

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 77 of 2009

In the matter of
Petition of M/s. Jaigad Power Transco Ltd. for approval of the assignment of
Transmission License to the lenders

Shri. V. P. Raja, Chairman
Shri. S. B. Kulkarni, Member
Shri. Vijay L. Sonavane, Member

Jaigad Power Transco Ltd.
Jindal Mansion, 5-A, Dr. G Deshmukh Marg
Mumbai-400 026

.....Petitioner

SBI Cap Trustees Co. Ltd.
202, Maker Tower 'E', Cuffe parade
Mumbai-400 005

.....Respondent

ORDER

Dated: May 11, 2010

M/s. Jaigad Power Transco Ltd. (“the Petitioner”) submitted a Petition under affidavit before the Commission on December 11, 2009 under Section 17 (3) of the Electricity Act, 2003 (“EA 2003”), seeking approval of the assignment of Transmission license to the lenders.



2. The prayers of the Petitioner are as under:

“

(a) *Allow the Assignment by way of security of the Transmission License by JPTL in favour of the Lenders on an urgent basis.*

(b) *Condone the delay / any inadvertent omissions / errors / short comings and permit JPTL to add/change/modify/alter this filing and make further submissions as may be required at a future date.*

(c) *Pass such other and further orders as are deemed fit and proper in the facts and circumstances of the case.”*

3. The Petitioner in its Petition submitted that it had submitted an application to the Commission on May 28, 2008 for grant of Transmission License for development and operation of 400kV Double Circuit (Quad) Transmission System between Jaigad - New Koyna and Jaigad - Karad. It is submitted that the Commission had granted Transmission License on February 8, 2009 for a period of 25 years. The Petitioner is a Joint Venture between JSW Energy Limited (JSWEL) and Maharashtra State Electricity Transmission Company Ltd. (MSETCL).

4. It is submitted that thereafter, the Petitioner has initiated the process of getting loans from the Banks/Lenders for the debt required for development of the project, and that the terms and conditions of sanction of the loan required the Petitioner to assign the license in favour of the Petitioner.

5. It is submitted that subsequently as per the MERC (Transmission Licence Conditions) Regulations, 2004, the Petitioner had submitted a combined petition in Case No. 15 of 2009 on May 20, 2009 for approval of capital expenditure scheme and expenditure thereof, ARR of FY 2009-10 and also seeking approval for assignment of the License in favour of the Lenders.

6. The Commission had held a Technical Validation Session (TVS) on December 7, 2009 where the Commission directed the Petitioner to submit a separate petition for the assignment of License by way of security to the Lenders to expedite the matter.

7. Accordingly, the Petitioner has submitted the petition dated December 9, 2009, under Section 17(3) of EA 2003.

8. Section 17(3) of the EA 2003 reads as follows:



“No licensee shall at any time assign his licence or transfer his utility, or any part thereof, by sale, lease, exchange or otherwise without the prior approval of the appropriate Commission.”

9. As per the Loan Agreement entered into between the Petitioner and the Lender, under Article 3.1 (B) of the terms and conditions of sanction of the term loan facility, the Petitioner shall have to secure the Transmission facility (together with all interests and all other amount payable by the borrower in respect thereof) inter alia by way of mortgage and charge on all its assets, cash flows, bank accounts etc..

Article 3.1 (B) of the term sheet provides as follows:

“The Borrower shall create mortgage over the existing transmission towers ... as well as other charges, assignments and pledge referred to in sub-paragraphs (b) to (g) of Article 3.1(A) save and except assignment by way of Security of the Transmission License prior to the Initial Disbursement. The Borrower shall obtain prior approval of MERC for the assignment by way of Security of the Transmission License under the relevant provisions of the Applicable Laws and shall do make execute and perform all such acts deeds matters and things, including submission of draft of the necessary Security Document in respect thereof, so as to ensure that the Borrower is able to create the assignment thereof within a period of six (6) months from the date of Initial Disbursement.”

10. It is submitted that since the above provision is a precondition in the Loan Agreement, the Lenders have specified that, approval for the same may be obtained from the Commission within 6 months from initial disbursement where the Initial Disbursement had taken place on July 6, 2009.

11. The Commission vide Notice dated December 22, 2009 fixed the hearing in the matter on January 12, 2010.

12. During the hearing held on January 12, 2010, Shri Navraj Singh, Shri R.K. Sharma and Shri Debashish Mishra, consultant of PWC appeared on behalf of the Petitioner. During the hearing the Commission had enquired about the legal implications of the assignment of Transmission license in favour of the lenders and the public interest which the Commission is expected to protect. The Commission had furthermore asked the Petitioners to approach the lenders with a proposal to modify Clause 3.1(B) of their Loan Agreement with a suitable escrow payment mechanism.



13. Thereafter, the Commission vide Notice dated February 22, 2010, fixed a further hearing in the matter on March 12, 2010 and directed the Petitioner to implead the Lenders as necessary Respondents in the matter, and also to serve a copy of the Petition, along with its accompaniments, to the Respondents by February 27, 2010.

14. Accordingly, M/s. SBI Cap Trustee Company Ltd., has been impleaded as Respondent in the matter. Petitioner has amended its petition accordingly.. In the amended petition, the Petitioner has modified prayer (a) as under:

“Allow the assignment by way of security of the Transmission License in favour of the Security Trustee on behalf of the Lenders subject to the condition that as and when the Lenders enforce the security by appointing a nominee to substitute the Petitioner or in such other manner, it shall be subject to previous approval of such nominee or other manner of enforcement by the Hon’ble Commission, for which the Lenders shall be at liberty to approach the Hon’ble Commission at that time.”

15. In the amended petition, the Petitioner submitted that, at the request of the Petitioner and the Lenders, the Respondent has agreed to act as trustee for the Lenders and to hold the security to be created pursuant to the security documents for the benefit of the Lenders. It is submitted that, accordingly, the Security Trustee Agreement dated April 29, 2009 had been executed inter alia among the Petitioner, the Lenders and the Respondent. Further, the Petitioner submits that under the said Security Trustee Agreement, the Respondent has been authorised to perform all such acts, deeds and things which the Respondent may from time to time deem necessary or appropriate for or incidental to the management and administration of the rights and security from time to time vested in the Respondents as the Security Trustee.

16. Subsequently, the Respondent has submitted its Reply on affidavit dated March 9, 2010. The averment made by the Respondent, i.e. SBI Capital Trustee Company Ltd. are as follows:

- a) It is submitted that the Petitioner had approached the consortium of Indian banks with the State Bank of India acting as the lead bank, collectively “the Lenders”, to avail financial assistance to part finance the Project. The Lenders and the Petitioner inter alia have entered into financing documents wherein the Lenders have agreed to extend to the Petitioners, loans of Rs. 435,00,00,000/-.
- b) It is submitted that the Respondent had agreed to act as trustee for the Lenders and to hold the security to be created / created pursuant to the security documents, for the benefit of the Lenders. And accordingly, the Security Trustee Agreement dated April



29, 2009 had been executed inter alia amongst the Petitioner, the Lenders and the Respondent. The terms and conditions of the sanction of the term Loan Facility require the Petitioner to assign by way of security, the government approvals relating to the Project, including the Transmission License.

- c) With reference to the Commission's directions to analyse the legal implications of the assignment of Transmission License and its effect on the public policy, the Respondents have submitted that the Infrastructure Projects are usually financed by way of non-recourse finance, where the lenders do not have any recourse to the assets of the sponsors of the infrastructure projects. It is submitted that since the security of the lenders is limited to the project, it is always in the interest of the lenders that the project is properly established and is properly operated.
- d) Further, it is submitted that the security to be created in favour of the lenders to such infrastructure projects, is needed for some purposes which includes allowing the lenders to foreclose on their security after the licensee's defaults and to transfer the whole of the licensee's right, title and interest in respect of the project to a new entity which will carry on the project in place of the licensee and generate revenues that can be used to repay the loan facility.
- e) It is submitted that an assignment by way of security as is envisaged in the present case is the Transmission License, which is different from absolute assignment and which is exercisable by the Lenders on occurrence of an Event of Default, and which will merely entitle the Lenders to appoint their nominee to exercise the rights under the Transmission License or to enforce the assignment by way of security in such other manner as may be permitted by the Commission. In absence of such an assignment, the Lenders will not be in a position to exercise the right of step-in and to substitute the Petitioner without requiring any action or consent on the part of the Petitioner. It is further submitted that the Lenders are agreeable for obtaining approval of the Commission as and when the Lenders enforce their security in respect of the Transmission License.
- f) It is submitted that the Lenders recognize the need of approval by the Commission of their nominee to substitute the Petitioner under the Transmission License as and when they enforce the security so that the Commission can evaluate the experience of such nominee in development, design, construction, operation and maintenance of transmission lines in order to be satisfied that it will be able to execute the Project.
- g) The Respondent has referred to the Order dated February 5, 2004 of the Central Electricity Regulatory Commission ("CERC") in Case No. 92 of 2003 filed by Power Links Transmission Limited, where the CERC had allowed the Power Links Transmission Limited to enter into agreement with the lenders to assign the license or to transfer the utility or assets to the extent of loan or other dues recoverable, and that



CERC before transfer of the license or the utility and the assets of the applicant to the nominees of the lenders would evaluate such a nominee's experience in development, design, construction, operation and maintenance of transmission lines in order to be satisfied that such nominee will be able to execute the project and/or undertake transmission of electricity. Also, CERC has to be approached in accordance with Regulation 20 of the Central Electricity Regulatory Commission (Procedure, Terms & Conditions for Grant of Transmission License and related matters) Regulations, 2003.

- h) It is further submitted that, in the absence of the rights enabling the Lenders to substitute the Petitioner on occurrence of an Event of Default, the Lenders will not be in a position to lend further to the project.

17. The Commission vide Notice dated March 11, 2010, communicated to the Respondent that the petitioner has impleaded M/s. SBI Cap Trustees Company Ltd. as a respondent in the matter and to be present in the 12th March 2010 hearing.

18. The Petitioner submitted its reply to the Commission on March 12, 2010. The main averments put forward by the Petitioner are as follows:

- a) The Petitioner has quoted Section 17(3) of the EA 2003, Regulation 15.1 of the Maharashtra Electricity Regulatory Commission (Transmission License Conditions) Regulations, 2004 and Regulation 20(e) of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Transmission License and Others Related Matters) Regulations, 2003. It is further submitted that under Clause 3.1(A)(f)(ii) of the Common Loan Agreement, the Petitioner was required to create a first charge by assignment by way of security in favour of the Lenders on the right, title and interest of the Petitioner, in, to and under, all the government approvals (i.e. the Transmission License in this case) relating to the Project.
- b) It submitted that the Petitioner is seeking to assign the Transmission License to the Lenders by way of security only and not as a matter of direct and absolute assignment whereby the Lenders will step into the shoes of the Petitioner from the date of assignment.
- c) It submitted that the Petitioner and the Lenders already have a Trust and Retention Account (TRA) mechanism in place stipulated by the Lenders, which is in effect an Escrow mechanism, prevalent in project financing or infrastructure projects. In this mechanism, the entire inflows and outflows pertaining to the project will have to be necessarily routed through the TRA account (bank account) maintained with the Lenders, which acts as a security mechanism and also provides for a check for the Lenders in order to ensure that the debt mobilised by the Petitioner for the project is only used for the project. The Petitioner is not allowed to maintain any other bank



account other than the TRA accounts with the Lenders. In view thereof, the Petitioner has submitted that no modification is required to Clause 3.1(B) of the Common Loan Agreement.

- d) Based on the above submissions, the Petitioner has submitted it be allowed to assign by way of security of the Transmission License in favour of the Security Trustee on behalf of the Lenders, subject to the condition that as and when the Lenders enforce the security by appointing a nominee to substitute the Petitioner or in any such manner, it shall be subject to previous approval of the Commission.

19. During the hearing held on March 12, 2010, Shri Ameya Gokhale, Advocate and Shri Navraj Singh appeared for the Petitioner. Shri Yash Jain, Advocate appeared for the Respondent, SBI Cap Trustee Co. Ltd. The Advocate for the Respondent submitted that the Respondent, SBI Cap Trustee Co. Ltd. may be allowed to approach the Commission with a request to allow the Petitioner to assign the Transmission Licence in favour of the nominee appointed by the Respondent in the event of any default / encumbrance to create security over the loan sanctioned to the Petitioner. If this is approved, then the Respondent will be able to finalise the proposal of the Petitioner.

20. The Advocate for the Petitioner submitted that the Commission may allow the assignment by way of security of the Transmission License in favour of the Security Trustee, subject to the condition that the Lenders enforce the security by appointing a nominee to substitute the Petitioner or in such other manner, it shall be subject to the previous approval of the Commission, for which the Lenders shall be at liberty to approach the Commission.

21. The Commission has considered the submissions made by the parties. Transmission projects are capital intensive projects requiring huge capital investment. These projects are financed through loans for which the recourse is against the project. Therefore, it is essential that to enable the licensee to avail the loan facility to set up the transmission project the licensee should be able to create security over the project assets, project documents and project licenses and approvals. In the event there is default under the financing documents, the lenders can then enforce their security by substituting the licensee by their nominee. However, it would be necessary at that point of time for the Commission to verify the credentials of such nominee of the lender to substitute the original licensee and to take over the project because the Commission will have to be satisfied about such nominee's capabilities (financial, technical and past experience) to set up and operate the transmission project. The Commission is thus satisfied that the Security Trustee needs to be given comfort by way of mortgage. The Commission, therefore, accords its in principle approval allowing the applicant to create security in favour of Security Trustee pursuant to Security Trustee



Agreement by way of mortgage on project assets by execution of indenture of mortgage for the project. The Commission, however, makes it clear that the transmission licence granted by the Commission to the petitioner cannot be assigned in favour of the nominee of the Security Trustee unless prior approval of the Commission has been obtained at the time of creating rights in favour of such nominee. Before agreeing to transfer of licence and the assets of the petitioner to the nominee of Security Trustee, the Commission has to evaluate such a nominee's experience in development, design, construction, operation and maintenance of transmission lines, and to be able to execute the project and undertake transmission of electricity. The lender, security trustee and the nominee, accordingly, shall be required to approach the Commission for seeking approval. This will enable the Commission to satisfy itself of the circumstances necessitating such transfer and fulfill its statutory obligations. Accordingly, in case of default by the licensee in debt repayment, the Commission may, on application made by the lenders, security trustee and the nominee consider and approve the assignment of the licence to a nominee of the lenders. Therefore, specific prior approval of the Commission for assigning the licence to the nominee of Security Trustee or transfer of any assets to them shall always be needed.

With the above, the present petition stands disposed of.

Sd/-
(V. L. Sonavane)
Member

Sd/-
(S. B. Kulkarni)
Member

Sd/-
(V. P. Raja)
Chairman



(K. N. Khawarey)
Secretary, MERC