

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 76/MP/2023

Coram:

Shri Jishnu Barua, Chairperson

Shri I. S. Jha, Member

Shri Arun Goyal, Member

Shri P. K. Singh, Member

Date of Order: 10th May, 2023

In the matter of

Petition under Sections 17(3) and 17(4) of the Electricity Act, 2003 seeking approval for creation of security interest over the Petitioner's Assets in favour of the Respondent No.2 (as the Security Trustee acting for the benefit of the Hedge Banks) in respect of the Petitioner's Transmission Project.

And

In the matter of

Lakadia Banaskantha Transco Limited,
Adani Corporate House,
Shantigram, Near Vaishno Devi Circle,
S.H.Highwat, Khodiyar,
Ahmedabad-382 421, Gujarat.

.... **Petitioner**

Versus

1. Powerica Limited,
9th Floor, C Wing,
Godrej Coliseum,
Sion (E), Mumbai- 400 022

2. Catalyst Trusteeship Limited,
GDA House, Plot No. 85,
Bhusari Colony (Right),
Kothrud, Pune-411 038.

.... **Respondents**

Parties present:

Shri Ramanuj Kumar, Advocate, LBTL

Ms. Priyal Modi, Advocate, LBTL

Shri Parveen Arora, Advocate, Powerica

Ms. Suruchi Kotoky, Advocate, Powerica

Shri Aishwarya Kaushiq, Advocate, Powerica

ORDER

The Petitioner, Lakadia Banaskantha Transco Limited (LBTL), has been granted transmission licence under Section 14 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') to establish transmission system for "Transmission System associated with RE Generations at Bhuj-II, Dwarka and Lakadia" (hereinafter referred to as "the Project") on Build, Own, Operate and Maintain (BOOM) basis, the details of which are specified in the schedule attached to the licence issued vide order dated 3.3.2020 in Petition No. 442/TL/2019.

2. The Petitioner has filed the present Petition seeking approval for creation of security interest by way of hypothecation/ mortgage/ charge/ pledge/ assignment, etc. over all assets including movable and immovable assets, Project accounts and documents (including assignment of transmission licence), etc. of the Petitioner in favor of Security Trustee (or its replacement or successor) to secure the Petitioner's obligations towards the Hedge Banks under Financing Documents for the hedge and for their subsequent transferees, assigns, novatees including any refinancing lenders and substitutes thereof and any future Hedge Banks or any other Secured Party to the Project by executing deed of hypothecation and power of attorney in relation thereto, indenture of mortgage, mortgage by deposit of title deeds and such other security documents as per law, for US\$85 million (Eighty Five Million United States Dollar Only). The Petitioner has made the following prayers:

“(a) Approve the creation of Security Interest by way of hypothecation/mortgage/charge/pledge/assignment etc., over all assets including the movable and immovable assets, Project accounts, Project documents (including assignment of transmission licence) etc. of the Petitioner in favour of Respondent No. 2 / Security Trustee (or its replacement or successor) to secure the Petitioner's Obligations towards the hedge Banks under the Financing Documents and for the hedge and their subsequent transferees, assigns, novatees including any refinancing lenders and substitutes

thereof and any future Hedge Bank or any other Secured Party in respect to the Project; and

(b) Pass any or such further orders as may be deemed fit and proper in the facts and circumstances of the case”

3. The Petitioner has entered into Facility Agreement dated 28.10.2021 with the lenders for grant of US\$85 million equivalent to Rs. 612 crore as loan facility for the Project.

4. The facility availed by the Petitioner is a foreign currency loan and hence it is subject to foreign exchange rate variations both in terms of principal repayment and interest payment. Accordingly, the Petitioner has adopted a strategy of managing and reducing the risks associated with such a foreign currency loan by entering into instruments of hedging and availing hedging products as a means to mitigate the risk and the volatility of a dynamic foreign exchange market.

5. As per the Reserve Bank of India Master Direction - External Commercial Borrowings, Trade Credits and Structured Obligations dated March 26, 2019 (“ECB Master Directions”) governing external commercial borrowings such as the Facility of the Petitioner, the Petitioner is required to mandatorily hedge 70 per cent of its ECB exposure in case the average maturity of the ECB is less than 5 years. In the present case, since the maturity date of the Facility of the Petitioner is less than 5 years from the date of the Facility Agreement, the requirement of mandatory hedging as per the ECB Master Directions is applicable to the Petitioner. The ECB Master Directions further requires that “the ECB borrower will be required to cover the principal as well as the coupon through financial hedges. Additionally, it is also the requirement of the lenders under the Facility Agreement that the Petitioner enters into suitable hedging arrangements to manage its currency and interest rate risk with respect to the Facility.

6. The Petitioner has appointed the Respondent, namely, Catalyst Trusteeship Limited as Security Trustee (hereinafter referred to as 'Security Trustee') who has agreed to act as Security Trustee and has entered into Facility Agreement and Security Trustee Appointment Agreement (hereinafter referred to as the Financing Documents) on 28.10.2021.

7. The Petitioner has submitted that in terms of the Financing Documents, the Petitioner is required to create security being the transaction security (as defined under the Facility Agreement) in favour of the Security Trustee for the benefit of the lenders and Hedge Banks.

8. The Petitioner has stated that in view of the provisions of Sub-sections (3) and (4) of Section 17 of the Act, the Petitioner, as a licensee, cannot create security interest over all the movable and immovable assets of the Petitioner in favour of Security Trustee acting on behalf of and for the benefit of the Hedge Banks pursuant to Facility Agreement dated 28.10.2021 and Security Trustee Appointment Agreement dated 28.10.2021 without approval of the Commission. Accordingly, the Petitioner has filed the present Petition seeking prior approval of the Commission for creation of security interest, over all assets including the movable and immovable assets for the Project in favour of Security Trustee pursuant to Security Trustee Agreement and Facility Agreements.

Hearing Dated 24.4.2023

9. The Petition was called out for hearing on 24.4.2023 after notice to the Respondents. No reply has been filed by the Respondents. During the course of hearing, learned counsel for the Respondent No.1, Powerica Limited submitted that the Respondent No. 1 has no objection to the prayers made by the Petitioner as long

as its rights under the Transmission Service Agreement entered into with Petitioner are not affected prejudicially.

Analysis and Decision

10. We have considered the submissions made by the Petitioner and perused the documents available on record. The Petitioner has submitted that it had approached the lenders for the purposes of part financing the implementation of the Project. The lenders had agreed to grant the financial assistance aggregating to US\$ 85 million. Subsequently, through the Petition No. 99/MP/2022, the Petitioner approached the Commission for seeking prior approval of the Commission for creation of security interest, over all assets including the movable and immovable assets for the Project in favour of Security Trustee pursuant to Security Trustee Agreement and Facility Agreements. The Commission vide order dated 24.6.2022 in Petition No. 99/MP/2022 accorded in-principle approval allowing the Petitioner to create security interest in favour of Catalyst Trusteeship Limited, by way of mortgage on project assets by execution of indenture of Mortgage and financing documents of the Project.

11. The Petitioner has submitted that there is also a requirement of the lenders under the Facility Agreement that the Petitioner enters into suitable hedging arrangements to manage its currency and interest rate risk with respect to the Facility. The Petitioner has submitted that it had appointed Catalyst Trusteeship Limited as Security Trustee (hereinafter referred to as 'Security Trustee') who had agreed to act as Security Trustee and had entered into Facility Agreement and Security Trustee Appointment Agreement (hereinafter referred to as the Financing Documents) on 28.10.2021.

12. The Petitioner has submitted that as on 31.12.2022, the lenders have disbursed amounts equivalent to USD 73 million. The Petitioner has submitted that since hedging will cause reduction in the Petitioner`s borrowings costs and protect it against uncertainty in the foreign exchange market, the benefits of hedging accruing will outweigh the hedge costs associated with it. The Petitioner has submitted that due to dynamic nature of the foreign exchange market including the possibility of better commercial terms/products offered by different hedging counterparties, the Petitioner may enter into hedging instruments with one or more banks in future that are not identified Hedge Banks. namely, DBS Bank Limited, Sumitomo Mitsui Banking Corporation, MUFG Bank Limited, Standard Chartered Bank and Societe Generale.

13. The Petitioner has submitted that each of the Hedge Banks, namely, DBS Bank Limited, Sumitomo Mitsui Banking Corporation, MUFG Bank Limited, Standard Chartered Bank and Societe Generale has appointed Catalyst Trusteeship Limited as Security Trustee for the purpose of creating and holding the securities for the benefit of the Hedge Banks to Security Trustee Appointment Agreement dated 28.10.2021. The Petitioner has submitted that in terms of the Financing documents for the hedge, the Petitioner is required to create security interest, on a first charge basis and in all respects ranking *pari passu* between the lenders and the Hedge Banks without any preference or priority to one over the other(s). The Petitioner has submitted that under the Financing Agreements and on enforcement of the security interest, it shall be lawful for the Hedge Banks and its assigns, transferees and novates, to enter into and to take possession of the assets/properties mortgaged/hypothecated/charges assigned for their benefits and substitute themselves or any one of them or its nominees for the Petitioner under any or all of the projects document(s).

14. Article 15.2.2 of the TSA provide as under:

“However, the TSP may create any encumbrance over all or part of the receivables, Letter of Credit or the other assets of the Project in favour of the Lenders or the lenders’ Representative on their behalf, as security for amounts payable under the Financing Agreements and any other amounts agreed by the parties:

Provided that:

i. The Lenders or the Lender’s Representative on their behalf shall have entered into the Financing Agreements and agreed in writing to the provisions of this Agreement; and

ii. Any encumbrance granted by the TSP in accordance with this Article 15.2.2 shall contain provisions pursuant to which the Lenders or the Lender’s Representative on their behalf agrees unconditionally with the TSP to release from such encumbrances upon payment by the TPS to the Lenders of all amounts due under the Financing Agreements.

In accordance with above provision, the Transmission Service Provider has been allowed to create encumbrance over all or part of the receivables, Letter of Credit or other assets of the Project in favour of the lenders or the lender’s representatives or Hedge Banks or their representatives, as security for amounts payable under the Financing Agreements and any other amounts agreed by the parties.

15. Article 15.2.4 of the TSA provide as under:

“15.2.4. Neither the TSP nor any of the Long Terms Transmission Customers can relinquish or transfer its rights and obligations, without prior approval of the Appropriate Commission.”

As per Article 15.2.4 of the TSA, the Petitioner is required to take permission from this Commission prior to relinquishment or transfer of its rights and obligations in the TSA.

16. Sub-sections (3) and (4) of Section 17 of the Act provide as under:

“17. (3) No licensee shall any time assign his licence or transfer his utility, or any part hereof, by sale, lease, exchange or otherwise without the prior approval of the Appropriate Commission.

(4) Any agreement relating to any transaction specified in sub-section (1) or subsection (3), unless made with the prior approval of the Appropriate Commission, shall be void.”

As per the above provisions, a licensee is required to obtain approval of the Commission for assigning its license or transferring its utility or any part thereof by way of sale, lease, exchange or otherwise and entering into an agreement relating to any of these transactions.

17. The Petitioner and the Hedge Banks have appointed Catalyst Trusteeship Limited as Security Trustee for creation of security over all the movable and immovable assets of the project. In our view, Catalyst Trusteeship Limited needs to be given comfort for creation of security for the benefit of Hedge Banks as well, serving as a safeguard for the financial support and Hedge Facility supplied by Hedge Banks. We, therefore, accord in-principle approval allowing the Petitioner to create security interest in favour of Catalyst Trusteeship Limited, by way of mortgage or any other security document on project assets by execution of indenture of Mortgage and financing documents of the Project. The Petitioner is directed to submit signed copy of Indenture of Mortgage for the Project immediately after its execution.

18. It is, however, made clear that the transmission licence granted by the Commission to the Petitioner and the underlying assets cannot be assigned in favour of the nominee of the Security Trustee unless prior approval of the Commission is obtained at the time of creating rights in favour of such nominee. Before agreeing to assignment of licence and the assets of the Petitioner to the nominee of Lenders or Hedge Banks, the Commission will evaluate such a nominee's expertise in development, design, construction, operation and maintenance of transmission lines,

and ability to execute the Project and undertake transmission of electricity. The licensee, lenders, Hedge Banks, security trustee and the nominee, accordingly, shall be jointly required to approach the Commission for seeking approval. This will give an opportunity to the Commission to satisfy itself of the circumstances necessitating such transfer. This decision of ours is in accordance with Regulation 12 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Transmission Licence and other related matters) Regulations, 2009 which reads as under:

“12. Assignment of Licence: In case of default by the licensee in debt repayment, the Commission may, on an application made by the lenders, assign the licence to a nominee of the lenders.”

19. Accordingly, in case of default by the licensee in debt repayment, the Commission may, on a joint application made by the licensee, lenders, Hedge Banks, Security Trustee and the nominee, approve the assignment of the licence to a nominee subject to proper due diligence of the process. 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. Lastly, financial documents and statements may be filed by the Petitioner as and when required by the Commission for any specific purpose. During the course of hearing, learned counsel for the Respondent No.1, Powerica Limited submitted that the Respondent has no objection for creation of security interest. However, the right of the Respondent under the Transmission Service Agreement entered into with the Petitioner should not be affected prejudicially. Needless to say, the aforesaid approval would not prejudice any interest or benefits of the beneficiaries of LBTL or in any way weaken the obligations of the licensee under the transmission licence and project documents.

20. The Petition No. 76/MP/2023 is disposed of in terms of the above.

Sd/-
(P.K. Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I.S. Jha.)
Member

Sd/-
(Jishnu Barua)
Chairperson