

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai - 400 005
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Case No. 03 of 2012

In the matter of
Petition filed by M/s Adani Power Maharashtra Ltd seeking approval under section
17(3) of the EA 2003 read with Regulation 15.3 of MERC (Transmission License
Conditions) Regulations 2004 for the assignment by way of security of the Transmission
License in favour of the Security Trustee acting on behalf of Project Lenders

Shri. V. P. Raja, Chairman
Shri. Vijay L. Sonavane, Member

M/s Adani Power Maharashtra Ltd.,
“ADANI HOUSE”
Near Mithakhali Six Roads,
Navrangpura
Ahmedabad- 380009

.....Petitioner

V/s

M/s SBI Cap Trustees Co Ltd,
No. 8, Khetan Bhavan,
5th floor, 198, Jamshedji Tata Road,
Churchgate, Mumbai 400 020.

.....Respondent

Present during the hearing:

For the Petitioner: Mr.Jignesh Langalia
 Mr.Rajesh Shah
 Mr.Mehul Rupera
 Mr.Dinesh Bansal

For the Respondent: Mr. Samir Jagad, Advocate
Mr Robin Tayal
Ms. Sayali Sawant
Mr. V.G.Pathak,

ORDER

Dated: 11th April, 2012

The Petitioner M/s Adani Power Maharashtra Ltd.(‘APML’) filed a Petition under affidavit before the Commission on January 07, 2012 under Section 17 (3) of the Electricity Act, 2003 (“EA 2003”), read with Regulation 15.3 of MERC (Transmission License Conditions) Regulations 2004 seeking approval for the assignment of Transmission license by way of security in favour of the Respondent, M/s SBI Cap Trustees Co Ltd (‘STCL’) who are acting as the security trustee on behalf the Project lenders.

2. The prayers of the Petitioner are as follows:

- “(a) *Allow the assignment by way of security of the Transmission License by the Petitioner in favour of the Security Trustee on behalf of the lenders on an urgent basis subject to the condition that as and when the Lenders enforce the security by appointing a nominee to substitute the Petitioner, the substitution of the Petitioner shall be subject to previous approval of such nominee by the Hon’ble Commission, for which the Lenders shall be at liberty to approach the Hon’ble Commission at that time.*
- (b) *Condone the delay / any inadvertent omissions / errors / short comings and permit the Petitioner 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 brief facts of the case as submitted by the Petitioner are as follows:

- i. The Petitioner in its petition submitted that Commission vide its Order dated 6th July, 2009 granted a Transmission License to the Petitioner [Transmission License No. 2 of 2009] for the development of the following transmission systems along with related infrastructure:-
- a. 400 kV D/C Transmission Line with Quad conductor from Tiroda (Gondia) to proposed 400 kV Koradi II substation.
 - b. 400 kV D/C Transmission Line with Quad conductor from Tiroda (Gondia) to proposed 400 kV Warora switching Station.

- c. 4 No.s 400 kV bays for the two D/C transmission lines at Tiroda project switchyard.
 - d. 2 No.s 400 kV bays for termination of 400 kV D/C Tiroda –Koradi II transmission lines at Koradi II
 - e. 2 No.s 400 kV bays for termination of 400 kV D/C Tiroda –Warora transmission lines at Warora switching station.
- ii. The Petitioner submitted that on account of upcoming generation in Eastern Maharashtra, STU reviewed power evacuation scheme and subsequent to load flow studies in consultation with PGCIL & CEA, suggested that a separate 765 kV system is required to be developed for evacuation of power from generation projects coming up in North-Eastern Maharashtra. In view of the above proposed development of 765 kV transmission system, the STU advised the Petitioner that the 400 kV D/C Tiroda –Koradi II transmission lines with associated bays at Tiroda and Koradi II will not be required.
- iii. It was submitted that consequently the Petitioner had filed an application for an amendment in the Transmission License No. 2 of 2009, to exclude development of 400 kV D/C Tiroda- Koradi II Transmission line with associated bays at Tiroda and Koradi from the scheme of the transmission license, before the Commission in Case No. 62 of 2010. Thereafter, the Commission vide its Order dated 30th, March 2011 granted the Petitioner an amended license authorising to establish and operate the following transmission lines inclusive of related infrastructure:-
 - 400 kV D/C Transmission Line with Quad conductor from Tiroda (Gondia) to proposed 400 kV Warora switching Station.
 - 2 Nos 400 kV bays for the above D/C Transmission lines at Tiroda project switchyard.
 - 2 Nos 400 kV bays for termination of 400 kV D/C Tiroda –Warora lines at Warora switching station.
- iv. It was further submitted that the transmission projects are capital intensive projects which require huge capital investment. These projects are financed through loans for which the recourse is against the project. Therefore, to enable the Petitioner to avail the loan facility to set up the project, it is essential that the Petitioner should be able to create security over the assets of the project, project documents, project licenses and approvals.
- v. The Petitioner submitted that it had initiated the process of securing long term debt financing from lenders for development of the project and at the request of the Petitioner, certain banks and financial institutions including Bank of India have agreed to make available financial assistance amounting to approximately 70 % of the capital cost of the project for the purpose of part financing the construction, development and implementation of the project on certain terms and conditions.

- vi. The Petitioner submitted that 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 such infrastructure projects. Furthermore, 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.
- vii. It was also submitted that the Petitioner and the lenders have appointed the Respondent STCL as the Security Trustee. The Security trustee has agreed to act as trustee for the lenders and to hold the security to be created in accordance with the terms and conditions of the loan agreements for the benefit of the lenders based on the Security Trustee Agreement.
- viii. Furthermore, it was submitted that the Commission has permitted the Petitioner to create encumbrance on the assets of the licensed businesses (where such encumbrance is created for the purpose of licensed business) under Section 17(3) of EA 2003 and Regulation 15.3 of MERC (Transmission License Conditions) Regulations 2004.

The 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.”

Regulation 15.3 of MERC (Transmission License Conditions) Regulations 2004 reads as follows:

“15.3 The Transmission Licensee shall seek the approval of the Commission before creating any encumbrance on the assets of the Licensed Business, except where such encumbrance is created for the purpose of the Licensed Business.”

Therefore, the Petitioner has now approached the Commission for obtaining approval for the assignment of the Transmission License by way of security in favour of the Respondent acting for the lenders of the project.

- ix. The Petitioner submitted that an assignment by way of security as envisaged here is exercisable by the lenders only on occurrence of an event of Default and will merely entitle the lenders to substitute the Petitioner with their nominee, to exercise the rights under the Transmission License.
- x. The Petitioner submitted that, the lenders to the project are aware that the lenders choice of the nominee to substitute the Petitioner in case of enforcement of security by the lenders in respect of the Transmission License is subject to obtaining approval of such nominee from the Commission in so

far as it relates to evaluation of such nominee's experience in development, design, construction , operation and maintenance of the relevant projects as stipulated in MERC (Transmission license Conditions) Regulation, 2004 as amended from time to time.

4. The Commission vide Notice dated January 20, 2012 scheduled the hearing in the matter on February 13, 2012 at 12.30 pm.
5. During the hearing held on February 13, 2012 the Petitioner reiterated its submissions as made in the Petition by giving a detailed presentation on the key facts and in response to a query raised by the Commission, it was submitted that the Petitioner APML is a registered company under Companies Act 1956 and is a subsidiary of the parent company Adani Power Limited (APL). The Petitioner submitted certain orders passed by this Commission and the Central Commission wherein such an approval was granted in similar matters. The Petitioner relied upon the following materials:-

- Order dated 10.05.2009 in Case No 77 of 2009 passed by this Commission;
- Orders in Petition No.26/2011 dated 27-04-2011, Petition No. 208/2009 dated 11-02-2010, and Petition No. 92/2003 dated 05-02-2004 passed by the Central Commission granting approval for assignment of transmission license in favour of lenders by way of security.

The Petitioner further submitted that the Lenders have stipulated a condition that the granting of the loans shall be subject to the assignment of Transmission License as part of security. It was submitted that the Petitioner has been granted six months time to create assignment of the transmission license. The Petitioner's prayer is to allow them to assign the Transmission License in favour of the security trustee acting on behalf of the lenders.

6. After having heard both the parties, the Commission directed the Petitioner to submit the following documents:
 - i. Copy of the Certificate of incorporation of the Company
 - ii. Copy of the Memorandum of Association
 - iii. Copy of the Articles of Association
 - iv. Copy of the Security Trustee Agreement entered into between the Petitioner, the Lenders, the Security Trustee and the Lender's Agent.
7. Subsequently, pursuant to the Commission's directions the Petitioner submitted the aforesaid documents, which was received by the Commission's Office on 21.02.2012.

8. Having heard the Parties and after considering the materials placed on record, the Commission is of the view that 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 provide comfort to the lenders / the Security Trustee as part of creation of security over the project assets, project documents and project licenses and approvals. It is necessary for the lenders, security trustees, their representatives, as the case may be, to secure their interests through assignment, transfer and substitution of the Borrower Petitioner in case of any financial default, i.e., the occurrence of a material breach of the terms and conditions of the financing agreements or a continuous default in debt service etc etc by the Petitioner, in terms of the financing documents. In order to enable implementation of the project including its financing, construction, etc, the Petitioner has agreed and undertaken to transfer and assign the transmission license to a Nominated Entity in accordance with the terms and conditions set forth in this order.

9. However, it would be necessary for the Commission to verify the credentials of the Nominated Entity selected by the Lenders' Representative, security trustee for assignment/transfer of the transmission license and 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) entitling it to operate and maintain the transmission project. The Commission is however satisfied that the Security Trustee needs to be given comfort by way of mortgage. The Commission, therefore, accords its '*in-principle approval*' allowing the Petitioner to create security in favour of the 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 license granted by the Commission to the Petitioner can neither be assigned in favour of the nominee of the Security Trustee nor can the transmission project and the Utility therein be transferred by sale, lease, exchange or otherwise, unless prior approval of the Commission has been obtained on the following matters:-
 - (i) On the qualifications inviting offers, either by private negotiations or public auction for the take over and transfer of the transmission Project to the Nominated Entity because to be eligible for substitution in place of the Petitioner, the Nominated Entity shall be required to fulfil the eligibility criteria laid down by this Commission;

 - (ii) At the time of undertaking and completing the substitution and at the time of creating rights in favour of such nominee. Before agreeing to transfer the license 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.

(iii) Upon selection of a Nominated Entity, the Borrower Petitioner, Lenders' Representative, Security Trustee shall file an application before the Commission:

(a) seeking the grant of approval to transfer to the Nominated Entity the right to construct, operate and maintain the transmission project;

(b) endorse and transfer the transmission license to the Nominated Entity, on the terms and conditions as may be applicable, for the residual period of the transmission license; and

(c) enter into a Substitution Agreement with the Petitioner, Lenders' Representative and the Nominated Entity.

The Commission is also of the view that these proceedings are limited to the above aspects relating to the transfer by substitution and endorsement of the transmission license unto the Nominated Entity. Other issues, if any, relating to revaluation of assets of the project etc., will not be open before this Commission.

10. The above processes will enable the Commission to satisfy itself of the circumstances necessitating such transfer. Accordingly, in case of financial default by the licensee under the financing agreements, the Commission may, on application made to it, approve the assignment of the license to a Nominated Entity subject to the Petitioner ensuring and procuring that each project agreement contains provisions that entitle the Nominated Entity to step into such project agreement, in its discretion, in place and substitution of the Petitioner in the event of such Nominated Entity's assumption of the liabilities and obligations of the Petitioner.

With the above the present Petition stands disposed of.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V. P. Raja)
Chairman