

BEFORE THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

Quorum

Shri Desh Deepak Verma, Chairman

Smt. Meenakshi Singh, Member

Shri I. B. Pandey, Member

In The Matter Of:

Application under sub-section (3) of Section 17 of the Indian Electricity Act, 2003 and sub-section (iii) of Section 4.3.1 of Uttar Pradesh Electricity Regulatory Commission (General Conditions of Transmission License) Regulations No. UPERC/Secy – 05-931 dated December 14, 2005 to allow M/s South East U.P. Power Transmission Company Limited (SEUPPTCL) to create security in favour of Power Finance Corporation Limited in pursuant to Security Agent Agreement dated 28th February, 2014 by way of mortgage and hypothecation on project assets and pledge of shares together with all other amounts whatsoever stipulated in the Financing Agreements by execution of indenture of mortgage, deed of hypothecation and deed of pledge for the project.

South East U.P. Power Transmission Company Limited, Shalimar Titanium, 601-602, 6th floor, Plot no TC/G-1/1, Vibhuti Khand, Gomti Nagar, Lucknow 226010

----- Petitioner

Vs.

1. Managing Director, Paschimanchal Vidyut Vitran Nigam Ltd.
Urja Bhawan, Victoria Park, Meerut-250001
2. Managing Director, Dakshinanchal Vidyut Vitran Nigam Ltd.
Urja Bhawan, NH – 2 (Agra – Delhi Bypass Road), Sikandra, Agra-282008
3. Managing Director, Purvanchal Vidyut Vitran Nigam Ltd.
DLW Bhikharipur, Varanasi -221004
4. Managing Director, Madhyanchal Vidyut Vitran Nigam Ltd.
4-A, Gokhale Marg, Lucknow – 226001
5. Managing Director, Uttar Pradesh Power Transmission Corporation Ltd.

(Nominee of Long Term Transmission Customers)
Shakti Bhawan, 14, Ashok Marg, Lucknow – 226001

----- Respondents

The following were present:

1. Shri S. K. Garg, Director, UPPTCL
2. Shri A. S. Prasad, CE, UPPTCL
3. Shri Sandeep Kumar Superintending Engineer, 765 KV Sub-Station, Design Circle.
4. Shri Vineet Kumar, Executive Engineer, 765 KV Sub-Station, Design Circle.
5. Shri Alfonso Perez Bustamante de Llano, Director, SEUPPTCL
6. Shri Ravindra Singh, C.G.M, SEUPPTCL
7. Shri V.M. Singh, Deputy General Manager, SEUPPTCL

ORDER

(Hearing on 10.3.2014)

- A. The Petitioner, M/s South East UP Power Transmission Company Limited (hereinafter referred to as SEUPPTCL) has filed this **petition no. 844 of 2012** on 30.10.2012 under sub-section (3) of Section 17 of the Indian Electricity Act, 2003 and sub-section (iii) of Section 4.3.1 of Uttar Pradesh Electricity Regulatory Commission (General Conditions of Transmission License) Regulations No. UPERC/Secy – 05-931 dated December 14, 2005 to allow M/s South East U.P. Power Transmission Company Limited (SEUPPTCL) to allow funding the initial capital expenditure for the project availed an initial financing facility to the extent of Rs. 4,200,000,000 (Four hundred twenty crores only) (“**Facility**”) from a consortium of lenders comprising of Deutsche Investments India Private Limited, L&T Infrastructure Finance Company Limited and Indusind Bank Limited (“**Lenders**”) on the terms and conditions as set out in the Amended and Restated Facility Agreement dated August 29, 2012, amending and restating the Facility

Agreement dated January 20, 2012 as amended by the Supplemental Agreement dated May 17, 2012 (“**Facility Agreement**”)

The Lenders have appointed IDBI Trusteeship Services Limited as the security trustee in terms of the Facility Agreement (“**Security Trustee**”)

B. Meanwhile through a supplementary application dated 23.8.2013 vide which The Petitioner submitted as under:

1. It may be noted that a Petition No. 844 of 2012 was filed by the Petitioner before this Hon'ble Commission for creation of security by way of a first ranking exclusive security interest over (i) the Transmission Service Agreement (ii) the immovable assets (present and future) and (iii) the movable assets (present and future) in favour of the security trustee appointed (acting for and on behalf of the lenders pursuant to the terms of the Amended and Restated Facility Agreement dated August 29, 2012, amending and restating the Facility Agreement dated January 20, 2012, as amended by the Supplemental Agreement dated May 17, 2012).
2. In the meantime, pursuant to the grant of the transmission license on 29.04.2013 and adoption of transmission tariff on 30.05.2013 by the Hon'ble Commission, the Petitioner has proceeded to tie up the long term financial arrangements for the Project.

It is hereby submitted that the transmission projects are capital intensive projects which require huge capital investment, and generally, are financed through loans for which the recourse is against the project. Therefore, the Petitioner is now in

the stage of finalizing the documentation for the long term financial assistance tied up for the Project and for the purposes of funding the capital expenditure for the Project, has availed **additional financing facility to the extent of Rs. 3713.25 Crores("Facility")**. Such additional facility is being obtained by the Petitioner from a consortium of lenders comprising of **Power Finance Corporation Limited, Rural Electrification Corporation Limited and Bank of India**, (collectively referred to as "**Lenders**" and individually as "**Lender**") and the Common Loan Agreement is in an advanced stage of being finalised and executed.

3. The Petitioner submits that the Petitioner and the Lenders have also proposed the appointment of a security trustee in terms of the Security Trustee Agreement which is to be executed by the Petitioner ("**Security Trustee**").The Security Trustee will act as trustee for the Lenders and to hold the security created in accordance with the terms and conditions of the Common Loan Agreement and the Security Trustee Agreement and the related security documents (to be executed) for the benefit of the Lenders.
4. It is hereby submitted that the Petitioner is, in terms of Article 15.1 of the Transmission Service Agreement read with Article 15.2.4 thereof, permitted to make assignment of its rights and obligations under the Transmission Service Agreement with the prior approval of this Hon'ble Commission. It is further submitted that in terms of Article 15.2 of the Transmission Service Agreement,

the Petitioner can create encumbrance over all or part of the assets of the Project in favour of the Lenders/ Lenders' representative on their behalf, as security for amounts payable under the financing agreements, provided that:

- (a) the Lenders or the Lenders' representative on their behalf shall have entered into the financing agreements and agreed in writing to the provisions of the Transmission Service Agreement; and
- (b) any encumbrance granted by the Petitioner contains provisions pursuant to which the Lenders or the Lenders' representative agree unconditionally with the Petitioner to release such encumbrances upon payment, to the Lenders, of all amounts due under the financing agreements.

5. The Petitioner also submits that in terms of Section 17(3) of the Electricity Act, 2003 read with the License Regulations, the Petitioner is required to obtain the prior approval of this Hon'ble Commission for transfer of '*utility*' (as defined in the Electricity Act, 2003) by creation of any encumbrance on the utility.
6. the Petition is filed for approval of the security to be created over (i) the Transmission Service Agreement (ii) the immovable assets (present and future) and (iii) the movable assets (present and future) in favour of the Lenders and Security Trustee. The Petitioner undertakes to file the Common Loan Agreement and Security Trustee Agreement upon its finalization and execution on record before the Hon'ble Commission.

7. The Petitioner submits that the Lenders have stipulated conditions to the effect that the grant of Facility shall be subject to, *inter alia*, the assignment of Transmission Service Agreement, mortgage of all immovable assets (present and future) and hypothecation of all movable assets (present and future) as part of the security for the Facility and all amounts due and payable under the Common Loan Agreement and related financing documents. It is also submitted that time is of essence in performance by the Petitioner of the aforementioned obligation cast on it. If the Petitioner fails to fulfill this commitment to the Lenders, it will be construed as an event of default under the provisions of the Common Loan Agreement and related financing documents, thereby giving rise to a right in favour of the Lenders and/or the Security Trustee to, *inter alia*, immediately recall the entire facility extended to the Petitioner and/or enforce the parent guarantee (extended in favour of the Lenders).

8. In the circumstances, the Petitioner has filed the present Petition before the Hon'ble Commission for approval of the Hon'ble Commission for the creation of security in favour of the Lenders and the Security Trustee pursuant to the Common Loan Agreement and Security Trustee Agreement to be entered into by the Petitioner with the Lenders and Security Trustee.

(a) grant its approval to the Petitioner for creation of security by way of a first ranking exclusive security interest over (i) the Transmission Service Agreement (ii) the immovable assets (present and future) and (iii) the movable assets (present and future) in favour of the Lenders and the

Security Trustee pursuant to the Common Loan Agreement and the Security Trustee Agreement to be executed by the Petitioner;

(b) the Security Agent Agreement has been executed on 28th February, 2014 and Common Rupee Loan Term Agreement is executed on 28.2.2014 and Inter Creditor Agreement , Lender’s Agent Agreement by way of mortgage and hypothecation on project assets and pledge of shares together with all other amounts whatsoever stipulated in the Financing Agreements by execution of indenture of mortgage, deed of hypothecation and deed of pledge for the project.

C. Elements of Transmission System titled “765KV S/C Mainpuri-Bara line with 765KV/400KV AIS at Mainpuri and associated Schemes/Works”

| <u>S.No.</u> | <u>Name of the Transmission Element / Project</u> |
|--------------|--|
| (I) | <u>Transmission lines</u> |
| 1 | 765kV SC Mainpuri - Unnao with Quad Bersimis (175Kms) |
| 2 | 400kV DC (Quad Moose) Mainpuri (765kV) - Aligarh (120kms) |
| 3 | LILO of both circuits of 400kV DC Orai - Mainpuri (PG) at Mainpuri (765kV) with Twin Moose (30Kms) |
| 4 | 765kV 2x SC Mainpuri - Bara with Quad Bersimis (2x350kms) |
| 5 | LILO of 400kV Panki - Obra at 400kV Rewa Road with Twin Moose (12 kms) |
| 6 | 400kV DC (Quad Moose) Rewa Road -Karchhana (30kms) |
| 7 | 400kV DC (Quad Moose) Rewa Road -Meja (25kms) |
| 8 | 400kV DC (Quad Moose) Bara - Meja (25kms) |

| | |
|--------------|---|
| 9 | 400kV DC (Quad Moose) Bara -Karchhana (30kms) |
| 10 | 400kV DC (Quad Moose) Tanda - Gonda (100kms) |
| 11 | 400kV DC (Quad Moose) Gonda -Shahjahanpur (230kms) |
| 12 | LILO of 400kV Sarojininagar - Kursi Road (PG) at 400kV Sultanpur Rd, Lucknow with Twin Moose (20kms) |
| 13 | LILO of 400kV Obra - Sultanpur at 400kV Aurai with Twin Moose (15kms) |
| (II) | <u>Substations</u> |
| 1 | 2x1000MVA (765/400kV) AIS at Mainpuri |
| 2 | 2x315MVA (400/220kV) GIS at Rewa Road |
| 3 | 2x315MVA (400/220kV), 2x100MVA (220/132kV) AIS at Gonda |
| 4 | 2x500MVA(400/220kV), 2x160MVA, (220/132kV) GIS at Sultanpur Road, Lucknow |
| 5 | 2x315MVA (400/220kV), 2x160MVA(220/132kV) AIS at Aurai |
| (III) | <u>Bus Switching-Arrangement</u> |
| 1 | Mainpuri : One & half breaker with double main bus scheme for 765 & 400kV side |
| 2 | Rewa Road : Double Main Bus scheme for 400kV and 220kV side |
| 3 | Gonda : One & half breaker with double main bus scheme for 400kV, Double main and transfer scheme for 220kV & single main and transfer bus scheme for 132kV side |
| 4 | Sultanpur Road, Lucknow : Double Main Bus scheme for 400kV , 220kV & 132kV side |
| 5 | Aurai : One & half breaker with double main bus scheme for 400kV, Double main and transfer scheme for 220kV & single main and |

| | |
|--|------------------------------------|
| | transfer bus scheme for 132kV side |
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D. The total Loan requirements :

| Name of Lender | Rupee Term Loan Facility (Rs.) |
|----------------------------|--------------------------------|
| PFC | Rs. 2475.50 Crores |
| REC | 1037.75 Crores |
| BOI | 200.00 Crores |
| Total | Rs. 3713.25 Crores |
| Total Project Cost | Rs. 4951.00 Crores |
| Debt Equity Ratio is 75:25 | |

E. The Petitioner is a transmission service provider for the project involving the erection, commissioning and operation of the 765 KV S/C Mainpuri-Bara Line with 765 KV / 400 KV AIS at Mainpuri, Uttar Pradesh, India and associated schemes/works with 1507.2 kilometers of length and 5 substations aggregating to 4890 MVA on a BOOT basis ("**Project**").

F. The Project was awarded through a Competitive Bidding Process under Section 63 of the Electricity Act, 2003 to the successful bidder, Isolux Corsan Concesiones S.A., a company registered under the laws of Spain with its registered office at C/Caballero, Andante No.8, Madrid-28021, Spain ("**ICC Spain**") and consequently the Petitioner was acquired by ICC Spain through one of its subsidiary company i.e. M/s. Mainpuri Power Transmission Private Limited.

- G. The Petitioner has entered into the Transmission Service Agreement with the Respondent Numbers (2) to (5), being the long term transmission customers, to provide transmission service on long term basis. The Petitioner has been granted the transmission license by the Commission on April 29, 2013. The transmission tariff has also been adopted by the Hon'ble Commission vide order dated 30.05.2013.
- H. The Petitioner has also enclosed the copies of following documents with the petition:-
- (a) Letter of Intent (LOI) dated 05-07-11, issued by UPPTCL to M/s Isolux Corsan CONCESIONES S.A. (hereinafter referred to as "Isolux" or "Successful Bidder") to establish the transmission system for "765KV S/C Mainpuri-Bara line with 765KV/400KV AIS at Mainpuri and associated Schemes/Works" (hereinafter referred to as "Project" or "Transmission System" or "Package-1") specified under Tender Specification no ESD-765/4 (Package-1) and all its amendments thereof till the bid deadline.
- I. The Transmission Service Agreement (TSA) signed on 20-01-12 by SEUPPTCL and the Long Term Transmission Customers (hereinafter referred to as the "LTTCS") of the Transmission System namely – Paschimanchal Vidyut Vitran Nigam Ltd (PVVNL), Dakshinanchal Vidyut Vitran Nigam Ltd (DVVNL), Purvanchal Vidyut Vitran Nigam Ltd (PuVVNL) and Madhyanchal Vidyut Vitran Nigam Ltd (MVVNL).
- 1) The Petitioner has also enclosed the copies of following documents with the petition:-
- a. Transmission License
 - b. Transmission Service Agreement
 - c. Common Rupee Term Loan Agreement
 - d. Inter Creditor Agreement

- e. Lenders Agent Agreement
- f. Security Agent Agreement

J. **Brief facts of TSA**

As per Article 15 under Assignment and Charges of TSA and 15.2.4 Neither the TSP nor any of the Long Term Transmission Customers can relinquish or transfer its rights and obligations without prior approval of the appropriate Commission.

15.3 Substitution Rights of the Lenders

15.3.1 The TSP would need to operate and maintain the Project under the provisions of the Transmission License granted by the Appropriate Commission and the provisions of this Agreement and cannot assign the Transmission License or transfer the Project or part thereof to any person by sale, lease, exchange or otherwise, without the prior approval of the Appropriate Commission.

15.3.2 However, in the case of default by the TSP in debt repayments, the Appropriate Commission may, on an application from the Lenders, assign the Transmission License to the nominee of the Lenders subject to the fulfillment of the qualification requirements and provisions of the Central Electricity Regulatory Commission (Procedure, terms and Conditions for grant of Transmission License and other related matters) Regulations, 2006 / Uttar Pradesh Electricity Regulatory Commission (General Conditions of Transmission License) Regulations, 2005 (as the case may be) or as amended from time to time.

K. UPPTCL vide letter no. 728 / ESD – 765 KV / PPA / 4 / isolux/Vol.-6 dated 8.11.2013 submitted that the petitioner has stated the following in the present petition :-

- 1) **Para 10 of amended petition** : It is respectfully submitted that the Hon'ble commission may kindly proceed on the petition for the approval of the security to be created over (i) The transmission service agreement (ii) the immovable assets(present and future) and (iii) the movable assets (present and future) in favor of the lenders and security trustee. The petitioner undertakes to file the common loan Agreement and security trustee Agreement upon its finalization and execution on record before the Hon'ble commission.
- 2) **Para 11 of amended petition** :The Petitioner submits that the lenders have stipulated conditions to the effect that the grant of facility shall to, inter alia, the assignment of Transmission Service Agreement, mortgage of all immovable assets (present and future) and hypothecation of all movable assets (present and future) as part of the security of the facility and all amounts due and payable under the common Loan Agreement and related financing documents . It is also

submitted that time as of essence in performance by the petitioner of the aforementioned obligation cast on it. If the petitioner fails to fulfill this commitment to the lenders, it will be construed as an event of default under the provisions of the Common Loan Agreement and related financing documents, thereby giving rise to a right in favor of the Lenders and / or the security Trustee to, inter alia, immediately recall the entire facility extended to the petitioner and / or enforce the parent guarantee (extended in favor of the lenders).

- 3) **Para 17 A of amended petition:** grant its approval to the petitioner for creation of security by way of the first ranking exclusive security interest over (i) the Transmission Service agreement (ii) the immovable assets (present and future) in favor of the Lenders and security trustee pursuant to the common Loan Agreement and the security Trustee Agreement to be executed by the petitioner.

And commented the following in context to provisions of article for 15 of TSA:-

2-UPPTCL comments;

In the context of the provision of article-15 of TSA signed with the petitioner, UPPTCLs

comments on above Para are as under.

- a) The provision of Article 15.2.2 of TSA are reproduced as below;

“Article 15.2.2 : However, the TSP may create any encumbrance over all or part of the receivable letter of credit or the other assets of the project in favor of the Lenders or the Lender’s Representative on their behalf, as security for amount payable under the financing Agreement and any other amounts agreed by the parties.”

Comments: As per above article, the petitioner has right to create any encumbrance as security for amounts payable under the financing agreements and any other amounts agreed by the parties limited to the following-

- (i) Over all or part of the receivables;
 - (ii) Letter of credit; or
 - (iii) The other assets of the project; and
- Therefore no charge can be created by the petitioner on TSA by way of assignment or other wise to nay person.

- b) The provision of Article 15.1.1 & 15.2.4 of TSA are reproduced below:
“ Article 15.1.1: This Agreement shall be binding upon, and inure to the benefit of the parties and their respective successor and permitted assigns.

This Agreement shall not be assigned by any party, except as provided in Article 15.2.4.

Article 15.2.4 : Neither the TSP nor any of the Long Term Transmission customer can relinquish or transfer its rights and obligations, without prior approval of the Appropriate Commission”

Comments: As per above, TSA cannot be assigned by TSP, Further scope of creation of security in favor of lenders is limited to provisions of Article 15.2.2

3- Therefore, the petition and the prayer in the petition are not in accordance with the provisions of Article 15 of TSA. The petitioner can only be allowed to create security on assets which have been agreed in TSA under Article 15.2.2.

L. SEUPPTCL vide letter no. SEUPPTCL/UPERC/2013-14/764 (A) dated 13.3.2014 replied as follows:

- (a) Article 15.1.1 of the TSA reads as, *“This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns. This Agreement shall not be assigned by any Party, except as provided in Article 15.2.4.”*
- (b) Article 15.2.4 of the TSA, *“Neither TSP nor any of the Long Term Transmission Customers can relinquish or transfer its rights and obligations, without the prior approval of the Appropriate Commission”.*
- (c) It needs to be considered that the rights and obligations of the TSP arises from the TSA and as per Article 15.2.4 of the TSA, TSP can relinquish or transfer its rights and obligations arising under the TSA with the prior approval of the Appropriate Commission.

Thus, the objection raised by UPPTCL that TSA cannot be assigned does not hold good. And, as per Article 15.2.4 of the TSA, the assignment of rights and obligations under the TSA is permissible with the prior approval of the Appropriate Commission. Therefore, SEUPPTCL has approached the Hon'ble Commission seeking its approval;

M. The Commission finds that the TSP i.e M/s SEUPPTCL can assign

- (i) TSA as per articles 15 of TSA.**
- (ii) The immovable assets (present & future) and**
- (iii) The movable assets (present & future) and**
- (iv) Shares of the company.**

N. The Commission has considered the submissions made by the representatives of the petitioner as well as the respondents. The 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 lenders 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. We are thus satisfied that the Security Trustee need to be given comfort by way of mortgage. We, therefore, accord our in principle approval allowing the applicant to create security in favour of Security Agent pursuant to Security Agent Agreement by way of mortgage on project assets by execution of indenture of mortgage for the project. We, however, make it clear that the transmission licence granted by the Commission to the first petitioner cannot be assigned in favour of the nominee of the Security Agent 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 first petitioner to the nominee of Security Agent, 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 licensee, lenders, security agent 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 accords with Regulation 4.3.1 of the Uttar Pradesh Electricity Regulatory Commission (General Conditions Of Transmission License) Regulations, 2005 which reads as under:-

4.3.1 The Transmission Licensee shall not, without prior approval of the Commission:

i) undertake any transaction to acquire by purchase or takeover or otherwise, the utility of any other licensee; or

ii) merge its utility with the utility of any other Licensee;

Provided that nothing contained in this sub-section shall apply if the utility of the licensee is situated in a State other than the State of Uttar Pradesh in which the utility referred to in clause (i) or clause (ii) is situated.

Provided that licensee shall, before obtaining the approval under subsection 4.3.1, give not less than one month's notice to every other licensee who transmits or distributes, electricity in the area of such licensee who applies for such approval.

iii) 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 Commission. Provided that any agreement relating to any transaction specified in subsection (i) to (iii), unless made with, the prior approval of the Commission, shall be void.

O. Accordingly, in case of default by the licensee in debt repayment, the Commission may, on a joint application made by the licensee, lenders, security Agent and the nominee, 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. Lastly, finance

documents and statements may be filed by the petitioner as and when required by the Commission for any specific purpose.

P. With the above, Petition No. 844/2012 stands disposed of.

(I. B. Pandey)
Member

(Meenakshi Singh)
Member

(Desh Deepak Verma)
Chairman

Dated: 26.03.2014