

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 Western U.P. Power Transmission Company Limited (WUPPTCL) to create security in favour of Power Finance Corporation Limited in pursuant to Security Agent Agreement dated 16th April, 2013 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.

1. Western U.P. Power Transmission Company Limited
S-3, 2nd Floor, Aditya Mega Mall, Indirapuram, Ghaziabad - 201010
2. Power Finance Corporation Ltd.
Urjanidhi, I Barakhamba Lane, Connaught Place, New Delhi – 110001

----- Petitioners

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 A. N. Gupta, Executive Engineer, 765 KV Sub-Station, Design Circle.
5. Shri Alok Kumar Gupta, WUPPTCL
6. Shri Swapnil Dagur, WUPPTCL
7. Shri R. Appa Rao, WUPPTCL
8. Shri Santosh Pandey, Counsel, PTC

ORDER

(Hearing on 10.3.2014)

1. M/s Western U. P. Power Transmission Co. Ltd. (WUPPTCL) has filed an application for approval to create security in favour of Power Finance Corporation Ltd. (PFC) by way of Mortgage on project assets by WUPPTCL vide Petition No. 899/2013. The first hearing in the matter was conducted by the Commission on September 23, 2013 which was attended by the representatives of M/s WUPPTCL, PFC and UP Power Transmission Corporation Ltd. (UPPTCL).
2. Based on the Petition filed by WUPPTCL before the Commission to allow them to create security in favour of PFC in pursuant to Security Agent Agreement dated April 16, 2013 by way of mortgage and hypothecation on project assets and pledge of shares together with all other amounts whatsoever stipulated in the Financing Agreement by execution of indenture of mortgage, deed of hypothecation and deed of pledge for the project.

3. The salient features of the proposal are elaborated as under:-

A. M/s WUPPCL were granted Transmission Licence by the Commission under section 14 of the Electricity Act, 2003 on June 20, 2012 to transmit electricity as a Transmission Licensee and for that purpose to undertake the business of establishing, commissioning, operation and maintenance of the following transmission lines and substations for the scheme of 765 kV S/C Mainpuri – Hapur & Mainpuri – Greater Noida Line with 765 / 400 AIS at Hapur & Mainpuri and Associated Schemes / work on Build, own, operate and maintain and transfer (BOOT) basis-

Transmission Lines

1. 765 kV S/C Mainpuri – Hapur line with Quad Bersimis Conductor.
2. 765 kV S/C Mainpuri – Greater Noida line with Quad Bersimis Conductor.
3. 765 kV S/C Greater Noida – Hapur line with quad Bersimis Conductor.
4. LILO of (2x S/C) 765 KV S/C Meerut – Agra (PGCIL) Line at Greater Noida substation with Quad Bersimis Conductor
5. 400 kV D/C Hapur Aaur (Ghaziabad) Line with Quad Bersimis Conductor.
6. 400 kV D/C Greater Noida – Sikandrabad Line with Quad Bersimis Conductor.
7. 400 kV D/C Aaur (Ghaziabad) Indrapuram Line with Quad Bersimis Conductor.
8. 400 kV D/C Hapur Dasna Line with Quad Bersimis Conductor.
9. 400 kV D/C Greater Noida – Noida (Sector 148) Line with Quad Moose Conductor.
10. LILO of 400 kV S/C Moradabad – Muradnagar Line at Hapur substation with Twin Moose Conductor.
11. LILO of 400 kV S/C Muradnagar – Muzaffarnagar Line at 400 kV Aaur (Ghaziabad) Substation with Twin Moose Conductor.
12. LILO of 400 kV S/C Risikesh - Kashipur Line at Nehtaur (Bijnor) substation with Twin Moose Conductor

Substations

1. 2 x 1500 MVA, 765 / 400 kV and 2 x 500 MVA 400 / 220 kV AIS at Hapur.

2. 2 x 1500 MVA, 765 / 400 kV and 2 x 315 MVA 400 / 220 kV AIS at Greater Noida.
 3. 2 x 500 MVA, 400 / 220 kV AIS at Sikandrabad.
 4. 2 x 200 MVA, 400 / 132 kV AIS at Nehtour (Bijnor).
 5. 2 x 500 MVA, 400 / 220 kV and 3 x 60 MVA 220 x 33 kV GIS at Aaur (Ghaziabad).
 6. 2 x 500 MVA, 400 / 220 kV and 3 x 60 MVA 220 / 33 kV GIS at Indirapuram.
 7. 2 x 315 MVA, 400 / 220 kV and 2 x 100 MVA, 220 / 132 kV GIS at Dasna.
4. The establishing, commissioning, operation and maintenance of above transmission lines and substations being a capital intensive project require huge capital investment which is required to be financed with Debt and Equity in the ratio of 75 : 25 respectively. Accordingly M/s WUPPTCL approached a consortium of four financial institutions / banks, namely M/s Power Finance Corporation Ltd. (PFC), M/s Rural Electrification Corporation Ltd. (REC), M/s India Infrastructure Finance Corporation Ltd. (IIFCL) and Bank of India (BOI) for long term loan to part finance the project. The said consortium of M/s PFC, REC, IIFCL and BOI have agreed to make available financial assistance to an aggregate principal amount not exceeding Rs. 3771,72,00,000.00 (Rs. 3771.72 crores) for the purpose of the project and on the terms and conditions set out in the "Common Rupee Term Loan Agreement", Inter Creditor Agreement, Lenders Agent Agreement, Security Agent Agreement and Trust and Relation Account Agreement. For this purpose M/s WUPPTCL and the lenders have appointed M/s PFC as Security Agent which has agreed to act as Security Agent for the lenders and to hold the security to be created pursuant to the Financing Agreement in accordance with terms and conditions thereof for the benefit of the lenders based on Security Agent Agreement dated 16th April, 2013 entered into by M/s WUPPTCL, PFC, REC, IIFCL and BOI.
5. In the petition M/s WUPPTCL have proposed that it shall be lawful for PFC to act as Security Agent to enter into and take possession of the mortgaged premises

along with all intangible and any future assets under the project comprised in Indenture of mortgage and deed of hypothecation and thenceforth the WUPPTCL shall not take any action inconsistent with or prejudicial to the Right of Security Agent on behalf of lenders quietly to possess, use and enjoy the name and to receive the income, profits and benefits thereof without any interruption or hindrance by it or by any person or persons whatsoever. Since as per the provisions of subsection (3) and subsection (4) of Section 17 of the Electricity Act, 2003, M/s WUPPTCL as a licensee shall not at any time assign his license or transfer his utility or any part thereof, by sell, lease, exchange or otherwise without the prior approval of the Commission, and any agreement relating to any transition specified in subsection (3), unless made with the prior approval of the Commission, shall be void and also according to the provisions of subsection (iii) of subsection 4.3.1 of the UPERC (General Conditions of Transmission License) Regulations, 2005. M/s WUPPTCL, as a transmission licensee shall not at any time assign his license or transfer his utility or any part thereof, by sell, lease, exchange or otherwise without the prior approval of the Commission. M/s WUPPTCL and PFC through this petition have sought the permission of the Commission to allow M/s WUPPTCL to create security in favor of PFC in pursuant to Security Agreement by way of mortgage on project assets, present and future, together with all other amounts whatsoever stipulated in the financing agreement by execution of indenture of mortgage for the project.

6. During the hearing on 23.09.2013, on the Petition filed by WUPPTCL, some objections were raised by UPPTCL. The Commission directed UPPTCL to communicate the same in writing to UPERC with a copy to WUPPTCL and PFC. Accordingly UPPTCL filed its objections vide letter no. 635/ESC-765 KU / PPP / Cobra / Vol – 5 dated September 30, 2013 before the Commission, copies were also provided to WUPPTCL & PFC. M/s WUPPTCL has replied to the objections raised by UPPTCL vide their letter no. UPERC / Mortgage/ 003 dated October 09, 2013.

7. As per Article 15 under Assignment and Charges of TSA it is provided:

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 can not 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.

8. UPPTCL filed objections on the above petition filed by WUPPTCL vide letter no. 635 ESD-765 kV / PPP/4/Cobra/Vol.V dated September 13, 2013 whereby it has been pointed out the following:-

I UPPTCL Submitted :

Clause 5.1.5 (ii) M/s MEIL shall have provided a Cost Overrun Undertaking to the effect that in event of any cost overrun to the project, the Project Cost will be met solely by that such cost overrun can be met solely by M/s MEIL from further Equity and / or funds to be contributed by it. Provided that such cost overrun can be met solely by M/s MEIL and / or any other entity, subject to prior written consent of the Lenders and without recourse to the Lenders and project assets.

Clause 5.1.5 (iii) M/s MEIL shall have provided and undertaking to the effect that until the final Settlement Date, M/s MEIL, shall bring in the Equity requirement for the project as per the project requirements mentioned in the Financing Plan, Provided further that, M/s MEIL shall hold and retain a minimum of 51% (Fifty one percent) of the Equity of the Borrower, directly or indirectly, till the Final Settlement Date;

UPPTCL's objection in respect to clause 5.1.5 (ii) & (iii) are :-

- (a) In both the above clauses, promoter's name is mentioned as M/s MEIL while it should have been M/s Cobra because LOI was issued in the name of M/s Cobra-MEIL consortium with M/s COBRA as the lead member. As per consortium Agreement Lead member is required to liaise with the Lenders.
- (b) Also requirement of M/s MEIL holding & retaining 51 % of the equity⁶ is subject to the prior written permission of LTTC/nominee of LTTC in accordance with clause 19.2.3 of TSA. In M/s Western U.P. Power Transmission Co. Ltd., present Share holding of M/s Cobra as lead member is 84% & that of M/s MEIL is 16 %.

WUPPTCL Replies in respect to the UPPCLs' objection in regard to clause 5.1.5 (ii) & (iii) are as follows:-

The said clause(s) are part of the Article 5 of the CRLA, which in totality may be read as follows:

Article 5 Conditions Precedent for Effectiveness of the Agreement and Pre-disbursement Conditions

5.1 Pre-Commitment Conditions:

5.1.5 Undertakings from the Promoter

i)

ii) M/s MEIL shall have provided a Cost Overrun Undertaking to the effect that in the event of any cost overrun to the project,

- iii) *M/s MEIL shall have provided an undertaking to the effect that until the Final settlement date,*
- (a) Some of the loan 'conditions precedent' to be met by one of the promoters only in no way dispute that the joint promoters of WUPPTCL are Cobra and MEIL (in the form of Cobra-MEIL Consortium with Cobra as Lead Member as defined in TSA). Further, the said Article does not contravene any provision of TSA or tries to circumvent any condition relating to shareholding of WUPPTCL. Furthermore, WUPPTCL confirms that the Lead member continues to undertake full responsibility for liaising with Lenders as per Consortium Agreement.
- (b) As stated during the hearing, WUPPTCL hereby clarifies and confirms that the equity shareholding in WUPPTCL of each of the consortium partners of the successful Bidder continues to be in compliance with RFQ/RFP conditions since signing of SPA and/or TSA, and no share has been sold/transferred by any shareholder to any other shareholder/ entity till date. WUPPTCL hereby also confirms that any transfer of shares by any consortium partner shall be with prior approval of LTTCs/nominee of LTTCs in accordance with Article 19.2 of TSA.

During the hearing the Commission enquired from WUPPTCL whether it is necessary or not that the cost overrun should be met by both the members of the consortium, WUPPTCL replied that it is not necessary that the cost overrun undertaking should be given by all the promoters, it may be given by any of the promoters. The capital required for it may be infused by any of the promoters. The ownership is only decided only buy the share capital and this overrun may be met by means of the debentures or any other means, but not the capital.

Commission's Findings:

The Commission view is that this cost overrun may be met by MEIL as long as it complies with the equity lock in conditions as per the TSA requirements.

The Commission further directed that no transfer of shares shall be carried out without the prior permission of LTTC/nominee of LTTC in accordance to the clause 19.2.3 of TSA.

II UPPTCL Submitted that as per Clause 5.1.7 (v) undertaking by the borrower:-

The borrower hereby unconditionally & irrevocably agrees, declares & undertakes as follows:-

Clause 5.1.7 (v) It shall bring in the entire Equity requirement for the Project as per the Project requirements and shall ensure that a minimum of 51% (fifty one percent) of the Equity shares of the Borrower is held by **M/s MEIL**, till the Final Settlement Date and that the management control & majority Board representation shall be retained by the Promoters.

UPPTCL's objection :-

In M/s Western U.P. Power Transmission Co. Ltd., present **Share holding of M/s Cobra as lead member is 84% & that of M/s MEIL is 16%.**

WUPPTCL reply with respect to clause 5.1.7 (v)

The said clause is a part of the Article 5 of the CRLA, which in totality may be read as follows:

Article 5 Conditions Precedent for Effectiveness of the Agreement and Pre-disbursement Conditions

5.1 Pre-Commitment Conditions:

5.1.7 Undertakings from the Promoter

i)

.....

v) It shall bring in the entire equity requirements for the project as per the project requirements and

The clause does not establish that the shareholding of the promoters of project (Cobra and MEIL) has changed. The said clause merely states that one of the pre-commitment conditions stipulated under CRLA is that Borrower shall/undertakes to ensure that MEIL holds specified minimum equity in the project, without which the Loan Agreement shall not become effective. Further, WUPPTCL hereby again clarifies and confirms that the equity shareholding in WUPPTCL of each of the consortium partners of the successful Bidder continues to be in compliance with RFQ/RFP conditions since signing of SPA and/or TSA (i.e. in the ratio of 84%:16% between Cobra : MEIL), and no share has been sold/transferred by any shareholder to any other shareholder/entity till date.

Commission enquired the petitioner as to what is the share holding pattern of the consortium at present and if it has been changed without the permission of the LTTCs'?

The petitioner replied that they have not transferred the shares and it is still in the ratio of 84%:16% between Cobra : MEIL and no share has been sold/transferred by any shareholder to any other shareholder/entity till date. They further iterated that the shares shall not be transferred / sold without the permission of LTTCs', if the permission is not granted they will bring the equity and not change the share capital.

The Commission notes that WUPPTCL has not transferred / sold its shares and it is still in the ratio of 84%:16% between Cobra : MEIL and no share has been sold/transferred by any shareholder to any other shareholder/entity till date.

It is directed that the shares shall not be sold / transferred without the permission of LTTCs' and the sale / transfer shall be intimated to the Commission by the petitioner.

III UPPTCL submitted in regard to Clause 5.2.7 Clearances & Approvals :-

Clause 5.2.7 (iii)- Borrower shall have received approval from UPPTCL and /or LTTCs for change in shareholding pattern as per the provisions of TSA subject to review by Lenders' Engineer.

UPPTCL's objection:-

In M/s Western U.P. Power Transmission Co. Ltd., present **Share holding of M/s Cobra as lead member is 84% & that of M/s MEIL is 16% no transfer of share has been allowed till date.**

Clause 5.2.7 (v)-The Borrower shall have obtained approval from UPPTCL and/or LTTCs to consider the later of the date of obtaining Act, 2003 date of issue of notification of Govt. of UP of the procedure for obtaining approval under Section 164 of the Electricity Act, 2003 and date of transfer of land for all the seven substations of the Borrower or such other date not earlier than June 1, 2012 as may be approved by UPPTCL/LTTCs, as zero- date for the commencement of construction period for the project. Further, the Borrower shall have amended the TSA with LTTCs to provide for extension in COD to a date later than Dec, 2014 with all other terms of TSA including transmission charges remaining same.

UPPTCL's objection:-

Zero date mentioned in the petition is wrong. Actual zero date is **31.05.2011**. No amendment in TSA has been done regarding extension in **COD** which stands as **30.11.2013 (30 months from zero date)** as of now.

WUUPPTCL reply in respect to clause 5.2.7 (v)

The said clause is a part of the Article 5 of the CRLA, which in totality may be read as follows:

Article 5 Conditions Precedent for Effectiveness of the Agreement and Pre-disbursement Conditions

5.2 Conditions Precedent – Initial Drawdown:

5.2.7 Clearances and Approvals

- i)*
.....
- v) The Borrower shall have obtained approval from UPPTCL and/or LTTCs to consider the later of the*

The clause states that one of the 'Condition Precedent' for initial drawdown of the loan is that the Borrower/WUPPTCL shall have obtained the said approval. The clause does not imply that the present zero date as per TSA which is date of issue of Lol has been changed / amended, and the fact that no amendments in TSA have been issued regarding extension of COD as on date, is a matter of record.

Commission has made clear its decision in regard to share holding pattern in the previous issue.

The Commission enquired if any amendment in TSA has been done regarding extension in **COD** which stands as 30.11.2013 as submitted by the respondents.

WUPPTCL replied that extension of schedule COD has been given to them by UPPTCL on behalf of LTTCs vide letter no. 161 (A)/ESD-765KV/PPP/4/Cobra/Vol-6 dated 5.3.2014.

The Commission finds that the objection of UPPTCL regarding COD does not hold good because COD has already been revised by UPPTCL itself. The total work has been divided into three lots and their CODs are as follows:

Name of Lot	Revised Schedule COD
LOT – 1	31.03.2015
LOT – 2	31.08.2015
LOT– 3	31.08.2016

IV UPPTCL’s submitted in respect to Clause 5.2.12 (C) Opinions of Lender’s Engineer, Lender’s Legal counsel, Lender’s Financial Advisor’s of CRLA.

Legal opinion confirming that the letter of Intent (LOI) issued by UPPTCL permits (i) reduction (below 26%) of M/s Cobra or transfer of equity (the said portion of 26% or part thereof) to the other company before the completion of stipulated period of 3 years and ii) issue of preference shares.

UPPTCL’s objection:-

In M/s Western U.P. Power Transmission Co. Ltd., present Share holding of M/s Cobra as lead member is 84% & that of M/s MEIL is 16 % & no transfer of share has been allowed till date.

WUPPTCL Reply in respect to clause 5.2.12 (c) of CRLA

The said clause is a part of the Article 5 of the CRLA, which in totality may be read as follows:

Article 5 Conditions Precedent for Effectiveness of the Agreement and Pre-disbursement Conditions

5.2 Conditions Precedent – Initial Drawdown:

5.2.12 Opinions of Lenders’ Engineer, Lenders’ Legal Counsel, Lenders’ Financial Advisor, etc.

The Lenders’ Agent shall have received:

a)

.....

c) *Legal opinion confirming that the Letter of Intent (Lol) issued by UPPTCL*

The clause merely stipulates that one of the ‘conditions precedent’ is to obtain the opinion of Lenders’ Engineer, Lenders’ Legal Counsel, Lenders’ Financial Advisor, etc. before initial drawdown of the loan regarding reduction/transfer of equity by Cobra.

WUPPTCL hereby again clarifies and confirms that the equity shareholding in WUPPTCL of each of the consortium partners of the successful Bidder continues to be in compliance with RFQ/RFP conditions since signing of SPA and/or TSA (i.e. in the ratio of 84%:16% between Cobra:MEIL), and no share has been sold/transferred by any shareholder to any other shareholder/entity till date. Any transfer of shares shall be done only with prior written approval of UPPTCL.

In its petition, the WUPPTCL has submitted Common Rupee Term Loan Agreement with M/s PFC, REC, IIFCL and Bank of India as per CRTLA. The debt equity ratio would be 75 : 25. The composition of which as per their financing plan is as follows:-

S.no	Particulars	Amount (Rs. In Cr.)	Percentage of Total
1	Equity	1257.24	25.00%
	Equity Share Capital		
a	Megha Engineering and Infrastructures Ltd. (MEIL)/Subsidiaries / Associates	73.73	1.47%
b	Cobra Instalaciones Y Services S.A (COBRA)/ Subsidiaries / Associates	26.84	0.53%
	Compulsorily Redeemable Preference Share Capital (CRPS)		
	0.01% CRPS from MEIL and its Promoters	1156.66	23.00%
2	Debt	3771.72	75.00%
	PFC	200.00	39.77%
	REC	1000.00	19.88%
	IIFCL	471.7	9.38%
	BOI	300.00	5.97%
3	Total Estimated Project Cost	5028.96	100.00%

The issue from the objection and the petition before the Commission in this regard are:

- a. Whether the share holding pattern as suggested by Financial Plan of Common Rupee Term Loan Agreement is valid which allows M/s Cobra Instalaciones Y Services S.A (COBRA), the Lead Member of Bidding Consortium, to hold 2.13% of the total equity of Rs. 1257.24 Cr. While Clause 19.2 of Transmission Service Agreement restricts them to hold at least 26% of the equity of the company?
- b. Whether M/s Western U.P. Power Transmission Company Ltd. can issue Compulsorily Redeemable Preference Share Capital (CRPS)?

Commission Finds:-

- a. M/s Western U.P. Power Transmission Company Ltd has amended its Article of Association and Memorandum of Association in its General Meeting held on 05th December 2012, to increase the authorised share capital of Company and to issue Preference Share Capital. Further the amended Article of Association now includes the power to issue redeemable preference shares.

b. Shareholding

Thus in our opinion the Share transfer between COBRA and MEIL as suggested by WUPPTCL in Financial Plan of CRLA shall only be made as per the provisions of TSA and only after the permission of LTTCs.

c. Issue of Compulsory Redeemable Preference Share Capital

- (i) The Companies Act, 2013 passed by the Parliament has received the assent of the President of India on 29th August, 2013. The Act consolidates and amends the law relating to existing companies Act 1956. The Companies Act, 2013 has been notified in the Official Gazette on 30th August, 2013. Some of the provisions of the Act have been implemented by a notification published on 12th September, 2013. The provisions of Companies Act, 1956 is still in force.

- (ii) Section 80 of The Companies Act 1956 allows the company to issue the Redeemable Preference Shares if it is authorised by the article of association of the company. Section 55 of The Companies Act 2013 also contains the similar provisions with the restriction that no company limited by share shall, after commencement of this Act, issue any preference share which are irredeemable.

It is established that the Transmission Service Agreement (TSA) does not contain any provision to restrict M/s Western U.P. Power Transmission Company Ltd. to issue Redeemable Preference Share.

The Commission finally holds that in terms of Clause 19.2.3 of TSA M/s Western U.P. Power Transmission Company Ltd has to take prior written permission from the Long Term Transmission Customers / nominee of the Long Term Transmission Customers before the transfer(s) of share(s) of M/s Western U.P. Power Transmission Company Ltd.

V UPPTCL's submitted in respect to Clause 7.1 (w) Change of Ownership

The Borrower has taken any action for its re-organization including change in ownership structure without the prior written approval of the Lenders' Agent.

UPPTCL's objection is that :-

Any reorganization including change in ownership structure can not be done without the prior written permission from LTTC / nominee of LTTC in accordance with clause 19.2.3 of TSA.

WUPPTCL Reply in respect to clause 7.1(w)

The said clause 7.1 (w) is part of the Article 7 of the CRLA, which in totality may be read as follows:

Article 7 Events of Default and Remedies

7.1 Events of Default: For the purpose of this agreement, each of the following events shall constitute an event of Default:

a)

.....

w) *Change in Ownership*

The Borrower has taken any action for its re-organization including change in ownership structure without the prior written approval of the Lenders' Agent.

Thus the said clause only defines "Change of Ownership" as an 'event of default' with respect to this CRLA; and does not imply that Borrower/WUPPTCL has taken an action resulting in any change of ownership.

It is held by the Commission that any change in ownership of WUPPTCL shall be in compliance with Article 19.2.3 of TSA and shall be carried out only with the approval of LTTC.

VI UPPTCL's submitted that in schedule I (B) Financing Plan of CRLA

Equity share capital of M/s Cobra & M/s MEIL is mentioned as Rs. 26.84 crs. & Rs. 73.73 crs respectively.

UPPTCL's objection is that :-

The share capital of WUPPTCL was 50000 shares of Rs. 10 each i.e. total share capital of Rs. Lakhs only. However in the Financial Plan on page 238, the equity share capital of Megha is shown as 73.73 crs & Cobra as 26.84 crs. From above it appears that the share capital of WUPPTCL has been increased which is not in the knowledge of UPPTCL.

Moreover the Equity Share capital shown in Financial Plan is not in ratio of 84% & 16% in favour of M/s Cobra & M/s MEIL respectively as per Consortium agreement.

WUPPTCL Reply in respect to Schedule I(B) Financing Plan of CRLA

- a) The Financing Plan as part of Schedule-I to the CRLA, which includes the proposed Equity share capital, is the proposed financing plan to qualify for loan approval.
- b) Under Article 1 – Definitions and Interpretation, the “Financing Plan” is defined (page 40) as *the base case financial plan as mutually agreed between the Borrower and the Lenders and as set out in Schedule-I and includes any modifications thereto as agreed upon by the parties hereto.*
- c) Article 5 – ‘Conditions Precedent for Effectiveness of the Agreement and Pre-disbursement Conditions’, clause 5.2.7 – ‘Clearances and Approvals’ under sub-clause (iii) (page 119) states that “*Borrower shall have received approval from UPPTCL and/or LTTCs for change of shareholding pattern as per provisions of TSA subject to review by Lender’s Engineer*”.
- d) Thus it is hereby submitted that the loan has been approved to the Petitioner/ Borrower/WUPPTCL with the express condition that the proposed Financing Plan as per Schedule-I has to be met with (in addition to other conditions) before the said CRLA becomes effective. Further, this agreement acknowledges vide article 5.2.7 that approval from UPPTCL/LTTCs is required for any change of shareholding pattern between consortium partners.
- e) Hence the Shareholding pattern indicated in the Financing Plan on page 238 of the petition is the shareholding pattern as submitted by WUPPTCL to the Lenders, which the Borrower has to achieve after due approvals of UPPTCL/LTTCs in compliance with the conditions of TSA before the CRLA becomes effective.
- f) Further, in compliance with article 19.2.3 of TSA, a proposal for transfer of equity between the consortium partners of the successful Bidder has already been submitted to UPPTCL/LTTCs to seek their prior written permission.
- g) WUPPTCL accordingly reiterates that the present shareholding pattern is in full compliance with the RFQ/RFP conditions, and any change in the same shall be with prior approval of UPPTCL/LTTCs in compliance with the conditions of TSA.

h) Regarding enhanced equity capital, WUPPTCL confirms that the equity capital of the WUPPTCL continues to be Rs. 5 lacs only at present. However, it may be appreciated that such a large project with over Rs. 5,000 crore investment and Debt: Equity ratio of 75:25, the total equity capital will be required to be raised to appropriate levels in order to achieve financial closure. However, WUPPTCL clarifies and confirms that whenever the total equity capital is raised, the equity shareholding between the promoters of WUPPTCL shall remain in the approved ratio as per TSA.

The Commission enquired WUPPTCL that why the equity share capital shown in financial plan is not in the ratio of 84 % and 16 % in favour of M/s COBRA and M/s MEIL as per consortium agreement.

WUPPTCL submitted that TSA is the mother document and all the conditions flow from it and to finance this huge loan some pre conditions have to be fulfilled to the lenders which they have agreed upon and no sale / transfer of shares shall be made without the prior permission of LTCCs.

Commission in the above circumstances directs WUPPTCL that no transfer of shares and change in ownership pattern shall be made without the prior permission of LTCCs.

VII The Commission has considered the objections of UPPTCL. Sub-sections 17 (3) and (4) of the Act clearly require a licensee to seek prior approval of the Commission for assigning licence or transfer its utility or any part thereof by way of sale, lease, exchange or otherwise. Since the first petitioner for the purpose of securing loan for the project is creating security in favour of the Security Agent by way of (a) Mortgage on all immovable assets; (b) Hypothecation of all movable assets, (c) assignments of all project documents, clearance etc and (d) Pledge of share of the company, it requires approval of the Commission under Section 17(3) and (4) of the Act. Moreover, the LTCCs' in Article 15 of the TSA have allowed the first petitioner to create any encumbrance over all or part of the payment security mechanism or the other assets of the projects in favour of the lenders or

lenders representative as security for amount payable under the Financing Agreement.

- 9. Commission grants permission to WUPPTCL to part finance the project awarded to them under package – 2 under BOOT Scheme for an aggregate principal amount not exceeding INR 37,71,72,00,000 /- (Indian Rupees Three Thousand Seven Hundred Seventy One Crores and Seventy Two Lakhs Only) from the consortium of four financial institutions / banks namely M/s Power Finance Corporation Ltd. as the lead member, M/s Rural Electrification Corporation Ltd. , M/s India Infrastructure Finance Company Ltd. and M/s Bank of India for the long term loan. This part financing shall be use for the purpose of construction, development and implementation of the project and on the term and conditions set out in the “Common Rupees Term Loan” executed on 28.12.2012 , “Inter Creditor Agreement” executed on 16.4.2013, “Lenders Agent Agreement” executed on and “Security Agent Agreement” executed on 16.4.2013 and “Trust and Retention Account Agreement” executed on 16.4.2013 .**

The Commission holds that the TSP i.e M/s WUPPTCL 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.**
- 10. 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, project license 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.

11. The Commission is thus satisfied that the Security Trustee need to be given comfort by way of mortgage. The Commission therefore, accord its 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. However, it is made 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.
12. 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.
13. This decision of the Commission is in accordance 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.

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.

With the above findings and necessary directions, the Petition No. 899/2013 stands disposed of subject to Commission's findings in preceding paragraphs.

(I. B. Pandey)
Member

(Meenakshi Singh)
Member

(Desh Deepak Verma)
Chairman

Dated: 26.03.2014