

Sikkim Government borrows to buy its own Equity

By Soumik Dutta - Gangtok, November 20, 2012

In a move that violates the equity subscription clause (clause 4.9.1) of the agreement signed between the Government of Sikkim (GoS) and Teesta Urja Limited (TUL), the GoS has gone on to borrow money from the Power Finance Corporation to buy equity shares worth 26% in the Joint Venture (JV). The GoS approached the Power Finance Corporation to directly lend money to Sikkim Power Investment Corporation Limited (SPICL), a SPV it has formed as per directives of the PFC to acquire the said loan. So far the GoS has asked for a loan of Rs. 294 crore. No official clarification on the details of this process of settlement between the GoS and TUL was offered to the public, nor was any explanation provided by the Energy and Power Department as to why the GoS was being forced to borrow money to pay for shares they were entitled to.

SPICL has been registered under the Companies Registration Act 1961 of Sikkim and not under the Companies Act 1956 as applicable in India. Interestingly section 2 (d) of the said Act states that such companies cannot conduct business in any other State except Sikkim relating to acquisition and transfer of stock or shares, or investment of money or value of money or any form of trade in investments. Whether this clause entitles it to borrow money from financiers outside the state is questionable.

Meanwhile, in a meeting held on July 19, 2012, the TUL board of directors decided to finally allot the 26% equity to the GoS in the Teesta Stage III HEP being developed by the TUL in a JV with the GoS, as per the agreement it had signed with the GoS.

According to file noting and note sheets obtained by this correspondent through the RTI Act from the Department of Power and Energy and the Sikkim Power Development Corporation (SPDC), contradictory correspondences between the GoS and the TUL emerges. On 17.1.12, vide a letter Lanco Teesta Hydropower Pvt. Ltd. (developers of Teesta 500 MW Stage VI) intimates the GoS of its decision to appoint Mr. Gyanbhadra Kumar as its representative in the committee of GoS to evaluate proposals from various Financial Institutes for the 26% equity subscription of the GoS in the project the agreement of which was drawn on the lines of the TUL JV.

The GoS it means had constituted a committee as is confirmed by Secretary Energy and Power Mr. A. K. Giri's letter dated 9.12.2011 to the Director Athena Power Projects Pvt. Ltd. (APPL), to evaluate such proposals from FI's for infusion of equity of the GoS, comprising of the Development Commissioner, Secretary Finance, Secretary Power and the representative of the private developer of the HEP.

On 9.1.12, TUL in a letter to Secretary Power A. K. Giri states that based on the latter's correspondences dated 15.9.11 and 11.10.11, and the meeting he had in New Delhi on 3.1.12 with TUL regarding equity participation of the GoS, the project cost has escalated due to several reasons beyond the control of the company and that the appraisal for cost overrun financing was underway. It also informs that as per the request of the GoS letter dated 9.12.11; APPL has initiated exercise for arrangement of loan from FI's for infusing 26% equity of the GoS. It further adds that the lead lender for the project Rural Electrification Corporation (REC) was seeking from TUL the confirmation of the GoS for its equity commitment towards 26% equity portion for the cost overrun. The letter also expresses the

fact that the Share Subscription Agreement (SSA) between the GoS and TUL should be drawn fast while equity infusion and cost overrun financing could move simultaneously.

On 7.3.12 the MD of TUL again in a letter to Secretary Giri states that based on GoS letters dated 6.3.12 and 17.2.12, TUL was enclosing draft SSA copy with modifications for early signing of SSA.

It is interesting to note that on 6.3.12 Giri had written to TUL and APPL to take early action for signing of SSA with GoS, since the newly formed Sikkim Power Investment Corporation Ltd., had as a precondition, the signing of the SSA for obtaining corporate loans on behalf of the GoS for investment in equity in various HEPs, including the Teesta Stage III. The letter of Giri also mentions that the Power Finance Corporation (PFC) has sanctioned a loan to GoS on 7.2.12 and the GoS consent was to reach GoS for disbursement before 6.3.12.

Clearly, there is something amiss in this correspondence. The TUL on the one hand confirms that it is scouting for FI's to infuse equity for the GoS, the GoS also requests the company to expedite the equity infusion, but ultimately decides to take a corporate loan from PFC. A note sheet of the Energy and Power Department reveals this missing link of the jigsaw puzzle. The file notings say that the TUL had taken a final call on the equity infusion issue and passed the ball into the court of the GoS wherein it stated that the FI's it approached did not deal in government equity since it was not in their portfolios. However, the TUL further suggested to the GoS that the possible solution lay in the fact that if the GoS could approach the PFC for a corporate loan, the vexed issue of infusion in the equity would be resolved.

The file notings further mention that Chief Minister Pawan Chamling had initiated a talk on the issue with Shinde in April 2010, the then Minister Power GoI. Shinde in turn had asked Chamling to send the GoS Secretary to meet CMD of PFC to seal the deal.

The GoS has further procured a loan of Rs. 162 crores from the Power Finance Corporation, to obtain the 15% equity stake in the TUL JV, which was allotted to it and currently the process of share transfers is underway. The balance 11% equity is to be procured after the balance loan (total Rs. 294 crores) is disbursed by the PFC for the purpose, confirmed Secretary Power Department, A. K. Giri to this correspondent.

TUL agreement to be standard agreement for GoS?

In a cabinet meeting on 14.7.2005, the cabinet while according approval to the draft agreement of Teesta Stage III, said that the same is to be adopted for all HEPs in Sikkim except NHPC, with minor changes. The MoU between the government of Sikkim and TUL on the issue of subscription of equity by the government clearly states: "The Company shall allocate 26% (Twenty Six percent) of the Company's equity share to Government by way of execution of an equity subscription agreement between the Company and Government, which shall be executed within a period of 6 (six) months from the date of signing of the Agreement.

Upon execution of such an equity subscription agreement, Athena as defined in the Definitions Clause 1.2.5 and MOU Clause 4.9.1 shall, on request from the Government without the requirement of sovereign guarantees, arrange the funding for equity participation of Government in the Project at the mutual agreed terms. The proceeds from such sale of Free Power and the dividends in respect of Government's equity in the Project, whether in part or full at the discretion of the Government, would be utilized for repayment of the funding arranged by Athena for financing the equity participation of the Government, and the Government shall execute all the necessary agreements as desired by the providers of such funding."

The amazing fact remains that in gross violation of the terms of the MOU the GoS had signed wherein the TUL was to procure this money on behalf of the GoS to purchase the 26% equity and the GoS was to adjust it through its revenue earnings in the subsequent years, from its share of the 12% free power it was entitled to. After this “settlement” with TUL , two directors, the Secretary Power and Secretary Finance, GoS, have been inducted into the TUL board while another appointee director of the GoS has been allowed to become the chairman of the board but is yet to be finalized, as was confirmed by Giri.

It may be recalled that since April 2012, after a slumber of seven years (since the agreement was signed with APPL on 18.07.2005), the GoS had woken up from a bad dream of being deprived from its legitimate rights to 26% equity holding in the TUL JV. The GoS had moved the lower court (District Courts, East and North) in Sikkim under section 9 of the Arbitration and Conciliation Act of 1996 praying for interim injunction restraining Teesta Urja from changing the constitution of its board of directors. The District Judge through an Order dated April 7, passed an interim order restraining the company from re-constituting its board of directors. The matter is set for further hearing on May 11. The government of Sikkim apart from staking claim of 26 percent equity shares has also raised a claim with respect to its right to appoint two directors, after approaching the State Electricity Regulatory Commission (SERC) with its grievance of being deprived of its rights to holding 26% equity in the JV as per the agreement it had signed with TUL way back in 18.07.2005. Teesta Urja had on April 25, obtained a stay on the order of State Electricity Regulatory Commission appointing a sole arbitrator upon an application filed by the government of Sikkim. The state commission had then appointed a sole arbitrator to resolve the dispute on the same day without granting a hearing to Teesta Urja on the application.

Teesta Urja Limited filed an appeal before the Central Electricity Regulatory Commission against the order of the State Regulatory Commission, referring the matter to a sole arbitrator.

The case is, surprisingly, still pending in the District Court of Sikkim, while the litigants decided to patch it up in an out of the Court settlement in the wake of the New Delhi based publication Current News expose of the scam by this reporter, and public outcry and protests.

In pursuance of the cost overrun of the project, the Rural Electrification Corporation has confirmed to extend an additional loan of Rs. 995 crore to the 1,200 MW Teesta III hydro project in Sikkim, whose overall cost has escalated to more than Rs. 8,500 crore. With the additional amount, state-run REC's total lending to the project would be Rs. 3,095 crore. Teesta III project has seen substantial cost overruns due to delays on account of natural calamities as well as legal disputes between the TUL and the GoS over equity shares. The cost overrun is about Rs. 2,700 crore. The additional term loan of Rs. 995 crore would include Rs. 851 crore senior debt. Originally, REC had given Rs. 2,100 crore loan for the project. The fresh amount has been sanctioned since the project cost has jumped to Rs. 8,581 crore from Rs 5,700 crore estimated earlier, informed a TUL senior employee on conditions of anonymity to this correspondent.

Sources: Government file notings & note sheets obtained through RTI Act, Version of Secretary Power Govt of Sikkim

Online at: <http://www.itsnotyellow.com/sikkim-government-borrows-buy-its-own-equity>