

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**IA No. 577 of 2023 in
Appeal No. 332 of 2023**

Dated: 6th July, 2023

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
 Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

IN THE MATTER OF:

Neyveli Uttar Pradesh Power Limited
Through its Chief Executive Officer
KH 419, (Behind Sai Mandir, Geetapuri Road)
G.N. Exentsion, Gomti Nagar, Lucknow
Uttar Pradesh- 226010.

...Appellant(s)

Versus

1. Uttar Pradesh Electricity Regulatory Commission,
 Through its Secretary,
 Vidyut Niyamak Bhawan,
 Vibhuti Khand, Gomti Nagar, Lucknow,
 Uttar Pradesh- 226010.
2. Ghatampur Transmission Limited
 Through its Secretary,
 C-105, Anand Niketan,
 Southwest Delhi,
 Delhi-110021.
3. Uttar Pradesh Power Corporation Limited
 Through its Managing Director,
 7th Floor, Shakti Bhawan,
 14th Ashok Marg,
 Lucknow,
 Uttar Pradesh-226001.

4. Paschimanchal Vidyut Vitran Nigam Limited,
Through its Managing Director,
Hydel Colony,
Victoria Park, Meerut,
Uttar Pradesh-250001.
5. Madhyanchal Vidyut Vitran Nigam Limited,
Through its Managing Director,
4-A Gokhale Marg, Lucknow,
Uttar Pradesh-226001.
6. Purvanchal Vidyut Vitran Nigam Limited,
Through its Managing Director,
Vidyut Nagar, Bhikharipur,
Post office-DLW, Varanasi,
Uttar Pradesh-221010.
7. Dakshinanchal Vidyut Vitan Nigam Limited,
Through its Managing Director,
Urja Bhawan,
NH-2 (Agra-Delhi Bypass Road),
Sikandra, Agra, Uttar Pradesh-282002.
8. Uttar Pradesh Power Transmission Corporation
Limited
Through its Managing Director,
7th Floor, Shakti Bhawan,
14 Ashok Marg,
Lucknow, Uttar Pradesh-226001.

.....Respondents

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Ritu Apurva
Mr. Amal Nair
Ms. Archita Kashyap

Counsel for the Respondent(s) : Mr. Sourav Roy
Mr. Kaushal Sharma
Mr. Prabudh Singh
Mr. Vishal Malik for R-2

Mr. Sitiesh Mukherjee
Mr. Abhishek Kumar

Mr. Shubham Mudgil
Mr. Nived Virapaneni for R-3 to 7

ORDER

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The Interlocutory Application (in short "IA") No. 577 of 2023 is filed by Neyveli Uttar Pradesh Power Limited (in short "Appellant" or "NUPPL") in Appeal No. 332 of 2023 seeking interim relief against the Order dated 14.02.2023 (hereinafter referred as "Impugned Order") passed by the Uttar Pradesh Electricity Regulatory Commission (in short "UPERC" or "State Commission") in Petition No. 1850 of 2022 filed by Ghatampur Transmission Limited (in short "GTL"), being the 2nd Respondent, seeking declaration of Deemed Commissioning and payment of Transmission Charges by the Long-Term Transmission Customers (in short "LTTCs") i.e. the Appellant and the four Distribution Licensees in the State of Uttar Pradesh (in short "UP").
2. The Appellant is aggrieved by the decision of the State Commission in imposing of 100% transmission charges of element 2 & 3 of transmission system implemented by GTL and thus seeking stay of the said Impugned Order to the extent of imposition of transmission charges and consequential action taken by GTL.
3. The factual matrix of the case is noted in brief, the Appellant is a joint venture Company of NLC India Limited (in short "NLCIL") and Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited (in short "UPRUVNL") established to set up 3x660 MW coal based Super Critical Thermal Power Plant at Ghatampur in Kanpur District in UP.

4. On 31.12.2010, NUPPL entered into a Power Purchase Agreement (“PPA”) with the 3rd Respondent i.e. Uttar Pradesh Power Corporation Limited (in short “UPPCL”), for sale of power from the power plant, UPPCL, a Govt. Company under the control of UP Govt. and vested with the function of distribution and supply of electricity for and on behalf of the Distribution companies in the State of Uttar Pradesh.

5. As per the PPA, 75% of the power capacity from the power plant is allocated to the State of Uttar Pradesh and balance 25% of the power has been allocated to State of Assam by the Ministry of Power in the absence of a firm PPA.

6. For the purpose of evacuating power from the generating station of NUPPL, the REC Transmission Projects Company Limited (in short “RECTPCL”) established a Special Purpose Vehicle (in short “SPV”) being the Ghatampur Transmission Limited (GTL) for the purpose of commissioning the transmission system through Tariff Based Competitive Bidding (in short “TBCB”) process with the following scope of work:

Element 1: 400 KV Ghatampur TPS- Kanpur (PG) D/C Line

Element 2: a) 765 KV Ghatampur TPS-Agra (UP) S/C line (including 189 MVAR Line Reactor at Agra end),

b) 765 KV Agra (UP)- Gr. Noida (WUPPTCL) S/C line (including 240 MVAR Line Reactor at Agra end)

c) 765 KV Feeder Bay at following substation locations

(i) Greater Noida (1 No.)

(ii) Agra (2 Nos.)

Element 3: a) 765 KV Ghatampur TPS-Hapur (WUPPTCL S/C Line (including 330 MVAR Line Reactor at Hapur end)

b) 765 KV Feeder Bay at Hapur (1 No.)

7. On 06.04.2018, GTL entered into a Transmission Service Agreement (in short "TSA") with the Appellant and the four Distribution companies of UP, being Respondent No 4 to 8 for the implementation of the aforesaid evacuation system.

8. The State Commission in the Impugned Order approved the deemed Commercial Operation Date (in short "COD") for the said Element 2 and Element 3 as 26.03.2021 and 28.01.2022 respectively, additionally, directed that the liability towards payment of transmission charges for Element 2(a) i.e. 765 KV Agra-Greater Noida S/C line (including 240 MVAR line reactor at Agra end) shall be borne by the LTTCs in the ratio of their share of Allocated Project Capacity as per the TSA, reasoning that 2 (a) is operationalized and put to use.

9. However, in respect of Element 2 (b) i.e. 765 KV Ghatampur TPS- Agra S/C line (including 189 MVAR line reactor at Agra end) and Element 3 (a) i.e. 765 KV Ghatampur TPS- Hapur S/C line (including 330 MVAR line reactor at Hapur end), the State Commission directed that the said lines were ready but not operational due to default on the part of the Appellant, and thus, the Appellant is liable to make payment to GTL.

10. The Appellant is aggrieved by the consequential actions of GTL in taking coercive steps against NUPPL in terms of the bills dated 15.02.2023 and 01.03.2023 raised by it, pursuant to the Impugned Order.

11. The Appellant argued that the impugned order of the State Commission is patently erroneous to the extent that the State Commission has held the Appellant liable to pay the entire transmission charges pertaining to Element 2(b) & 3(a) which is contrary to the terms of the TSA, inviting our attention to

Schedule 1 of the TSA to submit that its liability to pay transmission charges is restricted to 25% as per the terms of the TSA and the State Commission while passing the impugned order has completely ignored the provisions of Article 6.3.1 of the TSA, wherein, the parties to the TSA have envisaged a situation in which an element of the project is unable to connect due to non-availability of the interconnecting system, thus with a simple reading of Article 6.3.1 can make it clear that in case of a delay on account of an event of default by a LTTC then all LTTCs shall bear the non-escalable Transmission Charges towards the TSP in proportion to their allocated project capacity during the period of delay, therefore, the Appellant is liable to pay only 25% of the transmission charges even if it was a defaulting entity.

12. It was further argued that Article 18.12 provides that the liability of TSP and the LTTCs is to be limited to that mandated in the TSA, reliance was also placed on the observation made in the judgment dated 06.04.2023 of Hon'ble Supreme Court in Civil Appeal No 11826 of 2018 "*Haryana Power Purchase Centre vs Sasan Power Ltd & Ors*" that in a case where the matter is governed by express terms of the contract, it may not be open to the Commission even donning the garb of a regulatory body to go beyond the express terms of the contract.

13. The Respondent No. 4 to 7, countered the submissions of the Appellant stating that the State Commission vide Impugned Order has imposed liability of transmission charges on the Appellant as per the "defaulter's liability principle" in accordance with the Hon'ble Supreme Court judgment dated 03.03.2016 in *PGCIL vs PSPCL and Ors (2016) 4 SCC 797* and the Tribunal's judgment dated 18.01.2019 in *NPCIL vs CERC & Ors.*, further adding that the Hon'ble Supreme Court in the cited judgment has held that the beneficiaries

cannot be made liable to pay transmission charges before the transmission line is operational.

14. The Respondent No 2, GTL also countered the submissions of the Appellant and submitted that Article 6.3.1 of the TSA is only applicable if the Deemed CoD is on or before the SCoD, which is not the case here, further, it was clarified that the State Commission has held TSA entitled to receive Monthly Transmission Charges from the deemed COD of Element 2 & 3 in terms of Article 6.2.2, further clarified that the TSA is silent on the aspect whether all the LTTCs or only the defaulting entity (ies) would pay the transmission charges for the period of delay in such a situation, the State Commission judiciously, exercised its regulatory power to impose liability on the Appellant in accordance with defaulter's liability principle, as can be seen from the relevant portion of the Impugned Order, which is reproduced as under:

“121.The Commission observed that there is neither any ambiguity nor any dispute that the work under the scope of NUPPL was not completed and that NUPPL who is a party to the TSA is the defaulting entity in the present matter for both Element 2 and Element 3.

.....

125. Accordingly, the Commission observes following with respect to payment of transmission charges to the Petitioner:

(a)Therefore, the Petitioner is entitled for payment of Monthly Transmission Charges towards Element 2 in terms of Article 6.2.2 of the TSA from date of Deemed COD i.e. 26.03.2021 onwards.

(b)Therefore, the Petitioner is entitled for payment of Monthly Transmission Charges towards Element 3 in terms of Article 6.2.2 of the TSA from date of Deemed COD i.e. 28.01.2022 onwards.

126. Having discussed the issue of transmission charges to the Petitioner in previous paragraphs, the Commission also intends to analyze the “defaulter’s liability principle” in accordance with the Hon’ble Supreme Court Judgement dated 03.03.2016 in case of PGCIL vs PSPCL and Ors. (2016) 4 SCC 797 and Hon’ble APTEL Judgement dated 18.01.2019 in NPCIL vs CERC & Ors. and various submissions placed before it. In light of above judgements, it is abundantly clear that the entity due to which asset/transmission system developed through TBCB route cannot be put to use is liable to pay the transmission charges from the date of Deemed COD till the asset/transmission system is made operational/put to use.

127. Having settled the principle of payment of transmission charges to the Petitioner and the defaulter’s liability principle in paragraph 125 and 126 of this Order respectively, the case of the facts is set on the defaulter’s liability principle in order to fasten the liability of payment among concerned parties/LTTCs.

RE: Payment of Element 2:

It is undisputed that 765 KV Agra-Greater Noida S/C line (including 240 MVAR reactor at Agra end) is operationalized whereas, 765 kV Ghatampur TPS- Agra S/C line (including 189 MVAR line

reactor at Agra end) is ready but not operational due to default of NUPPL. In accordance with defaulter's liability principle, the liability of 765 kV Ghatampur TPS- Agra S/C line (including 189 MVAR line reactor at Agra end) rests exclusively with NUPPL as it is the default of NUPPL, which is restraining a completely ready element to be put to use.

RE: Payment of Element 3:

As far as payment liability of transmission charges for 765 kV Ghatampur TPS- Hapur S/C line (including 330MVAR line reactor at Hapur end) is concerned, the entire liability rests with NUPPL as it is the default of NUPPL which is restraining the line in getting operationalized. Therefore, NUPPL is liable to make payment to the Petitioner from Deemed COD (28.01.2022) of Element 3 as per Schedule 3 of the TSA till the work under the scope of NUPPL is completed.

15. From the above, it is seen that the State Commission relying upon the judgment dated 03.03.2016 of the Supreme Court in PGCIL vs PSPCL and Ors. (2016) 4 SCC 797 and this Tribunal's judgement dated 18.01.2019 in NPCIL vs CERC & Ors and invoking the defaulter's liability principle has imposed the liability on the Appellant.

16. Further, Article 6.2.2 of the TSA would read as under:

"6.2.2 Once any Element of the Project has been declared to have achieved deemed COD as per Article 6.2.1 above, such Element of the Project shall be deemed to have Availability equal to the Target Availability till the actual charging of the Element

and to this extent, shall be eligible for payment of the Monthly Transmission Charges applicable for such Element.”

17. Thus, as per Article 6.2.2, the GTL is entitled to monthly transmission charges from the deemed COD as also observed by the State Commission.

18. It was not disputed by the Appellant also that there is delay in Commissioning of its power project and is also not contesting the right of GTL to receive transmission charges, thus, there is no contest on the specific finding of the State Commission that GTL is eligible to recover Monthly Transmission Charges as per Article 6.2.2, the only issue is whether the entire liability is to be borne by the Appellant, which has already been settled by the State Commission as noted in the preceding paragraphs, prima-facie, we do not find any infirmity in the order of the State Commission.

19. The Appellant is thus aggrieved only in respect of the imposition of the liability to pay entire transmission charges of Element 2 & 3 though it is, admittedly, ready to pay 25% in terms of the allocation prescribed in the TSA, the reliance of the Appellant on Article 6.3.1. is quoted as under:

“6.3 Liquidated Damages for delay due to Long Term Transmission Customer Event of Default or Direct Non Natural Force Majeure Events or Indirect Non Natural Force Majeure Events or Natural Force Majeure Event (affecting the Long Term Transmission Customer)

6.3.1 If the TSP is otherwise ready to connect the Element(s) of the Project and has given due notice, as per provisions of Article 6.1.1, to the Long Term Transmission Customer(s) of the date of

intention to connect the Element(s) of the Project, where such date is on or before the Scheduled COD, but is not able to connect the Element(s) of the Project by the said date specified in the notice, due to a Long Term Transmission Customer Event of Default or due to Direct Non Natural Force Majeure Event or Indirect Non Natural Force Majeure Event or (Natural Force Majeure Event affecting the Long Term Transmission Customer) provided such Direct Non Natural Force Majeure Event or Indirect Non Natural Force Majeure Event or (Natural Force Majeure Event affecting the Long Term Transmission Customer(s)) has continued for a period of more than three (3) continuous or non-continuous Months, the TSP shall, until the effects of the Long Term Transmission Customer Event of Default or of Direct Non Natural Force Majeure Event or Indirect Non Natural Force Majeure Event or (Natural Force Majeure Event affecting the Long Term Transmission Customer(s)) no longer prevent the TSP from connecting the Element(s) of the Project, be deemed to have achieved COD relevant to that date and to this extent, be deemed to have been providing Transmission Service with effect from the date notified, and shall be treated as follows.

- a. In case of delay on account of the Long Term Transmission Customer Event of Default, the Long Term Transmission Customer(s) shall make payment to the TSP of Non Escalable Transmission Charges in proportion to their Allocated Project Capacity, calculated on Target Availability for and during the period of such delay.*

- b. *In case of delay due to Direct Non Natural Force Majeure Event, the Long Term Transmission Customer(s) shall make payments to the TSP of Non Escalable Transmission Charges calculated on Target Availability for the period of such events in excess of three (3) continuous or non continuous Months in the manner provided in (d) below.*
- c. *In case of delay due to Indirect Non Natural Force Majeure Event or (Natural Force Majeure Event affecting the Long Term Transmission Customer(s)), the Long Term Transmission Customer(s) shall make payment to the TSP for debt service, subject to a maximum of Non Escalable Transmission Charges calculated on Target Availability, which is due under the Financing Agreements for the period of such events in excess of three (3) continuous or non continuous Months in the manner provided in (d) below.*
- d. *In case of delay due to Direct Non Natural Force Majeure Event or Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Long Term Transmission Customer(s)), the Long Term Transmission Customer(s) shall be liable to make payments mentioned in (b) and (c) above, after commencement of Transmission Service, in the form of an increase in Non Escalable Transmission Charges. These amounts shall be paid from the date, being the later of a) the date of cessation of such Direct Non Natural Force Majeure Event or Indirect*

Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Long Term Transmission Customer(s)) and b) the completion of sixty (60) days from the receipt of the Financing Agreements by the Long Term Transmission Customer(s) from the TSP. Provided such increase in Non Escalable Transmission Charges shall be determined by Appropriate Commission on the basis of putting the TSP in the same economic position as the TSP would have been in case the TSP had been paid amounts mentioned in (b) and (c) above in a situation where the Force Majeure Event had not occurred. For the avoidance of doubt, it is specified that the charges payable under this Article 6.3.1 shall be paid by the Long Term Transmission Customer(s) in proportion to their then Allocated Project Capacity.”

20. From the above, it can be seen that Article 6.3.1 is qualified with the condition that the project should be ready to connect ‘on or before the Scheduled COD’, whereas the subject transmission elements have been commissioned after its SCOD.

21. We, therefore, find no merit in the contentions of the Appellant that the State Commission has ignored the provisions of Article 6.3.1 of the TSA.

22. The Appellant has failed to place before us any other express provision which will restrict the payment / liability to only 25% from the defaulting party i.e. the Appellant in this case or to support its case that liability of the TSP and

the LTTCs shall be limited to that explicitly provided in the TSA, reference Article 18.12: No consequential or indirect losses.

23. It is settled principle of law that interim injunction can be granted, only if the IA it fulfils the three well established principles i.e. (i) a prima facie case should have been made out, (ii) the balance of convenience should lie in its favour and (iii) it should suffer irreparable injury if it is not granted the said relief, however, we are of the opinion that the Appellant has failed to make out a prima facie case in its favour as we find no infirmity in the Impugned Order passed by the State Commission, it is also well settled that when a party fails to prove prima facie case in its favour, the question of considering the balance of convenience or irreparable loss and injury to the party would not be material at all, that is to say, if that party fails to prove prima facie case to go for trial, it is not open to the Court to grant injunction in his favour even if, he has made out a case of balance of convenience being in his favour and would suffer irreparable loss and injury if no injunction order is granted. [(2010) 1 SCC 689 *Kashi Math Samsthan and Another v. Shrimad Sudhindra Thirtha Swamy and Another*], additionally, the payment of bills by the Appellant cannot be treated as irreparable loss, as the same can always be subject to decision in the main appeal.

24. Undisputedly, the GTL, the 2nd Respondent, has incurred a huge cost in establishing the subject transmission asset and has not been able to recover the transmission charges solely on account of the delay on the part of the Appellant in commissioning of its system, as already noted and agreed that GTL is entitled for recovery of monthly transmission charges, and in case such a right is not provided in favour of GTL, its ability to maintain and operate such a transmission system build up after making huge expenditures may be

adversely impacted due to paucity of funds, we are satisfied that the Appellant is not entitled for a stay on the impugned order of the State Commission.

25. We are of the view that the questions raised in the main Appeal including the application of defaulter's liability principle must necessarily await a detailed examination when the Appeal is taken up for hearing later, therefore, at this stage we do not find sufficient reasons to grant interim injunction as prayed by the Appellant. Suffice it to make it clear that the payment to be made by the Appellant, in compliance with the Impugned Order, shall be subject to the result of the main Appeal.

26. The I.A., is accordingly, disposed of.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the present Application No. IA No. 577 of 2023 in Appeal No. 332 of 2023 filed by the Appellant is devoid of merit and stands dismissed.

PRONOUNCED IN THE OPEN COURT ON THIS 6th DAY OF JULY, 2023.

(Sandesh Kumar Sharma)
Technical Member

pr/mkj

(Justice Ramesh Ranganathan)
Chairperson