

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Pétition No. 323/MP/2019

**Coram
Shri P. K. Pujari, Chairperson
Dr. M. K. Iyer, Member
Shri I.S. Jha, Member**

Date of Order: 29.01.2020

In the matter of:

Petition under Section 79(1)(c) and (f) of the Electricity Act, 2003 seeking direction to Respondent to make payment of the Late Payment Surcharge towards Delayed Payments of Transmission Charges for the Associated Transmission System of the Kudgi Super Thermal Power Project.

And

In the matter:

Central Transmission Utility
(Power Grid Corporation of India Limited),
B-9, Qutab Industrial Area,
Katwaria Sarai,
New Delhi-110016

.....PETITIONER

Versus

NTPC Limited
NTPC Bhawan
Scope Complex, 7, Institutional Area,
New Delhi-110003

...RESPONDENT

Parties Present

Ms. Suparana Srivastava, Advocate, PGCIL
Shri Tushar Mathur, Advocate, PGCIL
Ms. Swapna Seshadri, Advocate, NTPC

ORDER

The Petitioner has filed the instant Petition seeking direction to Respondent, NTPC Ltd. to pay the late payment surcharge of ₹ 35,91,98,901/- on account of delayed

payment of transmission charges payable by the Respondent for the associated transmission system of the Kudgi Super Thermal Power Station since August, 2017 and ultimately paid on 11.1.2019. The Petitioner has made the following prayers:

- “(a) direct the Respondent to forthwith make payment towards late payment surcharge under the invoice dated 21.1.2019 issued by the Petitioner; and
- (b) pass such further and other order(s) as this Hon’ble Commission may deem fit and proper in the facts and circumstances of the present case.”

Submissions of the Petitioner

2. The Petitioner has submitted as under:

(a) NTPC has developed a 2400 MW (3x800 MW) coal based power station at Kudgi in the State of Karnataka (hereinafter, the “Kudgi TPS”). Power from Kudgi TPS is being supplied to various beneficiaries in the Southern Region through ISTS under long-term access (LTA) granted by the Petitioner with the corresponding liability to pay transmission charges for the same. The transmission system for providing transmission service to the long-term transmission customers of the NTPC has been implemented by Kudgi Transmission Ltd. or KTL (a wholly owned subsidiary of L&T Infrastructure Development Projects Limited) under the tariff-based competitive bidding process.

(b) The power from Kudgi TPS was allocated to the following States vide letter dated 17.1.2011 of Ministry of Power, Government of India:

- (i) Karnataka (1196.24 MW);
- (ii) Kerala (119.18 MW);
- (iii) Tamil Nadu (300.10 MW); and
- (iv) Andhra Pradesh (418.10 MW).

(c) NTPC vide its letter dated 15.4.2011 applied to the Petitioner for grant of LTA for a total capacity of 2392.45 MW. The said LTA was applied on behalf of the beneficiaries of the Kudgi TPS for a period of 25 years. After discussions, the Petitioner vide its letter dated 23.12.2011 granted LTA to NTPC.

(d) Thereafter, upon reorganization of the State of Andhra Pradesh, Ministry of Power, Government of India modified the power allocation, done by earlier letter dated 17.1.2011. Consequently, the Petitioner vide letter dated 23.1.2015 modified the LTA granted to NTPC. In the said letter, the Petitioner also called upon the NTPC to sign the LTA Agreement for payment of transmission charges. However, NTPC took a stand that the LTA Agreement governing the power transfer was to be signed directly between the Petitioner and the beneficiaries of the Kudgi TPS. Subsequently, the beneficiaries signed the LTA Agreements with the Petitioner directly on various dates as under:

(i) Karnataka Distribution Companies (1196.24 MW) - LTA Agreement dated 4.3.2015;

(ii) Kerala State Electricity Board Limited (119.18) – LTA Agreement dated 30.3.2015;

(iii) Tamil Nadu Generation & Distribution Co Ltd. (300.10 MW) - LTA Agreement dated 4.2.2015;

(iv) Andhra Pradesh Distribution Companies (192.79 MW)- LTA Agreement dated 10.3.2015' and

(v) Telangana Distribution Companies (225.31 MW) - LTA Agreement dated 27.2.2015.

(e) The scheme of power evacuation from Kudgi TPS was discussed and approved in the 33rd Standing Committee Meeting of Power System Planning of Southern Region held on 20.10.2011. Accordingly, the following transmission system was

identified for implementation by the Petitioner for evacuating power from the Kudgi TPS of the Respondent:

- (i) 2 nos. 400kV D/C transmission line Kudgi TPS–Narendra (New) [Element I];
- (ii) 765 kV D/C transmission line Narendra (New)–Madhugiri [Element II]; and
- (iii) 765 kV D/C transmission line Madhugiri–Bangalore [Element III].

NTPC was required to implement the following:

- (i) stepping up of power at the generation project to 400 kV
 - (ii) provision of bus reactor of 2x125 MVAR at generation switchyard.
 - (iii) provision of 2x500 MVA, 400/220kV transformers at generation switchyard and 6 nos. 220 kV bays.
- (f) A dispute arose between NTPC and KTL with respect to delayed operationalization of the 400kV D/C Kudgi TPS–Narendra (New) transmission line [Element-I] and payment of transmission charges for the same which resulted in filing of Petition No.236/MP/2015 by KTL before this Commission, wherein KTL sought declaration of deemed Commercial Operation Date (COD) of the said line as 4.8.2015 and also for payment of transmission charges from the said date. While seeking the said prayer, KTL pleaded that even though the entire scope of work for Element-I had been completed on 27.3.2015, the Element could not be tested and charged due to non-availability of inter-connection at both ends. Accordingly, KTL sought transmission charges for Element-I under clause 6.2 of its TSA with the long-term transmission customers from 4.8.2015. With regard to Elements II and III viz. Narendra (New)–Madhugiri 765 kV D/C line and Madhugiri-Bangalore 400 kV D/c (quad) line, the transmission charges were billed and recovered from the date of their respective

CODs as per the POC mechanism under the Central Electricity Regulatory Commission (Sharing of inter- State Transmission Charges and Losses) Regulations, 2010 (hereinafter referred to as the 2010, Sharing Regulations).

(g) The Commission vide Order dated 27.6.2016 in Petition No.236/MP/2015 observed that due to non-availability of inter-connection facility required to be developed by NTPC and PGCIL at each end, the transmission line could not be commissioned and therefore, the transmission charges for the period from 4.8.2015 to 23.8.2015 shall be shared by both NTPC and PGCIL in the ratio of 50:50. The Commission further observed that CTU is directed to raise the bills to PGCIL and NTPC for the period from 4.8.2015 to 23.8.2015 in the ratio of 50:50 and to PGCIL for the period from 24.8.2015 to 15.11.2015 and to NTPC from 16.11.2015 and disburse the same to KTL.

(h) NTPC filed a Review Petition against the Commission's order dated 27.6.2016 in Petition No. 236/MP/2015 stating that the deemed COD for Element-I of the transmission system of KTL had been declared w.e.f. 4.8.2015 by overlooking its pleadings and that the transmission line had not been test-charged at both ends and not put to regular use. PGCIL also filed Review Petition No.42/RP/2016 against fixing of its liability to pay transmission charges for the first element of the transmission project.

(i) The Commission vide its order dated 17.10.2017 in Review Petition No.44/RP/2016, filed by NTPC , partially allowed the Review Petition of the Respondent and held that NTPC shall be liable to bear transmission charges for Element-I from 11.12.2015 till the commercial operation of the 1st unit of Kudgi

TPS. In compliance with the above directions of the Commission, NTPC made payments of the transmission charges for Element-I for the periods as decided by this Commission till the COD of its 1st unit on 31.7.2017.

(j) After the declaration of commercial operation of Unit-1 on 31.7.2017 and considering that all the associated transmission system elements by KTL/PGCIL had been commissioned by then, the Petitioner operationalized the LTA granted to NTPC for the entire quantum of 2392.49 MW w.e.f. 1.8.2017, even though the required Letter of Credit (LC), as payment security mechanism, was not established by the beneficiaries. Consequently, the liability for payment of transmission charges for the said operationalized LTA also commenced.

(k) As per Regulation 8 (5) and (6) Central Electricity Regulatory Commission (Grant of Connectivity, Long- Term Access, Medium- Term Access and related matters), Regulations, 2009 (hereinafter referred to as the 2010, Connectivity Regulations), in the event entire LTA was operationalized and only Unit - 1 of Kudgi TPS was commissioned, the respondent became liable to pay to the Petitioner, transmission charges corresponding to the LTA quantum for the non-commissioned units from 1.8.2017 i.e. the date from when such LTA had become effective.

(l) As per the clause 3.4 of Billing, Collection and Disbursement (BCD) Procedure any payment made after due date attracts delayed payment surcharge in accordance with Tariff Regulations. Thus, delayed payment surcharge is a statutory liability imposed under the Regulations of this Commission. The monthly bills raised by the Petitioner towards transmission charges become due

and payable on the 30th day after the date on which such bills are received and duly acknowledged, in the event that the said bills remain unpaid for the next 30 days (i. e. 60 days after raising the bills) the liability to pay delayed payment surcharge to the Petitioner also ensues.

(m) Any revisions in the transmission charges bills on account of revisions in RTAs do not mitigate the liability to pay transmission charges to the Petitioner from the date that such liability has accrued. As a necessary corollary, such revisions in RTAs also do not mitigate the statutory liability to pay delayed payment surcharge to the Petitioner with reference to the date on which the liability to pay transmission charges has accrued.

(n) When the Regional Transmission Account (RTA) for August, 2017 was published on the website of SRPC on 01.09.2017, the Petitioner observed that the LTA quantum for Kudgi TPS had wrongly been considered as 754 MW instead of 2392.49 MW. The Petitioner requested SRPC vide letter dated 5.9.2017 for revision in the RTA by including the correct LTA quantum for Kudgi TPS for billing. SRPC revised the RTAs for August 2017 on 5.9.2017 incorporating the total LTA of 2392.49 MW to be billed on the beneficiary States of Kudgi TPS in proportion to their LTA quantum from the Kudgi TPS. However SRPC revised the RTA for August, 2017 & September 2017 on 02.11.2017 incorporating the liability of the Respondent to pay the LTA charges for un-commissioned generation of Unit-2 & 3 while limiting the liability of DICs to pay the LTA charges for commissioned generation only and continued the same billing mechanism thereafter from October 2017. Based on the revised RTA dated 2.11.2019 for

August 2017 & September 2017 and the regular monthly RTA dated 2.11.2017 for October 2017, the Petitioner issued a combined bill dated 6.11.2017 to NTPC for the transmission charges for August 2017, September 2017 & October 2017.

- (o) NTPC, instead of making payment of the transmission charges bills raised by the Petitioner, proceeded to file Petition No.261/MP/2017 and prayed for setting aside of the bill dated 6.11.2017 raised by the Petitioner and the revision of RTAs issued by the SRPC.
- (p) The Commission vide its order dated 6.11.2018 held that the operationalization of LTA was not linked with the commercial operation date (COD) of the generating units and stations and that the LTA was required to be operationalized from the date of commissioning of the transmission system irrespective of the COD of the generator. The Commission further held that that all the Elements I, II and III were part of evacuation system of Kudgi TPS as per the 33rd Standing Committee Meeting and accordingly, the sharing of their transmission charges was to be done in the manner laid down in the Order.
- (q) The Commission confirmed that it was the Respondent who was liable to bear the transmission charges with respect to the delayed units I, II and III of Kudgi TPS from the COD of transmission system till the respective COD of remaining units, which was prior to 1.8.2017 i.e. the date of LTA operationalization by the Petitioner on commissioning of unit-I of the Respondent. In furtherance of the direction of the Commission, SRPC issued revised RTA to the extent of revised liability of the Respondent for the period effective from COD of the transmission system to the respective COD of the remaining units of the Respondent.

(r) Based on the revised RTA issued by SRPC and considering the transmission charges bills already raised on the Respondent since 1.8.2017 as per the RTAs issued by SRPC earlier, adjustment bills towards applicable transmission charges for the transmission assets of KTL as also the bay extension works of PGCIL, was reworked by the Petitioner. Accordingly, vide letter dated 27.11.2018, a credit bill for ₹59,48,10,701/- was issued to the Respondent towards the differential transmission charges and the Respondent was requested to make payment of the outstanding dues amounting to ₹304,09,75,284/- immediately so as to avoid further accumulation of surcharge on the delayed payment as per the provisions of the 2010, Sharing Regulations.

(s) The Respondent, vide its letter dated 5.12.2018, raised objections on the billing adjustments and requested the Petitioner to raise a fresh bill for the transmission charges payable by the Respondent as per Order of the Commission dated 6.11.2018. In response, the Petitioner, vide its letter dated 11.12.2018, informed the Respondent that this Commission had clarified on the provisions of the 2010, Sharing Regulations and had expressly cast a liability onto the Respondent to make payment of transmission charges effective from the COD of the transmission system, which was prior to the commencement of billing on the Respondent by the Petitioner effective from 1.8.2017 based on the approved POC rates and RTAs issued by the SRPC. Since, the bill dated 27.11.2018 raised on the Respondent was towards the adjustment billing based on the said directions of this Commission as well as the revised RTA issued by SRPC, there was no question of raising any fresh bill and, therefore, the Petitioner requested

the Respondent to make payment. It was further clarified to the Respondent that any delay in payment of the same was to attract late payment surcharge as per applicable Regulations.

(t) The Petitioner, vide its letter dated 30.11.2018, informed the above position to KTL that since the proportionate transmission charges for its assets till September, 2018 were to be collected from the Respondent, NTPC as per the Order dated 6.11.2018 of the Commission and since said charges, amounting to ₹273.82 crore, were already disbursed to KTL from the PoC pool till that date, the same were required to be refunded by KTL back to the PoC pool in order to regularize payments.

(u) Being aggrieved by the said request, KTL filed a Review Petition No.48/RP/2018 seeking to setting aside letter dated 30.11.2018 of the Petitioner and a direction that tariff payments to KTL be not withheld arbitrarily pending payment by the Respondent. During the course of proceedings, the issue of payment of transmission charges by the Respondent was also reviewed. The Commission vide Record of Proceedings of the hearing held on 20.12.2018, directed the Petitioner to raise revised bills in terms of the Commission's Order dated 6.11.2018. This direction to raise revised bills did not in any manner modify the findings of this Commission that the Respondent was liable to pay transmission charges for the delayed units till they were commissioned. Accordingly, vide letter dated 28.12.2018, the Petitioner raised a revised bill on the Respondent for an amount of ₹304,09,75,284/- towards applicable transmission charges for the

transmission assets of KTL and the bay extensions by PGCIL and the same was payable by the Respondent by 12.1.2019.

(v) The Respondent, vide its letters dated 14.1.2019, informed the Petitioner that the payment in terms of bill dated 28.12.2018 issued by the Petitioner had been duly made on 11.1.2019. Thus, the Respondent accepted its liability towards the transmission charges payable to the Petitioner on account of delay in commissioning of units I, II and III of Kudgi TPS and in fact, also discharged the same after a lapse of more than one year of raising the first bill on the Respondent i.e. on 6.11.2017 as per the RTAs issued by SRPC. The revised bill dated 28.12.2018 issued by the Petitioner and the payments made by the Respondent was further discussed during proceedings while hearing of the Petition No.48/RP/2018 on 22.1.2019 wherein the Petitioner had categorically stated that it reserved its rights to raise the issue of surcharge payments by the Respondent.

(w) The payment of surcharge for delayed payment of transmission charges is an automatic liability under the BCD Procedure. Accordingly, the Petitioner issued a bill dated 21.1.2019 in the sum of ₹35,91,98,901/- on the Respondent towards delayed payment surcharge on transmission charges outstanding since August, 2017. However, the Respondent, vide its letter dated 8.2.2019, rejected the said bill on the ground that since the bill for ₹304.09 crore raised by the Petitioner in compliance of RoP dated 20.12.2018 in Petition No.48/RP/2018 had been cleared by the Respondent within the prescribed time of 15 days, Respondent is not liable for payment of any delayed payment surcharge.

3. The matter was heard on 18.12.2019. The Commission after hearing the parties, directed the Respondent to file its reply and also directed the Petitioner to file its rejoinder. The Commission reserved the order after hearing the parties. The Respondent has filed its reply vide affidavit dated 6.1.2020 and the Petitioner has filed its rejoinder dated 13.1.2020.

Submissions of the Respondent

4. NTPC vide affidavit dated 6.1.2020 has submitted as under:

(a) NTPC had filed the Petition No. 261/MP/2017 seeking setting aside the bill dated 6.11.2017 raised by the PGCIL towards the LTA charges. The bill dated 6.11.2017 had been stayed by this Commission throughout the proceedings in the Petition no. 261/MP/2017 which ultimately culminated in the final order dated 6.11.2018.

(b) The Commission vide its order dated 6.11.2018, set aside the bill dated 6.11.2017, raised by the PGCIL, being against the provisions of the 2209, Connectivity Regulations and 2010, Sharing Regulations. The Commission rejected all the contentions of the Petitioner on the applicability of provisions of Regulation 8(5), provisos of the 2010, Sharing Regulations to justify the bill dated 6.11.2017.

(c) NTPC has not delayed the payment of the bill when it was raised by the Petitioner as per this Commission's order. The issue of DPS/LPS arises only in case the principal payment is delayed. The bill dated 6.11.2017 was stayed and thereafter set aside by this Commission with a clear direction to Southern

Regional Power Committee (SRPC) to revise the RTA after which the Petitioner was to raise a bill. Therefore there was no question of late payment of the bill dated 6.11.2017, since the bill itself was held to be illegal. The next bill raised by the Petitioner was on 27.11.2018 but without complying with the terms of the Commission's order dated 6.11.2018. In the ROP dated 20.12.2018, the Commission directed the Petitioner to raise revised bills in terms of the order dated 6.11.2018. Accordingly, the Petitioner raised a bill on 28.12.2018 which was duly paid on 11.1.2019.

(d) The Petitioner had raised a bill which was not valid and was set aside by this Commission and Petitioner was required to raise the bill in terms of order dated 6.11.2018 passed by this Commission. Therefore, the Petitioner has no right to demand DPS / LPS on amounts which were not due at all.

Rejoinder of the Petitioner

5. The Petitioner has filed its rejoinder vide affidavit dated 13.1.2020 and has submitted as under:

(a) The consistent contention of the Respondent that the bill dated 6.11.2017 issued by the Petitioner has been 'set aside' by this Commission is misplaced. The Commission vide passing interim direction vide its RoP dated 16.1.2018 had only directed the Petitioner not to take any coercive measures against the said bill and had not expressly stayed the invoice. Further even in the final Order dated 6.11.2018, the Commission only directed the SRPC to revise the RTAs incorporating the liability of the Respondent and consequently directed the

Petitioner to revise its bill in terms thereof. Thus, the Commission had never set aside the bill dated 6.11.2017 issued by the Petitioner.

(b) Due to non-payment of bills raised from 1.8.2017 as per the RTAs issued by SRPC, the PoC pool suffered a deficit from 1.8.2017 till Sep'18, COD of last unit of Respondent on account of delayed payment on 11.01.2019 on part of the Respondent due to the litigation initiated by it.

(c) Based on the revised RTA and considering the transmission charges bill already raised on the Respondent since 1.8.2017 as per the RTA issued by SRPC earlier, adjustment billing towards applicable transmission charges for the transmission assets of KTL as also the bay extension works of PGCIL, was reworked by the Petitioner. Accordingly, vide letter dated 27.11.2018, a credit bill for ₹.59,48,10,701/- was issued to the Respondent towards the differential transmission charges and the Respondent was requested to make payment of the outstanding dues amounting to ₹304,09,75,284/- immediately so as to avoid further accumulation of surcharge on the delayed payment as per the provisions of the 2010, Sharing Regulations.

(d) The amount of ₹.59,48,10,701/- passed onto the Respondent was to be recoverable by the Petitioner from the DICs in the PoC pool upon revision of PoC rates and thereafter revision of RTAs for the relevant period and raising of adjustment billing. The PoC rates for the relevant period (August, 2016 to September, 2018) were to be revised by the NLDC and SRPC as requested vide letter dated 6.2.2019. Thus, the credit note was issued by the Petitioner as an adjustment towards the already issued bill and was in fact only an accounting

adjustment. However, vide its letter dated 5.12.2018, the Respondent again raised objections on the billing adjustments and requested the Petitioner to raise a fresh bill for the transmission charges payable by the Respondent. The Petitioner, vide its letter dated 11.12.2018, informed the Respondent that this Commission had clarified on the provisions of the 2010, Sharing Regulations and had expressly cast a liability onto the Respondent to make payment of transmission charges effective from the COD of the transmission system, which was prior to the commencement of billing on the Respondent by the Petitioner effective from 1.8.2017 based on the approved POC rates and RTAs issued by the SRPC. Since the bill dated 27.11.2018 raised on the Respondent was towards the adjustment billing based on the directions of this Commission as well as the revised RTA issued by SRPC, there was no question of raising any fresh bill and requested the Respondent to make payment.

Analysis and Decision

6. The instant petition has been filed seeking direction to Respondent NTPC to pay late payment surcharge of ₹ 35,91,98,901/- on account of delayed payment of transmission charges for associated transmission system of the Kudgi TPS since August, 2017. LTA for a quantum of 2392.49 MW was granted by CTU to NTPC for evacuation of power from Kudgi TPS of NTPC to its beneficiaries. Unit I of Kudgi TPS was declared under commercial operation on 31.7.2017. However, Units II and III of Kudgi TPS had not been commissioned as on 31.7.2017. The Petitioner operationalized the LTA granted to NTPC for the entire quantum of 2392.49 MW w.e.f. 1.8.2017 since Unit I of Kudgi TPS and the associated transmission system executed by KTL and PGCIL had been commissioned. As per the procedure specified under the Sharing

Regulation, CTU is responsible for billing, collection and disbursement of the transmission charges to ISTS transmission licensees on the basis of the monthly Regional Transmission Accounts (RTAs) prepared by the concerned RPC. RTA for August, 2017 for the associated transmission system was published on the website of SRPC on 1.9.2017 which considered the LTA quantum of Kudgi TPS as 754 MW. On a request by the Petitioner, SRPC revised the RTA on 5.9.2017 incorporating the total LTA for 2392.49 MW. SRPC on 2.11.2017 revised the RTA for August, 2017 and September, 2017 delineating the liability of NTPC to pay the LTA charges also for the non-commissioned generation of Unit-II and III and the liability of the DICs to pay the LTA charges for the commissioned generation of Unit-I only. This process of billing continued from October, 2017 onwards. The Petitioner based on the revised RTA dated 2.11.2017 for August, 2017 and September, 2017 and regular monthly RTA dated 2.11.2017 for October, 2017 issued a combined bill to NTPC for the transmission charges for August, September and October, 2017. NTPC instead of making the payment filed Petition No. 261/MP/2017 with the prayer that all liabilities for transmission charges should be levied on the beneficiaries alone. The Commission vide Record of Proceedings dated 16.1.2018 in Petition No. 261/MP/2017 issued the following interim directions:

“4. Learned counsel for the petitioner further submitted that the petitioner has filed an IA and requested to pass ad-interim ex- parte order staying the bill dated 6.11.2017. Considering the submission of learned counsel for the petitioner, the RoP in Petition No 261/MP/2017 Page 2 of 2 Commission directed PGCIL not to take any coercive measures against the petitioner till the next date of hearing. Accordingly, IA No. 92/2017 was disposed of.”

During the hearing on 6.3.2018, the Petitioner made a request for vacation of the above interim directions which was declined by the Commission. Consequently, the Petitioner continued to raise the bills on NTPC as per the RTAs issued by SRPC but

could not take any coercive measures to recover the charges on account of the interim order given on 16.1.2018.

7. Petition No. 261/MP/2017 was finally disposed vide order dated 6.11.2018 with the following directions:

“44. Summary of decisions:

a. The liability to pay charges towards Long term Access under Central Electricity Regulatory Commission (Sharing of inter-State Transmission charges and losses), Regulations, 2010 as amended from time to time shall be that of beneficiaries in view of Agreements entered into by them.

b. The LTA needs to be operationalized from the date of declaration of COD of the transmission system irrespective of the CoD of the generator.

c. Annual transmission charges of the associated transmission system (i.e.in this case - Kudgi-Narendra, Narendra-Madhugiri and MadhugiriBidadi and associated bays/substation) as determined or adopted by the Commission shall be considered in PoC mechanism corresponding only to the units declared under commercial operation and the balance transmission charges shall be recovered from NTPC till the respective COD of remaining units.

45. SRPC shall revise the RTA accordingly and CTU shall raise the bills as based on revised RTA.”

The directions of the Commission in para 44 (c) as quoted above confirmed the liability of NTPC to pay the transmission charges of the associated transmission system from the date of operationalisation of the LTA, corresponding to the capacity of Units of Kudgi TPS which had not been declared commercial operation.

8. Kudgi Transmission Limited (KTL) filed Review Petition No. 48/RP/2018 against the order dated 6.11.2018 in Petition No. 261/MP/2017. The Commission in its RoP dated 20.12.2018 noted the submission of the learned counsel for CTU and NTPC and directed as under:-

“3. Learned counsel for CTU submitted that bills have been raised on NTPC. Learned counsel for NTPC submitted that CTU has raised the bill which was challenged by NTPC

and the said bill has been set aside by the Commission. Learned counsel for NTPC submitted that the CTU has not raised the bills in terms of the Commission's order dated 6.11.2018. NTPC would make the payment after proper bill is raised in terms of the order of the Commission.

5. The Commission directed CTU to raise revised bills in terms of the Commission's order dated 6.11.2018 immediately but not later than seven days and NTPC shall make payments within 15 days thereafter. The Commission observed that any inter se issues between NTPC & CTU may be sorted out amicably and in case of any dispute, either party is at liberty to approach the Commission through appropriate application."

9. In terms of the order dated 6.11.2018 in Petition No. 261/MP/2017 and the directions contained in the RoP dated 20.12.2018 in Review Petition No. 48/RP/2018, the Petitioner vide its letter dated 28.12.2018 raised revised bills for the period from August 2016 to September 2018 amounting to Rs 304,09,75,284/-(Rupees Three Hundred Four Crore Nine Lakh Seventy Five Thousand Two Hundred Eighty Four Only) on NTPC. The Petitioner in the said letter has mentioned the following:

"It may kindly be noted that the above bill is issued by CTU without prejudice to its rights to levy applicable surcharge on the subject payment."

The above amount was paid by NTPC to CTU vide its letters dated 14.1.2019. During hearing of the Petition No. 48/RP/2018 on 22.1.2019, it was confirmed on behalf of NTPC that payments have been made to CTU as per the bills raised. However, learned counsel for CTU submitted that it reserves its right to raise the issue of surcharge payment by NTPC.

10. CTU vide its letter dated 21.1.2019 raised a bill for an amount of Rs. 35,91,98,901/- (Rupees thirty five crore ninety one lakh ninety eight thousand nine hundred and one only) towards late payment surcharge for the outstanding dues pending since August, 2017. NTPC vide its letter dated 8.2.2019 has rejected the claim of CTU on the ground that payment was made within the stipulated time as per the directions of the Commission on the basis of the bill raised on 28.12.2018 and therefore,

no surcharge is admissible. Aggrieved by the refusal of NTPC to pay the late payment surcharge, the Petitioner has filed the present petition.

11. CTU has submitted that the transmission charges dues have accrued after operationalisation of the LTA w.e.f. 1.8.2017 and bills were raised on the basis of the RTAs issued by SRPC in accordance with the Sharing Regulations and BCD Procedure. CTU has submitted that only on account of the pending litigation between the parties, the lawful dues of the Petitioner amounting to Rs. 304 crore have remained unpaid for more than 16 months for which the Petitioner is entitled to receive late payment surcharges as provided under the Regulations. The Petitioner has submitted that NTPC is liable to pay delayed payment surcharge on the outstanding dues as per the bill dated 21.1.2019 issued by the Petitioner. NTPC, on the other hand, has submitted that the bill dated 6.11.2017 was stayed by the Commission throughout the proceedings in Petition No. 261/MP/2017 which ultimately culminated in the final order dated 6.11.2018. NTPC has further submitted that since the Petitioner had raised a bill which was not valid and was set aside by the Commission and the Petitioner was required to raise the bill in terms of the order dated 6.11.2018, the Petitioner is not entitled for any late payment surcharge.

12. After taking note of the rival contentions of the parties, the following two issues arise for our consideration:

- (a) Issue No. 1: Whether there is provision in the Sharing Regulations and the BCD Procedure for payment of late payment surcharge?

(b) Whether the Petitioner is correct in levying late payment surcharge on the bills raised for the period August, 2017 till September, 2018 pursuant to the Commission's order dated 6.11.2018 and directions in RoP dated 20.12.2018?

Issue No. 1: Whether there is provision in the Sharing Regulations and the BCD Procedure for payment of late payment surcharge?

13. Clause 3.1 of Billing, Collection and Disbursement (BCD) Procedure under the Sharing Regulations, provides as under

“3.1 Due date The payment due-date in relation to any Invoice raised by the CTU shall mean the thirtieth (30th) day after the date on which any Invoice is received and duly acknowledged by the DIC.”

Any payment made after the due date attracts the delayed payment surcharge as per Clause 3.4 of the BCD Procedure which is extracted as under

“3.4 Late Payment Surcharge

The late payment surcharge shall be as per Tariff Regulations, 2009 and any subsequent amendment made thereto.”

Regulation 45 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 provides as under

“45. Late Payment Surcharge: In case the payment of any bill for charges payable under these regulations is delayed by a beneficiary of long term transmission customer/ DICs as the case may be, beyond a period of 60 days from the date of billing, a later payment surcharge at the rate of 1.50% per month shall be levied by the generating company or the transmission licensee, as the case may be.”

In the light of the above provisions, it is clear that delay in payment of the transmission charges raised through the PoC mechanism beyond the stipulated date would attract the late payment surcharge as per the prevalent tariff regulation of the Commission.

Issue No. 2: Whether the Petitioner is correct in levying late payment surcharge on the bills raised for the period August, 2017 till September, 2018 pursuant to the Commission's order dated 6.11.2018 and directions in RoP dated 20.12.2018?

14. The Petitioner operationalized the entire quantum of 2392.49 MW w.e.f 1.8.2017 after the commercial operation of Unit-I of the Kudgi TPS. SRPC issued the RTA on 5.9.2017 for the LTA of 2392.49 MW. Subsequently, SRPC vide its letter dated 2.11.2017, revised the RTA for August, 2017 and September, 2017 delineating the liability of NTPC for the transmission charges corresponding to the non-commissioned generation of Unit-II and Unit-III of Kudgi TPS and also raised the monthly RTA dated 2.11.2017 for the month of October, 2017. The Petitioner issued a combined bill for August, September and October, 2017 vide letter dated 6.11.2017. NTPC filed Petition No. 261/MP/2017 challenging the bills raised by the Petitioner. The Commission vide its RoP and order in IA No. 92/2017 dated 16.1.2018 did not agree to stay the bill dated 6.11.2017 raised by the CTU but directed the Petitioner not to take any coercive measures. It is pertinent to mention that even though there was no stay for payment, NTPC did not make any payment and RTAs were continued to be raised by SRPC in line with the bills raised from August, 2017 to October, 2017 as there was no stay by the Commission. Petition No. 261/MP/2017 was finally disposed of vide order dated 6.11.2018. Para 44 (c) of the said order upheld the liability of the Petitioner to pay the transmission charges corresponding to the non-commissioned capacity of Kudgi TPS. The Petitioner vide its letter dated 27.11.2018 raised a credit bill for Rs. 59,48,10,704/- towards the differential transmission charges and NTPC was requested to make payment of the outstanding dues amounting to Rs. 304,09,75,284/-. The Commission vide RoP dated 20.12.2018 in Review Petition No. 48/RP/2018 directed CTU to raise revised bill in terms of the Commission's order dated 6.11.2018. Accordingly, the

Petitioner raised a bill vide letter dated 28.12.2018 for Rs. 304,09,75,284/- for the period August, 2016 to September, 2018.

15. It is pertinent to mention that at no point of time, the bill raised by the Petitioner was set aside by the Commission. Vide its interim direction dated 16.1.2018, the Commission directed the Petitioner not to take any coercive measures during the proceedings before the Commission. This direction did not prevent NTPC to make payment of the transmission charges as per the bills raised by the Petitioner. Further, while raising the bill for the period August, 2016 to September, 2018 vide letter dated 28.12.2018, the Petitioner has clearly indicated that it would pursue its right for applicable surcharge on the subject payment.

16. Therefore, the question arises whether liability of NTPC subsists on month to month basis with effect from August 2017 to September 2018 alongwith late payment surcharge thereon till the payments were finally made or the liability of NTPC to pay the transmission charges for the period August 2017 to September 2018 arises only after the issue of the order dated 6.11.2018 and directions in RoP dated 20.12.2018.

17. Let us consider some of the case laws relating to late payment surcharge. A question arose before the Hon'ble Supreme Court in Kerala State Electricity Board v. MRF Limited [(1996) 1 SCC 597] whether KSEB was entitled for late payment surcharge on the bills which were stayed during the proceedings before the High Court but was subsequently upheld by the Supreme Court. In that case, MRF entered into an agreement with KSEB for supply of power to its factory manufacturing automobile tubes and tread rubber. The agreement contained a provision for payment of power and energy supplied to MRF by KSEB within 15 days from the date of receipt of invoice, in

default of which interest @18% p.a. or at such rate as may be fixed by KSEB from time to time would be chargeable. KSEB revised the tariff for electricity supplied by it in 1980, 1982 and 1984. MRF challenged the revisions in a Writ Petition before the High Court of Kerala. The revisions were struck down by the High Court. KSEB filed an appeal before the Supreme Court which upheld the revision of tariff. Consequently, MRF and other consumers became liable to pay the amounts due on the basis of revision of tariff. KSEB raised a demand for the payment of amount inclusive of the interest @18% p.a. MRF challenged the demand for interest before the High Court of Kerala. The Single Judge as well as the Division Bench of the Hon'ble High Court held that MRF could not be said to be in default of non-payment of liability which did not exist at the relevant time and struck down the demand for payment of interest. KSEB filed an appeal before the Hon'ble Supreme Court which held that once the upward revision was found to be valid and enforceable, such revision would be effective from the date the revision was made despite the fact that such revision had remained unenforceable for some period on account of decision of the High Court. The relevant paragraph of the judgment is extracted as under:-

“23. But after the decision of this Court upholding upward revisions of tariffs, the Board's entitlement to draw bills on the basis of upward revisions and consequential enforceability of payment of such bills by the consumers revived with full force. Hence, it would not be correct to contend that although the Company or for that matter other consumers were required to pay on the basis of revisions of tariffs from the dates when such revisions became effective, liability for such payment would accrue only from the date of pronouncement of the judgment by this Court upholding upward revisions and not from any date prior to that. If the upward revisions are hold as valid, enforceability of such upward revisions being consequential to such revisions, though it had remained unenforceable for some period on account of the decision of the High Court, cannot but revive from the dates of upward revisions.”

18. In *Kanoria Chemicals and Industries Limited v. UPSEB* [(1997) 5 SCC 772], Hon'ble Supreme Court dealt with the issue whether the stay of the operation of the

notification issued by UPSEB revising the electricity rates/tariff by the High Court would result in denial of the additional charges for late payment, if any. In that case, the validity of a notification issued by UPSEB revising the electricity rates/tariffs under Section 49 of the Electricity (Supply) Act, 1948 was challenged by the consumers. Interlocutory applications filed in the writ petitions for stay of the operation of the impugned notifications were allowed but the writ petition was eventually dismissed by the High Court whereupon the consumers deposited the differential amount between pre-revised and revised electricity rates but did not deposit the late payment surcharge recoverable in terms of Clause 7(b) of the notification. Notices for demand were issued by UPSEB to the consumers which were challenged in a fresh batch of writ petitions. The main contention urged by the consumers before the High Court was that since the operation of the notification revising the tariff was stayed between 25.7.1990 and 1.3.1993, no late payment surcharge could be levied on the amount withheld by the Petitioners under the order of the court, even though the writ petitions were finally dismissed. The said contention was rejected by a Division Bench of Allahabad High Court. In appeal, it was urged before the Supreme Court that stay of the operation of the impugned notification relieve the consumers of the obligations to pay the revised tariff/rates and consequently, additional charges for late payment, if any. The Consumers placed reliance on the decision of the Hon'ble Supreme Court in Adoni Ginning Factory Vs A.P. Electricity Board [(1979) 4 SCC 560]. The Hon'ble Supreme Court in its judgment held that the decision of the Supreme Court in Adoni Ginning Factory case has no application in Kanoria Chemical case and decided the issue of late payment surcharge as under:-

“11. We, therefore, agree with the High Court that Adoni Ginning cannot be read as laying down the proposition that the grant of stay of a notification revising the electricity charges has the effect of relieving the consumers/petitioners of their obligation to pay late payment surcharge/interest on the amount withheld by them even when their writ petitions are dismissed ultimately. Holding otherwise would mean that even though the Electricity Board, who as the respondent in the writ petitions succeeded therein, is yet deprived of the late payment surcharge which is due to it under the tariff rules or regulations. It would be a case where the Board suffers prejudice on account of the orders of the court and for no fault of its. It succeeds in the writ petition and yet loses. The consumer files the writ petition, obtains stay of operation of the notification revising the rates and fails in his attack upon the validity of the notification and yet he is relieved of the obligation to pay the late payment surcharge for the period of stay, which he is liable to pay according to the statutory terms and conditions of supply-which terms and conditions indeed form part of the contract of supply entered into by him with the Board. We do not think that any such unfair and inequitable proposition can be sustained in law.”

19. It is manifest from the above judgments that a party which fails in the main proceedings cannot benefit from the interim order issued during the pendency of such proceedings. In the present case, the liability of NTPC for payment of transmission charges based on the RTAs raised by SRPC was on the basis of the interpretation of Regulation 8(5) and (6) of the Sharing Regulations i.e. NTPC would be liable to pay the transmission charges for the LTA corresponding to its non-commissioned capacity of Units I and II of Kudgi TPS. During the proceedings before the Commission, an interim direction was issued for not taking any coercive measure for recovery of the bills. In fact there was no stay on the bills raised by PGCIL for the months of August, September and October 2017. As per the pleadings of the Petitioner, it continued to raise the bills on the basis of the REAs issued by SRPC every month. In the final order, the Commission decided the liability of NTPC on the basis of the provisions of Regulation 8(5) and (6) of the Sharing Regulations. In other words, the basis of RTAs issued by SRPC and the consequential bills raised by CTU were upheld by the Commission. Since there is provision for late payment surcharge under the BCD Procedure for the

payments made after the stipulated dates, NTPC becomes liable to pay the late payment surcharge in the light of the principles of restitution laid down by the Hon'ble Supreme Court in the judgments quoted above.

20. NTPC has submitted that in terms of the directions of the Commission dated 6.11.2018, the Petitioner raised a bill for Rs.304,09,75,284/- and a credit bill of Rs.59,48,10,704/- . NTPC raised the issue before the Commission that the said bill was not as per the order of the Commission dated 6.11.2018,whereupon the Commission vide RoP dated 20.12.2018 in Petition No.48/RP/2018 directed CTU to raise the revised bill in terms of the order dated 6.11.2018. CTU raised a revised bill for 304,09,75,284/- crore which was promptly paid by NTPC. NTPC has submitted that since it was a fresh bill which was paid within the stipulated time, no late payment surcharge is payable. We do not agree with the contention of NTPC. The principle based on which the bills for the months of August, September and October 2017 were raised in November 2017 was the same as directed in para 43(c) of the order dated 6.11.2018 in Petition No.261/MP/2017 i.e. NTPC would be liable to pay the transmission charges corresponding to the capacity of the generating station not commissioned and the transmission charges corresponding to the capacity of the generating station would be borne by the DICs through PoC. In other words, the bills raised from August 2017 onwards based on the RTAs were upheld. Secondly, CTU while raising the revised bill vide its letter dated 28.12.2018 has clearly mentioned about its right to claim late payment surcharge. Therefore, only because CTU was asked to raise a revised bill in accordance with the directions contained in order dated 6.11.2018 cannot obliterate the right of the CTU to claim and the liability of NTPC to pay late payment surcharge as per the BCD Procedure.

21. In the light of the above discussion, we hold that NTPC is liable to pay the late payment surcharge in accordance with the BCD Procedure on the monthly transmission charges from August 2017 to September 2018 corresponding to the capacity of the Kudgi TPS not commissioned. Accordingly, NTPC is directed to pay the late payment surcharge to CTU within a period of 15 days from the date of issue of this order.

22. Petition No. 323/MP/2019 is disposed of in terms of the above directions.

Sd/-
(I. S. Jha)
Member

Sd/-
(Dr. M. K. Iyer)
Member

Sd/-
(P. K. Pujari)
Chairperson