

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.221 of 2014

Dated: 13th March, 2015

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

In the Matter of:

**Mula Pravara Electric Co-operative Society Ltd. ("MPECS")
Shrirampur-413 709,
District Ahmednagar,
Maharashtra**

... Appellant(s)

Versus

- 1. Maharashtra Electricity Regulatory Commission
(MERC), World Trade Centre No.1,
13th Floor, Cuffe Parade,
Colaba, Mumbai-400 005**
- 2. Maharashtra State Electricity Distribution
Co. Ltd ("MSEDCL")
Prakashgad, Plot No.G-9,
Bandra (East),
Mumbai-400 051
Maharashtra**
- 3. Secretary,
Department of Co-operation,
Marketing and Textiles,
Government of Maharashtra,
Mantralaya, Mumbai-400 032**
- 4. Secretary,
Department of Industries, Energy and Labour,
Government of Maharashtra,
Mantralaya, Mumbai-400 032
Maharashtra**

... Respondent(s)

Counsel for the Appellant(s) : Mr. Akhil Sibal, Mr. Hasan Murtaza and
Ms. Malavika Prasad

Counsel for the Respondent(s): Mr. Buddy A Ranganadhan

Mr. G Saikumar,
Mr. Aditya Dewan
Ms. Soumya Sai Kumar
Mr. Rahul Kohli for R-2

J U D G M E N T

PER HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

1. The present Appeal has been filed u/s 111 of the Electricity Act, 2003 by the Appellant M/s. Mula Pravara Electric Co-operative Society Limited (MPECS) against the Impugned Order dated 18th June, 2014 passed by the Maharashtra Electricity Regulatory Commission (MERC) dismissing Petition/Case No.24 of 2012 filed by the Appellant without determining charges which were directed to be determined by this Tribunal in Appeal No.39 of 2011 on the basis of available material on record by its orders dated 16th December, 2011 and 7th January, 2014 (IA No.4 of 2014 in Appal No.39 of 2011).
2. The Respondent-1 is the Maharashtra Electricity Regulatory Commission (MERC) constituted under the Electricity Act, 2003 and the Respondent No.2 the Maharashtra State Electricity distribution Company Limited (MSEDCL), a Government Company registered under the Companies Act, 1956 and is a distribution licensee. The Respondent-3 is the State of Maharashtra and the Respondent No.4 is the Consumer Representative Bodies.
3. The facts of the case are as under:
 - 3.1 The Appellant, Mula Pravara Electric Cooperative Society (MPECS) was established as Farmer's Cooperative Society in the year 1969-70. The Appellant was granted a license by the State Government in the year 1971 for a period of 20 years to distribute the power in five specific Talukas (MPECS area) in District of Aurangabad in Maharashtra. The Appellant commenced its functioning as distribution licensee w.e.f 1.3.1971 and took over the electrical distribution network of Maharashtra State Electricity Board in the said area of supply After expiry of the initial period of 20 years, the Government of

Maharashtra after satisfying itself regarding the performance of services rendered by the Appellant, had renewed, extended and amended the Appellant's distribution licence for the said area for a further period of 20 years with effect from 1st February, 1991 by its order dated 21st May, 1999 up to 31.1.2011.

- 3.2 On 28.7.2010, the State Commission published a notice inviting "Expression of Interest (EoI) from prospective Applicants with expertise in electricity distribution for distribution of electricity in the MPECS area of supply. Six entities including the Appellant submitted their proposals expressing their interest in distributing electricity in the area served by MPECS area of supply.
- 3.3 Applications from two entities namely Mula Pravara Electric Co-operative Society Ltd, the Appellant and the Maharashtra State Electricity Distribution Company (R-2) were taken by the State Commission for consideration. The technical validation session for consideration of the applications for fresh license was held on 2.12.2010. On 5.12.2010 the Appellant as well as 2nd Respondent Distribution Company published notices in local newspapers inviting objection/comments on their application for license for distribution of electricity in the MPECS' area of supply. On 10.12.2010, the State Commission also published a public notice inviting objections/comments on applications of both the parties for fresh license. The public hearing was held on 14.1.2011. The State Commission after analyzing the claims of both the parties by the Order dated 27.1.2011 rejected the application filed by the Mula Pravara, the Appellant and issued license for the distribution of electricity in the MPECS area to the Distribution Company (R-2). The State Commission also amended the existing license of the Distribution Company (R-2) for distribution in the MSEB area of supply by merging it with the MPECS' area of supply under a new license.
- 3.4 Further, through the order dated 27.1.2011 the State Commission further directed the Mula Pravara (the Appellant) to handover its distribution network,

assets and equipments and consumer security to the Distribution Company (R-2) for its use even without payment of wheeling charges.

3.5 Aggrieved by this, the appellant (MPECS) filed an Appeal before this Tribunal vide Appeal No.39 of 2011 praying to set aside the order of the State Commission dated 27th January, 2011 and remand the matter to the State Commission with the direction to reconsider the application for license of the Appellant.

3.6 This Tribunal, after going through the merits of the Appeal, pronounced its order on 16th December, 2011. The relevant portion of the judgment is reproduced below:

“77. In view of our above findings we set aside the impugned order dated 27.1.2011 and remanded to the Commission with the direction to reconsider the application for license of the Appellant and dispose of on merits in accordance with the provisions of the Act and its own General Conditions of Supply Regulations and with a further direction to consider for grant of license to both the parties by allowing them to operate in the same area.

78. The Appeal is allowed. However, there is no order as to Costs.

After pronouncement of judgment, the learned Counsel for the parties request for issuing of consequential directions with regard to the existing arrangements and the time frame. Accordingly, we direct the Commission that the process to be completed within three months from today and in the meantime, the existing arrangement may be continued subject to payment of charges to the Appellant to be decided by the Commission after hearing all the parties concerned”.

3.7 The Appellant, MPECS, filed a Petition/Case No.24 of 2012 before the State Commission for determination of compensation/charges payable pursuant to this Tribunal judgment dated 16.12.2011 in Appeal No.39 of 2011.

3.8 The State Commission passed an interim order in Case No.24 of 2012 on 15.10.2012 and the relevant portion of the order is as follows:

“The State Commission, after going through the submissions made by the Appellant determined an interim amount of Rs1 Crore per month i.e. Rs.12 Crores per annum to be paid by the MSEDCL to MPECS on an adhoc basis as charges for continuation of the existing arrangements. Further, the cumulative amount of Rs.20 Crores from 1.2.2011 to

30.9.2012 should be paid by MSEDCL to MPECS in three monthly installments with first installment of Rs.7 Crores to be paid in October, 2012. The second Installment of Rs.7 Crores to be paid before November 5, 2012 and the third installment of Rs.6 Crores by December 5, 2012 and the monthly charge of Rs.1 Crore per month should be paid before 5th day of every month from November, 2012 and the monthly charge of Rs.1 Crore for the month of October, 2012 along with the first installment of Rs.7 Crores shall be paid within a period of two weeks from the date of issue of the Interim Order. However, the State Commission will pass an order revisiting the charges aforesaid once valuation of the distribution network is available. There shall be adjustment to the charges as determined in this order on interim basis once the Commission issues a further order determining the charges after taking into account valuation of the distribution network of MPECS.

The above monthly charges of Rs.1 Crore per month is an interim charge. Any excess or short fall in the charges shall be adjusted in the final order on the matter of determination of charges so that the existing arrangements may continue till the matter of grant of license is finally determined by the State Commission.

3.9 The Appellant filed miscellaneous Application No.3 of 2013 in case No.85 of 2010 in the matter of order dated 15.10.2012 in case No.24 of 2012 for determination of compensation/charges payable pursuant to this Tribunal judgment dated 16th December, 2011 in Appeal No.39 of 2011. The MPECS submissions in Misc Application No.3 of 2013 are as follows:

- (a) *That this Hon'ble State Commission exercise its powers, including under Section 19 of the Electricity Act 2003, to take steps and pass orders/directions for revocation of the Distribution License of MSEDCL;*
- (b) *That this Hon'ble State Commission may be pleased to strike off, reject and disregard MSEDCL's arguments and submissions in Petition/Case Nos. 85 of 2010 and 87 of 2010;*
- (c) *That pending the hearing and final disposal of this Application this Hon'ble State Commission be pleased to Report MSEDCL's conduct, non-payment and non compliance of its Order dated 15th October 2012 to the Hon'ble Appellate Tribunal (APTEL); that further hearings of Petition/Case No. 85 of 2010 be stayed and MSEDCL's arguments and submissions in the said Petition/Case No. 85 of 2010 and 87 of 2010 be rejected and disregarded; and that MSEDCL be restrained, prevented and not be permitted to supply electrical energy in the MPECS area of supply by continuing to use the Respondent Society's distribution network, equipment and assets without payment of compensation/charges as directed by the Hon'ble APTEL by its Order*

and Judgment dated 16th December 2011 in Appeal No. 39 of 2011 and as determined and directed by the Hon'ble State Commission by its Order dated 15th October 2012 in Petitioner/Case No. 24 of 2012;

- (d) *for ad-interim reliefs in terms of prayer (c)above;*
- (e) *for such further and other orders and directions as the nature and circumstances of the case may require”.*

Commission's Ruling

Prayer (a)

The prayer of invoking section 19 (d) of Petitioner is rejected.

Prayer (b)

The Commission is not inclined to pass any such orders that would be against protection of the interest of consumers.

Prayer (c)

The issues related to this primary non-compliance are being considered by the Commission as a part of Case No. 121 of 2012 and will be disposed through a separate Order.

Prayer (d)

Prayer (d) is a residual prayer and based on the rulings on Prayer (a) to (c) mentioned above, and hence, this prayer is rejected. The Commission is disposing this Petition through this Order and hence, this prayer is rejected.

Accordingly, with the above directions, the present Miscellaneous Application No. 3 of 2013 in Case No. 85 of 2010 stands disposed of.

- 3.10 MSEDCL filed Miscellaneous Application No.6 of 2012 in case No.121 of 2012 seeking a review of the Commission's order dated 15.10.2012 in case No.24 of 2012 on 4.12.2012.

3.11 On 3.9.2013, the State Commission pronounced an Order on the Review Petition filed by the MSEDCL and the Summary of the Order is reproduced below:

“To Summarize: In view of above, Order dated 15th October, 2012 in case No.24 of 2012 is reiterated and confirmed. The Review Petition is rejected. The Commission further directs MPECS to submit a copy of its asset register of electricity business within a week of issuance of this Order to MSEDCL. MSEDCL shall carry out the valuation exercise of assets of MPECS and submit the valuation report to the Commission, within a month of issuance of this order. Accordingly, Case No.121 of 2012 and the Miscellaneous Application No.6 of 2012 in Case No.121 of 2012 stands disposed of”.

3.12 The Respondent MSEDCL filed a Petition in Case No.119 of 2013 seeking clarification of the Commission’s Order dated 3.9.2013 passed in Case NO.121 of 2012 under Regulations 92 and 93 of the MERC (Conduct of Business) Regulations, 2014.

3.13 The State Commission pronounced the order on the Petition No.119 of 2013 filed by MSEDCL on 18.6.2014 which reads as under:

“17. Summary of Rulings:

- (i) Regarding the first prayer sought by the Petitioner, the Commission finds that its Orders in Case No.121 of 2012 and Case No.24 of 2012 were passed as per the directives of the Hon’ble APTEL vide its judgment in Appeal No.39 of 2011. Hence, the Commission reiterates its ruling in Case No.121 of 2012 and rules that there is nothing further to be clarified.**
- (ii) The Commission is disposing the matter in this case, hence, the second prayer of the Petitioner related to seeking stay of the Order passed by the Commission in Case No.121 of 2012 does not survive.**

In view of the above, Case No.119 of 2013 stands disposed of”.

- 3.14 This Tribunal has pronounced an order dated 7th January, 2014 in respect of IA No.4 of 2014 in Appeal No.39 of 2011 and the contents of the order are as follows:

ORDER

The State Commission, for the fifth time, seeks for extension of further six months time to comply with our directions issued earlier.

This Application is stoutly opposed by the learned counsel for the Respondent/Appellant.

However, it is noticed that on 24th September, 2013, the State Commission had asked for some documents from the Respondent/Appellant, but still the documents have not been furnished. This is one of the main reasons for seeking for further extension of time to comply with our Order. There is no explanation from the Respondent as to why the said Order has not been complied with still.

Therefore, while directing the Respondent/Appellant to furnish the documents as sought for as early as possible, we grant further extension of time of six months. However, we make it clear that this is the last chance and there will be no further extension of time.

The State Commission is directed to take up the matter by giving priority and pass the final Order in the light of our directions and findings rendered in our Judgment and on the basis of the materials available before it. The Respondent/Appellant is also directed to cooperate with the State Commission for the early disposal of the matter.

With these directions, the Application is allowed”.

- 3.15 Finally, the State Commission pronounced the Impugned Order dated 18.6.2014 in case No.24 of 2012 in the matter of “Determination of Compensation/charges payable pursuant to this Tribunal Judgment dated 16th December, 2011 in Appeal No.39 of 2011.

The relevant part of the impugned order dated 18.06.2014 in Case No. 24 of 2012 is reproduced as under:

Summary of the Rulings

- 1) As per the directives of Hon'ble ATE in Judgment dated 16 December, 2011 in Appeal No. 39 of 2011, the Commission has initiated the proceedings for determination of compensation / charges for use of distribution assets of MPECS by MSEDCL. The Commission had to approach Hon'ble ATE for seeking additional time and on the last occasion, Hon'ble ATE in its Order dated 7 January 2014 granted final 6 months extension from 20 December 2013.
- 2) The Commission in the Order dated 3 September, 2013 in Case No. 121 of 2012 has directed MPECS to submit a copy of its asset register of electricity business within a week of issuance of the Order to MSEDCL and MSEDCL shall carry out the valuation exercise of assets of MPECS and submit the valuation report to the Commission, within a month of issuance of the Order.
- 3) The Commission notes that in spite of several directives of the Commission, the valuation of assets has not been completed. The Commission is bound by the Hon'ble ATE's directions and any further delay in the proceedings is not possible. In the absence of the valuation of assets, the Commission will not be able to determine the charges payable by MSEDCL to MPECS for the use of the distribution assets. The Commission directs the Parties, MSEDCL and MPECS, to complete the process of valuation of assets of MPECS.
- 4) The Commission in the Order dated 18 June, 2014 in Case No. 120 of 2013 has directed the MPECS to submit the complete, updated asset register with requisite information for valuation to the MSEDCL within a period of two month from the date of the Order under intimation to the Commission.
- 5) The Commission directs that MSEDCL shall complete the valuation of assets within three (3) months after submission of asset register and requisite information by MPECS and submit the report to the Commission with copy to MPECS within two weeks after the completion of valuation of assets.
- 6) The Commission directs MPECS to file a fresh Petition for determination of compensation within a month after receiving the report from MSEDCL for valuation of assets.

In view of the above, the Petition in Case No. 24 of 2012 stands disposed of."

3.16 Aggrieved by the Impugned order dated 18.6.2014, the Appellant has filed this Appeal and sought for the following relief:

- (a) that this Tribunal may be pleased to set aside the Impugned Order dated 18th June, 2014.
- (b) that this Tribunal may be pleased to order charges to be paid by the Respondent No.2 (MSEDCL) to Appellants for the use of the Appellant's Distribution networks and related assets, as claimed in Petition/Case No.24 of 2012 together with interest at 18% per annum on the arrears.
- (c) that this Tribunal may be pleased to set side the Impugned Order dated 18th June, 2014 in case No.177 of 2013, in Review Petition No.121 of 2012 (filed from Interim Order) in Petition/Case No.24 of 2012 and further allow this Appeal against the said order dated 18th June, 2014.
- (d) that this Tribunal may be pleased to set aside the Impugned Order dated 18th June, 2014 in case No.120 of 2013 in Review Petition No.121 of 2012 (filed from Interim Order) in petition/Case No.24 of 2012.
- (e) that this Tribunal be pleased to order and declare that any order and/or direction given hitherto by the Respondent No.1 (MERC) to carry out valuation of assets of the Appellants or to obtain a Valuation Report thereof is set aside and null and void and of no effect whatsoever.
- (f) that this Tribunal be pleased to order and declare that any order or direction given by Respondent No.1 (MERC) to carry out Valuation of Assets of the appellant or to obtain a valuation report thereof to be made by Respondent No.2 (MSEDCL's) be set aside being null and void and of no effect whatsoever.
- (g) that this Tribunal be pleased to order and direct the Respondent No.2 (MSEDCL) to hand over possession of the Appellant's Distribution

Network and allied assets in the condition in which it was taken over by Respondent No.2 by the Appellants on 31 January, 2011.

- (h) That this Tribunal be pleased to order and direct the Respondent No.2 (MSEDCL) to pay to Appellants or to deposit in Court the aggregate sum of Interim charges determined by the Respondent No.1 (MERC) and ordered and directed to be paid to Appellants as per Order dated 15th October, 2012 passed by Respondent No.1, together with further sums at the interim rate so determined by the said Interim Order until passing/making of a Final determination and Order of Charges payable to Appellants for use of Appellant's Distribution Network and connected assets, alternatively, order and direct the Respondents No.2 (MSEDCL) to hand over possession of the Appellant's Distribution Network and connected assets in the condition in which they were handed over by Appellants to Respondents No.2 (MSEDCL) on 1st February, 2011.
- (i) That in the event of this Tribunal not passing orders in terms of prayer (g) above, and permitting the Respondent No.2 (MSEDCL) to continue use of Appellants Distribution Network and connected assets then the Respondent No.2 be ordered and directed to deposit the Interim Charges, as determined by Respondent No.1 (MERC) order dated 15th October, 2012, in this Tribunal in advance for each month's use.

4. We have heard the arguments of Mr. Hasan Murtaza, the learned Counsel for the Appellant and Mr. G. Saikumar and Mr. Buddy A. Ranganadhan for Respondent, gone through the written submissions and the materials available on record.

5. The learned Counsel appearing for the Appellant has raised the following grounds assailing the Impugned Order dated 18.6.2014.

5.1 that the State Commission in the Impugned Order has illegally or wrongly directed to handover the Asset Register to MSEDCL for valuation of assets.

That the assets are in the possession of and are being used by MSEDCL since February, 2011 and hence the said finding is erroneous and in teeth of and contrary to the judgment passed by this Tribunal in Appeal No.39 of 2011.

- 5.2 that the valuation of assets is only in the event, the assets are being vested or transferred to MSEDCL, which has been expressly struck down by this Tribunal. Further, there is no question of either of sale of assets to MSEDCL or vesting or transfer of the assets to MSEDCL.
- 5.3 that the order dated 27.1.2011 passed by the Commission in case No.85 and 87 of 2010 which was subject matter of Appeal No.39 of 2011 had directed vesting of the distribution assets of the Appellant thereby giving MSEDCL legal right to the property of the Appellant. The Commission had further held that “no wheeling charges” to be paid by MSEDCL to the Appellant, but transfer valuation to be determined. The said order was set aside by this Tribunal by its order and judgment dated 16.12.2011 allowing the Appellant’s said Appeal No.39 of 2011.
- 5.4 that the Commission in its impugned order dated 18.6.2014 while dismissing Case No.119 of 2013 filed by MSEDCL seeking clarification of the Order dated 3.9.2013 has itself clarified and ruled that “the directives of the Commission to hand over the asset register to MSEDCL were to carry out valuation exercise of MPECS’s assets and not for determination of the interim compensation as construed by the Petitioner. No appeal is filed against the said order and the same is binding on MSEDCL.
- 5.5 that the Commission, without providing any reason and without dealing with the Appellant’s argument that charges should be determined on the basis of “wheeling charges” as per Regulations 73 of the MERC (Multi Year Tariff) Regulations, 2011, has held that the charges will have to be derived by taking into account both valuation of the distribution network of the Appellant and wheeling charges as per the Tariff Regulations of the Commission.

- 5.6 Further that all the data required for calculation of wheeling charges as per the MYT Regulations, 2011 including audited figures for FY 2009-10, provisional figures of FY 2010-11 and estimated figures of FY 2011-12 were submitted by the Appellant to the Commission and the said figures have not been disputed by MSEDCL. Therefore, there is no reason or basis why the Commission could not determine the amount of charges calculated as per its own statutory regulations and methodology.
- 5.7 that the Commission had also erred in attempting to direct MSEDCL to constitute an internal team of officers to carry out the valuation of distribution of assets of the Appellate MPECS and was also not communicated to the Appellant MPECS and was without any notice or hearing being afforded to the Appellant MPECS. MSEDCL, an interested party, could never (be directed to) make such valuation on its own, nor by an independent authority capable of making such valuation.
- 5.8 that the alleged non production of the "Asset Register" by the Appellant MPECS is not and cannot be an excuse for MSEDCL's non compliance and non payment of the amounts as directed by the orders and directions of the Commission and of this Tribunal.
- 5.9 that while rejecting and dismissing MSEDCL's Review Petition/Case 121 of 2012 the Commission has itself noted and ruled, in its order dated 3.9.2013:
- ".....MSEDCL has not proposed any alternative scientific method for arriving at the compensation amount in its replies in Case No.24 of 2012. The Commission rules that the Petitioner may file a separate Petition for suggesting a scientific method along with proper justification and rationale for the purpose of computation of compensation for use of assets of MPECS within 30 days of issuance of this order.*
- 5.10 that then amount of charges of Rs.4.23 Crore per month was calculated on the above basis by the Appellant MPECS, whereas the Commission had directed payment of Rs.1 Crore per moth as interim charges vide its order dated 15.10.2012.

5.11 Further, the claim of the Respondent-2 that even if it is liable to pay any money to the Appellant MPECS, it may be set off against the past outstanding dues of the Appellant for alleged non payment of bill raised pursuant to certain earlier Tariff Orders. The said reasoning of MSEDCL is fallacious inter alia for the following reasons:

- (a) The same submissions were made by MSEDCL before the Commission and were rejected by the Commission in its order dated 3.9.2013 in Review Petition/Case No.121 of 2012 (MSEDCL's Review Petition against Order dated 15.10.2012)
- (b) The Commission also reiterated and confirmed its findings regarding set-off in the Impugned Order dated 18.6.2014. Admittedly, the said findings have not been challenged by MSEDCL.
- (c) In any event, the amount and bills sought to be claimed by MSEDCL are sub judice and subject matter of pending proceedings and Appeals before Hon'ble Supreme Court of India.

5.12 Therefore, that the directions and/or findings of the Commission in so far as it directs handing over MPECS asset register to MSDCL in review proceedings is erroneous.

5.13 Finally, that the MSEDCL in their written submissions has wrongly stated that this Tribunal upheld directions to provide asset register and has sought to submit that MPECS is itself guilty of non-compliance of the directions of this Tribunal by relying upon the order passed by this Tribunal dated 7.1.2014. The order passed by this Tribunal is reproduced below:

“However, it is noticed that on 24th September, 2013, the State Commission had asked for some documents from the Respondent/Appellant, but still the documents have not been furnished. This is one of the main reasons for seeking for further extension of time to comply with our Order. There is no explanation from the Respondent as to why the said Order has not been complied with still.

Therefore, while directing the Respondent/Appellant to furnish the documents as sought for as early as possible, we grant further extension of time of six months. However, we make it clear that this is the last chance and there will be no further extension of time.

The State Commission is directed to take up the matter by giving priority and pass the final Order in the light of our directions and findings rendered in our Judgment and on the basis of the materials available before it.

5.14 that MSEDCL has cited incorrect and wrong facts and deliberately tried to mislead this Tribunal and the submissions made by it ought to be rejected. And prayed as under:

- (i) that this Tribunal may be pleased to declare and direct that the Appellants are not liable to produce their Asset Register.
- (ii) that this Tribunal be pleased to order and direct Respondent No.2, MSEDCL to pay and to compensate the Appellants for all losses and damages and deterioration to Appellant's distribution network and related assets while in the MSEDCL possession and custody.

6. Per Contra, the learned Counsel for the Respondent-2 (MSEDCL) has made the following submissions:

6.1 that Regulations 73 of the Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2011 cannot be employed to determine the charges, if any, payable to MPECs in lieu of the use of its assets.

6.2 Regulation 73 of the Maharashtra Electricity Regulatory Commission (Multi year Tariff) Regulations, 2011 which lays down the methodology for computing wheeling charges cannot be employed as a benchmark to determine the charges, if any payable to MPECS in lieu of the use of its assets since:

- (a) After taking over of the distribution system of MPECS with effect from 1.2.2011, the MSEDCL has been making the operation and maintenance expenses itself. Further the Respondent MSEDCL

made specific investments to upgrade the infrastructure and creation of new capital assets in the licensed area of MPECS.

- (b) That the methodology specified in Regulations for determining the wheeling charges is only where the distribution system and associated facility of a transmission licensee or distribution licensee is being used and MPECS is neither a transmission licensee nor a distribution licensee.
- (c) As per Section 2 (76) of the Electricity Act, 2003 wheeling does not include within its ambit activities wherein the distribution system and associated facilities of an entity other than a transmission licensee or distribution licensee are being used. Section 2(76) reads as under:

Section 2 (76)

“Wheeling” means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case be, are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62”.

In this case, the license of MPECS had already expired on 31.1.2011 and the issue regarding grant of license to MPECS and/or MSEDCL was still pending before the MERC when the order dated 15.10.2012 was passed by the MERC in case No.24 of 2012. Accordingly, the methodology under Regulation 73 of the MYT Regulations, 2011 could not have been adopted and applied by MERC while passing the order dated 15.10.2012 directing the interim payment to MPECS as on the said date, the MPECS was neither a transmission licensee nor distribution licensee and the order dated 15.10.2012, therefore, was contrary to Section 2 (76) of the Electricity Act, 2003 and Regulation 73 of the MYT Regulations, 2011.

- 6.3 That the MERC did not have the jurisdiction, in the first place, to adjudicate any dispute between the MPECS and MSEDCL as MPECS was no longer a licensee under the Electricity Act, 2003.

- 6.4 MERC in any case did not have the jurisdiction under the Electricity Act, 2003 particularly under Section 86(1)(f) of the Electricity Act, 2003 to adjudicate any dispute between a Co-operative Society i.e. MPECS and Distribution Licensee, MSEDCL including the issue with respect to determination of charges payable to MPECS by MSEDCL, for use of its equipment and infrastructure pending determination of the applications filed by MSEDCL and MPECS for grant of distribution license in the erstwhile MPECS area.
- 6.5 MPECS is a co-operative society under the provision of the Maharashtra Co-operative Society Act, 1960 and ceased to be a licensee under the provisions of the Electricity Act, 2003 w.e.f 31.1.2011. Therefore, even if the Petition in case No.24 of 2012 had been allowed by the MERC and charges determined by the MERC for use of MPECS distribution network and allied equipments by MSEDCL, the said order would have been without any jurisdiction.
- 6.6 Further, the Commission in the Impugned Order dated 18.6.2014 in case No.24 of 2012 has issued no directions for payment of compensation to the Appellant. Further, once the final order is passed, all earlier interim orders merge into the final order and cease to exist. Here, the payment of compensation was pronounced by the State Commission in the interim order and hence the directions given in the Interim Order regarding payment of compensation would also cease to exist. Further, the Respondent has quoted Hon'ble Supreme Court's ruling in the case of M/s. Prem Chandra Agarwal and Anr Vs UP Financial Corporation and Ors (2009) 11 SCC 479 which is as under:
- “4. *It is well settled principle that once a final order is passed, all earlier interim orders merge into the final order, and the interim orders cease to exist.*
 5. *In this Appeal, since the final order has been passed by the High Court, obviously all interim orders passed by the High Court in the same writ petition, cease to exist automatically.*
 6. *In view of the final order passed by the High Court, the Impugned Order and any direction therein have ceased to exist. The Appeal has become infructuous and is, accordingly, dismissed.”*

In view of the above, the Petition in case No.24 of 2012 stands disposed of. At present, therefore, there is no order of the MERC that binds the payment of any amount by MSEDCL to MPECS.

- 6.7 that the Appellant owes an amount of Rs.23,16,98,49,078.85 (Rupees Two thousand three hundred sixteen Crore ninety eight lakhs forty nine thousand seventy eight and Paise eighty five only) in respect of the electricity supplied by MSEDCL to it towards which bills have also been raised on MPECS. After October 1977, MSEDCL defaulted in making payments of the regular bills to the erstwhile MSEB and MSEDCL and till the expiry of its license made payment of the electricity at the unilaterally decided rate of 42 paise per unit. Against the three tariff orders passed by Hon`ble Commission on 20.10.2006, 23.02.2007 and 18.05.2007 in Case No. 54 of 2005, Case No. 51 of 2005 and Case No. 55 of 2006 respectively, MPECS had filed separate appeal before the Hon`ble Tribunal which were disposed of vide a common judgment dated 28.01.2008. MPECS had filed also three separate civil appeals before the Hon`ble Supreme Court under Section 125 of the Electricity Act, 2003 against the aforesaid order dated 28.01.2008, being civil appeal nos. 4231 of 2008, 6043 of 2008 and 6044 of 2008, however, the Hon`ble Supreme Court vide the order dated 27.07.2009 declined to stay the order dated 28.01.2008 passed by this Hon`ble Tribunal and grant any interim relief in favour of MPECS. MSEDCL had filed a civil suit before the court of Civil Judge (Senior Division), Shrirampur, being Suit No. 5/2011, ("Civil Suit") against MPECS for recovery of an amount of INR 23, 16, 998, 49, 078.85 along with interest @ 12% which is still pending and a temporary injunction had been granted in favour of MSEDCL restraining MPECS from disposing of its property. The said amount is clearly reflected in annual reports of MPECS. MSEDCL had also filed an affidavit on 07.01.2014 in Case No. 24 of 2012 before the MERC bringing the aforementioned facts to the notice of the MERC. In the order dated 03.09.2013 itself, the MERC has stated that it understood that the amount stated to be due by MSEDCL had accumulated as a result of non-payment of power purchase dues (billed to MPECS as per the tariff

determined by the Hon`ble MERC) by MPECS to MSEDCL and that MPECS needed to comply with the said orders. Before any amount is found payable by MSEDCL to MPECS, it is imperative that consequential directions are issued to MPECS also for payment of the amount outstanding since ultimately it is the consumers in Maharashtra who would have to bear the burden if any amount is found to be due and payable from MSEDCL.

6.8 That the Appellant had not complied with the orders passed by MERC with regard to valuation of assets in case No.24 of 2012.

6.9 That the MERC emphasized that the valuation of assets was imperative in order to determine the compensation payable to MPECS for use of its distribution network, connected with the equipment and allied assets. The MERC in the order dated 15.10.2012 passed in case No.24 of 2012 stated that the charges to be determined by it as directed by this Tribunal will have to be derived after taking into account:

1. Valuation of the Distribution Network of MPECS
2. Arriving at an appropriate methodology possibly related to lease and typical industry norms
3. Determination of wheeling charges as per the tariff Regulations of the Commission.

Since in the present case, the methodology for wheeling cannot be employed as MPECS is neither a transmission licensee nor a distribution licensee and also because MSEDCL, in the present case, has itself incurred the repair, operation and maintenance charges in respect of the distribution network and allied equipments of MPECS, the charges can only be determined either by valuation of the distribution network of MPECS for which assets register is a must or by arriving at an appropriate methodology possibly related to lease and typical industry norms. For applying the methodology relating to lease

and typical industrial norms, also the valuation of assets is compulsory in order to provide a benchmark.

6.10 that the directions given to MPECS to provide asset register already upheld by this Tribunal and order has attained finality. The present Appeal is therefore, completely misconceived and ought to be dismissed as the Appellant is itself guilty of non-compliance with the orders of the Hon`ble MERC and this Hon`ble Tribunal regarding valuation of assets and furnishing of "assets register" which is evident from a plain reading of the order dated 18.06.2014 in Case No. 24 of 2012. Moreover, in any case, the order dated 15.10.2012 has now merged with the aforesaid final order dated 18.06.2014 and in the said final order there are no directions to MSEDCL to make any payment to MPECS. Assuming without admitting any amount is due from MSEDCL, MPECS ought to approach the civil courts for the same since the Hon`ble MERC has no jurisdiction under the Electricity Act, 2003 to decide any dispute between MPECS, a co-operative society and MSEDCL, distribution licensee.

7. In the light of the rival contentions made by both the parties, the following issues/questions would arise for our consideration:

(a) **Issue No.1: Whether the State Commission had jurisdiction under Section 86(1)(f) of the Electricity Act, 2003 to adjudicate the dispute between a cooperative society, namely appellant and a distribution licensee MSEDCL including the issue regarding determination of charges payable to the appellant by a distribution licensee for use of the distribution network of the appellant by a distribution licensee?**

(b) **Issue No.2: Whether the impugned order passed by State Commission is legal, just and proper and in compliance of the directions of Appellate Tribunal dated 16.12.2011 in Appeal No. 39 of 2011?**

8 Let us discuss **issue No.1** with regard to the **issue of jurisdiction raised by Respondent No.2.**

8.1 On this issue, the following contentions have been made on behalf of the Respondent:

- (a) That the Hon`ble MERC in any case **did not have the necessary jurisdiction under the EA, 2003, particularly under Section 86 (1) (f) of the EA, 2003 to adjudicate any dispute between a cooperative society i.e. MPECS and a distribution licensee i.e. MSEDCL, including the issue with respect to determination of the charges payable to MPECS by MSEDCL for use of its equipment and infrastructure pending determination of the applications filed by MSEDCL and MPECS for grant of distribution license in the erstwhile MPECS area.** MPECS is a co-operative society under the provisions of the Maharashtra Co-operative Society Act, 1960 and ceased to be a licensee under the provisions of the EA, 2003 with effect from 31st January, 2011. Therefore, even if the petition in Case No. 24 of 2012 had been allowed by the Hon`ble MERC and charges determined by the Hon`ble MERC for use of MPECS`'s distribution network and allied equipments by MSEDCL, the said order would have been without any jurisdiction and hit by the doctrine of coram non judice. MSEDCL in that case would have been well within its right to challenge the said order. The Hon`ble MERC, being devoid of any jurisdiction, therefore, could not even have passed the order dated 15.10.2012 directing interim payments to MPECS. **MPECS itself in the petition failed to disclose the provision in the EA, 2003 under which it was seeking the determination of compensation by the Hon`ble MERC.** Further, the fact that the Hon`ble APTEL

itself vide the order dated 16.12.2011 had directed the Hon`ble MERC to determine the charges payable to MPECS does not preclude MSEDCL from raising a question with respect to the jurisdiction of the Hon`ble MERC to adjudicate any dispute between a co-operative society and a distribution licensee since the same is a question of law and the Hon`ble MERC could not transgress beyond the statutory provisions in order to subsume jurisdiction and decide the dispute between a co-operative society and a distribution licensee.

- (b) The Counsel for the Respondent quoted the observations made by the Hon`ble Supreme Court in the case of Kanwar Singh Saini Vs High Court of Delhi (2012) 4 SCC 307 which are apt for consideration in this regard. The same are as under:

*“13. There can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes order/decreed having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the roots of the cause. Such an issue can be raised at any belated stage of the proceedings including in appeal or execution. **The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Acquiescence of a party equally should not be permitted to defeat the legislative animation. The court cannot derive jurisdiction apart from the statute”.***

Further, the aforesaid judgment of the Hon`ble Supreme Court also states clearly that when an enactment provides for something to be done in a particular manner for the purpose of enforcement of a right or even otherwise, it must be done in the said manner only or not at all. The relevant portion is as under:

“13.....

When a statute gives a right and provides a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act. When an Act creates a right or obligation and enforces the performance thereof in a specified manner, "that performance cannot be enforced in any other manner". Thus for enforcement of a right/obligation under a statute, the only remedy available to the person aggrieved is to get adjudication of rights under the said Act. (See: Doe d. Rochester (BP) v. Bridges 109 ER 1001; Barraclough v. Brown 1897 AC 615; The Premier Automobiles Ltd. v. K.S. Wadke and Ors. MANU/SC/0369/1975 : AIR 1975 SC 2238; and Sushil Kumar Mehta v. Gobind Ram Bohra (Dead) thr. L.Rs. MANU/SC/0593/1989 : (1990) 1 SCC 193)"

- (c) Further that the Respondent, MSEDCL in the affidavit dated 03.04.2012 filed before the Hon`ble MERC duly submitted that since the Hon`ble MERC was established under the provisions of the Electricity Regulatory Commission, 1998 and under Section 82 of the EA, 2003 continued to be the electricity regulatory commission for the state of Maharashtra, it derived its powers, authority and jurisdiction from the aforesaid statutes only and in the said act there was no power vested in it to adjudicate any dispute between a co-operative society and a distribution licensee. In these circumstances, the only remedy available in law to MPECS is to approach the civil court.
9. The learned counsel for the appellant has vehemently argued that all the orders mentioned hereinbefore have been passed by the Ld. State Commission legally as the State Commission is fully authorized and competent to pass the said orders in the light of the provisions of the Electricity Act 2003, the Regulations and the Rules framed thereunder.
10. Per contra, the following submissions have been made by the State Commission:

Commission's Rulings

- (1) The Commission in the Order in Case No.24 of 2012 has given the Ruling and exercised jurisdiction which is as under:

“29. MSEDCL has submitted that it is a settled position of law and as held by several courts that the issue of “Jurisdiction” and “Maintainability” is a preliminary issue and ought to be dealt with at the outset by the adjudicating authority. It has been submitted that this Commission may do so similarly. The Commission is of the view that the contention of MSEDCL that this Commission has no jurisdiction to determine the charges as directed by the Hon’ble Appellate Tribunal in its judgement dated 16th December 2011, is wholly misconceived for the simple reason that it is not open for MSEDCL to take these objections on Maintainability before the Commission. Any such objections on maintainability ought to have been taken by MSEDCL before the Hon’ble Appellate Tribunal. Once, the Hon’ble Tribunal has directed in its judgement dated 16th December 2011 that charges be determined for use of the assets of MPECS by MSEDCL, the Commission is bound by the same. It is not open for this Commission to hold that it cannot implement the direction of the Hon’ble Appellate Tribunal contained in its judgement dated 16th December 2011 on the ground that the Commission, for whatever reason, does not have jurisdiction to determine charges for use of the assets of MPECS by MSEDCL. These contentions have been raised by MSEDCL to be rejected.”

- (2) The Commission viewed that once the Hon’ble Tribunal has directed in its Judgment dated 16 December, 2011 that charges be determined for use of the assets of MPECS by MSEDCL, the Commission is bound by same. The Commission is of the view that it is not open for this Commission to hold that it cannot implement the direction of the Hon’ble Appellate Tribunal contained in the Judgment dated 16 December, 2011 on the ground that the Commission for whatever reason, does not have jurisdiction to determine charges for use of the assets of MPECS by MSEDCL. The Commission also noted that the issue of jurisdiction of the Commission to determine charges should have been raised by the Petitioner before the Hon’ble APTEL and not before the Commission.

(3) Thus, the Petitioner has been accorded opportunity to make its submission on the jurisdiction of the Commission and accordingly, the Commission has dealt with the issue and held that the Commission has jurisdiction in the matter and gave its speaking decision on the same. Now, the issue as to at which stage of the Case the objection on jurisdiction can be taken does not arise at all in the instant Case. Hence, the submissions made by the Petitioner do not show any error apparent on the face of the record within the purview of the limited scope of review. The Petitioner also could not satisfy the Commission that any misleading or wrong information or any wrong undertaking was given by the parties with respect to the issue of jurisdiction, based on which the Commission has passed the decision on jurisdiction.

11. **Conclusion:**

11.1 The Respondent MSEDCL pointed out that under Section 86(1)(f) of the Electricity Act, 2003 the Commission does not have jurisdiction to adjudicate upon the disputes between licensees and generators. The relevant Clause 86(1) (f) is quoted below:

Clause 86(1) (f) of Electricity Act, 2003

“86 (1) (f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration’

Since the Appellant MPECS is a Co-operative Society from 31.1.2011 onwards and the MSEDCL is a licensee, hence the Commission does not have jurisdiction to adjudicate the disputes between the two.

11.2 The State Commission earnestly pointed out if the Respondent was having any grievance regarding jurisdiction, he might have raised this before the Tribunal during hearing in Appeal No.39 of 2011 filed by the Appellant MPECS but the Respondent did not raise this issue before the Tribunal.

11.3 It is also to mention that the Commission is bound to implement the orders of the Tribunal rendered in judgment dated 16.12.2011 in Appeal No.39 of 2011.

11.4 Since the dispute is between the appellant, the earlier distribution licensee and the respondent No.2, another distribution licensee, regarding the use of distribution network of the appellant by a distribution licensee and the determination of amount of charges or compensation for such use, the learned State Commission had full competence and jurisdiction to decide the said dispute. We are unable to accept the contention of the distribution licensee that the State Commission had no jurisdiction to decide the said dispute. Consequently, this issue is decided in favour of the appellant and against the respondent distribution licensee.

12 Issues No.2: Whether the impugned order passed by State Commission is legal, just and proper and in compliance of the directions of Appellate Tribunal dated 16.12.2011 in Appeal No. 39 of 2011?

12.1 On this issue the following contentions have been made by the Appellant.

12.2 The Appellant prayed in the Appeal against the Impugned Order to direct the Respondent No.2 (MSEDCL) to pay to the Appellant or to deposit in court the aggregate sum of Interim Charge determined by the Respondent No.1 dated 15.10.2012 until passing/making of final determination and order of charges payable to Appellant for use of Appellants' network and connected assets, alternately order and direct the Respondent No.2 to hand over possession of the Appellants' distribution network.

12.3 That the Appellant submitted that after the judgment order of this Tribunal dated 16.12.2011 against Appeal No.39 of 2011, filed in Petition No.24 of 2012 for determination of compensation charges towards utilization of its network by MSEDCL since 1.2.2011 onward the Commission issued an interim order dated 15.10.2012.

12.4 The Commission, after going through the submissions of the Appellant MPECS and Respondent Distribution Company pronounced an order dated

15.10.2012 considering the capital expenditure related expenditure finalized, the interim relief.

- 12.5 Accordingly, the State Commission determined an interim amount of Rs.1 Crore per month i.e. 12 Crores per annum to be paid by MSEDCL to MPECS, on an adhoc basis, as charges for continuation of the existing arrangement. The cumulative amount from February 1, 2011 to September 30, 2012 would be Rs. 20 Crore, which calculated, as under:

Period	Amount in Rs. Crore
Two(2) months of FY 10-11 (i.e. February, 2011 and March, 2011)	2
Twelve (12) months of FY 2011-12	12
Six (6) months of FY 12-13 (April, 2012 to September, 2012)	6
Total	20

- 12.6 The above amount of Rs. 20 Crore was to be paid by MSEDCL to MPECS in three (3) monthly installments, with the first installment of Rs. 7 Crore to be paid in October 2012. The second installment of Rs 7 Crore was to be paid before November 5, 2012 and the third installment of Rs 6 Crore by December 5, 2012. Further, the monthly charge of Rs. 1 Crore per month was to be paid before fifth (5th) day of every month from November 2012 and the monthly charge of Rs 1 Crore for the month of October 2012 along with the first installment of Rs. 7 Crore was to be paid within a period of two (2) weeks from the date of issue of this Interim Order. However, the Commission will pass an order revisiting the charges aforesaid once valuation of the distribution network is available. There shall be adjustment to the charges as determined in this order on interim basis once the Commission issues a further order determining the charges after taking into account valuation of the distribution network of MPECS.
- 12.7 The above monthly charge of Rs. 1 Crore per month is an interim charge. Any excess or shortfall in charges shall be adjusted in the final Order on the matter

of determination of charges so that the existing arrangement may continue till the matter of grant of license is finally determined by the Commission.

12.8 Further, that the Appellant submitted that neither the said order dated 15.10.2012 nor the final order dated 18.6.2014 has been challenged by MSEDCL. Needless to say, no Appeal was filed challenging the order and judgment dated 16.12.2011 passed by this Tribunal in Appeal No.39 of 2011.

12.9 The Respondent No.2 MSEDCL had contended that even if it is liable to pay any money to the Appellant MPECS, it may be set off against the past outstanding of the Appellant, for alleged non payment of bill raised pursuant to certain earlier tariff orders. The said reasoning of MSEDCL is fallacious inter alia for the following reasons:

(a) The same submissions were made by MSEDCL before the Commission and were rejected by the Commission in its order dated 03.09.2013 in Review Petition/Case No.121 of 2012 (MSEDCL's Review Petition against the Order dated 15.10.2012) and reiterated in para 16.1 (a) of its order dated 18.6.2014 dismissing MSEDCL's case No.119 of 2013 (seeking clarification of the order dated 03.9.2013)

(b) The Commission also reiterated and confirmed its findings regarding set-off in the Impugned Order dated 18.6.2014. Admittedly, the said findings have not been challenged by MSEDCL.

(c) In any event the amount and bills sought to be claimed by MSEDCL are sub judice and subject matter of pending proceedings and Appeals before the Hon'ble Supreme Court of India. The Appellant MPECS has never admitted any liability for MSEDCL's alleged claim, and has disputed and denied the same, even while disclosing the same in its accounts statements.

13. Per contra, the following submissions have been raised by the Respondent, MSEDCL on this issue:

13.1 that the Impugned Order did not mention anything regarding the payment of compensation as per the Interim order. Further the Respondent, MSEDCL stated that in the Impugned Order the Commission had given an opportunity to the MPECs to comply with the directions for the complete and update copy of asset register with requisition information for valuation of assets to the Appellant MPECS within a period of two months from the date of the order dated 18.6.2014.

13.2 Further, that once the final order is passed, all earlier interim orders merge into the final order and cease to exist. Consequently, the directions given in the Interim Order would also cease to exist. The Counsel for the Respondent has quoted various judgments of Hon'ble Supreme Court to substantiate its plea. The Hon'ble Supreme Court in the case of Prem Chandra Agarwal and Anr Vs U.P Financial Corporation and Ors (2009) 11 SCC 479 has held as under:

"4. It is a well-settled principle that once a final order is passed, all earlier interim orders merge into the final order, and the interim orders cease to exist.

5. In this appeal, since the final order has been passed by the High Court, obviously all interim orders passed by the High court in the same writ petition, cease to exist automatically.

6. In view of the final order passed by the High Court, the impugned interim order and any direction therein have ceased to exist. The appeal has become infructuous and is, accordingly, dismissed."

13.3 that the MPECS itself owes an amount of Rs.23,16,998,49,078.85 (Twenty three hundred sixteen crores, ninety eight lacs, forty nine thousand seventy eight and paise eighty five only) in respect of the electricity supplied by MSEDCL to the Appellant towards which the bills have also been raised on MPECS.

13.4 that the said amount had accumulated as a result of non payment of the power purchase dues by MPECS to MSEDCL and hence the compensation specified

in the interim order need not be paid to the Appellant as the Appellant itself owes an amount of Rs. 23,16,998,49,078.85 (Twenty three hundred sixteen crores, ninety eight lacs, forty nine thousand seventy eight and paise eighty five only) to the Respondent..

13.5 that they have incurred lot of expenditure in the said licensed area for O&M expenses and also for capital works in the then MPECES licensed area.

13.6 that in any case, the order dated 15.10.2012 has nor merged with the aforesaid final order(Impugned) dated 18.6.2014 and in the said order there are no directions to MSEDCL to make any payment to MPECS and further stated that MERC has no jurisdiction under the Electricity Act, 2003 to decide any dispute between the MPECS (Co-Operative Society) and MSEDCL (the Distribution Licensee).

14 Our discussion and conclusion:

14.1 This Tribunal passed an Order dated 16.12.2011 in the Appeal filed by the Appellant MPECS and the relevant portion of the Order is quoted below::

“In view of our above findings we set aside the Impugned Order dated 27.1.2011 and remanded to the Commission with the direction to consider the Application for license of the Appellant and dispose of on merits in accordance with the provisions of the Act and its own General Conditions of Supply Regualtions and with a further direction to consider for grant of license to both the parties by allowing them to operate in the same area.

The Appeal is allowed. However, there is no order as to costs.

After pronouncement of judgment, the learned Counsel for the parties request for issuing of consequential directions with regard to the existing arrangements and the time frame. Accordingly, we direct the Commission that the process to be completed within three months from today and in the meantime, the existing arrangement may be continued subject to payment of charges to the Appellant to be decided by the Commission after hearing all the parties concerned.”

14.2 Based on the judgment of this Tribunal, the Appellant filed a Petition No.24 of 2012 for determination of compensation before the State Commission, pursuant to this Tribunal Judgment dated 16.12.2011.

14.3 The State Commission, after going through the submissions, pronounced an order on 15.10.2012. Relevant portion of the order is quoted below:

“Hence, the Commission is of the opinion that only capital expenditure related expenses may be allowed to MPECS as an interim relief. Accordingly, the Commission determined an interim payment as follows:

45. In the Order dated September 8, 2010 in Case no 133 of 2008, the capital expenditure related expenses is provided as follows:-

Capex related expenditure approved by the Commission is calculated as:

Particulars	Amount approved for FY 2009-10 in Case no 133 of 2008 (in Rs lakh)
Depreciation Cost	589
Interest on Long-term Loan Capital	91
Return on Equity Capital	254
Total	934

However, as per MPECS's submissions in this Petition, it has incurred additional capitalisation in FY 2010-11 and FY 2011-12 (till January 31, 2011), to the tune of Rs. 7 Crore. Taking this amount into account, the Commission hereby determines an interim amount of say Rs. 1 Crore per month, i.e., Rs 12 Crore per annum to be paid by MSEDCL to MPECS, on an adhoc basis, as charges for continuation of the existing

46. The cumulative amount from February 1, 2011 to September 30, 2012 would be Rs. 20 Crore, which calculated, as under:

Period	Amount in Rs.Crore
Two(2) months of FY 10-11 (i.e. February, 2011 and March, 2011)	2
Twelve (12) months of FY 11-12	12
Six (6) months of FY 12-13 (April 2012 to September, 2012)	6
Total	20

47. *The above amount of Rs. 20 Crore should be paid by MSEDCL to MPECS in three (3) monthly instalments, with the first instalment of Rs. 7 Crore to be paid in October 2012. The second instalment of Rs 7 Crore should be paid before November 5, 2012 and the third instalment of Rs 6 Crore by December 5, 2012. Further, the monthly charge of Rs. 1 Crore per month should be paid before fifth (5th) day of every month from November 2012 and the monthly charge of Rs 1 Crore for the month of October 2012 along with the first instalment of Rs. 7 Crore shall be paid within a period of two (2) weeks from the date of issue of this Interim Order. However, the Commission will pass an order revisiting the charges aforesaid once valuation of the distribution network is available. There shall be adjustment to the charges as determined in this order on interim basis once the Commission issues a further order determining the charges after taking into account valuation of the distribution network of MPECS.*

48. *The above monthly charge of Rs. 1 Crore per month is an interim charge. Any excess or shortfall in charges shall be adjusted in the final Order on the matter of determination of charges so that the existing arrangement may continue till the matter of grant of licence is finally determined by the Commission.”*

14.4 The Respondent filed a Review Petition against the Order dated 15.10.2012 but the same was rejected by the Commission.

14.5 The State Commission finally came out with the Impugned Order dated 18.6.2014 in case No.24 of 2012 and the Commission’s Ruling is reproduced below:

“The Commission, after going through the submissions of the Appellant MPECS and Respondent Distribution Company pronounced an order dated 15.10.2012 considering the capital expenditure related expenditure finalized, the interim relief.”

14.6 The Impugned Order did not specify anything about payment of charges towards utilization of MPECS network and other assets by MSEDCL from

1.2.2011 onwards even though this Tribunal directed in the order dated 16.12.2011 the existing arrangement may be continued subject to payment of charges to the Appellant after hearing all the parties concerned. Further, this Tribunal in its order dated 7.1.2014 in IA No.4 of 2014 (Appeal No.39 of 2011) directed the State Commission to take up the matter by giving priority and pass the final order in the light of this Tribunal's directions and findings in the judgment on the material available before it.

- 14.7** It is pertinent to mention here that the amount of Rs.2300 Crores sought to be claimed by MSEDCL from MPECS is sub judice before the civil court. Further, the contention of the Respondent MSEDCL that the amount due to MPECS by MPSEDCL towards utilization of assets of MPECS has to be adjusted towards the amount owed to MSEDCL cannot be accepted at this case as the same case is subjudice in the Civil Court.
- 14.8** The State Commission in the Impugned Order dated 18.6.2014 directed that the MSEDCL shall complete the valuation of assets within three months after submission of asset register and requisite information by MPECS and submitted the report to the Commission with a copy to MPECS within two weeks after completion of the valuation of assets.
- 14.9** Further, the Commission directed the MPECS to file fresh Petition for determination of Compensation within a month after receiving the report from MSEDCL for valuation of assets.
- 14.10** We feel that the Respondent MSEDCL is utilizing the assets of MPECS since 1.2.2011 without paying any charges. The valuation of assets will take some more time and hence we should direct the MSEDCL to pay MPECS as per the charges worked out by the Commission in the Interim order dated 15.10.2012.
- 14.11** The appellant filed the impugned petition being No. 24 of 2012 before the State Commission (MERC) for determination of compensation / charges to be paid by the respondent No.2 (MSEDCL / distribution licensee) pursuant to this Tribunal's judgment dated 16.12.2011 in Appeal No. 39 of 2011. This

Appellate Tribunal in its judgment / order dated 16.12.2011 in Appeal No. 39 of 2011 which was filed by the appellant against the order dated 27.01.2011 passed by State Commission, allowed the appeal observing that after considering the request of learned counsel for the parties for issuing consequential directions with regard to the existing arrangements and the time frame, this Tribunal directed the State Commission to reconsider the application of the license of the appellant and disposed of the same on merits further considering for grant of license to both the parties by allowing them to operate in the same area. This Appellate Tribunal in its judgment dated 16.12.2011 further directed the State Commission to complete the said process within three months and also directed that in the meantime the existing arrangement may be continued subject to payment of charges to the appellant to be decided by the Commission after hearing of the parties concerned. It was after the passing of the judgment dated 16.12.2011 by this Appellate Tribunal in Appeal No. 39 of 2011 filed by the appellant, power generating company, as stated above, that the appellant filed the aforesaid petition / impugned petition No. 24 of 2012 before the State Commission for determination of the compensation charge payable by the respondent No.2 distribution licensee to the appellant for use of the distribution system of the appellant.

14.12 Thus the State Commission was bound to determine the amount of compensation / charges so payable, by the distribution licensee to the appellant, in the impugned petition being No. 24 of 2012 after going through the directions given by this Appellate Tribunal.

14.13 We may also mention here that in the said petition being No. 24 of 2012 filed by the appellant, the State Commission passed the interim order dated 15.10.2012 that a monthly charge of Rs.1 Crore per month shall be paid by the distribution licensee to the appellant, power generating company, as the interim charge and any excess or short fall in the charges shall be adjusted in the final order in the impugned petition being No. 24 of 2012 so that the

existing arrangements may continue till the matter of grant of license is finally determined by the State Commission.

14.14 The facts on record clearly establish that the learned State Commission, in spite of very strong and clear direction given by this Appellate Tribunal to the State Commission, did not care or take precaution to comply with the directions / order dated 16.12.2011 in Appeal No. 39 of 2011 passed by this Appellate Tribunal. This Appellate Tribunal clearly directed the State Commission to complete the said process within three months and in the meantime the existing arrangement namely using of distribution system of the appellant by respondent No.2 distribution licensee would be continued and for that the charges for such use of distribution line / system should be paid to the appellant by the distribution licensee and the quantum of charges to be decided by the State Commission. The learned State Commission finding itself unable to decide the impugned petition being No. 24 of 2012 finally for determination of such charges passed the interim order dated 15.10.2012 determining the amount of such charge as Rs.1 crore per month for the use of distribution system of the appellant by respondent No.2 distribution licensee as the interim charge. Once the Commission had passed the same interim order like 15.10.2012 the State Commission was bound and required to determine the said charge / compensation on the said petition filed by the appellant being No. 24 of 2012 but the learned State Commission, as stated above, without caring to comply with the directions of this Appellate Tribunal, in letter and spirit, passed the impugned order dated 18.06.2014 whereby it dismissed the petition of the appellant.

14.15 We may observe that the distribution licensee MSEDCL filed some application before the State Commission seeking stay of the aforesaid interim order of the Commission which was rejected by the State Commission.

14.16 The State Commission has, by the impugned order dated 18.06.2014 in petition No. 24 of 2012, has dismissed the said petition of the appellant by twisting the relief which was directed to be given effect to by this Appellate

Tribunal and to stick to its original stand, and directing the MSEDCL to complete evaluation of assets within three months after submission of asset register and requisite information by the appellant to submit the report to the Commission within two weeks after completion of the evaluation of assets. Thus the State Commission misdirected itself, by dismissing the impugned petition, directing the appellant to produce the asset register and after the filing of the evaluation report of the assets of the appellant by the distribution licensee before the commission, the Commission further directed the appellant to file a fresh application thereafter for determination of compensation.

- 14.17 This approach of the State Commission is totally illegal, unjust and against the principle of justice, equity and good conscience which cannot at all be appreciated by this Appellate Tribunal, particularly when in the circumstances cited by us hereinbefore this Appellate Tribunal directed the State Commission to decide or determine the amount of charges or compensation payable by the distribution licensee to the appellant power generator for use of the distribution network / system of the appellant by the distribution licensee for an unreasonably long period.
- 14.18 We may also observe that the matter regarding alleged outstanding amount of the distribution licensee against the appellant is pending before the Hon'ble Supreme court in Civil Appeal No. 4231/2008, 6043/2008 and 6044/2008.
- 14.19 Thus in these circumstances, it would be just and proper that the impugned order dated 18.06.2014 passed by State Commission dismissing the petition being No. 24 of 2014 filed by appellant for determination of charge / compensation for use of distribution network of the appellant by the distribution licensee (respondent No.2) should be set aside and the matter should be remanded back to the State Commission for deciding the said petition being No. 24 of 2012 filed by the appellant in the light of the observations made by us in the upper part of the judgment. The impugned order passed by State Commission appears to be absolutely illegal, unjust

and cannot be allowed to stand. Consequently, this issue is decided in favour of appellant and appeal is liable to be allowed.

15 Summary of Our Findings:

The learned State Commission (respondent, MERC) had the jurisdiction to decide the impugned petition, being No. 24 of 2012, which was filed by the appellant petitioner for determining charges which was directed to be determined by this Tribunal in its judgment dated 16.12.2011 in Appeal No. 39 of 2011. The contention of the respondent No.2, distribution licensee, is not tenable at all. Particularly, once it had submitted itself to the jurisdiction of the State Commission by participating at various stages of the proceedings including review proceedings.

This Appellate Tribunal in its judgment dated 16.12.2011 in Appeal No. 39 of 2011, while setting aside the order dated 27.01.2011 of the learned State Commission and remanding the matter to the State Commission it had directed the State Commission to complete the process within three months and in the meanwhile, the existing arrangement namely use of distribution line / network of the appellant petitioner by the respondent No.2, distribution licensee may be continued subject to payment of charges to the appellant to be decided by the State Commission after hearing all the parties concerned. The State Commission was bound to comply with the order dated 16.12.2011 of this Appellate Tribunal, in letter and spirit, without seeking or trying to evade the compliance thereof. The State Commission was further bound in deciding the petition, being petition No. 24 of 2012, filed by the appellant petitioner, for determining charges for the said use of distribution network of the appellant by the distribution licensee in pursuance of this Tribunal's judgment dated 16.12.2011.

The learned State Commission, by interim order dated 15.10.2012 in the impugned petition No. 24 of 2012 of the appellant passed an interim order directing the distribution licensee to pay Rs.1 Crore per month as the interim charge for such use of distribution network of the appellant petitioner. The

learned State Commission instead of deciding the said petition of the appellant being No. 24 of 2012 on merit, preferred to dismiss the same by impugned order dated 18.06.2014 directing the appellant petitioner to make the assets register available to the distribution licensee and further directed the distribution licensee to complete the work of evaluation of assets of the appellant and to submit the report to the State Commission with further direction to the appellant petitioner to file a fresh petition thereafter, only for the determination of charges / compensation for use of his distribution network by the distribution licensee, respondent No.2. The impugned order of the State Commission, totally giving a go by to the judgment dated 16.12.2011 of this Appellate Tribunal, is totally illegal, unjust and unwarranted in the facts and circumstances of the case and the same is liable to be set aside.

- 16 In view of the above discussion, we allow this appeal and set aside the impugned order dated 18.06.2014 passed by the State Commission in Petition No. 24 of 2012 filed by appellant petitioner and remand the matter back to the State Commission to decide the said petition on merits. We further direct the State Commission to get the evaluation of the assets of the appellant petitioner done through some independent agency or through some impartial agency as the State Commission thinks proper or the State Commission itself may do the same work of evaluation of the assets of the appellant petitioner. We further direct that the respondent No.2, MSEDCL, (distribution licensee) shall pay to the appellant petitioner a sum of Rs.1 Crore Per Month from the date mentioned by the State Commission in the Interim Order dated 15.10.2012 in the same petition being No. 24 of 2012 till the disposal of the said Petition on merits. The previous outstanding amount which was to be paid by the respondent No.2, distribution licensee, to the appellant petitioner in the light of the interim order dated 15.10.2012 shall also be paid by the respondent No.2, distribution licensee within a period of three months in equal installments to the appellant petitioner and if the same is not paid within three months from today, then interest at the rate of 10% per

annum shall further be paid by the distribution licensee to the appellant petitioner till the complete outstanding amount is paid by the respondent No.2 to the appellant petitioner. All the findings recorded by the State Commission in the impugned order are hereby set aside. We direct the appellant to produce the asset register before the learned State Commission within one month and the learned State Commission is further directed to decide the instant petition within six months from the date of communication of this judgment. We make it clear that any remarks or observations made by us in this judgment shall not influence in any way the State Commission while deciding the said petition of the appellant petitioner on merits.

Pronounced in the open court on this **13th day of March, 2015.**

(T Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member



REPORTABLE / ~~NON-REPORTABLE~~