IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 260 OF 2016 & IA No. 6 OF 2018 & IA No. 902 OF 2018

Dated: 24th July, 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

In the matter of:

Maharashtra Eastern Grid Power
Transmission Company Limited,
Adani House, Nr. Mithakhali Circle,
Navarangpura, Ahmedabad - 380009 **….APPELLANT**

Versus

Maharashtra Electricity Regulatory Commission
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade,
Mumbai 400 005 **…RESPONDENT**

Counsel for the Appellant : Mr. Sanjay Sen, Sr. Adv.
Mr. Hemant Singh
Mr. Nishant Kumar
Mr. Tushar Srivastava
Mr. Ambuj Dixit

Counsel for the Respondent(s) : Mr. S.K. Rungta, Sr. Adv.
Ms. Pratiti Rungta for R-1

JUDGMENT

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeal has been filed by M/s Maharashtra Eastern Grid Power Transmission Company Limited (hereinafter referred to as the "Appellant/MEGPTCL"), under Section 111 (1) of the Electricity Act, 2003 challenging the Order dated 05.07.2016 (hereinafter referred to as "Impugned Order") passed by the Maharashtra Electricity Regulatory Commission (hereinafter referred to as "Respondent / Maharashtra Commission / MERC / Commission") in Case No. 50 of 2016 wherein the Commission has disallowed certain claims of the Appellant in the Aggregate Revenue Requirement (ARR).

2. Brief Facts of the case

2.1 The Appellant is a company incorporated under the provisions of the Companies Act, 1956, and is an intra state Transmission Licensee in the State of Maharashtra. The Appellant company was incorporated for development of 765 kV Transmission System to evacuate power from thermal power projects in North-Eastern Maharashtra to central and western parts of the State.

2.2 The Appellant was granted transmission licence vide order dated 14.09.2010 in Case No. 118 of 2009 by MERC to establish and

operate the following transmission lines, substations bays and equipment, inclusive of related infrastructure:

Transmission lines

- Tiroda – Koradi-III 765 kV S/C Line-1
- Koradi-III – Akola-II 765 kV S/C Line-1
- Akola-II – Aurangabad 765 kV S/C Line-1
- Tiroda – Koradi-III 765 kV S/.C Line-2
- Koradi-III – Akola-II 765 kV S/C Line-2
- Akola-II – Aurangabad 765 kV S/C Line-2
- Akola-II – Akola-I 400 kV Quad D/C Line

Substations

- Establishment of 765/400 kV switchyard at Tiroda
- Establishment of 765/400 kV substation at Koradi-III
- Establishment of 765/400 kV substation at Akola-II
- Extension of 765 kV Aurangabad substation

2.3 The Maharashtra Commission notified the MERC (Multi Year Tariff) Regulations, 2011 (MYT Regulations, 2011) on 04.02.2011 for the 2nd Control Period i.e. from FY 2011-12 to FY 2015-16. Subsequently, the Commission also notified the MERC (Multi Year Tariff) Regulations, 2015 (MYT Regulations, 2015) on 08.12.2015 for the 3rd Control Period from FY 2016-17 to FY 2019-20.

2.4 The Maharashtra Commission approved the Multi Year Tariff (MYT) Business Plan of the Appellant as per MYT Regulations, 2011 for the

second control period commencing from FY 2013-14 to FY 2015-16 by its order dated 15.01.2014 in Case No. 128 of 2013.

2.5 The Appellant filed Multi Year Tariff (MYT) Petition (Case No. 66 of 2014) for the Second Control Period on 05.03.2014. The Project has been implemented in various Sets. Set-1, Set 2a and Set 2b of the project were already commissioned while Set 3 was envisaged to be commissioned by 31.03.2015. Therefore, by order dated 08.08.2014, the Maharashtra Commission approved capital cost on provisional basis and approved the MYT for FY 2013-14 to FY 2015-16.

2.6 Thereafter, the Appellant filed a Petition being Case No. 50 of 2016 on 09.03.2016 for determination of capital cost as on the Commercial Operation Date (COD) of the Project i.e. 31.03.2015, true-up of ARR for FY 2013-14, FY 2014-15, provisional True-up of ARR for FY 2015-16 and determination of ARR for the Control Period from FY 2016-17 to FY 2019-20.

2.7 The Maharashtra Commission by order dated 05.07.2016 in Case No. 50 of 2016 reduced the Aggregate Revenue Requirement (ARR) claimed by the Appellant on account of the following issues:

a) Disallowance of Commercial Operation Date (COD), as proposed by the Appellant, of the third set of Transmission Lines and commencement of Revenue;

b) Disallowance of Foreign Exchange Rate Variation (FERV) on Material Import and Price Variation;

c) Disallowance of various capital cost components;

d) Considering Outstanding Delayed Payment Charges (DPC) as Non-Tariff Income for reduction of Allowed ARR; and

e) Non allowance of actual Operation & Maintenance (O & M) Cost.

f) Approval of less Interest on Long Term Loan.

g) Income from Interest and profit from sale of investment considered as non-tariff income.

h) Holding cost of interest on contingency reserve reduced from approved ARR.

2.8 The present Appeal has been preferred by the Appellant against disallowance of the aforesaid claims by MERC.

3. Questions of law:-

The Appellant has raised following questions of law:-

A. Whether the Impugned Order has been passed in violation of the provisions of the Electricity Act, 2003 and the applicable Multi Year Tariff Regulations, as promulgated by the Respondent Commission itself?

B. Whether the Impugned Order has been passed in blatant violation of the State Commission's earlier orders on the determination of ARR of Transmission Licensees?

C. Whether the Respondent Commission has acted in an arbitrary manner, de hors the provisions of the MYT Regulations, in disallowing the COD of Set 3 of the Transmission Lines, as claimed by the Appellant?

D. Whether Section 61 of the Electricity Act, 2003 envisages the addition of accrued Delayed Payment Charges (DPC) in the non-tariff income of the Transmission Licensees for the purpose of determination of ARR?

E. Whether the Respondent Commission has acted in contravention of the accounting/ commercial principles as provided in Section 61 (b) of the Electricity Act 2003, read with the applicable tariff regulations, in considering DPC as a part of non-tariff income for the purpose of determination of ARR?

F. Whether the Respondent Commission has grossly erred in not allowing the Actual O&M cost to the Appellant for determination of its ARR in gross violation of the principles contained in Section 61 of the Electricity Act, 2003?

G. Whether the Respondent Commission has acted in an arbitrary manner by not considering the Force Majeure events thereby disallowing the adverse impact of Foreign Exchange Rate Variation for material import and price of raw material in computing the capital cost of the Appellant?

H. Whether the Respondent Commission has grossly erred in considering income from interest and profit from sale of investments as non-tariff income?

I. Whether the Respondent Commission has grossly erred in reducing the quantum of holding cost of interest on contingency reserve from

the ARR of the Appellant, contrary to the provisions of the MYT Regulations?

J. Whether the Respondent Commission has acted in an arbitrary manner, contrary to the scheme of the applicable MYT Regulations and the Electricity Act, 2003 in disallowing the various capital cost components, as claimed by the Appellant in its petition?

K. Whether the Respondent Commission has subjected the Appellant to a differential treatment while allowing actual O&M cost in the matter of Rinfra-D in case No. 9 of 2013 by using power to relax?

4. <u>We have heard at length the learned senior counsel, Mr. Sanjay Sen, appearing for the Appellant MEGPTCL and learned senior counsel, Mr. S. K. Rungta, appearing for MERC and carefully considered their written submissions. The individual issues raised in the Appeal are dealt hereunder</u>:-

Issue No1: Disallowance of Commercial Operation Date (COD), as proposed by the Appellant, of the third set of Transmission Lines and commencement of Revenue

4.1 The learned senior counsel for the Appellant has made the following submissions for our consideration:-

(i) The Appellant had segregated entire transmission system in Set-1, Set-2a, Set-2b and Set-3 for the purpose of tariff determination based on Commercial Operation Date. The commissioning schedule was worked out in such a way that each set was independently capable of transmitting power from

the date of its commissioning and become an integral part of the Intra State Transmission System (InSTS).

(ii) MERC in the impugned order has approved the COD of the various Sets of the Transmission Lines of the Appellant as under:-

Set	**Proposed by MEGPTCL**	**Approved by the Commission**
Set 1	23 February, 2014	23 February, 2014
Set 2a	23 February, 2014	23 February, 2014
Set 2b	08 April, 2014	08 April, 2014
Set 3 (excluding 2 Bays at 765 kV Aurangabad (Ektuni) Sub-station)	31 March, 2015	20 May, 2015
2 Bays at 765 kV Aurangabad (Ektuni) Sub-station	31 March, 2015	27th May, 2016

(iii) All the elements forming part of Set 3, except the Line section from Akola – II to Aurangabad and the extension work at Ektuni (Aurangabad) substation, were put to use before 31.03.2015. The Appellant had claimed deemed Commercial Operation Date for entire Set 3 as 31.03.2015 as the delay in putting to use the said Set was on account of the reasons attributable to MSETCL /STU and not due to the Appellant. As against such claim, the Maharashtra Commission has considered COD of Set 3 (except the portion of Ektuni substation) as 20.05.2015.

The Commission arrived at the said conclusion merely on the basis of a single letter dated 03.06.2016 written by the State Transmission Utility (STU). Further, the Maharashtra Commission considered the COD of 2 Bays at 765 kV Ektuni Sub-station as 27.05.2016.

(iv) Set 3 of the Appellant's Transmission system has following different elements which have been charged/ put to use as per the following table:

Sr. No	Element	Date of Commissioning	Put to use from
1	Tiroda –Koradi III Line 2 (133.44 Km)	20.12.2014*	20.12.2014*
2	Koradi III - Akola II Line 2 (222.32 Km)	24.02.2015*	24.02.2015*
3	Akola II - Aurangabad (Taptitanda) Line 2 (218.92 Km)	29.03.2015#	20.05.2015#
4	Koradi III Substation	20.12.2014*	20.12.2014*
5	Extension of Ektuni Substation	27.05.2016#	27.05.2016#

* Respondent Commission's InSTS Order dated 26.06.2015
#STU Letter dated 03.06.2016, addressed to the Hon'ble Respondent Commission

(v) As per the Transmission System approved by the Maharashtra Commission, the Transmission Line was to be terminated at 765 kV Sub-station of MSETCL at Ektuni (Aurangabad)

including construction of two 765 kV bays at Ektuni by the Appellant. The two 765 kV Bays of the Appellant at the Ektuni Substation were allotted to MSETCL on deposit work basis since the said substation was being developed by MSETCL. The Appellant had also paid the full consideration for such deposit work to MSETCL much before 31.03.2015 to enable it to complete the work in time. However, as on September, 2014, the said Sub-station was not completed. MSETCL envisaged that the work on the said bays would not be completed before March 2016. Therefore, in view of the expected delay in completion of the 765 kV Ektuni Substation, it was decided to terminate the Appellant's line section from Akola II to Aurangabad at 400 kV level at the MSETCL's Taptitanda Substation as an interim arrangement until the 765 kV Substation at Ektuni was commissioned. The aforesaid interim arrangement was communicated by MSETCL to the Appellant, vide its letter dated 14.11.2011. The 765 kV Transmission Line from Akola II to Aurangabad had already been laid up to Ektuni substation by the Appellant and jumpering arrangement was done near Ektuni substation to Taptitanda Transmission Line of MSETCL for interim arrangement and therefore there is no change in circuit km of the Appellant's Akola II to Aurangabad

line after change in termination point. The aforesaid facts have been ignored by the Commission in the impugned order.

(vi) Further, the Appellant was ready for the commissioning of its line much before the envisaged date of 31.03.2015. However, the system could not be put to use until 20.05.2015 due to the pending work of the 400 kV bays at 400 kV Taptitanda Substation by MSETCL. As was done earlier for Line 1, the 765 kV S/C Line – 2 was also connected to Taptitanda S/s in Aurangabad on 31.03.2015. The power flow took place on Tiroda-Koradi III-Akola II line through the Akola-II to Akola-I line and Akola-II to Aurangabad Line 1. The Bay for onward transmission of power from the said Substation was completed by MSETCL subsequently, and the power flow in Line 2 commenced from 20.05.2015. In this regard, the STU, vide its letter dated 05.09.2015 addressed to the Commission, has categorically stated that the work for 765 kV Akola II to Taptitanda Line 2 was completed and test charged at 400 kV level by the Appellant on 29.03.2015. However, due to the pending work of the 400 kV bays at the 400 kV Taptitanda Substation by MSETCL, the said line was not put to use on the said date. The aforesaid fact clearly establishes that the “put to use” status of Akola II – Aurangabad Line 2 was delayed on

account of reasons not attributable to the Appellant but due to delay in commissioning of the onward transmission system by MSETCL / STU. Therefore, the Appellant cannot be held responsible for the delay caused on account of MSETCL/ STU and accordingly, the Appellant is entitled for payment of transmission charges w.e.f. 31.03.2015.

(vii) MYT Regulations, 2011 under Regulation 2.1(29) defines Force Majeure as “any event or circumstance, which is not within the reasonable control of, and is not due to an act of omission or commission of, that party and which, by the exercise of reasonable care and diligence, could not have been prevented”. The said Regulations under Regulation 12.1(a) provides that Force Majeure events are uncontrollable events, and further any additional cost incurred on account of the same is to be considered as pass through in tariff as per Regulation 13. As per Regulation 13, the approved aggregate gain or loss to the Transmission Licensee on account of uncontrollable factors shall be a pass through under Z-factor Charge, as an adjustment in the tariff of the said Licensee on half yearly basis or yearly basis, as specified. Z-factor Charge is defined in Regulation 2.1(62) of the MYT Regulations, 2011 so as to mean the charge allowed to the Transmission Licensee on account of

uncontrollable factors. Therefore, the Respondent Commission ought to have considered the COD of Set 3 of the transmission assets as 31.03.2015 keeping in mind the delays caused by MSETCL.

(viii) The Appellant has claimed deemed COD of 31.03.2015, in terms of the provisions contained in the Electricity Act, 2003 and the Regulations framed thereunder. The COD of a transmission system was neither defined in the MYT Regulations, 2011 nor in any other existing Regulations of the Maharashtra Commission. Under these circumstances, reference may be made to Regulation 2.2 & 100 of the MERC MYT Regulations, 2011. Regulation 2.2 of the MYT Regulations, 2011 states that the “Capitalised words” used in the Regulations, but not defined therein, shall have the meaning assigned to them in the Electricity Act, 2003 or other Regulations of the Commission. While Regulation 100 of the MYT Regulations, 2011 empowers the Respondent Commission to traverse beyond the said Regulation for removal of difficulties.

As per Regulation 2.2 of the MERC MYT Regulations, 2011, since “COD for a transmission system” is not defined therein, reference is made to the other Regulations of the commission

to arrive at the said definition. In this regard, reliance has been placed on the definition of 'date of commissioning' in Regulation 2.1(q)(iii) of the MERC (Terms and Conditions of Tariff) Regulations, 2005, 'Date of Commercial Operation' as defined in CERC (Terms and Conditions of Tariff) Regulations, 2009 and CERC (Terms and Conditions of Tariff) Regulations, 2014. The aforesaid Regulations provides that in the event regular service (put to use) of a transmission line is prevented for the reason not attributable to the licensee, the COD may be determined by the appropriate Commission.

(ix) The majority of the portion of Set 3, i.e. the line section from Tiroda to Koradi III, Koradi III to Akola II and Koradi III Substation were undoubtedly put to use before 31.03.2015. Accordingly, at least for all these elements (i.e Tiroda-Koradi III, Koradi III-Akola II portion of line 2 and Koradi III substation), the Maharashtra Commission ought to have allowed tariff from their respective date of put to use. Instead, the Maharashtra Commission considered COD of all the elements of Set 3 as 20.05.2015 thereby denying the Appellant, legitimate Revenue of around INR 80 Crore for the period from 31.03.2015 to 20.05.2015. Thus, in view of the above, the Appellant craves to set aside the findings of the Maharashtra Commission qua the

date of commercial operation for set 3 of its transmission assets and allow recovery of tariff from the date, as claimed by the Appellant i.e. 31.03.2015.

4.2 ***Per contra***, the learned senior counsel for Maharashtra Commission has submitted the following for our consideration:

(i) The Appellant was granted a licence to establish and operate entire set of transmission elements and, ideally, the COD of the entire transmission system should be considered only when the last element of the system is commissioned and put to use. However, the Maharashtra Commission in its various orders in Case No 128 of 2013 (Business Plan order), 66 of 2014 (MYT Order for the Second Control Period from FY 2013-14 to FY 2015-16) and the impugned order has considered the transmission assets of the Appellant in 'Sets' and allowed recovery of revenue of different elements of 'Sets' as and when such elements were certified to be put to use by the STU.

(ii) Further, the Commission has relied on STU certification to validate put to use of the transmission assets for all project specific transmission licensees viz. Amravati Power Transmission Co. Ltd. (APTCL) in Case No 17 of 2014 and 61 of 2016, Vidarbha Industries Power Ltd. in Case No 36 of 2015 and 21 of 2016.

(iii) Admittedly, the Appellant had given the work of erection of two bays at 765 kV Ektuni Sub-station to MSETCL on deposit work basis. Therefore, MSETCL can be construed to be the contractor appointed by the Appellant. The delay in construction of Sub-station by MSETCL cannot be construed as a force majeure event as it was not beyond the reasonable control of the Appellant and the Appellant had sufficient recourse through contractual and other avenues. Further, despite such a huge delay, no penal actions have been initiated by the Appellant towards MSETCL as available under the contractual arrangement which was also recorded in the impugned order.

(iv) MYT Regulations, 2011 allows recovery of ARR for only those elements which have been put to use. The Commission has relied on this aspect in the order dated 26.06.2015 in Case No 57 of 2015.

(v) The Tribunal has also held in its judgement in Appeal No. 123 of 2011 that recovery of ARR should be allowed only for those assets which are put to use and any delay in put to use caused by the non-readiness of the up-stream or down-stream transmission/distribution system cannot be condoned as a force majeure event. The Commission has relied on the

aforesaid judgement of the Tribunal in order dated 26.06.2015 in Case No 57 of 2015.

(vi) The interim arrangement of terminating the DC 765 kV Akola - II to Aurangabad transmission lines at MSETCL's 400 kV Taptitanda Sub-station at Aurangabad was worked out by MSETCL on the request of the Appellant as is evident from the letters dated 14.11.2011, 12.09.2014 and 07.10.2014 submitted with the Appeal.

Our consideration & findings: -

4.3 We have considered the submissions made by learned senior counsels for the Appellant and Maharashtra Commission. Admittedly, it is not in dispute that the Appellant's system was put to use on 20.05.2015 (excluding two bays at Ektuni Sub-station). The Appellant has submitted that due to unavailability of MSETCL's transmission sub-station at Ektuni, Aurangabad, the Appellant had to temporarily divert and connect its 765 kV S/C Akola-II to Aurangabad Line-2 with MSETCL's 400 kV Sub-station at Taptitanda, Aurangabad. The Appellant has stated that its line was ready for commissioning on 31.03.2015. However, the bay for onward transmission of power from Taptitanda Sub-station was completed by MSETCL subsequently and power flow in Akola-II to Aurangabad Line-2 commenced from 20.05.2015. The Appellant

has argued that any delay in commissioning on part of MSETCL was beyond the control of the Appellant and is an event of Force Majeure. The Appellant has sought declaration of COD on 31.03.2015 invoking Force Majeure under Regulation 2.1(29) of the MYT Regulations, 2011. The relevant extract of definition of Force Majeure as per Regulation 2.1(29) relied on by the Appellant is as under

> *"**Force Majeure Event**" means, with respect to any party, any event or circumstance, which is not within the reasonable control of, and is not due to an act of omission or commission of, that party and which, by the exercise of reasonable care and diligence, could not have been prevented."*

The Appellant has further submitted that Regulation 12.1(a) provides that the Force Majeure events are uncontrollable events. In this regard, the Maharashtra Commission in the impugned order has observed as under

"Commission's Analysis and Ruling

- *Additional Bays at Akola II Sub-station: Due to delay in the commissioning of 765 kV Sub-station at Aurangabad (Ektuni) by MSETCL, the Line section between Akola II to Aurangabad, which was originally to be charged at 765 KV, had to be charged to 400 kV level as an interim arrangement by terminating the Line at 400 kV MSETCL Aurangabad (Taptitanda) Sub-station as per MSETCL's direction vide letter dated 14 November, 2011. However, MEGPTCL should have taken necessary contractual or other action to ensure that there was no delay in the commissioning of the 765 kV Sub-station at Aurangabad (Ektuni) by MSETCL. No evident action appears to have been taken by MEGPTCL on the delay by MSETCL. MEGPTCL has also not considered levying any penalty or liquidated damages on MSETCL for this delay in completion of the two 765 kV Bays at Aurangabad (Ektuni) Sub-station."*

4.4 It is evident that there was a contractual relationship between MEGPTCL and MSETCL for construction 2 bays at Ektuni Sub-station on deposit work basis. However, it is also apparent that MSETCL in the capacity of STU had undertaken the work for construction of Ektuni Sub-station and failed to complete it before SCOD of MEGPTCL system. Further, MSETCL vide its letter dated 14.11.2011 had communicated to MEGPTCL that, as an interim arrangement, the Akola-II to Aurangabad line may be terminated at 400 kV level at Taptitanda sub-station. However, when the Appellant sought to terminate the line at Taptitanda Sub-station, MSETCL could not make it available for commissioning of line until 20.5.2015. MEGPTCL had also brought to the notice of the Commission about the delay being caused by STU from time to time. We notice from order dated 15.01.2014 in Case No 128 of 2013 that the Commission had also revised the scheduled commissioning dates to January 2014 (for Set 1 & 2) and July 2014 (for Set 3a and 3b). Accordingly, we opine that delay in commissioning of Ektuni substation by STU was beyond the reasonable control of the Appellant and is an event of Force Majeure as per Regulation 2.1(29) of the MYT Regulations, 2011. The STU further delayed the commissioning of the Appellant's system by delaying the construction of bays at Taptitanda despite there being

such proposal existing since 2011. The Appellant cannot be made to suffer on account of the delay by STU when the MEGPTCL has completed the construction of transmission system and admittedly charged it on 31.3.2015.

4.5 In light of the above, we set aside the findings of Maharashtra Commission qua the date of commercial operation i.e. 20.5.2015 for Set 3 of its transmission assets and allow COD of the transmission line on 31.3.2015. The Appellant shall be entitled to tariff from 31.3.2015 onwards as per Regulation 2.1(29) of the MYT Regulations, 2011 read with Regulation 12 and Regulation 13 of MYT Regulations, 2011.

Issue No.2: Disallowance of Foreign Exchange Rate Variation (FERV) on Material Import and Price Variation

5. Learned senior counsel for the Appellant has alleged that the State Commission has wrongly disallowed FERV on Material Import and Price Variation.

5.1 The learned senior counsel for the Appellant has submitted the following for our consideration:-

(i) The project was envisaged to be completed by March 2012 (for Line 1) and June 2012 (for the other lines). The aforesaid deadlines were subsequently revised to January 2014 (for Set

1 & 2) and July 2014 (for Set 3a and 3b) in Case No 128 of 2013, vide order dated 15.01.2014.

(ii) However, there was a delay in the completion of the project on account of certain uncontrollable factors relating to environment and land related clearances viz. delay in forest clearance, severe right of way issues, legal matters, line crossing clearances, non-availability of land for substation and storage related infrastructure etc.

(iii) The aforesaid events being Force Majeure events within the meaning of Regulation 2.1 (29) of the MYT Regulations 2011 led to delay in import of off-shore material such as disc insulators, optical ground wire (OPGW), shunt reactors, auto transformers, insulating oil, accessories, etc. for the transmission lines and the substations.

(iv) The Appellant placed four separate EPC contracts with M/s PMC Projects (India) Pvt Ltd on 27.09.2010 for supply of equipment and provision of service of transmission line as well as for sub-station. The EPC contracts entered into by the Appellant for the imported materials were on a unit rate fixed price basis during the currency of the contract in terms of Clause 25.4 of the General Conditions of contract. Further, as per Clause 2.1 read with Clause 2.3 of the EPC Contract, the

payment for the said equipments and the services was to be made in INR which was fixed in case the equipments and the services under the EPC Contract were supplied within the Scheduled Completion/Delivery date as per Clause 3.0 of the EPC Contract. The benefit of unit rate fixed price was available to the Appellant only up-till scheduled delivery date i.e. 22.03.2012 for 765 kV line-1, 22.06.2012 for 765 kV line-2 and 22.02.2012 for the sub-station package.

(v) However, on account of aforementioned force majeure events, the material could not be imported within the contractually stipulated period and the Appellant had to defer delivery of the imported material under duress due to absence of safe storage for the material. Further, the Appellant delayed import of off shore material to prevent incidence of IDC. However, the same resulted in an increased impact of FERV. This resulted in escalation of costs of imported material thereby increasing the capital cost of the project.

(vi) Clause 51.6 of General Conditions of Contract for 'transmission line package' and for 'substation pack' provides for development of mutually satisfactory solution in case of force majeure events. Based on the above clauses, the Appellant was constrained to revise the procurement cost of the imported

material through amendment of EPC purchase orders and the contract.

(vii) The Maharashtra Commission has erroneously disallowed the pass through of the impact of Foreign Exchange Rate Variation (FERV) on imported material, thereby causing an under recovery of approximately Rs. 326.81 crore upon Capital cost of the Appellant. Whereas, Regulation 27.1(a) of MYT Regulations, 2011 expressly provide for granting relief on account of foreign exchange rate variation subject to prudence check.

(viii) Further, the market price of raw material like steel, aluminium, copper etc. increased considerably during the period of delay. The total impact of escalation in project cost due to variation in price of raw material/labour cost etc for setting up the transmission line is Rs 57.25 crore (i.e. Rs 38.26 crore for transmission lines+ Rs 18.82 crore for sub-stations+ Rs 0.17 crore for service order). The said escalation in price due to aforesaid delay on account of force majeure events has not been considered by the Maharashtra Commission for the purpose of determination of Annual Revenue Requirement (ARR).

(ix) The Commission in the impugned order has acknowledged various RoW issues faced by the Appellant which led to delay in project implementation and approved RoW cost of Rs 128.28 crore over and above Rs 30.75 crore envisaged initially. Further, after taking into consideration the force majeure events, the Commission also allowed IDC amounting to Rs 527.63 crore and FERV on the ECB loan to the tune of Rs 180.56 crore. However, the Commission did not consider the impact of force majeure events on FERV qua imported material and increase in price of various equipments.

5.2 ***Per contra***, the learned senior counsel for Maharashtra Commission has made the following submissions for our consideration:

(i) The Commission has allowed foreign exchange rate variation (FERV) on loan component. However, FERV pertaining to imported material for its transmission system and price variation for the components of supply service and orders for the transmission lines and sub-stations were not allowed on account of delay in project implementation.

(ii) The reason for not allowing the aforesaid component is that, as per the contract, the contract price agreed is on a unit rate fixed price basis during the currency of the contract as per clause

25.4 of the General conditions of contract for purchase order dated 27.09.2010 awarded to the EPC contractor for transmission line package and sub-station package. Thus, there was no stipulation in the contract for payment towards FERV on import of material as sought by the Appellant. Further, the Commission disallowed price variation as the original EPC contract did not have any provision for pass through of the price variations in raw material cost as the contract was a fixed price Rupee denominated contract.

(iii) The Commission had rejected the aforementioned claims as the Appellant had sought remedy to its imprudent contracting practices under the garb of financial hardships citing them to be caused due to project delays on account of factors being beyond its control.

Our consideration & findings: -

5.3 We have considered the submissions made by learned senior counsels for the Appellant and Maharashtra Commission. The Appellant entered into an EPC contract dated 27.09.2010 on a unit rate fixed price basis during the currency of the contract. Admittedly, the benefit of the fixed price was to remain available up to delivery/completion period i.e. up to 22.03.2012 for 765 kV line-1,

22.06.2012 for 765 kV line-2 and 22.02.2012 for the sub-station package as per the EPC contract.

5.4 The project of the Appellant got delayed on account of various factors including delay in obtaining land and environment related clearances viz. forest clearance, Right of Way, land acquisition issues etc. As per Appellant's own admission, import of off shore material was delayed for the non-availability of storage space and to prevent incidence of IDC. However, the delay in procurement led to increase in capital cost on account of higher impact of FERV through an amendment in EPC contract.

5.5 The Maharashtra Commission disallowed FERV on imported material in the impugned order as under:-

" *XXXXX*

- *Under the EPC contract, the contract price agreed is on a unit rate fixed price basis during the currency of the contract as per Clause 25.4 of the General Conditions of Contract for the purchase orders dated 27 September, 2010 awarded to the EPC contractor for 'Transmission Line package' and Sub-station package':*

  XXXX

- *The Commission notes that the provision for pass through of the impact of FERV on material imports beyond the scheduled completion period was not part of the original contract between MEGPTCL and the EPC contractor, and was agreed to as a mechanism to address the cost implications on the EPC contractor on account of delays in completion of the work.*

- *The reasons for delay stated by MEGPTCL include RoW issues, delayed Forest clearances, land availability for Sub-stations, non-availability of shut downs, etc.*

- *The Commission had provisionally approved the impact of FERV in its Order in Case No. 66 of 2014. The Commission has further analysed the facts in greater detail in this Order.*

- *The Commission also notes that the amendments to the original Agreement for EPC work providing for cost revision were made subsequent to the filing of the previous MYT Petition and during those proceedings for the 2nd Control Period.*

- *It is well-known that power transmission and other infrastructure projects are generally face issues relating environmental / forest clearances, land acquisition and RoW. MEGPTCL is part of a well-known Group which has experience in developing such projects across the country and in Maharashtra, and hence all these factors should have been appropriately considered while planning the project and also entering into EPC contracts. Necessary safeguards could have been built into the contract so as to protect itself from such rate fluctuations. Further, as the EPC contractor was importing material from outside the country, it would have been known that the contractor would be subject to foreign exchange rate variations and would, accordingly, have built in the necessary mechanisms to protect its interest in a fixed price contract. The Commission does not view this as an event which could not have been foreseen by EPC contractor or MEGPTCL and the contracting parties should have included necessary provisions/ mechanism in the contract to protect them from such risks as part of prudent contracting practises. Such shortcomings or imprudence in the contracting process cannot be allowed as a pass through in the capital cost which has a long-term cost impact on consumers.*

Hence, the Commission has not approved any amount towards FERV on material imports in this Order*."*

5.6 We note that MERC has recognised that the Appellant had entered into an EPC contract on a unit rate fixed price basis during the currency of the contract as per Clause 25.4 of the General Conditions of Contract for the purchase orders dated 27 September, 2010 for 'Transmission Line package' and Sub-station package'. However, the Maharashtra Commission held that transmission projects generally face issues related to forest clearance, land acquisition, right of way etc. hence necessary safeguards could

have been built into the contract by MEGPTCL to protect itself from such rate fluctuations as prudent contracting practise. The Maharashtra Commission had also observed that it would have been known to the contractor that import of material would be subject to foreign exchange rate fluctuations. The contractor therefore would have built in necessary mechanism to safeguard its interest in the contract. The MERC did not view this as an event which could not be foreseen by both MEGPTCL and EPC contractor and disallowed FERV on import of material observing that such shortcomings or imprudence in the contracting process cannot be allowed as a pass through in the capital cost which has a long-term cost impact on consumers.

5.7 We fail to understand the rationale behind the decision of Maharashtra Commission particularly after noting that the same Commission had provisionally approved the impact of FERV in its earlier Order in Case No. 66 of 2014. We are also not in agreement with the conclusion arrived at by the MERC that in general all transmission projects would get delayed due to delay in getting various clearances. In our view the MERC has ignored the fact that the FERV being claimed by the Appellant pertains to the period after conclusion of the contract period. We are unable to understand as to how safeguards of any nature for any eventuality can be built for

a period which is beyond the tenure of the contract. We consider it prudent on part of the Appellant to enter into a unit rate fixed price basis during the currency of the contract as per Clause 25.4 of the General Conditions of Contract. The fixed price contract insulated the project from exchange rate fluctuations for the duration of contract. The cost of exchange rate variation during the term of the contract was incurred/absorbed by the EPC contractor. However, the EPC contractor also need certainty in terms of duration of the contract to incorporate associated risk in the contract. It may not be feasible for the EPC contractor to extend the benefit of fixed price for indefinite period. Further, incorporation of additional provisions or conditions in the contract under the apprehension of any delay would only increase the cost/value of contract either in terms of (1) higher upfront fixed contract value for the additional duration of the contract or (2) pass through of incremental FERV beyond the contract date. Therefore, contrary to the observation of the Commission, incorporation of such additional conditions in the contract would have led to only increase in contract value. Accordingly, it is now to be considered if the Appellant acted prudently in delaying the import of material.

5.8 The Appellant has submitted that the project faced delays due to delay in 1) obtaining forest clearance 2) obtaining RoW permission

for laying of transmission line 3) availability of land for Akola II sub-station and 4) delay in obtaining land for Koradi-III sub-station. The Appellant deferred import of material beyond the scheduled delivery/completion period of the contract on account of non-availability of space for storage of imported material and also to prevent incidence of IDC.

5.9 As regards cost claimed by the Appellant under the head 'Impact on Capital Cost of additional compensation paid in RoW', the Commission in the impugned order has acknowledged the RoW related issues faced by the Appellant during project execution which led to delay in project implementation. The Commission has also acknowledged the submission made by MEGPTCL that due to delay in obtaining RoW clearances, the land valuation has increased, driving up the RoW and crop compensation amounts substantially. Accordingly, the Commission has provisionally approved the RoW cost of Rs 128.28 crore over and above Rs 30.75 crore envisaged initially. Further, the Commission has also acknowledged in the impugned order that delay in completion of the project has also contributed to the increase in capital cost on account of FERV applicable on the loan component. Accordingly, the Commission has provisionally approved the amount of Rs 180.56 crore pertaining to FERV on ECB loan, as claimed by MEGPTCL. The

Commission disallowed FERV on import of material despite allowing these costs on account of delay in project implementation.

5.10 As regards Capital Cost, Regulation 27 of the MYT Regulations, 2011 provides as under:-

"27 Capital Cost and capital expenditure

27.1 Capital cost for a project shall include:

(a) the expenditure incurred or projected to be incurred, including interest during construction and financing charges, any gain or loss on account of foreign exchange risk variation on loan during construction up to the date of commercial operation of the project, as admitted by the Commission, after prudence check;

xxxxx

27.2 The capital cost admitted by the Commission after prudence check shall form the basis for determination of tariff:

Provided that prudence check may include scrutiny of the reasonableness of the capital expenditure, financing plan, interest during construction, use of efficient technology, cost over-run and time over-run, and such other matters as may be considered appropriate by the Commission for determination of tariff.

27.3 The approved Capital Cost shall be considered for determination of tariff and if sufficient justification is provided for any escalation in the Project Cost, the same may be considered by the Commission subject to the prudence check:

xxxxx "

5.11 The aforesaid definition of capital cost allows expenditure incurred including cost over-run subject to prudence check by the Commission. It is also provided that if sufficient justification is provided for any escalation in the Project Cost the same may also be considered for determination of tariff. We feel that the Appellant acted in prudent manner to delay material import in view of delay in implementation of the project to reduce incidence of IDC. In the

present case, the Appellant also saved IDC by delaying the payment for the material imported before the scheduled completion date. The increase in impact due to FERV cannot be attributed to any negligence or imprudent practice by Appellant since it is beyond reasonable control of Appellant. In our view the Appellant has also acted prudently by deferring the import of material to prevent its damage in the absence of land for storage facility. The intent of Appellant is to prevent a bigger financial impact on the project. Moreover, in case of reduction in exchange rate, the Appellant could have benefited the project from both reduction in IDC as well as low cost of imported material on account of FERV. Therefore, sufficient justification has been provided by the Appellant for increase in capital cost on account of increase in FERV.

5.12 We notice that the Commission has also acknowledged this aspect and accordingly allowed consequential impact of increase in IDC and FERV on loan. Once the MERC has come to the conclusion that the delays are not attributable to the Appellant and the Appellant is allowed the consequential increase in ROW costs and IDC, we do not agree with the conclusion of MERC that delays in transmission projects generally occur and hence FERV on material import cannot be allowed. As observed by us *supra*, it is not feasible to build safeguards into any contract for the events that may take place post

contract period. Further, since two different treatments cannot be given for the same cause of action, the cost towards FERV on material import ought to be allowed by the Commission. Accordingly, we set aside the decision of Maharashtra Commission and allow FERV on import of material after the scheduled completion of contract.

5.13 The Appellant has also claimed escalation in project cost by Rs 57.25 crore due to variation in price of raw material viz steel, aluminium, copper etc. during the period of delay. As per the submission of the Appellant in the impugned order, the project cost increased by Rs 38.26 crore due variation in raw material prices/labour/fuel cost etc in respect of transmission line items such as tower parts (including nuts & bolts), tower accessories, hardware fittings & accessories, insulators, ACSR (Aluminium Conductor Steel Reinforced) conductors, G.S. Earthwire, OPGW (Optical Ground Wire), etc. As regards substation, the Appellant has submitted in the impugned order that the project implementation got delayed beyond the scheduled completion date of 22 February, 2012 as per the terms of the contract on account of delay in clearances, legal matters, non-availability of land, storage related infrastructure, etc. This stated to have escalated the project cost by Rs 19.00 crore on account of price variation for the equipment

required for Koradi-III Sub-station such as circuit breakers, isolators, instrument transformers, surge arrestors, insulators, hardware fittings, structural materials, cables, earthing materials, switchgear panels, DC systems, PLCC equipment etc. under the supply order as well as their installation under service order.

5.14 The Maharashtra Commission has disallowed the aforesaid claim of the Appellant in the impugned order on the following ground:-

"The issue of increase in cost due to price variation of raw materials is similar to that of the impact of FERV on imported material. It is clear that the original EPC contract did not have any provision for pass-through of the price variations in raw material cost as the contract was a fixed price Rupee denominated contract. It may be noted that, in the absence of any such provision for pass through of price escalation in the original EPC contract, MEGPTCL would not have been entitled to any price escalation irrespective of whether or not the project was completed in time or delayed for any reason. The Commission's view is in line with the stand taken in the case of FERV on material import as discussed earlier in this Order."

5.15 We have held that after acknowledging the delay in implementation of the project and allowing consequential impact of increase in IDC and FERV on loan, the Commission ought to have allowed FERV on material import also. For the aforesaid reasons, the impact of price variation on raw materials is also allowed considering that the delay is not attributable to the Appellant.

Issue No.3: Disallowance of various capital cost components

6. The Appellant has alleged that the Maharashtra Commission has erroneously disallowed certain capital cost components claimed under the head 'Additional service/supplies- EPC' to the Appellant.

The Appellant has submitted that certain additional works were carried out under the EPC Contract in view of certain inevitable changes during execution of the Project and costs towards these items were reimbursed to the EPC contractors. Further, there were certain works which were carried out subsequent to the filing of the initial MYT Petition.

6.1 In this regard, the learned senior counsel for the Appellant has made the following submissions with regards to the individual components.

Additional Bays at Akola II Substation:

(i) Due to delay in the commissioning of 765 kV Ektuni substation at Aurangabad by MSETCL, the line section between Akola II to Aurangabad, which was originally to be charged at 765 kV, had to be charged at 400 kV level as an interim arrangement by terminating the line at 400 kV MSETCL Taptitanda (Aurangabad) substation as per the direction of MSETCL, vide letter dated 14.11.2011.

(ii) This interim arrangement resulted in additional capital expenditure on account of construction of two additional bays at Akola SS, extra termination towers at Aurangabad and necessary protection and communication arrangement at Akola

II substation. The additional scope of 2x400 kV Bays was agreed with the EPC contractor on a lumpsum basis, based upon the prevailing market rates.

(iii) The Commission has erroneously disallowed the cost of Rs 6 Cr. towards additional Bays at Akola II Sub-station by stating that the same were not “put to use”, in terms of the MYT Regulations. The Commission has erred in holding that the Appellant should bear the aforesaid capital cost on account of faulty planning and execution of the State Transmission Utility.

Damaged Items:

(iv) During the transhipment activity of ICTs and SRs, one of the vehicles met with an accident and certain material was damaged. Further, certain other material was also damaged while unloading. The same was reimbursed after netting of claims from the Erection All Risk (EAR) Policy. It is stated that the net impact on this account is Rs 0.31 Crore, which has been disapproved by the Commission contrary to the provisions of Section 61 of the Electricity Act, 2003.

Additional towers - Charging at 400 kV level:

(v) The interim arrangement to charge the transmission system by terminating Akola-II to Aurangabad line at Taptitanda Substation required procurement of additional 2 numbers of 400 kV tower including accessories. One common tower (line 1 and line 2) of 400 kV is used at Ektuni end for temporary connection at 400 kV Taptinanda SS and another 400 kV tower is used at Akola-II end for temporary connection at 400 kV Akola-II Bay. The aforesaid procurement and installation of additional towers resulted in an additional expense of INR 1.72 Crore. Cost towards the same has been included in Set 3 of the transmission system.

(vi) The Commission relied on STU letter dated 03.06.2016 to disallow the cost of INR 1.72 Crore towards the said additional towers and held that it was the responsibility of MEGPTCL to ensure that the necessary infrastructure required to commission its lines should have been available, and there should have been no requirement for any interim arrangement.

(vii) After commissioning of 765 KV tower, the two 400 KV towers have no useful purpose. The Appellant incurred the said cost as per the instructions of MSETCL and as such the same is beyond the control of the Appellant and therefore, uncontrollable.

Therefore, the Commission has unjustly denied the Appellant the benefit of recovery of such cost of Rs 1.72 Cr.

Idling Charge

(viii) Work at Location no. 24/0 of 400 kV D/C Akola-II to Akola-I line which was located in 400/220 kV Apatapa substation of MSETCL could not be started due to land compensation demand raised by MSETCL. It took almost one month to get resolved resulted into idling of foundation gangs.

(ix) Further, there was delay in availing shutdown of 132 kV Amravati-Achalpur line. Initially, the permission was granted for the shutdown vide letter dated 25.03.2012. However, it was cancelled by MSETCL at the last moment and it was informed to the Appellant to pay additional load management charges. The permission was granted again for shutdown on 27.05.2012. During this period, manpower and T&P remained idle due to high uncertainty in exact shutdown.

(x) Similarly, PGCIL cancelled shutdown of 400 kV Wardha-Akola line twice on 31.12.2012 and 04.01.2013. Finally, the shutdown of said line was granted on 16.02.2013. During this period, manpower and T&P deployed since December 2012 remained idle up to 15.02.2013.

(xi) The Commission has disallowed inclusion of idling charge to the capital cost by observing that it was the responsibility of the Appellant to manage execution related matters and their financial impact, and as such the same cannot be passed on to consumers.

(xii) Idling charges incurred were beyond control and inevitable for the Appellant as incurred on account of the actions of third parties, and as such uncontrollable. The same ought to have been treated as per Regulations 2(29), 2(62), 12 and 13 of the MYT Tariff Regulations 2011. Hence, the Commission has erred in disallowing idling charge to be part of capital cost, thereby resulting in an under-recovery of Rs. 4.57 Crores to the Appellant.

Demurrage Charges

(xiii) The Appellant took the delivery of the equipment under the hook of the vessels on Hydraulic/ low bed trailers. The delay in approval of Principal Secretory, MoP, GoI and delay in contract registration resulted into incurring of trailer detention charges. The net amount of such charges due to above mentioned reasons is Rs. 1.99 Crore (Rs. 1.58 Crore towards delay on

account of approval of Principal Secretary and Rs. 0.41 Crore due to delay in registration at Kandla port).

(xiv) The Commission has disallowed the Appellant's claim of Rs 1.99 crore on the ground that the incidence of Demurrage Charges is mainly on account of issues in getting necessary approvals from the concerned authorities. Delay in getting approvals was on account of Force Majeure events being beyond control of the Appellant, and as such fall under uncontrollable parameters as per Regulation 12 of the MYT Regulations 2011. Hence, the Respondent Commission erred in disallowing Demurrage Cost of Rs 1.99 Cr to be part of Capital Cost.

Interest During Construction (IDC)

(xv) The Project was started with initial scheduled completion date estimate of 22.02.2012 for Substations and 22.03.2012 (Line 1) and 22.06.2012 (Line 2) for Transmission Lines. Due to various Force Majeure reasons like delay due to RoW, Forest clearance, Land acquisitions, statutory clearances for substations for a prolonged period, which are beyond the control of the Appellant or its contractors, the Project got delayed beyond the initially estimated scheduled completion date, thereby impacting IDC adversely.

(xvi) Reliance has been placed on Regulations 27.1 (a) & 27.2 of the MYT Regulations, 2011 to contend that IDC and financing charges are an integral component of the capital cost and a pass through subject to prudence check. The main factors affecting the IDC are the completion period of the project, the capital cost and the interest rates being charged and the loan drawal schedule. In this case also, the substantial increase in IDC is mainly due to (1) substantial delay in project completion vis-à-vis the scheduled completion date; (2) increase in the capital cost over the provisionally approved capital cost; and (3) higher interest rate charged by certain lenders.

(xvii) The Appellant had claimed an amount of Rs. 574.25 Cr as Interest During Construction to be part of Capital Cost. The Commission has approved part of the capital expenditure claimed by the Appellant, and hence the IDC computation has been revised to reflect the approved components of the capital cost. The Commission has provisionally approved IDC of Rs. 527.63 Cr against Rs. 574.25 Cr.

(xviii) The Commission has erred in disallowing IDC of Rs 46.62 Cr. The delay in implementation of Set 3 of the transmission assets happened on account of Force Majeure events of delays in getting the requisite approvals qua forest clearance, ROW, etc.

Such factors being uncontrollable ought to have been allowed as per Regulations 2(29), 2(62), 12 and 13 of the MYT Tariff Regulations 2011. The Commission was required to examine the said issues, as pleaded by the Appellant in the tariff petition, and then give a finding.

(xix) Without prejudice to the foregoing, even if it is assumed, without conceding, that the principle adopted by the Commission is correct, the proportionate allowable IDC should have been Rs. 530.39 Cr as the Commission has approved proportionate IDC of Rs 527.63 Cr due to error in calculation.

6.2 ***Per contra***, the learned senior counsel of Maharashtra Commission has submitted the following for our consideration:-

Additional Bays at Akola II Substation

(i) The cost of additional bays at Akola II sub-station has been rightly disallowed as they were constructed as an interim arrangement and are no longer in service. As the these are spare bays, the cost incurred on these bays cannot be passed on to the consumers.

(ii) Further the temporary arrangement permitted the Appellant to start recovering the cost without waiting for total completion of the project. Thus, the delay on lack of preparedness of MSETCL

for charging at 765 kV level did not at all adversely affect the Appellant and did not postpone the recovery of cost.

Damaged items

(iii) The component of 'Damaged items' has been rightly disallowed by the Commission as any damaged item should be recovered under EAR Policy and further the Appellant could not provide any documentary evidence towards the expenses incurred on the damaged items.

Additional Towers for charging transmission lines at 400 kV level

(iv) The claim of additional towers was disallowed by the Commission as the towers were constructed for charging Line-I and Line-II transmission system from Akola-II to Aurangabad out of which Line-I was already commissioned on 08.04.2014 and the approval of this cost should have been sought at the time of previous MYT petition which was not done.

(v) Further, this was done for putting to use Line-I and Line-II even before the completion of the entire project therefore the Appellant was allowed to recover the cost incurred on these towers from earlier dates even without including its cost in the

previous MYT Petition. Further, these towers have also become spare and are not in use.

Idling Charges

(vi) The Commission disallowed the claim of idling charges on the ground that the Commission had already approved the cost to the tune of Rs 2.1046 crore for a project management consultant for inclusion in the capital cost to ensure smooth execution of the project.

(vii) In the impugned order the Commission has held that it was the responsibility of MEGPTCL to manage execution related matters and their financial impact cannot be passed on to consumers. It was also held that the instances cited by MEGPTCL are common in the implementation of such large projects and have to be factored in by the contractor in his costs.

Demurrage Charges

(viii) The Commission has disallowed Demurrage Charges considering it is mainly on account of issues in getting necessary approvals from the concerned authorities. The disallowance of Demurrage Charges is the conscious decision of the Commission in the interest of consumers.

Interest During Construction (IDC)

(ix) In the impugned order, the Commission approved IDC on pro-rata basis based on the approved capital cost components in line with the formula given. There is no calculation error in the computation of the revised IDC on pro-rata basis.

Our consideration & findings: -

6.3 We have considered the submissions made by the learned senior counsels for the Appellant and the Maharashtra Commission and impugned order.

6.4 We have held that the delay in construction of 2 bays at Ektuni sub-station is an event of Force Majeure. However, we agree with the submission of MERC that the interim arrangement allowed the Appellant in declaration of COD on 20.05.2015 and early recovery of tariff. It is further noticed that the Regulation 27.1 of the MYT Regulations, 2011 provides that "*the assets forming part of the project but not put to use or not in use, shall be taken out of the capital cost"*. **The additional bays and towers constructed under the interim arrangement are not only out of the scope of work of the project but also are not in use and are spare assets. Therefore, the cost of these assets cannot be passed on to the**

consumers. Accordingly, the cost of additional bays and towers is rejected on the above grounds.

6.5 We find substance in the submission of MERC that damaged item should be recovered under EAR Policy. Further, the instances cited by MEGPTCL leading to levy of idling charges and demurrage charges are common in the implementation of such large projects and have to be factored in by the contractor in his costs. **In light of above findings, the claims on account of damaged items and idling charges are rejected.**

6.6 As regards IDC, the Commission has provisionally approved IDC of Rs. 527.63 Cr against Rs. 574.25 Cr. The Appellant pleaded that MERC was required to examine the issues as pleaded by the Appellant in the tariff petition and then give a finding on IDC. The Appellant has further contended error in computation of IDC which has been denied by the Commission. We notice that MERC has not deliberated on the components leading to increase in IDC and disallowance of IDC against each component in the impugned order. Further, there is also dispute with regards to computation of IDC. **Therefore, we direct MERC to consider the contentions raised by the Appellant in detail while allowing the final IDC.**

Issue No.4:- Delayed Payment Charges (DPC) as Non-Tariff Income for reduction of Allowed ARR

7. Learned senior counsel appearing for the Appellant contended that the State Commission has erroneously considered the Delayed Payment Charges (DPC) as non-tariff income and accordingly reduced the ARR to that extent.

7.1 As regards, Delayed Payment Charges, the learned senior counsel for the Appellant has submitted the following for our consideration:-

(i) Regulation 62 of the MYT Regulations, 2011 provides for deduction of total non-tariff income of a Transmission Licensee from its ARR for determination of the annual transmission charges of the Transmission Licensee.

(ii) The Respondent Commission in the impugned order has considered the unrecovered Delayed Payment Charges (DPC) as non-tariff income which resulted in an under recovery for the Appellant of approximately Rs 31.57 crore in the period 2013 to 2016. Such an approach is contrary to the envisaged purpose of the said DPC.

(iii) As per Regulation 68 of the MYT Regulations, 2011, the Transmission Licensees are entitled to DPC for the delay in payment of transmission charges. However, Regulation 62 and 68 of MYT Regulations, 2011 are silent about treatment of DPC

as non-tariff income of Transmission Licensees. Regulation 2.1(42) of MYT Regulations, 2011 defines “non-tariff income” as an income which is other than the tariff for a transmission licensee. However, payment of compensation on account of delay in payment of tariff is also a tariff income.

(iv) Regulation 43.1 of MYT Regulations, 2011 pertaining to generation business contains an indicative list of various heads to be considered as non-tariff income including interest on delayed payments. However, in Regulation 62.1 pertaining to transmission business, there is no indicative list provided non-tariff income. Reference may be made to the judgement of Hon’ble Supreme Court in ***Bhim Singh Maharao of Kota vs Commissioner of Income Tax, Rajasthan-II, Jaipur*** reported in ***(2017) 1 SCC 554*** to contend that by no stretch can a provision of one section of a statute, be read into another provision of the statute. Reliance has been placed of the judgement of Hon’ble Supreme Court in ***K.P. Varghese vs ITO*** reported in ***(1981) 4 SCC 173 and New India Assurance Co. Ltd. vs Nusli Neville Wadia*** reported in ***(2008) 3 SCC 279*** wherein it has been held that an interpretation of law which leads to absurdity has to be avoided.

(v) Further, the subsequent Regulations i.e. MYT Regulations, 2015 in Regulation 36.3 provided that the delayed payment charges and the interest therein, are not to be considered for calculation of the non-tariff income of the Transmission Licensees.

(vi) Further, the above issue is decided by the Tribunal in favour of the Appellant in its judgement dated 29.05.2019 in Appeal No 250 of 2016.

7.2 ***Per contra***, the learned senior counsel for the Maharashtra Commission has made the following submissions for our consideration

(i) The Commission has maintained a consistent stand and considered the DPC receivable by the other Transmission Licensees in the State also as a part of the respective NTI for FY 2015-16 for such licensees.

(ii) The Tribunal has upheld the treatment of DPC as non-tariff income vide judgement dated 03.06.2016 in Appeal No 244/2015 & 246/2015 which has been challenged before Hon'ble Supreme Court in pending Civil Appeal No. 1356-58 of 2017. Whereas, in another appeal being 250/2016, the Tribunal has vide judgement dated 29.05.2019 has set aside the orders of the Commission treating DPC as non-tariff income.

Our consideration & findings: -

7.3 We have considered the submissions made by the learned senior counsels of the Appellant and the Maharashtra Commission. This Tribunal had considered the similar contentions raised by Adani Transmission (India) Ltd and Maharashtra Commission with regards to provisions of MYT Regulations, 2011 in the judgement dated 29.05.2019 in Appeal No 250 of 2016. After considering the MYT Regulations, 2011 and various other judicial pronouncements, the Tribunal held that DPC is in the nature of compensatory charges and it would be incorrect to treat DPC as not tariff income. The relevant extract of the judgement is as under.

> *" From the reading of the above provisions it is evident that Commission has not explicitly considered Delayed Payment Charges as Non-Tariff Income while determining ARR for Transmission Business.*
>
> *6.11 The concept of Delay Payment Charges or interest on delayed payment or late payment surcharge is a well-recognized element across the industries. DPC becomes applicable only when there is delay in payment of Transmission Charges by Transmission System Users (TSUs) after the due date. As per Regulation 35.2 of the MYT Regulations, 2011 of the Commission, the normative working capital covers receivables by the licensees only up to 45 days. Therefore, DPC is levied to compensate the Transmission licensee for the interest cost that is incurred on the additional working requirement due to delay in payment beyond 45 days.*
>
> *It is relevant to note that this Tribunal has decided similar issue in its judgement dated 30.07.2010 in Appeal No. 153 of 2009 (North Delhi Power Ltd. vs Delhi Electricity Regulatory Commission) as under:*
>
> *"……."*
>
> *6.12 In view of the above, it is apparent that DPC is in the nature of compensatory charges. This has been recognised by Hon'ble Supreme Court in its judgement dated 14.11.2000 in M/s Consolidated Coffee Ltd. Vs. The Agricultural Income-Tax Officer, Madikeri & Ors AIR 2000 SC 3731. as under*

> *"We cannot, based upon the aforesaid judgment or otherwise, accept the submission of learned counsel for the taxing authorities that the penalty contemplated by Section 42 is analogous to a late payment surcharge/interest.* ***A late payment surcharge/interest is necessarily compensatory in character****. A penalty is a punishment."*

Accordingly, if DPC is to be treated as Non-Tariff Income the interest cost towards requirement of additional working capital ought to be allowed in tariff by the Commission. This is needed to prevent creation of a vicious circle by TSUs where they may keep delaying the payment through-out the year and get the benefit of reduction of ARR through deduction of delayed payment surcharge. It is evident that this interpretation of the Regulation by MERC results in recovery of tariff lower than what is legitimately due to the Transmission licensee under Section 62 of the Act. Further, the interpretation of MERC to allow DPC as Non- Tariff Income without the provision for pass through of interest on additional working capital due to delay in payment beyond 45 days is also against the principle of 'recovery of the cost of electricity in a reasonable manner' laid down in Section 61(d) of the Act.

6.13 *The Respondents have relied on this Tribunal's judgement dated 11.5.2017 in Appeal No. 250 of 2015 and in Appeal No. 242 of 2016 wherein the Appellant Jaigad Power Transco Limited had made similar contentions with respect to denial of DPC under MYT Regulations, 2011. The relevant extract of the judgement is reproduced below:*

"……"

What thus transpires is that in the above judgement, the Tribunal ought not to have ignored its judgement dated 30.07.2010 in Appeal No. 153 of 2009 (North Delhi Power Ltd. vs Delhi Electricity Regulatory Commission) and allowed interest on additional working capital requirement as compensation for delayed payment. In the alternative, DPC could not have been interpreted as NTI against the principle of Section 61(d) and recovery of tariff under Section 62 of the Act. Therefore, in terms of the judgement of Delhi Municipal Corporation v Gurunam Kaur reported in AIR 1989 SCC 38, the above decision of the Tribunal is to be treated as given 'per incuriam' as it was given in ignorance of the judgement of the Tribunal in case of North Delhi Power Ltd. vs DERC and principles of Section 61 and 62 of the Act.

6.14 *Further, it is observed that DPC can be clearly differentiated from other NTI sources specified in Regulation 43.1 for Generation Business. While the source of income from other components do not affect the recovery of Tariff from licensed business, DPC affects the total recovery of tariff from licensed business. The Black's Law Dictionary defines Reimbursement as 'To pay back; to make return or restoration of an equivalent for something paid, expended or lost'. According to the dictionary meaning, reimbursement can be considered as repayment of what has already been spent or incurred. Thus, DPC is in fact a compensation in the nature of reimbursement and must not be treated*

as NTI. In case it is treated as NTI for deduction from ARR, the licensee must be compensated for interest on delayed payment separately.

6.15 As regards statutory provision, MYT Regulations, 2011 does not specifically provide that DPC shall be Non-Tariff Income in case of Transmission Business. Hence, in our view, it is bereft of any statutory backing. Since the said Regulation is silent, taking recourse of similar provision in generation business does not help. We are of the view that under such circumstance, the Respondent Commission ought to have followed the correct principle based on correct logic and interpretation. The Respondent Commission attempted to support its argument that the list of NTI for transmission business is indicative and therefore treatment similar to that of Generation Business was considered. We cannot accede to such argument. Having open end in the Regulation does not mean that Respondent Commission can apply any Regulation. If the intention was to consider DPC as NTI even for Transmission Business, the Commission would have included the same in the Regulations 46.1 as well. When there is vacuum in the Regulations, the Respondent Commission could have drawn analogy from MYT Regulations, 2015 which has recognized the issue and appropriately incorporated the provision to exclude DPC from NTI.

6.16 Also considering provisions of Section 61, it is incumbent on the Respondent Commission not to disregard the determination of tariff following the commercial principles. Considering DPC as Not-tariff Income is clearly against such principle. All the more when there is no explicit Regulation framed under MYT Regulations 2011.

6.17 In view of above, there is no doubt that such treatment to consider DPC as not tariff income is incorrect. Also, in such a situation a pragmatic way to ensure that Principle of Equity prevails would be to not consider DPC as Non-Tariff Income. Accordingly, we decide that DPC shall not be considered as Non-Tariff Income"

7.4 In light of the above judgement of this tribunal, DPC cannot be considered as Non-Tariff income. Accordingly, this issue is decided in favour of the Appellant.

Issue No.5:- Non allowance of actual Operation & Maintenance (O & M) Cost

8. The learned senior counsel appearing for the Appellant has submitted that the Operation & Maintenance cost has not been

considered on actual basis and considered for some other transmission licensee resulting into disparity and arbitrariness.

8.1 As regards, non-allowance of O&M cost, the learned senior counsel for the Appellant submitted the following for our consideration

(i) The Commission has erred in allowing lower O&M cost to the Appellant for its 400 KV Assets, as per the norms applicable to Jaigad Power Transmission Limited (JPTL), which is lower than the actual O&M cost incurred by the Appellant.

(ii) Such arbitrary rejection of O&M cost for the year has resulted in under recovery of approximately Rs. 181.17 crore in the years 2013 to 2020.

(iii) The Commission has erroneously observed in para 5.2.8 of the impugned order, that the Appellant did not register its concerns/ comments at the time when the MYT Regulations were being framed for the third control period. In the draft MYT Regulations for the period 2016-19, the Commission had proposed in Regulation 58.7 that the norms for Jaigarh Power Transmission Ltd. (JPTL) shall be applicable for new transmission licensees. The draft Regulation 58.7 further provided that new licensee shall be the one *"whose transmission project assets are commissioned after March 31, 2016"*. The Appellant, having

achieved its Commercial Operation Date by 31.03.2015, was not covered in the definition of "New Transmission Licensee" as proposed in the draft MYT Regulations. As the Appellant was an existing licensee for which no separate O&M norms were specified, the Appellant was under the impression that the norms of MSETCL were applicable to it.

(iv) However, when the Respondent Commission subsequently published the MYT Regulations, 2015, the Commission removed the reference *"whose transmission project assets are commissioned after March 31, 2016"* from the definition of "New Licensee".

(v) Accordingly, as per the revised definition of "New Transmission Licensee" in the MYT Regulations 2015, the norms of JPTL have been made applicable to the Appellant, which are lower than those of MSETCL. The Appellant could never have envisaged the aforesaid unilateral modification in the definition of "New Licensee" in the draft Regulations, such that the same could eventually adversely affect the interest of the Appellant.

(vi) The Commission has used its power to remove difficulties in a similar case of Reliance Infrastructure – Distribution Business (RInfra-D) where O&M norms under MYT Regulations, 2011 did not reflect actual expenses incurred by RInfra-D. The

Commission had exercised its powers under Regulation 100 of the MYT Regulations, 2011 to relax the O&M norms vide its judgement dated 22.08.2013 in Case No. 9 of 2013.

(vii) The Appellant is seeking parity in terms of the principles laid down by the Maharashtra Commission itself in the above case. The Commission has failed to exercise similar power vested in Regulation 102 of the MYT Regulations, 2015, in the present matter, without any reasonable justification for the same. As per Section 61 of the Electricity Act, 2003 actual cost ought to have been allowed to the Appellant by the Commission.

8.2 ***Per contra***, the learned senior counsel for the Maharashtra Commission has submitted the following for our consideration

(i) The Transmission voltage and design parameters of JPTL's Transmission line and MEGPTCL's 400 kV assets are similar and both are part of the intra-State Transmission System. Taking into account the geographical area, number of sub-stations and lines operated by MSETCL, its norms could not be applied to the Appellant.

(ii) At the time of framing the MYT Regulations, an opportunity was given to all the Transmission licensees including MEGPTCL for submission of their comments. MEGPTCL did not submit its comments on the O&M expense norms. Accordingly, the

Commission has considered the O&M expenses of the Appellant as per MYT Regulations, 2015.

(iii) As regards the precedent for relaxation in O&M expense norms for RInfra-D in case No 9 of 2013, the Commission has held in the impugned order that the RInfra's matter concerned complexities relating to issues of change over and switch over of consumers in the context of parallel distribution licensees and has no relevance to the present issue.

(iv) The Tribunal has dealt with the issue of O&M in Appeal No 250 of 2016 and upheld the findings of the Commission in order dated 29.05.2019.

Our consideration & findings: -

8.3 We have considered the submissions made by the learned senior counsels of the Appellant and the Maharashtra Commission. This Tribunal had considered similar contentions raised by Adani Transmission (India) Ltd and Maharashtra Commission with regards to provisions of O&M norms in MYT Regulations, 2015 in the judgement dated 29.05.2019 in Appeal No 250 of 2016. It is noted that the factual aspects of both the cases are also identical wherein the Appellant transmission licensees in both the cases had not submitted comments on O&M norms against the draft MYT Regulations, 2015. Accordingly, the norms of JPTL have been made

applicable on the Appellants in both the cases. This Tribunal in the said judgement has held as under.

"OUR FINDINGS:

7.5 *We have carefully considered the rival contentions of the parties on this issue and note that, while formulating the MYT Regulations, 2015, the Respondent Commission in the impugned order has noted that specific inputs were sought on O&M Expense related details from new and existing Transmission Licensees so as to enable the Commission to arrive at appropriate norms for the new Control Period. However, the Appellant did not submit any details in this regard. Further, the Respondent Commission has also observed that the Appellant did not make any submission with regards to O&M expense norms in its comments submitted on draft Regulations circulated along with the discussion paper for stakeholder comments. Therefore, the Appellant willingly chose not to represent before the Respondent Commission on this issue.*

7.7 We refer to a similar case, in which the Tribunal in judgement dated 05.04.2019 in Appeal No. 245 of 2015 & IA No. 398 of 2015 has decided as under:

> *"We have carefully considered the rival contentions on this issue and note that the State Commission has to follow its Regulations on all aspects including the O&M expenses. While taking note of the main premise of the Appellant's contention that in case the actual expenses are lower than the norms, then norms should be considered and in cases where the actual expenses are higher than the norms then the actual expenses should be considered. We do not find any force in the above contentions of the Appellant which results into the situation that only the efficiency gains should be considered whereas the efficiency losses should not be considered but under the regulated regime such pick & choose approach cannot be allowed. Additionally, the aforesaid judgments of this Tribunal have duly interpreted on similar issues. Accordingly, we opine that findings of the State Commission on the O&M issue is just and right in accordance with law and the Commission's Regulations. Therefore, interference of this Tribunal is uncalled for."*

In terms of the above judgement, it is noted that the State Commission has to follow its Regulations on all aspects including the O&M expenses. Further, if the O&M expenses are allowed on actual basis, the whole purpose of specifying norms after following due process of public consultation shall be defeated. Accordingly, we opine that findings of the State Commission on this issue is just and right in accordance with law and the Commission's Regulations. Therefore, this issue is decided against the Appellant."

8.4 In light of the above judgement of this Tribunal, we do not find any infirmity in the decision taken by the Maharashtra Commission in the impugned order. Accordingly, the claim of the Appellant for actual O&M expenses is rejected.

Issue No.6:- Approval of less Interest on Long Term Loan

9. The learned senior counsel for the Appellant has alleged that the State Commission has approved less interest on the Long Term Loan without providing cogent reasoning.

9.1 As regards Interest on Long Term Loan, the senior counsel for the Appellant has submitted that the Commission has allowed interest on long term loan, being Rs 6.29 Cr & Rs 8.21 Cr lower than the actual allowable for FY 2015-16 & FY 2016-17 respectively. As per allowed opening and closing balance mentioned in the impugned order for FY 2015-16, interest on long term loan has worked out as Rs 382.47 whereas the Commission has considered Rs 376.18 Cr for FY 2015-16. Similarly, For FY 2016-17, Interest on long term loan needs to be corrected to Rs 372.16 from Rs 363.95 Cr. Accordingly, the Appellant has sought correction of above errors in the present proceedings.

9.2 ***Per contra***, the learned senior counsel for the Commission has contended that the Commission has calculated interest on loan for financial year 2015-16 and FY 2016-17 based on the approvals of

the opening loan, loan addition during the year, loan repayment during the year and interest rates for the respective years after necessary prudence check which is in line with the applicable regulations viz MYT Regulations 2011 upto and including FY 2015-16 and MYT Regulations 2015 for FY 2016-17 onwards. The Respondent Commission has further contended that commission has computed the interest on loan for each set of asset, considering its put to use dates and in proportion to the number of days, the said set was in commercial operation in the respective year as certified by STU vide its letter dated 03.06.2016. The Respondent Commission has denied any calculation error in the computation of interest on loan for the FY 2015-16 and FY 2016-17.

Our consideration & findings: -

9.3 We have considered the submission made by the Appellant and the Respondent Commission. At the outset, the issue pertains to difference in the Interest on loan computation by the Appellant and the Respondent Commission. **Therefore, we do not find any reason to intervene on this issue**.

9.4 The issue may be taken up by the Appellant with the Respondent Commission during the next tariff proceedings for clarity on computation of interest. **The Maharashtra Commission is**

directed to clarify the above issue to the Appellant and correct computational error, if any.

Issue No.6:- Income from Interest & Profit from Sale of Investment considered as Non-Tariff Income

10. The learned senior counsel for the Appellant contended that the State Commission has wrongly considered income from interest and profit from sale of investment as non-tariff income.

10.1 The Appellant has submitted that the Commission, in the impugned order, has considered income from interest of Rs. 0.07 Crore and profit from sale of investment of Rs. 0.26 as a part of Non-Tariff Income for the year 2014-15 and consequently, reduced its ARR by Rs. 0.33 Crore. The Appellant has contended that Income earned by the Appellant is by way of investment from its Return on Equity and hence such income need not be considered as part of Non-Tariff Income. It has been further contended that the income earned by investing Return on Equity (RoE) cannot be considered as Non-tariff Income since RoE is a fund on which the shareholders have exclusive rights. The shareholders through Board of Directors may decide either to retain the ROE/profit in the same business by ploughing back the profits for creation of reserves or take it out of the business through payment of dividend.

10.2 The Appellant has further submitted that since dividend attracts Dividend Distribution Tax at the level of the company, in the interest of shareholders, the said RoE has been retained in the business and invested. Had the RoE been taken out of the business there would not have been any interest income due to the same. The Appellant has relied on the approach paper for MYT Regulations, 2011 to contend that interest earned from RoE is to be retained by the Licensee as per MYT Regulations, 2011. Further, the Commission has also not considered interest income on investments made out of RoE as Non-Tariff Income in MERC (Multi Year Tariff) Regulations, 2015.

10.3 ***Per contra***, the Maharashtra Commission has submitted that upon scrutiny of the audited accounts of the Appellant for FY 2014-15, it was observed that the Appellant had earned an income from interest of Rs. 0.07 crore and profit from sale of investment of Rs 0.26 crore. The Commission vide its data gaps, had sought clarification from the Appellant for not projecting any Non-Tariff Income for FY 2014-15. The Appellant in its response did not mention any information regarding non-inclusion of the said interest/income from profit as a part of Non-Tariff Income. In the absence of any relevant

information, the Commission has treated such income as part of Non-Tariff Income and deducted the same from ARR.

10.4 The Maharashtra Commission has further submitted that the Appellant has failed to provide any documentary evidence or any justification to prove that such income of the Appellant is earned out of investment made from RoE. The Commission has further contended that had the Appellant provided justification, the Commission could have dealt with the same accordingly.

Our consideration & findings: -

10.5 We have gone through the submissions made by the Appellant and the Respondent Commission as well as the MYT Regulations, 2011 and MYT Regulations, 2015. We note that 'Income from Investment' has been considered as Non-Tariff Income in MYT Regulations, 2015. However, it has been clarified through a proviso that interest earned from investments made out of Return on Equity corresponding to the regulated Business of the Transmission Licensee shall not be included in Non-Tariff Income.

10.6 It is also noticed that MYT Regulations, 2011 neither had 'Income from Investment' as part of Non-Tariff Income nor had the aforesaid proviso. However, as pointed out by the Appellant, the approach

paper for MYT Regulations, 2011 had provided that interest earned from RoE is to be retained by the Licensee.

10.7 Admittedly, MERC had observed during scrutiny of audited accounts of the Appellant for FY 2014-15 that the Appellant had earned an income from interest and profit from sale of investment in FY 2014-15. The Commission in the data gaps had sought clarification from the Appellant for not projecting any Non-Tariff Income for FY 2014-15. The Commission considered this income under Non-Tariff Income as the Appellant did not provide any documentary evidence or any justification to prove that such income is earned out of investment made from RoE. The Commission has submitted that if the justification had been provided it could have dealt with the same accordingly. We opine that the Appellant should have submitted the information sought by the Commission. However, we observe that the Commission should have straight away sought details about the source of aforesaid interest/investment from the Appellant after observing it in the audited accounts for FY 2014-15 instead of seeking clarification from the Appellant for not projecting any Non-Tariff Income for FY 2014-15.

10.8 In light of the above, we remand this issue to the Commission to reconsider the issue as per the appropriate Regulations after seeking necessary details and justification from the Appellant.

Issue No.7:- Holding Cost of Interest on Contingency Reserve

11. The learned senior counsel appearing for the Appellant contended that the State Commission has erroneously held the impugned order that the delay in investment of contribution to contingency reserves should be reduced from the approved ARR for FY 2014-15.

11.1 Learned senior counsel for the Appellant has submitted the following for our consideration:-

(i) The Commission in the impugned order has held that the holding cost of Rs.0.95 Crore for the delay in investment of Contribution to Contingency Reserves should be reduced from the approved ARR for the Financial Year 2014-15.

(ii) The Commission has recorded the submission of the Appellant that due to delay in recovery of the approved Transmission Tariff, the Appellant has not been able to make investment of Contingency Reserve. However, the Commission has held that the Carrying cost approved by the Commission for FY 2013-14 and 2014-15 includes component of Contribution to Contingency Reserve and that any delay in investment of the

funds available under the approved Contingency Reserves beyond the time-frame permitted needs to be compensated. The Commission has further opined that allowing the retention of the approved funds beyond the permitted time and also compensating the Appellant for the delay in recovery of ARR through carrying cost would result in a double benefit to the Appellant.

(iii) In view of the above, the Commission worked out holding cost for delay in Investment of Contribution to Contingency Reserve considering the rate of Interest at 14.75%, 14.29% & 10.80% for the years FY 2014-15, FY 2015-16 & FY 2016-17 respectively.

(iv) In terms of the Second Proviso to Regulation 36.1 of the MERC MYT Regulations, 2011, the Appellant was required to invest amount of allowed Contribution to Contingency Reserve in Securities Authorised under the Indian Trust Act, 1882 within a period of Six Months of the Close of the Financial Year.

(v) Return on Investment made to Securities Authorised under Section 20 of Indian Trust Act, 1882 remains approximately 6-7%. Therefore, the rate of interest considered by the Respondent Commission in excess of 6-7% for working out

Holding Cost of Rs 0.95 Cr. is not justified and consequently liable to be set aside.

(vi) Therefore, the Appellant craves indulgence of the Tribunal to set aside the findings of the Commission in the impugned order and declare that a holding cost of Rs 0.52 Cr., which is worked out at 6-7 % should be considered and the excess amount of Rs 0.43 Cr., which is worked out by the Respondent Commission should be reversed and allowed to the Appellant by way of proportionate increase in the ARR.

11.2 ***Per Contra***, the learned senior counsel for the Maharashtra Commission has contended that the licensees are compensated for under recovery of ARR through carrying cost at the SBI advanced rate SBAR as considered for the second control period as per MYT Regulations 2011 or 150 base points above SBI Base rate in accordance with Regulation 32 of 2015. In the impugned order, the Commission has computed carrying cost using weighted average SBAR of FY 2014-15 & 2015-16. For FY 2016-17, SBI Base rate plus 150 basis points has been considered in line with Regulation 32 of MYT Regulation 2015.

11.3 As such, the over recovery of ARR, the holding cost should be levied at the same rate as carrying cost to ensure fair treatment to both the licensees and the consumers.

Our consideration & findings: -

11.4 We have considered the submissions made by the Appellant and Respondents. The Appellant has stated to have not invested Contingency Reserve on account of delay in recovery of the approved Transmission Tariff. The Commission allowed carrying cost on 'Contribution to Contingency Reserve' for FY 2013-14 and 2014-15. The Commission has levied holding cost on the contribution to contingency reserve not invested but retained by the Appellant along with carrying cost. Since the contribution to Contingency Reserve was not invested by the Appellant and benefit of carrying cost was also accrued to the Appellant, it would not be prudent to allow excess amount retained by the Appellant without any cost.

11.5 Therefore, we do not find any infirmity in the decision of the Commission. However, holding cost shall be applicable only on the amount that was recovered from the consumer and not invested as contribution to contingency.

Summary of our findings:-

12. Based on our consideration and findings on various issues in the foregoing paragraphs, we sum up our findings / decisions as under:-

12.1 Issue No.1 :- Commercial Operation Date (COD)

It is decided that COD of Third set of Transmission Assets shall be 31.03.2015 and the Appellant shall be entitled to tariff from 31.03.2015 onwards as per MYT Regulations, 2011 (2.1 (29) read with Regulation 12 & 13).

12.2 Issue No.2 :- FERV on Material Import and Price Variation

It is decided to allow FERV on the material import as well as variation of prices of raw materials during the period of delay considering that the delay is not attributable to the Appellant.

12.3 Issue No.3 :- Disallowance of Various capital components

i) Additional bays at Akola -II sub-station and additional towers for charging:

These additional bays and additional towers are not only out of scope of work but also not in use and are spare assets. Therefore, cost of these assets cannot be passed on to the consumers and hence the claims of the Appellant on account of additional bays and additional towers are rejected.

ii) Claim for damaged items, demurrage charges and idling charges:

We find substance in findings of the State Commission on these issues and decide to reject these claims of the Appellant in the overall interest of consumers.

iii) Interest During Construction:

The State Commission has already approved provisional IDC which is required to be finalised considering the contentions raised by the Appellant.

12.4 Issue No.4 :- DPC as Non-tariff income

In light of the judgment of this Tribunal dated 29.05.2019 in Appeal No. 250 of 2016, DPC cannot be considered as non-tariff income. Accordingly, this issue is decided in favour of the Appellant.

12.5 Issue No.5 :- Non-allowance of actual O& M Cost

This Tribunal had considered similar contentions raised by Adani Transmission (India) Ltd. and MERC in regard to actual O&M cost in Appeal NO. 250 of 2016 and decided in the judgment dated 29.05.2019. In light of the above judgment, this issue is decided against the Appellant.

12.6 Issue No.6 :- Approval of less interest on long term loan

We do not find any reason to intervene on this issue decided by the State Commission. However, the issue may be taken up by the

Appellant with the Commission during next tariff proceedings for clarity on computation of interest and correction of error, if any.

12.7 Issue No.7 :- Income from interest & profit from sale of investment considered as non-tariff income

We decide to remand this issue to the State Commission to reconsider as per the appropriate regulation after seeking necessary details and justification from the Appellant.

12.8 Issue No.8 :- Holding cost of Interest on contingency reserves

We do not find any infirmity in the decision of the State Commission on this issue. However, holding cost shall be applicable only on the amount that was recovered from the consumers and not invested as contribution to contingency reserves.

ORDER

In the light of the above, we are of the considered view that some of the issues raised in the Appeal No. 260 of 2016 have merits and hence the appeal is partly allowed. The impugned order dated 05.07.2016 passed by Maharashtra Electricity Regulatory Commission in Case No. 50 of 2016 is hereby set aside to the extent of our findings under Para 12.1 to 12.8, stated supra.

The matter stands remitted back to the State Commission with a direction to pass consequential orders as expeditiously as possible within a period of three months from the date of pronouncement of this judgment /order.

In view of the disposal of the appeal, the IA Nos. 06 of 2018 and 902 of 2018 do not survive for consideration, hence stand disposed of.

No order as to costs.

Pronounced in the Virtual Court on this **24th day of July, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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