APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 58 OF 2018

Dated : 20th October, 2020

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

IN THE MATTER OF :

The Tata Power Company Limited
Bombay House,
24, Homi Mody Street,
Fort,
Mumbai 400 001
Maharashtra .....Appellant

Versus

Maharashtra Electricity Regulatory Commission
World Trade Centre,
Centre No.1, 13th Floor,
Cuffe Parade, Colaba,
Mumbai-400005
Maharashtra .....Respondent(s)

Counsel for the Appellant (s) : Mr. Amit Kapur
Mr. Apoorva Misra
Mr. Abhishek Ashok Munot
Mr. Kunal Kaul
Mr. Tushar Nagar

Counsel for the Respondent(s) : Ms. Pratiti Rungta for R-1

J U D G M E N T

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

1. The Appellant, Tata Power Company Limited (Distribution) ("**Tata Power-D**"/ "**Appellant**") has filed the present Appeal challenging the certain specific findings of the Maharashtra Electricity Regulatory Commission ("**MERC"**/ "**Respondent**") in its Tariff Order dated 21.10.2016 ("**MYT Order dated 21.10.2016**") passed in Case No. 47 of 2016 filed by Tata Power-D ("**Original Petition**") read with MERC's Review Order dated 22.11.2017 ("**Review Order dated 22.11.2017**") in Case No. 165 of 2016 filed by Tata Power-D ("**Review Petition**").

1.1 The MYT Order dated 21.10.2016 in Case No. 47 of 2016 was passed by MERC for Truing-up of FY 2014-15, provisional Truing-up for FY 2015-16 and Aggregate Revenue Requirement and Tariff for FY 2016-17 to 2019-20. Being aggrieved by MERC's MYT Order dated 21.10.2016, Tata Power-D had filed a Review Petition seeking review of MERC's MYT Order dated 21.10.2016 to the extent stated therein. The said Review Petition was partly allowed by MERC vide its Review Order dated 22.11.2017. As a result, the Review Order dated 22.11.2017 has merged with the MYT Order dated 21.10.2016 thereby modifying the same to that extent. Being aggrieved by the MYT Order dated 21.10.2016 read with Review Order dated 22.11.2017, Tata Power-D is filing the present Appeal. MERC's MYT Orders dated 21.10.2016 and Review Order dated 22.11.2017 are hereinafter collectively referred to as "**Impugned Orders**".

1.2 Tata Power-D has challenged the Impugned Orders on the following three issues:-

(a) Disallowance of appropriate depreciation rates for Retail Supply Business for FY 2014-15.

(b) Disallowance of DSM employee cost as part of its DSM expenditure for FY 2014-15.

(c) Erroneous Remittance of Transmission Charges received by Tata Power-D from Open Access Consumers to STU.

2. **Description of Parties*:-***

2.1 Tata Power-D is a Distribution Licensee supplying electricity in the Island City of Mumbai and Suburban Area of Mumbai in terms of various licences granted to it from time to time. By virtue of its Distribution Licence No. 1 of 2014, Tata Power-D is authorized to supply electricity to consumers in:-

(a) The Island City of Mumbai, where Brihanmumbai Electric Supply and Transport Undertaking ("**BEST**") and MSEDCLis also licensed to distribute and supply electricity.

(b) Suburban Mumbai and the villages of Chene and Vesave, where Reliance Infrastructure Limited and Maharashtra State Electricity Distribution Limited are also licensed to distribute and supply electricity.

2.2 Respondent, MERC, is a statutory authority constituted under the Electricity Regulatory Commissions Act, 1998 with limited and specific powers vested by Sections 86 and 181 of the Electricity Act. The powers of Maharashtra Commission, amongst others, include the power to determine the tariff.

3. **Facts of the Case:-**

3.1 On 10.06.2003, the Electricity Act came into force. Pursuant to the enactment of the Electricity Act, Tata Power-D is required to submit its Aggregate Revenue Requirement ("**ARR**") and Tariff Petitions as per procedureprescribed in Sections 61, 62 and 64, of the Electricity Act, and the governing regulations thereof.

3.2 On 26.04.2010, in exercise of its powers under Sections 181(1)(zp) and Section 181 (2) of the Electricity Act, MERC notifiedDSM Implementation Regulations, which is applicable to all distribution licensees in Maharashtra for implementation of appropriate DSM programmes on a sustained basis.

3.3 On 04.02.2011, in exercise of its powers under sub-sections (zd), (ze) and (zf) of Section 181 (2) read with Sections 61, 62 and 86 of the Electricity Act and all powers enabling it in that behalf, MERC notified MYT Regulations 2011, which are applicable for determination of tariff in all cases covered under the said MYT Regulations 2011 from 01.04.2011 till 31.03.2016.

3.4 On 29.11.2011, Tata Power-D filed Case No.165 of 2011before MERC, submitting its MYT Business PlanPetition for the Second Control Period.

3.5 On 04.12.2011, Tata Power-D filed Case No. 179 of 2011 before MERC seeking determination of ARR for the MYT period from FY 2011-12 to FY 2015-16 ("**MYT Petition for FY 2011-12 to FY 2015 -16**").

3.6 On 26.08.2012, MERC issued the Business Plan Order, wherein

Tata Power-D was directed to file ARR for FY 2011-12 as per the MERC (Terms and Conditions of Tariff) Regulations, 2005 ("**Tariff Regulations 2005**").

3.7 Being aggrieved by MERC's Order dated 26.08.2012 in Case No. 165 of 2011, Tata Power-D filed an Appeal (being Appeal No.183 of 2012) before this Hon'ble Tribunal, challenging MERC direction of filing ARR of FY 2011-12 as per the Tariff Regulations, 2005 and not as per the MYT Regulations 2011.

3.8 On 28.06.2013, MERC passed an Order in Case No. 179 of 2011,truing up expenses for FY 2011-12,approving the ARR for FY 2012-13 to FY 2015-16 and retail tariff and wheeling charges for the period FY 2013-14 to FY 2015-16 ("**MYT Order dated 28.06.2013**"). MERC in the said MYT Order dated 28.06.2013 observed that it would undertake the mid-term review of Tata Power-D's performance during the third quarter of FY 2014-15.

3.9 On 28.11.2013, this Hon'ble Tribunal by its Judgment allowed Appeal No.183 of 2012 and directed MERC to true up FY 2011-12 as per the MYT Regulations 2011.

3.10 Being aggrieved by the MYT Order dated 28.06.2013, Tata Power-D filed an Appeal (bearing Appeal No.244 of 2013) before this Hon'ble Tribunal. On 28.11.2014, the Tribunal passed by its Judgment partly allowing Tata Power-D's claims and directed MERC to pass consequential orders in terms of the findings therein.

3.11 On 12.01.2015, pursuant to the directions of MERC in its MYT Order dated 28.06.2013 and the directions issued by this Tribunal in its

Judgment dated 28.11.2014 in Appeal No. 244 of 2013, Tata Power-D filed the Mid-Term Review Petition (being Case No.18 of 2015) for revised Truing up for FY 2011-12, Truing up of FY 2012-13 and FY 2013-14, provisional True up of Aggregate Revenue Requirement for FY 2014-15, and revised Aggregate Revenue Requirement and Tariff for FY 2015-16 for the Distribution Business of Tata Power-D.

3.12 On 26.06.2015, MERC passed its Order in Case No. 18 of 2015 revising the tariff and truing up the expenses of Tata Power-D. The said Order was challenged by Tata Power-D by filing Appeal No. 245 of 2015 before this Tribunal, which is pending adjudication before this Tribunal.

3.13 On 08.12.2015, in exercise of its powers under sub-sections (zd), (ze) and (zf) of Section 181 (2) read with Sections 61, 62 and 86 of the Electricity Act and all powers enabling it in that behalf, MERC notified MERC (Multi Year Tariff) Regulations, 2015 ("**MYT Regulations 2015**"), which are applicable for determination of tariff in all cases covered under the said MYT Regulations 2015 from 01.04.2016upto 31.03.2020.

3.14 On 01.03.2016, Tata Power-D filed its Petition (Case No. 47 of 2016) before MERC for (i) Truing-up of FY 2014-15; (ii) Provisional Truing-up for FY 2015-16 under the MYT Regulations; (iii) ARR as per MYT Principles for the Control Period from FY 2016-17 to FY2019-20 under the MYT Regulations; (iv) Revenue from the sale of power at existing Tariffs and charges and projected revenue gap for each year of the Control Period; and (v) Proposed Category-wise Tariffs for each year of the Control Period.

3.15 On 21.03.2016, MERC scrutinised the Petition, and directed Tata Power-D to address the data gaps raised at the first Technical Validation Session ("**TVS**"), in which authorised Institutional Consumer Representatives were also invited.

3.16 Accordingly, on 24.04.2016, Tata Power-D filed its Revised Petition (Case No. 47 of 2016) before MERC after incorporating all the necessary data and changes.

3.17 On 26.04.2016, MERC passed an Order admitting the revised Petition (Case No. 47 of 2016) filed by Tata Power-D.

3.18 On 29.04.2016, Public Notices of the filing of the MYT Petition (Case No. 47 of 2016) were published by Tata Power-D for inviting suggestions and objections from the public and stakeholders in the variuous newspapers.

3.19 On 24.05.2016, a public hearing on Tata Power-D's MYT Petition (Case No. 47 of 2016) in the context of objections and suggestions was conducted by MERC.

3.20 On 29.05.2016, MERC sent an email to Tata Power-D raising certain queries relating to data in Tata Power-D's Case No. 47 of 2016.

3.21 On 30.06.2017, Tata Power-D issued another letter to MERC providing its response to the queries raised by MERC vide its email dated 29.05.2016.

3.22 On 21.10.2016, MERC passed the MYT Order dated 21.10.2016in Case No. 47 of 2016.

3.23 On 08.12.2016, Tata Power-D filed a Review Petition (Case No. 165 of 2016) before MERC seeking review of MYT Order dated 21.10.2016on the issues as stated therein.

3.24 On 22.11.2017, MERC passed its Review Order dated 22.11.2017 allowing certain issues while disallowing certain issues raised by Tata Power-D in its Review Petition.

3.25 Aggrieved by issues which have been decided by MERC against Tata Power-D, the Appellant has preferred the present Appeal.

4. **Questions of Law:-**

The Appellant has raised the following questions of law:-

(A) Whether MERC failed to compute applicable depreciation for each asset in accordance with the Depreciation Schedule provided in the MYT Regulations 2011 for retail supply of Tata Power-D for FY 2014 -15.

(B) Whether MERC erred in disallowing certain DSM expenditurefrom the total amount of DSM expenditure claimed by Tata Power-D for FY 2014-15?

(C) Whether MERC erred in directing Tata Power-D to remit the Transmission Charges of Rs. 2.02 Crores to STU?

5. **Shri Amit Kapur, learned counsel appearing for the Appellant has filed the following written submissions for our consideration:-**

5.1 The impugned disallowances by MERC are contrary to its own Regulations, viz:

Impugned Disallowances and their impact

S. No.	Impugned Disallowance	Contrary to	Impact (in Rs. Cr.)
1.	Partial disallowance of depreciation qua Tata Power-D's Retail Supply business	Regulations 31.1 and 31.2 read with Depreciation Schedule of the MERC MYT Regulations 2011 ("MYT Regulations, 2011")	1.94
2.	Partial disallowance of Demand Side Management ("DSM") expenses on account of employee expenses	Regulation 3.2 and 9 of the of the MERC (Demand Side Management Implementation Framework) Regulations, 2010 ("DSM Implementation Regulations 2010")	1.37
3.	Remittance of revenue from partial Open Access customers to State Transmission Utility ("STU")	Regulation 15.2(v) of MERC (Distribution Open Access) Regulations, 2014 ("DOA Regulations 2014")	2.02
		Total Impact	5.33

Partial disallowance of depreciation amount claimed by Tata Power-D qua its retail supply assets for FY 2014-15

5.2 As per Regulation 31.2(b)of the MYT Regulations 2011,Tata Power-D was entitled to depreciation of Rs. 7.23 Crores qua its Retail Supply Business for FY 2014-15 at an average rate of 6.49% on the current capital value of the assets at the asset-wise depreciation rates provided in the Depreciation Schedule to the MYT Regulations 2011. However, MERC has contrary to the said Regulations, allowed Tata Power-D depreciation of Rs. 5.29 Crores @ 4.75% i.e. being the weighted average rate of depreciation allowed for the previous year FY 2013-14). This rate of 4.75 % was wrongly applied by MERC by taking the average of opening and closing GFA for FY 2013-14 for the Retail Supply Business. As a result, MERC has wrongly disallowed Tata Power-D's depreciation claim of Rs. 1.94 Crores for its Retail Supply Business for FY 2014-15.

5.3 In this regard, MERC in the Impugned MYT Order dated 21.10.2016 held that:

"…

3.6 Depreciation

…….

Commission's Analysis and Ruling

….

The Commission also asked TPC-D to justify the Depreciation rates of 5.93% and 10.15% put forth by TPC-D for its Wires and Supply Business, respectively, when they were considered as 5.68% and 4.92% in the original Petition submitted on 27 February, 2016. TPC-D stated that the figures in the original Petition had certain linkage errors, which had been thoroughly examined and matched with SAP figures and rectified in the revised Petition. Further, the Depreciation considered in the audit certificate is based on the rate as per the Income Tax Act, which will not match with the Depreciation rate as per the MYT Regulations, 2011.

TPC-D has considered the Depreciation rate of 5.05% on the average of opening and closing Gross Fixed Assets (GFA) for FY 2014-15 for the Wires Business, rather than 5.93% as stated originally. The Commission has considered the average Depreciation rate of 5.05% on the average of opening and closing GFA for FY 2014-15 for the Wires Business, as submitted by TPC-D and in accordance with the MYT Regulations, 2011. In case of the Supply Business, the average Depreciation rate considered by TPC-D works out to 8.69%, which is far higher than 5.28%. The Commission has considered the average Depreciation rate of 4.75% on the average of opening and closing GFA for FY 2014-15 for the Supply Business, based on the average Depreciation considered for FY 2013-14 in the MTR Order.

…..

The Commission has approved Depreciation for the Wires Business and Supply Business for FY 2014-15 as shown in the Table below:

Table 3-28: Depreciation for Wires Business and Supply Business for FY 2014-15 approved by Commission (Rs. crore)

Particulars	Wires Business			Supply Business		
	MTR Order	TPC-D Petition	Approved in this Order	MTR Order	TPC-D Petition	Approved in this Order
Opening GFA	1315.64	1325.12	1315.64	97.04	87.56	97.04
Addition	369.70	464.82	232.41	19.69	29.45	28.65
Retirement	0.00	0.86	0.86	0.00	0.00	0.00
Closing GFA	1685.34	1789.08	1547.19	116.73	117.01	125.69
Depreciation	**75.65**	**78.58**	**72.24**	**5.24**	**8.89**	**5.29**
Depreciation as a percentage of average of opening & closing GFA (%)	5.04%	5.93%	5.05%	4.90%	10.15%	4.75%

5.4 In its Review Order dated 22.11.2017, MERC has held that:-

"….
6. ISSUE I: Depreciation for Retail Supply Business for FY 2014-15

The Commission had observed a large difference between the depreciation rate of 4.92% for the Supply Business for FY 2014-15 as presented by TPC-D in its original MYT Petition, and the rate of 10.15% submitted in the revised Petition. Considering this higher rate submitted subsequently, the average depreciation rate worked out to 8.69%, which the Commission noted was far higher than the average depreciation rate of 5.28% allowed for most assets (including those not expressly listed) in the Depreciation Schedule read with Regulation 31.2(b) of the MYT Regulations, 2011.
…..
The Commission observes that, subject to these ambiguities, the details provided by TPC-D show that, except for items contributing at most only 16% to the total depreciation (IT equipment and temporary structures), the depreciation rate specified in the MYT Regulations, 2011 is 5.28% or less. Considering this position and the errors or ambiguities in its submissions, the Commission had applied the average depreciation rate determined for FY 2013-14 in the earlier MTR Order as the depreciation rate for FY 2014-15 for the Supply Business. In these circumstances, review of the MYT Order on this issue is not warranted….."

5.5 MERC has sought to supplement the Impugned findings with the following new justifications (vide its Reply dated 18.05.2018, its Written Submissions dated 07.06.2020, Additional Written Submissions dated 09.07.2020 and during the hearing on 10.07.2020):-

(a) During the proceedings before MERC, Tata Power-D had only provided the asset codes but not the type of assets and the business such assets form part of (i.e. Wires or Supply). In the absence of actual depreciation with head-wise details, MERC relied on the previously approved (for FY 2013-14) weighted average rate of depreciation.

(b) A perusal of Tata Power-D's letter dated 30.06.2016reveals that the information required to examine rate of depreciation viz. date of acquisition of asset, type of asset and its corresponding business was not provided. Instead of providing the details of each asset and its corresponding business, Tata Power-D only provided the asset code. Hence, MERC had no option but to allow depreciation at the rate of 4.75% based on the average depreciation considered for FY 2013-14.

(c) The proviso to Regulation 31.5 clearly stipulates that depreciation shall be recalculated for the assets capitalized at the time of mid-term performance review or at the time of final truing up during determination of tariff for third control period based on documentary evidence of the assets capitalized by Tata Power-D subject to prudence check such that the depreciation is calculated proportionately from the date of capitalization. Because of the default on part of Tata Power-D to provide full information and documentary evidence, MERC was left with no option but to calculate depreciation based on the average of opening and closing value of the assets approved by MERC.

(d) One example of higher rate of depreciation claimed by Tata Power-D for its retail supply business for FY 2014-15 is in respect of Air Conditioning is 9.50% whereas in the Schedule to the MYT Regulations, 2011, the depreciation rate for static air conditioning is 5.28%. Tata Power-D has not specified whether the claim in respect of air conditioning is in relation to static air conditioning or portable.

(e) Tata Power-D has claimed 100% depreciation in respect of temporary structures for its retail supply business though in terms of Regulation 31.2(c) of MYT Regulations, 2011, the salvage value of the asset shall be considered at 10% of the allowable capital cost and depreciation shall be allowed upto a maximum of 90% of the allowable capital cost of the asset.

(f) Tata Power-D had included assets/ wires of its Transmission business in the data provided to MERC.

5.6 At the outset, it is noteworthy that MERC in its Submissions in the present Appeal has sought to furnish several additional reasons to justify its Impugned Orders. It is settled law that the same cannot be considered by this Hon'ble Tribunal in light of Hon'ble Supreme Court's Judgment in *Mohinder Singh Gill v. Chief Election Commissioner* [(1978) 1 SCC 40]holding that:-

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may,

by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in GordhandasBhanji [Commr. of Police, Bombay v. GordhandasBhanji, AIR 1952 SC 16] :

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older."

5.7 Depreciation is allocation of costs so as to charge a fair proportion of the depreciable amount in each accounting period during the expected useful life of the asset(s). Depreciation includes amortisation of assets whose useful life is predetermined [See *DERC Vs. BYPL and Ors.* [(2007) 3 SCC 33, Paras 40-41] It includes depletion of resources through the process of use. An asset is recognised in the balance sheet when one expects economic benefits associated with it to flow in future over a period of years. Accordingly, the asset has a cost or value that can be measured. Matching of revenue and expenses is an important exercise under accounting. Depreciation is a part of this exercise. The allocated cost of a given year has to match with the expected revenue for that year. The concept of matching is a concept according to which expenses are recognised in the statement of profit and loss on the basis of direct connection between the costs incurred and the earning of specific items of income. Depreciation helps this concept of matching. Depreciation is ordinarily not a "source of fund" under commercial accounting, however, under the Electricity Act/ Tariff Regulations depreciation enables the utility to work out the charges to be recovered from consumers for supply of electricity. Further, the applicability of higher rates of depreciation

for assets is also emphasized due to the substitution of the concept of historical cost with the concept of replacement cost on account of inflation in the economy. Therefore, MERC is required to follow the provisions of the Schedule to the said Regulations while calculating depreciation as one of the items of expense.

5.8 As per the aforesaid Judgment and the Judgment of the Hon'ble Supreme Court in the matter of *PTC v. CERC and Ors*: (2010) 4 SCC 603, MERC is duty bound to follow its regulations. In this regard, the relevant findings are set out below:

54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to

passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

5.9 Regulation 31 of the MYT Regulations, 2011 lays down that in case of truing up, depreciation has to be calculated in terms of Regulation 31.2(b) of the MYT Regulations, 2011 i.e. by following the straight line method at the rates set out in the Depreciation Schedule in the MYT Regulations, 2011 (as applied to each class of assets). These rates are to be allowed on the current capital value of the assets. Tata Power-D had calculated the depreciation on its assets in line with the computational principles laid out in Regulations 31.2 of the MYT Regulations, 2011. Relevant extracts of the MYT Regulations are set out hereunder for ease of reference:-

"31.2 The Generation Company and Transmission Licensee or Distribution Licensee shall be permitted to recover depreciation on the value of fixed assets used in their respective Business computed in the following manner:

(a) The approved original cost of the project/fixed assets shall be the value base for calculation of depreciation:

Provided that the depreciation shall be allowed on the entire capitalised amount of the new assets after reducing the approved original cost of the project/fixed assets of retired or replaced assets.

(b) Depreciation shall be computed annually based on the straight line method at the rates specified in the Annexure I to these Regulations:

Provided that the Generating Company or Transmission Licensee or Distribution Licensee shall ensure that once the individual asset is depreciated to the extent of seventy (70) percent, remaining depreciable value as on 31st March of the year closing shall be spread over the balance useful life of the asset, as provided in these Regulations. Provided that the Generating Company or Transmission Licensee or Distribution Licensee, shall submit all such details or documentary evidence, as may be required under this Regulation and as stipulated by the Commission, from time to time, to substantiate the above claims.

(c) The salvage value of the asset shall be considered at 10 per cent of the allowable capital cost and depreciation shall be allowed upto a maximum of 90 per cent of the allowable capital cost of the asset.

….

31.5 In case of projected commercial operation of the assets for part of the year, depreciation shall be calculated based on the average of opening and closing value of assets, approved by the Commission.

Provided that depreciation shall be re-calculated for assets capitalised at the time of Mid-term Performance Review or at the time of final truing up during determination of tariff for third Control Period, based on documentary evidence of assets capitalised by the applicant, subject to the prudence check of the Commission, such that the depreciation is calculated proportionately from the date of capitalisation.

5.10 The reason given by MERC for such disallowance is that Tata Power-D had failed to provide the actual depreciation rates with asset and business wise classification to MERC. This finding is factually incorrect and contrary to the documents placed on record, being:-

(a) By its e-mail dated 15.03.2016, MERC had raised queries in relation to certain data gaps in Tata Power-D's MYT Petition. MERC had also asked Tata Power-D to provide detailed asset-wise depreciation in MS Excel.

(b) On 20.03.2016, Tata Power-D responded to MERC's e-mail dated 15.03.2016. While providing its response to the data gaps, in Annexure 8 of its Reply Tata Power-D also provided detailed asset-wise depreciation in MS Excel sheet. This had also specifically provided for wires and supply businesses.

(c) By its letter dated 29.05.2016, MERC raised additional queries with respect to Tata Power-D's MYT Petition, including on the rate of depreciation sought by Tata Power-D with asset wise classification.

(d) By letter dated 30.06.2016, Tata Power-D responded to MERC's additional queries dated 29.05.2016:

    (i) Computing the asset wise depreciation in terms of the depreciation rates provided in the Depreciation Schedule of the MYT Regulations, 2011.

(ii) Justifying the rate of depreciation originally sought by Tata Power-D [@ 10.15%].

(iii) Providing MERC a list of assets along with the depreciation rates applied by it.

(e) On 21.10.2016, MERC passed the original Impugned MYT Order, failing to note the information provided by Tata Power-D on 20.03.2016 and 30.06.2016 to disallow the actual depreciation claimed by Tata Power-D for its Retail Supply Business for FY 2014-15.

(f) On 08.12.2016, Tata Power-D filed the Review Petition annexing details of asset wise break up of depreciation for FY 2014-15, as provided earlier vide letter dated 30.06.2016

(g) On 21.03.2017, Tata Power-D's Review Petition was listed for hearing before MERC. MERC vide its Daily Orderdirected Tata Power-D to submit, within 10 days, details of the head-wise asset depreciation considered for FY 2014-15

(h) On 13.04.2017, Tata Power-D, in compliance of MERC's directions dated 21.03.2017, once again provided the details of head-wise asset depreciation considered for FY 2014-15. It is noteworthy that the data provided by Tata Power-D on 13.04.2017 had detailed description of the assets for which the depreciation was being calculated. However, MERC once again failed to even consider such details, as is evident from a perusal of the Review Order dated 22.11.2017.

5.11 MERC's contention brought out only in its Written Submissions and Additional Written Submissions at the Appellate stage that Tata Power-D's letter dated 30.06.2016 did not contain asset-wise

depreciation details as sought by MERC is misconceived and factually incorrect. As is evident from the above, Tata Power-D had on multiple occasions provided MERC with asset wise details of depreciation. In fact, by its letter/ dated 13.04.2017, Tata Power-D provided detailed asset descriptions as well. A perusal of the Review Order shows that MERC has not even considered the data provide by Tata Power-D on 13.04.2017.

5.12 Given that these details were submitted by Tata Power-D to MERC (on multiple occasions), there was no reason for MERC to have ignored these submissions and approve the previous year's (i.e. FY 2013-14) depreciation rate contrary to its Regulations. MERC ought to have computed depreciation in terms of Regulation 31.2(b) [i.e. by following the straight line method].

5.13 MERC's has contended that Regulation 31.5 of the MYT Regulations is applicable in the present case. This is erroneous and based on an incorrect understanding of the MYT Regulations 2011. It is submitted that, Regulation 31.5 applies in the case of projected commercial operation of the assets for part of the year, i.e., when an asset is added during the year or retired during the year, whereas Regulation 31.2(b) of the MYT Regulations applies to the asset base which is pre-existing. Neither condition of Regulation 31.5 was fulfilled in FY 2014-15.In other words, the Regulations themselves do not permit the interpretation sought to be applied by MERC.

5.14 As regards MERC's example of air conditioning, it is noteworthy that the Schedule to the MYT Regulations, 2011 stipulates a depreciation rate of 5.28% for static air conditioning and 9.50% for portable air conditioning. The details mentioned alongside asset

wise heads submitted by Tata Power-D indicate that the rates were applied accordingly. Reference may be made to the following extract of Tata Power-D's letter dated 13.04.2017 from which it is abundantly clear that Tata Power-D had clearly identified portable and static air conditioners in its submission to MERC, and had also applied the appropriate depreciation rate as per the Schedule, viz.:

Asset	Capital-ization date	Cumulative Acquisition Value	Transfer Acquisition Value	Depreciation	Depreciation Rate	Asset name
522000327	15.10.2010	63,120.55	0	0.00	5.28%	AC 1.5tr Vertis gold hwm split at Mankhurd APC
522000328	15.10.2010	22,299.23	0	0.00	5.28%	AC split type 1tr f/Mankhurd APC
522000350	20.03.2013	34,56,957.50	0	-0.02	5.28%	Supply & Installn of VRF AC Units at Dharavi 1st &
523000895	22.02.2011	8,49,353.00	0	-0.01	9.50%	ACs w/installing at new office at Dharavi
523000921	30.10.2011	78,000.00	0	0.00	9.50%	Air conditioner split type 1.5TR for CRC's at Mala
523000922	30.10.2011	95,722.00	0	0.00	9.50%	Air conditioner split type 1.5TR for CRC's at Dhar
523000923	30.10.2011	32,990.00	0	0.00	9.50%	Air conditioner split type 2TR for CRC's at Dhar
523000934	11.10.2011	77,210.00	0	0.00	9.50%	Voltas Split AC 1.0 Ton at Porta cabin,Vikhroli

5.15 As regards MERC's example of temporary structures, Tata Power-D claimed the rate of 100% as is specified in the Depreciation Schedule. Even assuming that depreciation could have been allowed on 90% of the capital cost of the asset, MERC failed to do so and instead only applied the average depreciation rate of FY 2013-14 @ 4.75%, which is contrary to the MYT Regulations, 2011.

5.16 It is noteworthy that on one hand MERC contends that Tata Power-D had failed to provide requisite information to MERC to enable it to compute the depreciation rates (as per Schedule) for Tata Power-D's Retail Supply Business assets. On the other hand MERC has stated that from the details given by Tata Power-D, it was difficult to

decipher as to what were the exact depreciation rates to be made applicable for each asset. In other words, contrary to its own contention MERC has gone through the data provided by Tata Power-D to arrive at the conclusion that it was unable to ascertain what rate of depreciation was to be made applicable to Tata Power-D's assets. In fact, depreciation was approved by MERC for Tata Power-D's wires business based on similar data. MERC's contentions qua (allegedly incorrect) rates applied by Tata Power-D for air conditioning and temporary structures makes it evident that MERC has in fact gone through the data provided by Tata Power-D but failed to consider it at all. Hence, it cannot be MERC's contention that Tata Power-D has failed to provide the relevant details to MERC.

5.17 MERC's contention that Tata Power-D had included Transmission Wires along with its Retail Supply business assets for claiming depreciation is incorrect and contrary to the findings returned by it in the original Impugned Order. It is submitted that, Tata Power-D had included Transmission Wires as part of its Distribution Wires business as these Transmission Wires have historically (i.e. prior to the enactment of the Electricity Act when Tata Power did not have separate Generation, Transmission and Distribution books) been booked in the distribution business. MERC is well aware of these issues and has allowed the depreciation claimed by Tata Power-D for its Wires business which includes such alleged Transmission Wires as well. In any case, this is against MERC's contention that Tata Power-D has not given requisite details.

5.18 In any case, the present issue under challenge before this Hon'ble Tribunal relates to the depreciation rate claimed by Tata Power-Dfor

its Supply business and not Wires business. The present Appeal deals with disallowance of actual depreciation for Tata Power-D's Retail Supply Business. Hence, MERC's contentions are wholly misplaced and based on an erroneous understanding of the Impugned Order passed by it.

5.19 In light of the above submissions, it is submitted that the partial disallowance of depreciation in the Impugned Orders ought to allowed as claimed by Tata Power-D.

Disallowance of part DSM expenditure (on account of employee cost) out of the total DSM expenditure claimed by Tata Power-D

5.20 By the Impugned Orders, MERC has disallowed Tata Power-D's claim towards DSM employee cost (Rs. 1.37 Crores) while allowing the other DSM related cost (Rs. 1.45 Crores) from the total claim of Rs. 2.82 Crores (Rs. 1.37 Crores + Rs. 1.45 Crores). This is contrary to the DSM Implementation Regulations as also various representations/ clarifications issued by MERC on the issue of treatment of DSM employee costs. While disallowing part of Tata Power-D's DSM expenditure claim, MERC returned the following findings in the ImpugnedMYT Order dated 21.10.2016:-

"….

3.15 DEMAND SIDE MANAGEMENT EXPENSES

Commission's Analysis and Ruling

The Commission has approved the following DSM expenses, after prudence check and based on TPC-D's revised submissions:

Table 3-50: DSM Expenses for FY 2013-14 approved by the Commission (Rs. crore)

Particulars	*MTR Order*	*TPC-D Petition*	*Approved in this Order*
DSM Expenses	*-*	*2.82*	*1.45*

5.21 In its Review Order dated 22.11.2017, MERC held as under:-

"….
7. ISSUE II: DSM Expenses for FY 2014-15, and clarification regarding DSM for 3rd Control Period

In the impugned MYT Order and the earlier MTR Order for the 2nd Control Period, the Commission approved the DSM expenses separately considering the various schemes planned by TPC-D. At the time of truing up for FY 2012-13 and FY 2013-14, the Commission approved the DSM expenses separately after adjusting them with the Load Management Charges (LMC) Fund.

For FY 2014-15, the Commission has approved DSM expenses of Rs. 1.45 crore (as against Rs. 2.82 crore claimed by TPC-D) towards the specific DSM Schemes. TPC-D contends that, in its MYT submissions, even though it had removed certain DSM employee costs and miscellaneous expenditure not specific to any particular scheme from the O&M expenses, this deduction was not taken into account by the Commission while approving lower DSM expenses.

The Commission had not reduced this component from the O&M expenses. In fact, with or without these DSM employee costs, the actual O&M expenses presented by TPC-D were higher than the normative expenses which were allowed by the Commission in the MYT Order.

O&M expenses have been approved on a normative basis for the 2nd Control Period from FY 2012-13 to FY 2015-16. At the time of truing up, the Commission has allowed the sharing of gains and losses on the difference between the actual and normative O&M expenses.

TPC-D has stated that the DSM employee costs that it had deducted from O&M expenses and shown under the DSM Head were not specific to any particular DSM scheme. However, the DSM Implementation Framework Regulations, 2010 expect the Distribution Licensee to make DSM an integral part of its day-to-day operations. Thus, the expenses on any additional manpower are to be borne by TPC-D within the allowed O&M expenses. A similar approach has been followed by the Commission while approving the DSM expenses for FY 2015-16….."

5.22 In addition to the Impugned Findings above, during the hearing on 10.07.2020, MERC has argued that when normative O&M parameters were set by MERC, the factor of number of consumers was not considered for Tata Power-D, while it was considered for other distribution licensees. In other words, the normative O&M parameters are anyway higher for Tata Power-D as opposed to other licensees. This reasoning is neither borne out from the

Impugned Order or MERC's Written Submissions and Additional Written Submissions. As stated hereinabove, such submissions cannot be considered by this Tribunal in light of the Hon'ble Supreme Court's Judgment in *Mohinder Singh Gill (Supra)*.

5.23 MERC's disallowance of DSM expenses is contrary to Regulations 3.2 and 9.1(a) and (b)of the DSM Implementation Regulations, 2010. The DSM Implementation Regulations contemplates recovery of all expenditure, including expenditure incurred by a distribution licensee towards employees for implementation of a DSM (Demand Side Management) scheme (i.e., for schemes for energy efficiency, power procurement planning etc.). As such, all DSM costs are to be passed on to consumers in its entirety as seen from Regulations 3.2 and 9.1(a) and (b) extracted below:-

"3.1 Every Distribution Licensee shall make DSM an integral part of their day-to-day operations, and undertake planning, designing and implementation of appropriate DSM programmes on a sustained basis.

3.2 Distribution Licensees may recover all justifiable costs incurred by them in any DSM related activity, including planning, designing, implementing, monitoring and evaluating DSM programmes, by adding these costs to their Annual Revenue Requirement to enable their funding through tariff or by implementing programmes at the Consumers' premises that would attract appropriate Return on Investment.

…

9.1 Without prejudice to the generality of Regulation 3.2, the following provisions shall apply:-

a) Funding of <u>all the DSM programmes and plans</u> to be implemented by the Distribution Licensees shall be included in the Annual Revenue Requirements (ARR).

b) Distribution Licensees shall be allowed to recover all costs incurred by them in any DSM related activity, including planning, conducting load research, designing, implementing, monitoring and evaluating DSM programmes, by adding these costs to their ARR to enable their funding through tariff structure.

…."

5.24 MERC, by its letter dated 26.09.2007, has represented to Tata

Power-D that the cost incurred on DSM *including the staff cost* would be allowed by MERC as pass through in the ARR. MERC has vide its letter dated 02.04.2008, approved Tata Power-D's DSM Budget, which includes expenditure towards DSM employees. Relevant extracts of MERC's letter dated 26.09.2007areprovided below:-

"…to provide further clarity, it is reiterated that all cost incurred by the distribution licensee to set-up and run the DSM function, including recurring as well as capital expenditure incurred by the distribution licensee in creation of a separate DSM Cell/DSM Department will be allowed as pass through in the ARR. Inter Alia, cost incurred by the distribution licensee in dedicated staffing of the DSM Cell/ DSM Department with appropriate staff, equipping this Cell/ Department with necessary infrastructure and equipments such as computers, measuring and recording equipments/ meters, soft-ware etc. will also be allowed as pass through in the ARR."

The aforesaid approval was granted by MERC qua the DSM Cell (employees) working on implementation of DSM Schemes in general i.e. not in the context of any specific DSM Scheme.

5.25 While MERC in its Additional Written Submission dated 09.07.2020referred to Regulation 3.1, it has failed to respond/ refer to Regulations 3.2 and 9, as also the above representations/ clarifications dated 26.09.2007 and 02.04.2008. Nowhere does the DSM Implementation Regulations or MERC's representations/ clarifications state that DSM employee expenses will be pass through only for those employees/ equipment employed for a specific scheme. In fact, such a contention is contrary to Section 61 of the Electricity Act as it promotes inefficiency. MERC's contention, in fact means that Tata Power-D will have to employ persons for each separate DSM scheme instead of utilising a group of employees on multiple DSM schemes. The former will result in additional costs (and is imprudent) whereas the latter will result in

cost saving (and is prudent) and beneficial for its consumers.

5.26 As regards the submission that Tata Power-D's DSM employee cost is not part of any scheme, the same is incorrect. In its Review Petition, Tata Power-D had categorically submitted that, *"DSM-related expenses are cross-cutting and cannot be attributed to any single program. Hence, they are not part of specific program cost submitted to the Hon'ble Commission for their approval".* In other words, Tata Power-D had clearly stated that it is employing a set of employees on various DSM schemes instead of any one scheme in particular. By no stretch of imagination can it be contended that Tata Power-D's said submission means that the DSM employee costs incurred by Tata Power-D are not related to any scheme.

5.27 On the basis of the DSM Implementation Regulation and the representations made by MERC, Tata Power-D has been claiming DSM expenses including staff cost as a separate line item (i.e. not as a part of O&M Expenses) in the Tariff Petitions filed by it from FY 2008-09 and MERC has allowed the same till the Impugned Orders.Tata Power-D, as a prudent utility and of its own volition, has been deducting the amount towards DSM employee cost from the O&M Expenses in order to avoid double accounting of the said costs. In fact, since DSM cost is not considered when setting normative O&M expenses, there is no question of it being considered for actual O&M expenses and consequently for the efficiency gains/ losses calculation.

5.28 In order to understand the Efficiency gains and losses calculation, as per the MYT Regulations, 2011, if a distribution licensee's actual

O&M expenditure is lesser than its approved normative O&M expenditure, the distribution licensee is permitted to retain 2/3rd of the savings in expenditure while passing on the benefit of 1/3rd of the differential amount to the consumers (efficiency gain calculation). On the other hand, if a distribution licensee's actual O&M expenditure exceeds its approved normative O&M expenditure, 2/3rd of the excess expenditure is to be borne by the distribution licensee while only 1/3rd of such differential amount is passed onto the consumers(efficiency loss calculation) [***Regulation 12.2.***

5.29 The principle applied by MERC in the Impugned true up Order (for FY- 2014-15) is contrary to the principle set by it in the MYT Order dated 28.06.2013. DSM cost (including employee cost) has been allowed by MERC as a separate line item and not as part of its O&M expenses - in Tata Power-D's MYT Order dated 28.06.2013 in Case No. 179 of 2011(being the MYT/ principle Order for the Control Period FY 2011-12 to 2015-16). The Impugned Order is the final True up of the said MYT Order dated 28.06.2013for FY 2012-13 to FY 2014-15.It is settled law that the methodology/ principle applied for computation of tariff at the time of MYT cannot be changed at the stage of truing up. *Meghalaya State Electricity Board* v. *Meghalaya SERC*: 2010 ELR (APTEL) 940 (Para 34). The relevant extract of *Bangalore Electric Supply Company* v. *KERC* is reproduced hereinbelow:

"7. This Tribunal has since held that the truing up exercise is meant to fill the gap between the actual expenses and the actual revenues at the end of the year and expected expenditure and revenue at the beginning of the year. The truing up cannot be done on the basis of revised policy or by adopting new philosophy or a new methodology.

8. We direct that the Commission carries out the truing up based upon this

principle."

5.30 Without prejudice to the fact that the DSM cost ought not be deducted from the O&M cost for computing the efficiency gains and losses, it is noteworthy that while calculating the efficiency gains/ losses, MERC has deducted the entire DSM cost of Rs. 2.82 Crores instead of the approved DSM cost of Rs. 1.45 Crores from Tata Power's total O&M expenses. In other words, on one hand, Tata Power-D has been denied the legitimate pass through of its DSM employee cost of Rs. 1.37 Crores, while on the other hand, such disallowed DSM employee cost has been factored in while computing Tata Power-D's efficiency gains/ losses, thereby penalizing Tata Power-D twice over. Even as a result of the aforesaid disallowance and the erroneous calculation while computing Tata Power-D's efficiency gains/ losses, Tata Power-D has been denied its legitimate recovery of Rs. 0.46 Crores.

5.31 Without prejudice to the submission that Tata Power-D is entitled to complete pass through of Rs. 1.37 Crores, it is noteworthy that in its Additional Submissions dated 09.07.2020, MERC has admitted that they have not considered the DSM Employee Cost while calculating Efficiency Gains/ Loss which otherwise would have had an impact on the same. In other words, MERC has conceded that it erred on this issue, and that Tata Power-D is entitled to at least Rs. 0.46 Crores on this count.

5.32 As regards MERC's submission that the normative O&M expenses are anyway higher for Tata Power-D than it ought to be, it is submitted that not only is it struck by Hon'ble Supreme Court's Judgment in *Mohinder Singh Gill (Supra)* but is also otherwise erroneous and misplaced. Once normative parameters are set,

MERC ought to have followed the same in terms of the applicable Regulations. The Regulations nowhere permit MERC to follow different dispensations at different points of time by seeking to state that the norms were decided incorrectly. In any case, as per the DSM Regulations read with MERC's Letters dated 26.09.2007 and 02.04.2008, it is clear that DSM Costs are not included as part of O&M Expenses (i.e. separately allowed as pass through in Tata Power-D's ARR and allowed to be recovered from consumers in total).

5.33 In view of the above submissions, it is submitted that the DSM employee expenses disallowed by MERC be set aside and allowed as claimed by Tata Power.

Remittance of revenue from open Access Consumer to the STU

5.34 MERC erroneously and contrary to its own Regulations, directed remittance of revenue collected from Open Access Consumer to the State Transmission Utility ("**STU**"), to the tune of Rs. 2.02 Crores. In fact, this error has been conceded to by MERC in its Review Order, but failed to pass any consequential Order granting relief to Tata Power-D's consumers.

5.35 MERC's findings in the Impugned MYT Order dated 21.10.2016 are as under:-

"….
3.20 REVENUE FROM SALE OF ELECTRICITY

Commission's Analysis and Ruling

The Commission has accepted TPC-D's submission regarding the actual revenue in FY 2014-15, and accordingly approves the revenue from sale of power as shown in the following table:

Table 3-61: Revenue for FY 2014-15 as approved by the Commission (Rs. Crores)

Particulars	**TPC-D Petition**	**Approved in this Order**
Revenue from Sale of Power	3347.02	3347.02
Revenue from Wheeling Charges	466.49	466.49
Revenue from Open Access Consumers	2.02	-
Total Revenue	**3815.53**	**3813.51**

The Commission has not considered the receipt from Transmission Charges of Rs. 2.02 crores as part of the revenue, as it is to be remitted by the Distribution Licensees to the State Transmission Utility (STU) and cannot be retained. TPC-D is directed to remit this amount immediately to the STU.

5.36 MERC's Findings in the Review Order dated 22.11.2017 are as under:-

"….
8. ISSUE III: Revenue from Open Access Consumers

In the MYT Order, the Commission had directed TPC-D to remit to the STU the Transmission Charges of Rs. 2.02 crore collected from OA consumers for FY 2014-15. The Commission notes that, to the extent of the amount received from partial OA consumers, this direction was erroneous in as much as Regulation 15.2(v) of the DOA Regulations, 2014 provided that partial OA consumers of a Distribution Licensee should pay the Transmission Charges to that Licensee instead of to the Transmission Utility.

However, the MYT Order expressly states that, since this amount was to be remitted to the STU, the Commission had not considered it as part of TPC-D's revenue. Since the lower revenue to that extent was taken into account in the truing up of the ARR by the Commission, no loss has been caused to TPC-D…."

5.37 MERC has also sought to supplement a new justification in support of the Impugned Order in its Reply dated 18.05.2018, Written Submissions dated 07.06.2020 and Additional Written Submissions dated 09.07.2020, by stating that the amount remitted to the STU is used to reduce Transmission Charges applicable to all consumers in the State of Maharashtra, and hence, there is no loss caused to

Tata Power-D and Tata Power-D continues to remain a revenue neutral entity. As stated hereinabove, such submission cannot be considered by this Hon'ble Tribunal in light of the Hon'ble Supreme Court's Judgment in *Mohinder Singh Gill (Supra)*.

5.38 Tata Power-D has been collecting Transmission Charges from its Open Access consumers in terms of the Distribution Open Access Regulations, 2014. Regulation 15.2(v) of the Distribution Open Access Regulations 2014 provides that in case of partial Open Access consumer of a distribution licensee, such partial Open Access consumers should pay the Transmission Charges to the distribution licensee instead of the Transmission Utility for using a transmission network, viz.:-

"15.1 The bill for supply of electricity to the consumer shall be raised by the Supplier and such bill shall separately and clearly indicate the following:

….

15.2 The bill for use of the distribution system for wheeling of electricity shall be raised by the Distribution Licensee on the Supplier/Open Access consumer whosoever is located in the Distribution Licensee's area of supply and shall separately and clearly indicate the following:

…

(v) In case of Partial Open Access consumer of a Distribution Licensee, <u>Partial Open Access consumers should pay the Transmission charges to Distribution Licensee instead of Transmission Utility</u> for using a transmission network."

5.39 When MERC determines the Transmission Charges for the State of Maharashtra (Order dated 26.06.2015 in Case No. 57 of 2015), it considers the total Demand of Tata Power-D for computing the share of Transmission Charges required to be paid by Tata Power-D. This includes the Demand of Tata Power-D's Open Access consumers. As such, the Transmission Charges paid by Tata Power-D for FY 2014-15 was inclusive of the Transmission Charges pertaining to the Demand of its Open Access consumers.

5.40 Therefore, the intent of Regulation 15.2(v) of the Distribution Open Access Regulations 2014 is to ensure that the STU does not collect the same Transmission Charges twice. The subsequent MERC (Distribution Open Access) Regulations, 2016 ("Distribution Open Access Regulations 2016") provides for the establishment of an Open Access Monitoring and Review Committee (Regulation 31). In its second meeting dated 19.07.2017, the said Committee has also opined that distribution licensees should be permitted to retain the Transmission Charges received from partial Open Access Consumers*.* The relevant part of the said minutes is extracted hereinbelow:

"Since CPO /NCPD of distribution licensees includes the demand of partial open consumers (Embedded), the transmission charges are already being paid by the concerned distribution licensee, hence remittance of transmission charges collected from partial open access consumers to STU as per regulation 22,will result into double payment.

Hence the Committee recommends the transmission charges collected from Partial OA consumers may be retained by concerned distribution licensee."

5.41 In the Review Order dated 22.11.2017, MERC has conceded that its directions to Tata Power-D to remit the Transmission Charges received from its partial Open Access consumers to STU is in contravention of Regulation 15.2(v).However, having come to that conclusion, MERC has proceeded to not review its MYT Order dated 21.10.2016 on the pretext that no loss is caused to Tata Power-D. In other words, MERC has admitted that the original Impugned Order is contrary to its Regulations but has intentionally failed to take remedial measures by aligning it with the principles laid down therein.

5.42 Once MERC arrived at the conclusion that its directions in the MYT

Order dated 21.10.2016 regarding remittance of Transmission Charges by Tata Power-D to STU were erroneous and in conflict with Regulation 15.2(v), MERC ought to have returned appropriate consequential findings reviewing the MYT Order dated 21.10.2016 and allowing Tata Power-D's claim. A State Commission is bound to pass Orders in line with its Regulations.

5.43 MERC has sought to add a new justification in its Submissions in the present Appeal stating that the amount of Transmission Charges remitted to STU would result in reducing the overall Transmission Charges applicable to all consumers and would not result in losses to Tata Power-D's consumers. This is not only hit by the principle laid down by the Hon'ble Supreme Court's Judgment in *Mohinder Singh Gill (Supra)* but is also otherwise erroneous and misplaced. Tata Power-D's consumer base, in the context of the total consumer base in Maharashtra, is significantly small. The share in the benefit and losses on account of Transmission Charges would be significantly lesser for Tata Power-D and its consumers (being smaller). The benefit of reduction in Transmission Charges, if any, for Tata Power-D's consumers would be insignificant/ negligible. Tata Power-D's consumers would only receive approximately Rs. 0.14 Crores [6.86% (i.e. Tata Power-D's share in the Transmission Pool of Maharashtra for FY 2014-15) of Rs 2.02 Crores] as against the cost of Rs. 2.02 Crores borne by such consumers**.** However, if Tata Power-D was allowed to retain the Transmission Charges collected from its partial Open Access consumers (as mandated by the Distribution Open Access Regulations 2014), then it would lead to a reduction in Tata Power-D's ARR resulting in reduction in tariff to be borne by Tata Power-D's consumers. If MERC's contention is accepted, then it would

stand to reason that an admittedly erroneous decision of MERC will pass muster as long as some consumer is being benefited somewhere, even if the cost is actually being borne by a consumer who (i.e. Tata Power-D's consumers in Mumbai are subsidising another set of consumers in Maharashtra), by law, is not required to bear the said cost. In fact, even as per the Table provided by MERC in its Additional Submissions it is demonstrated that had Tata Power-D retained the Transmission Charges, only Rs. 653.40 Crores would be recovered from consumers (instead of Rs. 655.42 Crores).

5.44 MERC has failed to appreciate that Tata Power-D's challenge to the present issue is not on account of some perceived loss caused to Tata Power-D, but on account of the loss caused to Tata Power-D's consumers as evident from the above submissions.

5.45 In light of the above submissions, it is most respectfully prayed that the Impugned Orders be set aside to the extent impugned herein, and MERC pass consequential Orders granting Tata Power its due allowance.

6. **Ms. Pratiti Rungta, learned counsel appearing for the Respondent Commission has filed the following written submissions & additional written submissions for our consideration :-**

6.1 The Commission makes the following issuewise submissions to oppose the appeal: -

Disallowance of appropriate depreciation rates for Retail Supply Business for FY 2014-15.

6.2 The Respondent Commission has dealt this issue in its MYT order dated 21/10/2016 in Case No. 47 of 2016 under the heading

Depreciation and has also dealt with this issue in its Review Order dated 22/11/2017 in Case No. 165 of 2016 . The relevant portion of MYT order dated 21/10/2016 has already been reproduced hereinabove by the Appellant and hence not being repeated herein for the sake of brevity. Regulation 31.5 of MYT Regulations, 2011 is reproduced hereinbelow:

"31.5 In case of projected commercial operation of the assets for part of the year, depreciation shall be calculated based on the average of opening and closing value of assets, approved by the Commission.

Provided that depreciation shall be re-calculated for assets capitalised at the time of Mid-term Performance Review or at the time of final truing up during determination of tariff for third Control Period, based on documentary evidence of assets capitalised by the applicant, subject to the prudence check of the Commission, such that the depreciation is calculated proportionately from the date of capitalisation."

6.3 As per Regulation 31.5 of MYT Regulations, 2011, the Depreciation has to be calculated based on the average of opening and closing value of assets as approved by the Respondent Commission. It is submitted that for computation of Depreciation for FY 2014-15, the Respondent Commission has considered the opening balance of GFA for wires Business and supply Business as equal to the closing balance approved in the final truing-up of FY-2013-14. It is submitted that the Respondent Commission has considered asset addition for FY 2014-15 in line with the approved capitalization for that year. It is also submitted that during the MYT proceedings, in response to Respondents Commission's query the Appellant has submitted the details of the depreciation claimed where only the asset code was mentioned, but not the type of assets and the corresponding business. It is also submitted that for some assets, the depreciation rates were stated to be 20%, 25% or 100% whereas the rate specified for these items in the MYT Regulations,

2011 is 5.28% or less [*Depreciation Schedule read with Regulation 31.2(b) of the MYT Regulations, 2011]*. Therefore, the Respondent Commission after considering all these facts applied the average depreciation rate determined for FY 2013-14 in the earlier MTR Order as the Depreciation rate for FY 2014-15 for the supply Business.

6.4 Therefore, in absence of the actual depreciation with head wise details, the Respondent Commission had no option but to rely on the previous approved weighted average rate of depreciation. Further, the contention of the Appellant that the amount of depreciation should have been approved after computing the applicable depreciation on each class of assets as per the depreciation schedule of the MYT Regulations, 2011 is not relevant as the Appellant has not submitted any documents to substantiate its claims.

Disallowance of DSM employee cost as part of DSM expenditure for FY 2014-15.

6.5 The Respondent Commission has dealt with this issue in its MYT order dated 21/10/2016 in Case No. 47 of 2016 at and has also dealt with this issue in Review Order dated 22/11/2017 in Case No. 165 of 2016.The relevant portion in the MYT order dated 21/10/2016 in Case No. 47 of 2016 is not being repeated for the sake of brevity.

6.6 In the MYT order and earlier MTR Order for the 2nd Control Period, the Respondent Commission had approved the DSM expenses separately considering the various schemes planned by TPC-D. It is submitted that for the FY 2014-15 the Respondent Commission approved the DSM expenses of Rs 1.45 Crore as against 2.82 Crore claimed by TPC-D towards the specific DSM Schemes. It is

submitted that on the contentions of the Appellant regarding the removal of certain DSM employee costs and miscellaneous expenditure not specific to any particular scheme from the O&M expenses and not taken into account by the Respondent Commission while approving lower DSM expenses, it is submitted that the Respondent Commission had not reduced this component from the O&M expenses. It is further submitted that with or without these DSM employee costs, the actual O&M expenses presented by TPC-D were higher than the normative expenses which were allowed by the commission in the MYT order.

Remittance of revenue from partial open access consumers to STU

6.7 The contention of the appellant is that the direction of the Respondent Commission to the appellant to remit the amount of Rs. 2.02 crores to STU is contrary to the Open Access Regulations, 2014 and such a direction of the Commission would lead to double payment of transmission charges to the STU for the same open access (sought by the partial open access consumers).

6.8 The Respondent Commission has dealt with this issue in its MYT order dated 21/10/2016 in Case No. 47 of 2016 and has also dealt with this issue in its Review Order dated 22/11/2017 in Case No. 165 of 2016. The relevant portion of the said MYT order and review order has already been reproduced hereinabove by the Appellant and not being repeated herein for the sake of brevity.

6.9 In the Review order the Respondent Commission has noted that to the extent of the amount received from partial OA consumers the direction in the MYT order is contrary to Regulation 15.2(v) of the

Open Access Regulations, 2014. However, the Respondent commission did not grant any relief in the review order as no loss had been caused to the Appellant by the treatment given to the revenue by the Respondent Commission as the revenue of TPC-D was considered after excluding such revenue, for the purpose of true-up. It is submitted that the Appellant has admitted in its appeal that no loss has been caused to the appellant but has claimed that its consumers will have to pay this. It is further submitted by the Respondent Commission that the amount remitted to the STU is used to reduce the Transmission Charges applicable to all consumers in the State of Maharashtra and therefore, there is no loss caused to the consumers of the Appellant. Further, by this logic the appellant should not be granted any relief in terms of additional ARR to be recovered as this would be recovered from its consumers.

Addl. Written submissions filed by Respondent Commission

Disallowance of appropriate depreciation rates for Retail Supply Business for FY 2014-15

6.10 Commission's working out the depreciation and its allowable computation at depreciation rate of 4.75% which was the same rate for FY 2013-14 is contrary to the depreciation schedule provided in the MYT Regulations,2011. This is not a correct appreciation of the method of working out rate of depreciation in terms of MYT Regulations, 2011. It is submitted that in the first place, the Commission in the MYT order dated 21/10/2016 has provided a complete and proper justification for allowing average depreciation at 4.75%. The Appellant did not provide the required details and documentary proof in support of its claim towards depreciation in

respect of different assets nor details of the assets and corresponding business though in terms of ***second proviso to Regulation 31.2(b),*** the Appellant was obliged to provide details or documentary evidence, as may be required under this Regulation and as stipulated by the Commission, from time to time, to substantiate the above claims. The said Regulation is reproduced hereinbelow:

> *"31.2 The Generation Company and Transmission Licensee* or Distribution Licensee shall be permitted to recover depreciation on the value of fixed assets used in their respective Business computed in the following manner:
>
> > *(a) The approved original cost of the project/fixed assets shall be the value base for calculation of depreciation:*
> > *Provided that the depreciation shall be allowed on the entire capitalised amount of the new assets after reducing the approved original cost of the project/fixed assets of retired or replaced assets.*
> >
> > *(b) Depreciation shall be computed annually based on the straight line method at the rates specified in the Annexure I to theseRegulations:*
> >
> > *Provided that the Generating Company or Transmission Licensee or Distribution Licensee shall ensure that once the individual asset is depreciated to the extent of seventy (70) percent, remaining depreciable value as on 31st March of the year closing shall be spread over the balance useful life of the asset, as provided in these Regulations.*
> >
> > *Provided that the Generating Company or Transmission Licensee or Distribution Licensee, shall submit all such details or documentary evidence, as may be required under this Regulation and as stipulated by the Commission, from time to time, to substantiate the above c*laims."

6.11 The Appellant has contended during the hearing that it provided all details in response to the query of the Commission raised in its mail dated 29/05/2016 vide reply dated30/06/2016. A perusal of the said

letter reveals that the appellant has not provided the details of the type of assets nor the corresponding business (wires or retail).

6.12 The Appellant has not provided any documentary proof of each of the asset which information is necessary for the Commission to examine the rate of depreciation by taking into account the date of acquisition of the asset, the type of asset and its corresponding business. These are the important factors for working out the rate of depreciation in terms of MYT Regulations, 2011. It is also relevant to mention here that instead of providing the details of each of the asset and corresponding business the Appellant provided only asset code which does not satisfy the requirement of second proviso of Regulation 31.2(b) of MYT Regulation, 2011. Under these circumstances the Commission had no other option but to allow depreciation at the rate of 4.75% based on the average Depreciation considered for FY 2013-14 in the MTR Order. The relevant portion of the Commission's finding in this regard are reproduced below:

Commission's Analysis and Ruling

"3.6 Commission's Analysis and Ruling

The Commission asked for the detailed calculation of asset-wise Depreciation in MS Excel format in accordance with the MYT Regulations, 2011. It observed that TPC-D has included assets under 'Transmission lines' under Depreciation for the Distribution Wires Business, and asked TPC-D to justify this.

TPC-D stated that, although the nomenclature is 'Transmission Lines', the assets actually belong to the Distribution Business. This label has continued historically, since TPC was an integrated business and these assets are mostly underground cables and associated accessories.

The Commission also asked TPC-D to justify the Depreciation rates of 5.93% and 10.15% put forth by TPC-D for its Wires and Supply Business, respectively, when they were considered as 5.68% and 4.92% in the original Petition submitted on 27 February, 2016. TPC- D stated that the figures in the original Petition had certain linkage errors,

> *which had been thoroughly examined and matched with SAP figures and rectified in the revised Petition. Further, the Depreciation considered in the audit certificate is based on the rate as per the Income Tax Act, which will not match with the Depreciation rate as per the MYT Regulations, 2011".*

6.13 TPC-D *has considered the Depreciation rate of 5.05% on the* average of opening and closing Gross Fixed Assets (GFA) for FY 2014-15 for the Wires Business, rather than 5.93% as stated originally. The Commission has considered the average Depreciation rate of 5.05% on the average of opening and closing GFA for FY 2014-15 for the Wires Business, as submitted by TPC-D and in accordance with the MYT Regulations, 2011. In case of the Supply Business, the average Depreciation rate considered by TPC- D works out to 8.69%, which is far higher than 5.28%. The Commission has considered the average Depreciation rate of 4.75% on the average of opening and closing GFA for FY 2014-15 for the Supply Business, based on the average Depreciation considered for FY 2013-14 in the MTR Order.

6.14 As per Regulation 31.5 of MYT Regulations 2011, the Depreciation has to be calculated based on the average of opening and closing value of assets as approved by the Commission. For computation of Depreciation for FY 2014-15, the Commission has considered the opening balance of GFA for Wires Business and Supply Business as equal to the closing balance approved in the final truing-up of FY 2013-14. It has considered asset addition for FY 2014-15 in line with the approved capitalization for that year. Asset retirement as given in the formats provided has been considered in FY 2014-15. From the Case Approved Opening GFA, asset addition and asset retirement, the Commission has approved the closing

GFA for FY 2014-15 for the Wires Business and Supply Business.

Depreciation for Retail Supply Business for FY 2014- 15. In the MYT Order, the Commission had stated as follows:

"Commission's Analysis and Ruling

The Commission asked for the detailed calculation of asset-wise depreciation in MS Excel format in accordance with the MYT Regulations,2011. It observed that TPC-D has included assets under 'Transmission lines' under Depreciation for the Distribution Wires Business, and asked TPC-D to justifythis.

...The Commission also asked TPC-D to justify the Depreciation rates of 5.93% and 10.15% put forth by TPC-D for its Wires and Supply Business, respectively, when they were considered as 5.68% and 4.92% in the original Petition submitted on 27 February, 2016. TPC-D stated that the figures in the original Petition had certain linkage errors, which had been thoroughly examined and matched with SAP figures and rectified in the revised Petition. Further, the Depreciation considered in the audit certificate is based on the rate as per the Income Tax Act, which will not match with the Depreciation rate as per the MYT Regulations, 2011.

TPC-D has considered the Depreciation rate of 5.05% on the average of opening and closing Gross Fixed Assets (GFA) for FY 2014-15 for the Wires Business, rather than 5.93% as stated originally. The Commission has considered the average Depreciation rate of 5.05% on the average of opening and closing GFA for FY 2014-15 for the Wires Business, as submitted by TPC-D and in accordance with the MYT Regulations, 2011. In case of the Supply Business, the average Depreciation rate considered by TPC- D works out to 8.69%, which is far higher than 5.28%. The Commission has considered the average Depreciation rate of 4.75% on the average of opening and closing GFA for FY 2014-15 forthe

Supply Business, based on the average Depreciation considered for FY 2013-14 in the MTR Order..."

6.15 Thus, the Commission had observed a large difference between the depreciation rate of 4.92% for the Supply Business for FY 2014-15 as presented by TPC-D in its original MYT Petition, and the rate of 10.15% submitted in the revised Petition. Considering this higher rate submitted subsequently, the average depreciation

rate worked out to 8.69%, which the Commission noted was far higher than the average depreciation rate of 5.28% allowed for most assets (including those not expressly listed) in the Depreciation Schedule read with Regulation 31.2(b) of the MYT Regulations,2011.

> *"In reply to the Commission's query in this regard during the MYT proceedings, TPC-D had submitted the details of the depreciation claimed. In its response,*
>
> *(a) TPC-D had mentioned only the asset code, but not the type of assets and the corresponding Business (Wires or Retail),etc.;*
>
> *(b) For some assets, the depreciation rates were stated to be 20%, 25% or 100%, whereas the rate specified for these items in the MYT Regulations, 2011 is 5.28% orless.*
>
> *The Commission observes that, subject to these ambiguities, the details provided by TPC-D show that, except for items contributing at most only 16% to the total depreciation (IT equipment and temporary structures), the depreciation rate specified in the MYT Regulations, 2011 is 5.28% or less.*
>
> *Considering this position and the errors or ambiguities in its submissions, the Commission had applied the average depreciation rate determined for FY 2013-14 in the earlier MTR Order as the depreciation rate for FY 2014-15 for the Supply Business. In these circumstances, review of the MYT Order on this issue is not warranted."*

6.16 The Appellant contented that a new ground has been taken in the reply to the appeal for the first time that the depreciation has been worked out in terms of Regulation 31.5 of MYT Regulations, 2011 which was never the ground stated by the Commission in its MYT order or review order and therefore, the same could not be raised in reply to the appeal. It is submitted that this contention is factually incorrect. The Commission has already mentioned in the MYT order dated 21/10/2016 that *"As per Regulation 31.5 of MYT Regulations, 2011, the depreciation has to be calculated based on the average of opening and closing value of assets as approved by the Commission."*

6.17 The Appellant contented that the depreciation should have been worked out by applying Regulation 31.2(b) and not by calculating it as per Regulation 31.5 by taking into account the opening balance of GFA for wires business and supply business as equal to the closing balance approved in the final truing up for FY 2013-14.

6.18 This contention is also wholly misconceived. The Commission required the appellant to furnish the details of assets and the corresponding business as a part of prudence check but the appellant did not produce the required information properly and also no documentary proof was furnished to support the claim. The said information was required in terms second proviso to Regulation 31.2(b). It is also submitted that the Commission has also noted the material discrepancies in the information provided by the Appellant which prevented the Commission to allow depreciation by following the straight line method at the rates set out in the Depreciation Schedule in the MYT Regulations, 2011. It is further submitted that the contention of the Appellant that Regulation 31.5 in only applicable in case of projected commercial operation of the assets for part of the year is also untenable. It is submitted that proviso to Regulation 31.5 clearly stipulates that depreciation shall be recalculated for the assets capitalized at the time of mid term performance review or at the time of final truing up during determination of tariff for third control period based on documentary evidence of the assets capitalized by the applicant subject to the prudence check of the Commission such that the depreciation is calculated proportionately from the date of capitalization. From the above proviso to Regulation 31.5

it is amply clear that in the MTR proceedings depreciation was to be recalculated based on the documentary evidence for prudence check but because of the default on the part of the appellant to provide full information and documentary evidence, the Commission was left with no option but to calculate depreciation based on the average of opening and closing value of the assets approved by the Commission. Regulation 31.5 is reproduced hereinbelow:

> *"31.5 In case of projected commercial operation of the assets for part of the year, depreciation shall be calculated based on the average of opening and closing value of assets, approved by the Commission.*
>
> *Provided that depreciation shall be re-calculated for assets capitalised at the time of Mid-term Performance Review or at the time of final truing up during determination of tariff for third Control Period, based on documentary evidence of assets capitalised by the applicant, subject to the prudence check of the Commission, such that the depreciation is calculated proportionately from the date of capitalisation."*

6.19 One of the example of higher claim made by the appellant include the depreciation claimed by the appellant for its supply business for FY 2014-15 in respect of Air Condition which is 9.50% whereas in the said schedule the depreciation rate for static air conditioning is 5.28%.It is submitted that the appellant has not specified whether the claim in respect of air conditioning is in relation to static air conditioning or portable. Further, the appellant has claimed 100% depreciation in respect of temporary structure for its supply business though in terms of Regulation 31.2 (c) of MYT Regulations, 2011 the salvage value of the asset shall be considered at 10 per cent (10%) of the allowable capital cost and depreciation shall be allowed upto a maximum of 90 per cent (90%) of the allowable capital cost of the asset. Regulation 31.2 © of the MYT Regulations, 2011 is reproduced herein below:

> *"31.2 The Generation Company and Transmission Licensee or Distribution Licensee shall be permitted to recover depreciation on the value of fixed assets used in their respective Business computed in the following manner:*
>
> *© The salvage value of the asset shall be considered at 10 per cent of the allowable capital cost and depreciation shall be allowed upto a maximum of 90 per cent of the allowable capital cost of the asset."*

6.20 Since the information provided was not complete and also, since the depreciation rates claimed by the appellant were far higher in terms of Depreciation Schedule of MYT Regulations, 2011, there was no option but to allow the depreciation at the same rate of 4.75% as was allowed in the previous year. If the contention of the applicant is accepted, it would mean that whatever is claimed by the appellant has to be allowed and Commission would be precluded to undertake a prudence check by ascertaining the information provided by the Appellant and its correctness. As such, there is no illegality or infirmity in the order under challenge passed by the Commission on this aspect.

<u>DISALLOWANCE OF DSM EMPLOYEE COST AS PART OF DSM EXPENDITURE FOR FY 2014-15.</u>

6.21 The Respondent Commission has disallowed the DSM (demand side management) expenditure of Rs. 1.37 crores (towards DSM employee cost) as against the total DSM expenditure of Rs. 2.82 crore submitted by the Appellant for FY2014-15. It is the contention of the Appellant that the Respondent Commission has failed to consider the expenditure incurred towards the staff cost and other miscellaneous expenditure for DSM purposes which is contrary to Regulations 3.2 and 9.1(a) and (b) of the DSM Implementation Regulations,2010. This contention is not tenable. It is not the case of the appellant that no DSM expenses have been allowed. In fact, the Commission has taken into account the

cost of approved DSM Schemes depending on the present status of their implementation. It is further submitted that in terms of Regulation 3.1 of DSM Implementation Regulations, 2010-

"*Every Distribution Licensee shall make DSM an integral part of their day-to-day operations, and undertake planning, designing and implementation of appropriate DSM programmes on a sustained basis".*

6.22 Therefore, the Commission allowed the DSM expenses of Rs. 1.45 crore as against Rs. 2.82 crore claimed by the appellant in respect of specific DSM schemes. The expenditure which has not been does not related to specific DSM schemes but relate to employee cost and some miscellaneous expenses which do not form part of any specific DSM scheme. It is an admitted position that the appellant had removed certain DSM employee costs and miscellaneous expenditure not specific to any particular scheme from O&M expenses but this deduction was not taken into account by the Commission while approving lower DSM expenses. Infact, the Commission had not reduced this component from O&M expenses. It is further submitted that DSM Implementation Framework Regulations, 2010 expect the Distribution licensee to make DSM an integral part of its day to day operation. . Thus, the expenses on any additional manpower are to be borne by TPC-D within the allowed O&M expenses.

6.23 The said deducted amount of Rs. 1.37 crore was not added to the O&M expenses as actual O&M Expenses allowed for that year was more than the normative O&M expenses in the MYT order and earlier MTR Order for the 2ndControl Period, the Respondent Commission had approved the DSM expenses separately considering the various schemes planned by TPC-D. It is also

submitted that for the FY 2014-15 the Respondent Commission approved the DSM expenses of Rs. 1.45 Crore as against Rs. 2.82 Crore claimed by TPC-D in respect of specific DSM Schemes. It is submitted that on the contentions of the Appellant regarding the removal of certain DSM employee costs and miscellaneous expenditure not specific to any particular scheme from the O&M expenses and not taken into account by the Respondent Commission while approving lower DSM expenses, the Respondent Commission had not reduced this component from the O&M expenses. It is further submitted that with or without these DSM employee costs, the actual O&M expenses presented by TPC-D were higher than the normative expenses which were allowed by the Commission in the impugned MYT order dated 21/10/2016 in Case No. 47/2016.

6.24 It is also submitted that if the same would have been added in the O&M expenses, it would have impacted the sharing of gains and losses. The State Commission in its MYT Order MYT order dated 21/10/2016 has considered the contentions of the Appellant and has adequately justified its stand.

6.25 TPC-D has stated that the DSM employee costs that it had deducted from O&M expenses and shown under the DSM Head were not specific to any particular DSM scheme. However, the DSM Implementation Framework Regulations, 2010 expect the Distribution Licensee to make DSM an integral part of its day- to-day operations. Thus, the expenses on any additional manpower are to be borne by TPC-D within the allowed O&M expenses. A similar approach has been followed by the Commission while approving the DSM expenses for FY 2015-16.

"As regards the DSM expenses for the 3rd Control Period FY 2016- 17 to FY 2019- 20, the MYT Order states as follows:

5.16 DEMAND SIDE MANAGEMENT EXPENSES

Commission's Analysis and Ruling

The Commission has examined the activities underlying the proposed DSM cost submitted by TPC-D. The Commission has considered the cost of approved DSM schemes depending on the present status of their implementation.

Any further DSM schemes undertaken by TPC-D during the Control Period with the Commission's prior approval shall be considered at the time of the MTR.

While certain DSM-specific expenses are allowed separately under the Commission's DSM Regulations, at the time of the MTR the Commission shall approve the DSM costs based on actual details, and after prudence check that would include whether there are any common expenses that would already be covered under the regular O&M and other heads of expenses..."

REMITTANCE OF REVENUE FROM PARTIAL OPEN ACCESS CONSUMERS TO STU

6.26 It is the contention of the Appellant that the direction of the Respondent Commission to the appellant to remit the amount of Rs. 2.02 crores to STU is contrary to the Open Access Regulations, 2014 and such a direction of the Commission would lead to double payment of transmission charges to the STU for the same open access (sought by the partial open access consumers). In this regard It is submitted that the Respondent Commission did not modify the direction in the review order after noting that no loss has been caused to the Appellant which has also been admitted by the Appellant. It is further submitted by the Respondent Commission that the amount remitted to the STU is used to reduce the Transmission Charges applicable to all consumers in the State of Maharashtra and therefore, there is no loss caused to the

consumers of the Appellant. It is the submission of the Respondent Commission that while issuing the direction to pay to the STU the amount of Rs. 2.02 crores recovered by the Appellant from its open access consumers, the Respondent Commission has kept in mind that no loss may be caused to the Appellant. It is further submitted that the Appellant had included the said amount of Rs. 2.02 crores as its income on revenue side but the Commission did not treat the said amount as revenue receipt in the form of income thereby increased the gap between income (revenue receipt) and expenditure by the same amount. The following table would reflect this position:

Particulars	**Supply Business FY 2014-15 (Rs.CR.)**		
	Approved in MYT Order	**Adding Rs. 2.02 Cr in Revenue**	**Difference**
Total ARR of Wire & Supply Business	4468.93	4468.93	0
Total Revenue	3813.51	3815.53	2.02
Gap	655.42	653.40	**-2.02**

6.27 Thus, it is evident that if such amount would have been allowed to be retained by TPC-D then gap between its revenue and expenditure would have been reduced by same amount i.e. Rs. 2.02 Cr. Hence, TPC-D is revenue neutral in this matter.

6.28 The relevant portion of the said Review order dated 22/11/2017 is reproduced hereinbelow:

"ISSUE III: Revenue from Open Access Consumers

In the MYT Order, the Commission had directed TPC-D to remit to the STU the Transmission Charges of Rs. 2.02

> *crore collected from OA consumers for FY 2014-15. The Commission notes that, to the extent of the amount received from partial OA consumers, this direction was erroneous in as much as Regulation 15.2(v) of the DOA Regulations, 2014 provided that partial OA consumers of a Distribution Licensee should pay the Transmission Charges to that Licensee instead of to the Transmission Utility.*
>
> *However, the MYT Order expressly states that, since this amount was to be remitted to the STU, the Commission had not considered it as part of TPC-D's revenue. Since the lower revenue to that extent was taken into account in the truing up of the ARR by the Commission, no loss has been caused to TPC-D."*

7. **We have heard Shri Amit Kapur, learned counsel for the Appellant and Shri S. K. Rungta, learned senior counsel for Respondent Commission at considerable length of time and also carefully gone through their written submissions and arguments during the proceedings. The following three issues have emerged in the Appeal for our consideration**:-

Issue No.1:- Partial disallowance of depreciation qua Tata Power Distribution's Retail Supply and business.

Issue No.2:- Partial disallowance of Demand Side Management expenses on account of employees expenses

Issue No.3:- Remittance of revenue from partial Open Access customers to State Transmission Utility.

Our Analysis & Findings:-

8. **Issue No.1**:-

8.1 Learned counsel for the Appellant outrightly submitted that as per Regulation 31.2 (b) of the MYT Regulations 2011, TPD was entitled to depreciation of Rs. 7.23 Crores qua its Retail Supply Business for FY 2014-15 at an average rate of 6.49% on the current capital value of the assets computed at the asset-wise depreciation rates provided in the Depreciation Schedule to the MYT Regulations

2011. However, the State Commission has contrary to the said Regulations, allowed the Appellant depreciation of Rs. 5.29 Crores only @ 4.75% i.e. being the average weighted rate of depreciation allowed for the previous year (FY 2013-14). He further submitted that as a result of erroneous considerations, the State Commission has disallowed the depreciation claim of Rs. 1.94 Crores for its Retail Supply Business for FY 2014-15.

8.2 Learned counsel for the Appellant pointed out that the State Commission in its submissions has sought to furnish several additional reasons to justifiy the impugned orders which as per the settled law cannot be considered by this Tribunal. He placed reliance on the judgment of Hon'ble Supreme Court's in *Mohinder Singh Gill v. Chief Election Commissioner*(1978) 1 SCC 40. Learned counsel further submitted that the depreciation is ordinarily not a "source of fund" under commercial accounting, however, under the Electricity Act/ Tariff Regulations depreciation enables the utility to work out the charges to be recovered from consumers for supply of electricity. Further, the applicability of higher rates of depreciation for assets is also emphasized due to the substitution of the concept of historical cost with the concept of replacement cost on account of inflation in the economy. Therefore, the State Commission is required to follow the provisions of the Schedule to the said Regulations while calculating depreciation as one of the items of expense. Learned counsel for the Appellant also placed reliance on the Judgment of the Hon'ble Supreme Court in the matter of *PTC v. CERC and Ors*: (2010) 4 SCC 603 to contend that the State Commission is duty bound to follow its regulations.

8.3 Learned counsel for the Appellant vehemently submitted that Regulation 31 of the MYT Regulations, 2011 lays down that in case of truing up, depreciation has to be calculated in terms of Regulation 31.2(b) of the MYT Regulations, 2011 i.e. by following the straight line method as set out in the Depreciation Schedule in the MYT Regulations, 2011. These rates are to be allowed on the current capital value of the assets. Tata Power-D had calculated the depreciation on its assets in line with the computational principles laid down in Regulations 31.2 of the MYT Regulations, 2011. Learned counsel pointed out that the reason given by the State Commission for such disallowance is the Appellant had failed to provide the actual depreciation rates with asset and business wise classification in the Commission. On this issue, learned counsel clarified that such reasoning of the State Commission is factually incorrect and contrary to the documents placed by the Appellant on record. In fact, the Appellant had on multiple occasions provided MERC with asset wise details of depreciation including its letter dated 13.04.2017.

8.4 Learned counsel for the Appellant further submitted that the Stated Commission has followed Regulation 31.5 of the MYT Regulations which is not applicable in the present case. It is because of the fact that Regulation 31.5 applies in the case of projected commercial operation of the assets for part of the year, i.e., when an asset is added during the year or retired during the year. Against this, Regulation 31.2(b) of the MYT Regulations applies to the asset base which is pre-existing. Therefore, the Regulation 31.5 ought not to be interpreted for the instant case of the Appellant wherein the assets are pre-existing. Learned counsel for the Appellant contended that

in any case, the present issue under challenge before this Tribunal relates to the depreciation rate claimed by Tata Power-D for its Supply business and not Wires business. Learned counsel reiterated that in light of the above submissions, the partial disallowance of depreciation in the Impugned Orders ought to allowed as claimed by Tata Power-D.

8.5 ***Per contra,*** learned senior counsel for the Respondent Commission submitted that the Commission has dealt this issue in its MYT order dated 21/10/2016 as well as in its Review Order dated 22/11/2017 in detail and has rendered reasoning and justifications for not allowing partial depreciation claimed by the Appellant. He pointed out that as per Regulation 31.5 of MYT Regulations 2011, the depreciation has to be calculated based on the average of opening and closing value of assets as approved by the Commission. Accordingly, computation of depreciation for FY 2014-15, the Commission has considered the opening balance of GFA for Wires Business and Supply Business as equal to the closing balance approved in the final truing-up of FY 2013-14. Learned counsel was quick to point out that for some assets, the depreciation rates were stated to be 20%, 25% or even 100%,whereas the rate specified for these items in the MYT Regulations, 2011 is 5.28% or less. Therefore, the Commission had applied the average depreciation rate determined for FY 2013-14 in the earlier MTR Order as the depreciation rate for FY 2014-15 for the Supply Business.

8.6 Learned counsel for the State Commission further submitted that in the absence of actual depreciation with head wise details, the

Respondent Commission had no option but to rely on the previous approved weighted average rate of depreciation. Further, the contention of the Appellant that the amount of depreciation should have been approved after computing the applicable depreciation on each of assets as per depreciation schedule of MYT Regulations, 2011 is not relevant as the Appellant has not submitted any documents to substantiate its claims. Learned counsel for the State Commission refuted the contentions of the Appellant that it provided all details in response to query of the Commission raised in its mail dated 29/05/2016 vide reply dated 30/06/2016. A perusal of the said letter reveals that the appellant has not provided the details of the type of assets nor the corresponding business (wires or retail). Further, the Appellant has not provided any documentary proof of each of the asset which information is necessary for the Commission to examine the rate of depreciation by taking into account the date of acquisition of the asset, the type of asset and its corresponding business. Needless to mention that these are the important factors for working out the rate of depreciation. It is also relevant to mention here that instead of providing the details of each of the asset and corresponding business the Appellant provided only asset code which does not satisfy the requirement of second proviso of Regulation 31.2(b) of MYT Regulation, 2011. Under these circumstances the Commission had no other option but to allow depreciation at the rate of 4.75% based on the average Depreciation considered for FY 2013-14 in the MTR Order. The Commission has also considered asset addition for FY 2014-15 in line with the approved capitalization for that year. Asset retirement as given in the formats provided has been considered in FY 2014-15. From the base Approved Opening GFA, asset addition and asset retirement,

the Commission has approved the closing GFA for FY 2014-15 for the Wires Business and Supply Business. In view of these factual submissions, there is no merit in the claim of the Appellant to allow partial depreciation to the Appellant.

Our Findings:-

8.7 We have carefully analysed the submissions of both the parties and note that the primary dispute is regarding partial allowance of depreciation claimed by the Appellant and in the process of computation by the State Commission, a depreciation claim of Rs.1.94 crores for the Retail Supply Business for FY 2014-14 has been disallowed. The said disallowance of Rs.1.94 crores has mainly travelled from the adoption of average rate of depreciation as 4.75% considered by the Commission whereas it is the contention of the Appellant that it could have been allowed actual depreciation asset wise claimed by the Appellant. Learned counsel for the Appellant has also alleged that the State Commission has acted contrary to its Regulation which is not permissible in law while referring to the judgment of Hon'ble Supreme Court in *PTC v. CERC and Ors*: (2010) 4 SCC 603 rules that the Commission is duty bound to follow its regulations. In fact, we do not notice any violation of the Regulations as claimed by the Appellant, the real controversy is whether Regulation 31.5 or Regulation 31.2(b) is applicable in the present case. The State Commission has applied Regulation 31.5 of the MYT Regulations, 2011 as per which the depreciation has to be calculated based on the average of opening and closing value of assets, as approved by the Respondent Commission. In other words, for computation of depreciation for FY 2014-15, the Respondent Commission has considered the opening balance of

GFA for Wires & Supply business as equal to the closing balance approved in the final true up of FY 2013-14. The Regulation 31.2(b) provides that the depreciation has to be calculated by following the straight line method at the rates set out in the Depreciation Schedule in the MYT Regulations, 2011 and these rates are to be allowed on the current capital value of the assets.

8.8 While referring to the provisions under Regulation 31.2(b) and 31.5, it is relevant to notice that Regulation 31.2(b) of the MYT Regulations apply to the asset base which is pre-existing whereas Regulation 31.5 applies in the case of projected commercial operation of the assets for part of the year, i.e., when an asset is added during the year or retired during the year. On critical interpretation of the said Regulations, we are of the opinion that as the assets of the Appellant are pre-existing, the Regulation 31.2(b) is the relevant Regulation to be applied for calculation of depreciation rate for the assets of the Appellant. Accordingly, the average rate of depreciation on the opening and closing GFA, as considered by the Commission emerges to be irrelevant in the instant case in hand.

8.9 From the records placed before us, we also note that there have been mismatches in the supply of requisite data in detail furnished by the Appellant to the Respondent Commission. It is not in dispute that based on the queries of the Commission, the Appellant has furnished some data and details relating to the assets for which depreciation has to be accounted for but the same have found unsatisfactory and not relevant for computation of the depreciation rate in accordance with Regulation 31.2(b) of MYT Regulations, 2011.

8.10 We also find force in the arguments of the learned senior counsel for the State Commission that the Commission cannot blindly allow the depreciation claim of the Appellant without cross examination for which requisite details as asked for are required to be furnished by the Appellant. We are, therefore, of the opinion that the depreciation rate for the retail business for the year 2014-15 is required to be computed afresh based on the data and the details to be furnished by the Appellant to the State Commission. According, the State Commission shall compute the actual depreciation rate based on the factual data to be submitted by the Appellant.

9. **Issue No.2:-**

9.1 Learned counsel for the Appellant submitted that by the impugned orders, the State Commission has disallowed its claim towards DSM employee cost (Rs. 1.37 Crores) while allowing the other DSM related cost (Rs. 1.45 Crores). He alleged that this is contrary to the DSM Implementation Regulations as also various representations/ clarifications issued by the State Commission on the issue of treatment of DSM employee costs. Learned counsel pointed out that during the proceedings, the learned counsel for the State Commission has argued that when normative O&M parameters were set by the State Commission, the factor of number of consumers was not considered for the Appellant, while it was considered for other distribution licensees. In other words, the normative O&M parameters are anyway higher for the Appellant as opposed to other licensees. Learned counsel for the Appellant contested that this reasoning of the Commission is neither borne out from the Impugned Order nor Commission's written submissions.

As stated, such submissions cannot be considered by this Tribunal in light of the Apex Court's Judgment in *Mohinder Singh Gill (Supra)*.

9.2 Learned counsel for the Appellant further submitted that the disallowance of DSM expenses is contrary to Regulations 3.2 and 9.1(a) and (b)of the DSM Implementation Regulations, 2010. In fact, the DSM Implementation Regulations contemplate recovery of all expenditure, including expenses incurred by a distribution licensee towards employees for implementation of a DSM scheme. As such, all DSM costs are to be passed on to consumers in its entirety as evident from the Regulations. Learned counsel was quick to point out that nowhere the DSM Regulations state that DSM employee expenses will be pass through only for those employees/ equipment employed for a specific scheme. In fact, such a contention is contrary to Section 61 of the Electricity Act as it promotes inefficiency. Moreover, the principles applied in the impugned true up order for FY 2014-15 is contrary to the principles set out by it in the MYT Order dated 28.06.2013. He further submitted that it is settled law that the methodology/ principle applied for computation of tariff at the time of MYT Order cannot be changed at the stage of truing up. To substantiate his contentions, learned counsel placed reliance on the judgments of this Tribunal in *Meghalaya State Electricity Board* v. *Meghalaya SERC*: 2010 ELR (APTEL) 940 (Para 34) and *Bangalore Electric Supply Company* v. *KERC.* Learned counsel pointed out that the State Commission in its additional written submissions dated 09.07.2020, it has admitted that the DSM Employee Cost was not considered while calculating Efficiency Gains/ Loss which otherwise would have had an impact on the same.In other words, MERC has conceded that it erred on

this issue, and that the Appellant is entitled to at least Rs. 0.46 Crores on this count. In view of these submissions, learned counsel for the Appellant reiterated that the DSM employee expenses disallowed by the State Commission be set aside and allowed as claimed by Appellant.

9.3 ***Per contra,*** learned counsel for the Respondent Commission stated that this issue has been dealt in detail by the State Commission in its impugned orders and there has not been any gap or lacunae in the reasoning rendered by the State Commission. Learned counsel submitted that for FY 2014-15, the Respondent Commission approved the DSM expenses towards the specific DSM Schemes. In fact, the Commission had not reduced this component from the O&M expenses. Moreover, it is relevant to note that with or without these DSM employee costs, the actual O&M expenses presented by the Appellant were higher than the normative expenses which have been allowed by the commission in the MYT order. Learned counsel further submitted that it is the contention of the Appellant that the Commission has failed to consider the expenditure incurred toward the staff cost and other miscellaneous expenditure for DSM purposes which is contrary to Regulations 3.2 and 9.1(a) and (b) of the DSM Implementation Regulations,2010. These contentions are not tenable as it is not the case of the Appellant that no DSM expenses have been allowed. Infact, the Commission has taken into account the cost of approved DSM Schemes depending on the present status of their implementation. Moreover, the said deducted amount of Rs. 1.37 crore was not added to the O&M expenses as actual O&M Expenses allowed for that year was more than the normative O&M expenses in the MYT order and earlier MTR Order

for the 2nd Control Period. In view of these facts, there is no merit in the claim of the Appellant for allowing additional DSM employee cost for the Financial year 2014-15.

Our Findings:-

9.4 The basic grievance of the Appellant on this issue is that out of the total claim of Rs. 2.82 crores under DSM expenditure, the State Commission has disallowed the claim towards DSM employee cost amounting to Rs. 1.37 crores as per the contentions of the Appellant, it is contrary to the DSM Implementation Regulations as also various representations/clarifications issued by the State Commission on the issue of treatment of DSM employee cost. Before, we proceed further, it is relevant to refer to the clarifications rendered by the State Commission in the impugned order dated 21.10.2016 as under :-

> *"TPC-D has stated that the DSM employee costs that it had deducted from O&M expenses and shown under the DSM Head were not specific to any particular DSM scheme. However, the DSM Implementation Framework Regulations, 2010 expect the Distribution Licensee to make DSM an integral part of its day-to-day operations. Thus, the expenses on any additional manpower are to be borne by TPC-D within the allowed O&M expenses. A similar approach has been followed by the Commission while approving the DSM expenses for FY 2015-16….."*

9.5 Learned counsel for the Appellant further submitted that in addition to the impugned findings, during the hearing, the State Commission has argued that when normative O&M parameters were set, the factor of number of consumers was not considered for the Appellant, while it was considered for other distribution licensees. In other words, the normative O&M parameters are anyway higher for the Appellant as opposed to other licensees. Learned counsel was quick to point out that this reasoning is neither borne out from the

impugned order nor written submissions/additional written submissions of the Commission. In fact, such a disallowance of DSM expenses is contrary to Regulations 3.2 & 9.1 (a) & 9.1 (b) of the DSM Implementation Regulations, 2010. Learned counsel for the Appellant also pointed out that nowhere does the DSM implementation Regulations provide that DSM employee expenses will be passed through only for those employees/equipments employed for a specific scheme. In fact, such a contention of the State Commission is contrary to Section 61 of the Electricity act as it promotes inefficiency.

9.6 Learned counsel for the Appellant vehemently submitted that the principle applied by the State Commission in the true up order of FY 2014-15 is contrary to the principles set out by it in the MYT order dated 28.06.2013. It is a settled law that the methodology/ principle applied for computation of tariff at the time of MYT cannot be changed at the stage of truing up. To substantiate his contentions, learned counsel placed reliance on *Meghalaya State Electricity Board* v. *Meghalaya SERC*: 2010 ELR (APTEL) 940 (Para 34) and also *Bangalore Electric Supply Company* v. *KERC.*

9.7 As regards the State Commission's submission that the normative expenses are anyway higher for the Appellant than it ought to be, learned counsel for the Appellant submitted that not only is it struck by Hon'ble Supreme Court's Judgment in *Mohinder Singh Gill (Supra)* but it is also otherwise erroneous and misplaced. Once normative parameters are set, the State Commission ought to have followed the same in terms of the applicable Regulations. In fact, the Regulations nowhere permit MERC to follow different dispensations

at different points of time. Learned counsel was quick to point that in any case, as per the DSM Regulations read with MERC's Letters dated 26.09.2007 and 02.04.2008, it is clear that DSM Costs are not included as part of O&M Expenses. Learned counsel while summing up his arguments submitted that the DSM employee expenses disallowed by the State Commission be set aside and allowed as claimed by the Appellant.

9.8 Learned counsel for the Respondent Commission submitted that certain DSM employee cost and miscellaneous expenditure not specific to any particular scheme have not been reduced by the State Commission from the O&M expenses. Learned counsel further submitted that with or without the employees DSM costs, the actual O&M expenses presented by the Appellant were higher than the normative expenses which were allowed by the Commission in the MYT order. Learned counsel for the State Commission vehemently submitted that it is not the case of the Appellant that no DSM expenses have been allowed. In fact, the Commission has taken into account the cost of approved DSM schemes depending upon the present status of their implementation. The Appellant has stated that the DSM employee cost that it had deducted from O&M expenses and shown under the DSM head were not specific to any particular DSM scheme. However, the DSM implementation framework Regulations, 2010 expect the distribution licensee to make DSM an integral part of its day to day operation, therefore, the expenses on any additional manpower are to be borne by the Appellant within the allowed O&M expenses. A similar approach has been followed by the State Commission while approving the DSM expenses for FY 2015-16.

9.9 In view of the submission made by both the parties, it is relevant to note that the State Commission has duly allowed the DSM expenses in lieu of the specific DSM scheme depending upon their present status etc. and in the process has disallowed the claim of the Appellant towards certain DSM employee cost. It is also noticed that the Respondent Commission had not reduced the disallowed component of DSM expenses from the O&M expenses. Moreover, it is evident that with or without these employees DSM costs, the actual O&M expenses presented by the Appellant were higher than the normative expenses which were allowed by the Commission in the MYT order. It is expected that the distribution licensee makes DSM an integral part of its day to day operation, thus, the expenses on any additional manpower are to be borne by the Appellant within the allowed O&M expenses. In view of these facts, we do not notice any infirmity in the impugned order relevant to this issue. Hence, intervention of this Tribunal is not called for.

10. **Issue No.3**:-

10.1 Learned counsel for the Appellant alleged that the State Commission contrary to its own regulations, directed remittance of revenue collected from Open Access Consumers to the State Transmission Utility ("STU"), to the tune of Rs. 2.02 Crores. In fact, this error has been conceded to by MERC in its Review Order, but failed to pass any consequential Order granting relief to Appellant' consumers. Learned counsel for the Appellant further submitted that the Appellant has been collecting Transmission Charges from its Open Access consumers in terms of the Distribution Open Access Regulations, 2014. The intent of Regulation 15.2(v) of the Distribution Open Access Regulations 2014 is to ensure that the

STU does not collect the same Transmission Charges twice. The subsequent MERC (Distribution Open Access) Regulations, 2016 (“Distribution Open Access Regulations 2016”) provide for the establishment of an Open Access Monitoring and Review Committee (Regulation 31). In its second meeting dated 19.07.2017, the said Committee has also opined that distribution licensees should be permitted to retain the Transmission Charges received from partial Open Access Consumers.

10.2 Learned counsel for the Appellant was quick to submit that in the Review Order dated 22.11.2017, the State Commission has conceded that its directions to the appellant to remit the Transmission Charges received from its partial Open Access consumers to STU is in contravention of Regulation 15.2(v).However, having come to that conclusion, the State Commission has proceeded to not review its MYT Order dated 21.10.2016 on the pretext that no loss is caused to the Appellant. Learned counsel contended that once MERC arrived at the conclusion that its directions in the MYT Order dated 21.10.2016 regarding remittance of Transmission Charges by the Appellant to STU were erroneous, it ought to have returned appropriate consequential findings in the review Order and allow the Appellant’s claim.

10.3 Learned counsel for the Appellant contended that its challenge to the present issue is not on account of some perceived loss caused to it but on account of the loss caused to its consumers. Further, the new justification of the State Commission in its submissions in the present Appeal stating that the said amount of transmission charges would result in reducing the overall Transmission Charges

applicable to all consumers and would not result any loss to the Appellant. This contention of the State Commission is not tenable under the principles laid down in the judgment of *Mohinder Singh Gill v. Chief Election Commissioner*[(1978) 1 SCC 40] (supra). In the light of these submissions, learned counsel for the Appellant prayed that the impugned order be set aside to this extent and the State Commission pass consequential order granting Appellant its due allowance.

10.4 ***Per contra,*** learned counsel for the State Commission submitted that this issue has been dealt in detail in the MYT order dated 21.10.2016 and also in the Review Order dated 22.11.2017. In fact, in the review order, the Commission has noted that to the extent of the amount received from partial open access consumers. The direction in the MYT order is contrary to Regulation 15.2 (v) of the Open Access Regulations. However, the Respondent Commission did not grant any relief in the Review Order as no loss had been caused to the Appellant to this account. Moreover, this amount was not considered in the revenue of the Appellant for the purpose of true up and hence no loss has been caused to the Appellant. Hence, the Appellant remained revenue neutral in this matter. Learned counsel for the State Commission accordingly concluded that having incurred no loss on this account, the Appellant should not insist for further true up on this aspect.

<u>Our Findings</u>:-

10.5 We have evaluated the contentions of both the parties and also perused the relevant Regulations notified by the State Commission

in this regard. Under section 15.2(v) of the Open Access Regulation, 2014, it is provided that the concerned distribution licensee shall collect and retain the transmission charges from the partial open access consumers and get reflected in their ARR. However, vide the MYT order dated 21.10.2016, the State Commission by mistake directed the Appellant to deposit the said transmission charges amounting to Rs.2.02 crores to STU which Applicant did. In the review order dated 22.11.2017, the State Commission noted the error and the same was brought out in the impugned review order. However, instead of getting the said amount of Rs.2.02 crores, returned to the Appellant, the State Commission accounted for the same in reducing the overall transmission charges applicable to all consumers including those of the Appellant. In the process of such adjustment, the Appellant has remained revenue neutral and without any loss. But Appellant contends that by retaining that amount, its consumers would have benefitted more in comparison to getting benefit from reduced transmission charges. We are of the opinion that it is mandatory on the part of the State Commission to comply with the Regulations notified by it in true spirit.

10.6 In light of these facts, we opine that as the case has finally been trued up and the reference amount of Rs.2.02 crores has been accounted for the ultimate benefit of end consumers in reducing the transmission tariff and the Appellant has also remained revenue neutral, this issue need not be re-opened for further consideration/ true up.

11. **Summary of Findings**:-

11.1 **Issue No.1**:- It is decided that the rate of depreciation for the Retail Supply Business shall be computed afresh by the State Commission based on the requisite data and details furnished by the Appellant. **The issue is decided in favour of the Appellant.**

11.2 **Issue No.2**:- We hold that the DSM being an integral part of the day to day operations, the expenses on any additional manpower are to be borne by the Appellant within the allowed O&M expenses. **The issue is decided against the Appellant.**

11.3 **Issue No.3**:- As the amount collected from partial open access consumers in lieu of transmission charges has been accounted for by the State Commission in reducing the transmission charges of the end consumers and also the Appellant has not suffered any loss, the matter may be considered as trued up. **The issue is decided against the Appellant.**

ORDER

In light of the above, we are of the considered view that some issues raised in the Appeal have merits and hence the Appeal No. 58 of 2018 is partially allowed. The impugned orders dated 21.10.2016 in Case No. 47 of 2016 and dated 22.11.2017 in Case No. 165 of 2016, passed by Maharashtra Electricity Regulatory Commission are upheld/set aside to the extent of our findings stated in Para Nos.11.1 to 11.3.

The State Commission is directed to issue consequential orders as expeditiously as possible within a period of three months from the date of pronouncement of this judgment /order.

No order as to costs.

Pronounced in the Virtual Court on this **20th day of October, 2020.**

(S.D. Dubey) **Technical Member**	**(Justice Manjula Chellur)** **Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

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