

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**CASE No. 315 of 2018**

**Case of Adani Electricity Mumbai Limited (Transmission) for review of the  
Commission's Order dated 12 September, 2018 in Case No. 201 of 2017**

**Coram**

**Anand B. Kulkarni, Chairperson**

**I.M. Bohari, Member**

**Mukesh Khullar, Member**

Adani Electricity Mumbai Limited (Transmission) .....Petitioner

**Appearance:**

For the Petitioner: 1) Smt. Deepa Chawan (Adv.)  
2) Shri Ghanshyam Thakkar (Rep.)

**ORDER**

**Date: 12 December, 2018**

1. Adani Electricity Mumbai Limited - Transmission (**AEML-T**), CTS 407/A (New), 408 (Old), Village Eksar, Devidas Lane, Off SVP Road, Borivali (West), Mumbai 400 103 has filed a Petition on 26 October , 2018 under Regulation 85 of the MERC (Conduct of Business) Regulations, 2004 for review of the Commission's Order dated 12 September, 2018 in Case No. 201 of 2017 ( "**Impugned Order**" ) in respect of Truing-up of Aggregate Revenue Requirement (**ARR**) for FY 2015-16 and FY 2016-17, Provisional Truing-up for FY 2017-18 and approval of revised ARR for FY 2018-19 and FY 2019-20.
2. **AEML-T's main prayers are as follows:-**
  - a) "*Review the order dated 12.09.2018 passed in Case No. 201 of 2017 and consider the issues addressed in paragraphs 3 to 6 hereinabove;*
  - b) "*That this Hon'ble Commission be pleased to consider charges levied by PWD as uncontrollable amounting to "Change in Law" and approve the same over and above the normative O&M allowance;*
  - c) "*That this Hon'ble Commission be pleased to re-instate the IoWC treated as efficiency gains for FY 2016-17*

- d) *That this Hon'ble Commission be pleased to re-instate the PBT for FY 2015-16 and FY 2016-17 by not considering the Contribution to Contingency Reserve as an expense item and consequentially approve the reworked Income Tax for FY 2015-16 to FY 2019-20;*
- e) *That this Hon'ble Commission be pleased to reinstate the PBT for FY 2016-17 by considering only the net entitlement of IoWC and consequentially approve the reworked Income Tax for FY 2016-17 to FY 2019-20.*
- f) --- ”

3. The Commission vide letter dated 29.09.2018, assigned the Transmission Licence No. 1 of 2011 to AEML. Accordingly, the Review Petition is filed in the name of AEML.
4. The hearing was conducted on 27 November, 2018 wherein AEML-T reiterated the issues raised in the Petition and stated that there is an error on face of the record of the impugned Order. Hence, review is maintainable as per the provisions of MERC (Conduct of Business) Regulations, 2004. The Advocate of AEML-T submitted a copy of the Hon'ble Supreme Court's Judgment dated 10.1.2005 (*BCCI v. Netaji Cricket Club*) in support of its review Petition which read as under:

*“B. Civil Procedure Code, 1908 – S. 114 and Or. 47 R. 1-Review-Grounds for – Expressions “ mistake”, “sufficient reason ” – Scope – “Mistake ”, held , covered mistake on the part of court regarding the nature of undertaking given by the counsel of a party –What constitutes “sufficient reason ”, held , would depend on the facts and circumstances of the case – Words”, sufficient reason ” covered even a misconception of fact or law by the court or even an advocate – Moreover , the doctrine of “ actus curiae neminem gravabit” also may necessitate a review – In view of S.114 CPC the order admitting the review application was ex facie not bad – ”*

5. AEML-T has sought the review of the Order in Case No. 201 of 2017, and the grounds and submissions of AEML-T are elaborated in the following paragraphs:-
- 6. Issue 1: Public Work Department (PWD) charges considered as controllable expenses by including as part of R&M expenses for computing efficiency gains / loss on O&M expenses:**

***AEML-T's Submission***

- 6.1. The Commission has not considered PWD charges for ground rental for cable laying as uncontrollable O&M expense, which was not included in the O&M norms.
- 6.2. The Commission, at the time of issue of the MYT Regulations, 2011, had considered the actual O&M expenses for FY 2006-07 to FY 2008-09 and the same were considered for computing O&M norms for FY 2012-13 to FY 2015-16.
- 6.3. AEML-T at the time of submission of the MYT Petition in Case No. 141 of 2012 (for approval of ARR for FY 2012-13 to FY 2015-16) under the provisions of the MYT Regulations, 2011, had, inter alia, claimed PWD rental charges as additional expenses, because the same were not factored in the actual expenses for the period FY 2006-07 to FY 2008-09 considered for deriving the O&M norms. The Commission, in its Order in Case No. 141 of 2012 also allowed additional expenses such as energy charges, SCADA charges, PWD rental, etc. as additional expenses over and above normative

O&M expenses. Subsequently, during the Mid-Term Performance Review proceedings for Second Control Period, the Commission again recognized, inter alia, the rental charges of PWD as uncontrollable and which is to be allowed separately. However, as no actual payment had been made by AEML-T till then, the Commission did not include any amount towards the same in O&M expenses of FY 2015-16.

- 6.4. The Commission, by virtue of the above Orders, has already held that any O&M expenses which are additional and incidental to business, but not considered while preparing the norms of O&M expenses, should be allowed in addition.
- 6.5. Accordingly, for the current MYT Period from FY 2016-17 to FY 2019-20, the norms for O&M expenses were prepared considering the actual expenses incurred from FY 2010-11 to FY 2013-14. Further, AEML-T's submissions and the Commission's MTR Order dated 26 June, 2015 in Case No. 221 of 2014 shows that AEML-T has not included any expenses towards PWD ground rental charges.
- 6.6. O&M norms for the third control period from FY 2016-17 to FY 2019-20 also did not include PWD ground rental charges. Accordingly, in its MYT Period for the aforesaid Control Period, AEML-T again appraised additional expenses on account of O&M charges that could likely be paid in FY 2016-17. However, in MYT Order dated 22 June, 2016 in Case No.13 of 2016 the Commission held that it does not accept the plea of AEML-T to provide any escalation over and above the norms specified in the MYT Regulations, 2015. The same was of no consequence in as much as, there was no financial impact in absence of any demand from PWD.
- 6.7. Subsequently, the actual charges paid towards cable rental as per demand from PWD were claimed including past period in the True-up for FY 2016-17. Since such charges by their very nature are uncontrollable and have been considered as such by the Commission in its earlier Orders. However, the Commission, in the impugned Order at para 5.6.9, held that it has already dealt with the issue of not considering any additional expenses over and above the normative O&M expenses since the norms were derived after inclusion of additional expenses in the MYT Order dated 22 June, 2016 and this position has not been challenged by AEML-T.
- 6.8. In the MTR Petition in Case No.201 of 2017 , AEML-T had submitted that demand of rental charges were first time raised by the PWD in the FY 2016-17 including arrears for FY 2015-16. Similarly, demand for charges being an annual payment was also raised in FY 2017-18 and AEML-T had paid the same. AEML-T had provided necessary documentary evidence in support of its claim. No payment towards these charges was made prior to FY 2016-17 and AEML-T also never claimed these expenses in the past. Therefore, the disallowance of PWD charges on the ground that the MYT Order dated 22 June, 2016 included additional expenses in the O&M norms is not correct and these charges could not possibly have been included in the O&M norms.
- 6.9. It was held in previous Orders for the last MYT Period (FY 2012-13 to 2015-16) that these additional expenses, including PWD charges, are uncontrollable. Accordingly, PWD charges were allowed over and above the norms. This position cannot be reversed now, as the norms for the new MYT Period continue to exclude these expenses.

- 6.10. Expenses towards PWD charges are statutory in nature and are not reimbursed through the normative O&M allowance and needs to be allowed separately as uncontrollable as repeatedly held by the Commission in past and efficiency gains / losses on O&M expenses should be determined after excluding these expenses.

***Commission's Analysis and Rulings:***

- 6.11. Regulation 85(a) of the MERC (Conduct of Business) Regulations, 2004 governing review specifies as follows:

*“ Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Commission.”*

Therefore, the ambit of review is limited. The issues raised in this Review Petition are evaluated accordingly.

- 6.12. The Commission vide its MYT Order dated 22 June 2016 in Case No. 13 of 2016 had clearly ruled that additional O&M expenses of AEML-T have already been considered while setting O&M norms for the third Control Period (i.e. FY 2016-17 to FY 2019-20). Hence, AEML's demand for additional O&M expense over and above norms was not accepted. The Commission rulings in the said order read as under:

*“6.6.8 These norms were developed based on the actual O&M expenses of RInfra-T for the period from FY 2011-12 to FY 2013-14, which also included the additional expenses over and above the base O&M expenses.*

*6.6.9 In its comments on the draft Regulations, RInfra-T stated that all its additional expenses were not covered in FY 2011-12 to FY 2013-14 and that there would be an anomaly in case the norms are prepared based on the O&M expenses for these years.*

*6.6.10 The Commission considered RInfra-T's comments and normalized the expenses for FY 2011-12 to FY 2013-14 accordingly. The Commission prepared the O&M expense norms for RInfra-T in the final MYT Regulations based on these normalized expenses.*

*6.6.11 It will be seen that the O&M expense norms specified in the final MYT Regulations, 2015 are higher than in the draft Regulations. This also indicates that the additional O&M expenses over and above the base O&M expenses have been considered.*

- 6.13. In line with the MYT Order dated 22 June 2016 in Case No. 13 of 2016, the Commission in the impugned Order while approving the O&M expenses for FY16-17 has ruled as under: has ruled as under:

“4.6.12 Following Table summarizes inclusion of SCADA allocation, corporate allocation, energy charges etc. within employee expenses, A&G expenses and R&M expenses as controllable expense. However, these charges have been sought as inclusive in the O&M expense claim by RInfra-T as the same has been subsumed in the norms.

Table 1: Additional O&M expense subsumed as controllable O&M expense (Rs.Cr.)

Particulars	Employee Expenses	A&G Expense	R&M Expense
Gross expenses	38.00	9.32	7.59
Energy charges	-	3.55	-
<b>Land Usage charges</b>	-	<b>4.85</b>	-
SCADA allocation	0.86	0.01	0.19
Corporate allocation	2.12	0.78	0.07
Less: expenses capitalized	12.09		
Net Expenses	28.89	18.50	7.85

4.6.13 Accordingly, the actual O&M expenses are approved as shown in table below for FY 2016-17. RInfra-T had submitted PWD charges as uncontrollable. However, the Commission has included PWD charges in R&M expenses as controllable.

Table 2: Actual O&M expenses approved by the Commission

Particulars	MYT Order	MTR Petition	Approved in this Order
Employee Expenses		28.89	28.89
A&G Expenses		18.50	18.50
R&M Expenses		7.85	8.03
PWD Charges	-	0.18	-
Total O&M Expenses	53.19	55.42	55.42

4.6.14 The Commission thus approves actual O&M expenses of Rs. 55.42 Crore for FY 2016-17 with approved Employee Expenses as Rs.28.89 Crore and A&G Expenses Rs. 18.50 Crore which are same as submitted by RInfra-T. Approved R&M Expenses are Rs. 8.03 Crore against Rs. 7.85 Core submitted by RInfra-T. PWD Charges are included as component of R&M Expenses instead of additional O&M

4.6.17 RInfra-T in the MYT Order had asked for PWD charges to be treated as uncontrollable and to be allowed in addition to the normative O&M expense. The Commission had clarified in the MYT Order that additional O&M expenses of RInfra-T have already been considered while setting O&M norms for the third Control Period and request for additional O&M expense above normative was not acceptable. Following is the relevant extract from the MYT Order.

4.6.18 Considering above treatment of additional O&M expense norms provided to RInfra-T, PWD charges and other O&M charges including land usage charges, SCADA allocation, corporate allocation are not considered as uncontrollable in this Order.

5.6.9 As regards to submission of RInfra-T for additional expenses over and above the normative O&M expenses, the Commission has already dealt this issue in the

True up of O&M expense of FY 2016-17 as well as in the MYT Order. The position taken by the Commission in MYT Order of not considering any additional expense over and above normative since the norms were developed after inclusion of the additional expenses is already a settled position. This position of the Commission in the MYT Order has not been challenged by RInfra-T. Hence, the Commission doesn't accept the request of RInfra-T and in line with the Regulations approves the normative O&M expenses for FY 2017-18.

6.6.6 As already explained in the earlier sections in this Order, the Commission opines that the O&M norms specified in the MYT Regulations were developed based on the actual O&M expenses of RInfra-T for a period from FY 2011-12 to FY 2013-14, which also include the additional expenses over and above the base O&M expenses. Therefore, in line with the approach adopted in the earlier sections of this Order, the Commission is not considering any such additional expense for the balance years of the 3rd Control Period."

- 6.14. AEML's true-up for FY 2015-16 and FY 2016-17 is done as per MYT Regulations, 2011 and 2015 respectively. The comparison of O&M norms derived by the Commission for FY 2015-16 and FY 2016-17 are as shown in the table below:

**Table No.1 Comparison of O&M Norms of AEML-T for FY 2015-16 and FY 2016- 17 Rs. Cr.:**

Voltage level	FY 2015-16	FY 2016-17	
	MYT Regulations 2011 [A]	Draft Regulations 2015 [B]	Final Regulations 2015 [C]
Rs Lakh/ ckt km			
>66 kV & <400 kV	0.45	0.50	0.59
% increase over [A]		11.11%	31.11%
Rs Lakh/bay			
>66 kV & <400 kV	21.18	23.43	27.70
% increase over [A]		10.62%	30.78%
66kV and less	4.43	4.90	5.79
% increase over [A]		10.61%	30.70%

- 6.15. The above table statistics shows that O&M norms for the FY 2016-17 (as per MYT Regulations 2015) are about 30 % higher than the norms for the FY 2015-16 (as per MYT Regulations, 2011). Moreover, annual escalation in O&M norms has been provided for every year in control period from FY 2016-17 to FY 2019-20 as shown in table below.

**Table 3: Comparison of O&M norms in draft MYT Regulations 2015 vs. Final MYT Regulations, 2015**

Voltage level	FY 2016-17		FY 2017-18		FY 2018-19		FY 2019-20	
	Draft	Final	Draft	Final	Draft	Final	Draft	Final
Rs Lakh/ ckt km								
>66 kV & <400 kV	0.50	0.59	0.52	0.62	0.55	0.65	0.57	0.68
Rs Lakh/bay								
>66 kV & <400 kV	23.43	27.70	24.60	29.09	25.83	30.54	27.12	32.07
66kV and less	4.90	5.79	5.14	6.08	5.40	6.38	5.67	6.70

- 6.16. The comparison of the O&M norms as per the MYT, Regulations 2011 and 2015 clearly indicates that norms as per MYT Regulations, 2015 are much higher than MYT Regulations, 2011 as norms in the 2015 Regulations were derived by adding all expenses incurred by AEML-T in past. The Commission in past had recognized PWD rental expenses as uncontrollable in previous Order only on account of the fact that the same were not envisaged at the time of setting O&M norms in MYT Regulations, 2011 which is not the case in MYT Regulations, 2015. Hence, PWD charges could not be treated as uncontrollable as claimed by AEML-T as these are part of the normative expenses.
- 6.17. Neither AEML-T has brought any new facts on record which were not part of the proceedings in the impugned Order nor is there any apparent error on the face of record justifying the review. Further, there is no merit in the argument for the proposed review of the Order. Therefore, the Commission is of the view that no modification of its earlier ruling is warranted.
- 7. Issue 2: Consideration of actual Interest on Working Capital (IoWC) for FY 2016-17 as “Nil” and treating normative IoWC as efficiency gains:**

***AEML-T’s Submission***

- 7.1. AEML-T in the MTR Petition had claimed IoWC on normative basis as per Regulation 31.2 of the MYT Regulations, 2015 by applying the norms to the actuals. Also, it had further submitted that in line with the judgments of the Hon’ble Appellate Tribunal for Electricity (APTEL) in Appeal No. 203 of 2010 and Appeal Nos. 17, 18 and 19 of 2011, no efficiency gains have been considered on the IoWC and entire interest on working capital as worked out above has been claimed in the truing-up.
- 7.2. While passing the impugned Order, the actual IoWC is considered as nil thereby considering the entire normative IoWC as Efficiency Gain. AEML-T is seeking review of the above issue.
- 7.3. AEML-T’s business continues to be an integrated one, where the cash flows of the AEML-T’s individual business segments cannot be segregated from one another, making it impossible to actually allocate any interest cost of short-term loans or working capital loans towards any particular business segment.
- 7.4. For an integrated business like that of AEML-T, presence of Working Capital can only be inferred, but not directly seen from any loan or dedicated working capital funding. The inference has to be drawn from the cycle of payables and receivables in the business. There can be no denial of the fact that working capital is required for carrying on the business through borrowed funds.
- 7.5. APTEL Judgment in Appeal No. 111 of 2008 dated 28 May, 2009 [earlier Generation Tariff Order of Adani Electricity Mumbai Limited-Generation business (Erstwhile Reliance Infrastructure Limited-Generation or RInfra-G) in Case No. 65 of 2007 dated 21 April 2008] has specified that even when working capital has been funded through internal accruals of the Licensee (being an integrated entity), cost of such internal funds should be considered. Accordingly, the said decision is applicable to the present case also and efficiency gain cannot be denied merely because there are no external borrowings. APTEL rulings in this Appeal read as

under:

*“The Commission observed that in actual fact no amount has been paid towards interest. Therefore, the entire interest on working capital granted as pass through in tariff has been treated as efficiency gain. It is true that internal funds also deserve interest in as much as the internal fund when employed as working capital loses the interest it could have earned by investment elsewhere. Further the licensee can never have any funds which have no cost. The internal accruals are not like some reserve which does not carry any cost. Internal accruals could have been inter corporate deposits, as suggested on behalf of the appellant. In that case the same would also carry the cost of interest. When the Commission observed that the REL had actually not incurred any expenditure towards interest on working capital it should have also considered if the internal accruals had to bear some costs themselves. The Commission could have looked into the source of such internal accruals and the cost of generating such accruals. The cost of such accruals or funds could be less or more than the normative interest. In arriving at whether there was a gain or loss the Commission was required to take the total picture into consideration which the Commission has not done. It cannot be said that simply because internal accruals were used and there was no outflow of funds by way of interest on working capital and hence the entire interest on working capital was gain which could be shared as per Regulation No. 19. Accordingly, the claim of the appellant that it has wrongly been made to share the interest on working capital as per Regulation 19 has merit.”*

- 7.6. As per above Judgment, in the event working capital has been funded through internal accruals of the Licensee (being an integrated entity), cost of such internal funds should be considered. This is on the premise that internal funds of the entity also carry certain cost. The above Judgment principally held that internal funds for working capital also carry cost and has nothing to do with the MYT Regulations for any Control Period.
- 7.7. In the Accounting Statement Format for FY 2016-17 submitted by AEML-T, in response to data gaps dated 02 January, 2018 it is stated that there were no short term loans in the Transmission Business. However, considering the nature of Transmission Business, working capital funding is required by AEML-T, which, however, comes through internal resources provided by the corporate division of the AEML-T for FY 2016-17. AEML-T being an integrated entity, with a single cash flow / funds flow statement, the utilization of common funds pool by different business segments cannot be separately shown, but this does not mean that no funds are required for working capital.
- 7.8. Based on the above, AEML-T submitted the IoWC for FY 2016-17 vis-à-vis approved by the Commission as below:

**Table 4: Additional claim for IoWC submitted by AEML-T (Rs. Crore)**

Particulars		Approved in the MTR Order	Sought in Review Petition
Normative IoWC	A	5.74	5.74
Actual IoWC	B	-	5.74
Gain in IoWC	C = A-B	5.74	-
Rebate on IoWC	D = C*2/3	3.82	-



Particulars		Approved in the MTR Order	Sought in Review Petition
Net entitlement	A-D	1.91	5.74
Additional claim sought			3.83

### ***Commission's Analysis and Ruling***

- 7.9. AEML's contention is that the Commission in the impugned Order has considered actual IoWC for FY 2016-17 as "Nil" and treating normative IoWC as efficiency gains which is apparent error on the face of record and needs to review.
- 7.10. The Commission notes that in the impugned Order, sharing of Efficiency Gains / Losses on IoWC for FY 2016-17 has been undertaken as per clause 31.6 of MYT Regulations, 2015 which states that the actual interest on working capital incurred and substantiated by documentary evidence, shall be considered as an efficiency gain or efficiency loss. The relevant Regulation is reproduced below:

*"31.6 For the purpose of Truing-up for each year, the variation between the normative interest on working capital computed at the time of Truing-up and the actual interest on working capital incurred by the Generating Company or Licensee or MSLDC, substantiated by documentary evidence, shall be considered as an efficiency gain or efficiency loss, as the case may be, on account of controllable factors, and shared between it and the respective Beneficiary or consumer as the case may be, in accordance with Regulation 11:*

- 7.11. The Commission in the impugned Order while approving the IoWC has ruled as under:

*"4.7.10 The Commission in line with the above stated Regulation evaluated the actual working capital of RIntra-T. On scrutiny of the Reconciliation Statement of Audited Accounts and MTR Petition received in the reply to data gaps, a remark was included that the working capital funding was through internal accruals of RIntra Corporate and hence no interest was booked in accounts. However, in MTR Petition interest on working capital was computed normatively as per MYT Regulations. Further, in the Petition RIntra-T has not considered the Efficiency Gains on IoWC in line with the Judgements of ATE in Appeal No. 203 of 2010 and Appeal Nos. 17, 18, 19 of 2011.*

*4.7.11 The Commission observes that the MYT Regulations, 2015 is very clear that the sharing of Efficiency Gains/Losses needs to be done based only on the actual interest working capital which should also be substantiated by documentary evidence. However, the audited accounting statement doesn't reflect any actual IoWC, rather the audited accounting statement outrightly specifies that the IoWC has been computed normatively. Therefore, the Commission opines that there is no actual IoWC as well as no documentary evidence of the actual IoWC. Hence, the sharing of Efficiency Gains/Losses should be computed based on the nil IoWC compared against the normative IoWC. The computation of sharing of Efficiency Gains/Losses is dealt in the later section in this Order."*

- 7.12. It is an admitted fact, both in the MTR Petition as well as the review Petition, that the actual interest on working capital is "NIL". Also, the audited Accounting Statement Format submitted by AEML-T for FY 2016-17 for its transmission business, highlighted no short term loans for transmission business. Therefore, there was no actual documentary evidence submitted by AEML-T which indicated the actual cost

incurred against IoWC. Hence in line with the above Regulations, the entire normative IoWC has been considered for sharing in the impugned Order.

7.13. AEML-T contends that the Hon'ble APTEL Judgment has held that in the event, working capital has been funded through internal accruals of the Licensee (being an integrated entity), cost of such internal funds should be considered. In accordance with the above Judgment of Hon'ble APTEL, the Commission, in the impugned Order has allowed the normative interest on working capital in line with Clause 31.2 of MYT Regulations, 2015. Therefore, the requirement of working capital has been assessed by the Commission in the said Order based on cycle of payables and receivables in the business which is applicable to AEML-T on normative basis in line with the clause 31.2 of MYT Regulations, 2015.

7.14. Hon'ble APTEL's Judgment in Appeal No. 18 of 2011 dated 31 August, 2012 has also ruled as under which is missing in the submission of AEML-T:

*“However, the State Commission may frame regulations for evaluation of cost of internal accruals used as working capital for working out the actual interest on working capital and efficiency gain.”*

7.15. The Commission has notified MERC, MYT Regulations, 2015 for third MYT Control Period from FY 2016-17 to 2019-20 on 8 December, 2015 post Hon'ble APTEL's Judgment dated 31 August, 2012 in Appeal No. 18 of 2011. Hence, it is clear that Hon'ble APTEL Judgment was with reference to the earlier MYT Regulations, 2011 and is not applicable to the prevailing MYT Regulations, 2015 which states that actual IoWC needs to be demonstrated through documentary evidence.

7.16. Further, the Commission notes that AEML-T has submitted in its Audited Statement that actual IoWC is nil. No conclusive documentary evidence has been submitted by AEML-T which will ascertain that internal fund is used for working capital and cost of such internal fund used.

7.17. In view of the foregoing, the Commission is of the view that there is no error apparent on the face of the record and no ground has been made out for review of the impugned Order on this aspect which would satisfy the requirements of Regulation 85(a) of the MERC (Conduct of Business) Regulations, 2004. Accordingly, no change is proposed in the calculation of efficiency gains on IoWC for FY 2016-17.

### **8. Issue 3: Contribution to Contingency Reserve considered as an expense while computing Profit Before Tax (PBT) for FY 2015-16 and FY 2016-17**

#### ***AEML-T's Submission***

8.1. The Commission in the impugned Order has considered contribution to contingency reserve as expense in determination of regulatory PBT for FY 2015-16 and FY 2016-17 which is an error apparent on the face of the Order. Hence, AEML-T requests to reinstate the PBT for FY 2015-16 and FY 2016-17 by not considering the Contribution to Contingency Reserve as an expense item and consequentially approve the reworked Income Tax (IT) for FY 2015-16 and FY 2016-17. Since in the impugned Order, IT for FY 2017-18 to FY 2019-20 is considered based on the approved IT for FY 2016-17, the reworked IT for FY 2016-17 may also be considered for FY 2017-18 to FY 2019-20.

- 8.2. Contribution to contingency reserve is approved as an element of ARR and, as per the MYT Regulations, the amount so appropriated shall be invested in securities authorized under the Indian Trusts Act, 1882. Further, the income arising from such investment is passed on as Non-Tariff Income (NTI) and reduces the ARR.
- 8.3. Investment of contribution to contingency reserve appears as an asset in the Balance Sheet and is not a Profit & Loss (P&L) item. Information about the said investments was submitted in MTR Petition.
- 8.4. As per Sec. 115JB of the IT Act, 1961, contribution to any reserves is not considered a Tax deductible expense which read as below:
- “115JB. Special provision for payment of tax by certain companies*
- (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2001, is less than seven and one-half per cent of its book profit, the tax payable for the relevant previous year shall be deemed to be seven and one-half per cent of such book profit...*
- ... Explanation.—For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by—*
- ... (b) the amounts carried to any reserves, by whatever name called; or...*”
- 8.5. As per Section 37 of the IT Act, 1961; contribution to contingency reserve cannot be considered as expense for calculation of PBT.
- “37. (1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee, laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head “Profits and gains of business or profession”.*
- 8.6. Contribution to contingency reserve is in the nature of a provision which is created for meeting future contingency. This amount appropriated to this reserve can be called upon in future to meet expenses which could not have been prevented. Thus, such contribution for meeting future expenses cannot itself be treated as an expense element for computing PBT. In future, if such reserve is called upon in order to meet any contingency, then the amount so spent from the reserve could be considered as business expenditure for the purposes of IT.
- 8.7. The Commission while approving the MTR Orders dated 12.09.2018 in Case No. 200 of 2017 and Case No. 69 of 2018 pertaining to the Distribution Business of the AEML and TPC-D respectively did not consider Contribution to Contingency Reserve as an expenditure / expense while computing PBT for FY 2015-16 and FY 2016-17. Hence, the Commission gave differential treatment to Transmission and Distribution Licensees. There is an error in considering Contribution to Contingency Reserve as an expense element for the purpose of computing PBT.

## ***Commission's Analysis and Ruling***

- 8.8. AEML-T in the review Petition stated that the Commission in the impugned Order has considered contribution to contingency reserve as expense in determination of regulatory PBT for FY 2015-16 and FY 2016-17 which is an error apparent on the face of the Order and sought the review.
- 8.9. The Commission in the impugned Order while approving the PBT for the FY 2015-16 and 2016-17 has ruled as under:
- “ 3.10.4 The Commission has computed Income Tax in accordance with Regulation 34.1 of MYT Regulations, 2011 and as specified in ATE Judgement dated 2 December 2013 in Case No. 138 and 139 of 2012.*
- 3.10.6 As specified in the Regulations and ATE Judgment, the Commission has arrived at Income Tax paid based on Regulatory Profit Before Tax (PBT) considering the normative cost allowed by the Commission. The ratio with regard to tax liability is calculated on the regulatory income and cost within the MYT regime considering the applicable tax depreciation for computation of the Income Tax. Accordingly the calculation of Income tax provides the tax payable for the Regulatory business whereby all the items of ARR and Revenue are considered on normative basis for tariff purpose. Also in line with MYT Regulations, 2011 no efficiency gains and incentive earned are considered for computation of Tax on PBT basis.----*
- 8.10. The Commission notes that as per the provisions of the MYT Regulations, 2011 as well as MYT Regulations, 2015 contribution to contingency reserve is a part of expense along with the other ARR components. Hence, the Commission in the impugned Order has treated contribution to contingency reserve accordingly while calculating the PBT on standalone basis as specified in Hon'ble APTEL Judgment dated 2 December 2013 in Case No. 138 and 139 of 2012 .
- 8.11. The Commission's rulings in the impugned Order shows that consideration of contribution to contingency reserve as a part of expenses while calculating the PBT for FY 2015-16 and FY 2016-17 is a considered decision and there is no error apparent on face of record as claimed AEML-T.
- 8.12. Further, the Commission observed that AEML-T in its MTR Petition had claimed 'Transfer to Contingency Reserve Fund' of Rs. 3.62 Crore in 'Other disallowances while computing PBT for FY 2016-17. Due to this, effect of inclusion of Contribution to Contingency Reserves as expenses is getting offset, because this disallowance is increasing Regulatory PBT. This fact is not submitted by AEML-T in the review Petition. Inclusion of 'Transfer to Contingency Reserve Fund' of Rs. 3.62 Crore in 'Other disallowances while computing PBT for FY 2016-17 is as shown in the Table below:

**Table No.4: Revised Calculation of Income Tax for FY 2015-16 and FY 2016-17 (Rs. Crore)**

Particulars	FY 2015-16			FY 2016-17		
	Impugned Order	Review Petition	Approved in this Order	Impugned Order	Review Petition	Approved in this Order
Total Revenue	285.51	285.51	285.51	272.09	272.09	272.09
Less						
O&M expenses, Depreciation & Interest on Term Loan	175.48	175.48	175.48	177.21	177.21	177.21
Interest on working capital	5.21	5.21	5.21	5.74	0	5.74
Contribution to Contingency Reserve	3.59	-	-	3.71	-	3.71
Total Expenditure	184.28	180.69	184.28	186.66	177.21	186.66
Profit Before Tax	101.23	104.81	101.22	85.43	96.99	85.43
<b>Other allowances &amp; disallowances</b>	<b>-31.90</b>	<b>-31.90</b>	<b>-31.90</b>	<b>-19.42</b>	<b>-19.42</b>	<b>-23.04</b>
Total Taxable income	69.32	72.91	69.32	66.01	75.46	62.40
Income Tax	23.99	25.23	23.99	22.85	26.12	21.60
Net decrease in IT		<b>1.24</b>			<b>3.27</b>	<b>-1.25</b>

8.13. The Other allowances and disallowances as shown in the table above includes other disallowance of transfer to contingency reserve fund claimed by AMEL-T in FY 2016-17 as shown in the Table below:

**Table No.5: Other disallowances while computing Income Tax for FY 2016-17 (Rs. Crore)**

Particulars	MTR Petition	Approved by the Commission in MTR Order
Provision for leave encashment	2.65	2.65
Provision for gratuity	1.32	1.32
Loss on sale of obsolete asset		
<b>Transfer to Contingency Reserve Fund</b>	<b>3.62</b>	<b>3.62</b>
Interest accrued on borrowings	0.01	0.01
Provision for contingencies	0.04	0.04

8.14. The Commission in the impugned Order, inadvertently allowed Rs. 3.62 Cr towards Transfer to Contingency Reserve Fund as part of other disallowances as claimed by AEML-T. Due to this calculation error, Income Tax for FY 2016-17 increased by Rs. 1.25 Cr. as shown in the Table No.4 above which is an error on part of the Commission and not included in the Review Petition by AEML-T.

8.15. In view of the foregoing, the Commission is of the view that there is no error apparent on the face of the record and no ground has been made out for review of the impugned Order on this aspect which would satisfy the requirements of Regulation 85(a) of the MERC (Conduct of Business) Regulations, 2004.

- 8.16. As regards the inconsistency in the approach adopted in MTR Orders dated 12 September, 2018 in Case No. 200 of 2017 and Case No. 69 of 2018 for AEML-D and TPC-D respectively, the Commission will examine and take its appropriate view at the time of next tariff determination of AEML-D and TPC-D.
- 8.17. Decrease in entitlement of Income Tax for FY 2016-17 by Rs. 1.25 Crore due to inclusion of ‘transfer to contribution to contingency reserves’ in Other Disallowances will be given effect in next tariff determination of AEML-T.

**9. Issue 4: Double deduction of IoWC while computing PBT for FY 2016-17:**

***AEML-T’s Submission:***

- 9.1. The Impugned Order considers IoWC of Rs. 5.74 Crore on the expenditure side as well as net entitlement of IoWC of Rs. 1.91 Crore as reduction from revenue side. This appears to be an error apparent on the face of the Order. This has resulted in double deduction. Only the net entitlement of Rs. 1.91 Crore ought to have been considered as it is done in MTR Order of Distribution Business of AEML in Case No. 200 of 2017 dated 12 September, 2018.
- 9.2. As per the judgment of APTEL in Appeal No. 138 and 139 of 2012, the Regulatory PBT is determined by considering the revenue and allowable expenses.
- 9.3. The MYT Regulations, 2015 do not permit Income Tax on Efficiency Gains and Incentives. This implies that subsequent to sharing of efficiency gains in any cost item, whatever is the net allowable cost should be considered for the purpose of Income Tax as well.
- 9.4. In view of above AEML-T requests to consider only the net entitlement of IoWC on the expenditure side of Regulator PBT computation and consequentially revise the Income Tax for FY 2016-17. Since in the Order, the Income tax for FY 2017-18 to FY 2019-20 is considered based on the approved Income tax for FY 2016-17, the reworked Income tax for FY 2016-17 may also be considered for FY 2017-18 to FY 2019-20.
- 9.5. Additional claim sought is considering the approved values in Impugned Order without taking into consideration the issues sought for review under this Review Petition i.e. denial of actual IoWC as set out above.

***Commission’s Analysis and Ruling:***

- 9.6. The Commission, in the impugned Order, has determined the Regulatory PBT as shown in the Table below:

“ 4.9.7 *Income Tax calculation for FY 2016-17 is as shown in Table below:*

*Table 5: Income Tax for FY 2016-17, as approved by the Commission (Rs. Crore)*

<i>Particulars</i>	<i>MYT Order</i>	<i>MTR Petition</i>	<i>Approved in this Order</i>
<i>Revenue from InSTS</i>		<i>271.81</i>	<i>271.81</i>
<i>Non Tariff Income</i>	<i>27.94</i>	<i>4.30</i>	<i>4.30</i>

<b>Particulars</b>	<b>MYT Order</b>	<b>MTR Petition</b>	<b>Approved in this Order</b>
<i>Less: Incentives</i>		-	2.11
<b>Less: Efficiency Gains</b>		-	<b>1.91</b>
<b>Total Revenue</b>		<b>276.12</b>	<b>272.09</b>
<i>O&amp;M expenses</i>		54.07	53.21
<i>Depreciation</i>		63.52	63.52
<i>Interest on long-term loan</i>		60.50	60.48
<b>Interest on Working Capital</b>		<b>5.76</b>	<b>5.74</b>
<i>Contribution to Contingency Reserve</i>		-	3.71
<b>Total Expenditure</b>		<b>183.85</b>	<b>186.66</b>
<i>Profit Before Tax</i>		92.27	85.43
<i>Add: Depreciation as per ARR</i>		63.52	63.52
<i>Add: Other Disallowances</i>		7.64	7.64
<i>Less: Depreciation as per I-Tax</i>		87.36	87.36
<i>Less: Other expenses allowed</i>		3.22	3.22
<i>Total Taxable Income</i>		72.85	66.01
<b>Tax Payable at Normal rate (Corporate Tax Rate, i.e., 34.608%)</b>	<b>27.94</b>	<b>25.21</b>	<b>22.85</b>

9.7. The Commission has determined the Regulatory PBT by considering the revenue and allowable expenses on standalone basis and therefore is in compliance with the judgment of APTEL in Appeal No. 138 and 139 of 2012.

9.8. The Commission notes that deduction of Rs. 1.91 Crore from revenue in computation of Income Tax as shown in the Table above is not on account of 'net entitlement of IoWC' as submitted by AEML-T, but as Efficiency Gain on IoWC. Net entitlement of IoWC is equal to Efficiency Gain on IoWC as a result of actual IoWC being zero. This is in accordance with Regulation 33.1 of MYT Regulations, 2015 which read as below.

*"...Provided also that no Income Tax shall be considered on the amount of efficiency gains and incentive approved by the Commission, irrespective of whether or not the amount of such efficiency gains and incentive are billed separately"*

9.9. Therefore, the Commission rules that no change is required in computation of Income Tax on account of IoWC, because Rs. 1.91 Crore is deducted from revenue on account of efficiency gain and Rs. 5.74 Crore is included in revenue as normative IoWC.

9.10. In view of the foregoing, the Commission is of the view that there is no error apparent on the face of the record and no ground has been made out for review of the impugned Order on this aspect which would satisfy the requirements of Regulation 85(a) of the MERC (Conduct of Business) Regulations, 2004.

- 9.11. As regards the inconsistency in the approach adopted in MTR Orders dated 12 September, 2018 in Case No. 200 of 2017 for AEML-D, the Commission will examine and take its appropriate view at the time of next tariff determination of AEML-D.
- 9.12. The Commission notes the citation submitted by AEML-T at the hearing held on 27 November, 2018. However, the case is not fit for reviewing of the impugned Order. Hence, the following Order:

**ORDER**

- 1) **The Case No. 315 of 2018 is dismissed.**
- 2) **As regards the inconsistency in the approach adopted in MTR Orders dated 12 September, 2018 in Case No. 200 of 2017 and Case No. 69 of 2018 for AEML-D and TPC-D respectively , the Commission will examine and take its appropriate view at the time of next tariff determination of AEML-D and TPC-D.**
- 3) **Decrease in entitlement of Income Tax for FY 2016-17 by Rs. 1.25 Crore due to inclusion of ‘transfer to contribution to contingency reserves’ in Other Disallowances will be given effect in next tariff determination of AEML-T.**

Sd/-  
**(Mukesh Khullar)**  
Member

Sd/-  
**(I. M. Bohari)**  
Member

Sd/-  
**(Anand B. Kulkarni)**  
Chairperson



(Dr. Rajendra Ambekar)  
Executive Director