

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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CASE No. 2 of 2005

In the matter of
**BEST Review Petition against Order dated 23.02.2005 in Case No. 19 of 2004
regarding Amendment/ Supplementary bills.**

**Dr Pramod Deo, Chairman
Shri A. Velayutham, Member
Shri S.B. Kulkarni, Member**

ORDER

Dated September 29, 2005

Subsequent to the Order dated 23rd February, 2005 in Case No. 19 of 2004 regarding Amendment/Supplementary Bills, Brihanmumbai Electric Supply and Transport (BEST) Undertaking submitted a Petition dated 8th April, 2005 seeking review of the Commission's Order dated 23rd February, 2005.

2. The Commission held a hearing on 4th May, 2005 to decide admission and the prayer for stay of the Order in the presence of consumer representatives. Thereafter, the Commission desired that BEST may submit specific issues/ points to the Commission which require further hearing with regard to admissibility in the first instance.

3. In the meantime, one of the Licensees (Reliance Energy Limited - REL) being aggrieved by the Order dated 23rd February, 2005, filed a Writ Petition in the High Court . The High Court, by its Order dated 5th May, 2005 granted *ad interim* stay. Subsequently, vide its Order dated 24th June, 2005, the High Court permitted REL to withdraw the Writ Petition and approach the Appellate Tribunal, which had since been constituted, in appeal in accordance with law. Subsequently, the stay has ceased to operate, and the matter is before the Appellate Tribunal on various grounds



4. By way of submission dated 19th August 2005, BEST submitted draft issues to the Commission seeking that they be considered while deciding the Review Petition after hearing the parties . The matter was further heard for admission on 13th September, 2005, when Shri P. Palkhiwala, Counsel for BEST was heard at length. At the close, the Commission directed him to submit materials and judgements relied upon by BEST for consideration by 16th September, 2005. BEST submitted to the Commission certain judgements relating to review, under letter dated 15th September, 2005.

5. In the two hearings held by the Commission on 4th May, 2005 and 13th September, 2005, Counsel for BEST put forward the grounds for review of the Order dated 23rd February, 2005, essentially as follows:

(i) That the hearing held by the Commission on 21st October 2004, prior to the impugned Order, was a general meeting and only broad discussions had taken place.

(ii) That, subsequent to responding to submissions made by the Consumer Representatives (Mumbai Grahak Panchayat and Prayas) after that hearing, the Petitioner was awaiting communication from the Commission regarding a date for hearing the specific points raised by the Consumer Representatives.

(iii) That the Commission did not hold any such further hearing before passing the Order dated 23rd February, 2005. Consequently, BEST and other Licensees not having been given an opportunity to be heard, constitutes sufficient reason for the Commission to review its Order dated 23rd February, 2005 to ensure that the principles of natural justice are complied with.

6. The Commission regulates its procedures through its Conduct of Business Regulations, 2004. As provided under Regulation 85(a), a review of its own Order is permissible on any of the following grounds:

(a) Discovery of new and important matter or evidence which, after exercise of due diligence, was not within the knowledge of the person seeking review, or could not be produced by him at the time when Order was made, or

(b) On account of some mistake or error apparent on the face of the record, or

(c) For any other sufficient reason.

7. The Commission has duly considered the submissions made by BEST. The Commission is of the view that it cannot be accepted that the Petitioner was not given a proper opportunity to be heard and to place its arguments (on specific issues or points) before the Commission prior to passing the Order dated 23rd February, 2005.



8. In fact, the Commission, after having noticed that some Distribution Licensees had been issuing to their consumers “amendment”, “supplementary” or other such bills, often several years later, on a basis other than actual meter reading for the relevant period i.e., recorded consumption, issued a letter dated 3rd August 2004 directing all Licensees to follow due process and the provisions of law in relation to such “amendment”, “supplementary” or other bills. The Commission also directed all Licensees to bring their respective billing practices into conformity with statutory provisions. The Licensees were asked to submit their affidavits by 3rd September 2004 stating the corrective actions taken, including:

- (i) withdrawal of all such pending bills, and
- (ii) refund, through adjustment in energy bills or otherwise,

of amounts recovered from consumers on or after 10th June 2003 i.e., the date of notification of the Electricity Act (EA), 2003, on this count.

9. All the Licensees (including the present Petitioner) filed their respective Affidavits in pursuance of the directions contained in the Commission’s letter dated 3rd August 2004, and submitted therein information regarding Amendment/Supplementary bills being issued by them, including the instances and manner in which these are issued by them to their consumers.

10. With reference to the Commission’s directives to withdraw pending amendment bills, etc., in their affidavit dated 10th September, 2004 the Petitioner urged that they should be heard before concluding that such billing is illegal and ought to be withdrawn.

11. The Commission thereafter issued a notice dated 30th September 2004 to all Licensees stating “that the Commission has decided to take up the matter suo motu and to hear the licensees”, and notifying them of the date of hearing to be held on 21st October, 2004.

12. In their affidavit dated 10th September, 2004 the Petitioner had also stated that it was not clear whether the Commission’s letter dated 3rd August, 2004 related to all amendment bills or to only a particular category, but were presuming that the reference was to the one-time exercise undertaken by BEST for recovery in cases where there has been under-recording of consumption due to incorrect meters.

13. At the hearing held on 21st October, 2004, BEST and the other Licensees represented by their Advocates and representatives, and the Consumer representatives (authorised to represent the interests of a consumers on a standing basis under Section 94(3) of the EA, 2003) were present. Their attendance was also recorded.

14. Subsequently, vide letter dated 27th October 2004, the Mumbai Grahak Panchayat (consumer representative) offered comments on Amendment/ Supplementary bills being issued by the Licensees, to the Commission with copies to the Licensees, including BEST. The submissions advanced also pointed out specific legal provisions. Similarly, vide letter dated 28th October, 2004, Prayas also submitted their response to Affidavits filed by Licensees, including BEST. In response, by letter dated 19th November 2004 enclosing additional sheets (as Annexures), BEST submitted to the Commission their response on the specific issues raised by Mumbai Grahak Panchayat and Prayas. Neither in the letter dated 19th November 2004 nor in the Annexures did BEST specifically seek that a date be fixed for hearing the points submitted by Mumbai Grahak Panchayat and Prayas so as to enable the Petitioner to make further submissions or advance arguments. In fact, in their letter, BEST specifically requested the Commission to take into consideration their views (as contained in the *ad seriatim* comments annexed to the letter) while finalizing the Regulations on the Electricity Supply Code, which were in the process of formulation in consultation with Licensees and others at that time.

15. The specific issues raised, debated and discussed at the hearing held on 21st October, 2004, and also thereafter under the above written submissions by the consumer representatives (which were responded to by the Petitioner) clearly establish that all the Licensees, and the consumer representatives were heard. There was also no ambiguity in the intention of the Commission to implement billing on measurement as mandated by law rather than on the basis of estimated or assumed consumption forming billing practices adopted by some Licensees, be it *ex post* in the case of a general meter replacement programme or *ex-ante* in the case of a meter being replaced because an unusual drop in consumption is noticed. The Commission also reviewed the practices followed by the Licensees and the instances and circumstances in which they (including the present Petitioner) raise Amendment/ Supplementary bills, including the duration and manner of assessment, where meters have been replaced as a part of a replacement programme or on the presumption of defect but without testing or furnishing a test report, relying on observed variations in consumption before and after such replacement, or even without such replacement.

16. Through its letter dated 29th November, 2004, the Commission directed the Licensees to submit by 6th December, 2004, their detailed reports on the billing practices (as sought by Mumbai Grahak Panchayat and Prayas vide their letters dated 27th and 28th October, 2004, respectively). Vide letter dated 19th November, 2004, the Petitioner submitted to the Commission detailed comments on the billing practices followed/ adopted by it. After being reminded by the Commission, REL vide letter dated 6th December, 2004, and MSEB, vide letter dated 3rd January, 2005 submitted their detailed comments (including identifying specific legal provisions) on the billing practices followed/ adopted (as sought by Mumbai Grahak Panchayat and Prayas).



17. The Commission circulated the Record of Proceedings of the hearing held on 21st October, 2004 to all the Licensees (including the present Petitioner) under its letter dated 25th January 2005. The Record of Proceedings clearly sets out the submissions made by the Petitioner and other Licensees. The Record of Proceedings nowhere indicates any request by Licensees requiring the Commission to formulate the issues first and thereafter hold another hearing to consider such issues. The Commission has also not received any request from the Petitioner and other Licensees for correction/amendment/alteration of the Record of Proceedings of the hearing held on 21st October 2004.

18. The Commission is also unable to accept the contention that the hearing held by the Commission on 21st October, 2004, was a general meeting and that only broad discussions had taken place whereby some views were generally expressed on behalf of the Licensees and consumer representatives. In fact, the following documents make it amply clear that the Commission held a formal hearing on 21st October 2004, and also that the Commission had decided to take up the matter suo motu and to hear the Licensees:

- (i) Commission's Notice of hearing dated 30th September 2004 issued to all Licensees (including the Petitioner)
- (ii) Record of attendance in the attendance sheets for the hearing of 21st October, 2004
- (iii) Commission's letter dated 25th January, 2005 enclosing and circulating to all Licensees (including the Petitioner) the Record of Proceedings of the hearing held on 21st October 2004.

19. Further, the procedure followed in the matter of Amendment/ Supplementary bills, including conduct of the hearing held on 21st October 2004, was in accordance with the Commission's rules of procedure. Considering the seriousness and gravity of the situation and the magnitude of the problem, the procedure entailed discussion of specific issues and obtaining views of all the Licensees, including their further written submissions. By any stretch of imagination, it cannot be construed that the hearing entailed "general discussions" only.

20. Subsequent to the hearing held on 21st October, 2004, the Petitioner never requested that another date be fixed to enable them to make further submissions and to submit relevant case laws.



21. In the circumstances, the Commission is of the view that, the Petitioner and other Licensees having been given the opportunity of being heard, the principles of natural justice have been complied with, and nothing in the submissions of the Petitioner constitutes sufficient reason for the Commission to review its Order dated 23.2.2005.

22. The Petitioner has submitted that the “*provisions of law on their correct interpretation are required to be pointed out and argued before this Hon’ble Commission which could not be done for want of hearing*”. The Petitioner has also submitted that “*there are other matters also in the impugned order which, it is humbly submitted, may have been differently decided if the Petitioner had been given a proper opportunity to be heard after framing proper points on which the Petitioner was to present their case*”. These submissions cannot be a ground for review since proper opportunity was given to the Petitioners for being heard in the matter, they were in fact heard in the matter, and their submissions were also recorded. In such circumstances, the scope of review does not permit rehearing of the matter and/or passing a fresh Order on the case on merits.

23. Counsel for BEST has contended that the Order dated 23rd February, 2005 cannot rely on the Electricity Supply Code and Other Conditions of Supply Regulations, which were notified on 20th January, 2005, for concluding that the billing practices of the Licensees in regard to Amendment/Supplementary Bills are not mandated since these Regulations would deal with issues prospectively. The absence of the said Regulations on the date of hearing held on 21st October, 2004 does not mean that the Commission has no powers or jurisdiction over such issues. The principles on which such relevant Codes or Rules are based are in any case well known for the Commission to take them into consideration. Under Section 61(d) of the Electricity Act, 2003 the Commission would be guided to safeguard consumer’s interest and at the same time, ensure recovery of the cost of electricity in a reasonable manner, even if specific Regulations have not been made. Moreover, the Order nowhere states that the Supply Code Regulations have been applied retrospectively.

24. The maintainability of the Review Petition has to be tested against the requirements and criteria set out in Regulation 85(a) of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004. The scope of review is, accordingly, limited. A perusal of the Review Petition shows that none of the grounds stated therein can strictly speaking be said to fall within the ambit and scope of Regulation 85(a). A review Petition has a limited purpose and scope. It cannot be allowed to be an appeal in disguise, and ascribe to the Commission an appellate jurisdiction which has been assigned to another forum under EA, 2003.



25. The Petitioner has submitted to the Commission certain judgments relating to review, by way of letter dated 15th September, 2005. These judgments, in the submission of the Petitioner, deal with the validity of a review application when an Order has been passed without a party having had an opportunity to present his case and be heard, in various circumstances to which they refer. Since the Petitioner was, in fact, heard in the matter and its submissions considered and recorded, the Commission believes that none of these judgments are of any help to the Petitioner.

26. Accordingly, the Commission declines to admit the Petition, and disposes of it with the above observations .

Sd/-
(A. Velayutham)
Member

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(Dr Pramod Deo)
Chairman



(A.M. Khan)
Secretary, MERC