

**Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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CASE No. 2 of 2003

**In the matter of
Compliance of Tariff Orders in respect of Average Billing by MSEB.**

**Dr. Pramod Deo, Chairman
Shri A. Velayutham, Member**

ORDER

Dated: 22nd August, 2005

M/s Prayas (Energy Group), Pune have submitted an Application dated 11th January, 2005 alleging non-compliance of the directives in the Commission's Tariff Order dated 10th March, 2004 with regard to 'average' billing resorted to by Maharashtra State Electricity Board (MSEB), with the prayers to:

- (a) direct MSEB to withdraw all energy charges as well as related charges (regulatory liability, TDL, electricity duty, delayed payment charges, etc) from bills based on average consumption.
- (b) direct MSEB to refund money to consumers who have already paid such charges (and related charges mentioned above) based on average bills.
- (c) direct MSEB to immediately stop issuing 'average' bills;
- (d) undertake an external audit (through Commission - appointed consultants) of MSEB's metering and billing systems, procedures and software.
- (e) direct MSEB to reimburse Prayas' costs.

2. In their Application, Prayas have referred to the Commission's detailed Tariff Order dated 10th March, 2004 (Case No. 2 of 2003) directing MSEB to discontinue the practice of issuing bills on the basis of some estimate of average power consumption instead of on an actual basis. This issues had been brought to the fore in even earlier tariff and other Orders. At para 5.1.3, the Commission had stated that:

"The Commission had given a directive to MSEB to discontinue the practice of billing consumers on the basis of average billing. The Commission hereby emphasizes that the MSEB is required to comply with the directives expeditiously, both in letter and in spirit."

Further, in para 25, the Commission had stated as follows:

"The status of the various directives given by the Commission in the previous Tariff Orders and the directives issued in this Order have been summarized below:

Bullet No. 18- *"The MSEB is directed to discontinue Average billing - MSEB has continued to issue bills based on average consumption."*



3. Prayas have pointed out that, through a letter dated 3rd January, 2005 in connection with the separate proceeding regarding 'Amendment/ Supplementary' bills, MSEB provided information to the Commission (and Prayas) regarding average billing from July to October, 2004 (Exhibit-1 of the Application). According to Prayas, that information demonstrates that, MSEB have not discontinued the practice of average billing. On the contrary, a significant percentage of bills are still issued on average basis. For all Zones taken together, about 18%, 15% and 9% of residential, commercial and industrial consumers respectively are billed on 'average'/ 'faulty meter' basis. Prayas have stated further that although, in the absence of data, it is difficult to estimate the revenue collected by MSEB on the basis of average bills, considering the category-wise sales and average realization from the Commission's Tariff Order dated 10th March, 2004, it may be as much as Rs 25 crore per month. Moreover, in their submission dated 3rd January, 2005, MSEB have also admitted that they automatically increase the average billing by 10% and 20% respectively for residential and commercial/ industrial consumers after three consecutive average bills.

4. Prayas' Application concludes that MSEB have continued issuing average bills even after the March 10, 2004 Order, which constitutes a clear non-compliance with its directives, and violates various legal provisions as well as the Commission's Regulations. Such non-compliance attracts the penal provisions of Sections 142 and 146 of the Electricity Act (EA), 2003. The Application itself is being filed before the Commission considering the provisions of the MERC (Conduct of Business) Regulations, Sections 61, 62, 86, 142, 146, 147 and 185 of EA, 2003, and the MERC (Terms and Conditions of Tariff) Regulations, 2004.

5. While apologizing for the delay in responding, in their Reply dated 11th February, 2005 MSEB have stated as follows:

- (1) MSEB accept the need to discontinue the practice of average bills, which is also against MSEB's commercial interest. MSEB are making efforts to reduce the instances of average bills. MSEB's billing software is designed so as to provide average bills in the following general cases: faulty meter, locked or inaccessible meter, changed meter and 'reading not available' status.
- (2) There are more than one crore metered consumers, and technically faulty meters will be a continuous phenomenon. MSEB are trying to tackle this problem on a war footing, and are reducing the number of faulty meters by replacing them in a phased manner. In the first phase, around 1.25 lakh faulty meters in Thane (Urban) Circle, Vashi Circle, Kalyan Urban Circle and Pune Urban Circle are to be replaced by April 30, 2005. In addition, MSEB have taken action to replace all faulty meters in the following towns under the APDRP scheme.

- | | |
|--------------|-----------------|
| i) Amravati | vii) Nanded |
| ii) Kolhapur | viii) Ratnagiri |
| iii) Sangli | ix) Solapur |
| iv) Nagpur | x) Sindhudurg |
| v) Nashik | xi) Osmanabad |
| vi) Malegaon | xii) Jalgaon |

3.50 lakh meters are proposed to be replaced in these towns by March 2006. Further, MSEB propose to procure 3 lakh new meters for replacement of faulty meters in 2005-2006. This would be continued in 2006-2007.



- (3) The Supply Code has given the option to consumers for installation of meters, and those opting to replace their own faulty meters will be supported.
- (4) Further, MSEB envisage a massive drive of checking faulty meters. Efforts are being made to check them physically within 6 months. This drive is being undertaken to confirm and correct the faulty status of the meters. However, MSEB are facing stiff opposition from consumers in replacement of their meters. At times, there have been agitations against the replacement drive.
- (5) MSEB have undertaken a detailed study for revising the specification of meters so as to make them more tamper-proof and to ensure more reliable working.
- (6) In respect of locked and inaccessible meters, MSEB are implementing a programme to make the meters accessible. In the first phase, inaccessible meters in Kalyan Zone, Bhandup Zone and Pune Zone are being covered to make them accessible as per the Conditions of Supply. This first phase will be completed by April 30, 2005. Similar action is proposed for the remaining 8 Zones, so that all the inaccessible meters become accessible by December 31, 2005. The 'locked' cases will be dealt with according to the provisions of the Supply Code.
- (7) In respect of meter change cases, average bills are issued primarily due to the time required between physically changing the meter and updating the data base of the billing system. Action is being taken to ensure speedy updating of the data-base. This updating will now be ensured within one billing cycle, which will result in average bills not being given to this category of consumers on the second occasion.
- (8) There are cases where meter reading is not available or is not taken due to various reasons. In cases where reading is not available, MSEB may be allowed to issue the average bill once. Necessary action in such type of cases would be taken in accordance with the Supply Code.
- (9) MSEB have decided to implement Spot Billing in Municipal Corporation areas from 1st April, 2005, which will help to reduce average billing.
- (10) Average bills are issued by assuming the consumption of electricity energy, and hence all the related charges are also required to be included in such bills. Since efforts are being made to reduce and finally stop average billing, the Commission is urged not to accept Prayas' prayers (a), (b) and (c).
- (11) While MSEB are open to sharing any data with the Commission, they are not agreeable to the third-party appointment of any consultants for external audits.
- (12) As a result of the measures set out above, the average billing incidence will fall by more than 75% of the present level by the end of March, 2005. It is expected that an alternative mechanism for stopping of average billing would be implemented from 1st April, 2007.
- (13) MSEB have urged the Commission to consider the difficulties faced by them in immediate and full implementation of the directives for stoppage of average bills. The details of the average bills issued and the status report on the proposed plan for reducing the average bills would be submitted to the Commission on a six monthly basis.

6. The matter was heard on 1st March, 2005. Shri Gaurav Joshi, Counsel for MSEB submitted that, with the notification of 'Supply Code' on 20th January, 2005, there is no legal issue involved any longer. However, for cases prior to that, the Application seeks certain refunds. Apart from that, there are certain operational and other difficulties in implementing certain provisions of the Supply Code, and MSEB may have to file an application for extending the time for complying with them, setting out the programme and stating the difficulties.

7. Since refunds are sought from June, 2004 onwards, MSEB Counsel sought to make submissions on the legal issues pertaining to the situation prevailing prior to the Supply Code. There are various High Court decisions to the effect that there is no limitation on the past period in cases of stopped meters. Those contentions were in fact raised by BEST. The situation has changed after the Supply



Code came into effect. MSEB have already set out their difficulties with regard to average billing and may file a comprehensive application covering all such matters.

8. With regard to compliance of tariff Order directions on discontinuing average billing, Counsel for MSEB submitted that the only direction there was that it was to be done expeditiously. It did not have penal consequences, which now emerge from the Supply Code. Referring to MSEB's Reply, Counsel submitted that the numbers involved in faulty meters (11 lakh consumers) are so large that it would take a long time to rectify the situation on the ground. This figure is based on the observations of meter readers, and MSEB may have to test it at site to validate the position. Even if this resulted in a reduction of the real figure by half, replacing even those many meters would be an uphill task. The provisions regarding inaccessible meters under the Supply Code and related procedures would also have to be followed. Where the meters have been changed but the billing cycle has not changed, data entry issues also arise.

9. The Commission asked whether the urgency and magnitude of the issue had been brought to the Board's notice, along with the implications of continuing average billing considering the number of consumers and high T&D losses. Counsel for MSEB agreed that it is to MSEB's advantage to see to it that meters are read, but mentioned that some consumers also prefer average billing. Shri GS Limaye, Technical Director (Comm.), MSEB submitted that a metering action plan had been submitted to MERC. However, going by the number of faulty meters, it would be very difficult to procure them immediately, for which MSEB had given a programme. In the first phase, MSEB intend to replace 1.25 lakh meters in Vashi/ Kalyan/ Thane and Pune urban areas. The Commission observed that a specific roadmap for completing the task was necessary in the light of EA, 2003 and the Supply Code, going beyond broad plans. Shri Shantanu Dixit of Prayas submitted that MSEB had no argument or defence against the specific prayers, apart from the practicability argument.

10. Dr. Ashok Pendse of Mumbai Grahak Panchayat (MGP) pointed out, in the light of the projected requirement of replacing 11 lakh meters, the following:

- (i) In the affidavit filed in the Amendment/ Supplementary Bills case, MSEB had given a Zone-wise analysis of billing for residential, commercial and industrial categories. Surprisingly, in the commercial and industrial categories, which are the largest revenue earners for MSEB, the percentage of faulty meters is higher than in the residential category. This casts doubts on the steps actually being taken by MSEB and their priorities, particularly considering the smaller numbers involved in the most paying categories.
- (ii) If, after the Tariff Order, MSEB had systematically undertaken replacement, a clear downward trend would have been seen in the residential category, which is not the case.
- (iii) Whereas the focus should have been on replacement of 11 lakh faulty meters, in some Zones drives are being undertaken for indiscriminate, mass replacement of meters, whether faulty or not. As a result, sufficient meters are not available for replacement of faulty meters elsewhere.

11. Shri Ashwin Treasurer, Maharashtra Chamber of Commerce & Industry, cited the example of Bhandup Zone, where the meter cost was also recovered in defiance of the directives of the Commission. Dr. Pendse submitted that, month to month, the figures of faulty meters in the commercial and industrial categories has remained constant, as per MSEB's submission referred to. In fact, by now there should be no cases remaining in the commercial and industrial categories at all. The consumers are agitating because neither are faulty meters being tested and then replaced, nor are new consumers being provided meters or allowed to procure themselves. On the other hand, mass replacement is taking place elsewhere. Moreover, although, single-phase residential meter cost has come down to Rs 400 to Rs 500/-, consumers are being charged higher amounts on replacement when the cost is to be borne by MSEB themselves.



12. Counsel submitted that MSEB are facing a great deal of public opposition while replacing faulty meters with electronic meters. The existing meters can be tampered easily, and practical difficulties such as morchas, agitations, political interference, and lack of police support all aggravate the situation. Shri Limaye, T.D, MSEB stated that replacements are mostly done in pockets where there are electro mechanical whole current meters. Substantial improvement in revenue collection is seen on replacement, and that is the logic of mass replacement in such areas.

13. Shri Shantanu Dixit of Prayas submitted that it is generally accepted that the two most important steps to operationally improve the distribution licensees performance in India are (i) improvement in metering, billing and collection and (ii) ensuring accountability of all stakeholders. Unfortunately, these are the two factors which have been ignored by MSEB for long, and that is the cause of grievance in their Application. He reminded MSEB of the last ARR/ tariff process. At the Technical Validation session Prayas had raised the issue of the Commission's earlier observations on the issue essentially requiring that average billing should be stopped. To the Chairman, MSEB's response regarding practical difficulties, Prayas had suggested that MSEB could approach the Commission with their implementation problems and interim alternatives, e.g. permitting issue of average bills for one or two cycles while giving MSEB some time to implement the directive. However, this was ignored. Prayas' affidavit containing comments on MSEB's ARR/ tariff Petition had stated that:

"Continued Average Billing:

Despite preventing MSEB from issuing bills based on average consumption, MSEB has continued to issue average bills, clearly violating the Commission's Order. If the MSEB has any suggestions / request, it should have been discussed clearly in the application to MERC. The excess money charged due to this method (especially for the very small rural residential consumers) should be immediately calculated and refunded by MSEB."

Shri Dixit pointed out that the Commission took note of this, and reiterated the point in Section 17.1.1 of its Tariff Order. In this background, the excess money recovered on this basis, especially from very small consumers, should be refunded. This was also taken note of in the Order. The directives to discontinue average billing are absolutely clear. In the same Order, the Commission stated that if MSEB need any clarification or have nay difficulties, they should revert to it within a month.

14. Shri Dixit quoted MSEB's response to their submission during the last ARR / tariff process:

"With reference to your objection to average billing, it is submitted that it is practically not possible to eliminate average billing for the reasons already highlighted in Volume II of the proposal."

MSEB merely stated that it is practically not possible, rather than approaching the Commission for review of the directive. In fact, under letter dated 7th April, 2004, MSEB approached the Commission for clarifications on as many as 15 issues, but there is no mention of average billing.

15. Shri Dixit pointed out that, in connection with the 'free power' subsidy case, MSEB had stated that they had prematurely repaid Govt. loan of Rs 200 crores because it was high interest. Assuming that MSEB could afford to do so and had spare cash, he queried as to whether it was not required for faulty meter replacement, or metering, billing and collection improvement. That would have generated much more revenue than the interest saving. The Commission observed that funds are not the main issue. Such expenditures are allowed as a part of the Annual Revenue Requirement, and MSEB have to undertake these activities.

16. Shri Dixit submitted that, as per the provisions of the Act and Regulations, the position is very clear, i.e. that MSEB cannot bill on average basis. There is also a Commission directive. Any amount in excess of what the Commission has authorized has to be returned to consumers.



17. The Commission observed that, in addition, the practice of a built in percentage increase in average billing is highly objectionable. For practical purposes, MSEB need to state how much time they are going to take, and come up with a specific, operational plan, with all their limitations. Shri Dixit asked, however, what would happen to consumers who have paid in the intervening period. With the Supply Code, there is already a relaxation of earlier directives, inasmuch as estimated bills / average bills can be raised for upto 2 cycles. Thus, there is already a pragmatic dilution. Besides, although they would be entitled to do so, Prayas are not pressing for compliance from the first tariff Order onwards, but restricting it to the period between 10th March, 2004 and 20th January, 2005, and the question of how average bills issued in that period has to be addressed

18. Shri Dixit also sought an independent audit of MSEB's billing and collection system and software. He recalled the case of Niramaya Hospital in Baramati, in which the consumer was being charged for demand charges at HTP-2, i.e. industrial tariff, whereas for energy charges, he was being charged on commercial basis, and wondered as to how such things could happen. In the case of average billing, 10% or 20% increases are built in, without consistency. There have also been a number of cases of absurdly abnormal bills, such as billing Rs 11 lakh for connected load of 0.1 KW. Independent audit of the MSEB billing system and software would ensure that such instances are rejected and do not recur. Dr. Pendse added that the logic of the programme has to be examined, and automatic checks and balances introduced. He also supported Prayas' prayer for awarding costs.

19. Shri Ashwin Treasurer submitted that even Section 26(6) of the erstwhile Indian Electricity (IE) Act, 1910 did not permit average billing. There have been several cases upto the Supreme Court and National Consumer Commission disallowing such average billing and self-assessed bills. The provision is that the meter register is final, whether it has stopped or is running, and before billing on an average or such other basis, MSEB are supposed to approach the Electrical Inspector for assessment. Rulings by the Commission, and the subsequent legal framework have also prohibited any billing by averages. The question is why average billing continues. Giving the example of his own personal experience, Shri Treasurer submitted that the facts and figures indicate abnormal delays in taking the reading or issuing bills, which are a source of high so called T&D loss, though it may be camouflaged under the nomenclature 'locked premise', 'faulty meter', 'meter change' and other such terms.

20. To a query from the Commission, Shri G.S. Limaye, TD, MSEB submitted that one of the points in the Internal Reform Programme of MSEB is that of zero error billing. The directives given by the Commission were in MSEB's interest since average billing affects them adversely also. That is why, MSEB have drawn up a programme so that, by April 2007, the backlog of 11 lakh faulty meters and other meters would be completed. MSEB intends to proceed in phases, starting from urban areas. Counsel for MSEB submitted that they welcomed suggestions on this aspect. Ultimately, what the Commission wanted was to ensure that the process is expedited. Shri A.M. Varhokar, CE (Comm.), MSEB added that, after the tariff Order, the programme was designed with 3 components, viz to check all the zero consumption bills; to correct all the average bills, and to replace the faulty meters. As a result, MSEB have succeeded to some extent in reducing average billing, and replaced about 70000 meters.

21. Dr. Pendse, MGP suggested that privatization is essential. Industrial consumers are the smallest in number followed by commercial, and then residential. It should be possible for MSEB to bring the figure for 'stopped meter' industrial consumers to 5% without any difficulty within around 2-3 months, and possibly less in some Zones. This should be followed by a similar exercise for the commercial and residential consumers. It is a matter of priorities using ABC classification from the revenue angle, and executing the action plan within a strict time frame. In the case of residential consumers with faulty meters, who are larger in number, MSEB would have to commit to some time frame. In each Zone, there are some meters that are required every year for new connections, and some old meters will become faulty or stop. What could be done is to set a target on the basis of which it could be decided that out of, say, 11 lakh meters purchased, 6 lakhs will go towards new connections



and the remaining for replacing defective ones. Further prioritization could be done Zone-wise depending on revenues likely to accrue. Whatever the details, MSEB must commit themselves to a time-based performance. Shri G.S. Limaye, TD responded that MSEB had introduced the Bhagirath Yojana, in which Urban Zones such as Kalyan, Bhandup and Pune were given the highest preference in flow of resources (money, material and manpower) from December, 2004, including meters, and this is showing results. Consecutively for the last 3 months, MSEB have exceeded Rs 1000 crore revenue collection for the first time, and may cross Rs 1100 crore next month. The meter replacement programme is ongoing under the APDRP scheme also. MSEB have geared up their resources, and are giving priority to urban areas first.

22. Shri A.M. Varhokar, CE (Comm.), MSEB added that, whereas the proportion of faulty meters in the industrial and commercial categories is around 1% to 2%, due to other reasons the extent of average billing is higher. MSEB would be taking care of meters reported to be in locked premises as per the guidelines of the Supply Code. He assured that, within six months, whether because of faulty meters or locked premises, the average billing in respect of industrial consumers would be brought below 5%. As for commercial consumers, faulty meters are in the range of 6% to 7%, but the average billing sometimes goes upto 21%. This is mainly because the commercial consumers are not always in the larger cities, and much of the average billing is in smaller areas. However, these can also be brought within 5% by December 2005, for which a programme has already been chalked out and arrangements made for implementation.

23. Referring to MSEB's tabular statement, Dr. Ashok Pendse, MGP pointed out that, in Pune Zone, the Commercial category indicates zero consumption as 8%, average is about 13%, and faulty meter is 6%, totaling 26%. CE (Comm.), MSEB accepted that average billing is the highest in Pune Urban Zone (residential plus commercial), and lowest in Nagpur Urban Zone. He agreed that there are certain lacunae on MSEB's part, and that is why priority has been given to Pune Urban Zone, where MSEB have collected Rs 194 crores in February, 2005 as against the previous maximum of Rs 154 crores in any month. MSEB are also starting spot billing, for which instructions to engage agencies have been given.

24. Shri Shantanu Dixit commented that while Prayas are open to giving suggestions regarding the action plan for metering, the core issue remains that of non-compliance. Counsel for MSEB requested that MSEB be permitted to file an application giving all the details of the action plan and MSEB's commitment, and then the legal issues can be heard. The Commission observed that the legal issues can be heard straightaway, but the action programme for implementation of the tariff Order directives are the focus. In this context, Counsel submitted that a contention was raised that, under Section 26 of the IE Act, 1910, a licensee was prohibited from issuing average bill or billing on average basis or issuing supplementary bill. However, the High Court had upheld the right to issue average bill, not necessarily only for 6 months, but for an even longer period, where the meter had stopped or was not functioning. Even the Supreme Court, in the case of a Tata Company against BEST, has held that Section 26(6) only applies where there is a dispute regarding the functioning of the meter. If there is no dispute, or when the meter is stopped, Section 26(6) does not apply. Referring to the High Court judgement dated 14th October, 2004, Counsel stated that the fact was that basically the meter had stopped. The consumer was also aware that the meter had stopped. However, he said nothing. After around 2 years or so, BEST issued supplementary bills amounting to Rs 6.69 lakhs. The Electrical Inspector in that case had refused to entertain the matter on the ground that the High Court had held that stopped meters do not fall within the purview of Section 26(6).

25. In the context of that judgement, Counsel for MSEB submitted that, in most of the cases of average bills, electricity is actually being consumed by the consumer. Where the meter is functioning credit is given for payments made on average basis albeit at a later stage when the final bill is raised. Keeping that in mind, the prayer for refund is tantamount to asking that consumers who have consumed electricity should not be charged at all for the period for which average bills were raised. The fact is that



the consumer had consumed the electricity, even though the meter may be faulty, and the issue is only one of how to estimate his consumption. It was the consumer's duty to point it out, which he did not.

26. Counsel stated further that the Electrical Inspector is to adjudicate disputes between the parties. The logic behind Section 26(6) was that, if there is a dispute regarding whether the meter is recording correctly or not, then the Electrical Inspector could go to the site and determine the facts. Referring to page 17 of the High Court judgment, Counsel submitted that 6 months' limitation applies to those disputes before the Electrical Inspector. If there is no such dispute, or if there is no such reference of dispute, then there was no prohibition on the licensee issuing bills for a period over six months under the IE Act. Referring to paras 12 and 13 of the High Court judgment, Counsel submitted that the law as it stood under the IE Act clearly permitted licensees to issue average bills.

27. Seeking to make a distinction between 'directions' and 'directives' in the context of directions issued by the Commission from time to time regarding continuance of average billing in its Tariff Orders, MSEB Counsel submitted that these directions should not be taken as mandatory. Apart from the fact that the Courts have upheld billing on an average bills, the Tariff Order stipulations were directory rather than mandatory. In other words, their effect was not to render any act done void or bad in law so as to entitle the consumer for relief, but it was necessary for MSEB to take steps to implement the directions. That would not render the average bills issued in the past invalid, but would entitle the Commission to issue further directions which may be mandatory in nature, subject to the Court rulings which have been cited. Prospectively, the Supply Code Regulations have come into effect, which statutorily restrict average billing except for a limited period. MSEB have already stated that they would be applying to the Commission with regard to these provisions, considering the practical difficulties and the required time frame. In this connection, Counsel for MSEB referred to Regulation 24 of the Supply Code:

Power to remove difficulties-

"If any difficulty arises in giving effect to the provisions of these Regulations, the Commission may, by general or specific order, make such provisions not inconsistent with the provisions of the Act, as may appear to be necessary for removing the difficulty."

Thus, in its Regulations, the Commission itself has provided for situations where there may be certain difficulties, and MSEB can file an application for extension of time, subject to the satisfaction of the Commission, rather than have a situation where all average bills are treated as bad, except for the period provided in the Regulations. From the practical point of view, it is physically not possible for MSEB to replace 11 lakh defective meters in 3 months or such other Supply Code stipulation, and this stipulation can be relaxed for a reasonable time, which may also be subject to conditions such as the progress expected. Counsel urged, therefore, that this requirement be kept pending till MSEB's application is considered. For the period prior to the Supply Code, MSEB Counsel submitted that there should not be any refund. It is a question of Rs 360 crores, in respect of consumers who have in fact consumed electricity.

28. With regard to Prayas' prayer for award of costs, MSEB Counsel submitted that it should not be allowed. MSEB appreciate that Prayas has brought certain facts to the attention of the Commission, and the Commission has observed that MSEB should have approached the Commission first with an application regarding their difficulties. However, considering the facts of this case, he requested the Commission not to award any cost against MSEB, but wait for their application and see how bonafide it is. Awarding of costs is a discretionary power with the Commission, and it cannot be penal, but compensatory, e.g. towards filing fees.

29. Shri Shantanu Dixit of Prayas pointed out that the issues raised by Counsel for MSEB and involved in the High Court judgement are quite different from those raised in this Petition. In the entire matter which Counsel had cited, there is not a single mention of the Regulatory Commission, nor any



mention of the Electricity Regulatory Commissions (ERC) Act, 1998 or EA, 2003. The whole matter pertains to a dispute pertaining to some earlier periods when some different statutes were in force, and there was no Commission. He submitted that the core issue in the present case is that there is a directive of the Commission, and if that directive is not followed and as a result, if the licensee has recovered some amounts from consumers, then those consumers have a right to seek refund. He noted that there had been many occasions where Prayas and other consumer groups like MGP had taken such matters to MSEB's highest authorities and before the Commission on affidavit, but still no action was taken. There was clear neglect or defiance of the Commission's directives, and in this case the Commission must uphold the sanctity of its own directives. The core issue is that of accountability.

30. As far as statutory provisions are concerned, Shri Dixit cited Section 62(6) of the EA, 2003:

"If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee."

There was a clear prescription not to charge on the basis of average bill and, therefore, MSEB were not authorized to recover such charge, which was in effectively in excess of the tariff allowed and has to be refunded to the consumer considering Section 62(6).

31. Regarding MSEB Counsel's reference to whether the consumer was consuming electricity or not, Shri Dixit submitted that this is a quite different issue and not relevant to this case. The real issues are: what the Commission's directives were, and whether they have been followed; if money has been recovered in breach of a directive, whether consumers are liable to refund or not; and whether the directive was recommendatory or suggestive. He submitted that it was very clear in the Tariff Order that the direction was a binding one that MSEB had to follow. He again referred to page 82 of the Tariff Order dated 6th March, 2005 (Section 5.1.3) which is titled "Commission's Ruling". In fact, the Commission had referred to an earlier directive.

"The Commission had given a directive to MSEB to discontinue the practice of billing consumers on the basis of average billing. The Commission hereby emphasizes that the MSEB is required to comply with the directives expeditiously, both in letter and in spirit."

That is followed by the clear statement that "MSEB is directed to discontinue average billing", with the comment that MSEB have continued to issue bills based on average consumption. There is no room for confusion. If even such clear-cut, mandatory directions are taken as recommendatory, then the whole spirit of the regulatory process and the sanctity of the tariff Order becomes redundant. Shri Dixit submitted that MSEB can charge only on the basis of tariff determined by the Commission and its directives in this regard. If there is a directive that they cannot charge on the basis of average bills, then there is no legal sanctity to such bills, and the actual quantity consumed is indeterminate.

32. Elaborating further on the tariff approved by the Commission, Shri Dixit submitted that the consumer is liable to pay a fixed charge independent of the energy consumption, a variable charge for the energy actually consumed, plus some other stipulated charges which may be applicable. If the consumer receives a bill which is not in conformity with this position, then it constitutes a tariff charged over and above approved by the Commission. Even the Commission's Regulations on Terms and Conditions of Tariff are very clear, that the licensee cannot charge any tariff different from what is determined by the Commission.



33. Regarding the prayer for award of costs, Shri Dixit stated that it was basically to set a precedent. He queried as to why consumers should be forced to approach the Commission time and again simply for compliance by MSEB. This is not the first submission on the average billing issue. There is a need to set an example, and that is why Prayas are seeking reimbursement of costs.

34. Shri Dixit submitted further that Prayas' prayer for audit of MSEB's metering and billing systems, procedures and software is because these kinds of issues have come up time and again, and in connection with average billing also. Consumers were forced to extract the information on affidavit from MSEB that they are increasing average billing by 10% / 20%. In the Niramaya Hospital case, two different categories of fixed charges and energy charges were applied. MSEB had readjusted and paid back the amount, but it indicates the kind of billing and software system in place. They are not good enough, and do not have adequate checks and balances, for instance in cases of abnormal bills. Therefore, there has to be an independent audit of MSEB's billing system, procedures and software. Dr. Pendse of MGP added that the intention is to validate the logic by which a bill gets created.

35. The MSEB representative submitted that, regarding abnormal and excessive billing cases, there were sufficient checks. At the time of entering the reading, validation is done before the bill is generated, sometimes looking at the previous month's recording. If it is much higher or lower, that is separately printed. Only after rectification, are the bills issued as far as excessive consumption is concerned.

36. In response to Prayas, Counsel for MSEB clarified that the High Court judgement was cited to show what the law prevailing prior to the EA, 2003 was. In fact, after the EA, 2003 came into force, there is no such provision as under Section 26(6) with a restriction of 6 months. Thus, for the period for recovery, one would have to go by the general law, which permits 3 years, after which the claim becomes time barred. What the effect of a time barred claim would be is a separate question of law, and need not be gone into here.

37. With regard to Section 62(6) cited by Prayas, Counsel for MSEB submitted that it dealt with a situation of charges in excess of what a consumer is required to pay as per the approved tariff. That is matter for determination in case of each individual consumer. If a consumer complains that he has been charged on the basis of an average something more than for the actual consumption, such complaint will be considered individually. There cannot be a generic dispensation where the licensee has to refund all the amounts in cases where average bills have been raised. In fact, one may find that, because of such average billing, less has been charged than what would have been due. Wherever MSEB have improved the situation, as has been pointed out, their revenues have increased. Thus, Section 62(6) has absolutely no application in this case because it deals with the tariff and charging in excess of it and not with the method or mode of billing.

38. Coming to the direction of the Commission, MSEB Counsel submitted that the Commission had stated that it should be implemented 'expeditiously', not 'forthwith' or 'henceforth'. Effectively, the direction given was that MSEB proceed on this path. Assuming for a moment that it was mandatory, Section 142 provides the manner and method of ensuring compliance with the Commission's Order and a penalty. No one has invoked it. Even when the tariff Order was passed, the Commission itself did not think it fit to issue suo motu notice under Section 142, stating that this was the mandatory direction given, and asking why MSEB have not implemented it. MSEB have to do so expeditiously, and to take suitable steps. Therefore, in fact, MERC would now ensure, when MSEB's application is filed, that MSEB adhere to a time frame that is stipulated after due consideration. MSEB's application would really be in the nature of a proposal.



39. After the hearing, under letter dated 1st June, 2005, MSEB have made certain further submissions to the Commission. Essentially, while reiterating and elaborating upon some of the contents of their Reply dated 11th February, 2005, MSEB have furnished "details of the reasons resulting in issue of energy bills on average basis" as follows (as on 30th November, 2004):

Faulty Meters:	11,51,034
(Residential 10,81,890)	
(Commercial 64,246)	
(Industrial 4,898)	
Locket or inaccessible meters	5,36,904
Changed Meters	64,519
Reading not available	60,821

MSEB have also submitted their action plan for replacement of faulty meters and other measures, broadly along the earlier lines but with some changes and elaborations. MSEB have further stated that:

"However, the process of issue of energy bills on average basis is continuous ongoing process, which cannot be stopped or discontinued overnight and it is submitted that the Hon'ble Commission may also agree with the said submission, since the Hon'ble Commission subsequently has permitted issue of energy bills on average basis for a limited period (3 months). In this regard, a most important fact has escaped attention that the number of consumers billed on average basis is always a floating number. It is submitted that, if during a particular billing cycle, the billing software has generated certain number of energy bills on average basis for one or the other reasons, immediate remedial action is initiated to ensure that the average billing to the said consumers is not continued beyond next billing cycle. However, in the mean time, similar problems may get developed in respect of some other consumers and energy bills may get issued on average basis to these consumers, which would be different from the consumers who were issued energy bills on average basis during the preceding billing cycle. As a consequence, though the Board takes all precaution to ensure that the energy bill on average basis is not repeated to a consumer beyond three months, the number of consumers billed on average basis during the consecutive billing cycle may either remain static or increase or decrease, but may never get eliminated."

40. The Commission notes that, from its first Tariff Order dated 5th May, 2000, it has been stressing the need for metering in order to ensure that there is proper energy accounting and that consumers are billed on the basis of actual consumption. Since that time, all except the bulk of agricultural consumers have been metered, and new connections are being granted with meters. However, even at that time, Prayas had pointed out that:

"A large number of commercial consumers and industrial consumers are not being billed on the basis of actual metering. The main contention of Prayas is that the MSEB is issuing bills on the basis of not the actual meter data but on some presumed data, namely, average consumption i.e., a basis, other than actual consumption."

The Commission had also observed and directed in its Tariff Order dated 5th May, 2000 that:

"Billing data submitted by the MSEB revealed that more than 50% of metered consumers are being billed on the basis of either average or minimum charge. The MSEB should immediately review the meter reading process and submit to the Commission its report of action taken to improve the metering and billing efficiency. The Commission directs that all consumers will be required to pay tariff on the basis of metered consumption."



Nearly four years later, however it is seen that the phenomenon of average billing continues to be rampant, thus defeating one of the primary purposes of metering and necessitating clear cut the directions contained in the Tariff Order dated 6th March, 2004 to discontinue the practice of average billing.

41. In spite of this background, MSEB are still not in a position to say in their letter dated 1st June, 2005, for instance, that all the cases of average billing are on account of only the reasons cited. As indicated at Para 8 above, the presumption that a bill had to be raised on an average basis because of a defective meter is only prima facie and requires confirmation by actual verification or testing. Moreover, MSEB have sought to imply in their letter dated 1st June, 2005 that, although the number appears to be large, generally individual consumers are not subjected to average bills for more than a short period of time, and the Supply Code effective from 20th January, 2005 also gives some leeway in this regard. However, in the absence of any statistical submission containing time-wise analysis of average bills, these contentions cannot be corroborated. Instead, the thrust of Prayas and other consumer representatives has been that there are a large number of cases in which average bills have been raised for months if not years on end, which would also explain the practice apparently embedded in the billing software for an automatic escalation in the amounts contained in the average bills by 10% or 20%, depending on the consumer category.

42. Among other things, Counsel for MSEB has relied considerably on the judgement of the Bombay High Court dated 21st October, 2004 (Indian Silk Mfg. Co. & Another vs. BEST) to show that estimation of consumption can be made on an average basis and billed accordingly even for long periods. The Commission notes that the case pertains to the period from December, 1993 (when a replacement meter was installed) to September, 1995, and bills were raised on a monthly average basis based on consumption in a certain past period. The challenge was primarily against the decision of the Electrical Inspector, upheld by Govt. in appeal, that the case did not fall within his jurisdiction under Section 26(6) of the IE Act, 1910. The High Court held that the Electrical Inspector's decision was correct inasmuch as, essentially, there was no dispute that the meter recorded only for some time and stopped. It is true that the High Court also held that, considering the undisputed fact that the consumer's activities were ongoing and other circumstances of the case, the methodology adopted by BEST for estimating the likely consumption based on an average of the past period, was acceptable. However, this finding of the High Court has not only to be seen in the circumstances of the case before it, but also considering the fact that it pertains to a period when the IE Act was not in force, and the statute introducing the Electricity Regulatory Commissions with various functions, adjudication and regulatory powers had not yet come into existence. Since that time, from 10th June, 2003, the Electricity Act has come into force, and both the IE Act and the ERC Act have been repealed (with certain interim savings). Thus, the High Court judgement is essentially not relevant to the present matter.

43. Section 55 of EA, 2003 advisedly refers to the use of "correct meters". Sections 61, 62, 86 and other provisions set out the mandate of the Commission for fixation of tariff, and licensees cannot charge other than such approved tariff. Broadly similar provisions existed under the erstwhile ERC Act. The Commission notes that there are no two ways of interpreting its directions with regard to average billing contained in its last Tariff Order dated 10th March, 2004, particularly when seen in the context of the issue raised in its first tariff determination exercise in the year 2000. While the Commission can understand that some time is required for the signal to be noticed that a meter may be defective or there may be some other difficulty, and for the factual position to be ascertained, such a period can only be of a reasonable extent, or else the whole point of metering will be defeated. As Counsel for MSEB has pointed out, some period has been given for the purpose in certain circumstances in the Supply Code Regulations notified on 20th January, 2005. However, for the period prior to that, MSEB could have approached the Commission for clarification (as they did for several other issues) or for formal review of the Tariff Order directions, the procedure for which is well known to them. They chose not to do so. At this stage, considering the context and background set out above, the Commission would be well within its rights to require compliance of its directions from the date of issue of its detailed Tariff Order



dated 10th March, 2004. However, it has decided to give MSEB some leeway in this regard, and an extension of around three months for compliance.

44. As has been brought out during these proceedings, there may be many reasons for resorting to billing on an average basis rather than on the basis of meter reading, including the presumption or otherwise of faulty meters, or non-reading of meters for one reason or the other. The Commission has consistently held that, beyond a limited period, there is nothing in the statutes that allows such billing to be done on a purely presumptive basis rather than actual measurement (much less for assuming that such consumption is increasing by 10 or 20% and factoring it into continued average billing).

45. Considering the foregoing, the Commission disposes of Prayas' Petition with the following directions, which would apply for the period from 1st June, 2004 (i.e. around 3 months after the detailed Tariff Order dated 10th March, 2004, upto 19th January, 2005 (following which the Supply Code Regulations were notified):

- (a) no billing using past consumption or some related 'average' basis should be resorted to for more than a period of 3 months. (Where average billing has been continuing for more than that period just prior to 1st June, 2004, then it cannot be continued from that date. In case average billing has been resorted to for, say, 2 months prior to that, it can be continued only for upto one month more). During that period of 3 months, the meter should have been tested/ replaced, with the results intimated to the consumer, and appropriate bill adjustments carried out thereafter (where such average billing is being done on the basis of presumed faulty meter, and where defectiveness of the meter has accordingly been established). If due and timely diligence has not been exercised by the licensee, he cannot claim the right to continue billing on a presumptive, average basis. The same principle will apply to all other situations in which such 'average' billing has been resorted to, except in cases where the meter is not accessible. (However, the Commission notes that, in the case of locked/ inaccessible meters, the licensees have recourse to the remedies provided under Section 163 of EA, 2003, and it would be expected that MSEB would exercise it sooner rather than later.)
- (b) In all cases where bills have been raised and/or recoveries made which are not in accordance with (a) above, the bills should be withdrawn and/or amounts refunded to the consumers, through energy bills or other means, as may be relevant, by 30th November, 2005, with interest at the same rate as payable by consumers to MSEB for delayed payments.

46. As regards the prayer for an independent audit to be undertaken under the aegis of the Commission with regard to MSEB's billing and related software and protocol, it would not be appropriate or tenable for the Commission to step into the shoes of MSEB and ascribe to itself such executive and management functions. It is the outcome of such systems and procedures that are actionable and within the Commission's domain. However, considering the various instances cited during these proceedings, and elsewhere, MSEB would be well advised to conduct a third party review on their own.

47. Costs are awarded to the Petitioner, payable by MSEB.

48. MSEB's distribution function has been vested in the Maharashtra State Electricity Distribution Company Ltd. in June, 2005. The term 'MSEB' has been used throughout this Order for convenience.

Sd/-
(A. Velayutham)
Member

Sd/-
(Prمود Deo)
Chairman



(A.M. Khan)
Secretary, MERC