

Before the
Maharashtra Electricity Regulatory Commission,
Centre No.1, 13th floor, World Trade Centre, Cuffe Parade,
Mumbai 400 005

Filing No.MERC/Legal/09/2000

Case No.8 of 2000

IN THE MATTER OF
MERC making copies of Power Purchase Agreements, Contracts, Commitments,
Clearances, etc, entered into by the MSEB available to Prayas.

Shri P. Subrahmanyam, Chairman
Shri Venkat Chary, Member
Shri Jayant Deo, Member

ORDER

Dated – 31st July 2001

Prayas, an NGO, submitted an application on 7th October 2000, requesting the Maharashtra Electricity Regulatory Commission (MERC) to direct the Maharashtra State Electricity Board (MSEB) to submit a status-report and copies of various power-purchase contracts, commitments, clearances, etc, related to IPP projects. It was argued by Prayas that the documents should be furnished to them to enable a studied articulation of public opinion on matters relating to public policy and public interest.

2. In response, the MSEB submitted that transparency has always been a guiding principle in its working and with the enactment of the Maharashtra Right to Information Act, 2000, it is also now duty bound to make permissible documents available to its consumers and others in the public interest. It made a further commitment that it would make the documents sought by Prayas available by 31st January 2001 or give a reasoned reply to the applicant in cases where the custody of the documents is not with the MSEB.

3. In view of the above, the Commission felt that nothing survived in the matter of admission of the application by Prayas and passed its Order dated 12th January 2001 accordingly.

4. The MSEB vide its letter No. CP/DPC/Misc/Prayas/53 dated 23rd January 2001 informed Prayas, “*as per the Confidentiality Clause in the PPA, MSEB is not supposed to disclose certain information/documents to any other person. Also as per the Maharashtra Right to Information Act 2000 under Clause 3(2)(e)(h),(q) and (r), some of the documents cannot be disclosed*”.

5. Prayas, Pune, submitted another petition on 3rd April 2001 in the matter of (i) non-compliance of the MERC Order dated 12th January 2001 by the MSEB and (ii) seeking a directive from the Commission to the MSEB to submit all the remaining papers/documents to them for their perusal.

6. The matter was first heard on 24th May 2001. During the hearing, the MSEB submitted that, except for certain documents, which are claimed to be confidential, all other documents were handed over to Prayas. MSEB further submitted that they had sought the consent of the DPC for releasing the documents since the MSEB was bound to abide by the confidentiality clause of the Power Purchase Agreement (PPA) entered into between the MSEB and the Dabhol Power Company (DPC).

7. During the course of the hearing on 24th May 2001, the Commission directed that all documents, which are not falling under Clause 3 relating to ‘Right of Access to Information’ of the Maharashtra Right to Information Act 2000, should be given by the MSEB to Prayas, which is a consumers’ representative body recognised by the MERC under Section 26 of the ERC Act, 1998. All the documents which are and/or ought to be in the possession of the MSEB relating to the issues raised, including the confidential documents / reports, should be presented to the Commission and the MSEB may argue, with the help of their Counsels, document by document, to establish their confidentiality and the Commission shall take

appropriate decisions in the matter. The Commission further directed the MSEB to provide all the documents, which are not confidential, to Prayas within two weeks and all the documents including the confidential documents within one month to the MERC.

8. Prayas argued during the next hearing held on 2nd July 2001 that copies of the documents enlisted in Annexure 11 of its petition should be provided to them as Prayas is a petitioner and a party to the proceedings and, as a party, it has a right to obtain all documents submitted to the MERC in the course of the proceedings before the Commission. Prayas further submitted that it is also a recognized consumers' representative under section 26 of the ERC Act, 1998 and a member of the Commission's State Advisory Committee constituted under Section 24 of the ERC Act, 1998. To support their arguments, they cited Section 37 of the ERC Act, 1998 which states, "*The Commission shall ensure transparency while exercising their powers and discharging their functions*". They argued that the public has a general right to information in respect of the documents and acts, which do not fall in the legally (not contractually) privileged class with the sole exception that they need not be disclosed if their disclosure may harm the public interest or public order. Their further submission was that, even in such cases, the adverse effect on the public interest must be clearly established by the authority claiming privilege and Regulation 93(1), (2) and (3) of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 also clearly establish their case.

9. Prayas drew pointed attention of the Commission to para 16 of the Honourable Supreme Court's judgement in Dinesh Trivedi, M.P. and Others v/s Union of India and Others (1997 4 SCC 306) which states as follows:

"In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognised limitations; it is, by no means, absolute. This Court has had many an opportunity to express itself upon this issue. In the case of State of U.P. v Raj Narain,

Mathew, J. eloquently expressed this proposition in the following words: SCC p.453, para 74)

“In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption”.

10. The MSEB submitted that the DPC has taken objection to giving certain documents to any third party on the ground of the confidentiality clause of the PPA entered between the DPC and the MSEB and any disclosure, as such, may expose it to the risk of having to defend itself in proceedings or claim for damages on the ground of breach of confidentiality either by the DPC or its lenders.

11. The Commission observed that:

- (i) Since the apprehension of the MSEB is not based on any ground realities as such, the MSEB should give its view more specifically on the confidentiality issue raised by the DPC and the likely legal action that the DPC and its lenders may initiate.
- (ii) Would not a quasi-judicial pronouncement of the ERC in the instant case protect the MSEB from any legal proceedings against it from the DPC as suggested above?
- (iii) If the MSEB wants to claim any privilege, it should do so very specifically. Also, it should give to the Commission document-wise reasons for claiming privilege.

- (iv) Copies of the letters written by the DPC to the MSEB and vice-versa should be furnished to the Commission.

12. During the course of the hearing held on 18th July 2001, Counsel for the MSEB informed the Commission that they have handed over all the documents to Prayas as listed and in the possession of the MSEB vide its letter dated 6th June, 2001 and also to the Commission. However, a few other documents could not be given as they were still not in the possession of those documents. He further drew the attention of the Commission to Clause 21.1(a) and (b) of the PPA reflecting the confidentiality clause. He also read out Clause 21.2(d) and (e) of the PPA to clarify the position in which exception to the confidentiality clause can take place. The Counsel submitted that the Commission, being a statutory authority, does have discretion to decide on its own about the merit of confidentiality and he would not like to prejudice the same by his submissions, except for stressing the fact that if the authority directs the Respondents to furnish the documents related to the above PPA, he may be protected. He also did not submit document-wise reasons during the hearing, as it would have disclosed the contents of the confidential documents.

13. The Commission asked the Counsel to elaborate on the guiding principles to establish the question of confidentiality against disclosure. In response, the Counsel cited a judgement of the House of Lords [Lord Wilberforce, Lord Salmon, Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Scarman – 1979 Science Research Council v. Nasse (H.L. (E))]. The concluding portion of the House of Lords’ judgement states as follows:

“To conclude, I recognise the importance of discovery in discrimination cases. There is no special law protecting confidential documents in such cases. It is for that reason that I have avoided discussing the new “statutory torts” or the investigating powers of the statutory bodies. We are concerned with the litigation of private citizens seeking redress for private wrongs. The only complicating factor is the confidential nature of relevant documents in the possession of the party from whom redress is sought. The production of

some of these may be necessary for doing justice to the applicant's case. If production is necessary, they must be produced. The factor of confidence however militates against general orders for discovery and does impose upon the tribunal the duty of satisfying itself, by inspection if need be, that justice requires disclosure. Ordinarily, therefore, a tribunal will itself examine documents which are confidential before it orders their disclosure.

I agree therefore that the two appeals should be dismissed. It will be for the industrial tribunal in each case to decide whether, and to what extent, discovery should be ordered. I would expect that the tribunal would decide to inspect the documents for which confidence is claimed and determine whether any, and if so, which, should be produced. The inspection should be before the hearing takes place, so that the applicant may consider any that are produced. But the tribunal retains the power to order the production of further documents at a later stage (including at the hearing itself) if in its judgement it becomes necessary to do so in the interests of justice.”

14. The Counsel suggested that in view of the anticipated repercussions due to multilateral arrangements of the DPC with other international companies, where the MSEB is not even a signatory to the documents, the DPC may be invited to submit their remarks before the Commission on the question of confidentiality pertaining to the specified documents. He also pointed out that the Petitioner, Prayas, has already acknowledged this fact by making the DPC a co-respondent. Therefore, the DPC may be served a notice by the Commission for the next hearing.

15. Prayas submitted that this procedure may unduly prolong the proceedings and the basic issue raised by them in this case, as already stated, is different and no purpose would be served by inviting the DPC to make their submissions. The Petitioner is representing the case of consumers who are vitally affected by the decisions of the Respondent, the MSEB, and its PPA with the DPC. Therefore, under the ERC Act, 1998, the Commission does have the authority to decide about the issue of confidentiality and disclosure of documents to a third party to fulfill the objectives of the Act while maintaining transparency.

16. After hearing both the contesting parties and after perusing the contested documents in Annexure-11 of this petition, the Commission held the view that the MSEB must supply **all** the documents asked by Prayas, an NGO and consumers' representative under Section 26 of the ERC Act, 1998, upholding the basic principle of maintaining transparency while exercising discretionary powers and discharging duties of the Commission. Ordered accordingly.

Sd/-
(Venkat Chary)
Member

Sd/-
(Jayant Deo)
Member

Sd/-
(P.Subrahmanyam)
Chairman, MERC.

(Sanjay Kumar)
Secretary, MERC.