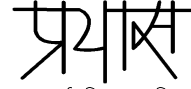


PRAYAS

Initiatives in Health, Energy,
Learning and Parenthood.



आरोग्य, ऊर्जा, शिक्षण आणि पालकत्व
या विषयांतील विशेष प्रयत्न

Amrita Clinic, Athawale Corner, Karve Road Corner, Deccan Gymkhana, Pune - 411004, **India**.
Tel.: (020) 544 1230 Tel/Fax: 542 0337 E-mail: prayas@vsnl.com Web site: www.prayas-pune.org

Before Maharashtra Electricity Regulatory Commission, Mumbai

Petition seeking certain documents relating to IPPs and Case 8/2000 and MERC Order dated 12th January 2001

INDEX

Page No.
(top right corner)

Petition	1
Annexures	

1. Prayas petition dated 7 th October 2000	5
2. Parawise reply by MSEB dated 31 st October 2000	10
3. Detail list of documents submitted by Prayas	29
4. MERC Order dated 12 th January 2001	34
5. MSEB letter to Prayas dated 25 th January 2001, listing documents that can be handed over to Prayas	36
6. Prayas letter to MSEB dated 6 th February 2001	43
7. MSEB letter to MERC dated 8 th February 2001	46
8. MSEB letter to MERC dated 27 th February 2001	65
9. Documents not submitted to MERC	70
10. Documents not made available to Prayas even though no third party has Claimed any confidentiality	73
11. Documents not made available to Prayas on account of DPC letters dated 25 th January 2001 and 26 th February 2001	76
12. DPC letter to MSEB dated 25 th January 2001 – preventing MSEB from Making certain documents available to Prayas	77
13. DPC letter to MSEB dated 26 th February 2001 – submitting Phase II Financing documents to MSEB but preventing the disclosure of the same to any third party	84
14. Why documents listed in Annexure 11 should be made available to Prayas notwithstanding Confidentiality provisions in the PPA or MRI Act 2000?	87

- X -

Before Maharashtra Electricity Regulatory Commission, Mumbai

1. Prayas had filed a petition (dated 7th October 2000) before the MERC. (Attached as Annexure 1) The petition requested MERC to
 - a. Obtain certain documents and information from MSEB and
 - b. To make the same available to Prayas and others.
2. MERC sought parawise reply from MSEB on this petition. In the parawise reply dated 31 Oct. 2000, MSEB did not claim any privilege or confidentiality; neither it raised any objection to prayer made by Prayas. (Attached as Annexure 2)
3. The hearing on the petition took place on 12th January 2001. Even during the hearing MSEB neither claimed any privilege nor objected to Prayas's prayer. In fact it made a categorical commitment that it would make available to Prayas and others all documents in its custody and sought by Prayas. MSEB stated that it would give specific reasons for not submitting each of the documents requested which were not in its custody.
4. Based on this commitment the MERC, in its order dated 12th January 01, concluded that nothing survives in the matter of application by Prayas. (Attached as Annexure 4)
5. In response to MERC order dt. 12th January 01, MSEB via letter dated 25th January 2001 communicated to Prayas a list of documents that MSEB can make available to Prayas. MSEB also claimed that it can not make certain documents available to Prayas on account of confidentiality provisions in the PPA and certain provisions of MRI Act 2000. But, MSEB did not specify which documents can not be made available and on what grounds. (copy of this letter is attached as Annexure 5)
6. Pursuant to this letter Prayas collected the documents listed in MSEB's letter dated 25th January 2001 (without comparing with originals and the list).
7. On preliminary scrutiny of the documents we realized that the MSEB letter dated 25th January 2001 and the limited documents made available by MSEB to Prayas
 - a) does not satisfy the full requirements of MERC order dated 12th January 2001, and
 - b) attract punishment under section 44 of the ERC Act and MERC Regulation no. 57.

8. Subsequently through our letter dated February 6, 2001 (Annexure 6), we informed MSEB of the grounds on which we believe that the MSEB letter dated 25th January 2001 and the limited documents made available by MSEB to Prayas a) does not satisfy the full requirements of MERC order dated 12th January 2001, and b) attract punishment under section 44 of the ERC Act and MERC Regulation no. 57.

Through this letter we also requested MSEB to

- i. *Submit all documents listed by Prayas to MERC*
- ii. *Make available remaining documents to Prayas*
- iii. *If MSEB believes that certain events and actions during the 13 day period of January 12th to January 25th compelled MSEB to deviate from its commitment before MERC and to claim confidentiality, then MSEB should submit a list of documents that cannot be made available (from Prayas list) and also give reasons and relevant provisions why individual documents can not be made available. MSEB should also furnish evidence what caused this change in its commitment.*

(Note: MSEB should ensure that it makes available COMPLETE and ALL 'clearances' and 'directives' as mentioned in the 'Detail list of documents' submitted by Prayas, and not just those mentioned in Schedule 2 of the DPC PPA.)"

9. MSEB responded to this letter via letter dated 8 February 2001 addressed to MERC. (Annexure 7). Through this letter MSEB submitted certain documents to MERC and claimed that these documents are confidential and hence can not be handed over to Prayas.

10. Subsequently, through letter dated 27th February 2001, (Annexure 8), MSEB submitted another set of documents to MERC and claimed that these are also confidential documents, and hence can not be handed over to Prayas. Through this letter MSEB also claimed that mathematical / computer model / tool prepared by MSEB to calculate / verify the payments to be made to DPC is internal property of MSEB and hence can not be handed over to Prayas.

11. In the context of our petition dated 7th October 2000 and MERC Order dated 12th January 2001, the present status of various documents requested by Prayas is as follows.

- a) MSEB has still not submitted a large number of documents to MERC (though some of these documents are made available to Prayas). Annexure 9 lists the documents not submitted to MERC as yet.
- b) Even though no third part has claimed any confidentiality MSEB has not made certain documents available to Prayas. (listed in Annexure 10)
- c) Based on DPC's letters dated 25th January 2001 and 26th February 2001, MSEB has refused to make certain documents (listed in Annexure11) available to Prayas.

12. It is essential to note that in-spite of Prayas letter dated 6th February 2001, specifically pointing out that in view of the MERC order dated 12th January 01, MSEB needs to submit all documents listed by Prayas to MERC, MSEB has failed to do so. Documents not made available to Prayas, are crucial and absolutely

essential for undertaking a through analysis of various aspects related to the power purchase expenditure.

13. Further on preliminary scrutiny of the DPC clearances made available to Prayas (via its letter dated 25th January 2001) it is apparent that MSEB has NOT made **all and complete clearances** available to Prayas as requested.
14. During the hearing on 12th January 2001, MSEB had made a clear commitment that it “... would make the documents sought by Prayas available by 31.1.2001 or give a reasoned reply to the applicant in cases where the custody of the documents is not with the MSEB”. In spite of this commitment, which formed the basis of MERC’s order dated 12th January 2001, MSEB has failed to make available certain documents to MERC and Prayas, even though the same are in MSEB’s custody. MSEB has not even referred to certain documents in its replies. As per the MERC order MSEB was dutybound to give reasoned reply to Prayas even if certain documents were not in its custody.
15. Thus, neither submitting the documents nor giving reasons for these documents not being in MSEB’s custody amounts to not adhering to its commitment before the MERC and also non-compliance with MERC order dated 12th January 2001.
16. MSEB has submitted certain documents (listed in Annexure 11) relating to DPC Project and demanded by Prayas to MERC. But it has refused to make these documents available to Prayas. When MSEB gave parawise reply to Prayas petition and also during hearing on 12th January 01, MSEB was fully aware of the confidentiality provisions in the PPA and financing agreements, as well as provisions under the MRI Act 2000, but still it chose to make these documents available to Prayas. This was the basis of MERC’s order dated 12th January 01. Now, based on DPC letter dated 25th January 2001 and 26th February 2001, MSEB has refused to make these documents available to Prayas. (Attached as Annexure 12 and 13) In light of Prayas petition dated 7th Oct. 2000, MSEB’s parawise reply dated 31st Oct. 2000, its commitment during the hearing on 12th January 01, and MERC Order dated 12th January 01, ERC Act 1998 and MERC (Conduct of Business) Regulation 1999, and certain Supreme Court Judgements, neither confidentiality provisions in the DPC PPA, nor provisions in the MRI Act 2000, prevent MSEB from making these documents available to Prayas. In fact, MSEB is now duty bound to make the documents available to MERC and Prayas. (Basis of this assertion is explained in Annexure 14)
17. In light of Prayas petition dated 7th Oct. 2000, MSEB’s parawise reply, and MERC Order dated 12th January 2001, amongst others, DPC has no right to restrain MSEB from making these documents available to Prayas without approaching the MERC. By purportedly preventing MSEB from sharing documents listed in Annexure 10, with Prayas, through letters dated 25th January 2001 and 26th February 2001, DPC has, in defiance of MERC order, tried to delay disclosure of vital information such as financing agreements and project contracts to Prayas and other consumers of MSEB.

18. On this background MSEB's refusal to submit documents to MERC and Prayas amounts to mis-leading the MERC, and non-compliance with MERC order dated 12th January 2001. This also amounts to taking consumer groups for a ride by not adhering to its own commitment, before a statutory body like MERC. Such actions amount to nothing but an attempt to prevent and scuttle legitimate scrutiny of MSEB's costs and decisions by consumer groups and public at large, even though it seeks to burden consumers with increased tariff resulting from these costs and decisions. Further, by not-adhering to its commitments and not submitting documents MSEB has tried to exploit and strain limited human and financial resources of consumer groups, such as the petitioner. MSEB seeks to recover all its costs through tariff and also has huge manpower. MSEB is using these resources to its undue advantage by delaying document disclosure and forcing the petitioner to approach the MERC again, resulting in wastage of scarce resources of MERC as well as petitioner. Considering these issues, we request MERC to take strong action against MSEB and DPC, to prevent mockery of quasi-judicial regulatory proceedings.

19. Various actions of MSEB and DPC described above and limited documents made available to MERC and Prayas attracts punishment under section 44 of the ERC Act 1998. Section 44 of the ERC Act – *“44. Whoever fails to comply with any order or direction given under this Act, within such time as may be specified in the said order or direction or contravenes, or attempts to contravene or abets the contravention of any of the provisions of this Act or any rules or regulations made thereunder shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to rupees one lakh or, with both in respect of each offence and in case of a continuing failure, with an additional fine which may extend to rupees four thousand for every day during which the failure continues after conviction of the first such offence.”*

20. Prayer –

Considering submission in paragraph 1 to 19 above and enclosed Annexures, and the original petition dated 7th October 2000, we request the commission to grant following specific relief to the petitioner:

- (a) Direct MSEB to immediately submit documents mentioned in Annexure 9 to MERC.
- (b) Make available to Prayas and other consumers documents listed in Annexure 10 and Annexure 11.
- (c) Take suitable action against concerned MSEB officials for not submitting documents to MERC and Prayas, even after MERC Order dated 12th January 2001 and Prayas letter to MSEB dated 6th February 2001.
- (d) Take suitable action against DPC for creating obstacles in MSEB's compliance with MERC order dated 12th January 2001.
- (e) Not to consider MSEB's application for revision of tariff before considering and deciding on this application.
- (f) Direct MSEB to reimburse the petitioner costs involved in this petition.

- X -

Annexure 9: Documents not submitted to MERC

1. Documents related to Dabhol Power Project

Sr. No. of Doc. (Prayas list)	Name of Document / Report
A i	DPC PPAs:
a	PPA dt. 8.12.93
b	2 nd Feb 1995 amendment
c	26 th July 1996 (Second Amendments)
ii	Clearances
iii	Directives
B	Documentary Evidence indicating fulfillment / achievement of
i	Any and All conditions mentioned in any 'clearance' or 'directive' mentioned in section 1A ii and 1 A iii above, and
ii	Condition Precedent as set out in section 2 of the DPC-MSEB PPA that have either been met or waived by DPC and / or MSEB
C	Mathematical / computer models / tools being used by MSEB to calculate / verify the payments to be made to DPC

2. Documents related to Reliance Project

Sr. No. of Doc. (Prayas list)	Name of Document / Report
i	Power Purchase Agreement dated 3/8 /1996
ii	Amendments to PPA dated 4/2/2000
ix	Bid solicitation / Request for Proposal documents
x	Bid evaluation report / analysis
xi	Fuel supply contract (if the contract is not finalized as yet then a note describing) <ul style="list-style-type: none"> a) the likely type and source of fuel, b) anticipated fuel cost in the first year of the project and any escalation in the future, and the basis for the same c) status of negotiations regarding fuel supply
xii	Status of financial closure of the project. This should include <ul style="list-style-type: none"> a) anticipated financial package and financing terms (i.e. currency, amount, moratorium, interest rate and repayment schedule) b) anticipated equity structure c) status and details of equity participation / agreement / tie-up
xiii	Status of clearances (in the format specified)
xvii	Copies of all 'MSEB security documents / agreements' concluded so far, and the necessary government approval if any.
xviii	Mathematical / computer models / tools used by MSEB to calculate / assess the tariff and payments to be made to project promoters

3. Documents related to Bhadrawati Project

Sr. No. of Doc. (Prayas list)	Name of Document / Report
ix	Fuel supply contract
	(if the contract is not finalized as yet then a note describing) d) the likely type and source of fuel, e) anticipated fuel cost in the first year of the project and any escalation in the future, and the basis for the same f) status of negotiations regarding fuel supply
x	Status of financial closure of the project. This should include
	d) anticipated financial package and financing terms (i.e. currency, amount, moratorium, interest rate and repayment schedule) e) anticipated equity structure f) status and details of equity participation / agreement / tie-up
xi	Status of all necessary clearances in the format specified
xiv	Status of various 'MSEB Security documents / arrangement'(e.g. escrow, GoM guarantee and GoI guarantee) for the project
xv	Copies of all 'MSEB security documents / agreements' concluded so far, and the necessary government approval if any.
xvi	Mathematical / computer models / tools used by MSEB to calculate / assess the tariff and payments to be made to project promoters

Annexure 10: Documents not made available to Prayas even though no third party has claimed any confidentiality

1. Documents related to Dabhol Power Project

Sr. No. of Doc. (Prayas list)	Name of Document / Report	Comment / Remark
A ii	Clearances	Only partial clearances are made available. Some of the clearances are even incomplete. DPC has also admitted in its letter dated 25 th Jan. 01, that clearances are not confidential documents but “need to be properly understood or explained in its context, before its disclosure”.
iii	Directives	MSEB has not even referred to this item in its reply
B	Documentary Evidence indicating fulfillment / achievement of	
i	Any and All conditions mentioned in any ‘clearance’ or ‘directive’ mentioned in section 1A ii and 1 A iii above, and	MSEB has not even referred to this item in its reply.
ii	Condition Precedent as set out in section 2 of the DPC-MSEB PPA that have either been met or waived by DPC and / or MSEB	MSEB has not provided any evidence indicating financial closure of Phase II.
C	Mathematical / computer models / tools being used by MSEB to calculate / verify the payments to be made to DPC	MSEB did not refer to this item in its replay dated 25 th January 01. But in its letter dated 27 th Feb. 01 claimed that this model being internal property of MSEB does not come under the nature of documents as asked by Prayas.

2. Documents related to Reliance Project

Sr. No. of Doc. (Prayas list)	Name of Document / Report	Comment / Remark
x	Bid evaluation report / analysis	MSEB has not even referred to this item in its reply.
xi	(if the contract is not finalized as yet then a note describing) g) the likely type and source of fuel, h) anticipated fuel cost in the first year of the project and any escalation in the future, and the basis for the same i) status of negotiations regarding fuel supply	MSEB claimed that the fuel supply contract is “Not yet furnished”. From the reply it is not clear weather the fuel supply contract has been finalized or not. If the contract is finalized then MSEB must have the same in its custody. If the contract is not finalized then MSEB should have give a note describing various aspects. MSEB has not made available any such note.
xii	Status of financial closure of the project. This should include	MSEB has just mentioned that the financial closure is not yet achieved, but has not given any “Status report” about the financial aspects as requested.
	g) Anticipated financial package and financing terms (i.e. currency, amount, moratorium, interest rate and repayment schedule) h) Anticipated equity structure i) Status and details of equity participation / agreement / tie-up	
xvi	Status of various ‘MSEB Security documents / arrangement’(e.g. escrow, GoM guarantee and GoI guarantee) for the project	We had asked for the “ Status ” of various documents, but MSEB has just replied that this is not applicable as financial closure is not achieved. MSEB has not given any information about “status” of various documents in the this item.
xvii	Copies of all ‘MSEB security documents / agreements’ concluded so far, and the necessary government approval if any.	MSEB has just replied as ‘Nil’
xviii	Mathematical / computer models / tools used by MSEB to calculate / assess the tariff and payments to be made to project promoters	MSEB reply is as “not applicable”. Does this mean that MSEB has signed the PPA without even assessing / satisfying itself about the exact likely tariff of power from this project ?

3. Documents related to Bhadrawati Project

Sr. No. of Doc. (Prayas list)	Name of Document / Report	Comment / Remark
vii	GoM Support Agreement	MSEB has not even referred to this item in its reply.
viii.	MSEB Support Agreement	MSEB has not even referred to this item in its reply.
ix	Fuel supply contract (if the contract is not finalized as yet then a note describing) j) the likely type and source of fuel, k) anticipated fuel cost in the first year of the project and any escalation in the future, and the basis for the same l) status of negotiations regarding fuel supply	MSEB has just mentioned that Fuel supply contract is not finalized. But has not provided any note describing various aspects as requested.
X	Status of financial closure of the project. This should include j) Anticipated financial package and financing terms (i.e. currency, amount, moratorium, interest rate and repayment schedule) k) Anticipated equity structure l) Status and details of equity participation / agreement / tie-up	MSEB has just mentioned that the financial closure is not yet achieved, but has not given any "Status report" about the financial aspects as requested.
Xi	Status of all necessary clearances in the format specified	MSEB has not even referred to this item in its reply
Xv	Copies of all 'MSEB security documents / agreements' concluded so far, and the necessary government approval if any.	MSEB has not even referred to this item in its reply.
Xvi	Mathematical / computer models / tools used by MSEB to calculate / assess the tariff and payments to be made to project promoters	MSEB has not even referred to this item in its reply. Does this mean that MSEB has signed the PPA without even assessing / satisfying itself about the exact likely tariff of power from this project ?

**Annexure 11: Documents not made available to Prayas on account of DPC letters
dated 25th January 2001 and 6th February 2001**

Documents related to Dabhol Power Project

Sr. No. of Doc. (Prayas list)	Name of Document / Report
v	Phase I Project Contracts
	Phase I O & M Agreement
	Phase I Construction Contracts
	Fuel Management Agreement
vi	Phase II Project Contracts
	Gas Supply Contract and Liquid Fuel Contract
	Phase II Construction Contract
	Phase I O & M Agreement
	Phase II Fuel management agreement
	The TARA
xi	LNG Transportation Agreement
xv	Financing Agreements

Annexure 14

Why documents listed in Annexure 11 should be made available to Prayas notwithstanding Confidentiality provisions in the PPA or MRI Act 2000?

1. ERC Act 1998 and MERC (Conduct of Business) Regulations 1999:

As per section 12 (read with section 23) of the ERC Act 1998 and MERC (Conduct of Business) Regulations 1999, MERC is fully empowered to seek information, documents and evidence from MSEB. As per these provisions MSEB is dutybound to supply information and documents sought by MERC. MSEB can not refuse to make documents available to statutory authority like MERC under the pretext of either confidentiality clauses in any PPA or other commercial contracts or the provisions of MRI Act 2000. Further, compliance with orders of MERC, which is a statutory authority, can not be avoided under the pretext of either confidentiality clauses in any PPA or other commercial contracts or the provisions of MRI Act 2000. Prayas being a petitioner and a party to the proceedings has a right to obtain all documents, evidences etc. submitted to the MERC in the course of proceedings before the commission. Prayas is also a recognized consumer representative (u/s 26 of the ERC Act 1998) and member of the Commission Advisory Committee (u/s 24 of the ERC Act 1998) Also it is essential to note that as per section 37 of the ERC Act 1998 states that, "*The commissions shall ensure transparency while exercising their powers and discharging their functions*"

2. Parawise reply of MSEB (dated 31 Oct. 2000):

1. MSEB's parawise reply (31 Oct. 00) was based on legal opinion (para 5 of affidavit)
2. MSEB did not object to Prayas prayer of submitting documents to MERC and Prayas, rather by supplying additional documents expressed its consent to give all documents listed by Prayas.
3. MSEB neither claimed any privilege or confidentiality nor questioned Prayas's need and right to seek these documents.

3. MERC hearing and order on January 12th 2001:

Neither MERC nor MSEB objected to Prayas's prayer in the petition. Being fully aware of the confidentiality provisions in the PPA and other documents as well as provisions of the MRI Act 2000, MSEB made a commitment that it will make all documents in its custody available to Prayas and to give reasoned reply in case the custody of the documents is not with MSEB. MSEB also asserted that as per MRI Act 2000, it was duty bound to make permissible documents available to its consumers and others in public interest. **Thus, when MSEB made commitment to give all documents in its custody to Prayas, it pronounced its decision that none of the documents sought by Prayas fall in categories mentioned in section 3. 2 of the MRI Act 2000.**

Further, this commitment by MSEB was the basis of MERC's order dated 12th January 01. As a result, in order to comply with MERC order dt. 12th January 01, MSEB is dutybound to make all documents in its custody available to Prayas. If MSEB has to

make certain documents available to Prayas in order to comply with order of MERC, which is a statutory authority, MSEB will not be in breach of any confidentiality provisions of commercial contracts like PPAs, project contracts and financing agreements. Orders of MERC a statutory authority, need to be complied with by all utilities in Maharashtra, including DPC. DPC and/or MSEB can not evade their responsibility to comply with MERC's order under the pretext of confidentiality clauses.

4. Certain Supreme Court Judgements:

1. State of UP vs Raj Narain and Others (1975) 4 SCC 428 and
2. Dinesh Trivedi and Others (1997) 4 SCC 306

As pointed out at the Hearing earlier, The public has a general right to information, which is far wider than that under the MRI Act 2000. The public has a right to information in respect of all documents and acts which do not fall in the legally (not contractually) privileged class with the sole exception (in the case of privileged documents) that they need not be disclosed if their disclosure harm the public interest or public order. However, even in such cases, the adverse effect on public interest must be clearly established by the authority claiming privilege.