

**APP Comments/Suggestions on
Draft Electricity (Late Payment Surcharge) Amendment Rules, 2021**

Ref. No.	Proposed Clause in Draft	Comments/Suggestions/Suggested Clause	Rationale/Remark
Proviso to Rule 5	Rule 4: Provided further that, if a distribution licensee has any payment including Late Payment Surcharge outstanding against a bill after the expiry of seven months from the due date of the bill, it shall be debarred from procuring power from a power exchange or grant of short term open access till such bill is paid.	<p>This proviso may also be added to Rule 6 so that it becomes applicable for projects with existing PPAs under Section 63.</p>	<p>As Rule 4 deals with LPS rates, which cannot be changed retrospectively for already signed PPAs under section 63, the Draft Amendment has limited the applicability of Rule 4 to power plants with PPAs under Section 62 and PPAs under Section 63 which become effective after these Rules come into force.</p> <p>The inclusion of the above applicability has led to the result of the last proviso of Rule 4, which debar distribution licensee from procuring power from power exchange or from grant of STOA if any payment including LPS remains outstanding against a bill after the expiry of seven months from the due date of the bill, to be applicable only for projects with PPAs under Section 62 and PPAs under Section 63 which become effective after these Rules come into force, and inapplicable to existing PPAs under Section 63.</p> <p>A look at the pending receivables shows that maximum amounts are due towards IPPs (50,000Cr) in comparison with sec 62 projects (3,000 Cr). It may be noted that the CGS plants already have an additional payment security in terms of Tripartite Agreements which are not available for IPPA with PPAs u/s 63.</p>

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			<div data-bbox="1318 261 1948 630" data-label="Figure"> <table border="1"> <caption>Overdue Amount (Excluding disputed) - Estimated Data</caption> <thead> <tr> <th>Month</th> <th>IPP (Rs. '000 Crore)</th> <th>NTPC (Rs. '000 Crore)</th> <th>CPSE (Rs. '000 Crore)</th> <th>RE (Rs. '000 Crore)</th> </tr> </thead> <tbody> <tr><td>Jan-20</td><td>38</td><td>15</td><td>25</td><td>12</td></tr> <tr><td>Feb-20</td><td>32</td><td>12</td><td>20</td><td>10</td></tr> <tr><td>Mar-20</td><td>38</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Apr-20</td><td>40</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>May-20</td><td>40</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Jun-20</td><td>38</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Jul-20</td><td>38</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Aug-20</td><td>38</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Sep-20</td><td>38</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Oct-20</td><td>38</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Nov-20</td><td>38</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Dec-20</td><td>38</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Jan-21</td><td>38</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Feb-21</td><td>38</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Mar-21</td><td>40</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Apr-21</td><td>42</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>May-21</td><td>45</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Jun-21</td><td>48</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Jul-21</td><td>50</td><td>18</td><td>25</td><td>10</td></tr> <tr><td>Aug-21</td><td>50</td><td>18</td><td>25</td><td>10</td></tr> </tbody> </table> </div> <p data-bbox="1234 672 2039 935">In such scenario making a proviso which is applicable only for one set of generators i.e. PPAs u/s 62, which in any case have lower dues and are also with tripartite agreements as a payment security, is unjustified and would result in IPPs facing a severely disadvantageous position since the distribution licensees would retain their access to exchange and STOA by making payments to Sec 62 projects while delaying payments to IPPs for even longer than seven months.</p> <p data-bbox="1234 976 2039 1170">As this condition of debarment from power exchange or grant of STOA should be applicable to all instances of power procurement under PPA by the Discoms (whether the PPA is under Section 62 or existing Section 63 PPA or future Section 63 PPA), this proviso may also be added to Rule 6 so that it becomes applicable for projects with existing PPAs under Section 63.</p> <p data-bbox="1234 1211 2039 1403">It may also be mentioned here that this provision of “seven months” is inconsistent with the MoP Order dated 28.06.2019 on Payment Security Mechanism and the corresponding detailed Procedure for scheduling of power to the distribution company for non-maintenance of LC, wherein the concerned LDC has been tasked to ensure that the distribution company, immediately upon occurrence</p>	Month	IPP (Rs. '000 Crore)	NTPC (Rs. '000 Crore)	CPSE (Rs. '000 Crore)	RE (Rs. '000 Crore)	Jan-20	38	15	25	12	Feb-20	32	12	20	10	Mar-20	38	18	25	10	Apr-20	40	18	25	10	May-20	40	18	25	10	Jun-20	38	18	25	10	Jul-20	38	18	25	10	Aug-20	38	18	25	10	Sep-20	38	18	25	10	Oct-20	38	18	25	10	Nov-20	38	18	25	10	Dec-20	38	18	25	10	Jan-21	38	18	25	10	Feb-21	38	18	25	10	Mar-21	40	18	25	10	Apr-21	42	18	25	10	May-21	45	18	25	10	Jun-21	48	18	25	10	Jul-21	50	18	25	10	Aug-21	50	18	25	10
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			of such default in maintenance of LC or payment of advance value, shall not be scheduled power from the affected generator and shall have no access to procure power from the Power Exchange(s) and they shall not be granted Short Term Open Access (STOA). This conflict in timelines may be reconciled.
Proposed Rule 5 sub rule (i)	All the bills payable by a distribution licensee to a generating company or trading licensee for power procured from it or to a transmission licensee shall be time tagged with respect to the prescribed date of payment specified in the Power Purchase Agreement and the payment shall be made by the distribution licensee first against the oldest procurement of power and then to the second oldest procurement and so on as to ensure that payment against a procurement is not made unless and until all procurement older than it have been paid for.	All the bills payable by a distribution licensee to a generating company or trading licensee for power procured from it or to a transmission licensee shall be time tagged with respect to the prescribed date of payment specified in the Power Purchase Agreement and the payment shall be made by the distribution licensee first against the oldest procurement of power <u>across all suppliers /across suppliers of same category i.e. renewable/thermal etc excluding state gencos</u> and then to the second oldest procurement and so on as to ensure that payment against a procurement is not made unless and until all procurement older than it have been paid for. <u>The sequence of invoices received, and payments made against the invoices may be scrutinized at the end of the year by an appropriate authority</u>	The proposed clause of time tagging invoices and mandating payment sequence from oldest is aimed at curbing practice of making out of turn payments / seeking LPS waivers by discoms. The proposed change in the wording is suggested to further clarify that this applies to invoices across generators and not to invoices of a particular generator i.e. the sequencing of invoices for payment is to be done for invoices across all generators and not only sequencing of invoice of a particular generator.
Proposed Rule 6	If a distribution licensee has any payment including Late Payment Surcharge outstanding after the expiry of seven months from the due date of payment as prescribed in PPA; then ...	If a distribution licensee has any payment including Late Payment Surcharge outstanding after the expiry of three months from the due date of payment as prescribed in PPA; then ...	Generating companies are usually provided with working capital loan covering 75% of receivables of two or three months and one months advance for coal supplies and other O&M expenses. Even the Tariff Regulations consider working capital against just 45 days of receivables.

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			<p>Considering that the entire working capital funds would be utilized by end of three months, it may not be possible for a generating company to fund further.</p> <p>Accordingly, MoP is requested to consider replacing "seven months" with "three months" in Rule 6. Alternatively, the working capital norms/Regulations for working capital would need to be revised to be in sync with 7 months clause.</p> <p>It may also be mentioned here that this provision of “seven months” is inconsistent with the MoP Order dated 28.06.2019 on Payment Security Mechanism and the corresponding detailed Procedure for scheduling of power to the distribution company for non-maintenance of LC, wherein the generator is supposed to inform the concerned LDC immediately upon the occurrence of default (non-maintenance of LC or payment of advance value), so that the LDC can stop the scheduling of power from the affected generator till the distribution company opens/renews the LC or provides advance payment. This difference in timelines may be reviewed and reconciled by MoP.</p> <p>Further, we would like to mention that the penal provisions need to be made more stringent in order to disincentivize the Discoms from taking their usual route of letting LPS payments accumulate. Towards this end, we suggest putting in place a staggered mechanism which will have higher rate of penal LPS interest as the delay in payment increases. As an example, after every 1 month of delay from the date of commencement of LPS, the LPS rate may be increased by 50 basis points, till the timeline under this proposed Rule 6 is reached.</p>

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New clause	Suggestion to avoid frivolous litigation		<p>With regard to ‘Change in Law’ items, it has been observed that despite passing of orders by the Regulators approving the applicability of change in law items, the Discoms invariably resort to frivolous challenges and litigation at every step of the process, even when they are fully aware and cognizant that the additional charges would need to be paid. We have had instances of developers (Bajaj Hindustan, Vedanta, Adani Power etc) being forced to take the matter right to the Supreme Court to finally get the payments as approved by the Regulators.</p> <p>In its order dt 25th Feb 2019 in CA No. 5865 of 2018, the Hon'ble Supreme Court has upheld the Hon'ble APTEL decision held that the Discoms are liable to pay carrying cost on the approved 'change in law' items. This entire additional cost is borne by the DISCOM and its consumers, while in the meantime, the officers responsible for taking the decision on challenge of regulatory order would have moved out of office by the time the higher Courts finally adjudicate on the case.</p> <p>In order to avoid such frivolous litigation, it is suggested that the Late Payment Surcharge Rules may incorporate a provision that any appeals against disputed LPS or Change in Law amount shall be heard by the APTEL only if at least 50% of the amount, as adjudicated by the respective Regulatory Commission is paid by the DISCOM to the generator.</p> <p>This would be in line with the provisions of the Real Estate (Regulation and Development) Act 2016 which stipulates that any appeal by a Promoter to the Appellate Tribunal shall not be entertained unless the total amount to be paid to the allottee including interest and compensation imposed on him, is deposited by the Promoter before the appeal is heard.</p>

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			Therefore, MoP may consider inclusion of such a provision to avoid frivolous litigation which only ends up increasing the delivered cost of power.