



ASSOCIATION OF POWER PRODUCERS

**COMMENTS ON DRAFT ELECTRICITY
(AMENDMENT) BILL, 2020**

Index

Executive Summary	3
1. Section 2 – Definitions	8
2. Sections 3A - National Renewable Energy Policy	10
3. Section 14 – Grant of License	12
4. Section 26 – National Load Despatch Centre	14
5. Section 28, 32 - Payment security mechanism	16
6. Section 38, 39, 40 – Duties of CTU, STU, Transmission Licensees	18
7. Section 42 – Duties of Distribution Licensees and Open Access	20
8. Section 49 - Agreement with respect to supply or purchase or transmission of electricity	24
9. Section 61 – Tariff regulations	26
10. Section 62 – Determination of Tariff	27
11. Section 63 – Determination of tariff by bidding process	28
12. Section 65 – Provision of subsidy by State Government	29
13. Section 77 – Qualifications for appointment of Members of Central Commission	30
14. Section 78 – Constitution of Selection Committee to recommend Members	32
15. Section 79 – Functions of Central Commission	33
16. Section 82 – Constitution of State Commission	35
17. Section 84 – Qualifications for appointment of Chairperson and Members of State Commission 37	
18. Section 86 – Functions of State Commission	38
19. Section 91 – Proceedings and powers of Appropriate Commission – Secretary, officers and other employees of Appropriate Commission	40
20. Section 92 – Proceedings of Appropriate Commission	41
21. New Section – Part XA – Electricity Contract Enforcement Authority (ECEA)	42
22. Section 111 – Appeal to Appellate Tribunal	50
23. Section 112 – Composition of Appellate Tribunal	51
24. Section 121 – Power of Appellate Tribunal	52

25. Section 142 – Punishment for non-compliance of directions by Appropriate Commission	54
26. Section 146 – Punishment for non-compliance of orders and directions	56
27. Section 158 – Arbitration	57
28. Section 176 – Power of Central Government to make Rules	58
Additional Comments on Electricity Act	61
1. Section 15 – Procedure for grant of license	62
2. Section 17 – Licensee not to do certain things	63
3. Section 19 – Revocation of licence	65
4. Section 31 - Constitution of State Load Despatch Centres	66
5. Section 38 – Central Transmission Utility and functions	67
6. Section 38 – Central Transmission Utility and functions	68

Please Note – Throughout this document, **red text** illustrates changes introduced in the Bill while **blue text** indicates APP’s views and suggestions.

Executive Summary

As per the Statement of Objects and Reasons to “The Electricity (Amendment) Bill, 2020”, the provisions of the Amendment Bill seek to address some critical issues which have weakened the commercial and investment activities in the power sector. Towards this end, we believe that the proposed amendments are progressive, transformative and formulated with the intent of making the sector financially viable and sustainable.

The notable amendments are - **mandating cost reflective tariffs accompanied by direct subsidy benefit to consumer’s account; empowering Load Despatch Centres to oversee the payment security mechanism and giving power to NLDC to direct any power system entity including SLDC; strengthening of APTEL; creation of Electricity Contract Enforcement Authority (ECEA) for dispute resolution; formulation of separate National Renewable Policy for providing necessary impetus to clean energy programme; creation of a standing committee at Central level for selection of members of APTEL and Chairperson and members of CERC, ECEA, SERCs and JERCs; introduction of Distribution sub-licensee; timebound adoption of tariff discovered through Competitive Bidding and empowering CERC to regulate Cross Border trade of electricity.**

We especially welcome the formal legalization of the payment security mechanism instituted by Ministry of Power. Since August 2019, this mechanism has helped in arresting, to a large extent, the growing burden of payment dues from the distribution licensees. As was expected, not all State DISCOMs were equally receptive or forthcoming about following the instructions and guidelines issued by MoP and therefore, giving legal teeth to the payment security mechanism through the Electricity (Amendment) Bill will help to smoothen and regularize the process in the future.

Another significant positive change is mandating Cost Reflective tariffs and the stipulation that the consumer tariff would be fixed on basis of actual cost to consumer and the subsidy, if any, will be provided directly to the consumer in their designated accounts. Absence of cost-reflective tariffs and delays in subsidy disbursements by the State Governments to the distribution companies have been the main factor contributing to the weak financial health of these companies. **These amendments were much needed, and they signal a strong intent to restore financial health of the distribution segment.**

A. Electricity Contract Enforcement Authority (ECEA) - In accord with the principle of separation of Regulatory and Adjudication functions, we support the creation of a separate body for contract dispute resolution. However, we have concerns regarding the creation of this body in the manner as outlined in the proposed amendment. The ECEA, with the sole authority and jurisdiction to adjudicate upon matters regarding specific performance of contracts related

to purchase or sale of power or transmission of electricity, but without the jurisdiction over any matter relating to regulation or determination of tariff or any dispute involving tariff, gives rise to the possibility of multiple disputes on the jurisdictional overlap of ECEA and the Appropriate Commission.

This is because there are very few disputes which do not involve tariff, as “Tariff” has been judicially interpreted to include not only determination of tariff but also terms and conditions of tariff, including payment of tariff, time for payment, delayed payment surcharge, rebate, payment security, consequences of non-payment etc. The ERCs are already flooded with cases where arguments are carried out over months specifically about whether the dispute pertains to tariff or not. Furthermore, in matters involving multiple issues, it may result in parallel litigation between the same parties across the Regulatory Commissions and ECEA – a situation which will not be conducive for early settlement of disputes.

Considering the above, it is suggested that all adjudicating functions assigned to the Regulatory Commissions under sections 79 (1)(f) and 86 (1)(f) may be withdrawn and assigned to the newly created Authority. As this Authority would adjudicate upon ALL disputes (except for disputes already pending before the Regulatory Commissions) between the licensees and the generating companies, it may be renamed accordingly to Electricity Dispute Resolution Authority (EDRA).

We would like to once again stress upon the potential conflicts and disputes which may arise from the present formulation of ECEA as mentioned in the Amendment Bill. In case our suggestion regarding assigning all dispute adjudicatory functions to the newly created Electricity Dispute Resolution Authority (EDRA) is not considered, we earnestly request that the proposal to create a hybrid adjudicatory space involving both ECEA and the Regulatory Commissions may be reconsidered.

If it is not considered feasible to entrust all adjudicatory functions with the newly created body, we propose the following alternative for consideration - **to empower the APTEL to also have original jurisdiction for resolution of disputes and appellate jurisdiction against orders passed by the State and Central Commissions in other regulatory matters. Such an arrangement would be similar to the Telecom sector, where the original jurisdiction to adjudicate disputes was vested with the Appellate Tribunal (i.e. Telecom Disputes Settlement and Appellate Tribunal) through an amendment in April 2000 to the TRAI Act 1997.** This model has reduced one level of appeal, which may be useful for power sector disputes/contracts as every stage of appeal has potential of delay and consequential uncertainty.

In order to implement this suggestion, the composition of APTEL will require changes. We have elaborated on this in our detailed comments which are enclosed.

B. National Renewable Energy Policy - With the accelerated growth of RE generation and the multiplicity of renewable energy policies across States, we feel that a National Renewable Energy Policy framework would help to promote uniform guidelines across the nation, while keeping in mind State specific realities and addressing industry concerns. However, having accepted the need for such a framework, the question that we need to ask is whether we need a separate policy framework for every form of energy, each operating within their own silos and self-contained space?

In this context we need to recognize that we are moving towards increasing hybridization of energy where every form of energy, whether RE (solar, wind, hydro, biomass etc), Thermal (coal, lignite, liquid fuel, gas etc) or Nuclear, would have its own role to play. In an optimal policy framework, all these forms of energy would need to complement each other in order to bring about the most suitable energy mix for the country and achieve the common objective of affordable and quality 24x7 Power For All.

Further, the Act already provides for preparation of a **National Electricity Policy** and **Tariff Policy** for development of the power system based on optimal utilization of resources, including hydro and RE sources, and also energy storage systems. We feel that there should be one single integrated ‘mother document’ – the **National Electricity Policy**, which may have different sections dedicated to different resources and technologies, but in the end, shall outline a harmonious and balanced approach for the development of the Power Sector while considering the specific nuances, business challenges, requirements, advantages and issues with all the energy resources and technologies.

Finally, while considering the promotion of generation of electricity from RE sources, the subventions to renewables and increasing burden of taxation and levies on thermal need to be balanced so that the ultimate consumer gets correct price signals, especially when the Tariff Policy and the Electricity Act enjoins tariff fixation to be reflective of true cost.

C. Payment Security Mechanism – As mentioned earlier, this is a formalization of recently notified circular by Ministry of Power dated June 28, 2019 and is a big positive for the generators who will have payment guarantees going forward. However, the proposed insertions as per the Amendment Bill reads as – *‘Provided that no electricity shall be scheduled or despatched under such contract unless adequate security of payment, as agreed upon by the parties to the contract, has been provided’*.

In this regard, it is felt that the word ‘adequate’ leads to some degree of subjectivity in determining the adequacy of payment security. Further, it has been practically observed that some States prefer to open shorter duration LCs or provide advance payments for a few days or a week, in order to manage their own liquidity. Such practices are allowed under the MoP

circular, as long as the quantum of electricity scheduled or despatched corresponds to the quantum of payment security provided. Therefore, the new provisos introduced under section 28 (3)(a) and section 32 (2)(a) may be reworded as follows - *“Provided that electricity shall be scheduled or dispatched to a distribution licensee under a contract to the extent payment security is provided by such distribution licensee.”*

D. Introduction of Distribution Sub-licensee – The Amendment Bill has introduced a concept wherein a distribution licensee can recognize and authorize a person as ‘Distribution Sub-licensee’ to distribute electricity on its behalf in a particular area within its area of supply. Thus, the concepts of distribution sub-licensee and distribution franchisee sit together in the Bill. However, there is lack of clarity in terms of difference in the two concepts with respect to operative framework, roles, responsibilities, operationalization, terms of appointment and functional modalities.

Further, while both the distribution sub-licensee and the distribution franchisee shall not be required to obtain any separate license, the distribution sub-licensee, unlike the franchisee, shall be fully responsible and directly accountable for compliance of all the provisions of the Act, Rules and Regulations applicable to a distribution licensee for its area of supply. This provision of relieving the Distribution Licensee (DL) from responsibilities of a sub-area amounts to amendment of its license without following procedure laid down in Section 18 of the Act. **It is our view that in order to avoid disputes and assign clear responsibility, in the areas where distribution sub-licensee is introduced, the distribution licensee should remain as the owner of the system in that particular area and should continue to be responsible for the distribution of electricity and operation and maintenance.**

E. Renewable Generation Obligation and Bundling of RE with thermal energy - The proposed section 176 (2) (ac) & (ad) provide for the Central Government to make rules for modalities of bundling of renewable energy (including hydro) with thermal energy and Renewable Generation Obligation (RGO). However, there is no section in the Principal Act or in the proposed amendment with enabling provisions for either bundling of renewable energy with thermal energy or RGO. It may be noted that section 176 (1) provides rule making power to the Central Government for carrying out the provisions of the Act. When there are no provisions in the act for bundling of RE and RGO in the Act, the Central Government cannot make rules u/s section 176.

Further, we believe that the proposed concepts of RGO and bundling of RE with thermal energy are not advisable for insertion in the Act at present. The Renewable Generation Obligation, as the name suggests would be on generators to generate certain percentage of

power from renewable energy sources. When RPO has been imposed to create the demand for renewable energy and there is no dearth of investment in renewable presently by many players, there is no need to impose RGO.

Regarding mandatory bundling of RE and thermal energy, this may not always lead to optimum utilization of the resources. Power procurement from thermal, renewable and hydro resources warrants planning by the DISCOMS based on their respective demand pattern which varies from State to State in the Country and DISCOM to DISCOM within a State. As such, bundling, if any, needs to be left at the sole discretion of the respective States/ DISCOMS based on thermal, RE and hydro resources tied by them according to their load demand on day to day basis so as to optimally utilize the entire tied up capacity.

F. Agreement with respect to supply or purchase or transmission of electricity – Section 49 as per the Amendment Bill seemingly creates a backdoor and allows any generator to bilaterally enter into an supply agreement with licensee with mutually agreed tariff and other supply terms and conditions, without the involvement of the Regulator, which is contrary to the spirit and provisions of the Act (Section 61 to 65 and 86(1)) and the Tariff Policy which stipulates that any future procurement by licensees is to be mandatorily through competitive bidding. This amendment therefore appears to go against the letter and spirit of the EA and the objective of encouraging competition.

This amendment only gives rise to ambiguities and confusion and we suggest that it should be removed or it should be comprehensively reframed to ensure that the relevant provisions and intent of the Act, Tariff Policy and guidelines issued by the Central Government are not overlooked or bypassed.

Our detailed clause-wise comments on the Draft Electricity (Amendment) Bill 2020 are as follows.

1. Section 2 – Definitions

A. Definition of Cross border trade of electricity:

(15a) Cross border trade of electricity” means transactions involving import or export of electricity between India and any other country and includes transactions related to passage of electricity through our country in transit between two other countries

APP Comments

We would like to submit that words that are otherwise defined in EA 2003 may be considered. For import and export – the terms used can be “supply” and “trading”. For “transactions related to passage, one can use “transmission of electricity. Usage of terms ‘import and export’ may invite custom duty in future.

Further the term “includes transactions related to passage of electricity through our country in transit between two other countries” may be replaced with the term” includes transactions between two other countries through the transmission system of India”.

Therefore, the definition may be worded as below:

15(a) “Cross border trade of electricity” means transactions involving ~~import or export of~~ sale or supply or trading of electricity between India and any other country and includes ~~transactions related to passage~~ transmission of electricity ~~through our country in transit between two other countries~~ between two other countries through the transmission system of India”;

B. Definition of Distribution sub-licensee:

‘(17a) Distribution sub-licensee means a person recognized as such and authorized by the distribution licensee to distribute electricity on its behalf in a particular area within its area of supply, with the permission of the appropriate State Commission. Any reference to a distribution licensee under the Act shall include a reference to a sub-distribution licensee;’

APP Comments

We understand that the amendments proposed are for the purpose of introducing efficiency in the distribution sector by way of competition and increasing private participation. However, there should be guidelines issued by the Appropriate Authority covering scope, roles, responsibilities, accountabilities, consideration, method of allocation etc. for sub-licensee and franchisee. With various franchisee models having been witnessed in the

sector, it would be appropriate to set out some differentiation in the functions of a franchisee and a sub-licensee in the Statement of Reasons.

The Act may also incorporate the introduction of “Electricity Distribution Policy” to be issued by competent authority, which will enable smooth implementation of the distribution sub-license concept.

C. It is suggested that the definitions of the following terms may be included, as these have been used extensively in the Act and it would be prudent to define them appropriately for the purpose of abundant clarity:

- a. Renewable Energy sources
- b. Renewable Energy Certificate
- c. Additional surcharge
- d. Cross subsidy surcharge
- e. Obligated entity

2. Sections 3A - National Renewable Energy Policy

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

‘National Renewable Energy Policy - The Central Government may, from time to time, after such consultation with the State Governments, as may be considered necessary, prepare and notify a National Renewable Energy Policy for the promotion of generation of electricity from renewable sources of energy and prescribe a minimum percentage of purchase of electricity from renewable and hydro sources of energy.’

APP Comments

With the accelerated growth of RE generation and the multiplicity of renewable energy policies across States, we feel that a National Renewable Energy Policy framework would help to promote uniform guidelines across the nation, while keeping in mind State specific realities and addressing industry concerns. However, having accepted the need for such a framework, the question that we need to ask is whether we need a separate policy framework for every form of energy, each operating within their own silos and self-contained space?

In this context we need to recognize that we are moving towards increasing hybridization of energy where every form of energy, whether RE (solar, wind, hydro, biomass etc), Thermal (coal, lignite, liquid fuel, gas etc) or Nuclear, would have its own role to play. In an optimal policy framework, all these forms of energy would need to complement each other in order to bring about the most suitable energy mix for the country and achieve the common objective of affordable and quality 24x7 Power For All.

Further, the Act already provides for preparation of a **National Electricity Policy** and **Tariff Policy** for development of the power system based on optimal utilization of resources, including hydro and RE sources, and also energy storage systems. We feel that there should be one single integrated ‘mother document’ – the **National Electricity Policy**, which may have different sections dedicated to different resources and technologies, but in the end, shall outline a harmonious and balanced approach for the development of the Power Sector while considering the specific nuances, business challenges, requirements, advantages and issues with all the energy resources and technologies.

While framing the National Renewable Energy Policy (NREP), as a part of the National Electricity Policy, the following may be kept in mind:

- a. The National Electricity Policy, and the NREP framework must take cognizance of the stressed thermal power capacity in the sector. Coal based power will continue to be a mainstay of the country for a long time to come and the policies must take due note of factors which adversely impact existing thermal power generating capacity in the country, such as declining PLFs and operation below technical minimum. If these aspects cannot be avoided, then the policies must ensure that they must be compensated for. Subventions accorded for promotion of RE sources should be provided with clear sunset timelines.
- b. With increasing penetration of RE in the energy mix, Energy Storage will emerge as an essential resource which will enable this transition, and provisions needs to be included in the Electricity Act. NREP should also cover development and promotion of energy storage systems and CEA and CERC/ SERCs mandated to with framing of operations, performance and disposal norms, rules and regulations regarding their induction on ESS into the electrical system.
- c. Vide Cabinet decision on 07.03.2019, the Government of India has approved the declaration of Large Hydropower Projects as Renewable Energy Sources, thereby bringing entire hydro power under RE sources. Therefore, Section 3A may be modified as follows:

“3A National Renewable Energy Policy - The Central Government may, from time to time, after such consultation with the State Governments, as may be considered necessary, prepare and notify a National Renewable Energy Policy for the promotion of generation of electricity from renewable sources of energy including hydro power and prescribe a minimum percentage of purchase of electricity from renewable and hydro sources of energy.”
- d. It is suggested that the NREP should address the issue of very high transmission charges for hydro projects, caused by transmission charges being calculated in terms of Rs/MW while the PLF of hydro plants is around 50%. Addressing this issue will improve the viability of hydro power projects and help meet the HPO targets. Therefore, suitable clause may be added in the NREP for rationalization of transmission charges for hydro power projects.
- e. The NREP should be comprehensive and also cover use of RE sources in applications which do not involve generation of power.
- f. Finally, while considering the promotion of generation of electricity from RE sources, the subventions to renewables and increasing burden of taxation and levies on thermal need to be balanced so that the ultimate consumer gets correct price signals, especially when the Tariff Policy and the Electricity Act enjoins tariff fixation to be reflective of true cost.

3. Section 14 – Grant of License

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

‘The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person -

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence:

....

.....

~~*Provided also that in a case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission and such distribution licensee shall be responsible for distribution of electricity in his area of supply:*~~

~~*Provided also that a franchisee shall not be required to obtain any separate license from the appropriate State Commission and such distribution licensee shall continue to remain responsible for distribution of electricity in its area of supply:*~~

~~*Provided also that a distribution sub-licensee shall not be required to obtain any separate license from the appropriate State Commission.’*~~

APP Comments

It is requested that the following may be considered:

- a. Concepts of ‘distribution franchisee’ and ‘distribution sub-licensee’ sit together in this draft Bill. **Clarity in terms of difference in the two concepts with respect to operative framework, roles, responsibilities, operationalization, terms of appointment and functional modalities needs to be provided.** Qualifying requirements and parameters with regard to Availability index, Billing and Collection Efficiency and Reliability etc., may be stated upfront with a view to ensure there is no adverse impact on the financial health of the Discoms. Apart from billing and

collection, clarity on capex for improving infrastructure and recovery of capex etc. are the issues that may be further detailed out in subsequent rules.

Elaboration of a broad framework as described above would help to create detailed guidelines and Model contract documents by the Appropriate Authority while avoiding ambiguity and ensuring faster implementation of Sub-licensee model.

- b. As per the second new Proviso to Section 14, it appears that the distribution sub-licensee will now be regulated by the concerned State Commission and will be responsible and answerable directly for compliance to the provisions of the Act, rules and regulations. The power purchase and procurement process including the price of electricity of a distribution sub-licensee as also CAPEX addition shall be regulated by the concerned State Commission. **This provision of relieving the Distribution Licensee (DL) from responsibilities of a sub-area would amount to amendment of its license without following procedure laid down in Section 18 of the Act.**

The statute provides a detailed procedure for grant of licensee and also for amendment and revocation thereof. There are provisions that provide for sale / transfer of utility. Further, there are certain qualifications (Capital Adequacy etc.) prescribed by the Central Govt. under its rule making power, to be eligible for grant of Distribution License. All these provisions have to be adequately amended (and effectively scrapped) to allow introduction of this concept of a private appointment of a sub licensee. The proposed provisions are in conflict with overall scheme / policy of the statute.

It is our view that in order to avoid disputes and assign clear responsibility, in the areas where distribution sub-licensee is introduced, the distribution licensee should remain as the owner of the system in that particular area and should continue to be responsible for the distribution of electricity and operation and maintenance. Therefore, the second new proviso to Section 14 may be reworded as follows:

‘Provided also that a distribution sub-licensee shall not be required to obtain any separate license from the appropriate State Commission and such distribution licensee shall continue to remain responsible for distribution of electricity in its area of supply.’

- c. In the Statement of Reasons (SOR) annexed with the draft Bill, it has been stated that enabling provisions have been proposed under Sec. 126, 135 and 164 with respect to distribution sub-licensee. However, no changes are observed in the draft bill. It is requested that such enabling provisions may be provided.

4. Section 26 – National Load Despatch Centre

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

"(4) the National Load Despatch Centre shall:

(a) be responsible for optimum scheduling and despatch of electricity in the country across different regions in accordance with the contracts entered into with the licensees or the generating companies;

(b) monitor grid operations;

(c) exercise supervision and control over the inter-regional and interstate transmission network; and

(d) have overall authority for carrying out real time operations of the national grid.

(5) The National Load Despatch Centre may give such directions and exercise such supervision and control as may be required for the safety and security of the national grid and for ensuring the stability of grid operation throughout the country.

(6) Every Regional Load Despatch Centre, State Load Despatch Centre, licensee, generating company, generating station, sub-station and any other person connected with the operation of the power system shall comply with the directions issued by the National Load Despatch Centre.

APP Comments

A. The Bill introduces additional obligations for NLDC and provides the authority to NLDC to supervise and issue directions for grid safety. More importantly, the Bill removes the ambiguity about the power of the NLDC over Regional Load Despatch Centre, State Load Despatch Centre and other entities connected with the operation of the power system. This is a welcome step.

Regarding 26(6), we suggest that all the directions of NLDC may be communicated through RLDCs and SLDCs. This has been suggested to maintain hierarchy and also to avoid any confusion in case different directions from RLDC and NLDC are received by SLDC or grid entity.

- B. In order to provide clarity with regard to possible disputes with reference to directions under subsection (5) or subsection (6), the following subsections may be added:

(7) If any dispute arises with reference to the quality of electricity or safe, secure and integrated operation of the national grid or in relation to any direction given under this section, it shall be referred to the Electricity Dispute Resolution Authority formed under Section 109A for decision:

Provided that pending the decision of the Electricity Dispute Resolution Authority formed under Section 109A, the directions of the National Load Despatch Centre shall be complied with by the regional Load Despatch Centre, State Load Despatch Centre or the licensee or the generating company, as the case may be.

(8) If any licensee, generating company or any other person fails to comply with the directions issued under sub-section (5) or sub-section (6), he shall be liable to penalty not exceeding rupees fifteen lacs.

5. Section 28, 32 - Payment security mechanism

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

Section 28 (3) (a):

‘Provided that no electricity shall be scheduled or despatched under such contract unless adequate security of payment, as agreed upon by the parties to the contract, has been provided’

Section 32 (2) (a):

Provided that no electricity shall be scheduled or despatched under such contract unless adequate security of payment, as agreed upon by the parties to the contract, has been provided

APP Comments

This is a formalization of recently notified circular by Ministry of Power dated June 28, 2019 and is a big positive for generators who will have payment guarantees. However, the following points may be considered:

- It is felt that the word ‘adequate’ leads to some degree of subjectivity in determining the adequacy of payment security. Further, it has been practically observed that some States prefer to open shorter duration LCs or provide advance payments for a few days or a week, in order to manage their own liquidity. Such practices are allowed under the MoP circular, as long as the quantum of electricity scheduled or despatched corresponds to the quantum of payment security provided. Therefore, the new provisos introduced under section 28 (3)(a) and section 32 (2)(a) may be reworded as follows:

“Provided that electricity shall be scheduled or dispatched to a distribution licensee under a contract to the extent payment security is provided by such distribution licensee.”

- There have been instances where clauses related to payment security have not been provided in recent contracts/RFPs. **The Act should make enabling provisions to ensure that clauses relating to adequate payment security should be made mandatory in every PPA/PSA.**

- The Payment Security Mechanism instituted by Ministry of Power stipulates **that during the period when the defaulting distribution licensee is being regulated by the Load Despatch Centre, the licensee will have no access to procure power from the Power Exchanges and they shall not be granted Short Term Open Access (STOA)**. This key and crucial provision **may also be included in the Act itself** as without this provision, there would be no real deterrent for the distribution licensees against dishonoring their payment security obligations.
- In the instance of a distribution licensee being regulated for lack of adequate payment security, the generator should be allowed to sell such unscheduled power (not scheduled due to lack of adequate payment security) to an alternate buyer or in the day ahead market of the power exchange. The generating company shall raise the bill on the Licensee for the tariff as per PPA i.e., for both the capacity charge and variable charge, less the amount realized by the generator considering the power exchange rate in the day ahead market net of the transmission charges for sale through PX.

In order to make the above enabling provision operational, Generator should be allowed relaxation to utilize linkage coal, if available, for such alternate sales during periods of payment security default. SLDC/RLDC should also be instructed to accord deemed NOC/approval during this period.

- It is also needed to ensure that lack of providing payment security should not be used by the distribution licensee as a means of backdoor exit from a PPA with the generator. As per standard PPA terms - the Procurers liability to pay fixed charges in case of stoppage of power supply due to inadequate payment security is limited to 6 months. Suitable safeguards are required to ensure that the distribution licensees do not use this stipulation of 6 months period to try and trigger termination of PPA.
- It is suggested that provision may be introduced to specify that payments need to be made strictly through the payment security mechanism established.
- It is also suggested that the word ‘contract’ should be defined separately under Section 2 (Definitions) and ‘short term contracts’ should also be included in such definition.

Apart from the above points regarding payment security mechanism, it is also suggested that the following may be added to the functions of SLDC/RLDC under Sections 28 and 32 – ***“To undertake measures and / or actions as may be necessary for ensuring grid security including procurement of ancillary services”***

6. Section 38, 39, 40 – Duties of CTU, STU, Transmission Licensees

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

'38 (2) The functions of the Central Transmission Utility shall be

(a)....

.....

(d) to provide non-discriminatory open access to its transmission system for use by

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges, ~~and a surcharge thereon, as may be specified by the Central Commission and a surcharge, as may be specified by the State Commission under sub-section (2) of section 42, if required by the Appropriate Commission to be collected by it.~~

39 (2) The functions of the State Transmission Utility shall be

(a)....

.....

(d) to provide non-discriminatory open access to its transmission system for use by

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges, ~~and a surcharge thereon, as may be specified by the State Commission and a surcharge, as may be specified by the State Commission under sub-section (2) of section 42, if required by the State Commission to be collected by it.~~

APP Comments

A. It is suggested that eligibility for open access should be made as a choice of the consumer and not to be made subject to approval of State Commission. Towards this end, the proposed modified sections are as follows:

'38 (2)(d)(ii) - any consumer ~~as and when such open access is provided by the State Commission~~ who wishes to procure power through open access under sub-section (2) of section 42, on payment of the transmission charges ~~and a surcharge thereon~~, as may be specified by the Central Commission and a surcharge, as may be specified by the State Commission under sub-section (2) of section 42, if required by the Appropriate Commission to be collected by it.'

'39 (2)(d)(ii) - any consumer ~~as and when such open access is provided by the State Commission~~ who wishes to procure power through open access under sub-section (2) of section 42, on payment of the transmission charges ~~and a surcharge thereon~~, as may be specified by the State Commission and a surcharge, as may be specified by the State Commission under sub-section (2) of section 42, if required by the State Commission to be collected by it.'

'40 (c)(ii) - any consumer ~~as and when such open access is provided by the State Commission~~ who wishes to avail open access under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the ~~State~~ Appropriate Commission.'

- B. It is further suggested that a clear definition of Additional Surcharge and Cross Subsidy Surcharge may be provided in the Act.

7. Section 42 – Duties of Distribution Licensees and Open Access

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

'42 Duties of Distribution Licensee and Open Access

.....

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints)

*Provided that such open access shall be allowed on payment of a surcharge **and charges for** wheeling as may be determined by the State Commission **in addition to the charges for intra-state transmission, as determined under section 39, if applicable, and charges for inter-state transmission, as determined by the Central Commission under section 38, if applicable***

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively ~~reduced in the manner as may be specified by the State Commission:~~ by the State Commission in the manner as maybe provided in the Tariff Policy

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

Provided also that the manner of payment and utilization of the surcharge shall also be specified by the State Commission'

APP Comments

A. Open access should be the choice of the consumer and all consumers should by default be eligible for open access. Therefore, it is proposed to modify section 42 (2) as below:

*(2) Any consumer can procure power through open access ~~The State Commission shall introduce open access in such phases and~~ subject to **such** conditions, (including **payment of** the cross subsidies, and other operational constraints) ~~as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for~~*

~~wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:~~

.....

.....

.....

~~Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.~~

- B. The proposed amendment in first proviso to 42 (2) lends to an interpretation of mandatory imposition of wheeling charges. It is important to note that for open access consumers which are directly connected to transmission utilities or through dedicated transmission line and are not using any distribution infrastructure, such wheeling charges should not be applicable. Therefore, the following change is suggested to the first proviso to 42 (2):

*‘Provided that such open access shall be allowed on payment of a surcharge **and charges for wheeling, as applicable** as may be determined by the State Commission in addition to the charges for intra-state transmission, as determined under section 39, if applicable, and charges for inter-state transmission, as determined by the Central Commission under section 38, if applicable.’*

- C. The fifth proviso to 42 (2) as per the Electricity (Amendment) Bill is redundant as the second proviso to section 42(2) already stipulates about the utilisation of the surcharge to meet the requirement of current level of cross subsidy within the area of supply of the distribution licensee. Therefore, the following may be deleted:

~~*Provided also that the manner of payment and utilization of the surcharge shall also be specified by the State Commission’*~~

- D. A new proviso may be added after the fourth proviso of 42 (2):

‘In the event industries which have captive generation but their plants have become old, seek open access to substitute their captive generation, the same should be provided on payment of transmission charge but no cross subsidy surcharge shall

be levied on such open access consumers as long as they do not reduce the contract demand with the DISCOM.'

- E. In Section 42, another duty of distribution licensee which may be included is to bring transparency regarding revenue and expenditure. In this context it is suggested that the distribution licensee should maintain and update, every month, a statement showing its revenues from different consumer categories including subsidy from government and payments to different generators in a such a format specified under tariff policy. If this is not possible every month, then such statement may be updated at least every quarter.

To summarize the changes proposed as described above, our consolidated formulation of Section 42 (2) is as follows:

~~“(2) Any consumer can procure power through open access The State Commission shall introduce open access in such phases and subject to such conditions, (including payment of the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:~~

Provided that such open access shall be allowed on payment of a surcharge and charges for wheeling, as applicable as may be determined by the State Commission in addition to the charges for intra-state transmission, as determined under section 39, if applicable, and charges for inter-state transmission, as determined by the Central Commission under section 38, if applicable.

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced ~~in the manner as may be specified by the State Commission:~~ by the State Commission in the manner as maybe provided in the Tariff Policy

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

Provided also that in the event industries which have captive generation but their plants have become old, seek open access to substitute their captive generation, the same should be provided on payment of transmission charge but no cross subsidy surcharge shall be

levied on such open access consumers as long as they do not reduce the contract demand with the DISCOM.'

~~*Provided also that the manner of payment and utilization of the surcharge shall also be specified by the State Commission*~~

~~*Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt."*~~

8. Section 49 - Agreement with respect to supply or purchase or transmission of electricity

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

49. (Agreement with respect to supply or purchase or *transmission* of electricity):

~~Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them.~~

(1) A generating company or a licensee may enter into an agreement with a licensee for supply, purchase or transmission of electricity on such terms and conditions, as may be agreed upon by them, including tariff and adequate security of payment consistent with the provisions of this Act.

(2) Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them.

APP Comments

The intent of the amendment under 49 (1) is not very clear. On the face of it, the proposed amendment creates a backdoor and allows any generator to bilaterally enter into a supply agreement with the licensee on mutually agreed tariff and other supply terms and conditions, without the involvement of the Regulator, which is contrary to the spirit and provisions of the Act (Section 61 to 65, 79 and 86) and the Tariff Policy which stipulates that any future procurement by licensees is to be mandatorily through competitive bidding. This amendment therefore appears to go against the letter and spirit of the EA and the objective of encouraging competition.

If the objective of this amendment is to permit bilateral contracts for sale and purchase of electricity between the distribution licensees, for re-balancing their power portfolios, then the same should be encouraged through DEEP e-bidding portal and through power exchanges only. In fact, Section 62 (1) (a) of the Act allows power purchase between two licensees if the contract duration is less than a year. Also, Guidelines issued by Ministry of

Power clearly stipulate that all short-term power purchase transactions (less than a year) have to be carried out on competitive bidding basis through DEEP Portal or power exchanges.

Therefore, this amendment only gives rise to ambiguities and confusion and we suggest that it should be removed or it should be comprehensively reframed to ensure that the relevant provisions and intent of the Act, Tariff Policy and guidelines issued by the Central Government are not overlooked or bypassed.

9. Section 61 – Tariff regulations

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

Section 61. (Tariff regulations):

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

.....

(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission as provided in the Tariff Policy

(h) the promotion of co-generation and generation of electricity from renewable and hydro sources of energy;

(i) the National Electricity Policy and tariff policy and National Renewable Energy Policy

APP Comments

- A. The reference to Tariff Policy in section 61 (g) is a welcome addition, as it ties up the trajectory of cross-subsidy reduction with the existing provisions in the Tariff Policy. With a view of encouraging competition and private investments in the sector, it is suggested that provisions on competitive procurement of power and transmission services for inter-state and intra-state transmission from the Tariff Policy may also be incorporated in the Electricity Act.
- B. Vide Cabinet decision on 07.03.2019, the Government of India has approved the declaration of Large Hydropower Projects as Renewable Energy Sources, thereby bringing entire hydro power under RE sources. Therefore, 61 (h) may be modified as follows:

‘(h) the promotion of co-generation and generation of electricity from renewable and including hydro sources of energy;’

10. Section 62 – Determination of Tariff

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

Section 62. (Determination of tariff):

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for

.....

(d) retail sale of electricity:

Provided that the Appropriate Commission shall fix tariff for retail sale of electricity without accounting for subsidy, which, if any, under section 65 of the Act, shall be provided by the government directly to the consumer

....

.....

*(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may **subject to provisions of the Tariff Policy**, differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required*

APP Comments

In order to ensure efficient targeting and accounting of subsidy, it must be ensured that subsidy is paid to the specific consumer after the consumer makes the full payment of bill. The subsidy can then be directly deposited in the consumer's account as is being done in the case of DBT for LPG. Therefore, the first proviso after section 62 (1)(d) may be modified as follows:

*'Provided that the Appropriate Commission shall fix tariff for retail sale of electricity without accounting for subsidy, which, if any, under section 65 of the Act, shall be provided by the government directly to the consumer's **account once the bill is paid;**'*

11. Section 63 – Determination of tariff by bidding process

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

(1) Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

(2) The Appropriate Commission shall, after receipt of application complete in all respects, adopt the tariff so determined under sub-section (1), in a timely manner but not later than sixty days from the date of application:

Provided that on expiry of sixty days from the date of application, if it is not decided by the Appropriate Commission, the tariff shall be deemed to have been adopted by the Appropriate Commission.

APP Comments

The Act does not require the State Commissions to seek public comments of the Tariff discovered through bidding. It provides only adoption or rejection of the tariff so discovered. However, some State Commissions seek response from public and even hold public hearings in the matter as in the case of tariff determination under Section 62 read with Section 64. It may be appreciated that public notice or even seeking public comments would not serve any purpose as the TBCB had been carried out as per standard Bidding guidelines issued by Government of India and Committee setup under these guidelines has certified that the discovered tariff is as per prevailing market price.

Therefore, to bring clarity and to prevent unwanted delays the words “without conducting public hearing” may be added at the end of proposed section 63(2).

12. Section 65 – Provision of subsidy by State Government

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

'If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under section 62, the State Government shall, notwithstanding any direction which may be given under section 108, pay, in advance ~~and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government:~~ the amount of subsidy directly to the consumer and the licensee shall charge the consumers as per the tariff determined by the Commission.

~~Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by State Commission shall be applicable from the date of issue of orders by the Commission in this regard.'~~

APP Comments

Payment of subsidy directly to Consumer is a very good provision as it would solve cash flow problems of DISCOMs to large extent. However, it would give rise to some practical issues which would have to be addressed. Mostly electricity connections are in the name of landlord and as such, landlord is considered as the consumer. In cases where the property has been rented out and the full bill is paid directly by the tenant, it would need to be addressed how the subsidy can be credited to the tenant's account and not the landlord's account.

It is proposed that electricity bill should also reflect amount of subsidy due which can be claimed by tenant from landlord or deduct from rent payable subsequently. Further, the issue of payment of subsidy directly to consumers for Single Point Delivery consumers should be addressed.

13. Section 77 – Qualifications for appointment of Members of Central Commission

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

(1) The Chairperson and the Members of the Central Commission shall be persons having adequate knowledge of, or experience in, or shown capacity in, dealing with, problems relating to engineering, law, economics, commerce, finance, public policy or, management and shall be appointed in the following manner, namely:-

(a) one person having qualifications and experience in the field of engineering with specialisation in generation, transmission or distribution of electricity;

(b) one person having qualifications and experience in the field of ~~finance~~ law;

(c) two persons having qualifications and experience in the field of finance, economics, commerce, ~~law~~, public policy or management:

Provided that not more than one Member shall be appointed under the same category under clause (c).

~~*(2) Notwithstanding anything contained in sub-section (1), the Central Government may appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of the Supreme Court or the Chief Justice of a High Court:*~~

~~*Provided that no appointment under this sub-section shall be made except after consultation with the Chief Justice of India.*~~

APP Comments

In our comments under the newly inserted Section 109A, we have suggested that in order to avoid disputes over jurisdictional overlap, all adjudicating functions assigned to the Regulatory Commissions under sections 79 (1)(f) and 86 (1)(f) may be withdrawn and assigned to a newly created body called the Electricity Dispute Resolution Authority. Or, if this is not feasible, then we have suggested that as an alternative, APTEL may be empowered to have original jurisdiction for resolution of disputes and appellate jurisdiction against orders passed by the State and Central Commissions in other regulatory matters.

As both our above suggestions involve removal of adjudicatory functions from the Regulatory Commissions, we suggest the following with respect to Section 77:

- There would be no requirement for a judicial member in the Central Commission.

- In order to effectively deal with diverse issues such as framing of regulations, tracking market developments and staying abreast of new technological advancements, the Commissions shall require adequate human resources having suitable knowledge and experience of the sector. Therefore, there should be a robust mechanism of identifying and recruiting suitable talent from across the industry to serve as Members and staff of the Commission. Towards this end, we suggest the following:
 - Commissions should be provided with adequate financial autonomy to function independently and engage specialists at market based pay packages in view of complexities of electricity law.
 - Vacant posts can be filled through Union Public Services Commission (UPSC) where mechanism is already in place.
 - Institute for Regulatory Personnel Selection (IRPS) may be formed in line with the Institute of Banking Personnel Selection (IBPS) meant for selection of personnel in the Banking sector. Selection may be based on exam and/or interviews.
- Vacancies of Chairperson or Members of the regulatory commissions should be filled up expeditiously avoiding delays. As a matter of fact, such regulatory positions should not be left vacant at any time.

14. Section 78 – Constitution of Selection Committee to recommend Members

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

(1) The Central Government shall, for the purposes of selecting the Members of the Appellate Tribunal and the Chairperson and Members of the Central Commission, Electricity Contract Enforcement Authority, State Commissions and Joint Commissions constitute a Selection Committee consisting of -

.....

.....

~~*(2) For the purposes of clause (d) of sub-section (1), the Central Government shall nominate from amongst persons holding the post of chairperson or managing director, by whatever name called, of any public financial institution specified in section 4A of the Companies Act, 1956.*~~

~~*(3) For the purposes of clause (e) of sub-section (1), the Central Government shall, by notification, nominate from amongst persons holding the post of director or the head of the institution, by whatever name called, of any research, technical or management institution for this purpose.*~~

APP Comments

The original provisions of 78 (2) and 78 (3), which provided that Committee would have one person holding the post of Chairman / MD of a Financial Institution and one person holding the post of Director of Utility or head of institution of any research, technical or management institution, ensured some diversity in the experience of the Selection Committee members. It is suggested that these original provisions may be retained.

Further, it is also suggested that the Committee may include at least one more member from the judiciary. Chairperson, APTEL could be an ex-officio member representing judiciary besides the Chairperson of the Selection Committee.

15. Section 79 – Functions of Central Commission

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

(1) The Central Commission shall discharge the following functions, namely:-

....

*(f) to adjudicate upon disputes, **except matters referred to in section 109A** involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;*

APP Comments

- A. In our comments under the newly inserted Section 109A, we have suggested that in order to avoid disputes over jurisdictional overlap, all adjudicating functions assigned to the Regulatory Commissions under sections 79 (1)(f) and 86 (1)(f) may be withdrawn and assigned to a newly created body called the Electricity Dispute Resolution Authority. Or, if this is not feasible, then we have suggested that as an alternative, APTEL may be empowered to have original jurisdiction for resolution of disputes and appellate jurisdiction against orders passed by the State and Central Commissions in other regulatory matters.

This would be in line with the overall scheme of the Constitution of India where doctrine of separation on power has been adopted and a clear demarcation of authority/ powers has been made between the Legislature and the Judiciary. **Therefore section 79(1)(f) may be dropped as adjudication of disputes would be a function of the proposed new entity (Electricity Dispute Resolution Authority) or the APTEL.**

- B. Over the years, many cross border electricity trade contracts have been operational and more are likely to be signed for supply of power to / from Bhutan, Nepal, and Bangladesh. CERC has already issued Cross Border Electricity Trade Regulations and Ministry of Power has issued Guidelines for Import/export (cross border) of Electricity. These guidelines and regulations may be given proper legal standing which will help to avoid any future disputes. Accordingly, it is suggested that the following clause may be added after 79 (1)(b):

‘(bb) – determine tariff related to Cross Border supply of electricity in compliance with Guidelines for Import/export (cross border) of Electricity by Govt. of India and Cross Border Electricity Trade Regulations by CERC’

The above insertion will empower CERC to determine the tariff, if agreed by the parties across the border and Indian procurer or seller as the case may be.

16. Section 82 – Constitution of State Commission

A. Regarding 82 (1):

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

‘(1) Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission:

Provided that the State Electricity Regulatory Commission, established by a State Government under section 17 of the Electricity Regulatory Commissions Act, 1998 and the enactments specified in the Schedule, and functioning as such immediately before the appointed date, shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary, and other officers and other employees thereof shall continue to hold office, on the same terms and conditions on which they were appointed under those Acts:

Provided further that the Chairperson and other Members of the State Commission appointed, before the commencement of this Act under the Electricity Regulatory Commissions Act, 1998 or under the enactments specified in the Schedule, may on the recommendations of the Selection Committee constituted under sub-section (1) of Section ~~85~~ 78 be allowed to opt for the terms and conditions under this Act by the concerned State Government.’

APP Comments

The proposed change in 2nd proviso to Section 82(1) is not required as this proviso was a transitory provision. Now, after more than 16 years from enactment of the Electricity Act each and every Member of the ERCs in the country have been appointed under EA 2003.

B. Regarding 82 (4):

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

‘(4) The State Commission shall consist of not more than ~~three~~ four Members, including the Chairperson.’

APP Comments

In our comments under the newly inserted Section 109A, we have suggested that in order to avoid disputes over jurisdictional overlap, all adjudicating functions assigned to the Regulatory Commissions under sections 79 (1)(f) and 86 (1)(f) may be withdrawn and assigned to a newly created body called the Electricity Dispute Resolution Authority. Or, if this is not feasible, then we have suggested that as an alternative, APTEL may be empowered to have original jurisdiction for resolution of disputes and appellate jurisdiction against orders passed by the State and Central Commissions in other regulatory matters.

Therefore, in line with the above suggestion that adjudicatory functions of the Regulatory Commissions may be transferred to either the EDRA or APTEL, the present composition of SERCs may be left unchanged.

C. Regarding 82(7):

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

‘(7) If there is no chairperson and member in a State Commission to perform its functions, the Central Government may, in consultation with the state government concerned, entrust its functions to any other State Commission or Joint Commission, as it deems proper.’

APP Comments

It could be detrimental for expeditious disposal of cases if partially heard petitions pending before a State Commission are referred to a new State commission or Joint Commission where the proceedings will start de-novo. **Therefore, instead of entrusting the functions of such State Commission without Chairperson or Member to any other State Commission or Joint Commission, it may be ensured that any vacancy of the State Commission should be filled within maximum 2 months.** The Central Selection Committee should, in consultation with State, act to fill the vacancy immediately after a lapse of 2 months.

17. Section 84 – Qualifications for appointment of Chairperson and Members of State Commission

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

~~‘(1) The Chairperson and the Members of the State Commission shall be persons of ability, integrity and standing who have having adequate knowledge of, or experience in, and have or shown capacity in, dealing with problems relating to engineering, law, economics, commerce, finance, public policy commerce, economics, law or management and shall be appointed in the following manner, namely:-~~

~~a) one person having qualifications and experience in the field of engineering with specialization in generation, transmission or distribution of electricity;~~

~~(b) one person having qualifications and experience in the field of law;~~

~~(c) two persons having qualifications and experience in the field of finance, economics, commerce, public policy or management.~~

~~‘(2) Notwithstanding anything contained in sub-section (1), the State Government may appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court:~~

~~Provided that no appointment under this sub-section shall be made except after consultation with the Chief Justice of that High Court.’~~

APP Comments

The recommendations of the 2010 V.K. Shunglu Committee may be considered wherein, in order to avoid conflict of interest, the Committee had recommended that any person who has worked during the preceding five years with the State Government or any of its undertakings/organizations should be ineligible for appointment as a Member or Chairperson of the Commission in the same State.

Accordingly, the following addition is proposed at the end of this section:

‘(5) The Chairperson or any other Member of the State Commission shall not have held any office in the same State in the past 5 years?’

18. Section 86 – Functions of State Commission

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

‘(1) The State Commission shall discharge the following functions, namely: -

.....

(e) promote co-generation and generation of electricity from renewable and hydro sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee as may be prescribed by the Central Government from time to time;

(f) adjudicate upon the disputes except matters referred to in section 109A between the licensees, and generating companies and to refer any dispute for arbitration; ‘

APP Comments

- A. In our comments under the newly inserted Section 109A, we have suggested that in order to avoid disputes over jurisdictional overlap, all adjudicating functions assigned to the Regulatory Commissions under sections 79 (1)(f) and 86 (1)(f) may be withdrawn and assigned to a newly created body called the Electricity Dispute Resolution Authority. Or, if this is not feasible, then we have suggested that as an alternative, APTEL may be empowered to have original jurisdiction for resolution of disputes and appellate jurisdiction against orders passed by the State and Central Commissions in other regulatory matters.

This would be in line with the overall scheme of the Constitution of India where doctrine of separation on power has been adopted and a clear demarcation of authority/ powers has been made between the Legislature and the Judiciary. **Therefore section 86 (1)(f) may be dropped as adjudication of disputes would be a function of the proposed new entity (Electricity Dispute Resolution Authority) or the APTEL.**

- B. Vide Cabinet decision on 07.03.2019, the Government of India has approved the declaration of Large Hydropower Projects as Renewable Energy Sources, thereby bringing entire hydro power under RE sources. Further, Renewable Energy Certificates (RECs) have

been introduced in 2010 as a valid instrument to meet the obligation of purchase of power from renewable sources.

Therefore, 86 (1)(e) may be modified as follows:

*‘(e) promote co-generation and generation of electricity from renewable **and including hydro** sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources **or renewable energy certificates**, a percentage of the total consumption of electricity in the area of a distribution licensee **as may be prescribed by the Central Government from time to time.**’*

19. Section 91 – Proceedings and powers of Appropriate Commission – Secretary, officers and other employees of Appropriate Commission

APP Comments

In order to strengthen the autonomy of the Commissions and also avoid conflict of interest, the following addition may be considered to section 91 (2):

*‘(2) The Appropriate Commission may, with the approval of the Appropriate Government, specify the numbers, nature and categories of other officers and employees **and appoint them.***

Provided that the Secretary and Director level officers appointed by the State Commission shall not have held any office in the same State in past 5 years.’

20. Section 92 – Proceedings of Appropriate Commission

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

6) Where before or during the course of a proceeding, the Appropriate Commission comes to a conclusion that the Electricity Contract Enforcement Authority has the sole authority and jurisdiction to adjudicate a matter, it shall refer the same to the Electricity Contract Enforcement Authority for its orders.

APP Comments

A. In our comments under the newly inserted Section 109A, we have suggested that in order to avoid disputes over jurisdictional overlap, all adjudicating functions assigned to the Regulatory Commissions under sections 79 (1)(f) and 86 (1)(f) may be withdrawn and assigned to a newly created body called the Electricity Dispute Resolution Authority. Or, if this is not feasible, then we have suggested that as an alternative, APTEL may be empowered to have original jurisdiction for resolution of disputes and appellate jurisdiction against orders passed by the State and Central Commissions in other regulatory matters.

Accordingly, sub-section (6) may be deleted as adjudication of disputes would be the function of the proposed new entity (Electricity Dispute Resolution Authority) or the APTEL.

B. It may be noted that several matters are already pending before various Regulatory Commissions pertaining to disputes related to performance of obligations under a contract related to sale, purchase or transmission of electricity with varied degree of progress.

In order to ensure that these pending matters do not get delayed, a new sub-section may be added in order to clarify that matters which are already pending before various Regulatory Commissions may be adjudicated upon by the Appropriate Commission.

21. New Section – Part XA – Electricity Contract Enforcement Authority (ECEA)

a. Comments on Section 109A (2):

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

(2) Notwithstanding anything contained in this Act or any other law in force, the Electricity Contract Enforcement Authority shall have the sole authority and jurisdiction to adjudicate upon matters regarding performance of obligations under a contract related to sale, purchase or transmission of electricity, provided that it shall not have any jurisdiction over any matter related to regulation or determination of tariff or any dispute involving tariff.

APP Comments

The proposed delineation of jurisdiction powers between Appropriate Commission and ECEA raises a multitude of issues, as listed below:

- **Jurisdictional overlap** - The Proposed Section 109A(2) of the Amending Act which seeks to define the jurisdiction of the ECEA omits to take into account the judicially interpreted meaning of “tariff”. “Tariff” has been judicially defined as to include not only the determination of tariff but also all the terms and conditions of tariff, including the payment of tariff, the time for payment, delayed payment surcharge, rebate, payment security, consequences of non-payment etc (Refer APTEL judgment dated 4.9.2012 in Appeal No 94-95 of 2012).

The proposed amendment contemplates that disputes pertaining to “tariff” should remain with the ERCs while other disputes which do not pertain to “tariff” go to the ECEA. All disputes pertaining to non-payment of tariff and its consequences like regulation of power on non-payment, delayed payment surcharge, rebate etc., impact tariff directly or indirectly. There are hundreds of disputes in the electricity sector which partly involve tariff and partly do not and this dichotomy has already involved numerous courts in numerous cases. A classic example of the above dichotomy has been seen in the terms of the SBD PPA which provided that disputes pertaining to tariff would be adjudicated by the ERCs whilst other disputes pertaining to issues other than tariff would be referred to arbitration. **The ERCs are already flooded with cases where arguments are carried out over months specifically about whether the**

dispute pertains to tariff or not. Such issues have also been taken to the Delhi High Court in several matters.

- **Parallel litigations** - Another classic example of the above dichotomy arises in disputes involving extension of the commercial operation dates for genco's or transmission licencees, of which there are several hundred across the country. All such disputes invariably involve a prayer for extension of the COD which is a non-tariff dispute and more often than not involves a question of the applicable tariff which would be a pure tariff dispute. Another example would be ECEA deciding the admissibility of a specific "Change in Law" event and the Appropriate Commission deciding the tariff impact on account of such "Change in Law" event. Such an involvement of multiple regulatory authorities over a single matter would amount to violation of the legal principle of res-adjudicata as both ECEA and Appropriate Commission will be having same legal statute. If the amendments as proposed were to be enacted, jurisdictional disputes would engage Courts for years at a time, leading to inordinate delays in deciding matters and frustrating the intent behind the ECEA.

Considering the above, it is suggested that instead of only vesting jurisdiction over purely contractual matters (which itself can be subject to interpretation, since every matter eventually has impact over tariff), all adjudicating functions assigned to the Regulatory Commissions under sections 79 (1)(f) and 86 (1)(f) may be withdrawn and assigned to the newly created Authority.

As this Authority would adjudicate upon ALL disputes (except for disputes already pending before the Regulatory Commissions) between the licensees and the generating companies, it may be renamed accordingly to Electricity Dispute Resolution Authority (EDRA). This would be in line with the overall scheme of the Constitution of India where doctrine of separation on power has been adopted and a clear demarcation of authority/ powers has been made between the Legislature and the Judiciary.

Accordingly, we suggest that 109A (2) may be modified as follows:

'(2) Notwithstanding anything contained in this Act or any other law in force, the Electricity ~~Contract Enforcement~~ Dispute Resolution Authority shall have the sole authority and jurisdiction to adjudicate upon all matters regarding performance of obligations under a contract related to sale, purchase, trading or transmission of electricity or refer any dispute for arbitration, provided that it shall not have any jurisdiction over any matter

related to regulation or determination of tariff. ~~or any dispute involving tariff.~~

Provided that Electricity Dispute Resolution Authority shall be the adjudicating authority for all matters pertaining to dispute resolution defined in all contracts related to sale, purchase, trading or transmission of electricity as well as for deciding the quantum of claims payable by the defaulting party. In case such claims are to be recovered through tariff, then Electricity Dispute Resolution Authority shall refer such cases to Appropriate Commission for determination or revision of tariff.

While making the above changes, the following may be kept in mind:

- Several matters are already pending before various Regulatory Commissions pertaining to disputes related to performance of obligations under a contract related to sale, purchase or transmission of electricity with varied degree of progress. If such matters are referred to the newly formed Electricity Dispute Resolution Authority, the disposal of such matters would be delayed and the affected parties would suffer. **Hence, it is requested to incorporate a suitable proviso which would allow pending cases (prior to creation of Electricity Dispute Resolution Authority) to be adjudicated by the respective Regulatory Commissions.**
- Regulatory Commission's responsibilities under sections 86 and 79 may be suitably modified to restrict it to form the regulations and determine the tariff and remove the adjudication powers.

ALTERNATE OPTION

We would like to once again stress upon the potential conflicts and disputes which may arise from the present formulation of ECEA as mentioned in the Amendment Bill. In case our suggestion regarding assigning all dispute adjudicatory functions to the newly created Electricity Dispute Resolution Authority (EDRA) is not considered, we propose the following alternative for consideration - **to empower the APTEL to also have original jurisdiction for resolution of disputes and appellate jurisdiction against orders passed by the State and Central Commissions in other regulatory matters.**

Such an arrangement would be similar to the Telecom sector, where the original jurisdiction to adjudicate disputes was vested with the Appellate Tribunal (i.e. Telecom Disputes Settlement and Appellate Tribunal) through an amendment in April 2000 to the TRAI Act 1997. This model has reduced one level of appeal, which may be useful for power sector disputes/contracts as every stage of appeal has potential of delay and consequential uncertainty.

In order to implement this suggestion, the number of benches for APTEL have to be increased. The APTEL will then be discharging two separate functions- firstly, to adjudicate original disputes and secondly, to adjudicate and dispose of appeals against orders emanating from the State and Central Commissions. These appealable orders would be concerning tariff orders, issues of licensing and regulatory orders (DSM, connectivity, open access etc.).

b. Comments on section 109A (3):

- Inclusion of contracts “*between the licensees*” will ensure jurisdiction over a contract between a trading licensee and a distribution licensee & transmission licensee and trading/distribution licensee.
- The draft is silent about the responsible entity for the filing. All contracts anyway require approval of the Appropriate Commission before the commencement of supply and such approval is taken by the distribution licensee. Thus, it may be clarified that any such formality for approval/filing shall rest with the distribution licensee.

Accordingly, the following modifications are proposed in Section 109A (3):

‘(3) Every contract between a generation company and a licensee, or between licensees, shall be filed with the ~~Appropriate Commission~~ Electricity Dispute Resolution Authority within 30 days of the said contract having been concluded.’

c. Comments on section 109B (1):

Since Electricity Dispute Resolution Authority would be a new forum for adjudication on disputes related to performance of obligations under a contract related to sale, purchase or transmission of electricity, the issues that have been settled by the Appropriate Commission but not challenged before the Hon’ble Appellate Tribunal for

Electricity could be agitated again by the aggrieved party before the new forum. To prevent such re-agitation of the same issue, the above proviso may be incorporated:

*“(1) Any person aggrieved in any matter referred to in section 109A may prefer an application to the Electricity ~~Contract Enforcement Authority~~ **Dispute Resolution Authority**. .*

Provided that no application by any of the parties agitating a dispute already settled by the Appropriate Commission or admitted by the Appropriate Commission for adjudication, prior to formation of the Electricity Dispute Resolution Authority can be referred before the Electricity Dispute Resolution Authority.

Similar modification would be required if the alternative option to creation of EDRA is pursued, i.e., if APTEL is empowered have original jurisdiction for resolution of disputes and appellate jurisdiction against orders passed by the State and Central Commissions in other regulatory matters.

d. Suggested change to section 109B (4):

*(4) On receipt of an application or matter under sub-section (6) of section 92 or under sub-section (1) of section 109B, the Electricity ~~Contract Enforcement~~ **Dispute Resolution Authority** may, after giving the parties to the application an opportunity of being heard, determine whether a valid contract subsists between the parties and whether any party is in violation of any of its obligations under the contract.*

Provided however contracts (PPAs) previously approved by an Appropriate Commission may not be further rechecked for validity.

Rationale – The proposed addition has been made to avoid unnecessary rechecking of validity of contracts already approved by the Appropriate Commission.

e. Comments on Section 109C – Composition of Electricity Contract Enforcement Authority

- The possible structure for the Electricity Dispute Resolution Authority is constitution of a principal bench at New Delhi and five Regional benches one each

located in each of the five electricity regions. Each bench may have one judicial and one technical member.

- The Regional Benches would have jurisdiction over disputes involving the territories of the States in the respective Region. The Principal Bench would have jurisdiction over all disputes involving States across two or more Regions.
- The Chairman of the EDRA would be only a retired or sitting Chief Justice of a High Court and would sit at the Principal Bench with a fixed term of 5 years.
- The members of the Principal Bench would be, in addition to the Chairman would be:
 - A Judicial Member who could be a Sitting or Retired Judge of a High Court;
 - Ex-officio, the Chairman of the CERC or his nominee which could be from any of the sitting CERC members. Such nomination could be co-terminus with the tenure of such Member ----- Ex-officio Member.
 - One Technical Member having expertise in the Electricity Sector whether from an engineering background, commerce, economics, law or finance with a term of 5 years.
- Each Regional Bench would be presided over by a Vice-Chairman who would be a person who is or has been a Judge of the High Court(s) and would sit at the Regional Bench with a fixed term of 5 years.
- The members of the Regional Benches, in addition to the Chairman, would be:
 - A Judicial Member who could be a Sitting or Retired Judge of a High Court;
 - Chairman of one of the SERC's of that Region, by rotation, or his nominee, which could be from any of the sitting SERC members; Such nomination would be co-terminus with tenure of such member in SERC.
 - One Technical Member having expertise in the Sector whether from an engineering background, commerce, economics, law or finance with a fixed term of 5 years.
- The EDRA's would have permanent staff and no staff on deputation, except for the Registrar, who shall be preferably recruited from the Higher Judicial Services.

f. Suggested changes to Section 109J (2) (i):

'Pass an interim order (including granting an injunction or stay) ~~after providing the parties concerned an opportunity to be heard~~ in any proceeding before it as it may consider appropriate.'

Rationale – “After providing the parties concerned an opportunity to be heard” as provided in Section 109 (J) 2(i) is self-contradictory to the power of Electricity Dispute Resolution Authority to any decide any application *ex-parte* (as provided in Section 109J (2)(g) – ‘*dismissing an application on default or deciding it ex parte*’). Electricity Dispute Resolution Authority shall have power to provide interim protection to any party (s) against irreparable harm.

g. Comments on Section 109J (4)

As per the Electricity (Amendment) Bill 2020, Section 109J (4) stipulates:

"Notwithstanding anything contained in Sub-section (3) the Electricity Contract Enforcement Authority may transmit any order made by it to a Civil Court having local jurisdiction and such Civil Court shall execute the Order of it were a decree made by the Court."

APP Comments - It needs to be specified whether it would be the Local District Courts or the High Court of the State. This is required as the Distribution Companies and Transmission Companies have their Head Quarters in the State Capitals mostly whereas the Power Plants of the Utilities are mostly in remote locations in the States. Further the Cases referred to the Civil Courts should be given priority to avoid further delays in the process of delivery the justice.

h. Suggested changes to Section 109N

'109 N. Appeal to Appellate Tribunal.-Any person aggrieved by any decision or order of the Electricity ~~Contract Enforcement Dispute Resolution Authority~~, may, file an appeal to the Appellate Tribunal within ~~sixty~~ forty five days from the date of communication of the decision or order of the Electricity ~~Contract Enforcement Dispute Resolution Authority~~ to him:

Provided that the Appellate Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding ~~sixty~~ forty five days

Rationale: The period for preferring an appeal against the order of EDRA to APTEL may be considered to be reduced to 45 days instead of 60 days (as presently specified in the draft), so as to maintain uniformity with the appeal timelines provided for appeal against the order of CERC/ SERC to APTEL. Additionally, this shall ensure the finality of decision is achieved at the earliest.

22. Section 111 – Appeal to Appellate Tribunal

APP Comments

- A. Regarding First Proviso to Section 111 (1), it may be noted that Tariff orders or other orders related to tariff are similar to money decrees. Distribution licensees have made it a matter of procedure to appeal against all orders pertaining to Tariff, even if it is due to incontestable Change in Law factors. As a result, generators are deprived of amounts legally payable to them while having to wait for final judgement from the Supreme Court and continuing to incur expenses. Accordingly, it is suggested that in case of orders pertaining to payment of tariff or change in law items, the person appealing against the order will have to first deposit the amount of payment due as per the order. This would act as a deterrent against filing of frivolous appeals which are being made with the sole intent of delaying due payments as much as possible.

Therefore, the following modification is suggested to the first proviso to Section 111 (1):

*‘Provided that any person appealing against the order of the adjudicating office levying any penalty **or any order pertaining to payment of a sum of money, such as increase in tariff or approval of change in law items etc.,** shall, while filing the appeal, deposit the amount of such penalty **or payment due or increase in tariff.***

- B. Regarding First Proviso to Section 111 (2), it may be noted that at times appeals against orders passed by the Regulators are filed before APTEL with prolonged delay(s). The amendment proposed below shall ensure that no appeals with delays exceeding 45 days are entertained by APTEL. This shall ensure that inordinate delays are avoided in appeal process and matter reaches finality at the earliest.

*‘Provided that the Appellate Tribunal may ~~entertain an appeal after the expiry of the said period of forty five days if it is satisfied that there was sufficient cause for not filing it within that period.~~ **,if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding forty five days.**’*

23. Section 112 – Composition of Appellate Tribunal

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

‘(1) The Appellate Tribunal shall consist of a Chairperson and ~~three other Members~~ such number of other Members, not less than seven, as may be prescribed by the Central Government.’

APP Comments

The increase in number of members in Appellate Tribunal is a much-needed step. However, considering the volume of cases pending at APTEL, it is essential that more benches are formed for early resolution of cases. For instance, only 139 number of cases were resolved through judgment in 2019 and there are more than 1300 cases still pending on date (21st May 2020). Further, with renewable energy capacity increasing to more than 80 GW, the number of cases pertaining to renewable energy are increasing manifold.

Therefore, increasing number of members to 11 will be appropriate.

*‘(1) The Appellate Tribunal shall consist of a Chairperson and ~~three other Members~~ such number of other Members, not less than ~~seven~~, **eleven**, as may be prescribed by the Central Government’.*

24. Section 121 – Power of Appellate Tribunal

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

‘(2) The Appellate Tribunal shall have the same jurisdiction, powers and authority to take action on wilful disobedience to any of its judgment, decree, direction, order or other process or wilful breach of an undertaking given to a it, as a High Court under the provisions of the Contempt of Courts Act, 1971 (70 of 1971) on its own motion or on a motion made by the Advocate General or such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf, or any other person, with the consent in writing of such Law Officer or the Advocate General, and a reference in the Contempt of Courts Act, 1971 to a High Court shall be construed as including a reference to the Appellate Tribunal’

APP Comments

Sub section (2) of section 121 is a welcome addition which would strengthen enforcement of the orders of the Appellate Tribunal. We feel that APTEL should also be empowered to initiate contempt proceedings for non-compliance of orders/direction of or undertakings given to the Commissions or Electricity Dispute Resolution Authority also. This will ensure compliance and accountability. Such an approach will also be in line with the provisions of the Contempt Act, which has been extended to APTEL.

Therefore, we suggest the following modification to section 112 (2):

*“(2)The Appellate Tribunal shall have the same jurisdiction, powers and authority to take action on wilful disobedience to any of its **or the Appropriate Commission’s or EDRA’s** judgment, decree, direction, order or other process or wilful breach of an undertaking given to a it **or the Appropriate Commission or EDRA**, as a High Court under the provisions of the Contempt of Courts Act, 1971 (70 of 1971) on its own motion or on a motion made by the Advocate General or such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf, or any other person, with the consent in writing of such Law Officer or the Advocate General, and a reference in the Contempt of Courts Act, 1971 to a High Court shall be construed as including a reference to the Appellate Tribunal.”.*

Further, the proposed amendment does not allow the affected generating companies or licensees to request invocation of the Contempt of Court provision against the party causing a willful breach of any judgment, decree, direction, order by the APTEL. **It is submitted that generating companies or licensees affected by the non-compliance of any judgment, decree, direction, order issued by the APTEL by any party should also be allowed to request invocation of the Contempt of Court powers against defaulting parties.**

25. Section 142 – Punishment for non-compliance of directions by Appropriate Commission

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [~~red text~~ illustrates changes introduced in the Bill]

(1) In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction ~~or order~~ issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one ~~lakh crore~~ rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to ~~six thousand rupees upto one lakh rupees~~ for every day during which the failure continues after contravention of the first such direction.

(2) Notwithstanding anything contained in sub-section (1), in case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person, with effect from such date as may be notified by the Central Government, has not purchased power from renewable or hydro sources of energy as specified by it using its powers under the Act, the Appropriate Commission shall after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, a sum calculated at the rate of fifty paise per kilowatt-hour for the shortfall in purchase in the first year of default, one rupees per kilowatt-hour for the shortfall in purchase in the second successive year of default and at the rate of two rupees per unit for the shortfall in purchase continuing after the second year.

APP Comments

A. Regarding section 142 (2), the following may be considered:

- a. Renewable Energy Certificates (RECs) have been introduced in 2010 as a valid instrument to meet the obligation of purchase of power from renewable sources under sec 86(1) e. Thus, in the proposed sub section (2) of section 142 appropriate inclusion of REC is required. Suggested modified sub section (2) of section 142 is as follows:

(2) Notwithstanding anything contained in sub-section (1), in case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person, with effect from such date as may be notified by the

*Central Government, has not purchased power from renewable or hydro sources of energy **or purchased Renewable Energy Certificates** as specified by it using its powers under the Act.....’*

- b. The use of fund collected through this penalty may be specified as ‘promotion of renewable energy’. If the penalty collected is not utilised for the promotion of the renewable energy it would not serve the desired purpose. Therefore, the Central Government should prescribe how this money shall be utilized. It is suggested that the money may be kept in a separate account to be maintained by the Discom to be used exclusively to procure REC or renewable energy to make up for the shortfall in the previous year(s).

26. Section 146 – Punishment for non-compliance of orders and directions

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]:

‘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 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 one ~~lakh~~ crore rupees, or with both in respect of each offence and in the case of a continuing failure, with an additional fine which may extend to ~~five thousand rupees~~ one lakh rupees for every day during which the failure continues after conviction of the first such offence:

Provided that nothing contained in this section shall apply to the orders, instructions or directions issued under section 121.

APP Comments

This Section has not been used by any Commission or APTEL. APTEL tried to invoke this Section in the year 2013 against OERC for not implementing APTEL’s direction given in Appeals u/s 111. However, OERC got ex-parte stay from Supreme Court misleading the court that direction were given u/s 121 and invoking of Section 146 is not permitted under the proviso to Section 146 which refers to and makes an exemption for section 121.

As this proviso fetters the powers of APTEL to take action upon contravention of any provisions of the Act or any rules or regulations made thereunder, **the following proviso to this section may be deleted:**

~~*‘Provided that nothing contained in this section shall apply to the orders, instructions or directions issued under section 121.’*~~

27. Section 158 – Arbitration

APP Comments

As we have suggested that the Electricity Dispute Resolution Authority should be conferred with the power and jurisdiction to adjudicate contractual disputes, it should also be empowered to refer such disputes to arbitration, should the need arise. Therefore, section 158 may be modified as follows:

‘Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission or Electricity Dispute Resolution Authority may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996.’

28. Section 176 – Power of Central Government to make Rules

Provisions of Electricity Act along with amendments as proposed in the Draft Electricity (Amendment) Bill [red text illustrates changes introduced in the Bill]

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely: -

(aa) the minimum percentage of purchase of electricity from renewable and hydro sources of energy under section 3A;

(ab) allowing and facilitating cross border trade of electricity and any matter related to it under sub section (1) of section 49A;

(ac) laying down the modalities of bundling of renewable energy (including hydro) with thermal energy;

(ad) Renewable Generation Obligation;

(ae) regarding maintaining adequate capacity resources;

APP Comments

- A.** The proposed section 176 (2) (ac) & (ad) provide for the Central Government to make rules for modalities of bundling of renewable energy (including hydro) with thermal energy and Renewable Generation Obligation (RGO). However, there is no section in the Principal Act or in the proposed amendment with enabling provisions for either bundling of renewable energy with thermal energy or RGO. It may be noted that section 176 (1) provides rule making power to the Central Government for carrying out the provisions of the Act. When there are no provisions in the act for bundling of RE and RGO in the Act, the Central Government cannot make rules u/s section 176.
- B.** Further, we believe that the proposed concepts are not advisable for insertion in the Act at present, due to the following factors:
- a. Renewable Generation Obligation:**
- The thermal power plants today are underutilized with the growth of renewable energy and their PLF is much below the normative levels. With further Renewable Generation Obligation, thermal power plants would find it difficult to operate at levels below their technical minimum, and consumers would have to bear the cost

of additional RE power generation while still bearing the fixed costs for idle thermal generating capacity.

- The forced requisition of renewable power in cases where cheaper thermal power is available, will push up the tariff of the ultimate consumer. When RPO has been imposed to create the demand for renewable energy and there is no dearth of investment in renewable presently by many players, there is no need to impose RGO.
- Renewable energy has firmly established itself in India and now it is competing with thermal power. The growth of renewable energy should now be increasingly left to market driven economics rather than at the cost of existing/established thermal power plant.
- It may also be noted that there is sizeable established capacity of thermal power plants of our country that are stranded without PPA and rely solely on sale of power to Power Exchange or through short term contracts. The ongoing prices at Exchange or at DEEP Portal are so low that the sustainability of these plants are in jeopardy. The Renewable Generation Obligation will shrink the available market further and will ultimately lead to closure of these plants operating on merchant basis. The mandatory RGO may only be pursued once the growth of power demand exceeds the installed and under execution capacity of thermal & renewables.
- The renewable generation obligation, as name suggests would be on generators to generate certain percentage of power from renewable energy sources. It is also clear that, entities obligated to purchase power from renewables as per sec 86(1) e would procure power from renewable energy projects coming under RGO. Thus, RGO would not help in any way increasing share of renewables in the country. It would also limit opportunity for pure renewable power generators as larger part of RPO would be met through RGO.
- Further, in terms of enforcement RGO would be a challenge. It is amply clear that despite DISCOMs being highly regulated entities which are required to file ARR every year, which includes details of power procurement, to state commissions, enforcement of RPO has been extremely challenging and no major penal action have been taken in last 16 years since enactment of Electricity Act 2003 for noncompliance of RPO. Generation on the other hand is a de-licensed activity and generators are not required to approach any regulator especially private IPPs supplying power through competitive route. In such a scenario enforcement of RGO would be very difficult while it would also not add anything for renewable capacity addition.

- b. **Bundling of renewable energy (including hydro) with thermal energy:** We would like to submit that mandatory bundling of RE and thermal energy as a product to be procured by a distribution licensee will not always lead to optimum utilization of the resources. Power procurement from thermal, renewable and hydro resources warrants planning by the DISCOMS based on their respective demand pattern which varies from State to State in the Country and DISCOM to DISCOM within a State. As such, bundling, if any, needs to be left at the sole discretion of the respective States/ DISCOMS based on thermal, RE and hydro resources tied by them according to their load demand on day to day basis so as to optimally utilize the entire tied up capacity.

Considering the above factors, it is thus suggested that the sub section (ac) and (ad) of section 176 may be removed.

Additional Comments on Electricity Act

1. Section 15 – Procedure for grant of license

Provisions of Electricity Act:

‘(8) A licence shall continue to be in force for a period of twenty- five years unless such licence is revoked.’

APP Comments

A. The term of the Transmission Service Agreement is 35 years. As per the current provision, the term of a license is 25 years. A transmission licensee needs to re-apply for the transmission license at the end of first license, which is again granted for 25 years, with only 10 years of term of contract left in the TSA. At the end of 35-year TSA, the licensee is left with a transmission asset, a transmission license with 15 years life, and no TSA to provide transmission service. In the draft ISA issued, the development model adopted is BOOT, and at the end of 35 year ISA, transmission assets is to be transferred to CTU or the designated entity at zero cost. To align with the contractual framework, it is suggested that the term of the transmission license be 35 years and co-terminus with ISA term. The term of distribution and trading license may also be extended to 35 years to maintain alignment with the term of transmission license.

Therefore, sub section (8) may be amended as under:

*“(8) A licence shall continue to be in force for a period of ~~twenty-five~~ **thirty-five** years unless such licence is revoked.”*

B. Presently the Act does not contemplate regarding extension of license post completion of term of license. It is suggested to add provisions/modalities to be followed for extension of existing licenses once their term is over.

2. Section 17 – Licensee not to do certain things

Provisions of Electricity Act:

‘(3) No licensee shall at any time assign his licence or transfer his utility, or any part thereof, by sale, lease, exchange or otherwise without the prior approval of the Appropriate Commission’

APP Comments

Citing Section 17(3) of the Electricity Act, 2003, lenders mandates Transmission Service Providers (TSPs), who are transmission license holders from Appropriate Commission to obtain prior approval of the Commission for creating charge over assets of the transmission project. Further, lenders also insist TSP to obtain prior approval of appropriate Commission to assign transmission license, in case of default by TSP in its obligation for repayment of loans.

Lenders grant loan with condition that Borrower (TSP) shall approach Appropriate Commission and obtain its prior approval. Such condition is included in Common Loan agreement. TSPs, who are transmission Licensees are required to approach appropriate Commission by filing petition to comply with requirement of lenders to seek prior approval of appropriate Commission.

Such process of taking in principle approval of the Regulatory Commission to consider request of potential assignment of transmission license in case of default, with the condition that the credentials of the entity proposed to take over the transmission assets in the future would be examined when such default/take over happens, is time consuming and does not serve or fulfil any practical objective.

The Financing agreements for specific projects are being approved by the Hon’ble Commission under section 17(3) of the Electricity Act 2003, which provide lenders to the project, with a right to substitute the licensee in case of default in debt servicing obligations. As these Financing agreements are already approved by the Hon’ble Commission, requirement of another approval by the Hon’ble Commission while substituting the licensee is not required. Further, the criteria and process for selecting the developer/organisation who shall be the substituting entity can be defined in the Financing Agreement.

Therefore, it is requested that the following proviso may be added to Section 17(3):

‘Provided that if such assignment or transfer occurs in line with the Financing agreement approved by the Appropriate Commission, then the licensee shall intimate the Appropriate Commission with details of the person to whom the license is being assigned or transferred. Criteria and process for selection of such Person to whom the license shall be assigned or transferred, in case of a default, shall be laid down in the Financing agreements.’

3. Section 19 – Revocation of licence

Provisions of Electricity Act:

‘(6) Where the Appropriate Commission has given notice for revocation of licence under sub-section (5), without prejudice to any penalty which may be imposed or prosecution proceeding which may be initiated under this Act, the licensee may, after prior approval of that Commission, sell his utility to any person who is found eligible by that Commission for grant of licence.’

APP Comments

The Act is subjective and does not provide a clear exit path to such project assets which have unsustainable debt or where the developers have been unable to complete construction of the projects. It is suggested that the provisions of Insolvency and Bankruptcy Code (IBC) may be made applicable in cases where the licensee is unable to sell the utility or alternatively assign or transfer his license as per provisions of section 17(3). By linking this to IBC, a clear exit route shall be provided to all such assets. Further, this amendment shall align the provision of the Act with the prevailing legal framework where such cases are referred to NCLT in such scenarios.

In line with the above, the following proviso may be added after section 19 (6):

‘Provided that in case the licensee is unable to sell the utility or alternatively assign or transfer his license as per provisions of section 17(3), within 90 days of the date fixed by the Appropriate Commission under section 19(5), then the relevant provisions of Insolvency and Bankruptcy Code shall become applicable.’

4. Section 31 - Constitution of State Load Despatch Centres

Provisions of Electricity Act:

‘(2) The State Load Despatch Centre shall be operated by a Government company or any authority or corporation established or constituted by or under any State Act, as may be notified by the State Government:

Provided that until a Government company or any authority or corporation is notified by the State Government, the State Transmission Utility shall operate the State Load Despatch Centre.’

APP Comments

There is need to separate and ringfence the load dispatcher at state level from Transco/Discom. Therefore, it is proposed that the following is added after the first proviso of sec 31(2):

‘Within one year of the notification of this amendment’

5. Section 38 – Central Transmission Utility and functions

Provisions of Electricity Act:

(1) The Central Government may notify any Government company as the Central Transmission Utility:

Provided that the Central Transmission Utility shall not engage in the business of generation of electricity or trading in electricity:

APP Comments

The functions of CTU are to undertake planning and coordination related to inter-state transmission system. However, at present CTU also operates as a Transmission Licensee – Power Grid Corporation of India Ltd. (PGCIL). By virtue of it playing the role of the system planner as well as being the developer, it has access to sensitive information, which leads to information asymmetry. To ensure a level playing field amongst all bidders, and to avoid conflict of interest, it is proposed that CTU through itself or through subsidiaries shall not engage in the business of development of transmission systems.

The function of planning and co-ordination needs to be carved out of the scope of functions and vested with CTU, while the asset development functions vested with PGCIL as the developer and O&M operator of its assets. This will enable CTU to be the counterparty signing the Implementation & Service Agreement under the proposed Standard Bidding Documents. This will address the inherent conflict of interest scenario.

Being the planning authority for transmission projects, CTU will have advantage over other players in case it is permitted to participate in competitive bidding of transmission and distribution projects. Therefore, we propose to include Transmission and distribution in the list of activities mentioned in the first proviso to the sub-section 1 of Section 38 which CTU shall not engage in. The modified clause is as under:

“Provided that the Central Transmission Utility shall not engage in the business of generation, transmission, distribution of electricity or trading in electricity”

6. Section 38 – Central Transmission Utility and functions

39 (1) The State Government may notify the Board or a Government company as the State Transmission Utility:

Provided that the State Transmission utility shall not engage in the business of trading in electricity:

APP comments:

At present STUs are vested with network planning and development of the network within the state. By virtue of this, they have access to sensitive information which will lead to a non-level playing field when future InSTS Transmission Projects are bid out under competitive development. Allowing the STU to bid for transmission projects, which have been planned by them as the planner, puts them at advantageous position over other bidders. Accordingly, in interest of having a level playing field and to avoid conflict of interest, it is proposed that STU through itself or through subsidiaries shall not engage in the business of development of transmission systems.

Therefore, the following may be added to section 39 (1):

(1) The State Government may notify the Board or a Government company as the State Transmission Utility:

*Provided that the State Transmission utility shall not engage in the business of trading in Electricity **or development of transmission system of electricity through itself or its subsidiary:***