

APP Comments on Draft Electricity (Change in Law, Must-run status and other matters) Rules, 2020

General Comments

1. The covering letter states that these rules shall be applicable for RE generators. Since PPAs under Section 62 and 63 are also applicable for power plants using conventional fuels like Coal and Gas, these Rules should not be restricted only to RE and may be framed in such a way so as to be applicable uniformly across all power plants.

2. The proposed Rules have certain provisions which may be conflicting with the existing provisions of the PPA for supply of power or transmission agreements executed between the parties after competitive bidding process held under the guidelines of Government of India. For example, the definition of Change in Law, notice for Change in Law event, determination of impact of Change in Law event, etc. Therefore, our suggestions below have been provided with a view to avoid conflict with existing PPAs u/s 63 and the sanctity of the bidding process, while meeting the desired objectives of expediting the process of recovery of the change in expenses/revenue due to impact of Change in Law. \

Detailed Comments

Sr. No.	Clause No.	Provision as per Draft Rules	APP Comments
1.	2	Definitions	Terms PPA and PSA used in Rule 3(c) and “CUF” used in the formula in Annex-1 may to be defined.

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2.	2 (1) (b)	<p>“Change in Law” means the occurrence of any of the following events after the date of submission of bids in case of tariff based bidding under Section 63 of the Act or after the determination of tariff by the Appropriate Commission under Section 62 of the Act –</p> <p>(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law, or</p> <p>(ii) a change in interpretation of any law by a competent court of law, tribunal or Indian Governmental Instrumentality provided such court of law, tribunal or Indian Governmental Instrumentality is the final authority under law for such interpretation, or</p> <p>(iii) change in any consents, approvals or licenses available or obtained for the project to be set up, unless specifically excluded in the agreement for supply or transmission of electricity, which results in any change in any cost of or revenue from the business of selling or transmitting electricity;</p>	<p>The definition of change in law should be in accordance with the provisions of the respective PPAs signed under Section 63 and as per the tariff regulations by the Appropriate Commissions for the PPAs under Section 62.</p> <p>In PPA/PSAs where such definitions are not provided then the definition prescribed in the Rules may be made applicable, but with the following changes:</p> <p>a. The cut-off date for projects where tariff is determined under section 63 has been proposed for occurrence of the Change in Law event as the date of submission of bids. The date of submission of bids by different bidders may be different. Therefore, it is suggested that the cut-off date should be a common date for all bidders. The cut-off date should be 7 days prior to the bid deadline as provided in a number of existing PPAs.</p> <p>b. Under sub-clause (b)(ii), it is suggested that “is the final authority under law for such interpretation” may be replaced by “is having such legal power to interpret it”. As the order of a Regulatory Commission or Appellate Tribunal can be challenged in appeal, the present formulation appears overly restrictive and could result in any change in interpretation by the Regulatory Commission or Tribunal not being considered as Change in Law.</p>

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		<p>but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the seller or transmitter of electricity, or (ii) change in respect of deviation settlement charges or frequency intervals by an Appropriate Commission.</p>	<p>c. Under sub-clause b(iii), after consents, ‘Clearances and Permits’ may also be inserted.</p> <p>d. Any change in domestic duties, levies, cess and taxes or imposition of new charge or surcharge by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost or revenue from the business of selling or transmitting electricity, unless specifically excluded in the Agreement, should also be included in the definition of Change in Law.</p> <p>For reference, a list of various Change in Law events allowed by APTEL and various Regulatory Commissions during construction and operation period is enclosed as Annexure.</p> <p>e. For clarity “Law” should be defined as below in line with the Standard bidding documents:</p> <p><i>“shall mean all laws including Electricity laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant</i></p>

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			<p><i>to or under any of them and shall include without limitation all rules, regulation, decision and orders of the Appropriate commission;”</i></p>
3.	3 (a)	<p>(a) On the occurrence of a Change in Law event the monthly tariff shall be adjusted in accordance with the principle that the affected party is compensated so as to restore it to the same economic position as if such change in law had not occurred.</p>	<p>The rules should put the onus on the CERC to move a suo moto petition for determining the normative tariff compensation as a result of change in law event within 30 days of notification of any change in law event. Such relief as determined by the CERC should be applicable to industry players automatically. This will ensure quick applicability of CIL relief fast and also significantly contribute to ease of doing business in a core sector of the economy.</p> <p>In case of any dispute between generator and PPA counterparty, parties may approach appropriate commission for the True-up of compensation over the normative tariff calculated by CERC.</p> <p>This will avoid multiple petitions and save valuable regulatory time.</p>
4.	3 (b)	<p>(b) The pass through will happen in an expeditious manner within a maximum of 30 days of the Change in Law event.</p>	<p>It appears that this clause refers to the payment of the pass through amount in the Monthly Tariff. For the sake of clarity, it may also be mentioned that the date from which the pass through of compensation for the Change in Law event shall be allowed should be the date of occurrence of the event of Change in Law.</p>

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			<p>Therefore, this clause may be reworded as follows - <i>“The date from which the pass through of compensation for the Change in Law event shall be allowed will be the date of occurrence of the event of Change in Law. The affected party shall be provisionally entitled for payment of compensation through monthly tariff payments or pass through of the impact of change in law by unaffected party in an expeditious manner within a maximum of 30 days of the occurrence of Change in Law event”</i></p>
5.	3 (c)	<p>(c) The bidding document or the Power Purchase Agreement will lay down the formula according to which the pass through shall be calculated and recovered. Where the relevant formula for pass through has not been included either in the bidding document or the PPA/PSA, the Appropriate Government may prescribe a formula by notification or direct that the formula given in the Annexure to these Rules shall be followed.</p>	<p>a. The formula prescribed in the Annexure is applicable for RE generators only. Since PPAs under Section 62 and 63 are also applicable for power plants using conventional fuels like Coal and Gas, these Rules should not be restricted only to RE and may be framed in such a way so as to be applicable uniformly across all power plants. Accordingly, the rules and the formula provided may have to be changed/modified to reflect the following for conventional fuel based plants:</p> <ul style="list-style-type: none"> • Adjustment in Tariff in Change in Law • Formula for determination of impact of an event of Change in Law <p>b. Further, the overall change in law methodology for conventional fuels in the last 6 years has been appropriately laid down by the</p>

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			<p>Regulatory Commissions. For Change in Law in Variable Cost (particularly in coal), change in law impact is computed based on coal consumption considering applicable operating parameters (i.e. Station Heat Rate, Auxiliary Consumption and As Received GCV of coal).</p> <p>Keeping the above in mind, it is felt that where the relevant formula for pass through has not been included either in the bidding document or the PPA/PSA, the Appropriate Commission may be better placed to prescribe the formula. This would be consistent with the provisions of the Electricity Act as the Act empowers the Appropriate Commission to regulate the tariff of generating companies and transmission licensees.</p>
6.	3 (e)	(e) The pass through according to the formula stipulated above shall be calculated and shall come into effect automatically after 30 days of the Change in Law event.	This clause may be reworded appropriately to clearly state that the compensation or pass through amount according to the formula stipulated above shall be calculated automatically and shall be effective from date of occurrence of Change in Law event , while the billing for the same shall commence automatically after 30 days from the date of such incurrence. This will be in line with the principles set by CERC and APTEL wherein Change in Law compensation with carrying cost is calculated from the date of Impact of Change in law event on the economic position.

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			<p>This clause may also specify that billing shall be done by the Generation companies based on</p> <ul style="list-style-type: none"> a. For increase in capital cost due to change in law – <ul style="list-style-type: none"> i. As per formulation given in PPA ii. In case no such formulation there, using the formulae provided in the Annexure to this document b. For impact on cost/revenue due to change in law – <ul style="list-style-type: none"> i. Calculated on per unit basis, based on actual impact as certified by statutory auditor. ii. For increase/decrease in costs related to fuel, based on normative heat rate, auxiliary consumption, actual GCV of fuel and actual cost incurred as certified by the statutory auditor.
7.	3 (f)	<p>Within 30 days of the pass through coming into effect the Generator/ Intermediary procurer/Procurer shall submit the relevant documents/calculation sheets to the Appropriate Commission for truing up the rate of pass through per unit.</p>	<p>It is suggested that the following may be added for the sake of clarity: “Within 30 days of the pass through coming into effect the Generator/ Intermediary procurer/Procurer shall submit the relevant documents/calculation sheets to the Appropriate Commission for truing up the <u>compensation or the</u> rate of pass through per unit.”</p>

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8.	3 (g)	The Appropriate Commission shall verify the calculation and do the truing up within 60 days of the pass through coming into effect after which the rates of pass through shall be adjusted if necessary according to the truing up.	<p>For proper clarity regarding the inclusion of carrying cost as upheld by the Supreme Court, the following may be added:</p> <p>“The Appropriate Commission shall verify the calculation and do the truing up within 60 days of the pass through coming into effect after which the rates of pass through shall be adjusted if necessary according to the truing up <u>along with carrying cost.</u>”</p>
9.	4 (1)	A Wind, solar, wind-solar hybrid or hydro power plant (in case of excess water leading to spillage) or a power plant from any other sources of renewable energy, as may be notified by the Government, having an agreement to sell power to any person (hereinafter called Power Purchase Agreement (PPA)) shall be treated as a must run power plant, which shall not be subjected to curtailment or regulation of power on account of merit order dispatch or any other commercial consideration.	<p>Thermal power, up to technical minimum schedule, should also be included in must-run category.</p> <p>For abundant clarity, it may be clarified whether this includes all hydro plants (small or large).</p>
10.	4 (1)	Provided that power generated from a must-run power plant may be curtailed or regulated in the event of any technical constraint in the electricity grid or for reasons of security of the electrical grid	Many States are citing ‘grid security’ as the reason for backing down RE power while the real basis for the backing down is for commercial reasons. Therefore, ‘grid security’ needs to be defined clearly and events which do not constitute a threat to grid security may also be

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			<p>defined so that the stakeholders and the adjudicatory body have proper clarity on what constitutes grid security.</p> <p>We suggest that the definition of grid security may be taken as defined by the Expert Group constituted to review “Indian Electricity Grid Code and other related issues”:</p> <p><i>‘Grid Security - means the power system's capability to retain a normal state or to return to a normal state as soon as possible, and which is characterized by operational security limits.’</i></p> <p>Further, the Rules may also mention that any instance of curtailment of RE caused due to backing down instructions given under any of the following conditions, will not be considered as a reason for ‘security of the electrical grid’:</p> <ul style="list-style-type: none"> a) Frequency is in the band of 49.90Hz-50.05Hz; b) Voltages level is between: 380kV to 420kV for 400kV systems & 198kV to 245kV for 220kV systems; c) No network loading issues or transmission constraints as per CEA's Transmission Planning Criteria; d) Margins are available for backing down from conventional energy sources;

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			<p>e) State is overdrawing from the central grid or State is drawing from grid on short-term basis from Power Exchange or other sources simultaneously backing down power from intra-state conventional or non-conventional sources. {State may enter into short term bilateral, day ahead agreements to procure power from Power Exchanges or from other sources and back down its own generation to limits and then back down RE generation purely on commercial principles. Such an arrangement cannot be considered as back down due to grid security }</p> <p>In the event of any dispute in deciding the nature of curtailment, a mechanism to be followed should also be specified in rules.</p>
11.	4 (2)	<p>In the event of a curtailment of supply from a Power Plant which comes under the category of “Must Run”, compensation shall be payable by the Procurer to the Generator at the rates prescribed in the PPA.</p> <p>Provided that when the notice for curtailment is received by the generating company of such power plant at least 24 hours in advance from the scheduled supply, it shall mandatorily sell the power not scheduled in the Power Exchange.</p>	<p>This clause in the Draft Rules proposes that in case notice for curtailment is given at least 24 hours in advance, then the power not scheduled will not be entitled for compensation from the Procurer and the power will have to be mandatorily sold in the power exchange. This is not a justified or practical stipulation, due to the following reasons:</p> <ul style="list-style-type: none"> • Scheduling of the power in the power exchange is not in control of Generator and no generator has the assurance of being able to successfully sell their power on the power exchange.

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			<ul style="list-style-type: none"> • In the event of any curtailment due to technical constraint in the electricity grid or due to planned grid shutdown for maintenance, generator may not be even able to inject the power and in such case generator will not be able to sell the power in the Power exchange. • Getting NOC from SLDC and RLDC and scheduling in IEX Day Ahead Market will be a challenge. Also, there is uncertainty in getting buyer in Term Ahead Market in such short notice. • Further, the provision that unscheduled RE must run power shall be sold only to power exchanges restricts the bilateral trading opportunity available for power generators for better tariff/price realization. <p>Keeping the above in mind, there should not be any enforcing provision for selling unscheduled power to power exchange as a mandatory requirement instead of claiming such legitimate compensation from the Procurer.</p> <p>Therefore, in case the plant is available to supply power but the offtake of power is not done by the Buying entity/ Procurer, in that case full compensation should be payable by the Procurer to the Generator at the rates prescribed in the PPA without any mandatory clause of selling such unscheduled power to power exchange.</p>

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12.	4 (3)	<p>The amount realized by a power plant from such sale of power in a Power Exchange, after deducting expenses, if any, in such sale, shall be adjusted against the compensation payable as per PPA, on monthly basis. Excess realization during a month from sale of power in a Power Exchange, if any, shall be carried forward and adjusted in the next month(s).</p>	<p>Curtailement of power from must-run plants must be avoided unless absolutely unavoidable. If such curtailment does have to be resorted to, then as mentioned in our comments on Clause 4 (2), there should not be any mandatory requirement to sell power on the Power Exchange.</p> <p>Further, <u>IF</u> the generator is able to sell power on the Power Exchange, then the amount realized by the power plant under such sale, after deducting expenses if any, should be adjusted against the compensation payable under the PPA. Any realization higher than the PPA tariff may be shared with the Procurer on 50-50% basis. This would be in line with the Standard Bidding Documents for sale/procurement of power from coal based power plants.</p>
13.	4 (4)	<p>Where the rate of compensation is not laid down in the PPA/PSA it shall be at rate of 75 % of the PPA rate per unit.</p>	<p>One of the main objectives of Electricity Act & National Tariff Policy, 2016 is promotion of Renewable Energy Sources and to ensure financial viability of sector and to attract investments.</p> <p>Existing provisions will discourage renewable energy sources since 75% of tariff will not be able to even cater the debt service cost of RE projects which are capital intensive. Also such compensation methodology will deprive developers of Return on Equity.</p>

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			<p>This clause is also in contradiction with Clause 4 (2) wherein compensation at PPA rate is mentioned.</p> <p>Also, the given provision is in contradiction with the Standard Bidding Guideline for Solar, Wind and Hybrid wherein compensation at PPA rate is stipulated.</p> <p>Hence it is requested to provide compensation at PPA rate only to put RE generators in same economic position. This will ensure that ‘Must Run’ status is implemented and there is no generation loss due to curtailment. Therefore, the clause may be reworded as:</p> <p><u>“Where the rate of compensation is not laid down in the PPA/PSA for curtailment, it shall be at PPA rate per unit.”</u></p>
14.	5	Trading licensee to procure power for distribution licensees	In Rule 5 in some clauses “trading licensee” and in others “Intermediary procurer” has been used. It is suggested that the term “trading licensee” should be used uniformly in all the clauses. Else, ‘intermediary procurer’ may be appropriately defined.
15.	5 (3)	For agreements signed between the trading licensee and distribution licensees prior to the coming into effect of these rules for sale of power based on sources of renewable energy from suppliers selected in a bidding	It is not clear how revisiting/ reopening of tariff under already concluded Power Supply Agreements (PSA) in between intermediary procurers/ trading licensee and Discom would be done. Any introduction of new tariff in place of tariff under concluded PSAs which

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		<p>process conducted under the guidelines issued by the Government under section 63 of the Act,</p> <ul style="list-style-type: none"> (i) The tariff applicable shall be the weighted average tariff of all the suppliers selected in the same bidding process; (ii) The appropriate Commission shall adopt the weighted average tariff after hearing the parties concerned; (iii) The tariff shall be trued up by the Appropriate Commission on yearly basis. 	<p>have already been approved by State Regulators would vitiate the principles of contractual certainty and increase litigation in the sector. Further, Discoms may take cue from this and direct developers for reduction in tariff as this has been done in some States in the past also.</p> <p>In view of the above, it is suggested that already concluded agreements between trading licensee/ intermediary procurer with Discoms should not be forced to change the tariff as per proposed clause.</p> <p>Further, (iii) of this Clause states that the tariff shall be trued up by the Appropriate Commission on yearly basis. Truing up of tariff is not available under the Competitive bidding route (Section 63 of EA 2003) and this would be in conflict with the principle that tariff identified/ approved under competitive bidding route held under section 63 is not subject to modification by the Commission.</p> <p>Therefore, this entire Clause should be deleted.</p>
16.		Annexure 1 – Formula for determination of impact of an event of change in law.	<p>a. The Formula proposed in the Annexure-I fails to comply with the principle that the affected party is compensated so as to restore it to the same economic position as if such change in law had not occurred. Proposed formula assumes that increase in capital cost due to change in law is wholly finance by Debt only at the annual rate of interest on loan as considered by CERC or at prevalent SBI one year MCLR + 200 basis points.</p>

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			<p>However, in reality no lender will finance this additional Capex or Opex cost at 100% debt. Developers have to finance this additional cost at normative Debt : Equity ratio of 70:30 and will expect the reasonable Pre-Tax return on equity. To put the developer in the same economic position, compensation should be calculated considering the normative Debt:Equity ratio and reasonable Pre-Tax Return on Equity as given in the Tariff Regulations from time to time.</p> <p>b. The formula prescribed in the Annexure is applicable for RE generators only and seems to capture the calculation of compensation for construction period. Further attempt has been made to recover the same by spreading over the tenure of PPA. This approach will not work for thermal/hydro generators. Change in Law (increase/ decrease) can result in either additional Capital Cost investment or in the increase in Variable Cost. MoP may consider devising specific provisions for Change in Law compensation for thermal/hydro generating stations as per the following:</p> <p>a. Compensation for Change in Law during operation period - In most of the PPAs (Case-1), formula for calculation of change in law impact for increase/ decrease in Capital Cost during construction period is specified but</p>

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			<p>formula is neither prescribed for any additional capex to be incurred during the operation period nor for any increase in cost of operation. This must be factored in appropriately in and formula provided in the Annexure of this document.</p> <p>b. For Change in Law in Variable Cost (particularly in coal), compensation should be based on actuals computed based on coal consumption considering applicable operating parameters (i.e. Station Heat Rate, Auxiliary Consumption and As Received GCV of coal). The impact on the Variable Cost can be computed as follows:</p> <p>Increase/decrease in VC = $(A \times B) / (C \times [1-D])$, where:</p> <p>A = Normative SHR as per CERC Tariff Regulations applicable for respective Units size or Actual whichever is lower;</p> <p>B = Change in Law impact in Rs / kg</p> <p>C = GCV of Coal as received basis after adjustment of stacking loss i.e. 85 kcal.</p> <p>D = Normative Aux consumptions as per CERC Tariff Regulations for respective units size.</p>

Annexure - Change in Law events allowed by APTEL & Various Regulatory Commission during Construction and Operation period

Sl. No.	Change in Law event
	Construction Period
1	Increase in declared price of land for the project which includes the land for the Power Station and captive coal block
2	Increase in cost of implementation of Resettlement & Rehabilitation Plan (R&R Plan) for captive coal block
3	Increase in cost of compensatory afforestation for captive coal block
4	Increase in cost of Water Intake system
5	Levy of Customs Duty on mining equipment imported for the Project
6	Change in rate of Service tax
7	Change in rate of Customs Duty
8	Change in rate of Excise Duty
9	Change in rate of other Taxes (Work Contract Tax, Value Added Tax, Central Sales Tax)
	Operation period
1	Additional duty on import of steam coal
2	Change in Customs Duty and Countervailing Duty on Imported coal
3	Countervailing Duty and Excise Duty on spares and equipment
4	Increase in Rate of Royalty on Coal
5	Service Tax on Royalty of Coal
6	Imposition/Increase in Central Excise duty/Change in components of Central Excise Duty
7	Clean Energy Cess
8	Change in Central Sales Tax
9	Levy of Service Tax, Education Cess and Higher Education Cess on Total Freight on Transportation of Goods by rail
10	Increase in MAT
11	Increase in VAT on procurement of materials (spares, equipment)
12	Imposition of Electricity Duty and energy development Cess on Auxiliary consumption
13	Levy of Forest Tax / Forest Transit Fee
14	Levy of Customs Duty on energy removed from SEZ to DTA
15	Chhattisgarh Paryavaran Upkar and Chattisgarh Vikas Upkar

16	Levy of duties under Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and/or Central Excise Tariff Act, 1985 & service tax after exemption as per SEZ Act was withdrawn
17	Service tax on transportation of goods by vessel
18	Increase in Service Tax Rate and imposition of Swachh Bharat Cess and Krishi Kalyan Cess on Railway freight and trip siding charges
19	Increase in Service Tax Rate and imposition of Swachh Bharat Cess and Krishi Kalyan Cess on Operation and Maintenance service/taxable services during operation period
20	Levy/Increase of Service Tax on Works Contract Service/Increase in Works Contract Tax
21	Change in rate of Service tax 10.3% to 12.36% - Construction Period
22	Enactment of GST Laws
23	Cancellation of coal blocks
24	Additional capital expenditure on account of Amendment in Environment Norms
25	Busy Season Surcharge
26	Developmental Surcharge
27	Additional R&R obligations imposed by State Government
28	Increase in fees for Consent to Operate
29	Coke and Coal Terminal charges
30	NMET and DMF
31	Amendment to Notification on utilization of Fly Ash from coal-based TPPs dated 25.01.2016
32	Add on premium on the MoC notified price of coal supplies under tapering linkage
33	Imposition of Evacuation Facility Charge by Coal India Limited
34	Port Congestion Surcharge
35	Change in coal quantities due to change in NCDP & SHAKTI
36	SEZ Notifications issued by Ministry Commerce and Industry
37	Water Allocation Fee