APP Comments on the Draft Electricity (Late Payment Surcharge and Related Matters) (Amendment) Rules 2023

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1.	**Rule 1 (3):** Short title, Commencement and Applicability. … (3) These rules shall be applicable to outstanding dues of generating companies, **inter-state** transmission licensees and electricity trading licensees.	**There is imminent need to bring the payment of dues of Intra State Transmission Licensees under purview of the LPS Rules too, and to duly facilitate Intra State Transmission System licensees to also upload Invoices/ outstanding receivables on the PRAAPTI portal.** Most of the distribution licensees are diverting the available funds for making payments to GENCOs and Inter State Transmission Licensees in view of the stringent punitive measures stipulated in LPS rules, 2022 for default in payments. In the process, the transmission charges payments to be made by distribution companies to Intra State Transmission Licensees have been adversely affected and payment delay has certainly increased compared to position prevailing prior to applicability of LPS rules, 2022. Non availability of sufficient funds for Intra-State Transmission Licensee will render the intra-state transmission licensees unable to conduct the O&M in prudent manner nor meet its obligation towards lenders, on timely basis.

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2.	**Rule 7 (1):** **"…** *Provided that the National Load Dispatch Centre (NLDC) may, under exceptional circumstances for grid security, temporarily review the regulation of short-term access or Temporary GNA (T-GNA) or General Network Access (GNA) under these rules, after recording the reasons for doing so, in writing."*	The term "exceptional circumstances" is not defined in the Draft Rules. In order to avoid ambiguity and interpretational issues, the term should be clearly defined.
3.	**Rule 7(4):** *"On payment of outstanding dues, the regulation of short-term or medium term open access or long term open access or Temporary GNA (T-GNA) or General Network access (GNA) under this rule shall end and it shall be restored at the earliest, but not later than two days."*	In Rule 7(1), there is regulation of access to Power Exchange also. On payment of dues, access to Power Exchange should also be restored, however, there is no specific mention of such restoration in Rule 7(4).

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4.	**Rule 7(6):** *"In case of such reduction of drawl schedule, the liability for payment of capacity charges for its original share in the generating station as also the inter-state transmission charges shall remain with the regulated entity."*	This rule is silent on charges payable to renewable generators as there are no capacity charges in RE PPAs. Accordingly, PPA tariff for RE generators shall be payable by immediate Buyer (SECI/NTPC) as generators are not having direct PPAs with Discoms which are regulated.
5.	**Rule 9 (1):** **"…** *failing which the generating company,* ***shall offer****, the un-requisitioned surplus power including the power available against the declared capacity of the unit under shut down, in the power exchange (s), subject to the limitation of ramping and start up capability, as specified in the Grid Code and the procedure made there under:*	**The proposed change to the words 'shall offer' should be dispensed and the original words 'may offer' may be retained.** It is our view that the mandatory provision of supply of un-requisitioned surplus power by way of replacing the word 'may' with 'shall' is not in line with the primary intent of the LPS Rules and is also not a practically feasible option due to the following reasons: 1. The Draft Rules propose to replace the word "may" with "shall", thereby, making it binding on the generating company to offer the un-requisitioned surplus power in the power exchange.

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		It may be noted here that the LPS rules were formulated to help stressed DISCOMS to liquidate the outstanding amounts in a phased manner. The applicability of the rules has been defined as: *"These rules shall be applicable to outstanding dues of generating companies inter-state transmission licensees and electricity trading licensees."* The proposed amendments of Clause 9 requiring generators to sell mandatorily un-requisitioned ("URS") power in DAM/RTM appear to have no relation with the stated objectives. 2. Presently, the FSA documents explicitly state that linkage coal can be used only under long term/medium term PPA supplies. There are some generators with long term/medium PPAs which do not permit sale of power generated using linkage coal to 3rd parties. For such generators, it will be thus incumbent on generator to arrange alternative procurement of coal from either e-auctions, SHAKTI B(viii)(a) auctions or other open market sources in order to be able to offer the said URS power in power exchange(s). The suggested amendment is an inequitable proposition since it will impose a 'Condition Precedent' on the generator for participating in the power market that will be contingent upon

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		market-based procurement of coal and its availability at the material time of offering the URS power for market sales. **If at all the condition of mandatory offer of un-requisitioned surplus in the power exchange(s) is to be retained, then appropriate clarification would need to be included that linkage coal can be utilized for the generation and sale of such un-requisitioned surplus and the terms of the PPA/FSA would need to be modified/amended to such extent.** 3. The standard PPAs provide for a right to the procurers to requisition the unscheduled / un-requisitioned surplus power on real time basis. Under these circumstances, a generating company may be violating the contracted provisions by offering such un-requisitioned power to power exchange and not fulfilling its obligation of meeting the procurers right on real time basis. 4. In the case of a generating company having multiple PPAs, the process of determining whether the un-requisitioned surplus capacity against specific PPA(s) has been offered in the power exchange will involve complex and laborious computations. In the absence of a specific provision/mechanism in the rules, there would be lot of operational difficulties/ disputes under PPA to establish offer of un-requisitioned power in power exchanges, especially for generators with multiple PPAs.

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		5. It is not clear who would certify whether the generating company had offered its un-requisitioned surplus power in the power exchange(s). .
6.	**Rule 9 (1):** **"…** *failing which the generating company, shall offer, the un-requisitioned surplus power including the power available against the declared capacity of the* ***unit under shut down****, in the power exchange (s), subject to the limitation of ramping and start up capability, as specified in the Grid Code and the procedure made there under:* *Provided that if the power so offered by the generating company* ***is not cleared in Day-***	As per the Indian Electricity Grid Code, the Start-up of Unit(s) is categorised into three parts, viz. • **Hot Start** - start up after a shutdown period of less than 10 hours • **Warm Start** - start up after a shutdown period between 10 hours and 72 hours • **Cold Start** - start up after a shutdown period exceeding 72 hours Based upon the unit technical feasibility, the different unit(s) have different time of restoration under Hot, Warm and Cold Start. As per the timelines, the final trade schedule under DAM is communicated by 13:00 hrs. In such cases, it is practically difficult to bring unit on bar from reserve shutdown under different cases of Start-up i.e. Hot, Warm and Cold. Thermal units are not designed for intermittent operations and it takes more than 48 hours to stabilize the water chemistry, after the unit is on bar. Also, the high start-up secondary fuel costs for such coal based plants makes it uneconomical to bring back a unit under reserve shutdown even if for a few days.

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	Ahead Market (DAM), then it shall be offered in other marget segments including the Real Time Market (RTM)*, in the Power exchange (s):"*	Furthermore, the bidding window for RTM market starts 7/8-time blocks prior to schedule delivery time. **Therefore, offering power which remain un-cleared in DAM in RTM from unit under reserve shutdown is not practically possible in any case of start-up of unit.** The Draft Rules, therefore, may be amended, accordingly.
7.	**Rule 9 (1):** **"…** *Provided also that such offer of power in the market shall be at a* ***price not exceeding 120%*** *of its energy charge, as determined or adopted by the Appropriate Commission:"*	**The capping of 120% on the offer of power in the market is arbitrary and without any basis. We are not in agreement with any such capping on the offer of power, on the following grounds: (it indirectly amends the PPA – there is no provision of capping in PPA, and as such whatever is being shared with procurer and end consumer** 1. It is a settled principle of law that the tariff determination is the sole prerogative of the Appropriate Commissions and the rule making power under Section 176(1), cannot be invoked to make rules to determine/ interfere with the tariff. The Draft Rule is against the rationale and objectives of the Electricity Act, 2003 i.e., distancing the government's role from the regulatory commissions and tariff determination/regulation.

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		2. Any cap on offer price of sale of un-requisitioned power in the power exchanges indirectly modifies the terms of the PPA and is hence bad in law. 3. Capping the tariff bids in exchange(s) up to 120% of Energy Charge (EC) as approved or adopted by appropriate Commission is unjustified as price capping mechanism for power exchanges is already in place. 4. The power tariff which is determined or adopted by the Appropriate Commission (at the start of a control period during MYT petition) for supply to distribution licensees under section 62 is an indicative tariff and does not reflect the actual fuel cost. The fuel cost approved in the MYT stage is trued up on the basis of landed cost of fuel and its quality. The cost is finally determined & approved at the end of control Period. In the current scenario of shortage in domestic linkage coal and volatility of international coal prices, the variation in actual energy charges may be beyond 20%. When such costs get approved at a later stage, it eventually gives the true picture on the entire Energy Charge, and there is no provision for recovery of the additional cost from the DAM/RTM consumers at a later date. 5. For section 63 contracts, the adopted ECR tariff is escalated as per CERC escalation index. Further, the ECR is subject to occurrence of 'change in law' events on account of variation in taxes / duties / cess rate as well as compensation

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		towards usage of alternate coal due to domestic coal supply shortfall. In majority of the cases, the extent of 'change in law' compensation approved by the Appropriate Commission has been more than 20% of the adopted tariff. Considerable time is consumed on litigations for approval of Change in Law events and other items of dispute which affect the energy charge before regulatory forums. There are several 'change in law' claims pending at various stages which are yet to be approved for payment. There is also scope for occurrence of new 'Change in Law' events in future which may take considerable time for being approved for payment. When such costs get approved at a later stage, it eventually gives the true picture on the entire Energy Charge, and there is no provision for recovery of the additional cost from the DAM/RTM consumers at a later date. 6. For medium term contracts (lumpsum tariff) under section 63, the energy charge is considered as half of the total quoted price. Further, the energy charge gets escalated with respect to WPI index. Thus, the adopted energy charge is not a reflective of the actual fuel cost and will thus, not be adequately compensating the Generators in case of sale of un-requisition power in Power Exchange. 7. Presently, the FSA documents explicitly state that linkage coal can be used only under long term/medium term PPA supplies. There are some generators with long term/medium PPAs which do not permit sale of power generated using

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		linkage coal to 3rd parties. For such generators, it will be thus incumbent on generator to arrange alternative procurement of coal from either e-auctions, SHAKTI B(viii)(a) auctions or other open market sources in order to be able to offer the said URS power in power exchange(s). It will be extremely difficult for such generators to comply with the proposed price cap of 120% of energy charge and the generators will run a high risk of suffering financial loss if the final energy price based on alternate market sourced coal is higher than the price realized from selling un-requisitioned power in the exchange. 8. The actual energy charge incurred is determined after the coal quality reports are available (after at least 2 months of dispatch) and based on that the final coal costs are determined by the coal company. Thus, the actual energy charges may vary by more than 20% than the anticipated costs when power is getting dispatched. The calculation is further complicated when blending of coal from different sources is being done. 9. Further, in case of multiple PPAs for the generating company, the Energy Charge (EC) is/ could be different for different PPAs due to reasons such as different tariff structures/ different coal sources etc. It is not clear as to which EC should be taken as base for determining the ceiling of 120% (there could be cases of simultaneous availability of URS from customers having different EC).

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		10. It is further submitted that gain from the sale of such power is shared with the distribution licensee too, which ultimately goes to the benefit of the end consumer only. **Considering all the above factors, no such capping should be kept on the price of the offer of such un-requisitioned surplus power.**
8.	**Rule 9 (1):** *"Provided further that if the generating company fails to offer such un-requisitioned surplus power in the power exchange(s),* ***the un-requisitioned surplus power to the extent not offered in the power exchange(s) up to the declared capacity shall not be considered as available for computing the payment of fixed charges."***	Linking recovery of Fixed Charge with the generating company's ability to offer un-requisitioned Surplus power in power exchange(s) appears to be a punitive measure impacting the generator arising out of a situation of default by the distribution licensee. In our view, such provision would make the recovery of FC as "conditional" for the un-requisitioned power, for no fault of the generator and in addition, be in conflict with the contractual arrangements entered between generator and distribution licensee in terms of long term/ medium term Power Purchase Agreements (PPAs) and hence bad in law. It would also be against the original intent of the LPS Rules which was formulated to enable the DISCOMs to liquidate their outstanding amounts in a phased manner. We also submit that the process of determining eligibility of FC recovery against URS power "offered" in exchange(s) will be compounded in cases of a generator

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		having multiple PPAs, involving complex computations in required time blocks of 15 minute intervals and raising the risk of potential disputes / litigations among the affected parties. **<u>Therefore, there should not be any additional conditions imposed for payment of fixed charges by the distribution licensee and this proposed proviso may be deleted.</u>** It may also be noted that in the event the generator is unable to recover FC in terms of extant PPA(s) due this conditionality imposed in the Draft Amendment Rules (due to reasons not attributable to the generator such as time required for start-up of unit under shutdown, as explained above), the generator would suffer financial impairment as a consequence and it would be tantamount to producing 'material adverse effect' in operationalisation of PPA(s) and hence, should be treated as Change-in-Law event for recompensing the generator against any under-recovery of FC.
9.	**Rule 9 (1) (b):** "In clause (i) of sub-rule (2), for the word "three", the word "six" shall be substituted.	**The sharing of gain from the sale of the un-requisitioned power by the generating company should be as per the agreement, i.e. PPA between the parties.** In case the PPA is silent on the issue of sharing of gains from the sale of un-requisitioned surplus, the Draft Rules may come into effect.

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	Sub-rule (2) of Rule 9 of LPS Rules 2022: 9 (2) The gain from the sale of such power shall be adjusted in the following order:- (i) payment to generating company of upto six paise per unit; (ii) recovery of fixed charges; (iii) liquidation of overdue amount; (iv) the balance shall be shared in the ratio of 50:50 between the distribution licensee and the generating company.”	