

Comment on the Electricity (Amendment) Bill, 2020

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A) National Renewable Energy Policy

Draft proposes to insert provision for a energy policy namely “National Renewable Energy Policy” (“NREP”). There is an amendment in Section 86 (1) (e) to make it mandatory for state commission to follow direction given in NREP for prescribing a minimum percentage of purchase of electricity from renewable and hydro sources of energy.

Electricity Act, 2003 had assigned responsibilities of determining percentage of renewable purchase obligation (“RPO”) on state electricity regulatory commission (“SERC”) with the intention that the SERC will analyse various state specific factor before determining a fix number of RPO. Few Electricity Regulatory Commissions were not inclined to comply with National RPO Trajectory determined by Ministry of Power. Further implementation of RPO provision was also a challenge and there were various rounds of litigation concerning non-compliance of RPO provisions.

These RPO provisions have been diluted by APTEL in LLYOD Metal Judgment wherein it has compared RE plant with any type of fuel-based co-generation plant for compliance of RPO and it absolved liability of captive consumer of co-generation plant from compliance of RPO. Ministry should bring an appropriate amendment to rectify these mistakes.

B) Electricity Contract Enforcement Authority

Electricity sector in India is under the concurrent list of the constitution and is administered both by the central and the state governments. The constitution has, however, given supremacy to central legislation, so that if there is conflict between a central act and the provisions of a state legislation, then the law made by the Parliament would prevail and the inconsistent provisions of the state legislation would be void.

Electricity Act, 2003 (“**2003 Act**”) was enacted as an exhaustive Code on all matters concerning electricity. It provides for "unbundling" of SEBs into separate utilities for generation, transmission and distribution. It repeals the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 ("1998 Act"), mandated the establishment of an independent and transparent regulatory mechanism, and has entrusted wide ranging responsibilities with the Regulatory Commissions. While the 1998 Act provided for independent regulation in the area of tariff determination; the 2003 Act has distanced the Government from all forms of regulation, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access, etc. 2003 Act also gives jurisdiction in hand of ERCs to adjudicate disputes of all nature between licenses and generating company considering ERCs were supposed act in a transparent an independent manner.

¹ *Opinions expressed are solely my own and do not express the views or opinions of the organization I worked with.*

In the proposed amendment, MoP has proposed to establish an Electricity Contract Enforcement Authority which will have jurisdiction to adjudicate upon matters regarding specific performance of contracts related to purchase or sale of power between a generating company and a licensee or between licensees; and contracts related to transmission of electricity between a generating company and a licensee or between licensees. Proposed amendment suggests that Enforcement Authority will have no jurisdiction on any dispute involving tariff. They have proposed certain amendments in Section 86 (1) (f) to avoid any conflict between Section 109 (A) and Section 86 (1) (F). Hon'ble Supreme Court in GUVNL vs Essar Power placing reliance on the present text of Section 86 (1) (F) held that all disputes, and not merely those pertaining to matters referred to in clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. Post amendment, this law will also be changed. Few years of implementation of the proposed amendment will see various litigation on the issue of jurisdiction. Non-payment of the dues will be subject matter of Enforcement Authority or Electricity Regulatory Commission? This proposition can be argued comfortably from both sides. Therefore, much clarification will be required from Ministry side to achieve the intention behind proposed amendment.

I can presume that the Central Government may have realized that ERCs are not fulfilling their obligation as envisaged under Electricity Act, 2003 while adjudicating disputes between Licensees and generating station.

In my opinion, Central Government should have thought on giving more independence to these bodies by reducing executive control over ERCs. In the instant case, Proposed Amendment is shifting control on adjudicatory body from the hand of the state government to central government (Shifting of Control from State Executive to Central Executive). In terms of proposed amendment, Appointment and Removal of Enforcement Authority will be by the Central Government.

C) Tariff

There are two key changes in tariff provisions: i) Subsidy; ii) Tariff Adoption.

It has been proposed that ERCs will determine tariff for retail sale of electricity without any subsidy under section 65 of the Act and the State Government shall directly pay subsidy to the eligible Consumer. This provision will be win-win for both DISCOMs and generating stations. DISCOMs have been using this defense of non-payment of subsidy for its inability to make timely payment to generating stations.

Proposed amendment has brought concept of deemed approval post expiry of 60 days of receipt of the application. It will help in removal of uncertainty in this sector. We have seen various bids which have not been approved for years by the Commission and once time passes one consumer appears from somewhere and challenge bid on frivolous grounds. We have also seen various instances wherein DISCOMs withdraw tariff adoption petition after passage of substantial time on the ground that the discovered tariff does not reflect market price. Further, it has been observed that the state utilities are not inclined in filing tariff adoption petition in a time bound manner. Generally, PPAs doesn't cast any obligation of adoption of Tariff to DISCOM

and considering very strict timelines of project, developers have no other option but to complete the projects in the given timelines in absence of tariff adoption. It has also been observed that few state Regulatory Commission refuse to adopt tariff at later stage which puts the complete project at risk.

Proposed Amendment also proposes to make it mandatory for the Commission to reduce cross subsidy in the manner as may be provided by the Tariff Policy. Section 42 envisages reduction in cross subsidy as per discretion of the ERCs. Proposed Amendment intends to take away discretion of the Commission for determination of cross subsidy. Enabling clause for reduction in cross subsidy is there from the very beginning of the amendment of the Act and we have not seen any Commission which has reduced cross subsidy placing reliance on this provision. Post amendment, ERCs will be bound to follow mandate of Central Government. At various places, the present set of proposal tried to make it mandatory for ERCs to follow provisions of tariff policy. These amendment could well favor the government of the day, since the tariff policy can be revised and published by the Central government from time to time, according to Section 3 of the Act. The potential consequences of an arrangement where the regulatory commissions are compliant with the central government's policies could be disastrous. The Central government's interests (beyond the efficiency of the electricity sector) could affect tariff determination all over the country. Determination of tariff should be an apolitical activity to ensure that the sector operates on commercial principles.

D) Decree of Civil Court

It further proposed that the order of the authority will be executable as a decree of civil court. This proposal will be big relief if it will be implemented. There is confusion amongst stakeholders about enforcement of Electricity Regulatory Commissions ("ERCs") orders and stakeholders file a petition under Section 142 for compliance of Electricity Commission Orders. Section 142 has certain inherent limitation in ensuring compliance of ERCs order. Post enactment of proposed amendment, stakeholders will be able to file execution petition for execution of ERCs order.

E) Payment Security Mechanism

Proposed amendment also proposed to empower central government to make rules for payment security mechanism and it is proposed to empower load dispatch centre to oversee the payment security mechanism before scheduling dispatch of electricity and to be made mandatory unless it is waived by the parties to contract themselves or contract suggests otherwise.

Recently, Ministry of Power had issued direction to Load Dispatch Centers to ensure opening of LC for dispatching and scheduling of the electricity. However, DISCOMs of AP had challenged the legality of the order before High Court and one of the ground for challenge was locus of the MoP in interfering agreement between Distribution Licensee and Generating Company.

F) Distribution Sub-Licensee and Franchisee

Proposed Amendment proposed to bring concept of Distribution Sub Licensee who with the approval of ERCs can distribute electricity in an area of existing distribution licensee on behalf of such distribution licensee. While there is a provision of deployment of franchisee under the Act, there were certain issues concerning regulatory interface and it was impacting interest of private players from entering into franchisee model. I assume greater independence will be given to Distribution Sub-Licensee for managing its sub-region while recognizing that performance of the sub-licensee will have will have an impact on the overall performance and the cost structure of the Utility which in turn would have an impact on the overall consumer tariff across the licensee's area.