Comments and Suggestions on the Proposed Amendment of the Electricity Act (2018)

By Prayas (Energy Group)

Based on proposed amendments published by the Ministry of Power on 7th September, 2018 seeking public comments

Contents

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The Ministry of Power published draft amendments to the Electricity Act, 2003 on the 7th of September 2018. The proposed amendments have several provisions to account for the flux in the sector and shed light on the direction of reforms being contemplated by the Ministry of Power. There are many positive amendments, especially in the context of the commitment to reliable power supply, regulation of franchisee agreements, two year review of power procurement to meet demand and review of functioning of Electricity Regulatory Commissions.

Given uncertain demand, rising cost of supply for utilities, significant pressures on utility finances and the emergence of several alternative options of supply for cross-subsiding consumers, several structural and institutional changes are required. Considering the varied impacts, possible ramifications and disparities in state-level realities, it is important that these changes are consistent and are introduced in a calibrated, planned manner while preserving the concurrent nature of the sector decision making.

In this context, Prayas (Energy Group)'s (PEG) comments and suggestions on the draft amendment are given below. In some cases modifications to the proposed amendment are also suggested with PEG's suggestion in **bold**, the draft amendment in *italics* and words from the prevailing act in plain text.

1 Need for a statement of reasons or an explanatory document

The draft amendment of the Electricity Act proposes to introduce many changes to broaden and deepen electricity markets, ensure reliable supply to all and enable strong, accountable institutions within the power sector. Given the nature and extent of the proposed changes, it is critical to have a larger framework to understand the necessity and impacts of the amendments in the context of present challenges and past experience. Unfortunately, there is no such background material that elaborates on the aims and objectives of the amendment or explains the analysis and reasoning behind introducing the new sector structure that it wants to create. It is suggested that the Ministry of Power release a statement of reasons or an explanatory document highlighting the background analysis, major changes proposed and the intended policy direction with the suggested amendments. This will ensure more

[1] For more details, please see: https://powermin.nic.in/sites/default/files/webform/notices/Proposed_amendment_to_Elelctricity_Act_%202003.pdf

clarity and promote engagement and consensus building among stakeholders in the process. The document can be released even after the first round of public consultations on this draft has been completed.

2 Role of Central Government

The proposed amendments in the Act have suggested additional roles and responsibilities for the Central Government. The Central Government can play a crucial role as an enabler of various progressive actions in the sector, persuading states to adopt policies. Given the varying realities and governance frameworks in states, the Central Government also plays a substantial role in ensuring monitoring, reporting and accounting for crucial parameters noting progress in the direction of transitions or reforms. However, it is important to ensure that the spirit of the federal system and the concurrent nature of the electricity sector do not change. This is especially true for areas where the implications of the change fall on state sector actors.

While the broader policy goals and objectives could be the same for the sector, in many a cases, the measures suggested by the central government, agency or institution may not help in addressing state specific challenges and hence flexibility at state level in terms of design and implementation would be necessary. If a proposal implies the central government decides to introduce a change where majority of the benefits are realised on a national level but most of the risks are borne by state level actors, then there is a need to revisit the proposal.

Given the flux in the sector the central government can play a crucial role in ensuring integrated grid operations, increasing market operations and instruments, transmission planning and increasing accountability for quality of supply and service. The Central Government can take steps to rationalise lending in the power sector and financing of inefficient practices of utilities. It can also create a framework and lay down guidelines and processes with adequate checks and balances which can be adopted and adapted by states based on their realities to ensure progress in the larger policy direction. Based on these principles and in the context of the proposed amendments, specific suggestions on changing the role of the Central Government are provided later in the submission.

3 Carriage and Content Separation

The draft amendment proposes the introduction of supply licensees. For this purpose it also proposes that the existing distribution and supply company be unbundled into two separate companies via a transfer scheme which can be implemented within a period as decided by the State Government. This would introduce the possibility of multiple supply licensees in an area of supply. Some suggestions related to this proposal are given below:

3.1 Transfer scheme

Section 131A specifies that carriage and content separation can only be implemented after the transfer scheme is initiated by the State Government. The transfer scheme will have significant impacts on consumers of the current distribution and supply licensees. In this context, especially to ensure the interest of small consumers is represented, the transfer scheme should involve public consultation by the State Government. Therefore, the amendment can mandate a process for consultation just as public

consultation is proposed to be mandated for Central Government policies in Section 3 (5). It is suggested that the following clause be added to Section 131A :

The transfer scheme shall be finalised and implemented only after seeking comments and suggestions through public hearings in the concerned licence area.

3.2 Role of intermediary company

As per Section 131A of the draft amendment, the power purchase agreements of the existing distribution and supply licensee are to be transferred to the intermediary company created with the implementation of the transfer scheme. Further as per clause (c) of Section 131A and clause (u) of Section 176 (1) the functions of the Intermediary Company are to be prescribed by the Central Government.

As the power procured by the distribution and supply licensees need to be allocated among the subsequent supply licensees, vesting the power purchase agreements with an intermediary company might be required. The allocation of power or contracting of power from the intermediary company by the supply licensees is central to the transfer scheme and will determine the costs of the supply licensees. Therefore, as the State Government initiates the transfer scheme, it is essential that the role and functions of the intermediary company are determined by the concerned State Government and not the Central Government.

As the company is vested with power purchase agreements, it is also crucial that the intermediary company created is regulated. The intermediary company created under the transfer scheme should require a licence under Section 14, for which the Commission will have to specify conditions under Section 16. This can be based on the framework specified by the State Government.

3.3 Need for guidelines or a framework for carriage and content separation

As carriage and content separation is to be initiated by the State Governments, there is a need for clarity on legal, procedural and operational issues to ensure smooth implementation across the country. State Electricity Regulatory Commissions (ERC) should be mandated to specify a framework for operationalisation which provides clarity on issues such as metering, billing, grievance redressal, duties and role of the provider of last resort, estimation of transmission and distribution (T&D) losses and the procedure for switching between supply licensees. The SERC should be mandated to decide this framework based on due public consultation, after the transfer scheme. The roles and responsibilities of the distribution licensee, intermediary company, incumbent supply licensee and subsequent supply licensees should be specified by the SERC. To this end, the State Commission should be required to publish draft model conditions of licence for distribution, supply and for the intermediary company, along with amendment of regulations pertaining to metering, billing, deviation settlement etc., six months before the transfer scheme is effective.

There could be several issues while implementing carriage and content separation in the Indian context and state governments might follow a cautious approach for implementation. Therefore, it is important to initiate implementation in some areas which are already ready for such changes. Cities like Mumbai

with no unmetered consumption, no agricultural load, well developed wires network, good supply and service quality can be considered for early adoption of carriage and content separation to inform policymakers of possible issues and mechanisms required for adoption.

To summarise, the Act can mandate that

- SERCs should specify a framework for carriage and content separation to provide operational clarity on metering, T&D loss estimation, switching between suppliers etc.
- Such a framework should be finalised through public consultation after transfer scheme
- SERC should finalise model licence conditions for the distribution company(ies), supply licensees, intermediary company and modify relevant regulations after public consultation. The process should be initiated six months before transfer scheme is effective.

Further, cities like Mumbai could be considered for early adoption of transfer scheme to gain important insights and learn about operational issues.

3.4 Need for clarity on ceiling tariffs

As per Section 61 (2) of the draft amendment, the supply licensees created after the transfer scheme will be subject to a ceiling tariff for a category of consumers, determined by the SERC. The ceiling tariff is to be determined on the basis of normative costs and standards of performance as laid down by the Commission. Further, the supply licensees are entitled to charge consumer categories less than the ceiling tariff. The purpose of ceiling tariffs is to promote competition among supply licensees, improve efficiency in supply provision and ensure competitive tariffs.

However as per Section 61 (4) of the draft amendment, the tariff determined by the Commission shall provide for recovery of all prudent costs, approved by the Commission. This will be in the monthly bills through appropriate fuel and power purchase adjustment formula including a surcharge, if any. In order avoid mis-interpretation that licensees will be allowed to recover all costs even after application of ceiling tariff (as in the case of current cost plus regulation), it needs to be clarified that this pass though of prudent costs relates only to fuel cost increase post determination of ceiling tariff.

Furthr, if prudent costs can be recovered every month on a post facto basis (as is the case with the current fuel surcharge mechanism) then consumers may not realise the benefits of competition and the purpose of ceiling tariffs will not be realised. To address this,

- the fuel surcharge levied on a monthly basis should be subject to a ceiling or price cap determined by the appropriate Commission in its regulations;
- cost incurred over and above the determined price cap should not be recovered from consumers of the licensee; and
- the costs to be passed through via the fuel and power purchase adjustment mechanism should be subject to regulatory scrutiny.

4 Licensing

4.1 Generation and supply based on renewable energy

Proviso 18 of Section 14 of the draft amendment specifies that any persons generating and supplying electricity from renewable energy sources do not require a licence for these activities. As the person is authorized to supply electricity, as per Section 42 (7) of the draft amendment, consumers need not apply for open access to obtain supply from such persons. Thus, it is possible for the generator to apply for open access and pay the applicable transmission and wheeling charges for the use of wires to supply the power to a customer. As the customer is not an open access consumer; they need not pay cross subsidy surcharge or its equivalent as specified in Section 42 (6) of the draft amendment. Based on this interpretation, such a provision can significantly increase sales migration and will substantially broaden and deepen market operations. However, it is not clear if the provision was intended for such large scale adoption of renewable energy based generation and supply services or if it was to facilitate selling of renewable power, generated in small area (e.g.-rooftop solar PV) to a smaller number of consumers by a third party, such as a Renewable Energy Service Company as defined in Section 2 (57B) of the draft amendment. If the intention was to operationalise the latter, the provisions need to be amended accordingly. However, if the Ministry of Power intends to facilitate transactions on a much larger scale, it is suggested that Section 42 (7) be amended such that it is necessary that every point of drawal for such supply should have special energy meters and is subject to an appropriate form of balancing and settlement mechanism. State ERCs should also be mandated to have regulations and ensure processes are in place to facilitate energy accounting, metering, balancing with such an arrangement.

4.2 Deemed licence as per Central Government notification

As per proviso 11 and proviso 13 of Section 14 of the draft amendment, companies notified by the Central Government from time to time shall be deemed licensees under the Electricity Act. In the draft amendment, deemed licences have been proposed for Railways, Special Economic Zones and other entities. Provision of licences, with the proliferation of trading activities, supply licensees, open access and captive options will make sector governance challenging at the state level. Further, when the Commission grants a licence, the persons who approach the Commission have to qualify as per a set of eligibility criteria. Granting licences to a class of persons, as suggested by the Ministry of Power, can also increase the risk of fly-by-night operators. It is suggested that persons not already being provided with a deemed licence as per the proposed amendment, should apply for licences before the Appropriate Regulatory Commission as is the current practice. Thus, the discretionary power to grant deemed licences should not be provided to the Central Government.

In a similar fashion, Section 13 of the Act has been amended in the draft such that power to exempt any local authority, Panchayat Institution, users' association, co-operative societies, non-governmental organisations, or franchisees from obtaining a licence under this Section rests with the Appropriate Government instead of the Commission. As grant of licence under Section 14 rests with the Commission, the power to exempt too should remain with the Commission. Thus it is suggested that Section 13 is retained as is.

4.3 Revocation of licence

As per Section 59A of the draft amendment, the appropriate government on the basis of a complaint can revoke a licence if it is satisfied that the licensee has not discharged its functions as per the Act.

As per Section 19 of the existing Act, the Appropriate Commission can revoke licence issued by it, based on an enquiry in an exhaustive set of cases which includes cases where the licensee has not discharged its functions as per the Act. The appropriate government or any persons can file an application before the Commission for revocation as per the existing provisions. As the licence is provided by the regulator and to avoid governance issues with the potential proliferation of licensees, it is suggested that the power to revoke licences rests with the regulator.

5 Generation and Power Procurement

5.1 Mandate for Long/Medium term Power Procurement

Section 42 (2) of the draft amendment suggests that distribution or supply licensees should tie up power through medium and long term contracts to meet the annual average demand of the area. Presently, utilities are facing significant demand uncertainty due to migration of sales due to open access and captive options. This uncertainty will be much greater with the increasing viability of renewable energy based captive solutions, multiple supply licensees and the enabling provisions for open access, captive generation and consumption in the draft amendment. With such demand uncertainty, utilities need to be flexible and agile when it comes to planning. If licensees do not have such flexibility then there is grave danger that these licensees may be saddled with excess and costly PPAs, making them perpetually dependent on government sponsored bail-out packages every now and then.

A mandate to procure power via medium and long term contracts limits flexibility and it is suggested that it be removed. Other provisions such as Section 42 (4) in the suggested amendment can ensure that distribution and supply licensees procure power in such a manner to provide reliable affordable power supply to consumers.

As per Section 42 (4) of the draft amendment, the appropriate commission shall carry out a review every two years to assess if adequate source of supply have been tied up and to review distribution system maintenance and efficacy of the compliant handling mechanism. This is a progressive provision introduced in the amendment which should be retained as it can increase accountability of the utilities and aid planning in the face of uncertainty. However, the review can check for provision of power supply in an efficient manner without load shedding rather than focussing on the type of contracts. This is because manner of procurement for the utility can change over time and to ensure flexibility and optimal planning, mandates for power procurement should not be specified in the Act.

5.2 Delayed Payment Surcharge Applicable in Change in Law matters

As per Section 92 (6) of the proposed amendment, any cost pass through approved on matters of change in law/duties/taxes will be applicable from the date of incidence along with a delayed payment surcharge as 18%. Section 92 (6) also specifies that such cases need to be resolved within 30 days at the most. The delayed payment surcharge is applicable in a similar fashion if ERC orders allowing

passthrough are upheld in appeal before the APTEL as per the first proviso of Section 111 (1) of the proposed amendment.

Applicability and relief for any event of change in law or force majeure should be as per the PPA terms and introducing specific provision in the Act to override PPA provisions would be serious governance shortcoming. Apart from the fact that such a specification is tantamount to micromanaging of the ERCs, it can also lead to serious legal complications which could in fact derail the process. For example, the ERCs could be constrained on account of some matters being subjudice or related matters pending before higher fora. Therefore, such specific short-term issues should not be considered in a legal document such as the Act and should be left for the ERCs and the judiciary to settle as per the prevailing norms and terms specified in respective contract documents.

5.3 Deemed adoption of power procurement tariffs

As per the third proviso of Section 63 of the draft amendment, tariffs discovered under Section 63 are to be deemed adopted by the ERC if the Commission has not passed an order within 30 days of completion of pleadings. It is suggested that this proviso be removed as tariff adoption for competitive bidding projects are important proceedings which can have significant impacts on the utility costs and consumer tariffs.

The Appropriate Commission needs to go into the merits of the matter and undertake due analysis of procedural compliance with respect to bidding guidelines. It needs to consider appropriate policy developments and any on-going legal proceedings and case law, before arriving at any decision. Further, the time taken for the process also depends on timely submission of all the related documents by the procurers and the project developer. As the tariff adoption process is not a mere token gesture, prescribing such a short and hard time limit after which the order is deemed to be adopted irrespective of its implications for consumer interest is highly inappropriate and should not be allowed.

5.4 Amendment of Section 11

As per the prevailing Act, directions under Section 11 are provided to safeguard public interest when there is a threat to state security, public order or in case of a natural calamity. Such directions do have financial consequences but they have been addressed in a manner such that the generator does not suffer any financial loss on this account. The amendment to Section 11 specifies that the State Government can only provide directions to generators of the state owned company whereas all other generators (private (renewable and conventional) and central sector) can be provided directions only by the Central Government. This amendment significantly reduces the powers and agency of the state governments to act in public interest during situations such as natural calamities or force majeure events that need urgent state action. It is suggested that Section 11 be retained as is, especially since the generator is assured of cost recovery independent of its ownership status.

5.5 Need for a Model Power Purchase Agreement (PPA)

Similarly, Section 49 (1) of the draft amendment specifies that all sale/purchase of power shall be through Long/Medium/Short term PPAs. This is to be based on a format specified by CEA with approval from the Central Government. It is not clear if Section 49 (1) is only meant for distribution and supply

licensees or if it is also meant for open access and captive consumers signing agreements with traders and generators. The wording of the provision in the draft amendment makes it open for either interpretation. Further, if short term contracts also need to comply with CEA formats, it could remove some amount of flexibility possible within this segment of contracts and this provision might even restrict the development of new and innovative instruments necessary for broadening and deepening of markets. It is suggested that Section 49 (1) be modified such that CEA (with the Central Government approval) has the mandate to specify model PPAs for long, medium and short terms which can be adopted by utilities, generators and consumers if needed. The model PPAs can be for projects under Section 62 as well. This will lead to standardisation of contracts without restrictive mandates in the Act.

5.6 Penalties for non-compliance to Renewable Purchase Obligation (RPO)

As per Section 57 (1A) in case of RPO non-compliance by the licensee, the Commission may impose a penalty which can range from Rs.1 to Rs.5 for every unit of shortfall of energy compared to the RPO specified by the commission.

The principle and need to specify a penalty per unit of RPO non-compliance to ensure better compliance is understood. However, it is suggested that the actual value of the penalty for non-compliance be specified by the Appropriate Commission in its regulations instead of the Act. Further, such penalties should be imposed not just on licensees but also on all obligated entities on whom the RPO is applicable including captive and open access consumers.

To operationalise this, the penalty specified by the respective State Commissions can be based on / linked to the average cost of renewable generation and applied on the total quantum of non-complied purchase obligation.

The Act can also specify that the Central ERC should create a fund where all the penalties collected from RPO non-compliance be deposited. These funds can be utilised to promote renewable energy generation and supply based on criteria to be defined under the national renewable policy.

5.7 Renewable Generation Obligation

Section 7 of the draft amendment specifies a Renewable Generation Obligation on new or expansion projects of thermal generation plants. This renewable power can be sold as bundled with the thermal power, to be counted towards the RPO compliance of the procurer. Stronger RPO non-compliance penalties, push towards facilitating open access coupled with the exemption of licence for generating and supplying RE power will create a strong push towards RE capacity addition. Hence there is no need for an additional instrument like RGO which will force capacity addition by thermal power plants and can further complicate energy accounting, scheduling etc. It is best to leave it to the obligated entities to meet their RPO obligation through any means allowed by the Act and regulatory framework.

6 Tariff, Subsidy and Cross Subsidy

6.1 National Tariff Policy

The national tariff policy was intended to provide a framework which delineates the intended direction of reforms in the medium term. Given the vast differences across states, the policy should be flexible such that states can incorporate contextual realities in design and implementation. Further, electricity being a concurrent subject, such flexibility is enshrined in the constitution itself. The draft amendment seeks to make the National Tariff Policy a binding document to be mandatorily followed rather than a guiding framework as is envisaged in the prevailing Act. States will need a good measure of flexibility and power to decide the pace and extent of changes to be introduced during the reform process. It would be challenging to prepare nationally applicable, one-size-fits all policy without it being too broad in its provisions. In the process, the very purpose of the policy will be diluted. Further, mandating the national tariff policy deprives the states of power even though they will be saddled with the consequences of the actions taken under the Policy. It will also divest the state institutions of the autonomy and flexibility that are essential for dealing with a fast changing sector. Further, the legal validity of such an action is also questionable.

It is suggested that the proposed amendments to Section 61, Section 64, Section 79 and Section 86 in this regard be removed.

6.2 Elimination of cross subsidy

Draft amendment to Section 61 says that the Appropriate Commission should determine tariffs such that the cross subsidy within a distribution area shall not exceed 20% and should be eliminated within three years. The draft amendment also prescribes that the Commission should determine a trajectory for cross subsidy reduction such that the annual reduction is not less than 6%.

The electricity sector is facing significant flux driven by uncertainty in demand. The average cost of supply for most distribution companies (DISCOMs) is around Rs. 7/kWh and has been growing at 5-6% per annum on an average. Driven by the rising costs and the current tariff design, which is hinged on significant cross subsidy, large consumers have been reducing their dependence on the DISCOM to meet their demand. In fact, sales migration due to captive and open access is already significant and is expected to grow with increasing viability of renewable energy options. These sustained trends necessitate an inevitable reduction in cross-subsidy revenue for the DISCOMs in the medium term.

However, cross subsidy reduction, though inevitable, should be undertaken in a phase-wise, calibrated manner such that the tariff shock on small consumers is reduced. The suggestions in the draft amendment will lead to a sudden change, which can have impacts on consumers and the political economy of the state sector. It is suggested that cross subsidy elimination should take place at a slower pace and over a time period as may be decided by the State Commission in consultation with the State Government and utilities. It should be based on sales mix, the possibility of intra-category cross subsidy, extent of migration of industrial consumers, and the demand of newly electrified households and agricultural consumers.

6.3 Direct Benefit Transfer (DBT) for electricity subsidies

Section 65 and Section 45 (1b) of the draft amendment proposes to have all electricity revenue subsidies provided directly to consumers in their bank accounts. This is a major proposal as state governments pay about Rs. 1.2 lakh crores every year as revenue subsidies. Such a move could also reduce inefficiencies in the subsidy delivery system and enable targeting. However, several issues need to be addressed before the universal implementation of DBT. In the pilots being implemented, there are issues in identifying the subsidy recipient where the users of electricity are tenants but the connection is in the name of the property owner. Another issue would be the identification of recipients with joint ownership and inheritance. Tenancy and inheritance issues are common in the agricultural sector, a highly subsidised category. DBT will not address the issue of delay in payments by State Governments and implementation of DBT without adequate safeguards might intensify the impact of delays. If the subsidy amount is transferred from the Government to the DISCOM and then provided to consumers by DISCOMs via DBT, the DISCOMs would continue to charge subsidised tariffs in case of delays and end up bearing the adverse financial impacts. If the subsidy payments are being made directly to the consumer by the State Government, delays in funds disbursal can result in significant tariff shock. In such a scenario, consumers might choose to pay only the subsidised bills or may even resort to non-payment of bills. Without a framework to address this, delays could result in penalties for consumers, build-up of arrears, and increase in commercial losses or even disconnection. Thus, before universal DBT for electricity is implemented, close attention needs to be paid to on-going pilots and more large-scale pilots are necessary. Lessons from multiple pilots for a mix of consumers can inform steps needed to ensure smooth implementation.

Thus, at this stage it is suggested that DBT should not be mandatory for subsidy provision. It can be universalised at a later stage with adequate checks and balances based on lessons from pilots. The Electricity Act amendment should make a provision for DBT adoption without mandating it and can also provide ERCs with the mandate to review DBT implementation.

7 Market Development

7.1 Open Access Implementation

Section 2 (47) has been proposed to be amended such that the open access takes place according to the rules made under the Act rather than the regulations of the Commission. However as per Section 42 (6) of the draft amendment, the appropriate state commission shall facilitate open access subject to conditions specified by it.

There is a need for clarity as to whether the rules specified in Section 2 (47) refer to rules made by the Central Government under Section 176 or rules made by the State Government under Section 180. There is also a need to clarify what aspects of open access operationalisation will be specified by the rules and which will be subject to regulations decided by concerned ERCs. Open access, especially on a large-scale as envisaged in the draft amendment will have significant impacts on tariff, supply and service quality for regulated consumers, DISCOM finances and even grid operations.

It is suggested that open access should take place in accordance to the regulations of the concerned State ERC to ensure that it is part of a phase-wise, calibrated and comprehensive approach to the transition. Therefore, the draft amendment to Section 2(47) should be removed.

7.2 Cross Subsidy Surcharge (CSS)

The first and second proviso of Section 42 (6) of the draft amendment suggest that the surcharge to be levied on open access consumers along with wheeling charges should be capped at 20% of the wheeling charge. Further the amendment also suggests that this surcharge should be eliminated in 2 years in a manner specified by the Appropriate Commission. The prevailing act specifies the levy of a surcharge on open access consumers to meet cross subsidy requirements in the area of distribution whereas this is not specified in the draft amendment. The provisions allowing additional surcharge has also been removed from the draft amendment.

Phasing out cross-subsidy surcharges as proposed in the draft amendment is necessary to encourage long term open access but the reduction in cross subsidy surcharge (CSS) should be a reflection of the reduction in cross-subsidy itself, which should to take place in a calibrated manner. Thus, such a change cannot take place in 2 years. Further, capping the surcharge at 20% of wheeling charges and also removing the possibility of additional surcharge levy will reduce the revenue provided to the DISCOMs substantially in a sudden manner further affecting its precarious financial position. Therefore it is suggested that:

a. CSS should continue to be levied on open access consumers but should be phased out in the medium term (say,5-7 years)
b. The maximum CSS to be levied on open access consumer can be fixed at Rs.3/unit to be applicable from the date of commencement of the Act. As CSS will be the same in nominal terms, the real rate of CSS will reduce over time. This will provide certainty of CSS charges for open access consumers.

Many distribution companies have also been voicing concerns over issues with power procurement planning and scheduling due to short term open access. The act can also specify that Commissions can also levy concessional CSS on consumers availing medium or long term open access.

7.3 Transmission charges for open access

As per Section 40 (c)(ii) of the draft amendment, transmission charges and any surcharge for open access consumers should be specified by the Commission of the state where the consumer is located. If the open access is inter-state, as per this provision, it is not clear how the inter-state transmission utility and the transmission utility of the state where the generator is located can avail transmission charges. It is suggested that clarity be provided in this context in the final amendment.

7.4 Forward and Futures for market development

The proposed amendment of Section 66 suggests that manner for development for forward and futures contracts in electricity shall be developed in a manner notified by the Central Government.

The draft amendment seeks to introduce several changes which will increase consumption via open access and captive, increase the number of supply providers and increase renewable energy generation.

Such developments would be aided by the development of a robust electricity market. In that respect, the proposal to introduce forward markets will help mitigate volumetric and price volatility and encourage growth of the market. However, market development should also take place in a phase-wise manner and given the current uncertainty and state of flux, the power market is in too nascent a stage for the introduction of futures contracts.

Thus, it is suggested that the amendment only specify that only forward contracts (i.e. Non-Transferable Specific Delivery) should be developed in a manner specified by the Central Government and the ERCs. Futures contracts should not be allowed at this stage of market development by any means and can be introduced via further amendments to the Act when the time is opportune.

7.5 Market Monitoring

Given the increase in number of potential players and possible expansion of market operations in the coming years, key trends in the market should be monitored to inform policy and regulatory processes to ensure a smooth transition.

Section 66 can also be amended to mandate the constitution of market monitoring committees under the Central and State ERCs. The committee consisting of researchers, representatives from the distribution and supply licensees, LDCs, traders, power exchanges, open access and captive consumer associations should be required to track key trends in intra-state and inter-state market operations and submit quarterly and annual reports to the appropriate commission. Such reports should also be available in the public domain. The committee should be able to engage experts or consultants for this study with prior approval from the Appropriate Commission.

Further, Section 66 can also be amended so that ERCs publish annual reports tracking key parameters with respect to open access, captive consumption, activity by trading licensees and exchanges etc. based on information submitted to them by licensees.

7.6 Framework for storage

Storage needs to be defined and it requires a framework to be specified for appropriate investment, procurement and utilisation activities to take place. As the technology is changing rapidly with significant advancements every year on a global scale, the definition and the framework for storage should not be codified in the Act. However, the Act should mandate the Central Government to specify rules under Section 176 to define and provide a framework for storage technologies.

8 Selection and Appointment of ERCs

8.1 Selection Committee Composition for Appointment of Regulators

The Selection Committee for appointment of regulators for the Central and State Commission have been changed in the draft amendment such that:

- As per drafts amendments in Section 78, the Central Commission Selection Committee comprises of secretaries from the Department of Legal Affairs, Ministry of New and Renewable

Energy and the Ministry of Power along with two Central Government nominees as members. The ex-officio Chairperson is to be the Chairperson of the Public Enterprises Selection Board.

- As per the draft amendments to Section 85, regarding selection committee for state ERCs, a serving judge of the Supreme Court nominated by the Chief Justice of India is to be the Chairperson of the Selection Committee. Further, the secretaries of Central sector line ministries such as the Ministry of Power, Ministry of New and Renewable Energy as well as the Chairpersons of CERC and CEA are to be members. The only state government representative is to be the Chief Secretary or the Secretary of the state power ministry.

The selection committee proposed at the state level seems to have many central government representatives, especially from line ministries in the energy sector, which provides the Central Government undue powers and point of influence in the appointment process of a crucial state level institution. The presence of secretaries of line ministries of the central government related to the power sector is dominant even in the selection committee of CERC as per the draft amendment. In order to ensure the concurrent nature of the power sector is preserved and to safeguard the autonomy of the regulatory institutions, the selection committee at the central and state levels should have a comparable and analogous composition with adequate representation. It is suggested that the provision to have Central Government nominees for the Selection Committee of the CERC, which can vary opportunistically, is removed. The composition suggested in Table 1 for the Central and State Commission selection committees can be incorporated with the amendment of Section 78 and Section 85.

Table 1: Suggested Composition of ERC selection committee

Central Commission Selection Committee Composition	State Commission Selection Committee Composition
Serving Judge of the Supreme Court nominated by the Chief Justice of India as Chairperson	Serving Judge of the High Court nominated by the Chief Justice of the High Court as Chairperson.
Secretary of the Ministry of Power or Ministry of New and Renewable Energy, Member	Secretary of State Department/Ministry dealing with power, Member
Chairperson of the Central Administrative Tribunal, Member	Chairperson of the State Administrative Tribunal, Member
Chairperson of the Public Enterprises Selection Board, Member	Chairperson of the State Public Service Commission, Member
Secretary, Ministry of Law and Justice, Member	Secretary, Department/ Ministry dealing with law, Member

In the draft amendment, Section 85 (4) which specifies that the Selection Committee for the State Commission shall recommend two names for every vacancy referred to it have been removed. However, a similar specification in Section 78 (7a) for the Central Commission has been retained. It is suggested that the Section 85 (4) be retained to provide the State Government the similar options as the Central Government during selection.

Given that the institutional autonomy depends upon the process of appointment and due to the number of governance issues that have been brought to light in this regard in the recent past, it is suggested that the selection committee should be mandated to record in writing, the reasons for recommendation of candidates, which should be made available in the public domain.

8.2 Eligibility of members of Commissions

Regulatory Commissions have a major role to play in the power sector and their independence and autonomy are crucial for the long term sustainability of the sector. Since the inception of regulatory commissions in the electricity sector, almost 70% of Chairmen of State Electricity Regulatory Commissions were previously members of the state bureaucracy and almost half of the members were previously with regulated utilities. Thus, there is a high risk of regulatory capture. To allay this risk and still benefit from the knowledge and experience of people who have worked in the sector, it is suggested that Section 77 and Section 84 which pertain to the Qualification for appointment of members to the Central and State Commissions respectively be amended. It is proposed that no person should be considered eligible for the post, if they were part of a line ministry related to the power sector, were employed by the regulated utility or were a consultant to the regulated utility, within the previous two years. An amendment to this effect is necessary to ensure regulatory autonomy and legitimacy of the institution.

8.3 Composition of Commissions

With the number of matters before the regulatory commission as well as the proliferation of licensees, increase in market operations, envisaged in the draft amendment, Commissions will have a crucial role to play and it is important that they have adequate capacity to handle matters.

It is suggested that Section 82 (4) of the Act be amended such that State Commissions have four members and one chairperson instead of the present two members and one chairperson. The act can also be amended such that, if it is necessary, the concerned commission can choose to operate in benches provided that each matter is decided by a minimum of three members of the Commission. This will enable the commission to efficiently carry out its functions and responsibilities. Similarly, Section 76 (5) of the Act can be amended to increase the composition of the Central Commission to six members. The composition should be one chairperson, four members and the Chairperson of the CEA as the ex-officio member. This commission can also be given the mandate to operate in benches provided there a minimum of 3 members deciding on a matter.

8.4 Vacancies in Commissions

Regulatory Commissions, especially at the state level have a history of prolonged vacancies which affects the functioning of the Commission and is also used as a tool for opportunistic appointment by the concerned Government. This issue can be addressed in the Act amendment. In case a vacancy in the State ERC is not filled within six months, the selection committee for the Central ERC should recommend two names and the State Government should be bound to appoint one of the recommended candidates. Further, this provision should also apply to vacancies concerning the commission chairperson as well, not just the members. Only such a strong provision may act as a serious deterrent for states to avoid delays in appointing the commission members or chairperson.

9 Effectiveness of Institutions

9.1 Accountability of ERCs

The draft amendment has several provisions to increase accountability of the performance and functioning of Electricity Regulatory Commissions.

As per Section 109A of the document, the Forum of Regulators (FoR) shall constitute an independent committee from time to time, consisting of persons of eminence to review ERCs once in three years. The committee functions, terms of reference and timelines for reporting are to be specified by the FoR. The committee can engage experts and consultants with approval of FoR. The review report along with recommendations is to be submitted to the Central Government.

The provision is a welcome step towards increased accountability. Measures necessary to strengthen this mandate, which should be part of the Act by modifying proposed Section 109A are listed below:

- The persons of eminence appointed for review shall not have any conflict of interest.
- The review report along with the recommendations shall be submitted to the Central Government and Appropriate State Governments.
- The final review report shall be made public and shall always be available on the FOR and the concerned commissions' websites.
- The review shall assess the capacity of the regulatory commission along with its performance. Thus the review should also assess staffing status and requirements.
- Based on the review of capacity, FoR can also issue guidelines for institutional strengthening.

Along with this, the draft amendment also has Section 79 (5) and Section 86 (5) where the Chairperson of the Central and State Commissions are to review the Commissions on a quarterly basis. The review report for the Central Commission is to be submitted to the Central Government and the report for the State Commission is to be submitted to both Central and State Governments. There is a comprehensive review of the functioning of the regulators by the FoR under Section 109A of the draft amendment. Further Section 100 and 101 of the Electricity Act have provisions to hold the Central Commission accountable before each House of Parliament. Similarly, Section 104 and Section 105 have provision to hold the State Commission accountable before the State Legislature. Given these stronger review mechanisms and accountability channels, there is no requirement for provisions for self-reporting on a quarterly basis as it is time-consuming and reduces autonomy. It is suggested that draft amendments in Section 79 (5) and Section 86 (5) be removed.

Section 121 has also been changed in the draft amendment to ensure APTEL reviews orders passed by the Commission to ensure compliance to provisions in the Act. This change was perhaps introduced to review the functioning of the ERCs. It is suggested that this change be removed from the amendment as APTEL has already has such powers under its original jurisdiction.

Section 99 (1A) of the draft amendment suggests that the surplus funds collected by CERC be deposited in the Consolidated Fund of India after CERC meets its annual budgetary requirement. This would provide CERC financial freedom only on an annual basis. Such a move would unnecessarily reduce the

financial autonomy of the institution and reduce its capacity for institutional strengthening. It is suggested that Section 99 (1A) be removed from the final amendment.

9.2 Need for matters to be dealt with expeditiously

Matters before the Commissions, especially matters related to tariff determination have been unnecessarily delayed in the past. In a move to ensure that such processes take place in a timely fashion, the amendment of Section 64 (1A)[2] is welcome. However, the reduction in time prescribed for issue of tariff order from 120 days to 90 days from the receipt of the petition or initiation of the suo-motu proceeding as specified in Section 64 (3) of the draft amendment should be removed. This is because adequate time is required to ensure wide-spread public consultation and to consider all matters before the commission during tariff determination. This is critical as most tariff orders are expected to be multi-year tariff orders, looking performance and tariff for 3 to 5 years. Currently a typical tariff order includes true-up for one year, annual performance review for another, review of sales, power procurement and costs for the Multi-Year Tariff period and determination of wheeling, CSS and various other charges along with tariffs. Similarly, given the complexity of issues it is necessary that 120 days be provided to the APTEL to decide matters as suggested in Section 111 (5) of the Act.

9.3 Proceedings before Regulatory Commissions

The prevailing Act requires the commissions to undertake public consultation for important issues such as tariff and grant of licence. However, some Commissions have interpreted this term in the narrowest sense and have avoided conducting any public hearings even in crucial areas of tariff determination. Such approach is highly undesirable, as it prevents the consumers and the public from participating in a crucial sector process. In order to ensure accountability of the regulators to consumers whose interests they are supposed to protect, and to broaden the scope for public participation by providing a voice to consumers and citizens, in addition to participation of consumer representatives under S 94, the Act should clearly define the term 'public consultation' such that public consultation necessarily includes public hearings for the following matters:

- All tariff related matters concerning distribution, transmission, supply as well as retail sale of power
- Approval of power purchase agreements
- Granting and revocation of licences
- Issues pertaining to access, quality of supply and service and compliance with standards of performance.

For all other proceedings before the commission, consumer representatives appointed under Section 94 (3) should be allowed to participate in commission proceedings.

Further, to enable such representation of public and consumer interest before the commissions it is suggested that Section 94 (3) of Act be amended such that Commissions shall be required to appoint

[2] If the application is not filed in time, the Appropriate Commission shall, not later than thirty days of the last date specified for such filing, on its own initiate proceedings for determination of tariff and call for such information, details and document as the Appropriate Commission may require for such determination.

consumer representatives for all matters before it. The existing clause uses the non-mandatory term 'may'.

9.4 Autonomy of Load Dispatch Centres

With the rise in the numbers of entities using the grid, the need for grid stability and smooth operations will increase. The independence and autonomy of Load Dispatch Centres become extremely critical. Even though setting up LDCs as separate entities was part of the earlier reform process; little progress has been made, especially at the state level. Hence, it is suggested that the Act should mandate establishment of independent companies to operate LDC within one year of Amendment.

9.5 Powers of CEA to require statistics and returns

Section 74 of the draft amendment has enhanced the powers of CEA to obtain information regarding traders, exchanges, open access, captive entities and large renewable energy supply companies. The mandate to demand data from power sector entities was already granted to CEA under Section 74 in the prevailing Act. However, non-compliance with such a data request by CEA to sector entities is not punishable under sections 142 or 146.Lack of such deterrence enables utilities and generators to routinely delay submission of crucial data to CEA. Non-compliance might increase with the increase in entities to track. To avoid such situation, the mandate of CEA needs to be sharpened by clearly defining the consequences of such non-compliance. It is suggested penalties for non-compliance to Section 74 are also part of the amendment. Section 74 should also mandate that CEA has the responsibility of publishing periodic reports on specific issues. This could include the status and extent of open access, revenue subsidies and extent of cross subsidy provided to various categories, status and extent of captive consumption and other such information crucial to understand the state electricity sectors.

9.6 Composition of APTEL

According to Section 112 of the draft amendment, the APTEL (Appellate Tribunal for Electricity/ Energy) shall consist of the chairperson and not more than five members. Such a specification limits the number of members and hence the number of benches which severely affects the operation of APTEL. Well-functioning benches are necessary to increase access to APTEL, especially for meaningful implementation of circuit benches, which can greatly help small consumers to participate in the proceedings before the APTEL. Thus, it is suggested instead of hard coding the number of Members in the amendment, the central government should decide the number of members and benches from time to time.

9.7 Mandate for Regional Benches of APTEL

Since APTEL has replaced the High Court as the forum for appeals against the orders of ERCs, it should be at the very least as accessible as High Courts. To ensure this, the Act should mandate setting up of permanent regional benches in the four major metro cities of the country.

10 Supply and Service Quality

10.1 24x7 Power Supply

As per Section 42 (1) of the draft amendment, the distribution or supply licensee has the obligation to supply 24x7 power to consumers. The proposed amendment will enshrine the commitment to reliable supply in the Act and is welcome. It is not clear if such an obligation should also apply to agricultural consumers who are typically supplied eight to twelve hours of power. Even in the Power For All documents, jointly released by the State and Central Government, the commitment to supply to agricultural consumers was for lesser number of hours. Electricity for agriculture is required only for a limited time during the year and 24x7 provision can also lead to excessive use of water. Further several state governments are in the process of implementing schemes to solarise agriculture, which necessitates that only day time power be provided to agricultural consumers. For all these reasons, it is suggested that this much needed amendment to the act be accompanied with a proviso exempting agriculture consumers. The hours of supply to agricultural can be based on orders of the State Commission.

10.2 Compensation provided for select parameters

The draft amendment to Section 57 (3) suggests strict penalties and compensation in case of defaults specified in the standards of performance. This is a good provision and must be retained. The provision should be strengthened by specifying that automatic compensation be provided for select parameters as specified in the regulations of the Appropriate Commission.

This is important as most consumers are unaware of these standards and the compensation in almost all states only takes place if there is a complaint or appeal by the consumers. This is often a long drawn process entailing significant transaction costs which discourages consumers.

The mandate in the Act can enable SERCs to specify that for select parameters in the Standards of Performance (SoP) regulations, compensation can be provided automatically which reflects in the next bill of the consumer. For example, compensation can be provided if the DISCOMs internal systems reflect that:

- Consumer has been facing fuse-off for durations longer than the standards specified in the regulations
- There was a delay in billing, burnt meter replacement or distribution transformer repair for longer than the time specified in SoP Regulations.

The details of such compensation provided as well as metering, billing and supply related details can be provided to the SERC for scrutiny and analysis, following which the distribution or supply licensee can be provided a reasonable opportunity to be heard for all cases of automatic compensation on an annual basis. In case automatic compensation is not provided, SERC can initiate suo-motu proceedings to investigate the matter and provide appropriate directions and penalties.

The suggested amendment to Section 57 (2) is as follows:

If a licensee fails to meet the standards specified under sub-section (1), without prejudice to any penalty which may be imposed, he shall be liable to pay such compensation to the person affected as may be determined by the Appropriate Commission.

Provided that before determination of compensation, the concerned licensee shall be given a reasonable opportunity of being heard.

Provided that for certain parameters as specified in the Standards of Performance Regulations, compensation can also be provided automatically which reflects in the next bill of the consumer. The concerned licensee can be provided reasonable opportunity to be heard once a year for such class of compensation cases in a public process before the Commission.

In case automatic compensation is not provided, the Appropriate Commission can initiate proceedings to investigate the matter and provide appropriate directions and penalties.

10.3 Addressing issues faced by a group of consumers

There are many instances of repeated non-compliance by DISCOMs of Standards of Performance specified by the State Commission. As per Section 42 of the prevailing act and as per State ERC regulations, individual consumers can approach the Consumer Grievance Redressal Forum (CGRF) seeking compensation for non-compliance. This is limited in its scope. To increase accountability of distribution and supply licensees, the Act should mandate that a group of more than 50 consumers can approach the Commission directly to ensure compliance with SoP regulations and seek compensation on behalf of group of consumers (which may include consumers not approaching the commission specifically) for repeated non-compliance. Further, a group of consumers being served by the same licensee, with similar complaints should also be allowed to approach the CGRF to represent their views together. Such a provision will help highlight systemic issues with supply and service quality and also increase accountability of utilities.

10.4 Compliance with CGRF and Ombudsman orders

It is often observed that any order passed in favour of the consumer by the Consumer Grievance redressal Forum (CGRF) or the Ombudsman is often challenged by the utility before the High Court. Many times, though the High Court has not stayed the implementation of the CGRF or Ombudsman order, the utility stops payment of compensation, stating that the matter is before the Court. This forces the consumer to file cases under 142 and 146 before the Commission to claim the compensation that rightfully belongs to them. To avoid this hassle and deliberate delay, the Act should clearly state that unless there is stay against a CGRF or Ombudsman order, the utility should be bound to act as per the same.

10.5 Theft and unauthorized usage

Presently, the Act does not distinguish clearly between electricity theft (Section 135) and unauthorized use of electricity (Section 126). The confusion arises from the fact that Section 135 uses the term 'unauthorized use'. This gives the inspecting officer the discretion to book even a Section 126 offence under section 135. This ambiguity leads to harassment of many consumers who are not guilty of theft.

The penalty clauses under section 135 are very stringent and should not be applicable for mere unauthorized usage. Hence, there is an urgent need to rectify this issue. To remove this ambiguity, the Section 135 should deal strictly with theft of electricity alone and should not use the term 'unauthorized use'.

11 Definitions

Many terms used frequently in the draft amendment are not defined in Section 2.

Some terms such as 'tariff', 'point of supply'. 'single point connection', 'bulk supply tariff', 'merchant capacity', 'village electrification', 'household electrification', 'net metering', 'energy banking', 'Renewable Energy Certificate' and 'public consultation' often used in the sector should be defined in the Act.

Further there are terms crucial to the changes in the sector that the draft amendment envisages which are not defined. These include 'Intermediary company', 'Direct Benefit Transfer' and 'Prepayment meter'.

There is also need for clarity with respect to some definitions in Section 2 of the draft amendment:

- In Sub-Section 75, the definition of 'utility' should be modified to account for supply licensees as it is currently defined in the context of distribution licensees.
- In Sub-Section 15A, the definition of 'decentralised distributed generation' does not specify where it is grid connected or not.
- In Sub-Section 41A, 42A, 'long term' and 'medium term' are defined in the context of power purchase when long term and medium term can apply to transmission and distribution open access as well.
- In Sub-Section 57B, 'renewable energy service company' is defined but the term is not used anywhere in the Act.

In order to avoid misinterpretation and unnecessary litigation, terms can be defined and definitions can be modified as suggested.

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