

Comments on proposed Electricity (Late Payment Surcharge) Amendment Rules, 2021

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The Ministry of Power published the [Draft Electricity Late Payment Surcharge Rules 2021](#) seeking public comments on 19th August 2021. Prayas (Energy Group)'s comments pertain to proposed Rule 6 reproduced below:

"If a distribution licensee has any payment including Late Payment Surcharge outstanding after the expiry of seven months from the due date of payment as prescribed in the PPA; then, notwithstanding anything contained in the Power Purchase Agreement or the Power Supply Agreement, the generating company may sell power to any consumer or any other licensee or power exchanges, for the period of such default, while retaining its claim on payment of fixed charges or capacity charges from the distribution licensee, after giving a notice of at least fifteen days to the distribution licensee. The claim, if any, shall be reconciled on annual basis and shall be limited, to only under recovery of the fixed charges or capacity charges."

Faced with the challenge of ensuring timely payment to generators, the Ministry of Power has introduced a slew of measures in the recent past which are detailed in Table below:

Central Government Notification	Proviso	Measure
Order on Opening and Maintaining adequate LC, 2019	Para 5	Detailing responsibilities of the LDCs to ensure opening and maintaining LC as per PPA
	Para 5 (v)	Detailing entitlement for encashment of LC by generator after grace period of 45 to 60 days (6 to 9 weeks)
	Para 5 (vi)	Specifying that DISCOMs are to continue to pay fixed charges in case power is not dispatched in case adequate LC was not maintained
	Para 6	LDCs to ensure DISCOMs do not have access to power exchanges or STOA in case LC is not maintained.
Late Payment Surcharge Rules, 2021	Rule 4	Introduction of incremental, additional late payment charge of 0.5% for every successive month of delay up till 3% higher than the base rate
	Rule 4	Debarring DISCOMs from procuring power from exchanges or having grant of short-term open access in case of outstanding bills for more than seven months.

Further, most power purchase agreements, transmission service agreements and power supply agreements have detailed, enforceable clauses to ensure payment security as well as payment of penalties/ compensation in case of delays.

In addition to these measures, Rule 6 proposes that:

- If any payment is delayed for more than seven months, generating companies can sell contracted power to other consumers till payments are cleared.
- This is provided that DISCOMs are given a notice of 15 days.
- During this period, the DISCOMs have to continue to pay fixed charges to the generator.

It is our suggestion that the proposed Rule 6 be deleted from the final rules. This is because it is unfair to the procurers and infringes upon the sanctity of the contract signed between the two parties. Further, a similar clause to ensure continued payment of fixed charges already exists in case LC is not maintained.

Implementation of Rule 6 could reduce faith that DISCOMs have in the processes for power contracting. This could lead to increased litigation, place undue burden on DISCOM finances, increase consumer tariffs, raise risk of load shedding and contribute to increase in state-owned capacity addition which could affect private investment in the sector. Some of the issues with implementation of Rule 6 are detailed below:

1. **Undue benefit to generators especially with lack of clarity on disputed claims:** As it applies to all pending payments, it does not distinguish between genuine delayed payments and disputed claims. As per Rule 6, if a claim is disputed and bills are raised by the generator, unless payments are made for the disputed amounts, the DISCOM loses the right to its contracted capacity and will have to pay fixed charges for the capacity. This is especially challenging given pendency of cases and the history of long drawn litigation before multiple forums such that disputes are seldom settled within seven months. If the provision applies to disputed claims, it will even affect DISCOMs which have high payment discipline and will disproportionately affect those DISCOMs contracting power where the costs are loaded on capacity charges rather than variable charges.
2. **Unilateral decision for sale of power increases price and volume risk faced by contracting DISCOM:**

As per the Para 6.2 (1) of the National Tariff Policy, 2016:

"Notwithstanding any provision contained in the Power Purchase Agreement (PPA), in order to ensure better utilization of un-requisitioned generating capacity of generating stations, based on regulated tariff under Section 62 of the Electricity Act 2003, the procurer shall communicate, at least twenty four hours before 00.00 hours of the day when the power and quantum thereof is not requisitioned by it enabling the generating stations to sell the same in the market in consonance with laid down policy of Central Government in this regard. The developer and the procurers signing the PPA would share the gains realized from sale, if any, of such un-requisitioned power in market in the ratio of 50:50, if not already provided in the PPA. Such gain will be calculated as the difference between selling price of such power and fuel charge. It should, however, be ensured that such merchant sale does not result in adverse impact on the original beneficiary(ies) including in the form of higher average energy charge vis-à-vis the energy charge payable without the merchant sale. For the projects under section 63 of the Act, the methodology for such sale may be decided by the Appropriate Commission on mutually agreed terms between procurer and generator or unless already specified in the PPA."

The purpose and intent of this provision is to ensure sale of un-requisitioned contracted capacity while ensuring adequate compensation from market sale for the procurers who have contracted the capacity. Such sale is initiated only with **mutual agreement** of the buyers and the sellers. A similar clause exists in most PPAs as well. With proposed Rule 6, in case of delays or non-payment of disputed amounts, the sale can be made unilaterally by the generator and gains from the sale will also not be shared with the DISCOM. In essence, the DISCOMs loses the right to capacity procured and consumers continue to bear the burden of fixed costs.

3. **Applicability of policy on non-DISCOM power sale agreements:** As per the draft amendments, with the proposed deletion of Rule 2, Rule 6 is also applicable to non-DISCOM PPAs. Many agreements for

third party sale are between small consumers and generators. Enforcement of contract and management of disputes already increases transaction costs for such arrangements. Over and above, having such a clause would increase the risk perception for consumers wishing to avail power via open access.

It is better if payment security is ensured through contract enforcement rather than through rules to ensure a stable, clear and certain policy environment that encourages investments and competition.

Given these concerns and considering the existing policy and contractual measures to ensure timely payment, it is our submission that the risks of such an arrangement both on DISCOMs and its consumers far outweighs the societal benefit from this provision. While generators are guaranteed timely payment, DISCOMs will face increase on their working capital requirements to ensure payment. This is even for disputed amounts just to ensure right to retain contracted capacity. Notification of a such a rule will set a flawed precedent for power procurement and investment in the sector, much like the retrospective revision of renewable energy tariffs sought by state governments in some states in India.

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