

**Comments and Suggestions on the  
Draft Electricity (Change in Law, Must-run status, and other Matters) Rules,  
2020  
&  
Draft Electricity (Late Payment Surcharge) Rules, 2020**

**By Prayas (Energy Group)**

Dated 22<sup>nd</sup> October 2020

*Based on proposed drafts published by the Ministry of Power on 1<sup>st</sup> October, 2020 and 8<sup>th</sup> October, 2020 respectively seeking public comments<sup>1</sup>.*

The Ministry of Power published the Draft Electricity (Change in Law, Must-run status, and other matters) Rules 2020 on the 1<sup>st</sup> October 2020 and the Draft Electricity (Late Payment Surcharge) Rules, 2020 on 8<sup>th</sup> October, 2020 seeking public comments.

In this context, Prayas (Energy Group)'s (PEG) comments and suggestions on the draft rules are given below.

**1 Electricity Rules are not the right avenue to address such issues.**

The draft rules on Change in Law define 'Change in Law' and propose a mechanism for adjustment in tariff due to Change in law. Further the rules reinforce the 'must-run' status for renewables and supplement it with the need for at least 24 hours advance notice for any such proposed RE curtailment after which the RE generator must mandatorily sell such power in the power exchange. For trading licensees procuring power on behalf of DISCOMs, it notes that tariff applicable will be the weighted average of all suppliers selected in the bidding process, even if the agreements were signed prior to these rules being notified.

The draft rules on late payment charge define the 'bank rate' as the Marginal Cost of Funds Based Lending Rate of the SBI plus 500 basis points and further defines the 'due date' and 'late payment surcharge'. It proposes that the late payment surcharge will be at the 'bank rate' or the rate provided in the agreement, whichever is lower.

- a. Existing Standard Bidding Guidelines and PPAs already have clauses related to Change in Law as well as late payment surcharge. Further for cost plus projects, wherein contracts/PPAs may or

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<sup>1</sup> For more details, please see:

[https://powermin.nic.in/sites/default/files/webform/notices/Draft\\_Electricity\\_Change\\_in\\_Law\\_Must\\_run\\_status\\_and\\_other\\_Matters\\_Rules\\_2020.pdf](https://powermin.nic.in/sites/default/files/webform/notices/Draft_Electricity_Change_in_Law_Must_run_status_and_other_Matters_Rules_2020.pdf)

<https://powermin.nic.in/sites/default/files/webform/notices/Draft%20Electricity%20%28Late%20Payment%20Surcharge%29%20Rules%2C%202020.pdf>

may not explicitly have clauses related to Change in law or late payment surcharge, these terms are noted in the prevailing tariff regulations and have a history of regulatory treatment in states. For example, Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2019 define Change in Law<sup>2</sup> (pp. 11) and also considers it as part of uncontrollable factors (pp. 31). Similarly, the rate of late payment charge and the mode of payment for cost plus generators is stipulated in the same regulations.

- b. The rules propose a centralised one size fit all approach and is also unclear about whether the rules will apply prospectively or retrospectively<sup>3</sup>. Such rules will themselves have to be interpreted as a Change in law event and will further increase litigation around the issue and complicate decision making in the sector.
- c. Existing contracts between two parties are entered into in accordance with the prevailing regulatory environment and the contractually agreed risk and reward mechanism. The proposed centralised rules over-ride all such existing contractual agreements and state regulatory frameworks and are against the letter and spirit of the Electricity Act, 2003. The rules do not uphold the 'concurrent' nature of the subject matter as well.
- d. Further, it is unclear whether the MoP has the jurisdiction to implement rules under the EA, 2003 on these substantive issues. The statutory advice from the CERC<sup>4</sup> to the MoP on these rules also concludes that the ERCs have jurisdiction in these matters and clearly advise the MoP 'not to proceed with the framing of rules on these subjects'

*19. The subjects covered under the draft Rules at Serial No.(a) and Serial No.(c) and partly at Serial No.(b) (with regard to transmission access, charges and losses) are covered under the substantive functions of the Central Commission (also State Commissions), satisfy the twin conditions as enumerated by Hon'ble Supreme Court and therefore the Central Commission (also State Commissions) have the jurisdiction to make regulations. As these subjects are not covered under any of the substantive functions of the Central Government and therefore, making of rules in exercise of rule*

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<sup>2</sup> (15) "Change in Law" means occurrence of any of the following events: a. enactment, bringing into effect or promulgation of any new Indian law; or b. adoption, amendment, modification, repeal or re-enactment of any existing Indian law; or c. change in interpretation or application of any Indian law by a competent court, Tribunal or Indian Governmental Instrumentality, which is the final authority under law for such interpretation or application; or d. change of any condition or covenant by any competent statutory authority in relation to any consent or clearances or approval or Licence available or obtained for the Project; or e. any change in taxes or duties, or introduction of any taxes or duties levied by the Central or any State Government.

<sup>3</sup> <https://energy.economictimes.indiatimes.com/news/power/opinion-draft-rules-on-change-in-law-must-run-status-and-its-implications/78611919>

<sup>4</sup> [http://cercind.gov.in/2020/Advice\\_Gov/statutory\\_advice\\_15-10-2020.pdf](http://cercind.gov.in/2020/Advice_Gov/statutory_advice_15-10-2020.pdf)

*making power under Section 176 to carry out the provisions of the EA2003 will be against the letter and spirit of EA2003.*

*21. In light of above, the Ministry of Power is advised under Section 79(2) of the EA2003 not to proceed with the framing of rules on these subjects. The EA2003 envisages coordination between the Central Government and the Central Commission through various provisions. Under Section 79(2) of the EA2003, the Central Government can refer any matter for advice of the Central Commission. Further, Section 3 of EA2003 provides for formulation of National Electricity Policy and Tariff Policy by the Central Government and Section 79(4) provides that the Central Commission in discharge of its functions under EA2003 shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under Section 3 of the EA2003. It would, therefore, be in the larger interest of the sector that the Central Government and the Central Commission work in harmony by honouring the respective jurisdiction carved out in the EA2003.*

- e. As per section 180(o) of the prevailing act, it not just the central government, but also states that can notify rules on these issues. Thus, there is lack of clarity on jurisdiction, not just between ERCs and GoI but also between state govts and the GoI. This would make decision making in the sector even more complex and can even result in long drawn out litigation. The sector has just about managed to put an end to a decade long jurisdictional battle on the issue of forward markets. This has impeded development of crucial market instruments. A jurisdictional battle on such crucial contractual issues (as proposed in the rules) which influence 80% of the consumers final tariff would be a serious setback to policymaking in the power sector and should be avoided.
- f. **Considering all these factors, there is no need to have separate rules on these issues and change in law and late payment surcharge should be dealt with as per existing PPAs/SBDs and regulatory framework and the proposed rules should be withdrawn.**

## **2 Complexities and unanswered questions with proposed approach.**

- a. In addition to the issue of jurisdiction, some of the proposed rules open up new questions and are likely to create implementation challenges and hurdles within the sector. Some examples are described below.
- b. **Change in Law:** Rule 3(b) notes that the pass through will happen in an expeditious manner within 30 days while 3(e) notes that it shall come into effect automatically after 30 days of the Change in Law event. 3(f) notes that the generator or procurer will submit relevant documents to the Appropriate ERC within 30 days and 3(g) direct the ERC to verify the calculation and do true up as needed within 60 days. 3 (c) further notes that where change in law pass through formula is not given in the PPA or SBDs, the Appropriate Govt would prescribe the same. This whole approach raises a lot of unanswered questions, some of which are detailed below:

1. What happens if the procurer does not agree that it is a change in law or if there are disputes on the due amount?
2. What happens if the Commission disallows passthrough but the procurer has already paid the amount? Will the amount be repaid with appropriate carrying cost or will the DISCOM have to bear the brunt?
3. Why is the Appropriate Govt asked to specify a pass through formula and not the Appropriate ERC?

The proposed approach is heavily lop-sided in favour of the Generators and is not balanced with regard to the risk and reward sharing. Further, since the Commission approval is required in any case, any payment in accordance with the PPA/SBDs should only take place after the due process has been completed rather than automatically.

- c. **Mandatory sale of planned curtailed RE power:** The Indian Electricity Grid Code (5.2 (u) and 6.5(11))<sup>5</sup> already mandates the must-run status for wind and solar power, subject to grid security or safety. Most state RE tariff regulations or state grid code also specify the same. Section 4(1) in the draft rules notes that must-run plants can be curtailed only in the case of technical constraint or grid security. 4(2) further notes that where notice for curtailment is given 24 hours in advance, generator shall mandatorily sell the power not scheduled in the Power Exchange. 4(3) notes that amount realised through such sale of power would be adjusted with the compensation and the rate of compensation would be 75% of the PPA tariff (4(4)) if the same is not laid down in the PPA/PSA.

The proposed rules (4(1) and 4(2)) do not seem to be in congruence. If backing down can happen only due to grid security or technical constraints, then surely the said RE generation should not take place for system security reasons. Hence, the question of selling such un-scheduled generation in the Power Exchange cannot arise, for if it were safe to generate and inject the said RE power into the grid, then there would be no grid security issue and the procurer would be obliged to buy the same. Therefore 4(2) would only dilute the implementation of the must-run status for wind and solar power plants and hence should not be taken forward.

- d. **Late Payment Charge:** Timely payment should be encouraged and late payment charge should act as a deterrent. This would be in line with MoP's efforts to ensure timely payment and enforcement of payment security mechanism etc. Currently, different competitive bidding based PPAs have different arrangements with regard to late payment rates. The uniform methodology proposed in the rules would itself be construed as change in law and could lead to further litigation. As bank rates have been low for a while, there could also be petitions for retrospective applicability. Therefore, the rules should not attempt to change late payment surcharges which are enshrined in existing contracts/regulations.

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<sup>5</sup> <http://www.cercind.gov.in/Regulations/Signed-IEGC.pdf>

- e. **Considering such complexities and implementation challenges, the proposed rules will hinder sector development and hence should be withdrawn.**

### **3 Areas where further clarity/amendments needed.**

We take this opportunity to highlight some areas/issues where further clarity through appropriate instruments would help take the sector forward.

- a. MoP should finalise amendments to the rules for captive power which have been in the draft stage since 2018, in order to promote long term investments in captive power.
- b. MoP should finalise the amendments to the short term bidding guidelines which have been in the draft stage since 2018, in order to allow OA transactions on the DEEP portal.
- c. With regard to must-run status for RE, the need of the hour is the instil greater transparency and due process in the whole mechanism for backing down of RE power in the case of grid security. MoP should direct POSOCO to come up with a guiding procedure/framework in line with the IEGC which would objectively identify possibilities for grid disturbances/in-security and which would be followed by LDCs while giving written instructions to the RE generators.
- d. MNRE/MoP should amend RE (solar, wind, wind-solar hybrid, blended wind, RTC RE-Thermal) bidding guidelines such that the compensation rate/mechanism is harmonised across RE technologies.

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