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आरोग्य, ऊर्जा, शिक्षण आणि पालकत्व
या विषयांतील विशेष प्रयत्न

Amrita Clinic, Athawale Corner, Karve Road Corner, Deccan Gymkhana, Pune 411 004; INDIA
Tel.: (020) 2542 0720: Fax: (020) 2543 9134. E-mail: peg@prayaspune.org Web-site: www.prayaspune.org/peg

31 December 2013

To,
The Secretary,
Ministry of Power
Shram Shakti Bhavan
Rafi Marg, New-Delhi

Subject: Prayas submission related to amendments proposed to the Electricity Act 2003

Ref: Draft of amendments proposed to the Electricity Act 2003 uploaded on the Ministry of power website

Dear Sir,

This submission is regarding the matter mentioned above. Amending the Electricity Act 2003 is a crucial process with far reaching implications for the sector. Considering this fact, we feel it is of utmost importance to proceed in this matter only after carefully evaluating all aspects of the proposed changes and giving all stakeholders adequate opportunity to comment on the same.

Recently, the power sector has been facing serious challenges such as large scale financial losses, rising tariffs, deteriorating performance of existing plants, fuel availability and quality related concerns and poor quality of supply and service. The proposed amendments aim at making fundamental changes to the sector structure and organization, but it is not clear how these changes will help in tackling the issues mentioned above. Unfortunately, though the draft amendments are available on the Ministry of Power's website, there is neither any review of a decade of implementation of the 2003 Act, nor a clear statement of intent that will help to understand how the proposed changes will aid in the present and long term context. In spite of this lack of clarity, we are submitting our preliminary comments and suggestions based on the plain reading of the proposed draft and the same are attached as an Annexures to this letter. These inputs are based on the insights gained by Prayas through its long term and consistent engagement with the sector issues as well as the policy and regulatory processes.

We sincerely hope that the Ministry will consider our suggestions and deliberate on the same. We will be glad to provide any further clarifications or information regarding our submission and/or assist in this process in any other manner as may be desired by the Ministry. We request the Ministry to kindly take our submission on record.

Thanking you
Sincerely

Ms. Ashwini Chitnis
Senior Research Associate
Prayas Energy Group
Athawale Corner, Karve Road,
Deccan Gymkhana
Pune, 411004 India
Tel. 91-20-25420720, 65205726
www.prayaspune.org/peg

Encl: Annexure I, Annexure II

Annexure I

Comments and suggestions from Prayas (Energy Group) regarding the draft of amendments proposed to the Electricity Act 2003

Outline of the submission

1. Background and context

The Electricity Act 2003 was a watershed in power sector reforms. It brought about fundamental changes in the sector design and institutions. The main objective was to promote efficiency and provide better service delivery through competition. However, even after a decade of implementation, the sector today continues to be plagued by same ills which the Act aimed at remedying such as, enormous financial losses (accumulated by several State Distribution Companies), rising cost of generation and supply, and high level of technical and commercial losses. Apart of these challenges, we as a nation also face the huge responsibility of providing electricity access and ensuring reasonable hours of supply to a large number of hitherto non-electrified households.

Given this background, it is of utmost importance to undertake a thorough review of the Act implementation (along with the national policies) over the last decade to understand which provisions were useful and effective and which areas need modification. There needs to be basic clarity regarding issues pertaining to design of the legislation and those emanating from its implementation. Unfortunately, there is no background paper or analysis published by the Ministry in this regard. Nowhere in the developed world has there been such reform exercise undertaken without sufficient public debate and/or background analysis. Therefore, the Ministry should first undertake a comprehensive review of implementation of the present Act, issues pertaining to institutional design, market operation and consider relevant international experience in light of these factors. The Ministry must share these findings and analysis with the public at large so as to facilitate a more informed public debate in this regard.

2. Need for a clear vision document and statement of intent:

The changes being proposed will have significant implications for the sector structure, institutional framework as well as competition. Given the above context, it becomes critical for the Ministry to define and articulate its vision behind the proposed reforms. Further, the Ministry should publish a clear statement of intent to justify the relevance and appropriateness of the proposed amendment and how will it achieve its stated objectives. It is important note that there are several issues pertaining to the appropriateness and relevance of the proposed approach in the Indian context, which are not clearly addressed in the proposed draft. To begin with, the objective behind introducing carriage and content separation is itself not clear. If the objective is to remove hurdles in competition for large consumers, the same can be achieved by simply modifying open access related provisions. But, if the aim is to introduce competition for small retail consumers, then it raises the following concerns, which are presently not addressed in the proposed draft.

a. International experience: There is no unequivocal support or evidence to establish that competition (through, carriage and content separation) translates into concrete benefits for all small retail consumers. Further, the relevance and applicability of the international experience regarding such reforms needs to be analysed while keeping in mind the Indian context. However, there is no background material shared by the Ministry to help understand this issue further. The only recent report available in this regard, is a study published by the Forum of Regulators, which also does not support the proposed approach unequivocally.

b. Reliable data: Most states have not undertaken AMR metering at distribution feeder and/or transformer level. Even today, large numbers of State Discom consumers (in some cases accounting for up to 30% or more of the total sales) are not metered and hence basic data regarding actual technical and commercial losses is not accurate. There is no reliable public data regarding actual hours of supply and load shedding.

c. Shortages, load shedding and lack of operating reserves: In many States, there is a huge gap between supply and demand, both in MU and MW terms. Peak deficits are as high as 10% to 15%. Most of the idle capacity is stranded on account of high cost of fuel such as gas. Thus,

introducing market operation in absence of operating reserves would entail the danger of further increasing load shedding and/or imposing burden of high cost power on small consumers.

d. Access is still a major challenge: Around 40 crore Indians (more than the entire population of the US) still do not have access to electricity, though the Government deadline for providing access to all was 2012. There are Central and State Government funded programs to enable grid expansion, but ensuring universal household electrification and reasonable hours of supply, still remains a major challenge.

e. High reliance on cross-subsidy and State subsidy: Financial viability of most State Discoms is dependent on subsidy support from State Governments. The in-built cross-subsidy mechanisms make the tariff structure (and tariff philosophy) quiet complex. Further, stark difference in supply and service quality between urban and rural areas adds to this complexity.

f. Concurrent nature: In India, electricity is a concurrent subject. Hence, though the Central Government can define a broad vision for the sector, it can only guide State level policy and regulatory decisions and thus, its role and influence is limited.

Given such peculiarities and constraints, there is an urgent need to critically assess how and whether the proposed approach is indeed the best alternative for the sector today and in the long term. Hence, in order to enable a more informed and focused public debate in this regard, the Ministry should do the following:

- Publish a vision document to share its long term plans and objectives for the sector policy and regulation and explain how the proposed amendments fit into this larger scheme.
- Publish a detailed background paper explaining the rationale of the proposed reforms in the context of:
    - Comprehensive review of implementation of the 2003 Act over the last decade
    - Issues pertaining to institutional design, information asymmetries and market operation
    - Relevance of international experience considering the unique challenges and constraints faced by the Indian power sector.
- Publish a 'statement of intent' clearly articulating the reasons for adopting the proposed approach and how it will help best to achieve the stated objectives, vis-a-vis other possible alternatives.
- Undertake a detail public consultation process involving all stakeholders such as; State Governments, State Regulatory Commissions, Generators, traders, transmission and Distribution Companies, consumer groups and civil society actors. All stakeholders should be given sufficient time and adequate opportunity to participate the process.

3. Comments and suggestions regarding key amendments being proposed

The following section highlights key issues pertaining to the proposed amendments and also suggests a possible alternate solution. More detailed clause-wise and section-wise comments are attached as Annexure II.

a. Separation of carriage and content**:** As per the present Act, multiple licenses can be issued for electricity distribution thereby allowing parallel distribution licensees to exist and function simultaneously. Through open access, large consumers have the option of choosing a supplier other than the designated distribution licensee(s) in their areas. However, as per the proposed amendment, there will be a one single distribution company which will be responsible for maintaining the distribution network i.e. the wires licensee and there will be several supply licensees. This is a major change which will have significant implications for the sector structure, institutional framework as well as competition. However, there are several issues with respect to this proposed approach which are not clearly address in the proposed draft and the same are listed below:

   i. Definition of supply license: In the context of proviso to section 14, the term "*load profile*" is not defined. It is not clear whether it refers to a class of consumers, consumer mix or simply connected load in kW terms. This clarity is essential to understand the criteria for deciding contestable consumers between multiple supply licensees. If eligibility is decided based on load profile in kW terms alone, then it would let the subsequent supply licensees to cherry pick good paying consumers and the 'area of supply' will cease to have meaning. To avoid this problem of cherry-picking, alternate supply license should be based on area of supply i.e. consumer mix and not just connected load in kW terms.

   ii. Supply obligation: The proviso to Section 51B - Duty to supply on request, states: "*Provided further the subsequent supply licensee shall have the obligation to supply electricity to such consumers or category of consumers as have been allowed open access under section 42*". Why supply obligation of the alternate supply licensees is limited to open access consumers is not clear. Practically, it may not be possible for any given supply licensee to fulfil such obligation. Further, in case the alternate supply licensee fails to fulfil its obligation, then the incumbent supply licensee is anyway mandated to be the supplier of last resort. Instead, it might be better to appoint one primary supply licensee per state, which shall be designated as the supplier of last resort for all consumers in that area/State. Having just one designated supplier of last resort will help in power purchase planning of such licensee. Also, in order to avoid misuse of the incumbent supply licensee's supply obligation, it is very important to ensure that consumers do not keep selectively switching between market and regulated tariff. Hence, all open access and/or alternate supply licensee consumers seeking supply from the incumbent supply licensee should be charged sufficiently high tariff so as to discourage such behaviour.

   iii. Cross-subsidy surcharge: As stated above, it is not clear whether consumers of an alternate supply licensee are to be considered as open access consumers under section 42. Further, the term cross-subsidy surcharge is mentioned only in the context of open access. So, unless the consumers of an alternate supply licensee are treated as open access consumers, the incumbent supply licensee will not be able to recover its loss of cross-subsidy on account of multiple supply licensees. This is an extremely serious issue given the precarious financial position of most State Discoms and their dependence on revenue from large consumers, and hence needs to be dealt with in a clear and unambiguous manner.

   iv. Incumbent supply licensee and transfer scheme related issues: The amendment keeps referring to incumbent and alternate supply licensees and the incumbent supply licensee

is mandated to be the supplier of last resort. In this regard, following issues are not clear:

- A licensee cannot be incumbent in perpetuity. Thus, for how long will a supply licensee be considered as '*incumbent*'?
- Post the transfer scheme, whether the newly formed supply licensee will still be considered as 'incumbent'?
- In areas where distribution licensees are privately owned, will the concerned State Government formulate transfer scheme for such companies too?
- In some cities such as, Mumbai, multiple distribution licensees are operational in the same area. In such cases, which licensee will be the 'incumbent' supply licensee and who will decide this?

The present draft does not throw any light on these critical issues and the same need to be expressly clarified. As mentioned before, rather than using the term, 'incumbent' it might be better to term the supplier of last resort as 'Primary' or 'Main' supply licensee and post transfer scheme, the State Government should notify such licensee(s) in consultation with the State Commission.

v. Problems with settlement mechanism: The amendment does not clarify responsibilities of the distribution and supply licensee(s) with regards to metering, billing and revenue collection. As per theory regarding separation of carriage and content, usually it is the distribution company that undertakes all these operations. The reason for this being that there needs to be reconciliation of the actual energy pumped into the grid by all supply licensee(s) and the actual sales to their consumers, at each 15 minute time interval. Even if one makes the supply licensee(s) responsible for metering, billing and revenue collection from its consumers, there will still be a need for reconciling whether it has actually pumped in as many units as it is billing to its consumers. Therefore, the Distribution Company or incumbent supply licensee will anyway have to be involved. This issue becomes more critical in light of the absence of reliable metering infrastructure even at 11 kV feeders and high levels of commercial losses and unmetered consumption. Given this situation, the settlement and reconciliation of alternate supply licensee(s) sales will become complex and in absence of reliable metering and billing data, it will also be commercially risky.

vi. Power purchase planning of incumbent supply licensee: As the incumbent supply licensee is the supplier of last resort, its power purchase planning becomes an important issue. This fact is widely acknowledged in the theory concerning competition in electricity sector. In this context, there are several issues which the amendment does not clarify. The first and foremost issue is the fate of existing power purchase contracts. Many States have tied up large quantum of power through various sources and many of these projects are in advanced stage of construction. The issue of status of all this pre-contracted capacity post such amendment needs to be clearly addressed.

vii. Preventing non-serious players from entering the market: An application for alternate supply license cannot be reject on grounds of already existing supply licensees. Also, the supply licensees can enlist consumers and collect security deposit from them and hence there is a real possibility of dubious companies to obtain supply license and run away with people's money and leaving the incumbent supply licensee responsible for catering to these consumers. This has happened in other countries as well. The standard way to take care of this issue is to have sufficiently strong eligibility conditions for qualifying as supply licensee. This of course has the drawback of introducing entry barriers which thwart competition. Therefore, this once again highlights the fact that managing and regulating multiple supply licensees will be a complex issue which needs careful examination before introduction.

b) Possible alternate approach: The points discussed above highlight serious issues regarding carriage and content separation based approach and thus, underscores the need for cautious, gradual and calibrated move. However, most of the objectives that the amendment strives to achieve through such separation of carriage and content, can be achieved with lesser complexity by simply segregating all open access eligible, let us say 1MW and above consumers, from the rest of the consumers of a distribution licensee. Such approach gives clarity in terms of power purchase planning and costs as well as cross-subsidy loss and helps to take appropriate corrective measures. Some of the critical issues which need to be considered for implementing this approach are discussed below:

- Separation of consumers in tariff determination process: With effect from the date of amendment, all the open access eligible consumers (demand/connected load greater than say, 1 MW), should be classified as 'deemed open access' consumers. While considering the annual revenue requirement (ARR) process of a distribution licensee, all such consumers should be separated from the rest of the consumers, irrespective of whether they explicitly opt for open access or not. The deemed open access consumers should be mandated to arrange for their supply requirement from either market or from the distribution licensees based on contract, as explained below. Such approach will help to arrive at a realistic estimation of power purchase requirement, sales, revenue from the rest of the regulated (i.e. non-open access eligible) consumers and potential loss on account of loss of cross-subsidy.

- Contracts with deemed open access consumers: Any deemed open access consumer willing to avail supply from a distribution licensee should be required to sign at least two to three year contract with the licensee for this purpose. This will give the licensee the necessary certainty for managing its power purchase planning. Any deemed open access consumer, who has not signed such contract but wants to avail supply from a licensee for a short period of time, should be charged higher tariff comparable to temporary charges. It should be explicitly clarified that issues such as terms and conditions of contract with deemed open access consumers, including early termination, grievance redressal, etc. shall be dealt with, through the distribution open access regulations.

- Obligation to serve non-open access consumers on priority: The distribution licensee shall be obligated to meet the demand of its regulated i.e. non-open access eligible consumers on priority. Only after meeting this obligatory demand, if it has any surplus it can sell the same to the market or deemed open access consumers. The concerned commission must regulate such contracts of the Discom with open access consumers, as it will affect the interests of regulated consumers. The commission must ensure that the demand of open access consumers is not being met at the cost of load shedding for the rest of the consumers.

- Stand-by support: The open access consumers can be given stand-by support by the distribution licensee. The appropriate commission should be mandated to determine the charges for such support and the same should be sufficiently high to discourage opportunistic switching between market and regulated tariff. It is important to ensure that stand-by support is not being provided at the cost of load shedding for the regulated consumers and at the same time, it should fully cover the cost associated with maintaining the additional reserve capacity. Therefore, the commission should be explicitly mandated to oversee this business and also to fix the said charge.

- Metering and billing: All open access consumers (deemed or otherwise) should be mandated to install Special Energy Meters (SEM). This will ensure transparency and accountability in the metering and billing data and will ease out operational issues. Similarly all distribution licensees should be mandated to install AMR meters for all 11 kV feeders. Further the commission should be mandated to undertake periodic independent

metering and billing audits as well as energy audits of all open access transactions to ensure that interests of the rest of consumers have not been adversely affected.

- No need for Parallel distribution licensee: If consumers eligible for open access are segregated from regulated consumers, there remains no need for provision such as parallel licenses for distribution of electricity and the same should be removed from the Act. Instead, the criteria for eligibility for open access can be reviewed and revised from time to time.

- Provisions to remove barriers to open access: In the long term, there should be an effort to reduce dependence of distribution companies on revenue from cross-subsidy. To achieve this, there should be a time-bound plan to progressively reduce cross-subsidy surcharge. However, any move in this direction should be taken after carefully accounting for all the factors and after due consultation with all stakeholders.

Thus, if the Ministry's main aim is to promote competition and efficiency through open access, the same can be achieved through the above mentioned approach, without getting into the complexities of carriage and content separation. We will be happy to develop this concept further make detailed submission on this issue.

c) **Franchisee related issues:** Past performance of several input based distribution franchisees suggests the need to bring its functioning and operation under regulatory scrutiny. Performance of the franchisees affects the licensee's financial health and hence the rest of its consumers. In Maharashtra, there have been cases where some franchisees have not paid their bills to the Discom for several months, thereby severely straining the Discom's working capital needs. In spite of repeated submissions highlighting these issues, State regulatory commissions still view the franchisee as a distribution company's sub-contractor. There is a need to change this approach towards regulating large franchisees (say above expected first year revenue of Rs. 100 Cr.) and hence the Act should clearly specify the Regulatory mandate in this regard. Such a mandate could be limited to review of certain aspect of franchisee's business to avoid regulatory burden and micro-regulation. Also, it needs to be pointed out that provision in proposed amendment for allowing supply licensees to appoint franchisee does not seem necessary and should be removed.

d) **Regulatory Appointment process and cooling off period:** The proposed amendments try to improve the appointment process but do not address the issue of lack of transparency. To address the same, the Act should specifically mandate the selection committee to issue a report which explains the reasons for arriving at the final decision and the same should be required to be published on the commission's website. Presently, there is strong path dependency in the appointments process and there seems to be a need for a cooling off period, even prior to joining as members or chairperson of a State commission. To achieve this, the Act should mandate that no officer of a regulated utility or State government should join in the capacity of member or chairperson in the same State commission for at least a period of 2 years following resignation or retirement.

e) **Role of the Appellate Tribunal:** Apart from being the legal forum for challenging orders of the regulatory commissions, the amendment also entrusts the Tribunal with the responsibility of facilitating review of a 'non-performing' Commission. Periodic reviews of the functioning of the regulatory commission are quiet necessary, irrespective of whether they are performing well or not. Therefore, it will be better to formalise an annual (or once in every two years) review process for all regulatory commissions through a larger panel of experts and consumer representatives. Instead of the Tribunal, perhaps the Planning Commission could be designated as the nodal agency for initiating and facilitating this process. For the reviews to be truly effective, the Act should make it mandatory for the nodal agency to publish the terms of reference for such review and seek public comments on both, the terms of reference as well as the performance and functioning of the commission concerned. All such performance review reports should be made public and should be available online on the commissions' as well as the nodal agency's website.

f) **Bilateral purchases and forward markets:** The proposed amendment allows forward markets along with bilateral purchases and trading of electricity. Given the Indian power sector structure and monitoring mechanisms, it needs to be studied whether the proposed approach can create any gaming possibilities. Non-Transferable Specific Delivery (NTSD)[1] electricity contracts can help mitigate volumetric and price risk, even if they are week or month ahead. However, if they are not NTSD contracts and if contracts have the option of financial settlement as in the case of derivatives, then in the present nascent state of electricity markets in India, it can result in increased volatility and uncertainty which speculators may take advantage of. Given the fact that there is no information in public domain regarding intra-state trading transactions, it is indeed questionable whether the time is right to introduce complex financial instruments such as forward contracts in the Indian power sector. This question becomes even more critical in light of the serious issues pertaining to monitoring, availability of reliable and accurate data and capacity of crucial stakeholders such as Load despatch centres, State Discoms and State regulatory commissions to effectively engage with such mechanisms. Therefore, till the time the basic issues pertaining to data and monitoring are not resolved, complex financial instruments and non NTSD contracts should be explicitly prohibited by the Act.

4. Issues not considered in the present amendment

Listed below are some of the salient issues which the proposed amendment does not consider. Detail clause-wise and section-wise comments on issues not addressed in the present amendment are attached as Annexure II.

a) **Renewable energy related issues:** The amendment is completely silent on issues concerning renewable energy. In this regard even the key definitions such as renewable energy certificates (REC), obligated entity in case of Renewable Purchase Obligations or cogeneration with respect to clause 86(1)(e) are missing. These terms need to be clearly defined. Further, the need for undertaking competitive bidding for procurement of renewable energy should also be explicitly defined. The detailed guidelines and procedures could be subsequently prepared by Ministry of New and Renewable Energy or the Ministry of Power, as per the directions under the Act.

b) **Theft and unauthorised 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 even the 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’.

c) **Broadening mandate of State Regulatory Commissions:** The State Regulatory Commissions have largely restricted themselves to issues of financial viability and tariff determination. Although, even the present Act confers the commissions with a much wider jurisdiction, many crucial issues largely remain neglected. With increasing open access and market penetration there is a need for explicit mandate to ERCs for improving transparency and reducing information asymmetries. In this regard, it would be helpful if the Act gives a clear mandate to the commission regarding the following issues:

   a. Explicit mandate to ensure universal access to electricity and for monitoring and reviewing implementation of central and state level schemes/programs aimed at improving electricity access
   b. Specific targets for implementing energy efficiency programs/schemes, similar to renewable energy purchase obligation.

[1] http://www.cercind.gov.in/2009/Advice_Gov/D.O_No_2009_date_19-2-2010.pdf

c. Explicit mandate to State regulatory commissions for tracking, recording, monitoring of data pertaining to all intra-state trading transactions (by formulating regulations on the lines of CERC's market monitoring) and publishing and maintaining all the relevant data and information on the website on a regular basis in an easily accessible and downloadable format.

d) **Improving transparency and public participation:** Last but not the least, is the issue of improving transparency in the functioning of the regulatory commissions. Presently, the Act mandates the commissions' to undertake public consultation before finalising tariff. It would help if the Act clearly and explicitly mandated the following:

a. Forum of Regulators shall be designated as the nodal agency to facilitate consumer participation in regulatory processes as well as before the Tribunal, by providing requisite financial, technical and any other assistance, as may be necessary.

b. For all proceedings before the ATE concerning tariff of large number of consumers, the Tribunal shall be mandated to appoint an 'Amicus curiae' to represent interests of the consumers before the Tribunal.

c. Presently, only large consumers, generators and licensee are filing cases before the ATE. In order to facilitate consumer participation in the proceedings before the Tribunal, among other things, there is a need to ensure functional benches of the Tribunal in all regional headquarters and not just in Delhi.

d. To further encourage consumer participation before regulatory commission, under section 94(3), all Commissions shall be explicitly mandated to appoint a certain minimum number of consumer representatives, per distribution licensee.

e. Instead of mere public consultation, the Act should specifically mandate all commissions to undertake public hearings in the licensee's area of operation, for all tariff related matters, including adopting or modifying tariff discovered as per the process under section 63.

f. The Tribunal and all commissions should be mandated to maintain all judgments, orders, rules, regulations and advice and/or official correspondence with the concerned Government and any other notifications issued by them on their websites in an easily accessible and downloadable format, at all points of time.

g. All licensees should be explicitly mandated to maintain all petitions and regulatory filings submitted by them on their websites in an easily accessible and downloadable format, at all points of time.

e) **Missing Definitions:**

Following terms are not defined in the present Act:

a. Tariff, Input based urban distribution franchisee, load profile, Point of supply, Single point connection, Bulk supply tariff, Deemed licensee status of Special Economic Zones, Merchant capacity, village and household electrification, etc. are not defined in the Act.

These terms should be clearly defined to make the interpretation easier and unambiguous.

5. Process and governance aspects

Amendment of an important law like the Electricity Act 2003 is a crucial process with long term implications for the sector policy and competition. Considering this, the changes should be designed with a long term vision and should not be influenced too much by short term problems and exigencies. Hence, we would once again request the Ministry of Power to look at this exercise from such long term perspective and undertake the following steps to ensure proper process for amendment:

- Publish a detailed background paper explaining the rationale of the proposed reforms in the context of:
    - Comprehensive review of implementation of the 2003 Act over the last decade
    - Issues pertaining to institutional design, information asymmetries and market operation
    - Relevance of international experience considering the unique challenges and constraints faced by the Indian power sector.
- Publish a vision document to share its long term plans and objectives for the sector policy and regulation and explain how the proposed amendments fit into this larger scheme.
- Publish a 'statement of intent' clearly articulating the reasons for adopting the proposed approach and how it will help best to achieve the stated objectives, vis-a-vis other possible alternatives.
- Undertake a detail public consultation process involving all stakeholders such as; State Governments, State Regulatory Commissions, Generators, traders, transmission and Distribution Companies, consumer groups and civil society actors. All stakeholders should be given sufficient time and adequate opportunity to participate the process.

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Annexure II

Section-wise, clause-wise specific comments and suggestions

Sr No	Section	*Proposed amendment*	Prayas Comments
1	Section 2 - Definitions	*(3) "area of supply" means the **area within which a supply licensee, is authorised** by his licence to supply electricity;*	Will the supply licensee have obligation to serve all consumers in a given area or only consumers eligible as per load profile criterion?
2	Section 2 - Definitions	*(8) "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity for use of members of such cooperative society or association, on terms and conditions as may be **prescribed by the Central Government** from time to time;*	Instead the definition should be worded as: "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity for use of members of such cooperative society or association, on terms and conditions as may be ***prescribed by the Central or State Government*** from time to time;
3	Section 2 - Definitions	*(27) "franchisee" means a person authorised by a distribution licensee to distribute electricity or **by a supply licensee** to supply electricity, as the case may be, on its behalf in a particular area, whether in a rural area or outside rural area, within his area of distribution or area of supply;*	No reason for a Supply licensee to appoint franchisee and the same should not be allowed. Functioning of the franchisee affects the licensee's financial health and hence the rest of its consumers. In spite of repeated submissions highlighting these issues, State regulatory commissions still view the franchisee as a distribution company's sub-contractor. There is need to change this approach towards regulating franchisees and hence the Act should clearly specify the Regulatory mandate in this regard.
4	Section 2 - Definitions	*(35A) "**incumbent** supply licensee" means the deemed supply licensee referred to in the second proviso to section 14;*	How long the incumbent supply licensee will be considered as 'incumbent'? In areas such as Mumbai, which have multiple or parallel distribution licensees, who will be considered 'incumbent'?

5	Part II - NATIONAL ELECTRICITY POLICY AND PLAN	*(3a) Notwithstanding anything contained elsewhere in any other provisions of the this Act and to the extent specified in the National Electricity Policy and tariff policy referred to in sub-sections (1) (2) and (3) to be mandatory,* ***the provisions thereof shall be binding on all including the Appropriate Commissions, Appropriate Government, authorities, licensees generating companies consumers.***	Legal tenability of such provision need to be verified as it overrides the central-state relationship in a concurrent subject like electricity. Also, it needs to be critically evaluated whether such provision is indeed desirable, as in some extreme circumstances, it may render the entire regulatory framework meaningless by overriding State Commission's regulatory jurisdiction and/or decisions.
6	Section 11 - Directions to generating companies	*PROVIDED that any* ***such direction of the Appropriate Government shall not affect in any manner the capacity of the generating station already committed under valid and binding contract and open access*** *for conveyance of such capacity duly taken.*	There seems to be no reason for excluding capacity contracted under PPA and/or by open access consumers, as the Government is expected to its powers under this section only in extra-ordinary circumstance and whenever such circumstances prevail, the Government should be able to utilise all capacity at its disposal, regardless of ownership or nature of contract. As the clause allows compensation for such use and also puts a definite time limit for which such directions can apply, hence there is no reason to exclude any particular type of capacity. If the concern is regarding possibility of State Government misusing this discretion, then specific provision could be made to allow the ATE to decide whether a State government's order in this regard meets the spirit of 'extra-ordinary' circumstances or not.
7	Section 14 - Grant of licence	*PROVIDED also that the Appropriate Commission may grant a* ***licence to two or more persons for supply of electricity to consumers having specified load profile within the same area of supply****, subject to the conditions that the applicant for grant of licence within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements 1 (relating to the capital adequacy, Credit worthiness or code of conduct) as may be prescribed by the Central Government, and no such applicant, who complies with all the requirements for grant of licence,*	The term 'load profile' is not defined. If eligibility is decided based on load profile alone, then it would let the subsequent supply licensees to cherry pick good paying consumers and 'area of supply' will have no meaning. If at all supply licensees are to be given, then it should be based on area of supply which will cover different types of consumers and avoid the problem of cherry-picking by alternate supply licensees.

		shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose:	
8	Section 14 - Grant of licence	*PROVIDED also that an intra-State trader shall be deemed to be a supply licensee for the area for which trading license has been granted to it and* ***shall have the obligation to supply on demand to all consumers who have been provided open access*** *in the said area of supply.*	There should not be any obligation on traders (or also alternate supply licensees for that matter), to provide supply to all open access consumers, as it will not be possible for any trader to practically fulfil such obligation. Moreover, for smooth and efficient market operation, like the open access consumers have choice to select generator, the same choice should also be there with the generators / suppliers / traders.
9	Section 42 - Duties of distribution licensee and open access	*PROVIDED that 2[****such open access shall be allowed on payment of a surcharge to the incumbent supply licensee****] which shall be in addition to the charges for wheeling and other charges payable to the distribution licensee,* ***as a compensatory charge****, as may be determined by the State Commission to take care of the requirement of cross subsidy and obligation to supply by such incumbent supply licensee:*	Cross-subsidy surcharge is mentioned only in the context of open access. Unless the consumers of alternate supply licensee are treated as an open access consumers, the distribution licensee will not be able to recover its loss of cross-subsidy. This is an extremely serious issue given the financial dependence of State distribution companies on the revenue from high end consumers. Therefore, whether consumers of an alternate supply licensee are to be considered as open access consumers and whether they will have to bear cross-subsidy surcharge, should be made explicitly clear.
10	Section 51B - Duty to supply on request	*Provided further the subsequent supply licensee shall have the* ***obligation to supply electricity to such consumers or category of consumers as have been allowed open access under section 42****.*	There should not be any obligation on alternate supply licensees to provide supply to all open access consumers as it will not be possible for any one licensee to practically fulfil such obligation. There should be just one primary supply licensee per state, which shall be the supplier of last resort for all consumers within that State.
11	Section 51E Power to require security	*(1) Subject to the provisions of this section, a supply licensee may require any person, who requires a supply of electricity in pursuance of section 51 B, to give him reasonable security, as may be determined by regulations, for the payment to him of all monies which may become due to him in respect of the electricity supplied to such person; and if that*	Supply licensees can enlist consumers and collect security deposit from them and hence there is a real possibility of dubious companies to obtain supply license and run away with people's money, leaving the incumbent supply licensee responsible for catering to these consumers. This has happened in other countries as well.

		person fails to give such security, the supply licensee in the area of supply may, if he thinks fit, refuse to give the supply of electricity for the period during which the failure continues.	The standard way to take care of this issue is to have sufficiently strong eligibility conditions for qualifying as supply licensee. This of course has the drawback of introducing entry barriers which thwart competition. Therefore, this once again highlights the fact that managing and regulating multiple supply licensees will be a complex issue which needs careful examination before introduction.
12	Section 51 H-Consumer Grievances Redressal	*(1) Every distribution licensee or* ***supply licensee, as the case may be, having the obligation to supply in the area of supply****, shall, within six months from the appointed date or date of grant of licence, whichever is earlier,* ***establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission****.*	In case of multiple supply licensees in the same area of supply, will there be multiple fora for redressal of grievances of the consumers? Is this desirable, in case the number of supply licensees proliferate? It may be more appropriate to appoint fora for redressal of grievances of the consumers based on area of distribution and it should have members from all supply licensees and consumer groups in that area. This issue needs more analysis.
13	Section 55 - Use, etc., of meters		The amendment does not clarify responsibilities of the distribution and supply licensees with regards to metering, billing and revenue collection. As per theory of separation of carriage and content, usually it is the distribution company that undertakes all these operations. The reason for this being that there needs to be reconciliation of the actual energy pumped into the grid by the supply licensee(s) and the actual sales to their consumers, at each 15 minute time interval. This issue becomes more critical in light of the absence of reliable metering infrastructure at feeder level and high level of commercial losses and unmetered consumers. Given this situation, the settlement and accounting of supply licensee(s) sales will become complex and in absence of reliable metering and billing data, it will also be commercially very risky.

14	Section 61 - Tariff regulations	*PROVIDED that the Central Government may direct such of the principles and methodologies specified by the Central Commission as it considers appropriate to be followed by the Appropriate State Commissions.*	Leaving aside the issue of legal tenability, it needs to be critically evaluated whether such provision is indeed desirable. A good example is MYT regime prescribed by the National Tariff Policy. Most States have implemented MYT, but that has not helped to achieve any time bound improvements in efficiency or have predictability and certainty in tariffs. The Central Government may not always be in the best position to identify the most suitable tariff approach for a given State and it is better to leave such matters with the State Commission.
15	Section 61 - Tariff regulations	*PROVIDED that the provisions of the National Electricity Policy and Tariff Policy to the extent specified in such policy shall be binding.*	As mentioned above, legal tenability as well as desirability of such provision needs to be critically evaluated as it overrides the central-state relationship in a concurrent subject like electricity.
16	Section 62 - Determination of tariff	*(a) supply of electricity by a generating company to* ***the incumbent supply licensee*** *including supply of electricity under a back to back arrangement involving an intermediary electricity trader or any other licensee*	How long the incumbent supply licensee will be termed as 'incumbent'? Who will be the supplier of last resort post transfer scheme? As the incumbent supply licensee is also the supplier of last resort, its power purchase planning becomes an important issue. This fact is widely acknowledged in both theory as well as practice. In this context, there are several issues which the amendment does not clarify. Some are listed below - Clarity regarding the fate of existing MoUs and/or power purchase agreements with Central, State and private power producers. - Many of these projects (with whom contracts or MoUs have been signed) are in advanced stage of construction. What will happen to this capacity upon commissioning? If it becomes stranded capacity based on merit order dispatch, who will bear the fixed cost? Issues such as these needs to be clearly dealt with. - In order to ensure that the incumbent supply licensee can be the supplier of last resort, it is very important to ensure that consumers do not keep selectively switching between open access, alternate supply licensees and incumbent supply licensee.
17	Section 62 - Determination of tariff	*PROVIDED further that there shall be no such determination of tariff by the Appropriate Commission under clause (a) of this sub-section if it is*	As per this clause, certain class of consumers would be deemed as 'open access' consumers who can choose their supplier and will have to bear a cross-

		specified in the National Electricity Policy or the Tariff Policy that the procurement of electricity by the supply licensee shall be done only by competitive bidding as per section 63.	subsidy surcharge as may be determined by the appropriate commission. In the context of this provision, the need for and role of subsequent supply licensees is not clear. If through open access, consumers anyway have the choice to select their supplier, why should there be any 'license' to supply?
18	Section 62 - Determination of tariff	*PROVIDED that in case of supply of electricity in the same area by two or more supply licensees, the Appropriate Commission shall not determine tariff for retail sale of electricity for such consumers or category of consumers in respect of whom both the incumbent licensee and the subsequent supply licensee have the obligation to supply, but may, for promoting competition among licensees, fix only maximum ceiling of tariff for retail sale of electricity.*	As mentioned before, it needs to be clarified whether the consumers of alternate supply licensee will be considered as open access consumers, i.e., will they have to bear cross-subsidy surcharge?
19	Section 64 - Procedure for tariff order	*(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application or initiation of proceedings, as the case may be, under sub-section (1) and* ***after considering all suggestions and objections received from the public***	Some ERCs have interpreted the term 'public consultation' in a very narrow sense and have refused to undertake public hearings, even in tariff matters. Hence, it is necessary that the Act should clearly and explicitly mandate the Commissions to undertake public hearings (not just consultation) in the licensee's area of operation for all tariff related matters, including adoption or modification of tariff discovered as per the section 63.
20	Section 66 - Development of market	*The Appropriate Commission shall endeavour to promote the development of a market (including trading and forward market) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in section 3 in this regard and other directions issued by the Appropriate Government in the public interest from time to time.*	The proposed amendment allows forward markets along with bilateral purchases and trading of electricity. Given the Indian power sector structure and monitoring mechanisms, it needs to be studied whether the proposed approach can create any gaming possibilities. Non-Transferable Specific Delivery (NTSD) electricity contracts can help mitigate volumetric and price risk, even if they are week or month ahead. However, if they are not NTSD contracts and if contracts have the option of financial settlement as in the case of derivatives, then in the present nascent state of electricity markets in India, it can result in increased volatility and uncertainty which speculators may take advantage of.

			It is questionable whether the time is right to introduce complex financial instruments such as forward contracts in the Indian power sector, in light of the serious issues pertaining to monitoring, availability of reliable data and capacity of crucial stakeholders such as Load despatch centres, State Discoms and regulatory commissions to effectively engage with such mechanisms. Therefore, till the time the basic issues pertaining to data and monitoring are not resolved, the Act should categorically prohibit complex financial instruments and non NTSD contracts.
21	Section 121 - Power of Appellate Tribunal	*(2)The Appellate Tribunal may, after hearing the Appropriate Commission, licensees and other interested persons decide on the adhoc tariff for the concerned generating company or licensee as provided in section 64 (3A).* *3(a) The Appellate Tribunal may, from time to time, constitute a committee consisting of not more than three persons of eminence to review the performance of the Appropriate Commissions or any of them in accordance with the quantifiable and time bound parameters to be prescribed and submit a report with recommendations of such committee to the Appellate Tribunal;* *(b)The Committee appointed under sub clause (a) shall be entitled to take the assistance of experts and consultants to be engaged with the approval of the Appellate Tribunal;* *(c)The Appellate Tribunal after considering the report of the committee and after giving an opportunity to the Appropriate Commission, forward the performance review to the Appropriate Government and also to the Appropriate Commission to be included in the Annual Report under section 101 or 104, as the case may be.*	Periodic reviews of the functioning of the regulatory commission are quiet necessary, irrespective of whether they are performing well or not. Therefore, it will be better to formalise an annual (or once in every two years) review process for all regulatory commissions through a larger panel of experts and consumer representatives. Instead of the Tribunal, perhaps the Planning Commission could be designated as the nodal agency for initiating and facilitating this process. For the reviews to be effective, the Act should make it mandatory for the nodal agency to publish the terms of reference for such review and also seek public comments on both, the terms of reference as well as the performance and functioning of the commission concerned. All such performance review reports should be made public and should be available online on the commissions' as well as the nodal agency's website.

22	Section 131 - Vesting of property of Board in State Government	*(4A) (a) The State Government may, after consulting the Appropriate Commission on the progressive separation of distribution activities of the distribution licensee from the supply of electricity, from time to time draw up a transfer scheme for transfer of such of the functions, the property, interest in property, rights and liabilities of the distribution licensees relating to supply of electricity to a company to whom supply licence for the concerned area of supply and publish such scheme as statutory transfer scheme under the Act.* *(b) The distribution licensee shall cease to be charged with and shall not perform the functions and duties under this Act with regard to supply of electricity to the extent of the transfers made under sub clause (a) on and after the effective date of such transfer*	Who will be the 'incumbent supply licensee', i.e. also the supplier of last resort, post such transfer scheme? In areas where distribution licensees are privately owned, will the concerned State Government formulate transfer scheme for such distribution companies too? In some cities such as say, Mumbai multiple distribution licensees are operational in the same area. In such cases, which licensee will be termed 'incumbent' supply licensee and who will decide this? Rather than using the term, it might be better to term the supplier of last resort as 'Primary' or 'Main' supply licensee and post transfer scheme, the State Government should notify such licensee after consultation with the State Commission.
23	Section 176 - Power of Central Government to make rules	*(ya) conferernment of powers of Department of the Central Government to the Chairperson, APTEL*	The intent as well as implication of the proposed change is not clear. There needs to an explanation as to why this modification is being proposed only then it would be possible to comment on its appropriateness.

Issues not addressed in the present amendment

Sr No	Section	Present clause	Proposed modification
1	Section 63 - Determination of tariff by bidding process	*Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.*	There seems to be lot of confusion regarding procurement of renewable energy based on competitive bidding. The Act can make this issue explicitly mandating competitive bidding for procurement of renewable energy. The detailed guidelines and procedures could be subsequently prepared by Ministry of New and Renewable Energy or the Ministry of Power, as per the directions under the Act.
2	Section 78 - Constitution of Selection Committee to recommend Members	*(6) The Selection Committee shall finalise the selection of the Chairperson and Members referred to in sub-section (5) within three months from the date on which the reference is made to it.*	In order to improve transparency regarding the appointment process, the Act should specifically mandate the selection committee to issue a report which explains the reasons for arriving at the final decision and the same should be required to be made a public document.

3	Section 78 - Constitution of Selection Committee to recommend Members	*(8) Before recommending any person for appointment as Member of the Appellate Tribunal or the Chairperson or other Member of the Central Commission, the Selection Committee shall satisfy itself that such person does not have any financial or other interest which is likely to affect prejudicially his functions as the Chairperson or Member.*	Given the strong path dependency in the appointments process there is also a need for a cooling off period before becoming eligible to join as members or chairperson of a State commission. To achieve this, the Act should mandate that no officer of a regulated utility or State government should be allowed to join in the capacity of member or chairperson in the same State commission for at least a period of 2 years following resignation or retirement.
4	Section 85 - Constitution of Selection Committee to select Members of State Commission	*(3) The Selection Committee shall finalise the selection of the Chairperson and members within three months from the date on which the reference is made to it.*	In order to improve transparency regarding the appointment process, the Act should mandate the selection committee to issue a report which explains the reasons for arriving at the final decision and the same should be required to be made a public document.
5	Section 85 - Constitution of Selection Committee to select Members of State Commission	*(5) Before recommending any person for appointment as the Chairperson or other member of the State Commission, the Selection Committee shall satisfy itself that such person does not have any financial or other interest which is likely to affect prejudicially his functions as such Chairperson or Member, as the case may be.*	Given the strong path dependency in the appointments process there is also a need for a cooling off period before becoming eligible to join as members or chairperson of a State commission. To achieve this, the Act should mandate that no officer of a regulated utility or Ministry of Power should be allowed to join in the capacity of member or chairperson in the Central commission for at least a period of 2 years following his or her resignation or retirement.
6	Section 86 - Functions of State Commission	*(1) The State Commission shall discharge the following functions, namely:--*	The State Regulatory Commissions have largely restricted themselves to issues of financial viability and tariff determination. Although, even the present Act confers them a much wider jurisdiction in many aspects of the sector functioning, many crucial issues largely remain neglected. In this regard, it would be helpful to clearly mandate the commission to following issues: - Explicit mandate to ensure universal access to electricity and for monitoring and reviewing implementation of central and state level schemes/programs aimed at improving electricity access. - Specific targets for implementing energy efficiency programs/schemes, similar to renewable energy purchase obligation. - Explicit mandate to State regulatory commissions for tracking, recording, monitoring of data pertaining to all intra-

			state trading transactions (by formulating regulations on the lines of CERC's market monitoring) and publishing and maintaining all the relevant data and information on the website on a regular basis in an easily accessible and downloadable format.
7	Section 86 - Functions of State Commission	*(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.*	- The Commissions must also be required to maintain all their orders, rules, regulations and advice or official correspondence with the concerned Government on their websites in an easily accessible and downloadable format.
8	Section 92 - Proceedings of Appropriate Commission	*(5) All orders and decisions of the Appropriate Commission shall be authenticated by its Secretary or any other officer of the Commission duly authorised by the Chairperson in this behalf.*	The Act should mandate that, all orders should be 'reasoned orders' and all proceedings before the commission shall be properly recorded and uploaded on the website. Similarly the commission should be required to publish a statement of reasons along with any rules or regulations notified by it.
9	Section 92 - Proceedings of Appropriate Commission	*(6) Every proceeding before the Appropriate Commission shall be decided expeditiously and with the endeavour to dispose the proceedings within one hundred and twenty days and in the event of delay the Appropriate Commission shall record the reasons for delay beyond one hundred twenty days*	The time frame should also be applicable to the process of formulating rules and regulation. There should be a time limit, say hundred and twenty days after last date for public process, to finalise any rules or regulations. ERCs sometime do not notify final regulations after undertaking consultation on a given draft, e.g. MERC invited comments and suggestions on draft regulations for standards of performance in August 2010, but as of December 2013, the final amended regulations are yet to be notified. Many such other examples can be cited which underscore the need for improving regulatory discipline in this critical area of formulating regulations.
10	Section 94 - Powers of Appropriate Commission	*(3) The Appropriate Commission **may** authorise any person, as it deems fit, to represent the interest of the consumers in the proceedings before it.*	In order to institutionalise consumer participation, there should be clear mandate for the commission to appoint at least a minimum (say three or four) number of consumer representatives for each distribution licensee.
11	Section 114 - Term of office	*The Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal shall hold office as such for a term of three years from the date on which he enters upon his office: PROVIDED that such Chairperson or other Member shall be eligible for reappointment for a second term of three years:*	The provision for reappointment is not desirable from good governance point of view and the same should be removed.

12	Section 124 - Right of appellant to take assistance of legal practitioner and of Appropriate Commission to appoint presenting officers	*(1) A person preferring an appeal to the Appellate Tribunal under this Act <u>may either appear in person or take the assistance of a legal practitioner</u> of his choice to present his case before the Appellate Tribunal, as the case may be.*	The option of seeking professional assistance should not be limited to legal practitioners and the clause can reworded as follows: *A person preferring an appeal to the Appellate Tribunal under this Act <u>may either appear in person or take the assistance of any professional consultant, including legal practitioner</u> of his choice to present his case before the Appellate Tribunal, as the case may be.*
13	Section 126 - Assessment	*3[(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorised use of electricity has taken place and if, however, the period during which such unauthorised use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.*	This power of discretion to use section 135 for unauthorized use, gives inspecting officer undue authority which can be misused. There have been cases where utility officers have exploited this discretion of interpretation to harass consumers who are not indulging in theft but can be blamed of unauthorized use for which penalty is significantly low.
14	Section 135 - Theft of electricity	*2[(1) Whoever, dishonestly,-- (e)uses electricity for the purpose other than for which the usage of electricity was authorised, so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both:*	As penalty provisions under theft are very stringent there is need to bring in clarity regarding when such clause becomes applicable. Removing the term 'unauthorized use' from section 135 can bring in this clarity.