Comments and Suggestions on the Draft Electricity (Amendment) Bill, 2020

By Prayas (Energy Group)

16th May 2020

Comments and Suggestions based on version of the draft amendment bill published on the website of the Ministry of Power for public consultation on 17th April and appended to public notice dated 27th of April 2020.

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The Ministry of Power published the draft Electricity (Amendment) Bill, 2020 as well as the accompanying statement of objects and reasons on the 17th of April 2020 for public comments[1].

While the proposed amendments seek to address specific issues to enhance the sector's financial viability, the approach seems piecemeal, impinges on the concurrent nature of the electricity sector, and could result in implementation challenges.

The draft amendments seek to introduce crucial structural and institutional changes in the sector without providing clarity on the long-term framework they aim to achieve. Further, there is also lack of clarity on many of the proposed amendments which, if introduced could increase ambiguity and litigation in the sector.

Having said that, some of the proposed amendments would provide legal mandate for certain necessary changes and are welcome[2]. At the same time, crucial changes aimed at long-term, structural improvements, especially with respect to ensuring balanced, risk-reward regime in retail competition framework for consumers as well the electricity distribution companies (DISCOMs), are not present. Additionally, increased accountability for supply and service quality is also missing.

Prayas (Energy Group)'s (PEG) comments and suggestions highlight issues with some proposed amendments and suggest changes towards increasing financial viability, protecting consumer interest and, improving accountability in the sector, which is also facing rapid changes due to technological shifts. Specific suggestions for modifications are highlighted in the text (***bold*** for proposed insertions/ additions, ~~***strikethrough***~~ for suggested deletions).

1 Need for articulation of sector structure that proposed legal framework seeks to achieve

Providing a legal framework through legislative changes is an important step in sector governance and is expected to provide at least a medium term direction to all stakeholders. Hence, before embarking on the path of legislative changes, it is desirable to analyse the experience of existing legislation and its implementation. Such a review would provide insights into which provisions were useful and effective and which areas need further modification. This would ensure that any proposals to undertake legislative changes would address core challenges in a comprehensive manner, rather than focusing only on a few, short term challenges in a piecemeal manner, as seems to have happened in the current scenario.

[1] https://powermin.nic.in/sites/default/files/webform/notices/Letter_dated_27_April_2020_for_extension%20of%20time%20for%20seeking%20comments.pdf

[2] For example, increasing the number of members of the Appelate Tribunal of Electricity (APTEL) would aid the establishment of functional benches and improve access to the forum. Stipulating deemed adoption of tariff for competitively bid projects after 60 days of reciept of complete application by the regulator would ensure timely completion of this crucial process. Further, providing clarity on NLDC functions and clear provisions on the levy as well as collection of cross subsidy surcharge from transmission open access consumers would help intra-state and open access transactions.

It is critical to have a broader framework to understand how and why the proposed changes are useful and needed in the context of past experience, present challenges and the emerging sector scenario, both domestic and global. Unfortunately, there is no 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.

In the absence of such background material, one is constrained to infer the same, based on the limited insights provided by the statement of objects and reasons and interpretation of the proposed bare amendments themselves. Often, it is not just the Act, but the associated policy formulation that lends clarity and helps understand the broader policy vision. In this context, it was crucial to have latest drafts of the associated policy documents also in the public domain along with the proposed amendments. This is especially relevant considering that revisions in these policies have been in the making for several months. This would have helped to understand the policy direction, long-term objectives and the possible alternatives that have been considered for dealing with the potential implementation challenges.

2 Subsidy provision and accountability

2.1 Phase-wise implementation of direct transfer of subsidy

The proposed amendment in Section 62(1d) introduces a proviso stipulating that the Appropriate Commission shall fix tariffs for retail sale of electricity without accounting for subsidy, which will be provided by the government directly to the consumer. Section 65 of the draft amendment bill further states that the State Government shall pay the subsidy amount directly to the consumer, in advance, and the distribution licensee shall charge consumers, the tariff set by the Commission.

While such a provision may help target subsidies and reduce wastage of public funds, the premature roll-out of such a provision is likely to be met with implementation issues owing to lack of clarity on certain fronts. Primarily, the proposed amendment and the statement of objects and reasons do not clarify whether the subsidy will be transferred to the consumer bank account or will be provided to the DISCOMs to be transferred to consumer accounts. If the subsidy is being provided to the DISCOMs, then delays in payment by the state government will result in significant strain on working capital requirements and affect their financial viability. This scenario may not be vastly different from the current situation in many states. Therefore, monitoring and ensuring timely payments is imperative. However, if the subsidy is transferred directly to consumer bank accounts, the following issues would arise, which need to be addressed:

- **Delay in subsidy payment**: Even in the event of a delay in the transfer of subsidy, consumers will be charged the retail tariff, which could result in significant tariff shock especially for categories that receive heavily subsidised or free power. In such an event, consumers may not make the payment or may make delayed payments, in anticipation that the full payment can be made after receipt of promised government subsidies. This could lead to a culture of non-payment, which in turn would result in the worsening of the licensee's AT&C losses. There is also lack of clarity on whether non-payment owing to such delayed subsidy transfer will result in disconnection of supply or whether the burden of delayed payment charges will be borne by the state government.
- **Advance payment**: While Section 65 states that the State Government is to pay the subsidy in advance, it does not clarify the basis of such advance payment. It is unclear if the disbursal of advance subsidy under this provision will be based on average bills, and whether bill payments by consumers will also be

carried out in advance. If so, it will give rise to cash flow issues, especially for agriculture consumers who have hitherto received highly subsidised or free power.

- **Identification of beneficiaries**: Agriculture and domestic consumers are the primary recipients of subsidy. Tenancy is a common practice within these categories, which further complicates the implementation of the direct benefit transfer (DBT) provision. The proposed amendments do not clarify whether the owner of the premises or user of electricity would receive subsidy in their bank accounts. Similarly, identification of beneficiaries is also an issue in cases of property/inheritance disputes, joint ownership and issues/ delays in updating consumer name and details for generations

Owing to the far-reaching impacts of DBT, large and varied pilots should be undertaken before mandating for adoption on a national scale. Toward this end, the DBT scheme should be implemented in a phase-wise manner over five years, and in the interim, DBT pilots, with emphasis on learning and addressing various implementation challenges should be encouraged.

2.2 Reporting of subsidy payments

Subsidy contribution accounts for about 20% to 25% of the total revenue requirement of many DISCOMs in India. Given the significant role of subsidy and the changing mode of its provision, it is essential to report details regarding subsidy in a disaggregated manner to ensure accountability. Such reporting should be done on a periodic basis (at least annual) by each DISCOM to the state commission. Consumer category-wise subsidy promised and received along with details of delay in payment (schedule for advance disbursal, the date of actual disbursal etc.) as well as the financial impact of such delays (which includes interest payments for short-term borrowing undertake due to delays) should be reported. In addition, the mode of financing payment (via budgetary allocation, adjustment with electricity duties/ loan repayments) should also be provided.

Suggested change: Section 65 should be amended to have provisions similar to Section 59 of the prevailing Act to ensure reporting of subsidy payments. Section 65 should be further amended to include a regulatory mandate for monitoring the implementation of DBT payments to consumer accounts.

3 Cross-subsidy and associated surcharge

3.1 Cross-subsidy reduction trajectory to be specified by SERCs

The third proviso of Section 42 (2), Section 61 (g) and Section 181 (p) of the proposed amendments state that cross-subsidies are to be reduced based on a trajectory specified in the National Tariff Policy. In the prevailing Act, it is the State Electricity Regulatory Commission (SERC) that decides this.

Specifying the trajectory through central government policy is not in accordance with the concurrent nature of the electricity sector. Further, state-specific realities, their sales and power procurement mix may not be accounted for in the central government policy, and therefore the proposal could adversely affect many states. Additionally, if such a mandate is introduced, it is likely that state governments would resort to measures such as increasing the electricity duty to retain cross-subsidising revenue. This would defeat the purpose the amendment seeks to achieve.

Given the recent increase in cost of supply and reduction in cross subsidy in many states, it is not clear if such a measure alone (without complementary measures to reign in working capital borrowing, reduce cost of supply) will address the challenges related to financial viability before the sector. As states should

retain the right to determine tariff design and take measures to ensure sector viability, it is vital that the cross subsidy reduction trajectory is fixed by SERCs, not the central government.

Suggested change: Drop amendments to Proviso 3 of Section 42 (2), Section 61 (g) and Section 181 (p)

3.2 Need to delink surcharge from cross-subsidy and remove separate additional surcharge

The fifth proviso of Section 42 (2), Section 181 (oa) and Section 181(pa) of the proposed amendments specify that the manner of payment and utilisation of the surcharge shall be specified by the State Commission. Such an amendment implies that SERCs can decide the purpose for which the surcharge can be utilised. Providing the flexibility with respect to levy and determination the surcharge allows for recovery of surcharge even when cross-subsidies are not part of the tariff design. Given uncertainty in demand and technological changes in the sector, keeping such modes for transition finance is necessary and welcome. However, proviso 3 of Section 42 (2) which explicitly states that the surcharge shall be used to meet cross subsidy requirement is retained. To ensure that the surcharge is de-linked from cross-subsidies, this provision must be deleted. In addition, if the surcharge is not linked to cross-subsidy, Section 42 (4) on additional surcharge can also be deleted. This would help simplify current tariff design.

Suggested change: Drop proposed amendment of third proviso in Section 42 (2) and Section 42 (4)

3.3 Need to extend surcharge levy to new captive consumers

The prevailing Act exempts captive consumers from paying surcharge specified in Section 42 (2). This was justified at a time when captive was mostly coal-based and consumers took significant risks to set up capacity with long gestation periods, incurring high investments. However, of late, new captive units are mostly renewable energy (RE) based and, thus, require low investments, contribute to meeting consumer requirement at competitive rates, while having relatively higher dependency on DISCOMs for standby and grid services. Given the services being provided by the DISCOMs and the challenges they face, it is crucial that captive units established after the enactment of the amendment are subject to the surcharge levied on open access consumers. This will contribute to sector viability and could reduce different treatment for open access and captive consumers over time.

Suggested change in fourth proviso in Section 42(2) :*Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant* ***before the enactment of this Act*** *for carrying the electricity to the destination of his own use.*

4 Structural changes in distribution business model

4.1 Revoke provisions related to distribution sub-licensee

Based on amendments proposed in Section 2 and Section 14, regarding introduction of distribution sub-licensees (DSLs) and amended provisions regarding franchisee, it appears that the intent is to enable alternative distribution entities to undertake distribution in smaller areas rather than the entire DISCOM area. If this is the intent, irrespective of the desirability of such an approach, proposed amendments create avoidable legal ambiguity and would not further this intent without long-drawn litigation.

In Section 2 (17a) of the proposed amendment, Distribution sub-licensee is defined as:

'*… a person recognized as such and authorized by the distribution licensee to distribute electricity on its behalf in a particular area within its area of supply, with the permission of the appropriate State Commission. Any reference to a distribution licensee under the Act shall include a reference to a sub-distribution licensee;'*

This proposed definition raises several questions. For example, do DSLs come under the dual jurisdiction of the distribution licensee and the regulatory commission, as a DSL is distributing electricity on behalf of the distribution licensee and all distribution licensee related provisions are also applicable to the DSLs. If this is the case, there is lack of clarity on many crucial fronts:

- Who will be responsible for consequences of non-compliance with certain regulatory orders or regulations, say, regarding standards of performance or renewable purchase obligation (RPO)?
- Are DSLs allowed to procure power directly? If not, what is the mechanism to do so? How is their power purchase rate to be decided?
- Are DSLs required to file separate tariff petitions and will the retail tariff in DSL area be different from the distribution licensee's retail tariff?
- Will DSLs share surcharge collected from open access consumers with DL?
- Are DSLs allowed to undertake capital expenditure? If so, how will this be regulated? Will it be recovered from consumer tariffs?

In addition, the distinction between a DSL and franchisee is also not clear. As per proposed amendment, DSL needs to operate '*with permission of appropriate state commission*' while franchisee is to be appointed / authorised by the licensee under '*information*' to the SERC.

Thus, it is clear that the proposed amendments regarding DSL would create significant confusion and legal disputes, and hence, should be omitted. Further, given the proliferation of franchisees, issues with pending payments and increased spate of termination of appointed franchisees, it is critical that they are brought under regulatory purview.

Any structural or ownership changes in a sector like electricity need to be introduced with adequate care, and through a well thought, comprehensive, legal framework with adequate checks and balances. Else there is grave danger of long drawn legal disputes and creation of lock-in with significant costs to the public.

Therefore, the Act should be amended to ensure that franchisees too, operate with permission of the appropriate state commission and are brought under regulatory jurisdiction. This will ensure accountability as well as rights of the franchisees, as this will allow them to approach SERC in case of any dispute with the DISCOM or such other relevant manner. This would also circumvent the need to have a complicated and sub-optimal structure like DSL.

Suggested change: Drop proposed amendment Section 2(17a) and proposed amendment to Section 14 regarding distribution sub-licensee. Modify amendment to Section 2(27) as suggested:

franchisee means a person recognized as such and authorized by a distribution licensee to distribute electricity on its behalf in a particular area within his area of supply, ***under information to the with approval of the*** *appropriate State Commission.* ***Subject to the provisions of the agreement entered into between the distribution licensee and the franchisee, any reference to a distribution licensee in the Act shall include a franchisee;***

4.2 Legal framework towards level playing field for different generators and retail competition

Introducing an alternate ownership structure in the distribution business without adequate emphasis and a proper legal framework to enable retail competition and provide a level playing field for different generation arrangements would imply moving from a public monopoly to private monopoly. This would not serve national and consumer interest.

With rapidly changing costs of alternate supply sources and with similar changes expected in battery storage systems, sales migration away from DISCOM and towards alternate supply options is certain to increase in coming years.[3] Any legislative changes at this stage should take cognizance of such trends. Considering all these aspects, we submit that amendments to Electricity Act 2003, should stipulate a balanced, risk-reward regime in retail competition framework for consumers as well as DISCOMs. In the current framework, open access consumers have full freedom to choose supplier and draw from DISCOMs' regulated supply when profitable, whereas the DISCOM is required to always plan for meeting demand from these consumers and incur costs for the same. This anomaly could be addressed with following measures:

- **Eligibility for open access should be reduced to 500 kW load:** Eligibility for availing open access should be reduced to 500 kW, from current 1 MW in next five years. Within a span of 5 years, in a phase-wise manner, all such eligible consumers (i.e those with sanctioned load >500 kW) should be declared as 'deemed open access' consumers, such that their tariffs are not determined by the regulatory commission. These consumers should be required to procure power from any supply source, including distribution licensee, at mutually negotiated tariff or through power exchanges.
- **Fixed surcharge for medium term, applicable on all migrating sales:** A ceiling / fixed (cross-subsidy) surcharge on all open access consumers (irrespective of source of supply, RE or conventional) should be levied. Actual amount of such surcharge could be decided by respective SERC, but Act should mandate that such a surcharge would remain constant for at least five years, and would decrease subsequently. Section 42 should be amended to facilitate this. Such a surcharge should also be applicable for captive generation plants, RE as well as conventional, set-up after the Act amendment, as mentioned in Section 3.3 of this submission. This will ensure distribution licensees are able to ensure financial viability as they transition to a new business model.
- **Solar feeder approach to rationalise subsidy, surcharge to finance part of revenue requirement:** DISCOMs requirement of subsidy to keep agricultural tariff affordable for farmers could be met by measures such as solar feeders (which drastically reduce subsidy requirement) and through surcharge revenue earned from open access and captive generation consumers, along with direct subsidy by state governments. More analysis and details of this approach are provided in the Prayas report referred above (in footnote 3).

These measures would deepen electricity markets, provide freedom for large consumers to source electricity at competitive rates, and mandate distribution companies to focus on providing quality service and supply to small and rural consumers.

Suggested change: Section 42 and Section 49 should be amended such that consumers with sanctioned load > 500 kW are open access consumers and their tariff is eventually not determined by the Commission. This change should be implemented in a phased manner within the next 5 years. Such a step would reduce the demand uncertainty and planning challenges before DISCOMs. Further, Section 42 should be amended such that the surcharge determined by the SERC remains ceiling rate / fixed rate for five years.

[3] For more details, please read report titled 'Electricity Distribution Companies in India: Preparing for an uncertain future', available here: https://www.prayaspune.org/peg/publications/item/377

5 Power procurement, scheduling and dispatch

5.1 Lack of clarity in enabling provisions for payment security mechanism

Section 28 (3a) and Section 32(2a) of the draft amendment bill stipulate that the RLDC/SLDCs are not to dispatch power unless adequate payment security is provided as per contract. Ensuring payment security as per contract will bring in payment discipline in the sector, which will increase the viability of the entire value chain[4]. Providing such a legal mandate to the LDCs will increase their autonomy and empower them to enforce commercial discipline as per the terms of the contract. However, there are multiple issues, which need to be addressed before the proposal is implemented:

- In case of disputes between the generator and the licensee on the amount payable (say, due to disputes regarding force majeure or change in law dispensation), it is not clear how the LDC will decide on the payment security required. Adequate measures need to be in place to ensure enforcement is not one-sided.
- It is likely that state generating companies will continue to be impacted especially as SLDCs may not be able to enforce contract between two state-owned agencies. Therefore, measures to increase the independence of the SLDCs are needed.
- It is not clear if all contracts allow generators to sell power elsewhere in the event of procurer default and in the absence of payment security. This needs to be clarified such that generators can exercise this option in case of payment default.

5.2 Need for clarity on functions of NLDC

Proposed amendment in Section 26 (6) stipulates that every RLDC, SLDC, licensee, generating company, sub-station and any other person connected with the operation of the power system shall comply with the directions issued by the NLDC. While compliance to NLDC directions as stated in Section 26 (5) are necessary for safety, security and stability of the grid, it is not clear why an additional blanket mandate is required in Section 26(6), which could potentially provide NLDC powers to issue directions even in commercial matters.

Without adequate safeguards to ensure that Section 26(6) does not encroach on the commercial freedom of state actors[5], the proposal reduces the autonomy of state agencies, especially the SLDC. Hence it is suggested can Section 26(6) be modified as follows:

*Every Regional Load Despatch Centre, State Load Despatch Centre, licensee, generating company, generating station, sub-station and any other person connected with the operation of the power system shall comply with the directions issued by the National Load Despatch Centre**, regarding matters listed in Section 26(4).***

6 Renewable Energy Promotion

6.1 National renewable energy policy

The amendment has proposed a new section 3A, wherein the Central Government may come up with a National Renewable Energy Policy. The policy is also to prescribe a minimum percentage of purchase of electricity from renewable and hydro sources of energy.

[4] Such a proposal to ensure payment security is legally tenable and enforceable as it does not propose any additional conditions beyond the contract unlike provisions in the June 2019 order issued by the Ministry of Power (Para 6).

[5] For example, such a provision could enable NLDC to provide directions to SLDC to provide open access to certain consumers who have been denied permission by the SLDC.

Given the vast renewable energy resources in the country, already announced policy targets (175 GW by 2022 and 450 GW by 2030) coupled with their very low and inflation-proof, fixed, discovered prices, section 3A is a much needed and welcome mandate.

6.2 No requirement for proposed hydro purchase obligation

Large hydropower is a well-established conventional generation technology, being in existence for over a century. While the social and environmental impacts of hydropower are already well known, it is increasingly not an economic resource as it is made out to be.

In response to a Rajya Sabha question on stalled hydro projects, the Ministry of Power stated that:

'As on 01.07.2017, there are 14 under construction Hydro Power Projects (above 25 MW), totalling 5,055 MW, which are stalled due to various reasons. The cost overrun calculated by CEA due to these stalled projects is Rs. 25,593.78 cr.[6]*'*

Thus, there is on average a Rs 5 Crore/MW **cost overrun** for these projects, which is in stark comparison to the **total** cost of new solar projects (Rs. 3.5-4 Crore/MW) and new wind projects (Rs. 6-7 Crore/MW). Further, the gestation period for hydro projects is significantly long, coupled with uncertainty due to various factors. The CEA quarterly review dated December 2019[7] notes the time delay for on-going projects. The average time overrun for the 35 listed projects is a staggering 7.7 years (Prayas analysis). Finally, a suite of emerging technologies can now provide a variety of the flexibility characteristics, which made hydropower a valuable resource for balancing in the past. Further, these are increasingly becoming available at much lower prices and with significantly lower gestation periods. Thus, the entire value proposition for hydropower needs to be looked at afresh.

Large hydropower should not be considered as a renewable energy resource for the purpose of the RPO and, hence, should not be made part of the non-solar RPO. Large hydropower may be counted towards renewable energy in appropriate international comparisons since this is the practice in most countries.
Suggested change: The proposed amendment should be redrafted so that there is no new separate HPO or a separate hydro obligation as part of the existing non-solar RPO. Similarly, section 3A, 61 (h), 86 (1) (e) and 176 (2) (aa) can drop the words, *'and hydro'* and section 142(2) can drop the words, *'or hydro'*.

6.3 Renewable Purchase Obligation and penalty for non-compliance

Statement of Objects and Reasons (pt. 12) notes that, *'To harmonize the national level commitments for environment protection, it is proposed to empower the State Commissions to specify the RPO as per RPO trajectory prescribed by the Central government from time to time'.*

As per proposed section 79 (4) and 86 (4), the CERC and SERCs shall be guided by the new National Renewable Energy Policy (3A). Further, as per the new renewable energy policy (3A) and 'Power of Central Government to make rules' according to 176 (2) (aa), the Central Government may *'prescribe a minimum percentage of purchase of electricity from renewable and hydro sources of energy'.* SERCs are to set RPOs as per (86)(1)e wherein SERCs shall, *also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee as may be prescribed by the Central Government from time to time.*

[6] https://powermin.nic.in/sites/default/files/uploads/RS24072017_Eng.pdf
[7] http://www.cea.nic.in/reports/others/hydro/hpm/QUARTERLY%20REVIEW%20NO.%2099.pdf

Considering the increasing economic competitiveness of renewables, their contribution to energy security, mitigation of local and global environmental pressures and low gestation periods, it is appropriate for the Central Government to prescribe a minimum RPO from time to time. However, while deciding minimum RPOs, it is crucial that there are comprehensive deliberations with states and sector stakeholders to consider existing state specific resource mix, load growth and profiles, RE grid integration challenges, renewable resource potential and the local environmental impacts of conventional generation among other factors.

Section 142(2) has significantly increased the penalties for non-compliance to RPO specified by the Commission. Such a step is appropriate and in the right direction given the benefits of low-cost RE generation. With such high penalties for non-compliance, renewable energy purchase as well as market operations will increase.

However, one change to the proposed amendment is suggested. There is a Rs. 2/kWh penalty after the second year of default. It is suggested that this be reduced to Rs. 1.5/kWh. The Act should also specify that the fund composed on penalties for RPO non-compliance should be dedicated for the further development of the renewable energy sector and no other purpose.

National minimum RPO to be determined after extensive consultation and keeping in mind state-specific constraints and realities. Penalty for non-compliance for default after second year can be reduced to Rs. 1.5/kWh and collected penalties to be utilised solely for RE development.

6.4 New mandate for a storage purchase obligation

Instead of a Hydro Purchase Obligation, a broader Storage Purchase Obligation (SPO) which can comprise of various existing and emerging cost-effective solutions that provide appropriate flexibility should be advocated. Prices of energy storage systems have fallen drastically and are predicted to further reduce in the years to come. Electricity storage systems are generally modular and are used in multiple renewable energy applications, like firming dispatch, shifting energy from off-peak to peak, avoiding curtailment etc. Further, it can play a vital role in avoiding transmission congestion, improving power supply quality, modernizing the grid and providing much needed flexibility to the system. Hence, it is critical to enhance procurement of cost optimal, grid scale energy storage systems in standalone mode or in hybrid form, coupled with wind or solar power. DISCOMs should be free to choose specific form of procurement - hybrid RE + storage or RE and storage independently.

Suggested change in Section 86 (1) with new clause (ee): ***promote energy storage, either as stand-alone projects or coupled with generation sources, and also specify required storage capacity, as a percentage of the total consumption of electricity in the area of a distribution licensee in a cost optimal manner;***

6.5 Need to re-visit policy for stand-alone systems

Section 4 of the Act regarding a national policy on stand-alone systems for rural areas and non-conventional energy systems has been retained in the amendment. Given the near universal reach of grid electricity in the country, the specific need for continuing with such a policy is questionable. The policy is only applicable for rural areas. Further, the term, 'non-conventional sources of energy' is not clear, given the earlier separate reference to renewable energy and is further not defined. However, with the proliferation of distributed generation systems and the ever-decreasing prices of energy storage, stand-alone systems may become quite economical in the coming years. Hence, there is a need to make this section more relevant to the current realities, on following lines.

Suggested change in Section 4: *Section 4. (National Policy on **distributed grid-interactive and** stand alone **systems ~~for rural areas and non- conventional energy systems~~**): The Central Government shall, after consultation with the State Governments, prepare and notify a national policy, **~~permitting~~ enabling grid-interactive and** stand alone systems (including those based on renewable sources of energy) **~~with or without energy storage) and other non- conventional sources of energy) for rural areas.~~***

6.6 Re-assess need for RGO and bundling of thermal power with RE given potential risks

The proposed clauses to enable the central government to formulate rules regarding renewable generation obligation (RGO) and bundling thermal power with RE should be deleted. The RPO framework has worked reasonably well and should not be further complicated by introducing RGO (which is not even defined in the proposed amendment). The proposal to provide round the clock (RTC) power by bundling power from RE and thermal projects will not address the issues with grid integration before the sector. Without establishing the need for RTC, long term power in states and without providing DISCOMs with flexibility in procurement, such a scheme could result in resource lock-ins, increase in unutilized or backed down thermal capacity, high burden of contractual payments for unutilised capacity with DISCOMs. These would severely affect DISCOM finances and the viability of the RE sector. Rather, alternative options to provide flexibility in power procurement in an optimal, cost-effective manner should be pursued.

Suggested change: Proposed amendments in Section 176 (2) (ac) and Section 176 (2) (ad) to be deleted.

7 Regulatory Functioning

7.1 Separate selection committees for ERCs at centre and state

The proposed amendment replaces Section 85 (Constitution of Selection Committee to select Members of State Commission) with a new Section 78 which refers to a centralised selection process for all electricity regulatory commissions, including those at the state level. The proposal takes away a key function of the state in appointing its own SERC members, which infringes upon the concurrent nature of the electricity sector. So, it should be ensured that there are Selection Committees both at the State and the Central level. In addition, for better representation, the current provisions for the selection committee need to be changed.

Suggested changes: Changes in the composition of Selection Committees by replacing following sections:-

Section 78 (1) :*The Central Government shall, for the purposes of selecting the Members of the Appellate Tribunal and the Chairperson and Members of the Central Commission, constitute a Selection Committee consisting of:*

- ***a) Serving Judge of the Supreme Court nominated by the Chief Justice of India……..…..…Chairperson***
- ***b) Secretary of the Ministry of Power ……..…….……..Member***
- ***c) Secretary of the Ministry of New and Renewable Energy……..…..Member***
- ***d) Chairperson of the Central Administrative Tribunal……..……...Member***
- ***e) Chairperson of the Public Enterprises Selection Board……..…..…..Member***
- *f) **Secretary of the Ministry of Law and Justice……..……..……....Member***

Section 85 (1)*: The State Government shall, for the purposes of selecting the Members of the State Commission, constitute a Selection Committee consisting of:*

- ***a) Serving Judge of the High Court nominated by the Chief Justice of the High Court…...Chairperson***
- ***b) Secretary of State Department/Ministry dealing with power…….. Member***
- ***c) Chairperson of the State Administrative Tribunal……..……..Member***
- ***d) Chairperson of the State Public Service Commission……...Member***
- ***e) Chairperson of the Central Electricity Authority or Chairperson of Central Commission..…..Member***
- *f) **Secretary, Department/ Ministry dealing with law……....Member***

In addition, to enhance transparency in the selection process, there needs to be mandate to ensure public availability of documentation which highlights the basis of selection.

Suggested change: The following sub-sections should be modified :

Section 78 (7) and Section 85(4): *The Selection Committee shall recommend a panel of two names for every vacancy referred to it* ***and provide publicly accessible documentation for basis of selection.***

7.2 Alternative procedures to address prolonged vacancies

The statement of objects and reasons states that the proposed Section 82(7) is aimed at ensuring SERCs are functional even with vacancies. The expertise of each SERC/JERC lies in detailed knowledge in matters of the concerned state/UT. So, entrusting another SERC with the regulating the sector in a state with vacant SERC seats will not adequately address the problem. Instead, mechanisms can be set in place to ensure timely appointments while upholding the federal structure of the sector.

Suggested change: Delete proposed Section 82 (7). Addition of clause (7) in Section 85:

Section 85 (7) ***If the positions of the Chairperson and/or Member(s) of any state commission remains vacant for greater than three months, the selection committee constituted for selection of CERC and APTEL, shall recommend two names for each post to the State Government. If the State Government fails to make an appointment of one of the recommended names within 30 days of receiving such recommendation, selection for the same shall be done by the Chief Justice of the state High Court.***

7.3 Powers of the Commission to make regulations

Sections 178 (2) (ze) and 181(2) (zp) specify that central and state commissions can make regulations on any matter other than those listed in Section 178 and Section 181. However, these sub-clauses have been deleted in the current proposal. This could potentially reduce inherent powers of the commissions to exercise their powers and ensure accountability. Mandate to specify regulations on matters at their discretion is necessary in a rapidly changing sector to ensure adequate and timely regulatory response. Hence, these provisions should be retained as in the prevailing Act.

Suggested change: Retain Section 178 (2) (ze) and Section 181 (2) (zp) as in the prevailing Act.

7.4 Qualifications for appointment of members of ERCs

Regulatory Commissions' independence and autonomy are crucial for the long-term sustainability of the sector. Since the inception of regulatory commissions, almost 70% of Chairpersons of SERCs were previously members of the state bureaucracy and almost half of the members were previously employed with regulated utilities. Thus, there is a high risk of regulatory bias. There is a need to allay this risk and still benefit from the knowledge and experience of sector experts. Similar to Section 89 (5) (a), where no member is allowed to accept commercial employment for 2 years after they demit office, to ensure independence, no employee of the respective government (central or concerned state government) and regulated utility should be eligible for appointment to CERC / SERCs before completion of a year since their retirement.

Suggested change: Section 77 and Section 84 to be amended to specify that persons who have been employees of the regulated utility or appropriate government shall not qualify for appointment before completion of one year from retirement.

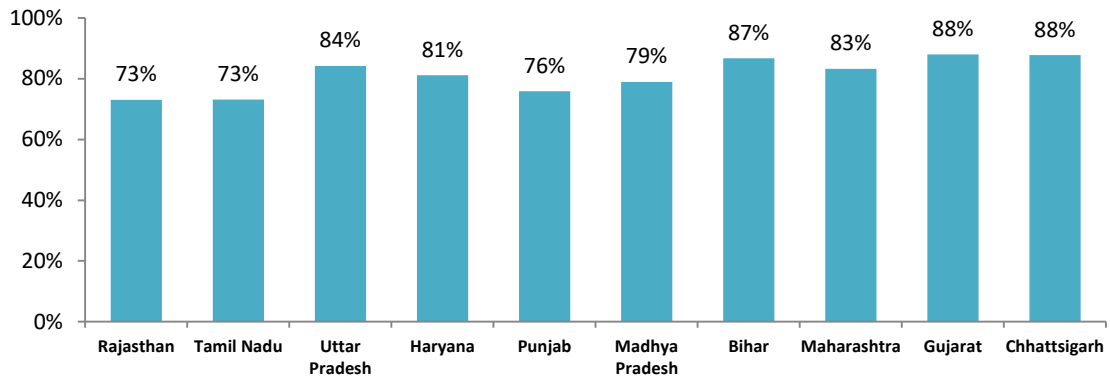
7.5 Revoking formation of Electricity Contracts Enforcement Authority (ECEA)

As per Section 109A (2) of the proposed amendment,

Notwithstanding anything contained in this Act or any other law in force, the Electricity Contract Enforcement Authority shall have the sole authority and jurisdiction to adjudicate upon matters regarding performance of obligations under a contract related to sale, purchase or transmission of electricity, provided that it shall not have any jurisdiction over any matter related to regulation or determination of tariff or any dispute involving tariff.

If the ECEA is the sole authority to adjudicate upon performance obligations related to sale, purchase and transmission of electricity, it is unclear whether it can adjudicate on disputes in franchisee agreements, open access contracts and net-metering agreements. If they can, it is doubtful that a 6-member authority will be able to handle the volume of cases in the country that 29 Commissions currently adjudicate. Further, Section 109A (2) states that the ECEA has no jurisdiction to adjudicate over matters related to tariff. About 70 to 80% of DISCOMs' costs relate to power procurement and transmission as has been illustrated in Figure 1. These costs can change with dispensations in contractual dispute, which will ultimately impact retail tariffs. In such instances, it is not clear how such cases will be distinguished and whether these cases would be eligible to be taken up before the ECEA.

Figure 1: Power procurement and transmission cost as a percentage of total expenses for FY18



Source: Tariff filings and orders before SERCs by various DISCOMs, audited statement of licensees

With the lack of clarity on which issues are related to tariff, there is likelihood of forum shopping by applicants and the possibility of jurisdictional disputes between the ERCs and ECEA. Given the potential legal issues and the fact that such an institution significantly curtails the ERCs' jurisdiction, the proposed amendments should be dropped.

In addition, unlike the Electricity Regulatory Commissions, the proposed ECEA has no explicit mandate to protect consumer interest. Decisions regarding dispute resolution in the electricity sector impact not just the parties to the contract but consumers at large, in the form of either impact on tariff or quality of supply. Hence, any dispute resolution mechanism must ensure consumer participation in such forums. In fact, there are several Supreme Court judgements that uphold such a view. Therefore, adjudication by the ECEA or dispute resolution via closed-door arbitration with only the contracting parties involved would not serve consumer interest in particular and public interest at large.

Thus, instead of creating an additional institution, efforts to should be taken to strengthen existing institutions like the ERCs and APTEL as suggested in sections 7.6, 7.7, 7.3 and 7.2 of this submission.

Suggested change: Delete proposed Sections 109A to 109N regarding ECEA and strengthen APTEL as suggested in section 7.7 of this submission.

7.6 Review of ERCs by Forum of Regulators

Forum of Regulators (FoR) can constitute an independent committee from time to time, consisting of persons of eminence to review ERCs' functioning once in three years. The persons of eminence appointed for review shall not have any conflict of interest. The review shall assess the capacity of the regulatory commission, staffing status and requirements, along with its performance. The committee's functions, terms of reference and timelines for reporting should be specified by the FoR. The committee could engage experts and consultants with approval of FoR. The review report, along with recommendations, shall be submitted to the Central Government and the concerned State Government. Based on the review, the FoR can also issue guidelines for institutional strengthening. The final review report shall be made public and shall always be available on the FOR's and the concerned commissions' websites.

Suggested change: Amendment of Section 104 to enable review of functioning of SERCs and JERCs by an independent committee constituted by the FoR.

7.7 Strengthening of APTEL

An independent, well-functioning and accessible APTEL is critical to strengthen regulatory functioning. Some suggestions to improve APTEL effectiveness are detailed below:

Expansion of APTEL: It is a welcome step that number of members of APTEL has been increased to 7, with a possibility of further increase without legislative changes. Along with this, it would be helpful to increase the staff strength of APTEL to ensure that APTEL actually meets requirement of section 111 (5), which stipulates that appeals filed before the APTEL are required to be decided within 180 days. Ensuring adherence to this provision will actually obviate need to establish the ECEA.

Mandate for instituting regional benches of APTEL: Since APTEL has replaced the High Court as the forum for appeals against the orders of ERCs; it should be as accessible as High Courts. Section 122 has scope for setting up of benches. Given the increase in members, the draft amendments should mandate setting up of permanent regional benches in four major metro cities to ensure accessibility.

Appointments and term of the APTEL members: The Supreme Court has held that re-appointments undermine the independence of the tribunals, as the members are likely to decide matters in a manner that would secure re-appointments[8]. The report of the Law Commission of India on Assessment of Statutory Frameworks of Tribunals in India[9], strongly discourage re-appointments. Re-appointments are permissible for APTEL members under Section 114 of the prevailing Act. Instead of re-appointment, the term of the APTEL members could be made similar to that of the ERCs, which is five years. Also, to avoid any conflict of interest, similar to the ERCs (Section 89(5)(a)) there should be a restriction on the kind of post-retirement employment that can be taken up by the members of APTEL.

Suggested change: Mandate permanent regional benches for the APTEL by amending Section 122. Amend Section 114 to ensure no re-appointment of members and extension of term from three to five years. Need for an additional provision in Section 114 similar to Section 89 (5)(a) for SERCs.

[8] As per Supreme Court Judgement in Madras Bar Association Vs. Union of India dated September 25, 2014, available here: https://main.sci.gov.in/jonew/judis/41962.pdf

[9] For more details, please see: http://lawcommissionofindia.nic.in/reports/Report272.pdf

8 Consumer Protection

The Act has some clauses on protecting and promoting consumer interest. Examples include: Sections 57 to 59 on Standards of Performance, 42 (5) on forum for redressal of grievances, 15 (2 i) on licensing and 64 (3) on tariff applications. Our suggestions are aimed to further strengthen the provisions for consumer protection.

8.1 Public hearing for crucial regulatory processes

Public consultations for crucial processes have already been mandated in the Act as Section 15 (2)(i) states regarding objections on license applications, and 64 (3) stipulates for suggestions and objections received from the public on tariff applications.

As a positive step, many ERCs have organised public hearings not only for tariff determination and granting of license, but also PPA approval and other matters. These public hearings have been helping consumers to represent and resolve many issues. This practice should be formalised in the Act such that public hearings should be conducted by all ERCs for tariff determination and grant of licence as well as other major aspects like PPA tariff adoption, quality of supply and service, major capital investment, franchisee/DSL agreements and modification/ revocation of licence.
Amendments to Sections 79 (3) for CERC and 86 (3) for SERC are required to promote consumer participation in regulatory processes for matters detailed in Sections 15, 18, 19 (grant/ modification/ revocation of licence), 59 (Standards of Performance), 62, 63, 64 (on tariff determination), and such other matters.

Suggested change:

Section 79 (3): *The Central Commission shall ensure transparency* ***and consumer participation in all proceedings, including hearings*** *while exercising its powers and discharging its functions.* ***This includes grant, amendment or revocation of licence under Sections 15, 18 and 19; standards of performance under Sections 57 and 59; and tariff determination and adoption under Sections 62 and 63.***

Section 86 (3): *The State Commission shall ensure transparency* ***and consumer participation in all proceedings, including hearings*** *while exercising its powers and discharging its functions.* ***This includes grant, amendment or revocation of licence under Sections 15, 18 and 19; standards of performance under Sections 57 and 59; tariff determination and adoption under Sections 62 and 63; and approval of distribution sub-licence and franchisee agreements under Section 14.***

8.2 Leveraging technology to improve quality of supply and service

Consumers are currently compensated by the distribution licensee for violation of Standards of Performance, only after a consumer complaint is processed. With the planned roll-out of smart meters across the country, it will soon be possible to remotely monitor few parameters like supply failure and low voltage. Having computerised records would make it possible to track metering and billing errors, as well as delays in providing or modifying connections. Automatically recording violations and compensating the consumer will increase the importance of quality of supply and service.

The details of such compensation, as well as metering, billing and supply related details should be provided to the SERC for scrutiny and analysis, following which the distribution licensee must 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.

Suggested change in Section 57(2): *If a licensee fails to meet the standards specified under sub-section (1), without prejudice to any penalty which may be imposed or prosecution be initiated, he shall be liable to pay such compensation to the person affected as may be determined by the Appropriate Commission**, with select failures, recorded by smart metering or computer systems, attracting automatic compensation, while providing licensees an opportunity to be heard. Such compensation should not be recovered by the licensees through their annual revenue requirement.***

8.3 Addressing issues faced by a group of consumers

There are many instances of repeated non-compliance by distribution licensees of Standards of Performance and other regulations specified by the State Commission. As per Section 42 (6) of the prevailing Act and as per SERC 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 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 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.

Suggested change in Section 42 (6): *Every distribution licensee 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. **A group of consumers can approach the Commission or this forum with a grievance affecting all of them or persistent violations of DISCOM Standards of Performance formulated under Section 57.***

8.4 Mandatory appointment of consumer representatives

In a welcome provision, Section 94 (3) of the Act provides for appointment of authorised consumer representatives, to enable representation of public and consumer interest in all proceedings of the Commissions. Unfortunately, not many SERCs have adhered to this provision. In Maharashtra, where this provision was adhered to since inception, recently discontinued this practice. Non-compliance with this important provision, aimed at facilitating ERC accountability and consumer participation, needs to be prevented, and ERCs should be mandated to appoint consumer representatives. The existing clause uses the non-mandatory term 'may', which should be amended to 'shall'. Additionally, commissions should prepare suitable regulations for selection of consumer representatives and detailing their role in contributing to the regulatory proceedings.

Suggested changes:

Section 94 (3): *The Appropriate Commission **shall** ~~**may**~~ authorise any persons, as it deems fit, to represent the interest consumers in the proceedings before it.*

Section 181 (2): *In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely: -*

(zq) selection and functioning of consumer representatives under Section 94 (3)

8.5 Clear differentiation between theft and unauthorised use of electricity

Section 126 is on assessment in cases of unauthorised use of electricity. Section 135 on theft also includes unauthorised use in 135 (1e). This leads to unnecessary harassment of small consumers. There is no need to cover the same offence under two different clauses with vastly different consequences, giving large

discretionary power to DISCOM officers. Hence, clause on unauthorised use could be removed from Section 135.

Suggested change: Delete 135 (1e), "*uses electricity for the purpose other than for which the usage of electricity was authorised,*"

8.6 Electricity Safety

Number of human fatalities due to electrocution has nearly doubled from 6,336 in 2003[10] to 12,154 in 2018[11]. Currently, CEA formulates the safety regulations. The State Electrical Inspectors along with distribution licensees are expected to ensure implementation of safety norms. This arrangement provides limited transparency and participation, and no regulatory oversight. Including the SERCs in the formulations of safety regulations as well as their implementation could lead to reduction of electricity accidents, saving many lives. Including safety in the standards of performance and providing compensation, instead of ex-gratia to accident victims, will incentivise improvement in safety standards. Therefore, amendments to Sections 53 (1), 57 (1), 161 (2) and 162 (1) are suggested.

Suggested changes:

Section 53 (1): *The Authority may, in consultation with the State Government,* ***and the Appropriate Commission*** *specify suitable measures for –*

Section 57 (1): *The Appropriate Commission may, after consultation with the licensees and persons likely to be affected, specify standards of performance,* ***including electricity safety*** *of a licensee or a class of licensees.*

Section 161 (2): *The Appropriate Government* ***or the Commission*** *may, if it thinks fit, require any Electrical Inspector, or any other person appointed by it in this behalf, to inquire and report-*

Section 162 (1): *The Appropriate Government may, by notification, appoint duly qualified persons to be Chief Electrical Inspector or Electrical Inspectors and every such Inspector so appointed shall exercise the powers and perform the functions of a Chief Electrical Inspector or an Electrical Inspector under this Act and exercise such other powers and perform such other functions as may be prescribed within such areas or in respect of such class of works and electric installations and subject to such restrictions as the Appropriate Government* ***or Commission*** *may direct.*

Some SERCs have prepared regulations on providing ex-gratia for accidents affecting humans and animals. There are wide variations in these regulations across states, and the ex-gratia amount of Rs. 4-6 lakhs given to the public is meagre compared to the compensation offered for traffic or train accidents or the compensation offered in case of fatalities of utility employees . It is important to mandate payment of compensation and have a clear procedure for determination of the amount and method of payment.

Suggested change to Section 161 (1): *If any accident occurs in connection with the generation, transmission, distribution, supply or use of electricity in or in connection with, any part of the electric lines or electrical plant of any person and the accident results or is likely to have resulted in loss of human or animal life or in any injury to a human being or an animal, such person shall give notice of the occurrence and of any such loss or injury actually caused by the accident, in such form and within such time as may be prescribed, to the Electrical Inspector or such other person as aforesaid and to such other authorities as the Appropriate Government may by general or special order, direct.* ***The Appropriate Commission shall form guidelines to provide compensation for the loss, in consultation with the licensees and the Electrical Inspector.***

[10] For more details, please see: https://ncrb.gov.in/sites/default/files/accident03.pdf

[11] For more details, please see: https://ncrb.gov.in/sites/default/files/ADSI-2018-FULL-REPORT-2018.pdf

8.7 Consumer access to APTEL

The APTEL is the institution, which hears appeals against orders by the Commissions. However, unlike regulatory commissions there is no explicit mandate provided to APTEL to protect consumer interest. To ensure representation of consumer interests, it is suggested that Act specify that the APTEL:

- has an explicit mandate to protect consumer interests, public interest (Amendment in Section 120)
- should appoint amici curiae especially in matters where tariffs of large number of consumers are affected (Amendment in Section 112)
- should empanel a few experienced and public-spirited advocates to specifically represent the interests of consumers and the public at large in specific cases (Amendment in Section 124)
- should dispense with fee requirements for small and individual consumers and consumer organisations or specify a nominal fee (say Rs. 10,000) so as not to deny access to APTEL processes.(Amendment to Section 112)

Suggested change: Amendments to Section 120, 112 and 124 to protect and represent consumer interest before the APTEL.

9 Data, public accountability and transparency

9.1 Powers of CEA to require statistics and returns

Section 74 grants CEA powers to require data from power sector actors. However, non-compliance with such data requirements does not evoke penalties. Lack of such deterrence has led to utilities and generators routinely delaying submission of crucial data. Thus, penal powers should be provided to CEA.

Suggested change: To track sector trends in a timely fashion, it is suggested the section be amended to stipulate specific penalties for non-compliance to Section 74, which CEA can levy.

9.2 Increased accountability of crucial processes

Section 92 (5) should be amended to mandate that all orders passed by the commission shall be reasoned orders. This will further improve regulatory accountability and is already a practice adopted by many state commissions where it is specified in their conduct of business regulations. In the same vein, a new sub-section can be added to Section 178 and Section 186 to ensure that all regulations are accompanied with a statement of reasons to enhance regulatory clarity and potentially reduce litigation in the sector.

To ensure transparency, a new sub-section can be added in Section 92 and Section 120 which can stipulate that the ERCs and the APTEL ensure that all judgements, orders, rules and correspondence with the government are publicly available at all times in an easily accessible format on their websites. Similarly, Section 42 should be amended such that DISCOMs (and by extension the proposed DSLs), maintain all petitions and regulatory filings on their website in a publicly accessible format at all times.

Suggested change: Proposed amendments to Sections 92 (5), 178 and 186 to ensure regulator orders and regulations are reasoned. Suggested changes to Sections 92, 120 and 42 to ensure availability of orders, petitions and important documents.

9.3 Institutionalising a market monitoring committee

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. Section 66 should be amended to mandate the constitution of market monitoring committees under the Central and State ERCs. The committee consisting of representatives from the distribution 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 publish periodic reports. The committee should be able to engage experts/ consultants for this study with prior approval from the ERC.

Suggested change: Amending Section 66 to constitute a market monitoring committee under each ERC.

10 Missing Definitions and other clarifications

The terms such as; 'Tariff', 'Point of supply', 'Single point connection', 'Bulk supply tariff', 'Merchant capacity', 'Village electrification', 'Household electrification', 'Renewable Energy', 'Net metering', 'Co-generation', 'Storage', 'Energy banking', 'Must-run status', 'Renewable Energy Certificate' are widely used in the Act and associated rules and policies but are not defined in the Act leading to multiple interpretations. All such terms need to be clearly defined in the Act.

Additionally, amendment of the Act should ensure that the provisions in the Act refer to the Companies Act, 2013 instead of Companies Act, 1956 and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 instead of Land Acquisition Act, 1894.