

**DISCUSSION PAPER
ON
THE ELECTRICITY
(AMENDMENT) BILL,
2022**



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I. Executive Summary

The Ministry of Power, Government of India introduced the Electricity (Amendment) Bill, 2022 (hereinafter, "the Bill") in the Lok Sabha on 8th August, 2022. The Bill has since been referred to the Parliamentary Standing Committee for Energy. In the present discussion paper, SOLPO Research presents its initial comments and recommendations in response to the Bill beginning with a summary of the main issues and followed by a more detailed clause-by-clause narration.

Summary Of the Main Issues

1. Issues pertaining to Multiple Distribution Licensees

At the outset, one needs to look at the introduction of multiple distribution licensees. The Central Electricity Regulatory Commission has been vested with the power to issue distribution license for distributing electricity in more than one state under the proposed section 79 (1) (ja). Apart from the loss of initial jurisdiction of the State Electricity Regulatory Commission on the subject, several other issues are likely to arise from this amendment. Although the Central Electricity Regulatory Commission will be the license issuing authority, it appears that the State Electricity Regulatory Commission will continue to regulate the distribution licensee.

Section 14 (b) is substituted so as to enable the Central Government to prescribe criteria (by rules) for grant of license for distribution of electricity. The Bill also proposes to delete in the 6th proviso to section 14 the words "*through their own Distribution System*". As a result, duplication of distribution system for purposes of parallel distribution license is being done away with. The proposed amendment to distribution licensee to use its network on non-discriminatory open access. Further, the duty of a distribution licensee in section 42 (1), has now been amended to delete the words "*develop and maintain a distribution system*". There appears to be a shift in the manner in which the distribution business is going to unfold in the future.

Issues regarding maximum ceiling tariff and minimum tariff for retail sale of electricity and the contradiction thereto relating to prudence check etc. also needs to be discussed. The proposed amendment to section 61 substituting sub-section (g) now requires the Appropriate Commission to make regulations to ensure that the tariff recovers all prudent costs incurred for supply of electricity and that the tariff reduces cross subsidies in the manner specified by the Appropriate



Commission. A new proviso is introduced to section 62 (1) (d) so that in case of distribution of electricity in the same area of supply by two or more distribution licensees, the Appropriate Commission shall, fix the maximum ceiling of tariff. Section 86 (1) has also been proposed to be amended with insertion of a proviso viz., *“Provided that the tariff recovers all prudent costs incurred for supply of electricity and also provide reasonable returns on investment and take necessary steps to ensure financial stability of the licensees.”*

The sharing of capacity of power purchase agreements and related costs amongst all distribution licensees in same area of supply as mandated by the proposed new section 60A will be contentious for it will affect vested rights of incumbent distribution licensee and also its business plan.

Administration of cross-subsidy surcharge through the cross-subsidy balancing fund as suggested in the new section 60A (2) & (3) in case of issuance of licence to more than one distribution licensee in an area of supply also needs to be discussed.

2. Appointment of Chairperson and Members of Commission

On the issue of appointment of Chairperson of the Central Electricity Regulatory Commission, the amendment to section 77 (1) tilts in favour of *“(i) head of an organisation dealing with generation, transmission or distribution of electricity; or (ii) Secretary to the Government of India or its equivalent”*. Amended section 84 (1) tilts in favour of *“(i) head of an organisation dealing with generation, transmission or distribution of electricity; or (ii) a Principal Secretary to the State Government or its equivalent”* as a Chairperson of the State Electricity Regulatory Commission. The above amendments take away the ability of a judge / judicial officer from becoming a chairperson. Clearly, no superior court judge will then accept a position as a Member of the Central Electricity Regulatory Commission or the State Electricity Regulatory Commission where the presiding officer is a bureaucrat / technocrat. The purpose of this amendment needs a closer understanding. Additionally, the recent observations of the Supreme Court relating to the P&NG Bench of the Appellate Tribunal for Electricity where the Member (Technical) was hearing matters relating to his parent company are relevant. This issue of conflict of interest is not being addressed in the present amendment.

3. Power to punish for non-compliance

While the amendment to section 142 has strengthened the hands of the Central Electricity Regulatory Commission / State Electricity Regulatory Commission on matters of compliance of its orders, there is no such additional power given to the Appellate Tribunal for Electricity. This can also be discussed as to whether there



is a need for such additional powers / contempt powers for ensuring compliance of orders.

4. Ability to refer disputes to arbitration

In a significant amendment to section 79 (1) (f) and section 86 (1) (f), the ability of the Central Electricity Regulatory Commission and the State Electricity Regulatory Commission to refer disputes to arbitration has been done away with. Although, one can argue that most Commissions did not refer disputes to arbitration and they decide issues themselves, it is felt by many practitioners that contractual disputes including those arising out of terms of the PPA, TSA etc. can well be adjudicated in an arbitration proceeding. This will reduce the burden on the system. However, in the past regulators have been reluctant to adopt that route.

5. Enhanced role of the National Load Despatch Centre

The role of National Load Despatch Centre has been enhanced under section 26 for it now has the power to buy and sell electricity for implementation of any scheme to ensure stability of the system. Is there a conflict of interest? Will they need a trading license? What margins can they retain?

6. Grid security issues

Section 40 (c) (ii) after the fourth proviso provides that a 1 MW consumer can directly be connected to an inter-State transmission system which generally operates at 400 kV level. We are informed that this creates grid security issues and has been recognised in the Grid Code, which provides that only those at or above 50 MW can be connected to the inter-State transmission system. The efficacy of this departure has to be balanced with the need for grid security and the associated costs thereto.

7. Centralising features of the Bill

As has been noted earlier, the Bill has features that lean towards centralisation of power at the Union / executive level. The expression, "*as prescribed by the Central Government*" finds mention nine times in the Bill. This is a little worrisome as it erodes the independence of the State Electricity Regulatory Commissions in terms of the principal Act and has the ability to shake up the independent regulatory structure that was originally envisaged.



II. Clause-By-Clause Comments¹

1. Amendment Sr. No.3 in relation to the definition clauses

1.1 Amended Section.

2 In this Act, unless the context otherwise requires,

(31) "Government company" shall have the meaning assigned to it in clause (45) of [section 2](#) ~~section 617~~ of the Companies Act, ~~1956~~[2013](#);

(50) "power system" means all aspects of generation, transmission, distribution and supply of electricity and includes one or more of the following, namely:-

- (a) generating stations;
- (b) transmission or main transmission lines;
- (c) sub-stations;
- (d) tie-lines;
- (e) load despatch activities;
- (f) mains or distribution mains;
- (g) electric supply-lines;
- (h) overhead lines;
- (i) service lines;
- (j) works;
- [\(k\) energy storage system;](#)

[\(60a\) "security of payment" means such security of payment as may be prescribed by the Central Government;](#)

1.2 Comments/Observations

Amendment sr. no. 3 in relation to the definition clauses in the principal Act has added (a) "*Energy Storage System*" in the definition of Power System in section 2 (50), and (b) "*Security of Payment*" by inserting new section 2 (60a). In relation to "*Security of Payment*", the Central Government has now been delegated the authority to frame rules. It may be noted that most power purchase agreements (hereinafter, "PPAs") and power sale agreements (hereinafter, "PSAs") have clauses related to payment security mechanism.

¹ All omissions / deletions proposed in the Bill are denoted with a strikethrough hereinafter in the "Amended Section" paragraph of the present note. All insertions / substitutions proposed in the Bill have been denoted in blue hereinafter. The same has been undertaken for the better understanding of the reader.

2. Amendment Sr. No. 4 relating to Section 8.

2.1 Amended Section.

8. (1) Notwithstanding anything contained in section 7, any generating company intending to set-up a hydro-generating station shall prepare and submit to the Authority for its concurrence, a scheme estimated to involve a capital expenditure exceeding such sum, as may be fixed by the Central Government, from time to time, by notification.

(1A) The Authority shall, after examining the scheme, concur on the scheme in such manner as may be prescribed by the Central Government.

2.2 Comments/Observations

The Central Electricity Authority (hereinafter, “the CEA”) is now required in matters of hydro-generating station to examine and concur on the scheme in a manner prescribed (by rules) by the Central Government. As a result, the Central Government’s role is more pronounced as it now has to therefore not only notify the threshold capital expenditure beyond which concurrence of the Authority is required, but also it may prescribe other conditions which the Authority shall examine for purposes of concurrence.

3 Amendment Sr. No. 5 in relation to section 14 (b)

3.1 Amended Section

14. The Appropriate Commission may, on application made to it under section 15, grant licence to any person -

- (a) to transmit electricity as a transmission licensee; or
- ~~(b) to distribute electricity as a distribution licensee; or;~~
- (b) to distribute electricity as a distribution licensee in an area of supply in accordance with such criteria as may be prescribed by the Central Government; or
- (c) to undertake trading in electricity as an electricity trader,

in any area which may be specified in the licence:

Provided that ...

Provided also that the Appropriate Commission may grant a licence to two or more persons for distribution of electricity ~~through their own distribution system~~ within the same area, 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 *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, shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose:

3.2 Comments/Observations:

In amendment sr. no. 5, section 14 (b) of the principal Act is substituted so as to enable the Central Government to prescribe criteria by rules for grant of license for distribution of electricity. Notes on clauses circulated along with the Amendment Bill state, “*This clause seeks to amend section 14 of the principal Act to facilitate the use of distribution networks of other licensees*”. Clearly, the proposed amendment is targeted towards the introduction of multiple distribution licensees. The sixth proviso to the existing section 14 already empowers the Central Government to make rules for additional requirements relating to capital adequacy, creditworthiness, and code of conduct. The purpose of this amendment appears to bring uniformity for issuance of second distribution license in the same area of supply in line with the judgment of the Appellate Tribunal for Electricity (hereinafter “the APTEL”) dated 28th November, 2014 in Appeal No. 246 of 2012 (*The Tata Power Company Limited vs. The Maharashtra Electricity Regulatory Commission*).

In another significant amendment, the Bill proposes to delete in the sixth proviso to section 14 the words “*through their own distribution system*”. As a result, duplication of distribution system for purposes of parallel distribution license is being done away with. This leans towards the Mumbai model read with the judgment of the APTEL dated 28th November, 2014 in Appeal No. 246 of 2012 (*The Tata Power Company Limited vs. The Maharashtra Electricity Regulatory Commission*), where it is held that duplication of network requires to be avoided for it leads to redundancy in the system.

The proposed amendment may have large ramifications unless addressed properly by Central Government rules to be laid under section 14 (b) as discussed above. It is pertinent to mention that the distribution business is a regulated business under the Act and retail tariff is determined under section 62 of the Act. The only income / profit a distribution licensee earns under section 62 is the return on equity (ROE) or return on investment (ROI). In case the new distribution licensee does not lay its own distribution system then its status would be nothing more than a trader and its income would be miniscule restricted to margin. A question would arise as to why a person would seek a distribution license if he were not going to earn anything. There are apprehensions that new distribution licensee would indulge in “*cherry picking*” by laying its own network to meet the demand of high-end consumers and meet demand



of low-end consumers utilising the network of the existing licensee, which is a government owned company at most of places.

Another question arises as to whether there would be any competition in the interest of consumers. This question is dealt with in the latter paragraphs of this discussion paper. However, it appears that the immediate beneficiaries would be the Indian Railways and other private players. In the case of the Indian Railways, it is well known that the Railways has been granted deemed distribution licensee status by the Central Electricity Regulatory Commission (hereinafter, "CERC" or "Central Commission"). Presently, a distribution licensee does not have the right to open access in distribution. With this arrangement the Indian Railways can meet its loads by utilising the system of the existing distribution licensee on payment of wheeling charges. Just to make things clear, the Indian Railways is still a consumer of the Tata Power Company in Mumbai for meeting the loads of the city's local trains as it is connected to distribution system of The Tata Power Company. With the proposed amendment read with amendment to section 42 of the principal Act, the Indian Railways will be able to meet its loads of Mumbai local trains by paying only wheeling charges.

4 Amendment Sr. No. 6 relating to Section 15.

4.1 Amended Section.

15.(1) Every application under section 14 shall be made in such form and in such manner as may be specified by the Appropriate Commission and shall be accompanied by such fee as may be prescribed.

(2) Any person who has made an application for grant of licence shall, within seven days after making such application, publish a notice of his application with such particulars and in such manner as may be specified and a licence shall not be granted –

- (i) ...
- (ii) until, in the case of an application for a licence for an area including the whole or any part of any cantonment, aerodrome, fortress, arsenal, dockyard or camp or of any building or place in the occupation of the Government for defence purposes, the Appropriate Commission has ascertained that there is no objection to the grant of the licence on the part of the Central Government.

...



(6) Where a person makes an application under sub-section (1) of section 14 to act as a licensee, the Appropriate Commission shall, as far as practicable, within ninety days after receipt of such application, -

- (a) issue a licence subject to the provisions of this Act and the rules and regulations made thereunder; or
- (b) reject the application for reasons to be recorded in writing if such application does not conform to the provisions of this Act or the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard.

Provided further that if the Appropriate Commission fails to grant the licence or reject the application, as the case may be, within the time so provided, the applicant shall be deemed to have been granted the licence.

4.2 Comments/Observations:

In amendment sr. no. 6, there is a deeming proviso where if the Appropriate Commission fails to grant a license or reject an application within a prescribed timeframe, the applicant shall be deemed to have been granted the license. While this provision appears to bring in efficiency in the process of grant of license, it fails to recognise the inherent risk attached to a deemed license status being granted in default. The proposed amendment has completely ignored provisions of section 15 (2) (ii) wherein a no objection certificate (hereinafter, "NOC") from the Central Government is mandatory in certain cases. There is no timeline for the Central Government to issue the NOC. Furthermore, Central Government ministries / departments might be involved in the process of issuing the NOC. It would be pertinent to mention that there would be hardly any area in the country where distribution license has not been granted. Therefore, the whole exercise in the amendment Bill appears to be for facilitating multiple distribution licensees in the name of competition. Apart from the aforesaid, the delays caused due to litigation / stays granted by superior courts in the process of grant of license has not been factored and as such no investor can possibly make investment solely on the basis of a default license. This proviso needs to be better articulated.

3. Amendment Sr. No. 7 relating to Section 26.

3.1 Amended Section.



26.(1) The Central Government may establish a centre at the national level, to be known as the National Load Despatch Centre for optimum scheduling and despatch of electricity among the Regional Load Despatch Centres.

(2) The constitution ~~and functions~~ of the National Load Despatch Centre shall be such as may be prescribed by the Central Government:

Provided that the National Load Despatch Centre shall not engage in the business of trading in electricity **except as mandated by the Central Government for implementation of any scheme to ensure the stability of the power system.**

(3)...

(4) The National Load Despatch Centre shall –

- (a) be the apex body to ensure integrated operation of the power system in the country.
- (b) be responsible for optimum scheduling and despatch of electricity in the country across different States and regions in accordance with the contracts entered into with the licensees or the generating companies:

Provided that no electricity shall be scheduled or despatched under such contract unless adequate security of payment, as may be prescribed by the Central Government, has been made;

- (c) monitor grid operations and ensure security of the electricity grid and for this purpose give directions as necessary to the Regional Load Despatch Centre or State Load Despatch Centre, as the case may be;
- (d) exercise supervision and control over the inter-regional and inter-State transmission network; and
- (e) have overall authority for carrying out real time operations of the electricity grid of the country

(5) The National Load Despatch Centre shall give such directions and exercise such supervision and control over the power system as may be required for the safety and security of the electricity grid of the country, for ensuring the stability of grid operation and for achieving maximum economy and efficiency in the operation of the power system throughout the country.



(6) The National Load Despatch Centre shall give such directions to the State Load Despatch Centre, as may be necessary through the Regional Load Despatch Centre concerned.

(7) 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 from time to time.

3.2 Comments/Observations:

In amendment sr. no. 7 in relation to section 26 of the principal Act, the Central Government's role in the functioning of the National Load Despatch Centre (hereinafter, "the NLDC") is reduced / curtailed by deleting the words "*and functions*". As a result, the Central Government in terms of the amendment in section 26 (2) can prescribe rules only for constitution of the NLDC. Functions of the NLDC have been described in new sub-section (4) to section 26. Another important change is that the NLDC can now engage in trading of electricity for implementation of any scheme to ensure stability of the system. This will be in direct conflict with section 12 (c) unless the NLDC also gets trading license from the CERC. This aspect needs clarification.

Significant amendments are brought in section 26 of the principal Act by inserting new sub-section (4) where the NLDC is now being vested with the status of an apex body which has to ensure integrated operation of the power system in the country. The NLDC is made responsible for the optimum scheduling and despatch of electricity in the country across different states and regions in accordance with contracts. Further, it is provided that no electricity shall be scheduled / despatched under such contract unless adequate security of payment as may be prescribed by the Central Government has been made. Clearly, the attempt is to arrest delays and defaults in making payments to generating companies and other traders / intermediaries, and as such security of payment has been made mandatory for purposes of scheduling and despatch.

The role of monitoring / supervision of the electricity grid has been expressly vested on the NLDC. NLDC has been given the power to issue directions and exercise supervision and control over the power system as may be required for safety and security of the electricity grid, and also for ensuring stability of grid operations, maximum economy and efficiency of the operations of the power system throughout the country.

The NLDC has been expressly vested with the power to issue directions to the State Load Despatch Centres (hereinafter, "the SLDC") as may be necessary through the



concerned Regional Load Despatch Centres (hereinafter, “the RLDC”). The amendment provides that the NLDC’s direction to the RLDC, the SLDC, licensees, generating companies, generating sub-station and any other person connected with the operation of the power system has to be complied with. Clearly the reach / hands of the NLDC has been extended much beyond what is currently there.

4. Amendment Sr. No.8 relating to Section 28

4.1 Amended Section.

28. (1)The Regional Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in the concerned region.

(2) The Regional Load Despatch Centre shall comply with such principles, guidelines and methodologies in respect of the wheeling and optimum scheduling and despatch of electricity as the Central Commission may specify in the Grid Code.

(3) The Regional Load Despatch Centre shall –

(a) be responsible for optimum scheduling and despatch of electricity within the region, in accordance with the contracts entered into with the licensees or the generating companies operating in the region;

Provided that no electricity shall be scheduled or despatched under such contract unless adequate security of payment, as may be prescribed by the Central Government, has been made;

4.2 Comments/ Observations

In amendment sr. no. 8, in relation to section 28 of the principal Act, the requirement to ensure availability of adequate security of payment in the manner prescribed by the Central Government is now to be followed by the RLDC for purposes of scheduling and despatch.

5. Amendment Sr. No.9 relating to Section 32

5.1 Amended Section.

32. (1) The State Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in a State.

(2) The State Load Despatch Centre shall -



- (a) be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State;

Provided that no electricity shall be scheduled or despatched under such contract unless adequate security of payment, as may be prescribed by the Central Government, has been made;

5.2 Comments/ Observations

In amendment sr. no. 9, a similar requirement for maintenance of adequate security of payment in the manner prescribed by the Central Government has to be ensured by the SLDCs for purposes of scheduling and despatch.

6. Amendment Sr. No.10 relating to Section 40

6.1 Amended Section.

40. It shall be the duty of a transmission licensee –

- (a) to build, maintain and operate an efficient, co-ordinated and economical inter-State transmission system or intra-State transmission system, as the case may be;
- (b) to comply with the directions of the Regional Load Despatch Centre and the State Load Despatch Centre as the case may be;
- (c) to provide non-discriminatory open access to its transmission system for use by-
- (i) any licensee or generating company on payment of the transmission charges; or
 - (ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

Provided further that such surcharge and cross subsidies shall be progressively reduced 1[***] in the manner as may be specified by the Appropriate Commission:

2[***]



Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Appropriate Commission:

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 for carrying the electricity to the destination of his own use.

Provided also that a consumer who requires supply of electricity where the maximum power to be made available at any time exceeds one megawatt shall be entitled to get open access to inter-State transmission system in accordance with the regulations made by the Central Commission, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission.;

Explanation.—For the purposes of this section and section 42, the expression “megawatt” means ten lakh watts.

6.2 Comments/ Observations

In amendment sr. no. 10 in relation to section 40 of the principal Act, a significant amendment by way of a proviso is being introduced. In section 40 (c) (ii) after the fourth proviso the Bill has proposed that a consumer who requires a supply of electricity more than one megawatt shall be entitled to open access to the inter-State transmission system in accordance with the regulations of the CERC on payment of transmission charges and a surcharge thereon as may be specified by the SERC. Clearly, the amendment seeks to remove difficulties faced by consumers (mostly industrial) in seeking open access for inter-State purchase of power. This proposed provision is in direct conflict with the CERC Grid Code where minimum limit of 50 MW has been prescribed for getting connected to the inter-State transmission system (hereinafter, “the ISTS”). There are certain issues relating to safety of the electricity grid. 1 MW of power is distributed at 11 kV and nearest ISTS substation may not have 11 kV voltage level. Providing 11 kV voltage level at 400 kV substation may jeopardize the safety of substation itself as protection schemes for 11 kV are much more inferior to protection schemes for 400 kV. The issue that requires to be additionally addressed is in relation to the delay in grant of NOC by the distribution licensee which to some extent has been addressed in the regulation framed by the CERC. However, appropriate adjudication process on account of failure to grant NOC has not been clearly addressed.



7. Amendment Sr. No.11 relating to Section 42

7.1 Amended Section.

42. (1) ~~It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.~~

(1) It shall be the duty of all distribution licensees to,—

(a) ensure an efficient, co-ordinated and economic distribution system in their area of supply:

Provided that a distribution licensee may use the distribution systems of other licensees in the area of supply for supplying power through the system of non-discriminatory open access;

(b) give non-discriminatory open access to other distribution licensees on payment of wheeling charges; and

(c) provide supply of electricity to the consumers,

in accordance with the provisions of this Act and the rules made thereunder by the Central Government and the regulations made by the Appropriate Commission and in accordance with the model regulations laid down by the Forum of Regulators.”;

....

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

(4A) A distribution licensee shall provide non-discriminatory open access through its distribution system to all distribution licensees having licence within the same area of supply, subject to payment of wheeling charges and in accordance with the regulations specified by the Appropriate Commission.

(4B) In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that a distribution licensee has knowingly failed to provide open access through its distribution system to another distribution licensee or hindered it in any manner from using its distribution network, the Appropriate Commission may, after giving the distribution licensee an opportunity of being heard,



issue such directions as it considers necessary and impose the penalties in accordance with the provisions of this Act.

7.2 Comments/ Observations

Amendment sr. no. 11 in relation to section 42 of the principal Act also introduces a significant amendment in the functioning of distribution licensees. Sub-section (1) of section 42 has been substituted. Most importantly the duty of distribution licensee to develop and maintain the distribution system has been omitted. This proposed amendment along with others appear to be aimed at facilitating the entry of another distribution licensee. These amendments may result in large scale ramifications that need to be duly considered. The proposed proviso to sub-section (1) (a) of section 42 enables a distribution licensee to use the system of the other licensee in the area of supply for supplying power through the system of non-discriminatory open access. This follows the Mumbai model recognising the principle laid down by the Supreme Court in *Tata Power Company Limited vs. Reliance Energy Limited & Ors.*, (2008) 10 SCC 321 (para 100) (Justice Altamas Kabir). Also, the amendment provides that non-discriminatory open access to the system of the other distribution licensee will be available on payment of wheeling charges only. There is no requirement / obligation for payment of cross subsidy surcharge by one distribution licensee for use of the system of the other distribution licensee. Additionally, the new provision relating to the duty of a distribution licensee requires adherence to the provisions of the Act and the rules made by the Central Government and the regulations made by the Appropriate Commission, and also the model regulation laid down by the Forum of Regulators. Clearly, there is a centralising force in this amendment by which the power / jurisdiction of the SERC over distribution of electricity is being curtailed. It can be argued that the same is being rationalised for bringing in competition in the distribution sector. The other amendments in section 42 in the form of sub-section (4A) and (4B) only strengthens the overall legislative mandate to provide non-discriminatory open access through the distribution system of all distribution licensees on payment of wheeling charges. The Appropriate Commission is additionally authorised to issue directions in case of failure of distribution licensee to grant open access to the other distribution licensee. What is interesting is whether the distribution licensee of West Bengal can supply power in Orissa based on the aforesaid provision or will it be restricted only to parallel distribution licensee where the license has been granted by the same SERC.

8. Amendment Sr. No.12 relating to Section 59

8.1 Amended Section.

59. (1) Every licensee shall, within the period specified by the Appropriate Commission, furnish to the Commission the following information, namely:-



- (a) the level of performance achieved under sub-section (1) of the section 57;
- (b) the number of cases in which compensation was made under sub-section (2) of section 57 and the aggregate amount of the compensation.
- (c) the status of compliance of the guidelines issued by the Central Government regarding corporate governance.

8.2 Comments/ Observations

Amendment sr. no. 12 needs no comment.

9. Amendment Sr. No.13 relating to new Section 60A

9.1 Amended Section.

60A. (1) Notwithstanding anything contained in this Act, on the issuance of licence to more than one distribution licensee in an area of supply, the power and associated costs from the existing power purchase agreements with the existing distribution licensee, as on the date of issuing licence to another distribution licensee, shall be shared among all the distribution licensees in the area of supply as per such arrangements as may be specified by the State Commission in accordance with the provisions of this Act and the rules made thereunder by the Central Government:

Provided that the State Commission shall periodically review the sharing of power as provided in the existing power purchase agreements:

Provided further that a distribution licensee may enter into additional power purchase agreements, after meeting the commitments of the existing power purchase agreements, to meet any additional requirement of power without sharing with other distribution licensees.

(2) In case of issuance of licence to more than one distribution licensee in an area of supply, the State Government shall set up a cross subsidy balancing fund which shall be managed by a Government company or entity designated by that Government in accordance with such regulations as the State Commission may make in accordance with the provisions of this Act and the rules made thereunder by the Central Government.

(3) Any surplus with a distribution licensee on account of cross subsidy or cross subsidy surcharge or additional surcharge shall be deposited into the fund referred to in sub-section (2), and the fund shall be utilised to make good deficits in cross subsidy in the same area or any other area of supply.



9.2 Comments/ Observations

Amendment sr. no. 13 introduces section 60A which relates to management of power purchase agreements (hereinafter, “the PPAs”), cross subsidies, etc. This insertion is at wrong place. It should be in Part VII of the Act which deals with tariff. Section 60A starts with a non-obstante clause and proposes that on issuance of a parallel distribution license, the power and associated costs under existing PPAs with the existing licensee shall be shared amongst all distribution licensees in the area of supply as per the arrangement to be specified by the SERC in accordance with the provisions of the Act and rules made by the Central Government. The objective appears to be that on account of introduction of two or more licensees in an area, the long-term PPAs that may have been entered in by the existing licensee (mostly state licensees) has to be bifurcated amongst the distribution licensees so that the existing licensee is not burdened with stranded power capacity / costs. While the SERC has the jurisdiction to make arrangements in relation to such PPAs, the Central Government has been authorised to prescribe rules in this regard. It has to be seen as to how the generators and their lenders will react to this provision. It allows assignment of capacity / costs through a regulatory process which is involuntary in nature.

This issue is required to be examined in detail. Retail tariff of the distribution licensee includes power purchase costs (70-80 %), wheeling charges (includes, ROE, interest on loan, interest on working capital and O&M charges), transmission charges, RLDC and SLDC charges etc. The new distribution licensee has to pay wheeling charges, transmission charges and load despatch centre charges, etc. In case the power and related costs are also shared then where is element of competition? How would the consumers be benefitted?

The 1st proviso to section 60(A) empowers the SERC to review the sharing of power periodically. This may lead to upsetting the business plans of both the licensees.

The 2nd proviso to section 60A only supports the principle enumerated in the beginning and clarifies that the distribution licensee may enter into additional PPAs, after meeting requirements of existing PPAs, to meet any additional requirement of power without sharing with other distribution licensees. This primarily means that the existing distribution licensee to avoid being burdened by stranded costs can share the power purchase capacity / costs should there be a second distribution licensee in the area. It will be necessary that the applicant licensee would know the



additional capacity available for distribution before the process for grant of license is initiated so that he can plan his business accordingly.

The issues that remains unresolved is that the introduction of a new distribution licensee will by itself will not by itself spur / increase demand of power. If there is stranded capacity under existing PPAs in the hands of the existing distribution licensee how will sharing that cost with the other distribution licensee mitigate the woes of the consumer? Once stranded, such capacity will continue to be stranded irrespective of the introduction of another licensee. The distribution licensees are revenue neutral, and all costs will be passed on to consumers. So finally, the consumer will bear the burden of the costs till there is an increase in demand which will result in socialisation of costs.

Section 60A (2) and (3) also brings in a substantial amendment in the form of creation of a Government company or entity which will balance manage a cross-subsidy balancing fund. The very mention of surplus cross subsidy in proposed sub-section (3) indicates that the Government recognises that there may be cases of "*cherry picking*" where the new distribution licensee would pick the subsidizing consumers and would have surplus cross subsidy at the end of the year. It appears that the proposed legislation seeks to provide for an institutional mechanism that when there is more than one distribution licensee in an area of supply the State Government shall set up a cross-subsidy balancing fund which will be managed by a Government company / entity designated by that Government in accordance with regulations of the State Commission and rules made by the Central Government. Cross subsidy is getting institutionalised by the way of present amendment and as such this does not fit with the overall scheme of the original Act or the amendment. The balancing of cross subsidy is done in the average revenue realized (thereinafter, "ARR") / tariff order of each distribution licensee based on various factors. By allowing balancing between distribution licensees, the efficiencies that are required to be gained on account of competition and the mandate to reduce cross subsidy under the principal Act gets diluted / lost. The purpose of this amendment and also section 60A (3) which deals with distribution of surplus on account of cross subsidy or cross subsidy surcharge or additional surcharge to be utilised to make good deficits in cross subsidy in same area of supply or any other area of supply is not clear. This is an adjustment outside the ARR and as such the purpose of having parallel licensee in an area to bring efficiency gets diluted.



10. Amendment Sr. No.14 relating to Section 61

10.1 Amended Section.

61. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

...

(f) multi year tariff principles;

(g) the tariff recovers all prudent costs incurred for supply of electricity;

(ga) the tariff reduces cross subsidies in the manner specified by the Appropriate Commission.

10.2 Comments/ Observations

In sr. no. 14, the amendment substitutes section 61 (g) of the principal Act and also introduces section 61 (ga). The intent of this amendment is quite loud and clear. It requires the Appropriate Commission to specify regulations that ensure that the tariff recovers all prudent costs incurred for supply of electricity and that the tariff reduces cross subsidies in the manner specified by the Appropriate Commission. What is lacking is that when the Central Government's rule making power has been expanded exponentially in the present amendment, the Central Government has shied away from making a rule in the matter of reduction of cross subsidies and the manner in which the same has to be addressed or calculated. Instead, reliance continues to be placed on the provisions of the tariff policy which has been violated time and again by various States.

11. Amendment Sr. No.15 relating to Section 62

11.1 Amended Section.

62. (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for –

(a) ...

...

(d) retail sale of electricity.

~~Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.~~



Provided that in case of distribution of electricity in the same area of supply by two or more distribution licensees, the Appropriate Commission shall, for promoting competition among such distribution licensees, fix the maximum ceiling of tariff and the minimum tariff for retail sale of electricity in accordance with the provisions of this Act and the rules made thereunder by the Central Government:

Provided further that in such ceiling tariff, the cross subsidy, wheeling charges and adjustment in tariff pertaining to the period prior to the introduction of ceiling tariff, if any, shall be indicated separately by the Appropriate Commission.

.....

(4) No tariff or part of any tariff may ordinarily be amended more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

Provided that the Appropriate Commission may, by an order and for reasons to be recorded in writing, allow the licensee to effect the changes due to amendment in tariff, not exceeding in four stages, during a year in accordance with the Tariff Policy.

11.2 Comments/ Observations

Amendment sr. no 15 relates to certain changes in proviso to sub-section (1) in clause (d) in section 62 of the principal Act to the extent that ceiling tariff for the areas where two or more licensees are engaged in business of distribution was discretionary hitherto has been made MANDATORY. This amendment ostensibly attempts to bring in competition and reduces regulatory superintendence in distribution by providing for maximum ceiling tariff and minimum tariff for retail sale of electricity. This amendment is in contradiction with the proposed amendment of section 61 (g) which states that regulations to recover prudent costs of distribution licensee. Let us consider example of an area where two distribution licensees viz., existing licensee 'A' and new licensee 'B' exists. Prudent costs of licensee 'A' is Rs 10/unit and prudent costs of 'B' is Rs 9/per unit. What would be the ceiling tariff for area? If the Commission fixes Rs 9/unit then prudent costs of 'A' is not recovered and if it fixes Rs 9/per unit then 'B' is unduly benefitted. The second proviso requires the Appropriate Commission to indicate separately the cross subsidy, wheeling charges and adjustment in tariff pertaining to the period prior to the introduction of ceiling tariff. It is not clear as to how this will work out because cross subsidy and adjustments in tariff will depend on actual recovery from the various subsidised and non-subsidising categories. This requires deliberation particularly from the perspective of tariff determination, APR and True-up.

A proviso introduced to sub-section (4) allows the Appropriate Commission / distribution licensee to effect changes in tariff not exceeding four stages during the



year in accordance with the tariff policy. The original provision restricted amendment of tariff or any part thereof to once a year, except for changes under terms of fuel surcharge formula. However, the proposed proviso now allows amendment in tariff not exceeding four stages. The purpose of this is not very clear. Perhaps the purpose to restrict revision of tariff quarterly including adjustment due to fuel surcharge formula.

12. Amendment Sr. No.16 relating to Section 64

12.1 Amended Section.

64. ~~(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.~~

(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee at such time and in such manner and accompanied by such fee, as may be specified by the Appropriate Commission:

Provided that the time specified should be such that the new tariff comes into effect from the beginning of the following financial year:

Provided further that if an application is not made by a generating company or licensee on time, the State Commission shall, not later than thirty days of the last date specified in the regulations, initiate proceedings for determination of tariff and call for such information, details and documents as may be required for such determination with the objective of determining the tariff before the beginning of the financial year:

Provided also that, where two or more distribution licensees operate in the same area of supply, the State Commission shall fix the maximum ceiling of tariff and the minimum tariff, *suo motu*, after calling for requisite information from such distribution licensees.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) ~~The Appropriate Commission shall, within one hundred and twenty days from receipt of an application~~ ninety days from the date of receipt of the application or initiation of proceedings under sub-section (1) and after considering all suggestions and objections received from the public,-

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

Provided that if tariff order cannot be issued due to any reasons which are to be recorded in writing, the Appropriate Commission shall issue the order for



interim tariff within the said period of ninety days from the date of receipt of such application or initiation of such proceedings:

Provided further that the interim tariff shall remain in operation till issue of final tariff order which shall be issued within such period not exceeding one hundred and fifty days of receipt of such application for determination of tariff or initiation of such proceedings.

12.2 Comments/ Observations

In sr. no. 16, the amendment to section 64 is designed to prevent delay in determination of tariff. The provision insists on timelines for making application for determination of tariff so as to ensure that the new tariff comes into effect at the beginning of the financial year. The second proviso to the amendment in Section 64 (1) addresses the concerns raised by the APTEL in order dated 11th November, 2011 in OP No.1 of 2011 (*Tariff Revision (Suo-Motu action on the letter received from Ministry of Power)*) that should the generating company or distribution licensee fail to file an application beyond 30 days from the last date specified in the regulations, the SERC can initiate suo-moto proceedings. The third proviso appears to do away with filing of tariff petitions by distribution licensee when there are two or more distribution licensees operating in the same area of supply. In such cases the State Commission shall fix the maximum ceiling tariff and minimum tariff suo-moto after calling for requisite information from such distribution licensee. This is a significant departure from what is being followed currently. The period for tariff determination under section 64 (3) in the principal Act is curtailed from 120 days to 90 days. In the event of delay / default in determining tariff within the prescribed period of 90 days the Appropriate Commission is now authorised to issue an interim tariff which interim tariff shall remain operational till issuance of final tariff. The amendment provides that the interim tariff will be for a period not exceeding 150 days of the receipt of the application for determination of tariff or initiation of such proceeding. This means that the interim tariff will only be for a period of 2 months, i.e., 60 days under the amendment.

13. Amendment Sr. No.17 relating to Section 77

13.1 Amended Section.

~~77 (1) The Chairperson and the Members of the Central Commission shall be persons having adequate knowledge of, or experience in, or shown capacity in, dealing with, problems relating to engineering, law, economics, commerce, finance or, management and shall be appointed in the following manner, namely:-~~

~~(a) one person having qualifications and experience in the field of engineering with specialisation in generation, transmission or distribution of electricity;~~



~~(b) one person having qualifications and experience in the field of finance;~~

~~e) two persons having qualifications and experience in the field of economics, commerce, law or management;~~

~~Provided that not more than one Member shall be appointed under the same category under clause (c).~~

(1) The Chairperson of the Central Commission shall be a person of ability, integrity and standing, who is or has been –

(i) head of an organisation dealing with generation, transmission or distribution of electricity; or

(ii) Secretary to the Government of India or its equivalent

Provided that preference shall be given to a person having adequate knowledge and experience of not less than two years in the power sector

~~(2) Notwithstanding anything contained in sub-section (1), the Central Government may appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of the Supreme Court or the Chief Justice of a High Court:~~

~~Provided that no appointment under this sub-section shall be made except after consultation with the Chief Justice of India.~~

(2) The Members, other than the Chairperson of the Central Commission shall be persons of ability, integrity and standing, having adequate knowledge of and experience in the fields of engineering, law, economics, commerce, finance, public policy or public administration or management and shall be appointed as follows:—

(a) one person having adequate qualifications and experience in the field of engineering with specialisation in generation, transmission or distribution of electricity;

(b) one person having adequate qualifications and experience in the field of finance, economics, commerce, public policy, public administration or management; and

(c) one person, who is, or has been holding a judicial office or is a person possessing adequate professional qualifications and experience in law.



(3) The Chairperson or any other Member of the Central Commission shall not hold any other office.

(4) The Chairperson shall be the Chief Executive of the Central Commission.

13.2 Comments/ Observations

In sr. no. 17, the amendment relates to section 77 of the principal Act dealing with the qualification of the Chairperson and Members of the CERC. The proposed amendment in sub-section 1 splits the qualification under two heads, one for the Chairperson and the other for the Members. This is a complete departure from the present law. The amendment proposes that the Chairperson's qualification shall be amongst (i) head of an organisation dealing with generation, transmission, or distribution of electricity; or (ii) Secretary to the Government of India or its equivalent. A proviso has been introduced to the amended section 77 (1) that a preference shall be given to person having adequate knowledge and experience of not less than two years in the power sector. It appears that by the new amendment, the Chairperson of the CERC is being tilted in favour of the head of an organisation dealing with generation, transmission, or distribution of electricity or a Secretary to Government of India. This amendment has to be seen from the perspective of the judgment of the Supreme Court (*Madras Bar Association v. Union of India* (2021) 7 SCC 369).

A judicial officer or a person who has not been the head of an organisation can never be the Chairperson of the CERC. The amendment while making some cosmetic changes deletes the proviso which envisaged appointment of a Judge of the Supreme Court or a Chief Justice of a High Court as Chairperson of the CERC. While specifying the qualification of the Chairperson in section 77 (1) to either head of an organisation dealing with generation, transmission, or distribution of electricity or Secretary to the Government of India or its equivalent, the option of having a judge in terms of the principal Act has now been deleted. This may become a contentious matter.

14. Amendment Sr. No.18 relating to Section 78

14.1 Amended 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) Member of the ~~Planning Commission~~ [Niti Ayog](#) incharge of the energy sector Chairperson;



(b)

(2) For the purposes of clause (d) of sub-section (1), the Central Government shall nominate from amongst persons holding the post of chairperson or managing director, by whatever name called, of any public financial institution ~~specified in section 4A defined in clause (72) of section 2 of the Companies Act, 2013.~~

.....

(9) No appointment of the Chairperson or other Member shall be invalid merely by reason of any vacancy, ~~other than the Chairman,~~ in the Selection Committee:

14.2 Comments/ Observations

Amendment sr. no. 18 relating to section 78 of the principal Act needs no comment

15. Amendment Sr. No.19 relating to Section 79

15.1 Amended Section.

79. (1) The Central Commission shall discharge the following functions, namely:-

(a)

~~(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;~~

(f) to adjudicate upon the disputes including those relating to performance of obligations under a contract related to sale, purchase or transmission of electricity, involving generating companies or licensees in regard to matters connected with clauses (a) to (d)

(fa) to adjudicate upon the disputes involving the National Load Despatch Centre or the Regional Load Despatch Centre in regard to matters connected with sections 26, 28 and 29

....

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;

(ja) to grant licence for distributing electricity in more than one State;

(k) to discharge such other functions as may be assigned under this Act.



Provided that the Chairperson of the Central Commission shall constitute a Bench consisting of a Member appointed under clause (c) of sub-section (2) of section 77 and not more than one Member, as may be nominated by the Chairperson, who shall discharge the functions as provided in clauses (f) and (fa).

15.2 Comments/ Observations

Amendment sr. no. 19 relates to section 79 of the principal Act dealing with the functions of the CERC. In sub-section (1) clause (f) the adjudicatory power of the CERC has been enhanced to specify that the CERC can adjudicate disputes including relating to performance of obligation under a contract, sale, purchase, or transmission of electricity involving generating companies or licensees. However, the ability to refer the matter to arbitration has been done away with. This is a matter of concern for the arbitration route for resolving certain matters concerning PPA and other disputes as envisaged in the original scheme has not been put to good use. By introduction of the proposed section 79 (1) (fa) the power to adjudicate disputes involving NLDC and RLDC has been vested with the CERC.

An interesting clause has been introduced under section 79 (1) (ja) by which the CERC has now been authorised to grant license for distributing electricity in more than one state. This will be a contentious issue for electricity is a concurrent subject and this centralising feature in matters of grant of distribution license (thereby excluding the State Commission / agencies) will be a matter of concern to various State Governments. The distribution license can now be issued / granted from Delhi for any part of India at least in relation to major private players who would have parallel licenses. Such licensees shall be licensees of the CERC, but the tariff will be determined by the concerned SERC (Retail tariff determination has not been included in the function of CERC). All actions under section 16 to 24 will be taken by the SERC. Can the SERC revoke or amend the license which it has not granted?

A proviso has been added to section 79 (1) (k) by which the CERC can have benches for adjudication with a legal / judicial Member which bench may be different from a bench conducting non-adjudicatory functions. This amendment is in line with the Supreme Court's judgment in *State of Gujarat Vs Utility Users Welfare Association*, 2018(6) SCC 21. In para 90 of this judgment, the Supreme Court has distinguished various functions of the Commissions and has observed that real adjudicatory function is under section 86 (f). This provision has been made to facilitate the Commission to carry out non-adjudicatory functions in the absence of a legal / judicial Member.

16. Amendment Sr. No.20 relating to Section 82



16.1 Amended Section.

82. (1) Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission:

....

~~(4) The State Commission shall consist of not more than three Members including the Chairperson.~~

(4) The State Commission shall consist of a Chairperson and three other Members.

(5) The Chairperson and Members of the State Commission shall be appointed by the State Government on the recommendation of a Selection Committee referred to in section 85.

(6) If any State Commission is unable to perform its functions on account of vacancies, the Central Government may, in consultation with the State Government concerned, entrust its functions to any other State Commission or Joint Commission, as it deems necessary.

16.2 Comments/ Observations

Amendment sr. no. 20 relates to section 82 of the principal Act dealing with the constitution of the SERC. The proposed amendment increases the strength of the SERC. Originally the SERC consisted of three Members including the Chairperson. Under the proposed amendment, the SERC shall consist of a Chairperson and three other Members, thus taking the total strength to four. An enabling provision has been introduced for a Joint Commission in case the SERC is unable to perform its function on account of vacancies. This provision could be applicable in cases single member commissions.

17. Amendment Sr. No.21 relating to Section 84

17.1 Amended Section.

84. ~~(1) The Chairperson and the Members of the State Commission shall be persons of ability, integrity and standing who have adequate knowledge of, and have shown capacity in, dealing with problems relating to engineering, finance, commerce, economics, law or management.~~



~~(2) Notwithstanding anything contained in sub-section (1), the State Government may appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court:~~

~~Provided that no appointment under this sub-section shall be made except after consultation with the Chief Justice of that High Court.~~

(1) The Chairperson of the State Commission shall be a person of ability, integrity and standing, who is or has been,—

- (i) the head of an organisation dealing with generation, transmission or distribution of electricity; or
- (ii) a Principal Secretary to the State Government or its equivalent:

Provided that preference shall be given to a person having adequate knowledge and experience of not less than two years in the power sector

(2) The Members, other than the Chairperson of the State Commission, shall be persons of ability, integrity and standing having adequate knowledge of and experience in the fields of engineering, law, economics, commerce, finance, public policy, public administration or management and shall be appointed as follows:—

- (a) one person having adequate qualifications and experience in the field of engineering with specialisation in generation, transmission or distribution of electricity;
- (b) one person having adequate qualifications and experience in⁴⁰ the field of finance, economics, commerce, public policy, public administration or management; and
- (c) one person, who is, or has been holding a judicial office or is a person possessing adequate professional qualifications and experience in law.

(3) The Chairperson or any other Member of the State Commission shall not hold any other office.

(4) The Chairperson shall be the Chief Executive of the State Commission.

17.2 Comments/ Observations

Amendment sr. no. 21 is in relation to section 84 of the principal Act. It mirrors the appointment provisions of the Chairperson and Members of the State Commission with that of the CERC. The comments made in relation to amendments proposed in section 77 may also be read as a part of the comments in this section.



18. Amendment Sr. No.22 relating to Section 85

18.1 Amended 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) a person who has been a Judge of the High Court.... Chairperson;
- (b) the Chief Secretary of the concerned State..... .Member;
- ~~(c) the Chairperson of the Authority or the Chairperson of the Central Commission Member:~~
- (c) a nominee of the Central Government not below the rank of Additional Secretary to the Government of India - Member

Provided that nothing contained in this section shall apply to the appointment of a person as the Chairperson who is or has been a Judge of the High Court

....

- 6) No appointment of Chairperson or other Member shall be invalid merely by reason of any ~~vacancy in the Selection Committee~~, **vacancy other than that of Chairperson**, in the Selection Committee.

18.2 Comments/ Observations

In amendment sr. no. 22 in relation to section 85 of the principal Act dealing with the constitution of Selection Committee to select Members of the SERC, the provision of the principal Act has been amended to remove the Chairperson of the CEA or the CERC in the Selection Committee and who is now replaced by the nominee of the Central Government not below the rank of an Additional Secretary to the Government of India.

19. Amendment Sr. No.23 relating to Section 86

19.1 Amended Section.

86. (1) The State Commission shall discharge the following functions, namely: -

- (a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that the tariff recovers all prudent costs incurred for supply of electricity and also provide reasonable returns on investment and take necessary steps to ensure financial stability of the licensees:



Provided further that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

....

~~(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;~~

(e) promote generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such person, a percentage of the total consumption of electricity in the area of supply of a distribution licensee which shall not be less than such percentage as maybe prescribed by the Central Government.

(ea) promote co-generation of electricity

~~(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;~~

(f) adjudicate upon the disputes including those relating to performance of obligations under contracts related to sale, purchase or transmission of electricity involving generating companies or licensees:

Provided that in case of renegeing of Power Purchase Agreement by a generating company or a licensee, the dispute shall be adjudicated along with appropriate compensation to the affected party, within ninety days from the date of submission of petition to the Appropriate Commission;

(fa) adjudicate upon the disputes involving the State Load Despatch Centre in regard to matters connected with section 32 and section 33

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;



(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary;

(ja) issue directions or guidelines or specify regulations to secure consumer choice and an efficient, coordinated and economical use of the distribution system, where there are more than one distribution licensee in an area of supply;

(jb) review the resource adequacy at intervals of every six months for each of the distribution licensees in accordance with the guidelines issued by the Central Government and

(k) discharge such other functions as may be assigned to it under this Act by the Central Government or the State Government:

Provided that the Chairperson of the State Commission shall constitute a Bench consisting of a Member appointed under clause (c) of sub-section (2) of section 84 and not more than one Member, as may be nominated by the Chairperson, who shall discharge the functions provided in clauses (f) and (fa).

19.2 Comments/ Observations

In amendment sr. no. 23, there are substantial amendments in relation to section 86 of the principal Act relating to functions of the SERC. The proposed amendment substitutes the proviso to section 86 (1) (a) to provide for recovery through tariff all prudent costs incurred for supply of electricity and also reasonable return on investment and to take necessary steps to ensure financial stability of the distribution licensee. How would this provision fit in with ceiling tariff deliberated above needs to be understood. Further, section 86 (1) (e) (dealing with promotion of generation of electricity from renewable sources) has been substituted. The principal departure in the amendment is that the renewable purchase obligation (hereinafter, "RPO") shall be in terms of the percentage prescribed by the Central Government in the form of a rule. Apart from the aforesaid, by introduction of a clause (Section 86 (1) (ea)) co-generation of electricity has to be separately promoted and is no longer clubbed with renewable energy. The result of this is that electricity generated through co-generation will not be available for fulfilment of RPO. This will put to rest disputes that are pending in various States, more so before the High Court at Calcutta. The adjudication clause, i.e., section 86 (1) (f) has been strengthened to allow for disputes arising out of contract relating to sale, purchase or transmission of electricity involving generating companies or licensees. The provision relating to settlement of disputes through arbitration has been dropped. Further, by way of a proviso a timeline for adjudication of PPA disputes has been provided which is within 90 days from date of submission of



petition. The amendment proposes to use the phrase “*appropriate compensation*” so as to clarify that the regulator will have the ability to award damages / compensation for breach of PPA. Adjudication of disputes involving SLDCs is expressly provided in the amended section 86 (1) (fa). Jurisdiction for efficient coordination and economical use of the distribution system where there is more than one distribution licensee in an area of supply has been strengthened / widened. The SERC under amendment section 86 (1) (ja) has the power to issue directions or guidelines or specify regulations in this direction so as to secure consumer choice etc. Apart from the aforesaid, the SERC has been empowered to review “*resource adequacy*” of each distribution licensee every six months in accordance with Central Government guidelines. “*Resource adequacy*” is not defined and as such needs to be explained. An introduction of the words “*Central Government*” or “*State Government*” in Section 86 (1) (k) may substantially erode the independence of the SERCs in terms of the principal Act. The SERC discharges functions in terms of the provisions of the Act. Now the SERC has to discharge functions not only in terms of the provisions of the Act but also by what the Central Government or State Government says. This is a little worrisome and has the ability to shake up the independent regulatory structure that was originally envisaged. The government’s role was only issuing policy guidelines and issuing directions in cases of emergency. Clearly, there is an expansion of role of government as is evident from various clauses. Section 86 (1) mirrors provisions relating to the proviso inserted in the context of section 79 (k). This is in the context of creation of separate benches for the adjudication of disputes and for other functions of the SERC. This distinction as has been observed earlier has risks for the reason that the legal / judicial Member may not be present in cases classified as non-adjudicatory in nature.

20. Amendment Sr. No.24 relating to Section 89

20.1 Amended Section.

89. (1) The Chairperson or other Member shall hold office for a term of five years from the date he enters upon his office;

Provided that the Chairperson or other Member in the Central Commission or the State Commission shall not be eligible for re-appointment in the same capacity as the Chairperson or a Member in that Commission in which he had earlier held office as such

Provided further that no Chairperson or Member shall hold office as such after he has attained the age of ~~sixty-five~~ **sixty-seven** years.

20.2 Comments/ Observations



In amendment sr. no 24 in relation to section 89 of the principal Act, the age of the Chairperson or Member for purposes of superannuation has been increased from 65 years to 67 years.

21. Amendment Sr. No.25 relating to Section 90

21.1 Amended Section.

90. (1) No Member shall be removed from office except in accordance with the provisions of this section.

(2) ...

(f) has been guilty of proved misbehaviour:

(g) has wilfully violated or overlooked the provisions of this Act or the rules or regulations made thereunder; or

(h) has been grossly negligent in performing one or more functions assigned to him or the Commission under this Act or the rules or regulations made thereunder:

Provided that no Member shall be removed from his office on any ground specified in clauses (d), (e) and (f), **clauses (d), (e) and (f), (g) and (h)** unless the Chairperson of the Appellate Tribunal on a reference being made to him in this behalf by the Central Government, or the State Government, as the case may be, has, on an inquiry, held by him in accordance with such procedure as may be prescribed by the Central Government, reported that the Member ought on such ground or grounds to be removed.

21.2 Comments/ Observations

Amendment sr. no. 25 relating to the section 90 of the principal Act dealing with removal of Members has inserted clauses which may also impair / impede the independence of the regulatory institution. A Member can now be removed if such Member has wilfully violated or overlooked a provision of the Act, or the rules or regulations made thereunder or has been grossly negligent in performing one or more functions assigned to him or the Commission under the Act or the rules or regulations made thereunder. The aforesaid insertions have the potential of allegations being made against a Member who will then be under a scanner and may thereafter not be allowed to function fearlessly or independently. These clauses have the potential of being misused or abused and being applied against Members who display independence. Surely, wilful violation and gross negligence are matters that require quasi-criminal investigation. These clauses will surely weigh on the mind of



independent regulators when the State Government who are at the receiving end can always make allegations and initiate proceedings.

22. Amendment Sr. No.26 relating to Section 94

22.1 Amended Section.

94. (1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -

...

(4) An order made by the Appropriate Commission or its Bench shall be executable as a decree of a civil court and, for this purpose, such Commission or Bench shall have all the powers of a civil court including but not limited to powers of attachment and sale of property and appointment of a receiver.

(5) Notwithstanding anything contained in sub-section (4), the Appropriate Commission or Bench referred to in that sub-section may transmit an order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

22.2 Comments/ Observations

Amendment sr. no. 26 relates to section 94 of the principal Act in respect of powers of the Appropriate Commission. The insertions in section 94 are designed to strengthen the hands of the Appropriate Commission by making the order made by the Appropriate Commission or its Bench executable as a decree of a civil court and, for this purpose, such Commission or Bench shall have all the powers of a civil court including but not limited to powers of attachment and sale of property and appointment of a receiver. These powers are important and may be welcome. However, it has to be seen whether these powers can be used only in matters where adjudication takes place or also in other matters because the Bill seeks to create benches in the SERC and CERC where in matters of adjudication the legal / judicial Member is present and in other matters there is no legal / judicial Member. While these powers are necessary, the way in which it can be exercised effectively needs to be deliberated.



23. Amendment Sr. No.27 relating to Section 112

23.1 Amended Section.

112. (1) The Appellate Tribunal shall consist of a Chairperson and ~~three other Members~~ such number of other Members, not less than three, as may be prescribed by the Central Government.

23.2 Comments/ Observations

In amendment sr. no. 27 in relation to section 112 of the principal Act, the Central Government has retained the power to increase the strength of the APTEL which currently consists of one Chairperson, and three other Members. Now the Central Government by a notification / rule can prescribe such number of other Members not less than three.

24. Amendment Sr. No.29 relating to Section 142

24.1 Amended Section.

~~142. In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any provisions of this Act or rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.~~

142. (1) Where the Appropriate Commission is satisfied on a complaint made to it or otherwise that any person has contravened any of the provisions of this Act or the rules made thereunder, the Commission may after giving such person an opportunity of being heard, by order in writing, direct that without prejudice to any other penalty to which he may be liable under this Act, such person shall be liable to pay a penalty, which shall not exceed one crore rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six lakh rupees for each day during which the failure continues after contravention of the first such direction.

(2) Where the Appropriate Commission is satisfied on a complaint made to it or otherwise that any person has contravened any regulation, direction or order issued by it, the Commission may after giving such person an opportunity of



being heard, by order in writing, direct that without prejudice to any other penalty to which he may be liable under this Act, such person shall be liable to pay a penalty, which shall not exceed ten lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to sixty thousand rupees for each day during which the failure continues after contravention of the first such direction.

(3) Notwithstanding anything contained in sub-sections (1) and (2), where the Appropriate Commission is satisfied on a complaint filed before it or otherwise, that obligated entity has not purchased power from renewable sources of energy as specified under clause (e) of sub-section (1) of section 86, the Commission shall after giving such entity an opportunity of being heard, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall be liable to pay a penalty of a sum calculated at a rate of—

- (i) not less than twenty-five paise per kilowatt-hour and not more than thirty-five paise per kilowatt-hour for the shortfall in purchase in the first year of default;
- (ii) not less than thirty-five paise per kilowatt-hour and not more than fifty paise per kilowatt-hour for the shortfall in purchase continuing after the first year of default.

24.2 Comments/ Observations

In amendment sr. no. 29, section 142 of the principal Act relating to punishment for non-compliance of directions by Appropriate Commission has been split into two parts. The first part, i.e., section 142 (1) deals with violations of any provisions of the Act or the rules made thereunder. In those violations the penalty has been increased from a maximum of Rs. 1 Lakh to Rs. 1 Crore and for continuing failure the additional penalty per day has been increased from Rs. 6,000 to Rs. 6 Lakh. However, in the proposed Section 142 (2) which deals with contravention of any regulation, direction or order issued by the Appropriate Commission the penalty is much lesser. Maximum penalty shall not exceed Rs. 10 Lakh for each contravention and for continuing offences, an additional penalty of Rs. 60,000 for each day during which the failure continues. In order to strengthen compliance of RPO, a punishment for violation of such obligation to purchase green power has been introduced by way of sub-section (3) in section 142. Sub-section (3) in section 142 proposes that in addition to the penalties prescribed in section 142 (1) and (2) additional penalty calculated not less than 25 paise per kWh and not more than 35 paise per kWh for shortfall in purchase in the first year of default; and not less than 35 paise per kWh and not more than 50 paise per



kWh for the shortfall in purchase continuing after the first year in default shall be imposed on the defaulting entity.

25. Amendment Sr. No.30 relating to Section 146

25.1 Amended Section.

146. Whoever, fails to comply with any order or direction given under this Act, within such time as may be specified in the said order or direction or contravenes or attempts or abets the contravention of any of the provisions of this Act or any rules or regulations made thereunder, ~~shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one lakh rupees, or with both in respect of each offence and in the case of a continuing failure, with an additional fine which may extend to five thousand rupees for every day~~ shall be punishable with fine which may extend to one crore rupees, in respect of each offence and in the case of a continuing failure, with an additional fine which may extend to one lakh rupees for every day during which the failure continues after conviction of the first such offence:

25.2 Comments/ Observations

In amendment sr. no. 30, in relation to section 146 of the principal Act, the punishment for non-compliance of orders or directions given under the Act has been enhanced to a fine that may extend up to Rs. 1 Crore in relation to each offence and for continuing failure additional fine may extend to Rs. 1 Lakh per day.

26. Amendment Sr. No.31 relating to Section 152

26.1 Amended Section.

152. (1) Notwithstanding anything contained in the Code of Criminal Procedure 1973, the Appropriate Government or any officer authorized by it in this behalf ~~may~~ shall accept from any consumer or person who committed or who is reasonably suspected of having committed an offence of theft of electricity punishable under this Act, a sum of money by way of compounding of the offence as specified in the Table below:

26.2 Comments/ Observations

In amendment sr. no. 31 relating to section 152 of the principal Act which deals with compounding of offences, the discretion to determine whether to compound or not to compound given to the Appropriate Government or any officer authorised by it has been taken away to some extent by replacing the words "*may accept*" by "*shall accept*".

27. Amendment Sr. No.32 relating to Section 166

27.1 Amended Section.



166. (1) The Central Government shall constitute a Coordination Forum consisting of the Chairperson of the Central Commission and Members thereof, the Chairperson of the Authority, representatives of generating companies and transmission licensees engaged in inter-State transmission of electricity for smooth and coordinated development of the power system in the country.

(2) The Central Government shall also constitute a forum of regulators consisting of the Chairperson of the Central Commission and Chairpersons of the State Commissions.

(3) The Chairperson of the Central Commission shall be the Chairperson of the Forum of regulators referred to in sub-section (2).

3(A) The Forum of Regulators referred to in sub-section (2) shall discharge the following functions, namely:—

(a) Prepare and lay on model regulations for the guidance of State Commission for the purposes of sub-section (1) of section 42, sub-section (1) of section 43, sub-sections (1) and (2) of section 60A, section 61 and the first proviso to sub-section (1) of section 62, in accordance with the provisions of this Act and the rules made thereunder;

(b) monitor the status of compliance of the provisions of clause (e) of sub-section (1) of section 86 by distribution licensees on annual basis and submit a report to the Central Government; and

(c) any other functions, as may be prescribed by the Central Government

(4) ...

27.2 Comments/ Observations

In amendment sr. no. 32 relating to section 166 of the principal Act, the Forum of Regulators has been vested with the power to prepare and lay model regulations for the guidance of SERC for the purposes of sub-section 42 (1), 43 (1), 60A (1) and (2), 61, and 62 (1) (First proviso).

Section	Subject
42(1)	“(1) It shall be the duty of all distribution licensees to,— (a) ensure an efficient, co-ordinated and economic distribution system in their area of supply: Provided that a distribution licensee may use the distribution systems of other licensees in the area of supply for supplying power through the system of non-discriminatory open access;

	(b) give non-discriminatory open access to other distribution licensees on payment of wheeling charges; and (c) provide supply of electricity to the consumers, in accordance with the provisions of this Act and the rules made thereunder by the Central Government and the regulations made by the Appropriate Commission and in accordance with the model regulations laid down by the Forum of Regulators.”
43(1)	Duty to supply on request
60 A (1) and (2)	Management of power agreement, cross subsidy, etc.
61	Tariff regulations
62 (1) (1 st proviso)	Determination of tariff

Apart from the aforesaid, the Forum of Regulators is also required to monitor status of compliance of RPO of the distribution licensee in terms envisaged in section 86 (1) (e) on an annual basis and submit a report to the Central Government. The Central Government has also retained the power to prescribe any other function that it feels necessary to be discharged by the Forum of Regulators.

28. Amendment Sr. No.33 relating to Section 176

28.1 Amended Section.

176. (1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely: -

~~(a) the time within which the objection and suggestions on the draft National Electricity Plan to be invited by the Authority under the proviso to sub-section (4) of section 3;~~

(a) the security of payment under clause (60a) of section 2;

(aa) the time within which the objection and suggestions on the draft National Electricity Plan to be invited by the Authority under the proviso to sub-section (4) of section 3;



(ab) the manner of concurrence by the Authority under sub-section (1A) of section 8;

(ac) the criteria for area of supply under clause (b) of section 14

...

(i) the functions and duties of the Central Electricity Authority under section 73;

(ia) the percentage of total consumption of electricity in the area of supply of distribution licensee under clause (e) of sub-section (1) of section 86.

...

(q) the form and the manner of verifying such form, and fee for filing appeal under sub-section (2) of section 111;

(qa) the number of members of the Appellate Tribunal under sub-section (1) of section 112.

...

(x) the powers to be exercised and the functions to be performed by the Inspectors under sub-section (1) of section 162;

(xa) any other functions to be discharged by the Forum of Regulators under clause (c) of sub-section (3A) of section 166

28.2 Comments/ Observations

In amendment sr. no. 33 relating to section 176 of the principal Act, the rule making power of the Central Government has been enhanced to provide for the following:

Matters enumerated in Amendment Sr. No. 33
(a) the security of payment under clause (60a) of section 2
(aa) the time within which the objection and suggestions on the draft National Electricity Plan to be invited.
by the Authority under the proviso to sub-section (4) of section 3
(ab) the manner of concurrence by the Authority under sub-section (1A) of section 8
(ac) the criteria for area of supply under clause (b) of section 14;
(ia) the percentage of total consumption of electricity in the area of supply of distribution licensee under clause (e) of sub-section (1) of section 86



(qa) the number of members of the Appellate Tribunal under sub-section (1) of section 112

(xa) any other functions to be discharged by the Forum of Regulators under clause (c) of subsection (3A) of section 166

29. Amendment Sr. No.34 relating to Section 178

29.1 Amended Section.

178 (1) Central Commission may, by notification make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(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 following matters, namely:-

...

(v) ~~the manner of making an application~~ **the time, manner of making an application** before the Central Commission and the fee payable therefor under sub-section (1) of section 64;

29.2 Comments/ Observations

In amendment sr. no. 34 in relation to section 178 of the principal Act, a small amendment has been introduced in the regulation making power of the CERC to provide for not only the manner of making an application to CERC for determination of tariff under section 61, but also now the CERC is required to specify the time of making application of determination of tariff.

30. Amendment Sr. No.35 relating to Section 181

30.1 Amended Section.

181. (1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(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 :-

(a)...



(l)...

(la) the payment of transmission charges and a surcharge thereon by the consumer under proviso to sub-clause (ii) of clause (c) of section 40;

(zb)...

(zba) the arrangements for sharing of power and associated costs amongst the distribution licensees in the area of supply under sub-section (1) of section 60A

(zbb) the managing of cross subsidy balancing fund by a Government company under sub-section (2) of section 60A

(zg) ~~the manner of making an application~~ the time, manner of making an application before the State Commission and the fee payable therefor under sub-section (1) of section 64

(zi)....

(zia) securing the consumer choice under clause (ja) of sub-section (1) of section 86;

30.2 Comments/ Observations

Amendment sr. no. 35 relating to section 181 of the principal Act empowers the SERC to frame regulations on certain matters which have been inserted by the proposed amendments, namely:

Matters enumerated in Amendment Sr. No. 35
(la) the payment of transmission charges and a surcharge thereon by the consumer under proviso to sub-clause (ii) of clause © of section 40;
(zba) the arrangements for sharing of power and associated costs amongst the distribution licensees in the area of supply under sub-section (1) of section 60A
(zbb) the managing of cross subsidy balancing fund by a Government company under sub-section (2) of section 60A
(zia) securing the consumer choice under clause (ja) of sub-section (1) of section 86

Further, a small amendment has been introduced in the regulation making power of the SERC to provide for not only the manner of making an application to SERC for determination of tariff under Section 64 (1), but also now the SERC is required to specify the time of making application of determination of tariff.



31. Amendment Sr. No.36 relating to Section 183

31.1 Amended Section.

Section 183. (Power to remove difficulties): --- (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published, make such provisions not inconsistent with the provisions of this Act, as may appear to be necessary for removing the difficulty:

Provided that no order shall be made under this section after the expiry of two years from the date of commencement of this Act.

(1A) Notwithstanding anything contained in sub-section (1), if any difficulty arises in giving effect to the provisions of this Act as amended by the Electricity (Amendment) Act, 2022, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act, as may appear to it to be necessary for removing the difficulty:

Provided that no such order shall be made under this section after the expiry of a period of two years from the date of commencement of the Electricity (Amendment) Act, 2022.

31.2 Comments/ Observations

In amendment sr. no. 36 in relation to section 183 of the principal Act relating to power to remove difficulty, the Central Government has vested to itself the power to remove difficulties for a period of two years after the amendments have come into force by issuing necessary orders for removal of difficulty.

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