

## HIGHLIGHTS OF THE ELECTRICITY (AMENDMENT) BILL, 2020

### 1. INTRODUCTION

1.1 The Electricity Act, 2003 (the "**Electricity Act**") was enacted to consolidate the electricity laws in India. While the Electricity Act facilitated significant private investments, market development, and adoption of transparent tariff mechanism etc., the power sector has been facing various developmental hurdles for some time. Consequently, to address various issues which have been highlighted by the industry and to further reform the power sector, the Ministry of Power ("**MoP**"), Government of India, released the draft Electricity (Amendment) Bill, 2020 (the "**Amendment Bill**") on April 17, 2020 to amend the Electricity Act. The MoP has requested the stakeholders to provide their comments and suggestions on the Amendment Bill within 21 (twenty one) days from the date of release of the Amendment Bill (i.e. by or before 8 May, 2020).

### 2. KEY AMENDMENTS PROPOSED TO THE ELECTRICITY ACT

A summary of the key proposed amendments is set out below.

#### 2.1 Improving Enforcement of Contracts

(a) **Establishment of the Electricity Contract Enforcement Authority ("ECEA"):** While various provisions of the Electricity Act relate to the sale and purchase of electricity, there are no specific provisions existing in the Electricity Act dealing with the issues under power purchase agreements ("**PPAs**") executed for such sale and purchase of electricity or contracts relating to transmission. In order to improve enforceability of PPAs and contracts relating to transmission, and to ensure time bound adjudication of disputes under PPAs/transmission related contracts, the Amendment Bill proposes to establish the ECEA to adjudicate upon the matters regarding specific performance of:

- PPAs between a generating company and a licensee or between licensees; and
- contracts related to transmission of electricity executed between a generating company and a licensee or between licensees.

ECEA is proposed to be the sole adjudicating authority with original jurisdiction over enforcement of performance obligations under PPAs/contracts relating to sale, purchase and transmission of electricity to the exclusion of the Appropriate Commission<sup>1</sup>, whose jurisdiction is proposed to be

<sup>1</sup> Under the Electricity Act, the "Appropriate Commission" is defined to mean the Central Regulatory Commission referred to in sub-section (1) of Section 76 of the Electricity Act or the State Regulatory Commission referred to in Section 82 of the Electricity Act or the Joint Commission referred to in Section 83 of the Electricity Act, as the case may be.

clearly limited to determination of tariff or any other dispute regarding tariff. According to the MoP, the ECEA is required to dispose of the matter within 120 (one hundred and twenty) days from the date of its receipt. Under the Amendment Bill, it is proposed that the orders of ECEA will be executed in the same manner as in the case of a decree of civil court. Further, an appeal against the orders of ECEA will be heard by the Appellate Tribunal for Electricity (“APTEL”).

It appears that if the Amendment Bill is enacted, agreements for sale, purchase and transmission of electricity involving a licensee cannot provide for arbitration (which is generally considered as acceptable terms to the international investor community).

- (b) **Payment Security Mechanism for Scheduling of Electricity:** A robust system to enforce compliance with payment security mechanism has been a major pain point for the power industry and has led to a huge pool of unpaid dues to generators – this has caused a lot of stress in the sector. The Amendment Bill provides that *"no electricity shall be scheduled or despatched under such contract unless adequate security of payment as agreed upon by the parties to the contract, has been provided"*. The dispatch of electricity is being undertaken by the load dispatch centre through the process of scheduling - the Amendment Bill proposes to empower the load dispatch centres to administer the establishment of adequate payment security mechanism before scheduling dispatch of electricity as per the relevant contracts<sup>2</sup>. Creation of such a payment security mechanism is proposed to be made mandatory keeping in view the sanctity of contracts, unless it is waived by the parties to the contract themselves.

## 2.2 Promotion of Renewable Energy and Hydro Power Sector

The Amendment Bill proposes that the Central Government (in consultation with the State Government) will prepare and notify, from time to time, a National Renewable Energy Policy (“NRE Policy”). The formulation and notification of the NRE Policy is intended to promote the generation of electricity from renewable sources of energy. The Amendment Bill proposed a minimum fixed percentage (as prescribed by the Central Government) of electricity from renewable and hydro sources of energy should be purchased – specifically, the proposed amendment to Section 86(1) (e) of the Electricity Act makes it mandatory for State Commissions to follow directions given in NRE Policy for prescribing a minimum percentage of purchase of electricity from renewable and hydro sources of energy. Further, as hydro power has been recognised as the renewable source of energy, the Amendment Bill further proposes to expand the scope of renewable power purchase obligations to include hydro sources.

## 2.3 Tariff and Cross Subsidy

In respect of the retail tariff, the Amendment Bill seeks to ensure that such retail tariff is determined by the Appropriate Commission to reflect the actual cost or fair cost of the power which is to be supplied in order to ensure financial health of the distribution companies. In order to achieve this, the Amendment Bill provides that the Appropriate Commission should set the tariff for the retail sale of electricity without accounting for any subsidy, which, if any, under Section 65 of the Electricity Act, should be provided by the

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<sup>2</sup> In this context we should highlight that recently, the MoP had issued direction to Load Dispatch Centres to ensure opening of letter of credit for dispatching and scheduling of the electricity. However, the DISCOMs of Andhra Pradesh had challenged the legality of the order before the High Court and one of the grounds for challenge was locus standi of the MoP in interfering in the agreement between a Distribution Licensee and a Generating Company.

relevant government directly to the consumer. As per the Amendment Bill, it is proposed that the tariff should reflect the cost of the supply of electricity and reduces the cross-subsidies levied in the manner provided under the tariff policy.

## 2.4 Open Access

Under the Electricity Act, open access can be granted to a consumer on the payment of surcharge and wheeling charges as determined by the relevant State Commission<sup>3</sup>. However, such charges do not include charges for intra-state transmission and inter-state transmission of power. In view of this, the Amendment Bill proposes to add such transmission charges, wherever applicable, to the existing charges (i.e. surcharge and wheeling charges). Further, it is proposed under the Amendment Bill that open access surcharge and cross-subsidies will be “progressively reduced” by the State Commission in the manner provided in the tariff policy - Section 42 of the Electricity Act envisaged reduction in cross subsidy as per discretion of the relevant State Commission, however, the Amendment Bill seek to take away discretion of the State Commission for determination of cross subsidy and post amendment the State Commission will be bound to follow the mandate of the Central Government.

## 2.5 The Distribution sub- licensee and Franchisee:

The Amendment Bill proposes that distribution licensees, with the permission of the relevant State Commission, can recognise and authorise a person as “distribution sub-licensee” (distinct from the “franchisee” model already available under the Electricity Act) to distribute electricity on its behalf in a particular area within its area of supply - however, the original distribution licensee will remain the licensee and will ultimately be responsible for ensuring the quality of the distribution of electricity in its area of supply. It is also proposed that such distribution sub-licensee is not required to obtain a separate license under Section 14 of the Electricity Act from the relevant State Commission.

## 2.6 Enhancement of the Regulatory Framework/Ensuring Better Compliance

- (a) **Easing the process for appointment of members of regulatory and adjudicatory bodies:** Under the existing provisions of the Electricity Act, there are multiple selection committees which are required to be constituted for the appointment of (a) members of the APTEL, (b) the chairperson and members of Central Commission<sup>4</sup> and (c) the members of State Commission. The Amendment Bill proposes to streamline the appointment process by having a single selection committee for the appointment of (a) members of the APTEL, and (b) chairperson and members of ECEA, Central Commission, State Commission and Joint Commissions. Further, the Amendment Bill also proposes uniform qualifications for the appointment of chairperson and members of Central Commission and State Commissions.

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<sup>3</sup> Under the Electricity Act, a “State Commission” is defined to mean the State Electricity Regulatory Commission constituted under sub-section (1) of Section 82 of the Electricity Act and includes a Joint Commission constituted under sub-section (1) of Section 83 of the Electricity Act.

<sup>4</sup> Under the Electricity Act, a “Central Commission” is defined to mean the Central Electricity Regulatory Commission referred to in sub-section (1) of Section 76 of the Electricity Act.

- (b) **Increasing the strength of APTEL:** The Amendment Bill proposes to increase the number of APTEL members to seven from three, in addition to the chairperson to enable speedy adjudication and disposal of matters which are filed before the APTEL.
- (c) **Increase in penalties for non-compliance:** Penalties under Section 142 and Section 146 of the Electricity Act are proposed to be increased through the Amendment Bill to ensure better compliance with the provisions of the Electricity Act. The proposed increase in penalties as per the Amendment Bill are set out in the table below:

| Increase in penalty under Section 142  |  |
|--|--|
| <b>Penalty for non-compliance with the directions of the Appropriate Commission</b>  | <b>Additional per day penalty in case of continuing non-compliance</b>   |
| <ul style="list-style-type: none"> <li>• Under the Electricity Act: upto INR 1,00,000</li> <li>• Proposed increase under the Amendment Bill: upto INR 1,00,00,000</li> </ul> | <ul style="list-style-type: none"> <li>• Under the Electricity Act: upto INR 6,000</li> <li>• Proposed increase under the Amendment Bill: upto INR 1,00,000</li> </ul> |
| Increase in penalty under Section 146  |  |
| <b>Penalty for non-compliance of orders or directions under the Electricity Act</b>  | <b>Additional per day penalty in case of continuing non-compliance</b>   |
| <ul style="list-style-type: none"> <li>• Under the Electricity Act: upto INR 1,00,000</li> <li>• Proposed increase under the Amendment Bill: upto INR 1,00,00,000</li> </ul> | <ul style="list-style-type: none"> <li>• Under the Electricity Act: upto INR 5,000</li> <li>• Proposed increase under the Amendment Bill: upto INR 1,00,000</li> </ul> |

- (d) **Penalty for failure to comply with the Renewable Purchase Obligation (RPO):** In what could be a major boost to the renewables sector, for non-compliance with the renewable and hydro power purchase obligation, the Amendment Bill proposed a penalty of INR 0.50/kWh for the shortfall in purchase in the first year of default, and if such default continues for the second successive year, then the penalty is proposed to be increased to INR 1 /kWh and thereafter INR 2/kWh.

## 2.7 Other material amendments proposed in the Amendment Bill

- (a) In view of the emerging requirement to regulate the cross-border transactions of electricity with other countries, the Amendment Bill proposes that the Central Government should be empowered to oversee and prescribe rules and guidelines for cross border electricity transactions.
- (b) To address a situation where there are vacancies in any of the State Commission and on account of such vacancies any State Commission is unable to discharge its functions, the Amendment Bill proposes that Central Government may, in consultation with the relevant State Government, entrust

functions of such State Commission to any other State Commission or Joint Commission, as it deems fit.

- (c) Section 63 of the Electricity Act provides for adoption of tariff by an Appropriate Commission if such tariff was determined through transparent bidding process. However, the timelines in which such tariff should be adopted has not been provided in the Electricity Act. The Amendment Bill proposes to set the timelines for such adoption of tariff (i.e. within 60 (sixty) days from the date of receipt of application for adoption of tariff by the Appropriate Commission). The Amendment Bill further proposes that in the event the tariff is not adopted within such period (i.e. 60 (sixty) days), then such tariff will be deemed to have been adopted by the Appropriate Commission.

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