



Bill Blowup

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Draft Electricity Act (Amendment) Bill, 2020

The Ministry of Power (MoP) recently floated an amended version of the Electricity Act 2003, after previous attempts to introduce changes in 2014 and 2018. The draft bill aims at “the development of the electricity industry through promoting competition and address a few critical issues, which have weakened the commercial and investment activities in the sector.”

The Bill proposes various reforms having direct impacts on power bills of the consumers. In the backdrop of financially stressed utilities, increased push to renewables and an overall economic slowdown in India and across the globe, there is an imminent need to revamp the Indian power sector. However, to achieve that in a just and sustainable way, it becomes crucial to assess the policy imperatives of the major changes proposed. This Bill Blow up is an effort in this direction.

The Bill at a Glance

Highlights

- Mandates State Electricity Regulatory Commissions (SERCs) to phase out cross-subsidies in accordance with the tariff policy (which is also under consultation by the Union Government)¹.
- Strengthens the Appellate Tribunal (APTEL) through proposed multiple benches and granting of enforcement-related powers.
- Provides statutory relevance to the National Renewable Energy policy for the development and promotion of generation of electricity from renewable sources of energy.
- Includes hydropower in the Renewable Purchase Obligation framework of state regulations and provides for higher penalties for non-compliance.
- Mandates security of payments before scheduling or dispatching any electricity through open access or other contracts.

Lowlights

- Lack of robust assessment of the parameters for the elimination of subsidy from tariff realisation.
- Lack of clarification on the roll-out, implementation and monitoring of DBT mechanisms.
- Issue of overlap of jurisdictions between ECEA and existing State Electricity Regulatory Commissions (SERCs), Joint Electricity Regulatory Commissions (JERCs) and the Central Electricity Regulatory Commission (CERC).
- Centralisation of powers by compromising the autonomy of regional and state-level authorities through provisions related to loading despatch centres, contract enforcement, tariff principles, selection of Chairperson and Members of SERCs, amongst others.
- Allowing DISCOMs to engage in Franchisees or Sub-Distribution licensee without much clarification on crucial issues related to the efficacy and rollout of such an intervention.

Action Points

- ◆ Elimination of subsidy in tariff realisation and DBT schemes should be implemented in a phased manner with proper assessment and regulatory mandate.
- ◆ The creation of new authority like the ECEA will complicate the adjudication process; hence, it is recommended that the existing SERCs should be strengthened giving them enforcement power and by capacity building in areas found lacking.
- ◆ The autonomy of Regional Load Dispatch Centres (RLDCs) and State Load Dispatch

- centres (SLDCs) should be ensured by removing the provision giving free hand to NLDC for grid operation.
- ◆ A provision can be added that the draft of the National Renewable Energy Policy will be released to invite public comments.
- ◆ Undertaking Regulatory Impact Assessment (RIA) or Cost-Benefit Analysis (CBA) of the proposed franchise and sub-distribution licensee model becomes imperative to map its impact on various stakeholders before its enactment.

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Introduction

As of the 21st century, electricity has emerged as one of the most vital tools for achieving the socio-economic and environmental objectives of sustainable development. Availability of electricity is an item in the evaluation of Human Resource Development Index highlighting the impact of this sector on the quality of life of the citizens of different countries of the world.

Concerted efforts of the State have repeatedly tried to address the lacunae of this sector. Be it achieving energy access or infusing competition and market reforms in the sector or enhancing the efficiency of usage of electricity or ensuring operational and financial efficiency of the utilities, the Government of India along with the State Governments have resorted to various schemes and programmes. These include Saubhagya scheme (electricity for all), UJALA (distributing LED bulbs and reducing consumption), UDAY (Ujjwal Discom Assurance Yojana), IPDS (Integrated Power Development Scheme) and APDRP (Accelerated Power Development and Reform Programme).

To reform the legislation governing the power sector, the Central Government promulgated the Electricity Act, 2003 (hereinafter E-Act). The E-Act has governed the laws regarding the generation, distribution, transmission, trading and use of electricity. It aimed at facilitating private investments, market development and adoption of regulated tariff mechanisms across the value chain of the power sector. However, there has been a growing consensus in the sector that the E-Act has become archaic² and has been unable to keep up with a fast-changing socio-economic landscape and development paradigm in India and across the globe.

Consequently, to address various issues and further develop the power

sector, the Ministry of Power (MoP), Government of India, released the Draft Electricity (Amendment) Bill, 2014 and 2018 to amend the E-Act. However, both of them were opposed inside and outside the parliament thus it never saw the light of the day.³

Finally, the Government of India has now come out with the Draft Electricity (Amendment) Bill, 2020 to address some recurring issues in the sector and provide a further commercial incentive for private players to enter the market in the generation, distribution and transmission of electricity.

The proposed amendments offer a spectrum of changes, ranging from the creation of ECEA to providing space for DISCOMs to engage in sub-distribution licensee model and institutionalising DBT mechanisms for any kind of subsidy transfers pertaining to state-subsidies given on tariffs. Many of the proposed reforms are indeed the need of the hour, but an evidence-backed rationale for structural changes proposed and an implementation framework seems to be missing from the current discourse.

Another point worth noting is the timing of this bill. As the COVID-19 era casts its shadow of uncertainty over this sector, the capability of authorities and utilities to uptake sweeping structural reforms becomes questionable. However, the need for revamping the power sector cannot be stressed more as we progress on our development agenda alongside the sustainable development goals and climate commitments.

The draft bill under consideration attempts to address some critical issues that have plagued the Indian power sector for years now. For instance, the ECEA is proposed for solving the contract enforcement problems in the sector, which have, severe impacts on various stakeholders engaged in the power supply operations. Provisions

regarding DBT model, removal of cross-subsidy and tariff rationalisation are to reduce the liquidity crunch and debt that has become a pain point for the financial health of many of these utilities, particularly the DISCOMs. While the initiatives taken to resolve the issues are commendable and may potentially transform the Indian power sector but there is a need for making these policies consumer-friendly and base them on regulatory evidence and not, just theories.

The section below discusses some of the key areas under the draft bill, which call for more informed consideration.

Discussion

Tariff Rationalisation: The draft bill stipulates that the Appropriate Commission shall fix tariffs for the retail sale of electricity without accounting for subsidy. The intent behind it is to enforce the long standing demand of tariff rationalisation and phase-out of lucrative subsidies for certain categories of consumers.

To implement it, the draft bill seeks to impose the principles laid down in the new tariff policy by making it binding on all states. If this comes to play, the number of consumer categories will be reduced from 50-plus to five, which will include commercial, industrial, domestic, agricultural and institutional. All of these categories will be charged tariffs as per the true cost of supply with the condition that any subsidy that the state wishes to give to any specific type of consumers should be transferred directly to the targeted beneficiary in their bank accounts through Direct Benefit Transfer (DBT).

Although the objectives behind such an amendment are well known, the bill lacks clarity in terms of their implementation. This becomes even

more relevant considering the examples of challenges faced in the DBT regime in various other sectors of the Indian economy. Firstly, the issue of incomplete penetration of financial inclusion amongst the underserved communities and remote localities remains a bottleneck. On top of it, the capacity of the state to identify and effectively undertake this complex exercise of providing subsidies directly to beneficiaries becomes an issue, especially given that the types of beneficiaries are diverse, scattered and not even on the official records of the state at times.

In such a scenario, if the administrative and implementation-level challenges result in a situation where the subsidies do not reach the targeted beneficiaries on time, there are huge potential economic consequences to it, particularly for the subsidised consumers like residential, agricultural and MSMEs.

The Bill's proposal for a cost-reflective tariff is designed to be achieved by reduction and later elimination of the cross-subsidy. However, the bill intends to do it via the national tariff policy that will be binding on the states. This can potentially take away the discretion of the State Electricity Regulatory Commissions to formulate and implement a plan of action as per the ground realities of the respective states.

Removal of Regulatory Assets: The bill seeks to reduce the accumulation of the regulatory assets, decrease its build-up in tariff and hence, make tariff cost-reflective. Many states have over time accumulated a lot of outstanding financial obligations, which have been acknowledged as regulatory assets by the respective SERCs.

The DISCOMs are allowed to charge a carrying cost on these regulatory assets, which are finally recovered, from the consumers. However, given

the extremely poor collection and billing efficiency of some DISCOMs, these regulatory assets just keep on adding and its amortisation seems a far-fetched idea. The original Electricity Act, APTEL orders and many SERCs have repeatedly highlighted the vicious nature of the regulatory assets. The recent amendment seems to only mention the significance of this issue without providing any concrete solution to tackle the problem.

In this regards, the SERCs should be empowered to prepare and implement an amortisation plan for the respective DISCOMs in consultation with the relevant authorities. Besides, innovative financing principles like discounted buyouts, bad-banks and Asset Restructuring Companies can be kept in mind to achieve the desired objectives.

Provision of Direct Benefit Transfer (DBT): Laudably, the bill states that SERCs will determine the tariff for the retail sale of electricity without any subsidy and the state government shall directly pay a subsidy to the eligible consumer. However, it leaves the DISCOMs and the consumers in disarray by not specifying the roadmap for implementation of DBT.

It does not establish criteria for eligibility for the subsidy, the amount that will be granted as a subsidy, the frequency of payment, consequence of non-payment of subsidy by the state and grievance redressal system related to the same. It also does not address the last mile challenges that have become a feature of the DBT mechanism, the problems faced by social protection schemes in the country and the lack of data and identify issues that are specific to the power sector.

Thus, it is recommended that the DBT mechanism be piloted through the regulatory sandbox⁴, which could be

extrapolated if it is found to be successful with required changes and alterations.

Establishment of Electricity Contract Enforcement Authority:

The proposed amendment provides for the creation of a central ECEA. It is suggested that rather than creating a new authority, the mandate of ERCs needs to expand. Given the issues that could arise due to creation of another national-level authority, the addition of a separate department within the ERCs modelled along Income Tax Department targeted towards contract enforcement could be a swifter, less costly and more effective solution.

In establishing ECEA as the national contract enforcement authority the powers are driven from the ERCs. Centralisation of power, which will inevitably result from such transfer, due to concentration of powers related to the contract and their enforcement in the central government, may have a negative impact on the fairness of the matters.

The extent of the powers and jurisdiction of the ECEA though defined in the amendment bill is liable to overlap with the jurisdiction of the ERCs and cause disputes that will have to be resolved by the Supreme Court. In the meantime, this can also lead to forum shopping.

Thus, it might be ideal to strengthen the SERCs and conduct specialised capacity building and training exercises to make the existing channels of contract enforcement more informed and adequate. Setting up a national-level authority with limited strength is expected to take over and perform the functions of all existing SERCs and the CERC and APTEL. This seems to be against the principle of optimal regulation and effective governance.

Strengthening the APTEL: In a move to strengthen the quasi-judicial channels in the Indian power sector, the bill provides for having three more members on the APTEL. From a body of four members, the APTEL can now have up to seven members. Currently, the APTEL can have at the most two functional benches at any point of time and considering that the APTEL is the appellate forum for all cases against all the electricity regulatory commissions in the country, its size is highly inadequate for the task cut out for it.⁵

The restriction on the number of members and hence the number of benches, not only affects the disposal rate but it also seriously limits the feasibility and effectiveness of circuit benches. Thus, the amendment would ensure that there are enough members for the proper functioning of circuit benches in at least three other major metropolitan cities, like, Mumbai, Chennai and Kolkata for overcoming the disposal rate and accessibility issues.

Facilitating Open Access

Regime: The original E-Act provides for payment of certain types of charges including surcharge, wheeling charges, cross-subsidy charges and others for availing supply through open access route. In addition to it, the draft bill proposes to add inter-state transmission and intra-state transmission charges to the existing charges.

This will potentially increase the rate of open access in the short term, but when reading with the proposition of phasing out cross-subsidy charges, seems to address a crucial issue that the DISCOMs faces owing to open access. With the falling cost of renewables and thermal generation (as private power producers are increasing), a lot of high paying industrial consumers have started shifting to open access resulting in loss

of substantial revenue for the already ailing DISCOMs. This provision thus extends an olive branch to the DISCOMs to recover the transmission charges from consumers opting for open access as well.

However, the bills do not address the long-standing demand of lowering the threshold of power demand (currently 1MW) to benefit MSMEs and other smaller industries, particularly in power-intensive manufacturing sectors. Also, with the rapidly changing scenario of power markets and trading, the easy roll-out of open access (especially short-term open access) becomes crucial.

Ensuring Grid Stability: In the wake of future capacity addition targets, ensuring stable and safe grid operations become a major goal for the Indian power sector. The bill provides for a more strengthened National Load Dispatch Centre, with a supervisory mandate over regional and state load dispatch centres for matters relating to the safety of grid operations and its stability.

Empowering the NLDC to be the authority responsible for monitoring grid operations can fix accountability for grid-related matters. However, powers to issue binding guidelines to Regional Load Dispatch Centres, State Load Dispatch Centres, licensee, generating company, generating station, sub-station 'or any other' person connected with the operations of the power system, provides the NLDC wide ambit of powers without fixing much responsibility and accountability. Thus, there needs to be a clear demarcation of what the NLDC can or cannot do.

Promotion of Renewable Energy: The bill provides for the addition of National Renewable Energy Policy (NREP) alongside the National Electricity Policy and the Tariff Policy. This is indicative of the statutory

significance being accorded to renewable energy generation and integration in the Indian power sector scenario.

However, there are certain clarifications and detailing required regarding what happens to the existing schemes with the addition of the NREP and how the interplay between these policies will look like. There is also a need to provide statutory importance to sources of financing as well and integration of this policy with India's targets for Clean Energy Transition.

The current draft bill also includes hydro energy under the Renewable Purchase Obligation regulations and provides for higher penalties in case of non-compliance of them. If the statutory significance is the objective, then there needs to be a mention of various other forms of RE sources including, wind, hybrid, waste-to-energy, biomass, geothermal, amongst others. Also, a bottom-up framework where the states are the nodal agency in deciding the RE targets and the approach of achieving those targets is required to foster the discourse on RE in India.

Sub-licensees and Franchisee Models of Distribution: The proposed bill also provides for a mechanism, through which the DISCOMs can outsource any operations relating to the distribution of power to a sub-licensee or a franchise.

Outsourcing the functions of distribution of electricity via franchise or sub-licensee models can ideally enhance the operational and financial efficiencies of DISCOMs. However, the bill creates more confusion than providing clarity on how the envisaged model will be rolled out. It fails to provide adequate checks and balances and set accountability for these franchisees or

sub-licensees by keeping the registration and licensing process outside the jurisdiction of respective SERCs. Furthermore, evidence from the existing such arrangements fails to provide a concrete relationship between the introduction of such models and the final reduction in the cost of supply.

Additionally, to avoid friction between the franchise and consumers and rent-seeking behaviour of the utilities, there is a need to ensure that existing grievance redressal avenues at the DISCOM levels are also available for any consumer grievance at the franchise or sub-licensee level. For this purpose, the administrative capacity of existing grievance redressal forums in such areas needs to be enhanced and participation of Civil Society Organisations based on capacity building, training and evidence-collection ensured.

Conclusion

The amendment comes 17 years after the E-Act, 2003 and tries to address issues such as the health of the DISCOMS, its impact on the upstream players in the sector, appropriate adjudicatory mechanism, the welfare of the consumers, enforcement of the agreements and migration towards renewable energy.

The bill has come up with solutions for these problems with increased privatisation for the redemption of DISCOMS, additional quasi-judicial authority for enforcement-related problems, centralisation of power in general and new renewable energy policy. However, the introduction of sub-licencing and franchisee in DISCOMS without cost/benefit analysis of the same or a study of existing systems can lead to disastrous results. Similarly, the new ECEA could take years to achieve full efficiency.

Though it can be argued that the concentration of power by the E-Act

had a non-negative impact on the sector, the concentration of power suggested by the amendment bill is neither explained by the central government nor is it justifiable given the performance of the ERCs. The sections providing for National Renewable Energy Policy are vaguely worded. Although it provides obligations it lacks the consideration in the fulfilment of the said obligations.

Nevertheless, the bill has been the need of the hour for the power sector and provisions such as strengthening of the existing authorities (APTEL), elimination of cross-subsidies and open access facilitation has been the highlights. The DBT scheme may be difficult to implement on the ground, however, it is a positive step towards the transformation of the sector. These are the provision that will require much trial and error to perfect while experiencing high stakes.

It must also be noted here that though the bill tries to address many issues, it leaves a substantial number of issues behind. These issues also include consumer-related aspects of the sector and some of them are provided in the following section.

Further Recommendations

In addition to our suggestions for the provisions in the amendment to the E-Act, here are some recommendations for issues, which did not find the due prominence in the draft bill.

- As electricity has been enshrined as part of the right to life (Article 21) of the Indian Constitution by the Himachal Pradesh High Court in 2018 and has been part of the National Government's agenda for decades it is proposed that the right to 24x7 reliable, quality and affordable power be enshrined in the E-Act, with defined exceptions. In conjunction with this, a mandate

to establish stricter and uniform Standards of Performance across the sector for distribution utilities should be made. In short, the universal supply obligations of Distribution Licensees should be explicitly mentioned for all categories (Agricultural etc.) and areas (rural/urban).

- Provision for fair and dynamic compensation shall also be extended to cases of electricity-related accidents and damage to life or property. Current regulatory practices often fail to address the issue of fair compensation and the compensation amounts remain stagnant over the years with no link to indices like inflation, it is thus suggested that a mechanism similar to one proposed in Sarla Mudgal vs UOI⁶ case for motor vehicle accidents be created or the above-mentioned system be adopted.
- The Act can make provision so that a group of more than 50 consumers can approach the Commission directly to ensure compliance with Standards of Performance regulations and seek compensation on behalf of a group of consumers (which may include consumers not approaching the commission) to increase accountability of distribution and supply licensees. A group of consumers, being served by the same licensee, with similar complaints should also be allowed to approach the CGRF to represent their views together.
- Regulations and infrastructure dedicated to grievance redressal of consumers are inconsistent across the states and generally found to be inadequate. Taking cognisance of issues on the ground, suitable provisions shall be made to formulate policy to safeguard their interests and protect them from harassment.

Special provisions need to be drafted for marginalised communities and populations. To this end, it is requested that provisions should be made for mandatory inclusion of independent consumer representatives and advocates in grievance redressal forums and institutions across different tiers.

- Access to regulatory institutions and appellate authorities by consumer advocates and civil society continues to be a grave concern. Individual and organisations are forced to bear extremely high fee and other expenses while they fight for interests of the general public and work for their welfare. Citizen and civil society participation in regulatory decision making and reforms is a pillar of a vibrant

democracy and accountable governance. It is suggested that suitable amendments should be introduced to mandate a nominal fee and reduce other barriers to access.

- An independent autonomous online and offline infrastructure should be created under the office of the State Electricity Regulatory Commission to facilitate awareness amongst consumers regarding their rights and responsibilities and grievance redressal, with the supervision of the chairperson. The mandate should also be made to provide advisory and legal support to consumers, especially from marginal backgrounds, for redressal of grievances.

- The EA 2003 vide Section 94[3] provides that the ERC may nominate a person to represent consumers in all its proceedings and hearings. But this provision has not been implemented by the ERCs, except Maharashtra ERC. We understand that even in Maharashtra the practice has been discontinued. In KERC, the Consumer Advocate was nominated but after a couple of years, the office of the consumer advocate was closed. The reason for not nominating a consumer representative is that the existing clause uses the non-mandatory clause 'may'. We suggest that the clause 'may' in Section 94[3] be substituted with 'shall'.

Endnotes

- 1 <https://energy.economictimes.indiatimes.com/news/power/opinion-tariff-policy-reforms-a-cautious-silver-lining-for-power-sector-consumers-in-the-covid-era/76378407/>
- 2 <https://energy.economictimes.indiatimes.com/news/power/the-electricity-amendment-bill-2020-an-overview/>
- 3 <https://www.hindustantimes.com/india-news/oppn-likely-to-unite-in-house-against-draft-electricity-bill/story-sQnn0J9UPz7X91BahiJRDK.html>
- 4 A regulatory sandbox (RS) usually refers to live testing of new products or services in a controlled/test regulatory environment for which regulators may (or may not) permit certain regulatory relaxations for the limited purpose of the testing.
- 5 <https://www.financialexpress.com/opinion/an-alternative-to-the-electricity-contract-enforcement-authority/1959464/>
- 6 AIR 1995 SC 1531

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