

# Draft Electricity Act (Amendment) Bill 2020

*Comments for Ministry of Power*

05-Jun-20

SUBMITTED BY

**CUTS INTERNATIONAL**

Ministry of Power invited Public comments on the Draft amendments to Electricity Act 2003 proposing many structural reforms. CUTS International has adopted a unique approach of using regulatory algorithm to provide evidence for its comments.

## **To whomsoever it may concern**

In response to the circular number 42/6/2011-R&R (Vol- VIII) of Ministry of Power inviting comments on the draft Electricity Amendment Bill 2020, CUTS International is pleased to submit our suggestions enclosed herewith, for your kind perusal.

At the outset, many structural reforms are proposed in this bill which can potentially transform the Indian power sector. These comments reflect on these amendments by adopting a regulatory algorithm test<sup>1</sup> to assess the prospects of the amendments with respect to the envisaged outcomes.

In addition to it, CUTS had organized a webinar on 4<sup>th</sup> June, 2020 on this subject inviting eminent experts/policymakers to seek their opinion on consumer aspects of these amendments.<sup>2</sup> Insights from the webinar also provided us relevant insights to prepare our recommendations.

We hope that the comments are taken into consideration while finalizing the bill and assure you of any possible support from CUTS International.

You are kindly requested to accept this submission on record and to allow us to make further submissions in person in this matter, if any.

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<sup>1</sup> For more details, see the article published on this subject by CUTS International: <https://bit.ly/2LTIVY4>

<sup>2</sup> <https://cuts-ccier.org/pdf/agenda-webinar-electricity-amendment-bill-2020.pdf>

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## The Bill at a glance

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Main Objectives of the Draft Electricity (Amendment) Bill, 2020 are stated below:

- The Bill proposes for a cost reflective tariff for the viability of Electricity Distribution Companies (DISCOMs). It also eliminates the subsidy part from tariff realization and proposes Direct Benefit Transfers (DBT) to the consumers. It also directs the state commissions to reduce the cross subsidy.
- The Bill proposes to create a Central Electricity Contract Enforcement Authority to enforce performance of contracts related to purchase or sale or transmission of power between a generating, distribution or transmission companies. In addition to this, it proposes to empower Load Dispatch Centers to oversee the establishment of adequate payment security mechanism before scheduling dispatch of electricity, as per contracts.
- The bill proposes to strengthen the regulatory regime by strengthening of the Appellate Tribunal (APTEL) so that multiple benches can be set-up to facilitate quick disposal of cases. It is also proposed to further empower the APTEL to enforce its decisions. In addition to this, it is proposed to have one Selection Committee for selection of Chairpersons and Members of the Central and State Commissions and uniform qualifications for appointments of Chairperson and Members of Central and State Electricity Regulatory Commissions.
- In Renewable and Hydro Energy, it provide for a policy document, known as National Renewable Energy Policy, for the development and promotion of generation of electricity from renewable sources of energy. It is also proposed that a minimum percentage of purchase of electricity from hydro sources of energy is to be specified by the Commissions.
- The bill also proposes to provide the Distribution Companies freedom to engage in Franchisees or Sub-Distribution Licensees to distribute electricity on its behalf in a particular area within its area of supply, however, it will be the DISCOM which shall be the licensee, and therefore, ultimately responsible for ensuring quality distribution of electricity in its area of supply.

## Table of Comments

Sl. No.	Section of the Act	Proposed Change	CUTS Comment	Explanation
1.	Amendment of section 1	Applying the Electricity Act and its proposed changes to the State of Jammu and Kashmir	It can be added that the provisions will apply to the Union Territories of Jammu Kashmir and Ladakh after due assessment of the existing scenario of power sector including public consultations.	<a href="#">Explanation 1</a>
2.	Amendment of section 3	Addition of section 3A for inclusion of a National Renewable Energy Policy	<p>Certain clarifications and detailing are required regarding what happens to the existing schemes and policies and how will the state consultations be reflected in the final policy.</p> <p>Futhermore, a provision can be added that the draft of the National Renewable Energy Policy will be released to invite public comments.</p>	<a href="#">Explanation 2</a>
3.	Amendment of section 14	The distribution franchise and sub-licensee to not require any separate license from the State Electricity Regulatory Commissions.	<p>Regarding distribution franchise and sub-licensee, a new section can be added mandating a Regulatory Impact Assessment study of existing sub-licensee and franchise models operating in India (eg. Bhiwandi).</p> <p>Also, provisions can be added in the new section regarding strengthening the consumer rights and grievance redressal mechanisms in the distribution circles operating</p>	<a href="#">Explanation 3</a>

Sl. No.	Section of the Act	Proposed Change	CUTS Comment	Explanation
			under franchise or sub-licensee model.	
4.	Amendment of sections 26	Provisions related to empowering National Load Dispatch Centre.	Provisions diluting the powers of RLDCs and SLDCs shall be removed.  The phrase ' <i>or any other person</i> ' in sub-section 6 shall be removed.	<a href="#">Explanation 4</a>
5.	Amendment of section 42	Dividing the discretion of payment of surcharge and wheeling charges for intra and interstate transmission under central and state commission, respectively, in proviso 1 of section 42 (2).  Substituting proviso 3 of section 42(2) where it makes mandatory for state commissions to reduce cross-subsidy.  Insertion of new proviso in section 42(2) to give discretion to state commission for payment and utilization of surcharge.	The proposed amendment of proviso 3 needs to be <b>deleted</b> .	<a href="#">Explanation 5</a>
6.	Amendment of section 49	Inserting a new clause in the principal Act of section 49 for giving freedom to the generation company to come into business with a licensee.  Inserting a new sub-section 49A for specifying the role of central government in Cross	The proposed amendment regarding generation company needs to be <b>implemented in a phase-wise manner</b> .	<a href="#">Explanation 6</a>

Sl. No.	Section of the Act	Proposed Change	CUTS Comment	Explanation
		border trade of Electricity.		
7.	Amendment of section 61	Insertion of “as provided in tariff policy” in section 61 (g), “hydro” in section 61(h) and “New Renewable Energy Policy” in section 61(i).	The amendments propose formulation of a National Renewable Energy policy. Instead formulation of a cohesive ‘National Clean Energy Transition policy’ is proposed. Further, setting minimum RPO should be done carefully with <b>extensive deliberation and consultation</b> .	<a href="#">Explanation 7</a>
8.	Amendment of section 62	Insertion of a new proviso under clause (d) in section 62(1). It mandates state commission to fix the electricity tariff without accounting for subsidy.	Good Intent, however, there is a need for assessing the parameters to get the full benefits of the amendment.	<a href="#">Explanation 8</a>
9.	Amendment of section 65	Insertion of a new sentence in the principal Act for transferring the subsidy directly to consumers.	<b>The DBT should be piloted</b> first and extrapolated if found successful. There should also be a <b>regulatory mandate for DBT Transfer mechanism</b>	<a href="#">Explanation 9</a>
10.	Amendment of section 77	Adds mandatory requirement for a legal expert and adding public policy to the list of expertise in Section 77 (1).  Removes mandatory requirement for a higher judiciary member as chairperson section 77 (2).	It would be better if the central commission included a researcher or academican of national acclaim and a public representative.	<a href="#">Explanation 10</a>
11.	Amendment of section 78	Omits the existing section 78. Provides new qualification	State Regulatory Commissions need to be <b>removed</b> from the	<a href="#">Explanation 11</a>

Sl. No.	Section of the Act	Proposed Change	CUTS Comment	Explanation
		for the Selection Committee.	list of authorities the Selection Committee appoints members for.	
12.	Amendment of section 82	<p>Replaces section 85 in section 82 (5) and the proviso to section 82 (1) with section 78.</p> <p>Increases the strength of state commission from maximum 3 to maximum 4 members under section 82 (4).</p> <p>Allows the Central Government in consultation with the State Government to entrust its function to another state commission or joint commission. Under section 82 (7)</p>	The word “consultation” used in the proposed amendment needs to be clarified or changed to “concur”.	<u>Explanation</u> <u>12</u>
13.	Amendment of section 84	Replaces of the existing qualifications for the member of the state commission provided in section 84 (1) and (2) with conditions similar to those in section 77.	The proposed amendment needs to be <b>retained</b> .	<u>Explanation</u> <u>13</u>
14.	Amendment of section 85	Omits of the Constitution of Selection Committee for selecting members of the State Commission.	The proposed amendment needs to be <b>deleted</b> .	<u>Explanation</u> <u>13</u>
15.	Amendment of section 90	Omits the proviso to the section 90 (2) for removal of members.	The proposed amendment needs to be <b>retained</b> .	<u>Explanation</u> <u>14</u>
16.	Amendment of	Creates mechanism for	The proposed amendment	<u>Explanation</u>



Sl. No.	Section of the Act	Proposed Change	CUTS Comment	Explanation
	section 92	referral of matters to ECEA by the appropriate commission section 92 (6).	needs to be <b>deleted</b> .	<u>15</u>
17.	Amendment of section 109A	Adds the Electricity Contract Enforcement Authority for matter related to contract enforcement.	The proposed amendment needs to be <b>deleted</b> .	<u>Explanation</u> <u>16</u>
18.	Amendment of section 110	Adds the ECRA to the authorities under Appellate Tribunal.	The proposed amendment needs to be <b>deleted</b> .	<u>Explanation</u> <u>17</u>
19.	Amendment of section 112	Increases the strength of the Appellate Tribunal from chairperson plus three to chairperson plus not less than seven in section 112 (1).	The proposed amendment needs to be <b>retained</b> .	<u>Explanation</u> <u>18</u>
20.	Amendment of section 121	Adds the ECEA to the list of authorities Appellate Tribunal can issue order or directions to in section 121 (1). Adds section 121 (2) related to Contempt of Court powers of the tribunal.	The proposed amendment related to section 121 (1) needs to be <b>deleted</b> . The proposed amendment related to section 121 (2) needs to be <b>retained</b> .	<u>Explanation</u> <u>19</u>

# Explanations

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## Explanation 1

- Post the abrogation of Article 370, it is a logical step. But the existing schemes and policies with the state's power sector and ground realities needs to be analysed first and then the proposed changes could be modified and applied to the state.

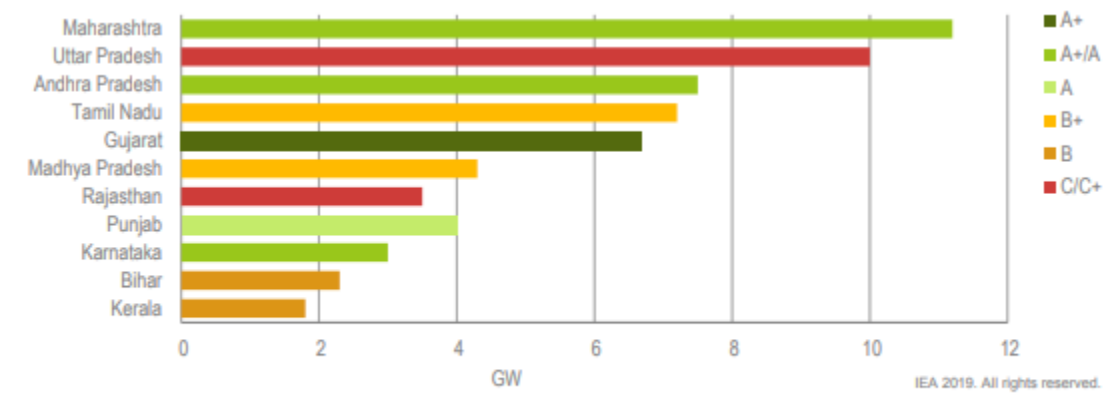
**Table 1: Performance Parameters in J&K. Source: UDAY National Dashboard**

Sl. No.	Performance Parameters	Existing Status	Remarks
1.	AT&C Loss	47.88%	Extremely high loss levels. Needs to assess causes and then design solutions for the region.
2.	ACS-ARR Gap	Rs 2.12/unit	Extremely high gap between cost of power and revenue requirement, highlighting the financial duress of the discoms.
3.	Feeder Audits and Segregation	0%	Might be one of the reasons for high levels of loss, hence needs to be addressed strategically.

## Explanation 2

- It will undoubtedly provide the clean energy transition a greater push. Therefore, this is a welcome step for enabling a strengthened discourse on renewable energy integration.
- Also, the consultations from different states regarding the policy and deciding purchase obligations needs to be made mandatory and the respective state's concerns should be floated for public comments to ensure consumer acceptability.
- Need to provide statutory importance to sources of financing as well and integration of this policy with India's targets for Clean Energy Transition (175GW by 2022 and 450GW by 2030).

- Decentralised targets to be designed for each of the state on the basis of potential of different types of renewable energy sources within them and the financial viability of utilities to integrate the RE sources. The following graph shows the share of Solar PV required in different states and the financial status of discoms in them.



### Explanation 3

- Outsourcing the functions of distribution of electricity via franchise or sub-licensee models can enhance the operational and financial efficiencies of discoms.
- But, at the same time, in order to avoid friction between the franchise and consumers and rent-seeking behavior of 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, administrative capacity of existing grievance redressal forums in such areas needs to be enhanced and ensure participation of capacitated Civil Society Organisations on the basis of capacity building, training and evidence-collection.

### Case Description of Franchise Model in Bhiwandi: Torrent Power

Bhiwandi, the powerloom town of India is home to many textile powerlooms. Hence, the electrical consumer base includes significant proportion of industrial consumers. One of their main concerns, as highlighted by many enterprises during a field inquiry conducted by CUTS International was high power tariffs. The below table summarises the argument that even after introducing franchise model, although efficiency gains are realized, they have not been translated to lower tariffs for different consumers. (Table cites the example of industrial users)

**Table 2: Torrent Power Franchise of MSEDCL  
Licensee in Bhiwandi. Source: Torrent Power**

Sl. No.	Parameter	Status			
1	Commencement of Franchise operations	26th Jan 2007			
2	Consumers as on 31st March 2019	7.66lakhs			
3	AT&C Losses at the time of takeover	58%			
4	AT&C losses in 2018-19	14.90%			
5	Industrial Tariff	Fixed Charges		Energy Charges	
5	Industrial Tariff in 2007-08	100	Rs per kVA per month	3	Rs/unit
6	Industrial Tariff in 2018-19	90	Rs per month per kW	4.5	Rs/unit

#### Explanation 4

- Empowering the NLDC to be the authority responsible for monitoring grid operations can fix accountability for grid-related matters. However, having Regional Load Dispatch Centers, State Load Dispatch Centers, licensee, generating company, generating station, sub-station '*or any other*' person connected with the operations of power system provides the NLDC wide ambit of powers without fixing much responsibility and accountability.
- With powers to give binding directions for ensuring safety and security of national grid, there needs to be clear demarcation of what the NLDC can or cannot do. The recent 9-minute blackout was an example of exemplary strength of the nation's grid, but decentralised efforts converging might be a better approach that centralized supervision trickling top-down. Hence, the autonomy of RLDC and SLDCs should be ensured by removing the provision giving free hand to NLDC for grid operation.

#### Explanation 5

- The proposed Amendment, under this section, makes it mandatory for the Commissions to reduce cross subsidy in the manner as provided by the Tariff policy. The sole discretion for reducing the cross subsidy falls under the ERCs, as proposed in the bill. However, it intends to take away the discretion of the Commission for

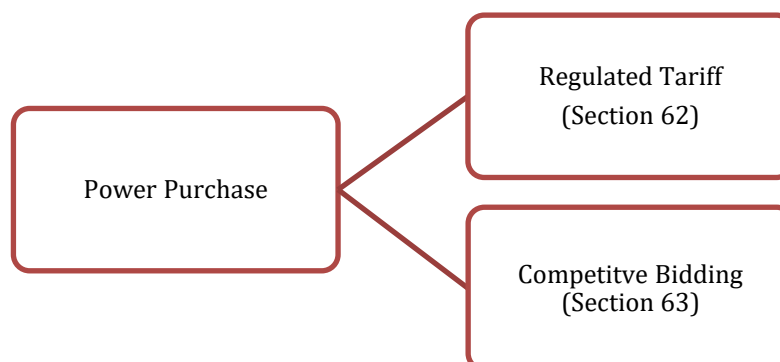
determination of Cross subsidy. Post amendment, ERCs will be bound to follow mandate of the central government.

- This type of arrangement with the central government can be disastrous as it fails to take into account the local socio-political economy of the sector. Determination of Tariffs should always be an independent activity to ensure that the sector operates on commercial principles. However, this move by the center may not be comfortable with the state governments and they may increase the electricity duty to retain the cross-subsidization revenue, that they are bound to lose when this bill come into force. Hence, the amendment loses its purpose here.
- Thus, it is recommended that the amendment to proviso 3 of section 42 (2) shall be dropped.

## Explanation 6

- The proposed amendment gives freedom for the generating companies to come into an agreement with a licensee for supply, purchase or transmission of electricity. The amendment is a step towards more privatization to the existing ones. As of April 2020, 47 percent of total installed generation capacity is by private developers. The proposed amendment creates an alternative structure in the sector so that it can enable retail competition and provide a level playing field for different generation arrangements. This would imply moving from a public monopoly to private monopoly.

**Figure 1: Methods of Power Purchase under EA 2003.**



- However, owing to increasing cost of power for different consumers, there is a need to enable them to shift to cheaper alternate sources of power. This amendment is a step towards that. In the current framework, open access consumers have full

freedom to choose supplier and draw from DISCOMs' regulated supply when profitable, whereas the DISCOM is required to always plan for meeting demand from these consumers and incur costs for the same.

- Thus, it is our imperative that this change should be implemented in a phased manner through regulatory sandbox<sup>3</sup>. This would give the DISCOMs adequate time for making certain relevant changes and removing any regulatory uncertainty.

## Explanation 7

- The amendments propose formulation of a National Renewable Energy policy. Instead formulation of a cohesive 'National Clean Energy Transition policy' is proposed. The policy shall aim to promote renewable energy along with other clean energy technologies such as energy storage, energy efficiency and electric vehicles, address issues of grid integration and balancing resources, lowering carbon footprint of electricity grid as a whole including thermal assets, fuel mix optimisation, and creating market signal to meet the goals and objectives defined within the policy.
- The proposed amendments as per Section 3A provides for minimum purchase of electricity through hydro sources of energy. Considering the huge investments in the sector, cost & time overruns, high number of stressed hydro assets and the social & environmental impacts of hydropower, it should not be considered as a renewable energy resource for the purpose of the RPO.
- The original Electricity Act, 2003 had "The National Electricity policy" which also included the renewable electricity. It assigned responsibilities of determining percentage of renewable purchase obligation ("RPO") on state electricity regulatory commission ("SERC") with the intention that the SERC will be in a better position to analyse and determine various state specific factors before determining a fixed percentage of RPO.
- However, few Electricity Regulatory Commissions were not inclined to comply with National RPO Trajectory determined by Ministry of Power. With the objective of ensuring uniformity across different states, it seems that a national level policy is envisaged.

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<sup>3</sup> 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.

- Nevertheless, the proposed amendment in the section 176 (2) has increased the center's intervention in setting the minimum RPO, in consultation with the state. This is crucial for the RE sector as there should always be a comprehensible deliberation with all the states. There are many states, which may not have the resources for attaining the minimum RPO, and, thus, they have to buy from the surplus states. This increases the cost of supply and directly affects the consumer.
- Hence, setting minimum RPO should be done carefully with extensive deliberation and consultation with the specific State and relevant stakeholders
- Furthermore, In the proposed amendment of Section 3 of the Act, provision for creation of a fund under the jurisdiction of the State Energy Department may be made where all the penalties collected from RPO non-compliance shall be deposited.

### Explanation 8

- The proposed amendment in Section 62(1d) introduces a proviso stipulating that the Appropriate Commission shall fix tariffs for retail sale of electricity without accounting for subsidy, which will be provided by the government directly to the consumer. Section 65 of the draft amendment bill further states that the State Government shall pay the subsidy amount directly to the consumer, in advance, and the distribution licensee shall charge consumers, the tariff set by the Commission.
- The proposed amendment seeks to eliminate the accumulation of the regulatory assets and reduce the cost of supply. This is reflected in the large dues pending from DISCOMS to generation companies of more than Rs 920 billion as of February 2020 (<https://www.saurenergy.com/solar-energy-news/discoms-dues-togencos-surges-31-to-rs-92674-cr-in-feb>). This is expected to be further exacerbated by the ongoing lockdown due to the COVID-19 outbreak, which is adversely affecting the electricity demand and in turn the revenues and cash collections for distribution utilities.
- Cases such as Mumbai DISCOMs, where the regulatory asset charges are levied on consumers as high as 11 to 24 percent of total chargers, gives us evidence for the requirement of the proposed amendment.
- Hence, it our view that the proposed amendment needs to be retained.

## Explanation 9

- The proposed Amendment under this section states that ERCs will determine the tariff for retail sale of electricity without any subsidy and the state government shall directly pay subsidy to the eligible consumer. This will benefit both the DISCOMs and the generating stations as DISCOMs have been using the defense of non-payment of subsidy for its failure to make timely payment to generating stations.
- However, the proposed amendment do not give any kind of clarification whether the subsidy will be transferred to the consumer bank account or will be provided to the DISCOMs to be transferred to consumer accounts. In both the cases, there is a need for a strong monitoring mechanism from the third party is required, as any kind of delay in transferring the subsidy will directly affect the DISCOMs and the consumers.
- Taking a note from the DBT scheme in the LPG cylinder segment, the scheme has provided more benefit to the urban consumers than the intended rural consumers. In addition to this, this kind of DBT transfer mechanism will not be efficient in this sector as lower or variable income consumer, such as agricultural consumers will have to pay from their own pocket first, which they cannot afford and any kind of delay in the transfer of payment will affect them drastically.
- Hence, it is recommended that the DBT should be piloted through regulatory sandbox, which could be extrapolated if it is found to be successful.
- However, there are no mechanisms stated in the amendment for monitoring the implementation of the DBT payments to consumer's accounts. There should be a regulatory mandate for such mechanism.

## Explanation 10

- Under the Electricity Act, 2003 the Central Commission (or CERC) has 3 members and a chairperson. The chairperson is a current or former Chief Judge of High Court or judge of the Supreme Court, the other three members were to be technical member, finance member and two general members.
- The amendment does away with the requirement for the Chairperson allowing non-judicial members to become chairperson. After removing the requirement of chairperson to preserve the importance of legal expertise in the commission legal member is proposed to be made mandatory along with technical member relegating the financial expert to the realm of general members with economics, commerce, public policy (new addition) and management.



- While the move to not confine the chairpersonship to the judiciary is welcome due to more reason than one, the fact that the commission still does not boast expertise like it should is concerning. The provision mandating the Central Electricity Regulatory Authority of India only provides for one member out of 5 (now 4) as specialist in engineering side of electricity sector, law and no researcher/academician of national acclaim in the area or public representative is not ideal.

## Explanation 11

- The removal of the existing section 78 which governed the appointment of the Selection Committee only the appointment of chairperson and members of Central Commission and the members of Appellate Tribunal and its replacement with the new section 78 which governs the appointment of the Members of the Appellate Tribunal and the Chairperson and Members of the Central Commission and *Electricity Contract Enforcement Authority (ECEA), State Commissions and Joint Commissions*. While addition of the ECEA as the national level authority in the sector for contract enforcement related matters is not surprising and even expected, the addition of State Commissions and Joint Commissions to the list is unexpected and shows signs of undeniable centralization of power into the central government.
- While a nominated current or former judge of the Supreme Court might add some objectivity to the selection process the inclusion of 2 Secretary-in-charge of the Ministry by Central government and only 2 Chief Secretaries of State Government to be decided alphabetically does not afford the state governments the representation it was afforded or which is expected in appointment of its state commission for a subject that falls in the concurrent list (item 38). As opposed to the Section 85 (omitted in the amendment) which provided for the selection committee for the appointment of the state commission to include a former judge of the High Court, the Chief Secretary of the State and Chairperson of the Central Commission. No rational is provided for the distrust in the state mechanism given that the qualifications for the members have been provided in the act and the appointments have been done in accordance with the same.
- Thus the stripping away of the state mechanism's autonomy to appoint its members unwarranted and arbitrary. Also the power to make the decisions related to the state commission is being taken away from the Experts of the Industry (Chairperson, CERC/CEA) and is being given to the hierarchical Union structure (in the form of Supreme Court Judge and Secretaries) which is counterproductive in a speciality driven sector like power. The concentration of power of appointment of

all electricity related authorities in the hands of the same five figure heads might lead to lack of transparency and biased appointment of members<sup>4</sup>.

- Given that the position of chairperson is open to all category of members by the amendment and the effect the new selection regime might have; it might lead to biased decision making by the authorities.

## Explanation 12

- Since section 85 which provided for the formation of the selection committee for the state commission has been omitted by the amendment and the selection authority under section 78 is given the authority to appoint the state commission members corresponding changes are made in the section. Also the strength of the state commission is increased from maximum three members to four, while the power to appoint them is taken away from the states.
- The provision for dealing with vacancy in the state commission by the Central Government is also made. The provision provides for a “consultation”<sup>5</sup> with the state government i.e. it is not necessary for the state to agree to such proposal by the central government for the center to proceed with it. This further takes the power of the state government with respect to its commission away to concentrate in the central government without any justification. This can lead to many problems which have already been discussed in the explanation to section 78.

## Explanation 13

- In consonance with the alteration made in section 77 this section removes the condition prescribing that the chairperson needs to be a current or former member of the higher judiciary and allows members of all specialities mentioned in the bill a chance to become chairperson. It also prescribes the constitution of the commission with one technical member, one legal member and two people qualified in other areas similar to the once present in section 77 for central commission.
- Section 85 which prescribes the constitution of the selection committee for the state commission has been omitted in favour of section 78 the selection committee under

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<sup>4</sup> Mercados, Electricity (Amendment) Bill 2020, Key Insights, April 2020  
[https://www.eqmagpro.com/wp-content/uploads/2020/04/Mercados-Insights\\_Electricity-Amendment-Bill-2020\\_compressed.pdf](https://www.eqmagpro.com/wp-content/uploads/2020/04/Mercados-Insights_Electricity-Amendment-Bill-2020_compressed.pdf)

<sup>5</sup> In *S.P. Gupta vs. Union of India* (AIR 1982 SC 149), the majority held that ‘consultation’ does not mean ‘concurrence’.

which will now appoint all electricity regulators on national and state levels. This is an unjustified centralisation of power in a subject that falls in the concurrent list. The criticisms are many and have been addressed in the comments to section 78.

### Explanation 14

- The removal in this section is an extension of the removal in the section 77 (qualification of member of the central commission) and section 84 (qualification of member of the state commission) of the condition precedent for appointment as the chairperson of the central and the state commission. The provision prescribed a past or present judge of the High Court or Chief Judge of a High Court or the Supreme Court to be eligible for the position of chairperson.
- The provision has been removed to keep the position of chairperson open to non-judicial members. The proviso existed because the integrity of a sitting judge of the higher judiciary cannot be questioned by the Central or State Government before a tribunal, if there is such a question it will be addressed by an impeachment process initiated under the Judges (Inquiry) Act, 1968. Since the sections that previously provided for the appointment of sitting judges are removed there is no need for the resulting provision in the removal of member section.

### Explanation 15

- The amendment to the section is solely for the purpose of creation of a mechanism for referral of the matters to be addressed by the Electricity Contract Enforcement Authority (ECEA).
- This section ensures that matters reach the ECEA only when they are deemed to fall under the authority's jurisdiction by the Appropriate Commission and not otherwise, limiting the access to the ECEA and giving the Appropriate Commission discretionary powers in the matter. Discretion due to its very nature may lead to uneven enforcement and unfairness.

### Explanation 16

- ECEA proposed to be established under the amendment as a way to enforce the performance of the contract in the power sector. The step is taken to inspire confidence in the private players who have complained in the past about termination related issues, inordinate delay in payments of verified energy bills, non-operationalisation of PPAs, unilateral tariff re-negotiation proceedings by

discoms, deliberate delay in payment of change in law claims of both thermal and renewable developers and other contractual issues. It had been felt by the players that the ERCs were unable or unwilling to deal with these issues leading to discontent. Thus, on the surface the authority seems to be a positive step in the right direction.

- But there are issues when it comes to creation of another national level authority to address the issues that could have been dealt with by allowing more power to the ERCs. Even if the authority is justified by the Separation of Power argument<sup>6</sup> (separating the rule making and judicial functions of the ERCs), creating a separate department within the ERCs modelled along Income Tax Department could be a swifter, less costly and more effective solution.
- Then there is the issue of jurisdiction, while the amendment tries to clearly define the jurisdictional boundaries of the ERCs and the ECEA there are some areas which overlap and thus might end up in the Supreme Court for adjudication. Add to that the issues arising out of centralisation of power with the central government ECEA seems less appealing.
- Thus, it might be ideal to strengthen the ERCs and experiment with providing them more executive control instead of less and if the need is felt an independent authority can be created with proper regulatory sandboxing in the future.

## Explanation 17

- The additions to the section are consequences of the other additions made by the bill and thus do not warrant any specific comment.

## Explanation 18

- The amendment to this section increases the strength of the APTEL from maximum four to not less than seven. Such a drastic change is made due to the following factors. Currently the APTEL can have at the most only two functional benches at any point of time (given that two members one technical and one judicial are required for the same), the two benches operate in New Delhi. In case of any vacancy and/or delays in appointment, even these benches cannot function simultaneously. Considering that the APTEL is the appellate forum for all cases

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<sup>6</sup> <https://www.financialexpress.com/opinion/an-alternative-to-the-electricity-contract-enforcement-authority/1959464/>

against all the electricity regulatory commissions in the country, its size is highly inadequate for the task cut out for it<sup>7</sup>.

- 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. Before APTEL the High Courts were the avenue for appeal, the high courts were more approachable and accessible for a normal consumer than APTEL which only sits in New Delhi, this especially applies to the southern and north-eastern states.
- The amendment would ensure that there are enough members for proper functioning of circuit benches in at least three other major metropolitan cities, viz. Mumbai, Chennai, and Kolkata overcoming the disposal rate and accessibility issues.

## Explanation 19

- The addition to the section is taking into consideration the instances of non-compliance with the order of the APTEL and those of contempt<sup>8</sup> by the parties to the appeal. Traditionally the power to punish for contempt is given to the Supreme Court and the High Courts by Article 129 and 215 of the Constitution of India. This power is moderated by the Contempt of Courts Act, 1971 which defines the types of contempt and the punishments that can be given. The act provides that a High Court can take up a matter of contempt of a sub-ordinate court but does not mention tribunals, given that the APTEL does not fall subordinate to a high court instances of its contempt cannot be addressed there and Supreme Court only punishes for contempt of itself<sup>9</sup>.
- The Contempt power is necessary for an authority passing orders and making decisions to ensure compliance, coerce cooperation and prevent interference in the orderly process<sup>10</sup>, so that the orders and decisions and the tribunal itself does not become a joke. Thus it is high time that the act addresses this issue.

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<sup>7</sup> Saumya Vaishnava, Ashwini Chitnis, Shantanu Dixit, *Amicus Populi? A public interest review of the Appellate Tribunal for Electricity*, Prayas (Energy Group), Pune, October 2018  
<https://prayaspune.org/peg/publications/item/393-amicus-populi-a-public-interest-review-of-the-appellate-tribunal-for-electricity.html>

<sup>8</sup> Anything that curtails or impairs the freedom or limits the judicial proceedings or hampers the administration of Law and is interfering with the due course of justice, constitutes Contempt of Court.  
<sup>9</sup> <https://doj.gov.in/sites/default/files/contempt.pdf>

<sup>10</sup> Ronald Goldfarb, The History of the Contempt Power, Washington University Law Quarterly, Volume 1961 No. 1, February 1961, pg. 1  
[https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=3241&context=law\\_lawreview](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=3241&context=law_lawreview)

## Suggestions on Consumer Rights and Interests

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- In the line with the commitment of the National Government, it is proposed that right to 24x7 reliable, quality and affordable power is enshrined within the Electricity Act, with appropriate exceptions. In conjunction with this, mandate to establish stricter and uniform Standards of Performance across for distribution utilities should be made. While appropriate deviations may be allowed across consumer categories and between urban and rural feeders, the practice of average reporting shall be discontinued since it allows for unfair disparity, especially amongst urban and rural supply of electricity and related services. Hence, universal supply obligations of Distribution Licensees should be explicitly mentioned for all categories (Agricultural etc.) and areas (rural/urban)
- Provision for fair compensation shall also be extended to cases of electricity related accidents and damage to life or property, wherein current regulatory practices often fail to address issue of fair compensation and compensation amounts remain stagnant over the years without being it linked to any index such as inflation.
- 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 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.
- Provisions for payment of compensation in case, the order passed by Consumer Grievance redressal Forum (CGRF) or the Ombudsman is challenged by the utility before the High Court, should also be introduced.
- Regulations and infrastructure dedicated for grievance redressal of consumers is inconsistent across the states and generally found to be inadequate. Taking cognizance of issues on the ground, suitable provisions shall be made to formulate policy to safeguard their interests and protect them from harassment. Special provisions especially 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 concerns. Individual and organisations are forced bear extremely high fee and other expenses while they fight for interests of general public and work for their welfare. Citizen and civil society participation in regulatory decision making and reforms is a pillar of vibrant democracy and accountable governance. It is suggested that suitable amendments should be introduced to mandate a nominal free and reduce other barriers to access. It
- An independent autonomous online and offline infrastructure should be created under the office of the ombudsman to facilitate awareness amongst consumers regarding their rights and responsibilities and grievance redressal. 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, hearings etc. 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 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'.

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