**Remarks on the draft Electricity (Amendment) Bill 2021**

1. The stated intention of the proposed legislation to give 'Choice to consumers', eliciting healthy competition resulting in better service and competitive rates. The stated intention is lofty, as is the underlying principle. As reasoned in the subsequent paragraphs, the proposed de-licencing which allows unregulated private capital with little entry and exit barriers, benefits only a few big consumer groups and profit seeking capital, will potentially derail the gains of universal electrification, defeating the very intention and spirit of the proposal. Introduction of untested models in power distribution is dangerous and is likely to lead to absolute mayhem. The move is to have a socially debilitating impact as the sector is responsible for dispensing a crucial basic amenity that is essential for growth and sustenance of the country and its populace.

**2. Delicensing Distribution**

2.1 The draft overzealously delegitimizes the term 'distribution licensee' and proposes that any distribution company can distribute electricity after registering with the State Commission concerned or with the CERC for operating in multiple states. The draft defines a distribution company as a company or a body corporate, registered under section 24 B for the purpose of supply of electricity through its own distribution system or using the distribution system of other distribution companies to the consumer in its area of supply. The draft permits any company to start distribution operations in any part of the Country, even across states after registering with the Commission concerned. The draft as such envisages no screening system including that of public hearing required for grant of registration. Section 24 B proposes registration of two or more distribution companies in an area. Section 176 (2) (ca) places the power to decide and notify the eligibility criteria for distribution companies on the Central Government. Section 42 (4) (a) & (b) of the draft places an obligation upon the existing licensee to provide access to the new companies to existing power distribution infrastructure. The flip side of this reform initiative is that the incoming distribution company can savour the fruits of the system without having to be part of the toil. The incoming distribution company is not statutorily encumbered with commitments regarding network development, there is no leashes pertaining to the power procurement activity and no obligation regarding past regulatory gaps. The picture is grossly unequal and is sorely unfair. For the envisioned system to work even in the short run, the incoming distribution company shall be statutorily accountable for commensurate commitments in system development and power procurement commitments. In the case of past regulatory gaps also there shall be statutorily ensured proportional apportioning of all past regulatory gaps or should have a mechanism as detailed in para 2.2.4 below, to wipe it off to ensure a level playing field. Unless the reform is designed scrupulously, taking into account the ground

2.2 realities, the stated objective of 'Choice to Consumers' would only end up in 'Choice to profit hankering capital'

**2.3 Inhibiting Cherry Picking**

2.3.1 The cross-subsidy system is the cornerstone of the sustenance of universal electrification. Even though, the draft desists from explicit abrogation of the cross-subsidy system, the proposal for delicensing distribution would naturally be the death knell. The incoming distribution company which played no part in the development of power sector and the associated hardships would definitely target only the fruits of the evolved system. The high demand consumers who are few in number and consuming huge quantum of electricity can easily be picked up by the incoming distribution companies by offering lower tariff, since the cost of supplying them is lower than their prevailing tariff. We have noted that the bill provides for Universal Service Obligation Fund to address these issues, but based on our analysis the same is inadequate to effectively address the challenges posed. The issues anticipated and proposal to address those are provided in subsequent paragraphs.

2.3.2 In this regard, the definition of area of supply in the draft itself is discriminatory. A Municipal Corporation/ Council or a Revenue District is the minimum area prescribed. The Bill does not identify the need for carefully designed rural – urban area mix. It is suggested that State Governments be given the authority to decide and notify the minimum area of supply considering various aspects including consumer mix, for introduction of multiple distribution companies.

2.3.3 Section 60 A of the draft proposes creation of a 'Universal Service Obligation Fund' for 'financing deficits in the area of supply'. Seemingly well-meant and innocuous, the proposal has an unworkable architecture. The fund is to be financed by 'any' surplus that distribution companies have on the account of cross subsidy or cross subsidy surcharge or additional surcharge and is to be managed by a Government Company or entity. It is pertinent to note that the draft places no binding obligation on the incoming distribution companies regarding financing the fund, who are liable only to the extent of transferring surplus 'if any'. Obviously, in the proposed scheme of things, the 'Universal Service Obligation Fund' would entirely be at the mercy of the incoming distribution companies. Considering the law abidance profile of private companies and the Regulators' resolve on display, the 'Universal Service Obligation Fund' (USOF) is more likely to be an illusion than a reality. For the fund to be of workable nature, Act should prescribe transferring the net cross-subsidy charge as prescribed by the regulator, in a time bound manner with harsh penalties for any default. Since cash flow of DISCOMs serving subsidised categories of consumers has to be maintained, the Act should mandate to transfer net amount of cross-subsidy collected in each month - instead of present provision 'Any surplus with Distribution Company' under Section 60A (2) – to USOF. For each day of default, the law should mandate a harsh late payment surcharge. Further, any consecutive default for a period of more than three months should lead to cancellation of registration of the DISCOM.

2.3.4 The average cost of supply of incumbent DISCOM is inclusive of servicing the debt due to past regulatory assets. The unrecovered regulatory asset in is there in almost all the States. The same has to be recovered from all consumers of the State, irrespective of which DISCOM is serving them. The new DISCOM does not have the baggage of past regulatory gaps and thus their average cost of supply would be lower than that of incumbent DISCOM. Thus, retail supply tariff determined by SERC under Section 62 shall also specify a separate component for

recovery of past regulatory gaps. The subsequent DISCOMS shall be mandated to remit this amount to designated account of the incumbent DISCOM, until past gaps are wiped out by the regulator.

**2.4 Network Development: *'Responsibility to All'* results in '*Responsibility to None'***

2.4.1 The concept of delicensing distribution and allowing multiple distribution companies on the same network is touted as measure for providing choice to consumers, introducing competition and for providing better service at a better price. Even a cursory analysis of the concept as proposed defeats the claim. Any consumer in the system would be connected to a common network maintained by the present distribution licensee. The quality and reliability of the power supplied is entirely dependent of the condition of the network. This condition obviously forecloses the claim regarding competition or choice in service or quality of power supplied. The draft amendment is devoid of any concrete proposal for improvement of the power system infrastructure. Consequently, the consumer stands to gain nothing in terms of quality of service, but stands to lose on several fronts. As recovery of system development expenditure through logically regulated tariffs happens only over a larger period of time, no commercial entity would choose to incur huge capital investments upfront, until clear responsibilities are spelt out in the law. Entry of random distribution companies would ultimately lead to a poorly developed and maintained network and inferior service to consumers, which is yet another result that no Government would be yearning for.

2.4.2 The present state of distribution network could create issues in the supply side like (i) distribution loss which has to be borne by the distribution company as unnecessary power purchase cost (ii) low quality of supply like low voltage, supply interruptions etc leading to low revenue realisation (iii) overloading of lines which may necessitate shedding of loads of the company (iv) low level of access, especially in rural areas leading to unmet demand. One of the identified chronic problems in Indian power sector is the high level of transmission and distribution loss and one of the major performance parameters prescribed now for distribution licensees is the loss reduction targets. When multiple DISCOMs take care of same area, upon whose shoulders does the responsibility of technical loss reduction fall? If the distribution business is delicensed as envisioned in the draft, without settling these problems it is likely to create anarchy in the whole value chain. The burden of additional power procurement due to higher transmission and distribution losses would go unattended in the new arrangements.

2.4.3 Under the proposal, all DISCOMs are to use the same network for supply in their areas. All DISCOMs are given responsibility for an efficient network development in the same area. This is a sure recipe for this critical responsibility landing in 'No-Man's Area', crippling the services to consumers. This will lead to practical difficulties in AT&C loss reduction, maintaining the network, maintaining performance standards, taking care of network augmentation both for future addition and for addition in demand of existing consumers etc.

2.4.4 To address this issue, the Distribution Companies in the service area should be mandated under the Act, to share the approved cost of network development in proportion to their estimated demand. The DISCOMs should have a cap on consumer addition, based on this cost sharing.

**2.5 Default in Power Purchase payments**

2.5.1 Lessons in this context are to be learnt from the Odisha example. In the State of Odisha which has been a harbinger of several ill-fated reforms in the Indian power sector, a situation similar to that envisaged in this draft amendment exists. Most of the power procurement agreements

and rights there are held by the GRIDCO, which sells power procured by virtue of these arrangements to individual distribution companies. Default of payment by distribution companies of power that they have availed has led to the bankruptcy of GRIDCO. The same situation has repeated in relations between distribution licenses and franchisees also in many States. This situation can happen among incumbent distribution licensee and incoming distribution companies also. Recovery of such dues may also become impossible as incoming distribution companies are required to hold no material assets for conducting their business, which may lead to collapse of the system as such, which is obviously not an intended outcome of the proposed amendment.

**2.5.2** Regulation of supply to defaulting DISCOMs as available to generators at present would become impossible, as various DISCOMs would be catered through same network in the same area and regulating supply to one among them is technically not feasible.Thus the proposal for sharing the existing PPAs with incoming DISCOMs are to be scrapped. At the same time the incumbent DISCOMs should be given freedom to review and exit from existing PPAs, to the extent required, in view of reduction in sale volumes (as incoming DISCOMs will be catering to part of the demand in the area). The incoming DISCOMs shall be mandated to enter into requisite PPAs to fully meet their responsibility.

**2.6 Enhanced cost to consumers**

2.6.1 In addition to all the above, the bloated system of multiple licensees running a business presently carried out by a solitary licensee would definitely push up overheads. The additional expenditure in essential activities such as meter reading, billing, audit, inspections etc would push up effective overheads which would add to the cost of providing power, the revenue requirement and eventually the cost of power supplied. This would result in increased retail price of power with no benefit to the user on any count, which would be another consequence that no Government would contemplate.

**2.7 Complexities in scheduling power among multiple DISCOMs in same area**

At the current level of metering and information technology in the country, it is next to impossible to segregate power scheduled by multiple DISCOMs in the same area and to regulate the over drawals and under drawals by SLDCs. Since the consumer served by different DISCOMs are connected in the same meshed network, the SLDC will not be in a position to aggregate the power consumed by consumers of each DISCOM on a real time basis and thus will not be in a position to carryout real time scheduling of power in a dispute free manner. The technology for metering, communication etc has to be upgraded significantly to achieve scheduling of power among multiple DISCOMs in same area. This alone calls for piloting the system in few select area and phasing out the system gradually as technology matures, based on learnings from initial phase.

**2.8 Phased implementation most suitable considering vast complexities**

2.8.1 Considering the aspects enumerated above, the introduction of random distribution companies shall be done only after ascertaining readiness of the industry. The envisioned system is likely to work out only in economies where the distribution network was in a fully developed state and the cross-subsidies for bulk consumers were minimum or negative. Even in such developed economies, the system of multiple DISCOMs has reportedly created complexities for smaller consumer who are large in number. When the distribution network in the country is under-developed there will be serious coordination issues among distribution companies and consumers at every stage right from availing connection, enhancing contracted

volume for supply, supply quality etc. The cross-subsidy pattern in the country is also different from that prevailing in economies where free market prevails. The peculiar pattern of cross subsidy in India results in a small section of consumers consuming huge quantum of energy is paying at rates well above the average cost of supply and the same is mostly higher than the price discovered in the market. This pattern of cross subsidy leaves the field absolutely ripe for flagrant cherry picking by subsequent distribution companies and thus their entry has to be done only after testing the efficacy of the envisioned system by conducting exhaustive pilot studies.

2.8.2 Taking the peculiarities of the ingrained cross subsidy structure, as well as the area and demographic differences within each State, introduction of random distribution licensees throughout the country in one go at this point of time is not advisable. Provisions to enable pilot implementation, i.e., implementation of the concept in selected areas are essential for ascertaining the impacts and effects.

**2.9 PPA sharing – Violation of Constitutional & Contractual Rights**

2.9.1 Proposed section 60A envisions sharing of power from the existing power purchase agreements as per the arrangements specified by the 'state commission' as per the prescription of the 'central government'. This is violation constitutional right of a person to trade and commerce as enshrined in article 301 of the Indian constitution. Moreover, the PPAs are executed between two or more parties as per the provisions of Indian Contracts Act, 1872. The central government or the state commission cannot dictate to deviate from the original terms and condition without free will and explicit consent of all the parties of the original agreement. The incumbent licensee to have a power sharing arrangement with other licensees who are not privy to the original agreement is not legally proper.

**2.10 Inhibiting Switching Over by defaulting consumers**

2.10.1 The proposal claims to give choice to the consumers, but there is no provision to check a defaulting consumer from migrating to another DISCOM who serves in the same distribution area. In some cases, the switching over will be after a prolonged period of disconnection, in which case a new entrant may not be even aware of dues to his other counterparts. In order to minimise the possibility of defaulting consumer switching to other service providers, clearance in the form of a No Dues certificate from other DISCOM shall become a necessary evil even when an applicant turn up for a new connection.

**2.11 Proposals**

Pertaining to the proposals for delicensing distribution and attendant arrangements, the summary of modifications required based on above discussion is listed below:

1 Considering the necessity of maintaining mandatory electricity service obligation envisioned in the parent law, measures to ensure that the USOF is adequately financed are to be put in place. To ensure this, mandatory contributions to the USOF is to be statutorily provided, without giving any loopholes. The DISCOMs should transfer net amount of cross-subsidy specified by SERCs in each month to USOF. Act should also clearly specify the penal provisions for default, including de-registration in case of persistent default for more than three months.

2 Further, SERCs should be mandated to specify the rate for recovery of regulatory asset in the area of supply. The subsequent DISCOM should be mandated to provide the amount of regulatory asset, at the rate specified for the entire sales made by them in the area of supply, to the incumbent DISCOM, until the past gaps are wiped out by the SERCs.

3 Considering the complexities and far-reaching impacts of the proposal for introducing multiple distribution companies, it shall only be introduced in a phased manner. The State Governments shall be allowed to set the road map for implementation. It shall be done only after detailed impact assessments, after exhaustive pilot studies in representative areas, which shall invariably include technology maturity, to address complexities in scheduling power to multiple DISCOMs within same area, regulating supply to defaulting DISCOMs etc.

4 The definition of area of supply in the draft itself is discriminatory. A Municipal Corporation/ Council or a Revenue District is the minimum area prescribed. Distribution companies would become naturally inclined to pick up lucrative service areas only. As such, for avoiding such discriminatory area selection, the State Governments shall be permitted to fix and notify area mix, considering endemic circumstances, in a phased manner.

5 Distribution Companies should be mandated to share the approved cost of network development in the service area, in proportion to their estimated demand. The DISCOMs should have a cap on consumer addition, based on this cost sharing.

6 The parent Act provides for multiple distribution licensees in the same area supplying through their own distribution networks. Delicensing distribution for exempting the need for developing own network is actually an unwarranted statutory adventurism. Retaining the licensing system would be beneficial to both consumers as well as the licensees. Choice to consumers can be provided through licensees itself by removing the existing entry barrier to compulsorily own entire distribution network.

7 In case sharing of power from existing PPA is intended, incumbent DISCOMs should be relieved from responsibilities such as Payment Security Mechanism, bill payment, late payment surcharge etc in the PPAs to the extent of shared quantum.

8 The right of consumers for choice of supplier shall be available to only those having 'zero dues' with existing DISCOM.

## 3. Negation of the spirit of federalism and other basic infirmities

3.1 The Constitution of India does not place the subject 'Electricity' within the exclusive domain of the Union Government. The item is placed in the concurrent list of the 7$^{th}$ Schedule of the Constitution. As such, constitutional propriety requires the Central Government to allow a stake for each State in deciding matters within it's jurisdiction, considering the endemic peculiarities, the stage of development, general aspirations as well as the general development road map. Besides being in line with the general spirit of federalism enshrined in the Constitution, it is the most practical approach as well. Power sector in each state has evolved independent to each other and are presently in varied stages of evolution. The comparison of the vital parameters of power sector in a state like the percentage of electrification, power availability, peculiarities of the load curve, consumer mix as well as extent of metering would reveal that the conditions are entirely disparate. The challenges that confront the power sector in each state are different, likewise are the solutions. The policies adopted for mitigation of problems faced are different for each state as well as the strategies for growth. The draft amendment proposes certain rigid policies intended for uniform implementation throughout the nation, which is a sure recipe for retardation of growth in evolved power sectors. The concept of 'Pan Indian Panaceas' in power sector is absolutely illogical, unrealistic, impractical

and portends of a future of overloaded/ underdeveloped systems as well as dissatisfied or even bankrupt stakeholders including consumers.

3.2 The draft amendment tends to violate principles of federalism in that it places all crucial decisions within the realm of the Central Government. The amendment proposed to Section 86 (1) (k) presents a serious statutory impropriety in empowering the Union Government to prescribe any functions to the State Commission, including those not provided in the parent statute.

3.3 The proposed amendment in Section 86 (1) (e) keeps the State Commissions on a short leash even in State specific matters like optimum selection of renewable resources. The amendment proposals fail to conceive that the Opportunities and Weaknesses differ from State to State and tries to compartmentalise RPO, which should be best avoided.

3.4 Section 176, of the draft amendment empowers the Central Government to decide eligibility criteria for distribution companies, rights and duties of consumers, quantum of electricity to be purchased from specified sources etc. In addition to all the above apprehended infirmities, there are several structural incongruities as well in the draft. To take one example, the draft amendment retains trading in electricity as a function that requires a license and makes distribution of electricity a function that does not require a license. Ninth proviso to section 14 of the Act is proposed to be amended as 'Provided also that a distribution company shall not require a licence to undertake trading in electricity'. This means that a distribution company can distribute and trade without any license, defeating the purpose of retaining trading as a licensed activity.

**4. Infringement of the Regulator's domain, contrary to the spirit of the parent law**

4.1 Several inclusions and alterations suggested in the draft tread in a direction opposite to this spirit of the parent Act. The draft amendment tends to narrow down the Regulator's domain, whereby the scope of all related quasi-judicial processes gets curtailed. The Regulator would be forced to function in line with Rules framed by the Government. This is against the general concept of fairness and stakeholder participation envisioned in the parent Act and is absolutely retrograde.

**5. Proposed reforms to be reviewed and states to be given flexibility, if union government is still inclined to proceed**

5.1 Considering the relevant facts and prevailing circumstances, it is clear that the proposed reform is counter productive and would lead to denial of electricity to millions of underprivilaged citizens and increase in tariff for domestic and agriculture consumers, benefiting only a few privileged sections of the society. If the Union Government considers reforms of the nature envisioned in the draft as policy imperative, it has to be done after detailed practical impact analysis and more exhaustive stakeholder consultations. Considering the aspects presented here, it is requested that the State Governments shall be given freedom for fixing timelines for implementation or otherwise.

A Section wise consolidation of suggestions for modification of the draft amendment is attached as Annexure.