Comments on Draft Central Electricity Regulatory Commission (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

With reference to the public notice No. RA-14026(11)/1/2022-CERC dated 15.02.2022, CESC Limited intends to submit comments / suggestions / objections on the Draft Central Electricity Regulatory Commission (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022 (hereinafter referred to as "Draft REC Regulations") in the following paragraphs:

A) The definition of "renewable energy sources" in the Draft REC Regulations has considered only urban or municipal waste and the definition is truncated to oust "industrial waste" as renewable energy source. In exercise of the powers conferred by clause (3) of Article 77 of the Constitution, the Government of India (Allocation of Business) Rules, 1961 has been framed. Under such rule only the Ministry of Power (and no other ministry) has been entrusted with administration of the Electricity Act, 2003 (hereinafter referred to as the "2003 Act"). According to Section 79(4) of the 2003 Act while discharging its functions, the Hon'ble Central Electricity Regulatory Commission (hereinafter referred to as the "Hon'ble Commission") shall be guided by the Tariff Policy notified by the Ministry of Power. Thus, while framing any regulations under the 2003 Act, the Hon'ble Commission have to rely on different clauses of Tariff Policy unless it is not consistent with the 2003 Act as required under sub-section (1) of Section 178 of the 2003 Act.

B) In the Draft REC Regulations, it has been observed that while Renewable Energy Certificate mechanism has been framed under the market development provisions under Section 66 of the 2006 Act, the Hon'ble Commission has developed such mechanism to extend a market based tool to the State Electricity Regulatory Commissions ("SERC"s) for achieving the objective of Section 86(1)(e) of the Act. It is respectfully submitted that under Section 86 (1) (e) of the 2003 Act, the responsibility of promotion of generation from renewable energy sources and cogeneration has been bestowed only upon the State Electricity Regulatory Commissions and not upon this Hon'ble Commission. It is respectfully submitted that from the Draft REC Regulations, it appears that the Hon'ble Commission exercising power under Section 66 of the 2003 Act is reaching an area specifically reserved for the SERCs under the 2003 Act. It therefore appears that the Hon'ble Commission, in a way, is trying to confer upon itself the power to regulate distribution, which has not been granted to the Hon'ble Commission under the scheme of the 2003 Act. Thus, the Hon'ble Commission needs to ensure that its finalised regulations in the matter of REC should not create any hindrance for the SERCs in discharging their responsibility under Section 86(1)(e) of the 2003 Act.

C) In absence of any definition of renewable energy sources in the 2003 Act and also in the Tariff Policy dated 28.01.2016 (hereinafter in short referred to as the "Tariff Policy"), the Hon'ble Commission has to consider the renewable sources specifically mentioned in the Tariff Policy. From paragraph 6.4(2) of Tariff Policy the renewable sources mentioned by name are wind, solar and waste to energy plants. Thus, the whole gamut of waste to energy needs to be considered under the definition of renewable energy sources. Therefore, industrial waste, specifically in form of waste heat or flue gas also needs to be considered as renewable energy source. The Hon'ble Commission, a statutory body created under the 2003 Act cannot restrict the waste to energy merely to urban or municipal waste, going against the Tariff Policy notified by the Ministry of Power. Thus, the following definition of 'renewable energy sources' may kindly be considered by the Hon'ble Commission:

'renewable energy sources' means sources of renewable energy such as hydro, wind, solar including its integration with combined cycle, biomass, bio fuel cogeneration, urban or municipal waste or industrial waste including waste heat or waste flue gas and such other sources as recognized or approved by the Central Government;

In this context, please note that at clause 3(22) of the Draft National Renewable Energy Act, 2015 prepared by the Ministry of New And Renewable Energy, the definition of "Renewable Energy (RE) Sources" also includes industrial waste.

D) The definition of 'renewable purchase obligation' or 'RPO' in the Draft REC Regulations has to be considered from the objective of the Section 86(1)(e) of the 2003 Act. To find out the objective of the said Section 86(1)(e) of the 2003 Act, the following documents need to be examined:

i) In this regard two judgements of Hon'ble Appellate Tribunal for Electricity (hereinafter referred to as "Hon'ble APTEL") may kindly be noted. In paragraph 26 of the order dated 28.01.2020 related to Appeal No 252 of 2018, the Hon'ble APTEL has mentioned following:

"From the above, it naturally follows that the statutory policy inherent in Section 86(1)(e) of Electricity Act 2003 expects the Regulatory Commissions to promote both "generation of electricity from renewable sources of energy" and also "cogeneration". We mention the two in reverse order for better clarity and for removal of doubts, if any persist."
(emphasis supplied)

Subsequent to the above order, at paragraph 53 of another order dated 02.08.2021 in Appeal No 176 of 2020 following is the observation *of Hon'ble APTEL:*

"….

Section 86(1)(e) of the Act contemplates two categories of generators; one is cogeneration and the other is 'generation of power from renewable sources'. The above Section uses the phrases 'cogeneration' and 'renewable energy sources'. Therefore, the Section mandates that both categories of generators must be promoted by the Appropriate Commission concerned issuing directions to distribution licensees to purchase electricity from both the categories. From reading of the above Section i.e., 86(1)(e) what emerges is, the cogenerating plants are required to be treated at par with renewable energy generating plants. Irrespective of the nature of fuel used in the cogeneration of power in the cogenerating plant to generate power, cogeneration has to be encouraged and promoted in terms of Section 86(1)(e) of the Act. Therefore, cogeneration plant cannot be fastened with the liability of purchasing power from renewable sources to meet its RPO obligation irrespective of the fuel used for cogeneration. From this it is seen that the nature of promotion ascribed to cogeneration plants, it is a sort of protection or special status is attached to cogeneration under statute i.e., Section 86(1)(e) of the Act. There is distinction and difference attached to both categories of generation of power under Section 86(1)(e), which would lead to a conclusion that both are required to be promoted. In other words, one cannot be given preference to the other. If such preference is given, it would amount to defeating the purpose and intention of the Section itself. Therefore, one category of generation of power cannot be allowed to affect the other category of generation of power." (emphasis supplied)

ii) Form the above two judgements it is clear that Section 86(1)(e) of the 2003 Act mandates following points:

a) Both generation of electricity from renewable energy sources and cogeneration, irrespective of fuel used in cogeneration of power, has to be promoted and treated at par with each other;

b) both generation of electricity from renewable energy sources and cogeneration must be promoted by the concerned SERC issuing directions to distribution licensees to purchase electricity from both these categories;

iii) In pursuance to discussion in paragraph (A) above the paragraph 6.4(1) of Tariff Policy along with its proviso may kindly be looked into. Relevant extracts are placed below:

"6.4 (1)
Pursuant to provisions of Section 86(1)(e) of the Act, the Appropriate Commission shall fix a minimum percentage of the total consumption of electricity in the area of a distribution licensee for purchase of energy from renewable energy sources, taking into account availability of such resources and its impact on retail tariffs. Cost of purchase of renewable energy shall be taken into account while determining tariff by SERCs. Long term growth trajectory of Renewable Purchase Obligations (RPOs) will be prescribed by the Ministry of Power in consultation with MNRE.

***Provided that cogeneration from sources other than renewable sources shall not be excluded from the applicability of RPOs**."*

(emphasis supplied)

With respect to the above paragraph and its proviso following points emerges:

a) The paragraph has been drafted with specific reference of Section 86(1)(e) of the 2003 Act and there a new coinage of words namely "Renewable Purchase Obligation" or "RPO" has been introduced without giving any definition. The 2003 Act also has neither such coinage of words nor any definition of it.

b) As per Section 2(12) of the 2003 Act, cogeneration means a process that ultimately culminates in generation of electricity in addition to generation of another form of energy. Thus, the proviso of the 2003 Act clearly means that cogeneration from all sources, irrespective of nature of fuel needs to be considered as applicable source to meet RPO / purchase obligation as specified under Section 86 (1) (e) of the 2003 Act. Thus, in case of cogeneration both cogeneration from renewable energy sources and cogeneration from other than renewable sources are to be considered as applicable sources for RPO / purchase obligation as specified under Section 86 (1) (e) of the 2003 Act.

iv) Therefore, it is clear that cogeneration, irrespective of nature of fuel needs to be promoted under Section 86(1) (e) of the 2003 Act. While framing a market mechanism under Section 66 of the 2003 Act, if the Hon'ble Commission restricts itself to the promotion of

renewable sources only, and that too as per the truncated definition as mentioned in the Draft REC Regulations, keeping aside industrial waste and the cogeneration from other than renewable sources, then that will create hindrance to the SERCs in the promotion of cogeneration from other than renewable sources at par with renewable sources as already explained above in pursuance to different court orders. The Hon'ble Commission, being a statutory body created under the 2003 Act, cannot frame any regulation against the provision of Section 86(1)(e) of the 2003 Act or create any difficulty for SERCs to promote both cogeneration and renewable sources as per Section 86 (1)(e) under the 2003 Act. In this context it is to be noted that under the 2003 Act, the Hon'ble Commission has no role under Section 86(1)(e) and thus the Hon'ble Commission may be pleased to remain vigilant that its finalised regulations on the basis of Draft REC Regulations do not create any discrimination in promotion between cogeneration from other than renewable sources and cogeneration / generation from renewable sources.

In view of the above discussion it can be said that the coinage of words "Renewable Purchase Obligation" or "RPO" is deceptive and creates a misleading sense of promotion of renewable sources only under Section 86(1)(e) of the 2003 Act. Thus it will be an option for consideration of the Hon'ble Commission that instead of coinage of the word "renewable purchase obligation", to use the term "statutory purchase obligation" or "SPO". In such case the definition shall be as follows:

"'statutory purchase obligation' or 'SPO' means the requirement specified by the State Electricity Regulatory Commissions under clause (e) of sub-Section (1) of Section 86 of the Act for an entity to purchase electricity from renewable energy sources and cogeneration sources;"

v) Alternatively, if the Hon'ble Commission concurs with the proposal placed in paragraph (C) for inclusion of industrial waste as a renewable sources in the definition of "renewable energy sources" then major part of cogeneration from other than renewable sources will get automatically covered. However, the proposal at sub-paragraph (iv) of this paragraph (D) appears to be technically superior.

E) The definition of "renewable energy sources" and "renewable purchase obligation" in the Draft REC Regulations has restricted the promotion of cogeneration from other than renewable sources under Section 86(1)(e) of the 2003 Act, as already explained, by using the REC mechanism. In addition, from purchase side, while the purchase of REC certificate against renewable energy sources is recognised as methodology of meeting RPO, such facility is not

extended to cogeneration from other than renewable sources and thus the objective of treatment of both renewable energy sources and cogeneration sources at par as explained in sub-paragraph (ii)(a) of paragraph (D) are being affected seriously and thus as consequential impact the promotion of both renewable energy sources and cogeneration at par under Section 86(1)(e) of the 2003 Act through this Draft REC Regulations are seriously affected. In such a scenario the SERCs may find it difficult to adopt such REC mechanism as mode of meeting purchase obligation under Section 86(1)(e) of the 2003 Act.

In view of the above submission, CESC would request that the Hon'ble Commission may kindly accommodate the proposals contained in paragraph (C) and (D) above.