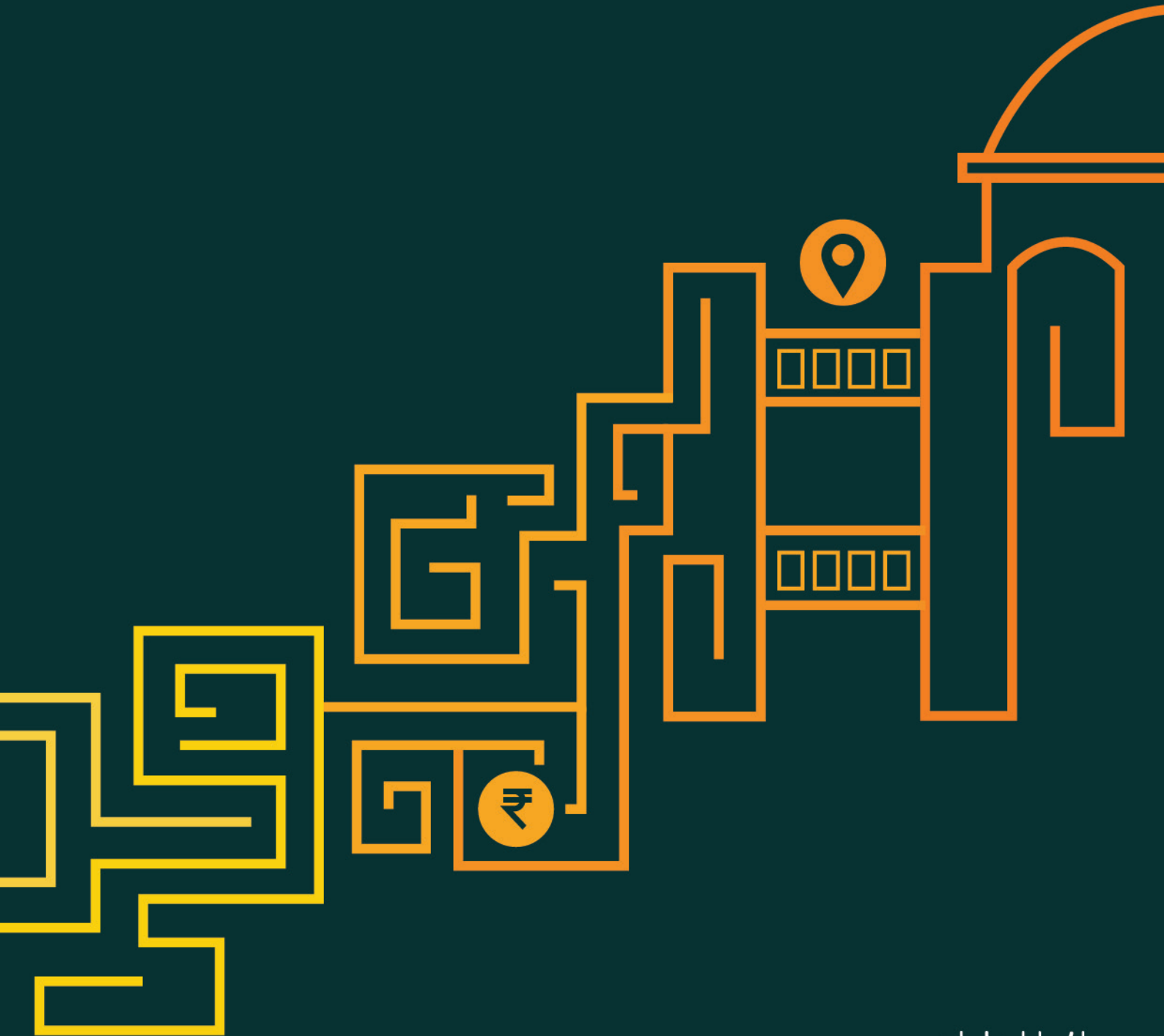


# Amicus Populi? A public interest review of the Appellate Tribunal for Electricity

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# *Amicus Populi?*

## A public interest review of the Appellate Tribunal for Electricity

Prayas (Energy Group), Pune

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October 2018



### **About Prayas**

Prayas (Initiatives in Health, Energy, Learning and Parenthood) is a non-profit organisation based in Pune, India. Members of Prayas are professionals working to protect and promote the public interest in general, and interests of the disadvantaged sections of society, in particular. Prayas (Energy Group) works on theoretical, conceptual, regulatory and policy issues in the energy and electricity sectors. Our activities cover research and intervention in policy and regulatory areas, as well as training, awareness, and support to civil society groups. Prayas (Energy Group) has contributed to the development of energy sector policy as part of several official committees constituted by ministries, the erstwhile Planning Commission and NITI Ayog and advisory committee of many regulatory commissions. Prayas is registered as a SIRO (Scientific and Industrial Research Organisation) with the Department of Scientific and Industrial Research, Ministry of Science and Technology, Government of India.

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### **Acknowledgements**

This report has greatly benefited from discussions with various utility officials, and regulatory and legal experts. We are thankful to Mukta Gadag for her valuable assistance in the initial phase of this study. We would also like to thank our colleagues at Prayas, particularly Ann Josey, Manabika Mandal, Shilpa Kelkar and Sreekumar Nhalur for their keen observations, advice and assistance. Any shortcomings or weaknesses in the report are our own.

We are grateful to Shakti Sustainable Energy Foundation for its support. The Shakti Sustainable Energy Foundation works to strengthen the energy security of India by aiding the design and implementation of policies that support energy efficiency and renewable energy. The views/analysis expressed in this report/document do not necessarily reflect the views of Shakti Sustainable Energy Foundation. The foundation also does not guarantee the accuracy of any data included in this publication nor does it accept responsibility for the consequences of its use.

**Suggested citation:** Prayas (Energy Group). (October, 2018). Amicus Populi? A public interest review of the Appellate Tribunal for Electricity.

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**Layout and Printed by:** Mudra, 383 Narayan Peth, Pune. Email: [mudraoffset@gmail.com](mailto:mudraoffset@gmail.com)

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# Summary

Electricity Regulatory Commissions (ERCs) are the cornerstone of power sector reforms. Many of the key sector decisions are made through the regulatory processes and the ERCs play the crucial role of balancing the interests of various stakeholders. While being responsible for several decisions that have political implications – for example setting retail tariffs or approving power purchase contracts – the ERCs have no direct political accountability. Instead, their accountability comes through, a) the public nature of their functioning, as they are required to hold public consultations on many issues, b) the mandate to record their decisions in the form of reasoned orders, and c) their orders being subject to judicial review and appeals. It is in this context that the role of the Appellate Tribunal for Electricity (APTEL) becomes crucial.

Established under the Electricity Act, 2003, the APTEL has the specific mandate of providing a dedicated forum with sector expertise to critically review the decisions of the ERCs. In spite of this crucial role and importance, and more than a decade of its existence, there is very little literature regarding the APTEL's functioning. In this context, the main objective of this report is to take a first step towards providing information regarding the functioning of the APTEL from a public interest perspective. The findings presented are based on the analysis of 852 judgements issued by the APTEL between April 2013 to March 2017. Based on this analysis, following are the key findings regarding the APTEL's functioning that emerge:

- **Nature of Appeals:** Out of the 852 judgements, the majority (618) were appeals appeal against an ERC order, and only eight cases were under Section 121 of the Electricity Act 2003, which grants original jurisdiction to the APTEL. In three out of these eight cases, APTEL has taken suo motu cognizance of matters. 36 appeals are concerning the Petroleum and Natural Gas Regulatory Board (PNGRB) and the remaining 190 include judgments pertaining to interlocutory applications and other kinds of petitions, such as those filed for review, condonation of delay, directions for execution, etc.
- **Type of Appellants:** Private generation companies are the most frequent appellants before the APTEL and they alone account for almost a third of all the judgments considered in the dataset. They are followed by state-owned distribution companies, which account for 19% of the judgements. Interestingly, while private distribution companies are operating in only a few cities in India, they are appellants in 9% of all judgments in the dataset. Similarly, large industrial and commercial consumers, and captive consumers account for almost 15% of the total cases. Small consumers and consumer organisations are appellants in only 3% of all judgments.
- **Kind of issues raised:** Considering the fact that generation and distribution companies are the most common appellants, it is not surprising that more than a third of the issues were related to tariff matters. This was followed by cases related to power purchase agreements and renewable energy related issues. It is important to note that most of the issues agitated before the APTEL are very relevant to all consumers, including small consumers, and can often lead to tariff impacts for them.
- **Geographic spread of appeals:** While appeals against all state and joint ERCs have to be filed before the APTEL, only five states account for nearly half (47%) of all judgments considered in the dataset. Interestingly, while private distribution companies are appellants in only 9% of the

total judgments, they were appellants in 27% of appeals from Maharashtra, 32% from Odisha and 44% from Delhi, the three states where they are present. This is especially interesting in the case of Maharashtra, where these utilities operate only in the city of Mumbai.

It is the responsibility of the APTEL to balance the interests of consumers and utilities, however, the information on its functioning indicates that there is very little representation of consumers and public interest in the proceedings before it. Further, a broad review of the concerned legal provisions and rules and regulations highlights the following:

- **Prohibitively high fees:** The fees for filing of an appeal before the APTEL are Rs. 1,00,000 if respondents are less than four, plus Rs. 10,000 for each additional respondent. Such exceptionally high fees make it very difficult for small consumers and consumer organisations to approach the tribunal. It is important to note that before the establishment of the APTEL, the concerned state High Court was the forum for appeals against ERC orders, which was in comparison to APTEL, much more accessible to common consumers.
- **Location restriction:** The APTEL is situated in New Delhi, and presently there are no functioning circuit benches. Thus, an electricity consumer from any part of the country will have to travel to Delhi to first file an appeal and thereafter to participate in the proceedings. There is no option of e-filing or remote participation in the hearings. The cost of travel along with high fees makes participation prohibitively expensive for small and individual consumers.
- **Number of benches:** As per the Electricity Act 2003, the strength of the APTEL is restricted to four, one Chairperson and three Members. Every bench needs at least two members (one judicial and one technical). Hence, at most two benches can function at any one point of time. In case of any vacancies and/or delays in appointments, even the two benches cannot function simultaneously. The restriction on the total 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.
- **Taking up suo motu issues:** The APTEL is distinct from other tribunals as it enjoys original jurisdiction and can suo motu issue directions to the ERCs for ensuring that they duly perform their statutory functions. However, so far it has used these powers only sparingly. Given its role and mandate, the APTEL can take more proactive steps to address broader sectoral issues such as ensuring meaningful access to electricity, facilitating greater competition and improving regulatory governance.

In light of the above findings, it becomes clear that there is an urgent need to reduce the access barriers and to improve the overall functioning of the APTEL. Apart from being unfair to small consumers, high entry barriers also deprive the sector institutions of crucial inputs from these key stakeholders and severely limit the constructive role of public participation in shaping policy implementation. In this regard, the report offers a few suggestions and recommendations, which are summarised below.

The most obvious suggestion is to introduce a more rational and reasonable fee structure to enable consumer participation. Using the existing provisions, the APTEL can immediately issue directions to relax the fee requirements for small and individual consumers, and consumer organisations. Another immediate measure to reduce access barriers would be to enable e-filing of appeals and to allow remote participation for hearings. These measures are already in place in several judicial and quasi-judicial fora and they can greatly save cost and time for all the concerned parties. Ensuring proper functioning of circuit benches would further ease the matters.

Apart from overcoming the access challenge, there is an urgent need to ensure adequate representation of consumer and public interest in the proceedings before the APTEL. For this purpose, the APTEL can consider empanelling a few experienced and public-spirited advocates to specifically represent the interests of common consumers and the public at large. This would be similar to appointing *amicus curiae*, as the tribunal has done in the past. These advocates should be required to undertake at least one round of consultation (through video conferencing or teleconferencing) with a few representative consumers from the concerned state before participating on their behalf. Such a process can greatly enrich the regulatory and policy debates before the APTEL.

Given the lack of any publication that provides useful information and insights regarding the case law that is emerging from the APTEL's crucial decisions, the Forum of Regulators (FOR) can on an annual basis, commission publication of a compendium of the most important judgments of the APTEL in that year along with a brief commentary on the case law that emerges from them, and its implications for sector policy and regulatory governance. While the FOR may appoint consultants for doing this exercise, it should also appoint a panel of experts to review and advise the team working on it. Such an advisory panel can consist of representatives from sector utilities, regulatory commissions, civil society organisations, and the designated consumer advocates. The terms of reference for the study as well as the final report should be finalised based on public consultation.

In addition to the above mentioned suggestions, which can be implemented immediately within the existing legal and regulatory framework, a few long-term measures aimed at institutional strengthening also need to be employed. These include, increasing the number of benches, establishing permanent regional benches, and introducing a more explicit legal mandate for consumer and public interest representation in all the matters before the APTEL.

Presently, the APTEL does not have its own budget, and is dependent on the Ministry of Power for its finances as well as personnel. Further, the Ministry of Power also decides appointments for the members of the APTEL. In the interest of institutional autonomy, the Supreme Court has suggested that administrative support for all tribunals should come from the Ministry of Law and Justice and appointments of the members of the tribunals should also be made by the Ministry of Law and Justice, and not by the line ministry of the sector concerned. The central government should undertake appropriate steps to implement these directions of the Supreme Court.

Given its broad mandate and wide ranging powers, we strongly suggest that the APTEL should strive to be an "amicus populi", i.e. a friend of the people, and not just an adjudicatory forum, which caters to the needs of the few who can afford access to it.



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# 1. Introduction and Context

The Electricity Act, 2003 (or E Act, 2003) is widely regarded as a watershed in Indian electricity regulation. The Act put the Electricity Regulatory Commissions (ERCs) at the centre of the functioning of the sector. Between the Central Electricity Regulatory Commission (CERC) and its state level counterparts (the state and joint electricity regulatory commissions), these institutions are empowered to regulate almost every aspect of the sector: they set tariffs for generation, transmission, supply and wheeling; give licenses for transmission, distribution and electricity trading; and adjudicate on disputes between the various licensees and generation companies. The ERCs also have the power to suo motu, or based on petitions filed before them, initiate proceedings to hold the licensees or institutions accountable for their statutory duties and responsibilities.

The E Act, 2003 is also considered a milestone for having the protection of consumer interest as its stated mandate. For the first time in the electricity sector, it introduced a dedicated channel for consumer grievances by mandating the establishment of Consumer Grievance Redressal Forums (CGRFs) by the electricity distribution companies and the Ombudsman by the ERCs. The provisions for consumer participation in the regulatory process were also strengthened under the Act, and public participation was mandated at the level of the ERCs in proceedings pertaining to tariff setting, grant of licenses and other such important proceedings. Even before the E Act, 2003, electricity regulatory commissions had been set up at the central and state level under the Electricity Regulatory Commissions Act of 1998. Under the 1998 Act, the High Courts were the forum of appeal for challenging orders issued by the ERCs.<sup>1</sup>

Overriding all the previous Acts, the E Act, 2003 further strengthened the role and mandate of the ERCs and also established the Appellate Tribunal for Electricity (APTEL), which was to take over the role of appellate body from the High Courts. Accordingly, the APTEL was established by the central government "to hear appeals against the orders of the adjudicating officer or the Appropriate Commission" in October 2004 (Gazette of India, 2004; PIB, 2005). Subsequent to its establishment, appeals pending in state High Courts were transferred to the APTEL (Ministry of Power, 2008). This model of a dedicated sectoral tribunal is found in many sectors in India; examples include telecommunication, petroleum and natural gas, securities market, and anti-competitive practices to name a few.

Regulatory commissions established in the electricity sector feature a combination of legislative function (regulation/rule making), executive function (implementation of regulations/rules) and quasi-judicial function (adjudication of disputes, compliance and penalties). Checks and balances have been put in place to ensure their accountability, for example the provisions for tabling of regulations formulated in the legislature, judicial review by constitutional courts and review of their decisions by an appellate authority. It is in this context that the APTEL has been created with the specific purpose of providing a dedicated forum with sector expertise to critically review the decisions of the ERCs. It is also expected to be a solution to the problem of separation of powers of the ERCs and to provide a check on regulatory excesses. Having inherent judicial powers and a much broader writ jurisdiction, the High Courts continue to play an important role in any judicial review concerning the ERCs, but any appeals against the substantive and technical decisions, such as, say those concerning tariff determination, would be decided by the APTEL and not the High Court.

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1. Under the Electricity Regulatory Commission Act, 1998, appeals from decisions of the commissions were to be made to the High Courts (Section 16 and Section 27).

## 1.1 Composition, appointments and autonomy

The APTEL consists of a Chairperson and three Members. There are two Technical Members and two Judicial Members, with the Chairperson also being the Judicial Member. The Chair needs to be a person with a legal background. According to the E Act, 2003, she should have been a Judge of the Supreme Court or the Chief Justice of a High Court, and is appointed by the central government in consultation with the Chief Justice of India. The other Judicial Member should either have been a Judge of a High Court or qualified to be one. The Technical Member is expected to have expertise and experience in either the electricity sector or in broader areas such as public policy, economics, law and regulation. Members are appointed by the Central Government on the recommendation of a selection committee. The selection committee is the same as the one that selects the Chairperson and Members of the CERC. Annexure I lists all the members and chairpersons of the APTEL so far.

The Chairperson and Members hold office for a term of three years, and are eligible for re-appointment for a second term. The Chairperson retires at the age of 70 years, and the Members at 65 years, which is in line with the recommendations of the Law Commission (Law Commission of India, 2009). Since its inception, the APTEL has had four Chairpersons, and 12 Members – five judicial and seven technical. Of the Chairpersons, only one was re-appointed to a second term. Of the twelve Members, however, three (all technical members) were re-appointed to a second term.

It is interesting to note that out of the seven persons who have served as Technical Members, three have previously served as Chairperson or Member of different ERCs. It may also be noted that all the technical members have had prior experience in public sector power utilities. Interestingly, there is no bar on employment on members leaving the APTEL. While the E Act, 2003 bars members of ERCs from taking up commercial employment with any organization that has been party to the proceedings before them for two years and from representing any person before ERCs in any manner, there is no bar on the members of ERCs becoming members of the APTEL. Thus, it is possible and indeed common to find ex-members of Regulatory Commissions serving as members of the APTEL.

The APTEL sits in New Delhi, but the E Act, 2003 allows for circuit benches to function at other locations as well. The chairperson in consultation with the central government can decide the location, duration, as well as the rules for the operation of the circuit benches. The number of members of the APTEL is fixed in the legislation at four (including the Chair), and since every bench needs at least two members (one judicial and one technical), at most only two benches can function at any point of time. Further, in case of any vacancies and/or delays in appointments, even the two benches cannot function simultaneously.

On the issue of financial autonomy, the APTEL does not have its own budget and it is provided funds by the Ministry of Power. Thus, the APTEL is dependent on its line ministry for funds, personnel and salaries. The salary and the terms of service of the Chairperson and Members are also prescribed by the Central Government. The central government also decides on the number of officers and other employees of the APTEL as well as their salaries and terms of service. The officers and employees, however, discharge their functions under the superintendence of the APTEL Chairperson.

## 1.2 Role and jurisdiction

Under Section 111 of the E Act, 2003, any person aggrieved by an order of a regulatory commission or an adjudicating officer can prefer an appeal to the APTEL, within 45 days of the receipt of the said order. The APTEL can, "after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against." All decisions of the APTEL have to be made by majority. Any issue of contention has to be referred to for majority decisions under Section 123. For the purposes of performing its function under the Act, and executing its orders, the APTEL has the powers of a civil court. All proceedings before the APTEL are judicial proceedings, and the tribunal has the power to review its own decisions (Section 120).

Apart from the appellate jurisdiction, Section 121 of the E Act, 2003, grants the APTEL original jurisdiction. It states that "Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act." The term "performance" here subsumes within itself all aspects of performance including partial, complete and non- performance (APTEL, 2013). Thus, under this section, the APTEL can suo motu take cognizance of any failure on part of the Regulatory Commission to perform its statutory duty, and give orders to that effect. Famously, upon receipt of a letter from the Ministry of Power lamenting the fact that regulatory commissions are not revising tariffs every year, the APTEL directed the regulatory commissions to determine tariff every year, even in the absence of a petition filed by the licensees (APTEL, 2011). It is interesting to note that such provision regarding original jurisdiction is missing from most legislative enactments establishing tribunals in other sectors.

In addition to electricity sector, APTEL is also the appellate body for appeals against the orders passed by the Petroleum and Natural Gas Regulatory Board (PNGRB), under Section 33 of the Petroleum and Natural Gas Regulatory Board Act, 2006. With the passing of the Energy Conservation (Amendment) Act, 2010, the APTEL is the appellate tribunal under this Act as well. Appeal against any judgment of the APTEL can be made to the Supreme Court within 60 days, as provided for in Section 125 of the Act and should involve a substantial question of law.

### 1.3 Objective and scope of this study

Electricity Regulatory Commissions enjoy far and wide powers and are responsible for most of the important decisions in the sector. While ensuring due compliance with the Act and the relevant policies and regulations, the ERCs have to make important and at times difficult decisions that affect the consumer tariffs and the financial viability of the entities regulated by them. The regulations set by them have implications for not just consumer tariffs, but also the commercial interests of different stakeholders. Hence, all stakeholders in the sector have a strong interest in ensuring that regulators exercise their powers judiciously, independently and responsibly. Also, unlike elected representatives, the regulators are not accountable politically. Instead, their accountability comes through the public nature of their processes, the requirement for issuing reasoned orders, and most importantly, review and appeal processes that can be initiated against their decisions. Therefore, as the dedicated appellate authority for review of the decisions of ERCs, the role of the APTEL assumes crucial importance in terms of protecting the interests of all the stakeholders.

Unfortunately, despite such a crucial role and more than a decade of operation, there is little information in the public domain in terms of reports or studies on the functioning of the APTEL. Existing literature on tribunals concentrates on the legal or jurisdictional aspect of the institutions – largely the turf war between the judiciary and the executive – and limited efforts have been made to study the functioning of these institutions, especially from a public interest perspective<sup>2</sup>.

The purpose of this report is to take the first steps towards such a study. It examines the functioning of the APTEL from a public interest perspective and tries to answer questions such as: who has access to the institution or in other words who are the most common appellants? Where are they based? What kind of issues they are raising? What kinds of issues are taken up suo motu? Are there any barriers to accessing the institution? Based on data and observations, the report also offers a few ideas and suggestions for the way forward.

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2. Please refer to the Annexure III for a brief review of the existing literature.

The analysis presented in this report is based on a dataset of APTEL judgments spanning four financial years, from 2013-14 to 2016-17. A total of 852 judgments were delivered by the APTEL in this period and the same have been grouped according to issues, appellants and by electricity regulatory commissions<sup>3</sup>. Annexure II provides a description of the dataset. One of the objectives of this report is also to highlight the utility and importance of collecting and analysing data beyond the pendency statistics and taking a closer look at the functioning of the tribunals and other such quasi-judicial bodies.

However, the analysis presented in this report is not without its limitations. The primary limitation is that the dataset covers judgments for only four financial years. Ideally, the entire database of APTEL judgments should be examined. In addition, this report does not examine the judgments of APTEL in detail to understand directives, if any, with regards to quality of supply, rural electrification, and other issues affecting consumers, or the implications of the APTEL's rulings for the wider sector policy. There is also no analysis or commentary regarding the case law that has emerged from the APTEL rulings over the years. Further, in spite of the existence of the APTEL, people often approach respective High Courts when aggrieved by any decision of an ERC. In this regard, questions such as: what are the number of such cases, what is the nature of such appeals, how have the High Courts dealt with these issues, etc. become very important. However, such analysis is beyond the scope of this report.

We hope that further research in this area will look at these various aspects of the tribunal's functioning. We also hope that there would be studies analysing specific judgments of the APTEL to understand its directives on different matters, especially those pertaining to power procurement and capacity addition, contract enforcement, regulatory governance, competition and markets, electricity access and rural electrification, and quality of supply and service. Future research should also try and understand through detailed interviews how consumer organisations, generation and distribution companies as well as the regulators and the APTEL itself view its role and functioning.

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3. The APTEL delivered 817 judgments in this four-year period. However, at times a single judgment is delivered by clubbing multiple cases. In cases where the appellants of the cases were different, the cases have been treated as different. Thus, in our database there are a total of 852 judgments.

## 2. Functioning of the APTEL

This section examines in detail the working of the Appellate Tribunal for Electricity (APTEL). For this purpose, the section begins with an examination of its pendency data, followed by the type of appellants and the issues raised before the APTEL.

### 2.1 Disposal of cases

Tribunals have been a major feature of India's post-independence legal structure. There are more than 36 central tribunals functioning in the country<sup>4</sup>, covering a wide range of subjects such as electricity, consumer protection, telecom, securities market, insurance, company law, aviation etc. The decision to set-up tribunals is often justified based on the need to reduce caseload of the High Courts and to provide sector expertise, especially in techno-economic matters.

As mandated by the E Act, 2003, the APTEL has to dispose of any appeal within 180 days from the date of receipt of the same. Although the APTEL website has a link for disposal rate and pendency, the same is not functional.<sup>5</sup> The date of filing of the appeal is not listed on the judgements page. In the absence of such data, it is not possible to easily determine how many appeals get disposed within the specified time frame of 180 days. Regarding disposal rate, the Ministry of Power provided the following data to the Parliament in 2015 regarding the working of the Appellate Tribunal.

Table 1: Number of appeals that were disposed by the APTEL between 2012 to 2014

Year	Filed	Disposed	Cumulative pendency	Disposal rate
2012	265	248	17	94%
2013	333	265	85	80%
2014	300	96	289	32%

Source: Lok Sabha Unstarred Question 2567 in 2015. Note: Year is a calendar year. Data for 2015 was available till only March 5, 2015 and hence that year is not included in the table above.

As can be seen from Table 1, the disposal rate declines from a high of 94% in 2012 to 32% in 2014. The declining efficiency in 2014 could be a result of the 11-month delay in the appointment of the Technical Member, because of which there was only one operational APTEL bench. It is likely that a similar trend might have recurred in 2016 when again there was delay of almost a year in appointing the judicial member.

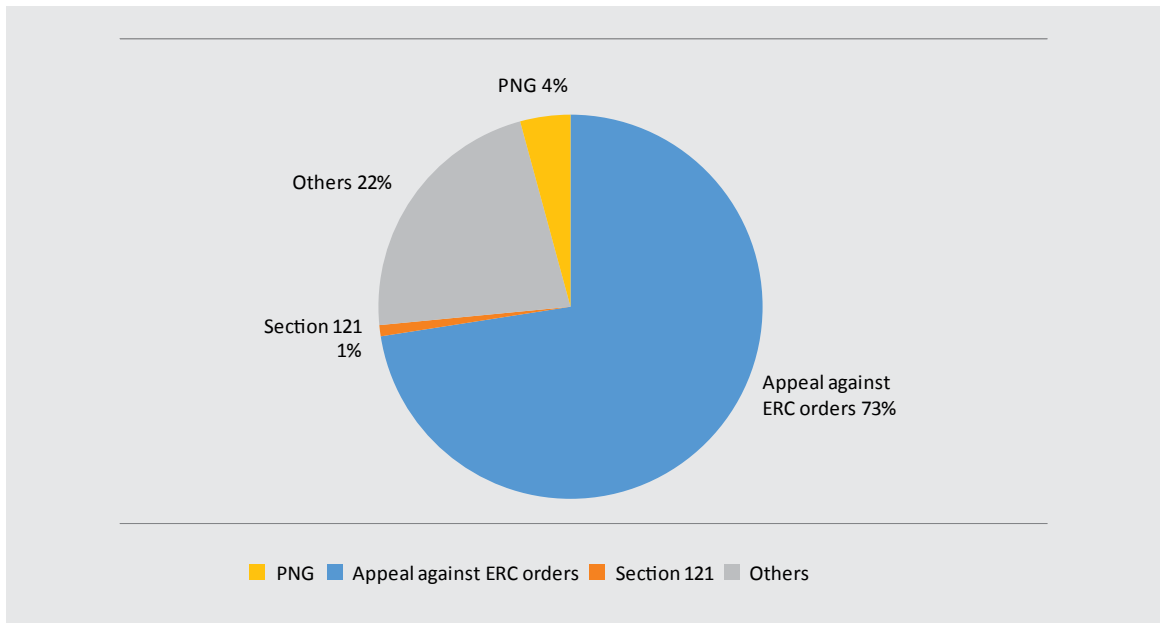
In its annual reports, the Ministry of Power publishes cumulative data regarding the number of cases filed before and disposed by the APTEL as on a particular date. This data shows that the number of new cases being filed before the APTEL almost doubled during the initial period between 2007 to 2009, and then again in 2012 and recently in 2016 (MoP, 2006-2017). As expected, the pendency rate increased around the period when the number of new cases filed per year also increased. Pendency issues were further aggravated by the delays in appointments, as it restricts the number of benches.

4. This number does not include the changes brought in by the Finance Act 2017 which merged 27 tribunals into 19 tribunals. Certain provisions of the Finance Act have been challenged and the matter is pending in the Supreme Court.
5. The APTEL link for pendency/disposal was not functional till this report was published: <http://www.aptel.gov.in/disposal.html>.

## 2.2 Nature of Appeals

As discussed earlier, the appeals filed before the APTEL can fall under any one of the following categories: (a) Section 111 of E Act, 2003, which is an appeal against an ERC order or an order issued by any adjudicating officer as per the provisions of the Act, (b) Section 121 which gives the APTEL original jurisdiction under the E Act, 2003, (c) appeals against the orders issued by the Petroleum and Natural Gas Regulatory Board (PNGRB), since the APTEL is also the appellate authority for the PNGRB, and d) others, which includes judgments pertaining to Interlocutory Applications and other kinds of petitions, such as those filed for review, delays, execution, etc.

Figure 1: Type of appeals filed before the APTEL



Source: PEG compiled dataset of APTEL judgements issued between FY 2013-14 to FY 2016-17

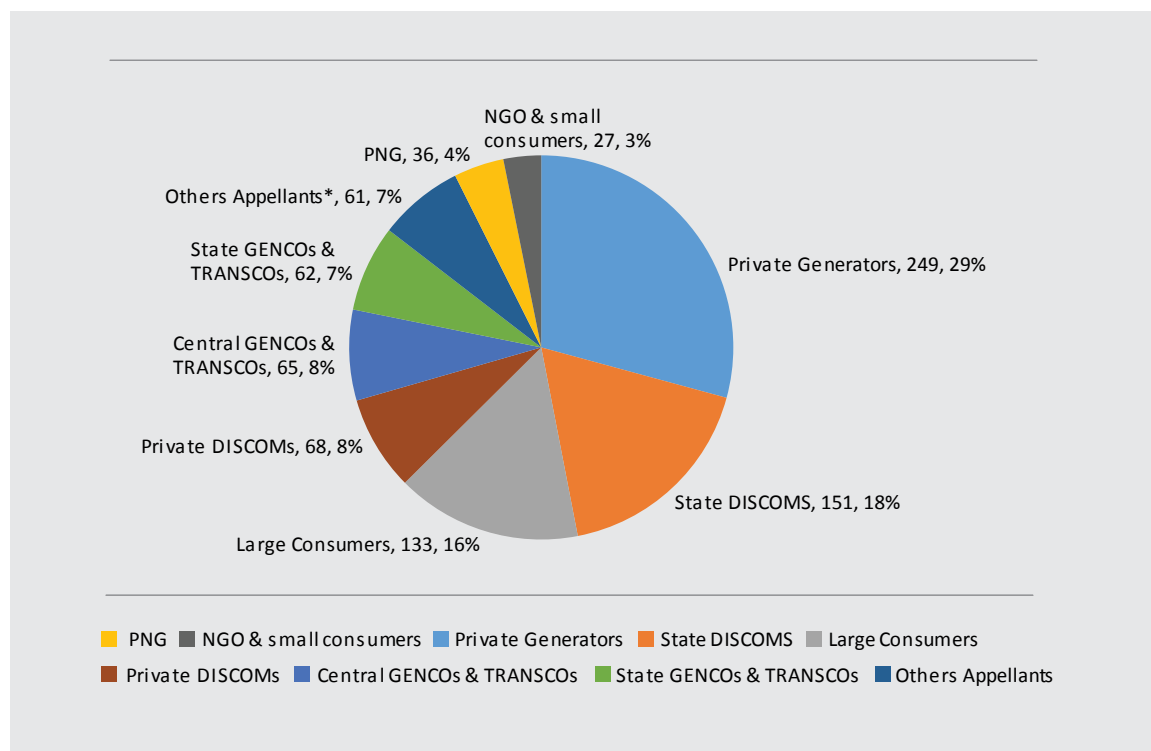
Figure 1 provides a split of the judgments in the dataset by type. As can be seen from the figure, of the 852, the majority (618) were appeals under Section 111, and only eight cases were under Section 121, three of which were cases where the APTEL took suo motu cognizance of matters. There are 36 appeals concerning the PNGRB and the remaining 190 fall under the 'Others' category.

## 2.3 Type of Appellant

Since majority of the appeals before the APTEL arise from grievances regarding the ERC orders, it is important to understand who is raising these issues. Figure 2 provides a breakup of the judgments issued based on the type of appellant. As can be seen from the chart, private generation companies are the most frequent appellants before the APTEL and they alone account for almost a third of all the judgments considered in the dataset. It is interesting to note that the generation segment of the electricity industry has seen a massive surge in private participation in just the last decade and currently, nearly 44% of installed capacity in India is with the private sector. They are followed by state-owned distribution companies, which account for 19% of the judgements. Interestingly, while private distribution companies are operating in only a few cities in India, they are appellants in 8% of all judgments in the dataset. Similarly, big high-tension consumers and captive consumer account for almost 16% of the total cases. It is pertinent to note that consumer migration under open access, a provision that allows large consumers to choose their supplier, has been on the rise for the last five-six years.

As against the active participation by the generation and distribution companies as well as the big consumers, small consumers and consumer organisations are appellants in only 3% of all judgments during this period.

Figure 2: Break-up based on the type of appellant and the number of appeals filed



Source: PEG compiled database of APTEL judgements issued between FY 2013-14 to FY 2016-17

Note: Large consumers are typically high-tension consumers eligible for open access and also include captive consumers.

\* 'Other appellants' includes appellants such as, private and central power trading companies, private transmission licensees, load dispatch centres, etc.

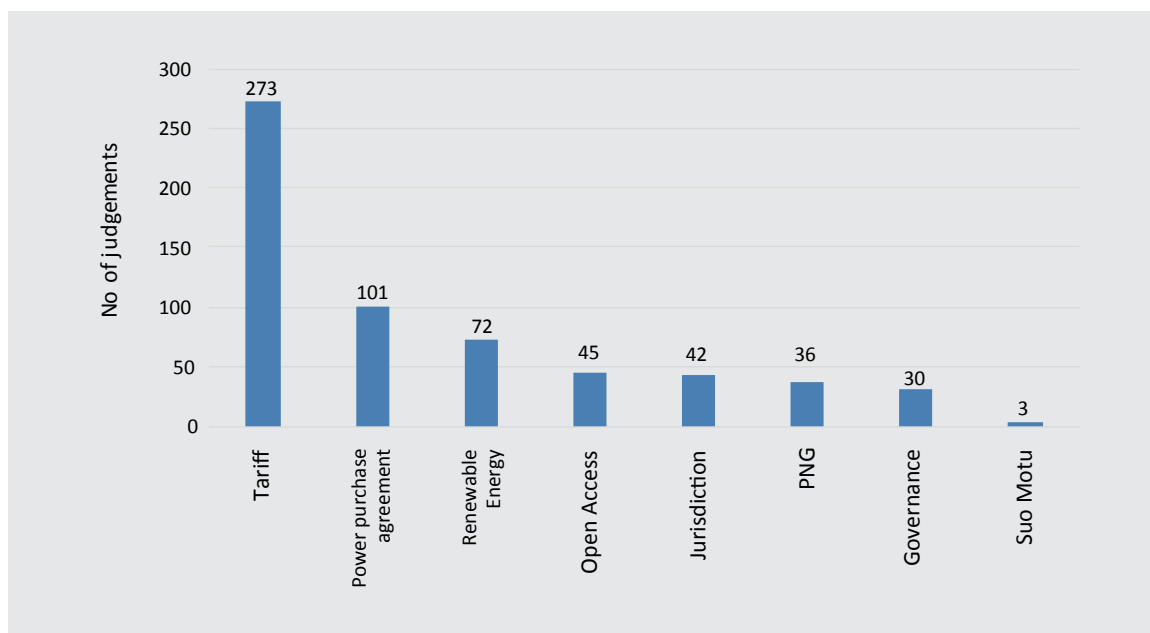
## 2.4 Type of Issues raised at the APTEL

Regulatory commissions handle a wide range of issues, and hence, the types of issues dealt with by the APTEL in appeals are also varied. Figure 3 provides a list of the main issues agitated before the APTEL. Considering the fact that generation and distribution companies are the most common appellants, it is not surprising that more than a third of the issues raised in front of the APTEL were related to tariff matters. This was followed by cases related to power purchase agreements, renewable energy and open access.

As can be seen, the issues agitated before the APTEL most often are extremely relevant to consumers and are also likely lead to tariff impacts for them. While these issues are of interest to all consumers in general, they are agitated mostly by only three kinds of stakeholders, namely, private generation companies, state utilities and large consumers. Involvement of small, individual consumers and consumer organisations is very low.



Figure 3: Issues agitated before the APTEL



Source: PEG compiled database of APTEL judgements issued between FY 2013-14 to FY 2016-17

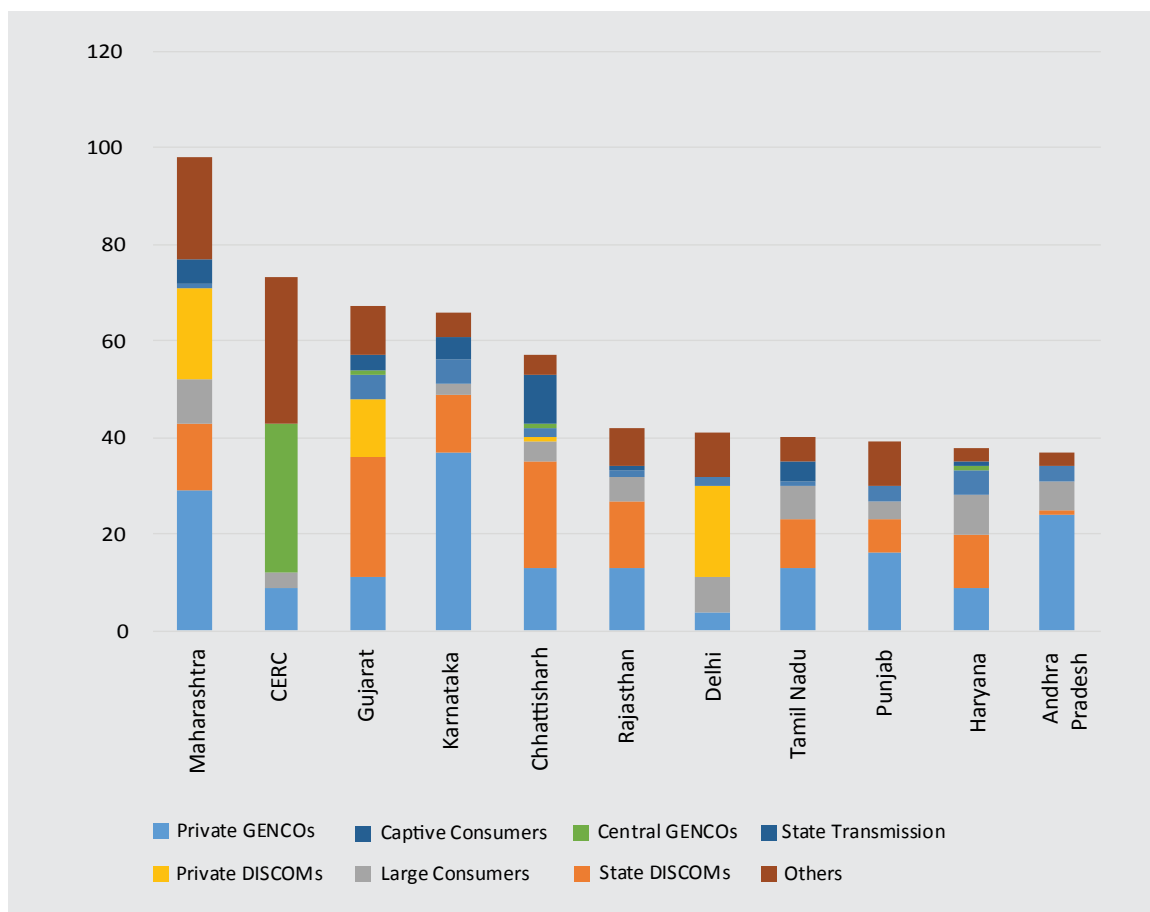
Note: Only judgments pertaining to appeals under Section 111 and 121 are categorised as per issues. All the other judgments pertaining to review petitions, interlocutory applications, condonation of delay etc. are not categorised.

## 2.5 Geographic spread of appeals

Figure 4 gives a breakup of the judgments issued by the APTEL based on the regulatory commission whose orders were appealed against. As can be seen from the figure, in the four-year data analysed in this report, only five states account for nearly half (47%) of all judgments delivered by the APTEL. The figure also shows the split by appellants within each state. As expected, private generation companies are the most frequent appellants, followed by state distribution utilities, but their frequency varies geographically. Interestingly, while private distribution companies are appellants in only 8% of the total judgments, they were appellants in 27% of appeals from Maharashtra, 32% from Odisha and 44% from Delhi, the three states where they are present. This is especially interesting in the case of Maharashtra, where these utilities operate only in the city of Mumbai, but have been the most active of litigants, with the APTEL once commenting that for Tata and Reliance (the private distribution companies in Mumbai), *'electricity means eternal litigation from forum to forum in the game of generation and distribution of electricity'* (APTEL, 2006).

Given the size of the country and the location of the courts, access to the higher judiciary has been a much debated issue in India. Recently, these issues were raised at the level of the Supreme Court in favour of the establishment of National Court of Appeals in the four corners of the country to improve access (The Hindu, 2016a; The Hindu, 2016b). Given the insights from the functioning of the APTEL, it is clear that very few small consumers and consumer organisations are able to approach the APTEL. It is therefore important to investigate the issue of access to the APTEL, especially its enablers and barriers.

Figure 4: State-wise, appellant-wise break-up of the appeals before the APTEL



Source: PEG compiled database of APTEL judgements issued between FY 2013-14 to FY 2016-17

## 2.6 Fee and Procedure

The Central Government makes rules regarding the form and fee for filing of appeals before the APTEL. The fee for an appeal to the APTEL is presently set at Rs. 1,00,000 for up to four respondents, and an additional Rs. 10,000 for each subsequent respondent. In addition, a one-time processing fee of Rs 2,000 is to be paid. Payments are to be made in the form of demand drafts.<sup>6</sup>

As can be seen from Table 2, that APTEL's fee is very high in comparison to similarly placed appellate tribunals. APTEL does have the power to excuse the payment of the fee, however such an order requires the filing of a separate application for fee waiver (with an amount of Rs 1,000), with no certainty that it will be granted. By contrast, the fee for filing an appeal against the APTEL judgment to the Supreme Court is only about Rs. 1500.<sup>7</sup>

6. In a recent development, courts fees are allowed to be paid using e-payment facility through the 'Bharat Kosh' website <https://bharatkosh.gov.in/>

7. Based on the fees indicated as per the fee calculator provided on the website of the Supreme Court of India for a civil appeal filed against orders of statutory bodies such as tribunals

Table 2 : Fees in different appellate bodies

Tribunal	Fee
Appellate Tribunal for Electricity (APTEL)	Rs. 1,00,000 if respondents are less than four, and an additional Rs. 10,000 for each additional respondent
Securities Appellate Tribunal (SAT)	<ul style="list-style-type: none"> <li>• For appeal against an order of SEBI, it is Rs. 5000.</li> <li>• Against an adjudication order, it depends on the penalty imposed and varies from Rs. 500 to Rs. 1,50,000.</li> </ul>
Telecom Disputes Settlement Et Appellate Tribunal (TDSAT)	Rs. 10,000 if respondents are less than four, and an additional Rs. 50 for each additional respondent
Airport Economic Regulatory Authority Appellate Tribunal (AERAT)	Rs. 10,000
Intellectual Property Appellate Board (IPAB)	<ul style="list-style-type: none"> <li>• For appeals under the Trade Marks Act: varied from Rs. 3000 to Rs. 10,000 depending on appeal.</li> <li>• Under Patents Act: Rs. 5000 for natural persons and Rs. 10,000 for other than.</li> <li>• Under GI Act, 2999: Rs. 5000</li> </ul>
Competition Appellate Tribunal (COMPAT)	<ul style="list-style-type: none"> <li>• For appeals: depends on the amount of penalty imposed, and ranges from Rs 1,000 to Rs 30,000.</li> <li>• For compensation applications: it depends on compensation claimed and ranges from Rs 1,000 to Rs 30,000.</li> </ul>

Source: Websites of respective appellate tribunals.

Note: With the passage of the Finance Act 2017, AERAT has been merged with TDSAT, and COMPAT has been merged with the National Company Law Appellate Tribunal. Certain provisions of the Finance Act have been challenged and the matter is pending in the Supreme Court.

Limiting frivolous litigation could be the objective of such excessively high fees. However, it has succeeded in deterring only the small consumers, since private generation companies, distribution companies and large consumers seem to be filing number of appeals. In addition, while small consumers and consumer organisations bear the entire amount of the fee, generation and distribution companies can and do pass these costs on to their electricity consumers. Thus, the high fee is unlikely to work as a deterrent for such appellants. Additionally, APTEL's location in New Delhi further increases expenditure in terms of travel and associated costs, which also deter only the small consumers, but not the large ones.

## 2.7 Benches

The Electricity Act allows for the establishment of APTEL benches. While the APTEL ordinarily sits in New Delhi, based on consultation with the central government, it can decide to sit in other places. The central government also notifies the geographical jurisdiction of each bench. As per its website, the APTEL has three circuit benches at Chennai, Kolkata and Mumbai, while Delhi has the principal and full bench status (Ministry of Power, 2012). Together, they exercise jurisdiction over the whole of India, except the state of Jammu and Kashmir. However, the circuit benches exist only on paper. Since its inauguration in August 2013 (Times of India, 2013), the Mumbai circuit bench functioned only in August and September of that year. Similarly, the Chennai circuit bench was functional only till April 2014. Further, it must also be noted that the existence of a circuit bench does not obviate the need for travel to New Delhi. The Registry of the APTEL remains at New Delhi, and thus, for the filing of appeal, aggrieved persons need to travel to Delhi, especially since e-filing has not been made available. While travelling to New Delhi for appeals is easy for generation companies, distribution companies and large consumers, the same may not be possible for small consumers.

In *Madras Bar Association vs. Union of India (2014)*, the Supreme Court held that when the appellate jurisdiction of a court is made to rest in a tribunal, the redress should be available with the same convenience and expediency as it was prior to the introduction of the tribunal. Since the APTEL took over the role of appellate authority from the High Courts, access to it should be at least as convenient as access to High Courts. Table 3 compares the accessibility of the APTEL with that of the High Courts, which it replaced as the forum of appeal against ERC orders. As the table highlights, the APTEL compares very poorly in terms of access, when compared with the forum it replaced.

Table 3: Comparison of the APTEL with the High Court as a forum for appeal that it replaced

Parameter	High Court	APTEL
Location	State capital or in case of union territories, nearby state capital. In case of many large states, multiple benches within the same state.	Only New Delhi. Possibility of circuit benches, but none functioning presently.
Fees	Depend on the nature of the case, but are mostly lower than Rs. 1,000.	Rs. 1,00,000 + Additional Rs. 10,000 per respondent if the no of respondents exceeds four.
Jurisdiction	Inherent judicial power, wider writ jurisdiction, but no sectoral expertise.	Quasi-judicial forum with sectoral expertise, but limited jurisdiction.

## 2.8 E-filing

APTEL does not have facilities for e-filing unlike some other courts and tribunals, such as the Cyber Appellate Tribunals, the Supreme Court, and the High Courts of Bombay and Delhi. Interestingly, the Appellate Tribunal for Electricity (Procedure, Form, Fees and Record of Proceedings) Rules, 2007 state that *"the Tribunal may allow filing of appeal or petition or application through electronic media such as online filing and provide for rectification of defects by e-mail or net and in such filing, these rules shall be adopted as nearly as possible on and from a date to be notified separately and the Chairperson may issue instructions in this behalf from time to time."* Thus, the APTEL is empowered to allow for e-filing, but has not done so.<sup>8</sup>

To summarise, based on the analysis of the functioning of circuit benches and the fee structure of APTEL, it is clear that small consumers and consumer organisations find it extremely expensive to approach the APTEL. Even if a waiver is granted, which is completely discretionary, lack of functioning circuit benches and high cost of travelling to New Delhi alone can be prohibitive for most small consumers and/or consumer organisations. Thus, as far as small and individual consumers are concerned, the location and the fees are a major barrier to access the APTEL.

8. On its website, the profiles of its first Registrar (2006) states that the person is involved in 'creation of a website of the Appellate Tribunal for Electricity and working on e-filing and video conferencing facility between State Electricity Regulatory Commissions and APTEL.' See Former Registrar, Deputy Registrar and Director, Profiles, APTEL, <http://aptel.gov.in/members/jmg.html>; <http://aptel.gov.in/Responsibilities.html>.

### 3. Amicus populi: friend of the people?

APTEL is undoubtedly an important institution in the context of the electricity sector; however, as seen in the earlier section, not just anyone can approach it. The analysis so far highlights that participation at the level of APTEL is heavily tilted in favour of generation and distribution companies, and large consumers. In this context, this section examines provisions related to public participation in the E Act, 2003 and how they apply to ERCs and the APTEL.

#### 3.1 From ERCs to APTEL

Public participation has been enshrined in the E Act, 2003 and is mandated in various important regulatory decisions such as grant or amendment of license, determination of tariff, formulation of regulations, etc. All the suggestions and objections received from the public are required to be considered while undertaking the above processes. In addition, the E Act allows the ERCs to designate certain organisations and/or individuals as consumer representatives to specifically represent the interests of the consumers as well as the public at large. Thus, the E Act, 2003 requires the commissions to perform public consultation on most of the crucial matters before them. Different state commissions have adopted these provisions differently. Some states such as Maharashtra undertake public hearings at multiple locations within the state, while others like West Bengal, solicit public comments only in writing (Khanna, Singh, Swain, & Narain, 2015). Table 4 provides a snapshot of the number of participants and objections filed at the level of the ERCs. As can be seen, consumers seem to be using the platform of public proceedings provided by ERCs to file objections and to discuss their issues. In states such as Maharashtra, the number of participants has been consistently high.

Table 4: Number of participants in retail tariff proceedings in some states

Items	Delhi Tariff Order (16.01.2013)	Karnataka Tariff Order (06.05.2013)	Maharashtra Tariff Orders (August 2013)	Rajasthan Tariff Order (06.06.2013)
Number of Objections Filed	242	106 (across all Discoms)		60
Total Number of participants in public hearings	244		765 (including 36 participants from BEST and 33 from Rlnfra at the hearing)	65 (This is excluding RERC staff)
Industrial and Commercial Consumers in public hearings	26			
Domestic Consumers, consumer groups and Others (specified) in public hearings	218			39 (excluding utility staff above)

Source: (Khanna, Singh, Swain, & Narain, 2015).

## Box 1:

### Barriers to consumer participation before the Central Electricity Regulatory Commission

The Central Electricity Regulatory Commission (CERC) is one of the important regulatory institutions in the country. All the key decisions pertaining to inter-state electricity matters are taken by the CERC. It also determines inter-state transmission charges as well as tariffs of all the central sector generating stations, which are the primary power suppliers for a number of states. Given its central role in power sector decision making, it is disturbing to note that like the APTEL, the fees imposed by CERC for filing of a petition or seeking a review of an order, are prohibitively high for a small consumer or an individual. The Table 5 below shows the fees charged by the CERC for different kinds of applications.

Table 5: Fees charges by CERC

Sr. No	Details	Fees as per CERC regulations
1	Miscellaneous Application	Rs. 3 lakh per application
2	Review Application	Rs. 3 lakh per application
3	Interlocutory Application	Rs. 1 lakh per application
4	Inspection of records	750/- per day for duration not exceeding three hours
5	Certified copies of documents	20/- per page

Source: [http://cercind.gov.in/2012/regulation/Payment\\_of\\_fee\\_reg\\_2012\\_30\\_3.pdf](http://cercind.gov.in/2012/regulation/Payment_of_fee_reg_2012_30_3.pdf)

In its statement of reasons issued along with the fees regulations 2012, the CERC has highlighted the importance of protecting consumer interests on several counts. For example, the statement of reasons published by the CERC along with its fees regulations 2012 states as follows: *"One of the most important principles is to balance the interest of the utilities and the consumers apart from ensuring that the generation and transmission are carried out on commercial principle, economical use of resources and encourage competition, efficiency, economical use of resources, good performance and optimum investments... Not only the generators and transmission licensees are benefited on account of regulatory certainty, the consumers get electricity at the regulated price. Considering the resources of the Commission used for tariff determination and the cost of such resources, the proposed fees for determination of tariff is reasonable."* (CERC, 2012)

In accordance with the E Act, 2003, the CERC does provide opportunity to the public to comment on its regulations as well as tariff determination processes under Section 62 of the Act, however, its fees and charges are high enough to discourage any active participation of individuals and/or small consumers. Such consumers would find it very difficult to approach the CERC for say, seeking review of its orders or for filing any miscellaneous application before it.

It is heartening to note that some state commissions such as the Maharashtra Electricity Regulatory Commission (MERC), have created specific sub-categories for individual consumers and consumer representatives, and the fees for these categories are lower than those meant for the licensees and the generators. For example, the fees for filing a miscellaneous application before the MERC for an individual consumer is Rs. 500 (MERC, 2017). As against this, it would cost Rs. 3,00,000 for filing a similar application before the CERC. Similarly, the fees for filing an application for review of a tariff order or a PPA related order before the MERC by a consumer or a consumer representative is Rs. 25,000, whereas the fees for filing a similar application before the CERC would be Rs. 3,00,000.

Such excessively high fees for small and individual consumers are not only detrimental for consumer and public participation, but they are also undesirable from the sector point of view as they exclude one of the key stakeholders from the sector's decision making processes. Being the custodians of public and consumer interest, it is the duty and responsibility of the institutions such as the ERCs and the APTEL to ensure effective and meaningful public participation.

While the public participation in the proceedings before the ERCs seems fairly active, in the APTEL judgement dataset for four years, there are only 27 cases where small consumers or consumer organisations were appellants. Thus, it would seem that while consumers are willing to approach the regulatory commissions when asked for comments, objections, etc., they hesitate to take these objections further as appeals before the APTEL. It is important to note that processes at the ERC level, such as tariff fixation and power purchase agreement approval, require public consultation and hence the information in this regard is more easily available to the public. Also, ERC as a forum is more accessible in terms of location, cost and ease of participation.

It is hard to imagine that the small consumers (which are the largest segment in terms of the number of consumers of a distribution company) have no issues with regard to the tariff orders or PPAs related decisions or any other regulatory orders, while the generators, large consumers and regulated utilities in their states seem to be challenging most of these orders.

Further, the appeals filed by the generators, large consumers and regulated utilities, are likely to have tariff impact for the small consumers. Therefore, it is even more disconcerting to note that in all such proceedings there is hardly any representation of their interests before the APTEL. In all such cases, the APTEL gets to hear the matter largely from the point of view of the appellants and respondents. Unlike the provision for appointment of consumer representatives before the ERCs, there is no similar mandate for the APTEL to ensure consumer interest representation, nor has it appointed any designated consumer advocates. It is also not clear whether and how often, the APTEL appoints any *amicus curiae* to represent the interests of consumers before it.

Thus, while the APTEL might be doing well in terms of dealing with the appeals filed by the generators, regulated utilities, and large consumers, it still has a long way to go if it has to truly fulfil its role and mandate under the E Act, 2003 and transform itself into an "amicus populi", a friend of the people.

### 3.2 Locus standi

Regulatory commissions deal with a variety of issues that directly affect the interests of the consumers as well as the public at large. While the ERCs are not bound by orders issued by other ERCs, including the CERC, they are however bound by any judgement issued by the APTEL. Thus, the implications of the APTEL's judgements are not limited to any one particular state or ERC. It follows that even though a consumer or a citizen may not be directly affected by an order of an ERC, but any judgement arising from the APTEL with regard to such an order can and will affect her. For example, appeals against orders of the ERCs dealing with issues such as say, load shedding, utility's compliance with standards of performance, technical issues pertaining to grid integration of renewable energy sources, open access, anti-competitive practices of licensees or generators, governance issues pertaining to procedures to be followed by ERCs, etc. can have serious implications for not just the consumer tariff but also the larger functioning of the sector. Given the technical nature of such issues, the High Courts are unlikely to engage with them, and hence the APTEL would be the appropriate forum to debate such issues. Therefore, access to APTEL becomes crucial if one wishes to meaningfully engage with the broader sectoral issues.

Unfortunately, tribunals such as the APTEL tend to have a narrow interpretation of locus when it comes to consumer participation in matters where one is not a direct consumer of the concerned ERC. As per the Section 111, any 'person aggrieved' by an order of the ERC can appeal against it to the APTEL. In this regard, two findings emerge from various APTEL judgements on this subject: First, a 'person aggrieved' is one who has (a) suffered a legal grievance; (b) suffered a legal injury; or (c) been deprived of something s/he was entitled to (APTEL, 2014). It is important to present evidence that one is 'aggrieved' by the order. Second, it is not essential that the aggrieved person be a party to the original proceedings before the ERC (APTEL, 2010).

Thus, it is possible that even when order(s) of the ERC(s) can potentially lead to serious implications for broader public interest or sector governance, it would be difficult for a concerned citizen to raise such issues before the APTEL, unless she can prove to be directly affected by the said order. This can significantly limit participation in crucial matters that can have broader sectoral implications.

### 3.3 Suo motu orders

As highlighted earlier, the APTEL exercises original jurisdiction under Section 121. Under this Section, persons aggrieved can either make a case for issuance of instructions by the APTEL or the APTEL can suo motu take cognizance of any failure on the part of an ERC in performing its statutory duty, and give orders to that effect. This provision is unique to the APTEL since it is missing from other legislative enactments establishing tribunals. The APTEL has till date used these powers on a very limited number of issues. One such example is regarding the establishment of the consumer grievance redressal forum (CGRF) by the distribution companies and the electricity Ombudsman by the ERCs. Up on discovering that this two-tier mechanism for grievance redressal provided under the E Act, 2003 has not been implemented by several states even six years after the Act coming into existence, the APTEL invoked its suo motu powers to direct all state and joint Commissions *to ensure that Sections 42(5) to (7), 50, 57 and 59 of the Electricity Act, 2003 are given effect to without any delay*. In the same order, the APTEL also sought *specific information as to the status of effective implementation of the Electricity Act, 2003 in letter and spirit in all the States and Union Territories from the Secretary to the Forum of Regulators* (APTEL, 2009).

Based on the information provided by the Forum of Regulators (FOR), the APTEL gave further directions for stricter compliance with the provisions of the E Act, 2003, including directions to some of the states to establish regulatory commissions in accordance with the Act. The directions to ERCs were not limited to just ensuring establishment the CGRFs and electricity Ombudsman, but also to empower them. It also directed all ERCs to formulate supply code and standards of performance and directed the Secretary to the FOR *to evaluate the standards of performance and the supply code notified by the Appropriate Commissions to evaluate variations and any specific gaps that need to be rectified* (APTEL, 2009). The FOR has been reporting status of compliance of different states with respect to these directions of the APTEL (FOR, 2018).

Another prominent example of the APTEL using its original jurisdiction is with regard to the issue of tariff revision. The Ministry of Power (MoP) through a letter to the APTEL highlighted the issue of lack of timely tariff revision by several ERCs and distribution companies. Treating the said letter as a petition, the APTEL using its suo motu powers directed all ERCs to ensure timely annual tariff revision and if the distribution company failed to file any petition for this purpose, the APTEL insisted that the ERCs should use their suo motu powers to revise tariffs under such circumstances (APTEL, 2011). Once again, the FOR was directed to report the status of compliance (FOR, 2015). Given the financial issues faced by the distribution sector at the time (Planning Commission of India, 2011) and considering the many governance challenges that impede timely tariff revision, it is not difficult to understand why the APTEL might have chosen to take such a strong step.

Barring these instances the APTEL has not used these powers for any other matters. Presently, the sector is faced with many challenges such as, enabling meaningful and sustainable electricity access to all the households, ensuring rational capacity addition planning, smoothening grid integration of renewable energy sources, enabling fair competition in both generation and supply, etc. Additionally, lot more needs to be done in areas such as protecting consumer interests, improving supply and service quality and strengthening regulatory governance. Given its unique powers, the APTEL can play an important role in dealing with many of these issues by holding the ERCs accountable for their role and mandate under the E Act, 2003.



## 4. Conclusions and way forward

With the responsibility of ensuring accountability of the ERCs and appropriate implementation of sector policy, the APTEL is undoubtedly a very important institution in the governance structure of the Indian electricity sector. In light of this role and responsibility, the analysis of its functioning presented in this report provides the following insights:

- **Autonomy and independence:** First, for its funds and personnel, the APTEL is dependent upon its line ministry, which is also responsible for the selection of its members. This has implications for its autonomy and independence. There are measures, for example those suggested by the Supreme Court, which could be implemented to overcome these issues and they need to be seriously considered by the central government.
- **Access:** Second, the fees for filing of an appeal before the APTEL are excessively high, making it very difficult for small consumers and consumer organisations to approach it. Considering this, it is hardly surprising that most of the appellants before it are either private generators, and large industrial & commercial consumers, who have strong commercial interests in the sector, or regulated utilities, who can pass on the costs of the litigation to their consumers.
- **Location:** Third, the APTEL is situated in New Delhi, and though provision of circuit benches exists, they have mostly not been operational. The location restriction of the APTEL makes the cost of travelling prohibitive for small consumers. This combined with the high fee for appeals makes it extremely difficult for them to approach this forum. Before the establishment of the APTEL, the High Court was the forum for appeals against ERC orders, which was much more accessible to common consumers. Sadly, the APTEL has not made any attempts to ease the locational challenge by adopting means such as enabling e-filing of appeals and video conferencing for hearings.
- **Number of benches:** Fourth, the APTEL can have at the most only two functional benches at any point of time. In case of any vacancy and/or delays in appointment, even two benches cannot function simultaneously. Considering that the APTEL is the appellate forum for all cases against all the ERCs in the country, its size is highly inadequate for the task cut out for it. 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.
- **Original jurisdiction and suo motu powers:** Finally, the APTEL is distinct from other tribunals as it enjoys original jurisdiction and can suo motu issue directions to the ERCs for ensuring that they duly perform their functions under the Act. However, so far it has used these powers only sparingly. Unfortunately, it has not taken enough steps to address broader issues such as, ensuring meaningful access to electricity, facilitating greater competition or improving regulatory governance, etc.

In light of the above findings, it becomes clear that there is an urgent need to reduce the access barriers and to improve the overall functioning of the APTEL. It is in this spirit that we list below a few measures that can be taken to improve access as well as the overall functioning of the APTEL so that it can fulfil its role and mandate more effectively. Some of these measures can be implemented within the existing legal and policy framework, while some need legal amendments.

- **Rational and reasonable fee structure to enable consumer participation:** This is the most obvious and also the most important of the corrective measures that needs to be immediately implemented. For this purpose, the APTEL does not need to wait for the central government to amend its rules. The Clause no 12 of the Appellate Tribunal for Electricity (Procedure, Form, Fee and Record of Proceedings) Rules, 2007, empowers the APTEL to exempt certain parties from compliance with any requirement of these rules. Using these and other such provisions for removal of difficulties, the APTEL can immediately issue directions to relax the fee requirements for small and individual consumers and consumer organisations. According to the Supreme Court the fees charged by tribunals should be comparable to the forum replaced by them, i.e. the High Courts in case of the APTEL. Hence the APTEL should set the fees for the small consumers keeping in mind this direction by the Supreme Court. If there is any concern regarding possibility of frivolous litigation on account of reduced fees, then the change can be implemented in a gradual manner. To begin with, the fees for appeals filed by small and individual consumers, and consumer organisations could be set at say, Rs. 10,000 (which is still substantially higher than fees for filing a similar application before the High Court), and further reductions can be brought about in a phase-wise manner.
- **Enabling e-filing of appeals:** This is another obvious measure that can be immediately implemented and which can greatly ease the locational restriction. To enable faster and more efficient filing of documents, courts often use e-filing systems. Several High Courts already have such systems in place and most recently, such a filing system has also been introduced by the CERC. As already highlighted in Section 2.8 of this report, a provision in this regard is already in place and the APTEL can implement it as soon as it sets up the necessary IT infrastructure, which should not more than a few months at the most.
- **Allowing remote participation for hearings:** Given the advances in communication technologies, it should be easily possible for the APTEL to set up video conferencing facilities to enable remote participation. Again, the Tribunal seems to have contemplated this already and enabling provisions are already in place. Using such technology, the APTEL can allow the appellants and respondents to participate in the proceedings from the premises of a concerned ERC. Such a measure can greatly save cost and time for all the concerned parties. It would also allow the appellants and respondents of a given state to leverage locally available legal help and expertise, and thus further ease the process for them. In this context it is useful to note that the National Green Tribunal hears cases through video conferencing. Similarly, the Central Information Commission allows participation in hearings through video conferencing facilities available at almost all district headquarters of National Informatics Centre (NIC) in the country.
- **Ensuring proper functioning of circuit benches:** The central government should ensure proper functioning of circuit benches in at least three other major metropolitan cities, viz. Mumbai, Chennai, and Kolkata. A well-planned schedule for the operation of these benches can greatly help in overcoming initial implementation hurdles. Again, legal provisions to enable such actions are already in place and it is just a matter of better planning and execution. In case there are any logistics related issues in this regard, the same could be resolved by joint interventions from the central government and the concerned state governments.
- **Empaneling designated consumer advocates:** In order to ensure adequate representation of consumer and public interest in the proceedings before it, the APTEL should empanel a few experienced and public-spirited advocates to specifically represent the interests of common consumers and the public at large. These advocates should be required to undertake at least one round of consultation (through video conferencing or teleconferencing) with a few

representative consumers from the concerned state before participating on their behalf. Such a process can greatly enrich the regulatory and policy debates before the APTEL.

- **Annual publication of a compendium on important APTEL judgements:** As highlighted earlier, the APTEL plays an extremely important role of ensuring that the ERCs function in accordance with their role and mandate and follow the due procedures and policies. However, there is no publication in the public domain, which offers any useful information or insights regarding this crucial role of the APTEL. This lacuna could be addressed by commissioning publication of a compendium of the most important judgments of the APTEL, along with a brief commentary on the resultant case law and its implications for the sector policy and regulatory governance. The Forum of Regulators (FOR) can bring out such a publication on an annual basis. While the FOR may appoint consultants for doing this exercise, it should also appoint a panel of experts to review and advise the team working on it. The advisory panel can consist of representatives from sector utilities, regulatory commissions, consumer & civil society organisations, and the APTEL designated consumer advocates. The terms of reference for the study as well as the final report should be finalised based on public consultation.
- **Measures aimed at institutional strengthening:** The measures discussed so far can be implemented immediately within the existing legal and policy framework and can help in overcoming some of the immediate barriers to consumer participation. However, in addition to these changes, a few long-term measures are needed to strengthen the institution and to improve its autonomy and independence. Some examples of such measures are listed below:
  - **Increasing the total number of benches and establishing permanent regional benches:** The current restriction on the number of members and hence the number of benches is a serious impediment in fulfilling the intended role and mandate of the APTEL. Considering the rising number of cases filed before the state ERCs and the APTEL, and the increasing complexity of the sector, the current strength of the APTEL is inadequate to meaningfully cater to the needs of the sector. It is therefore essential to amend the E Act, 2003 to enable higher number of benches. Further, similar to the National Green Tribunal, permanent regional benches also need to be notified to address the access challenge in the long-term.
  - **Explicit legal mandate for consumer and public interest representation:** As highlighted earlier, even in the existing legal framework the APTEL can take many steps to improve and ensure consumer and public interest representation in the matters before it. However, from the long-term sector interest and good governance point of view, such actions should not be discretionary. A clearly spelt legal provision can go a long way in protecting the rights of the consumers as well as the public at large. Hence, there should be an explicit legal mandate for the APTEL to ensure adequate representation of the public and consumer interests in the matters before it.
  - **Financial autonomy:** As highlighted earlier, the APTEL does not have its own budget, and funds are provided to it via the Ministry of Power. The salary and the other conditions of service of the Chairperson and Members of APTEL are prescribed by the Central Government. It is useful to note that in this regard the Supreme Court has held that the administrative support for all tribunals should be from the Ministry of Law and Justice, and not from the sponsoring ministry (Supreme Court, 2014). The central government through appropriate legal amendments can easily implement these measures suggested by the Supreme Court.

- **Appointments and term of the APTEL members:** The Ministry of Power decides appointments for the members of the APTEL. To ensure greater autonomy and independence, the appointments can be made by the Ministry of Law and Justice, instead of the concerned sector line ministry. Further, the Supreme Court has held that re-appointments undermine the independence of the tribunals, as the members are likely to decide matters in a manner that would secure re-appointments (Supreme Court, 2014). Since re-appointments are permissible for APTEL members under the E Act, 2003, the provision needs to be re-examined and possibly amended in light of the Supreme Court judgment. Instead of re-appointment, the term of the APTEL members could be made similar to that of the ERCs, which is five years. Also, to avoid any conflict of interest, similar to the ERCs there should be a restriction on the kind of post retirement employment that can be taken up by the members of APTEL.

The points listed above are only an indicative list of measures that need to be undertaken to improve the overall functioning of the APTEL and to make it more people-centric. There could be other measures, which could also further the same cause. The objective of this report is to highlight these possibilities and to initiate a wider discussion in this regard, and not to provide a blueprint for reforming the APTEL. We hope the readers will take these suggestions in this spirit and contribute towards building such discourse.

It is important to understand that being one of the key stakeholders, the consumers and citizens share the responsibility of ensuring that the sector policies are designed and implemented in an appropriate and responsible manner. Apart from being patently unfair to the small consumers, high entry barriers also deprive the sector institutions of crucial inputs from this key stakeholder and severely limit the constructive role of public participation in shaping policy implementation.

Given its broad mandate and wide ranging powers, we strongly suggest that the APTEL should strive to be an "amicus populi", i.e. a friend of the people, and not just an adjudicatory forum, which caters to the needs of the few who can afford access to it.

## Annexure I:

# Past experience and qualifications of Chairpersons and members

Table 6: Details of ATE members and Chairpersons appointed till date

Name	Position	Previous experience
Justice Anil Dev Singh	Chairperson	Chief Justice, Rajasthan High Court
Justice M Karpaga Vinayagam	Chairperson	Chief Justice, Jharkhand High Court, followed by private practice as Senior Advocate in the Supreme Court
Justice Ranjana Prakash Desai	Chairperson	Judge, Supreme Court of India
Justice Manjula Chellur	Current Chairperson	Chief Justice, Bombay High Court; Chief Justice, Calcutta High Court; Chief Justice, Kerala High Court; Judge, Karnataka High Court
Justice Partha Sakha Datta	Judicial Member	Judge, Calcutta High Court
Justice Manju Goel	Judicial Member	Judge, Delhi High Court
Justice Surendra Kumar	Judicial Member	Judge, Allahabad High Court
Justice E Padmanabhan	Judicial Member	Appointed as sole arbitrator in many cases by High Courts; Judge, Madras High Court
Justice N. K. Patil	Current Judicial Member	Judge, Karnataka High Court
Mr. Vishwa Jeet Talwar	Technical Member	Chairperson, Uttarakhand Electricity Regulatory Commission (ERC); Member (Technical), Uttarakhand Electricity Regulatory Commission (ERC)
Mr. Rakesh Nath	Technical Member	Chairperson, Central Electricity Authority (CEA); Chairman, Bhakra-Beas Management Board (BBMB); Whole-time Director of Power Trading Corporation (PTC); Member Secretary of Northern Regional Electricity Board and Western Regional Electricity Board.
Mr. Harbans L Bajaj	Technical Member	Director, Nuclear Power Corporation; Board of Directors of NTPC; Chairperson, CEA; Concurrently Chairperson of Central Electricity Board, and ex-officio Member of Central Electricity Regulatory Commission (CERC)
Mr. T Munikrishnaiah	Technical Member	Member (Engg.) of Jharkhand Electricity Regulatory Commission (ERC); Chairperson of Consumer Grievance Redressal Forum of A.P Southern Power Distribution Co. Ltd.; Chief Engineer of Andhra Pradesh State Electricity Board;
Mr. Anwar Ahmad Khan	Technical Member	Chairperson and Managing Director, Power Finance Corporation; Chief Engineer in ONGC, GAIL
Mr. I. J. Kapoor	Technical Member & Officiating Chairperson	Director (Commercial) on the board of NTPC Ltd.; Chairperson, Aravali Power Company Pvt. Ltd.(1500 MW); Chairman, Jawaharlal Nehru National Solar Mission; Director, PTC India Ltd.; Director, Meja Urja Nigam Pvt. Ltd.; Director, NTPC BHEL Power Projects Pvt. Ltd.; Director, NTPC Vidyut Vyapar Nigam Ltd.; Director, Trincomalee Power Company Ltd; Director, Bangladesh India Friendship Power Co Pvt. Ltd.
Mr. S. D. Dubey	Current Technical Member	Chairperson, Central Electricity Authority; over 37 years of service in different capacities in Central Electricity Authority.

Source: Profile of members, APTEL website.

## Annexure II:

# Description of PEG dataset

The dataset was compiled from the judgments of the Appellate Tribunal of Electricity (APTEL) available publicly on its website (<http://aptel.gov.in/judgementnew4.html>). The APTEL website provides the serial number for each case, along with the appeal/petition number, the cause title, the acronyms of the names of tribunal members hearing the case and the date of the decision. Each of the 852 judgments delivered between April 1, 2013 and March 31, 2017 (four financial years) were compiled into a dataset.

For each judgment, the following information was extracted:

- Type of Appellant: This consists of State Generation Company, State Distribution Utility, Large Consumer, Small Consumer, etc. In case of different appellants, the judgment was taken to be for different cases.
- Section under which the appeal/petition is filed: Section 111, Section 121, Execution petition, Interlocutory Application, etc.
- Issues: Which are the issues agitated. E.g. tariff related matters, power purchase agreement related issues, renewable energy related issues, jurisdiction, open access, etc.
- Judgment: Was the appeal/petition dismissed, allowed, etc.
- Location: The state ERC against which the appeal is being filed. In case of matters before the Central Electricity Regulatory Commission, the location is considered to be Delhi or the state where the appellant is based.
- Year of filing: This is taken from the appeal/petition number.
- Year of judgment: This is taken from the date of judgment as reported on the website.
- Regulatory Commission: The commission whose order is being appealed against.

Classification and Count by Appellant: The classification of appellants in an appeal with a single appellant was done as follows:

- Appellants have been categorized as Private and State Utilities, including whether they are Generation, Transmission, Distribution and Trading divisions. Thus, appellants have been categorized as 'Private Generator', 'State Distribution Utility', etc.
- Categorisation as 'Large Consumer' includes large individual consumers (like an industry) as well as their consumer associations (such as Indian Hotel and Restaurant Association).
- Similarly, 'Small Consumer' includes individual consumers as well as their consumer associations and NGOs working on consumer interest issues.
- Suo Motu cases have been categorized as such
- Miscellaneous: These are appellants which do not fall under any other category.

Classification by Issues: Appeals before the APTEL may involve more than one single issue. However, for the purposes of this report each judgment has been classified into one particular issue. Based on a reading of the judgment, the most prominent challenge in the appeal is identified. The following table provides an idea of the classification as per issues:

Table 7: Classification of Issues

Issue	Classification	Remarks
<b>Tariff</b>	All appeals dealing primarily with tariff related issues, such as disallowance by commission of certain costs, etc.	
<b>Power Purchase Agreement (PPA)</b>	All appeals dealing primarily with Power Purchase Agreements related issues, such as not abiding by the provisions of the PPA.	
<b>Renewable Energy</b>	Appeals related primarily to determination of tariff for non-conventional generation projects; related to Renewable Energy Certificates (REC) and Renewable Purchase Obligation (RPO); Banking charges.	
<b>Jurisdiction</b>	Appeals questioning the jurisdiction of the commission (i.e. is the regulator making decisions it does not have the power to make)	Questions of law coming up before APTEL ('Can an appeal be admitted when a review is pending?') are classified as Jurisdiction
<b>Open Access and Competition</b>	Appeals pertaining to operationalization of open access, such as No Objection Certificate from SLDC,	All the cases related to consumer migration under Mumbai's parallel license mechanism or "changeover" are also classified as this.
<b>Governance Issues</b>	Appeals against the ERCs for not following the process prescribed by legislation or basic processes like natural justice.	Cases where the challenge is that the SERC has not followed ATE's judgment are classified as Governance
<b>Suo motu</b>	These are issues taken up by APTEL on its own under Section 121	
<b>Others</b>	All Interlocutory Applications, review applications, etc.; appeals that did not fall under any of the above issues	
<b>Petroleum and Natural Gas Board</b>	Appeal under the PNGRB Act	

## Annexure III:

# Short summary of literature on tribunals

### What are tribunals?

Tribunals have been a major feature of India's post-independence legal structure. Even before they were established to provide an appellate body for regulatory agencies, tribunals, such as the Income Tax Appellate Tribunal (ITAT), had been functioning in the country. Although tribunals have existed in India for decades, no definition of tribunals has been provided either in the parent legislations or the Constitution of India. Over the years, it has fallen upon the courts to provide a definition to this institution. Thus, the Supreme Court in *Union of India vs R Gandhi* (2010) stated:

*"(Para 12) The term 'Courts' refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the state for administration of justice that is for exercise of the judicial power of the state to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special alternative institutional mechanisms, usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute, or to determine controversies arising out of any administrative law."*

Further, the Court also lists the differences between courts and tribunals. First, courts are established by the state and are entrusted with the state's inherent judicial power, while tribunals are established under a particular statute for dispute resolution. Second, while courts are manned exclusively by judges, tribunals feature a combination of judicial members and technical experts. Finally, while the courts are governed by detailed statutory procedural rules, the tribunals regulate their own procedures. Thus, tribunals are not a part of regular judicial system, but are an alternate dispute resolution mechanism created mainly to expedite disposal of cases under a particular statute (Supreme Court, 2010).

Advocates of tribunals usually point to speedy redressal and specialisation as the key reasons in support of tribunals. Tribunals are expected to serve better since they are not bound by elaborate rules, but guided by natural justice. In addition, the inclusion of technical members with sector expertise as well as judicial members with legal knowledge is supposed to allow for better handling of the cases emanating from specific statutes. On the other side are those who view this "tribunalisation" as "deliberately planned to strip away important functions of the High Courts and vest them in tribunals" (Datar, 2013). They raise concerns about the erosion of the jurisdiction of the courts and the lack of independence of these tribunals from the executive.

### The 42nd Constitutional Amendment and Supreme Court judgments

The concerns regarding the erosion of jurisdiction of courts and the independence of these tribunals form the crux of the literature regarding tribunals and have their genesis in the 42<sup>nd</sup> amendment of the Indian Constitution. In 1976, the central government amended the constitution to provide for the creation of the Administrative Tribunals (Article 323 A) by Parliament, and other Tribunals (Article 323 B) by the appropriate legislature. It must be noted that tribunals had existed in India before this amendment, but this amendment provided a "fillip to the tribunal system" (Satish, 2014). The amendment empowered the legislature to establish tribunals, and oust the jurisdiction of all courts, except that of the Supreme Court under Article 136 (Special Leave Petition). Questions regarding the constitutional validity of tribunals in general, and Articles 323A & 323B in particular, have been raised time and again. The following are the major cases regarding tribunals.



## Jurisdiction

Administrative Tribunals were set up by the central government via a 1985 Act under Article 323 A of the Indian Constitution. A challenge was posed to the constitutionality of the tribunal since they ousted the writ jurisdiction of the High Courts, among other things. The Supreme Court in its judgment in 1986 held that while judicial review was part of the basic structure of the Constitution, Parliament was competent to amend the Constitution so as to substitute in place of the High Court another alternative institutional mechanism for judicial review without violating the basic structure doctrine. However, the alternative mechanism has to be no less efficacious than the High Court. Since the 1985 Act did not do away with the writ jurisdiction (Article 32) or the special leave jurisdiction (Article 136) of the Supreme Court, the Court concluded that "a forum where matters of importance and grave injustice can be brought for determination or rectification" existed (Supreme Court, 1986). In 1997, however, a constitutional bench of the Supreme Court overturned this decision (Supreme Court, 1997). It held that the jurisdiction conferred on the High Courts under Articles 226 & 227,<sup>9</sup> and on the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of the Constitution. Certain clauses of Articles 323A & 323B were declared unconstitutional. Thus, tribunals constituted under these articles were to be subject to jurisdiction of High Courts under Articles 226 & 227.

## Conditions to be fulfilled by Tribunals

The Supreme Court has stated the following regarding the constitution of tribunals and their functioning<sup>10</sup>:

- The legislation constituting the tribunals and the criteria and qualifications of members etc. can be subject to judicial review of the superior courts. The qualifications/eligibility criteria for appointment must ensure that the members of the tribunal are able to discharge judicial functions. If this is not the case then the said provision will not pass the scrutiny of the higher Judiciary.
- Any tribunal to which any existing jurisdiction of courts is transferred should also be a judicial tribunal. This means that such tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters. In addition, the members of the tribunal should have the same independence and security of tenure as judicial tribunals.
- Whenever a transfer of power takes place, all conventions, customs and practices of the court sought to be replaced have to be incorporated in the court or tribunal created. The newly created court or tribunal would have to be established keeping in mind the salient characteristics and standards of the court which it is substituting.

## Other studies on the working of tribunals

There are only a few studies looking at the working of tribunals in India. This report reviews five such reports. The first two are the reports of the Chairperson of the Intellectual Property Appellate Board (IPAB) on the resources available to IPAB, and the last three are reports by the Vidhi Centre for Legal Policy: two of these look at the IPAB and the Telecom Dispute Settlement and Appellate Tribunal (TDSAT), and the last is a report titled 'Halting Tribunalisation'. The same are discussed in brief below.

## Reports of the Chairperson, Intellectual Property Appellate Board (IPAB)

In response to a PIL filed before the Madras High Court challenging the constitutionality of the IPAB, the Madras High Court asked the then-Chairperson of IPAB, Justice (Retd.) Prabha Sridevan to submit a report on the infrastructure and resources available to IPAB. The Chairperson submitted two reports on

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9. Article 226 is the writ jurisdiction of High Courts, while Article 227 is the power of superintendence of High Courts over all courts.

10. This is from Union of India vs. R. Gandhi (2010) and Madras Bar Association vs. Union of India (2014)

the matter - the first in 2011 and a follow-up report in 2013. The two reports stress upon the need for more resources and better facilities for IPAB and state "the object of setting up of tribunals is speedy disposal. It is impossible to achieve that if IPAB has to face a battle for survival everyday". The following are the major issues identified in the reports (Sridevan, Report of the IPAB Chairperson, 2011; Sridevan, Report of the IPAB Chairperson, 2013):

- **Premises:** In the 2011 report, it was highlighted that the IPAB's premises were grossly inadequate. As per the 2013 report, new premises had been allocated to IPAB as per directions of the Madras High Court.
- **Selection of Members:** The Search-cum-Selection Committee of the IPAB is headed by the Secretary, Department of Industrial Policy and Promotion, which raises concerns regarding the impartiality and integrity of IPAB. As per the 2013 report, in spite of the issue being raised in the first report, the same committee was constituted.
- **Staff and Salaries:** The staff strength has not increased, in spite of a manifold increase in workload of the IPAB. The report pointed to an unfair anomaly in pay scales/grade of officers of IPAB, which was affecting the Board's ability to attract the best talent.
- **Rate of disposal:** The report stated that the rate of disposal was low since the IPAB had been fully functional and able to form two benches simultaneously only for a short period.
- **Financial Requirements:** Allocation in financial year 2013-14 was the same as in 2012-13. Due to paucity of funds, IPAB was forced to cut down its schedule of circuit hearings.

#### **Reports by the Vidhi Centre for Legal Policy on IPAB and TDSAT**

The Vidhi Centre's reports on the 'State of the Nation's Tribunals' evaluate the functioning of select tribunal on three metrics: independence, efficiency and efficacy. For assessing the independence of the tribunals, these studies rely heavily on the Supreme Court judgment in *Union of India vs. R. Gandhi* (2010) to examine if the provisions in the legislation and rules of these tribunals meet the standards set by the judgment. The reports propose amendments to the parent legislations of these tribunals to bring them in conformity with the Supreme Court judgment.

The following issues are highlighted in their analysis of the functioning of the TDSAT and the IPAB (Vidhi Centre for Legal Policy, 2014b; Vidhi Centre for Legal Policy, 2014a):

- TDSAT and IPAB are dependent on the Central Government, specifically their line departments, for funding and staffing needs.
- There is no independent infrastructure (premises) provided to these tribunals.
- The delay in appointment of Chairpersons and members has resulted in decline in disposal rates in these tribunals.

The report on "Halting Tribunalisation" assesses the parent legislations of 29 central tribunals against the standard given in the Supreme Court judgment of *Madras Bar Association vs. Union of India* (2014). Their main conclusion is that, given the 2014 judgment, many provisions of the legislations establishing tribunals will become unconstitutional, and would require amendments (Vidhi Centre for Legal Policy, 2014c).

As the above review demonstrates, studies analysing the functioning of tribunals are few, and those analysing it from a public-interest perspective are completely missing. Research in the electricity sector has been overwhelmingly concentrated on the electricity regulatory commissions, while the APTEL has been largely ignored.

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  - 9 In the Name of Competition: The annals of 'cost-plus competition' in the electricity sector in Mumbai (2017)  
<http://www.prayaspune.org/peg/publications/item/333.html>

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  - 10 Residential Electricity Consumption in India: What do we know? (2016)  
<http://www.prayaspune.org/peg/publications/item/331.html>

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  - 11 Coal Block Allocations: Opportunity Lost, Chaos Gained? (2015)  
<http://www.prayaspune.org/peg/publications/item/312.html>
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Electricity Regulatory Commissions (ERCs) are the cornerstone of the power sector reforms. Many of the key sector decisions are made through the regulatory processes and the ERCs play the crucial role of balancing the interests of various stakeholders. The accountability of the ERCs is ensured through, a) the public nature of their functioning as they are required to hold public consultations on many issues, b) the mandate to record their decisions in the form of reasoned orders, and c) their orders being subject to judicial review and appeals before a specialised tribunal viz. the Appellate Tribunal for Electricity (APTEL). Hence, the role of the APTEL becomes crucial in terms of holding the ERCs accountable for their role and mandate, ensuring good governance in the sector and in protecting the interests of consumers and citizens.

In this context, this report takes a first step towards providing information regarding the functioning of the APTEL from a public interest perspective. The findings presented are based on the analysis of 852 judgements issued by the APTEL between April 2013 and March 2017. The report looks at aspects such as the nature of appeals, the type of appellants, the kind of issues raised and geographic spread of appeals. While it is the responsibility of the APTEL to balance the interests of the consumers and the utilities, the analysis indicates that there is very little representation of small consumers and the public interest in the proceedings before it. This is mainly due to prohibitively high fees and the challenges in approaching the APTEL as it is located in Delhi and has non-operational circuit benches. The report also provides suggestions to address these lacunae, such as reduction in fees, appointments of ‘amicus curiae’ to more frequently represent interests of small consumers, effective operationalisation of circuit benches, periodical publication of a compendium of APTEL judgements and emerging case law, etc.

Given its broad mandate and wide ranging powers, the report argues that the APTEL should strive to be an “amicus populi”, i.e. a friend of the people, and not just an adjudicatory forum, which caters to the needs of the few who can afford access to it.

