



Vacancies at the APTEL: A persistent problem of delayed appointments

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The Appellate Tribunal for Electricity (APTEL) till recently had its chairperson post vacant, a vacancy that lasted over 15 months. The post of technical member is currently vacant, and has been so for over 14 months. These prolonged vacancies at the APTEL are not a new issue, and they persist despite there being legislation in place to avoid such delays in appointments. The tribunal deals with litigation on several crucial matters, and its operations have significant impact on the sectors under its jurisdiction. Delays in appointments not only hinder the effective functioning of the APTEL, but also encumber accessibility to it. This article reviews the status of vacancies at the APTEL and suggests a few steps to address this critical issue.

In July 2022, the Chief Justice of India [expressed concerns](#) on the protracted vacancy of the Chairperson post at the Appellate Tribunal of Electricity (APTEL). At the time of the comment, the post had been vacant for 11 months, since August 2021. The vacancy had persisted despite there being legislation in place to avoid such delays in appointments. The post has since been filled, in December 2022, with it having been vacant for a total of over 15 months. Still, the concerns raised at the apex court hold current significance, and draw attention to a problem that has afflicted the electricity sector's appellate body since its early days.

Instituted in accordance to the Electricity Act, 2003, the APTEL provides a forum to critically review electricity sector regulators and hear appeals or original petitions against them. The appellate body's constitution has a chairperson and three other members. This includes two technical members and one judicial member, in addition to the chairperson, who is required to either be or have been a judge of the Supreme Court or the Chief Justice of a High Court.

While the APTEL was set up as an appellate body for the electricity sector, its jurisdiction expanded, and it is also the appellate body under the Petroleum and Natural Gas Regulatory Board Act 2006 and the Energy Conservation (Amendment) Act 2010. With this change in its

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² This article is part of an ongoing series called Power Perspectives which provides brief commentaries and analyses of important developments in the Indian power sector, in various states and at the national level. The portal with all the articles can be accessed here: <https://prayaspune.org/peg/resources/power-perspective-portal.html>. Comments and suggestions on the series are welcome and can be addressed to powerperspectives@prayaspune.org.

jurisdiction, its constitution also expanded to include an additional Petroleum and Natural Gas (PNG) technical member, bringing its current composition to a chairperson, one judicial member, two technical members, and one PNG technical member.

As on 24th February 2023, two posts, of judicial member and technical member, out of the total five posts of the tribunal are vacant. These vacancies have existed for varying durations, with the technical post being vacant since December 2021 and the judicial post being vacant since December 2022. This challenge is not new to the APTEL, the last time the tribunal had all its position filled for an entire year was in 2011. In every year since, vacancies have existed for a few months, sometimes for multiple posts at once.

Issues due to vacancies

The persistence of such vacancies hinders accessibility to the tribunal, as well as the efficiency of its operations. For instance, the establishment of APTEL benches is provided for by Section 112 (2)(b) of the Electricity Act. As per the tribunal's website, there are three circuit benches at Mumbai, Kolkata and Chennai, in addition to the principal bench at Delhi. Such a provision for regional benches can/should improve geographic accessibility to the appellate body. But this is not entirely the case, since APTEL does not have e-filing facilities and appellants still need to visit Delhi to register a case. Additionally, the provision for regional circuit benches has not translated to their operation, and they have [not been functional](#) since 2014. Moreover, the APTEL is limited by its composition and can have only two functional benches at once. This is because every bench constituted at the APTEL must include at least one judicial and one technical member, as per Section 112 (2) (b) of the Electricity Act 2003.

Long standing vacancies further reduces the feasibility of even two functional benches. For instance, as per the [judge's roster](#) hosted on the APTEL website, there has only been one electricity and one petroleum bench active since January 2022. Sittings for the other benches have been cancelled due to the lack of '*requisite strength of Chairperson/Members*'. This is because the APTEL has only had one active judicial member at any instance in the past year, and continues to do so. The existence of a single functioning bench, and by extension, a single functioning court, results in uncertainty about the final hearing on cases. This is because only matters listed in an active court are taken up, and even if a case was listed in the other court at an earlier date, it will not be taken up unless it is transferred to the active court.

The vacancies and the resultant restricted number of benches at the APTEL also impact its efficiency of operations. For instance, since 2006 the share of pending cases has been below 50% of the annual active cases³ for only three of the sixteen years, in 2007, 2013, and 2014. In fact, as per the Ministry of Power's [Annual Report](#) for the last four years (2019-2022), the share of pendency has averaged at about 70% of the annual active cases. Such pendency at the APTEL is

³ Active cases in a year includes cases filed in the year considered and cases pending from the previous year.

likely to ripple out and affect operations in the sectors under the appellate body's jurisdiction. The appellate body receives a large number of appeals, many of which deal with matters such as tariff decisions and power purchase related disputes. Lack of prompt action on such matters lead to regulatory ambiguity, delays in payments obligations, and also impact small consumers.

This is not ideal at any instance, but is especially undesirable at this juncture. With growing renewable generation in the country's power sector, not only has the number of renewable energy related cases been consistently on the rise over the past decade but they have also been [growing in complexity](#), with litigation on matters ranging from open access procedures and tariff principles to Renewable Purchase Obligation regulations and forecasting and scheduling regulations. Additionally, the [Energy Conservation Act](#) was amended in December 2022, to include changes such as empowering the government to introduce a carbon credit trading scheme, an energy conservation code for buildings with a connected load of 100 kW or above, and obligatory energy consumption standards and the use of non-fossil sources of energy for some consumers.

The dynamic changes in the power sector and the newly introduced changes regarding energy conservation is likely to result in contention on pivotal sector issues. Regulatory clarity on these fronts will require crucial and timely action if and when they are raised to the tribunal, a task made more challenging by the continued vacancies.

[Vacancies due to delayed appointments](#)

It is interesting to note that vacancies due to delayed appointments persist despite legislation in place to prevent it. According to Section 78 of the Electricity Act 2003, the Central Government is required make a reference for filling up a vacancy either one month from the date of occurrence of any vacancy (in case the vacancy is on account of death, resignation or removal of a member or the chairperson) or six months before the end of tenure of a member or the chairperson.

Section 78 further requires that the Selection Committee, which is constituted to shortlist appointments to the tribunal, must recommend two names for every vacancy referred to it within three months of the reference being made. The Tribunals Reform Act 2021, through Section (3) requires the Central Government to finalise appointments based on recommendations made by the Committee '*preferably within three months from the date of such recommendation*'.

However, with regard to actual appointments, every post on the tribunal has taken as much as seven months or more for several appointments, as illustrated in Table 1.

Table 1. Months between appointments at the APTEL*

No. of months between appointments:	Chairperson	Judicial Member	Technical Member	Technical Member	Technical Member PNG
1 st to 2 nd appointment	6 months	1 month	6 months	6 months	4 months
2 nd to 3 rd appointment	< 1 month	3 months	3 months	11 months	7 months
3 rd to 4 th appointment	8 months	7 months	4 months	5 months	4 months
4 th to 5 th appointment	15 months	13 months	14 months+	10 months	
5 th to 6 th appointment		7 months			
6 th to 7 th appointment		2 months+			
As on February 2023	Filled	Vacant	Vacant	Filled	Filled

Source: Prayas (Energy Group) compilation from APTEL website

Note: *It must be noted that the appointments across posts do not happen simultaneously, and varies according to the duration of tenure for each appointment, which may in turn vary based on parameters such as age of the candidate and reappointments. The number of appointments for each post also varies due to this reason.

+ indicates that the post is vacant as on date, highlighted cells indicate vacancies that have lasted for more than 6 months

More recently, delays in appointments have persisted for over a year, as in the case of the Chairperson post which was vacant for 15 months, and the post of technical member which has been vacant for 14 months as on date. It should be noted that the appointment of the Chairperson happened just in time to prevent the operations of the appellate body coming to a complete standstill. The tenure of the last presiding judicial member was slated to come to an end in December 2022, and in the absence of the appointment of the Chairperson, the tribunal would have had no judicial members, and by extension, no functional benches or courts.

Filling the gaps

The limitations of the current composition of the tribunal defined in the Electricity Act 2003 was recognised in the 2021 and 2022 draft amendment to the Act. The 2021 draft amendment published by the MoP proposes the expansion of the APTEL to a chairperson and not less than seven members, whereas the [2022 draft amendment](#) before the Standing Committee revises this to a chairperson and a number of members prescribed by the Central Government, not less than three. Expansion of the APTEL could potentially help address some issues of efficacy and accessibility. For instance, more members could translate to multiple functional benches, which in turn could improve the disposal rate of the tribunal. Regional benches could also be established, which could help with geographical accessibility to some extent. More members from varied experiential backgrounds will also be essential toward addressing growing sector complexities. Such expansion, while essential, should be undertaken gradually, with the intent of increasing the strength of the tribunal to the Chairperson and not less than seven members within five years, so as to avoid operational challenges on account of sudden expansion. However, expanding the strength of the APTEL without addressing the persisting challenge of delayed appointments would do little toward addressing the existing operational issues. To prevent delayed appointments, the Electricity Act could be amended such that if the decision on filling a

post is not taken by the Central Government even thirty days after receiving such recommendation, the Chief justice of the Supreme Court could do so.

Additionally, given the role of the tribunal in holding regulators accountable and the nature of the cases brought before it, ensuring timely appointments and sufficient staff capacity is not only crucial for effective operations, but also toward sector viability and safeguarding consumer interests. Of all the judgements between 2018 and 2022 listed on APTEL's website, 72% have Regulatory Commission's as their respondents. While these judgements deal with a broad selection of topics, such as power purchase, open access, renewable energy, etc., some of the matters dealt with at the tribunal also impact small consumers, such as tariff determination. Given this, it is crucial that the appellate body take enabling action to ensure farmers and small consumers can also approach the forum. Such action could include establishing regional circuit benches, as discussed above, and reducing fees for parties representing interests of the small consumer at APTEL proceedings. Additionally, APTEL may also appoint amicus curie to represent such small consumers, especially in appeals relating to tariff orders.

With consumers and citizens as one of its stakeholders, it is good practise for the appellate body to ensure transparency in their function. This includes introducing avenues of accessibility such as live streaming of hearings and making petitions available on APTEL's website, especially when they involve regulatory commissions or power distribution companies. With regard to operations at the tribunal, details on case pendency and disposal statistics should be published in an accessible, timely and regularly updated manner on the tribunal website⁴. Also, as per Section 111(5) of the Electricity Act 2003, appeals brought to the APTEL are to be dealt with expeditiously, and disposed within 180 days. Section 33 of the Petroleum and Natural Gas Regulatory Board Act 2006 require appeals at the APTEL to be disposed within 90 days. Toward ensuring timely function, as required of the APTEL, the time taken to dispose a case must also be updated in the public domain. Further, given the role of tribunal strength, as discussed earlier, clarity on status of appointments, reappointments, and retirements to every post of the APTEL must be updated on tribunal's website⁵. Given the impact of APTEL judgements on sector operations, it is pivotal toward operational accountability that such data be reported and updated regularly, in an accessible manner, on APTEL's website.

Delayed appointments and protracted vacancies hinder ability of the appellate body to function effectively. Expanding the tribunal, avoiding institutional vacuum, providing accessibility, and ensuring transparency is key towards improving tribunal effectiveness. The APTEL, with its wide

⁴ Details regarding pendency and disposal is reported in the MoP's annual reports, however the period of reporting varies. For instance, for most years data is reported as on 31st December of the year, but for other years its reported as on 31st November or 31st March of the corresponding year.

⁵ Currently, the tribunal website does host details, including information regarding appointment and retirement, of former and present members. However, in the event of a vacancy, details regarding status of appointment are not readily available on the website.

ranging powers, plays the role not only of holding the regulator accountable but also of guiding sector governance by providing legal clarity and guidance on several critical issues, roles that will only grow more critical with the extant and forthcoming dynamic sector changes, and related litigation. Taking on board the above suggestions will help the appellate body strengthen its operations, respond in a timely manner to pivotal issues, and effectively rise to the challenge be a torch bearer of much needed reforms in the sector.

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