

Comments and Suggestions
From
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On
The Draft Regulatory Reform Bill, 2015

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This is the submission regarding the Regulatory Reform Bill, 2015 ('the draft 2015 Bill'); an earlier submission with regards to the draft Regulatory Reform Bill, 2013 ('draft 2013 Bill') had also been made.¹

Drafting of the Bill

The draft 2015 Bill has errors in referencing other clauses. Many of these errors are due to the additions and omissions made to the earlier draft Bill, and the same changes not being made while referencing the changed provisions in the new draft. Thus, there are erroneous references, which make reading cumbersome. Some examples are given below:

- In the draft 2015 Bill, clause 40 on Arbitration, reference has been made to "conciliation" under section 45. The erstwhile clause 45 of the draft 2013 Bill was regarding conciliation, but the same has been deleted in the 2015 draft Bill. In addition, clause 45 of the 2015 draft Bill relates to jurisdiction of civil courts.
- Similarly, clause 51 of the 2015 draft Bill gives the matters on which the government is competent to make rules. Clause 51(2)(t) states that the government will make rules to provide for "the authority from which prior sanction may be sought under sub-section (2) of section 43". However, in the 2015 draft Bill, no sub-section 2 of section 43 exists. Section 43 of the 2015 draft Bill is in relation to applicability of the provisions of the Act to state matters, and contains no sub-sections.
- Again, clause 51(2)(u) states that the government will make rules to provide for "the manner and conditions as per which every notice, order or document by or under this Act required, or authorised to be addressed to any person may be served on him under of section 45". However, clause 45 of the draft 2015 Bill is about the jurisdiction of civil courts. Perhaps, the reference was meant for clause 50 in the 2015 draft Bill.
- Schedule II is a new schedule in the draft 2015 Bill which was not present in the draft 2013 Bill. It provides a format for repealing sections from certain Acts. It states that this is related to clause 51(1) of the 2015 draft Bill. However, clause 51 is related to the power of the government to make rules. The Schedule is perhaps associated with clause 56 on repeals and savings.

Given the importance of the Bill, attention to details is necessary. Mistakes, such as the ones highlighted above, need to be avoided.

Our further submission is divided into two parts: Part A contains the comments and suggestions regarding overall regulatory governance, and Part B contains comments and suggestions specifically with regard to appellate tribunals. Each of the suggestions has one or more parts corresponding to the following:

- Issues emanating from changes made to the draft 2013 Bill, labeled as '**changes made to earlier draft**', and
- Issues pertaining to new provisions introduced in the draft 2015 Bill are labeled '**new additions to 2015 draft**'.

The table in Annexure I provides a clause-wise summary of our suggestions.

¹ Consultation Paper on Regulatory Reform Law, Niti Ayog, http://niti.gov.in/content/consultation_paper.php. Comments invited by July 15, 2015.

Part A: Comments and Suggestions regarding Regulatory Commissions and Appellate Tribunals

1. Scope of the Bill

In our previous submission on the 2013 draft Bill, we had said that considering the diverse set of issues and differences in regulatory models across various sectors, if a central legislation, such as the proposed Bill, consisting of regulatory mandates for tariff, competition, open access and licensing is brought into force, it may create confusion regarding the regulatory jurisdiction and can potentially lead to series of litigation, thereby defeating the very purpose behind introducing a uniform framework. Therefore, considering this and the fact that different sectors have adopted different regulatory models, we had suggested that it would be best to limit the common framework to core issues of regulatory governance such as:

- (i) Selection, appointments and removal of members
- (ii) Transparency and accountability
- (iii) Institutionalising public participation
- (iv) Regulatory process and functioning
- (v) Financial and operational autonomy

However, the draft 2015 Bill continues to delve into details with respect to issues such as licensing, sale of utility upon revocation of license, etc. Additionally, the draft Bill continues to read as if it was written for the electricity sector, for example with clauses for open access, reference to cross-subsidy and so on.

We would like to once again reiterate our position that legislation such as this proposed Bill should restrict itself to the principles pertaining to good regulatory governance, while details regarding the functioning of the sector should be left to the individual laws establishing the said regulatory institutions.

2. Selection and Appointment of Members and Chairperson of Regulatory Commissions

Changes made to earlier draft

As per clause 4(1), a Selection Committee has to be appointed by the Central or the State Government, as the case may be, to recommend names to the appropriate government for the post of members and chairperson of the regulatory commissions. In the 2013 draft Bill, the Selection Committee was to consist of (i) the member of the Planning Commission in-charge of the concerned sector, (ii) a member of the UPSC to be nominated by the Chairperson of the UPSC, (iii) in case of selection of a member of regulatory commission/appellate tribunal, the chairperson of the regulatory commission/appellate tribunal, as the case may be, and (iv) the Secretary in charge of the Ministry dealing with the public utility industry. Thus, the committee was to have 3-4 members.

In the 2015 draft Bill, the member of UPSC has been removed from the Selection Committee, and two persons-one with qualifications and the other working in academia related to the public sector utility and having an experience of 20 years- has been included. These two persons will be selected by another selection committee, comprising of the Prime Minister, the Leader of Opposition and the Chief Justice of India. The other members include the Member of NITI Ayog dealing with the public

utility sector, Secretary of the ministry dealing with the public utility sector, and, in the case of selection of a member, the Chairperson of that regulatory commission. This gives a total of 4 (or 5) members in the Selection Committee. It is unclear who the Chairperson and the convener of the Selection Committee will be.

Similarly, for judicial members and chairpersons of the appellate tribunal, the draft 2013 Bill in clause 4(7) had a committee consisting of (i) a judge of the Supreme Court nominated by the CJI, (ii) the member of the Planning Commission in-charge of the concerned sector, and (iii) a member of the UPSC to be nominated by the Chairperson of the UPSC.

The draft 2015 Bill, the committee to select the judicial member and chairperson of the appellate tribunal is supposed to be with the same persons as that selecting other members, but with the CJI as the chairperson of the committee.

We suggest the following for the composition of the Selection Committee:

- There seems to be no need for forming a separate selection committee for selecting the two persons with 20 years experience, as it would make the process unnecessarily complicated, cumbersome and time consuming. Instead the concerned government can recommend these persons.
- Instead of two persons with qualification/academic experience and 20 years of experience, there should be just one such person in the committee.
- The responsibilities of chairperson and convener of the selection committee should be clearly stated.
- There should be a judicial person on the Selection Committee, such as in the case of the Selection Committee for recommending names for State Commissions under the Electricity Act, 2003.² This can be a (sitting or retired) Supreme Court judge for the national level selection committees and a High Court judge for the state level selection committees. The judicial person should be the chairperson of the selection committee.
- The selection committee should be a standing committee, so that any delay in constituting it would not delay the selection process. It should be the responsibility of the convener of the committee to refer vacancies to the selection committee at least 3 months in advance, if due to retirement or resignation.
- Given the fact that members of a regulatory body need to complement each other and may often be required to independently apply their mind to various sector issues, it is not appropriate to include existing members and/or chairperson of the regulatory body to be a part of the selection committee/panel and the same should not be allowed.

We suggest the following measures for improving transparency in the selection process:

- The committee should finalise two names after considering at least three applications for each vacant position, for the appointment to be made by the government. The final report of the committee should state the reasons based on which the committee arrived at its decision.

² Section 85 of the Electricity Act, 2003.

- To ensure accountability and transparency, the report of the committee should be available on the website of the related regulatory commission/appellate tribunal, and of the ministry in-charge.
- Delays in the selection process at every stage, with reasons, should be reported by the appropriate government to the State Legislature or Parliament, as the case may be, by laying a statement in the House. This statement should also be available on the website of the related regulatory commission/appellate tribunal, and of the ministry in charge.
- The appropriate government should place in the public domain both the report with the recommendations of the committee and the reasons for accepting/not accepting the recommended names, by laying a statement in the State Legislature or Parliament, as the case may be. This information too should be available on the website of the related regulatory commission/appellate tribunal, and of the ministry in-charge.

3. Eligibility

Changes made to earlier draft

In the 2013 draft Bill, clause 5(6) required all persons, prior to their appointment as members of the regulatory commission or appellate tribunal, and even during their tenure, to submit a statement of their assets, as well as that of their spouse and children.

The 2015 draft Bill modifies this clause, mandating that the member need only submit this information once prior to his appointment and not each year during his term in office. This is an important change, since public utility regulators are more likely to be offered bribes during their term of service.

We suggest that the clause from the draft 2013 Bill be re-instated. Apart from being a good governance practice, such information would also be necessary, if a process for removal under Clause 7(1) of the 2015 draft Bill is to be initiated against any member, who “has acquired such financial or other interests as is likely to affect prejudicially his functions as a member”.

4. Tenure and Re-appointments

(i) Tenure:

Changes made to earlier draft

The draft 2013 Bill provided for a term of 4 years with no re-appointment. Clause 6(2) provided for the bar on re-appointment, which read “A member shall, on ceasing to hold office, be ineligible for re-appointment in a regulatory commission or appellate tribunal.”

However, the draft 2015 Bill deletes this clause disallowing re-appointments while increasing the term of office for members to 5 years. It allows the government to prescribe the conditions of employment of members instead. Thus, members will have tenure for 5 years, with the possibility of re-appointment. This is potentially problematic since, as the Supreme Court stated in *Madras Bar Association vs UoI (2014)* in the matter of the National Tax Tribunal, re-appointments will in itself undermine the independence of the body. The same holds true for regulatory commissions since they too need to be insulated from government interferences. The same sentiment is echoed in the Planning Commission’s consultation paper on regulation of infrastructure, where it says “*Finally, the appointment of regulators who possess the competence and integrity so that they may inspire public*

*confidence will contribute immensely to the status of the regulator. There is a need to develop appropriate conventions, preferably enshrined in statutory rules, requiring that regulators are appointed on a fair and transparent basis with a view to ensuring that the regulatory system remains insulated from interference and capture”.*³

We suggest that the provision barring re-appointment be re-instated. However, the wording of the clause should be clarified to state whether “a regulatory commission or appellate tribunal” means the same regulatory commission/appellate tribunal of which the member was a part, or all regulatory commissions/appellate tribunals in the concerned sector.

(ii) Re-employment:

Changes made to earlier draft

Clause 6(7) of the draft 2013 Bill put a bar on the employment options for members after finishing their stint at the regulatory commission/appellate tribunals. The clause barred employment under the government and commercial employment for a period of one year. The draft 2015 draft Bill removes the provision barring employment under the government or commercial employment.

While clause 6(4)(1) of the draft 2015 Bill takes care of the commercial employment, since it states that “any member ceasing to hold office as such shall not acquire, hold or maintain, directly or indirectly, any office, employment or consultancy or any kind of professional arrangement or business with any entity or its associates dealing in matters under the jurisdiction of the regulatory commission for a period of three years from the date he ceases to hold such office”, there is nothing barring employment with the government.

We suggest that the bar of one year on employment with the government be re-instated, as it strengthens independence.

5. Removal

Changes made to earlier draft

The draft 2013 Bill in clause 7(1) mandated that “no member shall be removed from office except in accordance with the provisions of this section”. Thus, the process of removal of members of regulatory commissions and appellate tribunals was to be the same and was to be in the manner provided. The draft 2015 Bill deletes this clause, and in its place allows the government to choose either the process in the parent Act or this Act for removal of members.

We suggest that the the clause 7(1) be re-instated.

6. Transparency and Public Participation

(i) Public Participation:

Changes made to earlier draft

³ “Approach to regulation of Infrastructure: Issues and Options”, Planning Commission, 2006, http://planningcommission.nic.in/reports/genrep/infra_reglawl.pdf.

The 2013 draft Bill, mandated the regulatory commission to give notice and allow representations or objections from the persons affected for different types of matters.⁴ Even appellate tribunals are supposed to invite comments before notifying their regulations.

However, in the 2015 draft Bill, the provision for an annual plan (and as a result, public hearing for the annual plan) for the regulatory commission has been removed. Similarly, while the 2013 draft Bill required both, the person making an application for a license and the regulatory commission to publish notices and invite comments, the 2015 draft Bill gives this responsibility only to the licensees (clause 24). The 2015 draft Bill also removes the clause for inviting comments for any amendments proposed to the license. Instead it allows it to be done in the manner prescribed in the parent Act, and protects the rights of the licensees by mandating that they be given a chance to present their case (clause 27).

Public consultation is an important mechanism to ensure accountability of the regulatory process. In fact, in the discussion paper for the earlier draft Bill stated that “If the regulator’s decisions are based on publicly articulated rationale, the regulators would earn democratic legitimacy and it would also safeguard against regulatory capture by special interest groups.”⁵

We suggest that public consultation be made mandatory for the following type of matters before any regulatory commission:

- All tariff determination or revision related matters, including adopting or modifying competitively discovered tariffs.
- Capital expenditure planning, execution and implementation related issues
- Issues pertaining to access, safety, quality of service and compliance with norms and standards of performance.
- Granting, amendment or revocation of licenses
- For formulating any new rules or regulations

We suggest that the Bill define ‘public consultation’ as including both submissions and representations to the commissions, as well as public hearings. The public hearing should allow for people of all backgrounds to easily participate and hence, should always be conducted in the area of the licensee, preferably in local or regional language and the legal requirements for paper work, if any, should be minimum possible.

In addition, we suggest that the time period in which to hold public consultation should be increased from 30 to 60 days, since an effective public participation process is not possible in 30 days in a country as big and diverse as India.

(ii) Facilitating public participation:

New additions to 2015 draft

For facilitating greater public participation, we suggest:

- In the draft 2015 Bill, clause 9(4) states that a regulatory commission/appellate tribunal ‘may’ authorise a person or appoint an advocate to represent the interests of consumers in

⁴ See clause 16(4), clause 26(2)&(3), clause 29(5), clause 38(1)&(6), clause 57(2) and clause 40(7) of the draft 2013 Bill.

⁵ Consultation Paper on the Regulatory Reform Law, NITI Ayog, http://niti.gov.in/content/consultation_paper.php.

proceedings before it. This should be made mandatory, i.e. it should be explicitly stated that all commissions are mandated to appoint a certain minimum number of consumer representatives per licensee.

- A nodal agency should be constituted for facilitating consumer participation. It should be entrusted with the responsibility of providing financial, technical and legal support for representation of public interest before the commissions and the Tribunals.
- In case of proceedings before the appellate tribunal concerning tariff of large number of consumers, the appellate tribunal shall be mandated to hold a public process and also to appoint an 'Amicus curiae' to represent interests of the consumers and public at large.

(iii) Availability of information:

Effective public participation will be meaningless without the availability of information. The Bill should setup standards of transparency and information dissemination.

Changes made to earlier draft

Clause 40(7) of the draft 2013 Bill mandates the regulatory commission to "render such assistance and data as may be required by such consumer organisations, the public and/or any other person or association for the purposes of making their submissions and the regulatory commission shall consider the representation, objections and comments so received." This was a positive step. However, in the 2015 draft Bill, the regulatory commission is allowed to "refrain from making available such information or data as it may deem fit to withhold in public interest, or in the interest of licensees."

We suggest that this clause be re-framed. The regulatory commission must, in the case it decides to withhold information from the public, issue a notice giving in writing the reasons for the same. In addition, there should be a time limit post which this information must become public as well.

In addition, clause 40(9) from the 2013 draft Bill, which mandated the publication at least once a year of information collected or furnished to the commission to give to consumers and potential consumers, has been deleted from the 2015 draft Bill. We suggest:

- The commissions should be mandated to maintain all petitions, judgments, orders, including daily orders, notices, rules, regulations, monthly, weekly and daily schedule of hearings, and advice and/or official correspondence with the concerned Government and any other notifications issued by them on their websites in an easily accessible, text searchable and downloadable format, *up to date and at all points of time*. All data and numbers collected by the commission or furnished to it, must be available on its website in excel format.
- In addition, each regulatory commission should have a directory of all the information that they collect available on their website, *at all points of time and updated frequently*. The clause for publication at least once a year of information collected should be re-instated.

(iv) Regulatory Impact Assessment:

New additions to 2015 draft

The Regulatory Impact Assessment (RIA) is to be conducted by the regulatory commission before presenting the regulations in Parliament under clause 11(4)(q) of the draft 2015 Bill. The introduction of ex-ante RIA into India has the potential of rendering regulation-making more transparent and

participatory; however, the RIA process is also susceptible to bad design and implementation issues and hence, the government/regulators should be very careful when designing the RIA process. As a start, we suggest that following:

- Enabling RIA: Clause 52 of the draft 2015 Bill ('powers of the regulators and appellate tribunals to make regulations') does not mention RIA. While the draft Bill mandates a RIA, it is unclear if the regulator themselves will decide how a RIA is to be undertaken or will a central legislation do that. We suggest that each regulator and appellate tribunal be allowed to decide, via its regulations, its own RIA implementation process, but that the same should be decided with public consultation.
- RIA implementation process: The implementation process to be followed for the RIA should be put up on the website of the regulators and appellate tribunals. The implementation process will include information such as who will be responsible in the commission for the RIA, the schedule for the RIA, inviting consultation, and manner of dissemination of RIA report for further feedback. This process will remain unchanged from regulation to regulation, and hence, the regulator should put up the RIA process to be followed on their website. This will also facilitate better public vigilance over the RIA process.
- Annual Plan: The provision for preparation of annual plan by regulatory commissions and appellate tribunals (clause 16 (3) & (4) of draft 2013 Bill) must be reinstated. In addition, the approved annual plan should include the list of all regulations proposed to be introduced or revised in the coming years, along with the status of regulations under development as well as those completed, along with the timeline. This must be put up on the website of the regulator and the appellate tribunal, and should be in line with international best practices. This will help prepare the affected persons and businesses accordingly for consultations. For example, in the USA, federal agencies publish an annual Regulatory Plan as well as a bi-annual Regulatory Agenda giving such information.⁶
- RIA report: The report of the RIA should be made public on the website of the regulatory commission, along with the rules in question, for public consultation before it is presented to Parliament.
- Watchdog: In certain other countries conducting RIAs, there is a 'watchdog institution' which ensures that the RIA conducted meet certain quality standards. For example, the Presidential Commission on Regulatory Reforms (South Korea), or the Office of Information and Regulatory Affairs (USA). India should consider such a watchdog institution.

(v) Time period for regulations:

Changes made to earlier draft

In the draft 2013 Bill, clause 11(5) mandated all regulatory commissions to notify all regulations necessary for discharging their duties within the first one year. This provision has been deleted in the draft 2015 Bill.

⁶ This link gives access to the Regulatory Plan and Regulatory Agenda for the US Environment Protection Agency, <http://www2.epa.gov/laws-regulations/regulatory-agendas-and-regulatory-plans#background>. There is also an annual compilation of all such plans and agendas in the Unified Agenda, which can be accessed here <http://www.reginfo.gov/public/do/eAgendaMain>.

We suggest that each commission be mandated to put up, upon its establishment, a schedule for regulations.⁷ This schedule will include a timeline for regulations, including which regulations will be notified and when, for the next two years. This schedule will be made keeping in mind the priority of regulations for the particular sector. This can be the take-off point for the Annual Plans and the process for this schedule can follow that of the Annual Plan, as given in clause 16 of draft 2013 Bill.

(vi) National & State Advisory Committees:

Changes made to earlier draft

While the draft 2013 Bill required the advisory committees to be established within 90 days from the commission's appointed date, the draft 2015 Bill removes this provision. Such an important body needs to be established early in the course of the commission's working, especially to advise the commission in drafting regulations. We suggest that the provision from the draft 2013 Bill be re-instated.

(vii) Appeals:

New additions to 2015 draft

The draft 2015 Bill empowers a person aggrieved to file an appeal against the decision of the regulatory commission to the respective appellate tribunal within 30 days, and against an order of the appellate tribunal to the Supreme Court within 30 days. In addition, the appellate tribunal and the Supreme Court can condone any delay in the filing of the appeal.

We suggest that the initial period of filing the appeal should be increased to 60 days. We have seen in the case of the electricity sector that there has been lot of confusion regarding the applicability of the Limitations Act, 1963. Thus, we suggest that the Bill should clarify 'condonation of delay' and whether the Limitations Act, 1963 will be applicable to the regulatory commissions and appellate tribunals created or in operation for the public utilities listed in Schedule I of the draft Bill.

7. Financial Autonomy:

Changes made to earlier draft

- (i) Budget: In the draft 2013 Bill, the regulatory commission/appellate tribunal was to prepare the budget at the same time every year and the same was to be forwarded to Parliament for approval. Under the 2015 draft Bill, the provision mandating that the budget be prepared at the same time every year, and also the provision for forwarding the budget to the Parliament has been removed. In the new draft, the budget will be approved by the relevant ministry. To ensure financial autonomy and accountability of regulatory commissions/appellate tribunals to Parliament, we suggest that the provision from the draft 2013 Bill be re-instated.

New additions to 2015 draft

- (ii) Control of the fund: We suggest that the fund created for the regulatory commission or the appellate tribunal should be under the control of the concerned regulator or the Tribunal, and not with the concerned government. This is absolutely necessary to ensure financial autonomy of the institution in question.

⁷ This will be done when the commission is established, and can be later incorporated in to the Annual Plans.

- (iii) Salaries of members and chairpersons: In order to assure separation of the regulatory commission from the government, it is necessary that the government not be in charge of paying the salaries of the members and chairperson. We suggest that the salaries of the members and chairpersons of the regulatory commission and appellate tribunals be paid from the Consolidate Fund of India as 'charged expenses', in the same manner as the salaries of higher judiciary are charged.⁸ In addition, the salaries of the members and chairpersons should be fixed in a transparent manner, not varied to their disadvantage after appointment.

8. Regulatory Independence and Accountability

Accountability is one of the most crucial aspects of regulatory design. In our comments on the 2013 draft Bill, we had said that the real challenge in setting up regulatory institutions is finding the right balance between autonomy and accountability.

Changes made to earlier draft

- (i) Annual Report: The draft 2013 bill mandated the commission to submit several reports to the Government, including the annual reports (clause 16). However, the draft 2015 Bill removes the provision of an annual report (clause 15 of 2015) and instead leaves it to the government to decide what kind of reports are to be submitted by the regulators to Parliament. While we agree that flexibility should be provided since this is a common framework for regulators across sectors, we feel that a minimum standard of information to be made available via these reports should have been put in, and the government should have been allowed to exceed these standards in the law establishing the regulatory commissions. We suggest that the provision for submission of annual report be re-instated.

New additions to 2015 draft

- (ii) Independence: The draft 2015 Bill allows the government to grant exemption from licenses to any person for the purposes of national security or defence (clause 22(6)). While this exemption is probably in place for emergencies, however, it is important to ensure that this provision is not misused. Hence, we suggest that the government be mandated, when granting exemption, to give in writing the reasons why such an exemption is necessary for the purposes of national security or defence.

Similarly, the government, if satisfied of the prevailing market conditions and level of competition, can by notification direct that the regulatory commission shall not determine such tariff for the public utility (clause 34(3)). Again, here, it must be enshrined in the law that the government has to present evidence that such a step is justified.

- (iii) Accountability: In addition to such reporting, we suggest the following to facilitate more accountability regarding substantive decisions while keeping autonomy intact:
- For each sector, a panel comprising of sector experts, think tanks, judicial experts, academics and civil society representatives should be constituted, after ensuring that there is no conflict of interest.
 - Once every two years, the panel shall review the functioning of all the central and/or state commissions in the concerned sector.

⁸ Article 112 (Union) & 202 (States) of the Constitution of India.

- The panel should publish the terms of reference for the review and seek public comments on the same. Similarly, the findings and recommendations of the panel should also be finalised only after due public consultation.
- The review should aim at bringing out contrasts and differences in performance as well as best practices, which can help the sector at large. The final review report must be made public and should always be available on the concerned commissions' websites.
- Apart from providing comparative analysis of the various commissions functioning and decision making, the review report should also record specific observations and recommendations, if any, which shall be supported with adequate evidence and analysis.
- In case the review finds sufficiently strong reasons, it can recommend removal of a state or central commission member or chairperson, based on detail documentation of the evidence and analysis that compelled it to arrive at such a severe conclusion.
- If any adverse observations are noted in the final report submitted by the review panel, the concerned Tribunal should be entitled to initiate a suo-motu process based on such findings, in which the concerned commission shall have a right to participate. Based on this process, the tribunal can issue specific directions to the commission, including removal of a member or chairperson, which shall be binding on said state or central commission.

Since the aim is to improve the commission's functioning in general, we feel this broader approach which safeguards autonomy while improving accountability, is better. This approach is also consistent with the recommendations of the 2nd Administrative Reforms Commission, which stated "(Para 6.4.5.7) The Commission is also of the view that there should be independent evaluation of the work of these Regulators, based on pre-specified parameters. Such evaluation should be done by a panel of outside experts in a periodic manner."⁹

⁹ The 13th report on the "Organisational Structure of the Government of India", 2nd Administrative Reforms Commission, April 2009, Page 155, <http://arc.gov.in/13threport.pdf>.

Part B: Comments and Suggestions regarding Appellate Tribunals

The draft 2013 Bill and the draft 2015 Bill concentrate mostly on regulatory commissions. Matters concerning appellate tribunals, which could be dealt with provisions similar to those for regulatory commissions, have been included in the Bills. Again, while we believe that flexibility is important in such a common framework, we also believe that such a common framework offers a unique opportunity to set some basic minimum standards for the effective and consumer friendly functioning of the appellate tribunals, and such an opportunity should not be missed.

The Central Government has introduced the Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014 in Parliament. The Bill is pending in Parliament.¹⁰ The Standing Committee on the Bill expressed its concern over the “sad state of affairs in Tribunals/Commissions” and noted that the Bill precludes eligibility conditions and manner of appointment of Chairperson and Members, pay and remuneration, grounds and manner of their removal, provisions of supporting staff and infrastructure facilities, etc. The committee recommended that the Central Government come up with a comprehensive Bill that while ensuring uniformity in various aspects amongst Tribunals also allows for independent and efficient functioning of these Tribunals “by providing them with independence, security and capacity associated with Courts.”¹¹ We feel that the present Bill presents an opportunity for the Government to do such a thing. Thus, we suggest that the following areas of working be included and a minimum standard be provided in the Bill:

1. Powers of the Appellate Tribunal

As per clause 42(3) of the draft 2015 Bill, “the appellate tribunal shall have the power to require the regulatory commission to reconsider the decision or the order passed by it.” It is unclear if this is the only power envisaged for the appellate tribunals, since there is no provision stating that the appellate tribunal will also exercise such other powers as given in its parent/establishing Act.

We suggest that the appellate tribunals have powers similar to those of the Appellate Tribunal for Electricity under the Electricity Act, 2003 (E Act). The following powers can be included in the Bill with necessary modifications:

- On receipt of an appeal under subsection (1), the Appellate Tribunal may, 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 (Section 111 (3) of E Act)
- The appellate tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission, as the case may be, in relation to any proceeding, on its motion or otherwise, call for the records of such proceedings and make such orders in the case as it thinks fit (Section 111 (6) of E Act)
- The 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 (Section 121 of E Act).

¹⁰ The Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014,

<http://www.prsindia.org/uploads/media/Tribunal%20Authorities/Tribunal%20authorities%20bill,%202014.pdf>.

¹¹ “74th Report on the Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014,” Standing Committee on Personnel, Public Grievances, Law and Justice, February 26, 2014,

<http://www.prsindia.org/uploads/media/Tribunal%20Authorities/SC%20Report-%20Tribunals%20Bill,%202014.pdf>.

2. Access

Access includes both geographical access (proximity) and financial access (fees). Since the Tribunals are replacing High courts, which otherwise would be the fora for agitating these kind of issues/grievances, it becomes imperative for the Tribunal to provide the same level of access as the High Courts.¹² Presently, as far the Appellate Tribunal for Electricity (ATE) is concerned, the fees for filing an appeal are Rupees One lakh and an additional fee of rupees ten thousand per respondent, if the number of respondents exceeds four. In addition to this, the ATE is located in New Delhi, which only adds to the costs of filing an appeal. Although the Electricity Act 2003 allows for circuit benches and the ATE's rules allow for fee waiver, the experience has been that both these factors have not been very effective. To quote an example, Maharashtra as a state accounts for about more than 40% of the appeal being filed before the Electricity Tribunal annually, but the circuit bench in Mumbai, though inaugurated in 2012, is yet to become operational.

Thus, we suggest that the draft 2015 Bill state that all Tribunals must facilitate easy access (both in terms of location and fees) in a manner similar and comparable to any state High Court.

3. Mandatory e-filing and digitisation

To further improve access and to save cost and time, the 2015 draft Bill should mandate all Tribunals to facilitate electronic-filing of petitions, preferably within one year of the Act coming into force or establishment of the Tribunal, whichever is earlier. The Law commission in its report on "Reforms in Judiciary – Some Suggestions" noted that: "E-filing and video-conferencing by dispensing with physical appearance saves precious time and resources and makes justice more easily accessible and a less expensive option."¹³ Some High Courts have already adopted this practice. Further, the same report also observes that: "Courts records can be digitized to improve the productivity and efficiency of the courts. Computerization of the Registry of the Supreme Court has had its beneficial effects in slashing down arrears and facilitated scientific docket management."

Hence, facilitating implementation of these forward looking measures is very crucial in the Tribunal system, which by design is aimed at providing speedy dispensation. Therefore, we suggest that the proposed Bill incorporate these aspects appropriately.

4. Transparency and facilitating access

In the interest of transparency, we suggest that the draft 2015 Bill mandate all tribunals to publish the following information on their websites in an easily accessible manner:

- All the rules, regulations, relevant laws, forms and procedures.
- A simple document that clearly explains all the steps involved in filing an appeal before the tribunal (including the process for e-filing).
- All the judgments, notices, daily orders and any other orders as may be issued by the Tribunal from time to time.
- Monthly, weekly and daily cause lists or schedule of hearings for all the matters

¹² The same was pointed out by the Supreme Court of India in *Madras Bar Association vs Union of India* (2014), in which it was considering the matter of the constitutional validity of the National Tax Tribunal.

¹³ 230th Report of the Law Commission of India on "Reforms in Judiciary – Some Suggestions", August 2009, <http://lawcommissionofindia.nic.in/reports/report230.pdf>.

- Annual Plan with the details of work to be done by the appellate tribunal, including regulations to be revised or introduced.
- Annual report with the work undertaken by the appellate tribunal in the last year, including numbers of appeals made and dealt with, cases that went into appeal to the Supreme Court and summary of important decisions taken.

Annexure I

The following Table provides a summary of our recommendations on the draft 2015 Bill:

#	Clause in draft 2015 Bill	Comments	Suggested changes
Part A: Regulatory Commissions and Appellate Tribunals			
Drafting of the Bill			
1.	In clause 40 on Arbitration, reference has been made to “conciliation” under section 45.	Clause 45 of the 2015 draft Bill relates to jurisdiction of civil courts	Error should be corrected
2.	Clause 51(2)(t) states that the government will make rules to provide for “the authority from which prior sanction may be sought under sub-section (2) of section 43”	In the 2015 draft Bill, no sub-section 2 of section 43 exists	Error should be corrected
3.	Clause 51(2)(u) states that the government will make rules to provide for “the manner and conditions as per which every notice, order or document by or under this Act required, or authorised to be addressed to any person may be served on him under of section 45”.	Clause 45 of the draft 2015 Bill is about the jurisdiction of civil courts	Error should be corrected
4.	Schedule II, formats for repealing sections from Acts, states that it is related to clause 51(1) of the 2015 draft Bill.	Clause 51 is related to the power of the government to make rules	Error should be corrected
Selection and Appointment of Members and Chairpersons			
5.	Clause 4: Selection and appointment of members	Transparency in the selection process should be ensured	<p>Selection Committee should consist of</p> <ul style="list-style-type: none"> ▪ A judicial person, who will also be the chairperson ▪ NITI Ayog member incharge of the public utility ▪ One person with academic or other experience of a minimum of 5 years, to be recommended by the appropriate government ▪ Secretary of the Ministry incharge of the public utility, who will also be the convenor of the committee
	Clause 4: Selection and appointment of members	Transparency in the selection process should be ensured	Every step of the selection process should be transparent. Delays in the selection process at every stage, with reasons, as well as the final report, including reasons for selection of certain names, should be reported by the appropriate government to the State Legislature or Parliament. This statement should also be available on the website of the

			related regulatory commission/appellate tribunal, and of the ministry in charge (See page 5 of this submission).
Eligibility			
	Clause 5: Qualification for appointment of members: "Every person shall, prior to his appointment as a member of a regulatory commission or appellate tribunal, as the case may be, submit a statement of his assets as well as that of his spouse and children."	Members may be offered bribes during their term	Re-instate clause from draft 2013 Bill, which required all persons, even <u>during their tenure</u> , to submit a statement of their assets, as well as that of their spouse and children
Term and Re-appointments			
	Clause 6: term of office and other conditions	Draft 2015 Bill removed bar on re-appointments, while increasing tenure to 5 years. However, independence of commission from the government needs to be ensured	Re-instate bar on re-appointments
	Clause 6(4): Bar on re-employment after completion of tenure as member	The draft 2015 draft Bill removes the provision barring employment under the government. However, independence of commission from the government needs to be ensured	Re-instate the bar on employment of one year for government employment
Removal			
	Clause 7: Removal of member	The draft 2015 Bill allows the government to choose either the process in the parent Act or the current Bill for removal of members	Re-instate clause 7(1) of the draft 2013 Bill, which states: "no member shall be removed from office except in accordance with the provisions of this section".
Transparency and Public Participation			
	Public consultation (multiple clauses)	Public consultation is an important mechanism to ensure accountability of the regulatory process	Public consultation should be made mandatory for the following type of matters before any regulatory commission: <ul style="list-style-type: none"> ▪ All tariff determination or revision related matters, including adopting or modifying competitively discovered tariffs. ▪ Capital expenditure planning, execution and implementation related issues ▪ Issues pertaining to access, safety, quality of service and compliance with norms and standards of performance. ▪ Granting, amendment or revocation of licenses ▪ For formulating any new rules or regulations 'Public consultation' should be defined as

			including both submissions and representations to the commissions, as well as public hearings.
	Clause 9: Proceedings of the regulatory commission and appellate tribunals	Appointing consumer representatives is not mandatory	The commissions should be mandated to appoint a certain minimum number of consumer representatives per licensee. There should be a nodal agency be constituted for facilitating consumer participation. For proceedings before the Tribunal concerning tariff of large number of consumers, the Tribunal should be mandated to hold a public process and also to appoint an 'Amicus curiae' to represent interests of the consumers and public at large
	Clause 40: Consumer Protection	Draft 2015 Bill allows commission to withhold information; Provision mandating publication of data once a year has been removed.	The regulatory commission must, in the case it decides to withhold information from the public, issue a notice giving in writing the reasons for the same. In addition, there should be a time limit post that this information must become public as well. Commission to put up all information on website in appropriate format and keep a register of all information collected (See page 9 of this submission)
	Clause 11(4)(q): Regulatory Impact Assessment	Positive step, but caution advised	Allow regulators to decide on the RIA implementation process via regulations but after public consultation; re-instate the Annual Plan; consider a watchdog institution for ensuring RIA quality (See page 10 of this submission)
	Clause 11: Functions of the regulatory commission	The provision in the draft 2013 Bill, which mandated all regulatory commissions to notify all regulations necessary for discharging their duties within the first one year, has been deleted in the draft 2015 Bill	The commission should be mandated to put up, upon its establishment, a schedule for regulations. This schedule will include a timeline for regulations, including which regulations will be notified and when, for the next two years. This schedule will be made keeping in mind the priority of regulations for the particular sector. This can be the take-off point for the Annual Plans and the process for this schedule can follow that of the Annual Plan, as given in clause 16 of draft 2013 Bill.
	Clause 36: National Advisory Committee	While the draft 2013 Bill required the advisory committees to be established within 90 days from the commission's appointed date, the draft 2015 Bill removes this provision.	The provision from the draft 2013 Bill should be re-instated
	Clause 42: Appeals	Period of initial filing should be increased	The initial period of filing the appeal should be increased to 60 days; Clarification needed regarding applicability of the Limitations Act, 1963.
Financial Autonomy			

	Clause 19: Budget of the regulatory commission and appellate tribunal	The provision mandating that the budget be prepared at the same time every year, and also the provision for forwarding the budget to the Parliament has been removed. The independence of commission from the government needs to be ensured	Re-instate the clause from the draft 2013 Bill
	Clause 17: Fund of the regulatory commission and appellate tribunal	Financial autonomy of the regulatory institutions should be ensured	The fund created for the regulatory commission or the appellate tribunal should be under the control of the concerned regulator or the Tribunal, and not with the concerned government.
	Clause 6: Terms of Office and other conditions	Independence of commission from the government needs to be ensured	The salaries of the members and chairpersons of the regulatory commission and appellate tribunals should be paid from the Consolidate Fund of India as 'charged expenses', in the same manner as the salaries of higher judiciary are charged. The salaries should be fixed in a transparent manner and should be the same as that of High Court judges of similar experience
Regulatory Independence and Accountability			
	Clause 15: Reports by the regulatory commission	The draft 2015 Bill removes the provision of an annual report. This information should be mandated, and individual laws can exceed this minimum requirement.	The provision for submission of annual report should be re-instated
	Clause 22(6): Exemption from licensing	The draft 2015 Bill allows the government to grant exemption from licenses to any person for the purposes of national security or defence. It is Important to ensure that there is no misuse of this provision.	It must be enshrined in the law that the government has to present evidence that such a step is justified
	Clause 34(3): Tariff regulations	The draft 2015 Bill allows the government to direct that the regulatory commission shall not determine tariff for the public utility. It is Important to ensure that there is no misuse of this provision.	It must be enshrined in the law that the government has to present evidence that such a step is justified
	No clause	Regulatory accountability should be ensured	For each sector, a panel comprising of sector experts, think tanks, judicial experts, academics and civil society representatives should be constituted, after ensuring that there is no conflict of interest (See page 13 of this submission)
Part B: Appellate Tribunals			
Powers			

	Clause 42(3): “the appellate tribunal shall have the power to require the regulatory commission to reconsider the decision or the order passed by it.”	It is unclear if this is the only power envisaged for the appellate tribunals, since there is no provision stating that the appellate tribunal will also exercise such other powers as given in its parent/establishing Act.	The appellate tribunals should powers similar to those of the Appellate Tribunal for Electricity under the Electricity Act, 2003.
Access			
	No clause	Tribunals should provide the same level of access as the High Courts	The draft 2015 Bill ensure that all Tribunals facilitate easy access (both in terms of location and fees) in a manner similar and comparable to any state High Court
Mandatory e-filing and digitisation			
	No clause	The Law commission in its report on “Reforms in Judiciary – Some Suggestions” noted the benefits of e-filing, video conferencing and digitisation of court records in increasing access and reducing costs.	Bill should mandate all Tribunals to facilitate electronic-filing of petitions, preferably within one year of the Act coming into force or establishment of the Tribunal, whichever is earlier. Bill should also mandate digitisation of tribunal records.
Transparency and facilitating access			
	No clause	Transparency and facilitating access should be enshrined in the Bill.	The following should be on appellate tribunal websites: <ul style="list-style-type: none"> ▪ All the rules, regulations, relevant laws, forms and procedures. ▪ A simple document that clearly explains all the steps involved in filing an appeal before the tribunal (including the process for e-filing). ▪ All the judgments, notices, daily orders and any other orders as may be issued by the Tribunal from time to time. ▪ Monthly, weekly and daily cause lists or schedule of hearings for all the matters ▪ Annual Plan ▪ Annual report