Comments and suggestions from Prayas (Energy group) Regarding The draft Regulatory Reform Bill, 2013[1]

Below is our initial submission regarding the proposed regulatory reform bill. It is draws upon the understanding and insights gained by us through over a decade long engagement with the electricity sector regulatory processes at both central and state level. The submission is divided into two parts, A-which deals with the regulatory commissions, and B-deals with the Appellate Tribunals.

A: Functioning of regulatory bodies

1. **Good beginning, but need for caution and calibration:** It is a welcome step to formulate a common framework for governing the regulatory structures across sectors and bringing uniformity in the key regulatory processes such as appointments, tenures and other aspects of institutional design. However, while doing so, care must be taken to allow for the necessary flexibility and agility that is often needed while dealing with diverse sectors and their distinct and separate challenges. For example, while competition has worked well for distribution in telecom sector, in electricity distribution it has not been very successful, and not just in India, but broadly the world over. Further, the Electricity Act 2003 is also in the process of being amended and the parliamentary standing committee on energy has reviewed the proposed draft and has submitted its report. If the electricity act amendment goes through, there will be carriage and content separation in power sector. Under such circumstances, how the regulatory mandate for tariff determination and licensing stated in the proposed bill would apply or reconcile with the new structure of the electricity sector? Similarly, gas sector in India has different regulatory models for upstream and downstream and the downstream regulator does not even have jurisdiction to decide the delivered gas price[2]. So would the tariff related provisions in this bill apply to the downstream gas regulator? Similarly, the proposed Coal regulatory Authority bill does not envisage the coal regulator to set coal price, so would the tariff related provisions in the proposed bill grant such jurisdiction to the coal regulatory authority? Thus, 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, it would be best to limit the common framework to core issues of regulatory governance such as:
    a. Selection, appointments and removal
    b. Regulatory process and functioning
    c. Financial and operational autonomy
    d. Transparency and accountability
    e. Institutionalising public participation.

[1] http://niti.gov.in/mgov_file/consultation_paper/Annexure%20II%20-%20Draft%20Regulatory%20Reform%20Bill%202013.pdf
[2] Supreme Court CIVIL APPEAL NO.4910 OF 2015, Petroleum and Natural Gas Regulatory Board Vs.Indraprastha Gas Limited & Ors.

We feel it is best to leave out substantive issues such as tariff, licensing, competition and open access for the concerned sectors to deal with, using sector specific laws and policies. If at all such issues are to be included in the proposed bill, then there needs to be much more detail and careful analysis of all the sector specific issues and challenges, in context of the existing regulatory framework. Further, to avoid confusion and unnecessary litigation, the proposed bill will have to clearly and explicitly override sector specific laws, which deal with the same issues.

2. **Reconciliation with existing and proposed regulatory structures at sector level:** Section 1(4) of the proposed bill states that: "*This Act shall apply to all regulatory commissions established prior to this Act and to all regulatory commissions which may be constituted hereinafter.*" While this is necessary to ensure uniformity, it needs to be noted that some sectors already have laws that define the regulatory framework from that particular sector's point of view. The electricity act amendment bill 2014 mentioned in the earlier para, also proposes many changes regarding key regulatory aspects such as appointments, tenure, eligibility, and accountability etc. which are also dealt with in this proposed bill. Considering the possibility of both the bills being tabled simultaneously, it is necessary to ensure that they are in sync as far as the key regulatory provisions are concerned. Similar care should be taken with regard to other sectors listed in the schedule I, to avoid any unnecessary confusion or litigation.

3. **Selection and appointment of members**: Given that the institutional autonomy is greatly influenced by the process of appointment, the selection process becomes extremely important. The proposed draft recommends formation of a selection committee, which would suggest two names. The prime minister after consulting the leader of opposition and the finance minister is supposed to select a suitable person from the panel and forward the recommendation to the President of India for concurrence, whereupon the selected person shall be appointed. However, considering the possibility that regulators would be set up in all the sectors listed in Schedule I, the sheer administrative burden of this process may become too high and involving the Prime Minister and the President in these matters may not be the most judicious use of their valuable time. As more important matters start emerging, this kind of dependency may also lead to delays and long vacancies, defeating the purpose of the act. Further, in case of concurrent subjects like electricity, it will not be appropriate for the central government to make such appointments, as it is the prerogative of the concerned state government. Further, 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. Considering the above issues and to ensure that selection process happens in a smooth, timely, transparent and accountable manner, a process on the following lines could be considered instead:
    a. The State or Central government, as the case may be, should constitute a selection committee for appointing members and the chairpersons of a regulatory body.
    b. Composition of the selection committee could be as follows:
        i. A serving judge of the Supreme Court (or the High court, in case of state level regulatory body) should head the selection committee

ii. Other members can include the chairperson of the UPSC, the chairperson of Central (or state) Administrative Tribunal and a Director of IIT or IIM or such other reputed academic institute.
iii. Reference to member Planning Commission in the proposed bill needs to be appropriately modified and included in the selection committee.
iv. Secretary of the concerned state or central department should be its convener.

c. 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.
d. To ensure accountability and transparency, the report of the committee should be available in public domain.
e. 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 6 months in advance.
f. Delays in the selection process at every stage, with reasons, if any, should be reported by the government to the State Legislature / Parliament by laying a statement on the table of the House.
g. The government should place in the public domain both the recommendatory statement of the committee and the reasons for not accepting the recommended names, in case of rejection, by laying a statement on the table of the legislature / parliament.

4. **Eligibility criteria:** In order to allow the regulatory commissions to function in an autonomous manner, it is extremely crucial to facilitate an environment that allows them to deliberate on the issues in an independent and objective manner. Since the inception of regulatory commissions in the electricity sector, more than two-thirds of all the Chairpersons of State Electricity Regulatory Commissions were previously part of the same state bureaucracy and almost half of the members were previously working with the utilities regulated by the same commission. Given such strong path dependency, there is a high risk of regulatory capture. To allay this risk and still benefit from the knowledge and experience of people who have worked in the sector at state or central level, the clause (3) of section 5 of the proposed bill is very useful. It states: "*No person who has held any office in a department of the Central Government or the State Government, as the case may be, and has directly dealt with the subjects falling in the jurisdiction of the regulatory commission or appellate tribunal, as the case may be, shall be eligible for selection hereunder until expiry of one year from the date of demitting such office*." Increasing the expiry period from one year to two years, in case of persons coming from utilities regulated by the same regulatory commission can further strengthen this provision.

5. **Tenure:** Given the complexity and uniqueness of each sector and the instruments used by the commission in order to regulate various utilities, four year period may not provide sufficient time to the Commission to bring about long term constructive changes. Possibility of re-appointment can potentially erode autonomy and the proposed Bill is correct in not permitting the same. However, a five-year term without reappointment to the same commission would be a better approach in our opinion.

6. **Improving transparency and public participation:** Informed public participation is extremely crucial both from the point of view of improving quality of the regulatory process and also a useful mechanism for ensuring regulatory accountability. The electricity sector experience shows that the commissions have interpreted their mandate for public participation in quiet different ways. Some commissions routinely undertake public hearings in multiple locations, thereby making it easier for people to participate. While some others have simply solicited comments from the public by just issuing a notice to that effect and have chosen to not even conduct a public hearing. Considering this experience, it would help if the common framework clearly and explicitly mandated the following regulatory process for dealing with crucial issues:

    a. The Act should clearly define the term 'public hearing' and mandate the same for the following type of matters before any commission:
        i. All tariff determination or revision related matters, including adopting or modifying competitively discovered tariffs.
        ii. Capital expenditure planning, execution and implementation related issues
        iii. Issues pertaining to access, safety, quality of service and compliance with norms and standards of performance.
        iv. Granting or revoking of licenses
        v. For formulating any new rules or regulations

    b. 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.

    c. 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 and downloadable format, at all points of time.

7. **Financial autonomy:** 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.

8. **Institutionalising public participation**: One of the key objectives of setting up transparent regulatory bodies is to protect interests of the consumers and hence the public at large. However, translating this objective into a reality is harder said that done. Proceedings before the regulatory commissions and Tribunals are often of a complex nature requiring significant investments in terms of time, skill and effort. While the electricity related public hearings have greatly helped in providing people with the necessary space for voicing their concerns regarding the service delivery, it is not enough by itself to safeguard public interest in the true spirit of the term. Experience from electricity sector also shows that only large consumers, generators and licensees are active in filing cases before the Commissions and the Appellate Tribunal and small and poor consumers, who are often impacted most are not able to utilise these spaces

to the same extent. Therefore, in order to facilitate greater public participation following measures can be introduced:

a. All Commissions shall be explicitly mandated to appoint a certain minimum number of consumer representatives per licensee.

b. 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.

c. In case of proceedings before the Tribunal concerning tariff of large number of consumers, the 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.

9. **Regulatory accountability:** Accountability is one of the most crucial aspects of regulatory design. In fact regulation, as it has evolved in the United States and Europe, was an answer to the repeated question-'*who will guard the guards*'[3]? Given the role and the political context in which the institution is designed in India, it can be safely assumed that a regulator may at times be required to take decisions, which may not be supported by either a regulated utility or a politically influential set of consumers. Given this reality, and in order to enable the regulator to act as per its mandate, institutional autonomy becomes a crucial factor for effective functioning. However, at the same time, the government as well as the public at large should also be able to hold a regulator accountable for its actions and inaction. The real challenge then, is to find the right balance between autonomy and accountability. Mindful of this dilemma, the draft bill mandates the commission to submit several reports to the Government, including annual reports and budget. However, the electricity sector experience demonstrates that this kind of reporting is not a sufficient check to hold the commission responsible for its actions and inaction on substantive issues. To facilitate more accountability regarding substantive decisions while keeping autonomy intact, following approach can be considered:

a. 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.
b. Once every two years, the panel shall review the functioning of all the central and/or state commissions in the concerned sector.
c. 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.
d. 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.
e. Apart from providing comparative analysis of the various commissions functioning and decision making, the review report should also record specific

[3] Quis Cutodiet ipsos custodies? The Satires of Juvenal used in the context of political corruption.

observations and recommendations, if any, which shall be supported with adequate evidence and analysis.

f. 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.

g. 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.

B: Functioning of the Tribunals

1. Tribunals are not part of regular judicial system, but are an alternate dispute resolution mechanism created mainly to expedite disposal of cases under a particular statute. They are expected to serve better since they are not bound by elaborate rules, but guided by natural justice. Since the tribunal deals with cases coming from specific statute, they are composed of technical member with sector expertise and judicial members with knowledge of the law. In addition, as the Supreme Court has noted, they are expected to provide easy access to speedy justice in a 'cost- affordable' and 'user-friendly' manner. The Supreme Court has also proposed amendments and made observations regarding specific Acts establishing tribunals, most recently in the case of R Gandhi (2010) and the Madras Bar Association (2014) cases, and these are worth mentioning in this context. In the *UoI vs R Gandhi (2010)* case, the Supreme Court examined the constitutional validity of the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT), the establishment of which is provided by the Companies (Second Amendment) Act, 2002. The Court recommended various amendments to sections of the Act for it to be constitutional valid. Amendments proposed by the Supreme Court are:
    a. Members: If the Tribunals are intended to serve an area, which requires specialized knowledge or expertise, there can be Technical Members in addition to Judicial Members. Where however jurisdiction to try certain category of cases are transferred from Courts to Tribunals only to expedite the hearing and disposal or relieve from the rigours of the Evidence Act and procedural laws, there is no need to have any non-judicial Technical Member.
    b. Qualifications for Judicial Members: Only Judges and Advocates can be considered for appointment as Judicial Members of the Tribunal. Only the High Court Judges, or Judges who have served in the rank of a District Judge for at least five years or a person who has practiced as a Lawyer for ten years can be considered for appointment as a Judicial Member.
    c. Qualifications for Technical Members: As the NCLT takes over the functions of High Court; the members should as nearly as possible have the same position and status as High Court Judges. Only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment

as Technical members of the NCLT. A 'Technical Member' presupposes an experience in the field to which the Tribunal relates.

d. Support: The administrative support for all Tribunals should be from the Ministry of Law & Justice. The Tribunals or its members shall not seek nor be provided with facilities from the respective sponsoring or parent Ministries or concerned Department.
e. Ratio of Judicial and Technical members: Two-Member Benches of the Tribunal should always have a judicial member. Whenever any larger or special benches are constituted, the number of Technical Members shall not exceed the Judicial Members.

Similarly, in the *Madras Bar Association vs UoI (2014)* case, the constitutional validity of the National Tax Tribunal Act, 2005 was challenged. The NTT was to hear appeals arising from orders passed by Appellate Tribunals constituted under the Income Tax Act, the Customs Act, and the Central Excise Act. This had earlier been the jurisdiction of the High Courts. The Court held various provisions of the Act as unconstitutional for the following reasons:

a. Access: The appellate jurisdiction of a court can be vested via legislation in an alternate court/tribunal; however, the redress should be available with the same convenience and expediency, as it was prior to introduction of court/tribunal. Ordinary sitting at New Delhi by the NTT will render this ineffective. There is a need for the establishment of permanent benches at each High Court, or circuit benches at each place. Thus, this section is in violation of law declared by this court.
b. Independence: The Central Government will be a party in all disputes coming before the NTT, thus, allowing it power to determine the number, place, jurisdiction and transfer of members will impinge upon the independence of the tribunal. This power lies with the Chief Justice for High Courts. The alternate adjudicatory authority needs to be totally insulated from interference from coordinates of the Government. For the NTT Act to be valid, the Chairperson and members should be possessed with the same independence and security, as the High Courts that it seeks to replace.
c. Qualification of Technical Members: Accountant members and technical members do not have the status or qualification of a HC judge, and thus, where the qualification of members is concerned, S6(2)(b) is declared unconstitutional.
d. Manner of appointment: NTT is replacing the High Court, and thus, the manner for appointment of its Chairperson and members will have to be the same as that of the High Court. The selection process includes the Secretaries of the Central Government and cannot be considered valid since the Central Government will be a party in every litigation before the NTT. The central government cannot transfer jurisdiction and then provide that the manner of selection of persons in new court is not the same as that for the High Court it replaces. Thus, S7 is unconstitutional.
e. Re-appointment: Re-appointment itself will undermine the independence of the NTT. Since NTT is vested with jurisdiction that was once of the High Courts, in matters of appointments and extension of tenure, it must be protected from executive involvement.
f. Representation: A list of cases where different laws will have to be taken into account by the NTT while deciding tax related disputes. Since as per S15 of the

NTT, it will deal with appeals only on "substantial questions of law", both the CA and CS contentions make little sense (their expertise in the area of accounts falls in the realm of facts). Thus, S13(i) insofar as it allows CA to be representatives, is held unconstitutional.

Depending up on the nature of the sector and regulatory model being adopted, it would be important to factor in these recommendations while proposing a new framework for setting up new Tribunals. This will lend greater credibility to the Tribunal design and avoid litigation, which challenges its legal validity, such as the NTT case.

2. **Access:** 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. 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. Considering such issues and the points raised by the Supreme Court as mentioned above, the proposed bill should ensure that all Tribunals must facilitate easy access (both in terms of location and fees and charges) in a manner similar and comparable to any state High Court.

3. **Mandate for e-filing and digitization**: To further improve access and to save cost and time, the 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 vide its report no 203 on "Reforms in judiciary – some suggestions" dated August 2009[4] has 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*." Some of the 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, the proposed bill should incorporate these aspects appropriately.

4. **Transparency:** In the interest of transparency, the proposed draft bill should mandate all Tribunals to publish the following information on their websites in an easily accessible manner:
    a. All the rules, regulations, relevant laws, forms and procedures.
    b. A simple document that clearly explains all the steps involved in filing an appeal before the Tribunal (including process for e-filing).

[4] http://lawcommissionofindia.nic.in/reports/report230.pdf

c. All the judgments, notices, daily orders and any other orders as may be issued by the Tribunal from time to time.
d. Monthly, weekly and daily cause lists or schedule of hearings for all the matters.

5. The central government has introduced the Tribunals, Appellate Tribunals and Other Authorities (Conditions of Service) Bill, 2014 in Parliament. The Bill provides for uniform conditions for term of office, retirement age, post-tenure bar on pleading before same tribunal, allowances and benefits for members and chairpersons of 26 tribunals, including the Appellate Tribunal for Electricity. The Bill is pending in Parliament.[5] The Standing Committee on the Bill has noted some serious concerns, as it precluded 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 standing committee has recommended that the Government improve the Bill by bringing in a comprehensive legislation proposing uniform condition of service, and a National Tribunal Commission may be constituted to look into these functions and responsibilities.[6] This exercise will have to be done in tandem with the drafting of the proposed bill as both try to propose a common institutional framework for the Tribunals.

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[5] 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.
[6] "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.