

Working paper

Bypassing expert tribunals through writs: Judicial overreach in review of the Telangana State Electricity Regulatory Commission's orders

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Abstract

A 2023 decision of the Supreme Court underscored the importance of judicial deference to expert bodies, stating that the High Court should have remanded a technical matter to the Appellate Tribunal for Electricity ('APTEL') instead of adjudicating it itself.

Judicial review of ERC orders cannot be eliminated, but the grounds and scope of judicial review should be confined within well-settled principles of administrative law. Many challenges against the Telangana State Electricity Regulatory Commission's ('TSERC') orders are filed before the Telangana High Court: in 2021-22, 12 appeals from TSERC were filed before APTEL, while 85 appeals were filed before the Telangana High Court (i.e., over seven times the number of appeals before APTEL).

We analysed writ petitions and appeals involving TSERC before the Telangana High Court between 2014-2022 and examined whether judicial review of the TSERC's orders by the Telangana High Court is within the permitted limits in administrative law. We propose to conduct similar studies for other SERCs and a comparative study across SERCs.

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1 Introduction

In November 2023, the Supreme Court issued an order in an appeal from the Telangana High Court, which originated from an order by the Telangana State Electricity Regulatory Commission (‘TSERC’) challenged before the Telangana High Court. The Supreme Court noted that the respondents could have approached the Appellate Tribunal for Electricity (‘APTEL’) instead of the High Court and held that the High Court should have remanded the matter to the “expert body” (that is, the TSERC) instead of adjudicating issues of tariff and cross-subsidy charges.¹

This decision comes against the backdrop of a large number of challenges to the TSERC’s orders being filed before the Telangana High Court: in 2021-22, only 12 appeals from the TSERC were filed before the APTEL, while 85 appeals were filed before the Telangana High Court (that is, more than seven times the number of appeals before the APTEL).²

In contrast, as on March 31, 2022, 37 appeals from the Tamil Nadu Electricity Regulatory Commission were pending before the APTEL and 11 writ petitions were pending before the Madras High Court.³ In 2020-2021, 82 appeals from the West Bengal Electricity Regulatory Commission were filed before the APTEL, and 29 writ petitions / appeals were filed before the Supreme Court and the Calcutta High Court.⁴ Nonetheless, the problem of a large number of writ petitions from State Electricity Regulatory Commissions (‘SERCs’) is not restricted to the TSERC.⁵

The Electricity Act, 2003 (the ‘Electricity Act’) establishes a framework under which appeals may be preferred from orders of the Central Electricity Regulatory Commission (‘CERC’) and SERCs, including TSERC, before the APTEL.⁶ The APTEL has sector-specific technical expertise, which High Courts may not. Moreover, bypassing the APTEL defeats the purpose for

¹*The Southern Power Distribution Company of Telangana State v Agarwal Foundaries Private Limited and Another* SLP (C) No. 14047-14066/2019.

²TSERC, *Annual Report for FY 2021-22* (https://tgerc.telangana.gov.in/file_upload/uploads/Reports/Annual%20Report%20FY%202021-22.pdf).

³TNERC, *Annual Report for 2021-22* (<http://www.tnerc.gov.in/AnnualReport/files/AR-2021-2022-311020231109.pdf>).

⁴WBERC, *Annual Report for FY 2020-21* (<https://wberc.gov.in/sites/default/files/Annual%20Report%20%202020-21.pdf>).

⁵For example, in 2019-20, 25 appeals from the Rajasthan Electricity Regulatory Commission were filed before the APTEL while 114 writ petitions were filed before the High Court. (RERC, *Annual Report for FY 2019-20* (<https://rec.rajasthan.gov.in/rec-user-files/annual-reports>)) As another example, in 2019-20, 21 appeals from the Odisha Electricity Regulatory Commission were filed before the APTEL while 34 writ petitions were filed before the High Court. (OERC, *Annual Report for FY 2022-23* (https://www.orierc.org/CuteSoft_Client/writereaddata/upload/AnnualReport2022-23.pdf))

⁶Sections 110-11, the Electricity Act.

which tribunals were established, that is, to distribute the heavy case-load of High Courts.⁷ Therefore, as a matter of law and routine, TSERC orders should be reviewed by the APTEL, and not by Telangana High Court.

The judicial review of ERC orders cannot be eliminated, but the grounds and scope of such judicial review should be confined to the well-settled principles of administrative law. It follows that the Telangana High Court must restrict its review to the three grounds of judicial review: (i) illegality, (ii) irrationality, (iii) procedural impropriety. The Telangana High Court must also take into account the alternative efficacious remedy that lies at the door of a body with sector-specific expertise (i.e., the APTEL), and it should therefore limit its judicial review to matters involving the enforcement of fundamental rights, a violation of the principles of natural justice, jurisdictional questions, and a challenge to the validity of the legislation.

We therefore ask whether judicial review of the TSERC's orders by the Telangana High Court is within the permitted limits set out in Indian administrative law. To answer this question, we analysed writ petitions and appeals involving the TSERC before the Telangana High Court between 2014-2022 and examined the nature of these proceedings and the grounds on which the High Court exercised its powers of judicial review. Our analysis reveals that the Telangana High Court has adjudicated upon many matters involving substantive issues, by which we mean matters within the scope of quasi-judicial powers of ERCs and the appellate jurisdiction of the APTEL. More specifically, 52.5% of the writ petitions and 58% of the writ appeals in our data subsets concerned substantive issues. These substantive issues fall squarely within the APTEL's appellate jurisdiction, and not the High Court's scope of judicial review. We propose to conduct similar studies for other SERCs and a comparative study across SERCs.

The paper proceeds as follows: Section 2 provides a brief overview of the grounds and scope of judicial review in India. Section 3 presents the methods used in the creation of our dataset. Section 4 presents our data and results. Section 5 presents our analysis. Section 6 presents our conclusions.

2 Legal framework on judicial review

Judicial review allows constitutional courts to circumscribe arbitrary exercises of discretionary powers by administrative authorities. Resultantly, decisions of regulatory authori-

⁷*L Chandra Kumar v Union of India and Others* 1992 (69) ECR 401 (SC).

ties, such as the TSERC, may be subject to judicial review by the Supreme Court and High Courts in exercising their writ jurisdiction.⁸ The Supreme Court has specified limits for the grounds and scope of judicial review, stating that it should be concerned with a regulatory authority's decision-making process and not the merits of its decision, as "the court does not have the expertise to correct the administrative decision."⁹ More specifically, the Supreme Court has emphasised judicial restraint in reviewing administrative actions and established three grounds that delineate the scope of judicial review:

1. Illegality: has the regulatory authority (i) exceeded its powers, (ii) abused its powers, (iii) committed an error of law, (iv) failed to adhere to principles of natural justice, or (v) acted unreasonably?
2. Irrationality/ Wednesbury principle of reasonableness: has the regulatory authority reached a decision that is (i) unreasonable, (ii) not based on applicable law, (iii) not based on a holistic view of the facts of the case, or (iv) unequal in its operation?
3. Procedural impropriety: has the regulatory authority failed to follow the procedure established by law?

Moreover, courts must exercise caution when deciding whether to entertain writ petitions challenging regulatory orders, particularly when an alternative efficacious remedy, such as approaching a specialised appellate tribunal, exists. Generally, courts should not entertain a writ petition where there is an efficacious alternative remedy, unless:

1. the writ petition concerns the enforcement of fundamental rights,
2. there has been a violation of the principles of natural justice,
3. the order or proceedings lacked jurisdiction, or
4. there is a challenge to the validity of the legislation.¹⁰

The appeal procedure under the Electricity Act is an efficacious alternative remedy to filing writ petitions before High Courts. Although the availability of such a remedy is not a complete bar to the exercise of writ jurisdiction, it should be a relevant consideration since specialised tribunals and appellate authorities are best placed to examine the facts and merits of a case within their "exclusive domain."¹¹ This is particularly relevant in the electricity sector, as the Supreme Court has recognised the technical nature of disputes in this sector,

⁸Articles 32 and 226, Constitution of India.

⁹*Tata Cellular v Union of India* (1994) 6 SCC 651.

¹⁰*Ibid*; *Whirlpool Corporation v Registry of Trade Marks Limited* (1998) 8 SCC 1; *Radha Krishan Industries v State of Himachal Pradesh* (2021) 6 SCC 771.

¹¹*Executive Engineer v Sectaram Rice Mill* (2012) 2 SCC 108.

recommended the establishment of an expert appellate body for this sector, and emphasised the expertise of SERCs and the APTEL.¹² Moreover, the technical expertise of the APTEL is bolstered by the mandatory inclusion of a Technical Member (with certain prerequisite qualifications and expertise) on all benches.¹³

In 2018, the Telangana High Court itself noted that “APTEL, being a specialised tribunal, is better equipped to handle the technical nuances involved in electricity regulation and disputes arising from decisions of TSERC.”¹⁴ In 2022, it stated that “[g]iven the complex nature of issues related to electricity distribution and tariffs, they should first be addressed by TSERC and, if necessary, appealed to APTEL which has the requisite technical expertise.”¹⁵

In several instances, parties that have approached courts through the writ jurisdiction have been directed to first approach the specialised tribunal, such as the Telecom Disputes Settlement and Appellate Tribunal or the Debt Recovery Tribunal.¹⁶ However, despite these well-settled principles of administrative law, parties involved in TSERC orders continue to bypass the APTEL and instead directly approach the High Court.

3 Methods

Our research focused on the extent to which the Telangana High Court has exercised its powers of judicial review in respect of TSERC’s orders. In order to do this, we created a set of 82 ‘indicators’ for our reading and analysis of a subset of writ petitions and appeals involving TSERC before the Telangana High Court. These indicators could apply to a judgment as a whole (for example, date of the judgment and bench composition), each petition/ appeal in a judgment (for example, appeal allowed or appeal dismissed), or each party in an appeal (for example, prayers and imposition of costs).

¹²*West Bengal Electricity Regulatory Commission v CESC Ltd* (2002) 8 SCC 751; *Maharashtra State Electricity Distribution Co Ltd v Lloyds Steel Industries Ltd* (2007) 8 SCC 902; *PTC India Ltd v Central Electricity Regulatory Commission* (2010) 4 SCC 603.

¹³S. 113(1)(b)(ii) and (iii) of the Act require that such a person “is, or has been, a Secretary for at least one year in the Ministry or Department of the Central Government dealing with economic affairs or matters or infrastructure,” or “is, or has been, a person of ability and standing, having adequate knowledge or experience in dealing with the matters relating to electricity generation, transmission and distribution and regulation or economics, commerce, law or management.”

¹⁴*Telangana State Northern Power Distribution Company Limited v P Ramesh Kumar* 2018 SCC OnLine TS 1311.

¹⁵*Southern Power Distribution Company of Telangana Ltd v Commissioner, Income Tax* 2022 SCC OnLine TS 622.

¹⁶*SP Sampath Kumar v Union of India* (1987) 1 SCC 124; *Union of India v R Gandhi, President, Madras Bar Association* (2010) 11 SCC 1; *United Bank of India v Satyawati Tondon and Others* (2010) 8 SCC 110; *Nivedita Sharma v Cellular Operators Association of India* (2011) 14 SCC 337.

Findings against indicators were recorded only based on explicit language in a judgment. Accordingly, positive or negative findings against these indicators were not recorded based on subjective interpretation or unclear language in an order.

3.1 Measures of suitability for the scope of judicial review

We identify five issues involved in our subset of writ petitions and appeals:

- jurisdiction,
- derating,
- substantive issues,
- challenge to the validity of regulations, and
- procedural irregularities.

These issues provide insight on whether the matters taken up for consideration in writ matters by the Telangana High Court fell within the permitted limits set out in law.

4 Data

The TSERC's Annual Reports indicate that, during 2014-2022, 797 writ petitions and 72 writ appeals involving the TSERC were filed before High Courts. From this larger set, we created a subset of:

1. 179 writ petitions (the 'Writ Petitions Subset'), which comprises approximately 22.5% of the total writ petitions mentioned in the TSERC's Annual Reports for 2014-2022; and
2. 181 writ appeals (the 'Writ Appeals Subset'), which is much more than the 72 writ appeals identified in the TSERC's Annual Reports.

Table 1 specifies the disposition of petitions in the Writ Petitions and Writ Appeals Subsets.

Table 1 Disposition of writ matters

Disposition	Number of Writ Petitions	Number of Writ Appeals
Allowed	58.66% (105/179)	36.46% (66/181)
Partly allowed	0.05% (1/179)	None
Dismissed	3.35% (6/179)	16.57% (30/181)
Remanded	27.37% (49/179)	None
Orders quashed*	0.16% (29/179)	36.46% (66/181)
Unclear	0.10% (18/179)	46.96% (85/181)

*Instances in which orders are quashed will overlap with instances in which the appeal was allowed or partly allowed or the matter was remanded.

Table 2 shows the number of instances in our Writ Petitions and Writ Appeals Subsets categorised by the type of issue involved for our analysis of the Telangana High Court’s exercise of judicial review.

Table 2 Issues involved in writ matters

Issue	Writ Petitions	Writ Appeals
Jurisdiction	19	2
Deration	66	66
Challenge to the Validity of Regulations	1	No writ appeals
Substantive Issues	94	105
Procedural Irregularities	23	20

Non-State parties filed all the petitions in the Writ Petitions Subset and 86 appeals in the Writ Appeals Subset. State-owned electricity distribution companies (discoms) did not file any petitions in the Writ Petitions Subset, but filed 95 appeals in the Writ Appeals Subset.

This data is analysed in the next section.

5 Analysis

Arguably, the disputes on jurisdiction and deration were within the High Court’s powers of judicial review since they arose from extraordinary events:

- The writ matters involving ‘jurisdiction’ relate to confusion caused after the reorganisation of the erstwhile united Andhra Pradesh. More specifically, there was a lack of clarity as to whether the TSERC or the Andhra Pradesh Electricity Regulatory

Commission ('APERC') would have jurisdiction over certain sets of disputes after the reorganisation, particularly because the APERC took the view that any dispute relating to both Andhra Pradesh and Telangana would fall within its jurisdiction. This matter was brought to the High Court, which clarified that disputes related to both States could not automatically fall within APERC's jurisdiction.¹⁷ These disputes were then transferred to the CERC for adjudication. Arguably, these disputes on jurisdiction were within the High Court's powers of judicial review since they arose from extraordinary events.

- 'Deration' involved a set of matters in which industrial consumers approached the High Court to seek waivers of their minimum obligations under their contracts with the discoms. They claimed they could not meet their contractual obligations because of the lockdowns imposed due to the COVID-19 pandemic.¹⁸ Such matters fall within the scope of the TSERC's and the APTEL's jurisdiction, but it may be possible that the High Court entertained these matters since these, too, arose under extraordinary circumstances.

Matters involving challenges to the validity of regulations and procedural irregularities in administrative actions may also be appropriately taken up at the High Courts in line with the scope of judicial review established by the Supreme Court.¹⁹ The high incidence of matters involving procedural irregularities may be explained by the lack of a legal member at the TSERC between 2015-2018, especially since the matters involving procedural irregularities before the High Court were in 2015-2016 and 2018-2019. Although the absence of a legal or judicial member does not invalidate the TSERC's orders, it does raise questions on procedural safeguards and compliance with principles of natural justice.²⁰

Worryingly, the largest number of writ petitions and writ appeals relate to 'substantive matters', which we identify as those that fall squarely within the jurisdiction of the APTEL. The High Court has adjudicated upon many matters (that is, 52.5% of the writ petitions in the Writ Petitions Subset and 58% of the writ appeals in the Writ Appeals Subset) involving substantive issues. By substantive issues, we mean matters that the Act contemplates as falling within the scope of quasi-judicial powers of ERCs and the appellate jurisdiction of the APTEL (for example, matters such as classification of consumers and determination of

¹⁷ *Eastern Power Distribution Company of AP v GMR Vemagiri Power Corporation Limited* 2019 (2) ALT 52.

¹⁸ *Devashree Ispat Private Limited v The State of Telangana* (Telangana High Court order dated January 18, 2021) W.P. No. 7130 of 2020.

¹⁹ *L Chandra Kumar v Union of India and Others* (n 7).

²⁰ *Union of India v R Gandhi, President, Madras Bar Association* (n 16).

subsidy surcharges).

These substantive issues fall squarely within the APTEL’s appellate jurisdiction. The High Court’s powers of judicial review do not extend to such substantive issues, but, as demonstrated, the High Court nonetheless entertains several matters involving substantive issues instead of directing parties to approach the APTEL.

6 Conclusion

The Act provides an appellate mechanism for parties aggrieved by SERCs’ orders. The mechanism accommodates the need for technical expertise in deciding disputes in the electricity sector. While the existence of an efficacious alternative remedy is not a complete bar on judicial review, well-established principles of administrative law caution against judicial overreach and limit the situations in which courts should entertain matters when such an alternative remedy exists, particularly because specialised tribunals and appellate authorities have the technical expertise to examine the facts and merits of a case.

Since the rationale for providing such an appellate mechanism is the requirement of technical expertise, and the APTEL has such expertise, but the High Courts may not, the exercise of judicial review in such situations undermines the objectives of the Act. In such a situation, a High Court entertaining petitions challenging the TSERC’s orders undermines the good functioning of the regulator since the regulator would have to defend its actions before multiple fora instead of just at the APTEL. Within the High Court, the regulator is forced to defend its orders twice, at the stage of the initial petition and then again at the stage of the writ appeal. This imposes undesirable strains on limited state capacity.

Further, the Supreme Court has emphasised the need for judicial restraint in reviewing administrative actions and identified the three grounds (illegality, irrationality, and procedural impropriety) which circumscribe the scope of judicial review. Our study reveals that the High Court entertains many writ petitions related to the TSERC’s orders. While some of these petitions may relate to matters for which the High Court is the appropriate venue or which fall within the recognised grounds of judicial review of administrative action, there is a large number (that is, those involving substantive issues) that fall squarely within the scope of the matters for which the Act provides an appellate mechanism through the APTEL. Lastly, the adjudication of substantive issues by High Courts, bypassing APTEL, may lead to differing legal interpretations and outcomes, which may in turn lead to SERCs holding different positions on similar issues.

