

Working Paper

**Performance at the Appellate Tribunal as an
indicator of regulatory capacity: The case of TNERC at APTEL**

Bhavin Patel

Renuka Sane

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Abstract

The paper analyses all appeal orders at the Appellate Tribunal for Electricity (APTEL) from 2013 onwards where the Tamil Nadu Electricity Regulatory Commission (TNERC) was either an appellant or respondent. The TNERC is not able to hold its ground in 52% of appeals. Of these 24% of the appeals are “remanded” back to the TNERC, suggesting that it did not even do a good job of ensuring that all the evidence necessary to decide a matter was brought on record, despite being conferred the powers of a Civil Court for such purposes under Section 94 of the Electricity Act, 2003. Further, the TNERC lost 86% of matters that involved issues related to how it uses its regulatory powers. Analysis of these orders helps identify areas of concern, and can guide the management and board of the regulator towards remedial action, providing a pathway to enhancing regulatory state capacity.

Keywords: *regulation, adjudication, new administrative state, electricity*

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1 Introduction

Investability in the electricity sector, important for India’s growth and energy transition, is influenced by a high-quality regulatory environment. Electricity is a Concurrent List subject, and every state has an Electricity Regulatory Commission (ERC). Each ERC is vested with legislative functions (such as determining the method of calculating tariffs and regulating electricity purchase and procurement processes), executive functions (setting tariffs, issuing licenses, facilitating intra-state transmission and wheeling, specifying or enforcing standards of performance), and quasi-judicial functions (adjudicating upon disputes between power generators and various licensees). The fusing of legislative, executive, and judicial powers in one agency also leads to concerns about concentration of power, and the lack of democratic accountability in the new administrative state.

Several countries have constituted frameworks to evaluate regulators to improve their accountability (Bird, 2011; Coglianesi, 2012). One such tool is the study of orders emanating from the opportunity of appeal to an appellate authority (Mejia, 2020). Evaluating how a regulator’s orders perform at the appellate level helps us identify areas of concern, and can guide the management and board of the regulator towards remedial action, providing a pathway to enhancing regulatory state capacity (Roy et al., 2019). The Financial Sector Legislative Reforms Commission (FSLRC) in India had also suggested a process of judicial review of orders for all financial regulators. The ERC’s quasi-judicial powers are wider than those of other regulators such as the Securities and Exchange Board of India (SEBI), making it important to evaluate the regulator’s performance in exercising these powers.

This paper focuses on evaluating the Tamil Nadu Electricity Regulatory Commission (TNERC) on its quasi-judicial function. A useful metric of the quality of orders passed by the regulator is how well the orders fare at an appellate forum. If the regulator succeeds in defending its decisions, then one can argue that the orders are well-reasoned, and the procedure required by applicable law was followed. A high overturn rate would indicate weak state capacity in this area. The focus of our study, therefore, is the overturn rate of TNERC orders at the Appellate Tribunal for Electricity (APTEL) between 2013 and 2023. We record an order as overturned if APTEL’s order uses specific language stating that an appeal has been partially or fully upheld. This also helps examine how good the regulator is at determining contractual disputes between power generators and distribution licensees. We also examine if the results of appeals from the TNERC’s orders tell us something about how the regulator exercises its executive authority. If the APTEL upholds appeals against the TNERC’s orders on matters related to the exercise of its executive powers, it would indicate that the APTEL agrees with how the TNERC exercises such powers. Poor rates would suggest that the TNERC does not

exercise such powers well.

Our results suggest that the TNERC is not able to hold its ground in 52% of appeals. Of these 24% of the appeals are “remanded” back to the TNERC suggesting that it did not even do a good job of ensuring that all the evidence necessary to decide a matter was brought on record, despite being conferred the powers of a Civil Court for such purposes under Section 94 of the ACT. Further, the TNERC lost 86% of matters that involved issues related to how it uses its regulatory powers. The insights from this paper can lead to actionable suggestions for enhancing state capacity at the TNERC. This includes better staffing and training for TNERC’s officers involved in its quasi-judicial functions. A deeper analysis of the TNERC’s orders that perform better in appeal at the APTEL can lead to a framework for better order writing. Further analysis of the issues on which the TNERC suffers losses at the APTEL may help in framing better regulations and improving their predictability in such matters. All of these would help improve investor confidence in the electricity sector in Tamil Nadu.

The experience in India in evaluating regulatory orders is nascent. Goyal and Sane, 2021 study six months of SEBI orders, at the Securities Appellate Tribunal and find that there are often elementary mistakes in the application of procedural law in SEBI’s quasi-judicial processes. Damle and Zaveri, 2022 conduct a systematic study of SEBI enforcement orders over ten years, and suggest that the rate and outcome of appeals from these adjudicatory orders could be a rough proxy to evaluate the regulator’s conviction rate. Datta, 2023 examines appeals against the Reserve Bank of India’s (RBI) actions before the Supreme Court of India, and shows that various exogenous events post-2013-14 compelled the RBI to issue legal instruments impacting stakeholders beyond the Central Bank’s immediate jurisdiction, leading to rising rates of challenge against such actions and eroding judicial deference towards the RBI on regulatory process aspects. Much of this literature has focused on the financial sector.

In the electricity space, Vaishnava, Chitnis and Dixit, 2018 study APTEL orders from a “public interest perspective” with a focus on who the appellants are, what issues they face, and the hurdles (if any) in accessing the appellate tribunal. Das and Gambhir, 2020 study renewable energy-related orders by the Maharashtra Electricity Regulatory Commission (MERC) and the APTEL between April 2010 and March 2020. Their study differs from ours in two important aspects: firstly, they focus on the treatment of issues related to renewable energy such as open access and renewable purchase orders (RPOs) at the MERC and the APTEL, rather than on how the ERC’s decisions fare at the appellate level; secondly, they employ interpretative methods while applying certain tags to orders, such as *Topics*, *Sub Topics*, and *Decision*, while we only record findings against indicators where there is explicit language in

an order related to an indicator. As such, these studies can be considered complementary to each other. Our paper speaks to this literature on evaluating and improving the capacity of the regulatory state.

The paper proceeds as follows. Section 2 provides a brief overview of the electricity sector. Section 3 presents the methods used in the creation of the dataset. Section 4 presents our results and analysis. Section 5 presents our conclusions.

2 The electricity sector

Electricity is a Concurrent List subject (Entry 38 in List III of the Seventh Schedule to the Constitution of India, 1950), subject to both, Union and State legislative powers. This leads to increased regulatory complexity as compared to other sectors such as the financial markets, which are purely within the domain of the Union. The sector has a proliferation of regulators: a Central Electricity Regulatory Commission and 26 separate State- and Union Territory-level Electricity Regulatory Commissions (ERCs). The overall regulatory scheme of the sector is set out in a Union legislation, the Electricity Act, 2003 (the ACT). Broadly, the Central Electricity Regulatory Commission regulates the inter-state sale and transmission of electricity, while each State ERC regulates the intra-state aspects of the sector. The ACT permits the conferment of quasi-judicial powers on the various ERCs.

The Tamil Nadu Electricity Regulatory Commission (the TNERC) was established in 1999, pursuant to the enactment of the Union legislation The Electricity Regulatory Commissions Act, 1998. The Appellate Tribunal for Electricity (APTEL) hears appeals against the quasi-judicial orders of the State ERCs, including the TNERC. Note that some orders may also be challenged in writ proceedings before the superior courts. Further appeals from the APTEL's orders lie before the Supreme Court of India.

The APTEL also exercises a supervisory role over the ERCs under Section 121 of the ACT - it may issue orders, instructions, or directions as it deems fit to any State ERC or the Central ERC for the performance of its functions under the ACT. An example of how the APTEL exercises such powers is the matter of *Tariff Revision (Suo-Moto action on the letter received from Ministry of Power)*, OP No. 1 of 2011 ("OP 1 OF 2011"). Acting *suo moto* on the basis of a letter sent by the Ministry of Power to the Chairperson of the Tribunal, the APTEL pronounced a judgment on November 11, 2011 in which it noted that several State DISCOMS had failed to file annual tariff revision petitions in time, and consequently, tariff revisions had not taken place in the corresponding States for many years. In its judgment, the APTEL recorded several strong findings against the State ERCs for Tamil

Nadu, Tripura, and Rajasthan. It stated that where a State DISCOM had not filed a tariff revision petition, it was the responsibility of the relevant SERC to initiate *suo moto* action in this regard. In particular, it recorded several observations against these three SERCs in response to their arguments that they did not have the authority to initiate *suo moto* action in such cases and that the APTEL did not have the authority to direct the SERCs to take action in such matters either. Rejecting both arguments, the APTEL criticised the three SERCs for failing to discharge their duty in such matters. It issued several orders in its judgment, including a direction that SERCs must initiate *suo moto* proceedings for tariff determination in accordance with Section 64 of the ACT if there was a delay of more than one month in the relevant filings by the State DISCOM. The APTEL also directed that all SERCs must send reports on their compliance with the directions in the OP 1 OF 2011 judgment to the Forum of Regulators by June 1 of the relevant financial year, who in turn would forward such status reports to the APTEL, and also publish them on its website. These reports can be viewed on the Forum of Regulators’ website from 2011 onwards.¹ Vaishnava, Chitnis and Dixit, 2018 discuss the supervisory powers of the APTEL, and provide another example of how the APTEL has exercised this power.

As such, the APTEL performs the role of critically reviewing the decisions of the ERCs and exercising supervisory powers over them, providing effective *checks and balances* that are especially important when legislative, executive, and quasi-judicial functions are fused in one entity, such as the ERCs. For a detailed analysis of electricity sector regulation in Tamil Nadu, see Jaitly et al., 2024.

3 Data and methods

APTEL orders are available on its website from 2013 onwards.² We downloaded and identified all orders that involve the TNERC, i.e., orders in which the TNERC was either an appellant or a respondent. This gave us a corpus of 84 appeals. The TNERC website lists orders passed since 2002. Its Annual Reports provide a summary of petitions admitted and disposed for some petition types.³ These Annual Reports are available for the period commencing 2014-2015 and concluding 2021-2022. The TNERC’s Annual Reports also list the number of writs pending before it in the superior courts, including writs related to its orders. The TNERC website lists about 655 orders passed in this period. We took a random sample of 10% of

¹See: <https://forumofregulators.gov.in/reports-submitted-to-aptel.html>

²The orders are also referred to as judgments. However, we use the term orders consistently throughout the paper.

³The petition types include Dispute Resolution Petitions, Review Petitions, Miscellaneous Petitions, Power Purchase Approval Petitions, and *Suo-motu* (sic) Petitions.

these orders, and found an appeal rate of about 8%.⁴

3.1 Creating the dataset

The dataset is based on 82 'indicators' that could be applied to a reading of these appeals to evaluate the TNERC's performance against rule of law benchmarks. In designing these indicators, we have confined ourselves to examining procedural rule of law requirements such as the need to provide reasoned orders, and have not dealt with substantive matters such as evaluating the fairness or correctness of a decision. A detailed description of the indicators, their meaning, and what rule of law requirement they may correspond to is described in (Aggarwal et al., 2024). The 82 indicators can be divided into three categories:

1. Indicators that apply to an order as a whole - e.g., date of the order, and bench composition.
2. Indicators that apply to each appeal - e.g., appeal allowed, appeal dismissed.
3. Indicators that apply to each party - e.g., prayers, modification of sanctions.

A finding against an indicator was only recorded when the language of the order explicitly confirmed the existence or otherwise of that indicator. That is, explicit positive or negative findings against indicators were not recorded based on subjective interpretation of unclear language in an order. Further verification was done as follows:

1. In the first round of the findings recording exercise, each team member read the orders assigned to them and recorded findings against each indicator on a spreadsheet.
2. In the second round, the sets of orders assigned to each team member, and their respective findings spreadsheets, were assigned to another team member, who would verify the findings recorded in the spreadsheet and discuss changes and corrections to the spreadsheet with the person initially assigned those orders.
3. In the final round, all findings were added to a single spreadsheet and a smaller group of lawyers reviewed the consolidated findings. Where necessary, this group consulted with the first- and second-round reviewers for changes and corrections.

⁴We cannot determine the typical time between the TNERC passing an order and the APTEL determining an appeal arising from such an order without studying individual TNERC orders and conducting a life cycle analysis. Multiple appeals may arise from the same order, and one appeal from multiple orders. Some TNERC orders are challenged in superior courts through writ proceedings, and not through appeals before the APTEL. A better approximation of the rate of appeals from appealable orders of the TNERC may only be possible if we conduct a life cycle analysis of individual TNERC orders, which is beyond the scope of this study.

Our data consists of 84 unique appeals from 2013-2022. This date range relates to the date an order was passed; the facts involved in the appeals concerned arose earlier. Our focus here is on each appeal as a whole, rather than on individual parties. We have therefore analysed those indicators that apply to each appeal here. Our specific focus is on the variables discussed below, as these help evaluate how appeals against the regulator’s orders are faring.

3.2 Issues discussed in the orders

While all the appeals provide information about the TNERC’s exercise of its quasi-judicial functions, some appeals relate to issues that also tell us something about how the TNERC performs its executive functions. We noticed six broad sets of issues raised before the APTEL. These are:

1. **Tariff:** The TNERC has the authority to determine tariffs payable by consumers of electricity. We therefore record all instances where an order explicitly refers to how tariffs should be determined as an issue for consideration under this indicator.⁵
2. **Delay, or completion of project/payment:** Appeals involving such issues may involve a contest about the date of completion of a project, and the consequential impact on tariffs. We therefore record all instances of an explicit identification of an issue related to the date of completion of a project under this indicator.⁶
3. **Open access:** The ACT defines open access as *the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or systems by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission*. Certain charges, such as wheeling or banking charges are levied on open access. We recorded a finding against this indicator in all instances where the issues explicitly identified questions related to the charges associated with open access.⁷
4. **Non-payment by state entities:** Some appeals involve disputes related to the non-payment of dues by state entities to power generators. We recorded a finding against

⁵An example of such an issue would be whether the TNERC should adopt the tariff specified in the relevant PPA, or decide that tariff under Section 62 of the Electricity Act, 2003. TANGEDCO v. Penna Electricity Ltd. and Ors., Appeal No. 112 of 2012

⁶As an example, the tariff rates would depend on the date of completion of the power generation project, and the appeal related to what the relevant rate might be. (Kamuthi Solar Power Ltd. v. TNERC and Ors., appeal No. 287 of 2021)

⁷As an example, an appeal related to “Abnormal rise of banking charges”, and disputes over “Transmission and Wheeling Charges and Line Losses.” (Beta Wind Farms (P) Ltd. v. TNERC and Ors., Appeal No. 197 of 2012)

this indicator whenever the order explicitly identified this as an issue.⁸

5. **The use of regulatory powers:** The exercise of its regulatory authority by the TNERC, such as how it determines various tariffs, or how it delegates certain powers to other state entities may give rise to issues in an appeal. We recorded a finding against this indicator wherever an order identifies such issues.⁹
6. **Renewable Purchase Obligations:** Distribution Licensees, consumers owning grid-connected Captive Generating Plants (CGPs) and open-access consumers in Tamil Nadu are mandated to purchase a minimum specified percentage of their requirements from renewable energy sources. This obligation is known as an RPO. We recorded a finding against this indicator wherever an order identified a question related to the applicability of RPOs to an entity as an issue for consideration.¹⁰

The outcomes on appeals related to all six issues are informative about the TNERC’s performance in exercising its quasi-judicial functions. We are also interested in a specific part of the broader set of quasi-judicial functions, which is how good the TNERC is at adjudicating contractual disputes. Performance on appeals related to issues 2 and 4 tells us about this. Performance on appeals related to issue 5 can tell us about the quality of the TNERC’s performance of its executive functions.

3.3 Describing the data

Table 1 presents the dataset. There are a total of 84 appeals. For each appeal, we create two categories called ”appellant is state”, and ”respondent is state”, which we populate if even one of the entities listed in the respective sets of parties (i.e., appellants or respondents) to the appeal includes a State institution, such as the Tamil Nadu Generation and Distribution Company (TANGEDCO), the Tamil Nadu Transmission Corporation Limited (TANTRANSCO), or the Tamil Nadu Electricity Board (TNEB). In any case, the TNERC is a respondent in all the appeals, as all the orders included in our study are appeals from the regulator’s decisions. Non-state entities include private sector firms as well as consumer or industry associations.

Of the total appeals, 70 (83%) pertain to non-state entities appealing a decision of the TNERC

⁸See, OPG Power Generation Pvt. Ltd. v. Tamil Nadu Electricity Board and Ors., Appeal No. 68 of 2014

⁹For example, an appeal related to whether the regulator was correct in proceeding to determine a tariff in a suo-moto proceeding without circulating a consultative paper to the stakeholders concerned. (Beta Wind Farms (P) Ltd. v. TNERC and Ors., Appeal No. 197 of 2012)

¹⁰For example, an appeal involved issues about whether the regulator had correctly specified solar purchase obligations for different categories of consumers. (Tamil Nadu Electricity Consumers’ Association v. TNERC and Ors., Appeal No. 92 of 2013)

Table 1 The APTEL dataset

Appellant	Respondent	
	State	Not-state
State	2	12
Non-state	70	0

before the appellate tribunal. All appeals by non-state entities pertain to a TNERC decision that was in favour of a state entity. State entities have appealed only 14 decisions, of which 12 (86%) pertain to a decision that was in favour of a non-state entity. The data suggests that most appeals are by non-state entities against orders passed by the regulator in favour of state entities.

4 Results

The outcome of an appeal at the APTEL can only be a combination of four decisions - either the appeal is dismissed, fully allowed, partly allowed, or remanded back to the regulator. The detailed definitions of the decisions are as follows:

1. *Appeal dismissed*: The Tribunal rejected the appellants' prayers, and upheld TNERC's initial order.
2. *Appeal partly allowed*: The Tribunal granted some of the appellants' prayers, and struck down or modified some parts of the TNERC's initial order.
3. *Appeal fully allowed*: The Tribunal granted all of the appellants' prayers, and struck down the TNERC's initial order entirely.
4. *Appeal remanded*: The Tribunal sent the matter back to the TNERC for reconsideration. A remand may typically be ordered where an appellate court considers that the adjudicator decided the matter erroneously on a preliminary point without evaluating it substantively, or where it feels that a re-trial is required in the interests of justice. A remand indicates that the TNERC has failed to decide the matter appropriately in the first instance. The reasons for remand are important in evaluating the TNERC's quasi-judicial functions.¹¹

Table 2 Overall performance of TNERC

The table presents the overall performance of the TNERC. If an order is partly or fully allowed and remanded, it is recorded as the former. The “only remanded” refers to orders that are silent on whether they are partly or fully allowed. A total of 20 orders are remanded. However, only 3 of them are “only remanded”.

Outcome	N
Dismissed	34
Partly allowed	19
Fully allowed	22
Only remanded	3
Disposition not explicit	6

4.1 Dismissed and allowed appeals

Table 2 presents the results for the overall performance of the TNERC at the APTEL. The appellants’ petition is dismissed in 40% appeals. In the remaining 52% of appeals, the regulator is not able to hold its ground. The regulator’s decision is entirely struck down in 26% of the appeals, while it wins partially in 23% of the appeals. There are 20 appeals where the appeal is remanded back to the regulator - 17 out of these are also either partially or fully allowed. In a large majority of these appeals, the respondent is a State entity. That is, the TNERC rules in favour of the State, and more often than not loses the appeal before the APTEL.

Table 3 presents the results of appeals by issue. Note that an appeal may involve more than one issue, and hence, the number of issues involved is more than the number of appeals. Tariffs are the most frequent issue in these orders, and the regulator loses 61% of its appeals in this area. Similarly, its performance on RPOs is also poor at 78%. In the class of contractual disputes, there are two broad sets of issues related to *delay, or completion of project/payment, and non-payment by state entities*. There are not too many appeals on contractual issues from the TNERC before the APTEL. The regulator seems to fare better on issues related to non-payment, but not on issues of completion or delay. In those instances, the regulator’s decisions are not upheld almost 75% of the time.

There were 28 issues raised in appeal before the APTEL on the question of the “use of regulatory powers”, and the regulator lost 86% of these matters. This issue is the most important from the perspective of “regulatory governance”, in that, a high number would

¹¹See Shivakumar v. Sharanabasappa, Civil Appeal No. 6076 of 2009, Supreme Court of India for a discussion on this)

Table 3 Performance by issue

The table presents the the results of appeals by issue. Note that an appeal may involve more than one issue, and hence, the number of issues involved is more than the number of appeals.

	Total	Appellant win
Tariff	38	61%
Use of regulatory powers	29	86%
Open access	10	20%
Renewable purchase obligations	9	78%
Non payment	7	29%
Completion/delay	4	75%

suggest that the regulator is being challenged on the manner in which it uses its powers, implying that there are deeper problems in the rule of law in the regulatory state. The TNERC's performance in this area raises concerns about the quality of regulatory governance in the sector and potential abuses of authority.

4.2 Remands

The fact that over 24% of appeals from the TNERC's orders are remanded back to it by the APTEL is more worrying from a regulatory governance perspective than appeals being allowed. This is because an order being remanded potentially doubles the time required to resolve a matter, and can be particularly telling about how the TNERC discharges its quasi-judicial functions.

An appeal being allowed means that the regulator decided a particular question wrongly. This is a marker of the quality of decision-making. But an appeal being remanded means that the regulator failed in certain basic aspects of the judicial process. It is bad enough if the regulator makes a poor decision, but much more worrying if it has not gone through the process of decision-making appropriately. If it does not do a good job at judicial process basics, it is unlikely it will get better at making decisions.

The fact that 20 out of 84 appeals were remanded indicates that the APTEL found serious errors in the manner in which the TNERC exercised its quasi-judicial authority, and effectively directed it to re-examine the matter, either wholly or in part. Remands are to be ordered only where there is insufficient evidence on record for the appellate court to determine the matter itself,¹² This general rule may not apply to the APTEL, which may decide either that

¹²See: Arvind Kumar Jaiswal (D) thr. Lr. vs. Devendra Prasad Jaiswal Varun (13.02.2023 - SC Order) :

it should direct the TNERC to determine the matter rather than resolving the matter itself, or that in such instances, the APTEL felt that the TNERC did not ensure that all the evidence necessary to decide the matter was brought on record, despite being conferred the powers of a Civil Court for such purposes under Section 94 of the ACT. In either event, the result of such failures would be that the matter is prolonged further while the TNERC reconsiders the matter, with the possibility that an appeal may be preferred from its (reconsidered) order.

Why does the APTEL remand 24% of the TNERC's orders? Table 4 in the Appendix presents the reasons for remand in a subset of the orders we studied comprising all instances of remand. These provide further insight into the quality of the TNERC's exercise of its executive and quasi-judicial functions:

1. In four orders, the APTEL held that the TNERC failed to recognise that the matter before it required an exercise of its regulatory, rather than its dispute resolution powers. Further, it found that the TNERC dismissed petitions for a perceived failure of correct categorisation without examining the prayers to determine the exact nature of the matter before it. In effect, it relied upon the Tamil Nadu Electricity Regulatory Commission - Fees and Fines Regulations, 2022 which, as the APTEL points out, "only define the fees to be charged from a particular petitioner for a particular type of Petition", to dismiss the petition on the grounds that it had been erroneously classified under those Regulations. More simply, in such instances the TNERC chose to dismiss the matter altogether rather than direct the petitioner to pay the correct fees and get on with the job of examining the matter on merits. Such actions create delays in resolving matters since such orders are likely to be remanded when appealed, leaving open the possibility of further appeals. In a fifth order, the APTEL held that the TNERC issued orders that it could not have in the type of matter before it - that it issued directions that could only have been issued in a dispute resolution matter when the petition before it related to the exercise of its regulatory powers. Such instances demonstrate the erroneous interpretation of the scope of its powers by the TNERC.
2. In two orders, the APTEL found that the TNERC had failed to publish consultative papers before issuing regulations. These instances indicate the failure of the regulator to follow basic regulatory processes in the exercise of its legislative powers, giving rise to failure of rule of law concerns.
3. In two orders, the TNERC refused to exercise jurisdiction over matters that it should have determined, prompting the APTEL to say in one instance that this was "an attempt

MANU/SCOR/20811/2023; Shivakumar and Ors. v. Sharanbasappa and Ors., MANU/SC/0395/2020).

to run away from responsibility, or shall we say, abdication of the jurisdiction”. In a third order, the APTEL stated that ”The State Commission has passed the impugned order merely on suspicion.” These orders indicate egregious errors in the manner in which the regulator wields its quasi-judicial authority.

4. In one instance, the APTEL found that the TNERC had violated settled principles governing subordinate legislation and had wrongly delegated powers to the TANGEDCO. The APTEL stated: ”Vesting critical functions like verification of status of CGPs, captive users in the State of Tamil Nadu by the Commission upon an authority which can be a direct beneficiary of such process, cannot be said to be free and fair on the face of it.” In this instance, therefore, the TNERC, a State entity entrusted with certain powers, chose to pass on those powers to TANGEDCO, another State entity, even though the TANGEDCO would be directly impacted by the manner in which those powers were exercised. This raises serious questions about bias in the TNERC’s decision-making.

A reading of the APTEL’s reasons for ordering such remands points at the need for improvement in the manner in which the TNERC exercises its quasi-judicial powers, and also illuminates how the regulator contributes to a delay in the determination of matters it should resolve in the discharge of its quasi-judicial functions.

As stated earlier, our findings are based on the presence of explicit language in the orders we studied. A subjective reading of the APTEL’s language in the orders we studied might indicate problems in the manner in which the TNERC exercises its regulatory authority in about 23 out of 28 orders described in the Appendix. Such problems range from a failure to correctly determine various rates and tariffs under its regulations, a failure to consider methods and principles adopted by all other State ERCs and the CERC, errors in interpreting its regulations, and the aforementioned mistakes in interpreting the extent of its authority, and failures to follow basic regulatory requirements in the issuance of its regulations. Collectively, these indicate the TNERC’s poor record in the exercise of its regulatory functions.

5 Conclusion

Our analysis of the data about the TNERC’s performance in appeals before the APTEL raises serious concerns about the exercise of quasi-judicial authority by the TNERC, the quality of regulatory governance in the electricity sector in Tamil Nadu, and serious gaps in state capacity.

Our results indicate a need for some rethinking about the strength of institutional checks and

balances within the TNERC as well as the qualifying credentials and appointment processes for, and the training provided to TNERC staff, in particular, adjudicating officers. We also hope to provide suggestions for better order writing and other improvements to quasi-judicial functions at State ERCs. We understand that the problems in each State are unique, but given the broad similarity in the scope of the various State ERC's functions and powers, we suggest that some common solutions and suggestions may be derived from a comparative study across State ERCs.

Therefore, we propose to conduct similar studies examining other State ERCs, and a comparative study across ERCs. These may demonstrate that the TNERC is not particularly worse off than other State ERCs in how it discharges its functions and exercises its authority - but this would be an even more worrying finding about the electricity sector across India.

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Appendix

In the table below, we have described the reasons for the TNERC suffering 'some loss' at the APTEL.

Name of Judgment	Reasons for Remand
Indian Railways v. The Chairman and Managing Director, Tamil Nadu Electricity Board Limited and Ors., Appeal No. 188 of 2019	<p>The TNERC failed on at least two counts:</p> <ol style="list-style-type: none">1. It failed in the discharge of its regulatory responsibility to frame the relevant regulations in a timely manner, as required by the statute, and2. It failed in the exercise of its quasi-judicial functions by refusing to exercise jurisdiction over the petition because of its own failure to frame the relevant regulations, and because it was dissatisfied with the form of the petition presented before it.
Ramnad Solar Power Ltd. v. TNERC and Ors., Appeal No. 350 of 2017	<p>The TNERC:</p> <ol style="list-style-type: none">1. Failed to recognise that the matter before it required an exercise of its regulatory, rather than its dispute resolution authority; and2. Dismissed the petition for a perceived failure of correct categorisation without examining the prayers to determine the exact nature of the matter before it. In effect, it relied upon the Tamil Nadu Electricity Regulatory Commission - Fees and Fines Regulations, 2022 which, as the APTEL points out, "only define the fees to be charged from a particular petitioner for a particular type of Petition", to dismiss the petition on the grounds that it had been erroneously classified under those Regulations.
M/s Kamuthi Renewable Energy Ltd. v. Tamil Nadu Electricity Regulatory Commission & Ors., Appeal No. 71 of 2017	<p>The TNERC failed to read its own TNERC (Conduct of Business) Regulations, 2004 correctly, and refused to place an order of the Secretary before the Chairperson.</p>
Chennai Metro Rail Limited v. TANGEDCO and Ors., Appeal No. 262 of 2016	<p>The TNERC did not take a decision on the Chennai Metro Rail Ltd.'s prayer for special category status, and, according to APTEL, this was "an attempt to run away from responsibility, or shall we say, abdication of the jurisdiction".</p>

Biomass Power Producers Association, Tamil Nadu v. TNERC and Ors., Appeal No. 170 of 2016

The TNERC did not consider the data and analysis recommended by a Committee for deciding various parameters associated with biomass power plants, and hence, according to APTEL "All these facts clubbed together have resulted in determination of various parameters by the State Commission as inadequate and hence, the same are to be looked into afresh by the State Commission".

The South Indian Sugar Mills Association and Ors. v. TNERC and Ors., Appeal No. 199 of 2012

The APTEL directed the TNERC to:

1. Frame regulations for the issuance of a consultative paper, which it had not done;
2. Reconsider its decision regarding the calculation of capital costs of the power generators;
3. Fix the fuel costs afresh after providing the appellants an opportunity to furnish further materials;
4. Reconsider its decision on the incentives for generation beyond threshold Plant Load Factor; and
5. Reconsider its findings on O&M charges.

Beta Wind Farm P) Ltd. v. TNERC and Ors., Appeal No. 197 of 2012

In a batch of appeals challenging the comprehensive tariff order for Wind Energy dated July 31, 2012 issued by the TNERC, the APTEL directed that:

1. The TNERC should have issued a Consultative Paper in advance. It remanded the matter to the TNERC for reconsideration of some issues where it felt that the Appellants should be heard by the TNERC;
2. Modified the scope of application of the tariff order;
3. Reversed the TNERC's order on Annual Maintenance Contract Charges and Insurance Charges;
4. Reversed the TNERC's findings on Time Value of Money;
5. Set aside the TNERC's findings on the issue of Abnormal Rise of Banking Charges and directed it to reconsider the issue afresh;
6. Set aside the TNERC's findings on Deemed Demand Charges and directed it to reconsider the matter; and
7. Set aside the TNERC's order on encashment or lapsed Units by REC captive users and directed it to consider the matter afresh.

Solitaire BTN Solar Private Ltd.
v. TNERC and Ors., Appeal No.
67 of 2021

The APTEL held that:

1. The delay in the implementation of the project due to the unavailability of the transmission system was for reasons beyond the Appellant's control, and was a Force Majeure event; and
2. Set aside the impugned order of the TNERC while directing it to consider the matter afresh.

Adani Green Energy (Tamil
Nadu) Ltd. v. TNERC and Ors.,
Appeal No. 352 of 2017

While allowing the appeal and remanding the matter, the APTEL held that:

1. The TNERC erroneously classified a matter as one which should have been filed as a Dispute Resolution Petition when it was in fact a matter involving the exercise of its regulatory functions, and should therefore have been filed as a miscellaneous petition; and
2. As in Ramnad Solar in item 2 above, the TNERC dismissed the petition for a perceived failure of correct categorisation without examining the prayers to determine the exact nature of the matter before it. In effect, it relied upon the Tamil Nadu Electricity Regulatory Commission - Fees and Fines Regulations, 2022 which, as the APTEL points out, "only define the fees to be charged from a particular petitioner for a particular type of Petition", to dismiss the petition on the grounds that it had been erroneously classified under those Regulations.

Ramnad Renewable Energy Ltd.
v. TNERC and Ors., Appeal No.
31 of 201

In this matter, the APTEL remanded the matter to the TNERC since it erroneously classified a matter as one which should have been filed as a Dispute Resolution Petition when it was in fact a matter involving the exercise of its regulatory functions, and was therefore correctly filed as a miscellaneous petition.

Kamuthi Renewable Energy Ltd.
v. TNERC and Ors.

In this matter too, the APTEL remanded the matter to the TNERC since it erroneously classified a matter as one which should have been filed as a Dispute Resolution Petition when it was in fact a matter involving the exercise of its regulatory functions, and was therefore correctly filed as a miscellaneous petition.

Southern India Mills' Association v. TANGEDCO and Ors., Appeal No. 257 of 2012	The APTEL partly allowed the appeal to the extent that the matter regarding differential tariff for peak and off-peak hours was remanded to the State Commission with necessary directions to reconsider and re-determine the energy rates for peak and off-peak hours.
National Solar Energy Federation of India v. TNERC and Ors.	Allowing the appeal, the APTEL held that the TNERC had erred in denying generation charges/ compensation for issuing backing down instructions to the Appellant association's members for reasons other than grid security.
Kamuthi Solar Power Ltd. v. TNERC and Ors., Appeal No. 287 of 2021	The APTEL allowed the appeal as it held that the TNERC had erroneously disallowed the tariff under its Tariff Order dated September 12, 2014 for the solar PV projects commissioned by the Appellants.
JSW Steel Ltd. v. TNERC and Ors., Appeal No. 278 of 2015	Holding that captive cogeneration plants were not under a legal obligation to purchase power from renewable sources of energy in order to meet their Renewable Purchase Obligation, the APTEL allowed the appeals, and stated that the TNERC "proceeded to pass the impugned Order without evaluation of the material available on records and the case made out by the Appellant."
Techno Electric & Engineering Co. Ltd. v. TANGEDCO and Ors., Appeal No. 232 of 2017	Allowing the appeal, the APTEL held that the TNERC's notification of June 19, 2013, amending the definition of the APCC should not be given effect to in as much as till date, the APCC of a year had not exceeded the preferential tariff payable to wind generators for that corresponding year. The APTEL also directed that the APCC should be compared by the TNERC on a year-to-year basis and the proposed cap in its order should be implemented for years in which the APCC rate crosses over the rate of preferential tariff for that year. The TNERC was also directed to issue the necessary instructions to TANGEDCO to pay the Appellant at the full APCC rate without applying any cap for the period in question in the appeal.
Tamil Nadu Electricity Consumers' Association v. TNERC and Ors., Appeal No. 92 of 2013	The matter related to Renewable Purchase Obligations and Solar Purchase Obligations, and the TNERC's order of March 7, 2013 in relation thereto. Allowing the appeal, the APTEL held that the TNERC had "simply tried to implement the directions of the State Government by passing the impugned order without considering its own functions and powers under the 2003 Act and its own Renewable Energy Regulations notified under the Act and even without considering the other important issues raised by the objectors."

National Solar Energy Federation of India v. TNERC and Ors., Appeal No. 51 of 2021	The appeal was filed by solar power generators directly and through their federation, challenging the TNERC's order dated December 22, 2020, refusing issuance of directions restraining TANGEDCO from making deductions on account of Capacity Utilization Factor beyond 19%. The APTEL allowed the appeals, and directed the TANGEDCO to make the relevant payments to the Appellants.
TANGEDCO and Ors. v. TNERC and Ors., Appeal No. 321 of 2021	Allowing the appeal, APTEL held: "The appellant is right in arguing that since OPG had approached the State Commission invoking its regulatory jurisdiction, rather than dispute resolution jurisdiction, it having been expressly made clear by the appellant that no money claim was pressed for adjudication, the Commission could not and should not have given the directions in the nature given in the operative part of the impugned order".
Tamil Nadu Power Producers Association	Partly allowing the appeal, the APTEL held that the TNERC had exceeded the permissible limits of delegated legislation by delegating certain powers to the TANGEDCO, and certain parts of the TNERC's impugned order disregarded Rule 3 of the Electricity Rules, 2005. The APTEL stated: "Vesting critical functions like verification of status of CGPs, captive users in the State of Tamil Nadu by the Commission upon an authority which can be a direct beneficiary of such process, cannot be said to be free and fair on the face of it."
Raghu Rama Renewable Energy Ltd. v. TANGEDCO and Ors., Appeal No. 181 of 2013	Partly allowing the appeal, the APTEL held that the TNERC made an error in awarding compensation for short supply of power to the TANGEDCO "when it had failed to perform its own reciprocal promise and creating circumstances leading to non-fulfilment of obligation of maintaining contracted supply on the part of the Appellant."

<p>Sai Regency Power Corporation Pvt. Ltd. v. TANGEDCO and Ors., Appeal No. 71 of 2015</p>	<p>While not disturbing the impugned order,, the APTEL partly allowed the appeal, and held: "...we find it appropriate to direct the State Commission to consider the view points of the Appellant, a generator, who takes startup power from the Respondent No.1, a distribution licensee, on attaining commercial operation date. The generation in the country is to be promoted as the motive and the objective of the Electricity Act, 2003, for encouraging such kind of generation, there should be a separate category for generators drawing startup power for initiating generation from the station which will cater to the need of the power in the State. Thus, a separate category of such kind of generators should be created and a separate tariff in such category should be determined. The State Commission should consider these aspects in a positive manner in the immediate future and to frame the relevant regulations in this regard."</p>
<p>Cauvery Power Generation Chennai Pvt. Ltd. v. TNERC and Ors., Appeal No. 267 of 2014</p>	<p>The APTEL partly allowed the appeal, and set aside the TNERC's introduction of Grid Facilitation Factor for calculation of tariff for infirm power, holding that it was not in consonance with the applicable Regulations.</p>
<p>OPG Renewable Energy Pvt. Ltd. v. TANGEDCO and Ors., Appeal No. 196 of 2013</p>	<p>Partly allowing the appeal, the APTEL held that the TNERC had made errors in its approvals of Capital Expenditure without approval of Capital Investment Plans, set aside its findings regarding rates for peak hours/ off peak hours tariffs, voltage-wise cost of supply, and directed it to notify a road map for the reduction of cross subsidy as per the Tariff Policy.</p>
<p>Simran Wind Projects Private Limited</p>	<p>The APTEL partly allowed the appeal, and held that the TNERC had erred in its interpretation of the term 'Financial Year', as a result of which its order relating to rates was made applicable from the date the order was passed, and not from the commencement of the Financial Year.</p>
<p>The South Indian Sugar Mills Association v. TNERC and Ors., Appeal No. 199 of 2012</p>	<p>Partly allowing the matter, the APTEL modified the impugned order, directing the TNERC to change its method of computing receivables and to allow rebates for payment within one month of presentation of bills as per the Central Commission's Regulations, and that the provisions of the impugned order should not be made applicable to sugar mills who sell their energy to distribution licensees.</p>

<p>Welspun Renewables Energy Private Limited v. TNERC and Ors., Appeal No. 118 of 2016</p>	<p>The appeals were filed challenging the TNERC’s suo-moto Comprehensive Tariff Order on Solar Power dated March 28, 2016. The APTEL partly modified the order, and directed the TNERC to follow the CERC’s and other all other State REC’s methods and principles in calculating various components of tariff, as well as to re-compute various components of tariff.</p>
<p>Rengaraaj Ispat Industries Pvt. Ltd. v. The Tamil Nadu Electricity Board and Ors., Appeal No. 190 of 2013</p>	<p>Partly allowing Appeal No. 191 of 2013, one of the batched appeals in the matter, the APTEL held that ”It is not established conclusively that the Appellant was misusing the service connection... for purpose other than the start up power. The State Commission has passed the impugned order merely on suspicion.”</p>

Table 4 TNERC’s Losses at the APTEL