

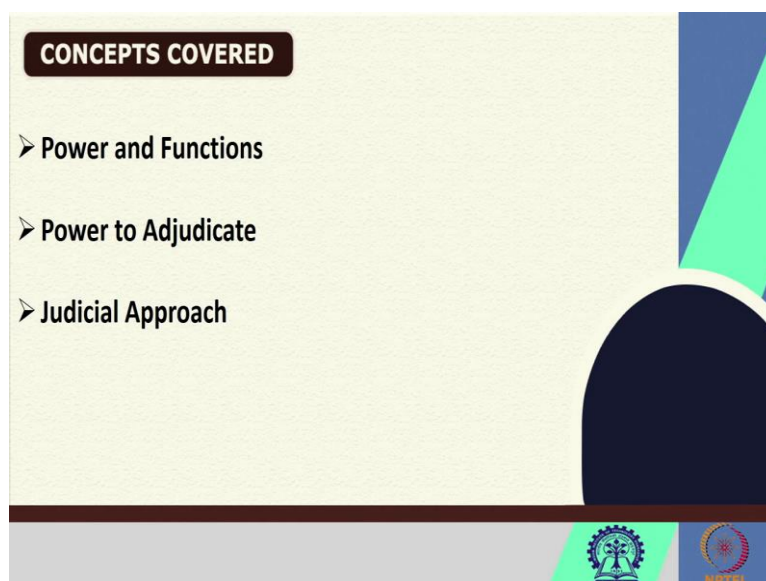
Introduction to Law on Electricity
Professor Uday Shankar
Rajiv Gandhi School of Intellectual Property Law
Indian Institute of Technology Kharagpur
Lecture 31
Regulatory Commissions (Contd.)

(Refer Slide Time: 00:19)



Greetings to all the learners. So, in the last session, we have studied about regulatory commission. Let us continue to discuss some of the facets of regulatory commission. And also let us understand that the important functions which the regulatory commission discharges.

(Refer Slide Time: 00:34)



Now, in this session, we will try to understand what are the power and function of the regulatory commission, the most important power to adjudicate, and how it is to be understood. And also, what are the opinion of the court on the power of the commission.

(Refer Slide Time: 00:49)



➤ Electricity Regulatory Functions – Mandatory, Advisory and Legislative Functions

➤ Mandatory Function (Secs. 79(1) and 86(1))

- Tariff Regulations, overseeing interstate transmission of power, issuance of licenses, adjudication of disputes between generating stations and/or transmission licensees
- Can be classified into two-
 - Decision-making
 - Adjudication
- Former is general application of rules – later is involvement of specific individuals

The slide features a video feed of a speaker in a white shirt on the right side. At the bottom, there are logos for IIT Bombay and NPTEL.

Now, when you look at the scheme of the law, there are three important functions which are being entrusted upon the regulatory commission. One is the mandatory, second one is the advisory, and third one is the legislative. Now, mandatory and legislative, you would find a bit overlapping, but I have placed them separately because of the very fact that I have considered regulation making power as a legislative one.

Though we have studied while discussing tariff, that tariff fixation is also of legislative character. So, please take note of this when you are reading on tariff and then when you are reading about the power and function of the regulatory commission at this stage. Now, when you look at the mandatory function, you would find that section 79(1) in case of Central Electricity Regulatory Commission and section 86(1) in case of State Electricity Regulatory Commission describes the function of the commission.

And what are the main functions? Tariff regulation, overseeing interstate transmission of power, in case of State Electricity Regulatory Commission, it will be intrastate, issuance of license, adjudication of disputes between the generating stations and the licensees. So, you can find that the function which is given under Section 79, it can be classified into two components, one is the decision making which is about the issuance of the license, which is about the revocation of license, which is about the suspension of license, which you have discussed in detail in the earlier sessions.

It is about a tariff determination. It is about ensuring that tariff determination through competitive bidding has been done in a fair and transparent manner. So, that these kinds of functions I am categorizing under the decision-making heading. And the second one is the adjudication because commission has also been entrusted to adjudicate, adjudicate the dispute which may arise on the issue of tariff, which may arise on the issue of issuance of license, which may arise on the issue of interstate transmission.

In case of state, it is intrastate transmission. So, we need to understand that the nature of the function of the commission when it is exercising a function distinct from adjudicatory is different. In adjudication, it is about examining the specific case which has been brought by the individual, whereas tariff regulation, issuance of license, in such kind of situation, the commission decides based on general application of rules, what is in consonance with the scheme of the Act.

(Refer Slide Time: 04:39)

- **Advisory Function (Secs. 79(2) and 86 (2))**
 - Formulation of National Electricity and National Tariff Policies, encouragement of investments in the sector, improving its efficiency and financial revival of the power sector in general
- **Legislative Functions (Secs. 179 and 181)**
 - Regulations related to licence; Grid Code; levying and collection of fees; transmission charges; reduction of surcharge and cross-subsidy; standards of performance of licensees; Procedure for tariff determination; etc
 - Legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases

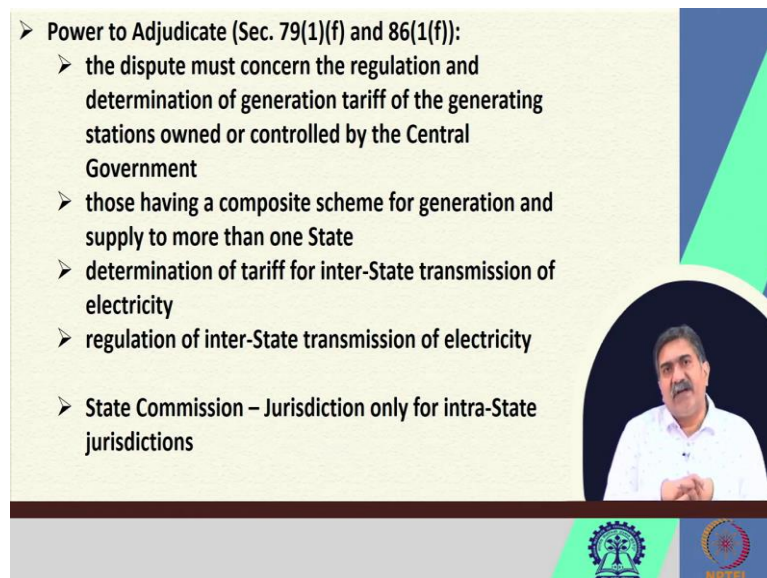
And we have also looked into the advisory function in the last session, which is given under section 79 subsection 2, or section 86 subsection 2 where the commission advises the government to formulate the electricity and the tariff policy and it encourages the investment in the sector. And also the production of the consumer and also efficiency and economy in the power sector. So that is the advisory function of the commission.

And we have discussed in detail that this advice has to be given a considerate thought; it must not be seen as only an empty formality. And as I said, that section 179 and section 181 confer rule making power on the regulatory commission. Central Commission or the State Commission has been given power to notify the regulations.

Now, notifying the regulation in relation to the licensing, notifying the regulation in terms of grid code, notifying the regulation in terms of open access, notifying the regulation in terms of trading margin, levying and collection of fees, transmission charges on the issue of subsidy and cross subsidy, and standards of performance to be followed by the licensees and what shall be the procedure for tariff determination. On all these, regulations can be made.

So, please do take note that the regulation making power which is primarily legislative in nature is conferred on the commission under section 179. And when I say legislative in character, what we need to understand that the commission need not consider particular cases for framing the regulations. It has to keep in mind the general rule of conduct that what is to be applied generally in a situation.

(Refer Slide Time: 07:21)



➤ Power to Adjudicate (Sec. 79(1)(f) and 86(1)(f)):

- the dispute must concern the regulation and determination of generation tariff of the generating stations owned or controlled by the Central Government
- those having a composite scheme for generation and supply to more than one State
- determination of tariff for inter-State transmission of electricity
- regulation of inter-State transmission of electricity

➤ State Commission – Jurisdiction only for intra-State jurisdictions

The slide features a video inset of a man in a white shirt speaking. At the bottom, there are logos for the Central Board of Secondary Education (CBSE) and the National Power Training Institute (NPTI).

So, that is what we need to consider when you are making a distinction between legislative function of the commission and the adjudicatory function of the commission. And why I am highlighting on this because the procedure would differ. In legislative function, the procedural requirement would be different. There may not be a very strict compliance of principles of natural justice, in case of legislative function. But in case of adjudicatory one perhaps, it may be suggested.

And also, in adjudication, it is about looking into the case which has come before the commission. So, what are the disputes which the commission can adjudicate under section 79 or section 86? It says the dispute must concern the regulation and determination of generation of tariff of the generating stations owned or controlled by the central government or those having a composite scheme for generation and supply to more than one state, determination

of tariff for interstate transmission or regulation of interstate transmission of electricity. And state commission shall have jurisdiction only for intrastate subject matters. So, section 79(1) clause a to d is what is the subject matter which has been given.

(Refer Slide Time: 09:12)



➤ Power to Adjudicate (Sec. 79(1)(f) and 86(1)(f)):

- Adjudication is determinative of the past and the present while legislation is indicative of the future
- Regulatory Commission is entrusted with judicial power – proceedings are quasi-judicial in nature
 - The judicial bodies generally deal with bipolar centric interests – generally - apply laws to facts.
 - The regulatory bodies are required to balance interests of multiple groups for the overall development of the sector
 - The procedure and processes that these bodies are required to follow would have to be different

The slide features a video inset of a man in a white shirt with his hands clasped in a prayer-like gesture. At the bottom, there are logos for a university and NPTEL.

Now, as I said, that adjudication is different from the legislative function. Adjudication is all about what has been done and how the same has to be resolved. Legislative is all about laying down the guidelines for future. Please do acknowledge and appreciate that the regulatory commission has been entrusted with both the tasks, these tasks to frame regulation and the task to adjudicate and also to decide under section 79, decide on tariff fixation, and decide on licensing.

So, when the regulatory bodies are being entrusted with the judicial power then certain safeguards are to be taken note of, and certain approaches are to be appreciated. One is the regulatory body is entrusted with the judicial power. The functioning of such body is quasi-judicial in nature.

So, judicial and quasi-judicial, we need to understand by using this terminology that one is about acting judicially, the other is about acting judiciously, judicial power is about to act judicially, quasi-judicial is about to act judiciously. So, when the regulatory bodies are entrusted with a judicial function, what is there is about looking at the facts and applying law, what is being said as bipolar centric interest where parties are there, parties are alleging that their rights are being violated and the adjudicatory body has a responsibility to look at the relevant law and resolve the dispute accordingly.

And in that process, regulatory bodies need to take into account the interests of the multiple groups. In fact, this is very prominent aspect for entrusting adjudicative function on the commission and not on the court of law. Because court of law would only look at what issue has come and how it is to be resolved.

But then, regulatory bodies would look into the larger interest, larger interest of the sector, larger interest of the stakeholders. And thus, the procedure, the process which the regulatory body would follow, that is entirely different from what is being followed at the or in the judicial process.

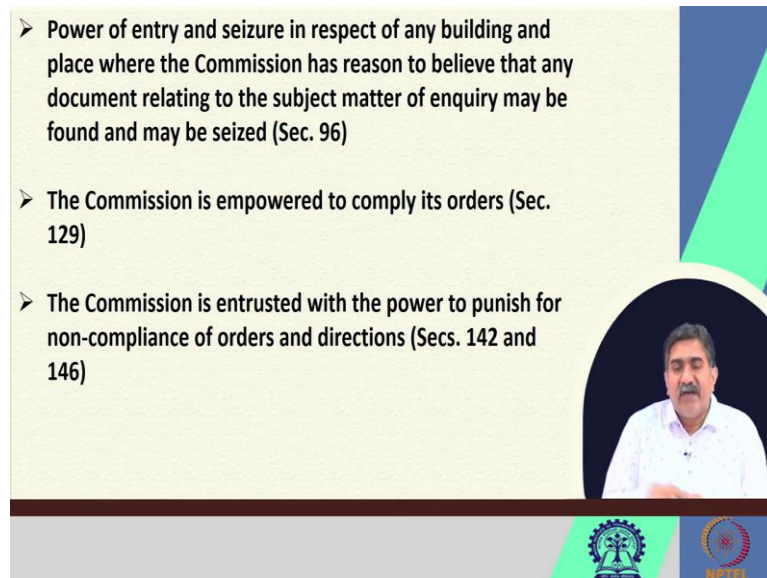
(Refer Slide Time: 12:39)

- Quasi-Judicial Function/Adjudicatory Function of the Regulatory Commission (Sec. 94)
 - summon and enforce attendance of witnesses
 - examine any witness under oath
 - receive evidence on affidavits
 - review its directions, orders, and decisions
- All such proceedings before the Commission - deemed to be judicial proceedings (Secs 198 and 228 IPC)
- The commission would be a civil court for purposes of Secs. 345 and 346 Cr PC

So, look at the legislative scheme, look at the provisions which are there in the Electricity Act for the same. In order to strengthen the hand of the regulatory commission to effectively adjudicate a dispute, section 94 empowers the commission to summon and enforce the attendance of a witness and examine any witness under the oath so that later on, there shall be no distraction or if there is a distraction, it shall be followed up by necessary punitive action, receive evidence on affidavits, reverse direction, orders and decision, so it can also review its own order.

And in order to attach sanctity to the proceedings, the proceeding shall be considered to be a judicial proceeding as it has been defined under section 198 or section 228 of the Indian Penal Code. And also, it has been suggested that the commission would be a civil court for the purposes of section 345 and section 346 of CRPC. This kind of provision, you would find almost in every adjudicatory body which has been entrusted to discharge judicial function which has been entrusted to resolve a dispute.

(Refer Slide Time: 14:11)



➤ Power of entry and seizure in respect of any building and place where the Commission has reason to believe that any document relating to the subject matter of enquiry may be found and may be seized (Sec. 96)

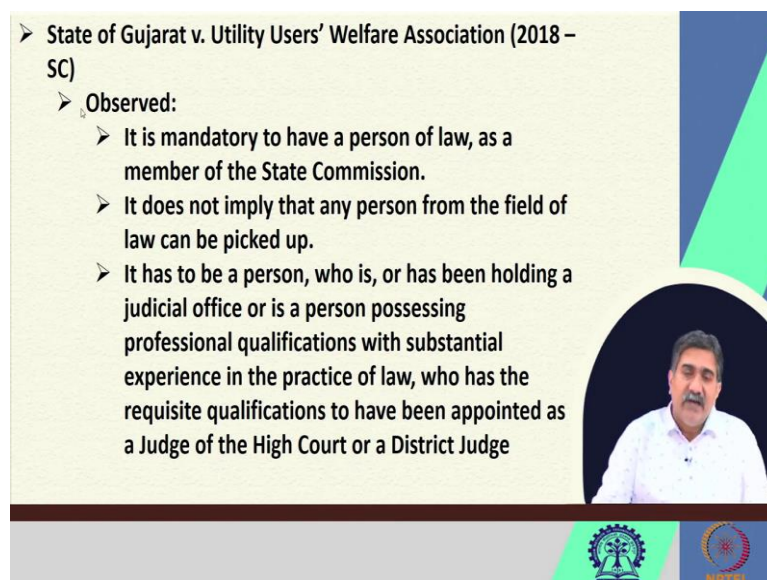
➤ The Commission is empowered to comply its orders (Sec. 129)

➤ The Commission is entrusted with the power to punish for non-compliance of orders and directions (Secs. 142 and 146)

The slide features a speaker in a circular inset on the right and logos for the Indian Institute of Technology (IIT) and NPTEL at the bottom.

Commission has also been given a power to enter into any premise and seize any document which the commission believe that is related to the inquiry which is ongoing. And commission, under section 129, also has a power to comply with the directions. And if noncompliance is there, section 146 and section 142 entrust the necessary authority on the commission to punish for such noncompliance.

(Refer Slide Time: 14:43)



➤ State of Gujarat v. Utility Users' Welfare Association (2018 – SC)

➤ Observed:

- It is mandatory to have a person of law, as a member of the State Commission.
- It does not imply that any person from the field of law can be picked up.
- It has to be a person, who is, or has been holding a judicial office or is a person possessing professional qualifications with substantial experience in the practice of law, who has the requisite qualifications to have been appointed as a Judge of the High Court or a District Judge

The slide features a speaker in a circular inset on the right and logos for the Indian Institute of Technology (IIT) and NPTEL at the bottom.

Now, the court has come up with the interesting analogy and interesting interpretation. This State of Gujarat versus Utility Users Welfare Association is one of the such landmarks judgments which the Supreme Court has given in the year 2018. In this case, an important

question was raised that should the commission be allowed to function without having any legal member?

Why this question was raised? Because adjudication is one of the essential functions of the commission. And section 79 or section 86, clearly spells out the power of the commission. And the composition, when we read, it says that there shall be a member from legal background. Now, in this case, the court clarifies and says that considering the function which the commission has been entrusted with, there shall always be a member from a legal background in the commission; a person of law shall always be there.

And the same should not be one only a case of fulfilling the formality of appointing a member with a law degree. The court categorically said that the person must be holding a judicial office or is a person possessing professional qualification with substantial experience in the practice of law, or who has the requisite qualification to have been appointed as a judge of the high court or a district judge.

So, the court categorically laid down that the person who shall be considered to be a legal member must be the one who is practicing. Merely possessing a law degree and working somewhere else would not be sufficient for the purpose of the composition of the commission.

This judgment makes the functioning of the commission more particular by involving a law person, so that it shall be ensured that necessary procedural aspect has been complied with, judicial principles are being followed, and whimsical or arbitrary decisions are not been taken.

That is what appears to be an idea for insisting a person having requisite knowledge in law to be a member of the commission. There is a fallout of this judgment. A question was being raised that whether this judgment would also apply for Central Electricity Regulatory Commission because this judgment was specifically in relation to State Electricity Regulatory Commission.

Petition was filed, matter went to the Supreme Court. Supreme Court has asked the Central Electricity Regulatory Commission not to continue functioning in the absence of a member from law background. Very recently, the stay was being lifted by the court when court was given this information that the appointment of a law member has already been made in

CERC; then, the court has lifted this stay and allowed the other members to proceed with the necessary functioning of the commission.

(Refer Slide Time: 19:24)

➤ DVC v. BRPL (2009 – APTEL)

➤ Observed:

- Combined reading of Secs 79(1)(a) and (f) –confers wide jurisdiction on the Commission to adjudicate disputes between the licensees and the generating companies in regard to implementation, application or interpretation of the provisions of the agreement (PPA)

IIT Bombay NPTEL

This is another case, DVC versus BRPL, where the court has made the observation that the power to adjudicate is very broad. It does not only talk about the dispute between the licensees and the generating companies, but it also talks about the terms and conditions which are being agreed between the licensees and the generating companies.

What is the interpretation? What are the concerns with regard to the implementation of systems and conditions? So, very wide jurisdiction has been given. That is what the tribunal has said in this case. That even the implementation, application or interpretation of provisions of the agreement, that is power purchase agreement, that also can very well be subjected to adjudicate jurisdiction of the commission. That is what the court has said in this case.

(Refer Slide Time: 20:30)

➤ PTC v. CERC (2010 – SC)

- Held:
- Decision-making power of the Commission is not dependent upon the regulation to be framed u/s 178
- If regulations are made u/s 178 then the Decision-making power must be in conformity with such regulations
- To regulate is an exercise which is different from making of the regulations
- Making of a regulation u/s 178 is not a pre-condition to the Central Commission taking any steps/measures u/s 79
- Power to make regulations is wider than decision making power

The slide features a video inset of a man with a mustache, wearing a light blue shirt, speaking. The background of the slide is light green with a dark blue and light green geometric design on the right side. At the bottom, there are logos for the Supreme Court of India and NPTI.

And then you have this landmark judgment again from the Supreme Court of 2010. In 2010, an important question was being raised that can the commission proceed with mandatory function in the absence of regulation to be made under section 178 of the Act? Now, in this case of PTC versus Central Electricity Regulatory Commission, the court examined the legislative scheme.

And the Court has said that decision making power entrusted upon the regulatory commission is not subject to the regulation to be made by the commission. It is not necessary that there would be a regulation first under section 178, and then only the commission shall exercise the power entrusted under section 79.

Having said so, the Supreme Court has also clarified that if the commission makes the regulation, then it makes the regulation under section 178. Then the decision-making power of the commission must be exercised in conformity with the regulation. So, there are two situations, one is the absence of regulation, second is the presence of regulation.

The court says that if there are no regulations made, that does not mean that commission shall not exercise its power under section 79. Tariff regulation, issuance of license, interstate transmission charges, all these functions are to be discharged even if there are no regulations. Because nowhere in the scheme of the law, it has been suggested that the Commission shall first make the regulation, and then only power under section 79 is to be invoked.

But then, if regulation has been made under section 178, such regulation has to be considered, kept in mind by the commission for discharging the power and function provided under

section 79 and section 86. So, to make a regulation is not a prerequisite. It is not a precondition. Also, the court has highlighted that power to make regulation is much wider than the decision-making power of the commission under section 79.

And this has to be understood in the context that regulation can be made, and fallout of the same could be alteration or modification of the power purchase agreement. So, regulation can very well alter or modify the power purchase agreement. Regulation can very well alter or modify the tariff fixation done under section 61 or section 62.

So, the court, in this case, clarified the relationship between section 79 and section 178 and made this very clear that to frame regulation under section 178 is a legislative function which is very general, which the commission shall undertake. But then absence of the same would not disallow the commission not to exercise the function entrusted under section 79. So, this is a very important clarification given by the court in the 2010 judgment.

So, this judgment has clarified an important position on the relationship between regulation making power of the commission and mandatory function entrusted upon the commission. So, this position, in a way, clearly makes a demarcation between two different responsibilities entrusted upon the commission. Thank you very much.