

**CENTRAL ELECTRICITY REGULATORY COMMISSION**

**NEW DELHI**

**IA No.36/2012**

**In**

**Petition No. 140/MP/ 2012**

**Coram**

**Dr. Pramod Deo, Chairperson  
Shri S Jayaraman, Member  
Shri V.S. Verma, Member  
Shri M. Deena Dayalan, Member**

**Date of Hearing: 26.7.2012**

**Date of Order : 8.10.2012**

**In the matter of**

Application under section 94 of the Electricity Act, 2003 for discharge/deletion of Jaiprakash Power Ventures Limited arrayed as Respondent No.2 from the above mentioned petition.

**And in the matter of**

**Jaiprakash Power Venture Limited**

**Applicant**

**Vs**

**PTC India Ltd & Others**

**Respondents**

**And in the matter of:**

**PTC India Limited**

**Petitioner**

**Vs**

**Powergrid Corporation of India Ltd. & Ors.**

**Respondents**

**The following parties were present:**

1. Shri Parag Tripathy, Senior Advocate, PTC
2. Shri Varun Pathak, Advocate, PTC
3. Shri Vishal Gupta, Advocate, JPVL
4. Shri Sanjiv K. Goel, JPVL

5. Shri Ankush Bajonia, PTC
6. Ms. Jyoti Prasad, POSOCO
7. Shri Mohit Joshi, POSOCO
8. Shri N.K. Jain, PGCIL

### **ORDER**

The applicant, Jaiprakash Power Ventures Limited (JPVL) has filed the Interlocutory Application seeking discharge/deletion of its name as a respondent from the main petition filed by PTC India Limited on the ground that it is not a necessary or proper party in a dispute between the Petitioner and Respondent No.1 relating to the long term open access charges under the Bulk Power Transmission Agreement between them.

2. The Applicant has submitted that the Petitioner has sought exemption from payment of long term open access charges to Respondent No.1 under the BPTA and from payment of any penalty/compensation. In the alternative the Petitioner has prayed that JPVL should be directed to pay the long term open access charges on the ground that JPVL has taken a stand that the PPA is void. The Applicant has submitted that the second prayer sought in the petition is not maintainable as it is an attempt on the part of the petitioner to shift its obligations under the BPTA on to JPVL.

3. The Applicant has submitted that JPVL is not a party to the BPTA between the petitioner and Respondent No.1. The BPTA is an independent commercial agreement between the petitioner and the Respondent No.1 and it has no reference to the PPA between the Petitioner and JPVL. The fact that the Petitioner entered into the BPTA for evacuation of 704 MW from JPVL's Karcham Project will not make JPVL a party to the BPTA. The Applicant has further submitted that the PPA between the Petitioner

and JPVL clearly stipulated that the delivery point of power by JPVL to PTC is at the generation bus bar which is situated in Himachal Pradesh and it is the responsibility of PTC to evacuate the said power at its own cost and accordingly, JPVL has no obligation under law to pay the transmission charges levied on the Petitioner under the BPTA. The Applicant has submitted that the dispute pending before the Delhi High Court regarding the PPA is irrelevant to the dispute between the Petitioner and Respondent No.1 to which JPVL is not a party. The Applicant has also submitted that the Writ Petition (C) No. 3627 of 2012 was filed by the Petitioner only against PGCIL as Respondent No.1 and JPVL was not a party. Even the Hon'ble High Court in its order dated 4.6.2012 has clearly noted that the disputes raised in the said petition were between the Petitioner and the Respondent No.1. The Applicant cannot initiate proceedings to indirectly recover long term open access charges from JPVL without any cause of action against JPVL. Accordingly, the Applicant has prayed to be deleted/discharged as Respondent No.2 from the array of parties in the Petition as it is not a necessary and/or proper party.

4. The Petitioner in its reply filed vide affidavit dated 24.7.2012 has opposed the application of JPVL for deletion as a party to the present petition. The Petitioner has submitted that the petition has been filed under Section 94 of the Act; however the power of deletion or addition of a party in a proceeding is not to be found under the said provision but in Order 1 Rule 10 (2) of the CPC. The Petitioner has submitted that the Supreme Court of India and High Court of Delhi in a catena of judgements have laid down that while deciding whether a person ought to be made a party to the suit, which needs to be examined is whether the controversy raised in the petition can be effectively and finally set at rest in the absence of the person sought to be impleaded

and if not, that person must necessarily be impleaded as a party or else it will leave scope for further litigation and may lead to multiplicity of proceedings. The Petitioner has submitted that the basic rule for the purpose of impleadment or deletion of the party is whether any relief has been directly or indirectly sought against such party. In the present case, the Petitioner has sought the following directions against Respondent No.2/Applicant:

“B. In view of Jaypee’s stand that PPA is void, direct Jaypee to pay LTOA charges for evacuation of power from the project;”

The Petitioner has submitted that if the Commission comes to the conclusion that certain orders may be required to be passed against Respondent No.2/Applicant, such a direction cannot be passed if deletion of Respondent No.2/Applicant is allowed. Moreover, there are various pleadings of the Petitioner on the conduct of Respondent No.2/Applicant and there is a relief directly sought against it, Respondent No.2/Applicant is a necessary party. The Petitioner has further submitted that Respondent No.2 would still be a proper party as the Commission has the power to pass appropriate orders against Respondent No.2 for doing complete justice in the matter. The Petitioner has submitted that Respondent No.2 has wrongly relied upon the fact that it was not impleaded before the High Court of Delhi in the writ petition filed by the Petitioner against Respondent No.1 since the nature of relief and the proceedings were completely different. It has been further submitted by the Petitioner that there was no certainty that Respondent No.2 would not have been impleaded subsequently, either at the discretion of the Hon’ble High Court or on an application filed by the petitioner. The Petitioner has submitted that on account of the action of Respondent No.2, having declared the PPA as void, PTC is not in a position to

operationalise the BPTA. The Petitioner has submitted that the Regulations of the Commission only contemplates a situation when a BPTA can be terminated and is allowable when the a Power Purchase Agreement or Power Sale Agreement has been terminated between the parties but there is a complete void with respect to Power Purchase Agreement or Power Sale Agreement having become void due to operation of law or having been declared void by one of the parties. The Petitioner has submitted that as the PPA was declared void by Jaypee and the BPTA cannot exist in isolation of the PPA, supply of power under the BPTA could not be made without any contribution by the Petitioner. The Petitioner has requested that the application of Respondent No.2 for deletion of its name from the memo of parties be rejected.

5. During the hearing of the IA, learned counsel for Respondent No. 2 relied upon the judgement of the Hon'ble Supreme Court in *Kasturi v Iyyamperumal and Others* {(2005) 6 SCC 733} and submitted that as per the law laid down in the said judgement, there are two tests to be satisfied for determining the question who is a necessary party i.e. there must be a right to some relief against such party in respect of the controversies involved in the proceedings and no effective decree can be passed in the absence of such party. Learned counsel submitted that the dispute involved in the present petition is between the Petitioner and PGCIL for enforcement of BPTA for non-payment of transmission charges. As per the BPTA, PTC India Ltd is the Injecting Utility and point of injection is the sub-station of PGCIL. Respondent No.2 is a stranger to the BPTA and therefore, cannot be sued for specific performance of the BPTA. Learned counsel submitted that the petitioner had not made Respondent No.2 as a party before the High Court as Respondent No.2 was not a necessary party to the

dispute. Learned counsel submitted that the Commission can grant or deny relief to the petitioner in the absence of Respondent No.2.

6. Learned Senior counsel appearing on behalf of the petitioner submitted that Respondent No.2 is not a stranger to the BPTA which is a statutory contract. Respondent No.2 was all along present during the course of the negotiations leading to the signing of the BPTA. Moreover, the transmission system was planned by Central Electricity Authority and Power grid for evacuation of power from Karcham Wangtoo generating station of the Respondent No.2 and the power which is generated by the generating station is to be transmitted in terms of the BPTA. The BPTA cannot be operationalised on account of termination of PPA by Respondent No.2; therefore, Respondent No.2 is a necessary party to the dispute and has accordingly been impleaded. The petitioner cannot be penalized as the PPA was terminated by Respondent No.2 and if it is held that the petitioner is responsible, then directions should be issued to Respondent No.2 as it is on account of the actions of Respondent No.2 that BPTA cannot be operationalised by the petitioner. Moreover, this is a dispute arising out of the inter-State transmission of electricity and the Commission can adjudicate the dispute relating to inter-State transmission of electricity involving the generating company or transmission licensee. In this case the dispute involves Powergrid, a transmission licensee and the Respondent No.2 which is a generating company. The learned counsel referring to the judgement in Kasturi relied upon by the Respondent No.2 submitted that it is a settled principle of law that a judgement should not be read and interpreted as a statute since a judgement is a judgement for the proposition it lays down in the facts which come up before the court. The learned senior counsel submitted that the said judgement is not applicable to the

present case for several reasons. Firstly, the case of the petitioner is not for specific enforcement of the BPTA but for appropriate directions that the 2004 and 2009 regulations do not provide for a situation where the BPTA cannot be operationalised on account of fault of Respondent No.2. Secondly, Respondent No.2 is not a stranger to the BPTA and by adding Respondent No.2 as a party in the petition, the nature of the petition remains the same. Thirdly, the petitioner is the dominus litis and has the liberty to decide who should be impleaded as a party. Learned senior counsel relied on the judgement of the Supreme Court in *Alliji Momonji & Co v Lalji Mavji* {(1996) 5 SCC 379}, where it has been held that “where presence of the respondent is necessary for complete and effectual adjudication of the dispute, though no relief is sought, he is a proper party. Necessary party is one without the presence of which no effective and complete adjudication of the dispute could be made and no relief granted”. The learned senior counsel submitted in accordance with the settled law on the subject, Respondent Nos.2 is a necessary and proper party to the dispute. The learned senior counsel submitted that the Electricity Act, 2003 is a complete Code and the relief with regard to inter-State transmission of electricity has to be sought in accordance with the Electricity Act, 2003 and not in accordance with the Specific Relief Act. As regards the allegation of Respondent No.2/Applicant that Jaypee was not made a party before the High Court, learned senior counsel submitted that writ petitions are filed seeking relief against instrumentality of the State and Jaypee being a private person was not impleaded as a party in the writ petition.

7. Learned counsel for Respondent No.2/Applicant submitted that the Commission in discharge of its function to regulate inter-State transmission of electricity has specified the regulations for different forms of open access. If the

regulations provide that the party seeking open access has to enter into an agreement with the CTU or transmission licensee, the said agreement be subject to the provisions of Indian Contract Act, 1872 and Specific Relief Act as Article 175 of the Electricity Act, 2003 provides that the Act is in addition to and not in derogation to the other Acts in force. The present dispute being a contractual dispute between PGCIL and the Petitioner, no relief can be sought against Respondent No.2 which is not a party to the contract.

8. Learned senior counsel for Respondent No.1 submitted that it is not concerned about the cancellation of the PPA between the Petitioner No.1 and Respondent No.2. Learned senior counsel submitted that in so far as the transmission charges are concerned, it is the BPTA which governs the lis between the Petitioner and Respondent No.1 and Respondent No.1 is interested to recover the outstanding dues in terms of the provisions of BPTA.

9. We have considered the submission of the parties. The Petitioner has made the following prayers in the petition:

“A. To exempt PTC from payment of LTOA charges under BPTA dated 20.7.2007 and exempt PTC from any penalty/compensation as PTC has acted in accordance with law; and/or

B. In view of Jaypee’s stand that PPA is void, direct Jaypee to pay LTOA charges for evacuation of power from the project; and/or

C. Pass any other order(s) and or directions(s), which the Hon’ble Commission may deem fit and proper in the facts and circumstances of the case.”



The Petitioner has sought relief against Respondent No.2 to pay the LTOA charges in view of its stand that PPA is void and has accordingly impleaded Respondent No.2 as a party in the petition. Respondent No.2 has submitted that it is stranger to the BPTA which is between the Petitioner and the Respondent No.1 and therefore it is neither a necessary party nor a proper party in the petition seeking specific performance of the BPTA.

10. We have not yet heard the petitioner on the maintainability of the petition in the light of the prayers made in the petition. We are of the view that it is premature to decide whether Respondent No.2 is a necessary or proper party to the petition without deciding the maintainability of the petition first. Accordingly, we shall decide the IA after hearing the petitioner on the maintainability of the petition.

11. The petition shall be listed for hearing on admission and maintainability on 16.10.2012.

sd/-  
**(M. Deena Dayalan)**  
**Member**

sd/-  
**(V.S. Verma)**  
**Member**

sd/-  
**(S. Jayaraman)**  
**Member**

sd/-  
**(Dr. Pramod Deo)**  
**Chairperson**