

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

1. **Shri Ashok Basu, Chairperson**
2. **Shri Bhanu Bhushan, Member**

Petition No. 113/2006

In the matter of

Adoption of tariff in respect of 2000 MW Thermal Power Station proposed to be established by ISN International Company Pvt. Limited in District Sidhi, Madhya Pradesh.

And in the matter of

ISN International Company Pvt. Limited (ISNI)

...**Petitioner**

Vs

1. Ajmer Vidyut Vitran Nigam Limited (AVVNL), Ajmer
2. Jaipur Vidyut Vitran Nigam Limited (JVVNL), Jaipur
3. Jodhpur Vidyut Vitran Nigam Limited (Jodhpur VVNL), Jodhpur
4. M.P. Power Trading Company Limited (MPPTCL), Jabalpur ...**Respondents**

The following were present:

1. Shri R.K. Mehta, Advocate, ISNI
2. Ms. Suman Kukrety, Advocate, ISNI
3. Smt. Roma Malkani, ISNI
4. Shri R.K. Jain, ISNI
5. Shri P.K. Gupta, SE (RPPC), Jaipur, Rajasthan Discoms
6. Shri Dilip Singh, Addl. EE, MPPTC
7. Shri O.P. Lal, A.O., MPPTC

**ORDER
(DATE OF HEARING : 2.2.2007)**

This petition has its origin in the affidavit filed on 30.9.2006 by the petitioner with a prayer to take the final Power Purchase Agreement (PPA) dated 14.9.2006 signed by the petitioner with MP Power Trading Company Limited and the PPA dated 28.9.2006 executed between the petitioner and Ajmer Vidyut Vitran Nigam Limited (Ajmer VVNL), Jaipur Vidyut Vitran Nigam Limited (Jaipur VVNL) and Jodhpur Vidyut Vitran Nigam Limited (Jodhpur VVNL), for sale/purchase of power from 2000 MW

Thermal Power Project proposed to be established by petitioner in District Sidhi in Madhya Pradesh in compliance with para 2 (ii) of Ministry of Power letter dated 28.3.2006. When the affidavit was pending on the file of the Commission, the petitioner submitted a supplementary petition praying for adoption of the tariff in respect of the proposed power project as set out in the PPAs dated 14.9.2006 and 28.9.2006, and referred to above, under Section 63 of the Electricity Act, 2003 (the Act). The petition is being disposed of through this order.

2. The facts of the case have been culled out from the supplementary petition filed by the petitioner. The Central Government in Ministry of Power under Secretary's DO letter dated 18.1.1995 circulated the guidelines for competitive bidding route for private power projects. These guidelines are referred to as "the 1995 guidelines". It has been stated that the State Government of Uttar Pradesh by its public notice published on 16.2.1995 invited International Competitive Bids for establishing a 2000 MW Thermal Power Project at Pratabpur, Allahabad on Build, Own and Operate basis. The petitioner has averred that the bids were invited in accordance with the competitive bidding guidelines, though the public notice issued by the State Government of Uttar Pradesh is silent on this aspect. The salient features of the public notice inviting bids are as under:

"LOWEST TARIFF

"The selection of the entrepreneurs will be based on lowest tariff for sale of Power."

"SALE OF POWER

The power generated will be purchased by U.P. State Electricity Board (UPSEB) at mutually agreed tariff.

FUEL AND TRANSPORTATION

The private promoter has to arrange for Coal and its transportation. The private promoter may have to enter into an agreement with the coal suppliers for Supply of required quantity of coal on firm basis to the proposed power project for the entire life of the plant.

LAND AND INFRASTRUCTURE

Private Promoter has to arrange required land, water and other infrastructure for the project.

ENVIRONMENTAL CLEARANCE

The clearance from the Ministry of Environment and Forests (MOEF) and Uttar Pradesh Pollution Control Board (UPPCB) are to be obtained by the promoters.

OTHER STATUTORY/NON STATUTORY CLEARANCE

Other Statutory/Non-Statutory clearances are also to be obtained by the promoters. Govt. of U.P./UPSEB will assist in obtaining these clearances.

INVESTMENT PATTERN

The investment pattern shall be as per the guidelines of the Government of India, foreign equity participation upto 100% is permitted. The booklet containing the details about Private Sector participation in the power generation is available with the Director, Investment Promotion Cell, Department of Power, Ministry of Power, Govt. of India, Shram Shakti Bhavan, New Delhi – 110 001 on payment.

DUE DATE FOR SUBMISSION OF PROPOSALS

Interested entrepreneurs may send their proposals in TWO PARTS (separate) in three sets on or before 10.05.1995 up to 17.00 hrs to:-

THE CHIEF ENGINEER (PLANNING), UP STATE ELECTRICITY BOARD, 3rd FLOOR, SHAKTI BHAWAN EXTN. 14, ASHOK MARG, LUCKNOW – 226 001

The following details may be furnished in the Part-I (Technical) of the proposal:-

1. Financial and Management standing of the entrepreneur and their associates specifically balance sheet, equity and turn over for last three years.
2. Technical competency and access to appropriate technology.

3. No. of power projects implemented in the past and their financial performance.
4. Sources of funds, Debt/Equity ratio etc.,
5. The proposal should also include the details such as make, type rating and other technical specifications and operating parameters of the Thermal Power plant, time required for completion of the Project.

The following details are to be furnished in the Part-II (Financial) of the proposal:

1. Estimated cost of the project with break-up.
2. The rate at which power will be sold to UPSEB.

On the basis of the Part-I of the proposals, the short listing of the entrepreneurs will be done based on which Part-II of the proposals will be considered.

Each part of the offer should be accompanied by a separate crossed bank draft of Rs. Twenty thousand (20,000/-) each, payable in favour of Superintending Engineer (HQ), Planning Wing, UPSEB, Lucknow towards processing charges. For those offers whose Part-II is not considered, the bank draft accompanied with Part-II will be returned. No offer will be considered without this deposit.”

3. The petitioner has stated that after issue of the public notice, a Pre-Qualification Request and Request for Proposal was made by the erstwhile Uttar Pradesh State Electricity Board (UPSEB) who drafted the project profile of the proposed power project. After evaluation, the petitioner was declared L-1 bidder out of six short-listed bidders which included three American companies and three Indian companies. The petitioner has stated that by its letter dated 5.4.1996, L-1 levelized tariff of Rs.2.23/kWh + 3% for OMI was, after negotiation, reduced to levelized tariff of Rs.2.12/kWh + 3% for OMI as the escalable component, with 4% for escalation. According to the petitioner, reduction in tariff was offered based on recognition and approval of the proposed power project for tax advantages offered by the Central Government. There is no evidence that based on the tariff offered by the petitioner,

Power Purchase Agreement (PPA) was signed between the petitioner and the State Government of Uttar Pradesh or the erstwhile UPSEB. It is, however, on record that by letter dated 22.10.1999, Department of Energy, Government of Uttar Pradesh conveyed cancellation of the approval earlier granted by order dated 9.9.1998 for the proposed power project at Pratabpur, since the terms of the PPA could not be mutually settled.

4. Meanwhile, Government of Uttar Pradesh decided to pose the Pratabpur Thermal Power Project to the Government of India for being considered as a inter-State Mega Power Project, with the State of Uttar Pradesh guaranteeing an off-take of 500 MW of power from the project, leaving open the remaining 1500 MW of power for purchase by other States with Uttar Pradesh having a first option to purchase another 500 MW. The decision was conveyed to the petitioner by the Special Secretary, Department of Energy, Government of Uttar Pradesh under his letter dated 17.8.1996. It is the petitioner's contention that the bidding process initiated by the State Government of Uttar Pradesh culminated in the issue of said letter dated 17.8.1996 in terms of which the firm commitment on the part of Uttar Pradesh Government was to purchase 500 MW power after acceptance of the tariff. The petitioner has placed on record copies of the letters from Rajasthan State Electricity Board, Punjab State Electricity Board, Delhi Electricity Supply Undertaking and Haryana State Electricity Board evincing interest in purchase of power from the proposed Pratabpur Thermal Power Project. However, the outcome of the process initiated by the concerned utilities has not been indicated. This is probably because the deal with these utilities was not clinched.

5. A meeting was held by Ministry of Power, Government of India on 23.5.2003 wherein the following conclusions were arrived at:

- I. Since the existing site is quite far from the coal mines (about 600 km), a new pit-head site would have to be identified. The other basic requirements viz, availability of land, water and fuel linkage, etc, would also have to be tied up. It was informed by Ms. Malkani that a site in close proximity to the Rihand Lake was under consideration for relocation of the project and they would prepare the Feasibility Report etc, once a suitable site is identified.
- II. Sale of power would be through PTC. However, PTC would be able to sell power from the project only if the tariff is reasonable, i.e. the tariff should be comparable to other similar Public Sector power projects being completed at the same time and should be acceptable to PTC and to the buyer States.
- III. To enable PTC to carry forward the discussions with the potential buyer States and to enter into PPAs with the state utilities, it would be necessary to provide PTC with details of the promoters and financing of the project including equity contribution by promoters. The financing package should fulfill the basic requirements viz. equity component at minimum 30% of project cost, promoters equity covering minimum 11% of the project cost, tying up of balance equity by the other consortium partners, and obtaining 70% commitment by lenders to the project etc.
- IV. The project (2000 MW) would be developed in two stages with a capacity of 2000 MW each.
- V. The project would be accorded the status of a "mega project" in case it met the prescribed criteria. It should, therefore, *inter-alia*, supply power to more than one State.
- VI. The tariff would require the approval of the Central Electricity Regulatory Commission (CERC).
- VII. PTC would examine the estimated project cost with other similar projects. For reasonableness of tariff, comparison should be made with similar Greenfield projects of NTPC and other projects such as Maithon and Majia. In this exercise of comparison of reasonable tariff, PTC may take the help of CEA and NTPC.
- VIII. The promoters would discuss and finalize the likely tariff with PTC. On the basis of the tariff so formulated, PTC would discuss the same with the buyer states.
- IX. PTC would examine and submit the payment security mechanism comprising of State Government Guarantee, Letter of Credit, after discussion with the concerned States and ISN International.

- X. On the request of the ISN International for a Counter guarantee by the Government of India, it was clarified that under the prevailing policy, GOI counter guarantee for power projects was not available. Secretary (P) was of the view that there may not be any requirement for a counter guarantee by the Central Government in view of the structuring of the project with sale of power through PTC, which could be covered by State level guarantees including State government guarantee besides L/c and escrow. If the project tariff is reasonable, based on the above three instruments, lenders do agree to fund the project. The Ministry would facilitate interaction for such tie up provided the developers have structured the project in a manner that they are able to finalize arrangements for sale of power to States through PTC.

6. Ministry of Power, thereafter took up the matter with Ministry of Coal for providing coal linkage for the proposed power project at pit head Singrauli mines. The matter remained under consideration of Ministry of Coal and Ministry of Power. This, however, shows that the location of the proposed power project was changed from Partabpur (Allahabad), for which bids were invited by the State Govt. of Uttar Pradesh to Singrauli in Sonbhadra Distt. in the State.

7. In 2003, the petitioner made an application under Section 63 of the Act, which was taken on the file of the Commission as Petition No.95/2003.

8. The said petition was disposed of by order dated 30.7.2004 as not maintainable. The relevant part of the said order dated 30.7.2004 is extracted below:

“8. We have considered the matter in the light of submissions made by the petitioner, the response of the State Utilities impleaded in the petition and the guidelines issued by the Central Government in Ministry of Power. As we have already noted, the guidelines issued by the Central Government envisaged four stages for solicitation of bids, namely, request for qualification; request for proposals; Power Purchase Agreement and Implementation Agreement between the developer and the State Government. From the notice it is not clear whether the first two stages were distinctly followed while inviting international bids, though the petitioner has filed along with the petition a copy of the request for proposals. Even if it is presumed that with the issue of letter of intent these stages are deemed to have been achieved, the remaining two

stages have not been implemented since the process never reached the stage of signing of Power Purchase Agreement between the State Government of UP and the petitioner. In fact, it is also noted that Ministry of Power under its letter dated 12.8.1996 had advised the State Government of Uttar Pradesh to develop the project in accordance with guidelines contained in the letter dated 18.1.1995, references to which are already made. It would only imply that these guidelines were not followed by the State Government while inviting international bids. Therefore, it is not a case where the tariff was actually “determined through transparent process of bidding in accordance with the guidelines issued by the Central Government,” to meet the conditions of Section 63 of the Act. For a slew of other reasons also, the tariff proposed in the petition by the petitioner cannot be said to have been result of competitive bidding process. When the proposal was invited, the State of UP was the only beneficiary. However, subsequently, the other states namely, the State of Punjab and State of Haryana have also been added as the beneficiaries. Also, there is change in location of the generating station from Pratabpur to a place near Singrauli. The project is proposed to be given the status of mega power project, with a number of concessions. There is also change in certain other terms and conditions including the tariff proposed. Accordingly, the petitioner’s prayer for approval of tariff under Section 63 of the Act is not maintainable.

9. However, the petitioner is granted liberty to approach the Commission for approval of tariff under Section 62 of the Act based on the terms and conditions of tariff notified by the Commission on 26.3.2004, applicable for a period 1.4.2004 to 31.3.2009. For this purpose, the petitioner shall be required to file a fresh petition with all the necessary details in support of the tariff claimed, as per the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004.”

9. Ministry of Power by its resolution dated 19.1.2005 issued fresh guidelines for determination of tariff by bidding process for procurement of power for distribution licensee, as contemplated under Section 63 of the Act. This resolution is hereinafter being referred to as “the 2005 guidelines”.

10. The petitioner has submitted that Collector, District Sidhi, Madhya Pradesh has by his letter dated 24.12.2005 informed the MP Power Trading and Investment Facilitation Corporation Limited of the proposal to allot about 5,000 acres of land to the petitioner for establishment of thermal power project at village Bagaiya in that District. The petitioner has signed the PPA with MP Power Trading Company Limited

on 14.9.2006 for sale/purchase of 200 MW of power from the project now proposed to be located in Sidhi Distt. of Madhya Pradesh. The PPA also contains certain provisions in regard to the tariff payable for the purchase of power. Another PPA was executed between the petitioner and Ajmer Vidyut Vitran Nigam Limited (AVVNL), Jaipur Vidyut Vitran Nigam Limited (JVVNL) and Jodhpur Vidyut Vitran Nigam Limited (Jodhpur VVNL) on 28.9.2006 for purchase of total of 500 MW of power. The petitioner has stated that this PPA also sets forth the tariff payable. According to the petitioner, these PPAs are in line with Ministry of Power model PPA, conform to parameters laid down in the 2005 guidelines and the tariff policy published by the Central Government, Ministry of Power on 6.1.2006. The petitioner has stated that it is in advanced stage of negotiations with MMTC Limited for sale of 500 MW of power and other Government undertakings for tying up the entire capacity of 2000 MW and the PPAs to be signed will be on lines in all respects (including tariff) with those already filed under affidavit on 30.9.2006. The petitioner has indicated the following salient features of the PPAs:

- (a) Tariff is uniform for all purchasers.
- (b) Tariff is levelized at 2.48 per kWh over a 12-year period of a 25-year term of Agreement including an assumed 3% escalation of the escalable component the tariff is levelized at Rs.2.51. (The escalation percentage will be as per the Commission's norms).
- (c) Tariff for Years 13 to 25 shall be submitted for approval to the Commission in the 12th year.
- (d) ISNI requires a fixed tariff in the first 12 years because only with the help of the fixed revenue stream the lenders are satisfied with the guarantee

of payment. As a result the agreement with the purchasers has been obtained for the 12-year period.

11. According to the petitioner the tariff for the first 12 years will be as under:

**FIRST TWELVE YEAR FIXED TARIFF
(OF THE 25 YEAR TERM)**

Years	Calendar Year (Current projection)	Fixed Rate (FCR)	Charge	Pass Through Variable Charge Rate Coal price estimated at Rs.900/ton	Escalable Component of the FCR	OMI Adjustment assuming Escalation of OMI charges at 3%	Total Tariff at PGCIL Bus Bar =Estimated Fixed Charge +Variable Charge+
1	2010	1.98000		0.54	0.0594	0.001782	2.521782
2	2011	1.98000		0.54	0.0594	0.003564	2.523564
3	2012	1.98000		0.54	0.0594	0.005346	2.525346
4	2013	1.98000		0.54	0.0594	0.007128	2.527128
5	2014	1.98000		0.54	0.0594	0.008910	2.528910
6	2015	1.93000		0.54	0.0579	0.010647	2.480647
7	2016	1.93000		0.54	0.0579	0.012384	2.482384
8	2017	1.93000		0.54	0.0579	0.0141210	2.484121
9	2018	1.93000		0.54	0.0579	0.015858	2.485858
10	2019	1.93000		0.54	0.0579	0.017595	2.487595
11	2020	1.98000		0.54	0.0594	0.019377	2.539377
12	2021	1.98000		0.54	0.0594	0.021159	2.541159

12. The petitioner has worked out the tariff, which is stated to be lower than the quoted L-1 tariff (levelised equivalent) of Rs.2.23/kWh as well as the subsequently reduced tariff of Rs.2.12/kWh offered in negotiations with the State Government of Uttar Pradesh and the erstwhile UPSEB, duly escalated.

13. Madhya Pradesh Power Trading Company Limited and the concerned utilities in the State of Rajasthan are impleaded as respondents. No replies have been filed by them despite notice. Chief Engineer, Rajasthan Power Procurement Centre under his letter dated 31.1.2007 has, however, confirmed that they are agreeable to purchase power from the proposed power project to be set up in the State of Madhya Pradesh at tariff to be approved by the Commission as per tariff regulations in force from time to time for which PPA has already been executed. This letter was received

in the Commission's office on 12.2.2007, after hearing held on 2.2.2007. However, the representative of the Discoms in the State of Rajasthan (Respondents 1 to 3) at the hearing underscored the necessity for approval of tariff by the Commission before its implementation. No formal communication has been received from MP Power Trading Company Limited. However, its representatives were present at the hearing, whereat, they emphasized that the tariff provided for in the PPA signed with M.P. Power Trading Company Ltd., was indicative and was subject to adoption or determination by the Commission.

14. We heard Shri R.K. Mehta, Advocate for the petitioner at length along with Smt. Roma Malkani for the petitioner. At their request, the matter was adjourned from time to time. We have also gone through the written submissions filed on behalf of the petitioner on 12.2.2007.

15. The Act has come into effect on 10.6.2003. Section 61 of the Act empowers the Commission to specify the terms and conditions for determination of tariff. Section 62 relates to determination of tariff by the Commission in accordance with the terms and conditions of tariff specified under Section 61. By way of exception, Section 63 of the Act enjoins upon the Commission to adopt tariff if such tariff has been determined through the transparent process of bidding in accordance with the guidelines issued by the Central Government. After the Act came into force, the 2005 guidelines have been issued by the Central Government as already noted. In the light of these provisions and the 2005 guidelines, we have to consider whether the present application is maintainable in the context of the petitioner's prayer for adoption of tariff

under Section 63 of the Act. In order that tariff is adopted within the ambit of Section 63 of the Act, the following conditions need to be satisfied, namely –

- (a) The transparent process of bidding in accordance with the guidelines issued by the Central Government has been followed, and
- (b) Tariff has been determined through such a process.

16. The Commission in its order dated 30.7.2004 in Petition No.95/2003 has categorically rejected the petitioner's claim for approval of tariff under Section 63 of the Act since in the opinion of the Commission the process laid down under the 1995 guidelines was not completed. The petitioner was, however, given liberty to make appropriate application for approval of tariff under Section 62 of the Act in accordance with the terms and conditions of terms and conditions notified by the Commission, with all necessary details. The relevant portion of the order dated 30.7.2004 has been extracted above.

17. In the said order dated 30.7.2004, it was held by the Commission that two stages, namely, signing of PPA and implementation agreement envisaged under the 1995 guidelines were not accomplished. It was also noted that Ministry of Power in terms of its letter dated 12.8.1996 had advised the State of Uttar Pradesh to develop the project in accordance with the 1995 guidelines, concluding thereby that those guidelines were not followed by the State Government while inviting bids. The Commission in its order dated 30.7.2004 also took notice of the fact that there was change in location of the proposed power project from Partabpur to Singrauli. Taking into consideration these and certain other facts, the Commission dismissed the petitioner's prayer for approval of tariff under Section 63 of the Act.

18. In the written submissions filed on 12.2.2007, the petitioner has submitted that execution of PPA is not part of the bidding process as per the 1995 guidelines. It has been stated that the bidding process came to an end after the petitioner was identified as L-1 bidder by the State Government of Uttar Pradesh.

19. After the Act came into force, the 2005 guidelines were published by the Central Government for procurement of power through the competitive bidding process. It is not the case of the petitioner that the two PPAs sought to be placed on record were the result of the competitive bidding process under the 2005 guidelines. On the other hand, the petitioner has contended that the process of competitive bidding that started in February 1995 with the publication of notice by the State Government of Uttar Pradesh culminating in the signing of the PPAs in September, 2006 is the continuous process and all the steps visualized under the 2005 guidelines have in fact been undergone.

20. We have given our serious thought to the contention of the petitioner but find ourselves unable to accept it. The bidding process, which starts with publication of notices inviting bids culminates in signing of the implementation agreement, through the intermediary stages which includes signing of PPAs, as envisaged in the 1995 guidelines. There is no force in the petitioner's submission that in the present proceedings the process should be carried forward after the stage of its identification as L-1 bidder.

21. Broadly, under the 2005 guidelines, bids are to be called by the procurer(s) of power. The levelised tariff is to be arrived at for the entire capacity of the power

project and through its whole life. From the facts narrated above, it would be seen that MP Power Trading Company Limited or the utilities in the State of Rajasthan, the procurer(s) of power, were not involved with the bidding process initiated in February 1995 by the Uttar Pradesh Government. The bids which are the basis of the petitioner's claim were invited by the State Government of Uttar Pradesh. Therefore, the fundamental condition that the bids are to be invited by the procurer(s) is not met. It is further noticed that the PPAs that have been signed, provide for tariff for a period of 12 years and not the entire life of the proposed project. Further, PPAs have so far been signed only for 700 MW of power against the proposed capacity of 2000 MW, and thus only 35% of the total capacity of the proposed project has been tied up. The petitioner is still negotiating for signing of the PPAs for the remaining capacity. The bidding process initiated by the State Government of UP in February 1995 ended with the cancellation under letter dated 22.10.1999 of the approval granted by the State Government. In view of this, the process cannot be resurrected or rejuvenated and treated as continuation of the process initiated in February 1995 by involving the utilities in other States, namely, State of Madhya Pradesh and the State of Rajasthan. That apart, the location of the proposed project has been changed from the State of Uttar Pradesh to the State of Madhya Pradesh. All these facts lead to the inescapable conclusion that the 2005 guidelines for procurement of power through the process of competitive bidding have not been followed. In this manner, the first condition for invoking Section 63 of the Act has not been satisfied.

22. In the written submissions filed by the petitioner on 12.2.2006, it has been contended that the previous petition (Petition No.95/2003) was disposed of at the admission stage and, therefore, the principle of *res judicata* shall not apply to the

present proceedings. It has been further stated that the earlier petition was not admitted on account of certain deficiencies which have been addressed since then as the PPAs have been signed and the application has been made to the Commission for adoption of tariff as agreed to in the PPAs.

23. We have considered these submissions as well. The earlier petition was disposed of by order dated 30.7.2004 at the admission stage after notice to the parties and considering their submissions. The Commission had given detailed reasons for rejecting the petition. The said order dated 30.7.2004 has acquired finality since no further proceedings have been taken by the petitioner. The present petition could be rejected summarily, as we are bound by the earlier decision, without going into the principle of res judicata. Nevertheless, we have considered the matter afresh in the light of the submissions now made by the petitioner that the process analogous to that defined in the 2005 guidelines on the competitive bidding have been followed before making the present application.

24. While clarifying the issue of calling of the bids by the State Government of Uttar Pradesh, the petitioner has stated that the present petition is competent since the project was transferred to Ministry of Power. On the question of change of location of the project from Pratabpur, the petitioner has stated that this is in accordance to the decision of Ministry of Power arrived at in the meeting held on 23.5.2003 and because of change in certain terms and conditions has resulted in reduction in tariff.

25. The clarifications furnished by the petitioner do not persuade us to accept its plea that the guidelines on the competitive bidding issued by the Central Government

in 1995 or 2005 have been followed. We are not convinced by the submission that the project has been transferred to Ministry of Power for the mere facts that the Ministry assisted the petitioner in getting coal linkage, etc. or that the State Government of Uttar Pradesh “posed” the project to the Central Government. The project still continues to be that of the petitioner.

26. Next we consider whether any tariff has been determined through the PPAs sought to be placed on record by the petitioner. If we may say so, no specific tariff has been arrived at in the process. The PPA dated 28.9.2006 signed with the utilities in the State of Rajasthan specifically provides that the fixed charges shall be as approved by the Commission and these shall be subject to the Notifications/Orders/Directions issued by the Commission from time to time. It has been added that levelized indicative tariff of Rs.2.50/kWh will be subject to approval by the Commission. Thus, in terms of the PPA, tariff has been left to be determined by the Commission so far as the utilities in the State of Rajasthan. As a part of the PPA, the petitioner has filed Schedule I, which contains certain details of 12-year fixed tariff, extracted in the table under para 11 above. However, there is no reference to the schedule in the main body of the PPA as the reference to Schedule I has been struck out in clause 6.1 of the PPA. Shri P.K. Gupta, SE, who appeared on behalf of the Discoms in the State of Rajasthan, disputed the petitioner’s claim of agreement on tariff. He strenuously urged that the question of tariff had been left open and was to be approved by the Commission.

27. We also consider the PPA signed by the petitioner with MP Power Trading Company Limited. In para 8.1.2 of Article 8 of the PPA dated 14.9.2006 it has been

provided that the monthly tariff payment shall be in accordance with procedure laid down in Schedule 5 attached thereto. Schedule 5 which relates to the tariff and payment thereof provides that the tariff will be determined or adopted as per the Commission's guidelines. The FCRs (Fixed Charge Rates) in each of the contract year of the term of the PPA are provided at enclosure of the said Schedule, extracted under para 11 above. It has also been provided that foreign exchange variations, if any, shall be applicable as per the regulations issued by the Commission. The petitioner has, however, clarified that the FCRs referred to in the enclosure to Schedule 5 are firm and are not subject to adjustment on account of foreign exchange rate variations. We have accepted the clarification given on behalf of the petitioner. On consideration of other provisions of the PPA, we are satisfied that the question of determination or adoption of tariff has been left to the Commission. This point was very vociferously stressed by the representatives of MP Power Trading Company Ltd. Thus, we are not in a position to accept the contention of the petitioner that any specific tariff has been agreed to by MP Power Trading Company Limited, either.

28. We quote from the concluding part of the written submissions filed by the petitioner on 12.2.2007, as under:

“15.0 Conclusion

In the above premises, it is most respectfully submitted that:

- a) The Petitioner is now in a position to go ahead with the project once the Hon'ble Commission adopts the tariff proposed in the PPAs, which has been agreed upon by the two Purchasers subject to the CERC adoption/approval.
- b) The FSA is almost finalized, the land has been earmarked, the environmental clearance is at the final stage and now the lenders are only waiting for a green signal from CERC.

- c) It is only because of the perseverance of the Petitioner and the persons responsible for managing its affairs that the Project is hoping to see the light of day, subject of course to the result of the present Petition.
- d) After the project has reached this stage after about 10 years, if it is now scuttled on technical grounds, it will:
 - (i) Not only prejudice the Petitioner, but will also send wrong signals to the investors, since the process in India is so long and drawn out that the foreign investors give up somewhere down the line and are not able to pursue the matter for so long.
 - (ii) It will be prejudicial to the public interest since the country is short of power.
 - (iii) It will also be prejudicial to the interests of the Respondents who are suffering from huge power shortages, and also prejudicial to the interests of other prospective users in the northern region that is experiencing large shortfalls in power supplies.
 - (iv) It will render infructuous the time and resources invested so far by various Ministries and Agencies of the GOI and States, especially, the MOC, the MOP, and State Energy Departments and the Respondents Distribution Licensees.
- (e) Moreover, this will also be a test case for many interested foreign investors considering to re-enter India's power sector. When India is slowly re-gaining the attention of a few foreign power companies, a rejection of this project's competitive tariff in the PPAs will send a strong signal to these few interested power companies regarding the long drawn out process of project development in India, and even the sanctity of any international competitive bidding process or following the model PPAs or the laws of the land which are prevalent at different time can be questioned at any level. This will certainly add to deterring the potential foreign investors.

16. Prayer

The petitioner thus humbly prays to the Hon'ble Commission not to take a purely legalistic or hyper-technical approach, and to take a broader view of the matter since the country is suffering from acute shortage and is in desperate need of power. The tariff which has been arrived at between the Parties after going through the transparent process of bidding in accordance with the prevalent guidelines of the GOI is comparable with the tariff of NTPC projects coming up around the same time. By adopting the said tariff, the Hon'ble Commission would not only be doing justice to the Petitioner but also serving the larger Public Interest. The Hon'ble Commission may, therefore, kindly adopt / accept / approve the Tariff as contained in the PPAs."

29. From the above, it is apparent that the petitioner is aware that the petition may fail if the Commission takes “a purely legalistic or hyper-technical approach”.

30. In the light of the above, the second condition for invoking Section 63 of the Act is also not fulfilled, and the petitioner’s prayer for adoption of tariff under Section 63 cannot be accepted.

31. We have noted that the petitioner’s proposal to set up a 2000 MW thermal power station in India has a long history. The petitioner has pleaded for taking a broader view of the matter since the country is suffering from acute shortage and is in desperate need of power, which indeed is a fact. Taking due cognizance of the situation, we propose to take a look at the tariff proposed by the petitioner, notwithstanding our conclusion that the petition under Section 63 of the Act is not maintainable.

32. The petitioner has tried to project that the tariff offered, in terms of equivalent levelised composite rate, is comparable to that of some thermal power generating stations, commissioned recently or due for commissioning in the near future. Since the variable charge part of the composite rate depends largely on the location of the generating station (due to coal transport element), and is adjustable on account of variations in delivered price and GCV of coal, the comparison of composite rates will not be of much relevance. It is basically the fixed charge part which has to be compared.

33. The petitioner has offered to the respondents a nearly levelised tariff, with basic fixed charge rate (FCR) of 198 paise per kWh for the first five years, 193 paise

per kWh for the next five years, and 198 paise per kWh for the eleventh and twelfth years. Its equivalent levelised fixed charge rate, for 12% discounting factor, is 196.36 paise per kWh. Prima-facie, this is much higher than that for the thermal power generating stations presently being set up by NTPC, etc. and therefore cannot be “approved” by the Commission.

34. The petitioner has projected a variable charge rate (VCR) of about 55 paise per kWh, based on coal price of Rs. 821 per MT, and weighted average GCV of 4000 kcal/kg, assuming a gross station heat rate of 2350 kcal/kWh. VCR offered is lower than that being charged for the nearby pit-head generating stations of NTPC, and is therefore attractive. However, since VCR would be adjusted for variations in GCV and coal price on a pass through basis, it would be necessary to ensure that the base figures and assumptions are in order. In its submission dated 19.3.2007, the petitioner has considered the gross station heat rate as 2350 kcal/kWh, an important parameter in the pass through VCR, which appears to be reasonable.

35. We have already given our observations regarding the high FCRs in para 33 above. However, the Commission would not like to come in the way of setting up of the proposed project. If the concerned beneficiaries are agreeable to the terms offered by the petitioner, they may go ahead subject to approval of tariff by the Appropriate Commission.

36. With the above observations, the petition stands disposed of.

Sd/-
(BHANU BHUSHAN)
MEMBER
New Delhi dated the 23rd March, 2007

Sd/-
(ASHOK BASU)
CHAIRPERSON