

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi**

Appeal No. 149 of 2007

Dated this 09th day of April, 2008

**Coram : Hon'ble Mr. A. A. Khan, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member**

IN THE MATTER OF:

ISN International Co. Pvt. Ltd.

10411, Motor City Drive,
Bethesda,
Maryland – 20807, U.S.A.

... Appellant

Versus

- 1. Central Electricity Regulatory Commission**
CGO Complex, Lodhi Road,
New Delhi – 110 003
- 2. Ajmer Vidhyut Vitran Nigam Ltd.**
Old Power House, Hathi Bhata,
Jaipur Road, Ajmer
- 3. Jaipur Vidyut Vitran Nigam Ltd.**
Vidyut Bhawan, Janpath,
Jaipur – 302 005
- 4. Jodhpur Vidyut Vitran Nigam Ltd.**
New Power House, Industrial Area,
Jodhpur

5. M.P. Power Trading Co. Ltd.

Block 2, Shakti Bhawan,
Vidyut Nagar, Rampur,
Jabalpur,
Madhya Pradesh

... Respondents

For the Appellant : Mr. R. K. Mehta, Advocate
Ms. Suman Kukrety, Advocate
Mr. Shobhit Jain, Advocate
Mr. Mragank,
Ms. Nalini Pal

For the Respondents: Mr. G. Umapathy, Advocate
Mr. P. K. Gupta, SE (RPPC), JDVVNL
Mr. T. C. Nigotiya, EE (RPPC), AVVNL
Mr. A. S. Chauhan, EE (RPPC)
Mr. A. K. Garg, AGM (Com.), MPPTC
Mr. T. Rout, JC (Legal), CERC
Mr. B. Sreekumar, AC (Legal), CERC

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

Introduction:

1) The present appeal is directed against the order of the Central Electricity Regulatory Commission (Commission for short) dated 23.03.07 in Petition No. 113/06 and against the order dated 27.08.07 in Review Petition No. 67 of 2007. The two impugned orders were passed on request of the appellant

for approval of tariff under section 63 of the Electricity Act 2003. Before proceeding further it would be proper to explain the manner of tariff fixation. Section 61 of the Electricity Act 2003 casts responsibility on the Appropriate Commission namely the State Electricity Regulatory Commissions or the Central Electricity Regulatory Commission, as the case may be, to specify the terms and conditions for determination of tariff. Section 61 further prescribes the principles which would guide the laying down the terms and conditions which include the National Electricity Policy and the National Tariff Policy. Section 62 requires the appropriate Commission to determine tariff for supply of electricity by a generating company, for transmission of electricity for wheeling of electricity and for retail sale of electricity. The section also empowers the appropriate Commission to call for data of various natures. The section also gives certain instructions in respect of tariff fixation. Section 63 is an exception to the tariff determination by the appropriate Commission under section 61 & 62 following the guidelines laid therein as well as the guidelines of National Electricity Policy and the National Tariff Policy. This exception is available where the tariff has been determined through a process of bidding. The Section is reproduced below:

“63. Determination of tariff by bidding process.-

Notwithstanding anything contained in section 62,

the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

2) The two impugned orders held that the tariff which the appellant offered for adoption of the Commission had not been arrived at through a process of bidding in accordance with guidelines issued by Central Government.

The facts:

3) The facts leading to the filing of the appeal are as under:

4) The State of Uttar Pradesh issued an advertisement in the Times of India (Lucknow Edition) dated 16.02.95 inviting International Competitive Bids (ICB) for establishing a 2000 MW Thermal power Project on 'Build, Own & Operate' basis to be established at Partabpur, District Allahabad, Uttar Pradesh. The advertisement was issued 'in pursuance to the energy policy of the Government of Uttar Pradesh'.

5) The salient features of the 'invitation for setting up the thermal power project' were as under:

- a) Power generated would be purchased by the U.P. State Electricity Board (UPSEB)
- b) The private promoter would arrange for coal and its transportation
- c) The private promoter will arrange required land, water & other infrastructure
- d) The selection of the entrepreneurs will be based on lowest tariff for sale of power

6) The appellant submitted its bid in response to the advertisement dated 16.02.95. Part-II of the bids was opened on 15.07.95. Vide a letter dated 26.09.95 UPSEB asked for certain details regarding total capital cost, construction period, year wise sale rate of energy for a period of 25 years etc. Some further details were called for vide letter dated 10.11.95. The appellant claims to have been the lowest bidder (L1) with lowest Tariff of Rs.2.23 kwh levelised at 12%. On the request of the Government of Uttar Pradesh, the appellant vide a letter dated 05.04.06 further reduced the tariff to Rs.2.12 kwh levelised at 12% which included Rs.1.69 kwh for the Fixed Component and Rs.0.43 kwh for the Variable Component. On 17.08.96, the Government of Uttar Pradesh wrote to the appellant :

“Dear Sir,

I am desired to refer to your letter Dated 30 July, 1996 and your subsequent presentation regarding Partabpur Project. The U.P.Government have decided to pose the Partabpur Project to the Government of India for being considered as an Inter-State Project with the State Government guaranteeing an off take of 500 MW of power from the project, the remaining being open for use by either States with U.P. having the first option to purchase another 500 MW. Since this proposal would involve wheeling of power as also commitment from other States, we are requesting the Government of India to take the lead in processing the same.

With regards,

Yours sincerely,

(R. M. SRIVASTAVA)”

7) Vide a letter dated 06.09.96, the Rajasthan State Electricity Board conveyed ‘in principle’ consent for buying, surplus power from the proposed power plant to be set up in U.P. The Punjab State Electricity Board showed interest in buying surplus power from the proposed project at Partabpur vide a letter dated 10.10.96. The Delhi Electricity Supply Undertaking also evinced similar interest in their letter dated 24.10.96.

8) The Government of India, Ministry of Power wrote to the appellant on 06.12.96:

“Madam,

Kindly refer to your fax letter dated November 29, 1996 addressed to Secretary (Power) regarding Government of Uttar Pradesh’s interest in ISNI setting up the 2000MW Partabpur Thermal Power Project as an inter-State project.

2. *Government of Uttar Pradesh have reiterated that the project be taken up as an inter-State Mega Project by the Government of India. They have also not informed us about the details of the competitive bid process undertaken by them. Government Uttar Pradesh were earlier informed that **if the project is posed to the Union Government as a Mega Power Project, the proposal would have to be structured ab initio in line with the guidelines issued on November 10, 1995.** (emphasis supplied)*

3. *Under the said guidelines, Central Electricity Authority will recommend the site as being feasible for development as a mega power project, after which*

National Thermal Power Corporation will prepare the feasibility reports and Power Grid Corporation of India Ltd. will take measures for selection of promoters through international competitive bids, involving the issue of 'Request for Qualification' and Request for Proposals', and help the chosen promoter to negotiate Power Purchase Agreements with the interested State Electricity Boards. We have requested Central Electricity Authority to examine the project in terms of guidelines stated above.

*(Vivek V. Prasad)
Director”*

9) The Partabpur Thermal Power Project was put up before the Cabinet for final decision. Eventually, the Special Secretary, Government of U.P. wrote to the appellant on 09.09.98 as under:

**“Subject : Partabpur Thermal Power Project
(4x500 MW)**

Dear Madam,

This is with reference to your offer to UPSEB for construction of the above Project on build, own and operate basis and discussions you had with Government.

I am directed to inform you that your offer for Partabpur Thermal Power Project along with subsequent amendments has been approved by the Government with the following conditions:-

- 1. That you will initial PPA for Partabpur Project with UPSEB within a month of receipt of this letter i.e. by 2nd week of Oct. '98.*
- 2. You will establish a company in India for execution of the Project within four months of finalization of PPA.*
- 3. You will achieve financial closure within seven months of ratification of the PPA.*

You are requested to kindly contact UPSEB for signing draft PPA and completing other formalities for establishing the Power Station.

Yours faithfully,

(Dr. R. P. Dubey)"

10) UPSEB on its turn wrote the letter dated 21.09.98 reiterating the three conditions mentioned in the letter of the Government of Uttar Pradesh dated 09.09.98. The appellant alleges in the appeal petition that the condition imposed in the letters dated 09.09.98 and 21.09.98 were highly unrealistic since: (a) final closure could not take place in seven months when no land & water had been secured and neither PPA nor

FSA had been concluded and (b) the terms of the PPA as requested by UP and SBI CAPS were impractical and demonstrated the lack of understanding. Be that as it may, the parties continued their discussions about the project till on 22.10.99, the Government of UP wrote to Ms.Roma Malkani of the appellant as under :

“Subject : Partabpur Thermal Power Project (4x500 MW)

Dear Madam,

Kindly refer to letter no. 350Ka.Ni.Pra/98-24 dated 9th Sep., 98 of Dr. R. P. Dubey the then Spl. Secretary to U.P. Govt., Deptt. Of Energy regarding approval of your offer to UPSEB for construction of the above project on build, own and operate basis.

I am directed to inform you in this regard that till date none of the conditions mentioned in the approval letter has been complied with by M/s.ISNI within the specified time. In spite of very sincere efforts, the PPA between UPSEB and M/s. ISN International Company could not be finalized during last one year. Even basic parameters for negotiating PPA have not yet been settled. In the light of these

developments, it would serve no purpose to keep negotiations on, therefore, the approval of the State Government given vide letter no. 350Ka.Ni.Pra/98-24 dated 9th Sep., 98 is hereby cancelled.

Thanking you for the interest shown in the project.

*Yours faithfully,
(Atul Chaturvedi)”*

11) The appellant alleges that this action of the Government of Uttar Pradesh was wholly arbitrary and unwarranted and attributes the action to change in the political leadership in the State. However, no action of any kind was taken by the appellant to challenge the cancellation of the approval of the Partabpur project.

12) The event which led to appellant seeking tariff under section 63 took place four years later which was a meeting with the Secretary (Power), Government of India. Placed on record is “Summary record of meeting taken by Secretary (Power) at 10:00 am on 23.05.03 regarding proposed thermal power project at Uttar Pradesh by M/s. ISN International”. List of participants annexed to this summary has officers from

the Ministry of Power, Central Electricity Authority, Power Trading Corporation of India, National Thermal Power Corporation, UPPCL and the appellant ISN International. No officer of the Government of Uttar Pradesh was present in the meeting. There is no mention in the summary about the letter of 22nd Oct. '99, whereby the State of UP cancelled the approval given vide a letter dated 09.09.98. There is no letter on record which in any way affects or recalls the letter of 22nd Oct. '99. The opening paragraph of the summary says as under :

*“2. Ms. Roma Malkani, President, M/s ISN International, made a brief presentation about the 2000 MW Partabpur thermal project for which their bid had been found to be lowest by the UP Government in November, 1995. The project could not be implemented due to a variety of reasons. After detailed discussions about setting the plant **at a new site and for sale of power through PTC**, the following conclusions were arrived at during the meeting:”(emphasis supplied)*

13) The rest of the summary shows: (a) the appellant proposed a site in close proximity to Rehand Lake, (b) power would be sold to PTC at a tariff comparable to other similar

public sector project being completed at the same time, (c) the project would be accorded the status of an inter-State mega project in case it met the prescribed criteria, (d) the tariff would require the approval of Central Electricity Regulatory Commission, (e) the promoter would discuss and finalise the likely tariff with PTC and on the basis of tariff so formulated the PTC would discuss with the buyer States and (f) if project tariff was reasonable the Ministry would facilitate interaction for tie up for funding.

14) On 03rd May, '05, the Government of India wrote the following to the appellant:

“Sub: Request confirmation of the mega project status for 2000 MW TPS of M/s. ISN International, USA

Dear Madam,

Please refer to your letter, dt. 2.05.2005 on the subject mentioned above. It is informed that as per the existing mega power policy, the basic qualifying criteria of a mega project is a minimum installed capacity of 1000 MW for Thermal projects. In addition, the following conditions precedent are also required to be met:

- i. The project must be interstate i.e. supply of power to more than one state*
- ii. That the power purchasing States must have constituted the Regulatory Commission with full powers to fix tariffs;*
- iii. The power purchasing States must undertake, in principle, to privatize distribution in all cities, in that State, each of which has a population of more than one million, within a period to be fixed by the Ministry of Power.*

We do not have the above details from you as yet.

- 2. Under the mega policy, the following exemptions have been accorded for mega power projects;*
 - i) Zero customs and excise duty exists for import of capital equipment*
 - ii) The domestic bidders get deemed export benefits as per the EXIM (Export-Import) policy*
 - iii) An income tax holiday of 10 years can be claimed by promoter in any block of 10 years within the first 15 years.*

- iv) In order to promote domestic industry, a price preference of 15% is being given for the domestic manufacturers.*
- v) The State Governments are also requested to exempt the supplies made to Mega Power Plants from sales tax and local levies.*

3. The minimum requirement for considering approval of mega status for the project is that financial closure of the project should have been achieved.

4. Please send us the following details immediately:-

- a) the likely promoters and their equity stake alongwith certified copy of their latest audited accounts.*
- b) your equity plan for bringing in the equity in a time bound frame*
- c) 'in principle' approval from Financial Institutions to bring in the debt*
- d) Indicative tariff and acceptance from the buyers.*
- e) Other project related experience.*

Yours sincerely,
(Dev Dutt)
Under Secretary to the Government of India”

15) The appellant submitted a petition before the Central Electricity Regulatory Commission for approval of tariff under section 63 of the Electricity Act 2003, being Petition No. 95 of 2003 asking for fixation of tariff as per a bidding process. The CERC asked for certain details vide its order dated 24.05.04. In this order the Commission noted, inter alia, that although as per the invitation for international bidding issues in 1995 by State of Uttar Pradesh the project was to be located at Partabpur the appellant is seeking fixation of tariff of the project to be located near Singrauli in Sonbadra District. It further noted that although the appellant's bid was lowest the project was not eventually selected and remained at the proposal stage. The Commission also noted that the Ministry of Power vide its D.O. letter dated 12.08.96 had advised the State Government to develop the project in accordance with guidelines contained in circular dated 18.01.85 regarding competitive bidding process which implied that the bidding, that were invited in 1995, were not in terms of guidelines issued by Central Government. The Commission also noted that the change of the location of the project would have its

implications on tariff. The Commission accordingly raised certain queries to be answered and directed filing of a revised tariff proposal by 25th June, 2004.

16) The appellant submitted its tariff proposal on 24.06.04 attempting therein to answer the queries raised by the Commission. This petition was disposed of by the order dated 30th July, 2004. The portion of the order which is relevant for the present purpose is as under :

“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 bides, 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 Partabpur 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.

10. With the above observations, the petition stands disposed of at the admission stage itself."

17) The respondents namely the distribution companies of Rajasthan and Madhya Pradesh showed interest in the

proposal of the appellant in setting up a power project. The appellant was offered 5000 acres of land for establishment of a thermal power plant at Village Bagaiya, District Sidhi, Madhya Pradesh. The Ministry of Coal, Government of India offered time upto 30th June, 2006 for signing a fuel supply agreement. In early 2006 the appellant started negotiations with Punjab, Haryana, Madhya Pradesh, Uttar Pradesh and Rajasthan. On 28.09.06, a PPA was signed between the appellant and Ajmer Vidyut Vitaran Nigam Ltd, Jaipur Vidyut Vitaran Nigam Ltd, and Jodhpur Vidyut Vitaran Nigam Ltd in respect of purchase of 500 MW of power in the ratio of 36:36:28 respectively. The tariff payable by these Discoms was also set out in the PPA subject to the adoption by the Central Electricity Regulatory Commission. After a lot of negotiations, in which State of Madhya Pradesh attempted to lower the tariff, on 14.09.06 a PPA was signed between the appellant and Madhya Pradesh Power Trading Co. Ltd. with respect to purchase of 200 MW of power from the project.

18) The appellant filed a petition under section 63 of the Electricity Act, 2003 before the Central Electricity Regulatory Commission being Petition No. 113 of 2003 with a prayer for fixing tariff as agreed to and included in the PPAs subject to adoption and approval by CERC. The impugned order dated 23rd March, 2007 was passed on this tariff petition. The

appellant sought a review of this order. The review petition was dismissed vide an order dated 27th August, 2007 which is also impugned in the present appeal.

The Impugned Orders:

19) Impugned Order dated 23.03.07: The Commission made a detailed study of the events leading to the filing of the petition No. 113 of 2006. These events are nothing other than the events narrated above. The Commission laid emphasis on the letter dated 22.10.99 of the Government of Uttar Pradesh by which the approval granted earlier vide letter dated 09.09.98 was cancelled as also on the earlier order of the Commission dated 30.07.04 by which the tariff petition of the appellant under section 63 of the Electricity Act 2003 was dismissed. The Commission particularly extracted paragraph 8 of the order dated 30.07.04 which has been extracted above by us. The Commission thereafter proceeded to notice the fresh guidelines issued by Ministry of Power on 19.01.05 for determination of tariff by a bidding process for procurement of power and the subsequent signing of PPA with the MP Power Trading Co. Ltd. for sale/purchase of 200 MW of power from the project which was then proposed to be located at Sidhi District of Madhya Pradesh. Further the Commission also noticed the PPA executed between the appellant and the Discoms of Rajasthan. The Commission noticed that the

petitioner had worked out a tariff which was claimed to be lower than which was quoted as 'Levelised Equivalent' to Rs.2.23/kwh as well as subsequent tariff of Rs.2.12/kwh over a negotiation with State of Uttar Pradesh and UPSEB duly escalated. The Commission, however, noted that its power to fix tariff was either guided by section 61 & 62 of the Electricity Act 2003 or by section 63 which was an exception to the general principles of fixing tariff under 61 & 62. While rejecting the prayer for fixing tariff under section 63 in the earlier order of the Commission dated 30.07.04 the Commission held that the 1995 guidelines for a bidding process had not been accomplished and the Ministry of Power in fact had advised the State of Uttar Pradesh vide a letter dated 12.08.96 to develop the project in accordance with 1995 guidelines. Another reason for rejecting the earlier petition was the change in the location of the proposed project from the Partabpur to Singrauli. To overcome the earlier findings of the Commission, the appellant pleaded in its written submissions before the Commission that execution of PPA was not a part of the bidding process as per the 1995 guidelines and that the bidding process came to an end after the petitioner was identified as L1 bidder by the State Government of Uttar Pradesh. The Commission noted that the two PPAs now sought to be placed on the record was not claimed to be the result of the competitive bidding process under 2005

guidelines. The appellant in fact had contended that the process of competitive bidding that started in February 1995 culminated in the signing of PPAs in September 2006 and was a continuous process in which all steps visualized under the 2005 guidelines had been undergone.

20) The Commission after examining all the pleas of the appellant came to the conclusion that the 2005 guidelines for procurement of power had not been followed in the case. The Commission also observed that the PPAs executed had left the tariff to be determined by the Commission and had not accepted any tariff through any bidding process and that, therefore, the appellant could not seek adoption of tariff under section 63 of the Electricity Act 2003. However, the Commission also compared the tariff offered by the appellant with the tariff offered by the thermal power generating stations being set up by NTPC. It observed that the variable charge part of the composite rate depends largely on location of the generation stations due to coal transport element and was adjustable on account of variations in delivered price and GCV of coal and therefore comparison of composite rate will not be of much relevance. The Commission compared the fixed charge part and concluded that the charge offered by the appellant was “*much higher than that for the thermal power*”

generating stations presently being set up by NTPC etc. and therefore cannot be approved by Commission.”

The Impugned Order dated 27.08.07:

21) The second impugned order dated 27.08.07 was passed on an application seeking review of the order dated 23.03.07. In the review petition, the petitioner raised three issues: (1) the observation of the Commission that neither the 1995 guidelines nor the 2005 guidelines had been followed constitutes an error on record, (2) the finding of the Commission that no specific tariff had been arrived at in the PPAs also constitutes an error on record and (3) a clarification was called for in respect of the Commission’s observation regarding the high FCRs in paragraph 33 of this judgment. The Commission in the order dated 27.08.07 rejected the contention that there was any error on the record in respect of the first two issues. So far as the clarification called for was concerned, the Commission said that one particular paragraph could not be read in isolation of the observations in the rest of the order. The Commission reiterated its observation that the appellant could not ask for tariff under section 63 of the Electricity Act 2003. The Commission, however, noted that the Commission would not be a hindrance in setting up of the project and for levying tariff according to law.

22) **Decision with reasons:** We have heard Mr. R. K. Mehta, Advocate appearing for the appellant at length. None of the respondents made any submissions before us. The question involved is entirely of law namely whether the appellant could ask for fixing of tariff as per its proposal on the plea that such tariff was arrived at by the competitive process of bidding. The facts narrated above are sufficient to conclude that the PPAs eventually signed by the appellant either with the Discoms of Rajasthan or with the MP Power Trading Co. Ltd. had no connection with the bid invited by the State of Uttar Pradesh in 1995. The approval given by the State Government vide a letter dated 09.09.98 was withdrawn vide the letter dated 22.10.99. No PPA was at all signed at any time before the letter of 22.10.99 as a consequence of the bid invited in 1995. **The process initiated by the State of Uttar Pradesh by issuing the advertisement calling for bids for setting up of a power project at Partabpur came to an end with the issuance of the letter dated 22.10.99.**

23) No other advertisement was ever issued either by the Government of India or by the State of Madhya Pradesh or the State of Rajasthan. Before the letter dated 22.10.99 was issued the project was posed to the Government of India. The Government of India duly advised that if the project was posed to the Government of India as a mega power project the

proposal would have to be restructured *ab initio* in line with the guidelines issued in 10.11.95. The letter dated 06.12.96 further said that those guidelines required the Central Electricity Authority to recommend the site as being feasible for development as a mega power project after which the National Thermal Power Corporation would prepare the feasibility reports and Power Grid Corporation Ltd. would take measures for selection of promoters through international competitive bids involving issue of request for qualification and request for proposals. It was only thereafter that the chosen promoter was to negotiate PPAs with the interested State Electricity Boards. The international bids which were envisaged for a mega power project and referred to in the letter dated 06.12.96 were never invited. The record placed before us show that despite such initial views expressed by the Government of India the requirement for inviting competitive bids were entirely overlooked when the meeting was taken by Secretary(Power) on 23.05.03. Although the caption of the summary says “REGARDING PROPOSED THERMAL POWER PROJECT AT UTTAR PRADESH BY ISN INTERNATIONAL”. What was discussed in the meeting was not the project proposed at Partabpur for which bids had been invited by the State of Uttar Pradesh. The summary shows that the appellant was looking for site near Rihand Lake and for sale of power to PTC. The State of Uttar Pradesh was not a

participant in the meeting. Eventually the appellant was offered site at Singrauli, Uttar Pradesh and later at Sidhi in Madhya Pradesh. As such the project discussed in the meeting of 23.05.03 was something entirely different from the Partabpur Project for which bids had been invited by the State of Uttar Pradesh. Shifting of the location gave certain advantages so far as coal linkage and water linkage was concerned which made it possible to reduce the cost of production. The project envisaged at Sidhi, Madhya Pradesh cannot be said to be the result of any kind of bidding process. No bid was ever invited by any Government or purchaser of power for an inter-State Mega Project to be set up at Sidhi, Madhya Pradesh with the coal and water linkage offered by Government of India as was made available to the appellant. Hence, the tariff arrived at by escalating the L1 tariff in 1995 has no applicability to the project now envisaged to be set up at Sidhi, Madhya Pradesh.

24) The appellant never challenged the order dated 22.10.99 whereby the approval for the project given by the State Government of Uttar Pradesh was cancelled. The appellant also never challenged the order of the Commission dated 30.07.04 in which the Commission held that for the proposed project at Singrauli tariff could not be approved under section 63 of the Electricity Act, 2003. This order has become final.

Only by changing the location from Singrauli to Sidhi no new right is created in favour of the appellant. All that has happened between the order dated 30.07.04 and the impugned order dated 23.03.07 is further negotiation with certain power purchasers and availability of other facilities of land, coal and water making it more favourable for the appellant to establish the power plant and to sell electricity at a lesser cost. This does not create any right for claiming tariff under section 63 of the Electricity Act 2003 better than what was existing when the project was stipulated to be set up at Singrauli. The Commission therefore was right in not revising its earlier opinion about applicability of section 63 of the Electricity Act 2003 to the tariff proposal of the appellant.

26) We are entirely in agreement with the two impugned orders and find no reason to interfere with anyone of them. The appeal is accordingly dismissed.

27) Pronounced in open court on this **09th day of April, 2008.**

(Justice Manju Goel)
Judicial Member

(A. A. Khan)
Technical Member

The End