Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.38 of 2010

Dated: 9th Nov. 2011

Present: **Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson,**
Hon'ble Mr.Rakesh Nath, Technical Member

Appeal No.38 of 2010

M/s. Fashion Suitings Limited,
RCM World, SPL-6, RIICO Growth Center,
Post-Swaroopganj, via-Hamirgarh,
Dist-Bhilwara-311 025
Rajasthan

..... Appellant(s)

Versus

1. Ajmer Vidyut Vitran Nigam Limited,
   Hathibhata Power House,
   Ajmer-305 001 (Rajasthan)

2. Rajasthan Electricity Regulatory Commission,
   Vidyut Bhawan,
   Jyoti Nagar,
   Jaipur-302 005 (Rajasthan)

.....Respondents

Counsel for Appellant(s): Mr. Anand K. Ganesan,
Ms. Swapna Seshdri,
Ms. Sneha Venkatramani,
Ms. Ranjitha Ramachandran,

Counsel for Respondent(s): Mr. Shyam Moorjani for R-1
Mr. R C Sharma for RERC

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Fashion Suitings Private Limited is the Appellant herein. Ajmer Vidyut Vitran Nigam Limited, the 1st Respondent, is a distribution Licensee in the State of Rajasthan.

2. Aggrieved by the billing pattern followed by the Distribution Licensee for adjustment of captive consumption and consumption taken by the Appellant from the Distribution Licencee(R-1), the Appellant had filed a petition for adjudication of this dispute between the Appellant and Respondent before the State Commission. By the impugned order dated 22.10.2009, the State Commission dismissed the claim of the Appellant. Being aggrieved over this order of the State Commission, the Appellant has

presented this Appeal before this Tribunal. The short facts are as follows:

(a) M/s. Fashion Suiting Limited, the Appellant is a High Tension (HT) Consumer of the Distribution Licensee, the Respondent-1 since the year 2006. The Appellant has established a textile mill in Bhilwara in the State of Rajasthan. For the electricity connection, the Appellant has been paying the prescribed tariff including the minimum charges to be paid as determined by the State Commission.

(b) In the financial year 2006-07, the Appellant established 2 x 0.60 MW Wind Energy Generating Station at Jaisalmer District in the state of Rajasthan. The Government of Rajasthan took the initiative of promoting renewable energy generating stations and in particular wind energy generating stations in the State of Rajasthan. The said power

plant was set up by the Appellant in pursuance of the said policy of the Government of Rajasthan for promoting generation of electricity from non-conventional energy sources.

(c) Since the Appellant had set up a generating station at a different place (Jaisalmer) in the State and the consumption of the Appellant being at a different plant in Bhilwara, the benefit of captive consumption and banking of electricity was granted to the persons including the Appellant. As per the arrangement, to the extent the Appellant was generating electricity and supplying to the grid of the distribution licensee (R-1), a set off was allowed in the consumption of electricity of the Appellant at a different place in the State and treated as captive consumption upon payment of the wheeling charges. To the extent the consumption is not set off and is injected to the grid of the Distribution Licensee(R-1),

the Appellant was paid tariff as determined by the State Commission.

(d) For the above purpose, the Appellant and the Distribution Licensee(R-1) entered into Wheeling and Banking Agreement dated 12.10.2006 and 23.3.2007 with the R-1 for the two units of 0.60 MW respectively. As per these agreements, the Appellant was generating and supplying electricity to the Distribution Licensee(R-1) and also consuming electricity. The Appellant was entitled to adjust the electricity towards its captive consumption at its textile mill at Bhilwara in the State and the balance unadjusted electricity at the end of the year was taken as deemed sale to the distribution licensee.

(e) The fixed charges applicable to the Appellant in the State is in the form of minimum monthly charges calculated with reference to a minimum number of

units of electricity. Thus, the consumer is liable to pay for a certain number of units per month irrespective of the fact whether he has actually consumed such minimum electricity.

(f) The entire electricity generated by the Appellant is supplied to the Distribution Licensee(R-1). Similarly, the entire electricity consumed by the Appellant is consumed from the distribution licensee. The adjustment for the captive consumption is only by means of energy accounting after the consumption period is over and the meter readings are available with the Respondent -1.

(g) In case of banking and wheeling of electricity by the consumer from its captive source, the minimum consumption of the consumer was first to be adjusted against the actual consumption and the balance consumption was to be taken against captive

consumption. However, the R-1 (distribution Licensee) changed its energy accounting and billing pattern for consumption of electricity by consumers, by first adjusting the total captive consumption and then adjusting the minimum consumption for the consumers. Thus, in effect, there was free supply of electricity by the generator to the distribution licensee without corresponding adjustment given in the consumption at the consumer end.

3. Aggrieved by the act of the Distribution Licensee(R-1) of having changed its billing pattern for consumption of electricity by the consumer, the Appellant filed the petition before the State Commission to adjudicate and request the relief. However, the State Commission dismissed the said petition mainly on the ground that methodology was adopted on the basis of the Regulation and therefore the State

Commission cannot give any relief to the Appellant. Hence, this Appeal.

4. The Learned Counsel for the Appellant has raised the following grounds as against the impugned order:

(a) The impugned order holding that the electricity generated by the Appellant from its power plant is required to be adjusted against the minimum charges payable by the Appellant, is wrong since minimum charges are payable irrespective of the level of consumption.

(b) The State Commission has not adjusted the mandatory minimum charges paid towards the actual consumption first and any balance towards the electricity injected by the Appellant from its power plant without considering the fact that minimum charges are levied by the Distribution licensee for the

purpose that the consumer guarantees the minimum consumption during the month.

(c) The State Commission has wrongly interpreted the provisions of the Agreement between the parties. The object of the electricity Act and the policies framed there under is for the promotion of the non-conventional source of generation of electricity and also for promotion of captive generation and consumption of electricity. The policies of the State Government are also towards the same end. In such circumstances, the State Commission ought to have interpreted the agreement and arrangement between the parties in the light of the object of the Act and the applicable policies.

(d) As a matter of fact, the State Commission has interpreted the agreement earlier in previous cases by directing for the consumption first towards the

minimum charges paid and then for the electricity injected from the captive generating stations. This interpretation was reasonable since this would result in licensee requiring full cost and at the same time, the generating company be compensated for the electricity generated. So, deviation from the earlier stand taken by the State Commission in the previous cases which were recognised and endorsed by this Tribunal, now the State Commission has given an erroneous interpretation of the provisions of the Agreement between the parties.

(e) The State Commission relied on Regulation 115 of the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations to contend that the Appellant has consciously made its option and as such the claim of the Appellant is contrary to the provisions of the Regulation. This finding is wrong since tariff

Regulations do not provide for any different methodology for energy account and as such, the said Regulations would support the claim of the Appellant.

5. In reply to the above contentions, the Learned Counsel for the Distribution Licensee(R-1) in justification of the impugned order elaborately argued that the grounds which have been raised in the Appeal are not sustainable in law as the reasoning given by the State Commission in the impugned order for rejecting the claim of the Appellant are valid in law.
6. Both the Learned Counsel for the parties have filed their written submissions and also produced various authorities.
7. In the light of the above rival contentions urged by the learned Counsel for the parties, the only question which arises in this Appeal is as follows:

"Whether the State Commission is justified in adjusting the consumption first towards energy generated and injected into the grid, irrespective of the fact that the Appellants is mandatorily required to pay minimum charges ?

8. On perusal of the entire records and also having considered the rival contentions made by the parties, we are of the opinion that the findings rendered by the State Commission are not sustainable in law and facts as we are convinced that the conclusion arrived at by the State Commission in the impugned order is not correct.

9. Our above conclusion is based upon the following reasons:

10. Let us first refer to the Wheeling and Banking Agreement dated 12.10.2006 and 23.3.2007 entered into by the Appellant with the Respondent no. 1 for the two generating units of 0.6 MW each. The

relevant provisions common to both the two Agreements are reproduced below:

"5. Wheeling and Banking of Energy

i) Keeping in view the GoR Policy, the Power Producer shall be free to use the power for their captive consumption at their unit viz. Fashion Suitings (P) Ltd. SPL 7, Growth Center P.O. Swaroopganj, Bhilawara-311001 after paying wheeling charges @ 10% of the energy fed into grid to RVPN/Discom(s). The power producer shall obtain exemptions/license from RERC, if required under the Act.

ii) RVPN/AJMER Discom shall allow banking of energy in a Calendar year upto 31st December of said Calendar year. At the end of the Calendar year if energy remains unutilized, it will be treated as deemed sale to Ajmer Discom, which will be paid at the pooled rate for procurement of power by the Discom in the preceding financial year.

iii) This agreement shall be subject to RERC scrutiny/approval as may be required under regulatory process/directions".

"7. Billing Provision

i) The billing will be on monthly basis. This shall be done after deducting the units for adjustment towards captive use by Power Producer. The detailed account of units generated and used for captive use shall be kept in a passbook & or subsidiary passbooks and such passbooks shall be used for adjustment of bills.

ii) Ajmer Discom shall prefer monthly bills as per applicable Tariff Rate for the electric power made available and energy supplied to the scheduled captive user out of their system after accounting for the energy delivered by Power Producer for captive use. It is clarified that the scheduled captive user shall continue to be the consumer of Ajmer Discom and shall liable to pay minimum billing, fixed charges, excess demand surcharge, power factor surcharge and any other charges leviable and as may be applicable from time to time as per Ajmer Discom's Tariff for supply of electricity and General Conditions of supply".

11. These Agreements provided that the Appellant was free to use the energy of its captive wind energy plant for its captive consumption and the Respondent distribution licensee would allow banking of energy upto the end of the calendar year. The unutilized energy would be treated as deemed sale to the distribution licensee. The monthly billing to the captive user would be preferred by the Respondent distribution licensee after adjusting the energy delivered by the wind generator for captive use. However, the captive user would be liable for payment of minimum billing charges.

12. In the light of the above facts, we shall now refer the earlier orders passed by the State Commission dated 25.7.2006 and 4.11.2006 in similar matters where the adjustment of the entire delivered energy of the wind generator for captive consumption before the minimum billing energy resulted in non-accounting of the full delivered energy of the wind generator.

13. The order dated 25.7.2006 relates to the case namely, Bal Krishna Industries Vs JVVNL, the distribution licensee. In this matter the State Commission in view of the anomalies in accounting of the wheeled energy and minimum consumption of energy of captive user held that the provision of clause 7 of the PPA is not proper and requires amendment and directed the distribution licensee to review similar provisions in other Agreements under wind power policies of Government of Rajasthan and to make amendments in the Agreement. The State Commission also noted that the Review of its order dated 31.3.2006 on promotion of renewable energy and the provisions of draft Regulations had already been initiated and in view of that, the State Commission invited the petitioner M/s Bal Krishna Industries to state his view point on this aspect, before the State Commission in the public hearing.

14. The order dated 4.11.2006 relates to the case i.e. RSMML vs. Ajmer Vidyut Vitran Nigam Ltd. In this case the distribution licensee had revised the energy accounting due to audit objection resulting in non-accounting of the delivered energy from the captive wind generator, in full. In the above order, the State Commission reiterated the findings rendered in its order dated 25.7.2006 in the matter of Bal Krishna Industries and held that the generator was the owner of the generated energy and by any interpretation of agreement, no part of energy generated by him and wheeled can be utilized free of cost by the distribution licensee. The State Commission again directed all the distribution licensees to review the provision of all the Wheeling and Banking Agreements in line with those orders and confirm in writing within 30 days. The State Commission in the order also gave detailed illustration to explain how the accounting of the wheeled energy, banked energy and energy supplied by the distribution licensee has to be

carried out to ensure accounting of entire energy delivered by the wind generator and to avert supply of free energy from the wind generator to the distribution licensee.

15. In fact, the above order of the State Commission dated 4.11.2006 was challenged before this Tribunal by the Respondent no. 1 in Appeal no. 74 of 2007. The Tribunal by majority upheld the decision of the State Commission. Hon'ble Shri H.L. Bajaj in Judgment dated 24.7.2009 has held as under:

> *"17. The whole issue can be examined by treating the two agreements in isolation as these indeed are. As far as the HT agreement is concerned, RSMML is a consumer and is required to pay for the electricity it consumes and is also liable to pay minimum charge; RSMML as a producer is exporting energy to the grid of the appellant with the facility of wheeling and banking. As the cost of energy corresponding to the minimum charges is a sunk cost, there is no reason or rationale for any generator who has the facility of banking and third party sale of energy to allocate its*

own generation towards its minimum consumption for which it has to pay the Discom anyway. The billing provisions of the agreements and the Power Purchase-cum- Wheeling and Banking Agreements do not come in the way of the generator to have flexibility of adjusting its excess energy generated over and above the energy consumed corresponding to the minimum charges. In view of this I conclude that the billing pattern for the energy consumption of RSMML being followed before November, 2005 was the correct pattern.

16. Despite the specific findings of the Tribunal as referred to above upholding the order the State Commission, the Distribution Licensee(R-1) did not modify the PPAs according to the directions of the State Commission to avert the situation of non-accounting of the available energy from the wind generator due to the minimum billing obligation of the captive user.

17. Therefore, in our view the procedure adopted by the State Commission for accounting of the energy delivered

by the wind energy generator is not consistent with the earlier orders passed by State Commission and the ratio decided by this Tribunal.

18. Learned counsel for the Distribution Licensee(R-1) has argued that the Regulations were revised in November, 2006 after the above orders of the State Commission, as such the energy accounting has been done as per the amended Regulations and that therefore, the findings of the State Commission in the earlier orders will not apply to this case. This contention is misconceived. We find that the period of dispute in the present case is between June, 2007 and September, 2007 and, therefore, the amended Regulations are applicable.

19. Let us now refer to the State Commission's order dated 29.9.2006 regarding review of its order dated 31.3.2006 in respect of power purchase from non-conventional energy sources and amendment of

Regulations. The relevant extracts from the order of the State Commission dated 29.9.2006 are reproduced below:

"95. Shri P.N. Bhandari, advocate has referred to the Commission's observation that billing provisions of wheeling and banking agreement in respect of billing is faulty and because of its distorted interpretation of accounting wheeled energy first and then applying the provisions of minimum billing, substantial quantum of wheeled units goes to the Discom free of cost. He has stated that this was never the intent of the Govt. and will go against provisions of wheeling & banking in GoR policy. He proposed a clause to provide solution to this problem as well as to prevent exploitation. The proposed clause broadly provides for adjustment of electrical energy first towards minimum charges and then wheeled and banked energy is to be adjusted. It appears that Shri P.N. Bhandari was referring to the Commission's order dated 25.7.06 in case of M/s Balakhrishna Industries, Bhiwandi v/s Jaipur Vidyut Vitran Nigam Ltd., wherein the Commission has held that clause 7 of wheeling and banking agreement is faulty but it has not been quashed (as it would have affected billing in other cases) and has held that

generator as owner of generated energy will have option to declare on or before meter reading the energy to be banked and /or supplied out of the quantum of energy generated during the month plus banked up to previous month. We state that Genco can supply to one or more captive units and/or consumers under third party sale. In that case it is for generator to declare as to how much energy (generated plus banked) is to be supplied to each unit or consumer. This cannot be accomplished by clause as provided by Shri Bhandari. Further, where available energy (i.e. generated and wheeled plus banked) is much above minimum billing, clause proposed will not operate correctly as consumption (equivalent to minimum billing under HT industrial Tariff) will be first considered against supply of energy by Discom, thereafter wheeled & banked energy will be adjusted and then balance, if any, is to be considered towards billing under HT industrial tariff. In our formulation of exercising option, there is apprehension of distorted billing, if option is not exercised timely or not received timely. We clarify that where option is not exercised/received on or before the meter reading date, such option exercised previously at any time shall be considered as applicable for the month. We further clarify that billing under HT

industrial tariff shall be for the energy consumption equal to either recorded consumption less available energy (i.e. wheeled plus banked) or energy equivalent to minimum billing, whichever is higher, and balance of available energy will be banked".

20. Thus the State Commission did not accept the procedure suggested by one of the objectors for adjustment of minimum billing energy against the captive consumption followed by wheeled and banked energy since according to the State Commission this procedure would not be workable where the generator supplied to more than one unit or consumer. The State Commission, therefore, decided to give option to the generator. However, the objective of the amendment of the Regulations to provide for option to the generator to declare how much energy is to be supplied to each consumer and to remedy the problem of non-accounting of the delivered energy of the wind generator, in full, and booking of free energy to the distribution licensee from the

wind generator due to minimum billing of the captive user by the distribution licensee. In the present case the wind generator had only one captive user.

21. Now let us refer to the Amended Regulations notified on 21.11.2006. The relevant Regulation 115 for banking of energy is reproduced below:

> *"115. Banking*
>
> *(i) (a) In respect of third party sale and /or captive use of non firm energy, the banking and drawal shall be on six monthly basis i.e. April to September and October to March.*
>
> *However, during the months of December, January and February utilization of the banked energy shall not be permitted.*
>
> *(b) For firm energy from biomass power plants banking and drawal will be accounted for in the same month.*
>
> *(ii) (a) Available energy shall be the sum of banked energy at the beginning of the previous month and the delivered energy from the generating station during the previous month after accounting for sale of disom.*

(b) Non-firm RE power station shall intimate on 1st of every month, the quantum of energy to be banked and to be distributed amongst third party and captive use, against the available energy. Where no such intimation is received on or before 1st of the month the intimation last received will become applicable for the month.

(c) The remaining available energy shall be carried forward for banking subject to sub regulation (i) above.

(iii) The billing to consumer under the HT tariff of respective category shall be for higher chargeable amount with regard to following:

(1) Recorded consumption minus available energy i.e. wheeled energy and banked energy, if any.

Or

(2) Energy equivalent to minimum billing.

(iv) Payment of unutilized banked energy of the end of each quarter will be @ 60% of energy charges (including power purchase and fuel cost adjustments if any) applicable for Large Industrial Power tariff".

22. According to clause (ii) above of the Regulation, the wind energy generator has to intimate on 1st of every month the quantum of energy to be banked and for captive use. Clause (iii) above stipulates the procedure for billing of consumer. According to clause (iii), the billing of the captive user has to be recorded consumption less the available energy from wind generator or minimum billing energy whichever is more.

23. As already observed by the State Commission in its earlier order dated 4.11.2006 in the matter of RSMML Vs Ajmer Vidyut Vitran Nigam Ltd., the wind energy generation is dependent on nature and about 70% of the annual energy is generated during the first and second quarters and balance about 30% is generated during the third and fourth quarters.

24. During the months of high wind generation, there may be a situation where the sum of the minimum energy

consumption and the available energy from the wind generator would have been more than the actual consumption. During those months, the unutilized energy of the wind generator by the captive user will have to be banked. The billing period under dispute in the present case namely June to September 2007 is the high wind generation period.

25. It is noticed that during the period under dispute the sum of available energy and minimum energy was more than the consumption of captive user. The Appellant has pointed out that for one month in issue, namely June, 2007, the actual consumption of the captive user was less than the total generation of the Appellant. Thus, under no circumstances total 100% generation could be adjusted against the consumption. According to the Appellant even for the month of June, 2007 no banking of wind energy had been allowed by the first Respondent.

26. The Distribution Licencee(R-1) was issuing bills for the entire energy consumption of the captive user during the previous month during the first week of the month. However, the adjustment of delivered energy of the generator was done in the following months after the receipt of the letter from the wind generator about the proposed supply of energy for captive use and banking. Admittedly, the Appellant in the letter sent to the Respondent no. 1 after the end of the month had indicated that the 100% energy be supplied to the captive user. However, it was not possible to utilize the entire available energy from the wind generator due to billing of minimum energy as per clause (iii) of the Regulation 115. Consequently, the unutilized energy has been utilized by the Distribution Licensee(R-1) for use by its consumers. Thus, the energy accounting carried out by the Distribution Licensee(R-1) resulted in supply of free energy from the wind generator of the Appellant to the

Distribution Licensee and resulted in the unjust enrichment of the Distribution Licencee.

27. When the option given by the Appellant as wind generator regarding wheeling & banking gave the negative result, it would have been in the interest of justice on the part of the distribution licensee, to ask the Appellant to give a fresh option which would permit accounting of the entire energy generation from the wind generator. In our opinion when the energy proposed by the Appellant as generator in its option for captive use was more than what could be consumed after accounting for the minimum energy consumption of the captive user, the balance unutilized energy of the wind generator should have been considered as banked energy.

28. As a matter of fact, the State Commission has adopted a mechanical approach in deciding the issue which has resulted in supply of free wind energy by the generator to the first Respondent, a situation similar to

the earlier cases of M/s. Bal Krishan and M/s. RSMML, which was intended to be remedied by amending the Regulations. The methodology adopted by the Distribution Licensee(R-1) in not accounting for the full delivered energy by the wind generator of the Appellant is not justifiable as it does not reflect the intent of the amended Regulation. The clauses (ii) and (iii) of the Regulation 115 have to be read in conjunction. When application of clause (iii) regarding billing of the captive consumer resulted in non-utilisation of the entire available energy from the wind generator, it would have been fair and in the interest of justice if the Distribution Licensee (R-1) would have asked the Appellant to reconsider the earlier option which was resulting in free supply of wind energy to the Distribution Licensee(R-1).

29. In our opinion the energy accounting of the energy generation of the Appellant carried out by the Respondent no. 1 is also against the spirit of the 2003 Act, National

Electricity Policy and Tariff Policy to encourage generation of renewable energy sources.

30. The Learned counsel for the Appellant has referred to the decision of the Hon'ble Supreme Court in the matter of Union of India vs. D.N. Revri and Co. reported in (1976) 4 SCC 147, wherein the Hon'ble Supreme Court has held as under:

> *"7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation……".*

31. Applying the above principle in the present case, proper accounting to the energy generated and consumed by the

Appellant ought to have been given effect to. The finding as given by the State Commission results in a part of generation of the Appellant not being accounted for and amounting to free supply of energy from the wind generator of the Appellant to the Distribution Licensse(R-1) and unjust enrichment of the Distribution Licensee(R-1). This in our view is inequitable.

32. Thus, we come to a different conclusion on conjoint reading of Regulation 115 (ii) & (iii) and taking a judicious and equitable approach to avert unjust enrichment of the Distribution Licensee 1st Respondent at the cost of the Appellant.

33. We also find that the minimum energy billing has already been withdrawn by the order of the State Commission with effect from November 2007 and, therefore, similar situation due to minimum billing of the captive user may not arise in future.

34. **Summary of our conclusions:-**

We do not agree with the findings of the State Commission accepting the accounting methodology which resulted in a part of the wind energy generation of the Appellant not being accounted for and amounting to free supply of energy from the Appellant to the Respondent Distribution Licensee and its unjust enrichment. We have

come to a different conclusion on conjoint reading of Regulation 115(ii) &(iii) and taking a judicious and equitable approach.

35. In view of above, the Appeal is allowed. Consequently, the Distribution Licensee(R-1) is directed to make payment for the wind energy, which could not be utilized by the captive user due to its obligation for minimum energy consumption and actually consumed by the Respondent no. 1, the distribution licencee, at the rate stipulated in the Regulation 115 (iv). Thus, the impugned order is set-aside.

36. However, there is no order as to cost.

(Rakesh Nath) (Justice M. Karpaga Vinayagam)
Technical Member Chairperson

Dated: 9th Nov. 2011

REPORTABLE/NON-REPORTABALE