Before the Appellate Tribunal for Electricity
Appellate Jurisdiction

Appeal No. 74 of 2007

Dated: 8th May, 2008

Present: Hon'ble Mr. A. A. Khan, Technical Member
Hon'ble Mrs. Justice Manju Goel, Judicial Member

Under Section 111 (2) of Electricity Act, 2003

In the matter of :

Ajmer Vidyut Vitran Nigam Limited
Hathibhata Power House
AJMER – 305001

….Appellant

Versus

1. Rajasthan Electricity Regulatory Commission
Vidyut Bhawan, Jyoti Nagar,
JAIPUR

2. Rajasthan State Mines and Minerals Limited
4, Meera Marg,
UDAIPUR

… Respondents

Counsel for the Appellant : Mr. Shyam Moorjani & Mr. Hemraj
Mr. S.D. Asudani, Ex. Engineer (Comm.I)
Mr. B.L. Sharma, Sr. Accountant (Comm.)
Mr. Chander Golkani (O/C)
Mr. H.G. Gupta, Sr. A.D. for Jaipur VVNL
Mr. P.C. Sharma, DA,

Counsel for the Respondent : Mr. Nitish Nair, Mr. P.N. Bhandari,
Mr. H.C. Gupta &
Ms. Suchi Jain for RSMML
Mr. R.C. Sharma, Dy. Secretary for RERC
Mr. Gopal Gandhi, DGM, RSMM

JUDGMENT

<u>Per Hon'ble Mr. A.A. Khan, Technical Member</u>

I have gone through the draft judgment of my esteemed colleague on the bench, Judicial Member, Mrs. Justice Manju Goel on the Appeal, which is placed below. While I respectfully differ with her analysis and findings firstly in respect of the fundamental issue of the impugned pre-existing procedure of billing by the Appellant for consumption of energy to Respondent No. 3 as CPP-cum-HT-Consumer which is found to be erroneous by me not being in accordance with the provisions of the relevant agreement and secondly I find that the doctrine of estoppel is not applicable in the instant case. I am in agreement with her on the issue of application of Section 56(2) of the Electricity Act, 2003 and the provisions of the Limitation Act. I also opine that the principle of conduct of parties to a contract in deciding its future operation is not applicable in the instant case. I additionally find the failure on the part of the Commission in not considering the prayer of the Respondent No. 2, RSMML (Petitioner before the Commission) for waiver of the minimum charges. Due to divergence of my views on the aforesaid points my analysis of the instant case has resulted into the conclusions which are at variance from that of my esteemed colleague. In my separate judgment I have dealt with the aforesaid issues in sufficient detail.

2. The Appeal of Ajmer Vidyut Vitran Nigam (for short 'AVVN') a distribution Company wholly owned by the State Government of Rajasthan, has challenged the order dated 13 Apr. 07 in Review Petition No. 124 of 2007 and original order dated 04 Nov. 2006 in Petition No. 100 of 2006 passed by Rajasthan Electricity Regulatory Commission (hereinafter to be referred to as the 'Commission/RERC'). Petition No. 100 of 2006 was

preferred by Rajasthan State Mines and Minerals Ltd. (for brevity to be called as 'RSMML') a company wholly owned by the state government engaged in Mining of minerals in the State which has also set up various Captive Power Plants based on wind power, generating electricity for captive use at its different industrial sites and sale to the Appellant and / or third party. RSMML has also been an HT-consumer of the Appellant and its' predecessors since 1984 and both had entered into agreements for a specific contract load, last being on 06 Feb. 02. RSMML becoming a power producer from its various wind energy based captive power plant set up under GOR Policy dated 04 Feb. 2000 for promoting generation of Power through Non-Conventional Energy (NCE) source also signed Wheeling and Banking Agreement (WBA) dated 29 Aug. 01 with the Appellant followed by another agreement titled Purchase, Wheeling & Banking Agreement on 19 Feb. 2004. The aforesaid agreements were signed in pursuance to Govt. of Rajasthan (GOR) Policy for Promoting Generation through Non-Conventional Energy (NCE) Sources dated 04 Feb. 00 and policy for promotion of electricity generation from wind dated 30 Apr. 03.

3. RSMML, the Respondent No. 2 has set-up 4.0 MW (Phase-I) wind energy power plant in Aug. 2001 in Jaisalmer district of Rajasthan under GOR policy of 04 Feb. 00. It executed a WBA with the Appellant, Rajasthan Vidyut Prasaran Nigam Ltd. ('RVPN') and Jodhpur Vidyut Vitran Nigam Ltd ('JdVVNL') for wheeling and banking of power from the aforesaid plant to its own industrial units and sale to third party on 29 Aug. 01. Subsequently, the aforesaid agreement was amended to include an additional installed capacity of 4.9 MW (Phase-II) in May 02. The aforesaid agreement was further amended vide RVPN's letter dated 16 Apr. 03 RSMML to add a further capacity of 5.0 MW in

Mar 04 under GOR Policy of Apr. 03 and power purchase-cum- wheeling and Banking agreement was extended on 19 Feb. 04 with RVPN, AVVNL, JdVVNL and Jaipur Vidyut Vitran Nigam Ltd (JVVNL). This agreement provides for sale of 95% of net generation to Discoms and balance 5% for the captive use of RSMML. From 2x4.9 MW captive power plant (Phase I & II), 75% of net energy generated is sold to Discoms and balance 25% is utilized/wheeled for captive use of RSMML.

4. On the request made by the Appellant, Jaipur Vidyut Vitran Nigam (JVVNL) has been impleaded as a party to this Appeal. JVVNL was the party respondent in the similar case of Balakrishan Industries Vs. JVVNL in which the Appellant was one of the respondents before the Commission in Case No. 101 of 2006. The Appellant in its application has stated that the parties in the aforesaid case have been following the same billing methodology as now proposed in the revised procedure in the instant case. The Commission in its order dated 25 Jul. 06 in Case No. 101 of 2006 has found certain anomolies and directed all Discoms including the Appellant in the instant case to amend Art. 7 of the Power Purchase cum Wheeling & Banking Agreement dated 21 Sep. 04. The Petitioner is having liberty for redressing its grievance either under the Act/regulations or by recourse to the provisions of the agreements.

<u>Dispute and Issues raised</u>

5. The dispute is primarily pivoting on the revised accounting procedure for energy exchange between the Appellant on one hand and RSMML as Captive Generator-cum-HT- consumer on the other highlighting on the issue of “Minimum Charges” not being paid for under the earlier procedure and *inter-alia* relates to issues that:

(a) As per the Appellant's claim the 'Banking' of energy with it is allowed only when the energy generated and wheeled in the grid is more than the captive consumption of RSMML. The energy generated and wheeled by the Captive generator unless found surplus to the captive consumption is not eligible to be banked and therefore, the generated and wheeled energy is to be first adjusted against the Captive consumption to determine the bankable energy.

(b) The Appellant has been raising bill allegedly following a wrong procedure under mistaken belief wherein the 'minimum energy' chargeable as per HT-Consumer agreement was being adjusted first against the Captive consumption and the generated and wheeled energy was then adjusted against the balance deficit in captive consumption, to determine the energy to be banked with it. This procedure continued till Oct. 2005 and the Appellant adopted the revised procedure as at (a) above when objected to in Audit with effect from Nov. 2005.

(c) The Appellant has claimed for recovery of arrears due primarily on account of minimum charges not being paid in the procedure adopted earlier as entitled to it by the HT-contract. RSMML while contesting the revised procedure has invoked the principles of estoppel and non-recovery of arrears under Section 56(2) of EA, 2003.

(d) Appellant has challenged the jurisdiction of the Commission on the ground that it is a billing dispute between the licensee and HT Consumer and does not fall within the purview of Section 86 of the EA-2003.

Issue of Jurisdiction

6. Before taking up the primary dispute of billing procedure, I will take up the issue of jurisdiction raised by the Appellant.

7. The Appellant has submitted that since the dispute has arisen out of the bills covered under the HT-agreement and thus is a consumer issue, and is beyond the jurisdiction of the Commission. The learned counsel for the appellant has submitted that dispute between licensee and consumer arising out of an independent consumer agreement is to be settled [under Section 42(5) and 42(7) of the Electricity Act, 2003] by forum namely Consumer Redressal Grievances Forum/Ombudsman and does not fall within the purview of Section 86(1) of the Act.

8. Mr. P.N. Bhandari, learned counsel of the respondent No. 2, RSMML has stated that it did not challenge the provisions of 'minimum charges' and nor there is any dispute between the Consumer and Licensee on it. He states that the dispute has arisen from the Wheeling & Banking agreements executed in accordance with GOR Policy

9. I have observed in para 13 later that the Clause 3.4 of wheeling and banking Agreement dated 24 Aug 01 and Clause 7.4 of Purchase, Wheeling & Banking Agreement dated 19 Feb. 04 link these Agreements with the HT-consumer Agreement signed between the contesting parties. It has necessitated the adoption of a common

composite billing methodology for wheeling and banking of energy with CPP as NCE generator and a consumer of HT for computation of captive consumption, adjustment of 'minimum charges', wheeling, banking etc. and has been implemented based on mutual agreement between the parties. Further, the Appellant, right from Aug 01, till Oct. 05, has been raising bills in the belief and understanding of that being in accordance with the relevant agreements. The Commission in its submission before us, has stated that the issue of its jurisdiction was examined by it in para 3 of its main impugned order dated 04 Nov. 06 which reads as under:

> *"…………….the Commission observes that under Section 86(1)(e), the Commission is to promote electricity generation from renewable sources of energy, including wind energy and under section 86(4), it is to be guided by National Electricity Policy. As per para 5.2.26 of the said policy, the Commission may have regulatory oversight on commercial arrangement between CPP and licensee so as to enable harnessing of surplus power from such captive power plant. Under these provisions, the Commission have jurisdiction to examine whether adjustment of wheeled energy as per the methodology adopted by AVVNL, adversely affects promotion/harnessing of surplus power from a captive power plant and that, too, of renewable sources of generation."*

10. This Tribunal in its judgment dated Sep. 06 in Appeal NO. 20 of 2006 in the case of **Chhattisgarh Biomass Energy Developers Association & Ors. Vs. Chhattisgarh State Electricity Regulatory Commission & Ors**. has stated thus,

"……………i*t is the mandate of the Act of 2003 more particularly Section 86(1)(e) of the Act of 2003 read with Section 61(h) thereof and Preamble thereto and the various policy guidelines to promote generation of electricity from renewable sources of energy including biomass. The appropriate Commission is bound to give effect to the statutory direction of the Act of 2003 to promote generation of electricity from renewable sources of energy."*

The aforesaid judgment has further held that:

"……….it is the bounden duty of the appropriate Commission to invoke the provisions of Section 86(1)(e) to issue appropriate directions with a view to promote generation for electricity from renewable sources of energy. This call for re-opening of power purchase and wheeling agreements by the Commission for suitable amendments in keeping with the provisions of Section 86(1)(e) of Electricity Act, 2003."

11. In view of the above, I hold that the claim of the Commission to intervene in the instant case is justified and is well within its jurisdiction.

Issue of Billing Procedure

12. The primary dispute between the Appellant and Respondent No. 2, RSMML is based on:

(a) RSMML as HT- Consumer of the Appellant under the agreement last being signed on 06 Feb. 2002 according to which 'minimum charges' is payable to the Appellant if the consumption of electricity is less than the minimum units specified by the HT agreement and the relevant applicable tariff order.

(b) Appellant, as licensee providing wheeling of generated energy earmarked for captive use from captive power generation plant of RSMML to its captive load for consumption and energy surplus to consumption for banking under Wheeling & Banking agreements dated 29Aug. 2001 and 19 Feb. 2004.

13. Even though the agreements at 5(a) and 5(b) above are distinctly separate agreements, the billing procedure specified in clause 3.4 of agreement dated 29 Aug. 01 and clause 7.4 of agreement dated 19 Feb. 2004 have linked them to HT-Consumer agreement of 5(a) above insofar as the liability of RSMML to pay 'minimum charges' are concerned beside maintenance of pass book for units generated, units consumed etc. Thus the quantum of captive generation, captive consumption, minimum charges towards demand charge and minimum guaranteed off-take of energy from grid and quantum of energy to be banked with the licensee were treated in a composite manner.

14. To have proper appreciation of the case and taking the agreement whereby 5% of the total generation of the captive power plant is earmarked for captive use for wheeling to the captive loads on payment of wheeling charges and the balance 95% is sold to the

Appellant for which no wheeling charges is leviable on the generator. Wheeling charges as per the agreement are recovered in the form of energy units and not in cash. Thus 5% of the total generation recorded by the export meter is injected into the grid and after netting of with the wheeling charges, the balance energy is available for captive use in the grid. The grid network additionally has a pool of energy procured and injected from different sources of the distribution licensee. The energy from different sources in the energy pool have common characteristics and is not distinguishable as to which energy is injected by which source into the grid; nor it is required to be known. The energy units injected into one point of the grid network are off-taken by one or more destination consumers recorded by the import meters within their premises. The transactions are carried out based on the energy equalization i.e. the sum of energy units injected by all sources into the grid is equal to sum of energy off-take from the grid by all connected consumers, giving due regard to T&D losses which are recovered through wheeling charges. The entire distribution and transmission networks providing connectivity to widely dispersed generation sources with innumerable consumers operate on this principle. The open access to transmission and distribution networks also work on the same principle.

15. Thus, in the instant case also, the injected energy into the grid by the generator becomes a part of the grid pool and the load draws energy from the grid which is measured by the import meter. The load has to consume what it needs. If the consumption recorded by the import meter is more than the energy injected by the generator (in this case 5% of energy generated & net of wheeling charges) recorded by the export meter, it would obviously draw deficit from the AVVNL owned sources and

will be determined by the difference of the aforesaid recorded readings. If the consumption is less than the injected energy into the grid, the difference will determine the energy surplus to the load requirement and will be eligible for banking. The 'minimum charges' is applicable only in case of HT-agreement which *inter-alia* means the energy off take from the sources owned by the AVVNL and not the energy generated and wheeled by the generator.

Composite Billing Methodology:

16. The billing procedure for exchange of units of energy is based on setting-off in kind the units exported to licensee from those imported from the licensee and working out the energy charges on the basis of net energy units imported from the grid. The prevailing billing methodology till Oct. 2005 admittedly is to first adjust 'minimum charges' against the captive consumption of RSMML. Thereafter, the Appellant used to adjust the generated and wheeled energy against the remaining actual captive consumption and balance left, if any, of wheeled energy was banked with it to be later released during lean season of wind generation for captive use of RSMML. It is submitted by RSMML that due to existing favourable natural wind-flow profile (six months from Jan. to Jun.) about 70% of the total energy is generated during the said period and 30% is generated in the remaining lean-season-period (six months from Jul. to Dec.). Accordingly, the energy banked with AVVNL is released back to RSMML for meeting the shortfall in captive consumption requirements. The said procedure has resulted into denial of 'minimum charges' to AVVNL as provided for in the terms and conditions of HT-contract.

17. Based on audit observations made in Mar. 05, the Appellant has revised the above stated procedure of billing from Nov. 2005. The said revised procedure provided, firstly to adjust the generated and wheeled energy for captive use against the captive consumption of RSMML, and meeting the deficit in captive consumption from the energy supplied by AVVNL.

18. The Commission in its impugned order dated 04 No. 06 has set out the pre-existing and revised procedure as indicated below:

> *"The Petitioner has stated that initially, after adjusting minimum charges against the actual energy consumption, AVVNL used to adjust wheeled energy against the remaining actual energy consumption and the balance wheeled energy was banked for the next month.* ***In other words, out of the actual energy consumption, energy corresponding to minimum charge was deemed to have been supplied by AVVNL and the balance energy was adjusted for banking.*** *However, from Nov. 05 AVVNL revised the procedure and started adjusting the wheeled energy first against the actual energy consumption and the balance energy consumption was considered as the energy supplied by the Nigam. If, however, such balance energy consumption was not adequate to cover minimum charge, AVVNL levied the minimum charge in the monthly bill. (*Emphasis supplied).

19. Without prejudice to the revised procedure I find that the 'Minimum Charges', while operating the stated earlier procedure, is interpreted to be as deemed supplied (portion under lined above) instead of deemed consumption. The units corresponding to 'Minimum Charges' is liable to be paid by the consumer without being delivered by the licensee and is, therefore, required to be added to the actual energy consumption.

20. Accordingly, consistent with the revised procedure AVVNL raised bill dated 04 Nov. 2005 for recovery of arrears of Rs. 48,653.18 (July 02 to Aug. 03) and Rs. 43,54,946.64 (Feb. 05 to Oct. 05) with retrospective effect, aggregating to Rs. 91.54 lakhs from RSMML.

21. In order to have better appreciation of the issues involved in the dispute certain terms involved are required to be clearly understood as described below:

(a) **Minimum Charges**: - The two-part tariff structure primarily has two components namely Demand (Fixed) Charges and Energy Charges. The fixed charges facilitates recovery of capacity charge which is often termed as 'Demand Charge' related to contract demand and is attributed to infrastructure cost incurred by the licensee in providing connection to the consumer. It has to be paid by the consumer whether or not it avails supply from the licensee. If the consumer consumes energy it has to additionally pay for the actual consumption of energy at the rate determined in the tariff applicable to the concerned category of consumers. However, in case of HT- consumers, often the tariff has also yet another component for minimum guaranteed off-take (generally termed as

'Minimum Units') of energy in order to ensure an assured revenue to the licensee to supplement the Fixed Cost. The deficit in drawal up to specified 'Minimum Units' is termed as 'Minimum Charges'. These charges are levied consistent with the tariff regime in force and basically compensate the supplier to arrange for energy to meet its liability of contracted demand of energy with the consumer and for sustenance of the feasibility of the connection. The 'Minimum Charge' is only compensation to licensee for consumer taking units less than the specified equivalent minimum units and only represents notional units and not physical units purchased. The notional units of 'Minimum Charges' are deemed consumed and have to be paid for by the consumers.

If the consumer does not draw any unit or its drawal is less than the prescribed 'minimum units', it has to pay the 'minimum charges' equivalent to shortfall in drawl up to 'Minimum Units'. If the drawal of the consumer is more than the prescribed 'minimum units' of energy, the 'minimum charges' is not separately recoverable as the charges of the energy off-take adequately provides for the deficit in fixed cost recovery. In other words, if the HT-consumer does not draw any energy or draws energy less than the 'Minimum Units' it is liable to pay 'Minimum Charges' for notional units not drawn and is considered as deemed consumption. If its drawal exceeds the 'Minimum Units', no 'minimum charges' is leviable.

(b) **Banking of Energy:** This Tribunal in para 22 of its judgment dated Sep. 06 in Appeal 20 of 2006 in the case between **Chhattisgarh Biomass Energy**

Developers Association & Ors. Vs. CSERC and Others, describes the banking of energy in the following terms:

"Banking

22. Banking of electricity is a facility to help small gene*ration stations based on non-conventional sources of energy to produce power by maximizing the utilizations of available fuel stock without demand restrictions. ……………………………………………………………….. In this arrangement the distribution licensee purchases the entire power generated by a plant even if it is more than the demand of the third party or its own and utilizes the excess power to meet its current demand by adjusting the purchases from other outside sources. The excess power so utilized (banked) by the distribution licensee is released back from its own source to the generators when required by them. This facilitates in optimal utilization of available sources of energy viz., water, wind, bagasse, biomass etc. and makes an economic sense."*

The dispensation of banking facility is to incentivise and promote maximizing the production of Power from Non-conventional energy sources (in the present case natural wind flow profile) by utilizing the fuel stock to the maximum extent. The obligation to produce power to the maximum extent is, therefore, inextricably linked to incentive of banking facility. One without other will not survive.

22. In the instant case, the energy surplus to captive consumption out of energy generated annually by the captive wind-based plant during the first two quarters of the year is banked with AVVNL and is released back from AVVNL's own source to RSMML during the last two quarters of the year or as and when required to supplement shortfall in its captive consumption when the captive generation of RSMML is merely 30% of the annual generation. Further, if at the end of December, still some banked energy is left it will be deemed to have been sold to AVVNL at 60% of the prevailing energy rate. The arrangement of banking facility for Non-conventional Energy generators is basically promotional initiative and is provided in both Wheeling and Banking Agreements in consonance with the GOR Policy referred to above and also in Ministry of Non-Conventional Energy Sources (MNES) guidelines of Govt. of India. This facility is provided to NCE- CPP in several states to promote development of green power sources and make them commercially competitive. The government provides promotional and fiscal incentives to attract investment in such environmentally benign sources of energy. The production of energy from wind-based power being not uniform throughout the year, the industries having wind based CPP while maximizing the production of electricity from CPP, have to essentially use grid-power support.

23. It may be pertinent to clarify here that the parties do not dispute that the energy is banked only when the energy generated and wheeled by the captive power plant is surplus to the total captive consumption. As a corollary to it, if the generated and wheeled energy is less than the captive consumption, the deficit energy is drawn from AVVNL owned sources to meet the deficit in consumption and there being no surplus energy the question of banking does not arise at all.

24. At the cost of repetition, the levy of 'minimum charges' is only related to contracted demand and energy drawn from AVVNL owned sources as per the HT-agreement and not on the energy generated and wheeled by the captive generator. The load draws energy from the grid pool which also contains energy generated for captive use by the captive generator. In order to operate the HT-agreement, the quantum of energy drawn from the AVVNL owned sources is to be first determined. It is obtained by taking the difference of consumption (Import Meter reading) and energy generated for captive use (5% of export meter reading adjusted for wheeling charges). The HT-agreement and the applicable tariff specify the 'minimum units' and any shortfall in consumption (i.e. 'minimum charges') from the AVVNL owned sources is liable to be charged from the consumer. The 'minimum charges' is not recorded by the import meter but is to be deduced by comparing the energy drawn by the load from AVVNL owned sources against the minimum units specified. This is why the 'minimum charges' is to be considered as deemed consumed and is to be added to quantum of energy units consumed from AVVNL owned sources which as mentioned above is computed from the difference of the recorded readings by the Import and Export meters. For illustration:

Case –I: When consumption recorded by Import Meter (M1) is greater than the generated and wheeled energy which is 5% of the quantum recorded by Export Meter (M2):

Energy drawn from AVVNL owned source (es) = M1 - M2; No banking.
Let Minimum units specified = x

Compare es with x,

Energy units to be billed = $e_s + e_m$; if $e_s \geq x$; No 'minimum charges i.e. $e_m = 0$

if $e_s < x$; the minimum charges ($e_m = x - e_s$) is chargeable.

Case –II **When consumption recorded by import meter (M1) is less than the generated and wheeled energy which is 5% of the quantum recorded by Export Meter (M2)**

Implies, Energy units surplus to consumption that will be eligible to be banked = (e_b) = M2-M1

- No energy units being drawn from AVVNL owned sources.
- The minimum charges equivalent to minimum units is chargeable.
- The energy units to be billed = Minimum units

25. From the above, it is abundantly clear that neither the captive generation nor the total consumption play any role to decide about the minimum charges. The 'minimum charges is exclusively dependant on the contracted demand and energy units drawn from the AVVNL owned sources as per HT-agreement and applicable tariff. The total consumption has nothing to do with the 'minimum charges'. Hence to determine minimum charges the 'minimum units' level can not be compared with the total consumption as is being done in page No. 5 of the reply submitted by Respondent No. 2. It will be examined later.

26. If the separate billing against each agreement is to be dispensed with and combined billing is resorted to, the HT-consumer agreement has to be necessarily kept in view while implementing the WB agreement signed between AVVNL and Respondent NO. 2 for captive generation and wheeling of energy for captive use and banking. The

concept is analogous to a generator given access to distribution grid to wheel its energy to a consumer who is also a consumer of the licensee.

<u>What are envisaged by Agreements?</u>

27. Since Respondent No. 2, RSMML has approached the Commission for enforcement of the agreement, the first step is to determine the terms of the agreement and its interpretation by harmoniously reading together the terms and conditions of HT-Consumer Agreement, WB Agreement dated 29 Aug. 01 and Purchase-cum-Wheeling & Banking Agreement dated 19 Feb. 04 entered into between the Appellant and Respondent NO. 2, RSMML. It is to be borne in mind that since 1984 the Respondent No. 2, RSMML has been HT-consumer of the Appellant and while continuing in that status, also became Wind Power Captive Generator from August 2001 onward.

(a) **HT-Agreement dated 15 Apr. 1984**:

- *"Clause 17 (b) of the agreement provides that*

  "The Consumer shall in any event be liable to pay the Minimum Charges/minimum guarantee every year as mentioned in the tariff schedule attached hereto" (Emphasis supplied)

- *Clause 19(a) made provisions for late payment surcharge and disconnection of supply in the event of default in payment.*

- *Clause 24, provides that the agreement shall remain in force for a period of five years in the first instance commencing from the date of supply and thereafter from year to year.*

- *In an agreement of 06 Feb. 02, the parties agreed to increase the contract demand to 6 MVA.*

From the above, it is clear that for the Maximum Demand of 6 MVA, the Consumer (RSMML), in any event, is liable to pay the Minimum charges as per the provisions of the prevailing tariff schedule for the Industrial consumers approved by the Commission.

(b) **WB Agreement dated 29 Aug. 01**

- Initial term of the agreement shall be twenty years from COD. On expiry of the aforesaid term, the agreement maybe extended for further ten years with mutual consent of the parties.
- RSMML shall be free to use the power for the captive consumption of its' industrial units/or sale to third party – after paying wheeling charges @ 2% of the energy fed to grid subject to changes, if any, by the Commission

  [Note: The facility to sale to third party was later withdrawn by the Commission by its order dated 05 Dec. 02) and a specified percentage (95% of the generation) is sold to AVVNL and 5% is allocated for captive use by the Respondent No. 2 , RSMML. The energy not utilized out of 5% allocation is only considered for banking].

- RVPN shall allow banking of energy in the financial year and if at the end of the financial year energy banked remains unutilized, it will be deemed to have been purchased by RVPN at the rate of 60% of the prevailing energy charges for Industrial Tariff.

- The cost of interfacing from the point of generation to the grid (delivery point) is to be borne by RSMML.
- RVPN will augment the sub-station capacity at 33 KV and down stream sub-transmission lines to receive power generated by RSMML at its own cost.
- Two meters, one for import and the other for export of power are to be installed by RSMML. Thus the energy units generated, exported and imported at all interfacing points are being measured. The energy units pooled in the grid from various sources are electrons which are indistinguishable from each other. But time-coincident measurement by Export meters at Delivery Points of generators and Import meters at load points, and the knowledge of the quantum of banked units with simple energy equalization will accurately determine the quantum of energy units consumed from generated, wheeled and/or banked units and how much is drawn from AVVNL's own source of power.
- Article 2.2 (iii) provides that,

  "The energy supplied by RSMML at the Delivery point shall be considered as the energy supplied to RVPN and deemed banking to RVPN after adjustment of units for captive use and / or sale to third party by RSMML in case the total generation is more than the Captive Consumption and /or sale to third party plus wheeling charges. The suitable metering arrangement shall be made at 132 KV GSS, Jaislamer, to have the account of power utilized by

Jodhpur Discom due to generation of power from RSMML's power plant"

- Article 3.4 provides that

"*The billing will be on monthly basis. This shall be done after deducting the units for adjustment towards captive use and/or sale to third party by RSMML. The detailed account of units generated and used for captive use and/or sale to third party shall be kept in a pass book and or subsidiary pass books and such pass books shall be used for adjustment of bills.* ***It is clarified that the users shall continue to be the consumer of Ajmer/Jodhpur Discom and shall be billed for the fixed charges and minimum charges as applicable for large industrial service as per the tariff determined by RERC****. The Energy Charges shall be worked out on the net energy drawl from the grid (Total energy drawn less captive generation less losses and wheeling charges). (***Emphasis supplied***)*

In the event the received Energy plus the banked energy so available for supply to the user(s) in any month is less than the Energy consumption of the User(s) in that month, the Energy supplied to each user from the plant shall be in the ratio, as intimated by RSMML two months in advance and such intimation shall be restricted to one a year and the balance of Energy consumed by each user will be deemed to have been supplied by the Jodhpur Discom/Ajmer Discom to the

User(s) at the applicable Energy Charges of Large Industrial Service Tariff."

It clearly stipulates that the energy supplied at Delivery Point is deemed banking only if the total generation is more than the captive consumption. The energy units generated for captive use are first adjusted against the consumption. The balance left after adjusting units generated and wheeled against the captive consumption is banked.

The above *inter-alia* specifies that:

(i) The captive generator (RSMML) will continue to be billed for 'Minimum charges' and fixed charges as applicable to large industrial user (under HT-consumer agreement). It indicates that while these agreements are linked their terms and conditions are mutually exclusive. It provides indisputable right to licensee to recover minimum charges. Non-recovery of 'Minimum Charges' will be repugnant to both HT-consumer agreement and WB agreement. As pointed out at para 27(a), clause 17(b) of the HT-agreement specify that "the consumer **shall in any event be liable to pay the minimum charges………"** and at para 27(b), Article 3.4 of WB Agreement reiterates that "………. the user shall continue …..and **shall be billed** for the fixed charges **and 'Minimum charges'….."**

(ii) Units for adjustment towards Captive use is to be determined. ‘Minimum Charges’ being units of deemed consumption is to be added to the recorded captive consumption by the captive load, to obtain adjusted captive consumption.

(iii) A pass book to be maintained for record of units generated and units for captive use for adjustment of bills.

(iv) The monthly billing is done after adjustment of the units towards captive use and/or sale to third party by RSMML from units generated and wheeled. Billing is to be based on net import of the energy supplied from the AVVNL owned sources of the grid which is equal to,

= (Total energy drawn or consumed (minus) captive generation net of Wheeling charges and losses)

(v) If (Energy + Banked energy) is less than the consumption, the deficit is deemed to have been supplied by the Appellant grid. It means, the energy supplied from the grid = consumption –(Energy generated and wheeled + energy banked)

(c) **Power Purchase & WB Agreement dated 19 Feb 04**

This agreement insofar as the metering and billing procedure is concerned is similar to the agreement mentioned in (b) above, except that the Wheeling Charges are increased from 2% to 10% of the energy available at the delivery point and the Appellant purchases 95% of the energy generated.

For the sake of completeness, Clause 7.4 (billing provision) is quoted hereunder:

"7.4 Billing provision

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 & used for captive use shall be kept in a pass book and or subsidiary pass books and such pass books shall be used for adjustment of bills.

Concerned Discoms 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 concerned Discoms 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 concerned Discom's Tariff for supply of electricity and General Conditions of supply."

(d) **GOR Policy for promotion of Electricity Generation from Wind, 2003**

The objectives of this policy are to support Wind Power generation programme based on Wind resource studies and assessment and to attract

investment in the power sector. It targeted a further capacity addition of 200-250 MW. It provided pricing of generated power; wheeling; banking; exemption from Electricity Duty; Grid interfacing; metering; allotment of sites to eligible developers etc. The fiscal concessions including banking facility under GOR policy are the incentives to maximize production up to the maximum available generating capacity and any regulation to avoid paying 'minimum charges' is bound to be counter productive and disadvantageous to the generator as it will affect its revenue out of sale to AVVNL as its purchase at a special price from the RSMML. Moreover, such practice for any commercial compulsion will make the facility of banking meaningless. Further, the Commission has said that the RSMML being the generator of the power could declare as to how much of its power is needed to be wheeled to its industry in another district. It is clarified that the ratio of energy supplied from the plant to each industry of the user, RSMML can only be changed once an year within 5% of the generation allocated for captive use. In this connection Article 3.4 of the WB Agreement may be referred to. This aspect is not relevant here as the entire 5% of the generated power for the captive use including the energy that is banked during the year is being fully consumed. The consumer has no option but to draw deficit energy from AVVNL owned sources and the payment of minimum charges is linked to such energy. The agreements described in (b) & (c) above are structured on these policies and are consistent with them. It will be `irrational to search for billing procedure in GOR policies.

Summary

28. Having seen the policy and relevant agreements concerning the dispute on the billing process, the essential steps required to operationalize the process could be sequenced and summarized to harmoniously satisfy the terms and conditions of both agreements namely HT-consumer Agreement and WB Agreements separately and jointly in composite billing.

(a) Operating **HT-consumer agreement** without captive generator since 1984 essentially implies that:

- Billing is done on units drawn from the grid to bridge the gap in consumption = ($e_L + e_m$); where, e_L is the consumption of load recorded by the import meter and e_m is the minimum charge not measured by the meter. When units drawn from the AVVNL owned sources is less than 'minimum units' e_m is charged and when it is more or equal to minimum units, $e_m = 0$.

(b) **A Captive generator,** later in Aug. 2001, is added into the system and is regulated by terms and conditions of WB Agreement. It inter-alia implies that:

- G Units Net of generated and wheeling charges is wheeled to the industrial load.
- The units banked (e_b) in the preceding month is added to G to give total units of energy available i.e. = G + e_b.

- Minimum charges (e_m) is payable, if units drawn from the grid's AVVNL's owned sources (e_s) is less than the specified minimum units determined by the HT-agreement and applicable tariff. For example, if minimum units = 20 and units drawn from the AVVNL owned sources=10, the shortfall in minimum units = (20-10) = 10 units represent 'Minimum Charges' (e_m). The units drawn from the grid's AVVNL owned sources (e_s) is equal to the difference of recorded consumption by the import meter (i.e. e_L) and the recorded generation by export meter net of wheeling charges (i.e G) by energy equalization. These measurements are recorded at coincident time and verified by both parties.
- e_m is 'units deemed consumed' and is to be added to captive meter consumption, e_L to obtain adjusted total consumption i.e. ($e_L + e_m$) units.
- Account of Minimum Charges (e_m) and 'other than Minimum Charges' (e_s) are to be recorded in pass Book.
- If $(G + e_b) > (e_L + e_m)$, the banking is allowed the units banked

  $$=[(G + e_b) - (e_L + e_m)]$$

- If $(e_L + e_m) > (G + e_b)$, the deficit in consumption is made up by drawing from the grid and the units drawn from the grid

  $$= [(e_L + e_m) - (G + e_b)]$$

- Units supplied from grid inclusive of minimum charge and the charges thereof are worked out at the rate of Large industrial Service Tariff.

The above sequence will meet the requirements of both Agreements.

<u>Revisiting Composit Billing Methodology (Per Impugned Order)</u>

29. Applying the above formulation to test the example depicted by the Commission in its impugned order of 04 Nov. 06 on pages 12 & 13.

We observe that in the given example the Commission has assumed;

Monthly consumption = 300 Kwh per KVA

Monthly Captive Generation = 280 Kwh in first six months and 120 Kwh in next six months

Monthly Minimum Units = 107 Kwh.

30. It has then sought to demonstrate and justify the pre-existing procedure of billing considering adjustment of wheeled energy <u>beyond</u> minimum billing as illustrated in the table below:

Table –I

Billing considering adjustment of wheeled energy <u>beyond</u> minimum billing

Months	Energy Consumption	Wheeled energy	Banked Energy at month beginning	Total wheeled + banked energy	Supply by Vitran Nigams#	Energy banked at month end
i	**ii**	**iii**	**iv**	**v**	**vi**	**vii**
1st	300	280	0	280	107	87
2nd	300	280	87	367	107	174
3rd	300	280	174	454	107	261
4th	300	280	261	541	107	348
5th	300	280	348	628	107	435
6th	300	280	435	715	107	522
7th	300	120	522	642	107	449
8th	300	120	449	569	107	376
9th	300	120	376	496	107	303
10th	300	120	303	423	107	230
11th	300	120	230	350	107	157
12th	300	120	157	277	107	84
Total	**3600**	**2400**			**1284**	

#equal to ii-v or minimum billing, whichever is higher.

31. It is observed that the formulation itself is misconceived i.e. billing considering adjustment of wheeled energy beyond minimum billing (excluding minimum units) which inter-alia means that minimum units is supplied by the licensee, even when the deficit in the wheeled energy to meet the consumption is less than the specified minimum units. The liability to pay minimum charges is being condoned by the very adjustment process of "energy beyond minimum billing" In other words 'Minimum Charges' is being taken outside the scope of adjustment and is banked. It may be pointed out that drawal is possible only up to the level required by the load and not more. Say in the first entry in the above Table-I, indicates that while 20 units (i.e. 300-280) are needed to meet the captive consumption, the units deemed drawn from the grid is 107 (up to the level of Minimum Units) and 20 units are consumed from the grid and balance (87 units) being banked. The energy units deemed drawn from the grid is only to meet the deficit in consumption and not for banking back with the licensee. The banking is only admissible for excess units supplied by the captive generation and are surplus units over and above the consumption. The minimum charges are the notional units basically considered as deemed consumed and is liable to be charged to meet an element of fixed cost. In the procedure erroneously units equivalent to 'minimum charge' are successively banked month after month. The 'Minimum Charges' if banked for use by the consumer, is not being paid for and, therefore, not supplementing the fixed cost of the licensee. It is contrary to the basic concept of 'minimum charge' and is repugnant to Clause 17(b) of HT-agreement and Article 3.4 and 7.4 of WB agreements referred to in para 27 above. This is despite the clear enunciation of the billing procedure in Article 3.4 and 7.4 of WB agreement whereby it is stated that the billing will be on monthly basis and shall be done

after deducting the units for adjustment towards captive use and / or sale to third party (i.e. 5% of the generation for captive use) by RSMML, from the consumption. This itself confirms that the first step of billing procedure to be the adjustment of generation for captive use against the consumption and is the major point of dispute between the parties. The procedure is ultra vires to the contracts and is liable to be set aside. The point, however, remains to be examined whether in the instant case of the concluded contracts with clearly stated provisions, if the parties have by genuine oversight erroneously operated the contract for first three years out of its operating life of 30 years, the provisions of doctrine of estoppel will apply to perpetuate the wrong for rest of the contract period.

32. Reviewing the process depicted in Table –I further, it is observed that in all cases **Generated or wheeled energy is less than the captive consumption.**

Firstly, Wheeled energy of 280 or 120 units being less than the total energy consumption of 300 units leads to - **No Banking in all scenarios as there is no surplus units available with the captive generator.**

Secondly, Where actual units required from the AVVNL owned sources of the grid to meet the deficit in consumption is less than the 'minimum units', then the shortfall in 'Minimum Units' i.e. 'Minimum Charge' is recoverable and where units drawn from aforesaid source of the grid is more than the prescribed 'Minimum Units', then the 'Minimum Charge' is not recoverable.

Thus <u>for 1st month to 6 month</u>

The actual units deficit = (300-280) = 20 units,

And 20 units being less than the prescribed minimum units of 107, the 'minimum charge' equivalent to 87 units (i.e. 107-20) are to be charged but not banked.

For 7th Months to 12th months

The actual units deficit = (300-120) = 180 units

And 180 units being more than prescribed minimum units of 107. being drawn from AVVNL sources of the grid to meet the deficit.

No recovery of 'Minimum Charge'. No adjustment for 107 units. Charges for 180 units need only to be paid for.

Based on the above, the Table is modified as under:

Billing as per Audit para
(figures in Kwh/KVA)

Table – II

Month	Energy consumption	Wheeled Energy	Banked Energy at Month Beginning	Tltal Wheeled + Banked energy	Prescribed Minimum off-take	Actual Deficit (Units drawn from grid and charged)	'Minimum Charge' (Units for captive use)	Extra units to be paid for non-drawal of min. energy	Energy banked at month end
I	II	III	IV	V	VI	VII (II-III)	VIII (VI-VII)	IX (viii-vii)	
1	300	280	0	280	107	20	87	87	0
2	300	280	0	280	107	20	87	87	0
3	300	280	0	280	107	20	87	87	0
4	300	280	0	280	107	20	87	87	0
5	300	128	0	280	107	20	87	87	0
6	300	280	0	280	107	20	87	87	0
7	300	120	0	120	107	180	0	0	0
8	300	120	0	120	107	180	0	0	0
9	300	120	0	120	107	180	0	0	0
10	300	120	0	120	107	180	0	0	0
11	300	120	0	120	107	180	0	0	0
12	300	120	0	120	107	180	0	0	0
	3600	**2400**	**0**	**1200**	**1722**	**1200**	**642**	**522**	0

33. The Commission in the impugned order has concluded that the consumer gets benefits of 1878 Kwh (3600 Kwh consumption – 1722 Kwh) while has supplied 2400 Kwh as a generator and has misconstrued that 522 Kwh supplied by the generator is availed by Vitran Nigam without any payment. The fact is that 522 units are the notional units which represent the cost of non-drawal up to the prescribed minimum off-take level for first six months @ 87 units / month and charges accrued from it is meant to

supplement fixed charges of the licensee. These units are liable to be charged as per Large Industrial Tariff Schedule and is meant to compensate cost incurred by the licensee. This is the legitimate liability of the Captive generator to licensee for under-drawal as per the HT-consumer agreement and is consistent with all agreements read together. It has essentially arisen out of the commission's notified tariff order applicable to HT-consumers. Firstly, the situation in all cases of the example show that Wheeled energy is less than the consumption and, therefore, are not eligible for banking, hence, not qualified for consideration even. Secondly the notional shortfall in minimum off-take units (107 units) by 87 units/month simply cannot be allowed to be carried forward and banked in successive months for banking at page 13 of the impugned order in accordance with the impugned methodology which is challenged by the Appellant. If the specified procedure in the agreement is followed there will be no occasion to make a prior payment for Minimum Units.

34. The learned counsel for Respondent No. 2, RSMML, during presentation before us, has attempted to focus on differentiating features of the two procedures through an example with certain assumptions. However, I feel that in order to have an appreciation of the revised procedure for all scenarios, the table of the impugned order be recast on page 32 above and expanded to cover two additional situations as under:

(a) When generated and Wheeled energy is = Energy Consumption

(b) When generated and Wheeled energy is > Energy consumption

35. The above scenario would appear as indicated below:

Table - III

I	II	III	IV	V	VI	VII	VII	IX	X
	300	300	0	300	107	0	107	107	0
	300	350	0	350	107	+50 (Surplus)	107	107	50

36. Thus the banking of energy is only allowed when the energy generated and wheeled inclusive of energy earlier in bank is more than the captive consumption and the 'minimum charge' is liable to be recovered for all drawal from AVVNL owned sources of the grid being less than the specified minimum level without any assumption of that being drawn by the consumer or supplied by the licensee.

37. From the above there is a clear conclusion that even the pre-existing procedure would give same result as the proposed revised procedure for billing and banking by the Appellant, if 'Minimum Charge' is considered as deemed consumption instead of deemed supplied.

38. The captive consumer having given up its right to use energy units up to the minimum guaranteed off-take level ceases to have lien on the units not used and can not claim it to be banked for future use. Shortfall in minimum energy off-take level is merely notional and is not available to the consumer for use and is treated as deemed consumption and is to be paid for. Since minimum charge equivalent units are not recorded by the consumption meter, it is to be added to recorded consumption for billing. The Commission's statement in the impugned order that *"The 'generator' is the owner of*

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" is, therefore, not sustainable. Clause 17 (b) of the HT-consumer Agreement and tariff order passed by the Commission impose this liability on Respondent NO. 2, RSMML. The Minimum charge is deemed consumption by the Respondent No. 2 and is required to be paid to supplement the fixed cost of licensee.

39. It is observed that the Commission in the impugned order has referred to its order in case of M/s Balakrishan industries Vs. JVVNL in respect of supply of electricity by a wind power captive plant to its industrial units under the GOR policy of 2003. It says that the agreement executed was similar to the instant case. In that case, JVVNL was first adjusting the wheeled energy of wind farm from total energy consumption and balance was considered as supplied by JVVNL under large industrial service tariff and provision of the minimum billing was enforced. The procedure which was followed by JVVNL is exactly the revised procedure being proposed in the instant case by AVVNL. The Commission has stated to have found some anamoly in that banking in the Agreement dated 28 Aug. 2000 is mentioned in clauses 1(iv) and 2.2 (iii) but not in clause 3.4 which mentions units of adjustment. It says that clause 6.1(ii) and 7.4 para 1 and 2 of Agreement dated 19 Feb. 04 are analogous respectively to Clause No. 5(i), 7(i) and (ii) of the agreement between M/s Balkrishna and JVVNL. I do not at all agree with the alleged anamoly as all clauses of the relevant agreements if read down and interpreted harmoniously shall give the same result. The impugned order has stated that *"the 'generator' is the owner of 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." It amounts to saying that even in HT-consumer Agreement, the tariff approved by the Commission providing recovery of minimum charge supplementing the fixed cost of the licensee for giving connectivity to the consumer and making energy available is not allowed as the units equivalent to minimum charge is paid for but not utilized by the HT-consumer. In such a case also if the consumer is not drawing units from grid or drawing less than the minimum units has to pay for minimum charges without licensee supplying those units. The billing in the instant case is based on netting-off in kind the units exported/imported with minimum charges as deemed consumed. The units deemed consumed is to be justifiably set-off against the units generated and cannot be termed as units 'utilized free of cost by the distribution licensee'. The Commission chooses to ignore the fact that the main cause is the prevailing tariff order approved by the Commission for HT-industrial consumers making provision for recovery of 'Minimum Charges' proportionate to contract demand, which is also applicable to wind based CPP. If the Commission was desirous of promoting NCE-source it could have addressed the situation under Sections 86(1)(e), 61, 62 and 64 of the Electricity Act 2003, either by creating a separate class of Tariff Category for CPP (NCE) exempting 'Minimum Charges' or providing any other concession to promote Non-conventional energy source of energy in particular wind power CPP.

<u>What specific relief relating to 'minimum charges' was prayed for by the Petitioner?</u>

40. While at it, attention has to be drawn to the Petition filed before the Commission in case of Balakrishna Industries Ltd. Vs. JVVNL, whereby the petitioner under Section

86(1)(e) and Section 86(4) of ES Act, 2003 had pleaded for removing the difficulties faced in the operation of wind based captive power plant. The impugned order in the instant case has drawn reference to the order in the aforesaid case and decided it accordingly. Mr. Bhandari, Advocate, on behalf of the Respondent No. 2, in the instant case, is also the advocate for the Petitioner. The petition is replete with the plea of waiver of 'Minimum Charge' clause in the following words:

> *"Ideally the old concept of* ***minimum charges should be waived for consumers drawing substantial power from captive and non-conventional energy plants****. This would greatly encourage them and lead to their faster growth. This would be a win win situation for all. By waiving minimum charges, the Discoms would not loose financially because whatever energy is consumed by the consumers, would be fully paid.* ***It is only the non consumption that would be waived. If the Discoms are not supplying power, in all fairness, they should not go all out to extract charges even for non-consumption."*** (Emphasis supplied).
>
> *Whatever may be the justification for minimum charges but for promoting captive and non-conventional energy,* ***it would be a bold, equitable and just measure if the Hon'ble Commission could waive the minimum charges of the Petitioner.*** *This will give a big boost to the captive plants and non-conventional energy without any financial burden upon the Discoms.*
>
> *x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x*

If the captive plants and non-conventional energy has to be given a boost, the ***minimum charge clause will have to be waived for consumers*** *like the Petitioner*

x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x

Removal of minimum charge clause is the only step which can give a quantum jump to the *growth of the captive plants and non-conventional energy without any financial burden upon the Discom.*

x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x x

The petitioner in its prayer has requested for:

*3. …………………. ………***provision of minimum charges should be waived*** in cases like the Petitioner, Payment for actual consumption on HT tariff can be made by the Petitioner"*. (Emphasis supplied).

41. Even in the instant case the Petitioner before the Commission has pleaded for removal of difficulties in exactly the same terms and words. The impugned order does not address to the prayer for the waiver of minimum charges in the petition. The request is legitimate and the Commission should not have ignored if it wished to promote NCE-sources. Had the Commission decided on giving relief requested, the dispute which is centered on 'minimum charges' would have been settled without acrimonious litigation. The Appellant has, however, not included this as an issue in the Appeal.

42. The above clearly conveys the understanding of the Petitioners in the case of M/s Balkrishan Vs. JVVNL and also in the instant case that the problem, if any, lay with the HT-consumer tariff order/policy and the Petitioner had sought remedial measures from the Commission by exercising the provisions of Sections 86(1)(e), 61, 62 and 64 of the Electricity Act, 2003 or power vested in it for removal of difficulty in Regulation. Instead the Commission proceeded to search for ambiguities in the W.B. Agreements (which did not exist) and did not take care to ensure that its interpretation should not compromise with HT-consumer agreement and its applicable tariff. The basic issues of composite billing have been threadbare examined in this judgment above while maintaining the integrity of all agreements and demonstrates beyond any doubt that the billing procedure followed prior to Nov. 05 is violative of agreement.

Additional Observation and Analysis

43. I also observe that despite Commission stating in the impugned order that *"we state that the provision of minimum billing is to ensure an assured revenue to the supplier to meet its fixed cost….."*, it has completely gone diametrically opposite in banking the notional shortfall in prescribed minimum off-take units and in the process has denied the rightful dues to licensee. One should appreciate the significance of 'minimum charges' being hypothetical units having nexus with HT-consumer agreement and are considered deemed consumption facilitating the recovery of charges to supplement a portion of fixed cost incurred by the licensee. The HT-consumer agreement and WB agreement being distinctly separate agreements with mutually exclusive terms and conditions, if operated independently, will yield the same results as in the composite billing methodology here.

44. Respondent No. 2, RSMML in its written submission has stated that *"while captive consumption' is self-consumption, 'minimum charges' indicate the minimum level of consumption which a consumer should achieve every month. If the consumer does not consume that much of power, the Discom can levy minimum charges even without consuming a single unit. Therefore, the minimum charges are levied for any shortfall in consuming up to the minimum specified level. The question of levy of minimum charges can arise only when the minimum consumption falls short of the specified limit of monthly consumption."*

45. It goes further to submit that "*But if the consumer regularly consumes equal or more than minimum charges, then there is no question of levying minimum charges against him. Minimum charges can be levied only if there is any short-fall in the minimum prescribed units. The present case is of analogous nature where the respondent has physically purchased electricity every month from the appellant, more than the minimum charges. Hence its liability to consume a minimum number of units is fully discharged. This liability of minimum charges is achieved not through any fiction or paper exercise or adjustment. This is achieved by actual purchase of power from the Discoms. "Minimum Charge" is nothing but such purchase of power from the Discom." I* may clarify that the payment on account of 'Minimum Charges' gets dissolved into the price of electricity if the drawal of units from the AVVNL owned sources of the grid is more than the specified level of 'minimum units'; else the 'minimum charges' are to be recovered by treating the corresponding units as deemed consumed and not as deemed supplied.

46. The Respondent NO. 2 RSMML has also averred that *"The electricity purchases every month is more than the prescribed minimum charges*." And has affirmed that *"there is not a single month when the answering respondent's electricity purchase was less than the minimum charges."* I hasten to add that if the aforesaid affirmation is held true then the 'minimum charges' is not liable to be recovered from RSMML and no adjustment of the corresponding 'Minimum Units' is warranted. This statement of the respondent, however, needs to be scrutinized and validated based on its submissions. The reference is made to passbook submitted as Annexure V and page No. 5 of reply filed before us. Respondent No. 2 has vehemently claimed that the electricity purchased every month is more than the prescribed minimum charges; that it has purchased electricity of Rs. 10.46 crores, the minimum charges being only Rs. 6.13 crores and thus it has purchased more electricity (Rs. 10.46 crores – Rs. 6.13 crores) than even the minimum charges. It further claims that there is not a single month when the answering Respondent's electricity purchase is less than the minimum charges. Using the passbook data and the statement showing power consumption at page No. 5 of the reply filed before us, the claim has been tested for the month of July, August, and September, 2002. Since the columns in the statement of page NO. 5 except for 'captive consumption' provide the data in Rupees, the data for other columns have been taken from pass book of Annexure V for the corresponding months.

Month	Captive Consumption	Generation wheeled for captive use	Units drawn from DISCOM	Min. Units required to be consumed	Minimum Charges (Units)
	I	II	(I-II)		
July	617184	334984	282200	482544	200344
August	579168	215324	363844	482544	118700
September,02	547200	156462	390738	482544	91806

Without going any further, the above figures demonstrate that in the above months the energy units drawn from AVVNL owned source of the grid is less than the specified Minimum units and, therefore, the claim made by the Respondent No. 2 is invalid. The data given by RSMML in column of 'Captive Consumption' of the above table is the total recorded consumption which includes captive generation plus drawl from AVVNL owned sources and has compared the minimum charges determined as per HT-consumer agreement with the total recorded consumption whereas it has to be compared only with what has been drawn from AVVNL owned sources. Therefore to obtain units drawn from AVVNL owned sources the total captive consumption for each month in column-I is to be reduced by the units of generation wheeled for captive use in column –II. In all the months taken for examination, the energy drawn from the AVVNL –owned sources are found to be less than the corresponding minimum units. Hence the minimum charges as indicated in the last column of the above table are liable to be charged from the Respondent No.2, RSMML.

47. RSMML also accepts that *"Once surplus generation is there, then as per the GOR policy and the WB agreement, banking has to be allowed by the Discom."*

48. From the above, it is observed that while RSMML has made right assertions on the applicability of principles to be followed for the composite billing methodology enunciated earlier, it, however, in the same submission has negated them all in supporting the findings of the examples on pages 12 & 13 of the impugned order wherein with respect to the model taken in the example it is concluded that new methodology leads to utilization of free units (522 Kwh) to AVVNL for which it does not pay anything to the

wind generator. I have no hesitation in confirming that it is how it is to be as it represents the cost of drawal of energy below the level of specified 'Minimum Units' and is meant to supplement the fixed charge of the licensee and the corresponding notional 'Minimum Units' are not eligible for banking as per the contract. I have analyzed the model sufficiently in detail above and found that the procedure followed prior to Nov. 05 has failed the test of composite billing methodology and principles thereof and is repugnant to the agreements. I have remarked earlier that if the procedure specified in the agreement is followed, there will be no necessity of prior adjustment of 'Minimum Units' in the billing process.

49. From the records of the Petition submitted by the Commission we found two letters written by RSMML, one dated 31.01.2005 addressed to M/s Rajasthan Renewable Energy Corporation Ltd and another D.O. letter dated 28.01.2006 from the M.D., RSMML to Secretary (Energy) GOR seeking help to resolve the disputes. We provided opportunity to the parties to clarify certain points on two occasions. Amongst other clarifications we also sought their comments on the aforesaid letters, particularly the examples given therein for illustration of the procedure. The Appellant and Respondent No. 2 has submitted their additional written submissions. The Appellant has submitted that minimum charges being deemed consumption and not recorded by the meter is to be added to recorded consumption, whereas the Respondent NO. 2. RSMML has endorsed the reduction of recorded consumption by the minimum charges. The example of the aforesaid letter is restated below with relevant remarks against each step in italics. I have remarked earlier that if the procedure specified in the agreement is followed then will be no necessity of prior adjustment of "Minimum Units' in the billing process.

(1) Captive Consumption (units) = A *(from the combined sources of Captive generation and AVVNL owned sources of grid and recorded by the consumption meter)*

(2) Minimum Charges (units) = B *(Not metered but derived from energy consumed from AVVNL owned source of grid and is deemed consumption)*

(3) Balance units of consumption available for adjustment of wheeled power A-B=C *(subtracting B from A amounts to exclusion of B in billing for payment. Instead B is to be added to A to obtain adjusted consumption)*

(4) Power Wheeled from Wind Farm = D *(Units adjusted in monthly bill of HT connection)*

(i) If balance captive consumption is greater than captive generation (i.e.C> D) then billing is = C-D

(ii) If captive generation is greater than balance consumption (i.e. D> C) then the energy units equivalent to D-C is banked; No minimum charges.

Minimum charges, B, being deemed consumption and not recorded by meter is to be added to recorded consumption A i.e. [C = (A+B) –D] i.e. [(A-D) + B]. This is equivalent to saying that the recorded consumption at load site is first adjusted against the energy generated and wheeled for captive use (that amounts to energy drawn from the of Discom sources of grid) and the balance then added to minimum charges B for billing. This exactly turns out to be the revised procedure which is sought to be introduced by the Appellant. It may be further stated that whether the minimum charge is adjusted in the

beginning with the captive consumption as in the pre-existing procedure or the same is adjusted in the end (as in the revised procedure) it should not make any difference in the result provided the minimum charges i.e. B is considered as deemed consumption and is treated as such. Respondent No. 2, RSMML in its written submission has illustrated the mechanism of billing by taking two examples, one where consumption is greater than the captive generation and second, in which the consumption is less than the captive generation:

Example -1		**Example -2**
A- Minimum Charges - 100 units		A- 100 units
B – Generation - 200 units		B- 400 units
C- Consumption -300 units		C – 200 units
It concluded that in Example - 1	and	in Example -2
C-B = (300-200) = 100 units		B-C = (400 – 200) = 200 units
Discom will charge for 100 units since consumption is more than generation		Discoms will bank the electricity since the generation is more than the Consumption
(It has rightly adjusted the captive generation against the total consumption first, to find out the energy units drawn from the Discom owned sources and it being 100 units which is equal to minimum charges, the billing will be for 100 units only without minimum charges. The total consumption can not be compared with minimum units specified by HT-consumer agreement and relevant tariff)		*(Here again it has rightly chosen to adjust generation against the consumption for the same reason as in Example-1)*

50. Through the above stated examples the Respondent No. 2, RSMML has supported the revised procedure that it had challenged before the Commission. I would not like to extend the examination of the issue further with respect to the submission of the Respondent No. 2 made on 15.04.2008 as I find that its arguments with respect to examples given at page 2 as well clarifications regarding the two letters of the Respondent analyzed at page 10 are mutually contradictory and are not sustainable.

51. Further, the Respondent No. 2, RSMML in its reply to the instant appeal has submitted the following averment:

(a) That there is no dispute on the statement of the appellant saying "*the Respondent no. 2 was entitled to banking only in the event nothing was left unutilized after adjustment of the wheeled energy against the captive consumption (self).*" And "*it is elementary that only when something is surplus it can be banked*". It also admits that *"The fact of the matter is that when generation is more and captive consumption less, then the provisions of banking come into play."* The aforesaid are the appropriate reiteration of the principles involved.

(b) *"under the HT-agreement the licensee is contractually duty bound towards minimum charges"*

52. Both of the above WB Agreements specify that banking is allowed only in case the total generation is more than the captive consumption and the quantum of energy to be banked is determined after adjustment of units for captive use inclusive of 'minimum charges'; units drawn from the grid; units banked etc.

Applicability of doctrine of estoppel

53. The Commission has decided the petition of Respondent No.2, RSMML based on the merit of the billing procedure and has mentioned the applicability of doctrine of estoppel only in passing without going into detail. My esteemed colleague in her judgment has contended that based on the billing method adopted, RSMML could have planned its consumption of electricity as well as its production of electricity. And any change in the billing procedure (revised procedure) will disadvantage RSMML being not able to gain by regulating its production such that it just matches the shortfall in consumption plus minimum charges and in the process could have saved in generating energy units just equal to minimum charges.

54. An example in support of the above is cited with the assumptions of consumption being 300 unit and energy generated and wheeled for captive use as 280 units and the deficit of 20 units in consumption is met by drawl of energy units from HT-supply of AVVNL owned sources. 'Minimum Units' is assumed as 107 units and RSMML pays for 87 units without actual consumption. The strategy recommended is to scale down the generation for captive use from 280 units to 193 units (i.e. reduction by about 30%) to avoid minimum charges for 87 units. It is only feasible if the entire production of the

plant is reduced by 30%. It implies that 95% of the generation which is presently sold to AVVNL at a special incentive rate will also get reduced to 65% giving a debilitating impact on revenue from the sale and obviously will not be in the interest of Respondent No. 2 RSMML.

55. Restating the example differently, the captive generator generates, 5600 units; 280 units (constituting 5% of the generation) is meant for captive use and 5320 units being sold to AVVNL. If generation is backed down by 30% to save 'minimum charges' the sale will come down by 1596 units from 5320 units to 3724 units. Taking into account the saving of 87 units of minimum charges, net loss in revenue due to reduction in sale will be for 1509 units (1596 units – 87 units). Further the reduced generation will force industries of RSMML to draw more energy from AVVNL's sources of the grid at a tariff applicable to large industries rather than using their own generation with payment of 2% or 10% towards the wheeling charges. It is not in consonance with the spirit of GOR policy.

56. I have no quarrel if to incentivise development of NCE sources, the minimum charges are abolished for supply of power from wind power plant meant for captive use as prayed for by the Respondent No. 2 RSMML in its petition before the Commission. Additionally as it brought out earlier at paras 21(b) and 27(d) the fiscal concessions including banking facility under GOR policy are the incentives to maximize production up to the maximum available generating capacity and any regulation to avoid paying minimum charges beside being contrary to the spirit of the policy is bound to be counter productive and disadvantageous to the generator and also such practice will make the

facility of banking meaningless. It also does not make any economic sense to scarifies more for less as brought out above. If the Wind Power generators are operationally available it would be sensible to generate the energy from them at their maximum capacity since the fuel stock naturally available is free of cost and should be exploited fully.

57. There is no doubt that in the instant case both the parties operated the agreement in a particular manner for three years based on the impugned pre-existing billing procedure before it was detected to be erroneous and violative of the provisions of the agreements and the same was accordingly revised by the Appellant. It has been pointed out earlier that JVVNL, as a party impleaded in this appeal, was the Respondent in a similar case No. 101 of 2006 of Balakrishan Vs. JVVNL before the Commission and the present Appellant was one of the Respondents. The Petitioner was following the same billing procedure in its contract with JVVNL as now proposed in the revised procedure in the instant case. The Commission by its order directed JVVNL to follow the billing procedure which is impugned in this Appeal. The impugned order of the Commission against which the instant Appeal is preferred is disposed of in terms of the order passed in Case No. 101 of 2006. In both of the aforesaid cases which are of the similar nature the parties concerned operated the different billing procedures for almost equal length of time. If the conduct of the parties to a contract is to reflect the interpretation of the terms of contract and their actions on such understanding give meaning to the contract from which no deviation is permissible, it will lead to providing sanction to two billing procedures by the Commission for similar consumers. It will amount to discriminating

consumers of the same class or category. It is against the provisions of the Electricity Act, 2003. The relevant portion of Section 62 of the Act is extracted below:

> *62. Determination of tariff (1) The Appropriate commission shall determine the tariff in accordance with the provisions of this Act for-*
>
> > *(a) supply of electricity by a generating company to a distribution licensee;*
> >
> > *………………………………….*
> >
> > *(b) transmission of electricity;*
> >
> > *(c) wheeling of electricity;*
> >
> > *(d) retail sale of electricity*
> >
> > *………………………………….*
>
> *(2) …………………..*
>
> *(3) The Appropriate Commission shall not, while determining the tariff under this Act, **show undue preference to any consumer of electricity but may** differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period of the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.*

58. If the parties have by genuine oversight erroneously operated a procedure to implement a concluded contract for the first three years of the long validity period of the contract the equity demands that the error should not be allowed to be perpetuated to the

commercial benefit/harm to one or the other signatories of the contract but needs to be corrected without further loss of time.

59. In the Case of C.V. Enterprises Vs. M/s. Baithwaite & Co. Ltd. and Ors., reported in AIR 1984 Calcutta 306, regarding the applicability of promissory estoppel in the concluded contract. The head note of the said judgment reads as under:

> "*There is no question of any promissory estoppel in respect of a contract which stands concluded. It applies only in the case where there is no concluded contract, but a promise has been made by one party intending to create legal relations or affect legal relationship to arise in the future and the other party has acted upon and changed its position. Thus where the contractual relationship between the parties have been established under a completed contract, there is no scope for the application of promissory estoppel). The rule of promissory estoppel is a rule of equity, while contractual relationship between the parties is governed by the law of contract. Where the provisions of law of the contract are applicable, the case comes within the domain of common law courts and the enforcement of the rule of promissory estoppel is mainly the concern of courts of equity.*"

60. Also the Hon'ble Supreme Court in its judgment in the case of Ester Industries Ltd. Vs. U.P. State Electricity Board and Ors. reported in 1996 (11) SCC 199 has held as under:

"*Promissory estoppel would apply only in a case where there was no contract executed between the parties. IN instant case, since there exists a contract duly executed under law between the petitioner and the Board which binds them unless the same is revised, the question of promissory estoppel does not arise"*

In the same case the SLP was dismissed for the reasons that :

"*In this case, the question does not arise for the reason that the promissory estoppel would apply only in a case where there was no contract executed between the parties. In this case, since there exists a contract duly executed under law between the petitioner and the Board which binds them, unless it is revised, the question of promissory estoppel does not arise. Considered from this perspective, we are of the view that the High Court has not committed any manifest error of law warranting interference."*

In view of the above in my opinion the doctrine of estoppel is not applicable in the instant case.

61. As regards Commission's finding that in respect of the validity of claim under Section 56(2) of Electricity Act 2003 I am of the same opinion as brought out by my esteemed colleague in para nos. 29 to 47 of her judgment and endorse that the amount claimed by the AVVNL is subject to the general law of limitation under the Limitation

Act and nothing falling due prior to three years from the date on which the claim is made would be barred by law.

Conclusion

62. In view of the above the impugned order is set aside and the Appeal is allowed subject to the Limitation Act, 1963. The Commission is advised to consider the prayer of RSMML (Petitioner before the Commission in Petition No. 100 of 2006) for waiver of minimum charges and take decision in accordance with law.

63. Accordingly the Appeal is disposed but no orders as to costs.

Pronounced in open court on this day of May, 2008.

(A. A. Khan)
Technical Member

(Mrs. Justice Manju Goel)
Judicial Member

INDEX: "Reportable/Non-Reportable."