**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISISON**
**GANDHINAGAR**

**Petition No. 2131 of 2022 with I. A. No. 18 of 2022**

**In the matter of:**

**Petition under Section 86 (1) (f) of the Electricity Act, 2003 read with Article 10 of the Power Purchase Agreements executed by the Petitioner with the Respondent Gujarat Urja Vikas Nigam Limited, seeking adjudication of disputes arising out of wrongful deductions purportedly toward Carbon Development Mechanism benefits under Article 12.12 of the said PPA and Allied IA.**

Petitioner: Vayu (Project 1) Private Limited (Erstwhile BLP Vayu (Project I) Private Limited)

Represented by: Adv. Ashwin Ramanathan

V/s.

Respondent: Gujarat Urja Vikas Nigam Limited

Represented by: Ld. Adv. Ranjitha Ramachandran with Rahul Pareek

**CORAM:**

**Anil Mukim, Chairman**

**Mehul M. Gandhi, Member**

**S. R. Pandey, Member**

**Order**

**Date:11/09/2024**

1. The petition has been filed by the Petitioner Vayu (Project 1) Private Limited (Erstwhile BPL Vayu (Project I) Private Limited), a generating company within the meaning of Section 2(28) of the Electricity Act, 2003, against the Respondent-Gujarat Urja Vikas Nigam Limited ("GUVNL"), which is a company incorporated under the provisions of the Companies Act, 1956 and is a holding company of the successor entities of the erstwhile Gujarat State Electricity Board and a licensee under the Electricity Act, 2003 engaged inter alia in the business of bulk power purchase and trading on behalf of the distribution licensees in the State of Gujarat.

2. By the present Petition, the Petitioner has prayed for the following reliefs:

   a) Declare that the Petitioner under Article 12.12 of the PPAs is only required to share benefits accruing to it from sale of Carbon Emission Reduction credits under the Clean Development Mechanism (CDM) regime of the United Nations Framework Convention on Climate Change and not otherwise;
   b) Declare that the Respondent is not entitled to retain or deduct any monies from the monthly tariff payable to the Petitioner under the PPAs or even otherwise, purportedly to claim its share of revenue realized by the Petitioner from sale of Voluntary Carbon Units under Verra's regime or any other scheme outside the purview of the Clean Development Mechanism;
   c) Direct the Respondent to forthwith refund the amount of INR 51,84,387/- (Rupees Fifty-One Lakh Eighty Four Thousand Three Hundred and Eighty Seven only) wrongfully retained by the Respondent from the monthly tariff under the PPAs, purportedly towards its share of revenue realized by the Petitioner from sale of Voluntary Carbon Units under Verra's regime, along with applicable interest for delayed payments in terms of Article 6.3 of the PPAs i.e., at 2 per cent per annum in excess of the applicable State Bank Advance Rate;
   d) During the pendency of the matter, restrain the Respondent from taking any precipitative action against the Petitioner including retaining or deducting any amount from the monthly tariff payable under the PPAs, inter alia to claim its

share of revenue realized by the Petitioner from sale of Voluntary Carbon Units under Verra's regime or even otherwise under any other carbon credit scheme outside the purview of the Clean Development Mechanism;

e) Pass appropriate ex-parte ad interim orders in terms of the prayers above inter alia restraining the Respondent from taking any precipitative or coercive steps against the Petitioner during the pendency of the present Petition; and

f) Pass any such other order(s) as this Commission may deem fit in the facts and circumstances of the present case.

3. During the pendency of the Petition, the Petitioner filed I. A. No. 18 of 2022 vide affidavit dated 08.07.2022 seeking urgent interim relief to restrain the Respondent from taking any precipitative action against the Applicant including retaining or deducting any amount from the monthly tariff payable under the PPAs, inter alia to claim its share of revenue realized by the Applicant from sale of Voluntary Carbon Units under Verra's regime or even otherwise under any other carbon credit scheme outside the purview of the Clean Development Mechanism and for refund of amount shared with GUVNL against the sale of VCs. Per Contra, Respondent seconded that the prayers by the Petitioner in I. A. are same as those of in the main Petition and it is a well settled principle that final relief cannot be granted at the interim stage.

This I. A. shall stand disposed off with this Order.

4. **Brief facts of the Petition:**

4.1. The Petitioner owns and operates four wind power projects with a cumulative capacity of 150 MW in the Kutch district in Gujarat ("Projects"). The power generated from the Projects is supplied to the Respondent in terms of three power purchase agreements dated 12.02.2008 for sale of 22.5 MW, 25.5 MW and 61.5 MW and one power purchase agreement dated 14.11.2008 for sale of 40.50 MW capacity ("PPAs"). The said PPAs were executed in furtherance of the generic tariff

order dated 11.08.2006 issued by the Commission for wind power projects. The PPAs were assigned to the Petitioner on 25.03.2013 by DLF Limited, the erstwhile developer.

4.2. Upon commissioning its Projects in 2008, the Projects were registered under the CDM administered by the UNFCCC. Under the above mechanism, carbon emission reductions from the Projects are sold as Certified Emission Reduction ("CER") credits to other entities that are required to reduce their carbon emissions. Article 12.12 of the PPAs requires the Petitioner to pass on 25% of thc gross CDM benefits availed by the Projects from thc sale of CERs to GUVNL. In terms thereof, the Petitioner has duly shared the proceeds from sale of CERs with GUVNL from time to time.

4.3. Thereafter, in the year 2019 Projects were registered with Verra i.e., a non-profit international organization that administers and facilitates the trading of Voluntary Emission Reduction ("VER") credits from renewable energy projects. The Verra approved carbon offsets are registered and traded as Voluntary Carbon Units ("VCUs"). The abovementioned scheme administered by Verra is unrelated to CDM and is completely outside the purview of the PPAs.

4.4. The Petitioner has availed benefits under Verra 's VER mechanism through sale of VCUs from 2019 onwards. However, the Petitioner's obligation to share benefits under Article 12.12 is restricted only to the proceeds from the sale of CERs under the CDM. The said provision does not require the Petitioner to share the benefits accruing under any other carbon credit scheme with GUVNL that is outside the ambit of the CDM, including the VCUs traded and sold by the Petitioner under Verra's scheme.

4.5. However, contrary to the express provisions of Article 12.12 of the PPAs, GUVNL in May 2021 erroneously demanded that the Petitioner should share 25% of the proceeds from sale of VCUs under Verra's mechanism with GUVNL. To ensure

continuity in payment of tariff by GUVNL, the Petitioner at the relevant time was compelled to share such benefits under the VER mechanism with GUVNL under protest. The Petitioner also requestcd GUVNL to provide a rationale for sharing of VER benefits when the PPAs contemplate sharing of CDM benefits only. The Petitioner further requested GUVNL to refund the amounts wrongfully deducted by it purportedly under Article 12.12.

4.6. In response, GUVNL erroneously contended that CDM specified under Article 12.12 of the PPAs means and includes sharing of revenue from sale of carbon credits under all emission reduction schemes including those under Verra's mechanism. It is submitted that the abovementioned position of GUVNL is erroneous, misconccived and contrary to the clear and express terms of Article 12.12 of the PPAs. Accordingly, GUVNL's retention of monies from tariff payments purportedly in terms of Article 12.12 of the PPAs ought to be refunded to the Petitioner forthwith.

4.7. It is submitted that the Commission passed a generic tariff order dated 11.08.2006 ("Tariff Order") for wind power projects that required GUVNL/ distribution licensees to procure wind energy at a tariff of Rs. 3.37 per unit from projects set up within the control period of the Order. On sharing of benefits accruing from sale of carbon credits, the Tariff Order specifically provided that wind energy generators will be required to pass on 25% of the gross CDM benefit to the distribution licensee.

4.8. In furtherance of the Tariff Order, Gujarat Energy Development Agency ("GEDA") issued the requisite approvals to DLF Limited for setting up wind projects with a cumulative capacity of 150 MW in the Kutch district of Gujarat. Pursuant thereto, DLF Limited executed three power purchase agreements datcd 12.02.2008 for sale of 22.5 MW, 25.5 MW and 61 .5 MW and one power purchase agreement dated 14. 11 .2008 for sale of 40.50 MW capacity generated from the Projects to GUVNL. In terms of the Tariff Order, Article 12.12 of the PPAs required the Petitioner to pass

on 25% of gross CDM benefits availed by the Petitioner to GUVNL. The said PPAs have since been assigned to the Petitioner from 25.03 .2013

4.9. Subsequent to execution of the PPAs. the present Projects were registered under the CDM mechanism of the UNFCCC on 18.06.2009 under which carbon emission reductions from the Projects are sold as carbon credits to entities that are required to reduce their carbon emissions.

4.10. It is submitted that the CDM mechanism flows from the Kyoto Protocol, which is an international treaty instrument. India acceded to the Kyoto Protocol in August 2002 with the objective inter alia to fulfil the prerequisites for implementation of CDM projects. These projects are for developed countries to meet their obligations under the Kyoto Protocol through the purchase of CERs from CDM registered projects located in developing countries. The CDM registration process is administered through the National Clean Development Mechanism Authority, which has been setup under the Ministry of Environment, Forests and Climate Change, Government of India ("MoEFCC"). As such, the CDM mechanism operates under the aegis of the UNFCCC and is monitored by the MoEFCC in India, which also certifies and grants its approval for inclusion and participation of projects under the CDM regime.

4.11. Upon registration under the CDM, in due compliance with the provisions of Article 12.12 of the PPAs, the Petitioner has from time to time duly shared the benefits accruing to it under the CDM with GUVNL. In this regard, it is submitted that the Petitioner during the period from 01.07.2013 up to 30.09.2019 has sold 7,08,840 CERs for an amount of Rs. 8,05,28,543/- (Rupees Eight Crores Five Lakhs Twenty Eight Thousand Five Hundred and Forty Three only) under the CDM. Out of this amount, the Petitioner has shared an amount of Rs. 1,98,94,261/- with GUVNL, being the 25% share required to be passed on to it in terms of Article 12.12.

4.12. The Petitioner's projects are also registered under an entirely independent VER mechanism administered by Verra, which is a non-profit international organisation that administers and facilitates the trading of VER credits from renewable energy projects. The Verra approved carbon offsets are registered and traded as VCUs, which are different from the CERs that are traded under the CDM mechanism.

4.13. The Verra administered VER regime is a voluntary market where project proponents register their projects under Verra without having any binding carbon offset obligations. Unlike the CDM mechanism that is administered by the UNFCCC, the Verra regime is administered under and subject to the laws of the District of Columbia, United States. The VCU regime is administered by Verra and its accredited auditors without any government interface in India. Moreover, the issuance and trading of VCUs under the Verra regime is governed by the manuals and bye-laws of Verra.

4.14. Thus, it is evident that CDM and VER regimes are distinct and entirely independent of each other. Therefore, referenece to one cannot be interchangebly used and construed as a reference to the other. Article 12.12. of the PPAs contemplates sharing of benefits only under the CDM regime and not otherwise.

4.15. It is settled law that a contract is to be read as per its explicit terms and in such cases, courts ought not to imply terms into a contract which are otherwise absent. As aforesaid, the CDM and VER regimes are distinct and entirely independent of each other. Article 12.12 requires that the power producer share 25% of only the gross CDM Benefits. The Petitioner is not obliged to share benefits accruing to it under any other carbon credit scheme except CDM. The same is evident from the express language used therein stating that the *power producer shall pass on 25%, of gross CDM beneifts availed by the power producer to GUVNL as specifIed in the GERC Tariff Order on annual basis*. Notably , the Tariff Order pursuant to which the present PPAs were executed also requires the Petitioner to share benefits accruing only under the CDM mechanism. Reference to one scheme under the

PPAs, namely the CDM mechanism, cannot be construed to also include reference to others such as Verra's VCUs.

4.16. At the time when the Tariff Order was issued and the PPAs were executed in furtherance thereof, there were several other carbon offset schemes prevalent in the market such as the Gold Standard (established in 2003) and VCS Version One (established in March 2006). Despite the existence of such other carbon offset mechanisms as stated above, the Commission in the Tariff Order at the relevant time had specifically provided for wind developers to share benefits accruing only under the CDM mechanism and not otherwise.

4.17. Notwithstanding the dbove, when the Petitioner submitted its invoice dated 27.05.2021 towards monthly tariff for April 2021, GUVNL demanded that the Petitioner issue a credit note to it for an amount equivalent to 25% of the proceeds from sale of VER credits. At the relevant time, the Petitioner without prejudice to its rights and under duress had issued a credit note dated 03.06.2021 in favour of GUVNL for an amount of Rs. 50,54,378/- (Rupees Fifty Lakh Fifty Four Thousand Three Hundred and Seventy Eight only). The Petitioner was forced to issue the abovementioncd credit note demanded by GUVNL under duress to prevent any undue delays in payment of tariff by GUVNL.

4.18. In subsequent correspondence between November 2021 and April 2022, the Petitioner through a series of letters and emails requested GUVNL to explain the rationale for deductions made by it purpoltedly under Article 12.12. The Petitioner in the above correspondence explained its position to GUVNL in detail stating that it was not obliged to share any revenue with GUVNL received from sale of VCUs under Verra's mechanism in terms of Article 12.12 of the PPAs. The Petitioner further requested it to refund the amount of Rs. 51,84,387/- (Rupees Fifty One Lakhs Eighty Four Thousand Three Hundred and Eighty Seven only), being the amount wrongfully deducted by GUVNL towards revenue from sale of VERs plus the penalty imposed by GUVNL for the purported delay in declaring and sharing

revenue from such VERs by the Petitioner. However, GUVNL by its response dated 15.11.2021 to the Petitioner's numerous representations has erroneously contended that the CDM benefits contemplated under Article 12.12 of the PPAs includes benefits accruing to the Petitioner under all carbon credit schemes availed by it, including Verra's VCUs.

4.19. GUVNL's contention that reference to CDM in Article 12.12 of the PPAs implies a reference to all carbon offset schemes in the market is errorneous and unfounded. As aforesaid, GUVNL is trying to imply terms into the contract that are otherwise absent, which is contrary to law. Accordingly, GUVNL ought not to be permitted to deduct any monies from the Petitioner from the monthly tariff or even otherwise, for the revenue accrued to the Petitioner from sale of VCUs under Verra 's mechanism.

*The extant regulatory regime has consistentjy required developers to share benefits accrued only under the CDM.*

4.20. The extant regulatory regime inc]uding the various tariff orders passed by the Commission from time to time have required contracting parties to share revenue accruing only under the CDM regime despite the prevalence of alternate mechanisms as stated above. In this regard, it is submitted that even in the subsequent tariff orders issued by the Commission for procurement of wind power by distribution licensees in Gujarat, there is no mention of sharing of benefits from carbon credits other than CDM.

4.21. In fact, the GERC (Power Procurement from Renewable Sources) Regulations, 2005, do not require the sharing of benefits accruing from sale of any carbon credits CERs or otherwise. In subsequent regulations on determination of tariff for wind power projects including the most recent one namely the GERC (Multi-year Tariff) Regulations, 2016, no other mechanism except CDM is envisaged, even though

alternate frameworks and platforms for trading of carbon credits have been available in the market for several years.

4.22. Moreover, the National Tariff Policy, 2006 issued under the Electricity Act (which was prevalent when the Projects were commissioned) as well as the subsequent National Tariff Policy, 2016 presently in force, do not refer to any other mechanism other than CDM. In fact, reference to CDM in the abovementioned tariff policies was made with a view to ensure that adequate incentives are provided to project developers that are registered under the CDM. Pertinently. the above tariff policies do not envisage any revenue sharing mechanism with the distribution licensees under CDM or even otherwise. The relevant extracts of the National Tariff Policy, 2016 is set out below:

**Tariff fIxation of all electricity projects that result in lower Green House Gas (GHG) emissions than the relevant base line should take into account the benefits obtained from Clean Development Mechanism (CDM) into consideration, in a manner as to provide adequate incentive to the project developers"*

In view thereof, it is submitted that the unjust demand made by GUVNL seeking sharing of revenue accruing from sale of VERs is not only contrary to the provisions of the PPAs and the Tariff Order but also in the teeth of the extant regulatory regime governing CDM under the Electricity Act.

4.23. It is submitted that not only has GUVNL arbitrarily and unlawfully retained monies purpotedly towards its share of revenue from sale of VERs/ VCUs from the monthly tariff payable under the PPAs, it has also imposed a penalty for the purported delay by the Petitioner in declaration of revenue realized from sale of VCUs and consequently sharing of such benefits with GUVNL. Under the PPAs, the Petitioner is not legally obliged to declare or share any revenues earned from carbon credit schemes other than CDM.

4.24. It is submitted by the Petitioner that it is not averse to sharing benefits accruing to it under the CDM regime. In fact, it has consistently shared such revenue with GUVNL in a bona fide manner from time to time, as and when the Petitioner has availed benefits under the CDM. Here, it is pertinent to mention that Article 12.12 of the PPAs only requires the Petitioner to share the benefits accruing under CDM, as and when such benefits are availed by the Petitioner. Moreover, in case the Petitioner avails benefits under another carbon offset scheme such as Verra's regime for sale of VCU credits in the present case, it is not required under Article 12.12 of the PPAs or otherwise, to share the revenue accruing to it from such schemes with GUVNL.

4.25. It is submitted that the arbitrary and unilateral retention of monies by GUVNL purportedly under Article 12.12 of the PPAs is adversely impacting the financial health and viability of the Petitioner's Projects. Such an approach if permitted to continue will create a negative sentiment in the renewable energy sector and will also result in unwarranted and unjust revenue loss to the Petitioner under the PPAs. It is submitted that necessary protection is required to be granted by the Commission to the Petitioner in line with the principles enshrined under Sections 61 (h) and 86(1)(e) of the Electricity Act, which require the Commission to promote renewable sources of generation of electricity.

5. **GUVNL's Reply on main Petition:**

5.1. GUVNL craves leave to refer to the Article 12.12 of the PPA for interpretation in the present case which reads as under:

*'12.12* ***Sharing of benefits from Clean Development Mechanism (CDM):*** *The power Producer shall pass on 25% of* ***gross*** *CDM benefits availed by the Power Producer to GUVNL as specifIed in GERC Tariff Order on annual basis.'*

A plain reading of the above leaves no doubt that Power Producers are required to share the benefits received by them to the extent of 25% of gross CDM benefits to

GUVNL. It is clear that the benefits which are accruing to the Power Producer / Wind Power Project Developer by being registered as a Clean Energy Generator ought to be passed on, albeit to the extent of 25% to GUVNL and further, to the consumers of the State of Gujarat.

5.2. It is pertinient to note that all the PPAs in question have been entered into by GUVNL under cost-plus tariff regime and GUVNL, is paying preferential tariff to the Petitioner in terms of the Wind Tariff Order dated 11.08.2006 passed by the Commission in Order No. 2 of 2006. In the Tariff Order dated 11.08.2006, the Commission had decided as under:

"***21. Sharing of benefits from Clean Development Mechanism (CDM)***

*In the discussion paper, the Commission had proposed that 23% of benefits received from the CDM projects are to be shared by the Developer with the Distribution licensee.*

*The proceeds of the* ***carbon credits*** *will accrue to the wind energy generator and will reduce costs correspondingly. Therefore, the Commission, after considering all the aspects decides to pass on 25% of the* ***gross*** *CDM benefit to the Distribution Licensee.*"

The Commission has recognized that the carbon credits that accrue to a Wind Generator reduce the costs being incurred by it correspondingly and therefore, 25% of the gross CDM benefits are to be passed on to the Distribution Licensee.

5.3. In further Wind Tariff Order dated 30.01.2010 passed by the Commission – Order No. 1 of 2020, the Commission further refined the manner of sharing of the CDM benefits on a gross basis starting from 100% to the Wind Tariff Generator/s ("WTGs") in the first year of commissioning and thereafter, a reduction of 10% till the sharing comes to the proportion of 50:50. From the sixth year onwards, the

sharing of the CDM benefits would remain equal. Relevant extracts from the Commission's tariff order dated 30.01.2010 are as under:

***6.5 Sharing of CDM***

*The Commission has proposed sharing of CDM benefits as per the recommendation made by the Working Group for Renewable Energy Generation constituted by the Forum of Regulators and as per the CERC (Tariff for Renewable Energy Sources) Regulations, 2009, which is as under:*

*"The CDM benefits should be shared on a gross basis, starting from 100% to developers in the first year after commissioning, and thereafter reducing by 10% every year till the sharing becomes equal (50:50) between the developers and the consumers, in the sixth year. Thereafter, the sharing of CDM benefits should remain equal till the time that benefit accrues."*

***Suggestions of the Objectors & Commission's Ruling***

*Various Wind Energy Project Developers and the consumers of wind energy have proposed different ways for sharing of CDM benefits, which range from full benefits to developers to more benefits to consumers. Keeping in view the effort of developers to harness renewable sources of green energy and also the fact that the consumers are sharing all the costs of projects, the Commission decides that the above mentioned formula for sharing of CDM benefits is just, and the same is accepted.*

5.4. In the later Wind Tariff Order dated 08.08.2012 passed by the Commission - Order No. 2 of 2012, the Commission further reviewed the above and decided that the sharing of CDM benefits would be on net basis. Extract thereof is produced as under:

### *4.5 Sharing of Clean Development Mechanism (CDM) Benefits*

*In the discussion paper, it was proposed to retain the provisions for sharing of CDM benefits as specified in Commission's Wind Tariff Order dated 30 January 2010 for the next control period.*

*The provisions were as follows:*
*"The CDM benefits should be shared on a gross basis, starting from 100% to developers in the first year after commissioning, and thereafter reducing by 10% every year till the sharing becomes equal (50:50) between the developers and the consumers, in the sixth year. Thereafter, the sharing of CDM benefits should remain equal till the time that benefit accrues."*

***Suggestions from Objectors***

*……*

***Commission's Decision***

*Considering the high initial cost of registering CDM projects, application of taxes on CDM benefits, the long time frame taken to realize the CDM benefits and the operational issues, the Commission decides that the sharing of net proceeds on account of CDM benefits realized through sale of CER generated from corresponding annual energy generation should be as follows:*

- *100% of net proceeds through sale of CER generated from the energy generation in the first year after the date of commercial operation of the wind power project shall be retained by the wind power generating company.*

- *In the second year, the share of the beneficiary shall be 10% which shall be progressively increased by 10% every year till it reaches 50% in the sixth year; thereafter the proceeds shall be shared in equal proportion by the wind power generating company and the beneficiary.*

*Wind power projects availing CDM benefit shall share the net CDM proceeds annually as per above, by 31 March of every year with affidavit stating the annual energy generation (date of commissioning as starting point of the first year), CER generated, gross receipts, and net receipts.*

5.5. Since GUVNL has executed PPAs with the Wind Generators at the preferential tariff determined by the Commission under each of the above Tariff Orders, the relevant provision for sharing of CDM benefits in the PPAs summarised in the table below:

| PPAs executed prior to 30.01.2010 | PPA executed after 30.01.2010 |
|---|---|
| PPAs under Order dated 11.08.2006 (Tariff @ Rs. 3.37/unit) | 1. PPAs under REC Mechanism<br>2. PPAs under Order dated 30.01.2010- (Tariff @ Rs. 3.56/unit);<br>3. PPAs under Order dated 07.01.2013 – (Tariff @ Rs. 4.15/unit);<br>4. PPAs under Order dated 30.08.2016 – (Tariff @ Rs. 4.19/unit) |
| The power Producer shall pass on 25% of gross CDM benefits availed by the Power Producer to GUVNL as specified in GERC Tariff Order on annual basis. | CDM benefits shall be shared on a gross/ net basis (as the case may be), starting from 100% to Power Producer in the 1st year after commissioning, and thereafter reducing by 10% every year till the sharing becomes equal (50:50) between the Power producer and the Power procurer, in the 6th year. Thereafter, the sharing of CDM benefits shall remain equal till the time that benefit accrues. |

The term “CDM benefits” has - to be understood with reference to the expressions used in the various Tariff Orders passed by the Commission. GUVNL had incorporated the term CDM benefits in all its PPAs since in all the Wind Tariff Orders, the Commission had used the said term.

5.6. It is noteworthy that the Commission while determining the preferential tariff through various Tariff Orders as referred to hereinabove, has determined cost-plus tariff on levelized basis considering all operational and financial costs and/or parameters pertaining to the Wind Projects along with return on equity (ROE:). With regard to the revenue / benefits that accrue (if any) to the Wind Projects viz. the benefits through trading carbon credits, the Commission has decided that the same shall have to be shared by such Wind Generator (Power Producer) with the Distribution Licensee / consumers Power Procurer). Thus, the Wind Generators (Power Producer) are fully compensated for all the costs incurred by them and also get RoE.

5.7. From the year 2008 to 2019, the Petitioners were registered under the UNFCCC protocol and passing on the gross CDM benefits from trading carbon credits in terms of revenue sharing with GUVNL. The Petitioner has admitted that it was registered under the CDM till the year 2019, when it chose to get registered under the Verified Carbon Standard ("VCS") mechanism replacing the CDM.

5.8. As per the documents of the 'Project Registration’ available on UNFCCC website and VERRA for the Petitioner’s above 4 Wind Projects aggregating to 150 MW, it is evident that the Petitioner had earlier registered its BundIed Project of 150 MW under the CDM with UNFCCC having Project ID No. 2347 and then it got converted / shifted to VCS Mechanism bearing Project ID No. 292. The Petitioner's 'Project Documents’ (Project Description, Monitoring Report, Verification Report, etc. available at the VERRA Registry also provide the declaration made by the Petitioner itself that their 150 MW Bundled Wind Project registered as VCS project 292 was registered under CDM (ID: 2347). Moreover, pursuant to transfer /

conversion / migration from UNFCCC (CDM Registry) to VCS Mechanism VERRA Registry) w.e.f. 30.09.2019, the Petitioner's Project ID 292 has started availing the benefits of emission reductions emanating from their 150 MW Bundled Wind Project (earlier registered as Project ID 2347 under UNFCCC) during the monitoring period from 01/10/2019 to 30/06/2021 and subsequently during the monitoring period from 01/07/2021 to31/12/2021. This is clearly evident from the details available at the VERRA Registry.

5.9. it is stated that a 'Carbon Credit' or 'Carbon Offset' is an 'environmental benefit' which is a tradable permit or certificate for emission reduction which provides the holder the right to emit one ton of carbon dioxide or an equivalent of another greenhouse gas. It is further submitted that there are several carbon crediting mechanisms viz. Clean Development Mechanism (CDM), Voluntary Carbon Standard Mechanism or VCS (administered by VERRA), Gold Standard GS (administered by GS Foundation), Approved Carbon Credits or ACC (registered under Global Carbon Council GCC, etc. The carbon offsets from Projects registered under Clean Development Mechanism (CDM) under the regulatory framework of Kyoto Protocol for the purpose of offsetting the Projects' emissions are termed as 'Certified Emission Reductions (CERs) which entail due validation & verification by an independent third party certifying body accredited UNFCCC / designated operating entity (DOE). While, the carbon offsets exchanged in over-the-counter voluntary markets are being termed as 'Voluntary Emission Reductions (VERs)'.

5.10. It is submitted that a Wind Generator cannot simultaneously get registered and/or claim benefits under more than one carbon crediting mechanism. Each carbon credit emanated by a Wind Generator ought to be associated with a single GHG emission reduction platform / carbon emission removal activity and there is no double counting or double claiming of the environmental benefit being passed on to the Generator in respect of the emission reduction / removal. While the regimes may be slightly different, such GHG emission reduction/ removal regimes entail the Generator to get carbon credits. It cannot be accepted that the Generator will opt for

a different mechanism to get carbon credits emanating from its Wind Project instead of CDM but will not pass on the same to GUVNL under a hyper technical argument that Article 12.12 of the PPA uses the term "CDM benefit" only. This would be an incorrect way of reading the PPA especially when the entire cost and expenses incurred by the Petitioners in setting up the Wind Generators are being paid by GUVNL and the consumers in the State of Gujarat under a preferential tariff regime.

5.11. The interpretation of the Petitioner that selling of VERs and sharing of revenue generated therefrom is not within the purview of the PPAs is misconceived. It is submitted that VER or VCS is only an alternate to the CDM regime and many Wind Projects which were earlier registered under the CDM regime have converted / re-registered their Projects under the VER regime on some other Carbon Emission Trading Platform / Carbon Offset Schemes viz. VCS or Gold Standard. It is evident from the UNFCCC & VERRA (VCS) websites that the Petitioner's Bundled Project of 150 MW has been converted / switched to VCS Registry.

5.12. In the wind industry, many projects, in wake of longer time period for approval by MOEFCC, higher fees associated with UNFCCC, etc., are reluctant to make new registrations / trade on the compliance platform administered under UNFCCC and are shifting to the voluntary platforms which entail faster documentation and/or transactions. Further, as an outcome of UN's COP-26 Summit, all CDM Credits are now eligibie to be sold to any Nation to meet its NDC / Voluntary Markets similar to the Voluntary Carbon Standard or VCS (administered by VERRA), Gold Standard or GS (administered by GS Foundation], Approved Carbon Credits or ACC (registered under Global Carbon Council – GCC), etc. In fact, these Voluntary Carbon Offset Programs are supplementing the existing Carbon Market Programs viz CDM and use the standardized CDM methodologies, etc. It is thus amply clear that the 'environmental benefits' or 'carbon credits' or 'CDM benefits' are identical.

5.13. The conduct of the Petitioner also reflects that it understood that it had to pass on the VERs to GUVNL under the PPA. After the Petitioner got registered under the Voluntary Emission Reduction ("VER") regime, the Petitioner itself is issued a

Credit Note dated 03.06.2021 in favour of GUVNL. This shows that the Petitioner acknowledged that it is liable to pass on the benefits under the VER regime which are nothing but carbon credits to GUVNL under- Article 12.12 of the PPA.

5.14. The Petitioner did not resile from this position till 11.11.2021, when for the first time its auditor raised a query as to the sharing of the VER benefits. It was only in November 2021 for the first time, that the Petitioner took the position that the CDM and the VER are separate mechanisms and it is not required to share the benefits accrued under the VER regime with GUVNL.

5.15. It is explicitly denied that GUVNL had unilaterally made reductions or there was any alleged protest with regard to sharing of benefits accruing from carbon credits. It is incorrect on the part of the Petitioner to allege that GUVNL has unilaterally made deductions since the deduction of Rs. 51,84,387/- was made only based on the Petitioner's Credit Note dated 03.06.2021.

5.16. A perusal of the Credit Note dated 03.06.2021 shows that there is no protest or contest by the Petitioner and in fact, the Petitioner itself also described the VER benefit as *"sharing of CDM revenue with GUVNL as per PPA"*.

5.17. It is well settled that the the contract must be read as a whole to ascertain its meaning. GUVNL relies on the following decisions on this proposition –

***(i) Modi & Co. Ps. Union of India, at {1968) 2 SCR 565***

*"18. But it is argued for the respondents that unless there is in the contract itself a specifIc clause prohibiting transfer, the plea that it is not transferable is not open to the appellants and that evidence aliunde is not admisle to establish it and the decisions in Boddu Seetharamaswami v. Bhagwathi Oil Company, Illuru Hanumanthiah v. Umnabad Thimmaiah and Hussai Kasam Dada v. Vijayanagaram Comm. Asson. Are relied on his support of this position.* ***We agree that when a contract has been reduced to writing we must look only to that writing for***

***ascertaining the terms of the agreement between the parties but it does not foIlow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be express or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well established that in construing a contract it would be legitimate to take into account surrounding circumstances. Therefore on the question whether there was an agreement between the parties that the contract was to be nontransferable, the absence of a specific clause forbidding transfer is not conclusive. What has to be seen is whether it could be held on a reasonable interpretation of the contract, aided by such considerations as can legitimately be taken into account that the agreement of the parties was that it was not to be transferred. When once a conclusion is reached that such was the understanding of the parties, there is nothing in law which prevents effect from being given to it****. That was the view taken in Virjee Daya & Co. V. Ramakrishna Rice & Oil Mills, and that in our opinion is correct."*

***(ii) Commercial Auto Sales (P) Ltd. v. Auto Sales (Properties) , (2009) 9 SCC 620***

***"14. It is well settled that the intention of the parties to an instrument must be gathered from the terms thereof in the light of surrounding circumstances. In Union of India v. Millenium Mumbai Broadcast (P) Ltd. [(2006) 10 SCC 510] this Court said that a document must be construed having regard to the terms and conditions as well as nature thereof.*** *The true nature of relationship between the parties concerning the occupation of subject premises by the appellant was required to be ascertained from the family arrangement which the High Court failed to do and thereby committed grave error in not considering the matter in*

*right perspective. As a matter of fact, a material clause like Clause 8 of the family settlement has been overlooked altogether affecting decision in the matter"*

A perusal of the correspondence between the parties from November 2021 onwards also show that the Petitioner was only seeking to satisfy its Auditors by raising hyper technical objections that the VER is not the same as CDM. The alleged claim of the Petitioner of seeking refund from GUVNL is merely all afterthought to avoid sharing the future benefits accruing from in trading carbon credits.

5.18. It is submitted that the phrase *"Sharing of Benefits accrued from CDM"* implies the sharing of revenue from the trading of carbon credits in any form and under any emission trading scheme such as Certified Emission Reductions ("CER"), VER, Gold Standard, etc. If needed there was no requirement for the Petitioner to share the VER with GUVNL, it would have refused such sharing and in fact it would not have shared the benefits vide their Credit Note dated 03.06.2021.

5.19. To summarize, the present Petition is only an attempt on the part of the Petitioner to avoid performance of its obiigation under the PPA of sharing revenue / benefits that accrue from trading carbon offset credits from their Wind Projects, under the guise of misconstrued reading of the terminology "CDM Benefits", and reasons which are abrupt and bad in law and hence liable to be dismissed.

5.20. The regulatory regime prevailing at the time of the Tariff Orders dated 11.08.2006, 30.01.2010 and 07.01.2013 all refer to the sharing of CDM benefits, since, most projects were registered and in fact CDM was the primary mechanism available for registration of such renewable energy projects, The reference to the subsequent tariff orders of the Commission is also to be read accordingly. The GERC (Power Procurement from Renewable Sources), 2005 or GERC (Multi-year Tariff) Regulations, 2006 have nothing to do with the matter. The Petitioner's statement that even when the term CDM benefits was used by the Commission in the above wind tariff orders, there were alternate framework and platforms for

trading of carbon credits but since only CDM benefits was used, the generators trading on other platforms were not covered under such orders, is incorrect and denied.

5.21. The CDM scheme was the most comprehensive and detailed platform/ framework available and even if the generators were receiving carbon credits under other platforms, they were passing on the same to GUVNL under the very same Article 12.12 of the PPAs. The reference to the National Tariff Policy, 2006 and the subsequent National Tariff Policy, 2016 is also misplaced. GUVNL craves leave to refer to the same for their true scope and meaning. Both the Policies refer to the CDM benefits since that was the most widely accepted network available to generators for receiving carbon credits. This does not mean that the Generators who are receiving carbon credits or equivalent environmental benefits under an alternate mechanism to CDM can retain these benefits and need not pass on the same to GUVNL merely because the term CDM benefits has been used in the PPA. The Power Producers (Generators) have an obligation to share the benefits accruing from carbon credits with the Power Procurers (consumers) interpreting the contractual terms in true spirit.

5.22. There is no question of seeking refund of Rs. 51,34,387/- which was recovered by GUVNL based on the credit note issued by the Petitioner on 03.06.2021. It is wrong and denied that GUVNL has illegally adjusted or retained any amounts under the PPA or that any interest ought to be paid by GUVNL on the same. The Petitioner has itself admitted the VER is also a carbon offset scheme and therefore, is a substitution to the CDM regime. It is wrong and denied that the Petitioner is not obliged to share the revenue of the credits earned from the carbon credit apart from CDM with GUVNL. The Petitioner is enjoying preferential tariff and GUVNL is paying its entire cost and expenses as well as a return on equity. The Petitioner cannot switch from the CDM to VER regime and obtain carbon credits or carbon offset credits but refuse to share the revenue with GUVNL. It is wrong and denied that the financial health and viability of Petitioner's project is being impacted. The

Petitioner itself is contending that from 2008-2019 it has passed benefits under the CDM regirne to GUVNL. If so, how could passing on the VER benefits on the same benefits (25%, gross CDM benefits) would affect the financial health of the Petitioner is not clear. The reference to Section 61(h) and 86(i)(e) of the Electricity Act, 2003 cannot be made out of context and by permitting Renewable Generators to take advantage of environmental benefits / carbon credit benefits in place of CDM benefits but not pass on the same to the consumers. The Power Producers (generators) have a contractual obligation to share the benefits accruing from carbon credits with the Power Procurers(consumers) interpreting the contractual terms in true spirit. No direction can be sought for refund for GUVNL since it is only following Article 12.12 of the PPA in letter and spirit.

6. **Rejoinder dated 20.12.2021 to the Reply of Respondent by the Petitioner:**

6.1. The submissions of GUVNL in its reply are broadly stated as under:

(i) Article 12.12 of the PPAs mandate passing on of the benefits received by it from trading of carbon credits under any emission trading scheme, including those outside the scope of the CDM Mechanism. The term "CDM" used in the PPA has to be interpreted in a manner to include all forms of carbon credits.

(ii) The PPAs have been entered into under a cost-plus tariff regime, and GUVNL is paying preferential tariff in terms of the Tariff Order dated 11.08.2006. Therefore, the power producers are required to share the benefits accrued to them from trade of any form of carbon credit.

(iii) Carbon credits like VER credits are analogous to the CER credits under the UNFCC's CDM Mechanism, since both pertain to trading of carbon credits/ carbon offsets.

6.2. Firstly, it is submitted that the specific term "CDM" used in the PPA and under the Tariff Order has to be given its true meaning, and the same cannot be read in a generic manner to include all other forms of carbon credits. It is submitted that the decision to consider CDM benefits while determination of tariff of renewable power producers was a policy decision taken by the Central Government while formulating the National Tariff Policy 2006 and thereafter the National Tariff Policy 2016 (collectively, "Tariff Policies"). The said policy decision was taken and incorporated in the Tariff Policies to facilitate the reduction of carbon emissions under the framework of the Kyoto protocol to which India is also a signatory.

6.3. It was under these circumstances that the Central Government in the tariff policies contemplated that renewable energy projects set up at the relevant time be also registered under the CDM mechanism under the Kyoto Protocol. Accordingly, at the time when the Tariff Order was passed, since the aforesaid policy decision of the Central Government was in operation, the Commission considered it fit to include the benefits accruing under the CDM mechanism to renewable energy projects such as the Petitioner to be passed on to GUVNL.

6.4. It is settled law that terms in a contract ought to be given their plain and literal meaning. It is further settled that when a contract specifically provides for something, it naturally means that other similar matters stand excluded. Admittedly, there were various carbon credit schemes prevalent in the market when the Tariff Order was passed. However, the intention of the Commission by specifically mentioning CDM in the Tariff Order and the PPA was that benefits accruing specifically under the CDM mechanism, which was introduced as part of the Central Government's policy to give effect to the Kyoto Protocol, are required to be passed on to GUVNL. The said benefits cannot continue to subsist when the underlying policy i.e., the CDM mechanism itself, ceases to operate. It is submitted that any subsequent scheme that the Petitioner registers itself in, in relation to carbon offsets or even otherwise, cannot be brought within the ambit of CDM. Contrary to GUVNL's assertions, none of the surrounding circumstances indicate

that the Commission or either party to the PPA contemplated the passing on of any other benefit under the PPA except the benefits accruing under the CDM mechanism. Instead, if at all, the surrounding circumstances clearly indicate that the parties intended to share benefits accruing only under the CDM mechanism even when there were various other carbon offset schemes prevalent in the market at the relevant time.

6.5. Merely because the PPAs of the Petitioner have been entered into a cost plus tariff regime, does not mean that the Tariff Order is to be interpreted in a manner that the Petitioner is required to pass on any and every benefit that accrues to it. In fact, it is relevant to note here that the Tariff Order is not a project specific tariff order, where the Commission has factored in each and every cost parameter / benefit accruing to the Petitioner.

6.6. The CDM Mechanism flows from Article 12 of the Kyoto Protocol under the UNFCCC, which India had ratified in the year 2002. As aforesaid, India had agreed for emission reduction activities to be taken up in India, which under the CDM Mechanism would in turn help the developed countries to meet their commitments under the Kyoto Protocol. It is in this background, that the Central Government while formulating the National Tariff Policy, directed the CDM benefits to be considered in tariff fixation, and the Tariff Order and subsequent orders passed by the Commission also considered the same. Therefore, there was never any intention to include benefits from the private/ voluntary schemes in tariff fixation. The contention of GUVNL that all forms of carbon credits were envisaged in the Tariff Order is evidently false.

6.7. Without prejudice to the above submission, it is submitted that there is a clear distinction between carbon credits granted under the erstwhile CDM Mechanism (adopted by the Petitioner between 2008-2019) and the VCS certification provided by Verra (adopted by the Petitioner from 2019 onwards). The main points of distinction are (i) the voluntary nature of trading VERs; and (ii) the level of government control in grant of certification, which have been tabulated below;

| CDM Mechanism | VER Mechanism |
|---|---|
| The CDM Mechanism functions in the paradigm of compliance markets.<br><br>Compliance markets allow entities to buy and sell carbon credits or carbon offsets to comply with rules or regulations pertaining to their emissions, such as greenhouse gas emission targets agreed upon in international agreements such as Kyoto Protocol or the Nationally Determined Contributions under the Paris Agreement. | The VER Mechanism functions in the paradigm of voluntary markets.<br><br>Voluntary carbon markets operate outside of and in parallel to compulsory markets, allowing the trading of carbon offsets that are not for the purpose of meeting mandatory emission targets. Examples of voluntary carbon credits include inter alia the VCS (administered by Verra) and gold Standard (administered by the GS Foundation). These are administered by voluntary non-governmental organizations and cannot be used to comply with mandatory emission targets. |
| The CDM mechanism was set up under Article 12 of the Kyoto Protocol to enable developed countries to meet their obligations under the Protocol. | The VCS credits are granted by Verra, i.e. a non-profit organization that facilitates the trading of Voluntary Emission Reduction (VER) credits from renewable energy projects.<br><br>It has not been set up under any international instrument/ treaty, or for the purpose of meeting any mandatory obligations pertaining to emission targets. |
| As per the terms of the Protocol, the CDM process was governed by 'Designated National Authorities' appointed by National Governments. In | The entire regime is administered by Verra and its accredited auditors without any role of the government. In the absence of any governing international |

| | |
|---|---|
| India, the CDM registration process was administered through the National Clean Development Mechanism Authority, setup under the aegis of the Ministry of Environment, Forests and Climate Change, Government of India (MoEFCC). Thus, the grant and trade of the carbon credits under the CDM mechanism involves constant government regulation. | treaty or domestic government regulations, the issuance and trading of VCUs under this regime is governed by the manuals and bylaws of a private non-governmental organization. |

6.8. It is submitted that the significant distinction between mandatory/compliance carbon credits such CERs and the voluntary nature of other carbon credits was made evident in the COP-26 summit as well. Article 6 of the Paris Agreement creates a mandatory carbon credit mechanism akin to the CDM Mechanism under the Kyoto Protocol. Attempts to operationalize this mechanism were made by parties in the COP-26 Summit in Glasgow, by way of a rulebook. The mechanism agreed upon in COP-26 does not contain any reference to credits obtained under voluntary frameworks such as VER. However, it recognizes the need to carry over carbon credits from the previously applicable regulatory regime under CDM projects registered since 2013. This again indicates that regulatory carbon credit markets under international instruments such as the Kyoto Protocol and the Paris Agreement exist in parallel to the voluntary carbon credit market – and the two cannot be seen as alternatives to each other.

6.9. It is submitted that the CDM Mechanism is a carbon offset scheme functioning in a compliance market which is a distinct regime from voluntary carbon credits such as VER. The Commission has only referred to the CDM Mechanism in its Tariff Orders since trading of such mechanisms is regulated under the aegis of the UNFCC and the Government of India.

6.10. Contention of GUVNL that a plain reading of Article 12. 12 of the PPAs requires the Petitioner to share the benefits of any carbon credit mechanism with GUVNL to the extent of 25%. This contention is denied as being against the express terms of the contract. The text of Article 12.12 extracted by GUVNL clearly contemplates only "gross CDM benefits" and not the benefits under any other carbon credit mechanism. As aforesaid, it is settled law that the mention of specific inclusions in the clause of a contract indicates the exclusion of terms not mentioned expressly. Thus, contrary to the averments of GUVNL, a plain reading of the Article 12.12 indicates that only benefits of the CER credits under the CDM Mechanism are to be shared with GUVNL.

6.11. In all the Tariff Orders extracted by GUVNL in the said paragraphs, the Commission has repeatedly used the term 'CDM Benefits' and not accounted for any other form of carbon credits. During the period of 2006-2010, not only did other voluntary carbon credit mechanisms exist but also became more popular. Despite this, the Commission did not expand the Tariff Orders to include other forms of carbon credits.

6.12. Under the garb of there being a cost-plus tariff determination process, GUVNL cannot be permitted to travel beyond the specific provisions and allowances of the said Tariff Order. Having not challenged the Tariff Order, it is not open for GUVNL to seek revision of the Tariff Order at this stage. Moreover, merely because the PPAs of the Petitioner have been entered into a cost-plus tariff regime, does not mean that the Petitioner is required to pass on any and every benefit that accrues to it. This is particularly relevant as the Tariff Order is not a project specific determination for the Petitioner. All contentions and averments to the contrary are stated to be wrong and are denied.

6.13. GUVNL has wrongly sought to equate all forms of carbon credits/carbon offsets on the grounds that they are tradeable permits or certificates for emission reductions. It is submitted that GUVNL has failed to respond to the multiple points

of distinction between mandatory carbon credits (such as those under the CDM mechanism) and the voluntary carbon credits (such as those under the Versa registry). It is reiterated that CERs and VERs cannot be equated. They function in different markets and are distinguishable inter alia on the grounds of the (i) the voluntary nature of trading VERs; and (ii) the level of government control in grant of certification, as detailed in the table set out above. The said distinction between compliance markets and voluntary markets has been well-recognized, as recently as the COP-26 Summit in Glasgow. In fact, GUVNL itself admits that CERs require due validation from UNFCC - accredited bodies and function in a regulated market, while VERs are exchanged in voluntary markets.

6.14. It is GUVNL's contention that the Petitioner itself issued a credit note dated 03.06.2021 without protest in favour of GUVNL acknowledging its liability to pass on the benefits under the VER regime. GUVNL argues that the Petitioner took the position that it is not required to share the benefits under the VER mechanism at a belated stage, only in November 2021. These contentions are denied for want of relevance.

6.15. It is submitted that when the Petitioner submitted its invoice dated 27.05.2021 towards monthly tariff for April 2021, GUVNL demanded that the Petitioner issue a credit note to it for an amount equivalent to 25% of the proceeds from sale of VER credits. At the relevant time, the Petitioner without prejudice to its rights and under duress had issued a credit note dated 03.06.2021 in favour of GUVNL for an amount of Rs. 50,54,378/-. It is submitted that the Petitioner issued the said credit note demanded by GUVNL under duress to prevent any undue delays in payment of tariff by GUVNL.

6.16. In any case, the stage at which the Petitioner has raised the claim is completely irrelevant for the purposes of the present Petition. The alleged delay in making the claim by the Petitioner does not act as an estoppel against the Petitioner. The Commission while adjudicating the Petition is required to only determine whether

the PPAs and the Tariff Order contemplated that the benefits obtained under the VER scheme are to be passed on to GUVNL. Averments pertaining to the reason for raising the claim or the stage at which the claim is raised are merely an attempt to divert attention from the primary issue for adjudication i.e., the scope of Article 12.12 of the PPAs and the Tariff Order passed by the Commission. Instead of responding to the specific issues raised by the Petitioner, GUVNL is attempting to divert the Commission's attention from the merits of the case.

6.17. GUVNL seeks to rely on generic case law on the settled proposition of law that a contract must be read as a whole to ascertain its meaning without applying it to the PPAs in question. It is submitted that the Petitioner has no dispute with this settled proposition of law. In fact, it is submitted that the settled position stated by GUVNL itself is in the Petitioner's favour. In thIS regard, it is submitted that in addition to the express terms of Article 12.12, even the surrounding circumstances, namely, the Tariff Orders issued by the Commission indicate that the PPAs as well as the various Tariff Orders only contemplated sharing of benefits under the CDM mechanism and not any other carbon credit scheme. On the other hand, GUVNL has not relied on any other provision of the PPA in support of its contention that the contract is to be read as a whole.

6.18. GUVNL has sought to contend, without any supporting documentary proof, that there is a tacit understanding between GUVNL and various wind generators with whom they have executed PPAs at preferential tariff that the benefits accruing from different carbon credits such as VCS. Gold Standard etc. are to be shared.

6.19. It is submitted that the Petitioner has duly complied with all its obligations under the PPAs to share benefits under the CDM mechanism. Upon registration under the CDM, in due compliance with the provisions of Article 12.12 of the PPAs, the Petitioner has from time to time duly shared the benefits accruing to it under the CDM with GUVNL. In this regard, it is submitted that the Petitioner during the period from 01.07.2013 up to 30.09.2019 has sold 7,08,840 CERs for an amount of Rs. 8.05,28,543/- (Rupees Eight Crores Five Lakhs Twenty-Eight Thousand Five

Hundred and Forty-Three only ) under the CDM. Out of this amount, the Petitioner has shared an amount of Rs. 1,98,94,261/- with GUVNL, being the 25% share required to be passed on to it in terms of Article 12.12. In fact, by way of the wrongful deductions by GUVNL purportedly in terms of Article 12.12 of the PPAs, GUVNL is arbitrarily thrusting obligations on the Petitioner that are beyond the scope of the PPAs, to the detriment of the Project.

6.20. It is submitted that an affidavit disclosing the benefits accrued from VERs traded from 2019 would have no relevance to the present Petition. As aforesaid, the purpose behind the trading of CERs and government involvement in accreditation cannot be compared to the voluntary trading of VERs or their private accreditation. The PPAs and the Tariff Orders did not seek to pass on all the benefits of any emission-reduction incentives, but only the regulated and government controlled CDM mechanism. Thus, the benefits accrued through other environmental incentives do not alter the meaning of Article 12. 12 of the PPAs.

6.21. Further, contrary to the position taken by GUVNL, reliance inter alia on the National Tariff Policy, 2006 and the National Tariff Policy, 2016. the GERC (Power Procurement from Renewable Sources), 2005 or GERC (Multi-Year Tariff) Regulations, 2006 is apposite in the present case. The said policies and regulations indicate that the CDM mechanism is the only mechanism that has been recognized by the Commission and other government entities such as the Ministry of Power, Government of India ("MoP"). In fact, all the way up to 2016, despite the burgeoning voluntary carbon credits market, the MoP and the Commission retained references to only the CDM mechanism due to India having ratified the Kyoto Protocol, and the fact that CDM mechanism was regulated under the aegis of the UNFCC, and accreditation being carried out by a government body – the National Clean Development Mechanism Authority.

6.22. Pertinently, including carbon credits which are purely voluntary in nature within the ambit of the Tariff Orders or PPAs, would open floodgates wherein entities

would be de-incentivized from signing up for any private schemes to reduce carbon-emissions, given the regulatory uncertainty in relation to sharing benefits with the concerned distribution licensee.

7. **Submission of the Petitioner dated 19.06.2023:**

7.1. The limited issue that arises for consideration of the Commission in the present Petition is whether in terms of the PPAs, the Petitioner is obligated to pass on benefits accruing under any non-CDM market-based GHG reduction scheme.

*CDM is a specific term and does not include non-CDM carbon trading scheme.*

7.2. CDM has no generic meaning. CDM is a specific carbon trading scheme. CDM is not a generic term used to describe all forms of carbon trading schemes. Copies of Article titled Carbon Credit and Carbon Offset Fundamentals; and Paper titled CDM implementation in India The National Strategy Study by TERI are enclosed with the submission.

(i) CDM was established under Article 12 of the Kyoto Protocol under the UNFCCC, which India had ratified in the year 2002.

(ii) CDM is governed CDM is governed by the National Clean Development Mechanism Authority ("NCDMA") set up under the aegis of the Ministry of Environment, Forests and Climate Change, Government of India ("MoEFCC") in India.

(iii) Approval from the NCDMA is a pre-requisite for a project to qualify as a CDM Project.

(iv) There were various carbon credit schemes operational in the market when the Tariff Order was passed. Verra, Gold Standard, Approved Carbon Standard etc., are private carbon trading schemes which are not officially recognized instruments either by the Commission or any other government entity.

(v) However, the CDM is the only mechanism that has been recognized by the Commission and other government entities such as the Ministry of Power, Government of India ("MoP").

7.3. It is submitted that the decision to consider CDM benefits alone, while determination of tariff of renewable power producers was a policy decision made by the Central Government while formulating the Tariff Policy 2006 and thereafter the Tariff Policy 2016. The said policy decision was taken and incorporated in the Tariff Policies to facilitate the reduction of carbon emissions under the framework of the Kyoto Protocol, to which India is also a signatory. Accordingly, the Commission specifically mentioned CDM in the Tariff Order and the PPAs.

7.4. The PPAs and the Tariff Order do not envisage passing of any benefits other than CDM benefits. The PPAs and the Tariff Order would have to be reopened and amended to include other non-CDM carbon trading schemes. It is impermissible in law for the PPAs and the Tariff Order to be reopened now. Judgment dated 22.08.2014 in Appeal No. 279 of 2013 titled GUVNL vs. GERC & Ors. is enclosed with the submission.

7.5. It is submitted that the PPAs in unequivocal terms mandate passing on CDM benefits alone. There is no reason or evidence that the term CDM means all other non-CDM carbon trading schemes. Under the circumstances, it is submitted that the Commission is legally bound to uphold the sanctity of the PPAs and decide as per their clear language.

*Interpretation of the PPA and Tariff order*

7.6. It is GUVNL's stand that the term CDM ought to be interpreted to mean all other forms of carbon credit trading schemes which is entirely misconceived.

7.7. It is well settled that the terms of a contract and/or statute ought to be given their plain and literal meaning. The specific term "CDM'' has to be given its true meaning, and the same cannot be read to include all other forms of carbon credits. In support of this argument, the Petitioner relied upon the judgments of Hon'ble APTEL in **(i) Industrial Promotion & Investment Corpn. of Orissa Ltd. vs. New India Assurance Co. Ltd. , (2016) 15 SCC 315 and (ii) Appeal No. 210 of 2017 - Adani Power Ltd. vs. CERC & Ors.**

7.8. It may be relevant to mention here that GUVNL was a party to the above Judgment of the Hon'ble APTEL in the case of *Adani*. In the case of Adani's PPA dated 06.02.2007 with GUVNL, the specific entry on taxes under the Change in Law clause only covered taxes on specific transactions, namely, for (a) water; (b) primary fuel; (c) generation of electricity; and (d) sale of electricity. It was GUVNL's stand that the clause would not be applicable on any other transaction. The Hon'ble APTEL in its Judgment upheld GUVNL's contention that claims in relation to other taxes apart from the four specifically provided for are to be rejected. The Hon'ble APTEL held that the claims have to be restricted to the extent provided in the PPA.

7.9. Pertinently, the Tariff Policy 2006 uses the phrase *"the"* Clean Development Mechanism". The usage of the definite article "the" assumes importance, as it means a particular and specific term, and not a general one. The Hon'ble Supreme Court has in several of its judgments elaborated on the effect of using definite articles such as -'the" as opposed to indefinite articles such as "a" and "any". Judgments on Consolidated Coffee Ltd. and Another vs. Coffee Board, Bangalore (1980) 3 SCC 358 and Shri Ishar Alloy Steels Ltd. vs. Jayaswals Neco Ltd. (2001) 3 SCC 609 (Para 9) are relied upon in support of this contention.

7.10. Further, it is submitted that specific inclusion of the term "CDM" in the PPA and Tariff Order would necessarily imply exclusion of all other forms of carbon credit schemes of a similar kind - *expressio* tmius est exclusio alterius . Judgement on

Swastik Gases P. Ltd. vs. Indian Oil Corporation Ltd. (2013) 9 SCC 32 is relied upon in support of this contention.

*Additional benefits in Cost-plus regime/ Generic Tariff Order*

7.11. GUVNL has also erroneously asserted that under a cost-plus tariff, any additional benefits should be passed on to consumers. Once again, the Respondent's submission is entirely misconceived. First, it is incorrect that the Tariff Order mentioned CDM only because there were no other carbon credits trading schemes available at the time. As is borne out by the record and is admitted by the Respondent, several other carbon credit trading schemes including Verra itself, were operational when the Tariff Order was issued. The Tariff Order deals only with CDM, because the Tariff Policy required only CDM to be considered. Indeed, the Tariff Order itself states that it was issued after the Commission had considered *"all aspects"* of the matter.

7.12. Secondly, there is no basis to assert that under a cost-plus generic tariff regime, all benefits not expressjy discussed under the Tariff Order are to be passed on to the consumer. In fact, the logic behind a generic tariff is precisely the opposite, namely, to fix tariff on a generalized normative basis, to incentivize the project developers to adopt cost saving and revenue maximizing methods. If the Commission had intended that all benefits not expressly discussed were to be passed on to the consumer, the Commission would have determined a project-specific tariff with a provision for truing-up, to factor in every actual expense and revenue and determine a tariff accordingly.

In this regard, the decision of the Hon'ble APTEL in Judgment dated 22.08.2014 in Appeal No. 279 of 2013 titled GUVNL v. GERC & Ors. as referred above, is relevant to take note of. It was GUVNL's stand in the said case that post issuance of a generic tariff order, on account of issuance of certain Custom and Excise Notifications, there was a reduction in capital cost. Accordingly, GUVNL had

claimed that the normative capital cost benchmark considered under the original generic tariff should be revisited and the tariff ought to be reduced.

7.13. The Hon'ble APTEL in its decision, rejected GUVNL's contention holding that the generic tariff order on normative parameters is not permissible to be re-visited on the basis of the actual cost incurred in setting up the Project. In fact, the Hon'ble APTEL further held that in the light of the objectives of the Act, PPAs can be re-opened only for the purpose of giving a thrust to the renewable energy projects and not for curtailing the incentives. Moreover, the Hon'ble APTEL has clearly held that State Commissions only have the power to regulate the power purchase by the Distribution Licensees, and do not have powers to indirectly regulate the generating companies.

*Regulatory Certainty and Sanctity of Contract*

7.14. Moreover, in cases like the present one the importance of regulatory certainty and sanctity of contract cannot be overemphasized. It would be penny-wise pound foolish if GUVNL were permitted to disturb the fundamental principles of regulatory certainty and sanctity of contract by undermining the clear and express language of the PPA.

8. **Written submission dated 09.08.2023 of Respondent:**

8.1. When GUVNL, as the procuring agency is providing a preferential tariff which more than covers the entire cost of the generators and provides an assured return, the benefit that is availed of by the generators from other sources ought to be shared with GUVNL, albeit to the extent of 25% with the balance 75% being retained by the generators. This is also clearly provided for in the Order dated 11.08.2006 passed by the Commission in Order No. 2 of 2006, which inter-alia, reads as under:

*"21. Sharing of benefits from Clean Development Mechanism (CDM)*

*In the discussion paper, the Commission had proposed that 25% of benefits received from the CDM projects are to be shared by the Developer with the Distribution licensee.*

*The proceeds of the carbon credits will accrue to the wind energy generator and will reduce costs correspondingly. Therefore the Commission, after considering all the aspects decides to pass on 25% of the gross CDM benefit to the Distribution Licensee.*"

8.2. The projects of the Petitioner are registered under an entirely independent Voluntary Emission Reduction ("VER") mechanism administered by Verra, which is a non-profit international organization that administers and facilitates the trading of VER credits from renewable energy projects.

8.3. There is no dispute on the fact that substantial benefits accrue to the Petitioner by the sale of carbon credits, which goes on to reduce the cost of the Petitioner. This is the precise rationale provided for in the Order dated 11.08.2006 passed by the Commission in Order No. 2 of 2006 ~~(quoted above)~~ for sharing of the benefits, which the Petitioner is seeking to avoid in the present case.

8.4. The Petitioner has erroneously sought to distinguish between the CDM and VER mechanisms. The purported point of distinction is that CDM mechanism is administered by the UNFCCC while the Verra regime is administered under and subject to the laws of the District of Columbia, United States.

8.5. The above is wholly misconceived. The objective is for the sharing of the benefits that are available to the generators, which goes on to reduce the cost of the generators. This is the precise reasoning given by the Commission in the Order dated 11.08.2006.

8.6. It is irrelevant as to the nomenclature or the mechanism under which the benefits are being availed by the Petitioner in the sale of carbon credits, what is relevant is that the Petitioner has availed the benefits, which reduces the cost to the Petitioner.

8.7. Article 12.12 of the PPA requires the power producer to share 25% of only the carbon credits received. Merely because the nomenclature has changed, or the entity administrating the mechanism has changed, or there is an additional mechanism available for the same benefit, it cannot entitle the Petitioner to take advantage of such change in nomenclature or mechanism to retain the benefit, to the prejudice to the consumers in the State.

8.8. The expression CDM benefits mentioned in the PPA is not a defined expression and has to be given its natural meaning, being a generic expression contained in the PPA. The rationale provided in the tariff order of the Commission also makes it abundantly clear that the purpose is for the benefits accruing to the wind developers to be shared with the consumers.

8.9. The clause used in the PPA needs to be viewed in their natural and ordinary meaning. Reference in this regard may be made to the decision of the Hon'ble Supreme Court in **Sat Pal Gupta v. State of Haryana, (1982) 1 SCC 610, as under:**

> 5. ***The word "foodstuffs" which occurs in clause (v) of Section 2(a) is not defined in the Act and therefore it must receive its ordinary and natural meaning, that is to say, a meaning which takes account of and accords with the day-to-day affairs of life****. Cattle and poultry are living components of the natural environment and there is no reason to exclude that which they eat or feed upon, from the meaning of the word "foodstuffs". If, what the human beings eat is food, so is what the other living beings eat. "Cattle fodder" is expressly brought within the compass of essential commodities by sub-clause (i) of Section 2 (a). It would be illogical if, in that context, rice bran is*

*excluded from the purview of essential commodities on the ground that it is eaten by the poultry and not by Homo Sapiens*.

8.10. The Petitioner itself on the hearing dated 12.06.2023 has relied on a document by Areta A. Jez, Brad D. Alexander and Ayaz R. Shaikh titled Carbon Credit and Carbon Offset Fundamentals that for carbon credit benefits benefit can be claimed only from one entity. This essentially means that the Petitioner can claim benefits either from CDM or VER. Otherwise, there would be a double counting of carbon benefits.

Therefore, it is abundantly clear that VER is only an alternate to the CDM regime and many wind projects who were earlier registered under the CDM regime and have converted/re-registered their projects under the VERRA regime on some other carbon emission trading platform/carbon offset schemes.

8.11. In the wind industry, many projects, in wake of longer time period for approval by MOEFCC, higher fees associated with UNFCCC, etc. are reluctant to make new registrations/trade on the compliance platform administered under UNFCCC and are shifting to the voluntary platforms which entail faster documentation and/or transactions. Further, as an outcome of the UN's COP 26 summit, all CDM credits are now eligible to be sold to any Nation to meet its NDC / Voluntary Markets similar to the Voluntary Carbon Standard or VCS (administered by VERRA), Gold Standard or GS (administered by GS Foundation), Approved Carbon Credits or ACC (registered under Global Carbon Council - GCC), etc. In fact, these Voluntary Carbon Offset Programs are supplementing the existing Carbon Market Programs viz. CDM and use the standardized CDM methodologies, etc. It is thus amply clear that the 'environmental benefits' or 'carbon credits' or 'CDM benefits' are identical.

8.12. The term "CDM benefits" has to be understood with reference to the expressions used in the various tariff orders passed by the Commission. GUVNL had

incorporated the term CDM benefits in all its PPAs since in all the Wind Tariff Orders, the Commission had used the said term.

8.13. It is well settled that the contract must be read as a whole to ascertain its meaning. GUVNL relies on the following decisions on this proposition:

(i) **Commercial Auto Sales (P) Limited v. Auto Sales Properties, (2009) 9 SCC 620**

"*14. It is well settled that the intention of the parties to an instrument must be gathered from the terms thereof in the light of surrounding circumstances. In Union of India v. Millenium Mumbat Broadcast (P) Ltd. [(2006) 10 SCC 510] this Court said that a document must be construed having regard to the terms and conditions as well as nature thereof. The true nature of relationship between the parties concerning the occupation of subject premises by the appellant was required to be ascertained from the family arrangement which the High Court failed to do and thereby committed grave error in not considering the matter in right perspective. As a matter of fact, a material clause like Clause 8 of the family settlement has been overlooked altogether affecting decision in the matter.*"

**(ii) Bangalore Electricity Supply Company Limited (BESCOM) v. E. S. Solar Power Private Limited 2021 SCC OnLine SC 358.**

*"16. The duty of the Court is not to delve deep into the intricies of human mind to explore the undisclosed intention, but only to take the meaning of words used i.e. to say expressed intentions (Smt. Kamala Devi vs. Seth Takhatmal & Anr.). In seeking to construe a clause in a Contract, there is no scope for adopting either a liberal or a narrow approach, whatever that may mean. The exercise which has to be undertaken is to determine what the words used mean. It can happen that in doing so one is driven to the conclusion that clause is ambiguous, and that it has two possible meanings.*

*In those circumstances, the Court has to prefer one above the other in accordance with the settled principles. If one meaning is more in accord with what the Court considers to the underlined purpose and intent of the contract, or part of it, than the other, then the court will choose former or rather than the later. Ashville Investment v. Elmer Contractors. The intention of the parties must be understood from the language they have used, considered in the light of the surrounding circumstances and object of the contract. Bank of India and Anr v. K. Mohan Das and Ors. Every contract is to be considered with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavoring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Bihar State Electricity Board, Patna and Ors. v. M/s. Green Rubber Industries and Ors.*"

The above clarifies that the intention of the parties while entering the contract is of primal importance while interpreting the contract. The intention is to be seen in light of surrounding facts and circumstances with the object of the contract. This would also apply to the present PPA/s with the Petitioner and GUVNL.

8.14. The conduct of the Petitioner also reflects that it understood that it had to pass on the benefits to GUVNL under the PPA. After the Petitioner got registered under the VER regime, the Petitioner itself issued a credit note dated 03.06.2021 in favour of GUVNL. This shows that the Petitioner acknowledged that it is liable to pass on the benefits under the VER regime which are nothing but the carbon credits of GUVNL under Article 12.12 of the PPA. The PPA is a document agreed by both parties and is based on consensus ad idem. The parties to the PPA had itself understood and implemented the PPA in a manner that the benefits of CDM have been passed on by the Petitioner to GUVNL.

8.15. The principle of law is settled, when the parties to an agreement have interpreted and implemented the agreement in a particular manner, the parties are bound by

such an interpretation. In this regard, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Gedela Satchidananda Murthy** v. **Dy. Commr. And Ors.** (2007) 5 SCC 677 at para 32, as under:

> *"32. In Trustee Solutions Ltd. v. Dubery [(2007) 1 All ER 308 : (2007) ICR 412 : 2006 EWHC 1426 (Ch)] it was stated:*
>
> *"Group estoppel binds all beneflciaries under the trust, as well as the trustees and the company.*
>
> *The principle*
>
> *The principle on which Miss Rich relies is that formulated by Lord Denning, M.R. in Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. [1982 QB 8 : (1981) 3 WLR 565 : (1981) 3 All ER 577 (CA)] , QB at p. 121:*
>
> ***'If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it–on the faith of which each of them–to the knowledge of the other–acts and conducts their mutual affairs–they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not–or whether they were mistaken or not–or whether they had in mind the original terms or not. Suffice it that they have, by their course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.' "***
>
> *(emphasis supplied)*

This principle has been reiterated by the Hon'ble Supreme Court in the case of Transmission Corporation of **Andhra Pradesh Limited and Ors. V. GMR Vemag**iri, (2018) 3 SCC 716, para 25. The above principle is squarely applicable in the present case.

8.16. The Petitioner did not resile from this position till 11.11.2021 when for the first time, as per the Petitioner, its auditor raised a query as to the sharing of VER benefits. It was only in November 2021 for the first time, that the Petitioner took

the position that CDM and VER are separate mechanism and it is not required to share the benefits accrued under the VER regime with GUVNL.

8.17. GUVNL did not unilaterally make any deductions and there was no alleged protest to the sharing of benefits accruing from carbon benefits. The deduction was based only on the credit note of Rs. 51,84,387/- made on 03.06.2021.

8.18. Interpretation of contracts cannot be based on the queries raised by auditors, particularly when the parties have conducted themselves in a particular manner for the implementation of the contract. This is more particularly so where the Petitioner is not a public sector undertaking, auditors queries cannot be used as an excuse to reopen settled positions on interpretation of the contract between the parties.

9. From the submissions of both the parties and arguments advanced during the course of hearing, it emerges that following are the undisputed facts:

9.1. It is undisputed fact that there exists four number of PPAs between Petitioner and Respondent which are effective since the year of 2008 in respect to different Wind Power Project capacities of the Petitioner. These PPAs are signed in furtherance to the Order No. 2 of 2006 dated 11.08.2006 issued by the Commission in the matter of determination of price for procurement of power by the Distribution Licensees in the Gujarat for Wind Energy Projects. All these PPAs contains identical terms. The Articles of the said PPAs relevant for the purpose of the present Petition are reproduced as under:

*Article 1*

*Definitions*

……..

*"Tariff" shall have the meaning set for in Article 5.*

……..

*Article 5*

*Rates and Charges*

……

*5.2 GUVNL shall pay a fixed rate of Rs. 3.37 per kWh for delivered energy as certified by SEA of Gujarat SLDC during the 20 year life of the project as determined by the Commission vide order No:2 of 2006 dated 11th August 2006.*

……

*Article 12*

*Miscellaneous Provisions*

……

*12.12 Sharing of benefits from Clean Development Mechanism (CDM): The power Producer shall pass on 25% of gross CDM benefits availed by the Power Producer to GUVNL as specified in GERC Tariff order on annual basis.*

……..

9.2. It is undisputed fact that the Petitioner's wind power based electricity generation projects aggregating to 150 MW got registered under the CDM. The Petitioner shared the benefit received from sell of CERs during the period 01.07.2013 to 30.09.2019 to the Respondent in terms of Article 12.12 of the PPAs. With effect from 30.09.2019 the Petitioners' projects (entire 150 MW capacity) migrated from UNFCCC (CDM registry) to VCS mechanism (VERRA registry) and started availing the benefit of emission reductions resulting from their 150 MW bundled Wind Project during the monitoring period from 01.10.2019 to 31.12.2021. It is also an undisputed fact that the Petitioner have confirmed before the VERRA registry that they will claim emission reductions in one mechanism only for a particular period to avoid double counting and the Petitioner have submitted an undertaking in this regard to the VERRA registry also. The Petitioner had declared the details of CERs issued to them under CDM for the monitoring period from 18.06.2009 to 17.06.2016. The Petitioner shared the benefit accrued on selling of VERs to the Respondent in terms of Article 12.12 of the PPAs vide Credit Note dated 03.06.2021. The Petitioner vide e-mail dated 11.11.2021, for the first time,

raised the issue in regard to sharing of benefit accrued from sell of VERs to satisfy their Auditor's query.

10. In the present Petition, the issue emerges for the deliberation and decision of the Commission is whether sharing of benefits accrued from selling of VERs and other such mechanisms is mandatory under the Article 12.12 of the PPAs signed between the Petitioner and the Respondent.

10.1. We note that the Petitioner argued that the CDM, a mechanism under the Kyoto Protocol, allows developed countries to meet their emissions reduction obligations by purchasing CERs from CDM projects in developing countries. India participates in the CDM through the MoEFCC. The Petitioner has registered CDM projects and shared a portion of the benefits with GUVNL. It is also submitted by the Petitioner that they have started participating in the VER regime from the year 2019, a voluntary carbon offset market administered by Verra. VER credits, known as VCUs, are traded independently of CERs. The VER regime is administered by Verra without government involvement in India. It is contended by the Petitioner that the CDM and VER regimes are distinct and cannot be used interchangeably.

It is further stated by the Petitioner that the CDM and VER are mechanisms for carbon emissions reduction. The CDM is administered by the MoEFCC and allows developed countries to purchase CERs from developing countries. The VER is a voluntary market administered by Verra and trades VCUs. The main differences between the two are: (i) the voluntary nature of trading VERs; and (ii) the level of government control in grant of certification.

We also note that the Petitioner contended that the CDM is a mandatory carbon credit mechanism under the Kyoto Protocol, while VERs are voluntary carbon credits. The COP-26 summit recognized the distinction between the two and established a mandatory carbon credit mechanism under the Paris Agreement. The CDM operates in a compliance market, while VERs are traded in a voluntary

market. The Commission has only referred to the CDM in its Tariff Orders since trading of such mechanisms is regulated under the aegis of the UNFCC and the Government of India.

We note the submission of the Respondent that the Petitioner was initially registered under the CDM and then switched to the VCS mechanism. Carbon credits are tradable permits for emission reductions. There are different carbon crediting mechanisms, including CDM, VCS, and GS. A wind generator cannot claim benefits under more than one mechanism. Each carbon credit must be associated with a single GHG emission reduction activity. There cannot be double counting or double claiming of environmental benefits. The Generator cannot choose a different mechanism to get carbon credits and still not pass them on to GUVNL. The Petitioner's argument that the VER is not a substitution for the CDM regime is incorrect. The Petitioner is obliged to share the revenue of the credits earned from the carbon credit apart from CDM with GUVNL. The Petitioner cannot switch from the CDM to VER regime and obtain carbon credits or carbon offset credits but refuse to share the revenue with GUVNL. The Petitioner cannot avoid sharing the benefits from carbon credit sales, which reduce its costs. The distinction between CDM and VER mechanisms is irrelevant. The purpose is for sharing the benefits with consumers, regardless of the nomenclature or mechanism used. Article 12.12 of the PPA requires the power producer to share 25% of the carbon credits received. The Petitioner cannot take advantage of changes in nomenclature or mechanism to retain the benefits to the prejudice of consumers. The expression "CDM benefits" should be interpreted in its natural meaning. The rationale provided in the tariff order makes it clear that the purpose is for sharing the benefits with consumers. It is stated that reason of shifting from mandatory carbon credit platforms like CDM to voluntary platforms like VCS is due to longer approval times and higher fees. Following COP 26, all CDM credits can now be sold to any nation. Voluntary carbon offset programs supplement existing carbon market programs and use standardized CDM methodologies. This shows that the terms "environmental benefits," "carbon credits," and "CDM benefits" are essentially interchangeable.

From the above submissions of the parties, it is very much clear that CDM, VCS and GS are all carbon crediting mechanisms monitored and certified by different authorities. The similarity of trading of certificates received under these kinds of carbon crediting mechanisms to the developed nations against their obligations to reduce GHG emissions makes all such mechanisms identical to each other. Hence, the benefit accrued out of sale of certificates received from such kind of carbon crediting mechanisms can be categorised as benefit flowing from the same genesis. Thus, the contention of the Petitioner that VCS and CDM benefits are distinct and distinguishable, for the purpose of adjudication of the matter involved in the present Petition i.e. sharing of such benefits, cannot be accepted.

10.2. We note that the Petitioner contended that they are not obligated to share benefits accruing under any carbon credit scheme other than CDM. The specific term "CDM" used in the PPA and Tariff Order cannot be read in a generic manner to include all other forms of carbon credits. The extant regulatory regime has required contracting parties to share revenue accruing only from the CDM regime. Subsequent tariff orders for procurement of wind power in Gujarat also have no mention of sharing benefits from carbon credits other than CDM.

We note that the Respondent submitted that the Commission determined the preferential tariff on a cost-plus basis considering all operational and financial costs. Regarding revenue/benefits from carbon credits, the Commission decided that these should be shared by the Wind Generator with the Distribution Licensee. Thus, the Wind Generators are fully compensated for all costs incurred by them and also get RoE.

It is further submitted by the Respondent that the PPAs executed before 30.01.2010 require the power producer to pass on 25% of gross CDM benefits to GUVNL. The PPAs executed after 30.01.2010 require a sharing of CDM benefits from 100% to

the Power Producer in the first year, gradually decreasing to 50:50 in the sixth year. Thereafter, the sharing remains equal.

It is contended by the Respondent that the Petitioner's claim that selling VERs and sharing revenue is not within the purview of the PPAs is incorrect. VER or VCS is an alternative to the CDM regime, and many Wind Projects have converted from CDM to VER. The Petitioner's Bundled Project of 150 MW has been converted to VCS Registry.

The Respondent argued that the Petitioner's conduct shows that it understood the obligation to pass on VERs to GUVNL under the PPA. After registering under the VER regime, the Petitioner issued a Credit Note in favour of GUVNL, acknowledging its liability to pass on the benefits (carbon credits) under Article 12.12 of the PPA. The Petitioner did not contest the obligation to share VER benefits until November 2021, when its auditor raised a query. The Petitioner's claim of seeking a refund is an afterthought to avoid sharing future benefits from trading carbon credits. The Petitioner's correspondence shows that it was only seeking to satisfy its auditors by raising hyper-technical objections about the difference between VER and CDM.

The Respondent further argued that the Petitioner's claim that CDM and VER mechanisms are not analogous is incorrect. Both mechanisms entail the Petitioner to receive environmental benefits (carbon credits) which reduce its costs. The Petitioner admitted that from 2008-2019, they were registered under the CDM regime, while in 2019, they chose to get their Project registered with VCS Mechanism under VER regime. The test is whether the Petitioner can simultaneously receive the CER credits (under CDM) and VER credits or not. The answer is no. The Petitioner chose not to continue under the CDM regime and instead get registered under the VER regime. The Petitioner got converted/migrated the 150 MW Bundled Wind Project from CDM to VCS Mechanism. The hyper-technical contention of the Petitioner that Article 12.12 of the PPAs contemplates

sharing of benefits only under CDM regime administered by UNFCCC is based on misconstrued reading and understanding of regulatory framework. Merely because the CDM benefits accrue under the Kyoto Protocol administered by UNFCCC and the registration process is administered by National Clean Progress Agency while VER benefits are administered by VERRA, which is administered by the laws of the District of Columbia, USA and the trading of VERs is governed by the manuals and bylaws of VERRA does not mean the VERs are not carbon credits or cannot be traded by the Petitioner to receive amounts/environmental benefits like under the CDM.

To deliberate on this issue about the interpretation of words casted in Article 12.12 of the PPAs, it is apt to refer the Article 12.12 of the said PPAs which reads as under;

*12.12 Sharing of benefits from Clean Development Mechanism (CDM): The power Producer shall pass on 25% of gross CDM benefits availed by the Power Producer to GUVNL as specified in GERC Tariff Order on annual basis.*

It is also apt to refer the GERC Tariff Order of which the Article 12.12 speaks about. The relevant GERC Tariff Order based on which the PPAs under discussion have been signed, is the Order No. 2 of 2006 dated 11.08.2006 issued by the Commission in the matter of determination of price for procurement of power by the Distribution Licensees in the Gujarat for Wind Energy Projects. Relevant part of this Order is reproduced as under;

*21. Sharing of benefits from Clean Development Mechanism (CDM)*

*In the discussion paper, the Commission had proposed that 25% of benefits received from the CDM projects are to be shared by the Developer with the Distribution licensee.*

*The proceeds of the carbon credits will accrue to the wind energy generator and will reduce costs correspondingly. Therefore the Commission, after considering all the aspects decides to pass on 25% of the gross CDM benefit to the Distribution Licensee.*

From the bare perusal of the contents of Para 21 of the Order dated 11.08.2006 it can be seen that the Commission had referred three words viz. "CDM projects", "carbon credits" and "CDM benefit" in the decision part of the Order. We agree with the submission of the Respondent that at the point of time when the Order was issued, the most widely accepted network available to generators for receiving carbon credits was CDM. Hence, the words "CDM projects" and "CDM benefit" were used in the contents of the Tariff Order. But, the conclusive meaning of these words is to be drawn from the word "carbon credits" utilised in the same paragraph of the Order. It is the "carbon credits" which leads to certain benefits, which in a common parlance in vogue and primarily available network for availing benefits, at the time of issuance of the Tariff Order, was termed as "CDM benefits". Thus, it can be concluded that the word "CDM benefit" and the word "carbon credit" were synonymous to each other at the time of issuance of the Tariff Order dated 11.08.2006. Accordingly, prime important word is the word "carbon credit" rather than the word "CDM" to capture the true intent of the Tariff Order. The contention of the Petitioner related to mention about CDM benefits in various Tariff Policies and GERC (MYT) Regulations, 2016 is irrelevant for the subject matter of the present Petition, since the PPAs involved in the present Petition have been signed in pursuance to the Tariff order dated 11.08.2006 issued by this Commission.

We further note that the Petitioner argued that GUVNL cannot exceed the specific provisions of the Tariff Order under the guise of a cost-plus tariff determination process. Since GUVNL has not challenged the Tariff Order, it cannot seek a revision at this stage. Additionally, the cost-plus tariff regime does not require the Petitioner to pass on all benefits, especially as the Tariff Order is not project-specific.

To deal with this issue of generalized tariff on cost-plus method versus project specific tariff, it is pertinent to refer the Tariff Order dated 11.08.2006 issued by the Commission. In the beginning part of the said Order, various Stakeholders as well as the Commission emphasized upon need of generalized tariff over project specific tariff. The relevant part of the said Tariff Order is reproduced as under:

*1. Tariff- Project Specific or generalized*

*The Commission's Regulations on procurement of power from renewable sources provide that, the PPAs entered into by GEB, prior to the notification of these regulations shall continue to be in force for such period as mentioned in those PPAs. The said Regulations also indicate that while determining the tariff, the Commission will adopt normative parameters for financing cost, O&M and other expenses.*

*As regards normative parameters, the Indian Wind Energy Association (InWEA) submitted that for wind energy projects normative/generalized tariff, rather than project specific tariff, is the preferable approach as this will incentivise efficiency in selection of site, technology, financing package, etc. However project specific tariff design may be considered, in case a wind energy developer approaches the Commission, with a specific petition providing rationale and justification for such project specific tariff.*

*The Commission considers that a general tariff for wind energy projects is desirable since it will provide an incentive to the investors for selecting the most efficient machines and the most suitable project locations (besides being non-discriminatory).*

From the above paragraph of the Tariff Order, it is very much clear that the Stakeholders as well as the Commission were inclined to have generalized tariff over the project specific tariff. While determining the generalized tariff, the Commission has considered all the related cost parameters including assured Return

on Equity to a wind power project on normative basis after considering suggestions from the Stakeholders. It is also important to note that the Commission has recognized that the wind power project will have benefits from sale of carbon credits and hence, there will be reduction in the cost of project developer. Since, such benefit was supposed to be earned over the period of life of a project, and not at the time of commissioning of the project, the Commission considered it to stipulate that such kind of benefit is to be shared with the beneficiaries during the course of operation of the project. As explained above, the word "CDM benefit" is to be construed as benefit received from sale of carbon credits, the contention of the Petitioner that carbon credits benefit received only from CDM mechanism and no additional benefits are required to be shared though the tariff is determined on cost-plus basis is incorrect and rejected. As the benefit received by the Petitioner from sale of VCs is the benefit received from sale of carbon credits only and not any additional benefit which is not envisaged by the Commission in the Tariff Order dated 11.08.2006.

We note the contention of the Petitioner that GERC (Power Procurement from Renewable Sources) Regulations, 2005 do not require sharing of benefits accruing from sale of any carbon credits, CERs or otherwise.

To deal with this contention, it is appropriate to refer relevant Clause 5.4 of the GERC (Power Procurement from Renewable Sources) Regulations, 2005, which reads as under:

*5.4 While determining the tariff, the Commission may, to the extent possible consider to permit an allowance based on technology, fuel, market risk, environmental benefits and social contribution etc., of each type of renewable source.*

The above clause stipulates about consideration of environmental benefits while determining tariff for generation from various type of renewable energy sources.

Sale of carbon credits is nothing but an environmental benefit which has been considered by the Commission while issuing the Tariff Order dated 11.08.2006. Accordingly, contention of the Petitioner that the GERC (Power Procurement from Renewable Sources) Regulations, 2005 do not envisage for sharing of CERs is incorrect and rejected.

10.3. We note that the Respondent has referred following case laws to emphasize that in construing a contract it is legitimate to take into account surrounding circumstances.

(i) Modi & Co. Ps. Union of India, at {1968) 2 SCR 565;

(ii) Commercial Auto Sales (P) Ltd. v. Auto Sales (Properties) , (2009) 9 SCC 620.

We also note that the Petitioner on the above contention of the Respondent argued that even the surrounding circumstances, namely, the Tariff Orders issued by the Commission indicate that PPAs as well as various Tariff Orders only contemplated sharing of benefits under CDM mechanism and not any other carbon credit scheme, the case laws mentioned above are in their favour.

In this regard, it is to state that as deliberated in para 10.1 and 10.2 above, the interpretation of Article 12.12 of the PPAs has to be done keeping in mind the correct and identical intention of the parties regarding CDM and sharing of the benefits while executing the PPAs considering surrounding circumstances prevailing at the point in time when Tariff Order dated 11.08.2006 was issued and in furtherance of that Tariff Order, PPAs were came to existence. In view of this, we agree with the submission of the Respondent in respect to interpretation of the PPAs under deliberation.

10.4. We note that the Petitioner referred judgment dated 22.08.2018 issued by Hon'ble APTEL in Appeal No. 279 of 2013 in the matter of GUVNL Vs. GERC and Ors. contending that as per this judgment it is impermissible in law for the PPAs and the Tariff Orders to be reopened. On studying this judgment, it reveals that the facts of this judgment is different and distinct than the facts and merits involved in

the present Petition. In the said judgment, Hon'ble APTEL adjudicated on the matter of redetermination of tariff on account of certain facts which, the Petitioner therein, believed to be reasonable for the prayers therein. While in the present Petition, the main contention of the Petitioner and point to be adjudicated is regarding interpretation of Article 12.12 of the PPAs involved in the Petition. Hence, we do not find that the Hon'ble APTEL judgment dated 22.08.2014 referred by the Petitioner is applicable to the facts of the present Petition.

10.5. We note that the Petitioner referred Judgment issued by Hon'ble Supreme Court in Industrial Promotion & Investment Corpn. of Orissa Ltd. vs. New India Assurance Co. Ltd. (2016) 15 SCC 315, to argue that the terms of a contract and/or statute ought to be given their plain and literal meaning. The specific term "CDM" has to be given its true meaning, and the same cannot be read to include all other forms of carbon credits. On studying this judgment, it reveals that the said judgment is related to implementation of a clause incorporated in the Insurance Policy. While delivering the judgment, Hon'ble Supreme Court held that while construing a contract it should be construed strictly without adding or deleting anything from the terms thereof. In the present Petition, as deliberated in Para 10.1 and 10.2 above, we decide this Petition without adding or deleting any word in the PPAs involved for deliberation.

We also note that the Petitioner referred the Judgment dated 13.04.2018 issued by the Hon'ble APTEL in Appeal No. 210 of 2017 – Adani Power Ltd. Vs. CERC & Ors., referring the contention of GUVNL (Respondent therein). We are of the view that contention of GUVNL in the Appeal referred above cannot be considered to be a binding law for consideration of the Commission. In view of this, we do not deliberate on this contention of the Petitioner.

10.6. We note that the Petitioner referred the Judgments of Hon'ble Supreme Court on on Consolidated Coffee Ltd. and Another vs. Coffee Board, Bangalore (1980) 3 SCC 358 and Shri Ishar Alloy Steels Ltd. vs. Jayaswals Neco Ltd. (2001) 3 SCC 609 to elaborate the importance of usage of Article "the" in the Tariff Policy 2006.

In this regard, it is to state that as mentioned in Para 10.2 above, the contention of the Petitioner related to mention about CDM benefits in various Tariff Policies and GERC (MYT) Regulations, 2016 is irrelevant for the subject matter of the present Petition since the PPAs involved in the present Petition have been signed in pursuance to the Tariff order dated 11.08.2006 issued by this Commission.

10.7. We note that the Petitioner referred Judgment of Hon'ble Supreme Court on Swastik Gases P. Ltd. vs. Indian Oil Corporation Ltd. (2013) 9 SCC 32 to contend that specific inclusion of the term "CDM" in the PPA and Tariff Order would necessarily imply exclusion of all other forms of carbon credit schemes of a similar kind - *expressio tmius est exclusio alterius.* We have gone through the said judgment rendered by Hon'ble Supreme Court, wherein, the dispute amongst the parties involved was related to jurisdiction clause in any Agreement. In the said Appeal, the Agreement involved for deliberation was having clear and unambiguous clause that the Courts at Kolkata shall have jurisdiction. Hon'ble Supreme Court in this said judgment stated that:

*"…….for construction of jurisdiction clause, like clause 18 in the Agreement, the maxim expressio tmius est exclusio alterius come into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that agreement is subject to the jurisdiction of courts at Kolkata, parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of court at particular place and such court have jurisdiction to deal with the matter, we think that an inference maybe drawn that parties intended to exclude all other courts." ……*

As can be seen from the above paragraph that the judgment deals with the issue about name of courts/location of court that is having jurisdiction to deal with the issue that may arise out of a contract. Also, there is no mention of a broader term that can lead to suggest the court other than the courts of Kolkata. Here, in the matter of present Petition, as deliberated in Para 10.1 and 10.2 above, the word CDM

benefit is to be construed as benefit received from sale of carbon credits. Accordingly, there is no need to include or exclude any other terms in the PPAs involved in this Petition. In view of this, the judgment of Hon'ble Supreme Court on Swastik Gases P. Ltd. vs. Indian Oil Corporation Ltd. (2013) 9 SCC 32 is not applicable to the facts and merits of the present Petition.

11. In view of the above, we find that the Petition and I.A. are devoid of any merits and prayers sought for in the Petition and I.A. are rejected and accordingly both; Petition and I.A. stand disposed off. The Petitioner is liable to share the benefits accrued from sale of carbon credits on any platform with the beneficiary GUVNL for the past and future periods in terms of Article 12.12 of the PPAs.

12. Order accordingly.

| Sd/- | Sd/- | Sd/- |
|---|---|---|
| **(S. R. PANDEY)** | **(MEHUL M. GANDHI)** | **(ANIL MUKIM)** |
| **MEMBER** | **MEMBER** | **CHAIRMAN** |

Place: Gandhinagar
Date:11/09/2024