

**[Committer 2] Comments on
Second Draft Indexed REC
Contract**

Submitted Electronically to: Illinois-RFP@nera.com

March 8, 2022

Dear Procurement Administrator:

[Commenter 2] would like to offer the following responses to the Illinois Power Agency's (IPA's) request for feedback on the Second Draft 2022 Master REC Purchase & Sale Agreement.

[REDACTED]

[REDACTED]

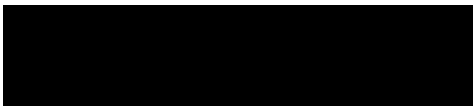
[REDACTED] We are excited about the opportunity to participate in Illinois' groundbreaking REC procurement goals, but are deeply concerned about contract language that may result in unfinanceable contracts.

The Second Draft Master REC Purchase & Sale Agreement includes welcomed improvements to the Annual Quantity by implementing a degradation factor. However, this draft does not address the majority of our February 9, 2022 comments. It also includes new language regarding 'regulatorily continuing' conditions, inviting additional risks to the future of the contract. While many concerns exist throughout the contract, the comments below aim to emphasize and reiterate the sincere detriment of Section 5.4 (Cost Recovery through Pass-Through Tariffs) as our primary concern and to offer a reasonable solution grounded in previously approved 2010 IPA agreement structures. In addition to these comments, we fully support [Entity]'s submission and reserve the right to comment on the other topics and draft contract language in subsequent proceedings.

Section 5.4 as a 'Poison Pill' to Project Financing

The language in Section 5.4 (Cost Recovery through Pass-Through Tariffs) allows utilities to stop paying the Seller for RECs if it cannot recover such costs from customers through the pass-through tariff. This is extremely problematic because if power prices plummet for several years in a row, the IPA will not collect enough money from Illinois utilities to pay for its utility-scale renewable energy contracts. While this may seem like a doomsday scenario, it directly impacts a project's ability to achieve operation since banks that finance development and construction activities (typically costing between \$150-300 million) consider this possibility a high risk to their investment. Therefore, the possibility of future nonpayment will make these projects very difficult, and unnecessarily expensive, to finance by risk averse banks. These financing hurdles will ultimately make the Illinois' REC procurement process extraordinarily unattractive to participate in. Furthermore, while the agreement requires the Buyer to return unpaid RECS within 90 days of the conclusion of such Delivery Year, this provision does not solve the underlying issue requiring bank confidence in reliable project revenue to secure funding.

[Commenter 2] supports the goals of CEJA and sincerely hopes to participate in this procurement round, but we



must clearly communicate this contract language dramatically increases the risk of these contracts. This risk will require bidders to increase their bids to the detriment of Illinois ratepayers.

Buyer's Fraction as a Reasonable Solution

While the underlying payment issues in Section 5.4 may require legislative solutions, we believe a Buyer's Fraction is a reasonable mitigation strategy both because the IPA already agreed to this contract structure in 2010 and because it will enable conditions required to secure project financing. A Buyer's Fraction permits each Buyer to purchase an 'Annual Contract Quantity Commitment,' which is a *percentage*, rather than a fixed annual quantity, of the expected total output. Using a Buyer's Fraction, the Seller is able to sign additional off-takers to the project. The diversification of revenue streams minimizes the project risk from the financiers' perspectives and increases the likelihood of financing. Additionally, the Buyer's Fraction is standard in the industry and is a preferred contract structure for both Buyers and Sellers involved with Power Purchase Agreements. For these reasons, adopting a Buyer's Fraction is the simplest and most effective way for the IPA to mitigate the project financing issues inherent to Section 5.4 and to draw more bidders into this procurement round.

The current contract language makes it unrealistic for Sellers to sign Buyers in addition to the IPA to their projects. Sellers cannot attract additional Buyers in the existing contract because the fixed annual quantity commitment places the IPA in an unfair premium position to any additional buyer during shortfall years. This is because the existing contract requires the Seller commit all available RECs until the Annual Quantity is met, regardless of commitments to other Buyers. During a shortfall year, the Seller would be required to default on the Buyer's Fraction in other contracts in order to meet the IPA's Annual Quantity commitment. While this appears beneficial for the IPA on a surface level, it is ultimately detrimental to the IPA's ability to procure RECs from promising projects. Without the flexibility to sign additional off-takers, Sellers will be less likely to bid into the IPA because they will not be able to spread the risk of IPA's nonpayment and will be less confident about financial support for their projects. Alternatively, if the IPA adopts a Buyer's Fraction, then the Seller will not have to default on payments to any one buyer in a shortfall year because REC deliveries will reflect each buyer's specified percentage of total output that year. The Buyer's Fraction facilitates a fair allocation of RECs each year and has been used successfully in previous contracts with the IPA and other REC buyers.

Our comments urging for the inclusion of a Buyer's Fraction is rooted in [Commenter 2]'s desire to produce a competitive procurement round for the IPA and the serious recognition that the existing contract will likely produce a less desirable outcome. For additional information outlining how a Buyer's Fraction could be implemented in this agreement, please see our February 9, 2022 comments or the IPA procurement contracts from 2010.

Additional Comments

- **Section 1.73 – Regulatorily Continuing:** [Commenter 2] recommends updating the language so that “Regulatorily Continuing” means, with respect to the Transaction, the Product shall

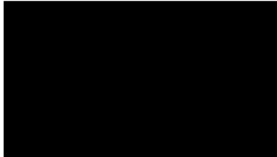
comply with the requirements of the Applicable Program, as of the Effective Date of the Agreement as of each Delivery Date, and Seller will do what is necessary to cause the Product that is Delivered to comply with such requirements; except as otherwise provided in Section 11.1.

- **Section 2.3 – Standing Order:** [Commenter 2] recommends striking the requirement for a standing order. As demonstrated above, a secondary or tertiary seller will be required to acquire financing for the project. A standing order inhibits the Seller’s flexibility to send RECs to multiple buyers. Additionally, a standing order increases the likelihood of accidental transfer of excess RECs and is not necessary for this contract.
- **Sections 1.17 and 1.23 – Operations Date:** [Commenter 2] recommends defining the “Date of First Operation” as the “Commercial Operation Date,” meaning the date on or after the Initial Energy Delivery Date, on which (i) Commercial Operation has occurred with respect to no less than ninety percent (90%) of the Target Project Capacity; and (ii) the COD Conditions have occurred or been satisfied with respect such portion of the Project.
- **Section 2.25 – Delivery Year Degradation Factor:** The addition of the degradation factor is an improvement to this contract and we appreciate IPA’s willingness to include this change. To improve this provision even further, we recommend adding the degradation factor to the Product Order, allowing the Seller to define their degradation factor based on the project’s panel specifications. This would make modeling more accurate as many panel manufacturers provide warranties for degradation factors less than the 0.5% currently included in the contract.
- **Section 2.2 (f) – Prevailing Wage Act:** [Commenter 2] recommends updating this section to specify construction activity within the constraints of the Prevailing Wage Act because it may not be possible to enforce the Prevailing Wage Act for work that occurs off site or outside of Illinois.
- **Section 7.1 – Performance Assurance:** Due to the financial risks associated with the Available Funds cap, it is necessary for the Buyer to provide a credit assurance. Lenders will perceive a risk that the Buyer may be unable to pay for utility-scale competitive RECs at some time over the life of the contract, and will require the Buyer to provide collateral to cover the risk of their non-payment. Buyer should be required to post credit support in the amount of the Collateral Requirement (\$10 times annual quantity for utility-solar) if the Buyer drops below a triple-B rating.
- **Section 10.1 – Force Majeure:** Force majeure for reliability curtailment of a wind or solar project’s operations must be allowed at all times, not just after the first five Delivery Years. The requirement that curtailment events will not be excused unless they prevent delivery of 5% of the Annual Quantity should be removed. Curtailment due to grid congestion is entirely out of Seller’s control and should be treated as such. Additionally, the requirement to notify Buyer within 30 days of any such curtailment or lose the right relief should be removed.
- **Exhibit E – Form of Security Instruments:** Through consultation with multiple major banks, we discovered the form provided needs flexibility to be submitted either virtually or by hard copy. [Commenter 2] recommends providing a form of the Letter of Credit for virtual submissions and a different form for hard copy submissions.



We appreciate your time and consideration of these comments as well as those of [Entity] and would be pleased to have the opportunity to provide further information on these topics.

Thank you,



[Commenter 2]'s representative's contact information