

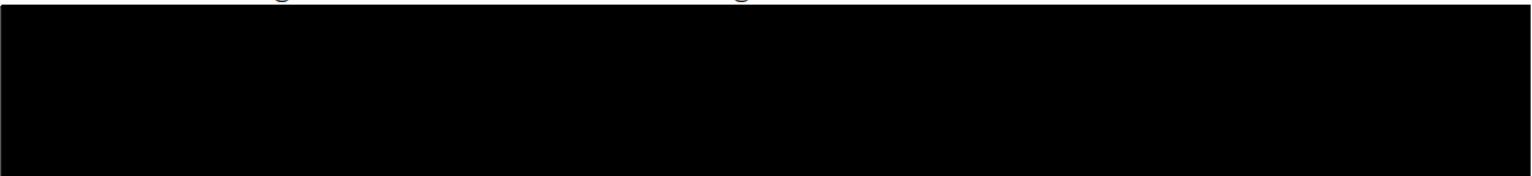
**[Committer 3] Comments on  
Second Draft Indexed REC  
Contract**



**[Commenter 3] Comments on**

**Second Draft Indexed REC Master REC Purchase & Sale Agreement**

[Commenter 3] submits the following comments in response to the IPAs request for feedback on the Second Draft Indexed REC Contract. [Commenter 3] comments address 18 topics. Even with the changes incorporated into the second Master REC Purchase and Sale Agreement, the overall structure of the contract still creates challenges for Sellers. Bidders will underbid their expected performance to avoid volumetric penalties. Consequently, Sellers awarded contracts will look for supplemental REC and energy offtakers. That will be difficult to execute because the supplemental offtaker's rights to the output will be secondary or subservient to the utilities fixed quantity, creating the potential for Seller default on the secondary and tertiary contracts. A significant portion of this risk rests with the Standing Order requirement in section 2.3. The changes to that section in this 2d draft are insufficient to minimize concerns from our members. Compounding that concern is the inefficient and unequal way the contract manages RECs in the event of a Budget Shortfall (§5.4). Returning RECs to the Seller 120 days after initial Delivery is not expedient enough to allow for resale of those RECs. The amount of risk this contract places on the Seller cannot be overstated. It requires attention and redress. Poor participation in the RFP is likely to be the outcome if the changes are not made to items 1 through 4 herein.



In addition, [Commenter 3] provides a number of other comments and edits to yield lower bid prices by reducing seller risk, improving certainty, and providing seller’s flexibility in selling RECs.

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**COMMENTS**

(1) **The structure of the irrevocable standing order will impede a Seller’s ability to fully utilize a project**

§ 2.3 - Standing Order

Almost every bidder will need a secondary or tertiary contract for a project, because they aren’t going to bid the full capacity of the project into this RFP and the IPA has the ability to take only a portion of what is bid. Section 2.3 requirements still require a fixed amount of RECs to be delivered each month. Wind and solar resource outputs vary each month, and having a fixed quantity each month makes it impossible for the Seller to ensure it has RECs available to deliver on other contracts. Moreover, the edit to section 2.3(iii) does not cure this problem because the Seller has no assurance it will have enough RECs to deliver too the offtake contracts.

The IPA should reconsider [Commenter 3] prior comments on this matter and either allow the Seller to submit the RECs to the Buyers, give the Seller the flexibility to adjust the Standing Order month-to-month, require the Buyer to Purchase excess RECs, or allow a Seller to sell a fraction of a project’s monthly REC production instead of a stated quantity. (see [Commenter 3] Comments on Indexed REC Master Purchase & Sale Agreement, sections 7, 9, and 10, respectively).

(2) **The Agreement still includes problematic language stating that a Buyer does not need to pay if the RPS Budget runs out of money**

§ 5.4 - RPS Budget Shortfall

Section 5.4 states that the Buyer does not need to pay for RECs beyond the Available Funds for the Delivery Year. Coupling this limitation in spending with the §2.3 Standing Order requirement to deliver a stated volume of RECs each month force's the Seller to assume the risk of delivering RECs that are unpaid for without a termination right or ability to recover costs.

Moreover, the timeline for returning unpaid RECs (pursuant to §§2.1(c), 4.1(i) and 5.4) is so long (120 days) that the returned RECs could not be used in other offtake contracts.

The Master Agreement should include a Buyer Performance Assurance Agreement which would cover the instance in which the RPS Budget runs out of money for that Delivery Year. If the RPS Budget Shortfall affects more than one Delivery Year, or is significant enough to warrant a material change to the contract (such as a reduction in the Agreement's RFP Awarded Annual Quantity), the Seller should be allowed to terminate.

(3) **Force Majeure Needs to Include RTO Interconnection Delays and Permitting Issues**

§ 10.1 - Force Majeure

The 2d Draft of the REC Master Agreement deleted provisions that allowed delays associated with permitting or RTO generation interconnection management to be identified as force majeure events:

*Force Majeure may include delays associated with processing of permit requests or addressing regulatory requirements or delays in the establishment by the Project of an operating interconnection with the applicable transmission or distribution system as a result of the actions or inactions of the transmission or distribution provider, provided Seller can demonstrate to Buyer and the IPA that such delays are not primarily attributable to Seller's failure to make in a timely manner permitting requests or a formal request for interconnection to such transmission or distribution provider or to provide in a timely manner the information or payment required by such transmission or distribution provider. Force Majeure may also include the failure of timely issuance or disruption in Deliveries of RECs by PJM EIS GATS or M-RETS.*

Wind and solar developers are still facing long delays in interconnection queue approvals by PJM and MISO. These delays are beyond the control of the developers/bidder/seller and should be considered force majeure events. The language above should be reinserted into the REC Master Agreement.

(4) **There are Common Force Majeure Terms that Need to be Added to Section 10.1**

§ 10.1 – Force Majeure

Force Majeure is missing language that covers major equipment failure, shipping disruptions, and broad (vs. localized to the Project) labor strikes as well. These events are commonly included in force majeure provisions and should be added to section 10.1.

Major equipment failure, such as a transformer, is an event in which a project could be out of service for months until a new transformer is delivered. Such an event would be beyond the Seller's control. Shipping disruptions are an ongoing global issue that should be included on the list. Labor strikes that are to be settled by entities other than the project owner/bidder/seller should also be added to the list of force majeure events.

(5) **Replace “Date of 1<sup>st</sup> Operation” with “Commercial Operation Date”**

§§ 1.17 and 1.23 – “Date of First Operation” and “Delivery Date”

The definition of “Date of First Operation” references the PJM EIS GATS and M-RETS operating manuals. Both of those manuals refer to the date commercial operation began, but provide little detail beyond that. To provide clarity the Master REG Agreement should define commercial operation date. [Commenter 3] recommends the following definitions be added to the Master REC Agreement:

**“Commercial Operation”** means, with respect to the Project or applicable portion of the Project, that it is operating and able to generate and transmit Delivered Energy to the Delivery Point pursuant to the terms of this Agreement.

**“Commercial Operation Date”** means 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.

**“Delivered Energy”** means the Energy generated by the Project, less Station Service and transformation and transmission losses, and delivered to the Delivery Point.

**“Delivery Point”** means the Interconnection Point.

(6) **Solar Degradation Factor Should be Defined by Bidder**

§ 1.25 – Delivery Year Degradation Factor

[Commenter 3] appreciates the IPA adding a degradation factor for solar projects to the 2d Draft REC Master Agreement. The rate proposed of .005 per year is larger than what most solar developers use. Additionally, panel manufacturers provide degradation factors specific to certain panel designs. [Commenter 3] recommends the application be structured so a bidder can define

their own degradation factor in the Product Order. This allows a developer to match the degradation factor to the panels planned for the project.

(7) **Notice of REC Monthly Price Should be Calculated in Conformance with the Master REC Agreement**

§ 1.71 – REC Monthly Price

This section states that the REC Monthly Price is “the price for RECs specified in the Price Calculation Notice for such Vintage as calculated by the IPA and issued to Buyer and Seller.” The IPA’s calculation should only calculate the price if duly and appropriately done in accordance with the Agreement. Therefore, [Commenter 3] suggests the following edit:

“the price for RECs specified in the Price Calculation Notice for such Vintage as calculated by the IPA **in accordance with the provisions of this Agreement** and issued to Buyer and Seller.”

(8) **Calculation of REC Monthly Price Should be Based on RECs Used for Compliance with the Agreement, not all of the RECs Generated by a Project**

§ 1.71 – REC Monthly Price

The REC Monthly Price for a Vintage month shall be calculated by dividing (a) the sum of all REC Monthly Price Hourly Components in such Vintage month by (b) MWh of actual generation for that month. Part (b) of this calculation methodology needs to be limited to RECs provided to the utility for such Vintage month, and not all of the MWh generated by the project. As currently written this provision would prevent a Seller from having secondary or tertiary offtakers from a project.

(9) **Clarification of RECs from a Renewable Project Co-located with Battery Storage – Part 1**

§ 1.72 – RECs Monthly Price Hourly Component

[Commenter 3] appreciates the amendment made to § 1.72 to account for a solar or wind project co-located with battery storage. [Commenter 3] recommends the following edit for further clarity on the point of measurement:

For avoidance of doubt, with respect to a Project co-located with an energy storage facility, the MWh actual generation data shall be for energy generated exclusively from the Project **as measured by the solar or wind project's revenue meter.**

(10) **Agreement Should be Defined by RPS Program at the Effective – Part 1**

§ 1.73 – Regulatorily Continuing

This section requires the Seller assume all risks of the IPA or legislative actions that changes the RPS at any point in the future. That creates an unknown risk that impacts the ability to obtain lending. The Agreement should be applied or carried-out in conformance with laws at the time of the effective date. [Commenter 3] recommends the following edit:

“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.

(11) **Prevailing Wage Act Should Not Apply to Off-site Activities**

§ 2.2(f) – Project Information re: Prevailing Wage Act

This sub-section states the following:

Applicable construction activities related to the Project include not only construction, but also any maintenance, repair, assembly, or disassembly work performed on equipment whether owned, leased, or rented.

The quoted language applies the Prevailing Wage Act to off-site activities and to work and workers that are not under an agreement with the General Contractor. Some of these operations will be outside of Illinois. It is not possible to enforce the Prevailing Wage Act to assembly/warranty work occurring off-site and out-of-state. In addition, the Illinois Department of Labor will be responsible for implementing and monitoring the Prevailing Wage Act. [Commenter 3] recommends the following edit:

Applicable construction activities related to the Project **that are subject to the Prevailing Wage Act could** include not only construction, but also any maintenance, repair, assembly, or disassembly work performed on equipment whether owned, leased, or rented.

(12) **Clarification of RECs from a Renewable Project Co-located with Battery Storage – Part 2**

§ 4.1(a) REC Delivery & Quantity

[Commenter 3] appreciates the amendment made to § 4.1(a) to account for a wind or solar project co-located with battery storage. So this is consistent with changes made to §1.72 [Commenter 3] recommends the following edit:

For avoidance of doubt, with respect to a Project co-located with an energy storage facility, the RECs Delivered shall be associated with energy generated exclusively from the Project **as measured at the solar or wind project's revenue meter** ~~and not from any other electric source.~~

(13) **Three Year Tally used for Event of Default Should Exclude Time Down Due to Force Majeure Events**

§ 4.1(g) – Event of Default

Force Majeure events should be excluded from the three year tally used to determine an Event of Default in §4.1(g). This makes the Shortfall Amount and Shortfall Years consistent with section 10.1, which clearly states that there shall be a Suspension Period of Project obligations to Deliver RECs if a Force Majeure event occurs.

(14) **Buyer Should Have an Event of Default for Failing to Comply with a Material Covenant**

§ 9.1 – Event of Default by Buyer

Buyer should have an event of default that parallels 9.2(e) (below):

“(e) Seller’s failure to perform any other material covenant or obligation set forth herein if such failure is not remedied within twenty (20) Business Days after written notice;”

(15) **Government Actions**

§ 11.1 -- Government Actions

Government Actions after this contract is executed should not change the terms of the agreement to such an extent that it cannot be complied with. [Commenter 3] recommends that sub-section (ii) be removed from §11.1.

(16) **Agreement Should be Defined by RPS Program at the Effective – Part 2**

§ 11.2 -- Regulatorily Continuing product

This section places all of the risk of future changes by the IPA or legislation on the Seller. This section should describe how a “Regulatorily Continuing” product and how that relates to risk allocation and exceptions.

(17) **Parties Should be Required to Reasonably Cooperate with Each Other if a Party intends to Collaterally Assign the Agreement**

§ 13.1 – Assignment

Section 13.1 states that without the consent of the other party, either Party may “pledge, encumber or collaterally assign this Agreement . . .” Even though the contract does not require consent, lending companies will require written consent of the assignment. Therefore, the contract should state that each Party is required to reasonably cooperate with the other Party regarding pledges, encumbrances or collateral assignments.

(18) **Flexibility in the Format of Security Instruments**

Exhibit E -- Form of Security Instruments

There is a significant degree of variance among banks regarding format of documents and processing of these forms, for example, some banks want hardcopies of forms, others want electronic, and some may allow either. Given this variance, the REC Master Agreement needs flexibility in how they are delivered. [Commenter 3] recommends they be delivered in the attached form or in a form reasonably agreed to by the Parties.

Prepared and submitted on behalf of [Commenter 3] by

***[Commenter 3]'s representative's contact information***

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