

**[Commenter 4] Comments  
on First Draft Indexed  
REC Contract**



**[Commenter 4] Comments on  
IPA’s First Draft Indexed REC Contract  
for the Fall 2022 Indexed REC RFP**

[Commenter 4] submits these comments in response to the Illinois Power Agency’s (“IPA”) request for feedback that is dated August 12, 2022<sup>1</sup>. [Commenter 4]’s comments address Topics 1 and 2 presented in the Request for Feedback, and provides recommendations regarding the following sections of the Master REC Purchase & Sale Agreement -- §§ 1.18, 2.2(c), and 10.1.

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<sup>1</sup> IPA, *Indexed REC Procurement Request for Stakeholder Feedback* (August 12, 2022).

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**II. [Committer 4]'S RESPONSES**

**(1) TOPIC 1: IPA QUESTION #1: Given that the strike price for a Project that submits an Equity Eligible Commitment will be reduced for purposes of bid ranking, assurances must be provided that the Bidder will meet this commitment. Are the requirements listed above (in the IPA’s Request for Feedback) appropriate?**

RESPONSE:

There are numerous uncertainties around the education, training, and supply of Equity Eligible Contractors (“EEC”) and Persons (“EEP”) needed to fulfill the Minimum Equity Standard (“MES”). Training programs are not yet funded and a database of EEC’s is not yet available. Therefore, it is extremely difficult for Bidders to have a vision for a plan to hire EECs for this Fall’s procurement.

[Committer 4]’s comments are provided with the caveat that until the Equity Workforce Training Hubs and the Energy Workforce Equity Database (“Database”) are fully setup and operational, and [Committer 4]’s Members understand the burden of complying with the MES, [Committer 4]’s

comments cannot reflect a thorough consideration of these preliminary requirements.

[Commenter 4] has one comment regarding proposed requirements for in order to qualify for a bid evaluation price reduction. The highlighted text (below), in the first bulletpoint under Proposal Requirement #3, requires clarification:

- a description of how Seller will meet the Minimum Equity Standard and a statement of intent to comply with equity accountability standards and to hire a diverse project workforce including Equity Eligible Persons and Equity Eligible Contractors;

The exact scope of the “equity accountability standards” is not known. It is [Commenter 4]’s understanding that equity accountability standards encompass compliance with the Equity Accountability system in 20 ILCS 3855/1-75(c-10) and not just meeting the MES (*e.g.*, 15% by 2025). If that is the case, a description of the process, deadlines, and documentation for compliance with the equity standards is lacking and needs to be provided before a commitment is requested and a commitment made. A Bidder cannot commit to complying with yet to be finalized requirements.

**(2) TOPIC 2: IPA QUESTION #1: If the current delivery obligations are too stringent, what additional flexibility (related or not to items 1-3 listed above) would be appropriate? Please provide specific examples and explanations on how the suggested edits satisfy the key considerations listed above.**

RESPONSE:

The Draft Master REC PSA (“Draft Contract”) requires the Seller to deliver provide the hampers their ability to

To increase Independent Power Producers’ participation in the Indexed REC procurement, the contract has to allow Independent Power Producers to optimize the revenue streams of their project – in other words, allow a business be a business. The IPA can do that by reducing the risk of non-payment, giving the Seller discretion over the rate at which it delivers RECs, and changing the Annual Quantity when the Seller fails to meet the Delivery

Year Requirement<sup>2</sup> instead of initiating an Event of Default. In terms of flexibility, the Draft Contract should allow the Seller to determine the monthly volume of RECs to be delivered to a Buyer.

Flexible Delivery Volumes: The Draft Contract defines the Delivery Year Requirement, but the Seller should be given the flexibility to determine the rate at which RECs are delivered to comply with that requirement. The Draft Contract demands that all of the RECs generated by the project be delivered to the Draft Contract Buyers until the Delivery Year Requirement is met<sup>3</sup>. This structure/requirement impedes the ability of a Seller to have contracts beyond and in addition to the Draft Contract. The Draft Contract is written for a scenario that is likely to not be the best business decision for an Independent Power Producer – selling all of a project’s RECs through the Indexed REC contract. In most instances, a Seller will sell RECs and energy through multiple offtake contracts.

The Seller should be given the discretion to choose how many RECs it delivers per month (for example) to each Buyer. The Seller can do this either through a Standing Order with the tracking service (PJM-EIS GATS and M-RETS), or delivering the RECs itself. An alternative to this is to allow a Bidder to allocate a ‘buyer’s fraction’ of the total output from a project, instead of a capped annual quantity.<sup>4</sup>

Control over monthly REC delivery volumes allows the Seller to optimize the revenue potential of its generating facility. Giving the Seller the flexibility of selecting how many RECs are to be delivered per month does not obviate the need for the Seller to meet the Delivery Year Requirement. The draft Contract’s lack of such flexibility on this point attacks a company’s ‘bottom-line,’ which discourages participation in the state REC program.

Standing Order: The Seller should be given the ability to select either a Standing Order with a tracking service or to deliver the RECs itself. If a Standing Order is selected the Seller

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<sup>2</sup> For example, failure to deliver 80% of the Delivery Year Requirement over a three consecutive years would result in the Annual Quantity of the contract being reduced.

<sup>3</sup> Draft Contract §4.1(f).

<sup>4</sup> A buyer’s fraction would ensure that RECs are delivered year-round, and not inadvertently truncated due to a strong wind or solar production year. A buyer’s fraction would also prevent one or two of the Buyer utilities from experiencing a shortfall if there is a shortfall in monthly or annual production by a utility-scale wind or solar project.

should be given the option of delivering either first-in-time RECs (as the current contract requires) or establishing a Standing Order for delivery of a certain volume of RECs to each Buyer, in conformance with the tracking service rules for delivering RECs to multiple Buyers.

The Seller should also have the ability to modify the Standing Order over time. This allows the Seller to sell RECS from a project to multiple Buyers through multiple contracts. It allows a Seller to enter into contracts subsequent to the date in which it is awarded the Draft Contract.

Seller Delivery of RECs: If a Seller wants to deliver the RECs, the Seller needs the flexibility to determine the rate at which it delivers RECs to Buyer's under the Indexed REC contract, compared to the number of RECs delivered to non-Indexed REC contract Buyers. For the reasons stated above, requiring first-in-time RECs be delivered to this contract's Buyer's ahead of RECs delivered to all other Buyers, discourages participation in any REC product.

Adjusting the Annual Quantity instead of and Event of Default: The Contract identifies an Event of Default if either (i) three (3) or more Shortfall Years occur and the cumulative sum of the Shortfall Amounts for all Shortfall Years equals or exceeds the Annual Quantity, or (ii) Seller breaches its representation under Section 4.1(f). The shortfall limit in (i) is problematic and the potential event of default impacts the ability for a Seller to obtain project lending.

Instead of the shortfall triggering an Event of Default, [Commenter 4] recommends that the shortfall result in an adjustment to the Annual Quantity for the remainder of the Term of the Agreement (section 3.2). If the Seller fails to deliver 80% of the Delivery Year Requirement to each of the Buyers for three (3) consecutive years, the Annual Quantity of the contract would be reduced to an amount equal to the highest Actual Delivery Year Requirement divided by the Delivery Year Allocation Factor during any Delivery Year over that three-year period. A similar approach is used by NYSERDA.<sup>5</sup>

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<sup>5</sup> NYSERDA 2021 REC RFP, §5.02(b); available at: [servlet.FileDownload \(ny.gov\)](#) and at: [Solicitations for Large-scale Renewables - NYSERDA](#).

Reducing Risk of Non-Payment: The cap on the amount of money Illinois will spend on renewable resources continues to trouble lenders, despite the recent increase in the RPS funding. The RPS is a key driver of the development of new clean energy resources in Illinois so the state can reach its long-term decarbonization goal. The statutory cap on RPS funds will curbs Independent Power Producers participation in the REC Procurements because the cap is fixed for the long term but the wholesale energy markets prices are not fixed and will continue to change over the 20 year life of a renewable resource contract. While the forecasted RPS Budget, approved in the Long Term Renewable Resources Procurement Plan of 2022, appears to adequately cover RPS costs into the 2030s, additional measures will likely be needed to quell lenders perceived cost risks over the long-term transition to a decarbonized portfolio. There are a few options that the IPA can choose from to reduce the risk of non-payment to a Seller: (a) a Rider that allows Buyer's to access additional funding on a short-term, or narrowly defined, basis; or (b) Buyer's performance assurance agreement. These types of assurances help alleviate risk of non-payment that deters participation in state REC procurements.

### **(3) Master REC Purchase & Sale Agreement §1.18 "Credit Rating":**

[Commenter 4] recommends two changes to the definition of "Credit Rating": [1] remove the term "U.S. utility operating company", and [2] accept credit ratings from *DBRS Morningstar*.

The definition of "Credit Rating" uses the undefined term "U.S. utility operating company." This term inadvertently discriminates against qualified bidders who may not be a U.S. company. [Commenter 4] recommends removing the term in the two instances in which it is used in the definition and replacing it with "company," as reflected in the block quote below:

1.1 "Credit Rating" means, with respect to the Seller or Seller's Guarantor, as applicable, the rating then assigned to such entity's unsecured, senior long-term debt obligations (excluding, however, any debt obligations that are supported by specific third party credit enhancement that would not apply to payment obligations under this Agreement) or if such entity does not have a ~~rating for its senior unsecured long-term debt~~, then the rating then assigned to such entity as an issuer default rating by Fitch, or the issuer rating by Moody's, or the corporate issuer rating or corporate credit rating by S&P if such entity is a **U.S. utility operating** company with an investment grade rating, or the

corporate issuer rating or corporate credit rating, discounted one notch, by S&P if such entity is not a ~~U.S. utility operating~~ company with an investment grade rating; provided, however, that in the event Seller (or Seller's Guarantor, if applicable) is rated by only one rating agency, that rating will be used. If Seller, or its Guarantor, is rated by only two rating agencies, and the ratings are split, the lower rating will be used. If Seller, or its Guarantor, is rated by three rating agencies, and the ratings are split, the lower of the two highest ratings will be used; provided that in the event that the two highest ratings are common, such common rating will be used.

[Commenter 4] also recommends including *DBRS Morningstar* as an accepted credit rating agency in this definition. DBRS is a large credit rating agency operating in Canada, Europe, and the U.S. It is useful because it rates worldwide entities.

#### **(4) Master REC Purchase & Sale Agreement §2.2(c)**

Section 2.2(c) of the Master REC PSA allows for an Event of Default after the Effective Date of the REC Agreement if the IPA determines that the Project does not meet the public interest criteria. The IPA should not be allowed to claim an Event of Default after pre-qualifying a bidder and allowing it to bid into the RFP.

#### **(5) Master REC Purchase & Sale Agreement §10.1 Force Majeure**

[Commenter 4] has two recommendations for the Force Majeure provision: [a] the minimum annual quantity of curtailed energy should be less than 5%, and [b] change the phrase "a Delivery Year" to "the Delivery Year."

The draft Master REC PSA allows RTO curtailment of a Project's operations to be a Force Majeure under the following conditions:

- (a) the curtailment is for reliability purposes and not for economic purposes,
- (b) the amount of such curtailment prevents the Delivery of more than five percent (5%) of the Annual Quantity in a Delivery Year.

The 5% of Annual Quantity requirement is far too large an amount. It is extremely unlikely that a one-time curtailment will ever reach that amount. To attain such a quantity the curtailment would need to occur over a number of days, whereas typically, a curtailment is

for minutes or hours. This volume would be the equivalent of a solar project being curtailed for 6 days, or a wind project being curtailed for 18 days.

RTO curtailment of operations for reliability purposes is a force majeure event. Therefore, all reliability related curtailments should qualify – without a floor of 5%. It is unclear to [Commenter 4] why a floor is needed, so it is difficult for [Commenter 4] to propose a more appropriate floor. Therefore, the IPA should either remove the floor or explain the rationale for the floor and proffer a lower value.

### **III. CONCLUSION**

Participation in the Indexed REC procurements will not improve unless the REC contract affords Sellers more options for managing market and external risks. [Commenter 4]'s comments recommend changes to the Indexed REC contract to increase participation in future Indexed REC RFPs and increase the supply of wind and solar resources in the state.

Prepared and submitted on behalf of [Commenter 4] by

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