[Commenter 8] Comments on
Draft Indexed REC Contract

[redacted]

Submitted Electronically to: Illinois-RFP@nera.com

February 9, 2022

Dear Procurement Administrator:

[Commenter 8] would like to offer the following responses to the Illinois Power Agency's (IPA's) request for feedback on the 2022 Master Renewable Energy Credit Purchase and Sale Agreement. [redacted] We are excited about the opportunity to participate in Illinois' REC procurement process, but are deeply concerned about contract language that could result in unfinanceable contracts due to the restrictive Annual Quantity and Available Funds cap. Additionally, we encourage the adoption of a Buyer's Assurance and an opportunity to cure breaches of contract in an Event of Default. We also support a broader acceptance of curtailment events as Force Majeure and would like to add language about COVID impacts to the Force Majeure section. Lastly, we support the additional comments provided by [Entity] and reserve the right to comment on the other topics and draft contract language in subsequent proceedings.

1.5 Annual Quantity

A fixed quantity obligation is not appropriate for an index-REC contract. With a fixed quantity obligation that temporally shifts each calendar year as the project's resource ebbs and flows, the buyer and the seller will be unable to accurately plan for the true weighted average cost of project RECs. The fixed quantity obligation also opens the project to unreasonable merchant risk by exposing the project to market pricing in each contract year for the months following the fulfillment of the fixed annual quantity.

Additionally, given that Section 5.4 makes the IPA REC contracts unlikely to provide the certainty needed to finance a project at attractive rates, projects will need to supplement the IPA contract with contracts from other buyers. Typically, project-specific REC contracts are written not in a fixed quantity obligation, but instead are formulated in terms of a proportional output of the facility in a 'buyer's fraction' concept. The ramifications of the current, detrimental IPA formulation are that the project owes the fixed Annual Quantity of RECs to the IPA off-takers as a 'first-position' offtaker regardless of generation at the project. This concept is harmful when a project has multiple off-takers and places the IPA off-taker in an unfair premium position. The current formulation is inherently incompatible with other contracts for the project dealing with remainder quantities.

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For example, a project has an expected annual output of 100 RECs. ComEd, Ameren, and MidAmerican together purchase 80 RECs per year and a Commercial and Industrial (C&I) customer purchases a 20% buyer's fraction. The current contract mandates all RECs be delivered to IPA customers until the annual quantity is met, which unfairly penalizes the additional Buyer in a shortfall year. If the project only produces 80 RECs that year, Ameren, ComEd, and MidAmerican would together receive 80 RECs and the C&I customer would receive 0 RECs. In addition to the unfair treatment to the C&I customer, the Seller would also be in default for not providing 20% of the 80 RECs available that year. While alternate offtakers may be necessary to secure financing on IPA partnered projects, current conditions are not manageable to attract these customers. A buyer's fraction solves the inequity of shortfall year deliveries because each Buyer's output will be reduced proportionate to their percentage commitment.

Fortunately, the IPA already has an example in its history of a contract formulated to balance the buyer's desire to have a relatively fixed annual quantity with the flexibility required for variable annual wind and solar energy output. Based on executed contracts found in IPA-run processes from 2010, a buyer's fraction, or 'Percentage Commitment', enables each Buyer to purchase an 'Annual Contract Quantity Commitment,' which is a percentage of as-generated electricity multiplied by the expected total output quantity. In each Delivery Year, all RECs generated by the project multiplied by the Percentage Commitment will first be credited toward any Short-fall RECs required for the immediately preceding Delivery Year and next toward the current Delivery Year's Annual Contract Quantity Commitment. Once the Annual Contract Quantity Commitment is met, the Seller retains the full benefit and value of RECs produced until the beginning of the next Delivery Year, unless the Seller indicates that it intends to utilize excess RECs as Carry-over RECs. This contract formulation solves the problem by (1) balancing the utility's need to have reasonable tolerance bands around how much generation to expect, and (2) satisfying concerns about IPA offtakers having a 'first position' claim on all RECs generated.

[Commenter 8] recommends that the Buyer be required to purchase the Seller's Carry-over RECs up to 20% of the Annual Contract Quantity Commitment. Buyers should be protected by not being required to purchase any RECs produced in excess of 120% of the Annual Contract Quantity Commitment. [Commenter 8] also recommends that a Short-fall Year be a Delivery Year in which Seller fails to deliver at least 75% of the Annual Contract Quantity Commitment. In the event that the Seller fails, through the utilization of Carry-over RECs and RECs delivered during the Delivery Year, to produce at least 75% of the Annual Contract Quantity Commitment, the Seller will have ninety (90) days from the end of the Delivery Year to transfer replacement RECS generated by projects in the MISO or PJM interconnection (depending on where the project interconnects) to Buyer so that Buyer's total Deliveries are not less than 75% for that Delivery Year.

2.3(b) Standing Order

If the Annual Quantity remains fixed, then our recommendation is to strike the Standing Order requirement. Standing Orders are generally meant for deliveries of RECs wherein Buyers are

committing to purchase a 'buyer's fraction' of RECs. Rescinding Standing Orders, and/or clawing back RECs from buyers once an Annual Contract Quantity order is met is – in general – tedious, burdensome and not behavior expected by Standing Orders as-designed in MRETS. However, if the Annual Quantity is adjusted per the recommendations above, [Commenter 8] is comfortable with the existing Standing Order. In the case that the Standing Order is established with a quantity limit, [Commenter 8] would be open to using a Standing Order.

5.4 Cost Recovery Through Pass Through Tariffs

Buyers' right to withhold future payments for RECs if costs exceed Available Funds poses an existential threat to the ability of electricity generating companies to secure financiers at reasonable rates for their projects. This provision will significantly deter, if not completely eliminate, a wide range of eligible wind and solar energy projects from partnering with the IPA. Because the intent for these contracts is to be the single revenue instrument for a renewable energy project, the IPA should maximize their authority to enable sources of funding to pay for the full life of each REC contract. One option to ensure the availability of funds includes designating reserves from each collection year to pay for anticipated utility scale REC contracts.

[Commenter 8] stresses the importance of changing the Seller's delivery obligations if Available Funds are exceeded. The Seller should not be obligated to continue delivering the Annual Contract Quantity Commitment if the Buyer stops paying for project RECs or will be unable to pay for future RECs. If the Buyer is excused from making payments, the Seller must be able to market RECs elsewhere. This will likely be a prerequisite to secure funding for the creation of these projects. The right to retain and market RECs if the buyer cannot pay is a minimum expectation, and does not mean that [Commenter 8] supports this provision in index-REC contracts if the project is allowed to retain RECs during budget shortfalls. The loss of this contract due to budgetary issues faced by Buyers would be catastrophic in general, and – due to the indexed nature of the contract – will likely expose the Project to the merchant market completely at the times when it is most in need of the hedge against market exposure for its RECs. This issue is far more critical than when IPA buyers were only procuring a fixed quantity of RECs at a fixed price: the shift to index-REC structures is much more conducive to affordable renewable energy project development; however, it makes projects much more sensitive to the issues that cause it to face unanticipated market exposure.

Finally, creative legislative solutions exist to remedy this risk. If and when power prices drop, Illinois ratepayers benefit from these market forces with lower electric bills. However, lower power prices (which should be a good thing) put upward pressure on the IPA's overall REC budget and could threaten the Buyer's ability to pay out on existing utility-scale REC contracts. Due to the beneficial consequences of index-REC procurement, a legislative initiative should afford flexibility in increasing the cap of Available Funds only if existing REC contracts are at risk. One way of achieving this increase is to add an emergency REC rider on ratepayer bills during occurrences of extremely low power prices. If power prices are low, ratepayers should not be burdened by a slight increase in the RPS rider to ensure that existing REC contracts can

remain solvent. While we recognize this may be outside the current authority of the IPA, we recommend this solution to be considered by the IPA and members of the Illinois General Assembly.

7.1 Performance Assurance

Due to the Available Funds cap in Section 5.4, lenders may 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. It is therefore necessary for the Buyer to provide credit assurance in the event that it is no longer investment grade. The requirement to post collateral if a party is not rated is a reasonable requirement found in most commodity contracts, and is a requirement currently placed on the Seller in this contract. Buyer should be subject to the same thresholds applicable to Seller in the contract, and be required to post credit support in the same amounts of the Collateral Requirement applicable to a non-investment grade Seller.

6.3 Project Labor Agreement

The Project Labor Agreement filing deadline should be updated to recognize that there may be more than one Project Labor Agreement with more than one contractor in various stages of construction. Additionally, we recommend removing the option to file the Project Labor Agreements within 30 days of signing the REC contract, as it is highly unrealistic for any Project Labor Agreement to be negotiated within this time frame. We recommend the Project Labor Agreements and any amendments thereto shall be filed with the Director of the IPA via email at the email address provided in Exhibit B within thirty (30) days of the execution of each Project Labor Agreement or amendment. If the IPA is opposed to this language, we recommend making the deadline to file each Project Labor Agreement prior to the start of that Project Labor Agreement's associated construction activity. Finally, the IPA should not have the authority to instruct otherwise on the deadline of this submission as it may result in unrealistic submission schedules.

9.2 Event of Default

In the Event of Default, Seller shall have the opportunity to cure breaches under clause 2.2(f), (g), and (h) before buyer is entitled to payment in 9.2(i). At present, there is not a cure period, only the ability to demonstrate within five business days that the event did not occur. If Seller can pursue a cure, it should have reasonable time to do so.

[Commenter 8] also supports [Entity]'s recommendation for 9.2(j) to modify the Annual Contract Quantity Commitment if the Seller fails to deliver 80% of the Annual Quantity to each of the Buyers for 3 consecutive years. The Annual Quantity of the contract would be reduced to an amount equal to the highest Actual Annual Amount delivered during any Delivery Year over that three-year period.

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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 the 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 to relief should be removed. [Commenter 8] also recommends the contract include language clarifying that impacts of COVID will qualify as Force Majeure, notwithstanding impacts that may have been reasonably anticipated. Finally, in the last sentence of the Force Majeure section, stating "the performance or breakdown of equipment not directly caused by an External Event," we believe "an External Event" should be replaced with "an event of Force Majeure."

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,

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[Commenter 8]'s representative's contact information