[Commenter 3]

Comments on Indexed REC Contract

From: [Commenter 3]
Sent: Wednesday, May 7, 2025 4:14 PM
To: Illinois-RFP <Illinois-RFP@nera.com>
Cc: [Commenter 3]
Subject: [Commenter 3] Comments

Thank you for the opportunity to submit comments on the Summer 2025 Indexed REC RFP contract. Please find attached comments from [Commenter 3].

Best,

[Commenter 3]

[Commenter 3]'s contact information

[redacted]

May 7, 2025

Mr. Brian Granahan
Director
Illinois Power Agency
105 West Madison Street
Suite 1401
Chicago, IL 60602

Dear Director Granahan,

[redacted] is writing in response to the Illinois Power Agency's (IPA) Summer 2025 Indexed REC Procurement Invitation to Comment and Opportunity to Provide Feedback. We commend the IPA for continuing to work with the industry to identify problems and pursue changes to the procurement contract structure that maximizes participation. While many risks are remedied in the latest contract, threat of RPS budget shortfall risks the long-term fidelity of IPA procurements. [redacted] looks forward to continuing to work with the IPA and the Legislature to identify a long-term solution.

[redacted]

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Topic 3: Feedback on Potential Improvements to the Indexed REC RFP

[redacted]

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[redacted]

Has the passage of Public Act 103-1066 increased your confidence in the certainty of the RPS Budget? Does this increase the likelihood of your participation in future procurement events?

[redacted] concerns over the inclusion of language in Section 5.4 that ties the buyer's performance to the Available Funds cap, allowing utilities to suspend the contract when the IPA has not collected sufficient funds. This contractual feature is extremely problematic with an indexed REC. [redacted] if power prices drop for several years in a row, it results in a higher IREC payment relative to high-priced power environments. Under this scenario, it is possible the IPA would not have collected enough money to support its utility scale IREC contracts. Subsequently, the projects' IREC buyers had a unilaterally exercisable, no penalty suspension right *that is most likely to be used during market environments in which their exercise would be most catastrophic to Seller.*

As a result of the passage of Public Act 103-1066, the IPA proposed adding the following language to the Summer 2025 REC Contract:

Notwithstanding anything to the contrary, as provided by Section 1-75(c)(1)(E-5) of the IPA Act, so long as at least one of: (i) the cost recovery mechanisms referenced in subsection (k) of Section 16-108 and subsection (l) of Section 16-111.5 of the Public Utilities Act remains in full force without limitation or (ii) Buyer is otherwise authorized and or entitled to full, prompt, and uninterrupted recovery of its costs through any other mechanism, then Seller shall be entitled to full, prompt, and uninterrupted payment under this Agreement.

By retaining the original contract language but making Seller's right to receive prompt payment contingent on the statutory references remaining valid, the risk of non-payment remains. Essentially, the IPA has substituted Seller's exposure to the State's cost cap for a new exposure to Change in Law Risk. Neither one is appropriate to handle a situation that results in Buyer having the contractual protection to unilaterally refuse to remit payment in a long-term contract. Additionally, this protection is purely one-way: if Seller owes money during a suspension period in the event of Change in Law Risk, they cannot similarly suspend performance as Buyer can, but must continue to remit payment, knowing that Buyer would have the contractual authority to refuse to do the same, were the situation reversed. [redacted] the inserted language does not assuage our concerns.

Recommendation: **Section 5.4 should be struck in its entirety**. The entire purpose of the legislative change was to provide comfort that payments from state funds to Buyers would not be affected by insufficient collection, and that comfort could then be passed on to Sellers under this contract. With those changes to section 1-75 made, it is *Buyers* that should feel comfort that their ability to obtain cost recovery will remain intact, which should obviate the need for this section entirely. Buyers for this product are in a much better position to wear change in law risk related to cost recovery compared to the individual project companies that are trying to secure financing on the back of this agreement. [redacted] **will not participate in this procurement if Section 5.4 remains as drafted**.

Buyer's Performance Assurance

Without performance assurance, in the case of an event of default by Buyer, Seller is left with an unsecured claim for damages and forced to resort to costly and time-consuming lawsuits to

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demand performance and compensation from Buyers who have failed to live up to their obligations in a contract. As bankruptcy is the most serious Buyer event of default, we suggest a posting requirement tied to the investment grade creditworthiness of each Buyer entity. At present, no party would be required to post security; however, if the Buyers' financial situation becomes more perilous, they should match seller's credit amounts via the same forms available to Seller. Section 7.1 outlines extensive seller performance assurance posting requirements and we encourage the IPA's inserting a buyer's performance assurance in the amount of the Collateral Requirement (i.e., $10 times annual quantity for utility-solar) if the Buyer drops below a triple-B rating. This way, in the most serious event of default (via bankruptcy) wherein Seller's recourse to collect damages would be the most in jeopardy, Seller's position is not completely unsecured.

Additional Items

- **Section 1.79 – Regulatorily Continuing:** It is not appropriate for development projects to wear uncapped exposure to Government Action. The requirement for 'regulatorily continuing' product is common and appropriate with RECs delivered under fixed quantity REC-only agreements that deliver only RECs that 'meet a standard' in the contract; they are **not** appropriate for contracts that specify a named asset. In contrast, RECs delivered under the index-rec contract form provided by the IPA are – in section 2.1(a) – already contractually required to come from the Project **without substitution**. What the Buyers are purchasing in this contract, then, are RECs *from a specific facility*. Given the named facility, it is far more common to see Buyer take risk of Government Action. Recommendation: In 11.1, provide for Seller to only be required to make modifications to the facility up to a maximum of 10k/MW of installed capacity. If modifications would cost more than this amount, Seller should be excused from making the changes and the contract should continue without the regulatorily continuing obligation. Again, Buyer is taking RECs from a named facility and therefore needs to accept the risk of that 'named facility' no longer complying with standards.

- **Sections 1.20 – Operations Date:** [redacted] 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 1 & 2.6:** Maximum Contract Quantity: It is curious to describe the quantity of RECs to be delivered under this contract in terms of an overall annual maxima. Renewables are intermittent and predicting the exact quantity of RECs to be produced in any given Delivery year is an intensely stochastic exercise. We would greatly prefer a structure where Buyers instead take a 'buyer's fraction' of all production at the facility, with a reduced quantity obligation serving as a 'minimum delivery requirement.' If – for some reason unknown to the respondent – this contract **must** be structured to provide a fixed quantity obligation – which, again, we cannot stress enough, is very odd – the

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[redacted] be able to flex the quantity up as well as down, up to 7%, to account for final DC/AC ratio design, panel selection, and layout optimization.

- **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:** [redacted] 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 2.6 – One Time Delivery Adjustment** – Given the quantity reduction mechanism in section 2.6 must be for a "significant" reduction – at the IPA's discretion – [redacted] is rightly concerned at how 'significance' will be adjudicated. For example, a swap in panels that has the same MWac size but provides for a different annual generation projection or degradation rate is a very real possibility (as this is a very common scenario for solar developers); however, the change in generation/degradation may not be enough to be deemed 'significant' in the IPA's eyes, given that the project has remained the same size in MWac terms. However, due to this change, the seller may now be in danger of having a MWh generation number now not connected to the original estimate that they bid, a problem that will become worse year-over-year as the now out-of-date degradation assumption eats away at the initial quantity. We suggest allowing for unilateral changes to sync with final equipment purchase at sellers discretion +/- 7% (see comment on Maximum Quantity, above, for the argument for small changes in *increased quantity)*, with IPA approval following the current process only for changes **larger** than that number.
- **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, and 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; Seller is already suffering via the lost production due to curtailment that they would otherwise have been compensated on. To have the events (again, to stress: which are completely out of Seller's control) also not excused from relief under the production guarantees and other requirements of this contract for which Force Majeure is a relief is punitive.
- **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. [redacted] recommends providing a form of the Letter of Credit for virtual submissions and a different form for hard copy submissions.

[redacted]

[redacted]

[redacted] We appreciate that the IPA has previously integrated stakeholder feedback into their contracts, and we hope that further improvements can be made to future IPA-led procurements. We commit to continue to work collaboratively with the IPA and its stakeholders to build a structure that effectively and efficiently unlocks Illinois' renewable energy potential.

Sincerely,

[redacted]

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[redacted]