

[Commenter 4]
Comments on First Draft
Indexed REC Contract

March 17, 2023

Re: Comments on the First Draft Indexed REC Contract

To Whom It May Concern:

[Commenter 4] submits the comments below for consideration by the Illinois Power Agency (“IPA”) as feedback on the IPA’s Indexed REC Contract.

1. **Uncertain Payments.** Section 5.4 of the Indexed REC Contract is the largest barrier to participation given it makes the entire transaction uncertain. Buyer is not obligated to buy project RECs and would return any RECs that it has not paid for. This clause poses a significant challenge to project financing, as Buyer’s commitment seems illusory and project revenues uncertain.
2. **Limitation of Liability.** Section 14 of the Indexed REC Contract would leave Seller with no practical remedy if Buyer breached the agreement before Deliveries commenced (i.e., before Seller had received any payments from Buyer) and would unduly limit Seller’s remedies during the early stages of performance. This presents significant challenges to project financing, as Buyer’s commitment seems illusory and project revenues uncertain. This should be revised to provide Seller with a realistic remedy for a Buyer breach that occurs before delivery or during the early stages of delivery.
3. **Change in Law.** Seller has an ongoing duty to provide RECs that meet the requirements of the “Applicable Program” as of each Delivery Date, and Seller is required to do what is necessary to cause the Product to comply with such requirements. This presents uncapped risk as to what Seller must do to meet the requirements of future programs. This should be revised to implement a cap on Seller’s expenses to meet new requirements and to clarify a process for termination should Seller’s commercially reasonable efforts prove ineffective in meeting future requirements. Addition, a definition of what IPA considers to be “commercially reasonable” action in this context would help Seller better understand its exposure to change in law risk.
4. **Index Price.** The Indexed REC Contract limits the Index Price to an Illinois trading hub. This creates node-to-hub basis risk for projects, which translates into a higher bid price to account for lost revenues. Would IPA accept an Index Price that is set to the LMP at the project busbar / point-of-interconnection? A busbar-settled structure would produce the cheapest REC price, given projects would not need to increase their bid prices to account for node-to-hub basis risk premium.
5. **Annual Quantity.** The annual quantity is a fixed amount rather than the quantity of RECs that a project actually produces. By fixing the Annual Quantity and decoupling it from production, projects are forced to offer an Annual Quantity that is lower than the project’s expected annual production in order to account for years that generation is lower (which may be out of the project’s control such as due to a lower wind/solar resource, grid outages, equipment outages, etc.). Ultimately, this leads to more risk for the project in terms of uncertain revenues for the portion of generation/product/RECs that are uncontracted. Can the Annual Quantity be unit-contingent, such that 100% of generation is contracted through the Indexed REC Contract? There can still be penalties for underperformance, but a unit-contingent Annual Quantity based on the project’s actual generation presents the lowest risk for the project and cheapest price for IPA.
6. **Capacity/ZRCs.** We understand that the IPA procures capacity for the 3 utilities through a separate procurement process. We would prefer for capacity and RECs to be procured through the same procurement process and contract. Contracting these products separately presents

challenges for financing given the level of merchant exposure / perceived risk of uncertain revenues from the uncontracted portion. For example, if we sign a project under an Indexed REC contract, we would then proceed with financing the project assuming uncertain cashflows from uncontracted capacity revenue. This increases the cost of financing due to the uncertainty of merchant capacity revenues. Is it possible to combine the capacity and REC procurements into a single contract?

7. **Additional Comments**. Section 4.1(d) should be revised to include the language concerning liquidated damages and Buyer's exclusive remedy that appears in Section 4.1(c). Section 9.2(g) should be expanded to include the Section 4.1(d) scenario.
8. **Additional Comments**. It should not be a Seller Event of Default if Seller is unable to deliver conforming Product between the occurrence of a Government Action and termination of the RECA under Section 11.1. Section 9.2(a) and Section 9.2(e) should cross-reference Section 11.1 to clarify that Seller has the remedies set forth in Section 11.1 if a Government Action prevents Seller from delivering Product that complies with the representation and warranty in Section 8.2(iii) that "the Product is Regulatorily Continuing and complies with the Applicable Program." Section 9.2(g) should cross-reference Section 4.1(d) as well as Section 4.1(c).

Thank you for your time and consideration of our feedback. Should there be any questions or requests for more information, please feel free to contact us at the contact information provided in the signature line below.

[REDACTED]

[REDACTED]

[REDACTED]

Sincerely,

On behalf of [Commenter 4],

[REDACTED]