

[Commenter 7]

**Comments on Indexed
REC Contract**

From: [Commenter 7]

Sent: Friday, August 30, 2024 5:15 PM

To: Illinois-RFP <Illinois-RFP@nera.com>

Subject: [Commenter 7] - Comments on Draft Indexed REC Contract

Hello –

Please find attached comments from [Commenter 7] on the Fall 2024 Indexed REC contracts. Four documents are attached:

- Redlines of the contract including comments
- Chart identifying and explaining the comments
- Attachment A (CONFIDENTIAL)
- Attachment A (PUBLIC)

Please do not hesitate to contact us with any questions you may have.

Thank you,

[Commenter 7]'s contact information

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[REDACTED] appreciates the opportunity to provide comment on the Fall 2024 standard Indexed REC Contract. [REDACTED]

[REDACTED] believes there are currently inefficiencies in the REC Contract that add unnecessary risk, translating to premiums on bids, otherwise good projects failing to develop or deliver RECs in support of the Illinois RPS, and other completely avoidable negative outcomes. The recommendations below are offered in the spirit of a cost-free way to reduce inefficiencies and enhance the competitiveness of this and future procurement events. [REDACTED] provides the following comments (at least within an issue) in the order of their importance from [REDACTED] perspective.

Issue	Document and Section	Text with Redline Changes	Comments
(1)(a) Downside risk based on severe underperformance	Draft Indexed REC Contract, Sections 4.1(f), 4.1(g) and 9.2(k)	4.1(f) In the event that Seller fails to <u>make the Utility-Scale Solar Project or Utility-Scale Wind Project that is the subject of this Agreement have an Actual Availability Percentage that meets or exceeds []% for</u> Deliver the Delivery Year Requirement for a Delivery Year under the terms of this Agreement, such Delivery Year shall be deemed a "Shortfall Year" and such amount of RECs that Seller fails to Deliver to satisfy the Delivery Year Requirement for a Delivery Year shall be deemed the "Shortfall Amount" accordingly. Notwithstanding the foregoing, Seller's failure to <u>make the Utility-Scale Solar Project or Utility-Scale Wind Project that is the subject of this Agreement have an Actual Availability Percentage that meets or exceeds []% in</u> the first two (2) full Delivery Years shall be excused and the failure to meet any Delivery Year Requirement through the first two (2) full Delivery Years shall not constitute a Shortfall Amount Year. Further, in no event shall RECs eligible for payment exceed the Maximum Contract Quantity. If in the last Delivery Year, the Delivery Year Requirement is greater than the quantity of RECs to meet the Maximum Contract Quantity, then the Delivery Year Requirement for the last Delivery Year shall be reduced to be the greatest quantity of RECs that would not cause the Maximum Contract Quantity to be exceeded. In the event that RECs are Delivered to Buyer in excess of	The edits for this issue (1)(a) are to adjust the mechanism for an event of default due to failure to deliver the Annual Quantity to be an event of default for failure to make the facility available to deliver RECs for a specified amount of time. [REDACTED] is providing along with these comments, as a confidential attachment, an example of contract terms utilizing such an availability-based mechanism that [REDACTED] has included in the majority of its non-public contracts. These changes address the risk on developers of multiple shortfall years due to weather or other factors outside of their control (but not considered force majeure), while still placing the responsibility on the developer to diligently develop and operate the facility consistent with industry practice. This issue (and the respective resultant proposals) arises from how prospective lenders to such projects model performance in underwriting debt associated with the projects. The forecast of a wind or solar project's annual production is in the form of

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		<p>the Maximum Contract Quantity, such RECs shall be disposed pursuant to Section 2.3(f).</p> <p>***</p> <p>4.1(g) As specified in Section 0, an Event of Default shall be deemed to occur if five (5) or more Shortfall Years occurred and the cumulative sum of the Shortfall Amounts for all Shortfall Years, as such sum may be adjusted pursuant to Section 4.1(k), equals or exceeds the Annual Quantity. Upon the occurrence of such Event of Default, Buyer shall terminate this Agreement twenty (20) Business Days after written notice by Buyer to Seller unless Seller demonstrates, within such twenty (20) Business Day period and to the satisfaction of Buyer in its reasonable discretion that such event has not occurred or has been cured. For such Event of Default, Buyer shall be entitled to payment by Seller in the amount of the Collateral Requirement. The Parties acknowledge that (A) Buyer shall be damaged by the failure of Seller to comply with the provisions set forth in this Section 0, (B) it would be impracticable or extremely difficult to determine the actual damages resulting therefrom, (C) the remedies specified herein are fair and reasonable and do not constitute a penalty and, (D) the remedy specified in this Section 0 shall be Buyer’s sole and exclusive remedy in such Event of Default and, for the avoidance doubt, neither Buyer nor Seller shall be entitled to any Settlement Amount calculated pursuant to Section 9.4 under such circumstance.</p> <p>***</p> <p>9.2(k) <u>Upon</u> the occurrence of five (5) or more Shortfall Years, and the cumulative sum of the Shortfall Amounts for all Shortfall Years equals or exceeds the Annual</p>	<p>a probability distribution. Most PPAs assume “P50” production, which is the average expected annual production (50% of expected years would have more production, 50% would have less). Lenders will generally assume a more conservative production estimate for their underwriting. In the current financing environment, banks have become even more conservative, relying on “P99” estimates, a production amount that in any given year (i) there is a 99% confidence that it will be exceeded, and (ii) 1% chance that production will be less than this amount. It is highly improbable that a project would generate less than P99 in a single year, much less multiple consecutive years.</p> <p>When running a P99 scenario, lenders will likely assume that the IPA REC Contract ends the year in which the P99 case shows an event of default, effectively shortening the tenor of a 20-year contract substantially. This materially reduces the amount of debt the lenders can underwrite, despite the fact that the statistical probability of a sustained P99 generation profile is near zero.</p> <p>While bidders to the current contract may anticipate lenders underwriting to P99 production, bidding a P99 production amount is also unlikely because RECs beyond the total quantity bid are not compensated and thus the system would be expected to substantially over-generate</p>

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		<p>Quantity, in which case, Buyer shall terminate the Agreement twenty (20) Business Days after written notice by Buyer to Seller unless Seller demonstrates, within such twenty (20) Business Day period and to the satisfaction of Buyer in its reasonable discretion, that such Event of Default has not occurred or has been cured. For such Event of Default, Buyer shall be entitled to payment by Seller in the amount of the Collateral Requirement as Buyer’s sole and exclusive remedy.</p>	<p>relative to the REC Contract contracted amount and leave a significant number of RECs uncontracted, thus putting upward pressure on bid prices for some bidders.</p> <p>The edits in 1(a) redefine a “Shortfall Amount” to allow cushion beyond a single REC of underdelivery to cause a Shortfall Year. The blank percentage could be 65-70%, which is commonly seen in the industry, to allow for flexibility without requiring substantial underbidding relative to nameplate capacity and anticipated capacity factor.</p>
(1)(b) Downside risk based on severe underperformance	Draft Indexed REC Contract, Section 4.1(f)	<p>4.1(f) In the event that Seller fails to Deliver the Delivery Year Requirement for a Delivery Year under the terms of this Agreement, such Delivery Year shall be deemed a “Shortfall Year” and such amount of RECs that Seller fails to Deliver to satisfy the Delivery Year Requirement for a Delivery Year shall be deemed the “Shortfall Amount” accordingly. Notwithstanding the foregoing, Seller’s failure to Deliver the Delivery Year Requirement through the first two (2) full Delivery Years shall be excused and the failure to meet any Delivery Year Requirement through the first two (2) full Delivery Years shall not constitute a Shortfall Amount. Further, in no event shall RECs eligible for payment exceed the Maximum Contract Quantity. If in the last Delivery Year, the Delivery Year Requirement is greater than the quantity of RECs to meet the Maximum Contract Quantity, then the Delivery Year Requirement for the last Delivery Year shall be reduced to be the greatest quantity of RECs that would not cause the Maximum</p>	<p>The edits for this issue (1)(b) are to add in to the Indexed REC Contract a mechanism similar to that in Section 4.2(f) of the 15-Year ABP REC Contract. Section 4.2(f) of the 15-year ABP REC Contract allows the Seller of RECs from a project that Seller determines is not capable of delivering RECs anticipated by the Part I (or, if lower, Part II) capacity factor to adjust the quantity of the standing order, with the agreement of Buyer and the IPA, to better match the actual expected performance of the facility (as informed by real-world experience in operating the facility).</p> <p>This approach allows a facility that is producing RECs toward the State’s RPS goals to continue producing without a default but provide fewer RECs—</p>

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		<p>Contract Quantity to be exceeded. In the event that RECs are Delivered to Buyer in excess of the Maximum Contract Quantity, such RECs shall be disposed pursuant to Section 2.3(f). <u>At any time prior to or during the Delivery Term, Seller may determine that its Utility-Scale Solar Project or Utility-Scale Wind Project is not performing at the level expected. In such case, Seller may submit a request to the IPA to have Delivery obligations of such project reduced, which shall be granted by the IPA in its reasonable discretion. Such request shall include pertinent information related to the payment adjustment as well as requested changes to the future Delivery Year Delivery obligations. Upon request by the IPA, Seller shall provide additional documentation reasonably required to support its request. Updates to the Product Order applicable to such projects shall be documented and provided to the IPA for reissue with the updates.</u></p>	<p>frequently, all other factors being equal, producing fewer RECs means higher prices but this provision does <i>not</i> allow for upward price adjustment than initially bid. It avoids a time gap for the IPA to procure replacement RECs and the corresponding systems to come online.</p> <p>The need for these edits is the same as Issue (1)(a) above. Making this change would allow underperforming facilities to continue to generate RECs to meet the State’s RPS goals without fully removing their capacity to generate RECs from the Indexed REC Procurement program, thereby limiting waste from projects that become financially unsustainable and are abandoned due to termination of their Indexed REC Contracts.</p> <p>Flexibility to downsize underperforming facilities and the certainty that the request will be granted is very important to financing parties, even if with limitations on the degree of downsizing.</p>
(1)(c) Downside risk based on severe underperformance	Draft Indexed REC Contract, Sections 2.1(a), 4.1(a), and 9.2(k)	2.1(a) Renewable Energy Credits. <u>Except as specified in Section 9.2(k),</u> t The Product to be Delivered by Seller and received by Buyer under this Agreement is RECs generated from the Project, for which summary information is specified in the Product Order. Seller may not substitute RECs generated from a generator other than the Project. For avoidance of doubt, Buyer is not purchasing Seller’s Project and Buyer shall have no ownership interest in, or responsibility for, the Project. For avoidance of doubt,	The edits for this Issue (1)(c) are to create an explicit cure mechanism in which replacement RECs are provided to address a Shortfall Amount by a separate project that can still count towards both the Buyer’s and the State’s RPS goals. While the REC Contract as it exists today provides for a short (20 business day) cure period for many defaults, such cure is not practical for

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		<p>subject to Section 2.2(e) there is no restriction on changes to the Nameplate Capacity of the Project during the Term of this Agreement; provided that if the Project is a Utility-Scale Wind Project or a Utility-Scale Solar Project, the Nameplate Capacity remains greater than 5,000 kilowatts.</p> <p>***</p> <p>4.1(a) <u>Except as specified in Section 9.2(k), all</u> RECss Delivered to Buyer from Seller under this Agreement shall be associated with electric energy generated by the Project. For avoidance of doubt, with respect to a Project co-located with an energy storage facility, the RECss Delivered shall be associated with energy generated exclusively from the Project as measured by the Project's Revenue Quality Meter and not from any other electric source. Each Delivery shall be deemed a representation by Seller to Buyer that the Product meets the requirements specified in this Agreement.</p> <p>***</p> <p>9.2(k) the occurrence of five (5) or more <u>consecutive</u> Shortfall Years and the cumulative sum of the Shortfall Amounts for all Shortfall Years equals or exceeds <u>five times</u> the Annual Quantity, in which case, Buyer shall <u>terminate</u> the Agreement twenty (20) Business Days after written notice by Buyer to Seller unless Seller demonstrates, within such twenty (20) Business Day period and to the satisfaction of Buyer in its reasonable discretion, that such Event of Default has not occurred or has been cured. <u>For purposes of curing such an Event of Default, Seller may provide RECs to Buyer from one or more Utility-Scale Solar Projects, Utility-Scale Wind Projects, Hydropower Projects, or Brownfield Solar</u></p>	<p>underdelivery due to weather or other circumstances outside of Seller's control.</p> <p>In this proposed cure mechanism, Seller would provide the RECs for free in order to cure the Event of Default and these RECs would be additive (not otherwise counted toward the RPS requirements if not transferred to the Buyer utilities for retirement due to the Event of Default). As a result, in this scenario the requirement of Sections 2.1(a) and 4.1(a) should be qualified to not apply to this proposed cure mechanism.</p> <p>In addition, the edits for this Issue (1)(c) include making the Shortfall Years consecutive and increasing the Annual Quantity to five times the Annual Quantity to trigger the Event of Default. If the IPA chooses to retain this structure to incentivize REC delivery (instead of adopting the proposals in Issues (1)(a) and (1)(b)), these two changes are necessary to finance these projects efficiently and on reasonable terms.</p> <p>These proposed changes are important to address the same challenges in project financing as Issue (1)(a) above.</p>

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		<p><u>Projects (in each case other than the Project) that meets the requirements of Section 2.2(a) through 2.2(i).</u> For such Event of Default, Buyer shall be entitled to payment by Seller in the amount of the Collateral Requirement as Buyer's sole and exclusive remedy.</p>	
(2)(a) Uncertainty regarding compliance with MES obligations	Draft Indexed REC Contract, Section 6.4(d)	<p>6.4(d) The IPA is the entity responsible for evaluating the submissions of Seller related to the Minimum Equity Standard and for confirming Seller's compliance with the Minimum Equity Standard requirements, and the Parties acknowledge and agree that the IPA shall have the right to request more information from Seller related to the Minimum Equity Standard requirements and to grant waivers or impose remedies should Seller fail to comply with the Minimum Equity Standard or the reporting requirements in this Section 6.4 in accordance with the IPA's long term renewable resources procurement plan as approved by the Illinois Commerce Commission in ICC Docket No. 23-0714. <u>For purposes of granting waivers of Minimum Equity Standard requirements, the IPA will appraise efforts to achieve compliance against a standardized, public scoring guide or rubric.</u> Unless instructed by the IPA and consistent with the IPA's long term renewable resources procurement plan as approved by the Illinois Commerce Commission in ICC Docket No. 23-0714, no other remedies are contemplated under this Agreement for Seller's failure to comply with the Minimum Equity Standard requirements as set forth in this Section 6.4. For avoidance of doubt, if Seller is an Equity Eligible Contractor, then Seller shall be deemed to have met the minimum percentage of the Project Workforce indicated in the Product Order for</p>	<p>The mechanism for obtaining a waiver of the MES standards provides a number of required or suggested actions and steps that a winning bidder should take prior, and in order, to obtain a waiver of the MES obligations.</p> <p>These edits in this Issue (2)(a) are to provide for such a scoring guide or rubric, which the IPA would need to develop pursuant to its policy preferences and interpretation of relevant statutory authority.</p> <p>While no successful or potential bidder intends to avoid fulfilling their MES obligations, the current system does not give a pathway to the lenders to a bidder to be assured in due diligence that the bidder will obtain a waiver, if, after best efforts, the bidder is ultimately unable to comply with the MES.</p> <p>In addition to lending parties, unions (who must be engaged due to project labor agreement requirements) also want to make sure that they are doing what is necessary to have a waiver granted (assuming they are</p>

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		<p>the Minimum Equity Standard. The foregoing shall apply only if Seller is an Equity Eligible Contractor and this does not apply if Seller relies on a subcontractor that is an Equity Eligible Contractor, but itself is not an Equity Eligible Contractor. Further, if Seller's subcontractor is an Equity Eligible Contractor, then each Equity Eligible Person of Seller's subcontractor shall be counted 1.5 times toward meeting the Minimum Equity Standard; for avoidance of doubt, the foregoing does not apply to meeting the higher equity commitments pursuant to Section 2.5(b).</p>	<p>unable to obtain compliance with the MES requirements despite efforts).</p> <p>To the extent that the steps and actions spelled out in the waiver requirements for the MES are policy goals of the State, providing a scoring guide would enhance the likelihood that a winning bidder is able to craft efforts so that even if they are ultimately unable to comply with the MES, they made considerable efforts the IPA believes are meaningful. In addition, a lender or other financing party could then better diligence a MES compliance plan and more fully assess a strong compliance plan.</p> <p>Access to the Energy Workforce Portal has proven difficult or impossible for unions who seek that information in connection with MES compliance when working on projects awarded an Indexed REC Contract. Guidance on how unions may access that portal would be very helpful for winning bidders (some of which are not Approved Vendors or Designees under the ABP) and unions working with those bidders.</p>
(2)(b) Uncertainty regarding compliance with MES obligations	Draft Indexed REC Contract, Section 6.4(b)	<p>6.4(b) Unless a waiver has been granted by the IPA, during a delivery year in which Construction Activities are carried out, the Project Workforce shall consist of Equity Eligible Persons or Equity Eligible Contractors such that these Equity Eligible Persons or Equity Eligible Contractors comprise at least the minimum percentage of the Project Workforce indicated in the Product Order for the Minimum Equity Standard. For avoidance of doubt, the minimum</p>	<p>Approved Vendors, contractors (both general contractors and subcontractors) and unions would benefit significantly from having a designated IPA representative to field and address questions related to MES compliance. This is particularly true given that the hiring process for projects is</p>

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		<p>percentage indicated in the Product Order for the Minimum Equity Standard shall not change during the Term of this Agreement. <u>The IPA has a designated representative available to address questions related to Minimum Equity Standard compliance, who can be contacted at [REDACTED].</u></p>	<p>typically very fast, sometimes as short as 1-2 weeks.</p> <p>The edits in this Issue (2)(b) add language indicating that such a representative may be contacted, but the IPA would need to designate such a representative in its discretion as the entity responsible for “evaluating the submissions of Seller related to the Minimum Equity Standard and for confirming Seller’s compliance with the Minimum Equity Standard requirements” pursuant to Section 6.4(d) of the draft Indexed REC Contract.</p>
(2)(c) Uncertainty regarding compliance with MES obligations	Draft Indexed REC Contract, Section 6.4(c)(i)	<p>6.4(c)(i) MES Compliance Plan. The first MES Compliance Plan shall be submitted to the IPA within thirty (30) days of the Commission Bid Approval Date regardless of whether Construction Activities have been performed or will be performed in that delivery year. <u>Requests for waivers of MES requirements may be submitted within [] days of the Commission Bid Approval Date and in any event not later than delivery of the first REC pursuant to Section 2.4.</u> Notwithstanding the foregoing, if the Date of First Operation of the Project as recorded by PJM-EIS GATS or M-RETS (or the Hydropower Refurbishment Completion Date if the Project is a Hydropower Project that is newly Modernized or Retooled) occurred prior to the date that is thirty (30) days of the Commission Bid Approval Date, then the MES Compliance Plan shall not be required. Subsequently, by June 1 of each delivery year, Seller shall submit to the IPA an MES Compliance Plan demonstrating how Seller will achieve compliance with the Minimum Equity Standard in such delivery year. <u>Requests for waivers of MES requirements may be submitted within [] days of</u></p>	<p>Currently, it is unclear when a waiver should be applied for in the process of complying with MES requirements. Many construction sub-projects related to a project awarded an Indexed REC Contract are on short timelines, sometimes as short as 9-10 months, and guidance on the timing of applying for a waiver of MES requirements would therefore be extremely valuable and would enhance MES compliance by requiring Approved Vendors and unions to take what steps towards MES compliance that they should within the proper time-frame.</p> <p>These edits in this Issue (2)(c) are to provide for a deadline for MES waiver applications, which the IPA would have to determine within its discretion as the entity responsible for “evaluating the submissions of Seller</p>

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		<p><u>the Commission Bid Approval Date and in any event not later than delivery of the first REC pursuant to Section 2.4.</u></p> <p>The MES Compliance Plan shall include: (a) a narrative description of how Seller will meet the Minimum Equity Standard and a statement of intent to comply with equity accountability standards for the applicable delivery year and to hire a diverse project workforce including Equity Eligible Persons and Equity Eligible Contractors; (b) projected number of workers and the demographic breakdown by race, gender, and participation in job training or workforce development programs, or other means of compliance with the standard for Equity Eligible Persons; (c) plans for the use of Equity Eligible Contractors, if applicable; (d) Seller classification (i.e., Minority-owned, Woman-owned, Disabled-owned, Veteran-owned, Small Business, etc.), if applicable; (e) communication plan for local outreach to increase the utilization of Equity Eligible Persons and Equity Eligible Contractors; and (f) status of any corrective actions or adjustments from the prior delivery year's MES Compliance Plan.</p>	<p>related to the Minimum Equity Standard and for confirming Seller's compliance with the Minimum Equity Standard requirements" pursuant to Section 6.4(d) of the draft Indexed REC Contract.</p>
<p>(3) Uncertainty regarding payment by utilities using pass-through tariffs</p>	<p>Draft Indexed REC Contract, Section 5.4</p>	<p>Nothing in this Agreement shall require Buyer to advance any payment or pay any amounts that exceed the actual amount of revenues anticipated to be collected by Buyer under paragraph (6) of subsection (c) of Section 1-75 of the IPA Act (20 ILCS 3855) and subsection (k) of Section 16-108 of the Public Utilities Act (220 ILCS 5) inclusive of eligible funds collected in prior years and alternative compliance payments for use by Buyer (the "Available Funds"). Buyer's payments for RECs in a given Delivery Year therefore shall not cause the sum of the cumulative payments to Seller and all other sellers under contracts executed pursuant to 20 ILCS 3855/1-75(c)(1), as well as all</p>	<p>The edits in this issue (3) are intended to clarify that while the lack of budget excuses Buyer from the strict timing requirements for payments of valid and undisputed invoices, Buyer remains obligated to pay valid and undisputed invoiced amounts once Buyer has sufficient RPS budget to do so.</p> <p>The edits are intended to create a regulatory mechanism consistent with the Illinois Power Agency Act that allows Seller to continue to deliver RECs to the Buyer</p>

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		<p>other applicable fees, charges, and administrative costs related to the purchase of RECs under 20 ILCS 3855/1-75(c)(1), to exceed the Available Funds for such Delivery Year as calculated under 20 ILCS 3855/1-75(c)(1)(E). For the purposes of this Agreement, the Available Funds under Section 1-75(c)(1)(E)'s rate impact limitations shall be calculated inclusive of any utility-held alternative compliance payments authorized for procuring RECs by order of the Illinois Commerce Commission or any unspent revenues collected by the utility under paragraph (6) of subsection (c) of Section 1-75 of the IPA Act (20 ILCS 3855) and subsection (k) of Section 16-108 of the Public Utilities Act (220 ILCS 5) that the utility is permitted to carry over across Delivery Years. For the avoidance of doubt, payment obligations for contracts executed pursuant to 20 ILCS 3855/1-75(c)(1) and associated expenses within a given Delivery Year exceeding the actual balance of collections made to date under Section 16-108(k) within that Delivery Year would not provide a valid basis for non-payment by Buyer, unless Buyer's compliance with such payment obligations would cause Buyer's cumulative payments for RECs associated with a given Delivery Year to exceed the amount of the Available Funds for that Delivery Year. <u>Consistent with and notwithstanding the preceding, to the extent that Seller delivers RECs up to the Delivery Year Requirement and Buyer is not required to pay some or all amounts invoiced within the Delivery Year under this Section 5.4 ("Unpaid Amounts"), Buyer shall be obligated to pay Seller such Unpaid Amounts at such time as Buyer has sufficient Available Funds to pay Seller such Unpaid Amounts. In no event shall Buyer be excused from payment of Unpaid Amounts once Buyer has sufficient Available Funds to pay Unpaid Amounts. Buyer shall track Unpaid Amounts and report such amounts not less frequently than</u></p>	<p>utilities, even if the utilities are unable to pay for them, and for the utilities to <i>defer</i> payments for such RECs only until there are sufficient Available Funds and not refuse to pay for RECs delivered simply because there are no Available Funds at the time of invoice for those RECs.</p> <p>Such a mechanism would provide significantly greater certainty that payment will be made on a delayed basis for RECs generated (and, under this mechanism, delivered to Buyer). Financing parties consistently raise Section 5.4 as a major issue, and the edits proposed here would make meaningful strides towards changing the risk under 5.4 to only the time value of money lost during the payment deferral.</p>

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		<u>monthly to the IPA.</u>	

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ATTACHMENT A

PUBLIC

No public version available.