



VISTRA CORP.'S COMMENTS ON A POTENTIAL PROCESS FOR ALLOWING POST-CONTRACT AWARD PRICE ADJUSTMENTS FOR INDEXED REC CONTRACTS

Vistra Corp. (Vistra) offers the following comments on the development of a potential process for allowing post-contract award price adjustments for indexed REC (renewable energy credit) contracts for the provision of RECs from renewable energy generation projects that have been selected in procurement events conducted by the Illinois Power Agency (IPA) and its Procurement Administrator (PA). Vistra has participated in the workshops on this topic conducted by the IPA, and bases these comments on consideration of the discussion at the workshops to date, including written comments submitted by others. Vistra welcomes continuing discussion on the issues raised and considered in the workshops.¹

I. Need for Analysis of Impact of Post-Award Price Increases on RPS Budget Rate Cap

1. Vistra submits that a consideration largely missing from the discussion to date is the impact of allowing post-award price increases on the renewable portfolio standard (RPS) budget rate cap that is imposed by statute. While there has been extensive discussion of provisions that could be adopted to provide for increases in contract prices due to unanticipated cost increases, there has been little or no discussion of how much strike prices could increase before the rate cap is reached, precluding additional price increases that would otherwise be allowed based on the price adjustment procedure. Thus, the proverbial cart has been placed before the horse. If the RPS budget is at a point where only small increases in contract prices can be allowed before the rate cap is triggered, the development of a post-award price increase procedure may be futile in terms of enabling more projects to be completed, and may in fact create unrealistic expectations that the “cure” for failing projects has been found.

2. Accordingly, Vistra submits that IPA and/or the PA should perform an analysis to show the levels of contract price increases that could be awarded before the current statutory rate cap is triggered. For example, if all projects that have been selected in a procurement event and are currently in development were granted price increases at several levels (e.g., 5%, 10%, 15%, and 20%), and considering other RPS funding commitments, at what point would the current rate cap be triggered (if at all). (Note that if this analysis shows only small (or no) post-award price increases could be accommodated, that result could trigger a need to argue for increases in the statutory rate cap.)

3. In addition, the IPA or the PA should analyze the amount of the increase in residential or small commercial monthly and annual electricity bills that would result from allowing post-

¹ References in these comments to points raised and views expressed in the workshops are based on the minutes of Workshops 1 through 4 posted on the IPA website. Vistra has numbered the paragraphs in these comments for ease of reference in further discussion.

award price increases at several levels (again, examples could include 5%, 10%, 15%, 20%) to projects that have been selected in a procurement event and are currently in development. In Vistra's experience, legislators are always keenly interested in the impacts of proposed electric energy legislation on their constituents' electricity bills.

II. Contract Issues

4. Vistra submits that some of the issues which have been cited in the workshops relate more to the terms of the form indexed REC contract than to the need for and components of a post-award price adjustment procedure, and therefore may be better addressed through revisions to the form indexed REC contracts going forward. Examples are the number of allowable Annual Shortfall Years (and the consequences of exceeding that number); and the amount of RECs a completed project can produce as compared to the volume specified in the developer's bid and the awarded contract. As illustrated by Ben Chee's (of NERA) presentation in Workshop 4, IPA/PA has previously made changes to the form indexed REC contract to address these and other specific concerns, and there is no reason to assume IPA/PA will be unwilling to implement changes to the form contract in the future.

5. That noted, Vistra does not object to providing the opportunity for non-price related "other contract changes" but submits that a specific list of potentially allowable "other contract changes" and their allowable bases should be developed and included in the form indexed REC contract or other documentation in which the price adjustment procedure is memorialized. As noted in point 4 above, some contract-related issues that have been a source of concern may be better addressed through revisions to the form Indexed REC contract.²

6. Assuming a post-award price adjustment procedure is adopted, it should be included in the form indexed REC contract going forward (either in the body of the contract or in an appendix). For previously-selected projects that are still in development, the price adjustment procedure can be added to their contracts as an amendment.

III. Specifics of a Post-Award Price Adjustment Mechanism

7. The post-award price adjustment mechanism should be available for brownfield projects as well as utility-scale wind and solar projects. Like utility-scale wind and solar projects, brownfield projects are susceptible to the post-award cost increases discussed in the workshops.

8. Vistra generally agrees with the comments submitted by CGA that the adjustment formula should be based on published inflation indices for components of a project, weighted

² Vistra notes Clean Grid Alliances's (CGA) reference to the "amendment provision" in the current form indexed REC contract, but Vistra submits that this provision was not intended to invite amendments but rather only to make it clear that the contract can only be amended in writing and not orally or through course of dealing. In any event, a detailed and transparent post-award price adjustment formula and procedure, applicable to all projects, should be developed, rather than addressing issues through individually-negotiated contract amendments.

to reflect the fraction of total project cost each component comprises in a “typical” project (which the IPA/PA would formulate), with one exception as described in point 8 below.³ Ideally, U.S. Department of Labor, Bureau of Labor Statistics (BLS) indexes that match as closely as possible the components of a wind, solar, or brownfield generating facility, and regionally are as close to Illinois as available, should be included in the formula, and not just one top-level inflation index such as the Consumer Price Index. It will be necessary to identify the project components and related BLS inflation indexes to be used in the price adjustment formula; however, as examples, the price adjustment formulas adopted by some of the Northeastern U.S. states and provided in Workshop 3 use multiple project components and related inflation indexes. The inflation index-based formula would be established for each type of facility selected in a procurement event, i.e. utility-scale wind, utility-scale solar, and brownfield. Vistra submits that an inflation indexing approach should be used to avoid turning every developer request for a price adjustment into a mini-rate case before the IPA (or the ICC).

9. The exception to the inflation indexing approach should be a separate provision for increased interconnection facilities costs, which are likely unique to every project and not adequately represented by an “inflation index” approach (as noted by several participants at Workshop 4). Increases in a project’s budget for interconnection facilities and system upgrades costs resulting from the interconnection study and approval process (e.g., the grid operator determines additional transformer capacity or voltage upgrades to existing transmission lines is needed) would need to be addressed on a case-by-case basis, as such cost increases would be unique to each project and not adequately captured by the inflation increase process described in point 8 above (and in CGA’s previously-submitted comments). These costs are also largely out of the developer’s control. To obtain a strike price increase for interconnection facilities or system upgrades cost increases, the developer would need to demonstrate to the IPA (or the PA) (i) what the project’s original estimate/budget for interconnection facilities and system upgrades used in its bid was, (ii) that the original estimate/budget was reasonable based on information at the time, and (iii) what the additional costs are that must be incurred as a result of and to comply with the RTO’s determination as to the necessary interconnection facilities or system upgrades.⁴

10. However, for interconnection process-related delays and local siting approval delays, the impact on project costs would be captured by the indexing formula described above, i.e., the impact of such delays is the inflationary impact on costs for project components that occurs during the delay period.

11. Vistra submits there should be further discussion of whether increases in labor costs should be included in the price adjustment formula, given that projects are required to enter into Project Labor Agreements and to pay Prevailing Wages, and therefore the project developer (or its EPC contractor(s)) has taken on the risk of Prevailing Wage Rate increases. In Vistra’s

³ Other participants at Workshop 4 expressed support for this type of procedure.

⁴ With a separate provision for price adjustment based on interconnection facilities costs, the inflation index-based component would apply to less than 100% of the contract price.

experience, it is typical for the EPC contractor to bear the risk of labor cost increases once construction has started.

12. Vistra agrees with CGA's comments that the strike price adjustment should be based on the period from project selection/ indexed REC contract execution to start of construction on the project. It is Vistra's experience that at the point where construction is ready to start, the developer (and its engineering, procurement and construction (EPC) contractor) have generally locked down project costs. (Other participants at Workshop 4 also expressed support for start of construction as an appropriate cut-off point for inflation index-based adjustments.) Further, if increases in labor costs were to be included in the price adjustment formula, only labor cost increases from the time of contract execution to the start of construction would be covered.

13. Vistra submits that the "floor" cost increase for strike price adjustments should be greater than the 2% value suggested by CGA. The developer should be expected to take on more risk, and the price adjustment mechanism should only be available for projects that have experienced more significant cost increases during the developmental stage. Vistra suggests a 5% "floor" and 25% "ceiling" (CGA suggested a 20% ceiling). Vistra notes several of the other states whose REC price adjustment procedures were reviewed in Workshop 3 allowed for a maximum increase of 15%-16%.⁵ An alternative to establishing "floor" and "ceiling" values would be to only allow a price adjustment for a portion (e.g., 80% or 85%) of the increase calculated using the inflation index plus interconnection costs formula.

14. As the Buyer electric utilities are the counterparties to the indexed REC contracts, the adjustment procedure should include opportunity for the utility counterparties to comment on and object to proposed price increases. It would seem inappropriate as a matter of contract law to require the utilities to accept price increases without providing them an opportunity to comment/object. Vistra recognizes that the utility Buyers are intended to be pass-through entities with response to the RECs and strike prices; nevertheless, a post-award price adjustment will require the electric utilities to charge their customers more.

15. Approved increases in the strike price for a project should be made known and available to other developers with projects of the same type (wind, solar, brownfield) and vintage (i.e. selected in same procurement event), so that the other similarly-situated developers can decide whether to request the same/similar price adjustment based on the formula.

IV. Other Comments

16. Given the concern about the number of projects selected in an IPA procurement event not being completed, the IPA, separately from these workshops, should also:

- (i) review and consider establishing more stringent project maturity requirements, including more stringent financial capability provisions, for a developer to be eligible to participate in a procurement event (e.g., greater assurances of ability to finance the

⁵ As the IPA noted at Workshop 4, at some point of increased project costs it may make more sense for the developer to withdraw and rebid the project.

project including to absorb cost increases and to accommodate interconnection and siting delays; or proof that project financing (or some portion thereof) has been secured contingent on the project being selected; or the project has reached a more advanced position in the RTO interconnection queue and process); and

- (ii) evaluate whether “benchmark” prices in prior procurements have been unrealistically low (e.g. have not included sufficient headroom to accommodate cost increases which experience is showing are likely to occur), resulting in otherwise suitable (and likely to be completed) projects not being selected.

Questions and comments regarding Vistra’s comments should be directed to:

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