

[Submitter 3]

From: [Submitter 3]

Sent: Friday, May 01, 2015 6:08 PM

To: Illinois-RFP

Cc: [Submitter 3]

Subject: [Submitter 3's] 2nd Round Comments on Draft IPA REC Purchase & Sale Agreement

[Submitter 3] appreciates the opportunity to review and provide input on the IPA's proposed form of REC Purchase and Sale Agreement in this second round of comments. Attached you will find (1) a summary table that provides an overview of our comments, and (2) a redline of the agreement, detailing our suggested changes.

Thanks for your consideration.

Best regards,

[Submitter 3]

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[Submitter 3] appreciates the opportunity to review and provide input on the IPA's revised proposed form of REC Purchase and Sale Agreement. While the IPA's recent revisions address a number of issues with the original agreement, significant issues remain. In particular, we note that the contract does not provide the Seller with a meaningful remedy in case of a Buyer default for failure to pay. At a minimum, the agreement should provide that Seller has all remedies available at law and equity, rather than merely the right to terminate the agreement. The following table details this and our other remaining concerns with the agreement.

Item	Section	Issue/Comment
1	Cover Sheet Exhibit A – page 2, Section 1.28	<p><i>Guaranteed System Energized Date no later than 12 months after bid date.</i></p> <p>The definition of Guaranteed System Energized Date (GSED) has been revised to require system be registration with PJM-EIS GATs or M-RETS, thereby reducing the developer's timeline for achieving this key deadline.</p> <p>[Submitter 3] recommends omitting registration as a requirement to achieving GSED, particularly given that the Delivery Term Start Date (Section 2.2.1) already takes registration into account as part of the overall contract timeline.</p>
2	Cover Sheet Exhibit C – page 1	<p><i>Submission of copies of documents.</i></p> <p>[Submitter 3] strongly recommends that the Seller be required to certify as to each of the facts, <i>without the requirement of submitting copies each of the listed documents.</i> Otherwise, IPA staff will be overwhelmed with documents to review and store (imagine 1,000 residential systems, each with a minimum of four pieces of supporting documentation).</p> <p>If IPA does require documentation, <i>a permission to operate (PTO) letter should be sufficient on its own,</i> as it will provide evidence that each of the prior requirements has been met. Further, notice of registration with the applicable tracking system shouldn't be necessary as the Seller will only be able to deliver the RECs if the system is, in fact, registered.</p>
3	3.9.2, 3.9.3 (Final System Size)	<p><i>Automatic termination of Agreement in case of any change in size that results in a change in Size Category</i></p> <p>We suggest that Seller have an opportunity to request the Buyer's consent to any change of size that would result in a change in Size Category.</p>
4	3.9.5 (System Size)	<p><i>Maximum Contract Quantity will not be adjusted to reflect Final System Size.</i></p> <p>We suggest deleting or modifying this section. An unintended</p>

		<p>result of this provision is that Sellers will likely bid in the largest system size possible for a site to ensure access to the Maximum Contract Quantity. Installed systems will thus likely be smaller, resulting in overall under-delivery in the program.</p>
5	8.3 (Payment)	<p><i>Payment date isn't clearly stated.</i></p> <p>Payment should be due no later than 30 days after invoice (note that because invoicing and payment are on a quarterly basis, Seller will not start receiving payment for a minimum of four months after it begins delivery).</p>
6	8.5, 8.6 (Late Payment), Appendix A.1, Section 1.1	<p><i>Seller's only remedy for Buyer's failure to pay is termination of the Agreement, without further liability to either party/late payment charge.</i></p> <p>This provision would allow Buyer to default under the Agreement without any consequence to Buyer or remedy for Seller and could present a significant impediment to Sellers' ability to finance projects using this contract as collateral. There is absolutely no deterrent in this Agreement for a Buyer failure to pay. Seller should have a clear right to a termination payment in case of a payment default by Buyer. The market standard in REC agreements for an uncured Buyer default is a termination payment equal to the difference between the market price for the RECs and the contract price, multiplied by the number of RECs remaining to be delivered. <i>At a minimum, Seller should have the right to pursue all remedies at law and equity for a Buyer default based on failure to pay.</i></p>
7	8.10 (Netting and Setoff)	<p><i>Right of setoff off/defacto cross default across multiple agreements.</i></p> <p>While we generally agree that a right of netting is desirable across agreements, the right of setoff and counterclaims could make financing challenging, particularly for developers that employ traditional project finance.</p>
8	9.1 (Provision of Performance Assurance)	<p><i>Seller must post performance assurance within 14 calendar days of the Illinois Commerce Commission approving the results of the procurement.</i></p> <p>We suggest that the date for posting performance assurance be tied to a requirement that Buyer <i>notify</i> Seller of such award.</p>
9	9.2 (Return of Performance Assurance)	<p><i>Performance Assurance is returned upon Buyer's first payment of RECs.</i></p> <p>Given that the earliest Buyer will make payment is 4-5 months after Seller commences delivery of RECs, this timeline for return of the Performance Assurance presents an unnecessary cost for Seller. Performance Assurance should be released/returned as</p>

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		soon as the conditions precedent in Section 5.1 have been satisfied.
10	11.3 (Assignments by Seller)	<p><i>Seller is required to obtain Buyer approval prior to any assignment, including assignment of rights to revenue from the agreement.</i></p> <p>The changes to this section offer a significant improvement over the original language; however, the Seller should be able to make a complete assignment to a wholly owned affiliate of the Seller without the Buyer's consent.</p>
11	13.3.1 (Remedies)	<p><i>Following a termination for Seller default, Seller is prohibited from selling RECs to any other party.</i></p> <p>This addition seems unnecessary and draconian, particularly in light of the fact that Seller has essentially no remedies in case of a Buyer default for failure to pay. This new language should be removed entirely.</p>
12	16.1 (Limitation of Liability)	<p><i>Agreement doesn't include a dollar maximum limit on Seller's liability.</i></p> <p>The Agreement should clearly specify that Seller's maximum liability under the Agreement is tied to the notional dollar value of the agreement, and such amount should decline each year based on performance.</p>