COMMENTS TO REC CONTRACT ON BEHALF OF JOINT SOLAR PARTIES

May 12, 2020

The Solar Energy Industries Association, the Coalition for Community Solar Access, and the Illinois Solar Energy Association—collectively the Joint Solar Parties—appreciate the opportunity to provide comments on the REC Contract as the IPA considers a redrafting. The Joint Solar Parties applaud the IPA's support for rethinking the form and (to the extent not already locked in by statute or LTRRPP) substance in this forum.

Given that one of the audiences for the REC Contracts, financing parties (primarily but not exclusively tax equity and construction debt) and equity take-out partners, may not directly participate, the Joint Solar Parties request that the IPA consider allowing a second comment period once the IPA drafts changes to at minimum (though not necessarily limited to) Joint Solar Parties members receiving feedback from their financing partners. While of course nothing prohibits financing parties or equity take-out partners from direct participation—the Joint Solar Parties would welcome it—the Joint Solar Parties cannot force their direct participation but will be directly impacted by the viewpoint of those entities.

The IPA's prompts for questions are listed below and the Joint Solar Parties' responses are in bold.

1. The January 2019 REC Contract uses as a base the ABA-EMA-ACORE REC Purchase & Sale Agreement and includes a Cover Sheet that modifies existing terms of the ABA-EMA-ACORE REC Purchase & Sale Agreement. The Cover Sheet is the main body of the contract that includes specific terms related to project requirements and delivery obligations as well as modifications to the ABA-EMA-ACORE REC Purchase & Sale Agreement by introducing specific edits to existing provisions or the removal of existing provisions.

> a. The Agency is considering shortening and simplifying the REC Contract (and, if possible, synthesizing the contract into a single set of terms and conditions). This would remove the reliance of a coversheet to modify existing provisions or remove inapplicable provisions in the ABA-EMA-ACORE Master REC Purchase and Sale Agreement. What are key considerations as the Agency undertakes to redraft the REC Contract?

The Joint Solar Parties strongly support synthesizing the current collection of documents into a single contract. While as a reference document a redline against the ABA-EMA-ACORE REC Purchase & Sale Agreement would be a handy reference for financing parties unfamiliar with the Adjustable Block Program, having a single, simplified document will in and of itself be a substantial improvement.

Within the context of unifying the REC Contract into a single set of terms and conditions, simplification and clarification of several areas would be very helpful for financing as well as reducing Approved Vendor confusion:

- **Clearer statements about when adjustments to REC Contract price lead to permanently lost revenue compared to when an Approved Vendor will not suffer a loss if later metrics are met.**
    - **Example 1: The REC Contract allows for recovery of drawdowns due to REC underperformance at the termination of the (master) REC Contract to the extent there is a REC surplus at that point.**
    - **Example 2: There was disagreement between the Joint Solar Parties and the IPA in the most recent LTRRPP docket as to whether an Approved Vendor that failed to hit maximum subscription mix or subscription level targets at Energization or the last day of the first three full Quarterly Periods would ever recoup the lost revenue from the Energization or first three quarterly payments associated with that shortfall.**
    - **Example 3: In the Solar for All REC Contract, Section 6(e) of the Cover Sheet is approximately two pages long and is at minimum susceptible to multiple interpretations as to how failure to meet anchor tenant and low income subscriber targets are treated.**
- **Clearer statements about REC Contract-level defaults vs. Designated System defaults.**
- **Clearer cure periods.**

Specifically with regard to cure periods, the Joint Solar Parties continue to recommend that if a community solar system falls short of its subscription targets at Energization or the last day of one of the first four full Quarterly Periods, the REC Contract should allow a reasonable cure period of [21 calendar] days. Due to the steps and potential length of the customer solicitation and enrollment process—which the Joint Solar Parties did not object to in substance in the recent update to the Marketing Guidelines—customers terminations (including due to move-out or disconnection) just before the end of the Quarterly Period could have a substantial impact on system revenue, particularly for the last of the four full Quarterly Periods.

b. Are there other contract forms that you have used or reviewed from other jurisdictions that could serve as a basis for updating the contract structure for the ABP? What are the advantages of these other contract forms?

c. The January 2019 REC Contract is used for both distributed generation projects and community solar projects, with numerous provisions specific to either distributed generation projects or community solar projects. Should there be separate contracts used for distributed generation projects and community solar projects?

To the extent that the IPA decides to make the REC Contract into a single-batch contract, the Joint Solar Parties support having separate REC Contracts for distributed generation and community solar projects (further broken down for Solar for All by applicable program). If the REC Contract remains a master contract and does not allow for portfolio-level benefits to be addressed outside of the contract (for instance, surplus REC banking), then the master contract should continue to address both.

d. Various exhibits have been developed to record the progress of projects included in the REC delivery contract and to implement the requirements of the ABP. Do you have any specific comments on any of the exhibits appended to the January 2019 REC Contract (such as the form of the annual report or the Schedules to the Product Order)? Are there any which you believe are unnecessary? Are there any additional exhibits which should be included?

The exhibits that are examples of how different processes work are helpful but perhaps might benefit from additional input about scenarios of concern to Approved Vendors or their financing parties.

The Letter of Credit requirements are quite stringent and multiple Approved Vendors ran into challenges from their banks even if they ultimately were able to post the form Letter of Credit. The Joint Solar Parties understand that some of the rigidity might have been due to utility request, but urge additional flexibility while retaining perhaps key minimum core terms.

While Exhibit A could be simplified and further annotated (for instance explaining that the contract price is subject to adjustment at Energization, a question posed by many financing parties for systems targeting 75% small subscriptions), Exhibit A is not a material problem for Approved Vendors.

e. The January 2019 REC Contract is structured as a Master Agreement with one or more Product Orders. Each Product Order is associated with a batch of projects and will contain project specific information for each project included in such batch. It is contemplated that only one Master Agreement shall be executed between the utility counterparty and the Approved Vendor. This Master Agreement – Product Order structure is not expected to change given projects are consolidated into batches and are approved by the ICC at the batch level under the ABP. Are there areas where the structure of the contract is currently unclear and should be clarified in respect of obligations or penalties applicable at a project level, or at a batch (portfolio) level, or at a master contract level?

For a variety of reasons related to development, project acquisition/disposition, and financing, both early-stage developers and long-term owners are incentivized to place larger systems into single-project Approved Vendors. While that approach does have drawbacks—including foregoing access to portfolio-level REC production targets—it is done by some to avoid financing party distaste for master contracts. Because the Program Administrator tracks Approved Vendor affiliations for other reasons, portfolio-level benefits (such as portfolio-level REC production targets) and the IPA/Program Administrator already tracks those values, the Program Administrator should address REC banking outside of the REC Contract to allow for single-batch contracts. In particular for Approved Vendors whose financing parties insist on a single REC Contract per batch—whether a master contract with a single-batch Approved Vendor or a contract designed to address only a single batch—moving banking from the master contract level to affiliated Approved Vendor level will better allow developers to mitigate risk.

The Agency is seeking feedback on a variety of provisions in the REC delivery contract.

2. Removal of Projects for convenience at the Approved Vendor's Request. The January 2019 REC Contract requires each project to meet certain development milestones, the failure of which will lead to the removal of the project from the REC contract. The Agency recognizes that in some cases, the developer may learn that development of the project is no longer feasible in advance of the energization deadline and that it would be sensible at such point to remove the project from the REC contract (subject to penalties if applicable). Under the January 2019 REC Contract, prior to the ICC's Order in Docket No. 19-0995, such a project could not be removed from the contract until contract requirements related to the Approved Vendor meeting the project's energization deadline were not timely met. The Agency will introduce provisions that would allow the Approved Vendor to make requests to Buyer for the removal of the project from the REC Contract subject to applicable penalties such as the forfeiture of collateral. In introducing such provisions, are there specific issues that the Agency should consider? Are there other reasons that the Agency should consider for allowing the Approved Vendor to request the removal of a project from the contract or for allowing an early termination of the contract for convenience (subject to applicable penalties)?

The IPA should consider two primary substantive changes to the REC Contract regarding project removal:

- **14 calendar days after a study is frequently not enough time to trigger Section 4.3(b) (as modified by the Cover Sheet) for Approved Vendors working in good faith with utilities to modify the scope of an interconnection or avoid costly upgrades. A better approach would be to allow an Approved Vendor to terminate the REC Contract under Section 4.3(b) (i.e. retain 75% of the system's collateral) upon notice to the IPA within 30 calendar days of receiving the most recent non-binding cost estimate from the utility that is $0.30/W (AC). While the IPA cannot unilaterally change interconnection rules or Commission-granted waivers thereto, at minimum this change will avoid a separately-imposed deadline from the Adjustable Block Program that is not always coincident with utility interconnection deadlines. 30 calendar days may not be enough in all cases and should be determined on a case-by-case basis in the event productive discussions between the developer and the interconnecting utility are ongoing.**
- **To the extent that individual under 10 kW (AC) systems are removed from the REC Contract prior to Energization, an Approved Vendor should be able to use that collateral towards other under 10 kW (AC) systems with the same utility REC Contract counterparty This reduces the incentive for Approved Vendors to submit residential systems immediately prior to construction as a mitigation strategy against customers changing their mind, and removes a significant cost of smaller DG developers and their partners/financing parties (project cancellation) while still accomplishing the goal of developing systems in place of removed systems.**

In support of the second recommendation, the Joint Solar Parties propose the following amendment to the REC Contract (or, more specifically, the Cover Sheet thereto):

Section 5(d):

> **In the event that Seller fails to Energize a Designated System by the Scheduled Energized Date (plus any extension) for a Designated System, then the Designated System and the RECs associated with such Designated System shall be deemed removed from this REC Contract (such Designated System, a "Cancelled Designated System"). As soon as practicable after the occurrence of such failure by Seller, the IPA shall provide to Buyer and Seller a revised Schedule A and Schedule C to the Product Order for such Cancelled Designated System indicating the removal of such Cancelled Designated System from the REC Contract. Upon the occurrence of such failure, Buyer shall be entitled to payment by Seller in the amount of the Collateral Requirement associated with such Cancelled Designated System as indicated on Schedule A to the Product Order that is applicable to such Cancelled Designated System and any extension fees associated with such Cancelled Designated System that have been paid by Seller to Buyer; provided that if such Cancelled Designated System has a Proposed Nameplate Capacity less than 10 kW AC, Seller may apply the Collateral Requirement for such Cancelled Designated System to a subsequently submitted Designated System so long as such subsequently submitted Designated System has a Proposed Nameplate Capacity of equal to or less than the applicable Cancelled Designated System.**

In addition, the Joint Solar Parties propose that the IPA consider a mid-contract early termination payment mechanism that would allow an Approved Vendor, with notice to the IPA and utility, to remove a system from the REC Contract. This is particularly important for smaller systems owned by the property owner (for instance a homeowner) where the property is sold and the new property owner does not wish to participate in the program or is unwilling to enter into a relationship with the Approved Vendor.

3. Verification of Community Solar Subscription levels. For community solar projects, the January 2019 REC Contract requires the Approved Vendor to maintain its subscription level each year. Failure to maintain the subscription levels each year from a baseline set forth in the contract will result in a draw on the Approved Vendor's Performance Assurance. In order for the Agency to verify subscription information, the Approved Vendor is required to provide written authorization in the form of Exhibit I to the contract (Subscription Information Access Authorization) from the owner of each community solar project, authorizing the interconnecting utility to disclose subscription information to the Agency (with any personally identifying information to be afforded confidential treatment by the Parties and the Agency). The Agency proposes for Exhibit I to the contract (Subscription Information Access Authorization) to specify certain verification information that it requires from the interconnecting utility including: utility account number, utility account name, subscription size (kWac), subscription start date, subscription end date (if any, after the subscription has ended), and any changes to the subscription size over time. The Agency seeks input from stakeholders regarding the information requested and best practices related to obtaining such subscription verification information from the interconnecting utility (which may not be a counterparty to the REC contract) observed in other jurisdictions.

The Joint Solar Parties have limited experience with this issue due to no community solar projects (to date) to the knowledge of the Joint Solar Parties achieving Energization.

4. Mechanism of Collateral Holdbacks. The Approved Vendor's Performance Assurance in the form of a letter of credit or cash is due within thirty (30) business days of the ICC approval of a batch for contract award. The Approved Vendor's Performance Assurance is maintained at a portfolio basis and is returned only after the expiry of the delivery term of all projects in a Product Order. The Agency will introduce flexibility whereby in cases where the Approved Vendor's Performance Assurance was posted through a letter of credit, the Approved Vendor may choose and request for the utility to withhold an amount from the last (or only, if a distributed generation system of 10 kW or smaller in size) REC payment as the Approved Vendor's Performance Assurance in exchange for a release/reduction of the letter of credit. Are there issues related to the process for such release or reduction of the letter of credit amount that the Agency is to consider in implementing this change?

Upon assignment of the REC Contract, the new Approved Vendor should have the flexibility to make a new election so long as the final REC Contract payment for the batch has yet to be paid.

5. Incorporation of Acknowledgement of Assignment forms. Section 9.2 (page 32) of the January 2019 REC Contract contains assignment provisions. Since the finalization of the January 2019 REC Contract, the Agency has introduced two standalone forms related to assignments to be used in connection with the January 2019 REC Contract; namely: (a) the Acknowledgement without consent form to be used if the Assignee already is a valid Approved Vendor with an existing fully executed REC contract (click here), and (b) the Acknowledgement and Consent form to be used in all other situations (click here). The Agency proposes to integrate these forms into the REC Contract and seeks input on any necessary changes or areas where these forms could be improved. What are some key issues that should be considered or captured in the forms? Are there other contract forms from other jurisdictions that could serve as a basis for implementing the provisions related to assignments in the REC contract under the ABP?

The Joint Solar Parties have no objection to the two acknowledgement forms, and agree that making them an exhibit to the agreement is prudent.

The Joint Solar Parties recommend that affiliate assignments should never trigger a transfer fee. If the IPA or utilities are concerned about restricting the frequency of assignments between affiliates for ease of administration purposes—which the Joint Solar Parties recognize as valid concerns—a better approach is time restrictions. Because assignments between affiliates are frequent in tax equity financings, the mandatory transfer fee for transfers between affiliates serves as essentially a tax on financing, especially for systems sold from an early stage developer (who initially applied to the program) to a long-term owner (who likely purchased the system after the REC Contract award) and then financed by the long-term owner.

6. IPA as Mediator. The ICC Order in Docket No. 19-0995 calls for the Agency to serve as a mediator between the utility counterparty and the Approved Vendor in disputes. What items

should be considered for the Agency to act as a mediator in contract disputes between the utility counterparty and the Approved Vendor? Under what circumstances should the Agency recuse itself from this role? Should the IPA's determinations be binding on all parties, or merely advisory? How should the IPA memorialize or publish its determinations? Please provide proposed language to facilitate our comprehension of your comments on this matter.

The Joint Solar Parties were one party supporting this recommendation. Generally speaking, the Joint Solar Parties recommend non-binding mediation by the IPA to reduce costly dispute resolution in other venues and to provide the history and background that some (including perhaps Approved Vendors) may otherwise lack regarding the REC Contract and Adjustable Block Program.

The Joint Solar Parties believe that the IPA should consider recusing itself when the dispute is over the substance of a determination by the IPA. For example, if the IPA makes a determination under Section 5(h) of the Cover Sheet that a project must cure a defect or fails to approve a *force majeure* claim under Article 6 (as amended by the Cover Sheet), those decisions should not be mediated by the IPA because the disputed decision is the IPA's. However, if the dispute is over the utility's implementation of an IPA determination—for instance a dispute over utility payment based on an IPA-issued Quarterly Netting Statement, rather than the content of the Quarterly Netting Statement itself—the IPA should be able to mediate.

One formulation of language would be rewriting Section 9.8 as follows:

> **Dispute Resolution. <u>The Parties will make commercially reasonable efforts to resolve disputes under this Agreement. Upon written notice of a dispute by one Party to the other, the disputing Party shall provide a written request to the IPA for mediation. Such written request shall include a brief summary of the dispute, with confidential information so marked. The IPA shall undertake mediation procedures developed by the IPA for the purposes of implementing this Section 9.8, except in such cases where under the IPA's mediation procedures the IPA must recuse itself. Both Parties shall participate in the IPA's mediation procedures in good faith. In the event that, upon completion of the IPA's mediation procedures (including termination due to IPA recusal), the Parties have not resolved their dispute, either party may pursue dispute resolution</u> ~~Disputes under this Agreement will be resolved~~ in accordance with applicable law~~, or in accordance with the provisions of the Dispute Resolution Addenda selected on the Cover Sheet~~.**

Note that this formulation would require the IPA to at minimum develop informal guidelines for mediation, including standards for recusal, which would reside outside of the REC Contract. This allows the IPA the flexibility to change its procedures over time but creates at least an aspirational obligation on the IPA to have some procedure at all times.

7. Other Pertinent Issues. Are there other pertinent issues to consider or areas where the January 2019 REC Contract has proven to be complex or inflexible in ways that may not benefit the Program? Do you have specific feedback on sections such as Extensions (Section 5(b)),

Treatment of Performance Assurance in Connection with Interconnection Cost Estimates (Section 4.3(b)), Force Majeure (Article 6) or Assignments (Section 9.2) of the January 2019 REC Contract?

In the event of a REC shortfall where there are surplus RECs but not enough to cover the entire shortfall of a portfolio, the Approved Vendor should have the discretion to choose which shortfall the surplus RECs will apply to. Otherwise, for Approved Vendors offering a service to multiple customers or system owners, some customers will be cross-subsidizing other customers. In addition, Approved Vendors providing services to third parties would have to implement complex and confusing language to their customers in order to fully and accurately describe the customer's actual costs and charges under the existing formulation.

The Joint Solar Parties further recommend the following line edits to the REC Contract to the extent the revised REC Contract contains substantially similar language:

Sec. 2.2 (4th Paragraph)

> **Further, if the IPA reasonably determines and delivers notice to Buyer that any portion of the Product Delivered by Seller does not conform to the requirements of this Agreement (such Product the "Non-Conforming Product"), Buyer's payment obligation with respect to any Non- Conforming Product shall be excused.**

Rationale:
The lack of a reasonable determination creates uncertainty and complicates feasibility, financing, and operation of the project. A notice is not sufficient to provide comfort or certainty for project owners or operators.

Sec. 9.2 (3rd Paragraph)

> **Seller may not assign Seller's rights and obligations under this Agreement without the prior written consent of the Buyer, which consent shall not be unreasonably withheld, conditioned or delayed; provided that any such assignment (i) shall be a minimum of one or more Product Orders in their entirety and (ii) may be made no earlier than the greater of a) thirty (30) Business Days after the Trade Date of the applicable Product Order(s), or b) the point in time at which the Collateral Requirement associated with all Designated Systems in Seller's Product Orders proposed for Assignment has been received by Buyer (excluding collateral assignment, as described below); and provided further, that Seller may, without the consent of Buyer, transfer or assign this Agreement or a Product Order to an entity already registered with the IPA as an Approved Vendor ~~having a valid REC Contract with Buyer through the ABP~~. In the case of an assignment made by Seller without the consent of Buyer, Seller must notify the IPA and Buyer of any such assignment, and provide Buyer with all pertinent contact and payment information with respect to the assignee.**

Rationale:
The requirement to have a contract is problematic for an assignee because the assignee needs to take assignment of the Product Order in order to get a contract for such Product Order. This creates a catch 22: it is problematic for the assignee to enter into a contract without first receiving assignment of a Product Order (especially where the system/project related to the Product Order is assignee's only asset or first asset); however, the assignee cannot receive assignment of the Product Order without already having a contract.

Sec. 5.7
Please make the following edit:

> **Limitation of Liability. THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED HEREIN SATISFY THE ESSENTIAL PURPOSES HEREOF. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGE IS PROVIDED, SUCH REMEDY OR MEASURE SHALL BE THE SOLE AND EXCLUSIVE REMEDY THEREFOR. IF NO REMEDY OR MEASURE OF DAMAGE IS EXPRESSLY PROVIDED, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY AS THE SOLE AND EXCLUSIVE REMEDY. EXCEPT AS SPECIFICALLY SET FORTH HEREIN, NO PARTY SHALL BE REQUIRED TO PAY OR BE LIABLE FOR SPECIAL, CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES, LOST PROFIT OR BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT, CONTRACT OR OTHERWISE. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE DEEMED LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS. NEITHER PARTY'S LIABILITY SHALL EXCEED THE AMOUNTS PAID HEREUNDER EXCEPT AS REQUIRED BY SECTION 4 OF THE COVER SHEET.**

Rationale:
The absence of a limitation on liability is problematic. It is customary for liability to be limited to amounts received.

Sec. 5.3
Please make the following edit:

> **Net Out of Settlement Amounts. The Non-Defaulting Party will aggregate all Settlement Amounts into a single amount by netting out (a) all amounts that are due to the Defaulting Party for Product that has been Delivered and not yet paid for, plus, at the option of the Non-Defaulting Party, any cash, security or other Performance Assurance then available to the Non-Defaulting Party, plus any or all other amounts due to the Defaulting Party under this Agreement against (b)**

all Settlement Amounts that are due to the Non-Defaulting Party, plus any or all other amounts due to the Non-Defaulting Party under this Agreement, so that all such amounts will be netted out to a single liquidated amount (the "Termination Payment"). ~~If the Termination Payment is a positive amount, t~~The Defaulting Party shall pay the positive amount of Termination Payment to the Non-Defaulting Party. ~~If the Termination Payment is a negative amount, there shall not be a Termination Payment and the Non-Defaulting Party shall not owe any amount to the Defaulting Party~~. The Termination Payment, if any, is due to the Non- Defaulting Party within twenty (20) Business Days following notice.

Rationale:
The Defaulting Party is penalized with the loss of any cash, security or other Performance Assurance. However, the Defaulting Party should not lose amounts due to it for products and/or services produced and delivered in good faith and without default.

Sec. 4.3(a), (3rd Paragraph)

If a Designated System is otherwise Energized as of the Trade Date pending the full establishment of the Standing Order and where such Standing Order request has been initiated by Seller as of the Trade Date, Seller may request for Buyer to withhold, and if so requested, Buyer shall withhold, a portion of the ~~first~~ last REC payment in the amount of the Collateral Requirement of such Designated System as Seller's Performance Assurance in respect of such Designated System in lieu of the timing required by the first paragraph of this Section.

Rationale:
This change is for consistency with the final order in 19-0995.

8. Illinois Solar for All REC Contracts. The contracts for the Illinois Solar for All program were based on the ABP REC Contract with changes made (a) to conform with the specific requirements of the Illinois Solar for All program, and (b) to conform with applicable State of Illinois requirements for contracts with the Agency (as opposed to contracts with a utility). Are there issues specific to the Illinois Solar for All program that are not also applicable to the ABP REC Contract that should be considered?

The Solar for All REC Contract will benefit as much if not more from simplification and addressing a single program per REC Contract—or at least having terms separated by program type.