

December 31, 2018

[Commenter 18]

[Commenter 18 address]

Re: Adjustable Block Program Contract – Second Round Comments

[Commenter 18] appreciates the further opportunity to comment on the draft Renewable Energy Credit Agreement (“REC Contract”) released on December 7th.

[Commenter 18] appreciates that the opportunity for significant, considered stakeholder comments on the REC Contract has been limited given the compressed timeframe for review. In order to allow an opportunity for cleaning up the issues of inconsistent definitions, etc. that will undoubtedly result from a compressed review and revision process, [Commenter 18] suggests that the REC Contract be released on the proposed timeframe in “substantially final form”, which would give the parties another opportunity to clean up outstanding issues.

We are generally supportive of the comments submitted by [redacted] on even date herewith (the “[redacted] Comments”), and would like to offer the following comments, clarifications, and proposed language:

1. Assignment

As noted in the [redacted] Comments, the assignment language is critical to a functioning market for financing counterparties. We have proposed language generally consistent with those comments. In particular, the proposed revision provides for Buyer consent to collateral assignment, which is standard industry practice and required by major financing parties. In the rare event that a utility has decided not to provide consent to collateral assignment (and where such requirement was not incorporated in the revenue contract or otherwise required of the utility), the result was a severe constraint in available financing, which set back solar development in the relevant utility service territory for years. Lenders and tax equity investors understand that notice to or consent by a utility buyer is necessary, but these financing parties require a consent to ensure that they can exercise their rights as secured parties in respect of the Seller’s interests in the REC Contract.

In order to allow for appropriate direct assignment, as well as for the collateral assignment required in connection with third-party financing, we recommend the following revisions to Section 13(j):

“The following changes are made to Article 9:

Section 9.1 shall not apply.

Section 9.2 is replaced in its entirety with the following:

“This Agreement shall be binding upon, shall inure to the benefit of, and may be performed by, the successors and assignees of the Parties, **except provided** that no assignment, pledge or other transfer of this Agreement by either Party shall **be permitted or** operate to release the assignor, pledger, or transferor from any of its obligations under this Agreement unless, **except as otherwise provided below**, the other Party (or its successors or assigns) consents in writing to ~~the any such~~ assignment, pledge or other transfer ~~and expressly releases the assignor, pledger, or transferor from its obligations thereunder.~~

Buyer may make a request to Seller for the transfer or assignment of Buyer’s rights and obligations under the Agreement to the “Transferee” provided that the assignment is for all Transactions under this Agreement and provided, however that Buyer may **not**, without the **written** consent of Seller (**such consent not to be unreasonably withheld or delayed**), ~~(i) transfer or assign this Agreement to an Affiliate of Buyer which is creditworthy on the Effective Date, or (ii) transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets of Buyer that is creditworthy on the Effective Date.~~

Seller may make a request to Buyer for the transfer or assignment of Seller’s rights and obligations under the Agreement to the “Transferee”. ~~provided that the assignment is for all Transactions under this Agreement. Such request shall be made no earlier than thirty (30) calendar days after the Trade Date of the most recently executed Product Order.~~ Such request must name the **proposed** Transferee, ~~provide the relationship between Seller and Transferee (if any), and must provide all pertinent financial, settlement and contract information and all necessary documentation to show that Transferee meets all conditions specific to a Seller under this Agreement,~~ and **confirm further** that the Transferee is approved by the IPA or their designee as an “Approved Vendor”. ~~and agrees to abide by the applicable terms and conditions required of an “Approved Vendor” under the ABP. Buyer may request additional information from Seller,~~ and Buyer will have thirty (30) calendar days to provide consent (**such consent not to be unreasonably withheld or delayed**) or to notify Seller that Buyer rejects the assignment or transfer. In the event Seller assigns its rights and obligations to a Transferee, Seller’s Performance Assurance shall remain in place until Transferee posts replacement performance assurance consistent with Section 4.3 of this Agreement.

Notwithstanding the foregoing, Seller may without the consent of Buyer (i) assign its rights and obligations hereunder to an affiliate of Seller, (ii) transfer, sell, pledge, assign or otherwise encumber its interests in this Agreement in connection with any financing, including collateral assignment thereof to a party providing financing to Seller or a project, or (iii) transfer or assign this Agreement to any person or entity (A) acquiring or succeeding to all or substantially all of the assets

of the Seller or (B) with comparable experience operating solar projects (or that has hired a manager with such qualifications) and that has the financial capability to perform Seller’s obligations under this Agreement. In connection with any financing related assignment described in clause (ii) above, upon Seller’s (or its financing party) reasonable request, Buyer will promptly execute and deliver a consent to collateral assignment for the benefit of such financing party providing for its exercise of the rights of secured parties generally in respect of Seller’s interests under this Agreement.

This Agreement will bind each Party’s successors and permitted assigns. Any attempted assignment in violation of this provision will be void ab initio.”

2. Termination Rights

Hair-trigger Buyer termination rights present a significant barrier to financing, and, particularly in the initial years of any given solar project, commissioning issues may delay the project achieving its performance objectives. Typically, parties to REC contracts and Power Purchase Agreements anticipate these issues and provide for reasonable cure periods.

Financing parties will find it difficult to get comfortable with the REC Contract as currently drafted because the Buyer termination rights are onerous and do not provide reasonable opportunity for cure by Seller. [Commenter 18] supports the [redacted] Comments regarding extending subscription levels cure periods for Seller to 90 days.

In addition, [Commenter 18] supports a) an industry-standard 90-day cure period to cure any Buyer notices of Seller deficiencies, b) 30-day cure period for settlement amount payments, rather than the commercially unreasonable 2 day period proposed in the REC Contract, and c) a 90 day period for a defaulting party to remedy a noticed contract failure, with opportunity for extension if the defaulting party is diligently pursuing a remedy, rather than the commercially unreasonable 20 day period proposed.

3. Letter of Credit Form

In order to allow for the normal course variation in Letter of Credit forms, [Commenter 18] would recommend the following revision to Section 13(b) of the REC Contract:

“The following is added as Section 1.37.5:

““Letter of Credit” means an irrevocable, transferable standby letter of credit issued by a major U.S. commercial bank or the U.S. branch office or U.S. agency

office of a foreign bank utilizing **an agreement substantially in the form of** either of the **forms options** attached as Exhibit E to the REC Contract.””

4. Capacity Change

Section 5(e) of the REC Contract should be revised to be consistent with the allowance for variation in system layout set forth on Page 39 of the Final Adjustable Block Program Guidebook (“Final Guidebook”) released today, December 31, 2018. Alternatively, **[Commenter 18]** would point our comments submitted December 10th, 2018, suggest that a 20% variation would be appropriate and consistent with the latitude provided in the Final Adjustable Block Program Guidebook for “factors that were not apparent in the Approved Vendor’s commercially reasonable investigation of the project when conducting the initial project design” (Final Guidebook at 39).

Thank you for your consideration.