Comments of Sameer H. Doshi
on Adjustable Block Program Draft Refreshed REC Contract (published July 24, 2020)
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Disclaimer: I represent nobody in Illinois (although in my professional legal work I am representing a party in another state that is collaborating there with a solar-related entity) and am strictly writing as a concerned individual.

These comments, generally speaking, are more about ensuring that the different contractual provisions all tightly tie together, rather than about discretionary policy judgments. Thank you for your consideration.

Sections 1.29 and 3.3 – definition of Delivery Term. The text seems to define a 181-month period. (Month 181 is 180 months after Month 1. From the first day of Month 1 to the last day of Month 181 is a span of 181 months.) The Plan language (§ 6.15.5) quoted in Contract footnote 34 states 180 months.

Section 2.4(f) should mention Schedule D in connection with project removal.

In parts of Section 2.6(a) such as (ii), (v), and (vii), where the community solar project's REC quantities eligible for payment are being updated, you might want to reference contractually defined terms like Contract Nameplate Capacity, Designated System Contract Maximum REC Quantity, Delivery Year Expected REC Quantity. This isn't necessary [and the equivalent sections of the January 2019 ABP REC contract did not use those terms] but could make things a smidge clearer.

Section 4.1(b)(iii) should mention Schedule D in connection with project removal.

The last paragraph of § 5.1 could, or maybe should, mention the possible inclusion of community solar quarterly payment adjustments in the Quarterly Netting Statements, as described more fully in Section 2.6 and Exhibit F-3.

Section 5.4, edit: "paragraph (6) of ~~this~~ subsection (c) of Section 1-75 of the Illinois Power Agency Act (20 ILCS 3855)"

In three places (Section 1.57, Section 5.1, Exhibit F-4) you have the following typo: "16 quarterly periods **if** such Designated System"

Section 7.1(c), I suggest this edit: "cancel the Letter of Credit if the withheld amount of such last REC payment exceeds the Letter of Credit amount"

Section 7.1(e)(i), I suggest this edit: "Section 7.1(c) ~~and~~ or Section 7.1(d)"

Considering together §§ 7.1(c) and 7.1(e)(i), should the "excess Performance Assurance Amount" towards the end of § 7.1(c) say "excess Performance Assurance Amount, if any"? If Seller calculates the cash withholding and/or LC reduction correctly, maybe there wouldn't be excess at the end. Or maybe I'm misunderstanding.

Considering together §§ 7.1(c) and 7.1(e)(i), is Performance Assurance Requirement being reduced commensurately at the same time as the reduction in a Designated System's allocated Performance Assurance Amount following the cash/LC swap? That seems like a logical inference (§§ 1.62 and 7.1(b) say PAA must always ≥ PAR) but could be clearer.

Considering together §§ 7.1(d) and 7.1(e)(iii), maybe it should specify somewhere that Buyer or IPA will notify Seller of the amount of the new Performance Assurance Requirement after a collateral drawdown. [Also, an assignee Seller might want to know its total new Performance Assurance Requirement after receiving transfer of a Product Order under § 13.1.] Maybe this could be a program administration feature rather than contractual provision.

In each of §§ 7.1(d) and 7.1(e)(iii), it mentions the circumstance where "Buyer draws on Seller's Performance Assurance pursuant to Section 4.2(c)(v)(A) or Section 4.2(d)". This may be a bit of a judgment call, but you could consider deleting the reference there to Section 4.2(d), since § 4.2(c)(v)(A) describes a drawdown process that includes drawdowns under § 4.2(d).

Section 7.1(e)(i), edit: "reduced to be commensurate"

In several places, the draft relies on a concept of a posted Performance Assurance Amount "attributable to" or "in connection with" a Designated System. See, e.g., § 7.1(e)(v); Sch. D., para. 6; Sch. D, Att. A, Col. E; fourth & fifth paragraphs of Section 10.1; Exhibits C-2 & C-3 ("associated Collateral Requirement held by Buyer"). That concept makes sense intuitively, but it's not always clear how that "Amount" is known / tracked / calculated / allocated. Clearly it's initially based on the Designated System's Collateral Requirement from Schedule A on the Trade Date; although the contract allows for it to be updated at a later time (and then fixed indefinitely until maybe something else happens). § 7.1(e)(i) helpfully addresses the updating of this value; § 7.1(e)(iii) could be a little clearer in the same regard. And again, maybe that could be a program administration feature rather than contractual provision.

Section 7.2, second paragraph, first sentence. Read the first parenthetical phrase ("or inform Buyer…") carefully. The syntax of this phrase doesn't quite fit with the subject-predicate agreement of the overall sentence.

Section 8.2(b)(iii), capitalize the defined term "Regulatorily Continuing".

Section 9.2, under "Events Related to Removal of Designated Systems", in the third line of the paragraph, change "that" to "but"

Section 9.4(b)(iii): regarding the phrase "with any excess amounts return to Seller", a couple comments: First, the phrase should be moved to the end of the sentence to be clear that Seller

gets remaining excess Performance Assurance back at the end regardless of how Seller pays the Termination Payment (from new cash or from posted collateral). Second, the phrase should be edited as: "with any excess Performance Assurance Aamounts returned to Seller."

Section 15.7(g) mentions Article 7. This reference should be to Article 11. [In the equivalent section of the January 2019 ABP REC Contract -- Section 9.5(g) of the Master Agreement -- it refers to Article 7, which is the Government Action section of the Master Agreement there. The Government Action section of your refreshed contract is Article 11.]

Exhibit A, Schedule D: The top of page 1 mentions Section 2.4(d), but that's not the only contractual provision requiring this schedule.

Exhibit A, Schedule D, paragraph 6: reconcile this description of the Collateral Requirement being reduced to zero with the new definition of Collateral Requirement at Contract § 1.17, final sentence, part (i).

Exhibit A, Schedule D, general comment: a couple of the contractual project removal pathways give Buyer or IPA discretion to approve Seller's request. (I'm looking at § 7.2 [Buyer gives "recognition and substantiation" of the request] and last paragraph of § 10.1** [Agency "grant[s]" the request].) And the relevant contractual provisions mention the Seller using Schedule D to make the removal request. But Schedule D is framed (e.g. para. 9) as simply "memorializing actions provided for [in the contract]" [that presumably have already occurred before the Schedule D is signed], and then the signatory parties "acknowledge" the occurrence of the predicate event(s). Buyer's or IPA's approval for either of those two circumstances is not clearly stated within Schedule D. That seems a little inconsistent. Possibly a couple wording changes somewhere could address that.

Comments on Exhibit A, Schedule D, Attachment A

- Re the Column G heading of the table, couldn't the payment be made by an LC draw (as an alternative to cash payment or forfeiture of cash collateral)? That would be consistent with Sch. D, para. 5 ("(i) cash or (ii) forfeiture of previously posted Performance Assurance").
- Under each of Reasons for Removal A/B/C/D/J/K, the "Resulting Payment" should be the sum of the two values, not the greater of the two values. [to be consistent with § 2.2 in the first four cases; § 2.4(f) for Reason J; § 4.1(b)(iii) for Reason K]
- Under Reason for Removal C, it says "Section 2.2" rather than "Section 2.2(c)"
- Under Reason for Removal D, it says "Section 2.2" rather than "Section 2.2(d)"
- Under Reason for Removal E, the description of the event should more fully describe the various circumstances in § 2.4(b)(iii) (in addition to lack of interconnection approval) that could lead up to Seller's request for removal.

- Under each of Reasons for Removal G/H/I, in the "Resulting payment" part it should say "this ~~REC Contract~~ Agreement or an agreement between Buyer and Seller under the ABP" to match the language of § 2.5(b).
- Under Reason for Removal K, the description of the event (failure to deliver 1 REC) does not fully capture the new process outlined in §§ 4.1(a) and 4.1(b). The "60 days" mentioned here is a vestige of the old contract.
- Under Reason for Removal L, the description of the event (high interconnection cost estimate) needs to be edited to capture the revised process (30 days, plus the circumstance of a cost dispute, etc.) described in revised § 7.2. Also, the "Resulting payment" description should reflect the possibility that system removal in this pathway could occur prior to collateral posting.
- Under Reason for Removal M, in the "Resulting payment" part, perhaps it should reflect the possibility that the "Performance Assurance Amount attributable to such Designated System" could be returned to Seller, as contemplated in the fourth paragraph of § 10.1.
- **Need to insert a new Reason for Removal to capture the circumstance in the last paragraph of § 10.1 (irreparable damage to system).
- Reason for Removal N (referencing § 5.3.1 of the Revised Plan) – isn't this the same as the pre-construction exit option in Contract § 2.4(d)(i)? The text should probably mention that. Also, the "Required payment" part should acknowledge [assuming my assumption is correct that Contract § 2.4(d)(i) is being referenced here] that this removal could occur prior to scheduled initial collateral posting for the project, while Seller would still pay the Collateral Requirement upon project removal. Finally, if you're going to mention the related Revised Plan section, § 6.15.1 may be more directly relevant.

In Exhibit C-1, second page, final line, the "contained in Exhibit C" reference should instead be to Exhibit C-2. And I have the same comment about the final line on the second page of Exhibit C-3.

Exhibit C-6: the text near the top of this assignment form could be a little clearer about when this form is needed versus Exhibit C-5 (i.e., because the transferee Approved Vendor didn't already have an ABP Agreement, consistent with § 13.1).

Exhibit D, Form of Invoice could allow for the inclusion of community solar quarterly payment adjustments that are described more fully in Section 2.6 and Exhibit F-3. The idea that a payment for a system is simply for RECs from a particular [month, year] through [month, year] may not capture a retroactive adjustment for prior payments.

Exhibit F-1, final paragraph, I suggest this edit: "Sections 2.6 or 4.2(e) of the Agreement"

In Exhibit F-2, under each of the Step 1 table and the Step 4 table, there is an errant "(b)" that perhaps doesn't belong there.

Also in Exhibit F-2, in footnote 75 at the bottom of the second page, the reference to "Section 4.2(c)(v)" should be "Section 4.2(d)", I think.

In Exhibit F-3, in footnote 76 at the bottom of the first page, the reference to "this Exhibit H" should be "this Exhibit F-3".