

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on November 17, 2016

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair  
Patricia L. Acampora  
Gregg C. Sayre  
Diane X. Burman, concurring

CASE 15-E-0302 - Proceeding on Motion of the Commission to  
Implement a Large-Scale Renewable Program and a  
Clean Energy Standard.

ORDER APPROVING ADMINISTRATIVE COST RECOVERY,  
STANDARDIZED AGREEMENTS AND BACKSTOP PRINCIPLES

(Issued and Effective November 17, 2016)

BY THE COMMISSION:

INTRODUCTION

In response to directives in the Commission's August 1, 2016 "Order Adopting a Clean Energy Standard" in this proceeding (the CES Order), the New York State Energy Research and Development Authority (NYSERDA) filed a Petition on August 25, 2016, proposing an administrative adder to recover costs and fees incurred to administer Tier 1 of the Renewable Energy Standard (RES), and a proposed Renewable Energy Credit (REC) sales and payment schedule intended to generally match the sales quantity and timing to the expected actual load quantity so as to minimize the time that NYSERDA holds RECs in its own account. The Petition also proposes an administrative adder and sales and payment schedule for the Zero-Emissions Credit (ZEC) program and a mechanism by which the customers of electric distribution companies will provide security for the payments

that will be owed to REC and ZEC generators. On September 15, 2016, NYSERDA supplemented its Petition by filing proposed standardized agreements for the Commission's approval that NYSERDA proposes to use to govern REC and ZEC transactions between NYSERDA and the Load-Serving Entities (LSEs).

By this order, the Commission (1) approves a reduced ZEC adder for the recovery of ZEC administrative costs; (2) authorizes other REC and ZEC administrative costs, reduced from the amounts initially projected by NYSERDA, to be recovered by NYSERDA from existing fund balances; (3) approves the form and content of standard ZEC and REC agreements to govern REC and ZEC transactions between NYSERDA and the LSEs; (4) approves principles for the electric distribution companies to provide a customer funded financial backstop guarantee mechanism to ensure payments will be made to REC and ZEC generators; and (5) directs electric distribution companies to collaborate with NYSERDA and Staff of the Department of Public Service to develop an implementation process to effectuate the backstop mechanism.

THE PETITION

Administrative Adder

NYSERDA's Petition requests approval of administrative adders to cover costs and fees incurred by its administration of Tier 1 of the RES program in calendar year 2017 and the first year of the ZEC program (April 1, 2017 through March 31, 2018). NYSERDA's proposal requests amounts related to administration of the programs including direct and indirect costs for NYSERDA staff salaries, fringe benefits, and other operating costs. It also includes a request related to a proportional allocation of

the New York State Cost Recovery Fee (CRF)<sup>1</sup> to the CES program. NYSERDA proposes to provide quarterly reports to DPS Staff on actual expenses incurred.

As part of administering the CES program, NYSERDA indicates that it will build a purchase and sale platform for the purposes of buying and selling RECs and ZECs. NYSERDA also intends to enter into contractual relationships with each New York LSE to provide for the periodic payment by each LSE to NYSERDA for the LSE's share of REC and ZEC costs. In addition, NYSERDA proposes executing so-called "backstop" agreements with each of the electric distribution companies to cover any risk that inflows to NYSERDA from the LSEs not meeting their REC and ZEC payment obligations necessary for NYSERDA to cover its obligations to the REC and ZEC generators.

In an effort to reduce REC and ZEC adder charges related to non-recurring expenses and first year systems/capital costs in the first year of the programs, NYSERDA proposes to use uncommitted Systems Benefit Charge (SBC), Energy Efficiency Portfolio Standard (EEPS), and Renewable Portfolio Standard (RPS) dollars and remaining RPS Administrative Consulting and New York Generation Attribute Tracking (NYGATS) dollars to fund such costs rather than collect additional funds through a REC/ZEC adder mechanism. These uncommitted funds are in addition to those NYSERDA reported in an April 29, 2016 filing (which reported on committed and uncommitted fund balances as of

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<sup>1</sup> The Cost Recovery Fee is a fee assessed on public authorities by New York State for an allocable share of state governmental costs attributable to the provision of services to public benefit corporations pursuant to Section 2975 of the Public Authorities Law. The Director of the Budget is responsible for determining the amount owed by each public benefit corporation. NYSERDA is allocated an overhead cost across NYSERDA's program activities in proportion to its total annual expenses.

February 29, 2016).<sup>2</sup> The following tables summarize the 2017 REC program costs and REC/ZEC system and non-recurring expenses, and the dollars that NYSERDA proposes to fund the costs.

REC Program salary and overhead expenses (through December 31, 2017)	\$1,420,000
REC/ZEC Program non-recurring expenses	\$1,000,000
REC/ZEC system development costs	\$5,930,000
Estimated REC CRF expenses	\$150,000
Total Administrative Costs	\$8,500,000

Funded through repurposed SBC/EEPS/RPS funds	(\$6,500,000)
Funded through remaining RPS and NYGATS Administrative Funds	(\$2,000,000)
Total Funding Sources	(\$8,500,000)

The following tables summarize the 2017-2018 ZEC program costs. NYSERDA proposes a ZEC administrative adder of \$.2172 on the ZEC price for the period April 1, 2017 through March 21, 2018 to fund the costs.

ZEC Program Salary and overhead expenses (April 1, 2017 – March 31, 2018)	\$1,640,000
Estimated ZEC CRF expenses	\$4,360,000
Total Administrative Costs	\$6,000,000
ZECs expected to be offered for sale April 1, 2017 – March 31, 2018	27,618,000
ZEC Administrative Adder per ZEC (\$6,000,000 ÷ 27,618,000)	\$.2172

### The REC Program

NYSERDA proposes that the REC purchase and sale program would operate in accordance with the following principles:

- On or before December 1, 2016, and in each subsequent year, NYSERDA will publish on its website a REC price (including

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<sup>2</sup> See, Case 07-M-0548, Proceeding Regarding an Energy Efficiency Portfolio Standard, NYSERDA's Uncommitted Funds Report, filed April 29, 2016.

any adder), the estimated quantity of RECs NYSERDA expects to offer for sale in the 2017 compliance period, the ACP price, and will make available to each LSE the maximum number of RECs that may be purchased by such LSE.

- A requirement that each LSE execute and provide to NYSERDA a copy of the LSE REC Agreement, including the completed Attachment and the number of RECs to be purchased, which number will be reserved for the LSE.
- The LSE REC Agreement will provide a schedule of monthly payments due to NYSERDA, beginning in January of 2017, with each monthly amount calculated as 1/12 of the LSE reserved RECs multiplied by the REC price. Under NYSERDA's proposed funding approach, no administrative adder would be included in the REC price for year 2017.
- A requirement that each LSE to establish and identify to NYSERDA an account in the NYGATS to which NYSERDA will deposit RECs purchased by the LSE.
- NYSERDA will publish on its website the terms, including methods of payment, by which LSEs may make ACP payments to NYSERDA.
- NYSERDA will inform DPS Staff, on a monthly basis, as to the amount of funds received for both REC purchases and ACPs as against the total amount due for each month, and will report to DPS Staff on the compliance or non-compliance of individual LSEs.
- Between January and June of 2018, and in each subsequent year, NYSERDA, using data provided by NYGATS regarding actual load served during the previous year, will reconcile the compliance requirements for each LSE with the purchases and ACP payments by each LSE and determine the additional purchases and sales, if any, that must be directed to match the compliance requirements to load served.
- Between January and June of 2018, and in each subsequent year, NYSERDA will make available any unsold RECs for purchase by LSEs toward compliance requirements.
- In June of 2018, and in each subsequent year, NYSERDA, using data available in NYGATS will assist DPS Staff in determining LSE compliance based on actual load served and RECs purchased/ACPs paid during the previous year.

Relatedly, NYSERDA asks that the Commission clarify the requirement that LSE's notify NYSERDA of their intention to purchase RECs by December 1 also includes a requirement to inform NYSERDA of the number of RECs the LSE intends to purchase.

NYSERDA supplemented the Petition with a proposed standardized REC sales agreement with the relevant sales, payment schedules and other relevant and necessary terms including methods of payment, financial security requirements, penalties for non-compliance, and other requirements consistent with the principles stated above incorporated into the proposed standardized contract. NYSERDA further requests that the Commission direct each LSE to execute such agreements and provide them to NYSERDA. Finally, NYSERDA requests that DPS Staff be authorized, upon request by NYSERDA, to approve modifications to the form of those agreements as may be necessary to reflect changes to the Program or other contingencies over the life of the Program.

#### Zero-Emissions Credit Program

NYSERDA proposes that the ZEC purchase and sale program would operate in accordance with the following principles:

- NYSERDA will determine and make available to each LSE the number of ZECs the LSE will be required to purchase for compliance, assuming the maximum eligible generation from the zero-emission facilities. Each LSE's requirement will be determined based on data provided by NYGATS regarding the load served by the LSE during the previous 12 months.
- A requirement that each LSE execute and provide to NYSERDA a copy of the LSE ZEC Agreement, including the completed Attachment.
- A schedule of monthly payments due to NYSERDA, beginning on April 1 of 2017, with each monthly amount calculated as 1/12 of the LSE compliance amount multiplied by the ZEC price (including any adder).

- A requirement that each LSE establish and identify to NYSERDA an account in the NYGATS to which NYSERDA will deposit ZECs purchased by the LSE.
- NYSERDA will structure its agreements with the zero-emissions credit facilities to provide that NYSERDA's payments to those facilities will become due on interval dates that will allow NYSERDA to make payments using receipts from the LSE ZEC Agreements.
- NYSERDA will inform DPS Staff, on a monthly basis, as to the amount of funds received as against the total amount due for each month, and will report to DPS Staff on the compliance or non-compliance of individual LSEs.
- Between April and September of 2018, and each subsequent year, NYSERDA, using data provided by NYGATS regarding actual load served during the previous April to March time period and the total number of ZECs purchased by NYSERDA associated with zero-emissions MWh produced during the April to March time period, reconcile the compliance requirements for each LSE with the purchases by each LSE and determine the additional purchases and sales that must be directed to match the compliance requirements to load served.

NYSERDA supplemented the Petition with a proposed standardized ZEC sales agreement with the relevant sales, payment schedules and other relevant and necessary terms including methods of payment, financial security requirements, penalties for non-compliance, and other requirements consistent with the principles stated above incorporated into the proposed standardized contract. NYSERDA further requests that the Commission direct each LSE to execute such agreements and provide them to NYSERDA. Finally, NYSERDA requests that DPS Staff be authorized, upon request by NYSERDA, to approve modifications to the form of those agreements as may be necessary to reflect changes to the Program or other contingencies over the life of the Program.

Financial Backstop Guarantee

NYSERDA's ability to make timely payments to REC and ZEC generators is dependent upon receipt of REC and ZEC proceeds in advance of the payment due date. The CES Order provided that the distribution customers of the electric distribution companies should serve as a financial backstop to ensure NYSERDA has sufficient funds to make timely payments to the generators. NYSERDA proposes the financial backstop to apply to both REC and ZEC programs and consist of the following principles.

- On-going approval to use any NYSERDA cash balances in the Clean Energy Fund (CEF) to meet ZEC program cash shortages until such funds are restored to the CEF through ongoing ZEC payments or the financial backstop guarantee collection mechanism.<sup>3</sup>
- The financial backstop guarantee mechanism would be invoked if aggregate shortfalls exceeded the amounts that could be covered short term from CEF cash balances (and the CEF cash balances would have to be restored through this mechanism).
- The financial backstop guarantee must be established such that it can be called upon and implemented to timely address cash shortfalls and allow generators to be paid properly.

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), Notices of Proposed Rulemaking were published in the State Register on September 15, 2016 [SAPA No. 15-E-0302SP6 and 15-E-0302SP7]. The time for submission of comments pursuant to the Notices expired on October 31, 2016. The comments received are addressed below.

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<sup>3</sup> NYSERDA's petition notes that this source of temporary funds may be limited based on a scheduled decline from 2016 to 2019 and its potential use as an alternative to an outside borrowing source for the NY Green Bank.

COMMENTS

The following entities submitted comments regarding NYSERDA's August 25, 2016 petition: Alliance for Clean Energy New York, Inc.; Joint Utilities;<sup>4</sup> Constellation Energy Nuclear Group, LLC and Exelon Generation Company, LLC (Exelon Companies); Constellation NewEnergy, Inc., Constellation Energy Power Choice, LLC., Constellation Energy Services of New York, Inc. (Constellation); and Pace Energy and Climate Center (Pace). Assemblyman William A. Barclay (120<sup>th</sup> District) also submitted comments supporting the CES program, in particular encouraging the Commission to not delay implementation of the ZEC portion of the program.

ACE NY provides support specifically for the portions of NYSERDA's Petition which focus on the mechanism by which the distribution utility customers will provide a financial backstop for the contracts between NYSERDA and the generators of RECs for Tier 1 resources. PACE supports the financial backstop proposal, as well, stating that it is reasonable and in the public interest.

Exelon Companies suggest that the Commission direct NYSERDA to modify the proposed ZEC Sales Agreement to provide an explicit right for ZEC sellers to exercise the rights and remedies of third-party beneficiaries to the final ZEC Sales Agreement between NYSERDA and LSEs, such that ZEC Sellers will have the ability to enforce those contracts in the event that NYSERDA does not. Exelon Companies argue that the modification will benefit ZEC sellers, and therefore the ZEC program

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<sup>4</sup> Joint Utilities include: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation d/b/a National Grid; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

generally, by ensuring the dependability of the ZEC payment stream from NYSERDA.

Constellation also suggested changes to the proposed ZEC sales agreement by adding a new sub section (b) to Section 2.7 to read as follows:

(b) Regardless of the Actual ZEC Quantity, Buyer and Seller agree that, on a timely basis, the ZEC Purchase Quantity and the total purchase price paid hereunder shall be reconciled pursuant to the CES Order, reflecting the actual load served by Buyer during the applicable compliance period.

Constellation argues that the additional language will enable the efficient administration of the ZEC program including year-end balancing reconciliation of LSE actual load.

The Joint Utilities request that the Commission clarify that the financial backstop mechanism would apply to the New York Power Authority (NYPA) and the Long Island Power Authority (LIPA). Joint Utilities also seek clarification that any electric distribution company backstop charges are to be collected from distribution customers, raising concerns that requiring the electric distribution companies to be financial guarantors for NYSERDA or the State of New York, could have broad adverse financial implications for investor-owned utilities. Joint Utilities also request clarification that LSEs will be able to bank RECs from year-to-year.<sup>5</sup>

The Joint Utilities support NYSERDA's request to use uncommitted funds for the 2017 REC program and suggest that previously collected, uncommitted funds and any funds from Alternative Compliance Payments (ACPs) should apply to any

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<sup>5</sup> DPS Staff and NYSERDA have proposed details of the banking feature in the Clean Energy Standard Phase I Implementation Plan Proposal filed on October 31, 2016 in this proceeding. The Commission will address those details when it considers the Implementation Plan Proposal in the future.

backstop costs before additional funds are collected. Due to the complexity of the CES proposals, the Joint Utilities express their concern with the collection of funds from customers in excess of NYSERDA program needs. In order to minimize the potential for over-collections the Joint Utilities suggest the need for a formulaic true-up methodology to reconcile the new CES collections with program needs, on a monthly basis. The Joint Utilities support a contract structure for the backstop similar to the existing contracts implementing the System Benefits Charge (SBC). The Joint Utilities also suggest that the compliance period for ZECs be moved to a calendar year basis, with the compliance year for 2017 a partial year (for the months April–December 2017), then starting in 2018 and moving forward with a full 12-month calendar compliance period. The Joint Utilities suggest that when pricing RECs, NYSERDA should consider the market price of adjacent regions to avoid a large amount of unsold RECs held by NYSERDA, thereby requiring the full cost of these RECs to flow through a backstop charge. Also, the Joint Utilities express concern that their customers will be paying both the market REC price and the full REC price for NYSERDA's commitment.

The Joint Utilities request that the REC and ZEC standard contracts be clarified to confirm in plain terms that NYSERDA has good and marketable title to the RECs and ZECs it is selling to the LSEs. Further, the Joint Utilities state that since monthly payments are being made by each LSE, the available RECS and ZECs should be transferred into the LSEs NYGATS accounts on a monthly basis to provide greater visibility to LSEs for annual compliance. The Joint Utilities also suggest that the contract should also clarify that LSEs will have collected the funds from customers for the procurement of RECs and ZECs before being required to remit them to NYSERDA.

The Joint Utilities note that the standard contracts point out the possibility NYSERDA may be unable to fulfill its contractual obligation to provide the quantity of RECs and ZECs it has agreed to sell. The Joint Utilities believe that section of the contract (Provision 2.7) undermines the contract as a whole. The Joint Utilities suggest a remedy whereby NYSERDA would be granted the authority by the Commission to waive any ACP surcharges in the event that NYSERDA is unable to fulfill its contractual obligation to provide RECs.

Relating to ZECs, the Joint Utilities suggest that if an LSE returns unneeded ZECs to NYSERDA, the LSE should recover the price paid, inclusive of the administrative adder. The Joint Utilities point out that one LSE's excess ZECs are equal to another LSE's (or a group of LSEs') shortage of ZECs so that NYSERDA will recover the administrative adder for each ZEC because all the ZECs, by program design, will be purchased. The Joint Utilities state that this would not have to apply to RECs, since LSEs have other options for surplus RECs.

The Joint Utilities state that LSEs may have an interest in keeping the quantity of RECs they decide to purchase from NYSERDA private, in order to preserve competitive pricing of RECs in the broader REC market and limit the ability of other REC seller to target LSEs who may be short of their compliance obligation with discriminatory pricing. Finally, the Joint Utilities encourage additional consideration regarding other types of information about LSE acquisition and bidding strategies that should be kept confidential or private.

#### DISCUSSION

##### REC Administrative Adder

As administrator of the CES program, NYSERDA is required to develop new and expanded approaches for the

procurement, contracting and sale of RECs and ZECs to implement the CES Order. The required activities, among other things, include designing and building new internet-based purchase and sale platforms capable of accommodating all contemplated transactions. To accomplish these tasks, NYSERDA forecasts it will need to expend up to \$6.93 million for one-time REC and ZEC program and system development costs; which includes approximately \$1 million of non-recurring expenses to cover the potential for engaging support to assist with REC and ZEC program design components. In addition, NYSERDA forecasts the need to expend up to \$1.42 million for program staff salaries and benefits (including contractor support expenses) to administer the REC program. NYSERDA has also allocated \$150,000 of New York State Cost Recovery Fees to the REC program.

Recognizing that NYSERDA had limited time to fully develop detail cost estimates before it was required to file its petition, Staff engaged with NYSERDA to provide more details on its one-time REC and ZEC program and system development costs. NYSERDA agreed that the forecast included all possible likely costs that could reasonably been projected to be incurred in the operation of the program, therefore the costs were purposely conservative in the sense that NYSERDA is seeking authorization for the maximum amounts it might have to expend. However, over the past few months since the petition was filed, NYSERDA was able to refine its initial estimates and provide Staff with the following updated projected costs that it considers to be more in-line with actual costs to develop the program. Table 1 below summarizes the initial and revised projections:

	<u>Original</u>	<u>Original</u>	<u>Original</u>	<u>Revised</u>	<u>Revised</u>	<u>Revised</u>	
<u>Non-recurring</u>	<u>2016</u>	<u>2017</u>	<u>Total</u>	<u>2016</u>	<u>2017</u>	<u>Total</u>	
Design/staff augmentation	\$500,000	\$500,000	\$1,000,000	\$100,000	\$500,000	\$600,000	
<u><b>Capital</b></u>							
LSE/certification portal build	\$750,000	\$500,000	\$1,250,000	\$250,000	\$500,000	\$750,000	
NYGATS upgrades	\$750,000	\$750,000	\$1,500,000	\$250,000	\$750,000	\$1,000,000	
Resource-disposition design & reporting	\$152,000	\$314,000	\$466,000		\$314,000	\$314,000	
Resource-operational integration	\$305,000	\$628,000	\$933,000		\$628,000	\$628,000	
LSE/certification portal	\$153,000	\$628,000	\$781,000		\$628,000	\$628,000	
NEIS upgrades		\$1,000,000	\$1,000,000		\$0	\$0	
<b>Total</b>	<b>\$2,110,000</b>	<b>\$3,820,000</b>	<b>\$5,930,000</b>		<b>\$500,000</b>	<b>\$2,820,000</b>	<b>\$3,320,000</b>
<b>Total</b>	<b>\$2,610,000</b>	<b>\$4,320,000</b>	<b>\$6,930,000</b>		<b>\$600,000</b>	<b>\$3,320,000</b>	<b>\$3,920,000</b>

The Commission finds NYSERDA's revised estimate of expenses to be reasonable. The Commission hereby authorizes NYSERDA to expend administrative costs for REC Program salary and overhead expenses through December 31, 2017, one-time REC and ZEC Program non-recurring expenses, one-time REC and ZEC system development costs, and 2017 REC CRF expenses by category up to the amounts shown in the following table:

REC Program salary and overhead expenses (through December 31, 2017)	\$1,420,000
REC/ZEC Program non-recurring expenses	\$600,000
REC/ZEC system development costs	\$3,320,000
Estimated REC CRF expenses	\$59,000
<b>Total Administrative Costs</b>	<b>\$5,399,000</b>

Since these one-time costs are proposed by NYSERDA to be funded using uncommitted SBC, EEPS, and RPS program funds, as well as remaining uncommitted administrative funds from the RPS and NYGATS to offset the administrative adder costs of the REC Program for 2017, ratepayer collections in the short term will not be affected by any over-estimate. The Commission finds that the repurposing of these previously authorized balances is an appropriate use of existing funds rather than requiring additional collections for the one-time REC and ZEC costs and administration of the REC programs for 2017, particularly given the low initial quantity of RECs to which an adder would have been applied. This resolution of the funding proposal results in no need for a REC Administrative Adder in 2017. Therefore, the Commission approves funding of the costs describe above in the manner set forth in the following table:

Funded through repurposed SBC/EEPS/RPS funds	\$3,399,000
Funded through remaining RPS and NYGATS Administrative Funds	\$2,000,000
Total Funding Sources	\$5,399,000

#### ZEC Administrative Adder

For the ZEC program, NYSERDA estimates its administrative costs to be approximately \$6 million; \$1.64 million of program staff salaries and benefits (including contractor support expenses) and \$4.36 million of allocated CRF. The Commission finds NYSERDA's estimate of expenses to be reasonable. The Commission hereby authorizes NYSERDA to expend administrative costs for ZEC Program salary and overhead expenses and CRF expenses for the period April 1, 2017 - March 31, 2018 by category up to the amounts shown in the following table:

ZEC Program Salary and overhead expenses (April 1, 2017 – March 31, 2018)	\$1,640,000
Estimated ZEC CRF expenses	\$4,360,000
Total Administrative Costs	\$6,000,000

However, similar to the REC program adder, we direct NYSERDA to use uncommitted SBC/EEPS/RPS funds to offset the CRF portion of the anticipated ZEC program expenses which will significantly reduce the ZEC adder to be collected from ratepayers in 2017. Specifically, we direct NYSERDA to utilize uncommitted SBC/EEPS/RPS funds to cover CRF expenses allocated to the ZEC program. In its petition, NYSERDA notes that previously authorized programs, like the Clean Energy Fund, included an allocation of the CRF based on the higher allocation factor. A portion of those CRF costs will now be shifted from those programs to the CES program. Therefore, shifting uncommitted funds from those programs along with the shifting costs makes sense and will help minimize first year program impacts. The approved ZEC adder is calculated by dividing the \$1,640,000 in ZEC Program salary and overhead expenses by the number of ZECs (27,618,000) to be purchased by LSEs, and yields a result of \$.0594 per ZEC for the period April 1, 2017 through March 31, 2018. Therefore, the Commission approves funding of the costs describe above in the manner set forth in the following table:

Funded through repurposed SBC/EEPS/RPS funds	\$4,360,000
Funded through ZEC Administrative Adder	\$1,640,000
Total Funding Sources	\$6,000,000
ZECs expected to be offered for sale April 1, 2017 – March 31, 2018	27,618,000
ZEC Administrative Adder per ZEC (\$1,640,000 ÷ 27,618,000)	\$.0594

#### Administrative Adder Balances

While NYSERDA's revised projections for administering the REC and ZEC programs are reasonable, there is still the potential that the REC and ZEC administrative costs forecasted

above may be overstated. The Commission shall, therefore, require NYSERDA to keep a detailed account of all costs in administering the CES program, as described further below. Any unspent administrative funds shall be used for future ratepayer benefit.

Standard Contracts

The Commission agrees with the Joint Utilities that if NYSERDA is unable to provide the quantity of RECs it has agreed to sell, an LSE will be left without fault of its own with few options except to make Alternative Compliance Payments at a price that is ten percent higher than the REC price. That result is undesirable because it increases costs to ratepayers while defeating the incentive function of the ten percent premium. The suggestion by the Joint Utilities in that instance that Alternative Compliance Payments be made at the same price that would have been paid for the unfulfilled RECs, without the ordinary ten percent premium, is a reasonable solution and is adopted as a solution that will substantially simplify compliance.

The Commission also agrees that the Joint Utilities request that the ZEC and REC Standard Contracts be clarified to confirm in plain terms that NYSERDA has good and marketable title to the RECs and ZECs it will be selling is a reasonable clarification. However, the Commission will not direct a clarification suggested by the Joint Utilities, that would permit LSEs to withhold ZEC and REC funds from NYSERDA until after the funds have been collected from customers. The Commission expects the LSEs to provide funding in accordance with payment schedules contained in the Standard Contracts and to plan their collections accordingly. The Commission also does not adopt the Joint Utilities suggestion that RECs and ZECs be transferred into an LSE's NYGATS accounts at the same frequency

as the LSE's monthly payments to NYSERDA. If possible, matching REC payments with REC allocations in NYGATS would be an administrative convenience for program participants. However, over the course of the annual compliance period, generated RECs are unlikely to accrue to NYSERDAs account at an even, predictable rate that matches REC payments every month. In any event, the solution adopted above regarding the Alternative Compliance Payments price to be paid in cases of under-delivery by NYSERDA will greatly reduce the need of the LSEs to track NYSERDA deliveries on a monthly basis.

The Commission also adopts the suggestion by the Joint Utilities that LSEs returning unneeded ZECs to NYSERDA shall recover the price paid inclusive of the administrative adder. As the Joint Utilities point out, ZECs being returned by one LSE will, by design, be purchased by another LSE allowing full but not double recovery of the administrative adder. The Commission also clarifies that in the event LSEs obtain Commission authorization to purchase ZECs directly from the ZEC generators, the number of ZECs eligible for purchase by NYSERDA will be reduced in equal number to those purchased by LSEs directly.

The Commission will adopt Constellation's suggestion to modify Section 2.7 of the ZEC Standard Contract because it correctly implements the CES Order in a manner that is not yet covered. A subsection 2.7 (b) will be added such that it shall read (new language underlined):

2.7. Settlement and Reconciliation.

- (a) In the event the Actual ZEC Quantity is less than 27,618,000 (the ZEC Cap), NYSERDA shall notify Buyer in writing on or before June 1, 2018 of the adjusted Quantity of ZEC Certificates to be Delivered and shall refund to Buyer by check a proration of the projected purchase price, less the administrative adder.

(b) Regardless of the Actual ZEC Quantity, Buyer and Seller agree that, on a timely basis the ZEC Purchase Quantity and the total purchase price paid hereunder shall be reconciled pursuant to the CES Order, reflecting the actual load served by Buyer during the applicable compliance period.

The Commission does not adopt the suggestion by the Exelon Companies to provide for an explicit right for ZEC sellers to exercise the rights and remedies of third-party beneficiaries to the final ZEC Sales Agreement between NYSERDA and LSEs. Creating a private right of action against the LSEs would likely be considered an overly burdensome requirement by LSEs that would be difficult for the Commission to supervise. The contracts between ZEC sellers and NYSERDA in addition to the financial backstop mechanism are sufficient to protect the rights and interest of ZEC sellers.

Regarding trade secrets and confidentiality, NYSERDA's proposed provision regarding trade secrets and commercial information is sufficient to protect appropriate commercial interests and correctly references the State Freedom of Information Act. The REC and ZEC standard contract, as modified, are attached as in the Appendix.

LSE are directed to provide NYSERDA with executed copies of the ZEC and REC agreements attached hereto as soon as possible, but in no event later than 30 days from the date of issuance of this order. NYSERDA is encouraged to develop a process or method for executing the agreements including e-signatures and other tools or rules that streamline or otherwise facilitate NYSERDA's administration of the program and simplify LSE and generator participation. Staff is authorized to approve changes to the standard contracts needed to facilitate the program as long as so modified, the standard contracts continue to comply with this and other CES related orders.

Financial Backstop Mechanism

As noted in the CES Order, total procurement expenditures in any given cycle will not be known beforehand. Although the financial risk to NYSERDA will be relatively small, it may nevertheless require a guarantor. The electric distribution companies are best situated to provide this service through cost recovery from their ratepayers. The Joint Utilities are correct that the backstop obligation is to be collected from customers and is not intended to be a financial obligation on the electric distribution companies or their shareholders. Further, the Commission expects that LIPA and NYPA's previously announced participation in the CES program will include this backstop mechanism to ensure that full and equitable implementation of this vital statewide policy. The timing of collections is an issue that needs further development. In the interim, we approve the following principles:

- On-going approval to use any NYSERDA cash balances in the Clean Energy Fund (CEF) and balances in funds from Alternative Compliance Payments to meet REC or ZEC program cash shortages.
- The financial backstop guarantee mechanism would be invoked if aggregate shortfalls exceeded the amounts that could be covered short term from CEF cash balances and balances in funds from Alternative Compliance Payments.
- The financial backstop guarantee must be established such that it can be called upon and implemented to timely address cash shortfalls and allow generators to be paid properly.

The electric distribution companies are directed to collaborate with NYSERDA, Staff and other interested parties to further develop the financial backstop guarantee mechanism and NYSERDA in consultation with Staff shall file a petition proposing such a mechanism for the Commission's consideration.

The mechanism must give NYSERDA sufficient flexibility to manage its finances including cash flow but also provide transparency and predictability for other stakeholders including electric distribution companies, LSE's and ratepayers. An efficient true-up method should also be considered such that large under or over collections can be avoided to the extent possible.

Reporting Requirements

In its Petition, NYSERDA states that it expects to provide quarterly reports to DPS staff on actual expenses incurred in the administration of the CES program. The Commission directs that each quarterly report contain itemized expenses associated with administration and the development costs of the individual REC and ZEC platforms and systems described in the Petition and the number of NYSERDA staff that have been assigned to each program.

Other Issues

The Joint Utilities suggest that when pricing RECs NYSERDA should consider market prices in adjacent regions to avoid a situation where NYSERDA is contractually obligated to purchase RECs it cannot sell because LSEs have met their obligations by purchasing lower cost RECs from nearby states. The price of NYSERDA's RECs will remain as set in the August 1, 2016 Order Adopting a Clean Energy Standard - equal the weighted average cost per MWh NYSERDA paid to acquire the RECs to be offered, plus a reasonable Commission-approved adder to cover the administrative costs and fees incurred by NYSERDA to administer Tier 1. Allowing such a subjective interference would have a detrimental effect on the non-NYSERDA REC market. In any event, NYSERDA has the ability to rollover unsold RECs to the next compliance period. With targets increasing on an annual basis, the demand for NYSERDA-offered RECs will also increase in future years.

The Joint Utilities also suggest that the ZEC Program compliance period be moved to a calendar year, with April to December 2017 functioning as a partial year. The Commission will not adopt this proposal because the formula used to set the ZEC price and the tranches is partially based on costs in the April 1<sup>st</sup> to March 31<sup>st</sup> timeframe and modifying would cause more disruption to the program than benefit.

The Commission orders:

1. The New York State Energy Research and Development Authority (NYSERDA) is authorized to expend up to \$5,399,000 for Renewable Energy Standard program (REC Program) salary and overhead expenses through December 31, 2017, one-time REC Program and Zero-Emissions Credit Requirement Program (ZEC Program) non-recurring expenses, one-time REC and ZEC Program system development costs, and 2017 REC Program Cost Recovery Fee (CRF) expenses by category up to the amounts shown in the body of this order. NYSERDA is further authorized to repurpose up to \$3,399,000 of uncommitted System Benefits Charge (SBC), Energy Efficiency Portfolio Standard (EEPS), and/or Renewable Portfolio Standard (RPS) funds and up to \$2,000,000 of uncommitted RPS and NYGATS Administrative Funds to pay for such administrative costs. NYSERDA shall retain any unspent administrative funds for future ratepayer benefit.

2. NYSERDA is authorized to expend up to \$6,000,000 for ZEC Program salary and overhead expenses and ZEC Program Cost Recovery Fee (CRF) expenses for the period April 1, 2017 through March 31, 2018, by category up to the amounts shown in the body of this order. NYSERDA is further authorized to repurpose up to \$4,360,000 million of uncommitted SBC/EEPS/RPS to pay for such administrative costs, and to recover the remaining \$1,640,000 of such costs through a ZEC Adder to be

charged by NYSERDA to Load Serving Entities (LSEs) at a rate of \$.0594 per ZEC for the period April 1, 2017 through March 31, 2018. NYSERDA shall retain any unspent administrative funds for future ratepayer benefit.

3. NYSERDA shall file quarterly reports containing itemized expenses associated with administration and the development costs of the REC and ZEC platforms and systems described in the body of this order.

4. All Electric Distribution Companies are authorized to collect the ZEC price paid to NYSERDA to acquire the ZECs to be offered, including the approved adder to cover the administrative costs and fees incurred by NYSERDA to administer the ZEC program, from all supply customers on a volumetric basis.

5. All LSEs are directed to provide NYSERDA with executed copies of the standard contract REC and ZEC agreements attached hereto as soon as possible, but in no event later than 30 days from the date of issuance of this order.

6. The Electric Distribution Companies are directed to collaborate with NYSERDA, Staff and other interested parties to further develop the financial backstop guarantee mechanism described in the body of this order and NYSERDA in consultation with Staff shall file a petition proposing such a mechanism for the Commission's consideration.

7. In the Secretary's sole discretion, the deadlines set forth in this order may be extended. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least one day prior to the affected deadline.

8. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS  
Secretary

## **AGREEMENT FOR THE SALE OF RENEWABLE ENERGY CERTIFICATES**

This Agreement (the "Agreement") is made as of December 1, 2016 ("Effective Date") by and between the New York State Energy Research and Development Authority, a public benefit corporation, having a principal business address of 17 Columbia Circle, Albany, New York 12203 ("NYSERDA" or "Seller"), and the Load Serving Entity entering this Agreement using the unique Confirmation ID number provided by NYSERDA (the "LSE or "Buyer"). NYSERDA and Buyer are each referred to herein as a "Party" and are collectively referred to herein as the "Parties."

### **RECITALS:**

WHEREAS, by its August 1, 2016 "Order Adopting a Clean Energy Standard" ("CES Order") in Case 15-E-0302 the PSC established a Renewable Energy Standard ("RES"); and

WHEREAS, the RES requires each LSE, on behalf of its customers, to procure qualifying CES Tier 1 eligible renewable energy credits, in the form of Tier 1 eligible renewable energy certificates ("REC Certificates") in a defined and increasing percentage of the total annual load served by the LSE, and establishes the RES compliance period as January 1 to December 31 of each year, beginning in 2017; and

WHEREAS, under the CES Order LSEs are authorized to meet their customers' RES obligations by purchasing CES compliance-eligible REC Certificates from NYSERDA or from other sources, by making Alternative Compliance Payments ("ACPs") to NYSERDA, or by any combination thereof, and are required to inform NYSERDA, by December 1, 2016, whether they intend to purchase REC Certificates from NYSERDA during the compliance period; and

WHEREAS, the CES Order establishes, for compliance year 2017, the REC Certificate price to be offered by NYSERDA to Buyer as the estimated weighted average cost per MWh NYSERDA paid to acquire the RECs, which for year 2017 is \$21.16 (the "REC Certificate Price"); and

WHEREAS, Buyer is an LSE, acting on behalf of its customers; and

WHEREAS, Buyer, on behalf of its customers, has submitted to NYSERDA the Purchase of 2017 Tier 1 RECs – Acceptance of Terms and Conditions form, notifying NYSERDA of the number of REC Certificates Buyer wishes to purchase from NYSERDA; and

WHEREAS, NYSERDA will provide to Buyer a Renewable Energy Certificate Confirmation confirming the number of RECs it intends to Deliver to the Buyer in exchange for payments from Buyer ("REC Certificate Quantity"); and

NOW, THEREFORE, in consideration of the foregoing and of the mutual promises hereinafter set forth, the Parties, intending to be legally bound, agree as follows:

## ARTICLE 1: DEFINITIONS

- 1.1 **Definitions.** In addition to any other terms defined herein, the following terms shall have the meaning ascribed to them below:
- (a) **“Actual REC Quantity”** means the number of REC Certificates actually available for sale by NYSERDA to LSEs for compliance year 2017.
  - (b) **“Agreement”** means this Agreement for the Sale of Renewable Energy Certificates and including Exhibits A (Standard Terms and Conditions for All NYSERDA Agreements); B (NYSERDA Prompt Payment Policy Statement).
  - (c) **“Delivery” or “Deliver”** means NYSERDA’s electronic delivery of REC Certificates via the NYGATS to the Buyer’s account within the NYGATS, in accordance with the NYGATS Operating Rules, or such other form or matter of crediting REC Certificates to an LSE account as may be approved or directed by the PSC.
  - (d) **“Energy Services Company or ESCO”** means any eligible competitive energy services company (ESCO) operating in New York State pursuant to the Uniform Business Practices approved by the PSC.
  - (e) **“Load Serving Entity” or “LSE”** means any entity or individual that sells retail commodity electricity supply to an end use customer located in New York State, including any ESCO, each electric distribution company regulated by the PSC serving in their roles as electric commodity supplier of last resort, jurisdictional municipal utilities, community choice aggregators not otherwise served by an ESCO, customers purchasing power directly from NYISO, and Long Island Power Authority (“LIPA”) and New York Power Authority (“NYPA”) to the extent LIPA and NYPA have voluntarily agreed to act as LSEs.
  - (f) **“NYGATS”** means the New York Generation Attribute Tracking System, the tracking system that records electricity generation attribute information within New York State, and processes generation attribute information from energy imported and consumed within New York State, as a basis for creating tradable generation attribute certificates, including REC Certificates.
  - (g) **“NYGATS Operating Rules”** means the rules governing the operation of the NYGATS by NYSERDA and its designated NYGATS Administrator, and the participation in and use of the NYGATS by users. The Operating Rules describe how the system is operated and delineate the roles, requirements and responsibilities of all parties.<sup>6</sup>
  - (h) **“New York State Public Service Commission or PSC”** means the commission duly authorized to operate in New York State pursuant to Articles 1 and 2 of the Public Service Law.
  - (i) **“NYISO”** means the New York Independent System Operator.

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<sup>6</sup> . <https://www.nyserda.ny.gov/All-Programs/Programs/NYGATS/Registration-Documents>

(j) “REC Certificate” means certain CES Tier-1 eligible NYGATS Certificates evidencing RECs derived from the energy production of Megawatt-hours by RES-eligible electric generation sources. Each REC, as reflected in a REC Certificate, represents the energy production of one (1) Megawatt-hour.

## **ARTICLE 2: PURCHASE AND SALE OF RENEWABLE ENERGY CERTIFICATES**

2.1 Purchase. Subject to the terms and conditions of this Agreement, NYSERDA agrees to sell and Deliver to Buyer, and Buyer agrees to purchase and accept from NYSERDA, REC Certificates in a quantity equal to the REC Certificate Quantity. The purchase price for each REC Certificate shall be the REC Certificate Price; the total projected purchase price is equal to the REC Certificate Price multiplied by the REC Certificate Quantity (“Total Projected Purchase Price”). The amount of REC Certificates ultimately acquired by the LSE from NYSERDA shall be determined in accordance with the reconciliation procedure set forth in Section 2.7, below.

2.2 Deliver/Delivery. Subject to Section 2.7, Seller shall, on a quarterly basis, Deliver to Buyer via NYGATS REC Certificates, in a quantity equal to the proportionate share of the RECs actually owned by NYSERDA at the conclusion of such quarter that equals the proportion of the LSE’s REC Certificate Quantity to the aggregate number of REC Certificate Quantities confirmed by NYSERDA to all LSEs. Upon notification of Delivery by Seller, Buyer shall be obligated to accept Delivery in NYGATS within 10 days. NYSERDA shall transfer full and clear title to the REC Certificates to Buyer free and clear of any lien or other encumbrance at the time of Delivery. Notwithstanding the foregoing, this Agreement and the CES Order restrict Buyer from reselling REC Certificates. To the extent Buyer determines later that the number of REC Certificates purchased by Buyer from NYSERDA exceeds the Buyer’s REC compliance requirement, Buyer can offer to resell such excess REC Certificates to NYSERDA at the cost paid to NYSERDA, inclusive of any administrative adder.

2.3 Payment. Payment by Buyer shall be due to NYSERDA in uniform monthly amounts, beginning in January of 2017, equaling in the aggregate the Total Projected Purchase Price set calculated in Section 2.1, above, in accordance with the payment schedule to be provided to Buyer by NYSERDA. NYSERDA will not Deliver REC Certificates prior to receipt of payment. Any and all payments due to NYSERDA shall be made by check or by wire/ACH payment as follows:

By Check:

NYSERDA  
Attn: Finance  
17 Columbia Circle  
Albany, New York 12203

By Wire/ACH:

Bank:	Bank of America
Account No.:	601-0316543
ABA:	021000322 if by ACH; 026009593 if by wire
Account Name:	NYSERDA Mac30

When making payment, Buyer shall include the Customer ID provided on the Renewable Energy Certificate Confirmation that NYSERDA will send by e-mail in early December.

2.4 Interest. All overdue payments hereunder shall bear interest from (and including) the due date to (but excluding) the date of payment at a rate equal to two percent (2%) over the per annum rate of interest from time to time published in the Wall Street Journal under "Money Rates" as the prime lending rate, provided that in no event shall the applicable interest rate ever exceed the maximum rate permitted by applicable law. NYSERDA shall not refund interest in the event that LSE resells unused REC Certificates to NYSERDA.

2.5 Taxes/Fees. NYSERDA shall pay any taxes or other fees, if any, imposed on the creation, or ownership of the REC Certificates up to the date of Delivery. Buyer will pay any taxes or other fees, if any, imposed on the receipt or ownership of the REC Certificates after on and after the date of Delivery.

2.6 Term. This Agreement shall be effective on and as of December 1, 2016 and shall terminate upon satisfaction by Buyer and Seller of their respective obligations, unless terminated earlier pursuant to Article 5 of this Agreement or extended by mutual agreement of the Parties or at the direction of the PSC. Termination shall not affect provisions hereof that expressly survive termination.

2.7. Settlement and Reconciliation. On or before June 1, 2018, NYSERDA will reconcile the Actual REC Quantity with the aggregate amount of REC Certificate Quantities contained in Agreements for the Sale of Renewable Energy Certificates with the LSEs, and with the LSE's actual compliance obligation for the 2017 Compliance Year. If the Actual REC Quantity is insufficient to satisfy the REC Certificate Quantity contained herein, NYSERDA shall notify Buyer in writing on or before June 1, 2018 of the adjusted Quantity of REC Certificates Delivered and shall refund to Buyer by check a proration of the projected purchase price. If the Actual REC Quantity exceeds the aggregate amount of REC Certificate Quantities contained in Agreements for the Sale of Renewable Energy Certificates with the LSEs. NYSERDA may make additional REC Certificates available for purchase.

### **ARTICLE 3: REPRESENTATIONS AND WARRANTIES**

3.1 NYSERDA representations and warranties. NYSERDA hereby represents and warrants to Buyer as follows:

- (a) NYSERDA has and, at all times during the Term will have, all necessary power and authority to execute, deliver and perform its obligations hereunder.
- (b) The execution, Delivery and performance of this Agreement by NYSERDA has been duly authorized by all necessary action and does not violate any of the terms or conditions of NYSERDA governing documents, or any contract to which it is a party, or any law, rule, regulation, order, judgment or other legal or regulatory determination applicable to NYSERDA. This Agreement constitutes the valid and binding obligation of NYSERDA enforceable against it in accordance with its terms, subject to the effects of bankruptcy, insolvency, reorganization, moratorium and similar laws affecting enforcement of creditors' rights and remedies generally and to general principles of equity.

(c) There is no pending or (to NYSERDA's knowledge) threatened litigation, arbitration or administrative proceeding that materially adversely affects NYSERDA's ability to perform its obligations under this Agreement.

(d) The REC Certificates delivered to Buyer hereunder shall be of good title and eligible for compliance under the RES.

(e) EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, NYSERDA EXPRESSLY DISCLAIMS ANY OTHER REPRESENTATIONS OR WARRANTIES, WHETHER WRITTEN OR ORAL, AND WHETHER EXPRESS OR IMPLIED INCLUDING, WITHOUT LIMITATION, ANY REPRESENTATION OR WARRANTY WITH RESPECT TO CONFORMITY TO MODELS OR SAMPLES, MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE.

**3.2 Buyer representations and warranties.** Buyer hereby represents and warrants to NYSERDA as follows:

(a) Buyer is duly organized, validly existing and in good standing under its laws of incorporation and has the requisite power and authority to own, lease and operate its properties and to carry on its business as being conducted on the date hereof. Buyer has, and at all times during the Term will have, all necessary power and authority to execute, deliver and perform its obligations hereunder.

(b) The execution, delivery and performance of this Agreement by Buyer has been duly authorized by all necessary action and does not violate any of the terms or conditions of Buyer's governing documents, or any contract to which it is a party, or any law, rule, regulation, order, judgment or other legal or regulatory determination applicable to Buyer. This Agreement constitutes the valid and binding obligation of the LSE enforceable against it in accordance with its terms, subject to the effects of bankruptcy, insolvency, reorganization, moratorium and similar laws affecting enforcement of creditors' rights and remedies generally and to general principles of equity.

(c) There is no pending or (to Buyer's knowledge) threatened litigation or administrative proceeding that materially adversely affects Buyer's ability to perform its obligations under this Agreement.

(d) Buyer has, and at all times during the Term, will have the financial capability to perform its obligations hereunder.

(e) Buyer is an Account Holder as defined in the NYGATS Operating Rules.

#### **ARTICLE 4: EVENTS OF DEFAULT**

**4.1 Events of Default.** For purposes of and during the Term, each of the following shall constitute an event of default ("Event of Default") by a Party:

(a) if a Party materially breaches any or all of its obligations as described in this Agreement and such breach is not cured within five (5) Business Days of written notice of such breach from the other Party;

- (b) if any representation or warranty made by a Party in Article 3 of this Agreement proves to have been misleading or false in any material respect when made; and/or
- (c) if a Party:
  - (i) makes an assignment or any general arrangement for the benefit of its creditors,
  - (ii) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause under any bankruptcy or similar law for the protection of creditors, or has such a petition filed against it,
  - (iii) otherwise becomes bankrupt or insolvent (however evidenced), or
  - (iv) becomes unable to pay its debts as they fall due.

## **ARTICLE 5: REMEDIES UPON DEFAULT**

5.1 Remedies. Upon an Event of Default, the non-defaulting Party may (a) terminate this Agreement upon written notice to the defaulting Party, (b) withhold any payments due in respect of this Agreement, (c) set off any payments due against any other credits or payments under other agreements between the Parties, and/or (d) withhold any REC Certificate Delivery.

5.2 Exclusive Remedy. The remedies set forth in this article 5 shall be the sole and exclusive remedies of the respective parties in the event of a default, and a party's liability shall be limited as set forth in this section. All other remedies or damages at law are hereby waived.

5.5 Limitation of Liability. In the event of a default, the defaulting party's liability shall be limited as set forth herein. In no event shall any other liability be incurred by either Party for any obligations that arise under this agreement, including (but not limited to) liability for consequential, incidental, punitive, exemplary, or indirect damages in tort, contract, or otherwise.

## **ARTICLE 6: NOTICES**

### **6.1 Notices.**

- (a) All notices, requests, consents, approvals and other communications which may or are required to be given by either party to the other under this Agreement shall be in writing and shall be transmitted either:
  - (1) via United States express mail, return receipt requested;
  - (2) by personal delivery;
  - (3) by expedited delivery service; or
  - (4) by e-mail, return receipt requested (provided a copy is also sent by expedited delivery service).

Such notices shall be addressed as follows, or to such different addresses as the parties may from time-to-time designate as set forth in paragraph (c) below:

To Buyer:                      Company  
Attn:  
Name  
Address Line 1  
Address Line 2  
City, State Zip code  
Email Address:

To NYSERDA:                    NYSERDA  
Attn: Office of the General Counsel  
17 Columbia Circle  
Albany, New York 12203-6399  
Email address: [pete.keane@nyserda.ny.gov](mailto:pete.keane@nyserda.ny.gov)

With a copy to

NYSERDA  
Attn: Doreen Harris  
17 Columbia Circle  
Albany, New York 12203-6399  
Email address: [doreen.harris@nyserda.ny.gov](mailto:doreen.harris@nyserda.ny.gov)

- (b) Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States [or Canadian] mail, as of the date of first attempted delivery at the address and in the manner provided herein, or in the case of facsimile transmission or email, upon receipt of an email acknowledgement of receipt.
- (c) The parties may, from time to time, specify any new or different address in the United States [or Canada] as their address for purpose of receiving notice under this Agreement by giving fifteen (15) days written notice to the other party sent in accordance herewith. The parties agree to mutually designate individuals as their respective representatives for the purposes of receiving notices under this Agreement. Additional individuals may be designated in writing by the parties for purposes of implementation and administration/billing, resolving issues and problems and/or for dispute resolution.

6.2 The addresses for notice and payment specified in Sections 6.1 may be changed from time to time by written notice by either Party to the other Party without amendment of this Agreement.

## **ARTICLE 7: MISCELLANEOUS**

7.1 **Force Majeure.** Neither party hereto shall be liable for any failure or delay in the performance of its respective obligations hereunder if and to the extent that such delay or failure is due to a cause or circumstance beyond the reasonable control of such party, including, without limitation, acts of God or

the public enemy, expropriation or confiscation of land or facilities, compliance with any law, order or request of any Federal, State, municipal or local governmental authority, acts of war, rebellion or sabotage or damage resulting therefrom, fires, floods, storms, explosions, accidents, riots, or strikes. In the event that such failure or delay occurs, the claiming Party shall notify the other Party of the occurrence thereof as soon as possible, shall use reasonable efforts to resume performance as soon as possible, and shall regularly consult with the other Party during the pendency of the force majeure event. In the event that the force majeure event lasts more than forty-five (45) days, NYSERDA may terminate this Agreement with no further obligation or liability to Buyer other than to Deliver any REC Certificates for which Buyer has made payment prior to termination that have not been Delivered to Buyer as of the termination date.

7.2 Severability. If any provision of this Agreement shall be declared by any court of competent jurisdiction to be illegal, void or unenforceable, all other provisions of this Agreement shall not be affected and shall remain in full force and effect. If any provision of this Agreement is so broad as to be unenforceable, that provision shall be interpreted to be only so broadly as will enable it to be enforced.

7.3 Waiver. No delay or omission by a Party in the exercise of any right under this Agreement shall be taken, construed or considered as a waiver or relinquishment thereof, and any such right may be exercised from time to time and as often as may be deemed expedient. If any of the terms and conditions hereof are breached and thereafter waived by a Party, such waiver shall be limited to the particular breach so waived and is not deemed to waive any other breach hereunder.

7.4 Forward Contract. Each Party represents and warrants to the other that it is a “forward contract merchant” within the meaning of the United States Bankruptcy Code, that this Agreement is a “forward contract” within the meaning of the United States Bankruptcy Code, and that the remedies identified in this Agreement shall be “contractual rights” as provided for in 11 U.S.C. § 556 as that provision may be amended from time to time.

7.5 Assignment. Except as specifically provided otherwise in this Section 7.5, the assignment, transfer, conveyance, subcontracting or other disposal of this Agreement or any of the Buyer’s rights, obligations, interests or responsibilities hereunder, in whole or in part, without the express consent in writing of NYSERDA shall be void and of no effect as to NYSERDA. Such consent shall not be unreasonably withheld.

Either Party may, upon written notice, assign its rights and obligations hereunder, or transfer such rights and obligations by operation of law, to any entity with which or into which such Party shall merge or consolidate or to which such Party shall transfer all or substantially all of its assets, provided that such other entity agrees to be bound by the terms hereof and provided further, that such other entity’s creditworthiness is comparable to or higher than that of such Party at the time this Agreement was executed and such Party is not relieved of any obligation or liability hereunder as a result of such assignment.

7.6 Entire Agreement; Amendment. This Agreement embodies the entire agreement and understanding between NYSERDA and the Buyer and supersedes all prior agreements and understandings relating to the subject matter hereof. Except as otherwise expressly provided for herein, this Agreement may be amended, modified, changed, waived, discharged or terminated only by an

instrument in writing, signed by the party against which enforcement of such amendment, modification, change, waiver, discharge or termination is sought.

7.7 All Legal Provisions Deemed Included. It is the intent and understanding of the Seller and NYSERDA that each and every provision of law required by the laws of the State of New York to be contained in this Agreement shall be contained herein, and if, through mistake, oversight or otherwise, any such provision is not contained herein, or is not contained herein in correct form, this Agreement shall, upon the application of either NYSERDA or the Seller, promptly be amended so as to comply strictly with the laws of the State of New York with respect to the inclusion in this Agreement of all such provisions.

7.8 Governing Law/Venue. This Agreement shall be governed by, and construed in accordance with the laws of the State of New York applicable to contracts executed and to be performed in New York State without regard to its conflicts of laws principles. The parties irrevocably acknowledge and accept that all actions arising under or relating to this Agreement, and the transactions contemplated hereby and thereby shall be brought exclusively in a United States District Court or New York State Court located in Albany, New York having subject matter jurisdiction over such matters, and each of the Parties hereby consents to and accepts such personal jurisdiction of, and waives any objection as to the laying of venue in, such courts for purposes of such action.

7.9 Headings. The Article and Section titles in this Agreement are only for purposes of convenience and do not form a part of this Agreement and will not be taken to qualify, explain or affect any provision thereof.

7.10 No Third Party Beneficiaries. Nothing herein is intended to or should be construed to create any rights of any kind whatsoever in third persons not parties to this Agreement.

7.11 Freedom of Information Law. Seller acknowledges that NYSERDA is subject to and must comply with the requirements of New York's Freedom of Information Law ("FOIL," see Public Officers' Law Article 6; 21 NYCRR Part 501).

7.12 Claim of Confidentiality. Information of any tangible form including any document that Buyer wishes to be protected from disclosure to third parties, including this Agreement must be marked "Confidential" or "Proprietary" at the time such information is provided to NYSERDA. Notwithstanding the foregoing, NYSERDA, in accordance with the provisions of the CES Order, shall be permitted to report to the New York State Department of Public Service, as to the amounts received from LSE for REC purchases and ACPs as against the total due each month and on the LSE's compliance or non-compliance, generally, with the terms of this Agreement.

7.13 Trade Secrets/ Commercial Information. The FOIL Law (Public Officers Law § 87(d)(2)) provides an exception to disclosure for records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." If NYSERDA receives a request from a third party for information or a document received from Seller and which has been marked "Confidential" or "Proprietary," NYSERDA will process such request under the procedures provided by NYSERDA's FOIL regulations (21 NYCRR Part 501).

## **AGREEMENT FOR THE SALE OF ZERO-EMISSIONS ENERGY CERTIFICATES**

This Agreement (the “Agreement”) is made as of \_\_\_\_\_, 20\_\_ (“Effective Date”) by and between the New York State Energy Research and Development Authority, a public benefit corporation, having a principal business address of 17 Columbia Circle, Albany, New York 12203 (“NYSERDA” or “Seller”), and the Load Serving Entity entering this Agreement using the unique Confirmation ID number provided by NYSERDA (the “LSE” or “Buyer”). NYSERDA and Buyer are each referred to herein as a “Party” and are collectively referred to herein as the “Parties.”

### **RECITALS:**

WHEREAS, by its August 1, 2016 “Order Adopting a Clean Energy Standard” (“CES Order”) in Case 15-E-0302 the PSC established a Zero-Emissions Credit Requirement Program (“ZECR”); and

WHEREAS, the ZECR directs NYSERDA to offer long-term contracts for the purchase of zero-emissions credits, in the form of ZEC Certificates (“ZECs”) from the FitzPatrick, Ginna and Nine Mile Point generating facilities in accordance with the price, contract period and other terms specified in the CES Order; and

WHEREAS, NYSERDA has entered contracts for the purchase of ZECs from the FitzPatrick, Ginna and Nine Mile Point generating facilities; and

WHEREAS, the CES Order established a cap of 27,618,000 ZECs to be purchased from the FitzPatrick, Ginna and Nine Mile Point generating facilities, on an annual basis, by NYSERDA; and

WHEREAS, the ZECR requires each LSE that serves end-use customers in New York to procure from NYSERDA, on behalf of its customers, beginning April 1, 2017, qualifying ZECs in an amount equal to the percentage of ZECs purchased by NYSERDA in a year that represents the portion of the electric energy load served by each LSE in relation to the total electric energy load served by all such LSEs; and

WHEREAS, the Order establishes the ZECR compliance period as April 1 to March 31 of each year, beginning in 2017, and divides the ZECR purchase obligation into six two-year tranches, the last ending on March 31, 2029; and

WHEREAS, the CES Order establishes, for Tranche 1 the ZEC price, including the amount approved by the Commission as an administrative adder, as \$ \_\_\_\_\_ per ZEC (the “ZEC Price”); and

WHEREAS, Buyer is an LSE, acting on behalf of its customers; and

WHEREAS, NYSERDA has informed the Buyer as to the number of ZECs the Buyer shall purchase in order to fulfill its compliance requirement for the compliance period beginning April 1, 2017 (the “ZEC Quantity”); and

WHEREAS, Buyer wishes to fulfill its obligation to purchase ZECs from NYSERDA, under the terms and conditions of this Agreement; and

NOW, THEREFORE, in consideration of the foregoing and of the mutual promises hereinafter set forth, the Parties, intending to be legally bound, agree as follows:

## **ARTICLE 1: DEFINITIONS**

- 1.1 **Definitions.** In addition to any other terms defined herein, the following terms shall have the meaning ascribed to them below:
- (a) “Actual ZEC Quantity” means the number of ZECs actually purchased by NYSERDA for compliance year 2017.
  - (b) “Delivery” or “Deliver” means NYSERDA’s electronic delivery of ZEC Certificates via the NYGATS to the Buyer’s account within the NYGATS, in accordance with the NYGATS Operating Rules, or such other form or matter of crediting REC Certificates to an LSE account as may be approved or directed by the PSC.
  - (c) “Energy Services Company” or “ESCO” means any eligible competitive energy services company operating in New York State pursuant to the Uniform Business Practices approved by the PSC.
  - (d) “Load Serving Entity” or “LSE” means any entity or individual that sells retail commodity electricity supply to an end-use customer located in New York State, including any ESCO and each electric distribution company regulated by the PSC, serving in their roles as electric commodity supplier of last resort, jurisdictional municipal utilities, community choice aggregators not otherwise served by an ESCO, customers purchasing power directly from NYISO, and Long Island Power Authority (“LIPA”) and the New York Power Authority (“NYPA”) to the extent LIPA and NYPA have voluntarily agreed to act as LSEs.
  - (e) “NYGATS” means the New York Generation Attribute Tracking System, the tracking system that records electricity generation attribute information within New York State, and processes generation attribute information from energy imported and consumed within New York State, as a basis for creating tradable generation attribute certificates, including ZEC Certificates.
  - (f) “NYGATS Operating Rules” means the rules governing the operation of the NYGATS by NYSERDA and its designated NYGATS Administrator, and the participation in and use of the NYGATS by users. The Operating Rules describe how the system is operated and delineate the roles, requirements and responsibilities of all parties.<sup>7</sup>
  - (g) “NYISO” means the New York Independent System Operator.

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<sup>7</sup> . <https://www.nyserda.ny.gov/All-Programs/Programs/NYGATS/Registration-Documents>

- (h) "New York State Public Service Commission" or "PSC" means the commission duly authorized to operate in New York State pursuant to Articles 1 and 2 of the Public Service Law.
- (i) "ZEC Cap" means 27,618,000, the maximum number of ZECs that NYSERDA is obligated to purchase for the year 2017 compliance period.
- (j) "ZEC Certificate" means certain NYGATS certificates evidencing ZECs derived from the energy production of megawatt hours by ZECR-eligible electric generation sources. Each ZEC, as reflected in a ZEC Certificate, represents the energy production of one (1) megawatt-hour.

## ARTICLE 2: PURCHASE AND SALE OF ZECS

**2.1 Purchase.** Subject to the terms and conditions of this Agreement, NYSERDA agrees to sell and Deliver to Buyer, and Buyer agrees to purchase and accept from NYSERDA, ZECs in a quantity equal to the ZEC Quantity. The total projected purchase price due to NYSERDA shall equal the ZEC Price multiplied by the ZEC Quantity ("Total Projected Purchase Price"). The amount of ZEC Certificates ultimately acquired by the LSE from NYSERDA shall be determined in accordance with the reconciliation procedure set forth in Section 2.7 below.

**2.2 Deliver/Delivery.** Subject to Section 2.7, Seller will Deliver, on a quarterly basis via NYGATS, the ZEC Certificates, in a proportionate share of the RECs actually owned by NYSERDA at the conclusion of such quarter, the proportion being equal to the ZEC Cap divided by the LSE's ZEC Quantity. Upon notification of Delivery by Seller, Buyer shall be obligated to accept Delivery within 10 days. NYSERDA shall transfer full title to the ZEC Certificates to Buyer free and clear of any lien or other encumbrance at the time of Delivery. Notwithstanding the foregoing, this Agreement and the CES Order restrict Buyer from reselling ZEC Certificates.

**2.3 Payment.** Payments by Buyer shall be due to NYSERDA in uniform monthly amounts equaling in the aggregate the Total Projected Purchase Price as set forth in Section 2.1, above, in accordance with the payment schedule to be provided to Buyer by NYSERDA. NYSERDA will not Deliver ZEC Certificates prior to receipt of payment. Any and all payments due to NYSERDA shall be made by check or by wire/ACH payment as follows:

By Check:

NYSERDA  
Attn: Finance  
17 Columbia Circle  
Albany, New York 12203

By Wire/ACH:

Bank:	Bank of America
Account No.:	601-0316543
ABA:	021000322 if by ACH; 026009593 if by wire
Account Name:	NYSERDA Mac30

When making payment, Buyer shall include the Customer ID provided on the ZEC Confirmation that NYSERDA previously sent to Buyer by e-mail.

2.4 Interest. All overdue payments hereunder shall bear interest from (and including) the due date to (but excluding) the date of payment at a rate equal to two percent (2%) over the per annum rate of interest from time to time published in the Wall Street Journal under "Money Rates" as the prime lending rate, provided that in no event shall the applicable interest rate ever exceed the maximum rate permitted by applicable law.

2.5 Taxes/Fees. NYSERDA shall pay any taxes or other fees, if any, imposed on the creation, or ownership of the ZEC Certificates up to the date of Delivery. Buyer will pay any taxes or other fees, if any, imposed on the receipt or ownership of the ZEC Certificates on and after the date of Delivery.

2.6 Term. This Agreement shall be effective on and as of December 1, 2016 and shall terminate upon satisfaction by Buyer and Seller of their respective obligations pursuant, unless terminated earlier pursuant to Article 5 of this Agreement or extended by mutual agreement of the Parties or at the direction of the PSC. Termination shall not affect provisions hereof that expressly survive termination.

2.7. Settlement and Reconciliation. In the event the Actual ZEC Quantity is less than 27,618,000 (the ZEC Cap), NYSERDA shall notify Buyer in writing on or before June 1, 2018 of the Actual ZEC Quantity to be Delivered. NYSERDA shall calculate the LSE's actual compliance obligation for the 2017 Compliance Year, and should the amount paid by the LSE exceed the amount necessary to fulfill the LSE's actual compliance obligation for the compliance period beginning April 1, 2017, NYSERDA shall refund to Buyer by check a proration of the projected purchase price, less the administrative adder.

### **ARTICLE 3: REPRESENTATIONS AND WARRANTIES**

3.1 NYSERDA representations and warranties. NYSERDA hereby represents and warrants to Buyer as follows:

- (a) NYSERDA has and, at all times during the Term will have, all necessary power and authority to execute, deliver and perform its obligations hereunder.
- (b) The execution, Delivery and performance of this Agreement by NYSERDA has been duly authorized by all necessary action and does not violate any of the terms or conditions of NYSERDA governing documents, or any contract to which it is a party, or any law, rule, regulation, order, judgment or other legal or regulatory determination applicable to NYSERDA. This Agreement constitutes the valid and binding obligation of NYSERDA enforceable against it in accordance with its terms, subject to the effects of bankruptcy, insolvency, reorganization, moratorium and similar laws affecting enforcement of creditors' rights and remedies generally and to general principles of equity.
- (c) There is no pending or (to NYSERDA's knowledge) threatened litigation, arbitration or administrative proceeding that materially adversely affects NYSERDA's ability to perform its obligations under this Agreement.

(d) The ZEC Certificates delivered to Buyer hereunder shall be eligible for compliance under the ZECR.

(e) EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, NYSERDA EXPRESSLY DISCLAIMS ANY OTHER REPRESENTATIONS OR WARRANTIES, WHETHER WRITTEN OR ORAL, AND WHETHER EXPRESS OR IMPLIED INCLUDING, WITHOUT LIMITATION, ANY REPRESENTATION OR WARRANTY WITH RESPECT TO CONFORMITY TO MODELS OR SAMPLES, MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE.

3.2 Buyer representations and warranties. Buyer hereby represents and warrants to NYSERDA as follows:

(a) Buyer is duly organized, validly existing and in good standing and has the requisite power and authority to own, lease and operate its properties and to carry on its business as being conducted on the Effective Date. Buyer has, and at all times during the Term will have, all necessary power and authority to execute, deliver and perform its obligations hereunder.

(b) The execution, delivery and performance of this Agreement by Buyer has been duly authorized by all necessary action and does not violate any of the terms or conditions of Buyer's governing documents, or any contract to which it is a party, or any law, rule, regulation, order, judgment or other legal or regulatory determination applicable to Buyer. This Agreement constitutes the valid and binding obligation of the LSE enforceable against it in accordance with its terms, subject to the effects of bankruptcy, insolvency, reorganization, moratorium and similar laws affecting enforcement of creditors' rights and remedies generally and to general principles of equity.

(c) There is no pending or (to Buyer's knowledge) threatened litigation or administrative proceeding that materially adversely affects Buyer's ability to perform its obligations under this Agreement.

(d) Buyer has, and at all times during the Term, will have the financial capability to perform its obligations hereunder.

(e) Buyer is an Account Holder as defined in the NYGATS Operating Rules.

## **ARTICLE 4: EVENTS OF DEFAULT**

4.1 Events of Default. For purposes of and during the Term, each of the following shall constitute an event of default ("Event of Default") by a Party:

- (a) if a Party materially breaches any or all of its obligations as described in this Agreement and such breach is not cured within five (5) Business Days of written notice of such breach from the other Party;
- (b) if any representation or warranty made by a Party in Article 3 of this Agreement proves to have been misleading or false in any material respect when made; and/or
- (c) if a Party:

- (v) makes an assignment or any general arrangement for the benefit of its creditors;
- (vi) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause under any bankruptcy or similar law for the protection of creditors, or has such a petition filed against it;
- (vii) otherwise becomes bankrupt or insolvent (however evidenced); or
- (viii) becomes unable to pay its debts as they fall due.

## **ARTICLE 5: REMEDIES UPON DEFAULT**

5.1 Remedies. Upon an Event of Default, the non-defaulting Party may (a) terminate this Agreement upon written notice to the defaulting Party, (b) withhold any payments due in respect of this Agreement, (c) set off any payments due against any other credits or payments under other agreements between the Parties, and/or (d) withhold any ZEC Certificate Delivery.

5.2 Exclusive Remedy. The remedies set forth in this article 5 shall be the sole and exclusive remedies of the respective parties in the event of a default, and a party's liability shall be limited as set forth in this section. All other remedies or damages at law are hereby waived.

5.5 Limitation of Liability. In the event of a default, the defaulting party's liability shall be limited as set forth herein. In no event shall any other liability be incurred by either Party for any obligations that arise under this agreement, including (but not limited to) liability for consequential, incidental, punitive, exemplary, or indirect damages in tort, contract, or otherwise.

## **ARTICLE 6: NOTICES**

### 6.1 Notices.

- (d) All notices, requests, consents, approvals and other communications which may or are required to be given by either party to the other under this Agreement shall be in writing and shall be transmitted either:
  - (5) via certified or registered United States mail, return receipt requested;
  - (6) by personal delivery;
  - (7) by expedited delivery service; or
  - (8) by e-mail, return receipt requested.

Such notices shall be addressed as follows, or to such different addresses as the parties may from time-to-time designate as set forth in paragraph (c) below:

To Buyer: At address, electronic mail addresses confirmed through prior communications

To NYSERDA: NYSERDA  
Attn: Office of the General Counsel  
17 Columbia Circle  
Albany, New York 12203-6399  
Email address: [pete.keane@nyserda.ny.gov](mailto:pete.keane@nyserda.ny.gov)

With a copy to: NYSERDA  
Attn: Doreen Harris  
17 Columbia Circle  
Albany, New York 12203-6399  
Email address: [doreen.harris@nyserda.ny.gov](mailto:doreen.harris@nyserda.ny.gov)

- (e) Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States [or Canadian] mail, as of the date of first attempted delivery at the address and in the manner provided herein, or in the case of facsimile transmission or email, upon receipt of an email acknowledgement of receipt.
- (f) The parties may, from time to time, specify any new or different address in the United States [or Canada] as their address for purpose of receiving notice under this Agreement by giving fifteen (15) days written notice to the other party sent in accordance herewith. The parties agree to mutually designate individuals as their respective representatives for the purposes of receiving notices under this Agreement. Additional individuals may be designated in writing by the parties for purposes of implementation and administration/billing, resolving issues and problems and/or for dispute resolution.

6.2 The addresses for notice and payment specified in Sections 6.1 may be changed from time to time by written notice by either Party to the other Party without amendment of this Agreement.

## **ARTICLE 7: MISCELLANEOUS**

7.1 Force Majeure. Neither party hereto shall be liable for any failure or delay in the performance of its respective obligations hereunder if and to the extent that such delay or failure is due to a cause or circumstance beyond the reasonable control of such party, including, without limitation, acts of God or the public enemy, expropriation or confiscation of land or facilities, compliance with any law, order or request of any Federal, State, municipal or local governmental authority, acts of war, rebellion or sabotage or damage resulting therefrom, fires, floods, storms, explosions, accidents, riots, or strikes. In the event that such failure or delay occurs, the claiming Party shall notify the other Party of the occurrence thereof as soon as possible, shall use reasonable efforts to resume performance as soon as possible, and shall regularly consult with the other Party during the pendency of the force majeure event. In the event that the force majeure event lasts more than forty-five (45) days, NYSERDA may terminate this Agreement with no further obligation or liability to Buyer other than to Deliver any ZEC Certificates for which Buyer has made payment prior to termination that have not been Delivered to Buyer as of the termination date.

7.2 Severability. If any provision of this Agreement shall be declared by any court of competent jurisdiction to be illegal, void or unenforceable, all other provisions of this Agreement shall not be affected and shall remain in full force and effect. If any provision of this Agreement is so broad as to be unenforceable, that provision shall be interpreted to be only so broad as will enable it to be enforced.

7.3 Waiver. No delay or omission by a Party in the exercise of any right under this Agreement shall be taken, construed or considered as a waiver or relinquishment thereof, and any such right may be exercised from time to time and as often as may be deemed expedient. If any of the terms and conditions hereof are breached and thereafter waived by a Party, such waiver shall be limited to the particular breach so waived and is not deemed to waive any other breach hereunder.

7.4 Forward Contract. Each Party represents and warrants to the other that it is a “forward contract merchant” within the meaning of the United States Bankruptcy Code, that this Agreement is a “forward contract” within the meaning of the United States Bankruptcy Code, and that the remedies identified in this Agreement shall be “contractual rights” as provided for in 11 U.S.C. § 556 as that provision may be amended from time to time.

7.5 Assignment. Except as specifically provided otherwise in this Section 7.5, the assignment, transfer, conveyance, subcontracting or other disposal of this Agreement or any of the Buyer’s rights, obligations, interests or responsibilities hereunder, in whole or in part, without the express consent in writing of NYSERDA shall be void and of no effect as to NYSERDA. Such consent shall not be unreasonably withheld.

Either Party may, upon written notice, assign its rights and obligations hereunder, or transfer such rights and obligations by operation of law, to any entity with which or into which such Party shall merge or consolidate or to which such Party shall transfer all or substantially all of its assets, provided that such other entity agrees to be bound by the terms hereof and provided further, that such other entity’s creditworthiness is comparable to or higher than that of such Party at the time this Agreement was executed and such Party is not relieved of any obligation or liability hereunder as a result of such assignment.

7.6 Entire Agreement; Amendment. This Agreement embodies the entire agreement and understanding between NYSERDA and the Buyer and supersedes all prior agreements and understandings relating to the subject matter hereof. Except as otherwise expressly provided for herein, this Agreement may be amended, modified, changed, waived, discharged or terminated only by an instrument in writing, signed by the party against which enforcement of such amendment, modification, change, waiver, discharge or termination is sought.

7.7 All Legal Provisions Deemed Included. It is the intent and understanding of the Seller and NYSERDA that each and every provision of law required by the laws of the State of New York to be contained in this Agreement shall be contained herein, and if, through mistake, oversight or otherwise, any such provision is not contained herein, or is not contained herein in correct form, this Agreement shall, upon the application of either NYSERDA or the Seller, promptly be amended so as to comply strictly with the laws of the State of New York with respect to the inclusion in this Agreement of all such provisions.

7.8 Governing Law/Venue. This Agreement shall be governed by, and construed in accordance with the laws of the State of New York applicable to contracts executed and to be performed in New York State without regard to its conflicts of laws principles. The parties irrevocably acknowledge and accept that all actions arising under or relating to this Agreement, and the transactions contemplated hereby and thereby shall be brought exclusively in a United States District Court or New York State Court located in Albany, New York having subject matter jurisdiction over such matters, and each of the Parties hereby consents to and accepts such personal jurisdiction of, and waives any objection as to the laying of venue in, such courts for purposes of such action.

7.10 Headings. The Article and Section titles in this Agreement are only for purposes of convenience and do not form a part of this Agreement and will not be taken to qualify, explain or affect any provision thereof.

7.11 No Third Party Beneficiaries. Nothing herein is intended to or should be construed to create any rights of any kind whatsoever in third persons not parties to this Agreement.

7.12 Freedom of Information Law. Seller acknowledges that NYSERDA is subject to and must comply with the requirements of New York's Freedom of Information Law ("FOIL;" see Public Officers' Law Article 6); 21 NYCRR Part 501.

7.13 Claim of Confidentiality. Information of any tangible form including any document that Buyer wishes to be protected from disclosure to third parties, including this Agreement must be marked "Confidential" or "Proprietary" at the time such information is provided to NYSERDA. Notwithstanding the foregoing, NYSERDA, in accordance with the provisions of the CES Order, shall be permitted to report to the New York State Department of Public Service, as to the amounts received from LSE for ZEC purchases as against the total due each month and on the LSE's compliance or non-compliance, generally, with the terms of this Agreement.

7.14 Trade Secrets/Commercial Information. The FOIL Law (Public Officers Law § 87(d)(2)) provides an exception to disclosure for records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." If NYSERDA receives a request from a third party for information or a document received from Seller and which has been marked "Confidential" or "Proprietary," NYSERDA will process such request under the procedures provided by NYSERDA's FOIL regulations (21 NYCRR Part 501).

Commissioner Diane X. Burman, concurring:

As reflected in my comments made at the November 17, 2016 session, I concur on this item.