



**Susan Vercheak\***  
Assistant General Counsel

October 31, 2016

Honorable Kathleen H. Burgess  
Secretary  
New York State  
Public Service Commission  
Three Empire State Plaza  
Albany, NY 12223-1350

Re: Case 15-E-0302 - Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Energy Program and a Clean Energy Standard; and  
  
Case 14-M-0094 - Proceeding on Motion of the Commission to Consider a Clean Energy Fund

Dear Secretary Burgess:

Enclosed for filing please find the Comments of 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 (collectively the "Joint Utilities") in response to the Petition by the New York State Energy Research and Development Authority regarding implementation of the Clean Energy Standard.

If you have any questions, please contact me. Thank you.

Very truly yours,

Susan Vercheak

Enclosure

\*Admitted only in New Jersey

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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

Proceeding on Motion of the Commission to Consider a ) Case 14-M-0094  
Clean Energy Fund )

**COMMENTS OF THE JOINT UTILITIES ON THE PETITION OF THE  
NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY  
REGARDING CLEAN ENERGY STANDARD IMPLEMENTATION**

Pursuant to the New York State Register,<sup>1</sup> 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 (collectively the “Joint Utilities” or the “Utilities”) respectfully submit these comments in response to the Petition (the “Petition”) by the New York State Energy Research and Development Authority (“NYSERDA”) regarding implementation of the Clean Energy Standard (“CES”).<sup>2</sup>

**I. Introduction**

In its *Order Adopting a Clean Energy Standard*<sup>3</sup> (“CES Order”), the New York State Public Service Commission (the “Commission”) directed NYSERDA to file a petition proposing mechanisms to implement the Renewable Energy Credit (“REC”) and Zero-Emissions Credit

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<sup>1</sup> New York State Register, September 14, 2016. Comments are due October 31, 2016.

<sup>2</sup> Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large Scale Renewable Energy Program and a Clean Energy Standard* (“CES Proceeding”), Petition by the New York State Energy Research and Development Authority (filed August 25, 2016) (“Petition”).

<sup>3</sup> CES Proceeding, *Order Adopting a Clean Energy Standard* (issued August 1, 2016) (“CES Order”).

(“ZEC”) programs.<sup>4</sup> The Petition responds to these requirements, and further proposes an approach to implementing the Electric Distribution Company (“EDC”) backstop charge contemplated in the CES Order.<sup>5</sup> Finally, NYSERDA filed draft contracts to govern the purchase of RECs and ZECs from NYSERDA by Load Serving Entities (“LSE”). The Joint Utilities appreciate the opportunity to comment on these matters.

## **II. All Customers Should Contribute to Meeting New York’s Clean Energy Policy Objectives**

The Joint Utilities support the Commission’s statement in the CES Order that “all customers and market participants must share” in the State’s effort to secure renewable energy resources.<sup>6</sup> Indeed, in this proceeding, both the New York Power Authority (“NYPA”) and the Long Island Power Authority (“LIPA”) filed letters supporting the State’s environmental goals and indicating their intent to participate in the CES.<sup>7</sup> The Joint Utilities support NYSERDA’s proposal to allocate any backstop charges to all EDC customers, including LIPA customers. It is requested that the Commission clarify that these charges would also apply to all energy supplied to customers by NYPA, and further clarify that customers of the EDC, not the EDC itself, are ultimately responsible for funding any backstop charges.

## **III. NYSERDA Should Make Efficient Use of Existing Cash Balances to Limit New Collections from Customers**

The Joint Utilities have been consistently concerned with the collection of customer dollars in excess of NYSERDA program needs and the resulting accumulation of large cash balances.<sup>8</sup> The Joint Utilities will collect \$585 million from customers for NYSERDA’s use in

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<sup>4</sup> *Id.*, pp. 108-109, 155.

<sup>5</sup> *Id.*, pp. 111-112.

<sup>6</sup> *Id.*, p. 95.

<sup>7</sup> CES Proceeding, Letter from Rick Shansky, Long Island Power Authority (filed July 22, 2016); CES Proceeding, Letter from Jill Anderson, New York Power Authority (filed July 22, 2016).

<sup>8</sup> *E.g.*, *Cases 07-M-9548 et al., Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard*, Comments of Joint Utilities (filed October 28, 2013), pp. 43-44.

2016 alone,<sup>9</sup> in addition to what will likely be more than \$100 million collected from customers via Regional Greenhouse Gas Initiative Allowances (“RGGI”).<sup>10</sup> More than \$1.6 billion in customer funds will be collected between 2016 and 2024 for NYSERDA’s renewable energy programs, not including any other monies that will be collected under the CES.<sup>11</sup> While the Joint Utilities appreciate NYSERDA’s effort to reduce the need for additional customer collections, more work is needed to make efficient use of customer dollars already collected and to make sure, going forward, that only necessary funds are collected – and no more..

NYSERDA’s proposal to cover 2017 REC Program administrative fees using uncommitted funds from the System Benefits Charge (“SBC”), Energy Efficiency Portfolio Standard, and Renewable Portfolio Standards should be adopted. Additionally, consideration should be given to using existing uncommitted funds as well as Alternative Compliance Payment (“ACP”) collections to apply to any backstop costs before any additional collections are implemented. Should this approach be adopted, a mechanism should be established that recognizes the customers that provided those funds so that all customers fairly and equitably contribute to these expenses, including LIPA and NYPA customers.

Additionally, a formulaic true-up methodology must be put in place to reconcile the new CES collections with program needs so that only the dollars necessary are collected, with regular adjustments, at least monthly. The annual reconciliation process must capture the fluctuations between projected and actual renewable generation output and energy use. The following

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<sup>9</sup> Case 14-M-0094, *Proceeding on Motion of the Commission to Consider a Clean Energy Fund*, Order Authorizing the Clean Energy Fund Framework (issued January 21, 2016).

<sup>10</sup> Regional Greenhouse Gas Initiative Auction Results. [http://rggi.org/market/co2\\_auctions/results](http://rggi.org/market/co2_auctions/results) Viewed on October 19, 2016.

<sup>11</sup> Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Order Authorizing Customer-Sited Tier Program Through 2015 and Resolving Geographic Balance and Other Issues Pertaining to the RPS Program (issued April 2, 2010), Appendix, p. 11.

scenarios demonstrate the complexity of various NYSERDA funding mechanisms, which could result in excess customer collections:

- a. NYSERDA relies on a backstop charge to collect customer funds for RECs it is unable to sell in year 1, banks those RECs, and then sells them in year 2;
- b. NYSERDA relies on a backstop charge to collect customer funds for ZEC-related charges it has been unable to collect from an LSE facing financial difficulty, the LSE ultimately remits payment;
- c. NYSERDA sells RECs generated by resources that entered service on or after January 1, 2015, but which were contracted for through previous Main Tier solicitations conducted under the Renewable Portfolio Standard or Clean Energy Fund, for which NYSERDA has already collected customer funds;
- d. NYSERDA projects an average REC price for the year and contracts to sell RECs to LSEs at this price, but due to the variable production of contracted resources, the true average price paid differs from the projected average price;
- e. NYSERDA contracts to sell RECs to LSEs based on projected use of electricity for the coming year, but actual energy use is lower than projected, causing LSEs to bank RECs and purchase fewer RECs in the subsequent year(s); and
- f. NYSERDA receives Alternative Compliance Payments.

Due to the scale of the CES, these collections could quickly add up. When coupled with existing customer collections, unnecessary over-collections can result. It is crucial for NYSERDA and the Commission to consider these issues and develop a mechanism that, on one hand, maintains solvency of its programs and, on the other hand, avoids unnecessary collections and resulting customer bill impacts.

#### **IV. EDCs as Corporations Should Not Be “Financial Guarantors” for the State of New York; Any NYSERDA Backstop Charges Should Be Implemented as a Pass-Through Charge to Customers**

The Petition’s presentation of the CES backstop charge requires clarification to accurately reflect the intent of the provision. In fact, in its recent *Clean Energy Standard Implementation Proposal*, the Department of Public Service Staff (“Staff”) clarified that the CES backstop mechanism should provide for “customers to provide the necessary financing and

guarantees” (emphasis added).<sup>12</sup> The Commission should eliminate any implication that EDCs as corporations would in any way become a financial guarantor for NYSERDA, and, by extension, the State of New York. Such a role would inappropriately shift clean energy standard payment obligations and could have broad adverse financial implications for investor-owned utilities, including probable credit actions that could significantly increase costs for all utility operations, not just CES-related activities, by increasing utilities’ cost of debt.

Despite the lack of clear and explicit language in the Petition, the Joint Utilities understand it has been the intent of Staff and NYSERDA to implement the backstop mechanism using a delivery surcharge mechanism applied to customer bills, similar to the current SBC. According to NYSERDA<sup>13</sup> during the September 14, 2016 Clean Energy Standard Informational Session,<sup>14</sup> NYSERDA’s intent is to develop an approach that would allow EDCs to collect funds from customers before remitting them to NYSERDA. The Joint Utilities generally support this approach, should additional customer collections be necessary, as discussed above.

To the extent a contract is necessary to provide for common understanding of the terms and mechanism by which NYSERDA would collect funds from customers via the EDC,<sup>15</sup> a contract could be structured similarly to the existing EDC contracts implementing the SBC. Such contracts do not, and should not, include any contractual obligation on the part of the EDC itself to provide funding to NYSERDA that is not directly linked to a specific collection of customer funds, an arrangement that is critical to ameliorating ratings agency concerns.

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<sup>12</sup> CES Proceeding, Clean Energy Standard Implementation Proposal (filed September 30, 2016)(“CES Implementation Proposal”), p. 3.

<sup>13</sup> Clean Energy Standard Informational Session, September 14, 2016 Webinar Recording, at: <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/56C58A580D2CF2E185257FD4006B90CE?OpenDocument> (“CES Informational Session”).

<sup>14</sup> CES Proceeding, Notice Regarding Informational Session on Clean Energy Standard (issued August 10, 2016).

<sup>15</sup> Clear direction from the Commission through an order would appear to render contracts unnecessary.

Finally, the Commission should clarify that any backstop charge would be collected from all New York customers, including NYPA and LIPA customers, and that EDCs are not required to provide any backstop funds to NYSERDA until after they have been collected from EDC customers.

**V. NYSERDA Should Modify Certain Program Details to Enhance Compliance**

In the Petition, NYSERDA proposes to use the New York Generator Attribute Tracking System (“NYGATS”) to determine the Load Share Ratio NYSERDA will use to assess compliance with the ZEC program.<sup>16</sup> It is unclear whether this data will actually be stored in NYGATS. In any case, the ultimate source of this information should be the final settled and reconciled data from the New York Independent System Operator (“NYISO”).

The Joint Utilities propose a modification to the initial compliance period that will greatly simplify the process of compliance for the ZEC program. The proposed ZEC program is not on a calendar year basis, therefore demonstrating compliance will be difficult within the NYGATS system, which is set up to retire certificates on a calendar year basis. NYGATS trading for calendar year 2017 ends June 30, 2018, thus ZECs from vintage year 2017 will need to be in each LSE’s NYGATS account by June 30, 2018 in order to demonstrate compliance with the CES. Furthermore, as listed in the materials for the CES Informational Session, the proposed reconciliation period for the ZEC program, wherein actual ZEC obligations are determined based on the actual LSE share of the total load, can extend beyond the end date for the NYGATS trading period. It is recommended that NYSERDA make the compliance year 2017 a partial year (for the months April – December 2017), and then start in 2018 and go forward with a full 12-month compliance period that matches to a full 12-month calendar year.

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<sup>16</sup> CES Proceeding, Petition, p. 6.

The alignment of the ZEC program with the NYGATS trading periods will greatly simplify certificate tracking, ZEC program administration, and compliance for the program.

In the Petition, NYSERDA proposes to grant LSEs only one week to determine whether they will purchase RECs from NYSERDA, and how many RECs they intend to buy.<sup>17</sup> The Joint Utilities appreciate Staff and NYSERDA's consideration of this issue, as discussed during the Informational Session.<sup>18</sup> NYSERDA should provide LSEs a minimum of three weeks to make this determination, to provide adequate time for necessary internal review at the LSEs.

The Commission should also clarify that LSEs would be able to bank RECs from year to year. Allowing LSEs to bank RECs could significantly reduce the risk that NYSERDA retains RECs on its books that it is unable to sell, or that LSEs end the year with an unexpected shortage or excess of RECs due to any number of factors, including unavoidable weather conditions that may have caused electricity usage and/or renewable output to vary significantly from forecasts. Banking is an important market feature that will help to reconcile differences between supply and demand in any given year. LSEs should be provided the flexibility to implement REC-purchasing compliance strategies that align with their individual risk profiles.

Finally, in pricing its RECs for the market, NYSERDA should consider the market price of RECs in adjacent regions. By allowing out-of-state renewable resources to qualify for New York RECs, market opportunities may arise that encourage market participants to seek lower-cost RECs in nearby states, potentially leaving NYSERDA with contractual obligations to purchase RECs that it is ultimately unable to sell at cost. In this case, NYSERDA may be better off selling the RECs at a competitive market price to recover at least a portion of its expenses, rather than flowing the full cost of these RECs through a backstop charge. The latter will result

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<sup>17</sup> Id., pp. 6-7.

<sup>18</sup> CES Informational Session.

in customers paying both the market REC price and the full REC price for NYSERDA's commitment, which may be the most costly outcome.

## **VI. NYSERDA Should Modify Its Draft Contracts for the Purchase and Sale of RECs and ZECs**

The Joint Utilities appreciate the opportunity to review NYSERDA's proposed contracts for the purchase and sale of RECs<sup>19</sup> ("REC Contract") and ZECs<sup>20</sup> ("ZEC Contract"), respectively. In addition to the discussion below, the Joint Utilities attach a redline of the contracts in Exhibits A and B, respectively, to propose specific revisions.

As a preliminary matter, the REC Contract and ZEC Contract should be clarified to confirm in plain terms that NYSERDA has good and marketable title to the RECs and ZECs it is selling to LSEs. This issue will become particularly important in the case of RECs generated by behind-the-meter resources, where the ownership of RECs remains unclear.

Also, as a general matter, the remittance of funds should align with the provision of goods. To the extent NYSERDA requests monthly payments from LSEs,<sup>21</sup> available RECs and ZECs should be transferred into LSEs NYGATS accounts on a monthly basis as well. This approach will provide greater visibility to LSEs for annual compliance, particularly for those LSEs that may choose to purchase a portion of their RECs from NYSERDA and a portion from other sources. Furthermore, the contract should clarify that EDCs will have collected the funds from customers for the procurement of RECs and ZECs before being required to remit them to NYSERDA.

Both the REC Contract and the ZEC Contract raise the possibility that NYSERDA may be unable to fulfill its contractual obligation to provide the quantity of RECs and ZECs it has

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<sup>19</sup> CES Proceeding, Agreement for the Sale of Renewable Energy Certificates (filed September 15, 2016) ("REC Contract").

<sup>20</sup> CES Proceeding, Agreement for the Sale of Zero Emissions Credits (filed September 15, 2016) ("ZEC Contract").

<sup>21</sup> CES Proceeding, REC Contract, p. 3; CES Proceeding, ZEC Contract, p. 3.

agreed to sell, raising significant compliance concerns for LSEs, particularly under the REC program. Provision 2.7 of the REC Contract reads, in part: “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 to be Delivered and shall refund to Buyer by check a proration of the projected purchase price.”<sup>22</sup>

This provision undermines the contract as a whole. While the remedies proposed are appropriate, they remain insufficient to address the harm that would be caused to an LSE should this effective breach of contract occur. In the CES Order, the Commission established compliance obligations for LSEs, requiring that LSEs hold a quantity of RECs in their NYGATS account equal to the applicable percentage of their total electric sales to demonstrate compliance in each respective year.<sup>23</sup> In designing a compliance strategy, an LSE must have firm commitments for the provision of RECs in place in order to meet this compliance obligation, otherwise it may fall short and be forced to pay the ACP for any RECs it has not been able to procure. Any contract between an LSE and a third-party REC seller for the purchase of RECs would include a provision for damages, which would require the third party to make the LSE whole should it become unable to provide the RECs it promised to deliver. These provisions for damages are generally structured to cover the utility’s costs of replacing the RECs, either by buying them from the spot market or paying the ACP. NYSERDA’s unique role as both the program administrator and the REC seller allows for an alternate approach that achieves the same result: if NYSERDA fails to meet its contractual obligation to provide the quantity of RECs it promised, it should be granted the authority by the Commission to keep the price already paid for the REC and simply waive any ACP surcharges that would otherwise be incurred by the

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<sup>22</sup> CES Proceeding, REC Contract, p. 4.

<sup>23</sup> CES Proceeding, CES Order, pp. 94, 106-107.

LSE to make up the shortage for CES compliance purposes. This approach avoids what would otherwise be a cash payment from NYSERDA to the LSE for the full ACP.

In the opposite case, where an LSE has purchased more RECs or ZECs than ultimately needed, the REC Contract and the ZEC Contract contain provisions allowing the LSE to sell RECs and ZECs back to NYSERDA.<sup>24</sup> As far as ZECs are concerned, the structure of that program requires LSEs as a group to procure a fixed quantity of ZECs from a single source. As 100 percent of all available ZECs must be purchased each year and NYSERDA is the only source of these ZECs, by definition one LSE's excess ZECs are equal to another LSE's (or group of LSEs) shortage of ZECs. As a result, banking of ZECs should be prohibited as it would cause certain LSEs to experience a ZEC shortage. NYSERDA should design a seamless process that would require customers to be made whole when an LSE has been required to purchase more ZECs than ultimately needed. NYSERDA should issue refunds to LSEs returning ZECs to NYSERDA in an amount equivalent to the price paid by the LSE, *inclusive* of the administrative adder. NYSERDA's proposed provision that LSEs would return the ZECs (and as described below, potentially RECs) at a price *less* the administrative adder<sup>25</sup> would be inappropriate, as NYSERDA would effectively collect the administrative fee for that REC or ZEC twice, once on its initial sale, and again on its re-sale. Furthermore, particularly as it relates to the ZEC program, LSEs should not be penalized for variations in Load Share Ratio that occur over the year by obligating them to pay administrative fees for ZECs they were initially required to purchase, but did not need. This is fully appropriate as NYSERDA is guaranteed to recover its administrative costs because a second LSE, or group of LSEs, will be required to purchase these ZECs immediately to fulfill their annual compliance obligation.

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<sup>24</sup> CES Proceeding, REC Contract, p. 3; CES Proceeding, ZEC Contract, p.3.

<sup>25</sup> CES Proceeding, REC Contract, p. 3.

The REC market is fundamentally different because RECs can be procured from parties other than NYSERDA and the quantity and market price of Tier 1 RECs available for purchase from NYSERDA, behind-the-meter resources, renewable developers, and other third-party REC sellers in New York and adjacent states in any given year will vary. Allowing LSEs to return RECs to NYSERDA free of any restrictions<sup>26</sup> could present a gaming opportunity that allows LSEs to procure lower-priced RECs as they become available in the market, with the guarantee of being able to return their higher cost NYSERDA RECs at any time. Under the contract,<sup>27</sup> NYSERDA would be obligated to re-purchase those RECs, potentially triggering a backstop charge and ultimately requiring customers to pay for both the lower-priced REC and the NYSERDA REC. Instead of allowing LSE's to return RECs to NYSERDA, the Commission should clarify that LSEs should have the option to bank any excess RECs for future compliance.

Finally, further consideration is needed of the design of the REC market concerning what information about LSEs bidding strategies should be made available either publicly or to other market participants. Provision 7.13 of the REC Contract provides for an exception to disclosure for records that are trade secrets or commercial information.<sup>28</sup> 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 sellers to target LSEs who may be short of their compliance obligation with discriminatory pricing.

## **VII. Conclusion**

The Joint Utilities appreciate the opportunity to file these comments and respectfully request the Commission's consideration of the concerns raised herein.

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<sup>26</sup> CES Proceeding, REC Contract, p. 3.

<sup>27</sup> *Id.*

<sup>28</sup> CES Proceeding, REC Contract, p. 10.

October 31, 2016

Respectfully submitted,

**CENTRAL HUDSON GAS AND ELECTRIC CORPORATION**

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**CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and ORANGE AND ROCKLAND UTILITIES, INC.**

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**NEW YORK STATE ELECTRIC &  
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**EXHIBIT A**

Comments of the Joint Utilities on NYSERDA's Proposed  
Agreement for the Sale of Renewable Energy Credits

**AGREEMENT FOR THE SALE OF  
RENEWABLE ENERGY CREDITS  
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 "LSE or "Buyer") a \_\_\_\_\_ [corporation], having a principal business address of \_\_\_\_\_. 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 ("RECs") 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 Tier 1-compliance-eligible RECs-Certificates from NYSERDA, or from from other sources, or by making Alternative Compliance Payments ("ACPs") to NYSERDA, or any combination thereof, and are required to inform NYSERDA, by December 1, 2016, whether they intend to purchase RECs-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 \$ \_\_\_\_\_; and

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

WHEREAS, Buyer, acting on behalf of its customers, wishes to exercise its option to purchase REC-Certificates RECs from NYSERDA, under the terms and conditions of this Agreement;

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 RECs actually available for sale by NYSERDA to LSEs for compliance year 2017.

**EXHIBIT A**  
Comments of the Joint Utilities on NYSERDA's Proposed  
Agreement for the Sale of Renewable Energy Credits

- (b) "Agreement" means this Agreement, ~~for the Sale of Renewable Energy Certificates~~ over a compliance period of not more than twelve (12) months and including Exhibits A<sup>1</sup> (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~~ RECs 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~~ RECs to an LSE account as may be approved or directed by the PSC.
- (d) "Energy Services Company or ESCO" means any eligible competitive ~~Energy energy Service-services Company-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~~ RECs.
- (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>2</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.
- (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 RECs (REC ~~Certificate~~ Quantity). The purchase price for each REC ~~Certificate~~ shall be \$ \_\_\_\_\_ dollars, for a total projected purchase price equal to \_\_\_\_\_ Dollars (USD \$ \_\_\_\_\_). The amount of REC Certificates RECs ultimately acquired by the LSE from NYSERDA shall be determined

<sup>1</sup> The Joint Utilities assume that all exhibits will be properly marked and referenced, without duplication of exhibit identifiers.

<sup>2</sup> <https://www.nyserda.ny.gov/All-Programs/Programs/NYGATS/Registration-Documents>

**EXHIBIT A**  
Comments of the Joint Utilities on NYSERDA's Proposed  
Agreement for the Sale of Renewable Energy Credits

in accordance with the reconciliation procedure set forth in Section 2.7, below.

2.2 Deliver/Delivery. ~~On or before June 1, 2018. By the end of each month.~~ Seller will Deliver via NYGATS ~~REC Certificates~~RECs, in a quantity equal to the REC Certificate Quantity elected by Buyer in Section 2.1 or the amount calculated in Section 2.7. Upon notification of Delivery by Seller, Buyer shall be obligated to accept Delivery in NYGATS. At the time of delivery, NYSERDA shall ~~transfer the REC Certificates~~RECs to Buyer the REC CertificatesRECs and all ownership interest therein, free and clear of any lien or other encumbrance ~~at the time of Delivery~~. Upon notification of Delivery by Seller, Buyer shall Confirm and accept Delivery in NYGATS within 10 days. Notwithstanding the foregoing, this Agreement and the CES Order restrict Buyer from reselling ~~REC Certificates~~RECs purchased from NYSERDA to other Parties. To the extent ~~LSE-Buyer~~ determines later that a certain quantity of ~~REC Certificates~~RECs are not needed by Buyer to achieve compliance in that compliance year, Buyer can ~~offer to resell the unused REC Certificates~~RECs to NYSERDA at cost or retain those RECs in their possession for future compliance periods less the administrative adder.

**Comment [A1]:** Please refer to the Comments of the Joint Utilities, at p. 8.

2.3 Payment. NYSERDA shall require payment by Buyer in uniform monthly amounts, beginning in January of 2017, equaling in the aggregate the total projected purchase price set forth in Section 2.1, above, in accordance with the payment schedule attached hereto as Exhibit A. NYSERDA will not Deliver ~~REC Certificates~~RECs prior to receipt of payment. Any and all payments due to NYSERDA shall be made by check or by wire/ACH payment as follows:

**Comment [A2]:** Please refer to the Comments of the Joint Utilities, at pp. 10-11.

By Check:

NYSERDA  
17 Columbia Circle  
Albany, New York 12203

By Wire/ACH:

Bank: Bank of America  
Account No.: xxxxxxxxxxxxxxxx  
ABA: 021000322 if by ACH; 026009593 if by wire  
Account Name: NYSERDA NYS Energy Research and  
Development

**Comment [A3]:** To the extent this exhibit contains any remaining contractual provisions beyond the schedule for the date and amount of payment, LSEs should have an opportunity to review and comment before being required to execute the agreement.

2.4 Interest. All overdue payments hereunder shall bear interest from (and including) 45 calendar days following 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~~RECs 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~~RECs 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~~RECs 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

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satisfaction by Buyer and Seller of their respective obligations, unless terminated earlier pursuant to Article 5 or Section 8.3 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.

**Comment [A4]:** Section 8.3 does not exist.

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 the Agreements for the Sale of Renewable Energy Credits with the LSEs. 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/RECs to be Delivered and shall waive any Alternative Compliance Payments for the difference between the REC Quantity contained herein and the adjusted Quantity of RECs to be Delivered ~~refund to Buyer by check a prorated portion of the projected purchase price.~~

**Comment [A5]:** Please refer to the Comments of the Joint Utilities, at pp. 8-9.

**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/RECs delivered to Buyer hereunder shall be eligible to be compliant for compliance under the RES for the applicable compliance period.~~

(e) Seller warrants that at the time of Delivery of RECs, that (i) it has good and marketable title to such RECs; (ii) such RECs have not been retired or sold to any other person or entity nor used to meet compliance requirements under the RES or any other regulatory or voluntary renewable energy program or standard, including any greenhouse gas reduction requirements; and (iii) it has right, title to and interest in such RECs and that such RECs shall be transferred to Buyer free and clear of any liens or other encumbrances or title defects.

**Comment [A6]:** Please refer to the Comments of the Joint Utilities, at p. 8.

(f) 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

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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 a [corporation] duly organized, validly existing and in good standing under its laws of [incorporation] and has the requisite [corporate] 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. 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.
- (b) 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.
- (c) Buyer has, and at all times during the Term, will have the financial capability to perform its obligations hereunder.
- (d) 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

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(iv) becomes unable to pay its debts as they fall due; and /or.

(d) if Seller fails to Deliver or cause to Deliver, when due, the Contract Quantity in accordance with this Agreement without a waiver of any associated Alternative Compliance Payment fees and such breach is not cured within two (2) Business Days of written notice of such breach from Buyer.

**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.

In addition, if Seller is the defaulting Party, the Seller shall waive any associated Alternative Compliance Payments reimburse the Buyer for any prepayments made by the Buyer for the undelivered REC Certificate Quantity.

~~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.~~

5.2 Exclusive Remedy; Limitation of Liability.

THE PARTIES CONFIRM THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS AGREEMENT SATISFY THE ESSENTIAL PURPOSES HEREOF. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE DEFAULTING PARTY'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN THE DEFAULTING PARTY'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. EXCEPT AS HEREIN PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.  
~~In the event of a default, the defaulting party's liability shall be limited as set forth herein. In no event~~

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~~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 ~~certified or registered~~ United States express mail, return receipt requested;
- (2) by personal delivery;
- (3) by ~~expedited overnight courier delivery~~ service; or
- (4) by e-mail, ~~return receipt requested~~ (provided a copy is also sent by overnight mail or overnight courier).

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: **TBD**  
    17 Columbia Circle  
    Albany, New York 12203-6399

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Email address:

- (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 effective upon receipt.~~
- (c) The ~~parties~~ Parties may, from time to time and without amendment of this Agreement, 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 at least 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.~~

Comment [A7]: Already addressed in 6.1(c).

**ARTICLE 7: MISCELLANEOUS**

7.1 Force Majeure. Neither ~~party~~ 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 either~~ Party may terminate this Agreement with no further obligation or liability to ~~Buyer the other~~ Party other than to Deliver any ~~REC Certificates~~ RECs for which Buyer has made payment prior to termination that have not been Delivered to Buyer as of the termination date. Variability in the frequency or force of the wind, of rainfall, of cloud cover, of sun intensity, or of water levels will in no event constitute force majeure events. Except as set forth below, Force Majeure does not include (a) any changes of law or any other event or circumstance that affects the value or other features of a REC, (b) Seller's ability to sell RECs at a price greater than the price set forth in this Agreement, or (c) Buyer's ability to purchase RECs at a price less than the price set forth in this Agreement. Notwithstanding the foregoing, it shall be an event of Force Majeure if the PSC terminates, revokes or eliminates the RES Program.

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

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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. No waiver shall be effective unless such waiver is approved in writing by the waiving Party.

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 of a Party hereunder, in whole or in part, without the express consent in writing of NYSERDA the other Party shall be null and void and of no effect, provided, however, that such as to NYSERDA. Such consent shall not be unreasonably withheld, conditioned or delayed.

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 both Parties 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 provision.~~Intentionally Omitted. s.

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

**EXHIBIT A**  
Comments of the Joint Utilities on NYSERDA's Proposed  
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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." The REC Quantity procured by Buyer under this contract shall not be disclosed as it would cause substantial injury to the competitive position of Buyer within REC markets. 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).

**Comment [A8]:** Please refer to the Comments of the Joint Utilities, at p. 11.

IN WITNESS WHEREOF, the Parties have ~~Buyer has~~ executed this Agreement as of the Effective Date.

**BUYER**

**SELLER**

By:

By:

\_\_\_\_\_  
Name:

\_\_\_\_\_  
Name:

Title:

Title:

**EXHIBIT B**

Comments of the Joint Utilities on NYSERDA's Proposed Agreement for the Sale of Zero-Emissions Credits

**AGREEMENT FOR THE SALE OF  
ZERO-EMISSIONS ~~CREDITSENERGY~~  
~~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"), and \_\_\_\_\_, a \_\_\_\_\_ [corporation], having a principal business address of \_\_\_\_\_ (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 ("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 as \$ \_\_\_\_\_, including the amount approved by the Commission as an administrative adder which is, as \$ \_\_\_ per ZEC; and

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

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Comments of the Joint Utilities on NYSERDA's Proposed  
Agreement for the Sale of Zero-Emissions Credits

**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) "Agreement" means [this Agreement for the Sale of Zero Emissions Credits over a compliance period of not more than twelve \(12\) months and including Exhibits A \(Standard Terms and Conditions For All NYSERDA Agreements\); B \(NYSERDA Prompt Payment Policy Statement\)](#).<sup>1</sup>
- (c) "Delivery" or "Deliver" means NYSERDA's electronic delivery of ~~ZEC Certificates~~ZECs 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 ~~ZECREC~~ 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 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 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.
- (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 ~~ZECs~~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>2</sup>
- (h) "NYISO" means the New York Independent System Operator.
- (i) "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.

<sup>1</sup> [The Joint Utilities assume that all exhibits will be properly marked and referenced, without duplication of exhibit identifiers.](#)

<sup>2</sup> <https://www.nyserda.ny.gov/All-Programs/Programs/NYGATS/Registration-Documents>

**EXHIBIT B**  
Comments of the Joint Utilities on NYSERDA's Proposed  
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- (j) "ZEC Cap" means 27,618,000, the maximum number of ZECs that NYSERDA is obligated to purchase for the year 2017 compliance period.
- (k) "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 (ZEC Purchase Quantity). The purchase price for each ZEC shall be \_\_\_\_\_ dollars (USD \$ \_\_\_\_\_), for a total projected purchase price equal to \_\_\_\_\_ dollars (USD \$ \_\_\_\_\_). The amount of ZECs ~~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. By the end of each month, Seller will Deliver via NYGATS the ZECs ~~Certificates~~ in a quantity equal to the ZEC Purchase Quantity shown in Section 2.1 or the amount calculated in Section 2.7, below. Upon notification of Delivery by Seller, Buyer shall be obligated to accept Delivery. At the time of delivery, NYSERDA shall transfer ~~the ZEC Certificates~~ ZECs to Buyer ~~the ZREC Certificates and all ownership interest therein~~ free and clear of any lien or other encumbrance ~~at the time of Delivery~~. Upon notification of Delivery by Seller, Buyer shall Confirm and accept Delivery in NYGATS within 10 days. Notwithstanding the foregoing, this Agreement and the CES Order restrict Buyer from reselling ZECs ~~Certificates~~. To the extent Buyer determines later that a certain quantity of ZEC Certificates ZECs are not needed by Buyer to achieve compliance in 2017, Buyer can offer to agree to resell the unused ZEC Certificates ZECs to NYSERDA at cost, inclusive of the administrative adder.

2.3 Payment. NYSERDA shall require payment by Buyer 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 attached hereto as Exhibit A. NYSERDA will not Deliver ZECs ~~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  
17 Columbia Circle  
Albany, New York 12203

By Wire/ACH:

Bank: Bank of America  
Account No.: XXXXXXXXXXXXX  
ABA: 021000322 if by ACH; 026009593 if by wire  
Account Name: NYSERDA NYS Energy Research and  
Development

**Comment [A1]:** Please refer to the Comments of the Joint Utilities, at p. 8.

**Comment [A2]:** Please refer to the Comments of the Joint Utilities, at pp. 10-11.

**Comment [A3]:** To the extent this exhibit contains any remaining contractual provisions beyond the schedule for the date and amount of payment, LSEs should have an opportunity to review and comment before being required to execute the agreement.

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2.4 Interest. All overdue payments hereunder shall bear interest from (and including) 45 calendar days following 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 ~~ZECs 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 ~~ZECs 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 or ~~Section 8.3~~ 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.

Comment [A4]: Section 8.3 does not exist.

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 adjusted Quantity of ~~ZEC Certificates~~/ZECs to be Delivered and shall refund to Buyer by check or wire/ACH payment a proration of the projected purchase price no later than July 1, 2018, 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~~/ZECs delivered to Buyer hereunder shall be eligible for compliance-compliant under the ZECR for the applicable compliance period.

(d)(e) Seller warrants that at the time of Delivery of ZEC Certificates/ZECs, that (i) it has good and marketable title to such ZECs; (ii) such ZECs have not been retired or sold to any other person or entity nor used to meet compliance requirements under the ZECR or any other regulatory or voluntary

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renewable energy program or standard, including any greenhouse gas reduction requirements; and (iii) it has right, title to and interest in such ZECs and that such ZECs shall be transferred to Buyer free and clear of any liens or other encumbrances or title defects.

**Comment [A5]:** Please refer to the Comments of the Joint Utilities, at p. 8.

~~(e)~~(f) 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 a [corporation] duly organized, validly existing and in good standing under its laws of [incorporation] and has the requisite [corporate] 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~~

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- (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; and/or
- (d) if Seller fails to Deliver or cause to Deliver, when due, the ZEC Purchase Quantity or ZEC refund in accordance with this Agreement and such breach is not cured within two (2) Business Days of written notice of such breach from Buyer,-

**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.

In addition, if Seller is the defaulting Party, the Seller shall reimburse the Buyer for any prepayments made by the Buyer for the undelivered ZEC Purchase Quantity. and shall pay the Buyer:-

5.2 Exclusive Remedy; Limitation of Liability.

THE PARTIES CONFIRM THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS AGREEMENT SATISFY THE ESSENTIAL PURPOSES HEREOF. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE DEFAULTING PARTY'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN THE DEFAULTING PARTY'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. EXCEPT AS HEREIN PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO

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DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

~~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 ~~certified or registered~~ United States express mail, return receipt requested;
- (2) by personal delivery;
- (3) by ~~expedited delivery~~ overnight courier service; or
- (4) by e-mail, return ~~receipt requested~~ (provided a copy is also sent by overnight mail or overnight courier.

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<br>Attn:<br>Name<br>Address Line 1<br>Address Line 2 City,<br>State Zip code<br>Email Address:   |
| To NYSERDA:            | NYSERDA<br>Attn: Office of the General Counsel<br>17 Columbia Circle<br>Albany, New York 12203-6399<br>Email address: <a href="mailto:pete.keane@nysesda.ny.gov">pete.keane@nysesda.ny.gov</a> |
| <u>With a copy to:</u> | NYSERDA<br>Attn: TBD<br>17 Columbia Circle<br>Albany, New York 12203-6399<br>Email address:  |

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- (b) Any such notice shall be ~~effective upon 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~~ Parties may, from time to time ~~and without amendment of this Agreement,~~ 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 ~~at least~~ fifteen (15) days written notice to the other ~~party~~ Party sent in accordance herewith. The ~~parties~~ 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.~~

Comment [A6]: Already addressed in 6.1(c).

**ARTICLE 7: MISCELLANEOUS**

7.1 Force Majeure. Neither ~~party~~ 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 either Party~~ may terminate this Agreement with no further obligation or liability to ~~Buyer the other Party~~ other than to Deliver any ~~ZEC Certificates~~ ZECs for which Buyer has made payment prior to termination that have not been Delivered to Buyer as of the termination date. Except as set forth below, -Force Majeure does not include (a) any changes of law or any other event or circumstance that affects the value or other features of a ZEC, (b) Seller's ability to sell ZECs at a price greater than the price set forth in this Agreement, or (c) Buyer's ability to purchase ZECs at a price less than the price set forth in this Agreement. Notwithstanding the foregoing, it shall be an event of Force Majeure if the ZECR program is terminated, revoked or eliminated.

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

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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. No waiver shall be effective unless such waiver is approved in writing by the waiving party.

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 of a Party hereunder, in whole or in part, without the express consent in writing of ~~NYSERDA~~ the other Party shall be null and void and of no effect as to, provided, however, that such NYSERDA. ~~Such~~ consent shall not be unreasonably withheld, conditioned or delayed.

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~~ both Parties.

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~~ Intentionally Omitted.

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

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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 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.

7.13 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).

IN WITNESS WHEREOF, the Parties have Buyer has executed this Agreement as of the Effective Date.

**BUYER**

**SELLER**

By:

By:

\_\_\_\_\_

\_\_\_\_\_

Name:

Name:

Title:

Title: