

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

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Proceeding on Motion of the Commission to  
Implement a Large-Scale Renewable Program  
and a Clean Energy Standard

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Case 15-E-0302

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**PETITION REGARDING CLEAN ENERGY STANDARD  
Competitive Tier 2 Program for Baseline Renewable Generation**

Introduction

The New York State Energy Research and Development Authority (NYSERDA) submits this Petition and requests that the New York Public Service Commission (Commission) issue an order establishing a Competitive Tier 2 program through which NYSERDA would issue a series of annual competitive procurements for Renewable Energy Certificates (RECs) from eligible existing renewable resources in order to provide compensation for the beneficial environmental attributes associated with their generation, including zero carbon emissions. These resources have many years of useful life remaining and can be reasonably expected to continue to contribute to the goals of the Clean Energy Standard (CES).

The Commission has addressed the challenges and opportunities in maintaining the State's baseline of renewable resources upon which the CES seeks to build in order to achieve the State's renewable energy goals. In its most recent directive, the Commission's March 16, 2018 Baseline Order<sup>1</sup> adopted modifications to provide targeted, adequate, and prudent support to New York's existing Tier 2 "Maintenance" renewable resources to ensure their continued operations.<sup>2</sup> Specifically, as relevant here, the Baseline Order: (1) expanded Tier 2 eligibility to include eligible facilities in operation prior to January 1, 2015; (2) increased the size of eligible hydroelectric facilities from 5 MW to 10 MW; (3) revised the "to-go-cost" standard; (4) provided for a streamlined review process; and, (5) established a standard contract term of three years with the potential for contract renewals. The Commission adopted the Department of Public Service Staff's (Staff) recommendation that the existing CES eligibility rules for incremental project

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<sup>1</sup> Case 15-E-0302; Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Adopting Measures for Retention of Existing Renewable Baseline Resource (issued and effective March 16, 2018) (Baseline Order).

<sup>2</sup> Tier 2 resources are those that qualify as renewable under the CES but are not eligible for RES Tier 1 because they commenced operations prior to January 1, 2015.

upgrades be maintained. Under those rules, any incremental generation above the 2014 historic baseline production that results from post-2015 capital improvements completed at an existing renewable facility can be eligible for Tier 1.

The Tier 2 Maintenance program and the current incremental project upgrade opportunity are important components of the CES in that they support the continued operation and expansion of existing resources and the continued generation and retirement of the associated RECs in New York State.

In vetoing legislation intended to compensate existing large-scale renewable generators for their clean energy attributes, Governor Andrew Cuomo called for a cost-effective competitive program for existing renewables.<sup>3</sup> Accordingly, this Petition presents a competitive procurement approach designed to address this interest and to align with the Commission's long-standing philosophical belief in the superiority of competitive markets over government mandates.<sup>4</sup>

This Petition also includes a proposal regarding NYSERDA's administration of the Competitive Tier 2 program for the period beginning in 2020 and through the reconciliation process in 2026.

### Background

On August 1, 2016, the Commission issued its Order Adopting a Clean Energy Standard (CES Framework Order),<sup>5</sup> which, based upon the recommendation and comments on a White Paper filed by NYSERDA and Staff, established the Renewable Energy Standard (RES) to achieve the goal that 50% of New York's electricity is generated by renewable sources by 2030 (i.e., the 50 by 30 goal). The CES Framework Order included a Tier 1 obligation on all load-serving entities to financially support new renewable generation resources to serve their retail customers, and a limited Tier 2. The CES Framework Order directed that Tier 2 would consist of a continuation of the Maintenance Tier to support the continued operation of certain at-risk baseline small hydro, wind and biomass generation facilities that demonstrate a financial need and that would cease operation without such support.<sup>6</sup> The Commission determined that a full two-tiered program was unnecessary at that point, in that the vintage and delivery requirement in external markets made it unlikely that there would be a significant loss of baseline contribution that would necessitate additional New York consumer support for the retention of those attributes.

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<sup>3</sup> See Veto Message #204 (December 13, 2019).

<sup>4</sup> Case 03-E-0188; Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard, Order Regarding a Retail Renewable Portfolio Standard (Issued and Effective September 24, 2004), p. 4.

<sup>5</sup> Case 15-E-0302; supra, Order Adopting a Clean Energy Standard (Issued and Effective August 1, 2016).

<sup>6</sup> The CES Maintenance Tier is a continuation of the Maintenance Tier from the RPS Program. Case 03-E-0188, Retail Renewable Portfolio Standard, Order Approving Modifications to Maintenance Resource Category, (Issued and Effective October 31, 2005).

In the subsequent Baseline Order, Maintenance eligibility was expanded, the review process was streamlined, and additional costs included in the determination of need, but the program remained a project specific application process requiring Commission consideration for each resource seeking Maintenance support. The Baseline Order also determined that Tier 1 eligibility for repowering would continue to be permitted, under the requirements in the CES Final Phase 1 Implementation Plan, for an incremental upgrade to an existing facility.<sup>7</sup> Under those requirements, a facility's baseline is calculated based on historic energy generation and any additional generation above that baseline, which results from capital improvements to the existing facility, can be eligible for Tier 1.

On February 1 and December 31, 2019, NYSERDA filed CES Annual Progress Reports (Progress Report) for the 2017 and 2018 CES Compliance Years.<sup>8</sup> Each Progress Report highlights the strength of the RES in developing a robust pipeline of Tier 1 projects. The Progress Reports also include details of baseline renewable energy that had been exported out of New York in its respective year and therefore did not contribute to the CES. Quarterly information is also provided through the Open NY database.<sup>9</sup>

In July of 2019 Governor Andrew Cuomo signed the Climate Leadership and Community Protection Act (CLCPA), which increases the 50% renewable CES goal to 70% by 2030, converts the goal into a mandate, and includes consideration for maximizing the contributions and potential of New York's existing renewable resources.<sup>10</sup> The 70 by 30 goal is an ambitious clean energy goal and emphasizes the need to not only continue to procure new renewable resources, but to ensure that all renewable generation in the State of New York contributes to its maximum potential. All renewable energy consumed by end-use customers in New York State contributes to the CES, including generation supported by past, present, and future State renewable energy policies as well as voluntary renewable energy purchases.

Non-contracted baseline renewable generation will grow as baseline projects complete their 10-year Renewable Portfolio Standard contracts; those resources may then seek value in external markets for the renewable energy and attributes they generate. In recognition of the contribution of these resources, and in anticipation of Commission action to modify the CES to include the expanded CLCPA goals, NYSERDA has developed the following proposal to meet the objective of maximizing the contributions and potential of New York's existing renewable resources.

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<sup>7</sup> Case 15-E-0302; supra, Order Adopting Measures for Retention of Existing Renewable Baseline Resource (Issued and Effective March 16, 2018), p. 31.

<sup>8</sup> Case 15-E-0302; supra, Clean Energy Standard Annual Progress Report: 2017 Compliance Year (filed February 1, 2019), and 2018 Compliance Year (filed December 31, 2019).

<sup>9</sup> <https://data.ny.gov/Energy-Environment/Large-scale-Renewable-Projects-Reported-by-NYSERDA/dprp-55ye>

<sup>10</sup> State of the State 2019, Governor Andrew M Cuomo, issued January 15, 2019, page 315, available at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2019StateoftheStateBook.pdf>.

NYSERDA proposes that any new program or initiative to succeed NYSERDA's proposed Competitive Tier 2 program be considered and evaluated during its implementation, based on the outcome of the Competitive Tier 2 program and conditions in adjoining markets, and as a part of the Commission's activities with respect to new section 66-p of the Public Service Law.

#### Proposal for Competitive Tier 2 Program for Baseline Renewable Generation

NYSERDA proposes to advance a three-year Competitive Tier 2 program to support wind and hydropower facilities through standard 3-year contracts. Competitive Tier 2 eligible facilities would be existing non-state-owned run-of-river hydropower and existing wind generators located within the State. The CLCPA definition of renewable energy systems excludes certain resources currently eligible under the CES rules, including fuel cells using natural gas and anaerobic digesters, among others. Those resources therefore would not contribute to the achievement of the CLCPA goals and NYSERDA does not propose that they be eligible for this program.<sup>11</sup>

To be eligible for the competitive Tier 2 program, facilities would have to have entered commercial operation prior to January 1, 2015. Qualifying Tier 2 facilities could submit a bid to sell RECs associated with generation output that is not under contract with NYSERDA, as well as any output that comes off of a NYSERDA contract during the period covered by the Competitive Tier 2 commitment period.<sup>12</sup> Facilities with an active agreement with NYSERDA, such as an agreement for their Tier 1-eligible generation based on a facility upgrade, or an agreement under the existing Tier 2 Maintenance contract program, would only be eligible to participate in the Competitive Tier 2 program to the extent that any otherwise eligible generation is not subject to such an agreement. NYSERDA proposes that the Commission continue the existing Maintenance program, as adopted through previous orders, for any developers not selected under the Competitive Tier 2 program or that otherwise may face a financial hardship. However, facilities with active Tier 2 Maintenance agreements would not be eligible for the Competitive Tier 2, and vice versa. Further, participation in Competitive Tier 2 solicitations would not prohibit a facility from obtaining Tier 1 eligibility for an upgrade or repowering.

NYSERDA proposes to size the overall program volume to include the majority of the eligible generation, but to limit annual procurement volumes to promote competition with the goal of lowering costs and encouraging generators to submit reasonable bids based on need.

Additionally, this partial procurement approach would allow growth of the voluntary market to purchase the remaining RECs from generators not awarded a contract.

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<sup>11</sup> Case 15-E-0751; *supra*, Order Regarding Value Stack Compensation for High-Capacity-Factor-Resources (Issued and Effective December 12, 2019), p. 16-17 (wherein the Commission declined to make new resources not included in the CLCPA eligible for the VDER "e" value.

<sup>12</sup> For example, if a generator has a contract for only 10% of the output due to an upgrade, the remaining 90% would be eligible for a Tier 2 contract.

The Competitive Tier 2 program would utilize a modified version of the current solicitation format used for RES Tier 1 procurements. In each year of the three-year program, NYSERDA would issue a Request for Proposals (RFP) for approximately one-third of the total MWh of generation from eligible facilities, which would ensure that some RECs would remain available for voluntary markets for uses such as green power products, Community Choice Aggregations (CCA), etc. This staggered approach would provide an opportunity for most wind and hydropower generators to receive an award by the end of the 3-year program.<sup>13</sup>

Baseline renewable generators would need to apply to NYSERDA for a determination of eligibility to participate in Competitive Tier 2 solicitations. NYSERDA would utilize a confidential maximum bid price to contain program costs and would not award a contract to a facility where the bid price exceeds the maximum bid price. NYSERDA, in consultation with Staff, would establish the confidential maximum bid price and target solicitation MWh for each solicitation.

NYSERDA would perform all services related to the development, review, approval and ongoing validation of certification materials. NYSERDA proposes specific details and processes regarding Eligibility, Certification, Procurement, LSE Compliance and other Reporting Requirements similar to the current processes in place for Tier 1 and would revise and update the New York Clean Energy Standard RES Tier 1 Certification Submission Instructions and Eligibility Guidelines<sup>14</sup> to establish threshold requirements for Competitive Tier 2 projects. The Certification Application would require each facility to submit materials sufficient to demonstrate its fulfillment of all program eligibility requirements. The determination of eligibility would be a pre-requisite to participate in a Competitive Tier 2 solicitation.

During an RFP, eligible facilities could then submit a bid as a combination of annual MWh (bid quantity) and a dollars per Tier 2 REC/MWh bid price. After the RFP closed, all eligible bids would be ranked in ascending order based on bid price alone. Contracts would be awarded based on the as-bid price, starting with the lowest bid until the total bid quantity reaches the target solicitation MWh or the confidential maximum bid price is exceeded. NYSERDA would reserve the right to reject any and all bids.

Successful bidders would enter into 3-year standard contracts with NYSERDA for the bid quantity at the bid price. The standard terms of the contract would include a January 1 through December 31 performance period; each annual RFP would be issued in time for awards to be made and contracts executed prior to January 1 of the following year. Payments would equal the number of Tier 2 RECs delivered to NYSERDA's New York Generation Attribute Tracking

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<sup>13</sup> Each Tier 2 facility would be limited to one Tier 2 contract during the Tier 2 program.

<sup>14</sup> <https://www.nyserdera.ny.gov/-/media/Files/Programs/Clean-Energy-Standard/Eligibility-Certification-Guidelines.pdf>

System (NYGATS) account multiplied by the bid price. NYSERDA proposes that the aggregate funding for a Competitive Tier 2 program REC purchases be capped at approximately \$200 million, roughly allocated among the three proposed annual solicitations.

NYSERDA has included with this Petition a standard agreement that would be used to govern Tier 2 REC transactions between NYSERDA and the LSEs (see Attachment 1).

#### Funding for Competitive Tier 2 Program for Baseline Renewable Generation

NYSERDA proposes that funding for the Competitive Tier 2 program would be through a new Tier 2 REC obligation imposed on load serving entities (LSE).<sup>15</sup> The program would be administered in a manner similar to the process approved by the Commission for the zero-emissions credit program.<sup>16</sup> NYSERDA and Staff would annually calculate a uniform per MWh rate that would be applied to each LSE's actual wholesale load to calculate their Tier 2 Monthly Obligation Payments, with a January 1<sup>st</sup> through December 31<sup>st</sup> compliance year.

The dollar per MWh rate to be paid by each LSE for the compliance year would be calculated according to the following formula:

$$\text{LSE Tier 2 Rate} = \frac{\text{NYSERDA's maximum expected total cost to procure Tier 2 RECs}}{\text{Forecasted statewide electric load}}$$

The LSE Tier 2 Rate would be applied to the wholesale load data NYSERDA receives from the NYISO.<sup>17</sup> The cost component of the LSE Tier 2 Rate would be based on the total forecasted cost for NYSERDA to purchase Tier 2 RECs in the specific year, based on the aggregate bid quantity and bid prices for the contracted generation. The load component of the LSE Tier 2 Rate would be based on a statewide forecasted load. An LSE's Tier 2 Monthly Obligation Payment would be calculated using the LSE Tier 2 Rate, the number of MWh the LSE served, using the

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<sup>15</sup> The "statewide load" referenced in the calculations in this section assumes participation by all LSEs serving retail load within the State, including investor-owned distribution utilities, energy service companies (ESCOs), Community Choice Aggregation programs not served by ESCOs, and jurisdictional municipal utilities, as well as the New York Power Authority (NYPA) and the Long Island Power Authority. We recognize, however, that NYPA owns and operates a significant quantity of hydroelectric facilities and may seek to support the State's goal of maintaining the existing renewable generation baseline in a different manner. Should NYPA inform NYSERDA of a determination that a different manner of support is more effective than participating in this program, NYSERDA will inform the stakeholders and adjust the "statewide load" calculations accordingly.

<sup>16</sup> Case 15-E-0302; *supra*, Final Zero Emissions Credit (ZEC) Implementation Plan (filed on October 21, 2019).

<sup>17</sup> It should be noted that the LSE Tier 2 Rate is based on wholesale purchases and not retail sales; the wholesale rate must be "grossed-up" to account for delivery losses that occur between the LSE's wholesale purchases from the New York Independent System Operator and retail sales to customers.

New York Independent System Operator's (NYISO) Version 1 load data<sup>18</sup> and a Load Modifier Rate<sup>19</sup> according to the following formula:

$$\text{LSE Tier 2 Monthly Obligation Payment} = (\text{LSE Tier 2 Rate}) \times (\text{LSE's Version 1 MWh}) \times (\text{Load Modifier Rate})$$

NYSERDA would utilize Version 1 of the total LSE load data, as settled by the NYISO each month, as a basis for each LSE's Tier 2 Monthly Obligation Payment to NYSERDA. NYSERDA typically receives load data from the NYISO on or around the 15<sup>th</sup> day of the following month.<sup>20</sup> NYSERDA would then determine the LSE's Tier 2 Monthly Obligation Payment to NYSERDA using the formula specified above and issue an invoice. LSEs would submit their payment to NYSERDA within 15 days from the issuance of the invoice.

The Annual Tier 2 Obligation Amount<sup>21</sup> would be determined by a final reconciliation that would occur after the close of each compliance year. The reconciliation process would be based on the LSE's load using NYISO Version 2 data, the total load served by the LSEs and the total dollars expended by NYSERDA to purchase Tier 2 RECs during the compliance year.

The reconciliation process would occur after the Tier 2 compliance year ended on December 31<sup>st</sup>. NYSERDA would reconcile the funds collected from each LSE to the funds necessary to meet their obligation based on the Version 2 load data that is provided from the NYISO and recorded in NYGATS. This load would be adjusted for load modifiers as described in the Phase 1 Implementation Plan.<sup>22</sup> NYSERDA would also reconcile the funds collected from the LSEs against NYSERDA's financial obligations due to the purchase of Tier 2 RECs. This reconciliation would take into account the actual adjusted statewide load and NYSERDA's actual Tier 2 REC payments during the referenced compliance year.

In summary, NYSERDA would utilize the following process to determine the Annual Tier 2 Obligation Amount and reconcile the funds necessary to purchase the Tier 2 RECs and account for collections from the LSEs.

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<sup>18</sup> NYISO Version 1 load data is part of the NYISO settlement process. This is the initial monthly billing period data from the NYISO.

<sup>19</sup> Case 15-E-0302; supra, Final Zero Emissions Credit (ZEC) Implementation Plan (filed on October 21, 2019), pg. 4. The Load Modifier Rate is detailed in the Final ZEC Implementation Plan and provides a method to account for load modifier adjustments for LSEs that are subject to load modifiers.

<sup>20</sup> Case 15-E-0302; supra, Order Approving Zero-Emissions Credit Implementation Plan with Modifications (Issued and Effective September 20, 2019), p. 11.

<sup>21</sup> See definition in the standard agreement, Attachment 1.

<sup>22</sup> Case 15-E-0302; supra, Order Approving Phase 1 Implementation Plan (Issued and Effective February 22, 2017), p. 30.

1. NYSERDA would determine the actual dollar per MWh charge based on the total dollars expended by NYSERDA to purchase Tier 2 RECs during the compliance year.
2. NYSERDA would sum the total load served by the LSEs using the NYISO Version 2 load data including load modifiers.
3. Steps 1 and 2 would be used to determine the Annual Tier 2 Obligation Amount.
4. The Annual Tier 2 Obligation Amount would be applied to the total load associated with each LSE, as recorded in NYGATS, and provide the LSEs their Tier 2 obligation for the compliance year.
5. NYSERDA would reconcile the payments received from each of the LSEs against the Annual Tier 2 Obligation Amount.

NYSERDA would then retire for compliance, for each LSE, the Tier 2 RECs for which NYSERDA received payment.

#### Competitive Tier 2 Administrative Costs

Should this Petition be adopted by the Commission, NYSERDA would seek to cover the costs and fees it would incur and require to administer the Competitive Tier 2 program for the life of the program, which is expected to begin in 2020 with the issuance of the first Competitive Tier 2 RFP and to continue through the final settlement, in 2026, of transactions in the last contract year (2025).

Consistent with approach taken to administration for other CES programs,<sup>23</sup> NYSERDA proposes to use existing unspent System Benefits Charge (SBC), Energy Efficiency Portfolio Standard (EEPS), and/or Renewable Portfolio Standard (RPS) funds to cover administrative costs for the Competitive Tier 2 program. NYSERDA would file quarterly itemized reports on costs associated with the administration and the development of the Competitive Tier 2 program.

NYSERDA's administrative budgets typically include NYSERDA staff direct and indirect salaries, fringe benefits, and other direct program operating costs and allocated general and administrative expenses. The Competitive Tier 2 program would also require System Development for program and system development required for the issuance of RFPs and anticipated revisions to NYGATS and other systems as well as Technical Support for program design and review of proposals. Administration of the Competitive Tier 2 program would require 1.25 FTE staff. Activities of this staff would be to issue three Tier 2 RFPs, determine eligibility and actively manage contracts resulting from the solicitations.

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<sup>23</sup> Case 15-E-0302; supra, Order Approving Administrative Budget for 2018 Clean Energy Standard," (Issued and Effective March 16, 2018) ("March Order").

Contract Management includes settlement and invoicing of contracts. In addition, staff would need to develop processes to collect and reconcile the LSE compliance obligations for Tier 2 RECs and integrate various financial, compliance and progress report activities into existing reports. Technical Support and System Development categories includes support to customize the existing databases which would be required for the procurement, contracting, invoicing, LSE compliance and reporting of contracts. NYSERDA would effectively streamline and integrate existing business process in the most cost-effective manner.

NYSERDA would allocate a proportionate share of the annual New York State Cost Recovery Fee (CRF) to the Competitive Tier 2 program. The CRF is a fee assessed to NYSERDA and other 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. For the fiscal year ended March 31, 2019, the CRF assessment was about 1.18% of NYSERDA’s annual expenses, and NYSERDA has assumed a similar percentage of the Competitive Tier 2 funding for the program’s allocable share of CRF costs. If actual cost allocations exceed these estimates, NYSERDA would reallocate approved but uncommitted administrative Competitive Tier 2 funds or would request approval for additional funds.

NYSERDA proposes to file quarterly itemized reports on costs associated with the administration and the development of the Competitive Tier 2 program and would continue to keep detailed accounting of all costs in administering the CES program; any unspent administrative funds would be used for future ratepayer benefit.

<b>Administrative Category</b>	<b>Proposed Costs</b>
Salaries and Overhead	\$2,545,371
Technical Support	\$300,000
System Development	\$300,000
NYS Cost Recovery Expense	\$2,397,115
<b>Total</b>	<b>\$5,542,486</b>

### Reporting

Should the proposed Competitive Tier 2 program be adopted by the Commission, NYSERDA proposes to incorporate relevant elements of the program into existing schedules for CES reports, including quarterly administrative reports as described above, the annual CES Financial Status

Report, the annual RES Procurement Performance report and the annual CES Progress Report as defined in the Final Phase 3 Implementation Plan.<sup>24</sup>

Conclusion

NYSERDA's proposal for the treatment of baseline renewable energy resources is aligned with the Commission objective of cost-effectively maximizing renewable electric generation to serve New York State while ensuring that both new and existing renewable resources receive competitively determined financial support for their development and operations. Competitive Tier 2 is designed to achieve the lowest possible cost while maximizing customer benefits, promoting competition, and animating voluntary markets for renewables to complement public investments. NYSERDA respectfully requests that the Commission issue an Order that authorizes NYSERDA to implement the Competitive Tier 2 program, as described herein.

Dated: January 24, 2020

Respectfully submitted,



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<sup>24</sup> Case 15-E-0302; supra, Final Phase 3 Implementation Plan (Filed January 11, 2019).

## Attachment 1

### **TIER 2 RENEWABLE ENERGY CERTIFICATE PURCHASE AND SALE AGREEMENT**

This Agreement (the “Agreement”) is made as of TBD, 2020 (“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 the Load Serving Entity entering this Agreement using the unique Confirmation ID number provided by NYSERDA (“LSE”). NYSERDA and LSE are each referred to herein as a “Party” and are collectively referred to herein as the “Parties.”

#### **RECITALS:**

WHEREAS, by its (“Tier 2 Order”) in Case 15-E-0302 the New York State Public Service Commission (“PSC”) established a Tier 2 program; and

WHEREAS, the Tier 2 Order directed NYSERDA to administer a series of three competitive Requests for Proposals (“RFPs”) for the purchase of Tier 2 eligible renewable energy credits (“RECs”) from eligible generating facilities; and

WHEREAS, the Tier 2 Order authorizes NYSERDA to enter three-year agreements with eligible facilities receiving competitive awards under the Tier 2 RFPs; and

WHEREAS, the Tier 2 program includes a requirement that each LSE purchase from NYSERDA a proportionate share of the Tier 2 RECs acquired by NYSERDA under the Tier 2 program; and

WHEREAS, the Order establishes the Tier 2 compliance period as January 1 to December 31 of each year, after the completion of the first Tier 2 RFP (“Compliance Year”); and

WHEREAS, the Tier 2 Order directs that each LSE be charged a uniform wholesale per MWh charge (“Tier 2 Charge”) that will be applied to each LSE’s actual wholesale load to calculate their monthly Tier 2 obligation payments; and

WHEREAS, the Tier 2 Order established the method for calculating the Tier 2 Charge ; and

WHEREAS, the Tier 2 Order approved this form of agreement for the procurement of Tier 2 RECs by LSEs from NYSERDA; and

NOW, THEREFORE, in consideration of the foregoing and of the mutual promises hereinafter set forth, which the Parties agree is sufficient, and 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) “Agreement” means this Tier 2 Renewable Energy Certificate Purchase and Sale Agreement, and including [Exhibits A \(Standard Terms and Conditions for All NYSERDA Agreements\)](#); [B \(NYSERDA Prompt Payment Policy Statement\)](#)<sup>25</sup>; and C (LSE E-mail Confirmation for Tier 2 RECs) all of which are incorporated herein and made part hereof.
- (b) “Annual Tier 2 Obligation Amount” shall be calculated as an amount equal to the Total Tier 2 Expenditure, multiplied by the percentage of the wholesale electric energy load served by LSE in relation to the total electric energy load served by all LSEs during such Compliance Year.
- (c) “Compliance Year” shall mean January 1 to December 31 of each year during which NYSERDA is purchasing Tier 2 RECs.
- (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.

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<sup>25</sup> <https://www.nyserda.ny.gov/Funding-Opportunities/Standard-Forms-and-Agreements>

- (f) “Monthly Obligation Payment” means the monthly payment due from LSE to NYSERDA. The Monthly Obligation Payment is calculated as the wholesale load, for the prior month, in MWh, multiplied by the Tier 2 Charge, multiplied by a load modifier rate as applicable based on the LSE. NYSERDA and the LSE will jointly determine the load modifier rate for each Compliance Year.
- (g) “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 Tier 2 RECs.
- (h) “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>26</sup>
- (i) “NYISO” means the New York Independent System Operator.
- (j) “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.
- (k) “Total Tier 2 Expenditure” shall mean the total dollars expended by NYSERDA to purchase Tier 2 RECs during the compliance year.
- (l) “Tier 2 REC Certificate” means certain NYGATS certificates evidencing Tier 2 RECs derived from the energy production of megawatt hours by Tier 2 eligible electric generation sources. Each REC, as reflected in a Tier 2 REC Certificate, represents the energy production of one (1) megawatt-hour.
- (m) “Tier 2 Rate” means the per MWh charge used by all LSEs and NYSERDA as calculated by the formula adopted in the Tier 2 Order and as posted on NYSERDA’s website, and including any administrative adder, if approved by the Commission.<sup>27</sup>

## ARTICLE 2: PURCHASE AND SALE OF Tier 2 RECs

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<sup>26</sup> <https://www.nyserda.ny.gov/All-Programs/Programs/NYGATS/Registration-Documents>

<sup>27</sup> Case 15-E-0302, Order Approving Zero-Emissions Credit Implementation Plan with Modifications (issued September 20, 2019) p. 3.

2.1 Procurement. Subject to the terms and conditions of this Agreement, NYSERDA agrees to purchase Tier 2 RECs on behalf of LSE, and LSE agrees to make payment to NYSERDA, in an annual amount equal to the Annual Tier 2 Obligation Amount.

2.2 Retirement. Upon conclusion of the Settlement and Reconciliation process as described under Section 2.7, NYSERDA will retire in NYGATS on behalf of LSE for purposes of Tier 2 compliance by LSE all Tier 2 RECs purchased by NYSERDA on behalf of LSE for which LSE has provided payment to NYSERDA.

2.3 Invoicing. NYSERDA will provide invoices to the LSE on a monthly basis for the Monthly Obligation Payment.

2.4 Payment. Payments in the amount of the Monthly Obligation Payment shall be due to NYSERDA within fifteen (15) days of the invoice date. 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:

Contact NYSERDA for electronic banking information.

When making payment, LSE shall include the Customer ID that NYSERDA previously sent to LSE by e-mail.

2.5 Taxes/Fees. NYSERDA shall pay any taxes or other fees, if any, imposed on the creation or retirement in NYGATS.

2.6 Term. This Agreement shall be effective as of the Effective Date, and unless terminated earlier pursuant to Article 5 of this Agreement. Termination shall not affect provisions hereof that expressly survive termination.

2.7 Settlement and Reconciliation. NYSERDA shall calculate LSE's Annual Tier 2 Obligation Amount for each Compliance Year. Should the amount paid by the LSE in a

Compliance Year exceed the Annual Tier 2 Obligation Amount for the same Compliance Year, NYSEDA shall make payment to LSE in an amount equaling the overpayment. Should the amount paid by the LSE in a Compliance Year be less than the Annual Tier 2 REC Obligation Amount in the Compliance Year, LSE shall make a payment of the difference between the amounts actually paid to NYSEDA and the Annual Tier 2 REC Obligation Amount. LSE and NYSEDA agree that, on a timely basis the Annual Tier 2 Obligation Amount and the total aggregated payments to NYSEDA hereunder shall be reconciled pursuant to the Tier 2 Order, reflecting the actual load served by LSE during the applicable Compliance Year.

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

3.1 NYSEDA representations and warranties. NYSEDA hereby represents and warrants to LSE as follows:

- (a) NYSEDA has and, at all times during the Term will have, all necessary power and authority to execute this Agreement and to perform its obligations hereunder.
- (b) The execution of and performance under this Agreement by NYSEDA has been duly authorized by all necessary action and does not violate any of the terms or conditions of NYSEDA 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 NYSEDA. This Agreement constitutes the valid and binding obligation of NYSEDA 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 NYSEDA's knowledge) threatened litigation, arbitration or administrative proceeding that materially adversely affects NYSEDA's ability to perform its obligations under this Agreement.
- (d) The Tier 2 payments made by LSE to NYSEDA hereunder shall be made for compliance under the Tier 2 Order.
- (e) EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, NYSEDA 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 LSE representations and warranties. LSE hereby represents and warrants to NYSERDA as follows:

(a) LSE 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. LSE has, and at all times during the Term will have, all necessary power and authority to execute this Agreement and to perform its obligations hereunder.

(b) The execution of and performance by LSE under this Agreement by LSE has been duly authorized by all necessary action and does not violate any of the terms or conditions of LSE'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 LSE. 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 LSE's knowledge) threatened litigation or administrative proceeding against the LSE that materially and adversely affects LSE's ability to perform its obligations under this Agreement.

(d) LSE has, and at all times during the Term will use reasonable efforts to maintain, the financial capability to perform its obligations hereunder.

(e) LSE 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 fifteen (15) 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 become 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, (d) withhold the retirement of Tier 2 RECs on behalf of the defaulting Party, and/or (e) exercise its legal rights to secure payment of amounts due and owing to the non-defaulting Party by the defaulting Party. Notices by LSE pursuant to this section shall be served on NYSERDA and the PSC. NYSERDA may enforce this Agreement and pursue the collection of any unpaid portion of the Annual Tier 2 Obligation Amount or Monthly Obligation Payment due to NYSERDA by referring the matter to the New York State Attorney General or by any other legal means.

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.

5.3 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**



6.2 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 LSE other than to retire on behalf of LSE for Tier 2 REC compliance purposes any Tier 2 RECs for which LSE has made payment prior to termination.

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 LSE'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 LSE and, excepting any Tier 2 reconciliation process provided for by prior agreement, supersedes all prior agreements and understandings relating to the subject matter hereof, including but not limited to any prior agreement between the parties regarding the purchase and sale of Tier 2 RECs. 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 LSE 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. The FOIL Law (Public Officers Law § 87(d)(2)) provides an exception to disclosure for records or portions thereof for numerous reasons, including but not limited to protected material 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).

7.13 Claim of Confidentiality. Information of any tangible form including any document that LSE 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 Tier 2 Order, shall be permitted to report to the New York State Department of Public Service through its Records Access Officer seeking confidential treatment as appropriate, as to the amounts received from LSE for Tier 2 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 Electronic Execution. LSE acknowledges, confirms and agrees that any signature (including any electronic symbol or process attached to, or associated with, this standard Tier 2 Renewable Energy Certificate Purchase and Sale Agreement or other record and adopted by LSE with the intent to sign, authenticate or accept such contract or record hereto or to any other certificate, agreement or document necessary to this transaction shall have the same legal validity and enforceability as a manually executed signature or use of a paper-based recordkeeping system to the fullest extent permitted by applicable law, including the Federal **Electronic Signatures** in Global and National Commerce Act, the New York State Electronic Signatures and Records Act, and the parties hereby waive any objection to the contrary.