Chadbourne draft 2-25-2014

**Indicative Term Sheet**

**Proposed Fixed Price Physical Energy Sale Transaction for**

**Mesquite Creek Wind Project**

This indicative term sheet (this “**Term Sheet**”) is issued for discussion purposes only and does not constitute an offer or commitment to provide the commodity transaction described below. For the avoidance of doubt, this Term Sheet is a summary of certain requirements and not an exhaustive specification. Any transaction will be governed by final documents in form and substance satisfactory to BP Energy Company and Mesquite Creek Wind LLC. The consummation of any transaction is subject to conditions usual for transactions of this nature including, without limitation, due diligence, market conditions, satisfactory documentation, and internal approvals. This Term Sheet and its contents are confidential and shall not be disclosed without the written consent of BP Energy Company and Mesquite Creek Wind LLC.

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|  | **PARTIES AND PROJECT** |
| **Buyer** | BP Energy Company |
| **Seller or Project Company** | Mesquite Creek Wind LLC |
| **Project** | Wind project to be located in Borden and Dawson Counties, Texas, consisting of up to 118 GE-1.7-100, 80-m hub height wind turbines, with a total nameplate capacity of approximately 200.6 megawatts. The date of commercial operations (“**COD**”) is expected to occur by July 1, 2015. |
| **Transaction** | Sale of fixed price physical electric energy on the terms and conditions herein |
|  | **PRODUCT AND TERMS** |
| **Trade Date** | March [*\_\_\_*], 2014 |
| **Commodity** | Electric energy |
| **Quantity** | [7x24 shape in accordance with Appendix A /  Blocks listed by month in accordance with Appendix A] |
| **Price** | $[\_\_\_\_\_]/MWh |
| **Delivery Point** | [ERCOT [North / West] 345 kV Hub] |
| **Delivery Period** | From and including July 1, 2015, through and including June 30, 2022, Monday through Sunday including NERC holidays HE 0100 through HE 2400 |
| **Product Type** | Firm LD |
| **Scheduling** | Seller shall schedule, though the Energy Manager (or any replacement energy manager), the Quantity under the Transaction. |
| **Energy Manager** | MP2 Energy Texas LLC[[1]](#footnote-2) |
| **Payment Date** | Daily |
|  | **CREDIT SUPPORT AND COLLATERAL** | |
| **Guaranty** | BP Corporation North America Inc. will issue a guaranty in the amount of $[\_\_\_\_\_\_\_\_\_] for the benefit of Seller in respect of Buyer’s obligations (which shall remain in effect from and after the Trade Date until full and final satisfaction of Buyer’s obligations) in a form agreed by Seller prior to entering into the Transaction.  In the event that at any time the Credit Rating of BP Corporation North America Inc. falls below BBB by S&P or Baa2 by Moody’s, and Buyer does not post cash to cover Seller’s exposure, if any, an Additional Termination Event in respect of Buyer shall occur. | |
| **Pre-COD Letter of Credit and Collateral Package** | Within 5 business days of the execution of the EEI documentation and until the Project’s COD, Seller will provide to Buyer:  (i) a letter of credit from one or more Qualified Issuers in an amount equal to $[50] million. Seller and Buyer will agree to the form of letter of credit prior to entering the Transaction; and  “**Qualified Issuer**” means (i) The Bank of Tokyo-Mitsubishi UFJ, Ltd., (ii) Sumitomo Mitsui Banking Corporation, (iii) Mizuho Bank, Ltd. or (iv) a major U.S. commercial bank or a U.S. branch of a foreign bank that, at the time of delivery of a letter of credit, (A) has a combined capital surplus of $10,000,000,000 and (B) has a senior unsecured long-term credit rating (the “**Credit Rating**”) of at least “[A-]” by S&P or “[A3]” by Moody’s. Customary Letter of Credit Default provisions to be agreed by the parties prior to entering the hedge.  (ii) an exclusive, uncapped second lien security interest on a collateral package consisting of all of the member interests in and all of the assets and properties of Seller (the “**Collateral Package**”), subject only to (A) the first lien for the senior creditors, (B) pari passu shared first liens on the Collateral Package securing agreed-upon types of power transactions entered into in the ordinary course of business and not for speculation that do not exceed agreed upon volume and tenor limits (“**Approved Hedges**”), and (C) standard permitted liens under the terms of the Pre-COD Intercreditor described below. | |
| **Post-COD Collateral** | At and following COD, Seller will provide to Buyer an capped first lien security interest on the Collateral Package, subject only to (i) standard permitted liens, (ii) pari passu shared first liens on the Collateral Package securing senior creditors, and (iii) Approved Hedges, subject to the terms of the Post-COD Intercreditor described below.  Buyer will continue to have a second lien security interest in the Collateral Package (as described above) following COD. | |
| **Pre-COD Intercreditor** | Buyer’s rights as a second lien holder prior to COD shall be subject to customary intercreditor limitations and cure rights to be negotiated between Buyer and relevant creditors in good faith, provided that such rights shall include, unless otherwise agreed:  (i) upon an Event of Default or Termination Event under the EEI, Buyer shall be allowed to terminate the Transaction, subject only to the Consent Restrictions described below;  (ii) following termination, Buyer’s rights to apply cash and letters of credit shall not be restricted;  (iii) Buyer’s rights to enforce the second lien against the Collateral Package will be subject only to the Consent Restrictions described below and a [120] day standstill period;  (iv) Buyer shall not be required to release liens on Collateral Package except in connection with (A) a foreclosure subject to the requirements of the UCC, bankruptcy, or other applicable law where the proceeds thereof are applied in accordance with an agreed waterfall respecting the first and second liens, or (B) disposition or other release of assets in the Collateral Package as permitted under the senior financing documents;  (v) Buyer shall have the right to purchase the first lien obligations at par without premium prior to any exercise of remedies on the Collateral Package, including all related fees, accrued interest and breakage costs; and  (vi) Buyer shall retain its rights as a secured creditor in bankruptcy, subject to agreed upon restrictions regarding adequate protection, use of cash collateral, DIP financing, and similar customary matters. | |
| **Post-COD Intercreditor** | Buyer’s rights as a first lien holder after COD shall be subject only to a customary collateral agency and intercreditor agreement (to be negotiated between Seller and Buyer in good faith) under which a collateral agent holds the security interests on behalf of Buyer, the senior creditors and the counterparties to the Approved Hedges, provided that such rights shall include, unless otherwise agreed:  (i) upon an Event of Default or Termination Event under the EEI documentation, Buyer shall be allowed to terminate the Transaction;  (ii) following termination, Buyer’s rights to apply cash and letters of credit shall not be restricted;  (iii) enforcement against the Collateral Package will be subject to majority voting, provided only that Buyer cannot be restricted beyond [120] days of standstill subject to extension to be agreed; and  (iv) Buyer shall not be required to release liens on Collateral Package except in connection with (A) a foreclosure subject to the requirements of the UCC, bankruptcy, or other applicable law where the proceeds thereof are applied in accordance with an agreed waterfall respecting the first and second liens, or (B) disposition or other release of assets in the Collateral Package as permitted under the senior financing documents. | |
| **Third Lien Intercreditor** | The Collateral Package will also be subject to a third priority lien held by one or more third-party offtakers. Such offtakers’ rights as third lien holders, both prior to and after COD, shall be subject to customary intercreditor limitations (including, for the avoidance of doubt, subordination to the first and second liens) and cure rights to be negotiated between Buyer and the relevant offtakers in good faith. | |
| **Consent Restrictions** | Customary cure rights for senior creditors to be agreed by Seller and Buyer in good faith.  Senior Creditor Cure Rights:  The senior creditors shall receive notices of defaults and have rights to cure defaults, after applicable cure periods in the Agreement, if any, as follows: (i) for payment defaults, [15] days; (ii) for non-bankruptcy non-payment defaults, [45] days, with the possibility of an additional extension of up to [30] days if cure is being effected; and (iii) for a bankruptcy event, [15] days (or [zero] days for bankruptcy liquidation). Prior to Buyer terminating and exercising remedies, senior creditors shall have the right to purchase the Transaction from Buyer for Buyer’s Exposure as reasonably determined by Buyer as if an Additional Termination Event with respect to Seller existed.  [Incremental Exposure:  The rights of the senior creditors to use the above cure periods shall be conditioned upon their agreement to post acceptable collateral to cover incremental increases in the exposure of Buyer during such cure periods.] | |
|  | **COVENANTS, EVENTS OF DEFAULT, AND ADDITIONAL TERMINATION EVENTS** | |
| **Covenants** | Seller to agree to customary affirmative and negative covenants for similar companies and projects similar to the Project, subject to customary qualifications, exceptions, materiality standards and thresholds.  Affirmative covenants shall include, without limitation, compliance with laws, preservation of corporate existence, maintenance of properties, maintenance of insurance and application of loss proceeds, and further assurances and delivery of further information with respect to the Collateral Package.  Negative covenants shall be limited to liens, indebtedness, mergers and dissolution, dispositions of assets, subsidiaries, distributions, and termination or modification of material project documents.  The aforementioned affirmative and negative covenants shall be as set forth in the senior financing documents. Provided that the outstanding principal amount of indebtedness owed to the senior creditors is equal to or greater than a specific threshold to be agreed upon, such covenants may be amended, waived, supplemented or otherwise modified from time to time as permitted under the senior financing documents and will apply to the Seller mutatis mutandis as modified or waived. | |
| **Cross Acceleration** | Standard definition of “Specified Indebtedness” will apply to Buyer and Seller. Cross-acceleration will apply.  Seller Threshold:   * Zero with respect to Specified Indebtedness under the senior facility; and * $[\_\_] million for other Specified Indebtedness.   Buyer Threshold:  [\_\_]% equity of BP Corporation North America Inc. | |
| **Events of Default and Additional Termination Events** | Standard EEI Events of Default (with modified cure periods as described below) will apply to both parties.  Additional Termination Events with respect to Seller shall include, but not be limited to:   * during any period where the Collateral Package secures the Agreement, any of Seller’s obligations under the Agreement cease to be secured by the required security interests in the Collateral Package, excluding as a result of regulatory changes or as otherwise permitted under the senior financing documents and, in all cases, subject to a materiality qualifier to be agreed; and * Seller breaches certain agreed-upon Covenants, as such covenants are set forth in the senior financing documents and may be amended, waived, supplemented or otherwise modified from time to time as permitted under the senior financing documents.   In the case of any Additional Termination Event, Seller will be the sole “Affected Party” and all transactions will be “Affected Transactions”. | |
| **Deliverables** | Diligence Deliverables:  [BP to confirm what (if anything) it needs for diligence]  Project documents, including the construction agreement, senior financing documents and ancillary agreements thereunder, organizational documents, and other related documents reasonably requested by Buyer.  General Deliverables:  Standard deliverables for power hedge transactions (e.g., corporate approval documents, audited financial statements, and credit support documents), including an opinion of counsel (regarding enforceability of the security agreements and such other opinions as are customarily provided in secured transactions), generating and operating reports delivered on a monthly basis and ongoing financial and other reporting (including construction progress), as appropriate. | |
| **Change of Control; Assignment** | Except as otherwise provided in this paragraph, any Change of Control of either party is permitted only with other party’s prior written consent, which shall not be unreasonably withheld or delayed. For the avoidance of doubt, the party that is not experiencing a Change of Control may withhold consent if it reasonably determines that the potential acquirer is not as creditworthy as the party experiencing a Change of Control and such acquirer refuses to provide additional performance assurance. A Change of Control shall be permitted without the other party’s consent if the following conditions are satisfied: (i) the party experiencing the Change of Control is financially solvent; (ii) the creditworthiness of the party experiencing the Change of Control is not adversely affected by such Change of Control; and (iii) the party experiencing the Change of Control will have the same or improved ability to perform its obligations under the EEI documents.  “***Change of Control***” means (i) if any person that is not a member or equity holder of a party (on the effective date of the EEI documentation) should hereafter acquire, directly or indirectly, more than 50% of the beneficial ownership of (a) equity securities having the power to elect any percent of the management of that party or (b) any other ownership interest or (ii) the sale of all or substantially all of a party's assets, whether now owned or hereafter acquired, to a person.  Seller may assign the EEI documentation without Buyer’s consent (i) to creditors or tax investors in connection with the Project’s financing, (ii) to an affiliate, (iii) to a person succeeding to all or substantially all of the assets of Seller, or (iv) to a person with equal or greater creditworthiness as that of Seller. Other assignment by Seller is only permitted with Buyer’s prior written consent, which shall not be unreasonably withheld or delayed. | |

**Appendix A**



1. Note: Hedge provider to confirm if it wants to be the energy manager/QSE for the entire Project. [↑](#footnote-ref-2)