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April 10, 2024

VIA ELECTRONIC MAIL

Illinois Power Agency
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**Re: Stakeholder Feedback Request – Equity Accountability System Assessment
Request Issued Mar. 20, 2024; Comment Deadline Apr. 10, 2024
Joint EEC Parties’ Comments**

To Whom It May Concern:

We are furnishing these comments on behalf of ADL Solutions LLC, Blacktech Solutions Corp., GarDen Enterprises, LLC d/b/a UpSouth Energy, LLC, LiveWire Electrical Systems, Inc., Millennium Solar Electric, Sesenergi Eco Solutions Enterprise, LLC, and Windfree Wind and Solar Energy Design Company (collectively, the “Joint EEC Parties”). Each of the Joint EEC Parties is a registered Equity Eligible Contractor (“EEC”) Approved Vendor (“AV”) in the Illinois Adjustable Block Program (“ABP”). We respectfully request that the Illinois Power Agency (“IPA”) accept the Joint EEC Parties’ comments through the care of the undersigned, with the understanding that such comments do not in any way reflect the positions of Barnes & Thornburg LLP, its employees, partners, agents, or affiliates, nor any of its other clients.

Subject to that qualification, the Joint EEC Parties provide the following comments:

I. THE EQUITY ACCOUNTABILITY SYSTEM AND ASSESSMENT SCOPE

In its Stakeholder Feedback Request dated Mar. 20, 2024 (“Request”), the IPA recognizes that certain amendments to the Illinois Power Agency Act (“Act”) had the objective of providing “priority access to the clean energy economy for businesses and workers from communities that have been excluded from economic opportunities in the energy sector, have been subject to disproportionate levels of pollution, and have disproportionately experienced negative public health outcomes.” (Request at 1 (quoting 20 ILCS 3855/1-75(c-10).) Further, “[t]o advance that objective,” the Act provides for the establishment of the Equity Accountability System (“EAS”), which includes the EEC category within the ABP. (*Id.* at 1-2 (citing 20 ILCS 3855/1-75(c-10)).)

Continuing, the Act “further **establishes several data collection and reporting requirements to support the assessment of the [EAS]** and improve transparency regarding who participates in and benefits from the clean energy economy.” (*Id.* at 2 (emphasis added).) The Request frames the IPA’s charge as assessing the EAS’s effectiveness “**to determine the extent to which it has advanced its goal of increasing participation of Equity Eligible Persons (‘EEPs’) and [EECs] in IPA programs and procurements.**” (*Id.* (emphasis in original).)

Accordingly, while the IPA’s Request here outlines several questions, the IPA explicitly encourages stakeholders to “not feel limited by the[se] questions” and “provide comments on these proposals beyond the scope of these specific questions as it relates to the EAS Assessment.” (*Id.* at 1.) The breadth of the Request is consistent with the statutory latitude given to the IPA to collect data on the EAS, and for the IPA to improve the EAS to achieve the aims of the Act. *See, e.g.*, 20 ILCS 3855/1-75(c-10)(5) (IPA must “collect information about work on projects or portfolios of projects subject to these minimum equity standards to ensure compliance with” the EAS), *id.* 3855/1-75(c-10)(7) (IPA can adjust the EAS based on “stakeholder input, including from equity eligible persons, [and] equity eligible contractors,” so as to “advance the goals” of the Act).

II. EAS ASSESSMENTS SHOULD COLLECT DATA ON CORPORATE-FORMATION AND TAX-RELATED BARRIERS TO EEC PARTICIPATION

The IPA should take a broad view on collecting corporate-formation and taxation data on EEC and non-EEC participants in the ABP, in a manner that protects confidentiality where commercially appropriate, so as to ensure parity in EECs’ ability to access opportunities through ABP procurements versus non-ECC participants. The need for the IPA to gather data at this time is crucial because the “rules of the road” continue to change, including in the latest Long-Term Renewable Resources Procurement Plan (“LTRRPP” or “Plan”) proceeding that just concluded.

The Joint EEC Parties contend that collecting such data here is warranted in two respects: (A) to determine whether recent Plan changes on EEC ownership structures improve EEC access to financing, including tax equity financing; and (B) to determine whether continued corporate-formation and tax-related disparities exist such that future Plan changes are still needed.

A. Data on EEC Access to Tax Equity and Other Financing

For example, in the latest Plan proceeding, the IPA concurred with several commenters that it was “open to adjusting the limitation on EEC ownership by an individual EEP” because it did “not want to create additional barriers for true EECs.” LTRRPP, ICC No. 23-0714, Order (Feb. 20, 2024), at 152. The Commission “adopt[ed] the IPA’s proposal to allow an individual EEP to serve as the majority-owner of one EEC Designee and one EEC AV, which may be separate legal entities” recognizing that this may have addressed “some of” the EECs’ concerns. *Id.* at 154.

In response to the Joint Solar Parties¹ (“JSP”) raising several additional ownership and tax-related concerns arising out of the EEC-specific rules, the IPA recognized “the potential financial

¹ The JSPs are the Solar Energy Industries Association, the Coalition for Community Solar Access, and the Illinois Solar Energy Association. Order at 1.

challenges posed by the requirement that an SPAV [single-project AV] own the project” but that the IPA “does not have sufficient expertise in the financing models to determine whether the challenge is severe enough to warrant a blanket exemption.” *Id.* at 152-53. The IPA deferred to the Commission on “whether to adopt the JSPs[’] proposal, which would eliminate the requirement that the EEC SPAV must own the system or systems subject to the REC contract “to allow EECs to leverage tax equity financing for these projects.” *Id.* at 154. The Commission did so. *Id.*

The Joint EEC Parties appreciate the IPA’s deference to the experience of market participants, like those that the JSPs represent, as reflected in the Commission’s Order on the LTRRPP.

Accordingly, the Joint EEC Parties encourage the IPA to collect corporate-formation and tax-related data on EECs and EEC SPAVs to empirically determine whether EECs are able to access tax equity and other financing for these projects.

B. Data on Continued Corporate-Formation and Tax Disparities for EECs

The rationales advanced by the JSPs and certain of the Joint EEC Parties underscore the need for the IPA to collect additional corporate-formation and tax-related data on EEC and non-EEC participants in the ABP, so as to determine if additional clarity regarding EEC-specific rules is warranted. As the JSPs explained, “[w]ithout financing or with impaired financing, EECs will be at a severe disadvantage competing in the marketplace and unlocking the wealth-building value of REC contract awards.” *Id.* at 148. Continuing, “allowing the same structure for EECs and access to EEC-protected opportunities will allow the EEC structures grow to compete with similarly situated non-EECs that exist in the solar marketplace today.” *Id.* at 149. At bottom, the Joint EEC Parties agree that there should not be “a single vision of what an EEC company structure must be to compete with the myriad different structures within the solar marketplace.” *Id.*

Indeed, as certain of the Joint EEC Parties further explained during Plan proceedings, “**an EEP who owns multiple legitimate firms should not be penalized with a limitation of utilization by the IPA to register these firms as EEC AVs and Designees because it interferes with normal business activities and prohibits growth and expansion**, which is supposed to be a desired outcome of this Program.” *Id.* at 151 (emphasis added).

While the Commission has adopted, and the IPA has endorsed, changes to the EEC SPAV construct, as noted above, other ambiguities remain that the Joint EEC Parties contend may continue to hamper EECs’ ability to access opportunities through ABP procurements. Specifically, in the Plan that was originally filed with the Commission, the IPA obliquely referenced that “[a]n EEC must be majority-owned by an Equity Eligible Person, not another Equity Eligible Contractor,” without citation (ICC No. 23-0714, Petition (Oct. 20, 2023) at 350), but then proposed “two additional requirements for EEC certification.” *Id.* at 351. These two proposed requirements were subject to comment, ultimately reflected in the Commission’s Order.

But this purported limitation on EEC-ownership of EECs was not further addressed. Indeed, it is dubious whether this limitation is even supported by the Act. Under the Act, an EEC is “a business that is majority-owned by **eligible persons**, or a nonprofit or cooperative that is majority-governed by eligible persons, or is a natural person that is an eligible person offering personal services as an

independent contractor.” 20 ILCS 3855/1-10 (emphasis added). In turn, EEPs or “eligible persons” are “**persons** who would most benefit from equitable investments by the State designed to combat discrimination.” *Id.* (emphasis added). Finally, “persons” are “**any** natural person, **firm, partnership, corporation**, either domestic or foreign, **company, association, limited liability company**, joint stock company, or association and includes any trustee, receiver, assignee, or personal representative thereof.” *Id.* (emphasis added).

The effect of this issue—*i.e.*, the IPA’s reference in the initial Plan filed in October 2023 to purportedly limit EEC-ownership of EECs, combined with the Commission’s recent decisions—may now present its own “new” barrier to EECs.

Specifically, if a “natural person” EEP is required to own each EEC SPAV entity instead of allowing an EEP-qualified EEC “parent company” to own such an entity, the “natural person” EEP will be subject to typically higher federal and state tax rates than if an EEP-qualified EEC “parent company” were permitted to own each EEC SPAV. Furthermore, the accounting and administrative burden on “natural person” EEP ownership of each EEC SPAV is also relatively more onerous because individual tax returns are necessary, which would not be required if an EEP-qualified EEC “parent company” were permitted to own each EEC SPAV. Non-EECs that create SPAV entities in the Traditional Community Solar Block have no comparable IPA-imposed limitation on registering SPAV entities that are wholly owned by the main parent-company AV. EECs should not need to experience this unfair limitation specific to EECs, which makes no policy sense,² and furthermore may serve to continue to stymie EECs’ ability to access opportunities through ABP procurements, even with the changes adopted in the latest Plan.

Accordingly, the Joint EEC Parties encourage the IPA to collect corporate-formation and tax-related data on EECs and EEC SPAVs to empirically determine whether continued corporate-formation and/or tax-related barriers for EECs exist, including for the reasons outlined in the Joint EEC Parties’ comments here, amongst others.

² The IPA appears to implicitly agree, outlining in its Draft 2024 Guidebook (Mar. 13, 2024) issued for comment, that

An Equity Eligible Person (EEP) is allowed to serve as the majority-owner of one EEC Designee and one EEC AV, which may be separate legal entities. The only exception to this limitation is the registration of Single-Project Approved Vendors (“SPAVs”). **There is no limit on the number of SPAVs which can be registered as EECs by a single EEC. This EEC and their EEC Single-Project Approved Vendors** will be considered affiliated and subject to the same Developer Cap should that be triggered for the given Program Year.

However, additional clarity by the IPA explicitly endorsing that an EEP-qualified EEC “parent company” can own each EEC SPAV would be helpful, such as: “There is no limit on the number of SPAVs which can be registered as EECs **and wholly owned** by a single EEC.”

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Please feel free to contact me if you have any questions to the Joint EEC Parties or clarifications from the Joint EEC Parties. Thank you much.

Best regards,



Alexander J. Bandza

Signatories to the Joint EEC Parties:

- ADL Solutions LLC
- Blacktech Solutions Corp
- LiveWire Electrical Systems, Inc.
- Millennium Solar Electric
- Sesenergi Eco Solutions Enterprise, LLC
- UpSouth Energy, LLC
- Windfree Wind and Solar Energy Design Company