RESPONSE TO MINIMUM EQUITY STANDARD REQUEST FOR COMMENTS ON BEHALF OF THE SOLAR ENERGY INDUSTRIES ASSOCIATION, COALITION FOR COMMUNITY SOLAR ACCESS, AND ILLINOIS SOLAR ENERGY ASSOCIATION

February 22, 2023

The Solar Energy Industries Association, Coalition for Community Solar Access, and Illinois Solar Energy Association (collectively the "Joint Solar Parties" or "JSP") appreciate the opportunity to respond to the IPA's Minimum Equity Standards ("MES") Waiver Request and Evaluation dated February 8, 2023.

I. Issues Related To MES Calculation

As an initial matter, the Joint Solar Parties note that part and parcel of a waiver (and showing diligent efforts to the goal) is clarifying how the minimum equity standard target is calculated. On some level, the basic calculation seems apparent: number of persons who count toward equity eligible contractors/eligible persons numbers divided by total project workforce. However, as the request for comments makes clear, the actual calculation still has substantial ambiguity. These ambiguities appear to not have been addressed at the webinars held by the IPA and Energy Solutions, so are ripe to be addressed now.

First, the Joint Solar Parties wish to address an issue regarding calculation of the numerator—persons who count toward the number of eligible persons and equity eligible contractors. The Joint Solar Parties disagree with the IPA's proposal to analyze the workforce of an equity eligible contractor for MES purposes reflected on page four of the request for comments, which appears to count non-eligible person employees of an equity eligible contractor against the denominator (all project workforce) only.

The Joint Solar Parties believe the IPA's proposal is inconsistent with statute. Section 1-75(c-10)(1) requires that "The Agency shall create programs with the purpose of increasing access to and development of equity eligible contractors, who are prime contractors and subcontractors, across all of the programs it manages." Undervaluing an equity eligible contractor under the MES falls short of increasing access and facilitate wealth-building for their eligible person owners. Section 1-75(c-10)(1) continues to set out that "at least 10% of the project workforce for each entity participating in a procurement program outlined in this subsection (c-10) must be done by equity eligible persons or equity eligible contractors." (*Id.*) The statutory language makes clear that the 10% relates to work done by *either* eligible persons *or* equity eligible contractors—the disjunctive makes clear that the statutory intent is that equity eligible contractors count as an entity.

The Joint Solar Parties also caution against a measurement approach that values a contractor not majority owned by eligible persons but that employs a single eligible person the same as an equity eligible contractor that employs non-eligible persons.[1] This approach would advantage non-equity

[1] The Joint Solar Parties noted the example in the penultimate paragraph on page 4 of the request imagined a hypothetical equity eligible contractor with fifteen employees that were not eligible persons—the Joint Solar Parties assumed that the number of employees is not relevant (only the fact that none are EECs), because the relevant factor is the number of employees or contractors of the equity eligible contractor that participate on the project and where the duties are performed in Illinois. (*See* Final LTRRPP dated August 23, 2022 at 327-328.)

eligible contractors with the resources to hire a position over an emerging (or existing) equity eligible contractor that did not or cannot initially support a large number of eligible persons on staff. The Joint Solar Parties do agree that non-equity eligible contractors should be incentivized to hire eligible persons, but both the General Assembly's own words and policy supporting growth of equity eligible contractors requires treating the equity eligible contractor's workforce as counting toward the minimum equity standard.

As a result, the Joint Solar Parties request that to the extent that an equity eligible contractor is performing work that qualifies it as part of the project workforce under the LTRRPP that their own employees or (natural person) independent contractors are counted toward the minimum equity standard, but (juristic persons) contractors or subcontractors to an equity eligible contractor would not qualify unless they themselves were equity eligible contractors. To use the example from the request for comments, if an equity eligible contractor had four employees or (natural person) independent contractors performing roles within the scope of project workforce and with duties performed in Illinois, the four employees would be included both in the denominator of the project workforce (total number of people) and the numerator (total eligible persons/equity eligible contractors). However, if that equity eligible contractor hired a subcontractor that was not an equity eligible contractor whose employees were part of the project workforce and whose duties were performed in Illinois, those employees will be counted toward the denominator (number of people in the project workforce) but not the numerator (total number of eligible persons).

Second, in addition to the clarification above, the IPA should also clarify what it means to be an employee or contractor to "whose duties are performed in Illinois." (Final LTRRPP dated August 23, 2022 at 328.) At one level, the Joint Solar Parties recommend the IPA clarify which part of that phrase applies to "in Illinois"—the employee or contractor's physical location or the nexus of the work. For instance, it is not clear whether an out-of-state development employee negotiating over the telephone with an out-of-state facilities manager for a large DG system located behind a meter located in Illinois should be considered in Illinois because the customer's facility is in Illinois or out of Illinois because the sales agent and the customer contact are not in Illinois. Similarly, if an engineer located out-of-state visits a site in Illinois as part of designing a system, it is not clear whether that engineer is performing duties out-of-state because that is where their desk is located or in Illinois because they performed a site walk or were designing a system to be located in Illinois. Similar situations are likely to recur frequently because many—though not all—developers, long-term owner/operators, and service providers have some employees or independent contractors located in Illinois, others primarily located elsewhere that travel in, and others that work on Illinois matters from out of state. Other than construction, which is primarily on-site and thus there is little doubt (other than for utility-scale systems developed in other states) over whether many physical construction tasks are performed in Illinois, many tasks will have a similar split and ambiguity without further clarification as to whether they take place in Illinois.

Third, the IPA should definitely clarify that projects that were selected or submitted to the Adjustable Block Program prior to June 1, 2023 (or alternatively September 15, 2021—the effective date of CEJA) are not subject to the MES. There have been several hints and implications that the IPA believes they may apply. The IPA should definitively clarify its position, especially given that over 7,000 projects are delayed in process currently with the Adjustable Block Program that could be impacted if not clarified. The Joint Solar Parties request the IPA further clarify

whether MES applies to maintenance of behind-the-meter systems and acquisition and billing of subscribers to a community solar system.

Fourth, the Joint Solar Parties request additional information about verification of eligible person status. For instance, while the Joint Solar Parties appreciate the online tool that Energy Solutions has provided for an address lookup, it would greatly improve efficiency if Energy Solutions could provide the GIS shape file so Approved Vendors (or Designees or other vendors) can run it through their own automated checks rather than entering addresses one by one into the current online tool. In addition, the Joint Solar Parties note that there may be a limited ability for Approved Vendors to verify the eligible person status of employees or subcontractors of vendors. Specifically, there may be privacy issues with the vendor or subcontractor providing substantiation of (for instance) previous incarceration, employee/subcontractor primary residence, or participation in the foster care system.

II. Responses To Prompts Regarding Waiver Timing And Scope

In response to the specific prompts provided in the request for comments, the Joint Solar Parties further respond as follows:

- **Timing of Waiver.** Because each waiver request will be different—based on a different system or portfolio of systems with different timing and different issues (such as changes in contractor or vendors, delays, ebbs and flows in employee workforce of the developer/owner-operator and vendors, etc.)—it is not possible to generalize when waivers are likely to be necessary. However, the Joint Solar Parties note that at minimum allowing for waiver requests prior to or concurrent with the required submittals under Section 1-75(c-10)(1)(A)-(C) will reduce duplication and administrative burden. The waiver timing and content also depends on whether the project workforce is calculated annually or as of a particular milestone (such as Energization)—an open-ended calculation will naturally lead to fluctuations as different natural persons begin and end work on the specific project or portfolio of projects. Waivers may also be either forward-looking (that future compliance is unlikely) or backwards looking (compliance in the current year, despite best efforts, was undone by unfortunate circumstances).

    - Specifically with regard to hiring, while those developers or owner/operators that use a third-party EPC for construction will frequently go to bid between when the system is accepted into the Adjustable Block Program (and after it is sold by an early-stage developer, if applicable), not all Approved Vendors are the same. Developers or owner/operators that use their own workforce for construction may also hire on different patterns totally unrelated to their construction schedule for a particular project or portfolio of projects.

    - With regard to timing of rejection, respectfully the Joint Solar Parties expect that most if not virtually all Approved Vendors will view waiver of the MES as a last resort rather than an option. In other words, while all situations are different, a waiver is most likely going to be requested when an Approved Vendor believes it is likely that it will not be able to comply with the MES. Thus, while highly relevant for compliance purposes and related to obligations to third parties (such as

financing parties or investors) to remain in compliance, granting the waiver or not may not alter an Approved Vendor's ability to meet their MES obligations.

- With regard to the number of projects an Approved Vendor may work on during a given year, those may change frequently depending on the role of the Approved Vendor (early-stage developer, long-term owner/operator, or both), conversion of opportunities (whether selection of projects in the ABP, sales opportunities by an early-stage developer to end-use customers for behind-the-meter projects or long-term owner/operators seeking to buy systems), or other factors. Those other factors could include availability of EPCs or in-house workforce, weather, macroeconomic factors, supply chain/equipment availability, site access (whether for behind-the-meter customers or community solar). In addition, while the number of projects may change, the workforce itself is also at times difficult to predict given the changing staffing of Approved Vendors, their affiliates, and their contractors.

- With regard to when an Approved Vendor will know that compliance with MES is not possible, it will once again depend on circumstances. It could be early when an existing Approved Vendor with few projects going forward and a small long-term workforce is unable to exit preexisting contracts that do not provide for staffing of eligible persons. In other contexts, a few eligible persons leaving employment by the Approved Vendor (or its affiliates) or a contractor could suddenly and unexpectedly make compliance impractical. In other situations—especially depending on how equity eligible contractors with non-eligible person employees are counted—particular circumstances for an Approved Vendor make compliance not impossible but highly impractical.

- **Project vs. Portfolio Basis for Waivers.** The Joint Solar Parties appreciate the IPA's proposal to have all behind-the-meter systems request waivers on a portfolio basis. The Joint Solar Parties believe, however, that the logic should apply equally to community solar as well. While construction of a 5,000 kW community solar system (like a similarly-sized behind-the-meter system or larger utility-scale system) is certainly a more concentrated and discrete *construction* project, the administrative, sales, and marketing roles may cross several different projects and not be easy to separate efforts by system. Furthermore, to the extent that community solar systems or other systems end up in single-project Approved Vendors (or Approved Vendors with a small number of systems) owned or operated by a single entity, so not only should an Approved Vendor be allowed to aggregate workforce across a portfolio but affiliated Approved Vendors should have the right (but not obligation) to aggregate MES compliance over some or all affiliated Approved Vendors. The Joint Solar Parties have no objection to prohibiting an Approved Vendor that is an equity eligible contractor to be aggregated for compliance purposes with non-equity eligible contractor Approved Vendors.

III. Responses To Form/Fields For Waiver Request

The IPA further sought comment on the form/fields for the waiver request. First and foremost, the Joint Solar Parties noted the emphasis on hiring eligible persons—twenty-nine points appear to be exclusively related to hiring (items 3(a), 3(b), 3(c), 4, 6, and 7). The Joint Solar Parties of course

strongly support industry participants of all varieties hiring eligible persons for participation in Adjustable Block Program system workforces. However, many developers and owner/operators (especially smaller or more leanly staffed entities) heavily rely on vendors. While an Approved Vendor may try to exercise control over their vendors through the vendor contract, an Approved Vendor still has limits to what changes they can compel from their vendors. The scoring should allow Approved Vendors to demonstrate a commitment through their selection process for (and contractual commitments from) third-party vendors to include eligible persons in the project workforce. Currently, only four points are available for equity eligible contractor outreach and there are no points for efforts to select non-equity eligible contractor vendors that hire eligible persons.

Providing points for Approved Vendors that require or otherwise incent the hiring of eligible persons by their vendors (and the vendors' subcontractors) will strongly improve the overall ability for Approved Vendors to achieve the policy goals of the MES. The Joint Solar Parties recommend providing an additional five points if Approved Vendors demonstrate contractual provisions (whether as part of a redacted contract or an appendix or rider) that obligate vendors to use eligible persons or equity eligible contractors to perform the contracted tasks.

Conversely, the Joint Solar Parties fear that the scoring criteria will lead to much outreach to eligible persons, but limited new employment of eligible persons by some Approved Vendors—particularly those with substantial out-of-state presences and/or those who extensively use vendors. The jobs related to these Approved Vendors either do not count toward the numerator or denominator (because they are outside of the state) or they reside with vendors (which could be equity eligible contractors or vendors that hire eligible persons). In addition, the Joint Solar Parties note that under the IPA's proposal on page four, even hiring many equity eligible contractors may not be enough if the equity eligible contractors do not also employ eligible persons to work on the project(s) who perform their duties in Illinois.

It is also not clear how outreach to unions or community-based organizations (except those specifically involved in the approved job training programs to qualify as an eligible person) would benefit. Unions have their own rules and restrictions on who may work on which project and on recruitment efforts which may not always be compatible with maximizing use of eligible persons.

The Joint Solar Parties strongly discourage the IPA from comparing Approved Vendors and their reaching the MES standards. While the Joint Solar Parties appreciate the IPA attempting to control for different objective factors that may impact compliance, the Joint Solar Parties note many more factors go into compliance including timing/volume of projects, pre-CEJA fortuitous hiring of eligible persons (for instance by address, previous incarceration if not disclosed, or previous participation in the foster care system), or negotiation of exclusive relationships with equity eligible contractors or contractors that have successfully hired many eligible persons.

The Joint Solar Parties appreciate this opportunity to comment and look forward to continuing to support industry-wide compliance with the MES and expansion of opportunities for both eligible persons and equity eligible contractors.