COMMENTS ON APPROVED VENDOR APPLICATION REQUIREMENTS
ON BEHALF OF THE JOINT SOLAR PARTIES

The Solar Energy Industries Association and the Illinois Solar Energy Association (collectively the Joint Solar Parties or JSP), respectfully submit these comments on the IPA's Approved Vendor application requirements released on October 3, 2018. First and foremost, the JSP support having standards for Approved Vendors to ensure clarity, quality and stability for customers and the industry. While the imposition of minimum requirements on entities seeking to participate in state-level renewable energy incentive programs are not new, Illinois has the unique distinction of those requirements being developed largely outside of docketed administrative proceedings. Given the limited opportunity to comment, the JSP wish to support the overarching goal of public confidence in Approved Vendors without imposing regulatory requirements that impose more cost on the Approved Vendor than the requirement benefits the public.

Background: "Affiliate" And Corporate Structures

As the IPA and Program Administrator know, many renewable energy development companies are complex corporate structures. Some of these companies are subsidiaries of a publicly traded company; others are part of a privately-held family of companies that are in lines of business far beyond renewable energy development. Even those companies that mostly or exclusively specialize in renewable energy development tend to be complex corporate structures. While the JSP do not suggest that every single renewable developer is the same—or even complex—the JSP understand that complex structures are pervasive throughout the industry.

While complex structures can facilitate opportunities (such as tax equity monetization or early stage development, among others), those structures can lead to some challenges as well. The IPA appears to have identified one of those challenges: How to ensure full disclosure of relevant information. This is doubly so when there is nothing in the LTRRPP approved by the Illinois Commerce Commission on April 3, 2018 prohibiting a new subsidiary or affiliate of a developer becoming an Approved Vendor.

Perhaps acknowledging the potential for a developer to attempt to hide material information by the corporate form and affiliation of its Approved Vendor, the IPA appears to seek disclosure from the entire corporate family of the Approved Vendor. While theoretically this would mitigate attempts to hide misfeasance by the solar developer, in large and complex corporate hierarchies it creates unreasonable burdens—especially for an application that only opens on November 1, 2018 and must be fully approved by January 15, 2019 for Block 1 (and potentially lottery) participation.

Instead of the Approved Vendor Registration proposal's overly broad approach, the Joint Solar Parties recommend that the IPA restrict its definition of the term "affiliate" in one of the two ways outlined below:

[**ALTERNATIVE 1 - PREFERRED**] Keep the definition as is, but only apply it to entities that will be materially involved in developing Adjustable Block program-eligible assets in Illinois. This keeps the focus where it should be: on those parts of large and complex businesses that will interact with Illinois.

[**ALTERNATIVE 2**] Keep the definition as is, but only as it applies to entities involved in the development, installation, or marketing of distributed solar assets in the United States (community or behind-the-meter). This allows the IPA to look at an entity's national presence so it will be aware if substantial problems occurred in other states, but won't pull in affiliates (as the IPA defines it) that will not have an impact on Illinois site owners or customers.

In addition, the definition should exclude shareholders of public companies.

Legal and Regulatory Information

The JSP believe that the vast scope of Questions 24-33, both in terms of applicable entities and the volume of potential disclosures, need to be restricted to better balance useful information about Approved Vendor practices with applicant burden. As noted above, the JSP fully support having standards for Approved Vendors. The JSP understand how information regarding certain settled or adjudicated claims (to final judgment) against the solar development arms of a larger business would be relevant to the IPA's decision.

The JSP fear that the IPA's recommendations will simply push developers to use third-party Approved Vendors with no formal affiliation with the actual solar developer. In that instance, the IPA loses all vision into the developer's past conduct.

A better option would be to restrict the scope of Questions 24-33 to focus on the solar development business and to focus exclusively on adjudications to final judgment and settlements.

Commenting further on specific questions:

- Question 24**:** Consistent with the general recommendation above, the debarment should focus on development of renewable energy facilities.
- Question 25: An owner/operator that outsources construction would be expected to have a variety of construction liens that at a given point in time are undischarged—in Illinois, construction liens are common. If the IPA is concerned about a history of non-payment, the IPA should ask for that information rather than use liens as a proxy.
- Question 28: JSP notes that for complex business entities that must resolve complex tax questions to properly file and fully pay federal, state, and local tax liabilities, it is not infrequent that there is a "dispute" that is simply the result of clerical error or incorrect payments by *de minimis* amounts. The IPA should institute a minimum triggering requirement—the JSP recommend $25,000—and a requirement of an adverse finding by an agency or court.
- Question 30: The JSP understand that consumer protection agencies—including state Attorneys General—frequently reach out to entities at a customer's request to investigate complaints. In many cases, the complaint is resolved and/or the consumer protection agency takes no further action upon investigation. This could be for a variety of reasons, ranging from company taking action to satisfy customer complaint to an agency dismissing a claim if it was unfounded. The JSP recommends that the IPA limit the required list of complaints to complaints that have led to adjudication to final judgment within any consumer protection authority. Unless there is an adjudication to final judgment of the

complaint, the IPA should not seek information because disclosure will not provide any usable information.

- Questions 31-32: Once again, the JSP urge the IPA to look at disciplinary action rather than allegations that are not fully adjudicated to final judgment. Especially in front of agencies or courts where the pleading standard is notice pleading, the customer need not provide specific factual allegations of wrongdoing.
- Evaluation Criteria: No response to any of Questions 24-33 should be automatic disqualifiers, even if those questions are restricted to renewable energy development operations and to adjudications. The IPA and Program Administrator should look at the underlying findings and holdings in each adjudication or terms of each settlement, and determine where on the continuum between intentional or knowing malfeasance and strongly held but not unreasonable views of law and fact the case lies. Also, the IPA and Program Administrator should be open to evidence that the Approved Vendor or its relevant affiliates have implemented improvements or controls, particularly if the allegations relate more to failure to monitor than intentional malfeasance.

In addition, for all of the questions that relate to the actions of individuals (as opposed to corporate entities), given the quick application turnaround and the challenges in larger, more complex entities of quickly compiling such information, the IPA should allow an Approved Vendor to certify that it queried its in-house legal and compliance departments for records and information. In other words, the IPA should temper the absolute reporting burden to allow a reasonable search given the time limitations.

Attestation

The JSP are highly concerned about items (g) and (m).

With regard to item (g), while the JSP do not object to providing sample marketing materials and receiving comments, the JSP have several concerns about the requirement that the Approved Vendor and its agents must make changes requested by the IPA or Program Administrator:

- The JSP are highly uncomfortable with a government agency (and its agent) reserving the ability to essentially redline marketing materials generally—the JSP are not aware of another REC incentive program or regulatory authority with this power—but specifically here where there are no clear standards.
    - Under the IPA's proposal, the changes would be "take it or leave it," with the choice being abandon the marketing material or abandon the program.
    - The IPA still has not provided a standard for how it or the Program Administrator will evaluate marketing materials. The IPA has reserved itself the unlimited right to make changes as it sees fit—even to marketing materials that comply with applicable federal and state law regarding advertising.
    - To the extent that the IPA is planning on using the marketing guidelines for distributed generation and to-be-released marketing guidelines for community solar to make these evaluations, while some of the requirements are clear and supported by the JSP others are highly subjective (the JSP will provide specific comments on the marketing guidelines for distributed generation closer to the due date of October 26, 2018).

    - Because the IPA has not stated that it is making these changes through a formal administrative action subject to the Administrative Review Law, it is unclear whether an Approved Vendor would have formal recourse if the IPA or Program Administrator abuses their discretion—other than the highly costly and inefficient approach of seeking an injunction in court.[1]
- The IPA has not provided a timeline for review. Without a timeframe for review, the IPA has granted itself the ability to essentially pocket veto a marketing campaign. With stringent deadlines in particular for acquiring subscribers (particularly small subscribers) by energization—a date that the Approved Vendor either does not or does not fully control—the IPA could put Approved Vendors in an impossible situation with regard acquiring the very subscribers for whom the IPA is directed by statute and the Commission's Order to promote opportunities.

In order to address these issues, the JSP recommend that the Program Administrator have 10 business days to provide take-it-or-leave-it changes to marketing materials. While the JSP certainly do not wish to restrict the Program Administrator or IPA's ability to reach out informally to Approved Vendors with concerns, if the response comes after 10 business days it should no longer be binding upon the Approved Vendor.

While the JSP are cognizant that there are limited venues to handle disputes between the IPA or Program Administrator and an Approved Vendor regarding marketing materials (or other matters), the JSP strongly urges the IPA to develop a dispute resolution process. While the Commission may not necessarily have authority to hear an appeal (even if all parties were in favor of pursuing this route) and the Executive Ethics Commission also does not necessarily have the authority, perhaps the IPA could identify mediators to resolve disputes between Approved Vendors and the IPA or Program Administrator. Such an approach would be superior to the few remaining alternatives, such as litigation. It is of critical importance to the JSP for the IPA to develop a functioning dispute resolution process.

In addition, the JSP are concerned with an attestation that an Approved Vendor must "comply with . . . [Program] Administrator requests." Once again, the IPA appears to be imposing a unilateral, unappealable requirement that any time the Program Administrator makes a request on any topic, the Approved Vendor must comply. Because the IPA has taken the legal position in ICC Docket No. 17-0838 that it can impose any terms and conditions on program participation it pleases, other than direct conflict with statute (such as directing an Approved Vendor to not market to individuals of a particular national origin), there do not appear to be any limits on what the IPA believes the Administrator can require an Approved Vendor to do.

While the JSP understand the need to inform the IPA about bankruptcy events, the JSP oppose a requirement that an Approved Vendor inform the IPA of "any complaints, lawsuits, legal or regulatory action" or "adverse changes in business condition." The IPA should add a materiality threshold, such as only requiring disclosures of lawsuits or formal regulatory action related to Illinois (in addition to bankruptcy).

[1] The IPA did identify a limited appellate process for Approved Vendor registration whereby the Program Administrator makes the initial determination and the applicant may appeal to the IPA. In that case, it appears more likely that the Administrative Review Law would at minimum provide a pathway to appeal in Circuit Court.

Company Background

The JSP wish to bring concerns to requests for information raised by the IPA: the balance sheet disclosure and three references.

- The JSP recommend the IPA remove the requirement that the application include the balance sheet and profit and loss statement for the previous fiscal year of the company applying.
    - As an initial matter, the draft guidelines indicate that the IPA essentially will not rely on these documents: "Absent any other negative information, an Approved Vendor will not be accepted or rejected based solely on its financial statements." The JSP believe that either "other negative information" is sufficiently concerning to lead the IPA to reject the application or it is not—it is not clear how financial information (especially if the Approved Vendor is a new entity without much financial history) would make that negative information better or worse.
    - The JSP note that although this requirement provides some burden to all companies, it particularly burdens smaller private companies that do not publicly share this information. While the JSP are confident that the IPA will take reasonable steps to ensure confidentiality, because the IPA is not relying on it the burden of production on the Approved Vendor and burden of protecting the information on the IPA outweighs the benefit of the IPA reviewing the balance sheet and profit and loss information.
- The JSP also recommend that the IPA remove the requirement for three references. Some Approved Vendors may be new entities, and thus will not have references. If the IPA is concerned about execution ability, the IPA should instead solicit identification of a small sample distributed generation or community solar projects. However, even in that case it is inappropriate for an Approved Vendor that is not itself a developer.

Potential Impact on Small Businesses

The JSP have seen member estimates that for certain entities, specifically companies that sell non-financed (i.e. cash purchase) solar systems to customers that will use a third-party aggregator acting as Approved Vendor on their behalf. The JSP understand such entities are primarily small and medium-sized businesses. The cost to utilize a third-party Approved Vendor could increase the total solar system cost these developers' customers by 10-15%. The JSP believe that the fewer burdensome regulatory requirements are imposed, the lower the potential price impact on those smaller business that will rely on third-party Approved Vendors.