

Illinois Power Agency  
Attention: Anthony Star  
160 North LaSalle Street  
Suite C-504  
Chicago, IL 60601

## **Re: Request for Comments to Initial Forward Procurements**

Mr. Anthony Star:

On behalf of United States Solar Corporation (“**US Solar**”), Chapman and Cutler LLP hereby submits the following comments in response to the Illinois Power Agency’s (“**IPA**”) Request for Comments issued on May 11, 2017. As active developers of solar facilities in various jurisdictions throughout the United States, US Solar welcomes the opportunity to provide its collective perspective and experience with respect to the matters currently before the IPA.

### **Background**

The Future Energy Jobs Bill (SB 2814) (the “**Act**”) was enacted into law on December 7, 2016, as Public Act 99-0906, with an effective date of June 1, 2017. Among other things, the Act calls for updates to Illinois’ renewable portfolio standards (“**RPS**”), net metering, and energy efficiency standards, as well as a new zero emissions credits plan. Under the Act, the IPA is charged with developing various plans and Illinois’ investor owned utilities are charged with collecting and distributing funds and entering into contracts for the procurement of emissions credits.

As a key component of the Act, the IPA is required to conduct an initial forward procurement (the “**Initial Forward Procurement**”) for renewable energy credits (“**RECs**”) from utility-scale (greater than 2 MW) wind projects and solar projects. The Act then requires the IPA to develop a plan for follow-on REC procurements (the “**Long Term Procurement Plan**”), which will set forth the rules for procuring RECs from other renewable energy sources, such as distributed

generation and community solar. In order to assist the IPA with the development of both the Initial Forward Procurement and the Long Term Procurement Plan, the IPA elected to hold a series of workshops to discuss with interested stakeholders its proposed revisions to Illinois' RPS, the first of which was held on May 10, 2017 (the "**May 10 Workshop**"). Following the May 10 Workshop, the IPA issued a request for comments to interested stakeholders on two of the topics discussed at the May 10 Workshop. US Solar's comments are provided below.

**Comments**

**I. SITE CONTROL**

**1. Should site control be required when bidding into the REC procurement process and, if so, what is the appropriate level of site control?**

Demonstrating site control has become a standard component in the development of renewable energy generating facilities across the country, particularly when seeking to interconnect a facility to the electric grid. Importantly, utilities and public utility commissions have routinely determined that generation projects should be required to demonstrate some basic level of development milestone before a utility is required to spend significant resources studying such facilities. Almost universally, proof of site control has been used as the basic indicator of a facility's maturity in the development process and has been used by utilities as a way to focus their resources on those facilities that are most likely to proceed with construction.

This same basic requirement should apply to generation facilities that wish to bid into the IPA's REC procurement process. Importantly, a developer should be required to demonstrate at some basic level that it is committed to developing facilities in Illinois and, in fact, has actively taken steps to move such facilities forward. In recent years, we have witnessed an increase in the number of speculative developers whose primary business model is to (i) submit uninformed (and

often unrealistically low) bids into multiple markets in hopes of winning the bid, and (ii) then figure out the actual logistics of building the facility at a later time. This not only places legitimate developers, who are bidding based on realistic development costs, at a competitive disadvantage, but it also significantly increases the level of risk that the underlying facility can actually be financed and built at the price that was bid, which is detrimental to the goals stated in the Act for renewable energy development, job growth, and the utilities' ability to meet RPS requirements in the State of Illinois. In our opinion, the IPA should not spend its resources entertaining such bids. Rather, the IPA and Illinois' utilities should focus on those bidders who can demonstrate at least a basic level of development through site control.

There are a number of recognized ways in which a developer can demonstrate site control. These include: (i) the ownership of fee simple title to the underlying real property; (ii) the execution of a binding written lease for such real property for the duration of the contract term plus development time; or (iii) the execution of a binding written option to purchase or lease such real property, with all key terms stipulated, unconditionally exercisable by the developer or its assignee. Any of these alternatives would be sufficient to demonstrate site control in connection with the IPA's REC procurement process and, in our experience, require a minimal amount of resources. Therefore, we do not believe that requiring proof of site control will place an undue burden on smaller developers. If anything, it will help smaller developers by eliminating the speculative bidding practices that have become commonplace in other states.

**2. Would providing performance guaranties in lieu of site control be sufficient?**

While a requirement to provide a performance guaranty would provide certain protections to the IPA and the utilities when it comes to execution risk, it would not stop speculative bidders

from submitting such bids into the market. In fact, such a requirement may only benefit very large developers who can afford to take a greater level of execution risk, while placing smaller developers at more of a competitive disadvantage. As between a requirement to demonstrate site control and a requirement to post a performance guaranty, we would strongly recommend site control for the reasons outlined above.

## **II. REC DELIVERY**

As an initial matter, we note that the IPA's questions with respect to REC delivery requirements are based on the premise that a facility must guaranty the delivery of a certain level of RECs during a certain period. We note that, due to the intermittent nature of renewable generation facilities, most renewable energy power purchase agreements in today's market are drafted as "all output" contracts, which means the facility simply must deliver, and the purchaser must purchase, all of the energy and/or RECs that are actually produced during any given period. In other words, there is no minimum delivery requirement. States such as Minnesota, Connecticut and New York also follow this concept in their respective REC programs.

In those cases where there is a minimum guarantee, the minimum guarantee is usually measured on a rolling basis (e.g., a rolling three year basis) so that the facility has time to make up any shortages over time. Moreover, such contracts often give the seller the ability to cover any shortages by delivering replacement products to the buyer. In circumstances where a shortage does exist, the penalties for such shortage are typically modest payment penalties, and do not result in the termination of the contract. Typically, termination only occurs in instances where it is apparent that the renewable generation facility has been abandoned or has suffered an event of total loss.

In our experience, most lenders will not finance a facility if its revenue contracts can be terminated due to a default that cannot be cured by either the developer or the lender. Further, requiring a minimum guarantee will materially impair the developer's ability to receive competitive project finance terms for projects in Illinois, as compared to other states. As we understand it, the IPA is currently considering such a structure (i.e., a structure whereby the failure to deliver the minimum quantity of RECs is required, and failure to deliver such minimum quantity in a year cannot be cured either by delivering "banked" RECs or "replacement" RECs). We strongly encourage the IPA to reconsider this approach as it would likely adversely impact the ability of the underlying facilities to receive financing, which would then limit the development of renewable generation facilities in Illinois.

Assuming the IPA will require a minimum REC guaranty, we have provided the following responses to the IPA's questions:

**1. What circumstances could lead to failure to deliver RECs and could this be mitigated by allowing banking or replacement of RECs?**

As with any generation facility, there are any number of reasons why a renewable generation facility may be out of service and not generating energy and RECs, including, for example, casualty or curtailment. In addition to those common reasons, however, renewable generation facilities are, by their nature, intermittent resources, which further adds to the possibility that such facilities will not be producing an expected level of output at any given time. Due to the intermittent nature of renewable energy facilities, output will vary year-to-year, sometimes significantly. Though we do not believe that a minimum REC guaranty is appropriate, certainly, the ability to "bank" RECs and or purchase replacement RECs from other sources would go a long way toward mitigating the risks associated with a minimum REC guaranty. In fact, without this ability to mitigate, lenders may not even be willing to lend to such facilities.

**2. Should the ability to bank RECs be unlimited or should there be parameters?**

As a general rule, a developer will seek to maximize the revenues generated by its generation facility. Therefore, as a practical matter, it seems unlikely that a developer will “bank” an excessive number of RECs simply to cover any potential shortfall in the future. In our experience, it is more likely that, in the event of a shortfall, a developer would seek to mitigate the same through the purchase of replacement RECs. Therefore, we do not believe it is necessary to cap the amount of RECs that can be “banked,” as project economics will encourage developers to “bank” as few RECs as possible.

**3. Should banking of RECs be allowed between multiple projects owned by the same entity?**

As discussed above, a developer should be permitted to acquire replacement RECs to cover any shortfall in its REC delivery requirements. The IPA and the utilities should be indifferent as to whether such RECs are generated by a third party’s facility, or another facility owned by the same developer. Therefore, we do believe it is necessary to place any restrictions on replacement RECs that were generated by a facility owned by the same developer.

**4. Should there be limits or parameters on replacement RECs?**

In our experience, the only limitations on replacement RECs is that they be of the same vintage and technology as the RECs that are otherwise required to be delivered under the contract. How “vintage” is defined varies from jurisdiction to jurisdiction. For instance, some states may require that replacement RECs be generated in the same State, while others may permit replacement RECs to be generated in surrounding States or in other regions. Ultimately, Illinois will need to evaluate whether there will be sufficient excess RECs generated in Illinois to satisfy the need for replacement RECs. If not, then the definition of vintage should be broadened to

include RECs that could be used by the utilities to comply with their RPS compliance requirements.

Again, to the extent lenders do not believe there will be sufficient RECs to use as replacement RECs in the event of a shortage, they may not be willing to finance these projects as they will not have any means by which to cure the shortage. Therefore, we recommend that the IPA take as broad of view as possible when determining what constitutes a “vintage” REC for purposes of this program. As for vintage year, we would recommend that the IPA permit replacement RECs that are generated during the current delivery year or in the prior three delivery years, but no earlier than June 2, 2017.

**5. Under what circumstances should REC shortages lead to termination?**

From a developer’s, and more importantly a lender’s, perspective, the failure to deliver RECs ideally should never result in the termination of the underlying REC contract. Instead, contract termination should only occur if the facility is abandoned or suffers an event of total loss. If the IPA desires to terminate contracts pursuant to a failure to deliver RECs, the developer should only be required to pay modest liquidated damages to the contracting utility, which damages should not exceed the utility’s actual damages for non-compliance with the RPS. As noted above, renewable generation facilities only get paid if they are generating energy and RECs. Therefore, developers have every incentive to keep these facilities operating at all times. To the extent a facility is not producing energy and RECs, it is most likely due to circumstances beyond the developer’s control. In such cases, the developer already will be incentivized to bring the facility back into operation without an underlying threat of contract termination.

Thus, the only practical affect that contract termination provisions will have on a facility that is under-producing will be to hinder its ability to receive financing. As a general rule, lenders

will not lend to a facility if the lender believes the facility's revenue contract could be at risk of termination or significant penalties for underproduction. In fact, most lenders will insist on lender step in rights and extended lender cure periods to further mitigate the risk of termination.

Ultimately, whether lenders will accept termination risk related to a facility's underperformance will depend on various factors, including (i) how underperformance is measured (e.g., annually or on a rolling 3 year period) and (ii) how such underperformance can be mitigated (e.g., purchasing replacement RECs or paying liquidated damages). Therefore, if the IPA desires to make underperformance a termination event, it should take care to ensure there are adequate opportunities for the developer and its lenders to cure such failures. Otherwise, lenders will likely not be willing to lend to such facilities.

**Conclusion**

We want to thank you again for this opportunity to provide comments in response to the items discussed at the May 10 Workshop. US Solar is excited about the opportunity to expand its renewable energy development activities in the State of Illinois and looks forward to working with the IPA to develop a program that promotes renewable energy in and renewable energy-related job growth Illinois. Should you have any questions or wish to discuss our experience in other States further, we are happy to meet at your convenience.

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Respectfully submitted,

CHAPMAN AND CUTLER LLP

/s/ Bruce A. Bedwell

/s/ Sameer A. Ghaznavi

On behalf of,

UNITED STATES SOLAR CORPORATION