April 20, 2026

Andrew S. Johnston Executive Secretary, Maryland Public Service Commission
6 St. Paul Street, 16th Floor
Baltimore, Maryland 21202-6806

Subject: PC75 NGEAtx Obligations Working Group

Dear Mr. Johnston:

We thank the Maryland PSC for allowing us to comment on the issues in the PC75 NGEAtx Obligations Working Group.

MAREC Action (the Mid-Atlantic Renewable Energy Coalition) is an industry organization representing more than 50 utility-scale solar, wind, and energy storage developers, as well as manufacturers, dedicated to advancing renewable energy development across the Mid-Atlantic region. Our members represent a diverse coalition of developers, owners, and operators that operate renewable energy facilities all over the country.

This memo summarizes our major comments on the issues raised in the docket by the topic area.

Escrow Mechanics

The PSC should consult with an escrow industry professional experienced in establishing and administering escrow arrangements as it develops the conditions for the Escrow Administrator, Escrow Agreement, and Escrow Account. *The Commission's conditions and the Escrow Agreement should also include clear procedures for circumstances in which the Escrow Administrator is unwilling or unable to continue performing its fiduciary duties*. Under the proposed framework,

utilities, with PSC oversight, should be responsible for selecting a replacement and managing any transition to a new Escrow Administrator.

An escrow industry professional can provide valuable input on the PSC's draft conditions governing escrow commercial relationships and help inform both the Commission's Order and the Escrow Agreement. This ensures the Escrow Administrator can effectively carry out the full scope of responsibilities the Commission envisions, including managing invoicing and payment processing, reconciling ESCC payments with PJM statements, assessing penalties for underperformance or Performance Assessment Interval events, administering annual true-ups, addressing non-payment, supporting dispute resolution, and meeting appropriate standards of care and liability.

Because energy storage developers will be parties to the Escrow Agreement, the selection process should allow them to provide feedback or raise concerns before the Escrow Administrator is finalized, regardless of which entity (utilities in conjunction with the Commission or the Commission alone) makes the final selection of the Escrow Administrator.

One potential option for the escrow administrator selection would be for the sub-team of utilities to provide a shortlist of potential escrow administrators to the developers prior to final selection and allow the developers to conduct a red flag analysis to provide feedback. This would keep the responsibility on the utilities while also allowing the developers to identify any key issues, potentially impacting financing with the potential escrow administrators.

Contractual Obligations

There is an important distinction between a traditional contract and a PSC order in this framework. Traditional project financing relies on contracts that define the commercial relationship and payment obligations between parties. Here, there is

no direct contract with a utility or supplier. Instead, the PSC order establishes the structure for payments and defines the obligations across the project, suppliers, and escrow administrator. In practice, the order is what creates the payment framework and governs how funds flow through the escrow.

From a financing perspective, lenders are relying on the PSC order rather than a bilateral contract. The order establishes the right to receive payments and is the legal basis for project cash flow. *Because of that, the strength and clarity of the order matter. It effectively serves as the foundation for revenue certainty, and any uncertainty around how the order is applied or maintained can directly affect how the project is underwritten.*

Maryland has not published a draft Standard Form Agreement, so Applicants are bidding 15–20-year price schedules without seeing the "contract" they will sign. The items below are either absent (1-10) from the Round 1 Request For Applications (RFA) or addressed in ways that fall short of lender and tax-equity requirements (11-16).

- **Change in Law.** The RFA is silent on changes in PJM market design, FERC orders, capacity accreditation methodology, or Maryland construction codes that affect Project economics over the term. The contract should require good-faith renegotiation to preserve original economic intent, with a revenue-neutrality objective, a defined tolerance band for code-driven cost changes above which the ESCC Payment Rate is adjusted, and a seller termination right where an uncured Change in Law drives a threshold cost increase.

  <u>Proposed Language:</u>

  The awardee and, if applicable, its successors, represents and warrants that the energy storage capacity credits (ESCC) transferred to awardee conform to the definition and attributes required for compliance with the Maryland Energy Storage Program pursuant to Public Utilities Article (PUA), §7-216.1, Annotated Code of Maryland, § 7-801 and 7-802, as set forth in Maryland

Public Utilities Commission Decision XXX. To the extent a change in law occurs after execution of this Order that causes the Project to no longer be eligible under the definition of such attributes, it shall not be a violation of the Order's conditions if the awardee has used commercially reasonable efforts to comply with such change in law.

If a Change in Law (including the applicable PJM Capacity market rules) occurs that renders the awardee's performance of its obligations hereunder impossible or impracticable, the awardee shall be excused from such performance to the extent affected by the Change in Law, provided the awardee provides written notice to the Commission within 30 days of such occurrence, and the Parties shall negotiate in good faith to amend the Order to maintain the original intent of the parties as of the effective date. If the Parties are unable to agree on an adjustment within 60 days, the matter shall be submitted to the Commission for a final, binding determination of a just and reasonable adjustment. The awardee may file an appeal of a final determination by the Commission to the circuit court within 30 days.

The Parties intend that the Order shall not be terminated for convenience or for no cause. To the extent the Order is terminated by a future action of the Commission or Maryland law, awardee shall be entitled to an early termination payment, calculated by an independent and qualified third-party, which approximates the remaining market value of the Order to the awardee.

- **Financial Assurance.** Proposed to ensure that projects are financeable with investors.
  <u>Proposed Language:</u>
  Payment obligations pursuant to this Order are backed by the full faith and credit of the State of Maryland, as established pursuant to Public Utilities Article (PUA), §7-216.1, Annotated Code of Maryland, § 7-801 and 7-802.

The Commission hereby establishes a non-by passable cost recovery mechanism to ensure the timely and full payment of all obligations under the Maryland Energy Storage Program. This mechanism shall remain in effect for the duration of the Program.

- **Force Majeure (FM) During Operations.** The RFA references FM only for COD extensions. The operating contract needs a full FM article covering both parties throughout the term, with express pandemic/epidemic coverage, day-for-day deadline extensions, and seller termination for prolonged FM.
- **Indemnification.** Standard seller indemnity for breach, negligence, misconduct, and CBA/prevailing-wage failures, with a carve-out: no seller indemnity for third-party challenges to the legal validity of the Agreement, the ESCC construct, or the solicitation itself.
- **Limitation of Liability.** Mutual waiver of consequential, incidental, punitive, and exemplary damages and lost profits, with carve-outs for third-party indemnified claims and fraud or willful misconduct. A baseline market term whose absence materially increases the cost of capital.
- **Insurance.** Minimum coverage, additional-insured requirements, and a self-insurance process for institutional sponsors.
- **Change in Tax / ITC Risk.** Given the reliance on ITC safe harboring, the contract should expressly address how a post-selection change in federal tax law affecting ITC availability is treated, via Change in Law trigger, pricing adjustment, or termination right.
- **Dispute Resolution.** Mandatory good-faith negotiation between senior executives before litigation, with specified governing law, venue, and an Escrow Administrator invoice dispute procedure.
- **Seller Recourse on Withheld Payments.** The RFA requires the Escrow Administrator to pay accurate invoices within 10 business days but provides no mechanism to dispute withholdings, no interest on improperly withheld amounts, and no continuation of-of-performance rule during disputes.

- **Representations and Warranties.** Standard seller and reciprocal State reps, with a clear materiality, cure, and survival framework.
- **Pre-COD Cost Index Adjustment**. A one-time pre-COD adjustment to the ESCC Payment Rate tied to defined component cost indices, capped at a modest band, would improve both bid competitiveness and developer risk tolerance across the pre-COD window. For example, 15 percent is what the Maryland code has given to nuclear procurements in past legislation.
- **Events of Default.** The RFA enables Commission termination for CBA and PAI failures but provides no enumerated EOD list, no reciprocal State/Escrow Administrator EODs, no cure periods, and no notice of mechanics. The contract should define EODs for both parties with meaningful cure periods, typically 30 days for operational defaults and 10 business days for undisputed payment defaults.
- **Termination Rights.** The RFA contemplates Commission termination but gives Applicants none. The contract should provide either-party termination after an uncured EOD, seller termination for prolonged FM or a threshold-exceeding Change in Law or persistent Commission/Escrow Administrator default, and clear survival provisions.
- **Financing Assignments and Lender Accommodations.** The change-of-control and anti-assignment language is a significant lender red flag. The contract should expressly permit, without Commission consent: collateral assignments to lenders and tax-equity investors; customary lender step-in, cure, and foreclosure rights; and assignments to a Permitted Transferee on notice. The Commission should also commit to execute a customary lender consent and estoppel.
- **Graduated Underperformance Adjustment. T**he RFA authorizes termination for "consistent" PAI failure without defining threshold, measurement period, or graduated remedies. A bankable framework scales payment reduction to verified shortfall over a sustained period, reserving termination for severe or unremedied failures. Binary termination risk is difficult to finance.

- **ESCC Suspension Remedies for CBA Shortfalls.** The Commission's power to suspend ESCC payments in part or in total for CBA/EJ shortfalls is open-ended, with no thresholds, cure periods, or caps. Lenders cannot size debt against a payment stream suspendable at Commission discretion. The contract should set proportional, capped remedies with defined cure mechanics.
- **Commercial Operation Surety Bond.** The $25,000/MW bond/ Letter of Credit/cash is a reasonable pre-COD delay-LD mechanism. Two refinements would improve bankability without changing the level: restrict the Commission's discretion to terminate once the bond is drawn so a Project reaching COD remains entitled to ESCCs; and confirm the bond is released, not drawn, on termination for Force Majeure or Change in Law.

Risk Allocation and Performance Requirements

In the Performance Requirements and Risk Allocation discussion, PSC staff emphasized the need for storage resources to have risk sharing on performance and availability in the PJM market. While appropriate risk allocation and performance are important, *PJM already establishes comprehensive resource performance obligations through its market rules*.

Maryland is contracting for the capacity portion of storage resources, The ESCC incentive requires that a storage resource must have capacity interconnection rights (CIRs) in the PJM market. Any resource with CIRs has a must-offer requirement to bid into the PJM capacity market and clearing that market makes it a Capacity Resource. Capacity Resources are subject to must-offer requirements and performance assessments under the PJM Tariff and Manuals to ensure availability daily, including during system stress events.

As a Capacity Resource, energy storage resources must participate with their full availability in the Day-Ahead market and are dispatched by PJM in real time. Resources must follow PJM instructions, so performance (i.e., duration of dispatch)

is inherently governed by PJM operations. Additionally, Capacity Resources are assessed throughout the year on availability, outages, and performance during emergency events. *Imposing additional state-level performance or duration requirements, beyond the requirement to maintain CIRs, risks creating conflicting obligations and may not reflect actual system conditions at the time of dispatch*.

The approach discussed in the workgroup where resources are expected to perform consistent with their accredited capability and contracted duration appropriately aligns with PJM's framework. Final program design should avoid imposing requirements beyond PJM rules to ensure consistency, maintain financeability, and support efficient market participation.

Additionally, other structures of Maryland's energy storage program allocate appropriate risk to developers. Because Maryland is only sizing an incentive relative to the predicted value of capacity and other benefits named in the code of the storage resource, developers bear the merchant risk for the energy and ancillary services products. This creates additional risk allocation to the resource and serves as an additional incentive for the resource to perform daily in the PJM markets to generate revenue sufficient to make the project viable. Resources are also subject to Maryland's financial security requirements with performance assurance of a $25/kW surety bond. These additional aspects of the program provide reasonable protection to Maryland ratepayers that the storage resource has sufficient risk and performance incentives.