

**COMMENTS OF  
COMMONWEALTH EDISON COMPANY  
ON THE  
ILLINOIS POWER AGENCY'S  
DRAFT 2013 ELECTRICITY PROCUREMENT PLAN**

**September 14, 2012**

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**COMMENTS OF COMMONWEALTH EDISON  
COMPANY ON THE ILLINOIS POWER AGENCY'S  
DRAFT 2013 ELECTRICITY PROCUREMENT PLAN**

Commonwealth Edison Company (“ComEd”) submits these comments on the Illinois Power Agency’s (“IPA”) Draft 2013 Electricity Procurement Plan (“Draft Plan” or “Plan”) that was posted on the IPA’s website on August 15, 2012, pursuant to Section 16-111.5(d)(2) of the Illinois Public Utilities Act (“PUA”) (220 ILCS 5/16-111.5(d)(2)). For the convenience of the IPA, the Illinois Commerce Commission (“ICC” or “Commission”), and the parties, a redlined version of the Plan reflecting ComEd’s comments is attached hereto as Appendix A.

In general, ComEd commends the IPA for a very well-drafted and thorough Draft Plan. ComEd supports the Plan’s proposal not to conduct any procurement events for energy or renewable energy credits in 2013. These comments focus primarily on clean coal, the pre-existing long-term renewables contracts and distributed generation by clarifying certain aspects of the Plan in relation to these issues and making it more consistent with the PUA and the Illinois Power Agency Act (20 ILCS 3855/1-1 *et seq.*) (“IPA Act”). While the comments identify several specific ways to improve the Plan, ComEd’s silence regarding any issue not addressed in these comments should not be interpreted as agreement with all statements, approaches, calculations, or recommendations made in the Plan pertaining to that issue.

**I. CLEAN COAL**

The Illinois Power Agency’s (“IPA”) Electricity Procurement Plan (“Plan”) proposes the procurement of clean coal energy pursuant to a sourcing agreement with the FutureGen Industrial Alliance, Inc. (“FutureGen”).<sup>1</sup> As the Plan notes, the IPA and FutureGen have held several discussions with Commonwealth Edison Company (“ComEd”), Ameren and the retail

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<sup>1</sup> Plan, section 7.5, pp. 73-6.

electric suppliers (“RES”) in Illinois concerning the terms of the sourcing agreement. Both ComEd and Ameren proposed significant revisions to the sourcing agreement. While the sourcing agreement attached to the Plan incorporates a couple of these proposed revisions, many of the more significant proposals are not included. ComEd understands that FutureGen intends to continue considering the utilities’ proposals and to engage in further discussions with them. However, without the revisions proposed by ComEd, the proposed sourcing agreement is unfair, unreasonable and inconsistent with the IPA Act. The proposed revisions are discussed below.

**A. The IPA Must Present a Complete Sourcing Agreement Before it Can Be Approved by the Commission**

The sourcing agreement that the IPA attached to its Plan is incomplete. It contains a number of blank spaces that need to be filled before the sourcing agreement can be evaluated for its reasonableness and compliance with law. The IPA states that it understands that FutureGen will provide information at some point so that the Commission can assess the prices under the agreement,<sup>2</sup> but it does not state when that information will be available or whether it will be provided with the official plan that will be filed with the Commission and that will commence the docketed investigation of the Plan and the sourcing agreement. ComEd believes that it needs to be submitted at that time in order to give the Commission and all parties adequate time to review and evaluate the proposed sourcing agreement.

In addition to the pricing information, the following information will also need to be provided at that time:

- The Target Commercial Operation Date and the Outside Commercial Operation Date;<sup>3</sup>
- The Term;<sup>4</sup> and

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<sup>2</sup> Plan, p. 75.

<sup>3</sup> Sourcing agreement, section 1.1.

- The Minimum Annual Energy amounts.<sup>5</sup>

**B. The Benchmarks Must be Used to Evaluate the Initial Price and All Subsequent Changes to the Price**

The Plan indicates that the IPA has retained Levitan to develop confidential benchmarks that can be used to assess the reasonableness of the price proposed in the sourcing agreement.<sup>6</sup> However, it is not clear to what price the benchmarks are proposed to be compared. As noted above, the IPA understands that some pricing information will be provided in the upcoming procurement proceeding with which the Commission can compare the benchmarks. However, the facility is not scheduled to come into service until 2017, and once it is in service, the sourcing agreement proposes a pricing mechanism that results in a constantly changing price. The IPA should be clear that the benchmarks are to be used to evaluate not only the initial price but also all subsequent changes to that price. This is another reason why Commission review and approval is required before any changes in the price for energy from FutureGen should be allowed to become effective.

**C. Either All or None of the Illinois Electric Utilities (for whom the IPA procures energy) and RES Should be Required to Execute a Sourcing Agreement with FutureGen**

While it may be a laudable goal to procure 25% of the electricity used in Illinois from clean coal facilities so as to advance the technology necessary to cleanly convert Illinois basin coal, it is neither fair nor reasonable to require only certain customers to bear the cost of the development of this technology. If the development of this technology will benefit Illinois, as the Illinois General Assembly apparently believes, then all customers should equally bear the

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<sup>4</sup> Sourcing agreement, section 2.1.

<sup>5</sup> Sourcing agreement, Exhibit 6.6(c)

<sup>6</sup> Plan, p. 75.

cost. Yet, unless certain revisions are made to the proposed FutureGen sourcing agreement, it is the utilities' customers who will be bearing the cost of the development of this technology.

Besides being unfair, compelling utilities' customers to bear the cost of this project is neither competitively neutral nor practical. As recent events have demonstrated, customers can and will switch to alternative suppliers if faced with higher prices from utilities. Since a utility's obligations under the proposed sourcing agreement (and under the IPA Act) are limited to the load that it serves, having only the utilities execute sourcing agreements raises issues as to the viability of the FutureGen project. At some point, the dwindling stream of revenue that FutureGen receives under the agreements will not be sufficient to support the continuation of the project. There seems little point to approving a project if it is structured to fail.

Thus, fairness, competitive neutrality and practicality dictate that either all or none of the Illinois electric utilities (for which the IPA procures energy) and RES must execute a sourcing agreement. However, the sourcing agreement that the IPA attached to its Plan is unexecuted. No Illinois electric utility or RES has signed that document or even indicated it will sign. The IPA has developed procurement plans for both ComEd and Ameren pursuant to which it is seeking Commission authorization to require both ComEd and Ameren to execute the sourcing agreement. However, it is unclear whether any RES will volunteer to sign or whether the IPA or the Commission has any authorization to compel a RES to sign. Thus, much uncertainty surrounds the issue of which entities will ultimately sign a sourcing agreement with FutureGen.

This uncertainty can be resolved with several simple revisions to the sourcing agreements. First, it should be a condition precedent to the effectiveness of the agreement that FutureGen execute sourcing agreements with ComEd, Ameren and all RES. This will permit the utilities, and those RES who are willing to do so, to go ahead and execute an agreement without

concern that other RES might not eventually sign. Second, to ensure fairness and project viability for the term of the agreement, FutureGen should be required to maintain the effectiveness of all agreements and to enter into new agreements with any new RES that commences service during the term. The failure to do so should be an event of default for which the utilities or RES could terminate the agreement. These changes are reflected in the redlined version of the sourcing agreement attached hereto as Appendix B.

**D. The Sourcing Agreement Must be Brought into Compliance with the IPA Act**

The IPA is requesting approval of the FutureGen project pursuant to Section 1-75(d)(5) of the IPA Act. That section authorizes the Commission to review and approve sourcing agreements with re-powered or retrofitted coal-fired power plants. “Sourcing agreement” is a defined term under the IPA Act. In general, it is defined as an agreement which “shall have terms and conditions meeting the requirements of paragraph (3) of subsection (d) of Section 1-75[.]” The proposed sourcing agreement fails to meet the requirements of Section 1-75(d)(3) in a number of respects, as stated below.

**1. The Utility’s Payment Obligation Under the Sourcing Agreement Must Be Limited to Such Amount as the Utility is Allowed to Recover Through Tariffs**

Section 1-75(d)(3)(D)(viii) of the IPA Act provides that the terms of the sourcing agreement should “limit the utility’s obligation to such amount as the utility is allowed to recover through tariffs filed with the Commission[.]” While a number of sections of the proposed sourcing agreement purport to recognize this limitation, they all seek to limit or condition it. These provisions all fail to comply with the IPA Act and need to be revised or deleted.

Section 5.2(f) of the proposed sourcing agreement provides as follows: “Buyer shall not be responsible for payment of the Contract Price to the extent its recovery from Buyer’s Eligible

Retail Customers is disallowed by the Commission; provided the Commission is properly exercising jurisdiction over this agreement.” This provision is not consistent with the IPA Act.

First, the sourcing agreement bases ComEd’s payment obligation on the amount of sales to all of ComEd’s retail customers. This would include both Eligible and Non-Eligible Retail Customers. However, section 5.2(f) provides that ComEd is not liable only to the extent recovery from Eligible Retail Customers is not allowed. The IPA Act has no such limitation. It broadly provides that any disallowance of recovery from any of its customers limits ComEd’s payment obligation under the agreement.

Second, section 5.2(f) provides that ComEd is not responsible for payment if recovery is disallowed by the Commission. However, once again, there is no such limitation in the IPA Act. The IPA Act does not require that the Commission be the entity doing the disallowance. Instead, the IPA Act focuses on the amount that ComEd is “allowed” to recover regardless of the source of any limitations on that allowance, i.e. the Commission, the Illinois General Assembly, the FERC or any other entity with the ability to limit ComEd’s recovery.

Third, the provision at the end of section 5.2(f) of the sourcing agreement is a very curious provision indeed. It appears to question the Commission’s jurisdiction over the sourcing agreement. However, any obligation of ComEd under the agreement flows solely from the jurisdiction of the Commission to review and approve this agreement in the first instance. If the Commission has no such jurisdiction, then ComEd has no obligation under the agreement at all. This provision should be stricken and further provisions should be added to the agreement to make it abundantly clear that if any Commission jurisdiction over this agreement is challenged or limited in any way, then the entire agreement should be null and void.

Similarly, section 5.2(d) of the sourcing agreement also addresses the cost recovery issue. It requires ComEd to notify the seller as to whether or not it will accept any Commission order disallowing cost recovery. The IPA Act does not require any such notice or make ComEd's obligations contingent on providing it. This section should also be stricken.

Lastly, section 5.3 purports to require ComEd to renegotiate the agreement if cost recovery is denied. Nothing in the IPA Act requires this. There is simply nothing to negotiate. The limitation on ComEd's obligations in the event it is not allowed recovery is unconditional and absolute. ComEd has no further obligation for any amounts it cannot recover. The sourcing agreement needs to be very clear on this point.

The attached redlined version of the sourcing agreement contains the appropriate revisions remedying the problems discussed above.

**2. Any Change to the Contract Price in the Sourcing Agreement Requires Commission Approval Prior to Its Taking Effect**

Section 1-75(d)(3)(D)(vii) of the IPA Act requires that the terms of the sourcing agreement provide for Commission review of the justness, reasonableness and prudence of the inputs to the formula rate "prior to an adjustment in those inputs[.]" This review is to occur no less than every three years and is to be completed within nine months. However, section 5.2(b) of the sourcing agreement only provides for Commission review "if required"; limits such review to 60 days; and does not require affirmative Commission approval of changes prior to those changes going into effect. The attached redlined version of the sourcing agreement revises the agreement to bring it into compliance with this subsection of the IPA Act.

**3. The Term of the Sourcing Agreement May Not Exceed 30 Years**

Section 1-75(d)(3)(D)(i) of the IPA Act provides for a term "of no more than 30 years[.]" However, section 2 of the sourcing agreement provides for an initial term of 15-30 years and a

renewal term of five years, for a potential total term of 35 years. This section should be revised to limit the total term to 30 years. In addition, the section should be revised to provide that the initial term and any renewal term must be the same for all utilities and RES.

**4. FutureGen Should be Required to Document and Report on the Capture and Sequestration of Carbon Emissions**

Section 1-75(d)(3)(D)(v) of the IPA Act requires FutureGen to report to the Commission annually on the quantity of carbon emissions that have been captured and sequestered. To the extent that FutureGen fails to capture at least 50% of the total carbon emissions, it must procure carbon offsets. In addition, the Commission is authorized to lower the allowable return on equity for the facility if FutureGen willfully fails to comply with this section.

The sourcing agreement does not contain any of the requirements of this section of the IPA Act. It should be revised to do so.

**5. FutureGen Must Be Generating Power and Delivering it to the Grid**

Section 1-75(d)(3)(D)(ix) of the IPA Act provides that before any utility or RES incurs any liability under a sourcing agreement the facility must be “generating power and energy and such power and energy is being delivered to the facility bus bar[.]” However, this is not a requirement for achieving commercial operation in the sourcing agreement. The agreement should be revised to reflect this.

**E. Other Provisions of the Sourcing Agreement are Unreasonable and Should be Revised**

**1. Credit Support for ComEd Should Not be Required**

Section 14 of the sourcing agreement requires ComEd to provide credit support if its bond rating falls below investment grade. This is unnecessary, will increase costs to customers and has been previously rejected by the Commission. No other ComEd supply contract, not even

ComEd's long-term renewable contracts, requires ComEd to provide credit support. This requirement should be deleted.

As the Commission recognized when it rejected reciprocal credit requirements in Docket 05-0160, there is an important difference between ordinary "competitive contracts" and utility supply contracts under which utilities acquire supply for customers that they have a duty to serve. Final Order, Docket No. 05-0160 (January 24, 2006) at 171. ComEd has an obligation to serve its customers and it must meet that obligation, even in the face of adverse regulatory or legislative action. ComEd is required to provide that service under tariffs that are regulated by the Commission. In providing that statutorily-required service, ComEd has a right to cost recovery and at rates that cannot properly be set in a manner that deprives the utility of the opportunity to recover its reasonable and prudent cost of serving customers. Thus, any risk to FutureGen is minimal, if not non-existent.

Therefore, the proposed credit requirement is unnecessary and will simply serve to increase the costs for what is already a very costly product. This provision should be deleted.

**2. ComEd Should Not Be Required to Support FutureGen's Requests for Approval of Project Costs, the Formula Rate and the Agreement**

Various provisions of the sourcing agreement, e.g. section 5.2(c), require ComEd to support FutureGen's efforts to obtain regulatory approval for various aspects of the agreement, including changes to the contract price. This is unreasonable. ComEd should not be required to blindly support increasing costs for its customers. This provision should be deleted.

**3. FutureGen Should be Required to Sell Some Reasonable Amount of Energy, Capacity, Ancillary Services and other Products from the Project**

Sections 6.3 and 6.4 of the sourcing agreement provide for credits against the price for any energy, capacity, ancillary service or other product attributes FutureGen is able to sell into

the market. However, these sales are entirely voluntary on FutureGen's part. There is no incentive for FutureGen to make any such sales. It will receive the same amount of total revenues if it makes absolutely no such sales, therefore these provisions are unreasonable. The sourcing agreement should be revised to provide that FutureGen shall propose and the Commission shall finally establish a reasonable amount of these products that FutureGen would be expected to make on an annual basis.

**4. The Commission Should Ensure the Rate Cap is Not Exceeded When it Approves the Prices in the Sourcing Agreement.**

Section 6.5 of the sourcing agreement implements the rate cap imposed by Section 1-75(d)(2) of the IPA Act. It provides that a determination be made prior to each contract year with a true-up after each contract year. ComEd agrees that a determination be made prior to each contract year that purchases under the sourcing agreement will not cause the rate cap to be exceeded. However, as a practical matter, because ComEd's obligation under the sourcing agreement is proportional to its prorata load share of energy sales, it is not the amount of resources procured that would cause the cap to be exceeded, but rather the price itself. Therefore, there is no practical way for ComEd to implement the cap by reducing the amount of resources procured, as the price itself would have to be lowered. The rate cap is, in fact, a fixed annual average price in cents per kWh. Therefore, ComEd believes the Commission should simply make a determination at the time it approves the prices for the sourcing agreement that those prices, on an annual average basis, will not cause the rate cap to be exceeded.

**5. The Minimum Annual Energy Provisions Need to Be Strengthened**

Section 6.6 of the sourcing agreement proposes some very weak minimum annual energy provisions. These provisions operate over a six-year cycle. However, as the agreement nears the end of its term, there simply will not be enough remaining time for the six-year cycle to operate

and FutureGen will escape having to pay any damages. Thus, the agreement needs to be amended so that these provisions do not operate over the last six years of the term. Instead, the minimum annual energy provisions should operate on an annual basis for the final six years, with FutureGen being responsible for paying damages for any shortfall in any of the last six years of the agreement.

In addition, the sourcing agreement proposes some rather arbitrary caps on the annual and total damages that FutureGen must pay for failure to deliver the minimum amounts. However, FutureGen is already adequately protected by the six-year cycle proposal. Caps on the damages are unnecessary and unreasonable. They should be eliminated.

**6. Certain Provisions of the Sourcing Agreement Need to Be Revised to Reflect That the Agreement is Being Settled Financially**

The sourcing agreement is to be settled financially as described in section 6.1. However, not all of the provisions of the agreement appropriately reflect this. Section 6.8 of the agreement provides for the “acceptance” of the energy at the delivery point. It is not clear what this means or how this is to be accomplished since FutureGen will be selling the energy to MISO at the delivery point. This language should be deleted.

Similarly, section 19 of the sourcing agreement provides for buyer to pay all taxes imposed on seller with respect to buyer’s “purchase” of the energy. Once again, buyer will not be purchasing the energy, MISO will be. Any issue as to taxes relating to an actual physical sale and purchase of the energy should be a matter between seller and MISO. This language should be deleted.

7. **The Severability Clause Needs to Be Revised to Reflect the Statutory Basis of the Agreement**

Section 24.5 of the sourcing agreement seeks to preserve the substance of the agreement in the event that any particular clause is held to be invalid, illegal or unenforceable. However, the language of that section fails to recognize that this entire agreement arises from operation of the IPA Act. There are certain provisions that are so central to the intent and purpose of what the IPA Act wanted to achieve that if any of these core provisions is eliminated, the entire contract should come to an end. Many of the core provisions are discussed above. They include the concepts that all electric utilities and RES must enter into a sourcing agreement, that the utilities' obligations are limited to what they can recover from their customers, and that the Commission must approve this agreement and any changes to its terms. The sourcing agreement should be revised to reflect this.

8. **The Termination Payment Provisions Need to be Revised**

The Termination Payment provisions of the sourcing agreement are unreasonable in several respects.<sup>7</sup> First, the calculation of the Termination Payment takes into account only the costs associated with the project and ignores all the credits and revenues, such as from the net energy and capacity that the project should generate. Those credits and revenues need to be considered. Second, in the event a party disputes the calculation of the Termination Payment, that party must still pay the disputed portion. It is a more common practice, and one included in all of ComEd's other supply agreements, that the disputing party pay only the undisputed amount until the matter is resolved. The sourcing agreement should incorporate both of these changes.

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<sup>7</sup> Section 16.5 of the sourcing agreement.

**9. The Billing Disputes Provision Needs to be Revised**

The Billing Disputes provision<sup>8</sup> of the Sourcing Agreement is unreasonable for the same reason. It also requires the payment of the disputed portion of the bill. This should be changed as discussed above in relation to the Termination Payment.

**10. The Event of Default for Non-Payment Provision Needs to be Revised**

Section 15.1(a)(i) provides that it is an event of default for a party to fail to pay an amount due within 30 days of the due date. However, a party paying in good faith has no way of knowing if a payment was actually received by a party. Some administrative glitch, or bank or computer system error could prevent the processing of a payment that was in fact timely made. Only the receiving party knows whether or not it has received the payment. Accordingly, the receiving party should be required to give notice to the paying party that it has not received payment prior to be allowed to terminate the agreement.

**F. The Plan Should Explicitly Seek Approval to Procure On Behalf of the Utilities' Non-Eligible Retail Customers and to Allow ComEd to Recover Those Costs**

The proposed sourcing agreement proposes to include the utilities' Non-Eligible Retail Customers in the definition of Final Buyer Retail Sales.<sup>9</sup> This would mean that the utilities' Non-Eligible Retail Customer load would be used in the determination of the charges for which the utilities would be responsible for paying FutureGen. ComEd does not object to this. As ComEd stated above, fairness and competitive neutrality require that all Illinois retail customers be equally responsible for supporting the development of clean coal technology. However, since the Illinois Public Utilities Act generally only provides for the IPA to procure for the utilities'

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<sup>8</sup> Section 7.3 of the sourcing agreement.

<sup>9</sup> Sourcing agreement, section 1.1.

Eligible Retail Customers, the Plan should be explicit on this point so the Commission can expressly approve it and the recovery of these costs by ComEd from Non-Eligible Retail Customers.

ComEd believes the IPA Act authorizes the IPA to procure clean coal resources on behalf of all retail customers in Illinois. Section 1-75(d)(1) of the IPA Act makes it the goal of the State to procure “25% of the electricity used in the State” from clean coal resources. In order to reach that goal, the IPA Act specifically authorizes the IPA and the Commission to approve proposed sourcing agreements for clean coal energy from retro-fit facilities.<sup>10</sup> Thus, it appears the Illinois General Assembly intended to include the utilities’ Non-Eligible Retail Customers in clean coal procurements.

**G. The Plan Should Be Revised to Incorporate These Comments**

While most of the comments above relate to necessary revisions to the sourcing agreement, the Plan should also be revised to address these concerns. The proposed changes are shown in the attached redlined version of the Plan.

**II. RENEWABLE RESOURCES**

**A. Long Term Renewable Contracts**

The Draft Plan recognizes that due to previous commitments to procure renewable resources, ComEd’s procurement of renewable resources for each of the five delivery years covered under the Draft Plan will exceed the cap set out in Section 1-75(c)(2) of the IPA Act. Therefore, the Draft Plan recommends no new REC procurement event.<sup>11</sup> While the Draft Plan appears to anticipate that ComEd will curtail some of its purchases pursuant to those previous

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<sup>10</sup> 20 ILCS 3855/1-75(d)(5).

<sup>11</sup> Draft Plan, pp. 80-1.

commitments, it does not directly propose that ComEd do so. The Draft Plan should do so for at least three reasons: 1) it was the IPA that had proposed the procurement of the renewable resources that now exceed the cap; 2) the IPA drafted and negotiated the agreement that provides for the curtailment of renewable resources in the event that the cap is exceeded; and 3) it is the IPA's responsibility to propose the procurement of renewable resources consistently with the requirements of the IPA Act.

In Docket No. 09-0373, the IPA proposed and the Commission approved the procurement by ComEd of 1,400,000 megawatt hour ("MWhs") of renewable energy resources each year for 20 years pursuant to long-term contracts ("LT Renewables Contracts").<sup>12</sup> As required by law,<sup>13</sup> the IPA then proceeded to draft the agreement that would be used to implement this procurement. Among the provisions the IPA included in the agreement was the following:

Unless otherwise required by law, statute or an order, rule or decision of the Illinois Commerce Commission, Buyer will not refuse to pay for any Product delivered by Seller for the sole reason that payment for Product would cause the cost caps provided for in Section 1-75(c)(2) of the Illinois Power Agency Act (20 ILCS 3855/1-75(c)(2)) to be exceeded. In the event that Buyer is not allowed to recover costs as a result of any of the above actions, the following additional conditions shall apply: 1) Buyer shall inform Seller as soon as practical of the law, statute or order, rule or decision of the Illinois Commerce Commission limiting costs recovery; 2) unless otherwise directed by the Illinois Commerce Commission or statute, Buyer shall reduce the quantity of Product purchased under all contracts for renewable energy resources that allow for pro-ration in this circumstance and that are effective and in force at the time by reducing proportionately for each contract the Annual Contract Quantity or similar contract term as required such that the amount of expenditures for Product are recoverable; and 3) Buyer will provide notice to Seller each time a change is made to the Annual Contract Quantity under this provision. Each time Seller receives a notice from Buyer pursuant to clause (3) of the preceding sentence, Seller shall have thirty (30) days thereafter to provide notice to Buyer of (a) its election to terminate this Agreement effective no later than 60 days after Seller's notice to Buyer of such election; (b) its election to reduce permanently the Annual Contract Quantity to the reduced level contained in Buyer's notice effective when the

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<sup>12</sup> See *Illinois Power Agency*, ICC Docket No. 09-0373, pp. 115-20 (Order, Dec. 28, 2009).

<sup>13</sup> 220 ILCS 5/16-111.5(c).

reduction is scheduled to take place; or (c) its election to accept the reduced Annual Contract Quantity contained in Buyer's notice for that Delivery Year. In the event that the Seller accepts the reduced Annual Contract Quantity contained in Buyer's notice pursuant to clause (c) of the immediately preceding sentence, the Applicable Percentage shall be reduced proportional to the reduction in the Annual Contract Quantity for that Delivery Year. In the event that the Seller accepts the reduced Annual Contract Quantity contained in Buyer's notice pursuant to clause (b) above, the Applicable Percentage shall be reduced proportional to the reduction in the Annual Contract Quantity.<sup>14</sup>

Thus, it appears that the agreement the IPA drafted anticipates a Commission order providing for curtailment under the LT Renewables Contracts prior to ComEd actually curtailing its purchases under them. In addition, that agreement also provides for various notices and elections to be made. Implementation of these provisions of the agreement would be clarified and materially assisted if the Draft Plan were revised to be clear that it is proposing that purchases under the LT Renewables Contracts be reduced.

This is consistent with the IPA Act. The IPA Act clearly envisions the IPA would make a recommendation regarding the amount of renewable resources to be procured in any year. Section 1-75(c)(1) provides that "procurement plans shall include cost-effective renewable energy resources" and goes on to set out the amount of renewable resources that must be included in the plan. The IPA Act initially requires a certain percentage of the load to be served to be renewable energy resources, but then provides that "the total of renewable energy resources procured pursuant to the procurement plan for any single year shall be reduced by an amount necessary to limit the annual estimated average net increase..." to certain percentages.<sup>15</sup> Thus, the IPA Act appears to anticipate that a procurement plan will explicitly identify any need to reduce the quantities of renewable energy resources to be procured due to the statutory cost cap.

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<sup>14</sup> Long-Term Master Agreement (FINAL) (November 8, 2010), Sample Confirmation, Additional Provisions, § D ([http://www.comed-energyrfp.com/2010-RFP/docs/lt/8Sample\\_Confirmation\\_Final\\_11-08-2010.pdf](http://www.comed-energyrfp.com/2010-RFP/docs/lt/8Sample_Confirmation_Final_11-08-2010.pdf)).

<sup>15</sup> 20 ILCS 3855/1-75(c)(2).

Therefore, consistent with these facts and the law, the IPA's procurement plan should be modified to provide that the procurement of renewables under the LT Renewables Contracts should be reduced by sufficient quantities so as not to exceed the 2.015% statutory cap and include this determination in the list of Plan components for which the IPA is requesting Commission approval.<sup>16</sup>

**B. The Use of the Utility's ACP Amounts**

The Draft Plan also proposes that ComEd be directed to use the alternative compliance payments ("ACPs") collected from its hourly-priced service customers during the 2010/11 and 2011/12 delivery years "to mitigate any reductions in delivery of RECs under the long term contracts due to the operation of the rate cap."<sup>17</sup> With respect to ACPs for utility customers on hourly service, Section 1-75(c)(5) of the IPA Act provides as follows:

(5) Beginning with the year commencing June 1, 2010, an electric utility subject to this subsection (c) shall apply the lesser of the maximum alternative compliance payment rate or the most recent estimated alternative compliance payment rate for its service territory for the corresponding compliance period, established pursuant to subsection (d) of Section 16-115D of the Public Utilities Act to its retail customers that take service pursuant to the electric utility's hourly pricing tariff or tariffs. The electric utility shall retain all amounts collected as a result of the application of the alternative compliance payment rate or rates to such customers, and, beginning in 2011, the utility shall include in the information provided under item (1) of subsection (d) of Section 16-111.5 of the Public Utilities Act the amounts collected under the alternative compliance payment rate or rates for the prior year ending May 31. Notwithstanding any limitation on the procurement of renewable energy resources imposed by item (2) of this subsection (c), the Agency shall increase its spending on the purchase of renewable energy resources to be procured by the electric utility for the next plan year by an amount equal to the amounts collected by the utility under the alternative compliance payment rate or rates in the prior year ending May 31.<sup>18</sup>

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<sup>16</sup> See 20 ILCS 3855/1-75(c).

<sup>17</sup> Draft Plan at 80.

<sup>18</sup> 20 ILCS 3855/1-75(c)(5).

As stated in the Draft Plan, “ComEd holds \$1,499,113 in hourly ACP funds collected during the 2010/11 delivery year that should have been earmarked for spending in the 2012 procurement but were not. An additional \$284,847 was collected during the 2011/12 delivery year ....”<sup>19</sup>

Section 1-75(c)(5) of the IPA Act provides that utility hourly ACPs shall be used by the IPA to increase the spending on renewable energy resources even if those purchases would otherwise be limited by the statutory caps. While the IPA’s proposal represents an alternative and unconventional means for the IPA to use hourly ACPs to “increase its spending on the purchase of renewable energy resources to be procured by the electric utility,” such use appears to fall within the scope of Section 1-75(c)(5) of the IPA Act. In essence, the IPA proposes to use the hourly ACPs to increase the statutory caps that would otherwise be applicable to the LT Renewables Contracts. ComEd does not oppose this proposal, so long as the Plan is amended as discussed above to be clear that ComEd should reduce its purchases under the LT Renewables Contracts consistently with the statutory cap provisions of the IPA Act.

### **C. The Use of the RES ACP Amounts**

Finally, the IPA also proposes to consider -- outside of the IPA Plan -- use of the ACPs collected from RES and held in the Illinois Power Agency Renewable Energy Resource Fund (“IPA RERF”) created by Section 1-56 of the IPA Act to further mitigate the effects of curtailments of LT Renewables Contracts pursuant to the statutory caps.<sup>20</sup> While no specific proposal is presented for approval and the Plan states that the IPA does not believe its spending of RERF funds is subject to Commission approval in IPA utility procurement plans or otherwise, the IPA describes one example of the type of mechanism it is contemplating:

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<sup>19</sup> Draft Plan at 80.

<sup>20</sup> Draft Plan at 81.

The IPA proposes, upon approval of the 2013 Procurement Plan, to enter into discussions with the utilities and the counter-parties to the 2010 long-term energy and REC contracts to sort out a mechanism wherein any shortfall in the ability of the utility to purchase the REC portion of the output is made up for by the IPA's RERF. As an example of how this might work, the utility might sell to the IPA at the imputed REC contract price any RECs that would cause the utility REC budget to be exceeded. The IPA would then retire those RECs. The RECs would have been purchased initially through the 2010 competitive procurement approved by the ICC. The IPA would set up any required accounts and processes at PJM and M-RETS that would facilitate the documented retirement of RECs.<sup>21</sup>

While ComEd expresses no opinion and takes no position one way or the other regarding any proposal for the IPA to use funds held in the IPA RERF to purchase RECs from the other counter-parties to the LT Renewables Contracts that are curtailed pursuant to the statutory caps, the Draft Plan needs to be clearer as to what, if any, approval it is seeking from the Commission in this proceeding regarding this proposal. Most of the discussion in the Draft Plan on this issue seems to indicate the IPA is not seeking, and does not need, any ICC approval to pursue its proposal. However, the Draft Plan includes one curious sentence – “[t]he IPA presents this proposal in the context of Plan, however, so that the potential shortfall in the utility ability to compensate the long-term REC sellers may be settled.”<sup>22</sup> It is not clear how or what the IPA is proposing to settle in this proceeding. If by “be settled” the IPA means simply that it is giving notice to the parties that it intends to settle the shortfall on its own, outside the context of this proceeding and through the use of the RES ACP payments, that is one thing.

However, if by “be settled” the IPA is actually seeking ICC approval for its proposal, ComEd objects strongly to that. Although ComEd is always willing to discuss these issues with the IPA and the other parties, there is no basis or requirement under the IPA Act or the PUA for either the IPA or the Commission to require ComEd to sell RECs to the IPA or otherwise be

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<sup>21</sup> Draft Plan at 82.

<sup>22</sup> Draft Plan, p. 81.

involved in such a transaction. ComEd has no desire or intent to become involved in a transaction that is neither authorized nor required by any provision of the IPA Act or PUA. Indeed, the hypothetical arrangement contemplates a utility purchase of RECs that contravenes the directive in Section 1-75(c)(2) of the IPA Act that “the total of renewable energy resources procured pursuant to the procurement plan for any single year shall be reduced by an amount necessary to limit the annual estimated average net increase due to the costs of these resources included in the amounts paid by eligible retail customers in connection with electric service to [the statutory caps].”<sup>23</sup> The sale of RECs procured and purchased by a utility to meet the renewable portfolio standard established in Section 1-75(c) of the IPA Act would also run contrary to the requirement that “[t]he *electric utility* shall retire all renewable energy credits used to comply with the standard.”<sup>24</sup>

The simplest solution would be to delete the sentence quoted above and clarify that the IPA is not seeking any approval from the ICC in this proceeding on this issue. Alternatively, all references in the Plan to the potential use of funds in the IPA RERF to purchase from ComEd RECs procured under LT Renewables Contracts that exceed the statutory cap should be deleted. ComEd expresses no opinion or position regarding any proposal by the IPA to use such funds to purchase RECs that are curtailed pursuant to the statutory caps from other counter-parties to the LT Renewables Contracts.

### **III. DISTRIBUTED GENERATION**

In section 8.2 of the Draft Plan, the IPA discusses the new requirement in the IPA Act to procure a portion of the renewable energy resource requirements from small distributed

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<sup>23</sup> 20 ILCS 3855/1-75(c)(2).

<sup>24</sup> 20 ILCS 3855/1-75(c)(4) (emphasis added).

generators (“DG”).<sup>25</sup> The IPA recognizes that there is a great deal of uncertainty concerning when it may be economically feasible to actually implement a DG program. In fact, the IPA does not propose that any RECs be procured pursuant to the current Draft Plan. Nevertheless, the IPA proposes a program design for a DG program for which it seeks Commission approval in the current Draft Plan.<sup>26</sup>

ComEd does not support this proposal. As the IPA correctly concludes, because of the amount of ComEd load switching to RES, the utilities will not be procuring any RECs in the next procurement. Therefore, it is not necessary to approve a distributed generation program at this time. The Commission and parties’ time and resources are more efficiently spent focusing on the significant issues currently before it, such as FutureGen and the LT Renewables Contracts, rather than focusing on a program that cannot be implemented at this time.

ComEd notes that the IPA’s efforts are useful in understanding stakeholder views and can indeed be a good starting point for developing a DG program, but only when it becomes apparent that the utilities will be procuring DG renewable resources. However, as is evidenced by the discussion below, the IPA has put forth a skeletal program, many details of which must be worked out or further articulated. That type of program development is better done in the context of workshops when the time is appropriate. Furthermore, a DG program that is developed and approved at such time as it is required will allow the marketplace to incorporate the applicable and evolving market conditions into the final process.

ComEd has additional comments regarding several other parts of the program proposed by the IPA, as reflected below.

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<sup>25</sup> 20 ILCS 3855/1-75(c)(1).

<sup>26</sup> Draft Plan, p. 83.

**A. A Competitive Procurement Process Should be Used for all Parts of the Program**

The IPA proposes to use a “standard offer” process for the procurement of RECs from DG smaller than 25kW. This proposal is not consistent with the PUA. The PUA provides for the procurement of all products within a plan pursuant to a request for proposals competitive procurement process. The PUA sets out in great detail how the process shall be conducted and the various steps that must be accomplished.<sup>27</sup> The purpose of requiring such a process is to enable the Commission to make the necessary determination that the procurement will result in “the lowest total cost over time[.]”<sup>28</sup> Instead of seeking the lowest price, the IPA proposes to offer the small DG owners a guaranteed fixed price. The IPA offers no rationale for how this satisfies the lowest cost standard in the PUA.

Moreover, the IPA offers no reason for discriminating in favor of the small DG owner or how that is consistent with the PUA and IPA Act. ComEd recognizes the potential uniqueness of dealing with small generators. Nevertheless, when the Illinois General Assembly provided for the procurement of RECs from these generators, it did *not* provide for a special procurement process for these entities, nor did it in any way indicate they should be treated more favorably than any other types of REC generators specifically listed in the IPA Act. In fact, it would seem that the exact opposite is true because the General Assembly provided for the use of aggregators for small DG generators and provided for a minimum of 1 MW nameplate capacity to be aggregated. The evident purpose of such requirement is to put small DG generators on similar footing as everyone else, so that they can more effectively compete on a level playing field and undertake the same requirements other REC suppliers must meet.

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<sup>27</sup> 220 ILCS 5/16-111.5(c) & (e).

<sup>28</sup> 220 ILCS 5/16-111.5(d)(4).

ComEd believes that all REC suppliers should be treated fairly and in a similar fashion. This is the only way to ensure that the overall procurement of RECs will result in the lowest cost over time.

**B. If the Standard Offer Process is Used, It Requires Further Clarification**

In the event a “standard offer” process is approved, further clarity must be added to the “standard offer” that would apply to DG resources < 25 kW. ComEd interprets the process to be that a price would be established and approved by the Commission based upon a competitive procurement of > 25 kW DG resources occurring concurrently with the renewable generation procurement process. The “standard offer” price would therefore have to be established after the procurement of > 25 kW DG renewable resources. ComEd proposes that aggregators of DG resources < 25 kW have a finite period of time after the standard offer price is established (i.e., a two week period shortly after the renewable resource procurement), during which aggregators can execute contracts and put credit requirements and/or performance assurances in place, prior to delivery beginning June 1, consistent with past REC procurements. The utilities would execute contracts with aggregators for a minimum of 1 MW aggregated nameplate capacity on a first come-first serve basis, subject to an ICC-approved budget amount.

**C. ComEd is Only Required to Contract With an Aggregator**

In the description of the program the IPA proposes in the Draft Plan, it appears the IPA anticipates the use of an aggregator to procure the renewable resources from the DG generators, and then contract with ComEd for the sale of the aggregated RECs.<sup>29</sup> However, the IPA does not

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<sup>29</sup> Draft Plan, pp. 86-88.

explicitly state as much even though the IPA Act clearly requires such.<sup>30</sup> ComEd believes the program description should be revised to clearly provide for this.

Additionally, the Draft Plan makes reference to the utilities filing “tariffs with respect to standard offer contracts[.]”<sup>31</sup> It is not clear what is meant by this, but ComEd believes the reference should be deleted as it is factually and legally incorrect. Nothing in the IPA Act or the PUA provides for ComEd to file tariffs relating to the contracts it enters for the procurement of RECs. In fact, the PUA requires the use of standardized contracts that are developed by the procurement administrator.<sup>32</sup> That is how all other contracts for the procurement of RECs have been developed. ComEd sees no reason to vary from this practice. This provision should be deleted from the Draft Plan.

**D. Metering of Small DG Generators Should Not Be Required**

The IPA proposes that DG generators <25kW should self-certify the number of RECs they produce through readings obtained from a meter. While this is acceptable, ComEd does not believe it to be necessary. The IPA and Commission should consider using a formulaic determination of the number of RECs produced from DG resources < 25 kW. In lieu of managing the metering, measuring, reporting and verification of RECs produced by DG resources < 25 kW, the amount of RECs produced by such devices could be calculated and assumed to be produced and delivered by applying an appropriate capacity factor (the average percentage of actual output of the generation device compared to its potential output if it had operated at full nameplate capacity over the course of a one-year period) to the nameplate value of the DG resources over the term of the agreement with the aggregator. For example, if a 20%

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<sup>30</sup> 20 ILCS 3855/1-75(c)(1).

<sup>31</sup> Draft Plan, p. 88.

<sup>32</sup> 220 ILCS 5/16-111.5(c)(1)(v) & (e)(2).

capacity factor were utilized for solar DG devices < 25 kW, and an aggregator contracted for a 1 MW aggregated nameplate capacity total of these devices, the amount of RECs produced over a five-year contract period would equal: 1 MW X 8760 hours/year X 5 years X 20% capacity factor = 8,760 RECs. Under the contract, the aggregator would be assumed to deliver these RECs evenly over the five-year contract period and be paid the contract price on a monthly basis for the following amount of RECs:

$$8,760 \text{ RECs} / 60 \text{ months} = 146 \text{ RECs per month}$$

Because the amount of RECs procured from < 25 kW resources is relatively small compared to the total renewable generation resource procurement targets, and the difference between the actual RECs as measured through metering vs. a formulaic determination will be even smaller over a five-year contract period, the incremental administrative and metering costs and efforts of utilizing metered values will exceed the benefits as compared to using a formulaic determination. Furthermore, in addition to reduced metering administrative costs, a formulaic determination will provide more revenue certainty to the aggregator and DG device-owner market participants. Metering of DG resources could be used for audit or validation purposes and also to verify that the capacity factor utilized under the formulaic approach is appropriate.

**E. The Delivery Start Dates Should Continue To Be June 1**

The IPA proposes to offer bidders a choice of start dates for the initial delivery year.<sup>33</sup> ComEd opposes this proposal. The delivery term start dates should continue to be June 1, as is consistent with past practice. This will help reduce the administrative tracking efforts. More importantly, this will allow renewable resource procurement planning and procurement to better align with existing practices and be incorporated into the forecasting and procurement processes

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<sup>33</sup> Draft Plan, p. 86.

for energy and other renewable resources. It will also better ensure that renewable resources budgets are not exceeded.

#### **IV. MISCELLANEOUS ISSUES**

##### **A. Capacity Credits**

Prior procurement plans have included provisions that authorized ComEd to sell excess capacity credits it received from PJM and to flow the proceeds back to customers. For some reason, that provision is not included in this year's Draft Plan. ComEd recommends it be included in order to ensure these funds are returned to customers. ComEd has included the provision in the attached redlined version of the Draft Plan.

##### **B. Updated Forecasts**

ComEd agrees with the IPA that the forecast should be updated in November, after the general election, and then again in March of 2013. While there will be no procurement event pursuant to this Draft Plan, ComEd will need to curtail purchases under the LT Renewables Contracts. The amount of that curtailment should be determined on the best available information. Likewise, ComEd will be updating its fixed supply charges to go into effect July 2013. These charges should also be based on the best available information. Since there are elections scheduled for both February and April of 2013, an updated forecast will permit ComEd to incorporate any additional municipal aggregation flowing from any referenda in those elections. ComEd believes that the forecast will need to be updated to incorporate any changes to the forecast that the Commission approves in its order, such as the amount of additional energy efficiency measures to be procured. Otherwise, the forecast should be updated in March only for the purposes of municipal aggregation as it is not likely that any of the other variables that impact the forecast will change significantly between November 2012 and March 2013.

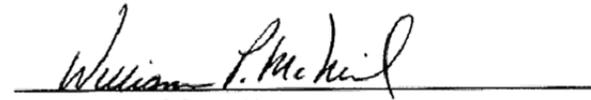
**C. Technical Corrections**

Finally, on pages 67-69 of the Draft Plan, the IPA includes three charts which depict the derivation of ComEd's required energy purchases over the period of the Plan. Some of the numbers used in those charts are incorrect. The correct numbers are shown on the attached redlined copy of the Plan. The corrections are relatively minor and do not impact any of the conclusions in the Plan.

Dated: September 14, 2012

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

A handwritten signature in cursive script, reading "William P. McNeil", is written over a solid horizontal line.

William P. McNeil

Vice President – Energy Acquisition