

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

**In the matter of the
Public Notice of Informal Hearing (Request for Comments)
Concerning the 2012 Electric Procurement Events
Which Were Held on Behalf of Commonwealth Edison Company
and Ameren Illinois Company**

Pursuant to 220 ILCS 5/16-111.5(o)

**REPLY COMMENTS BY THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

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Contents

- I. Introduction 1
- II. Reply to the Office of the Illinois Attorney General..... 1
 - A. The OIAG’s Comparison of Wholesale Prices 1
 - B. Market Structure and Performance 6
- III. Reply to Exelon Generating Company 8
- IV. Reply to NERA Economic Consulting 10
 - A. Comment process for standard contract forms and credit terms and instruments 10
 - B. Pre-bid letter of credit beneficiary 12
- V. Conclusion 15

I. Introduction

The Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, submits these Reply Comments in the matter of the Commission’s Public Notice of Informal Hearing (Request for Comments) Concerning the 2012 Electric Procurement Events Which Were Held on Behalf of Commonwealth Edison Company (“ComEd”) and Ameren Illinois Company (“Ameren”). The Notice of Informal Hearing was issued on May 17, 2012, pursuant to 220 ILCS 5/16-111.5(o). Initial comments (“IC”) were submitted to the Commission on June 15, 2012 by five parties: the Office of the Illinois Attorney General (“OIAG”), Boston Pacific Company (“BPC”), NERA Economic Consulting (“NERA”), Exelon Generating Company (“ExGen”), and Staff. The comments were posted on the Commission’s web site the next day. Staff’s failure in these Reply Comments to address some or all of the initial comments of any of the above-mentioned parties should not be interpreted as tacit agreement.

II. Reply to the Office of the Illinois Attorney General

A. The OIAG’s Comparison of Wholesale Prices

The OIAG states:

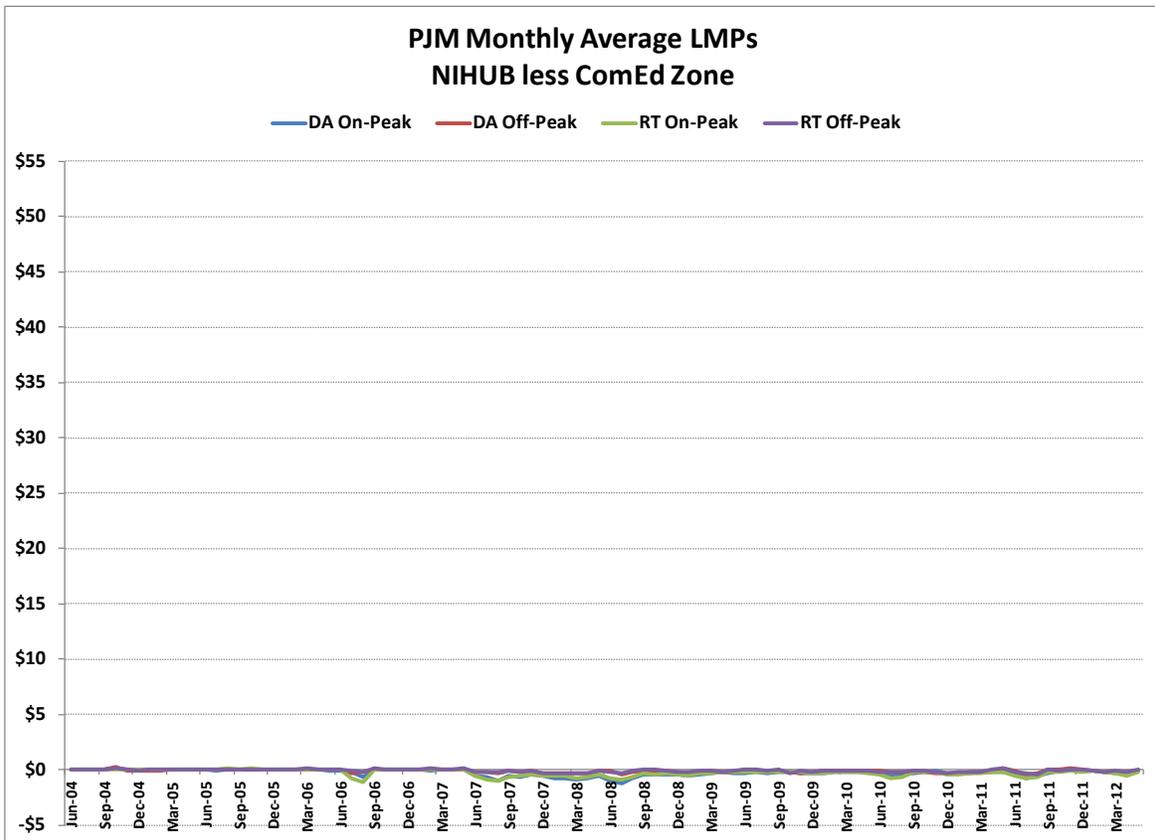
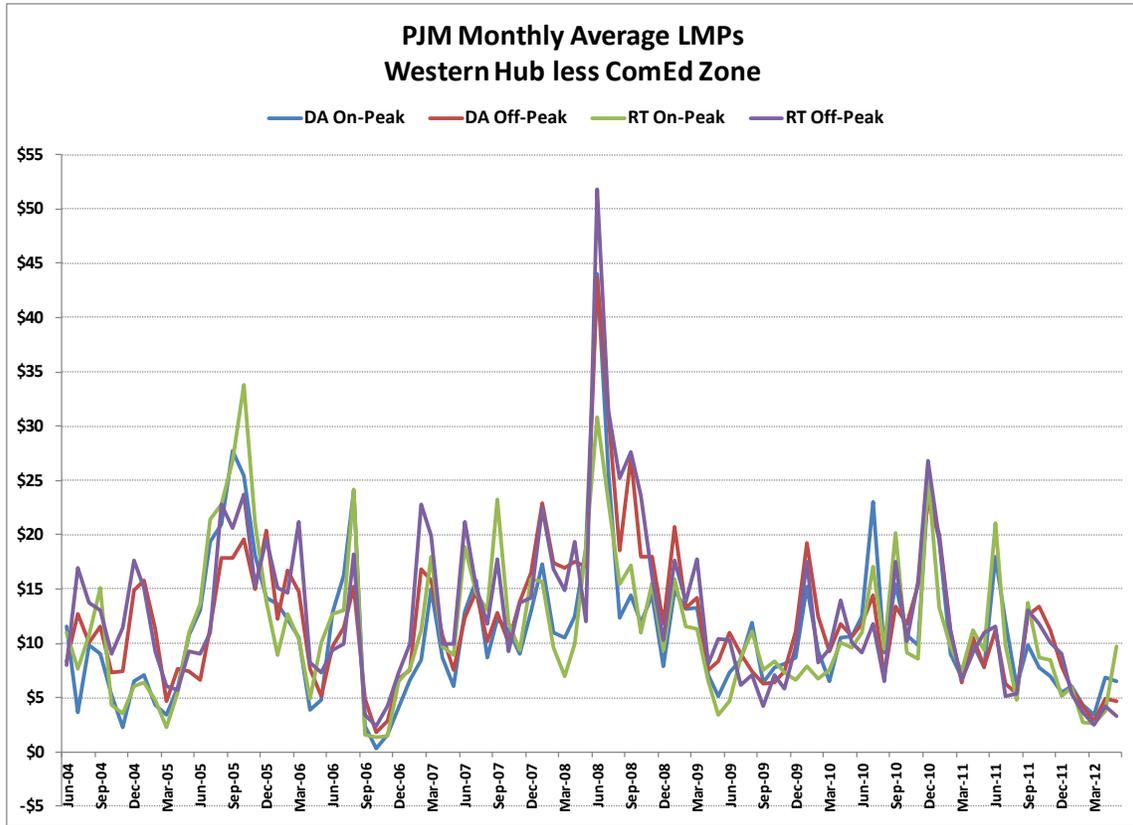
Consistent with prior IPA procurement results, this year the winning bids for Commonwealth Edison (“ComEd”) and Ameren electricity supply track the prices in the wholesale electricity market. The following tables compare the ComEd on-peak and off-peak results with the associated market prices. They show prices slightly below market prices for comparable products and comparable time periods, and demonstrate that the IPA’s procurement for ComEd benefits consumers.

OIAG IC, p. 1

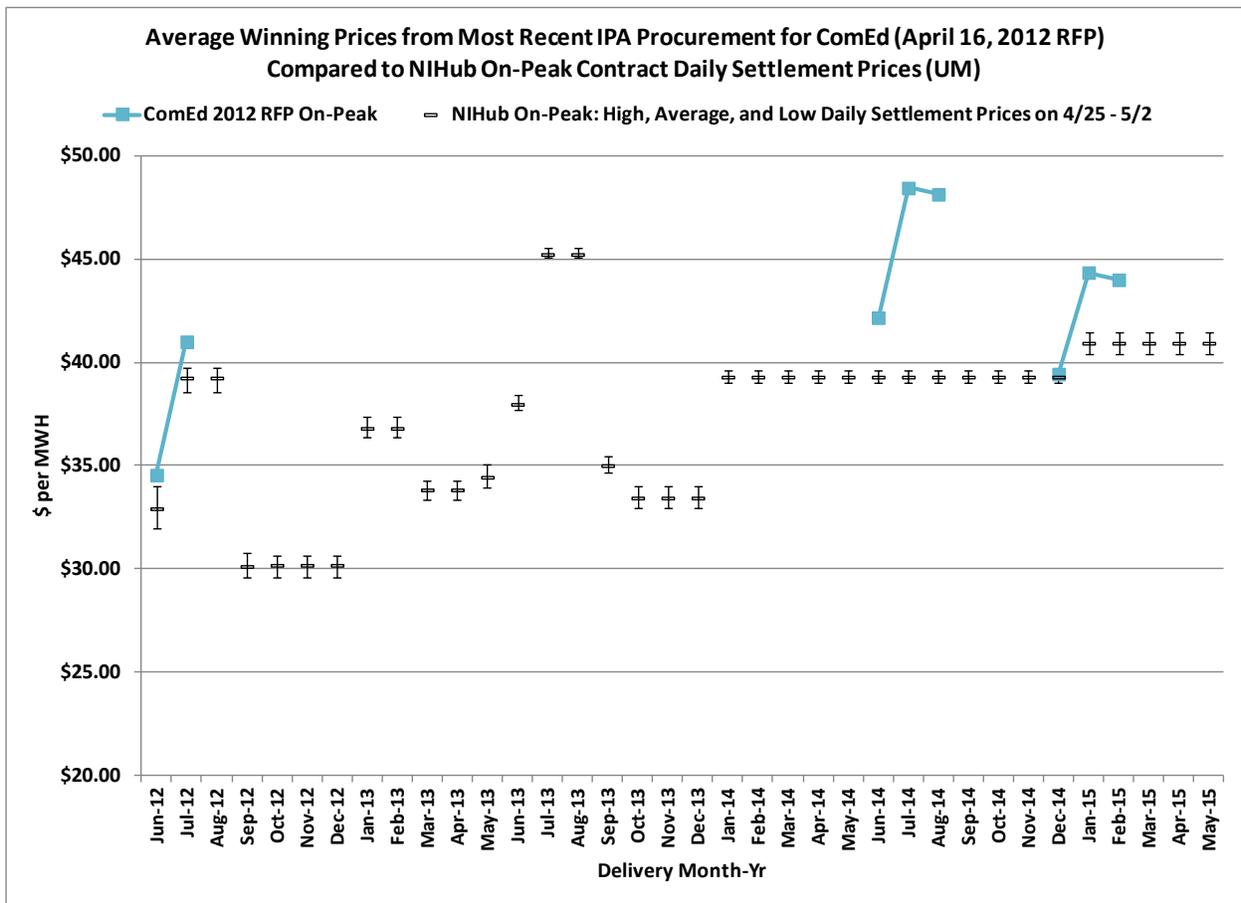
While Staff agrees that the winning bids track prices in the wholesale electricity market, Staff disagrees with the OIAG in several respects. First, the “tables” (actually

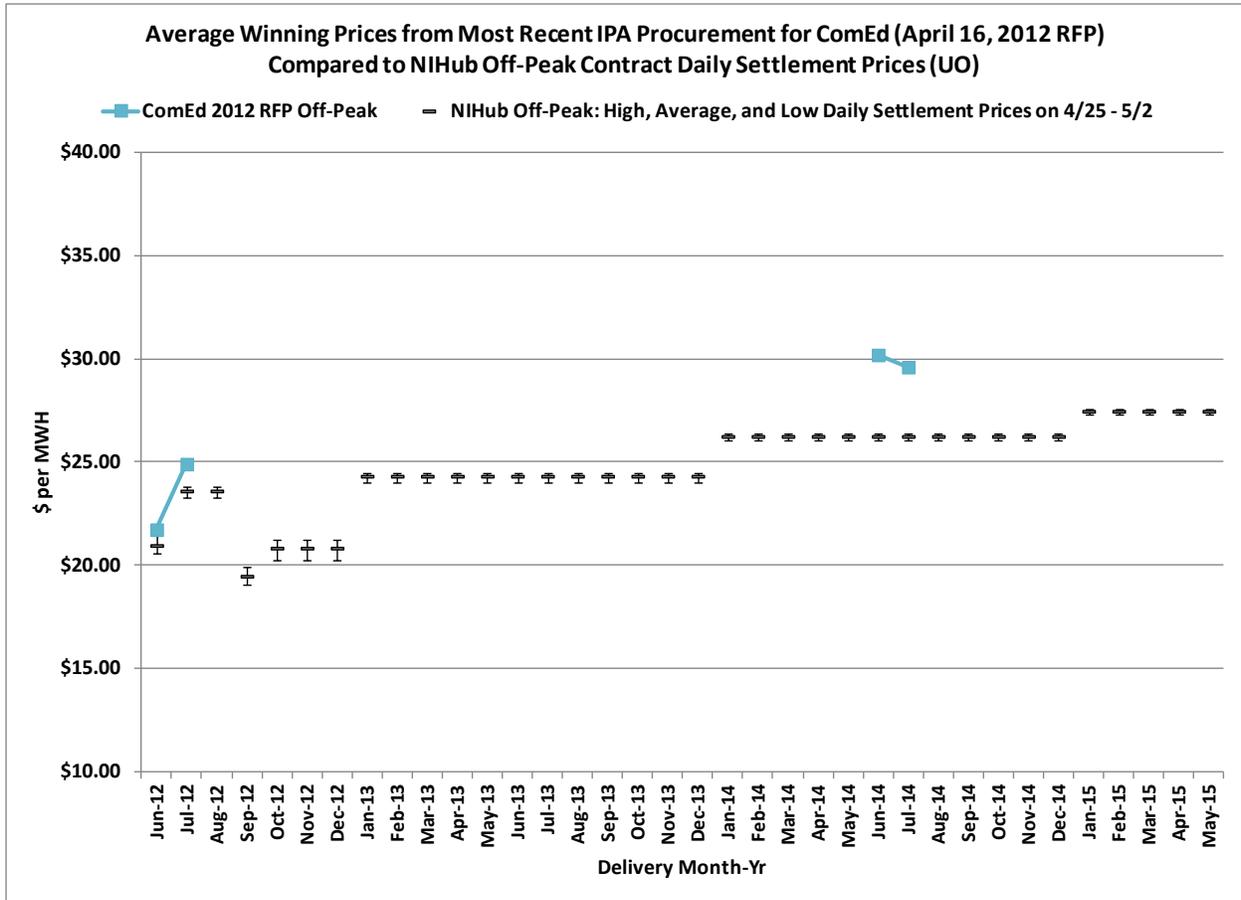
graphs) included in the OIAG's IC do not accurately display the average winning prices from this year's IPA procurements. Indeed, it displays some winning prices for several delivery periods that were not even included in this year's RFPs.

Second, those inaccurately-displayed winning prices are compared against what the OIAG calls "the associated market prices," which are labeled in the graphs as "NYMEX Futures." However, there are many electricity products traded on NYMEX. While the OIAG does not indicate which electricity products it chose for comparison purposes, assuming the OIAG's data were collected on or about the day of the IPA's energy RFPs, Staff has determined through inspection that the data for the ComEd graphs are definitely not for the Northern Illinois Hub NYMEX ("NIHub") contracts. Rather, the data appear much more likely to be for the PJM Western Hub NYMEX contracts. This is surprising since the spot prices for energy at the Northern Illinois Hub traditionally have been **very** close to ComEd Zone spot prices, and **much** closer to ComEd Zone spot prices than PJM Western Hub spot prices. Furthermore, Western Hub prices are typically much higher than ComEd Zone prices. This is illustrated, below. The first graph shows the average differences in locational marginal prices, by month, between the Western Hub and the ComEd Zone. The second graph uses the same scale to show the average differences between the Northern Illinois Hub and the ComEd Zone.



Using the actual average winning prices from this year's IPA procurements, and the futures prices for the Northern Illinois Hub NYMEX contracts, the two graphs below paint a somewhat different picture than the one painted by the OIAG's presentation for ComEd. The first graph is for the On-Peak contracts and the second (next page) is for the Off-Peak contracts. As shown, the average winning prices of the small hand-full of contracts purchased for ComEd were above rather than below the NI-Hub daily settlement prices around the time that bids were received, evaluated and approved by the Commission. Although not shown, a similar picture would emerge for Ameren, and for both utilities in prior years' RFPs.





While Staff believes the Northern Illinois Hub NYMEX contracts provide a better point of reference than whatever NYMEX contracts the OIAG employed, Staff also recognizes Northern Illinois Hub NYMEX contract settlement prices are not an ideal point of reference for various reasons. First, as should be obvious from the above graphs, beyond a certain number of months, the NYMEX settlement prices lack the expected seasonal pattern; rather, they seem to reflect assessments of calendar year products. For instance, in each of the above two graphs, note that a single price is used for all twelve months of calendar year 2014. Second, there are distinct differences between the Northern Illinois Hub NYMEX contracts and the contracts used by the IPA (margin requirements being one good example). Due to such differences, the existence of premiums for the IPA-solicited energy products relative to NYMEX futures (as

suggested by the above graphs) is not unexpected. That is, from the buyers' perspective, there are certain advantages to the IPA products relative to the NYMEX products. Whether those advantages are worth the level of observed premiums is a valid subject of inquiry, but not one attempted in these reply comments.

B. Market Structure and Performance

The OIAG concludes its Initial Comments with the following statement:

The results of the 2012-2013 procurement of electricity and renewable energy resources appear to be consistent with market prices. However, the reduction in the number of successful bidders for both energy and for RECs, and the failure to secure all capacity sought for July, 2012 in the Ameren areas raise questions about the administration of the procurement. These issues should be addressed by the Illinois Power Agency and the procurement administrators.

OIAG IC, p. 5

While the OIAG does not specify the "questions about the administration of the procurement" that are raised by the most recent procurement event, the OIAG appears to be concerned mostly about the degree of competition. The statutory scheme for ensuring the competitiveness of the IPA's electric procurement events includes four pillars:

1. The IPA hiring independent and professional procurement administrators to design and implement fair RFPs, to attract as wide a range of bidders as possible, and to evaluate the bids and submit confidential reports to the Commission on the results of bidding;
2. The Commission hiring independent and professional procurement monitors to observe the entire procurement process and to submit confidential reports to the Commission on the fairness and competitiveness of procurement events;

3. The Commission considering the confidential reports and deciding whether or not the results should be approved, based in part on the procurement monitors' assessments.
4. The OIAG taking law enforcement steps, as it deems appropriate, pursuant to Section 6.5(d) of the Attorney General Act, which states:

In addition to the investigative and enforcement powers available to the Attorney General, including without limitation those under the Consumer Fraud and Deceptive Business Practices Act, the Illinois Antitrust Act, and any other law of this State, the Attorney General shall be a party as a matter of right to all proceedings, investigations, and related matters involving the provision of electric, natural gas, water, and telecommunications services before the Illinois Commerce Commission, the courts, and other public bodies. Upon request, the Office of the Attorney General shall have access to and the use of all files, records, data, and documents in the possession or control of the Commission. The Office of the Attorney General may use information obtained under this Section, including information that is designated as and that qualifies for confidential treatment, which information the Attorney General's office shall maintain as confidential, to be used for law enforcement purposes only, which information may be shared with other law enforcement officials. Nothing in this Section is intended to take away or limit any of the powers the Attorney General has pursuant to common law or other statutory law.

15 ILCS 205/6.5(d)

As should be clear from the above summary, the process for ensuring the competitiveness of the IPA's electric procurement events must remain confidential to a very significant degree, a fact recognized even in Illinois sunshine laws. See 5 ILCS 140/7(y) (information contained in or related to proposals, bids, or negotiations related to electric power procurement that is determined to be confidential and proprietary by the Illinois Power Agency or by the Illinois Commerce Commission is exempt from disclosure under Illinois Freedom of Information Act). Furthermore, while the OIAG clearly has a role in that process as a party of right, 15 ILCS 205/6.5(d), oversight of the

competitiveness of the most recent procurement events, and indeed all procurement events, is vested by statute in the procurement monitor. See 220 ILCS 5/16-111.5(c)(2)(i-vii) (describing duties of procurement monitor).

Notwithstanding the above discussion, Staff has requested that the Commission's current procurement monitor address in reply comments the substance of the OIAG's concerns about the competitiveness of the most recent procurement events, bearing in mind the procurement monitor's own statutory and contractual duty to preserve the confidentiality of bidding data.

III. Reply to Exelon Generating Company

ExGen makes three recommendations for improving the implementation of procurement plans:

- Hold Procurements Earlier in the Week;
- Notify Potentially Winning Bidders Same Day; and
- Hold REC Procurement Events Earlier.

In principle, Staff has no objection to these recommendations. However, each presents practical challenges, which may prevent its adoption.

For example, with respect to ExGen's first recommendation, ExGen opines that the market is more volatile later in the week and that accepting bids later in the week also means that bids will remain "open" over the weekend and hence for a longer period of time. Both of these factors increase risk for bidders and increase the risk premiums that are included in bids. Staff does not disagree with this assessment.

However, scheduling receipt of bids at the beginning of the week would force the Commission to convene special open meetings for each procurement event, which

presents logistical challenges. To avoid those challenges, procurement administrators have been encouraged to develop their procurement schedules to culminate with delivery of post-bid reports to the Commission one to two days prior to regularly-scheduled Commission meetings (either “Regular Open Meetings” or “Bench Sessions”). Generally, this means that bids must be due on Wednesdays, Thursdays, or Fridays. This is because regularly-scheduled Commission meetings are held on Tuesdays and Wednesdays, and it is impractical for bids to be received on a Monday or Tuesday, and procurement administrator and monitor reports to be prepared, distributed, and digested by the Commissioners prior to Thursday or Friday, respectively (see scenarios A and B in the table below).

	A	B	C	D	E
Monday	Bids				
Tuesday	Reports	Bids			
Wednesday		Reports	Bids		
Thursday	Approvals	Approvals	Reports	Bids	
Friday		Approvals		Reports	Bids
Saturday					
Sunday					
Monday		Approvals	Approvals	Reports	Reports
Tuesday			Approvals	Approvals	
Wednesday					Approvals
Thursday					

Even if bids are received on a Monday, and reports are delivered the next day, they would most likely be delivered late in the day (judging by the last several years of experience). Thus, it would be very difficult for the Commission to receive and digest the reports and be ready to vote on accepting or rejecting the results of the RFP by Wednesday morning (when Bench Sessions are typically convened). To make it work, it would be necessary for bids to be due early on Monday and for the procurement

administrators and monitor to prepare their reports and deliver them to the Commission early on Tuesday.

Whether it is by the Commission committing to convening a plethora of special open meetings, or by the procurement administrators and monitors committing to even faster preparation of their confidential post-bid reports, theoretically, the length of time that bids remain open could be shortened. Theoretically, achieving that goal would also reduce ratepayers' cost of electricity supply. Thus, further study of the costs and benefits, but also the practicality of ExGen's recommendation is warranted.

IV. Reply to NERA Economic Consulting

A. Comment process for standard contract forms and credit terms and instruments

In its initial comments, NERA recommends that consideration be given to reducing the frequency of the contract comment process if allowed under Illinois law. (NERA Initial Comments, p. 2) NERA does not propose to dispense with the comment process for the procurement of new products (*Id.*, pp. 2-3), but suggests that the IPA request that the Commission approve the documents used in the immediately prior procurement process without change upon a finding that there have been no substantive changes in the market which would require changes to the contract terms or upon consultation with potential bidders. *Id.* Alternatively, NERA urges the IPA to request that the Commission approve the contract forms for a period of three years (unless superseded to reflect market or product changes) (*Id.*, p. 3) NERA suggests a Master Agreement be used for products across procurement years, with the products for a given procurement year memorialized in a separate transaction confirmation. *Id.*

At this time, Staff withholds judgment on the overall merits of NERA's proposal. However, with respect to the legality of the proposal, Section 16-111.5(e)(2) provides that:

The procurement process shall include each of the following components:

* * *

(2) Standard contract forms and credit terms and instruments. The procurement administrator, in consultation with the utilities, the Commission, and other interested parties and subject to Commission oversight, shall develop and provide standard contract forms for the supplier contracts that meet generally accepted industry practices. Standard credit terms and instruments that meet generally accepted industry practices shall be similarly developed. The procurement administrator shall make available to the Commission all written comments it receives on the contract forms, credit terms, or instruments. If the procurement administrator cannot reach agreement with the applicable electric utility as to the contract terms and conditions, the procurement administrator must notify the Commission of any disputed terms and the Commission shall resolve the dispute. The terms of the contracts shall not be subject to negotiation by winning bidders, and the bidders must agree to the terms of the contract in advance so that winning bids are selected solely on the basis of price.

220 ILCS 5/16-111.5(e)(2).

Staff reads Section 16-111.5(e)(2) to require the procurement administrator to develop "standard contract forms" for the supplier contracts that meet generally accepted industry practices. 220 ILCS 5/16-111.5(e)(2). Likewise, it is Staff's view that Section 16-111.5(e)(2) requires any comments the procurement administrator receives on the standard contract forms, credit terms, or instruments during the development of those standard documents to be made available to the Commission. *Id.* However, once a standard contract form, credit terms and instruments have been developed and commented on by the parties, Staff does not believe Section 16-111.5(e)(2) requires the procurement administrator to entertain comments on the previously adopted standard

contract form, credit terms and instruments, in the years following the establishment of standard contract forms, credit terms and instruments.

NERA's proposal appears consistent with Staff's reading of Section 16-111.5(e)(2), except under the circumstance where NERA is allowing for modification to the standard contract form, credit terms and instruments due to technical or market changes. NERA proposes that for those types of changes, comments would be sought for those changes only but not for comments on the entire contract. NERA's argument that it need not accept comments on the entire revised or new standard contract seems contrary to the requirement under Section 16-111.5(d)(2) that "all comments" be considered with regard to the development of standard contract forms, credit terms and instruments.

B. Pre-bid letter of credit beneficiary

NERA recommends changing the beneficiary of pre-bid letters of credit that bidders in the IPA's RFPs are required to provide. In particular, NERA recommends that the beneficiary be changed from the purchasing utility to the IPA. The purpose of the pre-bid letter of credit is revealed in paragraph 2 of the most recent form of the document adopted by NERA:

2. This Letter of Credit is issued at the request and for the account of _____ (including its successors and assigns, the "Bidder"). This Letter of Credit may be drawn by presenting the documents required by paragraph 3 hereof, including your drawing certificate stating that:
 - a) "the Bidder has made a material omission or misrepresentation in the Part 1 Proposal or the Part 2 Proposal submitted in connection with the 2012 Spring Standard Products RFP"; or
 - b) "the Bidder has disclosed information relating to its Proposal publicly or to any other party before the Illinois Commerce

Commission has rendered its decision on the results of the procurement event”; or

- c) “the Bidder has won one or more blocks and has failed to execute all Confirmations in the timeframe required by the STP Master Agreement or has failed to execute the Supplier Fee Binding Agreement as represented in the Part 2 Proposal”.

One of the reasons NERA cites for recommending the IPA should become the beneficiary of the pre-bid letter of credit, instead of the utility, is “the IPA could consider and propose that the ‘pre-bid’ letter of credit be drawn upon if bidders fail to follow through on their undertakings under their proposal, including the undertaking that they promptly pay supplier fees.” (NERA comments, p. 5)

In Staff’s view, NERA’s proposal goes too far, given that a collaborative contract review process, involving the IPA, NERA, ComEd and Commission Staff, occurs prior to posting contracts for supplier feedback. This process already provides ample opportunity to consider whether it would be appropriate to add a provision authorizing the beneficiary to draw upon the pre-bid letter of credit if a winning bidder fails to pay the supplier fee by the deadline. In any case, it is not clear to Staff that, by requiring each bidder to name the IPA as the beneficiary of a letter of credit on a going-forward basis, the IPA could draw upon the pre-bid letter of credit to cover a past due supplier fee, unless the pre-bid letter of credit were revised to expressly state that the occurrence of such an event permits a drawing by the beneficiary. As such, NERA’s proposal to change the beneficiary does not necessarily address its concern regarding past due supplier fees.

Furthermore, although sub-paragraph (c) of the pre-bid letter of credit protects the IPA (and ultimately taxpayers) in the event a winning bidder does not execute the

supplier fee binding agreement, it also protects the utility (and ultimately ratepayers) in the event a winning bidder does not execute the contract by the deadline. If a bidder fails to execute all confirmations, one possible reason might be that market prices have risen since bids were submitted, in which instance the utility may be forced to purchase replacement products at higher prices. This added cost will then be included in ratepayers' bills. Drawing on the pre-bid letter of credit offers a means to mitigate or eliminate the rate increase. Thus, despite NERA's argument to the contrary, even if the IPA is the beneficiary of the pre-bid letter of credit (which it should not be), then ComEd will still need to be involved in reviewing pre-bid letters of credit. (NERA comments, p. 5)

More importantly, Staff's primary concern regarding the RFP credit provisions is balancing the risk between utilities and suppliers in a manner that minimizes costs to ratepayers while at the same time providing sufficient protection in the event a supplier defaults. It is not clear to Staff that requiring bidders to name the IPA rather than the buying utility as the beneficiary of pre-bid letters of credit would lead to more efficient, more timely, or otherwise more appropriate administration of pre-bid letters of credit. Rather, Staff is concerned that NERA's proposal may diminish the degree of immediate protection offered to ratepayers under the current system (where the utility is the beneficiary of pre-bid letters of credit) by adding unnecessary steps and delays to the process. It is even conceivable that making the IPA the beneficiary would absolutely prevent the utility from accessing the funds, since as a general matter letters of credit are not transferable unless they specifically so provide. 805 ILCS 5/5-112.

Hence, Staff recommends that the IPA reject NERA's proposal to change the beneficiary from the utility to the IPA and instead consider other means of encouraging or compelling winning bidders to pay the Supplier Fees needed to sustain the IPA procurement process.

V. Conclusion

Staff respectfully requests that the Illinois Commerce Commission, the Illinois Power Agency, and all other interested parties make note of Staff's reply comments in this informal hearing.

Respectfully submitted,

/s/ _____
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