

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

ILLINOIS POWER AGENCY

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**Petition for Approval of Initial
Procurement Plan**

Docket No. 08-0519

**REPLY BRIEF ON EXCEPTIONS OF THE
STAFF OF THE ILLINOIS COMMERCE COMMISSION**

Now comes the Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned counsel, and pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (“Commission”), 83 Ill. Adm. Code § 200.830, respectfully submits this Reply Brief on Exceptions to the briefs on exceptions (“BOEs”) filed on December 9, 2008, by Commonwealth Edison Company (“ComEd” or the “Company”) and the People of the State of Illinois, by and through Illinois Attorney General Lisa Madigan (the “AG”), which were filed in response to the Administrative Law Judge’s (“ALJ”) Proposed Order issued on December 5, 2008 (“Proposed Order” or “PO”).

I. RESPONSE TO THE AG’s BOE

A. Use of Benchmarks for Renewable Energy Credits (“RECs”)

The Proposed Order concludes that “benchmarks should not be used in the acquisition of renewable resources for the 2009 procurement event.” PO, p. 51. The AG takes exception to this conclusion, and in support of its exception explains that “the General Assembly recently passed and sent to the Governor [Senate Bill 1987] which

amends Section 1-75(c)(1) of the Illinois Power Agency Act (“IPA Act”) to expressly require the use of benchmarks in connection with the procurement of renewable energy resources.” AG BOE, p. 2. As noted by the AG, Senate Bill 1987 passed the House on July 16, 2008, and the Senate on November 20, 2008, and is awaiting the signature of the Governor. AG BOE, p. 3. Thus, Senate Bill 1987 has not yet become law and, if signed by the Governor, would become effective on June 1, 2009.¹

The Proposed Order reviews the issues presented in this proceeding in a clear and concise manner, is well written, reflects the positions taken by Staff, the IPA, the utilities and the intervening parties, and provides well reasoned conclusions. In particular, Staff finds the Proposed Order’s analysis and conclusions regarding the renewable resource benchmark issue to be well reasoned and proper. The renewable resource benchmark requirement cited by the AG has not yet become law and, if it becomes law, will not be directly applicable to the 2009 procurement events which are scheduled to occur prior to June 1, 2009 (the date Senate Bill 1987 would become effective if it becomes law). While Senate Bill 1987 does not require modification of the Proposed Order and Staff continues to support the Proposed Order’s analysis and conclusions on the renewable resource benchmark issue, Staff is open – as expressed below – to accepting benchmarks for renewable resources as described below.

¹ Under the Effective Date of Laws Act (5 ILCS 75/0.01 et seq.), if a bill does not provide for an effective date in the terms of the bill (as is the case for Senate Bill 1987), a bill passed between January 1 and May 31 (“prior to June 1”) is effective on January 1 of the following year (5 ILCS 75/1) and a bill passed between June 1 and December 31 (“after May 31”) is effective on June 1 of the following year (5 ILCS 75/2). As used in the Effective Date of Laws Act, “a bill is ‘passed’ at the time of its final legislative action prior to presentation to the Governor pursuant to paragraph (a) of Section 9 of Article IV of the Constitution.” 5 ILCS 75/3. Since SB 1987 passed both Houses on November 20, 2008, and does not contain its own effective date, that date will be the date the bill was “passed” if signed by the Governor. Thus, SB 1987 would become effective on June 1, 2009, if/when signed by the Governor.

The AG correctly notes that the Legislature has voted to impose a renewable resource benchmark requirement on and after June 1, 2009, and this is a new development not considered by the parties or the Proposed Order. As expressed in Staff's prior filings and summarized in the Proposed Order, Staff had several concerns with the proposal to use benchmarks for renewable resources. Subject to Senate Bill 1987 actually becoming law, Staff's concerns regarding legislative intent and balancing the various goals set forth in the Public Utilities Act and the Illinois Power Agency Act are addressed by this new legislation on a going forward basis. Staff's concern regarding the availability of adequate data to construct such a benchmark will be an ongoing concern, although Staff hopes that adequate data will become available and prevent this concern from becoming an issue.

While Senate Bill 1987 is not yet a law and will not be directly applicable to the 2009 procurement events, Staff would not object to acceptance of the proposal to use benchmarks for RECs for the 2009 procurement provided it is made clear that the Commission may reject the benchmarks presented to it for approval and proceed without benchmarks for RECs for the 2009 procurement if it determines that adequate data is not available to create such benchmarks at this time. Otherwise, Staff would oppose the AG's exception on the ground that the Senate Bill it refers to has not yet become law and, if it becomes law, will not be effective at the time the 2009 procurement events are scheduled to occur.

Staff proposes the following changes to the exceptions language proposed by the AG if the Commission determines that it should incorporate benchmarks for RECs for the 2009 procurement:

Although the benchmarking amendment has not yet been signed into law and, if it is signed into law, will not be effective prior to conduct of the 2009 procurement events, it is clear that the General Assembly supports the use of benchmarks to screen bids for renewable energy resources on and after June 1, 2009. We also note, however, the concern expressed by Staff regarding the availability of adequate data to develop such benchmarks at this time. In light of this legislative development mandate and recognizing that existing law does not preclude the use of benchmarks, the Commission will accept-not disturb the IPA's directive to the Procurement Administrator to establish benchmark REC prices, and to reject bids priced above the benchmarks, subject to the Commission's authority to reject the REC benchmarks presented for approval and direct the REC procurement to proceed without benchmarks if it is determined that adequate data is not available to create such benchmarks at the time they are presented for approval.

B. Multi-year Bids for RECs During the 2009 Procurement

The AG takes exception to the Proposed Order's conclusion that the Illinois Power Agency ("IPA") is not permitted to undertake the acquisition of multi-year or long-term renewable resources absent "a change in law that would explicitly require the use of multi-year or long-term renewable resources during the June 2009 to May 2010 acquisition period." PO, p. 44; AG BOE, p. 4. The AG notes that the IPA's Plan proposed consideration of long-term contracts for renewable resources if new legislation is passed providing for benchmarking of long-term contracts for renewable energy supply and/or RECs. AG BOE, p. 4. The AG notes that Senate Bill 1987, discussed above, requires benchmarks for renewable resources and does not limit the use of benchmarks to one-year contracts. *Id.*, p. 5. While the AG reiterated some arguments previously made in support of long-term renewable resources, no new arguments were advanced other than the reference to Senate Bill 1987.

Staff identified multiple concerns with the proposal to use multi-year or long-term renewable resources. See Proposed Order, pp. 42-43. These issues have not been addressed by the AG's exceptions or Senate Bill 1987. For instance, Staff explained that a proposal to use multi-year renewable resources necessarily requires a proposal to allocate the statutory budget constraint and preferences to multi-year purchases – details that were not provided with the IPA's current plan nor otherwise provided in this docket. Neither this nor the other deficiencies identified by Staff are addressed by the AG's BOE or Senate Bill 1987. The Proposed Order correctly concluded “that there are potential risks as well as potential benefits associated with long-term renewable contracts,” and that the record did not contain sufficient analysis to determine whether the potential risks exceed the potential benefits. PO, p. 44.

Simply stated, the AG's BOE presents no basis to change the conclusion contained in the Proposed Order regarding the procurement of long-term renewable resources at this time. Staff also notes that Senate Bill 1987 does not “explicitly require the use of multi-year or long-term renewable resources during the June 2009 to May 2010 acquisition period.” PO, p. 44. Finally, as noted above, Senate Bill 1987 has not yet become law and, if it is signed by the Governor, will not become effective until June 1, 2009. For all the foregoing reasons, the Commission should reject the AG's exception with respect to long-term renewable resources.

II. Response to ComEd's BOE

ComEd's second exception to the Proposed Order addresses certain language at page 56 of the Proposed Order. ComEd argues that the Order should be clear that if

any portfolio modification occurs, they must occur either (1) under the rebalancing mechanisms included in the Plan itself as approved by the Commission; or (2) be submitted for approval by the Commission. ComEd BOE, p. 2. ComEd further argues that the Order should state that “if the portfolio is to be modified in a manner that varies from the Plan as approved, then the modified portfolio and updated utility information should be submitted by the IPA to the Commission for advance approval.” Id. To address this concern ComEd proposes certain language modifications to the Proposed Order. Staff does not disagree with the statements made by ComEd; however, Staff finds ComEd’s suggested language to cause some confusion about whether any rebalancing is allowed without Commission approval and therefore does not support ComEd’s alternative language.

Staff recommends the following alternative language to address ComEd’s concern:

The IPA's proposal for modifying its portfolio for ComEd and AIU in the event of a “significant shift” in load, as laid out in its October 21, 2008 Plan (See IPA Plan at 39 and 52), is deemed to be reasonable and is hereby approved. Thus, if a “significant shift” in load occurs as described in the October 21, 2008 Plan, a rebalancing is authorized, without further Commission approval, if the IPA, the Procurement Administrator, Commission Staff, and either ComEd or AIU, as applicable, all concur to the need, extent and manner of achieving a proposed rebalancing. In order to determine whether it is necessary for the IPA to modify the portfolio in the event of a significant shift in load, however, the Commission believes it would be appropriate for ComEd and AIU to provide the IPA with updated load forecasts. Therefore, the Commission directs ComEd and AIU to provide the IPA with updated load forecasts by April 15, 2009 or such other date as may be established by the mutual agreement of the Procurement Administrator, Staff, the Procurement Monitor and either ComEd or AIU, as appropriate. If the portfolio must be modified in a manner other than as allowed under the above-described specifically approved Portfolio Rebalancing procedures (See also IPA Plan at 39 and 52), the revised forecast and proposed revisions should be submitted to the Commission for review, investigation, and approval.

Staff believes that its alternative language addresses ComEd's concern and has in fact discussed this language with counsel for ComEd. Counsel for ComEd has indicated that the Staff alternative language to the Proposed Order is acceptable to ComEd.

III. CONCLUSION

Staff respectfully requests that the Illinois Commerce Commission approve Staff's recommendations in this docket.

Respectfully submitted,

/s/
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