

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS POWER AGENCY :
 :
Petition for Approval of the : No. 10-0563
220 ILLS 5/16-111.5(d) Procurement Plan :

REPLY BRIEF ON EXCEPTIONS OF
COMMONWEALTH EDISON COMPANY

Table of Contents

- I. The IPA is Entitled to no Special Deference; The Procurement Plan Must Meet the Requirements of the Public Utilities Act2
- II. The Proposed Order Correctly Concludes that the IPA Lacks the Authority to Procure Energy Efficiency Measures.....5
 - A. ComEd Will Be Complying With the Minimum Energy Efficiency Obligations Imposed By Section 8-1036
 - B. The IPA Lacks Statutory Authority to Procure Energy Efficiency Measures7
- III. Demand Response.....9
- IV. The Proposed Order Correctly Rejected the Plan’s Proposal to Oversubscribe for July and August.....13
- V. The Proposed Order Correctly Rejects the Plan’s Proposal to Conduct Optional Procurement Events15
- VI. Replacement RECs16
- VII. The Proposed Order Properly Rejected RESA’s Request for Multiple Procurement Events16

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**REPLY BRIEF ON EXCEPTIONS OF
COMMONWEALTH EDISON COMPANY**

Commonwealth Edison Company (“ComEd”) submits this Reply Brief on Exceptions in accordance with Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (the “Commission” or “ICC”), 83 Ill. Admin. Code § 200.830, and the schedule established by the Administrative Law Judge (“ALJ”).

In its Brief of Exceptions, the Illinois Power Agency (“IPA”) repeats its rejected claims that it should be allowed to procure energy efficiency resources outside of the statutory process and that it should be able to procure demand response resources that the evidence shows will not be cost effective.¹ These proposals – opposed by the majority of parties and Staff – are unlawful, unsupported, and not in the public interest. The Commission rejected them in the past and the Proposed Order correctly rejects them now.

The IPA also argues that it should be permitted to engage in optional procurements.² This proposal, too, is unsupported by evidence, let alone by the type of specific data and detailed analyses required in the procurement realm.³ It has not been shown to be in the best interests of customers and, as the Proposed Order correctly finds, should be rejected.

¹ The Illinois Power Agency’s Exceptions to the Administrative Law Judge’s Proposed Order (“IPA Exceptions”), pp. 4-17.

² IPA Exceptions, pp. 40-2.

³ See 220 ILCS 5/16-111.5(d)(2).

The only parties supporting the IPA's arguments are the Illinois Attorney General's office ("AG")⁴ and the Environmental Law & Policy Center ("ELPC"),⁵ parties who submitted no comments or other evidence at the beginning of this docket and, in the AG's case, intervened only a few days ago. Their arguments add nothing to the IPA's.

Finally, the AG argues that the IPA should continue to purchase excess energy in summer months, a practice that the data shows is not in the public interest.⁶ The AG also argues that the Commission should defer to the IPA's reading of the Illinois Power Agency Act⁷ ("IPA Act"), a novel view that is both incorrect and an effort to reduce the Commission's express statutory jurisdiction and obligation to review and approve the plan.⁸

I. The IPA is Entitled to no Special Deference; The Procurement Plan Must Meet the Requirements of the Public Utilities Act

The AG argues that the IPA's interpretation of the IPA Act should be given deference by the Commission.⁹ The AG is wrong, as a matter of law. It mischaracterizes the role of the IPA and the Commission's plan approval process.

First and foremost, the administrative agency that is vested with the quasi-judicial task of evaluating the plan and whether it is supported by the evidence and consistent with the law is the Commission, not the IPA. The Commission, not the IPA, is vested by the Public Utilities Act ("PUA") and the IPA Act with the obligation and duty to review the evidence and the Plan and to approve it "if the Commission determines that it will ensure adequate, reliable, affordable,

⁴ Exceptions and Brief on Exceptions of the People of the State of Illinois ("AG Exceptions"), pp. 10-18.

⁵ Brief on Exceptions of the Environmental Law & Policy Center and the Natural Resources Defense Council ("ELPC Exceptions"), pp. 1-7.

⁶ AG Exceptions, pp. 38-40.

⁷ 20 ILCS 3855/1-1 *et seq.*

⁸ AG Exceptions, pp. 5-9.

⁹ *Id.*

efficient, and environmentally sustainable electric service at the lowest total cost over time, taking into account any benefits of price stability.”¹⁰ The AG’s assertion that the statutory “review process demonstrates that the General Assembly vested the IPA with primary responsibility to implement the IPA Act”¹¹ – at least as to the plan approval process – could not be more backwards.

No part of the PUA or the IPA Act vests the IPA with any quasi-judicial authority, or interpretive authority. The IPA does not make findings of fact. It does not issue conclusions of law. It holds no hearings. It issues no orders. Indeed, in the context of Plan proceedings like this Docket, the IPA is a party litigant, required to present evidence and arguments like any other party. The IPA, in fact, has no authority to take *any* definitive action with respect to the approval of the plan. The IPA’s role is to propose a plan after considering public comment. The review process is a docketed Commission proceeding, presided over by a Commission ALJ, and the approval of the plan – the event that gives it any legal force or effect – is vested in the Commission. Furthermore, if there is any question of the plan’s legality, the appellate process – where appropriate deference is afforded – is from the Commission’s order and the Commission’s findings of fact and conclusions of law.

In addition, the fact that the IPA is required to employ subject matter experts is hardly a reason to afford it deference in the interpretation of the law. The AG argues as if the key legal provisions at issue were only in the IPA Act and only within the expertise of the IPA. The AG is wrong on both counts. Other parties, including Staff, presented to the Commission evidence of

¹⁰ 220 ILCS 5/16-111.5(d)(4).

¹¹ AG Exceptions, p. 6.

subject matter experts at least as qualified as is the IPA.¹² And, the Commission – with its own professional Staff and decades of experience – is recognized by Illinois law as at least as expert of an agency as the IPA. That fact is reinforced by the General Assembly’s express direction that the Commission, not the IPA, make the final determination of a proposed plan’s legality. Moreover, many of the legal requirements that the plan must meet, including the consumer-protection mandates that the plan produce the “lowest cost over time” are not even contained in the IPA Act, but rather in the PUA. Nothing in the legislative language suggests that the IPA has any special role in construing the PUA. In short, if any agency’s interpretation of the law is entitled to deference, it is the Commission’s, not the IPA’s.

On top of all that, the AG also misapplies and overstates the law of administrative agency deference. Deference is typically given to factual determinations of an administrative agency by a reviewing court, not by another expert agency, especially the one vested by law with decision making power. Moreover, even when an agency decision is reviewed by a court, questions of law may be reviewed *de novo*.¹³ Here, the effect of the “deference” that the AG seeks to impute to the IPA would be to approve actions directly contrary to the language of the IPA Act and contrary to the mandatory standards of the PUA. So read, the plan would authorize the IPA to purchase resources that it has no authority or jurisdiction to acquire. The law is clear that, deference or no, an agency’s interpretation of a statute may not be contrary to the manifest

¹² Indeed, by far, the most detailed factual analysis of the meaning of key terms of the law, such as “standard wholesale products,” is in the 16-page affidavit of Mr. Scott Fisher. App. A to Commonwealth Edison Company’s Verified Objections to the Procurement Plan of the Illinois Power Agency (“ComEd Objections”) (Oct. 4, 2010).

¹³ See, e.g., *Buchino v. Industrial Comm’n*, 172 Ill. App. 3d 162, 164-65, 526 N.E. 2d 425, 426 (1st Dist. 1988); *Citizens Utility Bd. v. Illinois Commerce Comm’n*, 275 Ill. App. 3d 329, 342, 655 N.E. 2d 961, 970 (1st Dist. 1995).

legislative intent,¹⁴ and it certainly may not extend the agency's jurisdiction to take actions not authorized by law.¹⁵

Finally, ComEd notes that the AG – and the portions of the IPA's and ELPC's exceptions that the AG tries to support with this argument – is arguing contrary to prior Commission decisions. The AG is asking the Commission to drastically depart from its own past decisions. Such a decision would warrant even less deference, and in fact cannot be sustained unless the Commission articulates a “reasoned basis” for the change.¹⁶ Here, the evidence makes clear that there is no reason to change course. The Commission has correctly interpreted the IPA's authority, as provided by law, as encompassing standard cost-effective demand response and energy products. The Proposed Order correctly adheres to those decisions.

II. The Proposed Order Correctly Concludes that the IPA Lacks the Authority to Procure Energy Efficiency Measures

The Proposed Order thoroughly discussed the numerous and substantial comments that were submitted by the parties regarding the procurement of energy efficiency measures by the IPA and appropriately concluded that the IPA lacked the statutory authority to do so.¹⁷ The IPA,¹⁸ the AG¹⁹ and ELPC²⁰ all filed exceptions to this well reasoned conclusion. For the most part, these parties simply rehashed the same arguments that were discussed in the Proposed Order and appropriately rejected. ComEd will not rehash its response to these arguments, but

¹⁴ *Allied Delivery System v. Illinois Commerce Comm'n*, 93 Ill. App. 3d 656, 667-68, 417 N.E. 2d 777 (1st Dist. 1981).

¹⁵ *Ace Ambulance & Oxygen Co. v. Illinois Commerce Comm.*, 75 Ill. App. 3d 17, 393 N.E.2d 1322 (3d Dist. 1979).

¹⁶ *See Citizens Utility Bd. v. Illinois Commerce Comm'n*, 166 Ill. 2d 111, 132 (1995).

¹⁷ Proposed Order, pp. 33-42.

¹⁸ IPA Exceptions, pp. 4-12.

¹⁹ AG Exceptions, pp. 10-18.

²⁰ ELPC Exceptions, pp. 1-7.

will simply provide a short response to each of the major arguments advanced by these parties.²¹ The IPA did raise a new argument by claiming that ComEd will not be complying with its statutory energy efficiency obligations. As discussed below, that argument is simply incorrect.

A. ComEd Will Be Complying With the Minimum Energy Efficiency Obligations Imposed By Section 8-103

As mentioned above, the IPA crafted a new argument in support of its position in its exceptions. The IPA argued that because ComEd does not plan to meet the statutory energy efficiency targets under Section 8-103 of the PUA, the IPA should be allowed to procure energy efficiency measures.²² The only “evidence” cited by the IPA for this argument was found improper by the ALJ on December 3, 2010.²³

ComEd, nonetheless wants to make clear that the IPA’s argument – unsupported though it is – is also just plain wrong. ComEd will be complying with its statutory energy efficiency obligations. Section 8-103(i) of the PUA allows the IPA to procure energy efficiency measures only if the utility fails to meet the statutory efficiency standard “as modified by subsections (d) and (e).” Subsection (d) is the rate cap section that limits the amount of energy efficiency measures that can be procured in any one year. The sole reason cited by the IPA for the claim that ComEd will not meet the statutory energy efficiency target in 2013/PY6 is that the statutory rate cap will be reached in that year, thus limiting the amount of energy efficiency measures that could legally be procured.²⁴ The ALJ in that matter agreed with the above analysis and

²¹ For a complete response to these arguments, see ComEd Objections, pp. 2-9; Commonwealth Edison Company’s Verified Reply to Certain Response to the Objections to the Procurement Plan (“ComEd Reply”), pp. 1-6 (Oct. 27, 2010).

²² IPA Exceptions, pp. 5-7.

²³ Notice of Administrative Law Judge Ruling issued December 3, 2010.

²⁴ See Verified Petition of Commonwealth Company For Approval of its Energy Efficiency and Demand Response Plan, pars. 8-10, filed October 1, 2010 in Docket No. 10-0570; ComEd Ex. 1.0, pp. 23-4; ComEd Ex. 2.0,

concluded that ComEd would be complying with statutory requirements.²⁵ Because ComEd will, in fact, be meeting the statutory standard, there is no authority for the IPA to procure energy efficiency measures.

B. The IPA Lacks Statutory Authority to Procure Energy Efficiency Measures

The IPA argument largely relies on references to the words “energy efficiency” in the legislative preamble section of the IPA Act.²⁶ That section sets out the legislative goal to support the development of energy efficiency measures, as well as demand response measures, clean coal technologies and renewable resources. Such legislative preambles do not “confer powers” or “determine rights.”²⁷ Moreover, unlike the latter three products listed above, the Illinois General Assembly nowhere gave the IPA any express authority to procure energy efficiency measures. Instead, the General Assembly specifically authorized the IPA to procure demand response measures,²⁸ clean coal²⁹ and renewable resources.³⁰ When it came to the procurement of energy efficiency measures, the General Assembly authorized the utilities and the Illinois Department of Commerce and Economic Opportunity to procure this product.³¹

That the General Assembly specifically listed demand response measures, clean coal and renewable resources as products that the IPA could procure, but did not include energy

pp. 7-11. To the extent that the Commission grants the IPA’s request for administrative notice, ComEd requests that the Commission take administrative notice of these materials, as well.

²⁵ Docket No. 10-0570, Proposed Order, pp. 35-6 (Dec. 3, 2010).

²⁶ 20 ILCS 3855/1-5.

²⁷ *Citizens Utility Bd. v. Illinois Commerce Comm’n*, 166 Ill.2d 111, 131 (1995); *Governor's Office of Consumer Services v. Illinois Commerce Comm'n*, 220 Ill.App.3d 68, 74 (3rd Dist.1991).

²⁸ 220 ILCS 5/16-111.5(b)(3)(ii).

²⁹ 20 ILCS 3855/1-75(d).

³⁰ 20 ILCS 3855/1-75(c).

³¹ 220 ILCS 5/8-103(e).

efficiency measures, is a clear indication that the Illinois General Assembly did not intend to authorize the IPA to procure energy efficiency products. As the Illinois Supreme Court emphasized in *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 151-152 (1997), under the familiar principle of *expressio unius est exclusio alterius*, where a statute provides for one thing and not another, “omissions should be understood as exclusions.” This rule “is based on logic and common sense.” *Id.* “It expresses the learning of common experience that when people say one thing they do not mean something else.” *Id.*

Instead of specifically allowing the IPA to procure energy efficiency measures, the General Assembly provided that only if the utilities are unable to meet the statutorily-prescribed efficiency standards for a three-year period is the IPA authorized to procure this product.³² It is inconceivable that the General Assembly would have written this specific requirement into the law if it intended the IPA to have the authority to procure efficiency products regardless of the 3-year requirement.

Similarly, neither the AG nor the ELPC cite any provision of either the IPA Act or the PUA specifically delegating authority to the IPA to procure energy efficiency measures.³³ Instead, these parties cite to the general powers delegated to the IPA; pluck a word here or a phrase there out of context from various sections; and suggest that the act needs to be evaluated as a whole in reaching their conclusion that the General Assembly obviously intended to authorize the IPA to procure energy efficiency measures. In their view, it was apparently an oversight that the General Assembly did not grant the IPA the authority they assume it should have.

³² 220 ILCS 5/8-103(i).

³³ AG Exceptions, pp. 10-18; ELPC Exceptions, pp. 1-7.

The wishes of the IPA, AG, and ELPC aside, the fact is that an administrative agency, such as the IPA, is a creature of statute and must find any power or authority it has within the provisions of the statute creating it.³⁴ Agencies have no general or common law powers. Thus, it cannot legally be inferred that the IPA has authority to procure energy efficiency measures.

III. Demand Response

The Proposed Order correctly determined that although the PUA authorizes the IPA to include demand response resources in its procurement plans, it does not require that demand response resources be included in every plan.³⁵ Rather, the IPA must present “sufficient support to justify [] inclusion [of demand response resources] in the Plan.”³⁶ The Proposed Order correctly found that the IPA failed to make that showing, and properly determined that it “does not appear likely that the IPA could successfully reduce capacity costs by procuring supplemental demand response measures.”³⁷

While no other party supported the IPA’s demand response proposal up through issuance of the Proposed Order, the AG filed a Petition to Intervene on November 30, 2010 and filed exceptions supporting the IPA’s demand response proposal on December 1, 2010.³⁸ Neither the IPA nor the AG offer any basis for departing from the Proposed Order’s rejection of the IPA’s proposal to procure demand-response resources outside of the PJM Interconnection (“PJM”) Reliability Price Model (“RPM”) auctions. The IPA continues to assert flawed legal arguments

³⁴ *City of Chicago v. Fair Employment Practices Comm’n*, 65 Ill.2d 108, 112-13 (1976); see also *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill.2d 540, 551 (1977); *Business & Professional People for the Public Interest v. Illinois Commerce Comm’n*, 136 Ill.2d 192, 243-44 (1989); *Gilchrist v. Human Rights Comm’n*, 312 Ill.App.3d 597, 601 (1st Dist. 2000).

³⁵ Proposed Order, p. 46.

³⁶ *Id.*

³⁷ *Id.*

³⁸ AG Exceptions, pp. 18-22.

that disregard the law and ignore relevant facts. No one questions that demand-response resources can be a valid part of procurement plans under the PUA. The problem is that the IPA proposes to procure demand-response resources in a manner that is contrary to the facts and the law.

The IPA asserts that Section 16-111.5(b)(3)(ii) of the PUA requires the Plan to include a mix of demand response products where the cost of the demand response is lower than procuring comparable capacity products.³⁹ The IPA's argument continues to fail to take into account the key statutory mandate that those demand response resources be "cost-effective."⁴⁰ Cost-effectiveness is not achieved by simply procuring demand-response resources whenever a new unit of demand response can be obtained at a lower cost than already procured capacity resources. As explained in ComEd's Response, the IPA's proposal "is not likely to be 'cost effective' ... [because] buying more demand response ... [than already procured through the PJM-administered auction process] is simply buying excess capacity-qualified resources, ... and will increase costs to consumers."⁴¹ Put simply: buying more product than needed is not cost-effective, even if it is on sale.

While the IPA earlier attempted to piece together arguments based on ComEd's evidence to discredit the PJM-administered auction process as inconsistent or contrary to Illinois' standards,⁴² ComEd explained how the IPA's arguments were incorrect, contrary to the evidence,

³⁹ IPA Exceptions, pp. 11-12.

⁴⁰ 220 ILCS 5/16-111.5(b)(3)(ii) (emphasis added); *see also* 220 ILCS 5/16-111.5(d)(2) ("Cost-effective demand-response measures shall be procured as set forth in item (iii) of subsection (b) of this Section." (emphasis added)).

⁴¹ ComEd Objections, p. 9; *see also* ComEd Objections, App. A (Fisher Aff.), ¶¶ 4-10.

⁴² Verified Response of the Illinois Power Agency to the Objections to the 220 ILCS 5/16-111.5(d) Power Procurement Plan ("IPA Response"), pp. 4-5 (Oct. 18, 2010).

and based on misinterpretations or mischaracterizations of the evidence.⁴³ While the IPA did not resurrect these discredited arguments in its exceptions, it continued to overreach by attempting to manufacture new arguments in its exceptions regarding compliance with demand response requirements based on ComEd's and the Ameren Illinois Company's ("Ameren") current energy efficiency dockets.⁴⁴ The ALJ granted Ameren's motion to strike this material and ruled that "administrative notice will not be taken of portions of the record in Docket Nos. 10-0568 and 10-0570 as requested by the Illinois Power Agency in its December 1, 2010 Brief on Exceptions."⁴⁵ As indicated above, ComEd strongly disagrees with the IPA's assertions and conclusions directed to it, and ComEd will be complying with its statutory demand response obligations; however, ComEd will not further address those assertions given the ALJ's rulings.

The AG correctly observes that the Proposed Order rejects the IPA's demand response proposal "because the record did not 'contain sufficient support to justify its inclusion in the Plan' and 'it does not appear likely that the IPA could successfully reduce capacity costs by procuring supplemental demand response measures.'"⁴⁶ The AG criticizes this aspect of the Proposed Order by asserting that "[i]n the absence of an evidentiary record and a hearing, it is unclear how the IPA or any other party could create a "sufficient" record"⁴⁷ This criticism is not well founded. First, the AG's office committed just one day earlier to accept the record as it found it in its Petition to Intervene. Having failed to intervene until the exceptions phase of this case, the AG is in no position to complain about the initial decision as to whether to hold hearings. Second, there is an evidentiary record established in this docket through affidavits and

⁴³ ComEd Reply, pp. 7-9, Proposed Order, pp. 43-44.

⁴⁴ IPA Exceptions, pp. 12-14.

⁴⁵ Notice of Administrative Law Judge Ruling issued December 3, 2010.

⁴⁶ AG Exceptions, p. 19.

⁴⁷ *Id.*

verifications. While the Commission decided hearings were not necessary, the IPA had every opportunity to explain and support its proposal in its response to objections and reply to responses. Finally, the IPA urged the Commission not to conduct hearings, and cannot now complain – by itself or through the AG -- that the Commission granted its requested relief.⁴⁸

The AG ignores the cost-effective requirement and adds nothing new regarding the substance of the PUA regarding demand response requirements. The AG’s main point is to repeat its earlier argument that the Commission should only modify the plan if the IPA has abused its discretion.⁴⁹ ComEd has already explained why this argument lacks merit, and will not repeat those arguments here.

The AG then asserts that the Proposed Order’s statement that “it does not appear likely that the IPA could successfully reduce capacity costs by procuring supplemental demand response measures” is contradicted by its statement that “the least expensive power is frequently the power never acquired.”⁵⁰ To the contrary, there is no inconsistency and the AG’s argument ignores the evidence. As explained earlier, the IPA’s proposal “is not likely to be ‘cost effective’ ... [because] buying more demand response ... [than already procured through the PJM-administered auction process] is simply buying excess capacity-qualified resources, ... and will increase costs to consumers.”⁵¹ While buying demand response resources may be the least expensive power in some circumstances, that is not the case when demand-response capacity resources have already been acquired and additional purchases will only result in additional costs.

⁴⁸ The Illinois Power Agency's Petition for Approval of the 220 ILCS 5/16-111.5(D) Procurement Plan (“IPA Petition”), p. 7; see also ALJ Memorandum to the Commission dated October 1, 2010, p. 2.

⁴⁹ AG Exceptions, p. 19.

⁵⁰ *Id.*, pp. 19-20.

⁵¹ ComEd Objections, p. 9; see also ComEd Objections, Appendix A (Fisher Aff.), ¶¶ 4-10.

Finally, the AG asserts, without explanation or support, that including additional demand response resources in the plan will lower costs and deliver benefits.⁵² This unsupported conclusion highlights the appropriateness of the Proposed Order. Given the facts of this case, it does not appear that such benefits would result; rather, ratepayers would simply incur additional cost. The Proposed Order simply required support for the proposal to include procurement of demand response resources in the plan; the inability of the IPA and the AG to provide this support demonstrates the wisdom and appropriateness of that decision.

IV. The Proposed Order Correctly Rejected the Plan’s Proposal to Oversubscribe for July and August

The Commission should reject the AG’s recommendation to reinstate the 10% over-procurement for July and August power.⁵³ The Proposed Order correctly notes that the IPA provided no analysis as to why such over-procurement would be a benefit to customers while ComEd provided analysis demonstrating that the over-procurement (1) has cost ComEd customers \$1.6M to date and (2) increases rather than decreases the risk to customers for 2011-12.⁵⁴

In an effort to dispute this finding, the AG points to a statement in the Plan that “the model does factor for intentional oversubscription of planned volumes in summer months (July and August) and for non-summer periods to investigate whether procuring more or less than 100% of net open requirements would reduce a model portfolio’s risk.”⁵⁵ While this statement appears in the IPA’s plan (and in previous versions), it is unclear what the word “factor” refers

⁵² AG Exceptions, p. 20.

⁵³ *Id.*, pp. 38-42.

⁵⁴ Proposed Order, p. 94.

⁵⁵ AG Exceptions, p. 39.

to. However, while prior year's plans have included a section on "Summer Period Peak hours Oversubscription Analysis," this year's Plan does not include any such data or analysis.⁵⁶ Indeed, the IPA nowhere states that such an analysis was performed or, more importantly, what the results were.

The AG also refers to the data showing that ComEd's customers have lost \$1.6 million so far from over-procurement as "meaningless data points".⁵⁷ ComEd doubts its customers would feel the same way about the additional \$1.6 million they have paid for this excess energy. ComEd also doubts that the General Assembly regarded actual data as "meaningless" when it called on the Commission to evaluate IPA Plans.

The AG then points to some comments that it apparently sent to the Commission last June in which it noted that prices in PJM could reach a maximum of \$2,700/Mwh. Such comments are not in the record of this proceeding and must be disregarded by the Commission.⁵⁸ Moreover, assuming the statement is true, the comments are accompanied by no "data points" showing that consumers actually paid prices anything close to this. Further, the key question that must be analyzed is whether or not the proposed over-procurement decreases customer risk and, if so, at a reasonable cost. Neither the IPA nor AG has offered such analysis in this docket.

ComEd, as the Proposed Order notes, did prepare such an analysis using the same methodology as originally used by the IPA and incorporating current market prices which are materially different from when the IPA first analyzed the issue.⁵⁹ This updated analysis showed

⁵⁶ See e.g., Docket No. 08-0519, Procurement Plan attached to Illinois Power Agency's Petition for Approval of the 220 ILCS 5/16-111.5(d) Procurement Plan, p. 27 (Filed Oct. 21, 2008, Approved by Order entered Jan. 7, 2009).

⁵⁷ AG Exceptions, p. 39.

⁵⁸ 220 ILCS 5/10-103.

⁵⁹ Proposed Order, p. 94.

that in addition to losing money historically, continuing the 10% over-procurement increases rather than decreases risk to customers. This analysis was not contested by the IPA, the AG or any other party in this proceeding. In addition, we note that while the IPA filed exceptions to five of the recommendations in the Proposed Order, it did not challenge this one.⁶⁰

In summary, the Proposed Order correctly decided this issue. All evidence in the record shows that given ComEd's contract portfolio and current market prices, buying more power than needed for July and August will increase both the expected cost and risk borne by customers. Such purchases amount to little more than speculation on rising prices.

V. The Proposed Order Correctly Rejects the Plan's Proposal to Conduct Optional Procurement Events

Both the IPA⁶¹ and AG⁶² filed exceptions to the Proposed Order's conclusion that the IPA's proposal for optional procurements should be removed from this year's Plan.⁶³ Neither set of exceptions is persuasive.

As Staff and ComEd pointed out in their objections,⁶⁴ this particular IPA proposal is not well defined and leaves too many issues unresolved to be approved. These issues include lack of any analysis showing how this approach is better than the IPA's current procurement process, how the process would be implemented given that market prices are constantly in flux and who pays for the not insignificant costs of failed procurement events when prices initially support an optional procurement and then change before the procurement is completed.

⁶⁰ See generally, IPA Exceptions.

⁶¹ IPA Exceptions, pp.40-1.

⁶² AG Exceptions, pp. 42-5.

⁶³ Proposed Order, pp. 99-100.

⁶⁴ Response and Objections to the Illinois Power Agency's Procurement Plan filed September 29, 2010 by the Staff of the Illinois Commerce Commission ("Staff Objections"), pp. 8-11; ComEd Objections, pp. 16-7.

In their exceptions, neither the AG nor the IPA offers any additional justification for this proposal. The AG merely states that limiting bidders and terms to those of the Spring 2011 procurement event somehow creates certainty for this proposal where clearly no such certainty exists. Neither the IPA nor AG even attempt to address any of the practical concerns raised by Staff and ComEd.

The Proposed Order's conclusion to remove this ill-defined proposal from the Plan is correct, supported by the record and should be approved by the Commission.

VI. Replacement RECs

In Staff's exceptions to the Proposed Order, Staff concurs with ComEd's view that replacement RECs are not required in the event of a supplier default. However, Staff suggests that it would not be opposed to replacing such RECs as a matter of policy. Staff then goes on to discuss possible alternatives for replacing RECs before concluding that the Commission should request that the IPA develop a more robust proposal for next year's plan.⁶⁵

ComEd submits that the simplest and most customer-friendly path for the Commission to take on this issue is to find that replacement REC's are not required or desirable for supplier defaults on short term REC contracts. If the Commission disagrees with this approach, then ComEd would agree that Staff's proposal to continue discussions to develop a proposal for inclusion in next year's plan is a reasonable alternative.

VII. The Proposed Order Properly Rejected RESA's Request for Multiple Procurement Events

The Proposed Order correctly concluded that RESA's proposal for the IPA to conduct multiple procurement events left too many significant issues unanswered and could not be

⁶⁵ Staff of the Illinois Commerce Commission Brief on Exceptions ("Staff Exceptions"), pp.14-6.

approved as proposed.⁶⁶ Nevertheless, ComEd believes that some small increase in the number of procurements may be beneficial for customers and is certainly willing to discuss this further with the IPA, Staff, RESA, and other parties prior to next year's Plan submittal.

That being said, ComEd does not necessarily agree with the premise that the energy rate that ComEd charges its retail customers must closely track current short-term market prices. The IPA's mandate in procuring energy and renewable energy resources for utility default customers is to "ensure adequate, reliable, affordable, efficient, and environmentally sustainable electric service at the lowest total cost over time, taking into account price stability."⁶⁷ Conducting very frequent or continuous procurements to obtain supply exclusively for terms of one year or less would not meet the need for price stability. The IPA's analysis that supported the use of the current three year procurement cycle specifically accounted for this.⁶⁸

Furthermore, in addition to the direct costs of the Procurement Administrator and the Procurement Monitor, the IPA, Staff, the Commission and the utilities must contribute a significant amount of resources to manage a procurement event. Before additional procurement events are approved, and their additional costs ultimately passed on to customers, the benefits of such additional procurement events must be shown to outweigh the costs.

⁶⁶ Proposed Order, p. 103.

⁶⁷ 220 ILCS 5/16-111.5(d)(4).

⁶⁸ Plan, pp. 19-23.

Dated: December 6, 2010

Respectfully submitted,

COMMONWEALTH EDISON COMPANY



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