

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

ILLINOIS POWER AGENCY)
) **Docket No. 12-0544**
Petition for Approval of)
220 ILCS 5/16-111.5(d) Procurement Plan)

**OBJECTIONS OF EXELON GENERATION COMPANY, LLC AND
CONSTELLATION NEWENERGY, INC.
TO THE ILLINOIS POWER AGENCY’S DRAFT 2012 PROCUREMENT PLAN**

Now comes Exelon Generation Company, LLC and Constellation NewEnergy, Inc. (collectively, “Exelon”) and, pursuant to Section 16-111.5 of the Public Utilities Act (220 ILCS 5/16-111.5) (the “Act”), submits these comments to the Illinois Power Agency (“IPA”) procurement plan for the generation supply to eligible retail customers of Commonwealth Edison Company (“ComEd”) and Ameren Illinois (“Ameren”) for the period of June 2013 through May 2018 (the “Plan”).

I. Background

Exelon Generation Company, LLC (“Exelon Generation”) owns approximately 35,000 megawatts (“MW”) of generation, including nuclear, fossil, hydroelectric, solar, landfill gas, and wind generation assets. It is the nation’s largest nuclear operator with 17 reactors located in Illinois, Pennsylvania and New Jersey and has a growing renewable energy business. It is the nation’s ninth largest wind energy generator. In addition, Exelon Generation operates the nation’s largest urban solar power plant, Exelon City Solar, a 10 MW solar installation located on a 41-acre brownfield in Chicago, and two of the largest hydroelectric facilities in the Eastern United States, Conowingo Hydroelectric Generating Station and Muddy Run Pumped Storage Facility totaling nearly 1,600 MWs

of capacity. Exelon Generation markets wholesale energy and capacity products to municipal, cooperative, and investor-owned utilities, retail suppliers, retail energy aggregators, merchant participants, power marketers, and major commodity trading houses.

Exelon Generation, individually or through its subsidiaries, has participated in the competitive procurement processes under which contracts for the electricity needs of Ameren and ComEd have been awarded since the end of the transition period at the end of 2006. Exelon Generation has been an active participant in all of the Commission and IPA proceedings and workshops related to the adoption and development of procurement plans for ComEd and Ameren and has been a successful participant in many of these procurement events over the past few years.

Constellation NewEnergy, Inc. (“CNE”) provides electricity and energy-related services to retail customers in Illinois as well as in 15 other states and the District of Columbia, and serves over 14,000 megawatts of load and over 10,000 customers. CNE holds a certificate as an alternative retail electric supplier (“ARES”) from the Commission to engage in the competitive sale of electric service to retail customers in Illinois. Since the introduction of customer choice in the Illinois electric industry in 1999, CNE has actively participated in the Illinois retail market. CNE has actively participated in nearly every regulatory proceeding before the Commission involving electric industry restructuring and has served as an advocate for fair and competitive open markets that are designed to provide customers with an array of competitive options. Additionally, CNE is one of the nation’s leading solar developers, designing, financing, and constructing solar projects that can help Illinois meet its renewable portfolio standard

and solar carve-out. In addition, CNE provides service to thousands of Illinois homeowners and renters.

As described in the Plan, the dramatic decline in utility load forecasts have lead to an oversupply of energy and renewables. The current procurement situation provides very clear evidence of the importance of taking a thoughtful, measured approach to future procurements in order to protect competition at the wholesale and retail level, and to avoid the creation of stranded costs. Based upon its experiences in procurement events in Illinois and elsewhere, and its experience serving industrial, commercial, and residential customers, Exelon has a number of recommendations to improve the Plan.

II. RECOMMENDATIONS

Based on its expertise over the years in procurement events in Illinois and other jurisdictions, its experiences in Illinois as an ARES, and as a leading solar developer, Exelon makes the following observations and proposes the following recommendations for improvements to the Plan:

- The process improvements will lead to efficiencies and more robust participation (whenever or if any future procurement event is held).
- The proposed FutureGen sourcing agreement requires a number of key modifications.
- The proposed use of the Alternative Compliance Payment (ACP) funds is questionable.
- The bidding rules for the proposed distributed generation (DG) procurement should be altered.

A. Process Improvements

Exelon commends the IPA's commitment to making improvements to the competitive procurement documents and processes that will expedite the process, reduce administrative redundancies, and aid in streamlining future procurements, including the following:

- Notifying winning bidders as expeditiously as the law allows;
- Harmonizing pre-bid letters of credit so that there will be a single credit form;
- Utilizing a previously executed EEI Master Agreement and long form agreement for procurement events for the 2013 and subsequent Plan; and
- Standardizing procurement documents.

(IPA Plan, pp. 92-96) In numerous past proceedings, Exelon has advocated for these changes, which will no doubt be beneficial to bidders and winning suppliers in future procurements.

B. FutureGen Sourcing Agreement requires modification

The Plan includes a sourcing agreement for a contemplated repowered/retrofitted clean coal facility, known as FutureGen. (IPA Plan, p. 74 *et seq.*, Appendix IV.) Whether the legal authority to require ARES to enter into sourcing agreements with FutureGen exists is the subject of much debate; however, Exelon takes no position on that in this filing. Rather, these comments will focus on the fact that, aside from questions regarding any underlying statutory authority, the sourcing agreement provided by FutureGen and included in the IPA Plan is unworkable in its current form.

There are three over-arching issues with the current sourcing agreement. First, the sourcing agreement appears to have been drafted with a focus on the relationship between FutureGen and regulated utilities. As a result, several of the sections designed to protect buyers are deficient when applied to ARES, and should be modified so as to not place ARES at a competitive disadvantage. Second, in addition to the sourcing agreement's focus on utilities as the counter-party, the sourcing agreement shows an obvious bias toward FutureGen, and is not an agreement in which parties are given equal commercial rights. Exelon's objections to the proposed sourcing agreements include, but are not limited to the following, which attempt to ameliorate that bias. Third, there has been inadequate time to assess the significant proposed changes with respect to contract pricing made in the Plan from the informal draft on which comments were previously made. The failure to identify a particular subject shall not be construed as concurrence with the sourcing agreement, as drafted. Given the late filing of that portion of the Plan containing the sourcing agreement, and the lack of a redline provided in the Plan filing, Exelon reserves the right to make other suggested modifications to the sourcing agreement.

Definitions

Changes need to be made to two terms found in Section 1.1 Definitions (IPA Plan, Appendix IV pp. 7-16). The first change is to the definition of the term "Outside Commercial Operation Date" (IPA Plan, Appendix IV p.14). The appropriate definition of the term should be a date that is 90 days after the "Target Commercial Operation Date," but a date that is no more than 180 days after the "Target Commercial Operation Date" could also be acceptable. The second change is the removal of the term "Pre-

approved Total Capital Costs” (IPA Plan, Appendix IV p. 14), as approval of any capital costs should be subject to review after the expenditure has been made, and subject to formal hearing at the ICC.

Article 2

The modified sourcing agreement filed with the ICC seeks to lock ratepayers into to a thirty (30) year sourcing agreement (as opposed to the originally proposed fifteen (15) year agreement) (IPA Plan, Appendix IV, p.17) at rates that have not been shown to be just and reasonable. Rationale as to the basis for doubling the term of the sourcing agreement from what was originally proposed to stakeholders is noticeably absent in the Plan. Given the excessive length of the proposed mandate, the Plan should offer justification and rationale for the extended contract term.

Article 3

To the extent ARES are legally required to enter into a sourcing agreement, they should only be required to do so if a mirror sourcing agreement has been executed by all utilities and all ARES. To do otherwise would place those ARES that had executed a sourcing agreement at a serious competitive disadvantage from ARES and/or utilities who had not been required to enter into an identical sourcing agreement. This should be made an express condition precedent.

Article 5

The Seller's ability to recover costs requires greater controls, particularly given the fact that the sourcing agreement is not a competitive procurement but, rather, is a sole-source contract, the costs of which electric customers will ultimately pay. Necessary controls include a required filing with the Commission regarding the anticipated costs of the project, as well as Buyer and Commission audit rights. In addition, the sourcing agreement must make clear that the proposed final Formula Rate must be subject to Commission review and approval. It should be clear that the Commission has the ability to thoroughly evaluate the costs and proposed Formula Rate, just as it evaluates claimed costs and proposed rates of electric utilities. Buyers should not be required to support any filing by Seller seeking Commission approval; rather, they are free to challenge the justness and reasonableness of any claimed costs, or the appropriateness of any proposed Formula Rate. Along those lines, Seller should be capped at recovery not to exceed 10% above the anticipated project costs and/or Buyers should obtain notice of, and have veto power over, non-essential changes to the project that will materially impact the initial operating budget and thus the amount of recoverable costs.

Additionally, this Article is very focused on Buyer cost recovery for traditional utilities. To the extent it is also intended to cover ARES, modifications are required. The sourcing agreement needs to be modified to specify when, how, and how often the "Contract Prices" can be changed, in order to give ARES some certainty so they can appropriately price their contracts. Otherwise, the sourcing agreement could adversely affect competition by requiring ARES to build a premium into their prices to account for this risk, thereby further raising retail rates. Setting a Contract Price on an annual basis

through a docketed Commission proceeding is most appropriate, and gives Buyers the necessary opportunity to review and challenge the claimed costs, as well as to make recommendations to the Formula, while providing much-needed stability in the retail market that costs under the sourcing agreement will not be changing for Buyers every month with little notice. Finally, there needs to be an assurance that the utilities and ARES would always pay the same rate, such that if cost recovery is denied for the utility based on rate cap or other limitations, those costs must not be shifted to ARES or their customers.

Article 6

The final sourcing agreement must maintain explicit definitions and calculations of the Buyer's cost obligation, with consideration given for a competitive market that is likely to see a great deal of load shifting, new market entrants, exits from the market, etc., particularly for a contract of this length.

Article 14

The credit provisions should be struck. Buyers should not be compelled to agree to specific terms now, without knowing anything about the financing/lender. Rather, it should be left to the parties to negotiate customary and commercially reasonable lender consent documents.

Article 15

The sourcing agreement needs language to specify what a Buyer would be entitled to in the event of a Seller default, especially given that the damages the Seller would be entitled to are much more clearly spelled out. In addition, the sourcing agreement should explicitly indicate that a default by one Buyer will not increase the share of any other.

Article 16

As currently drafted, if the Seller exercises early termination rights, they have no obligation to Buyer, even in the event there is an energy shortfall. That situation should be remedied, such that Buyer should be refunded costs already paid for energy that has not been delivered.

Article 18

The force majeure provision should be bilateral, and there should be a 12 month maximum, after which either party may terminate the agreement with notice to the other party.

C. Use of ACP Funds Is Questionable

The Plan clearly demonstrates the perils of mandating long-term contracts, for any resource. Several parties, including Exelon cautioned the ICC in 2010 regarding entering into 20-year contracts. The Act attempts to balance achieving the state's renewable energy goals while at the same time protecting consumers from paying too much by requiring renewable resources to be "cost effective." Besides the legislative rate caps in

place under the renewable portfolio standard, the cost of procuring renewable resources must not exceed benchmarks based on **market prices** for renewable energy resources. Because there is no long-term market for renewable resources, it is impossible to establish an appropriate benchmark to ensure consumers are actually getting the cost effective resources guaranteed under the Act. As a result, Illinois consumers have been forced to pay significantly *more* under the long-term contracts for significantly *fewer* RECs than if they had been procured under shorter term purchases. In other words, the 20-year bundled contracts are frustrating, not helping, the state meet its RPS goals.

Furthermore, since the contracts were entered into, there has been a dramatic shift in competition for residential and small commercial customers, resulting in significant load migration away from the utilities (*Id.* at 16-17), with more migration anticipated in the balance of the planning horizon as a result of a number of communities that have or will implement municipal aggregation for electric load. (*Id.* at 18) Given the amount of load migrating to ARES as a result of this robust competition, there is likely an insufficient number of bundled utility customers to support the commitments made to renewable energy resources through competitive procurements in previous years within the statutory price cap. (*Id.* at 3) Consequently, due to the costs exceeding the cost cap, the utilities' ability to accept the full amount of contracted renewable energy resources under the long term contract lies in question. As noted by the IPA, "The long-term bundled REC and energy purchases made in 2010, before there was a practical appreciation of how quickly and successfully customers would choose alternate electricity suppliers, are becoming **the new generation of stranded costs.**" (*Id.* at 81). (Emphasis added.)

The Plan contemplates two potential means of dealing with the current situation. First, the IPA is considering using its Renewable Energy Resources Fund, funded by ACPs made by the ARES to comply with at least 50% of the RPS requirements and administered by the IPA pursuant to Section 1-56 of the IPA Act, to help mitigate payment risk for these long-term contracts (*Id.* at 3) In addition, the IPA proposes to use the ACP payments that have been collected by Ameren and ComEd from their respective hourly-priced service customers to be collectively used as necessary to supplement payment to the suppliers to the extent such payment would exceed the individual utility renewable resource budget caps in a given year. (*Id.* at 3)

Without admitting or denying the IPA's legal authority to use the Renewable Energy Resource Fund as proposed in this year's Plan, Exelon does not oppose the proposal in recognition of the fact that the IPA has inherited a difficult situation in that commitments were made under long term renewable procurements that are not necessarily sustainable by utility bundled customers within the statutory rate cap. However, lack of opposition to use of those funds for this year's Plan should not be interpreted as agreement with this proposal as it relates to monies collected from ARES, nor shall it be construed as the appropriateness of such a proposal for future years. As the Plan acknowledges, this proposal would convert funds collected from ARES and their customers that are supposed to be used to purchase renewable energy credits on behalf of ARES, and instead use them to finance a utility contract for the benefit of eligible retail customers. (*Id.* at 82) Additionally, the statute's directive that ACP payments are to be used to "purchase renewable energy credits" (220 ILCS 5/16-115D)(d)(4)) may limit how

those funds may be used and notwithstanding Exelon's position in this filing, it fully reserves the right to challenge the IPA's use of these funds in the future.

D. Balance the Procurement Across all Sizes of Solar Development.

The Plan includes a new Distributed Generation ("DG") component, with two products: one for individual generators less than 25 kW, and a second product for generators between 25kW and 2MW. (Plan, pp. 86-92). This is a positive addition, in that DG sources, including solar, provide many benefits. These benefits include the reduced need for new transmission, reduced line losses as distributed energy is generated and consumed on-site, reduced distribution upgrades through the extension of useful lives of lines and transformers, reduced need to upgrade transformers to support load growth, and enhanced distribution system performance through electricity counter-flow and reduced low-end voltage variations. A competitive DG market in Illinois would be expected to spur competition, which would bring downward pressure to costs for the solar industry throughout Illinois, and benefit ratepayers accordingly

Exelon commends the IPA for conducting a series of workshops on DG, in order to obtain useful feedback in advance of filing the Plan. The IPA accurately summarized the key discussion points, including the following:

Experience with project financing by developers in other states suggests that while leasing equipment to a homeowner rather than selling it to him/her may make more sense, a PPA model that accomplishes the same cash flow is preferable from a tax standpoint. Developers do not want to become an ARES. This may require revisiting ARES rules, or creating an exception for PPAs associated with DG financing structures.

(*Id.* at 88) This is an important observation, given that the third-party model in Illinois requires that the entity be licensed as an ARES. PPAs, which are the main means of

deploying solar, would be effectively ineligible since the average solar developer is not an ARES.

One improvement that can be made to the DG proposal is with respect to bidding rules. Experience in other jurisdictions has shown that it is necessary to discourage underbidding and place-holding from developers without the intent to actually bring projects to fruition. Too often, developers have deliberately under-bid into auctions, or held spaces in queues for the sole purpose of re-selling their place in line at a higher price. Proof of executed contracts is already required in the 25kW and over category in the proposed procurement. However, since developers submitting in the small (under 25kW) category need a minimum of 40 contracts to hit the 1MW threshold, there is far greater risk that developers will claim a 1MW block but will not be able to deliver in a timely manner – sending confusing market signals to other developers, suppressing competition, and raising prices. Obscurity in oncoming supply has caused severe hiccups in market growth in other states.

In order to combat that potential problem, the IPA should require that 50% of a 1MW block be under contract before bid submission. With that combination of customers under contract and room to sign up new customers, the IPA has some assurance of deliverability, while at the same time other developers have a clearer view of oncoming supply, allowing them to effectively compete. Real-time data from the program administrator should be provided, in order for developers to have a clear sense of what load is still available; armed with that information, they should be able to plan their sales cycles accordingly.

III. Conclusion

As we enter into a new era of retail electric competition in Illinois, it is essential that the IPA Plan preserve the competitive marketplace where it is robust, and take steps to enhance competition in those areas that are ripe for growth. Exelon therefore recommends that the IPA Plan be modified as described herein.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing documents was served this 3rd day of October, 2012 by electronic mail upon the persons on the master service list.

A handwritten signature in black ink that reads "Cynthia Fonner Brady". The signature is written in a cursive style with a long, sweeping tail on the letter "y".

Cynthia Fonner Brady