

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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

RESPONSE TO OBJECTIONS
OF THE ENVIRONMENTAL LAW & POLICY CENTER

On October 3, 2012, ELPC filed an Objection in this docket objecting to the IPA’s failure to conduct a distributed generation (DG) procurement in 2013 using the “alternative compliance payment” (ACP) funds that the IPA collects annually from alternative retail suppliers. We argued that the IPA’s proposal to “roll-over” these funds for use in subsequent years violates Section 1-56 of the Illinois Power Agency Act, which requires the IPA to use the Renewable Energy Resources Fund (RERF) to “procure renewable energy resources at least once each year in conjunction with a procurement event for electric utilities.” 20 ILCS 3855/1-56(c). No other parties to this docket directly address this issue in their Objections.

The Commission has general authority “to see that the provisions of the Constitution and statutes of this State affecting public utilities ... are enforced and obeyed.” 220 ILCS 5/4-201. Thus, the Commission should order the IPA to comply with Section 1-56 and conduct a distributed generation procurement using ACP funds *this year* instead of waiting until some future year. (See ELPC Objection at 5-6). ELPC endorses the position of Wind on the Wires (WOW) and the Illinois Coalition for Renewable Energy (I-CARE) that ACP funds could also be used by the IPA to backstop existing contracts for long-term renewable resources if those contracts would otherwise need to be curtailed. As outlined in ELPC’s Objection, there should be sufficient funds in the RERF to backstop the 2010 long-term contracts and also move ahead with

a DG procurement in 2013. (*See* ELPC Objection at 4.) ELPC also endorses the position of the Natural Resources Defense Council with regard to the proposed incremental energy efficiency to be achieved by the utility and third-party programs pursuant to 220 ILCS 5/16-111.5B.

Response #1 – Illinois law exempts third-party financing and operating arrangements (leases and PPAs) from ARES regulation.

Exelon Generation Company LLC and Constellation NewEnergy Inc. (collectively Exelon) are generally supportive of the distributed generation (DG) component of the IPA Plan. As stated in Exelon’s comments:

[The DG Plan] 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 volt gyrations. 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 Objection at 12. ELPC agrees that a DG program is important and that a competitive DG market in Illinois would have myriad benefits for Illinois consumers. Our Response focuses on one narrow but important issue that is related to the DG procurement program outlined in the IPA’s Plan – whether or not third-party financing using power purchase agreements (PPAs) would require entities to register as an alternative retail electricity supplier (ARES) under Illinois law. We conclude that it would not, as the Illinois legislature has explicitly exempted this kind of arrangement from regulation under the Illinois Electric Service Customer Choice and Rate Relief Law of 1997, 220 ILCS 5/16-101 *et seq.*

Third-party financing is a popular way for cities, school districts, homes and businesses to minimize the up-front costs of on-site renewable energy development. Under this type of arrangement, a third-party with greater access to capital makes the up-front cash outlay for the

renewable energy system and the customer compensates the third-party developer over time. This can either be structured as a flat monthly payment (equipment lease) or by a variable charge for the actual amount of energy that the renewable energy system produces (third-party PPA).

Third-party financing has grown immensely in recent years, particularly in states with mature solar markets. As one leading market research firm explains, “[t]hird-party ownership has taken the residential solar space by storm, particularly in the last year and a half. The promise of lower energy bills with little to no upfront payment has spurred tens of thousands of homeowners to install solar systems through a PPA or lease agreement.”¹ Third-party financing is particularly important for municipalities and other tax-exempt entities such as school districts, colleges and other non-profit institutions because it allows them to take advantage of federal renewable energy tax credits that would otherwise not be available.

Exelon notes that one of the “key discussion points” from the IPA’s DG workshop process involved third-party project financing under leasing or PPA models. (Exelon Objection at 12). The IPA recognized that third-party financing was desirable, but acknowledged that there was some uncertainty regarding whether or not the use of PPAs could trigger a requirement for third-party entities to register as ARES under Illinois’ law. As stated in the IPA Plan:

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.

IPA Plan at 88. When discussing this issue, Exelon Generation states, in an offhand manner, “that the third-party model in Illinois requires that the entity be licensed as an ARES.” (Exelon Objection at 12). Thus, concludes, Exelon, “PPAs, which are the main means of deploying solar,

¹ GTM Research, Solar Energy Industries Ass’n (SEIA), *Solar Market Insight Report 2012 Q2* (excerpt available at <http://www.seia.org/research-resources/solar-market-insight-report-2012-q2>).

would be effectively ineligible since the average solar developer is not an ARES.” *Id.* Exelon is mistaken. Illinois law explicitly exempts third-party financing and operating arrangements from ARES regulation and Commission precedent has acknowledged the same.

The Illinois legislature defined “alternative retail electricity supplier” (ARES) at Sec. 16-102 of the Illinois Electric Service Customer Choice and Rate Relief Law of 1997. *See* 220 ILCS 5/16-102. The Commission interpreted this definition in 1998 to *exclude* on-site behind-the-meter sales of power pursuant to a third-party ownership arrangement. In *CogenAmerica (Morris) LLC*, 1998 Ill. PUC LEXIS 1078, the ICC granted petitioner CogenAmerica’s request for a declaratory ruling that it was not subject to regulation as an ARES where the company developed and provided electricity to an industrial customer from an on-site cogeneration facility. The Commission recognized that the third party development of the project was “essentially a financing mechanism” and that the “fundamental purpose” of the project was to provide capacity and energy for the benefit of the site owner. Thus, the Commission concluded that the developer should not be regulated as an ARES.

The legislature subsequently amended and broadened the exclusion from ARES regulation for any third-party entity that “owns, operates, sells, or arranges for the installation” of a customer’s self-generation facility on behalf of that customer. Section 16-102 now reads:

"Alternative retail electric supplier" means every person ... or other entity ... that offers electric power or energy for sale, lease or in exchange for other value received to one or more retail customers, or that engages in the delivery or furnishing of electric power or energy to such retail customers ... **but shall not include** ... (v) **an entity that owns, operates, sells, or arranges for the installation of a customer's own cogeneration or self-generation facilities**, but only to the extent the entity is engaged in owning, selling or arranging for the installation of such facility, or operating the facility on behalf of such customer, provided however that any such third party owner or operator of a facility built after January 1, 1999, complies with the labor provisions of Section 16-128(a) as though such third party were an alternative retail electric supplier...

220 ILCS 5/16-102. Legislative history confirms that this language “explicitly provides expanded cogeneration and self-generation options to electric consumers with opportunity for third party financing and operating arrangements.” *See* Floor Debate of SB 24, May 27, 1999, Comments of Senator Mahar, p. 46, 58.²

Exelon does not reference the applicable statute in its comments and it is unclear what the company based its position on when it argued that PPAs “would be effectively ineligible” in Illinois. (Exelon Objection 12-13). However, given the importance of third-party financing as one of the predominant tools to reduce up-front costs of distributed renewable energy development, it is very important for the Commission to send a clear message that PPA financing does *not* trigger ARES regulation under Illinois law.

CONCLUSION

The Commission should require the IPA to amend its 2013 Procurement Plan to comply with Section 1-56 of the Illinois Power Agency Act by procuring renewable energy resources using ACP funds *this year*, rather than allowing the funds to roll forward to future years. In so doing, the Commission should clarify that third-party PPA financing of on-site customer generation does *not* trigger ARES regulation under Illinois law.

Dated: October 15, 2012

² Available at <http://www.ilga.gov/senate/transcripts/strans91/ST052799.pdf>.

Respectfully submitted,



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NOTICE OF FILING

To: (attached service list):

Please take note that on October 15, 2012, I submitted the above Response of the Environmental Law & Policy Center for filing in the above-captioned matter, via e-Docket, with the Clerk of the Illinois Commerce Commission.



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CERTIFICATE OF SERVICE

I, Bradley Klein, hereby certify that the foregoing document was served to all parties of record listed on the attached service list by e-mail on October 15, 2012. Paper copies will be provided upon request.



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