

**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.)

**REPLY BRIEF ON EXCEPTIONS ON BEHALF OF
THE ILLINOIS POWER AGENCY**

The Illinois Power Agency (“IPA”), pursuant to Section 200.830 of the Illinois Commerce Commission’s (“Commission”) Rules of Practice, 83 Ill. Admin. Code § 200.830, respectfully submits this Reply Brief on Exceptions in the above-captioned matter. This docket involves Commission approval of the IPA’s proposed Procurement Plan pursuant to Section 16-111.5(d)(4) of the Public Utilities Act (“Procurement Plan”).

I.

In its Brief on Exceptions (“BOE”), the IPA presented four Exceptions and corresponding replacement language. After reviewing the Exceptions presented by other parties, the IPA continues to urge the Commission to accept its previous Exceptions, and presents no new Exceptions. In this Reply Brief on Exceptions, the IPA responds to the Briefs on Exceptions (“BOEs”) of ELPC, WOW, I-CARE, CES and FutureGen.¹ For the reasons set out below, the IPA supports the recommendations contained in the Exceptions of FutureGen, and requests that the Commission reject the recommendations contained in the Exceptions of ELPC, WOW, I-CARE, and CES.

RESPONSE TO ELPC

In the Proposed Order (“PO”), the Administrative Law Judge (“ALJ”) correctly held that the Commission does not have authority over how the IPA procures renewable resources using

¹ For ease of reading, the IPA refers to the three rounds of verified comments as Objections, Responses, and Replies. The IPA also uses the shorthand for parties found on pages 1 and 2 of the PO.

the Renewable Energy Resources Fund (“RERF”). The PO stated: “it is clear the Commission has no authority over disbursements from the RERF collected on behalf of ARES customers,” and explained why the Commission did not have such statutory authority. (PO at 110.) The PO also presented sound policy reasons regarding why the Commission should not be involved, noting that, in contrast with hourly utility customer ACP payments held by the utilities, “the procurement of RECs using ACP funds collected on behalf of ARES has nothing to do with the procurement process.” (*Id.*) The IPA supports the PO’s holding on this legal matter.

Nevertheless, ELPC argues that the Commission should take jurisdiction over the RERF and interpretation of Section 1-56 of the IPA Act. (*See* ELPC BOE at 4-5 (disagreeing with IPA position), 7-8 (reasons for Commission involvement).) ELPC’s arguments about Commission authority, as recognized by the PO, are without merit. First, ELPC suggests that because a RERF procurement must be held in conjunction with a utility procurement, the RERF procurement must be “part of the IPA plan or to be otherwise addressed in conjunction with one other.” (ELPC BOE at 7.) However, as the PO pointed out, nothing in Sections 1-56 or 1-75 of the IPA Act or Section 16-111.5 of the Public Utilities Act requires the IPA to submit RERF procurements to the Commission for approval, or even mentions plans for RERF procurements in the Procurement Plan. (*See* PO at 110.) ELPC’s argument is further undermined because the standard for Commission approval of a Procurement Plan under Section 16-111.5(d)(4) would not be impacted by purchases with the RERF on behalf of ARES customers. (*See* 220 ILCS 5/16-111.5(d)(4) (no provision for impact on non-Eligible Retail Customers such as ARES customers).)

Second, ELPC argues that because the Commission has oversight powers over certain aspects of the provision of renewable energy, the Commission must also have oversight over the

RERF. (*See* ELPC BOE at 8.) Like the Proposed Order, Staff rejects ELPC’s arguments. As Staff states, “ELPC exaggerates the significance of the general powers bestowed on the Commission and ignores the specific powers bestowed on the IPA . . . [T]he IPA administers the ACP funds, not the Commission and under Section 16-111.5(b) of the PUA there is no requirement that the IPA’s procurement plan set forth how the IPA will use the RERF to procure renewable energy. . . .” (Staff Response at 31-32.) ELPC’s examples of where the Commission has exercised authority over renewable energy policies only highlight the need for specific statutory provisions that grant Commission oversight in specific cases. In both examples ELPC cites – interconnection and metering – the Commission is vested with specific statutory authority to enforce compliance with these requirements (*See* 220 ILCS 5/16-107.5 (cited by ELPC); *see also* 220 ILCS 5/16-108 (generally, Commission oversight over delivery services provided by electric utilities).) Procurements from the RERF do not similarly have implications for delivery services offered by AIC and ComEd to their customers or the functioning of delivery infrastructure owned by AIC or ComEd. Indeed, the procurements from the RERF are restricted to purchases of RECs – purely financial transactions. (*See* 20 ILCS 3855/1-56(b) and (d).) Furthermore, the Commission is given no express statutory authority over the RERF.

Finally, assuming the Commission does have authority, ELPC essentially argues that because the RERF will have significant resources, the IPA should ignore (or be forced to ignore) the statutory requirement to hold RERF procurements “in conjunction with” a utility procurement and instead hold stand-alone RERF procurements “at least once each year”² (*See* ELPC BOE at 7.) Divorcing RERF procurements from utility procurements also divorces RERF procurements from important consumer protections, which clearly was not the legislature’s

² WOW makes a similar argument, but does not repeat ELPC’s request that the Commission require the IPA to take action. (*See* WOW BOE at 7-9.)

intent. ELPC does not address how RERF procurements without a utility procurement would affect Section 1-56(d), which serves as the only price cap for procurements from the RERF.

Section 1-56(d) states in full:

The price paid to procure renewable energy credits using monies from the Illinois Power Agency Renewable Energy Resources Fund shall not exceed the winning bid prices paid for like resources procured for electric utilities required to comply with Section 1-75 of this Act.

(20 ILCS 3855/1-56(d).) Unlike procurements on behalf of Eligible Retail Customers (including procurements for renewable resources), there are no provisions for the Procurement Administrator to develop cost-based benchmarks and for the Commission to review and approve such benchmarks. (*See* 220 ILCS 5/16-111.5(e)(3)-(4).) In addition, unlike procurements on behalf of Eligible Retail Customers, there are no provisions for the Procurement Monitor to review procurement results for Commission consideration prior to Commission approval. (*See* 220 ILCS 5/16-111.5(f).) Because Section 16-111.5 does not apply to RERF procurements, none of these protections is available, and even if the Commission somehow made them available, there is no statutory requirement that the IPA utilize these protections for RERF procurements.

Setting aside the question of whether the Commission has the authority to force the IPA to procure using the RERF, the IPA fully understands the cross-tensions highlighted, in part, by ELPC. On one hand, as explained above, the IPA is constrained from procuring renewable energy resources using the RERF except in conjunction with utility procurements. On the other hand, Section 1-56 contains substantial mandates and targets that the IPA cannot reach if it does not procure RECs using the RERF. The IPA notes that some of the mandates were added with Public Act 97-0616, which was passed by the General Assembly at a time when – unlike at the time the IPA Act was originally drafted – it was foreseeable that utilities might not procure

renewable resources in certain years. (See Bill Tracker for SB1652, House Amendment 2 (introduced May 27, 2011)³ In fact, by mandating what came to be known as the “Rate Stability Procurements” for the June 1, 2013 through December 31, 2017 delivery period, that result was virtually made certain by the Legislature. (See 220 ILCS 5/16-111.5(k-5) (authorized by Public Act 97-0616).) One might argue that the IPA should have spent the RERF dollars that it had at the time those procurements were made in February 2012, yet the time was not ripe to do so – the IPA’s Distributed Generation workshops were not yet concluded, the State had not yet repaid all the funds that it had borrowed from the RERF⁴, and the legislature had not approved a spending appropriation for the IPA from the RERF for FY 2012.⁵

The IPA fully recognizes and agrees with the apparent stakeholder consensus that the RERF should be spent in the manner intended by and consistent with Section 1-56 of the IPA Act. Yet, the IPA is a creature of statute and must follow the plain requirements set out in Section 1-56. Also, the IPA is subject to strict fiscal oversight and annual audits and the IPA believes that it risks a determination that it is not acting in a fiscally responsible way if it spends funds in a manner not authorized. Although the IPA does not endorse any particular solution at this time, the IPA believes a fix to incorporate additional consumer protection in Section 1-56(d) is preferable to reinterpreting Section 1-56(b)-(d) without regard to consumer protection and the IPA’s authority. The IPA is willing to work with stakeholders on this issue further outside of the context of a docketed Commission proceeding. For the foregoing reasons and those stated in the

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<http://ilga.gov/legislation/fulltext.asp?DocName=09700SB1652ham001&GA=97&SessionId=84&DocTypeId=SB&LegID=57620&DocNum=1652&GAID=11&Session=.>

⁴ See, for example, the discussion of balances in the RERF in the IPA’s April 1, 2012 report, “Annual Report: The Costs and Benefits of Renewable Resource Procurement in Illinois Under the Illinois Power Agency and Illinois Public Utilities Acts”.

⁵The IPA has secured an appropriation for FY 2013, anticipating that it could spend or commit RERF funds during this fiscal year.

IPA's Procurement Plan, Response, and Reply, the IPA respectfully requests that the Commission not accept ELPC's arguments regarding IPA use of the RERF.

RESPONSE TO WOW AND I-CARE

Consistent with its Final Orders in previous Procurement Plan dockets, the PO properly held that there is no need for Commission review of the utilities' updated March load forecasts because the March load forecasts only address whether or not there is a need to rebalance the supply portfolio. (*See* PO at 67-68.) The rebalancing issue is, for the 2013 Plan, at essence a matter of compliance with the renewable resources rate cap in Section 1-75(c) of the IPA Act. (*See id.* at 68.) The PO clearly set out a procedure for the March load forecast:

With regard to the magnitude of ComEd's curtailment of existing long-term renewable contracts, the Commission finds that it should be based upon the March 2013 load forecast update, in the event there is consensus of the IPA, Staff, the Procurement Administrator and Monitor, and ComEd. In the event AIC receives Commission authorization to curtail existing long-term renewable contracts, the Commission finds that it should be based upon the March 2013 load forecast update, if there is consensus of the IPA, Staff, the Procurement Administrator and Monitor, and AIC.

(PO at 107.) Significantly, the PO found a lack of controversy regarding the load forecasts from AIC and ComEd in this proceeding "of little surprise":

The Commission also notes that there have been no serious controversies regarding the load forecasting methodologies or the results of the load forecasts produced by AIC or ComEd, including the routine updates provided by ComEd during the pendency of the previous procurement proceedings. Load forecasting has undoubtedly become somewhat more difficult subsequent to the changes to the PUA in 1997 and the introduction of the IPA Act. Nevertheless, both AIC and ComEd have extensive experience and expertise in the area of load forecasting. Additionally, the Commission can conceive of no incentive for AIC or ComEd to either over-forecast or under-forecast the load of eligible retail customers.

(PO at 67.)

Two parties, WOW and I-CARE, who did not comment on AIC or ComEd's methodology for developing the load forecast presented for approval in this docket, and did not

comment on either AIC or ComEd's revised load forecasts filed in this docket in November 2013⁶, now request the opportunity to influence the March update. WOW recommends that interested parties be allowed to provide "comments" on the March load forecast update. (*See* WOW BOE at 5-6.) I-CARE goes even further, suggesting renewable developers' "due process rights" are implicated and some sort of participation is legally necessary. (*See* I-CARE BOE at 3-5.)

Both miss the point highlighted by the PO: the updated load forecasts and contingencies are driven simply by compliance with Section 1-75(c) of the IPA Act using the non-controversial load forecast methodology cited by the ALJ. The "decision" to curtail – which itself simply triggers a set of rights and contingencies under the contracts rather than inevitably leading to curtailment – is based on a simple application of load forecast to the 1-75(c) budget. In other words, the Commission's finding of possible curtailment is the rote application of a basic formula. There is no need to add input from interested parties to interpret the load forecast, which the PO explicitly found that utilities have no incentive to over- or under-state. (PO at 67.) Receiving comments from these parties will not change the Section 1-75(c) budget constraints. For the reasons outlined in the PO and above, the IPA recommends that the Commission reject the Exceptions proposed by WOW and I-CARE.

RESPONSE TO FUTUREGEN AND CES

In addition to the Exceptions presented by the IPA regarding approval of Sourcing Agreements with FutureGen 2.0, FutureGen provided additional analysis and replacement language. The IPA agrees with the points made by FutureGen. Moreover, the Commission should recognize the concessions made by FutureGen in its proposed revised Sourcing

⁶ See Notice of Administrative Law Judge's Ruling requiring parties to comment on or before November 26, 2012, to updated load forecasts filed on November 20, 2012 by Ameren and November 16, 2012 by ComEd. (ALJ Ruling dated November 20, 2012.)

Agreement (*See* FutureGen BOE at 18-22; FutureGen BOE Attachment A (summarizing compromise and remaining points of contention); *but see* FutureGen BOE at 15-18 (noting certain issues identified by PO as open have been closed).) As noted by the IPA and FutureGen, the Commission should resolve contested terms on the strengths of the arguments, not on whether there is consensus among interested parties. (*See* IPA BOE at 8-10; FutureGen BOE at 13-15.) Here, the IPA has proposed a Plan which will permit the Utilities and ARES to meet their statutory obligations to meet the clean coal portfolio standards set forth in Section 1-75(d)(1), and FutureGen has proposed a modified Sourcing Agreement in its Brief on Exceptions which minimizes open issues. The IPA urges the Commission to approve the Plan, require ComEd and Ameren to enter into the new Sourcing Agreement, and take such further steps as necessary to require ARES and hourly utility customers to also be bound by the Sourcing Agreement.

CES agrees with the PO's conclusion, but argues at length that the Commission should find (apparently in *dicta*) that the Commission lacks authority to direct ARES to purchase any FutureGen output. (*See* CES BOE at 3; IPA BOE at 14-15 (noting a finding given the PO's conclusion regarding application to ARES would be *dicta*.) CES does not raise any new arguments in support of its position and Staff, FutureGen, and the IPA have rebutted these arguments. (*See* CES BOE at 3-11.) For the purposes of this Reply Brief on Exceptions, the IPA notes that if the Commission rejects FutureGen and the IPA's Exceptions regarding FutureGen, accepting CES's Exceptions to find that the Commission lacks authority to bind the ARES, would simply be adding *dicta*, which should be avoided.

II.

CONCLUSION

Based on a review of the Exceptions presented by the parties to this docket, the IPA does not present new Exceptions, but supports FutureGen's Exceptions. The IPA respectfully requests that the Commission reject Exceptions from ELPC, WOW, I-CARE, and CES.

WHEREFORE the IPA respectfully requests that the Commission:

1. Accept the IPA's and FutureGen's Exceptions;
2. Modify the Proposed Order consistent with the IPA's and FutureGen's Exceptions;
3. Reject the Exceptions of ELPC, WOW, I-CARE, and CES; and
4. Grant such relief as required by the interests of justice.

Dated: November 29, 2012

Respectfully submitted,

Illinois Power Agency

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NOTICE OF FILING

Please take notice that on November 29, 2012, we caused to be filed via electronic mail with the Illinois Commerce Commission, **Reply Brief On Exceptions On Behalf Of The Illinois Power Agency**. Copies of the foregoing document is hereby served upon you.



Henry T. Kelly, attorney for
the Illinois Power Agency

CERTIFICATE OF SERVICE

I, Henry T. Kelly, an attorney, on oath state that I served a copy of the foregoing **Notice of Filing** and **Reply Brief On Exceptions On Behalf Of The Illinois Power Agency** on the service list maintained on the Illinois Commerce Commission's eDocket system for the instant docket via electronic delivery on November 29, 2012.



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