

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS POWER AGENCY :
 : No. 14-0588
Petition for Approval of the :
220 ILCS 5/16-111.5(d) Procurement Plan :

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

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Commonwealth Edison Company (“ComEd”) submits this Reply Brief on Exceptions (“Reply BOE”) relating to the Administrative Law Judge’s Proposed Order served on November 13, 2014 (the “Proposed Order” or “PO”) and the Briefs on Exceptions (“BOEs”) filed by various parties on November 21, 2014, concerning the Illinois Power Agency’s (“IPA”) 2015 Procurement Plan (“Plan”).

In general, the BOEs reflect a growing consensus around issues that had been contested during much of this docket. For example, only the Citizens Utility Board¹ (“CUB”) continues to argue in favor of adopting the original Energy Efficiency as a Supply Resource (“EEAASR”) proposal in this docket, but even then only devotes a couple pages to the issue. Notably, the IPA – the original proponent of the EEAASR proposal – generally accepts the Proposed Order’s conclusion that this proposal cannot be adopted, and concurs that only the Alternative EEAASR proposal is potentially viable. And, while certain parties nevertheless persist in resurrecting arguments on other topics now firmly discredited by the Proposed Order, it is clear that their BOEs offer nothing new regarding incremental energy efficiency cost-effectiveness analysis, distributed generation procurement, or clean coal.

¹ While the Environmental Defense Fund (“EDF”) joins CUB’s BOE, CUB has previously corrected its filings in this docket to delete references to EDF. EDF has not intervened in this docket, and CUB’s Petition to Intervene does not purport to be on behalf of EDF. Following CUB’s BOE filing on November 21, 2014, CUB late-filed its Exceptions language on November 24, 2014, but did not remove EDF at that time. It is therefore unclear to ComEd whether EDF is a proper party to this docket.

ComEd therefore respectfully requests that the Illinois Commerce Commission's ("ICC" or "Commission") Final Order in this proceeding adopt the changes to the Proposed Order suggested in ComEd's BOE.

I. ENERGY EFFICIENCY

A. The Proposed Order Correctly Concludes That the EEAASR Proposal Cannot Be Adopted.

Consistent with the provisions of the Public Utilities Act ("PUA"), the Proposed Order correctly concludes that the IPA's EEAASR proposal cannot be adopted because it was not offered pursuant to, and does not comply with, Section 16-111.5B of the PUA. PO at 152 ("Having reviewed the IPA Act and the PUA, the Commission concludes that any energy efficiency programs to be undertaken by the IPA must be pursuant [to] Section 16-111.5B of the PUA. The IPA and CUB fail to identify any other provision in the IPA Act or the PUA which would govern additional energy efficiency procurements."). The BOEs, moreover, confirm that the Proposed Order has adopted the correct conclusion – with one exception, the BOEs do not take exception to the Proposed Order's substantive conclusion, which found that the EEAASR proposal cannot be adopted. Indeed, the IPA – the proponent of the EEAASR proposal – did not take exception to the Proposed Order's ultimate conclusion rejecting EEAASR.²

Only CUB persists in arguing that the EEAASR proposal should be approved in this docket. Relying on thoroughly discredited arguments, CUB again claims that Section 16-111.5B is not the exclusive statutory provision through which incremental energy efficiency may be procured in conjunction with the Plan and that procurement of EEAASR is authorized under Section 16-111.5 because it is – allegedly – a "standard wholesale product." CUB Corrected

² While the IPA finally abandons arguments that the EEAASR proposal should be adopted in this docket, it nevertheless continues to argue that EEAASR *could* be approved under Section 16-111.5. IPA BOE at 5. As explained in this Section, however, the IPA's position is not credible and, as the Proposed Order concludes, must be rejected.

BOE at 1-3. While Staff, Ameren, and ComEd have devoted dozens of pages to identifying and explaining the many serious legal and practical impediments to the EEAASR proposal, CUB offers only a couple of pages on the issue, cursorily claiming that EEAASR is a standard wholesale product because energy efficiency products are procured in venues such as PJM Interconnection (“PJM”). Yet this argument, and the entire EEAASR proposal, have been conclusively rejected by a prior Commission order, the General Assembly, and the parties’ arguments in this docket. As the Proposed Order correctly concludes, the proposal must again be rejected for the reasons summarized below.

EEAASR cannot be proposed under Section 16-111.5; Section 16-111.5B is the exclusive statutory provision through which incremental energy efficiency can be procured in conjunction with the Plan. Staff’s, Ameren’s, and ComEd’s Objections have provided a thorough analysis of the legislative history and past Commission orders addressing the IPA’s ability to procure energy efficiency, which establish that the law does not permit energy efficiency to be procured pursuant to Section 16-111.5, and that Section 16-111.5B instead provides the exclusive framework for the procurement of incremental energy efficiency. PO at 112-133. Neither CUB’s BOE nor the IPA’s BOE addresses, much less refutes, this determinative statutory framework:

- The Commission first considered an IPA EEAASR proposal in Docket No. 10-0563, which was brought under Section 16-111.5 of the PUA (the General Assembly had not yet created Section 16-111.5B of the PUA). *Illinois Power Agency*, ICC Docket No. 10-0563, Order (Dec. 21, 2010) at 42-43. The Commission rejected the proposal because energy efficiency is not a “standard wholesale product” as required by Section 16-111.5, and the procurement raised a host of other complicated and unresolved issues. *Id.*
- During the following year, the legislature enacted the Energy Infrastructure Modernization Act, which amended Section 16-111.5 and also created new Section 16-111.5B. *See* 220 ILCS 5/16-111.5B. Importantly, the General Assembly did not

include energy efficiency procurement within Section 16-111.5, but instead provided for its consideration separately under Section 16-111.5B.

- Where the legislature acts to amend a statute following a judicial interpretation of the statute, and does not disturb or overturn that interpretation, the legislature is deemed to have acquiesced in the interpretation. Put another way, the fact that the legislature amended Section 16-111.5 after the Commission found that it did not include energy efficiency – but did nothing to correct the Commission’s conclusion – is confirmation that the Commission’s interpretation was correct. *In re Marriage of O’Neill*, 138 Ill. 2d 487, 495-96 (1990), and *State Bank of Cherry v. CGB Enters., Inc.*, 2013 IL 113836, ¶ 61.³

The Commission orders and law are clear – incremental energy efficiency cannot be procured under Section 16-111.5. As the Proposed Order correctly concludes, incremental energy efficiency may only be considered under Section 16-111.5B.

Neither CUB nor the IPA claims that the EEAASR proposal is proposed under, or complies with, Section 16-111.5B. The IPA did not purport to bring the EEAASR proposal under Section 16-111.5B. IPA Response at 17, fn.7. Not surprisingly, then, neither the IPA’s BOE nor CUB’s BOE has suggested that this proposal complies with Section 16-111.5B. Ameren’s and ComEd’s Objections, moreover, confirmed that it does not satisfy the many requirements of that Section. *See* 220 ILCS 5/16-111.5B(a)(3), (4), (5), (b). Perhaps most importantly, the IPA has made no showing that the EEAASR proposal complies with the most basic of customer protection requirements – *i.e.*, that it is cost effective and satisfies the statutorily defined Total Resource Cost Test (“TRC Test”). PO at 117-133.

³ The IPA ignores these legislative and legal arguments, yet claims, without reference to any legislative history, order or case, that “Section 16-111.5B ... was drafted as an expansion of Section 8-103-related authority instead.” IPA BOE at 5. This unsupported claim, however, does not cure the underlying legal defect – Section 16-111.5 does not provide for energy efficiency procurement, and the Commission has already concluded that energy efficiency cannot be read into Section 16-111.5. Moreover, the IPA’s claim that the mere passage of time has magically transformed energy efficiency into a “standard wholesale product” cannot stand (IPA BOE at 4) – while legislatures may amend statutes to reflect updates to technology or markets that occur over time, the General Assembly has not done so here. The words reflected in Section 16-111.5 are the same today as they were when the Commission issued its order in ICC Docket No. 10-0563. *See Illinois Power Agency*, ICC Docket No. 10-0563, Order (Dec. 21, 2010) at 42-43.

Even if EEAASR could be proposed under Section 16-111.5 (and it cannot), it is not a “standard wholesale product” and violates statutory cost-recovery provisions. Ignoring the law and Commission orders to the contrary, the IPA and CUB continue to insist that the EEAASR proposal can be brought under Section 16-111.5 because it is a “standard wholesale product.” IPA BOE at 4-5; CUB Corrected BOE at 1-3. Yet, a “standard wholesale product” is one that is routinely traded in a liquid market and has visible price indices, which allow market participants to be confident that the prices they receive are fair market prices. ComEd Objections at 15-16. Neither the IPA nor CUB has presented any evidence that such visible market prices exist for this proposed super peak product, however, and the proposal thus fails to satisfy this most basic requirement.

CUB only argues that EEAASR is a “standard wholesale product” because energy efficiency products are procured in venues such as PJM Interconnection (“PJM”). IPA BOE at 4; IPA Response at 19; CUB Corrected BOE at 2. To the contrary, however, these separate procurements highlight even more complications with the EEAASR proposal. For example, ComEd already offers its energy efficiency into the PJM Capacity Market (the “Reliability Pricing Model,” or “RPM”). ComEd Reply at 6. Yet, the EEAASR proposal does not address how to ensure that double counting does not occur, first by load-serving entities through the RPM and again through EEAASR. *Id.* Relatedly, neither the IPA nor CUB resolves the many other evaluation, measurement and verification issues identified in Staff’s Objections. *Id.*⁴

⁴ CUB also incorrectly claims that energy efficiency *as a supply product* is also a standard wholesale product: “Any generation technology employed by participants in capacity auctions could also participate in supply auctions, because electric grids are agnostic as to the original source of energy, be it MW of installed capacity or MWh of supplied power.” CUB BOE at 2. Under PJM’s market rules, however, energy efficiency may participate as a capacity product, but there is no mechanism by which energy efficiency can be offered into PJM’s energy markets. While demand response can be offered into such markets presently, the recent vacatur of FERC Order 745 may change that landscape. *Electric Power Supply Ass’n v. Federal Energy Regulatory Comm’n*, 753 F.3d 216 (D.C. Cir. 2013).

And, as explained below, the EEAASR proposal's forced subsidization of energy efficiency for large industrial customers *by eligible retail customers* is equally, if not more, problematic:

- Because the IPA's procurement authority under Section 16-111.5 is limited to eligible retail customers, the IPA's proposal to require eligible retail customers to bear the costs of procuring energy efficiency from non-eligible retail customers (*i.e.*, all retail customers in the utility's service territory) is unlawful and unfair. ComEd Reply at 6; ComEd Objections at 16-18.
- Purchasing energy efficiency from industrial customers within ComEd's service territory does not reduce the energy requirements of utility-supplied eligible retail customers. ComEd Reply at 6-7. The PJM capacity obligations for eligible retail customers will not be reduced by a single kilowatt-hour if the IPA purchases energy efficiency from industrial customers. ComEd Reply at 7. ComEd's eligible retail customer energy requirements will only be reduced if the IPA procures energy efficiency from eligible retail customers. ComEd Reply at 7.

In sum, if the Commission were to approve the EEAASR proposal, it would force eligible retail customers to subsidize the costs of energy efficiency for commercial and industrial customers, which would receive all of the benefits of the energy efficiency installed at their premises, while the customers funding that efficiency (*i.e.*, eligible retail customers) would receive none of the benefit. By rejecting the primary EEAASR proposal, the Proposed Order correctly held that the Commission should not support this unlawful and unfair forced subsidization.

B. The Proposed Order Correctly Concludes That the Alternative EEAASR Proposal Should Be Further Developed During Workshops.

Similar to the original EEAASR proposal, the Proposed Order's conclusion regarding the Alternative EEAASR proposal appears to have been well-received by nearly all parties. Only the IPA contends that the Commission should *now* adopt the Alternative EEAASR, as proposed, without further development. IPA BOE at 5-7. Yet, the proposal was not presented to the parties until the IPA filed the Plan on September 29, 2014, and, as noted by Staff, Ameren and

ComEd, the proposal cannot be implemented as proposed. Staff Objections at 3, 7-8; ComEd Objections at 5-8; Ameren Objections at 9, 13-14; ComEd Reply at 8-9.⁵ Indeed, as a practical matter, it is now far too late to conduct a solicitation under Section 16-111.5B for the 2015 delivery year. With or without workshops, 2016 is the earliest that this proposal could be placed into effect. ComEd Reply at 9. Accordingly, the Proposed Order correctly adopted recommendations that the proposal be further considered in workshops given the unresolved issues associated with this relatively new proposal. PO at 153.⁶ The IPA offers no new argument to support adoption of the Alternative proposal now, and its argument should be rejected.

C. Incremental Energy Efficiency Procurement

1. The Proposed Order correctly declines to order that DRIPE and NEBs should be included in the TRC Test.

In response to three Ameren programs failing to pass the TRC Test, the Natural Resources Defense Council (“NRDC”) advanced radical changes to the statutorily-defined test that were admittedly designed to transform cost-ineffective programs into cost-effective programs. NRDC Objections at 3-5. Specifically, NRDC sought to include demand reduction induced price effects (“DRIPE”) and non-energy benefits (“NEBs”).⁷ *Id.* In response, Staff, ComEd and Ameren explained that these proposals are either contrary to, or do not comply with,

⁵ For example, ComEd explained that its TRC Test tool, DSM_{ore}, already reflects time differentiated avoided costs. ComEd Objections at 6; ComEd Reply at 9. Yet, in its Response, the Attorney General (“AG”) noted that it is “unsure exactly how ComEd develops and uses its avoided costs.” ComEd Reply at 9. In sum, given that the AG, IPA and CUB are unsure how DSM_{ore} works, the parties should explore this and other issues during workshops, with the goal of presenting a more fully developed proposal in the next Plan filing. *Id.*

⁶ PO at 153 (“The Commission directs the parties to commence workshops, coordinated by Staff, to pursue the IPA’s alternative proposal. Among other things, those workshops should consider whether an additional RFP for energy efficiency programs will be necessary, the duration of any such programs, whether the IL-TRM should govern these types of programs, and how such programs should be evaluated”).

⁷ NRDC also proposed that marginal line losses be included in Ameren’s analysis, a proposal with which ComEd does not take issue.

the TRC Test as defined in Illinois, and, in any event, it is inappropriate to propose fundamental changes to the TRC Test in an electric utility docket (whose purpose is not to revise cost-effectiveness methodologies) when the impact of any changes would extend to the electric and gas utilities subject to the TRC Test. Staff Response at 18-25; ComEd Response at 5-8; Ameren Response at 9. The Proposed Order agrees, and accordingly directed the parties to explore these issues further in workshops where all interested parties could participate. PO at 213-214.

While NRDC's BOE continues to argue that Illinois' TRC Test should be modified to include DRIPE and NEBs, it offers little more than a couple of pages in support of these sweeping changes and proposes no specific DRIPE or NEB values in relation to Ameren's programs (because none exists in the record). NRDC BOE at 1-3. NRDC nevertheless asserts that the Commission should open a new docket if the parties are not able to reach consensus on such values in workshops that would commence following this docket. *Id.* at 3. As described below, however, the Proposed Order reaches the correct conclusion in directing that the parties explore these issues further in workshops. PO at 213-214.

The present docket is not the correct forum to consider changes to the TRC Test methodology. Echoing the procedural and due process concerns of the IPA, ComEd, and other parties, the Proposed Order correctly observes that “[a] significant problem with procurement proceedings is the expedited schedule combined with a relatively large number of contested issues and parties. This makes it difficult for the Commission to deal with complex economic issues, such as those raised by NRDC. As a result, and because not all potentially affected parties are participating in this proceeding, the Commission must again decline to adopt the NRDC's recommendations.” PO at 214. Put another way, the sorts of changes NRDC is proposing to Illinois' TRC Test would, if adopted, reflect fundamental changes to the

determination of cost-effective energy efficiency in Illinois, and therefore should be fully vetted through the Stakeholder Advisory Group (“SAG”), which considers proposed changes to cost-effectiveness analyses that would ultimately impact the Illinois Technical Reference Manual. It is troubling, indeed, that these core changes to the TRC Test are being proposed in an expedited docket without the participation of the customary SAG participants, including Illinois gas utilities. ComEd Reply at 10-11.

The Illinois TRC Test does not include DRIPE. NRDC claims that its DRIPE proposal fits under “other quantifiable societal benefits” in the numerator of the TRC Test. NRDC Objections at 4. While the statute does not define “societal benefits,” a review of energy efficiency best practices and guidance at the national level strongly indicates that DRIPE should not be included as a societal benefit. ComEd Response at 5-6. For example, the National Action Plan for Energy Efficiency, an initiative led by the United States Environmental Protection Agency (“U.S. EPA”), includes the Societal Cost Test (“SCT”), which evaluates the “[b]enefits and costs to all in the utility service territory, state, or nation as a whole.” *Id.* at 6.⁸ Specifically, societal benefits include those that inure to society as a whole, and do not include those savings that only reflect a transfer of wealth between parties. *Id.* For example, tax credits (which are an applicable benefit under the TRC Test) represent a transfer of wealth between the individual taxpayer and society and therefore are not a societal benefit under the SCT. *Id.* Likewise, a reduction in the clearing price of energy that may be associated with energy efficiency also represents a transfer of wealth between power generators and energy consumers, and therefore is not a societal benefit. *Id.*

⁸ Understanding Cost-Effectiveness of Energy Efficiency Programs, p. 3-2, available at <http://www.epa.gov/cleanenergy/documents/suca/cost-effectiveness.pdf>.

Staff also provided additional insight on the issue in this docket, agreeing that DRIPE does not qualify as a “societal benefit” as required under Illinois’ statutorily-defined TRC Test. Staff Response at 20-25. As a result, benefits that inure to only one group of people, rather than to all of society, cannot be reflected in the TRC Test. Staff best illustrates the problems with DRIPE in the following excerpt from its Response:

From a customer’s perspective, a reduction in price is a benefit. If a customer pays \$1 less for a product or service without altering the quantity of the product or service used, that customer has additional money equal to \$1 times the number of units of the item that are purchased to use as desired. However, referring to this as a societal benefit is incomplete as customers are only one type of economic agent in a society. There is also the effect of the lower price on producers. In this case, each unit sold provides \$1 less revenue to a producer, without any corresponding decrease in production costs, and therefore represents a loss from the perspective of the producer. *The result is that on net, society neither benefits nor loses from the lower electric price. From a societal perspective, DRIPE represent nothing more than a transfer of wealth towards customers and away from producers. It is neither a societal benefit nor a societal cost.*

Staff Response at 21 (emphasis added). As such, the issues regarding DRIPE are not a matter of evidentiary proof – the statute simply does not permit inclusion of DRIPE in the TRC Test.

Finally, and contrary to NRDC’s overbroad claims, DRIPE is very rarely included in other jurisdictions’ TRC tests. ComEd Reply at 12. Indeed, ComEd understands that just a few states incorporate a DRIPE adjustment. While NRDC’s BOE attempts to create a different impression by highlighting which wholesale or capacity markets include DRIPE (NRDC BOE at 2), the unrefuted fact remains that just a handful of states incorporate DRIPE, and no evidence has been proffered to suggest that those states are governed by the same statutorily-defined TRC Test used in Illinois (ComEd Reply at 12). For the reasons described above and in ComEd’s Response, Illinois law does not permit DRIPE’s inclusion here. *Id.*; ComEd Response at 5-8. The adjustment should therefore be rejected.

NEBs. Regarding NRDC’s proposed non-energy benefits adder, NRDC’s BOE provides virtually no argument in support of its NEBs adjustment, other than to vaguely assure the Commission that this unsubstantiated adjustment is somehow uncontroversial because it is a societal benefit and should be approved. Yet, Illinois’ statutorily-defined TRC Test requires that societal benefits be “quantifiable.” 20 ILCS 3855/1-10; ComEd Response at 8. NRDC, however, offers no such quantification in this docket, and only claims that Ameren’s 10% adder to account for non-energy benefits is “overly conservative” and should be inflated. NRDC Response at 7-8; ComEd Reply at 12. Proposals based on guesstimates, such as these, should be rejected. ComEd Reply at 12.

To be sure, ComEd does not take issue with inclusion of NEBs generally, as the statutory definition of the TRC Test permits inclusion of “other quantifiable societal benefits.” ComEd, indeed, has already incorporated water saving impacts in measures such as low-flow showerheads, faucet aerators and efficient clothes washers. This was possible because ComEd was able to estimate the amount of water saved and, therefore, could place a monetary value on those savings. While ComEd appreciates NRDC’s desire to expand the list of benefits to be included, ComEd believes that parties should work together through the SAG to quantify additional NEBs with sufficient specificity to permit monetization.

2. Additional cost-effectiveness issues should be addressed in the workshops established by the Proposed Order.

While ComEd and Staff shared similar positions throughout this docket on the energy efficiency issues discussed above, ComEd had some difficulty parsing through the many “sub-exceptions” set forth in Staff’s BOE. Staff’s Exception 2, in particular, is comprised of nine sub-points regarding the TRC Test, while Staff’s Exception 3 sets forth four sub-exceptions, only one of which is described in the BOE. *See generally* Staff BOE at 4-17. While ComEd has

addressed a couple of these points above, the lack of detail regarding certain of these exceptions and short timeframe to prepare the Reply BOE further supports the Proposed Order’s conclusion that workshops are a better forum for exploring these complicated issues – the compressed timeframes of procurement dockets do not lend themselves to exploring complicated cost-effectiveness and evaluation methodologies in a meaningful way.

Even so, ComEd briefly comments on several of Staff’s sub-exceptions below, but nevertheless recommends that these concepts be further explored in workshops.

TRC Net Benefits. Staff has proposed that the TRC Test also be used to measure “net benefits”, which would mean that the legislatively-defined standard for determining whether measures are “cost effective” would now be used for an entirely different purpose – calculating “net benefits.” Staff Objections at 15-17; Staff BOE at 12-14. Yet, as explained in ComEd’s Response, the TRC Test was neither intended nor suited for the measurement of net benefits. ComEd Response at 3. Rather, Section 8-103 of the PUA provides that the TRC Test’s purpose is to assist the utility in selecting which energy efficiency measures and programs should be included within its energy efficiency portfolio.⁹ To this end, the TRC Test serves as an initial (or threshold) indicator for whether the measure or program might be included within the portfolio by indicating, through a simple ratio, whether the benefits exceed the costs.¹⁰ 20 ILCS 3855/1-10; ComEd Response at 4. The issue with Staff’s proposal, then, is that it would attempt to transform this simple threshold determination into a net benefits “ranking” test, a purpose for

⁹ See 220 ILCS 5/8-103(a) (“It is the policy of the State that electric utilities are required to use cost-effective energy efficiency and demand-response measures to reduce delivery load... [C]ost-effective’ means that the measures satisfy the total resource cost test”); ComEd Response at 3-4.

¹⁰ As ComEd’s Response (at 4 fn. 12) notes, the Commission has concluded that, ultimately, cost effectiveness must be demonstrated at the portfolio level rather than the program or measure level for purposes of approving an energy efficiency and demand response plan under Section 8-103 of the PUA. See, e.g., *Commonwealth Edison Co.*, ICC Docket No. 07-0540, Final Order (Feb. 8, 2008) at 28.

which it was not designed. ComEd Response at 4. While ComEd believes that the Proposed Order reaches the correct result in declining to repurpose the TRC Test as Staff suggests, ComEd would also be open to discussing the matter further in workshops, including whether the Utility Cost Test might be a better measure of net benefits.

ComEd also notes that Staff has incorrectly characterized the issue of TRC net benefits in its proposed exceptions language on page 223 of its Attachment A. Specifically, Staff's proposed text states:

Staff argues that any “distortions” that ComEd believes exist in its TRC net benefits calculations are largely due to ComEd's improper treatment of certain costs in the TRC analysis. Staff has raised concerns with ComEd's cost classifications used in the TRC analysis in a number of cases, most recently in Docket No. 12-0544. In that case, the Commission rejected ComEd's approach and agreed with Staff on the cost classification issue for the appliance recycling program, which resulted in the Commission ultimately rejecting the cost-ineffective appliance recycling program from being included in the procurement plan.

Staff BOE Attachment A at 223. The issue to which Staff refers, however, was not cost classification. In Docket 12-0544, ComEd initially analyzed the appliance recycling program as a three-year program. ComEd and Staff ultimately agreed, however, that the program should be analyzed as a one-year program. *Illinois Power Agency*, ICC Docket No. 12-0544, Final Order (Dec. 19, 2012) at 269. Because the program was changed from three years to one year, the program failed the TRC test, and was removed from the list of programs submitted. *Id.* at 270. While a separate cost classification issue was raised by a different party in that docket, the Commission rejected that argument. *Id.* at 269. ComEd's approach regarding cost classification for appliance recycling in that docket was not rejected. *Id.* at 269-270. Staff's exceptions language should not be adopted.

Administrative Cost Adders. While ComEd understands Staff's desire to include administrative cost adders within programs' TRC analyses (Staff BOE at 10-11), no evidence has

been presented in this docket that such a proposal is feasible given the highly compressed timeframe for soliciting proposals, undertaking their review, incorporating feedback from SAG, and integrating the findings into the Section 16-111.5B analysis. Indeed, ComEd does not believe that either time or resources exist to develop useful estimates of evaluation costs for each proposed program, or even to assess the level of administrative oversight that each proposal's vendor will require. At best, ComEd may be able to develop a generic adder applicable to all programs, which would inevitably lead to the same contentious comments directed at Ameren in this docket. ComEd therefore recommends that the issue be discussed further in workshops.

Tracking Administrative Costs. Staff also proposes that the Commission “should direct the utilities to make best efforts to track administrative costs by program in order to aid in future determinations of appropriate assumptions to use in the TRC analyses.” Staff Reply at 22. ComEd suggests, however, that this issue instead be left to the independent evaluator because early estimates of an administrative cost adder would be imprecise at best (and immediately be subject to revision during contract negotiations and final program design). ComEd Reply at 10 fn. 29. In any event, the issue could be addressed further in workshops.

Schedule for Third-Party Bid Process. While Staff has suggested that the utilities control the third-party bid process (Staff BOE at 16-17), the Proposed Order correctly observes that, “to some extent, the schedule for the third party bid process is out of the utilities’ control” (PO at 215). Indeed, under Section 16-111.5B, utilities must file their plans with the IPA by July 15 of each year, which must include proposals for programs that cannot be commenced until the following June (assuming they are accepted by IPA and ICC). Completing the proposal analyses, including stakeholder review in the manner endorsed by parties in this docket, means that utilities must receive proposals in March. Bidders, indeed, are already challenged to provide

robust proposals for programs that they cannot take to the street for 14-15 months. In sum, while ComEd may set the schedule for the third party bid process, ComEd does not control the schedule; rather, marketplace realities largely dictate the process.

II. THE RENEWABLES SUPPLIERS' EXCEPTIONS SHOULD BE REJECTED.

Among the renewable energy resources suppliers that took issue with various aspects of the Solar Renewable Energy Credits ("SREC") and distributed generation ("DG") procurements, only the Renewables Suppliers persist in their highly unique claims regarding (i) the date by which the hourly alternative compliance payment ("ACP") funds should be measured and (ii) special modifications to their members' contracts. As explained below, the Renewables Suppliers' BOE is designed to reap an exclusive benefit only for its members, and should be rejected as contrary to the statute.

A. The Renewables Suppliers' Exceptions Nos. 1 and 2 Are Contrary to Section 1-75(c)(5) and Commission Orders and Should Be Rejected.

As reflected in the Renewables Suppliers' BOE, they have developed an overly complicated and erroneous interpretation of what has been – to date – straightforward statutory language. To be sure, the date by which the IPA determines the amount of hourly ACP funds available for the next procurement year has been understood by parties, without issue, for years. While it was initially unclear to ComEd why the Renewables Suppliers were suddenly advancing an interpretation that contradicted well-established Commission practice, it is clear that this change, coupled with the contract changes proposed in their Exception No. 3, is designed to lay claim to additional hourly ACP funds for the Renewables Suppliers – at the expense of other renewable energy resources suppliers. As explained below, the Proposed Order should not be

revised to implement the incorrect change proposed in the Renewables Suppliers' Exceptions Nos. 1 and 2.¹¹

As an initial matter, the Proposed Order adopts the clarification proposed by ComEd and subsequently agreed to by the IPA, which merely incorporates the statutorily-set dates for determining what amount of hourly ACP funds is available for the next procurement year. Specifically, Section 1-75(c)(5) instructs that “the Agency shall increase its spending on the purchase of renewable energy resources to be procured by the electric utility *for the next plan year* by an amount equal to the amounts collected by the utility under the alternative compliance payment rate or rates *in the prior year ending May 31.*” 20 ILCS 3855/1-75(c)(5) (emphasis added). Put simply, this provision instructs the IPA, at the time it is preparing a procurement plan (mid-year), to increase the spending under a proposed procurement plan using available hourly ACP funds. In the present docket, then, the IPA submitted the 2015 Plan (June 1, 2015 – May 31, 2016) in September 2014, and the most recent procurement year for which the utilities have collected hourly ACPs is May 31, 2014. These statutorily-established dates thus facilitate the development and meaningful review of a proposed plan by identifying, with certainty, the amount of hourly ACP funds available. To ComEd’s knowledge, all procurement plans to date have followed this same convention, and the IPA and Proposed Order concur. PO at 277.¹²

¹¹ While Exception No. 2 reflects the core of the Renewables Suppliers’ argument on this issue, ComEd also objects to Exception No. 1 because it incorporates the wrong date of May 31, 2015. *See* Renewables Suppliers BOE at 3.

¹² The Proposed Order at 277 states:

The [Renewables Suppliers] proposed language regarding how available hourly ACP funds designated for a DG REC procurement would intersect with a potential purchase of curtailed RECs. ComEd proposed different language intended to accomplish the same goal. While the IPA endorsed the [Renewables Suppliers]’ proposed clarifications in Response, it appears to the IPA that ComEd’s proposed language is more consistent with the law and the utilities’ actual hourly ACP collection process, and the IPA supports ComEd’s proposed revisions to page 3 of the Plan. It appears the [Renewables Suppliers] did not reply to ComEd’s proposed language. Given that

Ignoring the plain language of the statute, however, the Renewables Suppliers instead myopically focus on the following single sentence in the Order on Rehearing in Docket No. 13-0546, which addressed the 2014 Plan: “Assuming a curtailment were declared for a year, the utility’s accumulated balance of hourly ACP funds at the start of the year (June 1) would be used to purchase curtailed RECs during the year.” Renewables Suppliers BOE at 5, citing *Illinois Power Agency*, ICC Docket No. 13-0546, Order on Rehearing (June 17, 2014) (“13-0546 Order on Rehearing”) at 18. As an initial matter, however, Docket No. 13-0546 did not consider the issue raised by the Renewables Suppliers here – *i.e.*, the date by which the hourly ACP funds are identified. Rather, the language cited by the Renewables Suppliers’ came from their proposal in Docket No. 13-0546, which focused on the price paid for curtailed Renewable Energy Credits (“RECs”) (and not on changing the amount of hourly ACP funds to which they had access). Moreover, and in any event, this language can be read in harmony with the statutory framework set forth in Section 1-75(c): “the utility’s accumulated balance of hourly ACP funds at the start of the year (June 1)” means the balance of hourly ACP funds at the start of the 2014 Plan year (June 2014-May 2015), which (pursuant to Section 1-75(c)) means the hourly ACP funds collected from June 2012 to May 2013. The Renewables Suppliers never sought in Docket No. 13-0546 to change the amount of hourly ACP funds to which they had access, only the price paid for their RECs.

Accordingly, the Renewables Suppliers’ proposal that a September 2015 procurement of distributed generation RECs be approved using hourly ACP funds as of May 31, 2015 (rather than as of May 31, 2014) must be rejected as contrary to Section 1-75(c). As a practical matter, moreover, the proposal cannot be implemented when the curtailment contingency is fully

the two competing sets of language are intended and apparently would achieve the same goal, the Commission approves the language proposed by ComEd and endorsed by the IPA.

considered. In other words, because the funds available for the September 2015 DG REC procurement must first be reduced by any hourly ACP funds needed to complete the purchase of all *curtailed* 2014 Plan year RECs (June 2014-May 2015) and all *curtailed* 2015 Plan year RECs (June 2015-May 2016), the amount of hourly ACP funding available for the DG procurement would not be certain until August 2016 (if there is a curtailment for the 2015 Plan year), which is nearly one year after the planned DG procurement event. Indeed, the complexities and timing of this process are due, in large part, to the variable pricing of curtailed RECs that was proposed by the Renewables Suppliers in Docket No. 13-0546 and approved therein.¹³ If the Commission were to adopt this latest request by the Renewables Suppliers, moreover, it would reduce the IPA's ability to optimize its procurements for RECs using hourly ACP funds in future plan years from suppliers other than the Renewables Suppliers. In other words, if the Renewables Suppliers' contracts have been curtailed, then the amount of the collected hourly ACP funds that remains after satisfying the Renewables Suppliers will not be known until after the start of the plan year.

To adhere to the process prescribed by Section 1-75(c) – by which the amount of hourly ACP funds available for REC purchases is fixed and known by the IPA when developing procurement plans – the Commission should leave the Proposed Order's conclusion undisturbed and reject the Renewables Suppliers' Exceptions Nos. 1 and 2, which are contrary to the statute and would benefit only a small group of suppliers at the expense of all other potential suppliers.

B. The Renewables Suppliers' Exception No. 3 Should Be Rejected.

Equally unique to the Renewables Suppliers is their request that the Commission alter their future curtailment contract terms. Renewables Suppliers BOE at 10. As an initial matter,

¹³ If the changes to the hourly ACP contract that the Renewables Suppliers have proposed in Exception 3 also are implemented, then the amount of hourly ACP funds available will not be known until all of the Renewables Suppliers have completed their deliveries for that contract year, which could be even later than September 2016.

ComEd explained in its Response that the request was inappropriate, and would remove the only modest performance clause in the hourly ACP contract. ComEd Response at 21-22. Rather than cherry-picking favorable terms from the base contract, all the terms, including performance obligations, should be used. ComEd Response at 21-22. In addition, as explained in connection with Renewables Suppliers' Exceptions Nos. 1 and 2, variable pricing coupled with extended delivery deadlines would reduce the IPA's ability to optimize its future plan year procurements for RECs from suppliers other than the Renewables Suppliers.

While the Proposed Order correctly declines to approve the changes requested by the Renewables Suppliers, it nevertheless expresses a desire that the parties further work toward resolution of the Renewables Suppliers' contract issues. PO at 278. In response, ComEd proposed in its BOE that suppliers seeking changes to the standard contract should direct their comments to the utility, IPA and Staff, rather than just the utility, and have the utility, IPA and Staff consider the comments and, if appropriate, work out changes to the standard contract (on behalf of all suppliers). ComEd BOE at 7-8. This process ensures that interested parties are included in the process of considering changes, while also relieving the utility from the role of sole clearinghouse for every unique change proposed by suppliers. Accordingly, ComEd requests that its exception regarding this issue be adopted.

III. THE PROPOSED ORDER CORRECTLY REJECTS THE SARGAS PROPOSAL TO CONDUCT AN UNLAWFUL COMPETITIVE PROCUREMENT PROCESS FOR CLEAN COAL.

The Proposed Order correctly rejects the proposal by Sargas, Inc. ("Sargas") for a clean coal procurement. PO at 301. As explained at great length by the IPA, Staff, Ameren, the Illinois Competitive Energy Association ("ICEA"), the Retail Energy Supply Association ("RESA"), and the Illinois Industrial Energy Consumers ("IIEC"), as well as ComEd, the

proposal is unlawful, and the Proposed Order’s conclusion is therefore inevitable and correct. PO at 291-301.

Although Sargas nevertheless filed a BOE taking exception to the Proposed Order’s conclusion on this issue, it is notable that Sargas’ argument essentially consists of *only one “substantive” paragraph*, which does nothing more than claim, without support, that it is a “clean coal facility” under Illinois law. Sargas BOE at 1. Regardless of whether this may or may not be the case, however, Illinois law does not authorize the IPA to consider sourcing agreements with a generic “clean coal facility.” Section 1-75(d) of the IPA Act provides for procurement from only two kinds of clean coal facilities – the initial clean coal facility and certain retrofitted coal facilities previously owned by Illinois utilities. 20 ILCS 3855/1-75(d). It is undisputed that the Sargas facility – still to be constructed – is neither. Section 1-75(d), moreover, does not otherwise authorize a competitive procurement process for clean coal generally. Further, this alleged “competitive” procurement is hardly competitive, with Sargas seemingly to be the only participant. The Proposed Order correctly concludes, as it must:

Assuming for the moment that the proposed Sargas facility qualified as a clean coal facility under Illinois law, there is essentially no discussion of how the IPA or the Commission would develop or evaluate a sourcing agreement with such a clean coal facility. This is in stark contrast to the detailed explanation of the requirements for, the approval process, and associated sourcing agreements associated with the initial clean coal facility and the re-powered and retrofitted coal power plants previously owned by Illinois utilities which qualify as clean coal facilities. The Commission finds this lack of detail a barrier to any evaluation.

PO at 301.

Finally, as the Proposed Order also notes, “courts appreciate an agency’s experience and expertise in a given area and therefore will give substantial deference to its interpretation of an ambiguous statute it administers and enforces.” PO at 297; Sargas Objections at 6 (quoting *Ill. Consolidated Tele. Co. v Ill. Commerce Comm’n*, 95 Ill. 2d 142, 152-53 (1983)). “[A]lthough

they are ‘not binding on the courts, an agency’s interpretations are an informed source for ascertaining the legislature’s intent in enacting the statute.’” *Id.* Consistent with these principles, the Plan’s analysis and conclusions regarding Sargas should prevail. PO at 297. “The Agency does not have a mechanism for considering sourcing agreements from a standard, non-delineated ‘clean coal facility’ for inclusion in its Plan, and Sargas has not submitted sourcing agreements to the Agency for consideration.” Plan at 96. Furthermore, “the Agency believes it would not be possible or wise to conduct a competitive procurement to solicit sourcing agreements for a ‘clean coal facility.’” Plan at 97.

The Proposed Order thus correctly rejects the proposal by Sargas for a clean coal procurement. PO at 301.

IV. CONCLUSION

Based on the record and the arguments made herein and in its BOE, ComEd respectfully requests that the Proposed Order be revised as set forth in its exceptions.

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Respectfully submitted,

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