

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS POWER AGENCY	:	
	:	
Petition for Approval of the 2015 IPA	:	Docket No. 15-0541
Procurement Plan pursuant to	:	
Section 16-111.5(d)(4) of the Public	:	
Utilities Act	:	

STAFF OF THE ILLINOIS COMMERCE COMMISSION
REPLY TO RESPONSES TO OBJECTIONS TO THE ILLINOIS POWER AGENCY'S
2016 PROCUREMENT PLAN

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Table of Contents

	<u>Page</u>
I. BACKGROUND	1
II. ARGUMENT	3
A. The Action Plan [Section 1.4]	3
B. Programs for which Ameren Illinois asserts the costs exceed the cost of supply [Section 7.1.5.3]	6
C. ComEd Identification of “Performance Risk” [Section 7.1.6.4]	10
D. Available Renewables Resources Budget and LTPPA Curtailment [Section 8.2]	13
III. CONCLUSION.....	14

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Pursuant to the October 6, 2015 Notice of Schedule and Notice of Administrative Law Judges Ruling, the Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, respectfully submits this Reply to Responses to Objections to the Illinois Power Agency’s (“IPA”) 2016 Procurement Plan (“Plan” or “IPA Plan”). Staff also submits the Affidavit of James Zolnierek in support of facts and non-legal matters contained herein.

I. BACKGROUND

On September 28, 2015, the IPA filed its Plan for the five year procurement planning period from June 2016 through May 2021 with the Illinois Commerce Commission (“Commission”) thereby initiating this docket.

On or about October 5, 2015, pursuant to Section 16-111.5(d)(3) of the Public Utilities Act (“PUA”), Staff and the following five parties served on each other and filed Responses and/or Objections to the Plan:

Ameren Illinois Company (“Ameren Illinois,” “Ameren,” or “AIC”),

Commonwealth Edison Company (“ComEd”),
Environmental Law and Policy Center (“ELPC”),
Mid American Energy Company (“MEC” or “MidAmerican”) and
Renewables Suppliers¹

On October 6, 2015, the Chief Administrative Law Judge of the Commission provided notice that, “pursuant to Section 16-111.5(d)(3) of the Public Utilities Act, no hearing in the above-referenced matter is determined to be necessary.” (October 6, 2015, Notice of Chief Administrative Law Judge’s Ruling.) A Notice of Schedule and Notice of Administrative Law Judges Ruling provides for the filing of: Responses to Objections (“Response”) and Replies to Responses (“Reply”), due October 20, 2015 and October 30, 2015, respectively. (October 6, 2015, Notice of Schedule and Notice of Administrative Law Judges Ruling.)

On October 20, 2015 Staff and the following six parties served on each other and filed Responses:

Ameren
ComEd
ELPC
IPA
Renewables Suppliers and
Wind on the Wires² (“WOW”)

¹ The Renewables Suppliers are comprised of: Invenergy LLC and its affiliated project companies Grand Ridge Energy IV LLC and Invenergy Illinois Solar; and Next Energy Resources, LLC and its subsidiary project company FPL Energy Illinois Wind, LLC. (Renewables Suppliers Objections, 1.)

² Wind on the Wires filed no objections to the IPA Plan. WOW filed a petition to intervene in this matter on October 16, 2015.

Staff's Reply to the Response filed by ComEd, the IPA, the Renewables Suppliers, and WOW is set forth below.³ The absence of a Staff response or reply to arguments or positions made in a parties' Objections or Response, does not imply that Staff agrees or accepts that argument.

II. ARGUMENT

A. The Action Plan [Section 1.4]

Response to the Renewables Suppliers and WOW⁴

The Renewables Suppliers and WOW take issue with IPA Plan Action item no. 7. Action item no. 7 asks the Commission to do the following:

Approve pro-rata curtailment of ComEd and/or Ameren Illinois' 2010 long-term power purchase agreements for renewable energy in the unlikely event that the updated March 2016 expected load forecast indicates that such a curtailment is necessary. This forecast will form the basis for pro-rata curtailment of long term renewable contracts assuming consensus is reached among the parties identified in Item 2 above. Otherwise, the July 2015 forecast will form the basis for curtailment.

(IPA Plan, 7.) Action item no. 7, references Action item no. 2 which provides as follows:

Require the utilities to provide an updated load forecast by March 15, 2016 which will be preapproved by the ICC as part of the approval of this Plan, subject to the review of the IPA. The consensus of each utility, the IPA, the ICC Staff, and the Procurement Monitor will be required if a utility load forecast triggers the curtailment of the Long-Term Power Purchase Agreements.

³ Consistent with the Administrative Law Judges October 6, 2015 Ruling, the section headings and sections of the IPA Plan at issue are indicated in bold and brackets [] below, respectively.

⁴ The respective party's Response being replied to is indicated in bold.

(IPA Plan, 6.) Both the Renewables Suppliers and WOW argue that action items no. 2 and no. 7 are contrary to Section 16-111.5(d)(4) of the PUA. (Renewables Response, 8; WOW Response, 4.) The Renewables Suppliers argue that “[p]re-approving’ a future forecast that the Commission will never review ... does not constitute expressly approving the forecast use in the Plan.” (Renewables Suppliers, 8.) WOW argues that “the statute vests the Commission – not the IPA, ICC Staff, the utilities or the Procurement Monitor – with the authority to approve the load forecasts used in the procurement plan.” (WOW Response, 4.) Contrary to the Renewables Suppliers’ and WOW’s arguments, Action items no. 2 and no. 7 do not conflict with the PUA.

First, Section 16-111.5(d)(4) of the PUA states:

The Commission shall approve the procurement plan, including expressly the forecast used in the procurement plan, if the Commission determines that it will ensure adequate, reliable, affordable, efficient, and environmentally sustainable electric service at the lowest total cost over time, taking into account any benefits of price stability.

220 ILCS 5/16-111.5(d)(4). It is Staff’s position that the word “forecast” in Section 16-111.5(d)(4) refers to the mathematical models and methods used to derive forecasted quantities. Therefore, IPA Plan action items no. 2 and no. 7 are consistent with Section 16-111.5(d)(4) of the PUA. To the extent to which there would be any controversy over a forecast used in a procurement plan, it would be a dispute about the mathematical models and methods used rather than the output of those models and methods. For example, one cannot reasonably argue against a forecasted quantity of 13,000,000 MWH on the grounds that “thirteen is an unlucky number.” As such, the Commission properly should be resolving disputes over models and methods and not over numbers. To the

extent that there is a dispute over the meaning of the word “forecast” the 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. Illinois Consolidated Telephone Co. v. Illinois Commerce Commission, 95 Ill. 2d 142, 152-53 (1983).

Second, Section 16-111.5(b)(4) of the PUA provides that “[t]he procurement plan shall include for load requirements included in the procurement plan, the process for (i) hourly balancing of supply and demand and (ii) the criteria for portfolio re-balancing in the event of significant shifts in load.” 220 ILCS 5/16-111.5(b)(4). (emphasis added). Beginning with the IPA’s first procurement plan (Docket 08-0519), the Commission has approved the use of updated load forecasts to address the potential for significant shifts in load. The Commission also approved the use of updated load forecasts in the IPA’s second procurement plan (Docket No. 09-0373). For both plans, the Commission approved the use of updated load forecasts and a process for determining whether rebalancing was necessary which included among other things the IPA convening a meeting between Commission Staff, the utilities, and the procurement administrator to determine whether rebalancing of the portfolio was necessary. The Commission’s orders stated that such a process using updated load forecast was “deemed to be reasonable.” (IPA Petition for Approval of 2009 Plan, ICC Order Docket No. 08-0519, 59 (January 7, 2009); IPA Petition for Approval of 2010 Plan, ICC Docket No. 09-0373, 166 (December 28, 2009).) Also, as Staff pointed out in its Response (Staff Response, 4-5.), the

Commission recently in Docket No. 13-0546 rejected a similar challenge made by the Renewables Suppliers.⁵ (Staff Response, 4-5.) The Commission noted in that case:

The Commission also observes that the IPA is an independent state agency created specifically to develop the Procurement Plan as well as to implement the approved Plan. While the Staff, Procurement Administrator, and Procurement Monitor participate in and oversee the IPA's activities, the IPA has responsibility for many of the procurement activities. Despite the concerns expressed by the [Renewables Suppliers], the Commission is comfortable the process it has previously used has been and will continue to be effective and successful.

As in previous procurement proceedings, between the IPA, Staff, and ComEd/AIC (as well as the Procurement Administrator and Monitor, should they be retained), the Commission believes that technical issues related to load forecasting will be objectively vetted and appropriately addressed. The Commission rejects the RS' proposals.

(IPA Petition for Approval of 2014 Plan, ICC Order Docket No. 13-0546, 198-199 (December 18, 2013).)

Therefore, despite the Renewables Suppliers' and WOW's claims to the contrary, IPA Plan Action items no. 2 and no. 7 are consistent with Section 16-111.5(d)(4) and should be approved.

B. Programs for which Ameren Illinois asserts the costs exceed the cost of supply [Section 7.1.5.3]

Response to IPA

⁵ The Renewables Suppliers in Docket No. 13-0546 consisted of the Renewables Suppliers in this pending case plus: Algonquin Power Co. and its subsidiary project company GSG 6.LLC; EDP Renewables North America LLC and its subsidiary project companies Blackstone Wind Farm, LLC, Meadow Lake Wind Farm, LLC, Meadow Lake Wind Farm II, LLC, Meadow Lake Wind Farm III LLC and Meadow Lake Wind Farm IV LLC. (Renewables Suppliers' Petition to Intervene, October 1, 2013.)

The IPA argues that two energy efficiency programs for Ameren which pass the total resource cost (“TRC”) test (i.e. the programs are cost effective),⁶ but would cost Ameren customers more than procuring supply, must be included in the IPA Plan. (IPA Response, 4.) The IPA relies in part upon Section 16-111.5B(a)(5) of the PUA to support its position that such programs must be included in the Plan. (Id. 8.) The IPA also argues that Section 16-111.5B of the PUA, unlike Section 8-103 of the PUA, does not contain a rate impact cap; therefore the two programs must be included in the Plan. (Id. 7-8.) Finally, the IPA argues that Ameren is asking the Commission to approve a new test for which there has been no vetting. (Id. 6.) In essence, the IPA’s position is that all cost effective energy efficiency programs and measures must be included in a procurement plan, without exception.

The plain language of the statute does not support the IPA’s position. With respect to the IPA’s argument concerning Section 16-111.5B(a)(5) of the PUA, that section states:

Pursuant to paragraph (4) of subsection (d) of Section 16-111.5 of this Act, the Commission shall also approve the energy efficiency programs and measures included in the procurement plan, including the annual energy savings goal, if the Commission determines they fully capture the potential for all achievable cost-effective savings, to the extent practicable, and otherwise satisfy the requirements of Section 8-103 of this Act.

220 ILCS 5/16-111.5B(a)(5). The IPA argues that “the law directs the Commission to include those programs necessary to fully capture the potential for all achievable cost

⁶ For purposes of Section 5/16-111.5B of the PUA, the term “cost effective” has the meaning set forth in subsection (a) of Section 8-103 of the PUA. (220 ILCS 5/16-111.5B(b).) Section 8-103(a) of the PUA defines “cost effective” to mean measures that satisfy the “total resource cost test.” Section 8-103(a) further provides that “total resource cost” test for purposes of Section 8-103 of the PUA has the meaning set forth in the IPA Act. (220 ILCS 5/8-103(a).) The “total resource cost” test is defined in Section 1-10 of the Illinois Power Agency Act (“IPA Act”). 20 ILCS 3855/1-10.

effective savings, to the extent practicable.” (IPA Response, 8.) Despite the IPA’s claims to the contrary, that section of the PUA does not require all cost effective energy efficiency programs and measures to be included in a procurement plan. That section only states that for those energy efficiency programs and measures included in the procurement plan they shall be included in the procurement plan “if the Commission determines they fully capture the potential for all achievable cost-effective savings, to the extent practicable, and otherwise satisfy the requirements of Section 8-103 of this Act.” (Id., emphasis added.) The more relevant section is Section 16-111.5B(a)(4) of the PUA, which states:

The Illinois Power Agency shall include in the procurement plan prepared pursuant to paragraph (2) of subsection (d) of Section 16-111.5 of this Act energy efficiency programs and measures it determines are cost-effective and the associated annual energy savings goal included in the annual solicitation process and assessment submitted pursuant to paragraph (3) of this subsection (a).

220 ILCS5/16-111.5B(a)(4). The word “all” does not appear in that section. That section does not state that the IPA shall include in the plan all cost effective energy efficiency programs and measures it determines are cost effective. It merely requires energy efficiency programs and measures included in a plan to be cost effective. In terms of formal logic, cost effectiveness is a necessary but not a sufficient condition for inclusion in a plan.

With respect to the IPA’s argument that Section 16-111.5B of the PUA does not contain a rate impact cap and therefore there is no basis to exclude cost effective energy efficiency programs and measures, the IPA fails to consider that not only must energy efficiency programs and measure be cost effective, but in order for the Commission to approve a procurement plan, the IPA must demonstrate that including the energy

efficiency programs and measures in a procurement plan will contribute to the objectives set forth in Section 16-111.5(d)(4) of the PUA. Section 16-111.5(d)(4) of the PUA requires a showing that the proposed procurement will "ensure adequate, reliable, efficient, and environmentally sustainable electric service at the lowest cost over time, taking into account any benefits of price stability." 220 ILCS 5/16-111.5(d)(4). Clearly, including in a procurement plan programs and measures that would cost Ameren customers more than procuring the supply does not meet such a standard.

In response to the IPA's argument that Ameren is proposing a "entirely new test" (IPA Response, 6), Staff disagrees. A utility analyzing whether programs and measures exceed the cost of supply is not subjecting the programs and measures to a new test. Rather this analysis is a component of a thorough determination of whether including the programs and measures in the plan meets the long established standard set forth in Section 16-111.5(d)(4) of the PUA.

Finally, as Staff discussed in its Objections to the IPA Plan, while all the programs or measures included in the Plan must be cost-effective using the Illinois TRC test, the fact that the statute sets forth a number of additional analyses⁷ to include with the utilities' energy efficiency assessments shows that the IPA and the Commission should consider information other than the results from the TRC test when determining which programs or measures to approve as part of a procurement plan. (Staff Objections, 9.) Those

⁷ The additional analysis requested include among other things: (1) analysis showing that the new or expanded cost-effective energy efficiency programs or measures would lead to a reduction in the overall cost of electric service, and (2) analysis of how the cost of procuring additional cost-effective energy efficiency measure compares over the life of the measures to the prevailing cost of comparably supply. (220 ILCS 5/16-111.5B(a)(3)(D)-(E).)

analyses are relevant when applying the standard set forth in Section 16-111.5(d)(4) of the PUA. The opposite cannot be true; otherwise it would mean that the legislature requires utilities to perform totally irrelevant and pointless analyses, only to have them disregarded by the Commission. In Illinois, it is a well-established rule of statutory construction that courts shall avoid any construction that renders a statute meaningless or void. (Portwood v. Ford Motor Co., 292 Ill. App. 3d 478, 487, 685 N.E.2d 941, 947 (1997) aff'd, 183 Ill. 2d 459, 701 N.E.2d 1102 (1998), citing *Hernon*, 149 Ill.2d at 195, 172 Ill.Dec. 200, 595 N.E.2d 561, citing *Harris v. Manor Healthcare Corp.*, 111 Ill.2d 350, 362–63, 95 Ill.Dec. 510, 489 N.E.2d 1374 (1986)). Because we presume the legislature did not intend to adopt a meaningless provision, we cannot accept IPA's position. Therefore, as Staff argued in its Objections, the Commission should consider passing the TRC test to be a minimum requirement in deciding whether the programs or measures should be approved as part of the Plan. (Staff Objections, 9.)

Based upon the above and arguments made in Staff's Objections and Response, the Commission should accept Ameren's recommendation to exclude from the IPA Plan cost-effective energy efficiency programs which pass the TRC test, but exceed the cost of supply.

C. ComEd Identification of "Performance Risk" [Section 7.1.6.4]

Response to IPA

The IPA takes issue with the statement made by Staff in its Objections that cost-effectiveness is merely the minimum requirement in determining whether programs or measures should be included in an IPA procurement plan. (IPA Response, 9.) The IPA,

as it did with respect to the two Ameren energy efficiency programs and measures, argues “the law requires that approved IPA procurement plans ‘fully capture the potential for all achievable cost-effective savings to the extent practicable,’” (Id.) As discussed above, the section of the PUA that IPA cites does not require all cost effective energy efficiency programs and measures to be included in a procurement plan. Rather, Section 16-111.5B(a)(5) of the PUA states only that energy efficiency programs and measures shall be included in the procurement plan “if the Commission determines they fully capture the potential for all achievable cost-effective savings, to the extent practicable, and otherwise satisfy the requirements of Section 8-103 of this Act.” 220 ILCS 5/16-111.5B(a)(5). The PUA simply does not require all cost effective energy efficiency programs and measures to be included in a procurement plan. Furthermore, by the nature of the programs being designated as “performance risk,” they cannot be said to satisfy the “achievable” requirement in Section 16-111.5B(a)(5) of the PUA. Also, as discussed above, the standard for determining whether to include energy efficiency programs and measures in a procurement plan is set forth in Section 16-111.5(d)(4) of the PUA. Section 16-111.5(d)(4) of the PUA requires a showing that the proposed procurement will “ensure adequate, reliable, efficient, and environmentally sustainable electric service at the lowest cost over time, taking into account any benefits of price stability.” 220 ILCS 5/16-111.5(d)(4). Staff’s position that cost-effectiveness is merely the minimum requirement in determining whether programs or measures should be included in a procurement plan is consistent with that standard.

Response to ComEd

ComEd takes issue with Staff's recommendation in its objections that (1) the Commission direct ComEd and Ameren to take all reasonable steps to reduce the financial risk to ratepayers through more effective pay-for-performance contracting (ComEd Response, 7) and (2) direct ComEd and Ameren to take all reasonable steps to make adjustments to their Total Resource Cost ("TRC") test analysis to reflect reasonable assumptions (consistent with the approach used by Ameren). (Id. 8.) ComEd proposes to address pay-for-performance contracting in workshops. (Id.) If the Commission accepts the IPA's proposal to include the ComEd performance risk programs as part of the IPA Plan, then it should direct ComEd to make adjustments to its contracts now and not defer resolution pending the outcome of the workshop process. Winning bidders should not be significantly compensated prior to demonstrating achieved savings or, if no measures are in place to compensate utilities and/or ratepayers, for performance failures. Neither utilities, nor ratepayers should pay for the programs that ComEd has identified as subject to performance risk without such protections.

With respect to the issue of TRC test analysis, ComEd also proposes to address the issue in workshops. (ComEd Response, 8.) The Commission should also reject ComEd's workshop proposal on this issue as there is no need for such a workshop. Staff's adjustments are not unspecified as ComEd claims. The adjustment to the TRC tests are simply that TRC tests should be consistent with the benefits that a utility assumes. ComEd submitted TRC tests for four programs included in the IPA Plan that ComEd indicated would not produce the benefits assumed in the TRC tests. ComEd should have adjusted the TRC tests so that they are consistent with the benefits that

ComEd assumes. Also, when utilities are aware of errors in TRC analysis, then utilities need to make adjustments to TRC tests to correct for those errors in their submissions to the IPA. The Commission should not rely on incorrect TRC tests pending the outcome of the workshop process.

Based upon the above and arguments made in Staff's Objections and Response, the Commission should exclude ComEd's performance risk programs from the Plan, direct ComEd and Ameren to take all reasonable steps to reduce the financial risk to ratepayers through more effective pay-for-performance contracting, and direct ComEd and Ameren to take all reasonable steps to make adjustments to their TRC test analysis to reflect reasonable assumptions (consistent with the approach used by Ameren).

**D. Available Renewables Resources Budget and LTPPA⁸ Curtailment
[Section 8.2]**

See above, II., A. The Action Plan [Section 1.4]

⁸ LTPPA stands for Long Term Power Purchase Agreement.

III. CONCLUSION

Staff respectfully requests that the Illinois Commerce Commission consider Staff's Reply to Responses to Objections to the IPA's 2016 Procurement Plan and the various recommendations contained herein.

Respectfully submitted,

/s/ _____

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AFFIDAVIT OF JAMES ZOLNIEREK

State of Illinois)
)
County of Sangamon)

The undersigned, under oath, deposes and states as follows:

1. My name is James Zolnierек. I am employed by the Illinois Commerce Commission as the Director of the Commission's Policy Division.
2. I have read the Staff of the Illinois Commerce Commission's Reply to Responses to Objections to the Illinois Power Agency's 2016 Procurement Plan ("Reply").
3. I have personal knowledge of the facts and matters discussed in the Reply and to the best of my knowledge, information and belief, the facts and non-legal opinions expressed in the Reply are true and accurate and, if sworn as a witness, I could testify concerning them.

Further affiant sayeth not.


James Zolnierfek

Subscribed and sworn to before me

This 29th day of October, 2015.


Notary Public

