

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Power Agency)	
)	
)	ICC Docket No. 15-0541
Petition for Approval of the 2016 IPA)	
Procurement Plan Pursuant to)	
Section 16-111.5(d)(4) of the Public Utilities Act)	

**BRIEF ON EXCEPTIONS AND EXCEPTIONS OF
THE PEOPLE OF THE STATE OF ILLINOIS**

The People of the State of Illinois (“AG” or “the People”), by Lisa Madigan, Attorney General of the State of Illinois, pursuant to the schedule set by the Administrative Law Judge and Section 200.830 of the Illinois Commerce Commission’s (“the Commission” or “ICC”) Rules of Practice, 83 Ill. Admin. Code § 200.830, hereby file their Brief on Exceptions (“BOE”) and Exceptions to the November 13, 2015 Proposed Order relating to the 2016 Procurement Plan presented by the Illinois Power Agency (“IPA”) to the Commission for approval.

I. INTRODUCTION

The People’s BOE addresses the Proposed Order’s resolution of two issues related to the IPA’s requested inclusion of energy efficiency programs to its Procurement Plan under Section 16-111.5B of the Public Utilities Act (“the Act”): (1) whether to exclude two of Ameren’s energy efficiency programs from the Plan when a utility asserts that the cost of these programs exceeds the cost of electric supply; and (2) whether a utility should be required to conduct Total Resource Cost (“TRC”) test analyses for programs a utility determines are duplicative to existing programs. As discussed below, the People urge the Commission to reject the Proposed Order’s conclusions on these points as inconsistent with Section 16-111.5B of the Act.

II. EXCEPTIONS AND PROPOSED LANGUAGE

A. EXCEPTION NO. 1 – Section 7.1.5.3 -- Programs for Which Ameren Illinois Asserts the Cost Exceeds the Cost of Supply

Section 16-111.5B of the Public Utilities Act (“the Act”) provides that IPA procurement plans “shall also include an assessment of opportunities to expand the programs promoting energy efficiency measures that have been offered under plans approved pursuant to Section 8-103 of this Act or to implement additional cost-effective energy efficiency programs or measures.” 220 ILCS 5/16-111.5B(a)(2). Utilities are charged with

...annually provid(ing) to the Illinois Power Agency by July 15 of each year, or such other date as may be required by the Commission or Agency, an assessment of cost-effective energy efficiency programs or measures that could be included in the procurement plan. The assessment shall include the following:

(A) A comprehensive energy efficiency potential study for the utility's service territory that was completed within the past 3 years.

(B) Beginning in 2014, the most recent analysis submitted pursuant to Section 8-103A of this Act and approved by the Commission under subsection (f) of Section 8-103 of this Act.

(C) Identification of new or expanded cost-effective energy efficiency programs or measures that are incremental to those included in energy efficiency and demand-response plans approved by the Commission pursuant to Section 8-103 of this Act and that would be offered to all retail customers whose electric service has not been declared competitive under Section 16-113 of this Act and who are eligible to purchase power and energy from the utility under fixed-price bundled service tariffs, regardless of whether such customers actually do purchase such power and energy from the utility.

(D) 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.

(E) Analysis of how the cost of procuring additional cost-effective energy efficiency measures compares over the life of the measures to the prevailing cost of comparable supply.

(F) An energy savings goal, expressed in megawatt-hours, for the year in which the measures will be implemented.

(G) For each expanded or new program, the estimated amount that the program may reduce the agency's need to procure supply.

220 ILCS 5/16-111.5B(a)(3). This provision of the Act further establishes clear guidelines for determining which energy efficiency programs shall be included in the IPA's annual Procurement Plan. Section 16-111.5B further provides that

In preparing such assessments, a utility shall conduct an annual solicitation process for purposes of requesting proposals from third-party vendors, the results of which shall be provided to the Agency as part of the assessment, including documentation of all bids received. The utility shall develop requests for proposals consistent with the manner in which it develops requests for proposals under plans approved pursuant to Section 8-103 of this Act, which considers input from the Agency and interested stakeholders.

220 ILCS 5/16-111.5B(a)(3). The IPA then, as part of its development of its annual Procurement Plan "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 ILCS 5/16-111.5B(a)(4). "Cost-effective" is specifically defined in this provision as having "the same meaning set forth in subsection (a) of Section 8-103 of this Act. 220 ILCS 5/16-111.5B(b). In defining "cost-effective", Section 8-103 refers to measures that satisfy "the total resource cost test."¹ 220 ILCS 5/8-103(a).

¹ Under the IPA Act, "total resource cost test" or "TRC test" means a standard that is met if, for an investment in energy efficiency or demand-response measures, the benefit-cost ratio is greater than one. The benefit-cost ratio is the ratio of the net present value of the total benefits of the program to the net present value of the total costs as calculated over the lifetime of the measures. A total resource cost test compares the sum of avoided electric utility costs, representing the benefits that accrue to the system and the participant in the delivery of those efficiency measures, as well as other quantifiable societal benefits, including avoided natural gas utility costs, to the sum of all

Finally, the Act clearly defines the Commission’s obligations for evaluating energy efficiency programs included in the IPA’s proposed Plan. The Act 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) (emphasis added). These provisions make clear that programs that are cost-effective (except for those deemed competing or duplicative) shall be included in the IPA’s annual Plan, assuming they are consistent with the provisions of Section 8-103.

As part of its submittal to the IPA, Ameren requested that two programs that passed the TRC should nevertheless be excluded from the IPA Plan “because the estimated costs of such programs are not less than the prevailing cost of supply.” IPA Plan at 97, citing Appendix B, Ameren Illinois Section 16-111.5B Submittal at 22. The IPA correctly opposed that request, stating:

Illinois law requires the inclusion of programs that the IPA determines to be “cost-effective” through application of the TRC test. Ameren Illinois based their suggestion on Section 16-111.5B(a)(3)(E), which requires the utilities to include an “analysis of how the cost of procuring additional cost-effective energy efficiency measures compares over the life of the measures to the prevailing cost of comparable supply” as part of their Section 16-111.5B submittal. However, this requirement does not create independent grounds for the exclusion of otherwise cost-effective programs in an IPA Plan. Indeed, the Commission is likewise directed to “approve the energy efficiency programs and

incremental costs of end-use measures that are implemented due to the program (including both utility and participant contributions), plus costs to administer, deliver, and evaluate each demand-side program, to quantify the net savings obtained by substituting the demand-side program or supply resources. In calculating avoided costs of power and energy that an electric utility would otherwise have had to acquire, reasonable estimates shall be included of financial costs likely to be imposed by future regulations and legislation on emissions of greenhouse gases. 20 ILCS 3855/1-10.

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.” This statutory cost-effectiveness threshold cannot simply be read out of the law in favor of a utility’s new preferred alternative approach.

IPA Plan at 97. The People concur that the utility’s required submittal of an analysis of “how the cost of procuring additional cost effective energy efficiency measures compares over the life of the measures to the prevailing cost of comparable supply” does not establish an independent ground for excluding energy efficiency programs that are cost-effective under the statutorily defined TRC test.

In its assessment of this issue, the Proposed Order adopts Ameren’s recommendation that energy efficiency programs that a utility determines are more expensive than the cost of supply should be excluded from the IPA’s Plan. Specifically, the Proposed Order states:

At issue is the propriety and the legality of including two EE programs in the Plan that are more expensive than the supply of electricity. The word “efficiency” is “the ability to do something or produce something without wasting materials, time, or energy: the quality or degree of being efficient.” Merriam-Webster.com. It is not “efficient” to procure a source of energy that is more expensive than supply, as such procurement, without other benefits, (and none have been raised here) is wasteful. Additionally, as Staff and Ameren point out, the cost of EE procurement is directly borne by ratepayers.

The Commission further agrees with Ameren’s statutory construction in that the phrase “to the extent practicable” in 220 ILCS 5/16-111.5B(a)(5) gives this Commission the authority to set practical limits on the procurement of EE. If the General Assembly had intended to require all EE plans that passed the TRC Test to be included in an IPA Plan, it would not have used any qualifier at all. The phrase “to the extent practicable” is a qualifying phrase that allows this Commission to exercise judgment and flexibility.

This Commission is further mindful of the fact that ratepayers should not bear the costs of EE programs that are expensive, when no party has pointed to some other benefit to

these programs. Further the SAG has determined that cost-inefficient programs should be eliminated. *See*, Plan at 88. Finally, as Staff has pointed out, rejection of these two programs should send a signal that in the future, EE programs should be competitively priced. The IPA shall exclude these two programs from its Plan.

Proposed Order at 96. While the People support the procurement of supply and energy efficiency resources at the lowest possible price, the Proposed Order's interpretation of the phrase "to the extent practicable" misreads the statute by applying this phrase to specific energy efficiency programs rather than to the goal of capturing "all achievable cost-effective savings." *See* 220 ILCS 5/16-111.5B(a)(5). Further, it would effectively add an additional test to the IPA's and Commission's evaluation of cost-effective energy efficiency program bids that does not exist in the clear language of the statute.

The fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent. The best indication of legislative intent is the statutory language, given its plain and ordinary meaning. *People v. McChriston*, 2014 IL 115310, at ¶ 15 (quoting *People v. Davison*, 233 Ill. 2d 30, 40 (2009)). As noted above, the Commission is obliged to "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 was specifically directed by the General Assembly to include in its Procurement Plan "energy efficiency measures it determines are cost-effective...." 220 ILCS 5/16-111.5B(a)(4). In this proceeding, the IPA made clear in its Plan and Response to Objections that a utility and indeed the Commission cannot simply supplant the required cost-effectiveness test with another related to a utility's assessment of the cost of supply. IPA Plan at 97; IPA Response to Objections at 4-

8. The People concur on this point given the language of Section 16-111.5B(a) of the Act. 220 ILCS 5/16-111.5B(a).

By focusing solely on the cost of supply, Ameren is ignoring the other factors that go into the calculation of the TRC. For example, did the Company simply compare the program cost to the cost of energy, ignoring avoided generation, transmission and distribution and line losses? Did Ameren and Commonwealth Edison Company (“ComEd”) make that calculation using the same inputs and variables? How the cost of supply calculation was conducted by Ameren has clear implications for the utility’s determination that the cost of an energy efficiency program exceeds the cost of supply. It is worth noting, too, that the record does not reveal how Ameren calculated the cost of supply. As such, one utility’s declaration on this point should not form the basis of any new test as to whether an energy efficiency program should be included in or excluded from the IPA’s annual Plan, especially when the IPA did not share this same concern.

The IPA also pointed out in its Response to Objections in this proceeding that “Staff and AIC admit that their suggested approach is a clear departure from existing practice, and that they are now asking the Commission to offer a new interpretation of a law four years into its operation.” *See* IPA Response to Objections at 5, citing Ameren Objections at 15; Staff Objections at 4. The IPA also noted, and the People agree, that subsection 16-111.5B(a)(3)(D) references a comparison of “measures” – not a single measure -- with the cost of comparable supply. 220 ILCS 5/16-111.5B(a)(3)(D); IPA Response to Objections at 4. There simply is no support in the language of the statute or Commission precedent in previous IPA filings to the rejection of selected energy efficiency programs based on Ameren’s cost of supply analysis.

The Proposed Order contradicts the rules of statutory interpretation by citing the dictionary definition of “efficiency” as support for accepting Ameren’s request to reject certain programs. However, Section 8-103 applies the term “cost-effective” to determine whether an energy efficiency plan should be adopted. Cost-effectiveness, not the dictionary definition of “efficiency”, defines which programs are approved as part of the energy efficiency portfolio, and cost-effective is defined as those programs that pass the TRC. The Commission should not refer to a general dictionary definition of “efficiency” when the statute explicitly establishes cost-effectiveness as the required standard.

The Proposed Order’s reliance on the term “practicable” within Section 16-111.5B(a)(5) as support for the exclusion likewise conflicts with the rules of statutory interpretation. When the statute contains undefined terms, it is entirely appropriate to employ a dictionary to ascertain the plain and ordinary meaning of those terms. *People v. McChriston*, 2014 IL 115310, at ¶ 15 (quoting *People v. Davison*, 233 Ill. 2d 30, 40 (2009)). Webster’s defines “practicable” as “capable of being put into practice or of being done or accomplished; feasible.”² Thus, whether something is “practicable” does not appear to refer to any assessment related to price or cost. It instead references the feasibility of including energy efficiency program in a Procurement Plan. The Commission’s prohibitions on including programs deemed to be competing or duplicative of Section 8-103 programs, as discussed in past Commission IPA procurement plan orders³, fits within this notion of “practicable.”

In short, the Proposed Order’s reliance on the phrase “to the extent practicable” for justifying the exclusion of two programs that Ameren has deemed exceed the cost of supply is not supported by the rules of statutory interpretation or Commission precedent. That being said,

² See <http://www.merriam-webster.com/dictionary/practicable>

³ ICC Docket No. 13-0546, Order of December 18, 2013 at 149.

the People point out that in another section of the Proposed Order, the administrative law judges (“ALJs”) correctly find that “It seems to be a simple matter to require the same level of scrutiny for Section 16-111.5B contracts as that which is imposed for Section 8-103 contracts.” Proposed Order at 103-104. In doing so, the Proposed Order directs the utilities to develop a plan to implement use of the same scrutiny for Section 16-111.5B contracts as that for Section 8-103 contracts through workshops conducted by the SAG. *Id.* at 104. The People applaud this finding. It is in this effort that the IPA, stakeholders and the Utilities can ensure that the IPA’s Procurement Plans effectively capture all cost-effective energy efficiency in a way that achieves the maximum benefit to ratepayers at the lowest cost – not in a separate test deemed relevant by one utility.

Proposed Language:

In accordance with the arguments presented above, the People urge the Commission to strike the conclusion at page 93 of the Proposed Order and revise it as follows:

Commission Analysis and Conclusion

The fundamental rule of statutory construction is to ascertain and give effect to the legislature’s intent. The best indication of legislative intent is the statutory language, given its plain and ordinary meaning. *People v. McChriston*, 2014 IL 115310, at ¶ 15 (quoting *People v. Davison*, 233 Ill. 2d 30, 40 (2009)). Section 16-111.5B(a) makes clear that the Commission is obliged to “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). Likewise, the IPA was specifically directed by the General Assembly to include in its Procurement Plan “energy efficiency measures it determines are cost-effective...” 220 ILCS 5/16-111.5B(a)(4).

In this proceeding, the IPA made clear in its Plan and Response to Objections that a utility and indeed the Commission

cannot simply supplant the required cost-effectiveness test with another related to a utility's assessment of the cost of supply. IPA Plan at 97; IPA Response to Objections at 4-8. The Commission concurs with the IPA on this point and rejects Ameren's and Staff's request that a separate test related to a comparison of the cost of supply be employed in determining which cost-effective energy efficiency programs are included in the IPA's annual Procurement Plan.

As noted later in this Order, the Utilities can help ensure that ratepayer bills are least cost while including opportunities for all cost-effective energy efficiency by developing a plan, with the IPA and stakeholders, to require the same level of scrutiny for Section 16-111.5B contracts as that which is imposed for Section 8-103 contracts. In this way, the IPA's Procurement Plans can effectively capture all cost-effective energy efficiency in a way that achieves the maximum benefit to ratepayers at the lowest cost.

B. EXCEPTION NO. 2 -- Section 7.1.4 Whether Ameren Should be Required to Conduct TRC Test Analyses for Programs that are Determined to Duplicate Existing Programs.

At page 85 of the Proposed Order, the ALJs conclude, contrary to the request of the IPA, that a utility need *not* submit TRC analysis information on bids “when they have been found to duplicate existing EE plans.” Proposed Order at 85. In doing so, the Proposed Order rejects the IPA's argument that permitting the Utilities to screen energy efficiency proposals to determine whether they are duplicative or competing with existing Section 8-103 programs prior to conducting any TRC analysis leaves the IPA without the critical TRC cost analysis it relies on to independently assess all of the Utility's findings and recommendations as to what should be included in the annual Procurement Plan, as required under Section 16-111.5B(a)(4) of the Act.

As the IPA correctly pointed out in its Response to Objections, the Commission issued specific directives as to the process for determining whether a proposed Section 16-111.5B program is “duplicative” of an existing utility Section 8-103 program, thereby justifying exclusion from the proposed Procurement Plan:

- First, the utilities receive and review the third party RFP results, and determine which bids are, in the utility's estimation, duplicative or competing. The utilities are under no obligation to identify any programs in this manner.
- Next, in the annual July 15 assessment submitted to the IPA, the utility may exclude programs it has determined are duplicative or competing from the estimated savings calculation (and associated adjustments to the load forecast). However, in their submittals to the IPA, the utilities must: (1) describe the duplicative or competing program; (2) explain why the utility believes it is competing or duplicative; and (3) *provide the IPA with all of the underlying documents as it would for any other bid.*
- In preparing its annual procurement plan, the IPA independently reviews all of the bids submitted by the utilities and determine which bids the IPA believes are duplicative or competing. The IPA identifies all proposed programs to the Commission in its Procurement Plan filing, along with a recommendation on which, if any, programs should be excluded as duplicative or competing.
- After the Plan has been filed, the parties to the Procurement Plan approval litigation—including the IPA—may opine on whether a particular program is duplicative or competing, and the Commission will make the final determination. To the extent that a utility had previously determined that a program is duplicative or competing but the Commission disagrees, the utility will update the estimated energy savings and load forecast to reflect the readmission of the program.

IPA Response to Objections at 13, citing ICC Docket No. 13-0546, Order of December 18, 2013 at 149 (emphasis added). As the IPA correctly noted, Ameren's desire to exclude a TRC analysis if it determines a program is duplicative or competing would only work if the utility had final say on the issue. IPA Response to Objections at 13-14. But as made clear by the procedure approved by the Commission in Docket 13-0546, that is not the case. The IPA retains independent authority to determine whether a program is competing or duplicative. And, because it relies on the utility to conduct the TRC analysis, with the IPA verifying the

assumptions and results but not conducting its own separate TRC analysis⁴, the importance of the utility submitting a TRC analysis for all bids cannot be understated. *See* IPA Response to Objections at 14.

While the Proposed Order directs the Utilities, the IPA and stakeholders to discuss in the SAG how to ensure the IPA has the information it needs, such deliberations are unnecessary. The Utilities should simply be ordered to conduct the TRC analysis first, as ComEd apparently did for this year's procurement plan, and not endorse a process that permits a utility to forego TRC analysis of energy efficiency program bids, as required by Section 16-111.5B(a). In that regard, the People urge the Commission to revise the Proposed Order's finding on this point in accordance with the request of the IPA.

Proposed Language:

In accordance with the arguments presented above and in the IPA's Response to Objections, the People urge the Commission to modify the conclusion at page 85 of the Proposed Order as follows:

Commission Analysis and Conclusion

The IPA is concerned with having enough information up front regarding an EE program and Ameren is concerned with the time and expense involved in conducting TRC analyses of bids made by entities that do not even follow the directions on its RFP form. Additionally, Staff rightly states that the 2016-2017 delivery year is the end of the current Section 8-103 three-year EE plan cycle, and therefore, it is not possible to duplicate a Section 8-103 EE

⁴ The IPA pointed out in its Response to Objections: "Whether the IPA should conduct its own TRC analysis was the topic of Commission-ordered workshops in 2014; in workshops, no party advocated for that approach. (See 2016 Plan at 88-89). Instead, as the utilities conduct TRC screenings for programs included under Section 8-103 of the PUA and because Section 16-111.5B requires that "'cost-effective' shall have the meaning set forth in subsection (a) of Section 8-103" for programs "incremental to those included in energy efficiency and demand-response plans approved by the Commission pursuant to Section 8-103," the utilities conduct initial TRC screenings for Section 16-111.5B programs in a manner consistent with the methodology utilized under Section 8-103." IPA Response to Objections at 14, footnote 5.

plan. However, it is possible, although it seems unlikely, to duplicate another Section 16-111.5B program.

~~At this time, the Commission agrees with Ameren in that it should not be required to conduct a TRC analysis on bids when they have been found to duplicate existing EE plans. Therefore, the IPA shall strike the language in its Plan that requires the utilities to do so. It may be possible, however, to find some common ground between the IPA's position and that of Ameren by exploring the topic in workshops conducted by the SAG. Perhaps additional information would be helpful up front, without the necessity of a full TRC analysis. Or, it may be possible that some parts of the TRC analysis could be conducted preliminarily, without the necessity of a full TRC analysis. There further may exist other ways that would bridge the gap between Ameren's position and that of the IPA. Exactly what information the IPA needs up front, however, should be discussed in SAG workshops and hopefully resolved therein.~~

~~The Commission acknowledges Ameren's argument that because the process has changed, this issue may be moot. However, the IPA is of the opinion that it needs more information, and how to address the information it needs is best left to discussions at the SAG workshops. On that point, the Commission agrees with the IPA.~~

Instead, the inherent problem with not conducting a TRC calculation for programs' deemed duplicative by the utilities is that the IPA and Commission are required to conduct an independent analysis and independently make a "duplicative" determination. Should the IPA or the Commission arrive at a different conclusion than the utilities as to whether a program is duplicative (something which will eventually occur through independent reviews), neither will have the information necessary for determining whether to include the program without having a TRC test result. Only by conducting the TRC calculation up front (as ComEd does) is this problem avoided. As a result, TRC information is required for all programs being considered for inclusion, including those that the utility deems duplicative.

III. CONCLUSION

Wherefore, the People of the State of Illinois respectfully request that the Commission enter an Order consistent with the recommendations in this Brief on Exceptions and Proposed Exceptions language.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
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November 20, 2015