

**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
ON BEHALF OF
THE ILLINOIS POWER AGENCY**

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The Illinois Power Agency (“IPA” or “Agency”) respectfully submits its Verified Brief on Exceptions to the Administrative Law Judges’ November 13, 2015 Proposed Order (“PO”) in Docket No. 15-0541, the IPA’s petition for approval of its 2016 Procurement Plan (“Procurement Plan,” “Plan,” or “2016 Plan”).

The IPA agrees with most of the Proposed Order’s conclusions, and finds that in many cases, the reasoning behind those conclusions is thoughtful, well-articulated, and justified. However, in other instances (perhaps because of the compressed timeline for the consideration of the Plan and associated filings), the Proposed Order’s conclusions and supporting analysis demonstrate a possible misunderstanding of what issues are being contested in parties’ arguments (and why), or adopt conclusions which constitute a change in direction from long-standing practice.

Compared to previous IPA plan approval proceedings, this year’s proceeding featured a relatively narrow set of contested issues, almost all of which concerned the Agency’s renewable energy resource procurement responsibilities or incremental energy efficiency programs included under Section 16-111.5B of the Public Utilities Act (“PUA”). Unlike in prior years, only clarifying edits were offered with respect to the IPA’s approach to procuring standard wholesale products (such as block energy and capacity), the core purpose for which these plans are

developed and approved. As stated in its Response to Objections, the IPA believes that this may be seen as the validation of a refined, successful, collaboratively-developed procurement approach.

However, those issues which did remain were vigorously contested by utilities, stakeholders, ICC Staff, and the IPA itself. The IPA thanks each party for its contribution to forming a more informed dialogue of these issues for Commission evaluation. As the contested issues which remained can be somewhat complex and confusing, the IPA appreciates the work of the Administrative Law Judges in producing a Proposed Order under an expedited timeline.

The IPA's Brief on Exceptions addresses five sections of the Proposed Order. The first four relate to the approval of incremental energy efficiency ("EE") programs pursuant to Section 16-111.5B of the Public Utilities Act, while the fifth addresses a new issue in an IPA procurement plan, the applicability of the Renewable Portfolio Standard to MidAmerican.

The five sections are as follows: (1) whether Ameren should be required to conduct TRC Test analyses for programs that it determines duplicate existing programs; (2) how Section 16-111.5B programs can be used to expand Section 8-103 EE Programs that have not yet been approved by the Commission; (3) whether Ameren's adder to its TRC analysis for administrative costs adequately states what its actual administrative costs are; (4) whether to exclude two of Ameren's EE programs from the Plan when Ameren asserts that the cost of these programs exceeds the cost of electric supply; and (5) whether MidAmerican's renewable energy resources procurement target should be calculated for all of its eligible retail load or only for the portion of its load for which it has requested procurement. These issues are addressed below in the order set forth above (which mirrors the order in which they appear in the Proposed Order), accompanied by replacement language.

To the extent that not all topics addressed by the Proposed Order are addressed herein, the failure to address a particular argument should not be construed as agreement with or acquiescence to the Proposed Order's conclusion. Similarly, nor should it be considered the abandonment of a) a position previously articulated by the IPA in its filings or b) a position demonstrated by the Agency through the content of its filed 2016 Plan.

I. Whether Ameren Should Be Required to Conduct TRC Test Analyses for Programs that it Determines Duplicate Existing Programs

The IPA disagrees with the Proposed Order's conclusion that Ameren "should not be required to conduct a TRC analysis on bids when they have been found to duplicate existing EE plans." (PO at 89). Instead, to ensure that both the Agency and Commission have the information necessary required for an informed analysis of proposed Section 16-111.5B energy efficiency programs, the Commission should direct Ameren to include such analyses for all programs that otherwise meet RFP requirements¹ in its July 15 submittal consistent with ComEd's ongoing practice.

An energy efficiency program proposed under Section 16-111.5B of the PUA is deemed "duplicative" when it "overlaps an existing program in a manner in which greater market participation by vendors does not yield sufficient additional value to consumers" (2014 Plan at 85), thus making it unfit for inclusion in an IPA Procurement Plan. The Commission-directed process for making that "duplicative" determination is as follows:

- 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

¹ While Ameren indicates that any "duplicative" program would have been submitted inconsistent with RFP requirements, whether a program is indeed "duplicative" of an existing program is often initially unclear—which is why the Commission developed the four-step process for making such determinations described below.

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.

(Docket No. 13-0546, Final Order dated December 18, 2013 at 149) (emphasis added). While this process does not expressly address total resource cost (“TRC”) calculations, it does require providing the IPA with “all of the underlying documents as it would for any other bid”—presumably so that if the IPA reaches a different conclusion in its “independent review,” it can still make an informed determination about whether that program should be included in its procurement plan.

Consistent with the spirit of this directive, and as previously explained by the IPA in its Response to Objections (IPA Response at 12-14), it is thus essential for both the IPA and the Commission to have TRC analyses for all programs, even those initially designated by the utilities as “duplicative.” Absent a TRC analysis, the IPA would not know whether it should—or could—include any program initially designated as “duplicative” by Ameren should the IPA’s independent review reach a different conclusion. The failure to receive TRC information is directly at odds with the entire purpose for which the IPA is required to receive “all of the underlying documents as it would for any other bid,” as the most essential piece of

information—whether the program is cost-effective—would be missing. And in spite the “time and expense” complaints made by Ameren as to why it ought not have to conduct such analyses, this has consistently been ComEd’s approach.

The Proposed Order reaches the opposite conclusion, although no specific rationale is offered as to why. The Proposed Order does, however, misstate that programs could initially “have been found to duplicate existing EE plans.” (PO at 89) (emphasis added). Perhaps if such a “finding” were binding upon the IPA, TRC analyses would be unnecessary. But at this stage, no “finding” is made. Instead, the utility’s *initial determinations* are merely that—initial determinations that Ameren chose to include in their July 15 submittal of programs to the IPA. It is not binding upon the Agency or the Commission, each of which must conduct independent reviews that may reach different conclusions. Once a different conclusion is reached, a decision about program inclusion (necessitating a TRC analysis) must be made. Additionally, an up-front TRC analysis may exclude programs that are potentially “duplicative” on the simple basis that they are not cost-effective, further reducing administrative burdens.

Similarly, the Proposed Order incorrectly claims that “because the process has changed, this issue might be moot.” (PO at 89). But contrary to Ameren’s statement in its Reply to Responses (Ameren Reply at 18), the process approved in Docket No. 13-0546 for the review of “duplicative or competing” programs has not changed. While Ameren decided to include the IPA in discussions related to *its* process for making those determinations prior to its July 15 submittal, the IPA made absolutely clear to Ameren that the IPA was still required to conduct an independent review (which it did, as detailed in the 2016 Plan). It is perhaps telling that Ameren waited until its fourth filing (Comments, Objections, Response, Reply) before raising this

“change in process” argument, as only then would a Proposed Order be published before the IPA had the opportunity to set the record straight.

As the Proposed Order offers no coherent rationale in support of a position that could hinder both the Agency and the Commission’s ability to conduct an informed review of Section 16-111.5B programs, this conclusion must be reversed.

Consistent with the foregoing, the IPA proposes the following changes to p. 89 of the Proposed Order:

Both the IPA and Ameren have valid points. 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 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 the Agency~~ that the utilities should not be required to conduct a TRC analysis on bids when they have initially determined that those bids been found to duplicate existing or proposed EE programs/plans. The Commission recognizes that absent such information, neither the Agency nor the Commission will have information sufficient to make an informed determination regarding programs which may have initially been deemed “duplicative” by the utility but for which the Agency or Commission disagree. ~~Therefore, the IPA shall strike the language in its Plan that requires the utilities to do so.~~ For future plans, the Commission directs the utilities to conduct a TRC analysis of bids that it believes are duplicative as part of its submittal of programs to the IPA.

~~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.~~

II. How Section 16-111.5B Programs Can Be Used to Expand Section 8-103 EE Programs That Have Not Yet Been approved by the Commission

It appears to the IPA that this issue is misunderstood in the Proposed Order. To recap, at issue is the following: Section 16-111.5B creates a pathway for the inclusion of “incremental” energy efficiency programs in IPA procurement plans. Such programs may be 1) new programs offered by third-parties or 2) the expansion of existing programs offered under Section 8-103 of the PUA. Section 8-103 program portfolios are determined on a three-year cycle, with the next such portfolio due to be filed for Commission approval in September of 2016. That portfolio will include programs for the 2017-2018 delivery year and the two years thereafter. However, RFPs for third-party “incremental” Section 16-111.5B programs for the 2017-2018 delivery year are due to be issued by the utilities in early 2016, and utility submittals of proposed programs will be made in July of 2016: before the Section 8-103 portfolios are even filed with the Commission, let alone approved (which would not occur until early 2017).

This creates a timing issue. How can “expansions” of Section 8-103 programs for the 2017-2018 delivery year (and beyond) be included in the IPA’s 2017 Plan when the underlying Section 8-103 portfolios have not yet been approved by the Commission? And how can the IPA’s plan “fully capture the potential for all achievable cost-effective savings, to the extent practicable” (220 ILCS 5/16-111.5(a)(5)) if expanded Section 8-103 programs are not included?

This timing issue was considered by the Commission in Docket No. 13-0546. In that proceeding, in response to an argument by the Office of the Attorney General that Section 8-103 program expansions should nevertheless be included, the Commission concluded that “the statutory framework related to energy efficiency programs has arguably created an unfortunate situation,” as “it is simply unfair to put the utilities in a situation where they must guess in one proceeding what the Commission will subsequently decide in another proceeding.” (Docket No.

13-0546, Final Order dated December 18, 2013 at 147). The Commission thus suggested “that an effective solution would be for the General Assembly to modify the existing framework to address the timing.” (Id.) As no modification to this framework has been made by the General Assembly in the ensuing years, the IPA flagged this issue for further discussion in its 2016 Plan.

The Proposed Order leaves this issue unresolved and to be addressed by workshops. While the IPA appreciates the value of the workshops and would be a willing participant in any workshops ordered by the Commission, further direction indicating that the Commission seeks actual progress on ways to overcome this timing issue is necessary. Otherwise, as suggested by parties’ positions in this proceeding, the IPA fears that parties may use the crutch of that prior Order as coverage against working toward a solution.

In any event, the Proposed Order also appears to misread the governing law and must be clarified regardless. Although the “parties” may not “define what is meant by ‘expansion’” in filings, that definition should be evident from the law itself. Section 16-111.5B(a)(2) states that the IPA’s plan may “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 5/16-111.5(a)(2)) (emphasis added). In other words, as opposed to an “additional” program, a program “expansion” constitutes taking a Section 8-103 program whose reach and budget is limited by the statutory rate impact cap present in Section 8-103(d)(5) (which necessitates an overall portfolio budget that often constrains the size of individual energy efficiency programs, even if more cost-effective energy efficiency could be achieved through a larger version of that program) and allows it to be “expanded” to “fully capture the potential for all achievable cost-effective

savings” through inclusion in an IPA procurement plan. (220 ILCS 5/16-111.5B(a)(5)).² As some Section 8-103 programs could “achieve” *more* cost-effective savings but for Section 8-103’s budget cap, Section 16-111.5B allows them to be “expanded” via IPA procurement plans to “fully capture” additional savings. However, as new Section 8-103 portfolios will not yet have been approved by next July’s utility submittal deadline, this creates the timing issue identified by the IPA in its Plan and discussed further above. The Proposed Order’s conclusions should be revised to clarify that managing this dynamic is the contested issue in this proceeding.

Each of these issues are addressed in proposed revisions below.

Consistent with the foregoing, the IPA proposes the following changes to p. 89 of the

Proposed Order:

~~The parties do not define what is meant by “expansion” of Section 8-103 programs. It appears that Section 16-111.5B limits what can be offered, but only in so far as they should not duplicate that which is provided pursuant to Section 8-103. However, that does not mean, for example, that a different program that is related to an existing Section 8-103 program, but which does not duplicate a Section 8-103 program, would contravene Section 16-111.5B.~~

~~The Commission notes that according to the IPA, if the Commission does not require workshop discussion on this issue, such discussion will not occur. The best course of action, with regard to planning, making sure that duplication does not occur, and regarding many other topics related to this subject, would be to address these topics at workshops conducted by the SAG. Therefore, the SAG shall convene workshops to address this specific issue.~~

The Commission recognizes the challenges of “expansion” of Section 8-103 programs when the portfolio for such programs has not yet been approved. This creates a natural tension: while unapproved programs cannot easily be “expanded,” the law calls for IPA plans to “fully capture the potential for all achievable cost-effective savings,” which would presumably include expanded Section 8-103 programs.

In recognition of this challenge, the Commission directs for this topic to be addressed at workshops conducted by the Stakeholder Advisory Group (“SAG”). As the Commission wishes to avoid the “unfortunate situation” referenced in Docket No. 13-0546 and as no legislative change appears imminent, these workshops should demonstrate a genuine commitment to resolving this problem consistent with the goal of capturing all achievable energy savings, and should consider solutions such as the conditional approval of Section 8-103 program expansions in the IPA’s 2017 Plan and potential contractual mechanisms to accommodate uncertainty present through an unapproved Section 8-103 portfolio.

² By contrast, a “duplicative” program is a new proposed program which “duplicates” a Section 8-103 program, and not the “expansion” of the Section 8-103 program itself.

III. Whether Ameren's Adder to its TRC Analysis for Administrative Costs Adequately States what its Actual Administrative Costs Are

The IPA agrees with the Proposed Order's conclusions with respect to the omission of Ameren's potential study costs from its TRC analysis. However, the Proposed Order's conclusion contains what may be considered a misstatement of the IPA's position: "The Commission agrees with Ameren and Staff, however, in that, the percentage of Ameren's administrative costs may very well differ from that incurred by ComEd." (PO at 95).

The IPA agrees with this statement as well. As the IPA outlined in its Response:

Third, this adjustment was not motivated by an effort to create equivalency between Ameren and ComEd. The logic for this adjustment is explained above. Equivalency occurring as a result of that adjustment is merely a coincidence—or, more accurately, a function of the percentages disclosed by the utilities in submittals. The total administrative costs that ComEd designated by percentage were 11.5%. The total administrative costs Ameren designated by percentage were 11.5%. Unlike ComEd, Ameren layered on an additional \$1.5 million non-administrative cost related to the development of its potential study. As those costs are not for the administration of its energy efficiency programs, the IPA justifiably removed those costs, resulting in both administrative adders being 11.5%. As this adjustment is necessary to maintain consistency with the Commission's prior directive and the law, Ameren's arguments must be rejected.

(IPA Response at 12). That the two percentages need be or should be equivalent was never the IPA (or any party's) position; it was merely an argument manufactured by Ameren to cast aspersions on the IPA's well-justified administrative cost adjustment. This issue was never contested, and thus it should not be addressed in the Commission's conclusion. As explained above, equivalency between the two values is simply a product of the utilities' own submittals.

Consistent with the foregoing, the IPA proposes the following changes to p. 95 of the

Proposed Order:

The Commission agrees with Staff and the IPA. Ameren's potential study is not a cost which was incurred in administering any particular program, and the potential study was the only change that the IPA made to Ameren's adder for administrative costs. As Staff has pointed out, including costs in a TRC Test analysis of a particular program that do not involve that specific program skews the test results. Additionally, while Ameren has argued that the IPA is cutting its administrative budget, the IPA and Staff

have demonstrated that this is not correct. ~~The Commission agrees with Ameren and Staff, however, in that, the percentage of Ameren's administrative costs may very well differ from that incurred by ComEd.~~

However, it seems that even after the Commission ordered the utilities to track their administrative costs in Docket No. 14-0588, the utilities are not clear as to what administrative costs should be tracked. This topic should be thoroughly addressed and determined with specificity in workshops conducted by the SAG.

IV. Whether to Exclude Two of Ameren's EE Programs from the Plan when Ameren Asserts that the Cost of These Programs Exceeds the Cost of Supply

The IPA strongly disagrees with the Commission's conclusion that proposed cost-effective energy efficiency programs can or should be removed from the IPA's 2016 Plan because Ameren has unilaterally determined, through a test apparently developed only for this year's proceeding, that those programs exceed a new metric it calls the "cost of supply."

Section 16-111.5B of the PUA sets forth a straightforward framework for how costs and benefits of proposed energy efficiency programs are to be evaluated: the Commission is to "approve the energy efficiency programs and measures included in the procurement plan . . . if the Commission determines they fully capture the potential for all achievable cost-effective savings, to the extent practicable." (220 ILCS 5/16-111.5(a)(5)) (emphasis added). The law further provides that "the term 'cost-effective' shall have the meaning set forth in subsection (a) of Section 8-103 of this Act" (220 ILCS 5/16-111.5(b)), defined as measures that "satisfy the total resource cost test." (220 ILCS 5/8-103(a)).

However, the Proposed Order ignores this linear framework in favor of imposing an new requirement that programs also not be "cost-inefficient" (PO at 100), using an unvetted new test developed by Ameren this summer which fails to consider benefits of energy efficiency programs that the law directs must be considered, resulting in the rejection of two otherwise "cost-effective" programs. This approach is contrary to the standard articulated in the law,

contrary prior Commission practice applying Section 16-111.5B, and must be rejected in the Final Order approving the 2016 Plan.

In reaching this conclusion, the Proposed Order's analysis also contains several logical flaws and mischaracterizations of the record and the governing law, some of which are addressed in arguments below. First, while the Proposed Order claims that 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" (PO at 100) (emphasis added), the IPA disagrees with this conclusory statement on which the remainder of the Proposed Order's analysis is predicated. Unlike TRC tests, which have been comprehensively vetted over 8 years of workshops and review (See, *inter alia*, Docket No. 14-0588, Final Order dated December 17, 2014 at 158-227), no scrutiny has been offered to this new "cost of supply" analysis. As the IPA explained in its Response to Objections:

[B]ased on prior Commission Orders, it would be highly inappropriate to adopt such a departure through an IPA Plan approval proceeding.

In Docket No. 14-0588, the Commission faced arguments from the Natural Resources Defense Council and the Office of the Attorney General seeking adjustments to the cost and benefit inputs to the total resource cost test. In response to those arguments, and acknowledging even that it had seen such arguments in prior dockets and was "intrigued" by the supporting logic, the Commission determined that "a significant problem with procurement proceedings is the expedited schedule combined with a relatively large number of contested issues and parties" that "makes it difficult for the Commission to deal with complex economic issues." (Docket No. 14-0588, Final Order dated December 17, 2014 at 224). As a result, the Commission held that "procurement proceedings are not the ideal forum for considering complex economic issues" and directed parties to attempt reaching consensus through a collaborative workshop process.

In the present proceeding, Ameren is asking the Commission to approve not merely adjustments to inputs, but to approve an entirely new test. Unlike the TRC issues raised in Docket No. 14-0588, there has been no vetting of this issue in prior proceedings, and little if any prior review of this new test by other key stakeholders (some of which may not be participating in this proceeding). In fact, Ameren's initial submission to the IPA simply contained a declaratory statement that two programs failed their cost of supply test with no substantiating information. It was only after further inquiry and a formal request that the IPA was able to review how this new "cost of supply" filter was applied. If known adjustments to inputs are too complex for a 90-day Commission proceeding, then clearly the introduction of a here-to-fore unseen and unvetted test is inappropriate for approval in this docket.

(IPA Response at 5-6). As recognized by the Commission’s prior treatment of these issues, without comprehensive scrutiny, it is simply impossible to know whether Ameren’s test indeed represents the “cost of supply.”³ Ignoring these technical complexities and past Commission practice to adopt a new formula Ameren developed this summer to filter programs for this year’s plan—as currently done by the Proposed Order—constitutes a highly irresponsible approach.

Second, even if this test were accurate, the benefits of an energy efficiency program are inappropriate to compare to only the “cost of supply,” as energy efficiency program benefits extend far beyond simply meeting load requirements. This is recognized by the law itself, which states that “[r]equiring investment in cost-effective energy efficiency and demand-response measures will reduce direct and indirect costs to consumers by decreasing environmental impacts and by avoiding or delaying the need for new generation, transmission, and distribution infrastructure.” (220 ILCS 5/8-103(a)). Ameren’s “cost of supply” analysis (which excludes the cost of transmission and distribution) ignores *any* benefits associated with avoiding transmission and distribution costs, despite such benefits being expressly recognized in the Public Utilities Act.⁴ In fact, the law explains exactly *which* benefits of energy efficiency programs may be taken into account: “the sum of avoided electric utility costs, representing the benefits that accrue

³ As previously explained by the IPA, it almost certainly does not: Ameren’s “cost of supply” test assumes a uniform cost for all customers based on costs to eligible retail customers, while supply costs for customers served by Section 16-111.5B (which includes non-competitive class customers taking supply from a retail electric supplier) may be very different. (See IPA Response at 6). While the IPA remains steadfast in its belief that use of this test is not legally authorized, because no prior vetting could be conducted of Ameren’s new test—its methodology was not even disclosed to the IPA in Ameren’s July 15th submittal, and only disclosed after formal request—these flaws make this test inappropriate to use even if it *could* legally be applied.

⁴ The Proposed Order incorrectly indicates that “no party has pointed to some other benefit to these programs” despite such benefits being repeatedly identified by the IPA in its filings. See, *inter alia*, 2016 Plan at 97 (“As the ‘cost of supply’ analysis conducted by Ameren Illinois did not follow the established strictures of the total resource cost test (for instance, by not including avoided transmission and distribution costs for the proposed cost-effective energy efficiency measures, despite such costs clearly being avoided), it appears to be inconsistent with the consensus approach decided upon in 2013.”); IPA Response at 6 (“Ameren’s cited ‘cost of supply’ test does not include transmission and distribution costs, despite such costs clearly being avoided by the adoption of energy efficiency measures.”).

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.” (20 ILCS 3855/1-10) (emphasis added). In recognition of these benefits, it is avoided electric utility costs, and not merely “supply” costs, which the law requires be used to evaluate the efficacy of an energy efficiency program. This is accomplished through the application of a total resource cost test, which all parties agree is passed by both programs excluded under Ameren’s “cost of supply” test. As that positive total resource cost test result is ignored by the Proposed Order in favor of Ameren’s apples to oranges comparison, the Proposed Order’s approach must be rejected.

Third, the Proposed Order’s emphasis on, and definition of, the term “efficiency,” and determination that the programs at issue are not “efficient,” must be rejected. The term “energy efficiency” is *already* defined in the law itself:

"Energy efficiency" means measures that reduce the amount of electricity or natural gas required to achieve a given end use. "Energy efficiency" also includes measures that reduce the total Btus of electricity and natural gas needed to meet the end use or uses.

(20 ILCS 3855/1-10). As this phrase is defined in the governing law, one of these words cannot simply be cherry-picked from that statutorily defined phrase and re-defined to create a new standard for program review. Further, Section 16-111.5B not only ensures that this definition of “energy efficiency” applies to its provisions, but also explains exactly how energy efficiency program benefits are to be compared to costs by a) defining the term “cost-effective” and b) using that term throughout Section 16-111.5B as the standard for program review:

For purposes of this Section, the term "energy efficiency" shall have the meaning set forth in Section 1-10 of the Illinois Power Agency Act, and the term "cost-effective" shall have the meaning set forth in subsection (a) of Section 8-103 of this Act.

(20 ILCS 5/16-111.5B(b)). Section 8-103 states that “cost-effective . . . means that the measures satisfy the total resource cost test,” which is defined in the IPA Act as follows:

"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 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 for 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) (emphasis added). This is a linear, straightforward statutory scheme which has governed the application of Section 16-111.5B in each prior proceeding. Somehow, the Proposed Order ignores *any* analysis of this scheme, the actual terms contained therein, or past Commission application of these terms, instead opting to pull one term out of a statutorily defined phrase to develop an entirely new way of looking at whether energy efficiency program benefits outweigh costs. Perhaps if there were no governing statutory scheme and the basis for making these determinations was left open-ended, this could be a legally permissible approach. But there is a governing statutory scheme and it cannot simply be ignored. That scheme calls for benefits to be compared to costs through an assessment of “cost-effectiveness” made through the “total resource cost test”—which *all proposed programs pass*. As the Proposed Order’s approach is plainly inconsistent with that statutory scheme, it must be rejected.

Fourth, the Proposed Order misreads the actual discretion granted to the Commission under Section 16-111.5B. The IPA does agree that Section 16-111.5B grants the Commission discretion to reject programs—but only to the extent that such programs would fail to “fully capture the potential for all achievable cost-effective savings, to the extent practicable.” (220 ILCS 5/16-111.5(a)(5)) (emphasis added). When interpreting a statute, the primary objective is

to ascertain and give effect to the intent of the legislature, with the best indication of legislative intent being the statutory language itself. (See Metro Utility Co. v. Illinois Commerce Commission, 262 Ill. App. 3d 266, 274 (1994)). This phrasing clearly did not intend for open-ended discretion; if open-ended discretion was the intent of the drafters, it would have used the phrase “at its discretion,” as is often used throughout statutes. Nor does it call upon the Commission to develop “practical” limitations; if that was the intent of the drafters, perhaps the law would have stated that “in approving the Plan, the Commission may apply practical limitations on the procurement of energy efficiency.” Instead, the law *actually* states that “the Commission shall also approve the energy efficiency programs and measures included in the procurement plan . . . if the Commission determines they fully capture the potential for all achievable cost-effective savings, to the extent practicable.” (220 ILCS 5/16-111.5B(a)(5)) (emphasis added). “Practicability” does not merely create discretion; it also informs how that discretion must be applied.

The Proposed Order makes no attempt at interpreting that actual phrasing. Rather than looking to a dictionary for a definition of the term “practicable,” the Proposed Order simply ignores the term “practicable” in favor of conflating “practicable” discretion with fashioning “practical” limits on energy efficiency procurement. As referenced above, the best indication of legislative intent is the statutory language itself, and clear and unambiguous terms used in statutory language are to be given their plain and ordinary meaning. (See West Suburban Bank v. Attorneys Title Insurance Fund, 326 Ill. App. 3d 502, 507 (2001)). The IPA painstakingly detailed the differences between “practicable” and “practical” in its Reply to Responses (See IPA Reply at 2-3); that need not be rehashed here, except to say that “practical” and “practicable” clearly do not share the same plain and ordinary meaning. Ignoring those distinctions in favor of

fashioning whatever level of discretion is necessary to meet the end result of rejecting two cost-effective energy efficiency programs is a legally unsustainable approach that cannot be adopted.

Fifth, the Proposed Order's reliance on the Stakeholder Advisory Group ("SAG") is misinformed and misplaced. The Proposed Order states that "the SAG has determined that cost-inefficient programs should be eliminated." (PO at 100, citing 2016 Plan at 89). Insofar as "cost-inefficient" means "not cost-effective"—with "cost-effective" being the term actually used by the law and in the consensus items listed on the cited page of the 2016 Plan⁵—this proposition is correct. But no parties contest that these programs are not cost-effective. That determination was made by initially made Ameren and agreed with by the IPA. (See 2016 Plan at 99-100; Appendix B at 18-19). Instead, at issue is whether these programs pass a new, previously-unapplied test developed by Ameren that has never been vetted or authorized by the SAG, let alone supported by it. As such, the Proposed Order's total mischaracterization of the record simply cannot constitute a permissible justification for an administrative decision.

Sixth, the Proposed Order also leans on the thin rationale that these programs are "expensive," and thus the Commission would be justified in fashioning limitations cabining overall costs. Setting aside the facts that 1) no budget cap exists in Section 16-111.5B (as distinguished from Section 8-103); 2) no budget cap could be inferred language that directs the Commission to "fully capture the potential for all achievable cost-effective savings;" and 3) the law dictates how to treat "costs" by directing the comparison of costs to benefits, the costs of the programs filtered out through applying this new "cost of supply" test are *de minimis* relative to overall supply portfolio costs (by comparison, the IPA's 2015 procurements of energy and capacity for Ameren constituted over \$320 million) and marginal relative to overall energy

⁵ Presumably this is what was intended by the Proposed Order's citation to that portion of the 2016 Plan, as it is unclear how any determination by the SAG would support the use of a new "cost of supply" analysis.

efficiency portfolio costs.⁶ To demonstrate, below is the Ameren Section 16-111.5B portfolio included in the 2016 Plan, with the “expensive” programs rejected via a new “cost of supply” test highlighted:

Program	Net Savings (MWh)	Total Utility Cost	TRC (As submitted)	TRC (IPA Adjusted)
Agricultural Energy Efficiency	945	\$380,615	1.09	1.11
Community-Based CFL Distribution	9,330	\$1,178,428	2.27	2.31
Demand Based Ventilation Fan Control	5,717	\$1,227,357	3.38	3.44
Electric Only Behavior Modification	8,640	\$373,920	1.06	1.06
HVAC Check-Up	5,940	\$1,160,182	1.35	1.38
LED Linear Lighting for Small Facilities	14,750	\$3,168,882	1.16	1.19
Private HVAC Optimization	7,692	\$1,135,800	1.29	1.31
Public HVAC Optimization	7,692	\$1,135,800	1.29	1.31
Small Commercial Lit Signage	9,417	\$2,271,599	1.31	1.34

Even if the Commission had the discretion posited by the Proposed Order to simply reject programs as “expensive,” rejecting these programs as “expensive” is baffling and directly contradicted by the table above. And, once again, *whatever* the expense of these programs, each program has been demonstrated in Ameren’s own submittal to offer benefits (primarily in the form of energy savings) which exceed those costs—and no party contests that conclusion.

But while excluding these two programs through a new filter would have little impact on portfolio costs, changing course and using a new test could introduce enormous uncertainty into what criteria is used to evaluate Section 16-111.5B proposals going forward and whether potential bidders believe it is worth their time and trouble to participate. That risk and instability could reduce the competitiveness of proposals received and introduce new, hidden costs in the form of risk premia and unsubmitted cost-effective bids. As these new costs and lost benefits could dwarf the minor costs associated with programs eliminated by a “cost of supply” test, citing how “expensive” these programs are as the basis for the Proposed Order’s approach is both unwise and unsustainable.

⁶ And while the IPA’s procurements serve only eligible retail customers, eligible retail customers constitute only approximately 40% of the load that pays for and benefits from these programs.

Lastly, the Proposed Order's approach constitutes a clear departure from how Section 16-111.5B's review criteria has previously been applied and approved by the Commission. At no prior point has a "cost of supply" analysis been used to filter proposed Section 16-111.5B programs. Nor were ComEd's programs subject to such an analysis in this year's proceeding. Indeed, even Ameren freely admits that the Proposed Order's approach constitutes a departure from existing practice. (See, *inter alia*, Ameren Objections at 15).

As the entity responsible for interpreting Section 16-111.5B, the Commission is not prohibited from changing its interpretation of Section 16-111.5B so long as such changes are not effected in an arbitrary and capricious manner. (See United Cities Gas Co. vs. Illinois Commerce Commission, 225 Ill. App. 3d 771, 782 (1992)). However, as explained above, the Proposed Order's conclusion contains numerous mischaracterizations of the record and, in several instances, appears to completely misunderstand the governing law and the arguments of the parties. The Proposed Order's approach is against the manifest weight of arguments offered and directly contradicted by a clear, linear statutory scheme which explains in detail how costs are to be compared to benefits. As no reviewing court could sustain this conclusion against the backdrop of Section 16-111.5B's language and the arguments offered in this proceeding, the Proposed Order's conclusion must be rejected and rewritten consistent with the governing law.

Consistent with the foregoing, the IPA proposes the following changes to p. 100 of the Proposed Order:

At issue is the propriety and the legality of including two EE programs in the Plan that Ameren contends are more expensive than the supply of electricity. The Commission agrees with the IPA and ELPC that the statutory scheme is clear: proposed Section 16-111.5B programs are to be evaluated based upon cost-effectiveness, which calls for use of the total resource cost test—and not a "cost of supply" analysis. As the two Ameren programs recommended for exclusion by the utility based on a "cost of supply" analysis do pass the total resource cost test, those programs are to be included in the 2016 Plan.

The Commission agrees with Ameren and other parties that it may exercise some discretion over which proposed energy efficiency programs may be included in IPA Procurement Plans. However, proposed

~~cost-effective programs may only fail to be included “to the extent practicable.” Black’s Law Dictionary defines practicable as “any idea or project which can be brought to fruition or reality without any unreasonable demands.” While programs that are “duplicative” of existing programs or other proposals may not be “practicable” to include in an IPA Procurement Plan, programs that fail to pass a secondary test comparing costs and benefits not referenced in the statute would clearly still be “practicable” to include, especially as the law already clearly explains how costs and benefits are to be weighed in program evaluation. As no party has provided a compelling, legally sustainable argument as to how the inclusion of these two cost-effective programs—programs submitted consistent with Ameren’s RFP, not found to be “duplicative” of existing programs or other proposals, and determined to be “cost-effective” by Ameren itself—would not be “practicable” to include in the IPA’s 2016 Plan, the arguments of Staff and Ameren calling for the exclusion of programs which fail a “cost of supply” test are rejected. 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.~~

V. Whether MidAmerican’s Renewable Energy Resources Procurement Target Should Be Calculated for Only the Portion of its Load for which It Has Requested Procurement

The IPA disagrees with the Proposed Order’s conclusion that MidAmerican’s renewable resources target should be based upon the incremental supply requirement for which the IPA conducts its procurement rather than for its entire eligible retail customer load. Instead, the Agency believes that because the more direct provisions of the statute—how to calculate the very target at issue—are found in Section 1-75(c)(1) of the IPA Act, that portion of the statute should be controlling.

As the Proposed Order correctly points out, this issue is simply “one of statutory interpretation.” (PO at 124). To be clear, the IPA does not believe that the Proposed Order’s

conclusion is unreasonable or unsustainable; in fact, the Agency indicated in its draft 2016 Plan that the issue was “unclear” and “open to multiple interpretations.” (Draft 2016 Plan at 120). While the IPA disagrees with the conclusion reached by the Proposed Order, the IPA appreciates the thoughtful and well-reasoned analysis provided for that conclusion.

In resolving this issue, the Proposed Order cites to the proposition that “[i]n analyzing these arguments, where one of two provisions is general and designed to apply to cases generally, and the other is particular and relates to only one subject, the particular provision should prevail.” (PO at 125). But the conclusion itself ignores the far more direct language for calculating the renewable energy resource procurement target found in Section 1-75(c)(1) of the IPA Act in favor of inferring an exception from the broad language contained in two subsections of Section 16-111.5 of the PUA. While the IPA appreciates the need to read the statute in its entirety, that “entirety” fails to include an exception to the clear target-setting language of Section 1-75(c)(1). The IPA believes that the statutory scheme as a whole would have expressly made an exception were an exception intended, an exception that Staff points out the drafters full well knew how to make. (See Staff Response at 18-23).

Further, it is unclear what “unnecessary hardship” (PO at 125) MidAmerican would face through a heightened renewable energy resource procurement target. MidAmerican would simply be placed on a level playing field with ComEd and Ameren, each of which are required to meet renewable energy resource procurement targets for their entire eligible retail customer load. The incremental costs to MidAmerican’s eligible retail customers could still not rise beyond the 2.015% rate impact cap found in Section 1-75(c)(2)(E), and MidAmerican itself would face no financial hardship through the collection of fees from its eligible retail customers to cover renewable energy resource costs.

As the IPA's statutory construction arguments on this topic can be found both in the Plan itself (2016 Plan at 125-126) and in its Response to Objections (IPA Response at 28-31), a restatement of those arguments need not be made here. In light of those arguments and the additional arguments made above, the Proposed Order's conclusion should be revised to calculate MidAmerican's renewable energy resource procurement target based on its eligible retail customer load.

Consistent with the foregoing, the IPA proposes the following changes to p. 124-125 of the Proposed Order:

The issue here is one of statutory interpretation. MidAmerican disagrees with Staff and the IPA about whether the renewable resources targets procured are determined based on all of MidAmerican's Illinois customers or just a percentage of customers for MidAmerican in the 2016 Plan. The IPA, Staff and MidAmerican all make reasonable points on how the statutes in question should be interpreted. MidAmerican advocates that the quantity of RECs procured should only be based upon that portion of the "total supply" procured for MidAmerican's jurisdictional eligible retail customers that is included in the Plan and should exclude the amount of Illinois-jurisdictional load that is supplied by MidAmerican owned generation. The IPA and Staff advocate that based on the plain language of the statutes, the Commission should find the IPA Act and the PUA require the renewable resources targets procured through the Plan for MidAmerican should be based upon total supply to serve MidAmerican's Illinois retail customers and not just a portion of MidAmerican's eligible retail customers' load. In this case, the statutes in question leave room for ambiguity.

When interpreting a statute, the primary objective is to ascertain and give effect to the intent of the legislature. *Metro Utility Co. v. Illinois Commerce Commission*, 262 Ill. App. 3d 266, 274 (1994). The best indication of legislative intent is the statutory language itself. *Id.* Clear and unambiguous terms are to be given their plain and ordinary meaning. *West Suburban Bank v. Attorneys Title Insurance Fund*, 326 Ill. App. 3d 502, 507 (2001). Where statutory provisions are clear and unambiguous, the plain language must be given effect, without reading into the language any exceptions, limitations, or conditions the legislature did not express. *Davis v. Toshiba Machine Co.*, 186 Ill. 2d 181, 184-85 (1999). Illinois courts have found where two statutes are allegedly in conflict, an interpretation that allows both to stand is favored, if possible. *See, McNamee v. Federated Equipment & Supply Co.*, 181 Ill.2d 415, 427 (1998). Where one of two provisions is general and designed to apply to cases generally, and the other is particular and relates to only one subject, the particular provision should prevail. *Bowes v. City of Chicago*, 3 Ill.2d 175, 205 (1954)).

MidAmerican argues that Section 16-111.5(a) and (b) of the PUA must be read together to ascertain the exception to the "eligible retail customer" carved out for small multi-jurisdictional utilities. It asserts that these parts of the PUA provide an exception for MidAmerican's eligible retail load so that only a portion

of MidAmerican's total eligible retail customer load represented as the "net" or "differential" between MidAmerican's eligible retail customer load in Illinois and MidAmerican owned generation allocated to Illinois customers. The IPA and Staff argue that MidAmerican erroneously reads an exception into the IPA Act and PUA. The IPA contends that even if the two provisions could only be viewed as competing, the more specific language for calculating the renewables targets found in Section 1-75(c)(1) should apply. It asserts that while Section 16-111.5(a) contains general provisions around procurement planning process participation, Section 1-75(c) directly and specifically addresses how procurement targets are to be calculated and should be applied. The IPA and Staff contend that as this is the more specific and direct language, it should be understood to govern the calculation of MidAmerican's renewable resource procurement targets.

In analyzing these arguments, where one of two provisions is general and designed to apply to cases generally, and the other is particular and relates to only one subject, the particular provision should prevail. *Bowes*, 3 Ill.2d 1 at 205. Further, where two statutes are allegedly in conflict, an interpretation that allows both to stand is favored, if possible. *McNamee*, 181 Ill.2d at 427. Consistent with this approach, the Commission agrees with the IPA and Staff that MidAmerican's renewable resource targets must be determined based upon MidAmerican's "total supply to serve eligible retail customers"—in other words, its entire eligible retail customer load. While procurement may be requested by a small, multi-jurisdictional utility for only a portion of that load through Sections 16-111.5(a) and (b), the renewable energy procurement target itself is set through the more direct and particular language contained in Section 1-75(c)(1) of the IPA Act ("a minimum percentage of each utility's total supply to serve the load of eligible retail customers"). The Commission believes that this language remains controlling regardless of whether the broader procurement is for only a portion of eligible retail customer load, and that were an exception to this requirement intended by the drafters of this language, such an exception would have been expressly made. MidAmerican is correct in arguing Section 16-111.5(a) and (b) of the IPA Act must be read together to determine the exception to the "eligible retail customer" carved out for small multi-jurisdictional utilities. The IPA's and Staff's argument that Section 1-75(c) of the IPA Act should apply to this issue is misguided because it fails to look at the statute in its entirety. In this case, the reasonable approach is to examine the entire statute so the greatest level of deference to legislative intent can prevail.

~~Further, prior to the enactment of Public Act 097-0325, the IPA developed procurement plans only for electric utilities that on December 31, 2005 provided service to at least 100,000 customers in Illinois (i.e., ComEd and Ameren). MidAmerican serves less than 100,000 customers. Plan, Appendix D, at 1. Staff asserts that if the legislature had intended for the IPA procurement plans for a small multi-jurisdictional electric utility to include renewables based upon a portion of the load that is being procured for that utility, and not the utility's total load, then the legislature would have made a change to the law to provide for that exception, when it amended the IPA Act and PUA in 2011.~~

~~MidAmerican disagrees and argues the legislature did provide an exception in Section 16-111.5(a) and (b) of the PUA and the 2016 Procurement Plan reflects that intent by including only a "portion" of MidAmerican's eligible retail load and not MidAmerican's "total" Illinois retail load. It explains that the Plan includes the incremental amount of capacity and energy that is not currently served or forecast to be served in Illinois by MidAmerican-owned Illinois jurisdictional generation. It states, consequently, that the 2016 Plan does not include the "total supply" to serve eligible retail customers. MidAmerican~~

~~contends that the Plan only includes the incremental amount of energy and capacity that is not serviced or forecast to be served in Illinois by MidAmerican owned jurisdictional generation.~~

~~The primary objective of statutory interpretation is to ascertain and give effect to the intent of the legislature and the best indication of legislative intent is the statutory language itself. *Metro Utility Co.*, 262 Ill. App. 3d at 274. Here, the statutory language provided in Section 16-111.5(a) and (b) of the PUA reflects including only a “portion” of MidAmerican’s eligible retail load and not MidAmerican’s “total” Illinois retail load is what the legislature intended to do if read in its entirety. In this case, it is likely unreasonable to determine that the intent of the legislature would be to create unnecessary hardship for MidAmerican to participate in the 2016 Procurement Plan.~~

~~Based on the foregoing, the Commission finds that the renewable energy resource procurement targets applicable to MidAmerican should only be calculated on that portion of the total load supply procured for of MidAmerican’s jurisdictional eligible retail customers included in the 2016 Procurement Plan. Thus, the statute should be interpreted by reading it in its entirety, as MidAmerican argues. The IPA shall amend the Plan accordingly.~~

CONCLUSION

The IPA thanks the Administrative Law Judges for his their work within an extraordinarily tight timeframe and recommends that the Commission resolve identified exceptions consistent with the IPA’s positions articulated herein.

Dated: November 20, 2015

Respectfully submitted,

Illinois Power Agency

By:

 /s/ Brian P. Granahan

Brian P. Granahan
Chief Legal Counsel
Illinois Power Agency
160 N. LaSalle St., Suite C-504
Chicago, Illinois 60601
312-814-4635
Brian.Granahan@Illinois.gov

STATE OF ILLINOIS)
)
COUNTY OF COOK)

VERIFICATION

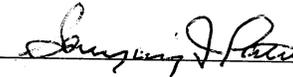
Anthony M. Star, being first duly sworn, on oath deposes and says that he is the Director for the Illinois Power Agency, that the above Verified Brief on Exceptions on Behalf of the Illinois Power Agency has been prepared under his direction, he knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.





Anthony M. Star

Subscribed and sworn to me
This 20th day of November, 2015



**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)

NOTICE OF FILING

Please take notice that on November 20, 2015, the undersigned, an attorney, caused the Verified Brief on Exceptions on Behalf of the Illinois Power Agency to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission in a new proceeding:

November 20, 2015

/s/ Brian P. Granahan
Brian P. Granahan

CERTIFICATE OF SERVICE

I, Brian P. Granahan, an attorney, certify that copies of the foregoing document(s) were served upon the parties on the Illinois Commerce Commission's service list as reflected on eDocket via electronic delivery from 160 N. LaSalle Street, Suite C-504, Chicago, Illinois 60601 on November 20, 2015.

/s/ Brian P. Granahan
Brian P. Granahan