

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

ILLINOIS POWER AGENCY	:	
	:	Docket No. 16-0453
Petition for Approval of the 2017 IPA	:	
Procurement Plan Pursuant to Section	:	
16-111.5(d)(4) of the Public Utilities Act	:	

**COMMONWEALTH EDISON COMPANY'S VERIFIED RESPONSE TO THE  
OBJECTIONS TO THE PROCUREMENT PLAN  
OF THE ILLINOIS POWER AGENCY**

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Commonwealth Edison Company (“ComEd”), pursuant to Section 16-111.5(d)(3) of the Illinois Public Utilities Act (“PUA” or “Act”), submits this Verified Response to Objections (“Response”) to the proposed 2017 Power Procurement Plan (“2017 Plan” or “Plan”) filed with the Illinois Commerce Commission (“ICC” or “Commission”) by the Illinois Power Agency (“IPA”). Below ComEd addresses certain Objections filed by the parties.<sup>1</sup> This Response is verified by Michael S. Brandt and David R. Zahakaylo, who are competent to testify as to the facts to which they attest.

While energy efficiency procurement issues generally comprised the bulk of the parties’ Objections, the issue of third-party vendor contracting in particular was addressed in the Objections of the Illinois Attorney General’s Office (“AG”), Commission Staff (“Staff”), and ComEd. The parties’ Objections highlight the regulatory uncertainty that persists following the diverging Commission rulings regarding the appropriate vendor contract terms and conditions. ComEd agrees with these parties that additional Commission action is required to address this

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<sup>1</sup> While this Response identifies specific ways to improve the Plan and make it consistent with applicable laws, ComEd’s silence regarding any issue or Objection not addressed in this Response should not be interpreted as agreement with all statements, approaches, calculations, or recommendations made in the Plan or Objection pertaining to that issue.

uncertainty, and to that end ComEd attached its proposed third-party vendor contract templates to its Objections for Commission review and approval. While the Plan's request for general guidance on this issue is a step in the right direction, the Objections underscore that the Commission must address the details of the particular proposed terms and conditions of the vendor contracts.

ComEd also responds below to additional energy efficiency and distributed generation ("DG") renewable energy credit ("REC") procurement issues raised in the parties' Objections.

## **I. Energy Efficiency**

The Objections to the 2017 Plan raise a number of issues relating to the implementation and administration of third-party administered energy efficiency programs in Illinois. As discussed above and further below, the Objections highlight the uncertainty that remains with respect to the fundamental issues of structuring and scrutinizing third-party vendor contracts. In addition, ComEd responds to Objections relating to the scale of Section 16-111.5B programs, certain confidentiality issues, and Staff's proposal to require additional reporting of non-program-specific administrative costs.

### **A. Approval of Third-Party Vendor Contract Templates (Sec. 9)**

Like ComEd, the Objections filed by the AG and Staff requested that the Commission resolve the regulatory uncertainty regarding third-party vendor contracting. AG Objections at 8-9; Staff Objections at 20. While the Commission's *2016 Procurement Plan Order* adopted a policy that utilities should not withhold funds from vendors or be subject to disallowances for underperforming vendors, the Commission's subsequent order six months later in Docket No. 14-0567 disallowed ComEd's costs associated with a vendor that became insolvent because

ComEd had not withheld funding from the vendor.<sup>2</sup> As explained in the Plan, ComEd and Ameren have introduced more restrictive contracting terms in the wake of these orders, with Ameren requiring surety bonds and ComEd withholding a set amount of funding depending on the nature of the energy efficiency measures to be implemented by the vendor, and the Plan requests guidance from the Commission regarding which approaches strike the correct balance between encouraging vendor participation and protecting customers. Plan at 112. In this same vein, ComEd, the AG, and Staff ask the Commission for additional detailed guidance in this docket regarding these issues.

The AG requests that the Commission examine and clarify, based on “specific evidence,” the nature of appropriate and balanced terms to be included in pay-for-performance contracts. AG Objections at 8-9. Specifically, the AG questions whether the contracts, as revised by ComEd and Ameren, strike the appropriate balance between protecting customers from vendor non-performance and disqualifying or impeding small energy efficiency vendors from participating in Section 16-111.5B programs. *Id.* The AG’s Objections also note that small, local vendors have expressed concerns regarding their inability to compete with larger vendors who are able to absorb the costs of “draconian” contract terms, such as “high-priced surety bonds or extensive holdback provisions.” *Id.* at 8. The AG thus urges the Commission to examine the utilities’ contract terms.

Staff, on the other hand, seems to question whether the utilities’ pay-for-performance contracts go far enough in insulating the utilities’ customers from the risk of an underperforming vendor. Specifically, Staff disagrees with the IPA that the risks associated with vendor non-

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<sup>2</sup> See *Illinois Power Agency*, ICC Docket No. 15-0541, Final Order (Dec. 16, 2015) (“*2016 Procurement Plan Order*”) at 110; *In re Commonwealth Edison Co.*, ICC Docket No. 14-0567, Final Order (June 21, 2016) (“*Plan Year 6 Reconciliation Order*”) at 29-30.

performance are almost entirely mitigated through pay-for-performance contracting. Staff Objections at 20. Staff opines that the protections afforded by such contracts are “overstated” because “pay-for-performance contracting certainly does not enable the utilities to recover from vendors the utilities’ administrative costs associated with non-performing programs.” *Id.*

In sum, the IPA’s Plan and the Objections of the AG, Staff, and ComEd underscore the ongoing uncertainty regarding third-party vendor contracts and bring into focus the important policy considerations for the Commission to decide. With the AG questioning whether the revised contract terms are too stringent and Staff suggesting the new terms may not go far enough, it is critical that the Commission provide detailed and specific guidance in this docket, and approve the proposed contract templates that ComEd attached to its Objections.

**B. The Appropriate Level of Section 16-111.5B Contract Scrutiny (Sec. 9.4.2)**

As part of its discussion concerning vendor contracting in its *2016 Procurement Plan Order*, the Commission stated that “[i]t 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. The utilities are directed 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.” *2016 Procurement Plan Order* at 110. As the Plan and the AG’s Objections note, the utilities and stakeholders took up this issue in the workshop process held from January through July of 2016 together with a host of other issues identified in the Plan. Plan at 106; AG Objections at 3-4. Although this issue was not fully resolved during this compressed timeframe, the Plan notes that further Commission guidance is not necessary at this time. Plan at 106. The AG proposes to short circuit the parties’ discussions, however, and define in its Objections what the “same level of scrutiny” means. AG Objections at 4. This proposal should be rejected.

Importantly, the *2016 Procurement Plan Order's* directive regarding application of the same “level” of scrutiny arose as part of the third-party vendor contracting issue discussed in Section I.A *supra*. *2016 Procurement Plan Order* at 110. After the *Order* rejected Staff's proposed changes to the third-party vendor contracting provisions, it directed the parties to instead focus on the level of scrutiny applied to the vendor contracts used under Sections 8-103 and 16-111.5B of the PUA. *Id.* Six months later, however, the Commission went on to disallow costs associated with an underperforming vendor because ComEd had not withheld payment from the vendor, which now called into question the very contract terms that had been acceptable just six months earlier. *Plan Year 6 Reconciliation Order* at 29-30. Because the *Plan Year 6 Reconciliation Order* was entered in late June of 2016, very little time remained in the workshop process to address these issues.

To be sure, the issue of the “level of scrutiny” has certainly not been ignored by either the utilities or stakeholders, and has been the subject of much discussion in the workshop process. Even so, the resolution of the issue has been complicated by the unanticipated confusion and uncertainty surrounding the contracts themselves, the appropriate terms of which are now in doubt. As evidenced by the contract templates attached to ComEd's Objections, ComEd has long utilized different contract structures depending on whether the energy efficiency program is managed by ComEd or by a third-party vendor, and the pay-for-performance contracts in particular reflect a more stringent approach in light of the *Plan Year 6 Reconciliation Order*. See ComEd Objections, Apps. B-F. It is thus critical that the Commission first review and approve the contracts to be used under Sections 8-103 and 16-111.5B so that stakeholders can proceed with reaching consensus on the “level of scrutiny” to be applied to these contracts. Once those

contracts are approved, the stakeholders will be able to more clearly and effectively discuss what it means to apply the same “level” of scrutiny to these different contract structures.

**C. Scale of Section 16-111.5B Programs (Sec. 9.4.1)**

In its Plan, the IPA questions why the number of bids under the third-party energy efficiency request-for-proposal process declined this year. Plan at 111. Because this issue has not been addressed previously, the IPA recommends that the Commission require (i) SAG workshops at which utilities and stakeholders can discuss marketing strategies and (ii) that utilities’ potential studies and stakeholder feedback be utilized in ensuring that the RFPs, while remaining open-ended, specifically identify any program areas for which bids should be actively sought. *Id.* In response, both the AG and Ameren offer support for the IPA’s two-part recommendation, and Ameren in particular offers a preview of the kinds of issues that should be considered as part of the workshop process. AG Objections at 2-3; Ameren Objections at 5-7.

ComEd agrees with the IPA’s proposal to further explore this issue through workshops. Like Ameren, moreover, ComEd already provides bidders access to its potential study, and thus it is unclear how the second part of the IPA’s recommendation would further enhance the existing process. To narrow the issues in this docket, ComEd does not object to discussions within workshops of how to continue to utilize the potential studies, and welcomes the opportunity to discuss these issues further in workshops.

**D. Confidentiality Issues Associated with Making Public Cost-Effectiveness Tools and Software (Sec. 9.5.3)**

As part of its review of Ameren’s Total Resource Cost (“TRC”) test analysis, the AG proposed that Ameren be required to make its cost-effectiveness tool and related assumptions public. AG Objections at 10. While ComEd takes no position on the substance of this issue as it

relates to Ameren, ComEd cautions that this issue is utility-specific, and ComEd's software licensing agreement for its cost-effectiveness tool – DSMore – prohibits ComEd from making the tool publicly available.

**E. Proposal to Require Reporting of All Section 16-111.5B Costs (Sec. 9.2)**

As noted above, the *2016 Procurement Plan Order* identified various issues to be discussed during the SAG workshop process. One of those issues included which administrative costs should be tracked, and how they should be categorized, reported, and used in the cost-effectiveness analysis for Section 16-111.5B programs. *2016 Procurement Plan Order* at 95. As outlined in Appendix H to the Plan, discussion of these issues resulted in a number of consensus items that should be approved by the Commission. *See* Plan, App. H at 7-13. During the workshop discussions, Staff also proposed that utilities should be required to provide estimates of non-scalable non-program-specific administrative costs in their July 15 Energy Efficiency Assessments submitted to the IPA. Workshop participants were unable to reach consensus on this issue, however, and Staff proposed in its Objections that the Commission order the utilities to provide this level of reporting so that the Plan is “capable of being audited.” Staff Objections at 8.

As evidenced by the consensus items approved in recent procurement plan orders,<sup>3</sup> utilities and stakeholders have devoted substantial time and resources to exploring and reaching consensus regarding administrative cost tracking issues raised by Staff. The present proposal, however, is disconnected from any statutory requirement and would serve no ostensible purpose – indeed, the information sought by Staff does not support any determination required to be

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<sup>3</sup> *See 2016 Procurement Plan Order* at 82-83; *Illinois Power Agency*, ICC Docket No. 14-0588, Final Order (Dec. 17, 2014) at 226-227.

made in this docket under Section 16-111.5B. The statute does not require the submission of non-program administrative costs, and, as Staff admits, the cost-effectiveness analysis does not require this information as an input. Staff Objections at 8-9. In addition, Staff cites to no legal basis for its claim that the information is required to make the Plan “capable of being audited” (*Id.* at 9), and ComEd is unaware of any audit requirement related to procurement plans. Finally, all of the costs ComEd incurs under Section 16-111.5B are reported in the annual reconciliation dockets required by ComEd’s Rider EDA – Energy Efficiency and Demand Response Adjustment. Each year the Commission reviews the prudence and reasonableness of these costs together with the energy efficiency costs ComEd incurs under Section 8-103 of the PUA.

At bottom, ample reporting and Commission review of all energy efficiency costs already exist, and Staff’s proposal would not provide the Commission with any additional information relevant to the determinations to be made in this proceeding.

## **II. Distributed Generation Renewable Energy Credit Procurement**

In their third objection, the Renewables Suppliers question whether the Hourly Alternative Compliance Payment (“ACP”) Funds are truly “contractually committed” to pay for DG RECs procured in the 2015 and 2016 procurement events and whether future DG REC procurement contracts should be given a higher priority for using Hourly ACP Funds than Long Term Power Purchase Agreement (“LTPPA”) RECs. Renewables Suppliers’ Objections at 4-5. Based on the applicable provisions of the 2016 Plan and the *2016 Procurement Plan Order*, ComEd believes that Hourly ACP Funds in an amount equal to the expected future payments under the DG REC contracts have indeed been committed to the 2015 and 2016 Hourly ACP contracts and that these funds are not available to purchase LTPPA RECs unless the DG RECs are not delivered as required by their contracts. *2016 Procurement Plan Order* at 60.

Going forward, ComEd assumes that the same approach will be applied. Under the current approach, if the IPA determines during the development of a future plan that there will be insufficient Hourly ACP Funds to purchase both LTPPA RECs and new DG RECs, then the IPA can propose whether or not to forgo a DG procurement and effectively prioritize LTPPA RECs. However, once a DG REC procurement event is completed, sufficient Hourly ACP Funds should be committed to fully fund the resulting contracts. Alternatively, if the IPA or the Commission concludes that going forward, DG REC contracts do not require Hourly ACP Funds to be committed to their future payments, then a curtailment provision must be included in the multi-year DG REC contracts to allow for the possibility that the funds that were expected to be available could be redirected for another purpose.

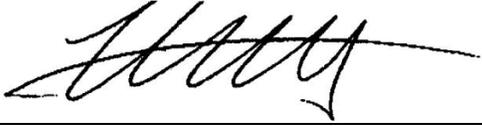
### III. Conclusion

For the reasons stated herein, ComEd requests that the Commission approve the Plan as amended by only the revisions described herein and in its Objections.

Dated: October 21, 2016

Respectfully submitted,

Commonwealth Edison Company

By: 

One of its attorneys

Thomas S. O'Neill  
Senior Vice President, Regulatory and Energy  
Policy and General Counsel  
COMMONWEALTH EDISON COMPANY  
440 South LaSalle Street, Suite 3300  
Chicago, Illinois 60603  
(312) 394-7205  
[thomas.oneill@comed.com](mailto:thomas.oneill@comed.com)

Mark R. Johnson  
McGuireWoods LLP  
77 W. Wacker Dr., Suite 4100  
Chicago, Illinois 60601  
(312) 750-8607  
[mrjohnson@mcguirewoods.com](mailto:mrjohnson@mcguirewoods.com)

Thomas J. Russell  
10 South Dearborn Street, 49<sup>th</sup> Floor  
Chicago, Illinois 60603  
(312) 394-5400  
[thomas.russell@exeloncorp.com](mailto:thomas.russell@exeloncorp.com)

Clark M. Stalker  
10 South Dearborn Street, 49<sup>th</sup> Floor  
Chicago, Illinois 60603  
(312) 394-5400  
[clark.stalker@exeloncorp.com](mailto:clark.stalker@exeloncorp.com)

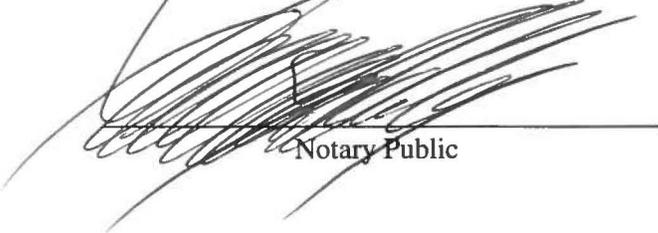
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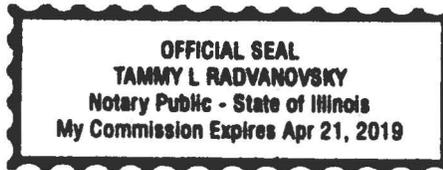
**VERIFICATION OF MICHAEL S. BRANDT**

I, Michael S. Brandt, first being duly sworn, depose and state that I am Manager, Energy Efficiency Planning & Measurement for Commonwealth Edison Company, that I have read Commonwealth Edison Company's Verified Response to the Objections to the Procurement Plan of the Illinois Power Agency, and know the contents thereof, and that the statements contained therein are true and correct to the best of my knowledge, information, and belief.

  
\_\_\_\_\_  
Michael S. Brandt

Subscribed and sworn to before  
me this 20<sup>th</sup> day of October, 2016.

  
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Notary Public

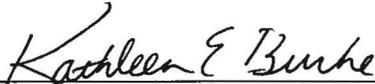


**VERIFICATION OF DAVID R. ZAHAKAYLO**

I, David R. Zahakaylo, first being duly sworn, depose and state that I am Director, Energy Acquisition for Commonwealth Edison Company, that I have read Commonwealth Edison Company's Verified Response to the Objections to the Procurement Plan of the Illinois Power Agency, and know the contents thereof, and that the statements contained therein are true and correct to the best of my knowledge, information, and belief.

  
David R. Zahakaylo

Subscribed and sworn to before  
me this 20<sup>th</sup> day of October, 2016.



Notary Public

