

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 REPLY TO OBJECTIONS TO THE
PROCUREMENT PLAN OF THE ILLINOIS POWER AGENCY

TABLE OF CONTENTS

I. Energy Efficiency..... 2

A. Third-Party Vendor Contracts and Contract Templates (Sec. 9)..... 2

B. Section 16-111.5B Contract Scrutiny (Sec. 9.4.2) 8

C. Reporting of Non-Scalable Non-Program-Specific Costs (Sec. 9.2)..... 10

II. Conclusion 11

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 REPLY TO OBJECTIONS TO THE
PROCUREMENT PLAN OF THE ILLINOIS POWER AGENCY**

Commonwealth Edison Company (“ComEd”), pursuant to Section 16-111.5(d)(3) of the Illinois Public Utilities Act (“PUA”), submits this reply (“Reply”) to certain responses (“Responses”) to the objections (“Objections”) to the proposed 2017 Power Procurement Plan (“2017 Plan” or “Plan”), which the Illinois Power Agency (“IPA”) filed with the Illinois Commerce Commission (“ICC” or “Commission”) on September 27, 2016. ComEd addresses below particular issues raised by the parties in their Responses.¹ This Reply is verified by Michael S. Brandt, who is competent to testify as to the facts to which he attests.

The parties’ Responses again highlight the opportunity before the Commission in this docket to resolve the regulatory uncertainty and confusion that persists regarding the appropriate terms and conditions for energy efficiency vendor contracts. To this end, ComEd attached its proposed contract templates to its Objections for Commission review and approval, as well as summarized the key terms and conditions of those contracts. *See* ComEd Objections at 5-8, Apps. B-F. As the Plan notes, it is imperative that the Commission clearly articulate its policy regarding vendor contracts and provide unambiguous guidance regarding which contract terms strike the

¹ The fact that ComEd does not respond herein to any Response or argument of any other party does not imply that ComEd agrees with or accepts that Response or argument.

correct balance between protecting customers from underperforming vendors while continuing to incent the expansion of energy efficiency in Illinois. Indeed, establishing the contract terms is a condition precedent to the parties reaching agreement regarding other issues, such as the “level of scrutiny” to be applied to these contracts.

I. Energy Efficiency

As discussed further below, ComEd requests that the Commission (1) provide the specific guidance and clarity requested by the parties regarding energy efficiency vendor contract terms and conditions, and approve ComEd’s proposed contract templates; (2) reject the AG’s untimely and unwise proposal to now decide the issue of the “level of scrutiny” to be applied to vendor contracts; and (3) reject Staff’s proposal to require additional reporting that is unrelated to the issues or determinations in this docket.

A. Third-Party Vendor Contracts and Contract Templates (Sec. 9)

In its Plan, the IPA highlights the regulatory uncertainty facing energy efficiency stakeholders following recent Commission orders:

While many programs have performed very successfully, other programs have been less successful, and in one case, as extensively litigated in ICC Docket No. 14-0567, a vendor bankruptcy led to costs incurred that did not result in any energy savings. While the IPA appreciates that the ICC must consider whether utilities prudently manage their expenditures, balance must be achieved between necessary risks to achieve cost-effective energy reductions and completely insulating ratepayers or shareholders from any lost expenses.

Plan at 112. Expanding on the past Commission orders addressing this issue, ComEd’s Objections and Response explained that 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, but the Commission’s subsequent order six months later in Docket No. 14-0567 disallowed ComEd’s costs associated with an insolvent vendor because ComEd had not withheld funding from the vendor.² In the wake of these orders, the Plan notes that ComEd and Ameren have introduced more restrictive contracting terms, 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. Plan at 112.

The parties’ Objections generally expressed support for the Plan’s proposal to revisit the vendor contracting issue in this docket and obtain much needed clarity – (i) the AG requested additional guidance from the Commission “to ensur[e] that ratepayers are not paying more than they should for an energy efficiency program, and that smaller potential vendors are not unfairly shut out of the bid process before it begins” (AG Objections at 9); (ii) Staff questioned whether the revised vendor contracts went far enough in insulating customers from risk (Staff Objections at 20); and (iii) ComEd proposed that the Commission provide specific guidance and also review and approve ComEd’s revised contract templates to be used with energy efficiency vendors (ComEd Objections at 4-5). In their Responses, the AG and ComEd, now joined by the IPA and Ameren Illinois (“Ameren”), continued to support the Plan’s recommendation that the Commission provide further guidance. Staff’s Response, however, departed from its prior Objections, and instead claimed that there is no regulatory uncertainty with respect to vendor contracting. Staff Resp. at 9. It is difficult to understand how Staff has now reached the conclusion that the issue is settled, especially in light of the concerns expressed by the AG, IPA, Ameren, and ComEd, for whom the issue is all but settled. As the AG observes, “[i]t must be made clear [] that

² 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.

the Commission never provided *specific* direction in its Docket No. 14-0567 Order as to what ideal contract terms look like.” AG Resp. at 4 (emphasis in original).

The present docket thus presents a convenient and timely forum for providing the clarity requested by the parties. Although the parties’ views differ regarding the scope of guidance to be provided, ComEd encourages the Commission to provide detailed guidance and, in this vein, also approve the contract templates proposed by ComEd.³ While some parties have opposed, or expressed hesitation regarding, the approval of ComEd’s proposed templates, the disagreement appears to be based solely on concerns about time constraints imposed by the statutory framework rather than any particular issue with the contracts themselves. The IPA, indeed, noted that it has identified no issues with ComEd’s proposed contract templates. IPA Resp. at 25. While ComEd appreciates the time constraints imposed by the statute, no party has identified any particular obstacle that presents an insurmountable challenge to reviewing and approving the contracts in this docket. To the contrary, it is a prudent course of action to pair the approval of the energy efficiency contract templates with the approval of the energy efficiency programs themselves, which involve hundreds of millions of dollars in expenditures.

The issue of vendor contract terms and conditions, moreover, is not new to the parties, with the Commission first ruling on the issue in last year’s procurement proceeding. Indeed, stakeholders went on to address the issue during the January through July 2016 workshop process, which resulted in certain consensus items proposed for approval in this docket. *See* Plan, App. H at 7-13. Even so, the Commission did not issue its order in Docket No. 14-0567 until late June 2016, which introduced unexpected uncertainty near the conclusion of the workshop process.

³ ComEd appreciates Ameren’s clarification that Ameren would not be required to use ComEd’s vendor contracts.

Within a week of the Commission’s denial of rehearing in Docket No. 14-0567, the IPA circulated its Draft Plan on August 15, 2016, and ComEd attached its proposed and revised vendor contract templates to its Comments filed on September 14, 2016. In sum, ComEd has responded as quickly as possible to this rapidly evolving regulatory environment, taking into account the workshop process and changing guidance in the Commission orders. With this background, ComEd believes that this issue is ripe for Commission action and additional workshops would not be useful. As the AG’s Objections observed, “[w]hile the workshop process has been effective at reaching consensus on many issues, reaching agreement on the nature and details of contract terms and negotiations after the Commission approves a program has proven elusive.” AG Objections at 9.

Regarding the comments in the IPA’s Response that it would have “strongly preferred a more pointed identification of what specific concerns necessitated approval of contract templates ... and highlighting of key terms within templates,” (IPA Resp. at 25) ComEd reiterates that it has been subject to hundreds of thousands of dollars in disallowed costs associated with a vendor that became insolvent, and, as the AG notes, the Commission “never provided *specific* direction in its Docket No. 14-0567 Order as to what ideal contract terms look like.” AG Resp. at 4 (emphasis in original). It is this disallowance risk and absence of direction regarding specific contract terms that has prompted ComEd’s request for approval of its contract templates. With respect to highlighting the operative terms and conditions of the proposed contract templates, ComEd notes that its Comments and Objections, as well as its proposed revisions to the Plan in Appendix A to the Objections, included detailed discussion of the key contract terms. For convenience, ComEd has reproduced this discussion below:

As reflected in Appendix A, ComEd has included proposed changes to the Plan that elevate and identify the third-party vendor and contracting issues as key policy issues to be decided by the

Commission in this docket. To this end, ComEd proposes that the Plan include additional discussion regarding the procedural history and relevant Commission orders on these issues, as well as descriptions of the utilities' proposed contracting approaches for both utility-managed and third-party managed programs. Specifically, ComEd proposes that the Plan be revised to highlight key terms of its vendor payment provisions in both its pay-for-performance contracts and its contracts for ComEd-managed programs. These include the following:

- ***Pay-for-Performance Contracting:*** Since the inception of the IPA third-party energy efficiency programs, ComEd has executed pay-for-performance contracts with the vendors whose programs are approved by the Commission in an IPA procurement plan. These contracts include standard terms and conditions, as well as a specific scope of work that describes the energy efficiency program to be offered, the promised kilowatt-hour savings, budgeting, reporting requirements, invoicing, and payment terms. As a pay-for-performance contract, moreover, the vendor is required to give back funds in proportion to any shortfall in promised kilowatt-hour savings, as determined by the independent evaluator. Under the original version of these contracts, vendors could begin receiving payment to cover start-up costs incurred prior to the commencement of the planning year, and also received in-progress payments throughout the year. At the end of the year, expenses were "trued up" under the pay-for-performance structure based on the actual net kWh savings achieved by the program as validated by the independent evaluator.

In response to the disallowance approved by the Commission in ICC Docket No. 14-0567, ComEd has revised its pay-for-performance contracts to eliminate payment of start-up costs, and has also implemented enhanced verification and withholding provisions that limit the amounts ComEd will pay prior to receiving final evaluation results from the independent evaluator. Specifically, ComEd will only pay 90% of verified savings for those measures whose energy savings have been "deemed" by the Illinois Technical Reference Manual. If the measure's energy savings have not been deemed, ComEd will only pay 75% of the verified savings for such measure. The withheld amounts will only be paid if the independent evaluator's final evaluated results justify such payment.

- ***Contracting and Payment Process for ComEd-Managed Programs:*** Several of the programs ComEd proposes for this

Plan are ComEd-managed programs (as opposed to third-party administered programs). In other words, these programs are similar in structure to those ComEd implements and manages under its overall energy efficiency portfolio and its various programs and program elements, as approved by the Commission under Section 8-103 of the PUA. For ComEd-managed programs, ComEd relies on a broad network of third-party vendors to assist with the implementation of its energy efficiency plans (*e.g.*, marketing, outreach, engineering and technical analysis, incentive fulfillment, inspections, appliance pick-up, data tracking). Each contract that ComEd executes with these vendors contains a unique and well-defined scope of work that clearly articulates the vendor's specific tasks and deliverables. Each contract also includes key performance indicators, which measure the vendor's performance under various metrics related to the contract's tasks and deliverables (*e.g.*, safety, customer experience, timeliness of rebates, data accuracy). Vendors generally submit invoices to ComEd on a monthly basis for the work performed during the prior month. Subject to ComEd's verification of the accuracy of the invoice and that the goods or services were delivered, ComEd will typically pay invoices within 45 days, and will expedite payment if the invoice is for rebate and incentives reimbursement.

To assist the Commission in providing additional clarification regarding contract terms and conditions, ComEd recommends that the Plan also be revised to attach the contract templates that the utilities propose to execute with third-party vendors, whether they are pay-for-performance contracts related to third-party managed programs or contracts related to utility-managed programs.

ComEd Objections at 5-8.

In sum, ComEd has provided ample information and detail in this docket regarding its proposed energy efficiency vendor contract terms and conditions, and therefore requests that the Commission approve its contract templates.

B. Section 16-111.5B Contract Scrutiny (Sec. 9.4.2)

As ComEd explained in its Response, the issue of contract scrutiny first arose in the *2016 Procurement Order* as part of the discussion regarding the appropriate terms and conditions of energy efficiency vendor contracts. *2016 Procurement Plan Order* at 110. After the *Order* rejected Staff's proposed changes to the third-party vendor contracting provisions (to require withholding of payment from vendors), 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. As a result, ComEd's Response highlighted that the uncertainty regarding the contracts themselves must be resolved before taking up the issue of the "level" of scrutiny to be applied to these contracts. ComEd Resp. at 5-6. Assuming the Commission provides the clarity and guidance requested by the parties, stakeholders will be able to resume their discussions through the SAG workshop process regarding the "level of scrutiny" to be applied to energy efficiency vendor contracts under Sections 8-103 and 16-111.5B of the Act.

To be sure, the AG's proposal to bypass the consensus workshop process and obtain a ruling on its scrutiny proposal is untimely and incorrect. As ComEd explained in its Response, it has long used different contract templates for its ComEd-managed programs (generally under Section 8-103) and those managed by third-party vendors (under Section 16-111.5B), which reflects the different statutory frameworks of each Section. ComEd Resp. at 5. In their Responses,

the IPA and Ameren also expressed their concerns with the AG’s proposal to “require the Utilities to treat Section 8-103 and Section 16-111.5B contracts the same in terms of ensuring the best contract terms for ratepayers.” AG Objections at 3-7. The IPA noted that “Section 8-103 and Section 16-111.5B feature fundamentally distinct statutory schemes.... Expecting one process to mirror the other seems unrealistic and unwise given these differences, as the opportunities for shaping program proposals and resulting contracts occur at different points and with entirely different levers for leverage held by different parties....” IPA Resp. at 12. Ameren’s Response similarly observed that “the AG appears to confuse the Commission’s directive that the utilities apply the same *level* of scrutiny to Section 5/16-111.5B contracts as to Section 5/8-103 contracts for a directive that the utilities employ the *exact same process* for scrutinizing *bids* in both contexts.” Ameren Resp. at 6. And, like the IPA, Ameren also elaborated on the differences between the statutory schemes. *Id.* at 6-7.

Importantly, the IPA appears to share ComEd’s view that the issue of contract terms and conditions is the more pressing issue to be decided at this time, and further cautions that the AG’s proposal could actually trigger a chilling effect on vendor participation, which is the very outcome the AG seeks to avoid with the revised vendor contracts:

If anything, disputes over the past year have centered on whether new, more protective contract terms – such as withhold up-front payments, cybersecurity requirements, surety bonds, and other hold-back provisions – have erred too far on the side of protecting against risks of non-performance at the expense of vendor participation. Additional RFP requirements signaling to potential bidders that the utilities will scrutinize and seek to adjust proposed terms based upon utility of review of proposal could have a strong chilling effect on vendor participation. Further, this new layer of review and scrutiny would empower the utilities with new gatekeeping responsibilities not envisioned by a statutory scheme focused on fully capturing all available cost-effective energy efficiency through an objective analysis of proposals received from the competitive marketing.

IPA Resp. at 12-13.

For these reasons, ComEd requests that the Commission reject the AG’s proposal regarding “the level of scrutiny,” and instead direct the parties to resume discussions of this issue in workshops, which would greatly benefit from further Commission guidance regarding the appropriate contract terms and conditions.

C. Reporting of Non-Scalable Non-Program-Specific Costs (Sec. 9.2)

Because the participants to the workshop process did not reach an agreement regarding Staff’s proposal that utilities be required to provide estimates of non-scalable non-program-specific administrative costs in their July 15 submittals to the IPA, Staff proposed in Objections that the Commission order utilities to provide this level of reporting so that the Plan is “capable of being audited.” Staff Objections at 8. As ComEd explained in its Response, however, Staff’s proposal serves no identifiable purpose – the data does not support any determination required to be made in this docket, and ComEd already reports all costs incurred through the annual reconciliation proceedings. ComEd Resp. at 7-8. Moreover, ComEd was unable to identify any IPA Plan audit requirement, much less one that would benefit from this kind of reporting. *Id.*

Like ComEd, the IPA’s Response also recommended that the Commission reject Staff’s proposal – “[t]he specific requirement of utility energy efficiency assessments and the Procurement Plan are detailed in statute..., and neither listing requires disclosure of these estimates the IPA believes [the Commission] should not impose extra-statutory requirements without sound justification.” IPA Resp. at 10. The IPA further observes that Staff’s “thin rationale for a new, extra-statutory, prescriptive requirement is merely that the resulting Plan would be ‘transparent and auditable’ without any explanation of who would ‘audit’ the IPA’s annual Plan

and under what authority, let alone how requiring reporting an estimate of expected utility administrative costs would aid in any audit process.” IPA Resp. at 10-11.

ComEd concurs with the IPA’s Response, and reiterates its recommendation that Staff’s proposal be rejected.

II. 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 previously filed Objections and Response.

Dated: October 31, 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

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

Thomas J. Russell
10 South Dearborn Street, 49th Floor
Chicago, Illinois 60603
(312) 394-5400
thomas.russell@exeloncorp.com

Clark M. Stalker
10 South Dearborn Street, 49th Floor
Chicago, Illinois 60603
(312) 394-5400
clark.stalker@exeloncorp.com

Counsel for Commonwealth Edison Company

VERIFICATION OF MICHAEL S. BRANDT

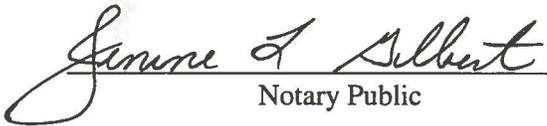
I, Michael S. Brandt, first being duly sworn, depose and state that I am Manager, Energy Efficiency Planning & Measurement for Commonwealth Edison Company, that I have read Commonwealth Edison Company's Verified Reply to the Objections to the Procurement Plan of the Illinois Power Agency, and know the 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 27 day of October, 2016.





Notary Public