STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Power Agency	)	
	)	ICC 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	)	

VERIFIED REPLY BRIEF ON EXCEPTIONS
ON BEHALF OF THE ILLINOIS POWER AGENCY

The Illinois Power Agency ("IPA" or "Agency") respectfully submits its Verified Reply Brief on Exceptions in Docket No. 16-0453, the IPA's petition for approval of its 2017 Procurement Plan ("Procurement Plan," "Plan," or "2017 Plan"). Responses to arguments offered in parties' Briefs on Exception are addressed below.

I. Chapter 8 -- Renewable Energy Resources and Procurement

In her Proposed Order dated November 14, 2016, the Commission's Administrative Law Judge serving as the hearing officer for this proceeding wisely rejected a series of arguments by a three holders of long-term bundled contracts (the "Renewable Suppliers") seeking for their narrow financial interests be placed ahead of the Agency's mandate that it satisfy state law at the "lowest total cost over time, taking into account any benefits of price stability." (20 ILCS 3855/1-5(A)). These proposals sought the following: 1) for the IPA's first DG procurement not to occur prior to the determination of whether to curtail LTPPAs (thus, subsequent to the March 15 receipt of load forecasts), rather than as determined by the Agency based on appropriate scheduling criteria; and 2) that any new DG contracts entered into using hourly ACP funds be designated as "subordinate to" any future contracts for the purchase of RECs from curtailed LTPPAs. (RS Response at 1-3). In addition to the IPA, all other parties offering comment recommended the rejection of these proposals.

In its Brief on Exceptions, the Renewable Suppliers offer no new (or otherwise compelling) arguments for the adoption of these controversial proposals, instead recycling the same arguments focused on elevating their own narrow financial interests above the legitimate concerns articulated in the Proposed Order. With respect to its proposal that they, and not the IPA, dictate the scheduling of the first of the IPA's two distributed generation procurements through requiring that it must be held after the March 15 load forecasts are received and a LTPPA curtailment determination is made, the Renewable Suppliers acknowledge that the IPA argued and the Proposed Order recognized that the Agency's procurements should be "based on the availability of its internal and external resources, the timetable for contract development and completion, maximizing bidder participation," and other concerns "relating to meeting statutory requirements at the lowest total cost over time." Nevertheless, the Renewable Suppliers pose that such reasons constitute "no explanation" for why the Agency requires flexibility in scheduling its procurement date according to such needs.

The Agency believes that its offered rationale is clear and convincing, as the Proposed Order properly found. But to the extent that the Renewable Suppliers somehow misunderstood the obvious subtext in that rationale, the Agency further explains as follows: after the approval of its Procurement Plan, the Agency has numerous procurements to schedule—most of which will occur in the Spring of 2017. These include energy procurements, REC procurements, SREC procurements, and DG procurements for the three utilities participating in its procurement process, as well as a potential contingency Supplemental Photovoltaic Procurement under Section 1-56(i) of the IPA Act and the Plan approved in Docket No. 14-0651 and a possible renewable resource procurement under its general authority in Section 1-56.[1] This process includes scheduling not only the procurement event itself, but also contract development, contract comment periods, bidder webinars, procurement rule development and publishing, bid solicitation, report development, and Commission approval—*all* of which must be scheduled for *each* event. This multitude of tasks creates overlaps between processes for distinct-but-parallel procurements; those overlaps limit the availability of Agency resources, thus necessitating maximum flexibility in scheduling.

Further, as its DG procurement a) will be the first of two such DG procurements, b) addresses a statutory procurement target currently unmet, and c) may be scheduled more quickly to maximize participation of solar DG project developers worried that there could be a significant pause in the market since the IPA's last SPV procurement (conducted in the Spring of 2016), scheduling this DG procurement carries unique urgency. Will this urgency necessitate a procurement event date of before March 15? Possibly; the Agency cannot say for certain.

To manage these pieces effectively, it is paramount that the Agency retain flexibility in scheduling its procurements according to the availability of its internal and external resources, the timetable for contract development and completion, maximizing bidder participation, and similar concerns. Conducting multiple procurements for similar resources too close together in time, conducting a procurement with insufficient staffing or procurement administrator resources, or conducting a procurement mistimed to occur in conjunction with external events in other jurisdictions (thus eroding market participation) could all compromise the Agency's efforts to achieve "the lowest total cost over time, taking into account the benefits of price stability" through its procurement events. To avoid the potential for increased costs, reduced participation,

[1] As the Commission is very aware, there also exists the very real possibility of *additional* procurements required by new legislation, such as zero emission credit procurements or initial forward procurements of renewables required under Senate Bill 2814.

or errors resulting from an unnecessarily constrained process, the Proposed Order wisely rejected the Renewable Suppliers' self-serving mandate that a procurement be scheduled according to its needs, and not those of the Agency. The Final Order should do the same.

The Renewable Suppliers' second exception is even more problematic. Despite the IPA's generous offer to utilize hourly ACP funds to purchase curtailed RECs if a curtailment takes place and such funds are still available, and to purchase curtailed RECs using the Renewable Energy Resources Fund if they are not, the Renewable Suppliers demand that future DG procurement contracts must include a clause stating that such contracts are "subject to and subordinate to the use of Hourly ACP Funds to purchase curtailed RECs, should any curtailments of purchases under the LTPPAs be required during the five-year period." (Renewable Suppliers BOE at 6). The Renewable Suppliers begin this argument with the absurd contention that because resulting *contract instruments* from prior DG procurements did not specifically designate from which funding source payments are to be made, the IPA's prior administratively approved plans and the Commission's prior administrative orders unequivocally stating that hourly ACP funds are to be used to meet those contracts somehow do not "contractually commit" hourly ACP funds. .

Under Illinois law, electric distribution utilities above a certain size may only enter into supply contracts—whether for energy, RECs, or other standard wholesale products—consistent with the planning and procurement processes described in Section 16-111.5 of the PUA. The mandates developed through the Section 16-111.5 process enable and inform any instruments that follow, and those instruments (such as REC supply contracts entered into by the utilities) cannot legally be developed and adopted absent those mandates. Through the annual Section 16-111.5 process, in Docket Nos. 14-0588 and 15-0541, the Agency and Commission unambiguously dedicated hourly ACP funds collected under Section 1-75(c)(5) for the purpose of procuring DG RECs, thus enabling hourly ACP funds—and only hourly ACP funds, as no authority was provided for the use of funding streams such as the renewable resource budget—for that purpose.[2] As the IPA explained in its Response (See IPA Response at 5-6), the notion that the Commission's final administrative action could somehow be invalid because it was not also specifically memorialized in a resulting contractual instrument is a preposterous argument; a contract determines the rights as between two entities, while the resulting Illinois Commerce Commission administrative order specifically designating hourly ACP funds for the purpose of purchasing renewable energy credits resulting from DG REC procurement contracts carries the force and effect of law.

As noted by the Proposed Order, even in the unlikely scenario that a) curtailments are required <u>and</u> b) hourly ACP funds are fully committed through the DG procurement, the IPA has offered to use the Renewable Energy Resources Fund to buy any curtailed RECs. Rather than recognizing the generosity of this offer—one which the Agency, as the sole administrator of that fund, is under no obligation to make—the Renewable Suppliers claim it to be insufficient, complaining that purchasing curtailed RECs using the RERF "does not provide full contractual revenue recovery" due to the fact that the Agency only pays the imputed REC value for any RECs to maintain consistency with Section 1-56(d) of the IPA Act.[3] This complaint is misleading, inaccurate, and can be easily dismissed on any of the following grounds. First, it is actually *unknown* whether the overall revenue received would be less; should market energy

---

[2] This pertains specifically to ComEd and Ameren; for MidAmerican, due to the absence of a similar load migration and budget erosion risk, renewable resource budget funds were available for use.

[3] Specifically, Section 1-56(d) provides that "[t]he price paid to procure renewable energy credits using monies from the Illinois Power Agency Renewable Energy Resources Fund **shall not exceed the winning bid prices paid for like resources** procured for electric utilities required to comply with Section 1-75 of this Act." (20 ILCS 3855/1-56(d) (emphasis added)). If the IPA paid a *higher* price for a curtailed REC than the imputed value of that REC as taken from the LTPPA (a value determined in a prior Section 1-75 procurement), it could be argued that the Agency ran afoul of this provision.

prices exceed the imputed energy prices in the LTPPAs (as happened as recently as early 2015), the IPA's methodology could actually result in *more* revenues for the Renewable Suppliers than envisioned under the contract. Second, the IPA's methodology would compensate Renewable Suppliers for the exact imputed REC value of the RECs sold to the utilities through the contract; it is only in *energy* revenues that the Renewable Suppliers could collect less than anticipated (and only for the curtailed portion of the contract, which may be a very small percentage of the overall contractual amount). Notably, any reduction in revenues would only occur because the Renewable Suppliers would merely receive *market value* for energy rather than an *above-market* contract amount. Third, the average winning bid price from the 2010 LTPPAs (bundled REC and energy) stands well above the combined average winning bid prices for RECs and energy from recent IPA procurements. A temporary adjustment of one revenue stream to actual market value for a small portion (the curtailed percentage) of one side (energy) of those contracts hardly leaves LTPPA holders on weak financial footing; instead, it simply leaves them on par with countless competing generating facilities that rely on wholesale markets for energy revenues. And lastly, as the Commission recognized in Docket No. 13-0456, "it is clear to the Commission that bidders on the LTPPAs should have known about the possibility of customer switching and curtailments." (Docket No. 13-0546, Order on Rehearing dated June 17, 2014 at 53). Against that backdrop, requiring the Renewable Suppliers to sell curtailed RECs in the open market for whatever value the market might bear would be a perfectly fair, anticipated, and foreseeable result. If anything, the IPA's offer to procure those RECs from hourly ACP funds if available and otherwise from the RERF at the LTPPA's imputed REC price may be overly generous.

More troubling is the negative impact that a subordination requirement could have on the Agency's proposed DG procurement. As the IPA explained in its Plan and Response, because 5-

year contracts are required for the procurement of distributed generation resources (See 20 ILCS 3855/1-75(c)(1)), the Agency and potential bidders need confidence that funds will be available to pay for those RECs in years beyond the coming year. As a result, while entering into additional long-term contracts using the renewable resources budget has previously been rejected by the Commission (in part because the Renewable Suppliers insisted that any new contracts be considered junior to their LTPPAs in the event of a curtailment, thus leaving any new agreements significantly exposed to being unmet),[4] the Commission has authorized the use of hourly ACP funds for 5-year contracts through a DG procurement in each of the past two plan proceedings. (See Docket No. 14-0588; Docket No. 15-0541). Already-collected hourly ACP funds carry no curtailment risk (as a collected balance could not be impacted by mass customer switching or other disruptive shifts), and because these funds are held by the utilities, they are shielded from being swept or diverted by the state.

As detailed by the IPA in its Reply and other parties in their Reply and Response (IPA Reply at 2-5; Staff Response at 3-7; ComEd Response at 8-9; Ameren Reply at 1-2; ELPC Reply at 3-4), making new DG contracts subordinate to existing LTPPAs in allocating hourly ACP funds would require the introduction of new curtailment provisions into DG contracts. Stated differently, the IPA would essentially be telling potential DG bidders through contracts that the utilities cannot promise to actually purchase RECs under contract because they can no longer promise the availability of funds. This undercuts the purpose of using already-collected hourly ACP funds for the DG procurement—the known availability of funds for a longer-term

[4] As it currently stands, all new renewable resource contracts – whether for DG, SRECs, wind RECs, or RECs more generally – are effectively subordinate to the LTPPAs in accessing renewable resource budget funds: each March, upon a determination of the renewable resource budget available, existing contractual obligations are subtracted from that number to create a maximum amount that may be spent on new renewables procurements. No new contracts may be entered into if the entire renewable resource budget would be exhausted solely through LTPPA-committed funds (as was the case for ComEd's contracts in two prior delivery years, when no renewable energy procurements were conducted). Apparently this generous treatment is insufficient for the Renewable Suppliers, and *only* the subordination of *all* potential streams of renewable energy funds would quell objections.

contractual arrangement—and risks submarining the procurement's potential success. Because the only benefits from this approach would merely be to ensure that the Renewable Suppliers' most convenient (but not only) solution to an unlikely problem is held above all other interests (including meeting DG procurement targets established by law), the Renewable Suppliers argument that all new DG contracts be beholden to existing LTPPAs is eminently unreasonable and the Proposed Order's conclusion must be upheld.

Lastly, the Commission's decision in Docket No 13-0546 is of no help to the Renewable Suppliers. As the Proposed Order properly recognized, that decision was made on the basis of a record specific to that proceeding in which no other use for hourly customer ACP funds was proposed. Alternatively, in Dockets No. 14-0588 and 15-0541 approving the Agency's past two procurement plans, hourly ACP funds were designated for a distributed generation procurement *without* any requirement that such funds be made subordinate to the LTPPAs or that curtailment provisions be included in resulting contracts. The Commission has never recognized that the LTPPA holders have any ongoing right to or priority over hourly ACP payments, and no compelling justification has been proposed for recognizing such a right starting this year.

II. <u>Section 9.3 – 2016 Workshop Consensus Items</u>

In its Brief on Exceptions, Staff recommends edits to the Proposed Order's conclusion on Consensus Items "in order to provide supporting rationale for adoption of the consensus language" and "to clarify the applicability of adoption of the consensus language." (Staff BOE at 4-5). The IPA has reviewed Staff's proposed revisions to the Proposed Order, believes those revisions to be consistent with the IPA's intent as expressed in its Plan, believes Staff's revisions offer beneficial clarifying and supporting text, and recommends their adoption.

III. Section 9.5.4 – Programs Deemed "Not Responsive to the RFP" by Ameren Illinois and Policy Implications

In attempting to justify arguments for the rejection of cost-effective energy efficiency programs that the Commission is required to "fully capture . . . to the extent practicable," Staff and Ameren continue to contend that Utility Cost Test and Cost of Supply scores below 1.0 and constitute grounds for program rejection. (Staff BOE at 5-8; Ameren BOE at 4-7). But whatever the policy merits of these various approaches to calculating costs and benefits of such programs, the Commission's utilization of a test other than the Total Resource Cost Test is inconsistent with Illinois law. As the IPA explained in its Reply:

> [T]he governing law directly addresses how the Commission is to weigh the costs and benefits of energy efficiency programs, and which costs and benefits may be considered in that analysis. As the IPA highlighted in its Response, Section 16-111.5B requires that programs be "cost-effective," with that definition drawn from Section 8-103 of the PUA (the TRC Test). (220 ILCS 5/16-111.5B(b)). The statutory definition of the TRC Test provides the manner for weighing costs and benefits, expressly and specifically detailing which inputs may be used and compared in its calculation:
>
>> 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
>
> (20 ILCS 3855/1-10). Stated differently, the TRC Test is best understood as a ledger, with the benefits and costs listed in its definition serving as entries akin to credits and debits, and the final result expressed as a ratio of the two. If credits exceed debits—or benefits exceed costs—the resulting ratio is above 1.0, and the program is cost-effective. The Utility Cost Test and Cost of Supply analysis are simply different ledgers in which certain entries present in the TRC are adjusted or deleted. For example, Ameren's Cost of Supply analysis excludes both gas benefits and transmission and system distribution benefits (which the law requires be considered in a TRC Test), while a Utility Cost Test does not include societal or gas benefits on one side of the ledger and only looks at utility-incurred costs on the other. Cells on a spreadsheet are deleted to reflect these differences, and outcomes in the ledger change accordingly. Debits may now exceed credits; benefits may now fall short of costs.

> Utilizing a different ledger to weigh costs and benefits might be sensible if the law was silent on what ledger to use. But the law is not silent: Section 16-111.5B mandates that a test of cost-effectiveness apply, this test is required by law to be the TRC Test, the statutory definition of the TRC Test mandates that items such as gas savings and T&D benefits be considered, and no other test weighing costs and benefits is mentioned elsewhere in Section 16-111.5B. Conducting a first review using the ledger required by law (TRC), but then allowing that ledger to be ignored by deleting certain entries for an stricter review (UCT or Cost of Supply) effectively writes the first ledger out the law. It no longer matters that the governing statute expressly mandates recognition of gas benefits, as a second test is applied which ignores those benefits entirely. This is no different than, say, state law mandating that 70% shall be considered a passing grade for a driver's test, but the agency implementing that test ignoring that provision to state that only an 80% score will result in the issuance of a license. Whatever the policy merits of an 80% score or a UCT Test above 1.0, the determination of how a driver or a program passes has been made through statute, and an administrative agency cannot simply set state law aside to create new, stricter limitations. (See generally In re Ill. Bell Tel. Co., Docket No. 01-0614, 2002 WL 1943561, at 30-31 (finding that the Commission "may not . . . add exceptions and limitations to the statute's applications, regardless of its opinion regarding the desirability of the results of the statute's operation)).

(IPA Reply at 7-9). Against this backdrop, as the IPA explained in its Reply, it is unsurprising that the Commission has never used the UCT as grounds for cost-effective program rejection:

> [I]t is also instructive that for each prior year for which Section 16-111.5B submittals were made, tests other than the TRC were not used to disqualify proposals even if the resulting ratios fell below 1.0. For instance, in Docket No. 13-0546, programs were approved for both Ameren's and ComEd's service territories despite a UCT score below 1.0 because each program featured a TRC of above 1.0. (See 2014 Plan at 87, 89). In Docket No. 14-0588, two programs proposed for ComEd's service territory were approved despite a UCT score below 1.0 because each program featured a TRC of above 1.0. (See 2015 Plan at 80).

(IPA Reply at 11). As Staff has provided no meaningful justification for a departure from this established approach, its argument should be rejected.

On exceptions, Staff turns its focus toward the general procurement provisions found in Section 16-111.5—specifically, Section 16-111.5(d)(4)'s requirement that IPA procurement plans "will ensure adequate, reliable, affordable, efficient, and environmentally sustainable electric service at the lowest total cost over time, taking into account any benefits of price stability." In addition to the fact that this provision was also applicable to each prior plan and the

Commission repeatedly saw no need to consider UCT results determinative,[5] thus setting a clear precedent as to how the interaction of these provisions should be understood, this argument also fails the following reasons. First, Section 16-111.5B(a)(5), and not Section 16-111.5(d)(4), is legally controlling over how costs and benefit of energy efficiency programs are to be evaluated by the Commission. It is a well-recognized principle of statutory interpretation that 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. (See Bowes v. City of Chicago, 3 Ill.2d 175, 205 (1954)). Section 16-111.5B(a)(5)'s requirement that energy efficiency programs be cost-effective under the total resource cost test is far more specific than Section 16-111.5(d)(4)'s general requirement regarding the cost of electric service and is intended to address only the evaluation of energy efficiency programs. As the Proposed Order properly recognizes, the criteria set forth in Section 16-111.5B(a)(5) is clearly and unequivocally the controlling criteria on the Commission's energy efficiency program review.

Second, the strictures of Section 16-111.5 are practically inapplicable to the criteria used to include and adopt proposed energy efficiency programs under Section 16-111.5B. Are these energy efficiency programs subject to the Section 16-111.5(e)(3) requirement that they be subject to market-based benchmarks? Do such programs require "a procedure for sealed, binding commitment bidding with pay-as-bid settlement" as required by Section 16-111.5(e)(4)? Of course not, and the application of such provisions would be absurd given the nature of the process for utility-led bid solicitation, evaluation, and inclusion set forth in Section 16-111.5B. Indeed, procurement plans are *generally* intended to meet load requirements of eligible retail customers—but energy efficiency programs *specifically* are not, as they are intended to include

[5] While not entirely clear from this section (Section B) of Staff's BOE, presumably Staff is referencing UCT results in referring to a "cost of electric service" program threshold given the discussion on pp. 15-16 of its BOE.

all customers who *could potentially be* eligible retail customers, including customers of retail suppliers for whom the Agency does not procure supply.

In IPA procurement plans, Section 16-111.5B energy efficiency programs are a distinct product (i.e., not a "standard wholesale product") procured for a distinct set of customers ("all retail customers whose electric service has not been declared competitive under Section 16-113 of this Act and who are eligible to purchase power and energy from the utility under fixed-price bundled service tariffs, regardless of whether such customers actually do purchase such power and energy from the utility") under a distinct standard of review ("cost-effective" as determined by the "total resource cost test"). Indeed, in the five years of implementation of Section 16-111.5B, no party has argued (or credibly could argue) that these provisions in Section 16-111.5 require that energy efficiency program adoption follow the procurement procedures set forth in Section 16-111.5, as those procedures are already addressed through and preempted by Section 16-111.5B. Staff's attempt to apply general plan evaluation language in Section 16-111.5(d)(4) to argue that it supersedes very specific program evaluation language in Section 16-111.5B(a)(5) fares no better and must be rejected.

And third, even if Staff were correct that this language did provide a new, independent basis for evaluating energy efficiency programs, there is no guidance from the law that the utility cost test is the proper evaluative method in determining the "cost of electric service." Staff's argument that the law bars the adoption of a program with a UCT score below 1.0 ignores that the law makes no mention of the UCT, the law provides no methodology for calculating the UCT, the Commission has never recognized Section 16-111.5(d)(4) as referencing the UCT, and the procurement of standard wholesale products under Section 16-111.5(d)(4) is not and has never been subject to a "Utility Cost Test." As a result, Staff and Ameren's attempt to create a new "overall costs of electric service" standard for evaluating energy efficiency programs through insistence that any such programs must also pass a test not referenced anywhere in statute should be rejected, as the Proposed Order properly does.

IV. <u>Section 9.5.4.2 – Demand Based Ventilation Control Program</u>

The IPA disagrees with Staff's contention that because the Demand-Based Ventilation Control Program vendor has been identified as a performance risk vendor in ComEd's service territory, that program's TRC results must be considered unreliable and the Proposed Order's conclusion should be modified to reflect that rationale. (See Staff BOE at 9-12).

First, Staff demonstrates no link between performance risk and TRC results. When a vendor fails to perform, aggregate benefits from a program do indeed decline—but so do aggregate costs, and in a roughly corresponding way. Just as it in did in presenting rejected arguments around performance risk in Docket No. 15-0541, Staff fails to present a methodology for its proposed downward TRC Test adjustment; it simply rushes to its conclusion to make the program not cost-effective without providing evidence for what input adjustments would need to be made and what resulting TRC value might emerge. This is quite surprising given Staff's insistence on the absolute integrity of other test results: according to Staff, a UCT result – a test not contemplated anywhere in the statute – of 0.95 is clearly determinative and must guide the Commission, but TRC Test results – a test contemplated by the law, with categories of costs and benefits to be considered embodied in law – can simply be adjusted downward to an unknown amount (so long as below 1.0) without any articulated methodology for doing so, or even any guidance as to which test inputs must be adjusted or ignored. As so clearly and brazenly using a chosen conclusion to dictate an evaluative process would leave the Commission with a legally untenable basis for its administrative action, Staff's arguments must be rejected.

Second, Staff clearly misapplies the performance risk test proposed by ComEd and adopted by the Proposed Order. That test operates as follows:

> In bid review discussions around program proposals for the 2017 Plan, ComEd and stakeholders developed new screening criteria for programs that could have a significant likelihood of failing to achieve savings based on past performance. This screening was manifest as a two-part test: first, as a way to identify potential "performance risk" vendors, programs were screened to determine whether the bidder submitting the program failed to deliver five percent of their savings goals from prior Section 16-111.5B programs. If a vendor was identified as failing this test, the second screen applied was whether there was new information or a compelling reason that would suggest a different outcome for the proposed programs (e.g., new programs, new delivery approach, changes in team, or different market conditions). If the answer was "no" to both, then ComEd and stakeholders agreed the program posed a performance risk so significant that the program should not be recommended for inclusion.

(2017 Plan at 125). In rushing to its conclusion on vendor performance to ensure the program's unequivocal disqualification, Staff overlooks that this test involves <u>two steps</u>: first assessing performance risk, but then also then applying a second screen determining whether a different outcome might occur—and <u>not</u> rejecting the program if it might. As the necessary analysis for the second step has not been completed, Staff simply ignores that step and hopes the Commission will turn a two-step test into a one-step analysis to support its preferred conclusion.

Third, this performance risk test proposed by ComEd has never actually been proposed for application by Ameren to its vendors, and it was not applied during the bid review process. The time for utilizing new performance risk standards in program review was this past summer, when *all* Section 16-111.5B proposals were being reviewed for development of the utility's submittal—not through Briefs on Exception, and certainly not through singling out a lone program for that review. Because selecting only one proposal for heightened scrutiny while evaluating others on traditional criteria would likewise leave the Commission with a very tenuous basis for reaching its conclusion, Staff's proposed revisions to the Proposed Order's conclusion on the Demand Based Ventilation Control Program should be rejected and the existing Proposed Order language should be maintained.

V. Section 9.6.8 -- ComEd Programs Recommended for Approval

Consistent with the reasoning set forth in Section III above, the Agency also believes that Staff's proposed changes to the Proposed Order's conclusion on ComEd's programs recommended for approval must be rejected. (See Staff BOE at 14-17). For reasons exhaustively explained in the IPA's prior filings (See IPA Response at 23-24; IPA Reply at 6-15) and in Section III of this RBOE, Staff's insistence on using the non-statutory Utility Cost Test for the rejection of two cost-effective programs is both inconsistent with past practice (See 2016 Plan at 99, 2013; 2015 Plan at 76, 80; 2014 Plan at 87, 89) and inconsistent with the law itself, which requires that energy efficiency programs be evaluated using the Total Resource Cost Test.[6] Nor is the term "practicable," found as a condition to cost-effective program approval in Section 16-111.5(a)(5), supportive of Staff's argument. As the IPA explained in its Response:

> Indeed, the IPA agrees with AIC and Staff that Commission does have some discretion to exclude cost-effective energy efficiency programs under this language—but only if the Commission does not conclude that such a program's inclusion would result in "fully captur[ing] the potential for all achievable cost-effective savings, to the extent practicable, and otherwise satisfy the requirements of Section 8-103 of [the Public Utilities Act]." In interpreting this language, the Agency believes that the following principles must apply: 1) as it is undefined in the law, the plain language meaning of the term "practicable" (that is, "capable of being put into practice or of being done or accomplished") must be utilized; and 2) any discretion exercised on the grounds of program's inclusion failing to be "practicable" must be exercised against the backdrop of language mandating that the Plan "fully capture the potential for all achievable cost-effective savings." As a result, the Commission's inquiry must focus on whether the energy efficiency program proposed under Section 16-111.5B is "capable of being put into practice or being done or accomplished," with a standing presumption that cost-effective programs should be approved if possible—and not based an analysis of whether approving the program constitutes good public policy in the view of Ameren, Staff, or other parties
>
> * * *

[6] Specifically, Section 16-111.5B(a)(5) requires that programs "the fully capture the potential for all achievable cost-effective savings, to the extent practicable," while Section 16-111.5B(b) requires that for this section of the law, "the term "cost-effective" shall have the meaning set forth in subsection (a) of Section 8-103 of this Act." Section 8-103(a) states that "[a]s used in this Section, 'cost-effective' means that the measures satisfy the total resource cost test," a test defined in Section 1-10 of the IPA Act. At no point does the law mention, define, or even reference the Utility Cost Test, despite Staff's insistence that it be considered a threshold for program inclusion.

> Whatever the policy merits of the UCT, the governing law 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 5/16-111.5(a)(5)). As a cost-effective program failing the UCT could still be "capable of being put into practice or being done or accomplished," the IPA believes that a program with a TRC test result of greater than 1 but a UCT rest result of less than 1 should be approved by the Commission—especially against the backdrop of a corresponding requirement that "all achievable cost-effective savings" be "fully capture[d]."

(IPA Response at 15-16, 23).

In evaluating energy efficiency proposals, the Commission is faced with a somewhat straightforward standard of review: under Section 16-111.5B(a)(5), it is required to "approve the energy efficiency programs and measures included in the procurement plan, including the annual energy savings goal, if the Commission <u>determines they fully capture the potential for all achievable cost-effective savings, to the extent practicable, and otherwise satisfy the requirements of Section 8-103 of [the PUA].</u>" (220 ILCS 5/16-111.5B (emphasis added)). Contrary to Staff's assertions, the flexibility and discretion described in the law is not open-ended; it is limited only to situations in which a) the program does not "otherwise satisfy the requirements of Section 8-103" of the PUA and b) the program would not be "capable of being put into practice or being done or accomplished," as it would not be "practicable." As nothing in this proceeding indicates that the two ComEd service territory programs with UCT scores below 1.0 fail to meet the requirements of Section 8-103 or could not be put into practice, Staff's contention that UCT Test results be utilized as grounds for program rejection must be denied. The Proposed Order wisely agreed, and its conclusion should not be modified to accommodate Staff's clear misunderstanding of the law.

CONCLUSION

The IPA thanks the Administrative Law Judge for her diligent, thoughtful work in an extraordinarily tight timeframe. The Agency recommends that the Commission resolve identified exceptions consistent with the IPA's replies to those exceptions articulated herein.

Dated: December 2, 2016

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 Reply 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.

OFFICIAL SEAL
SANJAY J PATEL
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:02/06/18

Anthony M. Star

Subscribed and sworn to me
This 2nd day of December, 2016

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Power Agency	)	
	)	ICC 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	)	

NOTICE OF FILING

Please take notice that on December 2, 2016, 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:

December 2, 2016

/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 December 2, 2016.

/s/ Brian P. Granahan___
Brian P. Granahan