

**REPLY COMMENTS ON THE 2008 PROCUREMENT PROCESS  
PURSUANT TO SECTION 16-111.5(o) OF THE PUBLIC UTILITIES ACT**

**PRESENTED TO**

**THE ILLINOIS COMMERCE COMMISSION**

**by**

**STAFF OF THE ILLINOIS COMMERCE COMMISSION**

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The Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, submits these reply comments to the Comments and Recommendations by the People of the State of Illinois On the 2008 Electricity Procurement Process (“AG Comments”). Specifically, these reply comments respond to the comments made by The People of the State of Illinois, by and through Illinois Attorney General Lisa Madigan (the “AG”), regarding disclosure of information about the 2008 procurement and whether certain information is “public” or “confidential or proprietary.”

## **I. Introduction**

The AG urges the Illinois Commerce Commission (“Commission”) to “disclose all information relating to the 2008 and 2009 procurements that is not expressly designated confidential by statute, rule or regulation -- absent a showing by a party requesting confidentiality that overcomes the legal presumption in favor of disclosure and an express finding by the ICC or IPA that the specific information should be treated as confidential or proprietary.” AG Comments at 1, 18. While Staff acknowledges that only certain information regarding Section 16-111.5 procurements is afforded confidential treatment under the Public Utilities Act (the “Act” or “PUA”), 220 ILCS 5/1-101 et seq., the AG fails to acknowledge that all “supplier and bidding information” is to be afforded such confidential treatment. 220 ILCS 5/16-111.5(h). Thus, for the 2008 procurement, the AG should specifically identify the specific information it requests to be publicly disclosed and, if such information is not the type of information afforded confidential treatment under Section 16-111.5, the Commission could disclose that information. The blanket assertion that all information is public and should be disclosed is not helpful in this regard. With respect to the 2009 procurement, the AG’s comments appear to

request that the 2009 procurement process explicitly call for additional public disclosures of information. To the extent that additional information should be publicly disclosed, Staff believes it would be beneficial to specify the information to be disclosed and the timing for disclosure in the next procurement plan. Staff notes, however, that the benefits of public disclosure must be weighed and balanced against the risk that public disclosure of certain information could discourage or have a negative impact on supplier and bidder participation in the procurements.

## **II. Comments on Confidential Information**

### **A. Protection of Confidential Information Under Section 16-111.5**

Many details involved in the Commission-sponsored procurement process described in new Section 16-111.5 are statutorily cloaked with confidentiality, through not every fact or circumstance concerning that process must remain secret. There are several references to confidentiality in new Section 16-111.5, added to the PUA by Public Act 95-481. With respect to confidentiality the procurement administrator is to develop benchmarks that the Commission is to review and approve on a confidential basis, “maintain confidentiality of supplier and bidding information in a manner consistent with” applicable laws, rules, and tariffs, and submit a confidential report to the Commission recommending acceptance or rejection of bids. 220 ILCS 5/16-111.5 (c)(1)(ii), (viii), (ix). Similarly, the procurement monitor must provide the Commission with an independent confidential report about the procurement results and “preserve the confidentiality of supplier and bidding information in a manner consistent with” applicable laws, rules, and tariffs. 220 ILCS 5/16-111.5(c)(2)(iii), (v). One of the tasks assigned to the procurement administrator is to establish market-based price

benchmarks, which are to be “confidential but shall be provided to, and will be subject to Commission review and approval, prior to a procurement event.” 220 ILCS 5/16-111.5((e)(3). Within two days of the opening of the sealed bids in a procurement event, both the administrator and the monitor are to submit to the Commission separate confidential reports concerning the event. The administrator’s report is to contain the bidding results for each product and the administrator’s recommendation whether to accept or reject the bids based on the benchmarks and other relevant criteria. The monitor, in its report, is to assess bidder behavior and assess the administrator’s compliance with the procurement process and rules. 220 ILCS 5/16-111.5(f.)

Finally, Section 16-111.5(h) states, in full:

The names of the successful bidders and the load weighted average of the winning bid prices for each contract type and for each contract term shall be made available to the public at the time of Commission approval of a procurement event. The Commission, the procurement monitor, the procurement administrator, the Illinois Power Agency, and all participants in the procurement process shall maintain the confidentiality of all other supplier and bidding information in a manner consistent with all applicable laws, rules, regulations, and tariffs. Confidential information, including the confidential reports submitted by the procurement administrator and procurement monitor pursuant to subsection (f) of this Section, shall not be made publicly available and shall not be discoverable by any party in any proceeding, absent a compelling demonstration of need, nor shall those reports be admissible in any proceeding other than one for law enforcement purposes.

220 ILCS 5/16-111.5(h). Thus, Section 16-111.5(h) allows the release of certain information regarding successful bids but otherwise requires that “all other supplier and bidding information” be accorded confidentiality. In addition, the statute requires that prior confidential information, such as administrator’s and monitor’s reports to the Commission, remain confidential, even following the conclusion of the procurement

event. An exception may be made, and otherwise confidential information may be released publicly, when there is “a compelling demonstration of need.”

**B. AG Arguments on Confidential Information**

The AG states that “the only information about the procurement events that the Commission has released to the public is a list of winning bidders and the average prices of winning bids.” AG Comments at 1, 16. As a preliminary matter, Staff wants to make clear that significant information about the procurement process, including all contract and qualification documents, was and is publicly available on the procurement administrators’ web sites. Nevertheless, Staff does not dispute that in terms of the specific results of the procurement events the Commission has publicly disclosed the winning bidders and the average prices of winning bids as allowed and required by Section 16-111.5(h) of the Public Utilities Act (the “Act”). 220 ILCS 5/16-111.5(h). Staff would also note that, to the best of its knowledge, no formal requests for other information regarding the 2008 procurement events have been received by the Commission. The AG also contends that the extent of available information has limited her ability to assess the 2008 procurement process. AG Comments at 1, 16.

The AG asserts that the public disclosures regarding the 2008 procurement events should have been broader, and contends that the current status of public disclosures is contrary to law. *Id.* at 16-18. The AG supports its contentions with the following argument:

The PUA contains two narrowly tailored exceptions that limit disclosure of electricity procurement information. Certain specifically enumerated reports prepared for the Commission by the procurement administrator and procurement monitor have been designated confidential. 220 ILCS 5/16-111.5(c)(1)(ix), (c)(2)(iii) and (f). The PUA also prohibits disclosure of the market-based benchmarks used to screen bids, 220

ILCS 5/16-111.5(c)(1)(ii) and (e)(iii). Beyond that, the IPAA and PUA simply require the IPA, the ICC, the procurement administrator and the procurement monitor to provide adequate protection for information that has been accorded confidential or proprietary status. 20 ILCS 3855/1-120; 220 ILCS 5/16-111.5(c)(1)(v) and (c)(2)(v).

\* \* \*

**Aside from the limited PUA exceptions to disclosure of certain confidential reports and the confidential benchmarks, all other information relating to the electricity procurement process is legally presumed to be public.** It is therefore surprising that the Commission has so far released only the names of winning bidders and the average prices of the winning bids. The PUA expressly requires the Commission to release that information “at the time of Commission approval of a procurement event.” 220 ILCS 5/16-111.5(h). The Commission could have and should have released the rest of the nonconfidential information relating to the 2008 procurement process at the same time.

AG Comments at .17-18 (emphasis added).

The AG’s argument regarding confidential information is incorrect and fails to take into account specific language in Section 16-111.5(h) which affords confidential treatment to all “supplier and bidding information” other than “[t]he names of the successful bidders and the load weighted average of the winning bid prices for each contract type and for each contract term ....” 220 ILCS 5/16-111.5(h). The confidential protection afforded to supplier and bidding information must be “consistent with all applicable laws, rules, regulations, and tariffs ...” (*Id.*) However, nothing in the language of Section 16-111.5(h) conditions confidential protection of supplier and bidding information on the declaration of confidentiality in some other law, rule, regulation or tariff.

The Act subjects the confidential protection of supplier and bidding information to conformance with “all applicable laws, rules, regulations, and tariffs ....” 220 ILCS 5/16-111.5(h). Thus, Staff believes the Commission and the Illinois Power Agency have

some discretion to approve rules or regulations, and the Commission has authority to approve tariff, that regulates or controls the disclosure of all information including information that would otherwise constitute “supplier or bidding information”. The Act also provides authority for discovery of confidential information if there is “a compelling demonstration of need ....” *Id.*

For the foregoing reasons, Staff submits that the AG’s assertion that everything related to the 2008 procurement is public except the benchmarks and the confidential reports is in error, and its request for public disclosure by the Commission of all such information is overbroad and improper. However, to the extent that the AG desires to identify specific non-confidential information regarding the 2008 procurement for disclosure, Staff would support disclosure of non-confidential information. To the extent the AG’s assertion regarding the 2009 procurement is a call to provide for public disclosure of additional information regarding the 2009 procurement, Staff believes it would be beneficial to specify the information to be disclosed and the timing for disclosure in the next procurement plan. If and to the extent that such information would otherwise be subject to confidential treatment under the Act, a rule, regulation or tariff authorizing its disclosure would need to be approved. Staff notes, however, that the benefits of public disclosure must be weighed and balanced against the risk that public disclosure of certain information could discourage or have a negative impact on supplier and bidder participation in the procurements.

Respectfully submitted,

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