



VIA ELECTRONIC MAIL

September 14, 2012

Ms. Arlene A. Juracek
Acting Director
Illinois Power Agency
160 North LaSalle Street
Chicago, Illinois 60601

RE: Comments on 2013 Draft Procurement Plan

Dear Ms. Juracek:

Bryan Cave LLP appreciates the opportunity to submit comments on the 2013 Draft Procurement Plan (“Draft Plan”) issued by the Illinois Power Agency (“IPA”) on August 16, 2012. Bryan Cave attorneys have been recognized as industry leaders in energy and natural resources acquisition, financing and project development transactions, and our interdisciplinary team represents both conventional and renewable energy project developers and investors in Illinois and nationwide. Having reviewed the Draft Plan, we object to the IPA’s implied conclusion (e.g., at pages 77-80 of the Draft Plan) that purchases of renewable energy resources by utilities can and must be curtailed under the existing long term contracts to avoid an exceedance in 2013 and thereafter of the legislative rate cap established under the Illinois Power Agency Act (“Power Act”) at 220 ILCS 3855/1-75(c)(2) (“cost cap provision”). The IPA’s conclusion apparently relies on an interpretation of the cost cap provision that is inconsistent with that of the Illinois Commerce Commission (“ICC”) and, moreover, ignores the plain language of the statute. Our legal analysis suggests that, in fact, the cost cap provision should not prevent ComEd and/or Ameren from taking full delivery under existing 2010 long-term Power Purchase Agreements (“PPAs”) in the 2013 procurement year and thereafter. Accordingly, and for the reasons set forth below, we request that the IPA revise its calculation of the budget currently available for renewable energy purchases.

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The IPA Should Ensure Consistency with the ICC's Interpretation of the Cost Cap Provision

Section 1-75(c)(2) of the Power Act provides the following cost cap provision limiting the increase in utility customer rates that may result from power purchased to comply with the Illinois Renewable Portfolio Standard ("RPS"):

Notwithstanding the requirements of this subsection (c), the total of renewable energy resources procured pursuant to the procurement plan for any single year shall be reduced by an amount necessary to limit the annual estimated average net increase due to the costs of these resources included in the amounts paid by eligible retail customers in connection with electric service to: . . . (E) [After 2011], the amount of renewable energy resources procured pursuant to the procurement plan for any single year shall be reduced by an amount necessary to limit the estimated average net increase due to the cost of these resources included in the amounts paid by eligible retail customers in connection with electric service to no more than the greater of 2.015% of the amount paid per kilowatthour by those customers during the year ending May 31, 2007 or the incremental amount per kilowatthour paid for these resources in 2011.

At page 80 of its Draft Plan, the IPA states as follows in its analysis of the renewable resource budget for ComEd:

The previously purchased RECs consist of a mix of one-year RECs purchased in the February 2012 Rate Stability Procurement and the December 2010 20-year energy and REC procurement. While the Rate Stability purchases are firm, the long-term purchases made in 2010 contain contract terms that allow for curtailed purchases sufficient to assure that the rate caps (budget limits) are not exceeded. If the entire value of the dollar shortfall . . . is used to adjust deliveries from the long-term contracts to meet the budget cap, then suppliers under those contracts will see sales curtailed by those dollar amounts, with percentage reductions in quantity ranging from 14.3% in 2013/2014 to 29.0% in 2017/2018. Stated another way, any additional purchases of renewable resources by ComEd in the 2013 Procurement Plan will violate the legislative rate cap constraints put in place to protect consumers.

This conclusion erroneously assumes that both energy costs and REC procurement costs under the existing long-term PPAs must be applied against the legislative cost cap. "Renewable Energy Resources" are defined at Section 1-10 of the Power Act in part as including "energy and its associated renewable energy credit or renewable energy credits from wind, solar thermal energy, photovoltaic cells and panels, biodiesel, anaerobic digestion, crops and untreated and unadulterated organic waste biomass, tree waste, hydropower that does not involve new construction or significant expansion of hydropower dams, and other alternative sources of environmentally preferable energy" (emphasis added). This definition suggests that the IPA should not count the bundled costs for energy and REC procurement toward the cost cap but must instead consider only the price of the RECs alone when

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determining the “annual estimated average net increase” due to the costs of renewable energy resources.

The ICC’s June 2011 report to the General Assembly on spending limits for renewable energy resource procurement supports this interpretation:

[I]n addition to the above-described annual procurement of unbundled RECs, for one-year periods beginning June 2009 and ending May 2012, the IPA has also held an RFP for 20-year contracts for RECs bundled with energy . . . Since these contracts provide not just RECs, but also energy, it would be improper to count the entire cost of these contracts toward the law’s spending limits. **Only the portion of the costs above the cost of buying unbundled energy, regardless of its source, should be counted**

(Emphasis added). See Report to the Illinois General Assembly Concerning Spending Limits on Renewable Energy Resource Procurement, June 2011 (“ICC Report”) at 5 (attached as Exhibit A).

For example, in its report, the ICC noted that, for the 2012 procurement year, the projected cost to ComEd for bundled RECs plus renewable energy would be approximately \$69 million, but the portion of that total cost above the cost of buying just energy was projected to be only \$21.6 million. ComEd’s spending limit for 2012 was estimated to be \$76 million – well above the calculated cost of RECs alone. See ICC Report at 6. Accordingly, the ICC concluded, “there are still ample budgetary resources to acquire the remaining renewable energy resource requirements for 2012, when the time comes.” ICC Report at 6.

We respectfully urge the IPA to remain consistent with the ICC’s approach and to revise the calculations in its Draft Plan accordingly. Although it is unclear from the Draft Plan whether the projections for the 2013 procurement year and thereafter are comparable, it seems likely that, even taking into account municipal aggregation and customer migration trends, the proportion of REC-only costs to total bundled costs under existing long-term PPAs would be similar, and these REC-only costs will be less than the utility spending limits for 2013. The recommended approach would therefore enable ComEd and Ameren to fulfill their obligations under existing long-term PPAs, as well as allow for additional renewable energy purchases. This would more effectively and lawfully advance the IPA’s stated objective (at 81): “to further mitigate any concerns by the sellers of the 2010 long-term energy and REC products that reduced revenue streams from the utilities will damage the continued viability of the underlying generating assets.”

The IPA Should Conclude That the Cost Cap Provision Does Not Require Prospective Curtailment Under the Current Circumstances

In addition, the IPA’s conclusion that additional purchases of renewable energy resources by utility suppliers will likely exceed the legislative rate cap is erroneous even under its own interpretation, given

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the current circumstances. As set forth in the Draft Plan, any utility purchases in excess of the cost cap in the 2013 procurement year, as calculated by the IPA, would be attributable to customer migration to Alternative Retail Electric Service (“ARES”) providers and to municipal aggregation. Section 1-72(c)(2) of the Power Act requires a reduction in procurement of renewable energy resources for any single year when necessary to limit the “annual estimated average net increase **due to the costs of these resources**” (i.e., renewable energy resources) (emphasis added). Here, however, any potential exceedance of the legislative cost cap (under the IPA’s interpretation) would be the result of a reduction in demand for power from the major utility providers, and not an increase in the cost of renewable energy resources. By its plain language, the cost cap provision does not require curtailment in these circumstances. Accordingly, to the extent the IPA declines to follow the ICC’s interpretation of the cost cap, the IPA should conclude, in the alternative, that the cost cap provision does not limit the ability of ComEd and Ameren to meet their obligations under existing long-term PPAs for the 2013 procurement year.

Applying the Cost Cap Provision to Long-Term PPAs Is Beyond the Scope of the IPA’s Role

Finally, the IPA’s implied observations with respect to obligations under the 2010 long term contracts are beyond the scope of its obligation to submit a procurement plan to the ICC for approval. The IPA has no authority to determine rights and obligations under these contracts. Even if the IPA had such authority, it is in no position to determine the separate cost of energy from the cost of RECs under contracts where, for example, the price to be paid by utilities for RECs is reduced by the actual wholesale market price of energy during each contract year. The IPA does not know what the actual wholesale market price of energy will be in 2013 or in any year thereafter. Accordingly, the IPA should refrain from any observations on the rights and obligations of the 2010 long term contracts in its Draft Plan and should confine its comments on the cost cap to a discussion consistent with the ICC’s interpretation of the cost cap provision.

Although we have provided no comments on specific legislative proposals, we would also support legislation that ensures full payment under the existing 2010 long term contracts in the event a cost cap exceedance actually occurs. In conclusion, for the reasons set forth above, we respectfully urge the IPA to revise its assessment of the budget available for future renewable energy procurement in accordance with these comments. Thank you for your consideration.

Very truly yours,



Thor W. Ketzback

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cc: Charles Zielinski, Esq.
Kathrine D. Hanna, Esq.