STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Power Agency	:	
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Petition for Approval of the IPA's Carbon Mitigation Credit Procurement Plan pursuant to Section 1-75(d-10) of the Illinois Power Agency Act.	: : : :	**21-0718**

ORDER

By the Commission:

I. PROCEDURAL HISTORY

On September 29, 2021, the Illinois Power Agency ("IPA") submitted to the Illinois Commerce Commission ("Commission") for consideration and approval its proposed plan for the procurement of carbon mitigation credits ("CMC") for certain customers of Commonwealth Edison Company ("ComEd") under the new provisions of Section 1-75(d-10) of the Illinois Power Agency Act (20 ILCS 3855) ("IPA Act") enacted through Public Act 102-0662 ("PA 102-0662").

The IPA's CMC Procurement Plan ("CMC Plan" or "Plan") sets forth the IPA's proposals for the procurement of CMCs – tradable credits, each of which represents the carbon emission reduction attributes of one megawatt-hour ("MWh") of energy produced from a carbon-free energy resource – through a competitive procurement process to secure five-year CMC delivery contracts between carbon-free energy resources and ComEd. The CMC Plan is intended to provide for the selection of winning bids "by taking into consideration which resources best match public interest criteria that include, but are not limited to, minimizing carbon dioxide emissions that result from electricity consumed in Illinois and minimizing sulfur dioxide, nitrogen oxide, and particulate matter emissions that adversely affect the citizens of this State." 20 ILCS 3855/1-75(d-10)(3)(D).

A Petition to Intervene was filed by Exelon Generation Company, LLC ("Exelon") on October 6, 2021. The Administrative Law Judge granted Exelon's Petition to Intervene.

Exelon filed Initial Comments on October 6, 2021. Staff of the Commission ("Staff") and the IPA filed Reply Comments on October 13, 2021. No party requested that a hearing be held.

In accordance with Section 1-75(d-10)(3)(E) of the IPA Act, if the Commission determines that the Plan is likely to result in the procurement of cost-effective CMCs, then the Commission shall, after notice and hearing and opportunity for comment, approve the CMC Plan or approve it with modification no later than 42 days after the plan is filed, November 10, 2021. Only two issues remain outstanding and are discussed below.

The Proposed Order was served on October 25, 2021. Exelon filed a Brief on Exceptions ("BOE") on October 29, 2021.

II. SECTION 6.1 BIDDER INFORMATION SUBMITTAL

Section 6.1 of the CMC Plan provides that carbon-free resources that intend to participate in the procurement shall submit to the IPA certain information including:

> A commitment to continue operating the carbon-free resource at an average annual capacity factor of at least 88% over the life of the CMC contract, subject to the exceptions contained in Section 1-75(d-5)(1)(E) of the Act.

CMC Plan at 40.

A. Exelon's Position

Under PA 102-0662, each carbon-free resource that intends to participate in the CMC procurement must commit to "continue operating the carbon-free resource at a capacity factor of at least 88% annually on average for the duration of the contract or contracts executed under the procurement." 20 ILCS 3855/1-75(d-10)(3)(B)(iii). Exelon suggests that compliance with the 88% capacity factor requirement be measured across all contracts executed by a single seller, rather than restricted to each individual unit. Exelon notes that the statutory requirement indicates that averaging must be over "the duration of the contract or contracts executed under the procurement." 20 ILCS 3855/1-75(d-10)(3)(B)(iii). In Exelon's view, averaging across multiple contracts would make sense given the way that individual nuclear units operate. Even though planned outages across the nuclear fleet are minimized and staggered by unit, unexpected issues may require deviations from the outage plan for an individual unit. Contingency planning ensures that capacity factor performance across the entire Illinois portfolio is maintained at a high level at all times, even if an individual unit occasionally operates below expectations. Exelon opines that this is accounted for in the statutory language: if the capacity factor commitment were intended to apply to each individual contract standing alone, then the words "or contracts" would have been omitted from the statutory provision. Exelon Init. Comments at 3-4.

Exelon notes that the IPA disagrees with this interpretation, finding that "nothing in Public Act 102-0662 indicates the operation of the carbon-free resources be averaged at the owner-level rather than the facility level." Petition at 7. However, the IPA does not reconcile its proposed unit-specific approach to measuring performance with the statutory directive to average performance over "the duration of the *contract or contracts* executed under the procurement." 20 ILCS 3855/1-75(d-10)(3)(B)(iii) (emphasis added). To give meaning to the statutory language, Exelon avers that there must be some form of averaging of performance across multiple contracts over the 5-year contract period. As an alternative to Exelon's suggestion to average performance over all the contracts executed by a single supplier, the Commission could instead conclude that the statutory language is directing averaging over multiple contracts at a single nuclear plant. Exelon Init. Comments at 4.

B. Staff's Position

Staff agrees with the IPA's position that nothing in PA 102-0662 indicates that operation of the carbon-free resources be averaged at the owner-level rather than the facility level. Therefore, Staff does not agree with Exelon's proposal that operation of carbon-free resources be averaged at the owner-level rather than the facility level. Staff Rep. Comments at 5.

Staff notes that the IPA Act provides that each carbon-free resource that intends to participate in the procurement is required to provide the following information: 1) in-service date and useful life of the carbon-free resource, 2) the amount of power generated by the facility, 3) a commitment to operate the carbon-free energy resource at a capacity factor of at least 88% annually, and 4) the financial need and risk of loss of the environmental benefits of such resource. 20 ILCS 3855/1-75(d-10)(3)(C)(i)-(iv). The IPA Act defines "carbon-free energy resource" as a generation facility that 1) is fueled by nuclear power; and 2) is interconnected to PJM interconnection, LLC. 20 ILCS 3855/1-75(d-10)(2) The definition of carbon-free resource and the list of information to be provided (i.e. items (i) through (iv)), Staff explains, are all in terms of each facility/resource and not with regard to the aggregate of facilities/resources. Therefore, it is clear to Staff that the 88% capacity factor requirement is to be measured at the single facility/resource level. In addition, as the IPA argues, there is no use of the word "owners of facilities" or "owners of resources" with regard to the information required to be provided by a bidder prior to or during the procurement event. Staff Rep. Comments at 5-6.

Finally, as an alternative to its proposal, Exelon argues the Commission could conclude that there is to be averaging over multiple contracts at a single nuclear plant. Staff does not object to the alternative proposal by Exelon. In fact, Staff finds Exelon's alternative proposal consistent with the language in Section 1-75(d-10)(3)(C)(iii) which states "… continue operating the carbon-free energy resource at a capacity factor of at least 88% annually on average for the duration of the contract or contracts executed …" 20 ILCS 3855(d-10)(3)(C)(iii). In other words, Staff argues, allowing for winning bids from multiple generating units (each with its own CMC delivery contract) within a single nuclear reactor plant appears to be what the "contract or contracts executed" language in the law intends to encompass. Staff Rep. Comments at 6.

C. IPA's Position

The IPA notes that Section 1-75(d-10)(3)(B)(iii) of the IPA Act provides in relevant part as follows:

> (B) Each carbon-free energy resource that intends to participate in a procurement shall be required to submit to the Agency the following information for the resource on or before the date established by the Agency:
>
> . . . .
>
> (iii) a commitment to be reflected in any contract entered into pursuant to this subsection (d-10) to continue operating the carbon-free energy resource at a capacity factor of at least 88% annually on average for the duration of the contract or

> contracts executed under the procurement held under this subsection (d-10), except in an instance described in subparagraph (E) of paragraph (1) of subsection (d-5) of this Section or made impracticable as a result of compliance with law or regulation.

20 ILCS 3855/1-75(d-10)(3)(B)(iii). Presumably, the IPA argues, the basis for this provision is to ensure that any resource benefitting from state-administered financial support will provide a baseline minimum amount of carbon-free energy (as reflected through an 88% minimum capacity factor); if a facility performed only in part, then the state's decarbonization trajectory would be negatively impacted by the production of fewer carbon-free MWh than expected. IPA Rep. Comments at 1-2.

In the IPA's opinion, from a public policy standpoint, Exelon's position may have merit: if two facilities of equal size owned by a single seller perform at, for example, 85% and 95% capacity factors respectively over the duration of their carbon mitigation credit delivery contracts, then the composite 90% capacity factor performance would be above the baseline minimum 88% level of carbon free energy expected over the course of the CMC contracts. This leaves the state with above the minimum amount of carbon-free energy envisioned by these provisions of PA 102-0662. Thus, recognizing a single underperforming generating unit as having committed an event of default through missing that 88% threshold may overlook that the public policy purpose underpinning new Section 1-75(d-10) of the IPA Act would still be satisfied if overall production across that seller's facilities remains above 88%. IPA Rep. Comments at 2.

But from a statutory interpretation standpoint, the IPA disagrees with Exelon. Section 1-75(d-10)(3)(B) of the IPA Act requires this certification from "each carbon-free energy resource," and it is unclear how any given resource—which will be submitting its bid subject to independent review and evaluation from other facilities' bids, even in the case of common ownership—could certify its expected performance levels if such values are dependent on other facilities' performance. Further, the fact that Section 1-75(d-10)(3)(B)'s certification requirement applies to "each resource", with a commitment to operate "the carbon-free energy resource at a capacity factor of at least 88% annually," demonstrates that the performance of that individual "carbon-free energy resource" is at issue. Under Section 1-75(d-10)(2), a "carbon-free energy resource" is defined at the "generation facility" level. While the IPA recognizes that a "generating facility" could arguably be read as a single plant in the case of a multi-reactor plant, the IPA has defined a nuclear "generation facility" at the reactor (generating unit) level. Consequently, the CMC Plan requires certification from each generating unit about that individual generating unit's promised performance. IPA Rep. Comments at 3.

The IPA is unconvinced that Section 1-75(d-10)(3)(B)(iii)'s use of "contract or contracts" demonstrates differently. While Exelon argues that this phrasing has no meaning unless a capacity factor is determined through averaging across multiple contracts, a less strained reading is simply that this certification requirement was put into place without knowledge of whether one or multiple CMC delivery contracts would be executed. Under Section 1-75(d-10)(3), CMCs are procured only from facilities which meet certain statutory requirements and bid below established bid prices, and then evaluated competitively based on public interest criteria. Whether that process results in

zero, one, or many carbon mitigation credit delivery contracts is not known until such bids are received and evaluated. IPA Rep. Comments at 3-4.

Lastly, the IPA is sensitive to the challenges inherent with individual facility underperformance potentially resulting in outsized negative consequences even if the broader policy purpose of the statute is met through sufficient overall performance. To this end, force majeure provisions in the CMC delivery contract will offer seller protection from individual facility underperformance resultant from events outside of the control of the seller. IPA Rep. Comments at 4.

D. Commission Analysis and Conclusion

The Commission turns to the statutory language and finds that when subsection (iii) is read in its entirety, the Commission cannot agree with Exelon. It states:

> (iii) a commitment to be reflected in *any contract* entered into pursuant to this subsection (d-10) to continue operating the carbon-free energy resource at a capacity factor of at least 88% annually on average for the duration of the contract or contracts executed under the procurement held under this subsection (d-10), except in an instance described in subparagraph (E) of paragraph (1) of subsection (d-5) of this Section or made impracticable as a result of compliance with law or regulation;

20 ILCS 3855/1-75(d-10)(3)(B)(iii) (emphasis added). Exelon omits the beginning of the sentence and focuses on the end. This is relevant because the beginning says *any contract* must commit to operating at 88% capacity. Contrary to Exelon's reasoning, the Commission agrees with the IPA that the "contract or contracts" language is included because the number of contracts that will result from the procurement event is unknown.

Moreover, with respect to Exelon's alternative proposal, the statute does not distinguish between nuclear plants and individual generating units, it focuses on the contract that is proposed for each "carbon-free resource" participating in the bidding process. The IPA has defined "carbon-free resource" at the individual unit level. CMC Plan at 39. The IPA's reasoning is sound when it explains its decision: "specific units at many multi-unit sites can have different levels of financial performance related to different output levels and different capacity factors." *Id*. The Commission finds that there is no basis in the statutory language or for policy reasons to adopt Exelon's position.

In its BOE, Exelon raises another alternative proposal regarding the terms of the CMC contract. No party has had the opportunity to respond to this proposal and it is beyond the scope of the docket.

III. SECTION 4.2 CMC PRICE CALCULATION

Section 4.2 of the CMC Plan contains the following process for addressing price changes that result from federal tax credits or subsidies:

> Upon recognition of a credit or subsidy, the Agency will file notice of a credit or subsidy with the Commission in the docketed proceeding for the approval of this Plan. If the

> Agency determines that the calculation of the price adjustment is straightforward and mechanical, then that filing shall take the form of a compliance filing outlining the necessary changes to the CMC pricing calculation to include a line item representing the price adjustment in $/MWh. However, if the Agency determines that calculating a price adjustment is not purely mechanical, then the Agency shall petition the Commission to reopen that Plan approval proceeding to allow for the development of the record necessary for determining what CMC price change shall result from the credit or subsidy.

CMC Plan at 21.

A. Exelon's Position

Exelon notes that PA 102-0662 specifies that the price paid under the CMC contract be reduced by the value of any monetized federal tax credit, direct payment, or similar subsidy provided to a carbon-free resource not already reflected in energy prices. 20 ILCS 3855/1-75(d-10)(3)(C)(iii). Exelon suggests that suppliers should have the opportunity to provide input on a potential CMC price adjustment that the IPA deems mechanical in nature. The CMC Plan proposes that the IPA would unilaterally change the CMC price based on its interpretation of the monetized value of a federal tax credit or other federal subsidy through a compliance filing with the Commission. CMC Plan at 21. Exelon requests that suppliers be given the opportunity to propose the necessary CMC price adjustment, which would be reviewed by the IPA and then subject to Commission approval. The CMC Plan suggests that the IPA's determination of whether a supplier complied with this obligation would be unilateral, with no opportunity for comment or review by the Commission. Exelon Init. Comments at 5.

To preserve the supplier's rights, Exelon requests that the Commission modify the CMC Plan such that the Commission certifies any changes to the CMC contracts, including price, as a result of federal subsidies. Specifically, Exelon proposes that suppliers should be obligated to provide information to the IPA regarding the availability of a federal subsidy, the steps taken to obtain such a subsidy, and the necessary CMC price adjustment if the subsidy is obtained. The IPA would then request additional information as necessary and reach a determination as to the supplier's satisfaction of its contract obligation and, if a subsidy is received, the necessary adjustment to the CMC price. Finally, the Commission would review any disagreements and certify any changes to the CMC contracts. Exelon Init. Comments at 5.

B. Staff's Position

Staff takes no position on Exelon's proposal. However, Staff notes that regardless of whether the Commission adopts Exelon's proposal, the fact remains that a winning bidder could use Section 9-250 of the Public Utilities Act ("Act") (220 ILCS 5/1-101 *et seq.*) to file a complaint against the other party to the contract, i.e. ComEd, if it takes issue with any changes to the CMC delivery contract or seeks a Commission investigation of the issue pursuant to Section 10-101 of the Act. 220 ILCS 5/10-101. Staff Rep. Comments at 3-4.

Staff notes that if the Commission ultimately accepts Staff's recommendations or any other changes to the CMC Plan, the Commission should direct the IPA to file a revised CMC Plan as a compliance filing in this docket similar to what is done in the annual IPA electric power and capacity procurement dockets. Staff Rep. Comments at 7.

C. IPA's Position

The IPA explains that CMC prices are established by beginning with a facility's delivery year per MWh bid price (capped by statute, as outlined in Section 1-75(d-10)(3)(C)(iv)) and subtracting that delivery year's assumed energy and capacity revenues, also distilled down to per MWh values. The resulting differential constitutes the CMC price. As a federal subsidy could constitute another source of revenue (or cost reduction) for a carbon-free energy resource, Section 1-75(d-10)(3)(C)(iii)(III) of the IPA Act provides an additional CMC price adjustment for "any value of monetized federal tax credits, direct payments, or similar subsidy provided to the carbon-free energy resource from any unit of government that is not already reflected in energy prices." IPA Rep. Comments at 4-5.

At issue is who is responsible for determining what value to attach to a subsidy providing to a participating facility, and under what process that value is confirmed and memorialized through a CMC price adjustment. The IPA's approach was developed to manage the following challenges: first, as the seller and buyer may be affiliates, the IPA believes that it is of utmost importance that determinations made about the value of a CMC price adjustment be made by an independent party (such as the Commission or the IPA). Second, as some adjustments to CMC price may be straightforward or mechanical (as a subsidy may have a publicly known defined value), the IPA does not believe that an exhaustive process (i.e., reopening) should be necessary in all cases. Consequently, the IPA proposes a process through which, if a subsidy's value was clear, resulting in a purely mechanical adjustment to the CMC price, that price adjustment would be reflected through a compliance filing. However, if a subsidy's value was at all unclear or open to interpretation, then reopening the CMC Plan approval proceeding would allow for all parties to provide arguments for how federal subsidy values should be reflected in CMC prices. IPA Rep. Comments at 5-6.

The IPA notes that in the rare circumstance that the IPA and a seller nevertheless disagree about whether a price adjustment is mechanical, the Commission's Rules of Practice already offer the seller with an ability to seek a forum for its arguments. Section 200.900 of the Commission's Rules of Practice provides that "[a]fter issuance of an order by the Commission, the Commission may, on its own motion, reopen any proceeding when it has reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, such reopening." 83 Ill. Adm. Code 200.900. A Seller who believes that a seemingly-mechanical price adjustment requires additional comment could still petition the Commission to reopen in the proceeding on its own motion, citing material conditions of fact that have changed (the presence of a federal subsidy impacting carbon mitigation credit prices) that were not present at the time that the Commission entered its Order. With that pathway already available to a seller and given the IPA's commitment to seeking feedback before determining that a CMC price adjustment is mechanical in nature, the IPA believes that no adjustments to the Plan's proposal are required. IPA Rep. Comments at 6-7.

D. Commission Analysis and Conclusion

The Commission agrees with both Staff and the IPA that the Act and the Commission's Rules of Practice provide several pathways for Exelon to seek Commission review of a disputed CMC price adjustment. The CMC Plan's approach for non-disputed CMC price adjustments is appropriate. Accordingly, no change to the CMC Plan is necessary.

IV. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) Commonwealth Edison Company is a corporation engaged in the retail sale and delivery of electricity to the public in Illinois and is a "public utility" as defined in Section 3-105 of the Public Utilities Act and an "electric utility" as defined in Section 16-102 of the Public Utilities Act;

(2) the Commission has jurisdiction over the subject matter herein;

(3) the recitals of fact set forth in prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and conclusions of law;

(4) the IPA's Carbon Mitigation Credit Procurement Plan provides for, among other things, the selection of winning bids by taking into consideration which resources best match public interest criteria that include, but are not limited to, minimizing carbon dioxide emissions that result from electricity consumed in Illinois and minimizing sulfur dioxide, nitrogen oxide, and particulate matter emissions that adversely affect the citizens of this State, consistent with Section 1-75(d-10)(3)(D) of the Illinois Power Agency Act;

(5) the IPA's Carbon Mitigation Credit Procurement Plan is likely to result in the procurement of cost-effective carbon mitigation credits and should be approved without modification pursuant to Section 1-75(d-10)(3)(E) of the Illinois Power Agency Act; and

(6) all motions, petitions, objections, and other matters in this proceeding which remain unresolved should be disposed of consistent with the conclusions herein.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that subject to the modifications adopted in the prefatory portion of this Order, the Carbon Mitigation Credit Procurement Plan filed by the Illinois Power Agency pursuant to Section 1-75(d-10) of the Illinois Power Agency Act is hereby approved.

IT IS FURTHER ORDERED that pursuant to Section 10-113(a) of the Public Utilities Act and 83 Ill. Adm. Code 200.880, any application for rehearing shall be filed within 30 days after service of the Order on the party.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 10th day of November, 2021.

(SIGNED) CARRIE ZALEWSKI

Chairman