



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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SENT VIA ELECTRONIC MAIL

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**Re: People of the State of Illinois Comments on the
Draft Carbon Mitigation Credit Procurement Plan released September 17, 2021**

Dear Mr. Stinner:

The People of the State of Illinois, through Attorney General Kwame Raoul (the People), submit the following comments on the Illinois Power Agency's Carbon Mitigation Procurement Plan (the Draft Plan), dated September 17, 2021. The People address the obligation of the successful bidder to seek federal nuclear reactor credits with reference to the currently pending federal legislation, available at: <https://www.congress.gov/117/bills/hr3684/BILLS-117hr3684eas.pdf> (see pages 1563-1570).

The People recommend changes to clarify the obligation of a nuclear power generator receiving Illinois carbon mitigation credits (CMC) to seek federal financial support or credits. On page 21 of the Draft Plan, the applicant for CMC is informed:

The successful bidder will be responsible for making all commercially reasonable efforts to ensure that they apply for any known federal tax credits, direct payments, or similar subsidy programs that support carbon-free generation and for which the successful bidder is eligible. Failure to apply for these subsidies will be considered an event of default.

The Draft Plan appropriately notes that Section 1-75(d-10)(2)(C)(i) provides that CMC “contract payments shall fully deduct the value of any monetized federal production tax credits, credits issued pursuant to a federal clean energy standard, and other federal credits if applicable.” *Id.* The price-per-megawatt-hour (\$/MWh) calculation described in Section 1-75(d-10)(3)(C)(iii)(III), is equal to the accepted bid price less “[t]he monetized value in \$/MWh of any federal tax credits or direct subsidies that would be provided to the carbon-free resource by any level of government which are not reflected in energy prices.” *Id.* at 20-21.

There is currently legislation passed by the United States Senate and pending in the United States House of Representatives that would establish a federal Civil Nuclear Credit Program. House Bill 3684, Senate Amendment at § 40323 (page 1563-1572), available at: <https://www.congress.gov/117/bills/hr3684/BILLS-117hr3684eas.pdf> (see pages 1563-1570). That program would “evaluate nuclear reactors that are projected to cease operations due to economic factors” and provide subsidies, or “credits,” for a four-year period. *Id.* at § 40323(b)(1), (d), (e). The bill specifies that the owner or operator of such a nuclear reactor “shall submit to the Secretary of Energy an application” including operating costs,¹ potential incremental air pollutants that would result if it ceased operations, the source of uranium for the four years the credits would be allocated, and a detailed plan to continue operations during the subsidy period. *Id.* at § 40323(c)(1)(A). The bill also specifies that if a reactor owner or operator receives payments from a State, it shall include all projected payments “in determining the average projected annual operating loss... ***unless the credits allocated to the nuclear reactor pursuant to the application will be used to reduce those payments.***” *Id.* at § 40323(c)(1)(C)(ii) (page 1566-1567) (emphasis added).

With regard to the federal nuclear subsidy program created in the Senate bill, the Draft Plan does not sufficiently address three issues. Those three issues are:

- (1) Whether the successful bidder is obligated to apply for credits under the Civil Nuclear Credit Program or other federal programs;
- (2) Whether it is clear that the federal credits will be used to reduce CMC payments funded by consumers; and
- (3) The timeline for applying for, receiving, and crediting the benefits under the federal nuclear credit program and other federal programs such as the Production Tax Credit is.

The People address each of these issues as follows:

(1) Obligation to Apply for Federal Credits. Illinois CMC are funded by consumers, mandated by Illinois law, and imposed pursuant to a State Program. To qualify for federal assistance, the proposed Civil Nuclear Credit Program requires that that the reactor “receives payment from a State zero-emission credit, a State clean energy contract, or any other State program with respect to that nuclear reactor.” See *id.* at § 40323(c)(1)(C)(i). Illinois law and

¹ The bill requires the applicant to submit, inter alia, average projected operating loss, operation and maintenance and capital costs, bulk power prices, out-of-market revenues, and operational and market risks. See § 40323(c)(1)(A)(i) (page 1564-1565).

the Draft Plan are clear that the CMC program can be characterized as a zero-emission credit and is a State program with respect to nuclear reactors. Participants in the CMC program are eligible to participate in the federal Civil Nuclear Credit Program as currently written.

The Draft Plan with regard to CMC should thus plainly mandate that the successful bidder apply for all federal credits, assistance, favorable tax treatment, and other subsidies that can offset the payments of Illinois consumers. The Draft Plan should place the obligation to remain informed about the requirements for federal programs squarely on the successful bidder.

(2) Federal payments will be used to reduce CMC. The proposed Civil Nuclear Credit Program contains two provisions that are affected by whether the federal credits will be used to reduce the State credits. At section 40323(c)(1)(C)(ii) (page 1566), the bill requires the applicant to include “projected payments from State programs in determining the average projected annual operating loss ... unless the credits allocated to the nuclear reactor pursuant to that application will be used to reduce those payments.” Illinois law is clear and the Draft Plan properly states that monetized value in \$/MWh of any federal tax credits or direct subsidies will be used to reduce the CMC payment funded by consumers. See Draft Plan at 21, citing 20 ILCS 3855/1-75(d-10)(2)(C)(i).

(3) Timeline. The proposed Civil Nuclear Credit Program provides that the Secretary of Energy will accept applications for credits for 120 days after the enactment of the bill. Section 40323(c)(1)(B) (page 1566). Annual applications are also authorized. *Id.* However, if a nuclear reactor “receives a payment from a ... State program with respect to that nuclear reactor,” it is only eligible to submit an application *after* the initial 120-day application period. *Id.* at 40323(c)(1)(C)(i) (page 1566). This limitation could have the effect of excluding Illinois plants that receive CMC from the initial round of federal credit payments and deny Illinois consumers the set-off mandated by Illinois law.

It is impossible to accurately predict if and when the proposed Civil Nuclear Credit Program will be adopted, and whether it will be amended. However, assuming the federal program is enacted as currently drafted, Illinois law specifies that the CMC deliveries will start June 1, 2022. 20 ILCS 3855/1-75(d-10)(3)(A). If the federal credit law is enacted before June 1, 2022, then the successful bidder should be mandated to submit an application in the first set of applications, within 120 days of the enactment of the bill, before it has received any CMC payments. At the same time, because Illinois law specifies that the federal credits will be used to reduce the CMC payments, the CMC will not be used to offset costs and consumers will benefit from receipt of federal credits.

The Draft Plan states that the contracts for CMC must be executed by December 3, 2021. Draft Plan at 17. It should also provide that the successful bidder must apply for federal credits before the successful bidder receives payment so that it can apply in the first round of applications and maximize the receipt of federal credits.

The People therefore propose the following edits to page 21 of the Draft Plan.

Specifically, the conditional language contained in the Draft Plan and quoted above from page 21 should be modified as follows:

The successful bidder will be responsible for ~~making all commercially reasonable efforts to ensure that they~~ applying for any known all federal tax credits, direct payments, or similar subsidy programs that support carbon-free generation and for which the successful bidder is eligible, and for making itself aware of all such programs for which it might be eligible and all application deadlines to maximize access to federal credits. Failure to apply for these subsidies will be considered an event of default and may result in the deduction of foregone federal credits for the period the foregone federal credits were available if the Agency files notice of a credit or subsidy with the Commission in the docketed proceeding for the approval of this Plan.

Thank you for the opportunity to comment on the Draft Plan.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS
By KWAME RAOUL,
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By: /s _____

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1 *disclosure during the term of any transaction de-*
2 *scribed in subparagraph (A) in accordance with*
3 *that subparagraph.”.*

4 **SEC. 40323. CIVIL NUCLEAR CREDIT PROGRAM.**

5 *(a) DEFINITIONS.—In this section:*

6 *(1) CERTIFIED NUCLEAR REACTOR.—The term*
7 *“certified nuclear reactor” means a nuclear reactor*
8 *that—*

9 *(A) competes in a competitive electricity*
10 *market; and*

11 *(B) is certified under subsection (c)(2)(A)(i)*
12 *to submit a sealed bid in accordance with sub-*
13 *section (d).*

14 *(2) CREDIT.—The term “credit” means a credit*
15 *allocated to a certified nuclear reactor under sub-*
16 *section (e)(2).*

17 *(b) ESTABLISHMENT OF PROGRAM.—The Secretary*
18 *shall establish a civil nuclear credit program—*

19 *(1) to evaluate nuclear reactors that are pro-*
20 *jected to cease operations due to economic factors; and*

21 *(2) to allocate credits to certified nuclear reactors*
22 *that are selected under paragraph (1)(B) of subsection*
23 *(e) to receive credits under paragraph (2) of that sub-*
24 *section.*

25 *(c) CERTIFICATION.—*

1 (1) *APPLICATION.*—

2 (A) *IN GENERAL.*—*In order to be certified*
3 *under paragraph (2)(A)(i), the owner or oper-*
4 *ator of a nuclear reactor that is projected to*
5 *cease operations due to economic factors shall*
6 *submit to the Secretary an application at such*
7 *time, in such manner, and containing such in-*
8 *formation as the Secretary determines to be ap-*
9 *propriate, including—*

10 (i) *information on the operating costs*
11 *necessary to make the determination de-*
12 *scribed in paragraph (2)(A)(ii)(I), includ-*
13 *ing—*

14 (I) *the average projected annual*
15 *operating loss in dollars per megawatt-*
16 *hour, inclusive of the cost of oper-*
17 *ational and market risks, expected to*
18 *be incurred by the nuclear reactor over*
19 *the 4-year period for which credits*
20 *would be allocated;*

21 (II) *any private or publicly avail-*
22 *able data with respect to current or*
23 *projected bulk power market prices;*

24 (III) *out-of-market revenue*
25 *streams;*

1 (IV) operations and maintenance
2 costs;

3 (V) capital costs, including fuel;
4 and

5 (VI) operational and market risks;

6 (ii) an estimate of the potential incre-
7 mental air pollutants that would result if
8 the nuclear reactor were to cease operations;

9 (iii) known information on the source
10 of produced uranium and the location
11 where the uranium is converted, enriched,
12 and fabricated into fuel assemblies for the
13 nuclear reactor for the 4-year period for
14 which credits would be allocated; and

15 (iv) a detailed plan to sustain oper-
16 ations at the conclusion of the applicable 4-
17 year period for which credits would be allo-
18 cated—

19 (I) without receiving additional
20 credits; or

21 (II) with the receipt of additional
22 credits of a lower amount than the
23 credits allocated during that 4-year
24 credit period.

1 (B) *TIMELINE.*—*The Secretary shall accept*
2 *applications described in subparagraph (A)—*

3 (i) *until the date that is 120 days after*
4 *the date of enactment of this Act; and*

5 (ii) *not less frequently than every year*
6 *thereafter.*

7 (C) *PAYMENTS FROM STATE PROGRAMS.*—

8 (i) *IN GENERAL.*—*The owner or oper-*
9 *ator of a nuclear reactor that receives a*
10 *payment from a State zero-emission credit,*
11 *a State clean energy contract, or any other*
12 *State program with respect to that nuclear*
13 *reactor shall be eligible to submit an appli-*
14 *cation under subparagraph (A) with respect*
15 *to that nuclear reactor during any applica-*
16 *tion period beginning after the 120-day pe-*
17 *riod beginning on the date of enactment of*
18 *this Act.*

19 (ii) *REQUIREMENT.*—*An application*
20 *submitted by an owner or operator de-*
21 *scribed in clause (i) with respect to a nu-*
22 *clear reactor described in that clause shall*
23 *include all projected payments from State*
24 *programs in determining the average pro-*
25 *jected annual operating loss described in*

1 subparagraph (A)(i)(I), unless the credits
2 allocated to the nuclear reactor pursuant to
3 that application will be used to reduce those
4 payments.

5 (2) DETERMINATION TO CERTIFY.—

6 (A) DETERMINATION.—

7 (i) IN GENERAL.—Not later than 60
8 days after the applicable date under sub-
9 paragraph (B) of paragraph (1), the Sec-
10 retary shall determine whether to certify, in
11 accordance with clauses (ii) and (iii), each
12 nuclear reactor for which an application is
13 submitted under subparagraph (A) of that
14 paragraph.

15 (ii) MINIMUM REQUIREMENTS.—To the
16 maximum extent practicable, the Secretary
17 shall only certify a nuclear reactor under
18 clause (i) if—

19 (I) after considering the informa-
20 tion submitted under paragraph
21 (1)(A)(i), the Secretary determines that
22 the nuclear reactor is projected to cease
23 operations due to economic factors;

24 (II) after considering the estimate
25 submitted under paragraph (1)(A)(ii),

1 *the Secretary determines that pollut-*
2 *ants would increase if the nuclear reac-*
3 *tor were to cease operations and be re-*
4 *placed with other types of power gen-*
5 *eration; and*

6 (III) *the Nuclear Regulatory*
7 *Commission has reasonable assurance*
8 *that the nuclear reactor—*

9 (aa) *will continue to be oper-*
10 *ated in accordance with the cur-*
11 *rent licensing basis (as defined in*
12 *section 54.3 of title 10, Code of*
13 *Federal Regulations (or successor*
14 *regulations) of the nuclear reactor;*
15 *and*

16 (bb) *poses no significant safe-*
17 *ty hazards.*

18 (iii) *PRIORITY.—In determining*
19 *whether to certify a nuclear reactor under*
20 *clause (i), the Secretary shall give priority*
21 *to a nuclear reactor that uses, to the max-*
22 *imum extent available, uranium that is*
23 *produced, converted, enriched, and fab-*
24 *ricated into fuel assemblies in the United*
25 *States.*

1 (B) NOTICE.—For each application received
2 under paragraph (1)(A), the Secretary shall pro-
3 vide to the applicable owner or operator, as ap-
4 plicable—

5 (i) a notice of the certification of the
6 applicable nuclear reactor; or

7 (ii) a notice that describes the reasons
8 why the certification of the applicable nu-
9 clear reactor was denied.

10 (d) BIDDING PROCESS.—

11 (1) IN GENERAL.—Subject to paragraph (2), the
12 Secretary shall establish a deadline by which each
13 certified nuclear reactor shall submit to the Secretary
14 a sealed bid that—

15 (A) describes the price per megawatt-hour of
16 the credits desired by the certified nuclear reac-
17 tor, which shall not exceed the average projected
18 annual operating loss described in subsection
19 (c)(1)(A)(i)(I); and

20 (B) includes a commitment, subject to the
21 receipt of credits, to provide a specific number of
22 megawatt-hours of generation during the 4-year
23 period for which credits would be allocated.

24 (2) REQUIREMENT.—The deadline established
25 under paragraph (1) shall be not later than 30 days

1 after the first date on which the Secretary has made
2 the determination described in paragraph (2)(A)(i) of
3 subsection (c) with respect to each application sub-
4 mitted under paragraph (1)(A) of that subsection.

5 (e) ALLOCATION.—

6 (1) AUCTION.—Notwithstanding section 169 of
7 the Atomic Energy Act of 1954 (42 U.S.C. 2209), the
8 Secretary shall—

9 (A) in consultation with the heads of appli-
10 cable Federal agencies, establish a process for
11 evaluating bids submitted under subsection
12 (d)(1) through an auction process; and

13 (B) select certified nuclear reactors to be al-
14 located credits.

15 (2) CREDITS.—Subject to subsection (f)(2), on se-
16 lection under paragraph (1), a certified nuclear reac-
17 tor shall be allocated credits for a 4-year period be-
18 ginning on the date of the selection.

19 (3) REQUIREMENT.—To the maximum extent
20 practicable, the Secretary shall use the amounts made
21 available for credits under this section to allocate
22 credits to as many certified nuclear reactors as pos-
23 sible.

24 (f) RENEWAL.—

1 (1) *IN GENERAL.*—*The owner or operator of a*
2 *certified nuclear reactor may seek to recertify the nu-*
3 *clear reactor in accordance with this section.*

4 (2) *LIMITATION.*—*Notwithstanding any other*
5 *provision of this section, the Secretary may not allo-*
6 *cate any credits after September 30, 2031.*

7 (g) *ADDITIONAL REQUIREMENTS.*—

8 (1) *AUDIT.*—*During the 4-year period beginning*
9 *on the date on which a certified nuclear reactor first*
10 *receives a credit, the Secretary shall periodically*
11 *audit the certified nuclear reactor.*

12 (2) *RECAPTURE.*—*The Secretary shall, by regu-*
13 *lation, provide for the recapture of the allocation of*
14 *any credit to a certified nuclear reactor that, during*
15 *the period described in paragraph (1)—*

16 (A) *terminates operations; or*

17 (B) *does not operate at an annual loss in*
18 *the absence of an allocation of credits to the cer-*
19 *tified nuclear reactor.*

20 (3) *CONFIDENTIALITY.*—*The Secretary shall es-*
21 *tablish procedures to ensure that any confidential,*
22 *private, proprietary, or privileged information that is*
23 *included in a sealed bid submitted under this section*
24 *is not publicly disclosed or otherwise improperly used.*

1 (h) *REPORT.*—Not later than January 1, 2024, the
2 Comptroller General of the United States shall submit to
3 Congress a report with respect to the credits allocated to
4 certified nuclear reactors, which shall include—

5 (1) *an evaluation of the effectiveness of the cred-*
6 *its in avoiding air pollutants while ensuring grid re-*
7 *liability;*

8 (2) *a quantification of the ratepayer savings*
9 *achieved under this section; and*

10 (3) *any recommendations to renew or expand the*
11 *credits.*

12 (i) *AUTHORIZATION OF APPROPRIATIONS.*—There is
13 authorized to be appropriated to the Secretary to carry out
14 this section \$6,000,000,000 for the period of fiscal years
15 2022 through 2026.

16 ***Subtitle D—Hydropower***

17 ***SEC. 40331. HYDROELECTRIC PRODUCTION INCENTIVES.***

18 Section 242 of the Energy Policy Act of 2005 (42
19 U.S.C. 15881) is amended—

20 (1) *in subsection (b)(2), by striking “before the*
21 *date of the enactment of this section” and inserting*
22 *“before the date of enactment of the Infrastructure In-*
23 *vestment and Jobs Act”;*

24 (2) *in the undesignated matter following sub-*
25 *section (b)(3), by striking “the date of the enactment*