

## **Purpose of this Document**

In this document, "Auction Rules" will designate each of the BGS-RSCP Auction Rules and/or the BGS-CIEP Auction Rules, depending on the context.

The Association and Confidential Information Rules portion of the Auction Rules uses a system of certifications to promote the competitiveness of the auction. The certifications are designed to prevent any bidder from gaining information about other bidders that might affect the Auction Process, and to ensure that each bidder is acting independently. Each bidder must consult the Auction Rules (including the Association and Confidential Information Rules portion of these Auctions Rules) before submitting its Part 1 Application. The Association and Confidential Information Rules contain definitions of terms and set out the period of time during which each certification will apply.

**Each bidder must consider carefully all certifications in the Part 1 Application and Part 2 Application and make its own determination regarding whether the bidder can or cannot make each certification.**

Below, the Auction Manager has provided a series of questions and answers regarding the Association and Confidential Information Rules. These questions and answers address a number of common situations. Bidders may rely on the answers provided below for the specific situations presented but must consider a question and answer in their entirety. Further, these questions and answers are intended to help bidders better understand the certifications so that bidders are better able to reach their own determination as to whether a certification can be made; bidders are strongly encouraged to read this document in its entirety.

These questions and answers relate only to the 2019 BGS Auctions. The Auction Rules and the application forms may change in future auctions. It is expected that this document will be re-issued for any future auction.

## General

### **ACI-1. Can a winning BGS Supplier use another entity as an agent for its dealings with PJM?**

Yes.

### **ACI-2. What is the intent of the Association and Confidential Information Rules?**

The intent of the Association and Confidential Information portion of the Auction Rules is to promote the competitiveness of the auction, to uphold the integrity of the Auction Process, to prohibit collusive arrangements, and to ensure that no bidder gains superior information regarding its competitors that might affect the Auction Process. A bidder shows compliance with these rules by making a number of certifications in the Part 1 Application and the Part 2 Application. If a bidder is able to make all the certifications, the bidder complies with the Association and Confidential Information Rules. The certifications ensure that the bidder is not part of a collusive arrangement, the bidder does not gain superior information regarding its competitors that might affect the Auction Process, and the bidder is not providing to others information related to the auction or its bidding strategy.

### **ACI-3. The Part 1 Application asks whether we will be “bidding independently”. Are there specific rules that define what it means to be bidding independently?**

Yes. If a bidder is party to a bidding agreement with another party, is part of a bidding consortium or joint venture for the purpose of bidding in the auction, or is party to any arrangement involving joint or coordinate bidding with another party, then the bidder is not bidding independently. Any such agreement and arrangement must be disclosed in the Part 1 Application.

Furthermore, the Association and Confidential Information Rules included in the BGS-RSCP Auction Rules (Section IX.E.) and the BGS-CIEP Auction Rules (Section VIII.E.) provide specific criteria for one bidder to be associated with another bidder. Such associations are links among bidders that may impede their ability to act independently. Bidders are entirely responsible for reviewing these criteria and for evaluating their ability to make certifications in this regard. Any such associations must be declared in the Part 2 Application.

### **ACI-4. Do the Association and Confidential Information Rules permit or prohibit specific types of transactions? If so, where can I find a list of such transactions?**

The Association and Confidential Information Rules do not “permit” or “prohibit” any specific transaction. Rather, these rules focus on employing a system of certifications to ensure that competition in the auction is not compromised either because bidders are not bidding independently, or because a bidder gains superior information about its competitors that might affect the Auction Process. If a bidder is unable to make a certification, typically the bidder will make an information disclosure and the Auction Manager may ask for more information to decide, on a case-by-case basis, upon a remedy that will ensure that competitiveness at the auction is not jeopardized (see, for instance, ACI-7). A list of permitted or prohibited transactions is not feasible or practicable: a given transaction may in one context allow the bidder to make all the certifications in the Association and

Confidential Information Rules, while the same bidder may be unable to make one or more certifications with respect to the same type of transaction in another context. The bidder must make this determination considering the full context in which the transaction is made.

**ACI-5. Do the Association and Confidential Information Rules, through the certifications that the bidder must make in the Part 2 Application, de facto restrict the type of supply arrangements that bidders can make for the auction product or restrict their day-to-day market activities?**

The objectives of the Association and Confidential Information Rules of preventing collusive arrangements and of preventing any one bidder from gaining superior information regarding its competitors mean that these rules do imply some restrictions on the day-to-day market activities of bidders and on possible supply arrangements.

For example, if one bidder (Bidder A) transacts with another bidder (Bidder B) and in the process Bidder A learns Bidder B's valuation for the auction product, then Bidder A would have gained superior information about a competitor, and this transaction could foster collusion (see, for instance, ACI-19 and ACI-20). The fact that the Association and Confidential Information Rules aim to prevent a bidder from gaining superior information about its competitors that might affect the Auction Process implies that Bidder A cannot sell a full-requirements product to Bidder B. Such a supply arrangement would provide Bidder A with reliable information regarding Bidder B's valuation of the auction product. This is an example of a restriction on supply arrangements implied by the Association and Confidential Information Rules. As another example, each bidder is asked to certify that it has not entered into a supply arrangement that would provide explicit instructions on how to bid (see certification 5 of the Association and Confidential Information Rules portion of the Auction Rules, section VIII.E.4 in the BGS-CIEP Auction Rules and section IX.E.4 in the BGS-RSCP Auction Rules). This is a restriction on supply arrangements that aims to prevent coordination of bidding of several bidders if these bidders all entered into supply arrangements that provided bidding instructions.

The Association and Confidential Information Rules attempt to place only necessary restrictions on supply arrangements and on day-to-day market activities. Such restrictions are unavoidable if these rules are to meet their goals. These rules may impact hedging activities and supply arrangements of bidders. Each bidder should be aware of these rules at all times, should be aware of the entities that have become Qualified Bidders for the auction in which it is participating, and should be especially mindful of these rules from the start of the auction until the Board renders a decision on the auction results. For additional information, see, for instance, ACI-23, ACI-24, and ACI-25, as well as other questions and answers in the "Transactions and Hedging" section of this document.

**ACI-6. Are the Association and Confidential Information Rules evaluated on a separate and independent basis in the two auctions?**

Yes. The BGS-RSCP and BGS-CIEP Auctions are separate in all important respects. The evaluation of the Association and Confidential Information Rules pertains to each auction separately. A bidder in the BGS-RSCP Auction is asked in its Part 1 and Part 2 Applications to make a number of certifications found in the BGS-RSCP Auction Rules. In these rules, a "bidder" means a bidder in the BGS-RSCP Auction. Most of these certifications are made in Insert #P2-1 required by the Part 2 Application, where it is stated: "In these certifications, a "Qualified Bidder" refers to an entity qualified to participate in the BGS-RSCP Auction." Similarly, a bidder in the BGS-CIEP Auction is asked in its Part 1 and Part 2 Applications to make a number of certifications found in the BGS-CIEP Auction Rules. In

these rules, a "bidder" means a bidder in the BGS-CIEP Auction. Most of these certifications are made in Insert #P2-3 required by the Part 2 Application, where it is stated: "In these certifications, a "Qualified Bidder" refers to an entity qualified to participate in the BGS-CIEP Auction."

**ACI-7. What would happen to a bidder if the bidder cannot make one or more of the certifications in the Part 2 Application?**

It depends on the certification. Some certifications of the Part 2 Applications are required for a Qualified Bidder to become a Registered Bidder. For example, a Qualified Bidder must certify that, other than agreements disclosed in the Part 1 Application, the Qualified Bidder has not entered into any agreement with any other Qualified Bidder regarding participation in the auction for which it is applying. If a Qualified Bidder is unable to make this certification, the Qualified Bidder will not be able to participate in the auction.

Other certifications of the Part 2 Application allow the Qualified Bidder to make an information disclosure to explain why it is unable to make a certain certification. For example, a Qualified Bidder that is unable to certify that it is not associated with any other Qualified Bidder will be asked to identify the Qualified Bidder(s) with which it is associated, and will be asked to describe the nature of the association. If a Qualified Bidder makes such a disclosure because it cannot make one of the certifications in the Part 2 Application, this disclosure will be considered when the Part 2 Application is processed. The Auction Manager may require additional information and will decide on a course of action on a case-by-case basis to preserve the competitiveness and integrity of the auction. This course of action could include allowing the Qualified Bidder to complete the Part 2 Application successfully without additional undertakings, could include requiring additional undertakings as a condition for the successful completion of the Part 2 Application and for participation in the auction, and could include rejection of the Part 2 Application.

**ACI-8. What would happen to a bidder that had made all the certifications of the Association and Confidential Information Rules in the Part 1 and Part 2 Applications and that had been found subsequently to have violated one or more of these certifications?**

Sanctions can be imposed for such a violation. These sanctions include loss of all rights to serve any BGS Load won in the auction, forfeiture of the Pre-Auction Letter of Credit, liquidated damages of \$100,000, action under state or federal laws, debarment from participation in future BGS Auctions, prosecution under applicable state and federal laws, or other sanctions that the Board may consider appropriate. The Auction Manager will make a recommendation to the Board on a possible sanction and the Board will make the final determination.

**ACI-9. The Part 2 Application states:**

**“Completion of the following certifications signifies:**

- **your agreement not to take any action during the period to which each certification applies that might affect the accuracy of the certifications; and**
- **your acknowledgement that you do not know of or cannot reasonably anticipate, at the time of this Part 2 Application, any event(s) that might cause these certifications to become untrue during the period to which each certification applies.”**

**What if a certification becomes untrue, but not as a direct consequence of an action taken by the applicant?**

The applicant is subject to sanctions if a certification it makes becomes untrue. The certifications are designed so that the applicant should either know or be able to control whether the certification stays true during the period to which a certification applies. There is no exception from sanctions if a certification becomes untrue, even if an action taken by the applicant is not the proximate cause.

In weighing the appropriateness of a sanction, we would expect that the Board would consider whether the applicant should have reasonably been aware of the possibility of the event that caused the certification to become untrue, as well as the nature of the relationship between the applicant and the party whose action caused the certification to become untrue.

**ACI-10. Suppose that an entity submits a Part 1 Application for the BGS-RSCP Auction, qualifies as a bidder, and then changes its status to a supplier by not filing the Part 2 Application. Can you confirm that the entity in question is then no longer in the ambit of the Association and Confidential Information Rules, and that this scenario presents no issues of compliance with the Association and Confidential Information Rules?**

No, your view is incorrect. This scenario presents important issues of compliance with the Association and Confidential Information Rules.

Please note that an entity that submits a Part 1 Application in the BGS-RSCP Auction, if successful, becomes a Qualified Bidder. Status as a Qualified Bidder cannot be rescinded or changed after the Auction Manager has provided the entity with the Notification of Qualification and has provided the entity with the confidential information that is available only to Qualified Bidders in the BGS-RSCP Auction. There is no such thing as a "supplier" status, no possibility to change status from a Qualified Bidder to a supplier, and no possibility to rescind status as a Qualified Bidder (see, for instance, ACI-11).

If an entity – call it Party A – submits a Part 1 Application for the BGS-RSCP Auction, qualifies as a bidder, and does not subsequently submit a Part 2 Application, Party A need not make certifications in the Part 2 Application, including certifications from the Association and Confidential Information Rules. But this does not mean that Party A is not in the ambit of the Association and Confidential Information Rules. Party A must continue to abide by its certifications made in the Part 1 Application.

Furthermore, other Qualified Bidders in the BGS-RSCP Auction that do submit a Part 2 Application are also asked to make certifications, including certifications from the Association and Confidential Information Rules. In making these certifications, other Qualified Bidders must consider the list of all

Qualified Bidders, and this list of Qualified Bidders includes Party A. This means that any Qualified Bidder in the BGS-RSCP Auction that has negotiated or negotiates supply arrangements specific to BGS-RSCP supply with Party A and that submits a Part 2 Application will most likely be unable to attest that it does not have any knowledge of confidential information relative to the bidding strategy of another Qualified Bidder (namely, Party A). Furthermore, a Qualified Bidder that submits a Part 2 Application may, as a result of interactions with Party A, be unable to attest to any one of the following:

- it is not associated with another Qualified Bidder;
- it has not entered into any agreement with another Qualified Bidder regarding bids at the auction;
- it is not a party to any contract for the purchase of power that might be used as source of supply for BGS-RSCP, and that (i) would require the disclosure of any confidential information (confidential information relative to the bidding strategy or confidential information regarding the Auction Process) to the counterparty under such a contract; or (ii) that would require the disclosure of any confidential information (confidential information relative to the bidding strategy or confidential information regarding the Auction Process) to any other party; or (iii) that would provide instructions, direct financial incentives, or other inducements for the bidder to act in a way determined by the counterparty in the agreement and/or in concert with any other bidder in the auction;
- it does not have any knowledge of confidential information relative to the bidding strategy of any other Qualified Bidder;
- it has not disclosed confidential information relative to its bidding strategy;
- no party has agreed to defray any of its costs of participating in the auction; and
- it will not disclose any confidential information regarding the Auction Process.

Every Qualified Bidder with which Party A wants to negotiate a supply arrangement is faced with not being able to make all certifications, with the need to make information disclosures, and with the possibility of being subject to any remedies as determined by the Auction Manager, which include not being able to participate in the BGS-RSCP Auction. The potential problem is not avoided by negotiating after the Part 2 Application has been submitted. If such an arrangement is negotiated after the Part 2 Application is submitted, a Qualified Bidder with which Party A negotiates a supply arrangement is faced with being unable to uphold the certifications made in the Part 2 Application and is subject to sanctions (see, for instance, ACI-4, ACI-5, and ACI-8).

The scenario you present therefore raises a number of important issues with respect to compliance with the Association and Confidential Information Rules for any BGS-RSCP Bidder negotiating with Party A. If Party A did not submit a Part 1 Application and did not become a Qualified Bidder, although each Qualified Bidder must take due care to uphold certifications in the Part 1 and Part 2 Applications (see, for instance, the discussion in ACI-5), the same issues may not arise.

**ACI-11. Is an entity that becomes a Registered Bidder for a BGS Auction but does not participate in that auction still bound by its certifications in the Part 1 and Part 2 Applications?**

Yes. An entity that receives a Notification of Qualification acquires Qualified Bidder status and retains this status until the end of the Auction Process. Similarly, an entity that receives a Notification of Registration acquires Registered Bidder status and retains this status until the end of the Auction Process. There is no possibility to rescind or change this status. This means that an entity that becomes a Qualified Bidder and that does not submit a Part 2 Application is bound by all the certifications it has made in the Part 1 Application. Similarly, an entity that becomes a Registered Bidder is bound by all the certifications it has made in the Part 1 and Part 2 Applications, regardless of whether the Registered Bidder subsequently participates in the auction.

Please review the certifications in the Part 1 and Part 2 Applications for more details and in particular for the time period during which these certifications must remain in effect.

**ACI-12. Can a Qualified Bidder publicly announce during the Auction Process that it is participating in one or both of the BGS Auctions? Can a Qualified Bidder discuss its participation in the Auction Process with anyone?**

No, once an entity has completed the Part 1 Application for a BGS Auction, this entity cannot announce that it is participating in a BGS Auction. In its Part 1 Application, the entity certifies that upon becoming a Qualified Bidder, it will not disclose information regarding the list of Qualified Bidders, including the identity of any one Qualified Bidder. This prohibits the Qualified Bidder from announcing or revealing to anyone that it is itself a Qualified Bidder, since this would reveal the identity of a Qualified Bidder.

In its Part 2 Application, the Qualified Bidder certifies that upon becoming a Registered Bidder, it will not disclose information regarding the list of Registered Bidders, including the identity of any one Registered Bidder. This prohibits the Registered Bidder from announcing or revealing to anyone that it is itself a Registered Bidder, since this would reveal the identity of a Registered Bidder.

Furthermore, an entity cannot discuss its participation with anyone while the auction is on-going. In its Part 1 Application, the entity also agrees to the Auction Rules. At that point, the entity agrees that as a Qualified Bidder, it will not disclose any confidential information regarding the Auction Process. Confidential information regarding the Auction Process explicitly includes the status of a bidder's participation in the auction. There are only narrow and specific exceptions to this principle; namely, the Qualified Bidder may discuss confidential information regarding the Auction Process with an Advisor, or with bidders with which it is associated (as disclosed in its Part 2 Application).

**ACI-13. Does a Registered Bidder violate the certifications of the Association and Confidential Information Rules made in the Part 1 and the Part 2 Applications by revealing whether it has won in a BGS Auction (and if so, the number of tranches it has won) once the Board has approved the results?**

No, this would not be a violation of those certifications.

Once the auction has concluded, if the Board approves the auction results, the Board may choose to release information regarding final auction prices and the names of the winners. The Association and Confidential Information Rules state that, at that point, a winner may itself release information (only) regarding the number of tranches it has won and the territories that the winner will be serving. The Association and Confidential Information Rules state that, at that point, a losing bidder may itself release information (only) regarding the fact that it participated in the auction.

The Registered Bidder may not make such a disclosure prior to the Board having approved the auction results. Winners and losing bidders otherwise continue to be bound by all certifications from the Association and Confidential Information Rules that extend beyond the Board decision on the auction results. Please consult the Association and Confidential Information Rules portion of the Auction Rules to identify which certifications must be upheld beyond the Board decision on the auction results.

**ACI-14. We are a Registered Bidder in a BGS Auction. We are also a public company subject to the disclosure rules established by the Securities and Exchange Commission ("SEC"). We are concerned about what we can and cannot say regarding the BGS Auction for purposes of our SEC disclosures. Can you provide guidance regarding what can and cannot be said while still upholding our certifications from the Part 1 and Part 2 Application?**

In your Part 1 Application, you agreed not to disclose that you are a Qualified Bidder. In your Part 2 Application, you agreed not to disclose that you are a Registered Bidder (see, for instance, ACI-4, ACI-5, ACI-9, and ACI-12).

There are ways in which auction participation could be revealed absent an explicit statement that you are intending to bid in the auction. Doing so could violate certifications that you have made in the Part 1 and Part 2 Applications. What you may be able to say for purposes of your SEC disclosure without violating certifications in the Part 1 and Part 2 Applications depends on your other business activities and your overall business outlook.

To the extent that you own significant generation in PJM, the marketing of which would be materially affected by the auction, providing factual information about the auction would not be unusual and it would not necessarily reveal that you are participating in the auction. A generation owner in PJM would be expected to have an interest in the BGS Auctions given that the auctions may create a demand for forward power products. These products need not be sales made at the auctions, but could be anything including sales of standard products to bidders or third-party suppliers. The auctions could thus be material to such an entity, even if it were not participating in the auctions. For such an entity to include in its SEC filings public factual information about the auctions or to refer to previously disclosed information about the auctions, would not, if carefully done, reveal that the entity is a Qualified Bidder or a Registered Bidder. It should be clear to readers of such information that whether or not the entity is a bidder, the BGS Auctions could have an effect on the entity's business outlook. Such a release of information, if carefully done, need not violate any certification.



At the other end of the spectrum, an entity that has no significant presence in PJM and that included in its SEC filings information about the auctions may well be viewed as using the filing to communicate that it is participating in one or both of the BGS Auctions. Such an entity may be violating the certification that it will not reveal that it is a Qualified Bidder or Registered Bidder in one or both of the BGS Auctions.

**ACI-15. If a bidder must provide details on its sales as a BGS Supplier and on its offers as a Registered Bidder in the BGS Auctions to comply with a governmental requirement or inquiry, would this be considered a violation of the certifications made under the Association and Confidential Information Rules?**

Once the auction has been concluded, if the Board approves the auction results, the Board may choose to release information regarding final auction prices and the names of the winners. The Association and Confidential Information Rules state that, at that point, a BGS Supplier may itself release information regarding the number of tranches it has won and the territories that the winner will be serving. Such details regarding your sales as a BGS Supplier may be released under the Association and Confidential Information Rules.

The offers that you presented as a Registered Bidder in the BGS Auctions are confidential information regarding the Auction Process. A bidder undertakes not to disclose confidential information regarding the Auction Process from the time of submission of the Part 2 Application. However, it would not be considered a violation of the certifications if you were to provide these in order to comply with a governmental requirement or inquiry as long as you designate the information as confidential and that you use your best efforts to seek to protect the information from release by the governmental authority and from being subject to release under any applicable open records statutes. The Auction Manager would also appreciate, but does not require, notification that such information has been requested of you.

**ACI-16. Do the certifications of the Part 1 and Part 2 Applications that involve undertakings by bidders not to reveal confidential information when seeking quotes and making arrangements for BGS Supply cease to apply once the auction is completed?**

No. The time period during which these certifications apply does not end when the auction is completed.

For instance, in its Part 2 Application, a Qualified Bidder undertakes not to disclose confidential information relative to its own bidding strategy, and undertakes to uphold this certification until the Board renders a decision on the auction results. The certification extends beyond the time at which the auction closes. The Board approves the auction results up to two business days after the close of the BGS-RSCP Auction or after the close of the BGS-CIEP Auction, whichever closes later. Obtaining quotes or making arrangements for BGS Supply when the auction is completed may affect a bidder's ability to uphold this certification. See, for instance, ACI-27 and ACI-28, as well as all other questions and answers in the Transaction and Hedging Section of this document.

Please note further that certifications concerning confidential information regarding the Auction Process hold beyond the Board approval of the auction results. Please consult the Association and Confidential Information portion of the Auction Rules to review the time period during which each certification must hold.

**ACI-17: Is it true that if two entities enter into a bidding agreement, joint venture for the purpose of bidding in the auction, bidding consortium, or other arrangement pertaining to bidding in an auction ("Arrangement"), if this Arrangement is disclosed in the Part 1 Application, and if the Auction Manager qualifies the entities under the Arrangement, then these entities can communicate freely regarding their bidding strategy as well as regarding any other matter related to that auction?**

That is correct.

**ACI-18: If two entities enter into a bidding agreement, joint venture for the purpose of bidding in the auction, bidding consortium, or other arrangement pertaining to bidding in the auction (an "Arrangement"), are these entities associated? If entities are associated with each other, are these entities automatically considered to be part of an Arrangement?**

There is no necessary relationship between associations and an Arrangement with respect to the auction.

If two entities participate in an Arrangement, they are not necessarily associated. For two entities to be associated with one another, some degree of relationship through the corporate structure of the two entities is necessary. Separate entities that have no corporate ties could participate in an Arrangement to submit bids in the auction, each providing separate resources or expertise for participating in the auction (e.g., financial support from one entity and trading expertise from another). In that case, the entities participate in an Arrangement but they are not associated.

If two entities are associated, they are not necessarily part of an Arrangement. It is possible that two entities that are affiliated (and thus associated) would not know of each other's plans to participate in the auction. Such entities may not be able (because one of the entities is regulated, for example) or may not be willing to collaborate in the submission of bids in the auction. In that case, the entities are not part of any sort of Arrangement but they are nevertheless associated.

## Transactions and Hedging

**ACI-19. Can a marketer, who becomes a Qualified Bidder in the BGS-RSCP Auction, purchase full-requirements supply to serve a particular zone should it win at the BGS-RSCP Auction from a generator/wholesaler, who is also a Qualified Bidder in the BGS-RSCP Auction? Could these two Qualified Bidders, in good faith, make all the certifications in the Part 2 Application for the BGS-RSCP Auction?**

No, they could not. The contractual arrangements with the generator for supply to serve full-requirements BGS-RSCP load should the marketer be a winner at the auction would reveal confidential information relative to the marketer's bidding strategy. There is no other use (or market) for full-requirements BGS-RSCP supply other than bidding in the BGS-RSCP Auction; further, the product is sufficient to meet virtually all supply requirements of a BGS-RSCP Supplier. Thus, a generator that is qualified for the BGS-RSCP Auction and that sells full-requirements supply for BGS-RSCP to a marketer that is also qualified for the BGS-RSCP Auction, has knowledge of confidential information relative to the bidding strategy of the marketer. The generator would not be able to certify that it does not have any knowledge of confidential information relative to the bidding strategy of another Qualified Bidder. The marketer may not be able to certify that it does not have any knowledge of confidential information relative to the bidding strategy of the generator if it has acquired knowledge of the generator's estimation of the risks associated with serving BGS-RSCP load or of serving a particular Electric Distribution Company ("EDC") through the transaction. Further, the marketer would not be able to certify that it has not disclosed confidential information relative to its own bidding strategy to another Qualified Bidder.

**ACI-20. Can a marketer qualified for the BGS-CIEP Auction contract with a generator/wholesaler, who is also qualified for the BGS-CIEP Auction, for the generator/wholesaler to supply certain ancillary services (i.e., those that need not be purchased from PJM, such as ancillary services of schedule 3, voltage regulation) and Renewable Energy Credits ("RECs") tied to the volume of BGS-CIEP load should the marketer win at the BGS-CIEP Auction? Is this permissible given that the marketer will not purchase capacity or energy from the generator in connection with BGS-CIEP supply? Could these two Qualified Bidders, in good faith, make all the certifications in the Part 2 Application for the BGS-CIEP Auction?**

No, they could not. Any contractual arrangements for both certain ancillary services and RECs tied to the volume of BGS-CIEP load should the marketer be a winner at the auction would reveal confidential information relative to the marketer's bidding strategy. The products together account for most requirements that a BGS-CIEP Supplier must meet and that involve price risk. For energy, the EDC pays the BGS-CIEP Supplier the zonal real-time locational marginal price, and the BGS-CIEP Supplier does not generally face price risk for energy. For capacity, the BGS-CIEP Supplier pays the price from the Reliability Pricing Model ("RPM"), which is known before the auction begins. A generator that is qualified for the BGS-CIEP Auction and that sells a contract to cover the variable ancillary services and RECs needed to serve BGS-CIEP to a marketer that is also qualified for the BGS-CIEP Auction, has knowledge of confidential information relative to the bidding strategy of the marketer. The generator would not be able to certify that it does not have any knowledge of confidential information relative to the bidding strategy of another Qualified Bidder. The marketer may not be able to certify that it does not have any knowledge of confidential information relative to the bidding strategy of the generator if it has acquired knowledge of the generator's estimation of the risks associated with serving BGS-CIEP load through the transaction. Further, the marketer would not be able to certify that it has not disclosed confidential information relative to its own bidding strategy to another Qualified Bidder in the BGS-CIEP Auction.

**ACI-21. Suppose that a marketer has in the past purchased standard products from a generator/wholesaler. Suppose that both the marketer and the generator qualify in the same BGS Auction (either the BGS-RSCP or the BGS-CIEP Auction). Can the marketer continue purchasing standard products (e.g., 7x24 blocks of energy) from the generator after they have both qualified to bid in the same auction without contravening the applicable Association and Confidential Information Rules? Will these two Qualified Bidders, in good faith, be able to make all the certifications required by the Part 2 Application for the auction in which they are participating?**

Two bidders that have qualified for the same auction and that meet in the course of conducting ordinary business (e.g., the trading of standard energy products such as 7x24 blocks of energy) do not contravene the Association and Confidential Information Rules simply through the ordinary conduct of business. Each of these Qualified Bidders will have to certify to the fact that it does not have any knowledge of confidential information relative to the bidding strategy of the other Qualified Bidder, or any other Qualified Bidder for the same auction. A standard product can be used not only to support a bid in the auction but it can be used outside the auction and it can be resold to another buyer in or out of the auction; furthermore, a standard product in and of itself is not sufficient to meet the supply obligations of a BGS-RSCP Supplier or of a BGS-CIEP Supplier. As such, the transaction of a standard product does not reveal confidential information relative to bidding strategy.

However, bidders that meet in the course of ordinary business should take particular care not to discuss anything relative to their bidding strategy in the auction or auctions in which they are participating.

**ACI-22. Can a Qualified Bidder in the BGS-RSCP Auction sell to, or buy from another Qualified Bidder in the BGS-RSCP Auction shaped energy, load-following products and/or basis products? Is it correct to assume that, as long as neither Qualified Bidder is required to disclose confidential information (relative to its bidding strategy or regarding the Auction Process), and as long as neither Qualified Bidder provides inducements for the other Qualified Bidder to act in the BGS-RSCP Auction in a way that it has determined, these two Qualified Bidders will, in good faith, be able to make all the certifications required by the Part 2 Application for the auction in which they are participating?**

Your question assumes that a sufficient test of whether a bidder will, in good faith, be able to make all certifications in the Part 2 Application, is whether the transaction requires disclosure of confidential information (relative to bidding strategy or regarding the Auction Process), and whether the transaction includes provisions that induce a Qualified Bidder to act in a pre-determined way in the auction. This assumption is false; although this test is relevant, it is not sufficient to determine whether a bidder will, in good faith, be able to make the certifications of the Part 2 Application.

Certainly, if Qualified Bidders were party to a transaction that required a Qualified Bidder to disclose confidential information, or that would induce a Qualified Bidder to behave in a pre-determined way in the auction, then almost certainly the Qualified Bidders would be unable to make all certifications in the Part 2 Application. However, even if the Qualified Bidders were parties to a transaction that did not require a Qualified Bidder to disclose confidential information and that did not provide inducements for a Qualified Bidder to behave in a pre-determined way in the auction, a Qualified Bidder may well not be able to make some of the certifications from the Part 2 Application. A Qualified Bidder should evaluate whether it can make each and every certification and it should not conclude that it can make those certifications simply because it has not been a party to a transaction that requires the disclosure of confidential information and/or because it has not been a party to a transaction that provides inducements for a Qualified Bidder to act in a pre-determined way.

Recall that a Qualified Bidder in the BGS-RSCP Auction will be asked to make the following certifications:

- The Qualified Bidder will be asked to certify that it is not a party to any contract for the purchase of power that might be used as source of supply for BGS-RSCP, and that would require the disclosure of confidential information to the counterparty under such a contract or to any other party, or that would provide instructions, direct financial incentives or other inducements for the BGS-RSCP Bidder to act in a way determined by the counterparty in the agreement and/or in concert with any other bidder in the BGS-RSCP Auction.
- The Qualified Bidder will be asked to certify that it does not have any knowledge of confidential information relative to the bidding strategy of any other Qualified Bidder in the BGS-RSCP Auction.
- The Qualified Bidder will be asked to certify that it will not disclose confidential information relative to its own bidding strategy except to bidders with which it is associated, to its Advisor, and to its financial institution. The BGS-RSCP Bidder may, however, during negotiations of contractual arrangements for power to serve BGS-RSCP load were it to be a winner at the BGS-RSCP Auction, discuss with the counterparty to such arrangements the nature of the products purchased, the volume, and the price at which it is willing to buy these products.
- The Qualified Bidder will be asked to certify that, except for information publicly announced by the Auction Manager or the Board, it will not disclose any information it has regarding the Auction Process, including any round results and the status of its participation in the BGS-RSCP Auction, with any party except its Advisor and bidders with which it is associated.
- The Qualified Bidder must certify that, other than entities with which it is affiliated, and other than bidders named in the Part 1 Application as parties with whom the Qualified Bidder has entered into a bidding agreement, joint venture for the purpose of bidding in the auction, bidding consortium, or other arrangement pertaining to bidding in the auction, no party has agreed to defray any of its costs of participating in the BGS-RSCP Auction, including the cost of preparing the bid, the cost of any financial guarantees, the cost to be paid upon winning a tranche, and any other participation cost.

Please note that all statements where a bidder is asked to certify that it will not disclose confidential information, the bidder is asked to certify that it will not disclose this confidential information to any other party; these statements are not limited to asking the bidder to certify that it will not disclose confidential information to other Qualified Bidders.

You ask about certain specific types of transactions. Please note that all transactions require a case-by-case consideration of whether the parties to the transaction that are Qualified Bidders will be able to make the certifications of the Part 2 Application; see, for instance, ACI-4, ACI-5, ACI-9, and ACI-23.

Transaction of a shaped product may or may not impede the ability of Qualified Bidders to make or uphold the certifications of the Part 2 Application. Transaction of a shaped product in isolation, with that product having a fixed price, a fixed volume and delivery pattern, along with no contingency between winning at the auction and purchasing the product, may not reveal the buyer's or the seller's assessment of migration risk or weather risk. A shaped product can be used not only to support a bid in the auction but it can be used outside the auction and it can be resold to another buyer in or out of the auction. A shaped product in and of itself is not sufficient to meet the supply obligations of a BGS-RSCP Supplier; several other significant components are required. Such a transaction need not reveal or provide confidential information relative to the bidding strategy, but such a transaction could reveal or provide confidential information relative to the bidding strategy. For example, if this transaction were not an isolated transaction but instead the parties were engaged in a series of transactions that included shaped products for varying delivery patterns, or if shaped products were added to other components that could be used for BGS-RSCP Supply, the totality of these transactions would most likely reveal confidential information relative to the bidding strategy of one or both parties. If the

totality of the transactions reveal confidential information relative to the bidding strategy of one or both parties, it would not be possible for the bidders to make or uphold all certifications of the Part 2 Application. Each Qualified Bidder is asked in its Part 2 Application to certify that it does not have and will not obtain confidential information relative to the bidding strategy of another Qualified Bidder and that it has not and will not reveal confidential information relative to its own bidding strategy to another party. Confidential information relative to bidding strategy includes the bidder's estimation of the value of a tranche of the various EDC systems; the bidder's estimation of the risks associated with serving BGS-RSCP load or of serving a particular EDC; and a bidder's contractual arrangements for power with a party to serve BGS-RSCP load were the bidder to be a winner at the auction.

Transaction of a load-following energy product, that is, one that followed actual BGS-RSCP load in some way, for example for an EDC territory, would likely impede the ability of Qualified Bidders to make or uphold the certifications of the Part 2 Application, even if the product were not a full-requirements product. Transaction of such a product would reveal a significant component of a bidder's cost and would reveal an estimation of the seller's risk of serving BGS-RSCP load. Such products have no or extremely limited alternative use outside of the context of the BGS-RSCP Auction. It is difficult to envision that a Qualified Bidder could transact for such a product with another Qualified Bidder and be able to make all certifications in the Part 2 Application including certifications that the bidder has not revealed confidential information relative to its bidding strategy and is unaware of confidential information relative to another Qualified Bidder's bidding strategy. The same would be true of basis products that would be tied to the BGS-RSCP load shape in any way, or to any product for which the transaction was contingent upon the outcome of the auction.

**ACI-23. You have stated that the Association and Confidential Information Rules may constrain the transactions that a Qualified Bidder makes. Are the Association and Confidential Information Rules applicable to transactions before, during, and after the Auction Process?**

It is clear that any type of transaction negotiated and executed after the Board has rendered a decision on the auction results cannot possibly influence the auction outcome or the competitiveness at the auction. These transactions are not within the purview of the Association and Confidential Information Rules and such transactions would not violate certifications made in the application process. (Please note, however, that bidders do make undertakings that extend beyond the time at which the Board renders a decision on the auction results; for example, bidders do undertake not to disclose confidential information regarding the Auction Process. Please consult the Association and Confidential Information portion of the Auction Rules to review the time period during which each certification must hold.)

It is also clear that transactions during the auction are most likely problematic. A bidder that makes all certifications in its Part 2 Application undertakes not to reveal the status of its participation in the auction at any time. Furthermore, a Qualified Bidder undertakes not to take any action that would undermine the certifications that it made in the Part 2 Application. Any transaction made during the auction would need to avoid revealing the bidder's continued participation in the auction, any confidential information relative to the bidder's strategy, or any confidential information regarding the Auction Process. We find it difficult to see how any transaction during the auction, other than the purchase and sale of standard traded products that the parties would trade in the normal course of business (see, for instance ACI-4, ACI-5, ACI-9, ACI-12, and ACI-21), would allow the Qualified Bidder to continue abiding by all its certifications.

Transactions before the auction may or may not prevent a Qualified Bidder from making or upholding all certifications in the Part 2 Application. As emphasized in ACI-4 and ACI-5, the Association and Confidential Information Rules do not provide a list of permitted or prohibited transactions as a given

transaction may in one context allow the bidder to make all certifications, while the same bidder may be unable to make one or more certifications with respect to the same type of transaction in another context. One consideration is whether the counterparty is also a Qualified Bidder. For additional information, see, for instance, ACI-19, ACI-20, ACI-21, ACI-22, ACI-24, ACI-25, and ACI-26.

**ACI-24. Certification (4) in Insert #P2-1 required by the Part 2 Application reads: “PLEASE CERTIFY that you are not a party to any contract for the purchase of power that might be used as a source of supply for BGS-RSCP, and that (i) would require the disclosure of any Confidential Information (Confidential Information relative to the bidding strategy or Confidential Information regarding the Auction Process) to the counterparty under such a contract; or (ii) that would require the disclosure of any Confidential Information (Confidential Information relative to the bidding strategy or Confidential Information regarding the Auction Process) to any other party; or (iii) that would provide instructions, direct financial incentives, or other inducements for you to act in a way determined by the counterparty in the agreement and/or in concert with any other bidder in the BGS-RSCP Auction. Notwithstanding the above, you may, during negotiations prior to the BGS-RSCP Auction for contractual arrangements for power to serve BGS-RSCP load were you to be a winner at the BGS-RSCP Auction, discuss with the counterparty to such arrangements the nature of the products to be purchased, the volume, and the price at which you are willing to buy these products.” An analogous certification is found in Insert #P2-3 required by the Part 2 Application for the BGS-CIEP Auction.**

**We believe that the latter part of this certification, starting with “Notwithstanding the above...” may allow a Qualified Bidder to enter into some types of transaction with a party before the auction. Given the other certifications that a Qualified Bidder must make in the Part 2 Application, we assume that this party cannot be a Qualified Bidder. Can you please elaborate on this portion of the certification, including confirming that it applies only to transactions with a party that is not a Qualified Bidder, explaining the types of transactions that are envisioned, as well as providing the precautions that a Qualified Bidder should put in place to ensure that it upholds its certifications from the Part 1 and the Part 2 Applications.**

You are correct in your interpretation that the portion of certification (4) quoted in your question, which states that a Qualified Bidder may, during negotiations prior to the BGS-RSCP Auction for contractual arrangements for power to serve BGS-RSCP load were the Qualified Bidder to be a winner at the BGS-RSCP Auction, discuss with the counterparty to such arrangements the nature of the products to be purchased, the volume, and the price at which the Qualified Bidder is willing to buy these products, applies only if the counterparty in question is not a Qualified Bidder in the BGS-RSCP Auction. This portion of certification (4) recognizes that a Qualified Bidder may buy in the wholesale market, from a counterparty that is not a Qualified Bidder in the BGS-RSCP Auction, products from which could be inferred information regarding the Qualified Bidder’s valuation of the BGS-RSCP Auction opportunity or interest in one EDC over another. This exception does not apply to purchases from another (selling) Qualified Bidder as such purchases would mean that the other (selling) Qualified Bidder would have confidential information relative to the bidding strategy of the (purchasing) Qualified Bidder. This exception only applies before the auction as any such negotiation from the time at which the auction begins to the time at which the Board renders a decision on the auction results would reveal confidential information regarding the Auction Process. Transactions after the Board has rendered a decision on the auction results are not within the ambit of the Association and Confidential Information Rules (see, for instance, ACI-16 and ACI-23).

While the Qualified Bidder may discuss with the counterparty to an arrangement the nature of the

products to be purchased, the volume, and the price at which it is willing to buy these products, the Qualified Bidder should take all measures to ensure that the counterparty will keep such information strictly confidential. Further, such a transaction, or the negotiations toward such a transaction, should reveal no confidential information regarding the Auction Process beyond the possible inference that the Qualified Bidder is participating in the auction. The Qualified Bidder should consider putting in place confidentiality agreements that would prevent the counterparty from providing information possibly revealed during negotiations to any other entity or that would prevent the counterparty from inadvertently revealing to the Qualified Bidder confidential information that it may have about another Qualified Bidder. The Qualified Bidder should also take all due care to reveal the minimum amount of information and only in the context of negotiations of contractual arrangements for power to serve load won at the auction were it to be a winner, and only in the context of discussions with the counterparty as to the nature of the products to be purchased by the Qualified Bidder, the volume of any such products, and the prices of such products.

Transactions with a party that is not a Qualified Bidder based on negotiations as described above and with the safeguards discussed above, may allow the Qualified to make and uphold all certifications of the Part 2 Application even if the products transacted do not have realistic and feasible uses in addition to supplying load for BGS-RSCP load, or even if the products transacted constitute a product that is substantially informative of a bidder's valuation of the opportunity for serving BGS-RSCP load.

Such transactions could include, for example, the purchase of a load-following product coincident with the term of the supply period. Such a transaction could reveal confidential information relative to the Qualified Bidder's bidding strategy, as a load-following product may be a non-standard product that would substantially inform as to the Qualified Bidder's valuation of the BGS-RSCP product for an EDC, and the safeguards discussed above are important in ensuring that the Qualified Bidder can continue to abide by its certifications even if it engages in such negotiations and transactions with a party that is not a Qualified Bidder. Such transactions could include an arrangement that is contingent on the Qualified Bidder winning supply obligations in the auction and the Board approving the auction results. All care must be taken so that such an arrangement or the negotiation toward such an arrangement reveals no confidential information regarding the Auction Process beyond the possible inference that the Qualified Bidder is participating in the auction.

We emphasize that the transactions and negotiations discussed in answer to this question apply before the auction (i.e., before bidding begins) as any such negotiation during the auction or immediately after (that is, prior to the Board rendering a decision on the auction results) could reveal confidential information regarding the Auction Process.

**ACI-25. Can a Qualified Bidder enter into a win-contingent transaction for a standard product during the auction and still uphold the certifications that it made in the Part 1 and Part 2 Applications?**

No. Each Qualified Bidder in its Part 2 Application is asked to certify that it will not, at any time, disclose any confidential information regarding the Auction Process with some narrow exceptions (i.e., the Qualified Bidder may reveal such information to bidders with which it is associated as disclosed in this Part 2 Application, and to its Advisor). This is certification (13) of each of Insert #P2-1 and Insert #P2-3. The purchase of a win-contingent product, once bidding has begun but before the Board has rendered a decision on the auction results, would likely reveal confidential information regarding the Auction Process, such as the status of the Qualified Bidder's participation in the auction and the status of the auction itself. Thus, if a Qualified Bidder entered into a win-contingent transaction, it would likely mean that the Qualified Bidder would be unable to uphold one or more of its certifications in the Part 2 Application.



**ACI-26. Can a Qualified Bidder enter into a unit-contingent or other generator-related transaction with another Qualified Bidder?**

The Association and Confidential Information Rules and the Part 1 and Part 2 Applications ask each Qualified Bidder to make a number of certifications, including that the Qualified Bidder certify that it does not have any knowledge of confidential information relative to the bidding strategy of another bidder; that the Qualified Bidder will not disclose confidential information relative to its own bidding strategy; that the Qualified Bidder is not the purchasing party in any contract for any product that would require the disclosure of any confidential information relative to bidding strategy or confidential information regarding the Auction Process to the counterparty, or that would provide instructions to act in a way determined by the counterparty; and that no entity has agreed to defray the Qualified Bidder's costs of participating in the auction.

The Association and Confidential Information Rules do not specifically allow or preclude specific types of transactions; see, for instance, ACI-4, ACI-5, ACI-19, ACI-20, ACI-21, ACI-22, ACI-23, ACI-24, and ACI-25. These questions and answers are intended to help bidders better understand the certifications of the Part 1 and Part 2 Applications so that bidders are better able to reach their own determination as to whether a certification can be made. A Qualified Bidder considering a unit-contingent transaction or other generator-related transaction with another Qualified Bidder will need to determine in good faith if such a transaction would prevent the Qualified Bidder from making or upholding any of the certifications in the Part 1 and Part 2 Applications.

To the extent that such a transaction is contingent upon you, Qualified Bidder A, winning at the auction, it would reveal Qualified Bidder A's contractual arrangements for purchasing power to serve BGS load were Qualified Bidder A to be a winner at the auction. Indeed, a Qualified Bidder's contractual arrangements for power with a party to serve the BGS load are part of the confidential information relative to the Qualified Bidder's bidding strategy. This means that the transaction would disclose such confidential information and that Qualified Bidder A would be unable to make or uphold all its certifications in the Part 2 Application.

To the extent that it is known to the market that Qualified Bidder A is serving default supply service load elsewhere in PJM or that Qualified Bidder A has routinely engaged in unit-contingent or generator-related transactions of the same type for these and other purposes, perhaps even with the same party, it is possible that such a transaction for a term that does not coincide with the BGS supply period would not reveal Qualified Bidder A's sources of supply were Qualified Bidder A to win at the auction. To the extent that any of these conditions do not hold, it becomes more difficult to envision how the transaction would not reveal confidential information relative to Qualified Bidder A's bidding strategy. Ultimately Qualified Bidder A must make this determination.

**ACI-27. A marketer is a Qualified Bidder in the BGS-RSCP Auction. Before submitting the Part 2 Application, can this marketer ask the trading desk of a wholesaler, who is also a Qualified Bidder in the BGS-RSCP Auction, for quotes on energy blocks to be delivered to a particular zone? Could these two Qualified Bidders, in good faith, make or uphold all the certifications in the Part 2 Application for the BGS-RSCP Auction?**

It is possible for the marketer to ask for quotes in a way that avoids revealing confidential information relative to its bidding strategy or regarding the Auction Process so that it can make or uphold certifications in the Part 2 Application. The marketer can ask for quotes for energy blocks only and the marketer can ask for quotes for multiple EDC zones rather than for a particular EDC. Further, the marketer can take all due care in its contact with the trading desk not to state that it is a Qualified Bidder for the auction (which would reveal confidential information regarding the Auction Process) and

not to otherwise reveal confidential information, relative to its bidding strategy or regarding the Auction Process.

The marketer's preference to serve one EDC over another is considered confidential information relative to the marketer's bidding strategy under the Association and Confidential Information Rules. The fact that the marketer asks for quotes for energy blocks for multiple EDC zones, regardless of its true preferences, means that the marketer will not reveal its preference for one EDC over another. Energy is only one component of BGS-RSCP supply, and energy blocks are traded independently of the auction, so that obtaining quotes for energy blocks alone is unlikely to provide confidential information regarding the marketer's or the wholesaler's valuation of the auction product (see for instance, ACI-22 for a discussion of transactions involving products other than energy blocks). It is possible that both Qualified Bidders and entities that are not Qualified Bidders in the BGS-RSCP Auction may ask for these quotes to obtain information concerning current market prices.

Please note that if the precautions above are not followed, for example because the marketer makes the request in a way that reveals a preference for one EDC over another, the wholesaler, who is also a Qualified Bidder for the BGS-RSCP Auction, would be required to disclose that it had such knowledge regarding the marketer's bidding strategy in its Part 2 Application. The marketer would have to disclose in its Part 2 Application that it had revealed such confidential information to another Qualified Bidder in the BGS-RSCP Auction. The Auction Manager would consider these disclosures in assessing whether these entities can become Registered Bidders in the auction.

**ACI-28. In ACI-27, you state that a marketer who is a Qualified Bidder in the BGS-RSCP Auction must take all due care in obtaining quotes for energy blocks from the trading desk of another Qualified Bidder. Similarly, in ACI-22 you discuss transactions for shaped energy. Must the same care be exercised by the marketer if the marketer instead goes to the broker market (using the inherent shield of anonymity) to obtain market price information for power products that may be used as components of BGS-RSCP supply (without making purchases through the broker in question)?**

Yes. As explained in ACI-27, care must be exercised so that the marketer can make and uphold the certifications in the Part 2 Application that state that the marketer will not disclose confidential information relative to its bidding strategy or regarding the Auction Process. These certifications apply to disclosure of confidential information not just to other Qualified Bidders, but to anyone, including a broker.

Please note that ACI-27 referred to quotes for energy only, while the question posed here refers to "power products that may be used as components of BGS-RSCP supply." The marketer is asked in its Part 2 Application to certify and uphold the certification that it will not disclose confidential information regarding the Auction Process. Confidential information regarding the Auction Process includes the fact that the marketer is a Qualified Bidder in the BGS-RSCP Auction. To make and uphold this certification, the marketer must take care not to reveal that it is a Qualified Bidder indirectly by seeking quotes for products that would only be of use to a Qualified Bidder in the BGS-RSCP Auction. As an example, power products tied to serving a BGS-RSCP tranche for a particular EDC, such as the full-requirements service for a percentage of the EDC's BGS-RSCP load, would only be useful to a bidder in the BGS-RSCP Auction. Asking for quotes for these products would reveal confidential information regarding the Auction Process (namely, the fact that the entity asking for the quote is a Qualified Bidder) to the broker. We note that we believe this situation unlikely since, to the best of our knowledge, products that are directly tied to BGS-RSCP supply are not traded in the broker market.

**ACI-29. If an energy supplier that is not participating in the BGS Auctions makes an arrangement to sell either an amount of capacity or power to an entity that intends to become a Registered Bidder in the auctions, but the sale is contingent upon this entity winning at the auction, does this arrangement need to be disclosed in the Part 1 Application?**

The arrangements that must be disclosed in the Part 1 Application may be described as follows. An applicant to one or both of the BGS Auctions must disclose any bidding agreement, bidding arrangement, bidding consortium, or joint venture in the Part 1 Application. Please consult the definitions of bidding agreement, bidder consortium and joint venture provided in the glossary to the Part 1 Application and the Part 2 Application. In such arrangements, two or more entities are cooperating to submit bids in the auctions. All entities participating in such arrangements must be named in the Part 1 Application and are included in the list of Qualified Bidders. All entities participating in such arrangements are asked to make the certifications under the Association and Confidential Information Rules in the Part 2 Application (even if only one of the entities is expected to sign the BGS Supplier Master Agreement). The pre-auction letter of credit must be submitted in a way that allows the EDCs to draw upon the pre-auction letter of credit if any of the entities that are parties to such arrangements fail to abide by these certifications or otherwise make a material omission or misrepresentation in the applications. Please note that all such arrangements must be entered into before the Part 1 Applications are received, must be disclosed in the Part 1 Application, and cannot be entered into later in the Auction Process.

While bidding agreements, bidding arrangements, bidding consortia, and joint ventures must be entered into before the Part 1 Application and disclosed in the Part 1 Application, this does NOT mean that all contractual arrangements entered into before the Part 1 Application by an applicant and that may be related to its participation in the BGS Auctions must necessarily be disclosed in the Part 1 Application. There are a variety of contractual arrangements in which an applicant to the BGS Auctions can enter that are not bidding agreements, bidding arrangements, bidding consortia, or joint ventures. There are a variety of contractual arrangements for power to serve BGS load where the applicant to be a winner at the BGS Auction that an applicant may enter into prior to the Auction and that do not require a disclosure in the Part 1 or the Part 2 Application.

While you provide a general description of the type of arrangement in which you have entered, you do not provide sufficient details for a definite response as to whether disclosures are necessary in the Part 1 or the Part 2 Application in your case. We can state that neither the fact that the arrangement in your case is entered into before the Part 1 Application or the fact that the arrangement is contingent on your winning in the auction imply that a disclosure is necessary. If the arrangement in question is not for purposes of submitting joint bids in the auction, and if you determine in good faith that the arrangement does not correspond to a bidding agreement, bidder consortium and joint venture as defined in the Part 1 Application, then the arrangement need not be disclosed in the Part 1 Application.

You also do not provide sufficient details regarding your arrangement for the Auction Manager to provide guidance as to whether the arrangement may affect your ability to make the certifications required by the Association and Confidential Information Rules in the Part 1 and Part 2 Applications. These certifications include that the Qualified Bidder certify that: it will not disclose at any time information regarding the list of Qualified Bidders (including the fact that it is itself a Qualified Bidder); it does not have any knowledge of confidential information relative to the bidding strategy of another bidder; it will not disclose confidential information relative to its own bidding strategy; it is not the purchasing party in any contract for any product that would require the disclosure of any confidential information relative to bidding strategy or confidential information regarding the Auction Process to the counterparty, or that would provide instructions to act in a way determined by the counterparty; and that no entity has agreed to defray the Qualified Bidder's costs of participating in the auction.

Certainly, the fact that you are entering in this arrangement prior to the list of Qualified Bidders being established facilitates your ability to make the certification that you have not disclosed information regarding the list of Qualified Bidders since qualification of bidders has not yet occurred. Similarly, the fact that you are entering in this arrangement with an entity that will not be a Qualified Bidder in the auction also facilitates your ability to make the certifications required by the Association and Confidential Information Rules in the Part 1 and Part 2 Applications (note, however, that if unexpectedly the entity becomes a Qualified Bidder, you may be unable to make or uphold some of the required certifications). While your ability to make such certifications is facilitated by these circumstances, such circumstances do not mean that you can automatically make all certifications required by the Association and Confidential Information Rules. It is the responsibility of each applicant and bidder to consider each certification carefully in light of the definitions in the Auction Rules and in the Application Forms so as to determine in good faith whether any circumstance, including a transaction or arrangement of the type in which you have entered, may prevent the applicant or bidder from making or upholding any of the certifications in the Part 1 and Part 2 Applications.

## Advisor

### **ACI-30. Please clarify the definition of an Advisor. Does legal counsel count as an Advisor?**

An Advisor is an entity or person(s) that will be advising or assisting a bidder with bidding strategy in the BGS-RSCP Auction, with estimation of the value of a system's tranches, or with the estimation of the risks associated with serving BGS load. This advice may be with respect to the round-by-round submission of bids and analysis of the information on the general progress of the auction. This advice may be in preparation for submitting bids at the auction in terms of analyzing the risks and rewards of supplying tranches for a given EDC.

A bidder may, for example, be obtaining general market information from an entity (i.e., subscribing to a service that educates its readers with respect to the market or provides to its subscribers general trends in market prices). This entity would not be an Advisor because the information obtained is general in nature and not specific to the auction. A bidder may, as another example, retain a person to provide updates on the market or educate the bidder as to items such as the responsibilities of being an LSE in PJM. This person would not be an Advisor because the information obtained is general in nature and not specific to the auction. A bidder may retain a person that will analyze the migration risk of customers of different BGS-RSCP classes for a given EDC. This person would be an Advisor as such an analysis would be one element of estimating the value of a system's tranches. In general, an Advisor provides assistance that is specific to the auction.

In general, legal counsel for the bidder would not be considered an Advisor under this definition unless legal counsel provides both legal advice and advice of the type described above.

Please note that, for a Qualified Bidder to be able to make and uphold its certification that it will not disclose confidential information relative to its bidding strategy or regarding the Auction Process, the bidder, when obtaining general information from a person that is not its Advisor, cannot disclose confidential information, including the fact that it has qualified to participate in one or both of the BGS Auctions.

### **ACI-31. If a Qualified Bidder has an Advisor, should this Qualified Bidder put in place confidentiality agreements in advance of the Part 2 Application? Why are such confidentiality agreements necessary?**

Confidentiality agreements are prudent in general given that the Qualified Bidder is providing confidential information to someone from outside its organization. Furthermore, the Qualified Bidder is responsible for any failure on the part of the Advisor to maintain the confidentiality of the information. Such failure may result in sanctions, including forfeiture of the Pre-Auction Letter of Credit and disbarment for participation in future BGS Auctions. Confidentiality agreements, as well as any other protections that the Qualified Bidder wishes to put in place, are required whenever an Advisor may be in a position to serve as a conduit of information between Qualified Bidders. Such would be the case if the Advisor has contact with more than one Qualified Bidder.

## Same Entity and Associations

**ACI-32. A Qualified Bidder is asked to certify in the Part 2 Application and uphold that it is not associated with another Qualified Bidder. It seems possible that a situation would arise where a Qualified Bidder is not associated with another Qualified Bidder at the time it makes the certification in the Part 2 Application, but that an association arises between the two Qualified Bidders as a result of a merger or other combination that occurs after the Part 2 Application.**

**If the Qualified Bidder knows that this possibility exists, can the Qualified Bidder be registered to participate in a BGS Auction if it explains that it can certify that it is not associated with another Qualified Bidder at the time of the Part 2 Application but that its circumstances may change during the Auction Process?**

With possible exceptions that will be discussed later in this answer, in general a Qualified Bidder cannot be registered to participate in a BGS Auction unless either it can state affirmatively that it is not associated with any other Qualified Bidder, or it can name the other Qualified Bidder(s) with which it is associated and explain the nature of the association as defined in the Association and Confidential Information Rules.

Although the Association and Confidential Information Rules are designed to accommodate many different circumstances, and although the certifications and disclosures from each Qualified Bidder are examined on a case-by-case basis, the Auction Manager must be able to completely determine whether a Qualified Bidder that has submitted a Part 2 Application is or is not associated with other Qualified Bidders. The Auction Manager must be able to make this determination because Qualified Bidders that are associated are treated differently under the Association and Confidential Information Rules. For example, associated Qualified Bidders may be jointly subject to load caps. Information with respect to associations must be known with certainty at the time of the Part 2 Application, so that the Auction Manager can request additional information, and so that the Auction Manager can impose any required restrictions on those Qualified Bidders that are associated with each other. The Association and Confidential Information Rules do not provide for this to occur after the Part 2 Application should an association be newly created during the Auction Process.

In general, two Qualified Bidders that may become associated but are unsure whether they will become associated during that period would not both be able to register and bid based on a disclosure that they "could" become associated. There may be exceptions. First, if a Qualified Bidder (Party A) submits a Part 2 Application disclosing that it could become associated with another Qualified Bidder (Party B) but Party B has not elected to submit a Part 2 Application, the Auction Manager may ask for additional information. The Auction Manager could conclude that Party A could register to participate in the auction. Second, if applicants had, in their Part 1 Application, declared a bidding agreement, joint venture for the purpose of bidding in the auction, bidding consortium, or other arrangement pertaining to bidding in the auction, and if they disclose the fact that they may become associated at the Part 2 Application stage, the Auction Manager could conclude that the Qualified Bidders can register to bid in the auction. In this case, the Auction Manager explicitly considers the fact that the restrictions placed on members of a bidding consortium or members of a bidding arrangement are likely to be sufficient for those that would apply to Qualified Bidders that are associated with one another.

Please note that this answer only examines the possibility that Qualified Bidders may become associated with one another while each Qualified Bidder continues to stand alone and conduct its business independently; for example, the parents of the Qualified Bidders could merge or combine in some manner, so that the Qualified Bidders would become sister companies, but the Qualified Bidders would not themselves combine or merge. This answer does not directly contemplate cases where, for example, the Qualified Bidders themselves would merge or combine. If Qualified Bidders themselves combined or merged, one or both of these Qualified Bidders would likely be unable to uphold the

certification that the Qualified Bidder would not substitute another entity in its place, transfer its rights to another entity, or otherwise assign its status as a bidder to another entity. This certification is required in the Part 1 and Part 2 Applications. These certifications ensure that the entity that submits to the qualification process, that certifies its agreement to the Supplier Master Agreement and the Auction Rules, and that certifies its compliance to the Association and Confidential Information Rules is the same entity that bids and that would sign the Supplier Master Agreement should that entity become a winner in the auction.

**ACI-33. Energy marketer A is a Registered Bidder in BGS-RSCP Auction. Before the auction starts, its parent company merges or combines with another company that also has subsidiaries active in trading and marketing power in PJM. However, energy marketer A continues to stand alone and is not merged or otherwise combined with any of the subsidiaries of the company merging with its parent. Will energy marketer A be considered to have substituted, assigned or transferred its rights as a Qualified or Registered Bidder, or be considered to have failed to uphold any of the certifications of the Association and Confidential Information Rules?**

If energy marketer A continues to stand alone and conduct its business independently, and has not legally or effectively combined with any subsidiaries of the company with which its parent has merged, it would not be considered to have substituted, assigned or transferred its rights. The Auction Manager may ask energy marketer A to certify that procedures are in place to keep its business separate from other affiliates including through corporate personnel who may communicate across affiliates. Furthermore, the Auction Manager may require additional information or additional undertakings to ensure continued compliance with the Association and Confidential Information Rules, such as ensuring that no confidential information (relative to its bidding strategy or regarding the Auction Process) would be exchanged with its soon-to-be affiliates. Under these conditions, it is expected that energy marketer A would remain eligible to continue participation in the auction. Please note that these are high hurdles that would most likely require careful advance planning on the part of energy marketer A. Further, energy marketer A would be required to continue upholding all certifications that it made in the Part 2 Application, including the certification that it will not disclose confidential information relative to its bidding strategy; there is no exception that would permit disclosure to affiliates or parents.

We have assumed in this answer that no other subsidiary of the merging parents is participating in the auction (see, for instance, ACI-32). If, on the contrary, a subsidiary of the company with which energy marketer A's parent has merged is a Qualified Bidder, then an additional and immediate issue arises with respect to the Association and Confidential Information Rules. Energy marketer A certified in its Part 2 Application that energy marketer A is not associated with any other Qualified Bidder. Energy marketer A would violate this certification of the Part 2 Application upon the merger of its parent. Indeed, if a merger of energy marketer A's parent and another Qualified Bidder's parent were to occur after the Part 2 Application, but prior to the auction, energy marketer A and the other Qualified Bidder would become sister companies and thereby associated with each other. Bidders who are known to be associated or to have become associated and have not declared an association in the Part 2 Application, and have not declared in the Part 1 Application a bidding agreement, joint venture for the purpose of bidding in the auction, bidding consortium, or other arrangement pertaining to bidding in the auction, are subject to sanctions, including forfeiting the right to any further participation in the auction.

**ACI-34. Energy marketer A is a Qualified Bidder in a BGS Auction. If energy marketer A acquires energy marketer B, would energy marketer A be considered to have substituted, assigned or transferred its rights as a bidder or be unable to make or uphold any of the certifications of the Association and Confidential Information Rules? Energy marketer B is also active in PJM but has not applied to participate in the BGS Auctions.**

By energy marketer A acquiring energy marketer B, we assume you mean that the corporate entity that is energy marketer A acquires the corporate entity that is energy marketer B or a corporate entity that owns energy marketer B.

This transaction most likely would not be considered a substitution, transfer or assignment of energy marketer A's rights as a bidder. However, this transaction would pose a high risk of energy marketer A not being able to make or uphold certifications made in the Part 2 Application. This in turn may mean that energy marketer A may not be able to become a Registered Bidder or, if energy marketer A is already a Registered Bidder, that energy marketer A risks sanctions including disqualification (see, for instance, ACI-4 and ACI-5).

If energy marketer A acquires energy marketer B or an entity that owns energy marketer B, any information held by energy marketer B would, by definition, be information held by energy marketer A as well. It would not be possible to keep energy marketer A as a stand alone entity, by attempting to separate it from information held by energy marketer B that may cause it to be unable to make or uphold certifications in the Part 2 Application. Energy marketer A would own energy marketer B and all certifications that it has made would apply to it and to energy marketer B that is now part of energy marketer A. If energy marketer B had confidential information relative to the bidding strategy of another Qualified Bidder, energy marketer A would be unable to make or uphold its certification that it did not have any knowledge of confidential information relative to the bidding strategy of another Qualified Bidder. If energy marketer A had made this certification in the Part 2 Application already, energy marketer A would face sanctions, which could include forfeiting the right to any further participation in the auction. We note that energy marketer A is also at risk of receiving information, during the due diligence process, concerning transactions that energy marketer B had made with respect to the auction, rendering energy marketer A unable to make or uphold the certification that it did not have any knowledge of confidential information relative to the bidding strategy of another Qualified Bidder.

As the time between becoming a Qualified Bidder and the end of the Auction Process is reasonably short, it would be advisable for Qualified Bidders to refrain from any acquisitions that would involve entities active in trading and marketing in PJM during that period, as there is a risk that a Qualified Bidder can then be in a position of not being able to make or uphold the certifications of the Part 2 Application, and of facing possible disqualification.

Furthermore, if energy marketer B had made any transactions with another Qualified Bidder (say, energy marketer C) where energy marketer C relied on the fact that energy marketer B was not a Qualified Bidder, the acquisition by energy marketer A could raise issues with respect to the certifications made by energy marketer C. All Qualified Bidders are asked to certify that they have not disclosed confidential information relative to their bidding strategy. However, notwithstanding that certification, "during negotiations prior to the auction for contractual arrangements for power to serve BGS load were it to be a winner at the BGS Auction", Qualified Bidders are permitted to "discuss with the counterparty to such arrangements the nature of the products to be purchased, the volume, and the price at which you are willing to buy these products." See, for instance, ACI-24, which explains that the counterparty in such negotiations must be an entity that is not a Qualified Bidder. Energy marketer C may have discussed confidential information with energy marketer B, believing, correctly at the time, that energy marketer B was not a Qualified Bidder. However, by being acquired by energy marketer A, energy marketer B would be part of a Qualified Bidder. The certifications of energy marketer C would become inaccurate through the action of energy marketer A. This type of circumstance may lead the Auction Manager to disqualify energy marketer A, who would be unable to



make or uphold the certification that it did not have confidential information relative to the bidding strategy of another Qualified Bidder (i.e., energy marketer C) because of its acquisition of energy marketer B.

**ACI-35. Energy marketer A is a Registered Bidder in a BGS Auction. If energy marketer A is acquired by energy marketer B, would energy marketer A be considered to have substituted, assigned or transferred its rights as a bidder or be unable to make and uphold the certifications of the Association and Confidential Information Rules? Energy marketer B is also active in PJM but is not a Qualified Bidder.**

The requirement that a Qualified Bidder and a Registered Bidder not substitute, transfer or assign its rights serves an important purpose. Each bidder is required to maintain its corporate identity so that the effectiveness of the certifications it has made and the certifications other bidders have made, in order to preserve the fairness and the competitiveness of the auction, are maintained. When a bidder changes its corporate identity, including being acquired and folded into another company, it would in general lose its rights as a bidder and would be disqualified from participation in the auction. There may be additional issues concerning the certifications of the Part 1 and Part 2 Applications but the inability to uphold the certification that energy marketer A not transfer its right is sufficient to result in energy marketer A's exclusion from the auction. It would not be able to assign or transfer its rights to the new corporate entity or substitute that entity in its place. Please note that these certifications are intended to be in effect from the time at which the certification is made until three days after the Board has rendered a decision on the auction results. This period of time should be sufficiently short that entities participating in the auction can plan any such activity so that it does not interfere with their participation in the auction.

If energy marketer A is acquired by energy marketer B, as stated above, in general energy marketer A would be precluded from further participation in the auction. However, it may be possible that the acquisition could be structured or timed in a way that enables energy marketer A to constitute a distinct part of an acquisition that can be postponed until a later time. If it is the case that energy marketer A continues to stand alone and conduct its business independently throughout the Auction Process, and that energy marketer A has not legally or effectively combined with the acquiring entity or any subsidiaries of the acquiring entity, then energy marketer A will not have assigned, substituted or transferred its rights as a bidder and energy marketer A may continue in the Auction Process. The Auction Manager may ask for additional information or additional representations to ensure that this is the case, and to ensure that energy marketer A continues to abide by the certifications of the Part 1 and Part 2 Applications even if its situation has changed and even if it will change its corporate structure in the near future. This could involve asking energy marketer A to represent that it has not exchanged and will not exchange any information concerning its business that could involve the auction to the acquiring entity or its affiliates. These are high hurdles that would most likely require careful advance planning on the part of energy marketer A.

**ACI-36. For purposes of the Part 1 Application, an entity no longer remains the Same Entity if, during a period between the qualification of bidders and three business days after the Board renders a decision on the results of the BGS-RSCP Auction, the entity consolidates into, amalgamates into, or merges into another corporate entity, regardless of whether such an event leads to a change in the entity's legal or trade name. Certifications required by the Part 1 Application ask the applicant to certify that it will remain the Same Entity.**

**Energy Marketer A's parent ("Parent A") has plans to acquire another entity ("Parent B"). Although timing is uncertain, these plans could receive all required regulatory approvals at some point between the qualification of bidders and three business days after the Board renders a decision on the results of the BGS-RSCP Auction. Parent B will initially be a wholly owned subsidiary of Parent A. Energy Marketer A will not be consolidated, amalgamated, or merged into another corporate entity as a result of the proposed merger. Energy Marketer A will remain a direct, wholly owned subsidiary of its parent.**

**Would Energy Marketer A remain the Same Entity for purposes of these certifications required by the Part 1 Application? Would Energy Marketer A be subject to additional requirements to participate in the BGS-RSCP Auction?**

If Energy Marketer A continues to stand alone and conduct its business independently, and has not legally or effectively combined with any subsidiaries of the company with which its parent has merged, it would not be considered to have substituted, assigned or transferred its rights as a Qualified or Registered Bidder and would be considered the Same Entity.

We are assuming that no other subsidiary of the merging parents is participating in the auctions. If, on the contrary, Parent A and Parent B do merge between the time of qualifications and three days after the Board renders a decision on the auction results and a subsidiary of Parent B is a Qualified Bidder, then an additional and immediate issue arises with respect to the Association and Confidential Information Rules. Energy Marketer A will have certified in its Part 2 Application that it is not associated with any other Qualified Bidder. Energy Marketer A would violate this certification of the Part 2 Application upon the merger of Parent A with Parent B if a subsidiary Parent B was also a Qualified Bidder. Indeed, in this case, Energy Marketer A and Energy Marketer B, the subsidiary of Parent B and another Qualified Bidder in the auction, would become sister companies and thereby associated with each other. Bidders that are known to be associated or to have become associated and have not declared an association in the Part 2 Application, and have not declared in the Part 1 Application a bidding agreement, joint venture for the purpose of bidding in the auction, bidding consortium, or other arrangement pertaining to bidding in the auction, are subject to sanctions, including forfeiting the right to any further participation in the auctions.

Even if, as it appears from your description of the situation, Energy Marketer A will remain the Same Entity and will not be considered to have substituted, assigned or transferred its rights as a Qualified or Registered Bidder, the Auction Manager may ask Energy Marketer A to certify that procedures are in place to keep its business separate from other affiliates including through corporate personnel who may communicate across affiliates. Furthermore, the Auction Manager may require additional information or additional undertakings to ensure continued compliance with the Association and Confidential Information Rules, such as ensuring that no confidential information (relative to its bidding strategy or regarding the Auction Process) would be exchanged with its affiliates as a result of the merger of its parent.

**ACI-37: Entity A's parent company has plans to merge or to combine with another company. This other company has a subsidiary, Entity B, which is also active in trading and marketing power in PJM. Entity A does not know whether Entity B intends to submit a Part 1 Application to a BGS Auction. Entity A is concerned that complications may arise if both Entity A and Entity B participate in the auction and the merger closes before such time that three days have elapsed after the Board renders a decision on the auction results. Would it be possible for Entity A to declare in its Part 1 Application a "contingent" Bidding Agreement whereby the Bidding Agreement is NOT effective unless: (i) Entity A and Entity B both become Qualified Bidders in the auction and learn that the other is identified as such through the list of Qualified Bidders provided with the notification of qualification; and (ii) the merger closes prior to the start of the auction. The Bidding Agreement, should it become effective, would allow the Entities to bid jointly.**

Although the Association and Confidential Information Rules are designed to accommodate many different circumstances, unfortunately these Rules do not contemplate the arrangement that you describe and the Auction Manager would not accept such an arrangement in the Part 1 Application. The contingent arrangement that you describe does not seem to be an 'agreement'. If, on the one hand, Entity A is acting without the accord and the knowledge of Entity B, then there is no agreement between Entity A and Entity B, contingent or otherwise. Entity A cannot declare a Bidding Agreement with Entity B when Entity B is not even informed of that fact. If, on the other hand, Entity A and Entity B are communicating with respect to their participation in the auction, then each of Entity A and Entity B should declare in its Part 1 Application an actual bidding agreement, joint venture for the purpose of bidding in the auction, bidding consortium, or other arrangement pertaining to bidding in the auction, which renders a 'contingent' agreement moot.

**ACI-38: Entity A's parent company has plans to merge or to combine with another company. This other company has a subsidiary, Entity B, which is also active in trading and marketing power in PJM. Our understanding is that if:**

- a) Entities A and B become Qualified Bidders in the auction;**
- b) both Entities submit a Part 2 Application in which each certifies that it is not associated with the other; and**
- c) the merger closes after both Entities are notified that they are registered to bid in the auction pursuant to a successful Part 2 Application but before the auction starts;**

**then Entities A and B become associated in violation of their certifications in the Part 2 Application and Entities A and B would then be subject to sanctions, including forfeiting the right to any further participation in the auction. ACI-32 mentions that Entities A and B may avoid such a situation by forming a bidding agreement and declaring such a bidding agreement (the "Arrangement") in their Part 1 Application provided that each Entity continues to stand alone and conduct its business independently after the merger of their parents and until three days after the Board renders a decision on the auction results. Can you please elaborate?**

We reiterate that it is assumed that neither Entity A nor Entity B would legally or effectively combine with each other or with any subsidiaries of the company with which its parent has merged.

The fact that Entities A and B could enter into an Arrangement in the Part 1 Application may contribute to ease concerns about an association forming between Entities A and B after the Part 2 Applications are submitted because the restrictions placed on the Entities participating in the Arrangement are

likely to be sufficient for those that would apply to any two Qualified Bidders that are associated with one another. However, the participation in an Arrangement does not grant an exception for the Entities to make all other certifications required of the Part 2 Application, including: (1) certifications that the Qualified Bidder must remain the same Entity until three days after the Board renders a decision on the auction results; and (2) the certification that the Qualified Bidder will not substitute another entity in its place, transfer its rights to another entity, or otherwise assign its status as a bidder to another entity. These certifications ensure that the Entities that submit to the qualification process, that certify agreement to the Supplier Master Agreement and the Auction Rules, and that certify compliance to the Association and Confidential Information Rules are those Entities that bid and that would sign the Supplier Master Agreement should they be successful at the auction.

On the basis of the Part 1 and Part 2 Applications, the Auction Manager would determine whether Entities A and B comply with the Association and Confidential Information Rules and whether these Entities could be registered in the auction as a "Joint Bidder". This determination would rely on the details of the certifications and information disclosures, as well as the specific circumstances; a general determination cannot be made.

We emphasize in the strongest possible terms that this response does NOT purport to state that if the parent of Entity A and the parent of Entity B have plans to merge, it is legal under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") or other controlling antitrust laws for Entity A and Entity B to form a bidding agreement, joint venture for the purpose of bidding in the auction, bidding consortium, or other arrangement pertaining to bidding in the auction ("Arrangement"). Our response discusses, under the hypothetical that Entity A and Entity B do participate in an Arrangement and have entered into such an Arrangement after seeking all relevant legal advice in their sole discretion, the possibility that these Entities may continue to participate in the auction. Bidders should consult their own legal counsel to determine whether any such Arrangement in their particular circumstances complies with the HSR Act as well as any other regulation, law, or undertaking of the Entities and of the merging parties.

**ACI-39. Entity A's parent company has plans to merge or to combine with another company. This other company has a subsidiary, Entity B, which is also active in trading and marketing power in PJM. Suppose that:**

- a) Entities A and B become Qualified Bidders in the auction;**
- b) both Entities submit a Part 2 Application in which each certifies that it is not associated with the other; and**
- c) the merger closes after both Entities have submitted the Part 2 Application.**

**Would the Entities be able to submit supplemental information to the Auction Manager and possibly register to bid in the auction if the merger closes before the Part 2 Application deadline?**

Yes. When the merger closes, the Entities will become associated. If the association is created after Entities A and B have submitted their Part 2 Applications but before the Part 2 Application deadline, the Auction Manager would consider any supplemental information submitted by Entities A and B as a consequence of the creation of the association.

**ACI-40. Entity A's parent company has plans to merge or to combine with another company. We anticipate that the merger will receive all necessary regulatory approvals but only after bidders are qualified to participate in the auction pursuant to a successful Part 1 Application and potentially before Part 2 Applications are due. Can Entity A submit a Part 1 Application with its parent as Guarantor if it is anticipated that its parent will cease to exist as a result of the merger?**

If it is possible that the parent and Guarantor of Entity A could cease to exist during the Auction Process, Entity A should apply to the auction under its own financial standing. There is no mechanism to update financial information or to change the identity of the Guarantor once it is submitted in the Part 1 Application and once a creditworthiness assessment has been made. If Entity A applies under the financial standing of its parent and Guarantor, the Auction Manager will communicate to Entity A through the notification of qualification that Entity A is required to submit a Pre-Auction Letter of Credit and that Entity A's named parent and Guarantor is required to submit a letter of intent to provide a guaranty for a specific amount that is determined on the basis of the creditworthiness assessment of the named parent and Guarantor. Entity A could be in a situation where it cannot fulfill the pre-auction security requirements of the Part 2 Application because its (now defunct) parent and Guarantor cannot provide a letter of intent to provide a guaranty.

Entity A should instead proceed through the Part 1 Application relying on its own financial standing. Entity A will be required to submit a Pre-Auction Letter of Credit and possibly a letter of reference from a bank (if its unsecured credit line under the terms of the Supplier Master Agreement is not sufficient to support its indicative offer). Entity A would be able to fulfill the pre-auction security requirements if the merger occurs as anticipated and its parent and Guarantor ceases to exist or becomes another entity. If Entity A is successful at the auction, Entity A can subsequently request of the EDC a creditworthiness assessment for an entity that would serve as Guarantor and that would fulfill the creditworthiness requirements of the Supplier Master Agreement.

## **Bidding Agreements, Affiliated Entities, and Associations**

### **ACI-41. When do applicants disclose bidding agreements to the Auction Manager?**

Bidding agreements are disclosed in the Part 1 Application.

### **ACI-42. We understand that bidding agreements must be fully disclosed to the Auction Manager before the auctions start. Can a bidder enter into a bidding agreement with another entity at any point during the Auction Process as long as such disclosure is made?**

No. Any bidding agreement, joint venture for the purpose of bidding in the auction, bidding consortium, or other arrangement pertaining to bidding in the auction, must be fully disclosed in the Part 1 Application. This implies that any such arrangement must be entered into before the Part 1 Applications are received and cannot be entered into later in the Auction Process. In the Part 2 Application, a Qualified Bidder will be required to certify that, other than agreements disclosed in the Part 1 Application, the Qualified Bidder has not entered and will not enter into any agreement regarding bidding or participation in the auction.

### **ACI-43. An entity enters into a bidding agreement, joint venture for the purpose of bidding in the auction, bidding consortium, or other arrangement pertaining to bidding in an auction and the entity becomes a qualified bidder. If the bidding partner subsequently withdraws its support at a later time, would the entity still be a qualified bidder able to continue participation in the Auction Process?**

Any bidding agreement, joint venture for the purpose of bidding in the auction, bidding consortium, or other arrangement pertaining to bidding in an auction must be disclosed in the Part 1 Application using the Insert prepared for this purpose. Any such agreement cannot be first disclosed at a later point in time. If the parties to this agreement qualify, the parties do so as a single "Joint Bidder". Joint Bidder receives a single notification of qualification naming the entities that are parties to the agreement. The list of Qualified Bidders included with the notification of qualification has a single entry for the Joint Bidder, naming all entities participating in the Arrangement (e.g., the entities are listed as "Entity A and Entity B" on a single line or in some other manner that makes it clear that the entities have qualified as a single joint bidder).

Thus it is the Joint Bidder that becomes the Qualified Bidder able to submit a Part 2 Application; each party separately does not have the status of a Qualified Bidder and cannot continue in the Auction Process separately. Status as a Qualified Bidder cannot be rescinded or changed after the Auction Manager has issued the Notification of Qualification. In particular, the Qualified Bidder status of the Joint Bidder cannot be assigned or transferred to one of the parties to the agreement. Applicants certify in their Part 1 Application that they will not assign or transfer their status as a Qualified Bidder to another party.

For the Joint Bidder to continue in the Auction Process after the Joint Bidder has become a Qualified Bidder, the entity that presented its financial information for creditworthiness purposes ("Entity A") submits the Part 2 Application including any required pre-auction security. For the Pre-Auction Letter of Credit, Joint Bidder has the following options: (i) Entity A submits a single Pre-Auction Letter of

Credit that names all parties to the agreement as the "Bidder"; or (ii) Entity A names Entity A as the "Bidder" strictly for the purposes of the Pre-Auction Letter of Credit and the Authorized Representative from Entity A acknowledges in writing that the EDCs may draw upon the letter of credit if any of the parties to the agreement have made a material omission or misrepresentation in the Part 1 Application or the Part 2 Application submitted to participate in the auction or has violated the Auction Rules; or (iii) each party to the agreement separately submits a Pre-Auction Letter of Credit for the full required amount. Entity A submits any additional pre-auction security that is required. The Part 2 Application for Joint Bidder must include the certifications for compliance with the Association and Confidential Information Rules (or appropriate information disclosures) from each party to the agreement.

**ACI-44. Do the load caps apply jointly to entities that enter into bidding agreements, joint ventures for the purpose of bidding in the auction, bidding consortiums, or other arrangements pertaining to bidding in the auction?**

Yes, all entities in any such arrangements together cannot bid or win more than the applicable load caps.

**ACI-45. Two entities enter into a bidding agreement, joint venture for purposes of the auction, bidding consortium, or other arrangement pertaining to the auction. Can you please explain how these entities would typically proceed through the Application Process and how they would submit bids in the auction? Do both entities submit to the Application Process and submit bids separately?**

Although such arrangements can take a variety of forms and the Auction Manager may require different procedures in specific circumstances, entities that bid jointly through a bidding agreement, joint venture for purposes of the auction, bidding consortium, or other arrangement pertaining to the auction ("the Arrangement") would typically proceed as follows through the Application Process and proceed as follows for the submission of bids.

Only the entity that intends to execute the Supplier Master Agreement should the entities participating in the Arrangement win at the auction ("Entity A") submits the Part 1 Application. In the Insert for the Part 1 Application prepared specifically for that purpose, Entity A states that it is NOT bidding independently, Entity A describes the Arrangement, and Entity A names the other entity that is participating in the Arrangement. In this same Insert, the Authorized Representative of Entity A signs to confirm that Entity A will be the entity that will fulfill the creditworthiness requirements (since it is the entity that would execute the Supplier Master Agreement should the entities participating in the Agreement win at the auction). The applicable Insert is Insert #P1-8 if Entity A is applying to participate only in the BGS-RSCP Auction; Insert #P1-14 if Entity A is applying to participate only in the BGS-CIEP Auction; or Insert #P1-11 if Entity A is applying to participate in both the BGS-RSCP Auction and the BGS-CIEP Auction, in which case Entity A notes in Insert #P1-11 whether the arrangement pertains to the BGS-RSCP Auction, or to the BGS-CIEP Auction, or to both Auctions. An Arrangement is specific to a particular Auction; it is possible, for example, for two entities to be participating in an Arrangement that only pertains to one Auction (say the BGS-RSCP Auction) and for one of the two entities to apply to bid independently in the other Auction (i.e., the BGS-CIEP Auction).

Please note that this same procedure for the Part 1 Application would be followed if more than two entities were participating in the Arrangement.

If the Part 1 Application for an auction complied with all requirements, both entities participating in the Arrangement qualify as a single bidder ("Joint Bidder") for that auction. Joint Bidder receives a single notification of qualification naming the two entities. With the notification of qualification, each Qualified Bidder receives a list of Qualified Bidders for that auction. The list of Qualified Bidders has a

single entry for Joint Bidder, naming both entities participating in the Arrangement (e.g., the entities typically are listed as "Entity A and Entity B" on a single line or in some other manner that makes it clear that Entity A and Entity B have qualified as a single bidder).

In the Part 2 Application for a given auction, each entity on the list of Qualified Bidders makes certifications for compliance with the Association and Confidential Information Rules (or makes appropriate information disclosures) using the list of all entities on the list of Qualified Bidders in that auction. Thus, each Qualified Bidder is asked whether it can make each certification with respect to Entity A and whether it can make each certification with respect to the other entity participating in the Arrangement, "Entity B". The indicative offer of Joint Bidder is subject to the same statewide load cap as any other single bidder in the auction. For the BGS-RSCP Auction, the preliminary interest of Joint Bidder is subject to the same EDC load caps as any other single bidder in the auction.

Entity A submits the Part 2 Application including any required pre-auction security based on Entity A's creditworthiness assessment at the Part 1 Application stage and on the indicative offer of Joint Bidder. For the required Pre-Auction Letter of Credit in an auction, Joint Bidder has the following options: (i) Entity A submits a single Pre-Auction Letter of Credit that names Entity A and Entity B as the "Bidder"; or (ii) Entity A names Entity A as the "Bidder" strictly for the purposes of the Pre-Auction Letter of Credit and the Authorized Representative from Entity A acknowledges in writing that the EDCs may draw upon the letter if Entity B has made a material omission or misrepresentation in the Part 1 Application or the Part 2 Application submitted to participate in the auction or has violated the Auction Rules; or (iii) Entity A submits a Pre-Auction Letter of Credit that names Entity A as the "Bidder" and Entity B also submits a Pre-Auction Letter of Credit that names Entity B as the "Bidder", each letter of credit being for the full required amount (i.e., \$500,000 per tranche of Joint Bidder's indicative offer at the maximum starting price for the BGS-RSCP Auction or \$375,000 per tranche of Joint Bidder's indicative offer at the maximum starting price for the BGS-CIEP Auction). Entity A submits any additional pre-auction security that is required. Entity A submits a letter of intent to provide a guaranty if it relies on the financial standing of a guarantor and/or submits a letter of reference from its financial institution if required. These documents refer to Entity A only as Entity A fulfills the creditworthiness requirements and would be the signatory to the Supplier Master Agreement should Joint Bidder win at the auction. Lastly, the Part 2 Application for Joint Bidder must include Entity B's certifications for compliance with the Association and Confidential Information Rules (or appropriate information disclosures).

If the Part 2 Application for an auction complied with all requirements, both entities participating in the Arrangement register as Joint Bidder for that auction. Joint Bidder receives a single notification of registration naming the two entities. With the notification of registration, each Registered Bidder receives a list of Registered Bidders for that auction. The list of Registered Bidders has a single entry for Joint Bidder, naming both entities participating in the Arrangement. The notification of registration for Joint Bidder includes the initial eligibility for Joint Bidder in the auction.

The Auction Manager provides to Joint Bidder a single confidential information packet, including a single Login ID and password, for purposes of participating in the Trial Auction and for submitting bids in the auction. Joint Bidder submits a single bid each round. Entities A and B are entirely responsible for agreeing among themselves on all logistics associated with the submission of bids, including the bidding location and the point of contact for the Auction Manager, it being understood that the Auction Software may not function properly when more than one individual is logged in as a bidder. Entity A and Entity B can communicate freely regarding their bidding strategy as well as regarding any other matter related to the auction for which they have declared the Arrangement to the Auction Manager.

If Joint Bidder does not win any tranches in the auction, the Pre-Auction Letter of Credit is returned to Entity A and cancelled as soon as practicable after the Board decision. If Joint Bidder is a winner at the auction and the Board approves the auction results, the Auction Manager provides to the EDC(s) the contact information for representatives of Entity A for execution of the Supplier Master Agreement. The Pre-Auction Letter of Credit is returned to Entity A and cancelled as soon as practicable after all EDCs with whom Entity A is executing a Supplier Master Agreement have confirmed that Entity A has executed the Supplier Master Agreement and met the creditworthiness requirements of the Supplier



Master Agreement (including the posting of any necessary security). The Auction Manager follows any special instructions for return of the Pre-Auction Letter of Credit provided in the Part 2 Application.

**ACI-46. ACI-45 describes how entities that enter into a bidding agreement, joint venture for purposes of the auction, bidding consortium, or other arrangement pertaining to the auction (the "Arrangement" among Entities) participate in the Application Process and submit bids at the auction. The response assumes that it is known which of the Entities participating in the Arrangement would execute the Supplier Master Agreement (and thus would submit to the creditworthiness requirements) should the Entities win tranches at the auction.**

**How would this process be different if either: the Entities do not know which Entity will execute the Supplier Master Agreement; or: two or more of the Entities participating in the Arrangement intend to execute the Supplier Master Agreement for a portion of the tranches won should they be winners at the auction?**

When Entities participate in an Arrangement, it is typical to nominate one Entity to fulfill the creditworthiness requirements and to sign the Master Supplier Agreement. If the Entities participating in the Arrangement are either uncertain as to which Entity will sign the Supplier Master Agreement or if any or all Entities may sign a Supplier Master Agreement, all Entities must submit to the creditworthiness evaluation in the Part 1 Application. All Entities should then submit separate Part 1 Applications, with all required documents, and in the Insert for the Part 1 Application prepared specifically for that purpose, each Entity states that it is NOT bidding independently, each Entity describes the Arrangement, and each Entity names all other Entities that are participating in the Arrangement. In this same Insert, the Authorized Representative of each Entity signs to confirm that the Entity will be subject to the creditworthiness requirements (since the Entity may execute the Supplier Master Agreement should the Entities under the Agreement win at the auction). Each Entity would respond to any request for additional information from the Auction Manager. For example, the Auction Manager may require that the Entities designate a single point of contact for purposes of providing materials related to the auction, including the confidential information needed to submit bids. Each Entity would present its financial information for purposes of a creditworthiness assessment. Assuming that all Entities submit all required materials and respond to all requests for information from the Auction Manager and provide all information requested by the Part 1 Application process, the Entities participating in the Arrangement would qualify as a single bidder ("Joint Bidder"). The Entities participating in the Arrangement would receive a single notification of qualification, and would be designated as a single bidder on the list of Qualified Bidders. However, because at the time of qualification it is not known which Entity or Entities would sign the Supplier Master Agreement, each Entity would receive a separate creditworthiness assessment that would specify the pre-auction security that the Entity must provide with the Part 2 Application. Please note that each Qualified Bidder will consider all Entities named on the list of Qualified Bidders when making their certifications in the Part 2 Application, including all Entities participating in the Arrangement.

At the Part 2 Application stage, each Entity to the Arrangement would make the certifications of the Part 2 Application or make appropriate information disclosures. The Entity responsible for the creditworthiness requirements and for signing the Supplier Master Agreement would be the Entity providing the pre-auction security required with the Part 2 Application and would be the Entity submitting the Part 2 Application. If the issue of which Entity is to sign the Supplier Master Agreement and is to be subject to the creditworthiness requirements is still not resolved by the Part 2 Application deadline, or should multiple Entities intend to enter into the Supplier Master Agreement upon winning at the auction, each Entity participating in the Arrangement would submit a Part 2 Application. In each Part 2 Application, the indicative offer and maximum preliminary interest (if applying to the BGS-RSCP Auction) would be expected to reflect the interest of Joint Bidder and thus would be expected to be identical in the Part 2 Application submitted by each Entity. The indicative offer for Joint Bidder is subject to the same statewide load cap as any other single bidder in the

auction. The maximum preliminary interest of Joint Bidder, if applying to the BGS-RSCP Auction, is subject to the same EDC load caps as any other single bidder in the auction. Each Entity would post the entire amount of pre-auction security required for the indicative offer presented at the maximum starting price. The amounts of pre-auction security for each Entity participating in the Arrangement may be different depending on the creditworthiness assessment of the particular Entity but these amounts should all be based on the same indicative offer at the maximum starting price valid for Joint Bidder. Each Entity will separately agree that the submission of any bid creates a binding and irrevocable offer to provide service under the terms of the Supplier Master Agreement. Each Entity would additionally be required to agree that upon conclusion of the auction, Joint Bidder would provide to the Auction Manager any division among the Entities of tranches won by Joint Bidder for purposes of signing the Supplier Master Agreement. The Entities participating in the Arrangement would receive a single notification of registration, would appear as a single bidder on the list of Registered Bidder, and would receive a single confidential information packet with information for the submission of bids.

If Joint Bidder wins at the auction, it may be the case that the issue of which Entity is to sign the Supplier Master Agreement has not been resolved at the conclusion of the auction or that multiple Entities intend to enter into the Supplier Master Agreement. In accordance with their undertakings at the Part 2 Application stage, the Entities participating in the Arrangement are entirely responsible for providing to the Auction Manager, within one business day of the close of the auction, the names of the Entities that will sign the Supplier Master Agreement, and the number of tranches that each such Entity will serve. Any failure of the Entities to agree on a division among themselves of the tranches won by Joint Bidder may result in the EDCs drawing upon the Pre-Auction Letters of Credit of any or all Entities participating in the Arrangement. Should the Board approve the auction results, each such Entity will be responsible for signing the Supplier Master Agreement and meeting the creditworthiness requirements within three (3) business days of the Board decision. The EDCs may draw upon the Pre-Auction Letter of Credit of an Entity that fails to abide by these obligations. When the contract execution process is successfully concluded, the Auction Manager will return the Pre-Auction Letter of Credit separately to each Entity participating in the Arrangement according to any specific instructions provided by that Entity in the Part 2 Application.

**ACI-47: Is it possible for two entities that are affiliated both to participate in the auction?**

Two affiliated entities may each be considering bidding in the auction and may separately submit a separate Part 1 Application, unaware that the other is also submitting a Part 1 Application. In the Part 1 Application, each entity will be asked to declare either that 1) it is bidding independently; or 2) it is part of a bidding agreement, joint venture for the purpose of bidding in the auction, bidding consortium, or other arrangement pertaining to bidding in the auction. Each entity would indicate that it is bidding independently given that it is unaware that the other is preparing an application to the auction. Each entity would learn that an affiliated entity is also preparing to submit a bid in the same auction upon seeing the list of Qualified Bidders after having qualified through a successful Part 1 Application.

A Qualified Bidder may submit a Part 2 Application but is not required to do so. If one or both of these affiliated Qualified Bidders subsequently submits a Part 2 Application, it would name the other (i.e., would name the affiliated entity) as a bidder with which it is associated. Whether or not the other Qualified Bidder submits a Part 2 Application is irrelevant to the requirement imposed on the Qualified Bidder that is submitting the Part 2 Application to disclose the association. Furthermore, the Qualified Bidder submitting the Part 2 Application will be asked to make a number of other certifications or to make information disclosures that may be affected by the presence of the associated bidder. In general, Qualified Bidders that are associated with one another are considered as one bidder for the purposes of application of the load caps and for the administration of the auction. It is certainly possible for two affiliated entities to participate both in the same auction. Should both affiliated entities submit a Part 2 Application, the Auction Manager will make a determination on a case-by-case basis of whether the two affiliated entities would be able to bid separately and whether the two affiliated would be considered as one bidder for the application of the load caps.

If instead the two affiliated entities know that the other is preparing a Part 1 Application for the auction so that these entities will have communicated their potential intention to bid to each other, these entities are considered to be bidding as part of a bidding agreement, joint venture for the purpose of bidding in the auction, bidding consortium, or other arrangement ("Arrangement") pertaining to bidding in the auction. These entities should follow the procedures for entities that have entered into an Arrangement, as described in ACI-45.

**ACI-48. If two Qualified Bidders are associated, will these bidders be jointly subject to the load caps?**

In general, Qualified Bidders that are associated with one another are considered as one bidder for the purposes of application of the load caps and for the administration of the auction.

**ACI-49. Entity A is contemplating selling a hybrid swap/credit-support product to Entity B, akin to a contingent credit sleeve. Entity A and Entity B are each a BGS Supplier. It is possible that each intends to bid in the next auction; however, these entities have not and do not intend to discuss with each other participation in future auctions. Further, Entity A and Entity B are not related entities, always bid separately, and have no agreements related to bidding in the auctions in any way.**

**The transaction can be described as follows. Entity B would pay Entity A a premium in exchange for Entity A standing ready and posting cash or a letter of credit directly to the EDC (not Entity B) if the PJM forward energy price exceeded a particular threshold. This would assist Entity B to meet its credit obligations under an existing Supplier Master Agreement.**

**This "contingent credit sleeve" product is negotiated after the close and certification of the results of the last BGS Auctions, and before the beginning of the next BGS Auction cycle. This product is not for the purposes of bidding in future BGS Auctions. Are there any issues with such a transaction under the Association and Confidential Information Rules?**

As we understand your inquiry, Entity A would sell to Entity B a product that would obligate Entity A to post margin as an agent for Entity B when forward prices for PJM exceeded a certain threshold. As you have described the product, the product applies for BGS obligations only and not for a wider range of trading obligations. Further, it applies to BGS load won in Auctions already held and ruled upon by the BPU.

There is no issue, with respect to BGS certifications that have been made, with the two entities transacting such a product that relate to positions won in past auctions once the Supplier Master Agreements have been signed for the relevant supply period. Your concern is also whether entering into such a transaction could make it difficult for Entity A or Entity B to make the certifications required to participate in future BGS Auctions.

Without going through each certification in detail, an entity will generally be required to certify in future auctions that the entity has no bidding agreements, no knowledge of another bidder's bidding

strategy, no knowledge of another bidder's preference for bidding on any product, or no knowledge of another bidder's valuation of any product in the upcoming auction. You will also be required to certify that you have not revealed any such information to anyone, including another bidder. It does not seem that selling the product you describe, in the particular timeframe you describe, related only to past BGS obligations, would create any type of bidding arrangement for a future auction, would reveal confidential information with respect to bidding strategy, would reveal either entity's valuation of the BGS product for future auctions, or would reveal an entity's preference for bidding on any specific product. Hence, it would seem that if Entity A and Entity B entered into this contingent credit sleeve arrangement in the timeframe you describe, the transaction would not have an impact on the certifications to be made for future auctions.

Our response does not contemplate, and would not necessarily apply, to a situation in which Entity A and Entity B entered into a general corporate agreement where Entity A would be supporting all of Entity B's trading obligations. Similarly, we are assuming that the arrangement is not a transaction that would entail Entity A conducting due diligence with respect to Entity B's trading operations, or BGS supply arrangements, or valuations (and vice versa). Further, we are assuming, as you have stated, that this credit product is not for the purposes of bidding in future BGS Auctions. Were any of these assumptions to be incorrect, the guidance we are providing could differ as the level of knowledge that each entity may have about the other's valuation methods and preferences could make it difficult to make some of the required certifications. However, trading a contingent credit sleeve on a one time basis, without a review of the other entity's trading strategies and BGS hedging and supply arrangements, does not in itself appear to pose any problem for future auctions. Finally, we note that the transaction you describe would not "make" one entity a financial institution for the other, and that any provisions for additional information to be provided to a financial institution under the Association and Confidential Information Rules would not apply to the circumstance described.