STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ILLINOIS POWER AGENCY	)	
Petition for Approval of the	)	**Docket No. 12-0544**
220 ILCS 5/16-111/5(d) Procurement Plan	)	

THE RETAIL ENERGY SUPPLY ASSOCIATION RESPONSE TO OBJECTIONS TO THE ILLINOIS POWER AGENCY'S 2013-2018 POWER PROCUREMENT PLAN

I. INTRODUCTION

The Retail Energy Supply Association ("RESA"), by its attorney, Gerard T. Fox, herewith files its Response to Objections to the Illinois Power Agency's ("IPA") 2013-2018 Power Procurement Plan (the "2013 Plan") filed with the Illinois Commerce Commission on September 28, 2012. Those Objections were filed on October 3, 2013. RESA is a broad and diverse group of retail energy suppliers who share the common vision that competitive retail energy markets deliver a more efficient, customer-oriented outcome than a regulated utility structure.[1] RESA is devoted to working with all stakeholders to promote vibrant and sustainable

[1] RESA's members include Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC); PPL EnergyPlus, LLC; Reliant; Stream Energy; TransCanada Power Marketing Ltd.; and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

competitive retail energy markets for residential, commercial and industrial consumers. RESA has been an active participant in all of the Illinois Power Agency's ("IPA") procurement plan proceedings, including the most recent proceeding, Ill. C. C. Docket 11-0660, in which the Illinois Commerce Commission ("Commission") entered its order approving, with modifications, the 2012 procurement plan of the IPA.

On October 3, 2012, RESA filed Objections to the IPA's 2013 Plan. Those Objections were limited to a single issue—the IPA's request that the Commission approve a sourcing agreement between FutureGen and the electric utilities and all Alternative Retail Electric Suppliers ("ARES") in Illinois, and the IPA's apparent belief that the Commission could bind ARES to enter into such sourcing agreements[2]. RESA's Objections analyzed the relevant law and concluded that the Commission does not have the authority to bind ARES to enter into sourcing agreements with FutureGen and that the Commission should deny the IPA's request and remove the sourcing agreement from the 2013 Plan.

The Objections of the following other parties also addressed the FutureGen sourcing agreement issue: Ameren Illinois Utilities ("AIU"), Commonwealth Edison Company ("ComEd"), Exelon Generation/Constellation New Energy ("Exelon"), FutureGen, Illinois Competitive Energy Association ("ICEA"), Illinois Industrial Energy Consumers ("IIEC"), and the Commission Staff ("Staff"). As discussed in detail in Section III, *infra*, all of these parties, except FutureGen objected, on various grounds to the inclusion of the sourcing agreement, at least in the form of Attachment IV to the 2013 Plan, in the final procurement plan to be approved

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[2] RESA notes that the IPA's position on this matter is somewhat ambiguous. For example, on page 76 of the 2013 Plan, the IPA "assumes" that the Commission does have the authority to bind ARES. However, on page 78, the IPA concludes by requesting Commission approval of the final proposed sourcing agreement once agreed upon by all affected parties. The latter request makes more sense in that the sourcing "agreement" (Attachment IV to the 2013 Plan) is obviously not a legal agreement, as no counterparty has agreed to FutureGen's draft.

by the Commission. While objecting to the sourcing agreement, the Staff nevertheless took the position that the Commission has the authority to order ARES to enter into a sourcing agreement with FutureGen. Of course, FutureGen also took the position that the Commission has such authority.

As stated previously, RESA set forth its legal position in its Objections, at pages 5-10, and will not repeat its analysis in its entirety here. However, RESA will present a summary of its legal analysis in Section II of this Response to Objections. In Section III, RESA will summarize the positions of the parties opposing the inclusion of the FutureGen sourcing agreement in the final procurement plan to be approved by the Commission in this proceeding. RESA will respond to the legal arguments of Staff and FutureGen in Section IV. In Section V, RESA will address an alternative approach to funding FutureGen, as set forth in the Objections of both the Staff and FutureGen.

II. THE COMISSION DOES NOT HAVE THE AUTHORITY TO ORDER ARES TO ENTER INTO SOURCING AGREEMENTS WITH FUTUREGEN.

If it exists, the Commission's authority to require ARES to enter into sourcing agreements with FutureGen would be expressed in the IPA Act and the Public Utilities Act. Those acts provide the Commission with express authority to require ARES to enter into clean coal sourcing agreements in only one circumstance: when the facility is deemed to be the initial clean coal facility. However, as the IPA has itself noted, FutureGen 2.0 does not qualify as the initial clean coal facility (*Id.*, p. 74). As explained in greater detail in RESA's Objections and in a summary fashion below -- and contrary to the IPA's assumption-- the Commission does not have the statutory authority to require ARES to enter into sourcing agreements with FutureGen.

While FutureGen 2.0 is not the initial clean coal facility, it is, however, a retro-fitted coal-fired power plant. Subsection 1-75 (d) (5) of the IPA Act sets forth the requirements relating to retrofitted plants. While that subsection provides that the Commission "may approve" **utility** sourcing agreements that do not exceed benchmarks, it provides no authority for the Commission to approve sourcing agreements with **ARES**, nor to require that ARES enter into such sourcing agreements.

The limited authority of the Commission with respect to clean coal facilities other than the initial clean coal facility can be demonstrated by comparing the statutory provisions relating to the initial clean coal facility to those related to a retrofitted coal plant, such as FutureGen.

Subsection 16-115 (d) (5) (iv) of the Public Utilities Act requires all ARES to execute a sourcing agreement with the **initial clean coal facility**. Supporting this express authority, the law provides clear enforcement for this authority. Subsection 16-115 (d) (5) (vi) requires the Commission to revoke the certification of any ARES that fails to execute a sourcing agreement with the initial clean coal facility.

In contrast, Section 1-75 (d) (5) allows owners of retrofitted coal plants to propose to the IPA sourcing agreements with the utilities and ARES required to comply with Section 1-75 (d) and Section 16-115 (d) (5) of the Public Utilities Act. Section 1-75 (d) (5) states that the IPA and the Commission **may** approve any such **utility** sourcing agreement that does not exceed certain cost-based benchmarks. However, Section 1-75 (d) (5) does not state that the IPA and the Commission may approve any **ARES** sourcing agreement that does not exceed certain cost-based benchmarks. Nothing in the IPA Act nor the Public Utilities Act gives the Commission the authority, let alone requires the Commission, to revoke the certification of any ARES that fails to execute a sourcing agreement with a retrofitted coal plant. The reason why the Public

Utilities Act fails to provide an enforcement mechanism for ARES' failure to enter into a sourcing agreement with a retrofitted coal plant is obvious—the Commission does not have the authority to require ARES to enter into sourcing agreements with a retrofitted coal plant, in the first place.

In summary, under Subsection 1-75 (d) (5) of the IPA Act, owners of retrofitted clean coal facilities **may propose** to the IPA sourcing agreements with utilities and ARES. Under that same subsection, the IPA and the Commission **shall consider** such agreements and the IPA and the Commission **may approve utility sourcing agreements** that do not exceed cost-based benchmarks developed by the procurement administrator, in consultation with the Commission Staff, IPA Staff and the procurement monitor, subject to the Commission review and approval. However, neither the IPA Act nor the Public Utilities Act gives the IPA and/or the Commission the authority to order ARES to enter into a sourcing agreement with a retrofitted clean coal facility. There are neither enforcement provisions nor express authority for ARES to enter into the sourcing agreements in the first place.

III. THE OBJECTIONS OF NUMEROUS PARTIES SUPPORT THE ELIMINATION OF THE FUTUREGEN SOURCING AGREEMENT FROM THE 2013 PLAN.

As previously stated, numerous parties objected to the inclusion of the FutureGen sourcing agreement, or at least the sourcing agreement set forth in Appendix IV to the 2013 Plan, on legal, policy, and factual bases.

While Staff takes the position that the Commission has the discretion under the law to approve or not approve sourcing agreements between ARES and retrofitted clean coal facilities, a position that RESA will rebut in Section IV of this Response to Objections, Staff correctly states that that discretion is subject to the least cost standard of Section 16-111.5 (d) (4).

However, the IPA did not address the standard set forth in Section 16-111.5(d) (4) of the Public Utilities Act which requires a demonstration that the proposed procurement will "ensure adequate, reliable, efficient, and environmentally sustainable electric service at the lowest cost over time, taking into account any benefits of price stability". (Staff's Objections, pp. 6-7) Furthermore, Staff's analysis concludes that the proposed procurement from FutureGen 2.0 is not sufficiently developed to warrant approval based on the current state of affairs (*e.g.* lack of a statutory benchmark; failure to resolve all contested issues before submission for approval). Furthermore, Staff takes the position that the Commission should resolve all substantive issues associated with the sourcing agreement prior to approval of the agreement. (*Id.*, pp. 16-17)

Both AIU and ComEd opposed the sourcing agreement in the form set forth in Appendix IV to the 2013 Draft Plan. According to AIU, the FutureGen sourcing agreement does not provide adequate protection for AIU or its customers. Therefore, the sourcing agreement, as currently proposed, should be rejected by the Commission or continued under a further proceeding. AIU provided a redlined version of the sourcing agreement, detailing the revisions that would have to be made to the sourcing agreement. (AIU Objections, pp. 1-5) According to ComEd, the FutureGen sourcing agreement is unfair, unreasonable and inconsistent with the IPA Act in many respects, including the following:

- The sourcing agreement is incomplete, containing a number of blank spaces that need to be filled in before it can be evaluated for reasonableness and compliance with law
- The IPA should be clear that the benchmarks are to be used to evaluate not only the initial price but also all subsequent changes to that price and that no party has an obligation to execute a sourcing agreement until the benchmarks are developed and approved and used to evaluate the price of energy under the sourcing agreement..
- Either all or none of the Illinois electric utilities (for whom the IPA procurements energy—i.e. ComEd and AIU) and ARES should be required to execute a sourcing agreement with FutureGen. In this regard, ComEd notes that it is unclear whether the IPA or the Commission has any authority to compel an ARES to sign the sourcing agreement.

- The sourcing agreement must be revised to be brought into compliance with the IPA Act.
- Other provisions of the sourcing agreement are unreasonable and should be revised.

(ComEd Objections, pp. 2-15)

ICEA is an Illinois-based trade association of active ARES. ICEA also opposed the inclusion of the FutureGen sourcing agreement, stating that there is no statutory support for requiring ARES to enter into sourcing agreements with FutureGen. Absent statutory requirements, sound public policy dictates that ARES be free to enter into contracts with the power producers of their choice. ICEA concludes that the IPA's proposal for a sourcing agreement between FutureGen and ARES should be rejected. (ICEA's Objections, pp. 4-11)

IIEC, an informal association of large industrial electric and gas consumers, also opposed the inclusion of the FutureGen sourcing agreement, stating that neither the IPA nor the Commission has authority to order ARES to enter into sourcing agreements with FutureGen. Moreover, the 2013 Plan does not provide any cost and pricing data that would allow the Commission to make the determination that the plan will ensure electric service at the lowest total cost over time. IIEC concludes that the FutureGen sourcing agreement should be removed from the 2013 Plan. (IIEC's Objections, pp. 2-7)

Exelon Generation and Constellation NewEnergy filed joint comments on the Draft Plan. Exelon Generation owns approximately 35,000 mW of generation, including nuclear, fossil, hydroelectric, solar, landfill gas and wind generation assets. Constellation NewEnergy provides electricity and energy-related services to retail customers in Illinois as well as 15 other states and the District of Columbia. (Exelon Objections, pp. 1-3) While they took no position on the legal authority of the Commission to require ARES to enter into sourcing agreements with FutureGen; they stated that the sourcing agreement is unworkable in its current form. First, the sourcing

agreement appears to have been drafted with a focus on the relationship between FutureGen and regulated utilities. Second, the sourcing agreement shows an obvious bias toward FutureGen. Third, there has been inadequate time to assess the significant proposed changes with respect to contract pricing made in the 2013 Plan from the informal draft on which comments were made. (*Id.*, pp. 2-9)

IV. THE LEGAL ANALYSES OF STAFF AND FUTUREGEN DO NOT SUPPORT THE CONCLUSION THAT THE COMMISSION HAS AUTHORITY TO REQUIRE ARES TO ENTER INTO SOURCING AGREEMENTS WITH FUTUREGEN.

Staff basically makes two arguments in support of its position that the Commission has the discretion under the law to approve or not approve sourcing agreements between ARES and retrofitted coal plants, like FutureGen. First, Staff claims that its position is consistent with the legislature's intent which is based upon the plain reading of the Section 1-75 (d) (5), as well as Sections 1-75 (b) and 1-75 (f) of the IPA Act and Section 16-111.5 (d) (4) of the Public Utilities. The Staff then cites a number of cases for the indisputable positions that the "overriding goal of interpreting any statute is to ascertain and effectuate legislative intent", that the "best evidence of the legislature's intent is the language of the statute, which must be given its plain and ordinary meaning", that each "undefined word in the statute must be ascribed its ordinary and popularly understood meaning", and that where "statutory language is clear it must be given effect". (Staff Objections, pp. 8-9)

RESA agrees with Staff that the goal of interpreting a statute is to ascertain and effectuate legal intent. RESA also agrees with Staff that the best evidence of the General Assembly's

intent is the language of the statute, in this case the IPA Act and the Public Utilities Act, and that the best evidence is the language of the statute. RESA further agrees that the language of a statute is to be given its plain and ordinary meaning, that each undefined word in the statute must be given its plain and ordinary meaning, and that where statutory language is clear it must be given effect.

However, RESA is puzzled that in analyzing Sections 1-75 and Section 16-111.5 of the Public Utilities Act, the Staff did not follow its own statutory guidelines. RESA's Objections, at pages 5-10, analyze those sections, utilizing the statutory guidelines used by Staff, but coming to the conclusion that the Commission does not have the authority to order ARES to enter into sourcing agreements with FutureGen. Staff comes to the opposite conclusion mainly because it does not follow those guidelines and ignores the most important and abundantly clear words of the statute on the issue of the authority of the Commission to order ARES to enter into sourcing agreements. Section 1-75 (d) (5) of the IPA Act specifically states that the IPA and the "Commission may approve any such **utility** sourcing agreements that do not exceed cost based benchmarks..." (emphasis added). The word "utility" is defined in Section 3-105 of the Public Utilities Act and an ARES is specifically excluded from the definition of "utility". The language of Section 1-75 (d) (5) is plain and clearly the General Assembly limited the Commission's authority to approve sourcing agreements with retrofitted coal plants to those with utilities.

Second, using the same principles of statutory interpretation and citing the same cases it cited in support of its first argument, Staff takes issue with the position of ICEA that ARES cannot be required to purchase electricity generated from retrofitted coal plants, in particular, FutureGen, stating that Staff is not aware of any language in the IPA Act or the Public Utilities Act that supports that position. (*Id.*, pp. 12-13)

RESA is surprised by Staff's position because on page 14 of ICEA's Objections, it quotes the language from Section 1-75 (d) (5) which states that the IPA and the "Commission may approve any such **utility** sourcing agreements that do not exceed cost-based benchmarks..." (emphasis supplied). Clearly, this quoted language supports the position not only of ICEA but of the other parties, including RESA and IIEC, taking the position that the Commission does not have the authority to approve sourcing agreements with ARES.

FutureGen also takes the position that the legislature intended for both ARES and utilities to be required to purchase electricity generated from retrofitted coal facilities, such as the one it intends to operate. In support of its position, FutureGen makes four arguments. First, FutureGen refers to Section 1-75 (d) (1) of the IPA Act which sets forth the goal of the State that by January 1, 2025, 25% of all of the electricity in the State shall be generated by cost-effective clean coal facilities. (FutureGen Objections, p. 6)

However, as stated on page 7 of RESA's Objections, the 25% figure cited by FutureGen is a "goal" and does not have the same effect as a statutory mandated percentage. This is contrast to the IPA Act's requirement in Section 1-75 (d) (1) that utilities purchase at least 5% of their total supply to serve the load of eligible retail customers in 2015 and years beyond from the initial clean coal facility and the Public Utilities Act's requirement in Section 16-115 (d) (5) for ARES to do the same. Utilities and ARES are free to use their discretion in how best to meet the 25% statutory goal, whether it be with purchases beyond 5% from the initial clean coal facility, other clean coal facilities, or retrofitted clean coal facilities, such as FutureGen.

Second, FutureGen also notes that the Commission has adopted rules requiring ARES to submit an annual report showing how much power the ARES has purchased from clean coal facilities, other than the initial clean coal facility. (FutureGen Objections, pp. 6-7)

The Commission's rules for reporting electricity from clean coal facilities, other than the initial clean coal facility, do not support FutureGen's argument that the Commission has the authority to order ARES to enter into sourcing agreements with FutureGen. ARES currently comply with that reporting requirement, which began in September 2010, by reporting the amount of energy purchased from clean coal facilities other than the clean coal facility, which has been zero. Moreover, the Commission's rules do not require specific reporting for retrofitted coal plants.

Third, FutureGen also argues that the IPA Act contains a special provision applicable to retrofitted coal plants and claims that under this retrofit provision, the sourcing agreements apply to both electric utilities and ARES. (*Id.*, pp. 7-8)

RESA has already responded to this argument in response to the Staff's position. Section 1-75 (d) (5) of the IPA Act limits the Commission's authority to approve sourcing agreements to those with utilities.

Fourth, FutureGen cites Subsection 1-75 (d) (6) of the IPA Act and states that the General Assembly prescribed that when clean coal power is purchased in compliance with the clean coal portfolio standard, "the costs of those purchases shall be recovered through a tariff filed with the Commission and 'deemed prudently incurred and reasonable in amount'". (*Id.*, pp. 15-16)

However, FutureGen's citation actually supports the position of RESA and the other parties that the Commission does not have the authority to order ARES to enter into sourcing

agreements with FutureGen. ARES do not have tariffs, utilities do. ARES do not recover the costs of purchases through tariffs filed with the Commission, utilities do. The Commission does not determine the prudence and reasonableness of energy purchases by ARES, the Commission does this for utilities.

V. STAFF'S AND FUTUREGEN'S ALTERNATIVE APPROACH TO FUNDING THE FUTUREGEN PROJECT

Staff suggests an alternative approach under which FutureGen would contract only with AIU and ComEd, but they would be allowed to recover all of the costs of FutureGen purchases from all of their retail customers (regardless of their retail supplier), through a competitively neutral charge. (Staff Objections, pp. 15-16) Similarly, FutureGen asks that the Commission consider adopting a similar alternative mechanism for payments to FutureGen—requiring the utilities to file a tariff that permits the utilities (regardless of whether their distribution customer is buying electricity from the utility or from an ARES) to charge distribution customers directly for their proportionate share of energy from the FutureGen project based on each customer's overall monthly energy consumption. (FutureGen Objections, pp. 17-18)

RESA has problems with the FutureGen sourcing agreement, in the form set forth in Attachment IV to the 013 Plan, and cannot support the sourcing agreement. However, RESA does agree that this alternative approach for funding the FutureGen project is preferable to the proposal that the Commission bind ARES to enter into sourcing agreements with FutureGen and is worth consideration.

VI. CONCLUSION

In conclusion, neither the IPA Act nor the Public Utilities Act gives the IPA and/or the Commission the authority to order ARES to enter into a sourcing agreement with FutureGen.

Moreover, the sourcing agreement fails to meet the statutory "least cost" test and suffers from numerous other deficiencies. The Commission should not approve the sourcing agreement. However, in terms of funding arrangements, the alternative mechanisms addressed by Staff and FutureGen is preferable to the Commission attempting to bind ARES to enter into a sourcing agreement with FutureGen and should be given some consideration.

Respectfully submitted,

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October 15, 2012

STATE OF ILLINOIS)
) **SS**
COUNTY OF COOK)

VERIFICATION

Gerard T. Fox, being first duly sworn, on oath deposes and says that he is an attorney for the Retail Energy Supply Association, that he has read the foregoing Response to Objections, that he knows of the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

/s/GERARD T. FOX
Gerard T. Fox

Subscribed and sworn to me

This 15th day of October, 2012

OFFICIAL SEAL
CHRISTINA V. HOLSTON
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES NOV. 18, 2012

Christina V. Holston
11/18/12

NOTICE OF FILING

Please take note that on October 15, 2012, I caused to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission, the attached Response of the Retail Energy Supply Association to the Objections filed in this proceeding.

Dated: October 15, 2012

/s/GERARD T. FOX
Gerard T. Fox

CERTIFICATE OF SERVICE

I, Gerard T. Fox, certify that I caused to be served copies of the foregoing Response of the Retail Energy Supply Association to Objections filed in this proceeding, upon the parties on the service list maintained on the Illinois Commerce Commission's eDocket system for the instant docket via electronic delivery on October 15, 2012.

/s/ GERARD T. FOX
Gerard T. Fox