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
REPLY TO BRIEFS ON EXCEPTIONS

I. INTRODUCTION

Pursuant to 83 Ill. Admin. Code Section 200.830 and the schedule established by the Administrative Law Judge ("ALJ") in this proceeding, the Retail Energy Supply Association ("RESA") herewith files its Reply to the Briefs on Exceptions to the ALJ's Proposed Order ("ALJPO") in this proceeding, concerning the Illinois Power Agency's ("IPA") 2013-2018 Power Procurement Plan (the "2013 Plan") filed with the Illinois Commerce Commission ("Commission") on September 28, 2012. 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

[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.

working with all stakeholders to promote vibrant and sustainable 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 Commission entered its order approving, with modifications, the 2012 procurement plan of the IPA.

The ALJPO was issued on November 14, 2012. On November 21, numerous parties filed Briefs on Exceptions ("BOEs") to the ALJPO. RESA's Reply to BOEs will be limited to a single issue—the IPA's request that the Commission include the FutureGen project in the 2013 Plan and require the electric utilities and all Alternative Retail Electric Suppliers ("ARES") in Illinois to enter into a sourcing agreement proposed by FutureGen.[2] The ALJPO, after a detailed analysis of the record in this proceeding, concluded that the Commission should not include the FutureGen project as part of the 2013 Procurement Plan and that the Commission should not approve the draft sourcing agreement that FutureGen submitted to the IPA for its consideration. The ALJPO does not attempt to resolve the "complicated" issue of whether the Commission can require ARES to enter into the proposed sourcing agreement with FutureGen. Only the IPA and FutureGen itself submitted BOEs arguing that the ALJPO's conclusion was incorrect and that the Commission should approve the FutureGen project. Moreover, FutureGen argues that the Commission should compel ARES to enter into that draft sourcing agreement.

Section II of this Reply demonstrates that the ALJPO was correct in rejecting the FutureGen project because it does not meet the requirements of Section 16-111.5 (d) of the

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[2] The proposed sourcing agreement has been a moving target throughout this brief proceeding. In addition to the proposed sourcing agreement attached as Appendix IV to the 2013 Plan, filed by the IPA on September 28, 2012, FutureGen has filed three more versions of its draft sourcing agreement in less than two months: Exhibit A to its October 15, 2012 Response to Objections, Exhibit 3 to its October 22, 2012 Reply to Responses to Objections, and Exhibit B to its November 21, 2012 Brief on Exceptions.

Public Utilities Act. Section III of this Reply demonstrates that, even the Commission approved the FutureGen project, it does not have the authority to bind ARES to enter into sourcing agreements with FutureGen. The Commission should accept the reasoned determination of the ALJPO and confirm that the draft sourcing agreement should be excluded from the 2013 Plan.

II. THE ALJPO CORRECTLY CONCLUDED THAT THE FUTUREGEN AGREEMENT DOES NOT MEET THE STATUTORY REQUIREMENTS FOR INCLUSION IN THE 2013 PLAN; THE IPA'S AND FUTUREGEN'S ARGUMENTS TO THE CONTRARY ARE WITHOUT MERIT.

A. THERE IS NO AGREEMENT.

In a paradoxical statement, FutureGen finds fault with the ALJPO's conclusion that the "Sourcing Agreement cannot be approved unless all affected parties agree on the terms of the Sourcing Agreement". (FutureGen BOE, p. 13). The IPA makes a similar argument, despite the fact that the 2013 Plan specifically stated: "The IPA requests Commission approval of the final proposed sourcing agreement **once agreed upon by all affected parties** and inclusion of this resource within the context of approving the 2013 Procurement Plan." (2013 Plan, p. 78, emphasis added)[3]

The simple fact is that there is no "agreement" unless the parties agree to it. While the record in this proceeding contains four draft sourcing agreements from FutureGen, to date there is no agreement. In fact, not only is there no agreement, but, as pointed out by the ALJPO itself, "none of the parties offering comments on the sourcing agreement in the current docket, other than the IPA and FutureGen, have expressed support for it in its current form, and the number and significance of disputed issues are considerable". (ALJPO, p. 223)

[3] The IPA, in its Brief on Exceptions, attributes its reversal of position to "excessive optimism" on its part. (IPA BOE, p. 8)

Section 1-75(d)(5) of the IPA Act allows owners of retrofitted coal plants to propose to the IPA sourcing agreements with utilities and ARES that are required to comply with Section 1-75(d) and Section 16-115(d)(5) of the Public Utilities Act. In this case, FutureGen has requested that the IPA and the Commission impose an arrangement it calls a "sourcing agreement," to which none of the counterparties have actually agreed. Approval of this so-called agreement would contravene the purpose of the IPA Act and the Public Utilities Act, and ignore basic essential principles of contract law.

Black's Law Dictionary defines "agreement" as "a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of *mutual assent* by two or more persons." Black's Law Dictionary 74 (8th Ed. 2007) (emphasis added). Mutual assent is at the core of all agreements.

The terms "agreement" and "contract" are often used interchangeably,[4] and it is clear from the terms of the IPA Act that the General Assembly intended that sourcing agreements be contracts. The IPA Act defines "sourcing agreement" as, "in the case of an [ARES], an agreement between the owner of a clean coal facility and such [ARES], which agreement shall have the terms and conditions" provided in Section 16-115(d)(5) of the Public Utilities Act. 20 ILCS 3855/1-10. In turn, Section 16-115(d)(5) of the Public Utilities Act enables parties to enter only two types of sourcing agreements: power purchase agreements or contracts for differences. 220 ILCS 5/15-115(d)(5)(iv)(1)-(2). Both power purchase agreements and contracts for differences are defined in the statute as "contracts" to purchase certain amounts of energy per

[4] However, the concepts differ slightly. A contract is an agreement that has become legally enforceable. Therefore, every contract is an agreement, but not every agreement is a contract. *See* Samuel Williston, *A Treatise on the Law of Contracts* § 2 at 6 (Walter H.E. Jaeger ed., 3d ed. 1957).

hour. *Id.* Thus, it is clear that a sourcing agreement, if executed by the parties, would be a contract.

Illinois courts have held that "it is elementary that in order to constitute a contract between two parties, there must be mutual assent by the contracting parties on the essential terms and conditions of the subject about which they are contracting." *Loeb v. Gray,* 131 Ill.App.3d 793, 475 N.E.2d 1342, 1346, 86 Ill.Dec. 755 (5th Dist. 1985), s*ee also Magee v. Garreau,* 332 Ill. App. 3d 1070, 1076 (2d Dist. 2002). Further, "in forming a contract, it is required that both parties assent to the same thing in the same sense and that their minds meet on the essential terms and conditions." *Artoe v. Cap*, 140 Ill. App. 3d 980, 985-986 (1st Dist. 1986) (internal citations omitted), *see also Quinlan v. Stouffe*, 355 Ill. App. 3d 830, 838 (Ill. App. Ct. 4th Dist. 2005) *and Acad. Chicago Publishers v. Cheever,* 578 N.E.2d 981, 984 (Ill. Sup. Ct. 1991). Alternatively, courts have held that a lack of mutual assent can render an existing contract invalid and unenforceable. *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461 (1st Dist. 2004). In other words, a contract cannot exist until the parties to the contract have reached a mutual understanding regarding the terms and conditions of the arrangement between them.

However, no such mutual understanding exists between FutureGen and any of the parties on whom it asks the IPA and the Commission to impose its "sourcing agreement." In fact, numerous parties have expressly voiced their opposition to the sourcing agreement proposed by FutureGen. (AIU Objections pp. 1-5; ComEd Objections pp. 2-15; ICEA Objections pp. 4-11; IIEC Objections pp. 2-7; Exelon Objections pp. 2-9). In light of this opposition, it is impossible to say that FutureGen has reached an "agreement" with any of the parties. Therefore, there is no sourcing agreement for the Commission to consider or approve.

B. THERE IS NO STATUTORY SUPPORT FOR THE IPA'S CLAIM THAT THE COMMISSION MAY MODIFY THE DRAFT SOURCING AGREEMENT.

In a related argument, the IPA claims that to the extent that there are disputes among parties regarding the terms of the proposed sourcing agreement, the Commission should resolve those disputes and modify the proposed sourcing agreement accordingly. (IPA BOE, p. 5) The IPA further faults for the ALJPO for declining "to use the Commission authority to review, modify and decide on terms for a sourcing agreement", concluding that it is not aware of any other Commission proceeding in which "consensus is a necessary prerequisite to the Commission approving a document that the Commission has the power to modify". (*Id.*, pp. 8-9)

However, the only authority that the IPA states for its claim is the IPA itself, basically referring to its Response to Objections at pages 2, 4 and 9 for the proposition that the "Commission has power to modify Sourcing Agreement". (*Id.*, p. 8) Unfortunately, no authority for that proposition can be found at pages 2, 4 or 9 of the IPA's Response to Objections.

- On page 2 of its Response to Objections, the IPA stated merely that it "had recommended that the Commission approve the sourcing agreement, or in the alternative modify the sourcing agreement to address stakeholder concerns and approve the modified agreement", citing pages 75-76 and 78 of the 2013 Plan. In fact, the only reference to modification is on page 76 which states that if the "Commission identifies **modifications that would make the FutureGen 2.0 sourcing agreement competitively neutral**, the IPA believes that Section 1-75 (d) (5) of the IPA Act would allow the Commission to order such changes". (2013 Plan, p. 76, emphasis added)
- On page 4 of the Response to Objections, the IPA stated "The debate appears to boil down to whether, in the absence of an explicit statement in the IPA Act or Public Utilities Act, ARES and hourly customers should be bound by the sourcing agreement; parties advocate either: (1) that the Commission is foreclosed from

compelling ARES to be bound by the sourcing agreement; or (2) it may use its discretion to approve and modify the proposed sourcing agreement."

- On page 9 of the Response to Objections, the IPA offers the following *non sequitur*: "As noted above, the Commission has the authority to modify the sourcing agreement, as a result it is appropriate for the Commission to consider the modifications proposed by each of the parties."

Unfortunately for the IPA, repeating an unfounded belief neither transforms it into the truth, nor establishes legal support where none exists. In fact, Subsection 1-75 (d) (5) of the IPA Act, the only authority mentioned by the IPA, does not support its position. Subsection 1-75 (d) (5) sets forth the requirements relating to retrofitted plants and states:

> (5) Re-powering and retrofitting coal-fired power plants previously owned by Illinois utilities to qualify as clean coal facilities. During the 2009 procurement planning process and thereafter, **the [IPA] and the Commission shall consider sourcing agreements** covering electricity generated by power plants that were previously owned by Illinois utilities and that have been or will be converted into clean coal facilities, as defined by Section 1-10 of this Act.[5] Pursuant to such procurement planning process, **the owners of such facilities may propose to the [IPA] sourcing agreements with utilities and alternative retail electric suppliers** required to comply with subsection (d) of this Section and item (5) of subsection (d) of Section 16-115 of the Public Utilities Act, covering electricity generated by such facilities. In the case of sourcing agreements that are power purchase agreements, the contract price for electricity sales shall be established on a cost of service basis. In the case of sourcing agreements that are contracts for differences, the contract price from which the reference price is subtracted shall be established on a cost of service basis. **The [IPA] and the Commission may approve any such 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 Commission review and approval. The Commission shall have authority to inspect all books and records associated with these clean coal facilities during the term of any such contract. (emphasis added)

Simply put, there is nothing in Subsection 1-75 (d) (5) that gives the Commission authority to modify sourcing agreements. It is clear that when the General Assembly intends to give the Commission authority to make modifications, it specifically so states. For example, Section 9-

[5] Section 1-10 of the IPA Act defines "Clean coal facility" as "an electric generating facility that uses primarily coal as a feedstock and that captures and sequesters carbon emissions at the following levels… at least 70% of the total carbon emissions that the facility would otherwise emit if, at the time construction commences, the facility is scheduled to commence operation during 2016 or 2017…

201(c) of the Public Utilities Act provides that the Commission may modify rate filings made by a utility, stating, in pertinent part: "If the Commission enters upon a hearing concerning the propriety of any proposed rate or other charge, classification, contract, practice, rule or regulation, the Commission shall establish the rates or other charges, classifications, contracts, practices, rules or regulations proposed, in whole or in part, **or others in lieu thereof, which it shall find to be just and reasonable**." (emphasis added)

Another example can be found in Section 9-244 (b) of the Public Utilities Act which gives the Commission the authority to modify alternative rate filings made by a utility: "If the Commission cannot make the above findings, it shall specifically identify in its order the reason or reasons why the proposed program does not meet the above criteria, and **shall identify any modifications supported in the record, if any, that would cause the program to satisfy the above criteria**." (emphasis added)

However, probably the most pertinent example is that the General Assembly has given the Commission the authority to modify the procurement plans filed by the IPA with the Commission. Section 16-115 (d) (3) of the Public Utilities Act states, "The Commission shall enter its order confirming or **modifying the procurement plan** within 90 days after the filing of the procurement plan by the Illinois Power Agency." (emphasis added)

Thus, while Section 1-75 (d) (5) of the IPA Act gives the Commission discretionary authority to approve utility sourcing agreements, it does not give the Commission authority to modify such agreements. For the reasons set forth in the preceding section of this Reply, the ALJPO was correct in concluding that there are far too many significant differences among parties with respect to the proposing sourcing agreement for the Commission to approve it.

C. THE ALJPO DOES NOT IGNORE THE IPA ACT'S REQUIREMENTS RELATING TO CLEAN COAL.

FutureGen makes the argument that because the ALJPO does not approve the inclusion of the FutureGen project in the 2013 Plan, the ALJPO is ignoring the IPA Act's mandate to include clean coal in each annual procurement plan. (FutureGen BOE, pp. 3-4) The argument is both self-serving and absurd. However, it is at least consistent with FutureGen previous (apparently now abandoned) argument that the Commission has to rubber stamp the IPA's inclusion of the FutureGen project because the Commission must defer to the authority of the IPA (FutureGen Response to Objections, p. 11) Similarly, the IPA refers to Section 1-75 (d) (1) and Section 16-115 (d) (5) of the Public Utilities Act as a "clear mandate by the Illinois Legislature that the utilities and ARES procure electricity that is generated using clean coal". (IPA BOE, p. 6)

The ALJPO complies with the IPA Act. As quoted on page 221 of the ALJPO, Section 1-75 (d) (5) of the IPA Act states that the Commission "may" approve a sourcing agreement with a retrofitted coal facility. The ALJPO cited the 2013 Plan itself for the proposition that Section 1-75 (d) of the IPA Act "does not restrict the Commission's review of the proposed sourcing agreement, the permissive 'may approve' allows the Commission the latitude to review the provisions of the proposed sourcing agreement for compliance with Illinois law and Commission orders and policy" (Id., p. 222, quoting the 2013 Plan at p. 76) As demonstrated herein, the ALJPO carefully weighed the statutory requirements, including the clean coal provisions of the IPA Act, and determined that the FutureGen sourcing "agreement" should not be approved.

With respect to Section 16-115 (d) (5) of the Public Utilities Act, RESA agrees that that section requires ARES to procure electricity generated using clean coal, but it does not mandate

that ARES purchase electricity from FutureGen. ARES are required to procure electricity from the initial clean coal facility, which FutureGen is not, and risk losing their certificate if they do not procure electricity from the initial clean coal facility. (Section 16-115 (d) (5) of the Public Utilities Act) However, there are no similar requirements with respect to clean coal facilities other than the initial clean coal facility and ARES are free to meet their clean coal sourcing requirements in a manner that makes economic sense to them, which the FutureGen sourcing agreement does not.

D. THE FUTUREGEN PROJECT DOES NOT MEET THE REQUIREMENTS OF THE IPA ACT AND SECTION 16-115 OF THE PUBLIC UTILITIES ACT.

In keeping with its practice of establishing an extremely low bar for itself, FutureGen makes the argument that the Commission does not have the discretion to reject the FutureGen project if it does not cause the rate cap to be exceeded.[6] (FutureGen BOE, pp. 4-5) However, as the ALJPO points out, the small size of the FutureGen project would make it virtually impossible for the rate cap to be exceeded. On the other hand, the cost of the FutureGen project and its disproportionate impact on the rate cap would make it virtually impossible for any other clean coal facility to be built in Illinois, including the initial clean coal facility. (ALJPO, p. 227)

FutureGen's primary argument is that Section 16-111.5 (d) (4) does not apply to the FutureGen project itself, but only to the entire portfolio in the IPA procurement plan. The IPA makes a similar argument, claiming that there is substantial evidence in the record that the 2013 Plan, including the FutureGen purchase, satisfies the standard in Section 16-111.5 (d) (4) of the Public Utilities Act. (IPA BOE, p. 13) However, after a careful analysis of the positions of the

[6] For example, on page 8 of its BOE, FutureGen compares itself favorably with the doomed Tenaska project because its costs are slightly less.

Commission Staff, ComEd, ICEA and IIEC, the ALJPO refuses to adopt FutureGen's argument that Section 16-111.5 (d) (4) is inapplicable. (ALJPO, p. 224)

Apparently as a fallback position, FutureGen claims that the ALJPO acknowledged that the FutureGen project satisfies the standards of Section 16-111.5 (d) (4) of the Public Utilities Act, but that the FutureGen project does not "satisfy those standards **enough**". (FutureGen BOE, p. 7, emphasis in original). FutureGen does not provide a citation to the section of the ALJPO which acknowledges that the FutureGen project satisfies the standards of Section 16-111.5 (d) (4), most likely because the ALJPO makes no such acknowledgement. On the contrary, the ALJPO finds that the FutureGen project does not meet the requirements of Section 16-111.5 (d) (4), specifically pointing out the following problems with the FutureGen project:

- With respect to reliability, the ALJPO agrees with Staff's position, based on statistics in the 2013 Plan, that the "capacity added by FutureGen is not currently needed for reliability purposes"
- With respect to environmentally sustainable electric service, the ALJPO accepts Staff's position that there are other hedges against the possible introduction of future greenhouse gas regulation that "would likely be less expensive for Illinois consumers, while generating fewer or no CO2 emissions". (*Id*., p. 225)
- With respect to the lowest total cost over time factor, the ALJPO notes the Commission Staff's unrebutted assertion that the FutureGen project "would be the highest-priced energy component in the Plan". (Id.) The ALJPO compared the levelized price of $148 per mWh in 2012 dollars of the output of the FutureGen project to the average spot market prices at the Illinois Hub of $26.05 in 2009, $31.39 in 2010, $31.93 in 2011, and $27.51 in 2012 (through August, 2012). *(Id*., p. 226)

- With respect to price stability, the ALJPO again noted that there are other hedges against future greenhouse gas regulation that are less expensive for Illinois consumers, while generating fewer CO2 emissions than FutureGen, or even no CO2 emissions. (Id., p. 226)

After considering all of the arguments, the ALJPO concluded, correctly, that the record in this proceeding does not "support a finding that the procurement of electricity from FutureGen 2.0 pursuant to the proposed sourcing agreement will contribute to the objectives set forth in Section 16-111.5 (d) of the PUA, or that a plan containing this component would satisfy the requirements of Section 16-111.5 (d) (4).

E. THE ALJPO WAS CORRECT IN DETERMINING THAT THE SOURCING AGREEMENT IS NOT SUFFICIENTLY DEVELOPED TO WARRANT COMMISSION APPROVAL--FUTUREGEN'S IMPLICATION THAT ONLY MINOR ISSUES REMAIN RELATING TO ITS DRAFT IS WITHOUT MERIT.

FutureGen claims that the ALJPO "ignores that the list of outstanding issues is very short and consists of appropriate, straightforward issues upon which the ICC could rule in this proceeding". (FutureGen BOE, pp. 2) A review of the ALJPO shows that FutureGen's claim is, at best, disingenuous.

Referring to the Commission Staff's position, the ALJPO notes Staff's belief that the "sourcing agreement is an extremely complex agreement, which warrants a more thorough investigation than the review which can be accomplished within the time frame provided for the Commission to approve the Plan. Staff suggests that attempting to address any shortcomings in this sourcing agreement within that timeframe is likely to result in the Commission approving a **sourcing agreement that contains provisions that are confusing and unworkable, which**

would ultimately harm ratepayers. (ALJPO, p. 121, citing Staff's Objections at p. 17, emphasis added)

The ALJPO also notes Staff's specific objections to the proposed sourcing agreement and its suggested modifications at pages 130-138. Similarly, ComEd's problems with the proposed sourcing agreement are set forth at pages 148-149 and pages 158-162 of the ALJPO. Ameren's many concerns with the proposed sourcing agreement led it to take the position that because the "Commission does not have a near or final draft of a mutually agreeable sourcing agreement…the Commission should reject it outright or continue consideration of the sourcing agreement under a future proceeding. (*Id*., pp. 167-169) The ALJPO also cites the position of Exelon and Constellation New Energy that the proposed sourcing agreement "is unworkable in its current form" due to "overarching" issues. (*Id*., pp. 193-196)

While it is true that FutureGen has made a number of changes in its proposed sourcing agreement, as witnessed by the fact that in less than two months, it has filed three revised versions of the proposed sourcing agreement contained in the 2013 Plan, it is hardly accurate to say that the list of outstanding issues is very short and straightforward. The proof of this is contained in FutureGen's own Brief on Exceptions which indicates that the issues outstanding include the appropriate capital structure (*Id*., pp. 22-23), the appropriate rate of return on common equity (*Id*., pp. 24-26), and a number of other issues identified on pages 27-29 of its Brief on Exceptions. As the Commission is well aware from utility rates cases, suggesting that establishing an appropriate capital structure and return on equity is simple and straightforward strains credibility.

Before leaving this subject, RESA feels compelled to address one of the more egregious statements of FutureGen. FutureGen states that the Commission cannot "sanction the apparent attempts of those parties to game the administrative process by refusing to participate in discussions with the FutureGen Alliance and now rely on the purported requirement that there must be unanimous consensus before the Commission can approve the Sourcing Agreement". (FutureGen BOE, p. 15) For the record, RESA representatives did participate in discussions with FutureGen. RESA, however, did not choose to attempt to negotiate the many problems with the proposed FutureGen sourcing agreement because the concept of a 30-year agreement, priced in multiples of the market prices for other sources of electricity, was a non-starter.

F. THE ALJPO DOES NOT SET FORTH AN "IMPOSSIBLE STANDARD" FOR CLEAN COAL PROJECTS.

The IPA argues that the Commission should strike the following paragraph of the ALJPO because it appears to set an impossible standard:

> In addition, given the small output of the facility and the high unit cost of the output, approving the FutureGen project as currently proposed would make only minor progress toward meeting clean coal goals while leaving little room in the rate cap for more economic clean coal projects including an initial clean coal project. Such a result could discourage the planning of such projects thereby frustrating, rather than helping achieve, the clean coal goals in the State of Illinois. In conclusion, the Commission finds that the request to include the sourcing agreement as currently presented by FutureGen in the Procurement Plan is denied.

(IPA BOE, pp. 13-14)

RESA disagrees with the IPA. Requiring a clean coal project to make more than a minor progress toward meeting clean coal goals; leave room in the rate cap for more economic clean coal projects, including the initial clean coal facility; not discourage the planning of clean coal projects; and helping, rather than frustrating, the achievement of the clean coal goals in Illinois,

does not seem an "impossible standard" to RESA. On the contrary, the IPA's implicit standard sets forth the lowest standard imaginable:

- Small output
- High unit cost
- Make minor progress toward meeting clean coal goals
- Leave little room in the rate cap for more economic clean coal projects, including the initial clean coal facility
- Discourage the planning of more economic clean coal projects, and
- Frustrate the clean coal goals of the State of Illinois

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

Both FutureGen argues that not only should the Commission approve the draft sourcing agreement, it should order both present and future ARES to enter into that agreement. (FutureGen BOE, p. 3)[7] However, its arguments have been rebutted by RESA and other parties throughout this proceeding. (see, generally, the Objections of the Illinois Industrial Energy Consumers ("IIEC"), the Illinois Competitive Energy Association ("ICEA"), and RESA; the Responses to Objections of ICEA/IIEC, the Coalition of Energy Suppliers ("CES"), and RESA; and the Replies to Responses to Objections of ICEA/IIEC, CES, and RESA)

If it exists, the Commission's authority to require ARES to enter into sourcing agreements with FutureGen would be expressed in the IPA Act. That Act provides 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

[7] The IPA takes the position that if the Commission approves the FutureGen project, it should require all customers including ARES customers and utility hourly customers to purchase their pro rata portions of the FutureGen output, basically endorsing Staff's alternative proposal, as set forth on page 228 of the ALJPO. (IPA BOE, pp. 14-15)

facility (*Id*., p. 74). As explained in greater detail below, the Commission does not have the statutory authority to require ARES to enter into sourcing agreements with FutureGen.

Subsection 1-75 (d) of the IPA Act sets forth the clean coal portfolio standard. Subsections 1-75 (d) (1) – (4) set forth provisions relating to the requirement that utilities enter into one or more sourcing agreements with the **initial clean coal facility**; however, since there is currently no initial clean coal facility FutureGen 2.0 cannot be the initial clean coal facility referred to in these subsections. There is not a comparable requirement for ARES in Subsection 1-75 (d) of the IPA Act.

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:

> (5) Re-powering and retrofitting coal-fired power plants previously owned by Illinois utilities to qualify as clean coal facilities. During the 2009 procurement planning process and thereafter, the [IPA] and the Commission shall consider sourcing agreements covering electricity generated by power plants that were previously owned by Illinois utilities and that have been or will be converted into clean coal facilities, as defined by Section 1-10 of this Act.[8] Pursuant to such procurement planning process, the owners of such facilities may propose to the [IPA] sourcing agreements with utilities and alternative retail electric suppliers required to comply with subsection (d) of this Section and item (5) of subsection (d) of Section 16-115 of the Public Utilities Act, covering electricity generated by such facilities. In the case of sourcing agreements that are power purchase agreements, the contract price for electricity sales shall be established on a cost of service basis. In the case of sourcing agreements that are contracts for differences, the contract price from which the reference price is subtracted shall be established on a cost of service basis. The [IPA] and the Commission **may approve any such 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 Commission review and approval. The Commission shall have

[8] Section 1-10 of the IPA Act defines "Clean coal facility" as "an electric generating facility that uses primarily coal as a feedstock and that captures and sequesters carbon emissions at the following levels… at least 70% of the total carbon emissions that the facility would otherwise emit if, at the time construction commences, the facility is scheduled to commence operation during 2016 or 2017…

> authority to inspect all books and records associated with these clean coal facilities during the term of any such contract. (emphasis added)

While the above subsection provides that the Commission "may approve" **utility** sourcing agreements that do not exceed benchmarks, it provides no authority for the Commission to require that ARES enter into sourcing agreements in the first place. An ARES is not a utility. If the General Assembly intended to provide the Commission with authority to require ARES to enter into sourcing agreements, it could have – and would have – done so expressly. However, it did not, and such authority cannot be assumed.

Section 16-115 of the Public Utilities Act sets forth the requirements for the certification of ARES. Subsection 16-115 (d) (5) requires, among other things, ARES to source electricity from clean coal facilities, in amounts at least equal to the percentages set forth in subsection (d) of Section 1-75 of the IPA. Subsection 1-75 (d) (1) of the IPA Act requires utilities to purchase at least 5% of their total supply to serve the load of eligible retail customers in 2015 and each year beyond from the initial clean coal facility, however that does not apply here. There are no percentages set forth in Subsection 1-75 (d) (5) relating to retrofitted facilities. While Subsection 1-75 (d) (1) also states that it is the goal of the State of Illinois that by January 1, 2025, 25% of the electricity used in the State shall be generated by cost-effective clean coal facilities, a "goal" does not have the same effect as a statutorily mandated percentage.

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. Again, however**, FutureGen 2.0 is not the initial clean coal facility.**

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. FutureGen is a retrofitted coal plant within the meaning of Section 1-75 (d) (5) and has submitted such a sourcing agreement to the IPA.

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.

Thus, while the first part of Section 1-75 (d) (5) refers to sourcing agreements with utilities and ARES, the latter part of Section 1-75 (d) (5) provides only that the IPA and the Commission may approve sourcing agreements with utilities. It does not say that the IPA and the Commission may approve sourcing agreements with ARES.

Limiting the authority of the IPA and the Commission to approve sourcing agreements with utilities makes sense for the following reasons. First, the purpose of the IPA's procurement plan is to obtain the Commission's approval of a procurement plan for the utilities' default customers, the customers purchasing delivery services and commodity from Ameren and ComEd. The IPA does not have the authority to propose procurement plans for the ARES, nor does the Commission have the authority to approve procurement plans for ARES. Second, the Commission has authority over the rates of utilities, not charges of ARES (see Section 9-201 of the Public Utilities Act). Third, the Commission's approval of sourcing agreements of the

utilities basically constitutes approval of the utilities' recovery of the costs incurred under such agreements from ratepayers. Neither the IPA nor the Commission has any authority over the prices ARES charge to their customers—these are negotiated between the ARES and their customers. Moreover, unlike utilities, ARES are not required to demonstrate the prudence of their commodity purchases in reconciliation proceedings. (see Section 9-220 of the Public Utilities Act)

Finally, the provisions of Subsection 16-115 (d) (5) are clearly different with respect to the initial clean coal facility, which FutureGen 2.0 is not, and any other clean coal facility, including a retrofitted clean coal facility, like Future Gen 2.0. Subsection 16-115 (d) (5) (iv) requires all ARES to execute a sourcing agreement with the initial clean coal facility. There is no comparable provision with respect to a retrofitted clean coal facility. 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, which FutureGen is not. There is no comparable penalty for failing to execute a sourcing agreement with a retrofitted clean coal facility. 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 conclusion, 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.

IV. CONCLUSION

In conclusion, the ALJPO, after a careful analysis of all of the evidence, correctly excluded the FutureGen project from the 2013 Plan and denied approval of the draft sourcing agreement. As demonstrated in this Reply, the FutureGen project does not meet the applicable statutory requirements. Moreover, even if FutureGen and the IPA were correct in arguing that the Commission should include the FutureGen project in the 2013 Plan and approve the draft sourcing agreement, 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.

Respectfully submitted,

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November 28, 2012

NOTICE OF FILING

Please take note that on November 28, 2012, I caused to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission, the attached Reply of the Retail Energy Supply Association to Briefs on Exceptions filed in this proceeding.

Dated: November 28, 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 Reply of the Retail Energy Supply Association to Briefs on Exceptions 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 November 28, 2012.

/s/ GERARD T. FOX
Gerard T. Fox