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
PETITION FOR REHEARING

I. INTRODUCTION

Pursuant to 83 Ill. Admin. Code Section 200.880 and Section 10-113 of the Public Utilities Act, the Retail Energy Supply Association ("RESA") herewith files its Petition for Rehearing of the Illinois Commerce Commission's ("Commission") final Order entered on December 19, 2012 ("Order") in this proceeding, concerning the Illinois Power Agency's ("IPA") 2013-2018 Power Procurement Plan (the "2013 Plan"). 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.; GDF SUEZ Energy Resources NA, Inc.; 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; NRG, Inc.; PPL EnergyPlus, LLC; 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 IPA's procurement plan proceedings.

RESA's Petition for Rehearing is limited to a single issue—*dicta* in the Commission's conclusion that it has the authority to require all Alternative Retail Electric Suppliers ("ARES") in Illinois to enter into a sourcing agreement proposed by FutureGen. The Order does not require all ARES to enter into the sourcing agreement with FutureGen because it adopts the Staff's Alternative Proposal under which only Ameren and ComEd would enter into such sourcing agreements and recover FutureGen costs from all delivery services customers, including customers receiving commodity service from ARES. However, the Commission's statements that it has the authority to require ARES to enter into such sourcing agreements are erroneous and should be removed from the Order as being gratuitous and unnecessary.

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

Despite ultimately concluding that the Staff's Alternative Method for funding the FutureGen project should be accepted, the Commission nevertheless found that it had the authority to order both present and future ARES to enter into that agreement. (Order, pp. 231-231) However, this finding had effectively 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 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.[2] 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

[2] 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…

> 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)

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 <u>goal</u> 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.

III. CONCLUSION

In conclusion, for the reasons stated in this Petition for Rehearing, the Commission should delete the language on pages 231-232 stating that it has the authority to require ARES to enter into a sourcing agreement with FutureGen. 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,

/S/ GERARD T. FOX
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January 22, 2013

NOTICE OF FILING

Please take note that on January 22, 2013, I caused to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission, the attached Petition for Rehearing of the Retail Energy Supply Association.

Dated: January 22, 2013

/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 Petition for Rehearing of the Retail Energy Supply Association, upon the parties on the service list maintained on the Illinois Commerce Commission's eDocket system for the instant docket via electronic delivery on January 22, 2013.

/s/ GERARD T. FOX
Gerard T. Fox