



**Comments of the
Illinois Competitive Energy Association
To the Illinois Power Agency's
Draft 2013 Power Procurement Plan**

The Illinois Competitive Energy Association (“ICEA”) is an Illinois-based trade association of some of the largest and most active alternative retail electric suppliers (“ARES”) seeking to preserve and enhance opportunities for customer choice and competition in the Illinois electric market.¹ Our members serve residential, commercial, industrial, and public sector customers, ranging from Main Street to the Fortune 500, including the manufacturing industry; retail businesses; the State of Illinois and local units of governments; cultural, sporting, and educational institutions; as well as hospitals, hotels, and restaurants. Our members also provide service to virtually all of the Municipalities that have enacted Governmental Aggregation programs. ARES provide more than 60% of the electricity consumed in Illinois, as noted by the Office of Retail Market Development’s most recent Retail Competition Report. As such, ICEA has a direct interest in the Draft Plan.

ICEA appreciates the opportunity to comment on the Illinois Power Agency’s (“IPA”) Draft 2013 Power Procurement Plan (“the Draft Plan”). In these Comments, ICEA will address three (3) aspects of the IPA’s Draft Plan. First, the IPA’s proposal for a sourcing agreement between ARES and a retrofitted coal plant should be rejected as relates to ARES. This proposal

¹ ICEA’s members include Ameren Energy Marketing, Champion Energy Services, Constellation NewEnergy, Direct Energy Services, Exelon Energy Company, FirstEnergy Solutions, Integrys Energy Services, MC Squared Energy Services, Nordic Energy Services, and Reliant.



increases price risk for ARES and their customers, and has the potential to erode the very basis of the current successful retail electric market. Second, the IPA's proposal to use ARES' Alternative Compliance Payment ("ACP") funds to pay for a portion of this year's utility renewables contracts represents a slippery slope that could result in no ACP funds available for the intended statutory purpose. Finally, since the Draft Plan does not contemplate the purchase of any energy or RECs, the IPA and the Commission should direct ComEd and Ameren to publish the applicable retail rates as commercially practical as possible but well in advance of June 1, 2013.

The Draft Plan cogently describes some of the risks inherent in entering into long-term energy contracts. Having entered into higher priced, long-term renewable energy contracts pursuant to previous procurement events, the utilities are now exposed to recovering those costs associated from a declining customer base. In addition, there is currently an over-supply of both energy and renewable energy, and no new procurements for energy or renewable energy credits are recommended under the Draft Plan. Yet simultaneously, the Draft Plan recommends that utilities **and ARES** enter into long-term contracts with a "clean coal" facility that has yet to be retrofit, without cost or other justification, and which is not scheduled to be commercially operational until 2017. Oversupply appears to be the new "norm", and should be rejected. At a minimum, decisions regarding new contracts should be deferred until the 2014 Plan.

ICEA is not proposing any specific change to the proposed procurement approach for energy or renewable energy credits, given the fact that there is no proposed procurement for



those products. However, in the event that forecasts change and procurement events do become necessary during the 2013 Plan Year, those procurements should be limited to daily purchases and/or full requirements contracts that avoid additional future stranded costs, and instead place the switching risk on wholesale suppliers.

I. The Draft Plan Should Be Revised To Exclude References to ARES as It Relates To The Proposed FutureGen PPA

a. ARES Are Not Required To Enter Into Sourcing Agreements

The IPA lacks authority under the Illinois Power Agency Act to force ARES into procurement contracts with FutureGen. The IPA's powers and authorities are created by the Illinois Power Agency Act (the "Act"), 20 ILCS 3855/1-20. Section 1-20 outlines the general powers of the IPA. Subsection 1-20(a) states that the IPA is required to develop electricity procurement plans "to ensure adequate, reliable, affordable, efficient and environmentally sustainable electric service at the lowest cost over time, taking into account any benefits of price stability," to meet the needs of eligible retail electric customers of **electric utilities** that "on December 31, 2005 provided electric service to at least 100,000 customers in Illinois and for small multi-jurisdictional electric utilities that (A) on December 31, 2005 served less than 100,000 customers in Illinois and (B) request a procurement plan for their Illinois jurisdictional load." Section 1-20(a).



The IPA’s powers do not extend to ARES. “Electric utilities” are defined by Section 1-10 of the IPA to have the same definition as found in Section 16-102 of the Public Utilities Act (“PUA”). Specifically, “electric utility” means a public utility, as defined in Section 3-105 of this Act, that has a franchise, license, permit or right to furnish or sell electricity to retail customers within a service area. And, under Section 3-105(b)(9), the term “public utility” does not include “alternative retail electric suppliers as defined in Article XVI” (or Section 16-102). Rather, “Alternative Retail Electric Supplier”, under Section 16-102, is defined as “every person, cooperative, corporation, municipal corporation, company, association, joint stock company or association, firm, partnership, individual, or other entity, their lessees, trustees, or receivers appointed by any court whatsoever, that offers electric power or energy for sale, lease or in exchange for other value received to one or more retail customers, or that engages in the delivery or furnishing of electric power or energy to such retail customers, and shall include, without limitation, resellers, aggregators and power marketers...” Section 16-102 of PUA. Given the above definitions, ARES fall outside of the scope of Section 1-20(a)’s specific mandate for certain public utilities. And, given Section 1-20(a)’s conditions, there are currently only two utilities providers that satisfy these conditions: Commonwealth Edison and Ameren.

Other sections of the PUA granting the IPA authority likewise do not extend its powers to ARES. Under Subsection 1-20(a) and the PUA, the IPA also has the authority to: (1) “conduct competitive procurement processes to procure the supply resources identified in the procurement plan, pursuant to Section 16-111.5 of the Public Utilities Act”; (2) “develop electric generation



and co-generation facilities that use indigenous coal or renewable resources, or both, financed with bonds issued by the Illinois Finance Authority”; and (3) “supply electricity from the Agency's facilities at cost to one or more of the following: municipal electric systems, governmental aggregators, or rural electric cooperatives in Illinois. Subsection 1-20(b) also states that the IPA “has all of the powers necessary or convenient to carry out the purposes and provisions of this Act,” and “including without limitation” each of the several listed powers under this subsection. Section 1-20 does not mention ARES at all. Although other sections of the Act do refer to ARES, including Sections 1-10 (definitions) and 1-75 (Planning and Procurement Bureau), none give the IPA power to force an ARES into a procurement contract. *See also* 220 ILCS 5/3-105 (excluding “alternative retail electric suppliers” from the definition of a “public utility”).

Nor does the statute elsewhere mandate that ARES enter into a sourcing agreement with a specific FutureGen-like facility. Section 16-115 of the PUA governs certification of ARES, and states that any ARES must obtain a certificate of authority from the Illinois Commerce Commission (“ICC” or “Commission”) in accordance with this Section before serving any retail customer or other user located in Illinois. Section 16-115(a). This section further states that the ICC shall grant such a certificate of authority if it makes certain findings, among which includes the finding that the ARES applicant “will procure renewable energy resources in accordance with [this Section] and will source electricity from clean coal facilities,” as defined by Section 1-10 of the Act and in certain amounts dictated by Section 1-75 of the Act. Section 16-115(d)(5). A



“clean coal facility” contains a complex definition under Section 1-10, and means “an electric generating facility that uses primarily coal as a feedstock and that captures and sequesters carbon dioxide emissions” at certain specified levels, among other very specific qualifications. Section 1-10 of the Act. Section 1-75(c)(1) required utilities (and ARES through the PUA) to enter into a supply contract with an “initial clean coal facility,” that was specifically defined to be a prior facility unrelated to FutureGen. But for that specific statutory language relating to the “Initial Clean Coal Facility”, which the IPA agrees does not apply to FutureGen (*Draft Plan* at 11), the PUA does not dictate the means by which ARES may meet their “clean coal” commitments.

In these provisions discussing renewable energy requirements, there is no provision that allows the IPA to force an ARES into a procurement contract with a clean coal facility. The Act does not contain any direct mandate for the IPA to force ARES/RES into procurement contracts with a specific clean coal facility, or even in general. At best, the Act gives broad general powers to the IPA to have all powers “necessary or convenient” to carry out the Act’s purposes, among which include entering into procurement contracts with utilities “to ensure adequate, reliable, affordable, efficient and environmentally sustainable electric service at the lowest cost over time, taking into account any benefits of price stability.” Section 1-20(a). This “necessary or convenient” power, although authorizing the IPA to undertake actions consistent with its purpose, does not specifically state that the IPA has compulsory power under this clause, and does not give the IPA rights with respect to ARES. Simply stated, there is no statutory authority to force an ARES into a procurement contract with FutureGen.



b. The Draft Plan Contains No Support For the FutureGen Agreement

In addition to the lack of statutory support for the proposed sourcing agreement with FutureGen, the Draft Plan contains no other means of support. The single reference as support for the PPA is the following: “The PUA contains an aspirational goal that cost-effective clean coal resources account for, 25% of the electricity used in Illinois by January 1, 2025.” (Draft Plan, p. 11). There is absolutely no discussion of why FutureGen should be included in this year’s Draft Plan, particularly given the fact that there is no requirement to include clean coal in this procurement cycle.

The IPA is required to make certain cost evaluations, which are notably absent in the Draft Plan. Given the lack of a requirement that this year’s Draft Plan contain a “clean coal” procurement, the IPA can only do so provided it will “ensure adequate, reliable, affordable, efficient, and environmentally sustainable electric service at the lowest total cost over time, taking into account any benefits of price stability.”² There can be no credible argument made by any party that electricity from a clean coal facility meets the “lowest total cost” requirement of the Illinois Public Utilities Act (“PUA”), and indeed, the IPA in its draft plan did not even try to make such a showing. Because no clean coal facility currently exists, it is unclear how the IPA would even establish the required benchmark. The Draft Plan glosses over this requirement, and fails to provide the necessary projected cost data of the FutureGen project that would allow for such analysis.

² 220 ILCS 5/16-111.5(j)(ii); 20 ILCS 3855/1-5.



Absent specific statutory requirements, which are not present here, sound public policy dictates that ARES be free to enter into contracts with the power producers of their choosing, for two reasons: first, that one power producer not be shown favoritism over any another similarly situated power producer, and second, that the competitive market be allowed to continue to develop. The IPA and the ICC should not be in the position of picking winners and losers in the power supply business. Yet that is precisely what the Draft Plan does, in seemingly dictating that all power suppliers enter into a long-term contract (with absolutely no justification or price data) with a private company. FutureGen is certainly not the only coal facility in Illinois. But it is the only one for which the Draft Plan is attempting to require that other private companies do business. ICEA is certainly not suggesting that ARES be required to enter into contracts with other facilities. To the contrary, ARES should not be required to enter into contracts with any particular entity; that freedom to contract is the lynchpin of the competitive market model.

Continued progress towards a robust competitive electric market best helps consumers balance price risk and budget certainty. Robust retail competition puts downward pressure on prices, offers a variety of product options for end-use customers, increases conservation incentives, and enhances customer service. Mandating that all suppliers enter into the same contracts is contrary to one of the most basic features of retail electric competition – that suppliers will have different portfolios, and thereby have the ability to offer different prices, products, and services from one another.



Accordingly, ICEA recommends that the IPA modify its Draft Plan to remove any requirements that ARES enter into a PPA with FutureGen.

II. Use of ACP Funds For Utility Contracts Is Not Sustainable

This year's Draft Plan differs dramatically from previous year's Plans in that it seeks to potentially use ACP funds to pay for utilities' renewable contracts. During the 2010 procurement cycle, against ICEA's objection, utilities entered into long term contracts for renewable energy resources. Since the time that those contracts were executed, there has been significant load migration away from the utilities, in favor of competitive suppliers. (*Draft Plan* at 16-17). Given the amount of load that has already migrated, as well as those that may through municipal aggregation (*Id.* at 18), the IPA has concluded that the renewable contracts cannot be honored within the statutory price cap. (*Id.* at 3) As noted by the IPA, "The long-term bundled REC and energy purchases made in 2010, before there was a practical appreciation of how quickly and successfully customers would choose alternate electricity suppliers, are becoming the new generation of stranded costs." (*Id.* at 81).

One potential alternative that the IPA is exploring is using the ACP funds collected by ARES, which are deposited into the Renewable Energy Resources Fund. (*Id.* at 81) For purposes of this year's Plan, ICEA does not oppose the use of ACP funds that have already been collected, given the difficult situation, and the failure of those funds to have been used in the past for the purchase of renewable energy. However, ICEA does not approve of the use of ACP funds for



utilities contracts on a long-term basis. As noted by the Draft Plan, ACP funds are to be used to purchase renewable energy credits on behalf of ARES. (*Id.* at 82)

Accordingly, ICEA recommends that the Draft Plan be conditioned and limited in the manner in which the ACP funds are utilized to pay for the utilities costs underneath the long-term renewable energy contracts.

III. Utilities Should Publish Retail Rates As Soon As Possible

Given the timing of past procurements, utilities' final retail rates were often not published until shortly before they were to become effective. That is because upon completion of the procurements, utilities had to run the numbers through their respective rate translation mechanisms to arrive at a particular price per kWh for bundled service customers. The utilities obviously could not calculate new rates, and the Commission could not publish the new "Price to Compare", until after the final procurement of the cycle. With the Draft Plan's lack of new procurements this year, there is no reason for time lags that have historically occurred, given that the only recalculations required are related to the blend between existing utility swap contracts and contracts through previous competitive procurements.

It is difficult for Retail Electric Suppliers to go to market with offers that are attractive to customers when utility rates for the upcoming procurement cycle are not published. Delays in release of the tariffs and charges cause substantial confusion and potential competitive harm in the retail market. Therefore, ICEA recommends that utility retail rates be published as soon as possible for the upcoming procurement cycle. Specifically, ComEd and Ameren should be



directed to publish the applicable retail rates as soon as is commercially practical, but not later than 10 calendar days following the final piece necessary for calculating retail rates in a given procurement cycle, be it a procurement event or the roll-off of an existing contract.

IV. Conclusion

With what is described as a new generation of stranded costs stemming from long term contracts, the IPA and the Commission should be loathe to mandate that any supplier enter into new long-term contracts, and cannot and should not place any burdens relating to any long-term obligations on to ARES or their customers. ICEA recommends that the IPA Draft Plan be modified as described above.

Respectfully submitted,

Kevin Wright, ICEA President

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