

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

ILLINOIS POWER AGENCY)	
)	
PETITION FOR APPROVAL OF THE 220 ILCS 5/16-111.5(D) PROCUREMENT PLAN)	Docket No. 12-0544
)	

**RESPONSE OF FUTUREGEN INDUSTRIAL ALLIANCE, INC. TO
OBJECTIONS TO THE ILLINOIS POWER AGENCY'S POWER
PROCUREMENT PLAN**

The FutureGen Industrial Alliance, Inc. ("FutureGen Alliance"), submits its response ("Response"), pursuant to the Notice issued by the Administrative Law Judge on October 4, 2012 and Section 16-111.5(d)(3) of the Illinois Public Utilities Act ("PUA") (20 ILCS 5/16-111.5(d)(3)), to the objections ("Objections") filed by the Staff of the Illinois Commerce Commission ("ICC Staff"), Commonwealth Edison Company ("ComEd"), Ameren Illinois Company ("AIC"), Exelon Generation Company, LLC and Constellation NewEnergy, Inc. ("ExGen"), and the Illinois Competitive Energy Association ("ICEA"), the Retail Energy Supply Association ("RESA"), and the Illinois Industrial Energy Consumers ("IIEC") to the Procurement Plan ("Plan"), filed with the ICC by the Illinois Power Agency ("IPA"). Specifically, the FutureGen Alliance responds to the objections raised by those parties to the Plan's provisions pertaining to clean coal resources, which the FutureGen Alliance fully supports (subject to the objections and recommendations the FutureGen Alliance included in its Objections and Response to the IPA's Plan and in this Response).

Pursuant to Section 1-75(d)(5) of the Illinois Power Agency Act (“IPA Act”), the FutureGen Alliance submitted a proposed sourcing agreement (“Sourcing Agreement”) to the IPA for the FutureGen 2.0 clean coal project (“FutureGen Project”), and the IPA included it in the Plan and recommended that the Commission approve the Sourcing Agreement. The FutureGen Alliance submitted the Sourcing Agreement pursuant to the IPA Act provisions that are applicable to existing coal-fired electric power plants that repower or retrofit with new technology. (20 ILCS 3855/1-75(d)(5), referred to herein as the “Retrofit Provision.”) The Retrofit Provision directs the IPA, as part of the procurement planning process, to consider sourcing agreements from qualifying clean coal facilities for utilities and ARES required to comply with Section 1-75(d) of the IPA Act and Section 16-115(d)(5) of the PUA. (See 20 ILCS 3885/1-75(d) and 220 ILCS 5/16-115(d)(5).)

ICEA, RESA and IIEC (collectively, the “Clean Coal Opponents”) filed objections challenging the authority of the IPA and the Commission to require the ARES to enter into Sourcing Agreement with the FutureGen Project (or any clean coal project) under Section 1-75(d)(5) of the PUA.¹ ComEd, Ameren and ExGen

¹ ICEA also petitions the Commission (without citing to any statute, administrative rule, or case law) to remove the Sourcing Agreement for the FutureGen Project from the IPA Plan on the grounds that the proposed Sourcing Agreement was not posted on the Commission’s docket until October 1, 2012. ICEA’s petition is without merit and should be rejected for several reasons. First, the Commission’s administrative rules provide that “[t]he filing of an electronic document is effective upon acceptance of the complete document and, if applicable, any required original paper verification or affidavit pages by the Chief Clerk of the Commission . . .” (83 Ill. Adm. Code §200.1040(b).) As of the date of this filing, the ICC’s e-docket system states that the Sourcing Agreement was filed on September 28, 2012 at 5:00 p.m., which is presumably the date and time that the IPA filed the Plan with the ICC. Since the Sourcing Agreement was filed in accordance with the ICC’s rules, ICEA’s petition must be rejected. Second, the Illinois Supreme Court has held that “the Commission’s regulations do not require that electronic documents to be transmitted

and ICC Staff (collectively, the “Sourcing Agreement Objectors”) objected to certain specific terms of the Sourcing Agreement. (ICEA and RESA also made more general objections to the terms of the Sourcing Agreement.) The first part of this Response responds to the arguments made by the Clean Coal Opponents and explains that the Sourcing Agreement complies with the IPA Act and the PUA and that the IPA and the ICC have the authority to require the utilities and ARES to enter into the Sourcing Agreement. The second part of this Response (i) responds to the objections of the Sourcing Agreement Objectors and explains those instances where the FutureGen Alliance has modified the Sourcing Agreement to reflect numerous changes proposed and issues raised by the Sourcing Agreement Objectors, and (ii) details that the FutureGen Alliance cannot agree to certain proposed changes or issues raised because to do so would undermine the financial viability of the FutureGen Project.

by 5 p.m. on their due date. So long as the document is transmitted prior to midnight of the due date, and otherwise complete under the Commission’s rules, that document is timely filed . . .” *People ex rel. Madigan v. Ill. Commerce Comm’n*, 231 Ill. 2d 370, 386, 899 N.E.2d 227, 235-36 (2008). Since the Illinois Supreme Court has ruled that electronic filings made after 5 p.m. are timely, then it is surely the case that the Sourcing Agreement in the instant case, which was filed on or before 5:00 p.m., was timely filed. Third, the Commission’s rules state that “[e]xcept for good cause shown, an intervenor shall accept the status of the record as the same exists at the time of the beginning of that person’s intervention.” (83 Ill. Admin. Code 200.200(e).) ICEA’s petition to intervene was filed on October 1, 2012 at 12:05 p.m. (per the ICC’s e-docket website), which occurred after the Sourcing Agreement appeared on the ICC’s e-docket website. Thus, ICEA accepted the record in this docket with the Sourcing Agreement having been timely filed. Finally, ICEA does not assert that it has been prejudiced.

I. THE IPA ACT AND THE PUA CONFER UPON THE IPA AND THE COMMISSION AUTHORITY TO REQUIRE THE UTILITIES AND THE ARES TO PURCHASE ELECTRICITY FROM THE FUTUREGEN PROJECT.

The FutureGen Alliance agrees with ICC Staff's (and IPA's) conclusion that the Commission has the authority to require both the utilities and ARES to enter into sourcing agreements under the Retrofit Provision. (Staff Obj. at 12.) The Clean Coal Opponents, on the other hand, ignore the plain language of the Retrofit Provision and related provisions of law that control on this issue, and instead cherry pick portions of the statute that suit their arguments. Well-established principles of statutory interpretation direct courts to "construe statutes so as to yield logical and meaningful results and to avoid constructions that render specific language superfluous or meaningless." *Rochelle Disposal Service, Inc. v. Illinois Pollution Control Board*, 266 Ill. App. 3d 192, 198, 639 N.E.2d 988, 203 Ill. Dec. 429 (1994). Moreover, "[s]tatutes should be interpreted as a whole, meaning different sections of the same statute should be considered in reference to one another so that they are given harmonious effect." *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 504, 732 N.E.2d 528, 247 Ill. Dec. 473 (2000). The relevant provisions of the IPA Act and the PUA discussed below set forth a comprehensive legislative scheme and must be read comprehensively consistent with the above Illinois precedent.

A. The Retrofit Provision Confers Upon the IPA and ICC the Authority to Require the Utilities and ARES to Enter Into Sourcing Agreements with Retrofitted Clean Coal Facilities.

1. The Plain Language of the Retrofit Provision Clearly Includes Both Utilities and ARES.

The Retrofit Provision, and related provisions of the IPA Act and the PUA, require both the utilities and ARES to enter into sourcing agreements with repowered and retrofitted clean coal facilities. Section 1-75(d)(5) of the IPA Act states that during each annual procurement process, the IPA and the ICC “*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” (20 ILCS 3885/1-75(d)(5).) (Emphasis added.) Next, the Retrofit Provision allows owners of such repowered and retrofitted facilities to “propose to the Agency 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.” *Id.* (Emphasis added.) The Retrofit Provision further provides that the IPA and ICC “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, Agency staff and the procurement monitor, subject to Commission review and approval.” *Id.*

In sum, the Retrofit Provision clearly mandates that the IPA consider sourcing agreements presented to it by proposed retrofitted clean coal plants. The Retrofit Provision also clearly authorizes proposed retrofitted clean coal plants to

propose sourcing agreements to the IPA that apply to both utilities and ARES. The same provision also clearly confers the power to the IPA and the ICC to approve such sourcing agreements that do not exceed cost-based benchmarks.

In spite of the statute's reference to both utilities and to ARES, the Clean Coal Opponents argue that the Retrofit Provision can only be used to compel Illinois' electric utilities, not ARES, to enter into a sourcing agreement with a repowered and retrofitted clean coal facility. As the ICC Staff correctly concludes in its Objections (Staff Obj. at 8), those arguments ignore the plain language of both the IPA Act and the PUA, as well as the General Assembly's clear intent, which is to provide the IPA and the Commission with the authority to require both the utilities and ARES to enter into sourcing agreements with repowered and retrofitted clean coal facilities like the FutureGen Project.

The Clean Coal Opponents' mistaken interpretation of the Retrofit Provision, which would limit the application of sourcing agreements only to AIC and ComEd, would render the use of the word "such" superfluous. The Retrofit Provision expressly permits that:

the owners of such facilities may propose to the Agency 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. . . . The Agency 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, Agency staff and the procurement monitor, subject to Commission review and approval.

(20 ILCS 3855/1-75(d)(5).) Because the previous sentence referencing “sourcing agreements” refers to sourcing agreements with both public utilities and ARES, the use of the word “such” necessarily must modify those sourcing agreements as applied to both utilities and ARES. Any other reading would render the use of the word “such” meaningless, which would be contrary to statutory construction rules under Illinois law. *See Rochelle Disposal Service, Inc. v. Illinois Pollution Control Board*, 266 Ill. App. 3d 192, 198, 639 N.E.2d 988, 203 Ill. Dec. 429 (1994) (Illinois courts are directed to “construe statutes so as to yield logical and meaningful results and to avoid constructions that render specific language superfluous or meaningless.”) Likewise, ignoring the word “such” as a modifier would fail to consider the provisions “in reference to one another so that they are given harmonious effect.” *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 504, 732 N.E.2d 528, 247 Ill. Dec. 473 (2000).

2. Even Assuming the Language of the Retrofit Provision is Not Clear, Other Provisions in the IPA Act and PUA Establish the General Assembly’s Intent to Apply the Retrofit Provision to Both Utilities and ARES.

The Clean Coal Opponents’ argument that the Retrofit Provision applies to only utilities also ignores the cross-reference to the Retrofit Provision in the PUA. Section 16-115(d)(5) of the PUA unambiguously requires all ARES to “source electricity from clean coal facilities, as defined in Section 1-10 of the Illinois Power Agency Act. . . .” (220 ILCS 5/16-115(d)(5).) Section 16-115(d)(5)(iii) of the PUA goes on to say that:

(iii) the *required sourcing* of electricity generated by clean coal facilities, *other than the initial clean coal facility*, shall be limited to the amount of electricity that can be procured or sourced at a

price at or below the benchmarks approved by the Commission each year in accordance with item (1) of subsection (c) and items (1) and (5) of subsection (d) of Section 1-75 of the Illinois Power Agency Act[.]

(220 ILCS 5/16-115(d)(5)(iii).) (Emphasis added.) Not only does this subsection make it clear that ARES must buy power from other clean coal facilities besides the initial clean coal facility, it also specifically references the Retrofit Provision.

This section of the PUA -- Section 16-115 -- is entitled "Certification of alternative retail electric suppliers," and it governs the certification of all ARES in the State of Illinois. (220 ILCS 5/16-115.) An ARES must comply with the provisions in Section 16-115 to receive a license to operate in Illinois from the Commission. Under this section, therefore, the Commission has the authority to condition (or suspend) the licensing of an ARES upon compliance with the Clean Coal Portfolio Standard. "An express grant of power to an administrative body or officer includes the authority to do all that is reasonably necessary to execute that power or to perform the duty specifically conferred." *O'Grady v. Cook County Sheriff's Merit Bd.*, 260 Ill.App.3d 529, 535 (1st Dist. 1994). When an administrative agency is granted broad authority to regulate, it possesses not only express authority, but also implied authority to effectively accomplish the objectives of the relevant statute.

In *Abbott Laboratories, Inc. v. Illinois Commerce Commission*, a case involving the ICC's authority to impose a non-cost based unauthorized use penalty on industrial gas customers, the Illinois Industrial Energy Consumers raised a similar challenge to the ICC's

alleged lack of any express authority to act. *Abbott Laboratories, Inc. v. Illinois Commerce Commission*, 289 Ill.App.3d 705; 682 N.E.2d 340 (1st Dist. 1997). The appellate court in *Abbott Laboratories* ultimately ruled that although the ICC's approval of a penalty was not expressly provided in the PUA, the action was within its broad ratemaking authority:

Notwithstanding the broad powers of the Commission, petitioners contend that there is no express authorization in the statute for imposing such a penalty, and that remedial civil sanctions may only be imposed by a regulatory agency where the agency's enabling statute so authorizes. See *Larkin v. Hartigan*, 250 Ill. App. 3d 969, 976, 620 N.E.2d 598, 189 Ill. Dec. 630 (1993). While petitioners are correct that there is no express authorization in the Act, it is a well-established rule that the express grant of authority to an administrative agency also includes the authority to do what is reasonably necessary to accomplish the legislature's objective. *Lake County Board of Review v. Property Tax Appeal Board*, 119 Ill. 2d 419, 427, 519 N.E.2d 459, 116 Ill. Dec. 567 (1988). See also *Moening v. Illinois Bell Telephone Co.*, 139 Ill. App. 3d at 525 (ICC has broad discretion to regulate the rate policies of public utilities).

Abbott Laboratories, Inc., 289 Ill. App. 3d at 712; 682 N.E. 2d at 347. It is therefore clear that the ICC can require ARES to enter into sourcing agreements with the FutureGen Alliance since there is express authorization in the PUA requiring such action. However, even if there was no such express authorization, which there is, the ICC can still require ARES to enter into such sourcing agreements in light of the court's ruling in *Abbott Laboratories*, which upheld the

ICC's authority to impose certain conditions and penalties even though it found that there was "no express authorization in the [Public Utilities] Act." *Id.*²

3. The Commission Should Exercise Its Discretion to Approve the Sourcing Agreement for Both Utilities and ARES.

The ICC and the IPA have discretion to construe the PUA and IPA Act consistent with the above arguments and explanations of the FutureGen Alliance. As ICC Staff correctly asserts in its Objections (Staff Obj. at 8), in the absence of clear statutory direction, courts will rely on the plain language of the statute and defer to agency discretion. *See Phoenix Bond & Indem. Co. v. Pappas*, 194 Ill.2d 99, 741 N.E.2d 248, 251 (Ill. 2000) ("we afford considerable deference to the interpretation placed on a statute by the agency charged with its administration."). Illinois appellate courts traditionally afford great deference to the ICC, primarily due to the technical nature of the issues presented. The Illinois Supreme Court has "long held that the decision of the [Illinois Commerce] Commission is entitled

² The Commission has also adopted regulations in furtherance of this authority. Section 455.210(c) of Title 83 of the Illinois Administrative Code expressly requires each 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. Section 455.210(c) states as follows:

To enable the Commission to monitor progress toward the State's goal that, by January 1, 2025, 25% of the electricity used in the State shall be generated by cost-effective clean coal facilities, beginning no later than September 1, 2010, and by September 1 of each subsequent year, each RES shall file with the Chief Clerk of the Commission, and provide to the Directors of the Energy Division and the Financial Analysis Division, or their successors, ***a report showing the amount of energy purchased by the RES from clean coal facilities other than the initial clean coal facility***, by month, during the most recent compliance year. Each report shall be accompanied by documentation from the clean coal facility verifying the amount of energy purchased.

(83 Ill. Adm. Code 455.210(c).) (Emphasis added.)

to great weight as being the judgment of a tribunal appointed by law and informed by experience.” *Iowa-Illinois Gas & Electric Co. v. Illinois Commerce Comm’n.*, 19 Ill. 2d 436, 442 (1960). Illinois courts have given “substantial deference to the decisions of the [Illinois Commerce] Commission, in light of its expertise and experience in this area [of electricity and utility regulation].” *Commonwealth Edison Co. v. Illinois Commerce Comm’n.*, 405 Ill. App. 3d 389, 397 (2d Dist. 2010).

In this case, the IPA has already acted to approve the Sourcing Agreement in fulfillment of its statutory mandate to include clean coal in each annual procurement plan. (See Plan at 76; 20 ILCS 3855/1-75(d)(1).) The ICC should defer to the IPA on the exercise of its discretion in interpreting the IPA Act. *LaBelle v. State Employees Retirement System of Illinois*, 265 Ill. App. 3d 733, 735, 638 N.E.2d 412 (1994). Because of the IPA’s familiarity with complicated energy procurement issues in the IPA Act, the IPA’s statutory interpretation must be accorded “extreme deference.” *Local Union Nos. 15, 51, & 702, International Brotherhood of Electrical Workers v. Illinois Commerce Comm’n.*, 331 Ill. App. 3d 607, 613-14, 772 N.E.2d 340, 345 (2002). As the ICC Staff has recommended, the Commission should also interpret the IPA Act and the PUA to authorize the Commission to require both the utilities and ARES to enter into sourcing agreements with retrofitted clean coal facilities, which includes, in this case, the FutureGen Project’s Sourcing Agreement.

II. THE CLEAN COAL PORTFOLIO STANDARD DETERMINES WHETHER THE SOURCING AGREEMENT IS COST EFFECTIVE.

Section 1-75(d) of the IPA Act mandates that annual procurement plans include electricity generated by clean coal facilities: “The procurement plans *shall include* electricity generated using clean coal.” (20 ILCS 3885/1-75(d)(1).) (Emphasis added.) When it created this mandate, the General Assembly also established a specific cost-effectiveness qualification standard for clean coal to be procured in Illinois: “25% of the electricity used in the State shall be generated by *cost-effective* clean coal facilities.” *Id.* (Emphasis added.) The General Assembly expressly included a specific definition of “cost-effective” for the CCPS:

[f]or purposes of this subsection (d), ‘cost-effective’ means that the expenditures pursuant to such sourcing agreements do not cause the limit stated in paragraph (2) of this subsection (d) to be exceeded and do not exceed cost-based benchmarks, which shall be developed to assess all expenditures pursuant to such sourcing agreements covering electricity generated by clean coal facilities, other than the initial clean coal facility, by the procurement administrator, in consultation with the Commission staff, Agency staff, and the procurement monitor and shall be subject to Commission review and approval.

Id. (Emphasis added.)

The primary rule of statutory construction, as the ICC Staff recognizes in its Objections, is to ascertain and give effect to the General Assembly’s intent. *Phoenix Bond & Indem. Co. v. Pappas*, 194 Ill.2d 99, 741 N.E.2d 248, 251 (Ill. 2000). By imposing a definition of “cost-effective” on the CCPS, the General Assembly made clear that this is the standard by which all clean coal facilities under the CCPS, including facilities under the Retrofit Provision, should be

measured. The definition of “cost effective” is *very specific* in its meaning and application, and as a matter of statutory interpretation, must control over all other general standards. *Knolls Condominium Ass’n v. Harms*, 202 Ill.2d 450, 459, 781 N.E.2d 261, 267 (2002) (fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision, and both relate to the same subject, the specific provision controls). *See also First Bank of Oak Park v. Avenue Bank and Trust Co. of Oak Park*, 605 F.2d 372, 375 (7th Cir. 1979) (cardinal principle of statutory construction is that specific governs over more general).

The Clean Coal Opponents (and ICC Staff) assert in their Objections that the more general “catch-all” provision found in Section 111.5(d)(4) of the PUA overrides the more specific definition of cost-effective in the CCPS. That provision is not only more general as applied to the definition of cost-effective, it is also more general as applied to the overall procurement plan. Although ICC Staff asserts that Section 111.5(d)(4) requires the individual FutureGen Project to comply with its standards, the language of Section 111.5(d)(4) does not say that.³ Rather, 111.5(d)(4) states that the overall *procurement plan* must comply with its standards. (220 ILCS 5/16-111.5(d)(4).)

The way in which the IPA and ICC have implemented the IPA Act’s Renewable Portfolio Standard is also instructive. Language identical to the “cost-

³ Even when applying the standards in Section 111.5(d)(4), ICEA and RESA and ICC Staff also focus on one facet of the standard, while ignoring the other components. As discussed in Section III, *infra*, the FutureGen Project nonetheless complies with the standards of Section 111.5(d)(4) of the PUA.

effective” definition language in subsection d also appears in subsection c, the IPA Act’s Renewable Portfolio standard:

[f]or purposes of this subsection (c), ‘cost-effective’ means that the expenditures pursuant to such sourcing agreements do not cause the limit stated in paragraph (2) of this subsection (d) to be exceeded and do not exceed cost-based benchmarks, which shall be developed to assess all expenditures pursuant to such sourcing agreements covering electricity generated by clean coal facilities, other than the initial clean coal facility, by the procurement administrator, in consultation with the Commission staff, Agency staff, and the procurement monitor and shall be subject to Commission review and approval.

(20 ILCS 3855/1-75(c)(1). (Emphasis added.) Every previous procurement plan proposed by the IPA and approved by the Commission has included a renewables component. Yet, the Commission has never found that a previous plan failed to comply with Section 111.5(d)(4) of the PUA, in spite of arguments made to the contrary that are similar to those made by the Clean Coal Opponents in this proceeding. In fact, the Commission approved the 2010 Plan, which included long-term renewables contracts, in spite of the same arguments having been made by ICEA. (*See* ICEA’s Response to Supplemental IPA Filng, at 5-6, in Docket No. 09-0373.)

To the extent that the language in the IPA Act’s CCPS is ambiguous (or “competes” against language in the PUA, as ICC Staff asserts (*see* ICC Staff Obj. at 8), that tension should be resolved in a manner that effectuates the General Assembly’s intent. Other language in the IPA Act and the PUA is useful for divining the General Assembly’s intent. First, the CCPS includes a specific, express goal for the State of Illinois to source 25% of electricity generated in the state come from clean coal facilities by 2025. (20 ILCS 3855/1-75(d).) Second,

the legislative findings in the IPA Act show a strong preference for promoting the development of clean coal facilities:

The State should encourage the use of advanced clean coal technologies that capture and sequester carbon dioxide emissions to advance environmental protection goals and to demonstrate the viability of coal and coal-derived fuels in a carbon-constrained economy.

(20 ILCS 3855/1-75(8).) Third, the PUA includes legislative findings which demonstrate a legislative intent to promote the development of clean coal facilities:

Including electricity generated by clean coal facilities, as defined under Section 1-10 of the Illinois Power Agency Act, in a diverse electricity procurement portfolio will reduce the need to purchase, directly or indirectly, carbon dioxide emission credits and will decrease environmental impacts.

(220 ILCS 5/16-101A(h).)

Finally, just last year, the General Assembly expressed its support for the FutureGen Project itself when it enacted the Clean Coal for FutureGen Act of 2011 (“FutureGen Act”). (20 ILCS 1108/1-1 *et seq.*) (providing for a liability management scheme for the FutureGen Project for CO₂ storage).

Applying the PUA in the manner ICC Staff recommends would nullify the CCPS and contravene the legislative intent of the IPA Act. Like the provisions in Illinois’ Renewable Portfolio Standard, which reside in the preceding subsection of Section 75 of the IPA Act, Illinois’ CCPS contemplates a separate standard to measure whether the electricity produced by retrofitted clean coal power plants is cost effective. Through cost caps and benchmarks, the IPA

Act establishes a framework to ensure that clean coal is delivered to ratepayers in the most efficient and least expensive way.

III. THE FUTUREGEN PROJECT WILL MEET THE STANDARDS CONTAINED IN THE IPA ACT AND THE PUA.

A. The FutureGen Project Will Deliver Cost-Effective Power.

As discussed in the FutureGen Alliance's Objections and Response, the FutureGen Project will deliver cost-effective clean coal-based electricity. (*See* Obj. and Resp. at 21.) Appendix IV to the Plan shows that the FutureGen Project will only have an average increase over the life of the project in customer rates of 1.3% above the May 2009 bundled retail rates for ComEd and Ameren, which is the rate cap in the IPA Act, well below the 2.015% cost cap imposed by the CCPS.⁴ (*See* Plan, App. IV.) To the extent that the FutureGen Project satisfies the confidential cost-based benchmarks that are currently being developed by the procurement administrator, and is under the rate cap discussed above, the FutureGen Project will satisfy the cost-effective definition set forth in Section 1-75(d)(1) of the IPA Act.

⁴ IIEC creatively asserts in its Objections that because the FutureGen Project will use up a portion of the rate cap, it will prejudice hypothetical future clean coal facilities which may seek to take advantage of the CCPS provisions. (IIEC Obj. at 4.) Yet, IIEC fails to identify any other clean coal facility which is seeking approval from the Commission or General Assembly. The Retrofit Provision does not operate that way, however. The IPA Act requires utilities and ARES to purchase from clean coal facilities, and the Retrofit Provision requires the IPA and the Commission to consider sourcing agreements presented by owners power plants previously owned by Illinois utilities, which the IPA has done.

B. The FutureGen Project Will Satisfy the Standards of Section 16-111.5(d)(4) of the PUA.

Section 1-75(f) of the IPA Act requires the IPA to submit a final procurement annual plan to the Commission, and that the *plan* must meet the standards found in Section 16-111.5(d)(4) of the PUA. (20 ILCS 3855/1-75(f).) Section 16-111.5(d)(4) requires the Commission to approve the *plan* “if the Commission determines that 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.” (20 ILCS 5/16-111.5(d)(4).) Section 1-75(d)(1) of the IPA Act also requires each *plan* to include clean coal. (20 ILCS 3855/1-75(d)(1).) The IPA’s Plan, including the FutureGen Sourcing Agreement, meets these standards.

1. The FutureGen Project Is Expected to Deliver the Least Cost Clean Coal Project for the Plan.

By including the FutureGen Project’s Sourcing Agreement in the 2013 Plan, the IPA has satisfied its statutory obligation to include clean coal in the Plan. (See 20 ILCS 3855/1-75(d)(1).) The Clean Coal Opponents incorrectly assert that the FutureGen Project itself must comply with the standards of Section 16-111.5(d)(4); instead, it is the IPA’s Plan, not the project, which must comply with those standards. (20 ILCS 5/16-111.5(d)(4) (“Commission shall approve the *procurement plan*” if it meets standards) (emphasis added).) The FutureGen Project carries with it a tremendous advantage to Illinois with regard to the State’s establishment of cost-effective clean coal power, which is predominantly due to the \$1 billion in American Reinvestment and Recovery Act funds as well as grant

funding from the State of Illinois and FutureGen Alliance member contributions. The current Plan must therefore be measured against other plans that contain clean coal to determine which plan is the lowest cost. By comparison, the only other known clean coal resource with published costs is the Initial Clean Coal Facility. If the FutureGen Project is compared with the published costs for the Initial Clean Coal Facility it is the lowest cost clean coal resource, as demonstrated by the Project Cost and Ratepayer Impact Report, and therefore should remain in the Plan. (*See* Plan, App. IV.) Accordingly, if the FutureGen Project meets the “cost-effective” criteria and is the lowest cost clean coal resource when compared to other proposed clean coal facilities, then the Plan will satisfy all the criteria in Section 16-111.5(d)(4) of the PUA. Failing to compare the current Plan that includes the FutureGen Project with other clean coal would nullify the statutory mandate that all plans must include clean coal. (20 ILCS 3855/1-75(d)(1).)

2. The FutureGen Project Will Deliver Environmentally Sustainable Power.

As demonstrated in the FutureGen Alliance’s Objections and Response, the FutureGen Project will deliver environmentally sustainable power with near-zero emissions of harmful pollutants. The project will capture and store 98% of the CO₂ emissions during continuous operations. The emissions for other conventional pollutants – SO₂, NO₂, mercury, carbon monoxide and particulate matters – will be at near-zero levels for the FutureGen Project, and will therefore fall far below the emission level requirements for a clean coal facility as defined

by the IPA Act. In fact, the overall emissions levels will be far lower than other fossil fuel plants. (See Ex. 2 to Alliance’s Obj. and Resp. (Champagne Aff.) at 2.)

3. **The FutureGen Project Will Contribute to Long-Term Price Stability to Illinois Power Markets.**

(a) **Carbon regulation hedge.**

The General Assembly recognized this risk when it created the clean coal portions of the IPA Act: “The State should encourage the use of advanced clean coal technologies that capture and sequester carbon dioxide emissions to advance environmental protection goals and to demonstrate the viability of coal and coal-derived fuels in a *carbon-constrained economy*.” (20 ILCS 3855/1-5(8).)

(Emphasis added.) The Plan acknowledges that the future risk of federal legislation limiting carbon emissions remains real. (See Plan at 45, n. 119.)

As discussed more fully in the FutureGen Alliance’s Objections and Response, the use of carbon capture and storage (“CCS”) technology by the FutureGen Project represents an important regulatory hedge against the continual ratchet down on carbon emissions from fossil-fueled electric generators under Clean Air Act regulatory programs – which could be quite substantial over the useful life of the FutureGen Project. For example, U.S. EPA is obligated under a court-approved settlement to establish NSPS guidelines for imposing significant mandatory carbon emissions reduction requirements on existing fossil-fueled

electric generating plants.⁵ Furthermore, the use of CCS insulates the FutureGen Project from the risks of future congressional action to limit carbon emissions under a national coordinated program – the pressure for which will only continually grow as EPA moves forward with its piecemeal regulation of carbon emissions under the Clean Air Act.

(b) The FutureGen Project Will Add New Base Load Power and Resource Diversity to the Illinois Power Markets.

Only one new base load power plant has gone on line in Illinois in the last decade and there are no additional base load facilities on the immediate horizon. FutureGen 2.0 will serve as a new source of up to 168 MW of base load capacity in markets – PJM and MISO – with a growing appetite for electricity. The plant will help mitigate the risk associated with future coal retirements, particularly in MISO. (*See* Sections 5.4 and 5.5 of the Plan at 40-41.)

In the IPA Act, with its inclusion of clean coal resources in the Plan and the creation of a Clean Coal Portfolio Standard with a goal of 25% of generation from clean coal resources, the General Assembly clearly envisioned a prominent role for the use of advanced coal technologies to generate electricity in Illinois. Facing a number of new U.S. EPA rulemakings that require costly retrofit investments a substantial number of coal-fired generating capacity will retire.

⁵ EPA Settlement Agreement and Amendment to Settlement Agreement, *New York v. EPA*, 2007 U.S. App. LEXIS 22688 (D.C. Cir. 2007), available at <http://www.epa.gov/airquality/cps/settlement.html>.

The National Electric Reliability Council has estimated that about 25 GW in coal fleet retirements will occur over the next decade.⁶

The installed electric power sector coal-fired capacity in the U.S. is 310 GW. Illinois is estimated to lose at least 9% (4 GW) of its coal-fired capacity due to the EPA rules by 2018.⁷ Ameren, Dynegy, and Edison International have already announced the first retirements. The FutureGen Project's output of 168 MW of advanced clean coal power will help maintain generation resource diversity in Illinois, create new base load capacity in Illinois, and help satisfy the Clean Coal Portfolio Standard.

4. The FutureGen Project Will Benefit From ARRA Funds.

In the 2010 IPA Procurement Plan ("2010 Plan"), the IPA included the following language in support of its proposal to include long-term renewable contracts in the Plan:

Further, substantial federal and state assistance in the form of various subsidies are available to offset a portion of the premiums associated with such providers. The IPA recommends taking advantage of the current financial climate to issue solicitations for longer term renewable energy supply contracts.

(2010 Plan at 20.) The 2010 Plan also included language asserting that "grants, loans and credit enhancement available currently from U.S. Department of Energy, Department of Commerce and Economic Opportunity and the Illinois Finance Authority will result in lower cost renewable energy projects that are

⁶ NERC: *2010 Special Reliability Assessment Scenario* (Oct. 2010).

⁷ *Id.*

developed now through the end of 2012 due to the public grants and financing.” (2010 Plan at 51.) In the docketed proceedings for the 2010 IPA Procurement Plan, the Office of the Illinois Attorney General supported the IPA Plan’s efforts to capture the benefits associated with grant and loans from the U.S. Department of Energy pursuant to the ARRA. (See Reply of AG’s Office, at 3 in Docket No. 09-0373.)

The U.S. Department of Energy has committed over \$1 billion in ARRA and other funds for the FutureGen Project. The Commission should recognize the unique opportunity presented by the ARRA funds and allow Illinois citizens and ratepayers to take advantage of it, similar to the way in which the Commission allowed Illinois citizens and ratepayers to take advantage of the ARRA funds by approving twenty-year renewable contracts in the 2010 Plan.

C. The Commission Has the Authority to Approve the FutureGen Project’s Sourcing Agreement.

The same arguments raised in this proceeding against the Sourcing Agreement were made in the proceedings for the 2010 IPA procurement plan against long-term renewable contracts. (See, e.g., ICEA’s Response to Supplemental IPA Filing, at 5-6, in Docket No. 09-0373.) In approving a procurement for 20-year renewable contracts, the Commission rejected those arguments, specifically finding that the 2010 Procurement Plan complied with the IPA Act and the PUA. Specifically, the Commission found that “the Plan filed by the Illinois Power Agency pursuant to Section 16-111.5 of the PUA should be approved; as modified, the Plan, and load forecasts found appropriate above, 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. . . .” (2010 Order at 171.) The Commission should reject the same arguments in this proceeding for similar reasons and exercise its authority to approve the proposed sourcing agreement for the FutureGen Project.

IV. THE COMMISSION SHOULD APPROVE A SOURCING AGREEMENT AS TO FORM NOTWITHSTANDING THAT SOME PARTIES MAY NOT AGREE WITH TERMS OF THE SOURCING AGREEMENT.

As noted by ICC Staff (Staff Obj. at 17), given the number of parties to this proceeding and their relative positions, it is highly unlikely that the FutureGen Alliance and other parties will reach an accord on all of the terms of the Sourcing Agreement, and ICC Staff suggests that more time should be allotted to that process. The FutureGen Alliance disagrees that more time should be allotted to resolving the Sourcing Agreement terms by voluntary accord of the parties, and reiterates its request that the Commission adopt a two phase proceeding and approve the Sourcing Agreement as to form by the end of 2012, followed by separate capital cost and rate-of-return determinations in the first half of 2013. The FutureGen Alliance’s understanding is that the ARRA funding will be jeopardized if there is not clarity on the PPA terms and conditions and formula rate by December 2012.

As to resolution of disagreements among the parties as to the form of the Sourcing Agreement, the FutureGen Alliance has been working continuously with the utilities and the ARES to solicit comments and incorporate suggested changes to the Sourcing Agreement whenever and wherever feasible. Attached to this

Response as Exhibit A is a revised Sourcing Agreement that attempts to address the most recent comments of AIC and ComEd. To further aid the Commission's review in this regard, attached as Exhibit B is a table listing the comments on the Sourcing Agreement submitted to date in this proceeding and whether or not they have been resolved in the revised Sourcing Agreement. The bulk of specific comments on the Sourcing Agreement have come from AIC and ComEd, but the attached Sourcing Agreement also seeks to address certain concerns of ICC Staff. The ARES, on the other hand, except for ExGen, have not, as a general matter, provided specific comments. While the FutureGen Alliance was able to accept numerous comments and revisions to the Sourcing Agreement suggested by the parties, there were a number of comments that could not be accepted, either because they were commercially unreasonable or would make financing of the Project unlikely. Each of these is also specifically detailed in Exhibit B.

V. ADDITIONAL RESPONSES TO CERTAIN COMMENTS AND OBJECTIONS OF ICC STAFF.

A. The FutureGen Alliance Can Accept a Sourcing Agreement Term of Between 20 and 30 Years.

ICC Staff proposes limiting the term of the Sourcing Agreement to 15 years, instead of the 30 proposed by the FutureGen Alliance. (Staff Obj. at 28.) The FutureGen Alliance could accept a Sourcing Agreement term as short as 20 years. This term of agreement is consistent with the term of the power purchase agreements approved by the Commission for the long-term renewable projects. (See 2010 Final Order at 120.) However, the Commission should be aware that as the term is shortened from 30 years, Project debt would still need to be fully amortized over the shorter period, the unit cost of electricity will increase and the

monthly bill impact for customers will go up during each year of the contract.

Thus, while the FutureGen Alliance believes that 30 years results in the least retail rate volatility, 20 years would be an acceptable minimum term, which balances Staff's concern against the need to maintain lower rates and ratepayer impacts in the early years of the Sourcing Agreement.

B. The Benchmarking Standard Should Be Applied at the Outset of the Rate Approval Process and Not Continuously over the Term of the Sourcing Agreement.

ICC Staff and other parties propose that throughout the term of the Sourcing Agreement, "FutureGen2.0 contract prices continue to be compared to cost-based benchmarks, according to a methodology to be developed by the IPA's procurement administrator." (Staff Obj. at 20-21.) Such an approach would undermine the financial viability of the project. As discussed above, the benchmarking process is only one aspect of a comprehensive approach outlined by the General Assembly to ensure that rates paid by retail customers for electricity delivered under the Sourcing Agreement are not excessive. The Retrofit Provision provides that the IPA and ICC "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, Agency staff and the procurement monitor, subject to Commission review and approval." (20 ILCS 3855/1-75(d)(5).) This language clearly contemplates only comparison of project costs to cost-based benchmarks prior to Commission approval of the Sourcing Agreement. There is nothing in the language of the Retrofit Provision to support Staff's assertion that the benchmarking process be continuously revisited. Instead, the Commission has ongoing authority, as embodied in the IPA Act and

the PUA, to review project costs to determine whether they are just and reasonable, and the FutureGen Alliance has proposed a corresponding process of periodic review before the Commission to ensure Project costs and rates are not excessive and that they do not cause the Rate Cap to be exceeded. (Alliance Obj. and Resp. at 18.)

C. Not All Provisions of Section 1-75(d)(3) of the IPA Act Are Required to be Addressed by the Sourcing Agreement.

The FutureGen Alliance agrees with the position of ICC Staff that not all provisions of Section 1-75(d)(3) of the IPA Act are required to be applied to a facility seeking Commission approval under the Retrofit Provisions. (Staff Obj. at 23). For convenience of reference by the Commission, Exhibit B indicates which provisions of Section 1-75(d)(3) of the IPA Act the FutureGen Alliance has addressed in the Sourcing Agreement.

D. The FutureGen Project Cannot be Ramped or Idled as Proposed by Staff.

The ICC Staff asserts that “ratepayers would be better off receiving no output from the FutureGen2.0 plant whenever the market price of electricity is below the FutureGen2.0's variable costs,” but that the Sourcing Agreement also be modified “to allow FutureGen2.0 to continue recovering from the buyers the fixed costs component of the rate, during periods when the market price of electricity is below the FutureGen2.0's variable costs” (Staff Obj. at 27.) The FutureGen Alliance disagrees with Staff’s position because there is no basis in either the IPA Act or the PUA for such an approach. As discussed above, the General Assembly in enacting the IPA Act specifically contemplated the procurement of clean coal electric power (*See* 20 ILCS 3855/1-75(d)(1).) ICC

Staff, on the other hand, suggests that the facility can merely sit idle and accomplish the state's goals for clean coal power procurement.

As explained in the affidavit of Douglas Cortez (attached hereto as Exhibit C), the FutureGen Project is a first of a kind oxy-combustion project with carbon capture and deep saline geologic storage, and is designed as a baseload plant with very limited cycling and turn down capability for both economic dispatch and technical reasons. The FutureGen Project has been designed as a baseload plant because it is a first of a kind facility and has been configured for maximum efficiency and reliability when operating at continuous baseload conditions. This design philosophy also minimizes capital costs associated with repowering of the Meredosia Energy Center with the oxy-combustion technology.⁸

In addition, the U.S. DOE cost-sharing funding is contingent upon a design and operating strategy that meets certain technology goals. One of those goals is to capture and store a minimum of 1.0 million metric tons per year of CO₂. In order to achieve this, the plant must operate at continuous baseload conditions. Cycling will also complicate CO₂ storage site operations by creating fluctuations in subsurface reservoir pressures and injection rates. While the pressures would remain at safe levels, it will complicate the monitoring of the CO₂ plume and make it more difficult to precisely predict CO₂ movement in the subsurface.

⁸ Specifically the air separation unit (ASU) and the compression and purification unit (CPU) of the FutureGen Project are designed with single compression trains versus multiple 50% compressors in order to achieve lower capital and operating costs. The ASU and the CPU can operate with less product flow, the efficiency, however, of these units is reduced significantly and the cost of electricity increases significantly. This resulted in the plant requirement to design and operate in a base load mode as the optimal condition.

Finally, any requirement to economically dispatch the plant at lower capacity factors would result in the plant being in non-compliance with the terms of the cost-sharing agreement with US DOE and the project could forfeit the ARRA funding.

E. The Return on Equity Requested by the FutureGen Alliance Is Appropriate, Reasonable, and Should Be Authorized by the Commission.

1. The Commission Should Approve the Capital Structure Proposed by the FutureGen Alliance.

ICC Staff has argued that the Commission should reject the rate of return on equity requested by the FutureGen Alliance, and has proposed an alternative rate of rate of return on equity substantially lower than the rate proposed by the FutureGen Alliance. (Staff Obj. at 32-38.) For the reasons discussed below, the FutureGen Alliance believes that Staff's analysis and assumptions are flawed in several material respects, and that the rate of return on equity requested by the FutureGen Alliance is necessary to support financing of the Project.

The capital structure requested by the FutureGen Alliance is set forth in the Cost Report prepared by the Alliance. (Cost Report at 42-44.) In short, the capital structure is based on the debt and equity structure outlined in the Sourcing Agreement and the IPA Act of 55% debt and 45% equity and which is consistent with the IPA Act. (20 ILCS 3855/1-75(d)(3)(A)(i).) Equity contributions to the Project are assumed to earn a rate of return on their investment in the Project. The debt and equity for the Project will be recovered through the levelized fixed charge component of the formula rate in the proposed Sourcing Agreement. The levelized fixed charge for the Reference Case was calculated based on the capital

structure discussed above, a 10% return on equity, cost of long-term debt of approximately 7%, 30-year straight line book depreciation, 20-year tax depreciation using the Modified Accelerated Cost Recovery System (MACRS), and current and federal and State of Illinois income tax rates.

ICC Staff takes issue with the use by the FutureGen Alliance of a hypothetical capital structure and claims that it has no purpose. (Staff Objections at 32.) However, Staff also recognizes that “defining a lower boundary on the Project's rate of return on common equity within the sourcing agreement could assist in securing financing for the unfunded portion of the project and allow pre-commercial operation date work on the project to proceed.” *Id.* The FutureGen Alliance concurs, and has requested the Commission to approve the 45/55 capital structure and the rate of return in this proceeding (either when it rules on the Plan or in the subsequent Phase II proposed by the FutureGen Alliance) in order to allow it to continue in meaningful discussions with potential Project equity participants (and lenders). Without some form of authorized capital structure and rate of return, it is very unlikely that the FutureGen Alliance can secure meaningful equity (and debt) commitments from third parties, the project will not proceed, and the ARRA funds will be forfeited.

The FutureGen Alliance, however, can be flexible on capital structure, but any such flexibility must recognize that to be successfully financed and developed the Project requires a fixed payment each month that covers all of its fixed costs necessary to service debt and equity providers as described in the Cost Report. The hypothetical capital structure proposed by the FutureGen Alliance ensures that the fixed payment is clearly defined for potential project lenders and investors using

agreed upon assumptions about debt/equity ratios, the market cost for debt and an authorized return for equity. If the Commission determines that a different structure is appropriate, the FutureGen Alliance would require that such structure be capable of generating the same monthly fixed payment as outlined above.

2. The Commission Should Reject Staff's Proposals on Rate of Return on Equity.

As noted above, Staff concurs that expeditiously defining a floor on the rate of return on equity will facilitate financing of the Project, and proposes a formula for that rate. However, Staff's formula produces a rate that is highly unlikely to attract equity to the Project. Staff's formula is essentially U.S. Treasury yields plus 300 basis points ("bp"). In addition to being too low to attract investment, the FutureGen Alliance has several other concerns with Staff's approach.

First, the assumptions underlying the formula do not appear to be relevant. Staff's only explanation is in a footnote where it states that it started with 580bp risk premium provided to utilities in Section 16-108.5(c)(3) and then "reduced it in recognition of factor CPA from the sourcing agreement, which effectively eliminates all major sources of operating risk except one: prudence and reasonableness." Section 16-108.5(c)(3) is part of the Illinois performance based ratemaking statute (the Illinois Energy Infrastructure Modernization Act or "IEIMA"), which is designed to incentivize regulated distribution utilities to make certain system and service improvements for their retail customers. That statute is hardly relevant for determining the appropriate rate of return on equity for financing a retrofitted power plant using first-of-kind technology.

Second, Staff notes that it reduced the 580bp premium to 300bp for the FutureGen Alliance. Even if the IEIMA approach were relevant in this case, utilities

are only subject to a maximum 50bp reduction for failures to meet performance goals and for all other causes. Moreover, the IEIMA assures utilities that they will almost always be entitled to recover costs. Third, Staff asserts that the only Project operating risk is “prudence and reasonableness.” (Staff Objections, fn.8) This assertion ignores the fact that Project equity will need to be invested on or before the construction phase of the Project. As such, equity investors will be exposed to various potential construction risks (such as delay, force majeure, technology risks, cost overruns, etc.) Even during the operating period, there are risks beyond simply prudence review, including technology and operating risks, and minimum energy generation and heat rate commitments made by the FutureGen Alliance in the Sourcing Agreement. Counterparty (buyer) default under the Sourcing Agreement is an additional risk that utilities providing distribution service typically do not face exposure on because they have the ability to seek recovery of their costs from other customers.

Fourth, Staff’s proposal ignores the fact that interest rates are at historical lows, that the market does not expect them as a general matter to stay at this level, and thus equity investors require returns that reflect their longer terms view of where returns should be. Moreover, most equity sources (i.e., private equity) are somewhat insensitive to interest rate movements and more focused on a required hurdle rate rather than a calculated spot cost of equity.

Finally, the FutureGen Project, aside from third party equity, has no opportunity to earn a profit on the investment or opportunity to somehow capture additional investment upside.

Other regulatory bodies have recognized that energy infrastructure projects with risk profiles similar to the FutureGen Project merit higher rates of return on equity. Wholesale power rates are subject to the jurisdiction of the Federal Energy Regulatory Commission (“FERC”). But as a result of deregulation, most wholesale power sales are authorized pursuant to FERC’s market based rate authorizations without inquiry into rates of return. However, because the electric transmission sector remains regulated, there are relevant examples in the last two years of FERC-approved rates of return on equity for transmission projects ranging from 10.09% to 12.38%.⁹ While not generation projects, these projects provide useful guidance on the returns that are appropriate for large scale electric power infrastructure development, and arguably have lower risk profiles than the FutureGen Project as a first of a kind project.

The Kemper clean coal electric generation plant, owned by Mississippi Power Company (“Kemper Project”), proposed a rate or return on equity for the Kemper Project in the range of 10.6% to 10.7%, based on the weighted average cost of capital of Mississippi Power Company.¹⁰ In a related proceeding before the FERC, Mississippi Power requested a 10.27% return on equity with respect to a cost-based wholesale electric tariff.¹¹ Mississippi Power acknowledged that much of the cost increase was attributable to the Kemper Project. The FERC

⁹ See, e.g., AEP Appalachian Transmission Co., Docket No. ER10-355 (Apr. 21, 2011) (ROEs of 11.49% in PJM and 11.2 in SPP); Atlantic Grid Operations, Docket No. EL11-13 (May 19, 2011) (ROE of 10.09%); DATC Midwest Holdings LLC, Docket No. ER12-1593 (June 19, 2012) (ROE of 12.38).

¹⁰ See Mississippi Power Co. Exhibit MHF-3 at 18, *Mississippi Power Co.*, Miss. Pub. Serv. Comm’n Docket No. 2011-UN-0135 (filed Nov. 11, 2011).

¹¹ *Mississippi Power Co.*, 137 FERC ¶ 61,241, at P 11 (2011).

allowed Mississippi Power's tariff to take effect pending a hearing on January 1, 2012.¹²

In 2011, the IPA commissioned a study to recommend an appropriate return on equity for the Chicago clean energy coke/coal gasification to synthetic natural gas project ("SNG Project") proposed by Chicago Clean Energy. The study's authors surveyed a range of return on equity values that reflect what investors in regulated utilities expect to earn over the last 20 years. The rate case data comprised 56 pending cases that were filed between late 2010 through mid-2011 and 924 completed rate cases between 1992 and 2011 where the return on equity values were determined by state regulatory commissions across the country.¹³ In both the pending and completed rate cases, the mean and median authorized rate of return on equity for electric utilities, were well in excess of FutureGen's proposed rate of return on equity of 10%.

Finally, the rate of return on equity requested by the FutureGen Alliance is not inconsistent with those granted to Illinois utilities for new investment, such as Ameren's smart grid incentive return on equity of 10.05%.¹⁴

¹² *Id.* at P 25. Although subsequent settlement proceedings reduced the rate increase, any resulting change to return on equity is not made explicit. See Revised Settlement Agreement, *Mississippi Power Co.*, Docket No. ER12-337 (filed September 27, 2012); Settlement Agreement, *Mississippi Power Co.*, Docket No. ER12-337 (filed Mar. 13, 2012).

¹³ QSI Consulting Inc., Chicago Clean Energy Coke/Coal Gasification to SNG Project, Analysis of Return on Equity per Section 9-220(h-3)(1)(B) of Public Act 97-96 (Oct. 12, 2011).

¹⁴ See *Ameren Illinois Co. d/b/a Ameren Illinois*, Order on Rate Map-P Modernization Action Plan—Pricing Filing, Docket No. 12-0001, at Ordering Para. 7 (Ill. Commerce Comm'n September 19, 2012).

3. If the Commission Does Not Approve the Rate of Return Requested by the FutureGen Alliance, Then it Should Establish that Rate Promptly as Part of the Phase II Proceeding Requested by the FutureGen Alliance.

As discussed above, ICC Staff's proposal on rate of return is not appropriate for use in this case, and the FutureGen Alliance respectfully requests that the Commission not accept Staff's proposal. The FutureGen Alliance believes that it has shown adequate basis for the Commission to adopt the FutureGen Alliance's proposals on capital structure and rate of return. However, if the Commission declines to adopt those proposals prior to the completion of its approval of the Plan, then the FutureGen Alliance respectfully requests that the Commission set these issues for expeditious resolution as part of the Phase II proceeding proposed by the Alliance.

VI. CONCLUSION.

For the foregoing reasons, the FutureGen Alliance respectfully requests that the Commission reject the arguments put forward by the Clean Coal Opponents and approve the Plan with the revised Sourcing Agreement, as

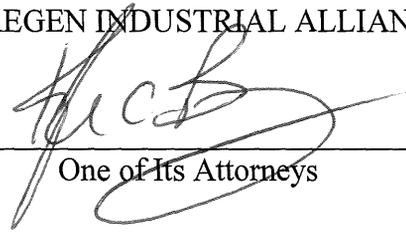
presented in Exhibit A, and the changes requested by the FutureGen Alliance in the Alliance's Objections and in this Response.

Dated this 15th day of October, 2012.

Respectfully Submitted,

FUTUREGEN INDUSTRIAL ALLIANCE,
INC.

By: _____



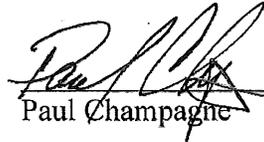
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VERIFICATION

I, Paul Champagne, President of PKM Energy Consulting, LLC acting in the capacity as Chief Development Officer for the FutureGen Industrial Alliance, Inc., hereby state that I have read the foregoing Response of the FutureGen Industrial Alliance, Inc. to Objections to the Illinois Power Agency's Power Procurement Plan, and that the facts stated therein are true and correct to the best of my knowledge and belief.


Paul Champagne

Subscribed and Sworn to
Before me this 15th day
of October, 2012.


Notary Public

My commission expires: 6/16/2013

NOTARIAL SEAL
KALPESHKIMAR A DAVE
Notary Public
LOWER MACUNGIE TWP, LEHIGH CNTY
My Commission Expires Jun 16, 2013