STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Power Agency	)	
	)	ICC Docket No. 12-0544
Petition for Approval of the 220 ILCS	)	
5/16-111.5(d) Procurement Plan.	)	

BRIEF ON EXCEPTIONS ON BEHALF OF
THE ILLINOIS POWER AGENCY

The Illinois Power Agency ("IPA"), pursuant to Section 200.830 of the Illinois Commerce Commission's ("Commission") Rules of Practice, 83 Ill. Admin. Code § 200.830, states as follows for its Brief on Exceptions in the above-captioned matter. This docket involves Commission approval of the IPA's proposed Procurement Plan pursuant to Section 16-111.5(d)(4) of the Public Utilities Act ("Procurement Plan"). This Brief on Exceptions responds to the Administrative Law Judge's ("ALJ") Proposed Order ("PO"), which was served on the parties on November 14, 2012.[1]

I.

INTRODUCTION

Although there was limited controversy on core issues such as standard power supply products and procurement of additional renewable resources for eligible retail customers, several significant issues regarding clean coal, existing long-term renewable energy contracts, and (to a lesser extent) energy efficiency arose in this docket. The IPA takes limited exception on those issues to, for the most part, clarify the PO, except in the case of FutureGen, where the IPA requests that the Commission approve a Sourcing Agreement. To that end, the IPA presents four Exceptions and companion replacement language in this Brief.

[1] For ease of reading, the IPA refers to the three rounds of verified comments as Objections, Responses, and Replies. The IPA also uses the shorthand for parties found on pages 1 and 2 of the PO.

The IPA's first Exception is to clarify the PO to allow the IPA to respond to a March 2013 updated load forecast. The IPA requests that the Commission, as it has done previously, confirm that the IPA (in conjunction with Staff, the Procurement Monitor, and the Procurement Administrator) may adjust procurement of supply where necessary to respond to a contingency presented by material modifications to the March 2013 updated load forecast, not just contingencies for statutory rate impact caps as they may affect the long-term renewable resource contracts. (*See* PO at 68.)

For its second Exception, the IPA disagrees with the ALJ's proposal that the FutureGen Sourcing Agreement should not be approved. The record before the Commission establishes that the Procurement Plan with the FutureGen procurement not only satisfies the statutory standards of Section 16-1111.5(d)(5), it is also in the public interest. The Commission should reject the ALJ's proposal, and:

- Find that agreement among the parties is not a necessary prerequisite to approve a Sourcing Agreement pursuant to Section 1-75(d)(5) of the IPA Act ("Retrofit Provision") (**Exception 2A**);

- Find that the Sourcing Agreement is sufficiently developed to be a template to be used among the utilities and ARES to procure the output of a clean coal generator (**Exception 2B**);

- Find that FutureGen made a sufficient showing under Section 16-111.5(d)(4) to approve the FutureGen 2.0 Sourcing Agreement and clean coal procurement (**Exception 2C**); and

- Conclude that all customers, including ARES customers and utility hourly customers, are responsible for purchasing a *pro rata* share (based on load) of FutureGen's output, whether by purchasing directly from FutureGen, or by purchasing through ComEd and Ameren under Staff's "alternative proposal" (**Exception 2D**).

For its third Exception, although the IPA supports the ultimate conclusion of the PO with regard to the hourly Alternative Compliance Payment ("ACP") funds held by utilities on behalf

of their hourly customers, the IPA recommends changes to the narrative for accuracy. In short, the PO incorrectly states that the ACP funds from hourly customers are held in the Renewable Energy Resource Fund (referred to in the PO as the "1-56 Fund"). Also, the PO contains the inaccurate implication that the IPA argued that the Commission does not have jurisdiction over use of the hourly customers' ACP funds. In fact, the hourly customers' ACP funds are held by utilities, and the IPA has consistently recommended that hourly utility customers' ACP funds be used consistent with Section 1-75(c)(5) of the IPA Act to increase the renewable budget for Eligible Retail Customers, which is subject to the Commission's jurisdiction. (*See, e.g.*, IPA Reply at 6.)

For its fourth and final Exception, the IPA responds to an invitation from the PO regarding Energy Efficiency, in hopes of providing the Commission with further information about the IPA's stance.

II.

EXCEPTIONS

A. Exception 1: The Commission Should Clarify The Authority Related To Load Forecasts

The IPA requests that the Commission revise language in the PO to confirm the IPA may undertake the actions apparently intended by the PO. In Section V.D (p. 68), the PO states:

> In the context of this procurement, the only portfolio rebalancing under consideration is the possible curtailment of existing long-term renewable contracts in event of significant shifts in load. Based upon all of the information provided in this proceeding, the Commission believes that portfolio rebalancing due to significant shifts in load should be based upon the statutory rate impact caps in Section 1-75(c)(2) of the IPA Act. The Commission concludes that this is the only criterion necessary for portfolio rebalancing in the event in significant shifts in load for the upcoming 2013-2014 procurement year.

(PO at 68.) In previous Procurement Plan approvals, the Commission has explicitly permitted the IPA, in consultation with Staff, the Procurement Administrator and the Procurement Monitor

to adjust supply procurements based on the updated March load forecast. (*See, e.g.*, ICC Docket No. 11-0660, Final Order dated December 21, 2011 at 37.) Although the IPA has not requested authorization to hold a procurement or a reverse procurement based on the information it currently has, the IPA recommends that the Commission add in language similar to the Final Order in last year's Procurement Plan docket, in the event that March forecast updates reveal significant changes to the supply and demand outlook:

> In the context of this procurement, the only portfolio rebalancing under consideration is the possible curtailment of existing long-term renewable contracts in event of significant shifts in load. Based upon all of the information provided in this proceeding, the Commission believes that portfolio rebalancing due to significant shifts in load should be based upon the statutory rate impact caps in Section 1-75(c)(2) of the IPA Act. The Commission concludes that this is the only criterion necessary for portfolio rebalancing in the event in significant shifts in load for the upcoming 2013-2014 procurement year. **However, ComEd and Ameren will provide the IPA with updated load forecasts in March 2013, and the IPA will work with Ameren, ComEd, Staff and the Procurement Administrator and Monitor to rebalance the portfolio, if required, commensurate with any change in forecast.**

(*Id.*) This language will ensure that in the event of an unforeseen load shift, the IPA will have the necessary Commission authority to ameliorate any problems without additional Commission approval.

B. Exception 2: The Commission Should Approve the FutureGen Sourcing Agreement Consistent With the IPA and FutureGen Recommendations

As an initial matter, the IPA addresses what appears to be an open question in the PO directed to the IPA. In the discussion about the Commission's authority to require ARES to pay for a *pro rata* share of FutureGen's output, the PO stated:

> The question is further complicated by the fact that the IPA has reversed its position on the issue without explanation. As indicated on page 53 of the Order in the last procurement proceeding, Docket No. 11-0660, the IPA stated that "ARES are not required to enter into contracts with a retrofitted clean coal facility."

(PO at 228.) The quote from the Final Order in ICC Docket No. 11-0660 is a partial quotation from the IPA's Response to Objections in that docket. The entire sentence in that document reads as follows: "*Utilities and* ARES are not required to enter into contracts with a retrofitted clean coal facility. 1-75(d)(1)." (ICC Docket No. 11-0660, IPA Response to Objections filed October 18, 2011 at 8 (emphasis added).) In the IPA's Response to Objections, the IPA was distinguishing the statutory framework of the initial clean coal facility from retrofitted clean coal facilities. Utilities and ARES are required to enter into contracts with the initial clean coal facility under statutorily-dictated terms based on General Assembly approval. On the other hand, the IPA and Commission must consider but *may* approve Sourcing Agreements with a retrofitted clean coal facility under Section 1-75(d)(5). (*See id.* at 7-8; *compare* 20 ILCS 3855/1-75(d)(3) (initial clean coal facility) *with* 20 ILCS 3855/1-75(d)(5) (retrofitted clean coal facility).) The IPA was not commenting on the Commission's authority to require utilities and ARES to purchase output of a retrofit clean coal facility if approved by the IPA and Commission subject to Section 1-75(d)(5). In fact, it would be an illogical reading of the IPA's Response to Objections to suggest that the IPA's position was that the Commission had no authority to bind ARES *or utilities* after approving a Sourcing Agreement under Section 1-75(d)(5).

In contrast, in this docket, the IPA and FutureGen have requested that the Commission modify the FutureGen Sourcing Agreement to reflect the Commission's resolution of disputes among parties regarding the terms and approve that Sourcing Agreement. Assuming the Commission approves a Sourcing Agreement, Staff, the IPA, and FutureGen all agree that the Commission may require utilities (specifically Ameren and ComEd) and ARES to enter into Sourcing Agreements with FutureGen. (*See, e.g.*, *Procurement* Plan at 75-78; IPA Response at 4-6; FutureGen Response at 4-10; Staff Objections at 12-16.) Because the IPA's position in this

docket describes the Commission's authority after approving a Sourcing Agreement, there is no contradiction with the IPA's position in ICC Docket No. 11-0660.

The IPA further notes that the shortened timeframe of this docket has placed the Commission, IPA, utilities, and other interested parties in a difficult situation regarding approving a Sourcing Agreement. The IPA is required each year to include in its Procurement Plans a plan for ComEd and Ameren to procure electricity generated using clean coal. (Section 1-75(d)(1).) Moreover, it is the express goal of the Illinois Legislature that 25% of the electricity used in the state (which includes electricity used by ARES customers, and non-Eligible Retail Customers) be generated using clean coal by 2025. (*Id.*) Furthermore, Section 16-115(d)(5) requires ARES to "source electricity from clean coal facilities". Given the foregoing, there is a clear mandate by the Illinois Legislature that the Utilities and ARES procure electricity that is generated using clean coal.

In the instant proceeding, FutureGen put forth a Sourcing Agreement that is necessary to develop a technologically advanced clean coal facility that will be developed with ***$1 billion*** of federal funds. Yet, as noted in the IPA's Response to Objections, compared with other clean coal development projects, the IPA has limited authority to only "approve" a sourcing agreement and not arbitrate or mediate the terms to resolve differences in the terms of an agreement, as in other clean coal projects. (*Compare* 20 ILCS 3855/1-75(d)(5) *with* 220 ILCS 5/9-220(h-1); Procurement Plan at 75-76.)

Assuming that the Commission exercises discretion to reject the Sourcing Agreement and the procurement of electricity generated by clean coal, the Commission should acknowledge the limitations of this proceeding to accomplish the legislative mandate.

Therefore, the IPA requests that the Commission take the following action regarding the PO. First, the Commission should remove the following two inaccurate sentences at page 228:

> ~~The question is further complicated by the fact that the IPA has reversed its position on the issue without explanation. As indicated on page 53 of the Order in the last procurement proceeding, Docket No. 11-0660, the IPA stated that "ARES are not required to enter into contracts with a retrofitted clean coal facility.~~

Second, should the Commission reject the IPA's proposal to approve the Sourcing Agreement, the IPA requests that the Commission modify the Proposed Order as follows:

> Since the Commission is not approving the proposed FutureGen agreement in this proceeding, the Commission will not make any determinations on the issues noted immediately above. The Commission does observe that the question of whether ARES can be required to sign a sourcing agreement for a retrofitted clean coal facility is a complicated one. ~~The question is further complicated by the fact that the IPA has reversed its position on the issue without explanation. As indicated on page 53 of the Order in the last procurement proceeding, Docket No. 11-0660, the IPA stated that "ARES are not required to enter into contracts with a retrofitted clean coal facility."~~
>
> With regard to Staff's alternative proposal, it appears that one of the purposes was to provide a way to avoid, or bypass, the ARES issue discussed above. Whether the Commission has the authority to approve such a proposal, or whether it is otherwise appropriate, remain open questions which can be revisited if the proposal is presented again in the future.
>
> As discussed above, there are still numerous other unresolved "sourcing agreement" issues that have been addressed by a large number and variety of parties. Since the Commission is not approving the proposed FutureGen agreement in this proceeding, the Commission will not make any determinations on those issues, except as otherwise indicated in this order.
>
> **<u>However, the Commission recognizes that the Illinois Legislature not only required the IPA to propose procurement plans that would procure electricity generated clean coal, but also that 25% of the electricity used in the state (which includes electricity used by ARES customers, and non-Eligible Retail Customers) be generated using clean coal by 2025. Id. Furthermore, Section 16-115(d)(5) requires ARES to "source electricity from clean coal facilities". Given the foregoing, there is a clear mandate by the Illinois legislature that the Utilities and ARES procure electricity that is generated using clean coal.</u>**

In the instant proceeding, FutureGen put forth a Sourcing Agreement that is necessary to develop a technologically advanced clean coal facility that will be developed with $1 billion of federal funds. Yet, the IPA Act, and the IPA's limited authority to only propose a procurement plan for Eligible Retail Customers (and not ARES customers), and the limited time frame of these proceedings, hinders the Commission's ability to take advantage of this opportunity to meet the Legislature's own goals.

1. Exception 2A: The Proposed Order Applies the Incorrect Standard in Rejecting the Sourcing Agreement

The PO appears to apply a standard to approval of a Sourcing Agreement, consensus on terms, that no party appears to have advanced.[2] (*See* PO at 222.) The PO correctly adopts (or at least acknowledges and does not disagree with) the IPA position that the Commission has the authority to conduct a wide-ranging review of the terms of the Sourcing Agreement. (*See id.*) The IPA set up a contrast between Sections 9-220(h) and 9-220(h-1) of the Public Utilities Act, where the IPA's ability to modify a Sourcing Agreement based on arguments of the parties is proscribed, and Section 1-75(d)(5) of the IPA Act, where the IPA does not play a quasi-judicial role. (*See* IPA Plan at 75-76.) However, the PO declines to use the Commission's authority to review, modify and decide on terms for a Sourcing Agreement. (*See* IPA Response at 2, 4, 9 (Commission has power to modify Sourcing Agreement).) As the IPA pointed out in its Response:

> Although the IPA has a strong preference for provisions with consensus or majority support, the IPA did not intend to suggest that stakeholder consensus or majority approval is a necessary prerequisite for the Commission to approve the sourcing agreement

(IPA Response at 9.) This clarification is intended to apply both to the Sourcing Agreement as a whole, as well as to individual provisions within the Sourcing Agreement. The IPA is aware of

[2] Although the IPA perhaps expressed excessive optimism that agreement on terms would be reached among parties that actively discussed agreement terms, the IPA did not intend to suggest that consensus was a necessary prerequisite and clarified its position on this matter in its Response.

no other aspect of the Procurement Plan or other Commission proceedings where consensus is a necessary prerequisite to the Commission approving a document that the Commission has the power to modify.

The PO's recommendation that consensus is necessary is further inconsistent with prior Commission Orders. In considering whether to require the Utilities to enter into long term contracts for renewable resources, the Commission considered the issue to be "[b]y far the most contentious issue in this proceeding." (ICC Dkt. No. 09-0373, Final Order dated December 28, 2009 at 39.) Like the instant proceeding, long term contracts were proposed to satisfy a statutory requirement on the Utilities to procure renewable resources (or in this instance, to meet the clean coal portfolio standard.) Specific terms in the Appendix K to the Procurement Plan were opposed by Wind on the Wires (*Id.* at 103), Illinois Wind Energy Association (*Id.* at 105), and Illinois Competitive Energy Association (*Id*. at 109). Notwithstanding these objections to Appendix K, the Commission approved the outline of the terms as set forth in Appendix K, subject to later clarification by the parties.

The IPA urges the Commission to not adopt consensus as a requirement for approving the Sourcing Agreement.

As a result of Exception 2A, the IPA recommends the following revision:

> ~~The Commission observes that this condition in the IPA's plan – that the sourcing agreement be approved "once agreed upon by all affected parties" – has obviously not been met. To the contrary, t~~**T**here are still numerous unresolved issues – many of them involving fundamental terms such as application of benchmarks, annual rate cap test, calculation and review of costs, changes in contract price, length of contract, and mandatory applicability to utilities and ARES -- identified and addressed by a large number and variety of parties, including ComEd, Ameren, Staff and the ARES. A partial list of such unresolved issues can be found in the table of contents in Staff's Response**; an additional list can be found in an attachment to FutureGen's Reply**. **Setting aside temporarily the applicability to ARES, the Commission – as it does in other dockets – need not be presented with consensus to issue a ruling. As described in further**

> **detail below, the Commission has, based on the input of the parties who chose to comment on the proposed Sourcing Agreement language, modified the Sourcing Agreement to reflect the best arguments of the parties. The Commission approves this modified Sourcing Agreement, subject to FutureGen and other interested parties providing evidence on appropriate rates of return.**
>
> In a related argument, Staff also contends that the proposed procurement from FutureGen is not sufficiently developed to warrant approval in this docket, a view shared by Ameren and others. **As described above, although the Commission is faced with making a decision in an abbreviated docket, the Commission has sufficient information to modify the Sourcing Agreement.**

(PO at 222.)

The IPA notes, as a final matter, that regardless of the Commission's response to Exceptions 2B-2D, clarifying that there is no requirement for consensus for approval under Section 1-75(d)(5) will have implications for, if or when, the Commission is faced with future requests for approval of a Sourcing Agreement under this section.

2. Exception 2B: There Is Sufficient Evidence and There Was Sufficient Opportunity to Present Evidence Regarding Sourcing Agreement Terms

As recognized by the PO, several parties, including Staff, Ameren, ComEd, ExGen/CNE, and FutureGen all provided arguments and evidence in favor of different terms in the Sourcing Agreement.[3] (*See* PO at 222.) Although FutureGen was not able to achieve consensus on terms with interested parties – some of whom express a position on the Sourcing Agreement but did not suggest specific terms – there is substantial evidence in the Objections about the terms of the Sourcing Agreement. The IPA does not presume to make those choices for the Commission because the IPA Act does not mandate that the Commission defer to the IPA on the terms of the Sourcing Agreement. (*Compare* 220 ILCS 5/9-220(h) (IPA mediates Sourcing Agreement) *and* 220 ILCS 5/9-220(h-1) (same) *with* 20 ILCS 3855/1-75(d)(5) (no IPA mediation).) Nor, as

[3] The PO also cites to disagreement about whether ARES can be bound.

described above, is the Commission bound to simply accept or reject the terms originally proposed by FutureGen and approved by the IPA: the Commission may modify the proposed Sourcing Agreement to satisfy all legal and technical requirements. As a result, although the IPA does not recommend specific modifications to the Sourcing Agreement, the IPA recommends that the Commission consider modifying the Sourcing Agreement to achieve the goals set out in the IPA's Response:

> As a general matter, however, the IPA favors modifications that reduce administrative burdens on all parties and ratepayers, effectuate competitive neutrality, and ensure that FutureGen 2.0 minimizes over- and under-recovery.

(IPA Response at 9-10.)

3. Exception 2C: FutureGen Made a Sufficient Showing to Meet Even the Proposed Order's Standard For Compliance With Section 16-111.5(d)(4)

Section 16-111.5(d)(4) states that "[t]he Commission shall approve the procurement plan, including expressly the forecast used in the procurement 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." (220 ILCS 5/16-111.5(d)(4)). The language of the PO implies (but does not explicitly state) that in approving a Procurement Plan, the Commission must examine the Plan's proposal to procure clean coal resources from FutureGen in isolation from the rest of the Plan to determine whether *the FutureGen* procurement satisfies Section 16-111.5(d)(4). (*See* ALJ P.O. at 223-224.) The PO then analyzes whether there is sufficient evidence in the FutureGen procurement to satisfy each of the factors in Section 16-111.5(d)(4). *Id.*

Regardless of whether the Commission approves or disapproves the FutureGen procurement, the Commission should follow the express language of Section 16-111.5(d)(4) and clarify that the Commission will approve a Procurement Plan that "ensures adequate, reliable,

affordable, efficient, and environmentally sustainable electricity service at the lower total cost over time, taking into account any benefits of price stability," and that it is not necessary for each element of the Procurement Plan to individually satisfy this requirement.

Section 16.111.5(a) provides that the IPA shall prepare a "plan" to meet the expected load requirements of Eligible Retail Customers, "and shall follow all the requirements set forth in the Public Utilities Act and all applicable State and federal laws, statutes, rules, or regulations, as well as Commission orders," including a plan to procure renewable resources and clean coal resources required under the renewable resource portfolio standard and the clean coal portfolio standard set forth in Section 1-75 of the IPA Act. The Plan is further required to include a "mix of demand-response products", a "mix and selection of standard wholesale products." *Id.*

Section 16-111.5(d)(4) explicitly states that this *Plan* (as a whole) is required to ensure adequate, reliable, affordable, efficient, and environmentally sustainable electricity service at the lowest total cost over time, taking into account any benefits of price stability, not each individual element of the Plan. The Commission must clarify that to the extent it applies these factors in evaluating FutureGen, it does not construe Section 16-111.5(d)(4) to require each individual element of a proposed Procurement Plan to satisfy these elements.

Therefore, the IPA requests that the Commission modify the Proposed Order as follows:

> In its response, the IPA argues that the standards in 16-111.5(d)(4) apply to the "IPA portfolio" rather than to any individual component such as clean coal. (IPA Response at 8; Reply at 4-5)
>
> FutureGen makes a similar argument, although its primary argument is that "the clean coal portfolio standard determines whether the sourcing agreement is cost effective." (FutureGen Response at 12)
>
> **On this point, the Commission agrees with the IPA that Section 16-111.5(d)(4) requires the Commission evaluate the proposed Procurement Plan in its entirety to determine whether the Plan "ensures adequate, reliable, affordable, efficient, and environmentally sustainable electricity**

> **service at the lowest total cost over time, taking into account any benefits of price stability", not each individual element of the Plan in isolation.**
>
> **However, we find that that Section 1-75(d)(5) of the IPA Act gives the Commission discretion on whether to approve the FutureGen procurement in this Plan. Rather than applying that discretion arbitrarily, we examine these standards in determining whether to approve the FutureGen procurement.** ~~ComEd and Staff that if Section 1-75(d) of the IPA Act were intended to mandate the result argued by FutureGen, it would have used the words "shall approve" rather than "may approve" in Section 1-75(d)(5), where the Commission is clearly given the discretion to approve or not approve sourcing agreements even if they are at or below cost-based benchmarks. FutureGen's primary argument, that Section 16-111.5(d)(4) is inapplicable, is not adopted.~~

(PO at p. 224).

There is substantial evidence in the record that the Procurement Plan, including the FutureGen purchase, satisfies the standard in Section 16-111.5(d)(4) of the PUA. Even under the standard proposed by the PO, that the Commission "consider the characteristics of the project relative to the elements in 16-111.5(d)(4) in performing that analysis" (PO at 227), the PO erred by crediting Staff's arguments over FutureGen's. (*See id.* ("The Commission also finds that the above-referenced Staff concerns about the project relative to the elements of 16-111.5(d)(4) are valid").) Thus, the IPA requests that the Commission modify the PO as follows:

> The Commission also finds that the above-referenced Staff concerns about the project relative to the elements of 16-111.5(d)(4) are ~~valid~~ **not convincing**. While the Commission is not suggesting that a project must satisfy all of those objectives or any particular one, the Commission does believe the project should contribute to such objectives on the whole. In the Commission's view, the information and arguments presented by the Parties in this proceeding ~~do not~~ support**s** a finding that the procurement of electricity from FutureGen2.0 pursuant to the proposed sourcing agreement will contribute to the objectives set forth in Section 16-111.5(d)(4) of the PUA, or that a plan containing this component would satisfy the requirements of Section 16-111.5(d)(4).

(PO at 227.)

The IPA also respectfully recommends striking the following paragraph (the final paragraph in Section VIII.J.3) because it appears to be setting an impossible standard:

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

(PO at 227.)

On the one hand, the IPA agrees that it is important to take the wider view, and look at the impact of FutureGen on a clean coal fleet (which may include the Initial Clean Coal Facility) rather than in a vacuum. (*See* Procurement Plan filed September 28, 2012 at 78 (posing a question to the legislature regarding cost cap for clean coal).) On the other hand, based on the wording of this paragraph, it is unlikely that *any* clean coal project aside from the Initial Clean Coal Facility would get approved under the standard of allowing sufficient room under the cost cap to allow the initial clean coal facility to meet the clean coal portfolio standard. The IPA does not believe any Clean Coal Facility will have sufficiently low costs to not take up a large portion of the clean coal budget. (*See* FutureGen Cost Report filed October 3, 2012.) As a result, and because a proposal regarding the Initial Clean Coal Facility is not before the IPA or the Commission, the IPA respectfully requests that the Commission strike the final paragraph of this section.

4. Exception 2D: The Commission Should Hold That All Customers, Including ARES and Hourly Customers, Must Purchase *Pro Rata* Portion of FutureGen 2.0 Output

The PO did not address issues, including Staff's "alternative proposal" and purchase requirements, for both ARES and hourly utility customers. (*See* PO at 228.) As labeled and correctly described by the PO, under Staff's alternative proposal, "FutureGen would contract with only ComEd and Ameren, and the Commission would permit the utilities to recover the

costs of the FutureGen contract from all delivery service customers."[4] (PO at 228 (internal quotations and citation omitted).) The IPA recognizes that the ALJ may prudently have avoided deciding these issues in order to avoid issuing *dicta*. However, if the Commission accepts the IPA's Exceptions 2A-2C, the Commission will need to address at minimum these two issues from Section VIII.J.4 of the PO. Several parties have provided extensive arguments in Objections for and against Staff's alternative proposal and requiring ARES and hourly utility customers to purchase from FutureGen. (*See, e.g.*, *Procurement* Plan at 75-78; IPA Response at 4-6; FutureGen Response at 4-10; Staff Objections at 12-16; *see also* RESA Reply at 16-17 (opposing FutureGen, but not objecting to alternative proposal if FutureGen is approved).)

The IPA requests that if the Commission accepts the IPA's Exceptions 2A-2C, that the Commission also approve Staff's alternative proposal and require ARES customers and hourly utility customers to purchase from FutureGen. In discussing specific modifications to the Sourcing Agreement, as noted above, the IPA stated in its Objections that the IPA favors modifications that "reduce administrative burdens on all parties and ratepayers, effectuate competitive neutrality, and ensure that FutureGen 2.0 minimizes over- and under-recovery." (IPA Response at 9-10.) The IPA believes Staff's alternative proposal minimizes net administrative burdens on all parties (and would allow utilities to recover costs for their additional burdens), would do the best job of preserving competitive neutrality among supply options, and would reduce over- and under-recovery. The IPA further believes that requiring all customers (including ARES and hourly utility customers) to purchase from FutureGen sharpens competitive neutrality and spreads the costs over a greater base, thus reducing under-recovery

[4] The IPA wishes to emphasize that although the charge would be recovered from all delivery service customers, the IPA does not believe that the purchase of FutureGen output is a "delivery service" as defined in Section 16-102 of the Public Utilities Act (220 ILCS 5/16-102) or that the costs of FutureGen should be billed as part of delivery services on a customer's bill. The IPA understands Staff's inclusion of "all delivery service customers" to indicate that ARES and hourly utility customers are not excluded from any charge.

risk. The Staff, the IPA, and FutureGen have also provided detailed analysis for why the Commission has the authority to both enact Staff's alternative proposal and require all customers to purchase from FutureGen. As a result, the IPA requests that the Commission grant Staff's alternative proposal and require all customers (including ARES customers and hourly utility customers) to purchase from FutureGen.

C. Exception 3: The Commission Should Maintain The Result But Provide Clarifying Language In The Discussion Of Renewable Resources.

The IPA concurs with the thorough analysis by the ALJ in the discussion regarding renewable resource issues in the PO. However, the IPA clarifies how hourly utility customers' Alternative Compliance Payment ("ACP") funds are held, and proposes parallel changes to the PO, which should not change any conclusions. Although similar in label to the ARES ACP funds, which are held in what the PO described as the "1-56 fund", ACP payments from utility hourly customer are billed, collected, and held by the utility serving that hourly customer. (*See* 20 ILCS 3855/1-75(c)(5).) As the IPA Act states:

> [A]n electric utility subject to this subsection (c) shall apply the lesser of the maximum alternative compliance payment rate or the most recent estimated alternative compliance payment rate for its service territory for the corresponding compliance period, established pursuant to subsection (d) of Section 16-115D of the Public Utilities Act to its retail customers that take service pursuant to the electric utility's hourly pricing tariff or tariffs. The electric utility shall retain all amounts collected as a result of the application of the alternative compliance payment rate or rates to such customers.

(*Id.*) The IPA's Procurement Plan states that the IPA Act also prescribes a specific use for hourly utility customers' ACP funds:

> Notwithstanding any limitation on the procurement of renewable energy resources imposed by item (2) of this subsection (c) [the cost cap for eligible retail customers], the Agency shall increase its spending on the purchase of renewable energy resources to be procured by the electric utility for the next plan year by an amount equal to the amounts collected by the utility under the alternative compliance payment rate or rates in the prior year ending May 31.

(20 ILCS 3855/1-75(c)(5); *see also* IPA Reply at 7 (describing Section 1-75(c)(5)); ComEd Corrected Reply at 26-27 (attempting to clarify IPA use of hourly ACP funds).) The IPA requested that the Commission authorize Ameren and ComEd to spend the hourly utility customer ACP funds in a manner consistent with the IPA Act. (*See* IPA Plan at 82, 83.) ComEd, Ameren, and the IPA have clarified what each believes to be the permissible uses of hourly ACP funds over the course of the Objections. (*See, e.g.*, IPA Reply at 7; ComEd Corrected Reply at 26-27; Ameren Response at 7-8.) Therefore, the IPA requests that the PO be modified as follows:

> Another related issue is the IPA's proposal to use ACP funds to supplement payments to the suppliers to the extent such payment would exceed the individual utility RRB caps in a given year. As the Commission understands it, there are two sources of ACP funds: ~~AIC and ComEd make ACP payments into the REFF for hourly load customers; and~~ **First,** ARES make ACP payments into the RERF **(1-56 fund)** on behalf of their customers. **Second, AIC and ComEd bill, collect, and hold ACP payments from hourly utility customers pursuant to Section 1-75(c)(5) of the IPA Act. The main argument is over the use of the 1-56 fund:** Some parties object to the use of ACP funds provided by ARES for ~~this purpose~~ **the purpose identified by the IPA**. Additionally, there is disagreement regarding the Commission's authority over the disbursement of RERF funds collected from ARES.
>
> **Some parties also seek clarification of the exact use of the hourly utility customers' ACP funds pursuant to Section 1-75(c)(5) of the IPA Act. On this latter point the Commission agrees that the only use to which such funds can be put in the 2013 Plan is to purchase RECs that would otherwise be curtailed from the long-term renewable resource suppliers, effectively supplementing the renewable resource budget, in the manner proposed by ComEd.**

(PO at 108).

D. Exception 4: The IPA Wishes To Clarify Next Steps Regarding Energy Efficiency

The IPA does not disagree in principle with the substance of the PO's conclusions with respect to energy efficiency, but clarifies the language regarding next steps. The IPA recommends the following change to the energy efficiency discussion:

> However, in light of the fact that several parties have raised or otherwise addressed additional requests, suggestions, or recommendations regarding the Section 16-111.5B energy efficiency programs that warrant further attention, the Commission directs Staff **participate in any workshops that the IPA may conduct** ~~to work with the IPA to conduct a series of workshops~~ to determine if there are additional changes or refinements to consider with regard to such requests, suggestions, or recommendations in future procurement proceedings.

(PO at 262.)

The IPA recommends the above changes for two reasons. First, the IPA proposes the change to clarify that the Commission is not directing the IPA, a sister agency, to undertake a workshop process. The Commission does not have the authority to direct the IPA to hold workshops. The PUA does not provide a process whereby the Commission either conducts workshops to consider the procurement plan design, or compels the IPA to conduct such workshops. That said, the IPA commits that it will conduct workshops regarding the implementation of the energy efficiency programs addressed in Section 16-111.5B.

III.

CONCLUSION

The IPA thanks the ALJ for his extensive examination of the issues in this Procurement Plan. With regard to most issues, to the extent that the IPA has Exceptions, the IPA recommends small changes that preserve the conclusions from the PO but that are intended to better effectuate what appears to be the intent of the PO. With regard to clean coal, the IPA respectfully recommends a conclusion that allows the FutureGen 2.0 project to proceed. The IPA understands that the FutureGen issue was particularly difficult and includes significant input from a variety of stakeholders, but the IPA believes that its proposed modifications better reflect the legal background and evidentiary record.

WHEREFORE the IPA respectfully requests that the Commission:

1. Accept the IPA's Exceptions;

2. Modify the Proposed Order consistent with the IPA's Exceptions; and

3. Grant such relief as required by the interests of justice.

Dated: November 21, 2012

Respectfully submitted,

Illinois Power Agency

By:_____
One of its Attorneys

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ILLINOIS POWER AGENCY	)	
	)	
Petition for Approval of the 220 ILCS	)	**Docket No. 12-0544**
5/16-111.5(d) Procurement Plan	)	
	)	

NOTICE OF FILING

Please take notice that on November 21, 2012, we caused to be filed via electronic mail with the Illinois Commerce Commission, **Brief On Exceptions On Behalf Of The Illinois Power Agency.** Copies of the foregoing document is hereby served upon you.

Henry T. Kelly, attorney for
the Illinois Power Agency

CERTIFICATE OF SERVICE

I, Henry T. Kelly, an attorney, on oath state that I served a copy of the foregoing **Notice of Filing** and **Brief On Exceptions On Behalf Of The Illinois Power Agency** on the service list maintained on the Illinois Commerce Commission's eDocket system for the instant docket via electronic delivery on November 21, 2012.

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