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ILLINOIS COMMERCE COMMISSION )  
On Its Own Motion )  
Phase 2 of Approvals for the )  
Sourcing Agreement for the )  
FutureGen 2.0 Project )

CHIEF CLERK'S OFFICE

**Docket No. 13-0034**

**RESPONSE TO PROPOSED ISSUES LISTS OF  
FUTUREGEN INDUSTRIAL ALLIANCE, INC.**

Pursuant to the Administrative Law Judge's ("ALJ") Order dated February 1, 2013, the FutureGen Industrial Alliance, Inc. ("FutureGen Alliance"), by and through its undersigned counsel, respectfully submits its Response to Proposed Issues Lists submitted by parties in this docketed Phase 2 proceeding.

**I. Background**

As part of its Final Order approving the Procurement Plan, dated December 19, 2012 (Docket No. 12-0554 (Dec. 19, 2012), hereinafter "Final Order"),<sup>1</sup> the Illinois Commerce Commission ("Commission") approved the terms of the sourcing agreement ("Sourcing Agreement") submitted by the FutureGen Alliance for the FutureGen 2.0 project. Final Order at 235.

<sup>1</sup> References herein to the Final Order and to prior filings by the parties all refer to filings in the Commission's procurement docket, Docket No. 12-0554, unless otherwise indicated.

In the Final Order, the Commission approved, among other things, the terms and conditions of the Sourcing Agreement; the formula rate structure; the term of the agreement (20 years); the capital structure and allowed rate of return on equity for determining the fixed level payment in the Sourcing Agreement; ICC Staff's proposed structure under which the FutureGen Alliance will contract only with Commonwealth Edison Company ("ComEd") and Ameren Illinois Company d/b/a Ameren Illinois ("Ameren"); and the Commission directed that project costs would be recovered through a new tariff or modification of an existing tariff through a competitively neutral charge. (Final Order at 232-36.)

The Sourcing Agreement also establishes certain key deadlines, including a 60-day deadline for the FutureGen Alliance and the IPA's Procurement Administrator to submit estimates of pre-approved capital costs to the Commission, and a 180-day deadline for the Commission to decide on the amount of pre-approved capital costs that may be included in the calculation of the fixed project payment of the formula rate.<sup>2</sup>

On January 9, 2013, on its own motion, the Commission entered an initiating order that opened this docket. (Docket No. 13-0034 (Jan. 19, 2013), hereinafter "Initiating Order.") The Initiating Order indicates that this docket opens a new proceeding to "determine the remaining contested issues regarding the proposed sourcing agreement identified in the prefatory portion of this Order . . . ." Initiating Order at 2.

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<sup>2</sup> References to the Sourcing Agreement refer to the agreement as approved by the Commission, which the FutureGen Alliance submitted in the procurement docket on November 21, 2012.

The Initiating Order incorporates the following language from the Final Order adopting a two-phase process for implementing the FutureGen sourcing agreement and specifying the scope of issues to be addressed in Phase 2:

The issues shall include, but not be limited to: the provisions within Section 1-75(d)(3) of the IPA Act that are mandatory for sourcing agreements that are not associated with the initial clean coal facility; the preapproved total capital costs; and Staff's recommendations for annual audits, reconciliations, and periodic benchmark tests.

*Id.*

In its Final Order and Initiating Order, the Commission makes clear that the issues to be addressed in Phase 2 should relate to implementation of the Sourcing Agreement, not a renegotiation or revision of the Sourcing Agreement. The Final Order indicates that the Phase 2 proceeding is not designed to address issues that the Commission already decided in its Final Order, stating that “[t]he Commission notes that issues resolved in Phase 1 shall not be relitigated in Phase 2 of the process.” (Final Order at 234.)

The Phase 2 Order does not define an exclusive list of issues to be considered in Phase 2. However, it is clear that the Commission did not intend to simultaneously approve the Sourcing Agreement and create a forum for parties to renegotiate the Sourcing Agreement to make it more commercially favorable. The Commission's guidance indicates that issues in this Phase 2 proceeding should be limited to issues associated with the *implementation of the Sourcing Agreement*, and the FutureGen Alliance strongly concurs with the Commission's guidance. This position informs the responses of the FutureGen Alliance below to issues proposed by other parties to this proceeding.

## **II. FutureGen Alliance's Response to Proposed Issues Lists**

As a prefatory matter, a number of the proposed issues suggested by both ComEd and Ameren revolve around imposing additional requirements to protect them against disallowance of cost recovery. However, as discussed below, many of these concerns were specifically raised by the parties in their previous filings, and have been addressed by the FutureGen Alliance in negotiation and in revisions to the Sourcing Agreement. The result is that no buyer under the Sourcing Agreement, as approved, is ultimately liable for payments to the FutureGen Alliance that it is not allowed to recover. No further changes to the Sourcing Agreement are needed or appropriate in this regard.

A number of the proposed issues raised by the parties are similar. For simplicity and brevity, this response cross references certain responses of the FutureGen Alliance rather than restating them.

### ***A. ComEd's Proposed Issues***

**1. How should the sourcing agreement that was approved as to form in Docket 12-0544 be revised to reflect that only the utilities will procure output. Among other revisions, the following must also be addressed:**

**a. Remove all references to credit requirements, in particular ¶ 14; and**

**b. Revise cost recovery/regulatory out provisions to address issues unique to this new relationship.**

**Response:** The Sourcing Agreement contains separate frameworks for utilities and ARES, and the terms governing the relationship between the FutureGen Alliance and

the utilities are unchanged despite the Commission's elimination of the ARES as counterparties. Thus, the Sourcing Agreement can stand on its own as is. Nevertheless, strictly as an implementation matter, the FutureGen Alliance agrees that it may be appropriate to make certain non-substantive changes to the Sourcing Agreement to reflect that only ComEd and Ameren will procure output from the FutureGen 2.0 plant. In addition, the credit requirements of the Sourcing Agreement already expressly do not apply to ComEd and Ameren; however, as a non-substantive implementation matter, the FutureGen Alliance agrees to consider any changes that the utilities propose to make it even clearer that no credit support is required.

With respect to cost recovery and "regulatory outs," such issues were raised repeatedly in the procurement proceeding, the FutureGen Alliance modified the Sourcing Agreement in response to such concerns, and thus these issues have been litigated to resolution. *See, e.g.*, ComEd Oct. 3 Objections at 9; FutureGen Oct. 15 Sourcing Agreement Redline at §§ 3.1(a)(vi); 5.2(a); 5.2(g); 5.2(h); 5.2(i); 5.3. The Sourcing Agreement by its own terms as approved by the Commission is clearly premised on the condition that utilities are not responsible for the FutureGen Alliance's costs to the extent that those costs are not recoverable. In addition, the utilities will now be protected by a tariff approved by the Commission for recovery of the FutureGen Alliance's costs. As described above, the Commission approved the Sourcing Agreement, and thus these questions have been litigated and resolved by the Commission, and should not be issues in this proceeding.

**2. Which requirements listed in section 1-75(d)(3) of the IPA Act should be included in the agreement.**

**Response:** The FutureGen Alliance agrees that the Commission identified this as an appropriate subject for Phase 2. The FutureGen Alliance believes that the issue is largely resolved since ICC Staff asserted that many of these requirements do not apply to any clean coal facility other than the “initial clean coal facility,” Staff Oct. 4 Objections at 22-26, and the FutureGen Alliance has addressed and accounted for the applicable requirements of Section 1-75(d)(3) of the IPA Act, FutureGen Oct. 15 Table of Issues at 13-17.

**3. The definition of “Forecasted Total Retail Load” must be revised to reflect that such information is not provided by the utilities to the IPA.**

**Response:** The FutureGen Alliance agrees that limited modifications to the mechanism for utilizing Forecasted Total Retail Load may be necessary, to the extent that they relate to the development of the tariff and implementation of the Sourcing Agreement.

**4. Section 3.1 must be revised to include as a condition precedent that an appropriate cost recovery mechanism has been approved by the ICC and put into effect.**

**Response:** The FutureGen Alliance opposes this proposed issue. The Commission’s Final Order directed that the utilities will recover their costs through a tariff approved by the Commission. As explained above in the response to ComEd Issue No. 2, the Sourcing Agreement already protects ComEd and Ameren from those costs that are not recoverable. Consequently, as a practical matter, the approval of a tariff by the Commission is already a precondition to ComEd and Ameren incurring any financial obligation. Finally, these cost recovery issues were raised repeatedly in the procurement docket, and the FutureGen Alliance modified the Sourcing Agreement to

address related comments of ComEd and Ameren. The Commission approved the Sourcing Agreement, and thus these questions have been litigated and resolved by the Commission, and are not at issue in this proceeding.

**5. Section 5.2(d) must be revised to put some limit on the length of time an approved price may remain in effect without further ICC review and approval.**

**Response:** The FutureGen Alliance opposes this proposed issue. ComEd's proposal simply seeks to upgrade terms that ComEd already requested and that the FutureGen Alliance incorporated into the Sourcing Agreement. In a filing in the procurement docket, ComEd commented that the Sourcing Agreement "does not state what happens if the Commission does not approve [FutureGen's] costs within the 120 day period or what prices would be in effect for the new contract year." ComEd Oct. 22 Reply at 16-17. The FutureGen Alliance modified the Sourcing Agreement to address ComEd's concern. *See* FutureGen Dec. 3 Sourcing Agreement Redline at § 5.2(e). As such, this issue has been litigated and resolved.

**6. Section 5.2(d)(ix) must be revised to correctly describe the Contract Price Adjustment.**

**Response:** The FutureGen Alliance generally opposes further changes to Section 5.2(d)(ix). The FutureGen Alliance changed its initial approach to this section, largely adopting ComEd's proposed approach to the provision, in order to ensure that the FutureGen Alliance's actual revenues collected and actual costs incurred are accounted for in the Contract Price Adjustment on an annual basis. *See* ComEd Oct. 3 Objections at 14; ComEd Oct. 22 Reply at 15-16; FutureGen Oct. 22 Redline at § 5.2(d)(ix); FutureGen Nov. 21 Table of Issues at 9. Therefore, proposed changes to this Section are

not warranted. However, the Alliance is willing to consider non-substantive changes or clarifications that relate to the mechanics of describing the Contract Price Adjustment.

**7. Section 5.2(i) must be clarified to ensure that the Buyer will in no event be responsible for payment of the contract price if recovery of any such costs is disallowed in any way by the Commission or any other governmental authority.**

**Response:** The FutureGen Alliance opposes the inclusion of this issue. As discussed above, the utilities are already protected from pass-through risk because there will be a tariff in place to ensure cost recovery, and because the Sourcing Agreement provides that the utilities are not responsible for costs to the extent that costs are disallowed by the Commission. In particular, in response to ComEd comments, the FutureGen Alliance revised the Sourcing Agreement to protect ComEd against price disallowances by any governmental authority. *See* ComEd Oct. 3 Objections at 9; FutureGen Oct. 15 Sourcing Agreement Redline at § 5.2(i). In effect, ComEd appears to seek a termination right if recovery of “any” costs are disallowed. Again, the Sourcing Agreement only obligates ComEd and Ameren to allowed costs. The recovery risk is borne by the Alliance, and allowing termination of the entire Sourcing Agreement for even a partial disallowance is an overly prejudicial result to the FutureGen Alliance. Therefore, it is not clear what further language could be necessary, and in any case, the Commission approved the Sourcing Agreement, and thus proposed changes to this Section are counter to the Commission’s directive not to relitigate issues.

**8. Section 5.3 must be deleted.**

**Response:** The FutureGen Alliance opposes changes, like this one, that were not necessitated by the Commission’s Final Order, but instead seek to make the Sourcing

Agreement more favorable to purchasers. Section 5.3 does not *require* ComEd to negotiate with the Alliance. ComEd has previously taken issue with the content of Section 5.3, and the FutureGen Alliance has revised the provision to make good faith negotiation (in the event of regulatory modification of the agreement) *discretionary* for ComEd, and further to clarify that any renegotiated agreement will be subject to Commission approval. *See* ComEd Oct. 3 Objections at 9; FutureGen Oct. 15 Sourcing Agreement Redline at § 5.3. By approving the Sourcing Agreement, the Commission has already resolved any remaining issue associated with Section 5.3, so there is no reason to relitigate such issues in this Phase 2 proceeding.

**9. Section 6.2 must be revised to:**

**a. Accurately and clearly describe the billing and payment process; and**

**b. Provide for revised settlement amounts in response to revised usage information from PJM or MISO or for other billing errors.**

**Response:** The FutureGen Alliance agrees that revisions to Section 6.2 may be required solely to reflect the tariff arrangement established for cost recovery on the grounds that it is an issue relating to the development of the tariff.

**10. Sections 7.3 and 16.5(b) need to be revised to only require the payment of the undisputed amounts.**

**Response:** The FutureGen Alliance opposes this proposed issue. ComEd previously raised concerns about the payment of undisputed amounts in these two sections, in the procurement proceeding. *See* ComEd Oct. 3 Objections at 14-15. The FutureGen Alliance modified Section 7.3 to provide for the payment of undisputed portions into escrow pending the resolution of the dispute, thus eliminating the risk that

the FutureGen Alliance itself will not be able to refund any overpayments by ComEd. *See* FutureGen Oct. 15 Sourcing Agreement Redline at § 7.3. Section 16.5(b) already provided such an escrow option. *See* IPA Sept. 28 Procurement Plan Appendix IV at § 16.5(b).

By approving the Sourcing Agreement, the Commission has already resolved any outstanding issue associated with Sections 7.3 and 16.5(b), so there is no reason to relitigate such issues in this Phase 2 proceeding.

**11. Section 15.2 must be revised to make it an event of default for FutureGen to fail to make the annual filing required by section 5.2.**

**Response:** The FutureGen Alliance opposes changes to the Sourcing Agreement, like this one, that are not necessitated by the Commission’s Final Order, but instead seek to make the agreement more commercially favorable to the commenter. Further, the proposed revisions to Section 15.2 are unnecessary. If the FutureGen Alliance fails to make the required annual filing pursuant to Section 5.2, ComEd could claim that such failure is a “failure to comply with . . . a material obligation” and thus a general default under the existing default provisions of Sections 16.1(d). Instead, ComEd is proposing another immediate (i.e., no cure period) termination right for a default that should reasonably be subject to cure before any termination right applies.

**12. Section 24.5 must be revised to include section 5.2 as a section that must remain in effect or else the agreement terminates.**

**Response:** The FutureGen Alliance opposes changes to the Sourcing Agreement, like this one, that are not required by the Commission’s Order, but instead seek to make the agreement more commercially favorable to the commenter by creating new termination opportunities. ComEd has previously sought this precise change.

See ComEd Oct. 15 Sourcing Agreement Redline at § 24.5. The FutureGen Alliance responded that such a new termination provision is not necessary to protect ComEd because any requirement for ComEd to pay the FutureGen Alliance is contingent on ComEd's ability to recover costs. See FutureGen 10.22 Table of Issues at 4. Furthermore, after the Commission's Final Order, ComEd will also be protected by a tariff that enables cost-recovery. Thus, ComEd's proposed change is both unnecessary and counter to the Commission's directive not to relitigate issues from the procurement proceeding in the Phase 2 proceeding.

**13. Exhibit 5.2(d) must be revised to include all components of price.**

**Response:** The proposed revisions are unnecessary since all price components are provided in Exhibit 5.2(a) to the Sourcing Agreement. However, the FutureGen Alliance is amenable to discussing changes to Exhibit 5.2(d) to incorporate those price components there as well, on the grounds that doing so requires no substantive change.

***B. Illinois Commerce Commission Staff's Proposed Issues***

**1. Sourcing agreement provisions specified in Section 1-75(d)(3) of the IPA Act:**

**a. With respect to the FutureGen sourcing agreement, which provisions of Section 1-75(d)(3) are mandatory by statute?**

**b. With respect to the FutureGen sourcing agreement, which provisions of Section 1-75(d)(3) are not mandatory by statute, but should be required by Commission order?**

**c. With respect to the FutureGen sourcing agreement, which provisions of Section 1-75(d)(3) are neither mandatory by statute, nor should be required by Commission order?**

**Response:** See FutureGen Alliance Response to ComEd Issue # 2.

**2. Pre-approved Total Capital Costs:**

**a. Is the procedure in section 5.2(c) of FutureGen's approved sourcing agreement to be used to determine the amount of Pre-approved Total Capital Costs? If the answer is yes, then the level of Pre-approved Total Capital Costs is not an issue to be litigated in this docket, since the procedure in section 5.2(c) of FutureGen's approved sourcing agreement is one that clearly does not involve litigation.**

**b. If the answer to (a) is no, then how should the procedure in section 5.2(c) of FutureGen's approved sourcing agreement be revised?**

**c. If the answer to (a) is no, what level of Pre-approved Total Capital Costs should be approved in this docket?**

**Response:** The Commission has already reviewed the procedures that the FutureGen Alliance proposed in Section 5.2(c) of the Sourcing Agreement, took no issue with those procedures, and approved the Sourcing Agreement. Accordingly, those procedures should be followed.

**3. Benchmark:**

**a. What is the purpose of the benchmark?**

**i. To provide the Commission with a range of possible costs (a sensitivity analysis), as a one-time risk assessment tool for deciding whether or not to approve the sourcing agreement?**

**ii. To provide the Commission with an upper limit of reasonable costs, as a one-time tool for disallowing costs that may be recovered by FutureGen throughout the term of the sourcing agreement?**

**iii. To provide the Commission with periodically-updated upper limits of reasonable costs, as a tool for disallowing costs that may be recovered by FutureGen throughout the term of the sourcing agreement?**

**iv. To provide evidence in periodic prudence reviews?**

**v. For some other purpose?**

**b. How frequently should the benchmark be prepared (e.g., one time, annually)?**

**c. How frequently should the benchmark be applied (e.g., one time, annually)?**

**d. Must or should the benchmark methodology and/or the benchmark values be confidential?**

**Response:** The FutureGen Alliance agrees that questions relating to whether and how to use benchmarks are appropriate issues to resolve in this Phase 2 proceeding.

**4. Scope and procedures for reconciliations:**

**a. What type of reconciliation should be prepared and by whom?**

**b. How often should the reconciliation be prepared?**

**c. Should prudence and cost reasonableness reviews be a part of the reconciliation? What should the procedures be for filing the reconciliation with the Commission and Staff?**

**Response:** The FutureGen Alliance believes that Section 5.2(d)(ix) of the approved Sourcing Agreement—which the FutureGen Alliance significantly modified to accommodate commenter concerns—adequately addresses issues and procedures relating to reconciliations. This section is a standard commercial provision for handling such issues. Nonetheless, the FutureGen Alliance is open to discussions about why this should be an issue to be addressed in this Phase 2 proceeding.

**5. Scope and procedures for audits:**

**a. What type of audit should be conducted and by whom?**

**b. What is the minimum scope of the required audit?**

**c. How often should the audit be conducted?**

**d. What should the procedures be for filing the reconciliation with the Commission and Staff?**

**Response:** The FutureGen Alliance agrees that the Commission identified this as an appropriate subject for Phase 2. The FutureGen Alliance notes that the Sourcing Agreement as approved by the Commission already provides for audits by the counterparties. *See* FutureGen Nov. 21 Sourcing Agreement § 6.6(e). In addition, the IPA Act’s Retrofit Provision expressly provides that “The Commission shall have authority to inspect all books and records associated with these clean coal facilities during the term of any such contract.” (20 ILCS 3855/1-75(d)(5).) Nonetheless, the FutureGen Alliance is open to discussions about why this should be an issue addressed in this Phase 2 proceeding.

**6. What should be the “Minimal Annual Energy” values?**

**Response:** The FutureGen Alliance strongly opposes the inclusion of Minimum Annual Energy values as an issue in this proceeding. The Sourcing Agreement approved by the Commission already contains the details for Minimal Annual Energy values. *See* Exh. No. 6.4(c). Furthermore, the FutureGen Alliance notes that it added those values into the agreement specifically in response to comments that the Commission could not approve the Sourcing Agreement without knowing the Minimal Annual Energy values. *See* ComEd Oct. 3 Objections at 3; Ameren Oct. 4 Objections at 2-3. The FutureGen Alliance was also responding to Staff’s concern that “the proposed procurement from FutureGen 2.0 is not sufficiently-developed to warrant approval.” Staff Oct. 3 Objections at 5. Accordingly, the FutureGen Alliance modified the Sourcing Agreement to accommodate concerns that the Commission could not approve the Sourcing Agreement without being able to consider detailed figures like the Minimum

Annual Energy figures. *See* FutureGen Oct. 15 Issues Table at 7. Now, since the Commission has already approved the Sourcing Agreement, no changes are necessary and there is no reason to relitigate these figures in this Phase 2 proceeding

**7. What should be the “Target Heat Rate” values?**

**Response:** The FutureGen Alliance strongly opposes the inclusion of Target Heat Rate values as an issue in this proceeding. The Sourcing Agreement approved by the Commission already contains the details for Target Heat Rate values. *See* Exh. No. 5.2(d). Furthermore, the FutureGen Alliance notes that it added those values into the agreement specifically in response to comments that the Commission could not approve the Sourcing Agreement without knowing the Target Heat Rate values. *See* ComEd Oct. 3 Objections at 3; Ameren Oct. 4 Objections at 2-3. The FutureGen Alliance was also motivated by Staff’s concern that “the proposed procurement from FutureGen 2.0 is not sufficiently-developed to warrant approval.” Staff Oct. 3 Objections at 5. Accordingly, the FutureGen Alliance modified the Sourcing Agreement to accommodate concerns that the Commission could not approve the Sourcing Agreement without being able to consider detailed figures like the Target Heat Rate figures. *See* FutureGen Oct. 15 Issues Table at 7. Now, since the Commission has already approved the Sourcing Agreement, no changes are necessary and there is no reason to relitigate these figures in this Phase 2 proceeding

**8. How and when will the cost of debt components be determined, before the adjustment described in Section 5.2(b) of the Sourcing Agreement? Will the Commission approve each of the following issues relating to the cost of debt?**

**a. Measurement period for the 10-year U.S. Treasury rate, plus the applicable spread over the Treasury rate;**

- b. Source documents to be used for the cost of debt calculation;**
- c. Party responsible for updating the cost of debt; and**
- d. Confirm January 1, 2017 is the date of the debt adjustment pursuant to Section 5.2(b) of the Sourcing Agreement.**

**Response:** The FutureGen Alliance agrees that the particulars of determining the cost of debt, to the extent they are not already established in the Sourcing Agreement, are an appropriate implementation issue for this Phase 2 proceeding.

**9. Will the Commission approve the precise methodology for determining the Levelized Fixed Carrying Charge Rate?**

**Response:** Exhibit 5.2(d), Attachment A in the Sourcing Agreement, as approved by the Commission, outlines the methodology for determining the Levelized Fixed Carrying Charge. Thus, the methodology for determining the Levelized Fixed Carrying Charge Rate is already established and is not at issue in this proceeding.

**10. Should the Capital Replacement and Additions component of the Monthly Contract Price be based on the useful life of the assets or when costs are expended?**

**Response:** The FutureGen Alliance has already agreed that the Capital Replacement and Additions component will be based on the useful life of the assets. *See* FutureGen Nov. 21 Issues List at 17. The FutureGen Alliance is willing to discuss appropriate non-substantive changes clarifying this point.

**11. How should the sourcing agreement be changed to reflect the answers to these questions?**

**Response:** To the extent negotiated or required by an order in this proceeding, the Sourcing Agreement will be modified to reflect the appropriate changes.

**12. How shall the Commission approve the components of the Levelized Fixed Carrying Charge Rate once they are finalized?**

**Response:** The Commission's Final Order already approved components of the Levelized Fixed Carrying Charge Rate including the debt to equity ratio and the return on equity. The Commission also approved the Sourcing Agreement, including the methodology for calculating the Levelized Fixed Carrying Charge rate set forth in Exhibit 5.2(d), Attachment A. The only component that remains to be approved by the Commission is the cost of debt to be included in the calculation. Approval of the cost debt can be determined as part of the Commission's review 9 months prior to the Commercial Operation Date, Sourcing Agreement § 5.2(d), subject to revision by the Commission 6 months prior to the Commercial Operation Date, Sourcing Agreement § 5.2(b). Accordingly, the process for approval of the Levelized Fixed Carrying Charge Rate already exists in the approved Sourcing Agreement.

***Ameren's Proposed Issues***

**1. Numerous contractual changes are required as a result of the fact that ARES will not be included as separate contract counterparties (various provisions throughout the sourcing agreement, including for instance, deletion of credit support requirements in Section 14 and Exhibit 14).**

**Response:** See FutureGen Alliance Response to ComEd Issue # 1.

**2. Inclusion of a condition precedent that appropriate cost recovery mechanism has been put in place for Ameren Illinois (see e.g., Section 3.1; Section 5.2(g)).**

**Response:** The FutureGen Alliance opposes this proposed issue. The Commission's Final Order directed that the utilities will recover their costs through a tariff approved by the Commission. Consequently, as a practical matter, the approval of

a tariff is a precondition to the FutureGen Alliance passing any costs to the utilities. Moreover, as explained above, the Sourcing Agreement already places pass-through risk on the FutureGen Alliance, and the utilities are correspondingly protected.

Furthermore, issues related to cost recovery were raised repeatedly in the procurement proceeding, and the FutureGen Alliance modified the Sourcing Agreement in response to such concerns. *See* FutureGen Oct. 15 Redline at §§ 5.2(a); 5.2(g); 5.2(h); 5.2(i). Notably, in doing so, the FutureGen Alliance adopted certain language based on that proposed by Ameren. *See* Ameren Oct. 3 Sourcing Agreement Redline at § 5.2(i); FutureGen Oct. 15 Sourcing Agreement Redline at § 5.2(i). The Sourcing Agreement approved by the Commission is clearly premised on the condition that utilities are not responsible for the FutureGen Alliance's costs to the extent that those costs are not recoverable. The Commission approved the Sourcing Agreement, and thus this question has been litigated and resolved by the Commission, and it is not at issue in this proceeding.

**3. Section 5.2(d) should limit the time period duration during which any Commission approved Monthly Contract Prices will remain in effect absent a timely annual filing by FutureGen. Failure by FutureGen to make the required annual filing within a specified period of time should constitute an event of default. If the Commission does not act upon FutureGen's filing within a reasonable amount of time, such failure should give the public utilities the right to terminate the agreement pursuant to Section 15.2.**

**Response:** The FutureGen Alliance opposes this proposed issue. As explained above, the FutureGen Alliance modified the Sourcing Agreement in the procurement docket to address concerns about what rates will apply if the Commission does not timely approve new rates. This proceeding is not an appropriate forum to push for more commercially favorable terms than the Commission approved.

Furthermore, Section 5.2(d) already requires the FutureGen Alliance to come before the Commission for rate approval every year, and failing to do so would be an event of default entitling Ameren to terminate under Sections 16.1(d) and 16.4(a). Under the Sourcing Agreement as approved by the Commission, prices will remain in effect until the Commission elects to change them during those annual reviews. Ameren's proposal would mean that if FutureGen complies with its annual obligation but the Commission review process is lengthy, the Sourcing Agreement will be subject to termination. This proposal is not fair or commercially reasonable.

**4. Appropriate process and remedy for disallowance of cost recovery mechanism(see e.g., Section 5.2(h) and (i) and termination right proposed by Ameren Illinois in Section 15.2 of its redline sourcing agreement filed with the Commission on October 4, 2012 in Docket No. 12-0544 ("Ameren Redline")).**

**Response:** The FutureGen Alliance opposes this proposed issue. As explained above, the Commission's Final Order directed that the utilities will recover their costs through a tariff approved by the Commission. Consequently, as a practical matter, the approval of a tariff is a precondition to the FutureGen Alliance passing any costs to the utilities. Moreover, as explained above, the Sourcing Agreement already places pass-through risk on the FutureGen Alliance, and the utilities are correspondingly protected.

With respect to the specific sections indicated, the FutureGen Alliance notes that Ameren did not propose any changes to Section 5.2(h) in its October 4 redline. As for Section 5.2(i), the FutureGen Alliance adopted language similar to the language Ameren proposed. *See* Ameren Oct. 4 Sourcing Agreement Redline at § 5.2(i); FutureGen Oct. 15 Sourcing Agreement Redline at § 5.2(i). With respect to Section 15.2, the FutureGen Alliance maintains that this proceeding is not an appropriate forum to push for more

commercially favorable terms—like added termination rights—than the terms the Commission approved in its Final Order. The Commission approved the Sourcing Agreement, and these matters have been litigated and resolved by the Commission and are not at issue in this proceeding.

**5. Regulatory modification should lead to a termination of the agreement (see e.g., Sections 5.3, language proposed by Ameren Illinois in Section 15.2 of the Ameren Redline).**

**Response:** See FutureGen Alliance Response to ComEd Issue # 8.

**6. MISO and PJM recalculations should be considered as part of the payment process to ensure accuracy of payments (see e.g., language proposed by Ameren Illinois in Section 6.2 of the Ameren Redline).**

**Response:** The FutureGen Alliance opposes this issue. Ameren did not propose any language related to MISO and PJM recalculations in Section 6.2 of its October 4 redline of the Sourcing Agreement, except to extend the window for such changes from 2 years to 5 years. The FutureGen Alliance took the position that 2 years is commercially reasonable and consistent with MISO and PJM resettlement procedures. See FutureGen Oct. 22 Table of Issues at 3. The Commission approved the Sourcing Agreement as submitted on November 21, and accordingly this matter has been litigated and resolved by the Commission, and is not at issue in this proceeding.

However, the FutureGen Alliance is willing to discuss appropriate implementation-related matters related to the treatment of recalculations in view of the tariff cost-recovery mechanism established by the Commission. See FutureGen Alliance Response to ComEd Issue # 9.

**7. Only payment of undisputed amounts should be required under Sections 7.3 and 16.5(b).**

**Response:** See FutureGen Alliance Response to ComEd Issue # 10.

**8. Invalidation of Section 5.2 should also lead to termination of the agreement and thus, Section 5.2 should be included in Section 24.5.**

See FutureGen Alliance Response to ComEd Issue # 12.

***ICEA's Proposed Issues***

**1. Benchmarks:**

- **What is the appropriate benchmark?**
- **How and when should the benchmark be determined?**
- **Establish appropriate periodic timing of benchmark and resulting analysis.**

**Response:** As indicated above in response to ICC Staff Issue No. 3, the FutureGen Alliance agrees that resolving questions relating to an ongoing benchmark is an appropriate issue to resolve in this Phase 2 proceeding.

**2. Annual reconciliation:**

- **Determine process for reconciliation.**
- **How costs are to be claimed by FutureGen:**
  - **Should required documentation mirror that of a utility rate case for capital expenditures?**
  - **Should costs be overall costs, or broken down by different types of costs?**

**Response:** As indicated above, the FutureGen Alliance agrees that the Commission identified this as an appropriate subject for this proceeding. The FutureGen Alliance believes that Section 5.2(d)(ix) of the approved Sourcing Agreement—which significantly modified to accommodate commenter concerns—adequately addresses issues and procedures relating to reconciliations. This section is a standard commercial

provision for handling such issues. Nonetheless, the FutureGen Alliance is open to discussions about why this should be an issue addressed in this Phase 2 proceeding.

As for ICEA's concerns about the mechanics of claiming costs, the FutureGen Alliance notes that it submitted a cost report to the Commission in connection with the procurement proceeding, and the Commission did not require any further detail. Further, the FutureGen Alliance will be required to submit its costs to the Commission 9 months before the Commercial Operation Date, and 4 months before every subsequent year. *See* Sourcing Agreement § 5.2(d). The Commission will determine the details of how costs are to be submitted, and the FutureGen Alliance will comply.

**3. Audit:**

- **Determine process for audit.**
- **Discuss transparency and public disclosure of information.**

**Response:** *See* FutureGen Alliance Response to Staff Issue # 5.

**4. How costs are impacted by construction and delays:**

- **Is there a construction timeline, with costs associated with each phase?**
- **How is the Commission and stakeholders to be assured that construction progresses at key milestones so as to be on track with projected costs?**
- **To the extent that costs are exceeding projections, such that the statutory cap may be hit, what will be the process?**

**Response:** The FutureGen Alliance notes that certain of these concerns are answered by Section 4.1 of the Sourcing Agreement as approved by the Commission, which provides as follows:

On the first Day of each Month following the Effective Date until the Commercial Operation Date is achieved, Seller shall provide Buyer with summary progress reports on the development and construction of the Project. These progress reports will include, but not be limited to, a

*project development schedule including all major activities and milestones and the status of these items, and other information determined pertinent by Seller in respect of its progress on development and construction of the Project. Buyer may at its sole risk and expense monitor the construction, start-up and testing of the Project and Seller shall permit that monitoring pursuant to reasonable requests of Buyer. All persons visiting the Project on behalf of Buyer shall comply with all of Seller's applicable safety and health rules and requirements.*

(Emphasis added.) Furthermore, the development risk is on the FutureGen Alliance, since the FutureGen Alliance will need to work within the pre-approved capital unless it obtains approval for more capital through a distinct proceeding at the Commission. In all events, counterparties are not responsible for any of the FutureGen Alliance's costs until the project achieves commercial operation.

As far as the statutory rate cap is concerned, cost responsibilities are limited by the rate cap under Section 6.3 of the Sourcing Agreement as approved by the Commission. The Commission determines in advance whether the FutureGen Alliance's proposed costs will exceed the Rate Cap Limit, and if so, the Sourcing Agreement provides for a reduction of the amount the counterparties would otherwise pay in order to achieve compliance with the statute. Pre-commercial operation costs cannot result in a contract price exceeding the statutory rate cap, because no costs will be passed through until the first year of commercial operation, and the Commission will review the proposed contract prices (and consider the rate cap) in advance of that year and every following year.

Thus, the FutureGen Alliance does not believe that the matters ICEA listed constitute issues to be considered in this proceeding. Nevertheless, the FutureGen Alliance remains amenable to discussing issues related to the implementation of the Sourcing Agreement, as opposed to renegotiation of its commercial terms.

**5. How will utilities bill customers for the costs associated with FutureGen?**

- **Specify logistics.**
- **Assurance that it will be transparent.**
- **Any additional line item, etc. on a customer's bill must not interfere with the allocation of space on a utility consolidated bill for ARES charges and messages.**

**Response:** The FutureGen Alliance agrees that this is an appropriate issue to resolve during the instant Phase 2 proceeding.

WHEREFORE, the FutureGen Industrial Alliance, Inc. respectfully requests that the Commission exclude proposed issues from this Phase 2 proceeding as described in the foregoing discussion, and adopt the list of proposed issues submitted by the FutureGen Alliance on January 30, 2013.

Respectfully Submitted,

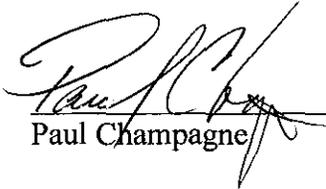
FUTUREGEN INDUSTRIAL ALLIANCE, INC.

By: \_\_\_\_\_

*Kelli Spaulman*  
One of Its Attorneys

**VERIFICATION**

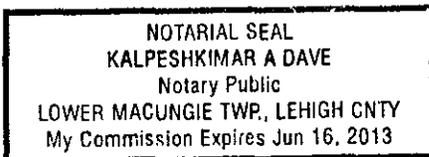
I, Paul Champagne, President of PKM Energy Consulting, LLC acting in the capacity as Chief Development Officer for the FutureGen Industrial Alliance, Inc., hereby state that I have read the foregoing Response to Proposed Issues Lists of the FutureGen Industrial Alliance, Inc. to the Illinois Power Agency's 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 11 day  
of February, 2013.

  
Notary Public

My commission expires: 6/16/2013



**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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<b>ILLINOIS COMMERCE COMMISSION</b>	)	
<b>On Its Own Motion</b>	)	
	)	
<b>Phase 2 of Approvals for the</b>	)	<b>Docket No. 13-0034</b>
<b>Sourcing Agreement for the</b>	)	
<b>FutureGen 2.0 Project</b>	)	

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**NOTICE OF FILING**

To: All Persons on the Attached Service List

Please take notice that on February 11, 2013, I, Kelli Storckman, attorney for the FutureGen Industrial Alliance, Inc., filed an Entry of Appearance, Response to Proposed Issues Lists of FutureGen Industrial Alliance, Inc., and a Verification of Paul Champagne, with the Clerk of the Illinois Commerce Commission.

Dated: February 11, 2013

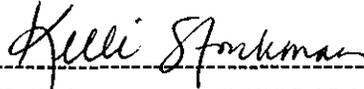
Respectfully submitted,  
FUTUREGEN INDUSTRIAL ALLIANCE,  
INC.

By: *Kelli Storckman*  
One of Its Attorneys

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**CERTIFICATE OF SERVICE**

I, Kelli Storckman, certify that I served this Notice of Filing, and its accompanying Entry of Appearance, Response to Proposed Issues Lists of FutureGen Industrial Alliance, Inc., and a Verification of Paul Champagne, to each person on the attached service list, as indicated, on February 11, 2013, by electronic mail and by depositing the same in a U.S. post office box at Mt. Carmel, Illinois, enclosed in an envelope, with postage fully prepaid.



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**ILLINOIS COMMERCE COMMISSION**

**DOCKET NO. 13-0034**

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