

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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<b>ILLINOIS COMMERCE COMMISSION</b> <b>On Its Own Motion</b>	)	
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<b>Phase 2 of Approvals for the Sourcing Agreement for the FutureGen 2.0 Project</b>	)	<b>Docket No. 13-0034</b>
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**REPLY BRIEF ON EXCEPTIONS OF THE  
FUTUREGEN INDUSTRIAL ALLIANCE, INC.**

The FutureGen Industrial Alliance, Inc. (“FutureGen Alliance”), by and through its undersigned counsel, respectfully submits its Reply Brief on Exceptions in the captioned proceeding. Because of the resolution of certain outstanding issues described further below, only one significant proposal remains for Illinois Commerce Commission (“Commission”) resolution: the proposal by Commission Staff, adopted in part in the Proposed Order,<sup>1</sup> to modify the Levelized Fixed Carrying Charge Rate (“LFCR”) methodology and the effective rate of return on common equity applicable to the Sourcing Agreement.

**I. Levelized Fixed Carrying Charge Rate**

**A. Background**

As the FutureGen Alliance explained in its Brief on Exceptions,<sup>2</sup> its Sourcing Agreements and ratepayer impact statements filed in this proceeding (“Phase 2”), as well

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<sup>1</sup> Proposed Order, Docket No. 13-0034 (May 8, 2013) (“Proposed Order”).  
<sup>2</sup> Brief on Exceptions of the FutureGen Industrial Alliance, Inc., Docket No. 13-0034 (filed May 15, 2013) (“FutureGen BOE”).

as in the Illinois Power Agency procurement proceeding, Docket No. 12-0544 (“Phase 1”), incorporated a Levelized Fixed Carrying Charge Rate. The LFCR is determined by a calculation that considers the Commission-approved capital structure and rate of return on common equity, the cost of debt, federal and state corporate income taxes, and certain other factors. (*See* FutureGen BOE at 5-6.) The LFCR is then applied to the FutureGen Alliance’s Pre-approved Total Capital Costs to determine the fixed project payment payable under the Sourcing Agreement that will be used to compensate equity and debt investors in the FutureGen 2.0 Project (“Project”). (*See* FutureGen BOE at 3.) The LFCR methodology and the resulting rate must be determined in advance of financing in order to allow the FutureGen Alliance to enter the financial markets and arrange for project investment with certainty as to the financial features of the Project. (*See* FutureGen BOE at 12-13.) The FutureGen Alliance developed the methodology for determining the LFCR based on an Electric Power Research Institute model, using its professional judgment about what methodology would be appropriate to attract the necessary debt and equity capital for this unique Project. (*See* FutureGen BOE at 5.) This LFCR methodology was the basis for all of the FutureGen Alliance’s financial projections throughout these proceedings, and for setting the return on equity and debt to equity components that the Commission expressly approved in its Final Order.<sup>3</sup> (*See* FutureGen BOE at 7.)

The FutureGen Alliance’s proposed LFCR in Phase 1, based on a 10% rate of return on common equity and a 55%/45% debt to equity ratio, was plainly presented before the Commission in the Sourcing Agreement that the Commission approved in its

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<sup>3</sup> Final Order, Docket No. 12-0544 (Dec. 19, 2012) (“Final Order”).

Final Order. (*See* Verified Brief on Exceptions of FutureGen Alliance (Sourcing Agreement), Exh. No. 5.2(d), Att. A, Docket No. 12-0544 (filed Nov. 21, 2012).) After the term of the Sourcing Agreement was reduced from 30 years to 20 years as ordered by the Commission, the same LFCR methodology was used to revise the LFCR. (*See* FutureGen BOE at 6-7.) The LFCR methodology proposed by the FutureGen Alliance produces a monthly fixed payment under the Sourcing Agreement necessary to support the required debt and equity investment.

In this Phase 2 proceeding, Staff proposed to substitute a different LFCR methodology and a rate of return on common equity of 9.57% (*see* Staff of the Illinois Commerce Commission Initial Verified Comments, Docket No. 13-0034, at 17-18 (filed Mar. 20, 2013) (“Staff Initial Comments”)), with the effect of reducing the FutureGen Alliance’s monthly fixed payment by approximately 9%. (*See* FutureGen BOE at 7-8.) Staff’s methodology changes the FutureGen Alliance’s assumptions about the applicable periods on which project cash flows are based, and about how the FutureGen Alliance’s debt payments will be allocated between principal and interest. (*See* FutureGen BOE at 8.) The Proposed Order largely adopted Staff’s proposal, although it did not go as far as Staff sought, and it also deferred determination of certain of the LFCR variables until when financing is actually obtained. The Proposed Order would have the effect of decreasing the return on common equity to 9.65% (*see* Staff of the Illinois Commerce Commission Brief on Exceptions, Docket No. 13-0034, at 4 (filed May 15, 2013) (“Staff BOE”)), and reducing LFCR in the Sourcing Agreement by approximately 8%. (*See* FutureGen BOE at 4-5.) Just as important, it increases the uncertainty over predictability of revenues necessary to attract financing. (*See* FutureGen BOE at 12-13.)

**B. Staff’s Request For Clarification As to the LFCR Should Be Rejected And The LFCR Methodology Should Remain As It Was Presented in the Sourcing Agreement as Approved By The Commission in Its Final Order**

Contrary to Staff’s proposed clarification in its Brief on Exceptions (Staff BOE at 3-5), the FutureGen Alliance maintains that the LFCR methodology should remain as it was presented in the Sourcing Agreement approved by the Commission, and that the Commission should reject both Staff’s proposal (and clarification) as to the return on common equity and the LFCR methodology, and the LFCR methodology as modified by the ALJ. The Final Order specifically acknowledges the importance of the levelized fixed charge and the need to clearly define the fixed payment using agreed upon assumptions. (Final Order at 233.) Altering any input to the LFCR—including the clarification of cash flow timing requested in Staff’s Brief on Exceptions—will ultimately change the LFCR away from the form in which it was reviewed by the Commission. Thus, to now adopt elements of Staff’s proposal on the LFCR methodology would render the Commission’s previous determinations of the return on equity and debt to equity ratio meaningless.

Staff’s Brief on Exceptions illustrates a major problem with departing from the LFCR calculation in the approved Sourcing Agreement. The Proposed Order did not adopt Staff’s approach in full, but instead adopted a “quarterly” methodology based on the ALJ’s unsupported assertion of when the FutureGen Alliance will likely make payments to *equity investors*. Thus, even while the Proposed Order appeared to adopt Staff’s proposal in part (insofar as it changed the timing of cash flows), the Administrative Law Judge (“ALJ”) indicated that the timing of *debt* payments would remain open—when the timing of *debt* payments was a focal point in Staff’s proposal to

change the timing of cash flows. (Proposed Order at 27; Staff Initial Comments at 13-4.) In other words, the Proposed Order departs from Staff's proposal and reduces the LFCR for a different reason than that urged by Staff. Now, in its Brief on Exceptions, Staff would like to extend the Proposed Order so that cash flows to debt investors are also presumed to be quarterly (Staff BOE at 4-5) (if not monthly, Staff implies.) (Staff BOE at 4.) These cash flow timing assumptions are inappropriate for the Project for reasons detailed in the FutureGen Alliance's Brief on Exceptions and prior filings.<sup>4</sup> More important for present purposes, this divergence between Staff's position in its Brief on Exceptions and the Proposed Order illustrates that there are *multiple* variables in the LFCR calculation that can theoretically be modified in *multiple* ways, depending on one's view of how the Project ought to be financed. In contrast to the indeterminacy revealed by Staff's Brief on Exceptions and the Proposed Order, the FutureGen Alliance's LFCR methodology—including the resulting LFCR—has already been reviewed by the Commission as described above.

The FutureGen Alliance also reiterates that deferring the determination of certain variables in the LFCR methodology (other than the actual cost of debt) until actual financing is *not* a workable solution to the indeterminacy illustrated by Staff's Brief on Exceptions, because the entire purpose of the LFCR is to establish investment characteristics for the Project in advance. Indeed, the Commission acknowledged that the fixed payment is intended to be determined in advance to facilitate investment. (*See* Final Order at 233.) Leaving variables open until post-financing would eliminate the

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<sup>4</sup> *See* FutureGen BOE at 8, 13-14; *see also* Aff. of Dr. Jean Agras, Comments Regarding Calculation of the Levelized Fixed Carrying Charge Rate, Docket No. 13-0034, at 7:3-8:14 (filed Apr. 10, 2013).

FutureGen Alliance's ability to present a straightforward understanding of the fixed project payment to the financing markets. For all of the foregoing reasons, the FutureGen Alliance submits that the appropriate outcome is to retain the LFCR calculation methodology submitted with the Sourcing Agreement approved by the Commission in its Final Order (as modified to reflect the 20-year term and certain changes in Illinois corporate tax rates as described in the FutureGen BOE at 7).

## **II. Modifications to the Sourcing Agreement**

### **A. The Commission Should Approve Proposed Modifications to the Sourcing Agreement Now Agreed Between the FutureGen Alliance, ComEd and Ameren to Address Certain Environmental Issues**

In its Brief on Exceptions, Commonwealth Edison Company ("ComEd") proposed certain modifications to the Sourcing Agreement that it views as necessary to clarify the rights and obligations between the parties to the Sourcing Agreement over Environmental Attributes associated with the Project. The FutureGen Alliance has continually opposed ComEd's request to modify the Sourcing Agreement to reflect the Proposed Order's ruling that the FutureGen Alliance must deliver to the utilities certain Environmental Attributes generated by the Project. The FutureGen Alliance views such changes as unnecessary, and the Proposed Order concurred that changes to the contractual language would be unnecessary. (Proposed Order at 41.)

However, ComEd has urged modifications to the Sourcing Agreement throughout this proceeding, including in its Exceptions, in which ComEd supplied proposed contract language. In the interest of achieving consensus with stakeholders and narrowing the issues remaining for Commission decision, the FutureGen Alliance agrees to modify the Sourcing Agreement. Submitted herewith as Exhibit A is a redlined version the Sourcing

Agreement containing revised language on Environmental Attributes. Exhibit B is a clean version of the same. The FutureGen Alliance is authorized to state that ComEd and Ameren Illinois Company agree that this revision to the Sourcing Agreement satisfies their concerns over the delivery of Environmental Attributes. The FutureGen Alliance requests that the Commission approve this modification to the Sourcing Agreement.

**B. The Commission Should Approve Proposed Modifications to Section 5.2(b) of the Sourcing Agreement Put Forth by Staff**

As detailed in the FutureGen Alliance's Brief on Exceptions, Staff proposed to modify Section 5.2(b) of the Sourcing Agreement to clarify that the cost of debt is subject to a review for prudence and reasonableness. Staff's proposed edit was as follows:

Pursuant to the Commission's December 19, 2012 final order in Docket No. 12-0544, the Parties acknowledge that the rate of return for the Project will be based on a capital structure consisting of 55% debt and 45% equity, a rate of return on common equity of 10%, a capital recovery period of 20 years, and the cost of debt capital including the interest rate Seller will pay, which cost of debt capital will be subject to a determination of prudence and reasonableness by the Commission, approval, and all of which All of the aforementioned factors will be used to calculate the Levelized Fixed Carrying Charge Rate of the Fixed Project Payment, which methodology will be as set forth in this agreement.

(Staff Initial Comments at 6.) The FutureGen Alliance resisted this proposed change as superfluous, since the Commission has the authority to apply whatever standard it determines is appropriate, regardless of the language in the contract.<sup>5</sup> The Proposed Order agreed that this change is unnecessary (Proposed Order at 28), and Staff did not contest that ruling in its Brief on Exceptions. The FutureGen Alliance does not agree

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<sup>5</sup> See Response Comments of the FutureGen Industrial Alliance, Inc., Docket No. 13-0034, at 7-8 (filed Apr. 10, 2013); Reply Comments of the FutureGen Industrial Alliance, Inc., Docket No. 13-0034, at 9 (filed Apr. 24, 2013); FutureGen BOE at 16).

with Staff, but because the FutureGen Alliance agreed to amend the Sourcing Agreement to accommodate ComEd's proposed revisions, it has also made Staff's proposed change. The FutureGen Alliance requests that the Commission approve this modification to the Sourcing Agreement as discussed above and shown in Exhibit A and Exhibit B, attached.

### **III. Conclusion and Request for Relief**

For the foregoing reasons and for reasons articulated in the FutureGen Alliance's Brief on Exceptions, the LFCR methodology is a key part of the overall project economic structure for the Project, has already been reviewed by the Commission and has informed all of the FutureGen Alliance's economic projections, and the FutureGen Alliance respectfully requests that the LFCR methodology remain as the FutureGen Alliance has submitted it in these Phase 1 and Phase 2 proceedings; the FutureGen Alliance further requests that the Commission issue an order in this proceeding and with respect to the Benchmark no later than July 10, 2013; and that other issues be resolved as discussed herein and in the FutureGen Alliance's Brief on Exceptions.

Respectfully Submitted,

FUTUREGEN INDUSTRIAL ALLIANCE, INC.

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

One of Its Attorneys

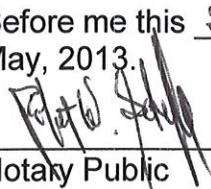
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**VERIFICATION**

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 document, 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 30th day of  
May, 2013.

  
Notary Public

COMMONWEALTH OF PENNSYLVANIA  
Notarial Seal  
Robert W. Schaeffer, Notary Public  
City of Allentown, Lehigh County  
My Commission Expires July 24, 2014  
Member, Pennsylvania Association of Notaries

My commission expires: 07/24/2014