

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

FutureGen Industrial Alliance, Inc.	:	
	:	
Application for a Certificate Authorizing the	:	13-0252
Construction and Operation of a Carbon	:	
Dioxide Pipeline.	:	

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**INITIAL BRIEF OF THE STAFF OF THE  
ILLINOIS COMMERCE COMMISSION**

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Kimberly Swan  
Matthew Harvey  
Office of the General Counsel  
Illinois Commerce Commission  
160 N. LaSalle St., Ste. C-800  
Chicago, IL 60601  
Email: kswan@icc.illinois.gov  
mharvey@icc.illinois.gov  
Phone: 312-793-2877  
Fax: 312-793-1556

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*Counsel for the Staff of the  
Illinois Commerce Commission*

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NOW COME the Staff witnesses of the Illinois Commerce Commission (“Staff”), by and through their undersigned counsel, pursuant to Section 200.800 of the Illinois Commerce Commission’s Rules of Practice (83 Ill. Adm. Code 200.800), and respectfully submit their Initial Brief in the instant proceeding.

**I. INTRODUCTION**

On March 29, 2013, the FutureGen Industrial Alliance, Inc. (the “FutureGen” or “Company”) filed an Application for Certificate Authorizing Construction and Operation of A Carbon Dioxide Pipeline. The application was submitted to the Commission pursuant to the Carbon Dioxide and Sequestration Act (the “CO<sub>2</sub> Act”), which requires a person or entity to obtain a certificate of authority from the Commission before that “person or entity may construct, operate, or repair a carbon dioxide pipeline.” 220 ILCS 75/20(a).

The following parties participated in Docket No. 13-0252: The FutureGen, as the Applicant; and staff witnesses (the “Staff”) of the Illinois Commerce Commission (“ICC”). One additional party, the Illinois Competitive Energy Association (“ICEA”), filed a

Verified Petition to Intervene in the case on April 22, 2013, which was granted by the Administrative Law Judge on May 9, 2013. ICEA, however, did not present any evidence in the docket, did not file any pleadings or documents in the docket, and did not otherwise participate in any way in the docketed proceedings.

On July 31, 2013 the FutureGen requested leave to file an amended application to accommodate route changes requested by affected landowners. The FutureGen's request was granted on August 27, 2013 and the amended application (the "Amended Application") was properly filed on September 11, 2013. An evidentiary hearing was held before a duly appointed Administrative Law Judge (ALJ) on September 24, 2013.

The purpose of this proceeding is for the Commission to review and evaluate the Application to determine whether the Applicant meets the standards of the CO<sub>2</sub> Act and should be granted a certificate of authority to construct and operate the Applicant's proposed carbon dioxide pipeline.

## **II. LEGAL STANDARD**

The CO<sub>2</sub> Act outlines in the standards that must be met by a person or entity in order for the Commission to grant that person or entity a certificate of authority. Staff reviewed FutureGen's testimony and application, and found no reason to deny FutureGen's application, "assuming the Commission's Order is conditioned on FutureGen obtaining certain permits and permissions."<sup>1</sup> ICC Staff Ex. 1.0 at 23. Staff noted, however, that FutureGen had not obtained some of the requisite permits and/or approvals necessary for the construction and operation of the pipeline prior. *Id.*

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<sup>1</sup> Staff also made other recommendations as to the Commission order, and requirements to be placed on FutureGen, but those are not at issue here. See ICC Staff Ex. 1.0 at 23.

The CO<sub>2</sub> Act provides the successful applicant with (1) a grant of authority to construct and operate a carbon dioxide pipeline; and (2) a limited grant of authority to take and acquire an easement in any property or interest in property for the construction, maintenance, or operation of a carbon dioxide pipeline. Specifically, the CO<sub>2</sub> Act states:

A certificate of authority to construct and operate a carbon dioxide pipeline issued by the Commission shall contain and include all of the following:

- (1) a grant of authority to construct and operate a carbon dioxide pipeline as requested in the application, subject to the laws of this State; and
- (2) a limited grant of authority to take and acquire an easement in any property or interest in property for the construction, maintenance, or operation of a carbon dioxide pipeline in the manner provided for the exercise of the power of eminent domain under the Eminent Domain Act. The limited grant of authority shall be restricted to, and exercised solely for, the purpose of siting, rights-of-way, and easements appurtenant, including construction and maintenance. The applicant shall not exercise this power until it has used reasonable and good faith efforts to acquire the property or easement thereto. The application may thereafter use this power when the applicant determines that the easement is necessary to avoid unreasonable delay or economic hardship to the progress of activities carried out pursuant to the certificate of authority.

220 ILCS 75/20(i).

The CO<sub>2</sub> Act specifies that the granting of a certificate of authority must be conditioned on the applicant, in this case FutureGen, obtaining all such permits and/or approvals. 220 ILCS 75/1 *et seq.* Specifically, the CO<sub>2</sub> Act states:

A final order of the Commission granting a certificate of authority pursuant to this Act shall be *conditioned upon* the applicant obtaining all required permits or approvals from the Pipeline and Hazardous Materials Safety Administration of the U.S. Department of Transportation, U.S. Army Corp of Engineers, and Illinois Department of Agriculture, in addition to all other permits and approvals necessary for the construction and operation of the pipeline prior to the start of any construction. The final order must

specifically prohibit the start of any construction until all such permits and approvals have been obtained.

220 ILCS 75/20(g)(emphasis added).

Finally, the Commission is further limited in its ability to grant an applicant a certificate of authority under the CO<sub>2</sub> Act. In relevant part, the CO<sub>2</sub> Act states:

The Commission shall not issue any certificates or permits allowing the construction of a carbon dioxide pipeline until it has adopted federal safety regulations governing the construction, maintenance, and operations of carbon dioxide pipelines, related facilities, and equipment to ensure the safety of pipeline employees and the public.

220 ILCS 75/30.

It is extraordinarily well settled that the interpretation or construction of statutes is a question of law, to be decided by the court or tribunal. See, e.g., Matsuda v. Cook County Employees and Officers Annuity and Benefit Fund, 178 Ill. 2d 360, 364; 687 N.E. 2d 866 (1997); Bruso v. Alexian Brothers Hospital, 178 Ill. 2d 445, 452; 687 N.E. 2d 1014 (1997); Branson v. Dept. of Revenue, 168 Ill. 2d 247, 254; 659 N.E. 2d 961 (1995). The primary rule of statutory construction is to give effect to the legislature's intent in enacting the statute. Bruso, 178 Ill. 2d at 451. Legislative intent should be sought primarily from the language of the statute, People v. Beam, 55 Ill. App. 3d 943, 946; 370 N.E. 2d 857 (5<sup>th</sup> Dist. 1977), since the language of the statute is the best evidence of legislative intent, Bruso at 451, and provides the best means of deciphering it. Matsuda, 178 Ill. 2d at 365. Statutes must be construed as a whole, and the court or tribunal must consider each part or section in connection with the remainder of the statute. Bruso at 451-52. If the legislature's intent can be determined from the plain language of the statute, that intent must be given effect, without further resort to other aids to statutory construction. Bruso at 452. Thus, the threshold task for a court or

tribunal in construing a statute is to examine the terms of the statute. Toys “R” Us v. Adelman, 215 Ill. App. 3d 561, 568; 574 N.E. 2d 1328 (3<sup>rd</sup> Dist. 1991).

In addition, it is clear that a court must construe a statute as it is, and may not supply omissions, remedy defects, or add exceptions and limitations to the statute’s application, regardless of its opinion regarding the desirability of the results of the statute’s operation. Adelman, 215 Ill. App. 3d at 568; *cf.* Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E. 2d 522 (2<sup>nd</sup> Dist. 1981) (in determining that application of statute of limitations barring minor’s products liability claim was proper, if perhaps harsh, court observed that, where statute is clear, only legitimate role of court is to enforce the statute as enacted by legislature); People ex rel. Racing Bd. v. Blackhawk Racing, 78 Ill. App. 3d 260, 397 N.E. 2d 134 (1<sup>st</sup> Dist. 1979) (court observed that, though the General Assembly could have enacted a statute more effective in accomplishing its purpose than the one it did enact, the court was not permitted to rewrite the statute to remedy this defect).

### **III. DISCUSSION**

There are no contested issues of fact and that only one contested issue of legal interpretation exists in this proceeding. That contested issue deals with the language in Section 20(g) of the CO<sub>2</sub> Act. 220 ILCS 75/20(g). The plain language of the statute provides that the Commission is to issue a certificate of authority to an applicant under the CO<sub>2</sub> Act effective only after all the conditions set by the General Assembly have been met. *See id.*

The statute provides that “the granting of a certificate . . . shall be conditioned upon the applicant obtaining all required permits or approvals[,]” including such permits

or approvals that each of the following: (1) PHMSA; (2) the Army Corp of Engineers; (3) the Illinois Department of Agriculture; and (4) all other permits and approvals necessary for the construction and operation of the pipeline prior to the start of any construction. *Id.* These are clearly conditions precedent to any certificate having force or effect. To assume otherwise would be to conclude that FutureGen is certain to obtain them, which the Commission cannot do.

To conclude that an applicant might properly exercise the powers granted to it under the certificate – such as the power of eminent domain provided for in Section 20 – is clearly contrary to legislative intent. It presumes, for example, permits and approvals that may not be forthcoming. FutureGen has offered evidence that it needs to obtain no fewer than twelve permits, of which it has a mere one in hand. FutureGen Ex. 19. It is not beyond the realm of possibility to conclude that PHMSA, the Army Corps, the DOA or any other of the other entities authorized by law to issue applicant with a permit or approval might delay granting it or withhold it altogether, based on FutureGen's showing to that entity.

This means no certificate may take force or effect until all of the conditions are met, but that once those conditions are met, a successful applicant shall obtain an effective certificate of authority. Any other interpretation is, as noted above, counter to the plain language of the statute. Specifically, the applicant should not be able to exercise authority pursuant to the certificate until such time as the applicant successfully meets all the conditions imposed by the General Assembly. For instance, an applicant should not have “a limited grant of authority to take and acquire an easement in any property or interest in property for the construction, maintenance, or operation of a

carbon dioxide pipeline in the manner proceeded for the exercise of the power of eminent domain under the Eminent Domain Act” before the certificate of authority had actually been granted. In past proceedings, the Commission has expressed strong views regarding the exercise of condemnation authority based on Commission-granted eminent domain. See, e.g., Order, 88, Illinois Power Company d/b/a AmerenIP and Ameren Illinois Transmission Company Petition for a Certificate of Public Convenience and Necessity, pursuant to Section 8-406 of the Illinois Public Utilities Act, to construct, operate and maintain new 138,000 volt electric lines in LaSalle County, Illinois, ICC Docket No. 06-0706 (March 11, 2009) (“The taking of property is a very serious matter and must be treated as such”). the statute clearly cannot contemplate the exercise of eminent domain before permits are in hand. This the plain meaning of the statute, that authority can be granted to only applicants which have met the conditions required to obtain, and actually obtained, a certificate of authority pursuant to the CO<sub>2</sub> Act.

Allowing otherwise, essentially allowing an applicant to function as if it had already obtained a certificate of authority before meeting the conditions, would entirely obviate the necessity of a person or entity obtaining the certificate of authority from the Commission while ignoring each requisite condition imposed by the General Assembly within the CO<sub>2</sub> Act. This result should not be permitted, and Staff recommends the Commission find FutureGen may be granted a certificate of authority after the statutory conditions (and other Staff and FutureGen agreed conditions and requirements) have been met, but not before.

#### **IV. SUGGESTED PROPOSED ORDER LANGUAGE**

The Parties have provided a partial joint draft proposed order, omitted the conclusion as to this contested legal issue. Staff recommends the Commission adopt the following Findings and Orderings Paragraphs and Conclusions:

#### **FINDINGS AND ORDERINGS PARAGRAPHS**

The Commission, having considered the entire record, is of the opinion and finds that:

- (1) The Application was properly filed.
- (2) The FutureGen Alliance is fit, willing, and able to construct and operate the CO<sub>2</sub> Pipeline in compliance with the Act and with the orders and regulations of the Commission and applicable federal agencies.
- (3) The FutureGen Alliance has entered or will enter in into an agreement with a clean coal facility.
- (4) The FutureGen Alliance will file all materials required by the Department of Transportation's Pipeline and Hazardous Materials Safety Administration.
- (5) The FutureGen Alliance will file all materials required by the U.S. Army Corps of Engineers.
- (6) The FutureGen Alliance has entered into an Agriculture Mitigation Agreement with the Illinois Department of Agriculture, dated January 20, 2012, which mitigates the agricultural impacts associated with the construction of the proposed CO<sub>2</sub> Pipeline.
- (7) The FutureGen Alliance has the financial, managerial, legal, and technical qualifications necessary to construct and operate the CO<sub>2</sub> Pipeline.
- (8) The proposed CO<sub>2</sub> Pipeline is consistent with the public interest, public benefit, and legislative purpose as set forth in the Act.

IT IS THEREFORE ORDERED that the FutureGen Industrial Alliance, Inc. is hereby conditionally granted a Certificate of Authority pursuant to Section 20(b) of the Act to construct and operate approximately 28 miles of new 10-12 inch carbon dioxide pipeline running from an oxy-combustion, coal-fueled power plant in Meredosia, Illinois to a deep geologic carbon dioxide facility in eastern Morgan County, Illinois, that shall be effective when all required permits and approval are obtained.

IT IS FURTHER ORDERED and that said Certificate of Authority, once all statutory conditions have been satisfactorily met, shall be the following:

### **CERTIFICATE OF AUTHORITY**

IT IS HEREBY CERTIFIED that the FutureGen Industrial Alliance, Inc. is authorized to construct and operate approximately 28 miles of new 10-12 inch carbon dioxide pipeline running from an oxy-combustion, coal-fueled power plant in Meredosia, Illinois to a deep geologic carbon dioxide facility in eastern Morgan County, Illinois, as requested in its Amended Application, subject to the laws of this State.

IT IS FURTHER ORDERED that this Certificate of Authority is conditioned upon the FutureGen Industrial Alliance, Inc. obtaining all required permits or approvals from the Pipeline and Hazardous Materials Safety Administration of the U.S. Department of Transportation, U.S. Army Corps of Engineers, and Illinois Department of Agriculture, in addition to all other permits and approvals necessary for the construction and operation of the pipeline prior to the start of any construction.

IT IS FURTHER ORDERED that the start of any construction is prohibited until all such permits and approvals have been obtained.

IT IS FURTHER ORDERED that the FutureGen Industrial Alliance, Inc. is hereby granted a limited grant of authority to take and acquire an easement in any property or interest in property for the construction, maintenance, or operation of a carbon dioxide pipeline in the manner provided for the exercise of the power of eminent domain under the Eminent Domain Act.

IT IS FURTHER ORDERED that this limited grant of authority shall be restricted to, and exercised solely for, the purpose of siting, rights-of-way, and easements appurtenant, including construction and maintenance.

IT IS FURTHER ORDERED that the FutureGen Industrial Alliance, Inc. shall not exercise this power until it has used reasonable and good faith efforts to acquire the property or easement thereto.

IT IS FURTHER ORDERED that the FutureGen Industrial Alliance, Inc. may thereafter use this power when the applicant determines that the easement is necessary to avoid unreasonable delay or economic hardship to the progress of activities carried out pursuant to the certificate of authority.

IT IS FURTHER ORDERED that if at any time the FutureGen Alliance no longer owns both the power plant and the CO<sub>2</sub> Pipeline then this Certificate of Authority shall cease to be in force and effective until such time as the owners of the power plant and the owners of the pipeline execute an agreement that will result in the reduction of carbon dioxide emissions and in the transportation and sequestration of carbon dioxide emissions from the power plant and file the same with the Commission within 30 days of execution.

IT IS FURTHER ORDERED that if, at some point in the future, FutureGen no longer owns both the power plant and carbon dioxide pipeline, then this Certificate of Authority will be null and void unless the owners of the power plant and CO<sub>2</sub> Pipeline provide the Commission with a copy of an agreement that results in the transportation and sequestration of carbon dioxide emissions from the power plant and reduction of carbon dioxide emissions within 30 days of FutureGen no longer owning both the power plant and carbon dioxide pipeline.

**V. CONCLUSION**

WHEREFORE, Staff respectfully requests that the Commission adopt its position, and its accompanying Findings and Orderings paragraphs and Certificate of Authority language.

Respectfully submitted,

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KIMBERLY J. SWAN  
MATTHEW L. HARVEY  
Office of the General Counsel  
Illinois Commerce Commission  
160 N. LaSalle Street, Ste. C-800  
Chicago, IL 60601  
Email: kswan@icc.illinois.gov  
mlannon@icc.illinois.gov  
Phone: 312-793-2877  
Fax: 312-793-1556

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*Counsel on behalf of the Staff  
Of the Illinois Commerce Commission*