STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	
Phase 2 of the initial approvals for	:	**13-0034**
FutureGen Industrial Alliance, Inc.	:	

ORDER

DATED: June 26, 2013

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ORDER

By the Commission:

I. INTRODUCTION AND PROCEDURAL HISTORY

On January 9, 2013, the Illinois Commerce Commission ("Commission" or "ICC") entered an Order initiating this proceeding, sometimes referred to as "Phase 2." This proceeding was initiated as a result of and pursuant to the Commission's Final Order in Docket No. 12-0544, *Illinois Power Agency Petition for Approval of the 220 ILCS 5/16-111.5(d) Procurement Plan*.

The purpose of this proceeding, as stated in the Initiating Order, is to determine and address "the remaining contested issues regarding the proposed sourcing agreement." The issues "shall include, but not be limited to: the provisions within Section 1-75(d)(3) of the [Illinois Power Agency Act ("IPA Act"), 20 ILCS 3855/1-75(d)(3),] 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...The Commission notes that issues resolved in Phase 1 shall not be relitigated in Phase 2 of the process."

The following parties ("Parties" or "Party" in the singular) intervened in Docket No. 13-0034: Ameren Illinois Company d/b/a Ameren Illinois ("Ameren," "Ameren Illinois" or "AIC"); the FutureGen Industrial Alliance, Inc. ("FutureGen"); Commonwealth Edison Company ("ComEd"); Dynegy Midwest Generation, LLC and Dynegy Kendall Energy, LLC; the Illinois Power Agency ("IPA"); the Illinois Competitive Energy Association; and the Coalition of Energy Suppliers ("CES").

Pursuant to the Initiating Order and a procedural ruling, the Commission Staff ("Staff"), the IPA, AIC, FutureGen, ComEd and ICEA submitted issues lists and suggested docket time frames on January 30, 2013. On February 11, 2013, Staff and other Parties filed responses to the issues lists.

On February 19, 2013, FutureGen submitted its request for approval of pre-approved total capital costs.

Pursuant to a procedural ruling, workshops were held on February 20 and 27, 2013, to address and potentially resolve issues. The intervening Parties and Staff participated in the workshops. Another workshop was held on March 7, 2013. Although the issues lists identified numerous contested issues, a number of these issues were resolved in the workshop process, or thereafter.

On March 6, 2013, FutureGen filed a motion requesting that this matter be presented and decided on the basis of written verified filings, without hearings. The other Parties concurred in this request, subject to adoption of a schedule allowing for the submission of three rounds of comments by the Parties and Staff. Rulings were issued granting the relief sought in the motion, and establishing a schedule, on the dates proposed by the Parties, for the filing of Initial Comments, Response Comments and Reply Comments.

On March 8, 2013, FutureGen submitted a Revised Sourcing Agreement.

On March 20, 2013, FutureGen, ComEd, Ameren, Staff, the IPA, and CES filed verified Initial Comments.

At FutureGen's request, the date for Response Comments was extended from April 3, 2013 to April 10, 2013, and the date for Reply Comments was extended to April 24, 2013.

On April 10, 2013, verified Response Comments were filed by the Parties who filed Initial Comments except for Ameren Illinois. On April 24, 2013, verified Reply Comments were filed by those Parties including Ameren Illinois.

On April 30, 2013, Staff filed a motion for leave to file supplemental Reply Comments that were attached thereto, or in the alternative, to strike certain portions of FutureGen's Reply Comments. On May 2, 2013, FutureGen filed a Response in which it agreed to the striking of those portions of its Reply Comments that were the subject of Staff's motion. Accordingly, those portions of FutureGen's Reply Comments are stricken, and shall not be cited in support of arguments appearing in briefs on exceptions or reply briefs on exceptions.

A Proposed Order was served on the parties. Briefs on exceptions ("BOEs"), including suggested replacement language sometimes referred to as "exceptions," were filed by Staff, Ameren Illinois, ComEd and FutureGen. The IPA filed a BOE in which no revisions to the Proposed Order are suggested. Reply briefs on exceptions ("RBOEs") were filed by Staff, Ameren Illinois, ComEd and FutureGen.

On May 22, 2013, FutureGen submitted a Revised Sourcing Agreement with its RBOE.

II. PHASE 2 ISSUES

As explained above, the Parties were directed to file issues lists at the outset of this proceeding. The issues lists filed by the Parties identified numerous contested issues; however, a number of these issues were resolved in the workshop process, or thereafter.

In their Initial Comments and subsequent comments, several Parties discussed some of the issues that are no longer contested, for whatever reasons, as well as those they believe do not require explicit determinations by the Commission. Rather than addressing those issues in detail, the rest of this Order will focus primarily on the contested issues identified and addressed in the filings.

III. BENCHMARKS

Section 1-75(d)(5) of the IPA Act provides, in part, that "the Commission may approve any such utility sourcing agreements that do not exceed cost-based benchmarks . . . ." In their filings, several Parties addressed various issues relating to the benchmark process. FutureGen filed exceptions with respect to the timing of the benchmark process.

A. ComEd's Position

ComEd reports that Section 1-75(d)(1) of the IPA Act establishes "the goal of the State that by January 1, 2025, 25% of the electricity used in the State shall be generated by cost-effective clean coal facilities." ComEd states that in furtherance of this goal, Section 1-75(d)(5) of the IPA Act establishes a framework for evaluation and approval of certain clean coal sourcing agreements. (ComEd Initial Comments at 8)

According to ComEd, the IPA Act requires that the Commission's authority to approve a sourcing agreement with a retrofitted clean coal facility is contingent upon its determination that the sourcing agreement does not exceed certain cost-based benchmarks developed by the Procurement Administrator. In its Initial Comments, ComEd contended that because the Sourcing Agreement is not the result of a competitive bidding process, determination of the Sourcing Agreement's compliance with this requirement must occur in the instant proceeding to approve the Sourcing Agreement. ComEd submits that a Sourcing Agreement may not be fully or finally approved in this proceeding unless and until the Commission expressly finds that: (1) it has reviewed and approved the requisite benchmarks, and (2) the Sourcing Agreement does not exceed such cost-based benchmarks. (*Id*. at 8-9)

ComEd insists it should not be required to sign the Sourcing Agreement with FutureGen until the Commission has approved a final and complete Sourcing Agreement. ComEd argues that approval, among other things, is contingent – by statute – upon the Commission's approval of certain cost-based benchmarks and its

determination that the Sourcing Agreement does not exceed such benchmarks. (ComEd Response Comments at 1-2, Reply Comments at 2-3)

ComEd's concern over these prerequisites arises out of potentially conflicting recommendations proffered by FutureGen and Staff. ComEd states that on the one hand, FutureGen requests that the Commission require ComEd to sign the approved Sourcing Agreement with FutureGen no later than 60 days after the Commission enters a Final Order in this docket. ComEd says this recommendation appears to be based on an assumption that the Commission would approve the requisite benchmarks and determine whether the Sourcing Agreement exceeds those benchmarks in the instant proceeding. On the other hand, ComEd says Staff's viewpoint is that the Commission need not approve the benchmarks in this docket at all. (ComEd Response Comments at 2)

In its Response Comments, ComEd clarifies that it does not contend that the Commission must approve benchmarks within this proceeding, although it suggests that determining compliance with applicable benchmarks during approval of specific bids or proposals is consistent with the process followed by the Commission in other contexts. However, ComEd does not agree with "Staff's statement" that the Commission need not make determinations about whether or not sourcing agreements exceed benchmarks, if the Commission intends to approve, in this docket, a final Sourcing Agreement with FutureGen for the procurement of electricity generated using clean coal. It is ComEd's position that absent such findings, the approval process is simply not complete. (ComEd Response Comments at 2-3, Reply Comments at 2)

ComEd notes that the IPA takes another approach, recommending the Commission consider and evaluate the benchmark required pursuant to Section 1-75(d)(5) of the IPA Act outside of this docket but in time for the Final Order in this docket. The IPA recommends that the Commission consider only input from Staff, the Procurement Monitor, the Procurement Administrator, and the IPA in the approval process for the benchmark; this procedure is consistent with the IPA Act and the Public Utilities Act ("PUA"), as well as the Commission's benchmarking practice in other IPA procurements. ComEd indicates it does not object to this proposal nor the IPA's request that input be limited to the persons and entities identified in Section 1-75(d)(5) of the IPA Act. According to the IPA, its preferred option is that Staff sends the benchmark (once Staff, IPA, the Procurement Administrator, and the Procurement Monitor work through any differences) directly to the Commission for consideration and also requests that the confidentiality of the benchmark methodology be preserved. (ComEd Response Comments at 3)

According to ComEd, the Memorandum attached to the IPA's Initial Comments additionally states that the IPA understands there is no objection to the benchmark (including its analytical methodology) being released to the public after the conclusion of this proceeding and related appellate litigation (if any) or to the release during the pendency of the instant docket of the bottom-line costs and rate impacts from the Benchmark Study, i.e., Levitan's conclusions. ComEd confirms it has no such

objection. The IPA further states it believes the best policy would be to avoid disclosing the benchmark prior to the Commission's approval of the benchmark. The IPA recommends that after consultation and agreement among the Procurement Administrator, Staff, IPA Staff, and the Procurement Monitor, Staff forward the benchmark to the Commission for review and approval in a non-docketed proceeding. ComEd also does not object to these proposals. (*Id*. at 3-4)

ComEd says the IPA also states that if the Commission does not vote on the benchmark before voting on a Final Order in this docket, the Final Order in the current docket would presumably approve the Sourcing Agreement conditional on the Commission accepting the benchmark and finding that the Sourcing Agreement satisfies the benchmark. In the event the Commission decides the benchmark is to be determined within this proceeding, the IPA makes other proposals intended to protect the methodology used to develop the benchmark that ComEd does not oppose. This then leaves the issue of when and how the Commission makes a determination as to whether the Sourcing Agreement exceeds the cost-based benchmarks. (*Id*. at 4)

ComEd says it does not oppose the IPA's proposal as stated at pages 7-8 of the IPA's Initial Comments. ComEd insists that the Commission must recognize that final approval of the Sourcing Agreement is necessarily contingent upon receiving and reviewing the benchmarks. At a minimum, ComEd claims the first determination (i.e., that the Sourcing Agreement does not exceed cost-based benchmarks) must be made before ComEd executes the Sourcing Agreement. (*Id*. at 4-5)

In the interests of clarity and efficiency, ComEd continues to recommend the Commission approve the benchmarks and evaluate whether the Sourcing Agreement exceeds those benchmarks in the instant proceeding. ComEd argues that making the determination of whether the Sourcing Agreement exceeds cost-based benchmarks in this proceeding will benefit all parties, including the Commission, by streamlining the procedural process for reaching a final Sourcing Agreement. ComEd also contends that this process is consistent with the Commission's traditional process of considering whether applicable benchmarks are satisfied in determining whether to approve specific bids or proposals. ComEd also claims that making these determinations in this Docket is consistent with the Commission's final Amendatory Order in Docket No. 12-0544 and its Order initiating this proceeding, which define the scope of this proceeding to include the remaining contested issues regarding the proposed Sourcing Agreement. If the Commission determines in this proceeding that the Sourcing Agreement does not exceed the benchmarks, then ComEd says it would not oppose a finding directing ComEd to sign a final and approved sourcing agreement within 60 days of the date the Final Order is served. (*Id*. at 5)

If the Commission does not determine in this proceeding whether the Sourcing Agreement exceeds the benchmarks, then ComEd claims no final Sourcing Agreement exists, and ComEd cannot be required to sign the Sourcing Agreement until those findings are made. If the Commission decides to proceed in that manner, ComEd requests that in order to facilitate the process for obtaining a final Sourcing Agreement,

the Commission approve a timeline and process for the appropriate parties (Staff, the IPA, the Procurement Administrator, and the Procurement Monitor) to develop the benchmarks and for the Commission to determine whether the agreement exceeds such benchmarks. If the Commission determines it should decide whether the Sourcing Agreement exceeds the benchmarks outside of this proceeding, then ComEd would not oppose being directed to sign an approved Sourcing Agreement if and within 60 days of the date that minutes reflecting a Commission determination that the Sourcing Agreement does not exceed applicable Commission-approved benchmarks are approved by the Commission and become publicly available on e-Docket. (*Id*. at 5-6)

B. Ameren's Position

Ameren believes that a crucial component of the FutureGen project (the "Project") approval process is a review to ensure that the costs anticipated to be incurred by FutureGen do not exceed the benchmark described in Section 1-75(d)(5) of the IPA Act to be provided by the Procurement Administrator and approved by the Commission. Since such requirement is fundamental to the execution of the Sourcing Agreement but is not a requirement of the Sourcing Agreement itself, Ameren requests that the Commission include in any Order approving the Sourcing Agreement an express determination that the costs under the Sourcing Agreement shall not exceed the established benchmark. (Ameren Initial Comments at 4, Reply Comments at 1-2)

C. Staff's Position

Staff "neither supports nor opposes" the concept of on-going periodic benchmark tests throughout the 20-year term of the FutureGen Sourcing Agreement. Staff notes that the Revised Sourcing Agreement now includes provisions explicitly acknowledging "the costs, revenues, and credits underlying the Contract Price Components may be subject to periodic audit and review for prudence and reasonableness, in a manner to be determined by the Commission." The document also states: "If, after hearing, the Commission finds that Seller has not shown all costs to be prudently incurred or has made errors in its Contract Price Adjustment computation, the difference determined by the Commission will be refunded or recovered, as appropriate, under the Ordered Reconciliation Factor, with such interest or other carrying charge as is ordered by the Commission, over such amortization period as is ordered by the Commission." (Staff Initial Comments at 20)

Staff takes no position with respect to whether the Commission should find such periodic audits and reviews for prudence and reasonableness to be adequate substitutes for periodic benchmark tests. (*Id*.)

Staff notes that FutureGen 2.0 is a power plant that was previously owned by an Illinois utility, which will be converted into a clean coal facility. With respect to sourcing agreements with such retrofitted clean coal facilities, Section 1-75(d)(5) of the IPA Act states, "the Commission may approve any such utility sourcing agreements that do not exceed cost-based benchmarks developed by the procurement administrator, in

consultation with the Commission staff, [IPA] Agency staff and the procurement monitor, subject to Commission review and approval." To Staff's knowledge, "the Commission has neither received nor approved any such cost-based benchmark, and therefore the Commission has not determined that a FutureGen sourcing agreement does not exceed any such benchmark." (*Id*. at 20-21)

It is Staff's intention to ensure that the Commission receives one or more "cost-based benchmarks developed by the procurement administrator, in consultation with the Commission staff, [IPA] Agency staff and the procurement monitor," as soon as practicable. It is Staff's further intention that the Commission receive advice from the Procurement Administrator, Commission Staff, IPA Agency staff, and/or the Procurement Monitor, with respect to making a determination that the FutureGen Alliance Revised Sourcing Agreement (and/or any subsequent draft Sourcing Agreements presented to the Commission during the course of this proceeding) does or does not exceed such benchmarks. (*Id*. at 21)

Staff believes that within this Phase 2 proceeding, the Commission need not approve benchmarks, and the Commission need not make determinations about whether or not Sourcing Agreements exceed benchmarks. Staff believes such approvals and determinations could be made outside this docket. However, Staff recommends that the Commission complete such tasks as soon as practicable following the completion of this docket. (*Id*.)

According to Staff, both Ameren and ComEd argue in their Initial Comments that final approval of a Sourcing Agreement with a retrofit clean coal facility, under the provisions of the IPA Act, is contingent upon Commission approval of cost-based benchmarks developed by the Procurement Administrator, in consultation with the Commission staff, IPA staff and the Procurement Monitor, and upon a finding by the Commission that the Sourcing Agreement does not exceed such benchmarks. Staff believes the comments of Ameren and ComEd concerning benchmarks are consistent with the comments submitted by Staff. (Staff Response Comments at 5-6)

However, Staff does not agree with ComEd and Ameren on the specific timing of the review of the benchmark and the timing of the determination of whether the Sourcing Agreement meets the benchmark. Staff claims that ComEd, without any statutory support, argues in its Initial Comments that because the Sourcing Agreement is not the result of a competitive bidding process, determination of the Sourcing Agreement's compliance with this requirement must occur in the instant proceeding to approve the Sourcing Agreement. Staff states that Ameren on the other hand, requests that the Commission include in any Order approving the Sourcing Agreement that there be an express determination that the costs under the Sourcing Agreement shall not exceed the established benchmark.

Staff says it finds no requirement under the IPA Act or the PUA that the approval of the benchmark must take place in this docket. Staff's position is that within this docket, Phase 2, the Commission need not approve the benchmarks and need not

make determinations about whether the Sourcing Agreement exceeds the benchmarks, but does agree with ComEd and Ameren "that the sourcing agreement is subject to the Commission reviewing and approving a cost-based benchmark and the sourcing agreement not exceeding such cost-based bench mark." Staff also says that while nothing in the IPA Act or PUA specifically prevents the Commission from making the determination in this docket, it seems to Staff that since not all Parties to the docket have a role in the determination of what the benchmark is and accordingly there is no substantive evidence in the record on the benchmark issue in the record for Phase 2, it would be unusual for a Commission Order for Phase 2 to make a finding on the benchmark issue since Orders are to be "based exclusively on the record for the decision in the case." (*Id*. at 6-7, citing 220 ILCS 5/10-103)

Staff indicates the IPA recommends that the Commission: (1) consider and evaluate the benchmark required pursuant to Section 1-75(d)(5) of the IPA Act outside of this docket but in time for the Final Order in this docket; (2) consider only input from Staff, the Procurement Monitor, the Procurement Administrator, and the IPA in the approval process for the benchmark; and (3) keep the benchmark confidential. With respect to the first two recommendations, Staff has no objections. Staff claims it is clear that Section 1-75(d)(5) of the IPA Act contemplates the benchmark being developed by a designated group of governmental agents, to the exclusion of other parties who might be more directly affected by the benchmark. In Staff's view, there is no legal rationale for using a litigated proceeding for purposes of approving the benchmark. (*Id*. at 8)

With respect to the IPA's third recommendation, however, Staff submits that in this instance, there is not a clearly compelling reason for confidentiality. Staff states that in all previous IPA procurements, benchmarks have been used in the context of multi-bidder competitive procurement events, pursuant to the provisions of Section 16-111.5 of the PUA. Staff avers that in such cases, revealing the benchmark to bidders would fundamentally alter their bidding strategies. However, Staff says the FutureGen contract is not the result of a competitive procurement event. Staff claims it is a sole-source contract for a unique project. Staff also asserts that the rates under the proposed Sourcing Agreement are to be set not by a market-based price bid, but in accordance with a cost-based accounting mechanism, subject to audits and prudence review. Staff also believes the law is clear that the benchmarks used in the context of competitive procurement events for standard electricity products and renewable energy resources have to be treated confidentially by the Commission, ICC Staff, Procurement Monitor, Procurement Administrator, and IPA, but no such requirement exists for Section 1-75(d)(5) clean coal facility benchmarks. Notwithstanding these observations, Staff "remains neutral with respect to the IPA's recommendation to keep the benchmark confidential (in the tradition of all benchmarks that have been used, to date, in the context of competitive procurement events pursuant to Section 16-111.5 of the PUA)." (Staff Response Comments at 8-9)

FutureGen states that the benchmark described in the law associated with retrofit clean coal facilities like FutureGen is not intended to be applied during the term of the Sourcing Agreement. According to Staff, FutureGen provides no support for this

assertion of the General Assembly's intent. Staff recommends that the Commission reject the assertion. On the other hand, Staff "neither supports nor opposes the concept of on-going periodic benchmark tests throughout the 20-year term of the FutureGen 2.0 sourcing agreement." Staff also maintains that the FutureGen Alliance Revised Sourcing Agreement now includes provisions recognizing that cost recovery for FutureGen is subject to periodic audit and review for prudence and reasonableness. Staff continues to take no position with respect to whether the Commission should find such periodic audits and reviews for prudence and reasonableness to be adequate substitutes for periodic benchmark tests. (*Id*. at 10)

According to Staff, the IPA states that it is possible that the Commission could end up approving the benchmark before a Final Order is issued in this docket. While Staff recognizes that is a possibility, Staff does not recommend that the Commission commit itself to such action given that as the IPA recognizes, its ability to work with the Procurement Administrator to respond to Staff and the Procurement Monitor's questions will be a limiting factor on how soon the benchmark may be approved. Rather, Staff recommends that the Commission only commit to completing such tasks as soon as practicable following the completion of this docket. (Staff Reply Comments at 2)

Staff notes that in its Response, ComEd is no longer contending that the Commission must approve the benchmarks within this proceeding but states that in the interests of clarity and efficiency, ComEd continues to recommend the Commission approve the benchmarks and evaluate whether the Sourcing Agreement exceeds those benchmarks in the instant proceeding. Staff says ComEd's recommendation ultimately seems to be tied to its position that before ComEd executes the Sourcing Agreement, the benchmark must be established and the Commission must determine that the Sourcing Agreement does not exceed the benchmark. (*Id*. at 3)

Staff states that on the same issue of utilities executing sourcing agreements, the IPA makes the observation that the plain language of Section 1-75(d)(5) of the IPA Act requires benchmark analysis as a prerequisite to the utilities signing the final approved Sourcing Agreement. Staff agrees with the IPA's statement. However, Staff asserts that just because the benchmark analysis is a prerequisite to the utilities signing the final approved Sourcing Agreement, this does not mean that the benchmark should or must be considered in this proceeding as ComEd initially suggested or that the Commission should consider the issue concurrently with this proceeding as FutureGen suggests. Staff's position has been and remains as set forth in its Initial Comments that within this Phase 2 proceeding, the Commission need not approve benchmarks, and the Commission need not make determinations about whether or not Sourcing Agreements exceed benchmarks. Staff believes such approvals and determinations could be made outside this docket. However, Staff recommends that the Commission complete such tasks as soon as practicable following the completion of this docket. (*Id*. at 3-4)

D. The IPA's Position

According to the IPA, the General Assembly was clear in prescribing roles to the IPA, Staff, the Procurement Administrator and the Procurement Monitor in developing the benchmark for Commission approval; other interested parties were not included, unlike several other instances in procurement-related sections of the IPA Act and PUA. The IPA is concerned that if any interested party could review and litigate the benchmark methodology, it would be more difficult to protect certain other benchmarks, especially those involving new renewable build where the procurement has already been completed. The IPA's preferred option is that Staff sends the benchmark (once Staff, IPA, the Procurement Administrator, and the Procurement Monitor work through any differences) directly to the Commission for consideration. Finally, although the IPA understands that the Commission has discretion to create the standard(s) for approval of the benchmark, the IPA provided two suggested factors the IPA hopes the Commission would find helpful. (IPA Initial Comments at 4-5) The IPA also believes Staff's analysis is consistent with the IPA's recommendation regarding participation in the benchmark evaluation process. (IPA Reply Comments at 1-2)

The IPA states that at present, consistent with a ruling dated March 7, 2013, the Procurement Administrator has provided copies of the draft benchmark to Staff and the Procurement Monitor for consideration. As required by Section 1-75(d)(5) of the IPA Act and as noted in the IPA Memo, the IPA plans to work with Staff, the Procurement Administrator, and the Procurement Monitor to finalize the benchmark for Commission consideration. (IPA Initial Comments at 5)

Section 1-75(d)(5) of the IPA Act provides:

> The Agency and the Commission may approve any such utility sourcing agreements that do not exceed cost-based benchmarks developed by the procurement administrator, in consultation with the Commission staff, Agency staff and the procurement monitor, subject to Commission review and approval.

In the IPA's view, although the requirement does not prescribe how the benchmark should be formulated, the exact components of the benchmark, and what "review and approval" means, the following requirements are clear from the statute:

- The Procurement Administrator (Levitan) initially develops the Benchmark, with input from Commission Staff ("Staff"), IPA Staff, and the Procurement Monitor (a consultant that reports exclusively to the Commission) – to the exclusion of all other interested parties during development.
- The Commission ultimately reviews and approves the benchmark against which the sourcing agreement is measured.

(IPA Initial Comments, Attachment A at 2)

The IPA believes the Parties have arrived at consensus on two issues. First, although some Parties believe it should be released earlier, there is no objection to the benchmark (including its analytical methodology) being released to the public after the conclusion of this proceeding and related appellate litigation, if any. Second, there is no objection to the release during the pendency of the instant docket of the "bottom line" costs and rate impacts from the Benchmark Study, i.e. Levitan's conclusions. (IPA Initial Comments, Attachment A at 3)

The IPA believes that the General Assembly did not intend for interested parties (other than those explicitly listed in the statute) to provide input to or to litigate the FutureGen benchmark. Furthermore, the IPA is concerned that allowing parties to litigate the benchmark in this case will have unintended yet potentially far-reaching effects on consideration of other benchmarks, such as those which may be developed for new renewable resource generating facilities associated with any future long-term renewable resource procurement by the IPA.

The IPA acknowledges that some Parties believe it is possible that the usual benchmark review and approval methodology does not adequately allow the Commission to make an informed approval decision regarding the FutureGen Sourcing Agreement, and that interested parties should be able to recommend alternative approaches. The IPA is concerned that if parties were able to litigate the benchmark in this proceeding, the IPA would have a diminished ability to protect benchmarks in other procurements. (IPA Initial Comments, Attachment A at 4-5)

The IPA does not believe either the benchmark or the Section 16-111.5(e)(3) benchmarks should be available to interested parties not explicitly named in the statute. The IPA says this is true whether or not the methodology is provided under a Protective Order, or whether proprietary numbers are redacted.

In its Reply Comments, the IPA indicates that it appreciates Staff's note that there is no statutory confidentiality requirement in Section 1-75(d)(5) of the IPA Act. The IPA has stated that it is comfortable with (and believes no party has an objection to) releasing the benchmark "bottom line" numbers as soon as they are agreed to by Staff, the Procurement Monitor, the Procurement Administrator, and the IPA, and releasing the entire benchmark (including the methodology) once this proceeding ends and appeals are exhausted. Furthermore, the IPA believes that the methodology for non-Standard Product procurement benchmark evaluations (such as the long-term renewable RFP authorized in Docket No. 09-0373) are more at risk for discovery and thus gaming by future bidders (if and when the Commission authorizes another such procurement). (IPA Reply Comments at 2-3)

The IPA has concluded that the best solution is to follow the procedure from the IPA standard product procurement benchmarks under Section 16-111.5(e)(2) of the PUA. The IPA says this procedure involves – after consultation and agreement among the Procurement Administrator, Commission Staff, IPA Staff and the Procurement Monitor – Staff forwarding the benchmark to the Commission for review and approval in

a non-docketed proceeding. The IPA states that under this approach, the Final Order in the current docket would presumably approve the Sourcing Agreement conditional on the Commission accepting the benchmark and finding that the Sourcing Agreement satisfies the benchmark, if the Commission does not vote on the benchmark before voting on the Final Order. (IPA Initial Comments, Attachment A at 6-7)

In the event that the Commission instead follows a course of action in which it rules on benchmark approval within the present docket, the IPA believes that the Commission should explicitly refuse to hear arguments regarding the benchmark methodology and block the methodology from discovery. The IPA, in the interest of transparency, offers to provide to parties the summary conclusions of the Procurement Administrator (once the validity of the analysis is agreed upon by the Procurement Administrator, the IPA Staff, the Commission Staff and the Procurement Monitor), but not the underlying analysis. The IPA says it (as the agency retaining Levitan) and Staff would not be subject to data requests for support for those numbers. The IPA wishes to emphasize that it will comply with any Commission Order regarding confidentiality of the benchmark, subject to the IPA's rights under the Commission's Rules of Procedure. (IPA Initial Comments, Attachment A at 7)

With regard to the appropriate analysis for whether the proposed Sourcing Agreements "do not exceed cost-based benchmarks," the IPA submits that this analysis should involve two determinations. The IPA believes the first determination should be whether, based on the benchmark analysis that is being conducted by the Procurement Administrator for the IPA using data supplied by FutureGen and the Procurement Administrator's professional knowledge of other projects and data sources, FutureGen 2.0's cost estimates are within the range of reasonable costs. The IPA says the second determination should be a comparison of the reasonable rate impact range relative to the clean coal cost cap in Section 1-75(d)(2). (IPA Initial Comments, Attachment A at 7-8)

According to the IPA, the source of the first determination is the application of "do not exceed" to "cost-based benchmarks." The IPA says the benchmark is a measure of costs. Because the benchmark is pre-review, the most logical measure is a reasonableness range or threshold based on estimated costs. The IPA adds that the "do not exceed" language "indicates that the key number is the upper value for the range of reasonableness, although the lower end of the range will be instructive for each individual cost component when reviewing overall cost." (IPA Initial Comments, Attachment A at 8)

The IPA states that the source of the second determination is a policy determination intended to ensure viability of the FutureGen 2.0 Project. If the upper range "is too far above the cost cap, the Project may never be in a position to fully recover its costs." The IPA says no party benefits if the Project is set up to fail, and believes the Commission should avoid this possibility. (*Id*.)

The IPA says it and the Procurement Administrator are consulting with Commission Staff, and the Procurement Monitor on this analysis and the proposed determinations to be made. The IPA makes these recommendations regarding Commission considerations cognizant of the fact that the Commission may use standard(s) of its own choosing. (*Id*.)

The IPA also offers the Parties and the Commission an alternative proposal. The IPA suggests that due to the fact that FutureGen's technology and the specific construction and operation proposal represent a "one-of-a-kind/first-of-a-kind demonstration project," special circumstances arguably apply that do not apply to the other benchmarking processes the IPA engages in. In this alternative proposal, "the IPA would offer interested parties signing a protective order a properly redacted version of the Benchmark analysis for review, prior to Commission review and approval, with no opportunity to influence the Commission, the Procurement Administrator, the IPA, the Commission Staff and the Procurement Monitor as to the nature and content of that analysis." (IPA Initial Comments, Attachment A at 7, Footnote 5)

Regarding Staff's suggested procedure for evaluation of the benchmark, the IPA generally agrees with Staff with a small caveat regarding the timing of the Commission's benchmark determination. The IPA believes Staff's recommendation about the Commission Staff's working with the Procurement Monitor, Procurement Administrator, and the IPA staff in order to present the Commission with a benchmark possibly outside of this docket is consistent with the IPA's recommendation. However, as a clarification, the IPA believes that – depending on how long it takes Staff, the Procurement Monitor, the Procurement Administrator and the IPA to develop a final benchmark and the Commission to evaluate the final benchmark – the IPA says the Commission may end up approving a benchmark before the Final Order in this docket.

The IPA still recommends that the approval process take place outside of this docket, and understands that its ability to work with the Procurement Administrator to respond to Staff and the Procurement Monitor's questions will be a limiting factor on how soon the benchmark may be approved. Nevertheless, the IPA does agree with Staff that the benchmark could be approved after this proceeding, acknowledging that the plain language of Section 1-75(d)(5) of the IPA Act requires a benchmark analysis as a prerequisite to the utilities signing the final approved Sourcing Agreement. (IPA Response Comments at 2)

E. FutureGen's Position

FutureGen claims the Parties in this proceeding are in agreement that the Commission must consider the Project's compliance with cost-based benchmarks pursuant to Section 1-75(d)(5) of the IPA Act. In particular, FutureGen submits that the benchmark should be considered pursuant to the IPA's proposed process, whereby the Project's compliance with the benchmark is reviewed confidentially, outside of this docket. FutureGen further submits that the benchmark should be considered concurrently with this proceeding, such that the Commission will have completed its

review of the benchmark before issuing a Final Order in this proceeding. (FutureGen Response Comments at 2, FutureGen BOE at 14-15, Exceptions at 1-3)

FutureGen says there are only two Parties that seem to disagree with any aspect of this approach. (FutureGen Response Comments at 2)

According to FutureGen, ComEd asserted in its Initial Comments that because the Sourcing Agreement is not the result of a competitive bidding process, determination of the Sourcing Agreement's compliance with the benchmark must occur in the instant proceeding to approve the Sourcing Agreement. FutureGen asserts that ComEd does not explain any practical or legal rationale supporting that position. FutureGen states that in contrast, the IPA offered compelling statutory and practical reasoning in favor of maintaining the confidentiality of the benchmark. For the reasons set forth by the IPA, FutureGen agrees that the benchmark -- an analysis that FutureGen claims it has never seen or influenced, prepared by an independent economic expert and reviewed by a second independent economic expert -- should not be made into a litigated issue in this hearing. FutureGen believes the best way to maintain the confidentiality of the benchmark, and no less importantly the integrity of the benchmarking process itself in this and other proceedings, is by submitting the benchmark, and the FutureGen Alliance's Project Cost and Ratepayer Impact Analysis ("Cost Report"), to the Commission for review outside of the present proceeding, as the IPA describes. (*Id*. at 3)

FutureGen says the second apparent conflict with its proposed approach to the benchmark is a difference in position between Staff and FutureGen, which relates to the timing of the Commission's benchmark determination. Staff states that within this Phase 2 proceeding, the Commission need not approve benchmarks, and the Commission need not make determinations about whether or not the Sourcing Agreement exceeds benchmarks. FutureGen notes that Staff recommends that the Commission complete such tasks as soon as practical following the completion of this docket. (*Id*. at 3-4)

FutureGen urges the Commission to consider the benchmark separately, but concurrently with this proceeding, such that an Order approving the Sourcing Agreement as modified in this proceeding can also address the benchmark. FutureGen is concerned that deferring this matter will only prolong the process of evaluating the Sourcing Agreement without adding any regulatory substance to the Commission's review. FutureGen complains that it will place FutureGen under continued regulatory uncertainty as it is soliciting financing from potential equity and debt investors. In contrast, FutureGen suggests that ruling on both the benchmark and this proceeding simultaneously will pave the way for the execution of the Sourcing Agreement by Ameren and ComEd, and will allow them to begin work on their tariff filings as FutureGen begins to approach financiers. (FutureGen Response Comments at 4)

FutureGen notes that among the issues that the Commission set for hearing was Staff's recommendation for periodic benchmark tests. FutureGen says this issue arose

from a proposal by Staff that the Project's performance would be compared against the benchmark described in Section 1-75(d)(5) of the IPA Act "repeatedly" during the term of the Sourcing Agreement. (*Id*.)

FutureGen's position is that the benchmark envisioned in Section 1-75(d)(5) of the IPA Act is intended to "inform the consideration" of the Sourcing Agreement during the initial procurement process, and is not intended to be revisited throughout the term of the Sourcing Agreement. FutureGen suggests that instead, the appropriateness of costs incurred by the FutureGen Alliance and included in the Sourcing Agreement rates will be ensured through the annual Commission review and reconciliation process. FutureGen also claims the Commission has express statutory authority to audit the Project pursuant to Section 1-75(d)(5) of the IPA Act. In connection with the recent workshops, FutureGen says it made several changes to the Sourcing Agreement underscoring the Commission's authority to audit the Project, and clarifying that the Project is subject to annual review and reconciliation before the Commission. (*Id*. at 4-5, citing FutureGen Initial Comments at 7-9)

According to FutureGen, the only party to offer remarks on periodic benchmarking in its Initial Comments was Staff. FutureGen says Staff notes that it neither supports nor opposes the concept of on-going periodic benchmark tests throughout the 20-year term of the FutureGen 2.0 Sourcing Agreement. FutureGen maintains that repeated application of the benchmark is not intended under the statute, and that existing statutory and contractual safeguards make it superfluous. In FutureGen's view, while Staff's position is understood to be neutral, it appears that no Party affirmatively disagrees with FutureGen's interpretation. (FutureGen Response Comments at 5-6)

In its Reply Comments, Future Gen states that all Parties that are prepared to commit to a position are in agreement that the benchmark may remain confidential at least for the duration of the present proceeding. FutureGen suggests this important proceeding should not be hindered by stray arguments that lack the unqualified support of the Party submitting them. FutureGen also suggests that Parties interested in obtaining access to the benchmark may do so following the conclusion of this proceeding without opposition from FutureGen, and apparently without the objection of ComEd and the IPA. (FutureGen Reply Comments at 12) In its BOE, FutureGen suggests the following language be added to the conclusion, "Parties interested in obtaining access to the benchmark may make a filing seeking such access." (FutureGen Exceptions at 3)

F. CES' Position

The IPA takes the position that the Benchmark Methodology that is contained in an IPA-procured Benchmark Study should be maintained as confidential. CES indicates it is not currently seeking access to the Benchmark Study or the Benchmark Methodology; however, CES suggests the Commission should take note that the IPA's position on this confidentiality matter is unusual, and at odds with the Commission's

practice of transparency, open access, and the integrity of the fact-finding process. (CES Response Comments at 4, citing 83 Ill. Admin. Code 200.25(a))

According to CES, the IPA and the Commission are state agencies, and the Benchmark Study setting forth the FutureGen-related Benchmark Methodology apparently contains relevant and material cost-related information and analysis relevant to the FutureGen Project -- a project that is not only the recipient of public funds but will also be funded on an ongoing basis by charges imposed upon Illinois consumers. In CES' view, as a matter of initial consideration and as a default position, the Benchmark Study should be considered by the Commission to be a publicly available document. (*Id*.)

CES says the IPA Confidentiality Memo repeatedly invokes the specter of "litigation" associated with the Benchmark Study as a reason for the Benchmark Study's suppression in the instant proceeding. CES claims that is a classic example of a party using a false "straw man" in an attempt to justify an otherwise unjustified action. CES argues that the IPA fails to invoke any authority that would suggest that the mere theoretical prospect of some unspecified legal challenge somehow trumps open access to public records. CES says it is unaware of the Commission ever endorsing such a policy, and the IPA cites no such precedent. (*Id*. at 4-5)

CES suggests there are many reasons other than "litigation" that interested parties might want to review the information in the Benchmark Study. CES maintains that the FutureGen Project is -- by the admission of both the IPA and FutureGen -- a demonstration project in which there is, or ought to be, substantial public interest. (*Id*. at 5)

CES also complains that the IPA Confidentiality Memo suggests that some Parties are reluctant to concede an inability to litigate the Benchmark methodology absent those parties' review of the analysis prepared by the Procurement Administrator. CES finds that statement troubling and somewhat insulting. According to CES, that statement appears to reveal communications that were made in the context of a workshop process that the IPA itself characterized as confidential settlement negotiations. CES also claims that statement suggests that a Party is somehow in the wrong by failing to agree to a state agency dictate that the Party broadly waive the right to analyze and potentially litigate issues relating to a document prior to the agency allowing that Party to understand the contents of that document. CES asserts that the IPA fails to provide any legal authority or precedent to justify its position, and it is unfair to suggest that a Party that seeks to review a document that might result in some litigation is per se precluded from seeing that document. In CES' view, that notion contradicts fundamental principles of open access to public records and discovery practice in Commission proceedings. (*Id*. at 5-6, citing 83 Ill. Adm. Code 200.340)

According to CES, the IPA Confidentiality Memo then quotes what the IPA calls a "parallel" statutory provision (Section 16-111.5(e)(3) of the PUA), which provision the IPA explicitly acknowledges does not apply to the Benchmark Study in question here.

CES says that statutory provision specifically applies to benchmarks used in the IPA's power procurement process, and the provision specifically states that those "benchmarks shall be confidential." (*Id*. at 6)

In CES' view, a comparison between the statutory provision applicable to the FutureGen-related benchmarks and the statutory provision related to the non-FutureGen-related benchmarks demonstrates that the General Assembly deemed that one sort of benchmark (the sort that relates to IPA energy procurement auctions) should be confidential, while another sort of benchmark (the sort that relates to a publicly-funded demonstration project like FutureGen) should not be confidential. CES believes any suggestion otherwise in the IPA Confidentiality Memo is an unconvincing and tortured application of two plainly dissimilar statutory provisions. In conclusion, CES requests that the Commission "critically evaluate" the IPA's position on the confidentiality of the FutureGen-related Benchmark Methodology. (*Id*. at 6-7; Reply Comments at 3)

G. Commission Analysis and Conclusions

Section 1-75(d)(5) of the IPA Act provides, in part:

> The Agency and the Commission may approve any such utility sourcing agreements that do not exceed cost-based benchmarks developed by the procurement administrator, in consultation with the Commission staff, Agency staff and the procurement monitor, subject to Commission review and approval.

The IPA's "preferred option is that Staff sends the Benchmark (once Staff, IPA, the Procurement Administrator, and the Procurement Monitor work through any differences) directly to the Commission for consideration." (IPA Initial Comments at 4-5) That is, the IPA recommends that the Commission consider and evaluate the benchmark required pursuant to Section 1-75(d)(5) of the IPA Act "outside of this docket" and that the Commission "consider only input from Staff, the Procurement Monitor, the Procurement Administrator, and the IPA in the approval process for the Benchmark." (*Id*. at 1) Staff does not object to this recommendation. In Staff's view, the Commission need not approve benchmarks in this Phase 2 proceeding. ComEd "does not object to this proposal nor the IPA's request that input be limited to the persons and entities identified in Section 1-75(d)(5) of the IPA Act." (ComEd Response Comments at 3)

The Commission finds that the benchmark submission and evaluation process described in the preceding paragraph is reasonable and it is adopted. Accordingly, the Commission has considered the benchmark, as well as advice from the Procurement Administrator, Commission Staff, IPA Staff and the Procurement Monitor outside of this Phase 2 docketed proceeding. Pursuant to that review, and in consideration of the advice described above, the Commission has concluded that the Sourcing Agreement does not exceed the submitted cost-based benchmarks.

As discussed above, ComEd objects to signing a Sourcing Agreement prior to a determination by the Commission, pursuant to Section 1-75(d)(5) of the IPA Act, that the Sourcing Agreement does not exceed the cost-based benchmarks. However, this issue is now mooted by the Commission's determination that the Sourcing Agreement does not exceed cost-based benchmarks, described above. Accordingly, ComEd and Ameren are directed to sign the Sourcing Agreement within 60 days of the date of the Final Order in this proceeding.

As noted above, the Initiating Order in the current docket identified some, but not all, of the "remaining contested issues" to be addressed in the Phase 2 proceeding. One such issue was "periodic benchmark tests." In the original proceeding in Docket No. 12-0544, Staff recommended that such tests be performed during the term of the Sourcing Agreement.

Upon reviewing the record in the instant docket, it appears there are no recommendations to require periodic benchmark tests during the term of the Sourcing Agreement. Although Staff disagrees with FutureGen's contention that the General Assembly did not intend the benchmark to be applied during the term of the Sourcing Agreement, "Staff neither supports nor opposes the concept of on-going periodic benchmark tests throughout the 20-year term of the FutureGen 2.0 sourcing agreement." (Staff Response Comments at 10) There being no proposals before the Commission to require periodic benchmark tests during the term of the Sourcing Agreement, the Commission finds that no such tests will be required.

In its Initial Comments, the IPA requests that the Commission keep the benchmark confidential and not made available to others beyond the Commission, Commission Staff, Procurement Monitor, Procurement Administrator and the IPA. The IPA, in the interest of transparency, will provide to parties the summary conclusions of the Procurement Administrator once the validity of the analysis is agreed upon by the Procurement Administrator, the IPA Staff, the Commission Staff and the Procurement Monitor, but not the underlying analysis.

Staff and the Coalition of Energy Suppliers raise concerns about the IPA's request. However, they do not recommend that it be denied. Rather, "Staff remains neutral with respect to the IPA's recommendation to keep the benchmark confidential (in the tradition of all benchmarks that have been used, to date, in the context of competitive procurement events pursuant to 220 ILCS 5/16-111.5)." (Staff Response Comments at 8-9)

The Commission understands and appreciates both the request of the IPA and its underlying rationale; however, no party has set forth a legal argument which would support retaining the confidentiality of the benchmark and supporting methodology as a matter of course and in perpetuity. This procurement event, pursuant to Section 1-75(d) of the IPA Act, is easily distinguished from the procurement events governed by Section 16-111.5(e)(3) of the Public Utilities Act. First, this procurement event is a unique one, the first one of its kind in Illinois and one which is not competitive in nature. Second,

had the General Assembly deemed the benchmarks in the instant matter to warrant confidentiality, they could have required that designation, as they did in Section 16-111.5(e)(3) matters. Without such a confidentiality requirement in the Statute, the Commission believes that the interests of transparency compel the disclosure of the benchmark and underlying methodology. However, the Commission also understands that there may be particular pieces of information contained in the benchmark's analytical methodology that warrant the protection of confidentiality. Thus, FutureGen, and the parties to this proceeding who have signed the Protective Order, shall have 14 days from the date of the signing of the Sourcing Agreement to request of the Commission that certain material contained in the benchmark and underlying methodology that is of a confidential and proprietary nature continue to be protected from public release. The scope of this filing should be limited only to issues of confidentiality and should not be construed as a vehicle to argue the substantive merits of the benchmark or its underlying analysis. Last, as the IPA has noted, no party objects to the immediate release of the "bottom line" costs and rate impacts from the Benchmark Study. Thus, the Commission directs the IPA to release the "bottom line" numbers as soon as is practicable following the entry of this Order.

IV. LEVELIZED FIXED CARRYING CHARGE RATE

Staff indicates that the Revised Sourcing Agreement contains a provision that permits recovery of and on capital expenditures by FutureGen, along with the associated income taxes, through a Fixed Project Payment. The main component of this monthly payment consists of total capital costs (expressed in dollars) times a Levelized Fixed Carrying Charge Rate ("LFCCR" or "LFCR") (expressed as a percentage per year) divided by 12 (months per year). According to Staff, for every dollar of investment, the LFCCR would embody the charge that would be used to recover loan principle and interest, an approved after-tax return on equity capital, and income taxes on that return, taking into account the effect of actual accelerated tax depreciation on taxable income. (Staff Initial Comments at 8)

BOEs and RBOEs on this issue were filed by FutureGen and Staff.

A. Staff's Position

In Staff's view, the draft Sourcing Agreement contains neither formulas nor adequate descriptions of any processes through which the LFCCR would be computed. Staff believes this is important because the LFCCR cannot be finally computed until the interest rate associated with debt capital is made known (most likely after this Phase 2 proceeding is concluded). To eliminate this ambiguity, Staff recommends that the LFCCR methodology be explicitly determined by the Commission in this proceeding and/or included within the Sourcing Agreement ultimately approved by the Commission.

Staff also expresses concern that the LFCCR methodology that FutureGen has provided to Staff (but not included in the Sourcing Agreement) is imprecise and results

in an excessive LFCCR. Staff recommends a specific alternative methodology that it believes is more precise. (*Id*. at 9)

Staff says the Revised Sourcing Agreement includes several separate categories of costs and defines separate charges to recover those costs. According to Staff, the monthly Fixed Project Payment is the only charge that provides for any recovery of federal and state income taxes, interest and principal payments on debt capital, and a return on investment to equity investors. Staff also says the return to equity investors can be measured by examining the negative and positive cash flows experienced by those equity investors after making federal and state income tax payments and interest and principal payments to lenders. In Staff's view, the LFCCR "should be computed in such a way that it results in a constant stream of pre-tax revenues to generate the cash flows to equity investors just enough to leave those investors with the rate of return authorized by the Commission." (*Id*.)

Staff notes that the Commission "has determined that the rate of return to FutureGen 2.0's equity investors should be 10% per annum and that this return should be achieved by the conclusion of the 20 year contract term (even though FutureGen may continue to exist and may continue to earn positive profits beyond those initial 20 years of its existence)." Staff says the Commission did not specify whether the 10% return was intended to be the effective annual return with quarterly, monthly, or daily compounding of cash flows, or the nominal annual return. Staff insists that it matters if the cash flows are modeled as quarterly, monthly, or daily, rather than annually. (*Id*. at 10)

Staff provides a table, reproduced below, which is intended to demonstrate its calculations.

Assuming Cash Flows Occur	If the Nominal annual return is 10%, then the Effective annual return is	If the Effective annual return is 10%, then the Nominal annual return is
Annually	(1+10%/1)^1 - 1 = 10.00%	(1+10%)^(1/1) - 1 = 10.00%
Quarterly	(1+10%/4)^4 - 1 ≈ 10.38%	((1+10%)^(1/4)-1)*4 ≈ 9.65%
Monthly	(1+10%/12)^12 - 1 ≈ 10.47%	((1+10%)^(1/12)-1)*12 ≈ 9.57%
Daily	(1+10%/360)^360 - 1 ≈ 10.52%	((1+10%)^(1/360)-1)*360 ≈ 9.53%

Staff argues that since the Sourcing Agreement's charges (including the Fixed Project Payment) are applied on a monthly basis, it is appropriate for the LFCCR model of cash flows to be a monthly model. In Staff's view, the correct equity rate of return to input into this model would be either 10%/12 per month (if the Commission intended to approve a nominal annual return of 10% and an effective annual return of approximately 10.47%) or approximately 9.57%/12 per month (if the Commission intended to approve an effective annual return of 10% and an nominal annual return of approximately 9.57%). (Staff Initial Comments at 10)

Staff maintains that whether the Commission intended for the approved annual return to be an effective rate or a nominal rate makes a more significant difference. Because Staff believes the 10% effective annual rate will enable equity investors to actually earn well above 10%, given the potential for them to take on more than 55% debt at advantageous terms, Staff recommends that the Commission clarify that the allowed 10% is the effective annual rate, corresponding to a nominal annual rate of approximately 9.57% and a monthly rate of approximately 9.57% divided by 12. Staff says that in any event, if Staff's monthly model is approved, that issue must be clarified one way or the other. (*Id*. at 17-18)

Staff also believes that pertinent to a LFCCR computation are the income tax rates that are assumed to be present during the life of the Project, the tax depreciation schedule that is assumed to be employed, the assumed capital structure (percentage of debt versus percentage of equity), and the assumed loan type. While Staff discusses these issues in some detail, and identifies some concerns, ultimately, it does not object to the assumptions made by FutureGen. (*Id*. at 11-17)

In its Response Comments, Staff contends that contrary to FutureGen's suggestion, the LFCCR cannot remain as approved by the Commission in the Final Order because there was no LFCCR approved by the Commission, nor was there a methodology presented by FutureGen for the Commission to approve. Staff states that in its Comments, FutureGen again fails to describe or justify a methodology for computing the LFCCR; whereas, Staff presented a detailed methodology in its Comments and a justification for its acceptance by the Commission in this docket. Staff continues to recommend that the Commission approve Staff's proposed methodology. (Staff Response Comments at 10-11)

Staff notes that while FutureGen seems to call upon the Commission to adopt in this docket a specific LFCCR (a value), it is Staff's belief that FutureGen and Staff are in agreement that the Commission should only be adopting a methodology for setting the LFCCR. Staff says the final value for the rate cannot be determined until the actual cost of debt is established, in accordance with Section 5.2(b) of the FutureGen Revised Sourcing Agreement. (*Id*. at 11)

Upon review of FutureGen's Response Comments and the work papers that supported the table shown on page 16 of Staff's Initial Comments, Staff acknowledges in its Reply Comments that an error was made in Staff's accounting for tax depreciation when the example was created. The error, according to Staff, was of the nature described by FutureGen affiant, Dr. Jean Agras, except that the error was in the case where the 21st year's depreciation is realized in the 21st year of the Project life (as opposed to the case where the 21st year's depreciation is realized in the 20th year of the Project life). Staff states that not only does correcting the error reduce the difference between the two cases to a mere 0.002% as noted by Dr. Agras, it also changes the sign of the difference. (Staff Reply Comments at 7, Staff BOE at 2-3)

According to Staff, Dr. Agras essentially testifies that while capital structure and debt service schedule are critical assumptions, they are unknowns at present. Staff does not disagree. Staff claims that Dr. Agras provides no argument for choosing one assumption about capital structure and debt service schedule over any other. (*Id*. at 8)

Staff argues that Dr. Agras provides no evidence that an annual model somehow minimizes the impact of debt service structures. In fact, Staff claims there is very little difference between the impact of debt service structure, when that impact is measured using an annual model versus a monthly model. Staff contends the impact is a half a percent on the one hand versus a half of a percent on the other hand. (Staff Reply Comments at 9)

Staff disputes Dr. Agras' assertion that using an annual cash flow model rather than a monthly one minimizes the impact of intra-year cash flow scheduling on the long-term results. Staff claims such an approach merely ignores those impacts. Staff suggests a more sensible approach to deal with such uncertainty would be to present one's best estimate of the monthly cash flows, along with whatever other reasonable scenarios there might be to provide upper and lower bounds on the long-term results. Staff also says another sensible approach, if feasible, would be to wait until more information becomes available. According to Staff, with respect to the repayment schedule for FutureGen's debt, presumably that information will become known at the same time that the interest rate for that debt becomes known. Staff claims this would not only deal with Dr. Agras' uncertainty over the issue of mortgage style versus equal principal payment, it would also deal with Dr. Agras' uncertainty over when, during any given year, those debt payments would be scheduled. (*Id*. at 9-10)

Staff suggests that in general, Dr. Agras overstates the degree of uncertainty over the intra-year distribution of cash flows. Staff claims it is a fact that FutureGen will bill its captive customers, Ameren and ComEd, on a monthly basis, and will expect prompt payment. (Staff Reply Comments at 10, citing Sourcing Agreement, Section 7.2) Staff also claims it is a fact that these monthly bills will include, among other things, a fixed capital charge derived from the LFCCR.

Staff also disputes Dr. Agras' argument that FutureGen's debt service will follow a schedule of equal principal payments rather than mortgage style payments because this payment structure results in the reduction in debt, as well as the risk to the lender, consistent with the life and physical depreciation of the asset. Staff says this claim implies that mortgage-style loan repayment schedules are inconsistent with the life and physical depreciation of the mortgaged asset. In Staff's view, such a claim does not stand up to scrutiny, given the prominence of mortgage-style loan repayment schedules. Staff argues that such inconsistency, if it exists, could not be cured by FutureGen's proposed 20-year constant principal repayment schedule, since FutureGen's developers have indicated that the proposed plant can continue to generate power through at least 30 years. (Staff Reply Comments at 10-11, citing Docket No. 12-0544, December 19, 2012 Order at 232) Staff finds unconvincing Dr. Agras' reasons for preferring to assume that principal payments will be constant over

time, rather than increasing over time, in accordance with mortgage-style loan repayment conventions.

In its BOE, Staff expresses a concern with respect to the Proposed Order's reliance on an assumption that most dividend-paying entities distribute dividends to equity investors on a quarterly basis. Staff argues that the timing of dividends should not be a factor in the Commission's decision to use a nominal return based on quarterly cash flows. In Staff's view, even if the funds are distributed to equity investors quarterly not does not change the fact that funds available earlier in the quarter are more valuable than funds that are available later in the quarter. Staff claims the funds do not have to lie dormant in a non-interest bearing account waiting to be distributed to investors; rather, they can be used as working capital or otherwise invested, thus contributing to the profitability of the enterprise. According to Staff, in the context of the LFCCR, the practical difference between assuming quarterly versus monthly compounding of returns is not significant enough to warrant an objection. Staff also states that a quarterly model is simpler to implement. Hence, although Staff proposes use of a monthly LFCCR approach, it does not object to the adoption of a quarterly LFCCR methodology, or to approving a nominal authorized annual return on equity is 9.65%. (Staff BOE at 5)

In its RBOE, Staff takes issue with FutureGen's assertion that the Proposed Order would significantly reduce the LFCCR. Staff asserts that the term "significantly" is subjective, but in Staff's view neither the Proposed Order, nor Staff's proposed monthly LFCCR methodology, would significantly reduce the LFCCR. Staff provides examples and calculations in support of its assertion. (Staff RBOE at 5-6)

Staff also disputes FutureGen's argument that the Proposed Order's resolution of the LFCCR would produce Project economics that are not commensurate with market requirements. In Staff's view, the record shows that, given the frequency of cash flows expected, a nominal rate of return below 10% will result in an effective rate of return of at least 10%. Staff disagrees with FutureGen's position that annualized calculations eliminate some of the uncertainty associated with the various timings and calculation of critical cash flow events. According to Staff, the annualized calculations preferred by FutureGen merely ignore uncertainty. (*Id*. at 6)

Staff contends that contrary to FutureGen's argument, the Proposed Order's use of an effective annual return in the LFCCR will not undermine the long-term certainty required by investors as to return of and on their capital investments, since it retains the concept of a LFCCR that remains constant throughout the term of the Sourcing Agreement. Staff also asserts that with either FutureGen's preferred methodology or the methodology approved in the Proposed Order, investors can determine the LFCCR value for any assumed set of debt financing terms. Staff suggests that the Proposed Order's resolution actually enhances certainty for the ultimate impact of the LFCCR on equity returns, since it would wait until the loan payback schedule is determined before finalizing the LFCCR computation. (*Id*.)

Staff notes that FutureGen also argues that the Proposed Order departs from the LFCCR that purportedly appeared in the Sourcing Agreement that was approved in Docket No. 12-0544. According to Staff, the approval of that Sourcing Agreement was a partial approval, and the Commission clearly reserved most of its decisions about the FutureGen Sourcing Agreement for this Phase 2 proceeding. (Staff RBOE at 7)

Staff takes issue with FutureGen's allegation that the Proposed Order errs in its assumption of quarterly dividend distributions. Staff claims FutureGen has already included within its "pre-approved capital costs" an allowance for debt service reserves, for which it will be earning a return of and on. Hence, even if it is not unusual in project-finance lending to require borrowers to meet four quarters of debt service coverage and maintain other reserve ratios for a similar period prior to allowing any distributions of cash, as FutureGen argues, that limitation may not apply to the FutureGen venture. (*Id*.)

B. FutureGen's Position

FutureGen believes that the LFCCR should remain "as approved" by the Commission in the Order in Docket No. 12-0544. The only modifications that FutureGen has made to the LFCCR since the version "approved" by the Commission are changes to reflect the 20-year Term of the Sourcing Agreement, and to reflect certain new tax rates in the State of Illinois. FutureGen says these changes are reflected in the Cost Report submitted in this docket on February 19, and the Sourcing Agreement submitted on March 8, 2013. (FutureGen Initial Comments at 9-10, Reply Comments at 6)

FutureGen objects to Staff's proposed modifications to the LFCCR, which it believes would materially reduce the rate of return for investors in the Project and impair FutureGen's ability to attract necessary debt and equity capital to the Project. FutureGen insists that the Commission's Final Order in Docket No. 12-0544 expressly approved the Sourcing Agreement, including FutureGen's approach to calculating the LFCCR, which was contained therein. FutureGen believes the Commission's approval of the Sourcing Agreement cannot be equated to an open-ended invitation for parties to continue pressing changes to the Sourcing Agreement, especially given FutureGen's willingness to negotiate and modify the Sourcing Agreement during the Phase 1 proceedings. FutureGen asserts that only changes resulting from the Final Order should be applied to the LFCCR methodology. FutureGen says the reduction of the term of the Sourcing Agreement to 20 years shortens the capital recovery period and is an appropriate, and the only required, change to the LFCCR methodology. FutureGen says this change is already reflected in the LFCCR calculation provided with the Sourcing Agreement filed with the Commission on March 8, 2013. (FutureGen Response Comments at 9-10, Reply Comments at 6, BOE at 9-11, Exceptions at 4)

It is FutureGen's position that even assuming, *arguendo*, that the Final Order did not approve the LFCCR methodology proposed by FutureGen, Staff's LFCCR proposal is not acceptable or appropriate without modification to correct certain errors and

inappropriate assumptions. FutureGen claims its proposed LFCCR methodology is based on a methodology published by the Electric Power Research Institute ("EPRI"). FutureGen asserts that the key difference between FutureGen's approach and Staff's approach is that FutureGen proposes levelized principal payments, whereas Staff proposes amortizing loan payments with a fixed total principal and interest payment (i.e., a mortgage style amortization). FutureGen believes that its approach reasonably anticipates what lenders will expect, and represents a reduction in risk to the lenders for the Project over time which is consistent with other project financing in the industry. FutureGen argues that in order to provide greater flexibility to support the actual financing that may be achieved by FutureGen, annual debt service payments in the LFCCR calculation should reflect levelized principal payments. (FutureGen Response Comments at 10-11)

FutureGen states that Staff has proposed a monthly repayment schedule, as opposed to the annual repayment structure in FutureGen's Sourcing Agreement. FutureGen contends that such monthly repayment structures are more appropriate where there is specific advance knowledge of actual monthly cash flows, and certainty around the financing structure. FutureGen claims cash flows for LFCCR calculations are generally not modeled on a monthly basis unless there exists specific knowledge of the actual monthly cash flows, including debt service that the Project will incur. Because these prerequisite conditions and knowledge do not exist in the context of this Project, and because an annual cash flow model minimizes the impact of intra-year cash flow scheduling on the long-term results, FutureGen recommends an annual cash flow model. (*Id*. at 11, Reply Comments at 5-6)

Finally, FutureGen believes there is an error with respect to Staff's calculation of depreciation in year 20 of the Sourcing Agreement. FutureGen initially asserted that if left uncorrected, this error would "inappropriately diminish FutureGen's LFCCR; however, FutureGen has withdrawn this assertion. (FutureGen BOE at 19, Exceptions at 7) FutureGen concludes that using Staff's proposed methodology as modified to correct for the use of an annual methodology, levelized principal payments, and the depreciation calculation error, the FutureGen Alliance should appropriately realize an LFCCR of 12.450%. FutureGen recommends that if Staff's methodology is deemed appropriate, it should be corrected to produce an LFCCR of 12.450%. (FutureGen Response Comments at 11)

In its BOE, FutureGen argues that the Proposed Order errs by "suggesting that" actual assumptions underlying the LFCCR remain open until actual financing. (FutureGen BOE at 12-13, Exceptions at 6-7) FutureGen also claims that the Proposed Order's assumptions about Project revenue and distributions do not account for the fundamental differences between a typical utility project and a special purpose project-financed asset. (FutureGen BOE at 13-14, Exceptions at 5-6)

FutureGen argues that the Proposed Order, in adopting Staff's proposals, "would otherwise produce project economics that are not commensurate with market requirements," would "significantly reduce[ ] the LFCR," and would undermine the long-

term certainty required by investors as to return of and on their capital investments. (FutureGen BOE at 4-5, 11)

In its RBOE, FutureGen contends that "Staff's request for clarification as to the [LFCCR] should be rejected and the [LFCCR] methodology should remain as it was presented in the Sourcing Agreement as approved by the Commission in its final Order" in Docket No. 12-0544. FutureGen argues that to now adopt elements of Staff's proposal on the LFCCR methodology would render the Commission's previous determinations of the return on equity and debt to equity ratio meaningless. (FutureGen RBOE at 4)

In FutureGen's view, Staff's BOE illustrates a major problem with "departing from the LFCCR calculation in the approved Sourcing Agreement." FutureGen says that while the Proposed Order largely adopted Staff's proposal, it did not adopt Staff's approach in full, but instead used a "quarterly" methodology based on an unsupported assertion of when FutureGen will likely make payments to equity investors. FutureGen complains that in its BOE, Staff would like to extend the Proposed Order so that cash flows to debt investors are also presumed to be quarterly. FutureGen insists these cash flow timing assumptions are inappropriate for the Project for reasons detailed in its BOE and prior filings. (*Id*. at 4-5, FutureGen BOE at 13-14)

FutureGen claims there are multiple variables in the LFCCR calculation that can theoretically be modified in multiple ways, depending on one's view of how the Project ought to be financed. FutureGen argues that its LFCCR methodology, including the resulting LFCCR, has already been reviewed by the Commission. (FutureGen RBOE at 3-5)

FutureGen contends that leaving variables open until post-financing would eliminate FutureGen's ability to present a straightforward understanding of the fixed project payment to the financing markets. FutureGen submits that the appropriate outcome is to "retain" the LFCCR calculation methodology submitted with the Sourcing Agreement (as modified to reflect the 20-year term and certain changes in Illinois corporate tax rates as described in the FutureGen BOE at 7). (FutureGen RBOE at 5-6)

C. Other Issues Relating to Cost of Debt

In its Initial Comments, Staff states that while FutureGen's Revised Sourcing Agreement addresses the issue of the cost of debt capital and acknowledges that the cost of debt including the interest rate is subject to Commission approval, Staff recommends adding clarifying language to Section 5.2(b) of the Sourcing Agreement. The purpose is to make clear that the Commission has authority to ensure a Commission-approved interest rate for use in the levelized fixed carrying charge rate is suitable for ratemaking purposes given the previously approved capital structure and return on common equity for the Project.

Staff states that its proposed language recognizes that in light of the Commission's Order in Docket No. 12-0544, the following issues are not subject to further review by the Commission: capital structure consisting of 55% debt and 45% equity, a rate of return on common equity of 10%, and a capital recovery period of 20 years. (Staff Initial Comments at 5-6)

The language change to Section 5.2(b) as proposed by Staff is 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.

FutureGen opposed these revisions. According to FutureGen, "In addition to being unnecessary (insofar as the current language allows the Commission to apply whatever standard it determines is appropriate, including prudence and reasonableness), this language would inject confusion into the Commission's review of the cost of debt capital." (FutureGen Response Comments at 7-8, Reply Comments at 9)

In particular, FutureGen argues, Staff's proposed language seems to suggest that the prudence and reasonableness of the cost of debt capital for the Project could be reviewed repeatedly during the term, perhaps along with the annual review of other components of the formula rate. However, FutureGen "is soliciting investments that will last for the 20-year term of the Sourcing Agreement, and consequently the cost of debt capital will be set at the start of the agreement and approved by the Commission." (FutureGen Response Comments at 7-8)

In its Reply Comments, Staff states that FutureGen appears to have misunderstood at least in part the intent of the proposed language changes Staff recommended to Section 5.2(b) of the Revised Sourcing Agreement in its Initial Comments. Staff says FutureGen apparently believes the intent of Staff's language was to subject the cost of debt capital to repeated reviews for prudence and reasonableness. Staff states that this was not the intent of Staff's language. Staff's position is that once the cost of debt capital is approved by the Commission in a subsequent proceeding for use in the LFCCR, it will remain unchanged for the duration of the contract. Staff also points out that there is no language in Section 5.2(b) which permits updates to the cost of debt capital. To address the FutureGen Alliance's concern about potential repeated reviews of prudence and reasonableness of the cost of debt capital, Staff recommends that the Final Order be clear that once the cost of

debt capital is determined by the Commission in a subsequent proceeding, it is not subject to subsequent repeated reviews for reasonableness and prudence. (Staff Reply Comments at 5)

According to Staff, FutureGen's other concern with Staff's language is the use of the terms prudence and reasonableness. Staff says FutureGen argues that use of the terms prudence and reasonableness is unnecessary and that the current language allows the Commission to use prudence and reasonableness as a standard to approve the cost of debt capital if it so chooses. Staff believes the Commission should reject FutureGen's argument on this issue. Staff argues that its language leaves no doubt that the standard to be applied to its review of the cost of debt capital. Staff contends that FutureGen's language fails to provide the same level of specificity. Staff insists it is within the Commission's discretion to subject all costs including cost of debt capital to a prudence and reasonableness review. (*Id*. at 5-6)

D. Commission Analysis and Conclusions

As explained by Staff, the FutureGen Sourcing Agreement contains a provision that permits recovery of and on capital expenditures by FutureGen 2.0, along with the associated income taxes, through a Fixed Project Payment. The main component of this monthly payment consists of total capital costs (expressed in dollars) times a Levelized Fixed Carrying Charge Rate (expressed as a percentage per year) divided by 12 (months per year). For every dollar of investment, the LFCCR would reflect the charge that would be used to recover loan principle and interest, an approved after-tax return on equity capital, and income taxes on that return, taking into account the effect of actual accelerated tax depreciation on taxable income. (Staff Initial Comments at 8)

In the current proceeding, FutureGen claims that in its Order in Docket No. 12-0544, the Commission expressly approved the Sourcing Agreement, including the FutureGen approach to calculating the LFCCR.

In calculating the LFCCR, the Commission has previously approved and hereby affirms the use of a capital structure containing 55% debt and 45% common equity.

Additionally, the Commission previously approved a return on common equity of 10%. In Staff's view, FutureGen's LFCCR analysis produces a return on common equity in excess of 10%.

As noted above, no Party disputes that the Commission expressly approved the requested return on common equity and capital structure in its Order in Docket No. 12-0544. FutureGen states that it developed and requested those two parameters based on its own proposed calculation of the LFCCR, which FutureGen placed into the record in Docket No. 12-0544 and in this proceeding. The Commission's approval of return on common equity and capital structure is thus also based on the LFCCR as proposed by FutureGen. To conclude otherwise would render the Commission's approval of return on common equity and capital structure meaningless.

FutureGen and Staff each argue that their respective method for calculating the LFCCR is superior. It appears to the Commission, however, that the disagreements between FutureGen and Staff are primarily over certain inputs to or assumptions underlying the calculation of the LFCCR -- particularly those relating to the calculation of the timing of cash flows to equity and debt holders, or from the utility buyers to FutureGen -- rather than over the method for calculating the LFCCR.

Staff observes that the computation of the LFCCR depends, in part, on whether the approved 10% return on equity is a nominal rate or an effective annual rate, and that the Order in Docket No. 12-0544 did not specify whether the 10% return was intended to be the effective annual return with quarterly, monthly or daily compounding of cash flows, or the nominal annual return. Staff recommends that the Commission specify that the approved return on equity of 10% is the effective annual rate. The Commission notes that Staff's current proposal reflects the correction of an error in calculation of depreciation that was identified in FutureGen's Response Comments.

FutureGen does not agree with Staff's proposal. Based on FutureGen's advocacy for the use of annual cash flows in the LFCCR calculation, FutureGen is of the opinion that the Commission approved or should approve a nominal 10% return on equity. Among other things, FutureGen argues that modeling annual cash flows, rather than more frequent cash flows, is preferable when the timing of cash flows to investors is uncertain.

With respect to the issue in dispute, the Commission is fully aware that the timing of cash flows impacts the value of those cash flows and should be considered in determining an appropriate rate of return. The Commission routinely faces and addresses this issue in utility rate proceedings. The Proposed Order found that in order to provide an opportunity to FutureGen equity investors to earn a 10% rate of return, it is necessary to recognize the likely timing of cash flows they will receive from FutureGen. It concluded that to provide an opportunity to FutureGen's equity investors to earn an effective annual return of 10%, assuming quarterly dividends, FutureGen's nominal authorized annual return on equity is 9.65%. As indicated above, in their BOEs, FutureGen and Staff expressed concerns with aspects of this analysis.

In its BOE, FutureGen argued, among other things, that it may not be able to pay dividends on a quarterly basis and it maintained that the LFCCR methodology should reflect annual cash flows. While Staff did not take exception to the use of quarterly cash flows in the LFCCR calculation, it did assert that the fact that entities distribute dividends to equity investors on a quarterly basis should not be relied upon in support of the quarterly approach. Staff suggests that the purpose of this proceeding is to calculate the periodic payments from the utility buyers, ComEd and Ameren, to FutureGen.

As the Commission understands it, most investor owned utilities distribute dividends to equity investors on a quarterly basis, rather than annually. However, any resolution of the LFCCR calculation must take account of the fact that there are

significant factual differences between the operations and financing of an established utility and those of a special purpose entity like FutureGen. For example, while assumptions about quarterly distributions may be common and appropriate for investor owed utilities, they are not appropriate for a project-financed single-project entity like FutureGen, the Party to the Sourcing Agreement. Unlike a public utility, FutureGen will neither have a lengthy credit and revenue history, nor a balance sheet containing diversified assets. Instead, the principal security for repayment of equity and debt will be the Sourcing Agreement itself. Consequently, lenders will likely impose cash flow and distribution restrictions on the Project that protect the long-term interests of lenders and affect cash flows to equity investors, which could very well include limiting distributions to an annual basis.

In conclusion, upon consideration of the two competing proposals of record advanced by Staff and FutureGen, the Commission finds that annual cash flows to equity investors is the more reasonable assumption and will provide FutureGen and its equity investors with a high degree of certainty regarding the potential return on investment, particularly where, as here, the rate of return on equity is established at an early point in the process..

The Commission next observes that the value for the LFCCR also depends upon the Commission's approval of the cost of debt, which will not occur in this proceeding. Section 5.2(b) of the proposed Sourcing Agreement currently provides in part that the cost of debt capital including the interest rate Seller will pay, which will be used in the calculation of the Levelized Fixed Carrying Charge Rate, "is subject to Commission approval."

Both Staff and FutureGen seem to recognize that the actual cost of debt depends on the structure and terms of the debt instrument issued as well as the interest rate on the debt instrument. Among other things, FutureGen believes the LFCCR methodology should reflect levelized principal payments rather than fixed total principal and interest payments as Staff recommends. FutureGen argues that its assumptions regarding these factors should be adopted in this proceeding for purposes of calculating the LFCCR. While Staff seems to believe its assumptions are superior to those advocated by FutureGen, its Reply Comments also suggest that the uncertainty associated with assumptions, such as the timing and level of principle payments, may be mitigated by waiting until the debt is actually issued to determine these terms.

Again, the Commission routinely determines the actual cost of debt in utility rate cases. The Commission is aware that the actual cost of debt depends not only on the interest rate associated with the debt instrument, but also the structure and terms of the debt instrument. Staff and FutureGen appear to agree that the Commission's approval of the cost of debt used in calculating the LFCCR will occur subsequent to this proceeding. However, for purposes of establishing the initial LFCCR, the Commission approves the assumptions FutureGen used in calculating the LFCCR, with only the actual cost of debt to be revised, if necessary.

Based on FutureGen's actual debt issuance, FutureGen may initiate a subsequent proceeding at the Commission. At that time, the Commission will approve FutureGen's cost of debt reflecting all relevant factors that impact the cost of debt. The Commission does clarify at this time that in computing the LFCCR, the cost of debt to be approved in a subsequent forum will be approved by the Commission only once and will not be updated periodically.

As indicated above, Staff also proposes that language in Section 5.2(b) providing that the cost of debt capital "will be subject to Commission approval" be revised to read "will be subject to a determination of prudence and reasonableness by the Commission." Although FutureGen opposes the language change proposed by Staff, FutureGen acknowledges that the current language is intended to allow the Commission to apply whatever standard it determines is appropriate, including prudence and reasonableness.

The Commission finds that the prudence and reasonableness standard is appropriate for making the determination with respect to the cost of debt capital. In its RBOE, FutureGen indicates that Section 5.2(b) of the revised Sourcing Agreement dated May 22, 2013 has been modified to incorporate the language modifications proposed by Staff. These modifications are identified on page 6 of Staff's Initial Comments and in this Order above, and they are approved.

In conclusion, the Commission approves an LFCCR methodology proposed and used by FutureGen.

V. ANNUAL AUDITS AND RECONCILIATIONS

The comments of the Parties are summarized below. The Commission notes that no exceptions to the Proposed Order were filed on these issues.

A. Staff's Position

In addition to the "sourcing agreement addressing reconciliations and audits, Staff recommends that the Commission include in its Order language imposing detailed requirements on FutureGen 2.0 related to the annual audits and annual reconciliations." Staff proposes that FutureGen be required to annually certify in either an internal audit report or an outside auditor's report that the costs that it proposes to be included in the Contract Price Adjustment ("CPA") reconciliation are in compliance with the Sourcing Agreement in all material respects, and that the costs that it proposes to recover have been reasonably and prudently incurred. (Staff Initial Comments at 7)

Staff suggests that the audit report be filed with the Chief Clerk on the Commission's e-Docket system, with a copy to the Commission's Manager of the Accounting Department, no later than the date of the reconciliation of CPA statement. Staff also suggests that work papers from such audits be made available to the Commission and its Staff. Staff says the audit would be used as a tool to aid Staff in its

review of the annual reconciliation of revenues with costs. In Staff's view, the audit report would provide a level of assurance that FutureGen is in compliance with the Sourcing Agreement or, in the alternative, would aid in the discovery of errors and recommended adjustments. (*Id*. at 6-7)

Staff also recommends that the Commission require FutureGen to file annually, no later than 120 days before the beginning of each Contract Year, a petition and supporting testimony, requesting approval of an annual reconciliation of revenues with costs included in the CPA. Staff believes FutureGen should be required to include with its petition a statement of costs with the Commission that identifies and provides calculations of each component of the CPA as defined in section 5.2(d)(i)-(x) of the March 8, 2013 FutureGen Alliance Revised Sourcing Agreement. Staff recommends that the Commission utilize such reconciliation proceedings to determine whether the reported revenues and costs are adequately supported by proper documentation, in conformity with generally accepted accounting practices, and consistent with the sourcing agreement are reasonably and prudently incurred. Staff suggests that costs not adequately supported by proper documentation or reasonably and prudently incurred should be disallowed, errors should be corrected, and any needed refunds or surcharges should be identified through the proceeding. (*Id*. at 7-8)

In its Response Comments, Staff indicates that FutureGen believes the issue of audits and reconciliations has been resolved through the workshop process. FutureGen further indicates that at the request of Parties made at the workshop, it added clarifying language to the Sourcing Agreement at Section 5.2(a) on the audit issue and that Section 5.2(d)(ix) already addressed the reconciliation issue. Staff says FutureGen also pointed out that the Sourcing Agreement was modified to include a reference to a Commission "Ordered Reconciliation Factor." Such a factor would come about from the result of reconciliation proceedings. Staff says FutureGen concludes on both issues that no further prescription of reconciliation procedures or audits in the Sourcing Agreement is necessary. Staff agrees but points out that its Initial Comments addressed certain issues related to the annual audits and reconciliations which it requested that the Commission order FutureGen to do. Staff assumed that the proposals made in its comments are agreeable to FutureGen but, in the event that they were not, Staff said it would respond accordingly in its Reply Comments. With that understanding, Staff stated its belief that the issue of annual audits and reconciliations is resolved and uncontested. (Staff Response Comments at 9-10)

In its Reply Comments, Staff states that based upon a review of FutureGen's Response Comments, it now appears to Staff that this is a contested issue at least with respect to a prudence review of costs. Staff says when addressing the issue of Staff's proposal for Audit and Reconciliation Procedures, FutureGen argues that "prudency" cannot be applied to FutureGen's costs. Since the FutureGen Alliance agreed to the inclusion in the Sourcing Agreement the following language -- "costs, revenues, and credits underlying the Contract Price Components may be subject to periodic audit and review for prudence and reasonableness, in a manner to be determined by the Commission" -- Staff assumed FutureGen took no issue with FutureGen's costs being

subject to a prudence and reasonableness review. (Staff Reply Comments at 12-13, citing FutureGen Initial Comments at 5) Staff says FutureGen now argues, however, in its Response Comments, that the IPA Act does not prescribe a prudence review.

In Staff's view, while not specifically required by the IPA Act, the IPA Act does provide the Commission with the discretion to subject FutureGen's costs to a prudence review. Staff says that with respect to the initial clean coal facility, Section 1-75(d)(3)(D)(vii) requires that the Commission review the justness, reasonableness and prudence of the cost inputs. Staff acknowledges that FutureGen is not the initial clean coal facility and therefore, Section 1-75(d)(3)(D)(vii) is not a mandatory requirement on FutureGen; however, Staff also has stated in its prior filings in Docket No. 12-0544 that the Commission has the authority to impose such a prudence review requirement on FutureGen's costs consistent with Section 1-75(d)(6) of the IPA Act. (Staff Reply Comments at 13)

It is Staff's position that the Commission can impose a prudence and reasonableness review requirement, if the Commission finds such a contractual requirement is necessary to ensure that the costs incurred under the sourcing agreement are prudently incurred and reasonable in amount. Staff requests that the Commission make a finding in this proceeding that the costs of FutureGen are subject to a yearly justness, reasonableness and prudence review, consistent with Section 1-75(d)(6) of the IPA Act, with the exception of the following items: capital structure (55% Debt and 45% Equity with a 20-year capital recovery period) and return on common equity (10%), which Staff says have already been determined by the Commission to be reasonable, and cost of debt capital including the interest rate, which will be subject to a one-time determination of prudence and reasonableness by the Commission. (*Id*. at 13-14, citing Docket No. 12-0544, Order at 233)

Staff finds FutureGen's objection to a prudence review to be surprising given that prudence review language is contained in the revised Sourcing Agreement. Despite that language appearing in the Sourcing Agreement, Staff says FutureGen argues that the IPA Act does not prescribe such a standard and instead allows the Commission to determine how to implement the pass-through of costs envisioned in the IPA Act. Staff believes the Commission should reject the FutureGen's claim since the IPA Act does allow the Commission to impose a prudence review of the costs. Staff claims FutureGen fails to recognize that the Commission has the authority to impose such a prudence review under Section 1-75(d)(6) of the IPA Act. (*Id*. at 14-16)

Staff asserts that its position is consistent with the arguments and comments Staff made in Docket No. 12-0544. Staff took this same position (that the Commission can impose a requirement if its necessary to ensure that costs are prudent and reasonable) in its Response and Objections to the IPA's Procurement Plan Filed September 28, 2012 in Docket No. 12-0544. In Staff's view, the Commission should reject FutureGen's arguments that the costs are not subject to a prudence review and should include specific language in its order language regarding audits and annual reconciliation proceedings to that effect. (*Id*. at 16-17)

B. FutureGen's Position

FutureGen notes that Staff stated in its Initial Comments that it approves of the language related to audits and reconciliations added to the Sourcing Agreement through the workshop process. FutureGen says Staff also proposed that the Final Order in this proceeding contain language specifying certain mechanics for the annual review and reconciliation process envisioned in the Sourcing Agreement. FutureGen indicates it has no objection to Staff's proposed procedures, or to ordering language prescribing such procedures. However, FutureGen "does not join Staff in specifically requesting that the Commission review FutureGen's costs under a 'prudency' standard, insofar as the IPA Act does not prescribe such a standard and instead allows the Commission to determine how to implement the pass-through of costs envisioned in the IPA Act." (FutureGen Response Comments at 13)

C. CES' Position

Staff advocates that the FutureGen Project should be subject to annual audits and annual reconciliation proceedings. CES agrees with Staff's suggestion for annual Commission oversight and review proceedings. (CES Response Comments at 3, Reply Comments at 2)

CES argues that as a demonstration project that will be funded by Illinois consumers as well as public dollars, it is particularly appropriate that the Commission maintain appropriate continuing oversight. CES believes it would be counterintuitive to suggest that this multi-billion demonstration for the world would not be closely monitored by the Commission, its Staff, and interested parties in Commission proceedings. Accordingly, CES supports Staff's suggestion for annual audits and annual reconciliation proceedings for the FutureGen Project. (CES Response Comments at 3-4)

D. Commission Analysis and Conclusions

On page 13 of its Response Comments, FutureGen states that "Staff proposed that the final order in this proceeding contain language specifying certain mechanics for the annual review and reconciliation process envisioned in the Sourcing Agreement." FutureGen "has no objection to Staff's proposed procedures, or to ordering language prescribing such procedures."

However, FutureGen "does not join Staff in specifically requesting that the Commission review FutureGen's costs under a 'prudency' standard, insofar as the IPA Act does not prescribe such a standard and instead allows the Commission to determine how to implement the pass-through of costs envisioned in the IPA Act."

The Commission observes that Section 5.2(a) of the Sourcing Agreement proposed by FutureGen provides, in part, "The Parties further acknowledge that the costs, revenues and credits underlying the Contract Price Components may be subject

to periodic audit and review for prudence and reasonableness, in a manner to be determined by the Commission." As such, the question of whether or not the IPA Act would otherwise require such a standard is not before the Commission. The Commission also notes that in its Reply Comments, page 17, FutureGen states that it "no longer takes issue with Staff's proposed language."

The Commission finds that the above-referenced mechanics and procedures for the annual review and reconciliation process envisioned in the Sourcing Agreement, as recommended by Staff, are approved. The Commission also determines that the process shall include a review for prudence and reasonableness, unless otherwise ordered by the Commission in its Orders initiating the reconciliation proceedings.

VI. PRE-APPROVED TOTAL CAPITAL COSTS

On page 234 of its Order in Docket No. 12-0544, the Commission identified some of the issues to be considered in the Phase 2 proceeding. One of those issues was pre-approved total capital costs.

In the current docket, FutureGen submitted confidential and non-confidential versions of its updated Project Cost and Ratepayer Impact Analysis ("Updated Cost Report"), which contain its Pre-approved Total Capital Costs request, on February 19, 2013.

FutureGen "submits that the Commission should accept the Cost Report and approve the amount of Pre-approved Total Capital Costs therein, for use in calculating the initial rate under the Sourcing Agreement." (FutureGen Initial Comments at 4, Response Comments at 8-9)

According to Staff, while the November 21, 2012 Sourcing Agreement described a procedure for determining "Pre-approved total capital costs," the Commission Order in Docket No. 12-0544 indicated that Pre-approved total capital costs was an issue to be resolved in this Phase 2 proceeding. (Staff Initial Comments at 18-19)

Thereafter, the above-mentioned procedure was eliminated by FutureGen and replaced by the "simple statement" in Section 5.2(c) of the Sourcing Agreement: "Pursuant to the Commission's December 19, 2012 final order in Docket No. 12-0544, the Pre-approved Total Capital Costs are [$____], as approved by the Commission in its Order of [DATE] in Docket No. 13-0034." Staff agrees that this is an appropriate modification. (*Id.*)

In the Updated Cost Report, FutureGen identifies the "net" capital cost for the plant after crediting to capital costs the DOE funding and other non-federal cash contributions. This "net" capital cost is the amount of pre-approved capital costs that FutureGen 2.0 is requesting the Commission approve in this Phase 2 proceeding. The same report compares this net capital cost to the net capital cost estimate that was included in an October 2012 cost report from the FutureGen Alliance. Staff compares

these estimates to the much lower net capital cost estimate contained in a June 2012 FutureGen cost report. The dollar amounts were treated by FutureGen, and in turn by Staff, as confidential. (*Id*.)

According to Staff, while it would like to be able to independently verify that the current estimate is a reasonable net capital cost estimate, or that the earlier estimates were reasonable, Staff does not have the resources to do so. Therefore, "Staff neither supports nor opposes the figures" presented by FutureGen. (*Id*.)

The Commission has reviewed the Comments filed in this proceeding. FutureGen "submits that the Commission should accept the Cost Report and approve the amount of Pre-approved Total Capital Costs therein, for use in calculating the initial rate under the Sourcing Agreement."

As noted by Staff, Section 5.2(c) of the proposed Sourcing Agreement filed by FutureGen on November 19, 2012 in Docket No. 12-0544 set out a four-step process for determining the amount of pre-approved total capital costs to be included in the fixed project payment of the formula rate. The Commission observes that its Order in Docket No. 12-0544 did not preclude the use of such a process. Rather, the Commission simply ordered that pre-approved total capital costs be "addressed" in Phase 2; the Commission did not require that such costs actually be approved in Phase 2.

Nevertheless, neither FutureGen nor any other party has proposed such a process in the instant docket. Instead, FutureGen has replaced it with what Staff characterizes as a "simple statement" identified above. Further, while questions have been raised with regard to the current estimates for Pre-approved Total Capital Costs, no party has objected to FutureGen's proposal on this issue.

There being no competing proposals or modifications to FutureGen's proposal in the current record for the Commission to evaluate, the Commission finds that the Pre-approved Total Capital Costs identified in the above-referenced cost report should be and are hereby approved for use in calculating the initial rate under the Sourcing Agreement.

VII. ELEMENTS REQUIRED UNDER SECTION 1-75(D)(3) OF THE IPA ACT

Pursuant to the Commission's Order in Docket No. 12-0544, one of the issues to be addressed in Phase 2 is "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 comments of the Parties are summarized below. No exceptions to the Proposed Order were filed with respect to this issue.

According to Staff, the issue is which of the Sourcing Agreement provisions specified in Section 1-75(d)(3) of the IPA Act should be considered mandatory for a Sourcing Agreement with FutureGen, which is not the initial clean coal facility. In its Initial Comments, Staff indicated there is no need for the Commission to resolve this

issue definitively within this proceeding, as long as there are no parties contesting, based on Section 1-75(d)(3) of the IPA Act, the inclusion or exclusion of any terms and conditions of the FutureGen Sourcing Agreement. (Staff Initial Comments at 21-22) In its Reply Comments, pages 12-14, Staff expresses a concern relative to Section 1-75(d)(3) elements due to FutureGen's position on Staff's proposed use of a prudence review in the context of audit and reconciliation procedures.

In its Response Comments, FutureGen states that while it does not rely on the absence of opposition by other parties, it does agree with Staff that no parties have raised issues concerning the Sourcing Agreement's compliance with Section 1-75(d)(3). (FutureGen Response Comments at 12) In its Reply Comments, FutureGen submits that there is no call for a "dicta ruling" on the "theoretical question" of which elements of Section 1-75(d)(3) apply to a clean coal facility other than the Initial Clean Coal Facility. FutureGen also states that it no longer takes issue with Staff's proposed language regarding audit and reconciliation procedures. (FutureGen Reply Comments at 16-17)

Having reviewed the filings, as well as the conclusions reached elsewhere in this Order regarding use of the prudency standard, the Commission finds that no further findings need to be made in this Order on the issue of which elements of Section 1-75(d)(3) of the IPA Act should be considered mandatory for a sourcing agreement with a clean coal facility other than the initial clean coal facility.

VIII. ENVIRONMENTAL ATTRIBUTES

A. ComEd's Position

ComEd avers that discussions concerning Section 6.6(d) of the Sourcing Agreement have revealed inconsistent views of the meaning of certain language in the IPA Act concerning the retirement of emission credits and the sale of emission allowances. In particular, ComEd "requests that the Commission expressly determine whether a utility party to a sourcing agreement with a clean coal facility is required to receive and retire any or all emission credits generated by the clean coal facility in connection with the electricity covered by such agreement." ComEd is concerned that absent such a determination, "arguable ambiguities will persist that could lead to inconsistent results and needless disputes." At a minimum, ComEd believes the Sourcing Agreement must be written consistently with the Commission's determination of this issue. (ComEd Initial Comments at 3)

According to ComEd, should the Commission determine that a utility party is not required to receive and retire any emission credits generated by the clean coal facility in connection with the electricity covered by the Sourcing Agreement, the existing language in Section 6.6(d) and Section 1-1 of the Sourcing Agreement need not be revised. Conversely, "if the Commission determines that a utility party is required to both receive and retire or, any specific type of, emission credits generated by the clean coal facility in connection with the electricity covered by the Sourcing Agreement,

then ComEd believes the agreement must be revised to require the delivery of such emission credits to the utility for retirement." (*Id*. at 3-5)

ComEd states that Section 1-75(d)(1)(A) of the IPA Act provides that "a utility party to a sourcing agreement shall immediately retire any emission credits that it receives in connection with the electricity covered by such agreement." ComEd asserts that Section 1-75(d)(1)(A) is a general requirement not specifically identified as an obligation related to the initial clean coal facility as defined in the IPA Act. ComEd indicates that Section 1-75(d)(3)(D)(v) further provides that "any carbon emission credits associated with sequestration of carbon from the facility must be permanently retired." ComEd adds that at the same time, Section 1-75(d)(3)(A)(ii), which appears to ComEd intended to be a catch-all clause, provides "that all miscellaneous net revenue, including but not limited to net revenue from the sale of emission allowances, if any, shall be credited against the revenue requirement for this initial clean coal facility ." (*Id*. at 5, emphasis added by ComEd)

ComEd contends that read together, these provisions are intended to require electric utilities to receive and retire carbon emission credits associated with the Sourcing Agreement. ComEd suggests that intention is also consistent with the gist of the clean coal provisions of the IPA Act as a whole, which focuses on capturing and sequestering carbon emissions from clean coal facilities. ComEd notes that the definition of a clean coal facility in the IPA Act is "an electric generating facility that uses primarily coal as a feedstock and that captures and sequesters carbon dioxide emissions at [certain specified] levels ." (emphasis added by ComEd) ComEd insists that it would be contrary to the overarching intent of the Legislature in establishing a clean coal portfolio standard tied to sequestration to not require the delivery and retirement of any credits associated with the requirement to capture and sequester carbon dioxide emissions that Illinois customers will be funding. (*Id*. at 5-6)

ComEd also asserts that Section 1-75(d)(3)(A)(ii) of the IPA Act itself contemplates the retirement of emission allowances, providing that the net revenue from the sale of emission allowance, if any remain, offset the revenue requirement. ComEd claims that in contrast, interpreting this provision as a mandatory requirement that the proceeds from all allowances offset the revenue requirement both reads that clause out of the law and contravenes the more specific provisions of Sections 1-75(d)(1)(A) and 1-75(d)(3)(D)(v). For these reasons, ComEd believes that the IPA Act requires a utility party to a sourcing agreement to receive and retire carbon emission credits associated with the electricity it receives under a sourcing agreement. (*Id*. at 6)

As for other emission allowances, ComEd indicates the definition of a clean coal facility provides that "[t]he power block of the clean coal facility shall not exceed allowable emission rates for sulfur dioxide, nitrogen oxides, carbon monoxide, particulates and mercury for a natural gas-fired combined-cycle facility the same size as and in the same location as the clean coal facility at the time the clean coal facility obtains an approved air permit." ComEd says this language sets minimum requirements based on allowable emission rates for non-clean coal facilities, and does

not prohibit a clean coal facility from installing equipment to generate greater emission reductions. ComEd also asserts that other emission reductions or limitations are not further tied to the clean coal facility standard or the definition of a clean coal facility, and are not otherwise required under the IPA Act. Accordingly, ComEd does not dispute that non-carbon emission credits and allowances can and should be sold by FutureGen to offset costs under the Sourcing Agreement. *(Id*. at 6)

ComEd states that in contrast to the law's distinction between carbon and non-carbon credits, Section 6.6(d) of the Sourcing Agreement, as proposed by FutureGen, is consistent only with the general obligation under subsection (d)(3)(A)(ii) to generate miscellaneous revenue and to credit that revenue against the costs to be paid under the Sourcing Agreement. ComEd says the Sourcing Agreement contains no provisions addressing the automatic delivery to the utility parties of emission credits in general or carbon emission credits associated with the facility in particular. If the Commission determines that a utility party to a sourcing agreement is not required to receive and retire emission credits or carbon emission credits, then ComEd believes no changes need to be made to the Sourcing Agreement. However, if the Commission determines that a utility party to a sourcing agreement is required to receive and retire emission credits or carbon emission credits, ComEd insists changes must be made. (ComEd Initial Comments at 7)

ComEd suggests:

- The Sourcing Agreement be modified to require FutureGen to deliver to the utility parties, consistent with the Commission's determination, either the emission credits or the carbon emission credits associated with electricity delivered to the utility party under the Sourcing Agreement.
- Section 6.6(d) of the Sourcing Agreement be modified to include as a prohibition and an additional exception to FutureGen's obligation to undertake sale efforts, consistent with the Commission's determination, either the emission credits or the carbon emission credits associated with electricity delivered to the utility party under the Sourcing Agreement that Seller is obligated to deliver to Buyer (e.g., by adding as an additional exception the following: "Seller's obligation to sell Environmental Attributes shall not apply to carbon emission credits associated with sequestration of carbon from the facility, which credits shall be delivered to Buyer.").

In any event, ComEd requests a specific Commission ruling on the scope of its obligation under the IPA Act to receive and retire emission credits in general and carbon emission credits in particular. ComEd believes a lack of clarity is in no one's interest. (*Id*. at 8)

In its Reply Comments, ComEd indicates that it disagrees with FutureGen's assertion that the Sourcing Agreement is flexibly structured, and with no modification necessary, will enable the parties to comply with any Commission determination as to Environmental Attribute obligations. Should the Commission determine that a utility

party is not required to receive and retire any emission credits generated by the clean coal facility in connection with the electricity covered by the Sourcing Agreement, then ComEd agrees that the language need not be revised. (ComEd Reply Comments at 3-5)

ComEd argues, however, that if the Commission determines that a utility party is required to both receive and retire emission credits generated by the clean coal facility in connection with the electricity covered by the Sourcing Agreement, then the agreement is vague and must be revised to require the delivery of such credits to the utility for retirement. If the Commission determines that a utility party is required to receive and retire any emission credits, ComEd believes the Sourcing Agreement should not be structured to as to require the utilities to take an affirmative action to avoid a result that is inconsistent with that determination. ComEd submits that the status quo under the Sourcing Agreement with respect to emission credits must be a result that is consistent with applicable legal requirements.

According to ComEd, if the Commission determines that a utility party is required to receive and retire any emission credits, the Sourcing Agreement must be modified to: (1) clearly require FutureGen to deliver to the utility parties, consistent with the Commission's determination, either the emission credits or the carbon emission credits associated with electricity delivered to the utility party under the Sourcing Agreement; and (2) to include as a prohibition and an additional exception to FutureGen's obligation to undertake sale efforts, consistent with the Commission's determination, either the emission credits or the carbon emission credits associated with electricity delivered to the utility party under the Sourcing Agreement that Seller is obligated to deliver to Buyer (e.g., by adding as an additional exception the following: "Seller's obligation to sell Environmental Attributes shall not apply to carbon emission credits associated with sequestration of carbon from the facility, which credits shall be delivered to Buyer."). (*Id*. at 5)

ComEd indicates that while Staff states that much of ComEd's argument on this issue is persuasive, Staff notes that there are goals other than the capturing and sequestering of carbon emissions expressed in the IPA Act and concludes that ComEd's case for requiring retirement (rather than sale) of emission allowances is not quite as robust as ComEd portrays. ComEd acknowledges that there are other legislative goals expressed in the IPA Act, but ComEd's position that the clean coal provisions of the IPA Act focus on capturing and sequestering carbon emissions from clean coal facilities remains the only position textually consistent with the definition of a clean coal facility in the IPA Act. ComEd also claims the IPA Act contains an express legislative finding that the State should encourage the use of advanced clean coal technologies that capture and sequester carbon dioxide emissions to advance environmental protection goals and to demonstrate the viability of coal and coal-derived fuels in a carbon-constrained economy. ComEd submits that its position is well supported by the language of the IPA Act. (*Id*. at 6)

In its BOE, ComEd proposes, in the interest of clarity, the deletion of a reference to "emission credits" in the Proposed Order's conclusion. (ComEd BOE at 5)

In its BOE, ComEd also continued to argue that the Sourcing Agreement should be modified to specifically reflect the Commission's findings on the treatment of carbon emission environmental attributes. (*Id*. at 2-5, ComEd Exceptions at 41)

In its RBOE, ComEd concurs in the language revisions proposed in Ameren's BOE and RBOE. ComEd also indicates that FutureGen has revised the Sourcing Agreement to reflect these revisions, and that ComEd concurs in these modifications to the Sourcing Agreement. (ComEd RBOE at 1-2)

B. Ameren's Position

Ameren states that in Section 1-75(d)(1)(A) of the IPA Act, there is a suggestion that certain environmental attributes from the clean coal facility should be transferred to the electric utilities and retired by them; whereas, Section 1-75(d)(3)(A)(ii) suggests that the revenues from the sale of certain environmental attributes would offset the price set forth under the Sourcing Agreement. Ameren believes the language in Section 6.6(d) of the Sourcing Agreement allows for appropriate flexibility with respect to environmental attributes so that if a determination is made that environmental attributes should be delivered to the electric utilities, that can be done under the Sourcing Agreement; otherwise, FutureGen can sell such attributes and set off those revenues from the costs paid under the Sourcing Agreement.

Ameren says that while it has become comfortable with Section 6.6(d) of the Sourcing Agreement and the flexibility it provides with respect to environmental attributes, Ameren requests that the Commission provide "an express determination that either environmental attributes are required to be delivered to the electric utilities in order to resolve the potential ambiguity in the IPA Act or Section 6.6(d) of the Sourcing Agreement otherwise satisfied the requirements of the IPA Act ." (Ameren Initial Comments at 4-5, Reply Comments at 2)

In its BOE, Ameren proposes certain language revisions to the conclusions in the order to eliminate a purported ambiguity. (Ameren BOE at 1-3) This concern is somewhat similar to one expressed in ComEd's BOE.

In its RBOE, Ameren represents that the above-referenced revisions are acceptable to ComEd and FutureGen. Ameren also indicates that FutureGen has revised the Sourcing Agreement to reflect these revisions, and that Ameren concurs in these modifications to the Sourcing Agreement. (Ameren RBOE at 1-3)

C. FutureGen's Position

FutureGen states that according to ComEd and Ameren, because of an apparent conflict in the statutory language in IPA Act Sections 1-75(d)(1)(A) and 1-75(d)(3)(A)(ii),

it is not clear whether FutureGen should deliver Environmental Attributes (or some subset thereof) to the utilities for them to retire, or should sell them and use the proceeds to reduce the cost of power generated by the Project. While both Ameren and ComEd are satisfied with the Sourcing Agreement language to the extent that they are not legally obligated to receive and retire emissions credits, they are uncertain whether they will be obligated to receive and retire some or all such credits. If they are required to retire emissions credits (or a subset thereof), ComEd contends that revisions to the Sourcing Agreement would be needed. Ameren does not, but nevertheless also asks that the Commission clarify the treatment of Environmental Attributes. (FutureGen Response Comments at 6)

FutureGen concurs in the utilities' requests for regulatory clarity on obligations with respect to Environmental Attributes. FutureGen "agrees with Ameren" that Sourcing Agreement Section 6.6(d) is flexibly structured and, with no modification necessary, will enable the parties to comply with any Commission determination as to Environmental Attribute obligations. Further, and without waiving its ability to respond to proposals in the future, FutureGen notes that it does not currently have a substantive position on the appropriate treatment of Environmental Attributes. Nevertheless, FutureGen agrees that the Commission should resolve the uncertainty surrounding this issue, because such clarification will ensure that the Project is being administered in such a way as to satisfy the General Assembly's legislative intent, and will serve FutureGen's interest in reducing the regulatory uncertainty for its counterparties. FutureGen reiterates its belief that the Sourcing Agreement will not need to be modified to accommodate the resolution of this issue. (*Id*. at 6-7, Reply Comments at 10-11)

In its RBOE, FutureGen states that it accepts the language revisions proposed in Ameren's BOE and RBOE, and that FutureGen has given effect to those revisions in Section 6.6(d) of its revised Sourcing Agreement filed May 22, 2013.

D. The IPA's Position

With regard to environmental attributes, both Ameren and ComEd raise the issue of what environmental attributes may be sold under the IPA Act. The IPA says Ameren and ComEd's Initial Comments include descriptions of the issue and analysis of the statutory and Sourcing Agreement framework within which the Commission can decide the issue. The IPA agrees with Ameren and ComEd that a Commission ruling clarifying what FutureGen may, should, or must/must not sell is important for smooth administration of the Sourcing Agreement. The IPA says both utilities also touch on a broader issue about FutureGen selling environmental benefits attributable to FutureGen. (IPA Response Comments at 2-3)

In light of the utilities' analysis and the IPA's understanding of the issue, the IPA has no specific recommendation for how the Commission should resolve this issue. As a general principle, the IPA recommends that the Commission resolve the matter in a way that allows all parties to meet legal requirements while maximizing benefits to utility and ARES customers from sales of environmental attributes. Regardless of the

outcome, the IPA believes a definitive resolution will assist all parties and lower the risk of future disputes. (*Id*. at 3)

E. Staff's Position

According to Staff, should the Commission determine that a utility party is not required to receive and retire any emission credits generated by the clean coal facility in connection with the electricity covered by the sourcing agreement, ComEd argues persuasively that the language in the FutureGen Alliance Revised Sourcing Agreement need not be revised. Conversely, if the Commission determines that a utility party is required to both receive and retire any, or any specific type of, emission credits generated by the clean coal facility in connection with the electricity covered by a sourcing agreement, then Staff believes ComEd again argues persuasively that the agreement must be revised to require the delivery of such emission credits to the utility for retirement. (Staff Response Comments at 3)

Staff believes ComEd has provided a reasonable interpretation of the law, but not the only one. Staff submits that there is nothing in the IPA Act representing an overarching intent of the Legislature in establishing a clean coal portfolio standard, let alone an overarching intent that requires retirement of emission credits. Citing Section 1-5 of the IPA Act, Staff contends that at least one of the reasons for enacting the clean coal provisions of the IPA Act was to diversify the electric supply portfolio. Staff also claims that in Docket No. 12-0544, the Commission recognized the potential risk management benefits of the FutureGen Project. (*Id*. at 4-5)

In Staff's view, to fully take advantage of FutureGen (or any clean coal facility) as a protection against the risk of future carbon regulation and legislation and the impact of such regulation and legislation on the price of electricity for Illinois consumers, it would be necessary to sell all carbon emission allowances on the market and to credit the proceeds of such allowance sales to the facility's Illinois electricity customers. Thus, Staff suggests that ComEd's case for requiring retirement (rather than sale) of emission allowances is "not quite as robust" as ComEd portrays. (*Id*. at 5)

F. Commission Analysis and Conclusions

Environmental attributes are defined in Section 1.1, and addressed in Section 6.6(d), of the Sourcing Agreement.

Questions have been raised with regard to the treatment of emission credits in general or carbon emission credits associated with the facility in particular.

As indicated above, a number of Parties urge the Commission to "expressly determine whether a utility party to a sourcing agreement with a clean coal facility is required to receive and retire any or all emission credits generated by the clean coal facility in connection with the electricity covered by such agreement." (ComEd Initial Comments at 3)

Several of the Parties do offer suggestions on what the Commission should do after it makes the above-referenced express determination. However, upon a close review of the filings, it appears only ComEd actually advances a specific recommendation or position identifying and explaining the express determination the parties believe the Commission should make on the threshold question posed: "whether a utility party to a sourcing agreement with a clean coal facility is required to receive and retire any or all emission credits generated by the clean coal facility in connection with the electricity covered by such agreement." Although Staff raises some questions regarding ComEd's position, Staff does not make a specific recommendation on the issue and Staff does not request rejection of ComEd's recommendation, which is set forth on pages 5-7 of ComEd's Initial Comments and is summarized above.

For the reasons explained therein, ComEd's position is that "the IPA Act requires a utility party to a sourcing agreement to receive and retire carbon emission credits associated with the electricity it receives under a sourcing agreement."

Upon reviewing the record, the Commission finds that the utility parties to the FutureGen Sourcing Agreement are required to receive and retire carbon emission credits associated with the electricity they receive under the Sourcing Agreement with FutureGen, including any carbon emission credits associated with the sequestration of carbon from the facility, and that FutureGen is required to deliver to the utility parties, consistent with the Commission's determination, such carbon emission credits associated with electricity delivered to such utility party under the Sourcing Agreement.

The Commission also finds that all Environmental Attributes (other than carbon emissions credits, which shall be delivered to the utility parties as provided above and for which FutureGen shall not have an obligation to sell), including any non-carbon emission credits and allowances, can and should be sold by FutureGen to offset costs under the Sourcing Agreement.

The Commission observes that the findings above reflect the language revisions which were proposed in Ameren's BOE and were agreed to by ComEd and FutureGen in their RBOEs, and that no other Party took issue with those revisions.

ComEd also recommends that the Sourcing Agreement be modified to reflect the above findings.

FutureGen argued that these determinations can be implemented without making revisions to the Sourcing Agreement. (FutureGen Reply Comments at 11) Ameren agreed, stating that "the language in Section 6.6(d) of the Sourcing Agreement allows for appropriate flexibility with respect to environmental attributes so that if a determination is made that environmental attributes should be delivered to the electric utilities, that can be done under the Sourcing Agreement; otherwise, FutureGen can sell such attributes and set off those revenues from the costs paid under the Sourcing Agreement." (Ameren Initial Comments at 5)

In their RBOEs, however, ComEd, Ameren and FutureGen now agree that the Sourcing Agreement should be modified consistent with the conclusions above.

The Commission has reviewed the input from the Parties on this question. The Commission believes that in the interests of clarity and certainty, the Sourcing Agreement should be modified consistent with the conclusions of the Commission in this Order. Specifically, Section 6.6(d) of the Sourcing Agreement shall be amended, as proposed by ComEd, Ameren and FutureGen, as follows:

The first sentence in Section 6.6(d) shall be amended to read as follows:

> Seller shall use Commercially Reasonable Efforts to sell Capacity Attributes, Ancillary Services, Environmental Attributes, and all other attributes, products or services of the Project into the appropriate market; provided, that Seller shall deliver to Buyer any carbon emissions credits associated with the delivery of electricity and sequestration of carbon from the Project ("Carbon Emissions Credits").

After the words "Seller's obligations under this section 6.6(d) are subject to the following exceptions:," the following numbered exception shall be added:

> (i) Seller's obligation to sell Environmental Attributes shall not apply to Carbon Emissions Credits, which such Carbon Emissions Credits shall be delivered to Buyer as described above and as required by the Commission.

IX. OTHER ISSUES

A. Filing of Tariffs

1. ComEd's Position

ComEd states that while it proposes no language changes in this regard, it draws attention to several terms of the Sourcing Agreement that relate to Commission actions. According to ComEd, Section 3.1 of the Sourcing Agreement correctly makes the Commission's approval of the form of the Sourcing Agreement, and FutureGen's execution of an approved agreement with the applicable electric utilities, conditions precedent pursuant to ComEd's obligations. ComEd also states that Section 3.1 of the Sourcing Agreement makes it contingent upon the Commission having issued a "Non-appealable Final Order approving a cost recovery mechanism for [ComEd] to recover all costs from its Retail Customers." (ComEd Initial Comments at 9)

ComEd says that to develop said cost recovery mechanism, Section 5.2(g) of the Sourcing Agreement provides that ComEd is to file a tariff or seek to amend an existing tariff by July 1, 2014 in order to provide for cost recovery in connection with the Sourcing Agreement. ComEd notes that these provisions are based upon the

Commission's final Amendatory Order in Docket No. 12-0544, as entered on January 29, 2013, which requires the electric utilities to collect the costs of the FutureGen Project from all retail customers. ComEd emphasizes the importance of these provisions to the lawfulness of the Sourcing Agreement and ComEd's position on its approval. (*Id.*)

ComEd states that in its Response, FutureGen reemphasizes its request that the Commission include express language in the Final Order directing ComEd to make certain tariff filings by July 1, 2014 pursuant to the Sourcing Agreement. ComEd does not oppose this request so long as the Commission also expressly approves a final Sourcing Agreement consistent with Commission-approved benchmarks in its final Order. However, because such tariff filings are dependent upon the existence of a final Sourcing Agreement, if the Commission does not approve a final Sourcing Agreement in this docket, then ComEd believes it would be unnecessary and improper to make such an express finding, if at all, until it approves the Final Sourcing Agreement consistent with the benchmarks. (ComEd Reply Comments at 3)

2. Ameren's Position

Ameren Illinois notes that Section 3.1 of the Sourcing Agreement contains a condition precedent pursuant to which Ameren's obligations under the Sourcing Agreement are contingent upon (among other conditions): (1) the Commission having approved the form of the Sourcing Agreement and FutureGen having entered into such agreement with all Electric Utilities; and (2) the Commission having issued a "Non-appealable Final Order approving a cost recovery mechanism for [Ameren Illinois] to recover all costs from its Retail Customers."

In connection with the cost recovery condition precedent, under Section 5.2(g) of the Sourcing Agreement, Ameren says it is obligated to file a tariff or seek to amend an existing tariff in order to provide for cost recovery in connection with the Sourcing Agreement by July 1, 2014. Section 3.1 of the Sourcing Agreement gives Ameren needed assurance that a "Non-appealable Final Order" would be achieved prior to any obligations being incurred under the Sourcing Agreement, while Section 5.2(g) of the Sourcing Agreement gives FutureGen needed assurance that Ameren will take steps necessary to obtain such cost recovery. Ameren says the inclusion of the above new provisions and Sections 5.2(i) and 5.3 were made based on the requirement that electric utilities collect the costs of the FutureGen Project from all retail customers pursuant to the Commission's Final Order in Docket No. 12-0544 (as subsequently amended) and these provisions are fundamental to the electric utilities. (Ameren Initial Comments at 3-4)

3. FutureGen's Position

FutureGen states that the Commission's Order in Docket No. 12-0544 adopts a cost recovery mechanism for the utility buyers under the Sourcing Agreement (Ameren and ComEd) that requires each of them to submit a tariff to the Commission pursuant to

which each will be able to recover costs incurred under the Sourcing Agreement. FutureGen says that it, Ameren and ComEd have agreed in Section 5.2(g) of the Sourcing Agreement that those tariffs will be filed with the Commission no later than July 1, 2014. Accordingly, the obligation to file and the date of filing is not in dispute. However, notwithstanding Section 5.2(g) of the Sourcing Agreement, FutureGen is concerned that the consequence of a buyer's failure to file the tariff may impact the FutureGen Project schedule in such a way as to put the Project's success in jeopardy. FutureGen asserts that the existence of that potential risk, in turn, affects the ability of FutureGen to attract financing for the Project. In order to reduce that risk, FutureGen requests that the Order in this proceeding include a requirement that Ameren and ComEd file those tariffs or amendments by the July 1, 2014 date specified in the Sourcing Agreement. (FutureGen Initial Comments at 10-11)

In its response comments, FutureGen concurs with ComEd's and Ameren's assessment of the importance of Section 5.2(g) of the Sourcing Agreement, to both the utilities and to FutureGen. FutureGen says it establishes a key obligation for the utilities and also a key precondition to all of the activities envisioned under the Sourcing Agreement. FutureGen believes, however, that there are no contractual consequences under the Sourcing Agreement for the failure of Ameren or ComEd to make this tariff filing timely. FutureGen reiterates its request that Ameren and ComEd be directed to file those tariffs or amendments by the July 1, 2014 date specified in the Sourcing Agreement. (FutureGen Response Comments at 13-14)

4. Commission Analysis and Conclusions

Section 5.2(g) of the Sourcing Agreement proposed by FutureGen provides, in part, "Not later than July 1, 2014, Buyer shall file any tariff or amend any existing tariff as may be necessary to provide for full recovery of costs incurred under this agreement and allowed by the Commission."

In its Initial and Response Comments, FutureGen requests that the Order in this proceeding include a requirement that Ameren and ComEd file those tariffs or amendments by the July 1, 2014 date specified in the Sourcing Agreement. In its Reply Comments, page 3, ComEd argues that it would be unnecessary and improper to make such an express finding, if at all, until the Commission approves the final Sourcing Agreement consistent with the benchmarks.

The Commission finds that not later than July 1, 2014, Buyers identified as Parties in the Sourcing Agreement shall file any tariff or amend any existing tariff as may be necessary to provide for full recovery of costs incurred under the Sourcing Agreement and allowed by the Commission. This finding is contingent on there being a determination by the Commission, prior to then, that the utility Sourcing Agreement does not exceed cost-based benchmarks as addressed elsewhere in this Order.

B. Unspecified Consensus Issues

The IPA requests that the Commission "approve the consensus portions of the Sourcing Agreement." (IPA Initial Comments at 5-6)

Staff supports the concept of consensus, but objects to the IPA's request on the grounds that the IPA failed to identify the portions of the Sourcing Agreement where the Parties have achieved consensus. (Staff Response Comments at 7)

FutureGen submits that this "rhetorical exchange" does not rise to the level of a disputed issue, and that no decision is needed on this matter. (FutureGen Reply Comments at 21)

The Commission joins the IPA in commending the Parties for their efforts in reducing the number of contested issues during the workshops process. However, the Commission agrees with Staff that the IPA's request for blanket approval of unidentified "consensus portions" of the Sourcing Agreement is too vague to warrant approval at this time.

X. FINDINGS AND ORDERING PARAGRAPHS

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

(1) Commonwealth Edison Company and Ameren Illinois Company d/b/a Ameren Illinois are Illinois corporations engaged in the retail sale and delivery of electricity to the public in Illinois, and each is a "public utility" as defined in Section 3-105 of the PUA and an "electric utility" as defined in Section 16-102 of the PUA;

(2) the Commission has jurisdiction over the parties and subject matter in this proceeding;

(3) the facts recited and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;

(4) the return on equity and capital structure approved by the Commission in its Order in Docket No. 12-0544 incorporates the Levelized Fixed Carrying Charge Rate proposed by the FutureGen Industrial Alliance, Inc. in its Sourcing Agreement submitted on May 22, 2013 in this proceeding;

(5) the Pre-approved Total Capital Costs submitted in this proceeding by the FutureGen Industrial Alliance, Inc. on February 19, 2013 should be approved and such costs should be used for calculating the initial rate under the Sourcing Agreement;

(6) Commonwealth Edison Company and Ameren Illinois should, not later than 60 days after the date of this Order, execute the Sourcing Agreement approved by the Commission in this proceeding;

(7) FutureGen, and the parties to this proceeding who have signed the Protective Order, shall have 14 days from the date of the signing of the Sourcing Agreement to request of the Commission that certain material contained in the benchmark and analytical methodology that is of a confidential and proprietary nature continue to be protected from public release;

(8) the Commission directs the IPA to release the "bottom line" numbers as soon as is practicable following the entry of this Order;

(9) subject to the determinations made in the prefatory portion of this Order, including such recommendations as are approved above, the Sourcing Agreement filed by the FutureGen Industrial Alliance, Inc. on March 8, 2013 in this proceeding, as modified on May 22, 2013, should be approved consistent with Section 16-111.5 of the PUA and Section 1-75(d) of the IPA Act; in making this finding, the Commission is not expressing its concurrence in every statement or opinion contained in the filed Sourcing Agreement and no presumptions are created with respect thereto.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that subject to the determinations made and conclusions reached in the prefatory portion of this Order, and the findings of this Order, the Sourcing Agreement filed by the FutureGen Industrial Alliance, Inc. on March 8, 2013 in this proceeding, as modified on May 22, 2013, is hereby approved.

IT IS FURTHER ORDERED that the return on equity and capital structure approved by the Commission in its Order in Docket No. 12-0544, including the FutureGen Industrial Alliance, Inc.'s requested 10% return on equity and 55%/45% debt/equity capital structure, is hereby reaffirmed.

IT IS FURTHER ORDERED that the Pre-approved Total Capital Costs submitted by the FutureGen Industrial Alliance, Inc. on February 19, 2013 are hereby approved and such costs shall be used for calculating the initial rate under the Sourcing Agreement.

IT IS FURTHER ORDERED that Commonwealth Edison Company and Ameren Illinois shall, not later than 60 days after the date of this Order, execute the Sourcing Agreement approved by the Commission in this proceeding.

IT IS FURTHER ORDERED that FutureGen, and the parties to this proceeding who have signed the Protective Order, shall have 14 days from the date of the signing of the Sourcing Agreement to request of the Commission that certain material contained

in the benchmark methodology that is of a confidential and proprietary nature continue to be protected from public release.

IT IS FURTHER ORDERED that the IPA shall release the "bottom line" benchmark numbers as soon as is practicable following the entry of this Order.

IT IS FURTHER ORDERED that all motions and objections made in this proceeding which have not been expressly disposed of are hereby deemed disposed of in a manner consistent with the conclusions contained herein.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By order of the Commission this 26th day of June, 2013.

(SIGNED) DOUGLAS P. SCOTT

Chairman