

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
)	
On Its Own Motion)	
)	ICC Docket No. 11-0710
In re Proposed Contracts between Chicago)	
Clean Energy, LLC and Ameren Illinois Company)	
and Between Chicago Clean Energy, LLC and)	
Northern Illinois Gas Company for the Purchase)	
and Sale of Substitute Natural Gas Under the)	
Provisions of Illinois Public Act 97-0096.)	

**CHICAGO CLEAN ENERGY, LLC’S
VERIFIED MOTION TO STRIKE**

Chicago Clean Energy, LLC (“CCE”), by and through its attorneys, DLA Piper LLP (US), pursuant to 83 Illinois Administrative Code Section 200.190, respectfully requests that the Illinois Commerce Commission (“Commission”) strike portions of the “Illinois Power Agency’s Response to the Parties’ Statements of Position” filed on December 20, 2011. In support thereof, CCE states as follows:

1. On October 11, 2011, pursuant to the Public Utilities Act (“Act”) as amended by Public Act 97-0096, the Illinois Power Agency (“IPA”), after months of negotiations between CCE and the participating natural gas utilities, transmitted to the Commission the IPA’s final draft sourcing agreement. (*See* 220 ILCS 5/9-220(h-1); IPA Memorandum dated October 11, 2011.)

2. On November 2, 2011, the Commission opened the instant proceeding, ICC Docket No. 11-0710, to approve the final draft sourcing agreement. Pursuant to the terms of the Act in effect at the time, the Commission was instructed to fill in certain blanks in the IPA’s final draft sourcing agreement. (*See* 220 ILCS 5/9-220(h-1).) The Commission’s review was limited

to filling in rate of return, capital, and O&M costs in this proceeding. (*See, e.g.*, Public Act 97-0096 (creating new section 220 ILCS 5/9-220(h-3)).)

3. During the pendency of the present docket, Northern Illinois Gas Company d/b/a Nicor Gas filed an administrative appeal in the Circuit Court of DuPage County, challenging certain terms of the IPA's final draft sourcing agreement.

4. To the knowledge of CCE, no other party has filed an administrative appeal with a Circuit Court in Illinois.

5. On December 8, 2011, Governor Quinn signed Public Act 97-0630 into law.

6. As amended by Public Act 97-0630, the Act now directs the Commission to do the following in the instant proceeding:

the Commission shall approve a sourcing agreement containing (i) the capital costs, rate of return, and operations and maintenance costs established pursuant to subsection (h-3) and (ii) all other terms and conditions, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement; provided, however, the Commission shall correct typographical and scrivener's errors and modify the contract only as necessary to provide that the gas utility does not have the right to terminate the sourcing agreement due to any future events that may occur other than the clean coal SNG brownfield facility's failure to timely meet milestones, uncured default, extended force majeure, or abandonment.

(220 ILCS 5/9-220(h-4).)

7. The Act does not provide the Commission with authority to consider other modifications to the IPA's final draft sourcing agreement.

8. On December 14, 2011, in compliance with a schedule set by the Chief Administrative Law Judge, CCE circulated proposed modifications to the final draft sourcing agreement consistent with the Commission's grant of authority in Section 9-220(h-4) of the Act.

9. On December 16, 2011, the IPA, the Staff of the Commission (“Staff”), Nicor Gas, and the Attorney General filed Statements of Position, responding to CCE’s proposed modifications.

10. On December 20, 2011, CCE filed Verified Reply Comments, responding to the other parties’ December 16, 2011 filings.

11. Also on December 20, 2011, the IPA filed a document styled “Illinois Power Agency’s Response to the Parties’ Statements of Position” (the “IPA Response”).

12. In the IPA Response (which is an unverified filing), for the first time in this proceeding, the IPA improperly seeks to introduce into the instant proceeding copies of confidential drafts of the sourcing agreement (“Confidential Drafts”) that were provided to the IPA as part of the mediation process. (*See* IPA Response at 4, Ex. A-C.)

13. The Confidential Drafts are wholly irrelevant to the very limited number of issues currently pending before the Commission in the instant proceeding. (*See* 220 ILCS 5/9-220(h-4).) (*See, e.g., In re: Estate of Bitoy*, 395 Ill. App. 3d 262, 277, 917 N.E.2d 74 (1st Dist. 2009) (irrelevant evidence is inadmissible); *see also* 11 Ill. Prac., Courtroom Handbook On. Ill. Evid. § 401:1 (2011) (“Relevance is a matter of logic; it is the relationship between the evidence and a matter properly provable in the case”).) Moreover, the Confidential Drafts constitute inadmissible hearsay. (*See* Ill R. Evid. 801(c); *In re: Cenco Inc. Sec. Litig.*, 601 F. Supp. 336, 337 (N.D. Ill. 1984) (settlement excluded from evidence on, *inter alia*, hearsay grounds).) Indeed, by not including the Confidential Drafts in its December 16, 2011 Statement of Position, the IPA itself implicitly acknowledged that the irrelevance of the Confidential Drafts to the issues in the instant proceeding.

14. Even to the extent that these documents are relevant, which they are not, they are clearly inadmissible, settlement-related communications. Each page of the Confidential Draft documents provided by CCE to the IPA included the phrases “CONFIDENTIAL – Settlement Related Communication,” “Confidential Discussion Draft” and “Not a Firm Offer” underscoring that the documents fall squarely in the category of inadmissible information. The Illinois Rules of Evidence prohibit the use of settlement related documents and communications as a general rule, and none of the exceptions to that rule apply here. (*See* Ill R. Evid. 408.) In Footnote 2 of the IPA Response, the IPA states: “**The IPA advised CCE, Nicor and Ameren that the IPA would consider the parties’ proposed contract terms as offers of compromise...**” (IPA Response at 4, n.2 (emphasis added).) Thus, the IPA itself acknowledges that the Confidential Documents are settlement-related communications. The IPA’s attempts to introduce those documents into the record before the Commission is therefore wholly inappropriate.¹

15. As a result, CCE respectfully requests that the Commission strike both the references to the Confidential Drafts and the Confidential Drafts themselves from the IPA Response.

¹ The IPA Response also suggests that the IPA does not consider the Confidential Documents to be confidential. (*See* IPA Response at 4, n.2.) That issue need not be adjudicated by the Commission at this time. However, CCE respectfully but very strongly disagrees with the IPA’s position and reserves all rights to challenge that view in this proceeding and any other proceeding or circumstance where the IPA might seek to compromise the confidentiality of CCE’s confidential information and documents.

WHEREFORE, Chicago Clean Energy, LLC respectfully requests that the Commission enter an order striking Exhibits A-C to the IPA Response and each reference to each of those Exhibits contained in the IPA Response, and grant such other relief as the interests of justice require.

Respectfully submitted,

CHICAGO CLEAN ENERGY, LLC

By: /s/ Christopher J. Townsend
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STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

VERIFICATION

Christopher J. Townsend, being first duly sworn, on oath deposes and says that he is one of the attorneys for Chicago Clean Energy, LLC, that he has read the above and foregoing document, knows of the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

Christopher J. Townsend

Subscribed and sworn to me
this 22nd day of December , 2011.
