

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, ~~Inc.~~ LLC and :
Ameren Illinois Company and Between :
Chicago Clean Energy, ~~Inc.~~ LLC and :
Northern Illinois Gas Company for the :
Purchase and Sale of Substitute :
Natural Gas Under the Provisions of :
Illinois Public Act 97-0096. :

ATTACHMENT A

To the

BRIEF ON EXCEPTIONS

On Behalf Of:

CHICAGO CLEAN ENERGY, LLC

DATED: December 28, 2011

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and Ameren Illinois Company and	:	
Between Chicago Clean Energy,	:	
LLC Inc. and Northern Illinois Gas	:	
Company for the Purchase and	:	
Sale of Substitute Natural Gas	:	
Under the Provisions of Illinois	:	
Public Act 97-0096.	:	

PROPOSED ORDER

By the Commission:

I. PRELIMINARY MATTERS

On October 12, 2011, the Illinois Power Agency purportedly filed¹ a memorandum and analysis of proposed contracts between Chicago Clean Energy, LLC (“CCE”) and Ameren Illinois Company d/b/a Ameren Illinois (“AIC”) and between Chicago Clean Energy, Inc. and Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor”) with the Illinois Commerce Commission (“Commission”) pursuant to the provisions of Illinois Public Act 97-0096. This Public Act revised both the Public Utilities Act (“Act”) and the Illinois Power Agency Act (“IPA Act”). The Commission entered an initiating order on November 2, 2011 setting this matter for hearing on November 14, 2011.

Petitions for leave to intervene were filed by the Illinois Power Agency (“IPA”), the People of the State of Illinois (“AG”), Nicor, AIC, and the Citizens Utility Board (“CUB”). A public hearing as required by Public Act 97-0096 was held on November 14, 2011. Written responses were filed by the Staff of the Commission, CUB, CCE, Nicor, and the AG. Replies were filed by AIC, Nicor, and CCE.

On December 7, 2011, the Commission entered an Interim Order approving a base rate of return on common equity under the sourcing agreement for the clean coal substitute natural gas (“SNG”) brownfield facility, as well as the operation and

¹ The Illinois Power Agency sent its memorandum and report to the Executive Director and General Counsel of the Commission. The Commission does not consider this to be a proper filing with the Commission in accordance with 83 Ill. Adm. Code 200.

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maintenance costs ("O&M") estimate provided by CCE. A proposed final Order was also served on the parties.

II. BACKGROUND AND AUTHORITY

In this proceeding the Commission is now required to approve a sourcing agreement containing the capital costs, rate of return, and O&M costs.

Section 9-220(h-4) of the PUA, as modified by Public Act 97-0630, provides:

No later than 90 days after the Illinois Power Agency submits the final draft sourcing agreement pursuant to subsection (h-1), the Commission shall approve a sourcing agreement containing 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. Once the sourcing agreement is approved, then the gas utility subject to that sourcing agreement shall have 45 days after the date of the Commission's approval to enter into the sourcing agreement.

Public Act 97-0630 was the last in a series of pieces of legislation relating to the clean coal SNG project being developed by CCE. That series of legislation set forth, inter alia, a framework for promulgation, modification, and finalization of the sourcing agreement. Under that statutory framework, the Commission's role is integral but limited.

The Commission, like other Illinois administrative agencies, is a "creature of statute." (Olin v. Dept. of Labor, 95 Ill. App. 3d 1108, 1112, 420 N.E.2d 1043, 1046 (5th Dist. 1981.) As such, the Commission derives its power and authority "solely from the statute creating it, and it may not, by its own acts, extend its jurisdiction." (Sheffler v. Commonwealth Edison Co., 399 Ill. App. 3d 51, 60, 923 N.E.2d 1259, 1268 (1st Dist. 2010), aff'd 955 N.E.2d 1110 (Ill. 2011); see also Harrison Tel. Co. v. Ill. Commerce Comm'n, 343 Ill. App. 3d 517, 523, 797 N.E.2d 183, 189 (5th Dist. 2003) (same), aff'd 212 Ill. 2d 237, 817 N.E.2d 479 (2004). The PUA is clear that any act taken by the Commission that is beyond the Commission's authority is illegal and must be reversed. (See 220 ILCS 5/10-201(e)(iv); see also Ill. Power Co. v. Ill. Commerce Comm'n, 339 Ill. App. 3d 425, 434, 790 N.E.2d 377, 384 (5th Dist. 2003).)

The statutory framework at issue here sets forth a somewhat complex procedure with respect to the sourcing agreement, the culmination of which is the Commission's decision in this order with respect to a limited set of items. This proceeding is distinct from most Commission proceedings, in which the Commission is the first (and often only) agency to review a broad range of complex matters. Here, the Commission's role comes at the end of a regulatory process that involved long study and substantive consideration and decision-making at the IPA and the CDB on most of the material terms and conditions of the sourcing agreement. The Commission's role is, therefore, limited by the PUA's specific language regarding our remaining tasks. Notably, the Commission lacks the authority in this circumstance to review, evaluate, or change the substantive decisions of the IPA and the CDB, and must act only as specifically permitted by the directives of the PUA. This is true even if the Commission might have decided an issue differently from the IPA or the CDB had the PUA assigned the Commission the decisional task in the first instance. We accordingly proceed here in a limited manner, respectful both of the actions taken previously by the other agencies assigned responsibilities under the statutory framework and the prevailing Illinois law that limits this Commission's role within that framework.

III. DESCRIPTION OF SNG PROJECT

The QSI Consulting, Inc. ("QSI") group was retained by the IPA to provide an analysis of return on equity for this project. QSI describes the project:

The Chicago Clean Energy project has the stated purpose of providing Chicago area gas customers with clean Synthetic Natural Gas (SNG) produced from local feedstock. Chicago Clean Energy proposes to place its project on a brownfield site (former LTV Steel Coke Plant) located at 11600 Burley Avenue in south Chicago. The facility will convert feedstock into SNG using a process with outstanding emissions performance including 90% capture of the CO₂ that would otherwise be emitted by the facility.

In its case study, Chicago Clean Energy uses a mixture of 50% coal and 50% coke to produce 126 million standard cubic feet per day (MMscfd) of SNG using proven General Electric gasification technology, but the facility will be designed to operate across a wide range of coal/coke blends to meet the dual objectives of providing competitively priced energy to consumers and develop the State's coal and petroleum coke resources. The project includes gas processing and treatment to remove undesirable components and compression to deliver pipeline quality SNG at the appropriate pressure to Chicago City Gate. Water usage would be minimized through re-use of recovered water onsite; make-up water would be drawn from the Calumet River. Electricity would be generated onsite through the recovery of waste heat to meet Chicago Clean Energy's

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normal power demand; a connection to Exelon would provide make-up power when needed, plant start-up power needs and a way to export surplus power when it is available. Other ancillary utilities and infrastructure would also be provided as part of the core facilities.

IV. ISSUES RELATED TO CAPITAL RECOVERY CHARGE

As noted above, on October 11, 2011, the IPA provided to the Commission a Form of SNG Agreement **that the IPA approved pursuant to Public Act 97-0096**. On December 14, 2011, **in accordance with the case schedule set by the presiding Chief Administrative Law Judge**, CCE provided a corrected version of the Form of SNG Agreement, **along with an itemized table of errors**. As the Commission understands it, CCE, essentially, wishes for the Commission to adopt Schedules 5.2A and 5.2B as provided in the December 14, 2011 for purposes of this proceeding.

A. Nicor's Position

The IPA's Sourcing Agreement contains a variety of provisions with which Nicor disagrees. Nicor states that given applicable statutory provisions, however, the authority to rule on many provisions was vested with the IPA, while the Commission's authority to review Sourcing Agreement issues is far more limited. According to Nicor, the IPA's approval of the Sourcing Agreement was a final administrative decision as to those issues subject to its jurisdiction and, therefore, the Commission cannot address such issues.

Nicor indicates it has filed an action in the Circuit Court of DuPage County contesting various IPA determinations as inconsistent with Section 9-220 of the PUA. Nicor does not ask the Commission to address those issues here, but to the extent the Commission would like more information regarding the nature of those challenges Nicor says it is prepared to address them. Meanwhile, ~~Nicor~~ **Nicor** ~~the comments in Section II below~~ **addresses** those issues that **Nicor believes** are squarely within the Commission's jurisdiction pursuant to Section 9-220 of the PUA.

Section 9-220(h-3)(1) of the PUA provides for the inclusion in the Sourcing Agreement of "a capital recovery charge approved by the Commission." 220 ILCS 5/9-220(h-3)(1). Similarly, Section 9-220(h-3)(2) of the PUA provides for the inclusion in the Sourcing Agreement of a charge for "[o]peration and maintenance costs approved by the Commission."

Nicor states that Section 5.2 of the Sourcing Agreement provides for these two charges as component "A" (the "Capital Component") and component "B" (the "O&M Component"), respectively, of the Base Contract Price. In the Sourcing Agreement, Nicor says each of these components is designated as a "\$[X.XX] per MMBtu" charge, reflecting that the Commission is assigned the responsibility to determine the actual dollar amount of each of these component charges on a per unit basis. Schedule 5.2A and Schedule 5.2B of the Sourcing Agreement set forth formulas that purport to

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indicate the procedure for determining the Capital Component and the O&M Component, respectively.

In setting the Capital Component under the Sourcing Agreement, Nicor says Section 9-220(h-3)(1) of the PUA directs the Commission to adopt a total capital cost based strictly on a procedure that compares a range of capital costs submitted to the Commission confidentially by the Capital Development Board (“CDB”) to a capital cost estimate submitted to the Commission by CCE. Section 9-220(h-3)(1)(B) of the PUA then provides for the Commission to conduct a hearing to determine the rate of return to be used to calculate the Capital Component, including the return on equity used to determine such rate of return.

According to Nicor, in setting the O&M Component under the Sourcing Agreement, Section 9-220(h-3)(2) of the PUA directs the Commission to adopt O&M costs based strictly on a procedure that compares a range of O&M costs submitted to the Commission confidentially by the CDB to an O&M cost estimate submitted to the Commission by CCE.

Nicor believes that the formulas reflected in Schedule 5.2A and Schedule 5.2B of the Sourcing Agreement both employ an incorrect billing determinants amount to develop the per MMBtu capital cost recovery charge and the per MMBtu O&M charge, which Nicor says results in an excessive allocation of costs to Nicor and its customers under the Sourcing Agreement. Nicor also asserts that the Commission must set the Capital Component in a manner that achieves the Commission-approved return on equity based on the actual capital structure of the CCE project. Nicor claims that Schedule 5.2A of the Sourcing Agreement is confusing in various respects and provides insufficient guidance regarding the line items that are to be finalized by the Commission in this proceeding and those that are to be finalized by the Commission at the time CCE completes its financing of the project.

Nicor suggests this risk of confusion is evident from the Verified Reply Comments on Return on Equity that CCE filed in this proceeding on November 23, 2011. According to Nicor, in Exhibit A to those comments, CCE proposes that, in this proceeding, the Commission approve final entries for lines A through L of CCE’s modified version of Schedule 5.2A and that only the entries for lines M through P of the revised schedule would be finalized following completion of CCE’s debt financing. However, if the Commission were to follow CCE’s proposal, Nicor says the final Capital Component would reflect a 70% debt / 30% equity capital structure regardless of the final capital structure actually achieved by CCE at the completion of its debt financing and the Commission-Approved Rate of Return (line K of CCE’s revised Schedule 5.2A) would be fixed now on the basis of that assumed 70% debt and 30% equity capital structure. Nicor suggests that if, however, the actual capital structure of the project differs from what was assumed, then both the equity return portion and the debt portion of the Capital Component need to be adjusted to account for the difference.

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Nicor recommends that the Commission modify Schedule 5.2A and Schedule 5.2B. Nicor contends that the modified Schedule 5.2A and Schedule 5.2B it has proposed utilize the correct billing determinants amount and the modified Schedule 5.2A also clarifies the line item entries that are to be finalized by the Commission in this proceeding and those that are to be finalized by the Commission upon completion of CCE's debt financing so as actually to provide for an equity return portion of the Capital Component that achieves the return on equity approved by the Commission based on the actual capital structure of the project.

In order to set the Capital Component and the O&M Component of the Base Contract Price in the Sourcing Agreement, Nicor says a decision needs to be made about the number of "billing determinants" to be used in the computation. In other words, to derive these per MMBtu charges, the Commission needs to divide the approved total capital costs and the approved total annual O&M costs for the CCE project by an appropriate number of sales units.

According to Nicor, the IPA decided that it was responsible for setting the number of billing determinants. Nicor says it does this in Section 5.2 of the Sourcing Agreement by directing that 43.5 Bcf be used as the Annual Contract Quantity for the Capital Component and the O&M Component of the Base Contract Price and again in Schedule 5.2A and Schedule 5.2B of the Sourcing Agreement by directing that the Maximum Annual Contract Quantity of 42,064,500 MMBtu is to be used as the number of billing determinants to set the Capital Component and the O&M Component.

Nicor disagrees that the IPA is responsible for setting the billing determinants to be used to calculate prices. Nicor indicates that Section 9-220(h-1)(12) of the PUA provides that a "utility is responsible to pay only the Commission determined unit price cost of SNG that is purchased by the utility." Nicor also says Sections 9-220(h-3)(1) and (2) of the PUA describe how the Commission sets the Capital Component and the O&M Component. Nicor contends that those sections provide that the Commission must begin with inputs provided by the CDB and CCE to establish the total capital cost and total annual O&M cost of the CCE project, but otherwise leaves it to the Commission to make the determination about how those total costs are to be converted to unit charges. Nicor finds it significant that nothing in Section 9-220(h-3) compels the Commission to accept any inputs from the IPA in setting the Capital Component or the O&M Component of the Base Contract Price.

In Nicor's view, it is for the Commission to decide the correct number of billing units to use to calculate the Capital Component and the O&M Component. Nicor believes the Commission is not bound by the IPA's actions in attempting to dictate the number of billing determinants through the Sourcing Agreement terms.

Nicor states that in the Sourcing Agreement, the IPA used 47,799,714 MMBtu as the "projected annual output" of the CCE facility for purposes of setting the annual quantity of gas Nicor will be required to purchase. Nicor says Section 9-220(h-1) of the PUA assigns to the IPA the authority to determine the volumetric purchase obligations

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under the Sourcing Agreement. While Nicor believes that the IPA was wrong to have used 47,799,714 MMBtu as the basis to allocate volumes, it is not within the scope of the Commission's authority to review the IPA's decision on this issue even if the Commission agrees with Nicor's interpretation of the law. Nicor contends the Commission simply is not charged under the PUA to review or modify this IPA determination. Nicor believes the Commission, however, is responsible for deciding the correct number of billing units to be used to calculate the Capital Component and the O&M Component of the Base Contract Price under the Sourcing Agreement. In doing so, Nicor says the Commission must accept as given the IPA's determination that the "projected annual output" of the CCE facility is 47,799,714 MMBtu and must decide on the correct number of billing units in light of this IPA determination.

If 42,064,500 MMBtu is used as the number of billing determinants as proposed by the IPA, then Nicor believes there is a disconnect between the percentage of the IPA-determined "projected annual output" of the CCE facility that Nicor Gas is required to purchase (42%) and the percentage of the capital costs and O&M costs for the CCE facility that Nicor and its customers are required to pay (approximately 48%). As such, Nicor claims it and its customers would be required to pay more than their share of the CCE facility's cost of service. Nicor believes this is contrary to fundamental cost causation principles. Nicor also asserts it is contrary to the requirements of Section 9-220(h-1) of the PUA in that the charges would not be "unit price costs" because all units of production would not be assigned the same costs. Nicor also claims it would further violate Section 9-220(h-1) by assigning to Nicor and its customers the responsibility to pay a purchase price for more than 42% of the "projected annual output" of the CCE facility.

Nicor argues that the unit price must be determined by dividing the total costs, as defined in Section 9-220(h-3), by the projected annual output of the facility. Nicor believes this methodology works both as a practical matter and in accordance with cost causation principles by accurately pricing each unit of output using the total cost and the total projected annual output of the facility. Nicor contends that cost causation principles are implicit in the rate setting called for under the PUA in that Section 9-220(h-1) provides for re-allocation of volume commitments among the purchasing utilities in the event some utilities elect the rate case option. In Nicor's view, there would be no purpose in such a re-allocation exercise if all costs were to be fully borne by the remaining utilities regardless of cost causation. Nicor also claims the application of this methodology will comport with the statutory mandate in Section 9-220(h-1)(12) that the utilities pay no more than the unit price cost of SNG for the units that the utilities purchase by allocating only a proportionate share of the cost of SNG to the units that the utilities purchase.

Nicor says the IPA describes the use of 42,064,500 MMBtu for billing determinant purposes as representing a "concession" on the part of CCE. Nicor asserts, however, that this can only be perceived as a concession if the legislation allows for more than 42% of costs of the project to be allocated to Nicor and its customers. Nicor suggests that though not stated by the IPA, what underlies the

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characterization of the use of 42,064,500 MMBtu as a “concession” is a mistaken view that the legislation actually provides for allocation of 100% of the cost of service to the utilities that purchase from CCE even though some utilities had opted out. According to Nicor, the fact of the matter is that Section 9-220(h-3) contemplates a cost of service rate structure but does not expressly address how costs are allocated when some utilities have elected to opt out. Nicor asks if those costs can be reallocated to the purchasing utilities. Nicor contends that this could not have been the legislative intent because it creates a penalty for those utilities that elected to contract versus opt out. If all utilities other than Nicor had opted out, Nicor believes it could not have been envisioned that Nicor customers could be made to bear 100% of the cost of service for only 42% of the output.

Given the IPA’s determination that the “projected annual output” of the CCE facility is 47,799,714 MMBtu, Nicor insists the Commission must use 47,799,714 MMBtu for billing determinant purposes also. In Nicor’s view, the Commission must ensure that the basis for allocating cost under the Sourcing Agreement is the same as the basis for allocating volume. Nicor contends the Commission must modify the Sourcing Agreement as follows: (i) delete, from the description of Component “A” in Section 5.2, the sentence “For purposes of determining the Capital Component, the Annual Contract Quantity will be 43.5 Bcf.”; (ii) delete, from the description of Component “B” in Section 5.2, the sentence “For purposes of determining the O&M Component, the Annual Contract Quantity will be 43.5 Bcf.”; (iii) replace, in Schedule 5.2A (line G) and in Schedule 5.2B (line B), the “Maximum Annual Contract Quantity” of 42,064,500 MMBtu with the “Projected Annual Output” of 47,799,714 MMBtu; and (iv) delete current footnote 2) from Schedule 5.2A and current footnote 1) from Schedule 5.2B.

Nicor indicates that Schedule 5.2A of the Sourcing Agreement is a chart that sets forth the formula for calculating the Capital Component of the Base Contract Price. Nicor says the farthest right column of the schedule attached to the Sourcing Agreement shows the mechanics of the calculation based on illustrative values for the relevant factors used in the calculation. Nicor adds that the second column from the right is intended to include the actual values of the relevant factors as determined in accordance with the provisions of the PUA, and the IPA did not include any values in this column. Instead, the IPA designated each cell in that column as either a value to be “Filled in by ICC” or “Calculated.” Nicor notes that the IPA did, however, identify the billing determinants factor in Row G of its Schedule 5.2A as “Maximum Annual Contract Quantity (MMBtu),” and included a footnote stating that the entry for that row in the chart is to be “[c]alculated based on 43,500,000,000 scf multiplied by the SNG heating value of 967 btu/scf.”

Nicor asserts that Schedule 5.2A is flawed in two respects. First, Nicor maintains that the IPA is not authorized under the PUA to determine the billing determinants to be used to calculate the Capital Component; that is to be decided by the Commission. Nicor asserts that the correct number of billing determinants to be used by the

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Commission to calculate the Capital Component is equal to the “Projected Annual Output” as determined by the IPA not the “Maximum Annual Contract Quantity”.

Nicor also asserts that Schedule 5.2A fails to indicate the values in the second column from the right that are to be finalized in this proceeding and those that are to be finalized after CCE has completed its debt financing. Nicor says CCE proposes that the only factor that will remain to be “Filled in by the ICC” after this proceeding will be the actual interest rate on the project’s debt. Nicor complains that the effect of CCE’s proposal would be to alter the return on equity if the actual capital structure of the project is other than the “base case” 70% debt.

Contrary to CCE’s proposal, Nicor believes the only values that properly are to be fixed by the Commission in this proceeding are: (i) the approved capital costs of the project; (ii) a thirty year term for the debt financing; (iii) the number of billing determinants; and (iv) the approved rate of return on equity. Nicor contends that the actual interest rate, the actual percentage of debt and all other values that are calculated based on either of those inputs can only properly be fixed after CCE’s debt financing has been finalized.

According to Nicor, Section 9-220(h-3) of the PUA expressly provides for approval in this proceeding of the amount of capital costs for the CCE project and the rate of return on equity for the project. Nicor says fixing the correct number of billing determinants is required to calculate the Capital Component but that number naturally results from the PUA and the IPA’s decision regarding the “projected annual output” of the CCE project; it is not dependent on the terms of CCE’s debt financing. As such, Nicor believes the correct number of billing determinants properly is fixed in this proceeding. For purposes of calculating the Capital Component, Nicor says the Commission must utilize a thirty year term for the debt financing so as to match the thirty year term of the Sourcing Agreement. Considering that the Capital Component is fixed for the entire thirty year term of the Sourcing Agreement, Nicor claims this requirement is evident. Nicor suggest that if, for example, CCE were to obtain debt with a twenty-five year term and Schedule 5.2A permitted the Capital Component to be adjusted at the completion of CCE’s debt financing to reflect the shorter duration of that debt, then the Capital Component would be a higher charge and that higher charge would be assessed under the Sourcing Agreement for the full thirty year term of the Sourcing Agreement even though the debt had been paid in full during the first twenty-five years of the term.

Nicor proposes that the Commission adopt a revised Schedule 5.2A that remedies the flaws in the schedule provided by the IPA. Nicor provided a document intended to replace the Schedule 5.2A currently contained in the Sourcing Agreement. In its proposed Schedule 5.2A, Nicor (i) substitutes “Projected Annual Output” for “Maximum Annual Contract Quantity” in line G as the correct input for fixing billing determinants⁷ and (ii) reformats the schedule to indicate clearly the factors relevant to calculating the Capital Component that are to be fixed in this proceeding and those that are to be fixed after CCE’s debt financing is finalized.

B. Staff's Position

Among other things, Staff believes certain changes should be made to Schedule 5.2 of the IPA's Final Draft Sourcing Agreement. Staff recommends that on line (A), change 2,930,712,456 to 2,938,225,690, which is the total capital cost that the Interim Order appears to implicitly adopt, and which, in any event, is the only value supported by the record. Staff says this would enable the Commission to meet its obligation under 9-220 (h-4) of the PUA to approve a sourcing agreement "containing the capital costs."

Staff also recommends that a row be added to Schedule 5.2 line for the computation of the "ICC-Approved Equity Amount = $A \times (1-C)$," which will equal \$881,467,707. Staff also believes a row should be added for the "ICC-Approved Rate of Return on Equity (%)" of 4.44%.

Next, Staff proposes the addition of a row for the "Projected Output of the Plant." CCE claims the projected output of the plant to be 47,799,714 MMBtu per year. Staff says the IPA's Final Draft Sourcing Agreement makes AIC and Nicor responsible for purchasing 84% of that level (42% each), or 40,151,759 MMBtu per year (the "Annual Contract Quantity" or "ACQ"), which is divided equally between the two utilities. Staff maintains, however, that the projected output of the plant appears to be significantly less than 47,799,714 MMBtu per year. Staff provides a range that it recommends that the Commission determine to be the expected output level.

Staff also recommends the addition of a row for the appropriate "ICC-Approved Cost Recovery Percentage" for AIC and Nicor (given their obligation to purchase only 84% of the plant's expected annual production, but also the contract's complex savings guarantee and revenue and savings sharing provisions). According to Staff, the IPA's Final Draft Sourcing Agreement Schedule 5.2A and 5.2B both implicitly utilize a cost recovery percentage of 95.45%, i.e. 84%/88%. Staff believes the Commission should either approve this level of some other level between 88% and 100%, and use it for all the charges, with the exception of the Transportation and Marketing Component.

Staff next recommends that the Commission amend and rename as "Volume Approved for Pricing Purposes (MMBtu)" the row entitled, "Maximum Annual Contract Quantity (MMBtu)," which is set equal to 42,064,500 in the IPA's Final Draft Sourcing Agreement. Staff believes this value should be changed, depending on what the Commission determines to be the expected annual production level of the plant and the appropriate cost recovery percentage for AIC and Nicor. Staff asserts it should be set equal to the Projected Output of the Plant times 84% divided by the Cost Recovery Percentage. This change will affect both the ICC-approved Return on Equity (\$/MMBtu) and the Base-Case Cost to Debt (\$/MMBtu).

Staff recommends the Commission rename as "ICC-Approved Return on Equity (\$/MMBtu)" and amend the line entitled, "ICC-Approved Rate of Return (\$/MMBtu)" so that it becomes a formula equivalent to the one described above, and implicitly

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approved in the Interim Order (i.e., Base Case Equity Amount times ICC-Approved Rate of Return on Equity (%) divided by the Volume Approved for Pricing Purposes).

Staff also recommends amending the rows entitled, “Base Case Cost of Debt (\$/year) = Levelized amortization based on B, D, E,” and “Actual Cost of Debt (\$/year) = Levelized amortization based on L, D, E,” to include a footnote explicitly defining in mathematical terms “Levelized amortization based on”

Staff notes that the Interim Order, the Commission states that O&M costs recoverable under the sourcing agreement are hereby set at \$84,018,452. To incorporate the foregoing language into the sourcing agreement, Staff recommends that the Commission direct CCE to modify Schedule 5.2B of the IPA’s Final Draft Sourcing Agreement to include this number (\$84,018,452) in row (A) “ICC-Approved O&M Budget (\$/year). In addition, Staff restates that it disputes the billing determinant used in both Schedules 5.2A and 5.2B. Staff believes many of the same changes it proposed for Schedule 5.2A should also be made in Schedule 5.2B.

According to Staff, CCE claims the projected output of the plant to be 47,799,714 MMBtu per year. Staff reports that the IPA’s Final Draft Sourcing Agreement makes AIC and Nicor responsible for purchasing 84% of that level (42% each), or 40,151,759 MMBtu per year (the “Annual Contract Quantity” or “ACQ”), which is divided equally between the two utilities. The IPA’s Final Draft Sourcing Agreement states that the projected output level of 47,799,714 MMBtu per year “is based on the projected annual total production of SNG by the Plant as shown in the summary of the base case economics in the April 30, 2010 facility cost report produced pursuant to Public Act 96-0784 (i.e., the quantity is equal the sum of the projected Contract SNG quantities and Incremental SNG quantities shown in such summary).”

Staff states that in the normal course of business, Staff received a report dated April 2010, entitled, “CHICAGO CLEAN ENERGY SNG PROJECT FACILITY COST REPORT,” bearing the Black & Veatch logo. This report contains information that Staff believes is inconsistent with the values used by the CCE and the IPA. Staff also notes that there are inconsistent heat content values for the SNG provided by CCE and the IPA.

Staff recommends that the Commission direct CCE to amend the sourcing agreement’s annual contract quantity to no greater than 37,737,708 and no less than 37,504,998 MMBtu per year, based on different expected output levels. In Staff’s view, the midpoints of the ranges recommended by Staff would be reasonable values for the annual expected output level of the plant, and for the annual contract quantity. With respect to the capital cost and O&M expense rate components, these midpoints are used in Staff Exhibits A and B.

According to Staff, the IPA’s Final Draft Sourcing Agreement establishes formulas for computing a capital recovery charge and an O&M expense recovery charge on pages 21 and 22, and in Schedules 5.2A and 5.2B. Staff stats that in both

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instances, the billing determinant used in computing the charge is neither 84% nor 100% of the plant's expected output. Staff asserts it is 88% of the expected output. Staff says since the purchase responsibility of Nicor and AIC is set at 84% of the plant's expected output, if the billing determinant also was set at 84% of the plant's expected output, the charges would be designed to recovery 100% of CCE's capital and O&M costs (84 divided by 84). Staff adds that if the billing determinant was set at 100% of the plant's expected output, the charges would be designed to recovery only 84% of CCE's capital and O&M costs (84 divided by 100), thus leaving the IPA to recover the remaining 16% of costs from customers other than Nicor and AIC.

In Staff's view, the IPA-proposed billing determinant of 88% (i.e., neither 84% nor 100%) implies an objective of recovering approximately 95.45% (84 divided by 88) of the capital and O&M costs from the base rates applied to Nicor and AIC. Staff presumes CCE would prefer to recover 100% (or more) from Nicor and AIC, while Nicor and AIC (on behalf of ratepayers) would prefer to pay 84% (or less). In Staff's view, the fact that the IPA approved using a billing determinant of 88% of the plant's expected output (to recover approximately 95.45% of the capital and O&M costs) might be seen as a scrivener's error or as a small concession to ratepayers, relative to the approach that should be preferred by CCE.

Staff reports that Section 9-220(h-1) of the PUA states that each utility entering into a sourcing agreement with a clean coal brownfield facility shall contract to purchase "(i) a percentage of 43,500,000,000 cubic feet per year, such that the utilities entering into sourcing agreements with the clean coal SNG brownfield facility purchase 100%, allocated by total therms sold to ultimate customers by each gas utility in 2008 or (ii) such lesser amount as may be available from the clean coal SNG brownfield facility; provided that no utility shall be required to purchase more than 42% of the projected annual output of the clean coal SNG brownfield facility, with the remainder of such utility's obligation to be divided proportionately between the other utilities." Staff notes that the energy content of a given volume of SNG can vary. CCE claims that the heating content of its SNG will average 967 Btu per standard cubic foot ("Btu per scf"). Assuming 967 Btu per standard cubic foot is correct, Staff says 43,500,000,000 cubic feet per year corresponds to 42,064,500 MMBtu. Since the proposed purchase responsibility of 40,151,759 MMBtu is less than 42,064,500 MMBtu, Staff believes the statute's first test for the contract quantity has been met, under these assumptions. Staff says the statute's second test is also met, as long as the projected output is greater than or equal to the level of 47,799,714 MMBtu per year which is stated in the IPA's Final Draft Sourcing Agreement.

Assuming 47,799,714 MMBtu per year is a correct projection for the output of the facility, and 84% of that, or 40,151,759 MMBtu per year, is the annual contract quantity for AIC and Nicor combined, then Staff believes it would stand to reason that the capital and O&M recovery charges should be designed to recover 84% of the capital and O&M costs, leaving CCE to recoup the remaining 16% from other customers. However, Staff says the issue is complicated by the fact that CCE does not necessarily get to keep all the revenues from sales to other customers. Staff indicates that the governing statute

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and the IPA's Final Draft Sourcing Agreement contain provisions related to "guaranteed" savings and revenue sharing from sales of SNG and other products to other customers. Staff says the savings guarantee and revenue sharing, in part, is managed through the Consumer Protection Reserve Account ("CPRA"). Staff believes the situation is even more complicated by the fact that this account is funded, not just through an initial payment by CCE and by one-half of the revenues from sales of SNG and other products to other customers, but also by contributions by the utilities (i.e., ratepayers) if and when the SNG contract price becomes lower than the market price of natural gas. In this latter situation, Staff says the ratepayer contribution to the CPRA is not one-half, but 100% of the "savings," defined as the difference in the market price of natural gas and the SNG contract price multiplied by the amount of SNG purchased by the utilities. Because of these additional provisions, Staff says a change in the base charges (established through Schedules 5.2A and 5.2B) changes the effective rate, but to a variable and generally smaller degree. Similarly, Staff indicates that changes in revenues generated from sales to other customers can go entirely or only partially to CCE, with the remainder, if any, going to ratepayers.

Staff provides an example where the Commission reduced the base capital charge by utilizing 100% of projected output rather than 88% of projected output as the billing determinant, that charge would be lowered by 59 cents per MMBtu in 2018 dollars, or 48.3 cents per MMBtu in real 2010 dollars. Assuming CCE's guarantee is honored, Staff says this would decrease the effective rate paid by Nicor and AIC by anywhere from 0 cents to 48.3 cents per MMBtu in real 2010 dollars (averaged over the entire 30 years). In cases of extremely high natural gas prices, Staff says the decrease can exceed 48.3 cents, but it is more likely that the decrease in the effective rate will be some fraction of the original decrease in the base capital charge. Staff states that in essence, the initially lower base capital charge can result in ratepayers receiving less of the initial funds deposited in the CPRA by CCE, less of the funds deposited in the CPRA by ratepayers when the SNG contract price is below market rates, less of the revenues from sales to other customers, and/or less of a final payment for any savings shortfall remaining at the end of the 30 years, based on the terms of the IPA's Final Draft Sourcing Agreement.

Staff indicates that similarly, if consumer savings under the contract would otherwise be less than the guaranteed level, increases in revenues generated from other customers would be allocated disproportionately to ratepayers. However, Staff states that if consumer savings were already higher than the guaranteed level, increases in revenues generated from other customers could be allocated disproportionately to CCE.

Staff draws several conclusions from its analysis. First, Staff believes designing the base rates to recover 84% of CCE's costs is intuitively reasonable, given the fact that the Nicor and AIC are only responsible for purchasing 84% of CCE's output. On the other hand, Staff suggests that due to the savings guarantee and the revenue sharing provisions contained in the IPA's Final Draft Sourcing Agreement, designing

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base rates to recover 100% of the capital and O&M costs of the facility is not, on its face, inappropriate, either.

Next, Staff states that the effective rates, after taking into account the savings guarantee, revenue sharing, and savings sharing provisions, are a complicated function of several variables (the values of which are presently unknown). However, it appears to Staff that lower capital and O&M cost recovery charges would tend to decrease the effective rates (but by a smaller degree -- possibly as small as 0%). Therefore, Staff believes setting the base rates between the levels needed for 84% and 100% cost recovery seems reasonable.

Staff also says before taking into account savings guarantees and revenue sharing, the base level implied by the IPA's Final Draft Sourcing Agreement is approximately 95.45%, i.e. 84%/88% (which is closer to 100% than 84%). However, Staff states that in general, the base rate cost recovery percentage ("BRCRP") is given by the equation:

$$\text{BRCRP} = \frac{84\%}{(\% \text{ of expected production used in billing determinants})}$$

Staff claims that for any given desired BRCRP, the percentage of expected production that should be used in billing determinants should be set equal to:

$$\begin{array}{l} \% \text{ of expected production} \\ \text{used in billing determinants} \end{array} = \frac{84\%}{\text{BRCRP}}$$

Staff believes the Commission should approve either (a) the IPA's proposal to set base rates to recover 95.45% of its costs, or (b) to set base rates to recover any other percentage of costs between 84% and 100%, based on what the Commission determines to be a fair and reasonable allocation, given the complex provisions of the IPA's Final Draft Sourcing Agreement. In Staff's view, the midpoint (92%) would be a reasonable allocation. Staff says this 92% is the value used in Staff Exhibit A, which is entitled, "Staff-proposed Schedule 5.2A: Formula for Adjustment of Capital Component," and in Staff Exhibit B, which is entitled, "Staff-proposed Schedule 5.2B: Formula for Adjustment of the Operation and Maintenance Component." Staff states that in these exhibits, the variable, "BRCRP," is referred to instead as the "ICC-Approved Cost Recovery Percentage."

Staff also believes the same ICC-Approved Cost Recovery Percentage can be applied to the Fuel Component and the Carbon Capture and Sequestration Component. With respect to the Transportation and Marketing component, Staff believes that the IPA's Final Draft Sourcing Agreement already appropriately limits that charge to the recovery of transportation and marketing costs directly associated with sales to AIC and Nicor. However, for the avoidance of doubt, Staff believes this should be made clearer and more explicit in the contract.

C. The IPA's Position

The IPA states that pursuant to the applicable provisions contained in P.A. 97-0096, the IPA was responsible for finalizing the sourcing agreements subject only to the Commission's determination of the various recoverable costs under the contract, and the provisions of P.A. 97-0630. The IPA has determined that the terms contained in the Form SNG Agreement are reasonable and equitable, in accordance with P.A. ~~0997~~97-0096 at (h-1), with the exception of the terms which the IPA agrees should be modified. The IPA says Nicor, Staff, and the AG have each proposed changes to the Form SNG Agreement in their respective Statement Of Position. The IPA believes several of Nicor and Staff's positions do not seek to substantively alter the Form SNG Agreement, and the IPA therefore does not object to correct these scrivener's errors. However, the IPA objects to proposed modifications to the Form SNG Agreement to the extent that those proposals seek to substantively modify the Form SNG Agreement in ways not specified under P.A. 97-0630.

According to the IPA, Nicor focused on the Form SNG Agreement's calculation of the Capital Component and the O&M Component. Nicor argues that the formulas reflected in Schedule 5.2A and Schedule 5.2B of the Form SNG Agreement employ an incorrect billing determinant to develop the per MMBtu capital cost recovery charge and the per MMBtu O&M charge. Nicor suggests that Schedule 5.2A and 5.2B will result in an excessive allocation of costs to Nicor and its customers under the Form SNG Agreement.

The IPA reports that Nicor recommends that if the Commission adopts the IPA's determined projected annual output of 47,799,714 MMBtu, and that 42,064,500 be used for purposes of billing determinants, the cost allocation factor to be used in the contract should be 42%, rather than 48%. The IPA agrees that 42% should be used as the cost allocation factor, and that the Commission should adopt the changes proposed by Nicor at page 9 of its Statement. The IPA further agrees with the changes in the billing determinants recommended by Nicor in Exhibit B to its statements.

The IPA states that Staff similarly objects to several of the Form SNG Agreement's substantive provisions and calculations. Staff notes that the Form SNG Agreement submitted by the IPA contains language required by Section 9-220(h-1)(4) of the PUA, including a Contract Saving Guaranty (section 2.6), Contract Savings Reconciliation (section 2.7) and Security for Contract Saving Guaranty Shortfall (section 2.8.) The IPA indicates that Staff believes that the contract provisions, while compliant with the P.A. 97-0096, do not sufficiently protect consumers in the event that there are insufficient funds to satisfy the \$100 Million Contract Saving Guaranty imposed by Section 9-220(h-1)(4). Staff recommends that the Sourcing Agreement be modified to add a requirement that all distributions to the equity holders of the development placed into a newly developed Guaranty Shortfall Trust Fund, or as an alternative, find a guarantor that will satisfy the Consumer Saving Guaranty in the event of insufficient funds.

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The IPA states that while it would likely support additional consumer protections that could or should have been provided in P.A. 97-0096, the IPA does not believe that a Guaranty Shortfall Trust Fund or additional guarantor was contemplated by the PUA, and was not within the authority of the IPA to impose on either the parties or CCE.

Staff recommends that Schedules 5.2A and 5.2B be modified to reflect the use of 84% as the billing determinant. The IPA agrees with Staff and Nicor's recommendation.

D. CCE's Position

CCE asserts that in light of the recent legislation embodied in Public Act 97-0630, the PUA now clearly requires that the Commission accept the final draft sourcing agreement that was provided by the IPA as the foundation for the sourcing agreement that the Commission ultimately approves, and directs the Commission to make only very specific revisions. In CCE's view, it is telling that the General Assembly thought that the Commission's authority to modify the sourcing agreement was so limited under the original statutory format established by Public Act 97-0096 that the General Assembly even had to explicitly authorize the Commission to correct typographical errors. CCE contends that the expedited time table that the General Assembly gave to the Commission also underscores that the Commission is not to look to investigate, evaluate or "re-cut" the fundamental provisions of the IPA's final draft sourcing agreement.

CCE claims that other than other than the provisions specified in the PUA, all other conditions, rights, provisions, exceptions, and limitations, that is, everything else in the contract, must remain exactly the same as was in the final draft sourcing agreement that was presented to the Commission by the IPA. Pointing to the language of the PUA and Illinois caselaw regarding the limited authority of administrative agencies and the strict requirement that agencies act only as permitted by statute, CCE argues that any other modifications to the sourcing agreement would be beyond the Commission's statutorily-defined limited role with respect to the sourcing agreement development process. CCE notes that says consistent with the Commission's very limited role, the Commission did not even attempt to take evidence in the instant proceeding, instead relying solely upon parties' statements of their position. CCE further notes that; neither Staff nor any other party verified its statement of position (although CCE's substantive filings were verified).

According to CCE, the PUA sets forth a specific role for the Commission at this time in determining three cost components that are to be included in the sourcing agreement: (a) the capital costs; (b) the O&M costs; and (c) the rate of return. CCE believes the processes for determining these components are now complete, and the Commission now should "fill in the blanks" for each component.

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Regarding the capital costs, CCE says the PUA requires that the Commission simply incorporate the results of a process involving CCE and the CDB into the IPA's final draft sourcing agreement.

In CCE's view, Schedule 5.2A of the IPA's final draft sourcing agreement provides the mechanism to convert the capital costs to a per-MMBtu recovery charge. CCE says that as shown in that schedule, the capital costs and the capital structure are used to ultimately determine the actual cost of debt, which is added to the return on equity to derive the capital recovery component.

CCE reports that as required by the Act, the CDB, after working for months with its outside experts, confidentially submitted to the Commission a range of reasonable capital costs that could be included in the sourcing agreement. CCE also provided the Commission with its estimate of capital costs for the Project. Since CCE's estimated capital costs fell within the range of capital costs deemed reasonable by the CDB, CCE says the Commission is to incorporate CCE's capital costs into the sourcing agreement. CCE says the Corrected Agreement includes this capital cost figure in Schedule 5.2A, row (A).

CCE states that Nicor's first contention in its Statement of Position is that the capital structure shown in Schedule 5.2A reflecting 70% debt and 30% equity should be adjusted at a later date to reflect the actual capital structure for the facility financing. CCE contends that Schedule 5.2A in the CCE Corrected Agreement already reflects what CCE considers the most likely capital structure that will be used to finance the Project. CCE also argues that the structure of proposed Schedule 5.2A provides a disincentive for CCE to deviate from this capital structure in the actual financing: If the debt percentage were to be lower than 70% (thus increasing the equity percentage), CCE's base return on equity would decrease, since CCE has no means to increase the equity return beyond the fixed \$.93/MMBtu. CCE further claims that if the debt percentage were to be higher than 70%, CCE would have no mechanism to recover the extra cost of debt based on the higher principal, since the maximum debt principal is set as well (only the final interest rate is used to determine the cost of debt). In CCE's view, the Schedule 5.2A proposed by CCE, while not guaranteed to match precisely with the ultimate actual capital structure, would punish CCE if CCE were to deviate from its terms.

CCE argues that Nicor's request that the capital charge be adjusted at some future time is contrary to law. CCE contends that the PUA requires the return on equity to be set in the sourcing agreement as part of the current process, within 90 days after the IPA submitted the final draft sourcing agreement, and it must remain fixed for the duration of the sourcing agreement. According to CCE, the only adjustment to be made to the capital recovery charge after the Commission approves the sourcing agreement is to account for the actual cost of debt, per Section 9-220(h-3)(1)(B) of the PUA. CCE believes the Commission is not authorized to make any adjustments to the return on equity beyond this 90-day process.

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CCE reports that Nicor's second contention in its Statement of Position is that the Commission should modify the "billing determinant" provision in the final draft sourcing agreement related to the capital costs, essentially the divisor (volume of gas) to be used in Schedule 5.2A to derive the per-MMBtu capital recovery charge. CCE says that while Staff makes a similar point in its Statement of Position, Staff recognizes CCE's risk under the terms of the IPA final draft sourcing agreement is that of under-recovery, not over-recovery, in that the billing determinant for the capital recovery charge is 42,064,500 MMBtu, but the Annual Contract Quantity for the two purchasing utilities is only 40,151,759 MMBtu. According to CCE this represents a shortfall of 1,912,741 MMBtu, or 5% of the contract volumes. CCE says Nicor asserts that the capital costs for the Project should be recovered across the entire projected annual output of the Project, rather than the volumes contracted by the purchasing utilities.

Nicor's request, CCE claims, would have the Commission modify this provision to increase the divisor used in Schedule 5.2A, line (G) of the IPA's final draft sourcing agreement from 43.5 Bcf (42,064,500 MMBtu) to 47,799,714 MMBtu. Staff considers a range of such divisors and concludes that "the Commission should approve either (a) the IPA's proposal to set base rates to recover 95.45% of its costs, or (b) to set base rates to recover any other percentage of costs between 84% and 100%, based on what the Commission determines to be a fair and reasonable allocation, given the complex provisions of the IPA's Final Draft Sourcing Agreement."

CCE argues that the suggestion of Nicor and Staff that the Commission modify the "billing determinant" provision in the IPA's final draft sourcing agreement is contrary to law. CCE says Section 5.2A of the IPA's final draft sourcing agreement is perfectly clear: "For purposes of determining the Capital Component, the Annual Contract Quantity will be 43.5 Bcf." CCE claims this provision was discussed extensively in the mediation process before the IPA, and the IPA explained its rationale for its decision in the memorandum that it transmitted to the Commission accompanying the final draft sourcing agreement.

CCE states that Public Act 97-0630, which was considered, passed and enacted after the IPA provided the final draft sourcing agreement to the Commission, modified the Act to contain a clear mandate that other than the exemptions specifically identified, "the Commission shall approve . . . all other terms and conditions, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement . . ." CCE says the capital cost billing determinant provision of the sourcing agreement must be preserved, and 43.5 bcf must be used as the billing determinant.

According to CCE, Nicor attempts to further justify its position on having the Commission modify the billing determinant provision by claiming that the IPA's final draft sourcing agreement is "contrary to fundamental cost causation principles." CCE believes the principles to which Nicor refers are traditional utility ratemaking principles, and Nicor offers no citation or explanation as to why such principles should be applied to modify the IPA's final draft sourcing agreement, which sets the rates for a non-utility entity in accordance with specific factors set forth by statute. CCE also asserts that

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even if such utility principles were applicable to the CCE Project, CCE is only assured of recovering its capital costs on the Annual Contract Quantity of SNG purchased by the Purchasing Utilities under the sourcing agreement. CCE says it has no assurance that any volumes of SNG beyond that volume can be sold, let alone at a price which recovers the capital costs net of fuel, O&M, and other costs; thus, contrary to the PUA, Nicor's proposal would create a structure that would be designed in a manner that would not enable CCE to recover its capital costs through the sourcing agreement. CCE notes that Section 9-220(h-3)(1) of the PUA states: "A capital recovery charge approved by the Commission shall be recoverable by the clean coal SNG brownfield facility under a sourcing agreement. The capital recovery charge shall be comprised of capital costs and a reasonable rate of return."

CCE asserts that as part of an involved set of negotiations with the parties, CCE has already agreed a higher billing determinant than is technically allowed. CCE says the billing determinant for the capital recovery charge is 42,064,500 MMBtu, but the Annual Contract Quantity for the two purchasing utilities is 40,151,759 MMBtu, putting CCE at risk of under-recovery. CCE also contends that the \$100 million in guaranteed customer savings flows through only to the customers of the Purchasing Utilities, so even applying the utility ratemaking principles, it would be appropriate to have the customers of the Purchasing Utilities pay the full capital costs associated with the Project.

CCE contends that just as with the capital costs, with regard to the O&M costs, the PUA requires that the Commission incorporate into the IPA's final draft sourcing agreement the results of a process involving CCE and the CDB. CCE says as the Commission appropriately noted in its December 7, 2011 Interim Order in the instant proceeding, CCE's O&M estimate fell "squarely within the range deemed reasonable" by the CDB, as a result, the Commission is to incorporate CCE's O&M figure into the sourcing agreement. CCE says the Corrected Agreement includes the Commission-approved O&M cost figure in Schedule 5.2B, row (A).

CCE states that just as with the capital costs, with regard to the O&M costs, Nicor contends that the Commission should revise the billing determinant provision in the IPA's draft sourcing agreement. Nicor asserts that the O&M costs for the Project should be recovered across the entire projected annual output of the Project, rather than 43.5 bcf. According to CCE, just as with the capital component, CCE's chief risk is under-recovery of O&M costs rather than over-recovery, as the current sum of annual contracted volumes is less than 43.5 bcf.

CCE maintains the IPA's final draft sourcing agreement is perfectly clear in including the billing determinant provision in the determining the per-MMBtu O&M calculation: "For purposes of determining the O&M Component, the Annual Contract Quantity will be 43.5 Bcf." CCE argues that as with the capital component, the Commission lacks the statutory authority to modify the O&M billing determinant provision in the IPA's final draft sourcing agreement.

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CCE says the PUA specifically tasks the Commission with determining an appropriate rate of return to be included in the sourcing agreement. CCE notes the Commission already determined the base rate of return in the Interim Order. CCE says the Corrected Agreement includes the Commission-approved base rate of return figure in Schedule 5.2A, row (K).

CCE reports that Staff does not dispute that the Commission-approved base rate of return should be approved under the assumed 70% debt and 30% equity ratios.

CCE believes Staff's suggestion of a change to the definition of "Annualized Daily Average" from the CCE Corrected Sourcing Agreement likewise is inconsistent with the PUA, to the extent that the basis for this proposed modification is Staff's improper proposal to change to the definition of Annual Contract Quantity. CCE asserts that the version of Schedule 5.2A proposed by Staff is not inconsistent in its final conclusion with that proposed by CCE in the CCE Corrected Agreement. CCE argues, however, that there is no statutory basis for the Commission to modify the IPA's final draft sourcing agreement to include a Commission-approved "Cost Recovery Percentage" (line M).

CCE also asserts there is no authority for the Commission to modify the Projected Output of the Project to be any number other than the "Annual Output" in the IPA's final draft sourcing agreement. CCE states that while the ultimate conclusions and means of calculation are equivalent between the Staff-proposed Schedule 5.2A and CCE's proposed Schedule 5.2A (namely, a \$4.04 base cost of debt and a \$.93 return on equity), CCE's believes its proposed Schedule 5.2A better reflects the form of sourcing agreement that the Commission is authorized to approve.

CCE also contends that the version of Schedule 5.2B proposed by Staff reflects a number of improper changes to the draft sourcing agreement not supported by the PUA. CCE asserts that the Projected Output of the Project intentionally [SHOULD THIS SAY "UNINTENTIONALLY"?] does not match the Annual Output specified in the IPA's final draft sourcing agreement, which is required to be set at 47,799,714 MMBtu. As with the Staff-proposed Schedule 5.2A, Staff argues that the Commission can and should approve a "Cost Recovery Percentage," a calculation CCE claims is neither defined nor authorized in the PIA. CCE's asserts that its proposed Schedule 5.2B, which is unmodified in form from the IPA-approved final draft sourcing agreement, is the only version which correctly complies with the PUA.

E. Commission Conclusions

As noted in Section II of this Order, the Commission's authority in this proceeding is limited. Accordingly, we may decide only a limited set of statutorily specified items, and we lack the authority to review, evaluate, or change the substantive decisions of the IPA and the CDB.

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Having reviewed the positions of the parties in this proceeding, the Commission finds that the sourcing agreement submitted by the IPA agreement containing the capital costs, rate of return, and O&M costs should be approved, subject to the modifications adopted herein. The base rate of return on common equity adopted in the December 7, 2011 Interim Order in this proceeding, as well as the as the O&M costs estimate provided by CCE, are hereby affirmed.

With regard to the Commission approved capital costs, it appears there may be no disagreement regarding this issue. According to the CDB, the reasonable range of all-in capital cost based on the work of its consultants is in the range of \$2,508,423,000 to \$3,422,240,000. The CDB also reports that CCE's all-In capital cost estimate on the same basis is \$2,938,000,000. **Thus, under the requirements of Section Section 9-220(h-3) of Act, which require Commission approval of an all-in capital cost within the CDB's range, the Commission finds approves CCE's all-in capital cost estimate of \$2,938,225,690 to be reasonable and that value is hereby adopted.**

Nicor asserts that rather than adopting CCE's projected capital structure containing 70% debt and 30% equity, the Commission should approve the actual capital structure after the debt issuance takes place. CCE argues Nicor's request that the capital charge be adjusted at some future time is contrary to law. On the other hand, CCE acknowledges that that under the law, an adjustment can be made to the capital recovery charge to adjust for the actual cost of debt. **Nevertheless, the Commission recognizes that the final capital structure will depend on CCE's ability to meet the budgets set by CDB and approved by the Commission, and thus are not ascertainable before CCE has completed the capital component of the project. Thus, because CCE established on Exceptions that it will have strong incentives to meet the 70% debt and 30% equity mark, the Commission declines to require any additional action.**

~~The PUA states that "[r]ate of return shall be comprised of the clean coal SNG brownfield facility's actual cost of debt, including mortgage-style amortization, and a reasonable return on equity." Also at issue is whether the Commission should fix the cost rate and capital structure associated with CCE's anticipated debt issuance. To ensure that CCE recovers its "actual cost of debt, including mortgage-style amortization," the Commission cannot, at this time, fix the cost rate or percentage of debt given that that information is totally unknown. The Commission rejects CCE's suggestion that the "actual cost of debt" depends upon the cost rate but not the proportion of debt in the capital structure. The Commission's decades of experience in utility rate cases demonstrates just the CCE's position is incorrect.~~

~~—The Commission directs CCE, within 15 days of issuing the debt associated with the facility to file a report in this docket showing the actual cost of debt, the actual capital structure associated with financing the facility and an updated schedule in the form of page 1 of the Appendix to this Order showing the final actual capital recovery factor. This procedure to adjust for the actual cost of debt, which CCE acknowledges, necessarily impacts the cost of common equity, though not the approved reasonable~~

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~~base rate of return on common equity. The formulae on page 1 of the Appendix to this Order appropriately adjust the capital recovery charge for the actual cost of debt with a possible corresponding change in the cost of equity in the event the actual capital structure differs from what CCE anticipates.~~

As discussed above, Nicor takes issue with the "billing determinants" used in calculating the capital recovery charge as well as the O&M charge. Staff has also raised concerns regarding the anticipated output of the SNG facility as well as the heat content of the SNG, both of which appear to be well founded. While some of the underlying source information used in Staff's calculations may be considered confidential, the resulting estimates of the output are not. For the reasons described below, the Commission declines to address the merits of Nicor and Staff's arguments because the Commission lacks the authority to alter the billing determinate calculation approved by the IPA.

The Commission notes that the IPA agrees with Nicor and Staff that the billing determinants should be modified in the approved Sourcing Agreement but, CCE does not. CCE claims establishes that the Commission does not have authority to adjust the billing determinants. CCE points to long-standing Illinois case law that prevents the Commission from delving into this question, as it has already been decided by the IPA and the PUA does not permit the Commission to review or amend that decision. We note that this limited authority, while somewhat unusual in Commission proceedings, is not outside the norm generally with respect to the interplay between administrative agencies. For example, CCE notes correctly that the although the Illinois EPA and the Illinois Pollution Control Board both deal with environmental matters, the Pollution Control Board's statutory authority to review IEPA actions is limited. In short, whatever the merits, the Commission has not been granted the authority to review the IPA's decision to the extent that such a review is not specifically authorized in the Act. Moreover, Section 9-220(h-3)(1) of the Act states in part, "A capital recovery charge approved by the Commission shall be recoverable by the clean coal SNG brownfield facility under a sourcing agreement." (emphasis added) "Capital costs' means costs to be incurred in connection with the construction and development of a facility, as defined in Section 1-10 of the Illinois Power Agency Act, and such other costs as the Capital Development Board deems appropriate to be recovered in the capital recovery charge." The Act continues in Section 9-220(h-4), which reads, in part: "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)." (emphasis added)

The Commission is directed to approve the capital recovery charge "costs established pursuant to subsection (h-3)," which in turn requires the Commission to undertake a simple calculation as to whether the capital cost or O&M cost is within the range set out by the CDB, not simply some of the components that are inputs to the capital recovery charge as CCE implies. If the Commission were to undertake a wholesale review of all of the components of capital (or O&M)

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recovery, it would far overstep the limited grant of authority in 9-220(h-4), unless the review involved another one of the Commission's approved topics of review. Regardless of the Commission's opinion on whether the IPA arrived at the right decision or one of the other parties has recommended a better answer, the Commission is powerless to alter the IPA's final draft sourcing agreement on this term. ~~only to have jurisdiction over some of the components that comprise the capital recovery charge, there would be no reason for the statute to require that the Commission approve the capital recovery charge itself. The statute specifies how the Commission is to determine some variables that determine the capital recovery charge, such as the Commission-approved capital cost, as well as the Commission approved O&M budget. While providing some guidance, the statute is less specific about how the Commission is to determine the Commission approved rate of return on equity. The statute provide even less guidance on how the Commission is to establish the billing determinants that are used to establish the capital recovery charge and the O&M charge. No party questions that billing determinants are one of the inputs into Commission approved capital recovery or the O&M charges, which are to be stated on a per MMBtu basis.~~ Thus, the Commission declines to disturb the IPA's decision on billing determinants.

~~For purposes of this proceeding, the Commission finds that CCE and the IPA overstated the anticipated output of the SNG facility. The Commission finds Staff's estimate, 44,787,326 MMBtu/year to be the best explained estimate and to be the most reasonable. For purposes of calculating the Capital Recovery Factor as well as the O&M Recovery Charge, the Commission directs CCE to incorporate this value into the sourcing agreements as shown in the Appendix to this Order.~~

~~There is also disagreement over the percentage of capital costs for which the utilities should be responsible, which is also referred to by some as the "billing determinants" or MMBtu volume that should be used for pricing purposes. The PUA fixes the proportion of output for which Nicor and AIG, combined, are responsible at 84%. Nicor states that if there were the only utility obligated to purchase the output of the SNG facility, that utility could be required to purchase only 42% of the output and that it would be unreasonable to require such utility to bear 100% of the capital cost of the SNG facility.~~

~~CCE maintains that the Commission has no authority over this issue. Additionally, while CCE attempts to refute Nicor's argument regarding cost causation, it totally ignores the potentially absurd result that its interpretation of the statute could easily produce. The Commission finds, without question, Nicor's view to be correct. As a result, the Commission finds that together, Nicor and AIG should be responsible for bearing 84% of the capital cost associated with the SNG facility. This conclusion is reflected in the Appendix to this Order.~~

[EXCEPTION #4 (ALTERNATIVE):

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There is also disagreement over the percentage of capital costs for which the utilities should be responsible, which is also referred to by some as the "billing determinants" or MMBtu volume that should be used for pricing purposes. The PUA fixes the proportion of output for which Nicor and AIC, combined, are responsible at 84%. Nicor states that if they were the only utility obligated to purchase the output of the SNG facility, that utility could be required to purchase only 42% of the output and that it would be unreasonable to require such utility to bear 100% of the capital cost of the SNG facility. **We note as an initial matter that Nicor's scenario cannot occur under the law and is wholly theoretical - pursuant to Section 9-220(h-1), the opportunity for a natural gas utility to opt out of the sourcing agreement and to elect biennial rate cases passed on September 12, 2011, and neither Nicor nor Ameren opted out. Thus, even under the most extreme scenario, Nicor ratepayers would be responsible for 50% of the capital cost of the clean coal SNG brownfield facility.**

If this proceeding were about a traditional natural gas utility asset, such as a pipe or meter, Nicor's argument might have some merit. Under that circumstance, Nicor would simply split the reasonable and prudent costs among cost causers. However, in this case, the final draft sourcing agreement contains several revenue-sharing provisions, including \$100 million in guaranteed customer savings and 50% net revenue sharing from sales of SNG and miscellaneous products to third parties, and 50% sharing of positive market differential (the amount, if any, which the SNG price is below-market). As Staff pointed out, the final draft sourcing agreement is well within the reasonable range of potential cost recovery. As a result, we adopt one of Staff's alternative recommendations, namely to approve recovery of 95.45% of the clean coal SNG facility's costs from Nicor and AIC collectively.

~~CCE maintains that the Commission has no authority over this issue. Additionally, while CCE attempts to refute Nicor's argument regarding cost causation, it totally ignores the potentially absurd result that its interpretation of the statute could easily produce. The Commission finds, without question, Nicor's view to be correct. As a result, the Commission finds that together, Nicor and AIC should be responsible for bearing 84% of the capital cost associated with the SNG facility. This conclusion is reflected in the Appendix to this Order.~~

END EXCEPTION #4 (ALTERNATIVE)]

V. SCRIVENER'S ERRORS AND TYPOGRAPHICAL ERRORS

On December 12, 2011, Public Act 97-0630 went into effect, amending subsection (h-4) as follows:

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(h-4) No later than 90 days after the Illinois Power Agency submits the final draft sourcing agreement pursuant to subsection (h-1), 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), as of December 12, 2011).

Illinois courts have defined scrivener's errors as situations in which the intent or conscious decisions of parties to a contract or document is not reflected in the final writing. (See, e.g., *Gray v. Nat'l Restoration Sys., Inc.*, 354 Ill. App. 3d 345, 371, 820 N.E.2d 943, 965-66 (1st Dist. 2004) (Campbell, P.J. concurring in part, dissenting in part).) To wit, "Several Illinois cases have confronted the issue of a scrivener's error. In each instance, the correction was mechanical or technical in nature, not decisional or judgmental." (820 N.E. 2d at 965; see also *Schaffner v. 514 West Grant Pl. Condominium Ass'n Inc. Ill.*, 756 N.E.2d 854 (1st Dist. 2001); *Dauderman v. Dauderman*, 130 Ill. App. 2d 807, 809, 263 N.E.2d 708, 710 (5th Dist. 1970) (inserting omitted phrase to harmonize particular term with the rest of the divorce decree).) A scrivener's error occurs when the parties had a meeting of the minds on a contract term, but the scrivener (here, the IPA) did not write the words that matched the parties' intent.

~~Various dictionaries define scrivener error and typographical error generally as follows respectively:~~

~~scrivener error~~

~~Mistake by preparer of a document that results in intent of the parties being thwarted; basis for not enforcing the document or reforming it. See mutual mistake.~~

~~typographical error~~

~~An error in printed or typewritten matter resulting from striking the improper key of a keyboard, from mechanical failure, or the like.~~

CCE, IPA, Nicor, and Staff have submitted statements concerning scrivener's and typographical errors in the basic sourcing agreement. While the above-quoted section of Public Act 97-0630 requires the Commission to correct scrivener's errors, it is a corollary of that correction that there must be agreement that an error occurred in the drafting of the document the key question is whether there was a meeting of the

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minds during the process of negotiating the final draft sourcing agreement. CCE submitted a grid outlining what it perceived as scrivener's errors in the basic sourcing agreement and requested the correction of those scrivener's errors. Staff and the IPA responded with agreement or disagreement with those changes. The Commission adopts changes as scrivener's errors only in those instances where there is agreement among the parties that an actual scrivener's error occurred a party has made a convincing argument that a meeting of the minds had been reached but that the meeting was not reflected in the document.

Perhaps the best example of this is the CCE-identified scrivener's error that "Buyer's Allocated Percentage" appears in both the definition of the term Maximum DCQ and in Section 2.1, which has the effect of applying Buyer's Allocated Percentage twice. We have carefully reviewed the documents submitted by the parties, and no party suggests that the participating utilities intended to take less than 42% each or 84% collectively of the clean coal SNG brownfield facility's output. There was a clear meeting of the minds on the 42% each/84% combined number. Thus, although the IPA objects to CCE's solution to the scrivener's error (noting that Ameren wanted Buyer's Allocated Percentage only in the definition of Maximum DCQ), there is no doubt this is a scrivener's error. Here, the Commission modifies the definition of Maximum DCQ according to CCE's proposal, because Ameren itself did not object to CCE's proposed remedy.

[EXCEPTION #3 (ALTERNATIVE): *replace the above paragraph with:*

Perhaps the best example of this is the CCE-identified scrivener's error that "Buyer's Allocated Percentage" appears in both the definition of the term Maximum DCQ and in Section 2.1, which has the effect of applying Buyer's Allocated Percentage twice. We have carefully reviewed the documents submitted by the parties, and no party suggests that the participating utilities intended to take less than 42% each or 84% collectively of the clean coal SNG brownfield facility's output. There was a clear meeting of the minds on the 42% each/84% combined number. Thus, although the IPA objects to CCE's solution to the scrivener's error (noting that Ameren wanted Buyer's Allocated Percentage only in the definition of Maximum DCQ), there is no doubt this is a scrivener's error. Here, the Commission modifies the definition of Maximum DCQ according to what IPA represents as Ameren's proposal, namely to remove the references to Buyer's Allocated Percentage from Section 2.1.

END EXCEPTION #3 (ALTERNATIVE)]

Undertaking a similar analysis for CCE's other scrivener's and typographical errors, the Commission similarly agrees that CCE has established that the parties had a meeting of the minds that is not reflected in the document.

In the absence of an alternative proposal, we adopt CCE's proposed solutions to scrivener's and typographical errors for the reasons set forth in CCE's Reply Brief and Brief on Exceptions.

~~The only revisions to the basic sourcing agreement herein directed by the Commission pursuant to Public Act 97-0630 are Sections 2.2(c); 12.5 (a); 14.1(b) as contained in Exhibit 3 entitled, "Illinois Power Agency's Proposed Revisions to the Form SNG Sourcing Agreement." All other changes, whether alleged to be scrivener's errors or typographical errors, are denied.~~

VI. OTHER ISSUES

A. Staff's Position

Staff reports that the IPA's Final Draft Sourcing Agreement addresses this requirement in sections 2.6 ("Contract Savings Guaranty"), 2.7 ("Contract Savings Reconciliation"), and 2.8 ("Security for Contract Savings Guaranty Shortfall Amount"). Staff also indicates that it not clear to what extent it is within the Commission's authority to impose changes under Section 9-220(h-4) as amended. Nonetheless, it is of sufficient importance that Staff is compelled to bring it to the Commission's attention, regardless of the Commission's ultimate determination in that regard.

In Staff's view, the provisions in these sections provide very little assurance that consumers will receive the mandated \$100 million in savings, notwithstanding the fact that the guarantee would be backed by (1) a CPRA and, (2) to the extent to which that fund proves insufficient liens on CCE's Plant and other non-cash assets. Staff asserts that the CPRA could easily be dwarfed by the Contract Savings Guaranty Shortfall Amount. Staff also claims the utilities' liens on the Plant and other non-cash assets of CCE would be subordinate to the senior lien and mortgage and security agreement executed in favor of the Financing Parties of CCE. According to Staff, even if CCE's indebtedness to the Financing Parties terminates by the end of the 30-year Sourcing Agreement term, since the Plant and other non-cash assets could be approaching the end of their useful lives, their value may be insufficient to cover the Contract Savings Guaranty Shortfall Amount.

Staff believes the sourcing agreement should be modified to increase the likelihood that the Contract Savings Guaranty is honored. In particular, Staff proposes adding to the sourcing agreement a requirement that, during the 30-year period of the agreement, all distributions to equity must be placed into a Guarantee Shortfall Trust Fund, with the accumulated balance at the end of the 30th year to be distributed first to the utilities, to the extent that there are insufficient funds in the CPRA to permit Seller to rebate to both utilities the full amount of the Contract Savings Guaranty Shortfall Amount. If and when the full Contract Savings Guaranty Shortfall Amount is distributed to the utilities, Staff suggests that then any and all remaining amounts in the Guarantee Shortfall Trust Fund could be released to CCE's stockholders. Staff also suggests the trustee of the Guarantee Shortfall Trust Fund could be the trustee of the CPRA. Staff

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also proposes that CCE be given an opportunity to find a guarantor who can provide a suitable guarantee to the utilities, which may be able to substitute for a Guarantee Shortfall Trust Fund.

Staff points out that even if distributions are made to the utilities from the proposed Guarantee Shortfall Trust Fund (or from a guarantor), the net present value of the \$100 million in savings actually will be negative for all real (as opposed to nominal) consumer discount rates over a certain percentage. Staff states that since the present value of any series of cash flows weights earlier flows higher than later flows, from this standard economic and business perspective, consumers can be worse off with the CCE commitment than without it, even when the simple sum of real “savings” is positive. Staff says the net present value of consumer savings is not only negative in all the scenarios where the CPRA proves insufficient; the net present value is negative even in Brattle’s base case scenario.

Staff states that while the market value could exceed the book value, this would depend on the condition of the aging plant and the feasibility of using it to make and sell SNG and the plant’s other outputs at market prices, while still covering on-going costs. Staff has received no evidence of the likelihood of this scenario, and any such evidence would be highly speculative, since it would deal with conditions and events over three decades into the future. Thus, even if CCE, by the end of year 30, has satisfied all its obligations to the Financing Parties, Staff has very little confidence that CCE will be able to satisfy its outstanding “guaranteed” debt to ratepayers, under the IPA’s Final Draft Sourcing Agreement.

Staff suggests that requiring CCE to deposit all distributions into a Guarantee Shortfall Trust Fund would greatly enhance the commitment to and the likelihood of ratepayers receiving the guaranteed savings level specified in 9-220 (h-1) (4) of the PUA and section 2.6 of the IPA’s Final Draft Sourcing Agreement. However, Staff notes that CCE may object to the proposal on the grounds that its shareholders would prefer to reinvest CCE’s distributions in a manner completely different than that of a trustee of a Guarantee Shortfall Trust Fund. Thus, as an alternative, Staff suggests CCE should be given the option of finding a guarantor, such as its parent (Leucadia National Corporation), to provide each of the utilities with a mutually-agreeable guarantee, negotiated in good faith between the utilities and the guarantor, and subject to approval by the Commission, for the prompt payment of any Contract Savings Guaranty Shortfall Amount still remaining after the utilities have availed themselves of the remedies described in Section 2.7 and 2.8 of the IPA’s Final Draft Sourcing Agreement. Given the state of Leucadia’s balance sheet as of September 30, 2011 (e.g., total assets of \$8.2 billion; total equity of \$6.0 billion), Staff is confident that a suitable guarantee, as a substitute for a Guarantee Shortfall Trust Fund, can be negotiated.

Staff notes that the IPA’s Final Draft Sourcing Agreement includes the following definition:

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“Monthly Base Overage Amount” means one-twelfth of \$174,000,000, which amount is equal to 2.015% of the average annual amounts paid by all gas distribution customers of the Purchasing Utilities during the 5-year period ending May 31, 2010. For the avoidance of doubt, the Monthly Base Overage Amount is \$14,500,000 in 2010 dollars.

Staff says the Monthly Base Overage Amount is used in determining how much should be withdrawn from the CPRA in any month on behalf of ratepayers to ameliorate rate increases due to purchases from CCE. Staff does not know how CCE or the IPA derived the figure of \$174 million used in the above definition (or if it is a scrivener’s error), but Staff believes it is grossly overstated (approximately 50-60% higher than the 2.015% level specified in the PUA). Staff claims the effect of the overstatement would be to significantly delay ratepayers’ access to the CPRA, leaving them to suffer negative savings for a longer period of time.

According to Staff calculations, the figure of \$174 million instead should be somewhere between \$113 million and \$117 million. Taking the average of \$113 and \$117 million, Staff recommends that the Commission direct CCE to modify the definition as follows:

“Monthly Base Overage Amount” means one-twelfth of ~~\$174,000,000~~ \$115,000,000, which amount is equal to 2.015% of the average annual amounts paid by all gas distribution customers of the Purchasing Utilities during the 5-year period ending May 31, 2010, in 2010 dollars. For the avoidance of doubt, the Monthly Base Overage Amount is ~~\$14,500,000~~ \$9,583,333 in 2010 dollars.

The IPA’s Final Draft Sourcing Agreement states:

“C” is the Fuel Component. The Fuel Component for each month shall be a price per MMBtu established based on the quotient of (i) the actual fuel costs incurred by Seller in accordance with the ICC-Approved Annual Fuel Procurement Plan for the Plant as described in **Section 4.6 (Feedstock Requirements and Procurement Plans)** during each month and the Btu content for each such month in accordance with the formula below:

(\$/MMBtu delivered fuel cost)

According to Staff, the first problem with the above provision is that the numerator of the quotient is designated with the Roman numeral (i), but the denominator lacks the expected (ii). Staff presumes that the (ii) was intended to be inserted just before the phrase “the Btu content for each such month.” Staff says while the phrase “the Btu content for each such month” is vague (begging the question, “The Btu content of what?”), Schedule 5.2C of the IPA’s Final Draft Sourcing Agreement clarifies that it is “the total MMBtus of all fuel consumed during the month.” However,

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Staff states that since the fuel charge is to be applied to “the total MMBtus of Conforming SNG accepted at the Title Transfer Point for Buyer’s account . . .” and the Fuel-to-SNG Efficiency rate of the plant is expected to be significantly less than 100%, such a charge would enable CCE to recover less than half of its total fuel costs from Nicor and AIC. Staff does not know if the IPA intended this result or if it is a scrivener’s error. However, if the Commission determines that the charge should be designed to recover CCE’s total fuel costs, then Staff believes the provision should be modified as follows:

“C” is the Fuel Component. The Fuel Component for each month shall be a price per MMBtu established based on the quotient of (i) the actual fuel costs incurred by Seller in accordance with the ICC-Approved Annual Fuel Procurement Plan for the Plant as described in **Section 4.6 (Feedstock Requirements and Procurement Plans)** during each month and (ii) the total MMBtus of Conforming SNG accepted at the Title Transfer Point for Buyer’s account up to the Buyer’s Allocated Percentage of MCQ as provided in this Agreement, up to the Buyer’s Allocated Percentage of the ACQ on an annual basis. ~~the Btu content for each such month in accordance with the formula below:~~

~~(\$/MMBtu delivered fuel cost)~~

Staff notes that CCE’s December 14, 2011 filing also makes a change to Schedule 5.2C of the IPA’s draft, which appears intended to give the same result as above. However, Staff believes it fails; additional changes to CCE’s new version of Schedule 5.2C would be needed to correct the remaining problems.

Staff states that on the other hand, both the IPA’s Final Draft Sourcing Agreement and CCE’s December 14, 2011 filing provide that Nicor and AIC are responsible for purchasing only 84% of the output of the plant. Hence, Staff says if the Commission finds that the fuel charges applied to Nicor and AIC should be modified commensurately to recover only 84% of the plant’s fuel costs (or some other level, as discussed in the next section), then Staff believes the above provision should be further modified as follows:

“C” is the Fuel Component. The Fuel Component for each month shall be a price per MMBtu established based on the quotient of (i) 84% [or some other level determined by the Commission to be appropriate] of the actual fuel costs incurred by Seller in accordance with the ICC-Approved Annual Fuel Procurement Plan for the Plant as described in **Section 4.6 (Feedstock Requirements and Procurement Plans)** during each month and (ii) the total MMBtus of Conforming SNG accepted at the Title Transfer Point for Buyer’s account up to the Buyer’s Allocated Percentage of MCQ as provided in this Agreement, up to the Buyer’s Allocated Percentage of the ACQ on an annual basis.

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Staff states that in the alternative, the revised Schedule 5.2C of CCE's December 14, 2011 filing should be further modified by adding an adjustment of 84% (or some other level), where this adjustment factor is referred to as the "ICC-approved Cost Recovery Percentage." Staff suggests that if this route is taken by the Commission, then ICC-approved Cost Recovery Percentage should be added to the sourcing agreement's definition section.

Staff says the same concepts are equally applicable in the context of both the Fuel Component and the Carbon Capture and Sequestration Component. According to Staff, the IPA's Final Draft Sourcing Agreement appears to require Nicor and AIC to pay for 100% of CCE's carbon capture and sequestration costs. Staff notes that the IPA proposes to use neither 84% nor 100% for the capital recovery and O&M cost recovery charges. Rather, it proposes a level of 84% divided by 88%, which is approximately 95%. Staff recommends that whatever percentage is adopted by the Commission for purposes of computing the capital recovery and O&M cost recovery charges should also be applied to the Fuel Component and the Carbon Capture and Sequestration Component.

Staff states that the IPA's Final Draft Sourcing Agreement includes seven conditions (and one left intentionally blank), upon which the Buyer (AIC or Nicor) may terminate the contract prior to the end of the contract's nominal term of 30 years commencing on the commercial production date of the SNG facility. Staff says all but the last of these conditions clearly deal with "the clean coal SNG brownfield facility's failure to timely meet milestones, uncured default, extended force majeure, or abandonment," and, therefore, are not affected by Public Act 97-0630's changes to (h-4).

Staff indicates the last of these conditions states:

(h) upon 90 days written notice to Seller of any final and non-appealable administrative, judicial, or other governmental action that (i) breaks or repeals the prudence protection provided to Buyer by the Public Utilities Act, (ii) has a material adverse effect on the ability of the Buyer to recover the costs incurred by Buyer in connection with its purchase of SNG from the Plant through Buyer's purchased gas adjustment clause in conjunction with a SNG brownfield facility rider mechanism, (iii) determines that this Agreement, the Parties' rights or obligations under this Agreement, or any amendment, modification, elections, ancillary agreements or consents provided under or in connection with this Agreement, fails to qualify for the prudence protection provided by the Public Act. (iv) or in the Financing, causes this Agreement (or any resulting or successor agreement) to fail to qualify for the prudence protection provided by the Public Act.

Staff states that in CCE's December 14, 2011 filing, CCE has deleted this paragraph (h). Unless other parties raise valid objections, Staff has no objection to this amendment.

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Staff also notes that CCE also proposes to delete section 14.20 from the IPA's Draft Sourcing Agreement, presumably because CCE views it as an example of a gas utility's right to terminate the sourcing agreement. Section 14.20 states:

14.20 Non-Severability. All of the provisions of this Agreement constitute a material integral part of the Parties' agreements and this Agreement shall be construed in whole and not in part so that if individual provisions, agreements or covenants are determined to be invalid, void or unenforceable by any court having jurisdiction, then such determination shall invalidate, void, and make unenforceable this Agreement in its entirety.

Staff disagrees with the deletion of this paragraph because (1) it is a reasonable provision for a contract of this nature, and (2) it is not affected by Public Act 97-0630's changes to (h-4) because Section 14.20 of the sourcing agreement does not deal with a gas utility's right to terminate the sourcing agreement (as limited by Public Act 97-0630). Hence, Staff recommends that the Commission reject CCE's proposal to delete this clause of the contract.

B. AG's Position

It is the AG's position that the Sourcing Agreement does not comply with Section 9-220(h-5)(A) of the PUA. The AG claims the contract is missing certain provisions that the PUA explicitly requires to be included in SNG sourcing agreements; specifically, the obligation of CCE to conduct monitoring and provide reports and documentation to the Commission regarding carbon capture and sequestration. The AG believes the Sourcing Agreement needs to be revised to include these provisions and to comply with the PUA.

The AG states that Subsection (h-5)(A) of the Act (as amended by P.A. 97-630, December 8, 2011) states that "all sourcing agreements . . . shall require the owner of any facility supplying SNG under the . . . sourcing agreement to provide certified documentation to the Commission each year, starting in the facility's first year of commercial operation," that does the following: 1) "accurately report[s] the quantity of carbon dioxide emissions from the facility that have been captured and sequestered"; and 2) "report[s] any quantities of carbon dioxide released from the site or sites at which carbon dioxide emissions were sequestered in prior years, based on continuous monitoring of those sites."

The AG contends that the documentation referred to above is an essential part of the carbon capture and sequestration requirements of the PUA. Without the monitoring and reporting data, the AG claims it would likely be impossible to determine whether CCE is capturing the obligatory amount of carbon dioxide and whether that carbon dioxide is staying underground once it is sequestered. The AG is concerned

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that this would prevent the AG from exercising its duty to enforce the carbon capture and sequestration requirements as intended in the PUA.

The AG claims the PUA explicitly requires that the obligation to provide certified documentation on carbon capture and sequestration be included in the SNG sourcing agreement itself. The AG says the proposed contract submitted by the IPA for the CCE facility does not do so. The AG believes the Sourcing Agreement therefore needs to be amended to meet the requirements of subsection (h-5)(A). The AG insists that the legally-required certification should take the form of a sworn and notarized affidavit, and the Sourcing Agreement should specifically require that a sworn and notarized affidavit accompany any documentation required by subsection (h-5)(A) of the PUA, verifying that the statements contained in the documents are true.

The AG suggests that the following text should be added to Section 6.1 (“Matters Regarding Public Act”) in the Sourcing Agreement:

(c) Seller covenants that it shall provide certified documentation to the ICC each year, starting in the Plant’s first year of commercial operation, that (i) accurately reports the quantity of carbon dioxide emissions from the Plant that have been captured and sequestered and (ii) reports any quantities of carbon dioxide released from the site or sites at which carbon dioxide emissions were sequestered in prior years, based on continuous monitoring of those sites. This certification shall take the form of a sworn and notarized affidavit, attesting to the truth of the statements contained in the documents.

C. The IPA's Position

The IPA reports that Staff requests that the Commission modify the definition of “Monthly Base Overage Amount.” The IPA does not oppose the principle advocated by Staff, but notes that the language adopted by the IPA was proposed by both CCE and AIC. The IPA believes that the recommendations made by Staff are substantive changes to the Form SNG Agreement, not merely a typographical or scrivener’s error.

Staff recommends that the Fuel Charge Billing determinant language be modified to correct a scrivener’s error. The IPA agrees with Staff’s recommended modification.

The IPA reports that the AG asserts that there are provisions required by Section (h-5)(A) relating to Carbon Sequestration reports required to be filed with the Commission. The AG proposes that language be incorporated into the contract to reflect that Seller will provide certified documents to the Commission on an annual basis. The IPA agrees with the proposed addition of language required by Section (h-5)(A) of the PUA.

D. CCE's Position

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CCE contends that Staff proposes numerous additional changes to the draft sourcing agreement that are outside of the statutory purview of the Commission. In its Statement of Position, Staff makes a number of suggestions for modifications to the following fundamental provisions in the sourcing agreement: (A) the Savings Guarantee, (B) the Base Overage Amount, and (C) the Projected Output and Annual Contract Quantity. CCE suggests that Staff seems to recognize each of these proposed modifications is contrary to the specific provision in Section 9-220(h-4) of the PUA limiting the Commission's ability to modify the IPA's final draft sourcing agreement.

CCE notes that Staff asserts that there is a potential scenario under which the clean coal SNG brownfield facility would not achieve the \$100 million Savings Guarantee during the course of the 30-year sourcing agreement, and would also lack the assets to fulfill that obligation at the time of contract expiry. CCE says the PUA requires that the SNG brownfield facility guarantee the \$100 million savings requirement, but does not specify the means by which that guarantee is to be enforced. CCE argues that like the other terms and conditions in the IPA's final draft sourcing agreement, the mechanism for enforcing the Savings Guarantee was the subject of negotiations and mediation during the IPA process of developing the final draft sourcing agreement, taking into account the scenario considered by Staff and many others. CCE says the IPA's decision on this issue is codified in Sections 2.6, 2.7, and 2.8. CCE contends that Staff does not and cannot identify any authority for the Commission to modify this provision of the final draft sourcing agreement. In CCE's view, there simply is no statutory authority for the Commission to substitute its judgment, or that of its Staff, to modify the Savings Guarantee provisions.

CCE reports that Staff suggests that the figure calculated by the IPA in the draft sourcing agreement for Base Overage Amount is overstated, not due to a scrivener's error, but rather because Staff disagrees with the calculation. CCE argues that as with the other revisions proposed by Staff, the Commission lacks the authority to modify this term of the final draft sourcing agreement, and Staff makes no attempt to suggest otherwise. CCE claims the calculation of Base Overage Amount required the IPA to engage in a certain amount of extrapolation, and include a number of assumptions to arrive at its figure. CCE says Staff acknowledges that to perform the calculation "the amount of non-utility revenues collected from transportation customers for unbundled gas sales is unknown, and therefore must be imputed." CCE claims the IPA, with its expertise in energy procurement and involvement with the Project and the related legislative process, was well equipped to impute the figures for these calculations, and the law requires all parties to accept its judgment, despite any disagreement on specifics.

In CCE's view, while Staff provides opinions regarding the Projected Annual Output and Annual Contract Quantity in its Statement of Position, the PUA provides no mechanism by which the Commission can modify these provisions in the IPA's final draft sourcing agreement. CCE says the IPA-managed process by which these terms were negotiated with the purchasing utilities properly took into consideration relevant

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factors, and the PUA requires that the draft sourcing agreement's statement of Annual Output and Annual Contract Quantity not be altered.

CCE reports that the AG takes the position that the IPA's final draft sourcing agreement does not comply with the Act, because: "The Contract is missing certain provisions that the Act explicitly requires to be included in SNG sourcing agreements; specifically, the obligation of CCE to conduct monitoring and provide reports and documentation to the Commission regarding carbon capture and sequestration." CCE claims the IPA and other parties were aware of this obligation and to comply with law included language in Section 5.2D in the draft sourcing agreement that incorporates by reference the yet-to-be-established Commission plan that will require such reports and documentation:

"D" is the Carbon Capture and Sequestration Component. The Carbon Capture and Sequestration Component for each month shall be a price per MMBtu established under the formula for determining the Carbon Capture and Sequestration Component that will be developed as part of the ICC's approval of Seller's carbon capture and sequestration plan pursuant to the Public Act and the approved formula will be set forth in Schedule 5.2D (Calculation of Carbon Capture and Sequestration Component) to be attached to this Agreement that will be automatically appended upon such approval.

According to CCE, the PUA requires that the referenced carbon capture and sequestration plan include a requirement that CCE "provide documentation to the Commission each year, starting in the facility's first year of commercial operation, accurately reporting the quantity of carbon dioxide emissions from the facility that have been captured and sequestered and reporting any quantities of carbon dioxide released from the site or sites at which carbon dioxide emissions were sequestered." CCE contends that the Commission already has the obligation within the further context of an approval for a carbon capture and sequestration plan to require monitoring, public reports, and documentation. Given the reference to the plan that the Commission is to develop, along with the recognition that the sourcing agreement will be revised to add an Appendix 5.2D based upon that plan, CCE believes any further modification of the sourcing agreement is not necessary at this time, and is not permitted under the PUA.

E. Commission Conclusions

To reiterate our comments above, the Commission finds itself in a situation where the General Assembly, in its wisdom, has tasked the Commission with the authority to modify the Sourcing Agreement only within a narrow set of parameters specifically authorized in Section 9-220(h-4). Thus, although all of the parties have proposed interesting modifications -- and undoubtedly could have produced many more -- the Commission does not have the power to act on those proposed modifications. Furthermore, even if the Commission did have the authority, the Commission notes that given the highly constrained time frame

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permitted under the statute, the factual record on all of these matters is underdeveloped to the point that the Commission could not make an informed decision even to the extent that it *did* have sufficient authority to make the changes. We will, however, deal with each recommendation below.

The Commission finds the concerns identified by Staff regarding the customer protections to be serious such that action by the Commission is necessary. Staff suggests CCE find a guarantor, such as its parent (Leucadia National Corporation), to provide each of the utilities with a mutually-agreeable guarantee, negotiated in good faith between the utilities and the guarantor, and subject to approval by the Commission, for the prompt payment of any Contract Savings Guaranty Shortfall Amount still remaining after the utilities have availed themselves of the remedies described in Section 2.7 and 2.8 of the IPA's Final Draft Sourcing Agreement. The Commission appreciates Staff's suggestion, but finds that this sort of guarantee is not required by the Act, and is not common in the Commission's experience with utilities. Moreover, even if the Commission were fully persuaded by Staff's argument, as Staff itself pointed out, there is no authorization in Section 9-220(h-4) or anywhere else in the Act that would grant the Commission the authority to require a guarantor. Thus, the Commission declines to adopt Staff's recommendation. The Commission believes Staff's recommendation is reasonable and appropriate. As a condition of approving the Sourcing Agreement, the Commission directs CCE to identify a guarantor and to negotiate guarantees with Nicor and AIG. Additionally, the Commission directs CCE to submit said guarantees to the Commission for approval.

The Commission believes that Staff has identified a problem with Regarding the definition of "Monthly Base Overage Amount" in the Final Draft Sourcing Agreement. The IPA appears to agree set the level in the final draft sourcing agreement. Even if the Commission had the authority to make this change now, it is not convinced by the IPA's apparent switch in position, which lacks substantive explanation. Furthermore, the Commission declines to act of the IPA's recommendation, since it constitutes an attempt by the IPA to reverse itself, which would be contrary to clear Illinois law that does not allow administrative agencies to abrogate final decisions outside of a formal rehearing process (which the IPA does not have). As a result, CCE is directed to incorporate the modification to the definition proposed by Staff into the Sourcing Agreement. we decline to change the definition of "Monthly Base Overage Amount" as proposed by Staff.

Staff recommends that the fuel charge billing determinants language be modified to correct a scrivener's error. The IPA Agrees with Staff's recommended modification, subject to the modification that CCE has presented on exceptions to correct an additional error on page 1 of Staff's recommendation. The Commission finds this correction to be appropriate and directs CCE to incorporate the change to the Sourcing Agreement.

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CCE proposes deleting section 14.20, addressing non-severability. Both Staff and Nicor objects to the deletion of this provision, arguing that it is a reasonable provision and that it is not subject to Public Act 97-0630. CCE responds that because the PUA now specifically provides 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,” CCE is requesting that Section 14.20 be deleted in light of the utilities’ articulated position that such provision is a basis to terminate the sourcing agreement. The Commission **is bound by the statutory language of Section 9-220(h-4), which requires that contractual provisions that would permit termination – other than those specified in the statute – to be removed. Section 14.20 plainly would permit utility termination for a reason other than those specified in the statute. Accordingly, it must be removed from the sourcing agreement.** ~~finds the statements of Nicor and Staff to be more convincing than those of CCE. The Commission concludes that Section 14.20 should, remain in the Sourcing Agreement. It does not appear to the Commission that this provision falls under Public Act 97-0630, as CCE contends.~~

~~As discussed above, Staff opposes CCE's proposal to delete Section 14.20 from the IPA's Draft Sourcing Agreement. As Staff suggests, it does not appear that CCE's proposal to delete this provision is related to the recent enactment of Public Act 97-0630. The Commission is unaware of any other basis for CCE's proposal to delete this provision from the IPA's Final Draft Sourcing Agreement. As a result, the Commission concludes that Section 14.20 should not be deleted and should remain in the sourcing agreement.~~

[EXCEPTION #6 (ALTERNATIVE): *Replace the preceding two paragraphs with:*

CCE proposes deleting section 14.20, addressing non-severability. Both Staff and Nicor objects to the deletion of this provision, arguing that it is a reasonable provision and that it is not subject to Public Act 97-0630. CCE responds that because the PUA now specifically provides 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,” CCE is requesting that Section 14.20 be deleted in light of the utilities’ articulated position that such provision is a basis to terminate the sourcing agreement. The Commission finds the statements of Nicor and Staff to be more convincing than those of CCE. The Commission concludes that Section 14.20 should, remain in the Sourcing Agreement. It does not appear to the Commission that this provision falls under Public Act 97-0630, as CCE contends. **However, the Commission is concerned by CCE’s statement that the participating utilities intend to use Section 14.20 as a termination provision, which would be an unacceptable end-run around Public Act 97-**

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0630. The Commission wishes to be clear: Nicor and AIC are directed *not* to use Section 14.20 as an early termination provision.

~~As discussed above, Staff opposes CCE's proposal to delete Section 14.20 from the IPA's Draft Sourcing Agreement. As Staff suggests, it does not appear that CCE's proposal to delete this provision is related to the recent enactment of Public Act 97-0630. The Commission is unaware of any other basis for CCE's proposal to delete this provision from the IPA's Final Draft Sourcing Agreement. As a result, the Commission concludes that Section 14.20 should not be deleted and should remain in the sourcing agreement, **subject to the qualification that Nicor and AIC may not use the non-severability provision as a termination provision.**~~

END EXCEPTION #6 (ALTERNATIVE)]

The AG asserts that the Final Draft Sourcing Agreement does not comply with certain requirements of Section 9-220(h-5) of the PUA and provided specific language it believes should be included in the Sourcing Agreement. **Without reaching the merits of this argument, the Commission does not have the statutory authority to add in new provisions to the final draft sourcing agreement except as is consistent with Section 9-220(h-4). The AG's proposed modification plainly does not fall within (h-4), nor does the AG advance such an argument. The Commission further notes that, regardless of whether the provision is in the sourcing agreement, the clean coal SNG brownfield facility cannot avoid the obligations under 9-220(h-5), which includes enforcement if the standards are not met. Thus, t**~~The Commission declines to adopt~~ finds that the AG's modification is correct that the Final Draft Sourcing Agreement is deficient. As a result, the Commission directs CCE to include in the Sourcing Agreement the language provided by the AG for Section 6.1.

VII. FINDINGS AND ORDERING PARAGRAPHS

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

- (1) Nicor and AIC are Illinois corporations and are public utilities as defined in Section 3-105 of the Public Utilities Act;
- (2) Chicago Clean Energy, LLC is a facility operator as defined in Public Act 97-0096;
- (3) the Commission has jurisdiction over the parties hereto and the subject matter hereof;
- (4) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;

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- (5) except as specifically modified in this Order, the findings and conclusions contained in the Commission's December 7, 2011 Interim Order in this proceeding should be affirmed;
- (6) as required by Section 9-220(h-4) of the PUA, the Commission should approve the Sourcing Agreement submitted by the IPA containing the capital costs, rate of return, and operations and maintenance costs, subject to the modifications adopted in the prefatory portion of this order.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the Sourcing Agreement submitted by the IPA agreement containing the capital costs, rate of return, and operations and maintenance costs, subject to the modifications adopted in the prefatory portion of this order, is hereby approved.

IT IS FURTHER ORDERED that, except as specifically modified in this Order, the findings and conclusions contained in the Commission's December 7, 2011 Interim Order in this proceeding are hereby affirmed.

IT IS FURTHER ORDERED that Schedule 5.2A of the Sourcing Agreement should be modified to conform, in substance, to the Appendix to this Order, and shall be incorporated into Chicago Clean Energy's sourcing agreements with Ameren Illinois Company d/b/a Ameren Illinois and Northern Illinois Gas Company d/b/a Nicor Gas Company and reflecting Chicago Clean Energy's actual cost of debt, as well as the other conclusions in the prefatory portion of this Order.

IT IS FURTHER ORDERED that, subject to the provisions of 83 Ill. Adm. Code 200.880, this order is final; and pursuant to Section 9-220(h-3)(7) of the Public Utilities Act, it is subject to the Administrative Review Law.