STATE OF ILLINOIS
BEFORE THE ILLINOIS COMMERCE COMMISSION

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

VERIFIED JOINT MOTION IN LIMINE OF CHICAGO CLEAN ENERGY, LLC AND THE ECONOMIC DEVELOPMENT INTERVENORS REQUESTING A RULING REGARDING THE ILLINOIS COMMERCE COMMISSION'S LIMITED AUTHORITY TO MODIFY THE FINAL DRAFT SOURCING AGREEMENT AND IMPOSE ADDITIONAL CONDITIONS UPON CHICAGO CLEAN ENERGY, LLC

Christopher J. Townsend
Christopher N. Skey
Eric Roberts
DLA Piper LLP (US)
203 N. LaSalle Street, Suite 1900
Chicago, Illinois 60601
(312) 368-4000

Michael A. Munson
Grant O. Jaskulski
Law Office of Michael A. Munson
22 West Washington Street, 15th Floor
Chicago, Illinois 60602
(312) 854-8088

March 12, 2012

TABLE OF CONTENTS

I. INTRODUCTION 2

II. THE COMMISSION'S AUTHORITY TO MODIFY THE IPA-APPROVED FINAL DRAFT SOURCING AGREEMENT IS LIMITED TO ONLY THOSE ITEMS EXPLICITLY IDENTIFIED IN SECTION 9-220(h-4) 5

III. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO IMPOSE ADDITIONAL CONDITIONS UPON CHICAGO CLEAN ENERGY 10

IV. CONCLUSION 12

STATE OF ILLINOIS
BEFORE THE ILLINOIS COMMERCE COMMISSION

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

VERIFIED JOINT MOTION IN LIMINE
OF CHICAGO CLEAN ENERGY, LLC AND
THE ECONOMIC DEVELOPMENT INTERVENORS
REQUESTING A RULING REGARDING THE
ILLINOIS COMMERCE COMMISSION'S LIMITED
AUTHORITY TO MODIFY THE FINAL DRAFT SOURCING AGREEMENT AND
IMPOSE ADDITIONAL CONDITIONS UPON CHICAGO CLEAN ENERGY, LLC

Chicago Clean Energy, LLC ("Chicago Clean Energy" or "CCE"), by and through its attorneys, DLA Piper LLP (US), and the Economic Development Intervenors ("ÉDI"), by and through its attorneys, the Law Office of Michael A. Munson, pursuant to Parts 200.190 and 200.310 of the Rules of Practice of the Illinois Commerce Commission ("Commission" or "ICC"), 83 Ill. Admin. Code 200.190, hereby move for an interim order on rehearing acknowledging the Commission's limited authority to modify the Final Draft Sourcing Agreement and the Commission's lack of authority to impose additional conditions upon Chicago Clean Energy. Consistent with the Commission's decision to grant the Applications for Rehearing of Chicago Clean Energy and the Economic Development Intervenors regarding the Commission's January 10, 2012 Order in the instant proceeding (the "January 10 Order") and in an attempt to create a more efficient process for rehearing consistent with the Commission's Rules of Practice related to Commission proceedings, the instant Motion in Limine respectfully

seeks Commission reconsideration of and revisions to components of the January 10 Order addressing the Commission's legal authority to modify the terms and conditions contained in the final draft sourcing agreement that was transmitted to the Commission by the Illinois Power Agency ("IPA") and to impose additional conditions upon Chicago Clean Energy. (*See* 83 Ill. Admin. Code 200.25(c) ("Expedition – proceedings must be brought to a conclusion as swiftly as is possible in keeping with the other goals of the hearing process.").)

In support of the instant Motion in Limine, Chicago Clean Energy and the Economic Development Intervenors state as follows:

I.

INTRODUCTION

Administrative efficiency would be best served by the Commission clearly articulating its understanding of its legal authority to modify the final draft sourcing agreement and impose additional conditions upon Chicago Clean Energy. This Motion is intended to afford the Commission with opportunity to provide much-needed guidance regarding the legal issues that will define the scope of the rehearing. That is, in the first instance, the Commission will be able to express its view on whether it has the authority to modify the final draft sourcing agreement beyond the explicit authority contained in the applicable statute. If, and only if, the Commission concludes that it has such authority will the parties then need to address how such authority should be exercised. Thus, articulation of legal authority at the outset of the rehearing process will provide useful guidance in the rehearing process as a whole.

After an extensive legislative vetting of the Chicago Clean Energy project – including a rigorous $10 million facility cost report conducted by a world-class engineering firm that was reviewed by the IPA and its outside experts – the General Assembly created a very detailed

structure for clean coal SNG brownfield facilities to develop sourcing agreements with the utilities. (*See* 220 ILCS 5/9-220(h-1).)

That structure provides that, in the first instance, a clean coal SNG brownfield facility is given the opportunity to negotiate a sourcing agreement with the utilities. In the event that the facility and the utilities are unable to agree upon terms, the IPA is to convene a mediation in an attempt to facilitate agreement. (*See id.*) As the final step, if that mediation fails to yield an agreement, the IPA is *required to* "revise the draft sourcing agreement as necessary to confirm that the final draft sourcing agreement contains only terms that are reasonable and equitable." (*Id.*) Once the IPA modifies the final draft sourcing agreement, the IPA is to forward that agreement to the Capital Development Board and the Commission is to develop and insert certain economic terms of the agreement under Section 9-220(h-3) and make limited, specific additional modifications under Section 9-220(h-4). (*See* 220 ILCS 5/9-220(h-3), (h-4).) Thus, the General Assembly gave the Commission a critical but very restricted role to play in developing the sourcing agreement. (*See id.*)

Nothing in the Act suggests that the Commission is to review the decision of the IPA, nor that the IPA can retroactively revise any of the terms of the final draft sourcing agreement. Nothing in the Act suggests that the Commission is authorized to impose additional conditions upon the facility. Nothing in the Act suggests that the Commission is authorized to freely modify the terms and conditions in the final draft sourcing agreement. To the contrary, the Act expressly limits the Commission's authority to insert numbers as authorized by Section 9-220(h-3) and modify the agreement only as explicitly authorized by Section 9-220(h-4). At the Commission's January 10, 2012 open meeting, the Commission's Chairman suggested that it might be appropriate for the General Assembly to provide further guidance regarding the

Commission's role. (*See* January 10, 2012 Tr. at 129:8-9 ("Obviously the parties can also choose to further refine those issues in the General Assembly as well.").) To the extent there was any question, the Senate adopted SR 585 (Totter-Cullerton) and the House adopted HR 755 (Colvin-Madigan), identical resolutions confirming the limited authority of the Commission. (Copies of SR 585 and HR 755 are attached hereto as Attachment A.)

In seeking rehearing, both Chicago Clean Energy and EDI, among other things, maintain that the January 10 Order exceeded the authority given to the Commission by the General Assembly by inappropriately modifying the IPA-approved final draft sourcing agreement and by imposing additional conditions upon Chicago Clean Energy. (*See* CCE Application for Rehearing at 2-6, _8-29; EDI Application for Rehearing at 2-13.) Both Nicor and Ameren, among other things, asserted that the Commission had the authority to modify the final draft sourcing agreement and impose additional conditions upon Chicago Clean Energy, and requested that the Commission further revise the final draft sourcing agreement. (*See* Nicor Application for Rehearing at 2-7; Ameren Application for Rehearing at 1-4.) By granting all of the applications for rehearing, the Commission has not clearly articulated its view regarding its authority.

Chicago Clean Energy and EDI respectfully request that the Commission enter an Interim Order on Rehearing finding that its authority to modify the final draft sourcing agreement that was approved by the IPA is limited to only those items explicitly identified in Section 9-220(h-4) and that it does not have authority to impose additional conditions upon Chicago Clean Energy.

II.

THE COMMISSION'S AUTHORITY TO MODIFY THE IPA-APPROVED FINAL DRAFT SOURCING AGREEMENT IS LIMITED TO ONLY THOSE ITEMS EXPLICITLY IDENTIFIED IN SECTION 9-220(h-4)

The statutory framework established by the General Assembly set forth a critical but limited role for the Commission to play in developing the sourcing agreement. After determining an appropriate rate of return for the project and overseeing the process to establish the capital and operations and maintenance costs for the facility, the Commission's role was defined in Section 9-220(h-4) of the Act. Chicago Clean Energy and EDI respectfully request that the Commission enter an Interim Order on Rehearing finding that the Commission does not have authority to take any actions to modify the IPA-approved final draft sourcing agreement beyond those explicitly identified in Section 9-220(h-4). Specifically, as outlined in Chicago Clean Energy's Application for Rehearing, the Commission lacks the statutory authority to modify the Billing Determinants, Annual Output, and the Monthly Base Overage Amount provisions in the IPA-approved final draft sourcing agreement. (*See* CCE Application for Rehearing at 8-9, 12-20.) The Commission also lacked the statutory authority to impose additional obligations on Chicago Clean Energy, including a Third Party Guarantor Requirement, a Capital Structure Reporting Requirement, and a Carbon Sequestration Provision Requirement. (*See id.* at 9-10; 20-26.)

The Commission is an administrative agency that was created by statute. As such, the Commission lacks any "implied powers" that would authorize it to act beyond the narrow confines of the Act. (*See 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) ("The Commission derives its power and authority solely from the statute creating it, and it may not, by its own acts, extend

its jurisdiction."); *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). *See also Landfill, Inc. v. Pollution Ctl. Bd.*, 74 Ill. 2d 541, 554, 387 N.E.2d 258 (1978); *see also Nat'l Marine Serv. Inc. v. Ill. Env. Prot. Ag.*, 120 Ill. App. 3d 198, 205-206, 458 N.E.2d 551 (4th Dist. 1983).) Rather, the Commission's powers "are limited to those granted by the legislature, so that any action taken by the [Commission] must be specifically authorized by statute[,]" and to the extent any decision is made without statutory power, "that decision is void." (*Alvarado v. Indus. Comm'n*, 216 Ill. 2d 547, 553-54, 837 N.E.2d 909, 914 (2005).)

In determining its authority, the Commission should look first to the plain and ordinary meaning of the Act and must always presume that the General Assembly "did not intend to create absurd, inconvenient or unjust results." (*See* Fisher v. Waldrop, 221 Ill. 2d 102, 112, 849 N.E.2d 334, 339 (2006).) As the Commission is aware, the terms of the Act that define the Commission's role were amended while the instant proceeding was pending before the Commission. (*See* P.A. 97-0630 amending 220 ILCS 5/9-220(h-4); CCE Reply Brief on Exceptions at 4-5; CCE Brief on Exceptions at 7-17; CCE Application for Rehearing at 27-28.) Under the amended statute, the General Assembly provided guidance both regarding what the Commission is authorized to do, as well as what the Commission was not to do at this point of the sourcing agreement approval process. The graphic below points to the specific language in the revised Section 9-220(h-4):

PUBLIC ACT 97-0630 OPERATIVE LANGUAGE

Effective Date December 8, 2011

(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. 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.

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

WHAT THE ICC WAS TO DO:

Within 90 days, the ICC shall approve the sourcing agreement:

(i) inputting capital costs, rate of return, and O&M costs;

(ii) correcting typos; and

removing early termination provisions.

WHAT THE ICC WAS NOT TO DO:

All other terms were to be approved without modification.

The **only** modification authorized was to address early termination.

In evaluating the construction of a statute such as Section 9-220(h-4), the primary objective is to ascertain and give effect to the intent of the General Assembly. (*See People v. Swift*, 202 Ill. 2d 378, 385, 781 N.E.2d 292, 296 (2002).) The best indication of the General Assembly's intent is the plain statutory language itself. (*See id. See also Metro Utility Co. v. Illinois Commerce Comm'n*, 262 Ill. App. 3d 266, 274, 634 N.E.2d 377, 382 (2d Dist. 1997).) Clear and unambiguous terms are to be given their plain and ordinary meaning. (*See West Suburban Bank v. Attorneys' Title Insurance Fund, Inc.*, 326 Ill. App. 3d 502, 507, 761 N.E.2d 346, 349 (2d Dist. 2001).) Where statutory provisions are clear and unambiguous, the plain language as written must be given effect, without reading into it exceptions, limitations, or

conditions that the General Assembly did not express. (*See Davis v. Toshiba Machine Co.*, 286 Ill. 2d 181, 184-85, 710 N.E.2d 399, 401 (1999).)

In this case, the statute is clear. Under the plain terms of P.A. 97-0630, which was passed with super-majorities in both chambers, and signed into law ***after*** the IPA approved the final draft sourcing agreement, to the extent there were ***any*** prior determinations made by the IPA (other than with regard to the early termination provisions), the Commission was not to modify those terms except as to correct typographical and scrivener's errors. That is, rather than giving the Commission additional authority to re-examine the terms , the General Assembly did the exact opposite, explicitly constraining the Commission's authority by requiring that the Commission approve "***all other terms and conditions***, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement [that was submitted to the Commission by the IPA]." (220 ILCS 5/9-220(h-4) (emphasis added).)

To the extent that the Commission finds there is any ambiguity in the plain terms of Section 9-220(h-4), the Commission should look to the Resolutions passed by the Senate and the House. (*See, e.g., Miller v. LaSalle Bank N.A.*, 595 F.3d 782, 790 (7th Cir. 2010) (subsequent legislative pronouncements on an "unclear statute" are entitled to be "respectfully considered.").) Each Resolution (attached hereto as Appendix A) contains clear findings that:

- "[T]he Illinois Commerce Commission in reviewing and approving sourcing agreements was only to: (1) fill in the blanks in the final draft sourcing agreement based upon the previously established capital costs, operations and maintenance costs, and the rate of return for the Chicago Clean Energy project; (2) remove two statutorily unauthorized early termination provision from the final draft sourcing agreement; and (3) correct typographical and scrivener's errors;"

- "No statutory authority was given to the Illinois Commerce Commission to modify the terms of the final draft sourcing agreement or impose other obligations upon the Chicago Clean Energy project beyond the limitations set forth in Public Acts 97-0096 and 97-0630;"
- "The Illinois Appellate and Supreme Courts have consistently held that because administrative agencies are creatures of statute, they possess only those powers expressly delegated by law, and they may not act beyond their statutorily-delegated authority;" and
- "The Illinois Appellate and Supreme Courts have consistently held that public policy in Illinois is expressed by the General Assembly, and it is not the province of an administrative agency to inquire into the wisdom and propriety of the legislature's act or to substitute its own judgment for that of the legislature . . .."

(HR 755, SR 585.)

Based upon those findings, both the Senate and the House "express[ed] serious concerns" that the January 10 Order failed to adhere to the statutory framework for review of the IPA-approved final draft sourcing agreement, and urged the Commission to grant rehearing and, upon rehearing, to "reach a decision which reflects statutory directives and the intent of the Illinois General Assembly in passing Public Acts 97-0096 and 97-0630 . . .."

Consistent with the guidance that the General Assembly has provided to the Commission, Chicago Clean Energy and EDI respectfully request that the Commission enter an Interim Order on Rehearing finding that the Commission does not have authority to take any actions to modify the IPA-approved final draft sourcing agreement beyond those explicitly identified in Section 9-220(h-4).

III.

THE COMMISSION DOES NOT HAVE THE AUTHORITY TO IMPOSE ADDITIONAL CONDITIONS UPON CHICAGO CLEAN ENERGY

Just as the Commission lacks the authority to make modifications to the terms of the IPA-approved final draft sourcing agreement beyond those explicitly identified in Section 9-220(h-4), so too the Commission lacks authority to impose additional conditions upon Chicago Clean Energy.

The General Assembly set forth a comprehensive list of requirements and obligations to be imposed upon Chicago Clean Energy. (*See* 220 ILCS 5/9-220(h-3).) Under the plain meaning of the Act, the Commission was not empowered to re-evaluate the General Assembly's decision or impose additional conditions upon Chicago Clean Energy, and has no implied power to do so. (*See Miller v. Hill*, 337 Ill. App. 3d 210, 220, 785 N.E.2d 532, 542 (3d Dist. 2003) ("It is not within the province of an administrative agency or court to take from or enlarge the meaning of a statute by reading into it language which will, in the opinion of either, correct any supposed omissions or defects." (quoting *American Steel Foundries v. Gordon*, 404 Ill. 174, 180-81, 88 N.E.2d 465, 468 (1949)); *see also 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) ("The Commission derives its power and authority solely from the statute creating it, and it may not, by its own acts, extend its jurisdiction."); *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).) Strict adherence to statutory direction is required even when the agency disagrees with the General Assembly's policy choice. (*People v. Pollution Control Bd.*, 129 Ill. App. 3d 958, 962, 473 N.E.2d 452, 455 (1st Dist. 1984) ("Neither the Board nor the Court may

inquire into the wisdom and propriety of the legislature's act and cannot strike down an act because of a disagreement with the policy choice made by the legislature.").)

Moreover, the Commission should be guided by the fact that the Commission explicitly was given some authority, but not given the authority to impose additional obligations. (*See, e.g., Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 203 Ill. App. 3d 424, 438 (2nd Dist. 1990) "the expression of one thing excludes any other, even if there are no negative words prohibiting it.").) Staff itself recognized the Commission's limited authority when it originally made its suggestion for adding a further obligation upon Chicago Clean Energy. (*See* Staff Dec. 16, 2011 Statement of Position at 3 ("It is not clear to the Staff that the matter discussed *infra* [i.e., Staff's savings guarantee suggestion] is clearly within the Commission's authority to impose under Section 9-220(h-4) as amended.") (*See also* CCE Brief on Exceptions at 40-41.)

Senate Resolution 585 and House Resolution 755 likewise each contain identical language confirming that the General Assembly did <u>not</u> intend to provide the Commission with the authority to impose additional obligations upon Chicago Clean Energy: "No statutory authority was given to the Illinois Commerce Commission to . . . impose other obligations upon the Chicago Clean Energy project beyond the limitations set forth in Public Acts 97-0096 and 97-0630 . . .." (HR 755, SR 585.)

The January 10 Order's third party guarantee requirement, capital structure reporting requirement, and carbon sequestration requirement are not contemplated by the Act and, therefore, each was imposed without statutory authority and contrary to law. Accordingly, Chicago Clean Energy and EDI respectfully request that the Commission enter an Interim Order on Rehearing acknowledging that the Commission lacks the legal authority to impose additional conditions upon Chicago Clean Energy.

IV.

CONCLUSION

Chicago Clean Energy and EDI respectfully request that the Commission enter an Interim Order on Rehearing acknowledging the Commission's limited authority to modify the IPA-approved final draft sourcing agreement and its lack of authority to impose additional conditions upon Chicago Clean Energy, and granting such further, additional or different relief as the Commission deems appropriate.

Respectfully submitted,

CHICAGO CLEAN ENERGY, LLC

By: */s/ Christopher J. Townsend*
One of Its Attorneys

ECONOMIC DEVELOPMENT INTERVENORS

By: /s/ *Michael Munson*
One Of Its Attorneys

Christopher J. Townsend
Christopher N. Skey
Eric Roberts
DLA Piper LLP (US)
203 N. LaSalle Street, Suite 1900
Chicago, Illinois 60601
(312) 368-4000
christopher.townsend@dlapiper.com
christopher.skey@dlapiper.com
eric.roberts@dlapiper.com

Michael A. Munson
Grant O. Jaskulski
Law Office of Michael A. Munson
22 West Washington Street, 15th Floor
Chicago, Illinois 60602
(312) 854-8088
michael@michaelmunson.com
grantoj@michaelmunson.com

DATED: March 12, 2012