

OFFICIAL FILE

ORIGINAL

ILLINOIS COMMERCE COMMISSION

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ILLINOIS PEORIA COUNTY

AMEREN ILLINOIS COMPANY d/b/a AMEREN ILLINOIS,

Plaintiff,

vs.

ILLINOIS COMMERCE COMMISSION; THE PEOPLE OF THE STATE OF ILLINOIS ex .rel THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS; NORTHERN ILLINOIS GAS COMPANY d/b/a NICOR GAS COMPANY; BLACK UNITED FUND OF ILLINOIS; CALUMET AREA INDUSTRIAL COMMISSION; CHICAGO CLEAN ENERGY, LLC; CHICAGO & COOK COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL; CITIZENS UTILITY BOARD; ECONOMIC DEVELOPMENT INTERVENORS; HISPANIC AMERICAN CONSTRUCTION INDUSTRY ASSOCIATION; ILLINOIS AFL-CIO; ILLINOIS COAL ASSOCIATION; ILLINOIS FAITH BASED ASSOCIATION; ILLINOIS POWER AGENCY; MECHANICAL CONTRACTORS ASSOCIATION; PASTORS UNITED FOR CHANGE; SOUTH CHICAGO CHAMBER OF COMMERCE,

Defendants.

12MR-370

FILED IN THE CLERK OF THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT PEORIA, ILL. 2012 AUG 16 P 12:06 ROBERT M SPEARS

THIS CASE IS SET FOR A CASE MANAGEMENT CONFERENCE ON 8-3-2012 AT 1:15 PM IN COURTROOM 203 OF THE PEORIA COUNTY COURTHOUSE. IF THE DEFENDANT(S) ANSWER(S) MORE THAN 35 DAYS BEFORE THIS DATE, THEN THE PARTIES SHALL SCHEDULE A CASE MANAGEMENT CONFERENCE WITHIN 35 DAYS OF THE DATE THE ANSWER IS FILED.

COMPLAINT

Plaintiff Ameren Illinois Company (d/b/a Ameren Illinois) ("Ameren Illinois") brings this Complaint against Defendants, and alleges as follows:

NATURE OF THE ACTION

1. This is an action for review of a final decision of an administrative agency brought under the Administrative Review Law, 735 ILCS 5/3-102.

FILED IN THE CLERK OF THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT PEORIA, ILL. 2012 AUG 20 A 10:53 ILLINOIS COMMERCE COMMISSION

2. This lawsuit pertains to the orders of the Illinois Commerce Commission (attached as Exhibits A and B) modifying the terms of the final draft substitute natural gas (“SNG”) Sourcing Agreement between Ameren Illinois and Chicago Clean Energy, LLC and approving the Sourcing Agreement pursuant to Section 9-220(h-4) of the Public Utilities Act, 220 ILCS 5/9- 220(h-4), as modified by Public Act (“PA”) 97-0630 (attached as Exhibit C). This lawsuit challenges PA 97-0630 and the Illinois Commerce Commission’s decision implementing PA 97-0630 as unconstitutional under (1) the Due Process Clauses of the Illinois Constitution and the United States Constitution; and (2) the Contract Clauses of the Illinois Constitution and the United States Constitution; and as otherwise contrary to law.

PARTIES

3. Plaintiff Ameren Illinois is a corporation organized and existing under the laws of the State of Illinois, with a principal place of business located at 300 Liberty Street, Peoria, Illinois 61602.

4. Defendant Illinois Commerce Commission (“Commission”) is an administrative agency of the State of Illinois formed pursuant to the Illinois Public Utilities Act with its principal place of business at 527 East Capitol Avenue, Springfield, Illinois, 62701.

5. Defendant the People of the State of Illinois ex rel. the Attorney General of the State of Illinois (“AG”) is the chief legal officer of the State of Illinois with a place of business at 100 W. Randolph St., 11th Floor, Chicago, Illinois 60601.

6. Defendant Northern Illinois Gas Company (d/b/a Nicor Gas Company) (“Nicor Gas”) is a corporation organized and existing under the laws of the State of Illinois, with a principal place of business located at 1844 Ferry Road, Naperville, Illinois 60563-9600.

7. Defendant Black United Fund of Illinois, Inc. (“BUFI”) is a not-for-profit organization existing under the laws of the State of Illinois with a place of business at 1809 East 71st Street, Chicago, Illinois 60649.

8. Defendant Calumet Area Industrial Commission (“CAIC”) is a not-for-profit organization existing under the laws of the State of Illinois with a place of business at 1000 East 111th Street, 10th Floor, Chicago, Illinois 60628.

9. Defendant Chicago Clean Energy, LLC (“CCE”) is a limited liability company organized and existing under the laws of the State of Delaware, with a place of business at 208 S. LaSalle Street, Suite 814, Chicago, Illinois 60604-1101.

10. Defendant Chicago & Cook County Building & Construction Trades Council (“CCCBCTC”) is a trade organization operating in the State of Illinois with a place of business at 150 N. Wacker Drive, Suite 1850, Chicago, Illinois 60606.

11. Defendant Citizens Utility Board (“CUB”) is a not-for-profit organization created and existing under the laws of the State of Illinois with a place of business at 309 W. Washington, Suite 800, Chicago, Illinois 60606.

12. Defendant Hispanic American Construction Industry Association (“HACIA”) is a not-for-profit organization existing under the laws of the State of Illinois with a place of business at 901 W. Jackson Boulevard, Suite 205, Chicago, Illinois 60607.

13. Defendant Illinois American Federation of Labor-Congress of International Organizers (“Illinois AFL-CIO”) is a trade organization operating in the State of Illinois with a place of business at 534 S. Second Street, Suite 200, Springfield, Illinois 62701.

14. Defendant Illinois Coal Association (“ICA”) is a not-for-profit organization existing under the laws of the State of Illinois with a place of business at 212 S. Second Street, Springfield, Illinois 62701.

15. Defendant Illinois Faith Based Association (“IFBA”) is a not-for-profit organization existing under the laws of the State of Illinois with a place of business at 7566 S. South Shore Drive, Chicago, Illinois 60649.

16. Defendant Illinois Power Agency (“IPA”) is an administrative agency of the State of Illinois with its principal place of business at 160 North LaSalle Street, Suite N-508, Chicago, Illinois 60601.

17. Defendant Mechanical Contractors Association (“MCA”) is a not-for-profit organization existing under the laws of the State of Illinois with a place of business at 7065 Veterans Boulevard, Burr Ridge, Illinois 60527.

18. Defendant Pastors United for Change (“PUFC”) is a not-for-profit organization existing under the laws of the State of Illinois with a place of business at 9231 S. Cottage Grove Avenue, Chicago, Illinois 60619.

19. Defendant South Chicago Chamber of Commerce (“SCCC”) is a not-for-profit organization existing under the laws of the State of Illinois with a place of business at 8826 S. Commercial Avenue, Chicago, Illinois 60617.

20. Defendants BUFI, CAIC, CCCBCTC, HACIA, Illinois AFL-CIO, ICA, IFBA, MCA, PUFC and SCCC will be collectively referred to herein as the Economic Development Intervenors (“EDI”) as they collectively acted in the underlying administrative proceedings before the Commission.

21. Pursuant to 735 ILCS 5/3-105, Ameren Illinois submits herewith an affidavit designating the address listed above for each defendant as the last known address of each defendant upon whom service shall be made.

22. Ameren Illinois, Nicor Gas, the AG, CUB, CCE and the EDI defendants were parties of record in the underlying administrative proceedings before the Commission.

JURISDICTION AND VENUE

23. This Court has jurisdiction over this action pursuant to 220 ILCS 5/9-220(h-3)(7) and 735 ILCS 5/3-102, 104. Venue is proper in the Circuit Court of Tenth Judicial Circuit of Illinois, Peoria County pursuant to 735 ILCS 5/3-104.

FACTUAL BACKGROUND

24. On July 13, 2011, PA 097-0096, amending the Public Utilities Act, became law. PA 097-0096 mandated that an Illinois gas utility such as Ameren Illinois either enter into a sourcing agreement to purchase SNG for an initial term of thirty (30) years from a clean coal SNG brownfield facility, or elect to file biennial rate proceedings before the Commission. 220 ILCS 5/9-220(h-1). The statutory deadline for that election was September 11, 2011.

25. For gas utilities that did not elect to file biennial rate proceedings, PA 097-0096 established the substantive framework for the sourcing agreement, the timeframe within which the sourcing agreement was to be negotiated, and the process under which the terms of the sourcing agreement were to be determined. An essential part of PA 097-0096 is the pledge by the State that any gas utility entering into a sourcing agreement with a clean coal SNG brownfield facility is guaranteed prudence protection, ensuring that the utility will recover from ratepayers the costs of purchasing the SNG. 20 ILCS 5/9-220 (h-9)(2); 20 ILCS 5/9-220 (h-11).

26. PA 097-0096 specified that in the event that the utility and the SNG brownfield facility did not reach agreement on the terms of the Sourcing Agreement by September 21, 2011,

the IPA was to retain an independent mediator to mediate the dispute. If, following the mediation, the parties failed to reach agreement then the IPA was to “revise the draft sourcing agreement as necessary to confirm that the final draft sourcing agreement contains only terms that are reasonable and equitable.” 220 ILCS 5/9-220(h-1). The IPA was then to submit the final draft Sourcing Agreement to both the Commission and the Capital Development Board by a date not later than October 11, 2011. *Id.*

27. Under the processes specified in PA 97-0096, the Capital Development Board was to develop and the Commission was to approve the capital recovery charge and the operations and maintenance charge to be recovered by the clean coal SNG brownfield facility under the Sourcing Agreement. 220 ILCS 5/9-220(h-3). PA 97-0096 further provided that the Commission’s decisions on the recoverable costs under (h-3) may be reviewed “only under and in accordance with the Administrative Review Law.” 220 ILS 5/9-220(h-3)(7).

28. PA 97-0096 required that no later than January 10, 2012 (90 days from the date on which the IPA submitted the final draft Sourcing Agreement to the Commission), the Commission was to “approve a draft sourcing agreement containing the capital costs, rate of return, and operations and maintenance costs.” 220 ILCS 5/9-220(h-4). And, once the Sourcing Agreement is approved, PA 97-0096 mandates that the gas utility enter into the agreement within 45 days of such approval. *Id.*

29. Two natural gas utilities subject to PA 97-0096—Peoples Gas Light and Coke Company and North Shore Gas Company—elected to file biennial rate proceedings before the Commission. Ameren Illinois did not, and its right to elect to file biennial rate proceedings rather than enter into the Sourcing Agreement expired on September 20, 2011. Ameren Illinois made its decision based upon the promises and commitments made to the utilities agreeing to

enter into a sourcing agreement contained in PA97-0096. This decision by Ameren Illinois was irrevocable, obligating Ameren Illinois to sign a sourcing agreement that complied with the requirements of PA 97-0096.

30. Pursuant to the process and timeframe set forth in PA 97-0096, Ameren Illinois and CCE negotiated the terms of a Sourcing Agreement under the general framework set forth in PA 97-0096. More specifically, on July 28, 2011, as required by PA 97-0096, CCE submitted its initial draft of a proposed Sourcing Agreement to Ameren Illinois and the IPA. On September 10, 2011, as required by PA 97-0096, Ameren Illinois submitted to CCE and the IPA Ameren Illinois' comments and proposed revisions to the draft Sourcing Agreement. On September 26, 2011, CCE submitted to Ameren Illinois and the IPA a revised redlined Sourcing Agreement in response to Ameren Illinois' comments on the initial draft proposed by CCE. Ameren Illinois and CCE could not come to an agreement on certain terms, and, as required by PA97-0096, the IPA retained a mediator to mediate the dispute. The parties failed to come to an agreement during the course of the mediation. As a result, also as required by PA97-0096, the IPA revised the terms of the contract, and on October 11, 2011 approved a final draft Sourcing Agreement containing the revised terms and submitted it to the Commission.

31. Among the revised terms of the final draft Sourcing Agreement approved by the IPA were (1) Section 1.2(h) which allowed Ameren Illinois and/or Nicor to terminate the sourcing agreement in the event that a future change in the law eliminated either utility's prudence protection; (2) Section 2.11, which recited the pledge of PA 97-0096 that any costs incurred by the utility to accommodate the purchase of SNG from the clean coal brownfield facility will be fully recoverable through a purchased gas adjustment clause rider mechanism; and (3) Section 14.20, a standard non-severability clause. No party sought judicial review of the

IPA's inclusion of these provisions in the final draft Sourcing Agreement. The statutory deadline for judicial review was November 15, 2011.

32. As no party sought judicial review of these provisions, which were approved by the IPA and included in the final draft Sourcing Agreement, Ameren Illinois has a vested right to have these provisions (Sections 1.2(h), 2.11, and 14.20) included in the Sourcing Agreement it would be obligated to sign.

33. On November 2, 2011, the Commission, on its own motion, initiated a proceeding pursuant to PA 97-0096 relating to the approval of the Sourcing Agreement.

34. On December 8, 2011, PA 97-0630 became law. The Commission's order implementing that law purported to remove critical substantive terms of the Sourcing Agreement that were essential elements of the agreement contemplated by PA 97-0096 and approved by the IPA as being consistent with PA 97-0096. PA 97-0630 retroactively altered fundamental elements upon which Ameren relied in making its election in September of 2011, in negotiating the terms of the Sourcing Agreement with CCE, and in participating in the mediation process that took place in the fall of 2011. Specifically, PA 97-0630 purports to require the Commission to alter terms of the Sourcing Agreement between Ameren Illinois and CCE "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." PA 97-0630.

35. On January 10, 2012, the Commission entered an order approving the Sourcing Agreement submitted by the IPA with the capital costs, rate of return and operations and maintenance costs to be recovered under the agreement, subject to the modifications adopted in the order. On February 9, 2012, Ameren Illinois timely filed and served an application for

rehearing pursuant to Section 10-113 of the Act, 220 ILCS 5/10-113. On February 23, 2012, the Commission granted all pending applications for rehearing, including that of Ameren Illinois. On July 11, 2012, the Commission entered an order on rehearing, which also approved the Sourcing Agreement subject to the modifications adopted on rehearing and further affirmed in part and modified in part the January 10, 2012 Order. The Commission's order on rehearing dated July 11, 2012 was served on all parties to the Commission proceeding on July 12, 2012. The amendments to the Sourcing Agreement at issue here are the Commission's removal of Section 1.2(h), and the exclusion of Section 2.11 from the scope of Section 14.20.

36. PA 97-0630 did not provide any mechanism for Ameren Illinois to choose not to enter the agreement if the Commission's actions modified or deleted material terms or to reconsider its election not to file biennial rate cases.

**COUNT I
(DUE PROCESS)**

37. Ameren Illinois restates and incorporates herein each of the assertions set forth in Paragraphs 1 through 36 above as Paragraph 37 of Count I.

38. The Illinois Constitution of 1970 provides:

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

ILL. CONST. 1970, art. I, § 2.

39. The United States Constitution provides:

[N]or shall any State deprive a person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., amend. XIV, § 1.

40. PA 97-0630 violates Ameren Illinois' right to due process under Article I, § 2 of the Illinois Constitution of 1970 and Ameren Illinois' right to due process under the 14th

Amendment to the United States Constitution because the retroactive legislation deprived Ameren Illinois of property without due process of law.

**COUNT II
(IMPAIRING CONTRACTS)**

41. Ameren Illinois restates and incorporates herein each of the assertions set forth in Paragraphs 1 through 36 above as Paragraph 41 of Count II.

42. The Illinois Constitution of 1970 provides that:

No ex post facto law, or law impairing the obligation of contracts or making an irrevocable grant of special privileges or immunities, shall be passed.

ILL. CONST. 1970, art. I, § 16.

43. The United States Constitution provides that:

No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts....

U.S. CONST., art. I, § 10, cl. 1.

44. PA 97-0630 impairs the contractual rights and obligations between Ameren Illinois and CCE in violation of Article I, § 16 of the Illinois Constitution of 1970 and Article I, § 10 of the United States Constitution.

**COUNT III
(VIOLATION OF 220 ILCS 5/9-220(H-4) OF THE PUBLIC UTILITIES ACT)**

45. Ameren Illinois restates and incorporates herein each of the assertions set forth in Paragraphs 1 through 36 above as Paragraph 45 of Count III.

46. If the constitutionality of PA 97-0630 is upheld, the Commission's determination to amend Section 14.20 of the Sourcing Agreement to exclude Section 2.11 as contrary to the legislature's directive to remove utility termination rights pursuant to Section 9-220(h-4) is contrary to law.

47. The IPA approved Section 1.2(h), Section 2.11, and Section 14.20 as provisions in the Sourcing Agreement submitted to the Commission. It made no scrivener's error or typographical error in approving these two sections. It is only as a result of the later enactment of PA 97-0630 and its directive to the Commission regarding termination rights that there arose any question about the possible impact of Section 2.11 in conjunction with Section 14.20.

48. The Commission correctly determined that Section 14.20 is not an early termination provision within the ambit of Section 9-220(h-4) of the Act, as amended pursuant to PA 97-0630. Section 2.11 is merely a recitation of protections articulated in the statute incorporated into the Sourcing Agreement. Section 2.11 is not a termination provision. Therefore, the modification adopted by the Commission to Section 14.20 cannot be characterized as the correction of a scrivener's error or a typographical error, is not a termination provision and, therefore, cannot be modified, as inconsistent with PA 97-0630.

PRAYER FOR RELIEF

WHEREFORE, Ameren Illinois respectfully requests that this Court:

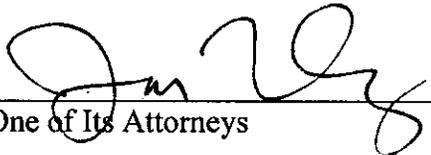
- a. Reverse the orders of the Commission in part based upon an adjudication that the Commission's revisions to and approval of the Sourcing Agreement pursuant to PA 97-0630 violate the Illinois Constitution and the United States Constitution;
- b. Reverse the orders of the Commission in part based upon an alternative adjudication that the Commission's revisions to and approval of the Sourcing Agreement pursuant to PA 97-0630 violate the Illinois Public Utilities Act; and

c. Enter all other relief this Court deems fair and equitable.

Dated: August 16, 2012

Respectfully submitted,

AMEREN ILLINOIS COMPANY
D/B/A AMEREN ILLINOIS

By: 
One of Its Attorneys

Geoffrey A. Vance
Jonathan C. Huckabay
MCDERMOTT WILL & EMERY LLP
227 W. Monroe Street
Chicago, Illinois 60606
Tel: 312.372.2000
Fax: 312.984.7700
Firm No. 54200

Attorneys for Plaintiff

DM_US 37509222-1.042002.0217