OFFICIAL FILE
ILLINOIS COMMERCE COMMISSION

ORIGINAL

UNITED STATES OF AMERICA
STATE OF ILLINOIS COUNTY OF DU PAGE
IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
CHANCERY DIVISION

NORTHERN ILLINOIS GAS COMPANY d/b/a NICOR GAS COMPANY, Plaintiff,	
vs.	
ILLINOIS COMMERCE COMMISSION; THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS; AMEREN ILLINOIS COMPANY d/b/a AMEREN ILLINOIS; 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,	2012MR001150 Case No. Status Date: 12/03/12 Assigned To: 2007
Defendants.	

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Aug 08 2012 - 8:52 AM
Chris Kachmarek
CLERK OF THE
18TH JUDICIAL CIRCUIT
DU PAGE COUNTY ILLINOIS

ILLINOIS COMMERCE COMMISSION
2012 AUG -8 A 10: 46
CHIEF CLERK'S OFFICE

COMPLAINT

Plaintiff Northern Illinois Gas Company (d/b/a Nicor Gas Company) ("Nicor Gas") 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.

2. This lawsuit pertains to the Illinois Commerce Commission's orders (attached as Exhibits A and B) modifying the terms of a substitute natural gas ("SNG") sourcing agreement between Nicor Gas and Chicago Clean Energy, LLC ("CCE") and approving the modified agreement pursuant to Section 9-220(h-4) of the Public Utilities Act ("Act"), 220 ILCS 5/9-220(h-4), as modified by Public Act ("PA") 97-0630. PA 97-0630, which amended the Act (attached as Exhibit C), is unconstitutional under (1) the Due Process Clause of the Illinois Constitution and the United States Constitution; (2) the Separation of Powers Clause of the Illinois Constitution; (3) the Equal Protection Clause of the Illinois Constitution; (4) the Special Legislation Clause of the Illinois Constitution; and (5) the Contract Clause of the Illinois Constitution and the United States Constitution.

PARTIES

3. Plaintiff 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. Nicor Gas provides natural gas to approximately 2.2 million customers in Northern Illinois, excluding Chicago.

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 Ameren Illinois Company d/b/a Ameren Illinois ("Ameren") is a corporation organized and existing under the laws of the State of Illinois, with a principal place of business at 300 Liberty Street, Peoria, Illinois 61602.

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 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, Nicor Gas 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. Nicor Gas, Ameren, 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 DuPage County pursuant to 735 ILCS 5/3-104.

FACTUAL BACKGROUND

24. On July 13, 2011, PA 097-0096, amending the Act, became effective. PA097-0096 mandated that an Illinois gas utility such as Nicor Gas or Ameren must either enter into a sourcing agreement to purchase SNG from a clean coal SNG brownfield facility, or elect to file biennial rate proceedings before the Commission. 220 ILCS 5/9-220(h-l).

25. For those gas utilities that elected to enter into a sourcing agreement with a clean coal SNG brownfield facility, PA 097-0096 establishes the general substantive framework for the sourcing agreement including a pledge by the State that a gas utility entering into a sourcing agreement is guaranteed prudence protection. Prudence protection ensures that the utility will be authorized to recover the costs of purchasing the SNG from ratepayers. PA 097-0096 also outlines a specific timeline and procedure for drafting and finalizing the sourcing agreement and, to the extent the clean coal SNG brownfield facility and the gas utility are unable to agree on the terms to the proposed contract, to mediate the dispute before the IPA. 220 ILCS 5/9-220(h-l); 20 ILCS 3855/1-20(a)(26). If the mediation fails to resolve the differences between the parties, PA 097-0096 mandates that the IPA "shall 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-l). After revising the agreement, the IPA approves the final draft sourcing agreement between the gas utility and the clean coal facility. *Id.*

26. Once the IPA approves the final draft sourcing agreement, the IPA submits the agreement to the Capital Development Board and the Commission. *Id.* The Commission must then determine 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). The capital recovery charge shall be comprised of capital costs and a reasonable rate of return. *Id.* After making its determinations, the Commission "shall approve" the final draft sourcing agreement submitted by the IPA. 220 ILCS 5/9-220(h-4).

27. Two natural gas utilities subject to PA 97-0096—Peoples Gas Light and Coke Company ("Peoples") and North Shore Gas Company ("North Shore")—elected to file biennial rate proceedings before the Commission. 220 ILCS 5/9-220(h-l). Nicor Gas did not and its right to elect to file biennial rate proceedings before the Commission rather than enter into the sourcing agreement expired on September 20, 2011. This decision by Nicor Gas was irrevocable, obligating Nicor Gas to sign a sourcing agreement that complied with the requirements of PA 97-0096.

28. As a result, pursuant to the process and timeframe set forth in PA 97-0096, Nicor Gas and CCE negotiated the terms of a sourcing agreement for a number of months subject to the general framework set forth in PA 97-0096. More specifically, on July 28, 2011, CCE (which is proposing to construct a clean coal SNG brownfield facility in Chicago) submitted its initial draft of a proposed sourcing agreement to Nicor Gas and the IPA. On September 9, 2011, Nicor Gas submitted to CCE and the IPA Nicor Gas' comments and proposed revisions to the draft

sourcing agreement. On September 26, 2011, CCE submitted to Nicor Gas and the IPA a revised redlined sourcing agreement in response to Nicor Gas' comments on the initial draft proposed by CCE. Nicor Gas and CCE could not come to an agreement on certain terms, and 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, the IPA revised the terms of the contract, and on October 11, 2011 approved a final draft sourcing agreement containing the revised terms.

29. As detailed, the parties participated in a mediation to resolve key issues and submitted drafts and comments to the IPA. The parties were taking these actions based on the general substantive framework for the sourcing agreement set out in PA 97-0096 and the process established and timeframe set forth in that law. A key substantive term at issue before the IPA was a termination right in Section 1.2(h) that allowed Nicor Gas to terminate the sourcing agreement in the event that a future change in the law eliminated Nicor Gas' prudence protection. The IPA determined that this termination right was reasonable and equitable and included it in the final contract it approved. No party sought judicial review of this IPA determination.

30. Due to the procedural mechanisms established in PA 97-0096, once the IPA approved the final draft sourcing agreement on October 11, 2011, Nicor Gas was entitled to have the Section 1.2(h) termination right approved by the IPA included in the sourcing agreement it would be obligated to sign. As previously indicated, the timeframe for opting out of the sourcing agreement and electing to file biennial rate proceedings had expired, and the legislation provided no other mechanism for Nicor Gas to change the terms of the agreement, or to choose not to enter into the agreement. 220 ILCS 5/9-220(h-1), (h-4).

31. The IPA submitted the final draft final draft sourcing agreement to the Commission on October 12, 2011. 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. PA 97-0096 explicitly provides that once the Commission determines the capital costs, rate of return and operations and maintenance costs these figures, the Commission "shall approve" the final draft sourcing agreement submitted by the IPA. 220 ILCS 5/9-220(h-4).

32. In clear contravention of the terms approved by the IPA in the final draft sourcing agreement, PA 97-0630 became effective on December 8, 2011. This legislation effectively removed a critical substantive term of the sourcing agreement that benefitted Nicor Gas and that had already been finally approved by the IPA in accordance with its authority under PA 97-0096. It did this by altering the general substantive framework for sourcing agreements set forth in PA 97-0096 in a fundamental way (by establishing a new standard for utility termination rights) and directing the Commission to alter terms of the sourcing agreement that had already been finally determined by the IPA. Specifically, PA 97-0630 requires the Commission to alter the terms of the final draft sourcing agreement between Nicor Gas 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. This legislation has the effect of requiring the Commission to retroactively delete the termination right finally approved by the IPA in accordance with PA 97-0096.

33. 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, Nicor Gas 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 Nicor Gas. 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 modification to Section 14.20.

34. PA 97-0630 did not provide any mechanism for Nicor Gas to choose not to enter the agreement if the Commission's actions modified or deleted a material term. Instead, because the statutorily mandated timeframe for opting out of the sourcing agreement and electing to file biennial rate proceedings had expired before PA 97-0630 became effective, Nicor Gas remains bound by the Commission's retroactive modifications of the sourcing agreement as detailed above.

COUNT I
(DUE PROCESS)

35. Nicor Gas restates and incorporates herein each of the assertions set forth in Paragraphs 1 through 34 above as Paragraph 35 of Count I.

36. The Illinois Constitution of 1970 provides that:

> 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.

37. The United States Constitution provides that:

> [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.

38. PA 97-0630 violates Nicor Gas' right to due process under Article I, § 2 of the Illinois Constitution of 1970 and Nicor Gas' right to due process under the 14th Amendment to the United States Constitution because the retroactive legislation because it deprived Nicor Gas of property without due process of law.

COUNT II
(SEPARATION OF POWERS)

39. Nicor Gas restates and incorporates herein each of the assertions set forth in Paragraphs 1 through 34 above as Paragraph 39 of Count II.

40. The Illinois Constitution of 1970 provides that:

> The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

ILL. CONST. 1970, art. II, § 1.

41. PA 97-0630 violates Article II, § 1 of the Illinois Constitution of 1970 because the legislation represents the legislature's attempt to retroactively alter the law after a final determination had been made by the IPA concerning utility termination rights in accordance with its authority under PA 97-0096. That IPA decision was subject only to judicial review under the Administrative Review Law and no party sought such review. Thus, the legislation encroaches on the authority of the executive and judicial branches.

COUNT III
(EQUAL PROTECTION AND SPECIAL LEGISLATION CLAUSES)

42. Nicor Gas restates and incorporates herein each of the assertions set forth in Paragraphs 1 through 34 above as Paragraph 42 of Count III.

43. The Illinois Constitution of 1970 provides that:

> The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.

ILL. CONST. 1970, art. IV, § 13. This provision is known as the Special Legislation Clause.

44. As set forth above, the Illinois Constitution of 1970 further provides that:

> 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.

45. PA 97-0630 violates Nicor Gas' right to equal protection under the law, including its right not to be disadvantaged by special legislation under Article I, § 2 and Article IV, § 13 of the Illinois Constitution of 1970 because there is no rational basis related to a legitimate state purpose to treat Nicor Gas differently from other similarly situated corporations under PA 97-0630.

COUNT IV
(IMPAIRING CONTRACTS)

46. Nicor Gas restates and incorporates herein each of the assertions set forth in Paragraphs 1 through 34 above as Paragraph 46 of Count IV.

47. 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.

48. 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.

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

COUNT V
VIOLATION OF 220 ILCS 5/9-220(h-4)OF THE PUBLIC UTILITIES ACT

50. Nicor Gas restates and incorporates herein each of the assertions set forth in Paragraphs 1 through 34 above as Paragraph 50 of Count V.

51. If the constitutionality of PA 97-0630 is upheld, then the Commission's determination to amend Section 14.20 of the sourcing agreement to purportedly address the interplay of Section 14.20 with Section 2.11 is contrary to the legislature's directive to remove utility termination rights pursuant to Section 9-220(h-4).

52. The IPA approved Section 1.2(h) as well as 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 Public Act 97-0630 and its directive to the Commission regarding Section 1.2(h) that there arose any a question about the possible impact of Section 2.11 in conjunction with Section 14.20.

53. 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 Public Act 97-0630. 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. As such, there is

no basis under Section 9-220(h-4) of the Act to modify Section 14.20 of the sourcing agreement in the manner approved by the Commission.

PRAYER FOR RELIEF

WHEREFORE, Nicor Gas 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;

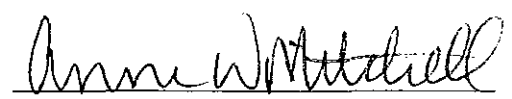
b. Reverse the orders of the Commission in part based upon an alternative adjudication that the Commission's revisions to and approval of the sourcing agreement pursuant to PA 97-0630 violate the Illinois Public Utilities Act; and

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

Dated: August 6, 2012

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY
D/B/A NICOR GAS COMPANY

By: 

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