STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company :  
Ameren Illinois Company d/b/a :  
Ameren Illinois and MidAmerican :  
Energy Company : 19-0844 :  

Verified Petition for Declaratory Ruling :  
puisant to Section 200.220 of the Illinois :  
Commerce Commission’s Rules of Practice.:  

ORDER

By the Commission:

I. INTRODUCTION


The Petition states that the Utilities request a declaratory ruling regarding the application of the Illinois Power Agency Act, 20 ILCS 3855/1-1, et seq. (the “IPA Act”), and the Public Utilities Act, 220 ILCS 5/10-101 (the “PUA”), to overlapping and parallel live controversies in which the Utilities are the affected parties and in which they each have the same counter-party. The Petition states that, in 2018, the Utilities each entered into a renewable energy credits (“RECs”) agreement (“RECs Agreement”) with a seller, Paris Solar, LLC (“Paris Solar”), in accordance with mandates of the Illinois Power Agency (“IPA”) and the Commission under the IPA Act and the PUA. The Petition alleges that Paris Solar, in May and June 2019, anticipatorily breached, repudiated, or breached the RECs Agreement by certain statements and actions, and by not posting collateral required under the ComEd and Ameren Illinois RECs Agreements by June 1, 2019. The Utilities, in Paragraphs 38 and 39 of the Petition, request a declaratory ruling regarding the application of the IPA Act and the PUA to the Utilities’ then-planned course of action as described in Paragraph 34 of the Petition and/or such other direction as the Commission concluded should be issued under the IPA Act and the PUA.

On August 27, 2019, the Administrative Law Judge (“ALJ”) issued a ruling that: (1) responses to the Petition were due on September 13, 2019; and (2) any replies were due on September 20, 2019. On August 30, 2019, the IPA filed a Verified Petition to Intervene. On September 12, 2019, Paris Solar filed a Petition to Intervene and a Verification.
On September 13, 2019, the ALJ issued a ruling that: (1) the due date for responses to the Petition was continued to September 27, 2019; and (2) any replies were due on October 4, 2019. On September 26, 2019, the ALJ issued a ruling that: (1) set a status hearing for October 10, 2019, at 10:30 a.m.; and (2) vacated the due dates for responses and replies.

Pursuant to notice given in accordance with the law and the rules and regulations of the Commission, on October 10, 2019, a status hearing was held at the Commission’s offices in Chicago. The parties participated through counsel and advised the ALJ of the status of the matter.

On November 19, 2019, the Utilities and Paris Solar filed a Joint Motion of the Utilities and Paris Solar for Approval of Joint Stipulation and Settlement and of Draft Proposed Order. There were two Exhibits to the Motion: a Joint Stipulation and Settlement (Exhibit 1) and a Draft Proposed Order (Exhibit 2). A copy of the Joint Stipulation and Settlement is attached as Attachment A to this Order.

The matter before the Commission at this time is the Utilities’ and Paris Solar’s proposed agreed resolution of their disputes and this docket. The Movants, for purposes of their Joint Stipulation and Settlement and in order to achieve an agreed resolution of their disputes and the closing of this docket, do not present or propose any allegation, opposition, finding, or conclusion on whether the Commission had jurisdiction over the Petition and the Utilities’ declaratory ruling requests under the foregoing authorities or on the merits or any other aspects of the Petition and the requested declaratory rulings. The proposed settlement provides for the Commission’s concluding this docket without ruling on its jurisdiction over the Petition and without ruling on the Petition’s merits and the requested relief, as reflected later in this Joint Stipulation and Settlement. For the reasons stated in this Order and appearing of record, the Commission has concluded that it should approve the proposed agreed resolution.

II. LEGAL STANDARD

In this Order, the Commission considers the proposed agreed resolution presented by the Utilities and Paris Solar. The IPA and Commission Staff (“Staff”) do not oppose the proposed agreed resolution.

The Commission has jurisdiction to review and approve the proposed agreed resolution. The Movants propose that the Commission exercise jurisdiction over the proposed settlement under Section 10-101.1(b) of the PUA. Section 10-101.1(b) of the PUA provides:

Nothing in this Act shall prevent parties to contested cases brought before the Commission from resolving those cases, or other disputes arising under this Act, in part or in their entirety, by agreement of all parties, by compromise and settlement, or by voluntary mediation; provided, however, that nothing in this Section shall limit the Commission’s authority to conduct such investigations and enter such orders as it shall deem necessary to enforce the provisions of this Act or otherwise protect the public interest. Evidence of conduct or
statements made by a party in furtherance of voluntary mediation or in compromise negotiations is not admissible as evidence should the matter subsequently be heard by the Commission; provided, however that evidence otherwise discoverable is not excluded or deemed inadmissible merely because it is presented in the course of voluntary mediation or compromise negotiations. No civil penalty shall be imposed upon parties that reach an agreement pursuant to the mediation procedures in this Section.


III.  UNCONTESTED FACTS AND ISSUES

The following statements of uncontested facts and issues are taken from the Petition, except when otherwise noted.

A.  The Parties

ComEd is a corporation organized and existing under the laws of the State of Illinois, with its principal office in Chicago, Illinois. ComEd provides electric delivery services and, in some cases, electric power and energy to approximately 4 million customers in the northern portion of Illinois. ComEd is a public utility within the meaning of Section 3-105 of the PUA, 220 ILCS 5/3-105, and an electric utility within the meaning of Section 16-102 of the PUA, 220 ILCS 5/16-102.

Ameren Illinois is a corporation organized and existing under the laws of the State of Illinois, with its principal office in Collinsville, Illinois. Ameren Illinois provides electric delivery services and, in some cases, electric power and energy to approximately 1.2 million customers in central and southern Illinois. Ameren Illinois is a public utility within the meaning of Section 3-105 of the PUA, 220 ILCS 5/3-105, and an electric utility within the meaning of Section 16-102 of the PUA, 220 ILCS 5/16-102.

MidAmerican is a corporation organized and existing under the laws of the State of Iowa, with its principal office in Des Moines, Iowa. MidAmerican provides electric delivery services and, in some cases, electric power and energy to approximately 85,000 customers in northwest Illinois. MidAmerican is a public utility within the meaning of Section 3-105 of the PUA, 220 ILCS 5/3-105, and an electric utility within the meaning of Section 16-102 of the PUA, 220 ILCS 5/16-102.

Paris Solar is a limited liability company organized and existing under the laws of the State of Delaware. Paris Solar's principal office is in Santa Monica, California. Notices to Paris Solar, under the RECs Agreements that are involved in the Petition, are to be sent to 3250 Ocean Park Boulevard, Suite 355, Santa Monica, California 90405. On August 23, 2019, the same day as the Utilities filed the Petition, the Utilities sent a genuine copy of the Petition, including its attachments, by email to Paris Solar and also by Federal Express service for delivery on August 26, 2019.

The IPA is a state agency created by Section 1-15 of the IPA Act, 20 ILCS 3855/1-15.
B. Statutory Background

In 2007, Illinois adopted a statutory renewable portfolio standard (“RPS”), i.e., a set of statutory mandates relating to the levels of use of renewable energy resources to generate electricity. The Illinois RPS is provided for in the applicable provisions of the PUA and the IPA Act as adopted and amended over the years.


C. The Initial Forward Procurement

On April 26, 2018, the IPA’s Procurement Administrator, NERA Economic Consulting (“NERA”) took bids from prospective sellers for a “Master Renewable Energy Certificate Purchase and Sale Agreement” (“Master Agreement”) relating to a proposed renewables project (the “Project”). Paris Solar was one of the winning bidders. Consistent with Sections 1-75(c)(1)(G)(ii) and (v) of the IPA Act, the applicable procurement mirrors the approach taken for the IPA’s competitive procurements under Section 16-111.5(e)(1) of the PUA, which was also adopted for the IPA’s competitive procurements contained in the LTRRPP. Pursuant to Section 1-75(c)(1)(G)(ii), the renewable energy credits procured under the initial forward procurement count toward the renewable energy goals and targets included in the LTRRPP.

On May 2, 2018, the Commission approved the procurement administrator’s selection of winning bids, including the bid of seller Paris Solar.

D. The RECs Agreements

On May 3, 2018, in compliance with the applicable statutory and regulatory mandates and determinations by the IPA and the Commission, the Utilities as purchasers each entered into their respective applicable RECs Agreement with seller Paris Solar. Each of the RECs Agreements has its own Exhibits, one of which, its Exhibit D, is the Master Agreement, subject to the changes made by the RECs Agreement to the Master Agreement. A template used for the RECs Agreements is attached to the Petition as Exhibit 1.

Among other things, each of the RECs Agreements mandates that Paris Solar:

1. Start to deliver RECs to the Utilities, as applicable, by June 1, 2021 (RECs Agreement, § 3(d); Master Agreement, § 5.1(i)).
2. Post collateral of one half of the Annual Contract Value before June 1, 2019 or $50,000, whichever is greater (RECs Agreement, § 10(b), adding Section 1.15.2 to the Master Agreement); and

3. Post collateral of an additional one half of the Annual Contract Value by June 1, 2019, if the collateral requirement outlined in paragraph 16(b) is greater than $50,000.

Paris Solar timely posted the initial collateral as to each of the three RECs Agreements.

E. The Disputes

On May 1, 2019, Paris Solar, LLC, through its parent company Cypress Creek Renewables, informed each of the Utilities individually, first through a telephone call and then through an email, that Paris Solar was “not able to proceed with the Paris Solar utility scale project.” Exhibits 2, 3, and 4 to the Petition. Paris Solar also, among other things, requested the return of the collateral it had posted.

The Utilities, in the Petition, contend that Paris Solar, by virtue of its acts and omissions, has anticipatorily breached, repudiated, or breached each of the RECs Agreements.

The Utilities, in Paragraphs 32 and 33 of the Petition, contend that, under the IPA Act, the PUA, and the RECs Agreements, there are various consequences or potential consequences for Paris Solar’s alleged anticipatory breaches, repudiations, or breaches.

The Utilities, in Paragraph 34 of the Petition, state that they believe that it would be lawful and prudent, under the IPA Act and the PUA, for the Utilities to take certain actions, including but not limited to retaining the collateral posted by Paris Solar to date. The Utilities proposed to deposit any collateral retained into the same account as monies collected under ComEd’s Rider REA – Renewable Energy Adjustment, Ameren Illinois’ Rider REA – Renewable Energy Adjustment, and MidAmerican’s Rider PRE – Illinois Power Agency Purchased Power Renewable Energy Resources Recover Adjustment, the riders that effectuate provisions in Section 16-108(k) of the PUA for ComEd, Ameren Illinois, and MidAmerican respectively.

The Utilities, in the Petition, state that they are very mindful that the RECs Agreements and the Master Agreement are contracts developed by the IPA’s procurement administrator, in consultation with the Utilities, the Commission, and other interested parties and subject to Commission oversight through the process described in Section 16-111.5(e)(2) of the PUA. Section 1-75(c)(1)(G)(v) of the IPA Act makes the procurement processes and procedures applicable to the procurement of electric power and energy under Section 16-111.5(e)(2) of the PUA also applicable to REC procurements. Such processes and procedures are interpreted to include development of standard forms of procurement contracts.

The Utilities, in the Petition, state that they should not be expected to act with risk that they later will be found to have acted inconsistently with the IPA Act or the PUA in this statutory structure in which the Utilities are required to enter into the contracts upon Commission approval of the IPA’s procurement results. That risk cannot fairly be placed on the Utilities.
Because of the Movants’ presentation of the Joint Motion, no party nor Staff reached the stage of filing a response to the Petition.

F. The Utilities’ Request for a Declaratory Ruling

The Utilities, in Paragraph 38 of the Petition, request a declaratory ruling that the application of the IPA Act and the PUA to this live controversy requires, authorizes, or is consistent with the Utilities’ planned course of action as set forth in Paragraph 34 of the Petition.

The Utilities, in Paragraph 39 of the Petition, in the alternative, in the event that the Commission were to conclude that the application of the IPA Act and/or the PUA in whole or in part yields different conclusions regarding what is required, authorized, or consistent as to ComEd, Ameren Illinois, and MidAmerican in this live controversy, request that the Commission should declare that as well. The Utilities again state that they should not be at risk under the IPA Act and the PUA in this situation.

As noted earlier, because of the Movants’ presentation of the Joint Motion, no party nor Staff reached the stage of filing a response to the Petition.

G. The Proposed Agreed Resolution

On November 19, 2019, the Utilities and Paris Solar together as Movants filed a Joint Motion of the Utilities and Paris Solar for Approval of Joint Stipulation and Settlement and of Draft Proposed Order. There were two Exhibits to the Motion: a Joint Stipulation and Agreement (Exhibit 1) and a Draft Proposed Order (Exhibit 2).

The Joint Motion states, and the Joint Stipulation and Agreement memorializes, among other things, that the Utilities and Paris Solar propose and agree to resolve their contract disputes and this Docket, subject to Commission approval and Commission findings, conclusions, and action, as follows:

1. The Utilities will retain the collateral posted by Paris Solar under the applicable RECs Agreements.

2. The Utilities shall deposit the applicable posted collateral as specified by Paragraph 34 of the Petition, i.e., into the same account as monies collected under ComEd’s Rider REA – Renewable Energy Adjustment, Ameren Illinois’ Rider REA – Renewable Energy Adjustment, and MidAmerican’s Rider PRE – Illinois Power Agency Purchased Power Renewable Energy Resources Recover Adjustment.

3. Under the proposed agreed resolution, Paris Solar shall not be required to post the additional collateral otherwise required under the RECs Agreements with ComEd and Ameren Illinois, and Paris Solar will be released from any and all obligations to supply RECs under the RECs Agreements with all three of the Utilities, as discussed and reflected further below in this Order.

4. The proposed agreed resolution is subject to, and conditioned upon, the Commission approving the Joint Stipulation and Settlement and issuing a final Order that is consistent in all material respects with the Draft Proposed
Order submitted as an attachment to the Joint Motion, including but not limited to findings and conclusions in the final Order:

a. the Utilities’ entry into and performance of the agreed resolution is prudent and reasonable given the anticipated or possible costs, burdens, risks, and delays of further litigation of this live controversy before the Commission and potentially before the Illinois courts; and

b. the Utilities’ entry into and performance of the agreed resolution is consistent with the IPA Act and the PUA.

5. Under the proposed agreed resolution, if all conditions are met, and the time for applications for rehearing of the Commission’s final Order has expired, then the applicable RECs Agreements shall be terminated, and the Utilities and Paris Solar will execute mutual releases of liability under the RECs Agreements, subject to the agreed resolution.

The Joint Stipulation and Settlement also contains certain other agreements and stipulations that should be noted in this Order. Among other provisions, the Joint Stipulation and Settlement states in part:

- “The Settling Parties agree and stipulate that the resolution of the disputes addressed in this Joint Stipulation and Settlement and the Draft Proposed Order is supported by the applicable facts and is reasonable under the circumstances.”

- “The Settling Parties agree and stipulate that the proposed agreed resolution: (a) is within the jurisdiction of the Commission under Section 10-101.1(b) of the Public Utilities Act, 220 ILCS 5/10-101.1(b); (b) is prudent and reasonable for the Utilities to enter into and perform given the anticipated or possible costs, burdens, risks, and delays of further litigation of this live controversy before the Commission and potentially before the Illinois courts; and (c) is consistent with the Illinois Power Agency Act and the Public Utilities Act. The Settling Parties also agree and stipulate that the Commission’s exercise of jurisdiction and review of the proposed agreed resolution also is consistent with the fact that the contracts at issue are RECs Agreements created and approved by IPA and the Commission.”

- “The negotiations leading to the Settling Parties’ proposed agreed resolution are and shall remain privileged, confidential, and / or inadmissible material pursuant to Section 10-101.1(b) of the Public Utilities Act, Illinois Rule of Evidence 408, and/or other applicable authority.”

- “The Settling Parties stipulate and agree that if the Commission approves this Joint Stipulation and Settlement and enters the Draft Proposed Order as the Commission’s final Order, and the time for any party or proposed intervenor to seek rehearing expires, then such actions shall constitute a final resolution of all issues presented for determination in this docket. As indicated earlier in this Joint Stipulation and Settlement, such actions will conclude this docket without the Commission’s ruling on its jurisdiction over
the Petition and without ruling on the Petition’s merits and the requested relief.”

- “The Settling Parties, in submitting this Joint Stipulation and Settlement and the Draft Proposed Order, understand that the Administrative Law Judge will review those documents and that the Commission may conclude that the Joint Stipulation and Settlement and/or the Draft Proposed Order should not be approved or should be modified.”

- “Accordingly, the Joint Motion of the Utilities and Paris Solar for Approval of Joint Stipulation and Settlement and of Draft Proposed Order will provide in part that the Settling Parties respectfully request that, in the event that the Commission does not approve, or materially modifies, the Joint Stipulation and Settlement and/or the Draft Proposed Order, then the Settling Parties be given a reasonable amount of time thereafter (at least 15 business days) to determine whether the Settling Parties nonetheless wish (a) to proceed with the proposed agreed resolution “as is” except subject to the modifications required to be consistent with the Commission’s actions, (b) to propose to modify the agreed resolution, or (c) to resume litigation. A decision in accordance with (a) or (b) above must be by unanimous agreement by each of the Settling Parties.”

- “If the Commission does not approve the proposed agreed resolution consistent with this Joint Stipulation and Settlement, then this Joint Stipulation and Settlement shall be null and void and the Settling Parties shall be in no way limited or prevented from pursuing any and all actions required or permitted in the instant docket and / or pursuing any and all other lawful actions relating to this subject matter.”

H. Commission Analysis and Conclusion

The Commission has carefully reviewed the Petition (including its attachments), the Joint Motion, the entire record, and the applicable law. The Commission finds that, based on the record, including but not limited to the stipulations, it can and should approve the Utilities’ and Paris Solar’s proposed agreed resolution as stated in the Joint Motion and in the preceding subsection of this final Order and as memorialized in the Joint Stipulation and Agreement attached as Attachment A to this Order. Also, no party opposes the proposed agreed resolution. The Commission approves the Joint Stipulation and Settlement.

The Commission concludes that it has jurisdiction over the proposed agreed resolution under Section 10-101.1(b) of the PUA and also because of the special circumstance that this dispute involves RECs Agreements created and approved by the IPA and the Commission as referenced earlier in this Order.

The Commission finds that the proposed agreed resolution of the disputes addressed in the Joint Stipulation and Settlement is supported by the applicable facts and is reasonable under the circumstances.

The Commission finds that it is prudent and reasonable for the Utilities to enter into and perform the proposed agreed resolution given the anticipated or possible costs,
burdens, risks, and delays of further litigation of this live controversy before the Commission and potentially before the Illinois courts, and that the proposal is consistent with the IPA Act and the PUA.

The Commission concludes that, in approving the proposed agreed resolution, the Commission is not making or rendering a declaratory ruling within the meaning of Section 5-150 of the Administrative Procedure Act or Section 200.220 of the Commission’s Rules. The Commission declines to make such rulings in this proceeding.

IV. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having given due consideration to the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) Commonwealth Edison Company is an Illinois corporation engaged in the transmission, sale, and distribution of electricity to the public in Illinois, and is a public utility as defined in Section 3-105 of the Public Utilities Act;

(2) Ameren Illinois Company d/b/a Ameren Illinois is an Illinois corporation engaged in the transmission, sale, and distribution of electricity to the public in Illinois, and is a public utility as defined in Section 3-105 of the Public Utilities Act;

(3) MidAmerican Energy Company is an Illinois corporation engaged in the transmission, sale, and distribution of electricity to the public in Illinois, and is a public utility as defined in Section 3-105 of the Public Utilities Act;

(4) the Commission has jurisdiction over Commonwealth Edison Company, Ameren Illinois Company d/b/a Ameren Illinois, and MidAmerican Energy Company and the subject matter of this proceeding;

(5) the Commission has jurisdiction over the proposed agreed resolution under Section 10-101.1(b) of the PUA and by virtue of its regulatory role in relation to the RECs Agreements;

(6) the statements of fact set forth in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;

(7) the proposed agreed resolution of the disputes addressed in the Joint Stipulation and Settlement is supported by the applicable facts and is reasonable under the circumstances;

(8) in entering this Order approving the proposed agreed resolution, the Commission is not making or rendering a declaratory ruling within the meaning of Section 5-150 of the Administrative Procedure Act or Section 200.220 of the Commission’s Rules.

(9) the entry into and performance of the agreed resolution by Commonwealth Edison Company, Ameren Illinois Company d/b/a Ameren Illinois, and MidAmerican Energy Company is prudent and reasonable given the anticipated or possible costs, burdens, risks, and delays of further litigation of this live controversy before the Commission and potentially before the Illinois courts;
(10) the Utilities’ entry into and performance of the agreed resolution is consistent with the IPA Act and the PUA;

(11) the proposed agreed resolution described in the prefatory portion of this Order is approved; and

(12) the Joint Stipulation and Settlement (Attachment A to this Order) is approved.

IT IS THEREFORE ORDERED that the proposed agreed resolution described in the prefatory portion of this Order and the above Findings and Ordering Paragraphs is approved.

IT IS FURTHER ORDERED that the Joint Stipulation and Settlement (Attachment A to this Order) is approved.

IT IS FURTHER ORDERED that the Commission finds and concludes that the proposed agreed resolution of the disputes addressed in the Joint Stipulation and Settlement is supported by the applicable facts and is reasonable under the circumstances.

IT IS FURTHER ORDERED that the Commission is not making or rendering a declaratory ruling within the meaning of Section 5-150 of the Administrative Procedure Act or Section 200.220 of the Commission’s Rules.

IT IS FURTHER ORDERED that the Commission finds and concludes that the entry into and performance of the agreed resolution by ComEd, Ameren Illinois, and MidAmerican is prudent and reasonable, given the anticipated or possible costs, burdens, risks, and delays of further litigation of this live controversy before the Commission and potentially before the Illinois courts.

IT IS FURTHER ORDERED that the Commission finds and concludes that the Utilities’ entry into and performance of the agreed resolution is consistent with the IPA Act and the PUA.

IT IS FURTHER ORDERED that any objections, motions, or petitions filed in this proceeding that remain unresolved should be disposed of in a manner consistent with the ultimate conclusions contained in this Order.

IT IS FURTHER ORDERED that pursuant to Section 10-113(a) of the Public Utilities Act and 83 Ill. Adm. Code 200.880, any application for rehearing shall be filed within 30 days after service of the Order on the party.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.
By Order of the Commission this 19th day of December, 2019.

(SIGNED) CARRIE ZALEWSKI

Chairman