
IN THE
SUPREME COURT OF ILLINOIS

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| ILLINOIS LANDOWNERS |) | On Appeal from the |
| ALLIANCE, NFP, et al., |) | Appellate Court of Illinois, |
| |) | Third District, Case Nos. |
| Appellees, |) | 3-15-0099, 3-15-0103 & |
| |) | 3-15-0104 (Cons.) |
| v. |) | |
| |) | There Heard on Review of |
| ILLINOIS COMMERCE |) | the Order of the Illinois |
| COMMISSION, et al. |) | Commerce Commission, |
| |) | ICC Docket No. 12-0560 |
| Appellants. |) | |

BRIEF *AMICUS CURIAE* OF INFINITY RENEWABLES
IN SUPPORT OF APPELLANTS

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POINTS AND AUTHORITIES

INTRODUCTION1

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*2

ARGUMENT3

I. Transmission Development and the Competitive Illinois Electricity Market3

A. The Need for the Development of New Transmission Capability.4

Ill. Landowners Alliance, NFP v. Ill. Commerce Comm'n, et al., Nos. 3-15-0099, 3-15-0103 & 3-15-0104, 2016 WL 4208095 (3d Dist. Aug. 10, 2016)3

Public Act 099-09063

B. The Competitive Illinois Electricity Market5

220 ILCS 5/1-1025

20 ILCS 3855/1-75 *et seq.*6

C. Illinois Renewable Portfolio Standard Mandates6

20 ILCS 3855/1-75(c) 6-7

Public Act 099-0906, 20 ILCS 3855/1-75(c)(1)(B), (C), (D), (I), (J)7

II. The Third District8

Miss. River Fuel Corp. v. Ill. Commerce Comm'n, 1 Ill. 2d 509 (1953)8

220 ILCS 5/8-406(a), (b) (West 2012)9

III. The Third District Decision Misinterpreted Key Statutes and Failed to Consider Significant Public Benefits to Be Provided by the Project10

Citizen's Util. Bd. v. Ill. Commerce Comm'n, 166 Ill. 2d 111 (1995)11

Ill. Consol. Tel. Co. v. Ill. Commerce Comm'n, 95 Ill. 2d 142 (1983)11

| | |
|---|-----------|
| Public Act 099-0906 | 11 |
| A. A Public Utility Applicant Is Not Required to Own Physical Assets to Secure a CPCN..... | 11 |
| B. The Purpose of the Project Is Interstate Transmission of Electricity..... | 12 |
| 220 ILCS 5/8-406(b)..... | 12 |
| C. The Project Will Provide Substantial Public Benefit | 13 |
| 220 ILCS 5/1-102 | 14 |
| Public Act 099-0906, 20 ILCS 3855/1-75(c)(1)(C)(i), (D), (F), (I) | 15 |
| CONCLUSION | 17 |
| ILL. S. CT. 4. 341(c) CERTIFICATE OF COMPLIANCE | 18 |
| CERTIFICATE OF SERVICE | 19 |

INTRODUCTION

Infinity Renewables (“Infinity”), formerly known as Infinity Wind Power, submits this *amicus curiae* brief in support of Appellants. In light of the fact that an affirmation of the Appellate Court’s holding in this matter could severely impede the continued growth and evolution of the Illinois competitive electricity market, along with making it more difficult to comply with the Illinois Renewable Portfolio Standard, this Court’s decision will have far reaching implications for Illinois power consumers and the planned transition to a cleaner, more modern generation portfolio. This amicus brief is intended to offer a larger perspective, addressing historical and public policy considerations that may not be mentioned by the parties in their own briefs.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Infinity is a developer of utility-scale renewable energy projects. It is organized in the State of Delaware with its principal place of business in Santa Barbara, California. Through the course of its business, Infinity has developed wind energy projects in multiple states. In an effort to support the development of clean, cost-effective, and more efficient wind energy production, Infinity has intervened in various regulatory proceedings throughout the country, including Illinois, to support the development of new transmission capabilities.

Infinity is interested in building cost-competitive wind energy projects in excellent but remote wind resource areas such as northwest Iowa, southwest Minnesota and western Kansas. However, there is presently a lack of direct, efficient transmission infrastructure to deliver electricity produced by wind farms in these areas to population centers such as northern Illinois where there is a strong demand for electricity from renewable resources. Therefore, Infinity is interested in and supports the development of long distance transmission lines such as the Rock Island Clean Line Project, which is the subject of this case.

ARGUMENT

Infinity, as *amicus curiae*, urges this Court to overturn the Appellate Court's decision in *Ill. Landowners Alliance, NFP v. Ill. Commerce Comm'n, et al.*, Nos. 3-15-0099, 3-15-0103 & 3-15-0104, 2016 WL 4208095 (3d Dist. Aug. 10, 2016) (the "Decision"). As set forth in detail below, Infinity supports the decision of the Illinois Commerce Commission ("ICC" or "Commission") to grant a certificate of public convenience and necessity ("CPCN") to Rock Island Clean Line LLC ("Rock Island") to construct a high-voltage direct-current ("HVDC") electric transmission line from northwest Iowa to Grundy County, Illinois (the "Project"). The Decision, overturning the determination of the ICC, is counter to both existing law and the evidence presented to and considered by the Commission. Further, it is against the best interests of Illinois consumers as it is at odds with the past twenty years of cumulative legislative efforts by the Illinois General Assembly to create an open, competitive and efficient electricity market within this state. Finally, if the Decision is allowed to stand, it will likely have a chilling effect on the construction of new renewable generation sources which will be necessary to meet the goals of the expanded renewable portfolio standards established by the General Assembly in Senate Bill 2814, signed into law by Governor Rauner on December 7, 2016. *See* Public Act 099-0906.

I. Transmission Development and the Competitive Illinois Electricity Market

The development of new electric transmission assets such as the Project is a key catalyst for the development of efficient and cost competitive renewable generation. This generation in turn is crucial for meeting the stated goals of Illinois' deregulated market, which are reliability, safety, environmental sustainability, and least-cost for consumers.

A. The Need for the Development of New Transmission Capability

Wind power is now the least expensive form of new-build power generation in the United States. This is true in large part because new developments are being sited in areas such as northwest Iowa that are very windy, making the wind farms quite productive. One of the primary factors that has limited the construction of wind farms in these wind-rich areas of the continental United States is the lack of adequate long-distance electric transmission capacity. Specifically, the lack of transmission facilities to cost effectively move wind power that can be inexpensively generated in windy areas to power load centers such as northeastern Illinois. R.V1 C-00184; R.V5 C-01177.

Difficulties with moving power efficiently over long distances in the United States is the result of two primary issues: (1) constraints within the current transmission system that make it difficult to move electricity between regional transmission organizations (“RTOs”), such as PJM and MISO which cover Illinois and (2) barriers and challenges to siting new assets. The Project and others like it such as the planned Grain Belt Express Clean Line Project are a key step towards solving these problems of statewide and national significance.

The evidence presented to the ICC in this case both showed that the Project bridges the gaps between RTOs (in this case MISO and PJM) and that its HVDC configuration, as opposed to the alternating current (“AC”) configuration of traditional electric transmission lines, is a more efficient and preferable manner in which to move power over long distances (there is significantly less power lost in transmission with HVDC lines). R.V1 C-00193; R.V2 C-00245-00247; R.V5 C-01176-01177; R.V22 C-05445-05449. In addition, the evidence established that HVDC transmission has a

significantly smaller footprint than AC transmission, resulting in less land use and visual impacts. R.V2 C-00245-00247.

The evidence put forth in this case showed that the delivery of power by the Project via its planned HVDC line will allow efficient, low-cost wind power to be brought into the Illinois market, offering significant benefits to Illinois ratepayers by providing cheaper, cleaner, and more reliable power. R.V5 C-00170-00196; R.V10 C-02302-02305; R.V34 C-08509-08513. The Project, and others like it, creates an economically feasible pathway to move large amounts of wind power from prime resource areas to large power markets where it can be utilized at lower cost in a more predictable manner. R.1 C-00184-00192. Additionally, the evidence showed that the Project and its associated components will provide direct economic benefits to the citizens of Illinois, primarily through construction and manufacturing jobs, along with tax revenues. R.V1 C-00198; R.V2 C-00370-00379, C-00399-00436.

B. The Competitive Illinois Electricity Market

Illinois deregulated its electricity market in 1997. The goal of this significant legislative effort was to offer consumers the choices and associated benefits of a competitive electricity market, namely competition among power generators which would lower costs to consumers. Specifically, the Public Utilities Act states in the findings and intent section that, "The General Assembly finds that the health, welfare and prosperity of all Illinois Citizens requires the provision of adequate, efficient, reliable, environmentally safe and least-cost public utility at prices which accurately reflect the long-term cost of such services and which are equitable to all citizens." 220 ILCS 5/1-102. Accordingly, efforts such as the Project, which will provide a more efficient manner

in which to transmit environmentally preferable electricity to consumers, resulting in lower cost and a more reliable transmission system, should be encouraged.

Additionally, the Project will be constructed and operated in a “merchant” capacity, meaning it will be privately financed with no guarantee of cost recovery via captive ratepayers through the ratemaking process. R.V6 C-01387; R.V21 C-05224; R.V35 C-08609. For purposes of the Project and other similar efforts, the equity investors and lenders will bear the full financial risk because under the merchant model the owner pays all the costs of building, operating and maintaining the transmission line and recovers those costs from the private customers who contract to use the transmission service. R.V35 C-08609.

As described in the third section of this brief, the Decision is counter to many of the legislative mandates established by the General Assembly and the evidence considered under that authority by the ICC. Accordingly, it must be reversed as the Decision will prove to be a barrier to the positive evolution of the Illinois electricity market and the implementation of newly enacted revisions to the Illinois Power Agency Act, which are discussed below. 20 ILCS 3855/1-75 *et seq.*

C. Illinois Renewable Portfolio Standard Mandates

As part of the effort to improve fuel and resource diversity in the Illinois electricity market, which is a key pillar of grid reliability and stability (ensuring that we are not overly reliant on any one generation source), along with the obvious advantages of environmentally friendly generation sources, Illinois created a renewable portfolio standard (“RPS”) in 2007 – mandating that a minimum percentage of each utility’s total retail supply of electricity shall be generated from cost effective renewable resources. 20

ILCS 3855/1-75(c). Significant revisions to the RPS were passed and signed into law in December 2016. Public Act 099-0906.

The newly revised RPS requirements state, among other things, that the long-term renewable resources plan developed by the Illinois Power Agency (“IPA”) shall include a goal for the procurement of renewable energy credits (“RECs”) sufficient to meet at least 25% of the portfolio by 2025. Public Act 099-0906, 20 ILCS 3855/1-75(c)(1)(B). At least 75% of the RECs procured must come from wind and photovoltaic projects. *Id.* at 1-75(c)(1)(C). The RPS requires that these RECs be “cost effective” which is defined to mean that the costs do not exceed regional benchmarks based on market prices. *Id.* at 1-75(c)(1)(D).

The IPA is obligated to design the renewable procurement plan in an effort to maximize the State’s interest in limiting environmental pollution, increasing fuel and resource diversity, enhancing reliability, and minimizing carbon dioxide emissions. *Id.* at 1-75(c)(1)(I). To effectuate these objectives, the IPA is directed to procure RECs from intra-state resources and RECs generated in neighboring states, once the generator of such RECs has been determined by the IPA to be helpful in promoting the interests described above. *Id.* RECs generated by projects whose costs are recovered through rates regulated at the state level [non-merchant projects, *i.e.*, projects owned by regulated utilities] are not eligible for RPS purposes. *Id.* at 1-75(c)(1)(J).

As fully explored in Section III below, the Decision, if allowed to stand, will prove to be a significant impediment for the IPA with regard to its mandate to procure cost effective renewable energy. This impediment will rob Illinois rate payers of one of

the key benefits the Illinois General Assembly sought to provide via the revisions to the RPS – improved access to reliable, affordable, and cleaner power.

II. The Third District’s Decision

The Decision stated that Rock Island, based on its application and the evidence presented to the ICC, failed to achieve what the court considered to be two basic prongs for attaining public utility status: (1) that a company own, control, operate, or manage utility assets, directly or indirectly, within the state and (2) that it offer those assets for public use without discrimination. Decision, at para. 41, citing *Miss. River Fuel Corp. v. Ill. Commerce Comm’n*, 1 Ill. 2d 509, 516-519 (1953). According to the court, the ICC therefore lacked authority to issue a certificate of public convenience and necessity under section 8-406(b) of the Public Utilities Act. Decision, at para. 47.

Specifically, with regard to prong one, the court took an over-simplified view concluding that since the Project was in the planning stages and did not own any physical assets or have agreements for service with any renewable energy generators in the state, it failed the court’s test of owning or controlling utility property in Illinois. Decision, at para. 43. The court also noted that while the potential may exist for generators to purchase service on the line, no Illinois generators have agreed to use the proposed line. *Id.*

In regard to the second prong, the court found that the transmission line was not available for public use without discrimination. Decision, at paras. 45 and 46. This is because, according to the court, the “anchor tenants” who will use a majority of the Project’s transmission capacity are located out of state. *Id.* The court noted that an order by the Federal Energy Regulatory Commission (“FERC”) mandated that at least 25% of

the transmission capacity be sold in an “open season” process approved by FERC, but it did not mandate that an Illinois generator participate in the bidding process. *Id.* Additionally, the court found that the Project does not designate a portion of the renewable energy to be transmitted by the line for public use in Illinois. Accordingly, the court concluded that Rock Island failed the public use requirement. *Id.*

Interestingly, the Decision acknowledged that, “[a] plain reading of the statute shows that an applicant may seek public utility status while, at the same time, applying for a certificate of public convenience and necessity to transact business and construct facilities.” Decision, at para. 49, citing 220 ILCS 5/8-406(a), (b) (West 2012). This conclusion, in and of itself, is indicative of the overall inconsistency of the Decision. Pursuant to the court’s own reasoning as stated above, the ICC had appropriate authority to determine that Rock Island was a public utility, whether or not it currently owned property in Illinois. Unfortunately, the Decision reached the opposite and incorrect conclusion. *Id.*

As fully analyzed in Section III below, the strict application of the Decision would result in making it utterly impossible to construct a merchant transmission line in Illinois. Without merchant transmission and generation, it would be extremely difficult to achieve the General Assembly’s goals for an open, efficient, reliable, and environmentally and consumer friendly electricity market, along with increased use of electricity from renewable resources. As analyzed in the next section of this brief, the Decision is completely at odds with: (1) applicable statutory authority; (2) market realities; and (3) recent revisions to the RPS.

III. The Third District Decision Misinterpreted Key Statutes and Failed to Consider Significant Public Benefits to Be Provided by the Project

Under the methodology established by the Decision, it would be essentially impossible to construct a merchant transmission line in Illinois. As an initial hurdle, a transmission customer will not sign a contract with a provider that has not received full regulatory approval for the proposed asset. This is because without such approval there is no construction scheduling certainty or any overall certainty that the line can be built. R.V1 C-00196-00197; RV19 C-04620-04621; R.V35 C-08614. Additionally, in the absence of complete approval – including routing, full regulatory approval, knowing the structures that can be installed and obtaining survey access – there can be no firm cost certainty (either as to construction costs or the user fees to be charged to transmission customers), making it impossible to obtain financing for the planned generation project. R.V5 C-01203; R.V21 C-00524-05225. In sum, in the absence transmission certainty, with regard to both the existence of the physical line and the user fees, wind generation developers, such as Infinity, will not commit capital to develop new generation projects in areas that currently lack such access. R.V1 C-00189-00190; R.V5 C-001178; R.V34 C-08507. In the absence of firm generation customers, the Project cannot be financed.

The issues regarding certainty, along with consumer protection, constitute the “unique balance” that the ICC recognized, and succeeded in navigating via the criteria and consideration applied to the issuance of the CPCN for the Project, in an effort to not unfairly disadvantage merchant transmission projects by setting a precedent that would not allow them to operate within their business model. R.V35 C-08628. As the administering agency, the ICC’s statutory construction should be given great weight and

deference. *Citizen's Util. Bd. v. Ill. Commerce Comm'n*, 166 Ill. 2d 111, 121 (1995); *Ill. Consol. Tel. Co. v. Ill. Commerce Comm'n*, 95 Ill. 2d 142, 152-154 (1983).

Second, the entire purpose of the Project is to move renewable power generated in wind rich areas to the Illinois electricity market – not to move power within the State of Illinois. Whether an Illinois generator uses the line or not, significant benefits to Illinois consumers will result from the Project, and as ordered by FERC, at least 25% of the capacity is set aside to be offered to customers on a non-discriminatory open access basis through an open season process.¹ R.V6 C-01382-01383; R.V34 C-08504.

Third, the decision fails to take into account the significant public benefits the Project will provide directly to Illinois consumers, all as shown in the evidence, such as lower power prices, environmentally friendly power, reliable delivery and economic development, among others, by delivering 15 million megawatt-hours annually (enough to power 1.4 million homes) to Illinois. Decision, at para. 8; R.V6 C-01391; R.V35 C-08488. Finally, the Project will provide needed support for the development of new renewable generation in Iowa, which will be necessary to meet Illinois RPS goals under P.A. 099-0906. For these reasons, the Decision should be overturned.

A. A Public Utility Applicant Is Not Required to Own Physical Assets to Secure a CPCN

The Decision acknowledged that the Public Utilities Act specifically allows new entrant transmission developers to apply for public utility status and a CPCN simultaneously. Decision, para. 49. This authority exists for good reason: it would be fiscally impossible for an entity such as Rock Island to propose a merchant transmission

¹ FERC also requires that Rock Island offer transmission capacity to the potential anchor customers on a non-discriminatory, open access basis. R.V6 C-01382-01383.

line while requiring it to already construct or acquire physical utility assets in Illinois. Why would a private entity unnecessarily construct and own physical assets prior to having certainty that it will be granted approval by the ICC to build the planned project? This “Catch-22” was acknowledged by the ICC administrative law judge, and by the Commission, in the decision approving the Project. R.V34 C-08484-08485. As previously noted, developers such as Infinity would not sign contracts with a transmission provider until, at a minimum, necessary regulatory approvals have been secured. To take the opposite position, as the Decision essentially did, would make the transmission line siting process, via Section 8-406 of the Public Utilities Act, the exclusive realm of incumbent utilities which control existing assets. This result cannot have been the intent of the General Assembly, particularly given that one of the statutory criteria for approval of a proposed transmission line project is that it will “promote the development of an effectively competitive market.” 220 ILCS 5/8-406(b)(1).

The reality is that private electric infrastructure developers rely on the financial markets to fund their projects. They do not have the same luxury of time and certainty as traditional incumbent utilities which recover costs through rate based mechanisms from captive retail customers. As it is the stated goal of the Illinois General Assembly to deregulate and open the Illinois electricity market to development that is not dependent on rate recovery, the Decision must be reversed. If it is not, the General Assembly’s intent will be thwarted and Illinois will miss out on important transformative projects, such as the one Rock Island is proposing.

B. The Purpose of the Project Is Interstate Transmission of Electricity

The reasoning in the Decision regarding “public use” was primarily focused on the fact that there is no guarantee that an Illinois generator will use the Project to transmit power and therefore Rock Island’s plan does not devote assets for public use in Illinois without discrimination. Decision, para. 46. This reasoning was unsupported by any citations to case law or statute. Not only is this position contrary to the statutory instruction to create an open and competitive market but it entirely misses the purpose of the Project (and others to follow), which is to efficiently move renewable power from wind rich areas west of Illinois to the demand center of northern Illinois. By doing so, the Project will promote an effectively competitive electricity market in this State as required by the Public Utilities Act for issuance of a CPCN. *See* 220 ILCS 5/8-406(b).

To follow the path set forth in the Decision, requiring that an Illinois generator must utilize the transmission line in order for the ICC to have authority to issue a CPCN to construct the project, would not only result in a violation of the Project’s FERC order and FERC’s nondiscrimination, open access requirements, but would also run counter to the General Assembly’s intent to create an effectively competitive electricity market. Private sector competition cannot be created in an open access market if there is a phantom requirement that one or more Illinois generators be users of every new transmission line. Access to interstate transmission is a matter within the FERC regulatory sphere, an aspect of the market which is both well known to and accepted as standard business practice by the private development community.²

² The FERC process, whereby a significant portion of a transmission line’s capacity is initially contracted to a set of interested eligible anchor customers and the remainder is made available through a non-discriminatory “open season” process is, from

The Decision simply does not conform to either the Public Utilities Act or market realities. Accordingly, it must be overturned. To allow it to stand would significantly hinder the development of new interstate transmission lines, which are the backbone of the power supply market.

C. The Project Will Provide Substantial Public Benefit

The evidence clearly demonstrated that the Project will result in lower electricity prices for Illinois consumers, resulting in potential savings of over a billion dollars over four years. R.V2 C-00290-00298, C-0304-0306; R.V6 C-01390 – 01391; R.V10 C-02302-0235; RV18 C-04478-04481; R.V19 C-04648-04652; R.V22 C-0528-05262, C05266-05277, C-05378-05416; R.V34 C-08509-08513, C-08516-08518. Further, the Project will deliver renewably sourced power in a reliable and efficient manner. R.V1 C-00193, R.V2 C-00245-00247. In addition, the Project will also create substantial construction and permanent employment opportunities. R.V1 C-00198; R.V2 C-00370-00379, C-00397-00436. These facts can lead to no other conclusion but that the Project will provide clear public benefits to Illinois residents that are in conformance with the legislative goals and objectives of the Public Utilities Act. *See* 220 ILCS 5/1-102. The failure to address these facts in the Decision warrants reversal as it is out of step with the dictates of the Public Utility Act.

Infinity's prospective, not only typical within the industry but amounts to an essential aspect of generation development – this is a standardized process (similar to the process followed for any FERC jurisdictional transmission provider) through which developers can obtain capacity on fair and equal terms. R.V.6 C-01380-01391. By utilizing this method, it can be clearly demonstrated that the Project is open to the public on a standardized basis and that the public consumer is gaining substantial benefit by receiving competitive power pricing.

Additionally, the IPA has a mandate to procure cost effective RECs on behalf of Illinois electric consumers. Such RECs shall be procured on a competitive basis and the price cannot exceed benchmarks based on the market prices for like products in the region. Public Act 099-0906, 20 ILCS 3855/1-75(c)(1)(D). As a matter of basic economics and based on the extensive wind power development activities of Infinity, as more new wind power generation is added in this region, related RECs prices will drop in the region, including in Illinois. R.V5 C-01186-01188; R.V22 C-05380-05381, C-05408-05409. Clearly, the Project will facilitate new wind development which will increase competition in the market, and lower REC prices will benefit Illinois consumers.

The IPA is also bound by certain geographic requirements with regard to REC procurement. Specifically, the IPA is instructed to procure RECs from Illinois based renewable projects and qualified facilities in neighboring states, such as Iowa. 20 ILCS 3855/1-75(c)(1)(I).

In addition to the geographic guidance, the IPA is instructed to focus on REC procurements from “new utility-scale wind projects.” *Id.* at 1-75(c)(1)(F). New wind projects are defined as wind renewable energy facilities that are energized after June 1, 2017. *Id.* at 1-75(c)(1)(C)(i). The development of new wind projects in neighboring states (in this case Iowa) is exactly what the Project is designed to support. R.V1 C-00170-00172, C-00179-00180, C-00183-00184; C-00188-00192; R.V5 C-00170-001178. This development will increase the pool of available RECs from new projects, in-turn decreasing prices, which will provide significant public benefit to Illinois consumers.

Iowa has many wind projects under development, which are on-hold pending further build out of the transmission grid. R.V5 C-01178. The Project will provide the

catalyst to bringing this new generation on-line, benefitting Illinois consumers.

Additionally, setting aside RPS requirements, as evidenced by installed capacity over and above RPS requirements in certain states, there is demand – based on cost competitiveness alone – for new wind projects. *Id.* This type of development should be encouraged and facilitated.

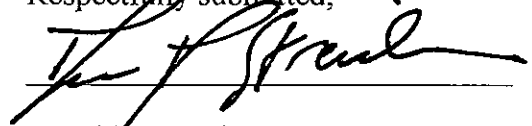
CONCLUSION

The Decision is grounded in an out-of-date view of the Illinois electricity market that presupposes transmission will be built by incumbent Illinois utilities to transmit electricity generated within the State. This is not the market the Illinois General Assembly envisioned when it passed deregulation in 1997 nor is it the market designed by applicable statutes. Illinois legislators have sought an open, competitive, environmental friendly, reliable, and consumer friendly market. The Project will help achieve all of those goals. The precedent that would be set by the Decision will make it impossible for the Illinois market to continue to evolve and modernize for the benefit of the public. Accordingly, it must be overturned.

For the reasons contained herein, Infinity urges the Illinois Supreme Court to reverse the Decision and confirm the well-reasoned determination of the Illinois Commerce Commission with regard to this matter.

Dated: February 1, 2017

Respectfully submitted,



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ILL. S. CT. R. 341(c) CERTIFICATE OF COMPLIANCE

I, the undersigned attorney, certify the Brief *Amicus Curiae* of Infinity Renewables in Support of Appellees conforms to the requirements of Rules 345, 341(a) and (b). The length of this brief, excluding the pages contained in Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 17 pages.



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CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I caused three copies of the foregoing **Brief *Amicus Curiae* of Infinity Renewables in Support of Appellees** to be served upon each of the below attorneys of record by depositing the same in the U.S. Mail at 161 N. Clark Street, Chicago, Illinois, proper postage prepaid, before 5:00 p.m. on this 1st day of February 2017.

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