



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

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STATE MATTERS:
Illinois Clean Energy Community
Foundation as a "State Agency"
under the State Officials and
Employees Ethics Act

Mr. Sean Ginty
General Counsel
Office of Executive Inspector General
for the Agencies of the Illinois Governor
32 West Randolph Street, Suite 1900
Chicago, Illinois 60601

Dear Mr. Ginty:

I have your letter inquiring whether the Illinois Clean Energy Community Foundation (the Foundation) is a "State agency," as that term is defined in the State Officials and Employees Ethics Act (the Ethics Act) (5 ILCS 430/1-1 *et seq.* (West 2008)), and is therefore subject to the provisions of that Act. For the reasons set out below, it is my opinion that the Foundation is not a "State agency" for purposes of the Ethics Act.

BACKGROUND

Section 16-111.1 of the Public Utilities Act (220 ILCS 5/16-111.1 (West 2008)) authorizes an electric utility that sells certain generating facilities in a transaction meeting the criteria of subsection 16-111(k) of that Act (220 ILCS 5/16-111(k) (West 2008)) to establish an Illinois clean energy community trust or foundation to provide financial support and assistance to public and private entities in Illinois for programs that benefit the public by improving energy efficiency, developing renewable energy resources, preserving or enhancing natural habitats and wildlife areas, and improving the quality of the environment in Illinois. In December 1999, shortly after the enactment of section 16-111.1,¹ electric utility Commonwealth Edison (ComEd) created the Foundation as a not-for-profit corporation under the General Not For Profit Corporation Act of 1986 (*see* 805 ILCS 105/101.01 *et seq.* (West 2008)). Pursuant to subsection 16-111.1(b)(6) of the Public Utilities Act (220 ILCS 5/16-111.1(b)(6) (West 2008)), ComEd provided \$225 million to fund the Foundation and also contributed \$25 million to Southern Illinois University for projects and programs related to clean coal.² *See* Remarks of Rep. Novak,

¹The General Assembly added section 16-111.1 to the Public Utilities Act in Public Act 91-050, effective June 30, 1999.

²Subsection 16-111.1(b)(6) of the Public Utilities Act provides:

The trust or foundation shall be funded in the minimum amount of \$250,000,000 * * *; provided, however, that this amount may be reduced by up to \$25,000,000 if, at the time the trust or foundation is funded, a corresponding amount is contributed by the electric utility establishing the trust or foundation to the Board of Trustees of Southern Illinois University for the purpose of funding programs or projects related to clean coal and provided further that \$25,000,000 of the amount contributed to the trust or foundation shall be available to fund programs or projects related to clean coal.

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May 27, 1999, House Debate on Senate Bill No. 24, at 19 (noting that "\$25,000,000 will be directly made [to] * * * Southern Illinois University, with respect to * * * clean coal projects. And then another \$25,000,000 will be able to be accessed * * * to enhance these coal projects").

Section 16-111.1 of the Public Utilities Act provides that the Foundation shall be governed by articles of incorporation and bylaws which, at a minimum, shall provide for a board of six voting trustees, each of whom serves a five-year term.³ *See* 220 ILCS 5/16-111.1(b)(1), (3) (West 2008). In keeping with the statute, ComEd, the Governor of Illinois, the President of the Illinois Senate, the Minority Leader of the Illinois Senate, the Speaker of the Illinois House, and the Minority Leader of the Illinois House each appoints one trustee. *See* 220 ILCS 5/16-111.1(b)(1) (West 2008). The person holding the office responsible for appointing any trustee whose resignation or death creates a vacancy is responsible for filling that vacancy. 220 ILCS 5/16-111.1(b)(4) (West 2008). Although section 16-111.1 is silent as to the removal of trustees, the Foundation's bylaws provide that trustees may be removed only for cause. Bylaws of Illinois Clean Energy Community Foundation, §4.2 (adopted January 17, 2000) (Bylaws).

The trustees are charged with determining how the Foundation's funds will be allocated and disbursed. 220 ILCS 5/16-111.1(b)(6) (West 2008); *see also* Bylaws §§1.4, 4.1, 7.1. In addition, the Foundation is authorized to employ an executive director and other officers and employees, to incur expenses, and to enter into contracts, leases, and other obligations on

³The statute also provides for four non-voting trustees, one appointed each by the Director of Commerce and Economic Opportunity, the Director of the Illinois Environmental Protection Agency, the Director of Natural Resources, and the electric utility creating the trust or foundation. The non-voting trustee appointed by the utility must "bring financial expertise to the trust or foundation and * * * have appropriate credentials therefor." 220 ILCS 5/16-111.1(b)(1) (West 2008).

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behalf of the Foundation. *See* 220 ILCS 5/16-111.1(b)(7) (West 2008); Bylaws, §§6.1 through 6.8; First Amendment to Bylaws, §6.6 (adopted March 14, 2000).

ANALYSIS

The General Assembly enacted the Ethics Act to regulate the conduct of officers and employees of the executive and legislative branches of State government. *See generally* 5 ILCS 430/1-1 *et seq.*, 5-5 *et seq.*, 10-10 *et seq.* (West 2008). The provisions of the Ethics Act are applicable generally to constitutional officers, members of the General Assembly, and officers and employees of State agencies. Section 1-5 of the Ethics Act defines the term "State agency" to encompass a broad range of governmental entities, including:

all officers, boards, commissions and agencies created by the Constitution, whether in the executive or legislative branch; all officers, departments, boards, commissions, agencies, institutions, authorities, public institutions of higher learning * * *, and bodies politic and corporate of the State; and administrative units or *corporate outgrowths of the State government which are created by or pursuant to statute*, other than units of local government (including community college districts) and their officers, school districts, and boards of election commissioners; and all administrative units and corporate outgrowths of the above and as may be created by executive order of the Governor. "State agency" includes the General Assembly, the Senate, the House of Representatives, the President and Minority Leader of the Senate, the Speaker and Minority Leader of the House of Representatives, the Senate Operations Commission, and the legislative support services agencies. "State agency" includes the Office of the Auditor General. "State agency" does not include the judicial branch. (Emphasis added.) 5 ILCS 430/1-5 (West 2008), as amended by Public Act 96-555, effective August 18, 2009.

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The General Assembly has the power to define statutory terms in any reasonable manner. *Ruva v. Mente*, 143 Ill. 2d 257, 263 (1991). If a statute defines the terms it uses, those terms must be construed according to the definitions contained in the act. *State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group*, 182 Ill. 2d 240, 244 (1998).

Under section 1-5, the definition of "State agency" includes a number of specific examples of State officers and governmental entities that constitute "State agencies." The term also includes governmental entities created by the constitution, statute, or executive order. The Foundation was not created by the constitution or executive order, nor is it one of the governmental entities, commissions, or support services agencies specifically enumerated in section 1-5. Further, nothing in section 16-111.1 of the Public Utilities Act or any other statute expressly or impliedly designates the Foundation as a department, board, commission, agency, institution, authority, public institution of higher learning, body politic and corporate of the State, or administrative unit of the State government. The issue, therefore, is whether the Foundation constitutes a "corporate outgrowth[] of the State government * * * created by or pursuant to statute[.]"

Illinois law, including the Ethics Act, does not define the term "corporate outgrowth." Undefined statutory terms must be given their ordinary and popularly understood meanings. *Wauconda Fire Protection District v. Stonewall Orchards, LLP*, 214 Ill. 2d 417, 430 (2005). The term "corporate" commonly means "having the nature of, or acting by means of, a corporation[.]" Webster's New World Dictionary 318 (2nd coll. ed. 1976). The term "outgrowth"

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generally refers to "that which grows out; offshoot[.]" Webster's New World Dictionary 1010 (2nd coll. ed. 1976). Based upon the commonly understood meaning of these terms, "corporate outgrowths of the State government" refers to those corporations that grow directly out of, or are offshoots of, the State government.

The Foundation is a not-for-profit corporation that was created by ComEd, a business corporation. Capitalization of ComEd is principally through private investment. Further, ComEd's board of directors and employees operate independently of direct governmental control, although the Illinois Commerce Commission (the ICC) has general supervisory authority of all public utilities. 220 ILCS 5/4-101 (West 2008). ComEd's primary function is the provision of electricity, which is a proprietary, not a governmental, function. *See generally City of Naperville v. Department of Revenue*, 103 Ill. App. 3d 312, 316 (1982) (citing to dissent in *Springfield Gas & Electric Co. v. City of Springfield*, 292 Ill. 236, 250-51 (1920)); *see also Rupp v. Grantsville City*, 610 P.2d 338, 341 (Utah 1980); *Newman v. City of Indianola*, 232 N.W.2d 568, 570 (Iowa 1975); *Schmidt v. Village of Kimberly*, 256 P.2d 515, 522 (Idaho 1953); *Public Utility District No. 1 of Pend Oreille County v. Town of Newport*, 228 P.2d 766, 771 (Wash. 1951).

The legislative history of section 16-111.1 suggests that ComEd agreed to the creation of the Foundation as the result of negotiations regarding the potential sale of certain power-generating facilities. Specifically, in 1999, the ICC authorized ComEd to sell its seven

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fossil-fuel power plants for \$4.8 billion, which resulted in a significant profit for ComEd. *See Illinois Clean Energy Community Foundation v. Filan*, 392 F.3d 934, 935 (7th Cir. 2004).⁴

Representative Novak's remarks during the House debate on Senate Bill 24, which as Public Act 91-050, effective June 30, 1999, added section 16-111.1, suggest that certain aspects of that transaction may have been conditioned on ComEd's agreement to establish and fund the Foundation:

Commonwealth-Edison, once the power plants are approved by the Commerce Commission, * * * [is] going to realize a substantial profit. They understand that. Probably beyond their comprehension. * * * So what has occurred is that Commonwealth-Edison decided well, we need to give some back. We asked them, you give some back. We're going to allow you * * * to realize a substantial profit. We want you to give something back. They're giving things back * * * by forming a \$250,000,000 trust fund. * * * So, it is give and take. Remarks of Rep. Novak, May 27, 1999, House Debate on Senate Bill No. 24, at 46.

The negotiations leading up to the enactment of section 16-111.1 and the subsequent creation of the Foundation, however, are not determinative of whether the Foundation is a "corporate outgrowth[] of the State[.]"

⁴In *Filan*, the Seventh Circuit held that the Foundation was not a "State agency," that its assets were therefore not public funds, and that, accordingly, the State's demand that the Foundation turn over \$125 million of its assets to pay off State bonds and fund State environmental programs would result in an unconstitutional taking. Although this opinion adopts some of the court's reasoning, the Seventh Circuit analyzed this issue under the fifth amendment's Takings Clause, not the Ethics Act. Further, Federal law does not govern the issue of whether the Foundation is a "State agency" under the Ethics Act. *See Crider v. State of Illinois*, 174 Ill. App. 3d 163, 167 (1988). Thus, *Filan* does not control the resolution of this matter.

Instead, the critical facts in this analysis are that the Foundation is wholly separate and distinct and operates independently from the State. The State is not authorized to assist the Foundation in carrying out its functions, nor does the State manage the daily activities of the Foundation or provide funds to support those activities. No express statutory provision requires that State officials serve as members of the Foundation's board of trustees.

Moreover, the State has no control over the decisions of the trustees as to the allocation or disbursement of Foundation funds. *See* 220 ILCS 5/16-111.1(b)(6) (West 2008) (noting that the "foundation shall be funded in the minimum amount of \$250,000,000, with the allocation and disbursement of funds * * * to be determined by the trustees"). While there are some statutory limitations regarding the use of Foundation funds,⁵ the trustees have operated the Foundation since its inception with a significant degree of independence in determining how to allocate the Foundation's funds, distributing over \$160 million in grants to Illinois nonprofit organizations, schools, municipalities, and other local government agencies. *See* Illinois Clean Energy Community Foundation Home Page, www.illinoiscleanenergy.org.⁶

⁵In addition to requiring that \$25 million of the \$225 million must be available to fund projects relating to clean coal, subsection 16-111.1(c)(2) requires the Foundation to provide an annual grant of \$1 million to the Citizens Utility Board (CUB), for seven years after the initial funding of the Foundation, for CUB to use in support of its operations, consumer education programs, and advocacy and litigation before the Illinois Commerce Commission. 220 ILCS 5/16-111.1(c)(2), (3) (West 2008).

⁶The Foundation has created a competitive grant application and award process that does not include State involvement. Entities seeking Foundation funding for a project are required to submit a letter of inquiry to the Foundation for each project for which a grant is sought. Following a review of the letters of inquiry, the Foundation notifies applicants if they have been selected to submit a full proposal. The Foundation then reviews the proposals and makes final grant decisions. *See* Illinois Clean Energy Community Foundation, 2009 Program Priorities and Grant Application Guidelines, *available at* http://www.illinoiscleanenergy.org/images/ICEFC_PDFs/2009/2009%20Program%20Guidelines.pdf.

Although five of the Foundation's six voting trustees are appointed by State officials, the authority to make appointments to the board does not surrender control of the Foundation to those State officials. *See, e.g., Hopf v. Topcorp, Inc.*, 256 Ill. App. 3d 887, 894-95 (1993), *appeal denied*, 154 Ill. 2d 560 (1994). Once appointed, the trustees autonomously administer the Foundation and may be removed only for cause related to performance in office. More importantly, the trustees, by whomever they are appointed, owe a fiduciary duty to adhere to the Foundation's charitable purposes, to avoid wasting the Foundation's charitable assets, and to use the Foundation's funds in conformity with its purposes and for the best interests of its beneficiaries. *See* 760 ILCS 55/15(a)(2), (4), (6) (West 2008); *Filan*, 392 F.3d at 937.

Lastly, the Foundation was not created to further the interests or welfare of the State or to provide assistance or services to the State. The purpose of the Foundation is to provide financial support to public or private entities to fund projects to improve energy efficiency, advance the development of renewable energy resources, and preserve and enhance natural areas and wildlife habitat throughout Illinois. 220 ILCS 5/16-111.1(a) (West 2008); *see also* Remarks of Rep. Novak, May 27, 1999, House Debate on Senate Bill No. 24, at 18-19; Remarks of Rep. M. Davis, April 15, 2000, House Debate on Senate Bill No. 385, at 150. These funded projects serve to benefit the public generally, not State government generally or any department or agency thereof.

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Thus, the Foundation operates independently of the State as a private, charitable, grant-making organization. As a result, it is my opinion that the Foundation does not constitute a "corporate outgrowth[] of the State government" and does not fall within the definition of "State agency" as that term is used in the Ethics Act.

This construction of the term "corporate outgrowths of the State government" is consistent with previous Attorney General opinions interpreting similar statutory language. In opinion No. S-1117, issued July 1, 1976 (1976 Ill. Att'y Gen. Op. 226), Attorney General Scott addressed whether the Northern Illinois University Foundation (the NIU Foundation) was a "State agency" for purposes of the Auditing Act (Ill. Rev. Stat. 1975, ch. 15, par. 301-1 *et seq.*, now codified at 30 ILCS 5/1-1 *et seq.* (West 2008)). The Auditing Act contained language similar to section 1-5 of the Ethics Act ("State agencies" means "all * * * administrative units or corporate outgrowths of the State government which are created by or pursuant to statute" (Ill. Rev. Stat. 1975, ch. 15, par. 301-7, now codified at 30 ILCS 5/1-7 (West 2008))). In concluding that the NIU Foundation was a "corporate outgrowth" of Northern Illinois University (NIU), and thus a "State agency" subject to audit, Attorney General Scott focused on the organizational structure of, and the purposes served by, the NIU Foundation. Although Attorney General Scott recognized that the NIU Foundation is a corporation distinct from NIU, he concluded that its objectives, which included developing and increasing the facilities of NIU, encouraging gifts to NIU, entering into contracts to benefit NIU, and acting as the business agent for NIU's governing

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board, as well as its basic dependence on NIU for its office space and membership, established the NIU Foundation as a corporate outgrowth of the university.

Further, in opinion No. UP-418, issued March 15, 1961, Attorney General Clark concluded that the Southern Illinois University Foundation (the SIU Foundation) was a "State agency" subject to audit under the Illinois Auditing Act (Ill. Rev. Stat. 1959, ch. 15, par. 61 *et seq.*), the precursor to the current Auditing Act. As used in the Illinois Auditing Act, the term "State agencies" was defined to include "all * * * universities * * * of the State and * * * any other administrative unit of State government or corporate outgrowth thereof, expending or encumbering State funds by virtue of an appropriation from the General Assembly, or handling money on behalf of the State, or holding any trust funds from any source derived." Ill. Rev. Stat. 1959, ch. 15, par. 63. In reaching his conclusion that the SIU Foundation was a "corporate outgrowth" of Southern Illinois University (SIU), and thus a "State agency" subject to audit, Attorney General Clark found the close interrelationship between SIU and the SIU Foundation to be determinative. It was significant to the analysis that certain members of the board of directors of the SIU Foundation were required to be officers, employees, or members of the board of trustees of SIU and that of the other directors of the SIU Foundation, two-thirds were required to be alumni of SIU. Further, the business manager of SIU was the treasurer of the SIU Foundation and the purpose of the Foundation was to receive, hold, and administer gifts for SIU. Although the SIU Foundation possessed a separate corporate existence, Attorney General Clark determined that it was not independent of SIU.

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In contrast to the NIU and SIU Foundations, the organizational structure of, and the purposes served by, the Foundation establish its independence from the State. There is no requirement that the Foundation's voting trustees be State officers or employees. Further, none of the Foundation's employees are public employees. *Filan*, 392 F.3d at 935-36. The Foundation's purpose is not to further or assist State purposes, but rather to provide grants and other financial support to public and private institutions in Illinois for projects designed to improve energy efficiency and to protect the environment. In keeping with this purpose, the Foundation's ten-year report indicates that the Foundation, among other things, has upgraded "lighting in over 3,500 school[s], college[s], librar[ies], park[s] and other public and nonprofit buildings[,]"" provided over \$12 million to seed wind power development, protected over 15,000 acres of natural landscapes, and sponsored "green" building design for \$2.8 billion in construction around the State (*see* Illinois Clean Energy Community Foundation, 10 Year Report (10 Year Report), at 3 (2000-2009)).⁷ Given its independent organizational structure and its broad public purposes, the fact that the General Assembly authorized ComEd to create the Foundation and that State officials appoint five of the six voting trustees does not, in my opinion, make the Foundation a "State agency" under the Ethics Act.

CONCLUSION

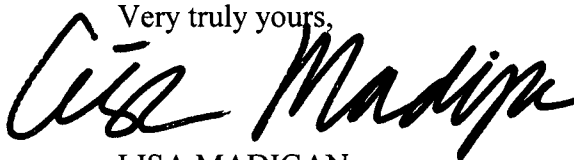
It is my opinion that the Illinois Clean Energy Community Foundation is an entity separate and apart from the State, and not a corporate outgrowth of the State government.

⁷The 10 Year Report is available at http://www.illinoiscleanenergy.org/images/ICEFC_PDFs/2010/10%20year%20report.pdf.

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Therefore, the Foundation is not a "State agency," as that term is defined in the State Officials and Employees Ethics Act. Consequently, the Foundation is not subject to the provisions of the Ethics Act.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Madigan". The signature is written in a cursive, flowing style with a large initial "L".

LISA MADIGAN
ATTORNEY GENERAL