STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Integrys Energy Services, Inc.	)	
	)	Docket No. 09-0165
Petition for Declaratory Ruling as	)	
to the Applicability of Provisions of	)	
the Consumer Fraud Act and Public	)	
Utilities Act.	)	

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S
VERIFIED RESPONSE TO INTEGRYS ENERGY SERVICES, INC.'S
PETITION FOR DECLARATORY RULING

PUBLIC VERSION

BEGIN CONFIDENTIAL XXX END CONFIDENTIAL - Denotes confidential matter

I. Petition and Relevant Facts

1. On March 24, 2009, Integrys Energy Services, Inc. (hereafter "IES") filed its Petition for Declaratory Ruling as to the applicability of Sections 16-115A and 16-115C of the Public Utilities Act, 220 ILCS 220 ILCS 5/16-115A; 16-115C; and Section 2EE of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2EE. *See, generally*, Petition. IES is certified as an Alternative Retail Electric Supplier (hereafter "ARES") within the meaning of Section 16-115 of the Illinois Public Utilities Act. Petition, ¶1; *see also* Order, Integrys Energy Services, Inc.: Application for Certificate of Service Authority Under Section 16-115 of the Public Utilities Act, ICC Docket No. 07-0279 (June 27, 2007).

2. In its Petition, IES alleges that it has entered into an agreement (hereafter "the Agreement") with an Illinois not-for-profit corporation known as the New Illinois

Cooperative Energy (hereafter "NICE"),[1] pursuant to which agreement NICE will offer NICE members electric service. Petition, ¶3. Such electric service will actually be supplied by IES, inasmuch as NICE is neither an ARES, nor a public utility, nor licensed as an agent, broker or consultant within the meaning of Section 16-115C of the Public Utilities Act. Id., ¶¶2-3. *See also* Joint Statement as to Certain Uncontested Facts (hereafter "Joint Ex. 1.0"), ¶3(a); Joint Ex. 1.1.

3. NICE is not a party hereto, and IES does not have authority, nor does it, seek relief on NICE's behalf. Joint Ex. 1.0, ¶3(f); Joint Ex. 1.6.

4. IES asserts that NICE is responsible for marketing services offered under the Agreement to the general public, and that IES will not be engaged in sales of any product to customers under the Agreement. Petition, ¶3. Pursuant to the specific terms of the Agreement, ***BEGIN CONFIDENTIAL XXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX

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> customers receiving unbundled electric service, (2) Taxes, and (3) the Monthly Fees for "Billing and Management" and NICE Membership Dues. All charges referenced in this section, the NICE Program rate and items (1) – (3), will be invoiced as separate line items and payable on your invoice. **THE NICE PROGRAM RATE IS NOT GUARANTEED TO BE LESS THAN THE UTILITY RATE.**
>
> **Monthly Fees:** Seller shall invoice and Buyer shall pay the following Monthly Fees per Utility Account Number per month: (i) the Billing and Management Fee, which shall not exceed $6.15 per month, and (ii) the NICE Membership Dues, which is $4.00 monthly if Buyer is a Residential Customer, or $8.00 monthly if Buyer is a Commercial Customer. Buyer represents that it is a member of NICE, acknowledges that the NICE Membership Dues are due pursuant to the terms of its membership agreement, and agrees that the collection and maintenance of Buyer's NICE Membership Dues is a service provided by Seller as a convenience to Buyer. NICE is not an agent of Seller.

Petition, ¶5 (emphasis in original); *see also* Joint Ex. 1.2

10. IES contends that the terms of the Agreement permit it to offer this so-called "managed service" product only to NICE members, at least within the state of Illinois. Petition, ¶6. However, IES avers that the Endorsement Agreement does not require NICE to offer: "electricity (or other service packages including electricity) only using electricity supplied by IES. In particular, the between agreement IES and NICE does not prohibit NICE from also working with other ARES." Id., ¶7. The Agreement provides that: ***BEGIN CONFIDENTIAL XXXX

II. Relief Sought

11. IES seeks a declaratory ruling as to each of the following two questions:

A. Whether Section 16-115A of the Public Utilities Act, Section 2EE of the Consumer Fraud Act, or both, are applicable to IES's managed price service, and specifically whether pricing electricity in the manner IES and NICE propose to price it is prohibited, Petition, ¶11; and

B. Whether Section 16-115C is applicable to the proposed arrangement, in light of the fact that marketing of all IES-supplied electricity and contacts with potential subscribers will be handled exclusively by NICE. Petition, ¶14.

III. Statutes

12. Section 16-115A(e)(i) of the Public Utilities Act provides, in relevant part, that:

> (e) An alternative retail electric supplier shall comply with the following requirements with respect to the marketing, offering and provision of products or services to residential and small commercial retail customers:
>
> > (i) Any marketing materials which make statements concerning prices, terms and conditions of service shall contain information that adequately discloses the prices, terms and conditions of the products or services that the alternative retail electric supplier is offering or selling to the customer[.]
>
> 220 ILCS 5/16-115A(e)(i)

13. Section 16-115B(a) of the Public Utilities Act provides, in relevant part, that:

> The Commission shall have jurisdiction in accordance with the provisions of Article X of this Act to entertain and dispose of any complaint against any alternative retail electric supplier alleging … that the alternative retail electric supplier has violated or is in

> nonconformance with any applicable provisions of Section 16-115 through Section 16-115A[.]
>
> 220 ILCS 5/16-115B(a)

14. Section 2EE of the Consumer Fraud and Deceptive Business Practices Act requires generally that an “electric service provider”, as elsewhere defined, disclose all material terms and conditions to a customer prior to switching such customer’s service to that of the electric service provider in question. 815 ILCS 505/2EE. Further, Section 2EE specifically provides that: “the terms conditions, and nature of the service to be provided to the subscriber must be clearly and conspicuously disclosed, in writing, and an electric service provider must directly establish the rates for the service contracted for by the subscriber[.]” 815 ILCS 505/2EE 815 ILCS 505/2EE(a)(5)(iii). Still further, Section 2EE provides that the Commission has the authority to entertain complaints against electric service provider which violate the Act. 815 ILCS 505/2EE(d).

15. Section 16-115C of the Public Utilities Act requires “agents, brokers or consultants” as defined by Section 16-115C(b) of the Public Utilities Act to obtain licenses from the Commission. 220 ILCS 5/16-115C(c). The statutory term “’agents, brokers, and consultants engaged in the procurement or sale of retail electricity supply for third parties" is defined as “any person or entity that attempts to procure on behalf of or sell retail electric service to an electric customer in the State[.]” 220 ILCS 5/16-115C(b). The definition excludes ARES offering service on their own behalf, entities acting on behalf of a single ARES where the exclusive nature of such relationship is disclosed, representatives of municipal systems, and entities seeking to sell power to entities with very high aggregate demands. Id.

IV. Commission Authority to Grant Declaratory Relief

16. Administrative agencies such as the Commission are authorized to issue declaratory rulings by Section 5-150 of the Illinois Administrative Procedure Act, which provides that:

> **Each agency may in its discretion provide by rule for the filing and prompt disposition of petitions or requests for declaratory rulings as to the applicability to the person presenting the petition or request of any statutory provision enforced by the agency or of any rule of the agency.** Declaratory rulings shall not be appealable. The agency shall maintain as a public record in the agency's principal office and make available for public inspection and copying any such rulings. The agency shall delete trade secrets or other confidential information from the ruling before making it available.
>
> 5 ILCS 100/5-150(a)(emphasis added)

17. The Commission has provided by rule for the filing of petitions for declaratory ruling. 83 Ill. Adm. Code 200.220. The Commission rule provides that:

> When requested by the affected person, the Commission may **in its sole discretion** issue a declaratory ruling with respect to: … the applicability of any statutory provision enforced by the Commission or of any Commission rule **to the person(s) requesting a declaratory ruling[.]**
>
> 83 Ill. Adm. Code 200.220(a)(1)(emphasis added)

18. While not binding on the Commission, the Illinois Declaratory Relief Act, 735 ILCS 5/2-701, provides guidance in how the Commission should properly employ its discretionary authority to grant declaratory rulings. The Declaratory Relief Act provides, in relevant part, that:

(a) No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby. The court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, of the construction of any statute, municipal ordinance, or other governmental regulation, or of any deed, will, contract or other written instrument, and a declaration of the rights of the parties interested. The foregoing enumeration does not exclude other cases of actual controversy. The court shall refuse to enter a declaratory judgment or order, if it appears that the judgment or order, would not terminate the controversy or some part thereof, giving rise to the proceeding. In no event shall the court entertain any action or proceeding for a declaratory judgment or order involving any political question where the defendant is a State officer whose election is provided for by the Constitution; however, nothing herein shall prevent the court from entertaining any such action or proceeding for a declaratory judgment or order if such question also involves a constitutional convention or the construction of a statute involving a constitutional convention.

735CS 5/2-701(a)

V. Argument

A. The Commission Should Deny Declaratory Relief With Respect to the Application of Section 16-115A of the Public Utilities Act, and Section 2EE of the Consumer Fraud Act

i. IES Lacks Standing to Seek the Declaration

19. It is clear from the forgoing that IES seeks a declaration on its own behalf, and not on behalf of NICE. It is further clear that NICE, rather than IES, is responsible for and will undertake all marketing activities associated with the program at issue here. These facts are fatal to IES' claim.

20. IES is perhaps excessively artful in its pleading here. It purports to seek a declaratory ruling as to "the applicability of the statute to IES' managed price service, and specifically whether pricing electricity in this way is prohibited." Petition, ¶11. However, Section 16-115A(e)(i)[3], the statute regarding which IES seeks a declaration, *see* Petition, ¶¶8, 11, does not govern the *pricing* of electricity but rather the *marketing* of electricity, requiring that marketing materials adequately disclose price, terms and conditions. 220 ILCS 5/16-115A(e)(i). The provision, in fact, contains no constraints regarding how electricity may be priced, so long as such price is adequately disclosed. Id.

21. Thus, IES does not in fact seek a declaration regarding the propriety of the *pricing methodology* used under the NICE program, but rather regarding the propriety of *price disclosures* given to customers by NICE to induce their participation in the NICE program. This is a significant difference, for the following reasons.

22. As noted above, Section 16-115A(e)(i), with respect to which IES seeks a declaration, governs "marketing materials", requiring that such materials contain: "information that adequately discloses the prices, terms and conditions of the products or services that the alternative retail electric supplier is offering or selling to the customer[.]" 220 ILCS 5/16-115A(e)(i).

23. Pursuant to the terms of the Agreement, NICE, rather than IES, is responsible for all marketing of products to be provided by IES under the Agreement. While IES has general approval of such materials, they are prepared, distributed, and

[3] IES refers to "Section 16-115A(e)(1)", using an Arabic, rather than Roman, numeral to refer to the subsection in question. Petition, ¶8. This provision does not exist as numbered. The Staff understands IES to refer to Section 16-115A(e)(i).

circulated exclusively by NICE; based on available telemarketing scripts, all customer contacts are initiated by NICE rather than IES; and contracts are distributed and collected by NICE. All promotional materials bear the NICE logotype, and prominently mention NICE; by contrast, IES is mentioned only in a very secondary and far less prominent manner.

24. By both statute and rule, a party has standing to seek a declaratory ruling only on the question of "the applicability **to the person presenting the petition or request** of any statutory provision enforced by the agency or of any rule of the agency." 5 ILCS 100/5-150(a)(emphasis added); see also 83 Ill. Adm. Code 200.220(a)(1)("the Commission may … issue a declaratory ruling with respect to: … the applicability of any statutory provision enforced by the Commission or of any Commission rule **to the person(s) requesting a declaratory ruling[.]**")(emphasis added). It is thus a requirement that the declaration sought be as to the petitioner, not as to some other entity not a party to the action.

25. The declaratory ruling that IES seeks here is, in essence, whether the marketing materials <u>prepared and used by NICE</u> accurately disclose the price of electricity offered under the program. NICE is thus the real party in interest here.

26. IES therefore seeks a declaration as to the application of Section 16-115A(e)(i) not as to it but rather as <u>to NICE</u>. However, IES lacks standing to do so, both because the statute and rule prohibit a party from seeking a declaratory ruling as to anyone but itself, and also because it is a matter of record here that IES has not been authorized by NICE to seek such a ruling. IES Tr. at 3-5; Joint Ex. 1.6. Accordingly, with

respect to the first issue raised by IES, the Commission should dismiss the Petition for lack of standing.

ii. IES Seeks a Declaration Beyond the Proper Scope of Declaratory Relief

27. The statute and rule authorizing declaratory rulings by the Commission also provide that a party is entitled to seek a ruling "as to the applicability" of a statute or rule. 5 ILCS 100/5-150(a); 83 Ill. Adm. Code 200.220(a)(1).

28. What IES seeks here, however, is not a declaration of whether Section 16-115A applies, but rather how, if at all, it applies. IES requests a declaratory ruling "as to the applicability of [Section 16-115A(e)(i)] to IES' managed price service, and specifically whether pricing electricity in this way is prohibited." Petition, ¶11.

29. As the Commission has found in the past, such a declaratory ruling would be beyond the scope of the Commission's authority to grant such rulings. As the Commission found in Illinois Power Company -vs- Town of Normal: Complaint as to Respondent's cease and desist order in Normal, Illinois, ICC Docket No. 98-0329, 1998 Ill. PUC Lexis 969 (November 5, 1998):

> **[A] declaration of the rights and responsibilities of the two parties to this docket, are beyond the scope of the authority granted the Commission in Section 200.220, which is limited to a declaration of the applicability of any statutory provision enforced by the Commission or of any Commission rule to the person or persons requesting the declaratory ruling.** To the extent that IP has argued that its amended complaint requests a ruling on the applicability of the Act to IP, the Commission finds that, in the absence of an additional ruling upon the rights and responsibilities of the parties, such a ruling would amount to a tautology (IP is subject to the Act). The Commission sees no purpose in

> allowing this matter to continue to the evidentiary stage in order to allow it to enter a tautological order.
>
> Id. at 4-5 (Lexis pagination) (emphasis added)

30. A declaration of rights and responsibilities is, however, precisely what IES seeks here. IES purports to seek a declaratory ruling determining whether it can price electricity in the manner described. Assuming that to be the case – and, as noted above, Staff believes that IES seeks different relief – the declaratory ruling that IES actually wants is one that squarely implicates rights and responsibilities under a statute, rather than the application of the statute, and is not properly within the scope of declaratory relief.

31. The same analysis applies to the declaration that IES is actually, rather than putatively, seeking – whether NICE can market service in the manner described. The question to which IES seeks an answer by way of declaration is not whether Section 16-115A(e)(i) applies to the marketing of electric service, but rather whether disclosures made by NICE are sufficient to satisfy Section 16-115A(e)(i). Again, this squarely implicates rights and responsibilities under a statute, rather than the application of the statute, and is not properly within the scope of declaratory relief.

iii. The Commission Should Decline, as a Discretionary Matter, to Entertain IES's Petition

32. Whether the Commission elects to entertain a petition for declaratory ruling lies entirely within its sound discretion. *See* 5 ILCS 100/5-150 (an Illinois administrative agency may, in its discretion, adopt rules governing and permitting the

issuance of declaratory rulings); *see also* 83 Ill. Adm. Code 200.200(a) (Commission may "in its sole discretion" issue a declaratory ruling). The Commission in the past has denied a request for a declaratory ruling. By way of example, the Commission stated in MidAmerican Energy Company: Verified Petition for Declaratory Ruling, ICC Docket No. 03-0499, 2004 Ill. PUC Lexis 2 (January 7, 2004):

> Section 200.220 of the Commission's Rules of Practice concern declaratory rulings. Section 200.220(a) provides that **the Commission may in its sole discretion issue a declaratory ruling** with respect to the applicability of any statutory provision enforced by the Commission or of any commission rule **to the person requesting a declaratory ruling**.
>
> Id. at 4 (Lexis pagination) (emphasis added)

The Staff recommends that the Commission exercise its discretion in favor of declining to issue a declaratory ruling here.

33. The Staff has a degree of sympathy for IES' position in this matter, and believes IES has not acted unreasonably in seeking a declaration. Further, the Staff does not wish to discourage innovative retail electric offerings, especially offerings marketed to small business and residential customers.[4] Nonetheless, there are compelling factors that militate against issuing a declaratory ruling in this case. Moreover, the plain terms of the statute and rule governing declaratory rulings appear to foreclose the declaratory ruling that IES seeks.

34. As noted above, IES does not actually seek a declaratory ruling as to the application of Section 16-115A(e)(i), or the propriety under that section of pricing under

[4] It is not clear to the Staff that the Commission, by declining to issue a declaratory ruling in this case, would in fact be discouraging such offerings.

the NICE plan, but rather whether NICE's proposed marketing complies with the statute. However, if IES succeeds in obtaining such a declaratory ruling, there is nothing to prevent every entity potentially subject to the statute from seeking such a ruling with respect to its own marketing program. In other words, the Commission might well be called upon to pre-approve each and every marketing plan an ARES or marketing agent for an ARES might choose to put forward. This is all the more likely as ARES taking this step might expect such a declaration to insulate them from liability from claims arising under Section 2EE of the Consumer Fraud Act. The implications of this are as obvious as they are troubling.

35. A second reason why the Commission should decline to issue a declaratory ruling is the fact that NICE is, apparently by choice, not a party to this proceeding. NICE is an almost glaringly necessary party to this proceeding, and its non-presence renders any declaration here a futile exercise.

36. Accordingly, the Commission should decline to issue a declaratory ruling in this case.

B. If the Commission Elects to Reach the Substance of IES's Section 16-115A Claim, It Should Find that Section 16-115A Applies and that the Marketing Materials In Question Do Not Satisfy the Requirements of the Section

i. Section 16-115A applies to IES

37. Section 16-115A specifically provides that: "[a]n alternative retail electric supplier shall comply with the following [marketing] requirements[,]" which includes the requirement that: "[a]ny marketing materials which make statements concerning prices,

terms and conditions of service … contain information that adequately discloses the prices, terms and conditions" of such service. 220 ILCS 5/16-115A(e)(i). That this section applies by its terms to IES, which is unquestionably an ARES, is to the Staff beyond dispute. As noted above, this should end the inquiry, since the proper scope of declaratory relief before the Commission is limited to application of a statute or rule. However, as further noted above, the declaration IES is truly seeking here is a ruling as to how the statute applies; more specifically, does it prohibit the use of a pricing scheme in which it might be difficult or impossible to disclose the price in advance of consumption?

38. Should the Commission elect to reach this question – which the Staff recommends that it decline to do – the Staff recommends that the Commission find that the marketing materials in question do not comply with the statute, inasmuch as they do not, in any way, adequately or otherwise, disclose the price of electricity sold under the program. The marketing materials, *see* Joint Ex. 1.4 and 1.5, do not adequately disclose the price under the IES Power Purchase and Sale Agreement, because the stated price of "a variable rate determined by Seller for program participants", Joint Ex. 1.2, cannot be known by anyone except IES, and then after the fact. Further, the disclosures in question do not contain enough price information for a customer to ever determine how the subject price was ascertained. In essence, the statements in the NICE marketing materials do not "adequately disclose" a price that can be independently determined or ascertained. *See* 220 ILCS 5/16-115A(e)(i). The materials therefore do not contain disclosures sufficient to satisfy the statutory requirements.

ii. Law Governing Adequacy of Disclosures

39. The law governing what generally constitutes adequate disclosure under the Consumer Fraud Act or other consumer protection statutes is not well-developed. The Consumer Fraud Act does not mandate any particular form or subject of disclosure, but rather is a general prohibition of fraud and misrepresentation. Lanier v. Associates Finance, Inc., 114 Ill. 2d 1, 17; 499 N.E.2d 440, 447; 1986 Ill. Lexis 317 at 21; 101 Ill. Dec. 852 (1986).

40. However, the Consumer Fraud Act prohibits unfair methods of competition and unfair or deceptive practices, including but not limited to the use or employment of any deception, fraud, false pretense, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment. 815 ILCS 505/2. A "material fact" exists where a buyer would have acted differently knowing the information, or if it concerned the type of information on which a buyer would be expected to rely in making a decision regarding whether to purchase the product. Hart v. Boehmer Chevrolet, 337 Ill. App. 3d 742, 748; 787 N.E.2d 350, 354; 2003 Ill. App. Lexis 411 at 10; 272 Ill. Dec. 535 (2nd Dist. 2003). It is difficult to see how price is not a "material fact" under such a definition.

iii. Pricing Disclosure for the IES NICE Product

41. Staff is encouraged by the fact that the Southwestern Electric Cooperative, through NICE, wants to offer residents in Ameren Illinois' service area an alternative way of buying electricity. Such an offer would be the first time residential customers of the Ameren Illinois Utilities ("AIU") would be able to actually choose their

supplier of power and energy. Staff hopes that other providers will follow suit and start offering purchasing alternatives for residential customers in the AIU territory. However, in the event the Commission elects to make a finding on the question of how Section 16-115A(e)(i) applies to the IES NICE managed price offer (hereafter "managed price offer"), Staff has some concerns the Commission should consider.

42. The contract the customer signs with IES, called the "Power Purchase and Sale Agreement", states that the price "shall be the NICE Program rate per kWh, which is a variable rate determined by Seller for program participants served by Ameren." Joint Ex. 1.2. The contract further states that "the NICE Program rate is not guaranteed to be less than the utility rate" (in bold lettering) and that "Integrys Energy Services, Inc. makes no warranty of, and assumes no responsibility for the satisfaction of price assumptions Buyer might have with respect to the NICE Program rate and/or for the NICE Program rate relative to other purchasing opportunities." Id. Finally, at the end of the contract, there is a box for the customer to initial next to the following statement: "By agreeing to these terms, Buyer acknowledges that the price is a variable rate per kWh that is expected to change from month to month. At any time during the length of this contract the NICE Program rate can be higher or lower than the utility rate." Id.

43. Similarly, the telephone script NICE intends to use states, among other things, the following:

- "The NICE Program rate is not guaranteed to be less than the utility rate – do you understand?" (must receive a "Yes" before going forward), Joint Ex. 1.3;
- "Do you understand that the price is a variable rate per kWh that is expected to change from month to month[?] At any time during the program, the NICE Program rate can be higher or lower than the

> utility rate - do you understand?" (must receive a "Yes" before going forward").
>
> Id.

44. In its provided marketing materials, NICE states that "using a cooperative approach to buying electricity, NICE may be able to save your family or business a significant amount of money on electricity costs. By joining NICE, you will benefit from Southwestern Electric Cooperative's proven method for prudently managing power supply costs, as well as a fixed margin secured from its power supplier, Integrys Energy Services."Joint Ex. 1.4. The marketing brochure also states that "NICE members are not guaranteed to save money." Id.

45. Nothing in the provided materials leaves Staff to believe that NICE and IES will be anything other than upfront about the fact that the monthly NICE Program Rate is not known in advance and that the NICE Program rate could be higher than the utility's supply rate. However, in Staff's view, the lack of any type of pricing information is still troubling. The lack of such pricing information is likely the reason IES decided to file the instant Petition. While Staff appreciates the desire of NICE and IES to be able to offer a monthly rate that is competitive with the utility's rate, the managed price offer, as proposed, fails to provide Staff with enough comfort in order to recommend a finding of compliance with Section 16-115A(e)(i).

46. The proposed pricing disclosure is very different from the types of pricing currently found in the market place. The following are examples of commonly used forms of pricing disclosures.

(1) A fixed price term contract permits very precise pre-sale price disclosure, since the customer knows the price in advance of contract execution. An example of a fixed price term contract is where an alternative retail electric supplier ("ARES") agrees to provide electric supply to a customer at ten cents per kilowatt hour ($.10 per kWh) for all power consumed each month through the term of the contract. The cost per unit amount is disclosed to and known by the customer before an agreement is signed, with the customer's cost being based on his use in the future;

(2) A different situation would be a contract based on day-ahead hourly pricing. However, even such contracts provide adequate price disclosure, since the customer knows the unit price prior to consumption and prior to the applicable billing cycle. Day-ahead hourly pricing typically provides an hourly breakdown of the price, usually via a website, with the price or cost per unit readily available to the customer prior to consumption, although not before the agreement is signed;

(3) Yet another form of pricing would be an index- or New York Mercantile Exchange ("NYMEX") based pricing[5]. Index or NYMEX[6] based pricing provides adequate price disclosure since the calculation or methodology used to determine the price, based on actual transactions, is known to the

[5] Index and NYMEX pricing information comes from a wide sampling of data and has generally been accepted as an industry standard in determining natural gas and electricity prices.

[6] the *Intercontinental Exchange* ("ICE"), is a commodity trading platform similar to NYMEX (See the ICE website; "month ahead prices methodology";

https://www.theice.com/marketdata/naNaturalGas/naGasMethodology.jsp)

customer throughout the agreement, even though the exact price per kWh may not be known prior to consumption in a given month. Accordingly, the price in any month could be calculated or verified near a given billing cycle; and

(4) Lastly, hybrid pricing utilizes some combination of pricing methods, usually associated with a price cap or ceiling. For example, a retail price could be based on an index or the NYMEX PJM electricity monthly settlement [7] price, provided that such price does not exceed twenty cents per kilowatt hour ("$.20 per kWh") for all power consumed each month through the term of the contract. In other words, the price is the lesser of: 1) the applicable NYMEX monthly settlement price; and 2) $.20 per kWh. Hence, this price scenario discloses the outer limit or maximum amount a customer will pay per kWh during a particular billing cycle.

47. As stated above, the proposed managed price offer does not use any of the described pricing disclosures. The customer contract, called the "Power Purchase and Sale Agreement", only states the following[8]:

> **Price:** Your price shall be the NICE Program rate per kWh, <u>which is a variable rate determined by Seller for program participants</u> served by Ameren[.]
>
> <u>Petition</u>, ¶5, (underlining added); Joint Ex. 1.2

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[7] NYMEX PJM Electricity, settlement price (see, http://futures.tradingcharts.com/marketquotes/NG.html)

[8] While IES and NICE collaborate to market the service offering, IES, unless otherwise assigned to another ARES, is the ARES in the relationship with the customer.

48. Even if there was an audit provision in the Power Purchase and Sale Agreement, which there is not, no information in the Agreement indicates how the applicable monthly customer price will be determined. Staff does not impute improper motives to either NICE or IES nor does it suggest that NICE or IES are not engaged in a good-faith attempt to provide a cost-effective product to customers. Nonetheless, the pricing disclosure is highly problematic. Simply put, under the NICE program, there is no up-front disclosure of price and no way for a customer to ascertain price, even retrospectively, since the price is neither capped, nor indexed to any other known price, nor ascertainable through any known formula or methodology. Without expressly indicating how Staff might evaluate a managed price offer that is modified to include some common pricing features outlined above, it is fair to say that the lack of any upper ceiling on the monthly NICE Program rate is Staff's overriding concern with the offer as presented. Accordingly, Staff is unable to conclude that prices under the proposed NICE program are adequately disclosed within the meaning of Section 16-115A(e)(i).

C. The Commission Should Decline to Issue a Declaration as to the Application of Section 16-115C

49. IES next seeks a declaration as to "[whether] Section 16-115C [is] applicable to IES' proposed arrangement[.]" Petition, ¶14. Again, IES is guilty of perhaps excessively artful pleading. As a threshold matter, Staff is somewhat unclear as

to what IES means by “proposed arrangement”. While it might be convenient to assume that IES refers exclusively to the Endorsement Agreement, Joint Ex. 1.1, it is by no means clear from IES’ pleading that this is the case. The term “proposed arrangement” might well refer to any, some or all of the following: the Endorsement Agreement, the Power Purchase Agreement IES concludes with NICE members, Joint Ex. 1.2, representations made by NICE to customers, and any informal understanding NICE and IES might have about their relationship. Such imprecision is fatal to IES’ request. The Commission is placed in the invidious position of having to ascertain precisely what the “proposed arrangement” is, which cannot be done based on the face of the pleadings. Accordingly, the Commission should decline to issue a declaratory ruling on this point.

50. Even if the Commission is able to discern what “proposed arrangement” means here, further bases exist to decline any exercise of its declaratory authority. Under Section 5-150 of the Administrative Procedure Act and Section 200.220 of the Commission’s Rules, the Commission is authorized to issue declaratory rulings as to the applicability of statutes or rules to “person(s)”. 5 ILCS 100/5-150; 83 Ill. Adm. Code. 200.220. However, the requested declaration is as to the applicability of Section 16-115C to a “proposed arrangement”. Thus, the Commission lacks authority either under the relevant statute or rule to grant the declaratory ruling sought.

51. In addition, prudential considerations militate against the issuance of a declaratory ruling here. Currently, the Commission is engaged in two other proceedings wherein, as here, the proper construction of Section 16-115C is the primary issue. *See* BlueStar Energy Services, Inc. -vs- Lower Electric LLC: Verified Complaint Regarding Apparent Violations of 220 ILCS 5/16-115C, ICC Docket No. 08-0364 (filed June 4,

2008); *see also* Illinois Commerce Commission On Its Own Motion: Implementation of Section 16-115C of the Public Utilities Act, ICC Docket No. 08-0548 (initiated September 24, 2008).

52. In the former case, an ARES filed a complaint against three other entities, alleging that each was an "agent, broker or consultant" within the meaning of Section 16-115C(a)-(b), and violated the code of conduct established for those entities by Section 16-115C(e). *See, generally,* Complaint, ICC Docket No. 08-0364. At least one of the respondents, Lower Electric, LLC (hereafter "Lower")[9], interposed the defense that it was not acting as an agent, broker or consultant, filing a Motion to Dismiss to that effect. *See* Lower Motion to Dismiss at 14-16, ICC Docket No. 08-0364 (filed September 10, 2008). Although this Motion was denied, see ALJ Ruling at 17-18 (November 7, 2008), Lower renewed this defense as an affirmative matter, *see* Lower Verified Answer at 3 (filed February 20, 2009), as well as on Motion for Summary Judgment. *See* Lower Motion for Summary Judgment at 2-7 (filed April 19, 2009). A Proposed Order was duly issued, rejecting these defenses, and recommending that the Commission find Lower to have been acting as an agent, broker or consultant under the facts presented. Proposed Order at 10-16 (issued June 19, 2009).

53. By contrast, the Proposed Order issued in the latter proceeding, Docket No. 08-0548, proposed adoption of a far narrower view of what constitutes an "agent, broker or consultant". This proceeding is a rulemaking required by Section 16-115C, see 220 ILCS 5/16-115C(d); the Proposed Order recommends the promulgation of

[9] Lower is a licensed ARES in Illinois that "sometimes acts as an agent for other ARES". Proposed Order at 4, ICC Docket No. 08-0364.

narrowly-drawn definitions of “attempts to procure” and “attempts to sell”, which would in turn limit the scope of activities that result in an entity acting in the capacity of an agent, broker or consultant. Proposed Order at 1-2 (issued January 15, 2009); App. A, Section 454.20.

54. The pendency of the two proceedings referred to above are significant for purposes of this one. First, the Commission is under a specific statutory duty to resolve both. Section 10-110 of the Public Utilities Act provides that, after a hearing on a complaint: “the Commission shall make and render findings concerning the subject matter and facts inquired into and enter its order based thereon.” 220 ILCS 5/10-110 (emphasis added). Likewise, Section 16-115C(d) provides that: “the Commission shall create requirements for licensure as an agent, broker or consultant[.]” 220 ILCS 5/16-115C(d) (emphasis added). In other words, the Commission obliged to enter orders in each of these proceedings, both of which have reached the procedural stage of issuance of a Proposed Order; in contrast, the issuance of a declaratory ruling in this matter is purely discretionary, and it is far less procedurally advanced.

55. Second, as noted above, the two Proposed Orders recommend the adoption of two seemingly irreconcilable positions regarding the very matter at issue here: what activities confer “agent, broker or consultant” status. The Commission will obviously be required to either adopt the principles stated in one or the other of the two Proposed Orders, or to reconcile the two Proposed Orders by some other means.

56. The implications for this proceeding are obvious. The Commission must resolve the rulemaking and complaint proceedings, but may in its discretion decline to resolve this one. The rulemaking and complaint proceedings are in both cases much

further advanced procedurally than this proceeding, and a Commission Order can therefore be expected in one or both well in advance of the resolution of this proceeding. Further, the Commission's Order in the rulemaking proceeding will have general application, and will very probably provide a de jure resolution to IES' request in this proceeding. The Commission's Order in the complaint proceeding, while not applicable to IES, will doubtless provide it with useful guidance for its future actions (as well as presumably being consistent with the rules adopted by the Commission). In short, all factors militate against the Commission issuing a declaratory ruling on the question of "[whether] Section 16-115C [is] applicable to IES' proposed arrangement[.]"

57. To the extent that the Staff's position is sought with regard to the substance of the request, Staff has set it forth in its various pleadings in Docket No. 08-0548.

58. In summary, then, the Staff recommends that the Commission deny the declaratory ruling sought. IES lacks standing to seek a declaratory ruling as to either issue upon which it seeks a declaratory ruling. In addition, with respect to both issues, IES seeks a declaratory ruling not regarding whether the implicated statutes apply to it, but rather regarding the manner in which they apply, a question beyond the scope of declaratory relief before the Commission. Further, with respect to the first issue presented, the Commission should exercise discretion and decline to issue a declaratory ruling, since doing so might result in the Commission having to pre-approve, through the declaratory process, all marketing programs and material offered by ARES. If the Commission elects to reach the substance of the first issue, it should determine that no price disclosure at all, which is what is offered here, is not an "adequate

disclosure" within the meaning of Section 16-115A(e)(i). With respect to the second issue presented, the Commission should exercise discretion and decline to issue such a ruling, since the matter is likely to be resolved in either of two pending dockets, both of which are at the proposed order stage.

WHEREFORE, Staff respectfully requests that its recommendations as set forth in this Response to the IES Petition for a Declaratory Ruling as to the Applicability of Provisions of the Consumer Fraud Act and Public Utilities Act be adopted.

Staff of the Illinois
Commerce Commission

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July 7, 2009

VERIFICATION

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

I, Torsten Clausen, do on oath depose and state that I am competent to testify, and that, if called as a witness herein, I would testify as follows:

1. I am employed by the Illinois Commerce Commission as the Director of the Office of Retail Market Development.

2. In that capacity, I have knowledge of the facts set forth in the Staff's Verified Response to Intergrys Energy Services, Inc.'s Petition for Declaratory Ruling, and know them to be true.

FURTHER YOUR AFFIANT SAYETH NOT

Torsten Clausen

Signed and Sworn Before Me This 7th Day of July, 2009

Notary Public

OFFICIAL SEAL
BARBARA J MITCHELL
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:04/21/11