

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

BlueStar Energy Services, Inc. :
-vs- :
Lower Electric LLC : **08-0364**
: :
Verified Complaint Regarding Apparent :
Violations of 220 ILCS 5/16-115C. :

**ALTERNATIVE
REPLACEMENT LANGUAGE
OF MIDAMERICAN ENERGY COMPANY**

MidAmerican Energy Company (“MidAmerican”) hereby submits the following alternative replacement language to the Proposed Order issued on June 19, 2009, regarding the Cross Motions for Summary Judgment filed in connection with this proceeding.

As set forth in MidAmerican’s Brief on Exceptions, regardless of the Commission’s decision on the merits of the complaint in the instant proceeding, no claims or allegations of wrongdoing have been alleged against MidAmerican, and MidAmerican has not been a party to this proceeding. The references to MidAmerican contained in the Proposed Order, and the implications to those references, are incorrect and unnecessary to any final decision in this case. Accordingly, as an alternative to the replacement language submitted as Exhibit A to its Brief on Exceptions, MidAmerican hereby submits this Exhibit B, at a minimum, requesting revisions to those sections of the Proposed Order in which MidAmerican is referenced.

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PROPOSED ORDER

I. PROCEDURAL HISTORY

* * *

Whether Lower was not an agent within the meaning of subsection (b) of the ABC Law because it was acting exclusively on behalf of a single ARES and had disclosed that exclusivity to the customer or was not required to disclose that exclusivity.

* * *

[Page 15, ¶2]

. . . Lower stipulates that it is “an agent for several electric providers, ~~including MidAmerican Energy.~~⁵⁷ 57 In fact, before the relevant solicitation here, Lower had acted as agent ~~for MidAmerican Energy (“MidAmerican”)~~ or independent contractor for a retail electric supplier when arranging electricity supply for the pertinent customer⁵⁸. That customer’s contract with ~~MidAmerican~~ the retail electric supplier, by which Lower had “assisted the customer in obtaining service,”⁵⁹ was still in effect when Lower solicited the customer on Strategic Energy’s behalf in April 2008. . . .

[Page 15, ¶ 3]

. . . other options⁶¹

⁵⁷ Joint Ex. 1, para. 10; Lower SJ Motion at 9.

⁵⁸ ~~Id., para. 6. MidAmerican is both a public utility and an ARES in Illinois. The Commission can infer from the record that MidAmerican was supplying the relevant customer as an ARES in ComEd’s service area, since Lower’s solicitation materials state that the customer would default to ComEd as its electricity supplier when the MidAmerican supply contract lapsed. Amended Complaint, Ex. C.~~

⁵⁹ Joint Ex. 1, para. 2.

⁶¹ The present case illustrates this. Since Lower had, during its history with the customer, represented ~~both Mid American and Strategic Energy~~ or served as independent contractors on behalf of different entities, the customer could reasonably assume, absent express disclosure of exclusivity, that Lower had additional offers available.

* * *

Whether penalty for violation of the ABC Law should not be imposed because any violation here was *de minimis* or committed in good faith.

* * *

[Page 18, ¶ 2]

. . . The letter was addressed to a recipient at ~~MidAmerican Energy (as noted,~~ an ARES client of Lower~~);~~ in response to the addressee's "recent inquiries" regarding the ABC Law.

* * *

[Page 18, ¶ 4 to page 19, ¶ 1]

. . . Instead, Lower could have responded to perceived uncertainty⁷⁵ by petitioning this Commission for a declaratory ruling under Section 200.220 of our Rules of Practice⁷⁶. In the Commission's judgment, that course of action would be more indicative of good faith than relying upon a legal analysis provided to a different entity⁷⁷, which stated on its face that it "should *not* be construed as legal advice" and that "[e]ach ABC *should consult with its own legal professional* with any questions regarding the application or impact of the [ABC Law]."⁷⁸II

* * *

Whether the Commission can impose the penalty prescribed by the ABC Law before Lower has been licensed pursuant to requirements created by the Commission.

* * *

⁷⁵ The Commission emphasizes that we are not rendering a finding that there was or is, in fact, "uncertainty in the energy community" with respect to the effective date of the conduct constraints in subsection (e) of the ABC Law. A single legal correspondence is just that – and there is no evidence of the recipient's point of view, since ~~MidAmerican~~the recipient is not among the respondents in this case.

⁷⁶ 83 Ill. Adm. Code 220.220. Subsection (a)(1) specifically allows a party to seek a Commission ruling concerning "the applicability of any statutory provision enforced by the Commission...to the person requesting a declaratory ruling." We note that Integrys Energy Services, Inc., an Illinois ARES, recently petitioned for a declaratory ruling regarding applicability of the ABC Law. Dckt. 09-0165.

~~⁷⁷ This is significant because the correspondent attorney's duties of competence and care went to MidAmerican, not to third parties.~~

~~⁷⁸II~~ Lower Answer, Ex. 1, p. 2 (emphasis added).

. . . Electricity sellers will be reluctant to be represented in the marketplace by agents that are unlicensed or prone to conduct violations, which can both tarnish the seller's reputation and potentially expose the seller to consideration for enforcement action⁸⁵.

* * *

In support of its argument that the Commission can only suspend an *existing* license, Lower relies on Rochelle v. Illinois Pollution Control Board⁸⁶⁸⁴, which Lower characterizes as the “best analogy” to the instant case⁸⁷⁸⁵. However, Rochelle says nothing about prospective penalties or about licensing. Rather, the issue in Rochelle was whether the agency could reduce a statutory penalty levied on a polluter. If anything, the Commission is *following Rochelle* here, because we agree with both the court and the agency in Rochelle that when the applicable statutory penalty is mandatory, it cannot be mitigated.

* * *

⁸⁵~~For example, Sections 5-202 of the Act also authorizes civil penalties for violations of the Act by public utilities when no other specific penalty is established by the Act. Since the ABC Law creates no penalties for public utilities, they could be vulnerable to Section 5-202 sanctions, because that section treats the acts of an agent as the act of the utility itself. Accordingly, a utility like MidAmerican would be unlikely to accept representation from an unlicensed agent.~~

⁸⁶⁸⁴ 266 Ill. App. 3d 192, 639 N.E. 2d 988 (2nd Dist. 1994).

⁸⁷⁸⁵ Lower SJ Motion at 13.