



accept the Proposed Order's suggested conclusion that Respondent Lower Electric LLC ("Lower") was attempting to sell electricity. (*See* Staff Br. on Exceptions at 5-6.)

A reasonable alternative construction of the ABC Law would result in a contrary finding, in light of the evidence presented, that Lower was not attempting to sell anything to the customer. Under this construction, the contract for sale was between the customer and an alternative retail electric supplier ("ARES"), and not between the customer and Lower. (*See* Agreed Statement of Undisputed Facts at 2, ¶ 3). As Lower explained, "Lower Electric does not have possession of the electricity and never will. The contract was between the customer and Strategic Energy. Strategic Energy, not Lower Electric, would have been obligated to deliver electricity to the customer if it had signed that contract." (Lower Br. on Exceptions at 7.)

If the suggestion in the Proposed Order and Staff's Brief on Exceptions is that under the proposed definition in the Rulemaking proceeding an entity can "attempt to sell" something that it does not own or possess, then such an interpretation should be explicitly addressed in the Rulemaking proceeding, so that all market participants can understand that the Commission is endorsing an interpretation that may not be evident on the face of the statute, and conduct their business in accordance with clear guidelines construing the ABC Law.

The interplay between the definition of an "Agent, Broker, or Consultant" and that of an ARES reflects another issue that can and should be more fully developed in the Rulemaking proceeding. That is, if Lower were offering electricity for sale, then presumably it was acting as an ARES (*see* 220 ILCS 5/16-101A), or an exclusive agent on behalf of an ARES, and in either case is apparently exempt from the ABC Law. (*See* 220 ILCS 5/16-115C(b)). At a minimum, there are questions yet to be resolved that make the award of summary judgment premature at this time. (*See, e.g., Foster v. Foster*, 273 Ill. App. 3d 106, 112 (3d Dist. 1995) (ambiguity in legal description to a deed warranted denial of summary judgment motion).) In considering

summary judgment motions, not only are all disputed facts to be construed strictly against the movant, but summary judgment motions should be “denied where reasonable persons could draw divergent inferences from the undisputed facts.” (*Pyne v. Witmer*, 129 Ill. 2d 351, 359 (1989).)

Moreover, under Illinois law, a statute is considered ambiguous as long as “it is capable of being understood by reasonably well-informed persons in two or more different senses.” (*Wade v. City of North Chicago Police Pension Bd.*, 226 Ill. 2d 485, 511 (2007).) In such circumstances, tools of interpretation may be considered to ascertain the meaning of a provision. (*Id.*) “[T]he interpretation of a statute by involved administrative bodies constitutes an informed source for guidance when seeking to ascertain the legislature’s intention when the statute was enacted.” (*Sangamon Cty. Sheriff’s Dept. v. Illinois Human Rights Comm’n*, 2009 Ill. LEXIS 378, \* 11 (Ill. April 16, 2009).)

Such divergent inferences and ambiguities plainly are present in this proceeding, and can be clarified by the completion of the Rulemaking proceeding. Just as there are diverging but reasonable opinions regarding whether the ABC Law can be construed to include or exempt Lower as an entity that attempted to *procure* electricity on behalf of a customer – a difference of opinion recognized by Staff – so too, there are diverging but reasonable opinions regarding whether Lower attempted to *sell* electricity within the meaning of the ABC Law, or is otherwise exempt from the scope of that law. Likewise, there are diverging but reasonable opinions regarding whether Lower was acting as an ARES, whether it was acting as an exclusive agent for Strategic Energy, and whether the customer had actual notice of Lower acting as an exclusive agent. All of these issues reflect ambiguities that would be better informed if the Commission were to set forth regulations containing its interpretation of the ABC Law.

Because the rulemaking process has not been completed, the “informed source for guidance” on how these ambiguities should be resolved, and how the ABC Law should be

applied, has not yet been issued. (*Id.*) Until rules are issued, and until the ambiguities are clarified through the rulemaking process, market participants will be left without clarity or at least a reasonable degree of certainty as to how to conduct their business and whether or not certain conduct will constitute a violation of the ABC Law.

Accordingly, it would be premature for the Commission to issue a final determination on the merits of the complaint in the instant proceeding, when potentially dispositive issues could be resolved or at least impacted through by the Rulemaking proceeding. Therefore, MidAmerican urges the Commission to issue an order in the form attached as Exhibit A to MidAmerican's Brief on Exceptions, by which the Commission declines to issue a ruling on the merits of the Cross Motions for Summary Judgment until the Commission has completed the Rulemaking proceeding.

Respectfully submitted,

**MIDAMERICAN ENERGY COMPANY**

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