

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

INTEGRYS ENERGY SERVICES, INC.	:	
	:	
Petition for Declaratory Ruling as to the	:	No. 09-0165
Applicability of Provisions of the Consumer Fraud	:	
Act and Public Utilities Act	:	

PETITIONER’S REPLY SUPPORTING DECLARATORY RULING

In this docket, Integrys Energy Services, Inc. (“IES”) seeks a declaratory ruling pursuant to Section 5-150 of the Illinois Administrative Procedure Act, 5 ILCS 100/5-150, and Section 200.220(a)(1) of the Rules of Practice of the Illinois Commerce Commission (“Commission”), 83 Ill. Admin. Code Sec. 200.220(a)(1). The Staff of the Commission and IES have stipulated to the relevant facts in a Joint Statement of Certain Undisputed Facts filed July 7, 2009 (“Stip.”) and a number of joint exhibits, so the issues that remain are legal ones. Staff, in its Response to the Petition, urges the Commission to decline to answer IES’s questions. In the alternative, Staff suggests that the answer to IES’s first question is that the proposed business arrangement would violate Illinois law.

Staff has accurately set forth the relevant facts. In summary, IES is an Alternative Retail Electric Supplier (“ARES”) certified by the Commission. Stip. ¶3(j). IES has proposed to undertake a new type of ARES business, which is to supply power to customers through a purchasing cooperative. The Public Utilities Act explicitly contemplates such an arrangement. 220 ILCS 5/16-115A(g) (“Nothing in this section shall be construed as preventing an alternative retail electric supplier, which is an affiliate of, or which contracts with ... a membership organization or association that exists for a purpose other than the purchase of electricity ... from

offering through the organization or association services at prices, terms and conditions that are available solely to the members of the organization or association.”). IES has proposed to sell electricity to the members of New Illinois Cooperative Energy (“NICE”), which is a not-for-profit subsidiary of Southwestern Electric Cooperative. Stip. ¶3(g). NICE will primarily market the service to its members, but the resulting power contracts will be between IES and individual customers. Stip. ¶3(h); Joint Ex. 1.2.

There are two key aspects of the proposed arrangements which are relevant to IES’ petition. The first is that the price of the electric power IES will sell to customers is a managed price. IES will use various techniques such as hedging, contracts of various lengths, and so on, to attempt to achieve an optimal price for customers. IES will earn a set fee for its efforts. An important aspect of this arrangement is that the actual price per kWh to the customer is not known in advance. The second aspect is that NICE will be marketing the service and recruiting customers. Under some interpretations of 220 ILCS 16-115C, which defines and regulates “agents, brokers, and consultants” that work with ARES, NICE could be considered an agent, broker, or consultant to IES.

IES’s petition therefore seeks the answer to two questions. First, it asks whether its proposed arrangement violates the Section 16-115A(e) of the Public Utilities Act and the Consumer Fraud and Deceptive Trade Practices Act, 815 ILCS 505/2EE (“Consumer Fraud Act”), both of which require an ARES to inform the customer, at the time the contract is entered, of the price of the electric power. Second, IES asks whether its arrangement with NICE violates Section 5/16-115C, because NICE is not licensed by the Commission as an agent, broker, or consultant.

I. Applicability of Provisions Enforced by the Commission to the Disclosure of Price

A. The Commission Should Not Withhold Its Decision

Staff urges the Commission to exercise its discretion to not decide this issue. First, Staff argues that IES lacks standing to seek the declaratory ruling, and that only NICE would have standing. This argument misconstrues the nature of ARES, their obligations, and the requirements of standing. IES is a certified ARES subject to the Public Utilities Act and the Consumer Fraud Act. The provisions regarding the disclosure of price apply specifically to an ARES that enters a contract with a customer. For example, Section 16-115A(e)(ii) states that “before any customer is switched from another supplier, the alternative retail electric supplier shall give the customer written information that adequately discloses, in plain language, the prices, terms and conditions.” This provision governs IES’s conduct, and that is why IES wants to know its applicability here. Surely Staff does not believe that, when charged with violating that section, IES would have a complete defense because NICE was handling the marketing work. Under the proposed arrangements, IES would have a contractual relationship with NICE’s members who purchase electricity from IES. If a customer wanted to complain that the disclosures regarding price were inadequate, that customer could and would make that complaint about IES. This absolutely gives IES the standing to find out whether a provision like Section 16-115A(e)(ii) applies to IES.

The fact that NICE is not also a party to this petition does not make it defective. IES is asking for its own sake whether IES would be found to have violated the statutes enforced by the Commission. Staff may assume that NICE would be interested in the answer as well, but that is not what IES’s petition is about.

Staff construes IES' petition as seeking a general declaration of "rights and responsibilities," which would be a broader request than the Commission's declaratory ruling provision permits. Staff Response at ¶30. For this proposition Staff cites *Illinois Power Company v. Town of Normal*, ICC Docket 98-0329 (Nov. 5, 1998), but that case is clearly distinguishable from IES' petition here. In that case, Illinois Power asked the Commission to interpret the Town of Normal's tree trimming ordinance and the franchise agreement between the utility and the town. The requested rulings were clearly beyond the scope of Section 200.220, as they did not even involve the interpretation of a statute or regulation enforced by the Commission. By contrast, here IES is asking, based on the stipulated facts as to how its business arrangement will be structured, whether certain specific sections of laws enforced by the Commission will apply to the arrangement, and whether they prohibit it. The Commission can, in its discretion, rule on this request, and IES, as a member of the Commission's regulated community, asks that it do so.

Staff takes the position in this docket that the scope of declaratory rulings is extremely narrow, so that the only question that can be asked is, yes or no, whether a statutory or regulatory provision applies. The Commission and the Appellate Court have interpreted the declaratory ruling power more broadly, however. In *MidAmerican Energy Corporation v. Illinois Commerce Commission*, 367 Ill. App. 3d 163, 854 N.E.2d 238 (3d Dist. 2006), the Appellate Court found that the Commission had, in fact, issued a proper declaratory ruling. The questions put to the Commission were whether MidAmerican was prohibited from selling natural gas at competitive prices in areas outside its utility service territory, and whether it could do so without prior Commission approval. 854 N.E.2d at 239. These questions are of a similar nature to those

IES asks here: whether a particular type of business arrangement is lawful under the Commission's statutes, and whether a business needs Commission approval to act.

The Commission also granted a declaratory ruling to the Ameren utilities in *Central Illinois Public Service Company, et al*, ICC Docket No. 06-0338 (Apr. 18, 2007). The request to the Commission there was to interpret the regulation requiring meters to meet certain standards before entering service. Ameren asked whether older meters predating the standards which were being put back into service could be reused without having to meet the latest requirements. In granting this request and ruling on the provision, the Commission clearly went beyond simply stating that yes, the provision applies to Ameren. It interpreted the provision so that Ameren would know whether it would be in violation by taking certain actions.

In still another docket, *ISG Hennepin, Inc., et al*, ICC Docket No. 02-0549 (Oct. 1, 2002), ISG Hennepin, Inc. and Illinois Power Company sought and received a declaratory ruling as to whether Illinois Power's assignment of a contract to ISG Hennepin would violate the Commission's rules on integrated distribution companies. Again, the issue was not simply whether the rules applied to Illinois Power, as they clearly did. The question was whether the Commission interpreted the rules to prohibit the particular transaction described in the petition. The Commission granted the request and held that the transaction was lawful.

These declaratory rulings are very similar to the type of ruling IES seeks here. It is certainly within the Commission's discretion to decide IES's petition.

B. Applying the Statutory Provisions, the Commission Should Find the Proposed Arrangement Lawful

Staff's Response argues that, should the Commission decide this petition, it should rule that IES's proposed disclosures to customers do not meet the requirements of the law. IES disagrees.

IES' proposed contract, along with the marketing materials that support it, accurately and openly informs customers of the pricing arrangements. The contract, Joint Ex. 1.2, discloses to the customer that the price is variable, that it has certain fees and charges added, and that it may not be lower than the utility rate.

Staff is unable to find any disclosure that IES could make, but has withheld. Indeed, Staff remarks that from its review of the marketing and contractual materials, IES will be upfront with customers. However, Staff is not "comfortable" with the pricing disclosure, because the price per kWh is not known (by either IES or the customer) when the contract is signed. The problem with this position is that, given the nature of the pricing itself, no possible disclosure would be satisfactory. If that is the case, then ARES are effectively foreclosed from offering this type of innovative pricing, even though utilities can. Both ComEd and Ameren have real time pricing options that let customers take prices in real time even though the prices are not known at the beginning of the month.

Staff's argument that various indices would work instead does not serve to illustrate Staff's point. The indices cited by Staff have the same problem Staff has identified as to IES's managed price: the price per kWh is not known until after the fact. Just as in the case with IES's

managed price, the disclosure in the contract would be of a pricing methodology, not the price per kWh itself.

IES requests that the Commission rule that the proposed disclosures, which set forth how the price will be determined, are adequate disclosures of price under the statutes enforced by the Commission.

I. Applicability of Provisions Defining Agents, Brokers and Consultants

A. The Commission Should Not Withhold Its Decision

As with the first issue raised by the Petition, Staff argues that the Commission should not grant IES' request for a declaratory ruling. Staff believes that only NICE could be interested in whether it falls under the definition of an "agent, broker or consultant." This position ignores IES' interest in the proposed business arrangement. IES will be the ARES that supplies electric power to customers. The heart of the arrangement is that the customers are members of the NICE cooperative. IES' question is not whether NICE, standing alone, is intrinsically an agent, broker or consultant. The question is whether the particular operation of the contract at issue here, IES' contract with NICE, describes a relationship that creates an agent, broker, or consultant as defined in the statute. That is a perfectly valid question to be answered – for IES – under the declaratory ruling provision.

If NICE is an agent, broker or consultant, and operates without a license, the arrangement between IES and NICE therefore would be unlawful. IES therefore requests that the Commission exercise its discretion to give IES guidance as to the applicability of Section 16-115C.

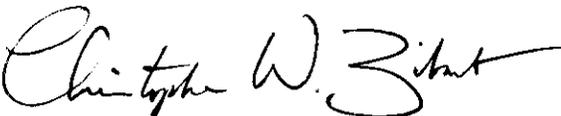
B. IES Does Not Take a Position on the Merits of the Question

Staff suggests that the definition of an agent, broker or consultant may be resolved in another docket. Staff's discussion of the two pending dockets underscores that guidance from the Commission is needed. As described by Staff, there are two pending proposed orders that would resolve the scope of the definition in fundamentally different ways. IES does not have an opinion as to correct answer to the question, but it is one that is proper for the Commission to answer.

Dated: July 28, 2009

Respectfully submitted,

Integrus Energy Services, Inc.

By:  _____

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