STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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

BRIEF ON EXCEPTIONS OF INTEGRYS ENERGY SERVICES, INC.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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

BRIEF ON EXCEPTIONS OF
INTEGRYS ENERGY SERVICES, INC.

Integrys Energy Services, Inc. ("IES") submits this Brief on Exceptions to the Proposed Order (the "Proposed Order") issued by the Administrative Law Judge ("ALJ") on September 10, 2009. IES respectfully submits that the Proposed Order incorrectly concludes that the proposed pricing of electricity in the IES-end user agreement is prohibited and that no ruling can be made regarding the applicability of Section 16-115C of the Public Utilities Act ("PUA") (220 ILCS 5/16-115C). Pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (the "Commission" or "ICC"), 83 Ill. Admin. Code § 200.830, suggested replacement language is included in separate Exceptions filed contemporaneously herewith.

IES is a licensed Alternative Retail Electric Supplier pursuant to Section 16-115 of the PUA. Verified Petition ¶1. Pursuant to an agreement with New Illinois Cooperative Energy ("NICE"), IES would become the electric supplier to NICE members who sign up for service. Id. at ¶3. IES will act as supplier to the customers, but NICE will do all marketing. Id. IES proposes to offer to NICE members a "managed price" for electricity. This means that IES will attempt to procure electricity at favorable cost. IES's compensation is a fixed margin, in effect a fee for the service of managing the procurement. At the time the customer signs on with IES, and even during any given month of electric service, the price of electricity is not known. It is not tied to any price index. The effective price for a particular month is not known at the time,

so there would be a subsequent true-up. Whether the resulting price to customers is lower or higher than other available prices, such as utility rates, is not guaranteed. Id. at ¶4.

IES has asked the Commission two questions in this request for a declaratory ruling. First, IES asks whether its disclosure of its managed price is sufficient under two laws enforced by the Commission. The Proposed Order holds that the disclosure does not comply with the PUA, but declines to rule on whether it also violates the Consumer Fraud and Deceptive Business Practices Act ("CFA"). Second, IES asks whether its arrangement with NICE is lawful despite NICE not being licensed under Section 16-115C of the PUA as an agent, broker, or consultant. The Proposed Order declines to answer this question.

I. IES' PROPOSED DISCLOSURES ARE COMPLIANT WITH THE PUBLIC UTILITIES ACT AND CONSUMER FRAUD ACT

The Proposed Order errs when it concludes that the IES-NICE do not provide the minimally necessary pricing disclosure required under Section 16-115A(e) of the PUA (220 ILCS 5/16-115A(e)). Proposed Order at 10-11. Additionally, the Proposed Order incorrectly concludes that IES' request for a declarative ruling pursuant to Section 2EE of the Consumer Fraud and Deceptive Business Practices Act ("CFA") (815 ILCS 505/2EE) was not supported by the record.

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. Thus, NICE members choosing this arrangement are electing to buy electricity not at a specific dollar amount or unit price specified in the contract, but are choosing to purchase electricity at prices tied to IES' wholesale market purchasing decisions and

supply costs for the program as disclosed to the customers in the Proposed Purchase and Sale Agreement between IES and each customer.

There is no disclosure that IES could make, but is choosing to withhold. Indeed, Staff remarks that from its review of the marketing and contractual materials, IES will be upfront with customers. Staff Response at ¶45. However, the Proposed Order concludes that the IES-end user contract is silent concerning commodity price except to say that it is variable. Proposed Order at 10-11. If the Proposed Order is correct, given the nature of the pricing itself, no possible disclosure would be satisfactory, not even the pricing schedules to which it refers. If that is the case, then ARES are effectively foreclosed from offering this type of innovative pricing, even though utilities can. Both Commonwealth Edison Company and the Ameren Illinois Utilities 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.

The Proposed Order states that Pricing Schedules contained in Joint Ex. 1.1 could be included in the IES-end user agreement but there is nothing in the record that customers will have access to these schedules. Proposed Order at 10. These schedules do not resolve the issue that 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.

Finally, the Proposed Order incorrectly states that the Commission has no way to tell what part of Section 2EE of the CFA (815 ILCS 505/2EE) is at issue. Section 2EE succinctly states, in its opening paragraph, the legal standard that an ARES cannot sign up customers unless "the provider first discloses all material terms and conditions of the offer to the subscriber." 815 ILCS 505/2EE. That is the legal standard that the Commission is charged with enforcing. The

rest of the section -- the two dozen subparts in the language of the proposed order -- is merely a list of alternative procedures (telephone, in-person, third parties, etc.) an ARES can use to meet this standard. IES's question to the Commission is simply whether its proposed disclosures to customers meet this legal standard. IES asks that the Commission not withhold its guidance to a member of its regulated community on this statute assigned to the Commission for enforcement.

IES requests that the Commission rule that, pursuant to Section 16-115A(e) of the PUA and Section 2EE of the CFA, the proposed disclosures, which set forth how the price will be determined, are adequate disclosures of price under the statutes enforced by the Commission. IES' proposed language in included in Attachment A under Exceptions 1, 2, and 4.

II. IT IS PROPER FOR THE COMMISSION TO ISSUE A DECLARATORY RULING IN THIS PROCEEDING

The Proposed Order incorrectly concludes that pursuant to Section 200.220(a) of the Commission Rules, 83 Ill. Admin. Code §200.220 (a), the Commission is not authorized to issue a declaratory ruling regarding an entity who is not a joint petition or an intervenor. Proposed Order at 12. The Proposed Order finds that only NICE could be interested in whether it falls under the definition of an "agent, broker or consultant." However, this conclusion 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 and 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 would be unlawful. IES therefore requests that the Commission exercise its discretion to give IES guidance as to the applicability of Section 16-115C (220 ILCS 5/16-115C). IES' proposed language in included in Attachment A under Exceptions 3 and 4.

Finally, the Proposed Order incorrectly implies that unless IES has a recommended answer to its questions, its request for a declaratory ruling is improper. That is not an accurate statement of the statute or the Commission's regulations. IES is asking the question so that it can make sure it is in compliance with the law before it begins operating in a new way. It need not state what ruling should be made. That being said, IES understands that the two recent final orders cited in the Proposed Order, neither of which had been decided when this docket was filed or briefed, appear to govern the situation presented in this case. IES' Exception language adopts this rationale. (See Exception 3.)

III. CONCLUSION

For the reasons stated herein, IES respectfully requests that the Commission modify the Proposed Order as provided in the Exceptions filed contemporaneously herewith.

Dated: September 24, 2009

Respectfully submitted,

Integrys Energy Services, Inc.

By:_____

One of the attorneys for
Integrys Energy Services, Inc.

Christopher W. Zibart
Foley & Lardner LLP
321 N. Clark Street, Suite 2800
Chicago, Illinois 60610
czibart@foley.com
(312) 832-4500

Kirsten K. Young
Integrys Energy Services, Inc.
500 West Madison Street, Suite 3300
Chicago, IL 60661
kkyoung@integrysenergy.com
(312) 681-1805

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Integrys Energy Services, Inc	:	
	:	
Petition for Declaratory Ruling as to the	:	**09-0165**
Applicability of Provisions of the Consumer	:	
Fraud Act and Public Utilities Act.	:	

INTEGRYS ENERGY SERVICES INC.'S
EXCEPTIONS TO PROPOSED ORDER

I. PROCEDURAL HISTORY

On March 24, 2009, Integrys Energy Services, Inc. ("IES"), filed a Verified Petition for Declaratory Ruling pertaining to the applicability of Sections 16-115A and 116C of the Illinois Public Utilities Act ("Act")[1] and Section 2EE of the Illinois Consumer Fraud and Trade Practices Act ("CFA")[2]. In the Petition, IES broadly frames two issues with respect to the foregoing statutes. First, IES asks whether a certain electricity pricing arrangement is prohibited under subsection 16-115A(e)(1) of the Act or Section 2EE of the CFA. Second, IES asks whether Section 16-115C of the Act applies to an electricity marketing arrangement between IES and New Illinois Cooperative Energy, ("NICE"), a not-for-profit subsidiary of Southwestern Electric Cooperative. The Petition itself does not present a substantive answer to these questions. However, in a subsequent filing, IES asserts that the electricity pricing arrangement is lawful. IES takes no position regarding the applicability of Section 16-115C to the IES-NICE marketing arrangement.

Pursuant to proper notice, a duly authorized Administrative Law Judge ("ALJ") conducted hearings on April 14 and May 19, 2009 at the Commission's offices in Chicago, Illinois. IES and Commission Staff appeared through legal counsel at both hearings.

At the April 14 hearing, the ALJ directed that a copy of the petition be served on NICE by the Clerk of the Commission. Such service was accomplished on April 15, 2009. Additionally, counsel for IES stated during the course of the May 19 hearing that NICE had actual notice of this proceeding. Tr. 19. NICE did not intervene in this proceeding; nor did any other party.

At the May 19 hearing, IES and Staff agreed to file a joint stipulation of undisputed facts, in lieu of evidentiary hearings. That stipulation (Joint Exhibit 1.0) was

[1] 220 ILCS 5/16-115A and 5/16-115C.
[2] 815 ILCS 505/2EE.

filed on July 7, 2009, the same day Staff filed its verified Response to the Petition. IES filed its Reply to Staff's Response on July 28, 2009. Both parties agreed that these filings provide a sufficient basis for a Commission decision regarding the relief requested in the Petition.

On September 4, 2009, the ALJ marked the record in this docket "heard and taken."

An ALJ's Proposed Order was served on the parties on September 10, 2009.

II. ANALYSIS AND CONCLUSIONS

A. AUTHORITY FOR DECLARATORY RULINGS

Illinois Administrative agencies, including this Commission, are authorized to issue declaratory rulings by Section 5-150 of the Illinois Administrative Procedure Act ("IAPA")[3]:

> 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.

To exercise the discretionary power offered by Section 5-150, the Commission promulgated the required rule, appearing at 83 Ill. Adm. Code 200.220, for filing and resolving declaratory ruling requests. The instant Petition is grounded in sub-part 200.220(a)(1), which provides that:

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

As our Rule indicates, Commission has elected to exercise the declaratory ruling power derived from APA Section 5-150 "in [our] sole discretion." Thus, the Commission need not render a requested declaratory ruling, irrespective of the merits of the substantive arguments presented by either the petitioner(s) or respondent(s).

B. UNDISPUTED FACTS

IES is certified as an Alternative Retail Electric Supplier ("ARES") within the meaning of Section 16-115 of the Act. Petition, ¶1. It has entered into an agreement with NICE ("the Agreement") by which NICE will offer, and IES will supply, electric

[3] 5 ILCS 100/5-150(a).

service to NICE members. *Id.*, ¶3. NICE is not an ARES or public utility and it is not licensed as an agent, broker or consultant within the meaning of Section 16-115C of the Act. Joint Ex. 1.0, ¶3(g).

NICE is responsible for marketing the services offered under the Agreement to end users; IES will not be engaged in sales of any product to customers under the Agreement. *Id.*, ¶3(h). However, pursuant to the Agreement, NICE is obliged to develop marketing materials, which it must submit to IES for review; NICE is only permitted to use such materials insofar as they are approved by IES. Joint Ex. 1.1, Sec. 1.4.3. NICE has in fact prepared such marketing materials. *E.g.*, Joint Ex. 1.0, ¶3(c)-(e); Joint Ex. 1.3, 1.4 and 1.5.

Under the terms of the Agreement, IES "shall provide…individual service agreement[s] to NICE for distribution to NICE Members." Joint Ex. 1.1, Sec. 1.4.3. NICE is required to distribute service agreement forms to NICE members, collect executed forms, and forward them to IES. *Id*., Sec. 1.5.1.

IES will provide electric service to NICE members on a per-kilowatt/hour ("kWh") basis, based upon IES' cost to supply NICE members with electricity. Petition, ¶4. This cost to serve includes a fixed margin for IES, an adjustment for bad debt, and a "true-up" component that IES says is "required" because its costs to supply NICE members with electricity will not be known until finalized, which occurs two months after customers have been billed. *Id*. Thus, NICE members will "purchase electricity at prices tied to [IES'] wholesale market purchasing decisions and supply costs[,]" rather than at a dollar amount or unit price stated in a contract. *Id.* IES and NICE "agree that the salient distinction between electric power provided under the [IES–NICE] Program and electric power available from other electric power suppliers is the manner in which the price is determined." Joint Ex. 1.1, Sec. 1.2. This pricing methodology is disclosed in the Power Purchase and Sale Agreement, or form contract ("IES-end user agreement") to be executed between IES and NICE members, in the following terms:

> **Price:** Your price shall be the NICE Program rate per kWh, which is a variable rate determined by Seller for program participants served by Ameren. The NICE Program rate is all inclusive except for (1) the Utility's distribution service charges and other tariff charges applicable to 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 (bold in original); Joint Ex. 1.2.

According to IES, the terms of the Agreement permit it to offer the foregoing "managed service" product only to NICE members in the state of Illinois. Petition, ¶6. Moreover, IES avers, the Agreement does not require NICE to offer "electricity (or other service packages including electricity) only using electricity supplied by IES. In particular, the agreement between IES and NICE does not prohibit NICE from also working with other ARES." *Id*., ¶7. Additionally, "NICE acknowledges that [IES] is under no obligation by virtue of this Agreement to provide service to any NICE member, and that [IES] reserves all rights to administer its contracts [with NICE customers.]" Joint Ex. 1.1, Sec. 1.5.

C. ISSUES PRESENTED

As indicated above, IES presents two issues for declaratory ruling – whether the pricing methodology in the IES-NICE Agreement is lawful and whether Section 16-115C of the Act applies to the marketing arrangements contemplated by IES and NICE. In addition to addressing those issues, Staff raises three others – whether IES has standing to seek some elements of the declaratory relief requested, whether IES raises issues that lie within the scope of the Commission's authority to issue declaratory rulings, and (if we answer the preceding questions in the affirmative) whether the Commission should exercise its discretion to decline to render a declaratory ruling. Staff's questions are threshold questions that, if decided adversely to IES, will obviate the need to address the two substantive issues IES presents. Accordingly, we will consider Staff's issues first.

1. IES' Standing

Staff asserts that IES lacks standing to request a declaratory ruling regarding IES's first issue (*i.e*., whether the pricing methodology in the IES-NICE Agreement is lawful). Staff's employs a chain of logic that includes five premises: 1) that IES specifically asks whether its *pricing* methodology is prohibited under relevant law; 2) that the Petition invokes a statute (subsection 16-115A(e)(i) of the Act) that pertains to *marketing*, not pricing; 3) that NICE, not IES, will perform the marketing functions contemplated by the IES-NICE Agreement; 4) that IES, not NICE, is the petitioning party

here; and 5) that subpart 200.220(a) limits our declaratory rulings to the applicability of a law "to the person presenting the petition." Staff Response at 8-11. Based on these premises, Staff contends that IES has no standing to seek a declaratory ruling regarding the applicability of the marketing provisions in subsection 16-115A(e)(i).

EXCEPTION 1

~~Initially, the Commission observes that although IES requests a ruling on the applicability of *two* statutory provisions - subsection 16-115A(e)(i) of the Act *and* Section 2EE of the CFA - Staff does not mention the latter provision[4]. IES is equally silent about Section 2EE in its reply to Staff on standing. IES Reply at 3-5. This void in the parties' analyses might not be so troublesome if the Petition had addressed Section 2EE thoroughly. However, Section 2EE is merely identified in the Petition, without any citation to, or discussion of, any of its two-dozen sub-parts (not including its complaint provisions). Accordingly, there is no meaningful assessment of Section 2EE in the instant record. If we assume that IES, as the petitioner, has the burden of persuasion on this point, then the empty record defeats IES. If we assume, in contrast, that Staff bears the persuasive burden because lack of standing is an affirmative defense, then the Commission invokes the discretion included in sub-part 200.220(a) to decline to issue a declaratory ruling regarding IES's standing under Section 2EE or the applicability of that provision to IES. The Commission will not endeavor to determine the applicability of a lengthy statute to IES' circumstances when IES has not offered any analysis in its own support[5].~~

~~As for s~~Subsection 16-115A(e)(i), the law states that:

> (b) An alternative retail electric supplier shall obtain verifiable authorization from a customer, in a form or manner approved by the Commission consistent with Section 2EE of the Consumer Fraud and Deceptive Business Practices Act, before the customer is switched to another supplier.
>
> (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,

---

[4] ~~More precisely, Staff's standing challenge appears under a general heading encompassing both statutes, but its specific standing argument does not address Section 2EE. Staff Response at 8-11.~~

[5] ~~Insofar as subsection 16-115A(e)(i) and Section 2EE share conceptual similarities, our analysis of IES' standing under the former may apply by analogy to IES's standing under the latter. Nevertheless, the Commission is not expressly rendering any declaratory ruling about Section 2EE in this Order.~~

> terms and conditions of the products or services that the alternative retail electric supplier is offering or selling to the customer[.]

The opening paragraph of Section 2EE of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2EE) provides that

> An electric service provider shall not submit or execute a change in a subscriber's selection of a provider of electric service unless and until (i) the provider first discloses all material terms and conditions of the offer to the subscriber; (ii) the provider has obtained the subscriber's express agreement to accept the offer after the disclosure of all material terms and conditions of the offer; and (iii) the provider has confirmed the request for a change in accordance with one of the following procedures …

Although Staff is correct that subsection (e)(i) concerns marketing, subsection (e) is broader than that. It also encompasses the "offering and provision" of products and services. From the facts in the record, the Commission can fairly infer that IES is involved in "offering" a product we regulate – electric power - and we can readily conclude that IES is "provisioning" that product. Indeed, IES is the only entity doing the provisioning here. Petition, ¶3. Furthermore, IES is also involved in the marketing addressed by subsection (e)(i). It reviews the marketing materials prepared by NICE and is contractually empowered to limit NICE to materials approved by IES. Joint Ex. 1.1, Sec. 1.4.3.

Moreover, all of subsection (e) - and, for that matter, all of Section 16-115A - applies only to ARES. NICE is not an ARES. Therefore, NICE would have no standing, and cannot be a "real party in interest," to seek a declaratory ruling with respect to the applicability of any part of Section 16-115A. In contrast, IES does have standing, because it is an ARES and because it is provisioning and marketing electric power. The fact that NICE is also involved in marketing under the ICE-NICE Agreement does not diminish IES' separate eligibility for standing with respect to the pertinent statute. Staff acknowledges this ("[subsection 16-115A(e)(i)] applies by its terms to IES, which is unquestionably an ARES," Staff Response at 15), which renders Staff's challenge to IES' standing somewhat puzzling.

The more meaningful question raised by Staff, then, is not whether IES, as an ARES involved in marketing and provisioning electricity, has standing to seek a declaratory ruling under subsection 16-115A(e)(i), but whether that subsection has anything to do with the particular activity – "pricing electricity" (Petition, ¶11) – that IES would apply it to. There is a distinction between, on the one hand, attaching a price or pricing methodology to a commodity and, on the other hand, describing that price or methodology during sales activities. Subsection 16-115A(e)(i) addresses only the latter. Therefore, insofar as IES requests a declaratory ruling with respect to the lawfulness, under subsection 16-115A(e)(i), of the pricing methodology in the IES-NICE Agreement,

the Commission can only say that subsection 16-115A(e)(i) does not determine whether pricing is lawful. Putting that in the terms of our declaratory ruling power, we find that subsection 16-115A(e)(i) is inapplicable to IES when it performs the price-setting function.

In contrast, with respect to *marketing*, subsection 16-115A(e)(i) is "applicable to" IES when it is performing the function of marketing (and/or provisioning) electricity, as it is here pursuant to the IES-NICE Agreement.

2. Authorized Scope of Declaratory Rulings

Staff recommends a narrow and literal interpretation of sub-part 200.220(a) (and of Section 5-150 of the IAPA, which sub-part 200.220(a) implements), under which the Commission would strictly limit declaratory rulings to the "applicability" of a provision to the petitioning party. That is, under Staff's approach, we would decide only *whether* a statute applies, not *how* it applies. Staff Response at 11-12. Applying that approach here, the Commission would not go beyond a determination that subsection 16-115A(e)(i) applies to IES.

The Commission rejects Staff's recommendation, which would severely diminish the usefulness of the declaratory ruling mechanism. Optimally, a petitioner seeks a declaration in order to comply with the directives we enforce. Declaratory rulings thus conserve stakeholder resources and promote administrative efficiency, by avoiding non-compliant activities and responsive enforcement actions. Those benefits would likely be lost if a petitioner cannot obtain any guidance whatsoever regarding *how* a provision applies.

The present case illustrates the point. As the Commission stated above, IES is an ARES and subsection 16-115A(e)(i) expressly governs ARES. Indeed, that subsection imposes mandatory obligations on ARES ("…an [ARES] *shall* comply with the following requirements" (emphasis added)). It is thus self-evident that subsection 16-115A(e)(i) is "applicable to" IES. Under Staff's view, that is the end of the matter. A petitioner can learn nothing more through declaratory ruling about the *manner* in which it must conduct itself under the applicable law. The Commission, however, did not promulgate sub-part 200.220(a) as a limited and sterile mechanism that excludes meaningful inquiry in most instances[6]. We intended a more broadly useful administrative tool.

Of course, if the text of either sub-part 200.220(a) or Section 5-150 of the IAPA compelled us to adopt Staff's interpretation of those provisions, the Commission would

[6] Most of the provisions of the Act pertain to a specific category, or sub-category, of regulated entities – typically, "public utilities," but also "telecommunications carriers," alternative gas suppliers" and "common carriers by pipeline" and several others. If sub-part 200.220(a) were narrowly and literally confined to the issue of "applicability to the petitioner," declaratory rulings would be essentially limited to questions of the "Am I a public utility?" variety. An affirmative answer to that question would make all statutes applicable to "public utilities" applicable to the petitioner. No additional guidance would be available via declaratory ruling.

do so. But that is not the case. Section 5-150 authorizes declaratory rulings "as to" the applicability of a law the requesting party. It does not limit declaratory rulings to the question of "whether" a statute is applicable. In our judgment, the legislature's chosen language sensibly allows an administrative agency to issue rulings regarding the *manner* in which a statute applies. Sub-part 200.220(a) thus contemplates declaratory rulings "with respect to" applicability, thereby capturing the flexibility we believe Section 5-150 allows.

The Commission did not, as Staff argues, hold otherwise in Illinois Power Company v. Town of Normal, Dckt. 98-0239, Order, Nov. 5, 1998. As Staff perceives it, the Commission concluded in that proceeding that we do not issue declaratory rulings concerning the "rights and responsibilities" of petitioning parties. Staff Response at 11-12. That is incorrect. In Illinois Power, the petitioning utility asked us to declare that a *municipal ordinance* affronted the Act and that both *that ordinance and a municipal cease and desist letter* violated the utility's franchise agreement. None of those requested rulings pertained to a statute or rule enforced by this Commission. For *that* reason, we found that the utility's requests went beyond our scope of authority. The applicability of a statute (and, more specifically, the meaning of "applicability") was not addressed. Indeed, we explicitly declined to rule on applicability (per our discretionary authority), because such a ruling would serve "no purpose" unless we also ruled on the municipal ordinance and letter.

On the other hand, IES cites three proceedings showing that the Commission has readily addressed the *manner* in which a statute applied to the party requesting a declaratory ruling. In MidAmerican Energy, Dckt. 03-0659, Order, May 11, 2004, Order or Rehearing, Nov. 10, 2004, affirmed as MidAmerican Energy Corp. v. Illinois Commerce Commission, 367 Ill. App. 3d 163, 854 N.E. 2d 238 (2006), the Commission expressly ruled on the manner in which a statute governed the petitioner's gas contracts, Order on Rehearing, 2nd Ordering Para. (in addition to ruling that another statute was applicable to petitioner, *id*., 1st Ordering Para.). In Central Illinois Public Service Co., *et al*, Dckt. 06-0338, Order, April 18, 2007, the Commission issued a declaratory ruling explicitly determining *how* an administrative regulation applied to the requesting party, without addressing applicability at all. Order, 1st Ordering Para. & Finding (4). In ISG Hennepin, Inc., and Illinois Power Co., Dckt. 02-0549, Order, Oct. 1, 2002, some of our analysis was nominally couched in terms of applicability, but the substance of our declaratory ruling pertained to the *manner* in which an administrative regulation applied. Staff expressly stated that it did not object to that ruling. Order at 4.

In the Commission's view, the above precedents do indicate that we have not construed or implemented our declaratory ruling authority in the constrained fashion Staff now recommends. Both the requested rulings and our analysis in those dockets reflect the understanding that "applicability" in the context of declaratory rulings is not a strict "yes-or no" question, but also a matter of "if yes, then how?" Significantly, the appellate court in MidAmerican did not challenge that understanding. While we recognize that the issue was not expressly before the court, that case did specifically examine the nature of the Commission's declaratory ruling power. The court reviewed

our ruling on the *manner* in which the pertinent statute applied and held that it was a "proper declaratory ruling." 367 Ill. App. 3d at 170.

The Commission acknowledges and appreciates Staff's concern that the declaratory ruling mechanism could be abused by a plethora of petitioners seeking Commission approval for their commercial activities – approval that could later be used as a shield against liability and enforcement action. Staff Response at 14. However, as sub-part 200.220(a) expressly states, declaratory rulings are issued, if at all, in our "sole discretion." That discretion is a satisfactory safeguard against the opportunism Staff appropriately decries. The Commission will wield that discretion to carefully tailor our declaratory rulings and reject requests that do not reflect genuine doubt about the manner in which a statute or rule applies.

3. Adequacy of Marketing Materials Under 16-115A(e)(i).

In the IEC-end user contract proposed here, customers would buy electricity "not at a specific dollar amount or unit price specified in the contract, but…at prices tied to IES' wholesale market purchasing decisions and supply costs." Petition, ¶4. IES' Petition specifically asks whether such "*pricing*…is prohibited" by subsection 16-115A(e)(i). *Id*., ¶11 (emphasis added). As we stressed earlier in this Order, subsection 16-115A(e)(i) of the Act concerns electricity marketing, not electricity pricing. Thus, there is a mismatch between the cited statute and the requested ruling. Consequently, the Commission is tempted to simply reiterate what we concluded above - that subsection 16-115A(e)(i) is not applicable to IES' electricity pricing and does not determine the lawfulness of its pricing or pricing methodology.

Alternatively, we could analyze the legal sufficiency of IES's *marketing* of electricity under subsection 16-115A(e)(i), since marketing is what the statute addresses. It is difficult, however, to address the adequacy of the disclosure of a price apart from the nature of the price itself. The parties' arguments reflect this. For example, Staff describes four pricing methods that Staff believes satisfy the statutes, and presumably assumes that prices derived from those methods would be adequately disclosed in marketing efforts. Staff Response at 18-21. For its part, IES complains that "given the nature of the pricing itself" – *i.e*., where the price per kWh is unknown when the supply contract is executed (as it is under the IES-end user agreement) – "no possible disclosure would be satisfactory" to Staff. IES Reply at 6. Despite this analytical blurring of pricing and marketing, the Commission believes that we can render a declaratory ruling that addresses the significant marketing disclosure issues raised by the parties without ruling on the sufficiency of IES' pricing methodology under a statute unrelated to pricing.

As set forth earlier in this Order, subsection 16-115A(e)(i)) requires adequate disclosure of the price of the service provided. As IES interprets this requirement, adequacy is achieved when there is congruence between the price the customer commits to pay (here, a price derived from what the IES-end user contract describes as a "variable rate," Joint Ex. 1.2) and the price described in any associated marketing

materials. Accordingly, IES asserts that the "proposed contract agreement, along with the marketing materials that support it, accurately and openly informs customers of the pricing arrangements." IES Reply at 6.

EXCEPTION 2

IES is ~~generally~~ correct that the limited references to pricing in the IES-NICE marketing materials are not inconsistent with the pricing terms in the IES-end user contract. Those marketing materials consist of a telemarketing script for soliciting prospective customers, Joint Ex. 1.3, and two examples of printed advertising[7]. Joint Ex's. 1.4 & 1.5. ~~To the minimal extent that those documents allude to pricing, they~~ These documents do not misrepresent what the contract provides - a variable rate and a disclaimer of any guarantee that the customer will save money relative to the customer's current utility rate[8].

~~However, t~~The Commission ~~does not~~ agrees with ~~the~~ IES ~~notion~~ that consistency (between contract terms and marketing materials) is the sole attribute of an adequate price disclosure under the relevant statute. ~~Under that notion, the disclosure that "buyer will pay whatever supplier demands" would be sufficient, so long as both the supply contract and associated marketing materials convey that information. The Commission is convinced that the General Assembly provided more consumer protection than that in subsection 16-115A(e)(i). Accordingly, we construe subsection 16-115A(e)(i) to require a pricing disclosure that enables the customer to ascertain - in general terms at the very least - the actual price of the electricity the customer is committing to buy. Without that disclosure, the customer cannot meaningfully determine whether entering into the proposed supply contract will serve that customer's interest. If subsection 16-115A(e)(i) does not require even that minimal disclosure, it would promote neither consumer choice nor retail competition.~~

The IEC-NICE documents in evidence here ~~do not~~ provide the ~~minimally~~ necessary pricing disclosure about the commodity covered by the contract. The agreement between IES and NICE provides that IES, as an ARES, will supply NICE's members with electricity at a per-kWh program rate that is based on IES' costs to supply the program, and includes a fixed margin for IES, a component for bad debt and a 'True-Up' component. The True-Up component is required because the costs to

[7] We cannot discern whether the IES-end user agreement is itself marketing material. Marketing is typically intended to induce the customer to enter into a contract and may not include the contract itself. The record does not reveal whether the end user contract here is, in fact, to be used as a marketing tool. The contract would, in any case, be relevant to IES' compliance with subsection 16-115A(e)(ii) and section 2EE of the CFA, which requires an ARES to provide a customer with adequate written price disclosure before switching that customer's electricity supplier. Subsection 16-115A(e)(ii) is not invoked in the Petition here, although IES addresses it in its supporting arguments. IES Reply at 3.

[8] ~~However, there is a provision in the IES-NICE print ads that apparently implies more than the contract discloses. That is, while the ads suggest that NICE's electricity purchasing arrangement "may be able to save your family or business a significant amount of money on electricity costs," Joint Ex's. 1.4 & 1.5, there is no quantitative or qualitative information in the contract that discloses the actual price of electricity, much less facilitates the comparison the print ads invite. To that extent, the consistency between the marketing materials and IES-end user contract cannot be determined.~~

supply the program cannot be known until IES's costs are finalized, which occurs approximately two months after the close of each calendar month. Therefore the True-Up component, which could be negative or positive, will be included in the program rate two months in arrears. Thus, NICE members choosing this arrangement are electing to buy electricity not at a specific dollar amount or unit price specified in the contract, but are choosing to purchase electricity at prices tied to IES' wholesale market purchasing decisions and supply costs for the program as disclosed to the customers in the Proposed Purchase and Sale Agreement between IES and each customer. ~~They say nothing whatsoever about the commodity price except that it will vary from month to month and may or may not exceed utility pricing. The customer is not even informed in general terms - whether qualitative or quantitative - of the components that make up the commodity price or the factors that will be applied when weighting or quantifying those components. Moreover, there are no price ceilings or floors or other referential indicia that would enable the customer to even estimate a likely range of prices under the contract. In effect, the telemarketing script and contract (assuming the latter is marketing material) disclose exactly what the Commission deemed inadequate in the preceding paragraph of this Order – that "buyer will pay whatever supplier demands."~~

~~There actually is information in the evidentiary record pertaining to the commodity price a customer would be expected to pay upon executing the IES-end user agreement. That information appears in the IES-NICE Agreement (in reference to the "supply price" component to be billed to the customer). Joint Ex. 1.1 (confidential). But nothing in the record suggests that prospective customers will have access to that information. To the contrary, we assume that information will be privately held by the signatories to the Agreement, IES and NICE. Given that assumption, the Commission concludes that IES's proposed price disclosures are insufficient under subsection 16-115C(e).~~

The Commission agrees that such ~~notes IES' admonition that disapproval of its~~ price disclosures as recommended by Staff would preclude ARES from offering "innovative pricing," even while utilities (specifically, ComEd and Ameren) are permitted to offer real-time pricing. ~~IES Reply at 6. The Commission strongly rejects the contention that real-time pricing and the pricing contemplated in the IES-end user contract are equivalent. Real-time pricing both enhances customer awareness of electricity pricing and empowers customers to make pre-consumption decisions in response to price trends. The IES-end user contract is utterly silent about commodity price, except to say that the rate is "variable." The actual commodity price will not be revealed to the customer until a post-consumption bill is issued weeks later. In essence, the IES-end user agreement offers "trust me" pricing. That is neither real-time pricing nor publicly tariffed pricing.~~

~~That said, this Order does not rule on - much less preclude – IES' proposed pricing. As the Commission emphasized above, the instant Petition requests a ruling on the applicability of a statute that governs marketing and disclosure, not pricing. Thus, a ruling on marketing disclosure is all we are rendering here. IES remains free to offer the~~

~~pricing plans of its choosing. This Order addresses how such pricing must be disclosed to satisfy subsection 16-115A(e).~~

~~The Commission will not endeavor to describe precisely what disclosure would satisfy the statute with respect to the pricing involved here. It is not the Commission's responsibility to draft contracts or ad copy for specific ARES promotions. Nonetheless, it is appropriate in declaratory ruling proceedings to provide some measure of guidance toward satisfactory legal compliance. Accordingly, the Commission observes that IES surely has a definite mechanism in mind for determining the price of electricity that each NICE customer will actually be expected to pay. (Otherwise, IES could not prepare customer bills.) That mechanism will presumably take into account the elements that comprise the "supply price" included in the Pricing Schedule included in the IES-NICE Agreement. Joint Ex. 1.1 (confidential). For whatever reason, IES and NICE have not elected to disclose to prospective customers the mechanism that will establish the price of electricity purchased pursuant to the IES-end user contract. As a result, customers have no way to ascertain, before executing that contract, how the price of electricity will be determined, let alone what the price will actually be.~~

Therefore,~~ to comply with subsection 16-115A(e)(i),~~ the Commission ~~recommends~~ holds that the disclosing information that is contained in the IES-end user agreement ~~and NICE consider disclosing information that, *at the least*,~~ is compliant with subsection 16-115A(e)(i) and Section 2EE of the CFA because it shows how the price of electricity to the customer will be determined. While the rate may be "variable" in the general sense that it is market-dependent, the specific components, weightings and calculations that make up that rate are presumably fixed. ~~Knowledge of those elements will enable the customer to, at the least, generally estimate whether acceptance of the IES-NICE offer will serve the customer's interests.~~

4. Applicability of Section 16-115C of the Act

Section 16-115C of the Act applies to agents, brokers and consultants ("ABCs") that sell or procure retail electricity for third parties. The statute establishes a licensing requirement and conduct rules for persons or entities meeting the definition of an ABC. "Because marketing of all IES-supplied electricity…will be handled exclusively by NICE," the Petition asks whether Section 16-115C is "applicable to IES's proposed arrangement" with NICE. Petition, ¶14. Since the Commissioned determined earlier in this Order that IES would also be involved in the marketing of electricity supply under the IES-NICE Agreement, the factual predicate for IES' request for declaratory ruling (*exclusive* marketing by NICE) is incorrect. Nonetheless, NICE is certainly also (indeed, principally) involved in marketing, so the Section 16-115C issues IES apparently poses are not invalidated by our factual finding of IES' own marketing involvement.

However, Staff asserts that IES's Section 16-115C issues are invalidly presented for other reasons. First, Staff maintains that IES' inquiry about its "proposed arrangement" is too vague to rule upon. Staff Response at 21-22. Staff has a point. The Petition presents broad questions that beg several additional questions. Section

16-115C is a multi-part statute and the Petition, taken literally, asks about the applicability of all of them. The Commission has no intention of performing a clause-by-clause analysis, particularly when IES has "does not have an opinion" of its own on the many substantive questions its Petition poses. IES Reply at 8. However, we do perceive that we understand the gravamen of IES' request – namely, whether NICE is an ABC under the "proposed arrangement" between IES and NICE. *Id*. at 7.

EXCEPTION 3

Second, Staff emphasizes that our declaratory ruling power extends to the applicability of a statute to a person, not to an "arrangement." ~~Of course, Staff is technically correct, but the Commission might have looked past that - given that an ABC's functions inherently involve a two-party "arrangement" - if the correct party had filed (or joined in filing) the instant Petition. However,~~ While NICE~~, not IES,~~ is the potential ABC under Section 16-115C~~ and it is not a petitioner~~, IES has an interest in the proposed arrangement because marketing of all IES-supplied electricity and contacts with potential subscribers will be handled exclusively by NICE. ~~Moreover, NICE had both formal and actual notice of this proceeding and did not choose to participate. Consequently, IES is asking us whether and how Section 16-115C applies to another entity that is not a joint petitioner, or even an intervenor.~~ The Commission concludes that sub-part 200.220(a) does ~~not~~ authorize us to issue a declaratory ruling under these circumstances. ~~Sub-part 200.220(a) is limited the applicability of a statute or rule to the party *requesting the declaratory ruling*.~~

NICE is a not-for-profit subsidiary of Southwestern Electric Cooperative. NICE is neither a public utility; nor is NICE certified as an ARES; nor is NICE licensed as an agent, broker or consultant. Thus, as for NICE, the Commission finds that NICE would not meet the definition of an ABC under Section 16-115C. As for IES, the petitioning party, Section 16-115C is of course inapplicable. IES is the ARES in the proposed arrangement and, therefore, cannot be an ABC.

The Commission notes~~, for whatever guidance it might provide,~~ that we recently issued two Orders concerning the ABC Law that appear to govern this case. In Docket 08-0548[9], we completed the statutorily mandated rulemaking for ABCs. In Docket 08-0364[10], we addressed ABC issues that are not necessarily resolved solely by reference to the administrative regulations promulgated in Docket 08-0548. In Docket 08-0364, we held that an entity engaged in electricity sales for or to third parties is not exempted under subsection 16-115C(b) from the obligations of an ABC unless it acts on behalf of a single ARES in the retail electricity marketplace. Based on the facts presented in the petition here, NICE therefore fits the definition of an ABC, and NICE would need to be licensed as such for IES's proposed arrangement to comply with the Act.

[9] Illinois Commerce Commission, On its Own Motion, Implementation of Section 16-115C of the Public Utilities Act, Order, July 29, 2008, and Amendatory Order, Aug. 4, 2009.
[10] BlueStar Energy Services, Inc. v. Lower Electric LLC, Order, Aug. 25, 2009.

EXCEPTION 4

D. CONCLUSIONS

IES has standing to request a declaratory ruling regarding the applicability of the marketing and disclosure requirements of subsection 16-115A(e) of the Act to the marketing materials and disclosures associated with the IES-NICE electricity sales program.

Pursuant to 83 Ill. Adm. Code 200.220(a), the Commission is empowered to issue a declaratory ruling regarding the manner in which subsection 16-115A(e) is applicable to IES.

The IEC-NICE documents in evidence here ~~do not~~ comply with subsection 16-115A(e)(1) of the Act because they ~~do not~~, individually or collectively, provide the minimally necessary pricing disclosure about the commodity to be supplied pursuant to the IEC-end user contract.

~~The Commission declines to issue a declaratory ruling regarding the applicability of Section 2EE of the CFA to t~~The marketing materials and activities associated with the IES-NICE electricity sales program are also compliant with Section 2EE of the CFA.

~~83 Ill. Adm. Code 200.220(a) does not authorize t~~The Commission ~~to issue a declaratory ruling concerning the applicability of~~ finds that Section 16-115C is not applicable to NICE~~, an entity that did not request such a declaratory ruling~~. Section 16-115C is inapplicable to IES, the requesting party, because it is an ARES in the proposed IES-NICE arrangement.

III. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) IES is an authorized Alternative Retail Energy Supplier in the State of Illinois within the meaning of Section 16-115 of the Act;

(2) the Commission has jurisdiction over the parties hereto and the subject matter hereof;

(3) the recitals of fact set forth in the prefatory portion of this Order are supported by the evidence of record and are hereby adopted as findings of fact;

(4) the Commission's authority to issue declaratory rulings is derived from Section 5-150 of the Illinois Administrative Procedure Act and codified as an administrative regulation of the Commission at 83 Ill. Adm. Code

200.220; under 83 Ill. Adm. Code 200.220, issuance of a declaratory ruling is at the sole discretion of the Commission;

(5) IES has standing to request a declaratory ruling regarding the applicability of the marketing and disclosure requirements of subsection 16-115A(e) of the Act to the marketing materials and disclosures associated with the IES-NICE electricity sales program;

(6) pursuant to 83 Ill. Adm. Code 200.220(a), the Commission is empowered to issue a declaratory ruling regarding the manner in which subsection 16-115A(e) is applicable to IES;

(7) the IEC-NICE documents in evidence here ~~do not~~ comply with subsection 16-115A(e)(1) of the Act because they ~~do not~~, individually or collectively, provide the minimally necessary pricing disclosure about the commodity to be supplied pursuant to the IEC-end user contract;

(8) ~~the Commission should decline to issue~~ IES has standing to request a declaratory ruling regarding the applicability of Section 2EE of the CFA to the marketing materials and activities associated with the IES-NICE electricity sales program;

(9) the marketing materials and activities associated with the IES-NICE electricity sales program are compliant with Section 2EE of the CFA;

(~~9~~10) ~~83 Ill. Adm. Code 200.220(a) does not authorize the Commission to issue a declaratory ruling concerning the applicability of Section 16-115C to NICE, an entity that did not request such a declaratory ruling;~~the Commission finds that Section 16-115C is inapplicable to NICE as it is not an ABC. Further, it is not applicable to IES, the requesting party, because it is an ARES in the proposed IES-NICE arrangement.

IT IS THEREFORE ORDERED and declared that subsection 16-115A(e) of the Act is applicable to IEC and that the IEC-NICE documents in evidence here ~~do not~~ comply with subsection 16-115A(e) of the Act because they ~~do not~~, individually or collectively, provide the minimally necessary pricing disclosure about the commodity to be provided pursuant to the IEC-end user contract.

IT IS FURTHER ORDERED that Section 16-115C is inapplicable to IES, the requesting party in this proceeding, because it is an ARES in the proposed IES-NICE arrangement; however Section 16-115C does apply to the arrangement between IES and NICE.

~~IT IS FURTHER ORDERED that the Commission declines to issue a declaratory ruling regarding the applicability of Section 2EE of the CFA to the marketing materials and activities associated with the IES-NICE electricity sales program~~.

IT IS FURTHER ORDERED that any motions, petitions, objections, and other matters in this proceeding that remain outstanding are hereby denied.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Admin. Code § 200.880, this Order is final; it is not subject to the Administrative Review Law.