

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  
REPLY TO BRIEF ON EXCEPTIONS

PUBLIC VERSION

\*\*\*BEGIN CONF XXX END CONF\*\*\* - Denotes confidential material

NOW COMES the Staff of the Illinois Commerce Commission (the Staff), and pursuant to Section 200.830 of the Rules of Practice before the Illinois Commerce Commission, 83 Ill. Adm. Code 200.830, states for its Reply to Brief on Exceptions in the above-captioned matter, as follows:

The only other party to file a Brief on Exceptions (hereafter "BOE") is Integrys Energy Services, Inc. (hereafter "IES"). See IES BOE. IES takes essentially three exceptions to the Proposed Order. First, it takes exception to the Proposed Order's finding that the so-called "price disclosure" contained in New Illinois Cooperative Energy (hereafter "NICE") marketing materials does not comply with Section 16-115A(e)(i) of the Public Utilities Act. IES BOE at 2-3. Second, IES contends that the Proposed Order errs by declining to rule on whether the NICE marketing materials comply with Section 2EE of the Consumer Fraud Act. Id. at 3-4. Third, IES contends that the Proposed Order erred by determining that the Commission lacks the authority to issue a declaratory ruling as to a non-party such as NICE. Id. at 4-5. The Commission should reject each of these arguments.

## 1. NICE's So-called "Price Disclosures" Do Not Satisfy Section 16-115A(e)(i)

In its BOE, IES first describes the New Illinois Cooperative Energy program:

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. [citation].

BOE at 1-2

IES argues that the NICE marketing materials properly disclose the fact that: "the price is variable, that it has certain fees and charges added, and that it may not be lower than the utility rate." Id. at 2. It states that:

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.

Id. at 2-3

According to IES, this complies with Section 16-115A(e)(i) because: (a) there is no other disclosure NICE could make regarding price and thus, assuming the Proposed Order is correct, no disclosure would be satisfactory. Id. at 3. This, IES argues, would foreclose NICE and other ARES from offering what it characterizes as "this type of innovative pricing, even though utilities can." Id. IES refers to the utilities' ability to offer real-time pricing programs which, it asserts: "let customers take prices in real time even though the prices are not known at the beginning of the month." Id.

The Proposed Order, however, anticipates this argument and recognizes the recognized the fallacy inherent in it. The Proposed Order states that:

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.

Proposed Order at 10-11 (emphasis added)

This passage accurately and succinctly describes the difference between the NICE proposal and real time pricing: namely, the fact that real time pricing customers actually know the price of electricity in time to decide whether or not to use it. In contrast, NICE customers find out prices something over a month after they use electricity. Comparing the NICE program to real-time pricing is therefore something that should, as the Proposed Order states, be: “strongly reject[ed].”

The Proposed Order is also correct in a more general sense. Simply put, Section 16-115A(e)(i) requires marketing materials to “adequately disclose[] the **prices** ... of the products ... that the [ARES] is offering or selling to the customer.” 220 ILCS 5/16-115A(e)(i) (emphasis added). The NICE materials do not disclose the price of electricity under the program; rather, they disclose some aspects of the methodology by which the price will be subsequently calculated, long after the customer has used the electricity in question. The Proposed Order recognizes this, correctly determining that:

**[W]e 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.

...

[T]he 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.**

Proposed Order at 10, 11 (emphasis added)

In short, the Proposed Order recognizes the deficiencies of the NICE program, referring to it as "trust me" pricing, unsatisfactory under the statute, in that it fails to disclose, even in the most general terms, the actual price of electricity under the agreement. It properly rejects the relevance of the bare, if well-intended, representation that IES and NICE will exercise good faith best efforts to obtain a favorable price for customers. The Staff urges the Commission to adopt the Proposed Order as modified by the Staff's exceptions.

## **2. The Proposed Order Correctly Declines to Rule on the Application of Section 2EE of the Consumer Fraud Act**

IES argues that:

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.

BOE at 3-4

However, as the Proposed Order correctly finds, the record is devoid of any evidence or analysis that would enable it to grant relief here. The Proposed Order states specifically that:

[T]here 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.[fn]

Proposed Order at 5

The Proposed Order is correct in this regard. However, the Staff notes that it is well established that where a statute does not specifically place any burden of proof, courts have uniformly imposed on administrative agencies the common-law rule that the party seeking relief has the burden of proof. Scott v. Dept. of Commerce and Community Affairs, 84 Ill. 2d 42, 53; 416 N.E.2d 1082, 1088; 1981 Ill. Lexis 229 at 14; 48 Ill. Dec. 560 (1981). The term “burden of proof” includes the burden of going forward

with the evidence, and the burden of persuading the trier of fact. People v. Ziltz, 98 Ill. 2d 38, 43; 455 N.E.2d 70, 72; 1983 Ill. Lexis 453 at 6; 74 Ill. Dec. 40 (1983). The burden of persuading the trier of fact does not shift throughout the proceeding, but remains with the party seeking relief. Ambrose v. Thornton Twp. School Trustees, 274 Ill. App. 3d 676, 680; 654 N.E.2d 545, 548; 1995 Ill. App. Lexis 614 at 7-8; 211 Ill. Dec. 83 (1<sup>st</sup> Dist 1995), *app. den.*, 164 Ill. 2d 557 (1995). Accordingly, IES has the burden of proof here, which the Proposed Order correctly determines that it failed to meet.

### **3. The Proposed Order Correctly Determines that It Lacks Authority to Render A Declaratory Ruling as to a Non-Party**

IES next argues that since it is a party to an agreement with NICE pursuant to which it will supply electricity to NICE members, the Commission is authorized to enter a declaratory ruling as to the application of Section 16-115C to the NICE-IES agreement. BOE at 4. More specifically, IES states that:

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 [citation].

Id. at 4-5

This contention, however, runs contrary to the statute and rules governing declaratory rulings. It is clear from the plain language of both that a party may seek a

declaratory ruling only: “as to the applicability [of the statute or rule] to the person presenting the petition or request[.]” 5 ILCS 100/5-150(a); see also 83 Ill. Adm. Code 200.220(a)(1) (petitioner for declaratory ruling may seek a declaratory ruling as to the: “applicability of any statutory provision enforced by the Commission or of any Commission rule to the person(s) requesting a declaratory ruling[.]”) The Proposed Order issues precisely such a ruling with respect to IES, finding that: “[a]s for IES, the petitioning party, Section 16-115C is inapplicable. IES is the ARES in the proposed arrangement and, therefore, cannot be an [agent, broker or consultant]” within the meaning of Section 16-115C. Proposed Order at 12. IES accordingly has its declaratory ruling insofar as the Commission is authorized to issue one.

It is not clear to the Staff how the agreement between NICE and IES would be unlawful if NICE were required to obtain an agent, broker or consultant (hereafter “ABC”) license, or what consequences would attach to IES if it were. Staff can find no provision in Section 15-115C that applies to ARES, or any sanction contemplated by Section 16-115C that attaches to an ARES doing business with an unlicensed ABC. See, generally, 220 ILCS 5/16-115C. IF NICE were found to have failed to obtain some necessary certification, such a failure might

\*\*\*BEGIN CONF XXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX END

CONF\*\*\* However, this does not place IES in jeopardy.

The Proposed Order correctly found that:

NICE, not IES, is the potential ABC under Section 16-115C and it is not a petitioner. 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*.

Proposed Order at 12 (emphasis in original)

This finding is correct and should be adopted.

Finally, and as an aside, the Staff understands IES to argue that:

[T]he 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.

BOE at 5

Contrary to IES' assertion, the Proposed Order's finding that: "[t]he Commission has no intention of performing a clause-by-clause analysis, particularly when IES 'does not have an opinion' of its own on the many substantive questions its Petition poses[.]" Proposed Order at 12, is a completely accurate assessment of the Commission's obligations under rules governing declaratory ruling. Section 200.220(b)(1) requires a party a requesting declaratory ruling to include in its request: "the requester's proposed resolution of that controversy or uncertainty[.]" 83 Ill. Adm. Code 200.220(b)(1). "No opinion" is not a proposed resolution, and the Proposed Order quite properly recognizes it as such.

WHEREFORE, Staff respectfully requests that its recommendations as set forth in this Reply to Brief on Exceptions be adopted.

Staff of the Illinois  
Commerce Commission

---

Matthew L. Harvey  
Office of General Counsel  
Illinois Commerce Commission  
160 North LaSalle Street  
Suite C-800  
Chicago, Illinois 60601  
(312) 814-2908

October 1, 2009