

Docket No: 09-0165
S.O.M.: 11/12/09
Deadline: N/A

MEMORANDUM

TO: The Commission
FROM: David Gilbert, Administrative Law Judge
DATE: October 28, 2009
SUBJECT: Integrys Energy Services, Inc.

Petition for Declaratory Ruling as to the Applicability of Provisions of the Consumer Fraud Act and Public Utilities Act.

RECOMMENDATION: Enter attached Order partly granting and partly denying declaratory relief.

In this docket, Integrys Energy Services, Inc. (“IES”), petitions for a declaratory ruling regarding the applicability of Sections 16-115A and 116C of the Illinois Public Utilities Act (“Act”) and Section 2EE of the Illinois Consumer Fraud and Trade Practices Act (“CFA”). IES broadly frames two issues under the foregoing statutes. First, IES asks whether a certain electricity *pricing* arrangement is prohibited under subsection 16-115A(e)(i) 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 contains important procedural and analytic defects. It presents no “proposed resolution” of the issues it poses, as required by subsection 200.220(b)(1) of the Commission’s Rules. In a later reply to Staff’s opposition to the Petition, IES does assert that its electricity *pricing* arrangement is lawful. But even in that reply IES takes no position regarding the applicability of Section 16-115C to the IES-NICE *marketing* arrangement.

Additionally, while IES asks about the lawfulness of electricity pricing under the Act and the CFA, it does so in reference to statutes (identified in the first paragraph of this memorandum) that govern electricity marketing, not pricing. This is significant because establishing the price for a commodity and marketing that commodity to the public are two different activities.

Nonetheless, by construing the Petition generously, the attached Order provides some of the guidance IES requests with respect to its proposed business plans. However, where the Petition's deficiencies are too serious to allow the Commission to act within its rules and enabling statutes, declaratory ruling is denied.

THE MEANING OF "APPLICABILITY"

As a threshold issue, Staff contends that the Petition exceeds the authorized scope of declaratory rulings by the Commission. Under subsection 200.220(a)(1) of the Commission's Rules, declaratory rulings address the "applicability" of a statute or rule. Staff argues that "applicability" is strictly a yes-or-no question, by which the Commission is limited to deciding whether a provision is or is not applicable. IES maintains that the Commission is also authorized to go further and decide *how* a provision applies. IES cites several examples of Commission declaratory rulings that do just that. The attached Order agrees with IES. The efficiencies afforded by declaratory rulings would be severely diminished if all a petitioner could only learn is that a statute does apply, but not how it applies. Furthermore, subsection 200.220(a)(1) contemplates rulings "with respect to" applicability, which permits a broader reading than Staff suggests. (Staff took no exception to this analysis.)

THE IES-NICE ARRANGEMENT

IES is a certified Alternative Retail Electric Supplier ("ARES"). It has entered into an agreement by which NICE will offer, and IES will supply, electric service to NICE members. NICE is not an ARES or public utility.

NICE is responsible for marketing the electricity services offered. However, IES will review all marketing materials NICE develops, and NICE is only permitted to use materials approved by IES.

NICE members that select IES as their electricity provider would have to make a five-year contractual commitment. There would be a \$75 fee for early termination by the customer.

IES will enter into an electricity supply contract with each individual customer. The contract states that the customer will pay "a variable rate [per-kilowatt/hour] determined by" IES. The sample marketing materials in the evidentiary record also state that customers will pay a "variable rate." That is the sole reference to what customers will pay for electricity supply in the IES-end user contract and marketing materials. Nothing in the contract or proposed marketing materials addresses how the "variable rate" will be determined and billed to customers. Customers will discover the rate retrospectively when they are billed. (NICE members will also pay membership dues to NICE, a monthly "billing and management" fee to IES, taxes and delivery charges.)

The Petition concerns the applicability of the relevant statutes to the foregoing arrangements involving IES, NICE and electricity end users.

APPLICABILITY OF THE ACT AND THE CFA TO PRICING AND MARKETING

Subsection 16-115A(e) of the Act requires that an ARES' *marketing materials* "shall contain information that adequately discloses the prices, terms and conditions of the products" offered by the ARES. Since this provision has nothing to do with *pricing*, the attached Order answers the question literally posed in the Petition by holding that subsection 16-115A(e)(i) is inapplicable to IES' proposed electricity pricing.

In addition, in order to give IES a measure of guidance with regard to the marketing plans associated with the IES-NICE retail electricity proposal, the attached Order also evaluates whether the *marketing materials* in the record (including the IES-end user contract) provide adequate price disclosure under subsection 16-115A(e)(i). As IES interprets the disclosure requirement, adequacy is achieved when the price the customer commits to pay (here, a "variable rate") is consistent with the price described in any marketing materials. The two documents that mention price at all - the contract and a telemarketing script - both refer to the "variable rate" (and nothing more).

The attached Order concludes, however, that consistency is not the sole - or even the most important - attribute of an adequate price disclosure. If it were, 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. Accordingly, the attached Order construes 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 minimum 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.

Consequently, the attached Order finds that the documents in evidence here do not furnish adequate price disclosure. Those documents say only that the commodity price will vary. 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. Simply put, 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.

Yet 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. 1.2, confidential.) Significantly, those elements are denominated the “*established pricing* components” in the IES-NICE Agreement. 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.

IES responds that the foregoing analysis “prohibits” its proposed *pricing*. No, it does not. IES would remain free to *price* electricity at a “variable rate.” But when it does so, its *marketing* materials must disclose, at a minimum, how that rate will ultimately be quantified and applied to the customer’s bill. Even that is arguably an inadequate disclosure. Indeed, the Commission might well consider disapproving *pricing* electricity at an unexplained “variable rate” – which is, in effect, “trust me” pricing.

IES also asserts that its “variable rate” is analogous to the real-time pricing plans offered by ComEd and Ameren. No, it is not. Real time pricing empowers customers to make *pre-consumption* decisions in response to price trends. For example, an Ameren real-time offering described in the record includes next-day pricing information, enabling customers to make consumption adjustments. In contrast, the actual commodity price for an IES customer will not be revealed until a *post-consumption* bill is issued weeks later.

The attached Order thus finds that IES’ marketing materials do not comply with subsection 16-115A(e)(i) of the Act. Staff agrees.

Section 2EE of the CFA states that an ARES cannot change a customer’s chosen electric service provider without meeting the conditions set forth in that section. Those conditions appear in Section 2EE’s two-dozen sub-parts (not including its complaint provisions). In the Petition, IES does not mention or discuss any specific sub-part of Section 2EE and does not provide its “proposed resolution” of the issue it purports to raise under Section 2EE (thus failing to comply with Section 200.220(b) of the Commission’s Rules). Consequently, the attached Order holds that the Commission will use its statutory discretion to decline to issue a declaratory ruling respecting Section 2EE. There is simply no record analysis by either party that would enable the Commission to render an informed ruling on Section 2EE. Staff agrees.

APPLICABILITY OF SECTION 16-115C OF THE ACT.

Section 16-115C applies to agents, brokers and consultants (“ABCs”) that sell or procure retail electricity for third parties. The statute establishes a licensing requirement and rules of conduct for persons or entities meeting the definition of an ABC. IES is the ARES in the proposed IES-NICE arrangement and, therefore, cannot be an ABC. Accordingly, the attached Order concludes that 16-115C is inapplicable to IES.

Nevertheless, IES wants to know if Section 16-115C is applicable to *NICE*. However, sub-part 200.220(a) of the Commission’s Rules only authorizes declaratory

rulings regarding the applicability of a statute or rule “to the person(s) requesting a declaratory ruling.” NICE had both formal and actual notice of this proceeding and did not choose to participate. Consequently, IES is asking for a ruling on the applicability of Section 16-115C applies to another entity. That is not permitted under sub-part 200.220(a) or the Illinois Administrative Procedure Act. Staff agrees.

For the foregoing reasons, I recommend entry of the attached Order, granting declaratory relief in part and denying it in part.

DG:fs