

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On Its Own Motion)	
vs.)	
Sperian Energy Corp)	
)	Docket No. 15-0438
Citation for alleged violations of Sections)	
16-115A(b) and 16-116A(e) of the Public)	
Utilities Act and of 83 Ill. Adm. Code)	
412.110, 412.130, 412.170)	

**RESPONSE OF THE CITIZENS UTILITY BOARD TO
SPERIAN ENERGY CORP.'S MOTION TO DISMISS**

Pursuant to Part 200.190 of the Administrative Rules of the Illinois Commerce Commission (“Commission”), 83 Ill. Admin. Code Part 200.190, the Citizens Utility Board (“CUB”), by its attorney, hereby responds to the Sperian Energy Corp.’s Motion to Dismiss Allegations 1-37 and 40 of the More Definitive Statement Filed by Staff, (“Motion to Dismiss” or “Motion”), filed on February 18, 2016. For the reasons set forth below, Sperian Energy Corp.’s (“Sperian”) Motion should be denied.

I. INTRODUCTION

In a January 21, 2016 Ruling, the Administrative Law Judge (“ALJ”) directed Staff of the Illinois Commerce Commission (“Staff”) to file a Complaint or a More Definite Statement, after the Commission granted Sperian’s Petition for Interlocutory Review of the ALJs denial of Sperian’s request. Staff filed a More Definitive Statement (“MDS”) on February 4, 2016, alleging that Sperian violated various provisions of the Public Utilities Act (“PUA”) and the Commission’s Administrative Rules, (“Rules”) based on Staff’s review of Sperian sales scripts used at varying times by Sperian telemarketing agents from August 2014 to April 2015. See MDS at ¶ 39. Staff’s review caused it to make the determination that “sufficient evidence

existed to conclude that Sperian’s sales tactics adopted in multiple scripts and used in late 2014 and the first quarter of 2015 were deceptive in nature.” *Id.*, Allegation 40. The Motion claims that certain allegations fail to state a claim, that the Commission lacks authority to adjudicate claims under the Telephone Solicitation Act and the Consumer Fraud and Deceptive Business Practices Act, and that the Commission exceeded its regulatory authority in adopting Part 412 regulations. This response addresses only the last argument and is not intended to be exhaustive. Any arguments not addressed herein should not be construed as CUB’s agreement with or acquiescence to arguments made in the Motion. The Motion should be denied for the reasons stated herein, as well as in Staff’s Response.

II. ARGUMENT

A. Part 412 Is Well Within the Commission’s Statutory Authority and Jurisdiction

Sperian argues that the Commission exceeded its regulatory authority in adopting the Part 412 regulations allegedly violated by Sperian. Motion at 8-14. Sperian is wrong and its arguments should be rejected. Agencies have wide latitude to adopt regulations that are reasonably necessary to effectuate their statutory functions. *See City of Chicago v. Illinois Labor Relations Board, Local Panel*, 396 Ill. App. 3d 61, 73 (2009). Part 412 is reasonably necessary to effectuate the Commission’s functions under Section 16-115A, “Obligations of Alternative Electric Suppliers,” which unambiguously encompasses retail electric suppliers (“RES”) “marketing, offering and provision of products or services to residential and small commercial retail customers.” 220 ILCS 5/16-115A.

Sperian bases its entire argument on the failure of Section 16-115A to explicitly grant the Commission rulemaking authority. *See* Motion at 11. The Commission has repeatedly considered and validated its statutory authority to enact Part 412, and no appellate court has ruled

otherwise. First, in the initial rulemaking docket in 09-0592, the Commission concluded that it “maintains general statutory authority over any proceeding ‘intended to lead to the establishment of policies, practices, rules or programs [which can be] ...conducted pursuant to either rulemaking or contested case.’ (emphasis added) We believe Section 10-101 clearly affords the Commission statutory authority over the present rulemaking. In addition, since the Commission is required to respond to JCAR pursuant to Section 5-120 (c), we find we have the authority to resolve the issues in this proceeding.” Docket No. 09-0592, October 3, 2012 Post Prohibition Order. In the ongoing Part 412 rulemaking, in which the Commission is considering revisions to the existing Part 412, the Commission states the following with regard to the Commission’s authority to enact Part 412:

The Commission has the authority to modify Part 412. Part 412 was originally adopted in Docket No. 09-0592 in 2012. In that docket, the Commission also amended Part 453. In that Initiating Order, the Commission cites to Section 16-118 of the Public Utilities Act (“Act” or “PUA”), which states:

It is in the best interest of Illinois energy consumers to promote fair and open competition in the provision of electric power and energy and to prevent anticompetitive practices in the provision of electric power and energy.

220 ILCS 5/16-118(a). When Part 412 was originally promulgated, there was no active energy market in this State. Now, over three years later, Commission Staff notes that the residential retail market is dynamic, with almost 70% of residential customers receiving supply service from a RES, or approximately 3 million customers. Staff states that the Commission’s Consumer Services Division (“CSD”) has seen an increase in customer complaints about RESs, and the majority of the complaints are from customers who do not take RES service pursuant to a municipal aggregation program; therefore, customers who contact CSD to raise a question or concern about a RES were actively marketed by suppliers. According to Staff, its suggested revisions to Part 412 attempt to respond to recurring problems that it has seen. Staff states: “the existing rules have not been entirely effective in ensuring that customers are fully informed regarding their rights and responsibilities in the marketplace, in preventing misunderstanding and mistake, in protecting customers from misrepresentation, abuse and fraud, or in making RESs and their agents,

employees and representatives fully aware of their obligations.” Staff Initial at 2.

The Commission is authorized by Section 10-101 of the Act, which states that it “shall have the power to hold investigations concerning any matters covered by the provisions of this Act...subject to such rules and regulations as the Commission may establish.” Further, “[a]ny proceeding intended to lead to the establishment of policies, practices, rules or programs applicable to more than one utility may, in the Commission’s discretion, be conducted pursuant to...rulemaking...provisions...” 220 ILCS 5/10-101. Finally, Section 8-501 provides that:

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rules, regulations, practices, equipment, appliances, facilities or service of any public utility, or the methods of manufacture, distribution, transmission, storage or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the Commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed and it shall fix the same by its order, decision, rule or regulation. The Commission shall prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility.

220 ILCS 5/8-501. Staff states in its Initial Comments that the phrase “of the character” requires the Commission to regulate non-utilities like RESs to the extent they provide service “of the character” supplied or furnished by utilities. Staff Initial at 3-5. The Commission agrees with Staff that these three provisions establish a basis for the Commission to promulgate Part 412.

Moreover, several provisions in Section 16-117 indicate the General Assembly desired the Commission to establish rules like Part 412 when the retail market opened in Illinois. Specifically, Section 16-117(a) states:

The restructuring of the electricity industry will create a new electricity market with new marketers and sellers offering new goods and services, many of which the average consumer will not be able to readily evaluate. It is the intent of the General Assembly that (i) electricity consumers be provided with sufficient and reliable information so that they are able to compare and make informed selections of products and services provided in

the electricity market; and (ii) mechanisms be provided to enable consumers to protect themselves from marketing practices that are unfair or abusive.

220 ILCS 5/16-117(a). Certainly the most effective way to create “mechanisms” which protect consumers from “marketing practices that are unfair or abusive” is a rulemaking which directs the manner in which a RES should interact with those consumers. It is important to note that the General Assembly recognizes in the statute that the average consumer is unable to readily evaluate this new electricity market.

The Commission has explicit authority over RESs in Sections 16-115, 16-115A, 16-115B and 16-115D of the Act. Specifically:

- 16-115A(e)(i): “Any marketing materials which make statements concerning prices, terms and conditions of service shall contain information that adequately discloses the prices, terms and conditions of the products or services that the alternative retail electric supplier is offering or selling to the customer.”
- 16-115A(e)(ii): “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 of the products and services being offered and sold to the customer.”
- 16-115A(e)(iii): “An alternative retail electric supplier shall provide documentation to the Commission and to customers that substantiates any claims made by the alternative retail electric supplier regarding the technologies and fuel types used to generate the electricity offered or sold to customers.
- 16-115A(e)(iv): “The alternative retail electric supplier shall provide to the customer (1) itemized billing statements that describe the products and services provided to the customer and their prices, and (2) an additional statement, at least annually, that adequately discloses the average monthly prices, and the terms and conditions, of the products and services sold to the customer.”
- 16-115B(a)(ii): The Commission has jurisdiction over complaints “that an alternative retail electric supplier serving retail customers having maximum demands of less than one megawatt has failed to provide service in accordance with the terms of its contract or contracts with such customer or customers.”

Also, Section 16-115(f), RES certification, expressly states that the Commission shall have authority to promulgate rules and regulations to

carry out this Section, which led to Part 451. Notably, the Retail Electric Competition Act of 2006 states:

[T]he Illinois Commerce Commission should promote the development of an effectively competitive retail electricity market that operates efficiently and benefits all Illinois consumers.

220 ILCS 5/20-102(d). Further, the Retail Electric Competition Act established the Commission's ORMD:

The [ORMD] shall monitor existing competitive conditions in Illinois, identify barriers to retail competition for all customer classes, and *actively explore and propose to the Commission and to the General Assembly solutions to overcome identified barriers...* Solutions proposed by the Office to promote retail competition must also promote *safe, reliable, and affordable electric service.*

220 ILCS 5/20-110. As charged in Section XX of the Act, the ORMD drafted and proposed Rules 412 and 453 with the input of stakeholders over a period of three years.

ComEd, CUB and the AG all agree with Staff's position that the Commission has the authority to modify the existing Part 412. *See*, ComEd Reply at 4-5; CUB Reply at 4-5; AG Reply at 2-6. CUB points out that the Appellate Court has upheld Commission-ordered consumer protections for a mass market natural gas small volume transportation program. That Court held that the Commission need not be purely reactive, and never proactive, in the practices, rules and regulations it requires in tariffs, nor do consumers need to be "exploited in sufficient numbers before measures can be taken to protect them." *Ameren Illinois Co. v. Ill. Comm. Comm'n*, 2015 IL App. (4th Dist.) WL 140173 at ¶134 ("Ameren"). RESA admits that the Commission has "substantial authority to regulate "important aspects of the operations of RESs." RESA Initial at 5-6. RESA urges the Commission, to use the enforcement authority it has instead of rewriting Part 412. The Commission points out that since 2014, it has brought three formal complaint proceedings against specific RESs for violations of Part 412. But as Staff notes, there has been widespread issues of abuse.

ICEA challenges the Commission's authority and implies that the proposed rule turns RESs into regulated utilities with none of the financial benefits. The General Assembly cannot have meant that RESs would not be subject to some oversight in terms of marketing, or it would not

specifically have noted in Section 16-117(a) that “mechanisms be provided to protect [customers] from marketing practices that are unfair or abusive.” The Commission disagrees that these Rules, which mandate the disclosures and marketing practices of RESs, in any way regulate price or what products the RES can offer. The Commission interprets Section 16-117 as a directive to ensure customers “be provided with sufficient and reliable information so that they are able to compare and make informed selections of products and services provided in the electricity market” and the best way to accomplish this is through an amendment of Part 412. While ICEA claims that “Article XVI of the Act is full of language directing RES, utilities and other entities to take positive steps,” the Commission finds ICEA’s position unreasonable that the directives of 16-117(a) do not allow the Commission to revise existing rules, especially when confronted by evidence that there are indeed ongoing marketing practices that are unfair and abusive by RESs. Parties can always take “positive steps” but the Commission lacks the very enforcement authority that ICEA urges it to use if those steps are not codified into a Rule.

RESA cautions the Commission against micromanaging RESs’ products, prices and services. The Commission finds that the Proposed Rule strikes the appropriate balance described in Section 16-117 of allowing a robust, competitive marketplace while also ensuring that customers receive adequate protections against fraud and abuse. The Commission need only look at the rapidly increasing number of Illinois’ citizens enrolling in alternative supply to see that the first prong of this goal has been met. It is up to the Commission to ensure the second is also achieved.

Docket No. 15-0512, Proposed Order at 2-6. Thus, the Commission has already thoroughly considered, and rejected, challenges to its authority to enact Part 412 regulations of RES marketing activity.

Once in place, administrative regulations have the force and effect of law. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill.2d 351, 368 (2009). Like statutes, they are presumed valid, and the party challenging them has the burden of showing that they are invalid. *People v. Molnar*, 222 Ill.2d 495, 508 (2006). An agency has the inherent authority and is given wide latitude and discretion to adopt regulations that are reasonably necessary to perform its statutory duties.

Resource Technology Corp. v. Commonwealth Edison Co., 343 Ill.App.3d 36, 44 (2003). Agency authority extends to that conferred by “fair implication and intendment ... for the purpose of carrying out and accomplishing the objective for which agencies were created.” *Briggs v. State*, 323 Ill.App.3d 612, 617 (2001). An administrative rule is valid if it follows the statute. *Illinois RSA No. 3, Inc.*, 348 Ill.App.3d at 77. If it can be reasonably done, a court has a duty to affirm the validity of administrative regulations. *Miniffee v. Doherty*, 333 Ill.App.3d 1086, 1088 (2002).

The scope of Section 16-115A plainly includes ARES marketing activities. The cardinal rule of statutory construction, to which all other canons and rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature. *People ex rel. Hanrahan v. White*, 52 Ill.2d 70, 73 (1972). “In determining the legislative intent, courts should consider first the statutory language.” *People v. Boykin*, 94 Ill.2d 138, 141 (1983). Unambiguous terms, when not specifically defined, must be given their plain and ordinary meaning. *Hayes v. Mercy Hospital & Medical Center*, 136 Ill.2d 450, 455 (1990). Moreover, “the courts also will avoid a construction of a statute which would render any portion of it meaningless or void.” *Harris v. Manor Healthcare Corp.*, 111 Ill.2d 350, 362-63 (1986); *People v. Tarlton*, 91 Ill.2d 1, 5 (1982); *People v. Lutz*, 73 Ill.2d 204, 212 (1978). The courts presume that the General Assembly, in passing legislation, did not intend absurdity, inconvenience, or injustice. *Harris*, 111 Ill.2d at 363. *Gerard Hernon v. E.W. Corrigan Construction Co.*, 149 Ill. 2d 190, 194-5, 595 N.E.2d 561, 562-3 (1992).

Sperian contradicts itself by at once claiming “the scope of section 16-115 does not include ARES marketing activities,” (Motion at 10), but then noting that Section 15-115A includes requirements “with respect to the marketing, offering and provision of products or

services to residential and small commercial retail customers” with which an ARES must comply. *See* Motion at 10-11; 220 ILCS 5/16-116A(e). Sperian’s claim that Section 16-115A does not include marketing activities cannot be squared with the language in that section, which, when given its plain and ordinary meaning, clearly encompasses ARES marketing activities.

Section 16-115A demonstrates the legislature’s intent to give the Commission authority to ensure consumer protections with respect to ARES. Wide latitude must be given to administrative agencies in fulfilling their duties. *See James v. Cook County Dept of Public Aid*, 126 Ill. App. 2d 75, 80 (1970). Though the legislature did not detail every consumer protection the Commission may enforce, Part 412 is a valid exercise of the Commission’s discretion to accomplish in detail what is legislatively authorized in general terms. *See Lake County Board of Review v. Property Tax Appeal Board*, 119 Ill. 2d 419, 428 (1988).

III. CONCLUSION

WHEREFORE, CUB respectfully requests that the Commission deny the Motion to Dismiss and proceed with setting a schedule for testimony in this proceeding.

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Citizens Utility Board



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