

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Constellation NewEnergy, Inc.	:	
	:	
Petition for Emergency Relief to Protect	:	
Portions of NewEnergy's 2008 Annual	:	09-0126
Kilowatt-hour Report and 2008 Call Center	:	
Report from disclosure for not less than five	:	
years in order to protect highly confidential	:	
and proprietary information.	:	

**CONSTELLATION NEWENERGY, INC.'S
BRIEF ON EXCEPTIONS**

Although not specifically discussed, the Administrative Law Judge's Proposed Order ("PO") implicitly acknowledges that the retail electric service industry is highly competitive, particularly so in the commercial and industrial segments in which CNE operates. Constellation NewEnergy, Inc. ("CNE") applauds the Administrative Law Judge for recognizing the competitively sensitive nature of CNE's kilowatt hour report. PO, pp. 2-3. In light of that sensitivity, and in order to preserve an even playing field for all competitors, CNE files this Brief on Exceptions with respect to the time frame for which CNE's kilowatt hour report should be afforded protection. In addition, CNE requests that the Commission provide clarification regarding the annual call center report and that public release of such reports not be made until such clarifications are made and CNE has the opportunity to tailor its call center report accordingly.

I. CNE's Kilowatt Hour Report Should Be Protected For A Period Of Not Less Than Five Years

The PO, in justifying a period of confidentiality for a mere two years rather than the five years requested by CNE, indicates that in the recent Orders in Docket Nos. 09-0117 and 09-0130,

the Commission granted confidential treatment to the Annual kWh Report of two ARES for a period of two years. PO, p. 5. The PO acknowledges that the Commission did not itself determine that two years was the appropriate length of protection but, rather, the ARES in those dockets reduced their request from five years to two years on their own accord. *Id.* The PO nevertheless suggests that a two-year period is appropriate for CNE's Annual kWh Report since the reports do not appear distinguishable. *Id.*

However, the PO does not address Docket No. 09-0065, in which the Commission afforded confidential treatment for a period of five years to the annual kilowatt report of another competitor. Indeed, that ARES was not required to provide any justification for its confidentiality request beyond the prayer included in its petition, and the kilowatt hour report was afforded confidential protection for the maximum period of time permitted under the rules, without objection or discussion from the bench. To provide one competitor protection for five years, and other competitors protection of the same type of information for only two years though requesting protection for a period of five year, sets a double standard and places certain entities at an objective competitive disadvantage. That competitive disadvantage is exacerbated when a new market entrant is granted protection for a longer period of time than competitors that have been active in the Illinois market for a number of years.

II. CNE's Call Center Report Warrants Protection

CNE's Call Center Report contains trade information and market sensitive information regarding CNE's provision of service to non-residential customers in Illinois. CNE considers this information to be highly proprietary and confidential information, the disclosure of which to competitors, or potential competitors, would be detrimental to CNE. CNE does not provide that

information to any individual outside of its employ, and permits access to that information by its employees only as necessary for job function.

Furthermore, release of information regarding an ARES' customer call center operations has the potential for misunderstanding, mischaracterization and/or misuse in a variety of ways. If the call center report is released, a prospective customer may believe (or be lead to believe by a competing ARES) that the number of reported calls is reflective of the number of customers that are unsatisfied with service. However, a call center receives calls from its customers for a variety of reasons, which may have nothing to do with service quality. Additionally, a call center is not restricted to current customers; anyone may call, for any reason. Just as the number of callers may be inappropriately construed as complaints, the particular use of the phrase "abandoned" calls could cause one to believe that an ARES has disconnected a given number of callers. In fact, a caller could voluntarily terminate a call for a variety of reasons, such as if the caller discovered the answer to a question about which it was calling, received a call on another line, etc.

In addition to the potential for misunderstanding or mischaracterization, there is a risk for manipulation of the data. For example, a nefarious individual or entity could repeatedly call a particular call center(s), thereby increasing the reportable number of calls as well as the number of calls in queue and therefore the average answer time. If hanging up, the number of "abandoned" calls would also increase. Public release of the call center report creates the opportunity for confusion, improper and misleading marketing practices, or outright abuse.

In denying CNE's request for confidentiality of its call center report, the PO failed to address certain of CNE's stated concerns relating to the Call Center reporting requirement. The PO indicates that the Commission has not been convinced by Petitioner's arguments, indicating,

Petitioner's fear that consumers may misinterpret call center data does not justify prohibiting public access to information that consumers may find useful in

selecting an energy supplier. Petitioner bears some responsibility for educating consumers. Nor is the fear that a competitor will use the information to mislead consumers sufficient reason to deny consumers such potentially useful information. Furthermore, the notion that some nefarious individual or entity may repeatedly call Petitioner in order to increase numbers in the Annual Call Center Report is speculative, and even if such occurs does not clearly lead to the conclusion that competitive harm may occur.

PO at p. 3. Yet the PO does not dispute that customers may, in fact, be confused, or the information mischaracterized or subject to abuse. Although the PO appears to believe that competitive harm is speculative, it is important to note that Section 7(g) of the Illinois FOIA exempts from public disclosure “trade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged or confidential, or where disclosure of the trade secrets or information **may** cause competitive harm...” 5 ILCS 140/7(g) (emphasis added). Further, the PO acknowledges that the call center report contains “potentially useful information” that “consumers may find useful in selecting an energy supplier”, which is itself is an acknowledgement of potential competitive harm. PO at p. 3.

Moreover, the PO’s statement that “Petitioner bears some responsibility for educating consumers” (*Id.*) goes to the heart of CNE’s concern regarding the Commission’s departure from its long-established treatment of these annual ARES reports, which the PO does not address.

III. Any Departure From Longstanding Commission Practice Should Not Be Applied Retroactively and Without Additional Clarity

Protection of annual ARES kWh reports and call center reports for a period of five (5) years is consistent with longstanding past Commission practice in virtually all such matters since the advent of retail competition. *See, e.g.*, Order, ICC Docket Nos. 08-0163, 07-0148, 06-0170, 05-0118, 04-0173. Although recognizing that Commission orders are not precedential, given that

neither the relevant laws nor rules have changed, CNE had every reason to expect that the Commission would continue to adhere to its long-established practice of protecting ARES' kilowatt hour and call center reports. That is particularly the case when there has not been a demonstration of a public benefit in the release of such information; indeed, CNE is unaware of any request for such information.

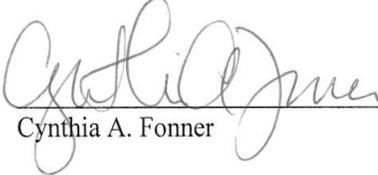
If it is the Commission's intent to depart from its long-established treatment of these annual ARES reports, CNE suggests that this should not be done retroactively and without notice. Further, much greater clarity should be provided to all ARES in advance of such a departure from long-established treatment. For example, the terms contained in those reports should be defined, and the purposes of and limitations on the intended use of those reports should be clear. Section 410.45 of the Illinois Administrative Code (83 Ill. Admin. Code 410.45) does not currently prescribe the format of the annual call center reports. With advanced knowledge of the public release of the call center report and the absence of additional clarity surrounding the rule, CNE would have provided its annual report using different language than that which it actually provided to the Commission. However, an abandonment of the historical practice of confidential treatment after CNE has already submitted its annual report leaves CNE without an adequate remedy.

WHEREFORE, Constellation NewEnergy, Inc. respectfully requests that the Commission revise the PO and enter an Order, without hearing, protecting from disclosure for a period of not less than five years the relevant portions of CNE's Kilowatt-Hour Report, and prescribe greater clarity regarding the annual Call Center Report, both of which were filed with the Chief Clerk of the Commission pursuant to Part 451 on or about March 1, 2009.

Respectfully submitted,

CONSTELLATION NEWENERGY, INC.

By:


Cynthia A. Fonner

One of Its Attorneys

Cynthia A. Fonner
Senior Counsel
Constellation Energy Resources, LLC
550 W. Washington Street, Suite 300
Chicago, IL 60661
Phone: (312) 704-8418
Fax: (312) 795-9286
cynthia.a.fonner@constellation.com

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing documents was served this 3rd day of April, 2009 by electronic mail upon the persons on the below service list.

A handwritten signature in black ink that reads "Cynthia A. Fonner". The signature is written in a cursive style with a long horizontal stroke at the end.

Cynthia A. Fonner

John D. Albers
Administrative Law Judge
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701
E-Mail: jalbers@icc.illinois.gov