

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

In Re: Just Energy Illinois Corp.)	
)	Docket No. 10-0428
Petition for Confidentiality)	

**PUBLIC
STAFF RESPONSE TO JUST ENERGY'S
VERIFIED PETITION FOR CONFIDENTIAL TREATMENT**

NOW COMES Staff ("Staff") of the Illinois Commerce Commission ("Commission"), by and through its attorneys, and pursuant to Part 200.190 of the Commission's Rules of Practice (83 Ill. Admin. Code 200.190), submits this Response Just Energy's ("Just Energy" or "Company") Verified Petition for Confidential Treatment ("Petition") filed on July 1, 2010.

In its Petition, the Company requests that the Commission enter a protective order prohibiting the disclosure of a document entitled Just Energy Complaint Report Summary: May Reporting Period ("Complaint Report Summary"), attached as Exhibit A to the Company's Petition. (Petition, p. 1)

Staff disagrees with the Company's request to deem the Complaint Report Summary as confidential and proprietary. While Staff recognizes that this Report was a "voluntary submission" (*Id.*) and not required by the Commission's Order in Docket No. 08-0175, Staff believes that the Report should be made public with confidential information to be redacted, and the law supports this.

Staff agrees with Just Energy that the Commission has the authority to protect information which is confidential, proprietary, and of trade secret nature. 83 Ill. Adm. Code 200.430 authorizes the Commission to enter an order to "protect the confidential,

proprietary or trade secret nature of any data, information or studies.” The Illinois Public Utilities Act (“PUA”) (220 ILCS 5/4-404) also authorizes the Commission to protect “confidential and proprietary information furnished, delivered or filed by any person, corporation or other entity.” Also correctly stated, 83 Ill. Adm. Code 551.60 authorizes the Commission to enter an order to “protect the confidential, proprietary or trade secret nature of any data, information or studies pursuant to 83. Ill. Adm. Code 200.430.” The Company is also correct that the Illinois Freedom of Information Act (“FOIA”) provides an exemption from public disclosure related to trade secrets or commercial information that causes competitive harm:

Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or commercial or financial information are furnished under a claim that they are proprietary, privileged or confidential, and that disclosure of the trade secrets or commercial or financial information would cause competitive harm to the person or business, ***and only insofar as the claim directly applies to the records requested.*** (5 ILCS 140/7(g)) (emphasis added)

However, when the Illinois General Assembly amended FOIA in 2009, effective January 1, 2010, its intent was to increase and ensure public disclosure of all public records of state agencies. The addition of the following language in FOIA clearly contemplates the General Assembly’s motivation behind public access:

The General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act. (5 ILCS 140/1)

In addition, this amendment’s legislative history also recognizes a clear intent of public disclosure as indicated by several members of the House of Representatives:

With Senate Bill 189, we amend the Freedom of Information Act to facilitate access to information at all levels of government... The Bill provides a presumption of disclosure... the government must prove an exemption from FOIA by clear and convincing evidence... The current law is only permissive... I think Illinois has been a slacker in the Freedom of Information Act... I think it's time for all of us to make sure this becomes the law of the State of Illinois. It's got a number of provisions that are important to tighten up FOIA, to make sure that documents and information is available to our citizens, to the press and in our effort to clean up Illinois... (96th General Assembly, Transcription Debate, 62nd Legislative Day, May 27, 2009)

Therefore, in order to rely upon this exception, the Company must demonstrate competitive harm in its claim for confidential treatment of information it seeks to be exempt from disclosure to the public. Disclosure of public records is the goal under FOIA. The permitted exemption is limited: the disclosure of the particular records requested under FOIA must cause the Company competitive harm. This exemption based upon "competitive harm" is not a broad catch-all to keep private all information that may be exclusive to the Company. Even the Administrative Law Judge ("ALJ") recognized this in his Ruling of January 6, 2009¹ to the Company's Motion for Confidentiality filed November 14, 2008 ("Ruling") in Docket No. 08-0175:

This Ruling does not and cannot determine whether documents deemed confidential for purposes of controlling the parties' conduct during this proceeding will ultimately be protected from disclosure in the event of a request under the Illinois Freedom of Information Act. (Ruling, p. 2)

The ALJ clearly distinguished the difference between confidentiality in a docketed proceeding pursuant to a protective order and confidentiality to be afforded to a FOIA request.

Nevertheless, what the Company fails to recognize is that the Commission is not required to deem information confidential just because the Company says it is or marks

¹ In its Petition, the Company references the wrong date of the Ruling as January 6, 2010.

it so. Instead, it is the Company's burden to demonstrate that the information is, in fact, confidential, proprietary or of trade secret nature. 83 Ill. Adm. Code 551.60 requires that the party "explain why that information is entitled to that protection in a supporting document..." Staff finds it interesting that Just Energy should cite *Cooper v. Dept. of the Lottery* to support its argument that disclosure of confidential information would "inflict competitive harm" (Petition, p. 3). The Appellate Court in *Cooper* actually reversed the trial court's decision and held that the Illinois Department of the Lottery had not met its burden of showing that the information sought by the plaintiff was protected from disclosure under a FOIA exemption. 266 Ill.App.3d 1007, 1025 (1st Dist. 1994).

In fact, *Cooper* lays out a test to demonstrate substantial competitive harm: "(1) the person or entity from which information was obtained actually faces competition; and (2) substantial harm to a competitive position would likely result from disclosure of the information..." 266 Ill.App.3d at 1013, citing *Calhoun v. Lyng*, 864 F.2d 34 (5th Cir. 1988). Confidential information which, if disclosed, would cause competitive harm includes: appraisal documents prepared by low-income housing developers (see *Calhoun v. Lyng*, 864 F.2d 34 (5th Cir. 1988)); financial records affecting contract renewal competition (see *National Parks & Conservation Asso. v. Kleppe*, 547 F.2d 673, 683 (D.C. Cir. 1976)); contract bids supplied to the U.S. Army (see *Gulf & W. Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979)); intrastate sales information of interstate natural gas companies (see *Continental Oil Co. v. Federal Power Com.*, 519 F.2d 31, 35 (5th Cir. 1975)); and annual financial statements of national park concessioners (see *National Parks & Conservation Asso. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).

Just Energy, starting at Paragraph 11 of its Petition, claims that the disclosure of the information in the Complaint Report Summary would cause competitive harm because it contains confidential and proprietary information. It cites the ALJ's Ruling as support of this Report needing confidential treatment as well; the ALJ's Ruling deemed confidential certain compliance and customer service training procedures and materials provided through discovery. (Ruling, p. 3) Nevertheless, the ALJ's Ruling specifically stated that:

[T]his Ruling does not adopt [the Company's] suggestion that 'competitive harm' includes disclosure that facilitates a competitor's entry into the retail gas market or enhances a competitor's operations after entry. The Public Utilities Act evinces a clear policy preference for competitive retail supply. Indeed, the legislature authorized competitive retail supply by entities such as [the Company] for that very purpose. **Accordingly, the purpose of confidentiality during Commission litigation is not to preclude competitors from studying practices designed to yield customer benefit. Rather, it is to avoid creating competitive disadvantage for litigants.** (*Id.*, p. 2) (emphasis added)

Staff does recognize the competitive nature of the market in which Just Energy operates. Just Energy is one of 12 alternative gas suppliers in Illinois, serving residential and small commercial customers. However, Just Energy is the only alternative gas supplier in Illinois which sells its products and services door-to-door; in fact, its business model in Illinois relies heavily on door-to-door sales, and nearly all of Just Energy's sales in Illinois are from door-to-door marketing. Moreover, Just Energy finds itself in a situation unlike any other alternative gas supplier in Illinois: it has been found to be in violation of the Alternative Gas Supplier Law ("AGSL") and is bound by a Commission Order which has mandated certain behavior and corrective measures on the part of the Company (see generally Order, Docket No. 08-0175, April 13, 2010). One such corrective measure is that Just Energy must "provide the Commission's CSD

p. 48). The Commission directly stated that it could not affirm the Company's assertions and thus, required Commission oversight of complaints lodged against the Company and ordered that CSD be notified of all complaints (see *Id.*). On the other hand, the information afforded confidential treatment by the ALJ in Docket No. 08-0175 consisted of specific company procedures, programs, and methods (including scripts) regarding customer service. Here, the Complaint Report Summary provides a ****[Begin Confidential]** **[End Confidential]**** and how the Company is planning to further comply with the Commission's Order.

In applying the substantial harm test, Staff believes that while Just Energy does face competition, the public disclosure of the information in the Complaint Report Summary will not cause substantial competitive harm to Just Energy. Staff simply does not believe that disclosure of the information in this Report would provide the Company's competitors "an advantage over Just Energy and be detrimental to Just Energy's ability to compete on an even playing field" (see Petition, p. 4). If there are specific details in this Report that can be demonstrated to deserve confidential treatment, Staff believes that these details can be redacted accordingly. However, Staff does not believe that the entire Complaint Report Summary should be deemed confidential as the Company would prefer.

The Commission was given the specific authority to grant Just Energy its certification as an alternative gas supplier. The Commission also has an ongoing obligation and responsibility to Illinois consumers to make sure that alternative gas suppliers are complying with their obligations under the PUA. In ordering the corrective

measures of Just Energy to evaluate its business practices and to recommend effective solutions, the Commission has a duty to the public to ensure that it has reacted justly and appropriately to the violations of the AGSL committed by the Company. It also has a duty to report back to the public that it has taken the appropriate measures to ensure that the Company will no longer violate the AGSL. This duty further requires that the Commission ensure that Just Energy is complying with its Order and its corrective measures. Confidential treatment of this information would hinder the Commission's ability to fulfill these duties.

WHEREFORE, Staff respectfully requests that the Commission consider this Response and deny Just Energy's Petition for Confidential Treatment.

July 14, 2010

Respectfully submitted,

/s/ _____

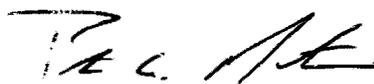
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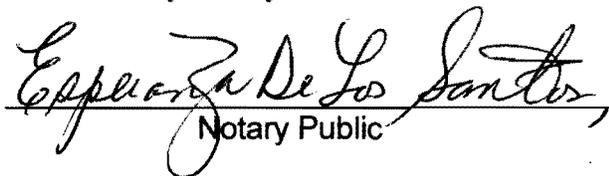
VERIFICATION

I, Peter Muntaner, being first duly sworn, depose and state that I am the Director of the Consumer Services Division of the Illinois Commerce Commission; that I sponsor the foregoing Staff Response to Just Energy's Verified Petition for Confidential Treatment; that I have personal knowledge of the information stated in the foregoing Response; and that such information is true and correct to the best of my knowledge, information and belief.



Illinois Commerce Commission

Subscribed and sworn to before me
this 14th day of July 2010.



Notary Public

