

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Constellation NewEnergy, Inc.	:	
	:	
Petition for Emergency Relief to Protect	:	
Portions of NewEnergy's 2009 Annual	:	10-0155
Kilowatt-hour Report from disclosure for	:	
not less than two years in order to protect	:	
highly confidential and proprietary	:	
information.	:	

ORDER

By the Commission:

In this proceeding, Constellation NewEnergy, Inc. ("Petitioner") filed, with the Illinois Commerce Commission ("Commission"), a verified petition seeking an order protecting from disclosure, for a period of not less than two years, certain information contained in its Annual kWh Report for 2009.

As an Alternative Retail Electric Supplier ("ARES"), Petitioner is required to file this report pursuant to Section 451.770 of 83 Ill. Adm. Code 451, "Certification of Alternative Retail Electric Suppliers" ("Part 451"). The report identifies the total kilowatt-hours ("kWh") delivered and sold to retail customers during the preceding year within each incumbent electric utility company's service area. Petitioner provided a redacted public version and an unredacted confidential version of the report.

The Commission Staff did not participate in this docket. No petitions for leave to intervene were received. No hearings were held in this matter.

Section 451.60 of Part 451 provides, in part, "If an applicant or ARES believes any of the information to be disclosed by an applicant or ARES is privileged or confidential, the applicant or ARES should request that the Commission 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."

Section 7(g) of the Freedom of Information Act ("FOIA"), 5 ILCS 140/1 et seq., exempts, from public disclosure:

Trade Secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where such disclosure of such trade secrets or information may cause competitive harm.

Petitioner considers the redacted information contained in its 2009 Annual kWh Report market to be sensitive and believes the public disclosure of such would be detrimental to it. Generally, Petitioner is concerned that public disclosure of the information it holds may harm it in the retail and/or wholesale markets. Petitioner believes this information should be afforded confidential treatment under Section 7(g) of the FOIA, as was done in prior Commission dockets.

Petitioner further asserts that the report contains trade information and market-sensitive information regarding its provision of service to non-residential customers in Illinois. Petitioner does not provide this information to any individual outside of its employ, and permits access to the information by its employees only as necessary for job function. Petitioner asserts that the data contained in the Annual kWh Report is among the most competitively sensitive information to an ARES because it identifies the volume of load served during the past year and the information is broken-down by each utility service territory.

According to Petitioner, information pertaining to its market share would provide competitors with direct insight into its operations. Petitioner fears that competitors could discern where it is active; identify to what extent it has penetrated the area market; determine its business plan; learn from Petitioner's mistakes to more effectively compete against it; and improperly characterize Petitioner's data and use it for marketing purposes. Petitioner also states that release of such information could erode the bargaining position of an ARES since a counter-party for wholesale supply would know the amount of energy such individual ARES would need to serve its load.

Petitioner also asserts that treating an Annual kWh Report as confidential and proprietary is consistent with case law protecting market share data. In Sharkey v. Food & Drug Administration et al., 2007 U.S. App. LEXIS 23597 (11th Cir. 2007), Petitioner says the court found that release of the market share and sales volumes of manufacturers of the hepatitis vaccine distributed in the United States was confidential commercial information falling within Exemption 4 of the federal Freedom of Information Act. Petitioner adds that this was true even though there were, at the time, only two competitors, who obviously already knew each other's respective market share. As explained by the court, competitive harm could nevertheless result if an international competitor or third party considering entry into the market learned the market share of the two existing domestic suppliers. The Commission observes that Rule 32.1 of the Federal Rules of Appellate Procedure govern the citation of unpublished opinions.

Commission Conclusions, Findings and Order Paragraphs

The Commission has considered Petitioner's explanation of its concerns about the harm that public disclosure of the redacted information in its Annual kWh Report could potentially bring. Having reviewed the petition, the Commission finds that the redacted portions of Petitioner's 2009 Annual kWh Report fall within the exemption in Section 7(g) of the FOIA; this information will be afforded proprietary treatment and will

be exempt from public disclosure and accessible only by the Commission and the Commission Staff, until March 1, 2012.

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

- (1) Petitioner is an ARES, as defined in the Public Utilities Act ("Act"), 220 ILCS 5/1-101 et seq;
- (2) the Commission has jurisdiction over Petitioner and the subject matter herein;
- (3) the recitals of fact set forth in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;
- (4) the information redacted from Petitioner's filing made to comply with Section 451.770 of Part 451 should be exempt from public disclosure under Section 7(g) of the Freedom of Information Act until March 1, 2012.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the information specified in Finding (4) above is afforded proprietary treatment and is exempt from public disclosure and will be accessible only by the Commission and the Commission Staff until March 1, 2012.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By order of the Commission this 9th day of September, 2010.

(SIGNED) MANUEL FLORES

Acting Chairman