

**STATE OF ILLINOIS
BEFORE THE ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	:
On its Own Motion	:
	: ICC Docket No. 10-0398
Audit of Just Energy Illinois Corp	:
d/b/a Just Energy d/b/a	:
U.S. Energy Savings Corp.	:

**JUST ENERGY ILLINOIS CORP.’S VERIFIED MOTION TO MAINTAIN
CONFIDENTIAL TREATMENT OF CONFIDENTIAL
PORTIONS OF THE JANUARY 4, 2012 AUDIT REPORT**

Just Energy Illinois Corp. (“Just Energy”), by its counsel DLA Piper LLP (US), pursuant to 220 ILCS 5/4-404 and 220 ILCS 5/5-108, Sections 200.190 and 200.430(a) of the Rules of Practice of the Illinois Commerce Commission (“Commission”), and paragraph 6 of the Order Regarding Protection of Confidential Information (the “Protective Order”) entered by the Administrative Law Judge on February 22, 2012 in this docket, respectfully submits the instant Verified Motion to Maintain Confidential Treatment of Confidential Portions of the “Compliance Audit and Management Assessment of the Business and Sales Practices of Just Energy” (the “Audit Report”) submitted by NorthStar Consulting Group (“NorthStar”) to the Commission on January 3, 2012.¹ In further support of this Motion, Just Energy states as follows:

I. INTRODUCTION AND BACKGROUND

On April 7, 2012, in accordance with the ruling of the Administrative Law Judge, Just Energy supplied to Counsel for CUB a confidential version of the Audit Report.. On May 1, 2012, CUB submitted a letter notifying Just Energy that it objected to certain designations of confidential information in the Audit Report. The Protective Order requires that, upon a party

¹ Although the Audit Report was submitted on January 3, 2012, it is dated January 4, 2012.

objecting to a confidential designation, Just Energy may file a motion requesting that the Commission maintain the confidential treatment of the information. Just Energy is doing so with the instant Motion.

The NorthStar Audit was conducted in 2011. The stated purpose of the audit was to “substantially reduce customer complaints and violations of the AGSL” and the audit was to “identify impediments to that objective and recommend effective solutions.” (June 23, 2010 Order Initiating Audit.) Just Energy expended substantial resources working with NorthStar in good faith to answer thousands of questions, provide complete information, coordinate review of substantial materials, and otherwise cooperate in the activities required for NorthStar to conduct its wide-ranging audit activities. In the course of responding to NorthStar’s requests, Just Energy produced substantial material that was designated as confidential, pursuant to a Confidentiality Agreement between NorthStar and Just Energy. NorthStar ultimately finalized the Audit Report at the beginning of 2012 and filed that report with the Commission on January 3, 2012.

In December 2012, prior to finalizing the Audit Report, NorthStar provided Just Energy with a draft version of the Audit Report and requested that Just Energy identify confidential information contained in that report. Just Energy complied with that request. Thereafter, as a result of discussions with Staff and NorthStar regarding confidentiality issues, Just Energy made some modifications to its confidential designations. Subsequently, on January 3, 2012, NorthStar filed the Audit Report in both a confidential form and a public, redacted form, which included the redaction of the information that Just Energy had designated as confidential as a result of the process that occurred in December 2011.

CUB’s May 1, 2012 letter challenges portions of the Audit Report that contain statements, descriptions, numbers, statistics, charts, and related items that plainly contain trade

secrets and similar confidential information and that are competitively sensitive and proprietary to Just Energy, falling squarely within the categories of information to which the Commission and Illinois Courts regularly afford confidential treatment.

The public dissemination of that information would serve no legitimate purpose – and CUB’s May 1, 2012 letter makes no attempt to articulate any such purpose. Dissemination of that information would undermine corporate policies and actions of Just Energy designed to preserve the confidentiality of the information, and would provide competitively sensitive information to competitors of Just Energy in the marketplace in Illinois, as well as affiliates of Just Energy in other states. Not only would release of the information harm Just Energy, it likely would have a chilling effect on other companies that may be subject to Commission audits in the future.

Importantly, Just Energy did not control the content of the information that the Auditor chose to include in the draft Audit Report. Respectfully, although Just Energy understands the purpose of the Audit Report and has agreed to implement the Audit Report’s recommendations, much of the information included in the Audit Report ranges from marginally tangential to wholly irrelevant to the defined purpose of the Audit under the Commission’s Orders in this proceeding. Further, the Audit Report was written in a manner that includes significant repetition of information, sometimes in identical presentation in multiple places and sometimes with slight variation in multiple places -- a presentation style that was not necessarily appropriate or the most efficient form of communicating the Auditor’s analysis. The fact that the Audit Report includes any particular piece of confidential information multiple times does not make that information any less confidential. Accordingly, where confidential information appeared repeatedly, Just Energy made a good faith effort to identify and redact it in each instance.

The redactions contained in the Audit Report cover information that is quintessential trade secret, proprietary information that is competitively sensitive and fits well within the scope of information to which the Commission regularly affords confidential treatment. Just Energy carefully reviewed the draft Audit Report at the Auditor's Request, and made confidential designations that sought to strike a balance between fair public dissemination of non-confidential information in the context of a Commission-ordered Audit and the need to protect hard-earned trade secrets and other confidential information, the dissemination of which would potentially harm the company in the competitive marketplace.

In further consideration of the issues raised by CUB's challenge, Just Energy has again examined the confidential designations made in the Audit Report. In a good faith effort to reach further resolution of contested issues and upon further consideration of the issues, Just Energy is willing to withdraw certain confidential designations from the Audit Report. Just Energy's position on those items is reflected in the Chart attached hereto and incorporated herein as Attachment A.² The Chart contains verbatim quotes from a chart that was contained within CUB's May 1, 2012 letter. The Chart then contains a column identifying by category or categories the rationale for Just Energy's confidential designations (which categories are

² Consistent with the process set forth in paragraph 6 of the Protective Order, Just Energy, through counsel, attempted to engage CUB in a dialogue to try to negotiate a satisfactory resolution of the issues. That attempt was unsuccessful, notwithstanding the fact that Just Energy is willing to withdraw certain confidential designations. Accordingly, Just Energy is proceeding with this Motion.

explained more fully herein) and additional summary explanation of the basis for the designation and the invalidity of CUB's particular challenge.³

It should be noted that CUB's stated "reasons" for many of its challenges are provided in a highly summarized form and often rely on statements such as "readily observable in the market" or reference certain documents from ICC Docket No. 08-0175. These challenges tend to be misleading. First, it is not clear what CUB means by "readily observable in the market" – if CUB is suggesting that the confidentially designated information is "readily observable" to other market participants, Just Energy challenges that notion, which is not verified or explained by CUB.

Similarly, the notion that a reference to an item in ICC Docket No. 08-0175 or a finding of non-confidentiality of some item in ICC Docket No. 08-0175 means certain information included in the Audit Report is not confidential lacks credibility. Information elicited in Docket No. 08-0175, which has been concluded for nearly two years, ignores the fact that Just Energy has modified many of its processes, strategies, and policies in the intervening period, *precisely* consistent with the theory of making Just Energy undergo an Audit. New confidential information about the company revealed in the Audit Report is no less confidential because it is related to a piece of information in the evidentiary record that was closed in ICC Docket No. 08-0175 two years ago.

Likewise, many of CUB's challenges fail to account for the context in which information is presented in the Audit Report. The Audit Report contains detailed descriptions of business

³ Given the number of challenges made by CUB and the summary manner of CUB's presentation of those challenges, the information in the Chart attached hereto as Attachment A is necessarily not a comprehensive rebuttal of each challenge, but rather is intended to provide a sense of why each item is confidential. To the extent the Commission has specific questions about any particular item designated as confidential, Just Energy would be pleased to answer such questions and provide additional information and argument as necessary.

processes, strategies, and policies. Cherry picking particular pieces of information from those descriptions and claiming that such a piece of information was discussed in a historic docket or making a bare assertion that the information may be “observable” does not diminish the confidential nature of that information, as it appears in the context of the discussion of particular business practices or recommendations for modified practices in the lengthy and detailed Audit Report.

It is in this context that Just Energy has once again reviewed the confidential designations in the Audit Report. As indicated on the Chart provided as Attachment A, with the exceptions noted, public disclosure of the information challenged by CUB would provide competitors of Just Energy and other parties both inside and outside of Illinois, with non-public market intelligence about Just Energy and its corporate and business strategies, and would threaten Just Energy with competitive harm, and therefore should not be permitted under Illinois law.

II. ARGUMENT

A. Statutory Law, Regulations, And Recent Case Law Support Confidential Treatment Of The Information Designated By Just Energy

The Public Utilities Act (“Act”) contains a mandatory requirement that the Commission protect confidential and proprietary information submitted to it:

Protection of confidential and proprietary information. The Commission **shall** provide adequate protection for confidential and proprietary information furnished, delivered or filed by any person, corporation or other entity.

(220 ILCS 5/4-404.) (Emphasis added.)

The Act also contains very strict language regarding disclosure of information designated as confidential:

Any officer or employee of the Commission who divulges any fact or information coming to his knowledge during the course of an inspection, examination or investigation of any account, record,

memorandum, book or paper of a public utility, except in so far as he may be authorized by the Commission or by a circuit court, shall be guilty of a Class A misdemeanor.

(220 ILCS 5/5-108.) This requirement is also specifically incorporated into the “Statutory Exemptions” non-disclosure provisions of the Illinois Freedom of Information Act (“FOIA”).
(See 5 ILCS 140/7.5(s).)

In addition to the Act, the Commission’s Rules of Practice similarly provide for protection of “confidential, proprietary or trade secret nature of any data, information or studies.” (83 Ill. Admin. Code 200.430(a).) The protection afforded to such confidential, proprietary, or trade secret nature of any data, information or studies is not limited to any specific time period and “**may exceed** five years upon a showing of good cause.” (83 Ill. Admin. Code 200.430(b).) (Emphasis added.)

The Illinois FOIA affords similar protection for confidential or proprietary information. Section 7(1)(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 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(1)(g).)

Section 7(1)(q) of FOIA also exempts from public disclosure:

Test questions, scoring keys, and other examination data used to determine the qualifications of an applicant for a license or employment.

(5 ILCS 140/7(1)(q).)

Recent authoritative case law from the Illinois Appellate Court specifically dealing with information submitted to the Commission mandates a broad application of the protection of confidential or proprietary information. In *BlueStar Energy Services, Inc. v. Illinois Commerce Commission*, decided in 2007, the Appellate Court stated:

The Illinois legislature intended that the term trade secret would be **construed broadly**. The bill's authors included the trade secret exemption because they did not wish to discourage private parties from doing business with the State.

(*BlueStar*, 374 Ill. App. 3d 990, 995 (1st Dist. 2007) (emphasis added) (quoting *Roulette v. Dep't of Central Management Services*, 141 Ill. App. 3d 394, 399 (1st Dist. 1986).). The *BlueStar* Court affirmed the Commission's position in favor of confidential treatment even though the Court found that the document in question "does not contain trade secrets in the conventional sense" (374 Ill. App 3d at 995.) In short, Illinois Courts clearly have recognized the need for meaningful, robust protection of confidential information submitted to the Commission and other agencies.

B. Just Energy Took Affirmative Steps To Protect Its Confidential And Competitively Sensitive Information

During the course of the audit, Just Energy was very careful about disclosing information to the Auditor in a manner that emphasized the confidential nature of that information. The sensitivity of Just Energy to disclosure of its confidential information during the audit process has been consistent with its overall corporate practice regarding protection of confidential information. For example:

- Just Energy maintains a detailed policy document relating to disclosure of company information, including confidential information, which includes restrictions on disclosure of confidential information to employees on an "as needed" basis only, includes restrictions on disclosure of confidential information by employees, and provides a reporting hierarchy and procedures for dealing with disclosure of confidential

information. The content of that policy document is used in standardized Just Energy employee training processes, and employees are required to agree to abide by the policy's requirements.

- Page 1 of the standard employment offer letter of Just Energy provided to all new hires contains an explicit statement confirming that the prospective employee understands that the employee may not disclose confidential information with respect to the business and affairs of the company.
- Page 1 of the standard independent contractor agreement of Just Energy contains an explicit confidentiality provision obligating all independent contractors to maintain the confidentiality of all Just Energy-related information both during and after the contractual relationship.
- The standard vendor services agreement of Just Energy contains an explicit and detailed confidentiality provision obligating all counterparties to maintain the confidentiality of all Just Energy -related information both during and after the contractual relationship.
- The executive employment contracts of Just Energy contain explicit confidentiality clauses with respect to non-disclosure of the company's confidential information.

These steps demonstrate that Just Energy has taken more than “reasonable efforts” to protect the secrecy and confidentiality of its sensitive information. (*See Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 942 (7th Cir. 1996) (applying the Illinois Trade Secrets Act).)

C. Disclosure of the Confidential Portions Of The Audit Report Challenged By CUB Would Prejudice Just Energy In The Highly Competitive Illinois Retail Natural Gas Service Industry

The retail gas market in Illinois is a robust competitive landscape with multiple market participants serving all sizes of customers. This, of course, is consistent with the Act, which contains specific provisions to provide for a competitive natural gas market involving AGSs such as Just Energy. (*See* Art. 19 of the Act, 220 ILCS 5/19-100, *et seq.*)

As a guiding principle, the Commission has “consistently advocate[d] the position that competitive forces, where viable, best protect consumers’ interests.” (Annual Report on the Development of Natural Gas Markets in Illinois, July 2007, at 5, available at

<http://www.icc.illinois.gov/reports/Results.aspx?t=4>.) Accordingly, the Commission has determined that “Small volume transportation programs for small commercial and residential customers are an important component of the Illinois retail natural gas markets.” (*Id.* at 6.) Thus, the Commission has opposed actions that would have an “incrementally adverse impact on supply competition” as “inconsistent with our policy of expanding customer choice.” (Feb. 5, 2008 Order at 304, *North Shore Gas Company/The Peoples Gas Light and Coke Company, Proposed General Increase in Natural Gas Rates*, ICC Docket No. 07-0241/0242c.)

Just Energy and other AGSs doing business in Illinois participate in the competitive markets that the Commission supports. Suppliers are constantly looking for business information about their competitors that can be used to advance their position in the markets; as a result, it is industry practice to closely guard all confidential information. Requiring public disclosure of information that is confidential and proprietary to Just Energy would be highly prejudicial to Just Energy, and would be detrimental to the ability of Just Energy to compete to provide the best products for consumers in the Illinois market.

D. The Confidential Information Challenged By CUB Is Well Within The Scope Of Information That Illinois Law Protects Against Disclosure

To facilitate the Commission’s review of CUB’s challenge, this Motion describes various categories of confidential information that are entitled to confidential treatment under the law, and then includes a chart modeled on the chart provided by CUB in its May 1, 2012 letter, adding columns that explain the category or categories of protected information into which the particular challenged items falls and related comments.

As background, it is important to note that the term “Trade Secret” is broadly defined under the Illinois Trade Secrets Act to include a wide range of information:

Information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers.

(765 ILCS 1065/2(d).) As noted above, Courts interpret the term broadly and apply trade secret protection in appropriate circumstances even when a document “does not contain trade secrets in the conventional sense” (*BlueStar*, 374 Ill. App 3d at 995.) Thus, depending on the circumstances, Courts afford confidential protection under Illinois in a broad range of categories. (See generally Brian M. Malsberger, *Trade Secrets, A State-by-State Survey*, vol. 1 at 681 (“Illinois”) (4th ed. 2011).)

Pursuant to the discussion above, Just Energy has identified the following categories of information which are confidential and which cover the objections raised by CUB in its May 1, 2012 letter:

- **Category 1 - Information about the corporate organization, strategies, business plans, staffing, and compensation models of JE Illinois.** (See, e.g., *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269-71 (7th Cir. 1995) (applying Illinois law); *Labor Ready, Inc. v. Williams Staffing, LLC*, 149 F. Supp. 398, 412 (N.D. Ill. 2001) (applying Illinois law).)
- **Category 2 – Information about the sales, customer numbers, and related data of JE Illinois.** (See, e.g., *May Centers, Inc. v. S.G. Adams Printing & Stationery Co.*, 153 Ill. App. 3d 1018, 1022 (5th Dist. 1987); *APC Filtration, Inc. v. Becker*, 646 F. Supp. 2d 1000, 1010 (N.D. Ill. 2009) (applying Illinois law); *Labor Ready, Inc. v. Williams Staffing, LLC*, 149 F. Supp. 398, 412 (N.D. Ill. 2001) (applying Illinois law); *Roton Barrier, Inc. v. Stanley Works*, 79 F.3d 1112, 1117-18, 64 U.S.L.W. 2612, 37 U.S.P.Q.2d 1816 (Fed. Cir. 1996) (applying Illinois law).
- **Category 3 – Information about the sales and marketing strategies, resources, and policies of JE Illinois.** (See, e.g., *Liebert Corp. v. Mazur*, 357 Ill. App. 3d 265, 285 (1st Dist. 2005); *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269-71 (7th Cir. 1995) (applying Illinois law); *Labor Ready, Inc. v. Williams Staffing, LLC*, 149 F. Supp. 398, 412 (N.D. Ill. 2001) (applying Illinois law).
- **Category 4 – Information about the sales and confirmation scripts of JE Illinois.** (See, e.g., *Stampede Tool Warehouse, Inc. v. May*, 272 Ill. App. 3d 580, 588-89 (1st Dist.

1995); *In re Aqua Dots Prods. Liab. Litig.*, No. 1-08-cv-2364, 2009 WL 1766776, at *2 (N.D. Ill. June 23, 2009) (applying Illinois law).)

- **Category 5** – **Information about the recruiting strategies and activities, training programs and materials, and compensation models of JE Illinois.** (See, e.g., *SKF USA, Inc. v. Bjerkness*, 636 F. Supp. 2d 696, 713-14 (N.D. Ill. 2009) (applying Illinois law); *Labor Ready, Inc. v. Williams Staffing, LLC*, 149 F. Supp. 398, 412 (N.D. Ill. 2001) (applying Illinois law).); *ISC–Bunker Ramo Corp. v. Altech, Inc.*, 765 F. Supp. 1340, 1342 (N.D. Ill. 1990) (applying Illinois law).
- **Category 6** – **Information about customer complaints.** (See, e.g., *Strata Marketing, Inc. v. Murphy*, 317 Ill. App. 3d 1054, 1070-71 (1st Dist. 2000); *Muehlbauer v. Gen. Motors Corp.*, No. 05 C 2676, 2009 WL 874511, at *2 (N.D. Ill. Mar. 31, 2009).

In the attached Chart, for each confidential designation objected to by CUB, Just Energy has identified the category or categories of confidential information that justifies non-disclosure.

III. CONCLUSION

WHEREFORE, Just Energy respectfully requests that the Administrative Law Judge order that the Confidential Portions of the Audit Report challenged by CUB should be maintained as confidential, except as outlined herein.

Respectfully submitted,

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