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| **PENNSYLVANIA**  **PUBLIC UTILITY COMMISSION**  **Harrisburg, PA 17105-3265** | |
| Public Meeting held December 17, 2009 | |
| Commissioners Present:  James H. Cawley, Chairman  Tyrone J. Christy, Vice Chairman, Dissenting Statement  Kim Pizzingrilli  Wayne E. Gardner  Robert F. Powelson | |
| License Application of Pennsylvania Energy Savings Corp. for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Broker/Marketer and Aggregator Engaged in the Business of Supplying Electricity | Docket No. A-2009-2097544 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration (Petition), filed by Just Energy Pennsylvania Corp. (JEPC), f/k/a Pennsylvania Energy Savings Corp. (PESC), on November 20, 2009, seeking reconsideration and rescission of the Opinion and Order entered November 9, 2009 (*November 2009 Order*) at the above docket number. No Answers have been filed in response to the Petition.

**Procedural History**

On March 18, 2009, PESC filed an application (Application) seeking to become a licensed electric generation supplier (EGS) in the service territory of Duquesne Light Company (Duquesne) within the Commonwealth of Pennsylvania. On March 24, 2009, PESC filed additional information in support of the Application. On April 15, 2009, PESC filed proof that it had published the required newspaper notices concerning the Application. No Protests were filed and no hearings were held.

On April 13, 2009, the Commission notified PESC that the 45-day time period for considering the Application, pursuant to 52 Pa. Code § 54.37(b), was extended until further Order of the Commission. On April 20, 2009, the Commission notified PESC that the Application was incomplete. The Commission requested additional information, which PESC supplied on May 19, 2009. On July 7, 2009, PESC notified the Commission that it had changed its name to JEPC.

The *November 2009 Order* denied the Application without prejudice. The Commission noted that the conduct of the Company’s affiliates in other states (particularly New York, Illinois and Texas) raised consumer protection concerns. The Commission stated “JEPC has not provided sufficient information to demonstrate that its conduct would not replicate the problematic history of its affiliates.” *November 2009 Order* at 6. The Commission concluded that JEPC was not fit and able to properly perform the service proposed in conformance with the applicable provisions of the Public Utility Code (Code), 66 Pa. C.S. §§ 101 *et seq.*, Commission Orders and Commission Regulations. *Id*. at 7.

On November 20, 2009, JEPC filed the Petition. No Answers have been filed. By Opinion and Order entered December 7, 2009, the Commission granted the Petition pending review of, and consideration on, the merits.

**Discussion**

We note that any issue that we do not specifically address herein has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. [Consolidated Rail Corporation v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also* see, generally, [University of Pennsyl­vania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

**The *Duick* Standards for Reconsideration**

The Code establishes a party’s right to seek relief following the issuance of the Commission’s final decisions pursuant to Subsections 703(f) and (g), 66 Pa. C.S. §§ 703(f) and 703(g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must be consistent with Section 5.572 of our regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision. The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (1982).

A Petition for Reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code to rescind or amend a prior order in whole or in part.

In this regard we agree with the court in the Pennsyl­vania Railroad Company case, wherein it was stated that:

Parties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them . . . what we expect to see raised in petitions for reconsideration are new and novel arguments, not previously heard or considera­tions which appear to have been overlooked by the Commission.

Additionally, a Petition for Reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances.

Under the standards of *Duick*, a petition for reconsideration may properly raise any matter designed to convince this Commission to exercise its discretion to amend or rescind a prior Order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick* at 559.

**Reconsideration**

**Positions of the Parties**

JEPC argues that reconsideration is warranted because the *November 2009 Order* was based in large part on consumer complaint-related information from other jurisdictions, which was obtained *sua sponte* by Commission staff. JEPC argues that the information in question is extra-record. Petition at 4. JEPC suggests that its due process rights were violated because due process requires that a party be given notice and a meaningful opportunity to be heard. JEPC alleges that it was not informed of the Commission’s concerns about its technical fitness prior to the issuance of the *November 2009 Order*, nor was it provided with an opportunity to respond to the information obtained by Commission staff relating to events in other jurisdictions. *Id*. at 4-5.

If it had been given an opportunity to respond, JEPC states that it would have argued that the statistics relied upon by the Commission do not provide context for evaluating quality of service. When placed in context, JEPC argues, the data demonstrates that JEPC is in fact technically fit. For example, the *November 2009 Order* notes that the Illinois Commerce Commission (ICC) issues reports that include data regarding the number of contacts (inquiries and complaints) that the ICC receives from residential customers regarding alternative gas suppliers. The number of contacts for JEPC’s Illinois affiliate ranged from 418 to 654 during the period 2006-2008, while the number of contacts for other Illinois suppliers only ranged from 2 to 95 per year during that same period. *November 2009 Order* at 5. JEPC notes that not all contacts are complaints. Moreover, JEPC notes, the number of customer contacts for its Illinois affiliate decreased by almost one-third from 2007 to 2008. Finally, JEPC alleges that its “justified complaint” rate (defined as the percentage of complaints that are reasonably determined to have merit) is only 11%, which is comparable to the “justified complaint” rate of the major gas utilities in Illinois. Petition at 7.

JEPC further contends that an effective tool for monitoring the quality of the sales process and compliance with applicable laws is the “Complaint Ratio.” The Complaint Ratio is based on the total number of sales-related complaints relative to the number of customer contracts sold for a given period. JEPC contends that, for its New York affiliate, the Complaint Ratio is less than 1% for 2009 (to date). For its Texas affiliate, its Complaint Ratio for 2009 (to date) is 0.61%, and for JEPC’s Illinois affiliate, the Complaint Ratio for 2009 (to date) is 1.28%. *Id*. at 5-6.

JEPC also argues that reconsideration is warranted because the Commission failed to consider the measures that JEPC’s affiliates have put in place to address the conduct that gave rise to complaints and lawsuits in Illinois, New York and Texas. JEPC contends that, in finding JEPC was not technically fit, the *November 2009 Order* relied on proceedings involving incidents that occurred prior to 2008. During 2008 and 2009, JEPC submits, its affiliates in other states have made many changes in their marketing and other business practices. Petition at 8-10 and Appendix C.

Finally, JEPC notes that it is willing to receive a license subject to extensive conditions, which are enumerated in the Petition and its Appendices. There is no indication in the record that JEPC offered to accept a license subject to these conditions prior to the issuance of the *November 2009 Order*. JEPC suggests that this is a change in circumstances warranting reconsideration.

**Disposition**

We find that the Petition meets the *Duick* standards for reconsideration. JEPC did not have an opportunityto respond to the Commission’s concerns regarding consumer related complaints in other jurisdictions prior to the issuance of the *November 2009 Order.* Consequently, JEPC did not submit pertinent information to address these concerns. We need not, and do not, address JEPC’s due process arguments. We simply find that JEPC has offered new and novel arguments, and described additional facts and circumstances that were not previously considered by the Commission. Based on these new submissions, we find that reconsideration is warranted.

**Relief Requested by JEPC**

**Positions of the Parties**

JEPC asks that the Commission rescind the *November 2009 Order* and instead grant the Application subject to extensive conditions. Specifically, JEPC proposes that the following conditions be applicable for door-to-door marketing/sales to residential and small business customers for a period of one year from the date that JEPC begins offering service:

1. Just Energy will only use employees, not independent contractors, when conducting door-to-door sales;
2. All Just Energy marketing materials to be used, including contracts and customer facing materials will be provided to Commission staff for comment 5 days prior to use;
3. Just Energy will meet monthly with the relevant Commission staff and provide a monthly reporting requirement to staff capturing: (i) the complaints by category; (ii) complaint rate against sales volumes and (iii) customer service level reporting as defined in Attachment E,[[1]](#footnote-1) Section G;
4. Just Energy will conduct background checks on all potential employees and will provide the background check criteria to staff;
5. Just Energy will provide a single point of contact and escalation contacts for Commission staff for resolution of consumer inquiries and/or complaints received by the Commission's Bureau of Consumer Services ("BCS") and will respond to all consumer inquiries and complaints in accordance with Attachment E and any other BCS requirements, including providing all information regarding the customer and complaint as requested by Commission staff, including a copy of the contract and any audio recordings of the verification call. Just Energy will also provide the Commission with the resolution of the complaint by the Company.
6. Just Energy will provide an extended cancellation period of up to 30 days after the issuance of the first bill on [the] Company's supply service during which the customer will not pay a termination fee;
7. Just Energy will hire an employee whose role is to oversee and ensure compliance of the sales office(s) and employees with these license conditions as well as applicable law and company policies;
8. Any early termination or exit fee imposed by Just Energy will not exceed $50.00 per contract;
9. Just Energy will operate under the commitments outlined in Attachment E, which contain substantially similar requirements to those in the Illinois Attorney General ("AG") Settlement dated May 14, 2009 and additional quality processes that exceed those captured in the AG Settlement;
10. Just Energy has provided . . . a draft Disclosure Statement and will work with the Commission's BCS to finalize the statements that will be utilized in Pennsylvania prior to contracting with customers;[[2]](#footnote-2)
11. Just Energy sales representatives will be prohibited from wearing blue clothing;
12. Following the expiration of the 1-year probationary period, Just Energy agrees to provide the Commission with written notice of any changes to the Company’s practices and procedures that are the subject of any of these conditions;
13. Within 60 days prior to the expiration of the 1-year probationary period, Just Energy will provide a report to Commission staff of any license violations in any jurisdiction, including Canada, where the Company operates.

Petition at 12-13.

JEPC proposes that the license be released from these conditions at the end of the twelve-month probationary period, if it has:

a. Operated in good faith and compliance with the Conditions set forth and applicable Laws;

b. Maintained a Complaint Ratio of less than 2% of sales over the 12- month period;

c. Maintained the customer service level commitments based on the 12-month period (averaged across the period);

d. Obtained concurrence from Commission staff with the release from the aforementioned Conditions, including the Condition regarding the use of employee sales agents for door-to-door sales.

*Id*. at 13-14.

**Disposition**

As stated previously, in the *November 2009 Order*, we concluded that JEPC failed to demonstrate that its conduct would not replicate the problematic history of its affiliates. We stated:

JEPC states that changes have been made to the business practices of the company and affiliates. However, based on the repetition of events in Illinois and the lack of a resolution in the most recent complaint in Illinois, it is not apparent that the issues have been resolved and that similar issues will not arise in Pennsylvania.

*November 2009 Order* at 7.

Upon review of the information submitted by JEPC in support of its Petition, we believe that, if the Commission would grant JEPC an EGS license subject to the conditions proposed by JEPC, including the conditions set forth in Appendix E to the Petition, it is unlikely that JEPC would replicate the problematic history of its affiliates in other jurisdictions. The extensive conditions proposed by JEPC go a long way toward addressing our concerns regarding consumer protection. We note, in this regard, that JEPC has committed to use employees rather than independent contractors to conduct door-to-door sales. These employees would be required to follow a code of compliance, which JEPC has pledged to enforce. The use of independent contractors by JEPC’s affiliates in other jurisdictions was of great concern to the Commission in rejecting the application. See, *November 2009 Order* at 3. Additionally, we are encouraged by JEPC’s commitment to work with Commission staff in developing marketing and other materials.

Nevertheless, we believe JEPC’s proposed conditions require clarification with regard to procedural matters. First, JEPC proposes that the conditions apply for a period of one year from the date that JEPC begins offering service. To provide greater clarity, we believe JEPC’s “probationary” period should be measured from the date of entry of this order. In addition, we believe a longer “probationary” period is necessary to allow complaints to percolate. We will provide for a “probationary” period of eighteen months.

Second, JEPC proposes that it provide a report on its compliance history in other jurisdictions before the expiration of the “probationary” period. The license conditions would then be released at the expiration of the “probationary” period, with the concurrence of Commission staff. JEPC’s proposal is unclear as to what happens if Commission staff does not concur with the release of the conditions.

In view of our consumer protection concerns, as stated in the *November 2009 Order*, we believe the following procedure better protects the public interest. Not less than sixty days before the expiration of the “probationary” period, JEPC will file a status report with the Commission describing its compliance history in Pennsylvania, as well as updated information regarding the compliance history of JEPC’s affiliates in other states. Commission staff will then make a recommendation as to whether license conditions remain necessary. If staff believes that license conditions remain necessary, staff shall recommend appropriate conditions, which may include some or all existing license conditions and/or different license conditions. This Commission will then issue an appropriate Order at a subsequent Public Meeting.

Finally, we believe one additional condition is necessary to protect Pennsylvania consumers. Due to the length of the contracts that JEPC proposes to use in Pennsylvania, we will require JEPC to annually send a letter to its customers stating that the customer has selected JEPC as his or her electric generation supplier and that JEPC has no affiliation with the customer’s public utility. This annual correspondence shall provide JEPC’s contact information, including the address, phone number and website. This annual correspondence shall also provide the Commission’s contact information, including the website and the toll-free number for consumer complaints.

**Conclusion**

Based on the foregoing, we will grant the Petition for Reconsideration filed by Just Energy Pennsylvania Corp., rescind the *November 2009 Order* and grant the application of Just Energy Pennsylvania Corp., subject to conditions, consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition for Reconsideration, filed by Just Energy Pennsylvania Corp., on November 20, 2009, is granted.

2. That the application of Just Energy Pennsylvania Corp. at Docket No. A-2009-2097544 is approved.

3. That a license be issued authorizing Just Energy Pennsylvania Corp. to operate as an electric generation supplier and as a broker/marketer and aggregator engaged in the business of supplying electricity in the service territory of Duquesne Light Company, subject to the following conditions, which will apply for a term of eighteen months from the date of entry of this Opinion and Order (Term). To the maximum extent possible, these conditions shall be construed to be consistent with the Commission’s regulations. In the event of a conflict, the following conditions shall control:

a. Just Energy will only use employees, not independent contractors, when conducting door-to-door sales;

b. All Just Energy marketing materials to be used, including contracts and customer facing materials will be provided to Commission staff for comment five days prior to use;

c. Just Energy will meet monthly with the relevant Commission staff and provide a monthly reporting requirement to staff capturing: (i) the complaints by category; (ii) complaint rate against sales volumes and (iii) customer service level reporting as defined in Section G of the Appendix hereto;

d. Just Energy will conduct background checks on all potential employees and will provide the background check criteria to staff;

e. Just Energy will provide a single point of contact and escalation contacts for Commission staff for resolution of consumer inquiries and/or complaints received by the Commission's Bureau of Consumer Services (BCS) and will respond to all consumer inquiries and complaints in accordance with the Appendix hereto and any other BCS requirements, including providing all information regarding the customer and complaint as requested by Commission staff (including a copy of the contract and any audio recordings of the verification call). Just Energy will also provide the Commission with the resolution of the complaint by the Company.

f. Just Energy will provide an extended cancellation period of up to 30 days after the issuance of the first bill on the Company's supply service during which the customer will not pay a termination fee;

g. Just Energy will hire an employee whose role is to oversee and ensure compliance of the sales office(s) and employees with these license conditions as well as applicable law and company policies;

h. Any early termination or exit fee imposed by Just Energy will not exceed $50.00 per contract;

i. Just Energy will operate under the commitments outlined in the Appendix hereto;

j. Just Energy will use the disclosure statement developed in cooperation with the Commission’s BCS;

k. Just Energy sales representatives will be prohibited from wearing blue clothing;

l. With regard to any condition that has been released by the Commission, for a period of three years following the condition’s release, Just Energy will provide the Commission with written notice of any change to the Company’s practices and procedures that was the subject of the released condition; and

m. Not less than sixty days before the expiration of the Term, Just Energy Pennsylvania Corp. shall file a status report with the Commission describing its compliance with the Public Utility Code, Commission Orders and Regulations, and the conditions set forth herein. The status report shall also include updated information regarding lawsuits, investigations, and state commission proceedings involving its affiliates in other jurisdictions. A copy of this status report shall be provided to Paul Diskin in the Commission’s Bureau of Fixed Utility Services and David Mick in the Commission’s Bureau of Consumer Services.

n. Just Energy will annually send a letter to each of its customers stating that the customer has selected Just Energy as his or her electric generation supplier and that Just Energy has no affiliation with the customer’s public utility. This annual correspondence shall also provide Just Energy’s contact information (including address, phone number and website) and the Commission’s contact information (including the website and the toll-free number for consumer complaints).

4. That the Commission’s Bureau of Fixed Utility Services, with the assistance of the Bureau of Consumer Services and the Law Bureau, shall monitor Just Energy Pennsylvania Corp.’s compliance with the conditions set forth in this Opinion and Order.

5. Upon receipt of the status report directed in Paragraph 3.m. above, the Bureau of Fixed Utility Services, with assistance from the Bureau of Consumer Services and the Law Bureau, shall prepare a Staff recommendation regarding appropriate license conditions after the expiration of the Term. The Commission shall consider the recommendation at a subsequent Public Meeting. In making their recommendation, Commission staff shall consider all relevant factors, including whether Just Energy Pennsylvania Corp.:

a. Operated in good faith and compliance with the Conditions set forth in Paragraph 3 and applicable Laws;

b. Maintained a Complaint Ratio of less than 2% of sales over the 18- month period; and

c. Maintained the customer service level commitments based on the 18-month period (averaged across the period).



**BY THE COMMISSION,**

James J. McNulty

Secretary

(SEAL)

ORDER ADOPTED: December 17, 2009

ORDER ENTERED: December 23, 2009

**Appendix:**

**Attachment E to the Petition for Reconsideration**

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1. The referenced Attachment is an Appendix to this Order. [↑](#footnote-ref-1)
2. The disclosure statement has been finalized by JEPC, in cooperation with BCS. [↑](#footnote-ref-2)