

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 23-2220-RULE

Proceeding to design the potential Clean Heat Standard	
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**VFDA'S MEMORANDUM OF LAW IN SUPPORT OF
AUTHORITY TO KEEP VOLUME AND SUPPLIER INFORMATION CONFIDENTIAL**

The Public Utility Commission (“PUC” or “Commission”) has the authority to keep confidential the volume of heating fuels purchased and sold and the identities of suppliers. Such information is exempt from public disclosure as a trade secret under the Vermont Public Records Act. Confidentiality should be maintained because it is necessary to prevent an unfair business advantage in the highly competitive market for heating fuel. Furthermore, the Clean Heat Act does not compel publication of this sensitive trade secret information.

I. Background.

The Clean Heat Act requires the annual registration of every entity that sells heating fuel into or in Vermont. 30 V.S.A. § 8124(b)(1). The Clean Heat Act requires registrants to provide data necessary to establish the “annual requirements under the [clean heat standard].” *Id.* The PUC issued an Order Addressing Annual Registration on December 15, 2023, which identifies the types of information that will be collected as part of the registration in process. In general, sellers will need to provide the following:

- Identity and contact information for the seller;
- Types of heating fuel sold;
- Identity of the supplier and the amount of each fuel purchased from the respective supplier;

- Exact amount of gallons of each heating fuel sold in Vermont;
- Exact amount of heating fuel consumed or stored (if not sold); and
- Exact amount of fuel type sold to another business (if not sold directly to consumers).

In determining whether to keep information confidential and prevent public disclosure, the PUC historically considers three different issues:

1. Is the matter sought to be protected a trade secret or other confidential information that should be protected;
2. Would disclosure cause cognizable harm to warrant a protective order; and
3. Is there good cause to invoke the PUC's protection?

In re: Comcast, VT-PUC Case No. 23A-1181, 2023 WL 3534588 (Order May 12, 2023); *In re: Vermont Electric Cooperative, Inc.*, VT-PUC Case No. 18-4258-SC, 2019 WL 568362 (Order Feb. 6, 2019).

Applying this analytical framework, the PUC should keep confidential the volume of fuel purchased, sold, stored, or consumed and the identity of suppliers. This information is not otherwise publicly available, and disclosure would create an unfair business advantage in a highly competitive market. Furthermore, the legislature did not compel disclosure under the Clean Heat Act.

II. Analysis.

A. The volume and supplier data are trade secrets that should be kept confidential to prevent cognizable harm.

The PUC looks to the Vermont Public Records Act, 1 V.S.A. 315 *et seq.*, in determining whether documents are confidential information and should be protected. *In re: Comcast*,

2023 WL 3534588; *In re: Vermont Electric Cooperative, Inc.*, 2019 WL 568362. Without limitation, trade secrets are exempt from disclosure under the Public Records Act. *Id.*; 1 V.S.A. 317(c)(9).

A trade secret includes private business information that gives the possessor a commercial advantage over others. *Long v. City of Burlington*, 2018 VT 103, ¶ 24. The PUC's recent decision in *In re: Comcast*, 2023 WL 3534588, provides a good illustration of how the trade secret exclusion is applied. In *Comcast*, the cable provider sought to keep confidential the number of customers that subscribe to its high-definition cable product as a trade secret. The PUC agreed that this market share information should be kept confidential. It did so by recognizing that this is commercially sensitive information, not available to the public, and disclosure would provide Comcast's competitors with an unfair business advantage by giving insight into Comcast's business operations and finances.

The PUC's analysis in *Comcast* to keep market share data is not an aberration. Courts across the country have recognized market share data as confidential trade secrets. *See Medidata Solutions, Inc. v. Veeva Sys. Inc.*, 2021 WL 467100, at 9 (S.D.N.Y. Feb. 9 2021)(market share data that is used to assess competitive positioning against rivals considered a trade secret); *Cooper Interconnect, Inc. v. Glennair, Inc.*, 2015 WL 13722129, at 3 (C.D.Cal. Feb. 3, 2015).

The amount of heating fuel purchased, sold, stored, or consumed should be protected as a trade secret. Such information reveals sensitive market share data, and public disclosure would create an unfair business advantage for competitors. The sensitivity of this

information is indicated by the fact that fuel sellers do not publicly disclose the granular volume data requested by the PUC. It is kept private and this information is not otherwise publicly available.

Furthermore, public revelations of volume data will likely cause cognizable harm by creating an unfair business advantage. Unlike fully regulated utilities, the heating fuel business is highly competitive. There may be several sellers of heating oil, propane, and kerosene available to consumers in any geographic area. Public disclosure of volume data reveals sensitive information where competitors can deduce market share, the scope of operations, and company finances from the number of gallons purchased, stored, or sold by competitors. With this information, competitors can undermine financial investments by targeting companies based on knowledge of their market share resulting in a loss of business.

In addition, the identity of suppliers should be kept confidential as a protected trade secret. Fuel sellers keep the identities of their suppliers confidential. Maintaining the confidentiality of suppliers is also needed to protect economic investments and prevent unfair business advantages in a highly competitive marketplace. Similar to concerns about volume data, fuel sellers may not want competitors to know the identities of their suppliers and the amount that is being sold or received from them. This is sensitive data that reveals the scope of a businesses' operations. If made public, Competitors will be able to identify fuel sellers as potential targets for market share within a geographic area based on knowledge about their ability to meet market demand with the identity and amount of

their source of fuel supply. This action has the potential to undermine financial investments and business relationships built up over generations.

It is noted that a number of courts across the country have recognized the confidential supplier data are trade secrets. *See Citizens of Humanity, LLC, v. Costco Wholesale Corp.*, 171 Cal.App.4th 1, 13-16 (Ca. Ct. App. 2009) (overturned on other matters); *Yeti by Molly, Ltd. V. Deckers Outdoor Corp.*, 259 F.3d 1101, 1108 (2001). *But see, Chemetall GMBH v. ZR Energy, Inc.*, 138 F.Supp.2d 1079, 1084 (N.D.Ill. 2001)(supplier not a trade secret because identity was already public information).

Public disclosure of heating fuel volumes and the identities of suppliers, as set forth above, will create unfair business advantage and harm to businesses in a highly competitive environment. Accordingly, there is good cause to keep this trade secret information confidential.

B. The Clean Heat Act does not require disclosure.

Neither 30 V.S.A. § 8124(b)(3) nor § 8124(b)(4) require disclosure of protected trade secrets including heating fuel volumes or supplier information. The objective of “...statutory interpretation is to construe and effectuate the legislative intent behind the statute.” *In Re: Mountain Top Inn & Resort*, 2020 VT 57, ¶ 27, 202 Vt. 554 (2020).’ In accomplishing this, our first step is to examine the statute’s language because ...the Legislature intended the plain, ordinary meaning of the statutory language.” *Id.* (citation omitted). ’Where there is ambiguity in a statute, we look to the general context of the

statutory language.” *Id.* (citation omitted). Public disclosure of heating fuel volumes and the identities of suppliers is not required when applying these cannons of statutory construction to each subsection.

30 V.S.A. § 8124(b)(3) states that the PUC “shall share complete registration information of obligated parties with the Agency of Natural Resources and the Department of Public Service for purposes of updating the Vermont Greenhouse Gas Emissions Inventory and Forecast and meeting the requirements of 10 V.S.A. § 591(b)(3).” The plain and ordinary meaning of this language does not require public disclosure. Information is to be shared with other government agencies to determine statewide greenhouse gas emissions and the pace and effectiveness of programs to reduce such emissions. Nothing about this process mandates public disclosure. Moreover, sharing information across state agencies does not otherwise create an exception to the exclusions of the Public Records Act. For example, state agencies such as the Department of Public Safety and the Agency of Human Resources share documents in furtherance of criminal investigations. This sharing does not otherwise obviate the public record exceptions related to criminal investigations under 1 V.S.A. § 317(c)(5). The PUC, along with the Agency of Natural Resources and the Department of Public Service, should equally protect the volume data and identities of suppliers as trade secrets from public disclosure pursuant to the Public Records Act.

30 V.S.A. § 2184(b)(4) provides that “[t]he Commission shall maintain, and update annually, a list of registered entities on its website that contains the required registration information.” There is nothing in the plain language or the greater legislative context that

requires disclosure of the volume and supplier data, which are otherwise exempt as trade secrets. The language merely requires the PUC to identify the types of information that are required for registration on its website, not the actual data itself.

The plain language states that the website will have the identities of the registered entities and the required registration information. There is nothing in the plain language that states that the answers to the required registration information be published. The plain language requires the PUC to publish what is required of heating fuel sellers to comply with registration. This interpretation is consistent with the greater legislative context to motivate regulatory compliance.

The Clean Heat Act intends to reduce thermal sector greenhouse gas emissions. *See*, Act 18, Section 3 (2023). Registration of heating fuel sellers is a key component to achieving the goals of this new statutory and regulatory scheme. *See* 30 V.S.A. § 8124(b). Publication of the types of required registration information is necessary for achieving regulatory compliance by heating fuel sellers. Otherwise, how would heating fuel sellers know what is required for registration? The details for registration are found in an Order published by the Commission in the e-PUC filing system. However, requiring heating fuel sellers to find an order issued by the PUC buried within the e-puc filing system is not an effective manner to achieve widespread compliance.

§ 8124(b)(4) addresses this problem by requiring the PUC to publish on its website the respective criteria. It is this context that makes the most logical reading of the statute.

Furthermore, if the legislature wanted seller-specific data, it could have expressed such clarity. It chose not to.

III. Conclusion.

For the reasons set forth above, the PUC should protect heating fuel volume data and the identity of the suppliers as confidential trade secrets exempt from public disclosure under the Public Records Act. Act 18 of 2023 does not require a different outcome.

Dated at Burlington, Vermont this 8th day of January 2024.

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