6345 Dixie Road, Suite 200
Mississauga, Ontario L5T 2E6

T 905.670.4440
F 905.670.9160
info@justenergy.com

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VIA electronic submission

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Manitoba Securities Commission
New Brunswick Securities Commission
Nova Scotia Securities Commission
Ontario Securities Commission

Re: Consultation Paper 91-407 on Derivatives: Registration

Dear Members of the Canadian Securities Administrators Derivatives Committee:

Just Energy Group Inc. ("Just Energy"), on behalf of itself and its subsidiaries, welcomes this opportunity to submit comments to the Canadian Securities Administrators Derivatives Committee (the "Committee") on Consultation Paper 91-407 on Derivatives: Registration published on April 18, 2013 (the "Consultation Paper").

Just Energy

Just Energy, through its subsidiaries, is a leading independent supplier of electricity and natural gas to residential and small to mid-size commercial consumers in Canada, the United States and the United Kingdom. In Canada, the Just Energy family of companies provides electricity in Alberta and Ontario and offers natural gas in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Quebec. Just Energy also is one of the largest competitive green energy retailers in North America.

To meet its delivery obligations to its Canadian customers, Just Energy purchases power and natural gas on a wholesale basis. Just Energy also periodically sells power and natural gas back into the wholesale markets when it has more supply than is needed to meet its customers' demands.

Just Energy provides power and natural gas to residential and commercial consumers under long-term fixed-price or price-protected contracts. The provision of such services is subject to Provincial utility regulations in each of the provinces in which Just Energy conducts its business. In Ontario, these include the Market Rules for the Ontario Electricity Market and the Gas Distribution Access Rules. Just Energy is subject to supervision by the Ontario Energy Board,

the Ontario Power Authority and the Independent Electricity System Operator. In the case of retail customers, it is also subject to applicable consumer protection laws.

The derivatives activities that Just Energy undertakes serve only to hedge its obligations to its customers. In particular, in an environment of variable market prices, it needs to balance the cost of its delivery obligations on its supply contracts with its cost of its customer delivery obligations.

The markets in which Just Energy operates are highly competitive. There are at least ten other companies in Ontario in each of the electricity and natural gas sectors with whom we compete for customers.

We believe that the imposition of registration requirements on Just Energy, whether as a dealer, adviser or Large Derivative Participant (LDP), would reflect a misunderstanding of the nature of its business activities and its relationship with its customers and is not warranted by either public interest concerns or Canada's G-20 commitments. Just Energy is already subject to regulatory regimes and laws designed to ensure both an orderly market in the commodities it sells and appropriate protection for consumers. The imposition of a further layer of regulatory requirements based on a perceived analogy between Just Energy's activities and those of a securities dealer or securities adviser or concerns that such activities might pose serious systemic risk to the Canadian financial markets are, in our view, not justified and would impose onerous and unnecessary regulatory burdens on Just Energy's business.

The imposition of registration requirements on Just Energy would also mark a significant departure from the position taken by US regulators, who designate as "end- users", rather than as potential registrants, entities who, among other things, engage in derivatives trading to hedge or mitigate commercial risk.[1] In this regard, we believe that the proposed regulation should be revised to make it clear that entities such as Just Energy are to be properly regarded as "end users" rather than as potential registrants.

Our responses to a number of the questions posed by the Committee are as follows:

Q5. Are the factors listed in the Consultation Paper the correct factors that should be considered in determining whether a person is in the business of trading derivatives?

As a preliminary comment, we believe it would be helpful to clarify what in the Committee's view constitutes a "derivative" for these purposes. Proposed OSC Rule 91-506: *Product Determination* and the Companion Policy exclude a variety of transactions (including physically-settled commodity transactions and related book-outs, as well as consumer supply transactions), from the ambit of derivatives reporting requirements under OSC Rule 91-507: *Trade Repositories and Derivatives Data Reporting.* These exclusions cover the bulk of Just Energy's

[1] See Section 2(h)(1)(A)(ii) of the *Commodity Exchange Act* as amended by Title VII.

transactions and it should be clear that such transactions do not fall back into the "derivatives" category for purposes of determining the applicability of registration requirements.

We also believe that greater clarity is required with respect to which activities constitute being in the business of trading of derivatives. Just Energy is not in the business of trading derivatives; it is in the business of selling electricity and natural gas to consumers. It should not be required to register as a derivatives dealer merely because certain hedging activities ancillary to its main business might be characterized as engaging in dealing in derivatives.

The Consultation Paper sets out several business triggers that are problematic in this regard. Specifically:

> *Intermediating trades and acting as a market maker:* Just Energy is not and does not hold itself out as a broker or a market maker nor does it engage in activities that would cause it to be commonly regarded as a broker of or market maker in derivatives. It does not seek to intermediate transactions between market participants who are taking different views on the future values of a derivative. While it does sit between its customers and the generator, this is due to the design of the energy supply system in Canada, which prevents small individual customers from approaching wholesale commodity providers for their individual needs. This is a function of how the deregulated retail energy market operates. Just Energy offsets its risk to a large number of individually small consumers by aggregated risk contracted with wholesale suppliers. Just Energy does not perform a market-maker function. It does not stand ready to enter into transactions at the request of its customers and counterparties but rather decides in each case with whom and on what terms it will contract.

- *Trading with the intention of being remunerated or compensated*: The existing definition is broad and does not appear to contemplate that commercial entities will always enter into a transaction to receive an expected benefit. What comprises compensation in this context requires more clarity as a current interpretation could capture the core retailer function of buying aggregated volumes of a commodity at market and retailing to consumers with a margin and therefore a benefit. We believe that the regulation is instead meant to capture situations where the specific derivatives transaction or group of transactions attracts a broker fee or where the intermediary is seeking to profit by capturing the spread between intermediated offsetting derivatives transactions or to realize gains as a result of movements in the value of the derivatives themselves.

- *Directly or indirectly soliciting*: Again the definition in the Consultation Paper is broad, referring to "contacting someone by any means". Just Energy's concern is related to the interpretation of whether its customer contracts will all be considered end-use as, if they do not meet the end-use exception, all our marketing materials could potentially be captured under this definition.

As a further example of the need for more clarity, currently the novation of a derivative, other than a novation with a clearing agency, as well as the assignment of any or all rights under a

derivatives contract, will be considered trading under the proposed regulation. We do not believe that it is the intent of the regulation, where the novation is required as a result of other requirements (e.g. novation of the transport of a commodity between a utility and a retailer, or where assignment is required as part of credit and collateral arrangements) to have these activities trigger registration requirements.

Guidance on what should properly be characterized as being in the business of trading derivatives can be found in the approaches taken by other regulators.

For example, in the EU, MiFID provides for the regulation of investment firms trading either as an agent or as a principal in relation to derivatives. For these purposes, an "investment firm" is defined as "…any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis". [2] Just Energy does not provide nor is it in the business of providing investment services to its customers, it provides price certainty around energy for consumption.

In addition, IOSCO's proposal for regulating derivative market intermediaries (DMIs) indicates that designation as a DMI should not include persons who, while they may enter into derivatives transactions, are not engaged in the business of dealing, making a market or intermediating trades in derivatives.[3]

In the US, the CFTC includes as one of the key criteria of being a "swap dealer" that an entity "regularly enters into swaps in the ordinary course of business for its own account" but then excludes from the calculation of whether such activities exceed a *de minimus* threshold any exposure from a non-dealing activity such as transactions entered into by the entity to hedge its own business risks.[4]

The Committee should also take into account the definition of "end-user" set out in CSA Consultation Paper 91-405: essentially, a non-financial institution hedging for its own account to mitigate commercial risk in its business and not of a size that poses systemic risk. We believe that this is an accurate characterization of Just Energy's activities and should not be displaced simply because some of its hedging activities could, in a technical sense, constitute "trading in derivatives".

In light of these considerations, we would recommend that either the criteria for being in the business of trading derivatives be clarified to exclude entities such as Just Energy or that the activities of entities such as Just Energy be expressly exempted from derivatives dealer registration requirements.

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[2] Consultation Paper, Part 3.2 – *European Union Approach,* (2013) OSCB 4120

[3] Consultation Paper, Part 4.1 – *Registration Standards,* (2013) OSCB 4121

[4] Consultation Paper, Part 3.1 – *United States Approach,* (2013) OSCB 4117

Q8: Are the factors listed in the Consultation Paper the appropriate factors to consider in determining whether a person is in the business of advising on derivatives?

We also have concerns with respect to the triggers for registration as an adviser.

The Consultation Paper states that the concept of advising in relation to derivatives is very similar to the concept of advising about securities and states that a person would be considered to be "advising" in relation to derivatives where they provide another person with any advice or direction relating, directly or indirectly, to trading in derivatives, including the provision of advice in relation to:

- The management of a portfolio of derivatives
- The use of derivatives as an investment strategy or part of an investment strategy; and
- The provision of advice in relation to hedging strategies

We believe that these types of advisory activities are quite different in kind than those engaged in by Just Energy with its customers, which relate to the consumption of energy rather than derivatives investment or hedging strategies.

While we understand that many of the supply contracts that our customers have with Just Energy will not be regarded as derivatives, since they will be "[a] consumer contract or instrument to purchase non-financial products or services at a fixed, capped or collared price"[5], we do have some customer contracts where payment is based on an indexed or variable rate[6]. There are often discussions regarding the payment options available to customers at the time of entering into such contracts. We do not believe such discussions should be characterized as "advising others in relation to derivatives", requiring the registration of both Just Energy and various individuals in the derivatives adviser category. These discussions focus on explaining payment terms under supply contracts, are ancillary to the supply of energy to consumers and should not be characterized as being the business of providing advice for compensation.

We would therefore recommend that the regulation either clarify the criteria for being in the business of advising on derivatives or expressly exempt entities such as Just Energy from any adviser registration requirement.

Q9: Are the factors listed in the Consultation Paper for determining whether an entity is an LDP appropriate?

[5] OSC's Companion Policy to 91-506 – *Derivatives: Product Determination* , Part 2, Excluded Derivatives

[6] In response to the request for comments on CSA Staff Consultation Paper 91-301, we have sought clarification as to whether these contracts are captured derivatives.

We note that the threshold for designation as an LDP is left for further study based on data to be obtained through trade reporting. In this regard, we understand that much of the business activity that Just Energy engages will not be subject to trade reporting, either because it constitutes a physically-settled commodity contract[7] or is a consumer contract referred to in the OSC's proposed Companion Policy.[8] This suggests that much of Just Energy's business activity has already been determined to be of a kind that does not need to be subject to regulation under the new derivatives regulatory regime.

To the extent that Just Energy's other derivatives activities are to be taken into account in assessing its status as an LDP, we urge that there be comparability with other jurisdictions in whatever exposure threshold is specified, both in what is included in the calculation of holding a substantial and systemically important position in the derivatives market and the actual dollar threshold. In particular, in clarifying what constitutes a "substantial position", consistency with other jurisdictions' exclusions of hedging to offset commercial risk and monetary thresholds, is needed.

On this point, we note that the Committee is considering taking derivatives activity into account, regardless of whether it is for hedging purposes or for speculative purposes and, in Question 6, specifically asks whether entities that are carrying on frequent derivatives trading activity for speculative purposes should be subject to a different registration trigger than entities trading primarily for the purpose of managing their business risks. Just Energy supports differentiation and submits that entities who engage in derivatives activity to hedge business risk should be exempt from registration since these activities serve to offset their commercial risk, and thus do not pose a serious risk to the stability of the financial markets. This would make such regulation consistent with that of other jurisdictions. As noted previously, the registration requirements of *Dodd- Frank* allow consideration of hedging or mitigating commercial risk and the IOSCO Standards recommend an exemption for end-users "that are not engaged in the business of dealing, making a market or intermediating trades". This would allow companies such as Just Energy, that enter into derivatives to hedge and mitigate commercial risk, and do not represent a threat to the soundness of the financial markets, to avail themselves of the exception. There does not appear to be an equivalent exemption available within the Consultation Paper and we would urge the Committee to consider its inclusion in the interest of equivalency of regulation.

Q14: Are the requirements described in the Consultation Paper appropriate registration requirements for derivatives dealers, derivatives advisers and LDPs?

As indicated previously, we do not believe that business activities of the kind engaged in by Just Energy require registration, in which case the registration requirements set out in the Consultation paper are moot. However, examination of such requirements in the context of Just Energy's business serves to highlight the inappropriateness of registration in our case.

[7] Section 2(c) of the OSC's Rule 91-506 *Derivatives: Product Determination* (OSC Rule 91-506)

[8] See Part 2(h) of the Companion Policy to OSC Rule 91-506

We note that a broad range of requirements are proposed for registrants. Generally speaking, the object of such requirements (at least in the context of the securities industry) is to protect the investing public and to ensure open, fair and efficient capital markets. The imposition of such requirements on LDPs in the derivatives context is intended to mitigate systemic risk.

As discussed previously, we do not believe that Just Energy's activities pose systemic risk to the Canadian financial markets and thus its designation as an LDP would be inappropriate. We also question the need for the various other requirements that might be imposed in connection with registration, either because they are inappropriate or unnecessary in the context of the sale of electricity or natural gas to consumers (which is already a regulated activity) or because Just Energy's supplier at the wholesale level are large, sophisticated entities who do not need such protections in their dealings with Just Energy.

For example, to address financial and solvency concerns, the new regulations would impose minimum capital, margin and insurance requirements on registrants. Firstly, Just Energy does not perform any kind of custodial or fiduciary function, the only assets it may receive from some of its customers are security deposits. This activity does not relate to Canadian customers, the deposits are not in material amounts and are held in segregated accounts**.** Secondly, credit concerns between Just Energy and its suppliers are addressed through bi-laterally negotiated security and collateral arrangements which are tailored to the parties' particular circumstances. The imposition of standardized capital, margin and insurance requirements serve no useful purpose in these circumstances and we urge the Committee to recognize the efficacy of existing arrangements. Finally, if Just Energy were to fail financially, the only practical consequence to its customers (apart from inconvenience) would be that they would have to switch to one of the many other energy retailers for supply on prevailing market terms. This is as likely to be beneficial to them as detrimental. There is no analogy between an energy supply of this kind and the functions performed by financial institutions and securities dealers for Canadian savers and investors.

Periodic financial reporting is contemplated for each registrant. Existing arrangements for many companies include the audit of one set of consolidated financial statements for the group rather than the audit of individual entity financial statements. The imposition of this additional requirement will result in increased costs to consumers without a tangible net benefit of decreasing overall financial market risk. Derivatives are by their nature forward-looking while financial statements reflect the past and therefore provide limited insight as to the open market risk a company is facing at the balance sheet date.

We believe that most of our customers would be characterized as "non-qualified persons". The regulation therefore contemplates that, if registered as a dealer or adviser, Just Energy would be required to perform a form of "Gatekeeper" role in respect of each of its 587,000 customers and implement KYC, business conduct and suitability procedures in its dealings with them. While this may be reasonable in the context of a relationship in which a client is relying upon the registrant to assist it in making investments, we question its appropriateness or utility when the relationship centers around the purchase and sale of a commodity for personal consumption.

We do not believe that it is the intention of the regulation to impose requirements on individuals and companies that do not materially impact overall market risk. This would cause concern both from Just Energy's retail customer base as well as simply adding to existing regulation from the OEB on the provision of customer information.

Particularly for customers that have indexed supply contracts which might be characterized as "derivatives", it is unclear whether they would be required to obtain independent advice before entering into such contracts (and, if so, from whom and at what cost?) or whether Just Energy will have the obligation to implement the proposed Business Conduct and Gatekeeper procedures and, if required to register as a dealer, pre-trade reporting, trade confirmations and account statement procedures.

Additionally, if the customers are considered non-qualified parties, it could mean that all of Just Energy's business activities might be considered a business trigger under 6.1(b)(vi) of the Consultation Paper. In this regard, we request clarity with respect to the definition of a "qualified party". Specifically,

- will existing collateral arrangements be considered when establishing whether the party has sufficient financial resources?

- What is meant by the 3rd inclusive bullet point: "they have not entered into a contract with the registered entity that requires the registered entity to provide the persons with the same types of protections that are adopted as registration requirements when trading with a non-qualified party.

Q23: Are the proposed registration exemptions appropriate? Are there additional exemptions from the obligation to register or from registration requirements that should be considered but that have not been listed?

Just Energy acknowledges that the Committee has considered potential exemptions from registration but requests further clarity. Specifically:

- the exemption for regulated persons is available for "equivalent regulatory requirements". More specifics are required as to what forms of regulation will be considered "equivalent" for these purposes.

- In the context of the adviser registration requirement, what threshold is considered "incidental" to the provision of trading services? Is it a percentage of revenue? How or would this be calculated or considered if the cost of this service is embedded in the cost of the related derivatives?

Finally, we note that an entity whose activities triggered a Dealer or Advisor registration requirement would be required to register even if they are not resident in Canada, potentially subjecting the same entity to multiple (domestic and foreign) registration regimes. It is therefore

important to keep regulatory requirements in Canada as consistent as possible with existing foreign rules as well as broaden the scope for substituted compliance.

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Just Energy asks the Committee to reflect on these comments. Please contact us if you have any questions or concerns regarding these comments.

Respectfully submitted,

/s/ Stephanie Bird
Stephanie Bird
SVP, Corporate Risk Officer