

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD**

In re: Invenergy Thermal Development LLC : SB-2015-06
Application to Construct the Clear River :
Energy Center in Burrillville, R.I. :

**MOTION OF INVENERGY THERMAL DEVELOPMENT LLC FOR
PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION**

Now comes Invenergy Thermal Development LLC (“Invenergy”) and hereby requests that the Energy Facility Siting Board (“EFSB” or “the Board”) grant protection from public disclosure certain confidential information submitted in response to the Town of Burrillville’s (“Town”) 22nd Set of Data Requests.

The confidential information that is the subject of this Motion and requires protective treatment from disclosure to the public is the following: (1) Invenergy’s response to Request No. 22-23 (a), stating the annual number of megawatt hours (“MWH”) the Clear River Energy Center (“CREC”) is anticipated to produce operated on natural gas, broken down by calendar year¹; and (2) Schedule 1 to Invenergy’s agreement with Benn Water & Heavy Transport Corp. (“Benn Water”), attached to Invenergy’s Response to the Town’s 22nd Set of Data Request, No. 22-16 as Exhibit 1. Invenergy requests protective treatment of this information in this proceeding in accordance with R.I. Gen. Laws § 38-2-2(4)(B).

I. LEGAL STANDARD

Rhode Island’s Access to Public Records Act (“APRA”), R.I. Gen. Laws § 38-2-1 *et. seq.*, sets forth the parameters for public access to documents in the possession of state and local government agencies. Under APRA, all documents and materials submitted in connection with the transaction of official business by an agency are deemed to be a “public record,” unless the

¹ The Board has previously granted protective treatment of similar PA Consulting, Inc. information and documents. See EFSB Order No. 82.

information contained in such documents and materials falls within one of the exceptions specifically identified in R.I. Gen. Laws § 38-2-2. Therefore, to the extent that information provided to the Board falls within one of the designated exceptions to APRA, the Board has the authority under the terms of APRA to deem such information to be confidential and to protect that information from public disclosure.

In that regard, R.I. Gen. Laws § 38-2-2(4)(B) provides that the following records shall not be deemed public:

Trade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature.

When interpreting APRA, the Rhode Island Supreme Court has held that the agencies making determinations as to the disclosure of information under APRA may apply the balancing test established by the Court in *Providence Journal v. Kane*, 577 A.2d 661 (R.I. 1990). Under this balancing test, the Board may protect information from public disclosure if the benefit of such protection outweighs the public interest inherent in disclosure of information pending before regulatory agencies. Further, where the release of information or data to a competitor will “cause substantial harm to the competitive position of the person from whom the information was obtained[,]” the Board should grant a request to protect the information from public disclosure. *Providence Journal Company v. Convention Center Authority*, 774 A.2d 40, 47 (R.I. 2001).

Moreover, the Rhode Island Supreme Court has held that the agencies applying the balancing test established in *Kane*, 577 A.2d at 664 may grant protection of the information even if the requested document does not fall within one of the twenty-five (25) enumerated exceptions in APRA, where the requested document may be subject to redaction upon an appropriate

balancing test weighing the public interests in disclosure against the privacy interests of the affected individual. *See Direct Action for Rights and Equality v. Gannon (DARE I)*, 713 A.2d 218 (R.I. 1998); *see also DARE (II)*, 819 A.2d 651 (R.I. 2003)); *Kane*, 577 A.2d at 664.

II. BASIS FOR CONFIDENTIALITY REQUEST

The Town's Data Request No. 22-23 (a) requests the annual number of MWHs CREC is anticipated to produce operated on natural gas between 2019 and 2038 broken down by calendar year. In order to respond to this request, Invenergy's consultants, PA Consulting Inc. ("PA") prepared this data. This information is not generally available to the public. Providing the details of PA's market assumptions, financial analysis and projections in a public filing would cause Invenergy "substantial harm to the competitive position" of the Company. *See Convention Center Authority*, 774 A.2d at 47-48. The Board protected similar annual projections of market inputs in PA's previous analysis. *See* EFSB Order No. 82. Invenergy's projections regarding the annual number of MWHs CREC is anticipated to produce operated on natural gas broken down by calendar year should therefore be protected under the trade secret and commercial information exception, as authorized at R.I. Gen. Laws § 38-2-2(4). *See id.*

The Town's Data Request No. 22-16 requests the Schedule 1, which is incorporated into Invenergy's Agreement with Benn Water. Schedule 1 contains third-party pricing information, which is not generally available to the public. This third-party pricing information is confidential and proprietary. Providing this third-party pricing information would cause a third-party (Benn Water) "substantial harm to [its] competitive position[,]" as a competitor could utilize this information to Benn Water's detriment. *Id.* Therefore, this third-party pricing information should also be protected under the trade secret and commercial information exception, authorized by R.I. Gen. Laws § 38-2-2(4). *Id.*

For the reasons stated above, this information should be exempt from the definition of a public record under APRA as “. . . commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature.” R.I. Gen. Laws § 38-2-2(4)(B). The EFSB should determine that the information provided is confidential and provide protective treatment for this information by granting this Motion for a Protective Order, pursuant to R.I. Gen. Laws § 38-2-2. Invenenergy respectfully requests that this information identified herein (i) be kept confidential indefinitely, (ii) be redacted in the public docket, and (iii) be disclosed only to the EFSB, attorneys and expert consultants as necessary to this proceeding and in accordance with the protections ordered.

WHEREFORE, the Invenenergy respectfully requests that the Board grant this Motion for Protective Treatment as stated herein.

Respectfully submitted,
Invenenergy Thermal Development LLC
By its attorneys,

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Dated: February 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2017, I delivered a true copy of the foregoing Motion via electronic mail to the parties on the attached service list.

/s/ Alan M. Shoer