

DOCKETED

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CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512



November 14, 2017

Andrew B. Brown
Ellison Schnieder Harris & Donlan LLP
Attorney for Direct Energy Business, Inc.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816

RE: **Application for Confidential Designation for Power Source
Disclosure Annual Report
Docket No. 17-PSDP-01**

Dear Mr. Brown:

The California Energy Commission is in receipt of an Application for Confidentiality submitted on behalf of Direct Energy Business, Inc. (Applicant). The application seeks confidential designation for specified data contained in Applicant's Annual Report under the Power Source Disclosure program (PSDP). The application states that confidentiality is sought for market sensitive information that constitutes a trade secret contained in PSPD Schedules 1 and 2 (Confidential Records). The information has not been previously disclosed to the public.

A properly filed Application for Confidentiality shall be granted under the California Code of Regulations, title 20, section 2505(a)(3)(A), "if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the [Energy] Commission to keep the record confidential." The California Public Records Act allows for the non-disclosure of trade secrets. (Gov. Code, § 6254(k); Evid. Code, § 1060.) California courts have traditionally used the following definition of trade secret:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . .

(*Uribe v. Howe* (1971) 19 Cal.App.3d 194, 207, citing the Restatement of Torts, vol. 4, § 757, comment b, p.5.)

California Code of Regulations, title 20, section 2505(a)(1)(D), states that if an applicant for confidential designation believes that the record should not be disclosed because it contains trade secrets, or its disclosure would otherwise cause loss of a competitive advantage, an application shall state: 1) the specific nature of the advantage; 2) how the advantage would be lost; 3) the value of the information to an applicant; and 4) the

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ease or difficulty with which the information could be legitimately acquired or duplicated by others.

The application addresses these four elements: 1) the Confidential Records contain historical retail sales data reflecting Applicant's market position, the disclosure of which would cause a loss of a competitive advantage; 2) disclosure of the retail sales data would allow competitors to determine Applicant's market position to the detriment of Applicant and its customers; 3) maintaining confidentiality of sales information allows Applicant to remain competitive in retail and wholesale energy markets; and 4) the information cannot be legitimately acquired or duplicated by others.

The application is clear that confidentiality is being sought for trade secret information reported as megawatt hours related to energy retail sales information. Information reported under PSDP as percentages of retail sales, as opposed to megawatt hours, do not qualify as a trade secrets warranting protection from public disclosure. Reported percentages do not pose a risk of disclosing historical retail sales or purchases information that would divest Applicant of a competitive advantage. Therefore, Applicant has made a reasonable claim that the law allows the California Energy Commission to keep all reported megawatts contained in the Confidential Records from public disclosure. Percentages contained in the Confidential Records are subject to public disclosure.

Applicant requests that the information be kept confidential until December 31, 2017. This requested time period is appropriate, because it represents the amount of time the information is expected to retain validity and market value, and because any lesser period of time would undermine existing confidentiality protection of the same or substantially similar data held by the California Public Utilities Commission. However, the information may be released earlier if Applicant-specific information is aggregated with information from all other Energy Service Providers on a statewide level.

For the reasons stated above, the request for confidential designation for the Confidential Record is granted. The information will remain confidential until December 31, 2017.

Be advised that persons may petition to inspect or copy records that I have designated as confidential. The procedures and criteria for filing, reviewing, and acting upon such petitions are set forth in the California Code of Regulations, title 20, section 2506.

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If you have any questions concerning this matter, please contact Michelle Chester, Staff Counsel, at (916) 651-2935.

Sincerely,

A handwritten signature in green ink, appearing to read 'Drew Bohan', with a long horizontal flourish extending to the right.

Drew Bohan
Executive Director

cc: Docket Unit, California Energy Commission
Camille Remy-Obad, California Energy Commission