

**DOCKETED**

<b>Docket Number:</b>	19-PSDP-01
<b>Project Title:</b>	Power Source Disclosure Program - 2018
<b>TN #:</b>	229144
<b>Document Title:</b>	Response letter to K&L Gates, LLC Regarding Application for Confidential Designation
<b>Description:</b>	Response letter
<b>Filer:</b>	Darlene Burgess
<b>Organization:</b>	California Energy Commission
<b>Submitter Role:</b>	Commission Staff
<b>Submission Date:</b>	7/30/2019 2:56:51 PM
<b>Docketed Date:</b>	7/30/2019



July 25, 2019

Mr. Buck Endemann  
K&L Gates, LLC  
Four Embarcadero Center, Suite 1200  
San Francisco, CA 94111

**Re: Application for Confidential Designation for Power Source  
Disclosure Annual Report, Docket No. 19-PSDP-01**

Dear Mr. Endemann:

The Energy Commission is in receipt of Direct Energy Business' (Applicant) Application for Confidentiality for specified data contained in the 2018 Annual Report under the Power Source Disclosure program (PSDP). Specifically, the Applicant seeks confidentiality for the following data:

- 1) PSD Schedule 1 - Unspecified Power purchase data in cells N94, P94; Total Net Purchases in cell O96; Total Retail Sales information in cell O99.
- 2) PSD Schedule 2 - Total and Renewable Specific Purchases: Percent of Total Retail Sales in cells D13:D18, D24; Unspecified Power: Net Purchases and Percentage of Total Retail Sales in cells C26:D26; Total Net Purchases in cell C28; Total Retail Sales in cell C30.

The application notes that the data should be kept confidential because the information is not public and the information is market sensitive and constitutes trade secrets. The application states that release of this information will result in loss of competitive advantage in the wholesale and retail marketplaces relative to the Applicant's ability to negotiate future contracts for the purchase or resale of energy and/or capacity at wholesale, or negotiate contracts with retail customers. The application states that confidential information contained in the annual report may be disclosed if it is aggregated with the same type of data reported by other energy service providers.

The application is also seeking confidentiality for the percent of retail sales as set forth in Schedule 2, column D. The granting of confidentiality for percent data would be inconsistent with confidentiality designations in prior years as well as with confidentiality requests from other entities. In addition, Power Content

Labels containing the percent data are required to be disclosed by utilities to their customers prior to the Applicant's requested confidentiality term of December 31, 2020. Therefore, to ensure consistency and compliance with the PSDP, the percent data in Schedule 2, column D, cannot be designated as confidential.

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

The application addresses these elements as disclosure of the Applicant's retail sales or procurement data could disadvantage the Applicant in negotiating for upcoming purchases of renewable energy. According to the application, this disadvantage could result in higher costs for customers and the potential loss of customers. Procurement data has been kept confidential and has not been publicly disclosed.

While the Applicant requested confidentiality for Schedule 2, column D percent data, that data cannot be designated as confidential. However, the Applicant has made a reasonable claim that the law allows the California Energy Commission to keep all reported megawatt hours contained in the annual report from public disclosure. This would include the MWh values listed in Schedule 2, column C.

Mr. Buck Endemann  
July 25, 2019  
Page 3

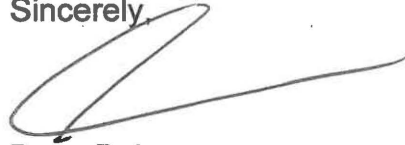
The Applicant requests that this information be kept confidential until June 1, 2020. A confidentiality term this long is inconsistent with terms requested by and granted to other entities under the PSDP, which is until December 31, 2019. A term ending December 31, 2019, or one year from the end of the reporting period, is the appropriate time to keep confidential all reported megawatt hours contained in the annual report because it is consistent with confidentiality protection of the same or substantially similar data held by the California Public Utilities Commission.

For these reasons, the request for confidential designation for the reported megawatt hours contained in the annual report is granted until December 31, 2019.

For future PSDP annual reports that are substantially similar, the Applicant may follow the simplified process set forth in the California Code of Regulations, title 20, section 2505(a)(4).

If you have any questions concerning this matter, please contact Jared Babula, senior attorney, at [jared.babula@energy.ca.gov](mailto:jared.babula@energy.ca.gov), or (916) 651-1462.

Sincerely,

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

Drew Bohan  
Executive Director