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August 20, 2021

Via Email

Barbara Farmer
Direct Energy Business, LLC
12 Greenway Plaza, Suite 250
Houston, Texas 77046
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**Application for Confidential Designation for Data in Power Source
Disclosure Program Annual Report, Docket 21-PSDP-01**

Dear Barbara Farmer:

The California Energy Commission (CEC) received the confidentiality applications submitted by Direct Energy Business, LLC (applicant) on June 8, 2021, July 7, 2021 and July 30, 2021, for specified data contained in its 2020 Annual and Revised Annual Report under the Power Source Disclosure (PSD) program. Specifically, both applications seek confidentiality for:

PSD Schedule 1 –

Cell L7 (Total Retail Sales (MWh) [megawatt-hours]); cell L8 (Total Net Specified Procurement (MWh)); cell L9 (Total Unspecified Power (MWh)); and cell L13 (Total Net Specified Nuclear, Large Hydro, Renewables, and ACS Power (MWh))

PSD Schedule 2 –

Cell L9 (Total Retired Unbundled Renewable Energy Credits (RECs) (MWh))

PSD Schedule 3 –

Cells C13, C18, and C24 (Percent of Total Retail Sales for Total and Renewable Specific Purchases; cell B24 (Total Unspecified Power Retail Sales (MWh)), cell B25 (Total Adjusted Net Procured purchases (MWh)), and cell C29 (Percentage of Retail Sales Covered by Retired Unbundled RECs)

Confidential designation of this data is requested pursuant to Title 20, California Code of Regulations, section 2505, on the grounds that the information constitutes trade secrets and proprietary information not available to the general public or is otherwise commercially sensitive data, the disclosure of which would cause loss of a competitive advantage. The applications also state that confidentiality is appropriate under Government Code section 6255(a) because the public interest in nondisclosure clearly outweighs the public interest in disclosure.

A properly filed Application for Confidentiality shall be granted under Title 20, California Code of Regulations, section 2505(a)(3)(A), "if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the [CEC] to keep the record confidential." The California Public Records Act allows for the non-disclosure of corporate proprietary information including trade secrets. (Gov. Code, sections 6254(k), 6276.44; see also Evid. Code, section 1060; Civ. Code, section 3426.1.) Government Code section 6255 also permits the CEC to withhold a public record where "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

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, 207-208, from the Restatement of Torts, vol. 4, section 757, comment b, p. 5.)

Title 20, California Code of Regulations, 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.

Here, the applications state that the data should be kept confidential because the applicant has taken reasonable steps to keep the information confidential; it is not otherwise publicly available or readily discoverable; a summary of Direct Energy Business' (DEB) very recent wholesale and retail activities is market sensitive and constitutes trade secrets; and that releasing DEB's confidential

commercial information would result in loss of competitive advantage in the wholesale and retail marketplaces relative to DEB's ability to negotiate future contracts for the purchase or resale of energy and/or capacity at wholesale, or negotiation of contracts with retail customers. Release of the data could be used to directly or indirectly to determine the applicant's market position and procurement strategy to the detriment of the applicant and its customers. Competitors could ascertain the Applicant's Renewables Portfolio Standards obligations and make its power procurement and compliance obligations more expensive.

The applications request that all the specified information be kept confidential until December 31, 2022. The CEC has historically granted confidentiality for this type of data through December 31 of the current year, at which time the data will be one year old. A term ending one year from the end of the reporting period also represents the amount of time this type of data is considered confidential by the California Public Utilities Commission (CPUC). (Decisions R05-06-040 [Appendix B, Electric Service Provider (ESP) Matrix, section V], and D06-06-066 [Appendix 2, ESP Matrix, *Market Purchases of Energy and Capacity: public after one year*])

Based on this information, the confidentiality applications are hereby approved the data will remain confidential through December 31, 2021 or until it is publicly released, whichever is earlier.

The information may be released before December 31, 2021 or publication of the power content label if applicant-specific information is aggregated with information from all other statewide energy service providers. Load serving entities provide quarterly annual retail sales under Title 20, California Code of Regulations, section 1306. As set forth in Title 20, California Code of Regulations, section 2507(e)(1)(A)(1), the quarterly data can be publicly disclosed for an individual load serving entity if aggregated at the statewide level by year. Therefore, data submitted consistent with this aggregation will not be confidential.

Be advised that persons may petition to inspect or copy records that the CEC has designated as confidential, the executive director may disclose or release records previously designated as confidential in certain circumstances, and the CEC may hold a hearing to determine the confidentiality of its records on its own motion or on a motion by CEC staff. The procedures and criteria for disclosing or releasing, filing, reviewing, and acting upon such petitions or motions are set forth in the Title 20, California Code of Regulations, sections 2506-2508.

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You may request confidentiality for similar data in a future annual report without submitting an application by following the procedures set forth in Title 20, California Code of Regulations, section 2505(a)(4).

If you have any questions, please contact Raj K. Dixit, attorney, at raj.dixit@energy.ca.gov or at (916) 776-3055.

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