

DOCKETED	
Docket Number:	23-PSDP-01
Project Title:	Power Source Disclosure Program - 2022
TN #:	250695
Document Title:	CEC's response letter to Direct Energy Business LLC's confidential application June 1, 2023
Description:	N/A
Filer:	Ngoc Tran
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	6/21/2023 11:06:42 AM
Docketed Date:	6/21/2023



June 21, 2023

Via Email

Barbara Farmer
Direct Energy Business LLC
910 Louisiana Street, Suite B200
Houston, Texas 77002
barbara.farmer@nrg.com

**Application for Confidential Designation for Data in Power Source
Disclosure Program Annual Report
Docket No. 23-PSDP-01**

Dear Barbara Farmer:

The California Energy Commission (CEC) has received Direct Business Energy, LLC's (applicant) application for confidential designation (TN 250465), filed June 1, 2023, covering the following data contained in the Power Source Disclosure Annual Report:

- PSD Schedule 1 – Procurements and Retail Sales
 - Total of Retail Sales in cell N7
 - Total of Net Specified Procurement in cell N8
 - Total Unspecified Power (MWh) in cell N9
 - Total Net Specified Nuclear, Large Hydro & Renewables in cell N13
 - Total Greenhouse Gas (GHG) Emissions (excludes grandfathered emissions) in cell N14
- PSD Schedule 2 – Retired Unbundled Renewable Energy Credits (REC)
 - Total Retired Unbundled RECs in MWh cells E9 and E12
- PSD Schedule 3 – Annual Power Content Label Data
 - Total and Renewable Specific Purchases: Percent of Total Retail Sales in cells C13:C22 and Other C23
 - Total Unspecified Power in cell B24
 - Total Percentage Unspecified Power in cell C24
 - Total Net Purchases MWh in cell B25
 - Total Retail Sales in cell C27
 - Total Percentage of Retail Sales Cover by Retired Unbundled RECs in cell C31

An application for confidential designation 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 [California] Public Records Act or other provision of law authorizes the [California Energy] Commission to keep the record confidential.” The executive director’s determination made in response to an application for confidential designation is subject to a reasonableness standard. It is the applicant’s burden to make a reasonable claim for confidentiality based on the California Public Records Act and other applicable laws.

The applicant asserts the data contains trade secret and proprietary information which is not made public by the applicant and that the data is considered confidential by the California Public Utilities Commission (CPUC). The applicant states the data can be aggregated with other similar data and made public.

The California Public Records Act allows for the non-disclosure of trade secrets including, among others, those records exempt from disclosure under the Uniform Trade Secrets Act. (Gov. Code, §§ 7927.705(k), 7930.005, 7930.205; Civ. Code, § 3426.1; Evid. Code, § 1060.)

Civil Code section 3426.1(d) defines “trade secret” as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(Civ. Code, § 3426.1(d); see also Gov. Code, §§ 7927.705, 7930.005, 7930.205; Evid. Code, § 1061(a); *Uribe v. Howie* (1971) 19 Cal.App.3d 194, 207.)

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, the application shall state (1) the specific nature of the advantage, (2) how the advantage would be lost, (3) the value of the information to the applicant, and (4) the ease or difficulty with which the information could be legitimately acquired or duplicated by others.

Discussion

The application addresses the four elements in California Code of Regulations, title 20, section 2505(a)(1)(D) by stating:

1. *The specific nature of the advantage* – The information can be used to determine the applicant’s market position directly or indirectly to the detriment of the applicant and its customers.
2. *How the advantage would be lost* – Disclosure of the information may impact the ability to secure a favorable margin or return as release of the

information may 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 or negotiate contracts with retail customers.

3. *The value of the information to the applicant* – The applicant operates in a competitive and dynamic retail energy market and is a net purchaser in the wholesale market. Public release of the information may harm the applicant's existing and future commercial opportunities and its ability to secure a return in the marketplace.
4. *The ease or difficulty with which the information could be legitimately acquired or duplicated by others* – The information is kept confidential by the applicant and only shared with relevant government agencies.

The applicant has not made a reasonable claim that the GHG emissions data including emissions intensity can be designated as confidential. Public Utilities Code section 398.4 requires every retail supplier that makes an offering to sell electricity that is consumed in California to disclose to consumers its electricity sources and the associated greenhouse gas emissions intensity for the previous calendar year. California Health & Safety Code section 38530 also requires the reporting and verification of GHG emissions. Finally, California Government Code section 7924.510 states all air or other pollution monitoring data, including data compiled from stationary sources, are public records.

The applicant has made a reasonable claim that the energy data is exempt as trade secrets. The application requests the data be confidential until December 31, 2023. This term is consistent with the one-year period this type of data is considered confidential by the CPUC. (See Order Instituting Rulemaking, R.05-06-040, D.06-06-066 Appendix 2 and D.08-04-023 Appendix B, ESP Confidentiality Matrix Section V *Market Purchases of Energy and Capacity*.)

Executive Director's Determination

For the reasons stated, the energy data is granted confidentiality until December 31, 2023. The data may be released before December 31, 2023, if applicant-specific information is aggregated with information from all other statewide energy service providers. Confidentiality is denied for all GHG emissions information.

Note that load serving entities provide quarterly annual retail sales under title 20, CCR, section 1306. As set forth in California Code of Regulations, title 20, section 2507(f)(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.

Barbara Farmer
June 21, 2023
Page 4

You may request that the CEC determine the confidentiality of records for which the executive director denied confidential designation. You have 14 days to request that the CEC determine the confidentiality of the record. If you make such a request, the CEC will conduct a proceeding pursuant to the provisions in the California Code of Regulations, title 20, section 2508.

Be advised that under California Code of Regulations, title 20, section 2506, one may petition to inspect or copy records that the CEC has designated as confidential. A decision on a petition to inspect or copy confidential records is issued by the CEC's chief counsel. Under California Code of Regulations, title 20, section 2507, the executive director may disclose records, or release records previously designated as confidential, in certain circumstances. The procedures for acting on a petition and criteria for disclosing or releasing records previously designated as confidential are set forth in the California Code of Regulations, title 20, sections 2506-2508.

You may request confidentiality for similar data in a future annual report without applying by following the procedures set forth in CCR, title 20, section 2505(a)(4).

If you have questions, please email confidentialapplication@energy.ca.gov.

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