

**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 and the Clear River Energy Center Project (“Invenergy”) and hereby requests that the Energy Facility Siting Board (“EFSB” or “the Board”) grant protection from public disclosure certain confidential information submitted in its responses to the Conservation Law Foundation’s (“CLF’s”) 9<sup>th</sup> Set of Data Requests.

The confidential information that is the subject of this Motion and requires protective treatment from disclosure to the public is information concerning the ISO-NE’s Annual Reconfiguration Auction and whether or not Invenergy participated in that Auction. 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 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 (R.I. 2001).

Moreover, the Rhode Island Supreme Court has held that the agencies applying the balancing test established in *Providence Journal v. Kane*, 577 A.2d 661 (R.I.1990) 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)); *Providence Journal Company v. Kane*, 577 A.2d 661 (R.I. 1990).

## **II. BASIS FOR CONFIDENTIALITY REQUEST**

CLF's 9<sup>th</sup> Set of Data Requests asked whether Invenegy participated in a so-called "Reconfiguration Auction," and if so, to describe the results. This requested information is commercially sensitive and not available to the general public. In order to fully respond to CLF's 9<sup>th</sup> Set of Data Requests, Invenegy provided commercially sensitive information, but respectfully requests protective treatment. Providing the details of the ISO-NE Annual Reconfiguration process and whether or not Invenegy participated or what confidential details occurred in a confidential auction process would cause Invenegy "substantial harm to the competitive position" of the Company. *See Providence Journal Company v. Convention Center Authority*, 774 A.2d 40 (R.I. 2001). Other companies could use this information to the detriment of Invenegy in future auctions or business transactions. The ISO-NE does not disclose the details of company participation (or lack of participation) in reconfiguration auctions. The ISO-NE also treats this level of detail as confidential. This information 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.* This type of information is also similar to the information that the Board has previously protected as confidential information. *See* Order No. 82 (March 10, 2016), Order No. 99 (October 3, 2016), Order No. 101 (October 5, 2016) and Order No. 109 (March 28, 2017).

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 the information identified herein (i) be kept confidential indefinitely, (ii) not be placed 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,  
INVENERGY THERMAL DEVELOPMENT LLC  
By its attorneys,

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Dated: July 11, 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on July 11, 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

**SB-2015-06 Invenergy CREC Service List as of 07/11/2017**

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