

**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 Supplemental Water Supply Plan, filed with the Board on September 28, 2017.

The confidential information that is the subject of this Motion and requires protective treatment from disclosure to the public is proprietary and sensitive confidential business information concerning two contingent/redundant water supply agreements between Invenergy and two contingent/redundant water suppliers. 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

Invenergy's Supplemental Water Supply Plan, filed with the Board on September 28, 2017 ("Supplement"), contains commercially sensitive information and information not available to the general public regarding two contingent/redundant water supply agreements, one between Invenergy and Benn Water and Heavy Transport Corp. ("Benn Water") and a second between Invenergy and the Narragansett Indian Tribe (the "Tribe"). The commercially sensitive information includes, but is not limited to, pricing and business terms and supply source locations. In order to provide the Board and the other Parties with as much information and analysis as possible, Invenergy attached these agreements to and included details regarding these agreements in the Supplement, but respectfully requests protective treatment.

Providing the details regarding the pricing and business terms and supply source locations to the public would cause Invenergy, Benn Water and the Tribe "substantial harm to the[ir] competitive position[s .]" *See Providence Journal Company v. Convention Center Authority*, 774 A.2d 40 (R.I. 2001). Both agreements are private agreements entered into by business entities for a commercial purpose. The pricing terms in certain circumstances and supply source locations included in these agreement are not publically available. Disclosing this information, especially the business relationships and supply source locations of Benn Water, would be anticompetitive and could disadvantage the commercial interests of Benn Water.¹ Other companies could also use the information contained in these agreements to the detriment of Invenergy, Benn Water and the Tribe in future business transactions. This information

¹ Additionally, Invenergy specifically entered into a Non-Disclosure Agreement with Benn Water.

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.*²

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. Invenergy 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 Invenergy respectfully requests that the Board grant this Motion for Protective Treatment as stated herein.

Respectfully submitted,
INVENERGY THERMAL DEVELOPMENT LLC
By its attorneys,

/s/ Alan M. Shoer
Alan M. Shoer, Esq. (#3248)
Richard R. Beretta, Esq. (#4313)
Nicole M. Verdi, Esq. (#9370)
Adler Pollock & Sheehan P.C.
One Citizens Plaza, 8th Floor
Providence, Rhode Island 02903
(401) 274-7200 (Telephone)
(401) 351-4607 (Facsimile)

² The Table and Figure attached to the Supplement are redacted because they also contain the sensitive and confidential business information from the two redundant/contingent agreements between Invenergy and Benn Water and between Invenergy and the Tribe.

Dated: September 27, 2017

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 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