

**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 as an attachment to the Supplemental Testimony of John Niland, filed with the Board on November 20, 2017.

The confidential information that is the subject of this Motion is contained within a recent “New Capacity Qualification Determination Notification” (“QDN”) that was prepared by ISO-NE. As more fully explained below, the QDN is protected from public release by ISO-NE’s Tariffs, in accordance with federal rules and is treated by ISO-NE and the Federal Energy Regulatory Commission (“FERC”) as a confidential document not subject to public review. Invenergy requests protective treatment of this information in this proceeding in accordance with R.I. Gen. Laws § 38-2-2(4)(B) and R.I. Gen. Laws § 38-2-2(4)(S).

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.

Additionally, R.I. Gen. Laws § 38-2-2(4)(S) provides that the following records shall *not* be deemed public:

Records, reports, opinions, information, and statements required to be kept confidential by federal law or regulation or state law, or rule of court.

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

The QDN contains highly commercially sensitive information regarding the Clear River Energy Center Project (“CREC” or the “Project”) and other critical infrastructure information related to the interconnection to the transmission system. This confidential information was recently filed by ISO-NE with the FERC in its November 7, 2017 Informational Filing concerning the up-coming Forward Capacity Market No. 12. *See* https://www.iso-ne.com/static-assets/documents/2017/11/public_info_filing_fca_12.pdf (last visited Nov. 15, 2017).

As explained by ISO-NE in its Informational Filing, Section III.13.8.1(c)(vi) of the FERC approving ISO-NE Tariff “requires the ISO to file the determinations [regarding qualification] as confidential.” *Id.* at 6. The ISO-NE clarifies that the QDN “only went to the Project Sponsor and include a detailed explanation of the ISO’s determination not to qualify a particular resource, which includes confidential information.” *Id.* The ISO-NE also states that the QDN is not made available to the public and is automatically protected by the FERC, without even requiring a separate protective order, given the “highly commercially sensitive nature contained in the information filed confidentially.” *Id.* at 6-7. ISO-NE further notes that because the information in the QDN is commercially sensitive, FERC has routinely granted ISO-NE’s request to treat this information for purposes of its filings with the regulatory agency. *Id.* at 6-7, n. 15 & 16. The

information contained in the QDN is, therefore, protected confidential information “required to be kept confidential by federal law or regulation.” Accordingly, the QDN is not considered public information, in accordance with the APRA, specifically the exception identified in R.I. Gen. Laws § 38-2-2(4)(S).

In order to provide the Board and the other Parties with as much information and analysis as possible regarding ISO-NE’s determination to disqualify Unit 2 from participating in the forward capacity auction (“FCA”) 12, Invenergy, with permission of ISO-NE, attached (confidentially) the QDN to John Niland’s Supplemental Testimony, but respectfully requests protective treatment of the document, for the reasons described in this Motion.

Providing all of the details in the QDN regarding ISO-NE’s critical infrastructure analysis and ISO-NE’s analysis of the CREC Project to the public would cause Invenergy “substantial harm to the competitive position” of the company. *See Providence Journal Company v. Convention Center Authority*, 774 A.2d 40 (R.I. 2001). Revealing this information to the public would also undermine the ISO-NE Forward Capacity Market process, as this process is a highly competitive market based auction system, where companies can, to the detriment of Invenergy, utilize the information contained in the QDN against Invenergy in future ISO-NE market transactions. Disclosing this information would undermine the ISO-NE competitive process because ISO-NE goes to great lengths to protect this information as confidential information so as not to reveal to other companies the commercially sensitive ISO-NE specific company determinations. This information should, therefore, also be protected under the trade secret and commercial information exception, as authorized by R.I. Gen. Laws § 38-2-2(4).

For the reasons stated above, the information in the QDN 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” and as confidential as “required to be kept confidential by federal law or regulation.” *See* R.I. Gen. Laws § 38-2-2(4)(B) and R.I. Gen. Laws § 38-2-2(4)(S). 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,

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Dated: November 20, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 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