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California Energy Commission
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December 11, 2013

Mr. Robert Oglesby
Executive Director
California Energy Commission
Office of the Executive Director
1516 Ninth Street, MS-39
Sacramento, California 95814-5512

Subject: **Application for Designation of Confidential Records**
Data Submitted in the Los Angeles Department of Water and Power's (LADWP's) 2011 and 2012 Renewables Portfolio Standard (RPS) Publicly Owned Electric Utility (POU) Annual Reports

Dear Mr. Oglesby:

The LADWP (Applicant) is applying for the designation of confidential records related to all its North American Electric Reliability Corporation (NERC) Electronic Tags (e-Tags) and all its energy sales data, including pricing information. This application is submitted specifically with its supplemental filing to the Applicant's 2011 and 2012 RPS annual reports.[1] However, the rationale provided herein, should also be applied generally to all of the Applicant's reports submitted to the CEC that include energy sales data and NERC e-Tag data based on state and federal regulations to automatically designate such data as confidential.

This application for automatic confidential treatment of NERC e-Tag data is consistent with the designated categories for such treatment, such as "[e]lectric power plant-specific hourly generation data" under 20 CCR 2505 (a)(5)(B)6 and "[e]nergy sales data" under 20 CCR 2505 (a)(5)(B)2. This treatment is also consistent with designating NERC e-Tag data as "[c]ritical energy infrastructure information," under 18 CFR §§ 388.112 subd. (a), 388.113 subd. (c)(1), 18 CFR 366.2 subd. (e), 78 FR ¶ 16133, 16137 (decided March 2013).

[1] 20 California Code of Regulations §2505 (a)(5).

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In addition, the Applicant requests that all NERC e-Tags, and all energy sales data, including the pricing data related to the Applicant's energy transactions (collectively Confidential Records) be designated confidential by the CEC indefinitely.

1. Automatic Designation of Confidential Records

Information submitted to the CEC must be automatically designated as confidential, without the need for an application for confidentiality, if it falls within one of the identified categories of 20 CCR 2505 subsection (a)(5)(B).[2] Within this list of categories are "[e]lectric power plant-specific hourly generation data" and "[e]nergy sales data."[3] The NERC e-Tag data requested for the 2011 and 2012 compliance reports to the CEC contains plant-specific hourly generation data as well as energy sales data.

An exemption to the California Public Records Act is "plant production data and similar information relating to utility systems obtained in confidence."[4] The NERC e-Tag data "contain information about where the power is sourced and delivered; the responsible parties in the receipt, delivery and movement of the power; the timing; and the volumes and specified details regarding which transmission paths are used."[5] Therefore, this plant production data should not be available to the public.

Also, many energy transactions are governed by a trading agreement known as the Western System Power Pool Agreement (WSPP). Disclosure of NERC e-Tags along with the wholesale electricity transactions made under the WSPP agreement for generating resources will allow other market participants to ascertain the extent to which the Applicant and/or WSPP participants may rely on certain generating resources and anticipate wholesale sales in the year ahead for compliance with its RPS Program. Since most negotiations for the purchase or sale of power center around the availability of resources and the need for additional resources, releasing this information will put the Applicant and/or WSPP participants at a disadvantage in the purchase and sale of renewable energy along with anticipating the ability to meet future RPS targets and portfolio balance requirements based on energy sales data. Furthermore, disclosure of energy sales data, including the counterparty and energy unit identification information, without a request for

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[2] A local governmental body may include a "private third party". 20 CCR 2503(b)(1)
[3] 20 California Code of Regulations §2505 (a)(5)(B)6.
[4] Cal. Gov. Code §6254 subd.(e)
[5] Elec. Mkt. Transparency Provisions of Section 220 of the Fed. Power Act, 143 F.E.R.C. P61,054, 61 (FERC 2013) citing Order No. 768, FERC Stats. & Regs. P 31,336 at P 156.

confidentiality may place the Applicant in violation of the terms and conditions of its WSPP agreement.

Moreover, NERC e-Tag data falls under the federal definition for critical energy infrastructure information. "Critical energy infrastructure information means specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that: (i) [r]elates details about the production, generation, transportation, transmission, or distribution of energy."[6]

Furthermore, the Federal Energy Regulatory Commission (FERC) views NERC e-Tag data as non-public information. In FERC's Final Rule assessing its need to access e-Tag data it reasoned that "[t]he need to gain access to e-Tag data led the [FERC] Commission to issue a Notice of Proposed Rulemaking on April 21, 2011, proposing to require NERC to make the complete e-Tags used to schedule the transmission of electric power in wholesale markets available to Commission staff on an ongoing, non-public basis."[7] Moreover, FERC is specifically directed in a federal regulation to maintain the e-Tag data as confidential. The regulation states that "[n]o member, officer, or employee of the Commission shall divulge any fact or information that may come to his or her knowledge during the course of examination of books, accounts, memoranda, or other records as provided in this section, except as may be directed by the Commission or by a court of competent jurisdiction,"[8] and NERC e-Tags are specifically identified as a type of information subject to this confidentiality restriction.[9]

In a recent Final Rule, FERC stated that "the Commission will deem all e-Tag information made available to the Commission pursuant to Order No. 771 as being submitted pursuant to a request for privileged and confidential treatment under 18 CFR 388.112."[10] "For the purposes of the [FERC] Commission's filing requirements, information subject to an outstanding claim of exemption from disclosure under FOIA, including critical energy infrastructure information (CEII), will be referred to as privileged material."[11] The FERC Commission went on to state that it:

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[6] 18 CFR 388.113 subd. (c)(1)
[7] 141 FERC ¶ 61,235 (Issued Dec. 20, 2012) n.15 citing Availability of E-Tag Information to Commission Staff, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,675 (2011) (E-Tag NOPR).(emphasis added).
[8] 18 CFR 366.2 subd. (e).
[9] 18 CFR 366.2 subd. (d)
[10] 18 CFR Part 366 Availability of E-Tag Info., 142 F.E.R.C. P61,181, 61 (FERC 2013).
[11] 18 CFR 388.112 subd. (a)

"will handle e-Tag information as privileged or confidential under section 388.112 of the [FERC] Commission's regulations without the need for e-Tag Authors and Balancing Authorities to include certain markings required under section 388.112(b)(1) of the Commission's regulations. In other words, the Commission will deem e-Tags made available to the Commission under Order No. 771 as universally being provided subject to a request for confidential treatment and e-Tag Authors do not need to separately make a request for confidential treatment in each instance for this to apply."[12]

This FERC position applies to "all e-Tags, including Intra-Balancing Authority e-Tags."[13] Consequently, not only is FERC treating all NERC e-Tag data as critical energy infrastructure information, which is not subject to disclosure under FOIA, but is automatically deeming all NERC e-Tag data as confidential.

Hence, the CEC should treat all NERC e-Tag data as automatically confidential under state and federal laws and the energy sales data, such as pricing data, as automatically confidential under state laws without the need for specific markings or identification as such by the Applicant.

2. Questionnaire: Application for Confidential Designation

The following responses to the CEC's questionnaire are provided to further support the Applicant's request for confidential designation:

Applicant Name, Address, and Contact Information

Applicant Name: Los Angeles Department of Water and Power

Submitted by: Mr. Randy S. Howard
Director of Power System Planning and Development
and Chief Compliance Officer
111 North Hope Street, Room 921
Los Angeles, CA, 90012
Office: (213) 367 - 0381
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[12] 78 FR ¶ 16133, 16137 (issued March 14, 2013)(citation omitted)(emphasis added).
[13] Id.

1(a). Title, date, and description (including number of pages) of the information or data for which you request confidential designations. Information or data seeking a designation of confidentiality must be included with this application.

The information is found on CEC-RPS-eTag form for 2011 and 2012. All Confidential Records provided to the CEC by the Applicant are deemed confidential information.

1(b). Specify the part(s) of the information or data for which you request confidential designation.

All Confidential Records, including the NERC e-Tag data provided to the CEC on the CEC-RPS-eTag form submitted for the annual RPS compliance reports for 2011 and 2012, and all energy sales data, such as all pricing information provided to the CEC, including those that are related to the WSPP agreement.

2. State and justify the length of time the Energy Commission should keep the information or data confidential.

The Applicant requests that the Confidential Records be kept confidential indefinitely because it is "[e]lectric power plant-specific hourly generation data" under 20 CCR 2505 (a)(5)(B)6, "[e]nergy sales data" under 20 CCR 2505 (a)(5)(B)2, and "[c]ritical energy infrastructure information," under 18 CFR §§ 388.112 subd. (a), 388.113 subd. (c)(1), 18 CFR 366.2 subd. (e), 78 FR ¶ 16133, 16137 (decided March 2013).

3(a). State the provision(s) of the public Records Act (Gov. Code, § 6250 et seq.) or other law that allows the Energy Commission to keep the information or data confidential, and explain why the provision apply to that material.

When another state or local agency "possesses information pertinent to the responsibilities of the [CEC] Commission that has been designated by that agency as confidential under the Public Records Act, or the Freedom of Information Act, the Commission, the Executive Director, or the Chief Counsel may request, and the agency shall submit the information to the Commission without an application for confidential designation. The Commission shall designate this information confidential."[14]

The CEC-RPS-eTag form and WSPP agreements that the Commission has requested contain confidential counterparty information along with NERC e-Tag data and energy sales data. In addition to the state and federal provisions referenced above, there are provisions of the Public Records Act and other law that allows the CEC to keep the Confidential Records confidential.

Government Code Section 6254 (e) exempts records from disclosure if the records, such as the NERC e-Tags, are plant production data relating to utility systems development. In addition, the data obtained from the WSPP agreements are part of the plant production data relating to the utility systems development, and are obtained in confidence pursuant to a confidentiality provision for wholesale electricity transactions in the WSPP agreement; consequently, also should be exempt from disclosure based on this provision.

In addition, the Confidential Records are "official information." In conjunction with the data designated as "[e]lectric power plant-specific hourly generation data" under 20 CCR 2505 (a)(5)(B)6, "[e]nergy sales data" under 20 CCR 2505 (a)(5)(B)2, and "[c]ritical energy infrastructure information," under 18 CFR §§ 388.112 subd. (a), 388.113 subd. (c)(1), 18 CFR 366.2 subd. (e), 78 FR ¶ 16133, 16137 (decided March 2013), Evidence Code Section 1040 subsection (b)(1) forbids their disclosure.

Also, trade secrets are exempt from public disclosure under Government Code section 6254 subdivision (k), "which incorporated the terms of Evidence Code section 1060."[15] Under controlling law expressed in *Uribe v. Howie*, 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."[16] A similar broad

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[14] 20 CCR 2505(b)
[15] *Uribe v. Howie* (1971) 19 Cal. App. 3d 194, 206.
[16] *Id.*

definition is incorporated into the Public Records Act by Government Code Section 6254.7 subsection (d), which protects against the disclosure of "trade secrets."

> "'Trade secrets,' as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it."[17]

To determine whether certain information is a trade secret, the information must be evaluated to assess if it:
(1) is valuable because it is unknown to others, and
(2) the owner has attempted to keep it secret.[18]

The Confidential Record represents a valuable compilation of confidential information related to energy sales data. Under CEC regulations, when requesting a trade secret be deemed confidential, an application must provide:
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.[19]

The NERC e-Tags and energy sales data, which includes wholesale electricity transactions made under the WSPP agreement, meet these qualifications.

1. "The specific nature of the advantage." The Confidential Record is not public information. The energy sales data and NERC e-tags represent production data

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[17] California Government Code §6254.7 sub. (d).
[18] *Whyte v. Schlage Lock Co.* (2002) 101 Cal. App. 4th 1443, 1454, citing *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal. App. 3d 1, 18.
[19] 20 CCR § 2505(a)(1)(D).
[20] See Paragraph 30 of WSPP.
[21] 141 F.E.R.C ¶61,235 n.142 citing E-Tag NOPR, FERC Stats. & Regs. ¶32,675 at P 16 (citing *5 U.S.C. 552(b)(4) (2006), amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007)); also, see discussion of trade secrets above in section 3(a) of this application.

of electricity generated and transacted among participants to the WSPP agreement within the Western Electricity Coordinating Council ("WECC").

2. "How the advantage would be lost." The Applicant has spent time and resources compiling the Confidential Records. The value of the information would be significantly impaired if made available to the public, which includes the Applicant's competitors, without a commensurate investment of time and resources. The Applicant could lose an advantage to keep electric rates affordable and competitive for its ratepayers if others could discern how and when the Applicant needed energy to meet the demands of its ratepayers.

3. "The value of the information to the Applicant." The NERC e-Tag data and energy sales data represent transactions with commercial value and provide the Applicant, as a California balancing authority, with a business advantage over other balancing authorities who do not know or use it. The Confidential Record is a valuable compilation of confidential transactions related to energy sales where the data represents significant (a) time and resources, and (b) information to facilitate its energy sales. Further, the Applicant has taken efforts to maintain the confidentiality of the Confidential Record to prevent others from driving up electricity prices and transmission costs based on the Applicant's sales.

4. "The ease or difficulty with which the information could be legitimately acquired or duplicated by others." The Confidential Record is not available to the public or readily available in the marketplace. The California Air Resources Board (ARB) has also recognized the confidential nature of the data and has sought the NERC e-Tag data via a subpoena issued to the Applicant in September 2013, pursuant to California Government Code section 11181, et. seq. The ARB is required to maintain the information confidential per Government Code section 11183.

Furthermore, section 6255 of the California Government Code as does Evidence Code Section 1040 subsection (b)(2) and Evidence Code Section 1060, apply a balancing test to assess whether data should be nonpublic information. The public interest served by not disclosing the record outweighs the public interest in disclosure in two primary ways. First, the express terms of the WSPP agreement require that the terms of any transaction and all information exchanged between purchaser and seller remain confidential.[20] Second, failure of the Applicant to comply with its contractual commitments would not only expose the Applicant to a potential breach action, but could also result in a refusal on the part of the counterparties to conduct business with the Applicant. This would likely result in an increase in electricity prices and transmission costs.

The information was acquired in confidence from the Applicant's counterparties under the express terms of paragraph 30 of the WSPP agreement. The express terms of the WSPP agreement require that the terms of any transaction and all information exchanged between purchaser and seller remain confidential. Further, the FERC Commission views energy sales data as "covered by exemption 4 of the Freedom of Information Act (FOIA), which protects 'trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.' "[21]

Therefore, the Confidential Records are exempt from disclosure under the Public Records Act, and other law, as provided above.

3(b). Discuss the public interest in nondisclosure of the material submitted for a confidential designation. If the material contains trade secrets or its disclosure would otherwise cause loss of a competitive advantage, please state how it would be lost, the value of the information to the applicant and the ease or difficulty with which the information could be legitimately acquired or duplicated by others.

The e-Tag information and contracts included in this request allow for the delivery of renewable energy and its attributes (and non-renewable energy). Disclosure of the counterparty and unit identification information without a request for confidentiality may place the Applicant in violation of federal law and the terms and conditions of its WSPP agreement.

Furthermore, disclosure of NERC e-Tags along with the wholesale electricity transactions made under WSPP agreement for generating resources will allow other market participants to ascertain the extent to which the Applicant and/or WSPP participants may rely on certain generating resources and anticipate wholesale sales in the year ahead for compliance with its RPS Program. Since most negotiations for the purchase or sale of power center around the availability of resources and the need for additional resources, releasing this information will put the Applicant and/or WSPP participants at a disadvantage in the purchase and sale of renewable energy along with anticipating the ability to meet future RPS targets and portfolio balance requirements based on transactions.

Release of NERC e-Tags and transactions under the WSPP agreements can cause the loss of a business advantage when the Applicant and/or a WSPP participant negotiates for the purchase or sale of power because knowledge of the actual availability or need for power provides an advantage in power contract

negotiations. The counterparty could raise its prices based on the knowledge of how much power the participant needs. This information could enable a savvy market participant to manipulate the wholesale electricity market for renewable energy. Therefore, the NERC e-Tags and all energy sales data, including those governed by the WSPP agreement, should be kept confidential.

4. State whether the information or data can be disclosed if it is aggregated with other information or masked to conceal certain portions (including but not limited to the identity of the applicant). State the degree of aggregation or masking required. If he data cannot be disclosed even if aggregated or masked, explain why.

The information may be disclosed if it is aggregated with other information to a degree that it conceals the identified Confidential Records.

5. State how the material is kept confidential by the applicant and whether it has even been disclosed to a person other than an employee of the applicant.

The Applicant does not disclose the NERC e-Tags to the public. Also, the WSPP agreement contains confidentiality provisions for energy sales data. The contracts are only available to employees of the City of Los Angeles Department of Water and Power that engage with the electricity wholesale transactions and the counterparties. In addition, the other entities that may have access to this information are the counterparties per the WSPP agreement, though just to their specific transactions, and the California Air Resources Board (ARB) via a subpoena issued to the Applicant in September 2013, pursuant to California Government Code section 11181, et. seq. The ARB is required to maintain the information confidential per Government Code section 11183.

I certify under penalty of perjury that the information contained in this application for confidential designation is true, correct, and complete to the best of my knowledge. I also certify that I am authorized to make the application and certification on behalf of the Los Angeles Department of Water and Power.

Sincerely,

Randy S. Howard
Director of Power System Planning and Development

OH:nsh
c/enc: Randy S. Howard