

DOCKETED

Docket Number:	15-AFC-01
Project Title:	Puente Power Project
TN #:	205762
Document Title:	NRG Oxnard Energy Center, LLC Application for Confidential Designation
Description:	Confidential Response to Data Request No. 2
Filer:	Paul Kihm
Organization:	Latham & Watkins LLP
Submitter Role:	Applicant Representative
Submission Date:	8/17/2015 3:26:17 PM
Docketed Date:	8/17/2015

650 Town Center Drive, 20th Floor
Costa Mesa, California 92626-1925
Tel: +1.714.540.1235 Fax: +1.714.755.8290
www.lw.com

LATHAM & WATKINS^{LLP}

FIRM / AFFILIATE OFFICES

Abu Dhabi	Milan
Barcelona	Moscow
Beijing	Munich
Boston	New Jersey
Brussels	New York
Century City	Orange County
Chicago	Paris
Dubai	Riyadh
Düsseldorf	Rome
Frankfurt	San Diego
Hamburg	San Francisco
Hong Kong	Shanghai
Houston	Silicon Valley
London	Singapore
Los Angeles	Tokyo
Madrid	Washington, D.C.

August 17, 2015

Mr. Robert Oglesby
Executive Director
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: **Application for Confidential Designation**
Puente Power Project (15-AFC-01)

Dear Mr. Oglesby:

NRG Oxnard Energy Center, LLC (“Applicant”) filed an Application for Certification (“AFC”) for the Puente Power Project (“P3”) on April 15, 2015 (15-AFC-01). On June 10, 2015, the California Energy Commission (“CEC”) accepted the AFC as data adequate. On July 17, 2015, CEC Staff issued Data Request Set No. 1. Data Request No. 2 seeks the spreadsheet version of AFC Appendix C-2 (Operational and Commissioning Emissions) with embedded calculations live and intact. In response to Data Request No. 2, Applicant is providing several live electronic Excel spreadsheet files which include the operational and commissioning emission calculations shown in AFC Appendix C-2 as well as the detailed calculations shown in AFC Appendices C-5 and C-8, all of which have been specifically identified as containing confidential and proprietary information (“Confidential Record”).

The air quality modeling results are not confidential and are fully available for public review. However, certain of the emissions data as well as the equations, formulas, and calculations used to determine the modeling results are confidential and proprietary in nature. Embedded in the spreadsheet files that comprise the Confidential Record is confidential emissions data from Applicant’s equipment vendor, GE, made available to Applicant in connection with its acquisition of the P3 generating equipment for which Applicant has paid valuable consideration. Also embedded in the spreadsheet files are equations, formulas and calculations used in the air quality modeling that are proprietary to Applicant’s consultant Sierra Research, and for which Applicant has paid valuable consideration.

We request that the entirety of the Confidential Record be permanently maintained as confidential by the CEC for the reasons described below. We present two independent bases for finding that the Confidential Record is confidential and exempt from disclosure under the

California Public Records Act: (1) California Government Code §§ 6254(k), 6254.7(d) (trade secrets); and/or (2) Government Code § 6254.15 (proprietary information).

A. The Confidential Record is Confidential as a Trade Secret

Applicant requests that the Confidential Record be designated confidential pursuant to California Government Code §§ 6254(k) and 6254.7(d), which exempts trade secrets from disclosure under the California Public Records Act. Under controlling law expressed in *Uribe v. Howie*, 19 Cal. App. 3d 194, 206-207 (1971):

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.

In addition, Government Code § 6254.7(d) specifically recognizes that a trade secret can include "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."

The confidential GE emissions data in the Confidential Record represents a compilation of information which is known only to GE, which it uses to fabricate and produce an article of trade, and which has independent economic value and provides a competitive advantage to GE that would be lost if the data were made available to its competitors. GE has expended considerable time and resources to develop and compile the subject emissions data. Applicant has paid GE valuable consideration for the subject emissions data to allow it to prepare the analysis necessary to obtain CEC certification of P3. Thus, Applicant has its own independent interest in maintaining the confidential emissions data for which it has paid.

The equations, formulas and calculations in the Confidential Record represent valuable formulas, processes, mechanisms, procedures and/or compilations of information that are known only to Sierra Research, which it uses to produce a service, and which has independent economic value and provides a competitive advantage to Sierra Research that would be lost if the equations, formulas and calculations were made available to its competitors. Sierra Research has expended considerable time and resources to develop the equations, formulas and calculations contained in the Confidential Record. Applicant has paid Sierra Research valuable consideration for the modeling analysis necessary to obtain CEC certification of P3. Thus, Applicant has its own independent interest in maintaining the confidential equations, formulas and calculations for which it has paid. Access to this information by others, such as competitors, would allow them to produce air quality modeling analysis using Sierra Research's proprietary methods, without the expenditure of time and resources that Sierra Research and Applicant have invested.

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. *See* Title 20, California Code of Regulations, § 2505(a)(1)(D). Accordingly, Applicant provides the following additional information:

- ***“The specific nature of the advantage”***

The confidential GE emissions data in the Confidential Record represents a compilation of information which is known only to GE, which it uses to fabricate and produce an article of trade, and which has independent economic value and provides a competitive advantage to GE that would be lost if the data were made available to its competitors. The specific nature of the advantage is that GE’s competitors are not knowledgeable about the emission performance of the GE equipment, and the level of performance that GE is able to guarantee to its customers. This puts GE’s competitors at a disadvantage because they do not know what the emission performance of the GE equipment is relative to their own equipment, and are therefore unable to make representations about their own emission performance relative to GE’s. As a result, competitors have imperfect information upon which to make decisions about their own emission guarantees and pricing. For example, competitors may be providing emission guarantees at levels below the GE emission rates believing that they have to in order to compete with what they believe GE’s emission performance to be. If this were the case, competitors would be taking on additional risk that they would not have to assume if they knew the emissions performance of the GE equipment. It is also possible that competitors are underpricing their equipment based on the mistaken assumption that their emission performance is inferior to GE’s, or overpricing their equipment based on the mistaken assumption that their emission performance is superior to GE’s. For many reasons, imperfect information about one’s competitors and their products puts one at a disadvantage that would be eliminated if all information were available.

The equations, formulas and calculations in the Confidential Record represent valuable formulas, processes, mechanisms, procedures and/or compilations of information that are known only to Sierra Research, which it uses to produce a service, and which has independent economic value and provides a competitive advantage to Sierra Research that would be lost if the equations, formulas and calculations were made available to its competitors. The specific nature of the advantage is that Sierra Research is able to charge for modeling services that its competitors who do not have access to the models that Sierra Research has developed cannot provide. Sierra Research therefore has an advantage over its competitors in the marketplace who are unable to conduct the necessary modeling. If its competitors were to obtain the equations, formulas and calculations in the Confidential Record, they would be able to provide the same services as Sierra Research without having invested the resources to develop the models on their own. This would undercut Sierra Research’s investment in developing the models, and eliminate their advantage in the marketplace.

- ***“How the advantage would be lost”***

The advantage to GE would be lost if its competitors had emission performance data related to GE equipment because they could then provide emission guarantees and charge prices

at levels that minimized their exposure to risk and maximized revenues. As discussed above, in the absence of perfect information, competitors may be taking on unnecessary risk, and/or failing to maximize revenues.

The advantage to Sierra Research would be lost because access to the proprietary models by others, such as competitors, would allow a competitor to produce air quality data and analysis using Sierra Research's proprietary methods, without the expenditure of time and resources that Sierra Research has invested to develop such equations, formulas, and calculations, which would deprive Sierra Research of a competitive business advantage.

- ***“The value of the information to the applicant”***

Applicant has paid valuable consideration to GE and to Sierra Research in order to obtain the data and the modeling analysis necessary to obtain certification of P3 by the CEC. Because the Confidential Record contains information held only by GE and Sierra Research, Applicant has paid a premium for the information relative to what it would be worth if it was generally available. Information that is generally available to the public has little or no value; whereas information that is known to only a few has a much higher value. Thus, the value of Applicant's investment in the Confidential Record would be greatly diminished if the confidentiality of the information was not maintained.

- ***“The ease or difficulty with which the information could be legitimately acquired or duplicated by others”***

The Confidential Record is not readily available on the marketplace and could not be easily replicated by others. Both GE and Sierra Research have invested substantial time, effort and expense to develop the emissions data and the equations, formulas, and calculations contained in the Confidential Record. The difficulty of otherwise acquiring or duplicating the information is precisely what gives it its value.

B. Government Code § 6254.15 – Proprietary Information

Gov. Code § 6254.15 exempts the following types of information from disclosure under the California Public Records Act:

[C]orporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California.

As discussed in Section A above, the Confidential Record contains “proprietary information, including trade secrets.” The information in the Confidential Record is related to siting a facility and “furnished to a government agency by a private company” for the purpose of “retaining, locating, or expanding a facility within California.” Thus, the Confidential Record qualifies for the exemption under Gov. Code § 6254.15.

C. Questionnaire: Application For Confidential Designation

To further support Applicant’s request, we provide responses to the CEC’s questionnaire regarding applications for confidential designation:

1(a). Title, date and description (including number of pages) of the record for which you request confidential designation.

See description above of the Confidential Record.

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

Applicant requests confidential designation for the entire Confidential Record.

2. State and justify the length of time the Commission should keep the record confidential.

Applicant requests that the Confidential Record be kept confidential indefinitely to protect the trade secrets and proprietary information described above. The information contained in the Confidential Record is relevant and valuable not only in the context of the CEC proceedings on P3, but could be utilized by competitors in connection with other projects located in California or throughout the world. Thus, any expiration of the requested confidential designation (e.g., until completion of the P3 certification proceedings) would not fully protect the valuable investment and competitive advantage associated with the Confidential Record and would merely delay the loss of same.

3(a). State the provisions of the Public Records Act or other law that allows the Commission to keep the record confidential, and explain why the provision(s) apply to the record.

We present independent bases for finding the Confidential Record confidential and exempt from disclosure under the California Public Records Act: (1) Gov. Code §§ 6254(k), 6254.7(d) (trade secrets); or (2) Gov. Code § 6254.15 (proprietary information). Please see the discussion above describing why these provisions apply to the Confidential Record. If the information in the Confidential Record is released to the public, the value and benefit of the trade secrets and proprietary information would be lost or impaired, which would result in a loss of competitive business advantage.

3(b). Discuss the public interest in nondisclosure of the record. If the record contains trade secrets or its disclosure would otherwise cause loss of a competitive

advantage, please also state how it would be lost, the value of the information to the applicant, and the cost or difficulty with which the information could be legitimately acquired or duplicated by others.

For the reasons provided above, the Confidential Record is a trade secret under California law and the public disclosure of the Confidential Record would result in the loss of a competitive business advantage for GE and Sierra Research. Time and resources have been spent compiling the information within the Confidential Record and the value of the information could be significantly impaired if made available to the public or competitors. Access to this information by others, such as competitors, would allow a competitor the ability to produce air quality data and analysis using GE data and Sierra Research's proprietary methods without the expenditure of time and resources that GE and Sierra Research have invested to develop such information, which would deprive GE and Sierra Research of a competitive business advantage, and impair Applicant's expenditure of resources to obtain such information from GE and Sierra Research.

4. *State whether the record may 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 the data cannot be disclosed even if aggregated or masked, explain why.*

Applicant considered whether it would be possible to aggregate or mask the information; however, there is no feasible method of aggregating or masking the information that would not either disclose the information or render the information provided useless. The results of calculations performed using the information have previously been provided to CEC Staff in the Portable Document Format (PDF). In this format, the results of the calculations are presented while protecting the confidential data and proprietary equations, formulas, and calculations. Applicant has no objection to the continued distribution to the public of PDF versions of the results of calculations.

5. *State how the record is kept confidential by the applicant and whether it has ever been disclosed to a person other than an employee of the applicant. If it has, explain the circumstances under which disclosure occurred.*

Applicant has not disclosed any of the subject confidential information to anyone other than its employees, attorneys, consultants, others working as part of the P3 AFC proceedings, or others with a specific need for the information.

D. Conclusion

According to the CEC's regulations, an application for confidential designation "shall be granted if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the Commission to keep the record confidential." Title 14, California Code of Regulations, § 2505(a)(3)(A). Applicant believes this letter establishes a reasonable claim for confidentiality based on the applicability of: (1) Government Code §§ 6254(k), 6254.7(d) (trade secrets); or (2) Government Code § 6254.15 (proprietary information).

LATHAM & WATKINS^{LLP}

I have been authorized to make this application and certification on behalf of Applicant. With my signature to this letter, 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.

Very truly yours,

/s/ Michael Carroll

Michael Carroll
of LATHAM & WATKINS LLP