

DOCKETED

Docket Number:	15-AFC-01
Project Title:	Puente Power Project
TN #:	206213
Document Title:	Letter from Michael Carroll to Robert Oglesby re Application for Confidential Designation - Revised Response to CEC Staff DR 2
Description:	N/A
Filer:	Paul Kihm
Organization:	Latham & Watkins LLP
Submitter Role:	Applicant Representative
Submission Date:	9/25/2015 4:20:39 PM
Docketed Date:	9/25/2015

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.

September 25, 2015

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

Re: Application for Confidential Designation - Revised Response to CEC Staff Data Request No. 2
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. CEC Staff Data Request No. 2 seeks the spreadsheet version of AFC Appendix C-2 (Operational and Commissioning Emissions) with embedded calculations live and intact.

On August 17, 2015, in response to CEC Staff Data Request No. 2, Applicant provided several live electronic Excel spreadsheet files under a request for confidential designation. The bases of the request for confidential designation were that 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. The response included confidential emissions data from Applicant’s equipment vendor (GE), and equations, formulas and calculations used in the air quality modeling that are proprietary to Applicant’s consultant (Sierra Research).

The GE confidential information was contained in a one-page document located at the last tab of the Excel spreadsheet files (the “GE Spec Sheet”). Upon further review, all of the relevant information contained in the GE Spec Sheet has already been provided in the AFC. The remaining confidential information in the GE Spec Sheet is not relevant to the air quality analysis set forth in the remainder of the response to CEC Data Request No. 2. Therefore, Applicant is submitting a revised response to CEC Data Request No. 2 which does not include the GE Spec Sheet. This eliminates the need to make any determination as to the confidential nature of the information contained in the GE Spec Sheet. As set forth below, the revised

response continues to contain equations, formulas and calculations that are proprietary to Applicant's consultant Sierra Research.

The revised response to CEC Staff Data Request No. 2 is identical to the initial response except for eliminating of the GE Spec Sheet. It consists of 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 are specifically identified as containing confidential and proprietary information ("Confidential Record"). 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 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 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 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 Sierra Research in order to obtain the modeling analysis necessary to obtain certification of P3 by the CEC. Because the Confidential Record contains information held only by 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. Sierra Research has invested substantial time, effort and expense to

develop 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 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 analysis using Sierra Research's proprietary methods without the expenditure of time and resources that Sierra Research has invested to develop such information, which would deprive Sierra Research of a competitive business advantage, and impair Applicant's expenditure of resources to obtain such information from 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).

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