

DOCKETED

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| Docket Number: | 15-AFC-01 |
| Project Title: | Puente Power Project |
| TN #: | 214440 |
| Document Title: | Response to NRG Oxnard Energy Center's Application for Confidential Designation |
| Description: | Regarding Air Quality Data Excel Spreadsheets |
| Filer: | Patty Paul |
| Organization: | California Energy Commission |
| Submitter Role: | Commission Staff |
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CALIFORNIA ENERGY COMMISSION1516 NINTH STREET
SACRAMENTO, CA 95814-5512

June 21, 2016

Michael Carroll
Latham & Watkins LLP
650 Town Center Drive, 20th Floor
Costa Mesa, CA 92626

RE: **Puente Power Project**
Application for Confidential Designation: Air Quality Excel
Spreadsheets
Docket No. 15-AFC-01

Dear Mr. Carroll:

The California Energy Commission has received an Application for Confidentiality submitted by NRG Oxnard Energy Center, LLC (Applicant). The application seeks confidential designation for the following:

- 1) *Active and Linked Excel Spreadsheets Containing the Air Quality Data.*

The application notes that confidentiality is sought for the live spreadsheets which contain multiple spreadsheets linked together based on various cell formulas. The actual data presented in the spreadsheet is not confidential and therefore, PDF or hardcopy versions of the spreadsheet would not be confidential.

If the active spreadsheet became public, a competitor of Sierra Research, the developer of the spreadsheet, could take the active spreadsheet, clear out the project specific information such as stack height or exhaust heat temperature. They could then insert new project information and take advantage of the Excel sheet functionality to perform various calculations without the need for spending the time and resources to develop the spreadsheet.

A properly filed Application for Confidentiality shall be granted under the California Code of Regulations, title 20, section 2505(a)(3)(A), "If the Applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the California Energy Commission to keep the record confidential." The California Public Records Act allows for the non-disclosure of trade secrets. (Gov. Code, § 6254(k); Evid. Code, § 1060.)

The California courts have traditionally used the following definition of trade secret:

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. . . .

(*Uribe v. Howe* (1971) 19 Cal.App.3d 194, 207-208, from the Restatement of Torts, vol. 4, § 757, comments b, p.5.)

California Code of Regulations, title 20, section 2505(a)(1)(D), states that if the Applicant for confidential designation believes that the record should not be disclosed because it contains trade secrets, or its disclosure would otherwise cause loss of a competitive advantage, the application shall state: 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.

The application addresses these four elements: 1) The Excel spreadsheets have independent economic value, as Applicant's consultant, Sierra Research, has expended substantial time and resources in programing the spreadsheets to produce accurate results; 2) If potential clients of Sierra Research were allowed access to live spreadsheets, those parties would derive economic value from such disclosure as they could obtain the benefit of consultant's services without compensating consultant for those services; 3) Disclosure of active spreadsheets to competitors would give those competitors a business advantage over Sierra Research because those competitors could sell services derived from the active functionality of the spreadsheet without investing the time and expertise required to develop the spreadsheets; and 4) The spreadsheets have never been released publicly and the active spreadsheets are only available to employees and consultants of Sierra Research.

In addition, Government Code section 6254.15, exempts from disclosure under the California Public Records Act corporate 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. In this case the submitted proprietary information relates to the siting of a facility in the state.

Applicant requests that the information be kept confidential indefinitely. Because the spreadsheets have use beyond the specific project at issue and it is anticipated the spreadsheets will continue to have value as long as air emission data is required to be produced by regulators, it is appropriate to grant confidentiality for an indefinite time period.

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For the above reasons, the request for confidential designation for the active Excel spreadsheets related to Air Quality data is granted. The information will remain confidential indefinitely. Because the actual data contained within the spreadsheet cells is not confidential, PDF or hard copy versions of the spreadsheet would not be confidential.

Be advised that persons may petition to inspect or copy records that I have designated as confidential. The procedures and criteria for filing, reviewing, and acting upon such petitions are set forth in the California Code of Regulations, title 20, section 2506.

If you have any questions concerning this matter, please contact Jared Babula, Senior Staff Counsel, at (916) 651-1462.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. P. Oglesby', with a long horizontal flourish extending to the right.

Robert P. Oglesby
Executive Director

cc: Docket Unit
John Hilliard, Project Manager
Matthew Layton, Air Quality
Gerry Bemis, Air Quality
Jacquelyn Leyva Record, Air Quality