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August 26, 2009

VIA OVERNIGHT MAIL
CONFIDENTIAL MATERIALS ENCLOSED

Ms. Melissa Jones
Executive Director
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512
(916) 654-4996

**Re: Application for Confidential Designation, Ridgecrest Solar Power Project
(Docket No. not yet assigned)**

Dear Ms. Jones:

Enclosed please find the original and five paper copies, and one electronic copy, of Solar Millennium LLC's ("Applicant") "Application for Confidential Designation" pursuant to the California Public Records Act ("PRA"), Cal. Gov't Code §§ 6250-6276.48 and 20 C.C.R. § 2505 *et seq.* The Applicant seeks confidential designation for the information contained in Exhibit A to the Application, which consists of the Applicant's Transition Cluster Phase I Interconnection Study. The Cluster Study accompanies the Application for Certification ("AFC") for the Ridgecrest Solar Power Project, which will be submitted to the CEC on September 1, 2009 and has not yet been assigned a docket number.

As indicated in the enclosed Application, the Cluster Study in Exhibit A is exempt from disclosure under the PRA or any other law pursuant to: (1) Government Code § 6254(k), California Evidence Code §§ 1060 *et seq.*, and California Civil Code §§ 3426-3426.11 as "privileged information" and "trade secrets;" (2) Government Code § 6255(a), because the public interest clearly favors nondisclosure; (3) Government Code § 6254(e) as confidential information relating to utility systems development; and (4) Government Code § 6254(k) and the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as information "specifically exempted from disclosure by statute," and as "commercial or financial information obtained from a person and privileged and confidential."

The Applicant understands that it may take up to thirty days for the CEC to make a decision on the enclosed Application. However, the Applicant requests that, while this review is occurring, the information that is the subject of the Application be forwarded to

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Twenty-Fourth Floor
San Francisco, CA 94105
telephone 415-856-7000 • facsimile 415-856-7100 • www.paulhastings.com

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09-AFC-9	
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Melissa Jones, Executive Director
August 26, 2009
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the appropriate technical staff who are reviewing the Applicant's AFC. We think this is a sensible approach and will avoid any unnecessary delay in that review process.

If the enclosed Application is granted, the Applicant respectfully requests that you promptly notify it of any request that you receive seeking disclosure of the information in Exhibit A under the PRA or any other law.

We appreciate your consideration of the enclosed Application.

Sincerely,



Matthew J. Sanders
PAUL, HASTINGS, JANOFSKY & WALKER LLP

cc: Josef Eichhammer, Chief Executive Officer, Solar Millennium LLC

Enclosures

APPLICATION FOR CONFIDENTIAL DESIGNATION

(Title 20 Cal. Code Regs. § 2505 et seq.)

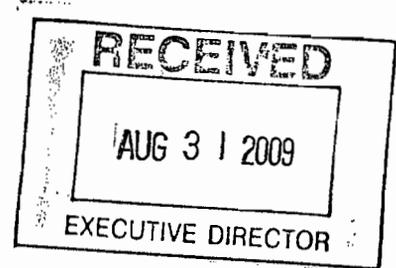
To: Energy Commission Executive Director

Docket No.: Not yet assigned
(Ridgecrest Solar Power Project)

Applicant: Solar Millennium LLC

Address: 1625 Shattuck Avenue
Berkeley, CA 94709

Contact: Josef Eichhammer
Chief Executive Officer
(510) 524-4507
eichhammer@solarmillennium.com



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

On September 1, 2009, Solar Millennium LLC will submit to the CEC the Application for Certification ("AFC") for the Ridgecrest Solar Power Project (docket number not yet assigned).

The Applicant requests a confidential designation for the Transition Cluster Phase I Interconnection Study ("Cluster Study") for the Ridgecrest Solar Power Project. The Study is attached hereto as Exhibit A.

Historically, the California Independent System Operator ("CAISO") and the relevant Transmission Operator have conducted System Impact and Facility Studies for individual power projects that hold interconnection queue positions and are proceeding through the development process. These so-called "System Impact Studies" traditionally have been a required element of the CEC's AFC and data adequacy process. Through a recent tariff—issued by the Federal Energy Regulatory Commission ("FERC"), implemented by CAISO, and referred to as "Generation Interconnection Process Reform" ("GIPR")—interconnection cluster studies for generation "clusters" have replaced individual System Impact Studies. ("Clusters" are groups of generators that are electrically related to each other, i.e., through their locations and/or ISO grid interconnection points.)

The Cluster Study for the Ridgecrest Solar Power Project provides a deliverability assessment and identifies required Reliability Network Upgrades, including the maximum cost responsibility for Network Upgrades assigned to the Project in accordance with the CAISO Large Generator Interconnection Procedures tariff. The Cluster Study replaces a System Impact Study as the means for characterizing the manner in which the Ridgecrest Solar Power Project will deliver its energy output to the grid.

FERC and CAISO consider System Impact Studies and cluster studies to be confidential because they contain Critical Energy Infrastructure Information ("CEII"). See 18 C.F.R. § 388.113; <http://www.aiso.com/1f4f/1f4f8bf4240c0.pdf> (CAISO nondisclosure agreement for CEII). The Applicant is subject to confidentiality restrictions imposed by CAISO.

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

As indicated in the answer to Question 1(a), the Applicant seeks confidential designation for the entire Cluster Study (Exhibit A).

If the Applicant's request for confidential designation is granted, the Applicant respectfully requests that the CEC promptly notify the Applicant of any request that the CEC receives seeking disclosure of any part of the information in Exhibit A under any law.

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

The CEC should keep the Cluster Study confidential for the duration of the CEC's certification or the operating life of the Ridgecrest Solar Power Project, whichever is longer.

The information in the Cluster Study applies to the Ridgecrest Solar Power Project throughout its operational life. The sensitivity of the CEII and the independent economic value of certain information in the Study (see response to Question 3(a), *infra*) do not change or become less valuable over time. Similarly, the risk that a competitor, energy off-taker, lessor, or lessee could gain unfair competitive advantage by obtaining this information does not change over time; that risk is as strong now as in the Ridgecrest Solar Power Project's second or third decade of operation.

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(s) apply to that material.

The Cluster Study is confidential and exempt from disclosure pursuant to the following provisions of law:

- (1) Public Records Act ("PRA") (Gov't Code) § 6254(k) and Cal. Evidence Code § 1060;
- (2) PRA (Gov't Code) § 6255(a);
- (3) PRA (Gov't Code) § 6254(e); and
- (4) The federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

PRA § 6254(k) and Cal. Evid. Code § 1060: Trade Secrets

Section 6254(k) of the PRA exempts from disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

Among the documents protected by privilege under the California Evidence Code are "trade secrets." See Cal. Evid. Code § 1060. Section 1060 provides that, "[i]f he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice."

"Trade secret" is defined in the California Uniform Trade Secrets Act, Cal. Civil Code §§ 3426-3426.11, as:

information, including a formula, pattern, compilation, program, device, method, technique, or process that:

- (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Cal. Civil Code § 3426.1(d); see also *ABBA Rubber Co. v. Seaquist*, 235 C.A. 3d 1, 18-22 (1991) (stating that definition of "trade secret" consists of three elements: (a) information (b) which is valuable because it is unknown to others and (c) which the owner has attempted to keep secret); *City of Hemet v. Superior Court*, 37 C.A. 4th 1411, 1428 (1995) (discussing exemptions from disclosure under §§ 6254(k) and 1060).

The Cluster Study is a “trade secret” within the meaning of Civil Code § 3426.1(d). Regarding the first factor (whether the information at issue derives independent economic value from not being generally known), the Cluster Study contains highly sensitive confidential business information in the form of project capital costs and related information. Public disclosure of this information would cause harm to the Applicant by allowing competitors, off-takers, assignees, or other parties to assess the overall capital cost of the Ridgecrest Solar Power Project and possibly derive the per-unit energy price negotiated in a Power Purchase Agreement (“PPA”). These or other parties thus could gain an unfair commercial advantage if the Cluster Study does not remain confidential.

See also response to Question 3(b), *infra*. Section 3426.1(d)’s second factor—whether the information at issue is “subject to efforts that are reasonable under the circumstances to maintain its secrecy”—also is satisfied here. Specifically:

- CAISO considers the Cluster Study confidential because it contains CEII, and imposes disclosure restrictions that the Applicant has observed.
- Consistent with these restrictions, the Applicant has not disclosed the Cluster Study or the information it contains in the Applicant’s AFC or through any other public filing or record.
- The Applicant has shared the Cluster Study only with its transmission consultants, environmental consultants, and attorneys, who need such information to assist in project development and counsel.
- The Applicant’s consultants and attorneys are subject to nondisclosure agreements concerning the Cluster Study and other confidential information. Those agreements prohibit those parties from disclosing the Cluster Study and other information without the Applicant’s prior consent. This restriction does not expire.
- Finally, the Cluster Study is identified by conspicuous markings such as “confidential.”

In short, the Applicant has made every reasonable effort to keep the Cluster Study confidential. For these reasons, and for the additional reasons set forth below, the Cluster Study is a “trade secret” protected from disclosure under the PRA.

PRA § 6255(a): The Public Interest Favors Nondisclosure

Section 6255(a) of the PRA exempts from disclosure records where the public’s interest in disclosure “clearly outweighs” the public’s interest in disclosure. Thus, an agency may withhold documents where it determines that the public interest clearly favors

nondisclosure. *See, e.g., City of San Jose v. Superior Court*, 74 C.A. 4th 1008, 1022-25 (1999) (explaining that § 6255(a) provides an exemption separate from express exemptions such as § 6254(k)); *see also Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1345-46 (1991); *Wilson v. Superior Court*, 51 C.A. 4th 1136, 1141 (1996).

Here, the public interest's in the *nondisclosure* of the Cluster Study is the same interest underlying the confidentiality of all trade secret or other confidential business information: to promote innovation, protect investment, and discourage unfair competition. Indeed, these interests are the reasons why the PRA, through the Evidence Code and the Uniform Trade Secrets Act, expressly protects such information from disclosure. Nondisclosure is key to ensuring that these interests are met.

In addition, as noted, the Cluster Study contains CEII, which both FERC and CAISO deem confidential. *See* 18 C.F.R. § 388.113; <http://www.aiso.com/1f4f/1f4f8bf4240c0.pdf> (CAISO nondisclosure agreement for CEII). FERC defines CEII as “specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

- (i) Relates details about the production, generation, transportation, transmission, or distribution of energy;
- (ii) Could be useful to a person in planning an attack on critical infrastructure;
- (iii) Is exempt from mandatory disclosure under [FOIA]; and
- (iv) Does not simply give the general location of the critical infrastructure.”

18 C.F.R. § 388.113(c)(1). “Critical infrastructure” means “existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.” *Id.* § 388.113(c)(2). Because the Cluster Study contains CEII, its disclosure could “negatively affect security, economic security, public health or safety, or any combination of those matters.” Under such circumstances, the public interest strongly favors nondisclosure.

In contrast, the public has little interest in the *disclosure* of the Cluster Study. The CEC's certification process is designed to provide a full and fair assessment of the potential environmental impacts of the Ridgecrest Solar Power Project, and the information that the Applicant has provided and continues to provide through this process is sufficient to accomplish that purpose. None of the information in the Cluster Study is necessary for the public to understand and evaluate the Ridgecrest Solar Power Project and, in any event, the CEC will have that information available to it during its review.

For these reasons, the public's interest in nondisclosure of the Cluster Study clearly outweighs any public interest in disclosure.

PRA § 6254(e): Information Relating to Utility Systems Development

Section 6254(e) exempts from disclosure under the PRA “[g]eological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person.”

As discussed in response to Question 1(a), the Cluster Study for the Ridgecrest Solar Power Project provides a deliverability assessment, identifies required Reliability Network Upgrades, and, in general, identifies the means for characterizing the manner in which the Project will deliver its energy output to the grid. This information clearly pertains to “utility systems development” and thus is exempt from disclosure under PRA § 6254(e).

PRA § 6254(k) and FOIA, 5 U.S.C. § 552: Federal Law

As noted above, Section 6254(k) of the PRA exempts from disclosure “[r]ecords, the disclosure of which is exempted or prohibited pursuant to *federal* or state law” (emphasis added).

FOIA, 5 U.S.C. § 552, is a federal law that protects from disclosure records that either are “specifically exempted from disclosure by statute” or are “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. §§ 552(b)(3)-(4) (emphasis added). The California Supreme Court has held that the PRA and FOIA “should receive a parallel construction.” *Am. Civil Liberties Union Found. v. Deukmejian*, 32 Cal. 3d 440, 451 (1982); *see also Braun v. Taft*, 154 C.A. 3d 332, 342 (1984) (using FOIA to construe PRA); *S. Coast Newspapers v. Oceanside*, 160 C.A. 3d 261, 267 (1984) (same).

In the case of the Cluster Study, both of FOIA's criteria are met. As discussed above, the Cluster Study contains CEII, which FERC regulations (18 C.F.R. § 388.113) expressly exempt CEII from disclosure under FOIA. In addition, for the same reasons that the Cluster Study is protected from disclosure under PRA § 6454(k), Evidence Code § 1060, and Civil Code § 3426.1(d), the Cluster Study is protected from disclosure under § 6254(k) and FOIA. The information in the Study is “commercial or financial information” that the Applicant keeps (and is required to keep) “privileged and confidential,” and that could lead to an unfair competitive advantage if released.

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.

As discussed above in response to Question 3(a), the public has an acute interest in the nondisclosure of the Cluster Study. The information contained in the Cluster Study is in part CEII, the release of which could “negatively affect security, economic security, public health or safety, or any combination of those matters,” 18 C.F.R. § 388.113(c)(2). The Cluster Study also contains proprietary information that the Applicant has developed at great expense, and that reveals the Ridgecrest Solar Power Project’s capital cost. This information could reveal the Project’s per-unit energy price, resource productivity and viability, project revenue, and return on investment. All of this information is an integral component of the Applicant’s business model.

The disclosure of any of this information would put the Applicant at a competitive disadvantage by allowing a competitor, energy off-taker, assignee, or other member of the public to:

- develop or improve competing projects;
- take advantage of useful transmission engineering, capital cost, and pricing information without incurring the costs associated with developing it;
- weaken the Applicant’s bargaining positions in ongoing or future negotiations;
- obtain otherwise confidential details of the Ridgecrest Solar Power Project’s capital cost, project revenue, and return on investment, as well as information about the Applicant’s business model.

If the CEC does not grant this application, the Cluster Study presumably will be posted on the CEC’s web site with other Project-related submissions and will be searchable via search engines and Adobe Acrobat. In addition, presumably the Cluster Study would be available through a PRA request. There would be no difficulty for any member of the public to obtain the confidential information in the Cluster Study. Moreover, it would not matter if there were a delay in the CEC’s publication of the Cluster Study, since the value of the information in Cluster Study to competitors and others does not diminish over time. *See response to Question 2, supra.*

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 the data cannot be disclosed even if aggregated or masked, explain why.

Aggregation or masking will not be sufficient to protect the Cluster Study’s confidential information.

Aggregating the Cluster Study with, for example, the AFC or other submissions would do nothing to prevent competitors, energy off-takers, or assignees from using the confidential business and trade secret information to gain an unfair competitive advantage, or the public to threaten critical energy infrastructure.

As for masking, even if, for example, the CEC redacts the Applicant's name and the name of the Ridgecrest Solar Power Project, the Applicant's competitors and other members of the public still will be able to acquire and use the information to obtain an unfair advantage or misuse CEII. Indeed, given the small number of large solar thermal power projects, members of the public will be able to link the Ridgecrest Solar Power Project to the Applicant even if such redactions are made.

The Applicant has done everything possible to limit the amount of information for which it seeks confidential designation. Specifically, the Applicant has disclosed almost all information concerning the Ridgecrest Solar Power Project in its AFC, and thus far has requested that only the Cluster Study be designated confidential.

For these reasons, aggregating and/or masking the Cluster Study will not be effective in protecting the information in the Study.

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. If it has, explain the circumstances under which disclosure occurred.

As explained in the response to Question 3(a), the Applicant has taken all reasonable efforts to keep the Cluster Study confidential. The Applicant has not included the Cluster Study in its AFC or in any other public filing or record; it has submitted to CAISO's nondisclosure agreement regarding the Study; and it has ensured that the Study is marked "confidential." In addition, within the Applicant's organization, access to the information is given only to those employees who require it.

The Applicant has disclosed the information to certain non-employee parties, including the Applicant's environmental consultants, transmission consultants, and attorneys. However, the Applicant has required these parties, and indeed requires any party with access to the Cluster Study, to sign strict confidentiality agreements that prohibit them from disclosing the information without the Applicant's prior consent. This restriction does not expire. No other disclosure of the information has occurred by the Applicant or by any other party.

* * * *

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, and that I am authorized to make the application and certification on behalf of the applicant.

Dated: 8-26-2009

A handwritten signature in black ink, appearing to read 'J. Eichhammer', with a stylized flourish at the end.

Signed:
Name: Josef Eichhammer
Title: Chief Executive Officer
Representing: Solar Millennium LLC

ATTACHMENTS

Exhibit A Transition Cluster Phase I Interconnection Study