

CALIFORNIA ENERGY COMMISSION

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February 21, 2011

John A. McKinsey
Stoel Rives, LLP
500 Capitol Mall, Ste. 1600
Sacramento CA 95814

DOCKET 11-AFC-1
DATE FEB 21 2011
RECD FEB 24 2011

RE: **Application for Confidentiality
Emission Reduction Credits
Pio Pico Energy Center
Docket No. 11-AFC-1**

Dear Mr. McKinsey:

On February 7, 2011, Pio Pico Energy Center, LLC, filed an application for confidentiality to the above-captioned docket, on behalf of Pio Pico Energy Center Project ("Applicant"). The application seeks confidentiality for the document related to the strategy and plans for the project to secure Emission Reduction Credits.

Applicant claims that the document identifies and details trade secrets in the form of negotiation strategies regarding Emission Reductions Credits Furthermore, according to Applicant:

Negotiation strategies regarding Emission Reduction Credits derive independent economic value from not being disclosed to the public or to competitors because of the competitive nature of the Emission Credit market.

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 [Energy] Commission to keep the record confidential." The California Public Records Act allows for the non-disclosure of trade secrets. (Gov. Code, §§ 6254(k), 6254.15; 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.)

The Public Records Act specifically allows for information related to the costs of obtaining emissions offsets to be confidential. (Gov. Code, § 6254.7(f).) However, that same section states that at the time that an air pollution control district issues a permit to construct to an applicant, data obtained from the applicant regarding offsets purchases becomes a public record.

The application makes a reasonable argument under the California Energy Commission's regulations for classifying the agreement setting forth the costs of obtaining emissions offsets as a trade secret, providing the applicant with a competitive advantage over potential competitors, in accordance with the above standards. Cal. Code Regs., tit. 20, § 2505. Therefore, it is in the public interest that the document be given confidentiality, so as not to interfere with offset negotiations and agreements.

Applicant requests that the information be kept confidential "indefinitely" or in the alternative, until publication of the San Diego Air Pollution Control District's release of its Preliminary Determination of Compliance ("PDOC"). The Public Records Act does not allow for such information to be kept confidential indefinitely, as stated above. The term of confidentiality needs to be carefully specified to ensure conformance with the policies of the Energy Commission. The identification and evaluation of offset sources is a critical component of the Energy Commission's licensing process, including our review of environmental impacts as the lead agency pursuant to the California Environmental Quality Act ("CEQA"). The confidentiality of potential offset sources can only be maintained until that point when public participation in review of the project's proposed offsets becomes necessary. This will likely occur when the air district issues its PDOC for the project.

Moreover, Public Resources Code § 25523, subdivision (d)(2), requires that compete emissions offsets for a proposed facility be identified before the Energy Commission licenses that facility. Staff's next use of Applicant's proposed offset sources would be in the Preliminary Staff Assessment, which reviews the air district's PDOC. Following issuance of the PDOC and Preliminary Staff Assessment, Energy Commission staff, the air district, other interested agencies, intervenors, and members of the public will attend workshops to discuss the PDOC, Preliminary Staff Assessment and other issues. At that time, certain aspects of your ERC agreement may be discussed.

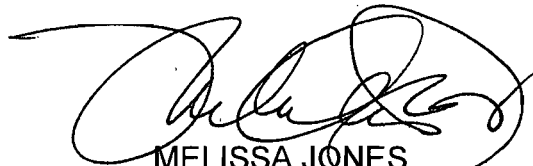
Thus, detailed information on the source, ownership, and characteristics of the offsets proposed for your project may become public as part of the air district's PDOC. I therefore grant **temporary confidentiality** to Applicant's ERC acquisition agreement, ~~only until such time as the air district issues the PDOC.~~

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Any subsequent submittals related to the project's ERC offset agreements can be deemed confidential for the temporary term specified in this letter without the need for a new application, provided that you file a certification under penalty of perjury that the new information is substantially similar to that which is granted confidential status by this determination. California Code of Regulations, title 20, § 2505, subdivisions (a)(1)(G) and (a)(4).

Persons may petition to inspect or copy the 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, § 2506. If you have any questions concerning this matter, please contact Jared Babula, Senior Staff Counsel, at (916) 651-1462.

Sincerely,



MELISSA JONES
Executive Director

cc: Docket Unit
Eric Solorio, Energy Commission Project Manager
