

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512

August 20 2009

David Wiseman
Galati Blek, LLP
455 Capitol Mall, Suite 350
Sacramento, CA 95814**DOCKET**
09-AFC-4

DATE 8/20/2009

RECD. 8/31/2009

RE: **Application for Confidentiality, Offset Strategy
Contra Costa Generating Station
Docket No. 9-AFC-4**

Dear Mr. Wiseman:

On July 20, 2009, Contra Costa Generating Station (Applicant) filed an application for confidentiality in the above-captioned Docket. Applicant seeks confidentiality for the Offset Strategy document and associated documentation.

Applicant bases the request upon the Public Records Act, Govt. Code § 6254(k), which provides for the nondisclosure of trade secrets. The application states, in part:

The Confidential Offset Strategy should be kept confidential until mutually binding contracts for all required offsets are signed. . . The information submitted is a special compilation developed by (Applicant) and provides (Applicant) with an advantage over potential competitors who have not developed such a compilation of information, offset holders, and offset pricing strategies (the material notes not include air emissions data which is susceptible to public disclosure under Government Code Section 6254.7). In addition to the complete offset strategy, disclosure of potential sources of emissions offsets may hinder current negotiations.

Applicant requests that the information be kept confidential until mutually binding contracts for all required offsets are signed.

A properly filed application for confidentiality shall be granted under the California Code of Regulations, title 20, § 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); 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 application makes a reasonable argument under the California Energy Commission's regulations for classifying the Offset Strategy 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 data information be given confidentiality, so as not to interfere with offset negotiations.

Furthermore, the Public Records Act allows for data used to calculate the costs of obtaining emissions offsets to be confidential. Gov. Code, § 6254.7(f). As noted above, Applicant claims that the Offset Strategy does not contain air emissions data. However, section 6254.7(f) does not limit the disclosure requirement to emissions data, but rather 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 offset purchases becomes a public record.

The term of confidentiality needs to be carefully specified to ensure conformance with the policies of both the Environmental Protection Agency (EPA) and 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 Preliminary Determination of Compliance (PDOC).

As interpreted by the EPA, the Clean Air Act requires "federally enforceable" emission reduction credit banking actions to be completed before the air district's PDOC is issued. 42 U.S.C. § 7503(a)(1). EPA's policy is that an air district's PDOC should satisfy all the requirements of a final Determination of Compliance so it can be the subject of meaningful public review. 40 C.F.R. § 51.161.

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 first use of an applicant's proposed offset sources is normally in the Preliminary Staff Assessment, which reviews and discusses the air district's PDOC. Following issuance of the PDOC, public workshops involving the Energy Commission staff, the air district, other interested agencies, intervenors, and members of the public will be held. At that time, certain aspects of your Offset Strategy will be discussed.

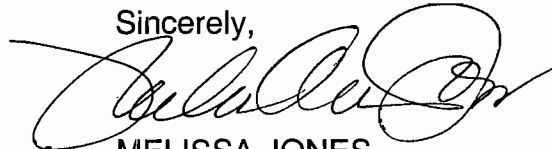
David Wiseman
August 20 2009
Page 3

Thus, detailed information on the source, ownership, and characteristics of the offsets proposed for your project may become public as part of a properly issued PDOC. I therefore grant **temporary confidentiality** to Applicant's Offset Strategy document, only until such time as the air district issues the PDOC. Accordingly, it is in your best interests that negotiations for offset sources be completed by that time.

Any subsequent submittals related to the offset strategy 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 Deborah Dyer, Senior Staff Counsel, at (916) 654-3870.

Sincerely,

A handwritten signature in black ink, appearing to read 'Melissa Jones', written in a cursive style.

MELISSA JONES
Executive Director

cc: Docket Unit
Project Manager