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May 6, 2024

Via Email

Simon Ross
Becky Moores
IP Darden I, LLC
c/o Intersect Power, LLC
9450 South West Gemini Drive, PMB #68743
Beaverton, Oregon 97008-7105
simon.ross@intersectpower.com
becky.moores@intersectpower.com

Application for Confidential Designation: Darden Clean Energy Project Docket No. 23-OPT-02

Dear Simon Ross and Becky Moores:

On March 26, 2024, the California Energy Commission (CEC) received the IP Darden I, LLC and Affiliates c/o Intersect Power, LLC's (applicant) application for confidentiality (TN 255283) for the following document in its entirety:

- DR SOCIO-7 Data Request Response (DR Response)

The DR Response, dated January 2024, submitted in response to the CEC's December 11, 2023 "Determination of Incomplete Application and Request for Information for the Darden Clean Energy Project" (TN 253578). The DR Response is an estimated dollar amount of the property taxes generated during an operational year of the project.

The applicant requests that the dollar amounts of the average costs per year in property tax that the project is expected to generate over a typical operating year be redacted and designated as confidential.

Discussion

The applicant states the DR Response should be kept confidential indefinitely to ensure that the applicant is not in violation of any of its non-disclosure agreements (NDAs) with its commercial partners. Additionally, the applicant requests indefinite confidentiality to ensure that the applicant's estimated capital and operational cost estimates, pricing information, and forecasted economic standing remains secure from market participants who could otherwise make competitive use of the information to the detriment of applicant and applicant's current or future negotiations with contractors, financiers, off-takers, and other industry partners.

A properly filed application for confidentiality shall be granted under 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 applicant argues that it has established a reasonable claim under the California Public Records Act that the DR Response contains trade secrets and public disclosure would harm applicant under Cal. Code Regs., title 20 section 2505(a)(1)(D).

A trade secret may include, but is not limited to, any process, compound, production data, or compilation of data that meet the following requirements: “(1) it is not patented, (2) it is known to only 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 (3) it gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.” (Gov. Code, § 7924.510(f)).

The California Public Records Act allows for the non-disclosure of trade secrets including, among others, those records exempt from disclosure under the Uniform Trade Secrets Act. (Gov. Code, §§ 7927.705(k), 7930.005, 7930.205; Civ. Code, § 3426.1; Evid. Code, § 1060.)

Civil Code section 3426.1(d) defines “trade secret” as:

[I]nformation, 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.

(Civ. Code, § 3426.1(d); See also Gov. Code, §§ 7927.705, 7930.005, 7930.205; Evid. Code, § 1061(a); *Uribe v. Howie* (1971) 19 Cal.App.3d 194, 207.)

California Code of Regulations, title 20, section 2505(a)(1)(D), states that if an applicant for confidential designation believes that the record should not be disclosed because it contains trade secrets, 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 the four elements in California Code of Regulations, title 20, section 2505(a)(1)(D) by stating:

- 1) *The specific nature of the advantage* – The information set forth in the DR Response contains commercially sensitive data and trade secrets.
- 2) *How the advantage would be lost* – Disclosure of any of the cost information, or derivatives of the cost information, would enable counterparties to reverse-engineer expected returns, capital cost components, or other key details of the project that would lessen the applicant’s negotiating power. Competitors could also leverage this information to secure more favorable agreements for themselves by leveraging the results that the applicant has achieved, further harming the applicant’s competitive advantage.
- 3) *The value of the information to the applicant* – Public disclosure of the information in the DR Response could harm the applicant’s existing and future commercial opportunities.

- 4) *The ease or difficulty with which the information could be legitimately acquired or duplicated by others* – The information contained in the DR Response could not be legitimately acquired or duplicated by others. The applicant’s estimates for property taxes include capital and operational cost figures that have been carefully assembled, leveraging a myriad of internal resources, including commercial partnerships, existing agreements, proprietary in-house knowledge, and other prior project experience. The information in the DR Response has not been publicly disclosed to anyone other than employees, attorneys, or consultants working with the applicant, and only once such parties have executed NDAs.

The DR Response contains a broad estimate of the expected property taxes generated from a typical operating year of the project. Property taxes are publicly accessible information. The applicant’s estimate, which has a seven-million-dollar range, does not meet the definition of a trade secret, as the information can be legitimately acquired by others. Further, given the wide range of the estimate, revealing this information would not reasonably enable counterparties to reverse-engineer costs to the applicant’s detriment.

Executive Director’s Determination

The applicant has not made a reasonable claim that the estimated data provided in the DR Response report contains trade secrets that would result in loss of competitive advantage. Therefore, confidentiality is denied. Within 14 days of the date of this letter, please file DR SOCIO-7 Data Request Response in docket No. 23-OPT-02 to ensure public access.

You may request that the CEC determine the confidentiality of records for which the executive director denied confidential designation. You have 14 days to request that the CEC determine the confidentiality of the record. If you make such a request, the CEC will conduct a proceeding pursuant to the provisions in the California Code of Regulations, title 20, section 2508.

If you have questions, please email confidentialityapplication@energy.ca.gov.

Sincerely,



Drew Bohan
Executive Director