DOCKETED

Docket Number:	16-RPS-02
Project Title:	Appeal by Los Angeles Department of Water & Power re Renewables Portfolio Standard Certification Eligibility
TN #:	213664
Document Title:	354 LADWP Application for Heat Rate Confidentiality (Bates Nos. LA001725-LA001733)
Description:	Confidential designation is not granted for this document, Bates Nos. LA001725-LA001733.
Filer:	Pjoy Chua
Organization:	LADWP
Submitter Role:	Applicant
Submission Date:	8/31/2016 6:04:37 PM
Docketed Date:	9/1/2016

Los Angeles Department of Water & Power

ERIC GARCETTI
Mayor

Commission
MEL LEVINE, *President*
WILLIAM W. FUNDERBURK JR., *Vice President*
JILL BANKS BARAD
MICHAEL F. FLEMING
CHRISTINA E. NOONAN
BARBARA E. MOSCHOS, *Secretary*

MARCIE L. EDWARDS
General Manager

June 2, 2016

Dockets Unit
California Energy Commission
1516 Ninth Street, MS 4
Sacramento, CA 95814

To Energy Commission Docket Unit:

Subject: **Application for Designation of Confidential Records.** Generator Heat Rates should be treated automatically as confidential data when submitted to the California Energy Commission for any purpose, including verification of LADWP's biomethane claims in support of its Renewable Portfolio Standard for Compliance Period 1.

The Los Angeles Department of Water and Power (LADWP or Applicant) is applying for the automatic designation of confidential records related to a range of generator heat rates to be provided to the California Energy Commission (CEC) as part of a request by CEC Staff for verification of Applicant's Renewable Portfolio Standard (RPS) data submitted for the compliance period from 2011 to 2013 (First Compliance Period).[1]

Applicant Name, Address, and Contact Information

Louis Ting
Director of Power Planning and Development
Los Angeles Department of Water and Power
111 North Hope Street, Room 921
Los Angeles, CA 90012
Office: (213) 367-0239
Email: Louis.Ting@ladwp.com

"When another federal, state, regional, or local agency or state-created private entity, such as the California Independent System Operator, possesses information pertinent to the responsibilities of the Commission that has been designated by that agency as confidential under the Public Records Act, or the

[1] 20 California Code of Regulations §2505 (a)(5) and (b).

Freedom of Information Act, the Commission, the Executive Director, or the Chief Counsel may request, and the agency shall submit the information to the Commission without an application for confidential designation. The Commission shall designate this information confidential." 20 CCR §2505 (b).

LADWP, a local agency, has designated the heat rate ranges, submitted with this application, as confidential under the Public Records Act. Therefore, the Commission shall designate this information confidential.

In addition to this designation, LADWP is providing further support for designating the information as confidential, as detailed herein.

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

Confidential Heat Rate Range for LADWP Generating Facilities, with a document date of June 2, 2016 ("Confidential Record"). The one page document, which includes heat rate ranges for the Applicant's power generation facilities in the Los Angeles basin, including those at Haynes, Scattergood, and Valley is confidential information.

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

The heat rate ranges and all information related to the heat rate ranges for all the power generating units at the Haynes, Scattergood, and Valley power plants in the Los Angeles basin shall be included in the Confidential Record.

1(c). State and justify the length of time the Energy Commission should keep the information or data confidential.

The information in the Confidential Record must be kept confidential indefinitely. The Applicant generates power from its in-basin power plants continuously and regularly to provide electricity to its customers. The heat rates will not fluctuate unless a particular unit is completely replaced. All the generating units at each power plant have a life expectancy in excess of 30 years.

Moreover, heat rates are part of market-sensitive information and are described as non-public information by federal law 18 CFR 35.36(a)(8). Generator heat rates provide "detailed design information about . . . existing critical infrastructure that . . . relates details about the production [and] generation" of energy, so it

would be considered "[c]ritical energy infrastructure information," under 18 CFR §§ 388.113 subd. (c)(1)(i). Therefore, the heat rate ranges should be kept confidential indefinitely.

1(d). 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 apply to that material.

An exemption to the California Public Records Act is "plant production data, and similar information relating to utility systems development." Gov. Code, § 6254 subd. (e). The heat rate ranges for power generation at each of the power plants is intricately part of plant production data because an entity obtaining the information would be able to calculate the generation of energy by the Applicant within a narrow margin of error. In addition, the calculation of energy could allow for the timing and delivery characteristics of the power which are properties of NERC e-Tag data and should not be available to the public.[2]

Moreover, this application for automatic confidential treatment of generator heat rates is consistent with the designated categories for such treatment related to "[f]uel cost data" and "fuel price data" under 20 CCR §2505 (a)(5)(B)4, and "[e]lectric power plant-specific hourly generation data" under 20 CCR §2505 (a)(5)(B)6.

This treatment is also consistent with designating "generator heat rates" as "non-public information" because it relates to "the electric energy and power business." 18 CFR 35.36(a)(8). Also, generator heat rates provide "detailed design information about . . . existing critical infrastructure that . . . relates details about the production [and] generation" of energy, so it would be considered "[c]ritical energy infrastructure information," under 18 CFR §§ 388.113 subd. (c)(1)(i)

In addition, the Confidential Records are "official information." " '[O]fficial information' means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." Cal. Evidence Code §1040 (a). "A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if... [d]isclosure is forbidden by an act of the Congress of the United States or a statute of this state" or "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the

[2] Elec. Mkt. Transparency Provisions of Section 220 of the Fed. Power Act, 143 F.E.R.C. P61,054, 61 (FERC 2013) citing Order No. 768, FERC Stats. & Regs. P 31,336 at P 156.

necessity for disclosure in the interest of justice. . ." Cal. Evidence Code §1040 (b).

In conjunction with the data designated as "[e]lectric power plant-specific hourly generation data" under 20 CCR §2505 (a)(5)(B)6, "[e]nergy sales data" under 20 CCR §2505 (a)(5)(B)2, and "[c]ritical energy infrastructure information," under 18 CFR §§ 388.112 subd. (a), 388.113 subd. (c)(1), 18 CFR 366.2 subd. (e), 78 FR ¶ 16133, 16137 (decided March 2013), the Confidential Record is "official information" and Evidence Code Section 1040 subsection (b)(1) forbids its disclosure.[3]

Furthermore, when another state or local agency possesses information pertinent to the responsibilities of the Commission that has been designated by that agency as confidential under the Public Records Act or the Freedom of Information Act, the Commission, the Executive Director, or the Chief Counsel may request, and the agency shall submit the information to the Commission without an application for confidential designation. 20 CCR §2502(b). The Commission shall designate this information confidential.

Also, the public interest served by not disclosing the record clearly outweighs the public interest in disclosure. Gov. Code §6255. The information could provide competitors a way to drive up the price of electricity if it knew which units would be unavailable for production of energy, thereby allowing it to calculate how much energy would need to be replaced and drive up the prices.

In addition, knowledge of the information in the Confidential Record could allow a competitor to claim it could produce the energy at a lower cost than the Applicant, thereby engaging in a campaign to undermine the Applicant and its ability to produce energy. Consequently, the Applicant could lose its competitive advantage in the market place. Less supply of electricity in the market place would likely result in an increase in electricity prices, all to the detriment of the public.

1(d). 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.

Trade secrets are exempt from public disclosure under Government Code section 6254 subdivision (k), "which incorporated the terms of Evidence Code

[3] See below in response to 1(d) for discussion on balancing test that favors non-disclosure.

section 1060."[4] Under controlling law expressed in *Uribe v. Howie*, 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."[5] A similar broad definition is incorporated into the Public Records Act by Government Code Section 6254.7 subsection (d), which protects against the disclosure of "trade secrets":

> "'Trade secrets,' as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to 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 which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it."[6]

To determine whether certain information is a trade secret, the information must be evaluated to assess if it (1) is valuable because it is unknown to others, and (2) the owner has attempted to keep it secret.[7] The Confidential Record represents a valuable compilation of confidential information related to energy production data. Under CEC regulations, when requesting a trade secret to be deemed confidential, an application must provide: 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.[8]

The energy production data, which includes the heat rate ranges, meet these qualifications.

1. "The specific nature of the advantage." The Confidential Record is not public information. It provides a key component on how to calculate energy production data from each unit at the Applicant's in-basin power plants.

2. "How the advantage would be lost." The Applicant has spent substantial time and resources on the design, construction, environmental assessments, and

---

[4] *Uribe v. Howie* (1971) 19 Cal. App. 3d 194, 206.
[5] *Id.*
[6] California Government Code §6254.7 sub. (d).
[7] *Whyte v. Schlage Lock Co.* (2002) 101 Cal. App. 4th 1443, 1454, citing *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal. App. 3d 1, 18.
[8] 20 CCR § 2505(a)(1)(D).

modeling the range of energy production data during each generating unit's life expectancy. The value of the information would be significantly impaired if made available to the public, which includes the Applicant's competitors, without a commensurate investment of time and resources. The Applicant could lose an advantage to keep electric rates affordable and competitive for its ratepayers if others could discern how and when the Applicant needed energy to meet the demands of its ratepayers.

3. "The value of the information to the Applicant." The energy production data represents commercial value and provides the Applicant with a business advantage over other utilities who do not know or use it. The Confidential Record is valuable information as related to energy production data because it represents significant (a) time and resources, and (b) information instrumental in identifying its costs to produce energy and, as a consequence, to facilitate its energy sales. Further, the Applicant has taken efforts to maintain the confidentiality of the Confidential Record to prevent others from either driving up electricity prices based on the Applicant's sales or placing the Applicant at an economic disadvantage by competitors claiming they could produce the energy at a lower cost.

4. "The ease or difficulty with which the information could be legitimately acquired or duplicated by others." The Confidential Record is not available to the public or readily available in the market place. In addition, under federal law the information is part of "market information," which is "non-public information related to the electric energy and power business." 18 CFR 35.36 (a)(8).

Furthermore, section 6255 of the California Government Code as does Evidence Code Section 1040 subsection (b)(2) and Evidence Code Section 1060, apply a balancing test to assess whether data should be nonpublic information. The public interest served by not disclosing the Confidential Record outweighs the public interest in disclosure in two primary ways.

First, the information could provide competitors a way to drive up the price of electricity if it knew which units would be unavailable for production of energy, due to maintenance, for example, and it would then be able to calculate how much energy would need to be replaced and drive up the cost of that replacement energy.

Second, knowledge of the Confidential Record could allow a competitor to "identify the least cost improvements to their facilities to reduce operating costs and heat rates to levels that would permit them to undercut" the price of the Applicant's energy for wholesale sales, thus undermine the Applicant and its

competitive advantage to produce energy. Consequently, the Applicant could lose an advantage in the market place.[9]

Moreover, FERC views energy sales data as "covered by exemption 4 of the Freedom of Information Act (FOIA), which protects 'trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.'"[10] In bolstering its position as to whether commercial or financial information is confidential, in one particular matter FERC referenced NYISO's tariff, which identifies "generator specific data, such as heat rates" as a trade secret.[11] The U.S. Department of Energy also considers actual heat rates as information to be protected and not disclosed. Form EIA 860, Instructions for Annual Electric Generator Report, Line 16, p.12. (OMB No. 1905-0129).

Therefore, the Confidential Record is exempt from disclosure under the Public Records Act, and other law, as provided above. Disclosure of this data to outside entities would place the Applicant at a disadvantage by allowing outside entities the ability to determine heat rates for generating facilities and manipulate fuel and/or energy pricing to maximize profit and hurt the Applicant.

1(e). 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.

The information may not be disclosed, because it does not lend itself to be aggregated. Each generating unit is unique. Furthermore, if it is aggregated with other information it would still provide insight into the energy production data of the Applicant, which would still allow unscrupulous entities to take advantage in the market place, resulting in an ability to manipulate fuel and/or energy pricing to maximize profit and hurt the Applicant.

---

[9] See e.g., Decision by State of New York Public Service Commission, Matter 13-01288, Case 11-M-0294, page 19, providing support for position that heat rates are a trade secret.

[10] 141 F.E.R.C ¶61,235 (F.E.R.C. 2012) n.142 stating "[t]he Commission noted its view that this data would be covered by exemption 4 of the Freedom of Information Act (FOIA), which protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential" citing E-Tag NOPR, FERC Stats. & Regs. ¶32,675 at P 16 (citing *5 U.S.C. 552(b)(4) (2006), amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007)); 141 F.E.R.C ¶61,235, rehearing denied 153 F.E.R.C. ¶61177; also, see discussion of trade secrets above.

[11] New York Indep. Sys. Operator, 129 F.E.R.C. P61,103, 61 (F.E.R.C. 2009).

1(f). 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.

The Confidential Record is available only on a "need-to-know" basis to select employees involved with energy production for the Applicant. It is not available to all employees.

I certify under penalty of perjury under the laws of the State of California 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 Los Angeles Department of Water and Power.

Sincerely,

Louis Ting
Director of Power Planning and Development
Los Angeles Department of Water and Power
111 N. Hope Street, Room 921
Los Angeles, CA 90012
Office: (213) 367 - 0239
Email: Louis.Ting@ladwp.com