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December 23, 2020

Mr. Andrew B. Brown
Ellison Schneider Harris & Donlan LLP
Constellation NewEnergy, Inc.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816

**Application for Confidential Designation for Power Source Disclosure
Annual Report, Docket No. 20-PSDP-01**

Dear Mr. Brown:

The California Energy Commission (CEC) is in receipt of Constellation NewEnergy, Inc.'s (applicant) Application for Confidentiality for specified data contained in the 2019 Annual Reports under the Power Source Disclosure program (PSDP). Specifically, the applicant seeks confidentiality for the following data:

- 1) PSD Schedule 1 – Retail sales (MWh), Net Specified Procurement (MWh), Unspecified Power (MWh), Net Nuclear, Large Hydro and Renewables in cells L7:L9 and L13; Gross MWh Procured in cells H16:H92, H95; Net MWh Procured in cells J16:J92, J95; Adjusted Net MWh Procured in cells K16:K92, K95; Specified Non-Renewable Procurement data in cells A109:K110; and
- 2) PSD Schedule 3 – Adjusted Net Procured (MWh) in cells B13:B25; Total Retail Sales (MWh) in cell C27; Percentage of Retail Sales Covered by Retired Unbundled RECs in cell C29.

The application notes that the data contains trade secrets or otherwise commercially sensitive data, the disclosure of which would cause loss of a competitive advantage. As an entity operating in the competitive and dynamic retail energy markets, as well as a net purchaser in the competitive wholesale markets, the applicant states that it holds information on its retail and wholesale market positions in confidence. The applicant states information can be used to directly or indirectly determine market position to the detriment of the applicant and its customers.

The application states that confidential information contained in the annual reports may be disclosed if it is aggregated with the same type of data reported by other energy service providers.

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 Commission to keep the record confidential.” The California Public Records Act allows for the non-disclosure of trade secrets. (Gov. Code, section 6254(k); Evid. Code, section 1060.)

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, citing the Restatement of Torts, vol. 4, section 757, comment b, p.5.)

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, or its disclosure would otherwise cause loss of a competitive advantage, an application shall state: 1) the specific nature of the advantage; 2) how the advantage would be lost; 3) the value of the information to an applicant; and 4) the ease or difficulty with which the information could be legitimately acquired or duplicated by others.

The application addresses these elements as disclosure of the applicant's retail sales or procurement data could disadvantage the applicant in negotiating for upcoming purchases of renewable energy. According to the application, this disadvantage could result in higher costs for customers and the potential loss of customers. Procurement data has been kept confidential and has not been publicly disclosed.

The applicant has made a reasonable claim that the law allows the California Energy Commission to keep the identified data contained in the annual reports from public disclosure except for total annual retail sales in megawatt hours.

Load serving entities like applicant, already provide quarterly annual retail sales under Title 20, section 1306(b). As set forth in Title 20, section 2507(e)(1)(A)(1), the quarterly data can be publicly disclosed for an individual load serving entity if aggregated at the statewide level by year. Therefore, data submitted consistent with this level of aggregation will not be confidential.

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The applicant requests that the information be kept confidential until December 31, 2021. A confidentiality term this long is inconsistent with terms requested by and granted to other entities under the PSDP, which is until December 31, 2020. A term ending December 31, 2020, or one year from the end of the reporting period, represents the amount of time the same or substantially similar data is considered confidential by the California Public Utilities Commission under R05-06-040 Appendix B ESP Matrix section V and D06-06-066 Appendix 2 ESP Matrix, *Market Purchases of Energy and Capacity: public after one year*.

For these reasons, the request for confidential designation for the identified data contained in the annual reports is granted until December 31, 2020. The information may be released before this date if applicant-specific information is aggregated with information from all other Energy Service Providers on a statewide level.

For future PSDP annual reports that are substantially similar, the applicant may follow the simplified process set forth in the California Code of Regulations, Title 20, section 2505(a)(4).

Be advised that persons may petition to inspect or copy records that have been designated as confidential, the executive director may disclose or release records previously designated as confidential in certain circumstances, and the CEC may hold a hearing to determine the confidentiality of its records on its own motion or on a motion by CEC staff. The procedures and criteria for disclosing or releasing, filing, reviewing, and acting upon such petitions or motions are set forth in the California Code of Regulations, Title 20, sections 2506-2508.

If you have any questions concerning this matter, please contact Jared Babula, senior attorney, at jared.babula@energy.ca.gov or (916) 651-1462.

Sincerely,



Drew Bohan
Executive Director