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EBCE Application for Confidentiality 21-IEPR-03

Dixit, Raj@Energy <Raj.Dixit@energy.ca.gov>

Tue 8/31/2021 11:00 AM

To: jdorrance@ebce.org <jdorrance@ebce.org>

August 31, 2021

Via email

Jim Dorrance
East Bay Community Energy
1999 Harrison Street, Suite 800
Oakland, California 94612
jdorrance@ebce.org

Application for Confidential Designation for Data in Integrated Energy Policy Report, Docket 21-IEPR-03

Dear Jim Dorrance,

The California Energy Commission (CEC) received the confidentiality application submitted by East Bay Community Energy (EBCE or applicant) on June 30, 2021, for specified data contained in the 2021 Integrated Energy Policy Report (IEPR). Specifically, confidentiality is sought for:

Form 1.3 –

Load-Serving Entity (LSE) Coincident Peak Demand by Sector, in megawatts (MW), for 2020-2032.

Form 8.1a (CCA) –

Budget Appropriations or Actual Costs and Cost Projections by Major Expense Category, in dollars, for 2020-2032.

Form 8.1b (CCA) –

Revenue Requirements Allocation, in dollars, for 2020-2032.

Confidential designation of this data is requested pursuant to Title 20, California Code of Regulations, section 2505, on the grounds that the information is not otherwise publicly available or readily discoverable in the form or detail provided at this time, that the information is market sensitive and constitutes trade secrets in terms of disclosing applicant's very recent wholesale and retail activities, that the data is proprietary (belonging to another company, from which applicant purchased it), and that the release of this information will result in loss of competitive advantage in the wholesale and retail marketplaces relative to applicant's ability to negotiate future contracts for the purchase or resale of energy and/or capacity at wholesale, or negotiation of contracts with retail customers. The application also states that confidentiality is

appropriate under Government Code section 6255(a) because the public interest in nondisclosure clearly outweighs the public interest in disclosure.

A properly filed Application for Confidentiality shall be granted under Title 20, California Code of Regulations, section 2505(a)(3)(A), "if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the [CEC] to keep the record confidential." The California Public Records Act allows for the non-disclosure of corporate proprietary information including trade secrets. (Gov. Code, sections 6254(k), 6276.44; see also Evid. Code, section 1060; Civ. Code, section 3426.1.) Government Code section 6255 also permits the CEC to withhold a public record where "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

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, section 757, comment b, p. 5.)

Here, the application states that 1) the confidential records contain commercially sensitive data which could provide insight into the applicant's business strategies; 2) if publicly disclosed, the data could be used to determine historical and forecasted power and capacity needs, which could be used by competitors to cause competitive harm to the applicant, or could be used by suppliers to the applicant's disadvantage in negotiating price and terms or procurement transactions, or could be used by customers to extract better terms in contract negotiations with the applicant; 3) the data has commercial value to the applicant which provides a competitive advantage; and 4) the confidential records are not available to the public.

The application also states that confidential information contained in Form 1.3 may be disclosed if it is aggregated on a statewide basis with the same type of data reported by other energy service providers or load serving entities, and steps are taken to ensure that the applicant's specific data cannot be ascertained. The application further states that confidential information contained in Forms 8.1a (CCA) and 8.1b (CCA) cannot, by its nature, be aggregated on a statewide basis with the same type of data reported by other energy service providers or load serving entities. The application further requests that the data in all three forms be kept confidential and not publicly disclosed until the end of 2024.

The information contained in Form 1.3 does not constitute trade secrets, nor does the public interest in non-disclosure of such data outweigh the public interest in its disclosure. This conclusion is supported, in part, by the Energy Commission's Order Denying Southern California Edison Company's Appeal of Executive Director Decision Denying Confidentiality, dated April 13, 2005, and, in part, in the subsequent decision in Superior Court upholding that Order (Case No. 05cs00860).

However, EBCE has indicated that information contained in Form 1.3 may be disclosed if it is aggregated on a statewide basis with the same type of data reported by other energy service providers or load serving entities, and steps are taken to ensure that EBCE's specific data cannot be ascertained. Based on this information, the confidentiality application for the information contained in Form 1.3 is approved through December 31, 2024, or until it is publicly

released, whichever is earlier. The information in Form 1.3 may be released before December 31, 2024, or other public release, if applicant-specific information is aggregated with information from all other statewide energy service providers. Load serving entities provide quarterly annual retail sales under Title 20, California Code of Regulations, section 1306. As set forth in Title 20, California Code of Regulations, 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 aggregation will not be confidential.

Under California Code of Regulations, title 20, section 2505, subsection (b), applicant, as a government entity, may submit information designated by that government entity as confidential under the Public Records Act without an application for confidential designation, and CEC will designate this information as confidential. The application, although not required, clearly demonstrates applicant's treatment of the specified data as confidential under the Public Records Act, and so the specified data are entitled to such designation by CEC. The confidentiality application for the information contained in Forms 8.1a (CCA) and 8.1b (CCA) is granted through December 31, 2024, or until it is publicly released, whichever is earlier.

Be advised that persons may petition to inspect or copy records that the CEC has 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 Title 20, California Code of Regulations, sections 2506-2508.

If you have any questions, please contact Raj K. Dixit, attorney, at raj.dixit@energy.ca.gov or (916) 776-3055.

Sincerely,

Raj K. Dixit

Attorney III

California Energy Commission

(916) 776-3055 State Cell