

CALIFORNIA ENERGY COMMISSION

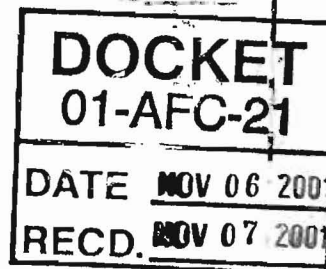
1516 NINTH STREET
SACRAMENTO, CA 95814-5512



(916) 654-4996

November 6, 2001

Scott A. Galati
Grattan & Galati
Counsel for Midway Power, LLC
Renaissance Tower
801 K Street
Penthouse Suite
Sacramento, CA 95814



RE: Potential Air Emission Offsets, Confidentiality Application,
Tesla Power Project, Docket No. 01-AFC-21

Dear Mr. Galati:

On October 18, 2001, you filed information regarding sources of intended air quality emission reduction credits (ERCs), together with an application for temporary confidentiality, as part of the applicant's submittals for the Tesla Power Project, Docket No. 01-AFC-21.

Your application makes a trade secret argument regarding Midway Power's offset acquisition strategy and the identity of potential offset sellers, stating:

The information submitted is a special compilation developed by Midway Power, LLC and provides Midway Power, LLC with an advantage over potential competitors who have not compiled such a list (the material does not include air emissions data which is susceptible to public disclosure under Government code Section 6254.7). In addition, disclosure of potential sources may hinder current negotiations.

The California Public Records Act allows for nondisclosure of trade secrets (Govt. Code Section 6254(k), Evid. Code Section 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. Howie (1971) 19 Cal.App.3d 194, 207-208, 96 Cal.Rptr. 493, 500-501, from the Restatement of Torts, vol. 4, sec. 757, comment b, p. 5.)

Scott A. Galati
November 6, 2001
Page 2

Your application makes a reasonable argument under section 2505 of the Energy Commission's regulations for classifying the identity of potential offset sources as a trade secret, providing the Tesla Power Project with a competitive advantage over rival developers, in accordance with the above standards. Non-disclosure of potential offset sources, such as those you have identified, can thus be in the public interest for a temporary period, so as not to interfere with an applicant's negotiations for offsets.

However, as with all other similar requests, the term of confidentiality needs to be carefully specified to insure 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 Commission's licensing process, including our review of environmental impacts as the CEQA lead agency. The confidentiality of potential offset sources can only be maintained until that point when public participation in review of your proposed offsets becomes necessary. I believe this is likely to occur when the air district issues its Preliminary Determination of Compliance (PDOC).

As interpreted by EPA, the Clean Air Act, at Title 42, U.S.C., section 7503(a)(1), requires "federally enforceable" emission reduction credit banking actions to be completed before the air district's Preliminary Determination of Compliance (PDOC) is issued. (See EPA's June 19, 1998 letter in the High Desert Power Project, pages 6-7, Docket No. 97-AFC-1.). EPA's letter specified at page 7 that the offsets must be "identified, quantified, and secured" before issuance of the PDOC. In reliance upon 40 C.F.R. § 51.161, EPA Region IX's clear policy is that an air district's PDOC should satisfy all the requirements of a DOC so it can be the subject of meaningful public review.

Additionally, Public Resources Code section 25523(d)(2) generally requires that complete emissions offsets be "identified" prior to Energy Commission licensing of a proposed facility. Therefore, CEQA, the Warren-Alquist Act, CEC policy, and EPA's directives all lead to the conclusion that information used by staff has to be on the public record. Staff's first "use" of an applicant's proposed offset sources is thus normally in the Preliminary Staff Assessment (PSA), which reviews the air district's PDOC.

I must insure that following issuance of the PDOC, public workshops can be held involving the Energy Commission staff, the air district, plus other interested agencies, intervenors, and members of the public regarding all aspects of your proposed emission offset credits.

Scott A. Galati
November 6, 2001
Page 3

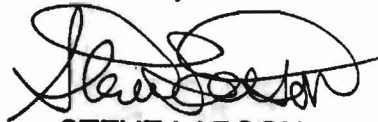
Thus, detailed information on the source, ownership and characteristics of the offsets proposed for your project needs to become public as part of a properly issued PDOC.

I therefore grant temporary confidentiality to the Tesla Power Project's potential offset sources until issuance of the PDOC by the Bay Area Air Quality Management District. My intention is that you will of necessity have completed negotiations for offsets by this time.

Any subsequent submittals related to potential offset sources can be deemed confidential for the temporary term specified in this letter without the need for a new application under sections 2505(a)(1)(G) and 2505(a)(4) of the CEC regulations, if 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. Any such submittals must identify specific offset sources with whom you are or may be negotiating in order to qualify for this procedure. A list of all available regional offsets will not qualify since such information is public.

Persons may petition to inspect or copy those records that I have designated as confidential. The procedures and criteria for filing, reviewing, and acting upon such petitions are set forth in the Energy Commission's regulations at Title 20, California Code of Regulations, section 2506.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Larson", with a stylized flourish at the end.

STEVE LARSON
Executive Director