

## CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET  
SACRAMENTO, CA 95814-5512

March 5, 2007

<b>DOCKET</b>	
<b>03-RPS-1078</b>	
DATE	MAR 05 2007
RECD.	MAR 07 2007

Evelyn C. Lee, Esq.  
Pacific Gas and Electric Company  
Law Department  
P. O. Box 7442  
San Francisco, CA 94120-75442

RE: Application for Confidential Designation  
CEC-SEP-1, CEC-SEP-2, and CEC-SEP-3 Data Requests  
Docket No. 03-RPS-1078

Dear Ms. Lee:

On September 5, 2006, the California Energy Commission (Energy Commission) received Pacific Gas and Electric Company's (PG&E) application for confidential designation of various information included in PG&E's CEC-SEP-3 Data Request submittal. This Data Request submittal was submitted to the Energy Commission in connection with a request for Supplemental Energy Payments (SEPs) by Military Pass Road-Newberry Volcano LLC (Military Pass), the counterparty to a proposed power purchase contract with PG&E. The Data Request submittal included the completed CEC-SEP-3 form, supporting Excel Spreadsheets, and a non-public version of PG&E Advice Letter 2863-E, which has been filed with the California Public Utilities Commission (CPUC).

PG&E's application for confidential designation was submitted to the Energy Commission pursuant to the California Code of Regulations, title 20, section 2505. Upon review of the application, the Energy Commission's legal office determined that it was incomplete and requested additional information. Among other things, the application included the Advice Letter for the Northwest Geothermal project and the IAE Truckhaven project (Advice Letter 2863-E), rather than the Advice Letter for the Military Pass project.

On November 8, 2006, PG&E submitted a new Data Request submittal and application for confidential designation to supersede and replace its earlier submittal and application. The new submittal included completed CEC-SEP-1, CEC-SEP-2, and CEC-SEP-3 forms, supporting Excel Spreadsheets, and non-public versions of PG&E Advice Letter 2860-E and Advice Letter 2860-E-A, both of which had been filed with the CPUC. Advice Letter 2860-E included three non-public appendices; Appendix A (Power Purchase Agreement), Appendix B (SEP/MPR worksheets) and Appendix C (Contract Analysis). Advice Letter 2860-E-A included one non-public appendix; Appendix A (First Amendment to Power Purchase Agreement).

On February 16, 2007, PG&E augmented its November 8, 2006 application for confidential designation (Application) with additional information in response to a request by the Energy Commission's legal office for clarification. The determination herein is based on PG&E's November 8, 2006 Application as augmented on February 16, 2007.

### Subject Data

The Application requests confidential designation of the following data (subject data) included with PG&E's Data Request submittal:

- CEC-SEP-1 Bid Data Request form -- Project-specific bid data for bids below MPR
- CEC-SEP-2 Bid Data Request form -- Project-specific bid data for bids above the MPR
- CEC-SEP-3 Data Request form, Question 6 -- Contract price data
- Excel Spreadsheet, tab entitled "Input Bid Data" -- Data in tables entitled "Estimated Contract Price" (cell C45), "Annual Contract Price by TOD Period" (cells C49-K68), and "Annual Weighted Average Bid Price" (cells C72-C91)
- Excel Spreadsheet, tab entitled "Results" -- Pricing and cost data in table entitled "Results" (cells D14-D17)
- Excel Spreadsheet, tab entitled "Contract Price" -- Data in Columns B entitled "Annual Weighted Average Contract Price" (cells E14-E33), data in Column C entitled "Annual Contract Payments" (cells F14-F34), data in Column D entitled "Lump Sum SEP Payments" (cells G14-G35), levelized price over contract term data in (cell F38); and levelized above market costs over contract term data in (cell F40)
- Excel Spreadsheet, tab entitled "Weighted Average Contract Price" -- data in Column entitled "Annual TOD Weighted Average Contract Price" (cells E11-E30), data in Table entitled "Annual Contract Price by TOD Period" (cells H11-P30), and data in Table entitled "Annual Contract Payment by TOD Period" (cells H59-Q78)
- Excel Spreadsheet, tab entitled "Bid Data Request Transfer Sheet" -- Price and above market cost data (cells F17, G17, H17, and I17)
- Excel Spreadsheets, tab entitled "Bid Price" -- Data in Columns B entitled "Annual Weighted Average Bid" (cells E14-E33), data in Column C entitled "Annual Contract Payments" (cells F14-F34), and Levelized bid price over contract term data (cell F37)
- Advice Letter 2860-E (non-public version), including Appendix A (Power Purchase Agreement), Appendix B (SEP/MPR worksheets) and Appendix C (Contract Analysis).
- Advice Letter 2860-E-A (non-public version), including Appendix A (First Amendment to the Power Purchase and Sale Agreement)

### Period of Confidential Designation

The Application requests that the subject data be kept confidential for a period of three (3) years, starting on the date PG&E submitted its application for confidential designation, November 8, 2006, and ending on November 7, 2009.

### Legal Justification

The Application cites the Public Records Act, Government Code section 6254(k), as the basis for keeping the subject data confidential. Section 6254 (k) provides an exemption from public disclosure under the Public Records Act if the disclosure is exempt or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege. Evidence Code section 1060 provides a privilege for "trade secrets," which is defined in Civil Code Section 3426.1 (d) as follows:

"Trade secret" means information, 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 could obtain value from its disclosure; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Application also cites *Klamath-Orleans Lumber v. Miller* (1978), 87 Cal. App. 3d 458, as an example of the Courts' general willingness to protect trade secret information from disclosure where the disclosure would be harmful to the privilege holder. *Pepsico v. Ramond* (9<sup>th</sup> Cir. 1995) 54 F. 3d 1262, is cited to support the type of harm that disclosures causes; specifically, the ability of competitors to gain knowledge at the expense of the privilege holder.

### Factual Justification

Regarding the bidder-specific data in the CEC-SEP-1 and CEC-SEP-2 Bid Data Request forms, the Application states that disclosure of the subject data could enable a market participant to determine how much competition it would face if it bid in PG&E's Renewables Portfolio Standard (RPS) solicitations. The Application states that this information would allow a potential bidder to take advantage of PG&E's mandatory need to purchase power from renewable energy resources. The Application states that the names of the projects can signify the location and technology of potential competitors to a knowledgeable person. In addition, the Application states that the contract start date, Market Price Referent (MPR) for contract year, and contract term provide insight into when supply is likely to materialize, and conversely may indicate periods of shortage when PG&E would be compelled to pay a higher price to obtain needed supplies. The Application also states that pricing information (whether consisting of the levelized bid price, levelized contract price, levelized above market costs, or the levelized Time of

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Delivery-adjusted MPR over the contract term) would provide potential competitors with benchmarks that could be used as a floor for their bids and deny PG&E customers the benefit of a competitive solicitation, since PG&E has a mandatory procurement obligation. The Application also states that the total above market costs over the contract term for each contract should be treated as confidential, because this information could reveal the price sought by each seller. Lastly, the Application states that information about whether the bid is on the investor owned utility's (IOU) short list should also be protected, because the disclosure of this information would enable a market observer or participant to discern the robustness of PG&E's RPS solicitation, and by extension, the bargaining strength that a bidder may have.

Regarding information on the CEC-SEP-1 and CEC-SEP-2 Bid Data Request forms about whether negotiation have begun, the Application states that this information should be confidential with respect to each of the listed projects during the pendency of the solicitation, but since the 2004 RPS solicitation has already concluded, this information may be disclosed in the aggregate.

Regarding the contract and bid prices and above market costs in the CEC-SEP-3 Data Request form (Question 6) and various supporting Excel Spreadsheets, as identified above, and included in Advice Letter 2860-E, Appendix B, the Application states that the disclosure of this subject data will reveal how much the utility is willing to pay in order to meet its RPS obligation. According to the Application, if price information is not revealed, a seller will be required to bid a price that reflects its true cost of production, not a potentially higher price floor, which will preserve the benefits of a competitive solicitation for consumers, as intended by the Legislature. The Application states that if the seller knew what the utility had paid, the seller would have no incentive to bid its product for a lesser amount, and the difference between the seller's cost and the previous sale price (representing savings to the consumer) would be lost.

In addition, the Application states that if the contract or bid prices of projects with which the utility has contracted are disclosed, those prices will effectively become the floor for subsequent bids. According to the Application, this is so, because a seller may assume that the utility would be willing to pay at least the same price for additional renewable energy, particularly if the utility's net short position is compared against the state's RPS goals. The Application states such knowledge may confer bargaining power over the utility and encourage the seller to seek a price that is, at a minimum, equal to the price of alternatives available to the utility.

Regarding the power purchase agreement and first amendment to the power purchase agreement included in Advice Letter 2860-E, Appendix A, and Advice Letter 2860-E-A, Appendix A, respectively, the Application states that the disclosure of this agreement may unfairly disadvantage the utility and may increase the difficulty and delay associated with future contract negotiations to the extent developers attempt to "cherry pick" non-standard, negotiated contract terms that were mutually agreed to between PG&E and Military Pass as the result of a comprehensive negotiation and

agreement. According to the Application, PG&E and Military Pass have consistently agreed to, and maintained, the confidentiality of the terms of their negotiations and the resultant contract. The Application states that prior to negotiations each party executed a confidentiality agreement to mutually protect proprietary information to be shared during contract formation. In addition, the Application states that the power purchase agreement prohibits each party from disclosing any terms or conditions of the agreement, except for terms required to be public by CPUC decision.

The Application references CPUC Decision D.06-06-066, which identifies the following terms as public: counterparty, project resource type, location, capacity, expected deliveries, delivery point, length of contract and online date. The remaining contract information, including pricing data, is designated confidential under Decision D.06-06-066.

Regarding the contract summary provided in Advice Letter 2860-E, Appendix C, the Application states that this summary contains an analysis of the terms that make the power purchase agreement with Military Pass particularly valuable to PG&E. According to the Application, the summary compares the contract price of the Military Pass project against a range of prices, analyzes the value of the bid in terms of market value, portfolio fit, transmission, and delivery issues, and discusses project viability and developer contingencies, security and credit terms, and other major contract terms that reveal the business plan of the project, all of which constitute commercially sensitive information, the disclosure of which would cause foreseeable harm to the Military Pass developer.

In addition, the Application states that the release of bidder's commercially sensitive pricing information and information contained in the contract summary may prompt developers to refrain from bidding into future solicitations or from participating in the California RPS program, so as to avoid the risk of disclosure of their confidential information.

Lastly, the Application states the public interest is better served if the subject data is not disclosed, since it is clearly in the public interest to protect utility customers, who will bear the increase cost of RPS procurement that would result if PG&E is disadvantaged in RPS procurement negotiations. According to PG&E, the risk that it will be placed at an unfair disadvantage in contract negotiations with RPS bidders is particularly high where, as is the case here, PG&E must conduct procurement by a specified time in order to comply with CPUC solicitation timelines and to achieve the goal of 20 percent renewable energy by 2010. Moreover, PG&E states that because of the ease with which its net short position can be derived (information about the utilities' net short position is available from the utility's semi-annual RPS compliance reports to the CPUC, according to PG&E), bidders would be uniquely positioned to use confidential pricing and business information to their advantage in RPS negotiations.

### Masking or Aggregation of Data

Except as noted below, the Application states that the subject data may not be aggregated, redacted, summarized, masked or otherwise protected in a way that allows partial disclosure without incurring the risk of harm discussed above.

The Application states that the total above market costs over the contract term could be disclosed if the costs represented by each project received in the solicitation are aggregated, and no other information about the solicitation, i.e., the identity of bidders, the number of bids, their prices, and the above market cost of each bid, is disclosed. In addition, the Application states that the aggregate number of all bids on PG&E's 2004 short list (whether above or below the MPR) may be disclosed three years after the close of the 2004 solicitation, June 30, 2005.

### Access to Data

The Application states that PG&E maintains access to the subject data on a confidential basis. According to PG&E, this information is only available by hard copy and electronically on a limited basis within certain departments and corporate affiliates, such as PG&E's parent company, that must have access to the information to conduct their procurement, regulatory, and business planning activities. The Application states that PG&E's procedures for access are set forth in Utility Standard Practice #8. In addition, the Application states that under Standard of Conduct #2 adopted by the CPUC for utility electric procurement activities, PG&E employees are obligated to protect PG&E's trade secrets in the following manner"

"Each utility must adopt, actively monitor, and enforce compliance with a comprehensive code of conduct for all employees engaged in the procurement process that: 1) identifies trade secrets and other confidential information; 2) specifies procedures for ensuring that such information retains its trade secret and/or confidential status [e.g., limiting access to such information to individuals with a need to know, limiting locations at which such information may be accessed, etc.] ... (CPUC Decision D.02-12-074, pp. 57-58.)."

In addition, as discussed above, the Application states that PG&E and Military Pass have consistently agreed to, and maintained, the confidentiality of the terms of their negotiations and the resultant contract. The Application states that prior to negotiations each party executed a confidentiality agreement to mutually protect proprietary information to be shared during contract formation. In addition, the Application states that the power purchase agreement prohibits each party from disclosing any terms or conditions of the agreement, except for terms required to be public by CPUC decision.

Determination of Confidentiality

As specified in the California Code of Regulations, title 20, section 2505 (a)(3)(A), a properly filed application for confidentiality shall be granted "unless the applicant has failed to make any reasonable claim that the Public Records Act or other provision of law authorizes the [Energy] Commission to keep the record confidential." As cited in the Application, the Public Records Act allows for the non-disclosure of trade secrets pursuant to Government Code section 6254 (k) and Evidence Code section 1060. California courts have traditionally used the following definition of "trade secret" consistent with Civil Code section 3426.1:

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, from the Restatement of Torts, vol. 4, sec. 757, comments b, p. 5.)

In the Application, PG&E has made a reasonable claim that the subject data has actual or potential economic value to PG&E and Military Pass by not being generally known to the public or to renewable energy developers that 1) may be in contract negotiations with PG&E or Military Pass, 2) may have an interest in bidding in future PG&E renewable solicitations, or 3) may be in direct competition with Military Pass. The Application also supports a reasonable claim that PG&E, its ratepayers, and Military Pass could be harmed if the subject data is disclosed. Lastly, the Application shows that PG&E is using reasonable efforts to maintain the secrecy of the subject data.

Based on the information presented, PG&E has made a reasonable claim that the subject data is entitled to be designated by the Energy Commission as a trade secret and is thereby exempt from public disclosure pursuant to Government Code section 6254 (k) and Evidence Code section 1060. Accordingly, the subject data shall be designated confidential pursuant to title 20, section 2505(a), for the requested three-year period starting on November 8, 2006, and ending November 7, 2009.

The subject data may be publicly disclosed by the Energy Commission after the applicable three-year period has lapsed. In addition, if any of the subject data is publicly disclosed by PG&E or Military Pass before the applicable three year period lapses, that data may be publicly disclosed by the Energy Commission.

Please be aware that individuals may petition the Energy Commission to inspect or copy any records that have been designated confidential. The procedures and criteria for filing, reviewing, and acting upon such petitions are set forth in the California Code of Regulations, title 20, section 2506.

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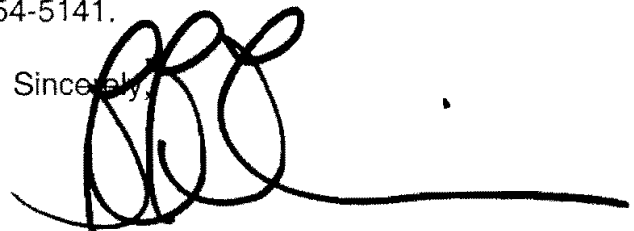
Gabriel Herrera of the Energy Commission's legal office is forwarding for your review public copies of PG&E's data request submittal, including the CEC-SEP-1, CEC-SEP-2, and CEC-SEP-3 forms, supporting Excel Spreadsheets, and non-public versions of PG&E Advice Letter 2860-E and Advice Letter 2860-E-A and the appendices to these advice letters. The subject data in these documents has been redacted so the documents may be disclosed publicly if requested pursuant to the Public Records Act. Please confirm in writing with Mr. Herrera that the subject data has been properly redacted from these documents.

In addition, I want to remind you that information concerning the total amount of any anticipated SEP award that may be made to Military Pass will be publicly disclosed by the Energy Commission once the Energy Commission issues a Funding Confirmation Letter pursuant to the Energy Commission's New Renewables Facilities Program Guidebook (Guidebook, April 2006, publication no. CEC-300-2006-006-F). Specifically, the Guidebook states that "After the Energy Commission issues a Funding Confirmation Letter, the Energy Commission will publish information on its Web site identifying the name of the Seller, the procuring retail seller, and the total anticipated SEP award amount." In addition, this information and the Seller's expected annual generation and SEP production incentive level will be identified in the Seller's SEP Award Agreement, which the Energy Commission will approve once the Seller completes any required environmental review for the project under the National Environmental Policy Act and/or the California Environmental Quality Act. In accordance with the Guidebook, the SEP Award Agreement will be made publicly available once the agreement is formally approved by the Energy Commission.

Lastly, please be advised that copies of PG&E's Advice Letter 2863-E are being destroyed at your request. Advice Letter 2863-E was erroneously submitted to the Energy Commission with PG&E's initial application of confidential designation. This Advice Letter pertains to projects by Northwest Geothermal Company and IAE Truckhaven I, LLC, not the Military Pass Road project, and therefore is not needed by the Energy Commission to evaluate the SEP request of Military Pass.

If you have any questions concerning this determination of confidential designation, please call Mr. Herrera at (916) 654-5141.

Sincerely,

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

B. B. BLEVINS  
Executive Director

cc: Gabriel Herrera  
Heather Raitt  
Fernando De Leon