

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512

April 12, 2007

DOCKET 03-RPS-1078	
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Kevin McSpadden, Esq.
Milbank, Tweed, Hadley & McCloy, LLP
601 South Figueroa Street, 30th Floor
Los Angeles, CA 90017-5735

RE: Application for Confidential Designation
CEC-SEP-3 (Seller) SEP Application
Docket No. 03-RPS-1078

Dear Mr. McSpadden:

On September 1, 2006, the California Energy Commission (Energy Commission) received Military Pass Road-Newberry Volcano, LLC's (Military Pass) application for confidential designation of various information included in Military Pass's Supplemental Energy Payment (SEP) application. The SEP application was submitted to the Energy Commission in connection with Military Pass's request for SEPs pursuant to the New Renewable Facilities Program and Military Pass's power purchase contract with Pacific Gas & Electric Company (PG&E). The SEP application included the completed CEC-SEP-4 form and the supporting Excel Spreadsheets.

Military Pass's application for confidential designation (Application) was submitted pursuant to the California Code of Regulations, title 20, section 2505. On November 17, 2006, and March 6, 2007, March 14, 2007, and April 2, 2007, Military Pass augmented its Application with additional and updated information in response to requests by Energy Commission staff. Military Pass's November 17, 2006 response provided revisions to information included on page 1, question 8, of its CEC-SEP-4 form. The April 2, 2007 response provided additional and updated information on the contract milestone dates included on page 2, question 11, of the Military Pass's CEC-SEP-4 form. The revised information and milestone dates supersede and replace the information and dates included in Military Pass's original SEP application.

PG&E submitted a related request for confidential designation covering the same contract pricing and energy payment information that Military Pass seeks protection for under its Application. PG&E's application for confidential designation was granted via a determination issued on March 5, 2007. A copy of PG&E's determination is enclosed for your information.

The determination herein is based on Military Pass's September 1, 2006 Application as augmented on November 17, 2006, and March 6, 2007, March 14, 2007, and April 2, 2007.

Subject Data

The Application requests confidential designation of the following data included with Military Pass's SEP Application. This data is referred to herein as the "subject data."

- CEC-SEP-4 form, response to question 7, which includes subsections (a), (b) and (c) – Bid price and contract price information
- CEC-SEP-4 form, response to question 8, which includes subsections (a), (b), (c) and (d) – Supplemental energy payments
- CEC-SEP-4 form, response to question 9 – Estimated maximum sales, weighted contract price, weighed MPR
- CEC-SEP-4 form, response to question 11 – Contract milestones
- The entirety of the supporting Excel Spreadsheets
- The entirety of the Power Purchase Agreement (PPA) and Confirmation Sheet between PG&E and Military Pass, with the exception of the terms that Military Pass and PG&E agreed may be publicly disclosed. The Application states that the PPA and Confirmation Sheet are attached as Appendix A to PG&E Advice Letter 2860-E and that the public terms are described in Appendix C of the Advice Letter. However, the Application did not include a copy of the Advice Letter.

Period of Confidential Designation

The Application requests that the subject data be kept confidential for a period of three (3) years, consistent with the Military Pass's confidentiality agreement with PG&E.

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.

In addition, the Application cites Government Code section 6255 (a) as a basis for keeping the subject data confidential. Section 6255 (a) provides that a state agency may withhold disclosure "if the public interest served by not disclosing data clearly outweighs the public interest served in disclosing data." The Application states that the general public interest is served by nondisclosure, because nondisclosure protects against gaming in current and future contract negotiations and contract solicitations [for renewable energy under California's Renewables Portfolio Standard (RPS)] which is valuable to the public, because it secures lower costs for the utility and ratepayers.

Factual Justification

The Application states that the disclosure of the subject data would harm Military Pass as a market participant, because other sellers could use this data to develop their contract bids and compete against Military Pass in the development of additional geothermal projects. The Application states that access to the subject data by competing developers would disadvantage Military Pass by providing competitors with information about Military Pass's development plans and obligations under its PPA with PG&E, which competitors could then use to hinder and frustrate the development of the Military Pass project.

In addition, the Application states that if the subject data was publicly disclosed, subcontractors and vendors of the Military Pass project could potentially use this data to their competitive advantage by negotiating equipment supply and services contracts, thereby putting an added cost burden on the development on the Military Pass project. For example, the Application states that if a supplier had information regarding the project milestones under the PPA, Military Pass might not be able to negotiate the best delivery terms or performance penalties should the vendor fail to perform. Because of this, the Application states that it is conceivable that the margins would be diminished to the point where the risk-return ratio would not justify Military Pass in taking the risk of potential losses in developing it projects.

The Application also states that disclosure of the subject data could directly harm specific rural areas with significant low-income populations. According to the Application, the sites for the Military Pass project are located in rural areas with significant low-income populations, and development of the project will produce significant economic benefits to these areas in the form of stable jobs, additional tax base, geothermal royalties and infrastructure investment. The Application states that the economic harm to Military Pass from the disclosure of the subject data could reduce Military Pass's ability to bring such public benefits to these rural areas and communities.

Lastly, the Application states that there is no concrete public benefit that would result from disclosure of the subject data. According to the Application, the public interest that is generally served by disclosure – transparency of process, monitoring government administration of public programs, or discouraging development of secret programs or improper contracts or awards of public funds – are not advanced by

disclosing the subject data, because this data has already been disclosed to the California Public Utilities Commission (CPUC) and PG&E's procurement review group in reviewing the merits of the Military Pass project. The Application states that no additional purpose is served in making this data available for public review.

Masking or Aggregation of Data

The Application states that the subject data can not be adequately protected by aggregation, masking, or other methods in a way that allows partial disclosure without incurring the risk of harm to Military Pass as discussed above.

The Application states that data aggregation will not reduce the risk of harm to Military Pass, because Military Pass is the only SEP applicant in the pool at this time. As a result, the Application states that the anonymity and data concealment that aggregation would theoretically afford applicants in a larger applicant pool is impossible to achieve for a single SEP applicant. It states that any data disclosed for a single applicant would amount to full disclosure of the single applicant's data. It further states that the introduction of additional applicants to the pool would not necessarily serve to increase anonymity of the data with respect to the PPA, and thus reduce the risk of harm from public disclosure, because there are few uniform terms among power purchase agreements.

In addition, the Application states that masking is not a viable method of concealing the subject data or preserving Military Pass's anonymity, because the contract and pricing information contained in the PPA, Confirmation Sheet, and SEP application is specific to the Military Pass project.

Access to Data

The Application states that Military Pass maintains the subject data as confidential and that access to the subject data is available only on a need-to-know basis to employees and agents and pursuant to non-disclosure agreements as applicable. The Application states that the only data that has been released to the public is that data which has been mutually agreed to by Military Pass and PG&E. According to the Application, Military Pass has not previously released the subject data to the general public, third parties, or market participants.

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.)

Based on the Application, Military Pass has made a reasonable claim that most of the subject data is entitled to confidential protection under the Public Records Act. Some of the subject data, however, is not entitled to confidential protection. Specifically, some of the data included in the supporting Excel Spreadsheets is not entitled to confidential protection to the extent this data has been publicly disclosed by PG&E or is required to be publicly disclosed by the CPUC.

With respect to power purchase contracts under the RPS, CPUC Decision D.06-06-066 identifies the following terms as public: counterparty, project resource type, location, capacity, expected deliveries, delivery point, length of contract, and online date. (D.06-06-066, Appendix 1, Section VII (F).) Hence, those portions of the Excel Spreadsheets that include this information must be public and may not be treated as confidential.

This was recognized by PG&E when it submitted its related request for confidential designation covering the same contract pricing and energy payment information for the Military Pass project. Accordingly, only the following information in the Excel Spreadsheets may be designated confidential:

- Excel Spreadsheet, tab entitled "Input Bid Data" – Pricing information contained in tables entitled "Annual Contract Price by TOD Period (lines 48-64) and "Annual Weighted Average Bid Price" (lines 71-87)
- Excel Spreadsheet, tab entitled "Results" – Pricing information contained in table entitled "Results" (lines 14-17)
- Excel Spreadsheet, tab entitled "Contract Price" – Columns B and C of table appearing at lines 11-35; Levelized price over contract term (line 38); Levelized above market costs over contract term, calculated on a cents/kWh basis (line 40)
- Excel Spreadsheet, tab entitled "Bid Price" – Columns B and C of table appearing at lines 11-34; Levelized bid price over contract term (line 37)
- Excel Spreadsheet, tab entitled "Weighted Average Contract Price" – Column entitled "Annual TOD Weighted Average Contract Price" of table appearing at lines 9-30; Table entitled "Annual Contract Price by TOD Period" appearing at lines 9-30; Table entitled "Annual Contract Payment by TOD Period" appearing at lines 57-78

- Excel Spreadsheet, tab entitled "Bid Data Request Transfer Sheet" – Highlighted pricing information (columns F-I), including "Levelized Bid Price (cents/kWh)," "Levelized Contract Price (cents/kWh)," Levelized Above Market Costs (cents/kWh)," and "Total Above Market Costs (\$)"

The Application makes a reasonable claim that the subject data, with the exception of the above noted Excel Spreadsheet information, has actual or potential economic value to Military Pass, and to PG&E as the counterparty to the PPA, by not being generally known to the public or to renewable energy developers that 1) may be developing other geothermal projects, 2) may have an interest in bidding in future PG&E solicitations, or 3) may be in direct competition with Military Pass. In addition, the Application supports a reasonable claim that the subject data has actual or potential economic value to Military Pass by not being generally known to subcontractors and vendors of the Military Pass projects, who could potentially use this data to their competitive advantage by negotiating better equipment supply and services contracts at an added expense of Military Pass. For example, the Application states that if a supplier had information regarding the project milestones under the PPA, Military Pass might not be able to negotiate the best delivery terms or performance penalties should the vendor fail to perform.

The Application also supports a reasonable claim that Military Pass could be harmed if the subject data, with the exception of above noted Excel Spreadsheet information, were disclosed. Lastly, the Application shows that Military Pass is using reasonable efforts to maintain the secrecy of the subject data.

Based on the information included in the Application, Military Pass has made a reasonable claim that all of the subject data except the above noted Excel Spreadsheet information 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, this subject data shall be designated confidential pursuant to title 20, section 2505(a), for the requested three-year period. The three-year period shall start on November 8, 2006, and end November 7, 2009, consistent with the determination of confidential designation issued to PG&E on March 5, 2007.

The subject data may be publicly disclosed by the Energy Commission after November 7, 2009. In addition, the contract milestone dates provided in response to Question 11 of the CEC-SEP-4 form may be publicly disclosed on an individual basis before November 7, 2009, if the milestone has been completed. For example, if the project's environmental permits are obtained before November 7, 2009, then the contract milestone date for this item may be disclosed once milestone is achieved. Furthermore, if any of the subject data is publicly disclosed by PG&E or Military Pass before November 7, 2009, that data may be publicly disclosed by the Energy Commission.

Kevin McSpadden

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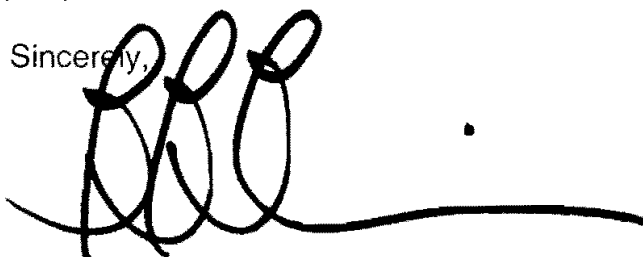
Also, please be aware that individuals may petition the Energy Commission to inspect or copy any records that have been designated confidential. The procedures and criteria for filing, reviewing, and acting upon such petitions are set forth in the California Code of Regulations, title 20, section 2506.

Gabriel Herrera of the Energy Commission's legal office is forwarding for your review public copies of Military Pass's SEP Application, including its completed CEC-SEP-4 form and supporting Excel Spreadsheets. 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.

Lastly, 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*, March 2007, publication no. CEC-300-2007-002-CMF). Specifically, the *Guidebook* states that "When the Energy Commission issues a Funding Confirmation Letter, the Energy Commission will disclose information on its web site identifying the name of the Seller, the procurement entity (if any), the procuring retail seller, and the total anticipated SEP award amount." In addition, this information and the expected annual generation and SEP production incentive level for the Military Pass project will be identified in Military Pass's SEP Award Agreement, which the Energy Commission will approve only after Military Pass 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 publicly available once the agreement is formally approved by the Energy Commission.

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

Sincerely,



B. B. BLEVINS
Executive Director

Enclosure

cc: Gabriel Herrera
Heather Raitt
Fernando De Leon
Mark Albert