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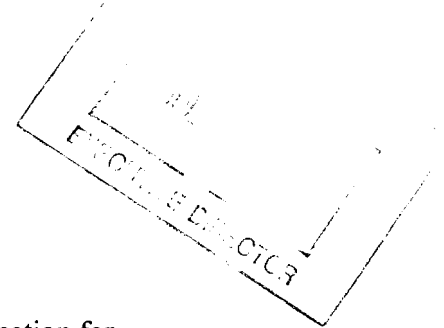
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July 16, 2008

Ms. Melissa Jones
Executive Director
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814



Re: Appeal of Constellation NewEnergy, Inc. Regarding Application for Confidentiality, RPS Track Form Submission, Docket No. 03-RPS-1078

Dear Ms. Jones:

Constellation NewEnergy, Inc. ("CNE") is in receipt of your letter dated July 2, 2008 regarding our May 19, 2008 application for confidentiality in the above-cited docket.

CNE's application sought confidentiality for the following calendar year 2007 data:

1. CEC-RPS-Track Schedule 1: (Columns A-N); and
2. CEC-RPS-Track Schedule 2: (Columns A-R, and row 30)¹

CNE wishes to thank you for granting the majority of CNE's request. However, with respect to those portions of our application for confidentiality that were denied, i.e. the information in Schedule 1, Columns C and N, and in Schedule 2, Columns C and R and Row 30 (i.e., cells A30 and H30), CNE is compelled to appeal your determination and request reconsideration.

Your letter at page 2 provides the following rationale for denying protection for certain portions of CNE's information:

Finally, CNE's May 19, 2008, confidentiality application does not make a reasonable claim to grant confidentiality to the aggregate data identified in Schedule 1 column N, the aggregate data identified in Schedule 2 column R, or, information in schedule 2 cell [A30] and cell [H30], since this information would not harm CNE if publicly disclosed or be reverse engineered to somehow reveal confidential information. Specifically, the information contained in Schedule 1, column N, constitutes aggregated annual

¹ Your letter at page 1 states that "We assume that CNE's request that information be designated confidential in RPS Track Schedule 2, row 30 is a typographical error, and assume the request actually refers to row 29 (row 30 does not contain data)." CNE has reviewed the excel file and confirms that the data is in fact located in Schedule 2 cells A30 and H30, although there are other cites in our initial application that refer to A29 and H29, which are typographical errors. For purposes of this letter, CNE will refer to row 30 and/or cells A30 and H30.

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generation procured; the information contained in Schedule 2, column R, contains total annual procurement in KWh. Cell [A30] is total annual retail sales, and cell [H30] is the total certified renewables procured. Consequently, this information is denied a designation of confidentiality since the Energy Commission has determined that similar information is already publicly available and does not rise to level of a trade secret. (Gov. Code, § 6254 (k).)

CNE respectfully disagrees with your findings, and therefore requests your reconsideration and submits this appeal to preserve its rights consistent with 20 CCR § 2505(a)(3)(B). The heart of CNE's concern is that CNE does not believe any of this data for the time period at issue is publicly available. Moreover, while some of this data can be considered "aggregated" as that term is used in 20 CCR § 2503(b)(9) because certain data represents the sum of the detailed data, *all of the data remains CNE-specific because it has not been aggregated with the data of any other LSE, and therefore remains trade secret data, the disclosure of which would harm CNE through the loss of competitive advantage.* In short, CNE is not aware of any basis for, and therefore disputes, the claim that any "similar information" specific to CNE applicable to this specific time period is publicly available.

Although more aggregated than the underlying detailed data, CNE considers each of these elements to constitute trade secret data with significant commercial value, the disclosure of which would provide (1) our retail competitors with competitively sensitive information regarding CNE's present market position (i.e., data in Schedule 2, Cell A30) that is not otherwise available, and (2) potential RPS suppliers with much more current insight into CNE's immediate RPS procurement needs (Schedule 2, Cell H30) than would be available if the limited duration of protection requested was granted. Disclosure would result in a loss of competitive advantage for CNE by providing those entities access to valuable information about existing commercial relationships, CNE's specific percentage share of certain resources allocated based on load share or CNE's regulatory compliance status that these entities otherwise would not have. Such access may result in a loss of CNE's ability to secure or maintain favorable commercial transactions. This outcome would obviously harm CNE, and it would also harm CNE's customers and undermine the market forces that keep consumer prices low.

Finally, even if any other LSE permitted disclosure of data concerning that LSE's 2007 RPS procurement activities, the acquiescence on that LSE's part to such disclosure or failure to assert confidentiality in no manner precludes CNE from asserting its right to protect its individual trade secret data over the period requested.

Because CNE understands the Commission's desire to balance access to timely information with the legitimate protection of commercially sensitive, trade secret data, CNE's original confidentiality requests asked to protect the less detailed data "for a period of at least one (1) year from the last month covered in the reports for Columns C and N of Schedule 1 and Columns

C and R and Cells A30 and H30.” This request would keep the data in question confidential only until December 31, 2008, a period CNE deems less than ideal, but adequate to prevent immediate harm to its business interests. As discussed in the original application, CNE carefully and deliberately crafted its confidentiality request to mirror the duration of protection the California Public Utilities Commission (“CPUC”) provides the same types of data under rules developed following extensive public processes. The rejection of CNE’s request would create conflict between the agencies’ practices—an outcome that does not serve the Commission’s interest in consistency and simplicity. What the Commission would gain in exchange—a relatively short additional period of public disclosure, certainly does not justify the inconsistency and attendant difficulties and expense associated with protecting trade secret data.

The California Public Records Act exempts “trade secrets” from public disclosure, including “any formula, plan, . . . production data, or compilation of information . . ., which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service . . . and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.” (Govt. Code § 6254.7(d).) As applied to this circumstance, CNE’s requested duration for the types of trade secret data is appropriate under this legal framework for the following reasons:

- (1) Total Annual Retail Sales in 2007 (Schedule 2, Cell A30):
 - a. CNE’s competitors could not otherwise discern, duplicate or develop this information on their own. Moreover, as explained throughout this request for reconsideration, CNE places a high value on maintaining the confidentiality of information concerning its retail sales, market share and the means and methods of providing services. Because the data at issue here is not otherwise public at this point in time, its disclosure would harm CNE due to the loss of competitive advantage. CNE’s original application was intended to convey these facts and positions pursuant to 20 CCR § 2505(a)(1)(D).
 - b. This annual retail sales number is a commercially sensitive trade secret value that reflects CNE’s most recent calendar year 2007 retail market share data, information that is not otherwise available to CNE’s retail competitors, including other ESPs. The sensitivity of this data is elevated due to the suspension of direct access, which has created a limited universe of contestable customers and relatively little variability in load shares as between the ESPs. Disclosure of this information would result in a loss of competitive advantage insofar as there is no other potential source for this type of contemporaneous information.
 - c. RPS suppliers could use the release of this sensitive data to much more accurately determine CNE’s present-day RPS compliance status and the magnitude of its future RPS procurement requirements needs. Because in other public reports

CNE's RPS procurement percentage is released (but not the current year's retail sales figure), disclosing the retail sales figure would permit competitors or potential suppliers to accurately estimate CNE's present-day RPS procurement needs, resulting in a loss of competitive advantage and bargaining power.

- d. If the Commission were to grant the duration of confidentiality CNE originally requested, it would maintain the same degree and duration of confidentiality the CPUC provides to the same type of data under the same overarching legal obligation to comply with the California Public Records Act. However, denying CNE's requested duration for confidentiality would deny CNE the protection the CPUC provides, creating inter-agency conflict and more confusion among market participants about the degree of protection afforded to market sensitive, trade secret data.
 - e. This information constitutes a "compilation of information", otherwise known only to CNE, which is used in its business and the provision of services and which gives it an opportunity to obtain an advantage over competitors, and the disclosure of which would cause CNE a loss of competitive advantage.
- (2) Facility Fuel Types and Annual Generation Procurement (Schedule 1, Columns "C" and "N" and Schedule 2, Columns "C" and "R")
- a. Disclosure of the data contained in Schedule 1, Column N and Schedule 2, Column R would disclose (i) the total quantity (or absence) of RPS eligible procurement undertaken in the prior year; (ii) the number of counterparty suppliers and/or RPS eligible resources in the portfolio and (iii) the relative magnitudes as between different resources and/or suppliers.
 - b. Disclosure of the data contained in Schedule 1, Column C and Schedule 2, Column C would—particularly when made in conjunction with disclosure of Columns N and R—disclose (i) the fuel sources for the quantities of RPS eligible procurement undertaken in the prior year; (ii) the counterparty suppliers and/or RPS eligible resources in the portfolio given the nature of the resources utilizing certain fuel supplies which are not under long-term commitments with the large IOUs; and (iii) the relative magnitudes as between different resource types and/or the associated suppliers.
 - c. This information—the resource types and relative contribution to CNE's RPS portfolio—is commercially sensitive trade secret information that reflects CNE's most recent RPS procurement efforts and nature of its portfolio. CNE seeks to maintain the confidence of this information so that it is not otherwise available to CNE's retail competitors, including other ESPs, or to its potential RPS-eligible

suppliers. CNE believes that the sensitivity of this data is elevated due to the relatively limited universe of RPS suppliers with presently operating projects not already tied up under long-term contracts with the large IOUs or municipal entities, the high level of demand for such resources, and the regulatory uncertainty about the reopening of direct access.

- d. This CNE-specific information constitutes a “compilation of information” which CNE uses in its business, which is not known by others, and the disclosure of which would result in loss of competitive advantage. The loss of competitive advantage is particularly acute as this information can be used in conjunction with other information regarding CNE’s commercial activities and status of its current portfolio to provide contemporaneous data about current procurement needs, shares of allocated resources, and existing commercial relationships. As such, the information constitutes trade secret information pursuant to Gov’t Code § 6254.7(d).

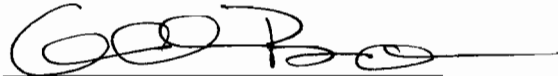
(3) Total Certified Renewable Procured (Schedule 2, Cell H30):

- a. This data is not presently public and its disclosure would permit competitors or potential suppliers to calculate CNE’s total retail energy sales (and thereby market share). The public release of this data at present will allow CNE’s competitors and RPS suppliers to determine CNE’s current RPS compliance status, and hence forward-looking RPS procurement requirements, which are extremely sensitive trade secrets. Accordingly, disclosure would result in loss of competitive advantage, and would place CNE at a competitive *disadvantage* in procuring for future RPS needs.
- b. The delayed release reflected in the duration of confidentiality originally requested in the application strikes a balance between CNE’s legitimate commercial concerns and need to protect trade secret data and the public’s interest in data regarding RPS compliance. CNE believes other information that it has made public on a contemporaneous basis helps in that respect. Moreover, as previously discussed, this information is not presently disclosed.
- c. This information, particularly when used in conjunction with other information at issue here (or presently public) regarding CNE’s commercial activities and status of its current RPS portfolio, constitutes a compilation of information, otherwise known only to CNE, which is used in its business and the provision of services and which gives it an opportunity to obtain an advantage over competitors, and the disclosure of which would cause CNE a loss of competitive advantage. As such, the information constitutes trade secret information pursuant to Gov’t Code § 6254.7(d).

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In conclusion, CNE respectfully requests that you reconsider the denial of confidentiality protection of the data specified herein for the duration CNE originally requested. For the reasons set forth above, reconsideration is appropriate because the information presently constitutes trade secret data and the very limited duration of the protection requested strikes the appropriate balance between protection of CNE's legitimate trade secrets and the public's use of detailed, LSE-specific data consistent with the Public Records Act. Moreover, granting the protection originally requested would avoid an inter-agency policy conflict as to the appropriate scope and limited duration of protection for these types of data.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. B. Brown", written over a horizontal line.

Andrew B. Brown
Ellison, Schneider and Harris LLP
Attorneys for Constellation NewEnergy, Inc.