

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512

December 24, 2008

Marc Campopiano
Latham & Watkins LLP
650 Town Center Drive
Costa Mesa, CA 92626

RE: **Application for Confidentiality, Emission Reduction Credits
CPV Vaca Station Project
Docket No. 8-AFC-11**

Dear Mr. Campopiano:

On December 8, 2008, CPV Vacaville, LLC ("Applicant") filed an application for confidentiality in the above-captioned Docket. Applicant seeks confidentiality for the Emission Reduction Credits ("ERC") Acquisition Plan for the CPV Vaca Station Project.

Applicant bases the request upon the Public Records Act, Govt. Code § 6254(k), which provides for the confidentiality of trade secrets. The application states, in part:

The information submitted is a special compilation developed by [Applicant] and provides [Applicant] with an advantage over potential competitors who have not developed such a compilation of information, offset holders, and offset strategies. . . In addition to the complete offset strategy, disclosure of potential sources of emissions offsets may hinder current negotiations.

A properly filed application for confidentiality shall be granted under the California Code of Regulations, title 20, § 2505(a)(3)(A), "if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the [Energy] Commission to keep the record confidential." The California Public Records Act allows for the non-disclosure of trade secrets. (Gov. Code, § 6254(k); Evid. Code, § 1040.) 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. Howe* (1971) 19 Cal.App.3d 194, 207-208, from the Restatement of Torts, vol. 4, § 757, comments b, p.5.)

The application makes a reasonable argument under the California Energy Commission's regulations for classifying the identity of potential offset sources as a trade secret, providing the applicant with a competitive advantage over potential competitors, in accordance with the above standards. Cal. Code Regs., title 20, § 2505. Therefore, it is in the public interest that non-disclosure of potential offset sources, such as those contained in the ERC Acquisition Plan, be given confidentiality, so as not to interfere with offset negotiations.

However, Applicant requests that the information be kept confidential indefinitely, in order to ensure that ongoing negotiations are not hampered. The term of confidentiality needs to be carefully specified to ensure 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 Energy Commission's licensing process, including our review of environmental impacts as the lead agency pursuant to the California Environmental Quality Act (CEQA). The confidentiality of potential offset sources can only be maintained until that point when public participation in review of the project's proposed offsets becomes necessary. This will likely occur when the Air District issues its Preliminary Determination of Compliance (PDOC).

As interpreted by the EPA, the Clean Air Act requires "federally enforceable" emission reduction credit banking actions to be completed before the Air District's PDOC is issued. 42 U.S.C. § 7503(a)(1). EPA's policy is that an Air District's PDOC should satisfy all the requirements of a Determination of Compliance so it can be the subject of meaningful public review. 40 C.F.R. § 51.161.

Moreover, Public Resources Code § 25523, subdivision (d)(2), requires that complete emissions offsets for a proposed facility be identified before the Energy Commission licenses that facility. Staff's first use of an applicant's proposed offset sources is normally in the Preliminary Staff Assessment, which reviews the Air District's PDOC. Following issuance of the PDOC, public workshops involving the Energy Commission staff, the Air District, other interested agencies, intervenors, and members of the public will be held. At that time, certain aspects of your ERC Acquisition Plan will be discussed.

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 Applicant's ERC Acquisition Plan, only until such time as the Air District issues the PDOC. Accordingly, it is in your best interests that negotiations for offset sources be completed by that time.

Marc Campopiano
December 24 2008
Page 3

Any subsequent submittals related to ERC offsets can be deemed confidential for the temporary term specified in this letter without the need for a new application, provided that 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. California Code of Regulations, title 20, § 2505, subdivisions (a)(1)(G) and (a)(4).

Persons may petition to inspect or copy the records that I have designated as confidential. The procedures and criteria for filing, reviewing, and acting upon such petitions are set forth in the California Code of Regulations, title 20, § 2506. If you have any questions concerning this matter, please contact Deborah Dyer, Senior Staff Counsel, at (916) 654-3870.

Sincerely,

A handwritten signature in black ink that reads "Pat Perry for Melissa Jones". The signature is written in a cursive, flowing style.

MELISSA JONES
Executive Director

cc: Docket Unit
Rod Jones, Project Manager