

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512



March 13, 2009

John Richardson
Madera Power, LLC
P.O. Box 1063
Sun Valley, CA 91352

DOCKET**02-REN-1038**DATE MAR 13 2009RECD. MAR 16 2009

**RE: Existing Renewable Facilities Application
Application for Confidentiality
Madera Power LLC
Docket No. 02-REN-1038**

Dear Mr. Richardson:

On February 13, 2009, Madera Power, LLC, (Madera Power) filed an Application for Confidentiality for information related to the 2009 Funding Eligibility Existing Renewable Facilities Program Application (Docket No.02-REN-1038). The application seeks confidentiality for information related to contract terms between Madera Power and PG&E. Specifically, the Application seeks confidentiality for responses to questions 24, 25, 26, 27, and 28 of the funding eligibility application (Form CEC-1250E-1). Those questions relate to the following:

- Line 24 – Explanation of how incentive payments will allow the facility to become cost-competitive by the end of the 2011 calendar year
- Line 25 – Explanation of the public benefits provided by the operation of the facility
- Line 26 – Copy of recent billing statements from your utility
- Line 27 – Estimate of the target price needed in order to ensure the continued operation of the facility through the application year
- Line 28 – Estimate of the production incentive cap needed

Madera Power also requests that the terms of the contract between Madera Power and PG&E be designated as confidential. The application requests that the information be kept confidential for the life of the contract, a minimum of 28 years.

Madera Power bases its request on the claim that Madera Power's contract with PG&E contains a provision requiring that the terms of the contract be kept in confidence, and that public disclosure may place Madera Power in breach of that contract. Madera Power goes on to state:

Accordingly, disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the

information that outweighs the necessity for disclosure in the interest of justice. . . . Our contract with PG&E binds us to hold confidential all aspects of our contract. A breach of this type could result in a termination of the contract at the request of PG&E. In such instance, we would forfeit a significant deposit and be forced to sell our electricity on the open market. If that were to occur it would cause a significant loss of competitive advantage and revenue.

A properly filed Application for Confidentiality shall be granted under the California Code of Regulations, title 20, (CCR) section 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."

Madera Power's application is made on the basis that disclosure of the information would be a breach of Madera Power's contract with PG&E. However, the application does not cite or discuss law which would authorize the Commission to keep records confidential on the grounds of breach of contract by the submitting party. Madera Power's contract with PG&E does not provide sufficient justification for designating the records as confidential pursuant to CCR section 2505.

Madera Power cites the California Public Records Act (Gov. Code, § 6254(k)) which exempts from disclosure records which are exempted pursuant to federal or state law (including Evidence Code sections related to privilege), and Evidence Code section 1040, which provides a privilege for official information. However, it is clear that the data is not official information, and thus does not fall within the exemption proved by Evidence Code section 1040.

It appears that Madera Power may have *intended* to claim the information is trade secret, and the California Public Records Act does allow for non-disclosure of trade secrets. (Gov. Code, § 6254(k), Evid. Code, § 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.)

However, Madera Power's application does not actually claim that the information for which confidentiality is sought are trade secrets. CCR section 2505(a)(1)(D) requires:

If the applicant believes that the record should not be disclosed because it contains trade secrets or its disclosure would otherwise cause loss of a competitive advantage, the application shall also state the specific nature of that advantage and how it would be lost, including the value of the information to the applicant, and the ease or difficulty with which the information could be legitimately acquired or duplicated by others.

Madera Power's application for confidentiality does not meet the above requirements for holding the information confidential on the basis of trade secrets, in part because the application does not claim that the information is trade secret or a formula, pattern device or compilation of information used in Madera Power's business. Furthermore, the application does not state the specific nature of the trade secret or competitive advantage, does not explain how that competitive advantage would be lost, nor what the value of the information is, nor the ease or difficulty with which the information could be acquired or duplicated by others.

Consequently, your application for confidentiality is denied. Should you feel that you have additional information that could support your claim of confidentiality, please submit a new application, following the procedures set forth in CCR, section 2505. Alternatively, the procedures and criteria for appealing any part of this decision are also set forth in CCR, section 2505. Be advised that an appeal of this decision must be filed within fourteen days from my decision. If you have any questions concerning this matter, please contact Deborah Dyer, Senior Staff Counsel, at (916) 654-3870.

Sincerely,

MELISSA JONES
Executive Director

cc: Docket Unit
Jason Orta, Energy Efficiency & Renewables Division