

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512

May 20, 2010

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| DOCKET | |
| 08-AFC-9 | |
| DATE | MAY 20 2010 |
| RECD. | MAY 25 2010 |

Marc Campopiano
Latham & Watkins
650 Town Center Drive, 20th Floor
Costa Mesa, CA 92626-1925

RE: **Application for Confidentiality, Emission Reduction Credits
Palmdale Hybrid Power Plant Project
Docket No. 08-AFC-9**

Dear Mr. Campopiano:

On April, 21, 2010, the City of Palmdale (Applicant) filed an Application for Confidentiality on behalf of the Palmdale Hybrid Power Plant (Docket No.08-AFC-9). The Application seeks confidentiality for an executed "Term Sheet for Proposed Contingent Forward Purchase and Sale of San Joaquin Emission Reduction Credits," ("the document") by and between the City of Palmdale and Calpine Energy Services. The document sets the terms to buy and sell emission offset credits for the Palmdale Hybrid Power Plant.

The application claims that the document is a trade secret in that it:

. . . represents a confidential business transaction between two private parties. . . Applicant has spent time and resources engaging in the executed (document) and Applicant's investment would be jeopardized if its competitors became aware of the terms. . . Applicant intends to use the (document) to obtain emission offset credits to mitigate potential air quality impacts associated with the project. . . The (document) is not readily available on the marketplace and can only be obtained with a significant investment of time and money.

The application cites to California Government Code section 6254(k) (the Public Records Act) in support of the claim that the information is trade secret, and therefore should be confidential.

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, § 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. Howe* (1971) 19 Cal.App.3d 194, 207-208, from the Restatement of Torts, vol. 4, § 757, comments b, p.5.)

The Public Records Act specifically allows for information related to the costs of obtaining emissions offsets to be confidential. Gov. Code, § 6254.7(f). However, that same section states that at the time that an air pollution control district issues a permit to construct to an applicant, data obtained from the applicant regarding offsets purchases becomes a public record.

The application makes a reasonable argument under the California Energy Commission's regulations for classifying the agreement setting forth the costs of obtaining emissions offsets as a trade secret, providing the applicant with a competitive advantage over potential competitors, in accordance with the above standards. Cal. Code Regs., tit. 20, § 2505. Therefore, it is in the public interest that the document be given confidentiality, so as not to interfere with offset negotiations and agreements.

Applicant requests that the information be kept confidential "indefinitely." The Public Records Act, however, does not allow for such information to be kept confidential indefinitely, as stated above. The term of confidentiality needs to be carefully specified to ensure conformance with the policies of 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 Final Determination of Compliance ("FDOC") for the project.

Moreover, Public Resources Code § 25523, subdivision (d)(2), requires that compete emissions offsets for a proposed facility be identified before the Energy Commission licenses that facility. Staff's next use of Applicant's proposed offset sources would be in the Final Staff Assessment, which reviews the air district's FDOC. Following issuance of the FDOC and Final Staff Assessment, hearings 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 agreement may be discussed.

Thus, detailed information on the source, ownership, and characteristics of the offsets proposed for your project may become public as part of the air district's FDOC. I therefore grant **temporary confidentiality** to Applicant's ERC acquisition agreement, only until such time as the air district issues the FDOC.

Any subsequent submittals related to the project's ERC offset agreements 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,

/S/

MELISSA JONES
Executive Director

cc: Docket Unit
Energy Commission Project Manager