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DOCKET

00-SB-1305

y 27, 2011

DATE MAY 27 2011

RECD. MAY 27 2011

Melissa Jones
Executive Director
California Energy Commission
1516 Ninth Street, MS-39
Sacramento, CA 95814-5504



RE: Docket 00-SB-1305 - Application for Confidential Designation – Constellation NewEnergy, Inc. Power Source Disclosure Form.

Dear Ms. Jones:

Constellation NewEnergy, Inc., (“CNE”) by this Application for Confidential Designation respectfully requests protection of certain information provided to the Commission in the attached Power Source Disclosure form consistent with Title 20 California Code of Regulations (“CCR”) Sections 2501 *et seq.*

Please feel free to contact me at (916) 447-2166 should you or Staff have any questions or require additional information regarding this Application. Thank you for your consideration of our request.

Sincerely,

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

Confidential Materials in Sealed Enclosure.

APPLICATION FOR CONFIDENTIAL DESIGNATION

Constellation NewEnergy, Inc.

Power Source Disclosure Form

May 27, 2011

1. *Specifically indicate those parts of the record which should be kept confidential.*

CNE requests that the following information remain confidential, as also indicated by the yellow pattern cells on the Excel worksheet:

Form	Information to be held confidential
SB 1305 Schedule 1	Generic purchase information in cells M26, O26 and O27.
SB 1305 Schedule 2A	Generic Power Sold in cells C30 and I30; Total Retail Sales in cells C32 and I32.
SB 1305 Schedule 2B	Generic Power Sold in cells C27 and D27; Total Retail Sales in cells C29 and D29.

Additionally, for ease of identification, CNE has shaded all cells containing information it seeks to keep confidential yellow.

2. *State the length of time the record should be kept confidential, and provide justification for the length of time.*

CNE requests that the identified information be kept confidential until December 31, 2011. This specific term is requested to align the protection of data provided to the CEC in this form with treatment provided in other contexts, most specifically by the CPUC under its confidentiality program.

This information should be kept confidential because: (1) the information is not otherwise publicly available or readily discoverable in the form or detail provided at this time; (2) the information is market sensitive and constitutes trade secrets in terms of disclosing CNE's very recent wholesale and retail activities, and (3) the release of this information will result in loss of competitive advantage in the wholesale and retail marketplaces relative to CNE's ability to negotiate future contracts for the purchase or resale of energy and/or capacity at wholesale, or negotiation of contracts with retail customers.

CNE asks that the identified data be held in confidence until December 31, 2011. This requested period of time is appropriate as the data is expected to retain validity and market value over that period, and because any lesser period would undermine existing protection of the same or substantially similar data by other regulators or market entities, including the California Public Utilities Commission ("CPUC"), the California Air Resources Board and the California Independent System Operator ("CAISO"). CNE has also fashioned this request to reflect the scope of protection provided to energy service provider ("ESP") data in CPUC Rulemaking 05-06-040, and, in particular, Decision ("D.") 06-06-066, Appendix B ("ESP Matrix") and related modifications made in D.08-04-023, in an effort to have consistency across California energy

agencies.¹ The public release of the specified information, particularly to competitors and potential customers, would result in a loss of competitive advantage for CNE in the wholesale and retail markets, and may result in a loss in the ability to secure a favorable margin or return or result in disclosure of information about internal operating practices.

3. *Cite and discuss (i) the provisions of the Public Records Act or other law which allow the commission to keep the record confidential and (ii) the public interest in nondisclosure of the record.*

Under Public Resources Code Section 25322, the Commission is required to grant a request for confidential designation of information collected pursuant to Pub. Res. Codes Section 25301(a) if:

- (a) the information is exempt from disclosure under the California Public Records Act (Govt. Code §§ 6250 et seq.);
- (b) the information meets the confidentiality requirements set forth in the Commission's regulations; or
- (c) on the facts of the particular case, the public interest served by not disclosing the information outweighs the public interest served by disclosure.

The 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).)

The Commission's regulations provide for information to be designated as confidential if it "contains a trade secret or its disclosure would otherwise cause a loss of a competitive advantage." (20 CCR § 2505(a)(1)(D).)

The information identified above contain trade secrets or otherwise commercially sensitive data the disclosure of which would cause loss of a competitive advantage. As an entity operating in the competitive and dynamic retail energy markets, as well as a net purchaser in the competitive wholesale markets, CNE closely holds information on its retail and wholesale market positions in confidence. The materials identified above should be protected for the requested period because the information is commercially sensitive and not publicly available and/or constitutes trade secrets the public disclosure of which would harm CNE. Moreover, this information can be used to directly or indirectly determine CNE's market position to the detriment of CNE and its customers. Accordingly, CNE requests that all of the information described in section 1 above, and any related, supporting data that may be provided pursuant to a subsequent Staff request, be designated as confidential.

¹ While CNE understands and acknowledges that the confidentiality rules granted by the California Public Utilities Commission and the California Energy Commission are different in some respects, CNE seeks to maintain consistency in the data it makes publically available. Consistency also prevents CNE from inadvertent disclosures of confidential information.

CNE believes that the public interest in having an open, public debate on key energy issues facing the state can be satisfied by disclosure of information submitted by CNE and the other ESPs collectively aggregated on a state-wide basis. Any greater granularity in the data released, including disclosure of any CNE-specific data that is not aggregated with other ESPs, could expose CNE's market position to its competitors, including other ESPs and the investor-owned utilities ("IOUs").

CNE requests that the identified information also be deemed confidential for the following additional reasons: The information is commercially sensitive and constitutes a trade secret and is therefore exempt from disclosure. Evidence Code §1060, Civil Code §3426.1(d). Moreover, the public interest in nondisclosure clearly outweighs the public interest in disclosure insofar as release of this economic information may directly harm CNE's existing and future commercial opportunities and its ability to secure a return in the marketplace, and disclosure may also harm CNE's electric customers by foreclosing favorable commercial opportunities. Gov't Code § 6255.

4. *State whether the information may be disclosed if it is aggregated with other information or masked to conceal certain portions, and if so the degree of aggregation or masking required.*

CNE has considered whether it would be possible to aggregate or mask the identified information. CNE can support the aggregation of CNE-specific information with similar information from all other ESPs and solely disclosed on a *statewide aggregated basis*. CNE believes that disclosure of CNE-specific data of the types collected here, even if aggregated on a statewide basis but specific to CNE, could lead to the disclosure of CNE's wholesale and retail market positions and thereby result in harm to CNE. Given the degree of competition between ESPs, and between ESPs and the IOUs, CNE asserts that any ESP-specific listing of data by utility territory would result in disclosure of confidential data.

5. *State whether and how the information is kept confidential by the applicant and whether it has ever been disclosed to a person other than an employee of the applicant, and if so under what circumstances.*

CNE has not disclosed any of the subject information to anyone other than their employees, attorneys and consultants working with the Company, or government agency employees or employees of the CAISO subject to confidentiality protection. CNE routinely keeps information of commercial value, like the subject information identified herein, confidential. In fact, all CNE employees, officers and directors should maintain the confidentiality of information entrusted to them by the company or its customers, suppliers, business partners or others in the course of conducting business with the company, except when disclosure is authorized or legally mandated.

I certify under penalty of perjury that the information contained in this application for confidential designation is true, correct, and complete to the best of my knowledge. I also certify that I am authorized to make the application and certification on behalf of Constellation NewEnergy, Inc.

Dated: May 27, 2011

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

Andrew B. Brown

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

Enclosure