

## CALIFORNIA ENERGY COMMISSION

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September 29, 2006

Aimee M. Smith, Esq.  
San Diego Gas and Electric Company  
101 Ash Street  
San Diego, CA 92101

<b>DOCKET</b> <b>03-RPS-1078</b>
DATE <b>SEP 29 2006</b>
RECD <b>SEP 29 2006</b>

RE: Application for Confidential Designation,  
CEC-SEP-3 (Utility) Data Request for SEP Application,  
Docket No. 03-RPS-1078

Dear Ms. Smith:

On June 15, 2006, the California Energy Commission (Energy Commission) received San Diego Gas and Electric Company's (SDG&E) application for confidential designation of various information included in SDG&E's CEC-SEP-3 Data Request submittal. This Data Request submittal was submitted to the Energy Commission in connection with a request for Supplemental Energy Payments (SEPs) by Esmeralda Truckhaven Geothermal LLC, the counterparty to a proposed power purchase contract with SDG&E. The Data Request submittal included the completed CEC-SEP-3 form, supporting Excel Spreadsheets, and SDG&E's Advice Letter 1795-E, which was filed with the California Public Utilities Commission (CPUC). The Advice Letter included five non-public appendices.

SDG&E's application for confidential designation (Application) was submitted pursuant to the California Code of Regulations, title 20, section 2505. On August 1, 2006, SDG&E augmented its Application with additional information in response to a request for clarification from the Energy Commission's legal office pursuant to title 20, section 2505 (a)(3)(A).

Subject Data

The Application requests confidential designation of the following data (subject data) included with SDG&E's Data Request submittal:

- CEC-SEP-3 form, response to Question 6 -- Contract price information
- Excel Spreadsheets, tab entitled "Input Bid Data" – Pricing information contained in tables entitled "Annual Contract Price by TOD Period (lines 48-64) and "Annual Weighted Average Bid Price" (lines 71-87)
- Excel Spreadsheets, tab entitled "Results" – Pricing information contained in table entitled "Results" (lines 14-17)
- Excel Spreadsheets, tab entitled "Contract Price" – Columns B and C of table appearing at lines 11-35; Levelized price over contract term (line 38); Levelized above market costs over contract term, calculated on a cents/kWh basis (line 40)

- Excel Spreadsheets, tab entitled "Bid Price" – Columns B and C of table appearing at lines 11-34; Levelized bid price over contract term (line 37)
- Excel Spreadsheets, tab entitled "Weighted Average Contract Price" – Column entitled "Annual TOD Weighted Average Contract Price" of table appearing at lines 9-30; Table entitled "Annual Contract Price by TOD Period" appearing at lines 9-30; Table entitled "Annual Contract Payment by TOD Period" appearing at lines 57-78
- Excel Spreadsheets, tab entitled "Bid Data Request Transfer Sheet" – Highlighted pricing information (columns F-I)
- Advice Letter 1795-E, Appendix A (Proposed Project's Contribution Toward SDG&E's RPS Goals)
- Advice Letter 1795-E, Appendix B-1 (Project Pricing Details)
- Advice Letter 1795-E, Appendix B-2 (Contract Summary, EEI Cover Sheets, EEI Confirmation Letters and Additional EEI Exhibits)
- Advice Letter 1795-E, Appendix B-3 (Selection of Esmeralda Project and Calculation of Supplemental Energy Payments) and Attachments
- Advice Letter 1795-E, Appendix C (Summary of PRG Meetings)

#### Period of Confidential Designation

The Application requests that the subject data be kept confidential for a "period of three (3) years." This three-year period is clarified in SDG&E's letter of August 1 to mean the period beginning on "June 15, 2006, with an end-date of June 14, 2009."

#### Legal Justification

The Application cites the Public Records Act, Government Code section 6254(k), as the basis for keeping the subject data confidential. Section 6254 (k) provides an exemption from public disclosure under the Public Records Act if the disclosure is exempt or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege. Evidence Code section 1060 provides a privilege for "trade secrets," which is defined in Civil Code Section 3426.1 (d) as follows:

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who could obtain value from its disclosure; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Application also cites *Klamath-Orleans Lumber v. Miller* (1978), 87 Cal. App. 3d 458, as an example of the Courts' general willingness to protect trade secret

information from disclosure where the disclosure would be harmful to the privilege holder. *Pepsico v. Ramond* (9<sup>th</sup> Cir. 1995) 54 F. 3d 1262, is cited to support the type of harm that disclosures causes; specifically, the ability of competitors to gain knowledge at the expense of the privilege holder.

### Factual Justification

The Application states that the premature disclosure of the subject data would cause harm to SDG&E and its ratepayers in that it would provide the market with relevant information concerning the prices SDG&E is willing to pay for renewable energy. This could allow developers to confidently bid a higher price than they would absent such information, thereby driving up prices in future renewable energy solicitations. According to SDG&E, disclosure of the terms of the contract between it and Esmeralda Truckhaven Geothermal LLC (Esmeralda), as provided in the Appendices to Advice Letter 1795-E, may unfairly disadvantage SDG&E and may increase the difficulty and delay associated with future contract negotiations to the extent developers attempt to "cherry-pick" non-standard, negotiated contract terms that were mutually agreed to as part of a larger negotiation between SDG&E and Esmeralda.

In addition, the Application states that the premature disclosure of subject data related to Esmeralda may cause harm to SDG&E in future renewable energy contract negotiations and may undermine the success of California's Renewable Portfolio Standard (RPS) program. For example, SDG&E states, the disclosure of Esmeralda's pricing and project viability information may prompt other renewable energy developers to refrain from bidding into future renewable energy solicitation or from participating in the RPS program, so as to avoid the risk of disclosure of their confidential information. This in turn, could reduce the number of developers that bid into future renewable energy solicitations and result in fewer competitive choices for SDG&E, thereby affecting SDG&E's costs and its ability to comply with its RPS requirements.

Regarding information related to the contribution of the Esmeralda project to SDG&E's RPS goals, as provided in Appendix A of Advice Letter 1795-E, the Application states the disclosure of this information will provide insight into SDG&E's procurement strategy. According to the Application, if SDG&E is close to meeting its RPS procurement requirements and potential bidders have knowledge of this proposed project's contribution towards SDG&E's satisfaction of its RPS requirement, they may assume that SDG&E has filled a "quota" from the project's geographic area and may decline to bid in future RPS solicitations. Alternatively, if SDG&E has not satisfied its RPS procurement requirements and the proposed project would not remedy the deficit, potential bidders may perceive that SDG&E has limited ability to negotiate and may increase bid prices in order to take advantage of this circumstance.

Regarding information related to the viability of the Esmeralda project, as provided in Appendix B of Advice Letter 1795-E, the Application states this information

provides SDG&E's assessment of the Esmeralda project's strengths and weaknesses based upon operational and construction information. According to SDG&E, if this information was publicly disclosed, Esmeralda's competitors could attempt to use the information in order to interfere with Esmeralda's ability to complete development activities in a timely and cost effective manner.

Regarding contract-related information, as provided in Appendix B-2 of Advice Letter 1795-E, the Application references the CPUC's recent Confidentiality Decision, D.06-06-066, which designates only limited contract information public. Specifically, D.06-06-066 designates the counterparty, project resource type, project location, project capacity, expected deliveries, delivery point, length of contract, and project on-line date as public information. The remaining contract information, including pricing data, is designated confidential. SDG&E states that it is not seeking confidential designation of any of the contract information designated public in D.06-06-066.

Regarding information related to the selection of the Esmeralda project and the calculation of SEPs, as provided in Appendix B-3 of Advice Letter 1795-E, the Application states that the disclosure of this information would harm SDG&E by providing the market with relevant information concerning the price SDG&E is willing to pay for renewable energy and would harm Esmeralda by allowing competitors to unfairly compete with Esmeralda.

Regarding information summarizing SDG&E's discussions with its Procurement Review Group (PRG), as provided in Appendix C of Advice Letter 1795-E, the Application states that this information describes pricing, costs, calculation methodologies, negotiating strategies, development plans and other commercially sensitive information relating to Esmeralda and other bidders who may or may not have entered in power purchase contracts with SDG&E and who are not seeking SEPs. According to the Application, this information is made available to members of SDG&E's PRG on a confidential basis pursuant to a non-disclosure agreement that members must sign. SDG&E states that disclosure of this information could provide competitors of Esmeralda with the means of interfering with or frustrating Esmeralda's ability to complete development activities in a timely manner by, among other things, hindering Esmeralda's efforts to obtain necessary equipment or interfering with land acquisition activities. Additionally, SDG&E contends that awareness of project pricing and other commercially sensitive details about the Esmeralda project as discussed during PRG meetings could confer an unfair advantage upon Esmeralda's competitors in future competitive bid situations.

#### Masking or Aggregation of Data

The Application states that masking or aggregation of the subject data would not prevent the harm described to SDG&E, its ratepayers, or to Esmeralda. The subject data is provided in connection with Esmeralda's SEP request to the Energy

Commission, and currently there is a very small universe of companies applying for SEP funds. Esmeralda's SEP request is the first of its kind. SDG&E does not believe that it will be possible to mitigate or avoid the harm of disclosure through aggregation or masking until the sample of SEP applicants is at least 20 to 25.

#### Access to Data

The Application states that SDG&E maintains access to the subject data on a confidential basis. According to SDG&E, this information is only available by hard copy and electronically on a limited basis within certain internal SDG&E departments that must have access to the information in order to conduct their procurement and regulatory activities. SDG&E also states that the information is password protected on computer systems, and in hard copy form is kept in secure locations, and that only certain individuals with key card access are able to enter areas of the company where the information is available and utilized.

#### Determination of Confidentiality

As specified in the California Code of Regulations, title 20, section 2505 (a)(3)(A), a properly filed application for confidentiality shall be granted "unless the applicant has failed to make any reasonable claim that the Public Records Act or other provision of law authorizes the [Energy] Commission to keep the record confidential." As cited in the Application, the California Public Records Act allows for the non-disclosure of trade secrets pursuant to Government Code section 6254 (k) and Evidence Code section 1060. California courts have traditionally used the following definition of "trade secret" consistent with Civil Code section 3426.1:

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, from the Restatement of Torts, vol. 4, sec. 757, comments b, p. 5.)

In the Application, SDG&E has made a reasonable claim that the subject data has actual or potential economic value to SDG&E and Esmeralda by not being generally known to the public or to renewable energy developers that 1) may be in contract negotiations with SDG&E or Esmeralda, 2) may have an interest in bidding in future SDG&E renewable solicitations, or 3) may be in direct competition with Esmeralda development activities. The Application also supports a reasonable claim that SDG&E, its ratepayers, and Esmeralda could be harmed if the subject data is disclosed. Lastly, the Application shows that SDG&E is using reasonable efforts to maintain the secrecy of the subject data.

Based on the information presented, SDG&E has made a reasonable claim that the subject data is entitled to be designated by the Energy Commission as a trade secret and is thereby exempt from public disclosure pursuant to Government Code section 6254 (k) and Evidence Code section 1060. Accordingly, the subject data shall be designated confidential pursuant to title 20, section 2505(a), for the requested three-year period beginning on June 15, 2006, and ending on June 14, 2009. The subject data may be publicly disclosed by the Energy Commission after this period. In addition, if any of the subject data is publicly disclosed by SDG&E or Esmeralda before June 14, 2009, that data may be publicly disclosed by the Energy Commission.

Also, please be aware that individuals may petition the Energy Commission to inspect or copy any records that have been designated confidential. The procedures and criteria for filing, reviewing, and acting upon such petitions are set forth in the California Code of Regulations, title 20, section 2506.

Gabriel Herrera of the Energy Commission's legal office is forwarding for your review public copies of SDG&E's Data Request submittal, including its completed CEC-SEP-3 form, supporting Excel Spreadsheets, and Appendices to Advice Letter 1795-E. The subject data in these documents has been redacted so the documents may be disclosed publicly if requested pursuant to the Public Records Act. Please confirm in writing with Mr. Herrera that the subject data has been properly redacted from these documents.

Lastly, I want to remind you that information concerning the total amount of any anticipated SEP award that may be made to Esmeralda will be publicly disclosed by the Energy Commission once the Energy Commission issues a Funding Confirmation Letter pursuant to the Energy Commission's New Renewables Facilities Program Guidebook (Guidebook, April 2006, publication no. CEC-300-2006-006-F). Specifically, the Guidebook states that "After the Energy Commission issues a Funding Confirmation Letter, the Energy Commission will publish information on its Web site identifying the name of the Seller, the procuring retail seller, and the total anticipated SEP award amount." In addition, this information and the Seller's expected annual generation and SEP production incentive level will be identified in the Seller's SEP Award Agreement, which the Energy Commission will approve once the Seller completes any required environmental review for the project under the National Environmental Policy Act and/or the California Environmental Quality Act. In accordance with the Guidebook, the SEP Award Agreement will be made publicly available once the agreement is formally approved by the Energy Commission.

Aimee M. Smith, Esq.  
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If you have any questions concerning this determination of confidential designation, please call Mr. Herrera at (916) 654-5141.

Sincerely,

A handwritten signature in black ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

B. B. BLEVINS  
Executive Director

cc: Gabriel Herrera  
Heather Raitt  
Fernando De Leon