CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET
SACRAMENTO, CA 95814-5512

May 21, 2007

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Mr. Scott A. Galati
Galati Blek, LLP
555 Capitol Avenue, Suite 600
Sacramento, CA 95814

RE: **Application for Confidential Designation of Air Emission Credits, San Gabriel Generation Station, Docket No. 07-AFC-2**

Dear Mr. Galati:

On May 4, 2007, San Gabriel Power Generation, LLC, (SGPG) filed an application for confidential designation of its air emission offset strategy on behalf of the San Gabriel Generation Station (San Gabriel) in the above referenced Application for Certification. San Gabriel's application states, in part:

> The Confidential Offset Strategy should be kept confidential until mutually binding contracts for all required offsets are signed. . . . The information submitted is a special compilation developed by SGPG with an advantage over potential competitors who have not developed such a compilation of information, offset holders, and offset pricing strategies. . . . In addition to the complete offset strategy, disclosure of potential sources of emissions offsets may hinder current negotiations.

The California Public Records Act allows 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.)

San Gabriel's application makes a reasonable argument under the California Energy Commission's (Energy Commission) regulations for classifying the identity of potential offset sources as a trade secret since it provides San Gabriel with a competitive

advantage over rival developers, in accordance with the above standards. (Cal. Code Regs., tit. 20, § 2505.) Therefore, it is in the public interest that non-disclosure of potential offset sources, such as those identified in San Gabriel's application be given confidentiality, so as not to interfere with offset negotiations.

However, that portion of San Gabriel's submitted materials identified as "List of Active SCAQMD Emission Reduction Credits-March 2007," does not constitute a trade secret since public disclosure of this information could not harm San Gabriel. Therefore, this information is not granted confidentiality.

With regard to the information granted confidentiality, as with all other similar requests, 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 California Environmental Quality Act (CEQA) lead agency. The confidentiality of potential offset sources can only be maintained until that point when public participation in review of your proposed offsets becomes necessary. This is likely to 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. (See 42 U.S.C. § 7503(a)(1); and EPA's June 19, 1998, letter in the High Desert Power Project, pages 6-7, Docket No. 97-AFC-1.) Specifically, EPA states that the offsets must be "identified, quantified, and secured" before issuance of the PDOC. (EPA's letter in High Desert Power Plant Project, Docket No. 97-AFC-1, at page 7.) Thus, EPA Region IX's clear 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.)

In addition, Public Resources Code section 25523 subdivision (d)(2) generally requires that complete emissions offsets be "identified" before the Energy Commission's licensing of a proposed facility. Therefore, CEQA, the Warren-Alquist Act (Pub. Resources Code, § 25000 et seq.), Energy Commission policy, and EPA's directives all lead to the conclusion that information used by Energy Commission staff has to be on the public record. Staff's first "use" of an applicant's proposed offset sources is thus normally in the Preliminary Staff Assessment (PSA), which reviews the air district's PDOC.

Consequently, following issuance of the PDOC, public workshops will be held involving the Energy Commission staff, the air district, plus other interested agencies, intervenors, and members of the public regarding all aspects of San Gabriel's proposed emission offset credits.

Thus, detailed information on the source, ownership, and characteristics of the offsets proposed for the San Gabriel project needs to become public as part of a properly issued PDOC. I therefore grant **temporary confidentiality** to San Gabriel's potential offset sources until issuance of the PDOC. Accordingly, it is in San Gabriel's best interest that negotiations for offsets be completed by this time.

Any subsequent submittals related to potential offset sources can be deemed confidential for the temporary term specified in this letter without the need for a new application under California Code of Regulations, title 20, sections 2505 subdivisions (a)(1)(G) and 2505(a)(4), if San Gabriel files a certification under penalty of perjury that the new information is substantially similar to that which is granted confidential status by this determination. In addition, persons may petition to inspect and/or copy those 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, section 2506.

Finally, an appeal of this decision must be filed within fourteen days from the date of this letter. The procedures and criteria for appealing any part of this decision are set forth in the California Code of Regulations, title 20, section 2505. If you have any questions concerning this matter, please contact Fernando De Leon, Senior Staff Counsel, at (916) 654-4873.

Sincerely,

B. B. BLEVINS
Executive Director

cc: Energy Commission Project Manager
Docket Unit