

CALIFORNIA ENERGY COMMISSION

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SACRAMENTO, CA 95814-5512

January 24, 2007

Angela Leiba
Starwood Power-Midway, LLC
591 West Putnam Avenue
Greenwich, CT 06830

DOCKET	
06-AFC-10	
DATE	<u>JAN 24 2007</u>
RECD.	<u>JAN 24 2007</u>

RE: Application for Confidential Air Quality Emission Reduction Credits
Starwood Power-Midway Project,
Docket No. 06-AFC-10

Dear Ms. Leiba:

On December 11, 2006, the Starwood Power-Midway (Starwood) project filed an application for confidential designation of Emission Reduction Credit (ERC) information in the above referenced Application for Certification (AFC). Your application states, in part:

Applicant requests that the ERC information including summary, Supplement C, purchase and sale agreement and all other information included with this document be designated as confidential. . . . The information should be kept confidential through the end term of the agreement to protect the Applicant and project's economic/financial trade secrets identified in the materials. Public disclosure of the negotiated costs for NOx and VOC, and of the Applicant[']s current negotiating to acquire PM10 and Sox Emission Reduction Credits would impact market cost and availability. . . . The material contains trade secrets and its disclosure would cause a loss of the Applicant's competitive advantage.

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.)

Your 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, providing the applicant 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 you have identified in your application be given confidentiality, so as not to interfere with offset negotiations.

However, 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 your proposed emission offset credits.

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

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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 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.

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.

Sincerely,

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

B. B. BLEVINS
Executive Director

cc: Project Manager, 06-AFC-10
Docket Unit