

## CALIFORNIA ENERGY COMMISSION

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SACRAMENTO, CA 95814-5512

June 18, 2009

John McKinsey  
Stoel Rives, LLP  
980 Ninth Street, Ste. 1900  
Sacramento CA 95814

<b>DOCKET</b>	
<b>07-AFC-6</b>	
DATE	June 18 2009
RECD.	June 18 2009

RE: **Re-Application for Confidentiality, Emission Reduction Credits  
Carlsbad Energy Center Project  
Docket No. 07-AFC-6**

Dear Mr. McKinsey:

On April 9, 2008, Carlsbad Energy Center LLC (“Applicant”) filed an application for confidentiality with the California Energy Commission (“Commission”) in the above-captioned Docket. That application was denied in a letter dated May 8, 2009. On May 19, 2009, Applicant filed a new, revised application for confidentiality. Applicant seeks confidentiality for information related to Applicant’s strategy and plans to secure Emission Reduction Credits (“ERCs”) for the Carlsbad Energy Center Project. Applicant requests that the information be kept confidential in perpetuity.

Applicant states that the information is a trade secret, claiming:

Applicant’s negotiation strategies regarding ERCs derive independent economic value from not being disclosed to the public or to competitors because of the competitive nature of the ERC market. The release of such information could hinder the process by which Applicant and other companies negotiate within the ERC market, particularly with regards to ERC pricing.

Applicant relies upon section 6254.15 of the California Public Records Act, which allows for nondisclosure of corporate proprietary information, including trade secrets, furnished to a government agency for the purpose of permitting a private company to retain, locate, or expand a facility within California.

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 data used to calculate 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 data used to calculate 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 data used to calculate emissions offsets be given confidentiality, so as not to interfere with offset negotiations.

Applicant requests that the information be kept confidential "in perpetuity." 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 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 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 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. 42 U.S.C. § 7503(a)(1). EPA's 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.

Moreover, Public Resources Code § 25523, subdivision (d)(2), requires that complete emissions offsets for a proposed facility be identified before the Energy Commission licenses that facility. Staff's first use of an applicant's proposed offset sources is normally in the Preliminary Staff Assessment, which reviews the air district's PDOC. Following issuance of the PDOC, public workshops 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 acquisition plan will be discussed.

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 Applicant's ERC strategy and acquisition plan, only until such time as the air district issues the PDOC. Accordingly, it is in your best interests that negotiations for offset sources be completed by that time.

Any subsequent submittals related to ERC offsets 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,



MELISSA JONES  
Executive Director

cc: Docket Unit  
Mike Monasmith, Project Manager  
Dick Ratliff, Legal Office