

COMPLETED

LATHAM & WATKINS LLP

November 1, 2012

Mr. Robert Oglesby
Executive Director
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: **Application for Confidential Designation**
Hydrogen Energy California Power Plant (08-AFC-8A)
Response to CEC Workshop Request No. A24

Dear Mr. Oglesby:

Hydrogen Energy California, LLC ("Applicant") proposed the Hydrogen Energy California integrated gasification combined cycle facility (08-AFC-8) on July 31, 2008 ("Project"). On May 2, 2012, Applicant filed an Amended AFC and a new Docket number, 08-AFC-8A, was assigned.

California Energy Commission ("CEC") Staff conducted a Data Response Workshop on September 27, 2012. As part of the workshop, Staff requested certain information about the Project's budgets for construction, operations, and maintenance. In response, Applicant provides the attached confidential information about the Project's budgets for construction, operations, and maintenance for CEC Workshop Request No. A24 ("Confidential Record").

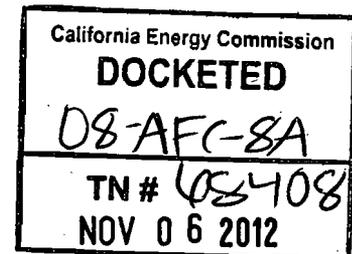
Applicant requests that the entirety of the Confidential Record be permanently maintained as confidential by the CEC for the reasons described below. We present two independent bases for finding the Confidential Record confidential and exempt from disclosure under the California Public Records Act: (1) California Government Code § 6254(k) (trade secrets); or (2) Government Code § 6254.15 (proprietary information).

650 Town Center Drive, 20th Floor
Costa Mesa, California 92626-1925
Tel: +1.714.540.1235 Fax: +1.714.755.8290
www.lw.com

FIRM / AFFILIATE OFFICES

Abu Dhabi	Moscow
Barcelona	Munich
Beijing	New Jersey
Boston	New York
Brussels	Orange County
Chicago	Paris
Doha	Riyadh
Dubai	Rome
Frankfurt	San Diego
Hamburg	San Francisco
Hong Kong	Shanghai
Houston	Silicon Valley
London	Singapore
Los Angeles	Tokyo
Madrid	Washington, D.C.
Milan	

050056-0001



10/31/12
4:21 PM

LATHAM & WATKINS LLP

I. The Confidential Record is Confidential Under Gov. Code § 6254(k) as a Trade Secret

The Applicant requests that the Confidential Record be designated confidential pursuant to California Government Code § 6254(k), which exempts trade secrets from disclosure under the California Public Records Act. Under controlling law expressed in *Uribe v. Howie*, 19 Cal. App. 3d 194, 206-207 (1971):

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. (Emphasis added.)

To determine whether certain information is a trade secret, one must evaluate whether the matter sought to be protected is information (1) which is valuable because it is unknown to others, and (2) which the owner has attempted to keep secret. *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1454 (2002).

The Confidential Record represents a valuable compilation of confidential information related to anticipated Project budgets for construction, operations, and maintenance. Information in the Confidential Record is not available to the public but is maintained as confidential by the parties because of sensitive technical and cost information.

Under CEC regulations, when requesting a trade secret be deemed confidential, an application must provide: 1) the specific nature of the advantage; 2) how the advantage would be lost; 3) the value of the information to the applicant; and 4) the ease or difficulty with which the information could be legitimately acquired or duplicated by others. See Title 20, California Code of Regulations, § 2505(a)(1)(D). Accordingly, the Applicant attests to the following:

- ***“The specific nature of the advantage”*** – The Confidential Record represents a valuable compilation of information related to anticipated Project budgets for construction, operations, and maintenance. The Confidential Record is intended to be confidential.
- ***“How the advantage would be lost”*** – Time and resources have been spent compiling the information within the Confidential Record and the value of the information would be significantly impaired if made available to the public.
- ***“The value of the information to the applicant”*** – The Confidential Record is valuable to the Project because of the: (1) time and resources expended to compile the information; (2) efforts to maintain the confidentiality of the Confidential Record; and (3) use of the information to facilitate ongoing business activities.
- ***“The ease or difficulty with which the information could be legitimately acquired or duplicated by others”*** – The Confidential Record is not readily available on the marketplace and can only be obtained with a significant

LATHAM & WATKINS^{LLP}

investment of time and money. Thus, others could not easily acquire or duplicate this information.

For the reasons provided above, the Confidential Record is a trade secret under California law and qualifies for the exemption in Gov. Code § 6254(k).

2. *Government Code § 6254.15 – Proprietary Information*

Gov. Code § 6254.15 exempts the following types of information from disclosure under the California Public Records Act:

[C]orporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California.

The Confidential Record contains corporate proprietary information and trade secrets that are being provided to the CEC related to locating a facility within California. The Confidential Record qualifies for the exemption under Gov. Code § 6254.15.

3. *Questionnaire: Application For Confidential Designation*

To further support Applicant's request, we provide responses to the CEC's questionnaire regarding applications for confidential designation:

1(a). Title, date and description (including number of pages) of the record for which you request confidential designation.

See description above of the Confidential Record.

1(b). Specify the part(s) of the record for which you request confidential designation.

Applicant requests confidential designation for the entire Confidential Record.

2. State and justify the length of time the Commission should keep the record confidential.

Applicant requests that the Confidential Record be kept confidential indefinitely to protect the trade secrets described above.

3(a). State the provisions of the Public Records Act or other law that allows the Commission to keep the record confidential, and explain why the provision(s) apply to the record.

We present two independent bases for finding the Confidential Record confidential and exempt from disclosure under the California Public Records Act: (1) California Government Code § 6254(k) (trade secrets); or (2) Government Code § 6254.15 (proprietary information). If

LATHAM & WATKINS LLP

the information in the Confidential Record is released to the public, the value and benefit of the trade secrets and proprietary information could be impaired.

3(b). *Discuss the public interest in nondisclosure of the record. If the record contains trade secrets or its disclosure would otherwise cause loss of a competitive advantage, please also state how it would be lost, the value of the information to the applicant, and the cost or difficulty with which the information could be legitimately acquired or duplicated by others.*

See description above in Section 1 regarding trade secrets. For the reasons provided above, the Confidential Record is a trade secret under California law and qualifies for the exemption in Gov. Code § 6254(k).

4. *State whether the record may be disclosed if it is aggregated with other information or masked to conceal certain portions (including but not limited to the identity of the applicant). State the degree of aggregation or masking required. If the data cannot be disclosed even if aggregated or masked, explain why.*

Applicant believes the CEC can incorporate a generalized summary of the information contained in the Confidential Record to properly describe the basis for its analysis without disclosing information specific enough to impair value of the trade secrets or proprietary information.

5. *State how the record is kept confidential by the applicant and whether it has ever been disclosed to a person other than an employee of the applicant. If it has, explain the circumstances under which disclosure occurred.*

The Applicant has not disclosed any of the subject confidential information to anyone other than its employees, attorneys, consultants, others working as part of the project application, or others with a specific need for the information.

4. Summary of Basis For Confidentiality Request

According to the CEC's regulations, an application for confidential designation "shall be granted if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the Commission to keep the record confidential." Title 14, California Code of Regulations, § 2505(a)(3)(A). The Applicant believes this letter establishes a reasonable claim for confidentiality based on the applicability of either Gov. Code § 6254(k) or Gov. Code § 6254.15.

The Applicant requests that the entirety of the Confidential Record be kept confidential indefinitely to protect the trade secret and proprietary information within the Confidential Record. The Applicant requests that the Confidential Record not be disclosed even if aggregated with other information or redacted to conceal certain information. The Applicant has not disclosed any of the subject confidential information to anyone other than its employees,

LATHAM & WATKINS LLP

attorneys, consultants, others working as part of the project application before the CEC, or others with a specific need for the information.

I have been authorized to make this application and certification on behalf of the Applicant. With my signature to this letter, 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.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Michael Carroll".

Michael Carroll
of LATHAM & WATKINS LLP