

DOCKETED

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October 30, 2013

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

Re: Hydrogen Energy California Power Plant (08-AFC-8A)
Application for Confidential Designation: Responses to Workshop Data
Requests Regarding Carbon Sequestration and Greenhouse Gas Emissions

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. On June 28, 2013, the California Energy Commission ("CEC") and Department of Energy ("DOE") issued a Preliminary Staff Assessment / Draft Environmental Impact Statement ("PSA/DEIS") for public review and comment. On September 17-19, 2013, staff for the CEC and DOE held public workshops to discuss issues related to the PSA/DEIS. During the workshops, staff requested additional information related to the Project's greenhouse gas emissions and carbon sequestration process. The responses to these requests require the Applicant to provide confidential data about Project operations and the heat and material balance information, which the Applicant hereby submits under confidential cover ("Confidential Record"). In a separate filing, the Applicant will docket non-confidential information related to these data requests.

On behalf of the Applicant, we request 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 that the Confidential Record is confidential and exempt from disclosure under the California Public Records Act: (1) California Government Code § 6254(k) (trade secrets); and (2) Government Code § 6254.15 (proprietary information).

A. 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 data related to the Project's operations and heat and material balance information, which is business confidential 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 confidential data related to the Project's operations and heat and material balance information, which includes business confidential vendor data about the Project equipment emissions.
- ***“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 could be significantly impaired if made available to the public or Project competitors without a commensurate investment of time and resources.
- ***“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.

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).

B. 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. Thus, the Confidential Record qualifies for the exemption under Gov. Code § 6254.15.

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

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

LATHAM & WATKINS^{LLP}

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,

/s/ Michael Carroll

Michael Carroll
of LATHAM & WATKINS LLP