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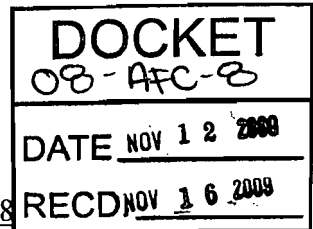
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November 12, 2009

VIA FEDEX

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 08-AFC-08
1516 Ninth Street, MS-4
Sacramento, California 95814-5512

File No. 045049-0001



Re: Hydrogen Energy California Project: Docket No. 08-AFC-08
Confidential Submittals

Dear Sir/Madam:

Pursuant to California Code of Regulations, title 20, Sections 1209, 1209.5, 1210, and 2505, enclosed herewith for filing please find letters from Michael Carroll to Melissa Jones regarding Applicant's applications for confidential designation of responses to California Energy Commission Staff Data Requests Nos. 28, 64, 81, 82, and 115. Per CEC protocols, five (5) copies of the application letters along with each of the confidential submittals are also enclosed.

Please note that the enclosed application letter (without the confidential materials) was filed today via electronic mail to your attention and to all parties on the attached electronic proof of service list.

Very truly yours,

Paul E. Kihm
Senior Paralegal

Enclosures

cc: 08-AFC-08 Proof of Service List (w/encl. application letter only, via e-mail and U.S. Mail)
Michael J. Carroll, Esq. (w/encl.)
Marc T. Campopiano, Esq. (w/encl.)

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File No. 045049-0001

November 12, 2009

VIA FEDERAL EXPRESS

Ms. Melissa Jones
Executive Director
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: **Application for Confidential Designation – Hydrogen Energy California Power Plant (08-AFC-8), Response to California Energy Commission Staff Data Request No. 28**

Dear Ms. Jones:

Hydrogen Energy International, LLC (“Applicant”) has proposed the Hydrogen Energy California Power Plant (08-AFC-8). In support of the Applicant’s response to California Energy Commission Staff Data Request 28, the Applicant prepared the attached Table 28-1 which summarizes information about potential destinations for molten sulfur associated with the project, including company names, business types, facility locations, and distances from the project site (the “Submitted Record”).¹ The Applicant requests that the Energy Commission designate the Submitted Record as confidential pursuant to Title 20, California Code of Regulations, § 2505.

In this submittal, we present two independent bases for finding the Submitted Record confidential and exempt from disclosure under the California Public Records Act: (1) California

¹ This material is based upon work supported by the Department of Energy National Energy Technology Laboratory under Award Number DE-FE0000663. This report was prepared as an account of work sponsored by an agency of the United States Government. Neither the United States Government nor any agency thereof, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise does not necessarily constitute or imply its endorsement, recommendation, or favoring by the United States Government or any agency thereof. The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States Government or any agency thereof.

Government Code § 6254(k) (trade secrets); or (2) Government Code § 6254.15 (proprietary information).

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

The Applicant requests that the Submitted 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 Submitted Record is a trade secret because it is a compilation of information that Applicant has attempted to keep secret because it is valuable to the Applicant to make strategic business decisions or to achieve more favorable terms in business negotiations than the Applicant would otherwise be able to achieve. (*See Uribe, supra*, 19 Cal. App. 3d at 206-207; *Whyte, supra*, 101 Cal. App. 4th at 1454.) The Applicant has spent time and resources compiling the information in Table 115-1, which creates an advantage not available to competitors who have not compiled the information. If this sensitive information became known to the public, the Applicant's competitors, or the businesses identified in the Submitted Record, the Applicant could be placed at a competitive disadvantage because its competitors and the businesses identified in the Submitted Record would gain a better understanding of its business strategies and negotiation positions. The Applicant would also lose its investment because the compilation of information is only valuable if it remains confidential.

Under Energy Commission 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 Submitted Record is valuable to the Applicant and provides a business advantage because the Applicant will use or has used the information to make strategic business decisions or to achieve more favorable terms in business negotiations than the Applicant would otherwise be able to achieve. The Applicant has spent time and resources compiling the information in Table 28-1, which creates an advantage not available to competitors who have not compiled the information.

- ***“How the advantage would be lost”*** – The advantage described above would be lost if the Submitted Record were no longer confidential because the Applicant’s competitors could gain a better understanding of its business strategy and negotiating positions. The Applicant would also lose its investment because the compilation of information is only valuable if it remains confidential.
- ***“The value of the information to the applicant”*** – The value of the Submitted Record to the Applicant is based on (1) the investment in time and resources that went into developing the Submitted Record, and (2) the Applicant’s use of the information to its advantage over its competitors to make business decisions or during negotiations.
- ***“The ease or difficulty with which the information could be legitimately acquired or duplicated by others”*** – The Submitted Record is not readily available on the marketplace and can only be obtained with a significant investment of time and money. Thus, others could not easily acquire or duplicate this information.

For the reasons provided above, the Submitted Record is a trade secret under California law and thus falls squarely under 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 Submitted Record contains corporate proprietary information because it is maintained as confidential by the Applicant for strategic business purposes. As stated above, the Submitted Record is also a trade secret under California law. In addition, the Submitted Record is information related to the siting of a facility within the state filed with the Energy Commission. As a result, it falls squarely under the exemption in Gov. Code § 6254.15.

3. *Summary of Basis For Confidentiality Request*

According to the Energy Commission’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) (emphasis added).) This letter establishes a reasonable claim for confidentiality because the Submitted Record falls squarely under two independent exemptions to the California Public Records Act, Gov. Code § 6254(k) and Gov. Code § 6254.15.

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The Applicant requests that the entirety of the Submitted Record be kept confidential indefinitely. The Applicant requests that the Submitted 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 Energy Commission, or others with a specific need for the information. This information has not been disclosed by the Applicant except on a "need-to-know" basis.

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,



Michael J. Carroll
of LATHAM & WATKINS LLP

cc:

Gregory Skannal, Hydrogen Energy International, LLC
Asteghik Khajetoorians, BP America, Inc.
Dale Shileikis, URS Corporation