

## CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET  
SACRAMENTO, CA 95814-5512

December 16, 2009

**DOCKET****08-AFC-8**DATE DEC 16 2009RECD. DEC 22 2009Michael Carroll  
Latham & Watkins LLP  
650 Town Center Drive, 20<sup>th</sup> Floor  
Costa Mesa CA 92626

RE: **Application for Confidentiality,  
Applicant's Response to Staff Data Requests 28, 82, and 115  
Hydrogen Energy International, LLC,  
Docket No. 08-AFC-8**

Dear Mr. Carroll:

On November 16, 2009, Hydrogen Energy International, LLC, filed three applications<sup>i</sup> for confidentiality on behalf of the Hydrogen Energy California Power Plant ("Applicant"), in the above-captioned docket. The applications seek confidentiality for the Applicant's response to California Energy Commission Staff Data Requests numbers 28, 82, and 115. Those responses include the following:

1. Response to Data Request 28 – Table 28-1, summarizing information about potential destinations for molten sulfur associated with the project, including company names, business types, facility locations, and distances from the project. Applicant claims the Table 28-1 is trade secret.
2. Response to Data Request 82 – Report titled "Potential for induced Seismicity from CO2 Injection Operations at Elk Hills." Applicant claims the Report is trade secret.
3. Response to Data Request 115 – Table 115-1, summarizing information about potential businesses that may reuse or recycle gasification solids associated with the project, including company names, business types, facility locations, and distances from the project. Applicant claims the Table 115-1 is trade secret.

A properly filed Application for Confidentiality shall be granted under the California Code of Regulations, title 20, section 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:

<sup>1</sup> Applicant submitted a total of five applications for confidentiality; the two applications seeking confidentiality for cultural information (Response to Staff Data Request 64) and paleontological information (Response to Staff Data Request 81) are determined in a separate letter of determination.

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.)

California Code of Regulations, title 20, section 2505(a)(1)(D) states that if the applicant for confidential designation believes that the record should not be disclosed because it contains trade secrets, or its disclosure would otherwise cause loss of a competitive advantage, the application shall state: 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.

For each of the three submitted records, Applicant claims that the information is 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 that the Applicant would otherwise be able to achieve. (Citation omitted). The Applicant has spent time and resources compiling (the information) which creates an advantage not available to competitors who have not compiled the information.

Applicant also claims that, for each of the submitted records, making the records public would cause Applicant to lose valuable negotiating terms by allowing competitors or negotiating parties a better understanding of Applicant's business strategy and negotiating positions. Furthermore, Applicant claims that, in each case, the information in the compiled form is not information that is readily available to the public, and can only be recreated by others with a significant investment of time and money.

Applicant has made a reasonable claim that the law allows the Commission to keep the above listed information confidential on the grounds that it is proprietary information. The information has been developed exclusively by Applicant, contains information that is not public, and has the potential for economic advantage. **As such, your request for confidential determination is temporarily granted, until such time as the Energy Commission's Preliminary Staff Assessment becomes publicly available.**

Applicant's request for confidentiality is temporarily granted because the information may be required to be publicly disclosed in order for the public and interested agencies to gain a full understanding of any potential environmental impacts of the proposed

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project. At the time the Preliminary Staff Assessment is published, the public's interest in disclosing the information regarding any potentially significant environmental impacts of the proposed project will be substantial, and will thus outweigh the interest in keeping the record confidential. Therefore, it is in your best interest to complete any ongoing negotiations by that time.

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, section 2506.

The procedures and criteria for appealing any part of this decision are set forth in the California Code of Regulations, title 20, section 2505. Be advised that an appeal of this decision must be filed within fourteen days from the date of this decision.

**Please note that subsequently submitted information can be deemed confidential as specified in this letter without the need for a new application if you file a certification under penalty of perjury that the new information is substantially similar to the information granted confidentiality by this determination.** California Code of Regulations, title 20, sections 2505(a)(1)(G) and 2505(a)(4).

If you have any questions concerning this matter, please contact Deborah Dyer, Senior Staff Counsel, at (916) 654-3870.

Sincerely,

/S/

Melissa Jones  
Executive Director

cc: Docket Unit  
Rod Jones, Energy Commission Project Manager  
Lisa DeCarlo, Energy Commission Project Counsel