

 ORIGINAL

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COMPLETED

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 (08-AFC-8)

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045049-0001



Dear Ms. Jones:

Hydrogen Energy California LLC (“Applicant”) has proposed the Hydrogen Energy California integrated gasification combined cycle facility (08-AFC-8). On May 28, 2009, the Applicant filed a Revised Application for Certification (AFC) with the California Energy Commission (CEC). The Revised AFC was deemed Data Adequate on August 26, 2009. Subsequent to the Data Adequacy finding, the CEC issued two sets of Data Requests and held one workshop. During the April 12, 2010 workshop, CEC staff identified potential issues associated with segments of the natural gas and potable water pipelines that transected portions of the Coles Levee Ecosystem Preserve. To fully address these potential issues, the Applicant has made the following modifications to the Project linear: elimination of the potable water linear; installation of a water well to be used for construction water and potable water during operations; and relocation of the natural gas linear to the north of the Project Site. Accordingly, the submitted files provide a detailed discussion of the linear modifications and revisions to associated descriptions and assessments that were previously presented in the Revised AFC and subsequent documents (the “Submitted Record”).

The Applicant requests that the Energy Commission temporarily designate the Submitted Record as confidential pursuant to Title 20, California Code of Regulations, § 2505 until such time as the Energy Commission releases Part 2 of the Preliminary Staff Assessment (PSA). In this submittal, we present two independent bases for finding the Submitted Record confidential on a temporary basis 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).

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 Applicant has spent time and resources compiling the information in the Submitted Record and preserving its confidentiality. If this sensitive information became known to the public, the Applicant's competitors could gain access to the information without having to make a commensurate investment, undermining the Applicant's competitive advantage. Public disclosure of the Submitted Record could materially impair the Applicant's position as the ROW Negotiations progress because other parties to the ROW Negotiations could obtain information about the Applicant's business and strategies related to the ROW Negotiations, potentially causing the Applicant to lose a fair bargaining position and suffer economic harm. Impairing the progress of the ROW Negotiations could potentially undermine the feasibility of obtaining the necessary ROWs which are critical to the HECA project.

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 has spent time and resources compiling the information in the Submitted Record and maintaining its confidentiality. Public disclosure of the Submitted Record could materially impair the Applicant's position as the ROW Negotiations progress because other parties to the ROW Negotiations could obtain information about the Applicant's business and strategies related to the ROW Negotiations, potentially causing the Applicant to lose a fair bargaining position and suffer economic harm. Impairing the ROW Negotiations could potentially undermine the feasibility of obtaining the necessary ROWs which are critical to the HECA project. Temporarily maintaining the confidentiality of the Submitted Record is critical to the progress of the ROW Negotiations.

- ***“How the advantage would be lost”*** – Any public disclosure of the Submitted Record would substantially and materially impair the Applicant’s position in the ROW Negotiations because other parties to the ROW Negotiations could obtain information about the Applicant’s business and strategies related to the ROW Negotiations.
- ***“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; (2) the Applicant’s use of the information for business purposes related to the ROW Negotiations; and (3) loss of bargaining position if the information becomes public.
- ***“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 others could not acquire or duplicate this information. Temporarily maintaining the confidentiality of the Submitted Record is critical to the progress of the ROW Negotiations.

For the reasons provided above, the Submitted Record is a trade secret under California law and falls 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 confidential corporate proprietary information related to the ROW Negotiations. The Submitted Record is maintained as confidential by the Applicant for business purposes and is a trade secret under California law. Moreover, the Submitted Record is information related to the siting of a facility within the state filed with the Energy Commission. As a result, the submitted Record falls 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).) The Applicant believes this letter establishes a reasonable claim for confidentiality based on the applicability of 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 temporarily until the Energy Commission issues Part 2 of the PSA, after which time the Submitted Record can be disclosed to the public. 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,



Marc Campopiano
of LATHAM & WATKINS LLP

cc: Gregory Skannal, HECA LLC
Asteghik Khajetoorians, HECA LLC
Dale Shileikis, URS Corporation
Kathy Rushmore, URS Corporation