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COMPLETED

CONFIDENTIAL

December 16, 2010

<b>DOCKET</b> 08-AFC-8
DATE DEC 16 2010
RECD. DEC 20 2010

VIA FEDEX

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 Data Request No. 179

Dear Ms. Jones:

Hydrogen Energy California, LLC ("Applicant") has proposed the Hydrogen Energy California Power Plant Project (08-AFC-8), an integrated gasification combined cycle facility ("Project"). On October 6, 2010, California Energy Commission ("CEC") Staff issued Data Request Set 3 (Data Request Nos. 153-218). In connection with the response to Data Request No. 179, Applicant, on its own and on behalf of Occidental of Elk Hills, Inc. ("Oxy"), requests confidential designation of the executed Letter of Intent by and between Hydrogen Energy California, LLC and Occidental of Elk Hills, Inc., dated September 24, 2010, regarding a negotiation of terms and conditions for the purchase and sale of carbon dioxide related to the Project (the "Submitted Record").

The Applicant requests the Energy Commission designate the Submitted Record as confidential pursuant to Title 20, California Code of Regulations, § 2505. We present two independent bases for finding the Submitted 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). Please note that the enclosed copy of the Submitted Record has been redacted to mask certain highly sensitive information that is not relevant to the CEC's review of the Project. We are requesting that the entirety of the Submitted Record be designated as confidential notwithstanding the redactions.

CONFIDENTIAL

***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 represents a confidential business transaction between two private parties related to a negotiation of terms and conditions for the purchase and sale of carbon dioxide related to the Project. The Applicant and Oxy have spent time and resources negotiating the Submitted Record and this investment would be jeopardized if their competitors became aware of the terms. The Submitted Record was intended to be confidential by the two parties involved in the transaction. (*See Uribe, supra*, 19 Cal. App. 3d at 206-207; *Whyte, supra*, 101 Cal. App. 4th at 1454.) Public disclosure could chill similar future contractual arrangements, making permitting of energy projects more difficult.

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 represents a confidential business transaction between two private parties related to a negotiation of terms and conditions for the purchase and sale of carbon dioxide related to the Project. The Applicant and Oxy have spent time and resources negotiating the executed Submitted Record. The Submitted Record was intended to be confidential by the two parties involved in the transaction. The Submitted Record provides Applicant and Oxy a business advantage over competitors that have not made a commensurate investment of time and resources to negotiate the information and business terms identified by the Submitted Record.
- ***"How the advantage would be lost"*** – The Submitted Record provides Applicant and Oxy a business advantage over competitors that have not made a commensurate investment of time and resources to negotiate the information and

business terms identified by the Submitted Record. Applicant's and Oxy's business advantage would be jeopardized if their competitors could view information in the Submitted Record without having made a commensurate investment. The Submitted Record was also intended to be confidential by the two parties involved in the transaction and the value of the Submitted Record would be substantially undermined if its contents were made public. Public disclosure could chill similar future contractual arrangements, making permitting of energy projects more difficult.

- ***"The value of the information to the applicant"*** – The Submitted Record represents a confidential business transaction between two private parties related to a negotiation of terms and conditions for the purchase and sale of carbon dioxide related to the Project. The Submitted Record was also intended to be confidential by the two parties involved in the transaction and the value of the Submitted Record would be substantially undermined if its contents were made 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 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. The Submitted Record represents a confidential business transaction between two private parties related to a negotiation of terms and conditions for the purchase and sale of carbon dioxide related to the Project. 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 qualifies for the exemption in Gov. Code § 6254.15.

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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).) 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.

The Applicant requests that the entirety of the Submitted Record be kept confidential indefinitely to protect the trade secret and proprietary information within the Submitted Record. 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.

Best regards,



Michael Carroll  
of LATHAM & WATKINS LLP

Enclosure

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