



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

California Energy Commission

DOCKETED
08-AFC-8A

TN # 68326

NOV. 02 2012

**AMENDED APPLICATION FOR CERTIFICATION
FOR THE
HYDROGEN ENERGY CALIFORNIA
PROJECT**

DOCKET No. 08-AFC-08A

COMMITTEE RULING ON INTERVENOR SIERRA CLUB'S MOTION TO COMPEL DATA RESPONSES

Background

On August 2, 2012, Intervenor Sierra Club issued Data Requests, Set One, to Hydrogen Energy California, LLC, the Applicant. Set one contained 97 data requests. On August 22, 2012, Applicant filed requests for extensions and objections to certain of the data requests. On September 4, 2012, Applicant provided responses to the remaining data requests and, on October 3, 2012, Applicant provided additional information responsive to those data requests as to which it had requested additional time to respond.

On September 10, 2012, Sierra Club sent a letter to Applicant responding to Applicant's objections. As a result of subsequent negotiations between the parties, Applicant agreed to provide responses to an additional 15 data requests.

Sierra Club's motion, filed September 21, 2012, placed before us 8 of the contested data requests. Applicant filed its opposition brief on October 8, 2012, and shortly thereafter Sierra Club filed a reply brief in which it withdrew its motion as to 4 of the 8. Thus, what remains for the Committee is to rule upon Sierra Club's motion as to the remaining 4 data requests.

The instant Motion comes before us prior to the presentation of any evidence. Nothing in these rulings is intended to comment on the merits of the Application for Certification (AFC) or the legal, factual and procedural issues involved in our review.

Sierra Club has also asked that, in connection with its motion, we conduct hearings designed to establish the scope of alternatives analysis deemed necessary by the Committee. We acknowledge the complexity of the Applicant's project, which affects the scope of alternatives examined, and we anticipate that the Commission staff assessment will undertake a robust and comprehensive alternatives analysis. While we

believe it is premature at this time to provide direction on the scope of alternatives to be analyzed, we reserve the right to provide such direction in the future.

Discussion of Contested Data Requests

Data Request No. 24

Data Request No. 24 reads as follows:

Please provide all Excel spreadsheets used to support the emission estimates in the AFC, Appendices E and M, in the native electronic format and unprotected (i.e. showing formulas), if necessary under confidential cover and/or password protected.

Applicant's objection reads as follows:

Applicant objects to Data Request No. 24 on the basis that embedded within the information requested is CBI (confidential business information) related to emission rates provided by equipment vendors.

In its opposition brief, Applicant states that the information is the confidential business information of its equipment vendor, Mitsubishi Heavy Industries (MHI). Applicant states that both it and its engineering firm, Fluor, are bound by confidentiality provisions in their agreements with MHI not to disclose the requested information.

Sierra Club points out that it has offered to enter into a nondisclosure agreement with Applicant to keep the information confidential. Applicant claims, however, that the above-referenced agreements with MHI prohibit the disclosure of the information "to anyone under any circumstances, including under a protective order."

Applicant has failed to demonstrate how MHI's business interests could be adversely affected by providing the information in confidence to Sierra Club. Nor can we imagine any circumstances under which providing the information in confidence to Sierra Club could be injurious to MHI. Sierra Club is not a competitor of MHI's nor is it in the business of developing electrical generation facilities.

Finally, Sierra Club has provided the declaration of Julia May, a Senior Scientist and Environmental Consultant with over 23 years of experience performing energy and industrial air pollution engineering evaluations. According to the declaration, Ms. May was provided with the Excel spreadsheets of emissions estimates for two proposed coal gasification plants in Kentucky in 2010 under confidential cover.

Although it did not interpose a relevance objection in response to Data Request No. 24, Applicant raises the issue of relevance in its opposition brief, stating simply that Sierra Club does not need the information in order to evaluate the project's compliance with LORS or to evaluate its environmental impacts. Sierra Club states that it needs the information in order to verify Applicant's emission calculations. It makes sense to us that the underlying data and formulae would be useful to Sierra Club in undertaking such verification.

Accordingly, we **grant** Sierra Club's motion to compel with respect to data request no. 24. The parties are directed promptly to enter into an appropriate nondisclosure agreement, drafted by Applicant, prior to the provision of the requested information.

Data Requests Nos. 47(b), 48 and 49

These 3 data requests ask Applicant to address the use of alternative fuels, specifically natural gas and biomass or biomass blends with solid fossil feedstocks. Applicant objects because the data requests seek analysis rather than information.

Section 1716(b) of our regulations describes the permissible scope of a data request submitted to the applicant: information reasonably available to the applicant which is relevant or reasonably necessary to make a decision on the application.

Sierra Club appears to acknowledge that these data requests seek information that is not currently possessed by or reasonably available to the applicant, stating that the data requests do not ask the applicant to perform "time-consuming research and analysis," but rather that they merely request a "discussion of what needs to change in the facility if alternative fuels were used and why it needs to change." In our view, in order for applicant to "discuss" what would need to change and why, it would need to perform significant research and analysis.

It is well-settled that a party may not require the applicant to perform analysis in response to a data request. "Information," as that term is used in section 1716, refers to material that already exists and is possessed by or reasonably available to the applicant. Here, while the air quality and other impacts of the proposed project are at issue and the requested analysis may be relevant, Sierra Club is asking that applicant develop information for Sierra Club. This request exceeds the permissible scope of a data request.

Accordingly, we **deny** Sierra Club's motion with respect to data requests 47(b), 48 and 49.

By ruling in favor of applicant with respect to Sierra Club's motion to compel responses to these 3 data requests, we do not opine as to whether or not the alternative technologies suggested by Sierra Club should be analyzed in the staff assessment. As indicated above, we do not express an opinion about the scope of alternatives at this time, although we reserve the right to do so in the future. Also, if Sierra Club still has

concerns after the staff assessment is complete that fuels and technologies meriting consideration as project alternatives have not been sufficiently analyzed, it will of course be free to independently offer testimony on those options during evidentiary hearings.

Dated: November 2, 2012, at Sacramento, California.

Original Signed By:

KAREN DOUGLAS
Commissioner and Presiding Member
Hydrogen Energy California Project
AFC Committee

Original Signed By:

ANDREW McALLISTER
Commissioner and Associate Member
Hydrogen Energy California Project
AFC Committee



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***AMENDED APPLICATION FOR CERTIFICATION FOR THE
HYDROGEN ENERGY CALIFORNIA PROJECT***

**Docket No. 08-AFC-08A
(Revised 10/8/12)**

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DECLARATION OF SERVICE

I, Jacqueline Clay, declare that on November 2, 2012, I served and filed a copy of the attached COMMITTEE RULING ON INTERVENOR SIERRA CLUB'S MOTION TO COMPEL DATA RESPONSES, dated November 2, 2012. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at: http://www.energy.ca.gov/sitingcases/hydrogen_energy/index.html

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:
(Check all that Apply)

For service to all other parties:

- ☒ Served electronically to all e-mail addresses on the Proof of Service list;
- ☐ Served by delivering on this date, either personally, or for mailing with the U.S. Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses marked **"hard copy required"** or where no e-mail address is provided.

AND

For filing with the Docket Unit at the Energy Commission:

- ☒ by sending one electronic copy to the e-mail address below (preferred method); **OR**
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1516 Ninth Street, MS-4
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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

- ☐ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

Original Signed By:

Jacqueline Clay
Hearing Advisers Office