

CALIFORNIA ENERGY COMMISSION1516 NINTH STREET
SACRAMENTO, CA 95814-5512

November 29 , 2012

California Energy Commission

DOCKETED
08-AFC-8A

TN # 68717

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Michael Carroll
Latham & Watkins LLP
650 Town Center Drive, 20th Floor
Costa Mesa, CA 92626

RE: **Application for Confidentiality, Response to Workshop Request No. 24**
 Hydrogen Energy International, LLC,
 Docket No. 08-AFC-8A

Dear Mr. Carroll:

On November 1, 2012, Hydrogen Energy International, LLC, filed an application for confidentiality seeking confidentiality for information related to the project's budgets for construction, operations and maintenance. The information is being provided in response to Commission staff's workshop request No. A24. The application states that the budget information is confidential as a trade secret and as proprietary financial information. Specifically, the application claims:

... the Submitted Record represents a valuable compilation of confidential information related to anticipated project budgets for construction, operations, and maintenance. Information in the confidential record is not available to the public but is maintained as confidential by the parties because of sensitive technical and cost information.

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 and proprietary information. (Gov. Code, §§ 6254(k), 6254.7, 6254.15 Evid. Code, § 1060.) The California courts have traditionally used the following definition of trade secret:

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.

The application addresses each of these four requirements by stating the following:

The specific nature of the advantage -The confidential record represents a valuable compilation of information related to anticipated project budgets for construction, operations, and maintenance. The Confidential Record is intended to be confidential.

How the advantage would be lost -Time and resources have been spent compiling the information within the confidential record and the value of the information would be significantly impaired if made available to the public.

The value of the information to the applicant -The confidential record is valuable to the project because of the: (1) time and resources expended to compile the information; (2) efforts to maintain the confidentiality of the confidential record; and (3) use of the information to facilitate ongoing business activities.

The ease or difficulty with which the information could be legitimately acquired or duplicated by others -The confidential 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.

In addition to trade secrets, Government Code section 6254.15 exempts from disclosure the following types of information:

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Corporate 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 locating a facility within California.

In this case the information subject to the confidentiality application relate to the siting of a facility within California.

Applicant has made a reasonable claim that the law allows the Energy Commission to keep the project's budgets for construction, operations and maintenance confidential on the grounds that it is proprietary and trade secret information. The information has been developed exclusively by Applicant, contains information that is not public, and has the potential for economic advantage.

Applicant requests that the information be designated confidential indefinitely and that a generalized summary of the information may be incorporated into Commission Staff's analysis. After discussing the confidentiality term with staff it is my understanding that the Applicant has agreed to accept a more defined term which will run until decommissioning of the facility or in the event the facility is not constructed, a term of 10 years.

Based on the above discussion, the Applicant's confidentiality application is granted. The budget data subject to this confidentiality designation will be kept confidential until the facility is decommissioned or if the facility is not built, 10 years.

Be advised that persons may petition to inspect or copy 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. If you have any questions concerning this matter, please contact Scott Babula, Senior Staff Counsel, at (916) 651-1462.

Sincerely,



Robert P. Oglesby
Executive Director

cc: Docket Unit
Robert Worl Energy Commission Project Manager