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LATHAM & WATKINS LLP

California Energy Commission
DOCKETED
08-AFC-8A
TN # 69136
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January 10, 2013

Mr. Robert Oglesby
Executive Director
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050056-0001

 ORIGINAL

Re: **Application for Confidential Designation**
Hydrogen Energy California Power Plant (08-AFC-8A) ("Project")

Dear Mr. Oglesby:

On January 8, 2013, Hydrogen Energy California, LLC ("Applicant") for the abovementioned Project filed certain confidential emissions spreadsheets containing information about Project emissions of criteria pollutants, greenhouse gases, and toxic air contaminants. Applicant has identified two revisions to the emissions spreadsheets to incorporate emissions changes in response to data requests. The revisions include additional fugitive emissions from rail car transportation and revised methanol emissions from the CO₂ vent. Accordingly, Applicant has updated three of the emissions spreadsheets (two related to transportation and one for public health), which it hereby files confidentially ("Confidential Record").

Applicant will provide the Confidential Record to the Sierra Club pursuant to a non-disclosure agreement, dated December 5, 2012, between Applicant and the Sierra Club. Under separate cover, Applicant will also docket with the California Energy Commission ("CEC") non-confidential information associated with the emissions spreadsheets for public review. The docketing of non-confidential information associated with the emissions spreadsheets does not affect the confidentiality of the Confidential Record or any other confidential materials filed by HECA.

On behalf of the Applicant, we request that the entirety of the Confidential Record be permanently maintained as confidential by the CEC for the reasons described below. We present two independent bases for finding that the Confidential Record is confidential and exempt from disclosure under the California Public Records Act: (1) California Government Code § 6254(k) (trade secrets); and (2) Government Code § 6254.15 (proprietary information).

A. The Confidential Record is Confidential Under Gov. Code § 6254(k) as a Trade Secret

The Applicant requests that the Confidential 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 Confidential Record includes a valuable compilation of business confidential vendor data that is not available to the public.

Under CEC 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 Confidential Record is maintained as confidential because of the sensitive technical nature of, and business value of, the business confidential vendor data, which establishes a business advantage over parties without access to the information.
- ***"How the advantage would be lost"*** – Time and resources have been spent compiling the information within the Confidential Record and the value of the business confidential vendor data could be significantly impaired if made available to the public because it contains sensitive technical and design information.
- ***"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.

For the reasons provided above, the Confidential Record is a trade secret under California law and qualifies for the exemption in Gov. Code § 6254(k).

B. 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 Confidential Record contains corporate proprietary business confidential vendor data and trade secrets that are being provided to the CEC related to locating a facility within California. Thus, the Confidential Record qualifies for the exemption under Gov. Code § 6254.15.

C. Questionnaire: Application For Confidential Designation

To further support Applicant's request, we provide responses to the CEC's questionnaire regarding applications for confidential designation:

1. *Title, date and description (including number of pages) of the record for which you request confidential designation.*

See description above of the Confidential Record.

2. *Specify the part(s) of the record for which you request confidential designation.*

Applicant requests confidential designation for the entire Confidential Record.

3. *State and justify the length of time the Commission should keep the record confidential.*

Applicant requests that the Confidential Record be kept confidential indefinitely to protect the trade secrets and proprietary information described above.

4. *State the provisions of the Public Records Act or other law that allows the Commission to keep the record confidential, and explain why the provision(s) apply to the record.*

We present independent bases for finding the Confidential Record confidential and exempt from disclosure under the California Public Records Act: (1) Gov. Code § 6254(k) (trade secrets); or (2) Gov. Code § 6254.15 (proprietary information). If the information in the

Confidential Record is released to the public, the value and benefit of the trade secrets and proprietary information could be impaired.

5. *Discuss the public interest in nondisclosure of the record. If the record contains trade secrets or its disclosure would otherwise cause loss of a competitive advantage, please also state how it would be lost, the value of the information to the applicant, and the cost or difficulty with which the information could be legitimately acquired or duplicated by others.*

See description above in Section 1 regarding trade secrets. For the reasons provided above, the Confidential Record is a trade secret under California law and qualifies for the exemption in Gov. Code § 6254(k).

6. *State whether the record may be disclosed if it is aggregated with other information or masked to conceal certain portions (including but not limited to the identity of the applicant). State the degree of aggregation or masking required. If the data cannot be disclosed even if aggregated or masked, explain why.*

Applicant believes the CEC can incorporate a generalized summary of the information contained in the Confidential Record to properly describe the basis for its analysis without disclosing information specific enough to impair the value of the trade secrets or proprietary information.

7. *State how the record is kept confidential by the applicant and whether it has ever been disclosed to a person other than an employee of the applicant. If it has, explain the circumstances under which disclosure occurred.*

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, or others with a specific need for the information.

D. Summary of Basis For Confidentiality Request

According to the CEC'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 either Gov. Code § 6254(k) or Gov. Code § 6254.15.

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

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attorneys, consultants, others working as part of the project application before the CEC, or others with a specific need for the information.

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,

A handwritten signature in black ink, appearing to read "Michael J. Carroll", written in a cursive style.

Michael J. Carroll
of LATHAM & WATKINS LLP

**STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION**

In the Matter of:)	Docket No. 08-AFC-08A
)	
REVISED APPLICATION FOR)	PROOF OF SERVICE
CERTIFICATION FOR THE HYDROGEN)	
ENERGY CALIFORNIA POWER PLANT)	(December 24, 2012)
PROJECT ("HECA"))	
_____)	

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HYDROGEN ENERGY CALIFORNIA PROJECT
CEC Docket No. 08-AFC-08A

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DECLARATION OF SERVICE

I, Paul Kihm, declare that on January 10, 2013, I served and filed copies of the attached:

APPLICATION FOR CONFIDENTIAL DESIGNATION

to all parties identified on the Proof of Service List above in the following manner:

California Energy Commission Executive Director (with confidential submittal)

- ☒ Transmission by depositing the original plus five copies with FedEx overnight mail delivery service at Costa Mesa, California, with delivery fees thereon fully prepaid and addressed to the following:

Mr. Robert Oglesby
Executive Director
CALIFORNIA ENERGY COMMISSION
1516 Ninth Street
Sacramento, California 95814

California Energy Commission Docket Unit (without Confidential Submittal)

- ☒ Transmission via electronic mail to:

CALIFORNIA ENERGY COMMISSION
Attn: DOCKET NO. 08-AFC-08A
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docket@energy.ca.gov

For Service to All Other Parties (without Confidential Submittal)

- ☒ Transmission via electronic mail to all email addresses on the Proof of Service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 10, 2013, at Costa Mesa, California.



Paul Kihm