

CALIFORNIA ENERGY COMMISSION

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January 14 2011

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

DOCKET	
08-AFC-8	
DATE	JAN 14 2010
RECD.	JAN 14 2010

RE: **Application for Confidentiality,
Responses to Data Requests 179 and 181/Trade Secrets
Hydrogen Energy International, LLC,
Docket No. 08-AFC-8**

Dear Mr. Carroll:

On December 20, 2010, Hydrogen Energy International, LLC, filed two applications for confidentiality on behalf of the Hydrogen Energy California Power Plant ("Applicant"), in the above-captioned docket. The applications request confidential designation for Applicant's responses to Staff's Data Request numbers 179 and 181. Specifically, Applicant requests confidential designations for the following:

1. Response to Data Request 179 is an executed letter of intent between Applicant and Occidental of Elk Hills, Inc., regarding a negotiation of terms and conditions for the purchase and sale of carbon dioxide related to the Project; and
2. Response to Data Request 181 pertains primarily to the related Occidental of Elk Hills', Inc. ("Oxy") enhanced oil recovery project ("EOR Project"), and Applicant claims that the information was provided by Oxy, and represents a compilation of confidential information.

The two applications are substantially similar, and thus are being considered together in this determination.

Regarding the Response to Data Request 179, the application states that the information is confidential as a trade secret and, as such, is corporate proprietary information. Specifically, the application claims:

. . . 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. . . .Public disclosure could chill similar future contractual arrangements, making permitting of energy projects more difficult.

Regarding Response to Data Request 181, Applicant asserts it also is a trade secret and, therefore, is also corporate proprietary information. Specifically:

The Submitted Record represents a valuable compilation of confidential information related to the EOR Project. (The information) is not available to the public but is maintained as confidential by the applicable parties. Applicant's competitors cannot readily obtain the information on the open market without making a commensurate investment of time and/or resources as the Applicant and Oxy. . . .Time and resources have been spent compiling the information . . . and the value of the information would be significantly impaired if made available to the public. The Applicant and Oxy would also lose their competitive advantage if its competitors could access the 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. (Gov. Code, § 6254(k); 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.

Applicant has made a reasonable claim that the law allows the Commission to keep the above-listed information confidential on the grounds that it is a trade secret and/or proprietary 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 kept confidential indefinitely.

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For the above reasons, your two requests for confidential designations for Response to Data Request 179 and for Response to Data Request 181 are granted.

Be advised that persons may petition to inspect or copy records that have been 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 Deborah Dyer, Senior Staff Counsel, at (916) 654-3870.

Sincerely,

A handwritten signature in black ink, appearing to read 'Melissa Jones', written in a cursive style.

Melissa Jones
Executive Director

cc: Docket Unit
Energy Commission Project Manager