

## CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET  
SACRAMENTO, CA 95814-5512

January 23, 2013

California Energy Commission

**DOCKETED****08-AFC-8A**

TN # 69231

JAN 23 2013

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

RE: **Application for Confidentiality, Response to Data Request A35  
Underlying Calculation on Excel Spreadsheet of Project Emissions of  
Criteria Pollutants, Greenhouse Gases, and Toxic Air Contaminants.  
Hydrogen Energy International, LLC,  
Docket No. 08-AFC-8A**

Dear Mr. Carroll:

On January 8, 2013, and subsequently on January 10, 2013, Hydrogen Energy International, LLC, filed an application and supplemental application ("application") for confidentiality seeking confidentiality for the underlying vendor calculations and formulas embedded in the Excel spread sheet used to calculate project emissions of criteria pollutants, greenhouse gases and toxic air contaminants. The application states that the formulas and calculations are confidential as a trade secret. Specifically, the application claims the data is technical in nature and required time and resources to develop which provides the applicant with a business advantage. In addition, the information is proprietary in nature and exempt from disclosure under Government Code section 6254.15.

It is important to clarify that the application does not seek to have the emissions data designated as confidential but only the underlying formulas and calculations.

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 is of a technical nature which provides 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 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 relates to the siting of a facility within California.

Applicant has made a reasonable claim that the law allows the Energy Commission to keep the underlying calculations and formulas confidential on the grounds that they are 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.

Based on the above discussion, the Applicant's confidentiality application is granted. The data subject to this confidentiality designation will be kept confidential until the facility is decommissioned or if the facility is not built, 5 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 Jared Babula, Senior Staff Counsel, at (916) 651-1462.

Sincerely,



Robert P. Oglesby  
Executive Director

cc: Docket Unit  
Robert Worl Energy Commission Project Manager  
John Heiser, Energy Commission Project Manger