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VIA DOCKET UNIT E-FILING SYSTEM AND EMAIL

Mr. Drew Bohan
Executive Director
California Energy Commission
715 P Street
Sacramento, CA 95814

RE: Response on Behalf of the Applicant, Compass Energy Storage, LLC, to the City of San Juan Capistrano's Objection to California Energy Commission Jurisdiction over the Compass Battery Energy Storage Project (Docket 24-OPT-02)

Dear Director Bohan:

I write on behalf of Compass Energy Storage, LLC ("Compass") in response to the June 3, 2024, letter submitted by Best Best & Krieger ("BBK Letter") and similar comments made at the California Energy Commission's ("Commission") May 29, 2025 hearing and in the City of San Juan Capistrano's comment letter dated June 4, 2025 ("City Letter"), which dispute the Commission's jurisdiction over Compass' Opt-In Application ("Application") for the Compass Energy Storage Project ("Project") located in the City of San Juan Capistrano.

The BBK and City Letters and related hearing comments suffer from various factual and legal deficiencies. For the reasons explained below, the Commission has jurisdiction over the Project under the plain language of Assembly Bill ("AB") 205, which is also consistent with the legislative history of the bill. Further, the Commission's consideration of the Project does not violate the separation of powers doctrine because the City's prior involvement with the Project did not amount to a denial of the Project. Nor would it have mattered if the City's actions *had* denied the Project (as BBK alleges it did) because AB 205 expressly permits the Commission to supersede local land use authority.

The City will remain a critical participant throughout the Commission's certification process and will have many opportunities to make recommendations and have its concerns addressed. The language and purpose of AB 205, however, vest ultimate approval authority over the Project in the Commission. Compass therefore respectfully recommends that the Commission reject the City's request to review the Commission's jurisdiction over the Project and decline to stay its review of the Application.

I. BACKGROUND

The Project is a battery energy storage system ("BESS") capable of storing and discharging up to 250 MW of electricity for four hours (up to 1,000 MWh). The Project will be composed of batteries, inverters, transformers, a switchyard, a collector substation, and other associated equipment to interconnect into the San Diego Gas & Electric Trabuco to Capistrano transmission line.

Contrary to the assertions in the BBK and City Letters, which rely on an obsolete project description that is over three years old, the Project will sit on approximately 12.4 acres of a nearly 41 acre parcel in the northern portion of the City of San Juan Capistrano. The Project also includes approximately 1.6 acres of offsite components (access road). The Project site is utilized by the Saddleback Church, for ancillary activities.

On March 25, 2022, Compass submitted a letter to the City Development Services Director ("Director") asserting why the Project could be processed under San Juan Capistrano Municipal Code ("SJCMC") section 9-2.337 for a conditional use permit, or in the alternative, why the project qualified for an unlisted use determination under SJCMC section 9-3.203. On April 29, 2022, the Director responded that the interim use of battery energy storage could not be accommodated under the Planned Community zoning district nor by an unlisted use determination. Instead, the Director instructed that a Comprehensive Development Plan ("CDP") for the entire Saddleback Church property would need to be initiated and then approved by the City Council before the Project could be considered.

Thereafter, on September 16, 2022, Saddleback Church requested that the City Council initiate a rezone study to initiate a CDP to govern land use over the approximately 161-acre Saddleback Church property. The proposed CDP would allow the existing church use by right, allow a BESS use with a Conditional Use Permit ("CUP"), and narrow the list of interim uses currently allowed.

On November 1, 2022, the City Council voted not to initiate the rezone study to initiate the CDP process. At the time, no action to approve the Project (i.e., issue a CUP) was before the City Council, nor had the City performed any environmental review of the Project pursuant to the California Environmental Quality Act ("CEQA").

The City's decision not to initiate the CDP at that time in no way foreclosed a request to do so in the future, as several City Councilmembers publicly recognized at the November 1, 2022, hearing. Importantly, Mayor Reeve confirmed from the dais that a City Council vote to deny initiation of a CDP would have the same effect as a continuance and that Saddleback Church was in no way barred from resubmitting a new proposal whenever it was "ready to go," and Mayor Pro Tem Hart encouraged Saddleback Church to come back with a better "visual."[1] Nor did the City Council's

[1] See https://sjc.granicus.com/player/clip/2628?view_id=3&redirect=true, at 2:08 to 2:13.

vote result in the termination of the rezone study application, which remained before the City until it was voluntarily withdrawn on February 15, 2024.

Instead of returning to the City Council, however, on April 11, 2024, Compass submitted its Application to the Commission for certification of the Project. After multiple data requests from the Commission and responses from Compass with additional information and materials regarding the Project, the Commission deemed the Application complete on April 30, 2025.

II. AB 205

Passed during the 2021-2022 legislative session, AB 205 establishes a new certification process within the Warren-Alquist Act for, *inter alia*, energy storage systems capable of storing 200 megawatt hours (MWh) or more of electricity and electric transmission lines from those generating or storage facilities to a point of junction with an interconnected electrical transmission system, upon the satisfaction of further conditions.

AB 205 gives the Commission ". . . the exclusive power to certify the site and related facility, whether the application proposes a new site and related facility or a change or addition to an existing facility. . . ." (Pub. Res. Code, § 25545.1(a).) The bill provides that issuance of the certification is "in lieu of any permit, certificate, or similar document required by any state, local, or regional agency, or federal agency . . . and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law." (*Id*. at § 25545.1(b)(1).)

The Commission's authority to review an application once submitted is unrestrained by prior local agency action. "Notwithstanding any other law, an application submitted pursuant to this chapter shall be reviewed by commission staff. The executive director shall prepare a recommendation for the commission's consideration at a publicly noticed meeting on whether to certify an environmental impact report and issue a certificate for the site and related facilities pursuant to this chapter." (*Id*. at § 25545.6.)

III. THE COMMISSION HAS JURISDICTION OVER THE PROJECT

A. The City Never Made a Final Decision Denying, or Effectively Denying, the Project

BBK and the City contend that both the Director's April 2022 indication that the Project could not be accommodated under the Planned Community zoning or by an unlisted use determination, and the City Council's November 2022 decision not to initiate a rezone study, were "final" agency decisions that denied the Project. However, these proceedings never considered a CUP application for or conducted environmental review of the Project. Thus, the City was never presented with a request for Project approval, but instead, merely addressed preliminary questions concerning how the City would approach the project application process. BBK's and the City's contention that the

Project went "through the same or similar approval process" as that sought by the Application today is a misstatement of the facts. (BBK Letter, p. 6.)

In April 2022, when the Director indicated that the Project could not be accommodated under the Planned Community zoning or by an unlisted use determination, he merely determined that Saddleback Church would first need to seek initiation of a CDP. Thereafter, in September 2022, Saddleback Church applied to the City requesting the City initiate a rezone study to establish such a CDP. Approval of the request would simply *initiate* a rezone study but was not to be interpreted as *approval* of any proposed rezone itself. The proposed CDP would allow the existing church use by right, allow a BESS use with a CUP, and narrow the list of interim uses currently allowed. The request did not specifically seek approval of a CUP for the Project—the mechanism required for approval of a BESS facility.

This is further evidenced by the fact that no CEQA analysis was performed. The CEQA process is triggered by an application for public agency approval. If the City had been asked to approve or deny the Project at this time, there would have been some level of CEQA analysis prepared. The record reflects that none of this occurred, evidencing that the Project was simply not before the City for review and approval.

Even if the City's decision not to initiate the requested rezone study was considered a decision affecting the Project, it was not a "final" decision precluding Compass from ever presenting the Project for approval again. In fact, the City Councilmembers' own statements made at the November 2022 hearing support this conclusion. Mayor Reeve confirmed that a City Council vote to deny initiation of a CDP would have the same effect as a continuance and that Saddleback Church was in no way barred from resubmitting in response to the City Councilmember's guidance during the hearing whenever it was "ready to go."[2] None of these proceedings amounted to an affirmative vote to deny the project.

Further, BBK inaccurately suggests that the City Council's vote not to initiate a rezone study triggered a 90 day statute of limitations under Code of Civil Procedure section 1094.6(b). (BBK Letter, p. 13.) This section permits "[j]udicial review of any decision of a local agency" if a section 1094.5 petition for writ of mandate is "filed not later than the 90th day following **the date on which the decision becomes final**." (Code Civ. Proc., § 1094.6(a), (b).)

As discussed above, however, the City Council never made a final decision on the Project. Instead, the Mayor confirmed its decision was like a "continuance" of the matter and that Saddleback Church was in no way barred from resubmitting a new proposal that took into account the City Council's concerns and suggestions from the November 2022 hearing. In fact, Mayor Reeve closed the City Council's consideration with the words, "See you at a future City Council hearing." And the rezone study application remained pending before the City until it was voluntarily withdrawn

[2] See https://sjc.granicus.com/player/clip/2628?view_id=3&redirect=true, at 2:08 to 2:13.

in February 2024. Accordingly, there was no "denial for purposes of the statute of limitations [which] cannot now be challenged or reconsidered," nor is there an exhaustion of administrative remedies issue because the City never adjudicated the merits of the Project. (BBK Letter, p. 13.)

Nor, to Compass' recollection, did the City ever notify Compass that it had made a final, appealable decision, much less advise of its appeal rights. (*Alford v. County of Los Angeles* (2020) 51 Cal.App.5th 742, 745 ["Section 1094.6, subdivision (f) requires the agency to provide notice to the party that the time within which judicial review must be sought is governed by section 1094.6. The 90-day limitations provision of section 1094.6 does not begin to run until the subdivision (f) notice is given."].)

Accordingly, the City Council's decision not to initiate a rezone study on November 2022 did not amount to a denial or "effective denial" of the Project such that any argument could be made against the Commission's jurisdiction over the Project today.

B. AB 205 Confers Exclusive Jurisdiction Over the Project to the Commission

1. AB 205's Plain Language Establishes Commission Jurisdiction

BBK claims that AB 205's plain language indicates a project's approval is meant to be secured by *either* local agency authority *or* Commission authority. According to BBK, once the applicant chooses one path, it is forever barred from changing its mind to pursue the other.

To discern the meaning of a statute, we first look to its language, giving the words their usual and ordinary meaning and construing them in context. (*Pacific Merchant Shipping Assn. v. Newsom* (2021) 67 Cal.App.5th 711, 725.) If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the legislature's intent is unnecessary. (*Ibid*.) However, if the statutory language permits more than one reasonable interpretation, various extrinsic aids may be considered, including legislative history and the purpose of the statute. (*Ibid*.) Ambiguities should be resolved by adopting the construction which best serves to harmonize the statute internally and with related statutes. (*Ibid*.)

There is no dispute that the Commission certification process set forth in AB 205 is a choice (the Commission itself labels the Application as an "opt-in" application), but the language of the statute simply does not support BBK's assertion that this choice presents an absolute binary choice, rather than an "alternative" option.

Public Resources Code section 25545.1(b)(1) states, "[e]xcept as provided in paragraph (2), the issuance of a certificate by the commission for a site and related facility pursuant to this chapter **shall be in lieu of** any permit, certificate, or similar document required by any state, local, or regional agency, or federal agency to the extent permitted by federal law, for the use of the site and related facilities, and **shall supersede any applicable statute, ordinance, or regulation of**

any state, local, or regional agency, or federal agency to the extent permitted by federal law." (Emphasis added.)

As BBK admits in its Letter, "in lieu of" is said to mean "in the place of : instead of." (BBK Letter, p. 10 [quoting Merriam Webster].) The plain language of this section grants the applicant the option to submit an application for Commission certification "in the place of" or "instead of" an application for local approval.

The City reads a restriction into the statute that is not there by further concluding that, as a condition precedent to exercising the option, the other one must never have been pursued in any way. Instead, the language is more naturally read as granting Commission jurisdiction as an alternative to local jurisdiction, without any consideration as to whether the applicant previously pursued that local jurisdiction or not.

Consistent with this conclusion is the reading of the term "new" to mean a facility that has not yet been built. Pub. Res. Code section 25545.1(a) gives the Commission ". . . the exclusive power to certify the site and related facility, whether the application proposes a **new site** and related facility or a change or addition to an existing facility. . . ." (Emphasis added.) BBK's interpretation of "new" as a facility which has not previously been reviewed and denied by a local agency is strained and again injects a restriction into the language of the statute that is simply not present. On its face, this language vests the Commission with "exclusive power" to grant all approvals necessary for a project which has not yet been built, or one which has been built and seeks a modification, regardless of whether the approval would violate any applicable local statute, ordinance, or regulation. The language means that a certification supplants other required approvals whether they have been secured or not ("in lieu of") and supersedes any other applicable law to the extent permitted by the rules of federal preemption.

That the Commission has the power to supersede any local decisionmaking is further evidenced by Pub. Res. Code section 25523. This section, made applicable to AB 205 projects by Pub. Res. Code section 25545.8(a), requires the Commission to consult with state, local, or regional governmental agencies where the Commission finds the project would not comply with relevant state, local, or regional ordinances or regulations. (*Id*. at § 25523(d)(1).) "If the noncompliance cannot be corrected or eliminated, the commission shall inform the state, local, or regional governmental agency" if it finds that "the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity." (*Id*. at §§ 25523(d)(1), 25525.) This "LORS" process suggests the Commission can supersede any local disapproval so long as it makes the required findings.

Finally, Pub. Res. Code section 25545.6 confirms the broad scope of authority the Commission has to review an application by using the phrase, "notwithstanding any other law":

> **Notwithstanding any other law**, an application submitted pursuant to this chapter shall be reviewed by commission staff. The executive director shall prepare a

> recommendation for the commission's consideration at a publicly noticed meeting on whether to certify an environmental impact report and issue a certificate for the site and related facilities pursuant to this chapter.

(Emphasis added.)

The "notwithstanding any other law" language expresses Legislative intent to sweep away any other state or local approvals except for those intentionally excluded (e.g., State Lands, Coastal, San Francisco Bay Conservation & Development Commissions, State Water Board, etc.). Courts have stated that the inclusion of the phrase "notwithstanding any other law" means the legislature intended that provision to override or displace contrary law (see *In re Greg F.* (2012) 55 Cal.4th 393, 406), conflicting law (see *Arias v. Superior Court* (2009) 46 Cal.4th 969, 983), or inconsistent law (see *People v. Superior Court* (1996) 13 Cal.4th 497, 524). Thus, notwithstanding any local approval requirements or prior review, the Commission can certify the Project.

2. Exercise of the Commission's Jurisdiction Will Not Lead to Absurd Results

Reading AB 205 as allowing Commission certification as an alternative to local approval would not result in absurd consequences. BBK expresses concern over "duplicating review" to "re-evaluate matters already decided." (BBK Letter, p. 10.) First, for the reasons set forth in Section III.A, *supra*, there is no concern of duplicative review here because the City never reviewed, evaluated, or decided whether to approve the Project.

Moreover, BBK expresses concerns that review of a project would be wasteful, consuming resources of state and local agencies. (BBK Letter, p. 10.) The AB 205 process is not free to applicants. Far from it, an applicant for a BESS project must submit an application fee based on how many megawatt hours of energy it will be able to store and discharge. (Pub. Res. Code, § 25806(a).) Further, local agencies are entitled to reimbursement for participating in the AB 205 process. (*Id*. at § 25538.) Nor would the Commission review be duplicative in a practical sense. When the Commission reviews an application, a new record is created based upon the state of the world as it exists at the time of review, applying those laws applicable to the Commission. There is no re-evaluation of matters already decided where the applicant is proceeding under an entirely different avenue for project approval. There is nothing in the language of AB 205 that limits an applicant's ability to opt-in to this avenue of approval.

Finally, Pub. Res. Code, 25545.1(c) clarifies that AB 205 even applies to charter cities. Typically, charter cities are given exclusive authority over "municipal affairs," but this subsection declares the certification process a matter of statewide concern, thereby obligating charter cities to comply with AB 205 as well. This subsection demonstrates that the Legislature comprehensively intended for the Commission to be the final say on project approval, except for those agency approvals which the Legislature expressly prevents Commission jurisdiction from superseding. (See, e.g., Pub. Res. Code, § 25545.1(b)(2) [the "in lieu of" language "does not supersede the authority of

the State Lands Commission to require leases and receive lease revenues . . . or the authority of the California Coastal Commission, the San Francisco Bay Conservation & Development Commission, the State Water Resources Control Board, or the applicable regional water quality control boards."], (b)(3) [Commission cannot supersede authority of local air quality management districts or the Department of Toxic Substances Control over certain facilities].) The express *inclusion* of these limits on the Commission's authority suggests the Legislature intended these to be the *only* limits on Commission authority. Had the Legislature intended to limit the Commission's authority to bypass local jurisdiction after a local agency had reviewed a project in some way—however minor—it would have said so.

3. The Legislative Purpose and Scheme Support Commission Jurisdiction

Even if we were to assume that a reviewing court could find the statutory language of AB 205 to be ambiguous, that would not be the end of the analysis. Instead, a reviewing court would proceed to consider various extrinsic aids, including legislative history and the purpose of the statute. (*Pacific Merchant Shipping Assn.*, *supra*, 67 Cal.App.5th at 725.) Such an exercise would achieve the same result—Commission jurisdiction over the Project—because any ambiguities would be resolved by adopting the construction that best serves to harmonize the statute internally and with related statutes. (*Ibid*.)

The legislatively expressed purpose behind AB 205 supports a finding that project approval authority is conferred upon the Commission regardless of any prior local agency review. One purpose of the bill was to facilitate the development of clean energy projects resisted and turned away by local agencies despite statewide goals and mandates to accelerate the deployment of renewable and energy storage projects in order to reduce greenhouse gas ("GHG") emissions. (See 06/26/2022 Senate Floor Analysis [AB 205 "create[s] opt-in permitting to accelerate bringing clean energy projects online sooner so that the state can rely less on fossil fuel generation sources."]; see also e.g., S. Wiener during 06/29/2022 Senate Floor Hearing: "This bill will cut through NIMBY-ism in so many ways, and make it much easier and faster to site and build these large-scale clean energy projects. And that is what is going to put an end to fossil-fuel reliance in the State of California.")

To accomplish this purpose, the Legislature clearly intended to accelerate clean energy projects by sweeping away local approval authority to bring more projects online faster. AB 205 "allows the [Commission] consolidated permit to replace all local, state, and federal permits," except for those expressly stated. (06/26/2022 Senate Floor Analysis; 06/26/2022 Assembly Floor Analysis.) This understanding is also consistent with the conclusion that the Commission has such overriding authority regardless of whether the local agency previously passed upon the project or not.

Other extrinsic aids support this reasoning as well, including prior interpretations of the Warren-Alquist Act. In enacting AB 205, the Legislature selected identical certification language to that in the pre-existing Warren-Alquist Act regarding certification of thermal power plants. Thus,

interpretations of the thermal power plant provisions are instructive and relevant for interpreting AB 205. Previously, these provisions have been interpreted as:

> indicat[ing] that the state has preempted the field of the evaluation, regulation and approval of thermal power plant sites and facilities. **A county government therefore would have no power to regulate or prohibit the construction of [a facility] if the plant should fall under the jurisdiction of the Energy Commission**. However, the Energy Act does require the Energy Commission to solicit extensive comments and recommendations from local governments concerning power plant site and facility proposals, and to give such comments major consideration in evaluating such proposals.

(58 Ops. Cal. Atty. Gen 729 (Oct. 31, 1975) [emphasis added].) This interpretation is consistent with the plain reading set forth above—that a local agency's attempt to prohibit a facility would fall flat where Commission jurisdiction is pursued instead.

C. AB 205 Is Not In Conflict with the California Constitution's Separation of Powers Doctrine

BBK further contends that Commission review of a project previously reviewed by a local agency would amount to a violation of the intertwined concepts of (1) the separation of powers and (2) the policy against retroactive application of the law. This argument not only reveals a fundamental misunderstanding of the importance and effect of a final agency decision, but it is also unsupported by cited case law.

A court or adjudicatory body's determination that a prior project denial was validly taken reflects an examination of that particular record and the agency's ability to approve the project pursuant to the laws then applicable to it. In practice, a denial would result in the project never being constructed. The flaw in BBK's argument is that it assumes the project is never thereafter made because the local agency's decision somehow acts as binding precedent, whereas, in reality, the project is never made because that local agency authority was the only lawful avenue for approval at the time.

With the adoption of AB 205, however, the Commission became an addition avenue, beyond local agencies, for project approval, as intended by the Legislature. The Commission can review an application and determine whether it satisfies the conditions of AB 205 and other applicable law. (See Pub. Res. Code, § 25545.1(b)(1) [Commission certification "shall **supersede** any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency"] [emphasis added].) If it does, the Commission can approve the application.

This result, particularly as applied to the facts presented here, is not in conflict with BBK's cited authority of *People v. Bunn* (2002) 27 Cal.4th 1 ("*Bunn*") and related cases. *Bunn* considered whether criminal statutes of limitation and judgments of dismissal obtained thereunder could be

revived by a later change in the law or whether such a revival would violate the separation of powers doctrine. The *Bunn* court found the latter because such retroactive legislation would "readjudicate or otherwise disregard judgments that are already final." (*Id*. at 17, 21 [internal quotations omitted].) But the "circumstances under which a judgment achieves finality and is therefore immune from legislative interference are clearly limited [to] . . . the final word of the judicial department as a whole, as expressed by the last court in the hierarchy that rules on the case." (*Id*. at 21 [internal quotations and emphasis omitted].)

The Project plainly does not implicate criminal law. Nor does it concern a statute of limitations question because the City never entered a final decision on the Project, but merely continued the evaluation of a rezone study, as demonstrated in Section III.A, *supra*. There can be no violation of the separation of powers doctrine here where the City never adjudicated the Project nor made a final decision on the merits denying or effectively denying the Project, let alone a final court judgment denying the Project.

BBK's argument relies upon a hypothetical concern that a project that is denied by the local agency and proceeds through all levels of appellate review could be "readjudicated" by the Commission under AB 205, but these are simply not the facts before us. (See Scalia & Garner, *Reading Law*, § 38, p. 247 (2012) ["A statute should be interpreted in a way that avoids placing its constitutionality in doubt."].) Instead, BBK's line of cases are plainly inapplicable because there has been no final judgment that may be interfered with.[3] None of these cases involved creation of an alternative permitting pathway, which is what AB 205 is designed to do.[4] It is not a statute with retroactive application, nor is it designed to resurrect a project denied by terminal judicial review. Even *Bunn* itself found no violation of the doctrine where the statute at issue was applied to reopen

[3] Like *Bunn*, *Plaut v. Spendthrift Farm, Inc.* (1995) 514 U.S. 211, *Mandel v. Myers* (1981) 29 Cal.3d 531, *People v. King* (2007) 27 Cal.4th 29, and *Perez v. Roe* (2006) 146 Cal.App.4th 171 are inapplicable here because the statutes at issue called for the reopening of final court judgments.

[4] *Fox v. Alexis* (1985) 38 Cal.3d 621 (holding invalid application of a criminal sanction enacted subsequent to commission of the crime); *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870 (declining to retroactively apply statute governing standard for preliminary title reports); *Hoffman v. Bd. of Retirement* (1986) 42 Cal.3d 590 (finding new statute regarding test for service-connected disability retirement clarified existing law and could be applied retroactively); *Baker v. Sudo* (1987) 194 Cal.App.3d 936 (finding law against furnishing alcohol to minor could not be applied retroactively because it changed law rather than merely clarified it); *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141 (holding law which eliminated social host liability for injuries resulting from intoxication of guest would not immunize host where injury occurred before effective date of legislation); *Glavinich v. Commonwealth Land Title Ins. Co.* (1984) 163 Cal.App.3d 263 (holding statute governing standard for insurance reports inapplicable since insurance policy issued before statute took effect).

cases that had not yet reached a final judgment at the time the legislation was enacted. (*Bunn*, *supra*, 27 Cal.4th at 25.)

Moreover, the AB 205 process intentionally includes the local agency. Upon courtesy receipt of an application, the local agency may comment on "the design of the facility, architectural and aesthetic features of the facility, access to highways, landscaping and grading, public use of lands in the area of the facility, and other appropriate aspects of the design, construction, or operation of the proposed site and related facility." (Pub. Res. Code, § 25519(f) [made applicable to AB 205 projects by *id*. at § 25545.8(b)].)

BBK cites no authority for its position that the Commission not only would have to consider the local agency's prior denial of the project in reviewing an application, but also that the prior denial would serve as binding precedent on the Commission. (See BBK Letter, p. 9.) Unlike the unlawful statute in *Bunn* that expressly tried to revive the statute of limitations for certain crimes that had already been finally adjudged, nothing in AB 205 creates an obligation on the Commission to look back in time and consider whether a project has been evaluated before. (*Bunn*, *supra*, 27 Cal.4th at 4.)

A Commission decision on an opt-in application would in no way reach back and invalidate a prior agency or court finding, but rather would determine, on the record presented to the Commission as it exists at that time and applying the laws presently applicable to it, whether the application satisfies the conditions of AB 205. BBK has not cited any case that holds that the Legislature cannot open up an alternative permitting pathway. Accordingly, under the alternative pathway of AB 205, there is no "retroactive" application of the law and no violation of the separation of powers doctrine. The AB 205 permitting pathway can be chosen at any time, and it was certainly not too late for Compass to choose it where the Project had never previously been considered on the merits.

IV. CONCLUSION

Based on the foregoing, the Commission has jurisdiction over the Project and the Application pursuant to AB 205.

Sincerely,

Ryan Waterman

cc: Ms. Renée Robin, Engie North America
Mr. Justin Amirault, Engie North America
Mr. Eric Knight, California Energy Commission
Ms. Renee Longman, California Energy Commission