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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:	)	
	)	
Application for Small Power Plant	)	Docket No. 19-SPPE-01
Exemption for the:	)	
	)	
Laurelwood Data Center	)	

MECP1 SANTA CLARA 1, LLC'S

OPPOSITION TO MOTION TO DISMISS

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August 30, 2019

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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:	)	
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Application for Small Power Plant Exemption for the:	)	Docket No. 19-SPPE-01
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Laurelwood Data Center	)	

MECP1 SANTA CLARA 1, LLC'S
OPPOSITION TO MOTION TO DISMISS

Pursuant to Section 1211.5 of the Commission's regulations, MECP1 Santa Clara 1, LLC (the "Applicant") files this opposition to the *Motion of Robert Sarvey to Dismiss the Proceeding* ("Motion") docketed by Robert Sarvey ("Intervenor") on August 19, 2019.[1] The Intervenor seeks to terminate this proceeding because the Intervenor disagrees with the California Energy Commission's ("Commission's") jurisdictional standards applicable to an application for a small power plant exemption ("SPPE").

First, the Intervenor's Motion should be denied because the Commission's statutory authorities and regulations provide plenary authority to establish standards to calculate the generating capacity of a non-turbine generator, which are set forth in the McLaren Backup Generating Facility proceeding. Second, the Motion fails to meet the standard for termination of an SPPE application set forth in the Commission's regulations, by failing to allege, let alone demonstrate, that the Applicant has not pursued the application with due diligence.

For all of the reasons set forth herein, the Intervenor's Motion must be denied.

[1] TN#: 229476. This response is timely filed in accordance with Sections 1003, 1211(d), and 1211.5 of the Commission's regulations. Section 1211(d) provides that the date of service is the date of the document's posting on the proceeding's website. Section 1211.5 provides that responses to motions are due in 14 days from service of the motion absent an order from the presiding member. The Motion was posted on the proceeding's website on August 19th, with responses due 14 days thereafter given the absence of an order directing otherwise. However, the 14th day, September 2, is a holiday. Therefore, in accordance with Section 1003, responses are timely if filed by September 3, 2019.

DISCUSSION

I. THE COMMISSION'S STATUTORY AUTHORITIES AND REGULATIONS PROVIDE PLENARY AUTHORITY FOR THE CALCULATION OF "GENERATING CAPACITY" FOR NON-TURBINE GENERATORS.

The Intervenor is incorrect in his argument that Section 2003[2] must be used to calculate the generating capacity of the Laurelwood Data Center. The Commission recently considered and rejected a similar argument that was raised in the McLaren Backup Generating Facility proceeding.[3] In that proceeding, the Commission declined to find that Section 2003 is the exclusive method to calculate generating capacity, and approved use of a methodology tailored to the use of backup generators like those at issue here to calculate generating capacity for the purposes of the Commission's jurisdiction under Public Resources Code section 25541.[4]

The jurisdictional standards applied by the Commission in the McLaren Backup Generating Facility proceeding, and utilized by the Applicant in the SPPE application for the Laurelwood Data Center, support the conclusion that the Motion must be denied. The Commission's organic statute, the Warren-Alquist Act (Public Resources Code Section 25000 *et seq.*), expressly provides that in addition to other powers specified in the Public Resources Code, the Commission also has plenary authority "…to take any action, it deems reasonable and necessary to carry out its statutory responsibilities.[5] Moreover, the "power or duty of the commission shall be liberally construed, in order to carry out the objectives of this division."[6]

Employing these authorities, relevant regulations, and with the benefit of other Commission decisions, the Commission found in the McLaren Backup Generating Facility proceeding that "the demand of the Data Center is the critical inquiry" in determining the Commission's jurisdiction, and that the demand should be calculated using "the maximum load

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[2] All references to "Section 2003" are to 20 C.C.R. § 2003.
[3] We note that the Intervenor is a member and representative of Helping Hand Tools, the entity that unsuccessfully challenged the Commission's jurisdictional standards in the McLaren Backup Generating Facility (17-SPPE-01) SPPE proceeding. (See, *Order on Petition for Reconsideration*, TN#: 226293.)
[4] See, *McLaren Backup Generating Facility Final Commission Decision with Corrected Publication Number*, CEC-800-2018-003-CMF (November 2018), pp. 7-9.
[5] Pub. Resources Code § 25218(e).
[6] Pub. Resources Code § 25219.

of the servers in the Data Center plus the cooling and ancillary load of the building."[7] With respect to the determination of generating capacity, the Laurelwood Data Center is similarly situated to McLaren, employing the same backup generating technology. Thus, as with the McLaren Backup Generating Facility, Section 2003 is not the applicable standard to determine the Laurelwood Data Center's qualifications for the SPPE process.

With respect to existing regulations, by its express terms, Section 2003 applies *only* to the calculation of generating capacity for ***turbine generators***.[8] Turbine generators, while common, are not the only "thermal powerplants" potentially subject to the Commission's jurisdiction. Section 2003 is silent as to the calculation of the generating capacity of other types of generators, such as the backup generators proposed for the Laurelwood Data Center. There are no regulations that mandate the application of Section 2003 alone to determine the Commission's jurisdiction under Public Resources Code section 25541.

When interpreting and applying its own regulations, an agency must be guided by the regulation's express terms. An agency is not permitted "to disregard [a] regulation's plain language."[9] Requiring the use of Section 2003 to analyze the capacity of the Laurelwood Data Center generating technology, as advocated by the Intervenor, would improperly require the Commission to disregard the plain language of the regulation limiting its applicability to turbine generators. The jurisdictional statutory and regulatory standards applied by the Commission in the McLaren Backup Generating Facility proceeding appropriately recognize that Section 2003 is not the applicable means for determining generating capacity for non-turbine generators. The facts in this prior SPPE application proceeding are directly on point. Therefore, the Intervenor's Motion lacks merit and should be denied.

II. THE INTERVENOR HAS FAILED TO MEET HIS BURDEN TO SUPPORT THE REQUESTED TERMINATION OF THE PROCEEDING.

Though styled as a motion to "dismiss," the Intervenor's petition is in reality a motion to terminate the proceeding: "Accordingly, Intervenor Sarvey moves to dismiss the

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[7] See, *McLaren Backup Generating Facility Final Commission Decision with Corrected Publication Number*, CEC-800-2018-003-CMF (November 2018), p. 8.
[8] 20 C.C.R. § 2003(a).
[9] See, *Motion Picture Studio Teachers & Welfare Workers v. Millan*, 51 Cal.App.4th 1190, 1195 (1996), as modified (Jan. 15, 1997).

proceeding…"[10] In this instance, "dismissing" the proceeding is equivalent to termination of the proceeding.

The Commission's regulations provide that an application for a small power plant exemption may be terminated upon motion by either the Committee or a party *only* upon a showing of an "applicant's failure to pursue the application or notice with due diligence…."[11] Notably, the Intervenor does not even allege, let alone provide any evidence, that the Applicant has failed to pursue the application with due diligence.[12] This diligent pursuit is memorialized, in part, by the thousands of pages of documents submitted in this proceeding by the Applicant in support of the SPPE application.[13]

As the moving party, the Intervenor carries the burden of proof[14] to establish that the Applicant has failed to pursue the application with due diligence. The Motion is wholly unsupported in this respect. For this reason alone, the Intervenor's Motion must be denied for failing to meet his burden.

CONCLUSION

For all of these reasons, the Intervenor's Motion must be denied.

September 3, 2019 ELLISON SCHNEIDER HARRIS & DONLAN LLP

By: */s/ Jeffery D. Harris*

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[10] See, Motion, p. 4.
[11] 20 C.C.R. § 1942, "Termination of an Application for Exemption," citing to 20 C.C.R. § 1720.2.
[12] Indeed, the record thus far clearly indicates the exercise of due diligence. See, for example, the Applicant's expeditious responses to information requests from CEC Staff. (TN#: 229274, 229160.)
[13] Evidence of this diligence is seen, for example, in Applicant's filings, TN#: 229508, filed in advance of the August 26, 2019 workshop in this proceeding, as noticed by TN#: 229473. In just the last 60 days, Applicant's diligence is evidenced by filings TN #: 229274, TN #: 229160, TN #: 229116, TN #: 229036, TN #: 229001, and TN #: 228913.
[14] 20 C.C.R. §§ 1212(b)(2) and 1212(c)(1)-(3); Evid. Code § 550(a); *Baber v. Superior Court*, 113 Cal.App.3d 955, 956, 966 (1980); *McCormick on Evidence* (6th) § 337.