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State of California
State Energy Resources Conservation and
Development Commission
715 P Street, Sacramento, CA 95814
1-800-822-6228 – www.energy.ca.gov

APPLICATION FOR SMALL POWER PLANT
EXEMPTION FOR THE:

***LAFAYETTE BACKUP GENERATING
FACILITY***

Docket No. 20-SPPE-02

RULING ON STAFF MOTION REGARDING INTERVENTION

On May 20, 2020, Digital Realty Inc. (Applicant) submitted an application for a small power plant exemption for the Lafayette Backup Generating Facility (Application)¹ to the California Energy Commission (CEC).² On July 8, 2020, the CEC appointed a committee consisting of Karen Douglas, Commissioner and Presiding Member, and David Hochschild, Chair and Associate Member, (Committee) to preside over this Application.³

The Committee issued a Scheduling Order on October 26, 2020,⁴ and a Revised Scheduling Order on May 10, 2021.⁵ Among other things, the Scheduling Orders set timeframes for filing petitions to intervene in the proceedings. In both the original and the revised Scheduling Order, the last day to file a petition to intervene was set at 30 days after CEC staff (Staff) published its environmental document.

Motion for Modification of Proceeding Orders

On October 8, 2021, Staff filed its Status Report #10 for the Lafayette Backup Generating Facility Small Power Plant Exemption and Motion for Modification of Proceeding Orders Regarding Intervention (Motion).⁶ In that Motion, Staff requests that

¹ Information about this proceeding, including a link to the electronic docket, may be found on the Lafayette Backup Generating Facility [web page](https://www2.energy.ca.gov/sitingcases/lafayette/) at <https://www2.energy.ca.gov/sitingcases/lafayette/>. Documents related to this proceeding may be found in the [online docket](https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=20-SPPE-02) at <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=20-SPPE-02>. The Application is TN 233041-1 to TN 233041-6.

² The CEC is formally known as the “State Energy Resources Conservation and Development Commission.” (Cal. Pub. Resources, § 25200.) All further references are to the Public Resources Code unless otherwise specified.

³ TN 233902.

⁴ TN 235419.

⁵ TN 237772.

⁶ TN 240012.

the Committee affirmatively prohibit intervention in the proceedings. Staff states that the public will have the opportunity to comment on Staff's Draft Environmental Impact Report (EIR), that Staff is required to provide responses to public comments on the Draft EIR, and that the public is provided with two additional opportunities to make comments, both at the evidentiary hearing and again at the Business Meeting when the Committee proposed decision will be considered. With no intervention allowed, Staff asserts that the Committee can conduct a more streamlined evidentiary hearing, limited to entering documents into the hearing record, responding to the Committee's written or oral questions, if any, and taking public comment.

Staff argues that permitting the public to intervene in the proceedings is redundant and unnecessary to inform Staff, the Committee, and the CEC of public concerns. Staff asserts that the change would improve the efficiency of the proceeding while still "preserving robust public engagement beyond the requirements of the California Environmental Quality Act," especially since the CEC is not approving the project, and the City of Santa Clara will hold additional public proceedings before any actual project approval.

To the degree that intervention is allowed, Staff requests that the Committee adopt an order requiring intervening parties to file substantive comments on the Draft EIR by the commenting deadline as a prerequisite to filing subsequent testimony. Staff claims that this will ensure that all relevant comments are known and available to Staff and can be considered in advance of preparing a Final EIR.

The deadline to file a response to the motion was October 22, 2021.⁷ No responses to the Motion were submitted.

PRESIDING MEMBER RULING

As to Staff's request to prohibit intervention in the proceeding, the Presiding Member finds that Staff has not identified any rule, law, or other authority authorizing the Committee to grant the request, or which would make limiting intervention in this proceeding reasonable. The Commission's regulations state that interested persons may intervene in any proceeding.⁸ Once a petition for intervention is filed, Staff may then respond and argue whether intervention would be appropriate.⁹ While the Presiding Member has the authority to regulate this proceeding in any manner that complies with law,¹⁰ Staff has not presented a discussion of legal authority to support the requested prohibition. Indeed, creating a blanket prohibition seems contrary to the right created by CEC regulations for interested persons to seek to intervene in the

⁷ Cal. Code Regs., tit. 20, § 1211.5, subd. (a) ("In the absence of such a schedule, responses to motions shall be filed within 14 days of the service of the motions.")

⁸ Cal. Code Regs., tit. 20, § 1211.7, subd. (a).

⁹ Cal. Code Regs., tit. 20, § 1211.5, subd. (a).

¹⁰ Cal. Code Regs., tit. 20, § 1210.

proceedings. As such, the Presiding Member **DENIES** the motion to prohibit intervention in this proceeding.

In the alternative, Staff requests that the Committee prohibit any intervenors from filing testimony for the evidentiary proceedings unless that intervenor previously filed substantive comments on the Draft EIR. The CEC's regulations state that, subject to the Presiding Member's authority, each party shall have the right to call and examine witnesses, to offer oral and written testimony under oath, to introduce exhibits, to cross-examine opposing witnesses on any matters relevant to the issues in the proceeding, and to rebut evidence.¹¹ The proper course of action for excluding proffered testimony would be a motion to exclude that information from the hearing record.¹²

Although the Presiding Member "may impose reasonable conditions on an intervenor's participation,"¹³ the exercise of that discretion must still comport with applicable law. As to the alternative request, the Presiding Member finds that Staff has not identified any rule, law, or other authority authorizing the Committee to impose such a restriction across the board. Moreover, an intervenor may wish to participate on an issue that is unrelated to the Draft EIR, such as the analysis of non-environmental factors related to the approval of an SPPE, making the requirement to comment on the Draft EIR superfluous to the proceeding. Therefore, the Presiding Member **DENIES** Staff's request to exclude testimony from intervenors unless that intervenor has filed substantive comments on the Draft EIR.

AVAILABILITY OF DOCUMENTS

Information regarding the status of the Application, as well as notices and other relevant documents are available on the [Lafayette Backup Generating Facility web page](https://ww2.energy.ca.gov/sitingcases/lafayette/) at <https://ww2.energy.ca.gov/sitingcases/lafayette/>.

IT IS SO ORDERED.

Dated: November 8, 2021

APPROVED BY:

Karen Douglas
Commissioner and Presiding Member
Lafayette Backup Generating Facility
SPPE Committee

¹¹ Cal. Code Regs., tit. 20, § 1212, subd. (a).

¹² Cal. Code Regs., tit. 20, § 1212, subd. (b)(2).

¹³ Cal. Code Regs., tit. 20, § 1211.7, subd. (c).