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STATE OF CALIFORNIA

STATE ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF: *LAFAYETTE BACKUP GENERATING FACILITY*	**Docket No.: 20-SPPE-02** **CEC STAFF RESPONSE TO DIGITAL REALITY'S MOTION TO DISSOLVE THE PROCEEDING'S COMMITTEE**

I. INTRODUCTION

On December 12, 2022, Digital Reality (applicant) filed a motion under California Code of Regulations, title 20, section 1211.5, requesting the committee assigned to the Lafayette Backup Generating Facility small power plant exemption (SPPE) application be dissolved upon the effective date of the amended regulations governing the SPPE process. The amended regulations repeal the provisions of California Code of Regulations, title 20, Article 5, setting forth the adjudicative procedures for reviewing SPPE applications. California Code of Regulations, title 20, section 1211.5(a) provides that parties to a proceeding have 14 days to file a response to another party's motion. California Energy Commission (CEC) staff agrees with applicant that the committee should be dissolved and the amended regulations should apply to this matter.

II. DISCUSSION

At the October 14, 2022 CEC business meeting, the CEC adopted regulatory changes to California Code of Regulations, title 20, sections 1934-1947, amending the process and procedures for reviewing SPPE applications. One change is the repeal of rules requiring an evidentiary hearing be conducted by assigned committees. There are currently five SPPE applications filed with the CEC. Two have assigned committees: the Lafayette Backup Generating Facility (20-SPPE-02) and the STACK Trade Zone Park (21-SPPE-02). The remaining three do not have assigned committees: Bowers Backup Generating Facility (22-SPPE-01), San Jose Data Center 04 (22-SPPE-02), and Martin Backup Generating Facility (22-SPPE-03).

The new regulations were approved by the Office of Administrative Law (OAL) on December 14, 2022, with an effective date of December 14, 2022. Staff concurs

with applicant that existing applications are subject to the new regulations by operation of law. What that means is the remaining steps in the SPPE process, for the Lafayette matter, should be conducted by staff, who will make a determination regarding whether the conditions for granting the exemption exist. If the conditions do exist, the Executive Director will present that recommendation to the Commission for approval.

The regulations no longer require the appointment of a committee, an adjudicative process, or an evidentiary hearing. While the Commission may appoint a committee for any matter (Pub. Resources Code, § 25211; Cal. Code Regs., tit. 20, § section 1204), under the new current regulations the committee has no duty or role. For these reasons, and based on the well-settled law that requires the new rules be applied to all SPPE applications that are not yet final, as set forth below, staff recommends under the authority of California Code of Regulations, title 20, sections 1203(c) and 1204(c), the committee refer the proceeding back to the Commission to dissolve the committee.

A. The New SPPE Regulations Operate Prospectively to All Pending Matters Upon Their Effective Date.

The application of new laws is a common occurrence in civil society as each January, in many jurisdictions, a host of new statutes and regulations go into effect. The laws become effective, and applicable, to any case that is pending a determination, unless the law specifies that the repealed rule remains applicable. Without specific language preserving superseded laws, only the new rule can be applied. In other words, the repealed procedural rules for SPPEs cannot be applied because they no longer exist. Instead, the existing rules are the only procedures for SPPEs. "It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287.) "Absent an express declaration of retrospectivity or other clear indication that the Legislature intended retrospective application, a new statute is presumed to operate prospectively." (*Brenton v. Metabolife Intl., Inc.* (2004) 116 Cal.App.4th 679, 688.)

> [A] law addressing the conduct of trials still addresses conduct in the future. This is a principle that courts in this state have consistently recognized. Such a statute "is not made retroactive merely because it draws upon facts existing prior to its enactment.... [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the *procedure to be followed in the future*."

(*Italics* added; *Tapia*, *supra*, 53 Cal.3d 282, at p. 288.) "[H]owever beneficial a statute may be to a particular person or however injuriously the repeal may affect him, the legislature has the right to abrogate it.… The reviewing court

must dispose of the case under the law in force when its decision is rendered." (*Lemon v. Los Angeles Terminal Ry. Co.* (1940) 38 Cal.App.2d 659, 670.) "The legislature may withdraw such a statutory right or remedy, and a repeal of such a statute without a saving clause will terminate all pending actions based thereon." (*Id*. at p. 671.) "[As] a general rule, ... a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute. [Citations.] The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right ... at any time." (*Callet v. Alioto* (1930) 210 Cal. 65, 67–68.)

These cases demonstrate the consistent holding that when a statute is amended or repealed before a final judgment is entered in the pending action, the court will apply the law in force at the time of the decision. (*Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 488–489.)

The rationale that a statute only exists because the legislature adopted it also applies to Commission regulations which exist only because the Commission opted to enact them. Such a quasi-legislative action can be repealed, and no rights persist after such repeal. Prospective application of the new regulations to the remaining steps in the SPPE review process is not only feasible and appropriate, but required as they are the only rules available for staff, the applicant, and the regulated community to follow.

Had the Commission intended, in its SPPE rulemaking, for the evidentiary hearing rules to persist after the effective date of the new regulations, the Commission would not have repealed those rules. Instead, it could have elected to maintain them and made them applicable only to specified matters, i.e., those filed prior to the effective date of the new regulations. The Commission often does this in the context of appliance standards, specifying that new regulations apply only to appliances manufactured after the effective date of the new standard. This retains the applicability of the older standards for appliances manufactured when those standards were the operative rule. The building code also adopts this methodology tying standards to the date of construction of the building.

However, the Commission did not make this choice in the SPPE regulations. Instead, the commission repealed the prior rules. Upon the new SPPE rules becoming effective, former procedural rules no longer exist. As such, only the new rules may be applied. This is consistent with how the legislature changes procedures in civil matters, and simply means that for any matter still pending a final determination, the new rules apply to the remainder of the process.

B. The New SPPE Regulations Are Procedural in Nature and Do Not Impose Additional Substantive Liabilities on Past Conduct.

The courts have broadly distinguished between substantive and procedural statutes to assess whether applying a new statute would have improper retrospective application. The courts have declined to interpret a statute as having retrospective application when doing so would "change the legal consequences of the parties' *past conduct*." (*Italics* added; *Tapia v. Superior Court*, *supra*, 53 Cal.3d at p. 289.)

In *Brenton*, *supra*, the court considered the effect of revisions to an Anti-SLAPP (strategic lawsuit against public participation) statute that became effective after litigation began. The court stated:

> In contrast to changed substantive statutes, applying changed procedural statutes to the conduct of existing litigation, even though the litigation involves an underlying dispute that arose from conduct occurring before the effective date of the new statute, involves no improper retrospective application because the statute addresses conduct in the future. (*Brenton v. Metabolife Internat., Inc.*, *supra*, 116 Cal.App.4th 679, 689.)

Quoting *Tapia v. Superior Court*, *supra*, 53 Cal.3rd at 288, the Brenton court further stated:

> Such a statute "is not made retroactive merely because it draws upon facts existing prior to its enactment.... [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future." [Citations.] For this reason, we have said that "it is a misnomer to designate [such statutes] as having retrospective effect." [Citation.] (*Brenton*, *supra*, 116 Cal.App.4th at p. 689.)

Prior to the regulatory changes at issue here, applicants and intervenors may have anticipated an opportunity to participate in an evidentiary hearing. However, the anticipation of an evidentiary hearing is not equivalent to a vested right or entitlement, and this is especially so for intervenors.

Consistent with longstanding rules of construction, the new SPPE regulations are procedural in nature. They do not alter past events or the past conduct of any party. Instead, these rules change the path an application must follow to complete the CEC review process and be presented to the Commission for approval or denial. Removing procedures from the SPPE process does not implicate any vested substantive right or entitlement. A change of procedure impacting pending matters, and applied to the

remainder of the process of the pending matter, is a prospective application of a rule, and proper under all known authorities.

C. Intervenors Have No Vested Right in Administrative Adjudications.

The relevant laws that address administrative adjudication do not provide a vested right for outside parties to intervene. Such participation is permissive, not an entitlement. (See Gov. Code, §§ 11410.10, 11425.10 and 11440.50; and Cal. Code of Regs., tit. 20, § 1211.7.)

There is no statutory requirement for holding an evidentiary proceeding as part of the CEC's review of an SPPE application and environmental analysis. Public Resources Code section 25541, which created the SPPE, makes no mention of an adjudicatory process. The current SPPE adjudication process is purely a creature of CEC regulations. Thus, the regulations created the adjudication process, and through amending the regulations the adjudication process can be removed.

Government Code section 11425.10 is part of the Administrative Adjudication Bill of Rights and addresses key governing procedures. This section provides that, "The agency shall give *the person to which the agency action is directed* notice and opportunity to be heard…" (*Italics* added; Gov. Code, § 11425.10.) In the case of the current SPPE hearing process, the SPPE applicant is the person to which agency action is directed. Thus, any argument that the evidentiary process must continue past the effective date of the new regulations could only be made by the applicant. Intervenors and members of public have no general adjudicative rights under section 11425.10. No individual rights are affected by this outcome.[1]

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[1]Government Code section 11440.50 governs the process for intervention in adjudicative proceedings. The process only applies, "…if the agency *by regulation* provides that this section is applicable in the proceedings." (*Italics* added; Gov. Code, § 11440.50.) To have a right to intervene, a person must, "state [] facts demonstrating that the applicant's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding or that the applicant qualifies as an intervenor under a statute or regulation…[and] The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention." (*Ibid.*) No intervenor in any pending SPPE proceeding has made such a demonstration, and thus no potential intervenor rights are impacted by the amended regulations being applied prospectively.
The Law Revision Commission's Comments regarding section 11440.50 further explain this qualification requirement for intervenors: "This provision is not intended to permit

While the CEC has not adopted Government Code section 11440.50, it has its own intervention provision set forth in California Code of Regulations, title 20, section 1211.7. The language is permissive. "[T]he presiding member may grant intervention and may impose reasonable conditions on an intervenor's participation, including, but not limited to, ordering intervenors with substantially similar interests to consolidate their participation or limiting an intervenor's participation to specific topics." (Cal. Code Regs., tit. 20, § 1211.7, subd. (c).)

Thus, intervention under the current SPPE adjudicatory process is permissive, and does not create a vested right or entitlement that would be impacted by application of the new regulations. This is especially so given that CEQA provides for ample public engagement and participation and the amendments to the SPPE regulations were accomplished through a public process governed by the Administrative Procedure Act.

D. Past Implementation of Amended Regulations

In 2016, the CEC made extensive revisions to procedural regulations contained in California Code of Regulations, title 20, sections 1200, et seq., and 1700, et seq. These revisions became effective during the pendency of several power plant licensing proceedings. To address and clarify the transition to the new regulations, the CEC issued an order dated January 13, 2016 (TN 207555, Docket 15-OIR-01), confirming prospective application of new procedural regulations to non-final matters. That CEC Order stated, "All existing proceedings are now subject to and shall abide by the updated regulations." The same prospective application of amended SPPE regulations applies to the pending SPPE applications before the CEC.

III. CONCLUSION

For the above-stated reasons, staff concurs with the applicant that upon the effective date of the new regulations, the existing SPPE cases will be subject to those regulations. The repeal of the evidentiary process obviates the need for committees and thus it is proper to dissolve the committee assigned to this proceeding.

Staff recommends under the authority of California Code of Regulations, title 20, sections 1203(c) and 1204(c), the committee refer the proceeding back to the Commission to dissolve the committee.

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intervention by a person such as a victim or interest group whose legal rights are not affected by the proceeding, but to permit intervention only by a person who has a legal right entitled to protection by due process of law that will be substantially impaired by the proceeding." The Comments also note that "...an agency may adopt other intervention rules or may preclude intervention entirely..."