

DOCKETED

Docket Number:	20-SPPE-02
Project Title:	Lafayette Backup Generating Facility
TN #:	248405
Document Title:	Proposed Order for January 25 Business Meeting
Description:	N/A
Filer:	Kristine Banaag
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	1/13/2023 1:34:42 PM
Docketed Date:	1/13/2023

STATE OF CALIFORNIA
STATE ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF:

Lafayette Backup Generating Facility

Docket No.: 20-SPPE-02

**[Proposed] Order Dissolving the
Committee Assigned to the Lafayette
Proceeding and Vacating Committee
Orders and Rulings.**

I. BACKGROUND

On May 20, 2020, Digital Realty Inc. (Applicant) submitted an application to the California Energy Commission (CEC) for a small power plant exemption (SPPE) for the Lafayette Backup Generating Facility (Application).¹

Small Power Plant Exemptions

The CEC has the exclusive authority to consider, and ultimately approve or deny, applications for the construction and operation of thermal power plants that have the capacity to generate 50 megawatts (MW) or more of electricity.² The CEC may grant an exemption to its certification jurisdiction, the SPPE, for thermal powerplants with a generating capacity between 50 and 100 MW.

To grant an SPPE, the CEC must make three distinct determinations:

- the proposed powerplant has a generating capacity up to 100 MW;
- no substantial adverse impact on the environment will result from the construction or operation of the powerplant; and
- no substantial adverse impact on energy resources will result from the construction or operation of the powerplant.³

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. TN numbers refer to the number listed in the left column of CEC dockets. All references to TNs are in this docket unless otherwise noted.

² Pub. Resources Code, §§ 25120, 25500.

³ Pub. Resources Code, § 25541.

The CEC must also make the latter two findings as the “lead agency”⁴ under the California Environmental Quality Act (CEQA).⁵

The grant of an SPPE does not approve the construction or operation of any project but merely grants an exemption from the CEC’s own certification process. If the CEC ultimately decides to grant an SPPE, the project proponent must then secure the appropriate licenses and permits from relevant local, state, and federal agencies.

Proposed Project⁶

The Applicant proposes to construct and operate the Lafayette Data Center, the Lafayette Backup Generating Facility, and related facilities on approximately 15.45 acres located at 2825, 2845, and a portion of 2805, Lafayette Street, Santa Clara, California. The Lafayette Data Center would consist of a single, mostly three-story, 576,120-square-foot building that would house computer servers in a secure and environmentally controlled structure. The Lafayette Backup Generating Facility would consist of one 0.8-megawatt (MW), and 44 3-MW, diesel-fired backup generators, which would supply up to 99.8 MW, exclusively to the Lafayette Data Center.

CEQA requires the CEC to consider the “whole of an action.”⁷ Therefore, the CEC will include all components of the Lafayette Data Center, the Lafayette Backup Generating Facility, and other related features and activities (collectively the Project), in its environmental analysis.

Status of the Lafayette Proceeding

On July 8, 2020, the CEC appointed a committee to preside over the proceeding arising from the Application (Committee).⁸ On September 4, 2020, the Committee held a committee conference,⁹ and subsequently issued a Scheduling Order on October 26, 2020,¹⁰ and a Revised Scheduling Order on May 10, 2021.¹¹

On August 4, 2021, CEC staff (Staff) filed a notice of preparation of an Environmental Impact Report (EIR).¹² On January 11, 2022, the Committee granted intervenor status to Robert Sarvey (Sarvey).¹³ On December 9, 2022, Staff reported that it would

⁴ Pub. Resources Code, § 25519(c).

⁵ The CEQA statutes, California Public Resources Code section 21000 *et seq.*; and CEQA Guidelines, California Code of Regulations, title 14, section 15000 *et seq.* (Guidelines), detail the protocol by which state and local agencies comply with CEQA requirements. We refer to the statutes and the Guidelines collectively as “CEQA.”

⁶ The information in this section is taken from the Application, TN 233041-1 as revised in TN 238299.

⁷ Cal. Code Regs., tit. 14, § 15378, subd. (a) (under CEQA, “project” means the whole of an action).

⁸ See TN 233902, as amended by TN 242446. The current Committee consists of Kourtney Vaccaro, Commissioner and Presiding Member, and David Hochschild, Chair and Associate Member (TN 242446).

⁹ See TN 234688.

¹⁰ See TN 235419.

¹¹ See TN 237772.

¹² See TN 239177.

¹³ See TN 241143; see Cal. Code Regs., tit. 20, § 1211.7.

evaluate whether it has the information necessary to complete a draft EIR after receiving information anticipated from Applicant.¹⁴ Applicant provided the information on December 21, 2022.¹⁵ Staff has historically published a draft EIR within approximately 60 days following a determination that it has no further data requests.¹⁶

Amendments to the SPPE Regulations

On July 14, 2022, the CEC published notice that it proposed to adopt amendments to its process, procedure, and siting regulations governing SPPE proceedings contained in Title 20, California Code of Regulations, Sections 1900, et seq.¹⁷ On October 12, 2022, the Commission adopted the proposed amendments governing SPPE proceedings,¹⁸ thereby removing the adjudicatory process applying to SPPEs, while maintaining the requirements for environmental review and public participation under CEQA.¹⁹ On December 14, 2022, the Office of Administrative Law approved the regulations and submitted them to the Secretary of State for publication with an effective date of December 14, 2022 (the Amended SPPE Regulations).²⁰

Applicant's Motion to Dissolve the Committee and Staff's Response

On December 12, 2022, Applicant filed a motion seeking to dissolve the Committee on the grounds that the Committee is no longer necessary under the Amended SPPE Regulations which, upon their effective date, eliminated the adjudicatory process for this proceeding (Applicant's Motion).²¹ In support of its motion, Applicant stated that under well settled case law, amendments to laws governing procedural matters apply immediately upon their effective dates to all proceedings unless the law expressly states otherwise.²² Applicant noted that here, the Amended SPPE Regulations govern the administrative procedure by which the CEC considers applications for SPPEs, and do not include any language restricting their applicability to only applications filed after their enactment.²³ Thus, Applicant contends the Amended Regulations immediately apply to the Lafayette proceeding.²⁴

Applicant points out that the Amended Regulations eliminated the entire SPPE process administered by the Committee, including evidentiary filings and hearings, legal briefing,

¹⁴ See TN 248002.

¹⁵ See TN 248195.

¹⁶ See TN 237772, p. 4.

¹⁷ See TN 244070, pp. 1, 4, in [docket 21-OIR-04](#) at:

<https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=21-OIR-04>. TN numbers refer to the number listed in the left column of CEC dockets.

¹⁸ See TN 246550, in [docket 21-OIR-04](#), *supra*.

¹⁹ See TN 244070, at p. 1, in [docket 21-OIR-04](#), *supra*.

²⁰ See Cal. Code Regs., tit. 20, §§ 1934-1947; TN 248156.

²¹ See TN 248014.

²² See TN 248014, pp. 1-2 (citing *Brenton v Metabolite Intl., Inc. (Brenton)* (2004) 116 Cal.App.4th 679, 689; *ARA Living Centers-Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1561; *Tapia v. Superior Court* (1991) 53 Cal.3d 282; and *Moore v. State Bd. of Control* (2003) 112 Cal.App.4th 371.)

²³ See TN 248014, pp. 1-2.

²⁴ See TN 248014, p. 2.

and the preparation of a proposed decision. Thus, Applicant contends that because the amendments eliminated the requirement and need for a Committee, the Committee should be dissolved.²⁵

Staff filed a response to Applicant's Motion on December 16, 2022, agreeing with Applicant that the Amended SPPE Regulations apply to this proceeding, thereby eliminating the adjudicatory process, and that the Committee is no longer needed and thus should be dissolved.²⁶ Staff elaborates further, noting that applying updated procedural laws, like the Amended SPPE Regulations, to an existing proceeding would not improperly retroactively change the legal consequences of parties' past conduct. Staff notes that the SPPE regulations are procedural in nature, they do not alter past events or conduct of any party but instead change the path that an application must follow to complete the CEC review process and be presented to the Commission for approval or denial.²⁷ Staff contends that applicants and intervenors in SPPE proceedings do not have vested rights or entitlements to the repealed procedure²⁸ or to administrative adjudication otherwise.²⁹ Staff states that upon dissolution of the Committee, Staff would conduct the remaining steps necessary under the Amended SPPE Regulations leading to, and including, providing a recommendation to the Commission for consideration of whether to grant the SPPE.³⁰

No further response to Applicant's Motion was filed within the time allowed to respond.³¹ However, on December 27, 2022, in a separate docket, Mr. Sarvey filed a comment letter regarding the CEC's adoption of the Amended SPPE Regulations at the October 12, 2022, business meeting.³² In his comment letter, Mr. Sarvey asked whether he will remain an intervenor in the Lafayette proceeding under the Amended SPPE Regulations. Mr. Sarvey also expressed concern about elimination of the intervenor role.³³

On January 5, 2023, the Committee referred Applicant's Motion to the full Commission for consideration, and the Committee extended the time for the CEC to rule on Applicant's motion to February 8, 2023, to allow the CEC to consider it at the CEC's next business meeting.³⁴

²⁵ See TN 248014, pp. 1-2.

²⁶ See TN 248134, pp. 2, 6.

²⁷ See TN 248134, pp. 3-5 (citing, among other things, *Brenton*, *supra*, 116 Cal.App.4th at 689).

²⁸ See TN 248134, pp. 2-4.

²⁹ See TN 248134, pp. 5-6.

³⁰ See TN 248134, p. 2.

³¹ See Cal. Code Regs., tit. 20, § 1211.5(a).

³² See TN 248238, filed in [docket 22-BUSMTG-01](#) at:

<https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=22-BUSMTG-01>. TN numbers refer to the number listed in the left column of CEC dockets.

³³ See TN 248238, filed in [docket 22-BUSMTG-01](#), *supra*.

³⁴ See TN 248327.

II. DISCUSSION

The Amended SPPE Regulations Apply to the Lafayette Proceeding

Staff and Applicant cited various cases representing the law relevant to our determination of Applicant's Motion.³⁵ For example, Staff noted the holding in *Beckman* that, when a statute is amended or repealed before a final judgment is entered in a pending action, a court will apply the law in force at the time of the decision.³⁶ Additionally, Staff cited *Brenton*, which holds that the current law applies even if the underlying dispute arose from conduct occurring before the current law took effect, when doing so would not change the legal consequences of the parties' past conduct.³⁷ Further, Staff notes that in *Brenton*, the court held the new law applied even though the underlying litigation had already commenced.³⁸ We agree that that the parties have cited the relevant authority that controls our determination of Applicant's Motion.

Thus, the law that is applicable to a proceeding is the law that is in effect at the time, even if the proceeding involves an underlying dispute that arose from conduct occurring before the effective date of the law, so long as the law does not "impose new, additional or different liabilities based on past conduct."³⁹

Here, the Amended SPPE Regulations took effect on December 14, 2022, eliminating the adjudicatory process for all SPPE proceedings.⁴⁰ They do not impose any "new, additional or different liabilities based on past conduct,"⁴¹ but rather establish the procedure by which the CEC will prospectively determine whether a developer has met the statutory requirements to grant an SPPE.⁴² It makes no difference that the Lafayette proceeding commenced before the Amended SPPE Regulations took effect.⁴³ Thus, the Amended SPPE Regulations properly apply to the Lafayette proceeding.

The Committee's Role and Its Orders and Rulings

The CEC is authorized to withdraw any matter from a committee, at any time, to allow the full Commission to consider the matter.⁴⁴

Here, the Amended SPPE Regulations eliminated the adjudicatory process for all SPPE proceedings. The Committee is no longer necessary to, among other things, mediate among parties, conduct proceedings and evidentiary hearings, prepare a committee

³⁵ See TN 248014, fn.1 (Applicant's Motion); TN 248134, pp. 2-5 (Staff's response).

³⁶ See TN 248134, p. 3 (citing *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 488–489).

³⁷ See TN 248134, p. 4 (citing *Brenton, supra*, 116 Cal.App.4th at 688).

³⁸ See TN 248134, p. 4 (citing *Brenton, supra*, 116 Cal.App.4th at 688).

³⁹ *Brenton, supra*, 116 Cal.App.4th at 688-689, 691.

⁴⁰ See Cal. Code Regs., tit. 20, §§ 1934-1947; TN 248156.

⁴¹ See *Brenton, supra*, 116 Cal.App.4th at 688.

⁴² See Cal. Code Regs., tit. 20, §§ 1934-1947; TN 248156.

⁴³ See *Brenton, supra*, 116 Cal.App.4th at 691 (applying amended law to litigation that already commenced).

⁴⁴ Cal. Code Regs., tit. 20, § 1204(c).

proposed decisions, or establish and modify deadlines. As Staff notes,⁴⁵ under the Amended SPPE Regulations, Staff can conduct the remaining steps necessary leading to and including providing a recommendation to the full Commission for consideration of whether to grant the SPPE. Because the Committee's role is not necessary, the Committee is dissolved.

The Committee's orders and rulings were issued to govern the conduct and responsibilities of parties in the former adjudicative framework. The Committee's general order,⁴⁶ scheduling orders,⁴⁷ and other orders, are no longer necessary because the Amended SPPE Regulations eliminated the adjudicatory framework, and with it, eliminated the necessity to coordinate among the roles of the Committee and the separate parties. The ruling granting intervenor status to Mr. Sarvey is no longer applicable because under the Amended SPPE Regulations, there is no role for an intervenor beyond that of a general member of the public. Because the Committee's orders and rulings are no longer necessary, all existing and ongoing Committee orders and rulings are vacated.

Dissolving the Committee and vacating its orders will not diminish the CEC's review of the Lafayette SPPE application. The CEC will remain the lead agency for the Project under the Warren-Alquist Act and CEQA; will prepare the appropriate environmental document; and thereafter will consider whether to grant an SPPE for the Project.

Robert Sarvey's Comments

Mr. Sarvey inquired whether he will remain an intervenor in the Lafayette proceeding.⁴⁸ The former order of the Committee that granted his intervenor status in the Lafayette proceeding is vacated, Mr. Sarvey is no longer an intervenor.

Concerning Mr. Sarvey's question regarding loss of the intervenor role,⁴⁹ opportunities for public participation and input will exist pursuant to CEQA. CEQA provides a process for obtaining information from the public and other interested parties and the public may comment on the need for additional information or propose mitigation to address issues through public comment on CEC's environmental review documents. Furthermore, in the case of an SPPE, there exists an additional opportunity for the public to participate in a proceeding because granting of an SPPE does not approve the project, but instead moves the decision whether to approve the project to a local jurisdiction for further consideration. Thus, if an SPPE is granted, interested persons may participate in the local process.⁵⁰

⁴⁵ See TN 248134, p. 2.

⁴⁶ See TN 234298.

⁴⁷ See TN 237772, TN 235419.

⁴⁸ See TN 248238, filed in [docket 22-BUSMTG-01](#), *supra*.

⁴⁹ See TN 248238, filed in [docket 22-BUSMTG-01](#), *supra*.

⁵⁰ See TN 248284, pp. 3, 5-7, italics added, in [docket 21-OIR-04](#), *supra*.

III. CEC FINDINGS

1. As of their effective date of December 14, 2022, all existing SPPE proceedings, including the Lafayette proceeding, were subject to and must abide by the Amended SPPE Regulations.
2. The December 14, 2022, Amended SPPE Regulations eliminated the adjudicatory process for this proceeding.
3. The services of the Committee appointed to preside over the Lafayette proceeding are no longer required or necessary.
4. The Committee's orders and rulings are no longer required or necessary.

IV. CONCLUSION AND ORDER

1. Applicant's Motion is hereby granted.
2. The CEC hereby withdraws the Lafayette proceeding from the Committee, and the Committee is hereby dissolved. The orders establishing the Committee⁵¹ and Amending Committee Assignments⁵² are hereby vacated.
3. All ongoing orders and rulings of the Committee, including the following, are hereby vacated:
 - General Orders Regarding Motions, Electronic Filing, Service of Documents, And Other Matters⁵³
 - Notice of Committee Conference and Related Orders⁵⁴
 - Committee Scheduling Order⁵⁵
 - Order Directing Parties to File Monthly Status Reports⁵⁶
 - Order Granting Staff's Motion for Scheduling Order Modification and Revised Scheduling Order⁵⁷
 - Ruling on Staff's Motion Regarding Intervention⁵⁸

⁵¹ See TN 233902.

⁵² See TN 242446.

⁵³ See TN 234298.

⁵⁴ See TN 234498.

⁵⁵ See TN 237772.

⁵⁶ See TN 236110.

⁵⁷ See TN 237772.

⁵⁸ See TN 240416.

- Ruling on Petition to Intervene Filed by Robert Sarvey⁵⁹
4. Staff is directed to process the Application in accordance with the current SPPE regulations.

IT IS SO ORDERED.

⁵⁹ See TN 241143.

CERTIFICATION

The undersigned Secretariat to the CEC does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the CEC held on MM DD, YYYY.

AYE:

NAY:

ABSENT:

ABSTAIN:

Dated:

Liza Lopez
Secretariat