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**State of California
State Energy Resources Conservation and
Development Commission**

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**APPLICATION FOR SMALL POWER PLANT
EXEMPTION FOR THE:**

***WALSH BACKUP GENERATING
FACILITY***

Docket No. 19-SPPE-02

**NOTICE OF OPPORTUNITY TO FILE STATEMENTS OF CONCERN
REGARDING JON HILLIARD SERVING AS AN ADMINISTRATIVE
ASSISTANT ON THIS CASE**

Please take notice that the Committee seeks to enlist the aid of California Energy Commission (CEC) employee Jon Hilliard in the Committee's administrative management of this proceeding. Specifically, the Committee wishes Mr. Hilliard to perform the following discrete tasks:

- Develop and implement project management tools to assist the Committee and Hearing Officer in setting and meeting internal and external milestones.
- Facilitate timely preparation and internal review of notices, orders, rulings, and decisions prepared by the Committee or on its behalf.
- Verify the accuracy of citations, references, figures, tables, charts, and such in Committee notices, orders, rulings, and decisions.

Performance of these tasks will require Mr. Hilliard to leave his current position in the CEC as the supervisor of the Biological Resources Unit in the Environmental Protection Office (EPO) of the CEC's Siting, Transmission and Environmental Protection (STEP) Division.

Mr. Hilliard will not provide the Committee members and their advisors, or the Hearing Officer, with substantive advice, guidance, input, or assistance on any matters other than those listed above. By so limiting Mr. Hilliard's communications with and actions regarding the Committee members, their advisors, and the Hearing Officer, the

Committee believes Mr. Hilliard's participation in this proceeding will be compliant with the Administrative Procedure Act Administrative Adjudication Bill of Rights¹ and related fair process rules, including Public Resources Code section 25513.3.

Specifically, the Bill of Rights states that:

While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.²

The Administrative Procedure Act provides two exceptions to this rule. The first applies to agency employees and allows either of the following:

- a communication for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage;³ and
- a communication for the purpose of providing advice to a presiding officer concerning a technical issue in the proceeding when the advice is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.⁴

The second exception is more general and states that a communication otherwise prohibited by section 11430.10 is permissible if the communication concerns a matter of procedure or practice, including a request for a continuance, that is not in controversy.⁵

The Bill of Rights also requires a state agency's adjudicative function to be separated from the investigative, prosecutorial, and advocacy functions within the agency.

¹ The Bill of Rights applies to this proceeding as a result of a CEC regulation that states in pertinent part: "Except as otherwise specified in these regulations or by other applicable law, in an adjudicative proceeding the presiding member may regulate the proceedings, and any parts thereof, in any manner that complies with the Administrative Adjudication Bill of Rights in section 11425.10 of the Government Code." (Cal. Code Regs., tit. 20, §1210.) The Bill of Rights is found at Government Code sections 11425.10 - 11425.60.

² Govt. Code § 11430.10, subd (a). All future citations are to the Government Code unless otherwise stated.

³ § 11430.30, subd. (a).

⁴ § 11430.30, subd. (c).

⁵ § 11430.20, subd. (b).

Accordingly, a person may not serve as presiding officer in an adjudicative proceeding if:

- (1) The person has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage.
- (2) The person is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage.⁶

Law Revision Commentary provides important assistance in understanding what the Legislature meant by the phrase “served as an investigator, prosecutor, or advocate”:

Under this provision, a person has “served” in any of the capacities mentioned if the person has *personally carried out the function, and not merely supervised or been organizationally connected with a person who has personally carried out the function.* . . . The limitation is intended to apply to *substantial involvement in a case by a person, and not merely marginal or trivial participation.* The sort of participation intended to be disqualifying is *meaningful participation that is likely to affect an individual with a commitment to a particular result in the case.* . . .

* * *

For this reason also, a staff member who plays a *meaningful but neutral role* without becoming an adversary would not be barred. . . ⁷

The Warren-Alquist Act provides further guidance on this issue by allowing an exception to this separation of function rule when a year or more has passed since the person served as an investigator or advocate.⁸

Based on this guidance, Mr. Hilliard’s work generally in the Biological Resources Unit would likely not qualify him as an advocate, investigator, or prosecutor. For the past five years, Mr. Hilliard has been responsible for coordinating his Unit’s review of powerplant certification and exemption applications submitted for consideration and administrative adjudication. His responsibilities regarding biological resources have included but not been limited to (1) reviewing and approving CEC staff’s data requests, environmental

⁶ § 11425.30, subd. (a).

⁷ Cal. Law Revision Comm’n Reports 55 (1995) at 166-167, italics added

⁸ Pub. Resources Code § 25513.3.

analyses, and hearing testimony; of biological resources issues, (2) evaluating applicants' environmental impact analyses; (3) ensuring quality control and consistency across application proceedings, and (4) conferring with other units within the EPO and with other offices within the STEP Division on pending powerplant applications.

However, with respect to *this* proceeding, the Committee is informed and believes that Mr. Hilliard has arguably served as advocate. In his role as the Biological Resources Unit supervisor, he was directly involved in reviewing, editing, and approving the biological resources sections of CEC staff's data requests, Issues Identification Report, and Initial Study and Proposed Mitigated Negative Declaration. These proceeding-specific tasks were undertaken to fulfill CEC staff's obligation to serve as a party in and prepare environmental analyses for administrative adjudication of the pending application for a small powerplant exemption.

Thus, it appears that Mr. Hilliard has arguably served as an advocate in this proceeding. As a result, the Committee is imposing the following restrictions on his activities. With respect to *ex parte* restrictions, he may only communicate to the committee on matters of process and procedure that are not in controversy and is limited to performing the above-listed discrete tasks. With respect to separation of functions, he may not serve as a technical or substantive advisor to the Committee and may perform only the above-listed discrete tasks.

Party Statement of Concern

Any party who believes that Mr. Hilliard is prohibited by law from performing the above-identified tasks may file a Statement of Concern. Any such Statement must be filed with the docket for this case **no later than 3:00 p.m. on June 19, 2020**. The Statement must identify the specific provisions of law that would be violated as well as specific, particular facts that are known or reasonably believed to be true by the filer that would justify a conclusion that Mr. Hilliard's performance of the above-identified tasks in this proceeding would violate applicable law. The Committee will respond to any such Statements, and Mr. Hilliard will not perform the above-identified tasks prior to the Committee issuing a response.

Questions of a legal or procedural nature should be directed to [Susan Cochran, Hearing Officer](#), at susan.cochran@energy.ca.gov or (916) 654-3965. Information concerning the status of the project, as well as notices and other relevant documents, may be viewed on the [CEC's web page for the Walsh proceeding](#) at:

<https://ww2.energy.ca.gov/sitingcases/walsh/>

You may also subscribe to receive e-mail notification of all notices on this page.

Dated June 12, 2020

Dated June 14, 2020

APPROVED BY:

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

APPROVED BY:

Patty Monahan
Commissioner and Associate Member
Walsh Backup Generating Facility SPPE
Committee