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August 29, 2022

California Energy Commission  
Docket Unit  
Docket No. 21-OIR-04  
715 P Street, MS-4  
Sacramento, CA 95814

Re: **Proposed Amendments to the Small Power Plant Exemption Regulations, Cal. Code Regs., tit. 20, §§ 1934-1948, Appendix B, and Appendix F**

Dear Commissioners:

California Unions for Reliable Energy (CURE) submits these comments on the California Energy Commission's (Commission) proposed amendments to regulations governing small power plant exemption (SPPE) proceedings, codified at Cal. Code Regs., tit. 20, §§ 1934-1948, Appendix B, and Appendix F.

## I. INTRODUCTION

The Commission proposes to eliminate the adjudicatory process for SPPEs, including eliminating (1) committees, (2) evidentiary hearings, (3) designation of parties, and (4) discovery by non-Commission staff. Instead, Commission staff would receive a more detailed SPPE application, perform an environmental review of the proposed project consistent with procedures required by the California Environmental Quality Act,<sup>1</sup> and make a recommendation to the Commission as to whether a proposed project meets Public Resources Code § 25541. SPPEs applications would be subject to the same informational requirements as applications for certification (AFCs).

CURE generally supports the proposed improvements to the informational requirements for SPPE and AFC applications to better align with current CEQA standards. However, removing the adjudicatory process from SPPE proceedings would significantly limit public participation in the process and consequently,

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<sup>1</sup> Pub. Resources Code § 21000 et seq.

diminish the quality of environmental impact analysis and mitigation measures for qualifying projects. The Commission should keep the adjudicatory process for SPPE proceedings.

## **II. DISCUSSION**

### **A. Eliminating the Adjudicative Process Will Limit Public Participation and Diminish the Quality of the Environmental Impact Analysis and Mitigation Measures**

While the existing process and procedures set forth in CEQA and its implementing guidelines afford the public an opportunity to make contributions, it is not as robust as the existing adjudicatory process for SPPE proceedings. Public participation in CEQA primarily consists of two types of input: scoping (providing input on the range of environmental issues to be addressed in the CEQA document), and review and comment (comments to the lead agency on the adequacy of the draft CEQA document before it is certified). While CEQA mandates that agencies make all documents referenced in an environmental review document available to the public during a public comment period,<sup>2</sup> CEQA contains no means for the public to engage in targeted discovery.

Under the current SPPE regulations, any party may obtain information necessary to complete an analysis of the application by following the requirements of section 1716.<sup>3</sup> Section 1716(b) gives any party the right to request from the applicant any information reasonably available to the applicant which is relevant to the proceedings or reasonably necessary to make any decision on the application.<sup>4</sup> The Commission's discovery procedures require the applicant to provide a response to the data request if the information sought appears to be reasonably available, relevant, or necessary for the Commission to reach any decision in the proceeding.<sup>5</sup> By removing the ability for parties to obtain relevant information directly from the applicant, members of the public are at an information disadvantage. Public access to relevant data that may not have been expressly relied upon in a CEQA document can aid the public's analysis of potentially significant environmental impacts and

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<sup>2</sup> Pub. Resources Code § 21092(b)(1); Cal. Code Regs., tit. 14, § 15087(c)(5).

<sup>3</sup> Cal. Code Regs., tit. 20, § 1941.

<sup>4</sup> Cal. Code Regs., tit. 20, § 1716.

<sup>5</sup> Docket No. 99-AFC-03, Committee Ruling RE: CVRP Petition to Compel Production of Documents (Nov. 1, 2000) p. 1.

development of feasible mitigation measures for significant adverse direct, indirect, and cumulative impacts of the project.

Moreover, the adjudicatory process affords parties the opportunity to provide testimony under oath, present evidence and witnesses, and the ability to cross examine other witnesses. As a regular intervenor in power plant siting proceedings, CURE can attest that these tools lead to improved impact analyses and mitigation measures. For example, in the Elk Hills Power Project proceeding, the Commission relied on the applicant's responses to CURE's data requests for the staff assessment.<sup>6</sup> Information obtained by CURE through discovery in that proceeding also led to improved mitigation measures, such as a requirement to switch from using anhydrous ammonia to using aqueous ammonia, which poses less environmental and public health risks to communities along transportation routes.

The significant benefits of the adjudicatory process, including improved environmental analyses and mitigation measures, outweigh any perceived delays. The Commission should keep the adjudicatory process for SPPE proceedings.

### **B. The Commission Should Reaffirm that SPPE Applications Do Not Fall Within the Scope of the Commission's Certified Regulatory Program**

The Commission's power plant site certification program is a certified regulatory program; however, the regulations do not expressly exclude SPPE proceedings.<sup>7</sup> When the Commission revised the SPPE regulations in 2018, it added subsection (c) to section 1936, mandating that "[t]he review of the application for exemption shall follow the requirements of the California Environmental Quality Act (Public Resources Code Sections 21000 et seq.) and the state CEQA Guidelines (California Code of Regulations Title 14, Chapter 3)."<sup>8</sup> The Commission explained: "Subsection (c) was added to ensure the reader understands that the small power plant exemption process is not part of the commission's certified regulatory program."<sup>9</sup>

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<sup>6</sup> Docket 99-AFC-01, Final Staff Assessment: Elk Hills Power Project (Part 1 of 3) (Jan. 2000) p. 316.

<sup>7</sup> 14 C.C.R. § 15251(j).

<sup>8</sup> California Energy Commission, Initial Statement of Reasons: 2018 Draft Regulations (May 25, 2018) p. 39, *available at* <https://efiling.energy.ca.gov/GetDocument.aspx?tn=223582&DocumentContentId=53669>.

<sup>9</sup> *Ibid.*

August 29, 2022

Page 4

Although the Commission does not propose any modifications to section 1936(c), the initial statement of reasons does not affirmatively state that SPPE proceedings continue to be excluded from the Commission's certified regulatory program. The Commission should reaffirm this statement as part of its rationale for retaining subsection (c).

### III. CONCLUSION

CURE strongly recommends that the Commission maintain the adjudicatory process for SPPE proceedings. Thank you for the opportunity to provide these comments.

Sincerely,



Andrew J. Graf

AJG:acp