

STATE OF CALIFORNIA  
STATE ENERGY RESOURCES  
CONSERVATION AND DEVELOPMENT COMMISSION

**IN THE MATTER OF:**

***STACK Backup Generating Facility***

**Docket No.: 21-SPPE-02**

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

**I. BACKGROUND**

On December 10, 2021, STACK Infrastructure (Applicant) submitted an application to the California Energy Commission (CEC) for a small power plant exemption (SPPE) for the SVY Backup Generating Facility (Application).<sup>1</sup>

***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.<sup>2</sup> 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

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<sup>1</sup> Information about this proceeding, including a link to the electronic docket, may be found on the CEC's [web page](https://www.energy.ca.gov/powerplant/tradezonepark) at <https://www.energy.ca.gov/powerplant/tradezonepark>. Documents related to this proceeding may be found in the [online docket](https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=21-SPPE-02) at <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=21-SPPE-02>. The Application consists of various documents filed in the online docket beginning with TN 240910. TN numbers refer to the number listed in the left column of CEC dockets. All references to TN numbers are in this docket unless otherwise noted.

<sup>2</sup> Pub. Resources Code, §§ 25120, 25500.

- no substantial adverse impact on energy resources will result from the construction or operation of the powerplant.<sup>3</sup>

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

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 Project***<sup>6</sup>

The Applicant proposes to construct and operate the Trade Zone Boulevard Technology Park on two adjacent parcels encompassing approximately 9.8 acres located at 2400 Ringwood Avenue and 1849 Fortune Drive in San Jose, Santa Clara County, California. With the development of the Trade Zone Boulevard Technology Park, Applicant proposes to construct and operate the SVY Data Center, the SVY Backup Generating Facility, an advanced manufacturing building, a parking garage, and related facilities. The SVY Data Center would consist of two three-story buildings totaling approximately 526,800 square feet, which would provide secure and environmentally controlled structures to house computer servers. The SVY Backup Generating Facility would consist of 36 3-megawatt (MW) and 3 1-MW diesel-fired backup generators, which would supply up to 90 MW, exclusively to the SVY Data Center. The advanced manufacturing building would be a four-story building of approximately 136,573 square feet of light industrial and ancillary support uses. The parking garage would be five levels totaling 174,751 square feet, located onsite, and would provide a total of approximately 339 parking spaces.

CEQA requires the CEC to consider the “whole of an action.”<sup>7</sup> Therefore, the CEC will include all components of the Trade Zone Boulevard Technology Park, and other related features and activities (collectively the Project), in its environmental analysis.

### ***Status of the STACK Proceeding***

On May 11, 2022, the CEC appointed a committee to preside over the proceeding arising from the Application (Committee).<sup>8</sup> On August 2, 2022, the Committee held a

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<sup>3</sup> Pub. Resources Code, § 25541.

<sup>4</sup> Pub. Resources Code, § 25519(c).

<sup>5</sup> 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.”

<sup>6</sup> The information in this section is taken from the Application, TN 240910, as amended by TN 246142.

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

<sup>8</sup> The Committee consists of Andrew McAllister, Commissioner and Presiding Member, and Kourtney Vaccaro, Commissioner and Associate Member (TN 243043).

committee conference,<sup>9</sup> and subsequently issued a scheduling order on September 15, 2022.<sup>10</sup> On November 28, 2022, Staff filed a status report indicating Staff anticipates publishing a draft Environmental Impact Report (EIR) by January 27, 2023.<sup>11</sup>

### ***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.<sup>12</sup> On October 12, 2022, the Commission adopted the proposed amendments governing SPPE proceedings,<sup>13</sup> thereby removing the adjudicatory process applying to SPPEs, while maintaining the requirements for environmental review and public participation under CEQA.<sup>14</sup> 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).<sup>15</sup>

### ***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).<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> Thus, Applicant contends the Amended Regulations immediately apply to the STACK proceeding.<sup>19</sup>

Applicant points out that the Amended Regulations eliminated the entire SPPE process administered by the Committee, including evidentiary filings and hearings, legal briefing, and the preparation of a proposed decision. Thus, Applicant contends that because the

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<sup>9</sup> See TN 245069.

<sup>10</sup> See TN 246119.

<sup>11</sup> See TN 247725.

<sup>12</sup> 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.

<sup>13</sup> TN 246550, in [docket 21-OIR-04](#), *supra*.

<sup>14</sup> See TN 244070, at p. 1, in [docket 21-OIR-04](#), *supra*.

<sup>15</sup> See Cal. Code Regs., tit. 20, §§ 1934-1947; TN 248157.

<sup>16</sup> See TN 248015.

<sup>17</sup> See TN 248015, 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.)

<sup>18</sup> See TN 248015, pp. 1-2.

<sup>19</sup> See TN 248015, p. 2.

amendments eliminated the requirement and need for a Committee, the Committee should be dissolved.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup> Staff contends that applicants and intervenors in SPPE proceedings do not have vested rights or entitlements to the repealed procedure<sup>23</sup> or to administrative adjudication otherwise.<sup>24</sup> 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.<sup>25</sup> No further response to Applicant's Motion was filed within the time allowed to respond.<sup>26</sup>

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.<sup>27</sup>

## II. DISCUSSION

### ***The Amended SPPE Regulations Apply to the STACK Proceeding***

Staff and Applicant cited various cases representing the law relevant to our determination of Applicant's Motion.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

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<sup>20</sup> See TN 248015, pp. 1-2.

<sup>21</sup> See TN 248135, pp. 2, 6.

<sup>22</sup> See TN 248135, pp. 3-5 (citing, among other things, *Brenton*, *supra*, 116 Cal.App.4th at 689).

<sup>23</sup> See TN 248135, pp. 2-4.

<sup>24</sup> See TN 248135, pp. 5-6.

<sup>25</sup> See TN 248135, p. 2.

<sup>26</sup> See Cal. Code Regs., tit. 20, § 1211.5(a).

<sup>27</sup> See TN 248328.

<sup>28</sup> See TN 248015, fn.1 (Applicant's Motion); TN 248135, pp. 2-5 (Staff's response).

<sup>29</sup> See TN 248135, p. 3 (citing *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 488-489).

<sup>30</sup> See TN 248135, p. 4 (citing *Brenton*, *supra*, 116 Cal.App.4th at 688).

Further, Staff notes that in *Brenton*, the court held the new law applied even though the underlying litigation had already commenced.<sup>31</sup> 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."<sup>32</sup>

Here, the Amended SPPE Regulations took effect on December 14, 2022, eliminating the adjudicatory process for all SPPE proceedings.<sup>33</sup> They do not impose any "new, additional or different liabilities based on past conduct,"<sup>34</sup> but rather establish the procedure by which the CEC will prospectively determine whether a developer has met the statutory requirements to grant an SPPE.<sup>35</sup> It makes no difference that the STACK proceeding commenced before the Amended SPPE Regulations took effect.<sup>36</sup> Thus, the Amended SPPE Regulations properly apply to the STACK 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.<sup>37</sup>

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 proposed decisions, or establish and modify deadlines. As Staff notes,<sup>38</sup> 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,<sup>39</sup> scheduling order,<sup>40</sup> and other orders and rulings, 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

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<sup>31</sup> See TN 248135, p. 4 (citing *Brenton*, *supra*, 116 Cal.App.4th at 688).

<sup>32</sup> *Brenton*, *supra*, 116 Cal.App.4th at 688-689, 691.

<sup>33</sup> See Cal. Code Regs., tit. 20, §§ 1934-1947; TN 248157.

<sup>34</sup> See *Brenton*, *supra*, 116 Cal.App.4th at 688.

<sup>35</sup> See Cal. Code Regs., tit. 20, §§ 1934-1947; TN 248157.

<sup>36</sup> See *Brenton*, *supra*, 116 Cal.App.4th at 691 (applying amended law to litigation that already commenced).

<sup>37</sup> Cal. Code Regs., tit. 20, § 1204(c).

<sup>38</sup> See TN 248135, p. 2.

<sup>39</sup> See TN 244085.

<sup>40</sup> See TN 246119.

Committee and the separate parties. 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 STACK 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.

### **III. CEC FINDINGS**

1. As of their effective date of December 14, 2022, all existing SPPE proceedings, including the STACK 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 STACK 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 STACK proceeding from the Committee, and the Committee is hereby dissolved. The order establishing the Committee<sup>41</sup> is 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 Matters<sup>42</sup>
  - Notice of Committee Conference and Related Orders<sup>43</sup>
  - Committee Scheduling Order and Order Requesting Supplemental Information<sup>44</sup>

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<sup>41</sup> See TN 243043.

<sup>42</sup> See TN 244085.

<sup>43</sup> See TN 244081.

<sup>44</sup> See TN 246119.

- Order Vacating Request for Supplemental Info Regarding Water Supply Assessment<sup>45</sup>
4. Staff is directed to process the Application in accordance with the current SPPE regulations.

**IT IS SO ORDERED.**

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<sup>45</sup> TN 246200.

**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 January 25, 2023.

AYE:

NAY:

ABSENT:

ABSTAIN:

Dated:

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Liza Lopez  
Secretariat