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Before the Energy Resources Conservation and Development
Commission of the State of California
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IN THE MATTER OF:

Docket No. 19-SPPE-01

LAURELWOOD DATA CENTER

STAFF'S PREHEARING CONFERENCE STATEMENT, LISTS OF EXHIBITS AND WITNESSES, AND REQUEST FOR CLARIFICATION ON THE COMMITTEE'S OCTOBER 17, 2019 ORDER

I. STAFF'S PREHEARING CONFERENCE STATEMENT AND LISTS OF EXHIBITS AND WITNESSES

On October 10, 2019, the Committee for the Laurelwood Data Center Small Power Plant Exemption filed a *Notice of Prehearing Conference, Evidentiary Hearing, Scheduling Order, and Further Orders* (Order). This document set October 21, 2019 as the deadline for CEC Staff (Staff) to file a Prehearing Conference Statement, including evidence lists and witness lists, in accordance with specific guidance outlined in that Order. However, the Committee suspended this deadline in an order issued October 14, 2019 and subsequently set October 25, 2019 as the deadline for Staff to file a Prehearing Conference Statement in accordance with the instructions in its October 10 Order. Staff now files its Prehearing Conference Statement and offers lists of exhibits and witnesses in accordance with the Committee's orders.

1. The subject areas that are complete and ready to proceed to Evidentiary Hearing.

All subject areas are complete and ready to proceed to the Evidentiary Hearing.

2. The subject areas upon which any party proposes to introduce testimony in writing rather than through oral testimony.

Staff has submitted the following testimonial materials in writing:

1. Laurelwood Data Center Initial Study and Proposed Negative Declaration (TN 229584) and supplemental figures (TN 229623)
2. Staff's Opening Testimony filing, which incorporates the IS/Proposed MND and includes the errata to the IS/Proposed MND, responses to comments on the IS/Proposed MND, and Staff's declarations and resumes (TN 230062)
3. Staff's Reply Testimony (TN 230202)

3. The subject areas that are not complete and not yet ready to proceed to Evidentiary Hearing and the reasons therefor.

As mentioned above, all subject areas are complete and ready to proceed to the Evidentiary Hearing.

4. The subject areas that remain disputed and require adjudication, the issues in dispute, and the precise nature of the dispute for each issue.

Staff is aware of no remaining areas in dispute between Staff and the applicant, Intervenor *California Unions for Reliable Energy*, the City of Santa Clara, and other public agencies or commenters.

Between Staff and Intervenor Robert Sarvey, the following issues are in dispute:

(a) Air Quality

Staff disagrees with Mr. Sarvey's statements, offered in his rebuttal testimony filed on October 22, 2019 (TN 230314), that Staff improperly evaluated air quality impacts from the Laurelwood Data Center, including his characterization of Staff's analysis of NOx emissions, emergency operation emissions, contributions to PM2.5 concentrations, and cumulative impacts. Moreover, Mr. Sarvey's statements amount to argument and unsupported opinions rooted in speculation. He has not introduced any substantial evidence of a significant air quality impact from the Laurelwood Data Center.

(b) Greenhouse Gas Emissions

Staff disagrees with Mr. Sarvey's statements that Staff improperly evaluated greenhouse gas emissions, direct and indirect, from the Laurelwood Data Center and the consistency of the project with plans, policies, or regulations for reducing GHG emissions. Moreover, Mr. Sarvey's statements amount to argument and unsupported

opinions, and he has not introduced any substantial evidence that the incremental effects of GHG emissions from the Laurelwood Data Center would be cumulatively considerable or contrary to state, regional, or local plans, policies, or regulations.

(c) Energy Resources

Staff and Mr. Sarvey disagree over whether the consumption of diesel fuel by backup generators for the Laurelwood Data Center would be a wasteful, inefficient, or unnecessary use of energy and whether the project's projected 1.25 Power Usage Effectiveness (PUE) is a wasteful use of energy. Mr. Sarvey has not introduced substantial evidence supporting either of these conclusions.

(d) Jurisdiction

Staff and Mr. Sarvey disagree over whether the project qualifies for a Small Power Plant Exemption under the Warren-Alquist Act and Commission Regulations. Specifically, Mr. Sarvey disagrees with the methodology applied by Staff to determine the Laurelwood Data Center's generating capacity. Mr. Sarvey's statements on this point take the form of legal argument and are largely duplicative of the arguments in his *Motion to Dismiss* (TN 229476), filed August 19, 2019, which remains under submission with the Committee. Staff's responses are available in its previous filing, *Staff's Response in Opposition to Intervenor Robert Sarvey's Motion to Dismiss* (TN 229593).

(e) Utilities and Service Systems

Mr. Sarvey identified concerns, with which Staff disagrees, about the potential for causing environmental effects described in the Utilities and Service Systems section of the IS/Proposed MND for the first time in his rebuttal testimony. Utilities and Service Systems is not listed as one of the topics within the scope of Mr. Sarvey's intervention (See *Committee Order Granting Petition to Intervene*, TN 228376). Furthermore, even if these comments are considered under the purview of "Reliability" and within the scope of intervention, these issues were neither identified in comments filed prior to the October 3, 2019 deadline for public comment on the IS/Proposed MND nor the October 8, 2019 deadline for opening testimony. Accordingly, Staff considers these statements to be public comment that should be accorded appropriate weight by the committee.

5. The identity of each witness the party intends to sponsor at the Evidentiary Hearing, the subject area(s) about which the witness(es) will offer testimony, whether the testimony will be oral or in writing, a brief summary of the testimony to be offered by the witness(es), qualifications of each witness, the time required to present testimony by each witness, and whether the witness seeks to testify telephonically.

Upon the Committee’s request, Staff intends to provide oral testimony from the witnesses identified in the table below. All Staff witnesses offering oral testimony intend to appear in person; however, telephonic appearances may be used in the event of unforeseen circumstances. For Staff’s qualifications, please see Staff’s declarations and resumes in Exhibit 202 (TN 230062). Staff proposes that witnesses in Air Quality, Public Health, Greenhouse Gas Emissions, Energy Resources, and Jurisdiction serve as a single panel due to the crossover between these topics in Mr. Sarvey’s rebuttal testimony. In lieu of opening statements, Staff would like to offer brief direct testimony from each of Staff’s witnesses. Staff would also request time for direct examination on any other issues identified by parties to this proceeding, even if not identified by Staff as an area in dispute.

STAFF’S PROPOSED WITNESS LIST

Staff proposes a single panel composed of the following witnesses:

SUBJECT AREA	WITNESSES	SUMMARY	ESTIMATED TIME FOR DIRECT TESTIMONY
Air Quality/Public Health/Greenhouse Gas Emissions	Ann Chu, Brewster Birdsall, Wenjun Qian	See Exh. 200, pp. 5.3-1 to 5.3-39 and 5.8-1 to 5.8-17; Exh. 202, p. 7; Exh. 203, pp. 2-9 and 11-16.	20-30 Minutes (for all)
Energy Resources	Shahab Khoshmashrab	See Exh. 200, pp. 5.6-1 to 5.6-6; Exh. 203, pp. 10-11.	
Jurisdiction	Matthew Layton, Shahab Khoshmashrab, Laiping Ng	See Exh. 200, Appendix A; Exh. 203, pp. 1-2.	

In addition to Staff's witnesses, Staff has also invited representatives from Silicon Valley Power, the Bay Area Air Quality Management District, and the City of Santa Clara to respond to questions.

6. Subject areas upon which the party desires to question the other parties' witness(es), a summary of the scope of the questions (including questions regarding witness qualifications), the issue(s) to which the questions pertain, and the time desired to question each witness. (Note: a party who fails to provide, with specificity, the scope, relevance, and time for questioning other parties' witness(es) risks preclusion from questioning witnesses on that subject area.)

None identified at this time; however, Staff reserves its right to question witnesses on any topic raised at the hearing by any other party.

7. A list identifying exhibits with transaction numbers (TN) that the party intends to offer into evidence during the Evidentiary Hearing and the technical subject areas to which they apply (see below for further details on Exhibit Lists).

STAFF'S PROPOSED EXHIBIT LIST

Exhibit Number	TN	Title	Subject Area(s)
200	229584	Laurelwood Data Center Initial Study and Proposed Mitigated Negative Declaration	All
201	229623	Laurelwood Data Center (19-SPPE-01) Illegible Figures In TN 229584 (Initial Study and Proposed Mitigated Negative Declaration)	Project Description
202	230062	California Energy Commission Staff Responses to Comments Received on the Initial Study/Proposed Mitigated Negative Declaration and Errata with Declarations and Resumes	Hazards and Hazardous Materials, Transportation, Aesthetics, Biological Resources, Land Use and Planning, Air Quality, Geology and Soils, Population and Housing
203	230202	California Energy Commission Staff Reply to Opening Testimony	Jurisdiction, Air Quality, Cumulative Impacts (Air Quality, Public Health), Energy Resources, Greenhouse Gas Emissions

204	229035	LDC Supplemental Status Report #2 (Contains BAAQMD's <i>Calculating Potential to Emit for Emergency Backup Power Generators</i> policy document)	Air Quality
205	229473	Notice of Mitigation Measures Workshop for Laurelwood Data Center	Biological Resources, Cultural and Tribal Cultural Resources

8. Proposals for briefing deadlines or other scheduling matters.

Staff proposes to continue following the most recent Committee-adopted schedule. Because no legal issues have arisen which would be appropriate for briefing, Staff does not propose briefing deadlines at this time.

9. Any objection by the party to the use of the informal hearing procedure outlined above.

Staff does not object to the use of informal hearing procedures, as identified in the Committee order.

II. STAFF'S REQUEST FOR CLARIFICATION ON THE COMMITTEE'S OCTOBER 17, 2019 ORDER

On October 17, 2019, the Committee issued its *Order Denying Sarvey Motion to Compel; Granting Motion to Extend; and Adopting a Second Revised Scheduling Order* (TN 230267). Page 2 of this order states the following:

Staff timely filed its Opening Testimony, responding to all comments received on its IS/MND except those contained in the Testimony. Sarvey labeled his comments as "testimony," which caused Staff to treat them as something qualitatively separate and distinct from all of the other comments received on the IS/MND. As a result, Staff's Opening Testimony did not directly respond to the Testimony.

In their respective responses to the Motion, Staff and Applicant essentially argue that the Testimony warranted different treatment because it was not labeled "comment" and Sarvey did not ask that it be treated as public comment. We disagree. Sarvey's timely submission contained comments that Staff should have addressed in its Opening Testimony as directed by the Revised Scheduling Order. Even so, it appears that Staff's October 15, 2019 filing of its reply to opening testimony cures the noncompliance. For this reason, we **DENY** as moot

Sarvey's request for the Committee to direct Staff to reply to the Testimony.
(Footnotes omitted, emphasis in original.)

This portion of the order raises questions about Robert Sarvey's October 3, 2019 *Testimony of Robert Sarvey on the Initial Study / MND for the Laurelwood Data Center* filing (TN 229959) that Staff requests to have resolved prior to the Evidentiary Hearing. Specifically, Staff is concerned with the present lack of clarity over which of Mr. Sarvey's statements should be considered testimony and which should be considered comment in the development of the evidentiary record for this proceeding.

Staff previously contended that, because Mr. Sarvey labeled his statements as his testimony and filed them under oath, Staff was under an obligation to treat the statements as testimony. Staff's conclusion that testimony is in fact qualitatively separate and distinct from comment is based on the definitions contained within the CEC's regulations, which define "testimony" as "any oral or written statement made under oath in any proceeding before the commission" (Cal. Code Regs., tit. 20, § 1201(v)). Conversely, "comment" is defined as "any oral or written statement made by any person, not under oath, in any proceeding before the commission" (Cal. Code Regs., tit. 20, § 1201(e)). These regulations leave Staff with no discretion to parse which of Mr. Sarvey's statements are comments and which are testimony. Mr. Sarvey's statements as a whole were supported by a declaration, issued under penalty of perjury, which stated that he "[is] personally familiar with the facts and conclusions related in the attached prepared testimony and if called as a witness could testify competently thereto." Thus, Staff seeks clarification to understand the Committee's statement in its October 17, 2019 order that Mr. Sarvey's filing "contained comments" in light of these regulations.

CEC regulations highlight the urgency of resolving this issue prior to the hearing so that all parties can be aware of how the Committee intends to treat Mr. Sarvey's October 3, 2019 filing in forming its proposed decision. For example, Title 20, California Code of Regulations, section 1212(c)(4) states:

Public comments . . . may be considered by the committee or commission, **but shall not be sufficient in themselves to support a finding.** The committee or

commission may rely on public comment, standing alone, to support a finding if the committee or commission provides notice of its intent to rely upon such comment at the time the comment is presented, other parties are provided an opportunity to question the commenter, and parties are given a reasonable opportunity, as ordered by the presiding member, to provide rebuttal evidence. (Emphasis added.)

This uncertainty also clouds the issue of which statements entitle staff to cross-examine Mr. Sarvey at the Evidentiary Hearing and which ones are mere comment. Staff acknowledges that much of Mr. Sarvey's October 3, 2019 filing relies on "speculation, argument, conjecture, and unsupported conclusions or opinions" and should be accorded appropriate weight by the Committee (Cal. Code Regs., tit. 20, § 1212(c)(2)). Nevertheless, the basic question of whether the statements in Mr. Sarvey's October 3, 2019 filing are testimony or comment is answered by the definitions in Section 1201.

Accordingly, Staff requests that the Committee issue a clarification to its October 17, 2019 order prior to or during the October 31, 2019 Prehearing Conference. Specifically, Staff requests that the sentence, "Sarvey's timely submission contained comments that Staff should have addressed in its Opening Testimony as directed by the Revised Scheduling Order" be clarified to explain which of Mr. Sarvey's statements were "comments" (under Section 1201(e)) and which may be considered "testimony" (under Section 1201(v)) and the basis for such differentiation so that Staff will be more able to make this determination in future proceedings.

Date: October 25, 2019

Respectfully submitted,



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