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Project Title:	Laurelwood Data Center (MECP I Santa Clara I, LLC)
TN #:	232470
Document Title:	Staff's Opposition to Intervenor Robert Sarvey's Petition for Reconsideration
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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:***

LAURELWOOD DATA CENTER

Docket No. 19-SPPE-01

STAFF'S OPPOSITION TO INTERVENOR ROBERT SARVEY'S PETITION FOR RECONSIDERATION

I. Introduction

On February 4, 2020, after a public hearing held at a Special Business Meeting, the California Energy Commission issued an order granting a small power plant exemption (SPPE) for the Laurelwood Data Center (LDC). The exemption allows the local municipality with land use authority, in this case the City of Santa Clara, to proceed with review and approval of the project. On March 5, 2020 at 6:18 pm Intervenor Robert Sarvey filed a petition for reconsideration (petition)¹ requesting that the Commission reverse its exemption of the LDC from the Commission's jurisdiction and deny the SPPE application. Although the Commission has not set a schedule for parties to the proceeding to respond to the petition, the following is CEC Staff's opposition to the petition.

II. The Petition for Reconsideration Must Be Denied Because it Was Not Timely.

To open his petition for reconsideration, Intervenor Robert Sarvey states that he has filed his petition "[p]ursuant to Public Resources Code section 25530" (TN 232325, p. 1). Public Resources Code section 25530 states that any party which seeks to invoke the right to petition for reconsideration "shall" file such a petition "within 30 days after adoption by the commission of a decision or order." The Commission Adoption Order is dated February 4, 2020, which is the same day a Special Business Meeting was held for the Commission to consider adopting the Committee Proposed Decision (TN 239150, p. 2). Therefore, March 5, 2020 was the last day to file a petition for reconsideration.

¹ Mr. Sarvey refers to his filing interchangeably throughout the document as a "petition" and a "request" for reconsideration. Because the proper form of such a filing under Public Resources Code section 25530 is as a petition, Staff refers to his filing as a petition throughout this document.

The Committee for the Laurelwood Data Center SPPE proceedings detailed the requirements for "Document Filing, Deadlines, and Service of Documents" in its *General Orders Regarding Motions, Electronic Filing, Service of Documents, and Other Matters (General Orders)* for this proceeding (TN 227867, pp. 1-2). In this filing, the Committee ordered all parties "to submit documents and provide service of documents using the Energy Commission's e-filing system" (*Id.* at 1). Service via the e-filing system is an integral part of the Commission's adjudicatory process for power plant licensing and exemption proceedings, codified in the Commission's regulations at Title 20, California Code of Regulations, section 1211.

The *General Orders* also detail the rules for filing deadlines and requirements for filings from parties to be considered timely:

Unless a different deadline is stated in a notice, order, or other document, a deadline shall mean 5:00 p.m. Pacific Time. All filings received by 5:00 p.m. on business days will be marked as filed on that date. *All filings received after 5:00 p.m. on business days, any time on a Saturday, Sunday, holiday, or other day when the Energy Commission is closed, will be marked as filed the next business day.*⁷ If the Committee sets an earlier time as a filing deadline, the document must be uploaded by the specified time.

...

7. Section 1208. The first page of the filed document will show both the time of uploading and the filing date assigned to it.

(TN 227867, p. 2 [emphasis added].)

The Committee did not set a different time than the statutorily prescribed 30 days after the Commission's SPPE Adoption Order for Mr. Sarvey or any other party to petition for reconsideration. However, Mr. Sarvey used the Energy Commission's e-filing system to submit and provide service of his petition at 6:18 pm on March 5, 2020. Due to his untimely filing, Staff and others on the service list did not receive service of the petition until 10:49 am on March 6, 2020.

Because Mr. Sarvey did not submit his Petition for Reconsideration using the Commission's e-filing system by 5:00 PM on March 5, 2020, he failed to meet the 30-day deadline set forth in Public Resources Code section 25530.² Section 25530 makes it clear that this is a mandatory deadline—not a recommendation or a flexible deadline. The language in this section vacillates between mandatory and discretionary phrasing in directing the activities of parties and the Commission. For example, Section 25530 states that the Commission "may order" reconsideration on the petition of a party and that reconsideration "may be" heard on the record or subject to additional hearings if

² Although the petition was not timely filed on March 5 and service of the petition occurred on March 6, the cover sheet for the petition shows a "Docketed Date" of March 5. The Dockets Unit confirmed to Staff that this was a clerical error on their part and that the "Docketed Date" (otherwise known as the filing date) should in fact have been manually changed to say March 6. See **Appendix A** to this opposition for additional information from the Dockets Unit on the timing of filing and service.

necessary. Conversely, Section 25530 treats as mandatory certain duties such as the requirement that the Commission "shall order or deny" reconsideration within 30 days of a petition. Likewise, the parties are bound by the requirement that a petition for reconsideration "shall be filed within 30 days after adoption by the commission of a decision or order." Because Mr. Sarvey failed to meet this mandatory prerequisite for seeking reconsideration, his petition must be denied.

III. Mr. Sarvey is an Experienced Intervenor, and His Untimely Filing of the Petition for Reconsideration Should Not be Excused.

Notwithstanding the unambiguous and nondiscretionary language of Public Resources Code section 25530, the Commission may still decide to consider whether Mr. Sarvey's untimeliness should be excused for good cause. It should not. Because Mr. Sarvey has not submitted any explanation for why his filing was untimely, Staff will not speculate on the reasons for his delayed petition. However, the record shows that Mr. Sarvey has experience as an intervenor before the Commission, both on his own behalf and on behalf of other entities. He is aware of the importance of timeliness in the filing of documents such as this petition.

Mr. Sarvey has intervened or participated in at least 10 power plant licensing and exemption proceedings before the Energy Commission, not counting matters in which he is currently involved and matters omitted from his resume (Exh. 300, pp. 23-24). His involvement in Commission proceedings has spanned over a period of at least 19 years (*Id.*). Recently, in the McLaren Backup Generating Facility SPPE proceeding (17-SPPE-01), Mr. Sarvey was involved as a representative of Intervenor Helping Hands Tools. In that proceeding, Mr. Sarvey also filed a petition for reconsideration after the Commission had approved the exemption. His petition in that matter was timely filed using the e-filing system, and served on all parties, before 5:00 pm on the 30th day following the Commission order granting the exemption. Mr. Sarvey has shown that he is familiar and capable of complying with the rules and procedures common to the CEC's adjudicatory proceedings for power plant siting. He should be held to the same standard as other parties, and his untimely filing of the present petition should not be excused.

IV. If Considered on its Merits, the Petition for Reconsideration Should Be Denied Because it is a Reassertion and Re-argument of Matters Already Raised in the Absence of Any Changed Circumstances.

As discussed above, Staff does not believe it is warranted or appropriate to consider the merits of Mr. Sarvey's petition for reconsideration. Nevertheless, even if the Commission elects to consider the merits over Staff's timeliness objections, it will find that the petition should be denied because of the redundant nature of the petition and the absence of any changed circumstances between the issuance of the Final Commission Decision and the petition for reconsideration.

A. Criteria for the Evaluation of a Petition for Reconsideration

If the Commission exercises its discretion to hear a petition for reconsideration of a small power plant exemption under Public Resources Code section 25530, Staff maintains the position that Title 20, California Code of Regulations, section 1720 is nevertheless inapplicable to a petition for reconsideration. Staff's position is supported by the fact that section 1720 is found in Article 1 of Chapter 5, which outlines the regulations that are only applicable to Application for Certification and Notice of Intent proceedings (Cal. Code Regs., tit. 20, § 1701). Article 5 of Chapter 5, which contains the regulations governing the SPPE process, has no similar provision for seeking reconsideration. Mr. Sarvey has not filed his petition pursuant to Section 1720, nor has he argued in favor of its applicability to this proceeding, so this is not a contested issue.

Staff nevertheless addresses this issue here because, if Commission elects to consider the merits, the Commission may look to Section 1720 for guidance on how Mr. Sarvey's petition should be evaluated. Public Resources Code section 25530 does not provide criteria to evaluate a petition for reconsideration, except to say that reconsideration shall be heard "on the basis of all pertinent portions of the record together with such argument as the commission may permit, or the commission may hold a further hearing" (Pub. Resources Code, § 25530). Without ceding the applicability of Section 1720, Staff agrees that the Commission has the discretion to look to Section 1720 for guidance in the evaluation of Mr. Sarvey's petition.

In particular, the requirement in Section 1720 that a petition for reconsideration "fully explain why the matters set forth could not have been considered during the evidentiary hearings, and their effects upon a substantive element of the decision" is instructive in reviewing Mr. Sarvey's petition (Cal. Code Regs., tit. 20, § 1720(a)). Furthermore, the Commission should consider the requirements in Section 1720 that petitions set forth either "1) new evidence that despite the diligence of the moving party could not have been produced during evidentiary hearings on the case; or 2) an error in fact or change or error of law." (*Id.*) The criteria outlined in Section 1720, while not directly applicable, strongly weigh in favor of denying Mr. Sarvey's petition.

B. Rebuttal of Mr. Sarvey's Alleged Grounds for Reconsideration

Mr. Sarvey's petition for reconsideration is a nearly verbatim reassertion of arguments made throughout the SPPE proceeding that were rejected after a full and fair examination by Staff, the Committee, and eventually the Commission.

1. Generating Capacity

Mr. Sarvey once again argues in his petition that Title 20, California Code of Regulations, section 2003 is applicable to emergency backup generators and that this regulation bars the Commission and Staff from considering maximum building load as a limit to generating capacity. This argument was considered and rejected in the Final Commission Decision that granted the exemption to the LDC (TN 232394, pp. 11-14). Mr. Sarvey has

not argued that this issue could not have been considered during the evidentiary hearings. Nor has Mr. Sarvey argued that new evidence or changed circumstances might cause the Commission to want to revisit this issue. Accordingly, this argument does not support granting Mr. Sarvey's petition.

2. Circulation of the Initial Study/Mitigated Negative Declaration

Mr. Sarvey's petition for reconsideration also contains a near-verbatim copy of arguments about the manner in which the Initial Study/Mitigated Negative Declaration (IS/MND) was circulated, which were previously contained in his comments on the Committee Proposed Decision (TN 231928, pp. 7-8). These arguments were presented to the Commission prior to the issuance of the Final Decision, and they were rejected by the Commission when it adopted the Final Decision. Mr. Sarvey has not argued that this issue could not have been considered during by the Commission at the February 4, 2020 hearing on the Committee Proposed Decision. Nor has Mr. Sarvey argued that new evidence or changed circumstances might cause the Commission to want to revisit this issue. Accordingly, this argument does not support granting Mr. Sarvey's petition.

3. Analysis of Energy Impacts

Mr. Sarvey's petition for reconsideration restates arguments that he has made throughout this proceeding about whether the LDC will have a significant impact on energy resources (See TN 232325, pp. 5-8; Exh. 300, pp. 9-14). Mr. Sarvey casts his arguments as concern about (a) whether Silicon Valley Power (SVP) will be able to procure enough electricity to serve the LDC and other data centers proposed to be built within their service territory, (b) whether fuel consumption by the emergency backup generators constitutes a wasteful use of energy resources, and (c) whether the building should be required to achieve a lower power usage effectiveness (PUE). In the petition for reconsideration, Mr. Sarvey for the first time phrases these arguments as relating to Appendix F of the CEQA Guidelines. Elsewhere, Mr. Sarvey has phrased these arguments as also relating to Utilities and Service Systems (Exh. 303, p. 8).

Irrespective of the different labels being applied, all three of Mr. Sarvey's arguments about the project's energy impacts were addressed in the evidentiary hearing, presented to the Committee, and rejected in the Committee Proposed Decision and the Final Commission Decision (TN 232394, pp. 40-43). The Commission should not rehash these arguments here merely because Mr. Sarvey has now added a reference to Appendix F of the CEQA Guidelines. Mr. Sarvey has not argued that these issues were not, or could not have been, considered during evidentiary hearings. Nor has Mr. Sarvey argued that new evidence or changed circumstances might cause the Commission to want to revisit this issue. Furthermore, Mr. Sarvey has waived any objections based on Appendix F by waiting until his petition for reconsideration to introduce this argument. Accordingly, the Energy Impacts portion of Mr. Sarvey's petition does not support reconsideration.

4. Greenhouse Gas Emissions

Mr. Sarvey's petition also raises various issues with the manner of Staff's quantification and evaluation of greenhouse gas emissions (GHGs) in the IS/MND (TN 232325, pp. 9-15). These are, again, a reassertion of points Mr. Sarvey raised throughout the SPPE proceeding. Mr. Sarvey raised similar or identical points in his opening testimony (Exh. 300, pp. 14-16), in his rebuttal testimony (Exh. 303, pp. 11-15), at the evidentiary hearing (TN 230999, pp. 68-69, 130), and in his comments on the Committee Proposed Decision (TN 231928, pp. 11-12). However, the Final Commission Decision rejected Mr. Sarvey's claims that the project's GHG emissions would cause a significant impact (TN 232394, pp. 30-33). Mr. Sarvey has not argued that this issue was not, or could not have been, considered during the evidentiary hearings. Nor has Mr. Sarvey argued that new evidence or changed circumstances might cause the Commission to want to revisit this issue. Therefore, the GHG emissions portion of Mr. Sarvey's petition does not support reconsideration.

5. Air Quality and Public Health

Mr. Sarvey's air quality and public health discussion focuses on reasserting prior points about the sufficiency of Staff's consideration of cumulative impacts, especially as related to Staff's evaluation of criteria pollutants and toxic air contaminants (TN 232325, pp. 15-18). Here, Mr. Sarvey admits the redundant nature of his arguments by stating that he raised the same issues with Staff's analysis "in [his] opening testimony and also in [his] rebuttal testimony" (*Id.* at 15-16). As with his other arguments, the Commission considered Mr. Sarvey's contentions and rejected them in the Final Commission Decision. The Final Decision found that Staff had appropriately relied on the applicable Bay Area Air Quality Management District significance thresholds to find that the project's criteria pollutant emissions would not be cumulatively considerable (TN 232394, pp. 28-30) and rejected Mr. Sarvey's objections to the methodology Staff employed to evaluate health risk from toxic air contaminants (*Id.* at 33-36). Because Mr. Sarvey admits that these issues were considered by the Commission—and Mr. Sarvey has not argued that new evidence or changed circumstances might cause the Commission to want to revisit this issue—the air quality and public health portions of Mr. Sarvey's petition do not support reconsideration.

6. Public Participation and Environmental Justice

The final assertion in Mr. Sarvey's petition is that Staff and the Commission failed to adequately engage the public and environmental justice communities during the SPPE proceeding. His argument is a nearly verbatim restatement of arguments previously raised to the Commission prior to the adoption of the Final Decision in Mr. Sarvey's comments on the Committee Proposed Decision (TN 231928, p. 13). His assertion contains no specific evidence that any local community was excluded from public participation, and it does not allege any cognizable procedural error.

The inclusion of environmental justice here is especially remarkable in light of the fact that Mr. Sarvey agreed environmental justice would not need to be addressed at the

evidentiary hearing (TN 230999, p. 36).³ His petition also contains a legal error in its assertion that Title 20, California Code of Regulations, section 1709.7 requires an informational hearing or site visit. This regulation only applies, on its plain terms, to Notice of Intent or Application for Certification proceedings.

Despite having the opportunity to do so at the evidentiary hearing, Mr. Sarvey could not offer tangible evidence of procedural or substantive deficiencies in Staff's approach to public outreach and engagement with environmental justice communities. He has not suggested that any new evidence or changed circumstances might cause the Commission to want to revisit this issue. Accordingly, the public participation and environmental justice portions of Mr. Sarvey's petition do not support reconsideration.

V. Conclusion

Mr. Sarvey's petition for reconsideration is untimely, and must be denied on that basis alone. If the Commission nevertheless considers the merits of Mr. Sarvey's petition, it will find that he has made no showing that there are new facts, evidence, or changed circumstances, or other factors that warrant reconsideration of the Final Decision. For these reasons, Staff requests that the Commission deny Mr. Sarvey's petition.

DATED:

Respectfully submitted,

/s/ Nicolas Oliver

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³ HEARING OFFICER COCHRAN: . . . "Did I miss anything that you wanted to have testimony on? We had excluded Environmental Justice and Jurisdiction from those topics for which testimony was required."
MR. SARVEY: "I agree."

APPENDIX A



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Page: 1

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Page: 1

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APPENDIX A



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Page: 1

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Page: 1			