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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:

***GREAT OAKS SOUTH BACKUP
GENERATING FACILITY***

Docket No. 20-SPPE-01

**ORDERS DENYING MOTION TO STRIKE, GRANTING APPLICANT
LEAVE TO FILE EXHIBITS, DENYING WRITTEN CROSS-
EXAMINATION, AND REQUESTING INFORMATION**

BACKGROUND

The Proceeding

On March 19, 2020, SV1, LLC, a wholly owned subsidiary of Equinix, LLC, (Applicant) submitted an application for a small power plant exemption (SPPE) for the Great Oaks South Backup Generating Facility (Application)¹ to the California Energy Commission (CEC).² Applicant seeks to construct and operate the Great Oaks South Data Center, the Great Oaks South Backup Generating Facility, and related accessories (collectively, the Project).³

The Application initiated a formal proceeding with the CEC, which initially included two parties, Applicant and CEC staff (Staff).⁴ On May 13, 2020, the CEC designated a Committee to preside over the proceeding (Committee).⁵ On August 2, 2021, the

¹ All of the documents in this proceeding including those related to the Application can be found in the [online docket](https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=20-SPPE-01) at <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=20-SPPE-01>. E.g., TNs 232466, 232467-1, 232467-2, 232467-3.

² The CEC is formally known as the “State Energy Resources Conservation and Development Commission.” (Cal. Pub. Resources, § 25200.)

³ The information in this section is taken from the Application (TN 232466.)

⁴ Cal. Code Regs., tit. 20, § 1937.

⁵ On May 13, 2020, the CEC designated a Committee consisting of Karen Douglas, Commissioner and Presiding Member, and David Hochschild, Chair and Associate Member, to preside over this SPPE Application. (TN 233123.)

Committee granted a petition to allow Robert Sarvey (Mr. Sarvey) to intervene as a party to the proceeding.⁶

Environmental Document

On May 27, 2021, Staff published its proposed findings and conclusions about the Application for public review and comment in an environmental document known as the draft Environmental Impact Report (Draft EIR).⁷ The Draft EIR concluded that the Project would have no significant impacts to the environment with mitigation.⁸ On July 28, 2021, Staff filed a final EIR (Final EIR), which incorporated the Draft EIR with minor modifications and included Staff's responses to public comment on the Draft EIR.⁹ The Final EIR concluded that the Project would have no significant impacts to the environment with mitigation.¹⁰

On August 18, 2021, Staff filed an addendum to the Final EIR, which, among other things, amended mitigation measure MM GHG-1 for GHG emission compliance.¹¹

Motion to Strike

The Committee scheduled a prehearing conference for September 7, 2021,¹² and an evidentiary hearing for September 21, 2021.¹³ The original notice scheduling the prehearing conference and evidentiary hearing included a scheduling order that set the deadlines for all parties to file opening testimony by August 11 and reply testimony by August 25 (June 24th Scheduling Order).¹⁴

On August 24, 2021, Mr. Sarvey filed reply testimony (Mr. Sarvey's Reply Testimony).¹⁵ Mr. Sarvey had not previously filed comment or testimony in the proceeding. Contentions in Mr. Sarvey's Reply Testimony concerned information in the Draft EIR,¹⁶

⁶ TN 239151.

⁷ TN 237875.

⁸ See *id.* at pp. 1-3 – 1-10.

⁹ TN 239063.

¹⁰ *Id.* at pp. 1-3 – 1-11, 1-44.

¹¹ TN 239361.

¹² TN 238471.

¹³ TN 239671.

¹⁴ TN 238471, p. 15.

¹⁵ TN 239449.

¹⁶ *Id.* at pp. 1-2.

the Final EIR filed on July 28, 2021,¹⁷ and Staff's addendum to the Final EIR filed on August 18, 2021.¹⁸

On August 27, 2021, Applicant filed a motion in limine to strike Mr. Sarvey's reply testimony (Motion to Strike),¹⁹ pursuant to California Code of Regulations, title 20, sections 1210, 1211.5 and 1212 subdivision (b)(2),²⁰ asking the Committee to strike Mr. Sarvey's Reply Testimony.²¹ The Motion to Strike contends that striking Mr. Sarvey's Reply Testimony would avoid unfairness to Applicant because Mr. Sarvey's failure to raise his concerns earlier in opening testimony is "[an attempt] to avoid the procedural exchange of information necessary to allow all parties the opportunity to respond in a timely and efficient manner," as required by the June 24th Scheduling Order.²² The Motion to Strike contends Mr. Sarvey engaged in gamesmanship to deprive Staff and Applicant of the ability to adequately respond to Mr. Sarvey's contentions.²³ The Motion to Strike further contends that the order is necessary to minimize hearing inefficiency and that the Committee could treat Mr. Sarvey's Reply Testimony as public comment to ensure an adequate record.²⁴

On September 3, Staff filed CEC Staff's Response to Mr. Sarvey's Reply Testimony.²⁵ Also on September 3, the Committee issued an "Order Shortening Time" that required responses to the Motion to Strike by September 8.²⁶

On September 8, 2021, Staff and Mr. Sarvey filed timely responses to the Motion to Strike. Staff supported it,²⁷ and Mr. Sarvey opposed it.²⁸ Staff characterizes Mr. Sarvey's Reply Testimony as mislabeled opening testimony that should have been filed earlier when opening testimony was due, thus contending it was filed untimely in violation of the June 24th Scheduling Order.²⁹ Staff also asserts that past practice has

¹⁷ *Id.* at pp. 3-5.

¹⁸ *Id.* at pp. 5-6.

¹⁹ TN 239489.

²⁰ All further references are to California Code of Regulations, title 20, unless otherwise specified.

²¹ TN 239489, p. 1.

²² *Id.* at pp. 4-6.

²³ *Id.* at p. 2.

²⁴ *Id.* at p. 6.

²⁵ TN 239587.

²⁶ TN 239599.

²⁷ TN 239640.

²⁸ TN 239639.

²⁹ TN 239640, pp. 2, 3-4.

been for the Committee to require parties to file both opening and reply testimony to participate in the evidentiary hearing.³⁰

Mr. Sarvey contends that his reply testimony is directed to and limited by the opening testimony filed by Applicant and Staff.³¹ Mr. Sarvey describes his reply testimony as addressing declarations and exhibits that were filed in opening testimony.³²

Requests from the Prehearing Conference

On September 7, 2021, the Committee conducted a prehearing conference during which Staff and Applicant made additional requests,³³ specifically:

- Applicant requested leave to file additional exhibits to respond to Mr. Sarvey's Reply Testimony in the event that the Committee denied the Motion to Strike;³⁴ and
- Staff requested that the Committee consider requiring written cross-examination before the evidentiary hearing with the opportunity to respond in writing.³⁵

DISCUSSION AND ORDERS

Order on Motion to Strike

The decision on whether to grant a motion to exclude information from the hearing record is decided upon three considerations: 1) fairness to the parties; 2) hearing efficiency, and 3) adequacy of the record.³⁶ The Committee reviews Applicant's motion to strike in light of these considerations. Section 1212 provides for the filing of a motion to exclude evidence such as a motion to strike. It states in relevant part:

Parties may move to exclude information from the hearing record on the ground that it is not relevant, is duplicative of information already in the record, or on another basis. If the presiding member grants such a motion,

³⁰ *Id.* at pp. 2-3.

³¹ TN 239639, p. 2.

³² *Ibid.*

³³ A transcript is pending and will be filed in the docket for this proceeding. An [audio recording of the September 7 prehearing conference](https://energy.zoom.us/rec/share/42qK5y0xtyGvjOxoMIKM_J9pENm1Tvkp0OpfP5AYARGLpMiY2ivbSL6TrgeUOXZ.nu7BDc1r1DpPrP3r) is available online at https://energy.zoom.us/rec/share/42qK5y0xtyGvjOxoMIKM_J9pENm1Tvkp0OpfP5AYARGLpMiY2ivbSL6TrgeUOXZ.nu7BDc1r1DpPrP3r.

³⁴ *Id.* beginning at approximately 22 minutes, 3 seconds.

³⁵ *Id.* beginning at approximately 24 minutes, 9 seconds.

³⁶ Cal. Code Regs., tit. 20, § 1212(b)(2).

the information shall be excluded from the hearing record. While the hearing need not be conducted according to technical rules relating to evidence and witnesses, questions of relevance and the inclusion of information into the hearing record shall be decided by the presiding member after considering fairness to the parties, hearing efficiency, and adequacy of the record.³⁷

A committee in an SPPE proceeding has authority to strike testimony to regulate the conduct of proceedings and hearings.³⁸ Section 1210 provides in relevant 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.

Here, under the first consideration of Section 1212 described above, both Staff and Applicant will have had a fair opportunity to respond to Mr. Sarvey's Reply Testimony by the end of the evidentiary hearing. Mr. Sarvey timely filed reply testimony on August 24.³⁹ Staff and Applicant will have had four weeks to review Mr. Sarvey's Reply Testimony before the evidentiary hearing set for September 21. Staff responded in writing to Mr. Sarvey's Reply Testimony.⁴⁰ Staff does not intend to offer live testimony at the evidentiary hearing.⁴¹ Mr. Sarvey's failure to raise his contentions earlier in opening testimony may require the parties to conduct live examination of witnesses at the evidentiary hearing that the parties may not otherwise have been required to conduct. But Applicant has identified a panel of four witnesses that the Applicant will offer to testify at the evidentiary hearing regarding the subjects disputed by Mr. Sarvey.⁴² Applicant also intends to cross-examine Mr. Sarvey.⁴³ As stated below, the Committee grants the Applicant's request for leave to file additional exhibits to cross-examine Mr. Sarvey at the evidentiary hearing regarding his reply testimony. Therefore, the Committee is not persuaded that admitting Mr. Sarvey's Reply Testimony would be unfair to the other parties.

Under the second consideration, Mr. Sarvey's Reply Testimony is not expected to make the hearing inefficient, because the hearing, including introduction of evidence and any

³⁷ Cal. Code Regs., tit. 20, § 1212(b)(2).

³⁸ Cal. Code Regs., tit. 20, §§ 1203, 1210; see also *id.* at §§ 1211.5 and 1943.

³⁹ TN 239449.

⁴⁰ TN 239587.

⁴¹ TN 239563.

⁴² TN 239567.

⁴³ *Ibid.*

cross-examination, will be conducted in an orderly and efficient manner. And the time expected to conduct the evidentiary hearing is more than adequate to address the disputed areas in Mr. Sarvey's Reply Testimony. Therefore, the Committee is not persuaded that undue inefficiency will result from allowing Mr. Sarvey's Reply Testimony.

Finally, based on the foregoing determinations, it is unnecessary to address Applicant's request to treat the Reply Testimony as comments and whether so doing would ensure an adequate record under the third consideration of Section 1212.

The Committee agrees that many of the contentions in Mr. Sarvey's Reply Testimony could and should have been raised in opening testimony,⁴⁴ and cautions Mr. Sarvey that the June 24th Scheduling Order required each party to raise contentions in opening testimony to the extent possible.⁴⁵ Should he or any party fail to follow Committee directives in the future, the Committee will examine whether the circumstances warrant consequences. But here the Committee is not persuaded that the Motion to Strike has presented circumstances that warrant striking Mr. Sarvey's Reply Testimony.

Accordingly, we **DENY** the Motion to Strike.

Order on Applicant's Additional Exhibits

During the prehearing conference, Applicant stated that if the Committee were to deny the Motion to Strike, it would request leave to file additional exhibits to reply to Mr. Sarvey's Reply Testimony. As we have denied the Motion to Strike above, the Committee **GRANTS** Applicant leave to file additional exhibits. Applicant shall file any additional testimony and exhibits **no later than 1:00 p.m. on September 17, 2021**. Once filed, Applicant shall file an updated exhibit list to reflect all evidence it will seek to admit at the evidentiary hearing.

Order on Staff's Request to Conduct Cross-Examination and Rebuttal by Written Questions

⁴⁴ The Committee notes that at least one of Mr. Sarvey's contentions—regarding the amended GHG mitigation measure—could not have been raised in opening testimony as the measure was not amended until August 18 (TN 239361), after opening testimony was due. (TN 238471.)

⁴⁵ TN 238471.

Staff proposed during the prehearing conference that cross-examination and rebuttal be conducted by written questions to focus the evidentiary hearing on the issues that weren't satisfactorily addressed.

Recently in a different proceeding,⁴⁶ the assigned committee required the parties to conduct cross-examination by written and required written responses to those questions.⁴⁷ However, that proceeding provided more time to conduct the written cross-examination than two weeks before the evidentiary hearing, the evidentiary hearing in that proceeding was limited to moving exhibits into the record, and the factual issues in that hearing were much narrower than the factual issues disputed here. None of those circumstances are present here. Moreover, Staff has not demonstrated how written cross-examination would improve the efficiency of this evidentiary hearing, where the request for written cross-examination was made only two weeks before the evidentiary hearing.

We therefore **DENY** Staff's request to conduct cross-examination and rebuttal by written questions.

Second Order Requesting Supplemental Information

On August 26, 2021, the Committee issued a Committee Order Requesting Supplemental Information in Response to Committee Questions (Committee Request for Information) to the parties.⁴⁸ Responses were timely received from Staff⁴⁹ and Applicant.⁵⁰

Now the Committee seeks additional supplemental information and to that end directs the parties to respond to this second set of requests listed below. Any written responses by the parties must be filed in the docket for this proceeding **no later than 5:00 p.m. on September 17, 2021**. Verbal testimony may be offered at the evidentiary hearing in lieu of or in addition to written responses. A party planning to offer verbal testimony in response to this request for supplemental information shall file a list of any additional witnesses with the subject of the witness's testimony **no later than noon on September 20, 2021**.

⁴⁶ Sequoia Data Center, Docket No. 19-SPPE-03.

⁴⁷ TN 237428.

⁴⁸ TN 239482.

⁴⁹ TN 239582.

⁵⁰ TN 239585.

1) The Committee Request for Information, request two, asked the parties whether the Project's construction-related noise would be consistent with the City of San Jose's General Plan Policy EC-1.7.⁵¹ Applicant responded in part that "the noisy portion of each phase of construction would be less than 12 months. . .[and] the majority of the noise and the loudest activities would take place during grading, which would be done for the whole site as part of the first phase and will be completed in less than 12 months."⁵² Please direct the Committee's attention to evidence in the record or provide evidence (documentary or witness testimony) supporting the timing of any noisy portion of the Project's construction.

2) The Committee Request for Information, request three, asked the parties to evaluate the Project's contribution to the magnitude of change in ambient noise and identify any applicable threshold of significance, or why it is not necessary to provide this information.⁵³ Staff responded in part that "As discussed in Section 4.13 Noise on pages 4.13-2 and 4.13-6, for operation, staff used the city allowable limits to evaluate the potential for impacts. Operational noise would be below the city's noise limits (FEIR, p. 4.13-8)."⁵⁴ Applicant responded in part:

The ambient conditions for the residences all exceeded the city's daytime residential noise level limit of 55 dBA Leq and was almost entirely related to nearby traffic. The project contribution was well below the ambient noise levels. Therefore, the City's daytime residential noise level limit was more restrictive than identifying a threshold that measured the increase over ambient. Additionally, as discussed in the FEIR the modeled noise was from simultaneous operation of the generators when SV1 will only run one generator at a time for maintenance and testing and never at night. The FEIR compared the project's modeled noise at sensitive receptors to the measured ambient levels and found them to be below the ambient levels as well (see FEIR 4.13-8).⁵⁵

Please direct the Committee's attention to evidence in the record or provide evidence (documentary or witness testimony) supporting the assertions that "project contribution was well below the ambient noise levels" and "the City's daytime

⁵¹ TN 239482, p. 2.

⁵² TN 239585, p. 3.

⁵³ TN 239482, p. 2.

⁵⁴ TN 239582, p. 3.

⁵⁵ TN 239585, p. 4.

residential noise level limit was more restrictive than identifying a threshold that measured the increase over ambient.”

3) The Committee Request for Information, request nine, asked about the appropriateness of the EIR’s noise survey data as the environmental setting (baseline) for noise, in light of the time between the date of the 2016 noise measurements and the date the CEC began preparing the EIR.⁵⁶ The Applicant responded in part that the COVID-19 pandemic significantly altered traffic patterns so “noise data in 2020 would have not yielded any meaningful background data because it would have produced sound levels with unsustainably low traffic levels caused by the Covid-19 quarantines.”⁵⁷ Please direct the Committee’s attention to evidence in the record or provide evidence (documentary or witness testimony) to support these statements.

4) The Committee Request for Information, request 10, asked the parties how the revised MM GHG-1 mitigates the potentially significant environmental impact of greenhouse gas emissions to less than significant levels.⁵⁸ Applicant responded that “the City of San Jose 2030 GHG [Greenhouse Gas] Reduction Strategy (GHG RS) . . . is a qualified greenhouse gas reduction plan pursuant to Title 14 CCR [CEQA Guidelines], Section 15183.5 (b).”⁵⁹ Applicant’s response concludes:

Since the City will be implementing the Mitigation Measure as an Alternative Measure to comply with its properly adopted 2030 GHG RS, the CEC can rely on both of these facts and can determine that the GOSBGF and GOSDC will not have a significant cumulative impact pursuant to Title 14, CCR 15183.5.⁶⁰

Please direct the Committee’s attention to evidence in the record or provide evidence (documentary or witness testimony) that the City of San Jose’s GHG RS satisfies each of the elements of CEQA Guidelines, section 15183.5, subdivisions (b)(1)(A) through (F), which is necessary for it to be deemed a qualified greenhouse gas reduction plan.

⁵⁶ TN 239482, p. 4.

⁵⁷ TN 239585, p. 9.

⁵⁸ TN 239482, pp. 4-5.

⁵⁹ TN 239585, p. 11.

⁶⁰ *Id.* at p. 12.

PUBLIC ADVISOR AND OTHER CEC CONTACTS

The CEC's Public Advisor's Office provides the public with assistance in participating in CEC proceedings. For information on participation or to request interpreting services or reasonable accommodations, please contact the Public Advisor's Office at publicadvisor@energy.ca.gov, or by phone at (916) 654-4489, or toll free at (800) 822-6228.

Direct questions of a procedural nature related to the Application to Susan Cochran, Hearing Officer, at susan.cochran@energy.ca.gov or (916) 891-8078, or Ralph Lee, Hearing Officer, at ralph.lee@energy.ca.gov or (916) 776-3408.

Direct technical subject inquiries concerning the Application to Lisa Worrall, Project Manager, at lisa.worrall@energy.ca.gov or (916) 661-8367.

Direct media inquiries to mediaoffice@energy.ca.gov or (916) 654-4989.

AVAILABILITY OF DOCUMENTS

Information regarding the status of the Application, as well as notices and other relevant documents, are available on the [Great Oaks South SPPE web page](#) for the Great Oaks South Backup Generating Facility proceeding found at: <https://www.energy.ca.gov/powerplant/reciprocating-engine/great-oaks-south-generating-facility>.

IT IS SO ORDERED.

Dated: September 15, 2021

Dated: September 14, 2021

APPROVED BY:

APPROVED BY:

Karen Douglas
Commissioner and Presiding Member
Great Oaks South Backup Generating
Facility SPPE Committee

David Hochschild
Chair and Associate Member
Great Oaks South Backup Generating
Facility SPPE Committee