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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:

Application For Small Power Plant
Exemption for the **MISSION COLLEGE
BACKUP GENERATING FACILITY**

DOCKET NO: 19-SPPE-2

**OPPIDAN INVESTMENT
COMPANY'S BRIEF**

The record in this proceeding is robust and conclusively supports the findings required by Public Resources Code Section 25541 for granting the Mission College Backup Generating Facility (MCBGF) a Small Power Plant Exemption (SPPE). This brief will focus on two issues before the Commission; the urgency that the Commission approve the SPPE, and Greenhouse Gas Emissions. All of the other issues raised by Mr. Sarvey have already been considered by the Commission in other cases. The evidence in this record contains un rebutted qualified expert opinion testimony and analysis. No additional input is necessary for the Committee to support its decision to rule, again, that Mr. Sarvey's arguments are not evidence and have no merit.

TIMING OF THE DECISION

As explained by Mr. Johnson at the evidentiary hearing¹ and reiterated in Oppidan's closing statement², it is imperative that the Committee quickly prepare a Proposed Decision granting the MCBGF a SPPE. As the Commission is aware, the City of Santa Clara cannot issue permits to continue construction until the Commission has adopted a

¹ 6/15/20 RT 53-54.

² 6/15/20 RT 115-116.

Final Decision granting the SPPE and files a Notice of Determination pursuant to the California Environmental Quality Act (CEQA). The Committee should not let one person, who has been recycling the same arguments throughout each ongoing Application for SPPE before the Commission since 2018, be the sole cause for any further delay. During this time of economic crisis keeping workers working is critical.

As explained by Mr. Johnson at the evidentiary hearing, Oppidan was able to keep workers on-site doing demolition and grading work even during the COVID-19 mandatory shelter in place orders because construction workers for a data center have been deemed essential. There has been no public opposition to either MCBGF or the Mission College Data Center (MCDC) other than the Intervenor who does not represent any Santa Clara residents or organizations.

We plead that the Committee produce a Proposed Decision granting the SPPE so that it can be considered at the upcoming July 8, 2020 Business Meeting. If that milestone cannot be achieved, we plead that the Commission conduct a Special Business Meeting the week of July 13 through 17, 2020. That will allow the City of Santa Clara to consider the matter in July and issue permits for construction to continue. Otherwise, construction workers will not be able to work at the site. There is simply no reason such delay should continue.

LEGAL OVERVIEW

GHG CEQA Framework

Section 15064.4 of the CEQA Guidelines outlines the general obligation and framework for a CEQA lead agency to evaluate GHG emissions. Specifically, it provides:

- (a) A lead agency shall make a good-faith effort, based to the extent possible on scientific and factual data, to **describe, calculate or estimate the amount** of greenhouse gas emissions resulting from a project. A lead agency shall have discretion to determine, in the context of a particular project, whether to:
 - (1) Quantify greenhouse gas emissions resulting from a project; and/or
 - (2) Rely on a qualitative analysis or performance based standards.
- (b) In determining the significance of a project's greenhouse gas emissions, the lead agency should focus its analysis on the reasonably foreseeable

incremental contribution of the project's emissions to the effects of climate change. A project's incremental contribution may be cumulatively considerable even if it appears relatively small compared to statewide, national or global emissions. The agency's analysis should consider a timeframe that is appropriate for the project. **The agency's analysis also must reasonably reflect evolving** scientific knowledge and **state regulatory schemes**. A lead agency should consider the following factors, among others, when determining the significance of impacts from greenhouse gas emissions on the environment:

- (1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;
- (2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project.
- (3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions (see, e.g., section 15183.5(b)). Such requirements must be adopted by the relevant public agency through a public review process and must reduce or mitigate the project's incremental contribution of greenhouse gas emissions. If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project. **In determining the significance of impacts, the lead agency may consider a project's consistency with the State's long-term climate goals or strategies, provided that substantial evidence supports the agency's analysis of how those goals or strategies address the project's incremental contribution to climate change and its conclusion that the project's incremental contribution is not cumulatively considerable. (Emphasis Added)**

The CEQA Guidelines generally address greenhouse gas emissions as a cumulative impact due to the global nature of climate change. (Public Resources Code, § 21083, subd. (b)(2).) As the California Supreme Court explained, "because of the global scale of climate change, any one project's contribution is unlikely to be significant by itself."

(*Cleveland National Forest Foundation v. San Diego Assn. of Governments*, 3 Cal.5th 497 at 512.). Thus, “[t]he question therefore becomes whether the project’s incremental addition of greenhouse gases is ‘cumulatively considerable’ in light of the global problem, and thus significant.” (*Cleveland National Forest Foundation San Diego Assn. of Governments*, 3 Cal.5th 497 at 512.) The court also stated that “**the analysis must keep apace with** scientific knowledge and **regulatory schemes.**” (*Cleveland National Forest Foundation v. San Diego Assn. of Governments*, 3 Cal.5th 497 at 519.)

CEQA Defines Types of Impacts

CEQA directs agencies to evaluate not only the potential direct impacts from a project but also those that are an indirect result of the project. Specifically, Section 15064 (d) provides:

(d) In evaluating the significance of the environmental effect of a project, the Lead Agency shall consider **direct physical changes** in the environment which may be caused by the project and **reasonably foreseeable indirect physical changes** in the environment which may be **caused by the project.** (*Emphasis added*)

(1) A direct physical change in the environment is a physical change in the environment which is caused by and immediately related to the project. Examples of direct physical changes in the environment are the dust, noise, and traffic of heavy equipment that would result from construction of a sewage treatment plant and possible odors from operation of the plant.

(2) An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project. If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment. For example, the construction of a new sewage treatment plant may facilitate population growth in the service area due to the increase in sewage treatment capacity and may lead to an increase in air pollution.

- (3) An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable.

In this case, and in accordance with the CEQA definitions, the GHG emissions from the MCBGF generators, and from the construction activities of the MCDC are directly emitted from the project and therefore are treated as ***direct physical changes in the environment***. It is undisputed in the record that the vast majority of the project's GHG emissions are not directly emitted from either the MCBGF or the MCDC. Rather the MCDC's consumption of electricity results in the generation of electricity from a various combination of electrical generation assets owned, or contracted by Silicon Valley Power (SVP). Therefore, the vast majority of GHG emissions are treated as ***indirect physical changes in the environment over which Oppidan has no control***.³

GHG Significance Thresholds

The CEQA Guidelines define a "threshold of significance" as "an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant." (CEQA Guidelines, § 15064.7, subd. (a).) The selection and development of thresholds requires a lead agency to "make a policy decision in distinguishing between substantial and insubstantial adverse environmental impacts based, in part, on the setting." (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614 at 625.)

A lead agency may choose to review a project's environmental impacts using more than one threshold of significance. (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* 3 Cal.5th 497 at 507, where the court acknowledged that the EIR in question used three different significance thresholds).

Pursuant to the California Supreme Court's decision in *Center for Biological Diversity v. Department of Fish & Wildlife*, 62 Cal.4th 204, a lead agency may use compliance with state goals as a threshold. A threshold need not be numeric.

³ Exhibit 1, SPPE Application, page 114, Exhibit 200, Staff Proposed Initial Study and Mitigated Negative Declaration (ISMND), page 5.8-10.

CEQA GHG Impact Methodology Employed

The SPPE Application and the IS/MND comply with all three directives in Section 15064.4 (b) while still treating the GHG emissions from the MCBGF as direct impacts and the GHG emissions from electricity generation as indirect impacts of the MCDC.

1. **Quantification of GHG Emissions:** The SPPE Application and the IS/MND quantify the direct and indirect GHG emissions to extent feasible.
 - a. Direct GHG emissions from the MCBGF are quantified based on worst case maintenance and testing operations on an annual basis.⁴
 - b. The direct impacts from construction and demolition activities of the MCDC are quantified and estimated on an annual basis.⁵
 - c. The worst case indirect GHG emissions associated with the MCDC's maximum electricity demand are quantified and estimated on an annual basis.⁶ Since these emissions are not emitted from MCBGF or MCDC equipment, the SPPE Application and IS/MND make assumptions based on SVP's published power mix using its average CO₂e per MWh.⁷ Exhibit 305 demonstrates that SVP's carbon intensity factor is projected to continue its downward trend, this is also corroborated by the testimony of Kevin Kolnowski at evidentiary hearing⁸. As Dr. Jiang testified at hearing the GHG annual emissions from electricity consumption made the very conservative assumption that the facility would be serving the maximum amount of critical IT (server) load and cooling the facility as if it was the hottest hour of the year, every hour of every day of the year.⁹

2. **Thresholds of Significance:** The only relevant quantitative threshold of significance for GHG emissions that is applicable to the project is the 10,000 metric tons CO₂e per year threshold for stationary sources established in BAAQMD's 2017 CEQA Guidelines, which applies only to the direct emissions of the MCBGF. Both the SPPE Application and the IS/MND use

⁴ Exhibit 1, page 116, Exhibit 200, page 5.8-10.

⁵ Exhibit 1, page 116, Exhibit 200, page 5.8-9.

⁶ Exhibit 1, pages 116-117, Exhibit 200, pages 5.8-8 through 5.8-11.

⁷ Exhibit 1, page 116, Exhibit 200, page 5.8-11.

⁸ 6/15/20 RT 21.

⁹ 6/15/20 RT 83-84.

the BAAQMD CEQA significance threshold for evaluation the GHG emissions from the MCBGF and correctly determine that the direct GHG emissions are below the threshold of significance¹⁰. No further analysis is required.

The BAAQMD CEQA Guidelines do not identify a GHG emission threshold for these short term construction-related emissions. Instead, BAAQMD recommends that GHG emissions from construction be quantified and disclosed, which was done. BAAQMD further recommends incorporation of Best Management Practices (BMPs) to reduce GHG emissions during construction, as feasible and applicable. MCBGF is incorporating BMPs.¹¹

It is undisputed in the record that there is no published numeric threshold of significance for indirect GHG emissions resulting from the generation of electricity to meet the MCDC demands.¹² As explained by Mr. Lisenbee, using the BAAQMD Guidelines numeric threshold for land uses would be misplaced as it was created to meet 2020 goals and is also outdated.¹³ Mr. Zielkiewicz of the Bay Area Air Quality Management District (BAAQMD) agreed that it was outdated and should not be used.¹⁴

3. Because there is no published threshold of significance for indirect GHG emissions from the generation of electricity to meet the MCDC demands, both the SPPE Application and the IS/MND used the third method of analysis contained in Section 15064.4 (b) (3)¹⁵ and sanctioned by the California Supreme Court in both *Cleveland National Forest Foundation v. San Diego Assn. of Governments*, 3 Cal.5th 497 and *Center for Biological Diversity v. Department of Fish & Wildlife*, 62 Cal.4th 204.
 - a. The first comparison performed by the SPPE Application and the IS/MND is to the Santa Clara Climate Action Plan (CAP). Both determine the MCDC would comply with the GHG reduction measures outlined in the CAP. Because the CAP would not be applicable to the MCDC because its measures expire in 2020, neither the IS/MND nor the SPPE Application used the CAP pursuant to CEQA Guidelines

¹⁰ Exhibit 1, page 116, Exhibit 200, page 5.8-10.

¹¹ Exhibit 200, page 5.8-9.

¹² 6/15/20 RT 60.

¹³ 6/15/20 RT 60-61

¹⁴ 6/15/20 RT 39

¹⁵ Exhibit 1, pages 116-121, Exhibit 200, pages 5.8-10 through 5.8-18.

Section 15183.5. The MCDC has incorporated several energy efficiency measures to reduce its electricity consumption¹⁶ and will have a PUE of 1.08¹⁷, significantly below the industry average.¹⁸

- b. With respect to the indirect GHG emissions from SVP's generation and/or procurement of electricity to serve the MCDC, the significance threshold is whether the project would comply with state goals. Since the GHG emissions from electricity are not generated by the MCDC, the more appropriate threshold question is whether the MCDC prevents SVP from complying with state laws, regulations, policies and plans to reduce its GHG emission profile of its power mix and meet the State's GHG reduction goals.

California's Electricity Goals

The SPPE Application and the IS/MND correctly identified California's laws and policies addressing GHG emissions and methods and targets for reduction.¹⁹ There is no evidence in the record that the IS/MND failed to identify a California law or policy that would be applicable to electricity generation. The IS/MND correctly identifies that it is Silicon Valley Power (SVP) that must comply with these applicable California laws and policies.²⁰ The IS/MND correctly identifies that SVP has met, and trends indicate that it will continue to meet, whatever GHG emission reductions and power mix goals are adopted and enforced by the State of California.²¹

At the evidentiary hearing, Mr. Kevin Kolnowski, Chief Operating Officer of SVP, explained how SVP was meeting its goals and identified the SVP 2018 Integrated Resource Plan (SVP 2018 IRP, Exhibit 302) as the document that outlined and proved it could in fact meet the goals for the electricity sector²². Exhibit 302 demonstrates that SVP's GHG planning target is met for the year 2030.²³

Exhibit 302 identifies at page 1-1 that it has been prepared to meet a specific GHG emission planning target range allocated to SVP by the California Air Resources Board,

¹⁶ Exhibit 1, page 115-116.

¹⁷ Exhibit 1, page 115.

¹⁸ Exhibit 1, page 115.

¹⁹ Exhibit 1, pages 116-121, Exhibit 200, pages 5.8-10 through 5.8-18.

²⁰ Exhibit 200, page 5.8-12.

²¹ Exhibit 200, pages 5.8-12.

²² 6/215/20 RT 26.

²³ Exhibit 302, pages 2-9 and 8-10.

pursuant to its authority under SB 350, codified as Public Utility Code 9621. The CARB Resolution adopting those goals pursuant to Public Utility Code 9621 is Exhibit 18, and its supporting Staff Report is Exhibit 19. Section 2.3.1 of the Exhibit 302 identifies in detail the specific California goals and state laws that it was developed to meet and comply with. Specifically outlined is the 2030 GHG reduction target which CARB developed to ensure that SVP achieved GHG emission reductions to support the electricity's sector allocation of meeting the State goal of reducing GHG emissions in California to levels that are 40 percent below those in 1990²⁴. Exhibit 302 describes that the CEC reviews it to ensure it complies with applicable law and that it must be updated and submitted to the CEC every five years. Mr. Kolnowski described the ongoing integrated resource planning SVP does between submittals of the Integrated Resource Plan to the CEC every five years.²⁵

Section 4 of the SVP 2018 IRP outlines how SVP forecasts its electricity demand and describes that it works closely with large data centers customers to routinely adjust its load forecasting. Mr. Kolnowski discussed this at the evidentiary hearing.²⁶

To summarize, the State of California has adopted specific GHG numeric targets for SVP to ensure that GHG emissions are reduced by 2030 to 40 percent below 1990 levels²⁷. That level is set to ensure California is doing its part to combat warming of the planet in excess of 2 degree Celsius.²⁸ The State of California then requires SVP to prepare an IRP on how it will meet those targets, and requires the CEC to review and approve the IRP every 5 years. SVP has prepared such a plan (Exhibit 302), the CEC has reviewed it and it shows that SVP can meet those targets on what it currently has procured. Mr. Kolnowski testified that the MCDRC would not prevent SVP from meeting the GHG goals and policies outlined in the Exhibit 302, the same conclusion reached by Staff in the IS/MND.²⁹ As explained by Mr. Lisenbee in his testimony at the evidentiary hearing, an agency may rely on generally applicable regulations to conclude an environmental impact will not be significant and therefore does not require mitigation. (*Tracy First v. City of Tracy*, 177 Cal.App.4th 912, 932-934).³⁰ In this case the Commission can rely on its own ability to review SVP's subsequent IRPs to ensure they comply with existing law and regulation of electricity sector greenhouse gas emissions.

²⁴ Exhibits 18 and 19.

²⁵ 6/15/20 RT 26-27.

²⁶ 5/27/20 RT 42-45.

²⁷ Exhibit 18, page 4.

²⁸ Exhibit 29, page 7 of 40.

²⁹ 6/15/20 RT 12-24, and 28.

³⁰ 6/15/20 RT 59.

Mr. Sarvey simply disagrees that SVP will meet its targets, even though Mr. Kolnowski described the ongoing planning and procurement process implemented by SVP. Mr. Sarvey's resume certainly does not demonstrate he is qualified to understand or perform electricity forecasting, electricity infrastructure planning, or electricity procurement. He is allowed to disagree, but he is simply not qualified as an expert in the field such that his opinion should be given any weight. Giving any weight to Mr. Sarvey's opinion would require a determination that Mr. Kolnowski and his SVP Staff are wrong, the CEC Staff who wrote the IS/MND are wrong, and the CEC Staff who approved SVP's IRP are wrong. That simply is an untenable conclusion.

Lastly, in Mr. Sarvey's closing statement, he cited to portions of Exhibit 19 (he meant Exhibit 18) out of context for the proposition that the CARB Resolution identified significant and unavoidable impacts. First, he fails to include the following context contained and secondly, he fails to inform the Committee that CARB found the impacts to Greenhouse Gases and Energy Demand to be beneficial impacts. Exhibit 18 at pages 11 and 12 of 29 of the pdf states:

The level of analysis in the Final EA reflects that the project is a State-level planning effort that recommends greenhouse gas (GHG) emissions targets to help achieve the statewide 2030 target, and approval of the Proposed Targets does not directly lead to any adverse impacts on the environment. As described in Chapter 4 of the Final EA, implementation of the Proposed Targets may indirectly lead to adverse environmental impacts as a result of reasonably foreseeable compliance responses. Therefore, the Final EA discloses the potential significant adverse impacts and beneficial impacts of the reasonably foreseeable compliance responses for implementing the Proposed Targets based on currently available information, without being speculative. The EA impact discussion includes, where relevant, construction-related effects, operational effects of new or modified facilities, and influences of the recommended measures on GHG and air pollutant emissions. Because the specific location, extent, and design of potential new and/or modified facilities cannot be known at this time, the impact discussions reflect a conservative assessment to describe the type of effects that may occur. These impact discussions are followed by the types of mitigation measures that could typically be required to reduce potentially significant environmental impacts. It is expected that many of the identified potentially

significant impacts can be feasibly avoided or mitigated to a less-than significant level through any project-specific approval or entitlement process related to compliance responses, which typically requires a project-specific environmental review. Nonetheless, in the interest of informed decision making, the Final EA takes a conservative approach for CEQA compliance purposes. Namely, to avoid any risk of understating an impact at this early planning stage, the Final EA presents conclusions for post-mitigation significance of these indirect impacts as significant and unavoidable where there is the possibility that feasible mitigation either may not be sufficient or there is some risk it may not be implemented by third parties with the authority to approve actions undertaken as foreseeable compliance responses.

The Final EA concluded that the reasonably foreseeable compliance responses associated with these Proposed Targets could result in the following short-term and long-term beneficial and adverse impacts: ***beneficial impacts to energy demand and greenhouse gases***; less than-significant impacts to air quality (odor), energy demand, hazards and hazardous materials, land use planning, mineral resources, population employment, and housing, public services, and recreation; and potentially significant and unavoidable adverse impacts to aesthetics, agriculture and forest resources, air quality, biological resources, cultural resources, geology and soils, hazards and hazardous materials, hydrology and water quality, land use planning, mineral resources, noise, recreation, transportation/traffic and utilities and service systems. ***(Emphasis Added)***

CARB, in Exhibit 18 at pages 28 through 29 of pdf, provides the following explanation and findings to support its statements of overriding consideration:

CARB expects that many of the significant adverse impacts identified in the EA will be avoided or mitigated; however, since uncertainty exists as to the extent of mitigation that other agencies will require at the site- and project-specific level, the Board is conservatively considering the impacts to be significant and unavoidable. The Board finds that despite the potential for adverse environmental impacts associated with the Proposed Targets, other benefits of the proposed actions are determined to be overriding considerations that warrant approval of the Proposed Targets

and outweigh and override its unavoidable significant impacts. Each benefit set forth below constitutes an overriding consideration warranting approval of the project, independent of the other benefits, despite each and every unavoidable impact. These benefits include:

1. ***Supporting California's ongoing efforts to address climate change and ambient air quality through 2020 and beyond*** – including the Scoping Plan, Short Lived Climate Pollutant Strategy, mobile source State Implementation Plan, and reducing motor vehicle petroleum fuel use – thereby enhancing public health and the environment;
2. ***Reduction in electricity-related greenhouse gas emissions, criteria, and toxic air pollutants from reduced dependence on fossil fuel power generation, increased building energy efficiency, renewable energy use, and transportation electrification;***
3. ***Mitigating effects of climate change, including sea level rise and disrupted precipitation patterns;***
4. ***Aiding LSE and POU planning efforts for broader electrification across other sectors – resulting in potential load increases – while procuring lower carbon resources to decarbonize the electricity sector;***
5. ***Providing a greenhouse gas planning target range for the electricity sector, LSEs, and POUs that enables LSEs and POUs to explicitly incorporate GHG considerations into their resource procurement decisions, and reduce GHG emissions from the electricity sector in support of the State's climate change goals;***
6. Economic benefits from energy efficiency and local job growth from increased development of advanced clean technologies as the result of LSE and POU implementation of IRP; and,
7. In line with the Legislature's findings and declarations, that in addition to other ratepayer protection objectives, a principal goal of resource planning shall be to minimize the cost to society of reliable energy services and to improve the environment and to encourage the diversity of energy sources through improvements in energy efficiency, development of renewable energy resources, such as wind, solar, biomass, and geothermal energy, and widespread transportation electrification. ***(Emphasis Added)***

In summary, CARB's findings prove that the Planning Targets are beneficial impacts because they will mitigate the electricity sector's contribution to climate change impacts, a far cry from Mr. Sarvey's contentions.

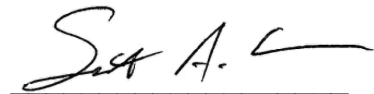
CONCLUSION

MCDC's indirect GHG emissions from its consumption of electricity are not significant. They cannot be deemed to be significant under CEQA because the MCDC will not prevent or interfere with SVP meeting the very goals determined to be necessary by CARB to prevent further warming of the planet using methods outlined in its SVP and approved by the CEC pursuant to the IRP iterative process.

Oppidan again urges the Committee to write its Proposed Decision in time for it to be considered at the July 8, 2020 Commission Business Meeting, or a Special Business Meeting the week of July 13-17, in order to continue construction of the MCDC

Dated: June 26, 2020

Respectfully Submitted,



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