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**APPLICATION FOR SMALL POWER PLANT
EXEMPTION FOR THE:**

***MISSION COLLEGE BACKUP
GENERATING FACILITY***

Docket No. 19-SPPE-05

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

I. Introduction

On August 12, 2020, the California Energy Commission (CEC) issued an order granting a small power plant exemption (SPPE) for the Mission College Backup Generating Facility (Mission College). The order exempts the project from CEC jurisdiction, allowing the project owner to obtain its permits from the entities that would normally have jurisdiction but for the CEC's exclusive permitting authority over thermal powerplants 50 megawatts and larger. On September 10, 2020, Intervenor Robert Sarvey filed a petition for reconsideration (petition) under Title 20, California Code of Regulations, section 1720(a)(1) (Section 1720), requesting that the CEC reverse its exemption of the project from the CEC's jurisdiction and deny the SPPE application.¹ The CEC will consider the petition at its October 14, 2020, Business Meeting. Parties have been invited to file responses to the petition by September 25, 2020. The following is CEC Staff's opposition to the petition.

II. The Petition Fails to Meet its Burden Under Section 1720.

Section 1720 requires a petition for reconsideration to specifically 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

¹ Robert Sarvey's Petition for Reconsideration.TN 234654-2. Cited hereafter as Petition. The provision for reconsideration cited in the petition is contained in the regulations related to consideration of Applications for Certification, but not Small Power Plant Exemptions. (See title 20, Cal. Code of Regulations, §1701 establishing the scope of the regulations. Nothing in Article 5 refers back to §1720 or otherwise indicates 1720 is applicable to exemption proceedings). Staff has chosen here to focus on the substance of the petition and not this procedural defect, but reserves the right to assert this argument in future proceedings.

error of law. The petition must 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.

The “new evidence” presented must be such that it would undermine or call into question a key point or fact on which the Commission’s findings have relied, thereby having an “effect on a substantive element of the decision.”² Thus, the petition must show that new evidence affects the Commission’s required findings that “no substantial adverse impact on the environment or energy resources will result from the construction or operation of the proposed facility.”³

The CEC’s regulations do not define evidence, but it is defined elsewhere as “testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact,”⁴ and, also pertinent, “relevant evidence” is “evidence... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.”⁵ Because the Commission’s decision is based on an analysis under the California Environmental Quality Act (CEQA), it is also helpful to understand “evidence” as that term is understood under that statute: “substantial evidence” includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.”⁶ Substantial evidence is not “argument, speculation, unsubstantiated opinion or narrative.”⁷

Taking all this together, the petition must show that it presents 1) evidence, that is 2) new, which 3) could not have been considered previously, and 4) affects a substantive element of the decision.

The petition appears to argue⁸ that the following constitute new evidence requiring reconsideration: 1) the rotating power outages experienced on August 14 and 15, 2020, and the Governor’s August 16, 2020 and September 3, 2020, Proclamations of a State of Emergency responding to the threat of rotating outages, designating August 14 through August 20 and September 3, 2020 through September 7, 2020 to be Extreme

² This is the purpose for requiring the petition to discuss the effects such new information has upon a substantive element of the decision. Thus, new information in and of itself should not be sufficient to justify reconsideration unless that information, assumed or proven to be true, could lead the CEC to change a finding with regard to its decision. For example, an assertion that there is new evidence that the project’s impacts are likely to be less than anticipated should not trigger reconsideration.

³ Pub. Resources Code § 25541.

⁴ Evidence Code § 140.

⁵ Evidence Code § 210.

⁶ Cal. Code of Regulations, tit. 14, § 15384 subd. (b). Cited hereafter as “Guidelines, §__.”

⁷ Guidelines, § 15384, subd. (a).

⁸ The petition itself only makes generic reference to these points, referring to them as facts, and failing to explain how these facts constitute evidence as required under § 1720. In order to best facilitate consideration of the matter, staff here fleshes out what we assume Mr. Sarvey’s assertions are in detail.

Heat Events and designating, among many other measures, the use of stationary generators during these Extreme Heat Events to be an “emergency use” under certain specified legal provisions⁹; and 2) statements made by the California Air Resources Board (CARB) and the Bay Area Air Quality Management District (BAAQMD) at the September 9, 2020 Business Meeting regarding another project under consideration.^{10,11} As discussed further below, neither of these events rises to the level of new evidence that would have an effect on a substantive element of the decision; therefore, the petition should be denied.

A. The Recent Constraints on the Electricity Grid, and the Governor’s Actions in Response, Do Not Constitute New Evidence That the Project May Result in a Significant, Adverse Impact to the Environment or Energy Resources.

The issue of emergency operation of this facility was thoroughly analyzed in this proceeding, with detailed discussions of the situations that might occur that could necessitate the use of the emergency generators and predictions about the potential frequency of their use.¹² The decision concluded the project would likely “operate very infrequently, if at all, for emergency operations” and that “quantification of those impacts [is] too speculative to be meaningful.”¹³ The recent power outages, coupled with the executive orders¹⁴ present a slightly new situation in which the backup generators might run (if the circumstances that led to the outages occur again and, importantly, the state has not taken measures to prevent a similar shortfall from recurring) but it does not constitute evidence that this particular facility is now more likely to run such that the original analysis is called into question.

⁹ August 16, 2020, Governor’s [Proclamation of a State of Emergency](https://www.gov.ca.gov/wp-content/uploads/2020/08/8.16.20-Extreme-Heat-Event-proclamation.pdf), available at <https://www.gov.ca.gov/wp-content/uploads/2020/08/8.16.20-Extreme-Heat-Event-proclamation.pdf>, and September 3, 2020, Governor’s [Proclamation of a State of Emergency](https://www.gov.ca.gov/wp-content/uploads/2020/09/9.3.20-Extreme-Heat-Event-Proclamation.pdf), available at <https://www.gov.ca.gov/wp-content/uploads/2020/09/9.3.20-Extreme-Heat-Event-Proclamation.pdf>.

¹⁰ Whether or not comments made by agencies in a different proceeding constitute evidence in the present proceeding by merely referencing their general nature is an open question. As with the previous assertion regarding the outages, staff here fleshes out Mr. Sarvey’s argument in more detail than was done in the petition to better assist the Commission in reaching a determination on the matter.

¹¹ Mr. Sarvey also mentions that “PG&E has just employed an unprecedented early September PSPS event.” Petition, p. 2. The petition does not explain how this event affects a substantive element of the decision. Staff does not address that item further as the possibility of PSPSs occurring was raised and addressed during the proceeding. See, Mission College Data Center SPPE Final Commission Decision, pp. 21-22; Appendix A pp. 4-9 to 10, and Appendix B of Appendix A, pp. 17-21. Cited hereafter as Decision. Thus, the fact that one of these events might have occurred recently does not constitute new evidence that would affect a substantive element of the decision.

¹² Decision, pp. 19-23, 35-36, Appendix A, pp. 5.3-1 and throughout chapter 5.3, with specific focus on pp. 5.3-42 to 5.3-53. TN 234401.

¹³ Decision, p. 22.

¹⁴ It’s important to note that emergency generators operating during a power outage cannot be new information – that is exactly when they are designed to run and the analysis specifically looked at how frequently outages could be expected. The only thing that is new here is that the Governor’s actions allowed the generators to run to avoid an outage in the first place.

There is still much to learn from these recent events, including, among other things, their proximate cause,¹⁵ and how various data centers responded, including how many generators were run in each instance, in what configuration, in what location, and for how long. As this information is gathered, various agencies, including the CEC, will also be investigating the effects of climate change on the availability of electricity and what steps need to be taken to ensure sufficient resources going forward to prevent rotating outages from happening again.¹⁶ It is worth noting that California had not experienced rotating outages for almost 20 years prior to these events and there is no indication that the state will be incapable of preventing these occurrences again; asserting that these outages are likely to occur into the future is speculative and, without more detail about the causes and effects of the events, or evidence that California will be incapable of preventing future occurrences, does not rise to the level of evidence, substantial or otherwise. As discussed above, the analysis already anticipated that emergency operation could occur (infrequently does not mean never). Having one or two additional data points where data centers operated on emergency power as a result of the Governor's orders does not change the estimate of Mission College itself running in emergency mode from being "infrequent" to "likely" or "frequent."

Even if these new data points rose to the level of new evidence, it would not change the analysis. As explored in detail in the decision, modeling emergency operations requires too many assumptions to result in useful information about a project's potential for significant, adverse impacts; any conclusion drawn from such modeling would be speculative.¹⁷ This is why, except for a few outlier instances, neither CARB nor any air district in the state requires modeling emergency operations when issuing air permits.¹⁸ This modeling becomes no less speculative with a few new data points, especially when those data points currently lack any detail about how the outages actually affected the operation of data center backup generators and what that may mean for the future operation of this facility in particular.

¹⁵ Different factors appear to have been involved on different days. For example, the rotating outage on August 14, at initial glance, appears to have been triggered by reduced availability of expected imports, whereas the ultimate triggering event of the outage on August 15 appears to have been caused by miscommunication between a utility distribution company and a powerplant, (where an order for megawatts was mistakenly sent to the wrong facility, resulting in a decrease in electricity instead of the intended increase).

¹⁶ August 19, 2020 letter to Governor Newsom from the CPUC, CAISO, and CEC.

https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/News_Room/NewsUpdates/2020/Joint%20Response%20to%20Governor%20Newsom%20Letter%20August192020.pdf. The agencies committed to "pinpoint the causes [of the August 14 and 15 outages] and ensure they do not reoccur." Initial reports indicate the reduced supply was the result of lesser availability of imported electricity due, in part, to other states moving away from coal and towards renewables, but more detailed investigation is necessary to truly understand that causes and effects of what transpired.

¹⁷ Decision, p. 20, Appendix A, pp. 5.3-42 to 44.

¹⁸ Decision, p. 19; Appendix A, pp. 5.3-48, 5.3-51.

B. Comments by the Bay Area Air Quality Management District and the California Air Resources Board at the September 9, 2020 Business Meeting Do Not Constitute New Evidence in This Proceeding That the Project May Result in a Significant, Adverse Impact to the Environment or Energy Resources.

The second category of alleged new information Mr. Sarvey cites to support his petition for reconsideration are the statements made by CARB and BAAQMD at the September 9, 2020 business meeting on the CEC's consideration of an exemption for the Sequoia Backup Generating Facility. These statements, however, do not rise to the level of new evidence. None of the comments made at the business meeting provided any new evidence or cited specific errors of fact or law in this decision that would support Mr. Sarvey's petition. Both agencies generally expressed concerns about the "growth in diesel combustion for backup power at data centers,"¹⁹ and a preference for alternatives;²⁰ they did not, however, provide any new facts or substantial evidence that the CEC's analysis of impacts in Mission College was flawed. As discussed further below, the record in this proceeding already addresses the issues raised by these agencies; their comments in the Sequoia proceeding cannot be relied on to support Mr. Sarvey's petition.

1. BAAQMD's Comments Are Policy Arguments About Reducing the Use of Diesel Generators in General; They Are Not New Evidence that Mission College May Have a Significant Adverse Impact on the Environment or Energy Resources.

There are at least two reasons BAAQMD's comments in the Sequoia proceeding cannot be relied on to support the petition: 1) the comments have been raised before and do not constitute new evidence; and 2) they raise policy concerns about diesel generators in general, and do not call into question a substantive element of this particular decision. BAAQMD representative Henry Hilken spoke at the September 9, 2020 Business Meeting regarding the Sequoia proceeding, expressing concern over the "continued dramatic growth in diesel combustion for backup power at data centers,"²¹ and the potential for increases in toxic diesel emissions in impacted communities. He did not, however, identify any specific portion of the Commission's analysis that is flawed or present any evidence that would affect a substantive element of the Mission College decision.²²

¹⁹ Item 13 – Transcript of September 9, 2020 Business Meeting, p. 22. TN 234840 in the Sequoia Data Center SPPE proceeding. Cited hereafter as 9/9/20 RT.

²⁰ *Id.* at 20 and 22.

²¹ 9/9/20 RT, p. 21.

²² 9/9/20 RT, pp. 21-22. Mission College is outside of the Community At Risk Evaluation program (CARE) area and would not significantly impact the communities referenced. Transcript of June 15, 2020 Evidentiary Hearing, pp. 46. TN 233540. Cited hereafter as 6/15/20 RT. See also Decision, Appendix A, pp. 5.21-1 to 27.

In the Mission College proceeding, as it has elsewhere, BAAQMD provided written comments on CEC staff's Initial Study/Proposed Mitigated Negative Declaration and also testified at the evidentiary hearing. In its written comments, it encouraged the CEC to promote cleaner alternatives and "enhance its CEQA analysis," and expressed disagreement with a few components of staff's cumulative GHG analysis, which were subsequently addressed by staff in its Response to Comments.²³ BAAQMD encouraged the CEC to require a reduction in the project's emissions "to the maximum extent possible," "even if the revised analysis does not conclude the Project's emissions will be cumulatively considerable."²⁴ At the Mission College evidentiary hearing, BAAQMD representative Jakub Zielkiewicz testified that the district was concerned with how these projects mesh with the state's carbon neutrality goals and BAAQMD's Diesel Free in '33 initiative, and expressed an interest in continuing to work with the CEC on these issues.²⁵ The decision addressed these concerns and concluded that the project would have a less than significant impact in these areas.²⁶

It is important to note that a generalized concern about the increase of diesel generators is only actionable in the context of this proceeding if it can be shown that this project has the potential to result in significant, adverse cumulative impacts in combination with that general increase. The record includes a thorough discussion of the potential of the Mission College data center's emissions to cumulatively contribute to a significant impact, including in the areas of greenhouse gas emissions, criteria pollutants, and toxic air contaminants, concluding that there is no such potential. Criteria pollutant and toxic air contaminant emissions from standby engines tend to be very localized impacts; any new facilities would need to be located fairly close to Mission College to have the potential to result in a cumulative impact. Neither the petition nor BAAQMD asserts that the CEC has failed to consider specific other facilities within the boundaries of the project's potential impact that are otherwise required to be included in the analysis.

2. CARB's Comments Are Not New Evidence that Mission College May Have a Significant Adverse Impact on the Environment or Energy Resources.

Unlike BAAQMD, CARB did not participate or provide comments in the Mission College proceeding. CARB commented during consideration of the Proposed Decision in the Sequoia Data Center Backup Generating Facility SPPE proceeding that they have "technical concerns related to the analysis of these data centers" and "believe better

²³ Exhibit 301, May 21, 2020 letter from Greg Nudd, Deputy Air Pollution Control Officer, BAAQMD to Leonidas Payne, Project Manager, California Energy Commission (BAAQMD Comment Letter), p. 1. TN 233079.

²⁴ *Id.* at p. 2.

²⁵ 6/15/20 RT, pp. 38-39.

²⁶ Decision, pp. 27-28.

options are available that provide cleaner or zero emission backup power.”²⁷ Notably, CARB did not specify what its concerns were, later promising to provide information in that proceeding by October 15, 2020.²⁸ These assertions and promise of details to come do not, however, constitute evidence meeting the requirements of Section 1720 in this proceeding.

While ensuring these facilities are as clean as possible is an admirable goal, it arguably lies outside the CEC’s authority if the projects are otherwise found to result in less than significant impacts, as this one has been found to do. Even if the CEC had such authority, staff does not currently believe there are any technology alternatives that meet the reliability objectives of these facilities.²⁹

Specifically, CARB states that the CEC should consider project alternatives such as Tier 4 engines, batteries, or fuel cells instead of the proposed Tier 2 diesel engines.³⁰ BAAQMD made identical comments in its CEQA comment letter and staff has already investigated the viability of these potential alternatives for backup diesel generators, concluding that there currently are significant drawbacks to each of those suggested.³¹ Tier 4 engines must reach a certain temperature before the additional emission reductions they provide can be realized and would only provide potential benefits during the annual load tests and emergency operations that approach or exceed one or more hours of operation.³² The analysis does not support requiring them here, but the project will require a permit from BAAQMD, who would have the authority to declare these engines Best Available Control Technology (BACT) pursuant to their rules established under the Clean Air Act, and require them in that forum.

Batteries may hold future promise but take up more space than the current site allows and can provide reliability for only approximately 4 hours, which does not meet the project objectives for reliability of Mission College or any other data center staff has reviewed.³³ Lastly, fuel cells would be difficult to configure on the current site, the technology’s reliance on a constant supply of natural gas would be unlikely to provide the reliability needed by these facilities, and staff does not consider the technology to have matured enough to be suitable for large data centers such as Mission College.³⁴

²⁷ 9/9/20 RT, p. 20.

²⁸ TN 234684.

²⁹ Exhibit 201, CEC Responses to Comments Received on the Initial Study and Proposed Mitigated Negative Declaration, pp. 3, 7-8. TN 233274, See also Exhibit 1, Mission College Backup Generating Facility Small Power Plant Exemption Application, pp. 199-201 (discussing project objectives and alternatives). TN 230848.

³⁰ 9/9/20 RT, p. 20.

³¹ Exhibit 201, pp. 2-6.

³² Exhibit 201, pp. 3.

³³ *Id.*

³⁴ *Id.* at pp. 7-8.

Staff looks forward to continuing discussions with CARB, BAAQMD, and project owners about possible alternatives that could meet project needs, but does not expect any to be identified as viable in the near-term.

Lastly, even if CARB’s statements constituted the necessary evidence, Mr. Sarvey fails to explain why it could not have been provided during the evidentiary hearing, as required by section 1720(a)(1). CARB makes a general allusion to the recent rotating outages as “underscore[ing] the need for analyses to ensure that backup generators are as clean as possible,” but nothing indicates that the recent events are the sole triggering factor or that the information they will be providing after this matter is heard could not have been provided during this proceeding.

III. Conclusion

The recent rotating outages are not evidence calling into question a substantive element of the decision to grant the Mission College SPPE. Nor are the comments made by BAAQMD and CARB during consideration of the Proposed Decision in the Sequoia Data Center Backup Generating Facility SPPE proceeding. These issues are broader policy concerns about 1) maintaining grid reliability in light of climate change’s effects on energy supply and need in California and the west, and 2) considering the continued interest in minimizing fossil fuel use in all applications, whether or not, as a policy matter, the state should continue to permit diesel backup generators to support data centers and, if not, what authority it has to cease doing so.

These are complex issues, both from a legal and a policy perspective, and do not lend themselves to easy or quick answers. Staff looks forward to its continuing collaboration with CARB and BAAQMD on these broader policy goals and concerns, and discussion about whether or not staff can and should modify its analysis of future projects to address those concerns, but does not believe that these concerns are evidence that the project-level analyses currently undertaken by the CEC are deficient or that review at the project level must immediately stop and wait for resolution of these broader concerns. As discussed above, the petition fails to meet the requirements of Section 1720 and should be denied.

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Respectfully submitted,

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