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**STATE OF CALIFORNIA
STATE ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION**

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

**GREAT OAKS SOUTH BACKUP
GENERATING FACILITY**

Docket No. 20-SPPE-01

CEC STAFF'S OPENING BRIEF

The Great Oaks South Backup Generating Facility has been thoroughly analyzed and there is substantial evidence in the record to support the conclusion that it meets the requirements of Public Resources Code Section 25541 for an exemption from the California Energy Commission's (CEC) jurisdiction. The project would generate up to 99 MW of electricity, within the boundaries of 50 to 100 MW established by Section 25541 for an exemption. (Exh. 200, Appendix A p. 1.) And no substantial adverse impact on the environment or energy resources would result from construction or operation of the proposed facility. (Exh. 200, p. 1-3.) Staff addresses a few of the questions raised at the evidentiary hearing about potential project impacts below.

1. The Project Would Not Result in Any Significant Adverse Impact to Air Quality

In his written testimony and at the hearing, Intervenor Robert Sarvey questioned the sufficiency of staff's analysis of air quality impacts in the absence of modeling of emergency operations. Mr. Sarvey's testimony focused on survey results provided by the Bay Area Air Quality Management District (BAAQMD) showing use of backup diesel generators in non-testing/non-maintenance mode over a recent 13-month period. Staff testified that these results are not necessarily representative of future operation and do not contradict staff's conclusion that the probability of a power outage occurring at any particular data center, including the proposed, remains low and does not support the speculation required to attempt modeling emergency operations. (RT p. 48:14-22; Exh. 205, p. 2) The CEC agreed with this conclusion in the recently approved Sequoia Backup Generating Facility exemption proceeding and the rationale applies equally here. (Exh. 200, p. 7-19; RT p. 51:1-21.)

2. MM GHG-1 Ensures the Project Will Comply with a Greenhouse Gas Reduction Plan and the Project's Indirect Emissions from Electricity Use will be Less Than Significant

At full buildout and occupancy, the data center could consume up to 867,240 MWh of electricity per year, which, conservatively relying on Pacific Gas and Electric Company's (PG&E's) Carbon Intensity factor, could have resulted in greenhouse gas emissions totaling 81,035 MTCO₂e/yr or 206 pounds of CO₂e per MWh. (Exh. 200, pp. 4.8-10 and 4.8-12.) The City of San Jose has adopted a greenhouse gas reduction strategy (GHGRS), which "serve[s] as a Qualified Climate Action Plan for purposes of tiering and streamlining under the California Environmental Quality Act (CEQA)." (Exh. 34, p. 9.) Therefore, the CEC can rely on the provisions contained therein pursuant to title 20, California Code of Regulations, section 15183.5(b)(2) to conclude the project's impacts would be less than significant. The Final Environmental Impact Report (FEIR) concluded that the project complies with the GHGRS, notes that these measures will be enforceable by the city when the project undergoes development review, and incorporates as a mitigation measure one of the most important mechanisms established by the city to reduce GHG impacts - participation in San Jose Clean Energy (SJCE) at the Total Green level, or an equivalent program. (FEIR, pp. 4.8-16 through 4.8-24.) Thus, the FEIR meets all the requirements of section 15183.5 for reliance on a GHGRS to conclude the project's impacts from greenhouse gas emissions would be less than significant.

Mr. Sarvey questioned the inclusion in MM GHG-1 of an option allowing the project owner to participate in a plan equivalent to SJCE Total Green. The city itself requested that that flexibility be added to the measure. (Exh. 204, p. 9.) The revised MM GHG-1 includes a performance standard requiring any alternative clean energy program to "accomplish[] the same goals of 100% carbon-free electricity as the SJCE Total Green Level." This equivalency includes any restrictions imposed on the 100% carbon-free electricity claim that SJCE will be subject to, including the restrictions on the use of unbundled Renewable Energy Credits contained in California Code of Regulations, title 20, section 1393.

As enforced by the city, the project owner will be required to produce documentation showing that it has developed an alternative program that meets these same 100% carbon free goals as verified by a qualified third-party auditor specializing in greenhouse gas emissions. And each year that the project wants to continue to use the alternative program, it will also be required to provide annual reports showing that the alternative program "continue[s] to provide 100% carbon-free electricity, as verified by an independent third-party auditor." (Exh. 202, Attachment pp. 20-21) The Director of the

City of San Jose Planning, Building and Code Enforcement will undertake the oversight responsibility. If the project owner fails to produce an alternative program that satisfies the performance standard (and, by extension, fails to show compliance with the city's GHGRS), the project owner will be required to either participate in SJCE at the Total Green level or negotiate with SJCE for an equivalent program. Because the measure clearly articulates the applicable standard the project will have to meet (purchase of electricity that is either the SJCE Total Green Level or accomplishes the exact same 100% carbon-free electricity as that product) there is no deferral of mitigation at issue. Also, the city is in the best position to determine whether the plan provided by the project owner in fact meets the requirements of the city's own GHGRS.

3. The Project Would Not Result in Any Significant Adverse Impact from Noise Emissions

As proposed, the project's construction would meet the city noise requirements and, with the proposed mitigation measures, the project would not result in an increase of ambient noise at the nearest noise receptor over 10 dBA, and staff concludes the project would not result in a significant adverse impact. (Exh. 204, p. 3.) Updated PD NOI-1, Updated PD NOI-2, and MM NOI-1 included in the FEIR ensure: (1) the requirements of General Plan policy EC-1.7 are implemented; and measures will be taken to alert nearby residents of particularly noisy construction events and provide a mechanism for receiving and addressing any noise complaints. (Id.) With the adoption of these measures, staff concludes the project's noise impacts related to construction would be less than significant. (Id.)

As discussed on pages 4.13-7 and 4.13-8 of the FEIR, the applicant modeled operational sources of noise for the project, using industry-accepted noise model software, to assess the impact of its operational activities on nearby noise receptors. (Exh. 24, p. 2.) The results showed that project operational noise levels would not exceed 47 dBA at the nearest residential receptor, which would be below the city's noise level limit for residential uses, and well below the average daytime ambient noise levels in the area. The results also showed that project operational noise levels would not exceed 57 dBA at the nearest commercial receptor, which would be below the city's noise level limit for commercial uses, and below the average daytime ambient noise levels in the area (Exh. 24, p. 6, Table 2.)

4. The CEC Does Not Have Legal Authority to Compel the Project to Use an Alternative Backup Generator Technology

Mr. Sarvey spent time in his testimony and cross-examining staff on the availability of alternative technology to provide backup electricity to the proposed data center. Staff

testified that some alternative technologies would not meet the needs and project objectives of the project as proposed and others could possibly meet them, but more information would be needed to reach a definitive conclusion. (Exh. 200, pp. 5-7 through 5-13 and 5-24 through 5-34; Exh. 205, p. 4.) More importantly, there is no substantial evidence that the project as proposed would result in a significant, adverse impact on the environment or energy resources; therefore, whether there are feasible alternatives that would similarly have a less than significant impact on the environment is ultimately immaterial to the CEC's determination of whether the project, as proposed and mitigated, qualifies for an exemption from CEC jurisdiction.

5. Conclusion

The record for this proceeding contains substantial evidence that the project, with mitigation incorporated, would not result in any substantial adverse impact on the environment or energy resources. Therefore, staff recommends the Committee grant the requested exemption from CEC jurisdiction, allowing the project to obtain the necessary permits from the City of San Jose and the Bay Area Air Quality Management District.

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Respectfully submitted,

/s/

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