

DOCKETED

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Filer:	Scott Galati
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Nadia Costa
MILLER STARR REGALIA
1331 N. California Blvd., 5th Floor
Walnut Creek, CA 94596
Telephone: (925) 935-9400

Scott A. Galati
DAYZEN LLC
1720 Park Place Drive
Carmichael, CA 95608
Telephone: (916) 900-8026

STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:

Application For Small Power Plant
Exemption for the **SAN JOSE CITY
DATA CENTER**

DOCKET NO: 19-SPPE-04

**MICROSOFT'S MOTION FOR
ADJUSTMENTS TO THE
SCHEDULING ORDER AND ORDER
SHORTENING TIME FOR RESPONSE
TO THIS MOTION**

Microsoft Corporation (Microsoft) hereby files this Motion For Adjustments to the current Scheduling Order to reflect the current status of the SPPE Application, to expedite Committee review to enable Microsoft to begin construction of this much needed data center infrastructure as soon as feasible. Microsoft also requests the Committee issue an order shortening time to respond to this motion by March 29, 2022. This motion is brought pursuant to Section 1211.5 of the Commission Regulations¹

¹ The term Commission Regulations used in this Motion shall refer to Title 20, Division 2 of the California Code of Regulations.

BACKGROUND AND NEED FOR SCHEDULING ADJUSTMENTS

On March 15, 2022, the Chair of the Commission issued a Revised Scheduling Order (Order)² unilaterally extending the dates for filing Opening and Reply Testimony. None of the parties were allowed to present arguments against the extension of the time. No reason was provided in the Order, but it is presumed that it was due to the need to assign a new Commissioner to the Committee to accommodate Commissioner Douglas leaving the Commission. The Order has resulted in a delay of the proceeding by at least one month, and while Microsoft would have sought to avoid this delay, proposed herein are reasonable adjustments to the schedule that, if approved, would offset the delay.

Microsoft is committed to constructing the San Jose City Data Center Project to meet its growing customer demand. To meet that demand and continue its investment into the South Bay Area community, it is critical for the project to begin construction as soon as possible. To that end, Microsoft proposes the following adjustments to expedite the process without limiting any public participation.

PROPOSED ADJUSTMENTS AND RATIONALE

Revised Opening and Reply Testimony Filing Dates

Microsoft requests that the filing date for Opening Testimony be revised to April 1, 2022 and Reply Testimony filing date be revised to April 8, 2022.

Neither of these proposed adjustments would limit the public from participating in the proceedings including filing of public comments and/or participating at a hearing to provide oral comments. The adjustments to the schedule are geared toward eliminating duplicative and lengthy hearing time for the parties.

There are two intervenors in the proceeding. Neither has filed comments on the Draft Environmental Impact Report (DEIR), which was published over three months ago on December 23, 2021. The California Environmental Quality Act (CEQA) contemplates that the DEIR is the heart of its process. Comments on the DEIR are the primary way for members of the public and intervenors to challenge the DEIR analysis and conclusions as well as to suggest alternative analyses and conclusions.

While the Commission process also affords opportunity for intervenor testimony, it is fundamentally unfair to Staff and the public if an intervenor uses its testimony as a substitute for providing comments on the DEIR. This tactic prevents Staff from

² TN 242335.

considering the comments prior to publication of the FEIR, thereby leaving evidentiary hearing as the only way to resolve any issues subsequently raised by the intervenor. The failure to provide comments on the DEIR deprives Staff of including any suggested changes in the FEIR (new analysis, mitigation modifications, etc.) and of the ability to defend the reasons such changes are unnecessary or unwarranted. It is unfair to the parties who have provided comments on the DEIR to allow an intervenor, based solely on their status as an intervenor, to file their first objection to the DEIR as Testimony *after* publication of the FEIR. This tactic needlessly prolongs the process and is employed solely to cause delay.

In this case, Staff prepared a thorough DEIR. Comments were received by the public and two agencies, and Staff thoroughly considered and responded to each and every comment.

It is also important to note that Microsoft filed comments on the DEIR to allow Staff to consider changes. Staff addressed these comments in detail, and as a result, there are no issues requiring adjudication between Staff and Microsoft. This is the way the process has been designed to work.

Since no intervenor has filed comments on the DEIR, Microsoft requests that the filing date for Opening Testimony be revised to April 1, 2022 and Reply Testimony filing date be revised to April 8, 2022.

Further, the Committee should require each intervenor to provide an explanation why issues raised in Opening Testimony were not previously identified in comments on the DEIR.

Combination of PreHearing Conference/Evidentiary Hearing

Because the Intervenors have not shown any disagreement with the DEIR and it would be unfair for the Committee to allow them to use Opening Testimony as a substitute for commenting on the DEIR, there is no reason to have any delay between the PreHearing Conference and the Evidentiary Hearing. Combining the date for both proceedings would save the Committee, Staff and Applicant time while still allowing for members of the public to provide comment.

Combination of the PreHearing Conference and Evidentiary Hearing has been approved by the Commission in numerous Application For Certification (AFC) proceedings in the past and has proven to facilitate more efficient proceedings, resulting in time-savings for Commissioners, Staff, Intervenors and Hearing Officers. It also allows for greater focus on entering Exhibits into the record and answering questions from the Committee and

members of the public. This fulfills CEQA's fundamental objective—ensuring the public and the decision-makers are fully informed of the potential effects of the project on the environment.

Microsoft also requests that the combined PreHearing Conference/Evidentiary Hearing be scheduled now for a date immediately after the filing of Testimony because at the present moment there simply are no evidentiary disputes between the parties that require adjudication.

LEGAL AUTHORITY OF COMMITTEE TO GRANT MOTION

Section 1203 of the Commission's Regulations provides broad power to the Presiding Member of the Committee to:

- (c) Regulate the conduct of the proceedings and hearings, including, but not limited to, disposing of procedural requests, ordering the consolidation or severance of any part, or all, of any proceeding or hearing, admitting or excluding evidence, designating the subject matter, scope, time of presentation, and order of appearance of persons making oral comments or testimony, accepting stipulations of law or fact, and continuing the hearings.
- (d) Set the time and place of hearings.
- (e) Cancel a scheduled hearing or meeting. To the extent feasible, notice shall be given of any cancellation, and the staff, in consultation with the public adviser, shall inform known interested participants by the most expeditious means possible.
- (f) For good cause shown, shorten or lengthen the time required for compliance with any provision of these regulations.

Revising the schedule order to make the proposed adjustments is clearly authorized by Section 1203. The proposed adjustments do not inhibit any member of the public from participating in the exact same way they would participate under the current schedule.

Microsoft also requests the Committee grant an order shortening time to require responses to this motion no later than March 29, 2022.

Dated: March 25, 2022

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read 'Nadia Costa', written over a horizontal line.

Nadia Costa
Counsel to Microsoft

A handwritten signature in dark ink, appearing to read 'Scott A. Galati', written over a horizontal line.

Scott A. Galati
Counsel to Microsoft