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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 **SAN JOSE CITY
DATA CENTER**

DOCKET NO: 19-SPPE-04

**MICROSOFT'S RESPONSE TO
COMMENTS ON THE FEIR BY ADA
MARQUEZ/OCA**

Microsoft Corporation (Microsoft) hereby provides the following responses to the comments on the Final Environmental Impact Report (FEIR) docketed by Ada Marquez on behalf of Organización Comunidad de Alviso (OCA) on July 11, 2022.¹ The comments are largely repetitive of comments previously made by Ms. Marquez and OCA in their letter on the Draft Environmental Impact Report (DEIR).² Staff thoroughly responded to each and every one of Ms. Marquez's 16 comments on the DEIR in Section 7 of the FEIR.³ Ms. Marquez's July 11 letter states disagreement with Staff's

¹ TN 243991. Ms. Marquez has submitted her comment letter on the letterhead of the law firm of Shute Mihaly & Weinberger, LLP, where Ms. Marquez is a staff Urban Planner. The letter is not signed by any attorney with the firm. For purposes of this response, her previous comments on the DEIR and the comments on the FEIR are treated as made by the same author.

² TNs 241474, 241475, 241476, 241477, 241478, 241479, 241480, 241481, 241482, 241511, 242481, 240572, 240562, 240189, 236959, and 236718

³ 243824-2, Comment Letter B, Response to Comments B-1 through B-16, pages 7-36 through 7-54.

prior responses, but in many instances ignores information and analysis provided in the FEIR that is directly on point, as outlined in the sections below.

It is important to note that the FEIR was available for review over four months ago on February 28, 2022, yet Ms. Marquez chose to file these comments less than two days prior to the Commission's Business Meeting, after the completion of both the Pre-Hearing Conference and Evidentiary Hearing—public hearings in which Ms. Marquez could have, *but chose not to*, either attend or participate. Nothing in the Commission's regulations or under the California Environmental Quality Act ("CEQA") legally prevents the filing of late comments, despite the obvious delay tactic that such comments represent.

Critical to the Commission's current review of the July 11 letter, *none of the comments* provide any evidence that would require recirculation of the EIR under CEQA Guidelines section 15088.5 as the letter *does not identify any evidence* of a new significant impact that was not previously identified and analyzed in the EIR or a substantial increase in the severity of an impact that was previously identified in the EIR, as outlined in the sections below. For these reasons, Microsoft requests that the Commission proceed with its July 13, 2022 Business Meeting and issue a decision on the Small Power Plant Exemption, as there is no substantive basis to delay the decision.

Microsoft respectfully requests the Commission find that the issues raised by Ms. Marquez have been addressed in the FEIR and the FEIR complies with CEQA; certify the FEIR; and grant the SPPE for the project for the San Jose City Data Center. This will allow the project to move forward with the City of San Jose for approval and begin construction on this important project without further delays to the schedule.

RESPONSE TO SPECIFIC COMMENTS

Ms. Marquez's comment letter is, at base, a reiteration of her comments on the DEIR and a disagreement with the conclusions of the EIR. It does not present any substantial evidence of any new impacts or significantly more severe impacts. The following is a summary of each comment, along with citations to where Staff has addressed the issue in the FEIR, and a discussion of why the comment does not provide substantial evidence to support Ms. Marquez contentions that the FEIR is defective.

Environmental Baseline

Comment: Ms. Marquez contends the environmental baseline for the FEIR is defective because it does not adequately describe the Alviso Community.

Staff's Prior Response: Staff previously addressed this same comment (Response to Comments B-1, B-4, B-5, B-7 and B-9). Ms. Marquez's continued contention that the Alviso Community is a disadvantaged community is misleading. Staff explained in Response to Comment B-5 that for CalEnviro Screening purposes, the Alviso Community is not a disadvantaged community. Nevertheless, Staff included the community in its environmental justice evaluation and also concluded that all of the potential impacts to the Alviso community (which is 2.5 miles away from the project site) would be less than those at receptors significantly closer to the project, where impacts were quantified and determined to be less than significant. Staff explained exactly how the FEIR conducted its analysis, including the distances from the project that could be impacted and why and how it evaluated potential impacts to the surrounding communities including the Alviso Community (Responses to Comments B-4). Staff further explained in its Response to Comment B-5 that the FEIR conducted an environmental justice analysis that included the Alviso Community. In Responses to Comments B-7 and B-9, Staff explained the FEIR's reliance on an established air quality evaluation methodology to evaluate impacts associated with air quality and health risks and its use of the BAAQMD's CEQA Guidelines. As provided in Staff's prior responses, the EIR evaluated impacts at sensitive receptors that were closer and therefore subject to higher emissions from the project than the Alviso Community which is further away.

Further Response: The environmental baseline was adequately described and in fact includes the Alviso Community.

MMRP Delegation

Comment: Ms. Marquez contends the Commission improperly delegated the Mitigation Monitoring Reporting Program (MMRP) to the City of San Jose citing the CEQA Guidelines.

Staff's Prior Response: Staff previously addressed this comment and stated that the comment was not a comment on the FEIR (Response to Comment B-2).

Further Response: Ms. Marquez's contention is legally inaccurate because of the unique regulatory framework under which the Commission is operating. The Commission's decision whether or not to grant a Small Power Plant Exemption does not

in effect allow the project to be constructed or operated. It simply **exempts** the project from compliance with any of the provisions of the Warren Alquist Act⁴. In other words, once a SPPE is granted, the Commission exempts the project completely from its jurisdiction. While the Warren Alquist Act requires the Commission to be the lead agency under CEQA for conducting the environmental analysis, it simply has no jurisdiction to enforce compliance with mitigation measures. Once the exemption is granted, the sole jurisdiction over the construction and operation of the project remains with the City of San Jose. Therefore, the City of San Jose is the only entity with jurisdiction to implement the MMRP. Ms. Marquez's interpretation of the CEQA Guidelines is incorrect because it does not incorporate the legal supremacy of the Commission's authorizing statute, the Warren Alquist Act.

Offsite Linears

Comment: Ms. Marquez contends the FEIR confines its analysis to the project footprint and does not evaluate offsite linear infrastructure.

Staff's Prior Response: Staff previously addressed this comment clarifying that the FEIR in fact does include the linear features in the analysis and at Responses to Comments B-3 and B-13 identifies where specifically the linear features were analyzed. The linear features are also clearly delineated and described in the Project Description. Ms. Marquez comments do not provide any evidence that the linear features are not thoroughly described or would result in environmental effects not analyzed in the FEIR.

Further Response: The linear facilities were adequately described and analyzed in the FEIR.

Environmental Justice

Comment: Ms. Marquez contends the FEIR's environmental justice analysis is defective because it excludes the Alviso Community.

Staff's Prior Response: Staff previously responded to this comment and provided a thorough explanation describing the environmental justice analysis in Responses to Comment B-1, B-4, B-7, B-9, B-12 and B-16. Staff explained how the Alviso Community was identified as an environmental justice community but explained that the potential impacts due to project emissions were negligible because the community was too far away from the project emissions source.

⁴ Public Resource Code Section 25500 et. Seq.

Further Response: The environmental justice analysis contained in the FEIR is adequate and does not exclude the Alviso Community.

Air Quality Analysis and Mitigation

Comment: Ms. Marquez contends the air quality analysis and mitigation are inadequate because it does not comply with the “Friant decision” and contends that the CEC should not use the BAAQMD CEQA Guidelines published thresholds of significance.

Staff Prior Response: Staff previously responded to this comment by explaining in significant detail how the air quality and public health analyses contained in the FEIR exceed the requirements of CEQA in its Response to Comment B-7 including a justification for using the BAAQMD CEQA Guidelines for thresholds of significance. Ms. Marquez appears to consistently suggest that because the FEIR did not specifically present a numerical impact at the Alviso Community the analysis failed to analyze impacts. Staff reiterated in several of its responses to her comments on the DEIR that every point outside the modeled study area would result in lower or negligible effects than the edge of the study area and the Alviso Community is significantly beyond the study area used to numerically quantify potential emissions contributions. Staff demonstrates that emissions at the outermost boundary of the study area are themselves numerically quantified and below the significance thresholds developed and published by the air quality expert agency in the region.

Further Response: The Air Quality analyses contained in the FEIR and the use of the BAAQMD Guidelines complies with CEQA. Ms. Marquez’s contention that the CEC should not rely on the BAAQMD CEQA Guidelines is not supported by any evidence and is at odds with the Commission’s approval of the last several data center SPPEs.

Biological Resources – Golden Eagle

Comment: Ms. Marquez contends the biological analysis and mitigation specifically for golden eagles is inadequate.

Staff’s Prior Response: Staff previously responded to this comment in Responses to Comments B-13 and B-14 where Staff demonstrated that it consulted with the wildlife agencies specifically about the Golden Eagle and developed four mitigation measures to protect the species even though there was no Critical Habitat identified as the species is no longer federally listed. Staff explained that the project is within an approved Habitat Conservation Plan and that all aspects of the project are covered

activities. Staff specifically conducted a data base search and consulted with the wildlife agencies with jurisdiction over the protection of species in the region. Those agencies and Staff agreed that the mitigation measures proposed would be sufficient to protect the Golden Eagle and many other species.

Further Response: The FEIR presumes presence of Golden Eagles and other species covered by the HCP, provides mitigation acceptable to the agencies with regional species expertise and ensures compliance with the provisions of the HCP, and therefore is adequate for CEQA purposes.

Cumulative Impacts

Comment: Ms. Marquez contends that the cumulative impacts analysis was defective.

Staff's Prior Response: For air quality analyses, Staff described Responses to Comments B-1, B-7, B-9 and B-12, that the existing sources recommended be included in the cumulative analysis were already reflected in the background criteria pollutant ambient measurements used for the modeling and detailed the different modeling techniques used to demonstrate the project does not result in cumulatively considerable significant impacts. For biological resources, Staff explained in Response to Comment B-14, that the cumulative effects on biological resources were also evaluated. Ms. Marquez simply disagrees with Staff's response. Ms. Marquez provides no evidence that supports her position.

Further Response: The FEIR sufficiently evaluates cumulative effects of the project.

Greenhouse Gas Emissions

Comment: Ms. Marquez contends that the mitigation for Greenhouse Gas Emissions is ineffective because the original mitigation measure proposed by Staff was slightly modified in response to a Microsoft Comment.

Staff's Prior Response: As described in Microsoft's comment letter and acknowledged and agreed to by Staff, MM GHG-1 was modified to reflect that the natural gas system is controlled by PG&E (Response to Comment E-8). In other words Microsoft cannot build its own pipeline to a renewable gas source. What Microsoft can do, as all others

who are “using renewable gas”, to avoid trucking renewable gas to the site and storing in it very large tanks, is to purchase the renewable gas for injection into the PG&E system, which will be used by PG&E customers and directly reduce use of non-renewable natural gas within the system resulting in a direct reduction in greenhouse gas emissions in an equivalent amount to what Microsoft will use on-site. This is similar to how renewable energy works within the electrical system. Mitigation Measure GHG-1 ensures with an enforceable performance standard that Microsoft purchases an amount of renewable gas to equal to the actual energy used by the generators. Since GHG impacts for CEQA purposes are only cumulative impacts, the renewable gas consumption will take place within PG&E’s system and is effective and enforceable mitigation. Ms. Marquez’s comments imply that the only way to mitigate GHG impacts would be to actually fuel the natural gas generators with only renewable natural gas. The cases she cites do not hold for that proposition.

With respect to GHG-2, the mitigation measure ensures that the project will comply with the 2022 San Jose Greenhouse Reduction Strategy (GHGRS) which has been adopted after CEQA review and therefore can be used by Commission pursuant to “CEQA Guidelines Section 15183.5 which specifically allows lead San agencies to analyze and mitigate GHG emissions through a plan for the reduction of GHG emissions, provided that the project complies with the requirements of the previously adopted plan or mitigation program.”⁵ MM GHG-2 was adopted to comply with the GHGRS.

Further Response: The FEIR’s evaluation and mitigation measures ensure that the potential GHG emissions impacts are reduced to less than significance levels and therefore the FEIR is sufficient for CEQA purposes.

CONCLUSION

Ms. Marquez comments largely repeats her comments on the DEIR. Her recent comments, although on different letterhead, disregard the thorough responses provided by Staff in the FEIR. She selectively quotes conclusions from Staff in the responses without summarizing the detailed explanations provided. None of the information contained in these most recent comments provide any evidence to support her contentions. Therefore, the Commission has a sufficient evidentiary record to: 1) find that the FEIR complies with the California Environmental Quality Act; 2) certify the FEIR; and 3) grant the SPPE for the project for the San Jose City Data Center.

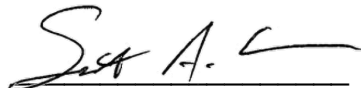
⁵ FEIR, page 4.8-7 and 4.8-8

No delay in the Commission Decision on the SPPE is warranted because no new issues have been raised by Ms. Marquez that would warrant supplementing either the administrative or evidentiary record.

Dated: July 12, 2022

Respectfully Submitted,

/s/
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