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June 13, 2018

**Via Email & Hand Delivery**

**ITEM 6**

Chair Ikezi & Planning Commission Members  
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**Re: Appeal of Architectural Review Committee Approval of a  
Mitigated Negative Declaration and Data Center Project  
Located at 2305 Mission College Boulevard**

Dear Chair Ikezi and Planning Commission Members:

We are writing on behalf of **California Unions for Reliable Energy (“CURE”)** to request that the Planning Commission grant CURE’s appeal and reverse the decision of the Architectural Committee to adopt a Mitigated Negative Declaration and approve the 2305 Mission College Boulevard Data Center Project (“Project”). The Project, proposed by PR III Mission College Boulevard, involves the construction of a 495,610 square-foot data center that would include approximately 60 megawatts (“MW”) of information technology power, a generator yard, an equipment yard for battery and electrical equipment, and associated parking. The Project would include 120 diesel-fueled engine generators capable of providing 75 MW of backup electrical power generating capacity and a new 90 megavolt amps electrical substation. The 15.7-acre Project site is located at 2305 Mission College Boulevard in the City of Santa Clara.

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## I. STATEMENT OF INTEREST

CURE is a coalition labor organizations whose members construct, operate, and maintain powerplants and other industrial facilities throughout California. CURE advocates for sustainable development of California's energy and natural resources. Environmental degradation consumes limited natural resources and jeopardizes future jobs by making it more difficult and expensive for industry to expand, including in Santa Clara County. CURE members Anthony Hernandez and Edme Hernandez both live in the City of Santa Clara. Because CURE's participating organizations and their members live, recreate, work, and raise families in the City of Santa Clara and Santa Clara County, CURE's participating organizations and their members will be directly affected by the Project's adverse environmental and health impacts.

## II. The City Lacks Authority to Approve the Project

In our written and verbal comments on the IS/MND, as well as in our April 24, 2018 appeal letter, we explained that the City lacks authority to approve the Project because it entails the construction of a thermal powerplant – the backup diesel generators – with a generating capacity greater than 50 MW. The backup generators are an integral part of the data center project. The generators are necessary to ensure an uninterrupted power supply to the facility.

The attached correspondence between the California Energy Commission (“CEC”) Siting Office Manager and a representative of the Applicant explains that data center projects with backup diesel generators with greater than 50MW of generating capacity are within the CEC's exclusive powerplant siting jurisdiction. It states: “Under the Public Resources Code section 25500, the California Energy Commission has exclusive jurisdiction over thermal generation of 50 MW or greater in California and is the lead agency for environmental review.”<sup>1</sup> It is further explained that, “if the data center exceeds the 50-MW threshold, the backup generators cannot be installed, tested, or operated without receiving a license or exemption from the Energy Commission.”<sup>2</sup>

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<sup>1</sup> Attachment 2 (Email from Chris Davis, Siting Office Manager, California Energy Commission, to David Nguyen, Vice President, Prudential Capital Group re Contact Form - Borrowers (Apr. 3, 2018); Email from Chris Davis, Siting Office Manager, California Energy Commission, to John Watts re 2305 Mission College Boulevard Data Center Project (Apr. 3, 2018)).

<sup>2</sup> Id.

4196-010acp

Under the Warren Alquist Act, a CEC license supersedes local approvals while the small powerplant exemption (“SPPE”) process allows certain projects with a generating capacity of 50 MW to 100 MW to proceed with local approvals. However, until the CEC determines that a powerplant project qualifies for a SPPE through the proper proceeding, local governments cannot approve powerplant projects. Here, the Applicant has not obtained a CEC license or SPPE, thus the Project remains subject to the exclusive powerplant siting jurisdiction of the CEC.

### **III. CEQA REQUIRES THAT AN ENVIRONMENTAL IMPACT REPORT BE PREPARED FOR THE PROJECT**

Our firm previously submitted comments on behalf of CURE on the Initial Study and MND (“IS/MND”) prepared for the Project. Our comments were prepared with the assistance of technical expert Dr. Phyllis Fox, PhD, PE. In those comments we identified potentially significant and unmitigated impacts due to operational noise and nitrogen oxide (NOx) emissions from the Project’s backup diesel generators, as well as the Project’s direct and indirect greenhouse gas (GHG) emissions, none of which were disclosed, analyzed, or mitigated in the IS/MND. Dr. Fox’s comments also provided substantial evidence in support of a fair argument that fugitive dust emissions generated during the Project’s construction phase may cause significant air quality impacts. Based on these potentially significant and unmitigated impacts, as well as other deficiencies identified in our comments, we concluded that the IS/MND violates CEQA and that an Environmental Impact Report (“EIR”) is required for the Project.

Our firm also attended the April 18, 2018 Architectural Committee meeting on behalf of CURE. At that meeting we reiterated our comments that substantial evidence supports a fair argument that the Project may result in significant environmental impacts and therefore an EIR must be prepared.

On the day of the Architectural Committee meeting to consider the IS/MND and approval of the Project, the City issued a response to comments submitted on the IS/MND. The agenda packet for the current appeal hearing also contains an additional Supplemental Memorandum responding to certain comments submitted by Dr. Phyllis Fox, to which the City had previously failed to respond or even include in the materials presented to the Architectural Committee. We have now had the opportunity to review the response to comments and the supplemental memorandum, and neither of those documents resolves all of the issues raised in

our comment letter.<sup>3</sup> Moreover, as the attached letter from Dr. Fox explains, the City's response to comments revealed new information which enabled her to determine that the Project's diesel storage tanks may cause a significant impact due to emissions of reactive organic gases in the event of a reasonably foreseeable power outage situation. Her comments thus provide an additional basis for requiring preparation of an EIR in this instance.

**A. Substantial evidence supports a fair argument that the Project's backup generators may cause significant noise and air quality impacts**

The City's response to comments improperly dismisses our comments demonstrating that substantial evidence supports a fair argument that simultaneous operation of the Project's backup diesel generators may cause potentially significant noise and air quality impacts. In essence, the City's response to these comments was that simultaneous operation of all generators would take place only during an "unforeseen emergency power outage," that the project site has not experienced a power outage during the last year, and that it would be speculative to assume the project site would be subject to regular power outages.<sup>4</sup> The City's response further added that CEQA does not require an analysis of emergency events, nor worst-case events that may never occur or rarely occur in a project's life span.<sup>5</sup> This response is inconsistent with CEQA's mandates and mischaracterizes any power outage as a "worst-case event."

Under CEQA, if there is substantial evidence a project *may* cause a significant effect on the environment the lead agency must prepare an EIR.<sup>6</sup> For purposes of this rule, "may" means that there is a "reasonable possibility" that the effect may occur.<sup>7</sup> While it may be true that a power outage has not occurred at the project site *within the last year*, this fact alone does not make a power outage an unforeseeable event. As our initial comments stated, there have been more than 40

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<sup>3</sup> See Attachment 1 Letter from Phyllis Fox to Collin McCarthy re IS/MND for the 2305 Mission College Boulevard Data Center (June 11, 2018).

<sup>4</sup> See Response to Comments from Adams Broadwell Joseph & Cardozo, Dated April 12, 2018, at response D-8, D-13.

<sup>5</sup> *Id.*

<sup>6</sup> Pub. Resources Code § 21080(d); CEQA Guidelines § 15064.

<sup>7</sup> *Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903, 927.

4196-010acp

power outages in SVP's territory during the last year.<sup>8</sup> Indeed, the Applicant has included 120 backup diesel generators as a necessary component of its Project for this exact reason. All generators will operate simultaneously during these situations, and CEQA requires that these potential impacts from the project be disclosed to the public and decisionmakers.

Analyzing such reasonably foreseeable events is required under CEQA. CEQA Guidelines Appendix G directs agencies to consider the potential for significant impacts in several reasonably foreseeable upset or accident conditions, including in the projects involving the handling or storage of hazardous materials, or projects to be built in flood and earthquake areas.<sup>9</sup>

In sum, contrary to the City's response, the pertinent question under CEQA is whether the Project *may* result in a significant effect on the environment. The City must analyze the impacts that are reasonably foreseeable. In this case, the IS/MND failed to include any analysis of noise resulting from simultaneous operation of the backup generators, as would occur during an outage for any period of time. As our comments demonstrate, substantial evidence supports a fair argument that the noise impacts from simultaneous operation may be significant. Additionally, Dr. Fox's comments provide substantial evidence in support of a fair argument that NOx emissions from simultaneous operation of the generators may be significant, and explain that the mitigation currently imposed only applies during maintenance and testing. For each of these reasons, an EIR is required.

### **B. Substantial evidence supports a fair argument that the Project may have significant GHG impacts**

Second, with respect to the Project's GHG impacts, the City's response to comments states, in effect, that the City has discretion to use a qualitative consistency analysis, and that the City's reliance on the Project's consistency with

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<sup>8</sup> See Outage History, Silicon Valley Power, City of Santa Clara, <http://www.siliconvalleypower.com/svp-and-community/outages-and-alerts/outages/outage-history> (last visited June 12, 2018).

<sup>9</sup> See CEQA Guidelines, Appendix G, section VIII (asking whether the project may "[c]reate a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment."); see also section IX(i) (directing agencies to consider impacts from flood).

the Climate Action Plan (“CAP”) is justified in this case.<sup>10</sup> The City also stated that because it is anticipated that the Project will be constructed prior to January 1, 2021, the Project is subject to AB32, and can properly rely on a qualified CAP designed to meet AB32 targets.<sup>11</sup>

As an initial matter, the response to comments does not cite any authority for its hard cutoff date of January 1, 2021 for evaluating the Project’s GHG impacts, which is presumably based on the compliance date for AB32. But following that same logic, projects built after 2017 are also subject to SB32, which sets more stringent GHG reduction targets for 2030. More fundamentally, however, CEQA requires that the long term impacts of a Project be considered in the environmental review process.<sup>12</sup> In this case, the Project will likely continue to operate and therefore contribute to GHG emissions well beyond 2021.

Although CEQA affords lead agencies discretion in establishing thresholds of significance, thresholds of significance must be supported by substantial evidence.<sup>13</sup> As our comments explain, a finding that a project that may be built in 2020 will not interfere with the City achieving 2020 GHG reduction targets does not provide substantial evidence that the Project’s GHG emissions will have a less than significant effect on the environment beyond that point, which in this case is much of the Project’s operational life.

Furthermore, as our comments explain in detail, many of the applicable CAP measures outlined in the IS/MND, including water conservation measures and reducing vehicle miles traveled, will do little to reduce the Project’s GHG emissions. Under CEQA Guidelines 15064.4, if there is substantial evidence a Project may result in significant impacts notwithstanding consistency with a reduction plan like the City’s CAP an EIR is required. Here, Dr. Fox’s analysis provides substantial evidence that the Project’s GHG emissions may have a significant environmental impact. Thus, the City must prepare an EIR to evaluate the Project’s GHG impacts and to incorporate all feasible mitigation measures as necessary.

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<sup>10</sup> See Response to Comments at Response D-5, D-7.

<sup>11</sup> Response to Comments at Response D-5.

<sup>12</sup> See 14 C.C.R. § 15126.2 (discussing impacts both during the “initial and continued phases of the project”); see also *Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268 (CEQA requires examination of the environmental impacts of “the entire project, from start to finish”).

<sup>13</sup> CEQA Guidelines § 15064.7.

#### IV. CONCLUSION

We urge the Planning Commission members to grant this appeal, reverse the decision of the Architectural Committee and withhold consideration of the application until the Applicant obtains the necessary approval from the CEC.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Collin S. McCarthy", with a long horizontal flourish extending to the right.

Collin S. McCarthy

CSM:acp

Attachments