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# Memorandum

To: Vice Chair Siva Gunda, Presiding Member  
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Subject: **REBUTTAL TESTIMONY (RESPONSE TO COMMITTEE QUESTION) THE CA3  
BACKUP GENERATING FACILITY (CA3BGF) SMALL POWER PLANT  
EXEMPTION (21-SPPE-01)**

Courts have held consistently that a lead agency is required to analyze the cumulative impacts of existing projects and probable future projects. (See *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397.) Courts have opined that an environmental impact report (EIR) must include relevant information to allow for informed decision-making and public participation. (See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692.)

Under the approach articulated by the cases *Kings County Farm Bureau v. City of Hanford* ((1990) 221 Cal.App.3d 692.) and *Los Angeles Unified School District v. City of Los Angeles* ((1997) 58 Cal.App.4th 1019.), the question for cumulative analysis is not to be how the effect of the project compares to the preexisting cumulative effect, but rather, whether any additional amount of any effect should be considered cumulative in the context of the existing cumulative effect. However, the appeals court in *Communities for a Better Environment v. California Resources Agency* ((2002) 103 Cal.App.4th 98.) refined the question of cumulative impact to not mean “any additional effect in a nonattainment for that effect *necessarily* creates a significant cumulative impact; the ‘one [additional] molecule rule’ is not the law.” (*Id.* at 120.) Rather that court additionally opined that in assessing whether a cumulative impact requires inclusion in an EIR, a lead agency is required to “consider whether the cumulative impact is significant and whether the proposed project’s incremental effects are cumulatively considerable.” (*Id.*)

For what constitutes foreseeable future development, the court of appeal held in *Lake County Energy Council v. County of Lake* ((1977) 70 Cal.App.3d 851.), that “where future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences.” (*Id.* at p. 854-855.) Further building on what constitutes future development, in *Golden Door Properties, LLC v. Superior Court* ((2020) 53 Cal.App.5th 733.), the court of appeal found in-process projects requiring a general plan amendment in San Diego County, and not through a project-level EIR, were beyond the initial planning stages as the

county “knew the scope, location, types of projects being proposed, and, in some cases, even amounts of [greenhouse gas] emissions that would be mitigated...” (*Id.* at p. 360.)

The final EIR (FEIR) identifies the health risks from cumulative sources and the potential for a significant cumulative impact in the project area by aggregating the effects of all nearby sources of toxic air contaminant emissions. The results indicated that there is a potential for a significant cumulative impact, but that the project’s contribution to the cumulative impact is less than cumulatively considerable and, thus, is not significant.

The cumulative impact reflects the effects of past, present, and foreseeable future projects to the extent they are foreseeable. CEC staff gathered data on existing sources from the applicant and the Bay Area Air Quality Management District (BAAQMD), and staff included the existing Vantage Data Centers at 2625 Walsh Avenue, CoreSite at 2901 Coronado Drive, and Cyxtera Communications LLC at 2401 Walsh Avenue. CEC staff is not aware of any probable future projects pending within 1,000 feet of the site. All the SPPE projects under CEC review are more than 2,000 feet away, the nearest approximately 4,500 feet distant. This BAAQMD data allowed the CEC staff to disclose the cancer risks, hazard indices, and annual average particulate matter with a diameter of 2.5 micrometers or less (PM2.5) concentrations caused by known existing sources.

The CEC staff elected to determine the impacts from existing stationary sources within a 2,000-foot radius of the project site rather than limiting the assessment to a 1,000-foot radius from the project site. This approach allowed the CEC staff to arrive at a conservatively high presentation of cumulative health risks. The approach overestimates the total cumulative risk relative to the BAAQMD CEQA Guidelines and thresholds that focus on the nearest 1,000 feet (FEIR p. 4.3-49 to p. 4.3-50).

The Committee points to the discussions and data in the two tables of the EIR dealing with cumulative cancer risks and PM2.5 (Table 4.3-12, p 4.3-53 and Table 4.3-14, p. 4.3-55). As recognized by the Committee, the data show four areas in which the impacts from cumulative sources exceed the BAAQMD thresholds for cumulative risk and hazards: (1) cancer risk at the maximally exposed individual sensitive receptor (MEISR); (2) cancer risk at the maximally exposed individual resident (MEIR); (3) annual PM2.5 concentrations at the MEISR; and (4) annual PM2.5 concentrations at the maximally exposed individual worker (MEIW).

Because the data on cumulative sources indicates the potential for a significant cumulative impact, the analysis also evaluates whether the incremental effects of the project are “cumulatively considerable.” This examines whether the exceedance of the cumulative threshold would be due to the project itself and the magnitude of the incremental project effects.

The cumulative impact is primarily due to nearby highways, major streets, and railways, and other stationary sources. For cancer risks, the cumulative cancer risks are over the BAAQMD threshold primarily because of the proximity of receptors to the nearby railroad (EIR p.4.3-52). Similarly, for PM2.5, transportation facilities and existing stationary sources dominate the cumulative PM2.5 concentrations (FEIR p. 4.3-55). The CEC staff did not account for the potentially beneficial effects of the ongoing and probable future Caltrain Electrification Program.

In this case, the project's incremental effects would not exceed the project-level thresholds of significance for an individual project (FEIR Table 4.3-10, p 4.3-47), and transportation facilities and existing stationary sources dominate the cumulative impact (for additional quantification see Response to Comment C-5 in FEIR p. 7-19 to 7-20). Additionally, to minimize the project's contribution to the cumulative impact, the project would implement the necessary Best Available Control Technology (BACT) to reduce diesel particulate matter and PM2.5 (EIR p. 7-19). For these reasons, the CEC staff concluded the project's contribution to the cumulative impact would not be cumulatively considerable.