

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**



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Order Instituting Rulemaking to
Update and Amend Commission
General Order 131-D.

Rulemaking 23-05-018
(Filed May 18, 2023)

**CENTER FOR BIOLOGICAL DIVERSITY AND
CLEAN COALITION OPPOSITION TO JOINT MOTION
FOR ADOPTION OF SETTLEMENT AGREEMENT**

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October 30, 2023

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I. INTRODUCTION

Pursuant to Rule 12.2 of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure (“Rules”), the Center for Biological Diversity and the Clean Coalition respectfully submit this Opposition to the Joint Motion for Adoption of the Settlement Agreement (“Joint Motion”).

As explained below, we urge the Commission to reject the Settlement Agreement (“Settlement Agreement”), which is inconsistent with the law, unreasonable, and contrary to the public interest. Because the Settlement Agreement seeks to resolve Phase 2 issues, has diverged so dramatically from the Scoping Memo, and has centered largely on proposals with little development in the record, Commission approval here would be inconsistent with the law.¹ The Commissioner’s October 26 Proposed Decision is yet another reminder that Phase 1 remains

¹ See *Southern Cal. Edison Co. v. Cal. P. U. C.* (2006) 140 Cal.App.4th 1085, 1104-1106 (finding prejudicial failure to proceed in the manner required by law when the Commission considered an issue beyond those identified in the scoping memo and gave parties insufficient time to respond).

well underway.² The Settlement’s provisions also find little support in the record and at times conflict directly with it. This is particularly true for the Settlement Agreement’s Phase 2 provisions that restrict the Commission’s California Environmental Quality Act (“CEQA”) analysis in favor of the California Independent System Operator’s (“CAISO”) system-wide analysis, despite CAISO’s comments themselves affirming the value of CEQA.³ Even the Settlement Agreement’s SB 529-related provisions – scarce as they are – improperly implement the legislation, which leaves the Commission at risk of litigation and delay in its efforts to realize a clean energy transition. For these reasons, the Commission must reject the Settlement Agreement and resume the scheduled Phase 1 of the proceeding.

II. CONTEXT AND PROCEDURAL BACKGROUND

This proceeding comes at an important moment in California’s clean energy transition. In the years since GO 131-D was adopted, California has sought to undertake a rapid shift from fossil fuel electricity generation to clean energy electricity generation.⁴ The energy transition has brought attention to California’s transmission system and permitting authorities. In 2022, the Legislature enacted SB 529 to “support the development of cost-effective, *environmentally responsible* transmission projects that can reliably deliver renewable resources throughout the state.”⁵ The bill “enables a more expedited review and approval process for upgrades to existing

² See Commissioner’s Proposed Decision Addressing Phase 1 Issues, October 26, 2023 (explaining that Phase 1 of the proceeding is designed to address SB 529 issues).

³ See *infra* Section IV.B (explaining that the Settlement is unreasonable in light of the record, including elevating the role of CAISO at the expense of CEQA despite CAISO’s express endorsement of the importance of CEQA in the transmission planning process).

⁴ See e.g. CARB Scoping Plan Executive Summary, at 1 (available at <https://ww2.arb.ca.gov/sites/default/files/2023-04/2022-sp-es.pdf>); CPUC R.20-08-2022 Order Instituting Rulemaking (clean energy financing rulemaking to facilitate clean energy transition, available at <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M346/K361/346361154.PDF>).

⁵ Assembly Committee on Utilities and Energy Analysis of SB 529 (June 29, 2022), at 2 (available at <https://autl.assembly.ca.gov/sites/autl.assembly.ca.gov/files/SB%20529%20%28Hertzberg%29.pdf> (emphasis added)).

transmission facilities in existing corridors.” Crucially, SB 529 “still ensures CEQA is complied with through the [permit to construct] process” and “expedites approvals least likely to pose rate concerns.”⁶ SB 529 reflects a targeted, thoughtful approach from the Legislature that seeks to hasten our clean energy transition in an environmentally sound, cost-effective manner.⁷

The Commission initiated this proceeding to implement SB 529 and facilitate a broader conversation about potential changes to the transmission permitting process.⁸ In the original Order Instituting Rulemaking, the Commission included a proposal that sought only to implement SB 529 (“Attachment A”) and a proposal that recommended a variety of other permitting reform changes (“Attachment B”). Several commenters raised concerns about meeting the January 1, 2024 deadline included in SB 529.⁹ As a result, the Assigned Commissioner issued a Scoping Memo (“Scoping Memo”) on July 31, 2023 that split the proceeding into two phases.¹⁰ Indeed, some of the parties proposing this Settlement (“Settling

⁶ *Id.*

⁷ This year’s legislative and executive actions have continued to follow this approach. For instance, the Legislature passed and the Governor signed SB 355 (Eggman) to expand the Multifamily Affordable Housing Solar Roofs Program, growing the deployment of distributed energy resources that advance the state’s climate and equity goals. SB 49 (Becker), also passed unanimously and signed this year, directs Caltrans to examine any barriers that prevent using existing highway rights-of-way for renewable energy and transmission deployment. Meanwhile, the Governor vetoed legislation like SB 420 (Becker) and SB 619 (Padilla) that would have removed additional transmission projects from Commission review. This legislative session, along with other initiatives in recent years, reflect a legislative and gubernatorial approach favoring a clean energy transition that maximizes greenhouse gas emissions reductions and minimizes environmental harms.

⁸ Order Instituting Rulemaking (“OIR”) R.23-05-18, at 1.

⁹ *See e.g.* Environmental Defense Fund (“EDF”) Opening Comments, at 2-3; Southern California Edison (“SCE”) Opening Comments, at 6-7.

¹⁰ Scoping Memo, at 4.

Parties”) themselves recommended this bifurcation.¹¹ Phase 1 deals only with SB 529 implementation and updating outdated references.¹² All other issues are left to Phase 2.¹³

Five weeks after the Scoping Memo was issued, the Settling Parties noticed a settlement conference and circulated a settlement proposal.¹⁴ While the Settling Parties describe the final Settlement Agreement as a product of revisions based on “party input during the Settlement Conference,” the Settlement Agreement does not address major concerns raised to Settling Parties during that process.¹⁵

Shortly after the settlement conference, the Settling Parties circulated a final Settlement Agreement. Along with the Settlement Agreement, the parties submitted the Joint Motion. In it, the parties admit—highlight, even—that, immediately after the Commission issued the Scoping Memo bifurcating the proceeding, the “Settling Parties began negotiations among themselves and other interested parties” on “myriad iterations” of proposals outside the scope of Phase 1.¹⁶ As they explain, the Settling Parties did so to “decrease the number of issues that would otherwise require consideration” during Phase 2.¹⁷

As explained below, the choice to ignore the Scoping Memo has come at a cost, as the Settlement Proposal fails to resolve major questions facing Phase 1 of this proceeding. Less than two months now separate this proceeding and the January 1, 2024, deadline to implement SB

¹¹ *See e.g.* EDF Opening Comments, at 3.

¹² Scoping Memo, at 4.

¹³ Scoping Memo, at 4-5.

¹⁴ Notice of Settlement Conference R.23-05-18.

¹⁵ Joint Motion for Adoption of Phase 1 Settlement Agreement (“Joint Motion”), at 16. Because the Settling Parties leave the impression that the Settlement Agreement was extensively revised based on feedback at the Settlement Conference, it is important to correct the record on this point.

¹⁶ Joint Motion, at 7.

¹⁷ *Id.* at 16.

529 – a subject on which the Commission’s Scoping Memo rightly gave three months to focus and about which major questions remain.

III. THE COMMISSION MUST REJECT THE SETTLEMENT AGREEMENT, WHICH IS UNLAWFUL AND UNREASONABLE.

Under Rule 12.1(d), the Commission “will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.”¹⁸ For several reasons, the Settlement Agreement is flatly inconsistent with the law and unreasonable in light of the whole record. First, as explained below, inclusion of Phase 2 elements flatly violates the Commission’s rules and settled caselaw. Second, the Phase 2 elements are also unreasonable in light of the record. The CAISO provisions in particular—which conflict with CAISO’s own submitted comments—reflect the fact that the Settlement Agreement’s Phase 2 elements lack support in the record, which is largely undeveloped as regards to Phase 2 issues. Third, the SB 529 provisions fail to properly implement the bill’s intent to preserve environmental review, fail to address only clean energy-related transmission projects, and fail to define crucial terms. Fourth, in light of these defects, the Settlement Agreement fails to meet the standards the Commission has identified in establishing its general support for settlement agreements. For these reasons, the Settlement Agreement is not in the public interest, and the Commission must reject it.

A. The Settlement’s Inclusion Of Phase 2 Proposals Is Inconsistent With Law.

Contrary to Settling Parties’ contentions, the Settlement Agreement is inconsistent with law.¹⁹ The Rules provide that the Scoping Memo “*shall determine* the schedule (with projected

¹⁸ Commission Rules of Practice and Procedure, Rule 12.1(d).

¹⁹ Joint Motion at 17-19, 27-49.

submission date), issues to be addressed, and need for hearing.”²⁰ In other words, the Scoping Memo dictates the “when” and “what” of a Commission proceeding. It is unlawful to deviate from the Scoping Memo when doing so prejudices other parties’ ability to provide an informed response to newly raised issues or proposals. For example, in *Southern California Edison Corporation v. California Public Utilities Commission* (“*SCE v. CPUC*”), the court rejected a settlement agreement when it included an issue beyond those identified in the scoping memo.²¹ Approval of the non-SB 529 elements of the Settlement Agreement here would similarly run afoul of the Scoping Memo, as it would be accomplished in a manner and under circumstances that have not given parties sufficient opportunity “to comment on the issues raised by the proposals, including issues of public policy, economic effects, legal implications, and effective administration of the proposed new rules.”²²

1. Approving The Phase 2 Elements Is Unlawful Because The Proposals Prejudicially Run Afoul Of The Scoping Memo.

The Scoping Memo divided this proceeding into two parts. Phase 1 is limited to amending GO 131-D to implement SB 529 and update outdated references.²³ The Commission’s Scoping Memo left consideration of all other changes proposed by parties in comments on the OIR to Phase 2.²⁴ The Commission was unambiguous: “[given] the expedited timeframe in which the changes required by SB 529 must be considered, a separate phase is required to give due consideration to other potential changes.”²⁵

²⁰ Cal. Code Regs., tit. 20, § 7.3 (emphasis added)

²¹ See *Southern California Edison*, 140 Cal.App.4th at 1104-1106 (finding prejudicial failure to proceed in the manner required by law when the Commission considered an issue beyond those identified in the scoping memo and gave parties insufficient time to respond).

²² *Id.* at 1106.

²³ Scoping Memo, at 4.

²⁴ *Id.* at 4-5.

²⁵ *Id.* at 5.

The Scoping Memo’s decision that only SB 529 and reference updates would be dealt with in Phase 1 came after some Settling Parties proposed a broader Phase 1 scope. Southern California Edison (“SCE”), for example, recommended that the Commission adopt SCE’s recommendations — which included most of the current Settlement Agreement’s edits to GO 131- D — as a new Staff Proposal attached to the Scoping Memo for a round of comments.²⁶ San Diego Gas & Electric and Pacific Gas & Electric made similar recommendations.²⁷ Despite these calls from some of the Settling Parties to address permitting reform issues in Phase 1, the Scoping Memo directed that Phase 1 focus only on SB 529 implementation and reference updates. All other issues, according to the Scoping Memo and the Proposed Decision, are left to Phase 2.

Defying the Commission’s clear direction, however, the Settling Parties have now forced Phase 2 issues into the Settlement Agreement.²⁸ The Settlement Agreement includes the following several proposals in addition to implementation of SB 529 and updating outdated references:

- Elimination of the Proponent’s Environmental Assessment, replaced by an applicant-prepared CEQA document (amending Section VIII.A.7 and Section IX.C.1);
- Barring Commission consideration of a reasonable range of alternatives, unless already identified by CAISO (proposing new Sections IX.C.2.(a)-(d));
- Inserting deadlines for CPUC CEQA analysis of transmission projects (adding new Section IX.A.5 and IX.A.8);
- Preventing Commission votes on advice letter protests (amending Section XI.B.4);

²⁶ SCE Reply Comments, (July 7, 2023) at 21-22.

²⁷ SDG&E Reply Comments, (July 7, 2023) at 3-4; PG&E Reply Comments, (July 7, 2023) at 11-13.

²⁸ *See* Joint Motion, at 7 (where Settling Parties admit to pursuing Phase 2 agreements immediately after the Commission issued a Scoping Memo to the contrary).

- Expanding discretionary permit exemptions to facilitate more unreviewed projects (amending Section III.B.1.g); and
- Revisions to implement new legislation.

The Proposed Settlement’s inclusion of Phase 2 issues is made worse by the fact that the Proposed Settlement’s permitting reform proposals are nowhere to be found in the Order Instituting Rulemaking or in either of the Commission’s Proposed Orders.²⁹ In neither the Order Instituting Rulemaking nor the Scoping Memo did the Commission propose major changes related to the elimination of the Proponent’s Environmental Assessment, new CEQA deadlines, or restrictions on considering a variety of alternatives to a proposed project. These proposals are only found in the Settling Parties’ various comments. Brief discussion of new proposals in a comment letter does not put parties on sufficient notice that they should be prepared to research, discuss, and make final recommendations to the Commission on those proposals within a matter of weeks at any time in a proceeding.³⁰ Without that notice, parties cannot give informed responses to complex proposals. Indeed, it is for precisely this reason — due consideration and due process — that the Commission left these matters to Phase 2.³¹

A similar situation also arose in *SCE v. CPUC*. There, the Commission entertained comments outside the scope of issues identified in the scoping memo.³² The comments were filed in early October and parties were given until early November to respond to them.³³ Most parties focused their objections on the timeliness of the proposals and the relationship of the

²⁹ OIR; Order Instituting Rulemaking to Update and Amend Commission General Order 131-D Attachments A and B (“Attachments A and B”).

³⁰ *See* Cal. Code Regs., tit. 20, § 7.3; *Southern California Edison*, 140 Cal.App.4th at 1104-1106 (establishing that the Scoping Memo, not a party’s comments, set the issues to be considered in a proceeding).

³¹ Scoping Memo, at 5.

³² *Southern California Edison*, 140 Cal.App.4th at 1105.

³³ *Id.* at 1106.

proposals to the scoping memo, so the administrative law judge modified the scoping memo to bring the new issues — there, prevailing wage requirements — into the scope of the proceeding.³⁴ Despite the Commission’s amendment and its action giving parties a window, albeit short, to comment on the new proposals, the Court of Appeals ruled that the Commission “violated its own rules by considering the new issue” and prejudiced the parties with a short window to consider and respond to the comments.³⁵

Approving the Settlement Agreement here would be unlawful for the same reasons. Six of the seven issues raised by the Settlement Agreement are clearly outside the scope of Phase 1 of the proceeding. Relative to the typical timespan of a Commission proceeding and given that the proceeding remains in Phase 1, the parties have had little to no time to consider the several Phase 2 changes to GO 131-D in the Settlement Agreement. Despite ample opportunity provided in Phase 2 to consider all non-SB 529 changes to GO 131-D, the Settling Parties ignored have these concerns and moved ahead with the Joint Motion.

To the extent there are factual differences between *SCE v. CPUC* and the present proceeding, those differences point even more strongly in favor of settlement rejection. For example, here, the Settling Parties mentioned some of the ideas in the Settlement Agreement in their original comments, whereas in *SCE v. CPUC*, the prevailing wage comments were made only after the first round of comments in the proceeding.³⁶ But a party’s comments do not set the agenda for issues to be addressed in a phase of a proceeding—that is the Scoping Memo’s job.³⁷ Indeed, if anything, this factual difference from *SCE v. CPUC* only makes the situation here

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Southern California Edison*, 140 Cal.App.4th at 1105.

³⁷ Cal. Code Regs., tit. 20, § 7.3; *Southern California Edison*, 140 Cal.App.4th at 1105.

worse. Here, the Settling Parties included these proposals in their comments, and the Commission expressly chose to leave consideration of all non-SB 529 or outdated reference issues to Phase 2. If any party should have been on notice, it was the Settling Parties, who were put on notice by the Scoping Memo's rejection of their proposed timeline for the proceeding.³⁸

Irrelevant factual differences aside, *SCE v. CPUC* stands for a clear legal proposition: the Commission must follow the Scoping Memo it issues. It is unlawful to ignore the Scoping Memo and deprive parties of due process and a meaningful opportunity for comment and consideration of new proposals. Any approval of the Phase 2 elements of the Scoping Memo here would run afoul of the Commission's rules and the case law interpreting them.

2. Including Phase 2 Elements Would Run Contrary To The Very Reasons The Commission Historically Supports Settlements.

As the Settling Parties describe, the Commission generally supports settlement because it “[reduces] the expense of litigation . . . and [allows] parties to reduce the risk that litigation will produce unacceptable results.”³⁹ Contrary to the Settling Parties' contentions, however, the Settlement Agreement here does not reduce litigation risk nor the risk that litigation could produce unacceptable results.

As explained above, the Settlement Agreement here is contentious and unlawful. Its contents have been opposed by several parties at various intervals. The Settling Parties ignored almost all of the concerns raised, despite now citing “consensus” as a reason in support of

³⁸ *SCE v. CPUC* also stands for the proposition that amending the Scoping Memo at precisely the same moment when the Commission would be running afoul of it by approving the Phase 2 elements of the Proposed Settlement does not save the Settlement Agreement. *Id.* at 1106. In addition, the court in *SCE v. CPUC* resisted the notion that the scoping memo can merely be read broadly to include issues not addressed explicitly as within the scope of the proceeding. *Id.* at 1104-1105.

³⁹ Joint Motion, at 16.

approval.⁴⁰ The hallmarks of a settlement are indeed amity and consensus — but this Settlement Agreement represents the opposite. The longstanding Commission position in favor of settlement therefore does not support the Settlement Agreement. If anything, it counsels against it.

B. The Settlement Agreement’s Phase 2 Elements Are Unreasonable In Light Of The Whole Record.

The Settlement Agreement’s Phase 2 elements are not just unlawful — they are also unreasonable. Because of the limited time given to review several complex changes, interested parties cannot fully assess and reply to each proposal here. Nevertheless, there are at least two grounds on which it is already evident that the Settlement Agreement is unreasonable. First, the Settlement Agreement’s CAISO provisions that contradict CAISO’s own comments are unreasonable in light of the whole record. Moreover, there is not yet a record for Phase 2 that could support the Settling Parties’ bases for their proposed revisions.

1. The CAISO Provisions Are Indicative Of The Settlement Agreement’s Unreasonableness.

The Settlement Agreement’s CAISO provisions tying the Commission’s hands in conducting a thorough CEQA analysis are unreasonable.⁴¹ The Settlement Agreement prohibits the Commission from studying in its CEQA analyses any alternative to a proposed project that was included in a CAISO transmission plan unless it is an alternative route or location. It also forces the Commission to rebut a presumption in order to consider cost-effective alternatives to a CAISO-approved transmission project if CAISO did not itself consider those alternatives. The Settlement also inserts CAISO’s proposed objectives and overriding considerations for a project into any Commission CEQA review of the same project and creates a rebuttable presumption in

⁴⁰ Joint Motion, at 16.

⁴¹ Joint Settlement Proposal, GO 131-D, Sections IX.C.2(a)-(d).

favor of a finding of necessity and public convenience for any CAISO-approved project.⁴² These proposals come to the Commission in the early stages of a proceeding to implement SB 529, which specifically preserved the role of CEQA, its author guaranteeing that the bill “still ensures CEQA is complied with through the [permit to construct] process.”⁴³ Instead, the Settlement Agreement limits CEQA analyses.

In fact, CAISO’s own comments to the Commission highlighted the importance of the Commission’s independent environmental review process, which the Settlement Agreement now seeks to constrict. As CAISO explained,

“[the] California Environmental Quality Act (CEQA) process evaluates routing and environmental impacts separate from the CAISO transmission planning process. The CEQA process also allows for *stakeholder engagement* and for the *identification of alternatives* that meet the same reliability needs. In some instances, the routing for a project changes through this process to reflect the needs and interests of impacted communities.”⁴⁴

As the CAISO comments make clear, the identification of routes is a valuable role played by the Commission’s CEQA review, but it is not the only role; CEQA review at the Commission also facilitates community engagement and the identification of non-wires alternatives that still meet reliability needs, separate from the CAISO transmission planning process.

The CAISO’s transmission plan’s treatment of non-transmission alternatives to meeting local transmission system needs speaks to the potential shortsightedness in restricting or tilting elements of the Commission’s review process in favor of the contents of CAISO’s transmission plans. In its section regarding Non-Transmission Alternatives and Storage, CAISO explains that

⁴² *Id.*

⁴³ Assembly Committee on Utilities and Energy Analysis of SB 529 (June 29, 2022), at 2 (available at <https://autl.assembly.ca.gov/sites/autl.assembly.ca.gov/files/SB%20529%20%28Hertzberg%29.pdf>).

⁴⁴ Opening Comments of The California Independent System Operator Corporation (“CAISO Comments”) at 4.

as the volume of renewable generation and storage necessary to meet system needs has grown, “the challenge has shifted from seeking to support resources that may not otherwise develop, to testing the effectiveness of preferred resources to meeting the local needs and encouraging system capacity resources be procured in optimal locations.”⁴⁵

CAISO’s description underscores a broader trend: distributed, non-wires alternatives to transmission expansion, like many of the distributed energy resources (“DER”) that have experienced steep technological improvements in recent years, have quickly become far more feasible. Certainly, both the Commission and CEC are actively preparing for that “high DER future.” The California Energy Commission (“CEC”) initiated a rulemaking in 2022 to examine how California can achieve a “High DER” future.⁴⁶ In that rulemaking, the CEC is exploring “issues related to the operation and performance of a mature high-DER electricity system in California, as well as near-term issues that must be addressed along the path to the future system,” specifically to “optimize DER benefits and value in support of advancing state goals for decarbonization, resilience, affordability, and environmental justice and equity.”⁴⁷ Similarly, the Commission also “anticipates a high-penetration DER future and seeks to determine how to optimize the integration of millions of DERs within the distribution grid while ensuring affordable rates.”⁴⁸

⁴⁵ See CAISO 2022-2023 Transmission Plan (“CAISO 2022 TP”), at 26 (available at <https://www.aiso.com/Documents/ISO-Board-Approved-2022-2023-Transmission-Plan.pdf>).

⁴⁶ CEC Order Instituting Informational Rulemaking In the Matter of Distributed Energy Resources in California’s Energy Future (March 9, 2022) (available at <https://www.energy.ca.gov/filebrowser/download/4010>).

⁴⁷ *Id.* at 3-4.

⁴⁸ CPUC Order Instituting Rulemaking 21-06-017 to Modernize the Electric Grid for a High Distributed Energy Resources Future (available at <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M390/K664/390664433.PDF>).

As described previously, recent action from the Legislature and the Governor has further signaled a desire to accelerate DER deployment at the same time as the Legislature and Governor have sent mixed signals about freewheeling transmission expansion.⁴⁹ Despite these signals and CAISO's recognition regarding the growing feasibility of non-transmission alternatives, very few projects approved by the CAISO in its most recent transmission plan appear to have been considered in light of potential non-transmission alternatives.⁵⁰

CAISO's failure to effectively project the popularity and utility of DERs has come at a cost before. In the 2017-2018 transmission planning cycle, CAISO reversed course and recommended the cancellation of 21 transmission projects to avoid \$2.6 billion in future costs. The cancellations were a result of "changes in local area load forecasts, and strongly influenced by energy efficiency programs and increasing levels of residential, rooftop solar generation."⁵¹

It is not surprising that CAISO often underestimates the role that DERs will play in the clean energy transition. CAISO relies on the Commission's techno-economic screens to project feasible non-wires alternatives, yet those screens exclude substantial areas suitable for rooftop solar and other DERs, including urbanized industrial areas.⁵² Already developed and industrialized areas present significant rooftop potential for solar generation that local

⁴⁹ *See, supra*, Section II (describing legislative action signed by governor promoting distributed energy solutions). The Governor has also vetoed two pieces of legislation cited in the Joint Motion to support the Settling Parties' efforts. *See* Joint Motion, at 7 (citing SB 619 and SB 420); Office of the Governor, SB 420 Veto Message (available at <https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-420-Veto.pdf>); SB 619 Veto Message (available at <https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-619-Veto.pdf>).

⁵⁰ CAISO 2022 TP at Appendix H.

⁵¹ CAISO 2017-2018 Transmission Plan Press Release (available at https://www.aiso.com/Documents/BoardApproves2017-18TransmissionPlan_CRRRuleChanges.pdf).

⁵² CEC Workshop on Land Use Screens (March 13, 2023) at Slide 8 (available at <https://efiling.energy.ca.gov/GetDocument.aspx?tn=249088&DocumentContentId=83646>).

jurisdictions have already identified,⁵³ yet the Commission, CEC and CAISO omit them. Overlooking this potential also ignores significant opportunities for community solar plus storage projects that provide significant benefits to environmental justice communities.⁵⁴

Here, the Settlement Agreement would tie the Commission to CAISO analyses despite CAISO's struggle to keep pace with DER deployment. Cordoning review to CAISO's parameters is particularly worrisome in light of CAISO's history of cancelling billions of dollars in projects because of DER growth it did not anticipate.

The Settlement Agreement would, in various forms, hold the Commission to CAISO's analysis despite the shifting nature of the non-transmission alternatives landscape, the promise of DERs, and the need to remain flexible in light of new opportunities to deploy non-wires alternatives. CAISO itself noted the importance of environmental review done in addition to its own transmission planning.⁵⁵ The Proposed Settlement goes the opposite direction, restraining or limiting the Commission's discretion.

2. The Settlement Agreement's Phase 2 Elements Are Unreasonable Because The Record Purportedly Supporting Them Is Undeveloped.

The CAISO-related amendments also underscore the broader problem with the Settlement Agreement: the Commission has not entered the phase of the proceeding intended to develop a record on Phase 2 recommendations offered by the Settling Parties. The scarce elements of the record that could provide any specific support for the Phase 2 elements of the Settlement Agreement are the comments by Settling Parties' themselves briefly proposing the

⁵³ See e.g. Draft 2045 Los Angeles County Climate Action Plan (available at <https://planning.lacounty.gov/long-range-planning/climate-action-plan/documents/>).

⁵⁴ See e.g. Center for Biological Diversity, Rooftop Solar Justice (March, 2023) (available at <https://www.biologicaldiversity.org/programs/energy-justice/pdfs/Rooftop-Solar-Justice-Report-March-2023.pdf>).

⁵⁵ CAISO Comments, at 4.

ideas that are now the centerpiece of the Settlement Agreement. Other interested parties had no reason to provide comments on these proposals when they fell clearly outside the current phase of the proceeding and when they were not included in the Commission's original proposed revisions.⁵⁶ For that reason, the record appears artificially supportive of the Settlement Agreement's proposals. At best, the argument in favor of the reasonableness of the Phase 2 elements of the Settlement Agreement is circular.

At worst, the Settlement Agreement's effort to jam Phase 2 proposals into the current phase of the proceeding is a self-serving attempt to tilt Phase 2 in its favor and create a self-serving precedent in their favor in future proceedings. During Phase 2, all parties should have an opportunity to discuss, assess, and negotiate a variety of permitting reform proposals.⁵⁷ Approving the Phase 2 elements of the Settlement Agreement will reward the Settling Parties with implementation of their preferred revisions simply because they ignored the Scoping Memo and proceeded with a schedule of their own making.

The Commission must not set this precedent. It must instead reject the Settlement Agreement by recognizing that its Phase 2 elements cannot be reasonable in light of the record.

C. The Settlement Agreement's SB 529 Revisions Should Be Rejected Because They Are Not Reasonable, Consistent With Law, Or In The Public Interest.

The Proposed Settlement includes language purporting to implement SB 529.⁵⁸ Those SB 529 proposals, however, run afoul of the bill's legislative intent in three crucial respects. First, the Settlement Agreement does not implement SB 529 properly with respect to the bill's intent to

⁵⁶ See *Southern California Edison*, 140 Cal.App.4th at 1104-1106 (establishing that the Scoping Memo, not parties comments, establish the scope of the proceeding).

⁵⁷ See, *supra*, Section III.B.1 (describing the need for GO 131-D updates that reflect improvements in distributed energy resource technology).

⁵⁸ Joint Settlement Proposal, GO 131-D, Section III.A.

preserve environmental review. Second, the Settlement Agreement does not define crucial terms that it would insert in GO 131-E, despite the legislative intention for the Commission to define terms used in the bill. Third, the Settlement Agreement does not confine the SB 529 application to clean energy-related transmission projects. Like the Phase 2 defects, these issues undermine the case that the Settlement Agreement should be favored in light of the Commission’s traditional support for settlements. For these reasons, the SB 529 provisions are unreasonable, inconsistent with law, and against the public interest.

1. The Settlement Agreement Violates SB 529 With Respect To Environmental Review.

SB 529’s author guaranteed that SB 529 “still ensures CEQA is complied with through the PTC process.”⁵⁹ Indeed, the bill was passed with a conscious emphasis not just on transmission build-out generally, but on “the development of cost-effective, *environmentally responsible* transmission projects that can reliably deliver renewable resources throughout the state.”⁶⁰ Currently, a project that undergoes PTC review also undergoes CEQA review, which assists in ensuring that California’s clean energy transition and related transmission expansion maximizes greenhouse gas reductions, protects the state’s natural resources and biodiversity, and promotes environmental justice.⁶¹

As written, however, the Settlement Agreement’s SB 529 provisions may result in the construction of major transmission projects without CEQA review. As a recent legislative committee analysis described, about ninety percent of transmission projects that have come under the Commission’s purview in the past two-and-a-half decades did not receive CEQA

⁵⁹ *Id.*

⁶⁰ Senate Floor Analysis of SB 529, at 6 (August 31, 2022) (emphasis added).

⁶¹ GO 131-D Section II; Pub. Util. Code §21000, 21001.

review.⁶² The only projects that consistently received CEQA review are those that underwent the CPCN process.⁶³ Projects that would, as a pure matter of voltage, be expected to undergo the PTC process — and CEQA review as a result — rarely receive either PTC or CEQA review because applicants claim a categorical exemption under CEQA, which secures them an exemption from PTC review.⁶⁴ The vast majority of transmission construction, in other words, is approved only by utilities, not by the Commission.

The Commission has initiated the Transmission Project Review Process, beginning in 2024, out of concern for this broader self-approval trend. As the Commission has explained:

Most utility transmission projects are currently self-approved projects, which lack transparency of their planning, prioritization, budgeting, and implementation. With the anticipation of the aforementioned large expansion of the transmission grid, it is more important than ever that transparency of transmission projects occur to protect ratepayers, ensure the Commission has the ability to track how projects best meet needs related to interconnection of renewable energy resources, CPUC permitting processes, risk and safety assessments, and more broadly address the integrated resource planning needed to meet the state’s clean energy goals and the changing electric grid.⁶⁵

Indeed, the concern that SB 529 projects may evade all forms of review, undermining SB 529’s intent to facilitate environmentally responsible transmission construction, may be what prompted the Commission in this proceeding to originally eliminate the PTC exemption for projects that are otherwise categorically or statutorily exempt from CEQA.⁶⁶ At the very least, it

⁶² Assembly Committee on Utilities and Energy Analysis of AB 914, at 4 (accessible through https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240AB914).

⁶³ *Id.*

⁶⁴ GO 131-D Section III B.1.h.

⁶⁵ Resolution E-5252 (April 27, 2023), at 3 (<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M507/K896/507896441.PDF>).

⁶⁶ OIR, Attachment B, Section III B.1.

is clear that SB 529 did not intend to add to the heap of utility self-approved projects.⁶⁷ SB 529 sought to deliver “environmentally responsible transmission projects” that undergo adequate environmental review.⁶⁸

The Settlement Agreement’s SB 529 implementation would not deliver on that promise, because it does not ensure that the projects falling from CPCN to PTC review undergo PTC and CEQA review. In order to do so, any change to GO 131-D in Phase 1 should provide that an expansion, extension, upgrade, or modification to an existing electrical transmission facility at or above a 200 kV level may not claim a categorical or statutory exemption to CEQA, nor may it avoid PTC review by attempting to claim a categorical or statutory exemption to CEQA. That framework would not alter the pre-SB 529 status quo, which generated the Settling Parties’ opposition to the Commission’s original Attachment A that would have eliminated the PTC exemption for CEQA-exempt projects entirely. It would, however, properly implement SB 529 by ensuring that projects newly eligible for PTC review would actually receive PTC and CEQA review. As written, the Settlement Agreement does not achieve this result. It frustrates existing Commission efforts to improve transparency and coordination in transmission construction review and runs counter to the legislative intent of SB 529. For those reasons, it is inconsistent with law and not in the public interest.

⁶⁷ These concerns were expressed in the record even prior to the proposal of the Settlement Agreement. *See e.g.* Protect our Communities Foundation (“PCF”) Reply Comments (September 28, 2023). PCF, for example, explained that the Commission is attempting to reduce the number of utility self-approved projects over \$1 million. *Id.* at 3. PCF described the importance of Commission review of these projects and highlighted the choice made by SB 529 to guarantee Commission review of projects irrespective of voltage. *Id.*

⁶⁸ Senate Floor Analysis of SB 529 (August 31, 2022), at 6; *see also* PCF Reply Comments (September 28, 2023) (describing the importance of Commission review of costly projects).

2. The Settlement Agreement Does Not Define Terms That SB 529 Left The Commission To Define, Creating Major Ambiguity Issues.

SB 529 alters the Commission’s regulation of an “extension, expansion, upgrade, or other modification of an existing electrical facility.”⁶⁹ The terms “extension, expansion, upgrade, or other modification” are ambiguous, and their definition will be crucial for determining which projects receive PTC review as opposed to CPCN review. As a legislative analysis details, “[t]he CPUC has noted it will need to define, or clarify terms, mentioned in this bill that are currently not defined (or mentioned) in the general order.”⁷⁰ Despite the need to clarify these terms, the Settlement Agreement merely inserts them into GO 131-D without any further explanation or definition.

By failing to define these terms, the Settlement Agreement opens a Pandora’s box that may worsen the transparency issues already plaguing the Commission’s review of utility transmission projects. Take, as one example, the Jefferson-Martin 230 kV Transmission Project approved in 2004.⁷¹ As provided in the Project Description section of the Jefferson-Martin Environmental Impact Report, the project included:

- “Installation of a *new* approximately 27-mile-long 230 kV transmission line with overhead and underground segments, with the first 14.7 miles of this line to be installed on a *rebuilt* version of PG&E’s existing Jefferson-Martin 60 kV double-circuit transmission line and the remaining 12.4 miles to be installed in a *new* underground duct bank . . .
- *Rebuilding* the *existing* Jefferson-Martin 60 kV double-circuit tower line to enable the east side to operate at 60 kV and the west side at 230 kV.

⁶⁹ Pub. Util. Code § 1001(b).

⁷⁰ Senate Floor Analysis of SB 529 (August 31, 2022), at 5.

⁷¹ Jefferson-Martin 230 kV Transmission Project Final Environmental Impact Review, Chapter 2: Project Description (available at https://files.cpuc.ca.gov/Environment/info/aspen/jefferson_martin/pdf/002.pdf).

- Construction of a *new* transition station . . . to transition from the 14.7 mile overhead 230 kV transmission line to the 13-mile underground 230 kV transmission line . . .”⁷²

Which of these proposals falls under the ambit of SB 529’s “extension, expansion, upgrade, or other modification of existing electrical transmission facilities”? The Settlement Agreement sheds no light. Indeed, even the applicant’s words in this application would not resolve the question. The “*new* 27 mile-long 230 kV transmission line” includes two segments: 14.7 miles of line “to be installed on a *rebuilt* version of PG&E’s *existing* Jefferson-Martin 60 kV double-circuit transmission line” and 12.4 miles of line “to be installed in a *new* underground duct bank.” If the entire line were considered “new,” it would all require CPCN review. But if the 14.7 miles of rebuilt wire on an existing line were considered an “upgrade” or “modification,” that part of the line may fall within SB 529’s scope. Indeed, if the new 14.7 miles of line were considered an “upgrade,” the additional 12.4 miles of underground construction could be construed as an “expansion” or “extension” of the existing line. While the applicant here did not choose those words, SB 529 and the coming updates to GO 131-D create new linguistic incentives and opportunities for applicants to frame projects in order to receive the least review possible, emphasizing the critical need for the Commission to clarify the distinction between new transmission projects and the extension, expansion, upgrade, or other modification of existing transmission projects.

The Jefferson-Martin project is not the only project that presents this type of conundrum. In fact, in June 2020, the Commission approved an application from PG&E that further expanded the Jefferson-Martin line.⁷³ The Egbert Switching Station Project rerouted two existing transmission lines — including the Jefferson-Martin line — to be connected to a new 230 kV

⁷² *Id.* (emphasis added).

⁷³ PG&E Egbert Switching Station Project CEQA Review Webpage, Project Description Section (available at <https://ia.cpuc.ca.gov/environment/info/dudek/egbert/egbert.html#ProjectDescription>).

switching station. The re-routing required just under 4 miles of additional new underground transmission lines.⁷⁴ Again, the same ambiguity arises. On the one hand, an applicant might describe this as a new project, given that it requires the construction of a new substation and some new underground transmission construction. On the other hand, the project is also comprised of re-routing existing transmission lines, which could also be described as the extension of an existing transmission facility. Without clear direction from the Commission, applicants will be incentivized to describe projects as extensions, expansions, upgrades or other modifications, pushing them into PTC review and potentially out of any discretionary review in its entirety if the applicant also pursues a categorical CEQA exemption.

Over the course of two decades, the Jefferson-Martin line reflects the importance of defining the terms at the heart of SB 529. It was first newly constructed — or, by another description, rebuilt and expanded. It was then connected to a new substation — or, by another description, expanded and re-routed. During those two decades, these were distinctions without differences, as each project received thorough CPCN and CEQA review. Now, these distinctions are the key difference. The Settlement Agreement does little in the way of helping applicants, interested parties, or the Commission decide what level of review a project should receive one way or another. If anything, the Settlement Agreement risks digging an even deeper hole of utility self-approval, a problem the Commission is actively attempting to solve.

The lack of statutorily required definitions not only makes the SB 529 provisions unreasonable — it also makes them inconsistent with law. The author of SB 529 expressly

⁷⁴ PG&E Egbert Switching Station Project Location and Alignment Map (available at https://ia.cpuc.ca.gov/environment/info/dudek/egbert/Egbert_ProjectLocation.pdf); PG&E Egbert Switching Station Project CEQA Review Webpage, Project Description Section (available at <https://ia.cpuc.ca.gov/environment/info/dudek/egbert/egbert.html#ProjectDescription>).

intended for the Commission to clarify the ambiguous terms in the statute.⁷⁵ In addition, SB 529 itself provides some guidance on its intended definitions of these terms, by including the following modifier: “an extension, expansion, upgrade, or other modification of an existing electrical transmission facility, *including transmission lines and substations within existing transmission easements, rights of way, or franchise agreements*, irrespective of whether the electrical transmission facility is above a 200-kilovolt voltage level.”⁷⁶ The author explained that the bill was intended to facilitate quicker review for “upgrades to existing transmission facilities in existing corridors, or ‘rights of way.’”⁷⁷ According to the author, this approach was informed by the principle that transmission build-out must be “environmentally responsible.”⁷⁸ To be consistent with law, the Settlement Agreement cannot merely insert SB 529’s brief text. It must also define “expansion, extension, upgrade, or other modification of an existing electrical transmission facility,” and in doing so, it must be mindful of the bill’s express intent to expedite only those reviews within existing rights of way. Because the Settlement Agreement’s SB 529 provisions fail that test, they are inconsistent with law.

3. Contrary To The Settling Parties’ Claims And SB 529’s Intent, The Settlement Agreement Is Not Confined To Environmentally Responsible, Clean Energy-Related Transmission Construction.

The Settling Parties introduce the Settlement Agreement’s SB 529 provisions by noting that the bill was designed to help the Commission “meet California’s climate change goals.”⁷⁹ They explain that SB 529 was intended to apply to a “defined group of transmission projects because they are necessary to meet the state’s zero-carbon and renewable energy resource

⁷⁵ Senate Floor Analysis of SB 529 (August 31, 2022), at 5.

⁷⁶ Pub. Util. Code § 564.

⁷⁷ Senate Floor Analysis of SB 529 (August 31, 2022), at 6.

⁷⁸ *Id.*

⁷⁹ Joint Motion, at 20.

goals.”⁸⁰ Settling Parties are correct that the author of SB 529 had no intention of expediting construction of transmission projects that do not facilitate the state’s clean energy transition.

But the Settlement Agreement does not confine its provisions to clean energy-related transmission projects. If a transmission project is an “expansion, extension, upgrade, or other modification to [] existing transmission electrical transmission facilities,” it is eligible for expediting whether it will facilitate clean energy generation, fossil fuel generation, or other combustion generation.⁸¹ The breadth of the language in the Settlement Agreement belies SB 529’s climate mandate and the Settling Parties’ own language.

The Settlement Agreement also diverges from SB 529’s intent by failing to take into account whether or not a project is “environmentally responsible.”⁸² Under the Settlement Agreement, an extension or expansion project would be subject to expedited review regardless of the potential land use impacts the project may entail. Applying expedited review to all types of transmission projects – clean energy or not, extremely land-use intensive or not – does not align with SB 529’s mandate, making these provisions inconsistent with law and not in the public interest.

4. The Commission’s Traditional Preference For Settlement Is Undermined By The Settlement Agreement’s SB 529 Issues.

The Settling Parties have pointed to the Commission’s general support for settlements, but here too, the reasons for that support do not apply. The Commission prefers settlements because they avoid litigation and conserve scarce Commission resources.⁸³ If the Commission adopts the proposed SB 529 changes, GO 131-D will not provide proper guidance to applicants

⁸⁰ Joint Motion, at 26.

⁸¹ Joint Settlement Proposal, GO 131-D, Section III.A.

⁸² Senate Floor Analysis of SB 529 (August 31, 2022), at 6.

⁸³ Joint Motion, at 16.

and interested parties about which projects should receive PTC review. Under these circumstances, an applicant and the Commission may disagree about the level of review to which the applicant's project should be subjected. In addition, the Commission and an applicant may agree about a project's eligibility for SB 529 streamlining, but an outside party may disagree. These scenarios create significant risk for delay, cost, and litigation—precisely the outcomes that a settlement is supposed to avoid. For these reasons, the Settlement Agreement does not share the qualities that the Commission favors in settlements.

V. CONCLUSION

For the foregoing reasons, the Center for Biological Diversity and the Clean Coalition respectfully urge the Commission to reject the Settlement Agreement as unreasonable in light of the record, inconsistent with law, and not in the public interest. Rather than approve the Settlement Agreement, the Commission should continue with the schedule provided in the Scoping Memo. Doing so will provide parties and the Commission the full opportunity to meet SB 529's deadline, properly implement the legislation, and enter Phase 2 of the proceeding with a commitment to accelerating California's clean energy transition and realizing the energy justice mandate it carries.

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Respectfully submitted,

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