

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

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

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

**CENTER FOR BIOLOGICAL DIVERSITY, CLEAN
COALITION & THE PROTECT OUR COMMUNITIES FOUNDATION
OPENING COMMENTS ON PHASE 2 ISSUES**

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Pursuant to the Administrative Law Judges’ Ruling Inviting Comment on Phase 2 Issues,¹ the Center for Biological Diversity (“Center”), The Protect Our Communities Foundation (“PCF”), and the Clean Coalition respectfully submit these comments responding to the Ruling Inviting Comment on Phase 2 Issues.

¹ R.23-05-018, Administrative Law Judge’s Ruling Inviting Comment on Phase 2 Issues (December 18, 2023) (“ALJ Ruling”).

I. INTRODUCTION

The Commission should focus Phase 2 on designing a permitting process that facilitates the Commission's compliance with the California Environmental Quality Act ("CEQA"), properly considers alternatives like distributed energy resources and ensures early community engagement. Phase 2 of this proceeding must also ensure that GO 131-D allows the Commission to meet its duty to ensure just and reasonable rates, preventing the permit-to-construct (PTC) process from serving as an end-around to unnecessary rate-spiking projects. The definitions proposed below for inclusion in the Phase 2 staff proposal are consistent with existing law, faithful to legislative intent, and effective at ensuring the Commission meets its legal duties to consider the environmental and rate impacts of utility transmission projects and alternatives that would minimize adverse environmental consequences and reduce ratepayer costs. None of these aims are served by adopting the Settlement Agreement proposed during Phase 1. The Commission should delete the existing preemption paragraph in GO 131-D to conform to law.

II. "EXISTING ELECTRICAL TRANSMISSION FACILITIES" SHOULD INCLUDE ALL EXISTING ELECTRICAL TRANSMISSION FACILITIES WITH A PERMIT OR CERTIFICATE, CURRENTLY IN USE AND WITHIN THE COMMISSION'S JURISDICTION, IRRESPECTIVE OF VOLTAGE.

The first question provided in the ALJ ruling asks: "What definition, if any, should the Commission adopt for the term: 'existing electrical transmission facilities' set forth in Public Utilities Code Section 564?"² The term "existing electrical transmission facilities" should be defined as all electrical facilities with an existing permit or certificate, currently in use, and within the jurisdiction of the Commission, "irrespective of whether the electrical transmission facility is above a 200-kilovolt voltage level."³

² ALJ Ruling, p. 1.

³ Pub. Util. Code § 564.

A. “Existing Electrical Transmission Facilities” Includes Only Those Facilities With an Existing Permit or Certificate that Are Actually Being Used.

The Commission should ensure that the term “existing electrical transmission facilities” includes only those facilities with an existing permit or certificate that in fact exist and are being used. The definition proposed in the OIR reflects the appropriate use of the term “existing,” when it states that “[a]n ‘existing electrical transmission facility’ means existing, operational electrical infrastructure and does not include property under utility control upon which no electrical infrastructure is currently located.”⁴

In addition to requiring that an existing electrical transmission facility actually be used, incorporating an existing permit or certificate will avoid conflicts with the Commission’s duty under CEQA to consider preventing environmental damage when regulating the utilities.⁵ Existing facilities under CEQA necessarily include only those facilities already in use.⁶ In the absence of cumulative impacts or unusual circumstances,⁷ projects involving the “operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use” are exempt from environmental review.⁸ Including in the definition of “existing electrical transmission facilities” all electrical transmission facilities currently in use and within the Commission’s jurisdiction that already have an existing permit or certificate will ensure that the Commission complies with CEQA.

⁴ R.23-05-018, Order Instituting Rulemaking, Attachment A (Redlines), p. 1.

⁵ Pub. Res. Code § 2100

⁶ Cal. Code Regs., tit. 14 § 15301 (“The key consideration is whether the project involves negligible or no expansion of use.”).

⁷ Cal. Code Regs., tit. 14 § 15300.2, subds. (b)-(c).

⁸ Cal. Code Regs., tit. 14 § 15301.

Without including the existing permit or certificate requirement, the Commission would effectively purport to create a new class of CEQA exemptions. However, only the Office of Planning and Research has the authority to develop regulations for implementing the CEQA statutes.⁹ The Commission lacks any authority to create a CEQA loophole or exemption when developing GO 131-D. Requiring that existing electrical transmission facilities include only those facilities with an existing permit or certificate that are actually being used will ensure that the Commission complies with its CEQA mandate to mitigate and avoid when feasible adverse environmental impacts,¹⁰ allow for the Commission to meet its duty to consider alternatives and to ensure meaningful public participation, and ultimately empower ratepayers and the public at large to hold the Commission accountable for its decision-making.¹¹

B. The Commission Has Jurisdiction Over All Environmental and Other Siting Concerns, and Over the Costs of the Transmission Facilities Used by the Utilities for the Local Distribution of Energy.

Requiring that existing electrical transmission facilities include all facilities within the Commission’s jurisdiction recognizes the Commission’s jurisdiction and duties to regulate environmental issues involved in transmission facilities construction in general, and its jurisdiction and duty to ensure just and reasonable rates for all transmission facilities used for local distribution of energy.¹²

⁹ Pub. Res. Code § 21084, subd. (g).

¹⁰ *Protecting Our Water & Environmental Resources v. County of Stanislaus (“POWER”)* (2020) 10 Cal.5th 479, 488 (CEQA “was enacted to (1) inform the government and public about a proposed activity’s potential environmental impacts; (2) identify ways to reduce, or avoid, those impacts; (3) require project changes through alternatives or mitigation measures when feasible; and (4) disclose the government’s rationale for approving a project.”).

¹¹ See e.g. *Sierra Club v. County of Fresno* (2018) 6 Cal. 5th 502, 511-512 (“...the EIR must be certified or rejected by public officials, it is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees.”) [.] The EIR ‘protects not only the environment but also informed self-government.’ [.]”).

¹² Pub. Util. Code § 451; Pub. Res. Code §§ 21000 et seq. (CEQA).

FERC will not regulate facilities used in local distribution.¹³ Nor will FERC get involved with the choice, siting, environmental review, and construction of transmission facilities,¹⁴ except with respect to “backstop” siting.¹⁵ Facilities used in local distribution, irrespective of voltage, as well as environmental review for transmission facility construction in general, are matters this Commission remains obliged to regulate.¹⁶

Senate Bill 529 did not amend sections 451, 454, 701, 747, or other provisions of the Public Utilities Code which require the Commission both to supervise public utilities and to ensure rates are just and reasonable and as low as possible.¹⁷ Additionally, the legislative history of SB 529 establishes that the bill was intended to expedite approvals of projects “least likely to pose rate concerns,” and recognized “the need to ensure adequate review of transmission projects, including upgrades, extensions, expansions, or modifications to existing approved transmission lines must be done with considerable consideration of the potential impacts, including those to landowners, communities, and ecosystems.”¹⁸ The Commission lacks authority to disregard its Legislative mandates to ensure rates are just and reasonable and to consider the environmental consequences of its actions while implementing section 564.¹⁹

¹³ 16 U.S.C. § 824, subd. (b) The Federal Power Act additionally instructs that the Federal Energy Regulatory Commission (FERC) “shall not have jurisdiction...over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce...”; *see also* 61 FR 21540-01, p. 21731 (seven factor test in FERC Order 888).

¹⁴ *Piedmont Env't Council v. FERC* (4th Cir. 2009) 558 F.3d 304, 310 (“The states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities.”).

¹⁵ 16 U.S.C. § 824p.

¹⁶ 16 U.S.C., §824, subd. (a) (“It is declared that...Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.”)

¹⁷ Pub. Util. Code §§ 451, 454, 701, 747.

¹⁸ Senate Floor Analysis of SB 529 (August 31, 2022), pp. 4, 6.

¹⁹ *S. Cal. Gas Co. v. Pub. Util. Com.* (1979) 24 Cal.3d 653, 659 (holding that the Commission lacks authority to disregard specific provisions in legislation).

C. Existing Electrical Transmission Facilities Must Be Defined Without Regard to Voltage.

The ALJ Ruling²⁰ also asks “whether modification of a facility below 50 kilovolts (kV) to a 200 kV facility should qualify for the permitting processes authorized in the statute,”²¹ and “whether modification of a facility between 50 kV and 200 kV to a 500 kV facility should qualify for the permitting processes authorized in the statute; and whether the permitting processes authorized in the statute should only apply to modifications to ‘transmission lines’ as defined in Section I of General Order 131-D (for instance, modifying a 200 kV line to 500 kV).”²² The answer to the first two questions is yes, because Section 564 mandates that the PTC process be authorized for existing electrical facilities “irrespective of whether the electrical transmission facility is above a 200-kilovolt voltage level.”²³ For the same reason, the PTC process may not be limited to “transmission lines” as defined in Section I of GO 131-D.

Public Utilities Code section 564 requires that the PTC process be authorized for “an extension, expansion, upgrade, or other modification to [an electrical corporation’s] existing electrical transmission facilities, including electric 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.”²⁴ The Commission lacks any power to define electrical transmission facilities in a manner that conflicts with Legislative directives in section 564.²⁵

²⁰ ALJ Ruling, p. 1.

²¹ *Id.*

²² ALJ Ruling, p. 2.

²³ Pub. Util. Code § 564.

²⁴ Pub. Util. Code § 564.

²⁵ Cal. Const. art. 12, §§ 2, 5; *see also Assembly of the State of California v. Public Utilities Com.* (1995) 12 Cal.4th 87, 103 (holding that the Commission lacks authority to act contrary to legislative directives).

Although existing GO 131-D does not define the term “electrical transmission facilities,” the term “transmission line” is defined as “a line designed to operate at or above 200 kilovolts (kV),” “power line” is defined as “a line designed to operate between 50 and 200 kV,” and “distribution line” is defined as “a line designed to operate under 50kV.”²⁶ The distinctions in GO 131-D between “transmission line,” “power line,” and “distribution line,” are based on voltage levels and therefore cannot be applied when the Commission defines the term “electrical transmission facilities.”²⁷ Section 564 unequivocally requires that the PTC process be authorized for electrical transmission facilities “irrespective of whether the electrical transmission facility is above a 200-kilovolt voltage level.”²⁸

III. THE COMMISSION SHOULD ADOPT DEFINITIONS IN ACCORDANCE WITH THE ENVIRONMENTAL, ENERGY, AND COST GOALS OF SB 529

SB 529 was passed with a focus on “the development of *cost-effective, environmentally responsible* transmission projects that can reliably deliver *renewable resources* throughout the state.”²⁹ The Commission should adopt definitions that further those goals and reject any proposals that undermine the statute's purposes. It should also ensure that applicants cannot piecemeal their way out of proper review.

A. The Commission Should Promote SB 529’s Goals by Adopting Common-Sense Definitions That Comply with CEQA, Promote Clean Energy, and Minimize Rate Concerns.

As the legislative history makes clear, SB 529 ensures that “CEQA is complied with through the PTC process.”³⁰ To that end, the Commission should adopt definitions of GO 131-D

²⁶ GO 131-D, p. 1.

²⁷ Pub. Util. Code § 564.

²⁸ Pub. Util. Code § 564.

²⁹ 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).

³⁰ *Id.*

terms that maintain adherence with CEQA and the CEQA Guidelines.³¹ Adherence to CEQA’s intent to inform decisionmakers and the public about the potential environmental effects of proposed activities, and to prevent significant, avoidable environmental damage³² can avoid litigation and other related project delays. In implementing SB 529, it is critical for the Commission to distinguish between potential project delays due to the CEQA *process* and CEQA *litigation*.

CEQA dictates that “lead agencies shall prepare . . . an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment.”³³ An effect is significant if it is a “substantial, or potentially substantial, adverse change in physical conditions which exist within the area.”³⁴ An agency must undertake environmental review if substantial evidence supports the conclusion that the project may have a significant effect.³⁵

Conversely, an agency need not prepare an environmental impact report if the project presents no significant effects on the environment. CEQA strikes a proper balance, ensuring that major projects with significant environmental impacts include adequate notice to the public, a thorough identification of those impacts, and adoption of potential mitigation measures.³⁶

³¹ Pub. Res. Code §§ 21000 *et seq*; Cal. Code Regs. tit. 14 §§ 15000 *et seq*.

³² *Protecting Our Water & Environmental Resources v. County of Stanislaus (“POWER”)* (2020) 10 Cal.5th 479, 488 (CEQA “was enacted to (1) inform the government and public about a proposed activity’s potential environmental impacts; (2) identify ways to reduce, or avoid, those impacts; (3) require project changes through alternatives or mitigation measures when feasible; and (4) disclose the government’s rationale for approving a project.”).

³³ Pub. Res. Code § 21100.

³⁴ *Id.* §§ 21100, 21151 (defining “significant effect”); *id.* § 21060.5 (noting that the physical conditions at issue are “the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.”).

³⁵ *Id.* § 21082.2.

³⁶ Cal. Code Regs. tit. 14 § 15382.

The Commission’s definitions should take this same approach. SB 529 did not intend to allow major projects to skip environmental or cost review. As the author of SB 529 stated clearly, it expedites approvals “least likely to pose rate concerns” for “upgrades to existing transmission system facilities in existing corridors.”³⁷ Nor did the bill intend to allow for major expansion of transmission projects without regard to their potentially significant environmental impacts.³⁸ SB 529 enables quicker review of “environmentally responsible transmission projects that can reliably deliver renewable resources throughout the state.”³⁹ Ultimately, through acknowledgement of the need to comply with the CEQA *process*, SB 529 recognizes that CEQA compliance, not CEQA evasion, speeds up project approval.⁴⁰

³⁷ 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).

³⁸ *See id.* (noting that transmission expansion must be “environmentally responsible” and that expedited projects under the bill should still ensure “CEQA is complied with”).

³⁹ *Id.*

⁴⁰ *See also* Douglas E. Bessette et al., *Good fences make good neighbors: Stakeholder perspectives on the local benefits and burdens of large-scale solar energy development in the United States*, 108 Energy Research & Social Science 5-9 (2024) (available at <https://emp.lbl.gov/publications/good-fences-make-good-neighbors>). One example illustrates the broader trend that transparency and proper community engagement speeds project development.

“This study demonstrates that the required processes for informing and engaging residents are insufficient, suggesting policy changes that increase notice and engagement requirements are necessary. Here, all agreed with the sentiment of one official in Texas who stated, ‘the most important thing in the process is making sure the community is brought in,’ identifying the value in scheduling bus tours, providing classes with residents focused on job training, having coffee with neighbors, establishing and meeting regularly with community advisory groups, and providing visuals and narratives explaining and seeking feedback regarding the process, design elements, and potential outcomes of development. These methods go well beyond the required public meetings and town halls, stress in-person contact and communication, and presume residents have a meaningful role in influencing project design.

One official in Iowa also identified the importance of communicating the pros and cons more readily to the broader community, noting: ‘A couple decided not to be in the program, which is fine, but I think they just didn’t understand it. That’s what we have to do better, communicate the pros and cons . . . [the developer] should have gone bigger. They only invited the people that would be looking at the panels. That started the rumor mill. You got several thousands of people not knowing anything about it.’” *Id.* at 8.

The Commission should therefore adopt the following definitions, which are the terms' plain meaning with the guardrails imposed by CEQA and SB 529.

- "Extension" (as used in Section 564 and Section III.A of GO 131-D) should be defined as "policy-driven construction, within an existing easement, right of way, or franchise agreement, of an electric transmission or power line facility that connects an existing electric transmission facility to a service delivery point and does not have a significant effect on the environment or rates."
- "Expansion" (as used in Section 564 and Section III.A of GO 131-D) should be defined as "policy-driven construction, within an existing easement, right of way, or franchise agreement, that adds new facilities or capacity to an existing electric transmission facility and does not have a significant effect on the environment or rates."
- "Upgrade" (as used in Section 564 and Section III.A of GO 131-D) should be defined as "policy-driven construction that improves an existing electric transmission facility and does not have a significant effect on the environment or rates."
- "Modification" (as used in Section 564 and Section III.A of GO 131-D) should be defined as "policy-driven construction that alters but does not otherwise expand or upgrade an existing electric power line facility or electric substation and does not have a significant effect on the environment or rates."⁴¹
- "Equivalent facilities or structures" (as used in the phrase "the replacement of existing power line facilities or supporting structures with equivalent facilities or structures" in

⁴¹ GO 131-D currently includes reference to station upgrades and modifications that define an upgrade as an expansion of land area or increase in voltage and a modification as an increase in voltage for which the substation was previously rated. GO 131-D Section III.B. The definitions offered here account for the fact that SB 529 included not just "upgrade" and "modification" but "extension" and "expansion," which suggests that the General Order's existing use of "upgrade" and "modification" may need to be changed to conform with the new terms.

Sections III.A and III.B.1.b of GO 131-D) and “Accessories” (as used in the phrase “the placing of new or additional conductors, insulators, or their accessories on or replacement of supporting structures already built” in Section III.A and similar phrases in Sections III.B.1.e and VI of GO 131-D) should be defined to ensure that the facility, structure, or accessory construction does not have a significant effect on the environment or rates.

- “Policy-driven construction” should be defined as “CAISO-adopted transmission projects that CAISO deems necessary to meet the state’s clean energy goals, and which the Commission has verified are still needed despite current and future non-wires alternatives and do not facilitate combustion resources.”

These definitions are critical to meet the intent of SB 529. The bill was passed to support “the development of *cost-effective, environmentally responsible* transmission projects that can reliably deliver *renewable resources* throughout the state.”⁴² In other words, the bill’s author sought to further three goals: environmental stewardship, clean energy development, and ratepayer protection.⁴³ The above proposed definitions guard against potential transmission development that serves fossil fuel interests, risks environmental harm, or spikes energy burdens, in particular for low-income communities. The words extension, expansion, upgrade, or other modification must be construed pursuant to their plain meaning – but their *scope* must be

⁴² 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).

⁴³ The definitions offered use the phrase “policy-driven construction,” which refers to CAISO-adopted transmission projects that CAISO deems necessary to meet the state’s clean energy goals. The Commission should include this phrase and should limit its application to projects that CAISO deems “policy-driven” and that the Commission confirms facilitate the production of renewable, non-combustion resources.

somehow limited, given that virtually all transmission projects are an extension, expansion, upgrade, or modification of some element of the existing transmission system.⁴⁴

As detailed in prior comments, the Commission has initiated the Transmission Project Review Process, beginning in 2024, out of concern for the broader trend of self-approval. 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.⁴⁵

The CEQA and SB 529 guardrails will assist the Commission in both accelerating the permitting process and avoiding delays due to developers' use of their own interpretation of the terms' plain meaning.

B. The Commission Must Be Vigilant Against Project Piecemealing as a Means of Avoiding Compliance with CEQA and SB 529.

Adopting definitions that account for a project's impacts will require the Commission to be wary of applicants unlawfully piecemealing transmission project applications to avoid proper review. Under CEQA, an agency must analyze "the whole of the action."⁴⁶ A project cannot be divided up into smaller projects for separate review and approval. The prohibition against piecemealing ensures that "where an individual project is a necessary precedent for action on a larger project, or commits the lead agency to a larger project with a significant environmental

⁴⁴ See Reply Comments by the Acton Town Council on the Phase 1 Proposed Decision at 1-2.

⁴⁵ Resolution E-5252 (April 27, 2023), at 3, available at <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M507/K896/507896441.PDF>.

⁴⁶ Cal. Code Regs. tit. 14 § 15378.

effect,” the agency must review the whole of the action and its cumulative impacts must be assessed at once.⁴⁷ For that reason, CEQA review “must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.”⁴⁸

The principles that underly concern about piecemealing apply here. As the California Supreme Court explained over three decades ago, the central purpose of CEQA is to ensure agencies “have information they can use in deciding whether to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved. If post-approval environmental review were allowed, [environmental impact reports] would likely become nothing more than post hoc rationalizations to support action already taken.”⁴⁹ The piecemealing prohibition arises out of the concern that “a strong incentive to ignore environmental concerns . . . could be dealt with more easily at an early stage of the project.”⁵⁰ In other words, identifying environmental concerns at the outset of a project application can accelerate the ultimate approval of the project.

Similarly here, applicants may not piecemeal overall larger projects in order to benefit from the relaxed review provisions implemented in GO 131-D. The definitions offered above ensure that transmission permitting favors environmentally responsible, cost-effective projects that facilitate clean energy; applicants should not be able to piecemeal a single project that will ultimately fail to serve those goals. For example, a project should not qualify under these

⁴⁷ *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283-284; see also *City of Antioch v. City Council of the City of Pittsburg* (1986) 187 Cal.App.3d 1325.

⁴⁸ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396.

⁴⁹ *Id.* at 394.

⁵⁰ *Id.* at 395.

provisions if future development that is a reasonably foreseeable consequence of the project will not serve SB 529 standards. The Commission must ensure an adequate scope of review.

IV. THE COMMISSION SHOULD REJECT THE SETTLEMENT AGREEMENT PROVISIONS

The ALJ Ruling asks whether there “are any other issues related to the settlement agreement the Commission should consider that have not already been raised in the settlement agreement or party comments?” We reiterate our opposition to the proposals made by the Settling Parties. In addition to rejecting the settlement for the reasons set forth in past comments on the settlement agreement from PCF, the Center, and the Clean Coalition which are here incorporated by reference,⁵¹ the Settlement Agreement improperly seeks to evade CEQA via this Commission’s administrative process, which this Commission does not have the power to do. Like all California agencies, the Commission lacks any power to evade CEQA’s mandates.⁵² The settling parties’ proposed changes fail to take into account the fact that the Commission spent significant resources within the last five years improving its Proponent’s Environmental

⁵¹ R.23-05-018, Center for Biological Diversity and Clean Coalition Opposition to Joint Motion for Adoption of Settlement Agreement (October 30, 2023); R.23-05-018, The Protect Our Communities Foundation Opposition to Joint Motion for Adoption of Phase One Settlement Agreement (October 30, 2023); R.23-05-018, The Protect Our Communities Foundation Reply to Responses to Joint Motion for Adoption of Phase One Settlement Agreement (November 14, 2023).

⁵² See, e.g., Pub. Res. Code, § 21000, subd. (g) (“It is the intent of the Legislature that **all agencies of the state government** which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.”) (emphasis added); Pub. Res. Code, § 21084, subd. (g) (“The Office of Planning and Research shall prepare and develop proposed guidelines for the implementation of this division by public agencies. The guidelines shall include objectives and criteria for the orderly evaluation of projects and the preparation of environmental impact reports and negative declarations in a manner consistent with this division.”); *Protecting Our Water & Environmental Resources v. County of Stanislaus* (“POWER”) (2020) 10 Cal.5th 479, 488 (CEQA “was enacted to (1) inform the government and public about a proposed activity’s potential environmental impacts; (2) identify ways to reduce, or avoid, those impacts; (3) require project changes through alternatives or mitigation measures when feasible; and (4) disclose the government’s rationale for approving a project.”).

Assessment process.⁵³ The Commission should reject the settling parties' attempt to subvert those significant Commission efforts.

A. The CAISO Provisions In Proposed Section IX.C.2 Interfere with the Commission's Independence and CEQA Obligations

The Settlement Agreement erroneously sought to replace the Commission's independent oversight and CEQA considerations with determinations made by the California Independent System Operator ("CAISO").⁵⁴ These proposals undermine bedrock CEQA principles and should be rejected.

Unless the Legislature dictates otherwise, it is the lead agency's responsibility under CEQA to exercise its "independent judgment and analysis" in the environmental review process.⁵⁵ Independent judgment is the guarantor of the fundamental purpose of CEQA: to "ensure that public agencies will consider the environmental consequences of discretionary projects they propose to carry out or approve."⁵⁶ For those reasons, the Commission's independent review of project alternatives and independent discretion over project objectives is crucial. Without this independence, the Commission cannot faithfully undertake its duties under CEQA. Instead, it would hand its authority over to CAISO, leaving itself without recourse anytime CAISO's chosen objectives or alternatives fall short of the Legislature's requirements for sound environmental decision-making.

The Settlement Agreement improperly cedes the Commission's authority and jurisdiction over environmental review to CAISO. Moreover, notwithstanding that CAISO is not a typical

⁵³ See CPUC Energy Division Infrastructure Permitting and CEQA Unit, *Guidelines for Energy Project Applications Requiring CEQA Compliance: Pre-filing and Proponent's Environmental Assessments* (November 2019), available at <https://www.cpuc.ca.gov/-/media/cpuc-website/files/legacyfiles/c/6442463239-ceqa-pre-filing-guidelines-pea-checklist-nov-2019.pdf>.

⁵⁴ Joint Settlement Proposal, GO 131-D, Section IX.C.

⁵⁵ Cal. Code Regs. tit. 14 § 15090.

⁵⁶ *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48Cal.4th 481, 488.

public agency, is neither equipped nor authorized to comply with CEQA, and maintains an opaque transmission planning process that includes little public engagement,⁵⁷ the Settlement Agreement erroneously treats as final the non-routing alternatives and statement of objectives identified in CAISO's Transmission Plan.

Handing the keys to CAISO is even more worrisome given the concerns raised about CAISO's planning process. Parties have identified the failure of CAISO to effectively use its transmission planning process to promote distributed alternatives,⁵⁸ concluding that "the CAISO's TPP does not actively engage the public . . . [and that] CAISO Transmission Plans are largely shaped by utility and energy interests and are developed in a very rarified process that relies on little or no public input."⁵⁹ Conversely, the Commission is actively planning for a high distributed energy resource future through significant stakeholder outreach.⁶⁰ While CAISO may play a valuable role in the transmission planning process, the Commission must maintain its independence to serve its core interests in environmental and ratepayer protection.⁶¹ Pursuant to CEQA, the Commission must maintain its independent judgment over transmission project applications.

⁵⁷ See Acton Town Council Reply Comments on the Joint Motion for a Settlement Agreement at 8-10.

⁵⁸ Center for Biological Diversity and Clean Coalition Opposition to Joint Motion for Adoption of Settlement Agreement (October 30, 2023) at 14-16.

⁵⁹ Acton Town Council Reply Comments on the Joint Motion for a Settlement Agreement at 9-11.

⁶⁰ 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>).

⁶¹ Indeed, in 2017-2018, CAISO was forced to cancel 21 transmission projects that would have cost \$2.6 billion. CAISO 2017-2018 Transmission Plan Press Release (available at https://www.caiso.com/Documents/BoardApproves2017-18TransmissionPlan_CRRRuleChanges.pdf). The provisions recommended here would cede even further power to CAISO despite the value of Commission independence.

B. Proposed Changes To GO 131-D Section XI.B Undermine The Ability to Make Good-Faith Protests of Advice Letters And Undermines Due Process.

The Settlement Agreement proposes to replace the current Commission process for resolving advice letters. The Settlement’s proposed process undermines due process despite an inadequately thin record. In the Joint Motion, the Settling Parties largely undertook an attack on the Commission’s recent advice letter practices and the original staff proposal in this proceeding with respect to advice letters.⁶² The Joint Motion did little to explain, however, the merits of its own proposal.

Indeed, the Joint Motion asserted that the advice letter protest process is “Draconian” and that protest timelines have gone from “bad to worse” without citing any data or source in the record in support of its contentions.⁶³ In fact, 98 of the past 100 energy advice letters filed and documented on the CPUC website went without protest.⁶⁴ Interested parties may have data that could inform Commission action on this front, but today, this data is not before the Commission nor other interested parties to review.

Instead, the Settlement proposes the Commission roll back its authority to review good-faith protests. Ceding that authority without an alternative that preserves the ability to make merited, good-faith protests undermines the crucial due process values that undergird Commission practice and the advice letter protest process.⁶⁵

⁶² Joint Motion for Adoption of the Phase One Settlement Agreement at pp. 43-47.

⁶³ *Id.* at pp. 44-45.

⁶⁴ California Public Utilities Commission, Energy Advice Letter Search (accessible at https://apps.cpuc.ca.gov/apex/f?p=505:1:0::NO:RP:P1_BRANCH,P1_TITLE:E,Energy) (last reviewed January 15, 2024).

⁶⁵ *See* Cal. Const. Art. XII § 2 (providing that the Commission shall establish its procedures” subject to statute and due process”).

V. ADDITIONAL ISSUES THAT THE COMMISSION SHOULD CONSIDER IN PHASE 2: THE COMMISSION SHOULD USE PHASE 2 TO COORDINATE WITH A “HIGH-DER” FUTURE; CONFORM ITS OUTDATED PREEMPTION PARAGRAPH TO CURRENT LAW; IMPROVE COMMUNITY ENGAGEMENT PRACTICES; AND INCLUDE COST REVIEW AS PART OF THE PTC PROCESS

The ALJ Ruling also asks whether there are “any additional issues or proposals that the Commission should consider in Phase 2 that have not already been raised in the settlement agreement or other party comments?”⁶⁶ The Commission should consider four additional items in Phase 2 of this proceeding: first, promotion of distributed energy resources (“DERs”); second, bringing its preemption provision in accordance with the law; third, improvement of early community engagement practices to reduce permitting delays; and fourth, reviewing cost and economic considerations in the PTC process.

A. The Commission Should Ensure Its Transmission Planning Facilitates Distributed Energy Resources

As detailed above, the State is primed for a “high-DER” future.⁶⁷ Phase 2 therefore offers an opportunity to coordinate with those inter-agency efforts, and avoid unnecessary and costly transmission infrastructure buildout. In this regard, the Commission should solicit proposals to improve the transmission planning and permitting process. As described in previous comments, distributed, non-wires alternatives to transmission expansion, like many of the DERs that have experienced steep technological improvements in recent years, are a growing decarbonization

⁶⁶ ALJ Ruling, p. 3.

⁶⁷ 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>); 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>); Governor Gavin Newsom, Building the Electricity Grid of the Future: California’s Clean Energy Transition Plan (available at <https://www.gov.ca.gov/wp-content/uploads/2023/05/CAEnergyTransitionPlan.pdf>)

opportunity on which California can rely. The Commission should explore options to ensure that GO 131-D best aligns with those goals. One option may include periodic and independent evaluation of CAISO recommendations to determine whether DERs, planned or unplanned, can eliminate the need for previously recommended transmission projects.⁶⁸

B. Section XIV.B Should Be Deleted to Avoid Conflicts with Supreme Court Jurisprudence Regarding Preemption.

Subsection B of Section XIV of General Order 131-D constitutes an outdated preemption provision that requires updating in order to conform to law.⁶⁹ Far from being preempted, local jurisdictions are *required* to exercise their jurisdiction to protect their constituents from the harmful effects of public utility operations. Section XIV.B. should be deleted.

In 2019, the California Supreme Court recognized that “[t]he Constitution vests principal regulatory authority over utilities with the PUC, but carves out an ongoing area of municipal control...,” and held that municipalities are forbidden from surrendering to the Commission their duty to protect the public from the harmful effects of public utility operations.⁷⁰ The existing language of Section XIV.B. of GO 131-D directly conflicts with the California Constitution, which the *T-Mobile* decision explained “carves out an ongoing area of municipal control.”⁷¹

A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission. This section does not affect power over public utilities relating to the making and enforcement of police, sanitary, and other regulations concerning municipal affairs pursuant to a city charter existing on October 10, 1911,

⁶⁸ See e.g. CAISO 2017-2018 Transmission Plan Press Release (available at https://www.caiso.com/Documents/BoardApproves2017-18TransmissionPlan_CRRRuleChanges.pdf).

⁶⁹ GO 131-D, pp. 13-14 (Section XIV.B.: “This General Order clarifies that local jurisdictions acting pursuant to local authority are preempted from regulating electric power line projects, distribution lines, substations, or electric facilities constructed by public utilities subject to the Commission’s jurisdiction. However, in locating such projects, the public utilities shall consult with local agencies regarding land use matters. In instances where the public utilities and local agencies are unable to resolve their differences, the Commission shall set a hearing no later than 30 days after the utility or local agency has notified the Commission of the inability to reach agreement on land use matters.”).

⁷⁰ *T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1124.

⁷¹ *Id.*

unless that power has been revoked by the city’s electors, or the right of any city to grant franchises for public utilities or other businesses on terms, conditions, and in the manner prescribed by law.⁷²

In other words, not even the California Legislature (much less the Commission) may prevent certain charter cities from regulating with respect to municipal affairs; or prevent any city from granting franchises. The Commission lacks jurisdiction to establish by general order preemption provisions that fail to recognize express constitutional limitations.

The existing language set forth in Section XIV.B. of GO 131-D also directly conflicts with Public Utilities Code section 2902:

This chapter shall not be construed to authorize any municipal corporation to surrender to the commission its powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets, and the speed of common carriers operating within the limits of the municipal corporation.⁷³

As the California Supreme Court held in *T-Mobile*:

Municipalities may surrender to the PUC regulation of a utility's relations with its customers (§ 2901), but they are forbidden from yielding to the PUC their police powers to protect the public from the adverse impacts of utilities operations (§ 2902).⁷⁴

Section XIV.B. of GO 131-D also purports to prescribe a preemption analysis that conflicts with the preemption analysis required by law.⁷⁵ The California Supreme Court explained in *T-Mobile* that where, as here, the subject matter is one in “which local governments traditionally exercise control,” the courts are to presume local regulations are “not preempted

⁷² Cal. Const., Art. XII, § 8.

⁷³ Pub. Util. Code § 2902.

⁷⁴ *T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1124.

⁷⁵ GO 131-D, pp. 13-14.

absent a clear indication of preemptive intent,” and that “[t]he party claiming preemption has the burden of proof.”⁷⁶

In its analysis, the Court explained that conflict preemption,⁷⁷ the “‘contradictory and inimical’ form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands,” and that “no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws.”⁷⁸

The Court further explained that “[f]ield preemption generally exists where the Legislature has comprehensively regulated in an area, leaving no room for additional local action.”⁷⁹ Lastly, the Court held that under an obstacle preemption theory “a local law would be displaced if it hinders the accomplishment of the purposes behind a state law.”⁸⁰

After analyzing the case under three preemption theories - conflict preemption, field preemption, and obstacle preemption - the California Supreme Court concluded that local

⁷⁶ *T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1121 (“Because the location and manner of line installation are areas over which local governments traditionally exercise control [], we presume the ordinance is not preempted absent a clear indication of preemptive intent [.]”); *id.* at 1116 (“The local police power generally includes the authority to establish aesthetic conditions for land use” and regulations involving the location of particular land uses are presumed not preempted); see also *id.* at 1121 (“location and manner of line installation are areas over which local governments traditionally exercise control”); *id.* at 1116-1117 (“‘when local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume’ the regulation is not preempted unless there is a clear indication of preemptive intent. [.] Ruling on a facial challenge to a local ordinance, the court considers the text of the measure itself, not its application to any particular circumstances or individual.”).

⁷⁷ *T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1116 (“A conflict exists when the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Local legislation duplicates general law if both enactments are coextensive. Local legislation is contradictory when it is inimical to general law. State law fully occupies a field when the Legislature expressly manifests its intent to occupy the legal area or when the Legislature impliedly occupies the field.”) (internal quotations and citations omitted).

⁷⁸ *T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1121.

⁷⁹ *T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1122.

⁸⁰ *T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1121-1123.

government regulation was not preempted. The Commission cannot by General Order impose a different preemption analysis than the analysis described by the California Supreme Court.

Section XIV.B. of GO 131-D violates Supreme Court jurisprudence, Legislative direction, and Constitutional limits. The Commission’s *raison d’être* to protect the public⁸¹ requires that GO 131-D be updated to delete Section XIV.B. in conformance with the law.

C. The Commission Should Integrate Early Community Engagement To Speed the Permitting Process.

The Commission should also take this opportunity to improve early community engagement practices. SB 529 intended to speed the transmission permitting process while ensuring CEQA compliance.⁸² Despite that, many proposals have focused on removing various CEQA provisions in the transmission context.⁸³ The bill calls for the opposite approach, recognizing that early community engagement and effective environmental review can improve and accelerate the permitting process and project outcomes. Multiple studies show that the right way to expedite projects, like transmission, is early and more consultation at the local and state level — not less.⁸⁴ The Commission can reduce permitting delays by ensuring transmission project applicants undertake early community engagement efforts. Phase 2 is the ideal setting to develop proposals to improve community engagement requirements under GO 131-D.

⁸¹ See *e.g.* *N. California Power Agency v. Pub. Util. Com.* (1971) 5 Cal.3d 370, 380 (stating that “the public interest in preventing monopolies is one facet of the larger public convenience and necessity which the Commission was established to protect”).

⁸² 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).

⁸³ See *e.g.*, Joint Settlement Proposal, GO 131-D, Sections IX.C.2(a)-(d).

⁸⁴ John C. Ruple et al., Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation, 46 *Columbia Journal of Environmental Law*, 274 (2022), available at <https://journals.library.columbia.edu/index.php/cjel/article/view/9479/4840>; Bessette et al., *supra* note 10.

D. The Commission Must Include Cost And Other Economic Considerations In The PTC Process.

In Phase 2 of this proceeding, the Commission should incorporate cost considerations into the PTC process.⁸⁵ The projects designed for operation below 200 kV, as with those designed for operation above 200 kV, pose significant rate concerns. Indeed, projects designed for operation at or below 200 kV now constitute some of the most expensive projects undertaken by utilities.⁸⁶ Recent data disclosures reveal that even modifications to lines below 200 kV can subject ratepayers to significant rate increases.⁸⁷

In SDG&E's recent Transmission Project Review Process (TPR) data disclosure, the most costly project (including projects approved via both the PTC and CPCN process) remains the Cleveland National Forest project.⁸⁸ With an original projected cost of \$680 million dollars, the total cost of this project is approaching double any other project found in the data disclosure, including those approved via CPCN.⁸⁹ Despite the fact that the project is designed for operation at 69 kV⁹⁰ (well below the 200 kV threshold of the PTC process), its rate impact is undeniably significant when compared with SDG&E's other projects. This project, involving wood-to-steel pole conversions and undergrounding in fire-prone rural areas of SDGE service territory, has become the de facto, very high-cost template for California IOU wildfire mitigation strategies.

⁸⁵ Scoping Memo, pp. 4-5 ("Phase 2 shall consider all other changes to GO 131-D, including the changes proposed in attachments to the OIR, changes proposed by parties in comments on the OIR, and any additional changes that may be proposed by Commission staff or parties during the course of the proceeding.")

⁸⁶ See SDG&E's January 2nd 2024 TPR Process Project Spreadsheet – Public Version (Jan 2, 2024) ("SDG&E TPR Spreadsheet"), available at <https://www.sdge.com/sdge-tpr-process>.

⁸⁷ See SDG&E TPR Spreadsheet.

⁸⁸ See SDG&E TPR Spreadsheet.

⁸⁹ SDG&E TPR Spreadsheet, cell BJ19.

⁹⁰ SDG&E TPR Spreadsheet, cell AA15.

Another example of an expensive project that requires cost review under the PTC process consists of the South Orange County Reliability project. The project involves rebuilding the existing Capistrano Substation, which is currently a 138/12 kV substation, to a 230/138/12 kV substation.⁹¹ The project is the second most expensive project in SDG&E's recent data disclosure, with a current projected cost of \$381 million dollars.⁹² This project was approved via the CPCN permit process.⁹³ It has been given a cost cap of \$419 million dollars.⁹⁴ Under the amendments to section 1001, there would have been zero cost or need review and no cost cap if this project were erroneously allowed to proceed under the PTC process.⁹⁵ The PTC process must ensure that projects – including the most expensive projects - do not evade cost review.

The Streamview Substation Rebuild provides another example of a project approved via the PTC process that should not be allowed to repeat itself going forward.⁹⁶ While the original projected cost of the project is listed as \$543 thousand dollars,⁹⁷ the current projected cost estimate has soared to \$83.4 million dollars, making it among the most expensive projects by current total projected cost.⁹⁸ The current projected cost is approximately **155 times greater** than the original estimate. Again, because this project was approved via the PTC process, there was and continues to be no cost review on the part of the Commission. Further, there is no cap on the eventual maximum cost of this project,⁹⁹ as there are for those projects approved via CPCN.¹⁰⁰

⁹¹ SDG&E TPR Spreadsheet, cell F16.

⁹² SDG&E TPR Spreadsheet, cell BJ16.

⁹³ SDG&E TPR Spreadsheet, cell AX16.

⁹⁴ SDG&E TPR Spreadsheet, cell BK16.

⁹⁵ Pub. Util. Code § 1001(b) (“The extension, expansion, upgrade, or other modification of an existing electrical transmission facility, including transmission lines and substations, does not require a certificate that the present or future public convenience and necessity requires or will require its construction.”)

⁹⁶ SDG&E TPR Spreadsheet, cell AX51.

⁹⁷ SDG&E TPR Spreadsheet, cell BJ51.

⁹⁸ SDG&E TPR Spreadsheet, cell BL51.

⁹⁹ SDG&E TPR Spreadsheet, cell BK51.

¹⁰⁰ See SDG&E TPR Spreadsheet, cells BK52 and BK53.

This means there is potential for the eventual cost of the Streamview Substation Rebuild to balloon even further out of control.

Yet another example consists of the Artesian Substation expansion which was approved via PTC.¹⁰¹ Like the Streamview Substation Rebuild, the initial cost estimate of \$17 million dollars¹⁰² pales in comparison to the current final cost estimate of \$130 million.¹⁰³ Ballooning cost estimates are particularly concerning given that capital costs are a fraction of total ratepayer costs; as one Clean Coalition analysis found, “total lifetime ratepayer cost is nearly 10x the initial capital cost” in nominal dollars and five times the cost in real dollars due to the major operation and maintenance costs associated with transmission development.¹⁰⁴ These examples demonstrate that projects designed to operate at or below 200 kV pose significant rate concerns.

Implementation of Senate Bill 529, and particularly the exception added to Public Utilities Code section 1001(b), incentivizes the Commission to consider costs in connection with the PTC process. SB 529 expanded the range of projects eligible to utilize the PTC process and dramatically decreased the projects eligible to utilize the CPCN process.¹⁰⁵

As the Legislature was well aware when adopted SB 529, the Commission must comply with section 451. Thus, in Phase 2, the Commission should ensure that the PTC process contain cost review in order to remain compliant with the Commission’s obligations to supervise the utilities and to ensure rates are just and reasonable.¹⁰⁶

¹⁰¹ SDG&E TPR Spreadsheet, cell AX54.

¹⁰² SDG&E TPR Spreadsheet, cell BJ54.

¹⁰³ SDG&E TPR Spreadsheet, cell BL54.

¹⁰⁴ Clean Coalition. 2021. "What CAISO didn't tell you about the August 2020 blackouts." Presentation. https://clean-coalition.org/wp-content/uploads/2021/01/What-CAISO-didnt-tellyou-about-the-August-blackouts-02_rf-28-Jan-2021.pdf

¹⁰⁵ Pub. Util. Code §§ 564, 1001(b).

¹⁰⁶ Scoping Memo, pp. 4-5 (“Phase 2 shall consider all other changes to GO 131-D, including the changes proposed in attachments to the OIR, changes proposed by parties in comments on the OIR, and any

VI. CONCLUSION

The Center, PCF, and the Clean Coalition request that the above comments be incorporated into the Staff Proposal and adopted by the Commission.

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additional changes that may be proposed by Commission staff or parties during the course of the proceeding.”).