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

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OPENING COMMENTS OF THE CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES ON THE ADMINISTRATIVE LAW JUDGES' RULING OF DECEMBER 18, 2023

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February 5, 2024

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The Center for Energy Efficiency and Renewable Technologies (CEERT) respectfully submits these Opening Comments on Phase 2 Issues pursuant to the Administrative Law Judges' Ruling issued in R.23-05-018 (General Order (GO) 131-D Update) on December 18, 2023 (12-18-2023 ALJs' Ruling). CEERT's Opening Comments are timely filed and served pursuant to the Commission's Rules of Practice and Procedure, the 12-18-2023 ALJs' Ruling, and the ALJ's Ruling issued on January 10, 2024, which granted a Joint Motion for an extension of time to file these Opening Comments to today, February 5, 2024 (1-10-2024 ALJ's Ruling).

I.
THE TIMELINESS OF THE COMMISSION'S IMPLEMENTATION OF SB 529 IN DECISION 23-12-035 SHOULD BE CONTINUED IN PHASE 2 BY PRIORITIZING CONSIDERATION OF THE JOINT SETTLEMENT AGREEMENT.

Since the outset of this proceeding, CEERT, along with the Utilities,[1] California Independent System Operator (CAISO), industry, communities, and environmental organizations, have demonstrated that the purpose of Senate Bill (SB) 529[2] is to accelerate transmission permitting by the Commission where it has been bogged down for years, but where

[1] San Diego Gas and Electric Company (SDG&E), Pacific Gas and Electric Company (PG&E), and Southern California Edison Company (SCE).

[2] SB 529 (Hertzberg; Stats. 2022, ch. 357) added Public Utilities (PU) Code Section 564, which, among other things, required the Commission to update GO 131-D (governing energy infrastructure permitting) by January 1, 2024, "to authorize utilities to use the PTC process or claim an exemption under Section III.B for all extensions, expansions, upgrades, or modifications to existing electrical transmission facilities." (D.23-12-035, Conclusion of Law 1, at p. 19.)

the necessity for increased transmission infrastructure has grown.[3] For CEERT, full implementation of SB 529 is not just a matter of simply giving the Utilities a choice between the GO 131-D permit to construct (PTC) and certificate of public convenience and necessity (CPCN) processes in seeking Commission approval of transmission modifications or additions, but also for streamlining both processes to eliminate unnecessary delays and document while preserving environmental protections.

CEERT appreciates the Commission's issuance of D.23-12-025 on December 18, 2023, prior to the January 1, 2024 implementation deadline of SB 529 to provide Utilities that permitting choice. However, CEERT remains concerned that D.23-12-035 declined the opportunity to do more than that simply based on the exigencies of time to meet that deadline. That "opportunity" was presented by a Joint Settlement Agreement reached by a broad spectrum of 18 parties, including CEERT, the Utilities, other electric service utilities and providers, environmental interests, industry, and communities, which fully complied with Article 12 ("Settlements") of the Commission's Rules of Practice and Procedure and was filed by Joint Motion for Adoption on September 29, 2023.

By D.23-12-035, the Commission recognized that the "settlement agreement reflects the efforts and consensus of a wide range of parties to this proceeding representing varied interests" and had been the subject of comments as required by Article 12. However, in that decision, the Commission did not address the specifics of the Joint Settlement Agreement and did not make any finding on the Joint Settlement Agreement "as a whole" or as to any term in the manner prescribed by Article 12.

[3] See, e.g., CEERT Reply Comments on OIR (July 7, 2023), at pp. 1-6, as also supported by and with citation to Opening Comments of Southern California Edison Company (SCE) Opening Comments on OIR, California Independent System Operator (CAISO) Opening Comments on OIR, San Diego Gas and Electric Company (SDG&E) Opening Comments on OIR, and Pacific Gas and Electric Company (PG&E) Opening Comments on OIR.

Rather, the Commission in D.23-12-035 only states in its discussion that there was not "adequate time…for the Commission to prepare and consider a proposed decision on the settlement agreement" prior to the implementation deadline of SB 529.[4] However, D.23-12-035 states that it "expect[s] Commission Staff to give due consideration to the proposals in the settlement agreement, which are within the scope of Phase 2,"[5] but does not identify any term of the Joint Settlement Agreement in that regard. In addition, the Commission concludes generally that "consideration of some of the Phase 2 proposals on a more expedited basis may be warranted if there are meritorious proposals to streamline the permitting process, which can be quickly implemented to enable the rapid deployment of transmission infrastructure projects needed to achieve the state's clean energy goals and ensure reliability."[6]

These vague statements regarding the Joint Settlement Agreement do not comply in any way with Commission rules, policy, or decisions applicable to the review of settlement agreements and certainly provide no notice as to what term or terms of that agreement are severable for the purposes of "due consideration" in the Phase 2 Staff Proposal. They further fail to define what or how a Phase 2 proposal will be considered "meritorious" and by whom or identify any "expedited" process by which such a proposal would be considered. Instead, D.23-12-035, coupled with the 12-18-2023 ALJs' Ruling and the 1-10-2024 ALJ's Ruling, leave in place the Scoping Memo's schedule for Phase 2 that effectively begins with that Staff Proposal, now delayed to "second quarter of 2024," and ends simply with comments on that proposal.[7] This circumstance is not improved by the 12-18-2023 ALJ's Ruling, which poses only limited questions for party comment on definitions of certain terms in GO 131-D or asks for party

[4] D.23-12-035, at p. 17.
[5] *Id.*, at p. 18.
[6] *Id*.
[7] Scoping Memo, at p. 7; 1-10-2024 ALJ's Ruling, at p. 3.

"modifications" to "proposals" in the Joint Settlement Agreement or suggestions on additional "issues" to be addressed in Phase 2.[8]

What is not vague, and continues to merit prompt and prioritized consideration in Phase 2 is the Joint Settlement Agreement, which fully complies with Article 12 and the Commission's decisions on settlement agreements. The requirements of those laws make clear that settlement agreements are not simply "proposals," and their terms cannot be modified by any party other than as prescribed by the agreement and applicable law. Further, the approach followed by D.23-12-035 and the 12-18-2023 ALJ's Ruling, without an evaluation by the Commission as to the Joint Settlement Agreement's terms, as individually or collectively to be "considered" in Phase 2, clearly undermine the Commission's policy in favor of settlements.[9] Both also ignore the holistic revisions to GO 131-D embodied by the Joint Settlement Agreement that are precisely aimed at "streamlin[ing] the permitting process" in a manner that "can be quickly implemented to enable the rapid deployment of transmission infrastructure projects need to achieve the state's clean energy goals and ensure reliability," which are to be a priority for Phase 2.[10]

There is no basis for an ALJ's Ruling to alter an Article 12-compliant settlement agreement to be considered only a "proposal" or a collection of "proposals" that can be modified by any party, including signatories or non-settling parties, as the first question suggests. It is also the case that Article 12 makes clear that its rules and requirements, including those established for the Commission, apply to *all* settlements, which "need not be joined by all parties" and may be "contested."[11]

[8] 1-10-2024 ALJ's Ruling, at p. 3.
[9] *See, e.g.,* D.23-09-032, at p. 16.
[10] D.23-12-035, at p. 18.
[11] Commission Rules of Practice and Procedure, Article 12, Rule 12.1(a) and (d).

Thus, as in the case of the Joint Settlement Agreement, its terms embody compromises between the parties to achieve "assent" to all terms of the agreement and "may only be modified in writing subscribed by all Settling Parties."[12] Such a circumstance would arise in the case of "Commission-ordered changes" to the settlement agreement,[13] where settling parties, as recognized by Rule 12.4, can be allowed to accept those changes or "renegotiate" the agreement. However, even in that latter case, the Commission can elect to "hold hearings on the underlying issues" "and "[p]ropose alternative terms to the parties to the settlement which are acceptable to the Commission and allow the parties reasonable time within which to elect to accept such terms or to request other relief."[14] Only when such acceptance or renegotiation by the parties does not occur is the settlement agreement no longer considered a "binding settlement" but is reduced to a "Joint Proposal."[15]

It is also the case for the Joint Settlement Agreement that the 12-18-2023 ALJ's Ruling inviting proposed "modifications" by any party to its terms ignores that the settlement has already been the subject of party comment pursuant to and in compliance with Article 12, with opening and reply comments filed by multiple parties on October 30, 2023, and November 13 and 14, 2023, respectively. In addition to the approach taken by the 12-18-2023 ALJs' Ruling being unnecessarily duplicative and time-consuming, there is certainly no provision in Article 12 that allows any party or Commission Staff to cherry-pick "proposals" or "terms" of a settlement agreement for modification to be adopted by the Commission.

The 12-18-2023 ALJs' Ruling also prefaces its questions on the Joint Settlement Agreement by citation to a page from D.23-12-035, which it misstates. Specifically, the cited

[12] Joint Motion for Adoption (September 29, 2023), Attachment 1 (Settlement Agreement), at p. 4.
[13] *Id*.
[14] Commission Rules of Practice and Procedur*e,* Rule 12.1(d) and 12.4.
[15] D.15-02-007, Ordering Paragraphs 1 – 5 (with supporting authority), at pp. 11-12.

page (page 18 of D.23-12-035) did not state that "proposals" made in the Joint Settlement Agreement were open to "modification" by any party, but rather that the Commission "expect[ed] *Commission Staff to give due consideration* to the proposals in the settlement agreement, which are within the scope of Phase 2."[16] Of course, even then, it is for the *Commission* to review the Joint Settlement Agreement for reasonableness, which it can and should still do, where it only concluded that there was not "adequate time…for the Commission to prepare and consider a proposed decision on the settlement agreement" prior to the implementation deadline of the SB 529 provisions on the utility choice between the PTC and CPCN processes.[17]

In this regard, the Commission remains committed to its ongoing "policy in favor of settlements," which "supports many worthwhile goals, including reducing the expense of litigation, conserving scarce Commission resources, and allowing parties to reduce the risk that litigation will produce unacceptable results."[18] This policy extends to review of both all-party and contested settlements and, in combination with Article 12, results in the review for reasonableness being based on consideration of the settlement "as a whole," and not "each separate term of the settlement," and can be applied to settlements of issues that cross phases of a proceeding, even where a later phase has not been completed.[19]

Clearly, for Phase 2 to proceed in a manner that disaggregates consideration of and permits modification by any party of specific terms of the Joint Settlement Agreement is wholly contrary to and defeats adopted Commission policies and rules applicable to settlements and the Joint Settlement Agreement itself. CEERT believes that this outcome is both unnecessary and

[16] D.23-12-035, at p. 18; emphasis added.
[17] D.23-12-035, at p. 17.
[18] *See, e.g.,* D.23-09-032, at p. 16.
[19] D.23-09-032, at pp. 16, 25, 27-28.

injurious not only to the Commission's policies and rules, but to the entire purpose of this proceeding – whether Phase 1 or Phase 2 – aimed at "streamlin[ing] the permitting process" in a manner that "can be quickly implemented to enable the rapid deployment of transmission infrastructure projects need to achieve the state's clean energy goals and ensure reliability."[20] It is, therefore, CEERT's primary recommendation that the Joint Settlement Agreement be prioritized and given prompt consideration by the Commission in Phase 2. Absent such action, CEERT strongly recommends the adoption of a transparent public process for developing any "record" relied upon by the Staff for its Phase 2 Staff Proposal as described below.

II.
THE COMMISSION NEEDS TO DEFINE WHAT CONSITUTES A "FULLY DEVELOPED" PHASE 2 "RECORD" AND ADOPT A FAIR, PUBLIC PROCESS APPLICABLE TO PARTIES AND STAFF IN DEVELOPING THAT RECORD WELL BEFORE THE ISSUANCE OF THE "STAFF PROPOSAL" IN THE "SECOND QUARTER OF 2024".[21]

By D.23-12-035, the Commission states that a "record on Phase 2 issues has not yet been fully developed" and uses that as a basis to deferring consideration of the Joint Settlement Agreement "proposals" to the Phase 2 "Staff Proposal," now delayed to "second quarter of 2024."[22] As noted above, however, D.23-12-035 fails to identify what those proposals are or how they might be considered by Staff, if different than consideration of the Joint Settlement Agreement "as a whole."

In addition to this vague instruction, neither D.23-12-035 nor the 12-18-2023 ALJ's Ruling identify what constitutes the "record on Phase 2 issues" that has already been developed and can be relied upon by parties and Staff to date. No doubt the Comments in response to the 12-18-2023 ALJs' Ruling would be part of the Phase 2 "record." However, the Commission

[20] *Id*.
[21] D.23-12-035, at p. 17; 1-10-2024 ALJ's Ruling, at p. 3.
[22] D.23-12-035, at pp. 17-18; 1-10-2024 ALJ's Ruling, at p. 3.

should also confirm that the Phase 2 "record" should also include the detailed information on the Commission's current GO 131-D permitting processes offered in the OIR Opening Comments by SCE and SDG&E, as examples,[23] as well as the Joint Settlement Agreement and the Joint Motion for its Adoption.

Further, what is critically still left missing from this "record" is data and information to be provided by Commission Staff regarding the Commission's own implementation and administration of its PTC and CPCN permitting processes pursuant to GO 131-D over the last 20 years as recommended by CEERT in its OIR Opening Comments, as amended by its Reply Comments. As proposed by CEERT, that information would include detail on CPCN and PTC filing and data requirements and the Commission's approval timeframe for all utility transmission projects from 2003 to 2023 with a proposed dashboard for tracking transmission projects approved by CAISO.[24] However, there has been no direction by the Commission to Staff to provide this information to parties to this proceeding.

If the Joint Settlement Agreement is not going to be prioritized for consideration by the Commission pursuant to Article 12, the current "process" authorized by the Commission for Phase 2 actually creates a "record vacuum" plagued by inadequate notice by the Commission or its Staff regarding the "record" on which the Staff can rely in developing its Phase 2 Staff Proposal. Thus, for the next many months following the filing of these current comments, parties to this proceeding will not be provided or advised of information or actions being taken or relied upon by Staff to develop its "Staff Proposal."

Given the delay in receiving a "Staff Proposal" until "second quarter of 2024," which could be as late as June 30, 2024, there is clearly time in the interim for the Commission to

[23] SCE OIR Opening Comments, at pp.4-22; Appendix A; SDG&E OIR Opening Comments, at pp. 1-48 (and related attachments); CAISO OIR Opening Comments, at pp. 1-6.
[24] CEERT OIR Reply Comments, at pp. 6-7.

precisely identify and publicly develop the "record" on which the Phase 2 "Staff Proposal" will be based, especially where, once that proposal is released, it will only be the subject of comments before a Phase 2 Proposed Decision is issued. In this regard, the Scoping Memo issued in July 2023 determined that an evidentiary hearing would not be held in this proceeding because the rulemaking would "be examining policy and legal issues, rather than factual controversies."[25] But, in the time since issuance of the Scoping Memo, it is clear that this is an incorrect assumption – especially given statements made in D.23-12-035 about needing "record demonstrations" in this proceeding[26] and certainly may result in Staff relying on "facts" it has assessed or relied upon in support of its Staff Proposal, which, again, will be unknown to parties until that proposal is issued.

Further, where "Staff" is not a "party" to the proceeding, discovery by other parties of Staff would not be permitted pursuant to Rule 10.1 of the Commission's Rules of Practice and Procedure, and, even if permitted, Staff responses may come too late to inform parties' limited ability to comment on the proposal itself. Finally, given the vagueness of D.23-12-035 and the 12-18-2023 ALJ's Ruling, signatories to the Joint Settlement Agreement today have no guarantee as to what if or how any agreement reached in the Joint Settlement Agreement will be give "due consideration" in the Staff Proposal.

For these reasons, absent prompt consideration of the Joint Settlement Agreement, the Commission should certainly issue a ruling or decision that will clarify what constitutes the "record" for Phase 2 and provide for a fair and public process that will contribute to the development of any "record" on which the Staff Proposal will be based. It should be noted that, as far as CEERT knows, Energy Division Staff did not participate in the one public forum to

[25] Scoping Memo, at p. 6.
[26] D.23-12-035, at p. 17.

discuss any "proposal" in this proceeding – namely, the Settlement Conference on the Joint Settlement Agreement that was held in compliance with Rule 12.1 on September 20, 2023. At this point, CEERT has no idea what Staff's position may be on any term in the Joint Settlement Agreement or on what facts or law it may rely in developing its proposal. Thus, at the very least, the Assigned Commissioner should issue a ruling (1) identifying the present "record" on which Phase 2 issues will be decided, (2) authorizing data requests to be posed to Staff by any party to R.23-05-018 regarding the Staff Proposal, including data on the Commission's administration of its PTC and CPCN permitting processes pursuant to GO 131-D or for any data requests issued and responses received by Staff for that purpose, and (3) scheduling a Workshop, no later than 60 days from today, to fully inform all parties of the "record" that the Staff has developed or is or will be relying on to address Phase 2 issues and any preliminary revisions to GO 131-D that Staff is considering and to permit input by all parties in response to resolve questions or aid in the development of that Phase 2 record.

In this manner, the Commission can preserve the due process rights of all parties to this proceeding by affording adequate notice and opportunity to be heard on issues or proposed revisions related to GO 131-D. By adopting this approach, the Commission can also remove any vagueness that exists after the issuance of D.23-12-035 as to what term or terms the Commission may consider relevant to remaining issues and how they may be incorporated in any upcoming "Staff Report." Where the Commission has routinely "amended" Scoping Memos for changed facts or law or record-building, such an amendment to the Scoping Memo issued in July 2023 or any Ruling that has followed to provide for this process is clearly warranted.

III.
CONCLUSION

CEERT again urges the Commission to give priority consideration to the Joint Settlement Agreement in this proceeding. Absent such action, to correct process and legal deficiencies that have emerged from D.23-12-035 and the 12-18-2023 ALJ's Ruling, CEERT strongly recommends that the Commission immediately issue an Assigned Commissioner's Ruling providing for the following publicly transparent process to apply to Phase 2 going forward. Namely, that ruling should (1) identify the present "record" on which Phase 2 issues will be decided, (2) authorize data requests to be posed to Staff by any party to R.23-05-018 regarding the Staff Proposal, including for data on the Commission's administration of its PTC and CPCN permitting processes pursuant to GO 131-D over the last 20 years or for any data requests issued and responses received by Staff for that purpose, and (3) schedule a Workshop, no later than 60 days from today, to fully inform all parties of the "record" that the Staff has developed or is or will be relying on to address Phase 2 issues and any preliminary revisions to GO 131-D that Staff is considering and to permit input by all parties in response to resolve questions or aid in the development of that Phase 2 record.

Dated: February 5, 2024

Respectfully submitted,

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