

No. A157299

**In the Court of Appeal of the State of California,  
FIRST APPELLATE DISTRICT, DIVISION FOUR**

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COMMUNITIES FOR A BETTER ENVIRONMENT ET AL.,  
Plaintiffs and Respondents,

vs.

ENERGY RESOURCES CONSERVATION AND  
DEVELOPMENT COMMISSION,  
Appellant and Defendant.

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Appeal from the Superior Court of Alameda County  
Case No. RG13681262  
The Honorable Stephen Kaus, Judge

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**BRIEF OF *AMICUS CURIAE* CALIFORNIA  
INDEPENDENT SYSTEM OPERATOR CORPORATION  
IN SUPPORT OF APPELLANT ENERGY RESOURCES  
CONSERVATION AND DEVELOPMENT COMMISSION**

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**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

There are no interested entities or persons that must be listed under California Rules of Court, rule 8.208.

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Dated: September 11, 2020

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## INTRODUCTION

The California Independent System Operator (“CAISO”) respectfully submits this *amicus* brief in support of Appellant Energy Resources Conservation and Development Commission (“Energy Commission”). The CAISO has a particular perspective to put this case in the broader context of maintaining reliability and fulfilling California’s energy policy goals.

The CAISO is a 501(c)(3) nonprofit public benefit corporation charged with managing the flow of electricity across the high-voltage lines that form the electric grid. (*See* Public utilities—electrical restructuring, 1996 Cal. Legis. Serv. Ch. 854 (A.B. 1890) (WEST)). The CAISO, as the independent system operator is responsible for balancing power supply and demand. To do so, the CAISO operates a wholesale energy market, facilitating tens of thousands of transactions every day to help ensure power can meet demand at all times at prices that reflect fair competition. In addition, the CAISO regularly analyzes the amount of generation needed to operate the California grid reliably, and provides this analysis to public agencies including the Energy Commission.

The CAISO also has other roles related to maintaining the reliability of the electric system. It is responsible for studying the electric engineering aspects of all new generation projects to ensure they can interconnect safely and reliably. In addition, the CAISO is the primary Reliability Coordinator (“RC”) for California and the transmission operators in the western United States. An RC oversees compliance with federal and regional

grid standards, and can determine measures to prevent or mitigate system emergencies in day-ahead or real-time operations. The RC also provides leadership in system restorations following major events.

The outcome of this appeal potentially will affect the CAISO's ability to maintain continuous electric service over the high-voltage transmission grid in California.

### **STATEMENT OF FACTS AND THE CASE**

*Amicus curiae* CAISO adopts by reference this portion of Appellant Energy Commission's opening brief.

## ARGUMENT

### **I. Delaying generator certifications would hinder the construction of needed generation and undermine public policy**

The power industry is bound by the fundamental principle that supply (“generation”) must, in every moment, equal demand (“load”). As the independent system operator, the CAISO is responsible for maintaining this critical balance at all times.

In order to avoid the blackouts that result from insufficient generation, timely construction of new power plants (or, more likely, modifications to existing power plants) is crucial. The legislature understood this and passed section 25531(a) to empower the Energy Commission, as the expert government body, to review power plant certification applications with meaningful finality. The California Supreme Court was similarly mindful that delay caused by multiple layers of judicial review could harm this careful balance when it upheld section 25531(a). (*County of Sonoma v. State Energy Resources Conservation and Development Commission*, (1985) 40 Cal. 3d 361, 370-71.)

The thermal power plants under the Energy Commission’s jurisdiction—geothermal, solar thermal, and gas-fired—are critical for reliability in California because they can ramp up and down quickly in response to changing load conditions or other contingencies. Without the timely, dependable, and consistent review provided by the Energy Commission, new and repowered generating plants may not be ready when needed, and developers may be reluctant to finance future projects. As a result, the

CAISO may have to rely upon older, less efficient resources, which can negatively impact reliability.

## **II. The California legislature acted within its constitutional authority when it enacted section 25531(a) and (b)**

The California Constitution, as revised in 1966, grants to all three levels of the court original jurisdiction over mandamus cases. (Cal. Const., art. VI, § 10.) It does not, however, guarantee litigants the right to choose the court in which they wish to challenge an administrative decision. Rather, the California Constitutional Revision Commission reserved that power to the legislature, to be carried out via statutes such as Cal. Pub. Res. Code § 25531(a),<sup>1</sup> which is at issue here. (*See* Appellant’s Opening Brief, p. 32.) The legislature has separate constitutional authority to limit the scope and manner of judicial review over matters regarding the regulation of public utilities. (*See Pickens v. Johnson*, (1954) 42 Cal.2d 399, 404.) As the California Supreme Court ruled in *County of Sonoma* (40 Cal. 3d at 367), that power extends to judicial review of the Energy Commission’s certification of power plants. Due to the existing functional relationship between the Energy Commission and the Public Utilities Commission, *County of Sonoma* still applies. (*Id.* at 369.)

The statutory language in section 25531(b) is purposely broad, and should be interpreted to allow for substantial evidence review consistent with the California Constitution. Because the

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<sup>1</sup> Unless otherwise noted, all statutory citations are to the California Public Resources Code.



Energy Commission supports such an interpretation, the meaning of section 25531(b) is undisputed, and summary judgment holding this statute constitutionally invalid was improper.

The Respondents Center for Biological Diversity and Communities for a Better Environment premise their argument on the notion the power industry is fundamentally different now than it was 35 years ago. But any restructuring of the electric industry does not mean the legislature may no longer limit the scope of judicial review of Energy Commission decisions. The legislature is well aware the electric industry has evolved, but it has elected not to alter the Energy Commission's role, nor the courts', in reviewing matters under the Energy Commission's purview.

### **III. Holding the statutes at issue to be unconstitutional would significantly curtail legislative power**

Legislation before a court comes “clothed with a presumption of validity” and ... [the Court's] mission is, ‘wherever possible, ... [to] interpret ... [the challenged] statute as consistent with applicable constitutional provisions, seeking to harmonize Constitution and statute.’” (*California Advocates for Nursing Home Reform v. Smith* (2019) 38 Cal.App.5th 838, 868, *as modified on denial of reh'g* (Aug. 21, 2019), quoting *California Housing Finance Agency v. Elliott*, 17 Cal.3d 575, 594 (1976).) As the Energy Commission makes clear in its opening brief, a reasonable construction of the statutes here harmonizes

its position with the Constitution. A contrary ruling would substantially limit legislative power in California.

The CAISO is concerned if section 25531(a) is deemed unconstitutional, the legislature will be unable to manage the judicial review process for Energy Commission certification decisions. The Energy Commission's thorough certification proceedings would then be transformed into a mere preliminary step before duplicative review occurs in the courts (followed by appeals). This would unduly and unnecessarily delay, and inject uncertainty into, the already lengthy generator certification process, thereby delaying and deterring the construction of potentially necessary new generating capacity and modifications to existing capacity that are required for reliability, improve efficiency and operational flexibility, and mitigate environmental impacts.

**CONCLUSION**

For the reasons stated above and those set forth by the Energy Commission, the *amicus* CAISO supports the appeal of the Energy Commission.

Respectfully submitted,

By: /s/ WILLIAM H. WEAVER

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California Independent

System Operator Corp.

Dated: September 11, 2020

No. A157299

**CERTIFICATE OF COMPLIANCE**

Pursuant to California Rules of Court, rule 8.204(c), I hereby certify that this brief contains 1,128 words using 13-point Century Schoolbook font, including footnotes, which is less than the total words permitted by the California Rules of Court. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: /s/ WILLIAM H. WEAVER  
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Dated: September 11, 2020

**PROOF OF SERVICE**

I am over 18 years of age and not a party to this action. My business address is 250 Outcropping Way, Folsom, CA 95630. My electronic service address is msedgley@caiso.com.

On September 11, 2020, I served a true copy of the attached Brief of *Amicus Curiae* California Independent System Operator Corporation in Support of Appellant Energy Resources Conservation and Development Commission by fax-filing to the Alameda County Superior Court per Local Rule 1.8 upon the following:

Superior Court for the County of Alameda The Honorable Stephen Kaus, Dept. 19 1221 Oak Street Oakland, CA 94612 (510) 680-2555 Fax No. (510) 267-1546
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On September 11, 2020, I served true copies of the attached Brief of *Amicus Curiae* California Independent System Operator Corporation in Support of Appellant Energy Resources Conservation and Development Commission via TrueFiling electronic service upon the following:

California Supreme Court 350 McAllister Street San Francisco, CA 94102	Stacey P. Geis EARTHJUSTICE 50 California Street, Suite 500 San Francisco, CA 94111  Attorneys for Communities for a Better Environment and on behalf of Center for Biological Diversity
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	Bryant B. Cannon California Attorney General Marc N. Melnick Deputy Attorney General 1515 Clay Street, 20th Floor Oakland, CA 94612  Attorneys For Energy Resources Conservation And Development Commission
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 11, 2020, at Folsom, CA.

By: /s/ Martha Sedgley  
Martha Sedgley