

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

DCR Transmission, L.L.C.

)

Docket No. ER23-2309-000

**MOTION TO INTERVENE AND COMMENTS OF THE CALIFORNIA INDEPENDENT
SYSTEM OPERATOR CORPORATION**

Pursuant to Rule 214 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure¹ and the Combined Notice of Filing issued on July 30, 2023, in the above-captioned docket, the California Independent System Operator Corporation (“CAISO”) submits this motion to intervene and comments on the request for acceptance of the Transmission Owner Tariff and annual Base Transmission Revenue Requirement submitted by DCR Transmission, L.L.C. (“DCRT”) on July 30, 2023. DCRT is the Approved Project Sponsor selected through the CAISO transmission planning process for the Ten West Link or Delaney-Colorado River Project transmission project (the “Project”). Under an Approved Project Sponsor Agreement between DCRT and the CAISO, DCRT is subject to a cost cap of \$258,961,024 for the Ten West Link project. However, DCRT’s proposed Base Transmission Revenue Requirement is based on a project cost of \$555,261,497, almost \$300 million more than its binding cost cap and more than double its agreed-upon project costs. DCRT has not shown that the vast majority of the costs in excess of the cost cap are recoverable under the provisions of the Approved Project Sponsor Agreement or are just and reasonable. The CAISO urges the Commission not to accept DCRT’s proposed annual Base Transmission Revenue Requirement, and instead set for evidentiary hearing and

¹ 18 C.F.R. § 385.214 (2022).

settlement procedures the issue of its just and reasonable transmission revenue requirement and the extent to which that transmission revenue requirement is limited by the binding cost cap in the Approved Project Sponsor Agreement.

The CAISO has the following specific concerns with DCRT's proposed annual Base Transmission Revenue Requirement:

- Foreseeable challenges and delays in obtaining regulatory approvals may result in economic hardships but do not satisfy the force majeure provisions of the Approved Project Sponsor Agreement and do not justify DCRT's recovery of costs in excess of the cost cap;
- All changes of route applicable to the Ten West Link project occurred prior to DCRT agreeing to an amended cost cap reflecting such route changes in March 2022, and DCRT is not entitled to recovery for any cost increases purportedly attributable to changes of route in excess of that agreed-upon amended cost cap;
- The Commission requires evidentiary trial-type hearings to address whether COVID-19 qualifies as a force majeure event in these circumstances, what DCRT cost increases – if any – are attributable to such a force majeure event, and the extent to which DCRT exercised due diligence to minimize any cost impacts of such a force majeure event;
- The level of the proposed “base year adjustment” to account for differences in 2020 cost years and the expected 2024 in-service date is not justified and appears to serve as a device to recover a range of costs in excess of the cap;
- The Approved Project Sponsor Agreement does not allow DCRT to recover “Regulatory Compliance” costs in excess of its cost cap;
- There is no basis in the Approved Project Sponsor Agreement for DCRT to recover a “contingency” in excess of the cost cap; and
- The CAISO has not agreed to allow DCRT to recover costs in excess of its agreed-upon cost cap under a “catch-all” provision.

Were the Commission to approve recovery of the costs substantially exceeding DCRT's contractually binding cost cap, it could undermine confidence in the CAISO's transmission planning process and competitive solicitations in the CAISO and other regional transmission planning processes. The primary purpose of a cost containment mechanism is to allow Project Sponsors voluntarily to agree to protect ratepayers from

significant cost increases that can have a profound impact on rates if left unchecked. As explained below, the CAISO selected DCRT in the CAISO competitive solicitation to build the Project due to its materially lower project costs and its binding cost containment measures. Because DCRT has committed to a project-winning cost cap, allowing DCRT to exceed the agreed-upon cap in a manner not permitted by the Approved Project Sponsor Agreement would undermine the enforceability of cost containment mechanisms across all transmission planning regions in the U.S. The Commission should enforce the terms of the Approved Project Sponsor Agreement and its binding cost containment provisions.

The CAISO agrees that DCRT is entitled to recover its prudently incurred costs through a just and reasonable transmission revenue requirement consistent with the cost cap in the Approved Project Sponsor Agreement. Determination of such a just and reasonable transmission revenue requirement is an issue the Commission should set for hearing.

I. Motion to Intervene

The CAISO is a non-profit public benefit corporation organized under the laws of the State of California with its principal place of business at 250 Outcropping Way, Folsom, California 95630. Among other things, the CAISO is a Commission-approved independent system operator responsible for conducting a regional transmission planning process in accordance with its tariff to identify transmission infrastructure projects in its balancing authority area to address reliability, economic or public policy-driven needs. As part of the 2013-14 planning process, the CAISO selected DCRT as the Approved Project Sponsor to build the Ten West Link, an economically driven

project. The CAISO selected DCRT based on its relatively low project costs and binding cost containment commitment. Under the Approved Project Sponsor Agreement executed December 1, 2015, between DCRT and the CAISO, DCRT is subject to a cost cap. Through its filing in this docket, DCRT requests that the Commission permit DCRT to recover in rates costs substantially in excess of this contractual cost cap and more than double the cost proposal that served as a basis for the CAISO's selection of DCRT as an Approved Project Sponsor. The CAISO has a substantial and direct interest in this proceeding in enforcing its Approved Project Sponsor Agreement with DCRT and in ensuring the integrity of its regional planning and competitive solicitation processes. Because no other party can adequately represent the CAISO's interests in the proceeding, the CAISO's intervention is in the public interest and should be granted.

II. Communications

The CAISO requests that service of all communications and notices regarding this proceeding be addressed to the following individuals:

Anthony J. Ivancovich
Deputy General Counsel, Regulatory
Deborah A. Le Vine
Director, Infrastructure Contracts
& Management
Sarah Kozal
Counsel
California Independent System
Operator Corporation
250 Outcropping Way
Folsom, CA 95630
Tel: (916) 351-4400
Fax: (916) 608-7222
aivancovich@caiso.com
dlevine@caiso.com
skozal@caiso.com

Sean A. Atkins
Samin Peirovi
Davis Wright Tremaine LLP
1301 K Street, NW
Suite 500 East
Washington, DC 20005
Tel: (202) 973-4294
Fax: (202) 973-4494
seanatkins@dwt.com
saminpeirovi@dwt.com

III. Comments

A. The Primary Reason the CAISO Selected DCRT as an Approved Project Sponsor Was Its Low Project Costs and Cost Containment Commitments

One of the primary factors the CAISO can consider in selecting a Project Sponsor to build a transmission project in its transmission planning process is the capability of a Project Sponsor to accept a cost cap.² In the CAISO planning process, a Project Sponsor that proposes a cost containment mechanism such as a binding cost cap is precluded from recovering costs that exceed the cap included in its transmission revenue requirements recovered through the CAISO's Transmission Access Charge.

When the CAISO, as part of its 2013-14 planning process, opened the solicitation window for the Delaney-Colorado River Project, it identified three key selection factors based on section 24.5.4 of the CAISO tariff, including cost containment capabilities and

² CAISO, *Delaney-Colorado River Transmission Line Project, Project Sponsor Selection Report* at 98 (July 10, 2015), <http://www.caiso.com/Documents/DelaneyColoradoRiverTransmissionLineProject-ProjectSponsorSelectionReport.pdf> ("Selection Report").

any “binding cost control measures the Project Sponsor agrees to accept.”³ The CAISO repeatedly stated the importance of cost in the Project solicitation process.⁴ The CAISO explained that the Project was fulfilling an economically driven need “and as a result the CAISO will carefully consider binding cost caps and other cost containment measures, as well as cost management information.”⁵

In its submission of a proposal to build the Project, DCRT provided a capital cost estimate along with a binding capital cost containment proposal.⁶ Ultimately, the primary reason the CAISO selected DCRT as the Approved Project Sponsor was due to its lower projected revenue requirements and capital cost containment measures. The CAISO found that cost containment “is particularly important in this instance given that the justification for this project is solely based on economic benefits to ratepayers.”⁷

On December 1, 2015, DCRT entered into an Approved Project Sponsor Agreement (“APSA”)⁸ with the CAISO, officially accepting its selection as the Approved Project Sponsor.⁹ The APSA memorialized the binding cost containment provisions DCRT represented in its bid for the Project.¹⁰ The APSA with DCRT has been amended twice, including in March 2022 when, based on changes of route, DCRT

³ Selection Report at 3.

⁴ See, e.g., CAISO, *Delaney - Colorado River 500 kV Transmission Line Project Phase 3 Competitive Solicitation* (Sep. 3, 2014), https://www.caiso.com/Documents/Presentation-Delaney-ColoradoRiver_CompetitiveSolicitation.pdf.

⁵ CAISO, *Delaney – Colorado River 500 kV Transmission Project Line Description, Key Selection Factors, and Functional Specifications for Competitive Solicitation* at 5 (July 2014), http://www.caiso.com/Documents/DelaneyColoradoRiverFunctionalSpecifications_KeySelectionFactors.pdf.

⁶ Selection Report at 102.

⁷ *Id.*, at 131.

⁸ Throughout this document, we refer to the entire package of Exhibit No. DCRT-2, which includes the First and Second Amendments, generally as the “APSA.”

⁹ Exhibit No. DCRT-1, Amirali Testimony, at Q18.

¹⁰ See Exhibit No. DCRT-2, Attachment 1, Original APSA, at 45-51 (“Original APSA”); Exhibit No. DCRT-2, Attachment 3, Second APSA Amendment, at 7-10 (“APSA Second Amendment”).

agreed to an amended cost cap of \$258,961,024, an increase of \$17,155,633 over the original cost cap of \$241,805,391.¹¹

Given the importance of DCRT's cost cap and associated revenue requirements in its selection to build the Ten West Link project, and DCRT's contractual obligations under the APSA, the Commission must carefully scrutinize DCRT's proposal in this proceeding to obtain approval of a transmission revenue requirement reflecting a project cost of more than double its cost cap and more than \$300 million more than the project costs in DCRT's proposal to build the Project.

B. There Is No Basis in the APSA for DCRT to Recover Costs Resulting From Delays in Regulatory Approvals as a Force Majeure Exception to the Cost Cap

DCRT argues that it can recover costs in excess of its contractual cost cap under the force majeure cost cap exception in Appendix E to the APSA. The CAISO and DCRT met on June 17, 2019, where DCRT presented that it had incurred and would incur additional costs for the project. DCRT proposed a cost increase for Change of Route, for force majeure and other costs increasing the Project's total cost by 33% from the existing binding cap. The discussions between CAISO and DCRT over the following 18 months regarding the issues and costs culminated in the APSA Second Amendment which amended Appendix E, consistent with Article 13.1.2 of the APSA, to include the costs agreed to by the CAISO for Change of Route. The CAISO did not agree with any cost increases due to force majeure or other reasons. This amendment increased the approved cost of the project to \$258,961,024.

With respect to force majeure, APSA Appendix E provides in part, that:

¹¹ APSA Second Amendment at Appendix E.

For avoidance of doubt, the following costs are not included in the cost cap referenced in Section 10.1.1, and will be entitled to recovery through Approved Project Sponsor's Transmission Revenue Requirement:

. . . .

- Any FERC approved costs resulting from delays due to events of Force Majeure, not covered by insurance, or caused by an Interconnecting PTO.¹²

Article 13 of the APSA contains relevant force majeure provisions, which state in relevant part:

13.1.1 No Party shall be considered to be in Default with respect to any obligation hereunder if prevented from fulfilling such obligation by Force Majeure. A Party unable to fulfill any obligation by reason of Force Majeure shall give notice and the full particulars of such Force Majeure to the other Party in writing or by telephone as soon as reasonably possible after the occurrence of the cause relied upon. Telephone notices given pursuant to this Section shall be confirmed in writing as soon as reasonably possible and shall specifically state full particulars of the Force Majeure, the time and date when the Force Majeure occurred, and when the Force Majeure is reasonably expected to cease. The Party affected shall exercise due diligence to remove such disability with reasonable dispatch, but shall not be required to accede or agree to any provision not satisfactory to it in order to settle and terminate a strike or other labor disturbance.

13.1.2 If required, the Parties shall revise this Agreement, including Appendix B and Appendix E, following a Force Majeure event.¹³

The APSA defines "Force Majeure" as:

[A]ny act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, earthquake, or explosion, any order, regulation, or restriction imposed by governmental, military, or lawfully established civilian authorities, or any other cause beyond the reasonable control of the Parties that could not have been avoided through the exercise of Good Utility Practice. A Force Majeure event does not include (1) acts of negligence or intentional wrongdoing by the Party claiming Force Majeure; (2) economic conditions that render a Party's performance of this Agreement unprofitable or otherwise uneconomic; (3) economic

¹² APSA Second Amendment at Appendix E.

¹³ APSA §§ 13.1.1, 13.1.2.

hardship of either Party; or (4) failure or delay in granting of necessary permits for reasons not caused by Force Majeure.¹⁴

Of the twelve alleged events of force majeure discussed by DCRT in its filing, three relate to the COVID-19 pandemic. The CAISO discusses these in Section III.D of these comments. The remaining nine alleged acts of force majeure involve actions by government agencies.¹⁵ These all relate to delays in regulatory approvals by the Bureau of Land Management (“BLM”) or the California Public Utilities Commission (“CPUC”). However, the definition of force majeure in the APSA expressly excludes “failure or delay in granting of necessary permits for reasons not caused by Force Majeure.” DCRT takes the position that any action by a regulatory authority is an “order, regulation, or restriction imposed by governmental, military, or lawfully established civilian authorities” and therefore an event of force majeure.¹⁶ This position cannot be reconciled with the plain language of the APSA. If this were true, the exception for “failure or delay in granting of necessary permits” would be meaningless. The permitting delay exception would also be meaningless if every event beyond the control of DCRT was an event of force majeure. The context of the definition in the APSA makes it clear that the types of governmental actions that might qualify as an event of force majeure would be extraordinary actions comparable to acts of the public enemy, war, insurrection, riot, fire, storm or flood, earthquake, explosion, *etc.* DCRT provides no evidence that the actions by government agencies it identifies are the types

¹⁴ APSA Article 1.

¹⁵ DCRT Transmittal Letter at 35, Table 3. DCRT lists the CAISO as a government agency. The CAISO is a not-for-profit public corporation and is not a government agency.

¹⁶ *Id.* at 35.

of actions that meet the contractual definition of force majeure or that justify cost increases above DCRT's agreed-upon cost cap.

DCRT notes the long chain of events which it claims caused its cost increases, but many events which cause cost increases are not events of force majeure.¹⁷ Much of DCRT's filing focuses on documenting the scope of its cost increases. Such cost increases potentially could result in economic hardships to DCRT. The APSA, however, clearly provides that "economic hardship of either Party" is not an event of force majeure. In this regard, the APSA provision is consistent with Commission precedent finding that economic hardship should not qualify as a force majeure event.¹⁸ The Commission should find that delays in regulatory approvals for the Project may have resulted in economic hardship for DCRT, but do not constitute force majeure events justifying an exception to DCRT's voluntary cost cap.

Delays in obtaining permits and regulatory approvals for a large transmission project in the Western U.S. are an entirely foreseeable risk that DCRT could have taken into account in developing its proposed cost cap when it bid on the Project. The Commission has recognized that regulatory delays are not unexpected factors in large infrastructure projects and that the costs associated with such delays can reasonably be accounted for in a developer's projection of the costs of the project.¹⁹

¹⁷ *Id.* at 39-44.

¹⁸ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103, at P 624 (2003).

¹⁹ *See Re Tennessee Gas Pipeline Co.*, 55 FERC ¶ 61,484, at 62,637 (1991) (finding, in the context of a natural gas certification proceeding, that "[r]egulatory delay and inflation are not exactly unexpected factors" and that "[a]llowances for them can reasonably be made in an applicant's projection of costs."). In that case, the Commission noted that the gas pipeline could file for a rate increase. Here, by agreeing to a cost cap, DCRT has voluntarily foregone its rights to rate increases subject only to the limited exceptions in the APSA.

With the possible exception of the occurrence of COVID-19 in early 2020, none of the alleged events of force majeure identified by DCRT satisfies the contractual prerequisites for force majeure status.

C. The Amended Cost Cap Agreed to by DCRT in March 2022 Reflects All Costs Related to Changes of Route the CAISO Agreed to

DCRT also claims that it can recover costs in excess of its contractual cost cap under the provisions of Appendix E to the APSA governing Changes of Route.²⁰ DCRT's argument is contrary to the express terms of DCRT's signed Approved Project Sponsor Agreement. Appendix E does not permit DCRT to go directly to the Commission to seek cost recovery in excess of the APSA cost cap due to a Change of Route. Rather, Appendix E allows DCRT to make a request to the CAISO to change the Project cost cap based on a Change of Route required by a regulatory authority, which request can affect the cost cap **only** if the CAISO agrees and amends the APSA. Moreover, the CAISO already agreed to an increase to the cost cap in the APSA based on all Changes of Route for the Project, and DCRT agreed to that cost cap in the revised Appendix E in the APSA Second Amendment. The APSA does not permit DCRT, having already agreed upon a cost cap amendment reflecting Change of Route costs, to seek additional costs associated with the same Changes of Route in excess of the contractual cost cap.

Appendix E to the ASPA provides in relevant part:

If the incremental costs associated with the Change of Route are greater than \$5,000,000, then the Approved Project Sponsor will provide a

²⁰ Appendix E states "'Change of Route' shall mean any alignment of transmission towers and transmission line connecting the Delaney substation and Colorado River substation, other than those specific alignments described in the definition of 'Route' that may result in changes relating to, without limitation, technical specifications, land acquisition, required mitigation, construction methods and/or schedules." APSA Second Amendment at 8.

request to change the Project cost cap to the CAISO which identifies i) the Change of Route required by the regulatory agency or agencies; and ii) explains all cost components associated with the Change of Route. The change request will include documentation stating the cost components originally budgeted for the route segment that was changed and the cost and schedule increase associated with the route change. The Approved Project Sponsor will also include all back-up documentation to justify the cost increase including but not limited to, the agency directive, vendor and third party costs. If the CAISO approves the increase then the Project cost cap will be revised in accordance with Article 25.9 of the APSA.²¹

Article 25.9 of the APSA governs amendments to the APSA. Under this provision, if the CAISO approves an increase to the cost cap based on the Change of Route, the Approved Project Sponsor does not have the right to seek Commission recovery of further cost increases associated with that Change of Route.

As discussed above, DCRT previously informed the CAISO that it was looking to increase its cost cap due to a Change of Route in accordance with Appendix E. The CAISO concluded that, as a result of regulatory approvals by the Arizona Corporation Commission (“ACC”), a total of 10.7 miles was added to the Project. The CAISO engaged in extensive discussions with DCRT regarding the appropriate level of any increases to the cost cap.

The CAISO and DCRT ultimately agreed to the APSA Second Amendment dated March 7, 2022, and executed by both DCRT and the CAISO. The recitals to the APSA Second Amendment reference the route changes ordered by the ACC. Appendix E, as revised by the APSA Second Amendment, provide for a \$17,155,633 increase to the cost cap which excludes \$5 million consistent with the Appendix E provisions applicable to amended cost caps due a Change of Route. Through its filing in the instant case, DCRT is improperly attempting to take a “second bite at the apple” by seeking recovery

²¹ APSA Second Amendment at 8-9.

of Change of Route costs not agreed to by the CAISO by bringing those same costs, and more, to the Commission for approval.

There have been no additional Changes of Route since March 7, 2022. The APSA does not permit DCRT to seek cost recovery in excess of the agreed-upon cost cap due to any Change of Route and certainly does not permit DCRT to ignore the fact that it already agreed to a more than \$17 million cost increase to reflect the Change of Route. The costs DCRT now seeks in excess of the cost cap purportedly based on Changes of Route cannot be justified, and they raise serious questions whether DCRT is attempting to seek recovery of some costs that have not been justified and other costs the CAISO believes were calculated incorrectly.²² The Commission should permit parties to address these issues in an evidentiary hearing in this proceeding.

D. DCRT Has Not Justified the Recovery of Costs Resulting from COVID-19 as a Force Majeure Exception to the Cost Cap

On March 13, 2020, DCRT notified the CAISO that:

Pursuant to Article 13 of the Approved Project Sponsor Agreement ("APSA"), DCR Transmission, LLC ("DCRT") is hereby notifying the California Independent System Operator Organization ("CAISO") that due to the Virus, our performance under the APSA will likely be impacted and delayed. While we do not yet know the full extent of the impact of the Virus on the Project, the likelihood of a material impact may be significant. Please be assured that we will keep you fully informed of the specific nature of the Virus' impact on the Project as we become aware of it, and will continue to work with our staff and contractors to mitigate issues impacting schedule where practicable.

Similarly, on June 8, 2020, DCRT notified the CAISO that:

Pursuant to Article 13 of the Approved Project Sponsor Agreement ("APSA"), DCR Transmission, LLC ("DCRT") is hereby notifying the California Independent System Operator Organization ("CAISO") that due

²² As an example, the original bid included two crossings of the Central Arizona Project, a water conveyance system that brings water from the Colorado River into the Phoenix basin; DCRT includes costs for three crossings in the Change of Route increase whereas only one additional crossing was required by the ACC.

to potential actions to be taken by the US Government under the EO ["Executive Order on Securing the United States Bulk Power System"], our performance under the APSA may be impacted. While we do not yet know whether or the extent to which the EO may impact the Project the likelihood of a potential impact given the state of the transmission system supply chain necessitates a formal notice of Force Majeure at this time. Please be assured that we will keep you fully informed of the specific nature of any impact on the Project due to the EO as we become aware of it. and will continue to work with our staff and contractors to understand and mitigate issues impacting procurement and schedule where practicable.

In both instances, there was no further specific discussion regarding the impact of COVID or the Executive Order until DCRT requested a meeting with the CAISO, which took place March 16, 2023. In the quarterly reports the CAISO received from DCRT beginning in April 2020, there were vague references to an emerging understanding of the impact of COVID, but DCRT noted that, ultimately, the impact to the Project may not be fully understood until after the fact.

Appendix E to the APSA provides that "[a]ny FERC approved costs resulting from delays due to events of Force Majeure, not covered by insurance, or caused by an Interconnecting PTO" are not subject to the APSA cost cap.²³ The CAISO believes the issue of whether COVID-19 constitutes a force majeure event under the APSA that led to increased costs resulting from delays is an issue of fact best addressed in an evidentiary hearing.

DCRT does not identify specific costs that are linked solely to delays caused by COVID-19. Instead, DCRT seeks significant costs in excess of the cost cap that they claim are attributable to multiple causes. The lack of specificity on the cost impacts of

²³ APSA Second Amendment at 8.

COVID-19 in the March and June 2020 notes and in the instant filing raises questions whether the requirements of Article 13 of the APSA have been satisfied.

DCRT also does not cite to Commission precedent to support its claim that COVID-19 is an event of force majeure in these circumstances. Instead, DCRT cites a Second Circuit Court of Appeals decision involving an art auction to be held in New York on a specific date, which is completely unrelated to the unique characteristics and complexities of transmission project development.²⁴ The CAISO recognizes that the Commission has found that difficulties resulting from COVID-19 were “unforeseeable.”²⁵ The question of whether COVID-19 constitutes an event of force majeure in this proceeding is a question of fact best addressed at hearing.

The Commission has also held that remedial measures in the face of unforeseeable events, such as COVID-19, are paramount. In a case involving a three-party generator interconnection agreement where one party accepted an interconnection customer notice of force majeure due to supply chain issues related to COVID-19, the Commission nonetheless approved a notice of termination filed by SPP because the three-year deadline under the interconnection agreement had passed. The Commission noted that the force majeure provisions of the interconnection agreement in question required the customer to “exercise due diligence to remove such disability with reasonable dispatch,” and held that the customer “failed to show that its actions demonstrate due diligence to resolve the force majeure event.”²⁶

²⁴ DCRT transmittal letter at 37 nn.142-43, *citing JN Contemp. Art LLC v Phillips Auctioneers LLC*, 29 F.4th 118, 124 (2d Cir. 2022).

²⁵ *See, e.g., PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,208, at P 17 (2020) (“At the time the original forecast was prepared, COVID-19 and the rapid reduction in forecasted 2021 economic activity it would cause were unforeseeable.”).

²⁶ *Milligan 3 Wind, LLC*, 178 FERC ¶ 61,185, at P 33 (2022).

The same obligation applies under the APSA. Article 13.1.1 requires that a party affected by an event of force majeure “shall exercise due diligence to remove such disability with reasonable dispatch.” Here, even if the Commission finds that COVID-19 was a force majeure event, DCRT has the burden of demonstrating that it exercised due diligence with reasonable dispatch to address any impacts of COVID-19 that potentially resulted in increased costs. The fact the claimed Project costs have increased to more than \$553 million fifteen months after DCRT agreed to a \$259 million cost cap raises issues of material fact regarding whether DCRT has exercised such due diligence. These issues warrant vetting in an evidentiary hearing.

E. DCRT’s Proposed “Base Year Adjustment” Is Substantially in Excess of Any Reasonable Adjustment Accounting for Inflation Between 2020 and 2024

The cost cap in Appendix E to the APSA is “\$258,961,024 in 2020 dollars.”²⁷ DCRT claims they are entitled to a massive “Base Year Adjustment” of \$86,881,356 to account for the difference between 2020 and the targeted 2024 date construction of the Project is now slated to be completed. Even accepting for the sake of argument that the reference to “2020 dollars” in the APSA allows DCRT to increase its costs to reflect the delay until 2024 for construction of the Project would be completed, any such adjustment should be based purely on the applicable inflation rate during that four-year period.

For example, in the CAISO transmission planning process which led to the selection of DCRT as Approved Project Sponsor for the Ten West Link project, the CAISO used a 2 percent annual inflation rate, which is outlined in the CAISO benefit

²⁷ APSA Second Amendment at 7.

study to justify the competitive solicitation projects. Applying that rate to the APSA cost cap would result in a cost cap of \$280,307,741 in 2024 dollars, which is an increase of \$21,346,717.

DCRT's filing, including the testimony submitted in support of its filing, make it clear that the proposed \$86,881,356 "Base Year Adjustment" is due to a range of factors beyond pure impacts of inflation resulting in increased material, labor, financing and administrative and general costs. For example, the testimony of Mr. John Reed makes it clear that the "Base Year Adjustment" reflects all increases in the costs of commodities and labor for the Project regardless of whether such cost increases are attributable to inflation or other factors. For this reason, the Commission should not accept the proposed \$86,881,356 "Base Year Adjustment" and should instead set for hearing the issue of what, if any, adjustment to the APSA cost cap should be reflected in DCRT's transmission revenue requirement because the cost cap is in 2020 dollars.

F. The APSA Does Not Permit DCRT to Recover Costs in Excess of Its Cost Cap for "Regulatory Compliance"

DCRT argues that it is also allowed to recover costs in excess of its agreed-upon cost cap under "Regulatory Compliance," a term it defines "to include [the] collective content of the second, third, and fourth of the six bullets starting at the bottom of the first page of Appendix E of the APSA."²⁸ None of the identified bullets in Appendix E provides a basis for DCRT to recover costs in excess of the cost cap under the facts of this case. The CAISO addresses each of these bullets in turn.

The second referenced bullet in Appendix E provides that the following costs are not included in the APSA cost cap:

²⁸ DCRT Transmittal Letter at 2 n.4.

Any FERC approved costs incurred by Approved Project Sponsor as a result of a delay caused by CAISO's unilateral amendment of this Agreement to eliminate a conflict with Applicable Laws and Regulations or Applicable Reliability Standards, as permitted by Section 4.4.

This bullet does not apply in this case because the CAISO did not unilaterally amend the APSA to eliminate a conflict with Applicable Laws and Regulations or Applicable Reliability Standards, as permitted by Article 4.4 of the APSA. Nor does DCRT allege that the CAISO did so.

The third referenced bullet in Appendix E provides that the following costs are not included in the APSA cost cap:

Any FERC approved costs incurred by Approved Project Sponsor to make changes to the Project under Section 5.4, to the extent that such changes were not included in the functional requirements for the transmission facility that the CAISO issued for the competitive solicitation or the Approved Project Sponsors bid.

This bullet does not apply in this case because the CAISO did not require DCRT to make changes to the Project, as permitted as part of the CAISO's review of Project specifications under article 5.4 of the APSA. Nor does DCRT allege that the CAISO did so.

The fourth referenced bullet in Appendix E provides that the following costs are not included in the APSA cost cap:

Any FERC approved costs incurred by Approved Project Sponsor to remedy deficiencies in accordance with Section 5.5.3.

This bullet does not apply in this case because DCRT has not been obligated to remedy deficiencies in the Project related to standards and specifications provide by the Interconnecting PTO or other entity, as required by Article 5.5.3 of the APSA. Nor does DCRT allege that this occurred.

DCRT also appears to commingle its proposed heading of “Regulatory Compliance” with the concept of “Change of Route” in Appendix E to the APSA. As explained above, DCRT is not permitted under the APSA to recover costs due to a “Change of Route” in excess of the increased cost cap agreed to by DCRT and the CAISO in the March 2022 APSA Second Amendment.

G. The APSA Does Not Permit DCRT to Recover Costs in Excess of Its Cost Cap as a “Contingency”

DCRT argues that the Commission should permit it to recover a “contingency in its project costs” of \$24,204,728. DCRT makes no attempt to cite some basis in the APSA to allow it to recover a contingency in excess of its agreed-upon project cost cap, and it did not include a contingency in the project costs to begin with. DCRT simply notes that contingencies are “[c]onsistent with industry practice.”²⁹ It may be true that contingencies are industry practice for estimating transmission project costs. However, under the binding cost containment measures DCRT proposed and accepted by signing the APSA, there is no basis for DCRT to recover such a contingency in excess of its APSA cost cap in its transmission revenue requirement.

H. The CAISO Does Not Agree to DCRT’s Recovery of Excess Costs under a “Catch-All” Exception to its Cost Cap

DCRT claims it may also be permitted to recover costs in excess of its cost cap under an overall “catch-all” provision that allows Project costs approved by FERC and the CAISO to be included in DCRT’s Base Transmission Revenue Requirements.³⁰ For the avoidance of doubt, the CAISO states it has not and does not approve of any

²⁹ DCRT transmittal letter at 18.

³⁰ Appendix E to the APSA provides in relevant part, “Changes to the Project cost cap for any reason other than those explicitly specified herein are not permitted without the approval of both the CAISO and FERC.” APSA Second Amendment at 9.

changes to the APSA Second Amendment cost cap or recovery by DCRT of costs in excess of the cost cap, with the exception of interconnection-related costs as already permitted under Appendix E. Thus, DCRT fails to satisfy a precondition for invoking the “catch-all” provision.

I. The Commission Should Consider DCRT’s Proposed Recovery of Interconnection Costs in an Evidentiary Hearing

Appendix E provides that the following costs are not subject to the agreed-upon cost cap:

Any FERC approved costs incurred by Approved Project Sponsor related to the Transmission Interconnection Facilities, or the Transmission Interconnection Service, including Metering Equipment, air gap on the series compensation equipment required by an Interconnection PTO and upgrades required at the Colorado River substation.³¹

The CAISO agrees that DCRT is permitted by the APSA to recover prudently-incurred costs related to Project transmission interconnection facilities or transmission interconnection service. However, DCRT proposes to include interconnection costs of \$60,291,086 in the Project costs recovered through its Base Transmission Revenue Requirement, which includes 38.9% of the cost being financing costs for the interconnections. The CAISO has not had sufficient time to review the specific details of the proposed interconnection costs. The CAISO believes the Commission should require review of such interconnection costs in the hearing the Commission establishes for this proceeding.

³¹ APSA Second Amendment at 7.

IV. Conclusion

Based on the record in this proceeding, DCRT has not made the requisite showings to justify its substantial cost increases above the binding cost cap in its Approved Project Sponsor Agreement with the CAISO. For the foregoing reasons, the Commission should not accept DCRT's proposed annual Base Transmission Revenue Requirement allowing cost recovery well in excess of its contractually binding cost cap and should instead set the issue of DCRT's proposed annual Base Transmission Revenue Requirement for evidentiary hearing and settlement procedures.

Respectfully submitted,

/s/ Anthony J. Ivancovich

Anthony J. Ivancovich
Deputy General Counsel, Regulatory
Sarah Kozal
Counsel
California Independent System
Operator Corporation
250 Outcropping Way
Folsom, CA 95630

Sean A. Atkins
Samin Peirovi
Davis Wright Tremaine LLP
1301 K Street, NW
Suite 500 East
Washington, DC 20005

Dated: July 21, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all of the parties listed on the official service list for the captioned proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Washington, DC this 21st day of July, 2023.

/s/ Daniel Klein

Daniel Klein