

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEXTERA DESERT CENTER BLYTHE, LLC, *et al.*, Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

Case No. 16-1003

On Petition for Review from Orders of the
Federal Energy Regulatory Commission

BRIEF OF INTERVENORS SUPPORTING RESPONDENT

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*CERTIFICATE OF COUNSEL TO PARTIES,
RULINGS, AND RELATED CASES*

Pursuant to Circuit Rule 28(a)(1), counsel for the California Independent System Operator Corporation (“CAISO”) and Southern California Edison Company (“Edison”) hereby submit the following information regarding parties, rulings, and related cases.

A. Parties and Amici

All parties, intervenors, and *amici* appearing in this Court are listed in Petitioner’s and Respondent’s briefs.

B. Rulings Under Review

References to the rulings under review in this case appear in the Petitioner’s brief.

C. Related Cases

Intervenors are not aware of any other related cases.

*CORPORATE DISCLOSURE STATEMENT OF THE CALIFORNIA
INDEPENDENT SYSTEM OPERATOR CORPORATION*

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, CAISO hereby discloses the following. CAISO is a nonprofit public benefit corporation organized under the laws of the State of California. CAISO issues no shares, but from time to time has issued debt securities to the public. CAISO has no affiliates, parent companies, or subsidiaries. CAISO is responsible for the reliable operation of the bulk of the electricity grid in the State of California, comprising the transmission systems of San Diego Gas & Electric Company; Southern California Edison Company; Pacific Gas and Electric Company; the Cities of Colton, Vernon, Pasadena, Anaheim, Azusa, Banning, and Riverside, California; Startrans IO, LLC; the Western Area Power Administration, Sierra Nevada Region (with regard to the Path 15 transmission lines in California); Valley Electric Association Inc.; Trans Bay Cable LLC; and Citizens Sunrise Transmission LLC.

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*CORPORATE DISCLOSURE STATEMENT OF
SOUTHERN CALIFORNIA EDISON COMPANY*

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the United States Court of Appeals for the District of Columbia Circuit, Southern California Edison Company submits the following disclosure statement:

Southern California Edison Company, a transmission-owning public utility, is a wholly-owned subsidiary of its parent, Edison International. Edison International has issued equity or debt securities to the public. There is no publicly-held company that has a 10% or greater interest in Edison.

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*Authorities upon which we chiefly rely are marked with asterisks.

Intervenors California Independent System Operator Corporation (“CAISO”) and Southern California Edison Company (“Edison”) (collectively “Intervenors”) hereby submit their joint brief supporting Respondent Federal Energy Regulatory Commission (“FERC” or the “Commission”).

STATEMENT OF ISSUES

Intervenors accept the Statement of Issues in Respondent’s brief.

STATUTES AND REGULATIONS

All pertinent statutes and regulations are included in Petitioner and Respondent’s opening briefs.

STATEMENT OF FACTS

Intervenors accept the procedural and factual background in Respondent’s brief and provide the following supplemental material.

I. THE CAISO MARKET AND CRRs

A. *The CAISO Market.*

CAISO is a nonprofit public benefit corporation charged with operating the electric transmission systems owned by several utilities and the associated market for electricity. *See Sacramento Mun. Utility Dist. v. FERC*, 616 F.3d 520, 523-26 (D.C. Cir. 2010). Utilities, municipalities, and other “load-serving entities” use this market to procure energy from

generators over high-voltage transmission lines to serve their customers. *Id.* Like most centralized wholesale energy markets, the CAISO market is based on locational marginal pricing. Locational marginal pricing is designed to ensure the dispatch of resources that are physically feasible, and to ensure that prices reflect the resources' impact on the power flows across the CAISO system. *Id.* A locational marginal price is established at each location on the system where energy is injected (the "source," typically representing generation) or withdrawn (the "sink," typically representing consumption). Each locational marginal price reflects the difference in the cost of delivering energy to the various locations on the grid. The locational marginal price is comprised of three components: the market energy price, the cost of transmission losses, and the cost of congestion. *Id.*

Congestion—the most relevant component in the instant case—occurs when market participants submit bids at locations where transmission facilities are insufficient to deliver all of the energy. *Id.* As a simplified example, consider an area that connects to the rest of the transmission system with only one transmission line. Based on bids and schedules, and before considering congestion, CAISO's market selects generation outside of the area to serve the load in its area. The capacity of the transmission line connecting the area with the rest of the system, however, is "constrained" by

certain factors, and cannot deliver all of the selected energy to the area. Accordingly, CAISO's market software will then revise the mix of generation, dispatching higher-priced generation within the load area to replace the generation outside the area that cannot be delivered due to capacity limitations. The additional cost of this generation reflects the cost of the transmission constraint, or "congestion."

B. CRRs and Their Role in the CAISO Market.

Congestion revenue rights ("CRRs") are an integral component in the CAISO market.¹ *Id.* at 527-28. An entity that holds a CRR is entitled to a share of the corresponding congestion revenues across a specific transmission path. While some entities may purchase CRRs as investments, CRRs are principally used by load-serving entities that require financial protection (*i.e.*, a hedge) against congestion charges. *Id.* For example, a load-serving entity generally holds CRRs along the transmission path to its sink. When congestion occurs along this transmission path, the load-serving entity will face a higher locational marginal price because of congestion charges, but it will receive a share of those congestion charges from its CRRs, thereby offsetting the higher price to procure energy.

¹ CRRs are also known as financial transmission rights ("FTRs") in other markets.

C. How Market Participants Obtain CRRs.

CAISO allocates some CRRs at no cost to market participants that serve load, and sells the remainder in an auction.² *Id.* For an entity that does not serve load, like Petitioner Desert Center in the instant case, the tariff only authorizes CAISO to allocate CRRs at no cost in two limited circumstances: (1) To new generators that financed “Network Upgrades” identified in CAISO’s generator interconnection process who elect to receive “Merchant Transmission CRRs” in lieu of direct cash reimbursement; and (2) to Project Sponsors that financed and constructed Merchant Transmission Facilities proposed and approved in CAISO’s transmission planning process. CAISO Answer at 2, JA274.

1. CRRs for Generators Financing Network Upgrades through the Generator Interconnection Process.

Companies seeking to build new generators and interconnect them to the CAISO grid must be studied in the CAISO generator interconnection process to ensure that they may interconnect without affecting grid reliability. *See Pacific Gas & Electric Co. v. FERC*, 533 F.3d 820, 823

² CAISO creates CRRs based upon the amount of transmission capacity, but a load-serving entity’s allocation is limited to the amount of load it serves. The difference between these two amounts results in CRRs available for auction. *See, e.g., Calif. Indep. Sys. Operator Corp.*, 122 FERC ¶ 61,296 (2008).

(D.C. Cir. 2008). CAISO and the local transmission owner also study the proposed generators and the existing transmission facilities to determine whether there is sufficient “deliverability capacity,” which is the transmission capacity necessary for the generator to deliver its full output to the grid during peak conditions. Where a generator cannot interconnect to the existing grid reliably, or where there is insufficient deliverability capacity, the interconnection studies identify additional transmission facilities that would be required, their estimated costs, and the time required to construct them. *Id.*

Generators are responsible for providing the initial financing to construct the additional facilities necessary for them to interconnect. Where those facilities “upgrade” the existing “network” by benefiting the grid as a whole—for other generators, load-serving entities, and ultimately ratepayers—the facilities are considered “Network Upgrades.” *See Nat’l Ass’n of Reg. Utility Comm’rs v. FERC*, 475 F.3d 1277, 1285 (D.C. Cir. 2007) (“NARUC”) (quoting *Public Service Co. of Colorado*, 62 FERC ¶ 61,013 at 61,061 (1993) (“[E]ven if a customer can be said to have caused the addition of a grid facility, the addition represents a *system* expansion used by and benefitting *all* users due to the integrated nature of the grid”)). Because Network Upgrades benefit ratepayers, the new generators that

finance the Network Upgrades receive partial reimbursement from transmission owners. To ensure that generators require only prudent Network Upgrades to interconnect, reimbursements for Reliability Network Upgrades in CAISO currently are capped at \$60,000 per MW of generating capacity. *Calif. Indep. Sys. Operator Corp.*, 140 FERC ¶ 61,070 at PP 83-85 (2012). The transmission owner includes the costs of refunding the generator for Network Upgrades in its rate base, making ratepayers ultimately responsible for those costs.

Facilities that do not benefit the grid are not considered Network Upgrades, and the generator alone bears their costs. For example, generators most commonly are responsible for financing their “Interconnection Facilities,” which generally consist of the generator’s switchyard and transmission lines that interconnect the generator to the grid, and only benefit the generator. *NARUC*, 475 F.3d at 1284.

At the time Desert Center interconnected to the CAISO grid, the CAISO tariff allowed generators to elect to receive Merchant Transmission CRRs in lieu of direct cash reimbursement from the transmission owner for Network Upgrades. CAISO Answer at 15 (citing Section 12.3.2.1 of Appendix Y to CAISO tariff), JA287. Currently, generators interconnecting to the CAISO grid can also receive Merchant Transmission CRRs for

“Network Upgrades for which the Interconnection Customer did not receive repayment,” such as Reliability Network Upgrades that exceed the \$60,000 per MW cost cap. *Id.* (citing Section 14.3.2.1 of Appendix DD to the CAISO tariff), JA287. To date, no generator has ever elected to receive CRRs rather than cash reimbursement of the actual costs of Network Upgrades.

2. *CRRs for Project Sponsors of Merchant Transmission Facilities Approved in the CAISO Transmission Planning Process.*

As the authorized planning authority, CAISO conducts an annual transmission planning process to identify network constraints (like congestion or reliability concerns), and the possible solutions to those constraints (*i.e.*, Network Upgrades). *See Calif. Indep. Sys. Operator Corp.*, 133 FERC ¶ 61,224 (2010). CAISO also may propose the construction of transmission facilities that will benefit ratepayers economically, or that address specified public policy goals. *Id.* In any case, CAISO employs a competitive process to select Project Sponsors for those upgrades it identifies. The selected Project Sponsors finance and construct the transmission projects, and then include the costs in rate bases upon completion.

Developers also may propose to build additional facilities that were not identified by CAISO, or for constraints where CAISO found that a ratepayer-funded transmission solution was not warranted. The additional facilities proposed by developers would be considered Merchant Transmission Facilities. *Id.* For example, the CAISO transmission plan could identify some congestion in an area, but not enough to justify building additional transmission. A developer could believe that CAISO has underestimated the projected congestion in an area, and propose a Merchant Transmission Facility so as to receive the Merchant Transmission CRRs—and the corresponding congestion revenues—that would result.

Because Merchant Transmission Facilities do not address a reliability, economic, or public policy goal identified by CAISO, Project Sponsors of Merchant Transmission Facilities assume the full costs of construction and may not recover those costs through a regulatory cost recovery mechanism (such as an approved rate base). Nevertheless, CAISO awards Merchant Transmission CRRs to the Project Sponsors of Merchant Transmission Facilities consistent with FERC’s policy in Order No. 681, which was meant to “promote[] *efficient capacity expansions* by allowing users that fund the expansions to compare directly any congestion cost savings with the cost of the necessary upgrades.” *Long-Term Firm Transmission Rights in*

Organized Electricity Markets, Notice of Proposed Rulemaking, 71 Fed. Reg. 6693-01 at P 51 (Feb. 9, 2006) (to be codified at 18 C.F.R. § 40) (emphasis added).

Section 24 of the CAISO tariff sets forth the myriad rules governing the transmission planning process. CAISO Answer at 10, JA282. It imposes stringent requirements on developers seeking to interconnect Merchant Transmission Facilities with the CAISO grid. *Well before construction*, CAISO must approve a developer's application for Project Sponsor status to ensure that it is technically and financially capable of completing its proposed Merchant Transmission Facility timely and consistent with industry standards. Edison Comments at 10-11, JA251-252. CAISO and the relevant transmission owner(s) would then study the proposed Merchant Transmission Facility to ensure that it can interconnect reliably with the CAISO grid.

II. DESERT CENTER'S PATH TO ACCELERATED DELIVERABILITY

As both the Petitioner and Respondent's briefs explain, Desert Center's goal in constructing the interim West of Devers transmission facilities was not to receive Merchant Transmission CRRs, but to develop and interconnect the Genesis and McCoy solar plants to the CAISO grid

with sufficient deliverability capacity to meet Desert Center's schedule to deliver power to Pacific Gas & Electric Company ("PG&E"). Petitioner's Brief at 2-4.

On March 19, 2007, Desert Center submitted an interconnection request to CAISO to develop new generators and interconnect them to the CAISO grid pursuant to the process described in section I(C)(1), above. CAISO and Edison then delivered their study results for the proposed Desert Center project, which identified the Network Upgrades and interconnection facilities necessary for interconnection. The study results found that in order for Desert Center to reliably interconnect to the CAISO grid with full deliverability capacity for its project, a large transmission project would need to be online first. This was the West of Devers project, which the CAISO had placed into its transmission planning process.³ Edison Comments at 3-4, JA244-245.

While it may seem problematic that generators such as Desert Center must wait for Network Upgrades from the transmission planning process, there is a distinct advantage to doing so that actually attracts potential

³ The West of Devers project consists of removing and replacing approximately 48 miles of an existing 220 kV transmission line with a new double-circuit 220 kV transmission line between Edison's Devers, Vista, and San Bernardino substations. Edison Comments at 4, JA245.

generators to interconnect to these projects. Project Sponsors for the transmission planning process projects—and not the interconnecting generators dependent on those upgrades for interconnection—must finance those upgrades. As a result, interconnecting generators like Desert Center get a “free” transmission upgrade. *Calif. Indep. Sys. Operator Corp.*, 140 FERC ¶ 61,070 at P 10 (2012).

As Desert Center continued through CAISO’s interconnection process, it also sought a load-serving entity to purchase the power Desert Center’s generators would sell once they were constructed and interconnected. Desert Center was successful, and entered into power purchase agreements in 2009 that would require the Genesis generators to deliver power to PG&E commencing in 2013, and the McCoy generators to deliver power to Edison commencing in 2016. Complaint at 8, JA15.

After Desert Center executed these power purchase agreements and they were approved by the California Public Utilities Commission, Desert Center executed its original “large generator interconnection agreement” with Edison and CAISO on August 12, 2011. *Id.* The agreement set forth the terms and conditions of interconnection for Desert Center, including that Edison’s construction of the West of Devers project was necessary to accommodate Desert Center’s need for deliverability capacity.

After Desert Center executed its original interconnection agreement—and well after it executed its power purchase agreements—Desert Center realized that it probably would not be able to meet the requirements of its power purchase agreement with PG&E without the deliverability capacity provided by the West of Devers project. Edison Comments at 4-5, JA245-246. Desert Center then asked CAISO and Edison to consider alternatives to West of Devers that would enable it to have sufficient deliverability capacity on an accelerated basis such that it could satisfy its power purchase agreement. *Id.* CAISO and Edison accommodated this request and found “interim facilities” that would accommodate Desert Center.⁴ CAISO and Edison estimated that the interim facilities would cost \$41,466,000.⁵ *Id.* CAISO offered all of the potential new generators proposing to interconnect

⁴ The interim facilities consisted of four sets of series reactors along the transmission lines west of the Devers substation, and a special protection system. Edison Comments, at p.1 of Exh. A, JA265. Series reactors do not increase transmission capacity the way additional or higher voltage transmission lines do, but instead add electrical impedance along a line so that additional energy is diverted to other lines with sufficient capacity. Special protection systems—also known as special protection schemes or SPSs—consist of telecommunications and relays that communicate with circuit breakers that open to curtail excess generation that cannot be supported safely by the grid.

⁵ Actual costs were approximately \$32 million. Petitioner Brief at 11.

in that area the option to co-finance the interim facilities and share in the benefit, but only Desert Center agreed. *Id.*

Because the interim facilities were a temporary solution designed only to accelerate deliverability to meet Desert Center’s contractual obligations, and would be replaced by the permanent West of Devers upgrades, they were cost inefficient to ratepayers, who should not pay twice for similar facilities. Respondent Brief at 9-10; Edison Comments at 6, JA247. As such, the parties agreed that “initially the Interim [facilities] shall not be considered a Network Upgrade,” and therefore “payments received from Desert Center for the Interim [facilities] shall not be subject to refund in accordance with Article 11.4.1 of the Interconnection Agreement.” Letter Agreement § 8, JA52.

The parties also set forth provisions governing what would happen in the event that the interim facilities remained permanently and were re-classified as Network Upgrades.⁶ In that case, Desert Center could elect to receive cash reimbursement of the funds it paid to Edison, or “make a one-time election by written notice to the CAISO and [Edison] to receive

⁶ This could happen for several reasons. The most likely cause would be if the California Public Utilities Commission denied Edison the necessary permits to construct the West of Devers facilities.

Congestion Revenue Rights as defined in and as available under the CAISO Tariff at the time of the election in accordance with the CAISO Tariff, *in lieu of a refund of the cost of Network Upgrades* in accordance with Article 11.4.1.” Interconnection Agreement, Art. 11.4, JA118 (emphasis added). These provisions were outlined in a letter agreement and then specifically memorialized in an amendment to the original interconnection agreement (“Interconnection Agreement”). The letter agreement and the Interconnection Agreement were filed with FERC on January 13, 2012, and October 16, 2013, respectively. Edison Comments at 4-5, JA245-246.

In order to comply with Desert Center’s power purchase agreement, the interim facilities had to be in service by November 1, 2013. Complaint at 9, JA16. As exemplified by the permanent West of Devers project, the traditional permitting and environmental review process to construct transmission upgrades in California takes years. Accordingly, Edison had to go to extraordinary lengths to accommodate Desert Center’s newly expedited schedule, including agreeing to build the interim facilities within existing Edison electrical facilities, which obviated the need for permitting and environmental review. Edison Comments at 5, JA246.

III. DESERT CENTER'S COMPLAINT

The interim facilities and Desert Center's initial generators began to come online as scheduled in November 2013. In June 2014, Desert Center learned that CAISO would include the interim facilities in CAISO's "full network model," which is used, *inter alia*, to determine the amount of transmission capacity for CRR allocations. Desert Center then demanded that CAISO allocate any CRRs resulting from any potential incremental capacity to Desert Center as Merchant Transmission CRRs. Complaint at 13-14, JA20-21. CAISO declined to allocate CRRs to Desert Center because Desert Center had received the full benefit of its bargain for accelerated deliverability under the agreements, and had not followed any process that would allow CAISO to allocate Merchant Transmission CRRs to Desert Center in accordance with the CAISO tariff.

Desert Center's complaint made three principal arguments: (1) the agreements do not prevent Desert Center from receiving Merchant Transmission CRRs under the CAISO tariff; (2) Desert Center is entitled to Merchant Transmission CRRs under the CAISO tariff; and (3) if Desert Center is not entitled to Merchant Transmission CRRs under the agreements or the CAISO tariff, then the agreements and the tariff are unjust and unreasonable under FERC policy. Complaint at 16-30, JA23-37. As

FERC's Respondent Brief explains in detail, it disagreed with each of Desert Center's arguments and dismissed the complaint.

After Desert Center filed its complaint, CAISO excluded the interim facilities from the full network model to avoid potentially creating CRRs. FERC then ruled that no party should receive any potential CRRs that could result if the interim facilities resulted in increased transmission capacity in the full network model. *Complaint Order* at P 22, JA382. As a result, CAISO never determined the amount of Merchant Transmission CRRs, if any, that might result from the interim facilities. Nor has CAISO determined what congestion revenues, if any, would result from such hypothetical Merchant Transmission CRRs. CAISO Answer at 23, JA295. As CAISO explained in its answer to Desert Center's complaint, there is not necessarily a correlation between capacity made available for accelerated deliverability and the capacity that could be made available as CRRs. CAISO Answer at 23 n. 49, JA295. While CAISO can create CRRs in proportion to transmission capacity on the CAISO grid, transmission capacity will not always increase as a result of greater deliverability. For example, Desert Center's interim facilities included "special protection systems," which are relays and other devices used to detect abnormal system conditions and take preventative actions to maintain reliability. These

systems allow Desert Center to deliver its output at peak conditions without jeopardizing reliability, but they do not increase transmission capacity on the grid and therefore the amount of CRRs the CAISO can create. Moreover, until the new facilities are included in the CAISO's full network model, it is not clear what amount of the capacity made available by the interim facilities for accelerated deliverability derives from modifications to special protection systems and what capacity derives from the installation of the series reactors at Edison substations. The range of possible outcomes is considerable and the resulting value of any feasible CRRs would vary greatly. *Id.*

SUMMARY OF ARGUMENT

Desert Center received the full benefit of its negotiated bargain, which was for accelerated deliverability capacity to meet the obligations of its power purchase agreements. Desert Center is not entitled to further benefit from the CAISO tariff. Allowing Desert Center to do so would be inconsistent with both the negotiated agreements and the CAISO tariff. There are two separate tariff processes that result in an allocation of Merchant Transmission CRRs: either as a Project Sponsor under the transmission planning process or by electing to receive CRRs in lieu of cash reimbursement for Network Upgrades. But Desert Center did not avail itself

of either of these tariff processes, and CAISO therefore is not authorized to allocate Merchant Transmission CRRs to Desert Center. First, the interim facilities are not Merchant Transmission Facilities and Desert Center is not a Project Sponsor. Second, Desert Center agreed that the interim facilities would not be classified as Network Upgrades unless they became permanent. As such, Desert Center cannot elect to receive CRRs in lieu of cash reimbursement unless the facilities become permanent and are reclassified as Network Upgrades.

Desert Center argues that FERC's dismissal of its complaint is inconsistent with FERC policy. But FERC rightly ignored the precedents cited by Desert Center because they pertain only to facilities that would be Network Upgrades, and are therefore inapposite to the interim facilities. CAISO and Edison ratepayers do not benefit from the interim facilities because they are redundant with the permanent West of Devers facilities. Accordingly, Desert Center agreed that the interim facilities would not be classified as Network Upgrades. Because the interim facilities are not Network Upgrades, assigning any costs to ratepayers, even in the form of Merchant Transmission CRRs and their resulting congestion revenues, would betray FERC policy and principles of cost causation.

Finally, the plain text of the filed agreements demonstrate that Desert Center never had any rights to CRRs to waive. Desert Center’s arguments to the contrary belie both the plain language of the agreements and Desert Center’s own inactions under the CAISO tariff.

ARGUMENT

I. STANDARD OF REVIEW

Desert Center argues that in the challenged orders, “FERC spoke the language of textual clarity,” in holding that the filed agreements were “clear and unambiguous,” and therefore this Court must examine the language of the filed agreements *de novo* under *Chevron* step one. Petitioner Brief at 27 (citing *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *PSEG Energy Res. & Trade, LLC v. FERC*, 665 F.3d 203, 209 (D.C. Cir. 2011)). This over-simplifies both the challenged orders and this Court’s precedents. Greater deference is accorded to agency decisions that, as here, involve policy judgments reflecting an agency’s greater expertise and understanding of industry conditions. *See Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999); *Covad Communications Co. v. FCC*, 450 F.3d 528, 539 n. 6 (D.C. Cir. 2006) (stating an agency’s “policy decisions are entitled to deference so long as they are reasonably explained”).

In other words, the “plain text” of these agreements is plain to FERC because it has expertise with the key term in this case: “Network Upgrade.” *See National Fuel Gas Supply v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) (“As this court stated even before *Chevron*, ‘there is room, in review of administrative agencies, for some deference to their views even on matters of law like the meaning of contracts, as on the meaning of statutes, where the understanding of the documents involved is enhanced by technical knowledge of industry conditions and practices.’”) (quoting *Columbia Gas Transmission Corp. v. FPC*, 530 F.2d 1056, 1059 (D.C. Cir. 1976)).

Moreover, Desert Center bases its arguments predominantly on the CAISO tariff and FERC policy rather than the four corners of the filed agreements. This court generally “gives substantial deference to [FERC’s] interpretation of filed tariffs, even where the issue simply involves the proper construction of language.” *See Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998). FERC’s interpretations of its own precedents are similarly considered with substantial deference. *See Colorado Interstate Gas Co. v. FERC*, 599 F.3d 698, 703-704 (D.C. Cir. 2010). As such, the issue of FERC’s withholding CRRs from Desert Center is a regulatory question, not a contract interpretation question. *See Pioneer Trail Wind Farm, LLC v. FERC*, 798 F.3d 603, 609-610 (7th Cir. 2015)

(finding that FERC’s choice to place costs on the generators in that case “was a regulatory decision,” rejecting the “contract model” for interpretation of the proper course of action). The Court should therefore defer to FERC’s expertise.

II. DESERT CENTER RECEIVED THE FULL BENEFIT OF ITS NEGOTIATED BARGAIN, AND IS NOT ENTITLED TO RECEIVE FURTHER BENEFIT UNDER THE CAISO TARIFF

Desert Center argues that it is entitled to Merchant Transmission CRRs under the CAISO tariff. Intervenors do not dispute that CAISO must create and allocate Merchant Transmission CRRs to those who take the necessary steps to qualify for them. As described above, there are two separate tariff processes that automatically result in such allocations: either as a Project Sponsor under the transmission planning process or by electing CRRs in lieu of cash reimbursement for Network Upgrades. But Desert Center did not avail itself of either of these standard tariff processes. As such, Desert Center’s argument that it is entitled to CRRs under the tariff is based on a false premise: The tariff processes Desert Center would invoke are inapplicable because Desert Center elected to negotiate a separate, singular bargain in lieu of any benefit the CAISO tariff could provide.

Tariffs help to ensure that customers receive equal terms and conditions of service. *See Transmission Access Policy Study Group v.*

FERC, 225 F.3d 667, 727 (D.C. Cir. 2000). Where parties seek service that is not contemplated by a tariff, the Federal Power Act requires parties to file their unique service agreement at FERC—as the parties did for the Desert Center agreement—so that other similarly situated customers may avail themselves of that service. 16 U.S.C. § 824d(d) (2012).

Outside of a tariff process, CAISO and Edison identified the interim facilities as a possible solution to Desert Center’s desire for accelerated deliverability capacity to comply with its power purchase agreements. After extensive discussion and negotiation, Edison and Desert Center memorialized the terms of the implementation of the interim facilities in a stand-alone letter agreement. Because the interim facilities (and interim deliverability capacity itself) were not the product of any existing CAISO tariff process or *pro forma* agreement, the letter agreement between Edison and Desert Center, as well as the Interconnection Agreement including the terms from the letter agreement, were filed separately for Commission review and approval. These agreements expressly “constitute[] the entire agreement among” the parties. Interconnection Agreement, Art. 30.4, JA146; Letter Agreement § 8, JA52. The agreements represented the full benefit of Desert Center’s bargain, and that bargain did not include the option for any form of CRRs unless the interim facilities became permanent.

Because Desert Center received accelerated deliverability capacity, it cannot now claim that Edison and CAISO have failed to satisfy the requirements of the agreements. Nor can it claim that it should be entitled to additional benefit. As Edison noted in its Answer: “It may very well have been inconsistent with Edison’s core principle that its customers not be harmed by the construction of the [interim] facilities if Edison would have agreed to use property paid for by its customers and within [Edison’s] substations in order to provide NextEra the exclusive rights to CRRs.” Edison Comments at 8, JA249.

III. THE CAISO TARIFF DOES NOT AUTHORIZE CAISO TO ALLOCATE CRRs TO DESERT CENTER FOR THE INTERIM FACILITIES

A. *The interim facilities do not meet the definition of a Merchant Transmission Facility.*

Even if Desert Center could avail itself of CAISO tariff provisions to supplement the benefit it bargained for, the CAISO tariff does not authorize CAISO to allocate CRRs to Desert Center for the interim facilities. Desert Center argues that it has a right to receive Merchant Transmission CRRs for the interim facilities under section 36.11 of the CAISO tariff. Petitioner Brief at 33-35. The plain language of section 36.11, however, provides no authority for CAISO to disburse Merchant Transmission CRRs to Desert

Center based on its investment in the interim facilities. The CAISO tariff defines a Merchant Transmission Facility as a facility “whose costs are paid by a *Project Sponsor*,”⁷ and defines a Project Sponsor as an entity “that proposes the construction of a transmission addition or upgrade *in accordance with Section 24*” of the CAISO tariff, which is CAISO’s transmission planning process.⁸ CAISO Answer at 9-10, JA281-282. Desert Center does not meet the definition of Project Sponsor because it never applied for that status in accordance with Section 24. Likewise, Section 24 includes explicit procedures stipulating when and how proposals for Merchant Transmission Facilities are processed and evaluated by CAISO.⁹

⁷ The complete definition of Merchant Transmission Facility is: “[a] transmission facility or upgrade that is part of the CAISO Controlled Grid and whose costs are paid by a Project Sponsor that does not recover the cost of the transmission investment through the CAISO’s Access Charge or [Wheeling Access Charge] or other regulatory cost recovery mechanism.” CAISO Answer at 9-10, JA281-282.

⁸ The complete definition of Project Sponsor is: “[a] Market Participant, group of Market Participants, a Participating TO or a project developer who is not a Market Participant or Participating TO that proposes the construction of a transmission addition or upgrade in accordance with Section 24.” CAISO Answer at 9-10, JA281-282.

⁹ See Tariff Section 24.1 (“The comprehensive Transmission Plan will identify Merchant Transmission Facilities meeting the requirements for inclusion in the Transmission Plan”); Section 24.4.3 (describing the timing windows during which CAISO will accept “proposals for Merchant Transmission Facility projects”); Section 24.4.6.1 (setting forth the criteria

Id. Desert Center's interim facilities were never proposed, evaluated, or approved in accordance with any of these procedures. Rather, they were the result of the direct negotiations among Edison, CAISO, and Desert Center. As such, CAISO had no authority under section 24 of the tariff to allocate Merchant Transmission CRRs to Desert Center for the interim facilities.

B. Desert Center does not qualify for Merchant Transmission CRRs as a Generator Interconnection Customer.

Likewise, Desert Center is not entitled to Merchant Transmission CRRs as a generator interconnecting to the CAISO grid. Desert Center cites to section 12.3.2.1 in tariff appendix Y and section 14.3.2.1 in tariff appendix DD, both of which, under certain circumstances, permit a generator interconnection customer to receive Merchant Transmission CRRs for Network Upgrades that CAISO identified through the generator interconnection process. Petitioner Brief at 42-44. Neither of these provisions is applicable to Desert Center.

Interconnection customers that have financed *Network Upgrades* may elect to receive Merchant Transmission CRRs *in lieu of* cash reimbursement pursuant to Section 12.3.2.1 of Appendix Y. CAISO Answer at 15-16,

by which CAISO evaluates Merchant Transmission Facility proposals). CAISO Answer at 9-10, JA281-282.

JA287-288. Similarly, section 14.3.2.1 in Appendix DD states that interconnection customers are eligible to receive Merchant Transmission CRRs *for Network Upgrades* for which the customer is not eligible for ratepayer reimbursement, namely, costs for Reliability Network Upgrades that exceed the \$60,000 per MW cost cap. *Id.* Per the terms of the letter agreement and the Desert Center Interconnection Agreement, the interim facilities are not Network Upgrades and Desert Center is not entitled to reimbursement for the interim facilities. Interconnection Agreement, App. A, § 9(b), JA176. Desert Center cannot request allocation of a benefit in lieu of something it was not entitled to receive in the first place. The benefit of the bargain received by Desert Center through the letter agreement was accelerated deliverability, for which it will receive the full value, regardless of the allocation of any CRRs. Indeed, Section 9(c) of the Interconnection Agreement explicitly states that Desert Center will be entitled to reimbursement only if the facilities become permanent.¹⁰

¹⁰ “In the event such re-classification occurs within fifteen (15) years of the [interim facilities] Letter Agreement execution date, then Participating TO will refund to the Interconnection Customer its share of the estimated net book value of those facilities which are re-classified as Network Upgrades.” Interconnection Agreement, App. A § 9(c), JA176.

These provisions do not support Desert Center’s broad interpretation of a Merchant Transmission Facility. Rather, these provisions provide separate tariff mechanisms, in addition to the transmission planning process, for obtaining Merchant Transmission CRRs. Pursuant to the plain language of those provisions, the CAISO cannot allocate Merchant Transmission CRRs to Desert Center for the interim facilities.

IV. BECAUSE THE INTERIM FACILITIES ARE NOT NETWORK UPGRADES, THE ORDERS FOR REVIEW ARE CONSISTENT WITH FERC POLICY

Desert Center attempts to bolster its arguments that it should be allocated CRRs by citing to FERC “regulations, precedent, and policy.” Petitioner Brief at 11-12, 14-15, 28-29. But FERC rightly ignored the precedents cited by Desert Center because they pertain only to facilities that would be Network Upgrades, and are therefore inapposite to the interim facilities.

Desert Center avoids the fact that Merchant Transmission CRRs can only be allocated to facilities that would be Network Upgrades by claiming that Network Upgrades “are defined to include transmission facilities ‘at or beyond’ the point of interconnection with the transmission system.” Petitioner Brief at 4-5. Desert Center then concludes that the interim facilities, which are beyond the point of interconnection “thus would be

classified as Network Upgrades under CAISO’s *pro forma* interconnection agreement.” *Id.* Desert Center’s quasi-definition of Network Upgrades is incomplete and therefore misleads the Court. Stating that Network Upgrades “*are defined to include* transmission facilities ‘at or beyond’ the point of interconnection with the transmission system,” gives the Court as much information as claiming that the term “voters” is defined to include people in voting booths. Petitioner Brief at 4 (emphasis added). While accurate from a descriptive standpoint, it conveys no meaningful information on what qualifies someone to vote, or where that “definition” falls short, such as a small child accompanying a voting parent.

Network Upgrades normally include transmission facilities beyond the point of interconnection because the point of interconnection generally separates the transmission facilities for the grid as a whole from the “Interconnection Facilities,” which are the transmission lines that allow a generator to reach the grid (and therefore only benefit that generator). *See NARUC*, 475 F.3d at 1285; Respondent Brief at 9. This simple demarcation works in the vast majority of cases because most facilities built beyond the point of interconnection and on the existing grid will benefit ratepayers, and therefore deserve Network Upgrade status.

Nevertheless, the point of interconnection test does not work in all cases, and therefore is not ultimately determinative, as evidenced by Desert Center’s explicit agreement with CAISO and Edison that the interim facilities—which are beyond the point of interconnection—are not Network Upgrades. *See Entergy Services, Inc. v. FERC*, 391 F.3d 1240, 1243 (D.C. Cir. 2004) (“[W]hen a new Generator incurs cost developing equipment of no benefit to the existing customers, the costs are assigned to the Generator alone”). FERC has ruled on numerous cases in which the point of interconnection demarcation fails and other factors must be evaluated to determine whether the facilities are Network Upgrades. *See Allegheny Power v. FERC*, 437 F.3d 1215 (D.C. Cir. 2006) (citing *Northeast Texas Electric Coop., Inc.*, 108 FERC ¶ 61,084 at P 51 (2004)); *Calif. Wind Energy Ass’n v. Calif. Indep. Sys. Operator Corp.*, 147 FERC ¶ 61,050 at P 9 (2014) (finding that FERC evaluates other factors “where the Commission’s ‘at or beyond the point of interconnection’ test does not adequately address the issue of whether a facility is a network upgrade (subject to rolled-in pricing), interconnection facilities or otherwise subject to direct assignment.”). In each of these cases, FERC has addressed one ultimate question to determine whether a facility is a Network Upgrade: Do ratepayers benefit such that they should pay the costs?

The plain language of the agreements evinces that Network Upgrade status is critical. Article 11.4.3 of the Interconnection Agreement, JA121, preserves certain rights and credits that are triggered by Network Upgrades:

Notwithstanding any other provision of this Interconnection Agreement, nothing herein shall be construed as relinquishing or foreclosing any rights, including but not limited to firm transmission rights, capacity rights, Congestion Revenue Rights, or transmission credits, that the Interconnection Customer shall be entitled to, now or in the future under any other agreement or tariff as a result of, or otherwise associated with, the transmission capacity, if any, *created by the Network Upgrades*, including the right to obtain cash reimbursements, merchant transmission Congestion Revenue Rights in accordance with Section 36.11 of the CAISO Tariff, or transmission credits for transmission service that is not associated with the Large Generating Facility.

Petitioner's Brief argues that this provision demonstrates that interconnection customers could have rights to CRRs, *inter alia*, outside of a *pro forma* Interconnection Agreement and under the CAISO tariff.

Petitioner Brief at 40-41. But Desert Center ignores that this provision depends on the facilities' classification as Network Upgrades. If the facilities are not Network Upgrades, then Article 11.4.3 does not preserve any other rights, including to CRRs.

Because the interim facilities are not Network Upgrades, assigning any costs to ratepayers, even in the form of Merchant Transmission CRRs and their resulting congestion revenues, would betray FERC policy and

principles of cost causation. CAISO and Edison ratepayers do not benefit from the interim facilities because they are redundant with the permanent West of Devers facilities (for which ratepayers will ultimately foot the bill). In other words, FERC understood its own precedent and policies in denying Desert Center's complaint. Once FERC found that the interim facilities were not Network Upgrades, FERC did not need to evaluate any other cost causation theory levied by Desert Center because those theories are each based on Network Upgrade status.

V. THE AGREEMENTS DEMONSTRATE THAT DESERT CENTER HAS NO RIGHTS TO CRRs.

A. *The plain language of the agreements demonstrate that Desert Center has no right to CRRs.*

Desert Center offers a number of legal theories to support its argument that FERC erred in its interpretation of the plain language of the agreements. These theories all follow a similar theme: Desert Center did not waive its rights to CRRs. But these theories all operate under a false premise. As explained above (and in FERC's order), because the interim facilities are not Network Upgrades, Desert Center never had any rights to CRRs to waive. As such, FERC did not err in its interpretation.

The facts also support this interpretation. If, as Desert Center argues, it had rights to Merchant Transmission CRRs, it failed to follow any CAISO

process—such as becoming a Project Sponsor for a Merchant Transmission Facility—that would enable CAISO to allocate Merchant Transmission CRRs to Desert Center.

Even assuming *arguendo* that Desert Center had a right to CRRs under FERC policy and the CAISO tariff, and had not failed to pursue those rights under CAISO tariff processes, the letter agreement and the Interconnection Agreement still preclude Desert Center from receiving CRRs for financing the interim facilities. Section 9(b) of Appendix A to the Interconnection Agreement, JA176, states that Desert Center

also understands and acknowledges that [Edison] intends to physically remove the Interim WOD Project from its transmission system following the date on which [Edison’s] Delivery Network Upgrades are constructed and placed in service. Accordingly, the Parties agree that, subject to Section 9(c) below, the Interim WOD Project shall not be considered a Network Upgrade and the Interim WOD Project Payments received from [Desert Center] shall not be subject to refund in accordance with Article 11.4.1 of the Interconnection Agreement.

As FERC found in its order denying Desert Center’s complaint, the parties agreed that “the interim facilities would not be considered an addition, modification, or upgrade to the CAISO controlled grid,” and as a result, “CAISO may not treat any incremental capability created by the Interim Project as though it is derived from an upgrade to the CAISO controlled grid.” *Complaint Order* at P 23, JA382-383. Understanding its own

policies on Network Upgrades and cost causation, this finding alone was sufficient for FERC to deny Desert Center's complaint and dismiss all other arguments.

In addition, FERC found that Section 9(c) of Appendix A to the Interconnection Agreement bolstered its finding that the parties did not intend to allocate CRRs to Desert Center. *Complaint Order* at P 22, JA382.

Section 9(c) states:

If, following the date on which [Edison's] Delivery Network Upgrades are constructed and placed in service, [Edison], in consultation with the CAISO, determines, in their sole discretion, that any elements of the Interim WOD Project are to remain in service and become part of the CAISO Controlled Grid, then the Parties agree to further amend this Interconnection Agreement to identify and reclassify any such elements as Network Upgrades and payments received for such elements will be subject to refund as follows.

Id. Section 9(c) thus explicitly states the only circumstance in which Desert Center could receive benefits beyond its bargained-for accelerated deliverability: if the interim facilities remain in service after the West of Devers project is completed or canceled. Until then, the interim facilities should not be treated as "an addition, modification, or upgrade to the CAISO controlled grid." Further, because CRR allocations are irreversible, this provision would be unnecessary if the parties intended to allocate CRRs to

Desert Center when the interim facilities were still considered temporary.

CAISO Answer at 8-9, JA280-281.

Article 11.4 of the Interconnection Agreement also is dispositive.

This Article mirrors the CAISO tariff reimbursement provisions and provides:

No later than thirty (30) Calendar Days prior to the Commercial Operation Date, [Desert Center] may make a one-time election by written notice to CAISO and [Edison] to receive Congestion Revenue Rights as defined in and as available under the CAISO Tariff at the time of the election in accordance with the CAISO Tariff, in lieu of a refund of the cost of Network Upgrades in accordance with Article 11.4.1.

Interconnection Agreement, Art. 11.4, JA118. As FERC found, “the amended Interconnection Agreement is thus clear that CRRs would be available *in lieu of a refund of the cost of Network Upgrades*,” which could happen if the interim facilities became permanent, but not before. *Rehearing Order* at P 15, JA417-418. This Court should uphold FERC’s finding that “the amended [Interconnection Agreement] clearly states that the Interim Project is not a Network Upgrade, and NextEra is not entitled to a refund, prior to the time the permanent West of Devers upgrades are completed and a determination is made at that time that some elements of the Interim Project are still needed.” *Id.*

B. Desert Center's arguments of statutory interpretation contradict the plain language of the agreements.

In Petitioner's Brief, Desert Center argues that it never surrendered its rights to CRRs, and that any such waiver would have to be explicit under precedent and traditional canons of construction. Petitioner Brief at 28-32. These arguments exaggerate precedent and downplay obvious contract semantics. The waiver of CRRs is inherent to Desert Center's agreement that the interim facilities are not Network Upgrades. Thus, FERC rightly held that

the lack of mention of CRRs in the amended Interconnection Agreement does not indicate that NextEra is necessarily entitled to CRRs; rather, we conclude that it was unnecessary to explicitly include a reference waiving CRR rights in the amended Interconnection Agreement because NextEra expressly agreed that the Interim Project would not be considered a Network Upgrade during the interim period, meaning that it could not receive CRRs in lieu of Network Upgrade refunds under the amended Interconnection Agreement.

Rehearing Order at P 16, JA418.

C. Desert Center's actions were consistent with the plain language of the agreements.

Desert Center's own actions belie its arguments and are consistent with FERC, CAISO, and Edison's interpretation of the agreements. Desert Center's parent company, NextEra, is a Fortune 200 company and one of CAISO's most sophisticated market participants in both the generator

interconnection and transmission planning processes. *See, e.g., NextEra Energy, Inc.*, 153 FERC ¶ 61,073 (2015) (describing NextEra’s national holdings and operations). NextEra is, in fact, the only holder of Merchant Transmission CRRs in CAISO.¹¹ CAISO Answer at 16-17, JA288-289. Here, however, Desert Center failed to invoke either of the processes established in the CAISO tariff for obtaining CRRs before filing its complaint. As FERC found:

If, as NextEra alleges, the parties were silent on the matter of CRRs because they were specifically permitted, rather than excluded by virtue of not being mentioned, then NextEra was indeed aware of the potential creation of CRRs, and would have had the ability to apply in a timely manner for Merchant Transmission Facility status for the Interim Project and Project Sponsor status. NextEra did not take these steps.

Rehearing Order at P 18, JA418-419. To date, Desert Center has offered no explanation why, if it believed it could be entitled to Merchant Transmission CRRs, it did not take any positive steps to follow any tariff process for acquiring them.

¹¹ NextEra received these Merchant Transmission CRRs through a singular process to allow NextEra to replace anachronistic firm transmission rights on an existing transmission line. CAISO Answer at 16-17, JA288-289 (citing *Calif. Indep. Sys. Operator Corp.*, 125 FERC ¶ 61,328 at P 21 (2008), *reh’g denied*, 128 FERC ¶ 61,072 (2009)).

CONCLUSION

For the reasons stated above and in FERC's brief, Intervenors respectfully request that the Court deny the petition.

Respectfully submitted,

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Dated: August 26, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Federal Rules of Appellate Procedure, and D.C. Circuit Rule 32(e)(2)(B), the attached Brief of Intervenors Supporting Respondent is proportionately spaced, Times New Roman font, has a typeface of 14 points and contains **7,544** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: August 26, 2016

Respectfully submitted,

/s/ William H. Weaver

William H. Weaver

CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedures, and D.C. Circuit Rule 25(c), I hereby certify that I have served a copy of the foregoing BRIEF OF INTERVENORS SUPPORTING RESPONDENT by first-class mail, postage pre-paid, or electronic mail through the Court's CM/ECF system upon each party to the proceeding, as listed on the attached Service List.

Dated: August 26, 2016

By: /s/ William H. Weaver
William H. Weaver

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