Public Version

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

	)	
DCR Transmission, L.L.C.	)	**Docket Nos. ER23-2309-001,**
	)	**ER24-1394-001,**
	)	**EL26-34-000**
	)	**(consolidated)**
	)	
	)	

INITIAL POST-HEARING BRIEF OF THE
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION

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Table of Short Versions of Terms and Acronyms Used in this Initial Brief

Abengoa T&I	Abengoa Transmission & Infrastructure, LLC
ACC	Arizona Corporation Commission
AFUDC	allowance for funds used during construction
ALJ	Administrative Law Judge
APLIC	Avian Power Line Interaction Committee
APS	Arizona Public Service Company
APSA	Approved Project Sponsor Agreement
BLM	Bureau of Land Management
CAISO	California Independent System Operator Corporation
CEC	California Energy Commission
CEQ	Council on Environmental Quality
CEQA	California Environmental Quality Act
Commission	Federal Energy Regulatory Commission
CPI	consumer price index
CPCN	Certificate of Public Convenience and Necessity
CPUC	California Public Utilities Commission
CRIT	Colorado River Indian Tribe
CTD	California Transmission Development
DEIR	Draft Environmental Impact Report
DEIS	Draft Environmental Impact Statement
DOD	U.S. Department of Defense
DOI	U.S. Department of the Interior

DRECP	Desert Renewable Energy Conservation Plan
DCRT	DCR Transmission, L.L.C.
DPV	Devers-Palo Verde
DPV1	Devers-Palo Verde No. 1 Transmission Project
DPV2	Devers-Palo Verde No. 2 Transmission Project
EIR	Environmental Impact Report
EIS	Environmental Impact Statement
EO	Executive Order on Securing the United States Bulk Power System (May 1, 2020)
EPC	engineering, procurement, and construction
EQR	Electric Quarterly Report
Estrella	Estrella Substation project
FAA	Federal Aviation Administration
FAST-41	Title 41 of the Fixing America’s Surface Transportation Act
FEIS	Final Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
GridForce	GridForce Energy Management, LLC
I-10	Highway I-10
IID	Imperial Irrigation District
ISO-NE	ISO New England Inc.
Kofa	Kofa National Wildlife Refuge
kV	kilovolt
LNTP	Limited Notice to Proceed

LUPA	Land Use Plan Amendment
MISO	Midcontinent Independent System Operator, Inc.
MW	megawatt
NERC	North American Electric Reliability Corporation
NEPA	National Environmental Policy Act
NEPOOL	New England Power Pool
NOI	Notice of Intent
OATT	Open Access Transmission Tariff
O&M	operations and maintenance
Order 3355	Secretarial Order No. 3355 issued by the U.S. Secretary of the Interior (Aug. 31, 2017)
ORTP	Offer Review Trigger Price
Project	Delaney-Colorado River 500 kV Transmission Project, subsequently renamed the Ten West Link Transmission Project
PTO	Participating Transmission Owner
ROD	Record of Decision
ROE	return on equity
SCE	Southern California Edison Company
SRP	Salt River Project
Suncrest	Suncrest 230 kV 300 MVAr Dynamic Reactive Power Support project
TAC	transmission access charge
TO	Transmission Owner
TransCanyon	TransCanyon DCR, LLC
TRR	transmission revenue requirement

WAC	wheeling access charge
WAPA	Western Area Power Administration
WECC	Western Electricity Coordinating Council
WHO	World Health Organization
YPG	Yuma Proving Grounds

I. Executive Summary

Every participant in this case agrees the capital costs to be recovered in DCRT's proposed Base TRR are subject to a $258,961,024 binding cost cap in the DCRT APSA. The total Project costs DCRT claims are recoverable through its Base TRR total $553,261,497, almost $300 million above that contractual cost cap. DCRT argues it should be allowed to recover most of these above-cap costs based on theories that have no basis in the DCRT APSA or in DCRT's competitive solicitation bid, including a base year adjustment and a "regulatory compliance" cost cap exclusion which does not exist in either document. Although there are cost cap exclusions in the DCRT APSA for delays due to events of Force Majeure and certain interconnection costs, these exclusions only support some of the above-cap costs DCRT seeks to recover in rates. DCRT's theories are inconsistent with the plain language of the APSA, inconsistent with DCRT's competitive solicitation bid, and contrary to the integrity of the CAISO competitive transmission planning framework the Commission required in Order No. 1000. Specifically, the record in this case supports recovery of the following capital costs in DCRT's Base TRR:

DCRT APSA cost cap	$258,961,024
Base year adjustment/inflation adjustment	None
"Regulatory compliance" costs	None
Cost cap exclusion for delays due to Force Majeure events	$4,052,089
Interconnection cost cap exclusion	$76,569,878
Financing costs not included in other categories	None
Total Project capital costs recoverable through Base TRR	**$339,582,991**

DCRT's proposed Base TRR is unjust and unreasonable because it seeks recovery of costs far above the limits established in the APSA. Because the Commission converted this case to a proceeding under section 206 of the FPA, CAISO, Commission Trial Staff, and other ratepayer-side participants bear the burden of proving that DCRT's filed rates are unjust and unreasonable. However, DCRT's principal arguments to recover capital costs in excess of its undisputed contractual cost cap—including Force Majeure and other claimed cost cap exclusions—are affirmative defenses for which DCRT bears the burden of proving by a preponderance of the total weight of the relevant evidence. DCRT has failed to meet that burden.

The Commission and the Presiding Judge can and should interpret and enforce the DCRT APSA in this proceeding. The DCRT APSA conforms to the Commission-approved *pro forma* APSA included in the CAISO tariff and complies with all Commission filing requirements for a valid service agreement. Because the DCRT APSA directly governs the level of costs DCRT may recover through its Base TRR, interpretation and enforcement of the APSA falls squarely within the Commission's exclusive jurisdiction over interstate transmission rates.

Nothing in the DCRT APSA or DCRT's competitive solicitation bid support DCRT's claimed base year adjustment or inflation adjustment to the cost cap. DCRT's arguments on this issue hang entirely on the reference to the cost cap being "in 2020 dollars." The DCRT APSA and DCRT's bid contain none of the elements that would support such a base year adjustment—no inflation adjustment mechanism, no escalation formula, no inflation index, and no contractual language authorizing automatic escalation of the cap after 2020. Although the plain language of the DCRT APSA is sufficient to rule against DCRT on the base year adjustment, the evidence of DCRT's own bid confirms this finding. DCRT's competitive solicitation bid repeatedly characterized the cap as being in current or nominal or current dollars, each of which are not adjusted for inflation. Neither the APSA nor the bid state the cost cap in constant dollars, which are adjusted for inflation. Reading an "implicit" inflation adjustment and inflation index into the DCRT APSA and DCRT's bid where none is stated would undermine the integrity of the competitive solicitation process by allowing Project Sponsors to retroactively expand binding cost commitments after selection. Further, as expressly stated in DCRT's bid, most of the costs underlying DCRT's cost cap are subject to fixed price contracts where the contractor, not the ratepayer, bears the cost increase risk. Strict interpretations of the DCRT APSA cost cap is particularly important in this case because the justification for the Project is solely based on economic benefits to ratepayers, and the primary reason the CAISO selected DCRT as the Approved Project Sponsor was due to its lower projected revenue requirements and the robustness of its capital cost containment measures compared with competing Project Sponsors. Had DCRT's bid contained the cost escalation adjustments it now claims, the CAISO never would have selected DCRT as the Approved Project Sponsor.

Contrary to the claims of DCRT, the APSA contains no general regulatory compliance exception to the cost cap or cost cap exclusions for the specific types of regulatory compliance costs for which DCRT seeks recovery. Unlike other Project Sponsors in the Project's competitive solicitation process, DCRT proposed no regulatory compliance cost cap exception other than a narrow "Change of Route" cost cap exclusion, which DCRT conceded is not a basis for DCRT's attempts to recover capital costs in excess of its binding cost cap. The fact DCRT proposed a specific regulatory compliance cost cap for Change of Route costs but for no other type of regulatory compliance obligation shows DCRT knew how to—and did in fact—request regulatory cost cap exclusions and its failure to include any other type of regulatory cost cap exclusion in its bid, and the lack of any other such exclusions in the DCRT APSA, demonstrates no additional regulatory cost cap exclusions were intended or agreed upon. DCRT now attempts years later to recharacterize these regulatory compliance costs as falling under the narrow cost cap exclusions for changes to the Project required by the CAISO or an interconnecting entity to satisfy technical specifications and standards. The costs DCRT seeks to recover under this theory, however, do not fall within those narrow exclusions. Instead, these costs arose from routine permitting, environmental mitigation, cultural resource protection, construction sequencing, route modifications required to comply with siting agency requirements. These were foreseeable permitting and development risks that DCRT assumed when it submitted its bid and were not risks addressed by any DCRT cost cap exclusion. Neither the CAISO nor any interconnecting entity directed DCRT to undertake these activities because DCRT's Project and equipment specifications failed to meet their standards and requirements, nor were these activities undertaken to remedy deficiencies interconnecting entities identified **during construction** of the Project in meeting their technical standards and specifications.

DCRT also fails to meet its burden of showing that delays due to events of Force Majeure caused most of the above-cap costs under the Force Majeure cost cap exclusion. Under the APSA as well as under applicable Commission and California law, Force Majeure requires extraordinary events that are objectively unforeseeable and beyond DCRT's reasonable control. The ordinary permitting delays, environmental review developments, scheduling issues, and construction complications DCRT claims are Force Majeure events are common and foreseeable risks in large transmission projects and therefore do not meet legal standards applicable to Force Majeure or the APSA definition. Indeed, the DCRT APSA expressly excludes permitting delays from the definition of Force Majeure unless they are caused by some different event of Force

Majeure. Further, with the exception of COVID-19, DCRT failed to provide the Force Majeure notice for these events as required by the DCRT APSA. As evidenced by its COVID-19 Force Majeure notice to the CAISO, and its Force Majeure notice for one other event for which DCRT seeks no costs for delay, DCRT knew how to send Force Majeure notices to the CAISO but did not do so for the other events it now claims were Force Majeure events. DCRT identified many of these events in quarterly reports as issues and requested extension of the Project milestones for the resulting delays, not once calling them Force Majeure events. Because these were not Force Majeure notifications, they were governed by Section 25.9 of the DCRT APSA, which the CAISO relied upon to amend the contract. It was only years later that DCRT claimed these were Force Majeure events, and in some cases it was not until the filing of its rate case that DCRT claimed certain events were Force Majeure events. The Presiding Judge and the Commission should not countenance these *post hoc* rationalizations.

The CAISO does not oppose the identification of COVID-19-related delays as a Force Majeure event. DCRT's recovery of above-cap costs for COVID-19 must be limited to approximately nine months associated with suspension of CPUC proceedings during the pandemic because the record supports no other delays due to COVID-19.

Regarding interconnection costs, the majority of DCRT's claimed above-cap costs for interconnection-related expenditures fall within explicit DCRT APSA exclusions. Certain portions of DCRT's claimed interconnection costs should not be recovered in DCRT's Base TRR because internal financing costs, delay claims, management expenses, or EPC costs do not satisfy the APSA's narrow definition of excluded interconnection costs.

The CAISO urges the Presiding Judge's decision and the Commission's ultimate resolution of this proceeding to require that DCRT refund any amounts already collected from ratepayers in excess of the APSA's cost cap and cost cap exclusions from the time DCRT received its first payment until the time of the Commission's decision. Because DCRT expressly agreed by contract not to seek recovery above the DCRT APSA cap, the Commission should require full compliance with those commitments and ensure that CAISO transmission ratepayers are protected from costs that DCRT contractually agreed to absorb.[1]

[1] In addition to the arguments discussed in Section II below, the CAISO includes its proposed statements of fact and conclusions of law in Attachment A to this Initial Brief.

II. Arguments

A. What Is the Proper Assignment of Burden of Proof on the Various Issues in This Proceeding?

Pursuant to the order issued in these consolidated proceedings on January 30, 2026,[2] the CAISO, Commission Trial Staff, and other participants (collectively, "Customer Participants") carry the burden of proof under section 206 of the FPA to show DCRT's tariff records are unjust, unreasonable, or unduly discriminatory or preferential.[3]

Specifically, the Customer Participants bear the burden of persuasion, which requires them to prove the facts needed to prevail on an issue under section 206 of the FPA.[4] The Customer Participants also bear the burden of proof, which requires them, as an initial matter, to make a *prima facie* showing that the evidence favoring their position on an issue amounts to a preponderance of the total weight of the relevant evidence on that issue—*i.e.*, to show the evidence meets a "more likely than not" standard or, expressed in percentage terms, amounts to 51 percent or more of the total weight of the relevant evidence on the issue (the "*prima facie* 51 percent burden of proof standard").[5] *Prima facie* evidence means "evidence which if unanswered would justify [persons] of ordinary reason and fairness in affirming the question which the plaintiff is bound [by the assignment of burden of proof under section 206 of the FPA and the California evidentiary rules] to maintain."[6] As part of their burden of proof, the Customer Participants also initially bear the burden of production (sometimes called the burden

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[2] *DCR Transmission, L.L.C.*, 194 FERC ¶ 61,085 ("January 2026 Order"), *order on reh'g*, 195 FERC ¶ 61,181 (2026) ("June 2026 Order"), *petitions for review pending sub nom. Cal. Indep. Sys. Operator Corp. v. FERC, et al.*, D.C. Cir. Nos. 26-1141, *et al.*

[3] *See* FPA section 206(b), 16 U.S.C. § 824e(b).

[4] *See Basin Elec. Power Coop.*, 187 FERC ¶ 63,021, at PP 132-33 (2024) ("*Basin*"); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs. Into Mkts. Operated by the Cal. Indep. Sys. Operator Corp. & the Cal. Power Exchange*, Opinion No. 536, 149 FERC ¶ 61,116, at PP 44-45 (2014) ("*SDG&E*"); *Sargent Fletcher, Inc. v. Able Corp.*, 3 Cal. Rptr. 3d 279, 284 (2003) ("*Sargent Fletcher*").

[5] *Basin* at P 131; *SDG&E* at P 45; *Sargent Fletcher* at 284.

[6] *Basin* at P 130 (quoting *SDG&E* at P 46).

of going forward)—*i.e.*, the burden of producing evidence regarding the facts the Customer Participants are trying to show that meets the *prima facie* 51 percent burden of proof standard.[7]

As discussed below, the CAISO has met its burden of production by, among other things, demonstrating that DCRT's capital cost recovery is subject to, and limited by, the APSA between the CAISO and DCRT, as amended.[8] The DCRT APSA expressly restricts DCRT's capital cost recovery to a specified amount, subject to a limited number of cost cap exclusions. DCRT is not permitted to recover from CAISO transmission ratepayers any capital costs above the amount permitted under the DCRT APSA.

Once the Customer Participants meet their burden of production on an issue, the burden of production on that issue shifts to DCRT,[9] meaning DCRT must introduce evidence showing Customer Participants have fallen short of meeting the *prima facie* 51 percent burden of proof standard. Preponderant evidence is *prima facie* evidence that survives DCRT's challenge.[10]

DCRT can also attempt to show it has an affirmative defense that would allow DCRT to prevail on the issue.[11] "An affirmative defense to the evidence is different from poking holes in the evidence [*i.e.*, different from attempting to show the Customer Participants have fallen short of meeting the *prima facie* 51 percent burden of proof standard]. A defendant mounts an affirmative defense first by admitting the alleged conduct, but then offering a justification for it."[12] The party claiming an affirmative defense bears the burden of making out that defense by showing that a preponderance (*i.e.*, 51 percent or more) of the total weight of the relevant

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7 *Basin* at P 132; *SDG&E* at PP 45-46.
8 Exh. No. DCT-0002.
9 *Basin* at PP 133, 157-58; *SDG&E* at P 45.
10 *Basin* at P 131; *SDG&E* at P 46; *Sargent Fletcher* at 284-85.
11 *Basin* at PP 161-62; *Sargent Fletcher* at 282, 286.
12 *Basin* at P 161.

evidence indicates the affirmative defense justifies the party's conduct.[13] DCRT admits it has exceeded the APSA cost cap[14] but attempts to rely on numerous affirmative defenses, *i.e.*, the specified cost cap exclusions in the DCRT APSA. For example, DCRT's claims that force majeure excuses its compliance with obligations and performance under the DCRT APSA, including the cost cap and cost containment provisions of that agreement. DCRT also claims that other cost cap exclusions in the DCRT APSA permit it to recover capital costs in excess of its agreed-to cost cap. All of these are affirmative defenses for which DCRT, as the participant in the proceedings claiming the defense, bears the burden of providing a preponderance of the total weight of the relevant evidence.[15] As explained below, DCRT has not met that burden.

B. May/Should the Presiding Judge Enforce the APSA in a Commission Proceeding to Determine a Just and Reasonable Base TRR for DCRT?

The Commission is empowered to enforce the DCRT APSA, and the Presiding Judge is empowered to make initial decision findings consistent with the Commission's authority to enforce the APSA. For the reasons discussed below, the Presiding Judge should enforce the DCRT APSA in this proceeding. The DCRT APSA conforms to the Commission-approved *pro forma* APSA set forth in Appendix X of the CAISO tariff. The DCRT APSA is on file with the Commission in the CAISO's EQR as Service Agreement No. 3496 under the CAISO OATT.[16]

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[13] *La. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, 183 FERC ¶ 63,020, at P 69 & nn.111-12 (2023) (citing U.S. Supreme Court and Commission precedent); *Sargent Fletcher* at 286 (finding "the defendant bears the burden of proof on new matter and affirmative defenses") (citing *Rancho Santa Margarita v. Vail*, 81 P.2d 533, 554, 11 Cal. 2d 501, 543 (1938)).

[14] Exh. No. DCT-0102 REV2 PUB at 5 (at rows 5, 7).

[15] *La. Pub. Serv. Comm'n*, 183 FERC ¶ 63,020, at P 69 & nn. 111-12, P 234 & n.492, P 291 & n.625, P 447 & n.938, P 458 & n.953, P 558 & n.1189, P 701 & n.1535, PP 715-17, P 784 (at third bullet point); *Wells Fargo Equip. Fin., Inc. v. Madanyan Enters., Inc.*, 2023 Cal. Super. LEXIS 107984, at *9-13 (May 11, 2023) (finding that "Defendants did not meet their burden of proof with respect to their . . . Affirmative Defenses," including *force majeure*); *Weiner v. Allied World Surplus Lines Ins. Co.*, 2019 Cal. Super. LEXIS 66946, at *3 (Nov. 25, 2019) ("The Court DENIES the motion because Steadfast has failed to introduce evidence sufficient to shift the burden of proof on its exclusion affirmative defenses.").

[16] Exh. No. CSO-0001 REV3 at 29:1-19. The vast majority of contracts with parties taking service under the CAISO tariff are based on *pro forma* agreements approved by the Commission and included in the CAISO tariff.

The DCRT APSA is not a nonconforming agreement. Section 10.1.1 of the *pro forma* APSA in Appendix X of the CAISO tariff provides "any cost cap or other binding cost containment measures" in an APSA will be specified in Appendix E of that APSA.[17] Because it is a conforming agreement, the CAISO did not need to file the DCRT APSA separately for Commission acceptance.[18] As a service agreement under an OATT filed under the EQR, the DCRT APSA constitutes a filed rate,[19] and the Commission has jurisdiction over the DCRT APSA and is empowered to enforce it. Moreover, the DCRT APSA directly affects DCRT's proposed Base TRR, which is an input into the CAISO's TAC formula rate.[20] The Commission has exclusive jurisdiction over all rates for interstate transmission facilities, like the Project.[21]

Those contracts satisfy Commission filing requirements through EQR reporting and include most of the hundreds of generator interconnection and market agreements with the CAISO. Exh. No. CSO-0001 REV3 at 29:20-30:4.

[17] Exh. No. DCT-0002 at 20.

[18] *See* 18 C.F.R. §§ 35.1(g), 35.10a-35.10b; *Revised Pub. Util. Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107, at P 18 (2002) ("Order No. 2001"); *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107, at P 4 (2014) ("CAISO notes that, as a *pro forma* agreement, individual APSAs will not be required to be filed with the Commission unless they contain non-conforming changes."). Also, in approving the *pro forma* Selected Developer Agreement set forth in MISO Tariff—MISO's equivalent of the CAISO's *pro forma* APSA—the Commission found that MISO was required to file for Commission approval only those agreements that were non-conforming, and all conforming agreements could be filed using MISO's EQR. *Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,168, at P 140 (2015) ("*MISO*"). *See also, e.g.*, *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,175, at P 3 n.8 (2023) ("MISO explains that the Agreement is a conforming agreement based on MISO's *pro forma* Selected Developer Agreement and met the filing requirement under section 205(c) of the Federal Power Act, pursuant to the Commission's Electric Quarterly Report regulations" set forth in 18 C.F.R. Section 35.10b.

[19] *See, e.g.*, Order No. 2001, 99 FERC ¶ 61,107, at P 18 ("[P]ublic utilities that have standard forms of agreements in their transmission, cost-based power sales tariffs, or tariffs for other generally applicable services will no longer file conforming agreements with the Commission. The filing requirements of FPA section 205(c) will be satisfied by the standard forms of agreements and by the electronic filing of Electric Quarterly Reports."); *Elec. Quarterly Reports*, 148 FERC ¶ 61,083, at P 6 (2014) ("The Commission established the EQR reporting requirements to help ensure the collection of information needed to perform its regulatory functions over transmission and sales of electric energy, while making data more useful to the public and allowing public utilities to better fulfill their responsibility under FPA section 205(c) to have rates on file in a convenient form and place.") (internal citation omitted); *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,175, at P 3 n.8.

[20] Exh. No. CSO-0201 at 10:2-7.

[21] *City of Lincoln v. FERC*, 89 F.4th 926, 928 (D.C. Cir. 2024) ("The Federal Power Act (FPA), 16 U.S.C. §§ 791-828c, gives FERC exclusive jurisdiction over all facilities for transmission of electric energy in interstate commerce. 16 U.S.C. § 824(b)."); *E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1305-06 (D.C. Cir. 2007) ("Section 201(b) of the FPA, 16 U.S.C. § 824(b), grants FERC 'jurisdiction over all rates, terms and conditions of electric transmission service provided by public utilities in interstate commerce, as well as over the sale of electric energy at wholesale.'") (quoting *Me. Pub. Util. Comm'n v. FERC*, 454 F.3d 278, 282 (D.C. Cir. 2006).

The competitive solicitation process the CAISO adopted to comply with Order No. 1000[22] allows the CAISO to solicit bids for new transmission facilities and substations. The APSA documents the details of each successful bid, thereby binding the bidder to the terms and conditions that were a basis for the CAISO's decision to select that entity as the Approved Project Sponsor. Absent the APSA, there is no reason to have a competitive solicitation process because the successful bidder has no standard to bind it. In addition, if the APSA does not document the cost cap or other binding cost containment measures in a successful bid, then the bidder could bid a low number and request any revenue requirement from the Commission, which would harm ratepayers and result in a process with no meaning.[23]

If the Presiding Judge addresses the issue of whether to assert primary jurisdiction over DCRT APSA contractual issues in this proceeding, he should find that the Commission should assert primary jurisdiction over those issues based on application of the three-part *Arkla* test: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity in interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.[24]

The following considerations justify a finding that the Commission should assert primary jurisdiction under all three parts of the *Arkla* test:

(1) Unlike a state court, the Commission has specialized knowledge of the provisions of the APSA impacting rates, which implement the results of the CAISO transmission planning process set forth in Section 24 of the Commission-approved CAISO tariff and the result

22 *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051, at PP 253-54, 284-85 (2011) ("Order No. 1000").

23 Exh. No. CSO-0201 at 9:4-18.

24 *Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979) ("*Arkla*").

of numerous Commission policy directives to the CAISO. APSAs like the DCRT APSA have cost caps and cost containment measures that establish limits on the TRRs of Approved Project Sponsors, and the Commission approves those TRRs, which directly impact the CAISO's TAC. The Commission also has much greater knowledge of electric transmission rate issues and transmission planning issues than a state court would be expected to have. Compared to state courts, the Commission alone has special expertise and experience regarding transmission rates and revenue requirements.

(2) There is a need for uniformity in interpreting APSAs and comparable project sponsor agreements resulting from Commission-approved transmission planning processes. There is also a need for uniformity in establishing just and reasonable TRRs and transmission rates subject to the Commission's jurisdiction under the FPA. This is particularly necessary to ensure no undue discrimination is occurring. Commission direction on disputed provisions in the DCRT APSA will establish precedent for all other agreements with similar terms. APSAs like the DCRT APSA that have cost caps and cost containment measures also require a uniform interpretation so that TRRs can be incorporated into the CAISO's TAC in a just and reasonable manner.

(3) Interpretation of the DCRT APSA is directly related to the Commission's regulatory responsibilities. The Commission has exclusive jurisdiction over public utility rates for interstate transmission facilities, like the Project. The DCRT APSA directly affects DCRT's TRR that will be reflected in the CAISO's TAC, and thus the issues in this proceeding are directly intertwined with the Commission's transmission rate responsibilities. This proceeding also implicates the Commission's broader regulatory role. If the Presiding Judge finds there are broad exceptions to the DCRT APSA cost

cap, as claimed by DCRT, and the Commission accepts these findings, it would likely change the way the CAISO and other independent system operators and regional transmission organizations conduct competitive solicitations in Commission-regulated transmission planning processes, reducing the weight afforded to proposed cost caps and cost containment measures. Indeed, the outcome in this case could change how billions of dollars of transmission in California and the rest of the west are planned by the CAISO and other regional transmission planners.[25]

1. Does the Presiding Judge Have to Find the APSA Is Just and Reasonable?

The Presiding Judge does not need to make any findings as to whether the DCRT APSA is just and reasonable. The Commission has already found the original *pro forma* APSA to be just and reasonable and subsequently accepted all revisions to the pro forma APSA for filing.[26] The DCRT APSA conforms to the *pro forma* APSA and has been validly submitted to the Commission via the CAISO's EQR. Therefore, the DCRT APSA is also a just and reasonable service agreement on file with the Commission. This is consistent with the *MISO* order referenced above[27] and the Commission's general treatment of service agreements based on *pro forma* agreements, *e.g.*, specific generator interconnection agreements based on *pro forma* interconnection agreements.[28] As the DCRT APSA is a just and reasonable service agreement

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[25] Exh. No. CSO-0001 REV3 at 31:5-16.

[26] *See* Docket Nos. ER14-2824, ER16-767, ER20-2374, ER23-1977, ER23-2557, and ER24-2687. The Commission was well aware of the existence of the DCRT APSA and the cost cap measures contained therein when it set DCRT's rate for hearing, as the Commission's suspension order mentions the DCRT APSA several times. *DCR Transmission. LLC*, 184 FERC ¶ 61,199, at PP 5, 9, 13-1625-27, 40, Christie Concurrence at PP 3-4 (2023). Nowhere did that order set for hearing the justness and reasonableness of the DCRT APSA.

[27] *See MISO*, 153 FERC ¶ 61,168, at P 140; *see also Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,175, at P 3 n.8.

[28] As Commission Trial Staff witness Dr. Norman testified, there would be no reason to have a *pro forma* APSA because every APSA would have to be filed with the Commission as every APSA has different cost containment measures. Tr. at 8611:21-8612:4. Comparable to the CAISO's *pro forma* APSA, MISO's *pro forma* Selected Developer Agreement contains an appendix—specifically, Appendix A.3—that provides a blank table for estimated project costs and cost categories, which states that the "Selected Developer may adjust the amounts in

on file with the Commission, the Presiding Judge must enforce applicable terms of the DCRT APSA in determining DCRT's Base TRR in this proceeding.

2. If the Presiding Judge Finds That the APSA's Cost Cap Does Not Allow for DCRT to Recover Certain of Its Costs (Inclusive of a Fair Return), Can the Presiding Judge Disregard the APSA Cost Cap?

If the Presiding Judge finds that the APSA's cost cap does not permit DCRT to recover certain costs, the Presiding Judge cannot disregard the APSA cost cap.

First, the issue of the justness and reasonableness of the DCRT APSA was not set for hearing in this proceeding. Furthermore, Section 10.1.1 of the DCRT APSA states in relevant part that "[t]he Approved Project Sponsor agrees that it shall not seek, for recovery through its TRR, higher costs than the maximum costs specified in, or determined in accordance with, any cost cap or other binding cost containment measures as specified in Appendix E" thereto.[29] This provision in Section 10.1.1 is identical to the corresponding provision in Section 10.1.1 of the *pro forma* APSA approved by the Commission.[30] Thus, the Commission has approved this TRR limitation applicable to Approved Project Sponsors like DCRT.[31]

As a service agreement under the CAISO OATT on file with the Commission through the CAISO's EQR,[32] and which expressly limits the Base TRR DCRT may seek, the DCRT

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each project cost category as needed during the term of the Agreement provided that the total Project cost does not exceed $xxx," and includes a blank space for any binding costs caps and cost containment measures to be listed. MISO's Selected Developer Agreement was approved as Appendix 1 to Attachment FF of MISO's tariff in a September 16, 2015 tariff amendment filing in Docket No. ER15-2657. *MISO*, 153 FERC, ¶ 61,168, at P 3 (2015), *order on reh'g and compliance*, 154 FERC ¶ 61,229, at P 3 (2016). As with the APSAs entered into by the CAISO, although MISO has entered into several Selected Developer Agreements with cost caps, there is no indication MISO filed such agreements as it had a *pro forma* agreement on file with the Commission. For example, the Commission accepted a notice of termination of MISO's Selected Developer Agreement with NextEra that had been filed under the EQR. *See Midcontinent Independent System Operator, Inc.*, 182 FERC ¶ 61,175, at PP 1, 3 & n.8. *See also Midcontinent Independent System Operator, Inc.*, 176 FERC ¶ 61,110, at PP 2, 21, 41 (2021) (referencing a Selected Developer Agreement with cost containment provisions without any indication it was ever filed with the Commission as a non-conforming agreement).

[29] Exh. No. DCT-0002 at 20.

[30] *See* Exh. CDN-0003 at 19.

[31] The CAISO also discusses Section 10.1.1 of the DCRT APSA below in Section II.C of this Initial Brief.

[32] *See* Exh. No. CSO-0001 REV3 at 29:1-19.

APSA—including Section 10.1.1 thereto—is binding in this proceeding. Neither the Presiding Judge nor the Commission can disregard the limitation in Section 10.1.1 or the DCRT cost cap.[33]

3. Under What Standard Would the Presiding Judge Require Amendment of the APSA Cost Cap?

Neither the Presiding Judge nor the Commission has the authority to require amendments to the DCRT APSA cost cap in this proceeding. The cost cap can be amended only upon a finding that the cost cap and cost containment provisions of the DCRT APSA are unjust and unreasonable under section 206 of the FPA. The justness and reasonableness of the DCRT APSA was not set for hearing in this proceeding. The issues set for hearing are limited to DCRT's proposed Base TRR and related transmission owner tariff filing.[34]

4. Is There Any Ambiguity or Indication of a Lack of a Meeting of the Minds with Regard to the DCRT APSA?

The plain text of the DCRT APSA supports the CAISO's positions in this proceeding. Thus, evidence outside of the four corners of the DCRT APSA (extrinsic evidence) is not necessary to interpret the DCRT APSA—*i.e.*, not necessary to understand what the provisions of the DCRT APSA mean.

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[33] *See, e.g., NextEra Energy Transmission W., LLC*, 154 FERC ¶ 61,009, at P 55 ("CAISO verifies that it awarded the Projects to NEET West based on its binding commitment in its project sponsor application to such cost caps, and that NEET West agreed to abide by these cost caps in section 10.1.1 of the APSAs."); *id.* at P 75 n.129 (2016) ("As NEET West and CAISO are both parties to the APSAs for the Projects, we expect that the parties would abide by the terms set forth and mutually agreed upon in the APSAs.").

[34] *DCR Transmission, L.L.C.*, 184 FERC ¶ 61,199, at P 1 ("In this order, we accept DCRT's proposed TO Tariff and Base TRR, and suspend them for a nominal period, to become effective March 8, 2024, subject to refund and to the outcome of hearing and settlement judge procedures."); *id.* at P 40 ("Our preliminary analysis indicates that DCRT's TO Tariff and Base TRR have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. DCRT's filing raises issues of material fact that cannot be resolved based on the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below."); *id.* at Ordering Paragraph (B) (directing that "a public hearing shall be held concerning the justness and reasonableness of DCRT's proposed TO Tariff and Base TRR, as discussed in the body of this order. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.").

However, if the Presiding Judge were to find any ambiguity regarding the meaning of the DCRT APSA, extrinsic evidence is appropriate for understanding what the provisions of the DCRT APSA are intended to mean[35] (*e.g.*, understanding DCRT's bid in the competitive solicitation process that resulted in the CAISO selecting DCRT as the Approved Project Sponsor for the Project, as reflected in the DCRT APSA). Such evidence confirms what the provisions of the DCRT APSA mean and provides context where the DCRT APSA is silent on a particular subject.

This use of extrinsic evidence is consistent with California law, which requires consideration of any relevant extrinsic evidence in all cases involving the interpretation of contracts (even cases in which the court or a party disagrees with the usefulness of evaluating the extrinsic evidence).[36] Section 11.2.1 of the DCRT APSA (and the same section of the *pro forma* APSA approved by the Commission) provides that "[t]he validity, interpretation and performance of this Agreement and each of its provisions shall be governed by the laws of the state of California, without regard to its conflicts of law principles."[37] More generally, both

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[35] *See, e.g.*, *PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,053, at P 15 (2021) (finding that "in situations where a contract provision is found to be ambiguous, the Commission looks to extrinsic evidence to resolve ambiguities, including statements, course of conduct, and contemporaneous correspondence, aimed at discerning the intent of the parties") (citing court precedent) (internal citation and quotation marks omitted); *Wolf v. Walt Disney Pictures & Television*, 76 Cal. Rptr. 3d 585, 602, 162 Cal. App. 4th 1107, 1126 (2008) ("The court generally may not consider extrinsic evidence of any prior agreement or contemporaneous oral agreement to vary or contradict the clear and unambiguous terms of a written, integrated contract. . . . Extrinsic evidence is admissible, however, to interpret an agreement when a material term is ambiguous.") (citing California state statutes and precedent).

[36] *See, e.g.*, *George v. Auto. Club of S. Cal.*, 135 Cal. Rptr. 3d 480, 491, 201 Cal. App. 4th 1112, 1128 (2011) (finding that "the court must consider the sufficiency of the allegations, including any [extrinsic] evidence allegations, to determine whether the contract is reasonably susceptible to the plaintiff's alleged interpretation"); *Wolf*, 76 Cal. Rptr. 3d 585, 602, 162 Cal. App. 4th 1107, 1126 (explaining in relevant part that "[w]hen the meaning of the words used in a contract is disputed, the trial court . . . . provisionally receives any proffered extrinsic evidence that is relevant to prove a meaning to which the language of the instrument is reasonably susceptible"); *Pac. Gas. & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644-46, 69 Cal. 2d 33, 37-40 (1968); Cal. Civ. Code Tit. 3 (Interpretation of Contracts), § 1636 ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."); *id.*, § 1637 ("For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this Chapter are to be applied."); *id.*, § 1647 ("A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.").

[37] Exh. No. DCT-0002 at 21; Exh. No. CDN-0003 at 20.

California law and Commission precedent apply to the DCRT APSA in this proceeding. Presiding Judges and the Commission have applied state law in analyzing contractual issues in previous proceedings.[38]

If the Presiding Judge or the Commission were to find any ambiguity existed in the APSA, such ambiguity should be interpreted in light of the Commission-approved provisions of the CAISO tariff requiring the CAISO to select more efficient or cost-effective solutions to regional needs for the benefit of ratepayers.[39] The Commission stated that introducing competition to transmission development would result in more cost-effective transmission as developers compete to build needed transmission at the lowest cost.[40]

Commission approval of recovery of a TRR based on capital costs substantially exceeding DCRT's contractually binding cost cap where cost cap exclusions do not apply would be contrary to the purpose of the CAISO's competitive solicitation processes regulated by the Commission. It would substantially undermine or render meaningless the concept of binding cost caps and cost containment commitments. If the CAISO and other regional transmission planners cannot expect cost containment commitments in competitive solicitations proposals to be binding, then a fundamental rationale for conducting a competitive solicitation in the first instance would be called into question. Binding cost containment commitments allow the CAISO to compare competing Project Sponsors head-to-head. If the CAISO selects one Project Sponsor over another based on the cost containment commitments and specified exclusions expressly stated (or not stated) in its project proposal and then the Project Sponsor, once

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[38] *See, e.g.*, *Jersey Cent. Power & Light Co. v, Atl. City Elec. Co.*, 118 FERC ¶ 63,027, at PP 42-44 (2007), *aff'd*, 122 FERC ¶ 61,169 (2008) (applying New Jersey state law); *Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 115 FERC ¶ 61,375, at PP 69-85 (2006) (applying New York state law).

[39] Exh. No. CSO-0001 REV3 at 19:6-10.

[40] *Id.* at 16:34-17:9 (citing Order No. 1000, 136 FERC ¶ 61,051, at PP 253-54, 284-85).

approved, seeks to back out of those commitments or claim cost cap exclusions that were not expressly stated in its proposal, it harms competitors because, had the CAISO been able to consider the subsequently requested exclusions the Approved Project Sponsor now claims, the CAISO might not have selected that Approved Project Sponsor in the first instance.[41]

The CAISO selected DCRT in the CAISO competitive solicitation to build the Project due to its materially lower project costs, its binding cost containment measures, the lack of cost cap exclusions, and the amount of risk it agreed to bear compared to other Project Sponsors.[42] Because DCRT committed to a project-winning cost cap, allowing DCRT to exceed the agreed-upon cap in a manner not permitted by the DCRT APSA and to claim cost cap exclusions that are not in its contract would undermine the enforceability of cost containment mechanisms across all transmission planning regions in the U.S. Accordingly, the Commission should enforce the terms of the DCRT APSA and its binding cost containment provisions.[43]

Moreover, the Presiding Judge and the Commission should find DCRT and the CAISO had a "meeting of the minds" regarding the DCRT APSA. DCRT argued in the hearing that there was no meeting of the minds on certain aspects of the APSA,[44] but those arguments are red herrings. Whether there was a meeting of the minds has to do solely with the foundational question of contract formation—*i.e.*, whether the parties agreed to enter into a valid and

[41] Exh. No. CSO-0001 REV3 at 19:11-20:15.

[42] *Id.* at 26:19-28:13, 58:5-59:20, 137:3-138:12; Exh. No. CSO-0007 at 133-35; Exh. No. CSO-0006 REV2 PUB at 133.

[43] Exh. No. CSO-0001 REV3 at 20:18-21:2.

[44] *See*, *e.g.*, Tr. 802:22-803:2 (DCRT witness Reed stating that he has "not seen any evidence that suggests there was a meeting of the minds with regard to the methodology, meaning the index to be used" to make a putative base year adjustment); Tr. 1006:22-24 (In reply to the question, "Is there any evidence of mutual intent?" regarding the putative base year adjustment, DCRT witness Reed stating "Other than the structure of the contract, I don't think so.").

enforceable contract.[45] As California courts have recognized, a quintessential example of a case in which there was no meeting of the minds is *Raffles v. Wichelhaus*, in which

> [t]he contract said that Peerless would transport cotton from Bombay to Liverpool. But there were two ships named "Peerless" arriving at Liverpool from Bombay months apart during a frenzied cotton market caused by the Civil War in the United States. Thus, there was a latent ambiguity. Extrinsic evidence led the English court to conclude that there was no contract at all because there had been no "meeting of the minds."[46]

In the instant proceeding, neither DCRT nor any other participant contends that the DCRT APSA should be voided *ab initio*—*i.e.*, that the DCRT APSA is not a valid and enforceable contract to which DCRT and the CAISO agreed.[47] Rather, DCRT contends the DCRT APSA should be interpreted differently from how the CAISO and other participants in the proceeding interpret it (*e.g.*, as to whether the DCRT APSA includes a base year adjustment). Thus, DCRT's arguments do not in fact concern meeting of the minds, despite DCRT's characterizing them as such. A dispute as to contract interpretation is not tantamount to a lack of meeting of the minds. If it were, then "any party to a contract could void that contract by acting in a manner contrary to the agreement subsequent to its entry, then arguing that this subsequent behavior indicates their lack of agreement to the terms of the agreement at formation."[48] California law does not permit such an effort to circumvent the terms of a contract. This is

[45] *Banner Entm't, Inc. v. Superior Court*, 72 Cal. Rptr. 2d 598, 603, 62 Cal. App. 4th 348, 357-58 (1998) ("California law is clear that there is no contract until there has been a meeting of the minds on all material points" of a contract) (emphasis in original omitted); *Holmes v. Lerner*, 88 Cal. Rptr. 2d 130, 141, 74 Cal. App. 4th 442, 457 (1999) ("If there is no evidence establishing a manifestation of assent to the 'same thing' by both parties, then there is no mutual consent to contract and no contract formation.") (quotation marks in original); *Wexler v. McLucas*, 121 Cal. Rptr. 453, 455, 48 Cal. App. 3d Supp. 9, 13 (1975) ("If 'co-signer' meant 'surety' to the defendant and 'purchaser' to the plaintiff, there would be no *consensus ad idem*, no meeting of the minds, no mutuality and, therefore, no binding contract.") (quotation marks in original).

[46] *Zissler v. Saville*, 240 Cal. Rptr. 3d 590, 602, 29 Cal. App. 5th 630, 645 (2018) (citing *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (1864)). *See also Wexler*, 121 Cal. Rptr. at 453, 455, 48 Cal. App. 3d Supp. at 9, 13 (citing the same case).

[47] If that were DCRT's contention, it would have profound and troublesome consequences for DCRT's status under the CAISO's transmission planning process. *See, e.g.*, Exh. No. CSO-0003 at 37-38 (provision in CAISO tariff section 24.5.3.5 requiring Approved Project Sponsor to "execute an Approved Project Sponsor Agreement").

[48] *Wilmar v. Got Cars? Auto Grp.*, 2023 Cal. Super. LEXIS 37275, at *5 (June 6, 2023).

consistent with the Commission's handling of situations where there is ambiguity as to the interpretation of specific contract provisions—the Commission relies on extrinsic evidence.[49]

The fact DCRT, having substantially exceeded its cost cap, now claims a disagreement in the interpretation of certain provisions in the DCRT APSA does not mean DCRT and the CAISO lacked a meeting of the minds in executing the DCRT APSA. As discussed herein, the plain language of the DCRT APSA and objective and extrinsic evidence in the record overwhelmingly supports the CAISO's interpretation of the contested provisions of the DCRT APSA.

5. Is This Case's Impact on Other CAISO Competitive Bidding Processes Relevant in These Consolidated Proceedings?

The Commission-mandated intent of the CAISO transmission planning process and the *pro forma* APSA is relevant to the circumstances under which the DCRT APSA was negotiated and therefore supports the proper application of the DCRT APSA in this proceeding. In addition, as this is the first proceeding where the Commission will act on the application of project cost caps under competitive transmission development policies enacted by the Commission, those policies are relevant to the Commission's final order in this proceeding.

6. What Is the Impact of This Case on the Transmission Access Charge and Ratepayers?

Whatever Base TRR amount the Commission authorizes in this proceeding will be passed on to CAISO transmission ratepayers under the TAC. DCRT seeks to recover a total of $553,261,497 of Project costs through a proposed Base TRR of $83,370,655.[50] Under applicable provisions of the DCRT APSA on file with the Commission, DCRT is only permitted to recover a maximum total of $339,582,991 in Project capital costs in its Base TRR in this proceeding.[51]

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49 *El Paso Elec. Co .v. Tucson Elec. Power Co .*, 115 FERC ¶ 61,101, at P 35, *aff'd on reh'g*, 117 FERC ¶ 61,017, at PP 13-14 (2006).

50 Exh. No. DCT-0102 REV2 PUB at 6:8-10.

51 Exh. No. CSO-0601 REV2 PUB at 3:5-6:1.

The difference between these amounts is $213,678,506, which are costs which should not be imposed on CAISO transmission ratepayers.

7. To the Extent the Project's Benefits Should Be Evaluated in These Consolidated Proceedings, What are the Project's Benefits? How, If at All, Should the Project's Benefits Be Evaluated in These Consolidated Proceedings?

As explained in the CAISO's selection report for the Project, the justification for the Project is "solely based on economic benefits to ratepayers, and the [CA]ISO considers commitment to robust binding cost containment measures to be the most effective way in which the [CA]ISO can ensure that a project is developed in an efficient and cost-effective manner."[52] 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.[53] An after-the-fact claim of Project benefits should have no bearing on DCRT's cost recovery in this proceeding.

The CAISO has not undertaken an analysis comparing the benefits of the Project to the costs under the proposed TRR in this proceeding, which is more than double the binding cost cap that was the basis for the CAISO selecting DCRT to build the Project. Barring the cost cap measures DCRT proposed and agreed-to in its competitive solicitation application, which consisted of a capital cost cap of $241,805,391—with no base year adjustment or other inflation adjustment provision beyond 2020 and no cost cap exclusion for regulatory compliance costs—the CAISO would not have selected DCRT.[54] DCRT agreed to a cost cap, and the DCRT APSA contains no provision for revising the agreed-to cost cap based on the amount of benefits the Project ultimately provided. Authorizing above-cap cost recovery for DCRT based on any *ex post* benefits considerations would render agreed-to cost caps meaningless and undermine the

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52 Exh. No. CSO-0007 at 123.
53 *Id.* at 133-35.
54 Exh. No. CSO-0001 REV3 at 28:1-13.

competitive solicitation process as no agreed-to cost containment measures would ever be firm, and it would just lead to more litigation and uncertainty.

C. Does the APSA Allow DCRT to Recover Capital Costs in Excess of the Amount Stated as the Binding Cap in Appendix E?

DCRT's recovery of capital costs is limited by the applicable terms of the DCRT APSA. The cost cap and cost containment provisions are set forth in interrelated parts of Sections 10.1 and 10.1.1 and Appendix E of the DCRT APSA. Section 10.1 states in relevant part that "[t]he Approved Project Sponsor acknowledges and agrees with the cost estimates and the binding cost cap, or other binding cost containment measures, if applicable, set forth in Appendix E."[55] Section 10.1.1 of the DCRT APSA states in relevant part:

> The Approved Project Sponsor agrees that it shall not seek, for recovery through its Transmission Revenue Requirement, higher costs than the maximum costs specified in, or determined in accordance with, any cost cap or other binding cost containment measures as specified in Appendix E except for costs incurred to comply with any additional specifications of the CAISO or Interconnecting PTO beyond the functional requirements for the transmission facility that the CAISO issued for the competitive solicitation. The Approved Project Sponsor shall not seek recovery through its Transmission Revenue Requirement of any incentives or other costs that it has agreed to forego, as specified in Appendix E.[56]

Appendix E of the DCRT APSA contains a table listing "estimated cost components for the Project" by cost category and dollar amount, and states "Approved Project Sponsor may adjust the amounts in each cost category as needed during the term of this Agreement provided the total Project cost does not exceed $258,961,024 in 2020 dollars."[57] The term of the

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55 Exh. No. DCT-0002 at 20. Article 1 of the DCRT APSA (entitled "Definitions") states that, "[w]hen used in this Agreement, a term with initial capitalization shall have the meaning set forth in this Article 1 or the recitals, or if not defined in this Article 1 or the recitals, shall have the meaning specified in the Article in which it is used or in the CAISO Tariff, Appendix A." *Id.* at 6. For example, the term Approved Project Sponsor is defined in Appendix A of the CAISO tariff but not in the DCRT APSA.

56 *Id.* at 20. The exception stated in Section 10.1.1 for "costs incurred to comply with additional specifications of the CAISO or Interconnecting PTO" parallels the exclusion from the cost cap contained in the third bullet point in Appendix E quoted below.

57 *Id.* at 77.

Agreement is ongoing with regard to the issues in this proceeding, which are governed by Section 10.1.1.[58]

Appendix E also states in relevant part that, "[f]or 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":[59]

- "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" ("Bullet #1").[60]

- "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" ("Bullet #2").[61]

- "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" ("Bullet #3").[62]

- "Any FERC approved costs incurred by Approved Project Sponsor to remedy deficiencies in accordance with Section 5.5.3" ("Bullet #4").[63]

- "Any FERC approved costs resulting from delays due to events of Force Majeure, not covered by insurance, or caused by an Interconnecting PTO" ("Bullet #5").[64]

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58 Section 2.2 of the DCRT APSA states "[t]his Agreement shall remain in effect until termination consistent with Section 2.3." *Id.* at 9. Section 2.3.1 of the DCRT APSA states that "[e]xcept for the obligations set forth" in specified sections of the DCRT ASPA, which include Section 10.1.1, "this Agreement shall terminate when the Project has been turned over to CAISO Operational Control." *Id. See also id.* at 20 (stating that "[t]he provisions of this Section 10.1.1 shall survive termination of this Agreement."). As discussed above, Section 10.1.1 prohibits DCRT from seeking, for recovery through its TRR, costs that exceed the cost cap and other binding cost containment measures specified in Appendix E.

59 *Id.* at 77.

60 *Id.*

61 *Id.*

62 *Id.* at 78.

63 *Id.*

64 *Id.*

In addition, Appendix E states that in the event of a Change of Route (as that term is defined in Appendix E), "Project Sponsor will be entitled to request a modification to the Project Cost Cap per Appendix E of this Agreement."[65] Appendix E goes on to state that if a regulatory agency imposes a Change of Route, "the Approved Project Sponsor agrees that as another cost containment measure, the Approved Project Sponsor will bear all costs associated with such change up to $5,000,000 cumulatively and not increase the total Project cost cap."[66] Appendix E of the DCRT APSA sets forth the process for amending the Project cost cap for Change of Route costs in excess of $5 million.

Lastly, Appendix E specifies that "[c]hanges 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."[67]

Other than in the provisions discussed above, the DCRT APSA does not specify any costs as being excluded from the cost cap. In interpreting the DCRT APSA, the Presiding Judge and the Commission should apply the fundamental principle of contract interpretation *expressio unius est exclusio alterius*—the expression of one thing implies the exclusion of others.[68]

DCRT has not complied with the cost cap and cost containment measures in the DCRT APSA. Although Section 10.1 states that DCRT acknowledged and agreed with the cost estimates and binding cost cap and other binding cost containment measures in Appendix E,

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65 *Id.*

66 *Id.* The table in Appendix E that lists estimated cost components for the Project by cost category and dollar amount includes this $5,000,000 Change of Route cost threshold under the "Cost Containment" category as a reduction of the cost cap. *Id.* at 77. "Minor repositioning of facilities within the Route [as that term is defined in Appendix E] will not count toward the $5,000,000 threshold and will not increase the Project cost cap." *Id.* at 78.

67 *Id.* at 79.

68 *See, e.g.*, *El Paso Nat. Gas Co., LLC v. City of Las Cruces*, 148 FERC ¶ 61,043, at P 50 (2014); *Cleveland Elec. Illuminating Co.*, 82 FERC ¶ 61,254, at 62,017 n.9 (1998); *White v. W. Title Ins. Co.*, 710 P.2d 309, 314 n.4, 40 Cal. 3d 870, 881 n.4 (1985); *Ronay Family Ltd. P'ship v. Tweed*, 157 Cal. Rptr. 3d 680, 688, 216 Cal. App. 4th 830, 842 (2013).

DCRT has not complied with the provision in Section 10.1.1 stating it would not seek recovery through its TRR of higher costs than the maximum costs specified in, or determined in accordance with, the cost cap and cost containment measures specified in Appendix E. The total Project costs DCRT claims are recoverable through its Base TRR in this proceeding total $553,261,497,[69] which is far above the cost cap ($258,961,024) and cost cap exclusions to which DCRT is entitled. Most of these excess costs do not fall within the specified exclusions to the cost cap and therefore are not recoverable in DCRT's rates. The CAISO has not agreed, and does not agree, to allow DCRT to recover any of those excess costs.

Appendix E of the DCRT APSA states that "Approved Project Sponsor may adjust the amounts in each cost category [*i.e.*, each cost category listed in the immediately preceding table of estimated cost components] as needed during the term of this Agreement provided the total Project cost does not exceed $258,961,024 in 2020 dollars."[70] Thus, the current cost cap of $258,961,024 in 2020 dollars is a single figure that applies to all the cost categories listed in the table in Appendix E. The explicit inclusion of certain components in the table of the Appendix E cost cap, such as financing costs, and management costs, and the fact those components are not included in any cost cap exclusions or exceptions, are relevant to determining the scope of the cost cap exclusions and exceptions under the DCRT APSA.

The maximum Project costs eligible for recovery through DCRT's Base TRR in this case total $339,582,991, which is the sum of the cost components eligible for recovery in DCRT's Base TRR as discussed below in this Section II.C of the CAISO's Initial Brief.[71] The total consists of the sum of: (i) $258,961,024 eligible for recovery under the currently effective cost

69 Exh. No. DCT-0102 REV2 PUB at 6:8-10.
70 Exh. No. DCT-0002 at 77.
71 This total of Project costs eligible for recovery through DCRT's Base TRR is also listed in Exhibit No. CSO-0601 REV2 PUB at 3:5-6:1.

cap set forth in the DCRT APSA, (ii) a maximum of $4,052,089 in costs resulting from delays due to the COVID-19 Force Majeure event ($3,678,723 in management run-rate costs ($408,747 per month multiplied by the COVID-19 delay to the Project schedule of nine months) and $373,366 in AFUDC costs, and (iii) $76,569,878 in interconnection costs excluded from the cost cap that are eligible for recovery.

The CAISO has met its burden of persuasion and burden of proof to show DCRT's proposed Base TRR is unjust and unreasonable due to DCRT's failure to comply with the cost cap and cost containment measures within the DCRT APSA. The CAISO has also carried its burden of production, and DCRT has failed to rebut the CAISO's evidentiary showing or make out an affirmative defense that negates the CAISO's evidentiary showing.

1. Does Appendix E Require the Commission to Adjust the Cost Cap Which Is Stated in 2020 Dollars or DCRT's Actual Costs in the Base TRR Calculation to Reflect Inflation Between 2020 and 2024? If So, How?

DCRT argues it is entitled to a $101,355,574 "base year adjustment" to escalate the cost cap in the DCRT APSA from 2020 dollars to 2024 dollars to reflect inflation from 2020 to 2024 based on the Handy-Whitman index.[72] The Presiding Judge and the Commission should reject this base year adjustment. Appendix E of the DCRT APSA does not permit or require the Commission to adjust the cost cap in the DCRT APSA for inflation after 2020. Appendix E states that DCRT "may adjust the amounts in each cost category as needed during the term of this Agreement provided the total Project cost does not exceed $258,961,024 in 2020 dollars."[73] There is no provision in the DCRT APSA that provides for a base year adjustment or inflation (or deflation) adjustment, unlike other APSAs executed months before the DCRT APSA and

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[72] Exh. No. CSO-0601 REV2 PUB at 4:1 (citing Exh. No. DCT-0007 REV2 at 9, Table 1); Exh. No. DCT-0022 REV at 51:2-13.

[73] Exh. No. DCT-0002 at 77.

which included explicit inflation adjustments or expressly stated that the cost cap was in "constant dollars."[74] The DCRT APSA cost cap contains no inflation adjustment clause, makes no reference to the terms base year or base year adjustment, contains no inflation measure or index that would be used to calculate any inflation adjustment, provides no method by which any adjustment would be made or under what circumstances it would be made, and makes no mention of the period of time to which any adjustment would apply or what events would trigger an automatic inflation adjustment. Nor does the DCRT APSA contain any language suggesting that the cost cap will be updated/escalated based on changes to the in-service date. Moreover, as explained below, DCRT's winning bid for the project expressly stated the cost cap was in current year/nominal year dollars, which are not adjusted for inflation. The bid was not stated in constant dollars.

As Dr. Davis, a former economics and business finance professor, testified, three elements are necessary for any base year or inflation adjustment to be operable: (1) an inflation adjustment provision/mechanism, (2) a specified inflation measure/index or calculation methodology,[75] and (3) the relevant comparison period.[76] The threshold and critical requirement, however, is that an agreement include language authorizing the inflation adjustment over time; merely referring to a dollar year only identities the pricing context of the amount but does not by itself establish a contractual mechanism for future adjustment and does not constitute an indexation.[77] Absent such language, no inflation adjustment exists, nor can it be implied.[78]

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[74] *See* Exh. No. CDN-0025 at 74 n.2 (Suncrest APSA); Exh. No. CDN-0025 at 124 n.3 (Estrella APSA); Exh. No. CDN-0019 REV2 PRIV-HC at 833.

[75] As CAISO witness Dr. Davis testified, both the Suncrest and Estrella APSAs "explicitly authorize an adjustment for the impact of inflation" and thus include a calculation methodology, even though those APSAs do not include stated inflation indices. *See* Tr. 3033:12-20.

[76] Exh. No. CSO-0801 PUB at 23:12-26:17.

[77] *Id.* at 21:14-20, 23:11-21, 24:18-25:3**.**

[78] *Id.* at 25:3-4.

Once an agreement provides for an inflation adjustment, the other two elements are necessary for the inflation mechanism to be operable.[79] The DCRT APSA includes none of these elements. All three of these absent provisions would have to be read into and essentially added to the DCRT APSA to accommodate DCRT's position and escalate the cost cap to 2024 dollars. The DCRT APSA does not allow or require a base year adjustment or inflation adjustment or contain a mechanism of any kind that would allow escalation of the stated cost cap of "$258.961,024 in 2020 dollars" to a higher cost cap in 2024 dollars as DCRT proposes.[80]

Evaluating whether a base year adjustment or inflation adjustment exists requires distinguishing between current or nominal dollars and constant or real dollars; mere year reference alone does not constitute indexation.[81] Standing alone, a year reference does not establish a mechanism for future adjustment; it simply defines the pricing context of the stated amount.[82] A contract must specify an inflation adjustment; a stated dollar amount is fixed unless the agreement includes language authorizing its adjustment over time.[83] Current/nominal dollars are not adjusted for inflation, while constant dollars are adjusted for inflation from a specified base year, index, and period.[84]

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79 *Id.* at 25:6-11.

80 Exh. No. CSO-0001 REV3 at 8 (row entitled "Base year adjustment and inflation adjustment"), 9:8-12. DCRT argues for an "Adjusted APSA Cost Cap" of $477,553,581. Exh. No. DCT-0102 REV2 PUB at 5 (Table 1, row 5).

81 Exh. No. CSO-0801 PUB at 21:14-20.

82 *Id.* at 23:8-10.

83 *Id.* at 23:14-16.

84 *Id.* at 22:12-18; Exh. No. CSO-0804 at 4, 6. *See also Gilkyson v. Disney Enters., Inc.*, 2019 Cal. Super. LEXIS 94295, at *25 (June 21, 2019) (finding that "[t]he court considers that the dollars will be current dollars, not subject to advance interest or discounting"); *Salgado v. County of L.A.*, 967 P.2d 585, 594, 19 Cal. 4th 629, 645-46 (1998) ("The record as a whole suggests that plaintiff is correct: the jury calculated the value of plaintiff's future noneconomic losses in current dollars—i.e., what he was entitled to receive from the County in an immediate lump-sum payment—not in future dollars."); *San Luis Obispo Bay Props., Inc. v. Pac. Gas & Elec. Co.*, 104 Cal. Rptr. 733, 738 n.2, 28 Cal. App. 3d 556, 562 n.2 (1972) ("If we assume that the rate of inflation over the three years was 10 percent for the entire period, the Goode appraisal would represent approximately a 23 percent decrease in value expressed in constant dollars.").

The Commission recognizes the important difference between constant dollars and current/nominal dollars. For example, in a proceeding on two alternate proposals jointly submitted by ISO-NE and the NEPOOL Participants Committee to revise the ISO-NE tariff to update the ORTPs used in the administration of the ISO-NE Forward Capacity Market, ISO-NE pointed out that "NEPOOL's model completes its cash flow analysis in nominal terms (*i.e.*, in current, not constant, dollar terms), but the [then-effective ISO-NE] Tariff requires that the ORTP calculation be performed using real (*i.e.,* constant) dollar cash flows."[85] The referenced ISO-NE tariff provision specified that the ORTP "model looks at 20 years of real-dollar cash flows discounted at a rate (Weighted Average Cost of Capital) consistent with that expected of a project whose output is under contract."[86] The Commission found in relevant part that "flawed assumptions" in NEPOOL's proposal "further undermine NEPOOL's methodological approach and render it unjust and unreasonable," including that "NEPOOL's analysis appears to be conducted in nominal dollars, when the Tariff requires the ORTP calculation to be performed in real dollars."[87]

The DCRT APSA states in relevant part that DCRT "may adjust the amounts in each cost category . . . provided the total Project cost does not exceed $258,961,024 in 2020 dollars"—*i.e.*, DCRT and the CAISO agreed to specify the Project cost cap in 2020 dollars without further adjustment.[88] The Presiding Judge and the Commission have no legal basis *sua sponte* to insert an adjustment provision into the DCRT APSA, *e.g.*, an inflation adjustment to some other year's dollars, such as 2024 dollars as DCRT argues, where no such adjustment provision is expressly

85 *ISO New Eng. Inc.*, 175 FERC ¶ 61,195, at P 71 (2021).
86 *Id.* at P 56 (quoting ISO-NE Tariff § III.A.21.2(b) and -(c)).
87 *Id.* at PP 79-80.
88 Exh. No. DCT-0002 at 77. The original version of the DCRT APSA included the same provision but with a specified cost cap of $241,805,391. *See id.* at 49.

included in the DCRT APSA. This situation is similar to the one presented in *Portland Natural Gas Transmission System*, where the Commission contrasted its finding in an earlier, separate proceeding that "the pipeline could have an inflation adjustment to [its] costs because such an adjustment was part of the original risk sharing agreement which led to the construction of the pipeline," with the situation at hand where "[t]here [wa]s no comparable risk sharing agreement between the pipeline and the participants that was relied on by the parties in deciding to construct Portland's system."[89]

The same principle applies under California law. For example, in one proceeding, the California court found that "[t]he fact that the Agreement is silent as to the time value of money concept indicates that there was no intention to include such a component in the IRR [projected internal rate of return] calculation. This presumed lack of intention is bolstered by paragraph 8.6 of the Agreement, which states that the writing is the full agreement of the parties."[90] Like the agreement at issue in that California proceeding, the DCRT APSA is silent as to the time value of money concept—solely listing the cost cap in 2020 dollars—and is expressly the full agreement of the parties.[91]

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[89] *Portland Nat. Gas. Transmission Sys.*, 134 FERC ¶ 61,129, at P 66-67 (2011) (contrasting situation at hand with situation *in Kern River Gas Transmission Co.*, Opinion No. 486, 117 FERC ¶ 61,077, at PP 98-99 (2006)). *See also Portland Nat. Gas Transmission Sys.*, 134 FERC ¶ 61,129, at P 67 ("Accordingly, the reason for allowing Kern River to attempt to justify its inflation adjustment does not exist in this proceeding, and Opinion No. 486 is inapplicable here.").

[90] *Laprairie Grp. Contractors Int'l v. Ce Casecnan*, 2008 Cal. Super. LEXIS 2474, at *7-8 (Feb. 4, 2008). *See also Rathbun v. City of Salinas*, 106 Cal. Rptr. 154, 158, 30 Cal. App. 3d 199, 204 (1973) ("There is no escalation clause, no provision for renegotiation, and apparently no account has been taken of progressive inflation."); *Squire v. City & Cty. of S.F.*, 91 Cal. Rptr. 347, 351, 12 Cal. App. 3d 974, 981 (1970) (finding in relevant part that "[t]he provision of the charter section . . . does not say the 'maximum rate of pay' provided in each such wage schedule as increased to comply with provisions for cost-of-living adjustments," and thus the referenced section of the charter "makes no provision for quarterly cost-of-living adjustments based on the movement of a consumer price index").

[91] Section 25.4 of the DCRT APSA states in relevant part, "This Agreement, including all Appendices and Schedules attached hereto, constitutes the entire agreement between the Parties with reference to the subject matter hereof." Exh. No. DCT-0002 at 0034.

More generally, well-established principles of contract interpretation require the Commission and courts to be guided by provisions of an agreement clearly expressed by the parties and not to read provisions into the agreement that are not found therein.[92] The Presiding Judge and the Commission should apply those same principles of contract interpretation to find the absence of an inflation adjustment provision in the DCRT APSA to mean the APSA contains no such provision.

Appendix E contains no base year or inflation adjustment provision nor a specific cost cap exclusion that permits, let alone requires, a base year adjustment to the cost cap for inflation if the Project were completed after 2020.[93] The Commission expects parties to clearly express their intentions and not to require the Commission subsequently to read into their agreements language they did not put there.[94] Imputing a base year adjustment provision or inflation adjustment clause into the DCRT APSA where none exists would violate this fundamental tenet and is unsupported by any extrinsic evidence. It would essentially allow any Approved Project Sponsor in a competitive solicitation process to claim, after the CAISO has already selected it as the Approved Project Sponsor, that its cost cap included an unstated, implicit cost cap exclusion or some other escalation provision that was nowhere in its executed contract or bid. This would

[92] *See Blue Ridge Power Agency*, 181 FERC ¶ 61,048, at P 33 n.57 (2022) ("Courts may not read into a contract a covenant that doesn't follow inexorably from its terms. Nor may they rewrite a contract to include terms that a party, with the benefit of hindsight, would have or should have included.") (quoting *In re GenOn Mid-Atl. Dev., L.L.C.*, 42 F.4th 523, 546 (5th Cir. 2022)); *Mont.-Dakota Utils. Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 190 FERC ¶ 61,168, at P 43 (2025); *Power Auth. of the State of N.Y. v. Long Island Lighting Co.*, 60 FERC ¶ 61,069, at 61,234 (1992); *Robles v. City of Ontario*, 327 Cal. Rptr. 3d 33, 39, 106 Cal. App. 5th 574, 582 (2024); *KB Salt Lake III, LLC v. Fitness Int'l, LLC*, 313 Cal. Rptr. 3d 820, 835-36, 95 Cal. App. 5th 1032, 1050-51, (2023); *Hambrecht & Quist Venture Partners v. Am. Med. Int'l, Inc.*, 46 Cal. Rptr. 2d 33, 39, , 38 Cal. App. 4th 1532, 1542 (1995) ("[W]e will not read into the agreement's unqualified language a restriction that the parties could easily have inserted but failed to include."); *Squire*, 91 Cal. Rptr. at 347, 351, 12 Cal. App. 3d at 974, 981 ("The provision of the charter section . . . *does* say the 'maximum rate of pay provided in each such wage schedule,' and we agree with the trial court that these words constitute a clearly expressed intention of the charter.") (emphasis in original).

[93] Exh. No. CSO-0001 REV3 at 49:10-20.

[94] *Mont.-Dakota Utils. Co.*, 190 FERC ¶ 61,168, at P 43; *Power Auth. of the State of N.Y.*, 60 FERC ¶ 61,069, at 61,234.

undermine the integrity of the competitive solicitation process and contravene a basis for the CAISO selecting the Approved Project Sponsor in the first instance.

Additional evidence confirms the express meaning of the cost cap in Appendix E. DCRT witness Reed claims repeatedly that the reference to 2020 dollars in the DCRT APSA means the cap was in "constant" 2020 dollars,[95] but there is not one iota of evidence to support his claim. Nowhere does the DCRT APSA or DCRT's application in the underlying competitive solicitation process state that the cost cap is in "constant" 2020 dollars. Indeed, witness Reed acknowledged that DCRT's application did not use the phrase "constant 2020 dollars" but instead referred only to "simple, 2020 dollars."[96] To the contrary, the overwhelming weight of the evidence clearly and consistently shows that the cost cap in the DCRT bid was expressly stated in, and intended to be in, current/nominal dollars and thus was not subject to any further inflation adjustment beyond 2020.

It is important to identify the origins of the reference to "2020 dollars" in the DCRT APSA. Although DCRT submitted its competitive solicitation proposal in 2014 and updated it in April 2015, DCRT set the dollar level of the cost cap it committed to in a future year's dollars—2020 dollars—by incorporating a 2.5 percent inflation rate from 2015 to 2020.[97] The reference to "2020 dollars" in Appendix E of the DCRT APSA is taken from DCRT's competitive solicitation bid and clarification submission in the competitive solicitation process. Thus, the "2020 dollars" terminology did not originate with the CAISO; it originated with DCRT. Any ambiguity in the phrase "2020 dollars" should therefore be construed against DCRT.[98]

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95 Exh. No. DCT-0125 REV2 PUB at 22:14-16, 24:5-8, 27:16-18, 29:7-11, 33:13-15, 35:22-26, 36:5-8.

96 Tr. 624:3-625:4.

97 Exh. No. CSO-0001 REV3 at 26:8-15, 50:9-21, 53:1-11; Exh. No. CSO-0006 REV2 PUB at 140, 143-44; Exh. No. CSO-0010 REV.

98 *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,216, at P 37 (2015) ("However, as the drafter of the Attachments, any inconsistencies or ambiguities must be construed against FirstEnergy.") (citing Commission precedent) (internal citation omitted); *Breathe S. Cal. v. Am. Lung Ass'n*, 305 Cal. Rptr. 3d 522, 530, 88 Cal. App.

The reference to 2020 dollars makes clear that instead of taking the simple and straightforward action to set its cost cap in constant 2015 dollars—which would have subjected the cost cap to future escalation for inflation—DCRT voluntarily calculated and set its cost cap in current/nominal 2020 dollars.[99] As Commission Trial Staff witness Dr. Norman stated:

> They [*i.e.*, DCRT] developed the cap by escalating the 2015 estimate that they were required to provide into a nominal 2020-dollar number and they placed that in as their cap in the — in the bid.
>
> . . . .
>
> But the bid documents do explain where a 2020 dollar came from, and it came from that requirement they provide a bid in 2015 dollars.
>
> . . . .
>
> There is the language in the Q&As as part of the bid selection process where they [*i.e.*, DCRT] said that they were absorbing costs of delay, and, to me, that suggests an explicit acknowledgement that inflation past 2020 won't be a part of this, that the prospective inflation estimate used from 2015 to 2020 is the inflation that will be there.[100]

Nothing in the DCRT competitive solicitation application or supporting documents provided to the CAISO expressly stated, or even suggested, that DCRT was proposing—or otherwise would be entitled to—any type of inflation adjustment or base year adjustment beyond the stated 2020 dollar cost cap amount if the Project in-service date was delayed.[101] Indeed, the statements in its application and elsewhere, clearly and compellingly demonstrated that DCRT set its cost cap in current/nominal dollars—not constant dollars—and no inflation adjustment

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5th 1172, 1182 (2023) ("It is "a 'well established rule of construction' that any ambiguities must be construed against" the drafter, where the uncertainty cannot be resolved by other rules of contract interpretation.") (quoting *Sandquist v. Lebo Automotive, Inc.*, 205 Cal. Rptr. 3d 359, 376, 1 Cal.5th 233, 248 (2016)) (internal quotation marks omitted); Cal. Civ. Code Tit. 3 (Interpretation of Contracts), § 1654 ("In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.").

[99] Tr. 3033:24-3034:22, 3092:6-3093:21, 3166:23-3167:6, 3170:2-5, 3204:16-3405:2, 3207:4-3208:8.

[100] Tr. 8662:2-5, 8667:8-10, 8673:3-8.

[101] Exh. No. CSO-0001 REV3 at 50:21-51:2, 51:10-52:26.

beyond 2020 was contemplated. In four places in its application, DCRT clearly stated it committed to cap its "Transmission Gross Plant" at $241,805,391.[102] There were no qualifications to this fixed cost cap amount. Clarifications of DCRT's proposal provided to the CAISO during the CAISO's comparative evaluation process confirmed that DCRT was proposing a binding bid cap with only two cost cap exclusions, neither of which was an inflation adjustment or base year adjustment for delays beyond 2020.[103] DCRT's application expressly stated in two places that the $241,805,391 cost cap was reflected in DCRT's annual TRR set forth in its response in F-16 of its application.[104] DCRT's response to F-16 in its bid expressly states that all the dollars in the annual revenue requirement in Table F-16-1—which includes the $241,805,391 cost cap number (as rounded up)—are in "'**nominal year' dollars**."[105] DCRT's application also expressly stated that its cost cap was in "**current** 2020 dollars,"[106] which are the same as nominal dollars, and neither are constant dollars. Thus, DCRT's claim that its cost cap was in "constant 2020 dollars" is unavailing and belied by its own statements in its application.

Other statements in DCRT's application support the conclusion that the $241,805,391 cost cap, the basis for the current cost cap, was not subject to a further inflation adjustment. Regarding its cost cap, DCRT made clear that "we have provided a binding agreement not to exceed certain investment amount. Cost over runs may occur but Caiso and rates payers will be cover [sic] by this binding commitment."[107] Further, in response to the CAISO's statement that

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102 *See, e.g.*, Exh. No. CSO-0006 REV2 PUB at 108, 109, 140, 328.

103 Exh. No. CSO-0001 REV3 at 53:1-54:2; Exh. No. CSO-0006 REV2 PUB at 107; Exh. No. CSO-0010 REV; Exh. No. CSO-0011 REV; Exh. No. CSO-0012 PRIV at 12.

104 Exh. No. CSO-0006 REV2 PUB at 108, 109.

105 *Id.* at 140 (emphasis added) (quotation marks in original); *see also id.* at 146 (same). DCRT further notes in its response to F-16 that its Transmission Gross Plant in Table F-16-1 is in 2020 dollars and includes 2.5 percent inflation from 2015-20 and DCRT "is proposing this as a binding cost cap." Ex. No. CSO-0006 REV2 PUB at 143-45. Again the dollar amounts in F-16-1 were stated in "nominal year dollars."

106 *Id.* at 109 (emphasis added).

107 *Id.* at 103.

"the ISO understands that any cost overruns and/or project delays will be absorbed by the Project Sponsor," DCRT stated that the "inclusion of the proposed total project cost cap, the contingency plans, the cost containment measures, and the parent company guarantees allow DCR Transmission to confirm that any cost overrun and project delays would be absorbed by the Project Sponsor."[108] In two places in its application, DCRT stated it had entered into an EPC contract with Abengoa T&I—an affiliate of DCRT's co-owner Abengoa—for "a fixed amount of $173,753,690.00" and that "[a]ny cost overruns in the EPC, at all, will be contractor's responsibility and will not be transferred to DCRT."[109] This $173,753,690 amount is the same amount reflected in the overall $241,805,391 cost cap in DCRT's response to F-16 and in Appendix E of the DCRT APSA.[110]

Given DCRT's representations that the majority of the $241,805,391 cost cap was under fixed price contracts whereby the contractor—not DCRT or CAISO transmission ratepayers—would bear the risk of cost overruns, it is difficult to fathom how the entire cost cap amount of $241,805,391 was stated in constant dollars that would automatically be adjusted for inflation beyond 2020 in the event of project delay. DCRT should be held to its express representations to the CAISO in its bid and not be permitted to now claim that these amounts were not fixed and were subject to some unstated base year adjustment. The lack of an inflation adjustment clause in the fixed-price contracts is dispositive.[111] Also telling is that DCRT's cost cap expressly

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108 *Id.* at 133-134.

109 *Id.* at 55; *see also id.* at 134 (reading substantially the same). DCRT then stated that because "most of the expected total cost of the project is related to the construction of the line, we have removed the most significant cost overrun risk from DCRT." *Id.* at 55; *see also id.* at 134 (reading substantially the same). DCRT also stated in its application that its contracts with outside firms for contracting and siting were "fixed price contract[s]." *Id.* at 19.

110 *See* Exh. No. DCT-0002 at 49; Exh. No. CSO-0006 REV2 PUB at 143-45.

111 *See, e.g.*, *RMR Equip. Rental, Inc. v. Residential Fund 1347, LLC*, 280 Cal. Rptr. 3d 6, 9, 65 Cal. App. 5th 383, 388 (2021) ("By agreeing to a fixed price with no escalation formula, Gilmour knew he was taking risks. If RMR's wage, gasoline, or insurance costs later rose, the contract did not allow RMR to adjust the fixed price."); *Univ. Casework Sys., Inc. v. Superior Court*, 115 Cal. Rptr. 836, 839, 41 Cal. App. 3d 263, 266 (1974) ("A party to

incorporated a 2.5 percent annual inflation adjustment from 2015 to 2020 but included no inflation adjustment post-2020; yet, DCRT's discussion of O&M costs in its application expressly included separate inflation adjustments (and inflation measures) for pre-2020 and post-2020.[112] Had DCRT intended its cost cap to be subject to an inflation adjustment post-2020, it could have expressly mentioned such an adjustment just like it mentioned the post-2020 inflation adjustment for O&M costs. Based on DCRT's representations in its application, the CAISO included no inflation adjustment or base year adjustment mechanism in the DCRT APSA.[113]

The CAISO based its selection of DCRT as the Approved Project Sponsor on these representations, *i.e.*, that DCRT's proposal only had two cost cap exceptions—for change in law and change of route—and did not include other cost cap exceptions or any provision for escalating the cost cap after 2020 due to project delays and inflation.[114] The Project Sponsor selection presentation by CAISO staff to CAISO officers on June 30, 2015 does not show DCRT's cost cap as being subject to any inflation escalation; although, it showed the cost cap of another Project Sponsor, TransCanyon/SCE, as being subject to an inflation adjustment.[115] Likewise, the CAISO's Project Sponsor selection report indicated that DCRT only had two cost cap exclusions—for change in law and change of route.[116] The selection report, which was public and available for review by DCRT, also noted that the cost cap in the TransCanyon/SCE joint collaboration proposal was subject to an inflation adjustment; it did not indicate that DCRT's cost cap was subject to any type of inflation adjustment.[117] DCRT witness Amirali

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a contract who fully performs his obligation under the contract may recover the value agreed to in the contract; the party may not recover above the contract price.") (citing California precedent).

112 Exh. No. CSO-0006 REV2 PUB at 146.

113 Exh. No. CSO-0001 REV3 at 49:10-51:9; Exh. No. CSO-0801 PUB at 15:16-19, 32:12-21.

114 Exh. No. CSO-0001 REV3 at 54:3-9.

115 *Id.* at 54:9-14; Exh. No. CSO-0012 PRIV at 12.

116 Exh. No. CSO-0001 REV3 at 54:15-17; Exh. No. CSO-0007 at 105, 117-18, 120.

117 Exh. No. CSO-0001 REV3 at 54:17-21; Exh. No. CSO-0007 at 105-07, 113.

confirmed that DCRT did not contest the characterization in the project selection report that the DCRT bid included only two cost cap exclusions—neither of which was an inflation adjustment.[118] The CAISO certainly did not select DCRT on the basis its cost cap was in "constant" 2020 dollars as DCRT never stated anywhere in its application (or clarifications to its application) that the cost cap was in "constant" 2020 dollars. To the contrary, DCRT expressly stated the cost cap was in current/nominal dollars. On the other hand, three competing Project Sponsor applications expressly stated that their cost caps were in constant 2015 dollars.[119] As Dr, Davis testified, had DCRT stated its cost cap was in "constant 2015 dollars" it would have been entitled to an inflation adjustment beyond 2020.[120] DCRT did not do that, however, and instead it chose to calculate and set a cost cap in current/nominal 2020 dollars. If the DCRT APSA and DCRT's application intended the cost cap to be set at the applicable year the Project was placed in service, they would have stated as such—they did not.[121]

After the CAISO selected DCRT as the Approved Project Sponsor and before execution of the initial DCRT APSA, DCRT made representations to the CAISO consistent with its application. DCRT's first quarterly report to the CAISO dated November 7, 2015—approximately one month before execution of the DCRT APSA—stated the total Capital investment budget for the Project was $241,805,380, *i.e.*, the cost cap amount in DCRT's application.[122] This was a specified amount with no qualifications. The quarterly report did not state the amount was in constant 2020 dollars, 2020 dollars, or subject to any type of inflation adjustment. DCRT also stated the EPC contract had been negotiated under a fixed price

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118 Tr. 6840:16-25.

119 Exh. No. CSO-0013 PRIV at 88; Exh. No. CSO-0014 PRIV at 76; Exh. No. CSO-0015 PRIV at 131.

120 Tr. 3092:6-23, 3204:18-3205:2, 3205:20-22, 3252:18-20.

121 Exh. No. CSO-0001 REV3 at 51:7-9.

122 Exh. No. CSO-0601 REV2 PUB at 23:21-24:3; Exh. No. DCT-0015 at 22-23.

structure in accordance with the EPC budget specified in the quarterly report, just as DCRT represented in its application.[123]

Moreover, none of the three amendments to the original DCRT APSA—amendments executed both before and after 2020 (in 2018, 2022, and 2024)— included a base year adjustment to the cost cap or any inflation adjustment to account for the Project delays even though the Project was delayed beyond May 2020. The DCRT APSA was first amended in August 24, 2018, and it extended the in-service date of the Project from May 1, 2020 to December 31, 2021.[124] Given the delay, this would have been the perfect time for DCRT to advise the CAISO that the cost cap required an upward adjustment for inflation due to the more than one-and-one-half year delay in the Project. It did not. In its June and July 2019 presentations to the CAISO, DCRT detailed numerous types of cost increases and delays the Project was facing.[125] Nowhere in those presentations did DCRT state that it was entitled to a base year adjustment or inflation adjustment to the cost cap to account for cost increases and project delays. To the contrary, DCRT's presentations expressly stated that the APSA cost cap was $242 million, a specified amount with no reference that it was subject to any base year adjustment or inflation adjustment.[126] The DCRT APSA was amended for a second time on March 7, 2022, and it extended the in-service date of the Project to April 15, 2024.[127] Given increasing Project costs and the more than two-year delay in connection with the second amendment to the DCRT APSA, this would have been an obvious time for DCRT to advise the CAISO that the cost cap required an upward adjustment for inflation due to existence of the

123 *Id.* at 24.
124 Exh. No. DCT-0002 at 56-69.
125 Exh. No. DCT-0018 REV2 PUB at 10-39.
126 *Id.* at 18, 24.
127 Ex. No. DCT-0002 at 70-80.

(unstated) base year adjustment. Again, it did not. The DCRT APSA was amended for a third time on March 13, 2024, and it extended the Project in-service date to June 30, 2024.[128] The reference to the cost cap being in 2020 dollars in Appendix E of the DCRT APSA was not changed in these amendments.[129] DCRT has conceded there are no documents or communications provided to the CAISO or conversations between DCRT and the CAISO regarding a base year adjustment to the cost cap.[130] DCRT never mentioned the base year adjustment to the CAISO until it was about to submit its rate case filing in this proceeding in 2023.[131]

DCRT's attempts now to claim the cost cap in DCRT's competitive solicitation bid was in "constant 2020 dollars" are unavailing. Instead, DCRT's bid and the DCRT APSA provisions were both stated in "nominal year dollars" and other equivalent terms—*i.e.*, values expressed in the prices of the year in which the costs are stated without adjustment to a different base year.[132] The Commission has addressed the importance of adhering to specified dollar frameworks in tariffs and agreements.[133] DCRT now wants to deviate drastically from the representations and dollar frameworks specified in its bid and in the DCRT APSA as originally written and subsequently amended, and relied upon by the CAISO.

Nor is there any basis for DCRT's proposal to use the Handy-Whitman Index to escalate the cost cap beyond 2020 dollars. Neither the DCRT APSA nor DCRT's competitive solicitation application mention the Handy-Whitman Index. The only inflation index DCRT used to calculate its binding cost cap in its competitive solicitation application was 2.5 percent annually

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[128] *Id.* at 81-87.
[129] Exh. No. CSO-0001 REV3 at 59:21-63:21; Exh. No. CSO-0801 PUB at 16:8-18:4.
[130] Exh. No. CSO-0001 REV3 at 62:16-20.
[131] *Id.* at 63:4-7; Exh. No. CSO-0601 REV2 PUB at 23:6-10, 26:11-14, 34:12-16, 39:16-18, 41:3-4, 10-14.
[132] *Id.* at 6:3-9:5; Exh. No. CSO-0801 PUB at 6:16-21, 18:6-32:10.
[133] *Id.* at 24:1-17 (citing *ISO New Eng. Inc.*, 175 FERC ¶ 61,195; *Portland Nat. Gas. Transmission Sys.*, 134 FERC ¶ 61,129).

(and only for 2015-2020). Using the Handy-Whitman Index is not mentioned in the DCRT APSA and was never mentioned in DCRT's application. Allowing its use in this proceeding would be wholly divorced from any representations DCRT made in the competitive solicitation and from what would have been considered by the CAISO, especially given DCRT's application did not provide for any inflation adjustment after 2020. Competing applications in the competitive solicitation that did provide for an inflation adjustment utilized a CPI to measure inflation, not the Handy-Whitman Index.[134] There are two narrow instances in connection with the generator interconnection process where the CAISO uses the Handy-Whitman Index, but both are unrelated to competitive solicitations in the CAISO's transmission planning process, such as the competitive solicitation to construct the Project.[135] In other tariff filings, the CAISO has used the CPI for escalation purposes, and other bidders in the competitive solicitation process also used the CPI for escalation purposes.[136] DCRT itself uses a 2.1 percent inflation adjustment factor for the generator interconnection process.[137]

Assuming solely for the sake of argument the Presiding Judge or the Commission finds an inflation adjustment should be applied to the DCRT cost cap, the only measure of cost escalation for any inflation adjustment that would be justified is 2.5 percent, *i.e.*, the only inflation measure DCRT used to inflate capital costs in its competitive solicitation application. Using any other measure of inflation would have no basis in DCRT's application or in the information the CAISO relied on in selecting DCRT as the Approved Project Sponsor. In its Project Sponsor proposal and in its supporting clarifications to the CAISO, DCRT stated it was

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[134] Exh. No. CSO-0001 REV3 at 69:1-14.

[135] *Id.* at 70:5-71:8; Exh. No. CSO-0601 REV2 PUB at 31:21-32:17.

[136] Exh. No. CSO-0001 REV3 at 69:12-70:4; Exh. No. CSO-0601 REV2 PUB at 32:18-21.

[137] Exh. No. CSO-0001 REV3 at 72:15-73:11; Exh. No. CSO-0025; Exh. No. CSO-0601 REV2 PUB at 32:22-33:17.

applying an inflation rate of 2.5 percent annually from 2015 to 2020 to arrive at its cost cap number.[138] However, again assuming solely for the sake of argument the Presiding Judge or the Commission finds some inflation adjustment should be applied to the DCRT cost cap, basing any such adjustment on 2024 dollars would be unjust and unreasonable. DCRT's amended EPC Contract was executed in mid-2022, and by DCRT's own admission it was a fixed-price contract.[139] Further, significant actual expenditures occurred before October 31, 2022 (and even more by December 31, 2023).[140] By definition, costs fixed by contract or already incurred in a prior year are not subject to further inflation.[141] It would be an unjustifiable windfall under the circumstances to allow escalation of such costs beyond the date of the amended, fixed-price EPC Contract, especially in circumstances such as those where DCRT is seeking well after-the-fact inflation adjustment even though neither the DCRT APSA nor DCRT's application contained an express inflation adjustment provision.

2. Does the APSA Allow DCRT to Recover Interconnection-Related Costs in Excess of the Cap, and If So, How Much of Such Interconnection-Related Costs Does the APSA Allow DCRT to Recover over the Cap in this Proceeding?

Under Bullet #1 in Appendix E of the DCRT APSA, interconnection costs are excluded from the cost cap only if they are "related to the Transmission Interconnection Facilities, or the Transmission Interconnection Service."[142] Such interconnection costs that are excluded from the

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[138] Exh. No. CSO-0001 REV3 at 71:9-72:14; Exh. No. CSO-0601 REV2 PUB at 41:10-18.

[139] Exh. No. CSO-0001 REV3 at 73:12-74:9; Exh. No. CSO-0601 REV2 PUB at 36:17-37:22.

[140] Exh. No. CSO-0001 REV3 at 74:10-75:2; Exh. No. CSO-0601 REV2 PUB at 37:22-38:3.

[141] *See, e.g.*, *RMR Equip. Rental, Inc.*, 280 Cal. Rptr. 3d at 9, 65 Cal. App. 5th at 388 ("By agreeing to a fixed price with no escalation formula, Gilmour knew he was taking risks. If RMR's wage, gasoline, or insurance costs later rose, the contract did not allow RMR to adjust the fixed price."); *Univ. Casework Sys., Inc. v. Superior Court*, 115 Cal. Rptr. 836, 839, 41 Cal. App. 3d 263, 266 ("A party to a contract who fully performs his obligation under the contract may recover the value agreed to in the contract; the party may not recover above the contract price.") (citing California precedent).

[142] Exh. No. DCT-0002 at 49.

cost cap are recoverable in DCRT's Base TRR to the extent they are just and reasonable and prudently incurred.

The DCRT APSA defines Transmission Interconnection Facilities in relevant part as "the Interconnecting PTO's or other entity's transmission facilities . . . necessary to physically and electrically interconnect the Project to the Interconnecting PTO's Transmission System."[143] The DCRT APSA defines Transmission Interconnection Service as "the service defined in Section 4.2 of this Agreement."[144] Section 4.2 states "Transmission Interconnection Service allows the Approved Project Sponsor [*i.e.*, DCRT] to connect the Project to the facilities of an Interconnecting PTO or a transmission system that is not part of the CAISO Controlled Grid."[145] Section 4.2 also requires DCRT to "obtain a separate agreement for Transmission Interconnection Service from the Interconnecting PTO or any other entity to whose facilities the Project will interconnect. This separate agreement . . . must identify the Transmission Interconnection Facilities that an Interconnecting PTO is responsible for, and must pay for in accordance with Section 24.14.2 of the CAISO Tariff."[146] Therefore, the only interconnection costs excluded under Bullet #1 are those that meet these requirements in the DCRT APSA.[147]

The Commission should not allow DCRT to exclude from the cost cap all the interconnection costs it claims, which total $88,343,757.[148] The Commission should only allow

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143 *Id.* at 8.
144 *Id.*
145 *Id.* at 10.
146 *Id.*
147 Exh. No. CSO-0001 REV3 at 160:10-161:10.
148 *See* Exh. No. DCT-0102 REV2 PUB at 5 (Table 1, row 6), 134:1. Earlier in the proceeding, DCRT claimed its interconnection costs totaled $89,363,263. Exh. No. DCT-0007 REV2 at 9 (Table 1, row 6), 74:1-2. As an examination of the cited exhibits shows, the difference is due to changes DCRT has made to some of the claimed dollar amounts for categories of costs that, as the CAISO explains below, the Commission should not allow DCRT to exclude from the cost cap.

DCRT to exclude a maximum of $76,569,878 from the cost cap.[149] That latter amount represents the sum of the amounts under the following five items:

(1) The total of $56,549,074 in costs DCRT was required to pay for transmission interconnections with APS ($13,241,693) and with SCE ($41,376,390), and costs DCRT was required to pay to SRP for affected system upgrades ($1,930,991).[150]

(2) An EPC-related interconnection cost of $283,712 for a change order for interconnection work done on SCE's behalf.[151]

(3) The $214,500 cost associated with EPC Change Order 8 for equipment and work required by SCE.[152]

(4) The $18,399,239 in AFUDC costs solely associated with payments to the utilities for transmission interconnection and additional interconnection costs.[153]

(5) A maximum of $1,123,353 in AFUDC costs associated with EPC Change Orders 1, 2, and 8. That maximum dollar amount is the CAISO's estimate, but when including the costs in AFUDC, DCRT should use the actual AFUDC associated with those three change orders.[154]

The Presiding Judge and the Commission should not allow DCRT to recover the balance of its claimed interconnection-related costs ($11,773,879, *i.e.*, $88,343,757 minus $76,569,878) because none of those costs meet the DCRT APSA cost cap exclusion requirements described above. The costs that do not meet the requirements consist of three items:

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[149] The CAISO's testimony erroneously listed a slightly lower sum, $76,569,778. *See* Exh. No. CSO-0601 REV2 PUB at 129:13-20.

[150] Exh. No. CSO-0001 REV3 at 161:10-16. The cited testimony correctly listed those three sub-amounts for APS, SCE, and SRP, but mistakenly listed them as totaling $56,549,474. *See also* Exh. No. CSO-0601 REV2 PUB at 125:3-11 (mistakenly listing the same total).

[151] *Id.* at 125:12-126:4.

[152] *Id.* at 127:1-12.

[153] *Id.* at 127:13-18.

[154] *Id.* at 127:18-22.

The $401,019.47 in EPC costs DCRT claims under Change Order 5. Those claimed Change Order 5 costs are Project costs distinct from the interconnection costs listed above under numbers (2) and (3). Change Order 5 was for mobilization, demobilization, and rework. DCRT was in close discussions with SCE on the status of the work. Absent special circumstances, of which DCRT provides no evidence, there is no reason why DCRT should have mobilized the EPC contractor multiple times for testing if the substation was not ready for testing.

Interconnection-related financing costs (i.e., AFUDC costs), other than those listed above under numbers (4) and (5). Those financing costs are part of the cost of the Project and were not paid to "an Interconnecting PTO or a transmission system that is not part of the CAISO Controlled Grid."[155] Thus, they do not meet the requirements of Section 4.2 or the interconnection cost cap exclusion in Appendix E of the DCRT APSA.[156]

Claimed costs for interconnection delay.[157] Specifically, DCRT should not be allowed to recover its requested $401,019.47 in costs associated with interconnection delay costs from March 8, 2024 to June 12, 2024, $2,992,017 in costs associated with overhead and management cost for the delay, and $8,380,369 in costs associated with AFUDC for the delay—for a total of $11,372,386 in claimed interconnection delay costs that should be disallowed.[158] None of these claimed costs were paid to "an Interconnecting PTO or a transmission system that is not part of the CAISO Controlled Grid." Thus, they do not meet the requirements of an excluded cost in Section 4.2 or the interconnection cost cap exclusion in Appendix E of the DCRT APSA.[159]

[155] Exh. No. DCT-0002 at 10.
[156] Exh. No. CSO-0001 REV3 at 163:1-12.
[157] Exh. No. DCT-0102 REV2 PUB at 133:1. The CAISO understands that DCRT is seeking to recover these costs as "FERC approved costs resulting from delays . . . caused by an Interconnecting PTO" under the Bullet #5 cost cap exclusion in DCRT APSA, Appendix E. For ease of review, the CAISO addresses all of DCRT's Interconnecting PTO cost cap exclusion arguments in this section.
[158] Exh. No. CSO-0601 REV2 PUB at 128:1-129:12.
[159] Exh. No. CSO-0001 REV3 at 163:22-164:3.

In addition, DCRT witness Crew testified "[t]he project schedule reflected a projected 'mechanical completion' (when the line itself and all interconnecting facilities should be complete) on February 7, 2024 and a 'substantial completion' (where the line would be energized and fully complete with the exception of final site restoration and minor 'punchlist' items) on March 8, 2024."[160] Witness Crew refers to this as the 96-day delay period.[161] In witness Crew's Rebuttal Testimony he quotes Change Order 5: "Contractor requests a Change Order for additional costs and time to perform the Work due to delays to Substantial Completion which were caused by Interconnection Utilities' (APS and Southern California Edison) testing and commissioning schedule."[162] However, even if the line had been mechanically complete on February 7, 2024, DCRT would have been unable to start testing the line and facilities. Although DCRT's transmission operator—GridForce—was already a Transmission Operator certified by the WECC, CAISO had additional onboarding requirements for GridForce to be certified as a Transmission Operator in the CAISO footprint which the WECC scheduled for completion in June.[163] In addition, there was a mandatory Transmission Registry training requirement for GridForce to achieve commercial operation of the Project, which was not completed until May 30, 2024.[164]

Further, based on the schedule DCRT proposed, DCRT assumed it would only take one month to complete all tests and obtain all approvals. This was a very aggressive schedule, which would have put the substantial completion date on May 1, 2024 had GridForce completed all of its training and met all of the requirements by then, which it did not. At most, DCRT could only

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160 Exh. No. DCT-0007 REV2 at 75:6-10.
161 *Id.* at 76:20-21, 77:10-11.
162 Exh. No. DCT-0102 REV2 PUB at 141:5-10 (quoting Exh. No. DCT-0021 REV PUB at 328).
163 Exh. No. CSO-0433 REV at 1-2; Tr. 7281:5-7283:21.
164 Tr. 7286:6-22; Exh No. CSO-0434 PUB.

claim a 43-day delay.[165] By arguing the affirmative defense of delay caused by an Interconnecting PTO, DCRT has the burden of proving the claimed three-month delay was due to the actions of SCE, not due to DCRT's own actions. DCRT has not met this burden.

DCRT also claims it incurred increased finance costs due to interconnection delay.[166] DCRT cites two components for the increased financing costs: $18,399,239 associated with the sums actually paid to APS, SRP, and SCE plus an additional $9,503,722 associated with Change Orders 1, 2, 5, and 8, as well as additional overhead and construction management costs attributed to the delay in energization.[167] The CAISO agrees DCRT should be reimbursed AFUDC for the sums paid to APS, SRP, and SCE ($56,549,548) provided the amount equals the AFUDC actually incurred based on when the funds were paid to the Interconnecting PTO and other transmission entities. However, reimbursement for AFUDC associated with Change Orders 1, 2, and 8 due to the interconnection delays should only be the AFUDC actually resulting from those change orders ($498,212), not the $9,503,722 DCRT is requesting.[168] As stated above, Section 4.2 of the DCRT APSA allows reimbursement above the binding cost cap for interconnection costs related to the Transmission Interconnection Facilities or Transmission Interconnection Service, and nothing more. DCRT's attempt to add costs related to the Project for EPC costs, overhead and constructions management, and associated AFUDC which is under the binding cost cap as "Interconnection costs" is an egregious misinterpretation of the DCRT APSA and the Commission should not allow such reimbursement.

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[165] Exh. No. CSO-0601 REV2 PUB at 128:19-23.
[166] Exh. No DCT-0007 REV2 at 74:14-17, 77:1-11.
[167] Exh. No. DCT-0102 REV2 PUB at 134:1.
[168] Exh. No. CSO-0601 REV2 PUB at 127:16-22.

3. Does the APSA Allow DCRT to Recover Regulatory Compliance Costs in Excess of the Cap, and If So, How Much of Such Regulatory Compliance Costs Does the APSA Allow DCRT to Recover over the Cap in This Proceeding?

DCRT seeks recovery of $85,936,149 in costs above the DCRT APSA binding cost cap as so-called "regulatory compliance" costs. These claimed "regulatory compliance" costs consist of: (1) a total of $67,219,743 in "specific regulatory compliance costs" comprising increased EPC costs DCRT claims arise from 10 enumerated regulatory requirements;[169] and (2) a total of $18,716,406 in "regulatory compliance management" costs comprising additional Management Costs arising from four regulatory requirements.[170] The DCRT APSA includes no cost cap exclusion(s) for "regulatory compliance" costs or the specified "regulatory compliance" costs DCRT lists. Recognizing this fact, DCRT attempts for the first time in this rate case to retrofit a claim that these costs fall under Bullet #3 or Bullet #4, suggesting they constitute costs to comply with interconnection requirements even though the underlying actions and Project changes leading to these specific costs were directed by the BLM and the CPUC, not by an Interconnecting PTO, other entity providing Transmission Interconnection Service, or by the CAISO. As explained below, none of the so-called "regulatory compliance" costs DCRT claims should be excluded from the DCRT APSA cost cap pursuant to Bullet #3 or Bullet #4.[171] The

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169 *See* Exh. No. DCT-0102 REV2 PUB at 93:1-121:14.

170 *See id.* at 121:15-127:18. DCRT also claims an intermingled combination of regulatory compliance costs and Force Majeure costs under the category of "regulatory compliance and Force Majeure delay – financing costs" comprising two categories of financing costs. *See id.* at 128:1-130:8. As explained below in Section II.C.4.d of this Initial Brief, those DCRT claims are without merit.

171 The CAISO understands that DCRT does not claim it is entitled in this proceeding to recover in its Base TRR any dollar amount of costs specifically related to Bullet #2. *See, e.g.*, *id.* (containing no discussion of Bullet #2 costs). Although DCRT does not claim any costs under Bullet #2, DCRT does argue that the CAISO's decision to hold procurement could be interpreted as, in effect, a unilateral amendment of the DCRT APSA's milestones and therefore would also qualify as a form of regulatory compliance under Bullet #2. Exh. No. DCT-0018 REV2 PUB at 9 n.5. DCRT's argument is without merit. The CAISO's directives to DCRT to hold procurement were a valid exercise of the CAISO's existing contractual authority under Section 5.8 of the DCRT APSA to consult with DCRT on the delay in the Project. Exh. No. DCT-0002 at 16. The CAISO also has authority under Section 5.4.1 of the DCRT APSA for CAISO review and comment, on a rolling basis, of specifications for major equipment and materials prior to DCRT soliciting offers to provide specific equipment or material to which the specifications apply

CAISO separately discusses Bullet #3 and Bullet #4 below. DCRT also suggests that its wholly fabricated "regulated compliance" cost cap exclusion applies only to regulatory compliance requirements that were not foreseeable at the time of the bid.[172] Even assuming, solely for the sake of argument, that Bullets #3 and #4 could be read in the manner DCRT suggests, their arguments fail their own test as each type of their claimed "regulatory compliance" requirements were entirely foreseeable. As such, the Presiding Judge and the Commission must deny recovery of the entire $85,936,149 in claimed "regulatory compliance" costs.

a. DCRT Is Not Entitled to Recover Any Above-Cap Costs Pursuant to Bullet #3

Bullet #3 in Appendix E of the DCRT APSA excludes from the cost cap costs incurred by DCRT to make changes to the Project under Section 5.4 of the DCRT APSA, to the extent that such changes were not included in the functional requirements for the Project that the CAISO issued for the competitive solicitation of DCRT's bid.[173]

Section 5.4, entitled "Submission and Review of Project Specifications," contains three subsections.[174] Section 5.4.1 states in relevant part that DCRT "shall submit specifications for major Project equipment and/or materials . . . to the CAISO and to the Interconnecting PTO or other entity providing Transmission Interconnection Service, for review . . . . to ensure that the Project is compatible with the technical specifications, operational control, safety requirements, and any other applicable requirements" of the CAISO and the Interconnecting PTO or other

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or otherwise commencing procurement. *Id.* at 13. The CAISO's directive did not require any amendment to the DCRT APSA and certainly did not involve any unilateral amendment by the CAISO to address a conflict with Applicable Laws and Regulations or Applicable Reliability Standards. Therefore Section 4.4 does not apply to those directives. Exh. No. CSO-0001 REV3 at 126:9-127:2. Moreover, Section 25.9 of the DCRT APSA states the APSA can only be amended by written agreement. Exh. DCT-0002 at 35. There was no such written agreement regarding Bullet #2.

[172] *See, e.g.*, Tr. 2529:15-22; Tr. 2056:2-12; Tr. 2057:1-4.

[173] Exh. No. DCT-0002 at 78.

[174] *See id.* at 13-14.

entity providing Transmission Interconnection Service.[175] Section 5.4.2 contains similar relevant provisions that apply to final specifications for major Project equipment and/or materials.[176] Section 5.4.3 states in relevant part that

> [a]s described in Section 5.4.2, Approved Project Sponsor shall make such changes to the Project as may reasonably be required by the Interconnecting PTO, other entity, or the CAISO, in accordance with Good Utility Practice, to ensure that the Project is compatible with the technical specifications, Operational Control, and safety requirements of the Interconnecting PTO, other entity, or the CAISO.[177]

The Presiding Judge and Commission should not allow DCRT to exclude from the cost cap any costs it claims under Bullet #3. As detailed below,[178] none of the provisions in Section 5.4 apply in this case, because neither the CAISO nor any interconnecting entity required DCRT to make changes to the Project based on their review of the initial and final specifications for major equipment and materials submitted by DCRT under Section 5.4. Nor does DCRT allege that the CAISO or any interconnecting entity required DCRT to change the specifications DCRT provided for their review.[179] Bullet #3 and Section 5.4 of the DCRT APSA do not address compliance with the requirements of regulators and siting agencies. Thus, DCRT fails to satisfy the basic precondition for the cost cap exclusion tied to Section 5.4.

Furthermore, the costs DCRT now seeks to recover under a non-existent "regulatory compliance" cost cap exclusion include: (1) costs DCRT sought to recover but did not justify when the CAISO agreed to increase the cost cap due to a Change of Route in the second amendment to the DCRT APSA; and (2) costs to comply with the general requirements of the BLM and CPUC already included in DCRT's bid and therefore subject to the binding cost cap.

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175 *Id.* at 13.

176 *Id.*

177 *Id.* at 13-14.

178 *See infra* Sections II.C.3.c, -d, and -e of this Initial Brief.

179 Exh. No. CSO-0001 REV3 at 127:3-128:2.

None of the costs DCRT now identifies as regulatory compliance pertain to changes to the Project the CAISO or an interconnecting entity directed DCRT to make to ensure the Project was compatible with the technical specifications, operational control, and safety requirements.[180]

b. DCRT Is Not Entitled to Recover Any Above-Cap Costs Pursuant to Bullet #4

Bullet #4 in Appendix E of the DCRT APSA sets forth an exclusion from the cost cap for costs incurred by DCRT to remedy deficiencies in accordance with Section 5.5.3 of the DCRT APSA.[181] Section 5.5 of the DCRT APSA is entitled "Construction Activities." Section 5.5.1 provides that the Approved Project Sponsor will commence construction of the Project consistent with the milestones in Appendix B of the DCRT APSA as soon as practicable after satisfaction of the following additional conditions:[182]

> **5.5.1.1** The Approved Project Sponsor has obtained appropriate Governmental Authority approval for any facilities requiring regulatory approval.
>
> **5.5.1.2** The Approved Project Sponsor has obtained necessary permits, real property rights, and rights-of-way, to the extent required for the construction of the Project.[183]

Section 5.5.2 then provides that "[a]t least thirty (30) calendar days prior to the commencement of Project construction, the Approved Project Sponsor shall provide to the CAISO, for informational purposes, a construction schedule for the Interconnecting PTO's or other entity's Transmission Interconnection Facilities."[184] Section 5.5.3 immediately follows and provides:

> **At any time during construction**, should any phase of the Project engineering, equipment procurement, or construction not meet the standards and specifications provided by the Interconnecting PTO or other entity, the Approved Project

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[180] *Id.* at 8 (row of table entitled "Regulatory compliance"), 10:16-34, 127:3-128:2, 131:10-150:21; Exh. No. CSO-0601 REV2 PUB at 93:10-96:8.

[181] Exh. No. DCT-0002 at 50.

[182] *Id.* at 45, Footnote 1: "Dates in this Appendix B are good faith estimates and can be modified . . . "

[183] *Id.* at 14.

[184] *Id.*

> Sponsor shall be obligated to remedy deficiencies in that portion of the Project. The Approved Project Sponsor may seek approval from FERC to recover in its transmission revenue requirement just and reasonable costs associated with such remedy.[185]

As the CAISO explained in the Commission proceeding that resulted in acceptance of the original version of the *pro forma* APSA, Section 5.5.3 applies only to costs incurred by an Approved Project Sponsor to "remedy any failure of the project to meet the standards and specifications provided by the interconnecting entity."[186] The Commission order accepting the original *pro forma* APSA expressly discussed Section 5.5.3 under the heading "13. Specifications Provided by Interconnecting PTO."[187] TransCanyon, an intervenor in the Commission proceeding, expressed concern that an interconnecting entity might be a competing entity in a competitive solicitation, giving the interconnecting entity an incentive to withhold information integral to the bidding process, or otherwise reduce the reliability of bids. TransCanyon argued the Commission should either require the CAISO to provide the necessary interconnection information to inform the bidding process at the time of the solicitation or allow for recovery of costs expended by that project sponsor "as a result of additional requirements raised by the Interconnecting PTO after the bid award."[188] The Commission "agree[d] with TransCanyon" and directed the CAISO to make a compliance filing to address this concern.[189]

The portion of the CAISO's December 3, 2014, compliance filing addressing the Commission's directive regarding *pro forma* APSA Section 5.5.3 was under the heading "Specifications Provided by Interconnecting Participating Owner."[190] The only language the

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185 *Id.* (emphasis added).
186 Exh. No. CSO-0044 at 19.
187 *See Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107, at P 88 (2014).
188 *Id.* at P 89.
189 *Id.* at P 91.
190 Exh. No. CSO-0611 at 3-4.

CAISO added to Section 5.5.3 in the compliance filing was to "specify that an approved project sponsor may include in its transmission revenue requirement additional just and reasonable costs, such as interconnection costs."[191] This addition consisted of the last sentence of Section 5.5.3 quoted above. The Commission subsequently accepted the CAISO's compliance filing in a February 12, 2015, letter order in Docket No. ER14-2824-001 without any modification. Thus, it is clear from the record in the *pro forma* APSA tariff amendment proceeding at the Commission that Section 5.5.3 applies only to the need for the developer to remedy a deficiency identified by an Interconnecting PTO or entity providing Transmission Interconnection Service related to the interconnection of the new project during construction. No Interconnecting PTO or entity providing Transmission Interconnection Service notified DCRT of any deficiency that needed to be remedied during construction.

The provisions of the *pro forma* APSA also in the DCRT APSA confirm that the reference in Section 5.5.3 to an "other entity" refers to an entity other than a PTO with whom the Approved Project Sponsor's transmission facilities will be interconnecting. There are over thirty references to an "other entity" in the DCRT APSA (and the *pro forma* APSA). A review of them all supports the view that an "other entity" is limited to an entity that owns or operates transmission facilities to which a project will connect. For example, the Recitals state, "**WHEREAS**, if applicable, the Approved Project Sponsor will seek interconnection of the Project from the Interconnecting PTO **or other entity** in accordance with the requirements provided in this Agreement."[192] DCRT's argument that this reference to "other entity" means a regulator like the BLM or CPUC does not make sense.[193]

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191 *Id.*

192 Exh. No. DCT-0002 at 5 (emphasis added).

193 *See* Exh. No. CSO-0601 REV2 PUB at 99:18-103:25 (citing Exh. No. DCT-0102 REV2 PUB at 84).

The same term appears in the definition of "Transmission Interconnection Facilities," which means "the Interconnecting PTO's **or other entity's transmission facilities**, including any modification, additions, or upgrades, that are necessary to physically and electrically interconnect the Project to the Interconnecting PTO's Transmission System."[194] Section 4.2, Transmission Interconnection Service, similarly uses the term "other entity" to refer exclusively to an entity that owns or operates a transmission system that is not part of the CAISO Controlled Grid to which an Approved Project Sponsor like DCRT will interconnect:

> Transmission Interconnection Service allows the Approved Project Sponsor to connect the Project to the facilities of an Interconnecting PTO **or a transmission system that is not part of the CAISO Controlled Grid**. Unless the Project connects solely to the facilities of the Approved Project Sponsor, the Approved Project Sponsor shall request Transmission Interconnection Service from the Interconnecting PTO **or other entity** according to the milestones set forth in Appendix B and shall comply with the Interconnecting PTO's **or other entity's applicable transmission interconnection procedures**. The Approved Project Sponsor must obtain a separate agreement for Transmission Interconnection Service from the Interconnecting PTO **or any other entity to whose facilities the Project will interconnect**. This separate agreement with each Interconnecting PTO **or other entity** must provide, at a minimum, for the Interconnecting PTO **or other entity** to take any procedural steps required in this Agreement with respect to the transmission interconnection, including Sections 5.3.4, 5.4.2, 5.4.3, 5.5.1.3, 5.6.2, 6.1, 8.1, and 9.2, and must identify the Transmission Interconnection Facilities that an Interconnecting PTO is responsible for, and must pay for in accordance with Section 24.14.2 of the CAISO Tariff. The CAISO may facilitate the coordination between the Approved Project Sponsor and the Interconnecting PTO contemplated by this Agreement.[195]

Article 5 uses "other entity" consistently throughout to refer to an entity that owns or operates transmission facilities to which an Approved Project Sponsor must interconnect. For example, Section 5.1 provides in part that:

> The Approved Project Sponsor shall comply with all requirements of law and shall assume responsibility for the design, procurement, and construction of the Project using Good Utility Practice and the standards and specifications provided by the Interconnecting PTO **or other entity**, if applicable. The Project shall be

194 Exh. No. DCT-0002 at 8 (emphasis added).
195 *Id.* at 10 (emphasis added).

> based on the assumed accuracy and completeness of all technical information received by the CAISO from the Approved Project Sponsor and by the Approved Project Sponsor from any Interconnecting PTO **or other entity providing Transmission Interconnection Service**.[196]

Sections 5.4.1 and 5.5.2 of the APSA similarly leaves no doubt that “other entity” as used in those sections refers solely to an entity that owns or operates transmission facilities providing Transmission Interconnection Service to which an Approved Project Sponsor’s facilities will interconnect. Section 5.5.3 must be read in the context of all the provisions of Article 5 of the APSA, including Section 5.5.2, limiting the term “other entity” to a transmission-owning entity like APS. No reasonable reading of either Section 5.5.3 or Section 5.4 could extend the interpretation of “other entity” to regulators or siting agencies like the BLM or CPUC. Regulatory and siting agencies like the BLM and CPUC do not own and operate transmission facilities and cannot be “other entities” with whom an approved project sponsor’s transmission facilities will interconnect. Indeed, the DCRT APSA expressly refers to the defined term Governmental Authority (*see* DCRT APSA Section 1 and Section 5.5.1.1) and the term siting agency (*see* DCRT APSA Section 5.9.3) as describing regulatory agencies having jurisdiction over the Parties and their respective facilities and services.[197] Those terms are found nowhere in Section 5.5.3 (or Section 5.4) because the provisions in those sections do not apply—and are not intended to apply—to changes ordered by a regulatory or siting agency.

The specific “regulatory compliance” costs DCRT seeks to recover in this proceeding do not even remotely meet the Bullet #4 standard of “costs incurred by DCRT to remedy deficiencies in accordance with Section 5.5.3.” Section 5.5.3 of the APSA does not apply to

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196 *Id.* at 11 (emphasis added).
197 *Id.* at 7, 14, 17.

general "regulatory compliance" costs unrelated to remedying the failure of the project during construction to meet the standards and specifications of an interconnecting entity.

An interconnecting entity under Section 5.5.3 of the DCRT APSA may be a CAISO PTO or another transmission entity.[198] For example, in the case of the Project, DCRT had to interconnect with SCE (a PTO) and with APS—a transmission owner providing interconnection service outside of the CAISO footprint and not a PTO.[199] The DCRT APSA uses the terms "Interconnecting PTO or other entity providing transmission Interconnection Service" and "Interconnecting PTO and other entity" interchangeably.[200]

Section 5.5.3 does not apply to the specific "regulatory compliance" costs for which DCRT seeks recovery, because none of them pertain to remedying deficiencies in the Project related to standards and specifications provided by SCE or APS.[201] Rather, all of the regulatory compliance costs listed by DCRT either (1) are related to route changes, environmental/archaeological mitigation/monitoring, or facility modifications ordered by a siting/permitting authority that are not inconsistent with the CAISO's Functional Specifications for the Project and were not ordered by an interconnecting entity, (2) are costs DCRT incurred to participate in siting and permitting proceedings, (3) are related to known seasonal restrictions, or (4) pertain to matters wholly unrelated to remedying deficiencies identified by a PTO or interconnecting entity during construction.[202]

Neither SCE nor APS found DCRT's construction, equipment, or materials to be inconsistent with their standards and specifications or thus directed DCRT to incur the

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198 Exh. No. CSO-0001 REV3 at 129:3-6.
199 *Id.* at 129:6-9.
200 *Id.* at 129:9-12.
201 *Id.* at 129:13-19.
202 *Id.* at 129:20-130:2; Exh. No. CSO-0601 REV2 PUB at 114:1-115:11.

"regulatory compliance" costs DCRT now claims in order to remedy deficiencies identified by SCE or APS. Rather, it was the BLM and/or the CPUC that directed DCRT to take the actions that resulted in most of DCRT's claimed "regulatory compliance" costs.[203] Other claimed "regulatory compliance" costs arose from actions wholly unrelated to remedying deficiencies identified by APS or SCE or pertained to DCRT's participation in rate case and permitting proceedings.[204]

Moreover, the deficiencies DCRT claims it was remedying did not arise **"during construction**," which is a condition for the application of Section 5.5.3 and therefore a requirement for cost recovery under Bullet #4.[205] These deficiencies occurred in connection with the BLM and CPUC proceedings that preceded construction or pertain to foreseeable limitations (*e.g.*, seasonal construction requirements) that were not last-minute obligations imposed on DCRT by a PTO or interconnecting entity. Section 5.5.1 of the DCRT APSA clearly requires the Approved Project Sponsor first to obtain all necessary permits, rights-of-way, and facility authorizations, and Section 5.5.2 requires the Approved Project Sponsor at least 30 days before construction begins to provide the CAISO a schedule for construction of the PTO's or interconnecting entity's interconnection facilities. Only after these two preconditions occur may the Approved Project Sponsor commence construction, and, under Section 5.5.3, "[a]t any time during construction" if it is determined that the Approved Project Sponsor is not meeting the specifications or standards of the PTO or interconnecting entity, the Approved Project Sponsor is then obligated to remedy the deficiency and may request the Commission to grant recovery of the costs it incurs occurs to remedy the deficiency.

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203 *See infra* Section II.C.4.d of this Initial Brief.

204 *See id.*

205 Exh. No. DCT-0002 at 14 (emphasis added).

The “regulatory compliance” costs for which DCRT seeks recovery fail to meet these basic requirements. Most of the “regulatory compliance” costs DCRT claims result from directives in the permitting/regulatory process that occurred well before construction began; they were not the result of SCE or APS finding DCRT’s actions during construction to be inconsistent with their standards and specifications, and they were not incurred to remedy any deficiencies identified by SCE or APS. The few claimed “regulatory compliance” costs that did occur during construction were the result of known seasonal restrictions or other causes unrelated to remedying deficiencies in meeting the standards and specifications of SCE and APS. Other claimed “regulatory compliance” costs such as additional rate case costs occurred years after construction of the Project and fall well outside of the bounds of Section 5.5.3. These are discussed in greater detail *infra* in the CAISO’s discussion of each individual “regulatory compliance” costs for which DCRT seeks recovery.

A different section of the DCRT APSA—Section 5.9—pertains to the modification of Project facilities ordered by a siting or permitting authority.[206] Section 5.9.3 provides:

> Any modifications to the Project’s facilities ordered by a siting agency are not subject to CAISO approval. However, the Approved Project Sponsor is required to notify the CAISO within thirty (30) calendar days after the siting agency has issued an order directing Project modifications.[207]

Unlike some other APSAs that preceded the DCRT APSA, Appendix E of the DCRT APSA does not include a cost cap exclusion associated with Section 5.9.3.[208] Several of the “regulatory

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206 Exh. No. CSO-0001 REV3 at 130:8-11.

207 Exh. No. DCT-0002 at 17.

208 Exh. No. CSO-0001 REV3 at 130:21-22. Compared with the DCRT APSA, the APSAs for Suncrest and Estrella (Exh. No. CDN-0025 at 74 and 124, respectively) were executed months before the DCRT APSA and they include the *pro forma* Sections 4.4, 5.4, and 5.5.3 that are in the DCRT APSA, as well as the following express exclusion to the cost cap:

> Pricing may be subject to adjustment prior to the completion of construction to reflect any changes to the Project directed by the CPUC or other governmental or regulatory body in accordance with Section 5.9.3 of this APSA, that impact project costs. Such changes by a siting agency could

compliance" costs for which DCRT seeks recovery fall under Section 5.9.3. Because the DCRT APSA does not contain a cost cap exclusion for costs incurred under Section 5.9.3, DCRT is not entitled to recover such costs.

As detailed below,[209] the Commission should not allow DCRT to exclude from the cost cap any costs it claims under Bullet #4. The costs DCRT now seeks to recover under a non-existent "regulatory compliance" cost cap exclusion include: (1) costs DCRT sought to recover but did not justify when the CAISO agreed to increase the cost cap due to a Change of Route in the second amendment to the DCRT APSA; and (2) costs to comply with the general requirements of the BLM and CPUC already included in DCRT's bid and therefore subject to the binding cost cap. These are not costs needed to remedy the failure of the Project to meet the standards and specifications provided by an Interconnecting PTO or other entity in accordance with Section 5.5.3. Furthermore, the provision in Section 5.5.3 stating that the Approved Project Sponsor "may seek approval from FERC" to recover just and reasonable costs in its transmission revenue requirement merely allows—but does not entitle—DCRT to recover such costs if the Commission approves them. The Commission should deny DCRT's requested cost recovery in this proceeding, especially given DCRT did not include any cost cap exclusion for "regulatory compliance" costs in its competitive solicitation bid or in the DCRT APSA.[210]

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include changes in the design, location, schedule, or other changes in the Project that forms the basis of the binding cost cap proposal.

Exh. No. CSO-0001 REV3 at 133:15-134:4 (citing the Suncrest and Estrella APSAs, available at Exh. No. CDN-0025). In contrast, the DCRT APSA contains no similar cost cap exclusion. The evidence of the APSAs for Suncrest and Estrella also shows that the CAISO and Project Sponsors know how expressly to reflect a broader cost cap exclusion regarding compliance with agency directives—a provision the DCRT APSA lacks. Exh. No. CSO-0001 REV3 at 134:6-15. These APSA cost cap exclusions also reflect that the type of regulatory authority-ordered changes for which DCRT seeks cost recovery are not covered by Section 5.5.3 of the APSA. *Id.* at 134:15-18.

209 *See infra* Sections II.C.3.c, -d, and -e of this Initial Brief.

210 Exh. No. CSO-0001 REV3 at 8 (at row entitled "Regulatory Compliance"), 10:16-34, 128:3-150:21; Exh No. CSO-0601 REV2 PUB at 96:9-115:11.

The agreement of DCRT and the CAISO to a $22,155,633 cost increase to the Appendix E cost cap (*i.e.*, $17,155,633 plus $5,000,000)[211] for Changes of Route is fully binding on the parties in accordance with the DCRT APSA. DCRT cannot seek cost recovery through this proceeding or through any other process for additional above-cap costs associated with Changes of Route that were the subject of negotiations leading up to the second amendment to the DCRT APSA where the cost cap increase did not include such costs.

c. Unlike Competing Project Sponsors, DCRT Failed to Include Any Cost Cap Exclusions For Regulatory Compliance Costs Other Than Change of Route in Its Competitive Solicitation Proposal

Section 5.5.3 of the DCRT APSA merely provides that "[t]he Approved Project Sponsor "*may seek approval from FERC* to recover in its transmission revenue requirement just and reasonable costs associated with such remedy."[212] This provision, which is also included in the Commission-approved *pro forma* APSA in the CAISO tariff, does not "entitle" any Approved Project Sponsor to recover such costs. This provision merely allows Approved Project Sponsors to request that the Commission allow recovery of any such costs. For the reasons discussed above and for those discussed below, the Commission should deny the recovery of the regulatory compliance costs DCRT seeks.[213]

Costs "attributable to complying with regulatory requirements that have arisen" such as "comply[ing] with BLM and CPUC requirements"[214] are addressed through cost caps and specific cost cap exclusions expressly addressing any such requirements.[215] DCRT included only two cost cap exclusions in its competitive solicitation proposal: for agency-ordered change

211 *See* Exh. No. DCT-0002 at 77.
212 Exh. No. CSO-0001 REV3 at 131:10-15 (citing Exh. No. DCT-0002 at 14 (emphasis added)).
213 Exh. No. CSO-0001 REV3 at 131:15-21.
214 Exh. No. DCT-0007 REV2 at 65:7-8, 68:17-18.
215 Exh. No. CSO-0001 REV3 at 130:24-131:9.

of route and for change in law such as new NERC requirements that require Project changes.[216] DCRT had no problem proposing an express cost cap exclusion for costs incurred to comply with agency orders requiring a change in route, but DCRT proposed no cost cap exclusion(s) for costs to comply with other "regulatory requirements" imposed on it, including those ordered by the BLM and the CPUC. As such, the DCRT APSA includes no cost cap exclusion for any type of "regulatory compliance" costs other than those resulting from an agency-ordered change of route.[217] This shows DCRT could have included—but chose not to include—additional "regulatory compliance" cost cap exclusion(s) in its proposal to cover the type of above-cap "regulatory compliance" costs it now seeks.[218] Indeed, DCRT stated in its bid

> Finally, to the extent any regulatory mitigation requires additional expenses other than as planned to support DCRT's line as proposed, DCRT has taken this into consideration in its bid cap. In other words, if there are additional regulatory mitigation costs involved, DCRT commits that it will not include any cost beyond its bid cap.[219]

Based on application of the fundamental principle of contract interpretation *expressio unius est exclusio alterius*—the expression of one thing implies the exclusion of others—expressly including one type of "regulatory compliance" cost cap exclusion in its proposal (and in the DCRT APSA), *i.e.*, agency-ordered change of route costs, necessarily excludes any other type of "regulatory compliance" cost cap exclusion that was not stated in its proposal.[220]

Unlike DCRT, other Project Sponsors competing to construct the Project expressly included cost cap exclusions in their proposals to cover the above-cap costs incurred to comply with specific, additional regulatory requirements that DCRT now seeks to recover as purported

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216 Exh. No. CSO-0011 REV; Exh. No. CSO-0012 PRIV at 12.

217 Exh. No. CSO-0001 REV3 at 130:23-131:1.

218 *See, e.g.*, *id.* at 146:8-12, 150:9-13; Exh. No. CSO-0601 REV2 PUB at 105:14-106:4.

219 Exh. No. CSO-0006 REV2 PUB at 92-93.

220 *See, e.g.*, *El Paso Nat. Gas Co., LLC*, 148 FERC ¶ 61,043, at P 50; *Cleveland Elec. Illuminating Co.*, 82 FERC ¶ 61,254, at 62,017 n.9; *White v. W. Title Ins. Co.*, 710 P.2d 309, 314 n.4, 40 Cal. 3d 870, 881 n.4; *Ronay Family Ltd. P'ship v. Tweed*, 157 Cal. Rptr. 3d 680, 688, 216 Cal. App. 4th 830, 842.

"regulatory compliance" costs. The cost cap exclusions these competing Project Sponsors proposed—that DCRT did not but for which DCRT now seeks cost recovery—included specific cost cap exclusions for compliance with agency-ordered changes in Project design, scope, elements, or schedule, increased environmental, biological, archaeological, palaeontologic, Native American, or cultural resources study, monitoring, mitigation, or reporting requirements beyond the amounts assumed in the cost cap, environmental mitigation and construction methods, and compliance offset mitigation.[221] Unlike these other Project Sponsors, DCRT proposed no specific cost cap exclusions for such costs yet seeks to recover such costs in its rate case filing. These other proposals show Project Sponsors know how to—and do—include in their competitive solicitation proposals express cost cap exceptions for regulatory compliance-type costs such as the types of above-cap costs DCRT seeks to recover here. DCRT could have included a regulatory compliance cost cap exclusion for these specific types of regulatory compliance costs other Project Sponsors included in their bids, but did not.

In comparing DCRT's bid to the bids of competing Project Sponsors and selecting DCRT as the Approved Project Sponsor, the CAISO relied on the express representations and plain language in DCRT's competitive solicitation submissions, which unlike the proposals of competing Project Sponsors included no cost cap exclusion for any type of "regulatory compliance" costs other than change of route.[222] Had DCRT's bid indicated it was proposing a much more expansive and broader cost cap exclusion for "regulatory compliance" costs—in addition to the other cost cap exclusions and escalation measures it now claims that were not expressly included in its bid—the CAISO likely would have ranked DCRT's proposal below the

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[221] Exh. No. CSO-0001 REV3 at 134:22-136:15; Exh. No. CSO-0012 PRIV at 12; Exh. No. CSO-0014 PRIV at 76; Exh. No. CSO-0015 PRIV at 131-34; Exh. No. CSO-0016 PRIV at 56, 62.

[222] Exh. No. CSO-0001 REV3 at 136:16-137:2; Exh. No. CSO-0012 PRIV at 12-13.

proposals of both CTD and TransCanyon/SCE regarding this component of the CAISO's comparative analysis, and barring the cost containment measure the CAISO would not have selected DCRT as the Approved Project Sponsor, especially given other Project Sponsors ranked higher in the non-cost containment categories.[223] The cost cap exclusions DCRT now seeks, in addition to the added costs for Change of Route costs DCRT received in the second amended DCRT APSA, far exceed the cost advantage it had over competing Project Sponsors when the CAISO considered DCRT's proposal that made no mention of these cost cap exclusions.[224]

Approved Project Sponsors must be bound by the specific representations and commitments in their competitive solicitation bids or else the CAISO's Project Sponsor selection process and Commission Order No. 1000 competitive transmission framework will be undermined.[225] Allowing DCRT essentially to modify its proposal after the fact and recover costs that were not reflected in its bid would undermine the entire competitive solicitation process and the basis for the CAISO's decision. Allowing DCRT or any similarly situated Approved Project Sponsor to recover such additional regulatory compliance costs under these circumstances would render their proposed binding cost caps meaningless and undermine both the CAISO's comparative analysis of the firmness of the cost containment measures proposed by each of the Project Sponsors and the competitive solicitation process generally.[226] It would render the CAISO unable to rely on the four corners of a Project Sponsor's proposal, as the Project Sponsor would always be able to seek after-the-fact recovery of additional costs it did not expressly exclude from its cost cap.[227]

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223 Exh. No. CSO-0001 REV3 at 137:17-138:7.

224 Exh. No. CSO-0001 REV3 at 138:7-12.

225 *Id.* at 134:18-21.

226 *Id.* at 133:3-10.

227 *Id.* at 133:10-14. In addition to the Suncrest and Estrella APSAs described above, other APSAs include specific cost cap exclusions for the types of "regulatory compliance" costs DCRT seeks to recover but were not included in DCRT's bid or in the DCRT APSA, *e.g.*, costs associated with additional impositions by a governmental

d. There Is No Merit in DCRT's Ten Individual Claims of EPC Cost Increases It Seeks to Recover Above the Cost Cap

The Commission should find no merit in DCRT's claims of ten individual EPC cost increases related to "regulatory compliance" which DCRT seeks to recover as cost cap exclusions. DCRT references Sections 4.4, 5.4, and 5.5.3 of the DCRT APSA for the reasoning behind the EPC cost increases.[228] In discussing these EPC cost increases, this section of the brief also refers to the summary of the CAISO's analysis of DCRT's claimed Change of Route costs when negotiating the second amendment to the DCRT APSA to show that DCRT already has agreed these costs are not subject to the applicable cost cap adjustments for these costs.[229]

The first above-cap EPC cost DCRT identifies is $1,136,499 in costs for a fire marshal, stating that these duties were previously handled by a Safety position.[230] As an initial matter, the claimed "requirement" is not based on BLM or CPUC written directives, but instead based on Mr. Crew's uncertain recollection of a conversation with a BLM representative.[231] Even if there were a documented BLM or CPUC mandate, these costs would not fall under one of the Appendix E cost cap exclusions. Because neither the CAISO, SCE, nor APS ordered DCRT to make this change to ensure the Project's compatibility with their functional specifications, Operational Control, or safety requirements, the costs DCRT incurred for this activity are not

authority beyond what was anticipated in the Approved Project Sponsor's proposal and any incremental mitigation for the project beyond what was assumed in the Approved Project Sponsor's proposal, including but not limited to alternative best management practices or compensatory mitigation. Exh. No. CDN-0019 REV2 PRIV-HC at 892-93, 950-51, 1003-04. Other APSAs include cost cap exclusions for governmental authority-ordered requirements to underground a transmission line that was proposed as overhead construction (*id.* at 59, 548, 658, 786, 893, 1056) or wildfire mitigation costs pursuant to a wildfire mitigation plan certified by the Office of Energy Infrastructure Policy above the costs assumed in the approved project sponsor's proposal (*id.* at 547, 599, 1056). All these "regulatory compliance" cost cap exclusions would have been unnecessary if APSA Sections 5.4 and 5.5.3 covered "regulatory compliance" costs—but they do not. DCRT should not be permitted to recover these "regulatory compliance" costs for which it had no cost cap exclusion either in its bid or in the DCRT APSA.

228 Exh. No. DCT-0007 REV2 at 65:1-66:12.

229 See Exh. No. CSO-0009 REV.

230 Exh. No. DCT-0007 REV2 at 66:13-19; Exh. No. DCT-0107 REV at 2; Exh. No. DCT-0102 REV2 PUB at 93:2-98:2.

231 Exh. No. CDN-0056 at 1; Tr. 2544:13-21.

eligible for a cost cap exclusion under the reference to Section 5.4 of the DCRT APSA.[232] Because the obligation resulting in these costs did not arise "during construction" and the costs are also not "engineering, construction, procurement, or equipment costs" incurred to "remedy deficiencies" to meet the "standards and specifications" of an Interconnecting PTO or other entity providing interconnection service, they are not costs eligible for a cost cap exclusion under the reference to Section 5.5.3 or in Appendix E of the DCRT APSA.[233] No Interconnecting PTO or other entity providing interconnection service directed DCRT to incur these costs to remedy a deficiency identified "during construction" of the Project. These are not costs associated with remedying deficiencies in meeting technical specifications and standards of any kind.[234]

The second above-cap EPC cost DCRT identifies is $2,373,001 in costs to meet FAA lighting requirements by installing certain lighting "as the Change of Route to BLM's Preferred Alternative Route put the Project into close proximity with military training routes."[235] There are several reasons why the Commission should not approve recovery of these costs. First, these costs do not fall under the cost cap exclusions in Appendix E linked to Sections 4.4, 5.4, and 5.5.3 of the DCRT APSA.[236] Moreover, neither the CAISO, SCE, nor APS ordered DCRT to make this change to ensure the Project's compatibility with their functional specifications, Operational Control, or safety requirements, nor was this change necessary to remedy a deficiency in meeting SCE's or APS's technical standards and specifications that arose "during construction" of the Project.[237] No Interconnecting PTO or other entity providing interconnection service directed DCRT to incur these costs to remedy a deficiency identified

[232] Exh. No. CSO-0001 REV3 at 139:10-15.
[233] *Id.* at 139:15-20.
[234] *Id.* at 139:20-22.
[235] Exh. No. DCT-0007 REV2 at 66:20-22; Exh. No. DCT-0102 REV2 PUB at 98:3-101:6; Exh. No. DCT-0107 REV at 2.
[236] Exh. No. CSO-0001 REV3 at 140:4-13.
[237] *Id.* at 129:13-19, 140:22-23.

"during construction" of the Project. These are costs incurred to comply with a siting agency directive that should have been confirmed with the FAA and/or the DOD prior to the negotiation of the Change of Route in the second amended DCRT APSA. The costs did not result from a directive of the CAISO, SCE, or APS. The DCRT APSA contains no cost cap exclusion for this type of siting agency directive.

DCRT also included these FAA lighting costs in its June and July 2019 cost increase requests in connection with Change of Route, but said the amount due was $7,504, which the CAISO granted and reflected in the second amended DCRT APSA.[238] In that regard, DCRT witness Crew testified that these costs resulted from the BLM-ordered Change of Route,[239] and the CAISO already accounted for them in the second amendment to the DCRT APSA.[240] Of note, DCRT states that "DCRT is no longer seeking to justify such cost increases related to Change of Route."[241] DCRT should not be permitted to agree to any additional increase in the cost cap for Change of Route and then come back for a potential second bite at the apple in this rate case and seek to recover even more without having followed the specific procedures in the DCRT APSA to recover any Change of Route costs to which the CAISO did not agree.[242] Moreover, the second amendment to the DCRT APSA was not executed for two years to allow for additional adjustments for Change of Route as it was not executed by the parties until March 7, 2022,[243] giving DCRT plenty of time to correct any estimated costs provided in 2020.

Finally, as noted in the testimony of Susan Lee, although the final approved route differed from DCRT's proposed route, DCRT should have been aware this lighting might have

238 *Id.* at 140:13-16.
239 Exh. No. DCT-0007 REV2 at 66:20-22.
240 Exh. No. CSO-0001 REV3 at 140:16-18.
241 Exh. No. DCT-0007 REV2 at 64:22-23.
242 Exh. No. CSO-0601 REV2 PUB at 117:23-118:17.
243 Exh. No. CSO-0001 REV3 at 155:23-32.

been required because both the proposed and the amended routes were in similar proximity to the DOD lands of YPG, which is a facility that tests military aircraft.[244] In other words, the cost of this type of lighting should have been expected.[245] DCRT places great reliance in general on the history of the DPV2 line, but when the DPV2 line was constructed in California in 2011-2012, the FAA required additional lighting on the new 500 kV line, even though it was immediately adjacent to the older 500 kV line that was unlit.[246] It was incumbent on DCRT to consider current requirements and to consult with the relevant agencies about specific requirements in defining the costs for the amended route.

The third above-cap EPC cost DCRT identifies is $3,733,170 in engineering, environmental, and cultural change orders pertaining to overhead and costs for staff to produce various iterations of construction plans and additional plans not contemplated in the original scope of the Project and to provide for the installation of wooden supports during installation of overhead wires to prevent the lead line used during the stringing of the wires from harming historic properties.[247] These costs do not fall under the cost cap exclusions in Appendix E linked to Sections 4.4, 5.4, and 5.5.3 of the DCRT APSA.[248] Neither the CAISO, SCE, nor APS ordered DCRT to make this change to ensure the Project's compatibility with their functional specifications, Operational Control, or safety requirements, nor was this change needed to remedy any deficiency in meeting SCE's or APS's technical standards and specifications that

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[244] Exh. No. CSO-0101 REV2 at 40:1-15.

[245] In this regard, CAISO witness Lee explained that changes in tower lighting requirements over time are foreseeable because FAA requirements are updated and publicly posted regularly, so simply looking at the lighting that was present on an older line should not have been considered an accurate predictor for what would have been required on a line constructed decades later. Exh. No. CSO-0701 PUB at 54:12-56:5.

[246] *Id.* at 55:1-4, 56:6-57:16. FAA advisories on tower lighting were in place and applied to the DPV2 line. Exh. No. S-0052 PUB at 50:17-19 (citing Exh. No. S-0056, Part I at 1); *see also* Exh. No. S-0055, Part II at 27.

[247] Exh. No. DCT-0007 REV2 at 67:1-7; Exh. No. DCT-0102 REV2 PUB at 101:7-104:4; Exh. No. DCT-0107 REV at 2.

[248] Exh. No. CSO-0001 REV3 at 141:4-14.

arose during construction of the Project. These are the types of costs and environmental mitigation/survey/planning requirements DCRT should have anticipated and accounted for—and did—in its bid.[249] DCRT's bid, unlike the bid of other competing Project Sponsors, did not include a specific cost cap exception for increased environmental mitigation and historic property protection costs above those assumed in its bid.[250]

The fourth above-cap EPC cost DCRT identifies is $676,488 in costs associated with marker balls and bird diverters required by the BLM and the CPUC.[251] Appendix 1C to the FEIS for the Project makes clear that the BLM applied the APLIC guidelines and methodologies (2006, 2012) regarding the design of transmission facilities to minimize the potential for bird collisions with transmission lines.[252] These were existing guidelines used by all transmission developers that DCRT should have been aware of in preparing its proposal and should have accounted for the costs thereof in its bid. Further, in the second amendment to the DCRT APSA, the CAISO approved $61,851 in costs for the bird diverters because they were associated with the Change in Route.[253] As discussed above with respect to FAA lighting costs, DCRT, having previously agreed to the second amended DCRT APSA that accounted for all Change of Route costs, is not permitted to come back in this rate case and seek a "second bite at the apple" to recover additional marker ball costs. In any event, these are not costs that fall under the cost cap exclusions in Appendix E linked to Sections 4.4, 5.4, and 5.5.3 of the DCRT APSA.[254] Neither the CAISO, SCE, nor APS ordered DCRT to make this change to ensure the Project's compatibility with their functional specifications, Operational Control, or safety requirements,

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[249] *Id.* at 141:14-17; Exh. No. CSO-0006 REV2 PUB at 153-55.
[250] Exh. No. CSO-0001 REV3 at 141:17-19.
[251] Exh. No. DCT-0007 REV3 at 67:8-9; Exh. No. DCT-0102 REV2 PUB at 104:5-106:13; Exh. No. DCT-0107 REV at 2.
[252] Exh. No. CSO-0001 REV3 at 141:20-142:5 (citing Exh. No. CSO-0046 at 61, 343).
[253] Exh. No. CSO-0001 REV3 at 142:7-10.
[254] *Id.* at 142:10-12; Exh. No. CSO-0601 REV2 PUB at 117:23-118-17.

nor is the change needed to remedy a deficiency in technical standards and specifications identified by SCE or APS that arose during construction of the Project. Moreover, these costs were foreseeable, as DCRT's own meeting notes from August 2015—before the DCRT APSA was executed—acknowledged that the Project would "need mitigation like colored balls on transmission lines that pertain to DoD impacts."[255]

The fifth above-cap EPC cost DCRT identifies is $588,250 in costs for additional environmental subcontractor requirements to monitor individual species.[256] These costs do not fall under the cost cap exclusions in Appendix E linked to Sections 4.4, 5.4, and 5.5.3 of the DCRT APSA.[257] Neither the CAISO, SCE, nor APS ordered DCRT to make this change to ensure the Project's compatibility with their functional specifications, Operational Control, or safety requirements, nor is the change needed to remedy any deficiency in meeting technical standards and specifications identified by SCE or APS that arose during construction of the Project. Instead, these are measures responding to requirements imposed on DCRT by the BLM and the CPUC. These are the types of costs and environmental/biological requirements DCRT should have anticipated and accounted for—and did—in its bid.[258] Unlike the bids of other Project Sponsors,[259] DCRT's bid and the DCRT APSA do not include a cost cap exception for increased environmental/species mitigation costs beyond the level assumed in DCRT's proposal.

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[255] Exh No. S-0055 Part I REV PUB at 87.

[256] Exh. No. DCT-0007 REV2 at 67:10-14; Exh. No. DCT-0102 REV2 PUB at 106:14-108:12; Exh. No. DCT-0107 REV at 2.

[257] Exh. No. CSO-0001 REV3 at 142:13-19.

[258] *Id.* at 142:20-22; Exh. No. CSO-0006 REV2 PUB at 153-55.

[259] *See* **[BEGIN CUI//PRIV]** [redacted] **[END CUI//PRIV]**

DCRT should have—and in fact did—account for siting, developmental, and environmental monitoring and mitigation activities and associated costs (including extensive environmental processes and individual species and habitats) and environmental/biological requirements in its proposal.[260] The fact actual environmental/species monitoring requirements (and associated costs) turned out to be more than DCRT anticipated and reflected in its cost cap should not excuse DCRT from its agreed-to cost cap. Doing so would allow DCRT to recover above-cap costs not permitted under the DCRT APSA and would unduly "punish" the other competing bidders for the Project who may have included more realistic environmental mitigation costs in their bids (or had specific cost cap exclusions for such costs) and thus had higher bids.[261]

The sixth above-cap EPC cost DCRT identifies is $12,393,215 in costs associated with the change in tower type from guyed V towers to self-supporting lattice towers.[262] As discussed below,[263] DCRT also claimed these costs as recoverable costs due to Force Majeure. They are neither. There are several reasons why the Commission should not permit DCRT to recover these costs as "regulatory compliance" costs in addition to the fact the DCRT APSA contains no cost cap exclusion for "regulatory compliance" costs. First, the costs do not fall under the cost cap exclusions in Appendix E linked to Sections 4.4, 5.4, and 5.5.3 of the DCRT APSA. The BLM directed DCRT to make these changes during the permitting process, not the CAISO, SCE, or APS, and they were reflected in the DEIS issued in 2018[264] which included as a line item in the second amended DCRT APSA.[265] They are not costs to remedy deficiencies in meeting the

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260 *See* Exh. No. CSO-0006 PUB at 19, 25, 138, 144, 153-214.
261 Exh. No. CSO-0001 REV3 at 142:22-143:9.
262 Exh. No. DCT-0007 REV2 at 67:15-16; Exh. No. DCT-0102 REV2 PUB at 108:13-111:17; Exh. No. DCT-0107 REV at 2.
263 *See infra* Section II.C.4 of this Initial Brief.
264 Exh. No. DCT-0046 at 839.
265 *See* Exh. No. DCT-0104 at 2, 10-11; Exh. No. CSO-0009 REV (line items C2 and C3).

CAISO's technical standards or specifications.[266] The CAISO's Functional Specification for the Project only specified that the towers had to be single-circuit towers; it did not specify the specific type of single-circuit tower that must be used.[267] Thus, any requirement to use steel lattice towers rather than guyed V towers was not necessary to remedy deficiencies in meeting the CAISO's specifications.[268] Further, neither the CAISO, SCE, nor APS ordered DCRT to make this change to ensure the Project's compatibility with their functional specifications, Operational Control, or safety requirements, or to remedy any deficiency in meeting SCE's or APS's technical standards and specifications that arose during construction of the Project. Indeed, the BLM directive for the changed tower design was clearly defined in the DEIS and FEIS, both of which were published in 2018 and 2019, several years before DCRT even commenced construction.

In addition, the tower design changes are facility modifications by a siting authority and are thus subject to Section 5.9 of the DCRT APSA, not Sections 5.4 or 5.5.3. As discussed above, DCRT, unlike other Project Sponsors, did not include a cost cap exception for regulatory authority-ordered changes to its proposed facilities.[269] Although DCRT now seeks to recover these costs as "regulatory compliance" costs, it states these tower changes resulted from the BLM's selection of its Preferred Alternative Route.[270] As such, these costs are governed by the Change of Route provision in Appendix E of the DCRT APSA.[271] The CAISO and DCRT previously agreed to a Change of Route increase to the cost cap in the second amended DCRT

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[266] Exh. No. CSO-0001 REV3 at 143:10-18.

[267] *Id.* at 143:18-21 (citing Exh. No. CSO-0004 at 4).

[268] The BLM required non-guyed towers for segments of the route in areas of high off-highway vehicle use. Off-highway vehicle users would have been in close proximity to the guyed V structures and that would pose an unacceptable risk for human health and safety. Exh. No. CSO-0001 REV3 at 143:21-144:5 (citing Exh. No. CSO-0047 at 26, 103).

[269] Exh. No. CSO-0001 REV3 at 144:6-11.

[270] Exh. No. DCT-0007 REV2 at 19:17-20:6.

[271] Exh. No. CSO-0001 REV3 at 144:11-15.

APSA. As discussed above, the increased cost cap in the second amendment to the DCRT APSA included $1,081,314 in increased costs for the tower changeout compared with the costs of the towers in its proposal. The CAISO and DCRT analyzed the exact number of towers that changed and then used the cost DCRT included in its proposal for the various transmission structures.[272] There was an increase of 123 lattice towers, and a reduction of 66 guyed V towers and 20 dead-end structures.[273] If DCRT believed additional Change of Route costs should have been included, it should have pursued the remedy under the DCRT APSA. It did not. As such, the Commission should not allow DCRT to come back for a “second bite at the apple” and recover such additional costs in this rate case.[274]

The seventh above-cap EPC cost DCRT witness Crew identifies is $15,458,100 for LNTP change order requests, which he testified were necessary to support additional laydown crews from July-September 2022 resulting from delays in the Project.[275] In Rebuttal Testimony, witness Crew stated these costs arose from regulatory requirements such as (1) the BLM’s requirement for site specific environmental plans, (2) additional studies, (3) additional compliance surveys, and (4) archaeological surveys and reporting.[276] These are not costs falling under the cost cap exclusions in Appendix E linked to Sections 4.4, 5.4, and 5.5.3 of the DCRT APSA.[277] Even assuming *arguendo* the stated rationale in witness Crew’s Rebuttal Testimony is correct, these costs arose from regulatory compliance obligations imposed by the BLM. Neither the CAISO, SCE, nor APS ordered DCRT to make this change to ensure the Project’s compatibility with their functional specifications, Operational Control, or safety requirements or

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272 *Id.* at 144:15-23; Exh. No. DCT-0104:10-11.
273 Exh. No. CSO-0001 REV3 at 144:23-145:2; Exh. No. CSO-0009 REV.
274 Exh. No. CSO-0001 REV3 at 145:2-5; Exh. No. CSO-0601 REV2 PUB at 117:23-118:17.
275 Exh. No. DCT-0007 REV2 at 67:17-19; Exh. No. DCT-0102 REV2 PUB at 112:1-114:12; Exh. No. DCT-0107 REV at 2.
276 Exh. No. DCT-0102 REV2 PUB at 30:15-31:6, 112:14-113:13.
277 Exh. No. CSO-0001 REV3 at 145:6-13.

to remedy any deficiency in meeting SCE's or APS's technical standards and specifications that arose during construction of the Project.

Witness Crew's testimony is devoid of any explanation of how the purported regulatory directives caused DCRT to need additional laydown crews. If the specified regulatory obligations caused the incurrence of these costs, they are related to environmental and archaeological mitigation and surveying. Unlike the bids of other Project Sponsors, DCRT's bid and the DCRT APSA include no cost cap exception for increased environmental or archaeological mitigation/surveying/reporting costs beyond the level assumed in DCRT's proposal. DCRT should have—and in fact did—account for environmental monitoring and mitigation costs and environmental/archaeological requirements in its proposal. The fact any environmental/archaeological monitoring/reporting requirements (and associated costs) were more than DCRT anticipated and reflected in its cost cap should not excuse DCRT from its agreed-to cost cap.[278] Finally, project delays are not a basis for seeking additional cost recovery from the Commission under Sections 5.4 and 5.5.3 of the DCRT APSA or any cost cap exclusion in the DCRT APSA.[279]

DCRT also states these costs resulted from the BLM Change of Route, which created inefficiencies.[280] If that is the case, recovery of these above-cap costs should be rejected along with all of the other Change of Route-related costs not accounted for in the amended cost cap for the reasons discussed elsewhere in this brief.[281]

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[278] Commission Trial Staff witness Dr. Norman also provide compelling testimony why these costs were foreseeable in nature. Exh. No. S-0052 PUB at 52:5-55:13.

[279] Exh. No. CSO-0001 REV3 at 146:8-12.

[280] Exh. No. DCT-0021 REV PUB at 17.

[281] Exh. No. CSO-0001 REV3 at 146:12-17.

The eighth above-cap EPC cost DCRT identifies is $3,325,356 associated with the increase in mobilization/demobilization costs to bring in additional manpower and equipment to accommodate seasonal restrictions.[282] This was a decision DCRT made regarding the scheduling of its construction of the Project (and not building the Project from one end to the other), and is not a cost falling under the cost cap exclusions in Appendix E linked to Sections 4.4, 5.4, and 5.5.3 of the DCRT APSA.[283] Neither the CAISO, SCE, nor APS ordered DCRT to make this change to ensure the Project's compatibility with their functional specifications, Operational Control, or safety requirements or to remedy any deficiency in meeting SCE's or APS's technical standards and specifications that arose during construction of the Project. Further, seasonal restrictions are common in the construction and maintenance of electric transmission facilities; they are not unforeseen or unexpected, and DCRT should have accounted for this potentiality in preparing the voluntary cost cap in its application.[284] DCRT's proposed binding cost cap included no exception for these types of costs.[285] DCRT also states these costs resulted from the BLM Change of Route, which created inefficiencies and different environmental restrictions.[286] If that is the case, recovery of these costs should be rejected along with all of the other Change of Route-related costs for the reasons discussed elsewhere in this brief.[287]

The ninth above-cap EPC cost DCRT identities is $4,505,939 in costs to mobilize equipment and manpower to different non-linear sections of construction of the Project to accommodate environmental and outage-related seasonal restrictions.[288] The Presiding Judge

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282 Exh. No. DCT-0007 REV2 at 67:20-22; Exh. No. DCT-0102 REV2 PUB at 114:13-117:2; Exh. No. DCT-0107 REV at 2.
283 Exh. No. CSO-0001 REV3 at 146:4-8.
284 *Id.* at 147:8-11.
285 *Id.* at 147:10-11.
286 Exh. No. DCT-0021 REV PUB at 20.
287 Exh. No. CSO-0001 REV3 at 146:15-17.
288 Exh. No. DCT-0007 REV2 at 68:1-3; Exh. No. DCT-0102 REV2 PUB at 117:3-119:6; Exh. No. DCT-0107 REV at 2.

and Commission should reject this cost recovery request because it does not fall under the cost cap exclusions in Appendix E linked to Sections 4.4, 5.4, and 5.5.3 of the DCRT APSA.[289] Neither the CAISO, SCE, nor APS ordered DCRT to make this change to ensure the Project's compatibility with their functional specifications, Operational Control, or safety requirements or remedy any deficiency in meeting SCE's or APS's technical standards and specifications that arose during construction of the Project. They are costs DCRT incurred given its chosen approach to constructing the Project—constructing different segments of the line at different times, as opposed to undertaking end-to-end construction, and the timing of construction of specific segments of the Project.[290] Seasonal restrictions are not an unforeseen or unusual occurrence in the permitting and construction of electric transmission lines.[291] DCRT had no specific cost cap exclusion for these types of costs in its proposal, and the DCRT APSA contains no applicable cost cap exclusion.[292]

The tenth above-cap EPC cost DCRT identifies is $4,313,319 in costs based on claims WAPA and IID did not provide the line outages as DCRT preferred.[293] Further, DCRT claims it was unable to execute a crossing segment with AltaGas in a timeline consistent with its Project schedule and, thus, EC Source incurred additional costs because it had to work out of sequence.[294] These also are not costs falling under the cost cap exclusions in Appendix E linked to Sections 4.4, 5.4, and 5.5.3 of the DCRT APSA.[295] Neither the CAISO, SCE, nor APS ordered DCRT to make this change to ensure the Project's compatibility with their functional

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289 Exh. No. CSO-0001 REV3 at 146:18-147:3.

290 *Id.* at 147:3-7 (citing Exh. No. DCT-0021 REV PUB at 22).

291 Exh. No. CSO-0001 REV3 at 147:7-10.

292 *Id.* at 147:10-11.

293 Exh. No. DCT-0007 REV2 at 68:4-9; Exh. No. DCT-0102 REV2 PUB at 119:7-121:14; Exh. No. DCT-0107 REV at 2.

294 Exh. No. CSO-0001 REV3 at 147:17-20.

295 *Id.* at 147:20-22.

specifications, Operational Control, or safety requirements or to remedy any deficiency in meeting SCE's or APS's technical standards and specifications that arose during construction of the Project. These costs relate to work done "out of sequence" with the construction plan.[296] There is no cost cap exclusion for this type of cost. It is not even a "regulatory compliance" cost as DCRT claims—neither the BLM nor the CPUC imposed this on DCRT. Further, DCRT provides no detail regarding what exactly these costs are. Scheduling issues are a common occurrence in the construction of large transmission facilities and are not something that is unusual or unexpected. They require effective advance coordination with the affected entities.[297]

e. There Is No Merit in DCRT's Claims of Other Regulatory Compliance Costs

DCRT also states it incurred additional management-related costs totaling $18,716,406 to comply with BLM, CPUC, and other requirements, including the BLM DRECP and Order 3355. These include: (1) $3,540,453 of cost for economic consultants due to the CPUC requiring DCRT to provide a cost-benefit analysis of its Project, which was foreseeable because applicants are required to submit cost and benefit information as part of the CPCN process on their route proposals and therefore costs of this nature were foreseeable;[298] (2) $8,011,344 for cultural resources compliance and monitoring for specialized environmental services for regulatory compliance with a historical properties treatment plan regarding archaeological and historical preservation requirements;[299] (3) $3,746,585 of additional outside counsel costs to support its rate filing with the Commission;[300] and (4) $3,418,024 of additional costs for construction

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[296] *See* Exh. No. DCT-0102 REV2 PUB at 119:17-120:2.

[297] Exh. No. CSO-0001 REV3 at 147:22-148:3.

[298] Exh. No. DCT-0007 REV2 at 68:17-69:4; Exh. No. DCT-0102 REV2 PUB at 121:16-123:17; Exh. No. DCT-0107 REV at 2.

[299] Exh. No. DCT-0007 REV2 at 69:5-9; Exh. No. DCT-0102 REV2 PUB at 124:1-125:13; Exh. No. DCT-0107 REV at 2.

[300] Exh. No. DCT-0007 REV2 at 69:10-12; Exh. No. DCT-0102 REV2 PUB at 125:14-126:12; Exh. No. DCT-0107 REV at 2.

oversight and compliance due to changes in the EPC contract related to non-linear work sites, additional sets of crews, and complying with environmental restrictions, which are costs resulting from DCRT's decision on how to build the Project in multiple simultaneous segments requiring redundant work sites, crews, and oversight, as detailed above.[301]

The Commission should not permit DCRT to recover these above-cap costs, because they are related to the cost cap exclusions DCRT identifies as the source of its "regulatory compliance" claims.[302] These are not costs DCRT incurred as a result of a delay caused by the CAISO's unilateral amendment of the DCRT APSA to eliminate a conflict with Applicable Laws and Regulations or Applicable Reliability Standards and, as such, they are not costs eligible for a cost cap exclusion under the reference to Section 4.4 in Appendix E of the DCRT APSA.[303] Nor are these costs DCRT incurred to make changes to the Project as directed by the CAISO, SCE, or APS to ensure the Project's compatibility with their functional specifications, Operational Control, or safety requirements.[304] Nor were these changes needed under Section 5.5.3 to remedy any deficiency SCE or APS identified in meeting SCE's or APS's technical standards and specifications that arose during construction of the Project.[305]

DCRT's increased economic consultant and attorney costs are costs DCRT incurred to prosecute its ACC Certificate of Environmental Compatibility, CPUC CPCN,[306] and rate filings at the Commission.[307] These types of costs are far outside of the scope of Sections 4.4, 5.4, and 5.5.3 of the DCRT APSA. Further, DCRT's competitive solicitation application accounted for

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301 Exh. No. DCT-0007 REV2 at 69:13-17; Exh. No. DCT-0102 REV2 PUB at 126:13-127:18; Exh. No. DCT-0107 REV at 2.

302 Exh. No. CSO-0001 REV3 at 149:3-7.

303 *Id.* at 149:7-12.

304 *Id.* at 149:12-18.

305 *Id.* at 149:18-23.

306 Also, because additional cost-benefit analysis costs in the CPCN were pre-commercial costs and not costs arising "at any time during construction," they do fall within Section 5.5.3.

307 *Id.* at 150:1-5; *see also* Exh. No. DCT-0007 REV2 at 60:11-61:1, 68:15-69:17.

these types of costs, and the fact they may have been higher than DCRT expected does not justify recovery of costs above the binding cost cap because the cost cap included no exclusion for these types of costs.[308] Likewise, costs associated with environmental/cultural studies services are typical costs developers incur in constructing transmission projects.[309] DCRT could have accounted for—and did account for—these types of costs in its competitive solicitation proposal.[310] The mere fact it cost more than DCRT expected to pursue its Certificate of Environmental Compatibility, CPCN, rate filings, monitor historical and archaeological conditions, or provide construction oversight is not a basis for escalating its agreed-to binding cost cap. There is no specific cost cap exclusion for these types of costs in the DCRT APSA.[311] Also, unlike the proposals of competing Project Sponsors, DCRT's proposal did not include a cost cap exclusion for increased environmental mitigation costs beyond the amount assumed in its proposal.[312]

4. Does the APSA Allow DCRT to Recover Costs of Delay Due to Force Majeure in Excess of the Cap, and If So, How Much of Such Delay Costs Does the APSA Allow DCRT to Recover over the Cap in This Proceeding?

Bullet #5 in Appendix E of the DCRT APSA sets forth an exclusion from the cost cap for "[a]ny FERC approved costs resulting from delays due to events of Force Majeure, not covered by insurance, or caused by an Interconnecting PTO."[313] As discussed below, only one of the twelve events of Force Majeure DCRT claims satisfies the DCRT APSA or Commission and California law for Force Majeure events.[314] Moreover, only the management run-rate costs and

[308] Exh. No. CSO-0001 REV3 at 150:6-9.
[309] *Id.* at 150:9-11.
[310] *Id.* at 150:11-13; Exh. No. CSO-0006 REV2 PUB at 92-93, 153-155.
[311] Exh. No. CSO-0001 REV3 at 150:13-18.
[312] *Id.* at 150:18-21.
[313] Exh. No. DCT-0002 at 78.
[314] *See infra* Sections II.C.4.a-c of this Initial Brief.

associated AFUDC costs DCRT claims qualify as costs resulting from the nine-month delay to the Project due to the COVID-19 Force Majeure event.[315]

a. The Definition and Scope of Force Majeure Under the DCRT APSA and Applicable Law

The DCRT APSA defines Force Majeure as

> any 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 hardship of either Party; or (4) failure or delay in granting of necessary permits for reasons not caused by Force Majeure.[316]

The term Good Utility Practice referenced in the definition of Force Majeure has not changed since the time the DCRT APSA was executed. It means

> [a]ny of the practices, methods, and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods, and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, and expedition. Good Utility Practice is not intended to be limited to any one of a number of the optimum practices, methods, or acts to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region, including those practices required by Federal Power Act section 215(a)(4).[317]

In addition, in its order approving the CAISO's *pro forma* APSA and in other decisions the Commission has explained that to qualify as a force majeure event, the event must be both

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315 *See infra* Section II.C.4.d of this Initial Brief.

316 Exh. No. DCT-0002 at 7.

317 Exh. No. CDN-0002 at 89-90. FPA section 215(a)(4) is referenced in this definition because "[i]n Order No. 890, the Commission incorporated the definition of reliable operation in FPA section 215 into the definition of Good Utility Practice in the [Commission's] *pro forma* OATT"—which the CAISO tariff definition matches in relevant part. *See Preventing Undue Discrimination & Preference in Transmission Serv.*, Order No 890-A, 121 FERC ¶ 61,297, at P 1004 (2007).

uncontrollable and unforeseeable.[318] To qualify as a Force Majeure event under the DCRT APSA, an event must also meet those Commission requirements. The same two requirements to qualify as a force majeure event also apply under California state law, and the DCRT APSA is subject to California law.[319] As noted above, under California law, a party claiming force majeure as a basis for non-compliance with a contract bears the burden of proof. [320]

Under applicable federal and state law, the unforeseeability component of force majeure is based on objective criteria—*i.e.*, whether the event in question was reasonably unforeseeable.[321] DCRT appears to acknowledge that the standard for unforeseeability is an

318 *See, e.g.*, *DCR Transmission, L.L.C.*, 184 FERC ¶ 61,199, at P 32 (2023) (describing DCRT's argument in this proceeding that "force majeure captures government action that is unforeseeable and beyond the reasonable control of a party that could not have been avoided through the exercise of Good Utility Practice") (internal quotation marks omitted); *Cameron Interstate Pipeline LLC*, 153 FERC ¶ 61,363, at P 10 (2015) ("Accordingly, Cameron's existing tariff includes *force majeure* events which are foreseeable and, therefore, conflicts with the Commission's definition of force majeure."); *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107, at P 37 & n.48 (order accepting CAISO *pro forma* APSA, in which the Commission explained that "the common understanding of the term" force majeure is an "event or effect that can be neither anticipated nor controlled") (quoting Black's Law Dictionary (9th ed. 2009)).

319 *See, e.g.*, *Free Range Content, Inc. v. Google Inc.*, 2016 U.S. Dist. LEXIS 64365, at *17 (N.D. Cal. May 13, 2016) ("Under California law, unless a contract explicitly identifies an event as a force majeure, the event must be unforeseeable at the time of contracting to qualify as such.") (citing *Watson Labs. Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1111 (C.D. Cal. 2001)) ("*Watson Laboratories*"); *Watson Laboratories*, 178 F.Supp. 2d at 1110 (stating "the California law of *force majeure* requires us to apply a reasonable control limitation to each specified event, regardless of what generalized contract interpretation rules would suggest") (internal citation omitted).

320 *See supra* Section IIA of this Initial Brief.

321 *See, e.g.*, *N. Baja Pipeline v. FERC*, 483 F.3d 819, 823 (D.C. Cir. 2007) ("In Opinion 406, however, the Commission defined *force majeure* events as events that are not only uncontrollable, but also unexpected. . . . Although some scheduled maintenance interruptions may be uncontrollable, they certainly are not unexpected.") (citing *Tenn. Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022 (1996)); *RH energytrans, LLC*, 165 FERC ¶ 61,218, at P 58 (2018) ("Outages resulting from governmental actions may be treated as resulting from a *force majeure* event only when the governmental requirement pertains to matters which are not reasonably in the pipeline's control *and are unexpected*. For example, government-mandated scheduled maintenance is a necessary non-*force majeure* event, even if it causes major disruptions.") (citing Commission precedent and internal quotation marks omitted) (emphasis in original); *U.S. v. Buffalo Coal Mining Co.*, 345 F.2d 517, 518 (9th Cir. 1965) ("Let us fully grant that a party should not be bound by a contract, the purpose of which is frustrated by an unforeseeable supervening event. . . . [T]he parties should be bound unless their contractual purpose was frustrated by a completely unforeseeable cause. And the test of foreseeability should be an objective one; not a subjective inquiry into the state of mind of the parties."); *Collins v. Indus. Accident Comm'n*, 273 P. 33, 34, 205 Cal. 727, 729 (1928) (explaining that "the rule applied by the courts almost universally, is as follows: 'As a general principle, the employer is not responsible for damages caused to his workmen by lightning, storms, sunstroke, freezing, earthquake, floods, etc. These are considered as "force majeure," which human vigilance and industry can neither foresee nor prevent.") (quoting *London Guarantee & Accident Co. v. Indus. Accident Comm'n*, 259 P. 1096, 1097, 202 Cal. 239, 242 (1927)).

objective one.[322] Because the foreseeability requirement is an objective rather than a subjective standard, the fact DCRT may not have foreseen the types of occurrences that are typical of large transmission projects is irrelevant. Consistent with their being reasonably unforeseeable, force majeure events are unusual by their nature rather than routine.[323]

Furthermore, federal and California state precedent requires a party seeking to justify noncompliance due to an alleged force majeure event to show a causal link between the event and the noncompliance with the party's performance obligations. Absent such a showing, there can be no finding that the party's noncompliance was due to force majeure.[324]

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322 *See* DCT-0102 REV2 PUB at 30:3-6 (arguing that aggregate impacts of claimed Force Majeure events were "compounded by delays and additional costs which were outside of DCRT's control, not reasonably foreseeable, and could not have been avoided through the use of Good Utility Practice"); *id.* at 43:7-8 (arguing that "the execution of the Original APSA should be the date upon which the reasonable foreseeability (or lack thereof) is evaluated"); *id.* at 64:11-12 (arguing that "BLM's notice of the revised permitting schedule was not reasonably foreseeable when DCRT signed the Original APSA").

323 *See, e.g., U.S. v. Bridgewater*, 995 F.3d 591, 596 n.3 (7th Cir. 2021) (explaining that "contract law allows for some unusual and unpredictable events to relieve a party of agreed obligations, such as through the doctrine *of force majeure* or so-called Acts of God") (citing Restatement (Second) of Contracts 11 Intro. Note (Am. L. Inst. 1981)); *First ECA Midstream LLC*, 158 FERC 61,113, at P 17 (2017) (explaining "the Commission has held that *force majeure* outages are both unexpected and uncontrollable events and that routine, scheduled maintenance is not a *force majeure* event"); *id.* (stating that "outages resulting from one-time, non-recurring government requirements . . . are *force majeure* events") (quoting *Sabine Pipe Line LLC*, 153 FERC ¶ 61,123, at P 17 (2015)); *Watson Laboratories*, 178 F. Supp. 2d. at 1111 ("As the Board points out, *force majeure* clauses have traditionally applied to unforeseen circumstances—typhoons, citizens run amok, Hannibal and his elephants at the gates—with the result that the Court will extend [the *force majeure* provision] only to those situations that were demonstrably *unforeseeable* at the time of contracting.") (internal citation omitted) (emphasis added by the court).

324 *See, e.g., Gulf Oil Corp. v. FERC*, 706 F.2d 444, 455 (3d Cir. 1983) ("For *force majeure* events to excuse nonperformance, some correlation must be drawn between the occurrence of an event and the obligation of the nonperforming party.") (citing U.S. Supreme Court precedent); *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187, at P 100 (2014) ("Since the facts of any qualifying *force majeure* event will differ, whether the Designated Entity cannot perform due to a *force majeure* event or mitigate the *force majeure* event through reasonable efforts will necessarily be determined at the time of the *force majeure* event."); *Nexen Mktg. U.S.A. Inc. v. Enbridge Pipelines (N.D.) LLC*, 126 FERC ¶ 61,073, at PP 38-41 (2009) (analyzing whether facts supported force majeure claim); *KB Salt Lake III, LLC v. Fitness Int'l, LLC*, 313 Cal. Rptr. 3d 820, 835-39, 95 Cal. App. 5th 1032, 1050-55 (finding that government's imposition of COVID-19 shutdown restrictions was not valid link for company to invoke force majeure clause in lease agreement to avoid paying rent); *W. Pueblo Partners, LLC v. Stone Brewing Co., LLC*, 307 Cal. Rptr. 3d 626, 634-36, 90 Cal. App. 5th 1179, 1188-90, (similar issue and findings).

b. Notice for Force Majeure Under the DCRT APSA and Applicable Law

The DCRT APSA provides two mutually exclusive paths for proceeding when a party anticipates it will be unable to fulfill any of its obligations under the contract, including obligations to satisfy the construction milestones in the DCRT APSA. If the anticipated noncompliance is by reason of Force Majeure, Section 13, entitled Force Majeure, governs. Section 13.1.1 states

> [n]o Party shall be considered 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.[325]

The provisions quoted above are the only Force Majeure notice provisions in the DCRT APSA and expressly apply to a party unable to fulfill **any** obligation by reason of Force Majeure. Thus, the provisions apply to a party's obligations regarding all Force Majeure events, including ones claimed under Appendix E of the DCRT APSA. Both the Commission and California courts have found a party's failure to give timely notice of a claimed force majeure event in accordance with an agreement was a factor in finding against the party's attempt to invoke the agreement's force majeure provisions.[326] In this case, Section 13.1.1 specifies timely notice to be "as soon as reasonably possible after the occurrence of the cause relied upon."

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[325] Exh. No. DCT-0002 at 22-23.

[326] *See, e.g.*, *United Gas Pipe Line Co.*, 20 FERC ¶ 63,070, at 65,310 (1982), *aff'd on other grounds*, 31 FERC ¶ 61,336, at 61,770-71 (1985) ("Moreover, the October 26, 1970, petition does not meet the notice requirement set forth in Section 11.2. No mention is made therein of *force majeure* or of Section 11. Coming as it did some ten

On the other hand, if the anticipated noncompliance with the DCRT APSA is for any reason other than Force Majeure, Section 21.2 governs. This section reads in relevant part:

> [e]ach Party (the "notifying Party") shall notify the other Party when the notifying Party becomes aware of its inability to comply with the provisions of this Agreement for a reason other than a Force Majeure event. The Parties agree to cooperate with each other and provide necessary information regarding such inability to comply, including the date, duration, reason for the inability to comply, and corrective actions taken or planned to be taken with respect to such inability to comply.[327]

Under the plain language of the contract, any noncompliance with the DCRT APSA is necessarily governed by either Section 13.1.1 or Section 21.2. In either case, when DCRT became aware of potential delays that would affect its ability to comply with provisions of the DCRT APSA, including Project milestones and the Project's in-service date in Appendix B, it was required to provide timely notice to the CAISO. The only question was which of the two provisions governed the situation—Section 13.1 or Section 21.2.

DCRT claims twelve specific events caused Force Majeure delays for which it is seeking cost recovery.[328] However, the only event for which DCRT provided an actual, timely Section 13.1.1 Force Majeure notice was for COVID-19.[329] DCRT provided no notice of Force Majeure

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months after curtailment began it is hardly notice 'as soon as possible after the occurrence of the cause relied on. . . .'"); *Joysar v. Derco Assocs., Inc.*, 2022 Cal. Super. LEXIS 86804, at *14 (Nov. 16, 2022) ("Nor did White Lotus show that it met the other two conditions for excuse on the basis of force majeure: written notice to the other party and the use of best efforts to remedy the effects of the force majeure on the obligations under the contracts."); *Packing Dist., LLC v. RTR Bakery, Inc.*, 2022 Cal. Super. LEXIS 59978, at *7 (Sept. 19, 2022) ("Here, the [force majeure clause in the] Lease Agreement requires specific notice to be provided, which Defendant does not contend it made."); *Culver City Mall, LLC, v. Shanghai No. 1 Seafood Vill., Inc.*, 2022 Cal. Super. LEXIS 40635, at *11 (May 20, 2022) ("Defendants did not provide any notification to either Culver City or Valencia of any financial or other impediments to continued payment of rent for any reason, including those stated in Paragraph 27.4 of the subject leases, at any time. For these reasons, reliance on and application of the concept of force majeure is misplaced.").

[327] Exh. No. DCT-0002 at 30.

[328] Exh. No. DCT-0007 REV2 at 55 Table 2).

[329] For purposes of this proceeding, DCRT and the CAISO treat five of DCRT's claimed Force Majeure delay events as being related to COVID-19—(1) WHO declaration of COVID-19 as global pandemic, (2) EC Source sends force majeure notice to DCRT re global pandemic, (3) DCRT sends force majeure notice to the CAISO, (4) CPUC ALJ suspends CPCN hearing because of COVID-19, and (5) CPUC ALJ declines remote hearings and further suspends schedule—even though DCRT only sent one COVID-19 notice to the CAISO on March 13, 2020. *See* Exh. No. CSO-0001 REV3 at 110:11-111:11; Exh. No. CSO-0601 REV2 PUB at 44:17-45:10.

(or even an indication that the events were Force Majeure events) for many of the events it now claims were Force Majeure events that caused Project delays; for others DCRT did not provide notice "as soon as reasonably possible after the occurrence of the cause relied upon"—in some instances years after the event occurred—and these notifications did not mention Section 13.1.1 and were not separate Section 13.1.1 Force Majeure notices like those DCRT submitted to the CAISO for COVID-19 and for another event DCRT does not rely on in this case—the EO.[330]

Without stating they were Force Majeure events at the time, DCRT notified the CAISO that various non-COVID-19 events it now claims are Force Majeure events were causing delays to the Project, and it provided notice to the CAISO of its inability to meet the milestones in the original APSA and requested the CAISO's written agreement to extend the milestones. On November 7, 2017, DCRT sent a letter to the CAISO making this request, citing "schedule delays due to the permitting and environmental review agencies for Project Ten West," including the BLM.[331] Nowhere does the November 2017 letter reference Section 13 of the DCRT APSA

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[330] *See* Exh. No. CSO-0001 REV3 at 81:20-84:22 (citing Exh. Nos. DCT-0020 at 3 and CSO-0028). DCRT claims Section 13.1.1 of the DCRT APSA only requires a Force Majeure notice if there is an actual Default under the agreement. Exh. No. DCT-0102 REV2 PUB at 51:1-53:13. To date, the CAISO has not treated DCRT's efforts to exceed its cost cap as a Default. Section 13.1.1 does not require the existence of a Default. It is a Party's awareness of a potential inability to comply with obligations in the agreement that triggers the obligation to notify the counterparty. Section 13.1.1 states 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." Exh. No. DCT-0002 at 22. A Default is not required by that language. Exh. No. CSO-0601 REV2 PUB at 74:1-77:11. DCRT's claim that a Default is required for a Force Majeure notice is belied by the two Section 13.1.1 Force Majeure notices it did provide the CAISO—for COVID-19 and the EO—neither of which involved a Default. *Id.* at 76:5-23. DCRT similarly claims it was not required to give Force Majeure notice shortly after the occurrence of the events because it claims it did not know the full effects and delays caused by the events until years afterwards. Exh. No. DCT-0102 REV2 PUB at 61:1-17. Section 13.1.1 imposes no such requirement. It merely requires the Party to provide notice "as soon as reasonably possible after the occurrence of the cause relied upon" and to provide "the full particulars of such Force Majeure to the other Party." This claim too is belied by the two Section 13.1.1 Force Majeure notices DCRT did give the CAISO, which clearly stated that DCRT did not know the extent of the potential delays and cost impacts of the two Force Majeure events. *See* Exh. No. DCT-0020 at 3; Exh. No. CSO-0028. That fact did not prevent DCRT from giving the CAISO formal Section 13.1.1 Force Majeure notice of those two events, and it likewise would not have prevented DCRT from providing timely Section 13.1.1 Force Majeure notice of the other events its belatedly claims were Force Majeure events. *See* Exh. No. CSO-0001 REV3 at 83:41-84:22; Exh. No. CSO-0601 REV2 PUB at 74:1-76:23.

[331] Exh. No. CSO-0610.

or suggest that these schedule delays by agencies constitute an event of Force Majeure. Instead, by requesting CAISO agreement to extend milestones, the letter essentially follows the form of a notice under Section 21.2.

In quarterly reports prior to this letter, DCRT identified two events as causing permitting delays without ever once calling them Force Majeure events (even though it now claims they were)—the BLM's providing notice of delay in the DEIS in February 2017[332] and the CPCN ALJ's action in August 2017 postponing the docket until after issuance of the FEIS.[333] In subsequent quarterly reporting through July 2018, DCRT (1) identified delays to the overall Project schedule caused by regulatory actions including the DRECP[334] and Order 3355,[335] among other purported causes, and (2) proposed a new energization date of December 1, 2021.[336] Thus, DCRT's quarterly reports prior to the August 2018 first amendment to the DCRT APSA discussed these agency actions DCRT now claims were Force Majeure events, sometimes in multiple quarterly reports, but at those times DCRT did not identify these agency actions as Force Majeure events requiring an amendment to the APSA, for a schedule or cost increase.

The request in DCRT's November 2017 letter as supplemented in these quarterly reports culminated in the August 14, 2018 first amendment to the DCRT APSA, which amended at DCRT's request the milestones in Appendix A and B to include a new energization date of December 31, 2021.[337] Although DCRT's quarterly reports referred to these events many times,

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[332] Exh. No. DCT-0015 at 94, 104, 120, 138.

[333] *Id.* at 139.

[334] *Id.* at 159.

[335] *Id.* at 162.

[336] *Id.* at 176, 188. Other causes of DEIS delay identified by DCRT included "significant comments from [BLM's] field and state offices," and "BLM circulat[ing] the PDEIS [Preliminary DEIS] to the Cooperating Agencies and receiv[ing] numerous comments which are requiring additional effort by BLM and their third party contractor, Stantec." Exh. No. DCT-0015 at 125, 138, 143, 153, 159, 170, 176, 186.

[337] Exh. No. DCT-0002 at 67. DCRT witnesses Amirali and Crew acknowledge the first amendment to the DCRT APSA extended the construction milestone dates in the DCRT APSA, including the in-service date of the Project, to account for permitting delays. Exh. No. DCT-0001 REV2 at 25:16-20; Exh. No. DCT-0102 REV2 PUB

never once did DCRT identify them as Force Majeure events, nor did it provide Force Majeure notices under Section 13.1.1 regarding such delays or events. As a result of these delays in the Project and relying on DCRT's express description of these events in its quarterly reports and in the November 17, 2017 letter, the CAISO agreed to execute the first amendment to the DCRT ASPA to modify the construction milestones to provide for a new in-service date for the Project of December 31, 2021—a 20-month extension.[338] This extension of the Project milestones necessarily occurred under Section 21.2 of the DCRT APSA as there was no notification (or even a passing mention) that DCRT considered these events to be Force Majeure events.[339] It was only long after DCRT obtained an extension of the Project milestones in the first amendment to the DCRT APSA, including the in-service date, that DCRT claimed a smaller subset of such events were Force Majeure events. The plain language of the APSA prevents DCRT from claiming years after the fact that its inability to fulfill the construction milestone and in-service dates were actually due to Force Majeure events, especially when such events were presented to the CAISO as non-Force Majeure events, and the CAISO treated them as such.[340]

As reflected in its own testimony, the first time DCRT referred to any event as a Force Majeure event in any communication to the CAISO was a presentation to the CAISO on June 17, 2019, which was well after events it now claims as Force Majeure events in this proceeding, and well after the CAISO and DCRT executed the first amendment to the APSA on August 24, 2018 to extend the milestones for such permitting delays on the basis that they were not Force Majeure delays based on DCRT's representations and notifications at that time.[341] Of note, that

at 55:16-56:2. DCRT's October 22, 2018 quarterly report to the CAISO also acknowledged that "DCRT and CAISO amended the energization date in the APSA to December 31, 2021 to account for some of the delays." Exh. No. DCT-0015 at 193.

338 Exh. No. CSO-0601 REV2 PUB at 73:1-6.

339 *Id.* at 67:7-14.

340 *Id.* at 73:8-11.

341 Exh. No. DCT-0007 REV2 at 32:21-34:8.

presentation and a subsequent documentation on July 8, 2019 only identified three events as causing Force Majeure delays—DRECP, Order 3355, and the federal government shutdown in December 2018-January 2019.[342] However, claiming these events were Force Majeure events under the DCRT APSA long after their occurrence does not constitute notice "as soon as reasonably possible after occurrence or the cause relied upon" as Section 13.1.1 of the DCRT requires for Force Majeure notices.[343] In any event, the CAISO had already agreed to extend the milestones under the APSA as a modification due to non-Force Majeure events under Section 21.2. It is disingenuous for DCRT to obtain an extension of the Project's milestones and in-service date for permitting delays it did not call Force Majeure and for which DCRT provided no Force Majeure notice and then, long after the extension has been agreed to, "out of the blue" start claiming they were in fact Force Majeure events.

Moreover, DCRT's presentations did not even identify the first two Force Majeure delay events claimed by witness Crew—the BLM's notice of the DEIS or the CPUC ALJ's decision not to hold CPCN hearings until after issuance FEIS—as Force Majeure events even though they occurred years before these notifications. DCRT never claimed these two events were Force Majeure delay events until it filed its rate case in July 2023, and it never provided Section 13.1.1 Force Majeure notices to the CAISO for these events.[344] Likewise, DCRT never provided Section 13.1.1 Force Majeure notices to the CAISO for two other events that occurred after execution of the first amendment to the DCRT APSA—the BLM requiring a tower design change and the CAISO telling DCRT to hold off on major procurement until after a CPCN is

342 Exh. No. DCT-0018 REV2 PUB at 18, 28-29.

343 Unlike the Section 13.1.1 notices DCRT gave the CAISO for COVID-19 and the EO, DCRT never provided separate Section 13.1.1 Force Majeure notices to the CAISO for the DRECP, Order 3355, or the federal government shutdown. Exh. No. CSO-0001 REV3 at 81:20-84:22, 99:15-100:10, 103:6-16, 107:1-10.

344 *Id.* at 91:8-15, 94:1-9.

granted—although, DCRT now claims for the first time in its 2023 rate case that they are.[345] Moreover, the CAISO accepted the tower change costs in the second amendment to the DCRT APSA as Change in Route and DCRT should not get double recovery.[346] In addition, DCRT should not be permitted to recover costs associated with four events it did not even call Force Majeure events until the filing of its rate case in 2023 even though they occurred many years earlier or for other events DCRT only called Force Majeure years after their occurrence without providing any Section 13.1.1 notice of Force Majeure.

c. Only DCRT's Force Majeure Claims Related to COVID-19 Satisfy the Requirements for Force Majeure Under the DCRT APSA and Applicable Law Discussed Above

To summarize the requirements discussed in the two sections above, DCRT can exclude costs from the cost cap based on a particular claimed Force Majeure event only insofar as: (1) the claimed event satisfies the DCRT APSA definition of Force Majeure and the requirement of the Commission and California law that the claimed event be both uncontrollable and objectively unforeseeable, *i.e.*, that the event was unusual rather than routine; (2) DCRT has shown a causal link between the claimed event and DCRT's noncompliance with its performance obligations under the DCRT APSA; (3) DCRT has provided notice and full particulars of the claimed event to the CAISO as soon as reasonably possible; (4) DCRT has exercised due diligence to remove any disability associated with the claimed event with reasonable dispatch; (5) costs specific to DCRT that the Commission should approve resulted from delays due to the claimed event; (6) those costs for the claimed event are known; and (7) those costs are not covered by insurance.

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[345] *Id.* at 109:11-22, 116:5-13. In its summer 2019 presentations, DCRT mentioned the tower design change but never identified it as a Force Majeure event, instead characterizing it as a Change of Route matter. Exh. No. DCT-0018 REV2 PUB at 17.

[346] Exh. No. CSO-0001 REV3 at 108:19-109:10, 144:17-145:5; Exh. No. CSO-0009 REV.

DCRT initially claimed a total of $25,620,096 in Force Majeure costs alone[347] and a total of $22,976,696 in an intermingled combination of regulatory compliance and Force Majeure costs under the category of financing costs.[348] On rebuttal, DCRT claims a total of $24,536,161 in Force Majeure costs alone[349] and a total of $25,481,079 in an intermingled combination of regulatory compliance and Force Majeure costs under the category of financing costs.[350] As discussed below, DCRT should only be permitted to recover costs associated with the CPUC nine-month delay resulting from COVID-19. Those recoverable costs are monthly management run-rate costs totaling $3,678,723 (= $408,747 multiplied by nine months) and $373,366 of associated AFUDC costs.[351]

Except for DCRT's five claimed Force Majeure events related to COVID-19 (DCRT's events 7 through 11),[352] the claimed Force Majeure events do not satisfy the requirements under the DCRT APSA, do not meet the definition of Force Majeure, are not both uncontrollable and unforeseeable, and do not satisfy the notification requirements contained in the DCRT APSA.[353]

In addition to the reasons described above why most of DCRT's claimed events do not satisfy the Force Majeure requirements, the CAISO highlights specific flaws with DCRT's

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347 S*ee* Exh. No. DCT-0021 REV PUB at 3 (listing components of that total in table entitled "Delays from Events of Force Majeure – [Descriptions not included]").

348 *See* Exh. No. DCT-0021 REV PUB at 3 (listing components of that total in table entitled "Regulatory Compliance and Force Majeure"); Exh. No. DCT-0102 REV2 PUB at 128:2-130:8.

349 S*ee* Exh. No. DCT-0107 REV at 2 (listing components of that total in table entitled "Delays from Events of Force Majeure – [Descriptions not included]").

350 *See id.* (listing claimed cost items constituting that total in table entitled "Regulatory Compliance and Force Majeure"); Exh. No. DCT-0102 REV2 PUB at 128:2-130:8.

351 *See infra* Section II.C.4.c.vii of this Initial Brief.

352 *See* Exh. No. DCT-0007 REV2 at 55:4-5 (table listing the twelve claimed Force Majeure events and associated dates). The CAISO calculated the AFUDC cost amount listed above by applying the methodology Commission Trial Staff used and prorating the amount of AFUDC Commission Trial Staff would permit DCRT to recover, as the actual delay resulting from COVID-19 is much shorter than the amount of delay Commission Trial Staff attributes. Exh. No. CSO-0601 REV2 PUB at 48:8-49:3, 123:16-124:21.

353 By its own admission, the first time DCRT notified the CAISO of any events as claimed Force Majeure events was June 17, 2019, which was well after the occurrence of DCRT's claimed events 1 through 6 and thus was not "as soon as reasonably possible after the occurrence of the cause relied upon" as required by Section 13.1.1 of the DCRT APSA. *See* Exh. No. DCT-0007 REV2 at 32:21-33:1; Exh. No. CSO-0001 REV3 at 84:11-14.

arguments on many of the claimed Force Majeure events. The CAISO then addresses DCRT's arguments related to its Force Majeure claims regarding management run-rate costs.

i. Alleged Force Majeure Event 1: The BLM Provides Its Notice of Delay in the DEIS

The BLM notice of delay in issuing the DEIS in February 2017 does not constitute an event of Force Majeure under the DCRT APSA. The definition of Force Majeure in the DCRT APSA expressly states Force Majeure does not include "failure or delay in granting of necessary permits for reasons not caused by Force Majeure."[354] This provision in the DCRT APSA would be meaningless if every delay during the permitting and approval process was deemed to be a Force Majeure event or if mere agency order, notice, or action that resulted in a delay in a proceeding constituted a Force Majeure event.[355] Delays in regulatory approvals are not the kind of extraordinary events that qualify as events of Force Majeure under the DCRT APSA definition. On the contrary, regulatory proceeding delays and delays in receiving permits are a regular occurrence for large transmission projects and are an objectively foreseeable risk DCRT should have accounted for in developing its proposed schedule and cost cap when it bid on the Project.[356]

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354 *See* Exh. No. DCT-0002 at 7.

355 Tr. at 3812:20-3813:21.

356 Exh. No. CSO-0001 REV3 at 80:15-19. *See, e.g.*, *San Diego Gas & Elec. Co.*, 146 FERC ¶ 61,066, at P 26 (2014) (finding "the delays experienced in the approval of the Sycamore Project are a usual part of the processes necessary to approve a contested project and do not constitute unique circumstances"); *Tenn. 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. *See also Sayles Hydro Assoc. v. Pac. Gas & Elec. Co.*, 1990 Cal. PUC LEXIS 1393, at *27, 38 Cal.P.U.C.2d 519 (Dec. 19, 1990) (in rejecting complainant's argument that project permitting delays were force majeure events, CPUC explained that "[a]s we have held in past decisions, permitting delays are common events and should be anticipated by project developers"). The discussion in the paragraph above also applies to DCRT's claimed events 2 through 6. DCRT provided an additional 20 percent to its cost cap to account for delays in planned time to start operations. Exh. No. CSO-0006 REV2 PUB at 133.

DCRT fails to acknowledge these facts. DCRT witness Crew states in his testimony that the BLM delay "was attributed to the expanded scope and number of alternatives at the direction of the BLM, and the CPUC's requirement that the BLM analyze complete alternative routes versus alternative route segments."[357] Similarly, DCRT witness Amirali testifies that as explained by Mr. Crew, Force Majeure events included the "unexpected extensive number of route alternatives studied by BLM as part of the National Environmental Policy Act ('NEPA') process."[358] In that regard, the BLM studied six alternatives, including a required no-action alternative and DCRT's proposed route.[359]

The study of multiple alternatives is a regular, and required, undertaking under NEPA and under the CEQA.[360] Indeed, Title 1, Section 102(C)(iii) of NEPA requires an EIS to evaluate a reasonable range of project alternatives, including a no action alternative, and imposes no limit on the number of alternatives the BLM can study.[361] The BLM's NEPA Handbook, which was in effect beginning in 2008 and throughout the DCRT process, recognizes the BLM "must analyze those alternatives necessary to permit a reasoned choice," "[t]he broader the purpose and need statement, the broader the range of alternatives that must be analyzed," and "[f]or some proposals there may exist a very large or even an infinite number of possible reasonable alternatives."[362] The NEPA Handbook further provided that when the BLM is working with cooperating agencies, as it did in this instance with the CPUC, the "range of

357 Exh. No. DCT-0007 REV2 at 24:6-9.
358 Exh. No. DCT-0001 REV2 at 34:17-18.
359 Exh. No. DCT-0046 REV at 41-43; Exh. No. DCT-0047 at 12-13.
360 Exh. No. CSO-0001 REV3 at 90:7-9.
361 Exh. No. CSO-0101 REV2 at 21:23-22:3 (citing 42 U.S.C. § 4332 (C)(iii)). Each Project's NEPA document defines its own "reasonable range of alternatives" depending on the specific potential effects and siting challenges of the proposed project. Exh. No. CSO-0101 REV2 at 22:3-5.
362 Exh. No. CSO-0030 at 60.

alternatives may need to reflect the decision space and authority of other agencies, if decisions are being made by more than one agency."[363]

Susan Lee, an Executive Vice President of a prominent consulting firm in the western United States, and with more than 40 years of experience in environmental planning and permitting, including environmental permitting and planning for electric transmission projects and energy infrastructure projects, testified that consideration of numerous alternatives in an EIS is typical for a large transmission project such as the Ten West Link Project.[364] She testified there is no rule as to what constitutes a "reasonable range," but consideration of a new alternative alignment and/or multiple alternative segments is a common practice for large transmission projects.[365] Based on her extensive experience, CAISO witness Lee testified the number of alternatives the BLM studied was not unreasonable, unexpected, or unusual.[366] DCRT's proposed Project would have passed through or adjacent to areas of significant environmental, military, and cultural concern; avoidance or minimization of effects within or near these types of areas are the drivers for developing alternatives. The DCRT proposed Project included nearly 25 miles within Kofa, and passed adjacent to the DOD YPG and the CRIT Reservation.[367] In particular, CAISO witness Lee noted the specific challenges associated with permitting of the route through Kofa; she noted that DCRT should have been aware of the risks of such a route

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363 *Id.*
364 Exh. No. CSO-0101 REV2 at 21:18-28:15.
365 *Id.* at 22:6-8.
366 *Id.* at 22:9-23:8. CAISO witness Lee noted that large transmission line projects frequently include consideration of alternative segments (sub-alternatives) that are evaluated as potential replacements to portions of the proposed route where the intent is to identify alternative alignment segments with smaller environmental impacts than the proposed route. *Id.* at 22:11-19.
367 *Id.* at 22:20-23:1.

and the likelihood that the BLM would consider several alternative routes to avoid effects within Kofa.[368]

Indeed, months before executing the APSA, DCRT was advised of the significant challenges faced by a proposed route through Kofa and was told by a senior BLM manager that such a route was "not going to happen."[369] DCRT was told that the BLM would need to study alternative routes, including a route that tracked the Section 368 Western Energy Corridor that was already set aside for transmission use and paralleled the DCRT proposed route.[370] DCRT ignored this advice and continued to pursue a route through Kofa in its bid. Consistent with the guidance the BLM gave DCRT before DCRT signed the APSA, the BLM did require study of several route alternatives that avoided Kofa, and it ultimately adopted a route that generally tracked the applicable Section 368 Western Energy Corridor that had been adopted in 2009.[371] Although the establishment of the Western Energy Corridors occurred several years after the 2006 FEIS for the DPV2 project on which DCRT relies, DCRT expressed surprise when it learned of the existence of the Energy Corridors and their applicability to the Project in 2015 even though they had been in existence for more than five years prior to DCRT submitting its bid in the CAISO's competitive solicitation process.[372] This further demonstrates DCRT's serious

[368] *Id.* at 6:13-14:10, 23:1-24.2, 24:3-21. CAISO witness Lee also concluded that a study of previous BLM projects would have alerted DCRT to the likelihood that the BLM would consider many alternative routes as a routine part of its permitting process and that approval of an alternative route would not be surprising. *Id.* at 25:17-20. In response to the question the Presiding Judge posed during the hearing, by the Presiding Judge, "Should the Company [*i.e.*, DCRT] have built in more time based on this advice in their timeline?", CAISO witness Lee responded: "This and other advice. I think that, you know, we looked at other discussions earlier about the schedule being overly aggressive, and I think certainly for a Kofa route, it was overly aggressive and probably impossible." Tr. at 3914:5-10.

[369] Exh. No. CSO-0704 REV at 6.

[370] *Id.* at 4, 6, 11, 13; Exh. No. CDN-0078 at 2.

[371] ***See*** Exh. No. DCT-0046 REV at 53, 75-76; Exh. No. CSO-0109 at 70; Exh. No. CSO-0110; Exh. No. CSO-0111.

[372] ***See*** Exh No. S-0071 at 4.

lack of due diligence and failure to follow Good Utility Practice in assessing possible routes, route risk, and schedule risk.[373]

Thus, the BLM's study of multiple alternatives was not an unreasonable, unforeseeable, or unusual occurrence under the circumstances, especially given the Project's complexity. The components of complexity were clear at the time of DCRT's submittal to the CAISO: the length of the transmission line, the need for multiple agency approvals, the two states the line transits, challenging route-related environmental and other issues associated with the route of the Project, and the need to assess alternative route segments that better tracked the approved Section 368 Western Energy Corridors.[374] These alternative routes—which included segments that DCRT in its submittal to the CAISO deemed unnecessary to study (including segments that the BLM ultimately adopted in its Preferred Route)—tracked the Section 368 Energy Corridor and existing BLM utility corridors, explored shorter routes for the Project, and sought to avoid the town of Quartzite as the Energy Corridor is not defined on the private lands within Quartzite.[375] DCRT is essentially asking the Presiding Judge and the Commission to "second guess" the BLM's consideration of alternative routes and segments and find that such consideration constituted a delay resulting from a Force Majeure event. For these reasons, the BLM's actions were not a Force Majeure event.

ii. Alleged Force Majeure Event 2: The CPUC/CPCN ALJ Postpones Its Docket Until the BLM Completes the FEIS and Record of Decision

The second event DCRT claims as a Force Majeure delay is the CPUC ALJ's August 4, 2017 decision to hold the CPCN docket in abeyance until the BLM completed its FEIS and ROD

[373] *See* Exh. No. CSO-0701 PUB at 10:5-13; 31:20-32:18.
[374] Exh. No. CSO-0001 REV3 at 90:23-91:7.
[375] Exh. No. DCT-0046 REV at 41-43, 53, 75-76; Exh. No. CSO-0701 PUB at 8:15-19, 31:1-32:18; Exh. No. CSO-0714 at 3, 6.

rather than commence the hearing process after issuance of the DEIS.[376] This action does not constitute a delay due to a Force Majeure event.

The ALJ duly considered arguments regarding the appropriate timing of the evidentiary hearings.[377] The ALJ determined "evidentiary hearings will be more effective and efficient after the environmental review is completed."[378] The ALJ's decision was neither unreasonable, unjustified, nor unforeseeable. In its decision granting a CPCN to DCRT for the Project, the CPUC agreed with the ALJ's determination stating "the assigned [CPUC] Commissioner also determined that evidentiary hearings would be more effective and efficient after the environmental review was completed."[379] DCRT is essentially asking the Presiding Judge and the Commission to "second-guess" the CPUC's administration of its own docket to determine the most effective and efficient means of processing a particular CPCN application. That should not be countenanced. DCRT relies on the fact that there was some CPUC precedent where evidentiary hearings were held in a CPCN proceeding after issuance of the DEIS; however, there also was precedent where hearings were not held until after a FEIS was issued or comparable environmental reviews were finalized; and the CPUC Office of Ratepayer Advocates submitted pleadings citing such precedent.[380] The CPUC ALJ agreed with that position.[381] Thus, it was not unforeseeable as DCRT claims that the CPUC would wait to conduct evidentiary hearings until after completion of the BLM's environmental review.

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[376] Exh. No. DCT-0007 REV2 at 28:13-29:6, 55 (Table 2).
[377] Exh. No. DCT-0016 REV at 8-9.
[378] *Id.* at 8.
[379] Exh. No. CSO-0031 at 11.
[380] Exh Nos. PUC-0006 and PUC-0007; *see also In the Matter of the Application of S. Cal. Edison Co. (U 338-E) for a Certificate of Pub. Convenience and Necessity Concerning the Antelope-Pardee 500 kV (Segment 1) Transmission Project as Required by Decision 04-06-010 and as Modified by Subsequent Assigned Comm'r Ruling*, A.04-12-007 (Dec. 12, 2005).
[381] Exh. No. PUC-0009.

There are other reasons why the CPUC's decision was not objectively unforeseeable. Only 21.5 miles of the approximately 124.9-mile Project is in California and subject to the CPUC's jurisdiction.[382] It may have been informed by prior events associated with the DPV2 project, where the CPUC went through evidentiary proceedings to issue a CPCN for DPV2 on January 25, 2007 only to have the ACC subsequently deny SCE's request for a Certificate of Environmental Compatibility (the equivalent under Arizona law of a CPCN) for the Arizona portion of the project.[383] This caused SCE to abandon the Arizona component of the DPV2 project and required the CPUC to modify the CPCN, which did not occur until November, 20, 2009. The BLM finally issued a ROD for only the California portion of the project in July 2011—more than four years after the CPUC had issued a CPCN.[384]

Failure to obtain the necessary BLM permits or a Certificate of Environmental Compatibility from the ACC would have resulted in termination of the Project.[385] Conducting a lengthy and litigious CPCN proceeding only to have the BLM or the ACC deny the requisite authorization would have been risky and a costly and inefficient use of time and resources.[386] Moreover, as DCRT witness Rogers testified, material changes in a project can occur between issuance of the DEIS and the FEIS/ROD.[387] Given the narrow cost-benefit margins for the Project, material changes to the Project occurring between the DEIS and the ROD potentially could have made the Project uneconomic.[388] The ALJ's approach conserves resources and promotes efficiency by waiting until the environmental review and permitting is complete to

382 Exh. No. CSO-0001 REV3 at 92:16-17.
383 Exh. No. CSO-0032 at 7-8.
384 *Id.* at 1, 7-8.
385 Exh. No. CSO-0001 REV3 at 93:6-9.
386 *Id.* at 93:14-17.
387 Tr. at 6548:3-8.
388 Exh No. DCT-0004 at 39.

undertake evidentiary hearings.[389] Under these circumstances, the CPUC ALJ's decision hardly constitutes an extraordinary or unforeseeable decision especially given that most of the Project was in Arizona, the Project posed many environmental-related issues, and the Project's viability was dependent on a right-of-way grant from the BLM.[390]

iii. Alleged Force Majeure Event 3: The BLM Decides to Apply the DRECP to the DEIS

DCRT witness Crew claims that application of the DRECP to the Project resulted in a permitting delay due to a Force Majeure event that requires increasing the cost cap in the DCRT APSA.[391] He stated in his testimony that the DRECP went into effect in 2016 and that it "applies to renewable energy generation projects and their connected transmission facilities but does not apply to stand-alone transmission projects with no connected renewable generator."[392]

Application of the DRECP to the Project is not an event of Force Majeure. Mr. Crew ignores that the DEIR/DEIS for the DRECP was issued in September 2014—before DCRT submitted its proposal to the CAISO on November 19, 2014, and a year before it executed the DCRT APSA. As stated in the executive summary of the draft DRECP, one of the BLM's objectives for the DRECP was to "[p]romote renewable energy and transmission development, consistent with federal renewable energy and transmission goals and policies, in consideration of state renewable energy and greenhouse gas reduction targets."[393] This objective was reiterated in the Executive Summary of the DRECP Proposed Land Use Amendment and FEIS, issued in November 2015, before DCRT signed the DCRT APSA in December 2015.[394] One of the

389 Exh. No CSO-0601 REV3 at 79:15-80:5.
390 *Id.* at 93:18-22.
391 Exh No. DCT-0007 REV2 at 21:3-9.
392 *Id.* at 21:9-11.
393 Exh. No. CSO-0033 at 11.
394 Exh. No. CSO-0034 at 9.

DRECP Planning Goals was to "[l]ocate renewable energy development covered by the DRECP in proximity to existing and planned transmission."[395]

The Executive Summary of the DRECP Proposed Land Use Amendment and FEIS identified similar Planning Goals related to transmission:

> The interagency goal of the DRECP is to provide a streamlined process for the development of utility-scale renewable energy generation and transmission consistent with federal and state renewable energy targets and policies . . . .[396]

Importantly, the requirements of the DRECP, as an adopted LUPA, apply to **all** proposed actions in the BLM California desert region.[397] Given the timing of issuance of the DEIR/DEIS for the DRECP, DCRT should have been on notice and aware of the DRECP and the proposed LUPA. The November 2015 DRECP Proposed LUPA and FEIS was published before DCRT agreed to the terms and conditions in the DCRT APSA, and the potential to impact the Project and Project schedule given the Project's route traversed the area covered by the DRECP was known.[398] A reasonable developer would track actions occurring along, and potentially affecting, its chosen route and, at a minimum, would inquire about them and conduct further due diligence. DCRT did nothing of the sort. Indeed, in early 2016, while the DRECP was still in draft form, BLM staff advised DCRT of the existence of the draft DRECP and proposed LUPA and advised

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[395] Exh. No. CSO-0033 at 14.

[396] Exh. No. CSO-0034 at 9. This reflected a similar statement in Section 2.3 of the draft DRECP. Exh. No. CSO-0033 at 17.

[397] Exh. No. CSO-0601 REV2 PUB at 81:10-12; Exh. No. CSO-0701 PUB at 37:5-38:4. The applicability of the DRECP was not limited to renewable generation and generation tie lines. *Id.* at 38:5-21. The Proposed DRECP LUPA expressly recognized certain areas would be designated for renewable energy development, other areas for conservation, some areas for recreational uses, and yet other areas for multiple uses. Exh. No. CSO-0034 at 12. The draft DRECP too recognized the LUPA would address areas for renewables development, conservation, and multiple other uses. Exh. No. CSO-0033 at 6-13, 28-37. Thus, the DRECP would affect all activities within the DRECP area. As the developer of a proposed transmission lune through the DRECP area, DCRT should have been aware of the potential implications of the DRECP on its Project.

[398] Exh. No. CSO-0001 REV3 at 97:1-99:14; Exh. No. CSO-0601 REV2 at 80:9-82:8. The draft DRECP was a high-profile and controversial land use plan that was widely reported in the region and, as such developers should have been aware of it. Exh. No. CSO-0601 REV2 at 81:10-18; Exh. No. CSO- 0614.

DCRT that they should plan to comply with it.[399] Just like DCRT's lack of awareness of the existence of the Western Energy Corridors when submitting its bid, DCRT's lack of awareness and follow-up research regarding the potential impacts of the DRECP reflects an apparent lack of due diligence and failure to follow Good Utility Practice. DCRT's lack of awareness and lack of due diligence do not render the application of the DRECP to the Project objectively unforeseeable.

Because the DRECP LUPA would clearly apply to all uses in the covered California desert area the Project would traverse, DCRT's claim that the DRECP did not apply to transmission projects like DCRT is irrelevant.[400] In any event, contrary to witness Crew's statement, the Project is not and was never intended to be a "stand-alone transmission project[ ] with no connected renewable generator."[401] The DEIS and FEIS for the Project both recognized that a stated purpose of the Project was to:

> [f]acilitate development of new renewable energy: The Project would create new transmission infrastructure needed to interconnect future renewable energy resources in both Arizona and California to the bulk transmission grid.[402]

Further, witnesss Crew's implication that DCRT would have "no connected renewable generation" is incorrect. Section 5.10 of the DCRT APSA requires the DCRT to participate in the generator interconnection process and commits DCRT to perform studies for any request for

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399 Exh. No. CSO-0701 PUB at 40:6-17; Exh. No. CSO-0718 at 5.

400 Exh. No. CSO-0601 REV2 PUB at 81:16-8

401 *See* Exh. No. DCT-0007 REV2 at 21:9-11.

402 Exh. No. DCT-0046 REV at 57; *see also* Exh. No. DCT-0047 at 46. Even the website for the Project indicated that:

> The new 500kV power line will improve transmission system efficiency and reliability while facilitating the development of new renewable energy and energy storage resources in Arizona and California. This will help both states achieve their renewable energy standards and carbon reduction goals.

Exh. No. CSO-0036 at 2.

generation interconnection.[403] DCRT received the first request to interconnect to the Project on April 28, 2017, for a 3,200 MW combined solar and battery project, and 1,750 MW has already synchronized to the grid.[404] DCRT has a total of nine projects that have requested interconnection to the Project for a total of 8,600 MW.[405] Given the Project would traverse the area covered by the DRECP where renewable resources were going to be developed and in close proximity to multiple renewable power projects under development to interconnect to the same substation, it is unsurprising the BLM would have evaluated the Project with the DRECP in mind even if the DRECP had been limited to renewable energy projects.[406] That way, the BLM could best site and approve a transmission line that might be able to interconnect future generation in the DRECP area and optimally size and locate generation and transmission in the area.[407] Moreover, as discussed below, the BLM's permitting of the Project was not unusually lengthy; to the contrary, the amount of time it took the BLM to permit the Project was less than the average amount of time the BLM took to authorize other projects during a similar timeframe.

These conclusions regarding the impact of the DRECP were corroborated by CAISO witness Lee. Ms. Lee, under a contract with the CEC, and under the direction of the BLM and CEC, was Aspen's project manager for preparation of the DRECP NEPA and CEQA documents that evaluated the potential impacts of implementing the DRECP LUPA.[408]

CAISO witness Lee testified that the DRECP was addressed in a highly visible public planning process in California through 2013 and 2014. DCRT witness Crew's claims that

403 Exh. No. DCT-0002 at 17-18.

404 Exh. No. CSO-0001 REV3 at 98:17-20. As of July 6, 2026, 1,051 MW has achieved commercial operation, and an additional 699 MW has synced to the grid and is being tested.

405 Exh. No. CSO-0037 at 1.

406 Exh. No. CSO-0001 REV3 at 98:22-27.

407 *Id.* at 99:1-3.

408 Exh. No. CSO-0101 REV2 at 29:7-21.

DRECP would not apply to a stand-alone transmission project is incorrect, and this guidance was documented in the DRECP.[409]

iv. Alleged Force Majeure Event 4: The U.S. Secretary of the Interior Issues Secretarial Order No. 3355

The fourth alleged event of force Majeure that DCRT claims caused a delay in the Project was the U.S. Secretary of the Interior's issuance of Order 3355 on August 31, 2017. DCRT witness Crew claims that this order "led to additional delays in the environmental review process and additional costs related to the additional redrafting and reduction of the DEIS from over 2,000 pages to under 300 pages" and "added to the months of delay already incurred by the incorporation of the DRECP requirements into the DEIS."[410] DCRT witness Rogers claims compliance with Order 3355 delayed the project by 16 weeks based on the amount of time Stantec estimated in a Change Order request from March 2018.[411]

Order 3355, an administrative order intended to streamline the regulatory process, does not constitute a Force Majeure event. As explained above, to qualify as an event of Force Majeure the event must be objectively unforeseeable, *i.e.*, the event must be unusual rather than routine.[412] Order 3355 was an agency order intended to improve and streamline the NEPA review process, increase efficiency, and enhance the review of infrastructure projects; this hardly constitutes a Force Majeure event. [413] DCRT's reading of the definition of Force Majeure, which seemingly would treat an agency order placing a page limit on briefs or granting a one-week extension of a procedural schedule as a Force Majeure event, is unsustainable.

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409 Exh. No. CSO-0701 PUB at 36:7-38:21.

410 Exh. No. DCT-0007 REV2 at 22:16-23:3.

411 Exh. No. DCT-0118 REV PUB at 46:5-8 (citing Exh. No. DCT-0105 at 68-74). Stantec emails indicated this estimate constituted its "initial thoughts" and they "estimated on the high side on the number of hour as well as the number of weeks that this effort could take, simply based upon the fact that we have yet to receive any guidance from the BLM on this . . ." Exh. No. DCT-0105 at 68.

412 See Section II.C.4.a of this Initial Brief.

413 *See* Exh. No. CSO-0001 REV3 at 101:5-19; Exh. No. CSO-0101 REV2 at 19:12-20.

Also, the documentation witness Crew provides to support his claim that Order 3355 constituted a Force Majeure delay belies his claim. The May 29, 2018 document indicates that DCRT received a waiver from Order 3355 and that the DEIS "does not have to be under 300 pages because a waiver from S.O. 3355 was granted."[414] Because DCRT received a waiver of Order 3355 and the DEIS ultimately exceeded 300 pages (excluding appendices),[415] DCRT was not required to comply with any "order, regulation, or restriction imposed by governmental . . . authorities" under the definition of Force Majeure in the DCRT APSA.[416] Thus, there was no Force Majeure event in connection with Order 3355 even under DCRT's twisted interpretation of the definition. Further, the Force Majeure definition clearly states a Force Majeure event does not include a delay in the permitting process not caused by a Force Majeure event.

DCRT's claim it took 16 weeks to comply with Order 3355 based on the "initial thoughts" and a "high side" estimate of Stantec[417] is unsustainable. In its October 22, 2018, quarterly report to the CAISO—**after the DEIS had been published on August 31, 2018 and thus after the DEIS page reduction effort had occurred**—DCRT stated the redrafting pursuant to Order 3355 only "delayed the issuance of the Draft EIS **by a month**."[418] Importantly, even though the DEIS process had run its course and concluded months earlier, DCRT did not state in this quarterly report, or in subsequent quarterly reports, that Order 3355 was a Force Majeure event, just as it had not called the order a Force Majeure event in any of its

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414 See Exh No. DCT-0014 at 7. This exhibit notes "AZSO [Arizona State Office] Director Ray Suazo has stated the document still must be shortened significantly to make it readable and to generally adhere to S.O. 3355's goals, according to general direction from WO [the Washington Office], which will also help expedite WO review times." However, the fact that BLM personnel strongly encouraged DCRT to shorten the document to make the DEIS more "readable" does not rise to the level of a Force Majeure event especially given it would "also help expedite WO review times."

415 See Exh. No. S-0055 Part I REV PUB at 50.

416 *See* Exh. No. DCT-0002 at 7.

417 Exh. No. DCT-0105 at 68.

418 *Id.* at 193 (emphasis added).

prior quarterly reports where it advised the CAISO of potential delays resulting from the order. The one-month delay is consistent with CAISO witness Lee's testimony that, based on her experience, compliance with Order 3355's page limit requirements would have added about three weeks of additional time.[419] Of note, DCRT notified the CAISO in its quarterly reports discussing Order 3355 "[t]he BLM has confirmed that the refinements to the format and content of the DEIS will not . . . result in a change in the overall NEPA schedule" and "[t]he BLM confirmed that this approach will not detract from the adequacy of the document under NEPA requirements or result in a change in the overall NEPA schedule."[420]

Other record evidence supports the conclusion DCRT experienced no unusual or unforeseeable delays resulting from the alleged BLM-related events of Force Majeure. An EIS Timelines (2010-2018) report issued by the Executive Office of the President's CEQ on June 12, 2020 found that the average time for the BLM to issue a ROD following a NOI to prepare a DEIS where an EIS was published between January 1, 2010 and December 31, 2018 and a ROD issued by June 18, 2019 was 4.36 years, and the median was 3.79 years.[421] This was based on a review of 143 completed EISs. For DCRT, the time between the NOI (March 23, 2016) and the ROD (November 22, 2019) was approximately 3.67 years—below the average and median amount of time for the BLM to issue a ROD.[422] Thus, there is no basis to find there was any unusual or unexpected delay in the time it took for the BLM to complete the EIS process or grant the authorizations requested by DCRT. The time it took the BLM to permit the Project was neither unusual nor excessive. A review by the Niskanen Center of new electric transmission

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419 Exh. No. CSO-0101 REV2 at 20:7-21:17. A one-month delay is also consistent with statements in the May 29, 2018 document in Exhibit No. DCT-0014 (at 7) that "the bulk of the reduction efforts will be in Chapter 3, which is currently over 650 pages" and "5 to 6 weeks is still necessary for Stantec to reduce the document to a readable level."

420 Exh. No. DCT-0015 at 178, 187.

421 Exh. No. CSO-0001 REV3 at 103:21-104:8 (citing Exh. No. CSO-0039 at 8, 13).

422 Exh. No. CSO-0001 REV3 at 104:9-13.

projects in the 2010-2020 timeframe showed similar results: NEPA EIS reviews took an average of 4.3 years with a median of 3.7 years from issuance of the NOI to the ROD.[423] Thus, the total amount of time it took the BLM to permit the Project was less than the average and median amount of time it took the BLM to permit other projects during that same timeframe.[424]

DCRT relies on DPV2 for its scheduling expectations, but DPV2 was developed before the Section 368 Energy Corridors were adopted, and DCRT's decisions not to follow the Energy Corridor for its proposed route had an impact on the Project schedule.[425] DCRT also relies on FAST-41 as its basis for claiming expectations of a two-year Project schedule,[426] but FAST-41 did not adopt the two-year "goal" into statute until 2021.[427] Although there was an Executive Order issued in 2017 generally supporting a two-year review timeline,[428] that Executive Order was issued almost three years after DCRT submitted its bid and two years after DCRT executed the APSA, so DCRT could not reasonably have relied on that Executive Order for Project timeline expectations.

v. Alleged Force Majeure Event 5: The Federal Government Shuts Down

DCRT witness Crew alleges the government shutdown that took place from December 22, 2018 to January 25, 2019 was an event of Force Majeure that caused Project delay because the "BLM was not reviewing or drafting DCRT's FEIS during this time period."[429] It is unlikely

423 *Id.* at 104:13-21 (citing Exh. No. CSO-0040 at 3).

424 The testimony of CAISO witness Lee affirms that the timelines for the Project were not unusual for a major and complex transmission line project. Exh. No. CSO-0101 REV2 at 15:19-21:17. She noted that across the federal government (not just the BLM), the average time for completion of an EIS and issuance of a ROD during this timeframe was 4.5 years and the median was 3.5 years and that DCRT Project timeline was less than the average amount of time and was about the median. *Id.* at 17:6-25. CAISO witness Lee testified that projects that traverse multiple states have typically required longer timelines due to different permitting requirements from state to state and, considering the complexity of the DCRT Project, the timeline could not be considered excessive. *Id.* at 18:1-6.

425 Tr. 3670:22-3671:18.

426 Exh. No. DCT DCT-0118 REV PUB at 32:17-33:7.

427 Exh. No. CSO-0601 REV2 PUB at 62:15-63:10.

428 Exh. No. DCT-0406.

429 Exh. No. DCT-0007 REV2 at 23:14-15.

and highly speculative that the office closure materially delayed issuance of DCRT's BLM permits given the government shutdown occurred during the holiday season, during which it was likely many federal workers were on vacations.[430] Indeed, one of DCRT's own exhibits, which discussed prior BLM schedule revisions that were needed "based upon the timing of the DCRT resource reports coming to us sometime later," indicated that based on this delay, two weeks had to be added for "the BLM and Cooperators review of the PDEIS [Preliminary DEIS] as it would fall over the Christmas and New Year's holidays and when a lot of federal employees take leave."[431] Furthermore, December 22, 2018 was a Saturday and there were three federal government holidays during the shutdown period (Christmas, New Year's, and Martin Luther King Jr. Day), and December 24 and 31 were Mondays before holidays, which BLM employees typically would have taken vacation days,[432] increasing the likelihood of four-day weekends to the extent employees were not taking off the entire week for vacation, which means only approximately 20 work days were lost by the reviewers.[433] Further, many federal employees take their "use or lose" annual leave during December and early January of each year.[434]

CAISO witness Lee testified that one would expect minimal BLM-driven delay during this timeframe because the DEIS had been published on August 31, 2018 and the public comment period ended on November 28, 2018. The BLM indicated it did not expect to issue a FEIS until 2019.[435] The first 30-60 days following the public comment period on a DEIS are typically entirely consumed by the consultant team reviewing and sorting through public comments to provide comment summaries to the lead agencies and to draft responses to

430 Exh. No. CSO-0001 REV3 at 106:4-7.
431 Exh. No. DCT-0105 at 95-96.
432 Exh. No. CSO-0101 REV2 at 36:17-37:1.
433 Exh. No. CSO-0001 REV3 at 106:7-12.
434 Exh. No. CSO-0101 REV2 at 37:1-3.
435 *Id.* at 37:9-14.

comments.[436] Thus, the unavailability of BLM staff during this timeframe should have had minimal to no effect on the schedule of the consultant team preparing the FEIS.[437] DCRT provides no documentation or other tangible support demonstrating the federal government shutdown actually caused any delay in the BLM's issuance of a ROD.[438] Indeed, permitting work on the Project continued during this timeframe.[439]

vi. Alleged Force Majeure Event 6: The BLM Requires Tower Design Changes

DCRT claims the BLM's requirement for tower design changes on certain portions of the transmission line in "[e]arly 2019" constitutes a Force Majeure event that warrants escalation of the cost cap.[440] However, Appendix E of the DCRT APSA clearly states the DCRT APSA does not include a cost cap exclusion for costs resulting from Force Majeure events—it only includes an exclusion for "[a]ny FERC approved costs resulting from *delays* due to events of Force Majeure."[441] As noted above and acknowledged by DCRT, the DCRT APSA does not include a cost cap exclusion for increased costs due to Force Majeure events not due to a delay.[442]

Even assuming *arguendo* the BLM's directive to change the tower structures on a portion of the Project to "match" existing towers along that portion of the Preferred Alternative Route that was co-located with SCE's DPV transmission line[443] was a Force Majeure event, there is no evidence this design change delayed permitting or construction of the Project. In the List of Key

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436 *Id.* at 37:14-18.
437 *Id.* at 38:2-5.
438 Exh. No. DCT-0007 REV2 at 23:8-16.
439 *See* Exh. No. CDN-0061 at 3 (email exchange on January 18, 2019 between the BLM and DCRT indicating the permitting work was ongoing).
440 Exh. No. DCT-0007 REV2 at 55:4-5.
441 Exh. No. DCT-0002 at 78 (emphasis added).
442 Exh. No. CSO-0027 REV at 1.
443 DCRT witness Crew states that the BLM's Preferred Alternate Route required "matching" of structure types in areas where the Project was co-located with SCE's existing DPV 500 kV line. Exh. No. DCT-0007 REV2 at 19:18-20:3.

Events of Force Majeure, witness Crew indicates this event occurred in "Early 2019," but then contradicts himself in the same testimony saying that DCRT became aware of the possible Preferred Alternate Route in August 2018 when the DEIS was issued.[444] The DEIS included multiple references to the requirement that tower styles must match nearby existing structures, including reference to 2013 BLM guidance presented in DEIS Appendix 2A.[445] This was far in advance of the Project's FEIS on September 13, 2019[446] and the BLM ROD in November 2019.[447] Further, DCRT did not receive its CPCN from the CPUC until November 2021 and did not receive a Notice to Proceed with construction from the BLM until July 14, 2022.[448] Further, DCRT did not execute its amended EPC Contract with EC Source until August 12, 2022[449]—almost nine months after the CAISO authorized DCRT to commence further procurement on December 24, 2021.[450] DCRT could not have commenced construction of the Project until all these events occurred, which was several years after DCRT became aware of the change. Witness Crew's testimony is bereft of any discussion of how much delay this tower structure change caused. He only vaguely stated this change "contribut[ed] a small amount" to permitting delays but could not identify how with specificity.[451]

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444 *Id.* at 19:15-16.

445 Exh. No. DCT-0046 REV at 839.

446 Exh. No. DCT-0007 REV2 at 19:12. The CAISO notes that after the DEIS came out in August 2018, DCRT started its redesign of the towers and sent the CAISO the 30 percent design package. The CAISO approved the new footing requirements for the guyed V tower structures on April 2, 2019. Exh. CSO-0001 REV3 at 107:22-108:2 (citing Exh. No. CSO-0041). This is a further indication that the tower design change did not cause any delay in construction of the Project.

447 Exh. No. CSO-0001 REV3 at 104:9-13.

448 *Id.* at 108:14-16.

449 Exh. No. DCT-0007 REV2 at 45:2-3.

450 *Id.* at 44:13-14.

451 Tr. at 1401:4-1402:1. Exhibit No. DCT-0018 REV2 PUB at page 6 refers to Exhibit No. DCT-0007 REV at pages 19-29 and Exhibit No. DCT-0047 at page 79 for discussion of associated delays; however, neither identifies any specific delay associated with this event. The former is witness Crew's Direct Testimony, and the latter is merely a reference in the FEIS to the tower design change. Neither mentions Project delays due to the tower design change.

In any event, the BLM's directive to change some of the towers to match existing towers along the portion of the Preferred Route where the Project would be co-located with an existing SCE transmission line does not constitute an event of Force Majeure. Indeed, DCRT never called it a Force Majeure event until it filed its rate case in 2023. Even in its June and July 2019 presentations to the CAISO where DCRT mentioned the requirement for different towers, it never referred to this as a Force Majeure event even though it expressly referred to other events as Force Majeure events in those documents, probably because they were including such costs associated with the tower change in the Change of Route costs which the CAISO approved in the second amendment to the DCRT APSA.[452]

DCRT's belated attempt to call the tower design change a Force Majeure event is nothing more than a *post hoc* rationalization to recover more costs than to which it is entitled. As discussed above, permitting authorities are required to consider alternative routes in the NEPA process, and they regularly order changes to transmission developers' proposed routes, equipment, and facilities; this is not an unexpected or wholly unforeseeable event, especially in connection with a corresponding route change.[453] Moreover, as clearly stated in the BLM's NEPA Handbook, the BLM's proposed actions include identifying and evaluating project design features, considering design features as alternatives, and identifying design features that would reduce or eliminate adverse effects after the initial formulation of alternatives, and serve as

[452] Exh. No. DCT-0104 at 10-11.

[453] Exh. No. CSO-0001 REV3 at 108:10-18; Exh. No. CSO-0101 REV2 at 14:12-15:18, 26:20-27:7. Any BLM directives regarding tower design are not the sort of extraordinary or catastrophic events that would constitute an event of Force Majeure under the DCRT APSA. As CAISO witness Lee testified, DCRT should have expected the "matching structure" requirement regardless of the route selected. Exh. No. CSO-0101 REV2 at 38:20-22. She cited to the BLM's "Best Management Practices for Reducing Visual Impacts of Renewable Energy Facilities on BLM-Administered Lands," which is cited in the EIS for the Project and states that the same tower types should be selected for new transmission facilities within the ROW corridor. *Id.* at 38:20-39:9.

mitigation measures.[454] Thus, route changes and facility design changes are foreseeable in the permitting process. Also, Appendix E and Section 5.9.3 of the DCRT APSA expressly contemplate the possibility of agency-ordered route changes and facility changes, respectively.[455]

vii. Alleged Force Majeure Event 7 Through 11: Alleged Events of Force Majeure Due to the COVID-19 Pandemic

DCRT witness Crew identifies five alleged events of Force Majeure related to COVID-19—the WHO declaring a global COVID-19 pandemic on March 11, 2020, its EPC contractor's provision of a Force Majeure notice regarding COVID-19 to DCRT on March 12, 2020, DCRT's March 13, 2020 notice to the CAISO regarding COVID-19, the CPUC ALJ temporarily suspending the procedural schedule due to COVID-19 on March 25, 2020, and the CPUC ALJ's July 23, 2020 denial of efforts to schedule remote evidentiary hearings in July 2020.[456] There are some differences in these events, but for purposes of applying the Force Majeure provisions and cost cap exclusion in the DCRT APSA, there is a common connection to the COVID-19 pandemic, so the CAISO will discuss them together.

The CAISO takes no issue with a finding that the COVID-19 pandemic itself constitutes an event of Force Majeure under the DCRT APSA.

The March 12, 2020 letter DCRT sent to the CAISO only mentions the occurrence of COVID-19.[457] DCRT sent no Force Majeure notifications to the CAISO pursuant to Section 13.1.1 of the DCRT APSA regarding the WHO declaration of the COVID-19 pandemic, EC Source's Force Majeure notice to DCRT regarding COVID-19, or the two separate actions of the

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[454] Exh. No. CSO-0030 at 46, 54-55, 72 (specifically, Sections 6.2, 6.5.1, 6.5.1.1, and 6.8.4 of the NEPA Handbook).

[455] Exh. No. DCT-0002 at 17, 78-79.

[456] Exh. No. DCT-0007 REV2 at 55:4-5.

[457] Exh. No. DCT-0019 at 3-4.

CPUC ALJ that it claims were Force Majeure events.[458] It is not unreasonable to treat the March 13 Force Majeure notification regarding COVID-19 as covering all of these events that were related to COVID-19. As noted above, this was the first APSA Section 13.1.1 notification DCRT provided to the CAISO. DCRT never provided the CAISO a Section 13.1.1 Force Majeure notification of any of the BLM events or the earlier CPUC ALJ event it now claims are Force Majeure events, and only long after the events had occurred did DCRT even inform the CAISO that it considered three of the events (*i.e.*, not all of them) to be Force Majeure events.

DCRT witness Crew generally alleges COVID-19 "delayed permitting."[459] He testified DCRT was "working under the **assumption** that the CPCN **could be issued by** the end of 2020"[460]—an assumption DCRT conveyed to the CAISO in January 2020.[461] The specific delays he attributes were those associated with the delays in the CPCN proceeding at the CPUC: (1) the CPUC ALJ temporarily suspending the CPCN procedural schedule on March 25, 2020 due to the COVID-19 pandemic; and (2) the CPUC ALJ declining to conduct remote hearings at a July 23, 2020 prehearing conference.[462] DCRT identified no other specific period of delay attributable to COVID-19. Mr. Crew notes in December 2020, DCRT settled with one party who withdrew from the proceeding, and there was a prehearing conference in the CPCN proceeding with the remaining parties.[463] In January 2021, the parties filed stipulated facts and exhibits and on January 25, 2021, the ALJ established a procedural schedule.[464]

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458 Exh. No. CSO-0001 REV3 at 111:22-112:1.
459 Exh. No. DCT-0007 REV2 at 58:8-11.
460 *Id.* at 41:1-5. DCRT's testimony indicated that it believed it would take 12-18 months to complete the CPCN process. *Id.* at 31:9-10.
461 Exh. No. DCT-0015 at 314.
462 Exh No. DCT-0007 REV2 at 40:13-42:4, 55 (Table 2).
463 *Id.* at 41:16-42:1.
464 *Id.* at 42:1-3.

In assessing this issue, it is important to keep in mind the pertinent cost cap exclusion is for "costs resulting *from delays* due to Force Majeure events."[465] There is no cost cap exclusion for other costs resulting from Force Majeure events. Thus, it is necessary to determine how much time COVID-19 actually delayed completion of the Project and then determine the costs associated with that specific delay. DCRT fails to demonstrate it incurred specific costs resulting from specific delays due to this (or any other) alleged event of Force Majeure; DCRT stated it is unable to isolate the costs resulting from delays due to each alleged event of Force Majeure.[466] Instead, DCRT aggregates all of its Force Majeure delays and costs into a single 47-month bundle.[467]

The CAISO's testimony in this proceeding clearly explains the only demonstrable Project delay resulting from COVID-19 is nine months—from the date the CPUC ALJ temporarily suspended the CPCN proceeding on March 25, 2020 until the CPCN proceeding recommenced with a prehearing conference on December 8, 2020.[468] Even taking at face value DCRT's **assumption** early in 2020 that it **could** receive a CPCN by the end of 2020 and the date it actually received a CPCN—November 4, 2021—that is only approximately an 11-month delay. The actual nine-month delay in the CPCN hearing process is in line with this assumption, and it is the only specific period of delay resulting from COVID-19 Mr. Crew described in his testimony.[469]

COVID-19 did not delay completion of the Project by more than nine months and certainly not as much as 39 months.[470] As of the March 13, 2020 date of DCRT's Section 13.1.1

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465 Exh. No. DCT-0002 at 78 (emphasis added).
466 Exh. No. CSO-0001 REV3 at 88:4-16, 91:16-19, 94:10-13, 100:11-14, 103:17-20, 107:11-14, 112:9-21, 116:14-23.
467 Exh. No. DCT-0007 REV2 at 69:18-70:2.
468 Exh. No. CSO-0201 at 5:5-7:8; Exh. No. CSO-0601 REV2 PUB at 44:17-47:17.
469 *See* Exh. No. CSO-0601 REV2 PUB at 44:17-45:19 (citing DCRT testimony).
470 Exh. No. CSO-0201 at 4:9-7:8; Exh. No. CSO-0601 REV2 PUB at 44:17-47:17.

Force Majure notice to the CAISO, the parties in the CPCN proceeding still had to file testimony, the CPUC ALJ had to conduct an evidentiary hearing, the CPUC had to take time to evaluate the record and then issue a CPCN, DCRT had to negotiate an amended EPC contract with EC Source, DCRT had to obtain a Notice to Proceed from the BLM, and DCRT had to undertake extensive post-permitting/pre-construction activities including procurement it identified in its Project schedule and milestones provided to the CAISO in the competitive solicitation process,[471] and then DCRT had to actually construct and complete the Project and place it into service.

All these activities occurred during COVID-19; they did not cease until the COVID-19 pandemic officially ended. Appendix B of the original DCRT APSA contemplated completing all permitting activities by November 12, 2017 and placing the Project in-service on May 1, 2020—a period of approximately 30 months.[472] The original DCRT APSA also contemplated a 22-month construction period for the Project—from June 28, 2018 to May 1, 2020.[473] Based on the representations in the third amended DCRT APSA, permitting activities were completed on September 30, 2022,[474] and the Project was placed in service on June 12, 2024—a period of 20½ months. Further, the actual construction period was 19½ months—from October 31, 2022[475] to June 12, 2024. Thus, actual post-permitting and construction timelines for the Project were actually less than was contemplated in the original DCRT APSA. Under these circumstances, there is no basis to find completion of the Project was delayed due to COVID-19 by any more than the nine-month delay in the CPCN proceeding at the CPUC. Also, it should be noted that

471 Exh. No. CSO-0202.
472 Exh. No. DCT-0002 at 44-45.
473 *Id.*
474 *Id.* at 86.
475 *Id.*

even though DCRT received a CPCN from the CPUC on November 4, 2021, it did not execute its amended EPC contract with EC Source until August 12, 2022[476]—almost nine months later. During that time period DCRT communicated with other vendors, assessed whether to re-bid the Project, and reevaluated the EPC Contract, but it ultimately decided to "attempt to renegotiate" the contract with EC Source rather than replace them.[477] CAISO transmission ratepayers should not be on the hook for any delay that occurred between November 1, 2021 and August 12, 2022 given DCRT still needed to have an EPC contract to proceed and DCRT was the entity holding up the Project.

To measure the costs due to purported delays from events of Force Majeure, DCRT calculated an average monthly management cost run-rate cost for the Project that it applies to the aggregate 47-month month delay it claims results from Force Majeure events.[478] DCRT also calculates financing costs for the aggregate 47-month delay.[479] DCRT does not identify specific monthly management run-rate costs or financing costs for the specific period of delay resulting from COVID-19. Commission Trial Staff recommends that its estimated management run-rate costs and associated AFUDC for the period March 13, 2020 through March 31, 2022 be used as the estimated Force Majeure costs for the COVID-19 pandemic, net of exclusions related to delays in the provision of required bonds by DCRT.[480]

Although Commission Trial Staff recommends a longer delay for COVID-19, Commission Trial Staff witness Dr. Norman agreed that her testimony does not show actual delays to the Project due to COVID-19.[481] Further, Dr. Norman agreed that the time period

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476 Exh. No. DCT-0007 REV2 at 45:2-3.
477 *Id.* at 45:1-2.
478 *Id.* at 70:3-71:6.
479 *Id.* at 72:16-73:7.
480 Exh. No. S-0052 at 37:6-16; Exh. No. S-0065 REV2 PUB at 59:11-16.
481 Tr. 8570:4-7.

between actual delay between completing permitting activities and placing the Project into service is substantially similar to DCRT's expected schedule in the first amended DCRT APSA,[482] and much faster than DCRT's expected schedule in the original APSA.[483] Accordingly, Dr. Norman agreed there was no concrete delay between permitting and energization due to COVID-19.[484]

For the reasons discussed above, the cost cap in the DCRT APSA should only be escalated to reflect the costs resulting from a nine-month delay in the Project due to COVID-19. This can be achieved by applying a monthly management run-rate cost and associated AFUDC to the nine-month period. Based on the methodology used by Commission Trial Staff applied only for that nine-month period, that would result in the recovery of permissible costs of $4,052,089—above the existing $258,961,024 cost cap. This increase is comprised of $3,678,723 of monthly management run-rate costs ($408,747 multiplied by nine months = $3,678,723) and $373,366 of associated AFUDC costs.[485] Commission Trial Staff's position fails to recognize that DCRT would have incurred management run-rate costs (and associated AFUDC) for much of the claimed 24-month period anyway even if COVID-19 had never occurred because, following issuance of the BLM ROD, DCRT still had to go through the CPCN hearing process and obtain a CPCN during that time (that based on DCRT's own assumptions would have taken 12 months) and then undertake the requisite post-permitting activities (including having to renegotiate its EPC contract before it could proceed and which did not occur until August 2022) and construct the Project even absent COVID-19. As such, Commission

482 Tr. 8582:21-25, 8584:9-20.
483 Tr. 8585:5-10.
484 Tr. 8585:12-25.
485 Exh. No. CSO-0601 REV3 at 47:18-48:3.

Trial Staff's proposal gives DCRT an unwarranted windfall that is not associated with any actual amount of delay DCRT actually faced due to COVID-19.[486]

viii. Alleged Force Majeure Event 12: The CAISO Requires a Hold on Procurement Until the CPCN Is Granted

DCRT claims the CAISO's directives to hold long lead-time procurement were an "Act of God/Government Action" which constitutes an event of Force Majeure.[487] DCRT is incorrect. The CAISO is not a "governmental, military, or lawfully established civilian authorit[y]" and therefore any actions by the CAISO cannot qualify as the type of government action that could qualify as an event of Force Majeure.[488] The DCRT APSA definition of the term Governmental Authority expressly excludes the CAISO.[489] Likewise, the CAISO's action is not an Act of God like a flood, hurricane, earthquake, or other enumerated Acts of God in the APSA's definition of Force Majeure.[490]

The procurement directives were simply the exercise of CAISO authority DCRT had agreed to in the DCRT APSA.[491] Such an exercise of existing contractual rights cannot qualify as events of Force Majeure. Section 5.4.1 of the DCRT APSA provides for DCRT to "submit specifications for major Project equipment and materials" for CAISO review and comment prior to DCRT "solicit[ing] offers to provide specific equipment or material to which the specifications apply or otherwise commenc[ing] procurement."[492] This review can occur on a rolling basis. Section 5.8 of the DCRT APSA addresses delays in approvals, property acquisition, and construction and in the event of a delay authorizes the CAISO "to take such

486 Exh. No. CSO-0201 at 6:1-7:8.
487 Exh. No. DCT-0007 REV2 at 55:4-5; Exh. No. DCT-0018 REV2 PUB at 9.
488 Exh. No. CSO-0001 REV3 at 114:11-14 (quoting Exh. No. DCT-0002 at 7).
489 Exh. No. DCT-0002 at 7.
490 *Id.*
491 Exh. No. CSO-0001 REV3 at 114:15-17.
492 Exh. No. DCT-0002 at 13.

action . . . as it determines to be necessary and appropriate."[493] Each of these provisions provides a separate basis for the CAISO's directives to hold procurement.[494]

It was DCRT that raised this procurement issue with the CAISO and discussed the potential risk of deferring procurement.[495] This shows DCRT itself conceded it could not undertake such procurement without the CAISO's permission and that it would not have been Good Utility Practice to do so given the CPUC CPCN had not been received yet. If DCRT believed it had this authority, it would not have needed to ask the CAISO and could have undertaken the procurement even if the CAISO had told DCRT to hold off on procurement. DCRT had no reasonable expectation it would be able to undertake major procurement and incur significant costs prior to receiving a CPCN. DCRT cites nothing to support a claim that it was unforeseeable the CAISO would tell DCRT to hold procurement until it received the CPCN.

DCRT should have been aware of this possibility given it had already applied for and received from the Commission the abandoned plant incentive, which would have allowed DCRT to recover 100 percent of all prudently incurred costs if the Project was cancelled for reasons beyond its control including DCRT failing to receive the necessary governmental authorizations.[496] This meant if DCRT undertook major procurement and the Project was abandoned because the CPUC denied the CPCN, ratepayers would have been on the hook for

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[493] *Id.* at 16.

[494] In his Rebuttal Testimony, DCRT witness Crew was dismissive of the applicability of these provisions. In her Rebuttal Testimony, CAISO witness LeVine discussed why Mr. Crew's arguments were without merit. Exh. No. CSO-0601 REV2 PUB at 89:1-93:6. Ultimately, this raises the question why, if the CAISO did not have the authority to direct DCRT to hold major procurement in abeyance, did DCRT even bother to ask the CAISO in the first place whether it could undertake such procurement. If the CAISO lacked the authority to stop DCRT from engaging in major procurement, DCRT would not have needed to seek the CAISO's authorization.

[495] Exh. No. CSO-0042; Exh. No. DCT-0102 REV2 PUB at 80:18-81:10.

[496] Exh. No. CSO-0001 REV3 at 115:6-116:4 citing *DCR Transmission, LLC*, 153 FERC ¶ 61,295 (2015); Exh. No. CSO-0601 REV2 PUB at 89:23-90:3.

significant costs.[497] Assuming the CAISO would permit significant procurement under these circumstances is not reasonable, and the CAISO's actions were entirely foreseeable.[498]

The CAISO's directives to DCRT to hold procurement were fully justified. There was opposition to the Project, including from the California Public Advocates Office, which is within the CPUC.[499] Given the chance the CPUC could deny the CPCN, the CAISO believed it was reasonable to exercise its authority to direct that DCRT not incur additional costs that may become abandoned plant.[500] Especially since the Project's cost-benefit analysis was barely over 1.0, and only in some cases.[501] Even DCRT recognized neither it nor the CAISO could guarantee a successful outcome to the CPCN proceeding and that is why DCRT coordinated with the CAISO regarding the procurement of materials.[502] This was a reasonable course of action consistent with Good Utility Practice by both parties under the circumstances.[503]

Moreover, DCRT did not provide the CAISO with the required Force Majeure notice of this event under Section 13.1.1 of the DCRT APSA.[504] DCRT cites no instance where it provided any notice to the CAISO that it considered the CAISO procurement hold to be an event of Force Majeure.[505] DCRT made this claim for the first time in its 2023 rate case filing. Even assuming *arguendo* the CAISO procurement hold directive on April 7, 2021, and release of such hold on December 24, 2021, was a Force Majeure event, DCRT witness Crew fails to show how it resulted in any undue delay in construction of the Project, because DCRT did not receive a

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497 Exh. No.CSO-0601 REV2 PUB at 90:3-5.
498 *Id.* at 90:6-8.
499 Exh. No. CSO-0001 REV3 at 115:7-8.
500 *Id.* at 115:8-11.
501 Exh. No. DCT-0004 at 39.
502 Exh. No. CSO-0001 REV3 at 115:11-14 (citing Exh. No. CSO-0042).
503 Exh. No. CSO-0001 REV3 at 115:14-16.
504 *Id.* at 116:5-7.
505 *Id.* at 116:7-8.

Notice to Proceed with construction of the Project from the BLM until July 14, 2022[506] and did not execute an amended EPC Contract with EC Source until August 12, 2022[507]—more than eight months after the CAISO directed DCRT to proceed with procurement and long after issuance of the CPCN on November 4, 2021.

ix. Management Run-Rate Costs

Mr. Crew states DCRT is seeking $20,238,200 above the cost cap to account for the "run rate" costs resulting from the alleged Force Majeure events he claims collectively delayed the Project in-service date by 47 months.[508] He states that the management run-rate costs during this period were approximately $430,600 per month.[509] In addition, as discussed below, DCRT initially sought to recover $4,297,961 in four specific management costs Mr. Crew alleges resulted from Force Majeure delays but is no longer claiming recovery of those four costs.

DCRT is no longer making its initial claim for recovery of $4,297,961 in specific management costs that Mr. Crew initially alleged were the result of Force Majeure delay.[510] Mr. Crew subsequently testified that "the company would be keen to simply eliminate these four items from the ask, just to simplify the overall set of issues and focus our attention on the larger issues in this case,"[511] and affirmed in response to a question from the Presiding Judge that DCRT would deduct the four items from the allowable APSA costs.[512] The CAISO agrees with eliminating these four items, especially given there was no basis for their recovery as costs

506 Exh. No. CSO-0035 at 1-2.
507 Exh. No. CSO-0001 REV3 at 73:16-18.
508 Exh. No. DCT-0007 REV2 at 69:18-70:17; Exh. No. DCT-0107 REV at 2.
509 Exh. No. DCT-0007 REV2 at 70:16.
510 *Id.* at 71:7-72.9.
511 Tr at 1960:2-1961:9.
512 Tr. 1961:23-1963:1.

resulting from delays due to events of Force Majeure.[513] Accordingly, DCRT's requested rate base should be reduced by this amount.

Further, DCRT never provided any Force Majeure notice to the CAISO regarding these events and makes no effort in its testimony to show that it did. Thus, any attempt to recover these costs fails a basic requirement of the DCRT APSA and constitutes nothing more than a *post hoc* rationalization. Mr. Crew also fails to demonstrate these costs were the result of a Force Majeure delay as opposed to costs arising from siting and permitting authority directives.[514] Mr. Crew offers only a conclusory statement that the "Specific Management Costs" were separate from the claimed "Monthly Management run rate costs."[515]

d. None of the Financing and AFUDC Costs that DCRT Claims Qualify as Either Regulatory Compliance Costs or Force Majeure Costs

DCRT seeks recovery of $8,702,226 of financing costs associated with both regulatory compliance and Force Majeure delay.[516] This is essentially an unjustified base year adjustment for financing costs.[517] Separately, DCRT seeks recovery of an additional $16,778,853, which DCRT witness Crew claims reflects the total additional borrowing costs the company incurred as a result of 47 months of delay due to events of Force Majeure.[518]

DCRT should not be permitted to recover either of these requested amounts. As discussed above, (1) DCRT is not entitled to recover any of its proposed regulatory compliance costs under the DCRT APSA, (2) DCRT is not entitled to any base year adjustment under the DCRT APSA, and (3) only one of DCRT's claimed Force Majeure events—the nine-month

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513 *See* Exh. No. CSO-0001 REV3 at 119:1-122:11.
514 *Id.* at 119:1-7.
515 *Id.* at 119:7-9; Exh. No. DCT-0007 REV2 at 70:3-72:9.
516 Exh. No. DCT-0102 REV2 PUB at 128:2-18; Exh. No. DCT-0107 REV at 2.
517 *See* Exh. No. DCT-0125 REV2 PUB at 66:3-10.
518 Exh. No. DCT-0102 REV2 PUB at 129:1-130:8; Exh. No. DCT-0107 REV at 2; *see also* Exh. No. DCT-0125 REV2 PUB at 66:10-15.

delay of the CPCN proceeding due to COVID-19—is a delay caused by an event of Force Majeure for which a cost cap exclusion exists under the DCRT APSA. Further, neither witness Crew's testimony nor Exhibit No. DCT-0107 breaks down the AFUDC associated with each individual event of Force Majeure and category of regulatory compliance costs DCRT claims, making it problematic to deconstruct DCRT's proposed cost recovery amount to eliminate AFUDC associated with alleged Force Majeure events and specific regulatory compliance costs that provide no justification for the recovery of costs above the binding cost cap.

Allowing DCRT to recover any financing costs pursuant to any type of base year adjustment would contravene the provisions of the DCRT APSA and DCRT's bid in the competitive solicitation process, which included a binding cost cap of $241,805,391 stated in current/nominal dollars, not constant dollars, contained no provision for any type of inflation adjustment beyond 2020, and had no cost cap exclusion for these types of costs.[519] The same reasons stated earlier herein as to why DCRT is not entitled to any four-year base year adjustment applies with equal force to DCRT's claim that it is entitled to a four-year base year adjustment (or any similar adjustment) for financing costs. DCRT's cost cap in the DCRT APSA includes a separate line item for financing costs of $22,865,730,[520] and the DCRT APSA includes no separate cost cap exclusion for financing costs. This financing cost amount is consistent with the financing component of DCRT's cost cap reflected in DCRT's bid in the competitive solicitation process, which was stated in nominal dollars, and DCRT's statement that DCRT's cost cap included AFUDC.[521]

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519 Unlike Project Sponsors in other CAISO competitive solicitations, neither the DCRT APSA nor DCRT's Project proposal include a cost cap exception for AFUDC/financing costs. Nor does DCRT claim that it does. Exh. No. CSO-0001 REV3 at 157:22-158:2.

520 Exh. No. DCT-0002 at 49.

521 Exh. No. CSO-0006 REV2 PUB at 49, 144.

The only exclusion to the binding cost cap applicable to financing costs is the cost cap exclusion for costs due to Force Majeure delays. As discussed above, the CAISO has conceded that the Project delays resulting from COVID-19 were the result of a Force Majeure event, and those delays totaled nine months. Also as discussed above, the CAISO proposes to grant DCRT recovery of nine months of AFUDC associated with the nine-month COVID-19 delay, which totals $373,366.[522] No other Project delays were the result of a valid Force Majeure event, and, thus, DCRT is not entitled to any recovery of additional AFUDC for those events.

5. Does the APSA Allow DCRT to Recover Any Other Category of Costs in Excess of the Cap, and If So, How Much of Such Other Costs Does the APSA Allow DCRT to Recover over the Cap in This Proceeding?

The APSA does not allow DCRT to recover any other category of costs in excess of the cap. As discussed below, the only other possible bases for such cost recovery under the DCRT APSA are for a Change of Route or a "catchall" exception, neither of which allows DCRT to recover any of its claimed costs.

a. Change of Route

Under Appendix E of the DCRT APSA, if a regulatory agency imposes a Change of Route, DCRT will bear all costs associated with that change (with an exception for minor repositioning of facilities within the Route) up to $5,000,000 cumulatively and not increase the total Project cost cap. If a regulatory agency approves a Change of Route that results in additional costs, the incremental costs solely associated with the Change of Route will count toward the $5,000,000 threshold. If the incremental costs associated with the Change of Route are greater than $5,000,000, then DCRT will provide a request to change the Project cost cap to the CAISO which (i) identifies the Change of Route required by the regulatory agency, and (ii)

522 *See supra* Section II.C.4.c.vii of this Initial Brief.

explains all cost components associated with the Change of Route. If the CAISO approves the requested increase, the cost cap will be revised in accordance with Section 25.9 of the DCRT APSA. If the CAISO does not approve the requested increase, DCRT can propose a panel of three independent consultants to provide an independent determination of the costs allowed to be recovered under the existing cost cap, with that determination being subject to Commission review and approval.[523]

In sum, under the DCRT APSA there is no exclusion from the cost cap for any costs associated with a Change of Route. Instead, any costs associated with a Change of Route that are above the $5,000,000 threshold are properly recoverable in DCRT's TRR only to the extent: (1) those costs are just and reasonable and prudently incurred, and (2) the CAISO agrees to increase the cost cap to account for Change of Route costs or an independent panel allows such costs to be recovered if the CAISO does not approve a requested increase of the existing cost cap (and the Commission affirms the decision of the panel).

The Commission should not allow DCRT to recover any claimed costs above the cost cap associated with a Change of Route.[524] Allowing DCRT to recover such claimed costs would be inconsistent with the provisions of the DCRT APSA discussed above.[525] DCRT cannot seek cost recovery through this proceeding or through any other process for costs associated with Changes

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[523] Exh. No. DCT-0002 at 50-51. The applicable language was in both the original DCRT ASPA and the current DCRT APSA.

[524] DCRT does not appear to specify a dollar amount of costs it claims as costs associated with a Change of Route. Instead, DCRT states it "rejects arguments that any cost ultimately determined to be a result of Change of Route would be precluded from cost recovery in these consolidated proceedings if it had not been first discussed with the CAISO on a stand-alone basis or as part of the three-person panel review process outlined in APSA Appendix E for disputed Change of Route cost." Exh. No. DCT-0102 REV2 PUB at 40:1-5. *See also* Exh. No. DCT-0102 REV2 PUB at 116:15-117:1 (arguing that "[t]he fact that DCRT's mobilization costs may or may not be Change of Route costs is not relevant"). Apart from the issue of claimed costs, DCRT also argues that "DCRT's total estimate of $568.4 million is reduced by $5 million to $563.4 [million] for ratemaking purposes based on the Change of Route deductible. as set forth in the APSA." Exh. No. DCT-0102 REV2 PUB at 6:1 (Figure 1).

[525] Exh. No. CSO-0001 REV3 at 11:1-22, 150:22-157:9.

of Route that were the subject of negotiations leading up to the second amendment to the DCRT APSA, which already resulted in a mutual agreement of DCRT and the CAISO to increase the cost cap for all Change of Route costs.

In his testimony accompanying DCRT's 2023 rate case filing, Mr. Crew estimated there were a total of about $20.9 million in costs consisting of about $12 million in total additional EPC costs and approximately $8.9 in additional management costs associated with Change of Route not reflected in the second amended DCRT APSA associated with six activities: stranded snub site tooling cost, survey, yard crews, rock fall mitigation, environmental mitigation, environmental monitoring, and management support.[526] This discussion disappears from his updated testimony in Exhibit No. DCT-0007 REV, and Mr. Crew instead states "DCRT is no longer seeking to justify such cost increases related to Change of Route."[527] However, nowhere does Mr. Crew propose to reduce DCRT's filed TRR to reflect a reduction in this $20.9 million amount. Given Mr. Crew's statements that the Change of Route costs reflected in the second amended DCRT APSA do not reflect the impact of inflation and delay, presumably DCRT simply shifted them, at least in part, to the base year adjustment, which has increased by approximately $15 million from DCRT's original rate case filing.[528] This seems to be suggested in a response to a data request, where DCRT notes that in its July 30, 2025 testimony, the permissible contract adjustments decreased (partially because Change of Route adjustments were no longer being included in this adjustment), but the base year adjustment increased.[529]

There are additional reasons to believe DCRT continues to seek to recover Change of Route costs in a manner inconsistent with the DCRT APSA. Mr. Crew states "the adjustments

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526 Exh. No. DCT-0048 at 233:6-233:18, 236:7-238:4.

527 Exh. No. DCT-0007 REV2 at 64:22-23.

528 Exh. No. CSO-0001 REV3 at 150:22-151.21.

529 *Id.* at 151:21-152:2 (citing Exh. No. CSO-0048).

for the additional $115,816,535" above the cap DCRT is seeking in this proceeding "are consistent with the APSA because these costs result from Changes of Route, Regulatory Compliance, and delays due to events of Force Majeure."[530] Further, in his Rebuttal Testimony, Mr. Crew claims DCRT was not obligated to follow the independent panel process in the DCRT APSA and could propose recovery of Change of Route costs to the Commission for the first time in this rate case.[531] He also argues that because none of the Change of Route costs DCRT seeks are expressly mentioned in the second amendment to the DCRT APSA that increased the cost cap to account for Change of Route, DCRT is not precluded from recovering them here.[532]

It appears DCRT may have simply moved most of what would have been Change of Route costs not approved in the second amended DCRT APSA and sought in its 2023 filing into different buckets—either an increased base year adjustment or one of the $115.8 million in other "permitted contractual adjustments" now claimed by DCRT. DCRT witness Reed's testimony appears to bear this out. He states "[p]ermissible Contractual Adjustments include cost increases for Changes of Route, Regulatory Compliance, and delays caused by events of Force Majeure,"[533] whereas as noted above, Mr. Crew specifically states "DCRT is no longer seeking to justify such cost increases related to Change of Route."[534] DCRT is moving Change of Route costs into a different bucket(s) because the express terms of the DCRT APSA preclude their recovery of additional Change of Route costs beyond what was included in the second amended DCRT APSA.[535]

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530 Exh. No. DCT-0007 REV2 at 51:2-5.
531 Exh. No. DCT-0102 REV2 PUB at 40:1-7.
532 *Id.* at 39:4-41:8.
533 Exh. No. DCT-0022 REV at 3:10-12.
534 Exh. No. DCT-0007 REV2 at 64:22-23.
535 Exh. No. CSO-0001 REV3 at 152:3-23.

Any attempt to recover these additional Change of Route costs in this rate proceeding would contravene the express terms and requirements of the DCRT APSA. Appendix E of the DCRT APSA expressly includes a specific, detailed process for recovering Change of Route costs, and that process does not permit DCRT to go directly to the Commission to seek recovery of additional costs related to a Change of Route when such costs have not been presented to the CAISO. Indeed, it was DCRT, not the CAISO, that proposed this process,[536] and now DCRT seeks to do an end run around the very process it proposed to apply for the recovery of Change of Route costs. DCRT has not raised this issue other than in its filing submitted in this proceeding on July 30, 2025, and as discussed below the CAISO has not agreed to a cost cap adjustment for such additional Change of Route costs nor have such costs been authorized by a panel of independent consultants as required in Appendix E. DCRT failed to follow the process set forth in the DCRT APSA regarding the recovery of any additional Change of Route costs.[537]

DCRT previously sought to increase its cost cap due to a Change of Route in accordance with Appendix E because regulatory approvals of the ACC and the BLM resulted in the addition of 10.7 miles to the Project.[538] The CAISO engaged in extensive discussions with DCRT regarding the appropriate level of the cost cap increase due to a Change of Route, and both parties eventually executed the second amendment to the DCRT APSA dated March 7, 2022.[539] DCRT's own testimony acknowledges that the negotiations leading up to the second amended APSA DCRT sought to increase the cost cap due to Change of Route,[540] the second amended APSA increased the cost cap to account for Change of Route costs agreed to with the CAISO,[541]

536 Exh. No. DCT-0224 at 1, 101-02.
537 Exh. No. CSO-0001 REV3 at 153:1-15.
538 *Id.* at 155:23-28.
539 *Id.* at 155:28-31.
540 Exh. No. DCT-0007 REV2 at 33:11-34:8.
541 *Id.* at 37:7-8, 38:22-23.

the $5 million Change of Route deduction was applied to the costs added in the second amended APSA.[542] Appendix E of the DCRT APSA was revised to reflect a $17,155,633 increase in the cost cap. This amount excluded $5 million consistent with the Appendix E provisions applicable to amended cost caps due to a Change of Route.[543]

The DCRT APSA does not permit DCRT to ignore the fact it already agreed to more than a $17 million cost increase to reflect the Change of Route. Had DCRT disagreed with the level of costs associated with a Change of Route to be reflected in the second amended DCRT APSA, DCRT could have pursued the remedy available to it under Appendix E—convening an independent panel of three consultants to determine the appropriate level of costs associated with Change of Route to be allowed. It did not.[544] Accordingly, DCRT cannot now come before the Commission and seek to recover such costs in this rate proceeding and essentially do an "end-run" around the required process procedures in the DCRT APSA and the cost cap adjustment it agreed to in the second amended DCRT APSA.[545] Thus, DCRT's transmission gross plant should be reduced by the $20.9 million in Change of Route costs reflected in DCRT's 2023 rate case filing, which costs DCRT did not deduct from its transmission gross plant in its updated testimony from July 30 and August 14, 2025.[546]

It is disingenuous for Mr. Crew to claim that because the second amendment to the DCRT APSA did not state with specificity the individual Change of Route costs that were reflected in the cost cap increase, DCRT is not precluded from seeking recovery of such costs. As discussed above, DCRT acknowledges the second amended DCRT APSA accounted for Change of Route

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542 Exh. No. DCT 0102 REV2 PUB at 39:10-12.
543 Exh. No. CSO-0001 REV3 at 155:31-156:2; Exh. No. DCT-0002 at 77.
544 Exh. No. CSO-0001 REV3 at 156:17-157:2.
545 *Id.* at 157:2-6.
546 *Id.* at 157:6-9.

costs, and the Answering Testimony of CAISO witness Le Vine identifies the specific Change of Route costs the CAISO provided for recovery of in the second amended DCRT APSA[547]—the same type of costs which DCRT seeks to recover in this case.

b. Catchall

The DCRT APSA includes a catchall provision at the end of Appendix E that allows changes to the Project cost cap only if approved by both the CAISO and the Commission.[548] The CAISO has not approved, and does not approve, any such changes to the cost cap. DCRT acknowledges that "DCRT has not taken the position that the CAISO has agreed to a cost recovery under this provision."[549]

6. Did DCRT Abide by the Proper Procedures Outlined in the APSA for Claiming the Ability to Recover Costs in Excess of the Cap?

In the second amendment to the DCRT APSA, based on Changes of Route ordered by the BLM, DCRT and the CAISO followed the procedures in Appendix E of the original version of the DCRT APSA and agreed to an amended cost cap of $258,961,024, which was an increase of $17,155,633 over the original cost cap of $241,805,391. This new cost cap included the $5,000,000 DCRT agreed to bear if there was a Change of Route.[550] The CAISO has authority to negotiate changes to the DCRT APSA, such as the second amendment thereto, in accordance with Sections 25.9 and 25.10 of the DCRT APSA, as applicable.[551] However, as discussed above, DCRT did not abide by the proper procedures set forth in the DCRT APSA for claiming the ability to recover costs in excess of the cap.

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547 *Id.* at 39:14-44:2.

548 *See* Exh. No. DCT-0002 at 79.

549 Exh. No. CSO-0049.

550 Exh. No. CSO-0001 REV3 at 36:15-37:11. As described above, the provision in Appendix E regarding the panel of three independent consultants is mandatory if the CAISO does not approve an increase in the cost cap related to a request for a Change of Route with associated costs greater than $5,000,000. Exh. No. DCT-0002 at 50-51.

551 *Id.* at 35.

D. Have the Intervenors and Commission Trial Staff Demonstrated that DCRT's Proposed Base TRR is Unjust and Unreasonable, and If So, What is a Just and Reasonable Base TRR for DCRT?

See the CAISO positions above regarding what the allowable Project cost is for ratemaking purposes.[552] The CAISO has demonstrated that DCRT is only permitted to recover a maximum total of $339,582,991 in Project capital costs in its Base TRR in this proceeding.. This demonstrated that DCRT's proposed inclusion of $553,261,497 in Project capital costs in its Base TRR is unjust and unreasonable. The CAISO takes no position on what the Project actual total cost is, except insofar as it concerns that allowable Project cost eligible for recovery in DCRT's Base TRR as discussed above.

1. Did DCRT Correctly Calculate Its Rate Base?

DCRT has not correctly calculated its rate base because the Project capital costs included in DCRT's proposed Base TRR exceed DCRT's cost cap in Appendix E of the DCRT APSA along with any permitted cost cap exclusions, by $213,678,506 for the reasons explained in this initial brief.

2. Did DCRT Correctly Calculate Its AFUDC?

The CAISO takes no position on the determination of AFUDC in this proceeding. However, as explained above, DCRT is prohibited by contract from recovering in its Base TRR any AFUDC above the DCRT APSA cost cap under any exclusion from or exception to the DCRT APSA cost cap except as discussed above.

3. What Is the Appropriate Amount to Be Included in the Pre-Commercial Regulatory Asset?

The CAISO takes no position on this issue.

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552 Sections II.B.6 and II.C.1-6 of this Initial Brief.

4. What Is an Appropriate Cash Working Capital Allowance for Inclusion in Rate Base?

The CAISO takes no position on this issue.

5. Should DCRT's Rate Base Include Any Offsets for Unfunded Reserves?

The CAISO takes no position on this issue.

6. Did DCRT Correctly Calculate Its Cost of Capital?

The CAISO takes no position on this issue.

7. What Are the Just and Reasonable Operations and Maintenance Expenses to Be Included in the Base TRR?

The CAISO takes no position on this issue.

8. What Are the Just and Reasonable Administrative and General Expenses to Be Included in the Base TRR?

The CAISO takes no position on this issue.

9. What Is the Appropriate Depreciation and Amortization Expense to Be Used for Determination of the Base TRR?

The DCRT APSA states that "[t]he Approved Project Sponsor agrees to apply straight-line depreciation over the life of the Project consisting of 2% based on a service life of 50 years";[553] otherwise, the CAISO takes no position on this issue.

10. What Other Adjustments, If Any, Should Be Applied to the Filed Base TRR?

The CAISO takes no position on this issue.

E. What Refunds or Other Relief, If Any, Should the Commission Order in These Consolidated Proceedings?

Section 10.1.1 of the DCRT APSA states in relevant part that "[t]he Approved Project Sponsor agrees that it shall not seek, for recovery through its Transmission Revenue

[553] Exh. No. DCT-0002 at 78.

Requirement, higher costs than the maximum costs specified in, or determined in accordance with, any cost cap or other binding cost containment measures as specified in Appendix E" thereto.[554] Section 10.3 of the DCRT APSA ("Refund Obligation") states in relevant part that

> [t]he Approved Project Sponsor, whether or not it is subject to FERC rate jurisdiction under Section 205 and Section 206 of the Federal Power Act, shall make all refunds, adjustments to its Transmission Revenue Requirement, and adjustments to its Approved Project Sponsor Tariff, and do all other things required to implement any FERC order related to the CAISO Tariff, including any FERC order the implementation of which necessitates the CAISO making payment adjustments or paying refunds to, or receiving prior period overpayments from, the Approved Project Sponsor.[555]

The Commission should enforce these contractual provisions. The Commission should find that, contrary to Section 10.1.1, DCRT's proposed Base TRR is higher than "the maximum costs specified in, or determined in accordance with, any cost cap or other binding cost containment measures as specified in Appendix E." To implement that finding, the Commission should enforce DCRT's contractual refund obligations under section 10.3 and require DCRT to refund the entire amount DCRT has collected through the CAISO TAC and WAC in violation of its contractual cost cap and binding cost containment provisions consistent with Appendix F, Schedule 3, Section 8.2 of the CAISO tariff, notwithstanding any refund limitations under section 206 of the FPA.

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554 *Id.* at 20.
555 *Id.* at 21.

III. Conclusion

For the foregoing reasons, the Presiding Judge and the Commission should make findings consistent with the discussion in this Initial Brief.

Respectfully submitted,

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ATTACHMENT A

Proposed Findings of Fact and Conclusions of Law

I. Proposed Findings of Fact

The CAISO proposes the following findings of fact:

A. Background

- The CAISO is a Commission-approved independent system operator responsible for conducting a regional transmission planning process in accordance with the CAISO tariff to identify transmission infrastructure projects in its balancing authority area to address reliability, economic, or public policy-driven needs.

- As part of the 2013-2014 CAISO transmission planning process, the CAISO selected and approved the Project as an economically needed transmission project.

- Pursuant to its tariff, the CAISO conducted a competitive solicitation process and selected DCRT's bid to be the Approved Project Sponsor to develop, finance, construct, own, operate, and maintain the Project.

- The primary reason for the selection of DCRT as the Approved Project Sponsor for the Project was DCRT's materially lower project costs, binding cost containment measures, and absence of cost cap exclusions that other Project Sponsors proposed.

- DCRT and the CAISO executed an APSA on December 1, 2015, as subsequently amended on August 24, 2018, March 7, 2022, and March 13, 2024.

- The Project was turned over to the CAISO's operational control and was placed in service on June 12, 2024.

- DCRT is now a PTO under the CAISO tariff.

- Pursuant to the APSA, DCRT is subject to a binding cost cap for Project costs that are prudently incurred and recoverable under its TO Tariff and annual Base TRR.

- Allowing DCRT to recover its requested Project costs above the binding cost cap will undermine the competitive solicitation process and harm transmission ratepayers by undermining the enforceability of cost containment mechanisms in the CAISO transmission planning process.

B. What Is the Proper Assignment of Burden of Proof on the Various Issues in This Proceeding? (Section II.A of the Initial Brief)

- On January 30, 2026, the Commission issued an order determining that DCRT's tariff records constitute a change in rate, establishing a proceeding under section 206 of the FPA, and consolidating the existing proceedings with that FPA section 206 proceeding, thereby establishing the burden of proof. Before issuance of that January 30, 2026 order, the above-captioned proceedings were established and administered under section 205 of the FPA.

- The CAISO, Commission Trial Staff, and other intervenors are challenging DCRT's tariff records in these consolidated proceedings.

- DCRT has claimed Force Majeure and other cost cap exclusions in Appendix E of the DCRT APSA as affirmative defenses to excuse compliance with obligations and performance under the DCRT APSA, including the cost cap and cost containment provisions.

C. May/Should the Presiding Judge Enforce the APSA in a Commission Proceeding to Determine a Just and Reasonable Base TRR for DCRT? (Section II.B of the Initial Brief)

- The DCRT APSA conforms to the Commission-approved *pro forma* APSA set forth in Appendix X of the CAISO tariff.

- The Commission found that the original version of the *pro forma* APSA was just and reasonable.

- The Commission found subsequent revisions to the *pro forma* APSA, including the one that is currently on file as Appendix X of the CAISO tariff, are just and reasonable.

- The addition of a cost cap and cost containment provisions in Appendix E of an APSA is provided for in Section 10.1.1 of the *pro forma* APSA and therefore does not render an APSA non-conforming.

- Conforming agreements are separately filed for Commission acceptance under the electronic quarterly reporting process.

- The DCRT APSA is a service agreement under the CAISO tariff, which is an OATT.

- The Commission has jurisdiction over service agreements under OATTs.

- The Commission has jurisdiction over the DCRT APSA and is empowered to enforce it.

- The DCRT APSA directly affects DCRT's proposed Base TRR, which is an input into the CAISO's TAC formula rate previously approved by the Commission.

- At the conclusion of each one of CAISO's competitive transmission solicitation process, details of the Approved Project Sponsor's bid are documented in an APSA that is executed between that Approved Project Sponsor and the CAISO.

- Compared with state courts, the Commission alone has special expertise and experience regarding electric transmission rates and TRRs, including the APSA and competitive transmission solicitation processes.

- Uniformity is necessary in the establishment of TRRs and transmission rates to ensure a lack of undue discrimination.

- Uniformity is necessary in the interpretation of APSAs and comparable project sponsor agreements to ensure a lack of undue discrimination.

- The Commission has exclusive jurisdiction over the rates of interstate transmission facilities such as the Project.

- The issues set for hearing by the Commission in these consolidated proceedings are limited to DCRT's proposed Base TRR and related transmission owner tariff filing, not the enforceability or the justness and reasonableness of the DCRT APSA.

- DCRT and the CAISO had a meeting of the minds when executing the DCRT APSA and its amendments.

- The justification for the Project in the 2013-2014 Transmission Plan was solely based on the economic benefits to ratepayers.

- The CAISO does not dispute that the Project, like any transmission project, provides a range of reliability and other benefits, but those benefits were not the justification for including the Project in the CAISO transmission plan.

D. Does the APSA Allow DCRT to Recover Capital Costs in Excess of the Amount Stated as the Binding Cap in Appendix E? (Section II.C of the Initial Brief)

- The DCRT APSA contains cost cap and cost containment provisions.

- Appendix E of the DCRT APSA sets forth a Project cost cap of $258,961,024 in 2020 dollars.

- Appendix E of the DCRT APSA states that certain specified costs are not included in the cost cap and may be recoverable through DCRT's TRR.

- Appendix E expressly identifies five categories of excluded costs: (1) qualifying interconnection-related costs (Bullet #1); (2) qualifying costs resulting from unilateral CAISO amendments under Section 4.4 (Bullet #2); (3) qualifying costs incurred to make changes under Section 5.4 (Bullet #3); (4) qualifying costs incurred to remedy deficiencies under Section 5.5.3 (Bullet #4); and (5) qualifying costs resulting from delays due to events of Force Majeure, not covered by insurance, or caused by an Interconnecting PTO (Bullet #5).

- Section 13.1.1 of the DCRT APSA requires a party unable to fulfill an obligation by reason of Force Majeure to give notice and full particulars of the claimed Force Majeure event to the other party as soon as reasonably possible after the occurrence of the cause relied upon.

- Section 21.2 of the DCRT APSA governs notices of inability to comply with the APSA for reasons other than Force Majeure.

1. Does Appendix E Require the Commission to Adjust the Cost Cap Which Is stated in 2020 Dollars or DCRT's Actual Costs in the Base TRR Calculation to Reflect Inflation Between 2020 and 2024? If So, How? (Section II.C.1 of the Initial Brief)

- DCRT seeks a base year adjustment of approximately $101,355,574 to escalate the DCRT APSA cost cap above the amount stated in the contract of $258,961,024 in 2020 dollars.

- The DCRT APSA does not use the terms "base year adjustment," "inflation adjustment," or "constant dollars" in connection with the DCRT cost cap.

- The DCRT APSA contains no inflation index for adjusting the Project cost cap.

- The DCRT APSA contains no formula for automatically escalating the Project cost cap beyond the stated amount in 2020 dollars.

- The DCRT APSA contains no provision stating that the cost cap will automatically change if the in-service date slips beyond 2020.

- DCRT submitted its competitive solicitation proposal in 2014 and supplemented it in 2015.

- In its competitive solicitation proposal, DCRT repeatedly represented it was committing to a binding cap on Project costs with only defined exclusions in Appendix E.

- DCRT's competitive solicitation proposal stated that its annual TRR figures were in current/nominal dollars.

- DCRT's competitive solicitation proposal stated that the transmission gross plant amount included inflation through 2020.

- DCRT's competitive solicitation proposal did not state that the cost cap was in constant 2020 dollars.

- DCRT's competitive solicitation proposal did not identify any post-2020 inflation escalator for the Project cost cap.

- DCRT’s competitive solicitation proposal did not state that the cost cap would automatically adjust for inflation if the Project were delayed beyond 2020.
- The reference to “2020 dollars” in the APSA reflects DCRT’s use of a future-year nominal dollar figure as its cost cap in its competitive solicitation proposal from 2015.
- DCRT’s proposed cost cap expressly provided for inflation through 2020 but provided for no post-2020 escalation mechanism.
- DCRT expressly used and described “nominal dollars” in connection with its proposed annual revenue requirement figures and expressly stated the cost cap was in “current” dollars.
- Current/nominal dollars are not subject to escalation for inflation.
- Other Project Sponsors’ competitive solicitation proposals to construct the Project expressly used “constant” dollar formulations and/or express escalation provisions, while DCRT’s competitive solicitation proposal did not use such terms or provisions.
- The CAISO relied on the terms of DCRT’s competitive solicitation proposal, including the absence of a post-2020 inflation escalator, in evaluating DCRT’s bid against competing proposals and choosing DCRT as the Approved Project Sponsor.
- None of the three DCRT APSA amendments added any base year adjustment or inflation adjustment for Project delays beyond 2020.
- DCRT did not advise the CAISO during the APSA amendment processes that the APSA required a post-2020 inflation adjustment to the cost cap.
- DCRT’s 2023 rate filing was the first time DCRT sought a base year adjustment to the DCRT APSA cost cap.
- The DCRT APSA contains no express provision authorizing use of the Handy-Whitman Index to escalate the cost cap.
- A 2.5 percent inflation was the only inflation figure DCRT used for capital costs in its competitive solicitation bid.
- Neither the DCRT APSA nor DCRT’s competitive solicitation bid identified the Handy-Whitman Index as the measure for any cost cap escalation.

2. Does the APSA Allow DCRT to Recover Interconnection-Related Costs in Excess of the Cap, and If So, How Much of Such Interconnection-Related Costs Does the APSA Allow DCRT to Recover over the Cap in This Proceeding? (Section II.C.2 of the Initial Brief)

- Appendix E excludes from the cost cap qualifying costs related to Transmission Interconnection Facilities or Transmission Interconnection Service.
- The APSA defines Transmission Interconnection Facilities in relation to facilities necessary to physically and electrically interconnect the Project to an Interconnecting PTO's or other entity's transmission system.
- The APSA defines Transmission Interconnection Service by reference to Section 4.2.
- Section 4.2 provides that Transmission Interconnection Service allows DCRT to connect the Project to the facilities of an Interconnecting PTO or another transmission system not part of the CAISO Controlled Grid.
- Under Section 4.2, DCRT must obtain a separate agreement for Transmission Interconnection Service from the Interconnecting PTO or other relevant entity.
- Not all costs above the cost cap that DCRT labels "interconnection" qualify as excluded costs under Appendix E.
- DCRT claims interconnection-related costs above the cap totaling $88,343,757.
- Only a portion—specifically, a maximum of $76,569,878—of DCRT's claimed interconnection-related costs qualify under Section 4.2 and Appendix E.
- Qualifying above-cap interconnection-related costs include amounts paid for APS interconnection, SCE interconnection, SRP affected-system upgrades, certain specified EPC change-order work performed for SCE interconnection scope, and related AFUDC associated with qualifying interconnection costs.
- Project-side EPC costs to bring the line to the point of interconnection are Project costs subject to the binding cost cap, not excluded interconnection costs.
- AFUDC and financing costs that were not paid to an Interconnecting PTO or transmission provider and that do not directly satisfy Appendix E and Section 4.2 are not excluded interconnection costs.
- Claimed "interconnection delay" costs paid to DCRT rather than to an Interconnecting PTO or other transmission provider do not satisfy the APSA's interconnection exclusion.
- DCRT cannot justify exclusion from the cost cap of all interconnection-related costs it claims.

3. Does the APSA Allow DCRT to Recover Regulatory Compliance Costs in Excess of the Cap, and If So, How Much of Such Regulatory Compliance Costs Does the APSA Allow DCRT to recover over the Cap in This Proceeding? (Section II.C.3 of the Initial Brief)

- DCRT seeks recovery of $85,936,149 in costs it characterizes as "regulatory compliance" costs.

- DCRT's claimed regulatory compliance costs include both EPC-related costs and management run-rate-related costs.

- The APSA does not contain an express cost cap exclusion labeled "regulatory compliance."

- DCRT now relies on Bullet #3 and Bullet #4 of Appendix E in support of its claimed regulatory compliance costs.

- Bullet #3 excludes qualifying costs incurred to make changes to the Project under Section 5.4 of the APSA, to the extent such changes were not included in the functional requirements issued for the competitive solicitation or in DCRT's bid.

- Section 5.4 of the APSA concerns submission and review of Project specifications to the CAISO and to the Interconnecting PTO or other entity providing Transmission Interconnection Service.

- Section 5.4 of the APSA is directed to compatibility with technical specifications, operational control, safety requirements, and related requirements of the CAISO and the other interconnecting transmission entity.

- The term "other entity" in Section 5.4 refers to an interconnecting transmission service provider entity, not to permitting or siting agencies such as the BLM or CPUC.

- Bullet #4 excludes qualifying costs incurred to remedy deficiencies in accordance with Section 5.5.3 of the APSA.

- Section 5.5.3 of the APSA addresses deficiencies that arise during construction where Project engineering, equipment procurement, or construction fails to meet the standards and specifications provided by the Interconnecting PTO or other interconnecting transmission entity.

- The term "other entity" in Section 5.5.3 refers to an interconnecting transmission entity, not to permitting or siting agencies such as the BLM or CPUC.

- The BLM and CPUC are governmental or siting authorities, not interconnecting transmission entities.

- The regulatory and siting requirements DCRT identifies were imposed principally by the BLM and CPUC, not the CAISO, APS, or SCE acting under Sections 5.4 or 5.5.3 of the APSA.

- Section 5.9.3 of the APSA pertains to changes ordered by a siting/permitting authority.

- The APSA does not include a cost cap exclusion for costs incurred under APSA Section 5.9.3.

- DCRT's claimed regulatory compliance costs do not arise from the CAISO, APS, or SCE directing changes to Project specifications to ensure compatibility with their technical specifications, operational control, or safety requirements.

- DCRT's claimed regulatory compliance costs do not arise from DCRT remedying construction deficiencies identified by APS or SCE under Section 5.5.3.

- Several of DCRT's claimed regulatory compliance costs relate to route changes, environmental mitigation, cultural resources compliance, seasonal restrictions, litigation or permitting support, rate-case support, or other matters outside the scope of Section 5.4 and Section 5.5.3, and the DCRT APSA does not contain an express cost cap exclusion for these specific types of costs.

- DCRT's proposed cost recovery of above-cap costs based on regulatory compliance do not satisfy the requirements of Bullets #3 and #4 in Appendix E of the DCRT APSA.

- DCRT's competitive solicitation proposal included an express exclusion for agency-ordered Change of Route costs but did not include a broader exclusion for the types of regulatory compliance costs DCRT now seeks to recover.

- Competing Project Sponsor proposals for the Project included broader or more specific regulatory-cost exclusions that DCRT did not include in its bid.

- The CAISO relied on the narrower scope of DCRT's stated cost cap exclusions when evaluating DCRT's bid and selecting DCRT as the Approved Project Sponsor.

- Some costs DCRT now characterizes as regulatory compliance costs overlap with costs associated with the Change of Route addressed in the second amendment to the APSA.

- The Change of Route cost cap increase agreed to in the second amended APSA was intended to address qualifying Change of Route costs through the contractual process set forth in Appendix E to the APSA.

- DCRT did not preserve in the DCRT APSA a separate, general right to recover the additional regulatory compliance costs it now seeks above the cost cap.

4. Does the APSA Allow DCRT to Recover Costs of Delay Due to Force Majeure in Excess of the Cap, and If So, How Much of Such Delay Costs Does the APSA Allow DCRT to Recover over the Cap in This Proceeding? (Section II.C.4 of the Initial Brief)

- Bullet #5 in Appendix E of the DCRT APSA provides a cost cap exclusion for any FERC approved costs resulting from delays due to events of Force Majeure, not covered by insurance.
- DCRT claims twelve Force Majeure events.
- Of those twelve events, DCRT provided an appropriate and timely Section 13.1.1 Force Majeure notice to the CAISO with respect to the COVID-19 pandemic.
- DCRT did not provide appropriate or timely Section 13.1.1 Force Majeure notice to the CAISO for all other events it now claims were Force Majeure events.
- Without stating that they were Force Majeure events at the time, DCRT notified the CAISO that events it now claims are Force Majeure events were causing delays to the Project.
- Before the first amendment to the DCRT APSA was executed, DCRT notified the CAISO of permitting and scheduling difficulties, and those communications did not characterize the identified events as Force Majeure events under Section 13.1.1.
- The CAISO and DCRT executed the first amendment to the DCRT APSA without invoking the provisions in Section 13.1.1 after DCRT raised permitting and scheduling difficulties.
- All of DCRT's claimed events of Force Majeure other than COVID-19 do not meet the DCRT APSA definition of Force Majeure.
- The BLM's review of multiple route alternatives in the NEPA process was a routine and foreseeable aspect of environmental review for a large interstate transmission project of this nature.
- The CPUC ALJ's decision to hold the CPCN docket in abeyance pending completion of federal environmental review was intended to promote the effectiveness and efficiency of the CPCN process and was neither extraordinary nor unforeseeable in the context of the Project's permitting requirements.
- The draft DRECP was issued in September of 2014, well before DCRT's submission of its bid for the Project.
- The draft DRECP and later DRECP materials existed before execution of the APSA and were part of the regulatory landscape applicable to the Project's route in the California desert region.

- Order 3355 was an administrative order intended to improve and streamline agency review processes.
- The BLM's overall NEPA review timeline for the Project was not unusually long compared with broader BLM EIS timelines cited by the CAISO.
- The federal government shutdown identified by DCRT occurred during a period when consultant work and internal processing could continue, and DCRT did not establish a concrete, Project-specific delay attributable to that shutdown beyond speculation.
- The BLM's requirement for certain tower design changes was associated with route and siting considerations, not with an extraordinary event that rendered the APSA's cost cap inoperative.
- The CAISO's direction to hold procurement until material permitting milestones were achieved was an exercise of contractual authority under the APSA, not an event of Force Majeure.
- COVID-19 was an unforeseeable, extraordinary and uncontrollable event.
- The CAISO does not dispute that the COVID-19 pandemic qualifies as a Force Majeure event under the APSA.
- The Project experienced delay only associated with COVID-19's impact on the CPUC CPCN proceeding.
- The demonstrated Project delay attributable to COVID-19 was nine months.
- DCRT seeks Force Majeure-related recovery far in excess of the costs associated with a nine-month COVID-19 delay.
- DCRT aggregates claimed Force Majeure delay costs across numerous alleged events over 7.3 years rather than isolating costs attributable to each qualifying Force Majeure delay.
- The only Force Majeure delay costs DCRT may recover above the cost cap are qualifying management run-rate costs and associated AFUDC attributable to the nine-month COVID-19 delay.
- Qualifying COVID-19 Force Majeure delay costs total a maximum of $4,052,089.
- DCRT also claims certain specific management-cost items as Force Majeure costs, but those items were not supported by timely Force Majeure notice and were not shown to be recoverable under the APSA's Force Majeure exclusion.
- DCRT seeks additional financing and AFUDC amounts tied to alleged Force Majeure and regulatory compliance delays.

- The APSA does not contain a separate general cost cap exclusion for financing costs beyond the specific exclusions stated in Appendix E.

- Financing and AFUDC amounts above the cap are recoverable only to the extent directly tied to qualifying excluded costs under Appendix E.

5. Does the APSA Allow DCRT to Recover Any Other Category of Costs in Excess of the Cap, and If So, How Much of Such Other Costs Does the APSA Allow DCRT to Recover over the Cap in This Proceeding? (Section II.C.5 of the Initial Brief)

- Appendix E includes a specific procedure for handling costs associated with Change of Route imposed by a regulatory agency.

- The DCRT APSA does not provide a separate, open-ended right for DCRT to recover additional Change of Route costs outside the contractual Change of Route mechanism after execution of the second amended APSA.

- DCRT and the CAISO delayed the execution of the second amended APSA to allow for any Change of Route costs that the CPUC ordered or any adjustments due to route costs that needed to be made.

- If DCRT disagreed with CAISO's determination regarding additional Change of Route costs, Appendix E provides an independent panel review process.

- The DCRT APSA's catchall provision requires approval by both CAISO and the Commission for cost cap changes not otherwise expressly permitted in Appendix E.

6. Did DCRT Abide by the Proper Procedures Outlined in the APSA for Claiming the Ability to Recover Costs in Excess of the Cap? (Section II.C.6 of the Initial Brief)

- DCRT invoked the Change of Route process, and the CAISO and DCRT addressed qualifying Change of Route costs, in negotiating and executing the second amended APSA.

- The second amended APSA increased the cost cap to reflect the agreed-upon Change of Route costs.

- DCRT did not obtain a further cost cap increase through the independent panel review process.

- The CAISO has not approved additional cost cap changes for the categories of above-cap costs DCRT seeks in this proceeding beyond those recognized in the APSA and the second amended APSA.

- Except for the Change of Route process reflected in the second amended APSA, DCRT did not secure the approvals required under the APSA for the additional categories of above-cap recovery it now seeks.

E. Have the Intervenors and Commission Trial Staff Demonstrated that DCRT's Proposed Base TRR is Unjust and Unreasonable, and If So, What Is a Just and Reasonable Base TRR for DCRT? (Section II.D of the Initial Brief)

- DCRT proposes a Base TRR reflecting total Project costs of $553,261,497.

- Any proposed Base TRR costs that are contrary to the binding cost cap in the DCRT APSA are unjust and unreasonable.

- DCRT is contractually permitted to recover in its Base TRR only those Project costs equaling the DCRT APSA cost cap, qualifying interconnection-related costs satisfying the Bullet #1 cost cap exclusion, and qualifying Force Majeure delay costs satisfying the Bullet #5 cost cap exclusion.

- DCRT is not contractually permitted to recover a base year adjustment to the APSA cost cap.

- DCRT is not contractually permitted to recover its claimed regulatory compliance costs above the cost cap.

- DCRT is not contractually permitted to recover most of its claimed Force Majeure costs above the cost cap.

- DCRT is not contractually permitted to recover additional Change of Route costs outside the mechanism already reflected in the second amended APSA.

- The maximum recoverable Project costs through DCRT's Base TRR under the APSA are substantially below DCRT's claimed $553,261,497 and, as stated by the CAISO, total $339,582,991.

- The difference between DCRT's proposed Project cost recovery and the amount that is contractually recoverable would be borne by CAISO transmission ratepayers through the TAC if approved by the Presiding Judge and the Commission.

- Allowing DCRT to recover costs materially above the APSA's binding cost cap and express exclusions would dilute the value of binding cost containment commitments in future competitive transmission solicitations and potentially lead to unjust and unreasonable results in the CAISO Transmission Planning Process.

- Allowing DCRT to recover costs materially above the APSA's binding cost cap and express exclusions calls into question the ability for the CAISO to implement Order No. 1000 if a project sponsor can execute an APSA based on its bid and then completely ignore the facts the decision of choosing such project sponsor the CAISO relied on.

F. What Refunds or Other Relief, If Any, Should the Commission Order in These Consolidated Proceedings? (Section II.E of the Initial Brief)

- Section 10.3 of the APSA requires DCRT to make refunds, TRR adjustments, tariff adjustments, and other implementing actions required by a Commission order related to the CAISO tariff.
- Section 10.1.1 of the APSA prohibits DCRT from seeking recovery through its TRR of costs above the cost cap and binding cost containment measures except as expressly provided in Appendix E.

II. Proposed Conclusions of Law

The CAISO proposes the following conclusions of law:

A. What Is the Proper Assignment of Burden of Proof on the Various Issues in This proceeding? (Section II.A of the Initial Brief)

The CAISO and Customer Participants bear the burden of proof under section 206 of the FPA to show that DCRT's tariff records are unjust, unreasonable, or unduly discriminatory or preferential. That burden includes the burden of persuasion, the prima facie burden of proof, and the initial burden of production. (16 U.S.C. § 824e(b); January 2026 Order, 194 FERC ¶ 61,085; June 2026 Order, 195 FERC ¶ 61,181; *Basin*, 187 FERC ¶ 63,021, at PP 130-33; *SDG&E*, 149 FERC ¶ 61,116, at PP 44-46; *Sargent Fletcher, Inc. v. Able Corp.*, 3 Cal. Rptr. 3d 279, 284-86, 110 Cal. App. 4th 1658, 1666-68.)

The CAISO has met that burden of proof by showing, among other things, that DCRT's capital cost recovery is subject to and limited by the APSA, and that DCRT may not recover from California consumers capital costs above the amount permitted under that agreement. (Exh. No. DCT-0002; *Basin* at PP 133, 157-58; *SDG&E* at P 45.)

DCRT bears the burden of proof on all its affirmative defenses. DCRT must therefore prove, by a preponderance of the evidence, that Force Majeure or any other asserted DCRT APSA cost cap exclusion excuses DCRT's noncompliance with the APSA cost cap. (*Basin* at PP 161-62; *La. Pub. Serv. Comm'n v. Sys. Energy Resources, Inc.*, 183 FERC ¶ 63,020, at P 69 & nn.111-12; *Sargent Fletcher* at 282, 286; *Wells Fargo Equip. Fin., Inc. v. Madanyan Enters., Inc.*, 2023 Cal. Super. LEXIS 107984 at *9-13; *Weiner v. Allied World Surplus Lines Ins. Co.*, 2019 Cal. Super. LEXIS 66946 at *3.)

B. May/Should the Presiding Judge Enforce the APSA in a Commission Proceeding to Determine a Just and Reasonable Base TRR for DCRT? (Section II.B of the Initial Brief)

The Commission may enforce the DCRT APSA in this proceeding. The DCRT APSA conforms to the Commission-approved *pro forma* APSA in Appendix X of the CAISO tariff, is on file in CAISO's EQR as Service Agreement No. 3496 under the CAISO OATT, and therefore is a filed service agreement the Commission may enforce. (Exh. No. CSO-0001 REV3 at 29:1-

30:4; 18 C.F.R. §§ 35.1(g), 35.10a-35.10b; Order No. 2001, 99 FERC ¶ 61,107 at PP 16, 18; *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107, at P 4; *MISO*, 153 FERC ¶ 61,168, at P 140; *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,175, at P 3 n.8.)

The DCRT APSA directly affects DCRT's proposed Base TRR, which in turn flows into the CAISO TAC. Because the Commission has exclusive jurisdiction over interstate transmission facilities and rates, it may and should enforce APSA provisions that limit what DCRT may recover in this rate case. (Exh. No. CSO-0201 at 10:2-7; *City of Lincoln v. FERC*, 89 F.4th 926, 928; *E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1305-06.)

Enforcing the DCRT APSA is necessary to preserve the integrity of the CAISO's Commission-approved competitive solicitation process. The APSA binds the successful bidder to the terms that formed the basis for CAISO's selection, including binding cost caps and cost containment measures; without enforcement, the competitive process would be meaningless and ratepayers would be exposed to bait-and-switch pricing. (Order No. 1000, 136 FERC ¶ 61,051, at PP 253-54, 284-85; Exh. No. CSO-0201 at 9:4-18.)

If the Presiding Judge addresses the issue of whether to assert primary jurisdiction over DCRT APSA contractual issues that might otherwise be subject to state court jurisdiction, he should find that the Commission should assert primary jurisdiction over those issues based on application of the three-part *Arkla* test. The Commission has special expertise regarding APSA provisions affecting transmission rates, there is a need for uniform interpretation of APSAs and comparable agreements, and the issues here are directly tied to the Commission's core regulatory responsibilities. (*Arkla*, 7 FERC ¶ 61,175; Exh. No. CSO-0001 REV3 at 31:5-16.)

Section II.B.1 of the Initial Brief: No separate finding that the DCRT APSA is just and reasonable is required here. The Commission already approved the *pro forma* APSA and accepted revisions to it, and the DCRT APSA is a conforming agreement validly submitted through CAISO's EQR. (*DCR Transmission, L.L.C.*, 184 FERC ¶ 61,189, at PP 5, 9, 13, 25-27, 40; *MISO*, 153 FERC ¶ 61,168, at P 140; *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,175, at P 3 n.8; Tr. 8611:21-8612:4.) The Presiding Judge should therefore enforce the DCRT APSA as a filed service agreement in determining DCRT's Base TRR.

Section II.B.2 of the Initial Brief: The Presiding Judge and the Commission cannot disregard the cost cap. Section 10.1.1 of the DCRT APSA expressly states DCRT "shall not seek" recovery through its TRR of costs above the maximum costs specified in, or determined in accordance with, Appendix E of the DCRT APSA. The Commission approved the corresponding *pro forma* provision, and the Commission expects Approved Project Sponsors and the CAISO to abide by those APSA cost cap commitments. (Exh. No. DCT-0002 at 20; Exh. No. CDN-0003 at 19; Exh. No. CSO-0001 REV3 at 29:1-19; *NextEra Energy Transmission W., LLC*, 154 FERC ¶ 61,009, at P 55 & n.129.)

Section II.B.3 of the Initial Brief: Neither the Presiding Judge nor the Commission may require amendment of the DCRT APSA cost cap in this proceeding absent a separate FPA section 206 proceeding that finds that the APSA cost cap provisions themselves are unjust and unreasonable. The Commission's order setting these consolidated proceedings for hearing concerns DCRT's proposed TO Tariff and Base TRR, not the justness and reasonableness of the

DCRT APSA. (*DCR Transmission, L.L.C.*, 184 FERC ¶ 61,199, at PP 1, 40, Ordering Paragraph (B).)

Section II.B.3 of the Initial Brief: The plain text of the DCRT APSA supports the CAISO's interpretation and does not require extrinsic evidence to establish its meaning. If any ambiguity in the language of the DCRT APSA were found, however, the Presiding Judge may consider relevant extrinsic evidence, and California law governs interpretation of the APSA. (*PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,053, at P 15; *Wolf v. Walt Disney Pictures & Television*, 76 Cal. Rptr. 3d 585, 602, 162 Cal. App. 4th 1107, 1126; Cal. Civ. Code §§ 1636, 1637, 1647; Exh. No. DCT-0002 at 21; Exh. No. CDN-0003 at 20; *Jersey Cent. Power & Light Co. v. Atl. City Elec. Co.*, 118 FERC ¶ 63,027, at PP 42-44; *Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 115 FERC ¶ 61,375, at PP 69-85.)

Any ambiguity must be interpreted consistently with the Commission-approved CAISO tariff and Order No. 1000, both of which require cost-effective transmission solutions and support enforcement of binding cost-containment commitments. (Exh. No. CSO-0001 REV3 at 16:34-17:9, 19:6-21:2, 26:19-28:13, 58:5-59:20, 137:3-138:12; Exh. No. CSO-0007 at 133-35; Order No. 1000 at PP 253-54, 284-85.)

The Presiding Judge should reject DCRT's "meeting of the minds" argument. The record does not show a failure of contract formation; it instead shows a dispute over interpretation after DCRT exceeded its cap. Under California law, that is not enough to negate mutual assent. (*Banner Entm't, Inc. v. Superior Court*, 72 Cal. Rptr. 2d 598, 603, 62 Cal. App. 4th at 357-58; *Holmes v. Lerner*, 88 Cal. Rptr. 2d 130, 141, 74 Cal. App. 4th at 457; *Wexler v. McLucas*, 121 Cal. Rptr. 453, 455, 48 Cal. App. 3d Supp. at 13; *Zissler v. Seville*, 240 Cal. Rptr. 3d 590, 602, 29 Cal. App. 5th at 645; *Wilmar v. Got Cars? Auto Grp.*, 2023 Cal. Super. LEXIS 37275 at *5; Tr. 802:22-803:2; Tr. 1006:22-24.)

Section II.B.5 of the Initial Brief: The case's impact on other CAISO competitive bidding processes is legally relevant. The Commission approved the *pro forma* APSA to implement the transmission competition policies adopted by the Commission in Order No. 1000. This appears to be the first proceeding in which the Commission will determine how project cost caps operate under Commission-approved competitive transmission development policies, and the answer will affect future solicitations. (Order No. 1000 at PP 253-54, 284-85; Exh. No. CSO-0001 REV3 at 19:11-20:15.)

Section II.B.6 of the Initial Brief: Whatever Base TRR amount the Commission authorizes in this proceeding will be passed to CAISO transmission ratepayers under the TAC. The difference between the amounts DCRT seeks to recover ($553,261,497) and the amounts DCRT is entitled to recover under the binding cost cap in the DCRT APSA ($339,582,991) in its Base TRR is $213,678,506, which are costs which should not be imposed on CAISO transmission ratepayers. (Exh. No. DCT-0102 REV2 PUB at 6:8-10; Exh. No. CSO-0601 REV2 PUB at 3:5-6:1.)

Section II.B.7 of the Initial Brief: *Ex post* claims of Project benefits do not authorize DCRT to recover costs above the binding cost cap. The CAISO selected DCRT because of its lower projected revenue requirement and binding cost containment package, and the DCRT APSA contains no provision permitting upward revision of the cost cap based on benefits ultimately realized. (Exh. No. CSO-0007 at 123, 133-35; Exh. No. CSO-0001 REV3 at 28:1-13.)

Allowing above-cap recovery based on after-the-fact benefits would render the agreed-upon cost cap meaningless and undermine the competitive solicitation process. (Exh. No. CSO-0001 REV3 at 28:1-13.)

C. Does the APSA Allow DCRT to Recover Capital Costs in Excess of the Amount Stated as the Binding Cap in Appendix E? (Section II.C of the Initial Brief)

DCRT's recovery of capital costs is limited by Section 10.1, Section 10.1.1, and Appendix E of the DCRT APSA. Appendix E states a single Project cost cap of $258,961,024 in 2020 dollars and identifies only a limited set of exclusions and amendment mechanisms. (Exh. No. DCT-0002 at 20, 77-79.)

The APSA's enumerated exclusions are exclusive. Costs not expressly excluded remain within the cap under the settled principle of *expressio unius est exclusio alterius*. (*El Paso Nat. Gas Co., LLC*, 148 FERC ¶ 61,043, at P 50; *Cleveland Elec. Illuminating Co.*, 82 FERC ¶ 61,254, at 62,017 n.9; *White v. W. Title Ins. Co.*, 710 P.2d 309, 314 n.4, 40 Cal. 3d 870, 881 n.4; *Ronay Family Ltd. P'ship v. Tweed*, 157 Cal. Rptr. 3d 680, 688, 216 Cal. App. 4th 830, 842.)

DCRT seeks recovery of $553,261,497 in total Project costs in its Base TRR, but the maximum recoverable Project costs in this case are $339,582,991, consisting of: (i) $258,961,024 under the effective cap; (ii) $4,052,089 for the nine-month COVID-19 Force Majeure delay; and (iii) $76,569,878 of recoverable interconnection costs. (Exh. No. DCT-0102 REV2 PUB at 6:8-10; Exh. No. CSO-0601 REV2 PUB at 3:5-6:1.)

1. Does Appendix E Require the Commission to Adjust the Cost Cap Which Is Stated in 2020 Dollars or DCRT's Actual Costs in the Base TRR Calculation to reflect Inflation Between 2020 and 2024? If So, How? (Section II.C.1 of the Initial Brief)

Appendix E does not permit any base year adjustment or inflation adjustment after 2020. The DCRT APSA says only that DCRT may adjust individual cost categories so long as total Project cost does not exceed $258,961,024 in 2020 dollars; it contains no base year adjustment clause, no inflation clause, no index, no method, and no trigger. DCRT's bid similarly does not include such language. (Exh. No. DCT-0002 at 77; Exh. No. CSO-0006 REV2 PUB.)

The absence of a base year adjustment or inflation adjustment in the DCRT APSA is dispositive. As CAISO witness Dr. Davis testified, an operable inflation adjustment requires at least an authorizing provision, an inflation measure or methodology, and a comparison period. The DCRT APSA contains none. (Exh. No. CSO-0801 PUB at 21:14-25:4.)

Neither the Commission nor a court may rewrite the parties' contract to include a term they omitted, and thus DCRT's attempt to read an inflation mechanism, implicit or otherwise, into the DCRT APSA should be rejected. (*Portland Nat. Gas Transmission Sys.*, 134 FERC ¶ 61,129, at PP 66-67; *Blue Ridge Power Agency*, 181 FERC ¶ 61,048, at P 33 n.57; *Mont.-Dakota Utils. Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 190 FERC ¶ 61,168, at P 43; *Power Auth. of the State of N.Y. v. Long Island Lighting Co.*, 60 FERC ¶ 61,069, at 61,234; *Laprairie Grp. Contractors Int'l v. Ce Casecnan*, 2008 Cal. Super. LEXIS 2474 at *7-8; *Rathbun v. City of Salinas*, 106 Cal. Rptr. 154, 158, 30 Cal. App. 3d 199, 204; *Squire v. City & Cty. of S.F.*, 91 Cal. Rptr. 347, 351, 12 Cal. App. 3d 974, 981.) Section 25.4 confirms the APSA is the entire agreement. (Exh. No. DCT-0002 at 34.)

There is no contractual or record basis to use the Handy-Whitman Index. Neither the APSA nor DCRT's bid mentions it, and the only inflation metric DCRT used for capital costs was 2.5 percent annually through 2020. (Exh. No. CSO-0001 REV3 at 69:1-73:11; Exh. No. CSO-0025; Exh. No. CSO-0601 REV2 PUB at 31:21-33:17.) Even assuming arguendo some escalation were allowed, any escalation to 2024 would be unjustified because DCRT's amended EPC contract was fixed-price and executed in 2022 and significant expenditures had already occurred well before 2024. (Exh. No. CSO-0001 REV3 at 71:9-75:2; Exh. No. CSO-0601 REV2 PUB at 36:17-41:18; *RMR Equip. Rental, Inc. v. Residential Fund 1347, LLC*, 280 Cal. Rptr. 3d 6, 9, 65 Cal. App. 5th 383, 388; *Univ. Casework Sys., Inc. v. Superior Court*, 115 Cal. Rptr. 836, 839, 41 Cal. App. 3d 263, 266.)

2. Does the APSA Allow DCRT to Recover Interconnection-Related Costs in Excess of the Cap, and If So, How Much of Such Interconnection-Related Costs Does the APSA Allow DCRT to Recover over the Cap in This Proceeding? (Section II.C.2 of the Initial Brief)

Bullet #1 excludes from the cost cap only costs related to Transmission Interconnection Facilities or Transmission Interconnection Service as defined in the APSA. (Exh. No. DCT-0002 at 8, 10, 49, 77; Exh. No. CSO-0001 REV3 at 160:10-161:10.)

DCRT may recover no more than $76,569,878 in above-cap interconnection costs, consisting of: (1) $56,549,074 paid for transmission interconnections with APS and SCE and SRP affected-system upgrades; (2) $283,712 for EPC interconnection work performed on SCE's behalf; (3) $214,500 associated with EPC Change Order 8 required by SCE; (4) $18,399,239 in AFUDC associated solely with utility interconnection payments and additional interconnection costs; and (5) a maximum of $1,123,353 in AFUDC associated with EPC Change Orders 1, 2, and 8, using actual AFUDC when booked. (Exh. No. CSO-0601 REV2 PUB at 125:3-127:22; Exh. No. CSO-0001 REV3 at 161:10-16.)

The Presiding Judge should disallow the remaining $11,773,879 of DCRT's claimed above-cap interconnection costs. Those amounts include Change Order 5 mobilization/demobilization/rework costs, financing costs not paid to an Interconnecting PTO or other interconnecting entity, and claimed interconnection delay costs that likewise do not satisfy Section 4.2 or Bullet #1. (Exh. No. CSO-0601 REV2 PUB at 126:11-23; Exh. No. DCT-0021

REV PUB at 328-30; Exh. No. CSO-0001 REV3 at 163:1-12, 163:22-166:2; Exh. No. CSO-0601 REV2 PUB at 128:1-129:12.)

The Presiding Judge should reject DCRT's interconnection-delay theory. The record shows that DCRT's schedule assumptions were aggressive, and although GridForce was certified as a Transmission Operator by the WECC, the CAISO had additional onboarding requirements for certification as a Transmission Operator in the CAISO footprint that were not completed by GridForce until June 2024, and GridForce did not complete a mandatory Transmission Registry training until May 30, 2024. Thus, the evidentiary record does not establish a recoverable interconnection-driven delay of the magnitude DCRT claims. (Exh. No. DCT-0007 REV2 at 75:6-10, 77:1-11; Exh. No. DCT-0102 REV2 PUB at 141:5-10; Exh. No. CSO-0601 REV2 PUB at 128:19-23; Tr. 7281:5-7283:21, 7286:6-22; Exh. No. CDN-0039 at 5-6; Exh. No. CSO-0433 REV at 1-2; Exh. No. CSO-0434 PUB.)

3. Does the APSA Allow DCRT to Recover Regulatory Compliance Costs in Excess of the Cap, and If So, How Much of Such Regulatory Compliance Costs Does the APSA Allow DCRT to Recover over the Cap in This Proceeding? (Section II.C.3 of the Initial Brief)

The DCRT APSA does not allow DCRT to recover any of its claimed $85,936,149 in above-cap "regulatory compliance" costs. The DCRT APSA contains no general regulatory compliance exclusion, and DCRT's claimed costs do not qualify under Bullet #3 or Bullet #4. (Exh. No. DCT-0102 REV2 PUB at 93:1-127:18; Exh. No. CSO-0001 REV3 at 8, 10:16-34, 126:9-127:2.)

The cost cap exclusion in Bullet #3 of DCRT APSA Appendix E does not apply. Bullet #3 covers only costs incurred to make changes to the Project under Section 5.4, and Section 5.4 concerns CAISO and interconnecting-entity review of major equipment and material specifications to ensure compatibility with technical specifications, operational control, and safety requirements. (Exh. No. DCT-0002 at 13-14, 78.)

The record does not show that the CAISO, SCE, APS, or any other interconnecting entity required the claimed changes under Section 5.4. The claimed costs instead arise from siting, permitting, environmental, cultural, and related regulator-driven issues outside Section 5.4. (Exh. No. CSO-0001 REV3 at 127:3-128:2, 131:10-150:21; Exh. No. CSO-0601 REV2 PUB at 93:10-96:8.)

The cost cap exclusion in Bullet #4 of DCRT APSA Appendix E does not permit recovery of any of DCRT's claimed regulatory compliance costs. Bullet #4 is limited to costs incurred to remedy deficiencies "in accordance with Section 5.5.3," and Section 5.5.3 applies only when, **during construction**, Project engineering, equipment procurement, or construction fails to meet the standards and specifications provided by an Interconnecting PTO or other interconnecting entity. (Exh. No. DCT-0002 at 14, 78; Exh. No. CSO-0044 at 19; *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107, at PP 88-91; Exh. No. CSO-0611 at 3-4.)

The “other entity” in Section 5.5.3 does not mean a regulator or siting agency such as the BLM or CPUC. The APSA consistently uses different terms—such as “Governmental Authority” and “siting agency”—when referring to regulators. Furthermore, the APSA consistently uses “Interconnecting PTO or other entity” to refer to an entity owning or operating facilities to which the Project interconnects. (Exh. No. DCT-0002 at 5, 7, 8, 10, 11, 13-14, 17; Exh. No. CSO-0001 REV3 at 128:3-130:22.)

Other Project Sponsors for the Project expressly included in their bids exclusions for agency-ordered changes in project design, scope, schedule, environmental mitigation, biological, archaeological, paleontological, Native American, and cultural-resource requirements. DCRT did not. This is extrinsic evidence confirming the DCRT APSA does not have a regulatory compliance cost cap exclusion or cost cap exclusions for these specific types of costs. (Exh. No. CSO-0001 REV3 at 134:22-136:15; Exh. No. CSO-0012 PRIV at 12; Exh. No. CSO-0014 PRIV at 76; Exh. No. CSO-0015 PRIV at 131-34; Exh. No. CSO-0016 PRIV at 56, 62.)

None of DCRT’s ten identified EPC cost increases (totaling $67,219,743) qualifies for recovery above the cap under Sections 4.4, 5.4, or 5.5.3, and none falls within any other applicable APSA exclusion. (Exh. No. DCT-0007 REV2 at 66:13-68:9; Exh. No. DCT-0107 REV at 2; Exh. No. CSO-0102 REV2 PUB at 93:2-98:2; Exh. No. CSO-0001 REV3 at 139:1-22, 140:4-20, 141:4-148:3; Exh. No. DCT-0101 REV2 PUB at 98:3-101:6; Exh. No. CSO-0701 PUB at 54:12-57:16; Exh. No. DCT-0102 REV2 PUB at 30:15-31:6, 101:7-121:14; Exh. No. CSO-0006 REV2 PUB at 153-55; Exh. No. CSO-0046 at 61, 343; Exh. No. S-0055 Part I REV PUB at 87; Exh. No. CSO-0004 at 4; Exh. No. CSO-0047 at 21, 103; Exh. No. CSO-0009 REV; Exh. No. DCT-0021 REV PUB at 22.)

DCRT’s claimed $18,716,406 in other regulatory compliance management costs are not recoverable above the cap. Those costs include economic consultant costs for CPUC cost-benefit analysis, cultural-resources compliance and monitoring, additional outside counsel costs for the rate filing, and additional construction oversight and compliance costs. None qualify under Sections 4.4, 5.4, or 5.5.3. (Exh. No. DCT-0007 REV2 at 68:17-69:17; Exh. No. DCT-0102 REV2 PUB at 121:16-127:18; Exh. No. DCT-0107 REV at 2.)

DCRT’s claimed regulatory compliance costs are ordinary permitting, litigation, environmental, and project management costs of the type DCRT either did account for or should have accounted for in its bid. The fact that they may have exceeded DCRT’s expectations does not create a new cost cap exclusion. (Exh. No. CSO-0001 REV3 at 149:3-150:21; Exh. No. DCT-0007 REV2 at 60:11-61:1, 68:15-69:17; Exh. No. CSO-0006 REV2 PUB at 153-55.)

4. Does the APSA Allow DCRT to Recover Costs of Delay Due to Force Majeure in Excess of the Cap, and If So, How Much of Such Delay Costs Does the APSA Allow DCRT to Recover over the Cap in This Proceeding? (Section II.C.4 of the Initial Brief)

The cost cap exclusion in Bullet #5 in DCRT APSA Appendix E allows recovery only of FERC-approved costs **resulting from delays** due to events of Force Majeure, not of all costs associated with events DCRT labels Force Majeure. The record in this proceeding indicates that only the COVID-19-related delay qualifies for recovery under Bullet #5, and only to a limited extent. (Exh. No. DCT-0002 at 78.)

DCRT may recover no more than $4,052,089 in Force Majeure-related above-cap costs, consisting of $3,678,723 in monthly management run-rate costs for a nine-month COVID-19 delay and $373,366 in associated AFUDC. (Exh. No. CSO-0601 REV2 PUB at 48:18-49:3, 123:16-124:21.)

Under the DCRT APSA and applicable authority, a Force Majeure event must be both uncontrollable and objectively unforeseeable, and must be unavoidable even with the exercise of Good Utility Practice. The APSA's definition also expressly excludes, among other things, economic hardship and failure or delay in granting necessary permits for reasons not caused by Force Majeure. (Exh. No. DCT-0002 at 7; Exh. No. CDN-0002 at 89-90; *DCR Transmission, L.L.C.*, 184 FERC ¶ 61,199, at P 32; *Cameron Interstate Pipeline LLC*, 153 FERC ¶ 61,363, at P 10; *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107, at P 37 & n.48; *Free Range Content, Inc. v. Google Inc.*, 2016 U.S. Dist. LEXIS 64365 at *17; *Watson Labs. Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1110-11.)

Force Majeure provisions are construed narrowly and require a causal link between the claimed event and the alleged nonperformance. DCRT bears the burden to prove that link. (*Gulf Oil Corp. v. FERC*, 706 F.2d 444, 455; *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187, at P 100; *Nexen Mktg. U.S.A. Inc. v. Enbridge Pipelines (N.D.) LLC*, 126 FERC ¶ 61,073, at PP 38-41; *KB Salt Lake III, LLC v. Fitness Int'l, LLC*, 313 Cal. Rptr. 3d 820, 835-39, 95 Cal. App. 5th 1032, 1050-55; *W. Pueblo Partners, LLC v. Stone Brewing Co., LLC*, 307 Cal. Rptr. 3d 626, 634-36, 90 Cal. App. 5th 1179, 1188-90.)

Section 13.1.1 required DCRT to provide Force Majeure notice and full particulars "as soon as reasonably possible after the occurrence of the cause relied upon." This notice requirement applies to any claimed inability to perform by reason of Force Majeure, including the claimed inability to comply with the binding cost cap in the DCRT APSA. (Exh. No. DCT-0002 at 22-23.)

Commission and California authorities recognize that failure to provide timely force majeure notice undermines that affirmative defense. (*United Gas Pipe Line Co.*, 20 FERC ¶ 63,070, at 65,310, *aff'd on other grounds*, 31 FERC ¶ 61,336, at 61,770-71; *Joysar v. Derco Assocs., Inc.*, 2022 Cal. Super. LEXIS 86804 at *14; *Packing Dist., LLC v. RTR Bakery, Inc.*, 2022 Cal. Super. LEXIS 59978 at *7; *Culver City Mall, LLC v. Shanghai No. 1 Seafood Vill., Inc.*, 2022 Cal. Super. LEXIS 40635 at *11.)

DCRT provided an actual, timely Section 13.1.1 notice only for COVID-19, and not for the other events it now claims were Force Majeure events. (Exh. No. DCT-0019 at 3-4; Exh. No. CSO-0001 REV3 at 81:20-84:22, 99:15-100:10, 103:6-16, 107:1-10.)

Apart from COVID-19-related events, DCRT's alleged Force Majeure events do not satisfy the APSA's Force Majeure requirements, do not meet the Commission's and California law's unforeseeability requirement, and do not satisfy the APSA's notice requirements. (Exh. No. DCT-0007 REV2 at 55 (Table 2); Exh. No. CSO-0001 REV3 at 84:11-14.)

The BLM's February 2017 notice of delay in issuing the DEIS was not a Force Majeure event. The APSA expressly excludes "failure or delay in granting of necessary permits for reasons not caused by Force Majeure," and permitting delays are a routine, foreseeable feature of large transmission projects. (Exh. No. DCT-0002 at 7; Exh. No. CSO-0001 REV3 at 80:15-19; *San Diego Gas & Elec. Co.*, 146 FERC ¶ 61,066, at P 26; *Tenn. Gas Pipeline Co.*, 55 FERC ¶ 61,484, at 62,637; *Sayles Hydro Assocs. v. Pac. Gas & Elec. Co.*, 1990 Cal. PUC LEXIS 1393 at *27.)

The BLM's study of multiple alternatives was ordinary and foreseeable under NEPA and under the Project's route-specific circumstances, including Kofa, military, cultural, and corridor issues. (Exh. No. DCT-0046 REV at 41-43; Exh. No. DCT-0047 at 12-13; Exh. No. CSO-0030 at 60; Exh. No. CSO-0101 REV2 at 21:18-28:15; Exh. No. CSO-0704 REV; Exh. No. CDN-0078; Exh. No. CSO-0711; Exh. No. CSO-0701 PUB at 10:5-13, 31:20-32:18.)

The CPUC ALJ's August 4, 2017 decision to hold the CPCN docket in abeyance until completion of the FEIS and ROD was not a Force Majeure event. The ALJ explained that evidentiary hearings would be more effective and efficient after environmental review was complete, and the CPUC later agreed. That case management decision was neither extraordinary nor unforeseeable. (Exh. No. DCT-0016 REV at 8-9; Exh. No. CSO-0031 at 11; Exh. No. PUC-0006; Exh. No. PUC-0007; Exh. No. PUC-0009; Exh. No. CSO-0001 REV3 at 92:16-93:22; Exh. No. CSO-0601 REV2 PUB at 79:15-80:5; *In the Matter of the Application of S. Cal. Edison Co. (U 338-E) for a Certificate of Pub. Convenience and Necessity Concerning the Antelope-Pardee 500 kV (Segment 1) Transmission Project as Required by Decision 04-06-010 and as Modified by Subsequent Assigned Comm'r Ruling*, A.04-12-007 (Dec. 12, 2005).)

Application of the DRECP to the Project was not a Force Majeure event. The draft DRECP predated DCRT's bid, the proposed land use amendment and FEIS predated the APSA, and the DRECP's planning goals expressly contemplated transmission development. Its possible application was therefore foreseeable. (Exh. No. CSO-0033 at 11, 14, 17; Exh. No. CSO-0034 at 9; Exh. No. CSO-0001 REV3 at 97:1-99:14; Exh. No. CSO-0601 REV2 PUB at 80:9-82:8; Exh. No. CSO-0701 PUB at 37:5-43:21; Exh. No. CSO-0718 at 5.)

DCRT's contention that the Project was a "stand-alone transmission" project and therefore was not reasonably expected to be subject to the DRECP is inconsistent with the Project's own stated purpose of facilitating development of new renewable generation and with Section 5.10 of the APSA. (Exh. No. DCT-0046 REV at 57; Exh. No. DCT-0047 at 46; Exh. No. CSO-0036 at 2; Exh. No. DCT-0002 at 17-18; Exh. No. CSO-0037 at 1; Exh. No. CSO-0001 REV3 at 98:17-99:3.)

Application of Order 3355 was not a Force Majeure event. An administrative directive aimed at streamlining NEPA review is not the kind of objectively unforeseeable and extraordinary event contemplated by the APSA's Force Majeure definition. Also, DCRT received a waiver of the order's applicability to the Project. (Exh. No. CSO-0001 REV3 at 101:5-19; Exh. No. CSO-0101 REV2 at 19:12-20.)

The record undercuts DCRT's claimed delay. DCRT received a waiver from the 300-page limit for the DEIS, later reported only a one-month delay, and elsewhere advised that the change would not alter the overall NEPA schedule. (Exh. No. S-0055 Part I REV PUB at 50; Exh. No. DCT-0015 at 178, 187, 193; Exh. No. CSO-0101 REV2 at 20:7-21:17.)

The 2018-2019 federal government shutdown does not qualify as a recoverable Force Majeure delay on this record. DCRT offers speculation, not proof, that the shutdown materially delayed issuance of Project approvals, and the record suggests minimal actual schedule impact during that holiday-period window. (Exh. No. DCT-0007 REV2 at 23:14-15; Exh. No. DCT-0105 at 95-96; Exh. No. CSO-0001 REV3 at 106:1-12; Exh. No. CSO-0101 REV2 at 36:17-38:5.)

The BLM's tower-design directive was not a Force Majeure event that permits above-cap recovery. Appendix E excludes only costs resulting from **delays** due to Force Majeure, not all costs associated with a claimed event. DCRT did not demonstrate any cognizable delay caused by the tower-design change, and the issue was intertwined with the Change of Route process. (Exh. No. DCT-0002 at 78; Exh. No. CSO-0027 REV at 1; Exh. No. DCT-0007 REV2 at 19:12-20:3, 45:2-3; Exh. No. CSO-0001 REV3 at 107:22-108:18; Tr. 1401:4-1402:1.)

The COVID-19 pandemic qualifies as a Force Majeure event under the APSA. The CAISO takes no issue with such a finding. (Exh. No. DCT-0019 at 3-4; Exh. No. CSO-0001 REV3 at 111:22-112:1.)

However, the recoverable delay attributable to COVID-19 is limited to the nine-month delay in the CPUC CPCN proceeding, from March 25, 2020 until November 20, 2020. Commission Trial Staff and DCRT did not prove the broader 24-month or 47-month delay theories they advance, respectively. The record instead shows that many post-permitting and construction activities proceeded within or faster than the schedules contemplated in DCRT's bid and in the APSA and its amendments, and that DCRT's own later EPC contract renegotiation decisions accounted for substantial additional time. (Exh. No. DCT-0007 REV2 at 40:13-42:4; Exh. No. CSO-0201 at 4:9-7:8; Exh. No. CSO-0601 REV2 PUB at 44:17-47:17; Exh. No. CSO-0202; Exh. No. DCT-0002 at 44-45, 86.)

DCRT may recover only $4,052,089 for COVID-19-related Force Majeure delay, comprised of $3,678,723 in monthly management run-rate costs and $373,366 in associated AFUDC. (Exh. No. CSO-0601 REV2 PUB at 48:18-49:3, 123:16-124:21.)

The CAISO's directive to hold long lead-time procurement was not a Force Majeure event. The CAISO is not a "governmental, military, or lawfully established civilian authorit[y]" within the APSA's Force Majeure definition, and the directive was simply an exercise of authority DCRT had already accepted in Sections 5.4.1 and 5.8 of the APSA. (Exh. No. DCT-0002 at 7, 13, 16; Exh. No. CSO-0001 REV3 at 114:11-116:16; Exh. No. CSO-0042.) DCRT gave no Section 13.1.1 Force Majeure notice for this event and did not prove that the procurement hold caused recoverable delay, particularly given the later timing of the BLM Notice to Proceed and DCRT's own execution of its amended EPC contract. (Exh. No. CSO-0001 REV3 at 116:5-8; Exh. No. CSO-0035 at 1-2; Exh. No. CSO-0001 REV3 at 73:16-18.)

DCRT is not entitled to recover management run-rate costs for its aggregated 47-month Force Majeure delay theory. At most, DCRT may recover such costs only for the nine-month COVID-19 delay that the record supports. (Exh. No. DCT-0007 REV2 at 69:18-70:17; Exh. No. DCT-0107 REV at 2; Exh. No. CSO-0601 REV2 PUB at 48:18-49:3.)

DCRT is no longer pursuing recovery of the four "specific management cost" items it initially claimed, and those items should be excluded in any event. (Tr. 1960:2-1961:9; Tr. 1961:23-1963:1; Exh. No. CSO-0001 REV3 at 119:1-122:11.)

DCRT is not entitled to recover either the claimed $8,702,226 in financing costs associated with purported regulatory compliance and Force Majeure delay or the additional $16,778,853 in alleged Force Majeure borrowing costs. As shown above, DCRT is not entitled to any regulatory compliance above-cap recovery, is not entitled to any base year adjustment, and proved at most only a limited nine-month COVID-19 delay. (Exh. No. DCT-0102 REV2 PUB at 128:2-18, 129:1-130:8; Exh. No. DCT-0107 REV at 2; Exh. No. DCT-0125 REV2 PUB at 66:3-15.)

The only recoverable AFUDC above the cap is the $373,366 associated with the nine-month COVID-19 delay. The APSA includes financing costs within the capped Project-cost framework, and the APSA contains no separate financing-cost exclusion other than the limited exclusion for costs resulting from delays due to Force Majeure. (Exh. No. DCT-0002 at 49; Exh. No. CSO-0601 REV2 PUB at 122:10-123:7; Exh. No. CSO-0006 REV2 PUB at 49, 144.)

5. Does the APSA Allow DCRT to Recover Any Other Category of Costs in Excess of the Cap, and If So, How Much of Such Other Costs Does the APSA Allow DCRT to Recover over the Cap in This Proceeding? (Section II.C.5 of the Initial Brief)

The DCRT APSA does not allow DCRT to recover any other category of costs in excess of the cap. The only remaining possible theories identified in the APSA are Change of Route and the catchall provision, and neither permits the recovery DCRT seeks here. (Exh. No. DCT-0002 at 78-79.)

Appendix E establishes an exclusive process for recovery of above-cap costs associated with a Change of Route. Under that process, DCRT bears the first $5,000,000, must present any request for additional cost-cap modification to the CAISO. If the CAISO does not approve the request, DCRT must proceed through the independent panel process specified in Appendix E, subject to Commission review and approval. (Exh. No. DCT-0002 at 78-79.)

DCRT may not use this rate case to obtain a second recovery of Change of Route costs. The CAISO and DCRT previously negotiated a cost cap increase for all Change of Route costs, and the second amended APSA increased the cost cap by $17,155,633, net of the $5,000,000 deductible DCRT agreed to bear. That amendment is binding. (Exh. No. DCT-0002 at 77; Exh. No. CSO-0001 REV3 at 155:23-156:2; Exh. No. DCT-0007 REV2 at 33:11-34:8, 37:7-8, 38:22-23; Exh. No. DCT-0102 REV2 PUB at 39:10-12.)

DCRT did not follow the required contractual process for any additional Change of Route recovery. DCRT did not obtain CAISO agreement for any further Change of Route costs and did not invoke the mandatory panel process. DCRT therefore cannot make an end-run around Appendix E by re-labeling or reasserting such costs in this case. (Exh. No. DCT-0224 at 1, 101-02; Exh. No. CSO-0001 REV3 at 153:1-15, 156:17-157:9.)

To the extent DCRT continues to seek recovery of additional Change-of-Route-related amounts, the Presiding Judge should reject that request. The DCRT APSA does not permit DCRT, after agreeing to the second amended APSA's Change of Route cost cap increase, to seek additional costs associated with the same route changes in this proceeding. (Exh. No. CSO-0001 REV3 at 156:3-16.)

The catchall provision in Appendix E does not support any above-cap recovery. That provision allows changes to the Project cost cap only with the approval of both the CAISO and the Commission, and the CAISO has not approved any such change here. (Exh. No. DCT-0002 at 79; Exh. No. CSO-0049.)

6. Did DCRT Abide by the Proper Procedures Outlined in the APSA for Claiming the Ability to Recover Costs in Excess of the Cap? (Section II.C.6 of the Initial Brief)

Except for the negotiated Change of Route increase reflected in the second amended APSA, DCRT did not abide by the procedures the APSA requires for claiming above-cap recovery. The CAISO and DCRT followed Appendix E when they negotiated the amended cost cap of $258,961,024 in connection with the Change of Route, including the $5,000,000 amount DCRT agreed to bear. (Exh. No. CSO-0001 REV3 at 36:15-37:11; Exh. No. DCT-0002 at 50-51, 35.)

DCRT did not follow those same procedures for the other above-cap costs it now seeks to recover. As discussed above, DCRT did not provide timely Force Majeure notice for most of its alleged Force Majeure events, did not comply with the exclusive Change of Route process for additional route-related claims, and seeks recovery under theories not stated in the APSA. The APSA does not permit DCRT to bypass its contractual procedures and seek relief for the first time in this rate case.

D. Have the Intervenors and Commission Trial Staff Demonstrated that DCRT's Proposed Base TRR is Unjust and Unreasonable, and If So, What Is a Just and Reasonable Base TRR for DCRT? (Section II.D of the Initial Brief)

DCRT's proposed Base TRR is unjust and unreasonable to the extent it includes capital costs above the amount permitted by the binding cost cap in the DCRT APSA. The CAISO takes no position on DCRT's actual total Project cost except insofar as it concerns the allowable Project cost eligible for recovery in DCRT's Base TRR as discussed above.

Section II.D.1 of the Initial Brief: DCRT did not correctly calculate its rate base because the Project capital costs reflected in DCRT's proposed Base TRR exceed the APSA cost cap and permissible exclusions for the reasons set forth above.

Section II.D.2 of the Initial Brief: The CAISO takes no position on the general determination of AFUDC in this proceeding. However, DCRT is contractually prohibited from recovering in its Base TRR any AFUDC above the APSA cost cap except to the limited extent permitted above.

Section II.D.9 of the Initial Brief: The APSA requires DCRT to apply straight-line depreciation over the life of the Project consisting of 2 percent based on a service life of 50 years. Otherwise, the CAISO takes no position on the issue of appropriate depreciation and amortization expense to be used for determination of the Base TRR. (Exh. No. DCT-0002 at 78.)

E. What Refunds or Other Relief, If Any, Should the Commission Order in These Consolidated Proceedings? (Section II.E of the Initial Brief)

The Presiding Judge should conclude that the Commission should enforce Sections 10.1.1 and 10.3 of the APSA. Section 10.1.1 provides that DCRT "shall not seek" recovery through its TRR of costs above the maximum costs specified in, or determined in accordance with, the cost cap and binding cost-containment measures in Appendix E. Section 10.3 requires DCRT to make refunds, TRR adjustments, tariff adjustments, and all other actions necessary to implement any relevant Commission order. (Exh. No. DCT-0002 at 20-21.)

DCRT's proposed Base TRR exceeds the maximum costs specified in, or determined in accordance with, Appendix E and therefore violates Section 10.1.1. The Commission should enforce DCRT's contractual refund obligations under Section 10.3 and require DCRT to refund the amounts it has collected through the CAISO TAC in violation of its contractual cost cap and binding cost-containment provisions, consistent with Appendix F, Schedule 3, Section 8.2 of the CAISO tariff, notwithstanding any refund limitations under section 206 of the FPA.

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 above-referenced dockets, pursuant to the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Washington, D.C. this 30th day of July, 2026.

/s/ Deiman Flores
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