

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

**DCR Transmission, L.L.C.**

**Docket ER23-2309-001  
Nos. ER24-1394-001  
(consolidated)**

**MOTION FOR LEAVE TO FILE COMMENTS AND COMMENTS OF THE  
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION**

**To: Chairman Christie, Motions Commissioner**

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”),<sup>1</sup> the California Independent System Operator Corporation (“CAISO”) urges the Commission to accept these comments in the above-captioned proceedings addressing the CAISO’s pending interlocutory appeal. If the findings in the Presiding Judge’s May 22, 2025, order in this proceeding<sup>2</sup> are not reversed by the Commission, they will harm ratepayers, undercut the consumer protections afforded by the Federal Power Act (“FPA”), and cast doubt on the CAISO’s and customers’ ability to rely on voluntary, binding cost caps proposed and agreed-to by project sponsors in competitive transmission planning processes. Adverse consequences of the May 22 Order include:

- Future FPA section 205 filings the Commission expressly makes subject to refunds will have no refund protection if an Administrative Law Judge later finds the case should have proceeded under FPA section 206 and the Commission has not established a refund effective date;

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<sup>1</sup> 18 C.F.R. § 385.212 (2024).

<sup>2</sup> Presiding Judge Joel deJesus’s “Order Confirming Bench Rulings, Permitting Interlocutory Appeal, and Transmitting Rule 715(b)(5)(i) Memorandum,” 191 FERC ¶ 63,022 (2025) (“May 22 Order”).

- Boilerplate language routinely used in Commission orders setting FPA section 205 filings for hearing will be read as an indication the Commission did not choose whether to proceed under FPA sections 205 or 206, creating confusion and weakening the ability of parties to protect customers against excessive rates;
- In every case involving a new public utility, the burden will shift to the Commission and intervenors to prove transmission revenue requirement filings in excess of a cost cap are unjust and unreasonable, even when – as in this case – the developer seeks to recover in rates capital costs of more than double their agreed-to cost cap;
- A chilling effect on competitive solicitation by creating two classes of bidders for the purposes of evaluating cost containment measures in competitive solicitations: (1) those with transmission revenue requirements (“TRRs”) on file with the Commission, and (2) those without, disadvantaging project developers without existing TRRs because of the shift in burden to the Commission and intervenors to demonstrate that their TRRs are unjust and unreasonable;
- Administrative Law Judges will have the authority to grant out-of-time requests for rehearing on the issue of whether a rate filing was an “initial rate filing” under FPA section 205(e);
- Administrative Law Judges will have the authority to find a rate filing is an “initial rate filing” under FPA section 205(e) where the Commission has made no such finding; and
- The enforceability in rate cases of Commission-jurisdictional contracts with binding cost caps between transmission developers and regional planners will be called into question.

The CAISO urges the Commission to accept these comments and grant the CAISO’s interlocutory motion to overturn the May 22 Order due to the multitude of negative consequences it will have on ratepayer protections and competitive transmission development processes across the country, as described in more detail in the comments below.

## I. MOTION FOR LEAVE TO FILE COMMENTS

The Commission has permitted motions that supplement the record, contribute to an understanding of the issues, or assist with the decision-making process.<sup>3</sup> The CAISO believes the Commission will benefit from these comments which highlight the issues raised by and the harms caused by the May 22 Order, which will clarify and supplement the record and will not cause undue prejudice, disruption, or delay. Therefore, good cause exists to grant this motion and to accept these comments.

## II. BACKGROUND

In its 2013-14 planning process, the CAISO selected DCR Transmission, L.L.C. (“DCRT”) as the Approved Project Sponsor to build the Ten West Link transmission project (“Project”) due to its lower projected revenue requirements and commitment to capital cost containment measures.<sup>4</sup> The CAISO entered into an Approved Project Sponsor Agreement (“APSA”) with DCRT which, as amended, binds DCRT to a cost cap of \$258,961,024 for the Project. Nonetheless, when DCRT filed in these proceedings its proposed initial annual Base Transmission Revenue Requirement (“Base TRR”) for the Project,<sup>5</sup> it proposed a Base TRR for a project cost of \$555,261,497, almost \$300 million

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<sup>3</sup> See, e.g., *Old Dominion Elec. Coop. v. PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,160 (2018) (granting motions for leave to supplement the record); *PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,159, at P 15 (2018) (same).

<sup>4</sup> CAISO, *Delaney – Colorado River 500 kV Transmission Project Line Description, Key Selection Factors, and Functional Specifications for Competitive Solicitation* at 102, 131 (July 2014), [http://www.caiso.com/Documents/DelaneyColoradoRiverFunctionalSpecifications\\_KeySelectionFactors.pdf](http://www.caiso.com/Documents/DelaneyColoradoRiverFunctionalSpecifications_KeySelectionFactors.pdf).

<sup>5</sup> DCRT’s filing consisted of its proposed Transmission Owner Tariff (“TO Tariff”) which includes, as Appendix I to that TO Tariff, DCRT’s proposed Base TRR for the Project.

more than its binding cost cap and more than double its agreed-upon Project costs. The CAISO, the California Public Utilities Commission (“CPUC”), ratepayer groups, and others objected to DCRT’s attempt to exceed its APSA cost cap.

The Commission’s September 29, 2023, order on DCRT’s June 2023 filing in Docket No. ER23-2309 (“DCRT TO Tariff/Base TRR Filing”) accepted the TO Tariff and the Base TRR appendix and suspended them for a nominal period, subject to refund and to the outcome of hearing and settlement judge procedures.<sup>6</sup>

After unsuccessful settlement negotiations that ran for eighteen months from September 2023 through April 2025, the Presiding Judge was assigned to this case. At a prehearing conference on May 8, 2025, the Presiding Judge, *sua sponte*, set for briefing and oral argument the issues of whether the DCRT TO Tariff/Base TRR Filing was an “initial rate filing” under section 205(e) of the FPA and whether there was any authority to treat an initial rate filing as if it were a rate change filing.<sup>7</sup> DCRT, which had not sought rehearing of the September 2023 Hearing Order, claimed its filing was in fact an initial rate filing and that the Commission “should have set Docket Nos. ER23-2309-000, ER23-2309-001, to proceed as a FPA section 206 proceeding.”<sup>8</sup> The CAISO and every other active participant in these proceedings explained the Commission had initiated the hearings under FPA section 205 subject to full refund protection and that the Commission had not treated DCRT’s filing as an initial rate filing. Nonetheless, the May 22 Order

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<sup>6</sup> *DCR Transmission, L.L.C.*, 184 FERC ¶ 61,199, at P 1 (2023) (“September 2023 Hearing Order”).

<sup>7</sup> May 22 Order at P 7.

<sup>8</sup> Brief of DCR Transmission, L.L.C., Docket Nos. ER23-2309-000, ER23-2309-001, ER24-1394-000, and ER24-1394-001 (May 15, 2025) at 11 (“DCRT Brief”).

determined almost twenty months after the September 2023 Hearing Order the DCRT transmission revenue requirement is an initial rate filing.<sup>9</sup> The Presiding Judge also found the Commission has not followed the statutory requirements to initiate an FPA section 206 proceeding in this case and held that the Commission “will have to take steps to establish formally a refund effective date and confirm the statutory basis of this hearing.”<sup>10</sup> Even though the May 22 Order found the Commission has not initiated an FPA section 206 proceeding in this case, the May 22 Order finds the Commission and intervenors have an FPA section 206 burden to demonstrate that DCRT’s attempt to recover excessive costs in its transmission revenue requirements is unjust and unreasonable.<sup>11</sup> The CAISO, a coalition of California Transmission Customers including the CPUC, the Electricity Transmission Competition Coalition, and Commission Trial Staff all filed motions for interlocutory appeal, which the Presiding Judge granted.<sup>12</sup>

### **III. COMMENTS**

The Presiding Judge began his inquiry with a question that is understandable in the abstract – given that the DCRT TO Tariff/Base TRR Filing involves both an initial Transmission Owner Tariff and DCRT’s initial base TRR, whether this could be considered a case involving an “initial rate filing” under section 205(e) of the FPA. The findings in the May 22 Order, however, contradict the plain language of the Commission’s orders in these proceedings. The findings in the May 22 Order also ignore

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<sup>9</sup> May 22 Order at PP 26-27.

<sup>10</sup> *Id.* at P 30; *see also id.* at P 28.

<sup>11</sup> *Id.* at P 10.

<sup>12</sup> *Id.* at PP 29-33.

the Commission’s long-standing view that the decision of whether a rate filing is an initial rate filing should be made by the Commission itself in furtherance of the consumer protections afforded by the FPA.<sup>13</sup>

**A. This Case Is About Consumer Protection and Agreed-To, Binding Cost Caps**

The CAISO does not contest the finding in the May 22 Order that *Middle South Energy*<sup>14</sup> and *SWEPCO*<sup>15</sup> remain “good law.” A review of applicable precedent, however, confirms that *Middle South Energy* and *SWEPCO* are properly applied by the Commission in a manner consistent with the Commission’s consumer protection mandate. The *Middle South Energy* Court noted that the D.C. Circuit has upheld the Commission’s broad view of what constitutes a changed rate, finding:

[t]his is precisely the type of question we must leave to the technical expertise of the Commission; we will not substitute our judgment unless the Commission's judgment is unreasonable and cannot be rationally reconciled with the terms of the Act.<sup>16</sup>

On remand from *SWEPCO*, the Commission confirmed that it would apply a “broadened definition of a change in rate” (*i.e.*, would construe what constitutes an initial rate filing narrowly).<sup>17</sup>

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<sup>13</sup> Many of the explanations provided in these comments are discussed in greater length in the CAISO’s May 15, 2025, Brief to the Presiding Judge, provided as Attachment A to this filing and incorporated by reference. Brief of the California Independent System Operator Corporation, Docket Nos. ER23-2309-001 and ER24-1394-001 (May 15, 2025) (“CAISO Brief”).

<sup>14</sup> *Middle S. Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984) (“*Middle South Energy*”).

<sup>15</sup> *Sw. Elec. Power Co. v. FERC*, 810 F.2d 289 (D.C. Cir. 1987) (“*SWEPCO*”).

<sup>16</sup> *Middle South Energy*, 747 F.2d at 771, quoting *Fla. Power & Light Co. v. FERC*, 617 F.2d 809, 815 (D.C. Cir. 1980).

<sup>17</sup> *Sw. Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,293 (1987).

Longstanding Court and Commission precedent makes clear the FPA is primarily a consumer protection statute: “The primary purpose of the [FPA] legislation is the protection of consumers from excessive rates and charges.”<sup>18</sup> The Commission’s broad definition of a change in rate it has employed since 1987 “is consistent with and serves to further [these] policies which underlie the FPA” and does so “by making filings subject to the Commission's suspension and refund authority under section 205(e) of the FPA, to protect consumers of electricity from excessive or exploitative rates.”<sup>19</sup>

This case is one where consumer protection interests are paramount. DCRT is seeking to recover transmission revenue requirements based on capital costs more than double its contractually binding cost cap set forth in the APSA between DCRT and the CAISO. In the September 2023 Hearing Order, then-Commissioner – now Acting Chairman – Christie highlighted the DCRT APSA cost cap in his concurring opinion, noting:

. . . the APSA, to which DCR Transmission agreed, originally “cost-capped” the Project at \$242 million. The APSA was later amended to increase the Project’s cost cap to \$259 million. Now DCR Transmission is seeking approximately \$553 million in cost recovery, more than double the original cost cap and almost double even the amended increased cost cap. . . . And if “cost caps” are not expected to be binding, one must also question their purpose, given that the Project’s agreed-upon cost containment

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<sup>18</sup> *Sw. Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,293 (citing *Towns of Alexandria v. FPC.*, 555 F.2d 1020, 1028 (D.C. Cir. 1977); *Mun. Light Bds. v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971); *Atl. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 388 (1959); *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944)). *See also, e.g., Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 492-93 (D.C. Cir. 1985) (“We agree with petitioners, since we think the provision must be read in light of the Federal Power Act's primary purpose of protecting the utility's customers.”); *Ass’n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 190 FERC ¶ 61,184, at P 94 (2025) (finding that “making customers whole through the payment of interest is consistent with the FPAs primary purpose of consumer protection”).

<sup>19</sup> *Sw. Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,293.

mechanisms were the reason why CAISO selected the Project in the first place.<sup>20</sup>

Given these consumer interests, it is reasonable that the Commission would apply its broad definition of a change in rate and make the DCRT TO Tariff/Base TRR Filing subject to the Commission's suspension and refund authority under section 205(e) of the FPA, to protect consumers of electricity from excessive or exploitative rates. That is precisely what the Commission did. The findings in the May 22 Order must be reversed because they ignore these key aspects of the September 2023 Hearing Order.

**B. The Findings in the May 22 Order Deprive Consumers of Refund Protection Contrary to the Plain Language of the Commission's Orders in This Proceeding**

The May 22 Order gives great weight to the observation that:

*Middle South* stands for the proposition that the Commission may neither suspend nor order refunds on an initial rate pursuant to FPA section 205(e) -- leaving FPA section 206(b) as the only avenue for the Commission to evaluate an initial rate filing.<sup>21</sup>

If the Commission intended to find that the DCRT TO Tariff/Base TRR Filing was an initial rate filing, the Commission legally could not have suspended that filing or set it for refund without initiating an FPA section 206 proceeding. And yet the Commission explicitly stated three times in its September 2023 Hearing Order that it was suspending the DCRT TO Tariff/Base TRR Filing and making that filing subject to refund.<sup>22</sup> The

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<sup>20</sup> September 2023 Hearing Order, separate concurring statement of Commissioner Christie at P 4.

<sup>21</sup> May 22 Order at P 6 n.14, *citing SWEPCO*, 810 F.2d at 291.

<sup>22</sup> September 2023 Hearing Order at P 1 and Ordering Paragraph (A). In addition, the September 2023 Hearing Order is captioned "Order Accepting and Suspending Proposed Transmission Owner Tariff and Transmission Revenue Requirement, Subject to Refund, and Establishing Hearing and Settlement Judge Procedures."

May 22 Order attempts to explain away the inconsistency between the finding that the DCRT TO Tariff/Base TRR Filing was an “initial rate filing” and the Commission’s express exercise of its FPA section 205 suspension and refund authority in the September 2023 Hearing Order by suggesting the Commission “did not decide whether to proceed under FPA section 205 or 206.”<sup>23</sup> This explanation fails, however, because under the reasoning of the May 22 Order, the Commission never legally made the DCRT TO Tariff/Base TRR Filing subject to refund. As an “initial rate filing,” the rationale underlying the May 22 Order would require a conclusion that no refunds can be ordered for DCRT’s transmission revenue requirements filing under FPA section 205. The May 22 Order also (correctly) found the Commission has not initiated an FPA section 206 proceeding in this case, so no refunds are available under section 206.

The CAISO agrees with the statement in the May 22 Order, that “proceeding under FPA section 206(b) requires the Commission to publish a notice of its intention to initiate a 206 proceeding and to establish a refund effective date . . . .”<sup>24</sup> None of these steps have occurred in this case. In addition, the May 22 Order concludes that, as a result of the finding the DCRT TO Tariff/Base TRR Filing is an “initial rate filing” and was subject to FPA section 206 all along, the Commission must now explain why it has not complied with additional requirements of section 206: “since more than 180 days have passed since the Hearing Order, proceeding under FPA section 206(b) will require the Commission to explain why this case was not resolved sooner and when it expects to

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<sup>23</sup> May 22 Order at P 27.

<sup>24</sup> *Id.* at P 28.

reach a final decision.”<sup>25</sup> Indeed, the May 22 Order states the Commission must now take additional steps to conform to its finding the DCRT TO Tariff/Base TRR Filing is an “initial rate filing,” directing, “if the Commission ultimately affirms my ruling on appeal, it will have to take steps to establish formally a refund effective date and confirm the specific statutory basis of this hearing.”<sup>26</sup>

Taken together, the findings in the May 22 Order would mean that, despite repeatedly stating the Commission was making the DCRT TO Tariff/Base TRR Filing subject to refund, the *September 2023 Hearing Order provided no refund protection at all*. At best, the May 22 Order suggests the Commission could provide statutory refund protection in this case at some future date when it satisfies the statutory requirements of FPA section 206.

The procedural history of this case illustrates the harm that comes from the May 22 Order’s interpretation of the September 2023 Hearing Order. The participants in this case engaged in extensive settlement discussions for eighteen months relying upon the FPA section 205 refund protection afforded under the plain reading of the Commission’s hearing order. If the participants had known the FPA refund protection was – or might have been – limited to the fifteen-month refund period allowed under FPA section 206, they likely would have concluded settlement talks much sooner or elected to forego settlement talks entirely.<sup>27</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at P 30.

<sup>27</sup> Although not the subject of this interlocutory appeal, the CAISO notes the provisions of the DCRT APSA provide contractual protections separate from the refund protections of the

The May 22 Order acknowledges that its approach of “construing hearing orders as not definitively choosing either the FPA section 205(e) or 206(b) path” would have “harsh implications for customers.”<sup>28</sup> Given the plain language of the September 2023 Hearing Order, there is no reason to impose such harsh implications or conclude the Commission intended to do anything other than set the rate for hearing and refund under FPA section 205(e).

**C. The Findings in the May 22 Order Would Interpret Boilerplate Language Typically Used in Commission Orders to Create Uncertainty as to Whether Numerous Cases Are FPA Section 205 or 206 Cases**

In determining whether these consolidated proceedings can proceed under FPA sections 205 or 206, the May 22 Order also relies heavily on the following language from Ordering Paragraph (b) of the September 2023 Hearing Order:

Pursuant to the authority contained in and subject to the jurisdiction conferred on the Commission by section 402(a) of the Department of Energy Organization Act and the FPA, *particularly sections 205 and 206 thereof*, and pursuant to the Commission’s Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), 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.<sup>29</sup>

This provision is discussed throughout the May 22 Order and is the primary basis for its conclusion the Commission intended to leave open the question of whether this case would proceed under FPA section 205 or section 206.<sup>30</sup>

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FPA and which preclude DCRT from recovering in the CAISO’s access charges any transmission revenue requirements that exceed its binding cost cap.

<sup>28</sup> May 22 Order at P 27 n.77.

<sup>29</sup> September 2023 Hearing Order at Ordering Paragraph (B) (emphasis added). This provision is cited in PP 6, 18, 24, 25 and the Appendix to the May 22 Order.

<sup>30</sup> May 22 Order at P 18.

This language is boilerplate that the Commission frequently includes in orders where section 205 filings are set for hearing.<sup>31</sup> For example, this language has been included in orders setting for hearing subject to suspension and refund proposed changes to transmission revenue requirements by long-time CAISO Participating Transmission Owners such as Pacific Gas and Electric Company.<sup>32</sup> There can be no argument that such a filing is an initial rate filing.

The CAISO's research indicates the "particularly sections 205 and 206 thereof" boilerplate language in ordering paragraphs is included in hundreds of Commission orders. If the inclusion of this language in an order means the Commission has not decided whether a case is being set for hearing under section 205 or section 206 of the FPA, it would create massive uncertainty – including in cases already set for hearing. Even when the hearing orders using that boilerplate are final and non-appealable, any utility that has made a rate filing could claim years after the hearing order their filing is actually an "initial rate filing" in an attempt both to limit the utility's refund exposure and to shift the burden of proof to the Commission and customers to demonstrate that their rate filing is unjust and unreasonable.

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<sup>31</sup> The Commission's orders in initial rate proceedings where the Commission initiated section 206 proceedings frequently include different boilerplate language, stating the Commission is instituting hearing and settlement judge procedures pursuant to its authority conferred "by section 402(a) of the Department of Energy Organization Act and the FPA, particularly section 206 thereof"—omitting reference to the Commission's additional authority to institute hearing and settlement judge procedures pursuant to FPA section 205. *See, e.g., Willowbrook Solar I, LLC*, 188 FERC ¶ 61,201, at Ordering Paragraph (B) (2024); *Mammoth N. LLC*, 187 FERC ¶ 61,220, at Ordering Paragraph (B) (2024); *Fern Solar LLC*, 172 FERC ¶ 61,160, at Ordering Paragraph (B) (2020); *Tri-State Generation & Transmission Ass'n, Inc.*, 170 FERC ¶ 61,222, at Ordering Paragraph (D) (2020).

<sup>32</sup> *See, e.g., Pac. Gas & Elec. Co.*, 185 FERC ¶ 61,243, at P 45 and Ordering Paragraph (C) (2024).

Finding this boilerplate language means the Commission has not decided whether a case is being set for hearing under section 205 or section 206 of the FPA also would undercut the Commission's policies favoring settled resolutions of rate cases, as state representatives and customer groups may be unwilling to take the time required to settle a complex rate case if that case could be subject to FPA section 206's 15-month refund limitations in the future.

At a minimum, such a finding would likely result in a massive increase in requests for rehearing and clarification of Commission orders using ordering paragraph language long employed by the Commission.

**D. The Findings in the May 22 Order Could Allow Transmission Developers Who Commit to Binding Cost Caps to Earn Excessive Rates**

Under the expansive approach as to identifying what constitutes an initial rate filing adopted in the May 22 Order, every filing by a new transmission developer to recover its transmission revenue requirements, even under existing regional transmission organization ("RTO") and independent system operator ("ISO") rates, will be treated as an "initial rate filing" which the Commission must accept and which can only be examined in the context of an FPA section 206 proceeding.

Not only is this expansive approach to identifying initial rate filings contrary to the "broadened definition of a change in rate" the Commission has employed since 1987,<sup>33</sup> it also is inconsistent with the objectives of Order No. 1000. The Commission explained that Order No. 1000 demonstrated "a reasonable expectation that competition in

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<sup>33</sup> See *Sw. Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,293.

transmission development may have some beneficial impact on rates.”<sup>34</sup> As the Commission found, “[f]ederal rules should not prevent consumers from being able to benefit from the full range of advantages that competition can provide, which the preservation of barriers to entry does not allow.”<sup>35</sup>

Under the approach adopted in the May 22 Order, however, if a new transmission developer is selected in an ISO or RTO planning process to build a project based in whole or in part on cost containment commitments, that developer is still entitled to require the Commission accept a transmission revenue requirement based on costs dramatically in excess of the developer’s agreed-to cost cap – a cap that most likely enabled it to be awarded the project ahead of other bidders.

Some ISOs and RTOs may not have contractual protections separate from the refund protections of the FPA comparable to the provisions of the CAISO APSA. In such regions, treating a transmission revenue requirement filing of a new transmission developer as an initial rate filing in all circumstances could mean that consumers are not fully protected from paying rates that exceed the developer’s cost cap. Litigating a new transmission revenue requirement through discovery, testimony, hearings, briefs, an initial decision, and an ultimate Commission order is likely to take longer than the maximum 15-month refund period allowed under FPA section 206. As such, consumers

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<sup>34</sup> See *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000-A, 139 FERC ¶ 61,132, at PP 76-90 (2012).

<sup>35</sup> *Id.* at P 82. See also *id.* at P 179 (“We also believe, as discussed in Order No. 1000 and herein, that the nonincumbent transmission developer reforms will lead to more competition among developers, which in turn will lead to the identification of more efficient and cost-effective transmission facilities.”).

could be required to pay excessive or exploitative rates based on costs many times in excess of the applicable cost cap at least for some period of time.

Even in regions where cost caps are fully enforceable by contract, the expansive approach as to identifying what constitutes an initial rate filing adopted in the May 22 Order will shift the burden of proof to the Commission, customer groups, and the applicable ISOs and RTOs to demonstrate that new transmission developer revenue requirement filings that exceed those cost caps are unjust and unreasonable. This shift of the burden of proof is both unjustified and contrary to the objectives of the Commission's policies favoring competition in transmission development.

**E. The May 22 Order Will Adversely Affect the CAISO's Competitive Solicitation Process**

If the May 22 Order is allowed to stand, it will have a chilling effect on the CAISO's competitive solicitation process and stifle competition in transmission development. How the CAISO processes and evaluates bids in the competitive solicitation process will fundamentally change because it creates two classes of bidders whose cost containment measures will be evaluated differently: (1) those with existing TRRs whose project costs beyond their cost containment measures must be justified by the developer, and (2) those without TRRs whose cost containment measures must be presented by intervenors to challenge costs. The CAISO's competitive solicitation process relies on the bids of project developers seeking the opportunity to build and recover costs for transmission solutions identified in the CAISO's transmission planning process. Any developer that meets the CAISO's qualification requirements can bid for

the right to construct these transmission solutions, whether they are public utility transmission developers with existing assets in the CAISO region, or other project developers who do not yet own assets in the CAISO region and thus have no TRR on file. The latter of these, those that would, under the May 22 Order, eventually file an “initial rate,” would thus have an additional barrier to competing in the bidding process. Regardless of any cost containment measures included in this latter group’s bids and agreed to in their APSA, any costs spent on developing the project will be presumed by the Commission to be just and reasonable and must be challenged by ratepayer intervenors, or the CAISO in an FPA section 206 proceeding. In a comparative analysis framework that seeks the most cost-effective and efficient bidder, this is a significantly less attractive prospect as it reduces ratepayer protections by shifting the burden for only *some* potential project sponsors to the ratepayer. The beneficial impact on rates resulting from competition will be undermined if new transmission developers or new special purpose entities can simply ignore any cost containment measures they included in their bids and in their executed APSAs by filing an initial transmission revenue requirement that is not subject to the Commission’s refund authority under Section 205 and that contains costs far in excess of their agreed-to cost caps.

Under the CAISO Tariff, one of the eleven selection factors, and one determined in every solicitation to be a key selection factor, is the binding cost control measures the project sponsor agrees to accept and any binding agreement by the project sponsor that preclude costs above the cap from being recovered through the CAISO’s Transmission

Access Charge.<sup>36</sup> These cost containment measures, which can include mechanisms such as cost caps, particular exclusions to the cost caps, or reduced return on equity, among other mechanisms, are currently evaluated by the CAISO on a level playing field, as if they have the same effect on each proposal. If DCRT's filing is treated as an initial rate and this proceeding continues under section 206, the CAISO will be unable to have the same confidence in the cost containment measures bid by new public utility transmission developers because any future TRR filing would be presumed just and reasonable regardless of any agreed-to measures, and the associated shift in burden for the CAISO, the Commission, and other intervenors to enforce these measures. The end result will be that the CAISO and other ISOs and RTOs with competitive transmission processes will decline to award projects to any entity that would need to file an initial rate, thus thwarting the Commission's competition goals and depriving ratepayers of the true benefits of competition.

Further, as a result of the May 22 Order, the CAISO must put on hold pending APSA negotiations for certain transmission projects it previously awarded to project sponsors that are not existing CAISO Participating Transmission Owners and for which an APSA has not yet been executed. Because these entities' TRR filings could be deemed initial rates if the May 22 Order is upheld, the CAISO must fully understand the potential ramifications and risks associated with such a determination and

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<sup>36</sup> See Section 24.5.1 of the CAISO Tariff at: <https://www.caiso.com/documents/section24-comprehensivetranmissionplanningprocess-asof-dec21-2023.pdf>.

comprehensively assess all next possible options to protect ratepayers and ensure the benefits of the competitive solicitation process cannot be undermined.

**F. The May 22 Order Constitutes an Impermissible Grant of An Out-of-Time Rehearing Request**

The only participant in this proceeding advocating that the Presiding Judge should find that the burden of proof under this proceeding should be on the Commission and intervenors is DCRT.<sup>37</sup> In its brief, DCRT also acknowledged the Commission has not initiated a section 206 proceeding in this case, but contends the Commission “should have set Docket Nos. ER23-2309-000, ER23-2309-001, to proceed as a FPA section 206 proceeding.”<sup>38</sup> DCRT goes on to suggest the Commission has not yet validly made its filings subject to refunds, claiming “the Commission maintains the authority pursuant to FPA section 206 to issue clear notice in the Federal Register of its initiation of a FPA section 206 investigation with a new refund effective date.”<sup>39</sup> DCRT effectively asked for modification of the September 2023 Hearing Order overturning the Commission’s directives already making the DCRT TO Tariff/Base TRR Filing subject to refund.

The deadline for DCRT to seek modifications to the September 2023 Hearing Order has long since passed. By statute, all requests for rehearing of Commission orders under the FPA are due within 30 days of the issuance of the orders.<sup>40</sup> If no party requests rehearing within 30 days of the issuance of a Commission order under the FPA, that order

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<sup>37</sup> DCRT Brief at 1-2.

<sup>38</sup> *Id.* at 11

<sup>39</sup> *Id.* at 12.

<sup>40</sup> 16 U.S.C. § 8251(a)

becomes final and non-appealable.<sup>41</sup> Neither DCRT nor any other party requested rehearing of the September 2023 Hearing Order.

The Commission should find Administrative Law Judges do not have the authority to do something the Commission itself lacks legal authority to do – modifying a Commission order or correcting claimed legal errors based on an out-of-time rehearing request.

**G. Administrative Law Judges Do Not Have Authority to Find a Rate Filing is an Initial Rate Filing Where the Commission Has Set a Rate Filing for Hearing under Section 205**

The May 22 Order rests on the premise that, in any proceeding where the Commission sets an FPA section 205 filing for hearing and has not explicitly analyzed whether a rate filing is an “initial rate filing,” the Administrative Law Judge assigned to preside over the hearing has the authority to find the case involves an “initial rate filing” thereby: (1) compelling the Commission “to publish a notice of its intention to initiate a 206 proceeding and to establish a refund effective date;” and (2) shifting the burden of proof.<sup>42</sup> The CAISO is aware of no basis on which the Commission has delegated this authority to Administrative Law Judges. The CAISO believes the determination of

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<sup>41</sup> See, e.g., *La. Pub. Serv. Comm’n v. Entergy Corp.*, 162 FERC ¶ 61,234, at P 149 (2018) (“Accordingly, we find that the Presiding Judge correctly found that the Louisiana Commission failed to take the critical step of seeking rehearing of the 2012 Rehearing Order. The 2012 Rehearing Order is the final order in that docket and is no longer subject to judicial review.”); *Old Dominion Elec. Coop. v. Pub. Serv. Elec. & Gas Co.*, 105 FERC ¶ 61,094, at P 17 (2003) (finding that “[b]ecause ODEC did not seek rehearing of the Complaint Order, that order became final and non-appealable 30 days following its issuance”); *CNG Transmission Corp.*, 86 FERC ¶ 61,013, at 61,030 (1999) (“Since no parties have filed a request for rehearing of that order, it is final and non-appealable.”).

<sup>42</sup> See, e.g., May 22 Order at P 26 (“*Middle South* and *SWEPCO* compel the Commission and me to proceed under FPA section 206 once we have determined that DCRT’s Tariff Records are an initial rate. I have now made that determination.”) (footnote omitted).

whether a section 205 filing is an initial rate filing rests entirely with the Commission. As such, the Commission should conclude the findings in the May 22 Order exceed the authority granted to Administrative Law Judges.

**H. The Commission Has Valid Reasons for Treating the DCRT Transmission Revenue Requirements Filing to be a Change in Rate Filing**

Although the Commission is not obligated to justify why it elected not to treat the DCRT TO Tariff/Base TRR Filing as an initial rate filing given that the September 2023 Hearing Order is final and non-appealable, there are several reasons why the Commission may have treated that filing as a change in rate filing.

**1. The CAISO's Transmission Access Charge is the Rate Actually Paid for Service Over the DCRT Project**

Under the Commission-approved CAISO Tariff, all market participants withdrawing energy from the CAISO controlled grid are assessed Transmission Access Charges in accordance with Section 26.1 and Appendix F, Schedule 3 of the CAISO Tariff.<sup>43</sup> The Transmission Access Charge or “TAC” is “designed to recover each Participating TO’s or Approved Project Sponsor’s Transmission Revenue Requirement.”<sup>44</sup> DCRT is both a Participating Transmission Owner or “Participating TO” and an Approved Project Sponsor.

The Commission’s longstanding test for determining if a rate filing is an initial rate filing, holds “an initial rate filing is one which provides for [1] a new service [2] to a

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<sup>43</sup> See Section 26.1 of the CAISO Tariff at: <https://www.caiso.com/documents/section-26-transmission-rates-and-charges-as-of-feb-5-2025.pdf>.

<sup>44</sup> *Id.*

new customer, and that both the service and the customer must be new.”<sup>45</sup> The DCRT Base TRR filing in these proceedings meets neither prong of the Commission’s initial rate filing test. The service being provided over the facilities covered by the DCRT Base TRR filing is not a new service, but rather the existing transmission service provided to customers under the CAISO Tariff. The Commission has long recognized the CAISO is the transmission provider providing service over the facilities placed under its operational control by Participating Transmission Owners like DCRT.<sup>46</sup> In addition, the customers taking the service that is the subject of the DCRT filing are existing transmission customers of the CAISO, *i.e.*, all market participants withdrawing energy from the CAISO controlled grid and paying the CAISO’s Transmission Access Charge.

This view of the DCRT filing’s relationship with the Transmission Access Charge is supported by the D.C. Circuit, which held:

The CAISO’s TAC methodology is a formula rate through which the TRR of each participating transmission owner is collected. . . . As such, the TRR

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<sup>45</sup> *Sw. Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,293 (1987).

<sup>46</sup> *See, e.g., Cal. Indep. Sys. Operator Corp.*, 112 FERC ¶ 61,009, at P 4 (2005) (“CAISO is the Transmission Provider that exercises operational control over the facilities owned by, among others, SoCal Edison, PG&E, and SDG&E.”) (emphasis added); *Cal. Indep. Sys. Operator Corp.*, 108 FERC ¶ 61,104, at P 9 (2004) (“CAISO is the Transmission Provider which exercises operational control over the facilities turned over to CAISO by, among others, the three PTOs subject to the jurisdiction of the Commission (SoCal Edison, PG&E, and SDG&E).”) (emphasis added); see also section 2.1 of the CAISO Tariff, providing in relevant part “The CAISO shall, subject to Sections 2.2 and 3, provide to all Eligible Customers open and nondiscriminatory access to the CAISO Controlled Grid regardless of the locations of their connections to the CAISO Controlled Grid in accordance with the terms of this CAISO Tarif . . . .” Section 2.1 of the CAISO Tariff can be found at: [https://www.aiso.com/documents/section2\\_accesstothecaliforniaisocontrolledgrid\\_asof\\_jun28\\_2010.pdf](https://www.aiso.com/documents/section2_accesstothecaliforniaisocontrolledgrid_asof_jun28_2010.pdf).

of each participating transmission owner can be conceptualized not as its own rate but rather as a cost of the CAISO.<sup>47</sup>

The Presiding Judge dismisses this construction of the role of TRR filings by a Participating Transmission Owner, focusing on the issue of whether a TRR filing could itself be considered a rate.<sup>48</sup> The CAISO submits that DCRT's Base TRR is not a rate paid by any customer; indeed, DCRT has no rate that is paid by any customer, nor does it have transmission service agreements with any customer. Even if the Base TRR is a rate, it does not meet the requirements of an initial rate under the facts of this case. Instead, DCRT's Base TRR results in an increase in the Transmission Access Charge and therefore constitutes a change in rate filing. In *Middle South Energy*, the DC Circuit gave weight to legislative history confirming that, under section 205 of the FPA, the Commission does have authority to order refunds for a change that results in an increase in rates:

If the investigation cannot be completed with [sic] the 5 months' period, the new rate may go into effect, *but in case the change results in an increase in rates the Commission may require the utility to make refunds if the increase is not approved.*<sup>49</sup>

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<sup>47</sup> *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1116 (D.C. Cir. 2002) (citation omitted). The D.C. Circuit's holding conflicts with the May 22 Order, but the May 22 Order treats this holding as *dicta*. May 22 Order at P 23 n.62.

<sup>48</sup> May 22 Order at PP 20-22.

<sup>49</sup> *Middle South Energy*, 747 F.2d at 770, quoting *Pub. Util. Holding Cos.: Hearings on H.R. 5423 Before the House Comm. on Interstate & Foreign Commerce*, 74th Cong., 1st Sess. 33-34 (1935) (emphasis added); *Pub. Util. Holding Co. Act of 1935: Hearings on S.1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess. 41-42 (1935) (emphasis added).

This precedent confirms the Commission was correct in the September 2023 Hearing Order to require DCRT to make refunds if the increase to the Transmission Access Charge resulting from DCRT's TRR filing is not approved in this proceeding.

## **2. The DCRT APSA is a Filed Rate**

DCRT's transmission revenue requirement filing also constitutes a change in rate because, as the winner of a competitive solicitation under Section 24.5 of the CAISO Tariff, DCRT was required to execute an APSA with the CAISO. The CAISO and DCRT executed the APSA on December 1, 2015, and subsequently executed amendments to the APSA.

The DCRT APSA contains provisions that directly govern the costs DCRT is entitled to recover through its Base TRR, which will be reflected in the CAISO's Regional Access Charge. For example, the APSA includes a cap on the costs of constructing the project that DCRT can include in its TRR. Specifically, the initial APSA included a construction cost cap of \$242 million (and the amended APSA includes a cost cap of \$259 million). The APSA also limits DCRT's inclusion in DCRT's TRR costs that DCRT incurs as the result of a route change and includes a limited number of clearly specified exceptions to the cost cap.

The APSA is a Commission-approved *pro forma* contract that is contained in Appendix X of the CAISO tariff.<sup>50</sup> The CAISO filed the executed DCRT APSA with the Commission as a service agreement (designated as CAISO Service Agreement No. 3496) under the CAISO Tariff through the Commission's Electric Quarterly Reporting (EQR)

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<sup>50</sup> *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107 (2014).

system years before DCRT made its transmission revenue requirements in this proceeding.

DCRT's rate filing constitutes a rate change from the filed rate in the APSA because DCRT seeks to recover (1) construction costs that far exceed the express construction cost cap in the APSA and (2) other costs in excess of the cost cap that do not fall under any of the cost cap exclusions in the APSA. The background section of Commission's September 2023 Hearing Order setting the DCRT TO Tariff/Base TRR Filing for hearing expressly refers to the APSA as "set[ting] forth the terms related to construction of the Project—including a cost containment mechanism with a cap—for planning, development, and construction of the transmission line portions of the Project."<sup>51</sup> The September 2023 Hearing Order also refers to the construction cost caps in the APSA and DCRT's much higher project costs reflected in its filed TRR.

As the Commission has recognized, EQR submissions related to *pro forma* agreements, such as the APSA, satisfy the rate filing requirements of section 205 of the FPA and constitute a rate on file with the Commission.<sup>52</sup> Thus, the DCRT APSA, which the CAISO submitted through the EQR, constitutes a filed rate. Because DCRT seeks to include in its Base TRR costs that are higher than the level specified in the APSA, as well as costs that are not permitted under the APSA, its rate filing constitutes a rate change from the filed rate in the APSA. Failure to uphold the APSA as a filed rate and to treat DCRT's rate filing as a rate change would allow DCRT, and any other similarly situated

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<sup>51</sup> September 2023 Hearing Order at P 5.

<sup>52</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107 (2002); *Electric Quarterly Reports*, 148 FERC ¶ 61,083, at P 6 (2014).

approved project sponsor, to evade any binding cost caps and cost containment measures they agreed to in the competitive solicitation process by simply filing an “initial rate” that ignores any such agreed-to commitments.

### **3. Commission Orders on Other TRR Filings Do Not Support a Finding the DCRT Filing Is an Initial Rate Filing**

The May 22 Order discussed at length various Commission orders setting for hearing TRR filings by new CAISO Participating Transmission Owners. As the CAISO explained at length in its Brief to the Presiding Judge provided as Attachment A to these comments, the Commission routinely treats TRR and Transmission Owner Tariff filings submitted by new Participating Transmission Owners in the CAISO as changed rate filings.<sup>53</sup>

The CAISO acknowledges there are a small number of cases involving initial Transmission Owner Tariff filings with transmission revenue requirement submissions in which the Commission has treated the filing as an “initial rate filing.”<sup>54</sup> As explained above, these cases are exceptions to the Commission’s routine practice in treating such filings by new Participating Transmission Owners. Notably, however, in each of these outlier cases, the Commission: (1) found that the rate in question was an initial rate; (2) accepted the rate without suspension; and (3) explicitly initiated a section 206 proceeding, consistent with the requirements of FPA section 206(b). The Commission has done none of these things in the DCRT orders in these consolidated proceedings.

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<sup>53</sup> CAISO Brief at 20-24.

<sup>54</sup> See, e.g., *Trans Bay Cable, LLC*, 132 FERC ¶ 61,083, at PP 25-28 (2010); *Citizens S-Line Transmission LLC*, 178 FERC ¶ 61,067, at P 28.

#### **4. The Commission’s Reference to the Regulation Cited by DCRT in Its Filing Does Not Indicate the DCRT Filing Is an Initial Rate Filing**

The May 22 Order suggests that the Commission’s recitation in the September 2023 Hearing Order that DCRT filed under 18 C.F.R. § 35.12 is a “strong indication[] that the Tariff Records are an initial rate, and not a rate change.”<sup>55</sup> Nowhere in that order or anywhere else in the docket did the Commission make a finding as to whether DCRT cited the correct regulations—*i.e.*, determining whether it is section 35.12 (regulations on initial rate filings) or section 35.13 (regulations on filings to change existing rates) that applies to the DCRT rate filing.<sup>56</sup> The Commission can treat a filing as a changed rate filing even if the public utility initially submits the filing under section 35.12, and the Commission has done exactly that in numerous cases.<sup>57</sup>

##### **I. The Commission Should Confirm the Question of Whether the DCRT Transmission Revenue Requirement Violates the APSA Is an Issue in this Proceeding**

In the May 21 oral argument leading to the May 22 Order, the Presiding Judge suggested that any effort to seek refunds for DCRT transmission revenue requirements in

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<sup>55</sup> May 22 Order at P 17.

<sup>56</sup> As discussed at p. 16 of the CAISO Brief, provided as Attachment A to these comments, DCRT also refers to section 35.13 a number of times in its filing.

<sup>57</sup> *See, e.g., Tri-State Generation & Transmission Ass’n, Inc.*, 174 FERC ¶ 61,009, at PP 20-21, 31 (“We agree with United Power that Tri-State’s filing represents changed rates that fall within the Commission’s filing requirements under 18 C.F.R. § 35.13 (2020).”); *Pub. Serv. Co. of Ind., Inc.*, 51 FERC ¶ 61,367, at 62,228 (1990) (“We disagree with PSI’s assertion that its FS-1 rate is an initial rate filing. This is clearly a change in rate because PSI may enter into FS-1 sales with some of its current customers, if they are otherwise eligible utilities.”); *Ne. Utils. Serv. Co. (re Pub. Serv. Co. of N.H.)*, 50 FERC ¶ 61,266, at 61,836 (1990) (“NUSCO contends that the Seabrook Power Contract and the Sharing Agreement are initial rate schedules pursuant to section 35.12 of our regulations, 18 C.F.R. § 35.12 (1989). We disagree. . . . NUSCO’s submissions demonstrate that PSNH is not a new customer of the Northeast system.”).

excess of the APSA cost cap as a remedy for contract violations is not something the Commission can do and is an issue for a state court proceeding.<sup>58</sup> The Presiding Judge raised similar questions about the enforceability of the APSA at the May 8 prehearing conference.<sup>59</sup> There are more than 60 references to the APSA in the September 2023 Hearing Order, confirming compliance with the DCRT APSA is one of the key issues in this proceeding. Further, the APSA is a Commission-approved *pro forma* agreement that is part of the CAISO Tariff; and the DCRT APSA has been filed with the Commission through the EQR. Indeed, then-Commissioner – now Acting Chairman – Christie highlighted the DCRT APSA cost cap in his concurring opinion. As the Commission provides guidance in its order on the pending interlocutory appeal, the Commission should also clarify that the question of whether DCRT’s proposed Base TRR complies with the APSA is an issue set for hearing in this proceeding.

#### **IV. CONCLUSION**

Wherefore, for the foregoing reasons, the CAISO respectfully requests the Commission overturn the findings in the May 22 Order and hold the following: (1) the Commission has not found that the DCRT TO Tariff/Base TRR Filing is an “initial rate filing;” (2) the Commission has accepted the DCRT TO Tariff/Base TRR Filing and suspended the filing for a nominal period subject to refund and to the outcome of hearing

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<sup>58</sup> Tr. 184:18-185:20.

<sup>59</sup> Tr. 36.19-37:1 (“is the APSA really something for me to enforce or, you know, it’s not a transmission agreement, it wasn’t even filed with the Commission, although I guess it was reported in the EQRs. I mean, at best it’s evidence of, I don’t know, prudence or something like that. But are we really talking about enforcing the APSA? Is anyone arguing that it should be enforced.”)

and settlement judge procedures as an FPA section 205 filing; (3) the Commission need not initiate a proceeding under section 206 of the FPA concerning the DCRT TO Tariff/Base TRR Filing; (4) DCRT has the burden of proof in the section 205 proceeding set for hearing in these consolidated proceedings; and (5) the extent to which DCRT TO Tariff/Base TRR Filing violates the APSA is an issue properly before the Commission and the Presiding Judge in these consolidated proceedings.

Respectfully submitted,

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May 27, 2025

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 27th day of May, 2025.

/s/ Deiman Flores

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## **ATTACHMENT A**

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

**DCR Transmission, L.L.C.**

**Docket Nos. ER23-2309-001  
ER24-1394-001  
(consolidated)**

**BRIEF OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR  
CORPORATON**

May 15, 2025

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

**DCR Transmission, L.L.C.**

**Docket ER23-2309-001  
Nos. ER24-1394-001  
(consolidated)**

**BRIEF OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR  
CORPORATION**

**To: The Honorable Joel deJesus, Presiding Administrative Law Judge**

In accordance with the “Order Directing Briefs and Scheduling Oral Argument” issued by Your Honor on May 14, 2025, in the above-captioned proceedings, the California Independent System Operator Corporation (“CAISO”) respectfully submits its Brief on the Federal Power Act (“FPA”) section 205 and Section 206 issues and related burden of proof issues raised during the prehearing conference held on May 8, 2025.

**I. SUMMARY**

These consolidated proceedings are fundamentally about the transmission revenue requirements proposed by DCR Transmission, L.L.C. (“DCRT”) that are an input used in calculating transmission rates paid by customers of the CAISO. DCRT filed its proposed Transmission Owner Tariff (“TO Tariff”) which includes, as Appendix I to that TO Tariff, DCRT’s proposed initial annual Base Transmission Revenue Requirement (“Base TRR”) for the Ten West Link transmission project (“Project”). The Commission’s September 29, 2023, order on DCRT’s June 2023 filing in Docket No. ER23-2309 (“DCRT TO Tariff/Base TRR Filing”) accepted the TO Tariff and the Base TRR appendix and suspended them for a nominal period, subject to refund and to the outcome

of hearing and settlement judge procedures.<sup>1</sup> A review of the September 2023 Hearing Order confirms the contested issues in this proceeding involve the proposed Base TRR, its impact on customers paying the CAISO's Transmission Access Charge, and the extent to which that Base TRR complies with contractual cost containment obligations set forth in the Approved Project Sponsor Agreement, a Commission-approved service agreement.

Given that the DCRT TO Tariff/Base TRR Filing involves both an initial Transmission Owner Tariff and DCRT's initial base TRR, it is reasonable to ask whether this case could be considered a case involving an "initial rate filing" under section 205(e) of the FPA. A review of the Commission's orders, however, confirms the Commission did not treat the DCRT TO Tariff/Base TRR Filing as an initial rate filing. First, the Commission, in its September 2023 Hearing Order, suspended the DCRT TO Tariff/Base TRR Filing, an action which the Commission lacks the authority to do for initial rate filings. The Commission also did not initiate an FPA section 206 proceeding in this case, as is its practice for initial rate filings. This is confirmed by the fact that the Commission's orders in this proceeding do not satisfy the requirements for FPA section 206(b) for section 206 proceedings initiated by the Commission – establishment of a refund effective date and publication of notice that it intended to initiate such a section 206 proceeding.

The Commission's treatment of the DCRT TO Tariff/Base TRR Filing as a changed rate filing rather than an initial rate filing is consistent with applicable precedent. The Commission takes a broad view of what constitutes a changed rate filing in order to provide protection to customers against excessive rates, consistent with the FPA's

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<sup>1</sup> *DCR Transmission, L.L.C.*, 184 FERC ¶ 61,199, at P 1 (2023) ("September 2023 Hearing Order").

primary purpose as a consumer protection statute. The courts have recognized that the Commission's determination of what constitutes a changed rate is left to the Commission's technical expertise. The Commission limits an initial rate filing to a filing which provides for: (1) a new service (2) to a new customer. The Commission clarifies that both the service and the customer must be new for a rate filing to be an initial rate filing. The DCRT TO Tariff/Base TRR Filing meets neither prong of the Commission's test. The service being provided over the Project owned by DCRT is an existing transmission service long-provided under the Commission-approved CAISO Tariff, and the customers receiving service over the project are the existing customers of the CAISO. The rates for this transmission service are CAISO rates not DCRT rates. DCRT has no transmission service agreements with the customers paying these transmission rates, which would change (increase) as the result of adding the costs of DCRT's facilities to the CAISO's existing Regional Access Charge for transmission.

For these reasons and all the reasons explained below, the CAISO respectfully requests Your Honor find: (1) the Commission has not found the DCRT TO Tariff/Base TRR Filing to be an "initial rate filing"; (2) the Commission has accepted the DCRT TO Tariff/Base TRR Filing and suspended the filing for a nominal period subject to refund and to the outcome of hearing and settlement judge procedures as a filing under section 205 of the FPA; (3) the Commission has not initiated a proceeding under section 206 of the FPA concerning the DCRT TO Tariff/Base TRR Filing; (4) in the section 205 proceeding set for hearing DCRT has the burden of proof; and (5) whichever participant or participants have the burden of proof in these consolidated proceedings will submit final rebuttal testimony.

## II. ARGUMENT

### A. The Rate at Issue in this Proceeding is the Transmission Access Charge Collected by the CAISO under the CAISO Tariff

In addressing the issue of whether DCRT’s filings in this proceeding involve an “initial rate,” the first question to be addressed is what is the applicable rate. In this case, the evidence confirms that the applicable rate is the Transmission Access Charge under the CAISO Tariff. Under the Commission-approved CAISO Tariff, all market participants withdrawing energy from the CAISO controlled grid are assessed Transmission Access Charges in accordance with Section 26.1 and Appendix F, Schedule 3 of the CAISO Tariff.<sup>2</sup> The Transmission Access Charge is “designed to recover each Participating TO’s or Approved Project Sponsor’s Transmission Revenue Requirement.”<sup>3</sup> DCRT is both a Participating Transmission Owner or “Participating TO” and an Approved Project Sponsor.

In its transmittal letter to support the filing of DCRT’s Base TRR, DCRT stated that the Base TRR will be collected by the CAISO under a rate in the CAISO Tariff – the Transmission Access Charge: “Upon becoming a CAISO [Participating Transmission Owner], DCRT’s Base TRR will be collected by the CAISO pursuant to the Transmission Access Charge for Regional Transmission Facilities (“TAC”).”<sup>4</sup> Section 5.1 of DCRT’s proposed TO Tariff states that the applicable Access Charges are provided in the CAISO

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<sup>2</sup> See Section 26.1 of the CAISO Tariff at: <https://www.caiso.com/documents/section-26-transmission-rates-and-charges-as-of-feb-5-2025.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> June 29, 2023, DCRT transmittal letter in Docket No. ER23-2309 at 2.

Tariff.<sup>5</sup> DCRT again acknowledges that the applicable rates are CAISO rates when it seeks waiver of certain Commission requirements under section 35.13 of the Commission’s regulations “because rate design information is not applicable because DCRT’s revenue requirement is collected by the CAISO via the CAISO TAC.”<sup>6</sup> The Commission’s September 2023 Hearing Order is consistent with a finding that the applicable “rate” in this proceeding is the Transmission Access Charge under the CAISO Tariff.<sup>7</sup>

The Approved Project Sponsor Agreement (“APSA”) is an agreement accepted by the Commission under section 205 of the FPA which governs the TRR issues in this case. The APSA between DCRT (in its capacity as Approved Project Sponsor for the Project) and the CAISO follows the *pro forma* APSA accepted by the Commission as Appendix X to the CAISO Tariff.<sup>8</sup> The APSA between DCRT and the CAISO (“DCRT APSA”) is on file with the Commission as a service agreement (designated as CAISO Service Agreement No. 3496) under the CAISO Tariff via reporting through the Commission’s Electric Quarterly Reporting (EQR) requirements.<sup>9</sup> DCRT acknowledges numerous

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<sup>5</sup> See also *id.* at 46.

<sup>6</sup> *Id.* at 49.

<sup>7</sup> September 2023 Hearing Order at P 7 (“The Base TRR will be collected by CAISO pursuant to the Transmission Access Charge for Regional Transmission Facilities”).

<sup>8</sup> See <https://www.caiso.com/documents/appendix-x-approved-project-sponsor-agreement-as-of-aug-3-2024.pdf>. The Commission accepted the *pro forma* APSA in *California Independent System Operator Corporation*, 149 FERC ¶ 61,107 (2014). The Commission also issued a letter order on February 12, 2015, that accepted revisions to the APSA submitted on compliance with that order.

<sup>9</sup> See, e.g., *Revised Pub. Util. Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107, at P 16 (2002) (“[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

times in its filing of its Base TRR that one issue in this case is whether its Base TRR is consistent with the DCRT APSA.<sup>10</sup> The DCRT APSA then in effect (not reflecting a subsequent amendment concerning the commercial operations date not relevant to the issues in this Brief) was provided as Exhibit No. DCRT-02 to DCRT's June 29, 2023, filing in Docket No. ER23-2309. Section 10.1 of that APSA further confirms that the Base TRR of DCRT, in its capacity as an Approved Project Sponsor, is an Access Charge under the CAISO Tariff:

If FERC approves such Transmission Revenue Requirement, the CAISO shall incorporate the Transmission Revenue Requirement into the Regional Access Charge or Local Access Charge in accordance with the CAISO Tariff. The 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.

In this case, due to the voltage level of the Project, the applicable Transmission Access Charge is the "Regional Access Charge," a term synonymous with the "Transmission Access Charge for Regional Transmission Facilities" referenced in the Commission's September 2023 Hearing Order. The Regional Access Charge is charged by the CAISO to customers withdrawing energy from the CAISO controlled grid for transmission that is

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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."); *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).

<sup>10</sup> See, e.g., June 29, 2023, DCRT transmittal letter in Docket No. ER23-2309 *passim*.

200 kV or above as a single CAISO-wide rate.<sup>11</sup>

There are more than 60 references to the APSA in the September 2023 Hearing Order, confirming compliance with the DCRT APSA is one of the key issues in this proceeding. Indeed, then-Commissioner – now Acting Chairman – Christie highlighted the DCRT APSA cost cap in his concurring opinion, noting:

. . . the APSA, to which DCR Transmission agreed, originally “cost-capped” the Project at \$242 million. The APSA was later amended to increase the Project’s cost cap to \$259 million. Now DCR Transmission is seeking approximately \$553 million in cost recovery, more than double the original cost cap and almost double even the amended increased cost cap. . . . And if “cost caps” are not expected to be binding, one must also question their purpose, given that the Project’s agreed-upon cost containment mechanisms were the reason why CAISO selected the Project in the first place.<sup>12</sup>

The CAISO respectfully submits that any decision or findings by Your Honor in this proceeding must recognize that the September 2023 Hearing Order establishes compliance with the APSA as an issue to be addressed in the hearings initiated by the Commission. Indeed, in the alternative, the DCRT APSA can be found to be the initial rate in these consolidated proceedings.

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<sup>11</sup> See Appendix F, Schedule 3, section 1.1(b) of the CAISO Tariff at: <https://www.caiso.com/documents/appendix-f-rate-schedules-as-of-aug-3-2024.pdf>.

<sup>12</sup> September 2023 Hearing Order, separate concurring statement of Commissioner Christie at P 4.

**B. Applicable Precedent Supports Finding the DCRT Filing in This Proceeding is Not an Initial Rate Filing**

The courts have held that the Commission “lacks the authority to suspend initial rate filings.”<sup>13</sup> As discussed in section II.C of this Brief, the Commission is well aware of this precedent and accepts initial rate filings without suspension while also frequently initiating section 206 proceedings to examine the justness and reasonableness of the initial rate. This is not what the Commission has done in these consolidated proceedings. Instead, in the September 2023 Hearing Order, the Commission accepted DCRT’s proposed TO Tariff and Base TRR and suspended them for a nominal period subject to refund and to the outcome of hearing and settlement judge procedures.<sup>14</sup>

Although it is understandable to question whether a filing that is intended to provide rate recovery through an initial Base TRR is an “initial rate” filing, the Commission’s actions in not treating the DCRT filing as an initial rate filing are wholly consistent with Commission precedent.

The Base TRR is not a rate. No customer will pay DCRT the Base TRR. Instead, DCRT’s Base TRR is one input of many to Participating TO transmission revenue requirements the CAISO uses to calculate the Regional Transmission Access Charge, a single grid-wide rate the CAISO charges to all market participants withdrawing energy from the CAISO controlled grid. DCRT acknowledges this in its initial filing of its Base TRR and TO Tariff when it states, “DCRT’s revenues will be derived from the CAISO

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<sup>13</sup> See *Middle S. Energy, Inc. v. FERC*, 747 F.2d 763, 765 (D.C. Cir. 1984) (“*Middle South Energy*”).

<sup>14</sup> September 2023 Hearing Order at P 1 and Ordering Paragraph (A).

TAC, which, in turn, is based on the combined transmission revenue requirements of the various entities that have turned over functional control of their transmission assets to the CAISO.”<sup>15</sup>

DCRT’s Base TRR filing is therefore properly seen as an input to an existing rate that will increase that rate, *i.e.*, increase the Transmission Access Charge. In the *Middle South Energy* decision, the U.S. Court of Appeals for the District of Columbia Circuit (“DC Circuit”) gave weight to legislative history confirming that, under section 205 of the FPA, the Commission does have authority to order refunds for a change that results in an increase in rates:

If the investigation cannot be completed with [sic] the 5 months' period, the new rate may go into effect, *but in case the change results in an increase in rates the Commission may require the utility to make refunds if the increase is not approved.*<sup>16</sup>

The DCRT filing is a transmission revenue requirement filing that results in an increase to the rates paid by all market participants withdrawing energy from the CAISO controlled grid.

The *Middle South Energy* Court also noted that the D.C. Circuit has upheld the Commission’s broad view of what constitutes a changed rate, finding:

[t]his is precisely the type of question we must leave to the technical expertise of the Commission; we will not substitute our judgment unless the

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<sup>15</sup> June 29, 2023, DCRT transmittal letter in Docket No. ER23-2309 at 3 n.8.

<sup>16</sup> *Middle South Energy*, 747 F.2d at 770, quoting *Pub. Util. Holding Cos.: Hearings on H.R. 5423 Before the House Comm. on Interstate & Foreign Commerce, 74th Cong., 1st Sess. 33-34 (1935)* (emphasis added); *Pub. Util. Holding Co. Act of 1935: Hearings on S.1725 Before the Senate Comm. on Interstate Commerce, 74th Cong., 1st Sess. 41-42 (1935)* (emphasis added).

Commission's judgment is unreasonable and cannot be rationally reconciled with the terms of the Act.<sup>17</sup>

Although the Commission did not explicitly address the question of whether the DCRT filing is an initial rate, all evidence on the face of the September 2023 Hearing Order supports the conclusion the Commission exercised its “technical expertise” to find the DCRT filing to be a changed rate.

On remand from *Southwestern Electric Power Company v. FERC*, 810 F.2d 289 (D.C. Cir. 1987), the Commission clarified the test it uses going forward to determine whether a rate filing is an “initial rate filing.” The Commission held:

. . . an initial rate filing is one which provides for [1] a new service [2] to a new customer, and that both the service and the customer must be new. Thus, where the service is new, but the customer is not, such filings will be deemed to be changes in rates, as has been the Commission's practice. Where a filing provides for the extension of an existing service to a new customer, the filing will be treated as a change in rate.<sup>18</sup>

This two-pronged test for identifying an initial rate filing remains in effect today.<sup>19</sup>

The DCRT rate filing in these proceedings meets neither prong of the Commission’s initial rate filing test. The service being provided over the facilities covered by the DCRT Base TRR filing is not a new service, but rather the existing transmission service provided to customers under the CAISO Tariff. The Commission has long recognized the CAISO is the transmission provider

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<sup>17</sup> *Middle South Energy*, 747 F.2d at 771, quoting *Fla. Power & Light Co. v. FERC*, 617 F.2d 809, 815 (D.C. Cir. 1980).

<sup>18</sup> *Sw. Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,293 (1987).

<sup>19</sup> *See, e.g., Tri-State Generation & Transmission Ass’n Inc.*, 174 FERC ¶ 61,009, at P 31 n.36 (2021), citing *Sw. Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,293.

providing service over the facilities placed under its operational control by Participating Transmission Owners like DCRT.<sup>20</sup>

In addition, the customers taking the service that is the subject of the DCRT filing are existing transmission customers of the CAISO, *i.e.*, all market participants withdrawing energy from the CAISO controlled grid. This is confirmed by section 4 of DCRT's TO Tariff, which states, "Transmission service over DCRT's Regional Transmission Facilities and Entitlements placed under the CAISO's Operational Control shall be provided only to Eligible Customers as defined by the CAISO Tariff." In addition, DCRT has no transmission service agreements with the customers taking service over DCRT's facilities, so there is no basis for DCRT to provide service to any customers, new or otherwise.

Even assuming, solely for the sake of argument, the Commission were to find one prong of its two part-test to be satisfied in these proceedings, it would not be enough for the Commission to find the DCRT filing to be an "initial rate filing."

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<sup>20</sup> See, e.g., *Cal. Indep. Sys. Operator Corp.*, 112 FERC ¶ 61,009, at P 4 (2005) ("CAISO is the Transmission Provider that exercises operational control over the facilities owned by, *among others*, SoCal Edison, PG&E, and SDG&E.") (emphasis added); *Cal. Indep. Sys. Operator Corp.*, 108 FERC ¶ 61,104, at P 9 (2004) ("CAISO is the Transmission Provider which exercises operational control over the facilities turned over to CAISO by, *among others*, the three PTOs subject to the jurisdiction of the Commission (SoCal Edison, PG&E, and SDG&E).") (emphasis added); see also section 2.1 of the CAISO Tariff, providing in relevant part "The CAISO shall, subject to Sections 2.2 and 3, provide to all Eligible Customers open and nondiscriminatory access to the CAISO Controlled Grid regardless of the locations of their connections to the CAISO Controlled Grid in accordance with the terms of this CAISO Tariff . . . ." Section 2.1 of the CAISO Tariff can be found at: [https://www.aiso.com/documents/section2\\_accesstothecaliforniaisocontrolledgrid\\_asof\\_jun28\\_2010.pdf](https://www.aiso.com/documents/section2_accesstothecaliforniaisocontrolledgrid_asof_jun28_2010.pdf).

As further evidence, the Commission when establishing this test, clarified “Where the utility provides the service pursuant to a standard tariff already on file with the Commission, there should be no question as to whether the service is the same.”<sup>21</sup> In these consolidated proceedings the service being provided over the Project is being provided to customers pursuant to the CAISO Tariff already on file with the Commission.

**C. The Commission’s Orders in this Proceeding Are Consistent with the Finding that the Commission Intended to Treat the DCRT Filing as a Change in Rate Filing**

The Commission was explicit in three places in the September 2023 Hearing Order that it was exercising its suspension and refund authority when setting the DCRT TO Tariff/Base TRR Filing for hearing.<sup>22</sup> If the Commission believed the DCRT filing was an initial rate filing, this exercise of its suspension and refund authority would be inconsistent with four decades of precedent that the Commission “lacks the authority to suspend initial rate filings.”<sup>23</sup>

In initial rate filing proceedings, the Commission frequently opens FPA section 206 proceedings to provide protection to customers against excessive or exploitative rates. However, in the above-captioned proceedings, the Commission did not take any

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<sup>21</sup> *Sw. Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,293.

<sup>22</sup> September 2023 Hearing Order at P 1 and Ordering Paragraph (A). In addition, the September 2023 Hearing Order is captioned “Order Accepting and Suspending Proposed Transmission Owner Tariff and Transmission Revenue Requirement, Subject to Refund, and Establishing Hearing and Settlement Judge Procedures.”

<sup>23</sup> *See Middle South Energy*, 747 F.2d at 765.

of the steps required to initiate a section 206 proceeding. As the Commission has acknowledged:

In cases where . . . the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than the date of publication by the Commission of notice of its intention to initiate such proceeding nor later than five months after the publication date.<sup>24</sup>

In these consolidated proceedings, the Commission has satisfied none of these FPA section 206 requirements. The Commission has not established a refund effective date. The Commission has not published notice of its intention to initiate such a section 206 proceeding in the Federal Register or otherwise.

The only reference to FPA section 206 in any Commission issuance in these dockets is its directive, in Ordering Paragraph (B) of the September 2023 Hearing Order, that it was instituting hearing and settlement judge procedures pursuant to its authority conferred “by section 402(a) of the Department of Energy Organization Act and the FPA, particularly *sections 205 and 206* thereof” (emphasis added). This language is boilerplate the Commission frequently includes in orders where section 205 filings are set for hearing. For example, this language has been included in orders setting for hearing subject to suspension and refund proposed changes to transmission revenue requirements by long-time CAISO Participating Owners such as Pacific Gas and Electric Company.<sup>25</sup> There can be no argument that such a filing is an initial rate filing.

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<sup>24</sup> *Basin Elec. Power Coop.*, 189 FERC ¶ 61,162, at P 40 (2024).

<sup>25</sup> *See, e.g., Pac. Gas & Elec. Co.*, 185 FERC ¶ 61,243, at P 45 and Ordering Paragraph (C) (2024).

As discussed in section II.D of this Brief, the Commission’s orders in initial rate proceedings where the Commission initiated section 206 proceedings frequently include different boilerplate language, stating the Commission is instituting hearing and settlement judge procedures pursuant to its authority conferred “by section 402(a) of the Department of Energy Organization Act and the FPA, particularly section 206 thereof”—omitting reference to the Commission’s additional authority to institute hearing and settlement judge procedures pursuant to FPA section 205.

The Commission’s intentionality as to which section(s) of the FPA to cite in its ordering paragraphs on rate filings is vividly illustrated by the action it took in a proceeding solely under FPA section 205 (Docket ER12-1428) regarding revisions that Entergy Services, Inc. submitted to its Open Access Transmission Tariff (“OATT”)—*i.e.*, a filing to change an existing rate. The Commission issued an order accepting and suspending the OATT revisions that also stated it was instituting hearing and settlement judge procedures pursuant to its authority conferred “by section 402(a) of the Department of Energy Organization Act and the FPA, particularly section 206 thereof,” without mentioning FPA section 205.<sup>26</sup> In response, some parties to the proceeding filed a motion for clarification or, in the alternative, request for rehearing of the Commission’s order in which they

request[ed] clarification that (1) implementation of the tariff changes that are the subject of this proceeding will be subject to refund pursuant to Federal Power Act (“FPA”) § 205, 18 CFR § 824d (2011), and, (2) consistent with proceedings arising under § 205, Entergy Services, Inc.

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<sup>26</sup> See *Entergy Servs., Inc.*, 139 FERC ¶ 61,173, at Ordering Paragraph (B) (2012).

(“Entergy”) bears the burden to justify the tariff changes it proposes in this proceeding.<sup>27</sup>

In response, the Commission issued an *errata* notice solely to correct the ordering paragraph in relevant part to read “particularly *sections 205 and 206* thereof.”<sup>28</sup> The case later concluded with Entergy bearing the burden under FPA section 205 to justify its proposed OATT revisions and the Commission declining to order refunds.<sup>29</sup> In light of this intentionality, there is no basis to conclude the reference to section 205 in Ordering Paragraph (B) of the September 2023 Hearing Order was an error.

In the September 2023 Hearing Order, the Commission does reference DCRT’s statement that it submitted its rate filing pursuant to section 35.12 of the Commission’s regulations,<sup>30</sup> but nowhere in that order or anywhere else in the docket did the Commission make a finding as to whether DCRT’s statement is accurate—*i.e.*, determining whether it is section 35.12 (regulations on initial rate filings) or section 35.13 (regulations on filings to change existing rates) that applies to the DCRT rate filing. Similarly, the May 2024 Consolidation Order contained no findings that the proceeding concerns an initial rate filing.<sup>31</sup> The Commission can treat a filing as a changed rate

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<sup>27</sup> Motion for Clarification or, in the Alternative, Request for Rehearing on Behalf of Mississippi Delta Energy Agency, *et al.*, Docket No. ER12-1428-000, at 2 (June 15, 2012).

<sup>28</sup> *Entergy Servs., Inc.*, Errata Notice, 140 FERC ¶ 61,042 (2012) (emphasis added). Soon after the issuance of the errata notice, the parties withdrew their motion for clarification and alternative request for rehearing.

<sup>29</sup> *See Entergy Servs., Inc.*, 142 FERC ¶ 63,017, at PP 28-36 (2013), *aff’d*, Opinion No. 532, 148 FERC ¶ 61,059, at PP 32-35, 132-33 (2014).

<sup>30</sup> September 2023 Hearing Order at P 1.

<sup>31</sup> *See DCR Transmission, L.L.C.*, 187 FERC ¶ 61,057 (2024) (“May 2024 Consolidation Order”).

filing even if the public utility initially submits the filing under section 35.12, and the Commission has done exactly that in numerous cases.<sup>32</sup>

DCRT is also unclear in its own June 29, 2023, filing in Docket No. ER23-2309 as to whether section 35.12 or 35.13 applies to its filing. DCRT refers to section 35.13 a number of times in its transmittal letter.<sup>33</sup> Notably, DCRT seeks waiver of certain requirements of section 35.13 but does not seek waiver of any requirements of section 35.12.<sup>34</sup> As such, the transmittal letter is not significant evidence the TO Tariff/Base TRR Filing was intended to be an initial rate filing.

**D. Unlike Other Commission Orders on Rate Filings, the Orders Issued in the Instant Proceedings Contain No Findings They Concern Initial Rate Filings**

Commission orders issued in other cases on rate filings submitted by utilities show the Commission is explicit about making findings that the submittals at issue are initial rate filings (*i.e.*, a filing that proposes a rate for a new service to a new customer).<sup>35</sup>

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<sup>32</sup> See, e.g., *Tri-State Generation & Transmission Ass’n, Inc.*, 174 FERC ¶ 61,009, at PP 20-21, 31 (“We agree with United Power that Tri-State’s filing represents changed rates that fall within the Commission’s filing requirements under 18 C.F.R. § 35.13 (2020).”); *Pub. Serv. Co. of Ind., Inc.*, 51 FERC ¶ 61,367, at 62,228 (1990) (“We disagree with PSI’s assertion that its FS-1 rate is an initial rate filing. This is clearly a change in rate because PSI may enter into FS-1 sales with some of its current customers, if they are otherwise eligible utilities.”); *Ne. Utils. Serv. Co. (re Pub. Serv. Co. of N.H.)*, 50 FERC ¶ 61,266, at 61,836 (1990) (“NUSCO contends that the Seabrook Power Contract and the Sharing Agreement are initial rate schedules pursuant to section 35.12 of our regulations, 18 C.F.R. § 35.12 (1989). We disagree. . . . NUSCO’s submissions demonstrate that PSNH is not a new customer of the Northeast system.”).

<sup>33</sup> June 29, 2023, DCRT transmittal letter in Docket No. ER23-2309 at 3 n.8, 12, 49, 50.

<sup>34</sup> *Id.* at 49-50.

<sup>35</sup> See, e.g., *Willowbrook Solar I, LLC*, 188 FERC ¶ 61,201, at P 1 n.4 (2024) (“*Willowbrook*”); *Mammoth N. LLC*, 187 FERC ¶ 61,220, at P 1 n.5 (2024) (“*Mammoth*”); *Citizens S-Line Transmission LLC*, 178 FERC ¶ 61,067, at P 28 (2022) (“*Citizens S-Line*”); *Fern Solar LLC*, 172 FERC ¶ 61,160, at P 1 n.4 (2020) (“*Fern Solar* Hearing Order”); *Tri-State Generation & Transmission Ass’n, Inc.*, 170 FERC ¶ 61,222, at P 85 (2020) (“*Tri-State*”).

Those same orders also expressly instituted FPA section 206 proceedings to consider the justness and reasonableness of the proposed initial rates.<sup>36</sup> Each of these orders established refund effective dates for the applicable section 206 proceeding.<sup>37</sup> An ordering paragraph in each of the orders specified the Commission was instituting hearing and settlement judge procedures pursuant to its authority conferred “by section 402(a) of the Department of Energy Organization Act and the FPA, particularly section 206 thereof”—omitting reference to the Commission’s additional authority to institute hearing and settlement judge procedures pursuant to FPA section 205.<sup>38</sup>

By contrast, the Commission undertook none of these actions in these consolidated DCRT proceedings. Neither the September 2023 Hearing Order nor the May 2024 Consolidation Order (nor any other issuance in these consolidated ER dockets) instituted an FPA section 206 proceeding or established a refund effective date for a section 206 proceeding.

**E. Even if the September 2023 Hearing Order Was Unclear, Policies Underlying the FPA Require Resolving Ambiguity by Finding DCRT Proposed to Change an Existing Rate**

For the reasons explained above, Your Honor should find the Commission treated the DCRT filing as a change in rates and did not find the filing to be an initial rate filing. However, even if there was any ambiguity on these matters stemming from the DCRT

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<sup>36</sup> See *Willowbrook* at PP 1, 13, 15; *Mammoth* at PP 1, 20; *Citizens S-Line* at PP 3, 28-29; *Fern Solar* Hearing Order at PP 1, 13; *Tri-State* at PP 2, 30.

<sup>37</sup> See *Willowbrook* at P 17; *Mammoth* at P 26; *Citizens S-Line* at P 29; *Fern Solar* Hearing Order at P 15; *Tri-State* at P 86.

<sup>38</sup> See *Willowbrook* at Ordering Paragraph (B); *Mammoth* at Ordering Paragraph (B); *Citizens S-Line* at Ordering Paragraph (C); *Fern Solar* Hearing Order at Ordering Paragraph (B); *Tri-State* at Ordering Paragraph (D).

Hearing Order, any ambiguity should be resolved by making the findings the CAISO urges in this Brief. That is the only way to satisfy the Commission’s fundamental obligation to ensure the availability of energy to customers at a reasonable cost.

Longstanding Court and Commission precedent makes clear the FPA is primarily a consumer protection statute: “The primary purpose of the [FPA] legislation is the protection of consumers from excessive rates and charges.”<sup>39</sup> The Commission’s broad definition of a change of rate it has employed since 1987 “is consistent with and serves to further [these] policies which underlie the FPA” and does so “by making filings subject to the Commission's suspension and refund authority under section 205(e) of the FPA, to protect consumers of electricity from excessive or exploitative rates.”<sup>40</sup> By making the DCRT filing subject to the Commission's suspension and refund authority, the September 2023 Hearing Order fulfills the consumer protection policies underling the FPA and protects consumers from excessive or exploitative rates.

The Commission remains focused on consumer protection. Chairman Christie has stated that “the Commission’s primary duty under the” FPA is “to protect consumers.”<sup>41</sup>

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<sup>39</sup> *Sw. Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,293 (citing *Towns of Alexandria v. FPC.*, 555 F.2d 1020, 1028 (D.C. Cir. 1977); *Mun. Light Bds. v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971); *Atl. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 388 (1959); *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944)). *See also, e.g., Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 492-93 (D.C. Cir. 1985) (“We agree with petitioners, since we think the provision must be read in light of the Federal Power Act's primary purpose of protecting the utility's customers.”); *Ass’n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 190 FERC ¶ 61,184, at P 94 (2025) (finding that “making customers whole through the payment of interest is consistent with the FPAs primary purpose of consumer protection”).

<sup>40</sup> *Sw. Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,293.

<sup>41</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 190 FERC ¶ 61,067, separate dissenting statement of Chairman Christie at P 9 (2025). *See also, e.g., Potomac Edison Co.*, 189 FERC ¶ 61,161, separate dissenting statement of Chairman Christie at P 8 (2024) (same).

Treating DCRT’s filing as an initial rate filing would limit the Commission’s refund authority and shift the burden of proof, thereby exposing customers to potential unjust and unreasonable costs in direct opposition to the main purpose of the FPA.<sup>42</sup>

Similarly, treating DCRT’s filing as an initial rate filing would be contrary to the Commission’s policy objectives in Order No. 1000 in opening up transmission development to competition. For example, the Commission explained that Order No. 1000 demonstrated “a reasonable expectation that competition in transmission development may have some beneficial impact on rates.”<sup>43</sup> As the Commission found, “[f]ederal rules should not prevent consumers from being able to benefit from the full range of advantages that competition can provide, which the preservation of barriers to entry does not allow.”<sup>44</sup> Exposing consumers to potential unjust and unreasonable costs would be contrary to the goal of benefiting consumers through competition in transmission development, such as through the competitive solicitation under the CAISO’s transmission planning process that resulted in DCRT being selected to build the Project. However, this beneficial impact on rates cannot be obtained if new transmission projects are awarded to non-incumbent transmission developers or new special purpose entities and those entities can ignore any binding cost containment measures they

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<sup>42</sup> With DCRT energizing the Project and turning it over to CAISO Operational Control, California ratepayers have been paying the Transmission Access Charge including DCRT’s Base TRR since June 12, 2024.

<sup>43</sup> *See Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000-A, 139 FERC ¶ 61,132, at PP 76-90 (2012) (“Order No. 1000-A”).

<sup>44</sup> *Id.* at P 82. *See also id.* at P 179 (“We also believe, as discussed in Order No. 1000 and herein, that the nonincumbent transmission developer reforms will lead to more competition among developers, which in turn will lead to the identification of more efficient and cost-effective transmission facilities.”).

included in their bids (and avoid any APSA or similar contractual cost containment obligations they agreed to) or propose transmission revenue requirements to be reflected in increased independent system operator (“ISO”) and regional transmission organization (“RTO”) transmission rates that are excessive or reflect the incurrence of costs that were imprudent simply because their rates are initial rates not subject to refund. The end result will be that regional transmission organizations with competitive transmission processes will decline to award projects to any entity that would need to file an initial rate, thus thwarting the Commission’s competition goals and depriving ratepayers of the true benefits of competition.

**F. The Commission Routinely Treats Transmission Revenue Requirement and Transmission Owner Tariff Filings Submitted by New Participating Transmission Owners in the CAISO as Changed Rate Filings**

The Commission routinely treats initial submissions of transmission revenue requirements by a new CAISO Participating TO under a Transmission Owner Tariff as changed rates. Such new Participating TO filings have become common in recent years as the addition of competition to the CAISO transmission planning process has resulted in Approved Project Sponsors like DCRT being selected to build new transmission projects.

For example, in *NEET West*, the applicant, an Approved Project Sponsor selected to build a 230 kV transmission project in the CAISO, filed a proposed return on equity (“ROE”) and Transmission Owner Tariff with an initial transmission revenue

requirement under FPA section 205.<sup>45</sup> The Commission accepted the NEET West Transmission Owner Tariff, suspended it for a nominal period, and set it for refund.<sup>46</sup> Under the precedent discussed above, the Commission would not have had the authority to suspend the NEET West Transmission Owner Tariff with an initial transmission revenue requirement if the Commission concluded the NEET West filing was an initial rate filing. The Commission found NEET West’s requested base ROE raised issues of material fact and set it for hearing and settlement judge procedures.<sup>47</sup> The Commission did not initiate an FPA section 206 proceeding in the *NEET West* case.

Similarly, in a case where Morongo Transmission LLC (“Morongo Transmission”) filed a proposed Transmission Owner Tariff establishing an initial transmission revenue requirement, the Commission accepted the Morongo Transmission TO Tariff, suspended it for a nominal period and set it for refund.<sup>48</sup> In *Morongo Transmission*, the Commission did not treat Morongo Transmission’s filing of an initial TO Tariff as an “initial rate filing” which cannot be suspended. The Commission did not initiate an FPA section 206 proceeding in *Morongo Transmission*.

Both *NEET West* and *Morongo Transmission* led to settlement agreements on an appropriate ROE.

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<sup>45</sup> *NextEra Energy Transmission W., LLC*, 154 FERC ¶ 61,009 (2016) (“*NEET West*”). The applicant, NextEra energy Transmission West, LLC (“NEET West”), also filed a request to recover certain transmission rate incentives pursuant to FPA sections 205 and 219 and Commission Order No. 679.

<sup>46</sup> *Id.* at P 1 and Ordering Paragraph (C).

<sup>47</sup> *Id.* at P 96.

<sup>48</sup> *Morongo Transmission LLC*, 174 FERC ¶ 61,171, at P 1 and Ordering Paragraph (B) (2021) (“*Morongo Transmission*”).

The following is a sampling of other Commission orders where the Commission accepted Transmission Owner Tariff filings establishing an initial transmission revenue requirement, suspended them and set them for hearing and settlement procedures subject to refund:

- *DesertLink, LLC*, 158 FERC ¶ 62,189 (2017) (delegated letter order initially setting formula to calculate annual transmission revenue requirement for hearing subject to refund);
- *DesertLink, LLC*, 161 FERC ¶ 61,126 (2017) (subsequent Commission order setting formula to calculate annual transmission revenue requirement for hearing);
- *MidAm. Cent. Ca. Transco, LLC*, 147 FERC ¶ 61,179 (2014);
- *TransCanyon DCR, LLC*, 152 FERC ¶ 61,017 (2015);
- *GridLiance W. Transco LLC*, 158 FERC ¶ 62,136 (2017) (delegated letter order initially setting formula to calculate annual transmission revenue requirement for hearing subject to refund);
- *GridLiance W. Transco LLC*, 160 FERC ¶ 61,003 (2017) (subsequent Commission order setting formula to calculate annual transmission revenue requirement for hearing); and
- *StarTrans IO, L.L.C.*, 122 FERC ¶ 61,306 (2008).<sup>49</sup>  
Many of these initial Transmission Owner Tariff and transmission revenue

requirement proceedings result in settlements. An older proceeding highlights how Transmission Owner Tariff filings with initial transmission revenue requirements are treated in a case that went to a full hearing, initial decision, and Commission order on that initial decision. In 2004, the CAISO selected Trans-Elect Inc. (“Trans-Elect”), together

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<sup>49</sup> DCRT and Startrans IO, L.L.C. are both indirectly owned by common parent companies, Lotus Infrastructure, LLC, and Starwood Energy Group Global, L.L.C. See *Beaver Falls, L.L.C., et al.*, Notice of Non-Material Change in Status, Docket No. ER15-1456-000, at 3 (Apr. 22, 2024); *Marco DM Holdings, L.L.C.*, Triennial Market Power Update for the Southwest Power Pool Region, Docket No. ER18-920-009, at 3-4, n.8 (Dec. 23, 2021).

with Pacific Gas and Electric Company (“PG&E”), to build an 83-mile, 500 kV transmission line within the Path 15 transmission corridor to relieve capacity constraints in California, and make related modifications to two PG&E substations (“Path 15 Project”).<sup>50</sup> In January 2003, Trans-Elect had become a Participating Transmission Owner in the CAISO.<sup>51</sup>

On October 4, 2004, the Commission received Trans-Elect’s transmission revenue requirement and TO Tariff filing (“Path 15 Filing”), which it treated as a changed rate pursuant to section 205 of the FPA and section 35.13 of the Commission’s regulations.<sup>52</sup> The Commission: (1) found that the Path 15 Filing had not been shown to be just and reasonable;<sup>53</sup> (2) found that the transmission revenue requirement and Transmission Owner Tariff filing raised issues of material fact that could not be resolved based on the record before it and were more appropriately addressed in hearing and settlement judge procedures;<sup>54</sup> (3) suspended the rate for a nominal period to make it effective upon commencement of commercial operation of the Path 15 Project, subject to refund;<sup>55</sup> and (4) established a hearing to be held in abeyance to provide time for settlement judge

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<sup>50</sup> *Trans-Elect NTD Path 15, LLC*, 109 FERC ¶ 61,249, at P 2 (2004) (“Trans-Elect Order”).

<sup>51</sup> *See Cal. Indep. Sys. Operator Corp.*, Commission Letter Order, Docket No. ER03-1217-000 (Oct. 14, 2003).

<sup>52</sup> Trans-Elect Order at P 6 (citing 18 C.F.R. § 35.13 (2004) and Ordering Paragraph (B)).

<sup>53</sup> *Id.* at P 31.

<sup>54</sup> *Id.* at P 30.

<sup>55</sup> *Id.* at P 31.

procedures.<sup>56</sup> The Commission did not establish an FPA section 206 proceeding for the Path 15 Filing.

The Commission maintained that the burden of proof rested with the applicant, Trans-Elect, in its Order on Initial Decision and Order Denying Rehearing.<sup>57</sup> The Commission ultimately required refunds over a period longer than the 15-month period for which refunds can be awarded under section 206 of the FPA.<sup>58</sup> The CAISO respectfully submits the Trans-Elect proceeding can serve as a model for Your Honor's findings on the issues addressed in this Brief.

The CAISO acknowledges there are a small number of cases involving initial Transmission Owner Tariff filings with transmission revenue requirement submissions in which the Commission has treated the filing as an "initial rate filing."<sup>59</sup> As explained above, these cases are exceptions to the Commission's routine practice in treating such filings by new Participating Transmission Owners. Notably, however, in each of these outlier cases, the Commission: (1) found that the rate in question was an initial rate; (2) accepted the rate without suspension; and (3) explicitly initiated a section 206

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<sup>56</sup> *Id.* at P 32.

<sup>57</sup> *Trans-Elect NTD Path 15, LLC*, Order on Initial Decision, 117 FERC ¶ 61,214, at P 58 (2006); *Trans-Elect NTD Path 15, LLC*, Order Denying Rehearing, 119 FERC ¶ 61,093, at P 16 (2007).

<sup>58</sup> The Commission approved a refund period for charges that would have been assessed from December 22, 2004 through March 31, 2007. *See Trans-Elect NTD Path 15, LLC*, Refund Report, Docket No. ER05-17-009 (Sep. 27, 2007); *Atl. Path 15, LLC*, Docket No. ER05-17-009 (Commission letter order accepting Refund Report, Dec. 13, 2007).

<sup>59</sup> *See, e.g., Trans Bay Cable, LLC*, 132 FERC ¶ 61,083, at PP 25-28 (2010); *Citizens S-Line Transmission LLC*, 178 FERC ¶ 61,067, at P 28.

proceeding, consistent with the requirements of FPA section 206(b). The Commission has done none of these things in the DCRT orders in these consolidated proceedings.

**G. There Is No Legal Basis to Modify the Commission’s DCRT Orders at This Time or Correct Any Claimed Legal Errors in Those Orders**

Any finding by Your Honor that the DCRT TO Tariff/Base TRR Filing is an initial rate filing and that the Commission should have initiated (or implicitly did initiate) a proceeding under FPA section 206 in this case would by necessity be a finding that the Commission made the following legal errors:

- The Commission erred in suspending and setting for refund an initial rate filing, as the Commission repeatedly stated it was doing in September 2023 Hearing Order;
- The Commission erred by failing to establish a refund effective date for the FPA section 206 proceeding; and
- The Commission erred by failing to publish notice of its intention to initiate such a section 206 proceeding.

To the extent Your Honor might consider a finding that the DCRT TO Tariff/Base TRR Filing is an initial rate and that the Commission did not initiate a section 206 proceeding, it arguably would have been legal error for the Commission to order any hearing at all.

It is possible some participant in this proceeding may now believe the orders issued in these consolidated proceedings – the September 2023 Hearing Order in particular – contain such errors and that the Commission should have: (1) accepted the DCRT TO Tariff/Base TRR Filing without suspension and (2) initiated an FPA section 206 proceeding and established a refund effective date. The time for a participant to seek corrections of such claimed errors and modifications or to seek rehearing of the Commission’s orders has long since passed. By statute, all requests for rehearing for

rehearing of Commission orders under the FPA are due within 30 days of the issuance of the orders.<sup>60</sup> If no party requests rehearing within 30 days of the issuance of a Commission order under the FPA, that order becomes final and non-appealable.<sup>61</sup> No party requested rehearing of the September 2023 Hearing Order.

The CAISO also respectfully submits that Your Honor does not have authority to correct claimed errors in the Commission’s orders in these consolidated proceedings or apply those orders in a manner inconsistent with the express language in the orders. If Your Honor were to do so on the basis of a participant’s brief, Your Honor would be doing something the Commission does not have legal authority to do – modifying a Commission order or correcting claimed legal errors based on an out-of-time rehearing request. Correcting errors in Commission orders or modifying those orders would also be beyond the scope of the issues set for hearing in these proceedings.

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<sup>60</sup> 16 U.S.C. § 8251(a)

<sup>61</sup> See, e.g., *La. Pub. Serv. Comm’n v. Entergy Corp.*, 162 FERC ¶ 61,234, at P 149 (2018) (“Accordingly, we find that the Presiding Judge correctly found that the Louisiana Commission failed to take the critical step of seeking rehearing of the 2012 Rehearing Order. The 2012 Rehearing Order is the final order in that docket and is no longer subject to judicial review.”); *Old Dominion Elec. Coop. v. Pub. Serv. Elec. & Gas Co.*, 105 FERC ¶ 61,094, at P 17 (2003) (finding that “[b]ecause ODEC did not seek rehearing of the Complaint Order, that order became final and non-appealable 30 days following its issuance”); *CNG Transmission Corp.*, 86 FERC ¶ 61,013, at 61,030 (1999) (“Since no parties have filed a request for rehearing of that order, it is final and non-appealable.”).

## **H. DCRT Bears the Burden of Proof in These Proceedings**

For all the reasons set forth above, Your Honor should find the Commission established these proceedings to consider the justness and reasonableness of the DCRT TO Tariff/Base TRR Filing as a changed rate filing under section 205 of the FPA. In a case under section 205 of the FPA, the public utility making the section 205 filing bears the burden of proof.<sup>62</sup> In this case, DCRT is the utility that has made the applicable section 205 filings and therefore bears the burden of proof.

Whatever ruling Your Honor makes on the general burden of the proof in this proceeding, Your Honor's findings should not prejudice the burden of proof on individual issues in this proceeding such as force majeure or prudence.

## **I. Whichever Party Bears the Burden of Proof in These Proceedings Should Have the Right to Submit Final Rebuttal Testimony**

In recognition of equitable considerations, the party bearing the burden of proof in Commission proceedings has the right to submit the last round of testimony.<sup>63</sup> Your Honor should find that the party having the burden of proof in this proceeding will submit the final round of testimony prior to hearings in these proceedings. As explained above, the CAISO believes DCRT has the burden of proof and should have this right. If

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<sup>62</sup> See, e.g., *Sw. Power Pool, Inc.*, 182 FERC ¶ 61,014, at PP 21-22 (2023); *Nw. Corp.*, 155 FERC ¶ 61,158, at P 29 (2016).

<sup>63</sup> See, e.g., *BP Pipelines (Alaska) Inc.*, 146 FERC ¶ 63,019, at P 114 (2014), *aff'd in relevant part*, Opinion No. 544, 153 FERC ¶ 61,233 (2015) (finding “the party with the burden of proof has the customary right of final rebuttal”) (internal quotation marks omitted); *Nw. Corp.*, 140 FERC ¶ 63,023, at P 79 (2012), *aff'd*, Opinion No. 530, 147 FERC ¶ 61,049 (2014) (“Finally, as a matter of fairness, NorthWestern has taken for itself the customary rights of the party with the burden of proof, such as the right to file rebuttal testimony.”).

Your Honor finds that the intervenors including the CAISO have the burden of proof, they should have the right to submit the final round of testimony in this proceeding.

### III. CONCLUSION

Wherefore, for the foregoing reasons, the CAISO respectfully requests Your Honor find: (1) the Commission has not found that the DCRT TO Tariff/Base TRR Filing is an “initial rate filing;” (2) the Commission has accepted the DCRT TO Tariff/Base TRR Filing and suspended the filing for a nominal period subject to refund and to the outcome of hearing and settlement judge procedures as a filing under section 205 of the FPA; (3) the Commission has not initiated a proceeding under section 206 of the FPA concerning the DCRT TO Tariff/Base TRR Filing; (4) in the section 205 proceeding set for hearing DCRT has the burden of proof; and (5) whichever participant or participants have the burden of proof will submit final rebuttal testimony.

Respectfully submitted,

/s/ Sean A. Atkins

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May 15, 2025

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 15th day of May, 2025.

/s/ Deiman Flores

Deiman Flores

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