UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

BRIEF ON EXCEPTIONS OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION

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Table of Short Versions of Terms and Acronyms Used in This Brief on Exceptions

ACC	Arizona Corporation Commission
AFUDC	allowance for funds used during construction
ALJ	Administrative Law Judge
APS	Arizona Public Service Company
APSA	Approved Project Sponsor Agreement
BLM	Bureau of Land Management
CAISO	California Independent System Operator Corporation
CIAC	Contributions in Aid of Construction
Commission	Federal Energy Regulatory Commission
CPCN	Certificate of Public Convenience and Necessity
CPUC	California Public Utilities Commission
D.C. Circuit	United States Court of Appeals for the District of Columbia Circuit
DCRT	DCR Transmission, L.L.C.
DEIS	Draft Environmental Impact Statement
DRECP	Desert Renewable Energy Conservation Plan
EO	Executive Order on Securing the United States Bulk Power System (May 1, 2020)
EPC	engineering, procurement, and construction
EQR	Electric Quarterly Report
FEIS	Final Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
GridForce	GridForce Energy Management, LLC

ISO	Independent System Operator
kV	kilovolt
LGIA	Large Generator Interconnection Agreement
MISO	Midcontinent Independent System Operator, Inc.
NERC	North American Electric Reliability Corporation
NextEra	NextEra Energy Transmission, Midwest, LLC
New York Transco	New York Transco, LLC
NYISO	New York Independent System Operator, Inc.
NYPA	New York Power Authority
O&M	operations and maintenance
Order 3355	Secretarial Order No. 3355 issued by the U.S. Secretary of the Interior (Aug. 31, 2017)
Project	Delaney-Colorado River 500 kV Transmission Project, subsequently renamed the Ten West Link Transmission Project
PTO	Participating Transmission Owner
ROD	Record of Decision
RTO	Regional Transmission Organization
SCE	Southern California Edison Company
SDA	Selected Developer Agreement
TO	Transmission Owner
TRR	transmission revenue requirement
WHO	World Health Organization

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BRIEF ON EXCEPTIONS OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION

Pursuant to Rule 711 of the Commission's Rules of Practice and Procedure[1] the CAISO submits this Brief on Exceptions regarding the Initial Decision issued in this proceeding on October 22, 2026.[2].

I. Summary of This Brief on Exceptions

This case is about whether ratepayers will receive the benefits of a contractually binding cost cap voluntarily agreed to by a transmission developer as a condition of being selected to build a project in the CAISO transmission planning and competitive solicitation process. Enforcing the contract in question—the DCRT APSA—is essential to preserving the integrity of the CAISO's Commission-approved competitive solicitation process. The primary reason the CAISO selected DCRT as the Approved Project Sponsor for the Ten West Link Project was due to its lower projected revenue requirements and the robustness of the capital cost containment measures in DCRT's bid compared with competing Project Sponsors. The DCRT APSA binds DCRT, as the successful bidder for the Project, to the terms that formed the basis for the CAISO's selection, including binding cost caps and cost containment measures. Without

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1 18 C.F.R. § 385.711.

2 *DCR Transmission, L.L.C.*, 197 FERC ¶ 63,003 (2026) ("Initial Decision").

enforcement of the DCRT APSA, the CAISO's competitive process and important policies underlying Order No. 1000 would be meaningless and ratepayers would be exposed to bait-and-switch pricing.

There is no dispute the capital costs to be recovered in the Base TRR DCRT proposes in this proceeding are subject to a $258,961,024 binding cost cap in the DCRT APSA. The total Project costs DCRT claims are recoverable through its Base TRR total $553,261,497, almost $300 million above that contractual cost cap. DCRT argues it should be allowed to recover most of these above-cap costs based on theories that have no basis in the DCRT APSA or in DCRT's competitive solicitation bid, including a base year adjustment and a "regulatory compliance" cost cap exclusion which do not exist in either document. The Initial Decision correctly found the majority of DCRT's above-cap capital costs are not properly recovered in its Base TRR. The CAISO supports the bulk of the Presiding Judge's findings but does ask the Commission to grant exceptions and modify the Initial Decision on a handful of issues.

The Initial Decision erred in allowing DCRT to recover more than $30 million in unsupported capital costs resulting from delays due to events of force majeure. The CAISO does not dispute that COVID-19 constituted an event of force majeure, but the Initial Decision would allow DCRT to recover costs for a 38-month "delay" based solely on the duration of the pandemic declaration by the World Health Organization even though the Project was not actually delayed by 38 months. The 38-month finding in the Initial Decision cannot be reconciled with DCRT's contract. The DCRT APSA allows DCRT to recover capital costs above the cap only for "FERC approved costs resulting from delays due to events of Force Majeure." The record demonstrates the only actual delay to the Project attributable to COVID-19 delay is the roughly nine-month suspension of the CPUC CPCN proceeding for the Project. The Initial Decision

cited no specific delay for most of the 38 months, relying on unsupported and speculative testimony that work during COVID-19 became "harder and slower." DCRT's own schedule refutes the finding that COVID-19 resulted in any delay after the CPCN proceeding resumed. DCRT's pre-pandemic schedule contemplated about 2.5 years from CPCN to service, and it took about 2 years and 7 months for this to occur (CPCN on November 4, 2021, service in June 2024). The emergency declaration of the WHO imposed no restrictions of its own, and state and local COVID-19 restrictions exempted construction and essential activities. The evidence also shows DCRT contributed to any Project delay during the term of COVID-19, including by waiting to execute an amended EPC contract, despite the DCRT ASPA's obligation to exercise due diligence to minimize the impacts of any force majeure event.

The Commission should reverse the finding in the Initial Decision that a December 2018 to January 2019 government shutdown was an event of force majeure that caused 28 days of delay to the Project. The Commission's order accepting the CAISO's *pro forma* APSA adopted the common understanding of force majeure, which requires that an event be unforeseeable. Even assuming this shutdown could meet the force majeure definition, DCRT offered only speculation, not evidence of delay to the Project from the shutdown. DCRT failed to produce emails from its witness alleging shutdown delays DCRT claimed to rely upon. The Presiding Judge properly discounted this testimony but chose to adopt a finding of a 28-day delay based solely on speculation, ignoring evidence any delay would have been minimal due to multiple federal holidays and the well-understood impact of end-of-the-year vacations.

The Initial Decision also improperly read out of the DCRT ASPA notice requirements for force majeure events. Despite the fact the cost cap exclusion set forth in Appendix E of the DCRT APSA for "delays due to events of Force Majeure" uses the defined term contained in the

body of the contract, the Initial Decision found DCRT had no obligation to comply with the force majeure notice provisions of the DCRT APSA. This finding is not only contrary to fundamental principles of contractual interpretation, but it would also harm ratepayers by allowing Approved Project Sponsors to raise force majeure cost cap exclusions for the first time in a rate filing years after the claimed events of force majeure. This reading would deprive the CAISO of timely information to oversee projects, the chance to consider mitigation of claimed events of force majeure or replacement of a project, or the opportunity to decide whether to terminate a project where the costs exceed benefits. Divorcing the force majeure cost cap exclusion from notice requirements would affect most CAISO APSAs, which contain similar exclusions. In this case, DCRT gave timely force majeure notice only for COVID-19. DCRT treated other events, including the government shutdown, as mere routine delays for reasons other than force majeure, only recharacterizing these events when it sought to recover almost $300 million in excess of its cost cap.

The Commission should reverse the Initial Decision's findings DCRT is permitted to recover $2.6 million in above-cap costs resulting from delays caused by an interconnecting Participating Transmission Owner. DCRT failed to prove the Transmission Owner caused a delay or the alleged costs caused by this delay. DCRT and the contractor DCRT selected to act as its Transmission Operator had not completed the steps needed to operate in the CAISO footprint at the time of the alleged delay, so the Project could not have entered operation even if the transmission owner delay had occurred. Moreover, the record shows DCRT contributed to the alleged delay in other ways.

The Initial Decision also makes unsupported findings regarding the burden of proof associated with affirmative defenses under contracts in a proceeding under section 206 of the

Federal Power Act. These findings are contrary to precedent and will make it harder to enforce contractual cost caps in the future. The CAISO does not dispute in this Brief on Exceptions that the hearing on DCRT's proposed Base TRR is subject to FPA section 206. DCRT admits its Base TRR exceeds the contractual cost cap in the DCRT APSA, demonstrating in the first instance the proposed TRR is unjust and unreasonable. DCRT then seeks to rely on cost cap exclusions, including those related to force majeure, to justify its departure from the cost cap. These arguments are affirmative defenses arising under a contract (irrespective of section 206)—the DCRT APSA—for which DCRT bears the burden under Commission precedent and California law. The Initial Decision's characterization of these affirmative defenses as the exercise of "contractual rights" does not alter the nature of these defenses. Once the record showed DCRT's recovery is limited by the DCRT APSA, the burden of production shifted to DCRT. The section 206 burden of proof did not shift.

Lastly, the Initial Decision makes several findings regarding the jurisdictional status of the DCRT APSA which would improperly limit the Commission's jurisdiction and would undermine the Commission's rules allowing the submission of conforming contracts based on *pro forma* agreements via Electric Quarterly Reports. Contrary to the Presiding Judge's findings, the entire DCRT APSA is jurisdictional, not just Section 10.1 and Appendix E. Section 205(c) of the FPA requires the filing of contracts that "affect or relate to" rates, terms, and conditions of jurisdictional transmission service, and the Commission routinely requires filing of a wide range of agreements under this standard. Under the Initial Decision's logic for determining whether a contract is a service agreement which should be filed for acceptance, the Commission might lack jurisdiction over countless agreements currently on file.

It is also error to suggest the DCRT APSA should have been filed for Commission acceptance as a non-conforming agreement rather than submitted via the CAISO's EQR submissions. The Initial Decision acknowledged that the body of the DCRT APSA matches the *pro forma* APSA. The *pro forma* agreement accepted by the Commission expressly contemplates that cost estimates, binding caps, and cost containment measures will be specified in Appendix E. The fact that those details are important does not render the DCRT APSA non-conforming. Other ISOs and RTOs are not required to file agreements with cost caps as non-conforming, and the Commission has never suggested the APSAs should have been filed.

II. List of Exceptions

1. The Initial Decision erred in finding DCRT bears no burden for affirmative defenses, including but not limited to claimed Force Majeure cost cap exceptions.[3]
2. The Initial Decision erred in finding only Section 10.1 and Appendix E of the DCRT APSA are Commission-jurisdictional.[4]
3. The Initial Decision erred in finding the DCRT APSA should have been filed for Commission acceptance instead of being included in the CAISO's EQR.[5]
4. The Initial Decision erred in finding that SCE caused a 25-day delay to the Project and that DCRT may therefore exclude $2,627,527 from the binding cost cap under Bullet #5 of Appendix E of the DCRT APSA.[6]
5. The Initial Decision erred in finding that the federal government shutdown from December 22, 2018, through January 25, 2019, constituted an event of Force Majeure

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3 Initial Decision at PP 142-43

4 *Id.* at P 166 n.416.

5 *Id.* at PP 167-70, 739.

6 *Id.* at PP 257-77.

under the DCRT APSA, caused 28 days of Project delay, and supported recovery of a month of management run-rate costs and associated AFUDC.[7]

6. The Initial Decision erred in finding that COVID-19 caused 38 months of Project delay, measured from the WHO's March 11, 2020 pandemic declaration through expiration of the federal public health emergency on May 11, 2023, and that DCRT may recover management run-rate costs and associated AFUDC for that entire period.[8]

7. The Initial Decision erred in finding that Bullet #5 of Appendix E of the DCRT APSA depends only on whether an event meets the APSA definition of Force Majeure, that Section 13.1.1's notice and due diligence requirements do not apply to a request for above-cap recovery under Bullet #5, and that DCRT therefore may obtain recovery for an alleged Force Majeure event without timely notice, or any notice to the CAISO.[9]

III. Statement of the Case

A. Background of This Proceeding Relevant to This Brief on Exceptions

The CAISO selected DCRT in a competitive solicitation as part of the CAISO's 2013-2014 transmission planning process to be the Approved Project Sponsor to build the Project, due to its lower projected revenue requirements and commitment to binding cost cap and capital cost containment measures.[10] On June 30, 2023, DCRT filed its proposed TO Tariff and Base TRR (together, "Tariff Records") for the Project in Docket No. ER23-2309-000 ("Tariff Records

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7 *Id.* at PP 357-64, 376.

8 *Id.* at PP 346-56, 366-76.

9 *Id.* at PP 335-38.

10 CAISO, *Delaney-Colorado River Transmission Line Project, Project Sponsor Selection Report*, at 102, 131 (July 10, 2015), available at https://www.caiso.com/documents/delaneycoloradorivertransmissionlineproject-projectsponsorselectionreport.pdf.

Filing").[11] The Tariff Records Filing indicated DCRT sought to recover a Base TRR based on capital costs more than double the construction cost cap set forth in the DCRT APSA (discussed below in Section III.B of this Brief on Exceptions).[12] On September 29, 2023, the Commission issued an order accepting DCRT's proposed Tariff Records and suspending them for a nominal period, subject to refund and to the outcome of hearing and settlement judge procedures.[13]

On March 4, 2024, DCRT filed a request in Docket No. ER24-1394-000 to establish an indefinite effective date for the Tariff Records. On May 2, 2024 (as corrected on July 31, 2024), the Commission issued an order granting DCRT's request, subject to refund and the outcome of the existing hearing and settlement judge procedures, and consolidating Docket Nos. ER23-2309-000 and ER24-1394-000.[14]

Following ultimately unsuccessful efforts at settlement over a two-year period to resolve contested issues in the proceeding, the Chief Administrative Law Judge terminated the settlement judge procedures and designated Judge Joel deJesus as the Presiding Judge for the purpose of conducting a hearing and issuing an initial decision in the case.[15] On May 22, 2025, Judge deJesus ruled that the Tariff Records Filing was an initial rate filing under section 206 of the FPA, a ruling the Commission initially reversed in an order on interlocutory appeal issued on June 20, 2025 but subsequently upheld in two successive orders on rehearing issued,

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[11] DCRT later supplemented the Tariff Records Filing on July 3 and August 18, 2023.

[12] Transmittal letter for Tariff Records Filing at 6-7.

[13] *DCR Transmission, L.L.C.*, 184 FERC ¶ 61,199, at PP 1, 40, and Ordering Paragraphs (A)-(E) (2023).

[14] *DCR Transmission, L.L.C.*, 187 FERC ¶ 61,057 (2024); *DCR Transmission, L.L.C.*, Errata Notice, 188 FERC ¶ 61,092 (2024).

[15] *DCR Transmission, L.L.C.*, Order of Chief Judge Terminating Settlement Judge Procedures, Designating Presiding Administrative Law Judge and Establishing Track II Procedural Time Standards, Docket Nos. ER23-2309-000 and ER23-2309-001 (Apr. 2, 2025) (as corrected May 7, 2025).

respectively, on January 30 and June 4, 2026.[16] The CAISO and other parties in the proceeding later filed petitions for review of the two orders on rehearing, which are currently pending before the D.C. Circuit.

The hearing in this proceeding was held from January 12 to February 5, 2026, and from April 8 to June 3, 2026, with a mid-hearing recess occurring between those two sets of dates. The Presiding Judge issued the Initial Decision in this proceeding on October 22, 2026.

B. The CAISO's *Pro Forma* APSA and the DCRT APSA

Consistent with Rule 711(b)(1)(ii), this Brief on Exceptions includes references to pages of the record or exhibits relevant to the limited exceptions identified by the CAISO. The CAISO also believes the following general background on the Commission's acceptance of the *pro forma* APSA, how the DCRT APSA conforms with that *pro forma* agreement, and the cost cap and cost containment provisions in the DCRT APSA will assist the Commission in considering these exceptions.

In 2014, the CAISO filed and the Commission accepted the *pro forma* APSA for inclusion in Appendix X of the CAISO tariff.[17] The *pro forma* APSA "sets forth the terms and conditions that will govern an approved project sponsor's responsibilities and relationship with

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[16] See *DCR Transmission, L.L.C.*, 191 FERC ¶ 63,022, *order on interlocutory appeal*, 191 FERC ¶ 61,212 (2025), *order on reh'g*, 194 FERC ¶ 61,085 ("January 2026 Order"), *order on reh'g*, 195 FERC ¶ 61,181 ("June 2026 Order") (2026). In the penultimate order cited in this footnote, the Commission also instituted a proceeding pursuant to FPA section 206 (Docket No. EL26-34), established a refund effective date of June 12, 2024, and consolidated Docket Nos. ER23-2309, ER24-1394, and EL26-34 for purposes of hearing. January 2026 Order at PP 2, 14.

[17] *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107, at P 1 and Ordering Paragraph (A) (2014) ("Pro Forma APSA Order"). Specifically, the Commission conditionally accepted the *pro forma* APSA subject to revisions it directed the CAISO to make on compliance. *Id.* The Commission accepted the CAISO's subsequent compliance filing. *Cal. Indep. Sys. Operator Corp.*, Commission letter order, Docket No. ER14-2824-001 (Feb. 12, 2015) ("Pro Forma APSA Compliance Letter Order"). The Commission later accepted revisions to the *pro forma* APSA in Docket Nos. ER16-767, ER20-2374, ER23-1977, ER23-2557, and ER24-2687 that have no relevance to this proceeding. *See* Exh. No. CSO-0001 REV3 at 29:1-8.

CAISO during the period prior to the time that the CAISO assumes operational control over the approved project sponsor's transmission facilities."[18]

The DCRT APSA is on file with the Commission in the CAISO's EQR as Service Agreement No. 3496 under the CAISO OATT.[19] The DCRT APSA was originally executed in 2015 and was subsequently amended three times (in 2018, 2022, and 2024).[20] Apart from DCRT-specific references and provisions used to fill in placeholders in the title page caption, introductory paragraph, recitals, signature block, and appendices of the *pro forma* APSA, the DCRT APSA is identical to the *pro forma* APSA in effect at the time the DCRT APSA was executed.[21]

DCRT's recovery of capital costs is limited by the applicable terms of the DCRT APSA. The cost cap and cost containment provisions are set forth in interrelated parts of Sections 10.1 and 10.1.1 and Appendix E of the DCRT APSA. Section 10.1 states in relevant part that "[t]he Approved Project Sponsor acknowledges and agrees with the cost estimates and the binding cost cap, or other binding cost containment measures, if applicable, set forth in Appendix E."[22] Section 10.1.1 of the DCRT APSA states in relevant part:

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[18] Pro Forma APSA Order at P 1.

[19] Exh. No. CSO-0001 REV3 at 29:11-19. The vast majority of contracts with parties taking service under the CAISO tariff are based on *pro forma* agreements approved by the Commission and included in the CAISO tariff. Those contracts satisfy Commission filing requirements through EQR reporting and include most of the hundreds of generator interconnection and market agreements with the CAISO. Exh. No. CSO-0001 REV3 at 29:20-30:4.

[20] *See* Exh. No. DCT-0002 at 37, 59, 73, and 84. Specifically, the CAISO and DCRT executed the original version of the DCRT APSA on December 1, 2015. *Id.* at 37. The DCRT APSA was first amended on August 24, 2018. *Id.* at 56-69. The DCRT APSA was amended for a second time on March 7, 2022. *Id.* at 70-80. The DCRT APSA was amended for a third and final time on March 13, 2024. *Id.* at 81-87.

[21] *Compare* Exh. No. DCT-0002 *with* Exh. No. CDN-0003. Specifically, to see the only differences between the *pro forma* APSA and the DCRT APSA due to the DCRT-specific provisions described above, compare Exh. No. DCT-0002 at 3 (title page), 5 (introductory paragraph and recitals), 37 (signature block), and 38-87 (appendices and amendments to the DCRT APSA to implement them), with Exh. No. CDN-0003 at 2 (title page), 4-5 (recitals), 35-36 (signature block), and 37-43 (appendices).

[22] Exh. No. DCT-0002 at 20. Article 1 of the DCRT APSA (entitled "Definitions") states that, "[w]hen used in this Agreement, a term with initial capitalization shall have the meaning set forth in this Article 1 or the recitals,

> The Approved Project Sponsor agrees that it shall not seek, for recovery through its Transmission Revenue Requirement, higher costs than the maximum costs specified in, or determined in accordance with, any cost cap or other binding cost containment measures as specified in Appendix E except for costs incurred to comply with any additional specifications of the CAISO or Interconnecting PTO beyond the functional requirements for the transmission facility that the CAISO issued for the competitive solicitation. The Approved Project Sponsor shall not seek recovery through its Transmission Revenue Requirement of any incentives or other costs that it has agreed to forego, as specified in Appendix E.[23]

Appendix E of the DCRT APSA contains a table listing "estimated cost components for the Project" by cost category and dollar amount, and states "Approved Project Sponsor may adjust the amounts in each cost category as needed during the term of this Agreement provided the total Project cost does not exceed $258,961,024 in 2020 dollars."[24] The term of the DCRT APSA is ongoing with regard to the issues in this proceeding, which are governed by Section 10.1.1.[25]

Appendix E also states in relevant part that, "[f]or avoidance of doubt, the following costs are not included in the cost cap referenced in Section 10.1.1 and will be entitled to recovery through Approved Project Sponsor's Transmission Revenue Requirement":[26]

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or if not defined in this Article 1 or the recitals, shall have the meaning specified in the Article in which it is used or in the CAISO Tariff, Appendix A." *Id.* at 6.

[23] *Id.* at 20. The exception stated in Section 10.1.1 for "costs incurred to comply with additional specifications of the CAISO or Interconnecting PTO" parallels the exclusion from the cost cap contained in Bullet #3 in Appendix E quoted below.

[24] *Id.* at 77.

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

[26] *Id.* at 77.

- "Any FERC approved costs incurred by Approved Project Sponsor related to the Transmission Interconnection Facilities, or the Transmission Interconnection Service, including Metering Equipment, air gap on the series compensation equipment required by an Interconnection PTO and upgrades required at the Colorado River substation" ("Bullet #1").[27]

- "Any FERC approved costs incurred by Approved Project Sponsor as a result of a delay caused by CAISO's unilateral amendment of this Agreement to eliminate a conflict with Applicable Laws and Regulations or Applicable Reliability Standards, as permitted by Section 4.4" ("Bullet #2").[28]

- "Any FERC approved costs incurred by Approved Project Sponsor to make changes to the Project under Section 5.4, to the extent that such changes were not included in the functional requirements for the transmission facility that the CAISO issued for the competitive solicitation or the Approved Project Sponsors bid" ("Bullet #3").[29]

- "Any FERC approved costs incurred by Approved Project Sponsor to remedy deficiencies in accordance with Section 5.5.3" ("Bullet #4").[30]

- "Any FERC approved costs resulting from delays due to events of Force Majeure, not covered by insurance, or caused by an Interconnecting PTO" ("Bullet #5").[31]

- "The Approved Project Sponsor agrees that it will not recover Construction Work In Progress during development of the Project" ("Bullet #6").[32]

In addition, Appendix E states that in the event of a Change of Route (as that term is defined in Appendix E), "Project Sponsor will be entitled to request a modification to the Project Cost Cap per Appendix E of this Agreement."[33] Appendix E goes on to state that if a regulatory agency imposes a Change of Route, "the Approved Project Sponsor agrees that as another cost containment measure, the Approved Project Sponsor will bear all costs associated with such

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27 *Id.*

28 *Id.*

29 *Id.* at 78.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

change up to $5,000,000 cumulatively and not increase the total Project cost cap."[34] Appendix E of the DCRT APSA sets forth the process for amending the Project cost cap for Change of Route costs in excess of $5 million.

Lastly, Appendix E specifies that "[c]hanges to the Project cost cap for any reason other than those explicitly specified herein are not permitted without the approval of both the CAISO and FERC."[35]

IV. Arguments

A. The Initial Decision Erred in Finding DCRT Bears No Burden to Justify Affirmative Defenses, Including but Not Limited to Claimed Force Majeure Cost Cap Exceptions

The Initial Decision stated, "Despite the statutory allocation of burden of proof to the challengers of DCRT's rate, Trial Staff and various intervenors [including the CAISO] have asserted that DCRT bears the burden of proof on specific issues, particularly issues involving common law *force majeure*."[36] The Initial Decision found "the issues in this case are only adjacent to common law *force majeure* because the DCRT APSA contains an explicit provision [in Appendix E thereto] that provides that '[a]ny FERC approved costs resulting from delays due to events of Force Majeure, not covered by insurance, or caused by an Interconnecting PTO' are excluded from the stated cap on total Project costs."[37] The Initial Decision stated, "While the participants challenging DCRT's Base TRR characterize the company's reliance on this

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

[35] *Id.* at 79.

[36] Initial Decision at P 142 (citing initial post-hearing briefs of various participants and the Revised Issues Lists submitted by various participants).

[37] *Id.* (quoting Exh. No. DCT-0002 at 50 and 78).

provision as a *force majeure* claim or as an admission that it was unable to fulfill its obligation to abide by the stated cap, I find that DCRT is merely attempting to exercise provisions in the DCRT APSA that allow for recovery of costs in excess of the stated cap."[38] The Initial Decision also stated, "For the same reason, I do not find that DCRT's reliance on that cost cap exclusion, or any others, to be an affirmative defense" and that "I reject the other participants' attempts to recharacterize DCRT's efforts as asserting affirmative defenses as a way to shift their statutory burden of proof to DCRT."[39]

As explained below, the Initial Decision erred in finding DCRT lacks the burden to demonstrate that affirmative defenses excuse DCRT's admitted contractual noncompliance in this proceeding. As a general matter, the Initial Decision mistakenly found requiring DCRT to bear the burden of making out an affirmative defense in this proceeding would violate the burden of proof under section 206 of the FPA. Furthermore, as to the specific affirmative defense of Force Majeure under the DCRT APSA, the Initial Decision misconstrued the nature of the defense.

The CAISO has a pending appeal before the D.C. Circuit addressing the issue of whether the justness and reasonableness of DCRT's proposed Base TRR in this proceeding should be evaluated under section 205 or section 206 of the FPA.[40] For purposes of this Brief on Exceptions, however, the CAISO accepts the finding of the order issued in these consolidated proceedings on January 30, 2026,[41] that the CAISO, Commission Trial Staff, and other participants (collectively, "Customer Participants") carry the burden of proof under section 206

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38 *Id.*

39 *Id.* at P 143.

40 *Cal. Indep. Sys. Operator Corp. v. FERC*, D.C. Cir. No. 26-1141 (May 29, 2026).

41 January 2026 Order, *order on reh'g*, June 2026 Order, *petitions for review pending sub nom. Cal. Indep. Sys. Operator Corp. v. FERC*, *et al.*, D.C. Cir. Nos. 26-1141, *et al.*

of the FPA to show DCRT's tariff records are unjust, unreasonable, or unduly discriminatory or preferential.[42]

Specifically, the Customer Participants bear the burden of persuasion, which requires them to prove the facts needed to prevail on an issue under section 206 of the FPA.[43] The Customer Participants also bear the burden of proof, which requires them, as an initial matter, to make a *prima facie* showing that the evidence favoring their position on an issue amounts to a preponderance of the total weight of the relevant evidence on that issue—*i.e.*, to show the evidence meets a "more likely than not" standard or, expressed in percentage terms, amounts to 51 percent or more of the total weight of the relevant evidence on the issue (the "*prima facie* 51 percent burden of proof standard").[44] *Prima facie* evidence means "evidence which if unanswered would justify [persons] of ordinary reason and fairness in affirming the question which the plaintiff is bound [by the assignment of burden of proof under section 206 of the FPA and the California evidentiary rules] to maintain."[45] As part of their burden of proof, the Customer Participants also initially bear the burden of production (sometimes called the burden of going forward)—*i.e.*, the burden of producing evidence regarding the facts the Customer Participants are trying to show that meets the *prima facie* 51 percent burden of proof standard.[46]

The Initial Decision failed to recognize that under section 206, the burden of production can shift to the subject of a 206 proceeding in certain circumstances where the participant with

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

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

44 *Basin* at P 131; *SDG&E* at P 45; *Sargent Fletcher* at 284.

45 *Basin* at P 130 (quoting *SDG&E* at P 46).

46 *Basin* at P 132; *SDG&E* at PP 45-46.

the initial burden of proof has met its burden of production. In this case, the CAISO has met its burden of production by, among other things, demonstrating that DCRT's capital cost recovery is subject to, and limited by, the DCRT APSA between the CAISO and DCRT, as amended.[47] The DCRT APSA expressly restricts DCRT's capital cost recovery to a specified amount, subject to a limited number of cost cap exclusions. DCRT is not permitted to recover from CAISO transmission ratepayers any capital costs above the amount permitted under the DCRT APSA.

DCRT can attempt to show it has an affirmative defense that would allow DCRT to prevail on the issue of whether it may recover costs in excess of its capital cost cap.[48] "An affirmative defense to the evidence is different from poking holes in the evidence [*i.e.*, different from attempting to show the Customer Participants have fallen short of meeting the *prima facie* 51 percent burden of proof standard]. A defendant mounts an affirmative defense first by admitting the alleged conduct, but then offering a justification for it."[49] The party claiming an affirmative defense bears the burden of making out that defense by showing that a preponderance (*i.e.*, 51 percent or more) of the total weight of the relevant evidence indicates the affirmative defense justifies the party's conduct.[50] DCRT admits it has exceeded the DCRT APSA cost cap[51] but attempts to rely on numerous affirmative defenses, *i.e.*, the specified cost cap exclusions in the DCRT APSA. For example, DCRT claims that force majeure excuses its compliance with obligations and performance under the DCRT APSA, including the cost cap and

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47 Exh. No. DCT-0002.

48 *Basin* at PP 161-62; *Sargent Fletcher* at 282, 286.

49 *Basin* at P 161.

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

51 Exh. No. DCT-0102 REV2 PUB at 5 (at rows 5, 7).

cost containment provisions of that agreement. DCRT also claims that other cost cap exclusions in the DCRT APSA permit it to recover capital costs above its agreed-to cost cap. All of these are affirmative defenses for which DCRT, as the participant in the proceedings claiming the defense, bears the burden of providing a preponderance of the total weight of the relevant evidence.[52]

1. The Initial Decision Mistakenly Found Requiring DCRT to Bear the Burden of Making Out an Affirmative Defense in This Proceeding Would Violate the FPA Section 206 Burden of Proof

The Initial Decision found "DCRT has correctly characterized its efforts in this case" as "simply enforcing provisions in the DCRT APSA that DCRT claims allow it to seek recovery of certain Project costs in excess of the cap."[53] Specifically, the Initial Decision quoted and endorsed DCRT's explanation it was "exercising the contractual rights explicitly stated in Appendix E of the APSA—not using provisions of the APSA to excuse a lack of performance."[54] In contrast, the Initial Decision "reject[ed] the other participants' attempts to recharacterize DCRT's efforts as asserting affirmative defenses as a way to shift their statutory burden of proof to DCRT."[55]

The Initial Decision misconstrued the nature of an affirmative defense. As explained above, "[a]n affirmative defense to the evidence is different from poking holes in the evidence.

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

53 Initial Decision at P 143.

54 *Id.* (quoting DCRT Post-Hearing Reply Brief at 1).

55 *Id.*

A defendant mounts an affirmative defense first by admitting the alleged conduct, but then offering a justification for it. The defendant admits to the action he's accused of; the affirmative defense is a legally recognized excuse for the action"[56] That is exactly what happened in this proceeding. Other participants demonstrated DCRT sought to recover costs exceeding the cost cap of $258,961,024 set forth in the DCRT APSA.[57] As the Initial Decision found, DCRT admitted it sought to recover costs exceeding the specified cost cap.[58] But then DCRT offered the justification that "the DCRT APSA allows recovery of up to $565,496,397 in Project costs after considering certain adjustments to and exclusions from the cost cap."[59] Those claimed adjustments to and exclusions from the cost cap constitute DCRT's affirmative defenses to its exceeding the cost cap.

Contrary to the findings in the Initial Decision,[60] DCRT has no "contractual rights" in the first instance to cost recovery under Appendix E of the DCRT APSA. Section 10.1.1 of the *pro forma* APSA approved by the Commission requires DCRT to abide by the Appendix E cost cap.[61] DCRT is not entitled to recover *any* above-cap amounts absent express Commission approval: Bullets #1-5 in Appendix E each state that cost recovery above the cost cap thereunder

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56 *Basin* at P 161.

57 *See, e.g.*, CAISO Initial Post-Hearing Brief at xvi, 3, 14, 19.

58 *See, e.g.*, Initial Decision at P 143 ("DCRT claims [provisions in the DCRT APSA] allow it to seek recovery of certain Project costs in excess of the cost cap."); *id.* at P 184 ("DCRT has claimed that its total Project costs were $538,625,569, which is nearly $270 million more than the stated cost cap in the DCRT APSA . . . .").

59 *Id.*

60 *Id.* at P 143.

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

is allowed only for "*[a]ny FERC approved* costs."[62] To the extent the Commission is inclined to grant DCRT's claimed adjustments and exclusions, they excuse DCRT's seeking recovery of costs above the cap to which DCRT would not otherwise be entitled. In other words, these would require the Commission to recognize "a legally recognized excuse" to compliance with the DCRT APSA, *i.e.*, an affirmative defense.

The Initial Decision mistakenly claimed the other participants are attempting to shift their statutory burden of proof to DCRT.[63] As the CAISO has explained,[64] it acknowledges that pursuant to the order issued in this proceeding on January 30, 2026,[65] the Customer Participants carry the burden of proof under section 206 of the FPA to show DCRT's tariff records are unjust, unreasonable, or unduly discriminatory or preferential.[66]

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[62] Exh. No. DCT-0002 at 77-78 (emphasis added). In contrast, Bullet #6 states, "The Approved Project Sponsor agrees that it will not recover Construction Work in Progress during development of the Project." *Id.* at 78. Thus, in drafting the DCRT APSA, the CAISO and DCRT took care to distinguish bullets allowing recovery of costs only insofar as the Commission may grant its approval (Bullets #1-5) from the bullet prohibiting recovery of costs in any circumstance (Bullet #6).

[63] Initial Decision at P 143. *See also id.* at P 145 (stating "the DCRT APSA does not override the statutory burden of proof set out in section 206(b) of the FPA"). The Initial Decision also claimed (at paragraph 145) that "burden of proof should not be a factor in most contract interpretation issues" and "contract interpretation is largely a legal matter for which the burden of proof is irrelevant." Nevertheless, the Initial Decision went on to rule against participants other than DCRT on a number of matters covered by sub-issues under Section III.C of the Initial Decision (entitled "ISSUE 3: Does the DCRT APSA allow DCRT to recover capital costs in excess of the amount stated as the binding cap in Appendix E?"), based on findings that the other participants did not carry their FPA section 206 burden of proof as to those matters. *See id.* at P 254 n.648 (finding "I cannot conclude that DWR/NCPA have carried their burden of proof as to the $24,600"); *id.* at P 267 (finding "CAISO and DWR/NCPA have not met their burden of proof to show that this methodology for determining delay AFUDC costs is unjust and unreasonable"); *id.* at P 269 (stating "I do not find these objections to EPC Change Order 05 sufficient to carry the participants' burden of proof"); *id.* at P 273 (finding "DWR/NCPA clearly has not met their burden of proof that the remaining 'standby' management costs should not be included in the bullet 5 cost cap exclusions"); *id.* at P 356 (finding "CAISO, DWR/NCPA, and Trial Staff have not carried their burden of proof on their respective efforts to limit this duration"); *id.* at P 363 (finding "the various participants challenging DCRT have not met their burden of proof to show that there was no delay caused by the government shutdown"); *id.* at P 370 (finding "I reject that recommendation because DWT/NCPA did not meet their burden of proof to show that their recommended adjustment was necessary").

[64] *See* CAISO Initial Post-Hearing Brief at 1-2.

[65] January 2026 Order; *order on reh'g*, June 2026 Order, *petitions for review pending sub nom. Cal. Indep. Sys. Operator Corp. v. FERC*, *et al.*, D.C. Cir. Nos. 26-1141, *et al.*

[66] *See* FPA section 206(b), 16 U.S.C. § 824e(b); CAISO Initial Post-Hearing Brief at 1.

DCRT's affirmative defenses do not require DCRT to bear the burden of proof but *do* require DCRT to bear the burden of production to make out its affirmative defenses once the burden of production shifts to it due to the Customer Participants meeting the *prima facie* 51 percent burden of proof standard.[67]

The CAISO met its burden of production by, among other things, demonstrating that DCRT's capital cost recovery is subject to, and limited by, the DCRT APSA.[68] The DCRT APSA expressly restricts DCRT's capital cost recovery to a specified amount—the cost cap of $258,961,024 set forth in Appendix E—subject to any costs above the cap for Bullets #1-5 that the Commission may approve. To obtain such above-cap cost recovery, DCRT must meet the burden of production that shifted to it when the CAISO made its own burden of production demonstration. DCRT is not permitted to recover from CAISO transmission ratepayers any capital costs above the amount permitted under the DCRT APSA. The fact this is a proceeding under section 206 of the FPA does not excuse DCRT from its burden with respect to raising and proving affirmative defenses, which separately and independently arise under a contract—in this case, the DCRT APSA. Affirmative defenses are not present in a generic section 205/section 206 proceeding where no contractual obligations are implicated. But this is not a generic section 206 proceeding. DCRT's right to cost recovery is limited by the DCRT APSA. Section 11.2.1 of the DCRT APSA provides that "each of its provisions" are governed by California law."[69] As

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[67] *Basin* at P 174 ("The second burden is the burden of production that the utility bears: to produce evidence amounting to an affirmative defense."); *Alterna Springerville LLC v. Tucson Elec. Power Co.*, 153 FERC ¶ 61,125, at P 16 (2015) ("Only after Complainants have established a *prima facie* case should any burden shift to [respondent] to raise an affirmative defense.") (citing *Nantahala Power & Light Co.*, 19 FERC ¶ 61,152, at 61,276 (1982)).

[68] Exh. No. DCT-0002.

[69] *Id.* at 21.

such, any cost cap exclusions in the DCRT APSA must be treated as affirmative defenses under California law, with the burden on DCRT.[70]

2. The Initial Decision Misconstrued the Force Majeure Defense Under the DCRT APSA

The Initial Decision stated, "Contrary to arguments and assertions by some participants, I do [not] rely on California or Commission decisions interpreting *force majeure* provisions in other contracts or applying general California law principles of *force majeure*."[71] The Initial Decision acknowledged the Commission approved the definition of Force Majeure set forth identically in the *pro forma* APSA and the DCRT APSA "because it was consistent with 'the common understanding of the term,'"[72] but nevertheless the Initial Decision stated it was intentionally ignoring the common understanding of the term and instead "bas[ing] [the] conclusions in this decision on the words of the DCRT APSA."[73]

The Initial Decision erroneously failed to base its conclusions on the entirety of the DCRT APSA. Regarding the law that is to govern the DCRT APSA, Section 11.2.1 thereto states, "The validity, *interpretation and performance* of this Agreement *and each of its provisions* shall be governed by the laws of the state of California, without regard to its conflicts of law principles."[74] Under California law, in order to qualify as a force majeure event under a

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[70] Under California law, affirmative defenses include defenses based on caps set forth in a contract. *See Julao v. Fort Self Storage*, 2023 Cal. Super. LEXIS 73516, at * 3-4, 7-8, 19 (Sept. 21, 2023) (granting summary adjudication in relevant part based on affirmative defense of limitation of liability due to contractual cap on damages).

[71] Initial Decision at P 335. The sentence in the Initial Decision quoted above omitted the word "not," but based on the rest of the Initial Decision's discussion on this issue, the omission appears to have been inadvertent.

[72] *Id.* (quoting Pro Forma APSA Order at paragraph 37 and noting that Order's citation to Black's Law Dictionary in footnote 48 thereto).

[73] *Id.*

[74] Exh. No. DCT-0002 at 21 (emphasis added).

contract, the event must be both uncontrollable and unforeseeable.[75] As noted above, under California law, a party claiming force majeure as a basis for non-compliance with a contract such as non-compliance with the DCRT APSA cost cap is asserting an affirmative defense and thus bears the burden of proof. [76]

As discussed below,[77] the Initial Decision erred in finding DCRT is entitled to recover above-cap costs due to (1) a claimed event of Force Majeure purportedly caused by the 2018-2019 federal government shutdown and (2) 38 months of purported delay caused by the COVID-19 pandemic, including because DCRT did not meet the requirements for such cost recovery under California state law.

B. The Initial Decision Erred in Finding Only Section 10.1 and Appendix E of the DCRT APSA Are Commission-Jurisdictional

1. The Entire DCRT APSA Is Commission-Jurisdictional

The Initial Decision found "the DCRT APSA does not provide for a jurisdictional service, and the Commission would not have jurisdiction over it apart from the terms in section 10.1 and Appendix E that govern DCRT's ability to include certain Project costs in the calculation of its Base TRR."[78] The Initial Decision is incorrect that the Commission would not

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

[76] *Sargent Fletcher* at 286.

[77] *See* Sections IV.E-F of this Brief on Exceptions.

[78] Initial Decision at P 166 n.416. *See also id.* at P 148 ("Although the DCRT APSA does not itself provide for jurisdictional transmission services, I determine below that the Commission should enforce the cost containment provisions in the DCRT APSA since they directly and significantly affect the rates CAISO may charge for jurisdictional transmission service using the Project and DCRT's Base TRR, which is a key input to those rates.").

have jurisdiction over the DCRT APSA apart from the terms in Section 10.1 and Appendix E. To the contrary, the entire DCRT APSA is Commission-jurisdictional.

If this aspect of the Initial Decision were allowed to stand, it would not only call into question whether the Commission has jurisdiction over the entirety of all APSAs, it would also call into question whether hundreds if not thousands of agreements already on file with the Commission are properly subject to the Commission's jurisdiction under the FPA. As the Presiding Judge acknowledged, section 205(c) of the FPA requires public utilities to file

> schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.[79]

The Commission has relied on this language to require public utility filings of a wide range of contracts from CIAC agreements to O&M agreements which do not directly provide for transmission service or specify the rates for such transmission, which is the test the Presiding Judge apparently applies.[80] The contracts public utilities file under the affecting or relating language of section 205(c) are routinely identified as "service agreements." The Initial Decision suggested this designation is wrong. On exceptions, the Commission should clarify that the test applied in the Initial Decision is inaccurate.

Application of the Initial Decision's test to the Commission's *pro forma* large generator interconnection agreement illustrates the shortcomings of that test. Section 4.4 of the *pro forma* large generator interconnection agreement states that "[t]he execution of this LGIA does not constitute a request for, nor the provision of, any transmission delivery service under

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79 16 U.S.C. §824d(c)

80 Initial Decision at P 163.

Transmission Provider's Tariff, and does not convey any right to deliver electricity to any specific customer or Point of Delivery."[81] As such, a generator interconnection agreement is not an agreement for transmission service. Moreover, unlike the DCRT APSA, no provision of the *pro forma* large generator interconnection agreement limits what costs may be included in transmission rates. Under the reasoning provided in footnote 416 of the Initial Decision, "the Commission would not have jurisdiction" over any term of a generator interconnection agreement.

As the CAISO has explained,[82] the DCRT APSA constitutes a filed rate because it is a service agreement under an OATT filed under the EQR,[83] and the Commission has jurisdiction over the DCRT APSA and is empowered to enforce it. Moreover, the DCRT APSA directly affects DCRT's proposed Base TRR, which is an input into the CAISO's TAC formula rate that the Commission approved over 20 years ago.[84] The Commission has exclusive jurisdiction over all rates for interstate transmission facilities, like the Project.[85]

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81 https://www.ferc.gov/media/pro-forma-lgia#.

82 CAISO Initial Post-Hearing Brief at 4.

83 *See, e.g.*, *Revised Pub. Util. Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107, at P 18 (2002) ("Order No. 2001") ("[P]ublic utilities that have standard forms of agreements in their transmission, cost-based power sales tariffs, or tariffs for other generally applicable services will no longer file conforming agreements with the Commission. The filing requirements of FPA section 205(c) will be satisfied by the standard forms of agreements and by the electronic filing of Electric Quarterly Reports."); *Elec. Quarterly Reports*, 148 FERC ¶ 61,083, at P 6 (2014) ("The Commission established the EQR reporting requirements to help ensure the collection of information needed to perform its regulatory functions over transmission and sales of electric energy, while making data more useful to the public and allowing public utilities to better fulfill their responsibility under FPA section 205(c) to have rates on file in a convenient form and place.") (internal citation omitted); *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,175, at P 3 n.8 (2023).

84 Exh. No. CSO-0201 at 10:2-7; *Cal. Indep. Sys. Operator Corp.*, 109 FERC ¶ 61,031, at PP 1-9 (2004).

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

The *pro forma* APSA "sets forth the terms and conditions that will govern an approved project sponsor's responsibilities and relationship with CAISO during the period prior to the time that the CAISO assumes operational control over the approved project sponsor's transmission facilities" and the line actually provides transmission service.[86] Under the transmission planning process set forth in Section 24 of the CAISO tariff, "the Approved Project Sponsor must execute an Approved Project Sponsor Agreement with the CAISO within one-hundred twenty (120) calendar days of CAISO approval [of that Approved Project Sponsor], unless otherwise agreed by the Parties."[87]

Moreover, the DCRT APSA tracks the *pro forma* APSA apart from DCRT-specific provisions contained in the appendices to the DCRT APSA. The Commission accepted the entirety of the *pro forma* APSA for inclusion in Appendix X to the Commission-jurisdictional CAISO tariff, without differentiating between portions of the *pro forma* APSA it stated were Commission-jurisdictional and other portions it stated were not Commission-jurisdictional.[88] Thus, the Commission accepted the entire *pro forma* APSA as jurisdictional and the entire DCRT APSA is likewise jurisdictional.

This means if for some reason the CAISO were to file and the Commission were to accept an amendment to the *pro forma* APSA or the DCRT APSA to remove Section 10.1 and Appendix E thereto and leave the rest of the APSA intact, the rest of the APSA would remain

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86 Pro Forma APSA Order at P 1.

87 Exh. No. CSO-0003 at 37-38 (CAISO tariff section 24.5.3.5).

88 *See* Pro Forma APSA Order at P 1 ("In this order, the Commission conditionally accepts CAISO's proposed *pro forma* APSA, effective November 10, 2014, as requested, subject to a compliance filing, as discussed below."); *id.* at P 16 ("We find that the uncontested aspects of the *pro forma* APSA are otherwise just and reasonable, and we accept them without further discussion."); Pro Forma APSA Compliance Letter Order ("The [CAISO's] revisions [to the *pro forma* APSA] are in satisfactory compliance with the November 7 Order, and are accepted for filing, effective November 10, 2014.").

Commission-jurisdictional (*e.g.*, the CAISO could not further amend any other provision in Article 10 of the APSA absent Commission acceptance of the further amendment). In that scenario, the Commission would not lose jurisdiction merely because the CAISO removed Section 10.1 and Appendix E—which is what the faulty reasoning of the Initial Decision would erroneously require.

2. If the Commission Addresses Whether to Assert Primary Jurisdiction Over DCRT APSA Contractual Issues, It Should Assert Primary Jurisdiction Based on Applying the *Arkla* Test

Regarding the Commission's exercise of jurisdiction, the Initial Decision stated, "I do not believe the *Arkla* test is applicable in this case because that test concerns whether the Commission should assert exclusive authority over a contract, over which the Commission and state courts hold concurrent jurisdiction."[89] The Initial Decision is incorrect that the *Arkla* test is inapplicable.

Because the entire DCRT APSA is Commission-jurisdictional as discussed above, if the Commission addresses whether to assert primary jurisdiction over the DCRT APSA contractual issues in this proceeding, the Commission should find it should assert primary jurisdiction over those issues based on application of the three-part *Arkla* test: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity in interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.[90]

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[89] Initial Decision at P 166 n.416 (discussing *Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (collectively, "*Arkla*")).

[90] *Arkla*, 7 FERC ¶ 61,175, at 61,322.

As the CAISO has explained,[91] the following considerations justify a finding that the Commission should assert primary jurisdiction under all three parts of the *Arkla* test:

(1) Unlike a state court, the Commission has specialized knowledge of the provisions of the APSA impacting rates, which implement the results of the CAISO transmission planning process set forth in Section 24 of the Commission-approved CAISO tariff and the result of numerous Commission policy directives to the CAISO. APSAs like the DCRT APSA have cost caps and cost containment measures that establish limits on the TRRs of Approved Project Sponsors, and the Commission approves those TRRs, which directly impact the CAISO's TAC. The Commission also has much greater knowledge of electric transmission rate issues and transmission planning issues than a state court would be expected to have. Compared to state courts, the Commission alone has special expertise and experience regarding transmission rates and revenue requirements.

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

[91] CAISO Initial Post-Hearing Brief at 5-7.

(3) Interpretation of the DCRT APSA is directly related to the Commission's regulatory responsibilities. The Commission has exclusive jurisdiction over public utility rates for interstate transmission facilities, like the Project. The DCRT APSA directly affects DCRT's TRR that will be reflected in the CAISO's TAC, and thus the issues in this proceeding are directly intertwined with the Commission's transmission rate responsibilities. This proceeding also implicates the Commission's broader regulatory role. If the Presiding Judge finds there are broad exceptions to the DCRT APSA cost cap, as claimed by DCRT, and the Commission accepts these findings, it would likely change the way the CAISO and other independent system operators and regional transmission organizations conduct competitive solicitations in Commission-regulated transmission planning processes, reducing the weight afforded to proposed cost caps and cost containment measures. Indeed, the outcome in this case could change how billions of dollars of transmission in California and the rest of the west are planned by the CAISO and other regional transmission planners.[92]

C. The Initial Decision Erred in Finding the DCRT APSA Should Have Been Filed for Commission Acceptance as a Non-Conforming Agreement Instead of Being Included in the CAISO's EQR

The Initial Decision found that the DCRT APSA is enforceable: "[a]lthough the DCRT APSA is not technically a jurisdictional service agreement under the FPA[,] CAISO and DCRT should have filed the DCRT APSA with the Commission (rather than merely reporting it in CAISO's EQR)."[93] The Initial Decision recognized the CAISO has a Commission-approved *pro forma* APSA and that since adoption of the *pro forma* APSA, the CAISO has included all

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

[93] Initial Decision at P 739.

developer-specific APSAs and thousands of other agreements in its EQR submissions as conforming agreements.[94]

The Initial Decision concluded, however, that "[w]hile I appreciate CAISO's position that it has treated several thousand agreements as conforming to *pro forma* agreements," the DCRT APSA "is a non-conforming agreement within the meaning of section 35.1(g) [of the Commission's regulations] and . . . CAISO and/or DCRT should have filed it with the Commission under section 205(c) of the FPA."[95] The Initial Decision noted Section 35.1(g) of the regulations requires individually executed service agreements that deviate "in any material respect" from the applicable *pro forma* service agreement contained in a public utility's tariff to be filed with the Commission.[96] The Initial Decision recognized the cost containment measures DCRT agreed to are reflected in Appendix E of the DCRT APSA but found the provisions of Appendix E are not "a mere fill-in exercise" and thus, "[e]ven though these differences between the DCRT APSA and the *pro forma* APSA occur in an appendix and not the body of the DCRT APSA, the record makes clear that these differences are material."[97] The Initial Decision then found that because many of the provisions in Appendix E of the DCRT APSA were initially proposed by DCRT as amendments to the body of the *pro forma* APSA, the DCRT APSA "deviates in any material respect" from the *pro forma* APSA even though the Initial Decision also acknowledged "the terms in [the] body of the DCRT APSA match the terms in the body of the *pro forma* APSA."[98]

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94 *Id.* at PP 167, 170 (citing *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107).

95 *Id.* at P 170 (citing Tr. 4834:2-8 (CAISO witness Le Vine)).

96 *Id.* at P 168 (quoting Section 35.1(g) of the regulations, 18 C.F.R. § 35.1(g)).

97 *Id.*

98 *Id.* at P 169.

Contrary to the conclusions reached in the Initial Decision, the DCRT APSA conforms to the Commission-approved *pro forma* APSA set forth in Appendix X of the CAISO tariff.[99] Because it is a conforming agreement, the CAISO did not need to file the DCRT APSA separately for Commission acceptance.[100]

As the Initial Decision recognized, the terms in the body of the DCRT APSA match the terms in the body of the *pro forma* APSA. Those identical terms expressly contemplate the provisions to be contained in Appendix E. Specifically, Section 10.1 of both the DCRT APSA and the *pro forma* APSA states "[t]he Approved Project Sponsor acknowledges and agrees with the cost estimates and the binding cost cap, or other binding cost containment measures, if applicable, set forth in Appendix E."[101] Section 10.1.1 of both of those agreements requires the Approved Project Sponsor to abide by "any cost cap or other binding cost containment measures as specified in Appendix E" except as otherwise stated in the section.[102] This language in Sections 10.1 and 10.1.1 leaves no doubt that the Commission, when accepting the *pro forma* APSA, understood details of any binding cost caps and binding cost containment measures would be specified in Appendix E. As such, the DCRT APSA precisely follows the model the Commission accepted in the *pro forma* APSA. Because the bodies of both agreements state that Appendix E will contain the cost estimates, binding cost cap, and binding cost containment

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[99] Most of the contracts with parties taking service under the CAISO tariff are based on *pro forma* agreements approved by the Commission and included in the CAISO tariff. Those contracts satisfy Commission filing requirements through EQR reporting and include most of the hundreds of generator interconnection and market agreements with the CAISO. Exh. No. CSO-0001 REV3 at 29:20-30:4.

[100] *See* 18 C.F.R. §§ 35.1(g), 35.10a-35.10b; Order No. 2001 at P 18; *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107, at P 4 ("CAISO notes that, as a *pro forma* agreement, individual APSAs will not be required to be filed with the Commission unless they contain non-conforming changes.").

[101] *Compare* Exh. No. DCT-0002 at 20, *with* Exh. No. CDN-0003 at 19.

[102] *Id.* Immediately prior to Section 10.1.1 in the *pro forma* APSA, there appears a bracketed note that reads "[i]nclude the following clause if the Approved Project Sponsor agrees to a cost cap or other binding cost containment measures." Exh. No. CDN-0003 at 19.

measures, the Initial Decision is mistaken that Appendix E does not have the express function of being where the specifics of those items are to be filled in by the parties. The Commission has explained that the inclusion of case-specific details in appendices of individualized agreements that do not change the bodies of the *pro forma* versions of those agreements generally does not make the individualized agreements non-conforming.[103] The Initial Decision's findings to the contrary are inconsistent with this precedent.

By incorporating the specific cost estimates, binding cost cap, and binding cost containment measures DCRT agreed to for the Project in Appendix E of the DCRT APSA, the CAISO was merely including Project-specific and bid-specific information and details that the *pro forma* APSA expressly contemplates and permits to be added in Appendix E. Nothing in Appendix E materially deviates from, is inconsistent with, or contravenes any provision in the body of the *pro forma* APSA. Nor does the Initial Decision identify any specific provision in Appendix E that materially deviates from a provision in the *pro forma* APSA.

Since the CAISO adopted a *pro forma* APSA, the CAISO has executed a total of twenty-five individualized APSAs with Approved Project Sponsors. All of the executed APSAs contain cost estimates, and most have binding cost caps or some form of binding cost containment measures. The CAISO has submitted all the APSAs using the Commission's EQR system and

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[103] S*ee, e.g., Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,040, at P 19 n.38 (2016) ("Generally, changes to the appendices of a *pro forma* GIA [generator interconnection agreement] are not considered non-conforming if they do not amend the terms and conditions of the *pro forma* GIA, but merely provide case-specific details regarding the interconnection."); *Sw. Power Pool, Inc.*, 133 FERC ¶ 61,040, at P 14 (2010) ("With regard to the language added to Appendix D addressing the parties' security and communications arrangements, we find that this addition does not deviate from SPP's *pro forma* LGIA, but merely provides needed particulars on the specific transaction. The *pro forma* LGIA contemplates parties entering specific details about their agreements into the appendices, including Appendix D. This kind of fill-in-the-blank provision was intended to vary from case to case and does not need to be filed with the Commission."). The Commission has made similar findings in a number of other orders. *See, e.g.*, *Pub. Serv. Co. of N.M.*, 181 FERC ¶ 61,154, at PP 32-33 (2022); *Sw. Power Pool, Inc.*, 133 FERC ¶ 61,132, at P 11 (2010); *Sw. Power Pool, Inc.*, 132 FERC ¶ 61,062, at P 16 (2010); *Sw. Power Pool, Inc.*, 128 FERC ¶ 61,116, at P 20 (2009); *Sw. Power Pool, Inc.*, 128 FERC ¶ 61,022, at P 13 (2009).

did not also file them for Commission approval as non-conforming agreements. Appendix E of each of those APSAs—including the DCRT APSA—simply incorporates the specific cost estimates, binding cost caps, and binding cost containment measures each individual Approved Project Sponsor proposed and agreed to in its bid—such measures are not uniform across all Approved Project Sponsors but are dependent upon each individual Project Sponsor's bid and cost recovery strategy in a particular competitive solicitation. The DCRT APSA is no different in these respects from all the other APSAs the CAISO has negotiated with Approved Project Sponsors. As Commission Trial Staff witness Dr. Norman astutely observed, there would be no reason to have a *pro forma* APSA at all if every APSA would have to be filed with the Commission anyway.[104]

The Initial Decision failed to consider the Commission's guidance that it expects agreements that do not conform to a *pro forma* agreement will be uncommon.[105] Indeed, as the Commission has explained, the whole reason it implemented *pro forma* service agreements is to improve efficiency and eliminate the need for utilities to file and for the Commission to review conforming service agreements.[106] The Commission has stated that non-conforming agreements may be necessary for agreements that raise specific reliability concerns, novel legal issues, or other unique factors.[107] These considerations are not present with the DCRT APSA or other

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[104] Tr. 8611:21-8612:4 (Dr. Norman explaining "So I guess the question here is to me . . . if you're filing a pro forma and the pro forma is approved, but each and every specific project will necessarily constitute a material deviation, then what does the pro forma do; right? And it seems like if that is the standard, if the standard for a material deviation is that you put in the project specifics, then I don't know why the pro forma exists.").

[105] *See Sw. Power Pool*, 133 FERC ¶ 61,040, at P 12 ("The Commission analyzes such non-conforming filings, which we do not expect to be common, to ensure that operational or other reasons make a non-conforming agreement necessary."); *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,421, at P 12 (2005) ("The Commission analyzes such non-conforming filings, which we do not expect to be common, to ensure that operational or other reasons necessitate the non-conforming agreement.").

[106] Order No. 2001 at PP 152-53.

[107] *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, 194 FERC ¶ 61,222, at P 23 (2026); *Duke Energy Carolinas, LLC*, 193 FERC ¶ 61,237, at P 19 (2025); *Cheyenne Light, Fuel, & Power Co.*, 181 FERC ¶ 61,198, at P

APSAs the CAISO has executed with Approved Project Sponsors, nor did the Initial Decision identify any such specific issues in connection with the DCRT APSA. Rather, the Initial Decision simply concluded that because DCRT initially sought to include some (but not all) of the cost cap exclusions in the body of the DCRT APSA rather than in Appendix E, they necessarily must constitute material deviations from the *pro forma* APSA.[108] DCRT's unilateral suggestions, which were never ultimately embodied in any amendments to the DCRT APSA, do not—and cannot—transform a conforming agreement into a non-conforming agreement. As indicated above, Sections 10.1 and 10.1.1 of the *pro forma* APSA expressly contemplate that all cost estimates, binding cost caps, and binding cost containment measures will be reflected in Appendix E, and nothing in Appendix E is inconsistent with those provisions in the body of the *pro forma* APSA.[109]

The Initial Decision states its conclusion that the DCRT APSA should have been filed with the Commission "draws support" from two Commission orders in other regions involving *pro forma* agreements similar to the APSA. Neither order the Initial Decision cited supports that conclusion.

30 (2022)*; Sw. Power Pool, Inc.*, 181 FERC ¶ 61,179, at P 76 (2022)*; Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,224, at P 13 n.20 (2014).

[108] Initial Decision at P 169.

[109] Similar to the *pro forma* APSA, other CAISO agreements likewise include provisions in their main bodies setting forth the counterparty's cost responsibility and stating the specifics of that cost responsibility are contained in an appendix to the agreement. *See, e.g.*, CAISO *pro forma* large generator interconnection agreement, Appendix EE of the CAISO tariff, at section 11.3 (stating in relevant part that "[t]he Participating TO shall design, procure, construct, install, and own the Network Upgrades and Distribution Upgrades described in Appendix A . . . The Interconnection Customer shall be responsible for all costs related to Distribution Upgrades. Network Upgrades shall be funded by the Interconnection Customer . . . [and] [t]his specific [funding] amount is set forth in Appendix G to this LGIA." The cited LGIA is available at https://www.caiso.com/documents/appendix-ll-lgia-for-interconnection-requests-processed-under-the-ris-as-of-aug-05-2026.pdf.

First, the Initial Decision noted the Commission order approving MISO's *pro forma* SDA.[110] There, in response to an argument that MISO should only be required to file non-conforming SDAs with the Commission, the Commission recognized that MISO would seek Commission approval of non-conforming SDAs and "it will report conforming agreements in [EQRs]." Second, the Initial Decision cited two Commission orders regarding the NYISO's *pro forma* Development Agreement under the NYISO's Public Policy Transmission Planning Process.[111] The Initial Decision stated the NYISO treats any cost cap provisions and exclusions from cost caps as material deviations from the *pro forma* Development Agreement and requires their filing with the Commission.[112]

The language from the MISO order cited in the Initial Decision expressly recognizes MISO is only required to file non-conforming SDAs with the Commission and conforming SDAs can be submitted through EQRs.[113] Nowhere does the MISO order state the inclusion of costs caps or cost containment measures or concessions in an appendix to the SDA requires the SDA be filed with the Commission for approval as a non-conforming agreement.[114] MISO has

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110 Initial Decision at P 170 n.425 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,168, at P 140 (2015)).

111 *Id.* (citing *N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,098, at PP 17, 18, 21 (2020), and *N.Y. Transco, LLC*, 185 FERC ¶ 61,122, at P 28 (2023)).

112 *Id.*

113 In approving th*e pro for*ma SDA set forth in the MISO tariff—MISO's equivalent of the CAISO'*s pro for*ma APSA—the Commission found that MISO was required to file for Commission approval only those agreements that were non-conforming, and all conforming agreements could be filed using MISO's EQR. *Midcontinent Indep. Sys. Operator, In*c., 153 FERC ¶ 61,168, at P 140. *See also, e.g., Midcontinent Indep. Sys. Operator, In*c., 182 FERC ¶ 61,175, at P 3 n.8 ("MISO explains that the Agreement is a conforming agreement based on MISO'*s pro for*ma 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. § 35.10b).

114 The CAISO'*s pro for*ma APSA and MISO'*s pro for*ma SDA are comparable in that they both expressly contemplate and provide for project sponsor-specific cost caps and cost containment measures to be reflected in an appendix to the agreement. *Compa*re Sections 10.1 and 10.1.1 of Appendix X of the CAISO tariff (Exh. No. CDN-0003 at 19)*, wi*th Attachment 1 of Appendix FF of MISO tariff (available at https://etariff.ferc.gov/TariffBrowser.aspx?tid=1162).

executed numerous SDAs that include cost caps and/or other cost containment measures,[115] and there is no indication MISO filed any of these SDAs with the Commission for approval or any Commission orders approving such SDAs as non-conforming agreements. This is evidenced in Commission orders regarding MISO's Hartburg-Sabine Junction Project, which was awarded to NextEra. NextEra's winning bid included a capital cost cap, a return on equity cap, a ten-year cap on O&M expenses, and a limitation on the amount of equity in the capital structure.[116] Years later, MISO filed with the Commission a notice of termination of the Hartburg-Sabine Junction SDA with NextEra, for state ROFR-related reasons, and the Commission's order accepting the termination noted MISO had filed the SDA under the EQR.[117] Thus, contrary to the inferences in the Initial Decision, MISO did not file for Commission approval an SDA that included cost caps and other cost containment measures as a non-conforming agreement, and nowhere in its orders on Hartburg-Sabine Junction-related matters did the Commission state that MISO should have filed the Hartburg-Sabine Junction SDA with the Commission for approval rather than submitting it through the EQR.[118]

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[115] *See* https://www.misoenergy.org/legal/rules-manuals-and-agreements/service-agreements/#nt=%2Fagreementtype%3ASelected%20Developer%20Agreement&t=10&p=0&s=FileName&sd=asc.

[116] *NextEra Energy Transmission Midwest, LLC*, 166 FERC ¶ 61,169, at P 5 (2019) (order granting incentives).

[117] *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,175, at P 3 n.8, *order on reh'g*, 184 FERC ¶ 61,020 (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. § 35.10b). Following termination of the SDA, the Commission permitted NextEra to recover abandoned plant costs associated with the terminated SDA. *NextEra Energy Transmission Midwest, LLC*, 194 FERC ¶ 61,217 (2026).

[118] Commission orders also recognize that the SDA for MISO's Duff-Coleman EHV 345 kV Competitive Transmission Project included various cost caps and cost concessions. *Midcontinent Indep. Sys. Operator, Inc.*, 176 FERC ¶ 61,110, at PP 2, 4 (2021); *Republic Transmission, LLC*, 161 FERC ¶ 61,036, at P 15 & P 18 n.24 (2017). There do not appear to be any Commission orders approving this SDA as a non-conforming agreement.

MISO's website identifies 10 effective SDAs that include various types of cost caps, cost containment measures, and cost cap exclusions.[119] These cost containment measures are included in appendices, exhibits, or attachments to the executed SDA. Like cost containment measures in the APSAs based on the CAISO's *pro forma* APSA, the MISO cost containment measures are not included in the bodies of the SDAs. The CAISO has reviewed the regulatory filings and order pages on the MISO website, and these SDAs were not filed for approval with the Commission as non-conforming agreements, and the Commission never issued orders approving them as such. This has been confirmed through CAISO communications with MISO. A Westlaw search likewise identified no Commission orders approving these SDAs as non-conforming agreements or otherwise approving the terms of these SDAs. Under these circumstances, MISO's practice regarding cost caps, cost containment measures, and cost cap exclusions in executed SDAs supports the CAISO's position and not the Initial Decision's conclusion that the DCRT APSA should have been filed with the Commission as a non-conforming agreement.

The NYISO orders likewise do not support the findings in the Initial Decision. In the first order the Initial Decision cited, the NYISO proposed changes to its tariff and its *pro forma* Development Agreement to address mechanisms for project sponsors to submit cost caps and for the NYISO to evaluate and enforce those cost caps.[120] The new tariff provisions explained how cost caps would be implemented and prescribed rules for cost caps.[121] In particular, the new tariff provisions required a selected project sponsor to file any cost cap measures it proposes as

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119 https://www.misoenergy.org/legal/rules-manuals-and-agreements/service-agreements/#nt=%2Fagreementtype%3ASelected%20Developer%20Agreement&t=10&p=0&s=FileName&sd=asc.

120 *N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,098.

121 *Id.* at PP 17-19.

part of its rate filing for the project.[122] In addition, the NYISO indicated it would amend the *pro forma* Development Agreement to include the cap cap(s) proposed by the developer of the selected project.[123] Nowhere did the NYISO propose, or the Commission require, any Development Agreement containing cost caps to be filed with the Commission as a non-conforming agreement.

The second order the Initial Decision cited involved a New York Transco tariff filing and request for rate incentives in which New York Transco made a tariff filing requesting approval for the following: (1) a cost allocation method associated with its investment in the Propel New York Energy Alternative Solution 5 Project via amendments to Rate Schedule 13 of the NYISO's OATT; (2) a cost containment mechanism to reflect the cost containment measures it voluntarily agreed to for the project; (3) establishment of a proposed return of equity; and (4) approval of certain electric transmission rate incentives, including the abandoned plant incentive.[124] Among other things, the Commission approved the cost cap proposal and, in doing so, noted that the excusing provisions reflected generally applicable terms for all transmission developers under the Public Policy Transmission Planning Process and the *pro forma* Development Agreement.[125] Nowhere in this order did the Commission state that the Development Agreement for the project had to be filed as a non-conforming agreement.

The CAISO notes the project was being jointly developed by New York Transco and NYPA as the selected developers. The NYISO filed a non-conforming Development Agreement for the project with the Commission for reasons wholly unrelated to the agreed-upon cost cap

122 *Id.* at P 17.

123 *Id.*

124 *N.Y. Transco*, 185 FERC ¶ 61,222, at PP 1, 21-22.

125 *Id.* at PP 28-29.

measures.[126] The transmittal letter for the Development Agreement noted the project was subject to a voluntary cost cap, but the NYISO did not identify the cost cap as a non-conforming change to the *pro forma* Development Agreement.[127] Rather, the NYISO expressly stated the Development Agreement conformed to the *pro forma* Development Agreement with the following limited exceptions (none of which was the cost cap): (1) changes to the *pro forma* Development Agreement to accommodate an agreement with multiple developers (*e.g.*, billing, notice, liability, breach provisions, etc.), and (2) modifications to address the unique status of the two developers (*e.g.*, NYPA as a public entity).[128] The Development Agreement for the project was approved via a delegated letter order on July 29, 2024. Under these circumstances, the *New York Transco* order does not support the Initial Decision's conclusion that "NYISO treats any cost cap provisions (and exclusions to such cost caps) as material deviations from the *pro forma* Development Agreement and requires their filing with the Commission."[129]

Finally, the CAISO notes that in two filed requests for rate incentives involving Approved Project Sponsors for CAISO transmission projects awarded through competitive solicitations, the Commission issued deficiency letters to the Approved Project Sponsors regarding their agreed-to cost caps and cost containment measures, and the Approved Project Sponsors accordingly provided such supplemental information and the corresponding executed APSAs.[130] Nowhere in the orders addressing the submittals by these Approved Project Sponsors

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126 Filing of Executed Developer Agreement Among the New York Independent System Operator Corporation, New York Power Authority, and New York Transco, Docket No. ER24-2165-000 (May 31, 2024).

127 *Id.*, transmittal letter at 2-3. The transmittal letter did not even describe the specific cost cap.

128 *Id.* at 3-5.

129 *See* Initial Decision at P 170 n.425.

130 *NextEra Energy Transmission W., LLC*, 154 FERC ¶ 61,009, at PP 63-73; *Desert Link, LLC*, 161 FERC ¶ 61,126, at PP 10, 25, 31 (2017).

did the Commission indicate the APSAs should have been filed for Commission approval as non-conforming agreements because they contained costs caps and other cost containment measures.[131]

To the extent the Commission desires project sponsor/developer agreements with cost containment measures arising from tariff-driven competitive solicitation processes to be filed as non-conforming agreements in the future, it should provide such guidance to the industry.

D. The Initial Decision Erred in Allowing DCRT to Recover $2,627,527 in Costs Purportedly Resulting from a Delay Caused by an Interconnecting PTO

The Initial Decision erred in finding that SCE caused a 25-day delay to the Project and that DCRT may therefore exclude $2,627,527 from the binding cost cap under Bullet #5 of Appendix E to the DCRT APSA.[132] The Initial Decision correctly recognized that Bullet #5 of the DCRT APSA does not authorize recovery for every cost that follows an action by an Interconnecting PTO.[133] The relevant language is narrow, excluding only "FERC approved costs resulting from delays . . . caused by an Interconnecting PTO" under Bullet #5.[134] Accordingly, the DCRT APSA requires DCRT to establish both a delay caused by an Interconnecting PTO and a causal connection between that delay and each cost claimed. The Initial Decision nevertheless awarded DCRT $2,627,527 by determining the CAISO and participants challenging DCRT failed to carry the burden to disprove DCRT's asserted delay and costs.[135]

The Initial Decision erred in finding the record in this proceeding established a "delay caused by an Interconnecting PTO." DCRT could not have commenced testing and energization

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131 *See generally NextEra Energy Transmission W.,* 154 FERC ¶ 61,009; *Desert Link*, 161 FERC ¶ 61,126.

132 *See* Initial Decision at PP 257-65.

133 *Id.* at PP 263-64.

134 Exh. No. DCT-0002 at 50, 78.

135 Initial Decision at PP 257, 265, 267-76.

on March 8, 2024, regardless of SCE's activities, because DCRT and its selected NERC Transmission Operator, GridForce, had not completed the steps necessary to operate within the CAISO footprint.[136] A period during which DCRT independently could not proceed is not a delay "caused by" SCE within the plain meaning of Bullet #5.[137] The Initial Decision acknowledged the evidence concerning GridForce's incomplete onboarding but rejected it based on what the Presiding Judge characterized as "competing evidence."[138] The existence of a genuine causal dispute, however, did not supply the affirmative causal showing necessary to treat DCRT's costs as allowable and outside the binding cap.[139]

The Initial Decision's selected period also does not establish a recoverable delay. It measured 25 days from March 8, 2024, the target date for completion of testing, through April 2, 2024, when SCE completed its installation and testing.[140] However, the record shows that DCRT did not notify SCE that its fiber was available for connection until February 21, 2024.[141] SCE then completed its fiber work and testing in approximately six weeks, substantially faster than SCE's typical four-month timeframe for that type of work.[142] The DCRT-SCE interconnection agreement also required only Reasonable Efforts to meet the engineering, procurement, construction, and testing milestones, and expressly contemplated that those milestones could be adjusted.[143] Thus, the mere difference between a planning milestone and

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136 CAISO Initial Post-Hearing Brief at 38-40; Exh. No. CSO-0601 REV2 PUB at 128:14-18; Exh. No. CDN-0039 at 5.

137 Initial Decision at P 264 n.679.

138 *Id.* at P 262.

139 As discussed in section IV.A of this Brief on Exceptions, DCRT has the burden of demonstrating that it has satisfied the prerequisites for an exception from its binding cost cap.

140 Initial Decision at PP 258, 263.

141 Exh. No. CDN-0040.

142 *Id.*

143 Exh. No. DCT-0003 at 164.

SCE's actual completion date does not establish that SCE caused a compensable delay under Bullet #5.

The Initial Decision further erred by treating the challenged 25-day period as a basis for awarding project-wide AFUDC. Of the $2,627,527 awarded in the Initial Decision, $1,829,790 represents AFUDC calculated on the entire Project, less interconnection AFUDC, prorated by 25/121.[144] The remaining award includes $401,019 for EPC Change Order 05 and $396,717 in management costs and related AFUDC.[145] This methodology assumes the very proposition DCRT failed to prove: that, but for SCE's actions, the entire Project would have entered into service on March 8, 2024, and project-wide AFUDC would have ceased. That assumption is inconsistent with the evidence concerning GridForce's readiness and the remaining CAISO onboarding steps. It also goes beyond the contractual text, as Bullet #5 excludes costs "resulting from" a delay caused by an Interconnecting PTO. It does not permit DCRT to take all AFUDC accruing on the Project during a disputed period and place the entire amount outside the contractual cost cap merely due to SCE's performance of some interconnection work during that period. Where other independent conditions prevented operation, the required causal relationship is absent.

The same flaw applies to EPC Change Order 05. The Initial Decision relied on the face of a contractor change order asserting that delays to substantial completion were caused by the testing and commissioning schedules of APS and SCE.[146] But the Initial Decision elsewhere declined to credit the same change order's assertion that SCE's actions delayed substantial completion until June 2024, noting that DCRT presented no EC Source witness who could be

144 Initial Decision at PP 267-68.

145 *Id.* at PP 269-76.

146 *Id.* at PP 269-70.

cross-examined regarding that assertion.[147] The Presiding Judge cannot reasonably reject the contractor's unsworn assertion as to the duration and consequences of the alleged delay, yet rely on the same assertion to establish causation for the $401,019 charge.

Nor does the record support the $391,769 in management costs and $4,948 in associated AFUDC. DCRT's calculations used full-month invoices from March through June and did not isolate costs incurred during the selected 25-day period.[148] Prorating a broader collection of costs by 25/121 does not establish that the resulting amount was caused by SCE. It merely produces an estimate. Bullet #5 requires costs "resulting from" the qualifying delay, not a proportionate allocation of costs DCRT incurred during a longer period for multiple reasons.

Therefore, the Commission should reverse the Initial Decision's findings in paragraphs 257-277 and remove the $2,627,527 from the exclusions to the cost cap. This result would leave the Initial Decision's findings regarding Bullet #1 unchanged, including the direct charges and change orders that CAISO agreed were properly related to interconnection facilities or service. CAISO's position distinguishes those direct interconnection costs from DCRT's unsupported claim that SCE caused a compensable delay.[149]

E. The Initial Decision Erred in Treating the 2018-2019 Federal Government Shutdown as a Force Majeure Event that Caused a Recoverable Project Delay

The Initial Decision erred in finding that the federal government shutdown from December 22, 2018, through January 25, 2019, constituted an event of Force Majeure under the

147 *Id.* at P 264.

148 *Id.* at PP 271-76.

149 *Id.* at PP 245-46, 253-56; CAISO Initial Post-Hearing Brief at 35-40.

DCRT APSA, caused 28 days of Project delay, and supported recovery of a month of management run-rate costs and associated AFUDC.[150]

The Initial Decision's conclusion rests on an incomplete reading of the DCRT APSA. The Force Majeure definition includes certain governmental orders, regulations, and restrictions, but only when the event is unforeseeable, beyond the parties' reasonable control and only if it could not have been avoided through the exercise of Good Utility Practice. The Commission's order accepting the *pro forma* APSA further explained that the definition adopts the common understanding of force majeure as an event or effect that can be neither anticipated nor controlled.[151] Accordingly, a qualifying event must be both uncontrollable and objectively unforeseeable, and DCRT must prove a causal link between the event and the claimed delay and costs resulting from that claimed delay.[152]

The Initial Decision rejected those requirements because the words "foreseeable" and "material" do not appear, verbatim, in Bullet #5 nor the contractual definition.[153] The CAISO did not ask the Presiding Judge to add such free-standing words to the DCRT APSA, it simply relied upon the Commission's prior findings as to how Force Majeure as used in the APSA should be interpreted. The foreseeability requirement gives effect to the existing contractual requirements that a Force Majeure event be beyond reasonable control and unavoidable through Good Utility Practice, as interpreted by the Commission when it accepted this exact definition in the DCRT APSA.[154] The Initial Decision's contrary approach improperly divorces the words of

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150 *See* Initial Decision at PP 357-64, 376.

151 *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107, at P 37 n.48.

152 CAISO Initial Post-Hearing Brief at 72-74; CAISO Post-Hearing Reply Brief at 72-75.

153 Initial Decision at P 362.

154 *See DCR Transmission, L.L.*C., 184 FERC ¶ 61,199, at P 32*; Cameron Interstate Pipeline LLC*, 153 FERC ¶ 61,363, at P 10 (2015)*; Cal. Indep. Sys. Operator Cor*p., 149 FERC ¶ 61,107, at P 37 n.48.

the DCRT APSA from the settled meaning the Commission gave those words when approving the *pro forma* APSA. Given the recent history of government shutdowns, a government shutdown was entirely foreseeable.

Assuming the shutdown itself could qualify as a Force Majeure event, DCRT did not prove that it caused a material delay to the Project. DCRT offered speculation rather than evidence that the shutdown delayed issuance of the FEIS, ROD, and other Project approvals. The shutdown lasted approximately one month, substantially overlapped the year-end holiday period, included three federal holidays (Christmas Day, New Year's Day, and Birthday of Martin Luther King, Jr.), and occurred while the BLM's contractor was reviewing comments on the DEIS. Work did not cease altogether.[155]

Nevertheless, the Initial Decision infers a day-for-day delay corresponding to the duration of the shutdown—and gives DCRT a Force Majeure delay credit for three days that were federal holidays—because the challengers purportedly failed to prove that the shutdown had no effect.[156] The CAISO and intervenors did not bear the burden of proving the effects of a Force Majeure delay, DCRT did as an affirmative defense. That is not a sufficient causal finding. The fact BLM personnel were unavailable for some period does not establish that the Project's delay moved by the same number of days. A delay to some activity is not necessarily a delay to the Project, and Bullet #5 authorizes recovery only for costs resulting from a "delay."[157] DCRT consistently failed to identify the actual delay attributable to each event and connect that delay to specific costs.[158]

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155 Exh. No. DCT-0007 REV2 at 23:14-15; Exh. No. DCT-0105 at 95-96; Exh. No. CSO-0001 REV3 at 106:1-12; Exh. No. CSO-0101 REV2 at 36:17-38:5; CAISO Initial Post-Hearing Brief at 97-99.

156 Initial Decision at PP 363-64.

157 Exh. No. DCT-0002 at 50, 78.

158 CAISO Initial Post-Hearing Brief at 73-74, 81; CAISO Post-Hearing Reply Brief at 72-73, 93-94.

The weakness in the record is evident from the Initial Decision's treatment of DCRT witness Rogers. Mr. Rogers initially estimated approximately two months of delay based in part on emails used to refresh his recollection, but DCRT did not produce those emails in discovery or place them in the evidentiary record. The Initial Decision accordingly declined to credit that portion of Mr. Rogers's testimony and drew an adverse inference that the emails did not support DCRT's two-month claim.[159] Once that testimony was discounted, no substantial evidence quantified a Project delay caused by the shutdown. The Presiding Judge then selected 28 days solely because that was the duration of the shutdown, even though it included three existing federal holidays, not because record evidence demonstrated that the shutdown actually delayed the Project by 28 days.

The Commission should reverse the findings under this section of the Initial Decision. A day-for-day assumption is particularly inappropriate where the record reflects existing federal holidays, the shutdown occurred during an end-of-year holiday period when federal and other workers typically take time off, continuing contractor activity on the Project, and no contemporaneous analysis showing that the shutdown altered the chain of tasks required for the Project, the FEIS or ROD schedule, or the ultimate Project completion date. It is unlikely and highly speculative the government shutdown materially delayed issuance of DCRT's BLM permits given the government shutdown occurred during the holiday season, during which it was likely many federal workers were on vacations.[160] Indeed, one of DCRT's own exhibits, which discussed prior BLM schedule revisions that were needed "based upon the timing of the DCRT resource reports coming to us sometime later," indicated that based on this delay, two weeks had

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159 Initial Decision at P 363 n.939.

160 Exh. No. CSO-0001 REV3 at 106:4-7; Exh. No. CSO-0101 REV2 at 36:17-37:7.

to be added for "the BLM and Cooperators review of the PDEIS [Preliminary DEIS] as it would fall over the Christmas and New Year's holidays and when a lot of federal employees take leave."[161] Furthermore, December 22, 2018 was a Saturday and there were three federal government holidays during the shutdown period, and December 24 and 31 were Mondays before holidays, which BLM employees typically would have taken vacation days,[162] increasing the likelihood of four-day weekends to the extent employees were not taking off the entire week for vacation, which means only approximately 20 work days were lost by the reviewers.[163] Further, many federal employees take their "use or lose" annual leave during December and early January of each year.[164]

Also, one would expect minimal BLM-driven delay during this timeframe because the DEIS had been published on August 31, 2018 and the public comment period ended on November 28, 2018. The BLM indicated it did not expect to issue a FEIS until 2019.[165] The first 30-60 days following the public comment period on a DEIS are typically entirely consumed by the consultant team, who are not subject to the government shutdown, reviewing and sorting through public comments to provide comment summaries to the lead agencies and to draft responses to comments.[166] Thus, the unavailability of BLM staff during this timeframe should have had minimal to no effect on the schedule of the consultant team preparing the FEIS.[167] DCRT provides no documentation or other tangible support demonstrating the federal

161 Exh. No. DCT-0105 at 95-96.

162 Exh. No. CSO-0101 REV2 at 36:17-37:1.

163 Exh. No. CSO-0001 REV3 at 106:7-12.

164 Exh. No. CSO-0101 REV2 at 37:1-3.

165 *Id.* at 37:9-14.

166 *Id.* at 37:14-18.

167 *Id.* at 38:2-5.

government shutdown actually caused any delay in the BLM's issuance of a ROD.[168] Indeed, permitting work on the Project continued during this timeframe.[169]

Because DCRT failed to establish the causal nexus required by Bullet #5, the Commission should remove the management run-rate costs and AFUDC attributed to the shutdown from the cost cap exclusion.

F. The Initial Decision Erred in Attributing 38 Months of Project Delay to COVID-19

1. The Evidence Shows the Actual Delay Was Approximately Nine Months

The Initial Decision erred in finding that COVID-19 caused 38 months of Project delay, measured from the WHO's March 11, 2020, pandemic declaration through expiration of the federal public health emergency on May 11, 2023, and that DCRT may recover management run-rate costs and associated AFUDC for that entire period.[170]

The CAISO does not dispute that the COVID-19 pandemic qualifies as an event of Force Majeure under the DCRT APSA.[171] Rather, the CAISO's exception concerns causation and duration. Importantly, Bullet #5 does not permit recovery of costs due to a Force Majeure event without evidence of resulting Project delay as the Initial Decision seems to apply it, nor does Bullet #5 permit recovery of costs for the duration of a declared public health emergency merely because the Project was under development during that period. If that were the applicable standard, DCRT would be permitted to recover costs for the duration of the declared public

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168 Exh. No. DCT-0007 REV2 at 23:8-16.

169 *See* Exh. No. CDN-0061 at 3 (email exchange on January 18, 2019 between the BLM and DCRT indicating the permitting work was ongoing).

170 *See* Initial Decision at PP 346-56, 366-76.

171 CAISO Initial Post-Hearing Brief at 102; Exh. No. DCT-0019 at 3-4; Exh. No. CSO-0001 REV3 at 111:22-112:1.

health emergency for the opioid crisis, which ran concurrently with the declared public health emergency for COVID-19.[172] By its express terms, Bullet #5 only permits recovery of costs "resulting from delays due to" the Force Majeure event.[173]

The CAISO's Initial Post-Hearing Brief identified the only demonstrable Project delay caused by COVID-19: the approximately nine-month disruption to the CPUC CPCN proceeding, beginning when the CPUC ALJ suspended the procedural schedule on March 25, 2020, and ending when the proceeding resumed with the December 8, 2020, prehearing conference.[174] The CAISO's calculation is grounded in identifiable procedural events affecting a necessary Project approval. It does not assume that every month during which COVID-19 remained a public health concern was a month of Project delay; indeed as discussed below, the facts show it clearly was not.

The Initial Decision adopted the unsupported assumption that the duration of the pandemic declaration and federal public health emergency automatically resulted in an equal day-for-day duration of delay to the Project.[175] However, the ending of a public health declaration is not evidence of when a specific transmission project ceased experiencing delay, just as the declaration's beginning is not by itself evidence that the Project's critical path immediately stopped or slowed. Instead, the relevant inquiry is what specific Project activities were delayed due to COVID-19, by how much time, and whether each delay affected the chain

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172 *See* U.S. Dep't of Health & Hum. Servs., *Determination That a Public Health Emergency Exists* (Oct. 26, 2017), https://www.aspr.gov/about/law-policy-strategy/emergency-declarations/declarations-public-health-emergency/2017-10-nationwide; U.S. Dep't of Health & Hum. Servs., *Renewal of Determination That a Public Health Emergency Exists* (Sept. 10, 2026) (renewing the public health emergency declaration that has existed since October 26, 2017).

173 Exh. No. DCT-0002 at 50, 78.

174 CAISO Initial Post-Hearing Brief at 102-08; Exh. No. CSO-0201 at 5:5-7:8; Exh. No. CSO-0601 REV2 PUB at 44:17-47:17.

175 Initial Decision at PP 347, 355-56.

of tasks required for the Project to continue being developed.[176] The Initial Decision cites not one iota of evidence in the record specifically answering those questions for the overwhelming majority of the 38-month period.

Rather, the Initial Decision relies on generalized testimony that COVID-19 affected business dealings, travel, work practices, field surveys, and the broader economy.[177] That evidence establishes that the pandemic created difficulties generally. It does not establish 38 months of concrete Project delay. Nor do generalized statements that work became "harder and slower" quantify how much additional time was required to perform any particular Project task or how that the task affected the chain of tasks needed to keep the Project moving through required stages of development. A Force Majeure event and a compensable delay are distinct elements under the language of the DCRT APSA, but the Initial Decision effectively collapsed those elements into one.

The record clearly confirms that the 38-month finding is excessive and that COVID-19 did not delay the Project schedule other than to delay the CPCN proceeding at the CPUC by nine months. Permitting, procurement, EPC contracting, and construction activities continued during the asserted period. As discussed *infra,* this is evidenced by the quarterly reports DCRT submitted to the CAISO during the public health emergency period, which showed the significant amount of work on the Project that was being done during the period the COVID-19 public health emergency was in effect. Indeed, the Project's physical construction period was also comparable to, and in material respects shorter than, the construction duration contemplated

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176 *KB Salt Lake III, LLC v. Fitness Int'l, LLC*, 313 Cal. Rptr. 3d 820, 835-39, 95 Cal. App. 5th 1032, 1050-55 (2023) ("*KB Salt Lake*").

177 Initial Decision at PP 350-51.

by DCRT's own schedule and the DCRT APSA.[178] That work continued during the pandemic is not dispositive by itself, but it refutes the Initial Decision's unsupported treatment of the entire public health emergency as a continuous Project delay.

The Initial Decision also erred in holding that Bullet #5 leaves "no room" to consider DCRT's own contributions to the delay.[179] The contractual definition requires that the event be beyond the reasonable control of the parties and could not have been avoided through Good Utility Practice.[180] Section 13.1.1 further requires the affected party to "exercise due diligence to remove such disability with reasonable dispatch."[181] A delay caused by DCRT's own decisions or failures is not a delay "due to" COVID-19. Treating COVID-19 as the cause of delay occurring during the public health emergency, without accounting for intervening or concurrent causes, reads the causal limitation out of Bullet #5 and the due diligence requirement out of Article 13.

Further, the CAISO's nine-month calculation does not improperly limit "delay" to a complete work stoppage. It identifies the period for which the record demonstrated that COVID-19 altered the required regulatory proceeding and delayed the Project. The Initial Decision criticizes the CAISO for not presenting evidence disproving broader Project effects,[182] but generalized evidence that the pandemic affected society and business dealings cannot substitute for proof that COVID-19 delayed this Project for 38 months.

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178 Exh. No. DCT-0007 REV2 at 40:13-42:4; Exh. No. CSO-0201 at 4:9-7:8; Exh. No. CSO-0601 REV2 PUB at 44:17-47:17; Exh. No. CSO-0202; Exh. No. DCT-0002 at 44-45, 86. CAISO Initial Post-Hearing Brief at 104-06; CAISO Post-Hearing Reply Brief at 91-92.

179 Initial Decision at P 355.

180 Exh. No. DCT-0002 at 22-23.

181 *Id.*

182 Initial Decision at PP 349-52.

2. Federal and California State Precedent Support the CAISO's Position on This Issue

Federal and California state precedent requires a party seeking to justify noncompliance with an obligation due to an alleged force majeure event to show a causal link between the alleged force majeure event and the noncompliance. Absent such a showing, a party's noncompliance with an obligation cannot be linked to a force majeure event.[183]

The COVID-19 Force Majeure event can be distinguished from *KB Salt Lake* and *SVAP* because the governmental authorities in those cases actually imposed restrictions. In contrast, the Public Health Emergency declared by the WHO made a declaration about the public health crisis without actually proposing any restrictions.[184] Those restrictions were enacted by state and local authorities, and they expressly excluded construction and other essential activities. The Project was constructed in Arizona and California. DCRT's filed testimony lists no state or local COVID-19 mandates as Force Majeure events under the DCRT APSA.[185] DCRT received its requisite Certificate of Environmental Compatibility from the ACC on March 31, 2020.[186] Importantly, the public health emergency declarations in California and Arizona did not prevent

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183 *See, e.g.*, *KB Salt Lake* at 835-39 (finding that government's imposition of COVID-19 shutdown restrictions was not valid link for company to invoke force majeure clause in lease agreement to avoid paying rent); *SVAP III Poway Crossings, LLC v. Fitness Int'l*, LLC, 87 Cal. App. 5th 882, 892-93, 303 Cal. Rptr. 3d 863, 871-72 (2023) (finding that government closure orders, while restrictive, did not hinder the party's performance of its obligation under the contract) ("*SVAP*"); *Gulf Oil Corp. v. FERC*, 706 F.2d 444, 455 (3d Cir. 1983) ("For *force majeure* events to excuse nonperformance, some correlation must be drawn between the occurrence of an event and the obligation of the nonperforming party.") (citing U.S. Supreme Court precedent); *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187, at P 100 (2014) ("Since the facts of any qualifying *force majeure* event will differ, whether the Designated Entity cannot perform due to a *force majeure* event or mitigate the *force majeure* event through reasonable efforts will necessarily be determined at the time of the *force majeure* event."); *Nexen Mktg. U.S.A. Inc. v. Enbridge Pipelines (N.D.) LLC*, 126 FERC ¶ 61,073, at PP 38-41 (2009) (analyzing whether facts supported force majeure claim); *W. Pueblo Partners, LLC v. Stone Brewing Co., LLC*, 307 Cal. Rptr. 3d 626, 634-36, 90 Cal. App. 5th 1179, 1188-90 (2023) (similar issue and findings).

184 *See* Exh. No. DCT-0053 at 4.

185 Exh. No. DCT-0007 REV2 at 55; Exh. No. DCT-0018 REV2 at 6-9.

186 Exh. No. DCT-0001 REV2 at 46:4-5.

the construction and post-permitting activities DCRT was undertaking.[187] Moreover, most COVID-19 restrictions were rolled back or terminated in mid-2021 (*i.e.*, they were not in effect until the end of the declared public health emergency in 2023).[188] DCRT's quarterly reports during the COVID-19 public health emergency period detail all of the specific activities that were undertaken during this time,[189] and the only specific delays DCRT identified were the delays in the CPCN proceeding described above. [190] DCRT indicated that travel and meeting guidance issued because of COVID-19 impacted outreach with non-governmental organizations, but DCRT identified no specific Project delay due to such limitations.[191] As discussed in greater detail *infra*, there were no Project delays resulting from COVID-19 other than the delay resulting from the CPUC holding the CPCN proceeding in abeyance for nine months. DCRT's actual post-permitting and construction schedule did not take longer than the schedule timelines it provided to the CAISO in the competitive solicitation process and reflected in the DCRT APSA. Moreover, the purported limitations DCRT identifies mostly overlapped with the nine months that the CPUC proceeding was in abeyance. Further, DCRT noted that "it had worked with all of

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187 State of Arizona, Executive Order 2020-12: Prohibiting the Closure of Essential Services (Mar. 23, 2020), available at https://azgovernor.gov/sites/default/files/eo_2021_0.pdf; Executive Department State of California, Executive Order N-33-20 (Mar. 19, 2020), available at https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf (citing March 19, 2020 Memorandum of Identification of Essential Critical Infrastructure Workers During COVID-19 Response). These state executive orders recognized that activities related to construction, energy, infrastructure, supply chain, telecommunications, transportation, computing, critical trades, manufacturing and distribution, etc. would continue.

188 State of Arizona Executive Order 2021-16 (July 2, 2021), available at https://azgovernor.gov/sites/default/files/executive_order_2021-16.pdf; Executive Department, State of California, Executive Order N-08-21 (June 11, 2021), available at https://www.gov.ca.gov/wp-content/uploads/2021/06/6.11.21-EO-N-08-21-signed.pdf.

189 Exh. No. DCT-0015 at 316-677. These quarterly reports document the extensive activities that were ongoing during the declared COVID-19 pandemic including extensive outreach activities, environmental and permitting activities, right-of-way/land acquisition, design and engineering, construction, and interconnection activities, etc.

190 *Id.* at 318, 345, 373, 402, 430.

191 *Id.* at 373.

its contractors and suppliers to implement all practicable measures to minimize impacts of the Virus, including using remote communications tools, electronic verification, and telephonic communications, etc."[192] Further, in its July 8, 2021 quarterly report and afterwards, DCRT noted that the "immediate impacts of travel and meeting restrictions are starting to abate as such restrictions gradually have been lifted."[193] Finally, DCRT indicated on multiple occasions during the course of the COVID-19 public health emergency that it was on track with the schedule specified in the DCRT APSA.[194] Under these circumstances there is no basis to find COVID-19 caused any amount of delay longer than the nine-month delay in the CPCN proceeding.

KB Salt Lake is particularly informative. There the court held that COVID-19 closure orders in California did not prevent a fitness company from paying rent or continuing construction at its site. The fitness company's lease included a force majeure provision that provided if either party was delayed or hindered in or prevented from performing any act under the contract due to a force majeure event, performance would be excused for that period of delay caused by the force majeure event and the period for performance of such acts extended by an equivalent period. The court found the fitness company could not show it was delayed, hindered, or prevented from paying rent because of the COVID-19 pandemic. Regarding its permits to renovate the premises, the court found that the fitness company could have continued construction during COVID-19 as the COVID-19 closure orders allowed the fitness company to renovate its facilities as it fell within the definition of essential infrastructure projects. Of note, the DCRT APSA's application of Force Majeure is even stricter than the contract at issue in *KB*

192 *Id.* at 393.

193 *Id.* at 479, 508.

194 *See id.* at 627, 656, 677.

Salt Lake, which contemplated events that delayed **or hindered** performance; whereas, the Force Majeure exclusion in the DCRT APSA only applies to delays resulting from events of Force Majeure (*i.e.*, not hinderances).

3. The Development Timeline Supports the CAISO's Position on This Issue

The Project's actual development timeline further demonstrates the absence of a causal connection between COVID-19 and the 38 months of delay attributed to the pandemic by the Initial Decision. Long before COVID-19, DCRT's 2014 competitive solicitation submission to the CAISO contemplated approximately 2.5 years between receipt of the CPCN and placement of the Project in service.[195] DCRT ultimately received its CPCN on November 4, 2021, and placed the Project in service in June 2024, approximately two years and seven months later.[196] Thus, DCRT completed the post-CPCN phase of the Project on a timeline remarkably similar to the timeline DCRT itself proposed years before the pandemic. That contemporaneous evidence cannot be reconciled with the Initial Decision's conclusion that COVID-19 delayed the Project continuously for 38 months. At most, the record identifies a discrete period during which COVID-19 actually altered the Project schedule: the approximately nine months during which the CPUC suspended the CPCN proceeding.[197]

Nor does the period at the end of the Project support attributing additional delay to COVID-19. The Initial Decision separately attributed 25 days of delay near the end of the Project to SCE as an Interconnecting PTO, not to Force Majeure.[198] Although the CAISO

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195 Exh. No. CSO-0202; Exh. No. CSO-0201 at 4:9-5:4.

196 *Id.* at 5:5-21.

197 *Id.* at 6:1-7:8 (identifying the approximately nine-month CPUC suspension as the demonstrated COVID-19 delay).

198 Initial Decision at PP 257-77.

separately excepts to that finding, it further illustrates why the Project's ultimate in-service date cannot itself establish the duration of any COVID-19 delay. The relevant question is what portion of the Project's schedule COVID-19 actually delayed, and the Project's close adherence to DCRT's own pre-pandemic post-permitting schedule strongly undermines the Initial Decision's conclusion that the answer is 38 months.

Other record evidence confirms COVID-19 did not delay the Project by 38 months. DCRT witness Crew generally alleged COVID-19 "delayed permitting."[199] He testified DCRT was "working under the **assumption** that the CPCN **could be issued by** the end of 2020"[200]—an assumption DCRT conveyed to the CAISO in January 2020.[201] Even taking at face value DCRT's **assumption** early in 2020 that it **could** receive a CPCN by the end of 2020 and the date it actually received a CPCN—November 4, 2021—that is only approximately an 11-month delay. The actual nine-month delay in the CPCN hearing process is in line with this assumption, and it is the only specific period of Project delay resulting from COVID-19 Mr. Crew described in his testimony.[202]

COVID-19 did not delay completion of the Project by more than nine months and certainly not as much as 38 months.[203] As of the March 13, 2020 date of DCRT's Section 13.1.1 Force Majeure notice to the CAISO, the parties in the CPCN proceeding still had to file testimony, the CPUC ALJ had to conduct an evidentiary hearing, the CPUC had to take time to evaluate the record and then issue a CPCN, DCRT had to negotiate an amended EPC contract

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199 Exh. No. DCT-0007 REV2 at 58:8-11.

200 *Id.* at 41:1-5. DCRT's testimony indicated that it believed it would take 12-18 months to complete the CPCN process. *Id.* at 31:9-10.

201 Exh. No. DCT-0015 at 314.

202 *See* Exh. No. CSO-0601 REV2 PUB at 44:17-45:19 (citing DCRT testimony).

203 Exh. No. CSO-0201 at 4:9-7:8; Exh. No. CSO-0601 REV2 PUB at 44:17-47:17.

with EC Source, DCRT had to obtain a Notice to Proceed from the BLM, and DCRT had to undertake extensive post-permitting/pre-construction activities including procurement it identified in its Project schedule and milestones provided to the CAISO in the competitive solicitation process,[204] and then DCRT had to actually construct and complete the Project and place it into service.

All these activities occurred during COVID-19; they did not cease until the COVID-19 pandemic officially ended. Appendix B of the original DCRT APSA contemplated completing all permitting activities by November 12, 2017 and placing the Project in-service on May 1, 2020—a period of approximately 30 months.[205] The original DCRT APSA also contemplated a 22-month construction period for the Project—from June 28, 2018 to May 1, 2020.[206] Based on the representations in the third amended DCRT APSA, permitting activities were completed on September 30, 2022,[207] and the Project was placed in service on June 12, 2024—a period of 20½ months. Further, the actual construction period was 19½ months—from October 31, 2022[208] to June 12, 2024. Similarly, the first amended DCRT APSA—the amended DCRT APSA that was in effect pre-COVID-19—provided in Appendix B that permitting activities would be completed on March 1, 2020, with construction commencing March 2, 2020, and the Project placed in service on December 31, 2022, a period of 34 months.[209] Thus, actual post-permitting and construction timelines for the Project were less than was contemplated in the original DCRT

204 Exh. No. CSO-0202.

205 Exh. No. DCT-0002 at 44-45.

206 *Id.*

207 *Id.* at 86.

208 *Id.*

209 Exh. No. DCT-0002 at 66-67.

APSA and the amended APSA pre COVID-19.[210] Under these circumstances, there were no delays in the post-permitting and construction process, and there is no basis to find completion of the Project was delayed due to COVID-19 by any more than the nine-month delay in the CPCN proceeding at the CPUC or that DCRT encountered any other unforeseeable delays in the Project. There certainly was no day-for-day delay in the Project during the 38-month declared public health emergency.

Also, it should be noted that even though DCRT received a CPCN from the CPUC on November 4, 2021, it did not execute its amended EPC contract with EC Source until August 12, 2022[211]—almost nine months later. During that time period DCRT communicated with other vendors, assessed whether to re-bid the Project, and reevaluated the EPC Contract, but it ultimately decided to "attempt to renegotiate" the contract with EC Source rather than replace them.[212] CAISO transmission ratepayers should not be on the hook for any delay that occurred between November 1, 2021 and August 12, 2022 given DCRT still needed to have an EPC contract to proceed and DCRT was the entity holding up the Project.[213]

DCRT's own representations do not support a 38-month COVID-19 delay. DCRT claims 13 separate Force Majeure events resulted in an aggregate 47-month delay in the Project.[214]

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210 Similarly, the second amended APSA executed on March 7, 2022 (*i.e.*, after CPUC had issued DCRT a CPCN) contemplated an 18 ½-month construction schedule—from October 1, 2022 to April 15, 2024. Exh. No. DCT-0002 at 75-76. The actual construction schedule went from October 31, 2022 (*see* Appendix B of third amended DCRT APSA) to June 12, 2024, a total period of 19½ months. However, this includes the 25-day delay the Initial Decision (P 266) attributes to a delay caused by an Interconnecting PTO, not COVID-19. Also, it should be noted that DCRT alleged the delay caused by the interconnecting PTO occurred from March 8, 2024- June 12, 2024—more than two months. Initial Decision at P 259. In any event, DCRT's construction schedule established under the second amended APSA was not delayed due to COVID-19.

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

212 *Id.* at 45:1-2.

213 It should further be noted that DCRT's own failure to timely post the reclamation and security bonds required by the BLM before issuance of a Limited Notice to Proceed, further undermining DCRT's delay and its attempt to attribute the delay to Force Majeure. *See* Commission Trial Staff Initial Post-Hearing Brief at 46-48.

214 Exh. No. DCT-0007 REV at 63 (Table 5), 69:20-22.

Many of these force majeure events were pre-COVID-19 and did not overlap with any COVID-19 delay. In its Initial Post-Hearing Brief, DCRT identifies the significant delays it alleges resulted from these pre-COVID-19 events: (1) the BLM provides notice of delay in issuance of the DEIS; (2) the CPUC ALJ postpones the CPUC CPCN docket until after the BLM completes the FEIS and issues its ROD rather than commencing evidentiary after issuance of the DEIS as DCRT desired; (3) application of the DRECP to the Project in late 2017, (4) issuance of Order 3355; (5) the federal government shutdown; and (6) the BLM modifies the tower design on a portion of the transmission line.[215] Because all of these claimed delays were pre-COVID-19 and did not overlap with COVID-19, there is no possibility COVID-19 constituted 38 months of DCRT's purported 47-month aggregate force majeure delay.

Although Commission Trial Staff recommended a longer delay for COVID-19, Commission Trial Staff witness Dr. Norman agreed that her testimony does not show actual delays to the Project due to COVID-19.[216] Further, Dr. Norman agreed that the time period between actual delay between completing permitting activities and placing the Project into service is substantially similar to DCRT's expected schedule in the first amended DCRT APSA,[217] and much faster than DCRT's expected schedule in the original APSA.[218] Accordingly, Dr. Norman agreed there was no concrete delay between permitting and energization due to COVID-19.[219]

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215 DCRT Initial Post-Hearing Brief at 59-65; Exh. No. DCT-0018 REV2 PUB.

216 Tr. 8570:4-7.

217 Tr. 8582:21-25, 8584:9-20.

218 Tr. 8585:5-10.

219 Tr. 8585:12-25.

The Initial Decision fails to recognize that DCRT would have incurred management run-rate costs (and associated AFUDC) for much of the purported 38-month period anyway even if COVID-19 had never occurred because that is the amount of time that was needed—and that DCRT expressly contemplated would be needed—because after issuance of the BLM's ROD, DCRT still had to go through the CPCN hearing process and obtain a CPCN during that time (that based on DCRT's own assumptions would have taken at least 12 months) and then undertake all the requisite post permitting activities (including having to renegotiate its EPC contract before it could proceed and which did not occur until August 2022) and construct the Project even absent COVID-19. As such, the Initial Decision gives DCRT an unwarranted windfall that is not associated with the actual amount of delay DCRT faced due to COVID-19. In other words, the amount of time it took DCRT to undertake these activities was not unforeseeable except for the nine-month delay in the CPCN proceeding.

4. AFUDC and Management Costs Would Erroneously Increase as a Result of the Initial Decision's Findings

The Initial Decision's error materially increased the awarded exclusion of costs outside the allowable cost cap. The Initial Decision applies a monthly management run-rate of $397,124 to 39 months comprising COVID-19 and the government shutdown (discussed above), producing $15,475,028 in direct management costs, and adds $2,860,208 in AFUDC.[220] Under the correct nine-month delay, DCRT would be able to recover approximately $4,052,089 for both direct management costs and AFUDC.[221]

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[220] Initial Decision at PP 366, 370-76.

[221] CAISO Initial Post-Hearing Brief at 102-08; Exh. No. CSO-0601 REV2 PUB at 47:18-48:3, 123:16-124:21.

The Commission should reverse the 38-month finding and limit the recoverable COVID-19 period to approximately nine months supported by identifiable record evidence. It should correspondingly limit the Bullet #5 exclusion to $4,052,089 for COVID-19-related costs.

G. The Initial Decision Erred in Holding that Notice Under Section 13.1.1 of the DCRT APSA Is Irrelevant to Recovery Under Bullet #5

The Initial Decision erred in finding that Bullet #5 of the DCRT APSA depends only on whether an event meets the APSA definition of Force Majeure, that Section 13.1.1's notice and due diligence requirements do not apply to a request for above-cap recovery under Bullet #5, and that DCRT therefore may obtain recovery for an alleged Force Majeure event without timely notice to the CAISO.[222] The Initial Decision treats Appendix E's use of the term "Force Majeure" as detached from the definition in the DCRT APSA and the DCRT APSA provisions governing how a party must invoke Force Majeure. That is contrary to the text and structure of the integrated agreement. Bullet #5 does not establish a separate concept of force majeure in the context of a cost cap exception; it uses the capitalized, defined term "Force Majeure" found in the body of the agreement (and in the *pro forma* APSA). Section 13.1.1 provides the operative requirements applicable when a party is unable to fulfill an obligation by reason of Force Majeure:

> A Party unable to fulfill any obligation by reason of Force Majeure shall give notice and the full particulars of such Force Majeure to the other Party in writing or by telephone as soon as reasonably possible after the occurrence of the cause relied upon.[223]

Section 13.1.1 also requires telephone notice to be confirmed in writing, requires the notice to state the full particulars, time and date, and expected cessation of the Force Majeure

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222 Initial Decision at PP 335-38.

223 Exh. No. DCT-0002 at 22-23.

event, and requires the affected party to exercise due diligence to remove the disability with reasonable dispatch.[224]

Nothing in the language of the DCRT APSA limits the notice obligation to circumstances in which the other party has formally declared a Default. The first sentence of Section 13.1.1 protects a party from Default when a Force Majeure event prevents performance. The next sentence independently provides that a party "unable to fulfill any obligation by reason of Force Majeure shall give notice." The obligation is triggered by an inability to perform any contractual obligation under the DCRT APSA because of Force Majeure, not by a Default declaration. DCRT's own conduct confirms this reading: DCRT issued Section 13.1.1 notices regarding COVID-19 and the EO even though neither event involved a declared Default.[225]

The Initial Decision focuses narrowly on the fact that Bullet #5 itself does not repeat the notice requirement.[226] It ignores that contracts must be interpreted as a whole, not as isolated provisions.[227] Appendix E states certain costs resulting from delays due to "events of Force Majeure" may be excluded from the cost cap. Article 1 defines Force Majeure, Article 13 specifies what an affected party must do when invoking it, Article 12 establishes the method for providing contractual notices, and Section 21.2 separately addresses notice of an anticipated

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224 *Id.*

225 Exh. No. CSO-0601 REV2 PUB at 76:5-23; CAISO Post-Hearing Reply Brief at 75-79.

226 Initial Decision at PP 335-36.

227 *See, e.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (identifying, as a "cardinal principle of contract construction," that "a document should be read to give effect to all its provisions and to render them consistent with each other"); *E. Tenn. Nat. Gas, LLC*, 190 FERC ¶ 61,125, at P 15 (2025) ("We find East Tennessee's assertions without merit and in contravention of longstanding Commission tariff interpretation principles requiring it give meaning to every provision."); *Evergy Kan. Cent., Inc.*, 183 FERC ¶ 61,094, at P 20 (2023) ("When interpreting tariff provisions, the tariff should be read to give meaning to every provision.").

inability to comply for reasons other than Force Majeure.[228] The absence of duplicated notice language in Appendix E does not nullify the notice obligation expressly established in Article 13.

Indeed, the Initial Decision's reasoning renders the phrase "any obligation" in the second sentence of Section 13.1.1 ineffective. DCRT's cost cap commitment is an obligation under the DCRT APSA. If DCRT contends that a Force Majeure event caused delay costs that are excludable from the cost cap, it is asserting that DCRT was unable to fulfill its contractual cost cap obligation. The fact the Commission ultimately determines what costs are "FERC approved" under Bullet #5 of Appendix E does not eliminate DCRT's obligation to provide CAISO contemporaneous notice of the event allegedly giving rise to the costs.

Section 21.2 of the DCRT APSA reinforces that conclusion, as it requires a party to notify the other when it becomes aware of an inability to comply with the APSA for a reason other than Force Majeure and to provide the date, duration, reason, and corrective action.[229] Sections 13.1.1 and 21.2 thus establish complementary notice pathways: Section 13.1.1 for Force Majeure, and Section 21.2 for non-Force Majeure events. Under the plain language of the DCRT APSA, any non-compliance with the DCRT APSA is necessarily governed by either Section 13.1 or 21.2. In either case, when DCRT became aware of potential delays that would affect its ability to comply with the provisions of the DCRT APSA, including Project milestones and the Project's in-service date specified in Appendix B of the agreement, it was required to provide timely notice to the CAISO. The only question was which of the two provisions governed the situation—Section 13.1 or Section 21.2. Under the Initial Decision's interpretation, however, an Approved Project Sponsor could avoid both provisions by waiting until its rate filing (sometimes

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228 Exh. No. DCT-0002 at 7, 22-23, 30.

229 *Id.* at 30.

years after an alleged event occurs) and asserting for the first time that historical delays were "events of Force Majeure" supporting recovery of costs above a contractual cost cap. That commercially unreasonable result would deprive the CAISO of timely information needed to oversee projects, evaluate project viability, assess schedule and cost consequences, determine whether mitigation or replacement-project-sponsor action is necessary, or determine whether to terminate the project.

The Initial Decision's ruling on this issue has far-reaching implications. Most of the APSAs the CAISO has executed contain some form of force majeure cost cap exclusion in Appendix E of the agreement. Under the Initial Decision's flawed interpretation of the APSA, none of these Approved Project Sponsors would be required to provide timely notice to the CAISO of force majeure events that affect their agreed-to cost containment measures. This is an untenable situation and one that is contrary to the plain wording and intent of the APSA.

Commission and California authorities likewise recognize that failure to comply with a contractual force majeure notice provision weighs against invocation of the provision.[230]

The notice requirement serves a substantive purpose in that it permits the counterparty to investigate the event while facts are available, evaluate causation and mitigation, determine

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[230] CAISO Initial Post-Hearing Brief at 75-76 (citing *United Gas Pipe Line Co.*, 20 FERC ¶ 63,070, at 65,310 (1982), *aff'd on other grounds*, 31 FERC ¶ 61,336, at 61,770-71 (1985) ("Moreover, the October 26, 1970, petition does not meet the notice requirement set forth in Section 11.2. No mention is made therein of *force majeure* or of Section 11. Coming as it did some ten months after curtailment began it is hardly notice 'as soon as possible after the occurrence of the cause relied on. . . .'"); *Joysar v. Derco Assocs., Inc.*, 2022 Cal. Super. LEXIS 86804, at *14 (Nov. 16, 2022) ("Nor did White Lotus show that it met the other two conditions for excuse on the basis of force majeure: written notice to the other party and the use of best efforts to remedy the effects of the force majeure on the obligations under the contracts."); *Packing Dist., LLC v. RTR Bakery, Inc.*, 2022 Cal. Super. LEXIS 59978, at *7 (Sept. 19, 2022) ("Here, the [force majeure clause in the] Lease Agreement requires specific notice to be provided, which Defendant does not contend it made."); *Culver City Mall, LLC, v. Shanghai No. 1 Seafood Vill., Inc.*, 2022 Cal. Super. LEXIS 40635, at *11 (May 20, 2022) ("Defendants did not provide any notification to either Culver City or Valencia of any financial or other impediments to continued payment of rent for any reason, including those stated in Paragraph 27.4 of the subject leases, at any time. For these reasons, reliance on and application of the concept of force majeure is misplaced.")).

whether milestones or other provisions should be amended, and avoid the precise *post hoc* disputes presented here. This can be especially important in the world of transmission development. It also disciplines the project sponsor's characterization of events. Here, DCRT pursued milestone extensions and described many permitting developments to CAISO as ordinary schedule delays, without identifying them as Force Majeure. Only years later, after obtaining amendments extending the Project milestones, did DCRT characterize some of those same events as Force Majeure events supporting recovery above the cost cap.[231]

DCRT provided an actual timely Section 13.1.1 notice only for COVID-19 among the events on which it relies here.[232] Its quarterly reports and general presentations concerning Project risks did not even come close to satisfying Section 13.1.1 because they did not identify the events as Force Majeure, provide the required full particulars, provide notice to the authorized representatives in Appendix D of the APSA or state that DCRT was invoking Article 13. In some instances, DCRT did not characterize an event as Force Majeure until years after it occurred. That cannot satisfy the requirement to provide notice "as soon as reasonably possible after the occurrence of the cause relied upon."

The Commission should therefore rule the findings in paragraphs 335-338 of the Initial Decision were erroneous and hold that a party seeking a Bullet #5 exclusion based on an event of Force Majeure must comply with Section 13.1.1's notice and due diligence requirements. For these reasons, the Commission should find DCRT cannot recover above-cap costs for the federal government shutdown or for any other alleged non-COVID Force Majeure event for which it failed to provide timely, contractually compliant notice.

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231 CAISO Initial Post-Hearing Brief at 76-81; CAISO Post-Hearing Reply Brief at 75-79.

232 Exh. No. DCT-0019 at 3-4; Exh. No. CSO-0001 REV3 at 81:20-84:22, 99:15-100:10, 103:6-16, 107:1-10.

V. Conclusion

The CAISO respectfully requests that the Commission grant the limited exceptions to the Initial Decision described herein for the reasons discussed above.

Respectfully submitted,

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Dated: November 23, 2026

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all of the parties listed on the official service list for the above-referenced dockets, pursuant to the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Washington, D.C. this 23rd day of November, 2026.

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