Public Version

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

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| **DCR Transmission, L.L.C.** | ) | **Docket Nos. ER23-2309-001,** |
| | ) | **ER24-1394-001,** |
| | ) | **EL26-34-000** |
| | ) | **(consolidated)** |
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**POST-HEARING REPLY BRIEF OF THE**
**CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION**

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**Table of Short Versions of Terms and Acronyms Used in this Reply Brief**

| | |
|---|---|
| Abengoa T&I | Abengoa Transmission & Infrastructure, LLC |
| 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 |
| ATRR | actual transmission revenue requirement |
| BLM | Bureau of Land Management |
| CAISO | California Independent System Operator Corporation |
| Commission | Federal Energy Regulatory Commission |
| CPI | consumer price index |
| CPCN | Certificate of Public Convenience and Necessity |
| CPUC | California Public Utilities Commission |
| DEIS | Draft Environmental Impact Statement |
| DOD | U.S. Department of Defense |
| DRECP | Desert Renewable Energy Conservation Plan |
| DCRT | DCR Transmission, L.L.C. |
| DPV | Devers-Palo Verde |
| DPV2 | Devers-Palo Verde No. 2 Transmission Project |
| EIA | Energy Information Administration |
| EIR | Environmental Impact Report |
| EIS | Environmental Impact Statement |

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|---|---|
| EO | Executive Order on Securing the United States Bulk Power System (May 1, 2020) |
| EPC | engineering, procurement, and construction |
| Estrella | Estrella Substation project |
| FAA | Federal Aviation Administration |
| FAST-41 | Title 41 of the Fixing America's Surface Transportation Act |
| FEIS | Final Environmental Impact Statement |
| FERC | Federal Energy Regulatory Commission |
| FPA | Federal Power Act |
| GridForce | GridForce Energy Management, LLC |
| HWT | Horizon West Transmission, LLC |
| Kofa | Kofa National Wildlife Refuge |
| kV | kilovolt |
| LUPA | Land Use Plan Amendment |
| MW | megawatt |
| NERC | North American Electric Reliability Corporation |
| NEPA | National Environmental Policy Act |
| NEPOOL | New England Power Pool |
| NOI | Notice of Intent |
| 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 |

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|---|---|
| ROD | Record of Decision |
| SCE | Southern California Edison Company |
| SONGS | San Onofre Nuclear Generating Station |
| SRP | Salt River Project |
| Suncrest | Suncrest 230 kV 300 MVAr Dynamic Reactive Power Support project |
| TCA | Transmission Control Agreement |
| TO | Transmission Owner |
| TOP | Transmission Operator |
| TRR | transmission revenue requirement |
| WECC | Western Electricity Coordinating Council |
| WHO | World Health Organization |

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**POST-HEARING REPLY BRIEF OF THE**
**CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION**

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

Pursuant to the Order Adopting Revised Procedural Schedule issued in this proceeding,[1] the CAISO submits its Reply Brief.

## I. Executive Summary

DCRT acknowledges that its Project is subject to a contractually binding cost cap of $258,961,024 set forth in Appendix E of the DCRT APSA. DCRT's commitment to a binding cost cap was the primary reason the CAISO selected DCRT to be an Approved Project Sponsor. Despite its commitment, DCRT in this proceeding advances an array of constantly evolving arguments as to why DCRT should not be required to comply with its contract or fulfill its commitments. The latest iteration of these arguments in DCRT's Initial Brief seek to contort the DCRT APSA in ways that are directly at odds with its plain text and contradict numerous statements DCRT made in its bid and in further communications in the CAISO competitive solicitation process, and attempt to rewrite history. The CAISO's responses to the DCRT Initial

[1] *DCR Transmission, L.L.C.*, Order Adopting Revised Procedural Schedule, Docket Nos. ER23-2309-001, et al. (June 2, 2026).

Brief explain how the CAISO's position on the DCRT APSA best implements the plain language of the contract, protects ratepayers from more than $200 million in unsupported above-cap costs DCRT seeks to recover in its Base TRR, and maintains the integrity of the CAISO competitive transmission solicitation process by holding developers to their express cost containment commitments.

DCRT first asks the Presiding Judge to read an unspoken but "implicit" base year adjustment into the APSA cost cap arising from the use of the two words "2020 dollars" which originated in DCRT's own bid. DCRT's position has no support in the text of the DCRT APSA. All the contemporaneous evidence in this proceeding—including the language of the contract and permissible extrinsic evidence in DCRT's own bid and communications—demonstrate that the cost cap is in current/nominal dollars, not in constant dollars, and thus without any base year adjustment or inflation adjustment beyond 2020.

Similarly, DCRT's attempt to rewrite the narrow Bullet #3 and Bullet #4 cost cap exclusions in Appendix E of the DCRT APSA into some broad "regulatory compliance" cost cap exception has no basis in the language of the DCRT APSA or DCRT's bid. DCRT essentially is asking the Presiding Judge to dramatically rewrite those bullets to the benefit of DCRT and the detriment of ratepayers. To the extent the route of the Project needed to change to comply with regulatory requirements, the DCRT APSA does allow for negotiated changes to the cost cap under the Change of Route provisions, but DCRT's rights under those provisions have already been fully exhausted. DCRT's regulatory compliance arguments in its Initial Brief also contradict representations DCRT made to the Commission when seeking rate incentives.

Although the DCRT APSA includes a cost cap exclusion for costs resulting from delays due to events of Force Majeure, DCRT attempts to characterize a wide range of regulatory and governmental actions that are foreseeable as Force Majeure events contrary to Commission precedent and California law. Other events DCRT claims were Force Majeure either do not meet the definition of Force Majeure in the DCRT APSA or do not fall within the parameters of the specific cost cap exclusion in Appendix E of the DCRT APSA. Under the Force Majeure cost cap exclusion, DCRT is only entitled to recover limited above-cap costs resulting from the nine-month delay to the CPUC proceeding caused by COVID-19. Similarly, DCRT is entitled to recover some but not all of its claimed above-cap costs under Appendix E's interconnection-related cost cap exclusions.

The Presiding Judge should find that, notwithstanding DCRT's efforts to throw every argument it can think of against the wall in order to avoid its contractual cost cap, the CAISO and other participants have demonstrated that DCRT's proposed Base TRR is unjust and unreasonable to the extent that Base TRR seeks recovery of capital costs above the limits established in the DCRT APSA.

## II. Arguments

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

DCRT argues the CAISO, Commission Trial Staff, and other intervenors in this proceeding bear the burden of proof under section 206(b) of the FPA on all issues in this proceeding.[2] DCRT's argument fails to account for the burdens DCRT is required to carry.

As explained in the CAISO's Initial Brief, the burden of proof in the proceeding requires the Customer Participants (*i.e.*, the CAISO and the other participants other than DCRT) to make a *prima facie* showing that the evidence favoring their position on an issue meets a "more likely than not" (*i.e.*, 51 percent) standard.[3] However, once the Customer Participants carry the burden of production associated with that burden of proof, the burden of production shifts to DCRT to introduce evidence showing the Customer Participants have fallen short of making the *prima facie* showing.[4] DCRT can also attempt to show it has an affirmative defense that allows DCRT to prevail on the issue; DCRT bears the burden to make a "more likely than not" showing as to each affirmative defense it claims, *e.g.*, that Force Majeure excuses its compliance with obligations and performance under the DCRT APSA.[5] DCRT acknowledges that it is subject to a "Project cost Cap of $258,961,024 for the transmission line portion of the Project."[6] All of DCRT's positions seeking cost recovery in excess of that acknowledged Project cost cap are affirmative defenses.

The CAISO's Initial Brief and this Reply Brief demonstrate the CAISO has made the required *prima facie* showings on all issues in this proceeding, DCRT fails to provide sufficient

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2 DCRT Initial Brief (PUB version) at 1.
3 CAISO Initial Brief (PUB version) at 1.
4 *Id.* at 1-2.
5 *Id.* at 2-3.
6 DCRT Initial Brief (PUB version) at 5.

evidence to rebut those *prima facie* showings, and DCRT fails to carry its burden as to its affirmative defenses.

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

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

DCRT argues the Presiding Judge has the ability under section 206 of the FPA to revise the DCRT APSA in this proceeding.[7] DCRT is incorrect. The sole issue the Commission set for hearing procedures is whether DCRT's proposed TO Tariff and Base TRR are just and reasonable,[8] not whether the DCRT APSA continues to be just and reasonable. The fact the DCRT APSA establishes contractual limitations on DCRT's Base TRR does not expand the scope of this proceeding beyond what the Commission has set for hearing. Therefore, revising the APSA would go beyond the scope of this proceeding.[9] As explained in the CAISO's Initial Brief, the DCRT APSA is a just and reasonable service agreement on file with the Commission, and the Presiding Judge must enforce applicable terms of the DCRT APSA in determining DCRT's Base TRR in this proceeding.[10]

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[7] *Id.* at 3-4.

[8] *See DCR Transmission, L.L.C.*, 184 FERC ¶ 61,199, at PP 1, 40-41, and Ordering Paragraphs (A)-(B) (2023) ("September 2023 Order") (directing "a public hearing shall be held concerning the justness and reasonableness of DCRT's proposed TO Tariff and Base TRR, as discussed in the body of this order"); *DCR Transmission, L.L.C.*, 195 FERC ¶ 61,181, at PP 1, 4 (2026) (stating the September 2023 Order "directed a hearing concerning the justness and reasonableness of DCRT's Tariff Records," *i.e.*, DCRT's proposed TO Tariff and Base TRR); *id.* at P 49 n.169 (finding "DCRT's Tariff Records do not change the substance of the APSA.").

[9] *See, e.g., Old Dominion Elec. Coop. N.C. Elec. Mbrshp. Corp. v. Va. Elec. & Power Co.*, 164 FERC ¶ 61,006, at P 46 (2018) (finding "the scope of the hearing did not extend to cost allocation" because "at the beginning of this proceeding, the Complaint Order set certain issues for hearing but did not set for hearing the issue of the incremental cost of placing the Projects underground"); *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,079, at P 64 (2013) ("Finally, we agree with the parties who assert that the issue of how to apply the Handy-Whitman Index adjustments was not set for hearing and, therefore, is beyond the scope of this proceeding."); *Calpine Oneta Power, L.P.*, 116 FERC ¶ 61,282, at P 79 (2006) ("We find the ALJ's findings regarding the refunctionalization of reactive power costs to be beyond the scope of this proceeding because the Commission only set for hearing whether Oneta's proposed rate schedule for reactive power is just and reasonable.").

[10] CAISO Initial Brief (PUB version) at 7-8.

DCRT has also been clear in this proceeding that it believes the Presiding Judge and the Commission should enforce the DCRT APSA as written (in accordance with DCRT's interpretation of it)—*i.e.*, not revise the DCRT APSA. DCRT witness Reed stated unequivocally in his written testimony:

> To be absolutely clear, my evidence in this case, and that of all of the other DCRT witnesses, is predicated on the position that ***the Commission need not make any changes to the provisions of the APSA, that all of those provisions should be upheld and enforced, and that all of those provisions support DCRT's filing.***[11]

Similarly, in response to questions posed by the Presiding Judge in the hearing, DCRT witness Crew confirmed DCRT's "preference would be that [the Presiding Judge] apply the APSA as written,"[12] DCRT is "not challenging the APSA or the legitimacy of the APSA in any way,"[13] and DCRT "views the APSA as enforceable and binding and the company is not challenging the validity of the APSA or asking [the Presiding Judge] to set it aside."[14] In its Initial Brief, DCRT states "as confirmed at hearing, the APSA is a valid, binding, and enforceable contract and the CAISO is bound *to the agreement it signed*."[15]

In sum, DCRT itself believes the Presiding Judge and the Commission should not revise the DCRT APSA and should instead enforce it as written. On that point, at least, the CAISO agrees with DCRT. Moreover, DCRT's concession that it is "not challenging the APSA or the legitimacy of the APSA in any way," means that no participant in this proceeding has offered any evidence that the DCRT APSA is not just and reasonable.

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11 Exh. No. DCT-0125 REV2 PUB at 8:14-17 (boldface type and italics in original).
12 Tr. 1312:12-15.
13 Tr. 1312:16-23.
14 Tr. 2111:5-12.
15 DCRT Initial Brief (PUB version) at iii (internal citation omitted) (emphasis added) (citing Exh. No. DCT-0102 REV2 PUB at 14).

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

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

##### a. The Plain Text of the DCRT APSA Does Not Require a Base Year Adjustment

As the CAISO explained in its Initial Brief[16] and below, there is no merit in DCRT's claims that Appendix E of the DCRT APSA permits or requires the Commission to adjust the binding cost cap to reflect inflation between 2020 and 2024. DCRT argues the plain meaning of Appendix E of the DCRT APSA requires a base year adjustment to the cost cap. DCRT states meaning must be given to the words in "2020 dollars," and the only meaning DCRT's cost cap can have is if it is compared to actual costs on an "apples-to-apples basis."[17] DCRT claims the only way to determine if DCRT's actual transmission costs "exceed $258,961,024 in 2020 dollars" is to apply a constant measure and compare such costs to the cost cap of $258,961,024 in 2020 dollars with that cost cap escalated from 2020 dollars.[18]

No other participant in this proceeding—including the independent Commission Trial Staff and the Electricity Transmission Competition Coalition, a coalition of independent transmission developers just like DCRT who have participated in competitive transmission solicitations conducted by the CAISO and other independent system operators and regional transmission organizations—agrees with DCRT's interpretation of the cost cap provisions of the DCRT APSA.[19] Contrary to DCRT's claims, the plain language of Appendix E of the DCRT

16 CAISO Initial Brief (PUB version) at 20-35.
17 DCRT Initial Brief (PUB version) at 5-6.
18 DCRT Initial Brief (PUB version) at 6.
19 Commission Trial Staff Initial Brief at 12-23; Electricity Transmission Competition Coalition Initial Brief at 16-26. *See also* CPUC Initial Brief at 39-40 ("The APSA's silence on post-2020 inflation indexing of capital

APSA does not permit or require the Commission to adjust the cost cap in the DCRT APSA for inflation after 2020. Appendix E states DCRT "may adjust the amounts in each cost category as needed during the term of this Agreement provided the total Project cost does not exceed $258,961,024 in 2020 dollars."[20] There is no provision in the DCRT APSA that expressly provides for a base year adjustment or inflation adjustment.

Thus, the DCRT APSA is unlike other APSAs executed months before the DCRT APSA. The cost caps in these APSAs were stated in terms of a dollar/year just like the DCRT APSA—specifically they were "in 2015 dollars"—but they also expressly included additional verbiage stating the cost caps were subject to a further inflation adjustment or were in "constant" dollars.[21] Obviously, those Approved Project Sponsors expressly included language in their APSAs and in their bids indicating not only that the cost cap was stated in a specific year's dollars, but also that the cost cap was subject to escalation for inflation. Merely stating the cost cap in terms of a "dollar/year" by itself was insufficient to indicate the cap was subject to an inflation adjustment. These contemporaneous APSAs also show the CAISO knew how to indicate in an APSA that a cost cap was subject to an inflation adjustment, and the absence of comparable language in the DCRT APSA means there was no intention for DCRT's cost cap to be subject to any inflation adjustment or base year adjustment.[22]

The proper interpretation of the DCRT APSA cost cap should also consider what is not included in the contract. The DCRT APSA cost cap has no inflation adjustment clause, makes no reference to the terms "base year" or "base year adjustment," does not include language

costs is dispositive: DCRT has no contractual basis to invoke the Handy-Whitman Index or any other escalator to inflate the agreed cost cap."); CDWR and NCPA Initial Brief (PRIV-HC version) at 20-39 (explaining why "[t]he Commission should reject DCRT's claimed base year adjustment").

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

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

[22] Exh. No.CSO-0001 REV3 at 65:18-66:18.

supporting the "apples-to-apples" comparison DCRT now claims, is not expressly stated in "constant" dollars, contains no inflation measure or index that would be used to calculate an inflation adjustment, provides no method by which any adjustment would be made or stating under what circumstances it would be made, and makes no mention of the period of time to which any adjustment would apply or what events would trigger an automatic inflation adjustment. Nor does the DCRT APSA contain any language suggesting the cost cap will be updated/escalated based on changes to the in-service date of the Project. DCRT's interpretation of the DCRT APSA would require such non-existent provisions to be "written into" and applied to the APSA after-the-fact to effectuate DCRT's claim. Moreover, as explained in the CAISO's Initial Brief,[23] DCRT stated in several places in its winning bid for the Project that the cost cap in its bid was a specified amount of $241,805,391 (with no qualifications) and confirmed this by stating its cost cap amount was in current year/nominal year dollars. Such amounts are not adjusted for inflation. Nowhere does DCRT's bid (or the DCRT APSA) state the cost cap is in constant dollars, which would allow for a subsequent inflation adjustment.

DCRT claims the CAISO's and Commission Trial Staff's "the cap is the cap" position is flawed because it purportedly ignores the words "in 2020 dollars."[24] DCRT also claims the term "in 2020 dollars" has meaning only if is compared to actual Project costs on an "apples-to-apples" basis.[25] These DCRT claims are flawed and ignore several important facts. First, DCRT ignores the reference to "2020 dollars" in Appendix E of the DCRT APSA is taken from DCRT's competitive solicitation bid and clarification submission in the competitive solicitation process. DCRT's bid and supporting documentation expressly set the dollar level of the cost cap in a

[23] CAISO Initial Brief (PUB version) at 27-30.
[24] DCRT Initial Brief (PUB version) at 8.
[25] *Id.* at 6.

future year's dollars—2020 dollars—by incorporating a 2.5 percent inflation rate from 2015 to 2020.[26] DCRT's bid included no provision for an inflation adjustment beyond 2020. The reference to 2020 dollars in the DCRT APSA simply reflects this. In other words, the cost cap language gives meaning to the choice to set the cost cap in a specific future year's dollars—2020 dollars—and recognizes the cap was inflated to 2020 dollars with no provision for any further inflation adjustment.[27] This language distinguishes the DCRT cost cap from the cost caps in the 2015 APSAs that preceded the DCRT APSA and were stated in terms of 2015 dollars and that included explicit language that the cap would be subject to a subsequent inflation adjustment upon completion of the project.[28] The use of the words "2020 dollars" does not reflect an intent to treat the cost cap as being in "constant" dollars, requiring some "apples-to-apples" comparison or requiring some inflation adjustment or base year adjustment.[29]

As CAISO witness Le Vine testified, an APSA is intended to reflect the specific commitments an Approved Project Sponsor makes in its competitive solicitation application; the CAISO does not and cannot unilaterally impose new cost caps or cost containment measures not reflected in the application.[30] The reference to 2020 dollars makes clear that instead of setting its cost cap in constant 2015 dollars—which would have subjected the cost cap to future escalation for inflation—DCRT voluntarily calculated and set its cost cap at an amount stated in current/nominal 2020 dollars.[31] Commission Trial Staff witness Norman recognized this, noting DCRT developed the cap by escalating the 2015 estimate it provided into a nominal 2020-dollar

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[26] Exh. No. CSO-0001 REV3 at 26:8-15, 50:9-21, 53:1-11; Exh. No. CSO-0006 REV2 PUB at 140, 143-44; Exh. No. CSO-0010 REV; Exh. No. CSO-0601 REV2 PUB at 17:1-8.

[27] Exh. No. CSO-0601 REV2 PUB at 17:1-23.

[28] *Id.* at 14:12-15:6, 16:9-20; 17:18-23.

[29] *Id.* at 17:9-16.

[30] *Id.* at 10:22-11:6 (citing Exh. No. CSO-0394).

[31] Tr. 3033:24-3034:22, 3092:6-3093:21, 3166:23-3167:6, 3170:2-5, 3204:16-3205:2, 3207:4-3208:8.

number and setting that as the cap in DCRT's bid.[32] In this respect, DCRT is no different from other Project Sponsors in CAISO competitive solicitations who provided cost estimates in constant dollars, but proposed cost caps in nominal dollars.[33]

Third, DCRT's "apples-to-apples" argument stems from the Rebuttal Testimony of its witness Reed, which was based on the flawed claim DCRT's cost cap was not based on absolute dollars, nominal dollars, or current dollars, but instead was based on "constant" dollars, which requires a comparison of whether actual Project costs exceed the stated cost in 2020 dollars.[34] Although Mr. Reed states numerous times in his Rebuttal Testimony DCRT's bid was in "constant" dollars,[35] never once did DCRT's bid state the cost cap was in "constant" dollars, nor does the DCRT APSA. However, in four places in its bid DCRT stated its cost cap was an absolute amount of $241,805,391 (without qualification) and further confirmed this by stating the cost cap was in "current 2020 dollars" or nominal dollars.[36] Amounts in current or nominal dollars are not subject to an inflation adjustment. Thus, DCRT's "apples-to-apples" claim is based on the flawed and incorrect factual premise that DCRT's bid was in "constant" dollars. DCRT is attempting to insert the word "constant" into the DCRT APSA when it simply is not there. Thus, in no way does the plain language of the DCRT APSA provide the cost cap is in "constant" dollars.

DCRT claims CAISO witness Davis "fundamentally agreed" inflationary adjustments are necessary to ensure consistent, apples-to-apples comparisons between different vintage-year

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

[33] Mr. Reed's Rebuttal Testimony evidences it is not unusual for APSAs to state cost caps in nominal dollar values. Exh. No. DCT-0125 REV PRIV at 38:1-39:1 (Figure 2).

[34] Exh. No. DCT-0125 REV2 PUB at 22:1-16.

[35] Exh. No. DCT-0125 REV2 PUB at 22:14-16, 24:5-8, 25:8-26:5, 27:16-18, 29:7-11, 33:13-15, 35:22-26, 36:5-8.

[36] *See* CAISO Initial Brief (PUB version) at 27-28.

costs.[37] DCRT bases its claim on Exhibit No. CSO-0806 attached to witness Davis's Rebuttal Testimony that states: "Converting nominal values to real values provides a consistent measure across time."[38] The aforementioned statement is unremarkable and does not support DCRT's claim it is entitled to a base year adjustment. The exhibit distinguishes nominal/current dollars from constant/real dollars, the former not adjusted for future inflation, and the latter adjusted for inflation from a stated base year pursuant to some inflation index such as the CPI or Producer Price Index.[39] The exhibit simply states the obvious fact that to determine the real value of money from year to year, one must account for the impacts of inflation over that time period.[40] In other words, the spending value of $20 today will not be the same as the spending value of $20 in ten years. DCRT ignores the stated purpose of this exhibit was to show the difference between current/nominal dollars (which is how the proposed cost cap is described in DCRT's bid) and constant/real dollars, a difference DCRT does not dispute.[41]

DCRT also ignores the most important fact: neither the DCRT APSA nor DCRT's competitive solicitation bid (1) stated the cost cap was in constant/real dollars, (2) contained any type of inflation adjustment provision or indicated the cost was subject to a base year adjustment, or (3) included any price index that would be required to effectuate any inflation adjustment. These terms would all have to be read into the DCRT APSA (and DCRT's bid) to accommodate DCRT's position. To the contrary, as discussed herein and in the CAISO's Initial Brief, DCRT's bid set its cost cap in the unqualified amount of $241,805,391 and subsequently reaffirmed the

[37] DCRT Initial Brief (PUB version) at 6.
[38] *Id.* (quoting Exh. No. CSO-0806 at 5).
[39] Exh. No. CSO-0806 at 1-2.
[40] *Id.* at 3-5.
[41] Exh. No. CSO-0801 PUB at 25:14-17 & n.37 (Exhibit No. CSO-0806 "explain[s] that converting nominal values to real values requires division by an appropriate price index").

amount was in current dollars/nominal dollars, which are not subject to a further inflation adjustment.

In a footnote in its Initial Brief, DCRT also references Exhibit No. DCT-0241 (and examination of Dr. Davis regarding that exhibit) as providing a reference to a pricing year so costs can be compared on an "apples to apples" basis over time without the impact of inflation and suggesting Dr. Davis agreed with this characterization.[42] This exhibit is irrelevant and provides no probative value regarding the intent of the DCRT APSA or DCRT's bid. DCRT also mischaracterizes Dr. Davis's testimony. Exhibit No. DCT-0241, a two-page document with no explanation, appears to be pages from the 2025 Annual Energy Outlook issued by the U.S. EIA. The exhibit lists 2024 prices for several types of energy resources and lists expected prices for certain future years and expected growth from 2024 to 2050. Dr. Davis testified it appeared EIA may have been doing some forecasting outlook, perhaps using 2024 as a base year, but acknowledged several times this was only an assumption because she did not have access to the underlying data set or what filters EIA was applying.[43] Dr. Davis emphasized just because something references the purchasing power of a specific year does not mean there is an express authorization to make an adjustment.[44] Dr. Davis later confirmed this Exhibit No. DCT-0241 appeared to be only a summary document, had many unclear terms, inputs, and underlying data, and appeared to state prices in terms of "constant" dollars over several years, but she stressed it provided no basis to find DCRT's cost cap was stated in constant dollars.[45] On questioning following the Presiding Judge's examination, there was the following exchange between DCRT's attorney and Dr. Davis:

[42] DCRT Initial Brief (PUB version) at 6 n.25.
[43] Tr. at 3062:2-3063:4; 3063:10-14.
[44] Tr. at 3062:3-5.
[45] Tr. at 3194:1-3196:4.

Q. Okay. So just again, I think what the Judge was asking you is he was referencing appendix E of the DCRT APSA, and the first sentence underneath the table that talks about the project costs and the reference to 2020 dollars. And you had indicated that – I think you agreed that an apples-to-apples comparison would be appropriate; correct?

A. No, I don't think that's what I said.

Q. What do you think you were saying there?

A. I think what I'm saying here is putting things in constant dollar format is a way to compare numbers on an apples-to-apples basis of a select year without the – without having to include the impact of inflation. ***But I do not think***, with respect to your question, that 2020 dollars, just because it's referring to a pricing year, is the same thing as authorizing an adjustment.[46]

Consistent with this testimony on the stand, in her filed Rebuttal Testimony Dr. Davis testified based on her review of the DCRT APSA and the documentation DCRT provided in its competitive solicitation application, (1) DCRT's cost cap reflected a defined escalation period ending in 2020, (2) the cost cap was never characterized as being a constant dollar amount subject to future adjustment, and (3) there was no basis to apply any base year adjustment or other type of inflation adjustment to DCRT's cost cap.[47] Dr. Davis testified a reference to a specific dollar year identifies the price level at which an amount is stated but, standing alone, a year reference does not establish a mechanism for future adjustment; it simply defines the pricing context of the stated amount.[48] Dr. Davis testified three elements are necessary for any base year or inflation adjustment to be operable: (1) an explicit inflation adjustment provision/mechanism, (2) a specified inflation measure/index or calculation methodology,[49] and (3) the relevant

[46] Tr at 3257:5-22 (emphasis added). DCRT wrongly asserts in footnote 25 of its Initial Brief (PUB version) that the exchange occurring at these pages of the transcript was between DCRT's attorney and CAISO witness Le Vine, when in fact the exchange was with CAISO witness Davis.

[47] Exh. No. CSO-0801 PUB at 29:2-21.

[48] *Id.* at 23:7-9, 19-21.

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

comparison period.[50] The threshold and critical requirement, however, is that an agreement include language explicitly authorizing the inflation adjustment over time; merely referring to a dollar year only identities the pricing context of the amount but does not by itself establish a contractual mechanism for future adjustment and does not constitute an indexation.[51] Absent such language, no inflation adjustment exists, nor can it be implied.[52] Once an agreement provides for an inflation adjustment, the other two elements are necessary for the inflation mechanism to be operable.[53] Dr. Davis found DCRT's bid and the DCRT APSA included none of these elements.[54] As such, all these absent provisions would have to be added to the DCRT APSA to accommodate DCRT's position and escalate the cost cap to 2024 dollars.[55]

DCRT states there is nothing unusual about its base year adjustment as commercial arrangements for infrastructure projects in the energy industry commonly provide for inflationary adjustments, including use of the Handy-Whitman Index.[56] DCRT notably ignores the commercial arrangement for the Project—the DCRT APSA—does not refer to 2020 as a base year, contains no explicit base year adjustment provision, and includes no inflation adjustment index such as the Handy-Whitman Index. Indeed, DCRT witness Crew admitted the phrase base year adjustment was never even used until 2023 in connection with DCRT's initial testimony—which DCRT filed approximately nine years after it submitted its competitive solicitation bid and

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50 Exh. No. CSO-0801 PUB at 23:12-26:17.

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

52 *Id.* at 25:3-4.

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

54 *Id.* at 20:17-19.

55 As Dr. Davis testified, determining whether a base year adjustment or inflation adjustment exists requires distinguishing between current or nominal dollars and constant or real dollars; a mere year reference alone does not constitute indexation. *Id.* at 21:14-20. Standing alone, a year reference does not establish a mechanism for future adjustment; it simply defines the pricing context of the stated amount. *Id.* at 23:8-10. A contract must specify an inflation adjustment; a stated dollar amount is fixed unless the agreement includes language authorizing its adjustment over time. *Id.* at 23:14-16.

56 DCRT Initial Brief (PUB version) at 7.

eight years after it executed the APSA.[57] Further, the examples DCRT cites involve explicit tariff provisions providing for inflationary adjustments or CPUC decisions that did not involve contractual commitments like the DCRT APSA, so they do not support DCRT's claim.

DCRT cites no authorities to support its position claiming mere reference to the words "in 2020 dollars" in a contract means a cost cap is subject to an inflation adjustment; DCRT only refers to the testimony of its witness Reed, who was not involved in DCRT's bid or in the DCRT APSA negotiations.[58] Mr. Reed had no documents or authorities supporting his interpretation.[59] On the other hand, the CAISO identified California and Commission precedent subscribing to well-established principles of contract interpretation that require the Commission and courts to be guided by provisions of an agreement clearly expressed by the parties and not to read provisions into the agreement such as inflation adjustment provisions that are not found therein.[60] In 2014, as revised in 2015, DCRT set its cost cap in future year dollars—2020 dollars. Future year dollars, which have already been escalated for imputed inflation as stated in the agreement, are not subject to a further inflation adjustment absent an explicit provision authorizing such an inflation adjustment.[61] As discussed below and in the CAISO's Initial Brief, California and Commission precedent on contract interpretation require explicit inflation adjustment provisions for a stated amount to be subject to a future inflation adjustment. The Presiding Judge should apply those same principles of contract interpretation to find the absence of a post-2020 inflation adjustment provision in the DCRT APSA to mean the APSA contains no such provision.

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57 Tr. at 1876:19-1877:7. DCRT witness Crew, a Lotus Senior Vice President and a Lotus employee since October 2018 who was involved in the negotiations for the second amended DCRT APSA, testified he was not the person who came up with the phrase "base year adjustment." Tr. at 1876:11-18. It is DCRT witness Reed who mainly testified that DCRT's bid and the DCRT contemplated a base year adjustment.

58 Exh. No. CSO-0348.

59 Exh. No. CSO-0353.

60 CAISO Initial Brief (PUB version) at 23-25.

61 Exh. No. CSO-0801 PUB at 21:2-23:21, 29:7-21.

Appendix E contains no base year or inflation adjustment provision nor a specific cost cap exclusion that permits, let alone requires, a base year adjustment to the cost cap for inflation if the Project were completed after 2020.[62] The Commission expects parties to express their intentions clearly and not require the Commission subsequently to read into their agreements language they did not put there.[63] Imputing a base year adjustment provision or inflation adjustment clause into the DCRT APSA where none exists would violate this fundamental tenet and is unsupported by any extrinsic evidence.

DCRT claims to the extent there is ambiguity in the DCRT APSA, the ambiguity should be read against the CAISO, who circulated the initial draft of the DCRT APSA.[64] DCRT ignores the reference to "2020 dollars" in Appendix E of the DCRT APSA is taken from references in DCRT's bid and clarification submission in the competitive solicitation process; the CAISO did not invent it. Although DCRT submitted its bid in 2014, and revised its application in 2015, DCRT's bid and supporting documentation expressly set the dollar amount of the cost cap in a future year's dollars—2020 dollars—by incorporating a 2.5 percent inflation rate from 2015 to 2020.[65] As indicated above, the reference to "2020 dollars" in the DCRT APSA merely reflects DCRT's representations in its bid. Also as indicated above, an APSA is intended to reflect the specific commitments an Approved Project Sponsor makes in its competitive solicitation application; the CAISO does not and cannot unilaterally impose new cost caps or cost containment measures not reflected in the application.[66]

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62 Exh. No. CSO-0001 REV3 at 49:10-20.

63 *Mont.-Dakota Utils. Co.*, 190 FERC ¶ 61,168, at P 43 (2025); *Power Auth. of the State of N.Y. v. Long Island Lighting Co.*, 60 FERC ¶ 61,069, at 61,234 (1992).

64 DCRT Initial Brief (PUB version) at 8-9.

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

66 Exh. No. CSO-0601 REV2 PUB at 10:22-11:6 (citing Exh. No. CSO-0394).

Thus, the “2020 dollars” terminology did not originate with the CAISO; it originated with DCRT. Any ambiguity in the phrase “2020 dollars” should therefore be construed against DCRT, not the CAISO, especially given nowhere before this rate case did DCRT state the cost cap would be subject to an inflation adjustment or that its cost cap was in “constant” dollars. DCRT witness Reed admitted DCRT’s bid did not contain the words “constant” 2020 dollars,[67] and stated the bid language was a “bit sloppy,”[68] DCRT proposed extensive redline edits to the initial drafts of the DCRT APSA to further clarify the document, change definitions, revise APSA provisions, include numerous additional understandings between the parties, and ensure the document clearly entitled it to certain cost cap exclusions, even though such cost cap exclusions were already reflected in the *pro forma* APSA.[69] DCRT also proposed including cost cap exclusions that were not contained in its bid. Despite these painstaking efforts to clarify provisions in the agreement, DCRT proposed no edits to indicate the cost cap was subject to a base year adjustment or inflation adjustment if the Project was delayed. As indicated above, unlike contemporaneous APSA cost caps that both were stated in a specific year’s dollars **and** expressly provided for an inflation adjustment (or stated the cost cap was in “constant-year” dollars), the DCRT APSA contains no such escalation language.

Finally, it is telling DCRT relies on an external consultant—Mr. Reed—to testify and attempt to explain that the cost cap was subject to a base year adjustment rather than relying on the two Starwood employees—Mr. Amirali (who did testify in this proceeding on other topics) and Mr. Saxena—who were directly involved in DCRT’s bid and the initial DCRT APSA

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67 Tr. at 624:8-13.
68 Tr. at 617:19-24.
69 Exh. Nos DCT-0224, DCT-0225, DCT-0226, DCT-0227, and DCT-0228.

negotiations.[70] DCRT witness Reed was involved in neither and was not retained by DCRT until 2023 in connection with this rate case.[71] Mr. Saxena, who was Managing Director of Starwood and is currently CEO of Lotus (successor to Starwood) executed a supporting affidavit accompanying DCRT's bid that provided:

> I certify after due investigation that the information provide in the application is true and accurate to the best of my knowledge and belief and there are no material omissions.[72]

DCRT's claim now its bid contemplated a base year adjustment even though DCRT's bid did not expressly provide for such an escalation in the cost cap would amount to a material omission, which DCRT represented there were none. Even assuming *arguendo* DCRT intended for its cost cap to be subject to a base year adjustment—even though its bid contains no evidence DCRT intended one—CAISO ratepayers should not be required to bear more than $100 million in additional costs for important provisions DCRT omitted in its bid or otherwise failed to articulate. Project Sponsors must be held to the specific, express representations they make in the four corners of their bids and not be allowed to rely on after-the-fact, ten-years-later claims, material omissions, or unstated representations to claim an entitlement to recover additional costs.

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[70] Mr. Saxena was a signatory to the DCRT APSA. Exh, No. DCT-0002 at 37. Both Mr. Amirali and Mr. Saxena were employed at Lotus—the successor to Starwood, which was an original co-owner of DCRT. Exh. No. DCT-0001 REV2 at 2:13-14**.**

[71] Exh. No. CSO-0601 REV2 PUB at 8:13-17 (citing Exh. Nos. CSO-0346, CSO-0347, CSO-0348, CSO-0349, and CSO-0353).

[72] Exh. No. CSO-0006 REV2 PUB at 334. The CEO of Abengoa, DCRT's co-owner, executed a similar affidavit that was submitted with DCRT's competitive solicitation application. *Id.* at 333.

### b. Extrinsic Evidence Does Not Support Imputing a Base Year Adjustment Into the DCRT APSA

#### i. The Integration Clause in the DCRT APSA Does Not Preclude Consideration of Extrinsic Evidence

DCRT argues Section 25.4 of the DCRT APSA precludes consideration of any prior documents or arrangements between the parties, including all bidding materials, and that thus, DCRT and the CAISO have agreed extrinsic evidence cannot be evaluated to interpret the DCRT APSA.[73] DCRT wants to preclude consideration of extrinsic evidence because extrinsic evidence contemporaneous with DCRT's submission of its bid and execution of the DCRT APSA undeniably supports the CAISO's position, not DCRT's position. DCRT misstates the extent of Section 25.4 of the DCRT APSA, which states:

> This Agreement, including all Appendices and Schedules attached hereto, constitutes the entire agreement between the Parties with reference to the subject matter hereof, and supersedes all prior and contemporaneous understandings or agreements, oral or written, between the Parties with respect to the subject matter of this Agreement.[74]

Section 25.4 only excludes consideration of prior and contemporaneous understandings or agreements between DCRT and the CAISO. It does not preclude consideration of other documents such as DCRT bid materials that are not oral or written understandings or agreements between the two parties. Under California law, the existence of an integration clause in a contract, such as Section 25.4 of the DCRT APSA, does not preclude the consideration of extrinsic evidence to interpret the contract and determine its intent.[75]

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73 DCRT Initial Brief (PUB version) at 8-9.

74 Exh. No. DCT-0002 at 34.

75 *Cont'l Baking Co. v. Katz*, 439 P.2d 889, 895, 68 Cal. 2d 512, 521-22 (1968) ("Although extrinsic evidence is not permitted in order to add to, detract from, or vary the terms of an integrated written agreement, extrinsic evidence is admissible in order to explain what those terms are.") (citing precedent); *Haggard v. Kimberly Quality Care, Inc.*, 39 Cal. App. 4th 508, 517-18; 46 Cal. Rptr. 2d 16, 21-22 (1995) ("If a writing is deemed integrated, extrinsic evidence is admissible . . . if it is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.").

### ii. DCRT's Reliance on Bids from Certain Future Competitive Solicitations Is Unavailing

DCRT argues that if the Presiding Judge considers extrinsic evidence to interpret the DCRT APSA, extrinsic evidence supports its position that the cost cap in the DCRT APSA is subject to an inflation adjustment.[76] Presumably because neither DCRT's bid documents, other documents contemporaneous with its bid, nor the DCRT APSA support its position, DCRT's lead argument is that the CAISO's practice is only to impute the risk of inflation to a developer that has expressly assumed inflation risk in its bid. The evidence DCRT provides to support this claim is **[BEGIN CUI//PRIV-HC]** [redacted][77] [redacted] **[END CUI//PRIV-HC]**

DCRT's claim is contrary to California and Commission precedent that an inflation adjustment is not to be assumed unless it is expressly provided for in a contract.[78] Also, as indicated above, the CAISO evaluates the specific representations and commitments each Approved Project Sponsor makes in its bid and then reflects those commitments in the APSA.

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76 DCRT Initial Brief (PUB version) at 9.

77 DCRT Initial Brief (PRIV-HC version) at 9-11.

78 *See* CAISO Initial Brief (PUB version) at 24-25 and accompanying footnotes.

Different bidders express their proposed cost caps and cost containment measures differently based on their particular commitments and preferred phrasing; there was no requirement that bidders state their cost caps or cost containment measures in any specific manner or use any specific wording. As discussed herein and in the CAISO's Initial Brief, DCRT's bid was rife with affirmative statements, representations, and commitments that lead to only one conclusion: the cost cap would not be escalated for inflation. DCRT would have the Presiding Judge ignore this overwhelming evidence contrary to DCRT's position. DCRT's flawed argument would mean even if a Project Sponsor stated its cost cap was in current dollars, nominal dollars, or a stated dollar amount with no qualifications, or if the Project Sponsor stated it was bearing all delay or cost overrun risk or that costs were fixed costs, its cost cap would be subject to an inflation adjustment unless it also expressly included the specific words "not subject to a future inflation adjustment." DCRT cites no precedent for such an unjustifiable interpretation, nor is there any.

#### iii. DCRT's Bid Documents Do Not Support Its Position

Nothing in the DCRT competitive solicitation application or supporting documents provided to the CAISO expressly stated, or even suggested, that DCRT's cost cap was in "constant" dollars or that DCRT was proposing—or otherwise would be entitled to—any type of inflation adjustment or base year adjustment beyond the stated 2020 dollar cost cap amount if the Project in-service date was delayed.[79] To the contrary, DCRT's statements clearly and compellingly demonstrate that DCRT set its cost cap in current/nominal dollars—not constant dollars—and no inflation adjustment beyond 2020 was contemplated. In four places in its application, including two places in its response to request P-12, the cost cap/cost containment

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

section of its bid, DCRT expressly stated it committed to cap its "Transmission Gross Plant" at $241,805,391.[80] In sum, the cost cap consisted of a stated dollar amount with no qualifications. This belies DCRT witness Reed's claim the cost cap was not an absolute dollar cap.[81] No reasonable person would conclude a cost cap in an unqualified, stated dollar amount actually is subject to some unstated inflation adjustment or any other unstated escalation adjustment. What else could the statement in the bid that the cost cap is $241,805,391 reasonably mean? Clarifications of DCRT's proposal provided to the CAISO during the CAISO's comparative evaluation process confirmed DCRT was proposing a binding bid cap with only two cost cap exclusions, neither of which was an inflation adjustment or base year adjustment for delays beyond 2020.[82]

DCRT's competitive solicitation bid also expressly stated in two places that the $241,805,391 cost cap was reflected in DCRT's annual TRR set forth in its response to request F-16 in its application.[83] DCRT's response to request F-16 in its bid expressly states that all the dollars in the annual revenue requirement in Table F-16-1—which includes the $241,805,391 cost cap number (as rounded up)—are in "**'nominal year' dollars**."[84] Nominal dollars are not subject to an inflation adjustment. In addition to the other two references in its response to request P-12 in its bid—the cost cap/cost containment section of the bid—that its cost cap was $241,805,391, DCRT also expressly stated in its response to request P-12 that its cost cap was in

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

81 *See* Exh. No. DCT-0125 REV2 PUB at 22:3-5.

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

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

84 *Id.* at 140 (emphasis added) (quotation marks in original); *see also id.* at 146 (same). DCRT further notes in its response to request F-16 that its Transmission Gross Plant in Table F-16-1 is in future 2020 dollars and includes 2.5 percent inflation from 2015 to 2020 and DCRT "is proposing this as a binding cost cap." *Id.* at 143-45. Again the dollar amounts in Table F-16-1 were stated in "nominal year dollars."

"**current** 2020 dollars,[85] which are the same as nominal dollars, *i.e.*, not subject to an inflation adjustment, and neither are constant dollars. DCRT's claim its cost cap was in "constant 2020 dollars" is unavailing and belied by its own statements in its application. DCRT's bid made no references to its cost cap being in "constant" 2020 dollars.

Numerous other statements in DCRT's application indicate the $241,805,391 cost cap in the initial DCRT APSA would not be subject to a further inflation adjustment. Regarding its cost cap, DCRT made clear that

> we have provided a binding agreement not to exceed certain investment amount. Cost over runs may occur but Caiso and rates payers will be cover [sic] by this binding commitment.[86]

Further, in response to the CAISO's statement "the [CA]ISO understands that any cost overruns and/or project delays will be absorbed by the Project Sponsor," DCRT stated the "inclusion of the proposed total project cost cap, the contingency plans, the cost containment measures, and the parent company guarantees allow DCR Transmission to confirm that any cost overrun and project delays would be absorbed by the Project Sponsor."[87] This indicates DCRT would absorb all cost overruns and project delays, and DCRT confirmed the CAISO's understanding.

Further, in two places in its bid, DCRT stated it had entered into an EPC contract with Abengoa T&I—an affiliate of DCRT's co-owner Abengoa—for "a fixed amount of $173,753,690.00" and that "[a]ny cost overruns in the EPC, at all, will be contractor's responsibility and will not be transferred to DCRT."[88] This $173,753,690 amount is the same amount reflected in the overall $241,805,391 cost cap in DCRT's response to request F-16 and in

85 *Id.* at 109 (emphasis added).
86 *Id.* at 103.
87 *Id.* at 133-34.
88 *Id.* at 55; *see also id.* at 134 (reading substantially the same). DCRT then stated that because "most of the expected total cost of the project is related to the construction of the line, we have removed the most significant cost overrun risk from DCRT." *Id.* at 55; *see also id.* at 134 (reading substantially the same). DCRT also stated in its application that its contracts with outside firms for contracting and siting were "fixed price contract[s]." *Id.* at 19.

Appendix E of the DCRT APSA.[89] Given DCRT's representations that the majority of DCRT's $241,805,391 cost cap was under fixed-price contracts whereby the contractor—not DCRT or CAISO transmission ratepayers—would bear the risk of cost overruns, it is difficult to fathom how the entire cost cap amount of $241,805,391 was stated in constant dollars that would automatically be adjusted for inflation beyond 2020 in the event of project delay. The $173,753,690 amount was an absolute amount with no qualifications.[90] No reasonable person could interpret DCRT's representations regarding the unqualified, fixed-cost nature of the EPC contract as actually including an (unstated) inflation adjustment that imposed the risk of inflation or Project delays on ratepayers. The lack of an inflation adjustment clause in the fixed-price contracts is dispositive.[91]

Also telling is that in DCRT's discussion in its response to request F-16 in its bid, where DCRT described all of the Project's individual cost components, DCRT expressly stated its cost cap incorporated a 2.5 percent annual inflation adjustment from 2015 to 2020, but DCRT neither included, nor discussed the possibility of, any inflation adjustment post-2020. However, DCRT's discussion of O&M costs in its response to request F-16 in its application expressly included separate inflation adjustments (and inflation measures) for O&M costs pre-2020 and post-2020.[92] Had DCRT also intended its capital cost cap to be subject to an inflation adjustment

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

90 DCRT's term sheet with Abengoa T&I similarly shows a fixed-contract price of $173,753,690, with no reference to the price being in 2020 dollars or that it was subject to, or allowed, any type of inflation adjustment. Exh. No. CSO-0019 at 5-6. This is consistent with DCRT's unequivocal representations to the CAISO in its bid that its EPC contractor—an affiliate—would bear all costs above the stated amount of $173,753,690.

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

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

post-2020 just like O&M costs post-2020, it could have said as much, but DCRT did not. DCRT's failure to do so is further evidence no such capital cost inflation adjustment was ever intended.

DCRT dedicates several pages of its Initial Brief to describing the contents of its bid and attempting to explain away some of its statements that otherwise show its cost cap was not subject to an inflation adjustment,[93] but it is unavailing. First, DCRT attempts to explain away the reference to nominal dollars in its response to request F-16 in its bid. DCRT indicates it proposed to use a stated rate in its response, because it "reasonably understood that an instruction for the preparation of a multi-year revenue projection for its proposed stated rate revenue requirement required the use of nominal dollars, and DCRT stated that all values in Table F-16-1 were expressed in nominal dollars."[94] Second, DCRT attempts to explain away the express reference in its bid to the cost cap being in "current" 2020 dollars. Finally, DCRT notes its statement in its response to request F-16 that "[t]his amount represents Project Sponsor's capital investment cap per question P-12 but stated in nominal year dollars."[95] DCRT claims the term "but stated" at page 145 of Exhibit No. CSO-0006 REV2 PUB indicates its cost cap per question P-12 was stated in "constant" dollars, not current or nominal dollars.[96]

DCRT's *post hoc* rationalizations are unavailing, and they appear nowhere in DCRT's filed testimony. Request F-16 was in the "Financial" section of the bid, not the cost cap/cost containment section.[97] It simply asked Project Sponsors to provide annual revenue forecasts for the Project in a manner that would be similar to what would be filed with the Commission and to

93 DCRT Initial Brief (PUB version) at 13-18.
94 *Id.* at 15.
95 *Id.*
96 *Id.*
97 Exh. No. CSO-0006 REV2 PUB at 113-53.

provide **all** assumptions used in the calculations.[98] Request F-16 did not require costs to be stated in nominal dollars or prescribe the assumptions Project Sponsors were to use,[99] and various Project Sponsors responded to this request differently.[100] DCRT's response to request F-16 included a separate heading for Assumptions, and DCRT provided an extensive list of assumptions that included assumptions for all of the individual cost components of its revenue requirement. For capital costs, DCRT noted the 2.5 percent inflation assumption from 2015 to 2020.[101] For Transmission O&M costs, DCRT assumed Transmission labor expenses would escalate annually by 4 percent per year from 2015 to 2020 and 3 percent per year during the rest of the life of the Project; DCRT assumed non-labor Transmission O&M would escalate annually by 2.5 percent.[102] Request F-16 requested Project Sponsors to provide **all** their cost assumptions. DCRT's response to request F-16 shows it considered the issue of cost escalation post-2020, and it expressly specified cost escalation assumptions for O&M costs post-2020 but specifies no comparable escalation assumptions for capital costs. If DCRT intended its capital cost cap to be subject to any inflation adjustment post-2020, this would have been an appropriate place to state its intent and to state what its inflation assumptions for capital costs would be post-2020, just like it did for O&M costs post-2020. DCRT's failure to do so indicates no inflation adjustment for its capital cost cap was ever intended post-2020.

DCRT's reliance on the "but" wording in its response to request F-16 in its bid (at pages 144-145 of Exhibit No. CSO-0006 REV2 PUB) to suggest the cost cap numbers in its response were in nominal dollars, but the cost cap amount in response to request P-12 was in constant

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98 *Id.* at 139.

99 *Id.*

100 *See* Exh. Nos. CSO-0013 PRIV at 110-11, CSO-0014 PRIV at 88-89, CSO-0015 PRIV at 159-61, CSO-0016 PRIV at 79-83, and CSO-0045 PRIV at 204-07.

101 Exh. No. CSO-0006 REV2 PUB at 144.

102 *Id.* at 146.

dollars, is unavailing. As DCRT acknowledges in its Initial Brief, request P-12 concerns the cost cap cap/cost containment section of its bid,[103] not request F-16. In its response to request P-12, DCRT expressly states: "Project Sponsor offers the following as a binding cost cap to CAISO: Project Sponsor commits to cap its 'Transmission Gross Plant' at $241,805,391.00."[104] A page later, also in response to request P-12, DCRT states: "DCRT commits to cap its 'Transmission Gross Plant' at $241,805,391.00."[105] These absolute amounts are unqualified. DCRT also expressly states in its response to request P-12 the cost cap is in "current 2020 dollars."[106] It does not get much clearer than these statements. Nowhere in the response (or anywhere else in its bid) does DCRT state the cost cap amount is subject to an inflation adjustment if the Project is delayed, nor can one be inferred from a cost cap stated in an unqualified dollar amount and as "current" dollars. In its response to request P-12, immediately after stating its cost cap was $241,805,591, DCRT stated in two places that it "includes **this number** in its annual base transmission revenue requirement (ABTRR) calculated in response to Question F-16."[107] Thus, DCRT expressly included the $241,805,591 in the calculation in its response to request F-16 because that was the amount of its cost cap, not because the numbers in the response to request F-16 were nominal dollar values. Further supporting this conclusion is DCRT's statement in its response to request P-12 that "[a]ll cost associated with the transmission solution are [sic] included in the cap."[108]

Had DCRT intended the cost cap to be subject to an inflation adjustment, it should have expressly stated in response to request P-12, the cost cap/cost containment section of the bid, that

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103 DCRT Initial Brief (PUB version) at 14.
104 Exh. No. CSO-0006 REV2 PUB at 108.
105 *Id.* at 109.
106 *Id.* (emphasis added).
107 *Id.* at 108, 109 (emphasis added).
108 *Id.* at 110.

the bid was in "constant 2020 dollars" or was subject to an inflation adjustment. It did neither, and in fact expressly indicated the opposite. Even in the "but" sentence in its response to request F-16, DCRT did not state affirmatively that its cost cap amount of $241,805,391 was in "constant" dollars or subject to an inflation adjustment.

DCRT's attempt to read some implicit intent into the "but for" wording is further undercut by the fact DCRT's bid is riddled with grammatical and spelling errors. Given the overwhelming evidence DCRT's bid was stated in current/nominal dollars and was a stated amount of $241,805,391 (with no qualifications), DCRT was bearing the risk of all overruns and delays, the vast majority of the capital costs were under a fixed rate contract at a set amount where the contractor was bearing the risk of overruns, and there were no express statements the cap was in constant dollars or subject to an inflation adjustment, a more likely explanation is use of the word "but" was the product of less than perfect grammar. Indeed, in discussing pages 144-45 of Exhibit No. CSO-0006 REV2 PUB, which contains the "but" wording, DCRT witness Reed described that portion of the document as "not perfectly worded."[109] Mr. Reed subsequently reaffirmed the wording in DCRT's bid was a "bit sloppy." Even assuming *arguendo* DCRT intended its cost cap to be subject to a base year adjustment, nothing in its bid conveys this intent, but there are numerous statements indicating otherwise. CAISO ratepayers should not be expected to bear more than $100 million in additional costs under these circumstances, especially given the CAISO awarded the Project to DCRT based on the fact the cost cap was not subject to an inflation adjustment.

DCRT's claim its cost cap in its response to request P-12 was in constant dollars not nominal dollars is also directly contravened by DCRT's explicit statement in the response: "The

109 Tr. at 615:25-616:4.

cap is based on **current 2020 dollars**."[110] Current dollars are nominal dollars and are not subject to further inflation; they are not constant dollars. Elsewhere in its Initial Brief, DCRT insists meaning must be given to specific words in documents, but here DCRT seeks to run as far away as possible from the unequivocal written words in its bid.

DCRT attempts to rationalize and explain away the statement that its cost cap was in current dollars, stating:

> DCRT understands that someone who reads that response [from DCRT in Exhibit No. CSO-0006 REV2 PUB regarding its response to request P-12], and only that response, in the DCRT Revised Bid may be confused by the term "2020 current dollars." As Witness Reed testified at hearing, a single word in a 2015 bid that a number is in "2020 *current* dollars," is not definitive, and when weighing the overall evidence, this one obtuse reference to current dollars does not undercut the words of the numerous other sections in the DCRT Initial and Revised Bids (and the APSA) that make clear that the cost cap was expressed in "2020 dollars," which has the meaning of 2020 constant dollars as used by and accepted in industry conduct.[111]

It is not just the express reference to "current dollars" in the cost cap section of DCRT's bid that leads one to conclude DCRT's bid was not in constant dollars subject to an inflation adjustment, it also is the numerous other statements (and key omissions) DCRT made, including: (1) four separate references to the cost cap being an unqualified amount of $241,805,591, including two such statements in its response to request P-12, the cost cap section; (2) two separate statements its EPC contract—accounting for approximately 70 percent of the $241,805,591—was a fixed rate contract with the contractor bearing all costs above that amount, (3) two separate statements DCRT was bearing the risk of all delays and cost overruns; (4) the discussion in its response to request F-16 describing inflation for O&M costs after 2020 but including no similar discussion

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110 Exh. No. CSO-0006 REV2 PUB at 109 (emphasis added).

111 DCRT Initial Brief (PUB version) at 16-17. DCRT witness Reed's characterization of the single "obtuse" reference to "current" 2020 dollars in the cost cap section of DCRT's bid can be compared to the zero references to "constant dollars" anywhere in DCRT's bid, although Mr. Reed claims throughout his Rebuttal Testimony DCRT's bid was in "constant" dollars.

of escalation for capital costs after 2020; (5) its first two quarterly reports to the CAISO stating that DCRT's investment amount was an unqualified $241,805,591;[112] (6) the fact that nowhere did DCRT's bid state the cost cap was in "constant dollars" (but did expressly state the cost cap was in "current dollars"); and (7) the fact that nowhere did DCRT state that the cost cap was subject to an inflation adjustment or base year adjustment if the Project was delayed. All these factors in their totality confirm the cost cap was in current dollars, not constant dollars.

DCRT's *post hoc* rationalization of its use of the term "current dollars" in its response to request P-12 is discussed nowhere in its pre-filed testimony. In his Rebuttal Testimony, DCRT witness Reed identified some of the statements DCRT made in its bid regarding the cost cap, including the statement in its response to request P-12 that the cost cap was in **current** 2020 dollars.[113] However, Mr. Reed stated throughout his Rebuttal Testimony that that the cost cap was in "constant dollars" or in "2020 dollars"—which he argued meant the cost cap was subject to an inflation adjustment—glossing over DCRT's express reference to the cost cap being in "current 2020 dollars."

DCRT next argues that a clarification question asked by the CAISO during the competitive solicitation process and DCRT's response show the CAISO knew DCRT's cost cap was being expressed in terms of 2020 dollars, not year-of-occurrence dollars, nominal dollars, or current dollars.[114] Although DCRT does not attribute this argument to DCRT witness Reed, Mr. Reed made this same argument in his Rebuttal Testimony stating, "This request indicates that the CAISO understood that the cost cap was in reference to 2020 dollars, which are constant dollars, not nominal dollars."[115] However, in its Initial Brief, DCRT has removed the reference to

[112] Exh. No.DCT-0015 at 22-24, 37-38.
[113] Exh. No. DCT-0125 REV2 PUB at 25:11-12, 30:12.
[114] DCRT Initial Brief (PUB version) at 17.
[115] Exh. No. DCT-0125 REV2 PUB at 27:16-18.

"constant dollars," presumably because nowhere does DCRT's bid state its cost cap is in "constant" dollars. DCRT is imputing words and meaning into the CAISO's request that simply are not there. There is no reference to the words "constant dollars" in the CAISO's request. DCRT's claim is particularly befuddling given DCRT's bid expressly stated the cost cap was in "current 2020 dollars" and given all the other statements in DCRT's bid, discussed above, that clearly indicated the cost cap was $241,805,391 with no qualifications. The CAISO's question merely sought confirmation that the cost cap included all the categories of Project-related capital costs and recognized DCRT had set its cost cap at a level based on 2020 dollars (as opposed to 2015 dollars like other Project Sponsors in the competitive solicitation process) by imputing a 2.5 percent inflation rate from 2015-2020.

#### iv. DCRT's Position Conflicts With the Bids of Its Parent Company in Other Competitive Solicitations

DCRT's claim its DCRT cost cap contemplated a base year adjustment or was otherwise subject to escalation for inflation is also belied by the content of four Starwood bids in other CAISO competitive solicitations. Starwood was a co-owner of the Project along with Abengoa[116] and then took over as the sole owner when Abengoa declared bankruptcy. The responsible persons for Starwood in connection with its four bids were Ali Amirali and Himanshu Saxena[117]—the same Starwood personnel involved in the DCRT bid and the DCRT APSA.[118] **[BEGIN CUI//PRIV-HC]** [redacted][119] [redacted][120] [redacted]

[116] Exh.No. CSO-0006 REV2 PUB at 16.

[117] Exh. Nos. CSO-0427 PRIV-HC at 180-82, CSO-0428 PRIV-HC at178-80, CSO-0429 PRIV-HC at 180-82, and CSO-0430 PRIV-HC at 186-88.

[118] Exh. No. CSO-0006 REV2 PUB at 334; Exh. No. DCT-0002 at 37, 48; Exh. No. DCT-0224 at 1, 103; Exh. No. CSO-0302. Only Mr. Amirali, not Mr. Saxena, submitted testimony in this proceeding.

[119] Exh. No. CSO-0427 PRIV-HC at 38.

[120] Exh. No. CSO-0428 PRIV-HC at 40.

[redacted][121] [redacted][122] [redacted][123] [redacted][124] [redacted][125] [redacted][126] [redacted][127] **[END CUI//PRIV-HC]**

Thus, all these Starwood bids propose **[BEGIN CUI//PRIV-HC]** [redacted]

[121] Exh. No. CSO-0429 PRIV-HC at 40.
[122] Exh. No. CSO-0430 PRIV-HC at 47.
[123] Exh. No. CSO-0427 PRIV-HC at 38.
[124] Exh. No. CSO-0428 PRIV-HC at 40.
[125] Exh. No. CSO-0429 PRIV-HC at 40.
[126] Exh. No. CSO-0430 PRIV-HC at 47.
[127] Exh. Nos. CSO-0427 PRIV-HC at 38-39, CSO-0428 PRIV-HC at 40-41, CSO-0429 PRIV-HC at 40-41, and CSO-0430 PRIV-HC at 47-48.

[redacted][128] [redacted] **[END CUI//PRIV-HC]** This is consistent with the other extrinsic evidence in the record and identified by the CAISO.

#### c. The DCRT APSA Amendment Negotiations Do Not Support DCRT's Position

DCRT states the CAISO and DCRT engaged in two-and-one-half years of negotiations on an amended DCRT APSA, and subsequently the CAISO executed the second amended DCRT

[128] DCRT submitted its bid in 2014 but claims 2020 was the base year for the cost cap. **[BEGIN CUI//PRIV-HC]** [redacted] **[END CUI//PRIV-HC]**

APSA with full knowledge of DCRT's intent to address disputed regulatory costs and "pursue its contractually-entitled adjustments" in its rate filing with the Commission.[129] DCRT further states it did not intend to assume the risk of cost increases or delays by executing the Second Amended APSA and never intended to assume any inflation risk beyond 2020.[130]

There are several fatal flaws in DCRT's argument, the most notable being DCRT never once informed the CAISO of its current position its cost cap was subject to a base year adjustment or some other inflation adjustment. DCRT produces no evidence it informed the CAISO it believed its cost cap was subject to a base year adjustment or inflation adjustment during the negotiations leading up to execution of the second amended DCRT APSA.[131] The discussion kicked off with DCRT's June and July 2019 presentations to the CAISO. [132] In those presentations, DCRT detailed numerous types of cost increases and delays the Project was facing. It broke these cost increases into three categories—route change, agency action/force majeure, and other additional costs, which it identified as additional costs it expected to incur as an indirect consequence of Change of Route, agency action/Force Majeure, and modifications to the financing calculation methodology due to the application of allowable Commission financing costs.[133] DCRT also identified certain additional costs outside of the cost cap, which DCRT stated were subject to discussion with and approval of the CAISO.[134]

Although DCRT refers to schedule delays throughout these presentations, nowhere do the presentations mention inflation or inflation adjustments or state DCRT is entitled to a base year

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[129] DCRT Initial Brief (PUB version) at 19-20.
[130] *Id.* at 20.
[131] DCRT conceded there are no documents or communications provided to the CAISO or conversations between DCRT and the CAISO regarding a base year adjustment to the cost cap. Exh. No. CSO-0001 REV3 at 62:16-20 (citing Exh. No. CSO-0018).
[132] Exh. No. DCT-0018 REV2 PUB at 10-39.
[133] *Id.*
[134] *Id.* at 31-34.

adjustment or inflation adjustment to the cost cap to account for cost increases and project delays. To the contrary, DCRT's presentations expressly stated the APSA cost cap was $242 million with no qualifications and no reference it was subject to any base year adjustment or inflation adjustment.[135] The DCRT APSA was amended for a second time on March 7, 2022, and it extended the in-service date of the Project to April 15, 2024.[136] Given increasing Project costs and the more-than-two-year delay resulting from the second amendment, this would have been an obvious time for DCRT to advise the CAISO that the cost cap required an upward adjustment for inflation due to existence of the (unstated) base year adjustment. It did not.

Another insight into the parties' intent stems from communications between the CAISO and DCRT regarding the appropriate amount DCRT should be compensated for the additional miles of transmission line resulting from the BLM's Change of Route decision. The CAISO initially concluded the amount should be $14,661,962,[137] which was based on the 2020 bid price per mile ($1,370,276.8 per/mile),[138] not the $18,374,389 DCRT was requesting.[139] DCRT responded that the $14,661,962 did not account for reasonable escalation.[140] DCRT recognized the APSA price was based on 2020 dollars but stated it had evaluated the estimated cost of commercial operation dates in 2020, 2021, and 2022, utilizing an escalation factor of 2.2 percent, and such escalated costs averaged slightly more than $1.4 million per mile.[141] The CAISO rejected DCRT's request.[142] This exchange reflects the contemporaneous understanding between the parties.

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135 *Id.* at 18, 24.
136 Exh. No. DCT-0002 at 70-80.
137 Exh. No. DCT-0104 at 6.
138 *See id.*
139 Exh No. DCT-0104 at 6. *See also* Exh No. CSO-0009 REV at 1.
140 Exh. No. DCT-0104 at 10.
141 *Id.*
142 Tr. at 4861:21-4865:25.

Had the DCRT APSA provided for a base year adjustment, this exchange would have been unnecessary. DCRT would not have needed to request escalation for a specific cost item for inflation in the second amendment, and the CAISO would have been unable to reject any such inflation adjustment.[143] If the DCRT APSA provided for a base year adjustment, DCRT would have been entitled to escalate all the cost components of the cost cap, as set forth in the DCRT APSA, and it would not have requested an inflation-adjusted price for just the roughly ten extra miles of transmission line resulting from the BLM's Change of Route.[144] This would have been the perfect time for DCRT to insist it was entitled to a base year adjustment under the DCRT APSA because Project construction would occur after 2020 and the agreed to in-service date in the second amended DCRT APSA was May 2024. The fact DCRT was aware of the CAISO's rejection of any escalation yet never notified the CAISO it was entitled to a base year adjustment or some other inflation adjustment under the DCRT APSA indicates neither DCRT nor the CAISO ever intended such an adjustment.

#### d. There Is No Basis to Apply the Handy-Whitman Index to Escalate the Cost Cap

DCRT argues its proposed use of the Handy-Whitman Index to escalate the cost cap is just and reasonable because the Handy-Whitman Index is commonly applied to infrastructure projects.[145] DCRT notes the Handy-Whitman Index is often used in California by the CPUC and by the CAISO in the context of escalation of costs in generator interconnection agreements.[146]

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[143] *See id.*

[144] Indeed, even the costs associated with the original 114 miles of the line would have been subject to an inflation adjustment as well, but DCRT neither requested such an adjustment nor notified the CAISO it was entitled to such an adjustment.

[145] DCRT Initial Brief (PUB version) at 20.

[146] *Id.* at 20-21.

DCRT also states the Commission has used it in some instances.[147] However, those arguments are irrelevant to the facts in this proceeding.

There is no legitimate basis to escalate DCRT's cost cap beyond 2020 using the Handy-Whitman Index. Neither the DCRT APSA nor DCRT's competitive solicitation application mention the Handy-Whitman Index (or mention that the cost cap is subject to an inflation adjustment). The only inflation index DCRT used for capital costs and to calculate its binding cost cap in its competitive solicitation application was 2.5 percent annually (and only for 2015-2020).[148] Although DCRT did not escalate capital costs beyond 2020 in its bid, it did escalate O&M costs for that period, using a fixed annual inflation rate of 3.0 percent for Transmission labor expense and an annual inflation rate of 2.5 percent for non-labor Transmission expense.[149] Thus, in its bid DCRT only mentioned using fixed inflation rates. It is pure fiction even to suggest DCRT contemplated using the Handy-Whitman Index to increase its cost cap if there were Project delays beyond 2020, given its submission never mentioned using the index, the only inflation rates used in its bid were imputed fixed inflation rates, and DCRT expressly assumed a 2.5 percent annual escalation for non-labor O&M (*i.e.*, parts and materials), the same inflation rate it used for capital costs for 2015 to2020.[150] Because the DCRT APSA does not mention the Handy-Whitman Index and it was never mentioned in DCRT's bid, allowing its use would be wholly divorced from any representations DCRT made in the competitive solicitation process. DCRT is inserting words (*i.e.*, indices) into its bid and the DCRT APSA that simply are not there and were never contemplated. The CAISO certainly did not evaluate DCRT's bid as if it would

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147 *Id.*

148 Exh. No. CSO-0006 REV2 PUB at 143; Exh. No. CSO-0010 REV.

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

150 Exh. No. CSO-0601 REV2 PUB at 35:11-16.

be subject to an inflation adjustment post-2020 using the Handy-Whitman Index.[151] Competing applications in the competitive solicitation that did provide for an inflation adjustment utilized the CPI to measure inflation, not the Handy-Whitman Index.[152]

The CAISO acknowledges there are two narrow instances in connection with the generator interconnection process where the CAISO uses the Handy-Whitman Index, but both are unrelated to APSAs or competitive solicitations in the CAISO's transmission planning process, such as the competitive solicitation to construct the Project.[153] Neither of these scenarios involves evaluating competing bids and cost caps (and the risk of cost cap escalation) in a competitive solicitation process or the setting of binding cost caps.[154] DCRT ignores that in other tariff filings, the CAISO has used a CPI for escalation purposes, and DCRT itself uses a 2.1 percent inflation adjustment factor for the generator interconnection process.[155]

Although the Commission has approved using the Handy-Whitman Index in connection with some infrastructure-related matters where use of the Handy-Whitman Index was established up front, it also has approved the use of the CPI and other inflation indices in other proceedings. For example, HWT used the CPI to escalate its cost cap for Suncrest[156] pursuant to an APSA that expressly stated the cost cap was subject to an inflation adjustment. The CPUC's use of the Handy-Whitman Index has no precedential value in a Commission proceeding, and its use of the Handy-Whitman Index in a CPCN proceeding is significantly different from, and not relevant to, the CAISO's consideration of competing bids and binding cost caps and cost containment proposals in a competitive solicitation process.[157] In a CPCN proceeding the CPUC seeks to

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151 *Id.* at 35:7-9.

152 Exh. No. CSO-0001 REV3 at 69:1-14.

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

154 Exh. No. CSO-0001 REV3 at 70:5-71:8.

155 *Id.* at 72:15-73:11; Exh. No. CSO-0025; Exh. No. CSO-0601 REV2 PUB at 32:22-33:17.

156 Exh. No. CSO-0601 REV2 PRIV at 36:9-11; Exh. No. CSO-0613 PRIV.

157 Exh. No. CSO-0601 REV2 PUB at 27:1-30:9.

determine the maximum reasonable and prudent cost of a Project and will adjust that number upward if actual costs will exceed the maximum amount it originally set.[158] None of the examples DCRT cites to support its position, CPUC or otherwise, involve evaluating competing bids and binding cost cap proposals in a competitive solicitation process or setting a binding cost cap in a contract that will govern cost recovery where a Project Sponsor never mentioned using the Handy-Whitman Index.[159]

Assuming solely for the sake of argument the Presiding Judge finds an inflation adjustment should be applied to the DCRT cost cap, the only measure of cost escalation for any inflation adjustment that would be justified is 2.5 percent, *i.e.*, the only inflation measure DCRT used to inflate capital costs in its bid.

#### e. Escalating the Cost Cap from May 2020 to June 2024 for Inflation Is Not Just and Reasonable

DCRT argues the base year adjustment should run from May 2020 (the initial Project in-service date) to June 12, 2024 (the actual in-service date) to permit an apples-to-apples comparison.[160] DCRT states cost incurrence was expected to occur in 2016 to 2020 but actually occurred from 2020 to 2024. DCRT argues there is no basis to truncate the adjustment period because it would not reflect the actual amount of schedule displacement.[161] To support its argument, DCRT points to Suncrest, where HWT used the project's in-service date as the endpoint of the inflation adjustment calculation, and the CAISO did not object to the final

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158 *Id.* at 27:6-28:9. DCRT also ignores that that in the CPUC proceedings it cites, the company requesting a maximum cost determination, or seeking to adjust a maximum cost determination, used the term "constant dollars" in its application, a term found nowhere in either the DCRT APSA or DCRT's bid. Exh. Nos. DCT-0131 at 47, DCT-0132 at 24, and DCT-0133 at 49-50. The company also expressly stated it was using the Handy-Whitman Index, unlike DCRT. Exh. No. DCT-0125 REV2 PUB at 41. DCRT also ignores the CPCN decision for the Project does not mention using the Handy-Whitman Index although other CPCN decisions do. Exh. No.CSO-0601 REV2 PUB at 31:13-16.

159 *Id.* at 28:19-30:3, 32:13-17.

160 DCRT Initial Brief (PUB version) at 21-22.

161 *Id.* at 22-23.

Suncrest cost report.[162] DCRT claims it constitutes undue discrimination against DCRT not to allow DCRT to escalate its cost cap to the actual in-service date of the Project.[163]

The fundamental flaw in DCRT's argument is that neither the DCRT APSA nor DCRT's bid expressly provided for a base year adjustment or any inflation adjustment to the cost cap beyond 2020. DCRT is coming in after all the costs have been incurred and are known to exceed the binding contractual cost cap, claiming for the first time DCRT is now entitled to a base year adjustment. Under these circumstances, assuming solely for the sake of argument the Presiding Judge finds some inflation adjustment should be applied to the DCRT cost cap, basing any such adjustment on 2024 dollars would be unjust and unreasonable. In particular, it would be unjust and unreasonable to approve any inflation adjustment through 2024 because the bulk of DCRT's capital costs became fixed years before through the fixed-price EPC contract.[164] DCRT's amended EPC Contract was executed on August 12, 2022, and by DCRT's own admission and clear explanation it was a fixed-price contract.[165] Further, significant actual expenditures occurred before October 31, 2022—the date the Project was released for construction—and even more by December 31, 2023.[166] DCRT had already incurred **[BEGIN CUI//PRIV]** [redacted][167] **[END CUI//PRIV]**

[162] DCRT Initial Brief (PRIV-HC version) at 23.

[163] *Id.* at 23-24.

[164] Exh. No. CSO-0001 REV3 at 73-74; Exh. CSO-0601 REV2 PUB at 37:19-22.

[165] Exh. No. CSO-0001 REV3 at 73:12-74:9 (citing Exh. No. DCT-0007 REV2 at 5:9-10, 15-23,16:6-7); Exh. No. CSO-0601 REV2 PUB at 36:17-37:22. DCRT witness Crew discussed the importance of the EPC contract being a fixed-price contract including protecting ratepayers, controlling costs, and shifting the cost risk to the EPC contractor. Exh. No. DCT-0007 REV2 at 14:5-17, 16:4-12.

[166] Exh. No. CSO-0001 REV3 at 74:10-75:2; Exh. No. CSO-0601 REV2 PUB at 37:22-38:3; Exh. No. CSO-0026 PRIV.

[167] Exh. No. CSO-0001 REV3 at 74:10-14; Exh. No. CSO-0026 PRIV.

By definition, costs fixed by contract or already incurred in a prior year are not subject to further inflation[168] and should not be escalated retroactively for future inflation that never would have applied to such costs and was not expressly contemplated in the DCRT APSA or the DCRT bid. It would be an unjustifiable windfall to permit DCRT to escalate the cost cap to 2024 dollars when most of the Project's costs became fixed years earlier.[169] At the latest, the end date for any permitted inflation adjustment should be October 31, 2022, when the Project was released for construction, or August 22, 2022, the date the EPC costs became fixed.[170] It is particularly unjust and unreasonable to allow escalation of such costs through June 12, 2024 in circumstances such as those where DCRT is seeking an inflation adjustment well after-the-fact even though neither the DCRT APSA nor DCRT's application contained an express provision authorizing an inflation adjustment.

DCRT's reliance on Suncrest is unavailing, and certainly no undue discrimination has occurred. The DCRT and Suncrest projects are not similarly situated. First, the Suncrest APSA, unlike the DCRT APSA, expressly provides the cost cap is subject to an inflation adjustment; it sets the cost cap at $42,288,000 and expressly states "2015 dollars. Pricing will be adjusted to reflect the impact of inflation."[171] The DCRT APSA includes no similar inflation adjustment provision, nor did DCRT's bid. Second, as discussed above, DCRT's bid expressly stated the costs in its EPC contract with an affiliate of its co-owner Abengoa—approximately 70 percent of the costs comprising DCRT's cost cap—were "for a fixed amount of $173,753,690" and any cost overruns "will be contractor's responsibility, and will not be transferred to DCRT."[172] There is

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168 *See, e.g.*, *RMR Equip. Rental, Inc.*, 280 Cal. Rptr. 3d at 9, 65 Cal. App. 5th at 388; *Univ. Casework Sys., Inc. v. Superior Court*, 115 Cal. Rptr. at 839, 41 Cal. App. 3d at 266.
169 Exh. No.CSO-0001 REV3 at 74:3-9.
170 *Id.*
171 Exh. No. CDN-0025 at 74 n.2.
172 Exh. No. CSO-0006 REV2 PUB at 55.

no similar representation on the record for Suncrest. Third, the Suncrest APSA cost cap is stated in 2015 dollars (the year HWT executed the APSA) and the cap amount does not include any inflation amount, whereas DCRT set its cost cap in future 2020 dollars (five years after DCRT executed the DCRT APSA) and built inflation into that cap. Fourth, the cost cap in the Suncrest APSA was set on an entirely forward-looking basis. HWT affirmatively took the risk in its bid and in the APSA that it would bear any costs above the cap. Here DCRT claims an entitlement to escalate the cost cap only after the project has been built and the costs are known to exceed the cap. In other words, unlike HWT and its forward-looking cost cap, DCRT is coming in with 20/20 hindsight and essentially seeking to recover every penny it spent on the Project. DCRT, unlike HWT, would bear no forward-looking risk. One wonders, if 2020-2024 had been a period of deflation rather than inflation as it actually was, whether DCRT would be seeking a lower cost cap knowing its costs exceeded any such adjusted cap. Any evaluation of DCRT's request must be evaluated in that light.

#### f. The CAISO Has Not Treated DCRT in an Unduly Discriminatory Manner

DCRT's final argument in its attempt to secure a base year adjustment not supported in the DCRT APSA is that the CAISO has unduly discriminated against it compared to the treatment of other Approved Project Sponsors.[173] Specifically, DCRT alleges that imposing the risk of inflation on DCRT, when DCRT did not expressly assume this risk, is unduly discriminatory. In support of its claim, DCRT discusses the APSAs for certain other projects.[174] DCRT is attempting to run away as far as possible from the express representations and assumptions of risk for project cost overruns in its own bid and, instead, to divert attention to the

[173] DCRT Initial Brief (PUB version) at 28-32.

[174] The CAISO will not repeat discussion of other APSAs contained in prior sections of this Reply Brief.

representations and commitments of other Approved Project Sponsors in different competitive solicitations. A review of these other bids and APSAs shows there is not one iota of evidence of undue discrimination against DCRT. If anything, they show DCRT actually is seeking to obtain unduly preferential treatment compared to other Project Sponsors.

For example, DCRT refers to the **[BEGIN CUI//PRIV-HC]** [redacted][175] [redacted][176] [redacted][177] [redacted][178] [redacted][179] **[END CUI//PRIV-HC]** Neither the DCRT bid nor the DCRT APSA specified any inflation rates or indices that would apply to the Project. Thus, DCRT is not similarly situated to **[BEGIN CUI//PRIV-HC]** [redacted] **[END CUI//PRIV-HC]** DCRT is seeking unduly preferential treatment by having its cost cap treated

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175 Exh. No. CDN-0019 REV2 PRIV-HC at 833.

176 DCRT Initial Brief (PRIV-HC version) at 29.

177 *Id.*

178 Exh. No. DCT-0125 REV2 PUB at 22:14-16, 24:5-8, 25:8-26:5, 27:16-18, 29:7-11, 33:13-15, 35:22-26, 36:5-8.

179 Exh. No. DCT-0429 PRIV-HC at 35, 46. Dr. Davis recognized that in some circumstances the index or escalation factor may be specified elsewhere in another binding document or contract. Exh. No. CSO-0801 PUB at 24:20-25:4.

as a "constant dollar" cost cap even though the DCRT APSA and DCRT's bid never stated the cap was in "constant dollars."

DCRT also points to Estrella, where an inflation adjustment will apply even though the Estrella APSA did not specify the specific inflation index to be used.[180] DCRT ignores the Estrella APSA expressly provides that the cost cap is subject to an inflation adjustment; it states that the cost cap is in "2015 dollars" and "[p]ricing will be adjusted to reflect the impact of inflation."[181] Neither the DCRT APSA nor DCRT's bid includes similar inflation adjustment language. Thus, DCRT is not similarly situated to Estrella. Again, DCRT seeks preferential treatment by having its cost cap treated as if it has a provision like that in the Estrella APSA authorizing an inflation adjustment even though neither the DCRT APSA nor DCRT's bid says the cost cap is subject to an inflation adjustment. As CAISO witness Davis testified, the critical requirement for any inflation adjustment is the existence of specific language affirmatively authorizing such an adjustment; absent such language no adjustment mechanism exist or can be implied.[182] Where an APSA such as that for Estrella **[BEGIN CUI//PRIV-HC]** [redacted] **[END CUI//PRIV-HC]** expressly authorizes an inflation adjustment but does not state the applicable index, the Commission ultimately will decide the appropriate escalation factor based on the specific facts, circumstances, and extrinsic evidence (*e.g.*, the Project Sponsor's bid) if there is any dispute. If the contract includes no authorizing language, one does not even get to step two in the process.

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180 DCRT Initial Brief (PRIV-HC version) at 29.
181 Exh. No. CDN-0025 at 124 n.3.
182 Exh. No. DCT-0801 PUB at 25:1-4.

DCRT next cites the following wording in the **[BEGIN CUI//PRIV-HC]** [redacted] **[END CUI//PRIV-HC]** APSA, which was executed after the DCRT APSA: **[BEGIN CUI//PRIV-HC]**

[redacted]

[redacted]

[redacted][183] **[END CUI//PRIV-HC]**

DCRT argues this contains the same "in 2020 dollars" language as the DCRT APSA but then claims inclusion of the **[BEGIN CUI//PRIV-HC]** [redacted] **[END CUI//PRIV-HC]** APSA but its absence from the DCRT APSA demonstrates the CAISO and DCRT never intended for DCRT to assume any inflation risk.[184]

DCRT grossly misreads the **[BEGIN CUI//PRIV-HC]** [redacted] **[END CUI//PRIV-HC]** sentence provision and attempts to impute a different meaning to it than what the words actually say. DCRT is reading the sentence as if it says, **[BEGIN CUI//PRIV-HC]**

[redacted]

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183 DCRT Initial Brief (PRIV-HC version) at 9-10, 30 (citing Exh. No.CDN-0019 REV2 PRIV-HC at 169 (emphasis added)).

184 DCRT Initial Brief (PRIV-HC version) at 10-11, 30.

[redacted][185] [redacted][186] [redacted][188] **[END CUI//PRIV-HC]** This belies DCRT's claim the mere reference to "in 2020 dollars" means the cost cap must be escalated for inflation or subject to a base year adjustment.[189] To the contrary, it supports the conclusion that because the cost cap was stated "in 2020 dollars" it was not subject to a further inflation adjustment.

DCRT's argument also ignores the several APSAs, executed months before the DCRT APSA, that expressly state both that (1) the cost cap is in 2015 dollars and (2) the cost cap is

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185 In its bid, DCRT provided a cost estimate in constant 2015 dollars (Exh. No. CSO-0006 REV2 PUB at 49, 59; Exh. No. CSO-0007 at 105) and a cost cap in current/nominal 2020 dollars.

186 Exh. No. CDN-0019 REV2 PRIV-HC at 159, 169.

187 **[BEGIN CUI//PRIV-HC]** [redacted] **[END CUI//PRIV-HC]**

188 Exh. No. CSO-0601 REV2 PRIV at 14:3-6; Exh. No. CSO-0604 at 76.

189 Exh. No. CSO-0601 REV2 PRIV at 14:9-11.

subject to an inflation adjustment or is in "constant 2015 dollars"[190]—terminology distinctly missing from the DCRT APSA and DCRT's bid. Had DCRT intended for the DCRT APSA (and its bid) to include an inflation adjustment, DCRT could have included verbiage similar to that in these APSAs; it did not, nor did DCRT suggest any edits to the DCRT APSA to clarify the cost cap was subject to an inflation adjustment although it provided extensive redline edits to the DCRT drafts. These APSAs immediately preceding the DCRT APSA clearly show the CAISO knew how to reflect in an APSA that a cost cap was subject to an inflation adjustment; the absence of any comparable language in the DCRT APSA indicates the CAISO did not intend for DCRT's cost cap to be subject to an inflation adjustment.

DCRT then claims the CAISO's treatment of DCRT and alleged inconsistencies in administering APSAs is reflected in the CAISO's treatment of LS Power in connection with Metcalf.[191] DCRT states there was a "re-scoping" of Metcalf that increased the cost of the project because the scope changes were an express exclusion to the cost cap. DCRT protests that the CAISO allowed LS Power to recover the costs of the re-scoped project without revising any of the cost containment measures in the APSA.[192] DCRT also objects that the CAISO did not re-bid Metcalf through a new competitive solicitation.[193] The Metcalf example is irrelevant and not on point with any of the circumstances here. First, by DCRT's own admission, Metcalf did not involve any issues pertaining to a base year adjustment to a cost cap or to any type of inflation adjustment.[194] Accordingly, it is not probative of that issue or to the intent and meaning of the DCRT APSA. Second, unlike Metcalf,[195] DCRT's Project involved no "re-scoping" by the

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190 *See* Exh. No. CDN-0025 at 74 n.2 (Suncrest APSA); Exh. No. CDN-0025 at 124 n.3 (Estrella APSA).
191 DCRT Initial Brief (PRIV-HC version) at 30-31.
192 *Id.*
193 *Id.*
194 *Id.* at 30-31.
195 Metcalf remained an HVDC line between the Metcalf and San Jose B substations. The re-scoping reflected in the amended Metcalf APSA involved (1) increasing the power injection at San Jose B from 500 MW to 1,000

CAISO, nor does DCRT allege there was any "re-scoping." Third, by DCRT's own admission, the Metcalf APSA included an express cost cap exclusion for Project scope changes required by the CAISO such as the increased injection/withdrawal capabilities at the source/sink points, respectively, of the transmission line.[196] Fourth, the CAISO has no authority unilaterally to impose new cost containment measures or cost caps on an Approved Project Sponsor.[197] Fifth, DCRT's Initial Brief contains no discussion whatsoever as to how exactly the CAISO's actions regarding Metcalf constitute evidence of undue discrimination against DCRT. Sixth, DCRT hypocritically objects that the CAISO agreed to a higher cost cap in the amended Metcalf APSA to reflect the increased project "re-scoping" costs pursuant to a specific cost cap exclusion allowing such an adjustment, but DCRT conveniently ignores the CAISO agreed to the second amended APSA with DCRT that increased the cost cap to reflect increased costs associated with a Change of Route that was expressly permitted by a cost cap exclusion in the DCRT APSA.

Lastly, DCRT fails to mention that in addition to Metcalf the CAISO simultaneously re-scoped another project in the San Jose area due to significantly increased load projections in the region—NRS. Both projects were from the same tranche of competitive solicitations, and LS Power won both competitive solicitations. The re-scoping of both projects required amendments to the respective APSAs. **[BEGIN CUI//PRIV-HC]** [redacted]

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MW (which involved a new 1,000 MW 230 k AC interconnection to the San Jose B substation rather than the original 500 MW 115 kV interconnection), and (2) changing the voltage at the AC side of the converter station from 115 kV to 230 kV (which involved bus work and termination equipment at the converter station). *See* DCRT Initial Brief (PUB version) at 31 n.154 (citing Exh. No. DCT-0308).

196 *Id.* at 31.

197 Exh No. CSO-0601 REV 2 PUB at 11:2-6.

[redacted] **[END CUI//PRIV-HC]** DCRT's selective "cherry-picking" should not be countenanced.

It appears DCRT's real objection is that the CAISO did not conduct a new competitive solicitation for Metcalf. But, DCRT identifies no tariff or APSA provision the CAISO violated. DCRT, or any other interested person objecting to the CAISO's actions, had every opportunity to file an FPA section 206 complaint against the CAISO. It is telling no such complaint was filed.[199] Under these circumstances, DCRT's argument amounts to nothing more than resorting to innuendo and irrelevant matters to deflect the focus away from the clear fact neither DCRT's bid nor any other contemporaneous documents support DCRT's claim it is entitled to a base year adjustment or any other type of inflation adjustment.

DCRT briefly repeats its argument that the **[BEGIN CUI//PRIV-HC]** [redacted][200] [redacted]

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198 **[BEGIN CUI//PRIV-HC]** [redacted] **[END CUI//PRIV-HC]**

199 DCRT fails to mention the CAISO was fully transparent regarding its actions. It presented study results to stakeholders regarding the need to re-scope Metcalf and NRS, had public discussions with them regarding the re-scoping of the two projects, and solicited and obtained their written feedback. The CAISO then went before the CAISO Board of Governors to obtain approval of the re-scoped projects. The CAISO noted stakeholders generally supported the modifications especially considering the urgent reliability need. The CAISO also noted that a few stakeholders suggested the projects should be re-bid. The CAISO noted the APSAs expressly contemplated and allowed for modifications for the projects that were in line with the original intent of the projects. The CAISO Board approved the projects as re-scoped. *See* PRIV-HC Tr. 4512:19-4513:6, 4551:22-4552:16, 4791:17-20.

200 DCRT Initial Brief (PUB version) at 30.

[redacted][201] [redacted][202] **[END CUI//PRIV-HC]** In any event, DCRT's arguments ultimately fail for all the reasons discussed above, in particular: DCRT expressly stated in its bid its cost cap was $241,805,391 (with no qualifications), its cost cap was in current/nominal dollars, and its EPC costs were a fixed amount with ratepayers not bearing the risk of overruns, while nowhere stating the cost cap was in constant dollars or subject to any type of inflation adjustment.

Finally, if anyone is seeking unduly preferential and discriminatory treatment it is DCRT. DCRT seeks to recover "regulatory compliance" costs associated with regulatory agency-ordered directives, but the DCRT APSA includes no cost cap exclusion(s) for costs incurred to comply with agency-ordered changes to the project or other agency-ordered directives except for a Change of Route exclusion. As discussed in Section II.C.3.b *infra*, costs for which DCRT seeks recovery but for which the DCRT APSA has no cost cap exclusion include costs for agency-ordered facility, design, and construction changes and costs associated with agency-

201 See Exh. No. CSO-0003 at 41 (item (ii) under last sentence of CAISO tariff section 24.6).

202 Exh. No. DCT-0432 PRIV-HC at 69; Exh. No. CDN-0019 REV2 PRIV-HC at 1002.

imposed environmental, cultural, and resource mitigation requirements. On the other hand, APSAs DCRT cites to support its undue discrimination claims include express cost cap exclusions for (1) siting or permitting authority directives to require incremental environmental mitigation beyond that assumed in the Project Sponsor's proposal, including alternative best management practices and increased compensatory mitigation,[203] (2) costs incurred by the Approved Project Sponsor associated with additional impositions by a governmental authority beyond what was anticipated in the Approved Project Sponsor's proposal,[204] and (3) changes by the CPUC or other governmental or regulatory body in accordance with Section 5.9.3 of the *pro forma* APSA, including changes by a siting authority in the design, location, or schedule, or any other changes that form the basis for the binding cost cap proposal.[205] Other cost cap exclusions not found in the DCRT APSA included incremental costs incurred by the Approved Project Sponsor due to a change in the CAISO project requirements or the Functional Specifications.[206]

Appendix E of the DCRT APSA includes none of these cost cap exclusions other Approved Project Sponsors had. DCRT's attempt to recover the aforementioned "regulatory compliance" costs above its binding cost cap that are not covered by a specific cost cap exclusion would result in unduly preferential treatment vis-a-vis these Project Sponsors and Approved Project Sponsors with whom DCRT was competing that expressly had these cost cap exclusions.[207]

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[203] *Compare* Exh. No. CDN-0019 PRIV-HC REV2 at 1004, *with* Exh. No. DCT-0432 PRIV-HC at 78 (the Project Sponsor's environmental mitigation measures were delineated in its bid and did not appear for the first time in the corresponding APSA).

[204] Exh. No. CDN-0019 PRIV-HC REV2 at 728.

[205] *Id.* at 324, 1259.

[206] *Id.* at 170, 399, 727-28.

[207] *See* Exh. No. CSO-0001 REV3 at 135:1-138:12.

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

For costs incurred from just the Participating TO or other entity providing Transmission Interconnection Service, DCRT states "[t]here is no dispute for the Presiding Judge to resolve regarding the Bullet 1 exclusion and recoverability of $56,249,161," which DCRT claims are the costs paid to SCE, APS, and SRP and for change orders 1 and 2 for work done on SCE's behalf.[208] The CAISO does not object to this amount.

DCRT also seeks to recover $615,519 for EPC change order nos. 5 and 8, and $2,992,017 for additional management costs totaling $3,607,536, prior to adding AFUDC.[209] Although DCRT previously categorized these costs as interconnection costs under Bullet #1 of Appendix E of the DCRT APSA,[210] DCRT now categorizes them as delay costs caused by an Interconnecting PTO, thus falling under Bullet #5 of Appendix E of the APSA.[211] DCRT states it "has reduced the $2,992,017 in Ex. No. DCT-0170 REV2 PUB to remove certain costs that were not the result of the energization delay (*e.g.*, commercial operations date bonuses) or adjust other costs for timing/proration reasons (*e.g.*, land payments)."[212] However, there is no discussion of any associated reduction in the AFUDC associated with this amount, as only two costs remain—for change order nos. 1 and 2 totaling $283,712 and for change order nos. 5 and 8 totaling $615,519—for a total combined cost of $899,231. The AFUDC cannot remain $9,503,767 if the associated capital cost has been reduced to only $899,231.

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208 DCRT Initial Brief (PUB version) at 32-33. As explained in the CAISO's Initial Brief (PUB version) at page 17, Appendix E of the DCRT APSA contains five bullet points (which the CAISO defines as "Bullet #1" through "Bullet #5") that list categories of costs are not included in the cost cap.

209 Exh. No. DCT-0102 REV2 PUB at 134:1 (Table 3).

210 *Id.* at 141:1-21, 147:18-148:4.

211 DCRT Initial Brief (PUB version) at 33.

212 *Id.* at 34 n.169.

In its Initial Brief, DCRT attempts to claim SCE caused the energization delay from March 2024 to June 2024 by "abruptly revising its interconnection timelines."[213] The record shows otherwise. DCRT executed the interconnection agreement with SCE effective June 17, 2023. The milestones table in the interconnection agreement with SCE (at Appendix E) notes that:

> In accordance with Section 8 of this Agreement, the Parties will use Reasonable Efforts to meet their respective engineering, procurement and construction related Milestones above (as such Milestones may be adjusted) by the applicable due dates. If either Party is not current in meeting its respective engineering, procurement and construction related Milestones (as such Milestones may be adjusted), such Party shall provide written notice to the other Party with the reasons for such failure to meet the identified Milestones and shall undertake Reasonable Efforts to meet the earliest dates thereafter. The failure to meet any insurance or payment related Milestones may be deemed a Breach and subject to Section 26 of this Agreement.
>
> 1. The Connecting Customer understands and acknowledges that the timeline above is only an estimate and that equipment and material lead times, labor availability, outage coordination, regulatory approvals, right-of-way negotiations, or other unforeseen events could delay the actual completion date of the Connecting Facilities beyond that specified. The Connecting Customer also understands and acknowledges that the completion of the Connecting Facilities may be delayed if the Connecting Customer does not meet or satisfy the Connecting Customer's Milestones as outlined above.
>
> 2. In accordance with Section 8.2.2 of this agreement, SCE shall not be liable for any cost or damage incurred by the Connecting Customer because of any delay in the work provided for in this Agreement.[214]

In executing the interconnection agreement with SCE in June 2023, DCRT knew all the dates were estimates and, if a milestone was delayed, the party that is delayed "shall undertake Reasonable Efforts to meet the earliest dates thereafter."[215] Four days after the execution of their interconnection agreement, on June 21, 2023, the SCE project team informed DCRT that it might

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213 *Id.* at 34-37 (initial capitalization in quotation omitted).
214 Exh. No. DCT-0003 at 164 (underlining added).
215 *Id.*

be unable to meet the milestone date due to potential unavailability of telecommunications resources.[216] SCE also told DCRT the typical time to perform all the telecommunications work was four months once DCRT completed all of its telecommunications work.[217] At the same meeting, DCRT noted that its portion of the telecommunications work, which originally was planned to be completed in November 2023,[218] was delayed until February 8, 2024.[219] Ultimately, DCRT did not notify SCE its telecommunications work was completed and ready for testing until February 21, 2024.[220] Thus, it was DCRT's delay in completing its portion of the telecommunications work as well as DCRT's delay in notifying SCE that resulted in moving the commercial operation date to June, not SCE's delay. SCE needed four months after DCRT completed its portion of the telecommunications work to do their work and had previously advised DCRT of that timeline.

In addition, although GridForce had the NERC certification as a Transmission Operator in WECC on April 1, 2023, WECC had not approved the expansion of the CAISO balancing authority area to include the Project with GridForce as the Transmission Operator until 2024.[221] This also drove the delay in energizing the Project. To expand a balancing authority area, completion of an onboarding checklist of tasks must occur before the WECC approves the expansion.[222] Emails exchanged in January and February of 2024 between CAISO witness Le

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216 Exh. No. DCT-0007 at 75:17-19.

217 Exh. No. CDN-0040 at 1. SCE stated in its response to the cited data request, "As a standard SCE practice when connecting to customer fiber for interconnections, once the customer informs SCE that fiber is available for connection, SCE will inspect the installation of fiber and then schedule the crew to perform the installation of the fiber connections to SCE's system. Once the installation is complete, SCE crews will test the fiber to ensure the fiber communication circuit is complete prior to the installation of any protection equipment. The typical timeframe for these activities is approximately four months in duration for an average circuit's fiber connection."

218 See Tr. 6927:24-6928:8.

219 Exh. No. CDN-0084 at 9 (see item 13.3).

220 Exh. No. CDN-0040 at 1; *see also* Exh. Nos. CDN-0087 at 3 (see item 3.3) and CDN-0084 at 9 (see item 13.3).

221 Exh. No. CSO-0433 REV at 1.

222 *See* Tr. 6890:19-6891:21; *see also* Tr. 7028:6-7029:14.

Vine and DCRT witness Crew noted WECC had not scheduled completion of GridForce's certification and the expansion of the CAISO balancing area until June 8, 2024.[223] Thus, even if SCE had completed its work in February 2024, the CAISO still would have needed to wait for WECC to certify the expansion before taking Operational Control of the line.[224] In addition, there was a mandatory Transmission Registry training requirement for GridForce to achieve commercial operation of the Project, which was not completed until May 30, 2024.[225] Consequently, the delay in energization between February and June 2024 was due to DCRT and no one else.

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

#### a. DCRT Is Not Entitled to Recover Any Above-Cap Costs Pursuant to Bullet #3 or Bullet #4

The CAISO's Initial Brief explained why the Presiding Judge should deny the entirety of DCRT's request for recovery of claimed "regulatory compliance" costs above the binding cost cap in the DCRT APSA.[226] The DCRT APSA includes no cost cap exclusion(s) for "regulatory compliance" costs or the specific "regulatory compliance" costs DCRT lists.[227] Unlike other Project Sponsors bidding into CAISO competitive solicitations, DCRT failed to include in its competitive solicitation proposal any cost cap exclusions for regulatory compliance costs other than for agency-ordered change of route and for change in law (*e.g.*, new NERC requirements that require Project changes).[228] DCRT's attempts to recover above-cap costs using Bullet #3

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223 Exh. No. CSO-0433 REV at 1-2.
224 *Id.* at 2.
225 Tr. 7286:6-22; Exh. No. CSO-0434 PUB.
226 CAISO Initial Brief (PUB version) at 41-42.
227 *Id.* at 41.
228 *Id.* at 53-56; Exh. Nos. CSO-0011 REV and CSO-0007 at 105, 117-18, 120.

and Bullet #4 in Appendix E of the DCRT APSA are unavailing. DCRT is not entitled to recover any above-cap costs for project specifications pursuant to Bullet #3, which only excludes from the cost cap "[a]ny FERC approved costs incurred by [DCRT] to make changes to the Project under Section 5.4 [of the DCRT APSA], to the extent that such changes were not included in the functional requirements for the transmission facility that the CAISO issued for the competitive solicitation or [DCRT's] bid."[229] Nor is DCRT entitled to recover any above-cap costs to remedy deficiencies determined by the Interconnecting PTO or other interconnecting entity pursuant to Bullet #4, which only excludes from the cost cap "[a]ny FERC approved costs incurred by [DCRT] to remedy deficiencies in accordance with Section 5.5.3" of the DCRT APSA.[230]

Nothing in DCRT's Initial Brief undermines the CAISO's demonstration that DCRT cannot recover any "regulatory compliance" costs under Bullet #3 or Bullet #4. DCRT argues Bullet #3, Bullet #4, and Sections 5.4.3 and 5.5.3 of the DCRT APSA do not prelude a developer's "proactive adherence" to technical specifications, safety requirements, and standards and specifications through the EPC process and is not limited to potential costs incurred after DCRT moved forward with any type of notice-to-proceed construction.[231] But the express provisions of Sections 5.4.3 and 5.5.3 contradict DCRT's argument it is permitted to take action under those sections absent a directive to do so from the applicable entity specified therein.

Section 5.4.3 must be read in the context of the immediately preceding provisions in Section 5.4 of the DCRT APSA (entitled Submission and Review of Project Specifications).

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229 CAISO Initial Brief (PUB version) at 42-44; Exh. No. DCT-0002 at 78. Similarly, Section 10.1.1 of the DCRT APSA only excludes from the cost cap "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." *Id.* at 20.

230 CAISO Initial Brief (PUB version) at 44-53; Exh. No. DCT-0002 at 78.

231 DCRT Initial Brief (PUB version) at 38-42.

Section 5.4.1 requires DCRT to submit specifications for major Project equipment and/or materials to the CAISO and all interconnecting entities for review and comment at least 30 days before DCRT solicits offers to provide specific equipment or material to which the specifications apply or otherwise commence procurement.[232] This is expressly required to ensure the compatibility of the equipment and/or materials with the CAISO's and the interconnecting entities' requirements and specifications.[233] Then Section 5.4.2 requires DCRT to submit final specifications for major Project equipment and/or materials to the CAISO and all interconnecting entities for review if the specification differs from the specification submitted originally and comment at least 180 days before the date testing is scheduled to commence for the Project.[234] Section 5.4.2 also requires DCRT to submit final specifications to the CAISO and all interconnecting entities for review and comment at least 90 days before the date testing is scheduled to commence for the Project.[235] If material and/or equipment are different from the original specification submittal, DCRT must provide the CAISO and interconnecting entities time to review such specifications to ensure they are compatible with the CAISO's and interconnecting entity's requirements and specifications.[236] Finally, Section 5.4.3 requires that, after the CAISO and the interconnecting entities perform their final specification review,

> [DCRT] shall make such changes to the Project **as may reasonably be required by the Interconnecting PTO, other entity, or the CAISO**, in accordance with Good Utility Practice, to ensure that the Project is compatible with the technical specifications, Operational Control, and safety requirements of the Interconnecting PTO, other entity, or the CAISO.[237]

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232 Exh. No. DCT-0002 at 13.
233 *Id.*
234 *Id.*
235 *Id.*
236 *Id.*
237 Exh. No. DCT-0002 at 14 (emphasis added).

Thus, contrary to DCRT's claims, Sections 5.4 *et seq*. set clear timelines as to when the review of specifications would occur and when changes to them would be made. DCRT submitted its specifications for review pursuant to Section 5.4.1 by June 1, 2019, and 5.4.2 by July 24, 2023, *i.e.*, after DCRT had already received a ROD from the BLM in November 2019 and the CPUC CPCN on November 4, 2021.[238] Equally important, under Section 5.4.3, a reasonable requirement **by** the Interconnecting PTO, other entity, or the CAISO is the necessary trigger for an obligation on DCRT to make changes to the Project pursuant to the section.[239] The term "other entity" as used in Sections 5.4 and 5.5 of the DCRT APSA refers solely to an entity other than a PTO with whom DCRT's transmission facilities will be interconnecting.[240] DCRT does not claim in its Initial Brief that an "other entity" in Section 5.4 refers to someone else, nor would that even be a reasonable or logical conclusion based on the specific rights, obligations, and required actions contemplated in Section 5.4. Neither an Interconnecting PTO, another entity with which DCRT was interconnecting, nor the CAISO, required DCRT to make any changes to the Project pursuant to Section 5.4.3 to ensure the Project is compatible with their technical specifications, Operational Control, or safety requirements, and DCRT does not claim—and cannot show—otherwise.[241] As such, DCRT's actions were not "changes to the Project under Section 5.4 [of the DCRT APSA], to the extent that such changes were not included in the functional requirements for the transmission facility that the CAISO issued for the competitive solicitation or [DCRT's] bid" and do not meet the requirements for a Bullet #3 cost cap exclusion. This is not complying through the EPC process, as DCRT contends. Instead,

238 *See id.* at 85, 86; Exh. No. DCT-0047 at 349-51; Exh. No. CSO-0031.

239 *See also* Exh. No. CSO-0001 REV3 at 127:11-19 (same).

240 CAISO Initial Brief (PUB version) at 46-48. Also, an "other entity" cannot be the CAISO, as shown by the fact that Section 5.4.3 refers to an "other entity, **or** the CAISO" (emphasis added).

241 Exh. No. CSO-0001 REV3 at 127:16-128:2; Tr. 4701:14-24.

the costs DCRT seeks to recover as "regulatory compliance costs" are costs DCRT says it incurred to obtain permits for the Project,[242] comply with permitting requirements or governmental agency regulations,[243] or to prepare its FERC rate case,[244] or they pertain to purported construction inefficiencies or delays.[245] Even DCRT witness Crew agreed the "regulatory compliance" costs for which DCRT was seeking recovery were not the result of changes in the Project's functional specifications.[246]

DCRT's claim Section 5.5.3 is not limited to costs associated with deficiencies identified and cured after construction has commenced contravenes the plain, unambiguous language of the section, which states:

> **At any time during construction**, should any phase of the Project engineering, equipment procurement, or construction not meet the standards and specifications **provided by the Interconnecting PTO or other entity**, [DCRT] shall be obligated to remedy deficiencies in that portion of the Project. The Approved Project Sponsor may seek approval from FERC to recover in its transmission revenue requirement just and reasonable costs **associated with such remedy**.[247]

First, DCRT seeks to read the words "[a]t any time during construction" out of Section 5.5.3. Under this language, the deficiencies cannot occur during the period prior to construction; they expressly must occur and be identified **during construction**. Thus, DCRT's claim Section 5.5.3 applies to purportedly preemptive actions undertaken before construction fails based on the plain text of this section. The references in Section 5.5.3 to "engineering, equipment, procurement, or construction" do not change this basic requirement; they merely mean that if any phase of the Project does not meet the standards and specifications provided by the

242 Exh. No. DCT-0107 REV at 2, 54.
243 *Id.* at 2-3, 10, 15, 21, 26, 32, 58.
244 *Id.* at 2, 62.
245 *Id.* at 2, 38, 43, 48, 53, 63.
246 Tr. at 2447:17-2455:17.
247 Exh. No. DCT-0002 at 14 (emphasis added).

Interconnecting PTO or other interconnecting entity, DCRT is obligated to go back and do some Project redesign/engineering, change equipment, procure different materials, or modify construction plans.[248] As the CAISO explained in its tariff amendment to implement the *pro forma* APSA, Section 5.5.3 pertains to the "remediation of construction deficiencies."[249]

Second, the deficiencies to be remedied must be associated with standards and specifications affirmatively provided by the Interconnecting PTO or other entity with which DCRT is interconnecting—but not from the CAISO, which is not referenced in the section.[250] Section 5.5.3 cannot reasonably be interpreted to mean DCRT got to be the decision-maker on whether the Interconnecting PTO's or other interconnecting entity's standards and specifications were being met during construction, because that was not DCRT's decision to make—it was the Interconnecting PTO's or other interconnecting entity's determination as to whether there is a deficiency in the entity's own standards and specifications provided to DCRT that counted. DCRT neither claims, nor provides any evidence, that the Interconnecting PTO, SCE, or other entity with which DCRT was interconnecting—APS—ever told DCRT during construction it must remedy any deficiencies in a portion (or the entirety) of the Project pursuant to Section 5.5.3 to meet the standards and specifications they provided.[251] However, the specific costs DCRT seeks to include under Bullet #4 are not related to remedying deficiencies identified by

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248 Tr. 4942:19-4945:2.

249 Transmittal letter for CAISO tariff amendment to implement *pro forma* APSA, Docket No. ER14-2824-000, at 8 (Sept 10, 2014).

250 Consistent with this meaning of Section 5.5.3, CAISO witness Le Vine described the cost cap exclusion under Bullet #4 and the associated provisions in Section 5.5.3:

> So this exclusion [under Bullet #4] is – in essence, is during the construction phase of the project, to the extent that *the interconnecting PTO or other entity determines that there is a problem* that has been created by the – by the construction of, in this case, DCRT's project, *they'll identify what the problem is and then* the DCRT would have to go ahead and remedy any deficiencies.

Tr. 4940:6-12 (emphasis added)

251 Exh. No. CSO-0601 REV2 PUB at 110:16-20.

interconnecting entities during construction. As noted above, they were costs DCRT claims it incurred to obtain permits, comply with the permitting requirements of governmental agencies, or to prepare its Commission rate case, or they were related to various purported ineffectiveness or delays. Consequently, any actions DCRT took to address these matters that were not standards or specifications affirmatively provided by SCE or APS were outside the scope of Section 5.5.3 and thus cannot be a basis for recovering any above cap costs under Bullet #4.

DCRT attempts to makes much of the absence of specific definitions of the terms "technical specifications," "safety requirements," and "standards and specifications" in the DCRT APSA.[252] As an initial matter, the plain reading of these terms cannot reasonably be read to have the broad interpretation DCRT suggests. For example, Sections 5.4 and 5.5 use the words "technical specifications," "safety requirements," and "standards and specifications" but make no reference to the defined term Applicable Laws and Regulations, which the DCRT APSA defines as "all duly promulgated applicable federal, state, and local laws, regulations, rules, ordinances, codes, decrees, judgments, directives, or judicial or administrative orders, permits, and other duly authorized actions of any Governmental Authority."[253] Thus, the defined term Applicable Laws and Regulations explicitly includes agency-ordered permits and actions, *i.e.*, the exact type of requirements for which DCRT seeks cost recovery as "regulatory compliance" costs. The APSA-defined term Governmental Authority encompasses a wide variety of entities but expressly not the CAISO, an Interconnecting PTO, or any other entity with which DCRT is interconnecting.[254]

[252] DCRT Initial Brief (PUB version) at 39-40.
[253] Exh. No. DCT-0002 at 6.
[254] The DCRT APSA defines a Governmental Authority to mean

> any federal, state, local, or other governmental, regulatory, or administrative agency, court, commission, department, board, or other governmental subdivision, legislature, rulemaking board, tribunal, or other governmental authority having jurisdiction over the Parties, their respective

However, the defined term Applicable Laws and Regulations appears nowhere in APSA Sections 5.4 or 5.5. If the words technical specifications, safety requirements, and standards and specifications, as those terms are used in the context of Sections 5.4 and 5.5, were intended to cover the broad regulatory requirements DCRT relies upon, those provisions would have included references to the APSA-defined term Applicable Laws and Regulations. This is demonstrated by the fact other subsections of Article 5 of the DCRT APSA do refer to "Applicable Laws and Regulations." For example, Section 5.9.2 states "[a]ny additions, modifications, or replacements made to the Project's facilities shall be designed, constructed, and operated in accordance with this Agreement, Applicable Laws and Regulations, and Good Utility Practice."[255] The DCRT APSA does not include a cost cap exclusion for Section 5.9.2. The absence of the term "Applicable Laws and Regulations" in Sections 5.4 and 5.5 but its presence in Section 5.9.2 indicates the APSA is deliberate in specifying the APSA provisions to which the term Applicable Laws and Regulations applies. DCRT's attempt to interpret "technical specifications," "safety requirements," and "standards and specifications" to be much broader than the plain meaning terms of those words therefore is contrary to the construction of Article 5. Applying DCRT's interpretation, DCRT could incur costs to comply with tax laws, securities laws, and employment laws, and they would be considered costs incurred to comply with the TCA and the SCE and APS interconnection agreements simply because they involve compliance with "All Applicable Laws and Regulations." There is no record evidence—or any reasonable basis—supporting such an overreaching interpretation of Sections 5.4 and 5.5.3 of the DCRT

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facilities, or the respective services they provide, and exercising or entitled to exercise any administrative, executive, police, or taxing authority or power; provided, however, that such term does not include the Approved Project Sponsor, the CAISO, or any Affiliate thereof.

*Id.* at 7.

[255] *Id.* at 17.

APSA or the specific provisions of these agreements, nor does DCRT cite any. These are costs to comply with the laws and regulations established by governmental bodies, not specific standards established by the CAISO and interconnecting entities.

DCRT's attempt to apply an unsupported interpretation to those words is merely misdirection from the dispositive fact: no matter the definitions or scope of those terms, DCRT was never told by the CAISO, an Interconnecting PTO, or another entity to which DCRT was interconnecting to meet any obligations under Section 5.4.3 or Section 5.5.3. Thus, regardless of the definition or the scope of the terms, DCRT cannot satisfy the basic requirements of those sections.[256]

More generally, DCRT's argument that it has a cost cap exclusion for "proactive adherence" to any obligation it believes it is subject to essentially is an argument the DCRT is subject to a cost cap exclusion for virtually anything DCRT does without first being so directed by the CAISO, an Interconnecting PTO, or other interconnecting entity in accordance with Section 5.4.3, or by the Interconnecting PTO or other interconnecting entity in accordance with Section 5.5.3. As an initial matter, the "proactive adherence" claim advanced in DCRT's Initial Brief appears nowhere in DCRT's filed testimony; it is yet another extremely *post hoc*

[256] Referring to statements in Docket No. ER14-2824, DCRT states recoverable costs under Sections 5.4.3 and 5.5.3 can be more than just "interconnection costs" of which the developer was unaware. DCRT Initial Brief (PUB version) at 40-41. For all the reasons cited above, this does not mean costs incurred to comply with agency-ordered requirements fall within Sections 5.4.3 and 5.5.3. It merely recognizes the CAISO, an Interconnecting PTO, or another entity with which DCRT is interconnecting may require DCRT to make changes to the Project's design, equipment, or materials under Section 5.4.3 or 5.5.3 or the CAISO may impose additional functional requirements on the Project. These would be costs DCRT incurs directly to modify its Project facilities, equipment, or materials at the behest of the CAISO, an Interconnecting PTO, or other interconnecting entity and would be recoverable under Sections 5.4.3 and 5.5.3. These costs are in contrast to "interconnection costs," which are costs the Interconnecting PTO or other entity to which DCRT is interconnecting incurs in the first instance to interconnect the Project and then passes them on to DCRT; interconnection facilities and costs are not part of the Project's functional specifications. Exh. No. DCT-0002 at 60-64. This distinction is recognized in Appendix E of the DCRT APSA, which has separate cost cap exclusions for interconnection-related costs (Bullet #1) and Sections 5.4 (Bullet #3) and 5.5.3 (Bullet #4). *Id.* at 77, 78. In any event, as discussed above, neither the CAISO, SCE, nor APS required DCRT to change Project design, equipment, or materials under sections 5.4.3 or 5.5.3 and to incur such Project costs.

rationalization on the part of DCRT. In any event, there is nothing in the text of Bullet #3 and #4 or the related provisions in the body of the DCRT APSA that support this idea of cost cap exclusion for "proactive adherence." Bullet #3 is expressly linked to Section 5.4.3, which applies to "changes as may reasonably be required by the Interconnecting PTO, other entity, or the CAISO" following their review of "final specifications for major Project equipment and/or materials." A requirement of these entities is incompatible with DCRT's conception of unilateral "proactive" efforts. Similarly, Bullet #4 is limited to remedying deficiencies identified "during construction." This can occur only after deficiencies have been identified, again incompatible with the idea of proactive choices. DCRT claims such "proactive adherence" occurred "through the EPC process,"[257] but this phrase appears nowhere in the DCRT APSA. In context, it appears DCRT intends that "through the EPC process" covers anything DCRT did at any point in the engineering, procurement, and construction of the Project. Such a broad cost cap exclusion cannot be reconciled with the plain text of Bullet #3 or #4.

DCRT claims the technical specifications, safety requirements, and standards and specifications of an Interconnecting PTO or other entity to which DCRT is interconnecting covered by Sections 5.4.3 and 5.5.3 "are inextricably related to the federal and state regulatory processes included in the design, permitting, and construction of a transmission project using Good Utility Practice."[258] This is nothing but verbal sleight of hand. Even if there is some relationship among these concepts, that fact does not expand the scope of the narrow Bullet #3 and #4 cost cap exclusions.

DCRT suggests changes in the "CAISO's originally solicited May 2020 in-service date" for the Project made in the successive amendments to the DCRT APSA arguably mean "all costs

257 DCRT Initial Brief (PUB version) at 39-40, 42.
258 *Id.* at 41.

resulting from the Project's revised in-service date are recoverable pursuant to Sections 5.4.3 and 5.5.3."[259] DCRT is incorrect. First, Section 5.5.3 is inapplicable on its face, because the section only applies to standards and specifications by the Interconnecting PTO or other entity with which DCRT is interconnecting, not the CAISO. As for Section 5.4.3, the dispositive fact, again, is the CAISO did not direct DCRT to change the originally solicited May 1, 2020 in-service date for the Project following its review of "final specifications for major Project equipment and/or materials," and the in-service date was not changed to ensure the Project was compatible with technical specifications. The CAISO's review of "final specifications" occurred after the in-service date of the Project had already been extended twice—once in August 2018 under the first amended DCRT APSA and again in March 2022 under the second amended DCRT APSA.[260]

Further, it was DCRT who requested extension of the Project's in-service date;[261] it was not a date change the CAISO unilaterally imposed on DCRT following its review of "final specifications." As DCRT recognizes, "the CAISO believed this in-service date would maximize the solicited Project's benefits."[262] The in-service date for the Project later needed to be changed for the simple reason that DCRT did not put the Project into service by that date. The CAISO and DCRT agreed to revise the in-service date in the amendments to the DCRT APSA to reflect that reality. It was not revised at the CAISO's behest, as even DCRT implicitly

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259 *Id.* at 43-44 (emphasis omitted). The CAISO notes DCRT never made this argument in its prepared written testimony but instead only raises the argument now in its Initial Brief. This is just one example of how DCRT has taken a "throw spaghetti at the wall" approach to making arguments in this proceeding: if a given argument turns out to be unpersuasive, just throw in additional arguments in hopes that one of them will stick with the decision-making authority (the Presiding Judge or the Commission). The "proactive adherence" argument discussed above is another example of DCRT's evolving arguments to avoid the consequences of its own binding cost cap.

260 Exh. No. DCT-0002 at 67, 76.

261 CAISO Initial Brief (PUB version) at 77-80 (discussing history of in-service date extensions for the Project).

262 DCRT Initial Brief (PUB version) at v (citing Exh. No. CSO-0004 at 5).

acknowledges.[263] In other words, the change to the in-service date in the DCRT APSA is not a change that the CAISO desired or directed. Thus, the changes in the in-service date cannot result in recoverable costs pursuant to Sections 5.4.3 and 5.5.3.[264]

Presumably recognizing that Sections 5.4.3 and 5.5.3 do not reference the defined terms Applicable Laws and Regulations or Governmental Authority, DCRT attempts to "backdoor" its way around these glaring omissions by arguing its interconnection agreements with APS and SCE and the TCA between the CAISO and PTOs impose "regulatory compliance" obligations on DCRT.[265] DCRT's obligations under those agreements are not covered by Sections 5.4 and 5.5.3 of the DCRT APSA but instead are independent obligations set forth in the agreements themselves. Indeed, Sections 5.4 and 5.5.3 are not DCRT APSA provisions requiring DCRT to enter into interconnection agreements. Instead, it is Section 4.2 of the DCRT APSA which requires DCRT to "obtain a separate agreement for Transmission Interconnection Service from the Interconnecting PTO or any other entity to whose facilities the Project will interconnect."[266] There is no cost cap exclusion in the DCRT APSA for compliance with Section 4.2. DCRT cannot indirectly impute requirements in Sections 5.4.3 and 5.5.3 that are not there but could have been if that is what the APSA intended, which it did not.

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263 *See* DCRT Initial Brief (PUB version) at 79 (claiming "DCRT experienced delays due to events of Force Majeure that were cascading and compounding over multiple years" and Project "energization was completed on June 12, 2024—a 49.5-month delay, 47 months of which resulted from the combined Force Majeure events and 2.5 months of which were caused by delays from an Interconnecting PTO").

264 Moreover, a change in the in-service date is not a substantive change. As CAISO witness Le Vine testified, it is solely non-substantive. Tr. 5061:17-23. The CAISO also notes that, although DCRT does not reference Section 10.1.1 of the DCRT APSA in its arguments regarding the changed in-service date for the Project (*see* DCRT Initial Brief (PUB version) at 43-44), that section does not support DCRT's suggestion either. Section 10.1.1 only excludes from the cap 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. Exh. No. DCT-0002 at 20. The change to the in-service date is not an additional functional requirement resulting from any CAISO specification but instead only a change in the original date. Thus, the cost cap exclusion under Section 10.1.1 does not apply to the changed in-service date for the Project.

265 DCRT Initial Brief (PUB version) at 44-47.

266 Exh. No. DCT-0002 at 10.

Although the SCE and APS interconnection agreements are not relevant to the Bullet #3 and #4 cost cap exclusions, it is also worth noting that any obligations under those agreements did not begin until well after any agency-ordered requirements were imposed on DCRT. The obligations under those interconnection agreements arose after the BLM issued its ROD and ACC and the CPUC issued their directives regarding the Project. The APS interconnection agreement became effective in July 2020,[267] following the ACC's order issued in March 2020 that authorized Project construction in Arizona and well after the BLM ROD in November 21, 2019.[268] The SCE interconnection agreement became effective in June 2023,[269] following the CPUC's order issued in November 2021 that authorized Project construction in California.[270] In other words, the "regulatory compliance" costs for which DCRT seeks recovery arose pursuant to agency-ordered requirements that were imposed well before DCRT entered into any interconnection agreements. These obligations certainly did not arise during construction, as Section 5.5.3 of the DCRT APSA requires.

DCRT did not become a party to the TCA until June 12, 2024 when operational control of the Project was turned over to CAISO.[271] The DCRT APSA is clear that the DCRT APSA applies to "rights and obligations associated with the Project that arise *prior to* the effective date of the Approved Project Sponsor's execution of the Transmission Control Agreement."[272] All of the claimed "regulatory compliance" obligations DCRT identifies arose prior to DCRT's execution of the TCA. Thus, DCRT could not have incurred "regulatory compliance" costs to comply with the TCA.

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267 Exh. No. DCT-0003 at 6, 8, 61.
268 Exh. No. DCT-0050 at 3-5.
269 Exh. No. DCT-0003 at 90, 146.
270 Exh. No. DCT-0016 REV at 121, 124.
271 Exh. No. DCT-0114 at 136; DCRT Initial Brief (PUB version) at 2 n.4.
272 Exh. No. DCT-0002 at 5 (emphasis added).

Moreover, it was entirely foreseeable DCRT would need to incur costs to comply with the interconnection agreements with APS and SCE and with the TCA. The *pro forma* APSA available to all Project Sponsors during the solicitation process makes it clear that any Approved Project Sponsor will be required to execute the TCA and agreement(s) for Transmission Interconnection Service with the Interconnecting PTO and other transmission entities the Approved Project Sponsor is required to interconnect with.[273] Thus, DCRT knew it would need to comply with those agreements before it even submitted a bid into the CAISO competitive solicitation for the Project. This is acknowledged in DCRT's bid.[274] For these reasons, even assuming *arguendo* it were true, as DCRT argues, that DCRT's claimed "regulatory compliance" cost line items qualify as "safety, reliability, or regulatory requirement[s] of the SCE Interconnection Agreement, the APS Interconnection Agreement, and the CAISO TCA,"[275] it would be irrelevant to whether DCRT is entitled to above-cap cost recovery under Section 5.4.3 or Section 5.5.3 of the DCRT APSA. For the reasons the CAISO explains, DCRT is not entitled to such cost recovery.

#### b. There Is No Merit in DCRT's Ten Individual Claims of EPC Cost Increases It Seeks to Recover Above the Cost Cap or in DCRT's Claims of Other Regulatory Compliance Costs

As the CAISO explained at length in its Initial Brief, none of the individual so-called "regulatory compliance" costs DCRT claims should be excluded from the DCRT APSA cost cap

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[273] Exh. No. CDN-0003 at 8 (Section 3.4) ("To the extent the Approved Project Sponsor is not already a Participating TO, the Approved Project Sponsor further agrees that it shall enter into the Transmission Control Agreement in sufficient time for its execution to become effective as of the date of energization of the Project and that it has met or shall meet all other CAISO Tariff requirements to become a Participating TO in accordance with Section 4.3 of the CAISO Tariff."); *id.* at 9 (Section 4.2) ("The Approved Project Sponsor must obtain a separate agreement for Transmission Interconnection Service from the Interconnecting PTO or other entity to whose facilities the Project will interconnect.").

[274] *See* Exh. No. CSO-0006 REV2 PUB at 11, 79.

[275] DCRT Initial Brief (PUB version) at 47-48.

pursuant to Bullet #3 or #4.[276] The CAISO also explained why the Presiding Judge and the Commission should reject DCRT's arguments that its wholly fabricated "regulated compliance" cost cap exclusion applies only to regulatory compliance requirements that were not foreseeable at the time of the bid.[277] In its own Initial Brief, DCRT simply rehashes arguments the CAISO has already addressed regarding DCRT's claimed ten individual EPC cost increases related to "regulatory compliance" which DCRT seeks to recover as cost cap exclusions,[278] and regarding additional management-related costs which DCRT claims to comply with BLM, CPUC, and other requirements.[279]

Consistent with its overall approach of seeking to avoid the consequences of its voluntary cost cap which was why DCRT was selected by the CAISO to build the Project, DCRT seeks to recover $72,968,051 in claimed above-cap costs incurred to comply with purported regulatory agency/permitting authority directives, claiming they fall within DCRT APSA cost cap exclusions and, thus, are recoverable.[280] This is over and above the $17,155,633 the CAISO and DCRT agreed to in the second amendment to the DCRT APSA for Change of Route costs. DCRT divides these "regulatory compliance" costs into five buckets: (1) agency-ordered facility changes and safety requirements (fire marshal and FAA/DOD lighting requirements); (2) agency-required route, design, outage, and safe-construction changes; (3) schedule, sequencing, and oversight costs caused by regulatory restrictions; (4) agency-imposed environmental, cultural, and resource-mitigation measures; and (5) CPUC CPCN benefits-cost analysis.[281] DCRT claims these costs were not reasonably foreseeable.[282]

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[276] CAISO Initial Brief (PUB version) at 41-42, 57-71.
[277] *Id.*
[278] *See id.* at 57-69.
[279] *See id.* at 69-71.
[280] DCRT Initial Brief (PUB version) at xi, 38.
[281] *Id.* at 47-53.
[282] *Id.*

DCRT's claim it is entitled to recover "regulatory compliance" costs also contravenes the representations it made in its competitive solicitation bid. DCRT's bid stated:

> Finally, to the extent any regulatory mitigation requires additional expenses other than as planned to support DCRT's line as proposed, DCRT has taken this into consideration in its bid cap. In other words, if there are additional regulatory mitigation costs involved, DCRT commits that it will not include any cost beyond its bid cap.[283]

DCRT's claims it is entitled to recover all "regulatory compliance" costs under the DCRT APSA and such costs are not foreseeable also are contrary to the claims DCRT made in filings with the Commission in 2015 when it sought rate incentives for its participation in the Project and stated its cost containment proposals (resulting in the cost cap in the DCRT APSA) could result in unrecoverable costs due to regulatory risks. First, in his Direct Testimony supporting DCRT's request for incentive rate treatment, DCRT witness Amirali testified there would be significant challenges in meeting its "aggressive schedule" to complete the Project by May 1, 2020 given the complex and challenging permitting processes it had to navigate.[284] Mr. Amirali specifically identified two BLM proceedings that took six and seven years, respectively, to permit. In other words, DCRT knew up front there was a delay risk and it was bearing that risk (for which the Commission should award it the requested rate incentives). Mr. Amirali also identified all the permits required for the Project and noted the litigation risk and delays associated with land acquisition.[285] He identified several route risk issues with the Project that increased the risk of adverse outcomes, including "[i]f portions of the route crossing federal lands in Arizona are not within a designated utility corridor, the BLM may require an

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

284 Exh. No. S-0084 at 13:1-14:19. *See also* Exh. No. CIT-0006 at 17-25, 42:7-11 (recognizing the cost containment commitments DCRT had made that could result in unrecoverable costs, receiving the necessary regulatory approvals by May 1, 2020 would be challenging, and the risk of cost escalation).

285 Exh. No. S-0084 at 19:13-23:1.

amendment to the affected Resource Management Plan ('RMPA')"[286] Mr. Amirali noted any required amendment to the RMPA "would involve lengthened public comment opportunities."[287] Also, Mr. Amirali's testimony contained the following question and answer:

> **Q23. ARE THERE ADDITIONAL CHALLENGES AND RISKS IN THE CONSTRUCTION PROCESS?**
>
> **A23.** Yes. Any environmental mitigations ordered by permitting agencies beyond those anticipated in our development plan, and/or any encounters during construction with environmentally sensitive areas or listed species beyond those anticipated in our development plan, will extend the construction time and increase construction expenses. While DCRT has worked to anticipate these issues, extended construction time and increased construction costs based on required mitigation requirements or unanticipated sensitive conditions or species are a real possibility. This uncertainty, in light of the cost containment provisions underpinning DCRT's Project Sponsor application to the CAISO, is yet another challenge for DCRT to manage in order to deliver the Project successfully.[288]

In the accompanying Petition for Declaratory Order ("Petition"), DCRT stated:

> DCRT's proposal, which the CAISO accepted, contained several cost containment commitments and cost caps that potentially in certain circumstances could result in unrecoverable costs. Accordingly, DCRT's proposal carries more risk with it than the usual cost of service approach. This unique bid structure alone sets the foundation for many of the risk reducing incentives DCRT has requested in this Petition.[289]

The Petition then described the various "Regulatory Challenges" DCRT was facing, which are summarized above from the Direct Testimony of Mr. Amirali and repeated that its bid in the CAISO competitive solicitation process "included robust cost containment commitments and cost caps."[290]

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286 *Id.* at 15.
287 *Id.*
288 *Id.* at 23.
289 Exh. No. CIT-0006 at 18-19.
290 *Id.* at 20-25.

In granting DCRT's requested rate incentives for the Project, the Commission recognized:

> DCR Transmission explains that construction of the Delaney Project is a major undertaking that will present many construction challenges. For example, DCR Transmission asserts, environmental mitigation ordered by permitting agencies may increase its construction time and cost risks, particularly given the construction cost caps DCR Transmission agreed to for the Project.
>
> DCR Transmission states that CAISO's competitive solicitation process results in robust competition among qualified applicants and is designed to create the highest value for CAISO's customers. DCR Transmission explains that its preparation of its application to include robust cost containment commitments and cost caps required it to commit much time and resources to address design and engineering needs, potential route identification, cost estimates, identification of development challenges, and other issues.[291]

The Commission granted DCRT's requested rate incentives, finding "DCR Transmission has demonstrated that its total package of requested incentives is tailored to address the demonstrable risk or challenges faced by DCR Transmission, including construction, regulatory, and financial challenges arising during the pre-construction and construction phases of the Delaney Project."[292]

Thus, DCRT requested, and received, incentive rate treatment based on the cost escalation and delay risks it claimed it was facing due to the cost cap and cost containment measures it proposed. These risks included delay, route change, and "regulatory compliance" obligations imposed on it by permitting agencies including increased environmental/species/cultural/resource mitigation. What this clearly shows is DCRT itself believed it was at risk for the recovery of "regulatory compliance" costs because of the cost caps in its bid and told the Commission as much. However, in the instant proceeding DCRT now seeks to recover all the costs it incurred in these areas as the result of claimed "regulatory

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291 *DCR Transmission, LLC*, 153 FERC ¶ 61,295, at PP 21-22 (2015) (internal citation omitted).

292 *Id.* at P 29.

compliance" obligations imposed on it by the BLM and the CPUC, including several specified mitigation-related costs. In other words, although DCRT told the Commission in 2015 it was at risk for the recovery of "regulatory compliance" costs to get rate incentives for the Project, DCRT now claims it was not at risk for such costs and is entitled to recover all such costs pursuant to a "regulatory compliance" cost cap exclusion that was neither in its bid or in the DCRT APSA. This is another example of DCRT saying something back in the day and now in this rate case claiming something entirely different. The Presiding Judge should not countenance this "about-face" by DCRT.

Finally, DCRT's interpretation of Bullet #3 and #4 of the DCRT APSA as permitting it to recover general "regulatory compliance" costs contravenes basic principes of contract interpretation. First, it makes no sense the DCRT APSA would provide for the recovery of general "regulatory compliance" costs through two separate cost cap exclusions that do not even mention the words "regulatory compliance." Second, DCRT's interpretation would also render unnecessary the detailed Change of Route cost cap exclusion provisions. In that regard, DCRT witness Crew admitted that under DCRT's interpretation of Bullet #3 and #4 Change of Route costs would qualify as excluded "regulatory compliance" costs as they were ordered by a permitting authority.[293] There would have been no need for a separate Change of Route exclusion if it was already captured by other cost cap exclusions that permitted the recovery of "regulatory compliance" costs. Third, the fact DCRT's bid and the DCRT APSA included a cost cap exclusion for agency-ordered Change of Route costs but for no other type of "regulatory compliance" cost indicates no other "regulatory compliance" cost cap exclusions were

[293] Tr. at 1914:17-24.

intended.[294] As discussed *supra* in Section II.C.1.f, DCRT is seeking preferential treatment vis-à-vis other Approved Project Sponsors, as well as developers it competed against to build the Project, who had specific, express cost cap exclusions for the types of "regulatory compliance" costs DCRT seeks to recover, but for which there is no comparable cost cap exclusion.

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

##### a. The Definition of Force Majeure in the DCRT APSA Is Supported and Narrowed by Commission Precedent, Federal Law, and California Law

In its Initial Brief, DCRT argues Force Majeure under the DCRT APSA has an extremely broad definition.[295] That argument is without merit. As the CAISO demonstrated in its Initial Brief, the definition of Force Majeure is narrower than DCRT claims.[296] DCRT can exclude costs from the cost cap based on a particular claimed Force Majeure event only insofar as: (1) the claimed event satisfies the DCRT APSA definition of Force Majeure and the requirement of the Commission and California law that the claimed event be both uncontrollable and objectively unforeseeable, *i.e.*, that the event was unusual rather than routine; (2) DCRT has shown a causal link between the claimed event and DCRT's noncompliance with its performance obligations under the DCRT APSA; (3) DCRT has provided notice and full particulars of the claimed event to the CAISO as soon as reasonably possible; (4) DCRT has exercised due diligence to remove

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[294] Applying the fundamental principle of contract interpretation *expressio unius est exclusio alterius*—the expression of one thing implies the exclusion of others—expressly including one type of "regulatory compliance" cost, *i.e*., agency-ordered change of route costs, necessarily excluded any other type of "regulatory compliance" cost cap exclusion. *See, e.g.*, *El Paso Nat. Gas Co., LLC*, 148 FERC ¶ 61,043, at P 50 (2014); *Cleveland Elec. Illuminating Co.*, 82 FERC ¶ 61,254, at 62,017 n.9 (1998); *White v. W. Title Ins. Co.*, 710 P.2d 309, 314 n.4, 40 Cal. 3d 870, 881 n.4 (1985); *Ronay Family Ltd. P'ship v. Tweed*, 157 Cal. Rptr. 3d 680, 688, 216 Cal. App. 4th 830, 842 (2013).

[295] DCRT Initial Brief (PUB version) at 55-68.

[296] CAISO Initial Brief (PUB version) at 72-114.

any disability associated with the claimed event with reasonable dispatch; (5) costs specific to DCRT that the Commission should approve resulted from delays due to the claimed event; (6) those costs for the claimed event are known; and (7) those costs are not covered by insurance.[297] For the reasons explained in the CAISO's Initial Brief and below, DCRT fails to meet these requirements as to any of its claimed Force Majeure costs, other than above-cap costs for COVID-19-created delays for a period limited to approximately nine months associated with suspension of CPUC proceedings during the pandemic.[298]

The DCRT APSA defines Force Majeure to include "any order, regulation, or restriction imposed by governmental . . . authorities," but to not include "(4) failure or delay in granting of necessary permits for reasons not caused by Force Majeure."[299] "DCRT argues the latter-quoted provision (which DCRT calls the "fourth qualifier") "captures the broad definition of Force Majeure" and does not preclude any of its claimed Force Majeure events from satisfying the definition.[300] DCRT claims if the delay was beyond DCRT's reasonable control, could not have been avoided through the exercise of Good Utility Practice, and arose from the order, regulation, or restriction of a governmental agency, then it constitutes a Force Majeure event.[301]

The Presiding Judge and the Commission should give no weight to that argument, which shows DCRT's general misapplication of the concept of Force Majeure in its Initial Brief. Following DCRT's interpretation of the above-quoted DCRT APSA provisions would render the so-called fourth qualifier meaningless: if any delay caused by a governmental agency that is announced via some governmental issuance qualified as a Force Majeure event, then the

297 *Id.* at 81.
298 *Id.* at 81-114.
299 DCRT Initial Brief (PUB version) at 69-70 (quoting Exh. No. DCT-0002 at 7).
300 DCRT Initial Brief (PUB version) at 69-70.
301 *Id.* at 69.

exclusion from the definition for failure or delay in granting of necessary permits for reasons not caused by Force Majeure would have no operative effect. That would be contrary to principles of contract interpretation,[302] and inconsistent with the express findings in the Commission's order accepting the definition of Force Majeure contained in the *pro forma* APSA, which is identical to the DCRT APSA definition. In its order accepting the *pro forma* APSA, the Commission quoted the fourth qualifier (and other provisions in the definition of Force Majeure) in underlined text to show APSA-specific modifications of the then-existing definition of "force majeure" contained in the CAISO tariff, and the Commission went on to find the "CAISO's proposed definition of force majeure to be just and reasonable requiring no further modifications."[303]

DCRT's attempt effectively to read the fourth qualifier out of the APSA definition of Force Majeure cannot be reconciled with the Commission's specific acceptance of this language. Indeed, the correct interpretation of the fourth qualifier accords with Commission precedent and California law and appropriately recognizes the Force Majeure definition distinguishes between general permitting delays and those caused by extraordinary events, as explained in the CAISO's Initial Brief[304] and by CAISO witness Le Vine on the stand.[305] Under DCRT's strained interpretation, a decision granting a one-week extension of a briefing schedule, a notice extending the public comment period on an environmental report, an updated procedural schedule that allows more time for discovery or testimony (or orders more testimony), or an

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302 *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 P 61,094, at P 20 (2023) ("When interpreting tariff provisions, the tariff should be read to give meaning to every provision.").

303 *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107, at PP 30, 37 (2014).

304 CAISO Initial Brief (PUB version) at 74, 81, 83.

305 Tr. 4214:1-10.

extension because an ALJ or an agency needs more time to rule on a difficult matter would each constitute a Force Majeure event simply because the delay was announced via a governmental agency issuance. There is no basis for, or authority supporting, such an expansive reading of the definition of Force Majeure. DCRT witness Reed acknowledged that even when a government agency is acting in an inefficient manner, it does not qualify as a Force Majeure event.[306]

#### b. DCRT Did Not Follow the Notice Provisions in the DCRT APSA

DCRT argues the DCRT APSA does not impose specific notice requirements for cost cap exclusions due to delays resulting from events of Force Majeure and DCRT provided sufficient Force Majeure notice to the CAISO.[307] But DCRT's arguments cannot overcome the fact it failed to follow the express notice requirements of the DCRT APSA. Section 13.1.1 of the APSA requires DCRT to issue CAISO timely, substantive notice of specific Force Majeure events with full particulars of such event.[308]

The plain language and structure of the DCRT APSA provide no support for DCRT's unsubstantiated claim that Section 13.1.1 only pertains to events of Default, not for Force Majeure delay costs.[309] As the CAISO explained in its Initial Brief,[310] Section 13.1.1 does not require existence of a Default as a prerequisite for the obligation to provide notice. It is solely a Party's awareness of a potential inability to comply with obligations in the DCRT APSA that triggers the obligation under Section 13.1.1 to notify the counterparty.[311] Indeed, the sentence in Section 13.1.1 requiring notice applies if DCRT is "unable to fulfill any obligation by reason of

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306 *See* Tr. 1022:25-1023:8; 1026:9-14.
307 DCRT Initial Brief (PUB version) at 71-77.
308 CAISO Initial Brief (PUB version) at 75 (discussing Exh. No. DCT-0002 at 22-23).
309 DCRT Initial Brief (PUB version) at 72-73.
310 CAISO Initial Brief (PUB version) at 77 n.330.
311 Exh. No. DCT-0002 at 22.

Force Majeure."[312] Moreover, Section 12 of the APSA (entitled Notices) explains exactly how notice is to be given by a Party:

> **12.1 General.** Unless otherwise provided in this Agreement, any notice, demand, or request required or permitted to be given by a Party to another and any instrument required or permitted to be tendered or delivered by a Party in writing to another shall be effective when delivered and may be so given, tendered, or delivered by (i) recognized national courier, (ii) depositing the same with the United States Postal Service with postage prepaid for delivery by certified or registered mail, addressed to the Party, or (iii) personal delivery to the Party, at the address set out in Appendix D, Addresses for Delivery of Notices and Billings.[313]

DCRT's arguments to recover costs above the cost cap are arguments that DCRT is unable to comply with its obligations under both Section 10.1.1 and Appendix E. DCRT's claim of a Default is required for the Section 13.1.1 Force Majeure notice requirements to apply is belied by the two Section 13.1.1 Force Majeure notices it did provide the CAISO—for COVID-19 and the EO —neither of which involved a Default.[314] Moreover, adopting DCRT's argument that Section 13.1.1 does not apply to Force Majeure delay costs under Bullet #5 would render Bullet #5 meaningless as there is no other provision or mechanism governing Force Majeure in the DCRT APSA, and there is no separate and different definition of Force Majeure in Bullet #5 than that in the *pro forma* provisions of the DCRT APSA itself. This result would be commercially unreasonable and contrary to the intent of the Parties.

DCRT also argues Section 13.1.1 does not require that a particular event be designated as an event of Force Majeure when notice is provided to the CAISO.[315] This argument is nonsensical on its face. It would allow DCRT to casually notify the CAISO of the occurrence of an event and then to claim years or decades after the fact that the occurrence was an event of

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312 *Id.*
313 *Id.*
314 Exh. No. CSO-0601 REV2 PUB at 76:5-23.
315 DCRT Initial Brief (PUB version) at 71.

Force Majeure. This argument ignores the requirements in Section 13.1.1 that the party providing notice provide "the full particulars of such Force Majeure . . . as soon as reasonably possible after the occurrence *of the cause relied upon*," and that any such notices provided by telephone "shall be confirmed in writing as soon as reasonably possible and shall specifically state full particulars *of the Force Majeure*, the time and date when the Force Majeure occurred, and the when the Force Majeure is reasonably expected to cease."[316]

As explained in the CAISO's Initial Brief, Section 21.2 of the APSA governs anticipated noncompliance with the APSA for any reason other than Force Majeure.[317] Sections 13.1.1 and 21.2 were the only two possible pathways for DCRT when it anticipated failure to fulfill any of its obligations under the DCRT APSA.[318] Accordingly, given the provisions in both of those sections, DCRT was required to provide timely notice to the CAISO regardless of whether or not the anticipated event was an event of Force Majeure.[319] To the extent DCRT did not identify an event as an event of Force Majeure "as soon as reasonably possible," the CAISO is entitled to treat any such notice as a Section 21.2 notice. DCRT did not provide timely notice of many events under either APSA provision. Instead, for many of the events it now claims are Force Majeure events, the CAISO received a medley of quarterly reports from DCRT with mentions of possible delays unaccompanied by an explanation of the relief sought, whether it would require an amendment to the APSA, a milestone update, or a cost increase, and without a warning or notice of DCRT's intent to proclaim the event a Force Majeure.[320] General Project updates and

316 Exh. No. DCT-0002 at 22 (emphasis added).
317 CAISO Initial Brief (PUB version) at 76 (discussing Exh. No. DCT-0002 at 30).
318 CAISO Initial Brief (PUB version) at 75-76.
319 *Id.* at 76.
320 *See id.* at 77 n.330, 78 nn.332-36.

presentations discussing “risks and obstacles” do not meet the express notice requirements of Section 12 of the DCRT APSA.

In furtherance of the argument DCRT was not required to provide Force Majeure notice for any of the Force Majeure events its claims, DCRT asserts that neither APSA Section 13.1 nor Bullet #5 discuss how notices of delay cost should be provided.[321] This argument is misplaced. Bullet #5 expressly pertains to “[a]ny FERC approved costs resulting from delays due to events of Force Majeure.”[322] There is only one definition of Force Majeure in the DCRT APSA—the one in the *pro forma* portion of the agreement that is replicated in the DCRT APSA; there is no separate Force Majeure definition in Bullet #5. Accordingly, if DCRT was claiming the occurrence of any Force Majeure event, whether it resulted in delay costs or not, DCRT was obligated to provide a Force Majeure notice under Section 13.1.1 in accordance with the notice provisions in Section 12. Indeed, Bullet #5 expressly states that the Commission alone (*i.e.*, not the CAISO or any other entity) will determine what claimed Force Majeure delay costs are approved and thus recoverable.

DCRT posits that “[a] party will not know (in fact, *cannot* know) what the Force Majeure delay costs may be until the Force Majeure event has concluded, the Project is complete, the scope and impact of the delay is known, the party files at FERC, and the permissible delay costs become ‘FERC-approved.’”[323] The Presiding Judge should reject DCRT’s argument. It would allow every Approved Project Sponsor subject to a cost cap with a Force Majeure exception looking to justify its costs before the Commission in a rate proceeding to wait until the day of its rate filing to claim a delay was caused by a Force Majeure event—which is essentially what

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321 DCRT Initial Brief (PUB version) at 71.
322 Exh. No. DCT-0002 at 78.
323 DCRT Initial Brief (PUB version) at 71 (emphasis in original).

DCRT, alone among all Approved Project Sponsors, has done. DCRT's argument also fails to take into account the Project in the instant proceeding was justified in the CAISO transmission planning process solely based on its economic benefits to ratepayers.[324] To suggest the CAISO, as the administrator of the entire footprint's transmission planning process delivering wholesale electricity, which provides power to many millions of customers, must sit on its hands and be kept in the dark on potential events that may affect the viability of a project, is contrary to reason and against the Commission's transmission infrastructure policy, especially for a project based on economic benefits and employing a bid cap with cost containment measures.[325]

#### c. DCRT Cannot Claim It Was Adhering to Good Utility Practice as a Blanket Excuse for All Events It Now Claims Are Force Majeure

The reference to Good Utility Practice in the current DCRT APSA definition of Force Majeure was already in place when the original DCRT APSA was executed on December 1, 2015, and the standard remains unchanged.[326] DCRT claims it was operating under reasonable assumptions about the Project's development under a Good Utility Practice Standard when it executed the DCRT APSA on December 1, 2015.[327] DCRT's application of Good Utility Practice in this proceeding is misplaced.[328] Notwithstanding DCRT's misapplication of the standard, the overwhelming evidence in this proceeding indicates DCRT failed to follow Good

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324 CAISO Initial Brief (PUB version) at 15 n.52 (as explained in the CAISO's selection report, the justification for the Project is "solely based on economic benefits for ratepayers, and the [CA]ISO considers commitment to robust binding cost containment measures to be the most effective way in which the [CA]ISO can ensure that a project is developed in an efficient and cost-effective manner.").

325 *See id.* at 5 n.22, 11 n.40.

326 *Id.* at 72 (citing Exh. No. DCT-0002 at 7; Exh. No. CDN-0002 at 89-90); DCRT Initial Brief (PUB version) at 56.

327 *Id.* at 56-57.

328 By agreeing to a binding cost cap, DCRT voluntarily assumed the risk of all cost overruns resulting from project schedule delays, whether caused by "low risk" or "high risk" events, unless an explicit cost cap exception applies. The BLM's rejection of the Kofa route and eventual adoption of a logical alternative such as a route that prioritizes the Energy Corridors was foreseeable and therefore not a Force Majeure event. As such, the cost overruns do not fall under a cost cap exception.

Utility Practice, did not undertake necessary due diligence, and made unreasonable (and unjustifiable) assumptions throughout the process. Some prominent examples included:

- DCRT "putting all of its eggs in one basket" on one route that traversed Kofa with three sub-alternative alternatives through the Copper Bottom Pass[329] and assuming the BLM would expeditiously approve such route because the BLM (1) approved the original SCE Devers-Palo Verde line in the 1980s along that route and (2) supposedly "approved" SCE's DVP2 line.[330] However, DCRT ignored that the BLM never approved the Arizona portion of the DPV2 line, including the route through Copper Bottom Pass, which is in Arizona, it only approved the California portion of the line.[331] DCRT also ignored that in 2009, the Section 368 Western Energy Corridors were adopted, which included designation of preferred routes for the siting of energy infrastructure, accounting for environmental concerns. These designated Energy Corridors included a route directly applicable to DCRT's Project, which did not go through Kofa[332] and ultimately was the route that the BLM adopted. Although the designated Energy Corridor route did not go through Kofa and DCRT was advised by the BLM on August 14, 2015, prior to executing the APSA, which DCRT witness Amirali attended, the BLM Branch Chief stated specifically that a route through Kofa was "not going to happen."[333] The BLM also advised DCRT it would need to study

329 Exh. Nos. CSO-0603, CSO-0608, and CSO-0609.

330 *See* CAISO Initial Brief (PUB version) at 86, 89, 97; Exh. Nos. DCT-0001 REV2 at 17:5-8, DCT-0007 REV2 at 19:8-11, DCT-0102 REV2 PUB at 18:3-12, and DCT-0118 REV PUB at 17:12-14.

331 Exh. No. CSO-0032 at 7.

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

333 Exh. No. CSO-0704 REV at 4, 6. Similarly, in a September 8, 2015 meeting, the U.S. Fish & Wildlife Service told DCRT that (1) this time a route tracking DPV2 could be deemed non-compatible regardless of mitigation, (2) it did not want the Project to go through Kofa, and (3) DCRT should consider other environmentally preferable alternatives. Exh. No. S-0006 REV PUB Part 1 at 58-60.

alternative routes including a route through the Western Energy Corridor that was already set aside for transmission use and parallelled DCRT's proposed route.[334] DCRT instead pushed ahead with a route that went through Kofa and did not track the designated Energy Corridor. Following meetings with the BLM, DCRT expressed surprise that its environmental consultant had not advised DCRT of the existence of the Western Energy Corridors,[335] even though they had been in existence since 2009. DCRT's unawareness of the existence of the Western Energy Corridors demonstrates neither DCRT nor its consultants did even basic due diligence to understand the current circumstances surrounding its Project or conduct necessary outreach prior to preparing its bid. DCRT was likewise unaware that a protected species of pronghorn sheep had been introduced into Kofa since the SCE line had been built although this was also discussed at the August 2015 meeting.[336] Instead, DCRT blindly assumed because there was an existing SCE line through Kofa, the BLM would approve another one even though circumstances had changed significantly since DPV was approved.

- DCRT's admittedly "aggressive" schedule that assumed the BLM would permit the Project in less than two years even though the average and median BLM permitting timelines at that time and years before were essentially double that amount of time,[337] and DCRT was aware of much longer BLM permitting timelines for recent projects.[338]
- DCRT ignoring that under NEPA, the BLM must analyze a reasonable number of alternatives to meet the purpose and need for the action, and if where, as here, the BLM

334 Exh. No. CSO-0704 REV at 4, 6, 11, 13; Exh. No. CDN-0078 at 2.
335 Exh. No. S-0071 at 4.
336 Exh. No. S-0055 Part 1 REV PUB at 71-72; Exh. No. DCT-0015 at 19.
337 Exh. No. CSO-0001 REV3 at 104:1-21.
338 Exh. No. S-0084 at 14.

is working with collaborative agencies, the range of alternatives may need to reflect their authority and decision space.[339]

- DCRT witness Rogers claiming DCRT relied on Title 41 of the FAST-41 legislation to support its two-year BLM permitting timeline assumption[340] even though (1) FAST-41 legislation was not introduced until months after DCRT submitted its proposed Project schedule to the CAISO that showed BLM permitting occurring in less than two years and (2) the two-year goal for FAST-41 permitting was not included in the FAST-41 legislation enacted in December 2015 and, in fact, was not enacted into law until late 2021.[341] Thus, there is no possibility DCRT could have relied on a FAST-41 two-year permitting goal in 2014 and 2015 during the competitive solicitation bidding process.
- DCRT undertaking no due diligence with respect to, and providing no evidence it was even aware of, the DRECP and its potential applicability to the Project even though (1) the draft DRECP was issued in September 2014 before DCRT submitted its proposal, including its proposed schedule, in the competitive solicitation process or executed the DCRT APSA,[342] (2) the DRECP applied to the lands the Project would traverse and thus might affect the Project, (3) the BLM advised DCRT on April 20, 2016 that the draft DRECP would apply to the Project,[343] (4) the requirements of the draft DRECP, as an adopted BLM land use plan amendment, applied to every type of project and land use (energy and non-energy related) on the BLM's California desert lands, as specific

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339 Exh. No. CSO-0001 REV3 at 90:6-91:7 (citing Exh. No. CSO-0030 at 60). *See also* Exh. No. CSO-0704 REV at 5-6 (DCRT advised in August 2015 meeting the BLM would need alternatives, including the Western Energy Corridor, but DCRT indicted these alternatives would "NOT" be included in its BLM application, but they would be in the DEIS and DCRT would have to provide data for them later on).
340 Exh. No. DCT-0118 REV PUB at 32:17-33:7.
341 Exh. No. CSO-0601 REV2 PUB at 59:23-64:2.
342 Exh. No. CSO-0033.
343 Exh. No. CSO-0701 PUB at 40:6-17; Exh. No. CSO-0718 at 5.

areas covered by the DRECP were being designated for specific uses such as renewable energy and transmission development, recreational uses, conservation, and multiple uses,[344] (5) the draft DRECP was intended to promote renewable energy and transmission goals and development,[345] and (6) a stated purpose of the Project was to "create new transmission infrastructure needed to interconnect future renewable energy resources in both Arizona and California to the bulk electric transmission grid."[346]

- DCRT assuming the CPUC ALJ would begin hearing activities for the Project after issuance of the DEIS because there was some precedent to that effect,[347] but ignoring other precedent to the contrary, ignoring there was no CPUC rule requiring DCRT's preferred approach, and ignoring its approach was not the most efficient way to advance the process given the Project was dependent on approvals from the BLM and the Arizona Corporation Commission, which had previously not approved DPV2 and therefore could affect the scope, costs, and need for—and even the mere existence of—the Project.[348]
- DCRT assuming the CAISO would authorize it to undertake significant procurement at significant cost before DCRT received a CPCN from the CPUC, knowing that under a Commission-approved transmission rate incentive DCRT could seek abandoned plant cost recovery for all prudently incurred costs if the CPUC were to deny a CPCN. If the CAISO had approved the proposed procurement in April 2021 with a significant risk of a large amount of abandoned plant costs being recovered in transmission rates, the

[344] Exh. No. CSO-0601 REV2 PUB at 81:10-12; Exh. No. CSO-0701 PUB at 37:5-38:4; Exh. No. CSO-0034 at 12; Exh. No. CSO-0033 at 6-13, 28-37.
[345] Exh. No. DCT-0046 REV at 57; *see also* Exh. No. DCT-0047 at 46.
[346] Exh. No. CSO-0001 REV3 at 95:11-98:8.
[347] Exh. No. DCT-0102 REV2 PUB at 67:19-21.
[348] Exh. No. CSO-0601 REV2 PUB at 78:9-80:5; Exh. Nos. PUC-0006 and PUC-0007; CAISO Initial Brief (PUB version) at 87-90.

> CAISO would not have been adhering to Good Utility Practice or acting reasonably and prudently on behalf of the CAISO's ratepayers.[349]

Thus, DCRT's claimed events, other than COVID-19, were foreseeable permitting and development risks that could lead to Project delays that DCRT could have accounted for in its schedule and bid, and do not meet the DCRT APSA definition of Force Majeure.[350]

#### d. Specific Force Majeure Claims

The CAISO's Initial Brief fully addressed DCRT's specific claims regarding the 12 Force Majeure events it claims caused Project delays.[351] The CAISO will not repeat that discussion here but will point out some key flaws in DCRT's position and address any new arguments the CAISO did not rebut in its Initial Brief.

##### i. Permitting-Related Delays

In relating many of the permitting-related governmental actions it claims are Force Majeure events, DCRT attempts to twist a set of foreseeable governmental actions into a set of unforeseeable "black swan" events.[352] The fact is, however, there is more than ample evidence DCRT failed on numerous fronts to undertake due diligence, follow Good Utility Practice, account for realistic Project risks, and sufficiently plan for contingencies. DCRT's claimed Force Majeure events such as the BLM's timeline, the CPUC ALJ's decision to postpone the CPCN docket, or other permitting-related delays described in the CAISO's Initial Brief and below, are foreseeable and reasonable aspects of transmission infrastructure permitting, especially for an electric project of the size of the Project that traversed multiple states, required state and federal permitting authorizations, and proposed to go through protected land.

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349 Exh. No. CSO-0001 REV3 at 114:8-116:4; Exh. No. CSO-0601 REV2 PUB at 89:10-93:6.

350 *See* CAISO Initial Brief (PUB version) at 83-97, 99-102, 108-11.

351 *Id.* at 83-111.

352 *See* DCRT Initial Brief (PUB version) at 59-66, 67-68.

### ii. DRECP

DCRT claims the BLM decided to apply the DRECP to the Project in late 2017, and its application to the Project was unforeseeable.[353] DCRT also claims the BLM did not know how to apply the DRECP to the Project, so DCRT had to initiate a series of discussion with the BLM in late 2017.[354] It is unfathomable DCRT would have been unaware of the potential implications of the DRECP until late 2017. The draft DRECP was issued in September 2014—before DCRT submitted its bid in the competitive solicitation process on November 19, 2014 and long before DCRT executed the DRCT APSA in December 2015.[355] The draft DRECP LUPA and EIR/EIS were issued in September 2014—before DCRT signed the APSA.[356] BLM staff advised DCRT in early 2016, while the draft DRECP and proposed LUPA were pending, that DRCT should plan to comply with them.[357] However, DCRT identified no outreach to, or meetings or discussions with, the BLM regarding the applicability of the DRECP and the draft LUPA to the Project during this time; nor did DCRT identify any documents showing it had internal discussions (or discussions with its environmental consultants) regarding the potential impact of the draft DRECP and LUPA on the Project. This raises the question whether DRCT was even aware the draft DRECP and LUPA had even been issued, which it should have known had it done its due diligence and exercised Good Utility Practice in assessing all the potential circumstances and regulations that might affect its Project, especially proposed regulations that applied to the Project's route.[358] It also raises the question why DCRT waited until late 2017 to

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353 *Id.* at 61-63.
354 *Id.* at 62-63.
355 Exh. No. CSO-0033. A DCRT exhibit recognizes the DRECP was initiated in 2008. Exh. No. DCT-0105 at 48.
356 Exh. No. CSO-0701 PUB at 37:8-10 (citing Exh. No. CSO-0033).
357 Exh. No. CSO-0701 PUB at 40:6-17 (citing Exh. No. CSO-0718 at 5).
358 Exh. No. CSO-0701 PUB at 40:14-17.

meet with the BLM regarding the implications of the DRECP, as it was approved on September 14, 2016.[359]

DCRT mischaracterizes the DRECP as something the BLM "decides" to apply. As CAISO witness Lee explained, the BLM does not just "decide" to apply the DRECP on a project-by-project basis—it is a broad land use amendment applied within a defined geographic region; it was not limited to renewable generation and generation-tie lines.[360] The DRECP applies to every proposed project and use in the BLM-controlled desert regions of Southern California, which should have put DCRT on notice when it submitted its bid in one of those regions.[361] This was reflected in the draft DRECP and draft LUPA, which recognized specific areas would be designated for renewable energy generation and transmission development, and other areas would be designated for conservation, recreational uses, or multiple uses.[362] In other words, any proposed project in the DRECP area would have fallen into one of these categories and its development would have been limited to the DRECP designated for that specific type of use. Thus, for example, the Project's route had proposed to go through an area of the DRECP designated for conservation and not renewable development, it would have to have been re-sited. A developer exercising Good Utility Practice routing a project through BLM lands would have been aware of the potential applicability of the DRECP.[363]

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359 *Id.* at 37:7-8 (citing Exh. No. CSO-0119). DCRT ignored multiple other notices from the BLM in 2016 that DRECP compliance was required and discussions with BLM staff essential to define the compliance process. Exh. No. CSO-0701 PUB at 39:16-42:13. In January 2017, DCRT personnel even referenced minimizing the impacts as prescribed in the DRECP, confirming DCRT's understanding it would apply to the Project. Exh. No. CSO-0423 at 1.

360 Tr. 3610:23-3611:18, 3612:1-10; Exh. No. CSO-0701 PUB at 37:5-38:21.

361 CAISO Initial Brief (PUB version) at 91 n.397, citing multiple exhibits.

362 Exh. Nos. CSO-0033 at 6-13, 28-37 and CSO-0034 at 12.

363 CAISO Initial Brief (PUB version) at 90-94.

DCRT also states the BLM received 502 "last-minute" comments on the draft DEIS, which cause an unprecedented second preliminary draft and resulting schedule delays.[364] DCRT provides no support whatsoever (testimony, exhibit, or otherwise) for this assertion. In any event, an agency's receipt of stakeholder comments it has publicly invited in the environmental review process (or any other process, *e.g.*, a Notice of Proposed Rulemaking), and any subsequent actions the agency takes to address those comments, which is necessary to develop a record that can withstand an appeal, does not constitute a Force Majeure event.

**iii. Order 3355**

DCRT claims despite its "efforts requesting waiver of Order 3355's application to the DEIS, the BLM determined that the Project should comply with the order, leading to additional delays and costs."[365] DCRT then states that although it was initially granted a waiver from Order 3355, the BLM ultimately required the Project to "generally adhere" to Order 3355.[366] The undeniable fact is DCRT was granted a waiver from Order 3355, and as such, the DEIS did not have to be under 300 pages[367] and in fact was longer than 300 pages.[368] The Arizona office "stated the document still must be shortened significantly to make it readable and generally adhere to S.O. 3355's goals, according to direction from the WO, which will also help expedite WO review times."[369] Shortening a document to make it more readable and expedite review times to adhere to Order 3355's goals streamlining the regulatory process, increasing efficiency, and enhancing the review of infrastructure projects[370] does not constitute a Force Majeure event under the DCRT APSA.

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[364] DCRT Initial Brief (PUB version) at 63 n.325.
[365] *Id.* at 63.
[366] *Id.* at 63-64.
[367] Exh. No. DCT-0014 at 7.
[368] Exh. No. S-0055 Part I REV PUB at 50.
[369] Exh. No. DCT-0014 at 7.
[370] *See* Exh. No. CSO-0001 REV3 at 101:5-19; Exh. No. CSO-0101 REV2 at 19:12-20.

DCRT claims Order 3355, along with the DRECP, caused approximately 12 months of delay in the issuance of the DEIS.[371] That claim is wholly without merit. The only support DCRT cites for its claim to a 12-month delay is DCRT witness Rogers's testimony on the stand during redirect.[372] Witness Rogers submitted no written testimony that either alleged or supported a 12-month delay.

Mr. Rogers dedicated approximately eight pages of his Rebuttal Testimony to discussing the DRECP, but nowhere did he testify, let alone provide any support, regarding the specific amount of delay it purportedly caused. The closest he comes is to state "the period of delay of the environmental review in California versus Arizona is in the record and speaks for itself."[373] Even assuming *arguendo* issuance of the DRECP was an unforeseeable event—which it is not given the draft DRECP was issued prior to DCRT submitting its bid and more than a year before DCRT executed the DCRT APSA—DCRT has failed to carry its burden of proof to demonstrate the amount of delay the DRECP caused.

Nor can DCRT precisely isolate the delay attributable to Order 3355, undermining its ability to quantify the costs attributable to this delay.[374] The only support for Mr. Rogers's claim of a four-to-six month delay for Order 3355 are a Stantec change order and communications from March 2018 **estimating** that an additional 14-16 weeks would be needed.[375] However, subsequent documentation in the record shows the estimate of 14-16 weeks, which amounts to four months or less, not four-to-six months, was way on the high side. In discussions among the BLM, DCRT, and Stantec from May 29, 2018—more than two months after Stantec provided its

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371 DCRT Initial Brief (PUB version) at 63-64. In a footnote, DCRT claims compliance with DRECP caused an eight-month delay and compliance with Order 3355 caused a further four-to-six month delay with some overlap. DCRT Initial Brief at 64 n.331.

372 *Id.*

373 Exh. No. DCT-0118 REV PUB at 42:15-16.

374 Tr. 6233:20-6235:15; 6479:10-6480:8; 6481:1-6.

375 Exh. No. DCT-0118 REV PUB at 46:6-8 (citing Exh. No. DCT-0105 at 68-74).

initial estimate—when DCRT witness Rogers asked if the "time frame for the reduction effort would be shortened from the allotted 5 to six weeks," the response was "the 5 to 6 weeks is still necessary for Stantec to reduce the document to a readable level."[376] In its October 22, 2018 quarterly report to the CAISO—after the DEIS had been published on August 31, 2018 and thus after the DEIS page reduction had occurred—DCRT stated the redrafting pursuant to Order 3355 only "delayed the issuance of the Draft EIS by a month."[377] Moreover, DCRT's July 24, 2018 quarterly report to the CAISO expressly stated that the BLM had confirmed the reformatting and content changes to the DEIS would not result in any change to the overall NEPA schedule.[378]

Thus, DCRT's claim of a 12-month delay is yet another example of a DCRT *post hoc* rationalization and saying one thing while the Project was ongoing, but then claiming something entirely different in this rate case.

**iv. Federal Government Shutdown**

DCRT claims the federal government shutdown from December 22, 2018 through January 25, 2019 delayed the Project by approximately two months.[379] The only support DCRT cites for the purported two-month delay is DCRT witness Rogers's re-direct examination by DCRT counsel at the hearing.[380] There is no specific justification or reasoned basis for this claim given the government shutdown occurred during a period with several federal holidays when many government employees take vacation.[381] Indeed, one of DCRT's own exhibits recognizes that two weeks should be added to any BLM review time that would otherwise occur

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376 Exh. No. DCT-0014 at 7.

377 Exh. No. DCT-0015 at 193. The CAISO also provided the quotation above in its Initial Brief (at 95), but there it mistakenly cited Exhibit No. DCT-0105 rather than Exhibit No. DCT-0015.

378 Exh. No. DCT-0015 at 178, 187. At the hearing, DCRT witness Rogers admitted there was no delay in the EIS or ROD at the time and the schedule would hold overall. Tr. 5975:22-5976:9, 5978:21:5972:2.

379 DCRT Initial Brief (PUB version) at 64-65.

380 *Id.* at 65 n.335.

381 CAISO Initial Brief (PUB version) at 97-99.

during the holiday season because that is when "a lot of federal employees take leave."[382] In other words, even if the government shutdown had not occurred, there would have been government employee outages for at least two weeks (not including the subsequent Martin Luther King, Jr. Day holiday).

**v. The BLM Requires Tower Design Changes**

DCRT claims the BLM's requirement to change tower design requirements on a portion of the Project qualifies as a Force Majeure event because it "significantly increased material costs by requiring more steel and larger foundations."[383] As the CAISO has explained, this is nothing but a *post hoc* rationalization to recover more costs than DCRT is entitled to recover.[384] DCRT identifies no delay resulting from the BLM's action or even claims it caused a delay. The CAISO's unrebutted testimony demonstrates there was no delay from the tower design change.[385] As discussed above and acknowledged by DCRT,[386] the DCRT APSA includes no cost cap exclusion for increased costs due to Force Majeure that do not result in a delay; it only contains a cost cap exclusion for "costs resulting from delays due to events of Force Majeure."[387] Thus, costs DCRT incurred as a result of the tower design change do not fall under the express cost cap exclusion in Bullet #5 of the DCRT APSA. The CAISO's testimony in this proceeding fully demonstrates why DCRT is not entitled to recover the costs it seeks for this claimed Force Majeure event under Bullet #5 of the DCRT APSA.[388] Finally, the CAISO compensated DCRT

382 Exh. No. DCT-0105 at 95-96.
383 DCRT Initial Brief (PUB version) at 65-66.
384 CAISO Initial Brief (PUB version) at 101.
385 Exh, No. CSO-0001 REV3 at 108:6-18; Exh. No. CSO-0601 REV2 PUB at 87:20-88:9.
386 Exh. No. CSO-0027 at REV at 1; Exh. No. CDN-0032 at 2.
387 Exh. No. DCT-0002 at 78.
388 CAISO Initial Brief (PUB version) at 99-102; Exh. No. CSO-0001 REV3 at 107:18-110:9; Exh. No. CSO-0601 REV2 PUB at 87:9-88:22; Exh. No CSO-0101 REV2 at 38:13-39:35; Exh. No. CSO-0701 PUB at 52:13-54:10**.**

for the tower design change costs by increasing the Project cost cap in the March 2022 second amendment to the DCRT APSA because they resulted from the BLM's Change of Route.[389]

**vi. COVID-19**

In its Initial Brief, the CAISO demonstrated how COVID-19 resulted in a nine-month delay in the Project due to the CPUC ALJ's two orders suspending the CPCN proceeding.[390] SWP and NCPA allege the COVID-19 delay was no more than five months.[391] DCRT identifies the same nine-month delay as the CAISO resulting from the CPUC ALJ's two orders,[392] and also in a footnote refers to testimony that the COVID-19 pandemic events are not isolated and all Force Majeure events amounted to an aggregate 47-month delay.[393] Commission Trial Staff proposes to allow DCRT to "recover Force Majeure costs for the COVID-19 pandemic as a whole, net of exclusions related to delays in the provision of required bonds by DCRT"—a 24-month period extending from March 13, 2020 through March 31, 2022.[394]

Consideration of this issue requires adherence to the specific wording of the cost cap exclusion in Bullet #5 of the DCRT APSA—"Any FERC approved costs resulting from delays dues to events of Force Majeure."[395] There is no cost cap exclusion for costs resulting from Force Majeure events, only for costs resulting from delays. Commission Trial Staff's proposed delay period of COVID-19 cost recovery is based on the duration from when DCRT provided a notice of Force Majeure to the CAISO (March 13, 2020) until the date right before DCRT's bond delays began (March 31, 2022),[396] not on the actual Project delay COVID-19 caused.

389 Exh. No. CSO-0001 REV3 at 108:19-109:8
390 CAISO Initial Brief (PUB version) at 102-08.
391 Initial Brief of SWP and NCPA (PUB version) at 114.
392 DCRT Initial Brief (PUB version) at 67-68.
393 *Id.* at 66 n.340.
394 Commission Trial Staff Initial Brief (PUB version) at 77.
395 Exh. No. DCT-0002 at 78.
396 Exh. No. S-0001 REV3 at 72:10-13; Exh. No S-0052 PUB at 37:11-18; Exh. No. S-0065 REV2 PUB at 42:1-43:7, 59:11-60:4.

Accordingly, Commission Trial Staff's proposed COVID-19 cost recovery exceeds the parameters set by the express cost cap exclusion as it was not tied to actual Project delays. Commission Trial Staff witness Norman agreed her testimony did not show actual delays to the Project due to COVID-19.[397] Further, she agreed the time period between DCRT's completion of permitting activities and placing the Project into service was substantially similar to DCRT's expected Project schedule in the first amended DCRT APSA[398] and much faster that DCRT's expected scheduled in the original DCRT APSA.[399] Dr. Norman agreed there was no concrete delay between permitting and energization due to COVID-19.[400]

The CAISO's testimony in this proceeding clearly demonstrated the only delay to the Project due to COVID-19 was the nine-month delay in the CPUC CPCN proceeding and no more.[401] The CAISO will not repeat that testimony here. No party in this proceeding addressed or rebutted the CAISO's testimony either in their own testimony or in their Initial Briefs in support of a longer period of delay, nor did any party even attempt to cross-examine the CAISO's witnesses regarding the amount Project delay resulting from COVID-19.

#### vii. The CAISO Requires a Hold on Procurement Until the CPCN Is Granted

DCRT argues the CAISO's decision directing DCRT to hold off on material procurement until issuance of a CPCN qualifies as a Force Majure event because the "CAISO's decision was driven by the CPUC's delay in issuing a CPCN in the CPCN docket," which was an order, regulation, or restriction imposed by a governmental authority.[402] DCRT cites no record support

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397 Tr. 8570:4-7.
398 Tr. 8582:21-25, 8584:9-20.
399 Tr. 8585:5-10.
400 Tr. 8585:12-25.
401 Exh. No. CSO-0001 REV3 at 113:7-15; Exh. No. CSO-0201 at 4:9-7:8; Exh. No. CSO-0601 REV2 PUB at 44:17-47:17; Exh. No. CSO-0202. *See also* CAISO Initial Brief (PUB version) at 102-06.
402 DCRT Initial Brief (PUB version) at 68.

for its claim the "CAISO's decision was driven by the CPUC's delay in issuing a CPCN in the CPCN docket," nor is there any. The CAISO's testimony and Initial Brief clearly show this was not the reason, and DCRT offered no testimony or exhibits to demonstrate otherwise.[403] This is yet another example of an unsupported DCRT *post hoc* rationalization. The record in this proceeding unequivocally shows the CAISO directed a hold on material procurement because there was a risk the CPUC might not grant the CPCN, and ratepayers would be on the hook for millions and millions of dollars because DCRT had received the abandoned plant incentive from the Commission.[404] DCRT's claim the CPUC's delay in issuing a CPCN order is in fact an "order, regulation, or restriction imposed by a governmental authority" strains credulity an the plain meaning of the words in the DCRT APSA. Finally, DCRT identifies no specific delay ruling from the CAISO's actions, and the record shows there was no delay.[405]

#### e. DCRT Bears the Burden of Showing Each of Its Claimed Force Majeure Costs

DCRT argues it is not required to disaggregate its twelve claimed events of Force Majeure and the costs DCRT claims regarding each of those events.[406] DCRT is incorrect. As the party asserting the affirmative defense of Force Majeure, precedent provides that DCRT bears the burden to make a "more likely than not" showing as to each claimed Force Majeure event and associated cost.[407] DCRT's argument that the Presiding Judge and the Commission should simply find these are aggregated, interrelated, and compounded costs that together fall within a zone of reasonableness—based on the Commission's principles for utility cost

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403 CAISO Initial Brief (PUB version) at 70; Exh. No. CSO-0001 REV 3 at 114:5-116:23; Exh. No. CSO-0601 REV2 PUB at 89:1-93:6.

404 CAISO Initial Brief (PUB version) at 109-10; Exh. No. CSO-0001 REV3 at 115:7-116:4; Exh. No. CSO-0601 REV2 PUB at 89:23-90:8.

405 CAISO Initial Brief (PUB version) at 110-11; Exh. No. CSO-0001 REV3 at 116:16-23.

406 DCRT Initial Brief (PUB version) at 77-80.

407 *See supra* Section II.A of this Reply Brief.

allocation—is a category error. Those cost allocation principles do not apply in the instant proceeding, the purpose of which is to determine what **specific** costs the Presiding Judge and the Commission should allow DCRT to recover.

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

##### a. Change of Route

In its Initial Brief, the CAISO explained that under the DCRT APSA there is no exclusion from the cost cap for any costs associated with a Change of Route. Instead, any costs associated with a Change of Route that are above the $5,000,000 threshold set forth in the DCRT APSA are properly recoverable in DCRT's TRR only to the extent: (1) the CAISO agrees to increase the cost cap to account for Change of Route costs or an independent panel allows such costs to be recovered if the CAISO does not approve a requested increase of the existing cost cap (and the Commission affirms the decision of the panel); and (2) those costs are just and reasonable and prudently incurred.[408]

The CAISO explained it had reason to believe DCRT continues to seek to recover Change of Route costs in a manner inconsistent with the DCRT APSA.[409] DCRT, however, makes three arguments why it is entitled to recovery of Change of Route costs in excess of the second DCRT APSA amendment increasing the cost cap to account for Change of Route: (1) the discussions between the CAISO and DCRT in 2019-2020 were based on estimates rather than final costs and cost classifications; (2) the second amendment to the DCRT APSA did not allocate specific costs to specific categories; and (3) Appendix E of the DCRT APSA gives

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408 CAISO Initial Brief (PUB version) at 114-16.
409 *Id.* at 116-20.

DCRT a right to follow the process set forth therein to seek additional Change of Route costs but does not obligate DCRT to follow that process before Commission review.[410]

DCRT's arguments are without merit. As the CAISO explained, the outcome of extensive discussions between the CAISO and DCRT beginning in 2019 was the second amendment to the DCRT APSA in March 2022, which increased the APSA cost cap from $241,805,391 to $258,961,024—including a cost containment reduction of $5,000,000 due the Change of Route threshold—based on Changes of Route ordered by the BLM.[411] DCRT concedes the second amendment to the DCRT APSA "was based on those estimates," but nevertheless DCRT now claims, without providing any supporting evidence, the amendment did not "resolve all Change of Route issues."[412] DCRT also claims—again with no supporting evidence, other than its own testimony—the amendment was "merely an interim step" that "the CAISO could not reasonably have understood" to allocate all Change of Route costs.[413]

The CAISO did indeed understand the second amendment to the DCRT APSA to account for all the Change of Route costs discussed beginning in 2019.[414] The CAISO and DCRT kept the amendment discussions open for almost three years (from June 2019 when DCRT initiated them until March 2022 when the second amendment to the DCRT APSA was executed) to allow for additional information and issuance of the CPUC decision to determine if the CPUC had additional Change of Route costs. The CPUC did not change the route, nor did DCRT provide updated costs for the BLM Changes of Route. The CAISO executed the amendment to memorialize those costs. DCRT provides no independent evidence to demonstrate the

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410 DCRT Initial Brief (PUB version) at 81-85.
411 Exh. No. CSO-0001 REV3 at 36:20-37:8, 37:12-45:2, 155:23-157:9.
412 DCRT Initial Brief (PUB version) at 82.
413 *Id.* at 82-83 (citing Exh. No. DCT-0007 REV2 at 38; Tr. 1546:9-15).
414 Exh. No. CSO-0601 REV2 PUB at 41:3-9; Tr. 5139:17-22.

amendment was a mere interim step rather than the final agreement of the CAISO and DCRT on Change of Route costs. The CAISO's understanding was reasonable and correct.

Section 10.1.1 of the DCRT APSA obligates DCRT in relevant part "not [to] 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."[415] If DCRT disagreed with the level of costs associated with a Change of Route reflected in the second amendment to the DCRT APSA, it could have pursued the remedy available to it under Appendix E: convening an independent panel of three consultants to determine the appropriate level of costs associated with Change of Route to be allowed. DCRT chose not to pursue that remedy. The Presiding Judge should not allow DCRT to recover any such costs above the cost cap in this rate proceeding and essentially do an "end run" around the process required in the DCRT APSA.[416]

DCRT attempts to characterize the process under Appendix E as an optional process it is permitted to end-run.[417] That is incorrect. Appendix E states, "In the event of a Change of Route, Project Sponsor will be entitled to request a modification to the Project Cost Cap per Appendix E of this Agreement."[418] The quoted provision states that, in order to request a modification to the Project Cost Cap based a Change of Route, DCRT will request a modification to the cost cap using the process set forth in Appendix E. "Will" is not "may" and does not indicate an option. The provision does not obligate DCRT to request such a modification to the cost cap, nor does it specify any alternative procedural path for DCRT to seek cost recovery in the event of a Change of Route—*i.e.*, the provision does not indicate an end

[415] Exh. No. DCT-0002 at 20.
[416] Exh. No. CSO-0001 REV3 at 156:20-157:6.
[417] DCRT Initial Brief (PUB version) at 84-85.
[418] Exh. No. DCT-0002 at 50.

run around its cost cap for Change of Route through some other mechanism is permissible. Indeed, the catchall provision in Appendix E states "[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*."[419] DCRT never asked the CAISO to include additional Change of Route costs other than those negotiated in the Second Amended APSA. The CAISO has not approved DCRT's efforts to circumvent the Appendix E process. Nor should the Presiding Judge.

Under the process set forth in Appendix E, if DCRT requests a modification of the cost cap in the event of a Change of Route but "the CAISO does not approve the request, [DCRT] *shall*" follow the requirements set forth therein for establishing a panel to evaluate DCRT's requested modification.[420] The panel's determination will be subject to Commission review and approval.[421] Again, DCRT never followed this process. Because DCRT chose not to follow the procedure specified by contract to request any Change of Route related cost cap increases above the level agreed to by the CAISO and thus there could be no panel determination granting DCRT's request, DCRT is barred from receiving any Change of Route costs above the cost cap established by the second amendment to the DCRT APSA.

**b. Catchall**

The DCRT APSA includes a catchall provision at the end of Appendix E that provides: "Changes to the Project cost cap for any reason other than those explicitly specified herein are not permitted without the approval of both the CAISO and FERC."[422] DCRT acknowledges it "has not taken the position that the CAISO has agreed to a cost recovery under this provision."[423]

419 *Id.* at 51 (emphasis added). The CAISO further discusses the catchall provision below in Section II.5.b of this Reply Brief.
420 Exh. No. DCT-0002 at 51 (emphasis added).
421 *Id.*
422 *See* Exh. No. DCT-0002 at 51.
423 Exh. No. CSO-0049.

However, in its Initial Brief, DCRT claims that because Commission approval is one of the prerequisites for cost recovery under this catchall provision, the DCRT APSA contemplates amendments in a filing with the Commission under section 205 or 206 of the FPA and, consequently, the APSA expressly allows additional costs in DCRT's rates if those costs were prudently incurred and cost recovery would produce a just and reasonable rate.[424] DCRT suggests one example of this might be if the Presiding Judge determines that an APSA provision is ambiguous but costs were prudently incurred and their recovery would be just and reasonable.[425]

DCRT ignores a critical piece of the catchall provision—the provision expressly requires **both** CAISO and Commission approval to effectuate any changes to the cost cap. The CAISO has not approved, and does not approve, any such changes to the cost cap pursuant to this provision. DCRT cannot read this requirement out of the contract.

Furthermore, as discussed in the CAISO's Initial Brief, the Presiding Judge and the Commission cannot amend the DCRT APSA in this FPA section 206 proceeding as DCRT suggests for, among other reasons, the issue of the justness and reasonableness of the DCRT APSA was not set for hearing in this proceeding.[426] Also as discussed in the CAISO's Initial Brief, to the extent there is any ambiguity in a contract, under California and Commission precedent extrinsic evidence will be relied upon to resolve any ambiguity.[427] DCRT also ignores that it, not the CAISO, bears the burden of proof as to all affirmative defenses, *i.e.*, the cost cap exclusions in the DCRT APSA.[428] Finally, the Presiding Judge should not entertain any after-

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[424] DCRT Initial Brief (PUB version) at 80.
[425] *Id.* at 80-81.
[426] CAISO Initial Brief (PUB version) at 8-9; *see also* Section II.B.1 of this Reply Brief, *supra*.
[427] CAISO Initial Brief (PUB version) at 9-14.
[428] *Id.* at 2-3; *see also* Section II.A of this Reply Brief, *supra*.

the-fact adjustments to the cost cap that were not reflected in DCRT's bid. The CAISO selected DCRT as the Approved Project Sponsor over other competing Project Sponsors based on DCRT's express representations and commitments in its bid. If the CAISO selects one Project Sponsor over another based on the cost containment commitments and specified exclusions stated (or not stated) in its bid, and then the Approved Project Sponsor is permitted to recover costs on a different basis (or based on some new exclusion or adjustment) other than what was expressed in its bid and relied upon by the CAISO and its ratepayers, it unduly harms competitors because had the CAISO been able to consider the "new" exclusions or adjustments, it might not have selected the Approved Project Sponsor in the first instance. Ultimately this adversely affects the integrity of the competitive solicitation process and renders the CAISO unable to rely upon the four-corners of competing Project Sponsors' bids. In addition, it calls into question the validity of even doing a competitive solicitation if the Approved Project Sponsor is not held to the obligations in its bid. Absent being able to rely on the express representations in a bid, the CAISO has no way to know who the Approved Project Sponsor should be and therefore what value a competitive solicitation has.

## III. Conclusion

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

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# ATTACHMENT A

## Supplement to Proposed Findings of Fact and Conclusions of Law

The following material in this Attachment A supplements the proposed findings of fact and conclusions of law contained in Attachment A to the CAISO's Initial Brief.

## I. Supplement to Proposed Findings of Fact

The CAISO proposes the following findings of fact:

### A. The Integration Clause In the DCRT APSA Does Not Preclude Consideration of Extrinsic Evidence (Section II.C.b.i. of the Reply Brief)

Section 25.4 of the DCRT APSA contains an integration clause.

## II. Supplement to Proposed Conclusions of Law

The CAISO proposes the following conclusions of law:

### A. The Integration Clause In the DCRT APSA Does Not Preclude Consideration of Extrinsic Evidence (Section II.C.b.i. of the Reply Brief)

The integration clause in Section 25.4 of the DCRT APSA does not preclude consideration of extrinsic evidence. Section 25.4 excludes consideration of prior and contemporaneous understandings or agreements between DCRT and the CAISO, but does not preclude consideration of other documents to interpret the DCRT APSA and determine its extent. (*Cont'l Baking Co. v. Katz*, 439 P.2d 889, 895, 68 Cal. 2d 512, 521-22; *Haggard v. Kimberly Quality Care, Inc.*, 39 Cal. App. 4th 508, 517-18; 46 Cal. Rptr. 2d 16, 21-22.)

**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 10th day of September, 2026.

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