UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

DCR Transmission, L.L.C.	)	ER23-2309-001
	)	ER24-1394-001
	)	EL26-34-000

POST-HEARING REPLY BRIEF OF THE ELECTRICITY TRANSMISSION COMPETITION COALITION

Respectfully submitted,

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I. INTRODUCTION

Notwithstanding the exhaustive hearing, the instant proceeding should be one of the easiest of the Commission cases as the biggest issues impacting consumers from a cost recovery perspective come down to a straightforward contract interpretation case. Read as a whole, the Approved Project Sponsor Agreement ("APSA), and its amendments, (DCT-0002) do not support DCR Transmission, L.L.C.'s ("DCRT") proposed Base Transmission Revenue Requirement ("TRR"). The APSA contractually prohibits DCRT from seeking a TRR in excess of its binding cost cap plus the limited exclusions to that cap. DCRT's filing violates that restriction. Applying the contract terms faithfully based on their plain meaning and the intent of the parties when the APSA was signed requires the Presiding Administrative Law Judge ("Presiding Judge") to reject out of hand DCRT's $101 million "Base Year Adjustment" (DCRT Br. at x), its nearly $73 million in "Regulatory Compliance" costs (DCRT Br. at xi) and the vast majority, if not all, of its Force Majeure claims. In addition, the Presiding Judge must reject DCRT's hail Mary argument that a supposed catch-all provision allows the Presiding Judge to grant DCRT's request regardless of DCRT's contractual commitments.

As demonstrated by its initial brief, (Initial Post-Hearing Brief Of DCR Transmission, L.L.C. (DCRT Br.)) DCRT's entire case is built on the premise that the Presiding Judge or the Commission will find it too difficult to deny more than $200 million in DCRT's expenditures, notwithstanding DCRT's contractual agreement to a binding cost cap containing very limited contractual exclusions. While such denial of recovery is not difficult based on the contract language itself, DCRT seems to bank on the fact that the Commission has never been asked to reject transmission infrastructure cost recovery based on binding contractual limitations to that recovery. DCRT's initial brief intersperses inapplicable Commission general rate approaches and precedent with concocted contractual interpretations on the apparent assumption that the

Commission will be unwilling to hold DCRT to its actual contract if it means Lotus Infrastructure Partners investors eat more than $200 million spent on development of the Ten West Link project. DCRT has nothing to lose in making its plea to the Commission as the money is spent. Simply put, DCRT asks that the Presiding Judge allow it to shift more than $200 million in costs from its upstream owners to ratepayers, notwithstanding that DCRT was only chosen to develop transmission infrastructure based on a proposal with a **binding** cost containment commitment. (*See, e.g.*, Initial Post-Hearing Brief of the California Independent System Operator Corp. ("CAISO Br.") at 12 (emphasis added) ("The CAISO selected DCRT in the CAISO competitive solicitation to build the Project *due to its materially lower project costs, its binding cost containment measures, the lack of cost cap exclusions*, and the amount of risk it agreed to bear compared to other Project Sponsors.")) The Electricity Transmission Competition Coalition ("Competition Coalition") has demonstrated that DCRT's investors are not entitled to the requested Commission bailout. The Commission's statutory mandate is to protect consumers, not fund investors.

DCRT's arguments, not surprisingly, follow the pattern the Competition Coalition outlined in its Opening Brief. Specifically, DCRT seeks to treat this contract centric case as if it were a run-of-the-mill transmission owner prudence case. (DCRT Brief at iii). This is not a run-of-the-mill prudence case, and as discussed below, prudence has no relevance to DCRT's requested recovery (even if DCRT were entitled to a presumption of prudence, which it is not). The facts demonstrate that DCRT blew through its binding cost cap, whether through prudent investment or not, and came up with a different plan to be played out through its Section 205 filing, the hearing, and now DCRT's Initial Brief. Its plan: Seek recovery of every expenditure regardless of compliance with the APSA and force the Commission to reject DCRT recovery, all while collecting on the overstated recovery and specifically noting that it should not have to refund most of the overpayment even if the Presiding Judge agrees that it is contractually barred from recovery. (DCRT Br. at 124-125).

DCRT seeks recovery substantially in excess of its binding cost cap though a series of wholly unsupported contractual interpretation positions. The why is simple; if DCRT applied the contract as written it would have to acknowledge to its investors that it cost them more than $200 million in unrecoverable investment in developing the Ten West Link project through its contract commitments and development actions. (*See, e.g.*, CAISO Br. at 14, noting that although DCRT seeks recovery of $553,261,497 in Project costs through a TRR while "[u]nder applicable provisions of the DCRT APSA on file with the Commission, DCRT is only permitted to recover a maximum total of $339,582,991 in Project capital costs in its Base TRR in this proceeding.")

The Presiding Judge should reject DCRT's attempt to shield investors from DCRT's contract commitments and development missteps and hold DCRT to the explicit terms of its contract. As CAISO states, "[a]bsent the APSA, there is no reason to have a competitive solicitation process because the successful bidder has no standard to bind it." (CAISO Br. at 5). Neither California law nor Commission precedent lets DCRT off the hook for its contractual commitments.

As the Competition Coalition addressed in its initial brief, DCRT seeks to have "in 2020 dollars" treated as "the three most important words in the APSA" (DCRT Br. at 8) rather than, as California law mandates, interpreting the APSA as a whole. In this regard, DCRT's effort to focus the Presiding Judge on the issue of whether it *intended* to take the inflation risk after the contractual in-service date of May 202 is disingenuous. Read as a whole, there is no reason for the APSA to specifically address who took the risk of inflation after the required in-service date because the APSA explicitly dealt with “delays” to that in-service date. It is without dispute that DCRT took the risk of inflation up to the contractually required in-service date. Appendix E of the APSA addresses the limited recovery available to DCRT if there are delays in achieving that contractual in-service date. Read as a whole there is no need for the contract to address “inflation risk” after May 2020 as the contract specifically addresses the limited right of DCRT to recover for delay caused by events of Force Majeure or an interconnecting transmission owner, the **only** two types of contractually recoverable delay costs available to DCRT. The intent of the parties to the APSA is clear. Allowing DCRT’s proposed Base Year Adjustment makes the delay provisions meaningless, violating California contract interpretation precedent mandates.

Finally, as discussed in the Competition Coalition’s initial brief, DCRT has not established its right to the additional claimed exceptions to the binding cost cap. DCRT’s Initial Brief fails to establish that DCRT is entitled to any adjustment for “regulatory compliance” costs. Likewise, while DCRT may have been entitled to a limited recovery for certain Force Majeure events, DCRT failed to establish that it met the contractual requirements for such recovery.

As it did in its initial brief, the Competition Coalition does not respond to every contention made by DCRT or every item of recovery sought in DCRT’s Base TRR. Instead, ETCC focuses on the contractual provisions of the APSA. Failure of the Presiding Judge or the Commission to hold DCRT to the explicit terms of the APSA would be a failure of the Commission to meet its statutory consumer protection mandate. DCRT was selected to build the Ten West Link project solely on the basis of its contractual cost containment commitments, which offered consumer protection over and above those available to consumers under the Commission’s general rate recovery policies for incumbent transmission owners. DCRT and its owner, Lotus Infrastructure Partners, are sophisticated parties that made those binding contractual commitments to win the right to develop the project from other parties and incumbent transmission owners in one of CAISO's early competitive solicitations. DCRT must be held to the letter of those contractual commitments. California contract law requires no less. The Presiding Judge should not countenance one of the several inapposite arguments DCRT makes for a Commission lifeline to Lotus investors while overriding California contract law.

II. REPLY TO DCRT'S OPENING BRIEF

A. DCRT's Position On Burden Of Proof

DCRT simplistically asserts that because the matter is proceeding under FPA Section 206 "the burden of proof on all issues in this case is properly assigned to parties challenging DCRT's Base TRR" (DCRT Brief at 1). As discussed fully in the Competition Coalition's initial brief (Coalition Br. at 8-13), the burden of proof is more nuanced than DCRT asserts. Commission Trial Staff and intervenors may carry the burden on the overarching matter set for hearing; whether DCRT's *Tariff Records* are unjust, unreasonable, unduly discriminatory, or preferential. But the biggest components of DCRT's requested TRR, those relating to the expenditures to develop the Ten West Link project, are merely contractually limited inputs into the Tariff Records. Because DCRT's recovery on those inputs is subject to the APSA's contractual limitations, California law controls how those contractual components are addressed.

The APSA must be interpreted under California law, not Commission precedent. (Ex. DCT-0002 at 21 of 87 (emphasis added) ("11.2.1 The validity, interpretation and performance of this Agreement and each of its provisions *shall be* governed by the laws of the state of California, without regard to its conflicts of law principles."); *see also* Coalition Br. at 11-12).[1] Thus,

[1] In this regard, CAISO's Opening Brief focuses almost exclusively on Commission precedent related to the burden of proof under Section 206 of the Federal Power Act. CAISO Br. at 1-3. While those citations to Commission precedent may have relevance to certain issues related to DCRT's Tariff Records generally, the citations have no relevance to the Presiding Judge's required interpretation of the APSA under California Law.

whether the matter before the Commission on the justness and reasonableness of DCRT's Tariff Records proceeds under Section 205 or Section 206 of the Federal Power Act is not legally relevant to the burden of proof to establish DCRT's contract interpretation claims. Interpretation of the APSA, including the party carrying the burden of proof as to a particular interpretation is subject to California law exclusively.

Section 10.1.1 of the APSA (DCT-0002 at 20 of 87) affirmatively limits what DCRT may submit to the Commission, providing:

> 10.1.1 The Approved Project Sponsor agrees that *it shall not seek*, for recovery through its Transmission Revenue Requirement, higher costs than the maximum costs specified in, or determined in accordance with, any cost cap or other binding cost containment measures as specified in Appendix E except for costs incurred to comply with any additional specifications of the CAISO or Interconnecting PTO beyond the functional requirements for the transmission facility that the CAISO issued for the competitive solicitation. The Approved Project Sponsor shall not seek recovery through its Transmission Revenue Requirement of any incentives or other costs that it has agreed to forego, as specified in Appendix E. (emphasis added)

DCRT conceded in its Initial Brief that Section 10.1.1 was binding on it, stating: "DCRT believes Section 10.1.1, which incorporates Appendix E and, in turn, the relevant cost containment provisions at issue in these proceedings are still binding on both the CAISO and DCRT." (DCRT Br. at 2, fn 4). Thus, under California law, DCRT bears the burden of establishing that each of its claimed exceptions to the APSA cost cap, as well as its made-up Base Year Adjustment, are consistent with the terms of the APSA. "When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party. If it is not, the case is over." *Oceanside 84, Ltd. v. Fidelity Federal Bank*, 56 Cal. App. 4th 1441, 1448 (2nd Dis. 1997)(link in Coalition Br. at fn 33). Under California law, DCRT must do more than simply assert a myriad of concocted contract interpretation positions and argue that Commission Trial Staff and intervenors bear the burden of proving them wrong under Commission precedent as such precedent does not control the APSA and California contract law does not work that way.

Under California law, the decider of fact, the Presiding Judge, and then the Commission, if primary jurisdiction is asserted, must interpret the APSA based on its plain meaning, but with each party to the contract carrying the burden of establishing that its preferred interpretation is consistent with the language employed.

> When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party. If it is not, the case is over. If the court decides the language is reasonably susceptible to the interpretation [*8] urged, the court moves to the second question: what did the parties intend the language to mean? ... Thus, where contract language is clear and explicit and does not lead to absurd results, we ascertain intent from the written terms and go no further. If the contract is capable of more than one reasonable interpretation, it is ambiguous, and we apply the standard rules of interpretation in order to give effect to the mutual intention of the parties. In sum, courts must give a reasonable and commonsense interpretation of a contract consistent with the parties' apparent intent. *Najum v. Fitness Int'l, LLC*, 2025 Cal. Super. LEXIS 69737, *7-8 (2025).[2]

Unless the Presiding Judge finds that DCRT's preferred interpretation is the only reasonably susceptible interpretation of the APSA—*i.e.*, CAISO has not established that the APSA is reasonably susceptible to CAISO's interpretation—DCRT bears the burden of establishing that its preferred interpretation reflects the mutual intent of the parties. If, however, the APSA is not reasonably susceptible to DCRT's preferred interpretation, that is the end of the matter.

DCRT asserts that "[w]hile California law may be evaluated for purposes of resolving disputes under the APSA, FERC precedent and reviewing court precedent are equally relevant in

[2] Najum v. Fitness Int'l, LLC

this case. Further, the Presiding Judge is preempted from applying state law in a way that conflicts with a FERC tariff and the Commission's obligations under Section 206 of the FPA in this case." DCRT Br. at 3. DCRT's position in the first sentence is simply wrong and as to the second sentence both wrong and misplaced.

The APSA mandates not just that California law "may be evaluated" but instead a definitive requirement that "[t]he validity, interpretation and performance of this Agreement and each of its provisions *shall be governed by the laws of the state of California*, *without regard to its conflicts of law principles*." (DCT-0002 at 21 of 87). The Commission accepted Section 11 as just and reasonable, finding "[w]e find that the uncontested aspects of the *pro forma* APSA are otherwise just and reasonable, and we accept them without further discussion." C*alifornia Independent System Operator Corporation*, 149 FERC ¶ 61,107 (2014) at P 16. In determining the "validity, interpretation and performance" of the APSA, the Presiding Judge is not permitted to simply ignore this contractual requirement to apply California law in that analysis.

Further, DCRT has not identified a "FERC Tariff" or "Commission[] obligation[] under Section 206 of the FPA" for which strictly applying the APSA under California contract law would conflict. The Commission approved Section 11.2's referral to California law as the mandatory law for determining the "validity, interpretation and performance" of the APSA "and each of its provisions" as just and reasonable under the Federal Power Act. There is no conflict between application of California contract law to the interpretation of the APSA and the Commission's obligations under Section 206 or some unnamed FERC Tariff.

Further, the Presiding Judge is not "preempted from applying [California] law" (DCRT Br. at 3) in this case as there is no conflict between Commission obligations under the Federal Power Act and California contract law. Indeed, the Commission's overarching consumer protection role under the Federal Power Act (Coalition Br. at 1) is consistent with holding DCRT to the strict terms of its contractual commitment as California law requires. The cases cited by DCRT (DCRT Br. at 3, fn 10) in support of its preference for Commission precedent over California contract law precedent are inapposite. *Dayton Power & Light Co. v. FERC* cited by DCRT addressed the question of whether a state requirement was preempted because the state law and FERC statutory obligations allegedly conflicted. The Court found the state law was not preempted as there was no conflict. The same is true here. DCRT has not raised, nor proven, that California law regarding contract interpretation conflicts with and is thus preempted by federal law. Further, as discussed below regarding *Ark. La. Gas Co.*, 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,009 (1979), contractual interpretation issues often reflect overlapping jurisdiction. Here, in light of the Commission's approval of the *pro forma* APSA's reference to California law as binding regarding the interpretation of and performance under the APSA, DCRT inference that there could be a conflict between apply that law and the Federal Power Act is false. The remaining two cases relate to Commission rulings regarding wholesale rates subject to the Commission's exclusive jurisdiction after which a state proceeding sought to counter those rulings. No such scenario is at play here. As discussed immediately below, DCRT seeking its preference for an outcome focused on Commission precedent rather than the required state law calls into question whether the Commission should assert primary jurisdiction over the contract issues at all.

B. DCRT's Position On Enforcement Of The APSA

DCRT concedes that the Presiding Judge should enforce the APSA. (DCRT Br. at 1). As the Competition Coalition noted in its Initial Brief, the Commission approved the *pro forma* APSA, inclusive of Section 10.1.1, as just and reasonable under the Federal Power Act and the issue of whether the APSA is just and reasonable is not before the Presiding Judge. (Coalition Br.

at 15, *citing California Independent System Operator Corporation*, 149 FERC ¶ 61,107 (2014)). The *pro forma* APSA is incorporated as Appendix X of the CAISO Tariff. As discussed immediately above, because the APSA contractually caps the amount DCRT can request for a Transmission Revenue Requirement the purported question as to whether that contractual restriction on DCRT recovery is just and reasonable is not an issue before the Presiding Judge or the Commission.[3] The issue before the Commission is whether the Tariff Records as a whole are just and reasonable. The inputs into the Tariff Records from application of the APSA is purely a matter of California contract law.

In this regard, DCRT's assertion that "the Presiding Judge has the power to revise the APSA to ensure that it allows a just and reasonable return" DCRT Br. at 3 is patently wrong and would make the contractual agreement between DCRT and CAISO meaningless. First, DCRT confirms that DCRT's position is that "both DCRT and the CAISO are contractually bound to the APSA . . .." DCRT Br. at 3. Neither *Hope* nor *Bluefield* cited by DCRT involved contractually agreed upon caps on a rate submission to the Commission. Instead, those cases set minimum requirements for administratively set rates. DCRT bid on development of the Ten West Link project and when selected entered into the APSA voluntarily to record its commitments. Neither the Commission nor ratepayers forced DCRT to participate in CAISO's solicitation. If the contract that DCRT agreed to does not provide DCRT a "just and reasonable return" as a result of a bad deal by DCRT or any other reason, that is not the Commission's job to fix.

[3] Stated differently, the Presiding Judge is not permitted to determine that adherence to the APSA is unjust and unreasonable because it would result in a failure of DCRT to recover expenditures. DCRT has not challenged the justness and reasonableness of the APSA under Section 206. The fact that the Commission determined that DCRT's Tariff Records should proceed under Section 206, does not implicate whether it is just and reasonable to deny DCRT recovery under the explicit terms of the APSA under California law. DCRT is a sophisticated party that understood the limitations on its Transmission Revenue Requirement imposed by Section 10.1.1.

If California law would not allow contract reformation because DCRT will lose money as written, the Commission's regulations cannot override that fact as to do so would interfere with the intent of the parties and the operation of Section 10.1.1 as approved by the Commission. DCRT has not alleged nor proven that it would be entitled to reformation under California law. Instead, DCRT apparently wants enforcement of the APSA only so long as enforcement is in DCRT's favor. If the Presiding Judge enforces the APSA as written, *i.e.*, the manner the Competition Coalition advocates, then DCRT wants the Presiding Judge to bail out its investors by ensuring a return on more than $200 million in costs it incurred but contractually agreed to forego. The Presiding Judge should summarily reject DCRT's position.

DCRT contractually committed to a limit on its return on equity of 9.5% (DCT-0002 at 50 of 87) but did not tie that return to costs incurred above the binding cost cap. DCRT also did not require a floor on that return either or otherwise invoke *Hope* or *Bluefield* in its proposal. DCRT took on the risk of cost overruns to the extent not subject to an exception in Appendix E. To the extent relevant at all in the context of a contract action, the reasonableness of DCRT's return of 9.5% should only be measured based on recoverable costs under the APSA. Allowing DCRT to exceed its contractually binding cap and then invoke *Hope* or *Bluefield* precedent to reform DCRT's contractual commitments would make a mockery of the solicitation process. If the Commission is permitted to reform binding contract provisions to allow a "just and reasonable return" the APSA and cost caps would be meaningless as parties could bid low proposals with the Commission relieving them of their contractual commitments. Such an outcome runs completely counter to the Commission's policy in requiring competition in the first instance. Contractually agreed to cost commitments do not invoke the precedents of *Hope* and *Bluefield*.[4]

As to DCRT's position on whether the Commission should exercise primary jurisdiction, (DCRT Br. at 2) the Coalition disagrees with the argument for the assertion of primary jurisdiction.[5] Application of the *Arkla*[6] test does not support the exercise of primary jurisdiction. As reflected in the Competition Coalition's Opening Brief: "The three-part test for deciding whether the Commission will assert primary jurisdiction, as explained in *Arkla*, is: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission." (Coalition Br. at 14, fn 35, *citing Ky. Utils. Co.*, 110 FERC 61,285 P 3 (2005)). The Competition Coalition will not repeat the points it made in its Opening Brief (Coalition Br. at 14), but in response to DCRT's and CAISO's *Arkla* assertions, offers the following reply.

As to the first point, DCRT asserts that the Commission should assert primary jurisdiction because "the Commission has the special transmission development expertise to interpret and enforce the APSA as it relates to the development of the Project and a Base TRR." (DCRT Br. at 2). This misrepresents the focus of the *Arkla* test in the context of the issues before the Presiding

[4] The Competition Coalition addresses separately below DCRT's assertion that "Moreover, as explained in response to Issue III.E, Appendix E's 'catch all' provision expressly contemplates a contingency in which the Commission imposes costs on the CAISO, through an FPA proceeding." DCRT's assertion misrepresents the APSA, which allows additional costs only if approved by both CAISO and the Commission.

[5] CAISO takes a similar position. CAISO Br. at 5.

[6] *Ark. La. Gas Co.*, 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,009 (1979).

Judge. As DCRT's Opening Brief makes clear, the principle disputed issues are not related to "transmission development expertise" generally (even if the Commission did possess it, which it does not) but instead the necessary expertise to interpret contracts under California law. The Commission has no special expertise in interpreting contracts under California law.

CAISO also misstates the first bullet of the *Arkla* test as reflecting the Commission's specialized knowledge of transmission rate issues. CAISO Br. at 5-6. The APSA however, is a development contract, not a rate contract. The APSA places a contractual limit on the TRR that DCRT may seek but beyond that does directly implicate rate issues under Commission jurisdiction. Instead, the APSA, particularly Appendix E, implicates basic contract interpretation issues under California law. A state court could decide the amount that the APSA cost cap provisions allow DCRT to submit as a TRR without implicating Commission jurisdiction at all. While CAISO may be correct that "Compared to state courts, the Commission alone has special expertise and experience regarding transmission rates and revenue requirements," the first and primary question is neither transmission rates nor revenue requirements, but what did DCRT commit to in the APSA as decided under California law.

Both DCRT and CAISO argue that the need for uniformity in the interpretation of the APSA requires that the Commission assert primary jurisdiction. (DCRT Br. at 2; CAISO Br. at 6). The primary issues in this case are DCRT APSA specific, *i.e.*, what does Appendix E allow in the context of Section 10.1.1. The is no evidence that any other developer had a similar Appendix E. DCRT's so-called Base Year Adjustment argument is purely a function of DCRT's four-year delay in placing the contractually required for transmission facilities in-service. Further, the Commission approved the application of California law as the binding law of the APSA. To the extent that a state court rules on APSA contract interpretation arguments, like a

Commission ruling, that interpretation decision would be binding on CAISO in the context of other developers asserting the same issue. The presumption in DCRT's and CAISO's argument that state court litigation could lead to inconsistent interpretations, is just that, a presumption and unfounded. It is also worth noting that notwithstanding over a dozen APSA's—and multiple more developer agreements in other regions—DCRT is the first developer to contest through litigation the interpretation of the APSA or to seek recovery in excess of CAISO agreed exclusions. DCRT's reasons for doing so are clear; the Commission's primary jurisdiction is not.

The Competition Coalition agrees with DCRT that "the interpretation and enforcement of the DCRT APSA has regulatory importance because it will reinforce the sanctity of contract." (DCRT Br. at 2). Where we differ is the presumption that only the Commission can make that interpretation or impose contract sanctity. The sanctity of the APSA is protected when a state court rules on DCRT's contract assertions just as it would be if the Commission makes that ruling. Further, DCRT's preference for the Commission to rule on pure California contract interpretation issues and its claimed desire for sanctity of contract is belied by its simultaneous assertion that the Presiding Judge can (or must) reform the contract to provide DCRT a just and reasonable return whether DCRT contracted away that right or not and its assertion that the Presiding Judge can use the claimed catch all provisions to allows prudently incurred costs that the APSA would not permit. California law provides no such reformation rights. In addition, as discussed below related to the claim for a Base Year Adjustment, DCRT's assertions, for the first time in its Brief three years into this proceeding, argue that interpretation of its APSA must account for provisions of other APSA's entered years after DCRT's or the interpretation would run afoul of the Commission's unduly discriminatory standard. (DCRT Br. at 4) That argument demonstrates precisely why the Commission asserting primary jurisdiction is problematic.

Under California law, DCRT's APSA with CAISO is subject to interpretation based on the agreement of the parties at the time the contract was entered, with later entered contracts having no interpretation relevance. "The interpretation of a contract is a judicial function. In engaging in this function, the trial court 'give[s] effect to the mutual intention of the parties as it existed' at the time the contract was executed." *Brown v. Goldstein*, 34 Cal. App. 5th 418, 432 (2nd Dis. 2019).[7] DCRT points to no precedent under California law allowing a court interpreting a contract to base that interpretation on unrelated later entered contracts because an interpretation implementing "the mutual intention of the parties as it existed' at the time the contract was executed" (*id*.) "would be unduly discriminatory against DCRT." (DCRT Br. at 4).

The Commission has expressed the "regulatory importance" of competition for transmission development. Interpretation by a state court of DCRT's wild contract claims does not implicate a conflict with that regulatory policy. Indeed, allowing DCRT to make those wild contract interpretation claims in a Section 205 proceeding, subsequently treated as a Section 206 proceeding, that its counter party does not agree with does far more harm to the Commission's policy objectives than a requirement that DCRT pursue all claimed exclusions to the cost cap through a state court contract claim. DCRT's approach has cost consumers millions of dollars in unrecoverable legal fees alone during this sprawling three-year proceeding that has had limited focus on California contract interpretation.

For its part CAISO argues that interpretation of the APSA is directly related to the Commission's regulatory responsibilities because the Commission has exclusive jurisdiction over rates. (CAISO Br. at 6-7). Again, there is no conflict between state court interpretation of DCRT's claimed exclusions to the binding cost cap and the Commission's exclusive rate

[7] Link provided in Coalition Br. at 4, fn 10.

jurisdiction. The Commission approved the requirement that interpretation and performance under the APSA is required to be determined under California law. Section 10.1.1 of the APSA limits DCRT's TRR submission to the binding cost cap. A state court determination as to that contractual cap under California law does not implicate the Commission's exclusive jurisdiction once a contract consistent TRR filing is made.

If the Presiding Judge or the Commission assert primary jurisdiction over DCRT's contract interpretation issues, those issues must be decided exclusively under California law.

C. Reply To DCRT Contract Interpretation Claims

1. DCRT's Assertion that the Commission Must Impose a Base Year Adjustment to Inflate The Agreed Upon Cost Cap

a) DCRT's contract argument for a Base Year Adjustment is not supported by the APSA language

DCRT asserts that it should get a more than $100 million addition to its binding cost cap because doing so "implements the most reasonable interpretation of Appendix E's cost cap." (DCRT Br. at 4). DCRT goes on to assert that "Trial Staff, the CAISO and other Participants have failed to establish that DCRT's reading of the Appendix E's plain text is not the intended interpretation of Appendix E; nor have they established that the proposed Base Year Adjustment is unjust, unreasonable, and unduly discriminatory." (*Id.*) Each one of these statements misrepresents California contract precedent.

DCRT's arguments for a Base Year Adjustment are a mishmash of reasons for granting it a $101 million reprieve from its delays in meeting the originally contracted for in-service date and its cost overruns, none of which are consistent with California contract law. As stated above, and in the Coalition's Opening Brief (Coalition Br. at 16-19), the "most reasonable interpretation"(DCRT Br. at 4) is not the interpretive standard for a contract under California law. The standard is to "'give effect to the mutual intention of the parties as it existed' at the time the contract was executed." *Brown v. Goldstein*, 34 Cal. App. 5th 418, 432 (2nd Dis. 2019). DCRT's Opening Brief is completely devoid of any discussion, let alone reference to proof as to the intention of the parties. Instead, DCRT's litigation position asserts two contradictory approaches. First DCRT argues that "the use of 'in 2020 dollars' can only lead to the conclusion that a comparison of the Project's actual transmission line costs to $258,961,024, with that comparison adjusting the actual costs to a value calculated 'in 2020 dollars,' is mandatory for that comparison to be consistent with the plain language of the contract." DCRT Br. at 6. The three word phrase neither leads to DCRT's preferred conclusion nor is it consistent with the intent of the parties. Alternatively, DCRT argues that there was no discussion at all of inflation risk after May 2020 (DCRT Br. at 12) thus it should be entitled to an inflation adjustment for its four-year delay in achieving the project's in-service date. Neither position is consistent with California contract law.

"When interpreting contracts, courts must first determine whether the language is ambiguous, or, in other words, whether it is reasonably susceptible to the interpretation urged by a party." *Oakland-Alameda County Coliseum Authority v. Golden State Warriors, LLC*, 53 Cal. App. 5th 807, 816 (2008).[8] Read as a whole, as the APSA must be,[9] the APSA is not "reasonably susceptible to the interpretation urged by [DCRT]" with respect to its Base Year Adjustment claim. Because the APSA is not reasonably susceptible to DCRT's claim for a Base Year

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[8] Link in Coalition Br. at 11, fn 30.

[9] *Montrose Chemical Corp. of California v. Superior Court*, 114 Cal. App. 5th 889, 900-902 (2025)("Montrose Chemical") ("language in a contract must be construed in the context of that instrument as a whole"). Link in Coalition Br. at 18, fn 41.

Adjustment, “the case is over.” *Oceanside 84, Ltd. v. Fidelity Federal Bank*, 56 Cal. App. 4th 1441, 1448 (2nd Dis. 1997).[10]

Although DCRT concedes that the APSA should be read as a whole, albeit citing Commission related precedent for that proposition rather than California law (DCRT Br. at 5), its Brief relies exclusively on the words “in 2020 dollars” as the sole contractual basis for its desired $101 million raise in its binding cost cap. (DCRT Br. at 5-8). DCRT cites to no other provision of the contract as supporting its claim and makes no effort to explain away inconsistent provisions. As the Coalition pointed out in its Opening Brief, the APSA “construed in the context of that instrument as a whole, and in the circumstances of [this] case” *Montrose Chemical*, 114 Cal. App. 5th at 900-902 demonstrates that the APSA is not reasonably susceptible to DCRT’s preferred interpretation that would write into the APSA a Base Year Adjustment awarding it $101 million for four years of delay in delivering the contracted for facilities.

As an initial matter, DCRT opening Brief does not cite to a single provision of the APSA that uses the phrase Base Year Adjustment. Instead, DCRT ask that the Presiding Judge infer a $101 million Base Year Adjustment that the APSA never mentions because it followed the binding cost commitment with “in 2020 dollars.” DCRT’s position however ignores that DCRT and CAISO entered into the APSA in December 2015, and thus the reference to “in 2020 dollars” was in merely a reference to a binding cost cap at the future contracted for in-service date.[11]

Although DCRT Witnesses Reed conceded that DCRT took 100% of the inflation risk in its cost cap notwithstanding use of “in 2020 dollars” (Coalition Br. at 19), in its initial brief

[10] Link in Coalition Br. at 12, fn 33.

[11] DCRT concedes that fact at DCRT Br. 13 “In the CAISO 2014 RFP, the CAISO competitively solicited an economic project with an in-service date of May 2020.”

DCRT claims that “DCRT’s bid and APSA, in stark contrast, includes no such express assumption of inflation risk.” The record clearly established that DCRT took all inflation risk between December 2015 and May 2020. (Tr. at 1202, line 14 to 1203, line 5 (Engleman, Reed, Presiding Judge). DCRT now claims that “DCRT was focused on that in-service date and *never intended* to assume inflation risk beyond that date in its bid.” (DCRT Br. at 13 (emphasis added)). It is interesting that DCRT’s assertion about intent related to its “bid” while also arguing the Presiding Judge cannot look at extrinsic evidence like the bid. (DCRT Br. at 8). Either way, reference to the bid is a misdirection at best as the APSA was a contract for delivery of the transmission addition by the contracted in-service date. DCRT took 100% of the inflation risk in meeting that contractually required in-service date. There was no reason to discuss inflation risk after the contractual in-service date as the APSA specifically addressed what happens if achievement of that date is delayed.

What the contract addresses, very clearly, were “delays” in meeting that contractual in-service date and the recovery of costs, in only two restricted circumstances, for such “delays.” As the Coalition established in its Brief, (Coalition Br. at 24-25), the APSA specifically addresses what happens if there are delays in DCRT achieving the required contractual in-service date. Appendix E permits DCRT to recover “costs resulting from delays due to events of Force Majeure, not covered by insurance, or caused by an Interconnecting PTO.” The APSA provides for recovery of no other delay costs. DCRT Witness Crew confirmed that the period for which DCRT is claiming a generic inflation adjustment to raise the cost cap by more than $101 million, is a period for which DCRT claims delays related to Force Majeure. (Coalition Br. at 25). Crew further acknowledged that to establish costs related to Force Majeure DCRT would be required to prove three distinct elements. (Coalition Br. at 25). The requested generic inflation adjustment to the cost cap is not a contractually permitted proxy for meeting the contract allowance for "costs resulting from delays due to events of Force Majeure" or those caused by interconnecting PTOs.

Reading the APSA in the manner DCRT seeks would read the limitation on recovery of costs for certain delays completely out of the APSA. Granting DCRT's Base Year Adjustment argument would result in DCRT's ability to increase its cost cap regardless of the reason the project was placed in-service four-years late. "Q. . . . as I understand it, based on what you've said, what Mr. Reed has said or testified to, is that DCR Transmission doesn't have to tie particular costs to the base year adjustment, it just -- the entire APSA cost cap goes up? A. Yes, in our construction of that analysis, that's true." (Tr. 1871, line 12-18 (Engleman, Crew)). A reading of the APSA as a whole does not support the position that at the time of contracting the parties intended that DCRT could deliver the project whenever it pleased and that its cost cap would adjust automatically adjust for inflation regardless of why DCRT failed to deliver. As DCRT makes clear, "DCRT proposes that the Base Year Adjustment run from *May 2020, the Project's contracted in-service date,* to June 12, 2024, the Project's actual in-service date." (DCRT Br. at 21 (emphasis added)). The intent of the parties at the time of contracting does not support an automatic $101 million adjustment no matter why DCRT failed to deliver by "May 2020, the Project's contracted in-service date."

Because the APSA is not "reasonably susceptible to the interpretation urged by [DCRT]" *Oakland-Alameda County Coliseum Authority v. Golden State Warriors, LLC*, 53 Cal. App. 5th 807, 816 (2008) as it relates to the requested inclusion of a Base Year Adjustment "the case is over." *Oceanside 84, Ltd. v. Fidelity Federal Bank*, 56 Cal. App. 4th 1441, 1448 (2nd Dis. 1997).

b) If the Presiding Judge Finds that the APSA is reasonably susceptible to DCRT's proposed meaning, that does not mean DCRT is entitled to the Base Year Adjustment

Even if the Presiding Judge determines that the APSA is reasonably susceptible to both DCRT's and CAISO's proposed interpretations, that does not mean that DCRT prevails because Commission Trial Staff and intervenors have not met their burden. (DCRT Br. at 4). "If the court decides the language is reasonably susceptible to the interpretation urged, the court moves to the second question: what did the parties intend the language to mean? . . . A contract is ambiguous when, on its face, it is capable of two different reasonable interpretations." *Southern Cal. Edison Co. v. Superior Court* 37 Cal. App. 4th 839, 847 (1995).

To aid in the interpretation of a contract susceptible to more than one meaning, deciding judge may review extrinsic evidence.

> "The interpretation of a contract involves 'a two-step process: 'First the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract." *Brown v. Goldstein*, 34 Cal. App. 5th 418, 432-33 (2019).

The key, however, is that the court accept relevant extrinsic evidence going to the party's intent at the time of contracting. DCRT's proposed extrinsic evidence is not relevant to the parties intent in 2015 when the APSA was entered.

(1) DCRT's reference to other APSA's is legally irrelevant

In an effort to overcome its complete lack of proof related to incorporation of a Base Year Adjustment in its own APSA, DCRT seeks to confuse the issue with other APSA's, based on other solicitations and other bids occurring after DCRT's. (DCRT Br. at 9-12) Where DCRT lacks direct proof of its own intent to ensure a Base Year Adjustment after May 2020 regardless of the reason for delay or in response to Force Majeure delays, DCRT seeks to use other APSAs entered after DCRT's to project what CAISO and those other non-parties must have intended in order to argue that the Presiding Judge should infer that same intent in the DCRT APSA. California does not support submission of those other contracts as extrinsic evidence.

Much of what DCRT filed is privileged and the Competition Coalition will not respond with privileged information, but instead to the extent necessary responds to DCRT assertions without naming the entity. In the context of the issue that must be decided, the mutual intent of DCRT and CAISO at the time the contract was entered, DCRT reference to other contracts is based on a false premise: "DCRT's bid and APSA . . . includes no such express assumption of inflation risk." As noted above, the record establishes unequivocally that DCRT in fact took all inflation risk until at least May 2020. (Tr. at 1202, line 14 to 1203, line 5 (Engleman, Reed, Presiding Judge). Thus, DCRT's effort to distinguish how inflation risk acceptance was memorialized in other contracts is irrelevant given that DCRT admitted at hearing that in the APSA as written DCRT took all inflation risk until May 2020.

DCRT's reference to other contracts does not address any contract where DCRT purports that the risk of inflation *shifted* at the required in-service date, regardless of the reason for failing to meet the in-service date. As such, DCRT's reliance on other contracts to infer an interpretation on the DCRT's APSA's use of "in 2020 dollars" to address DCRT's recovery of a Base Year Adjustment upon delay in achieving the contracted in-service requirement does not overcome the relevant extrinsic evidence that DCRT accepted inflation risk for its failure to meet the required in-service date.

(2) Regarding admissible extrinsic evidence, DCRT falsely argues that inflation risk was not addressed by its bid or the APSA

DCRT argues that its bid and the APSA negotiation did not indicate that it intended to assume inflation risk beyond May 2020, (DCRT Br. at 13-20) but the argument is a side step. The APSA was not a contract for delivery of a transmission addition in June of 2024. As stated above, for a project with a contractually required in-service date of May 2020, the allocation of inflation risk only needs to be addressed between the date of the bid/contract and the contractually required in-service date. The DCRT bid and APSA negotiations reflect exactly that understanding of the bid and APSA, with the bid and APSA being in alignment that DCRT accepted all inflation risk. There is no reason to address potential inflation after that required in-service date as any failure to meet the contractually required date is a "delay." As addressed above, the APSA specifically addressed DCRT's limited recovery upon delay.

By continually referring to acceptance of inflation after May of 2020, DCRT seeks to read the required in-service date right out of the APSA, as well as those sections of the APSA addressing delay in achieving that required in-service date. Indeed, DCRT refers to the May 2020 contractually required in-service date as "CAISO's *desired* May 2020 in-service date." (DCRT Br. at vii (emphasis added)). Other places DCRT refers to it as the "original" in-service date (DCRT Br. at 7, 13) or the "assumed" in-service date (DCRT Br. at 14), "originally solicited" in-service date (DCRT Br. at 43). Each of these references are an effort to downplay that DCRT contracted to deliver a project in May 2020 and accepted all risk of inflation relative to achieving that date. If DCRT failed to meet that date as a result of a delay tied to a Force Majeure event or an interconnecting PTO, the APSA protected DCRT from costs resulting therefore. DCRT has made no showing that those delay costs would not have included the impact of inflation on the particular cost increases resulting from the delay.

The DCRT bid material are relevant extrinsic evidence that the Presiding Judge can rely on to determine the intent of the parties in the APSA language. Those bid materials support that the bid intended for DCRT's cost cap entered into in 2015 was in 2020 nominal dollars. DCRT's bid specifically stated that the values it included in Table F-16-1, which includes the binding cost cap that made its way into the APSA, was stated in "'nominal year' dollars." (Exh. No. CSO-0006 REV2 PUB at 140, 146). AS DCRT concedes, "With a cost cap stated in nominal dollars and without a base year, there will be no adjustment to the cost cap when comparing the total project cost to the cost cap, regardless of how long it takes for the project to go into service." (DCRT Br. at 11).

On pages 15-16 of its initial brief, without citation to contemporaneous witness testimony as to DCRT's intent (because DCRT offered none), DCRT's lawyers seek to characterize the intent behind the use of nominal dollars and "current dollars" in the DCRT bid in a manner that makes those phrases meaningless. (DCRT Br. at 15-16). In interpreting the intent of the parties Presiding Judge should rely on the words DCRT used, not the characterization of those words a decade later to provide a $101 million bailout to DCRT.

Lastly, as addressed fully in the Competition Coalition's initial brief (Coalition Br. at 20-23), DCRT's reliance on Mr. Reed as to the interpretation to be placed on the APSA or extrinsic evidence is inappropriate. Purported expert testimony regarding the interpretation of a contract is not admissible in California. (Coalition Br. at 22).

Relative to the APSA negotiations, DCRT reiterates it argument that the "risk of inflation also was not addressed during the parties' discussions when amending the APSA in 2018, 2022, and 2024." (DCRT Br. at 19). This point does not support DCRT's effort to write a $101 million Base Year Adjustment obligation into the APSA. DCRT has not identified a single document arising before preparation of its rate filing where DCRT asserted to CAISO that the APSA carried a silent inflation adjustment from May 2020 onward solely as a result of its use of "in 2020 dollars." As DCRT acknowledges, leading up to the Second Amendment of the APSA "DCRT and the CAISO had been engaged in nearly two-and-a-half years of discussions." (DCRT Br. at 19). Thus, the vast majority of those discussions were *after* the date on which DCRT claims that the APSA incorporated an inflation adjustment. DCRT's actions in not asserting entitlement to an inflation adjustment is heavy proof that the argument for one is not reflective of the intent of the parties at the time the contract was entered (either the original APSA or the Second Amendment) but instead a creative interpretation concocted by lawyers and purported experts to recover cost overruns not recoverable under the actual language of the APSA.[12]

Finally, DCRT argues that "CAISO executed the amendment, with full knowledge of DCRT's intent to address *disputed regulatory costs* during its initial rate case at FERC." (DCRT Br. at 19 (emphasis added)). Disputed regulatory costs *are not* a Base Year Adjustment found no where in the APSA. DCRT disclosed its disputed regulatory costs, which CAISO rejected. At no point did DCRT disclose to CAISO its purported belief that it was entitled to an inflation adjustment in the cost cap reflected in the 2022 APSA amendment. Indeed, the sought Base Year Adjustment dwarfs the disputed regulatory costs that DCRT identified. DCRT provided no evidence that CAISO understood that DCRT would seek a Base Year Adjustment in addition to the disputed regulatory costs it specifically identified or that the interpretation reflected the intent of the parties in 2015 or 2022. In addition, DCRT offered no proof that it informed the CPUC of

[12] To the extent that DCRT actually believed at that time that it was entitled to an inflation adjustment to the future in-service date, failing to disclose that to CAISO prevented CAISO from canceling the project as a result of the breach in achieving the required in-service date.

that intent when seeking CPUC approval of a certificate of public convenience and necessity based on costs that were false if an inflation adjustment was contractually mandated.

DCRT also infers that witness Crews testimony that "the APSA's cost cap adjustments and exclusions were self-executing and that DCRT would be able to pursue its contractually-entitled adjustments when it submitted its initial rate filing to FERC" (DCRT Br. at 20) related in any way to the Base Year Adjustment that is not reflected anywhere in the APSA and which was not identified by Mr. Crew in his two and one half years of negotiations. Further, the fact that "DCRT did not intend to assume the risk of cost increases of delay by executing the Second APSA Amendment" is actually reflective of DCRT appropriately APSA focused position at the time that the delays were Force Majeure events for which the costs directly resulting from such delays is recoverable.

(3) DCRT's proposed 47 month Base Year Adjustment demonstrates why the adjustment is inconsistent with the APSA

DCRT argues that its proposed 47 month Base Year Adjustment is just and reasonable. (DCRT Br. at 20). Just and reasonable is not the California contract law standard for interpretation of the APSA. But DCRT's arguments for why its modeling is just and reasonable demonstrates why its contract interpretation argument is not.

The APSA permits recovery of "costs resulting from delays due to events of Force Majeure, not covered by insurance, or caused by an Interconnecting PTO." (DCT-0002 at 50 of 87). DCRT takes each claimed day of "delay" as appropriate for inclusion in modeling of a Base Year Adjustment. Thus, 47 months of delay equal 47 months of inflation increasing the cost cap automatically. But the APSA treats delay differently, tying contract recovery to "**costs resulting from delays** . . .." (*Id*. (emphasis added)). Under DCRT's approach, whether DCRT incurred a cost or not, its binding cost cap is increased. Under the APSA, if DCRT appropriately ties a cost to a contractually compensated delay, Force Majeure or interconnection delays, recovery is available. In fact, DCRT confirms that is the limitation under the APSA: “The APSA’s Force Majeure provision only permits DCRT to recover the costs of delays associated with Force Majeure events.” DCRT Br. at 26. Allowing a Base Year Adjustment directly conflicts with that limitation.

Although DCRT criticizes Witness Le Vine’s critique of the Base Year Adjustment and Force Majeure damages as “taking two bites at the apple” (DCRT Br. at 24) that is precisely what DCRT’s contract interpretation argument does. DCRT’s position is that DCRT is entitled to $101 million increase in its cost cap for delays it claims were caused by Force Majeure, untethered to any specific cost components in that cap as reflected in Appendix E, and also permitted to claim additional increases for the same Force Majeure delay through assertions of specific cost components of the cap in Appendix E. The APSA allows the latter, not the former. Allowing the former is not only outside the APSA agreed to by the parties, it runs counter to the recovery mechanism in the APSA and would in fact allow two bites at the apple.

DCRT asserts that it is not seeking two bites at the apple because the “level of the monthly management run-rate does not reflect any effect of higher costs due to inflation after May 2020, the original contracted in-service date.” (DCRT Br. at 26). But higher costs “resulting from delays due to events of Force Majeure” are precisely, and only, what Appendix E of the APSA allows DCRT as an exception to the binding cost cap. DCRT has not alleged that it would be unable to recover the impacts of inflation on actual expenditures resulting from Force Majeure events. Instead it asks that the Presiding Judge simply let it off the hook from addressing the costs components of delay allowed by the APSA by granting an automatic 47 month inflation adjustment.

DCRT requested Base Year Adjustment must be rejected from a contract interpretation perspective.

c) DCRT's Request To Review The APSA Interpretation From A Section 206 Unduly Discriminatory Perspective Should Be Rejected

DCRT's last gasp effort to secure a $101 million bailout for Lotus investors through a Base Year Adjustment is to argue that applying the intent of the parties at the time of contracting the DCRT APSA to deny a Base Year Adjustment "results in undue discrimination against DCRT." (DCRT Br. at 32). As is clear from DCRT's argument, the assertion of undue discrimination under Section 206 is wholly outside the scope of the instant proceeding.

The primary assertion by DCRT is that various other APSA's entered into after DCRT's APSA had different language from which CAISO acknowledged an inflation adjustment or denied an inflation adjustment. DCRT concludes that "[r]efusing to give that same treatment to DCRT's *similarly structured* APSA is textbook undue discrimination." (DCRT Br. at 29 (emphasis added)). This case is a contract interpretation case that turns on the interpretation of the contract language actually agreed to between DCRT and CAISO as reflecting the intent of the parties at the time the contract was entered. That determination turns on California contract law. DCRT cites no California case that "similarly structured" contracts override the language actually used by the parties. This case is not, and was not brought as or assigned for hearing as, an undue discrimination case under Section 206. The key to the issues in this case is what the APSA between DCRT and CAISO actually says.

DCRT asserts that "[t]aken as a whole, the record evidence demonstrates that the CAISO administers its APSA program in a manner that is neither transparent, consistent, nor neutral across competitive transmission developers." (DCRT Br. at 31). Even assuming that DCRT were correct as to the differential treatment, which the Competition Coalition denies, that claim is neither relevant under California contract interpretation precedent nor is it a matter set for hearing by the Commission. While DCRT asserts that "[t]he CAISO's inconsistent application of APSA terms is a practice within the meaning of Section 206(a) of the FPA" (DCRT Br. at 32) may be an accurate description of the scope of Section 206, DCRT did not bring a section 206 complaint alleging discriminatory treatment. Further, even if it had brought that claim, there is no legitimate expectation that the relief available under Section 206 is for the Commission to write a $101 million inflation adjustment into a decade old contract. Section 206 relief is prospective.

The only issue set for hearing under Section 206 are DCRT's Tariff Records, of which the APSA cost cap issues are a mere input as determined under California law. The Presiding Judge is prohibited from addressing DCRT's undue discrimination claim and that claim can have no bearing on APSA interpretation under California law.

2. DCRT's Argument For Recovery Of "Regulatory Compliance" Costs Is Not Supported By A Plain Reading Of The Contract

DCRT asserts that Appendix E Bullet 3, Bullet 4, Section 5.4.3 and Section 5.5.3 provide for broad exclusions from the APSA Cost Cap for so-called regulatory compliance costs. This assertion is belied by a plain reading of Sections 5.4.3 and 5.5.3. As is apparent from a causal reading of DCRT's initial brief, DCRT's proposed interpretation of Sections 5.4.3 and 5.5.3 makes the provisions meaningless in the context of the APSA as a whole. The Competition Coalition addressed many of DCRT's points in its initial brief, (Coalition Br. at 27-29) and will not rehash those arguments here. Instead, the Competition Coalition responds only to DCRT's overbroad assertions in its effort to force $73 million of cost capped expenditures into narrow exclusions.[13] In context, applying DCRT's arguments would mean that costs equaling 30% of the binding cost cap were excluded by provisions that are limited to required "changes" to project design mandated by interconnecting PTOs or CAISO. No such required changes were proven.

Resolution of DCRT's claims must start with the language of the contract. Appendix E allows for the recovery of "costs incurred by the Approved Project Sponsor to make changes to the Project under Section 5.4, to the extent that such changes were not included in the functional requirements for the transmission facility that the CAISO issued for the competitive solicitation or the Approved Project Sponsors bid." (DCT-0002 at 49 of 87). Both Section 5.4.1 and 5.4.2 require submission of "specifications for *major Project equipment and/or materials* . . .." (DCT-0002 at 13 of 87 (emphasis added)). In 5.4.1 the submission is to be made at least 30 days before DCRT "solicits offers to provide the specific equipment" with 5.4.2 requiring submission of final specifications 180 days before testing. Appendix E allows recovery only for changes made to the project following and as a result of those two distinct specification submissions.

DCRT makes no effort to tie its claimed regulatory compliance costs to changes required after submission of "specifications for major Project equipment and/or materials" (DCT-0002 at 13 of 87) at the two distinct time periods referenced by Section 5.4. Instead, DCRT strangely argues that "Section 5.4.3 does not preclude a developer's proactive adherence to a technical specification or safety requirement through the EPC process leading up to the Project's in-service date." (DCRT Br. at 39-40). DCRT is correct as proactive adherence to technical specifications

[13] DCRT's initial brief pegs "DCRT's Regulatory Compliance costs of $72,968,051" (DCRT Br. at xi) while CAISO asserts that DCRT is seeking "recovery of $85,936,149 in costs above the DCRT APSA binding cost cap as so-called 'regulatory compliance' costs." (CAISO Br. at 41). Since the Competition Coalition, as well as CAISO, demonstrate that DCRT is not entitled to a penny in regulatory compliance costs under the APSA, this Reply does not address the disparity.

or safety requirements is actually the APSA contracted obligation. The distinction is that adherence does not create Section 5.4 recoverable costs as those costs are only recoverable for "costs incurred by Approved Project Sponsor *to make changes* to the Project under Section 5.4 . . ..." Because 5.4 only relates to the submission of major specifications and such submission occurs at two distinction periods, DCRT's recovery under Appendix E for Section 5.4 "changes" in limited by the express temporal and specification breadth language reflected in 5.4.1, 5.4.2, and 5.4.3.

DCRT has made no effort to tie its claimed Section 5.4 regulatory compliance costs, which did not come from the interconnecting PTO or CAISO at all, to "changes" those entities required after the Section 5.4.1 of 5.4.2 submission. Applying California contract interpretation requirements to give meaning to the words used in the contract, DCRT is not entitled to any recovery under 5.4 for regulatory compliance costs.

Likewise, DCRT seeks to expand the available recovery under Section 5.5.3 beyond any conceivable meaning of the words used. Appendix E allows for an exclusion to the cost cap for "costs incurred by Approved Project Sponsor to *remedy deficiencies* in accordance with Section 5.5.3." (DCT-001 at 50 of 87). Section 5.5.3 provides "*At any time during construction*, should any phase of the Project engineering, equipment procurement, or construction not meet the standards and specifications provided by the Interconnecting PTO or other entity, the Approved Project Sponsor shall be obligated to remedy deficiencies in that portion of the Project." (DCT-0002 at 14 of 87). Section 5.5 is captioned Construction Activities and Section 5.5.1 refers to commencing construction consistent with the schedule in Appendix B. Appendix B reflects the commencement of construction as a distinct segment of the Milestones. (DCT-0002 at 40 of 87 (line 12); see also 66 of 87 (line 20); 75 of 87 (line 15); and 86 of 87 (line 15).

DCRT twists the very specific limitations of Section 5.5.3 cost recovery by arguing that that "Section 5.5.3 also does not preclude a developer's proactive adherence to an obligation through the EPC process." (DCRT Br. at 40). While that is true, as it was above, proactive adherence through the EPC process is simply not recoverable as a cost cap exclusion as it is not "costs incurred to *remedy deficiencies* in accordance with Section 5.5.3." Merriam-Webster defines "remedy" as "something that corrects or counteracts."[14] Likewise, it defines a "deficiency" as "the quality or state of being defective or of lacking some necessary quality or element : the quality or state of being deficient."[15] While proactive adherence to obligations is admirable,[16] it does not "remedy" a "deficiency" identified "at any time during construction."

DCRT also asserts that "Section 5.5.3 is not limited to potential costs incurred after DCRT moved forward with any type of notice-to-proceed to construction." (DCRT Br. at 40). This assertion is directly contrary to the very clear language of Section 5.5.3 which definitively limits its application to "at any time during construction" and the Appendix B milestones that delineate "Commence Construction" as a specified milestone. Had the APSA intended the provisions to apply to "EC Source's obligation to design, procure equipment for, . . . the Project" (DCRT Br. at 41) in addition to "construct the Project" it could have said so as design and procurement are standalone milestones. The APSA did not.

"When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party. If it is not, the case is over." *Oceanside 84, Ltd. v. Fidelity Federal Bank*, 56 Cal. App. 4th

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14 https://www.merriam-webster.com/dictionary/remedy

15 https://www.merriam-webster.com/dictionary/deficiency

16 It is actually the minimum standard expected of Approved Project Sponsors, but DCRT seems to want some admiration (in addition to cash) for doing the expected.

1441, 1448 (2nd Dis. 1997). DCRT's reading of Appendix E exclusions for costs incurred to "makes changes to the project under Section 5.4" (DCT-0002 at 49 of 87) or "to remedy deficiencies in accordance with Section 5.5.3" (DCT-0002 at 50 of 87) is not reasonably susceptible to DCRT's interpretation that they apply to costs to comply with general regulatory obligations. As demonstrated, Sections 5.4 and 5.5.3 have specific applicable timeframes for recoverable costs. DCRT's claimed regulatory compliance costs to not fit the reasonably susceptible interpretation of either provision or Appendix E. Requirements in SCE and APS Interconnection Agreement (DCRT Br. at 44-46) or the CAISO TCA (DCRT Br. at 46-47) are not covered by the exclusions in Appendix E for costs incurred related to Sections 5.4 or 5.5.3. The cost listed by DCRT on pages 48-53 are not reasonably susceptible to interpretation as costs covered by Sections 5.4 or 5.5.3. DCRT's claim for recovery of "regulatory compliance" costs must therefore be rejected.

3. DCRT's Force Majeure Claims Were Not Contractually Supported

DCRT claims $38,939,562 as allowable "costs of delays resulting from events of Force Majeure pursuant to Bullet 5 of Appendix E." (DCRT Br. at 54). As the Competition Coalition acknowledged in its initial brief (Coalition Br. at 30), the APSA Appendix E does allow DCRT the opportunity to recover "costs resulting from delays due to events of Force Majeure, not covered by insurance, or caused by an Interconnecting PTO." (DCT-0002 at 50 of 87).

To recover for costs resulting from events of Force Majeure, DCRT must establish that there was an event of Force Majeure, that DCRT provided the contractually required notice, and that a delay was caused, and that there are identifiable costs arising out of the delay. (DCRT Br. at 55 (acknowledging that DCRT must establish that "events identified by DCRT qualify as Force Majeure under the APSA's definition; whether adequate notice was given; and whether

DCRT's modeling of delay costs complies with Bullet 5 . . ..")). DCRT has failed to meet one or more components related to each of its claims.

DCRT spends the first part of its analysis in an effort to expand the definition of Force Majeure to cover a variety of basic transmission development glitches as matters DCRT could not have anticipated and thus are Force Majeure events. The company of which DCRT's own witness is CEO calls into question the foreseeability of DCRT's development woes, stating that "[w]ith detailed knowledge of local regulatory processes and challenges, an incumbent TO might have been positioned to anticipate regulatory challenges and other complications that led to delays." (CSO-0371 at 28 of 37). The Presiding Judge need not spend time analyzing DCRT's claims in the context of good utility practice however as DCRT did not provide contractually required notice, which DCRT acknowledges is necessary for its claim to move forward, for any of the events addressed on pages 59 to 65 of DCRT's initial brief.[17] That lack of notice ends the claims.

DCRT claims its notice of Force Majeure for BLM's delay in DEIS was made in its Quarterly Reports. (DCRT Br. at 60, fn 306). The APSA specifically requires more. Section 13.1.1 required that DCRT provide

> notice and the full particulars of such Force Majeure to the other Party i*n writing or by telephone as soon as reasonably possible*

[17] Whether they could have been anticipated by Good Utility Practice or not, DCRT's claims that (1) BLM's notice of delay in DEIS; (2) CPUC ALJ postponement of CPCN docket until BLM completes FEIS and ROD; (3) BLM decides to apply DRECP to DEIS; and (4) application of Secretarial Order No. 3355, are Force Majeure events is contractually wrong. Those are not recoverable events because the APSA specifically excludes the "(4) failure or delay in granting of necessary permits for reasons not caused by Force Majeure" from the definition of a Force Majeure event. (DCT-0002, APSA Package at 7 of 87). DCRT seeks to get around this permit delay exclusion by arguing that all of the events were unforeseen by it, making them "caused by Force Majeure" in a circular argument. This misconstrues "not caused by Force Majeure" as force majeure generally excludes an entity's own actions from causing a force majeure. As such, the Federal government making a decision about delaying a permit for reasons within its authority does not constitute a Force Majeure as the Federal government cannot cause its own Force Majeure event. Whether DCRT could contemplate the event is irrelevant. The APSA intentionally excludes permitting delays from the definition of Force Majeure events unless otherwise caused by a Force Majeure event. DCRT's claim that its inability to anticipate the permitting delay constitutes a Force Majeure event dragging permitting delays back into recoverable events is not a reasonable reading of the APSA.

> *after the occurrence of the cause relied upon*. Telephone notices given pursuant to this Section shall be confirmed in writing as soon as reasonably possible and *shall specifically state full particulars of the Force Majeure, the time and date when the Force Majeure occurred, and when the Force Majeure is reasonably expected to cease*. (DCT-0002 at 22 of 87 (emphasis added)

A line item in a Quarterly report does not meet the APSA requirement.

As to the claim that the CPUC postponement of the CPCN docket was an event of Force Majeure, DCRT is vague as to the notice provided other than a reference to Witness Reed claiming that Notice was provided. (DCRT Br. at 61, fn 311). Likewise, DCRT claims that Witness Crew testified that DCRT provided CAISO notice of the claim that BLM applying DRECP to DEIS was a Force Majeure event under the APSA as well as Secretarial Order No. 3355, and the BLM requirement for tower design changes from guyed-V to lattice structures. (DCRT Br. at 62, fn 321; DCRT Br. at 63, fn 327; DCRT Br. at 65, fn 336). There is no evidence for a single one of these alleged notifications that DCRT met the Notice requirement of 13.1.1. Indeed, for several DCRT conceded that the claimed Notice was mere a reference in a quarterly report. (See, e.g., DCRT Br. at 65, fn 337 (stating The BLM tower design mandate qualifies as an event of Force Majeure as a governmental action that was not foreseeable, and notice was given in quarterly reports and the June 2019 presentation.) Because DCRT failed to give contractually required notice, its claims must fail.

Each of the above claimed events of Force Majeure must also fail under Appendix E because DCRT fails to identify the "costs resulting from" the claimed event of Force Majeure for purposes of recovery under Appendix E. As an apparent defense to its failure to provide notice, DCRT argues that the APSA does not provide a clear mechanism to provide CAISO Notice of Force Majeure events for which delay costs are sought. (DCRT Br. at 71). This argument is simply wrong as Section 13.1.1 is specific as to the form of Notice. That notice is required regardless of whether the Force Majeure delay has costs associated with it or not.

It is particularly important that the Notice of a claimed Force Majeure event comply with Section 13.1.1 as a notification of delay, without meeting the specific requirements of 13.1.1, is simply a notice under APSA Section 21.2, which carries with it no additional cost recovery through an exclusion to the binding cost cap. Further, DCRT demonstrates in its initial brief that it knows how to give proper Notice of a Force Majeure event by its reference to its letter Notice re COVID-19. (DCRT Br. at 67).

Finally, DCRT's assertion that it cannot know the costs associated with a Force Majeure event until it is over and the project complete is largely misplaced. Force Majeure events, even significant world events like Covid-19, have definitive measurable impacts on project development. An example is delaying a CPUC hearing. A properly functioning developer knowing that it is obligated to tie any "costs resulting from an event to Force Majeure" to that event for recovery under its contractual agreement would track those impacts from the day of the event. How much did the price of steel go up during a Force Majeure delay impacting costs related to DCRT's required purchase of steel? How much management costs did it incur during the specific DEIS approval delay. Any of these costs are recordable. DCRT's failure to even attempt to measure as required by the APSA prohibits its recovery.

In another attempt to gloss over its failures to comply with the Force Majeure requirement, DCRT argues that Section 13.1.1 is related to "Default with respect to a specific APSA obligation, which is a different concept than notice of an event of Force Majeure for which the costs of delay are being sought under APSA Bullet 5." (DCRT Br. at 72-73). DCRT's argument is disingenuous. Both Section 13.1.1 and Appendix E refer to the defined term Force

Majeure. Further, failure to meet the contractually required in-service date would be a deflaut under the APSA unless excused by Force Majeure. The Notice requirement for Force Majeure events is not simply applicable to prevent a claim of default but to any claimed Force Majeure event. Preventing the declaration of default is the outcome of giving proper notice not the sole impact. The correlation between Section 13.1 and Appendix E is made clear by Section 13.1.2 which provides " If required, the Parties shall revise this Agreement, including Appendix B and Appendix E, following a Force Majeure event." The Notice requirement is directly tied to Appendix E.

DCRT conceded that it did not give proper notice of multiple claimed Force Majeure events, asserting that "DCRT attempted to mitigate the impact of events using Good Utility Practice and, only after determining that these efforts were not successful, classified them as Force Majeure for delay cost recovery." (DCRT Br. at 73). That approach violates Section 13.1.1's requirement for notice "in writing or by telephone as soon as reasonably possible after the occurrence of the cause relied upon." The notice required by 13.1.1 is not only required when delay costs are sought, it is required if there is a Force Majeure event preventing the fulfillment of any contractual obligations. DCRT acknowledges that its letter in November 2017 noting schedule delays that prevented it from meeting the contractual obligations "did not use the term Force Majeure." (DCRT Br. at 76). That letter then is simply a delay notice under Section 21.2 which carries no Appendix E cost cap exception. While Section 13.1.2 allows the CAISO to revise milestones as a result of a Force Majeure event, that does not mean that CAISO's revision of DCRT's milestone because DCRT could not meet them constitutes a CAISO concession that a contractually recoverable Force Majeure event occurred. (DCRT Br. at 76).

Finally, because DCRT failed to actually trace any "costs resulting from delays caused by events of Force Majeure" to the actual event of Force Majeure, DCRT argues that "DCRT's proposed calculation of its delay costs firmly rests within the Commission's zone of reasonableness" and "Presiding Judge should disregard the CAISO and other Participants' arguments that DCRT must disaggregate and incrementally model each event of Force Majeure; the proposed level of precision is not required for ratemaking." (DCRT Br. at 78).[18] But DCRT's ability to recover for costs resulting from delays caused by events of Force Majeure is a contract issue under California law, not a simple ratemaking exercise. The contract requires that the costs excluded from the cost cap must actually *"result[] from* the delays due to events of Force Majeure . . .." (DCT-0002 at 50 of 87 (emphasis added)). DCRT cannot simply excuse itself from the contractual requirement to tie costs to events by relying on the zone of reasonableness. DCRT makes clear that is used 2019 and 2020 proxies rather than the actual costs resulting from delays it claims in 2020-2024. (DCRT Br. at 78-79).

DCRT failed to establish that it met the requirements of the APSA or that the APSA language as to those requirements is reasonably susceptible to the interpretation of the contract that DCRT now advocates. As a result, its claims for cost recovery associated with events it argues are Force Majeure events must fail.

4. DCRT's "Catch All" Argument Is Not A Reasonable Interpretation of the APSA

DCRT argues that a provision in the APSA intended to allow CAISO and DCRT to mutually agree to cost changes, with FERC approval, actually allows FERC to dictate changes

[18] For its lack of need for precision point DCRT relies of a cost allocation case and the determination that the Commission need not allocate cost with precision. (DCRT Br. at 78, fn 395). This is not a cost allocation case. The Commission's uniform system of accounts required that components of rates be kept with precision. Appendix E demands not less.

that CAISO is mandated to accept. The APSA is not reasonably susceptible to DCRT's proposed interpretation.

The last sentence of Appendix E reads: "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." (DCT-0002 at 51 of 87). Although DCRT cites the requirement for approval by "both CAISO and FERC" (DCRT Br. at 80) DCRT nevertheless asserts that

> Because this is a section 206 proceeding involving DCRT's Base TRR, the Presiding Judge may choose to identify in his Initial Decision costs appropriate for inclusion in DCRT's Base TRR based on the catch all provision and the Commission has the authority to issue an order on those costs. This order would obligate the CAISO (and DCRT) to follow it as a FERC-jurisdictional entity. (DCRT Br. at 80).

As is obvious, DCRT's position reads the contractual mandate—that changes to the cost cap "are not permitted *without the approval of both the CAISO* and FERC"—to completely remove CAISO's *required* approval. If the provision intended to allow FERC to mandate the inclusion of costs on in DCRT's TRR notwithstanding the binding cost cap and without CAISO's consent it could have easily stated as such.

The referenced sentence is not a "catch-all" provision at all, but a mechanism for CAISO and DCRT to agree to changes to an APSA with the Commission's blessing. Under California law, DCRT's position that the mandated *approval* of both CAISO and FERC can be met by a FERC "order that would obligate the CAISO [ ] to follow it as a FERC-jurisdictional utility" (DCRT Br. at 80) is not permitted. This is made even clearer by DCRT's position that "[i]f the CAISO opposed such a determination, the CAISO could challenge the order through the standard FPA process for rehearing and appeal." (DCRT Br. at 81). Interpreting this provision of the APSA requires the Presiding Judge to give the words used their plain meaning. "If the language of the policy is not ambiguous, then the coverage inquiry ends, and the court determines coverage by applying the plain meaning of the unambiguous provisions of the policy." *Montrose Chemical*, 114 Cal. App. 5th at 902. Merriam-Webster defines approval as "an act or instance of approving something"[19] and "approving" as "to have or express a favorable opinion of; to accept as satisfactory; to give formal or official sanction."[20] DCRT's position that CAISO can seek rehearing or appeal a ruling mandating that costs above the agreed cap be included in the DCRT TRR is not consistent with the contractual requirement for CAISO "approval."

Reading the sentence in the manner DCRT advocates would also conflict with Section 10.1.1's limitation on DCRT's TRR submittal. As noted above, DCRT conceded in its Initial Brief that Section 10.1.1 was binding on it, stating: "DCRT believes Section 10.1.1, which incorporates Appendix E and, in turn, the relevant cost containment provisions at issue in these proceedings are still binding on both the CAISO and DCRT." (DCRT Br. at 2, fn 4). DCRT's initial brief simply ignores this inconvenient conflict. Because the APSA is not reasonably susceptible to DCRT's proposed interpretation of the last sentence of Appendix E, "the case is over." *Oceanside 84, Ltd. v. Fidelity Federal Bank*, 56 Cal. App. 4th 1441, 1448 (2nd Dis. 1997).

DCRT also couches its argument around whether certain costs were prudently incurred. If a cost is in excess of the binding cost cap, and not within one of the limited exclusions, it is not contractually relevant whether it was prudently incurred. That is one of the significant consumer benefits of the competitive model, it takes the concept of "prudence" out of the analysis and focuses on contractual definitions and whether or not the Approved Project Sponsor met its contractual commitments. Further, while FERC may "presume[] a utility's costs and expenses

[19] https://www.merriam-webster.com/dictionary/approval.

[20] https://www.merriam-webster.com/dictionary/approve.

have been prudently incurred" (DCRT Br. at iii) DCRT has not demonstrated that the Commission extends that presumption to a one-off transmission developer like DCRT or applies that presumption to contractual agreements. During the development of the Ten West Link project, DCRT was a "utility" as a technical matter because it had filed for and received incentive rates, but it had no utility infrastructure, no existing projects, and no history of utility management. In fact, its bid was submitted with a proven transmission developer, Abengoa, whose bankruptcy left DCRT to flounder, as development of the Ten West Link demonstrated. The Presiding Judge need not, and should not, determine whether DCRT is entitled to a presumption of prudence or even whether various costs were "prudently incurred" (DCRT Br. at 81) only whether, under California law, DCRT's proposed interpretation of the APSA reflects the intent of the parties at the time the APSA was entered. It does not, with respect to the so-called Catch-all provision or any other of DCRT's claims.

III. CONCLUSION

For electricity consumers, the overwhelming majority of the ninety plus entities comprising the Electricity Transmission Competition Coalition, this case represents a critical junction in the Commission's consumer protection mandate under the Federal Power Act. The Commission issued Order No. 1000 and required transmission competition as a mechanism for the Commission to ensure that rates for transmission investments were just and reasonable because it could not ensure that fact under existing mechanisms. The D.C. Circuit upheld that mandate, over dozens of objections, based on the "'well-established general principles'—for example, that competition will normally lead to lower prices." *South Carolina Public Service Authority v. F.E.R.C.*, 762 F.3d 41, 68 (2014) *citing* Order No. 1000–A ¶ 70, 77 Fed.Reg. at 32,197. The respondents to CAISO's solicitation to build what became Ten West Link each proved the Commission prescient regarding the benefits to consumer of transmission competition, with each offering a better deal for consumers than if the project had simply been handed to an incumbent under then existing FERC rate recovery precedent. "The CAISO selected DCRT in the CAISO competitive solicitation to build the Project *due to its materially lower project costs, its binding cost containment measures, the lack of cost cap exclusions*, and the amount of risk it agreed to bear compared to other Project Sponsors." (CAISO Br. at 12 (emphasis added)). The Commission can take the next step to ensuring the consumer protection built into transmission competition by holding DCRT to the letter of its agreement. To do otherwise provides a bailout for Lotus investors while throwing consumers to the wolves. As importantly, providing that bailout will inextricably harm transmission competition at a time when electricity affordability is critical.

As described above, the plan language of the APSA, when interpreted based on the parties' intent at the time of contracting and under California law, requires the denial of DCRT's $101 million Base Year Adjustment request and its more than $70 million regulatory compliance request. Those items alone reflect over $170 million in saving that competition provided consumer that would be unavailable if an incumbent transmission owner had built the project exactly the same. DCRT's filing, seeking nearly every penny spent on its development of the Ten West Link project, seeks to treat the matter as if DCRT were an incumbent utility that did not win the right to build the project though a competitive solicitation with the promise of protecting consumers from cost overruns by offering and agreeing to a binding cost cap. The Presiding Judge must soundly reject DCRT's efforts to avoid its contractual commitments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, this day, caused the foregoing Post-Hearing Reply Brief to be served upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated on this 10th day of September 2026.

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