



West-Wide Governance Pathways Initiative

Legal Analysis Cover Memo from the Launch Committee

Perkins Coie, on behalf of the Launch Committee, performed a risk-based analysis of the options presented in the Launch Committee's Evaluation Framework Paper. This legal analysis examines the extent to which current law permits the range of options being considered by the Launch Committee. It frames the litigation risk, under existing California law and Federal Energy Regulatory Commission (FERC) precedent, as energy market governance authority increasingly shifts from the California Independent System Operator (CAISO) to the Western Energy Imbalance Market Governing Body (WEIM GB) or a newly formed Regional Organization (RO). The Launch Committee's objective in providing this analysis is to establish a baseline of shared understanding of the state and federal legal issues arising from the identified governance options that can guide our collective decisionmaking.

Based on this legal analysis, the Launch Committee concludes that the option proposed as "Step 1" (Option 0) in the accompanying Straw Proposal presents little, if any, legal risk under current state law; it thus substantively increases independent governance of the WEIM and Extended Day-Ahead Market (EDAM) while retaining sufficient CAISO authority to enable it to meet its ongoing statutory and corporate governance requirements. The analysis recognizes that the proposed options that would effectuate "Step 2" (Options 2 and 2.5) push independent governance further, increasing legal risk under current state law. The Launch Committee believes, based on the analysis, that the increased risk in these specific designs could be materially mitigated through targeted legislation that reshapes the CAISO's role in energy market management. The scope of the legislation needed will turn on the selected design and will be revisited once that design is selected and the details are more fully developed through stakeholder feedback.

The legal analysis focuses solely on establishing independence over energy market governance and does not address the shift of governance over other functions currently within CAISO's corporate responsibility. The preservation of the CAISO's corporate responsibility for the BA function, in particular, distinguishes the Pathways Initiative from past Western regionalization discussions and California legislative efforts. Those prior discussions centered on a full-featured Regional Transmission Organization (RTO) built through absorption of balancing authority areas (BAAs) into an expanded, independent, regionalized CAISO. Whether or not this approach was the most beneficial path forward, it placed California policymakers in a challenging position of broadening the governance of all of the current CAISO functions before a critical mass of potential participants from other states had even indicated a full commitment to regionalization.

With the creation of a new and separate RO, building a potential future RTO no longer requires absorbing BAAs into an independent CAISO. The independent RO could build services that any BA, including the CAISO BA, can choose to participate in under the governance of an independent body. Indeed, Western BAs may be able to exercise other design options to provide even market services, without a change in California law, that could enable but not require participation by the CAISO BA. These approaches would likely increase costs and complexity and erode customer benefits as compared to the options the Launch Committee has focused on to date. Enabling the CAISO BA to fully participate,



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in parity with other BAs, allows the market to most efficiently leverage existing CAISO infrastructure to minimize costs and maximize customer benefits across the footprint.

The legal analysis is not intended to be exhaustive. It provides a solid foundation, however, to begin to integrate legal and technical considerations in evolving market governance, providing a key puzzle piece in a vision of a durable independent market design that can meet the needs of Western lawmakers and regulators and maximize customer benefits.

The Launch Committee is generally optimistic about the potential for achieving the goals of independent energy market governance as suggested by the July 14, 2023 letter from regulators. While this legal analysis explores legal concepts and law that are familiar to many who have participated in regional governance discussions over the last decade, the Launch Committee urges stakeholders to take a fresh look at the problems and solutions as our work continues.

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TO: Evelyn Kahl, Spencer Gray

FROM: Buck Endemann, Partner
Jane Rueger, Partner

RE: **Legal Evaluation of Framework for Pathway Options
Under California and FERC Law**

Section 1 Executive Summary

The WWGPI Launch Committee has asked Perkins Coie LLP to assess legal risk for a range of options regarding structural alternatives to the governance of wholesale electricity markets operated by the California Independent System Operator (“CAISO”) *under existing law*. This memorandum focuses on whether each such option could be contrary to or inconsistent with (1) California corporate and public utilities law requiring CAISO to manage the transmission grid and related energy markets pursuant to enumerated statutory factors, or (2) Federal Energy Regulatory Commission (“FERC”) policy and precedent regarding independence and governance of regional transmission organizations (“RTOs”) and independent system operators (“ISOs”) and the exercise of Federal Power Act (“FPA”) section 205 filing rights over RTO/ISO tariff provisions. The seven options we analyzed are below, and (with the exception of new Option 0.5 and Option 2.5) are generally consistent with—though somewhat refined from—the options described in the Launch Committee’s Pathways Initiative: Initial Evaluation Framework for Pathways Options memorandum prepared in December 2023.

Section 2 Summary of Options Presented

Implementing one or more of the Options laid out in this memorandum presents varying degrees of legal risk under existing California and FERC law. Under California law, Option 0 presents the least risk and Option 4 presents the greatest risk. For each Option, however, a change to California Public Utilities Code Section 345.5 (which requires CAISO to manage the “transmission grid and related energy markets”) ¹ would substantially mitigate the risk of legal challenge. Even with such a change, certain Options (including those that retain CAISO’s

¹ Cal. Pub. Util. Code §§ 345.5(b)(1)-(6).

responsibility for markets but attempt to substantially delegate governance rights over such markets), could present a legal risk under California Corporations Code Section 5210, which requires a Board to maintain “ultimate direction” over a corporation’s activities, affairs, and corporate powers.² Regarding FERC policy and precedent, while not all Options present a structure that precisely mirrors one approved previously by FERC, all are likely feasible though Options 2 and 2.5 exhibit slightly more regulatory risk than the other Options.

The Pathways Options being considered by the Launch Committee are as follows:

- **Option 0:** The Energy Imbalance Market Governing Body (“EIM GB”) remains a chartered committee within CAISO (not a separate legal entity). CAISO retains market activities within its corporate scope and operates the market, and the CAISO tariff continues to house, and CAISO administers, the tariff rules applicable to the Energy Imbalance Market (“EIM”) and Extended Day Ahead Market (“EDAM”) (“Markets Rules”). CAISO delegates to the EIM GB *primary* authority to direct changes to Markets Rules, which are placed on the CAISO Board consent agenda. CAISO has sole FERC section 205 filing rights, which are used to (1) file EIM GB-directed changes if no disagreement, (2) file both EIM GB-directed changes and an alternate proposal proffered by the CAISO Board in the event of disagreement (a “jump ball” approach) in non-time-critical exigent circumstances, and (3) file unilateral changes at the direction of the CAISO Board only in time-critical exigent circumstances.
- **Option 0.5:** The EIM GB remains a chartered committee within CAISO (not a separate legal entity). CAISO retains market activities within its corporate scope and operates the market, and the CAISO tariff continues to house, and CAISO administers, the Markets Rules. CAISO delegates to the EIM GB *sole* authority to direct CAISO to file changes to Markets Rules, with no remaining CAISO Board involvement.
- **Option 1:** The EIM GB becomes a Regional Organization (“RO”), a separate legal entity. CAISO retains market activities within its corporate scope and operates the market, and the CAISO tariff continues to house, and CAISO administers, the Markets Rules. CAISO delegates to the RO *primary* authority to direct CAISO to exercise its Section 205 rights to file changes to Markets Rules, which are placed on the CAISO Board consent agenda. CAISO exercises these rights to (1) file the RO-directed changes if no disagreement, whether initially or following dispute resolution, (2) file both the RO-directed changes and an alternate proposal proffered by the CAISO Board of Governors in the event of an impasse (a “jump ball” approach) in non-time-critical exigent circumstances, and (3) file unilateral changes at the direction of the CAISO Board only in time-critical exigent circumstances.
- **Option 2:** The EIM GB becomes an RO, a separate legal entity, and CAISO retains market activities within its corporate scope and operates the market. The CAISO tariff continues to house, and CAISO Administers, the Markets Rules. CAISO delegates or transfers to the RO

² Cal. Corp. Code § 5210.

the *sole* authority to direct CAISO to file changes related to Markets Rules, with no remaining CAISO Board involvement.

- **Option 2.5:** The EIM GB becomes an RO, a separate legal entity, and CAISO transfers responsibility for market activities from its corporate scope to the RO. The CAISO tariff continues to house, and the CAISO administers, the Markets Rules pursuant to a Market Operating Agreement. The RO has independent section 205 filing rights and sole authority to propose and file changes related to Markets Rules with no remaining CAISO Board involvement.
- **Option 3:** The EIM GB becomes an RO, a separate legal entity, and CAISO transfers responsibility for market activities from its corporate scope to the RO. The RO houses and administers the Markets Rules in a separate RO tariff over which the RO has *sole* authority to make changes to the tariff and file the changes using its own 205 filing rights. The RO executes a Market Operating Agreement with CAISO to operate the market.
- **Option 4:** The EIM GB becomes an RO, a separate legal entity; the RO houses the Markets Rules in a separate RO tariff over which the RO has *sole* 205 filing rights and operates the market. CAISO has no involvement with decision-making or administration of the RO tariff, nor with operating the energy market. An interface agreement of some sort may be required between the RO and CAISO.

To assess in isolation the legal risk with respect to each Option, we have necessarily assumed that other facts that may be material to application of California and FERC precedent do not present an independent source of risk. For example, we have assumed that the RO's governance structure meets FERC's independence principles as set forth in Order No. 2000³ and subsequent precedent. Similarly, we focus our analysis on the EIM GB's or the RO's (as applicable) governance and filing rights with respect to the Markets Rules, recognizing that to the extent governance and filing rights over other functions (such as transmission or balancing authority functions) are transferred at some future time, facts such as the independence of the RO's governance structure may become more critical to assess whether a particular Option would be accepted by FERC. In addition, other complex issues associated with how to use the "apply to" test in deciding which CAISO tariff provisions over which the EIM GB or RO has varying levels of authority under the different Options are important considerations that are beyond the scope of this memo. Nor have we considered the practical implications of having an RO assume functions performed historically by CAISO, including any indemnities, bonding, licensing, or other rights and obligations that may have to be negotiated among CAISO, the RO, and various stakeholders around the west.

³ *Regional Transmission Organizations*, Order No. 2000, FERC Stats & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

This memo first provides a brief preamble on applicable California law and FERC precedent. Next, the memo provides a brief analysis of each Option with respect to California law and FERC precedent. The table in Exhibit A compares each Option side-by-side and depicts where each Option falls on the range of legal risk under California and FERC law.

Section 3 Preamble on California Law and CAISO Corporate Governance

3.1 Introduction

CAISO's ability to delegate energy market responsibilities to a third party is constrained by California Public Utilities Code Section 345.5 and California Corporations Code Section 5210. Neither law, nor any similar corporate governance laws (including case law or guidance) in the Western United States, New York, or Delaware, provides much guidance on the limits of CAISO's ability to delegate or offload energy market responsibilities to an affiliated or arm's length third party. We assume, however, that there is a certain level of acceptance that California law allows the EIM GB and CAISO bylaws to operate in their present form and as they have existed over the past decade since the creation of the EIM.

3.2 California Board Governance Requirements

3.2.1 The Board Must Retain "Ultimate Direction" Over the Company

Foundational corporate law precepts require the Board to maintain "ultimate direction" over CAISO's activities, affairs, and corporate powers.⁴ The Board may delegate management responsibilities, however, "to any person or persons, management company, or committee however composed."⁵ California corporate law contains little precedent on the limits of such delegation or what it means to retain ultimate direction. One California appellate court held that a board retained "ultimate direction" over the corporation when it retained "mandatory duties, *and only those duties*, imposed on them by the California Corporations Code as Directors" and delegated all other responsibilities to shareholders.⁶ The court emphasized that while "decisions as to the future direction and operation of the corporation" fell squarely within the board's statutory responsibility, managing and directing the corporation's day-to-day operations could be delegated to shareholders of a closely held corporation without compromising the board's ultimate direction.⁷ This holding is the only example where a California Court had occasion to meaningfully analyze the requirements of Section 5210 and 5212, dealt with a closely held for-profit corporation, and did not meaningfully elaborate on the duties imposed by the California Corporations Code.

⁴ Cal. Corp. Code § 5210.

⁵ *Id.*

⁶ *In re ANNRHON, Inc.*, 17 Cal. App. 4th 742, 756 (1993) (emphasis added).

⁷ *Id.* (citing Cal. Corp. Code § 300(a)).

3.2.2 The Board Can Delegate, But Not Abdicate, its Duties

A board's power to delegate operational responsibilities is not unlimited and delegation cannot relieve the CAISO Board from its ultimate duty of directing the corporation. The Board must perform such direction in alignment with its fiduciary duties and for the benefit of the corporation.⁸ The edges of what is delegable by the Board are thus defined by its fiduciary duties of care, loyalty, and diligence.⁹

While California law is largely absent, courts in other states and federal agencies evaluating other state governance laws have concluded that a board's fiduciary duties prevent it from formally or effectively "abdicating" its statutory powers to manage and direct a corporation's business and affairs.¹⁰ For instance, other state regulators have invalidated arrangements that substantially remove directors from their duty to use their own best judgment on management matters.¹¹ Procedural or substantive bylaw amendments that *require*, rather than merely recommend, a board to take certain actions unlawfully prevent a board from acting in the corporation's best interests.¹² A board must exercise oversight, which could include the power to revoke delegated authority or otherwise intervene to retain a sufficient level of control necessary to exercise fiduciary duties.¹³ In the absence of any binding California law, in any challenge to a CAISO Board action there is no reason to assume that a California court would ignore these bedrock corporate common law governance issues.¹⁴

⁸ Cal. Corp. Code § 5231.

⁹ See CAISO Western EIM Review – Phase Three (EDAM), Governance Review Committee Revised Draft Final Proposal (Dec. 22, 2022), Appendix A at 53.

¹⁰ *Grimes v. Donald*, 1995 WL 54441, at *9 (Del. Ch. Jan. 11, 1995) (applying 8 Del. Code § 141 (corporations "shall be managed by or under the direction of a board of directors") and *In re Caremark Int'l* (Del. Ch. Sept. 25, 1996) 698 A.2d 959, 967); see also *Quickturn Design Systems, Inc. v. Shapiro* (Del. 1998) 721 A.2d 1281, *1291 (holding that a corporate board has statutory authority to manage a corporation and a "concomitant fiduciary duty pursuant to that statutory mandate.").

¹¹ *JPMorgan Chase & Co.*, 2015 WL 737682 (S.E.C. No-Action Letter Feb. 18, 2015) at *13; see also *In re Walt Disney Co.* (Del. Ch. May 28, 2003) 825 A.2d 275, 278 (holding that a board's abdication of all responsibility for involvement in actions or decisions of material importance to a corporation is equivalent to a failure to exercise business judgment and the according fiduciary duties.).

¹² *United Techs. Corp.*, 2015 WL 9460210, at *41-42 (S.E.C. No-Action Letter Jan. 19, 2016); see also *Amgen, Inc.*, 2024 WL 310514 (S.E.C. No-Action Letter Jan. 24, 2024) at *3-*4; *CA, Inc. v. AFSCME Employees Pension Plan* (Del. 2008) 953 A.2d 227, *238-*240; *Meta Platforms, Inc.*, 2024 WL 310503 (S.E.C. No-Action Letter Jan. 23, 2024) at *8 (holding that a bylaw mandating a substantive or procedural business decision must contain "an exception were the Board to determine that [taking the action] is not in the best interest of the Company [...] and therefore inconsistent with directors' fiduciary duties.").

¹³ *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996) (holding that "a sustained or systematic failure of the board to exercise oversight — such as an utter failure to attempt to assure a reasonable information and reporting system exists — will establish the lack of good faith that is a necessary condition to liability."); see also *Kanter v. Reed*, 92 Cal. App. 5th 191 (2023) (applying the *Caremark* standard to analysis of a claim alleging failure of board oversight).

¹⁴ See, e.g., *Understanding Fiduciary Duties in Business Entities* (Cal CEB) § 4.19 a; ABA Model Nonprofit Corp. Act, Official Comment 8-33.

3.3 CAISO's Statutory Responsibilities under Section 345.5

CAISO's responsibilities are further informed by Public Utilities Code Section 345.5(b). Like a corporate purpose articulated in a corporate charter, Section 345.5 requires CAISO to satisfy several broad requirements while ensuring the reliability of electric service and the health and safety of the public through its management of the "transmission grid and related energy markets."¹⁵ The Section 345.5 subsections generally outline CAISO's responsibility to balance the concerns of economic cost, environmental cost, and reliability.

3.4 CAISO-EIM Governance

It is relatively clear that the CAISO Board may delegate to a committee or a third party management of and decisions regarding the day-to-day operation over corporate functions. Such delegation, like the present arrangements with the EIM GB, is likely not an abdication of the Board's responsibility to maintain "ultimate direction" over energy markets related to the transmission grid because the Board maintains sufficient oversight and the power to intervene should circumstances require.

3.4.1 Status Quo: Board's Delegation of Authority to the EIM GB

CAISO expressly delegates certain authority to manage parts of the energy market to the EIM GB.¹⁶ The Board's delegated authority passes to the EIM GB's five members, who are selected by a Nominating Committee comprised of stakeholder representatives, subject to the EIM GB's approval.¹⁷ Presently, the EIM GB is given joint authority to approve or reject a proposal to change or establish a tariff within defined tariff sections relevant to the EIM.¹⁸ The EIM GB is given a somewhat lesser "advisory authority" over proposals to change or establish tariff rules that would apply to the real-time and/or day-ahead market, but that are not expressly within the scope of its joint authority.¹⁹

3.4.2 Status Quo: Resolution of Disputes Between Board and the EIM GB

The Board Bylaws and the EIM GB Charter contemplate that disagreements may arise over the joint management of CAISO's energy markets. Provisions for resolving disputes between the Board and the EIM GB apply when a proposed tariff rule falling within joint authority is not approved by both the EIM GB and the Board, when the EIM GB advises the Board not to adopt a proposal, and when the EIM GB objects to a decisional classification.²⁰

¹⁵ Cal. Pub. Util. Code §§ 345.5(b)(1)-(6).

¹⁶ CAISO Charter for Energy Imbalance Market Governance, Version 1.5 (Sep. 23, 2021) ("EIM Charter") at § 2.2.

¹⁷ CAISO Selection Policy for the EIM Governing Body, Version 1.2 (Jul. 15, 2021) at 2.

¹⁸ EIM Charter at § 2.2.1.

¹⁹ *Id.*

²⁰ *Id.* at § 2.2.2-4.

If the dispute resolution process fails to result in agreement between the two bodies, they can jointly decide to abandon the proposal or jointly agree, with input from CAISO management, on another remand to the dispute resolution process.²¹ Alternatively, the Board can exercise its ultimate authority to authorize a FERC filing over the EIM GB's objection if it determines unanimously that an exigent circumstance exists "such that a tariff amendment is critical to preserve reliability or to protect market integrity" and that the exigent circumstance "is so time critical" that "there is not sufficient time to develop and vote on a revised proposal" and thus requires immediate action.²² We have assumed that this present governance model is within the limits of California law.

Section 4 Preamble on FERC Regulation.

Section 201(b) of the FPA confers FERC jurisdiction over the transmission of electric energy in interstate commerce, sales of electric energy at wholesale in interstate commerce, and the facilities for such transmission or sale of electric energy. FPA section 201(e) defines the term "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the" FERC. Jurisdictional "facilities" may include tariffs, contracts, accounts, memoranda, papers, and other records, insofar as they are utilized in connection with wholesale sales.²³

Section 205(a) of the FPA charges FERC with ensuring that "rates and charges made, demanded or recovered by any public utility for or in connection with the transmission or sale of electric energy ... and all rules and regulations affecting or pertaining to such rates or charges [are] just and reasonable." FPA section 205(c) requires every public utility to file with FERC "schedules showing all rates and charges for any transmission or sale subject to [FERC] jurisdiction, and the classifications, practices, and regulations affecting such rates and charges together with all contracts which in any manner affect or relate to such rates, charges, classifications and services."

In Order No. 2000, FERC adopted minimum characteristics and functions for RTOs to enhance benefits from competitive electricity markets by encouraging development of independent regionally operated transmission grids. One of an RTO's minimum characteristics is that the RTO must have "independent and exclusive authority to propose changes in the rates, terms and conditions of transmission service provided over the facilities it operates."²⁴ To that end, FERC determined that "RTOs, in order to ensure their independence from market participants, must have the independent and exclusive right to make section 205 filings that apply to the rates, terms, and conditions of transmission services over the facilities operated by the RTO."²⁵ This general rule is subject to exception, however, as FERC concluded "it also is reasonable for the transmission owners to retain certain independent section 205 filing rights with respect to the

²¹ *Id.* at 2.2.2.

²² *Id.*

²³ See *Hartford Elec. Light Co.*, 131 F.2d 953, 961 (2nd Cir. 1942) ("*Hartford*"); *Golden Spread Elec. Coop.*, 39 FERC ¶61,322, at 62,022 (1987), *reh'g denied*, 40 FERC ¶61,348 (1987) ("*Golden Spread*").

²⁴ Order No. 2000 at 31,075.

²⁵ *Id.*

level of the revenue requirement that the transmission owners receive from the RTO and that the RTO, in turn, will collect from the transmission customers through its rates.”²⁶ FERC concluded that “the Commission will entertain other approaches as long as they ensure the independent authority of the RTO to seek changes in rates, terms or conditions of transmission service and the ability of transmission owners to protect the level of the revenue needed to recover the costs of their transmission facilities.”²⁷

Over time and across the different RTOs and ISOs in the United States, FERC has permitted certain utilities, committees, and other bodies to enjoy either the independent right to file changes to the RTO’s tariff under section 205, or the decision-making authority to direct the RTO to make a section 205 filing on their behalf. Generally, a structure that grants a separate legal entity with sole decision-making authority and section 205 filing rights over a portion of an RTO/ISO tariff exhibits more risk than a structure that grants primary, but not sole, rights, particularly where the rights that separate entity is granted are initially controversial with stakeholders. However, FERC has entertained a wide variety of structures allocating decision-making authority and section 205 filing rights in different ways. FERC places a premium on the RTO *voluntarily* agreeing to the proposed structure²⁸ and a clear delineation of rights and responsibilities between the RTO/ISO and separate entity.

Section 5 Analysis of Pathways Options

Option 0: *The EIM GB remains a chartered committee within CAISO (not a separate legal entity). CAISO retains market activities within its corporate scope and operates the market, and the CAISO tariff continues to house, and CAISO administers, the tariff rules applicable to the Energy Imbalance Market (“EIM”) and Extended Day Ahead Market (“EDAM”) (“Markets Rules”). CAISO delegates to the EIM GB primary authority to direct changes to Markets Rules, which are placed on the CAISO Board consent agenda. CAISO has sole FERC section 205 filing rights, which are used to (1) file EIM GB-directed changes if no disagreement, (2) file both EIM GB-directed changes and an alternate proposal proffered by the CAISO Board in the event of disagreement (a “jump ball” approach) in non-time-critical exigent circumstances, and (3) file unilateral changes at the direction of the CAISO Board only in time-critical exigent circumstances.*

- *CA Analysis.* Option 0 provides a low risk of violating California law.²⁹ The EIM GB has been a chartered committee within CAISO for nearly a decade, without legal challenge. Prior approved versions of the EIM GB Charter granted the EIM GB

²⁶ *Id.* at 31,075-76.

²⁷ *Id.* at 31,076.

²⁸ *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 122 FERC ¶ 61,283, at P 67 (2008).

²⁹ The CAISO bylaws presently require unanimous consent to unilaterally authorize a FERC filing in the case of exigent circumstances and an impasse between the Board and EIM GB. EIM Charter at § 2.2.1(i). We understand the launch committee is contemplating lowering the threshold to file unilateral changes to a simple Board majority. Such a change could arguably bolster Option 0’s likelihood of complying with California law because it would be easier for the Board to override an impasse with the EIM GB.

“primary authority” to make changes over the tariff sections over which it currently enjoys “joint authority.” And like the EIM GB delegation effective today, CAISO retains “ultimate direction” because any single Board member can pull a Markets Rule change from the consent agenda for discussion or a full vote, at any time.

The legality of Option 0 likely turns on whether the exigent circumstances exception (including the time critical provision) preserves sufficient control within the Board even in the case of a “jump ball.” Presently, the Board can prevent any proposed EIM GB tariff from being filed at FERC upon making a finding that an exigent circumstance exists. If the Board disagreed with the EIM GB’s proposal, the “jump ball” approach would transfer a certain amount of discretion away from the Board to the EIM GB and then to FERC. FERC must simply determine whether the proposed EIM GB tariff is “just and reasonable,” not whether it is in derogation of California or federal law (although, in certain limited circumstances, the Board may argue that the proposed EIM GB tariff might rise to that standard). A “jump ball” approach, without any additional safeguards, could be seen as limiting the Board’s ability to use its best judgment, unless there were a rare circumstance where the Board’s alternative would violate federal or state law. While the bylaws could conceivably be amended to accommodate such contingencies, they might be of little practical use.

- A modified “exigent circumstances” procedure could preserve the Board’s “ultimate direction” over CAISO’s affairs in the case of a jump ball filing. The EIM GB Charter presently allows CAISO to make an “exigent circumstances” FERC filing over the EIM GB’s objection in both time-critical and non-time-critical situations, and permits a statement reflecting the EIM GB’s position. Retaining exigent circumstances and time-critical exigent circumstances exceptions most likely satisfies the “ultimate direction” test.

FERC Analysis: Option 0 presents low FERC regulatory risk because FERC has accepted structures very similar to Option 0 in the past, and indeed has accepted structures that are more restrictive on an RTO/ISO’s ability to independently exercise its section 205 filing rights.

- ISO-New England (“ISO-NE”) uses a similar “jump ball” process as envisioned in Option 0. There, if the New England Power Pool (“NEPOOL”) supports an alternate proposal made at the ISO-NE Participants Committee, ISO-NE must include that alternate proposal in its section 205 filing of its preferred proposal, explain its reasons for not agreeing with the alternate proposal, and explain why its preferred proposal is superior.³⁰ In addition, ISO-NE has a unilateral right to file if necessary to address exigent circumstances.³¹
- Under the New York Independent System Operator (“NYISO”) tariff, NYISO holds section 205 filing rights over its open access transmission tariff (“OATT”) as well as

³⁰ ISO-NE Participants Agreement, Sections 11.1.4 to 11.1.5.

³¹ ISO-NE Transmission Operating Agreement, Section 3.04(c); *see also* Participants Agreement, Section 11.

- its market services tariff (among other agreements on file with FERC) but must obtain agreement from both the NYISO board and its Management Committee before exercising its section 205 filing rights to make any changes to those tariffs.³² NYISO does retain a limited ability to independently exercise its section 205 filing rights to address exigent circumstances, but any proposed changes submitted under this authority expire within 120 days after filing with FERC unless the Management Committee files a written concurrence within that period.³³ This structure is thus more restrictive on the RTO/ISO than Option 0.
- As applies to Southwest Power Pool (“SPP”), the SPP Bylaws confer upon the Regional State Committee (“RSC”) “primary responsibility” for determining regional proposals on certain topics, including, for example, financial transmission rights allocation, where a locational price methodology is used, as well as the “approach” for resource adequacy across the entire region.³⁴ To effectuate regional proposals for topics under its purview, RSC has authority to direct SPP to file such proposals that the RSC may develop from time to time.³⁵ SPP is not precluded from filing its own proposals, however, so in that sense the RSC “has primary, but not sole,” authority over filing rights within its scope.³⁶ In approving this arrangement, FERC noted certain disagreement among stakeholders regarding the appropriateness of the RSC having significant influence over the topics specified in the SPP Bylaws and concerns regarding the membership of the RSC (which did not include cooperative utility representation), ultimately emphasizing that SPP voluntarily agreed to file on behalf of the RSC.³⁷ The structure of granting the RSC “primary, but not sole” authority to direct SPP to use its section 205 rights to file an RSC proposal, while SPP retains unfettered rights to also file under section 205, balanced diverging stakeholder interests on this issue.
 - In regards to Midcontinent Independent System Operator (“MISO”), the Organization of MISO States (“OMS”) may request that MISO file for a new or amended regional cost allocation methodology provided under MISO’s tariff under certain circumstances.³⁸ Specifically, the OMS Committee, upon a majority vote by the Committee, may request that MISO file an amendment to establish a regional cost allocation methodology, provided that MISO first and independently makes a section 205 filing to amend existing cost allocation methodology.³⁹ Additionally, the OMS Committee may request that MISO (1) examine a change or changes in methodology, or (2) make minor technical and clarification Tariff changes, which MISO shall not

³² NYISO Agreement, Article 19.01; *see also* NYISO OATT, Section 2.10.

³³ *See* NYISO Agreement, Article 19.01.

³⁴ SPP Bylaws, Section 7.2.

³⁵ SPP Bylaws, Section 7.2.

³⁶ *Id.*; *see also* *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,010, at P 94 (2004).

³⁷ *Southwest Power Pool, Inc.*, 110 FERC ¶ 61,138, at P 33 (2005).

³⁸ MISO Transmission Owners Agreement, Appendix K, Section II.E.3.

³⁹ MISO Transmission Owners Agreement, Appendix K, Section II.E.3(a)(i).

- unreasonably deny, subject to the commencement of a stakeholder process.⁴⁰ If, upon completion of the stakeholder process, MISO decides to revise an existing methodology, but the OMS Committee disagrees with such change, MISO will submit the OMS Committee's alternative language and supporting documentation to FERC.⁴¹ Alternatively, if MISO determines it will not file any methodology changes, MISO will provide the OMS Committee with a written explanation of its decision not to file changes to the tariff.⁴² OMS's right to request that MISO file on its behalf does not supersede or abrogate MISO's existing 205 filing rights, and MISO may file its own independent proposals related to an existing cost allocation methodology.⁴³
- Similarly, when Entergy's operating companies were overseen by an Independent Coordinator of Transmission before Entergy joined the Midcontinent Independent System Operator ("MISO"), FERC accepted an attachment to Entergy's OATT that gave a committee of retail regulators the right, upon unanimous consent of its members, to direct Entergy to make a section 205 filing to change the terms and conditions that apply to cost allocation of transmission upgrades on a going-forward basis, change the time horizon used for cost allocation under base planning documents, as well as the authority to direct Entergy to add transmission projects to its transmission plan. Entergy retained the right to also make such section 205 filings.⁴⁴

Option 0.5: *The EIM GB remains a chartered committee within CAISO (not a separate legal entity). CAISO retains market activities within its corporate scope and operates the market, and the CAISO tariff continues to house, and CAISO administers, the Markets Rules. CAISO delegates to the EIM GB sole authority to direct CAISO to file changes to Markets Rules, with no remaining CAISO Board involvement.*

CA Analysis. Option 0.5 poses a higher risk under California law than Option 0 because the Board has no ability to contest or control any individual tariff filing options. The Board would have to maintain "ultimate direction" over its energy markets in some other way, through its ability to control the makeup of the EIM GB, through an exigent circumstances power, or through its power to revoke delegation of sole authority to the EIM GB.

- Opponents could characterize Option 0.5 as the Board abdicating its responsibility to manage energy markets because it lacks ultimate direction over how the EIM GB exercises its "sole authority" to implement CAISO tariff sections. The concept of "sole authority" could suggest that the Board has wrongly entrusted a piece of its

⁴⁰ MISO Transmission Owners Agreement, Appendix K, Section II.E.3(a)(ii).

⁴¹ MISO Transmission Owners Agreement, Appendix K, Section II.E.3(e).

⁴² *Id.*

⁴³ MISO Transmission Owners Agreement, Appendix K, Section II.E.3(a)(i) and (g).

⁴⁴ See *Entergy Arkansas, Inc.*, 133 FERC ¶ 61,211 (2010).

market to EIM GB members, none of whom have Board-like fiduciary duties to CAISO.

- On the other hand, CAISO could argue that it has simply delegated a small piece of its overall daily operation and management responsibilities to the EIM GB. CAISO could perhaps develop evidence that a “hands off” approach will entice more participants into the EIM/EDAM. If CAISO has a reasoned, good-faith belief that such an approach will further the goals of Section 345.5(b), the business judgment rule would likely shield Board members from individual liability. Personal liability aside, however, CAISO would still need to argue that it exercises “ultimate direction” over the future direction of energy markets because it has the ability to further modify the EIM GB Charter, alter the selection criteria for EIM GB members, revoke delegation, or otherwise change its governance to assert more control if EIM GB “sole authority” results in energy markets that fail to satisfy the Section 345.5 requirements. The question is whether the Board has retained sufficient control to properly exercise its fiduciary duties over a core corporate and statutory purpose.
- Option 0.5’s risks could potentially be mitigated by preserving a time-critical “exigent circumstances” right for the Board, similar to Option 0. An additional possibility could be to appoint a small number of Board Directors to serve as EIM GB observers to ensure that the Board retains sufficient visibility into how the EIM GB is exercising its sole authority, or to revoke delegation. These theories have not been tested under California law, however, and a time-critical “exigent circumstances” right cuts against EIM GB’s “sole right” to file tariff changes with no further CAISO Board involvement.

FERC Analysis: Option 0.5 poses a slightly higher FERC regulatory risk because this Option no longer affords the CAISO Board any voting authority or independent use of its section 205 rights with respect to the Markets Rules. Nonetheless, there is precedent found in PJM Interconnection L.L.C. (“PJM”) governance precedent, described below, for an approach similar to Option 0.5.

- In some cases, FERC has registered some discomfort with delegating sole authority to a committee or other body, especially where the delegate’s authority is contentious among stakeholders; for example, in approving RSC’s role within SPP, FERC “emphasize[d] that the RSC has primary, but not sole, responsibility for determining the proposals [within the RSC’s scope that are filed by SPP with FERC], to the extent that SPP also can file its own proposals.”⁴⁵ See discussion of the RSC’s role in SPP above with regard to Option 0.
- Nonetheless, there is precedent found in PJM for an approach similar to Option 0.5. PJM holds section 205 filing rights over its OATT.⁴⁶ However, PJM’s Operating Agreement reserves to its Members Committee the unilateral right to “make an

⁴⁵ *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,010, at P 94 (2004).

⁴⁶ PJM OATT, Section 9.2.

application to FERC for a change in any rate, charge, classification, tariff or service, or any rule or regulation related thereto, under section 205 of the [FPA]” and requires PJM to file with FERC on behalf of the Members Committee. Even if such revisions go hand-in-hand with revisions proposed by PJM to its OATT, a supermajority vote of the PJM Members Committee is required to set forth any amendments to the Operating Agreement in a filing with the Commission.⁴⁷ In the event a supermajority vote is not obtained, the PJM Board may only direct PJM to petition FERC to approve a proposed amendment to the Operating Agreement under FPA section 206; PJM has no vestigial section 205 filing right in that instance.⁴⁸ Noting in particular that these provisions would require PJM to use its section 205 rights to file a proposal it opposed, FERC commented that “[w]e see no general obligation for PJM to prejudge the legality of a particular filing before determining whether to make that filing either on behalf of the members or the PJM Transmission Owners. The onus of determining the legality of a filing falls on the Commission, and PJM’s evaluation of the merits of a filing should not operate to bar PJM from making a filing before the Commission from the PJM Transmission Owners or on behalf of the members.”⁴⁹

- The NYISO example cited with regard to Option 0 is also instructive here given the very limited and temporary authority NYISO has to independently change its market structures without Management Committee approval.

Option 1: *The EIM GB becomes a Regional Organization (“RO”), a separate legal entity. CAISO retains market activities within its corporate scope and operates the market, and the CAISO tariff continues to house, and CAISO administers, the Markets Rules. CAISO delegates to the RO primary authority to direct CAISO to exercise its Section 205 rights to file changes to Markets Rules, which are placed on the CAISO Board consent agenda. CAISO exercises these rights to (1) file the RO-directed changes if no disagreement, whether initially or following dispute resolution, (2) file both the RO-directed changes and an alternate proposal proffered by the CAISO Board of Governors in the event of an impasse (a “jump ball” approach) in non-time-critical exigent circumstances, and (3) file unilateral changes at the direction of the CAISO Board only in time-critical exigent circumstances.*

CA Analysis. Option 1 provides similar, if slightly higher, risks as Option 0. We assume for Option 1 the relationship between the Board and the RO will be governed by contract law, rather than by corporate governance bylaws and associated charters in Option 0.

- California law allows the Board to delegate a corporation’s management activities to any person, management company, or committee, however composed.⁵⁰ Whether such delegation occurs via committee or charter assignment in the bylaws, or with a

⁴⁷ PJM Operating Agreement, Section 8.4; see, e.g., *PJM Interconnection, L.L.C.*, Docket Nos. ER14-2705-000 and EL14-95-000, 149 FERC ¶61,091 (Oct. 13, 2014).

⁴⁸ *Id.* at Section 7.7(vi).

⁴⁹ *Duquesne Light Co. v. PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,052, at P 27 (2021).

⁵⁰ Cal. Corp. Code § 5210.

third-party contract, appears to make no difference for Section 5210, assuming the Board's fiduciary duties are otherwise met.

- We assume that CAISO and the RO would execute a Market Services Agreement detailing obligations and a scope of work that requires the RO to manage an energy market and requires CAISO to file RO-directed changes to the CAISO tariff. By contracting the management of the energy market to a third party, the Board could base its decision on evidence that a more independent approach to managing the market offers greater incentives and protections to market participants that will promote California's statutory goals.
- On the other hand, the present EIM GB is under the CAISO umbrella. While EIM GB members may not have fiduciary duties that run to CAISO, contracting with an RO would remove EIM/EDAM management even further from fiduciary duties and would for the first time place market management squarely outside the Board governance structure. CAISO may have an easier time accessing or controlling the dispute resolution mechanisms if they are contained entirely within its bylaws or charter, rather than introducing a bilateral contract that could require judicial intervention to enforce.

FERC Analysis: Option 1 has a similar FERC regulatory risk profile as Option 0. FERC has accepted approaches similar to Option 1 in the past, including where a separate legal entity holds the rights of the RO under this Option. *See, e.g.,* ISO-NE structure described briefly with regard to Option 0.

Option 2. *The EIM GB becomes an RO, a separate legal entity, and CAISO retains market activities within its corporate scope and operates the market. The CAISO tariff continues to house, and CAISO Administers, the Markets Rules. CAISO delegates or transfers to the RO the sole authority to direct CAISO to file changes related to Markets Rules, with no remaining CAISO Board involvement.*⁵¹

⁵¹ Option 2 (as well as Options 2.5, 3, and 4) present a scenario where FERC could determine that the public utility function has shifted from CAISO to the RO. While there is little FERC precedent addressing this issue in the context of shared filing rights over a tariff, there is a colorable argument that the RO is a "public utility" when it makes its own filings to change market rules pertaining to wholesale sales within FERC's jurisdiction. This raises a related question regarding accountability and which entity is subject to FERC's enforcement jurisdiction. While beyond the scope of this memo, CAISO may be able to shift accountability to the RO under contract law, and would likely be indemnified to the extent FERC exercised its enforcement authority against CAISO.

Assuming the vendor or service arrangements relevant to Options 2.5 and 3 (and possibly Option 2) are subject to contract law, the parties would have to agree on ownership of physical and intellectual property and execute the necessary licenses, consents, indemnities, and post the required bonding or credit support to satisfy the requirements of the multiple stakeholders involved in transacting and scheduling power in the Western electricity markets.

CA Analysis: Absent legislative change, Option 2 presents higher risks than Option 1, marginally lower risk than Option 2.5, lower risk than Option 3, and similar risks as Option 0.5 because the Board has a limited ability to contest or control any individual tariff filing options.

- As in Option 1, we assume that CAISO and the RO would execute a Market Services Agreement with similar obligations and scope of work, that could also provide remedies for the RO's breach of such obligations, including allowing CAISO to seek specific performance to force the RO to perform certain contractual obligations or to enjoin the RO from forcing a filing that could run contrary to Section 345.5 requirements. CAISO could argue that delegating or transferring near-exclusive operational and management control to a third-party entity would provide stakeholders a greater comfort that the energy market was being managed independently, thus attracting more market participants to further Section 345.5 goals. In addition, it could be argued that CAISO's ability to seek contractual remedies, including specific performance, provides CAISO with sufficient "ultimate direction" over the energy markets. Depending on the contract term, CAISO could argue that terminating (or not renewing) the contract preserves the Board's ability to exercise oversight of the "future direction and operation of the corporation."
- On the other hand, the present EIM GB is under the CAISO umbrella. While EIM GB members may not have fiduciary duties that run to CAISO, contracting with an RO would remove EIM/EDAM management even further from fiduciary duties. It is unclear whether the threat of equitable remedies, or whether a sufficiently short-term management contract, could truly act as "ultimate direction," particularly where courts may be reluctant to impose equitable remedies.
- There could be ways to mitigate certain risks of Option 2. These have not been proposed by the Launch Committee but are described here to assist in evaluating the legal risks of this Option. Besides retaining an "exigent circumstances" right in its bylaws and contract, it could be argued alternatively that contracting with a third-party RO provides the Board with slightly more control than implementing the EIM/EDAM through Board bylaws and the EIM Charter. The Board could insist on strong specific performance and other equitable remedies in the RO contract that would allow the Board to petition a court to block any RO tariff filings that breached particular requirements in the CAISO-RO contract. Furthermore, CAISO could build in certain conditions precedent to its filing obligations and refuse to file tariffs that failed to meet such conditions. These protections could be seen as more durable than unilateral decisions made under Board governance principles. Of course, each of these efforts to protect the Board's "ultimate direction" could be seen as reducing the RO's ability to act independently.

FERC Analysis: Option 2 presents greater FERC regulatory risk than Options 0, 0.5, 1, 3, and 4 because there are no precedents for delegating or transferring sole decision-making authority and section 205 filing rights over the tariff rules governing an RTO/ISO's entire energy market to a

separate legal entity, and the RO's sole authority over an element of CAISO's tariff raises similar potential concerns as Option 0.5. That said, FERC has accepted structures where separate legal entities have sole decision-making authority and section 205 filing rights over more targeted yet critical elements of an RTO/ISO's tariff, such as rates for transmission services, and FERC has not stated a limit or upper bound on the extent of a tariff over which a separate legal entity may have sole decision-making authority and section 205 filing rights. As explained below, Option 2 may also give rise to challenges under court precedent that limits the ability of state regulators to compel a utility to make a section 205 filing, though this precedent is distinguishable.⁵²

- The precedents for an option like this involve narrowly scoped unilateral section 205 filing rights. In many RTOs/ISOs, including PJM, NYISO, ISO-NE, and MISO, transmission owners have exclusive and unilateral filing rights to seek revisions to RTO/ISO tariffs governing their revenue requirements for transmission services.⁵³ However, these examples grew out of the initial creation of the RTO/ISOs, the *voluntary* transfer of control over participating transmission owners' transmission facilities to the RTO/ISO, and the associated desire of the transmission owners to retain some decision-making authority over the level of revenues they received from the transmission facilities they owned but no longer operated. In Order 2000, FERC stated “[w]e conclude that while the RTO must have independent and exclusive authority to propose changes in the rates, terms and conditions of transmission service provided over the facilities it operates, it also is reasonable for the transmission owners to retain certain independent section 205 filing rights with respect to the level of the revenue requirement that the transmission owners receive from the RTO and that the RTO, in turn, will collect from the transmission customers through its rates.”⁵⁴
- In similar examples, separate legal entities have decision-making authority over certain aspects of an RTO/ISO's tariff, and the sole authority to direct the RTO/ISO to use its section 205 filing rights with respect to those aspects of the tariff. For example, the NYISO tariff provides, with respect to public policy transmission needs, that if the New York Public Service Commission (“NYPSC”) “prescribes the use of a particular cost allocation and recovery methodology, then the [NY]ISO shall file that methodology with the Commission within 60 days of the issuance by the [NYPSC] of its identification of a Public Policy Transmission Need.”⁵⁵

⁵² *Mass v. US*, 729 F.2d 886 (1984).

⁵³ For example, in PJM, transmission owners have sole section 205 filing rights for the following areas: (i) transmission revenue requirement (Consolidated Transmission Owners Agreement (CTOA), Section 7.1.1); rates for transmission and ancillary services in its zone (CTOA, Section 7.1.3); regional transmission rates (CTOA, Section 7.2.1); the recovery of any other transmission-related cost incurred by a transmission owner (CTOA, Section 7.3.1); certain load determinations and obligations specific to several transmission owners (CTOA, Section 7.3.5); and measurable savings or efficiencies in power or ancillary services markets resulting from transmission facility construction, operations, or maintenance (incentive or performance based rates) (CTOA, Section 7.3.7).

⁵⁴ Order 2000 at 31,075-76.

⁵⁵ NYISO OATT, Attachment Y, Section 31.5.5.4.1.

- Option 2 may give rise to challenges under court precedent that limits the ability of state regulators to compel a utility to make a section 205 filing.⁵⁶ In *Mass. V. U.S.*, an electric utility sought FERC approval under section 205, at the direction of the Massachusetts Department of Public Utilities (“Massachusetts”), to change a rule which embodied a rate-setting practice to which Massachusetts objected. FERC rejected the proposed change “because it believed that [section 205] governs changes that the utility itself proposes, not those that a state regulator requires it to propose.”⁵⁷ Rather, if Massachusetts objected to a given rule, FERC concluded it should file a complaint under section 206. In affirming FERC’s decision, the First Circuit concluded that allowing regulator-compelled changes to a utility’s rules created “practical difficulties,” including the potential for conflicting rate practices in multistate service areas, as well as jurisdictional issues.⁵⁸ While that case is distinguishable because it involved issues of state encroachment on FERC’s exclusive jurisdiction that Option 2 would not give rise to, a party challenging this structure could try to use the general proposition that a third-party should not be allowed to compel a public utility to use its section 205 filing rights against its will to challenge a delegation or transfer of sole filing rights to an RO that dictates what CAISO may file with regard to the Market Rules, where the CAISO Board has no further involvement in deciding when and what to file.⁵⁹

Option 2.5. *The EIM GB becomes an RO, a separate legal entity, and CAISO transfers responsibility for market activities from its corporate scope to the RO. The CAISO tariff continues to house, and the CAISO administers, the Markets Rules pursuant to a Market Operating Agreement. The RO has independent section 205 filing rights and sole authority to propose and file changes related to Markets Rules with no remaining CAISO Board involvement.*

CA Analysis: Absent legislative change, Option 2.5 presents a marginally higher risk than Option 2 and Option 1, lower risk than Options 3 and 4, and similar risks as Option 0.5 because the Board has practically no ability to contest or control any individual tariff filing options.

- CAISO’s arguments about the potential benefits of giving the EIM near-exclusive operational and management control would remain the same as in Option 2.

⁵⁶ *Mass v. US*, 729 F.2d 886 (1984).

⁵⁷ *Id.* at 886.

⁵⁸ *Id.* at 888-89 (“For another thing, Massachusetts’ interpretation threatens confusion, possibly chaos. What is to prevent each state in a multistate service area from requiring the utility to file a different set of “reasonable” rate practices with FERC? Neither law nor economics can identify one unique set of rates or practices as “reasonable,” . . . , and each state would prefer a rate structure that benefitted its residents to the detriment of its neighbors. . . . FERC perhaps could sort out consequent confusions, but requiring it to do so has a procedural cost”)

⁵⁹ As we note under Option 2.5, California law interpreting Section 5210 has not distinguished a Board’s ability to delegate its authority from a Board’s ability to transfer its authority. Option 2 might involve either a near-complete delegation or a transfer of authority. Whether they are legally distinguishable depends on the scope of authority and responsibilities retained by the CAISO and may require further analysis.

- Option 2.5 retains the CAISO tariff and CAISO’s ability to administer the market tariff, which could theoretically mitigate concerns about entirely severing a CAISO role in EIM/EDAM with respect to the Board’s fiduciary duties.
- California law interpreting Section 5210 has not distinguished a Board’s ability to delegate its authority from a Board’s ability to transfer its authority. Despite the fact that both delegation and transfer as contemplated in these Options involve contractual agreements (a Market Services Agreement in Options 1 and 2, and a Market Operating Agreement in Options 2.5 and 3), a transfer of authority could be seen as riskier due to a perception that delegating authority inherently retains more control than transferring it (e.g., definitions of “delegate” refer to someone appointed or elected by a principal to carry out the principal’s orders). Given the Section 345.5 requirement that CAISO manage the energy markets and the Section 5210 requirement that CAISO retain ultimate direction over such management, Option 2.5 thus carries marginally more risk than Option 2. We note that Option 2 might involve either a near-complete delegation or a transfer of authority. Whether they are legally distinguishable depends on the scope of authority and responsibilities retained by the CAISO and may require further analysis.

FERC Analysis: Option 2.5 presents the same FERC regulatory risk as Option 2.

Option 3. *The EIM GB becomes an RO, a separate legal entity, and CAISO transfers responsibility for market activities from its corporate scope to the RO. The RO houses and administers the Markets Rules in a separate RO tariff. The RO has sole authority to make changes to the tariff and file the changes using its own 205 filing rights. The RO executes a Market Operating Agreement with CAISO to operate the market.*

CA Analysis: This analysis is similar to Option 2, but with a significantly higher risk. By placing the tariff within the RO and removing CAISO from the ministerial filing process entirely, the Board would remove nearly all of its direction over managing certain aspects of the California energy market. The Board would be subject to a Market Operating Agreement that would presumably limit CAISO’s discretion to manage energy markets consistent with its present statutory duties. CAISO would be a functionary, merely fulfilling the terms of a Market Operating Agreement to provide the day-to-day administration of the energy markets pursuant to the direction and discretion of the RO’s tariff.

FERC Analysis: Option 3 presents low FERC regulatory risk because the RO is its own separate legal entity with sole decision-making authority and section 205 filing rights over its own tariff containing the Markets Rules, and thus does not present the added risk inherent to “shared” authority (in the form of sole 205 rights) over separate parts of a single tariff in Options 2 and 2.5. The RO can strongly argue that it may file its own tariff under section 205 because the Markets Rules contain “rules and regulations affecting or pertaining to” rates for wholesale sales of electric energy, and the RO administers those Markets Rules. Moreover, once filed with

FERC, the RO's tariff becomes a "paper facility" with respect to which FERC has independent jurisdiction over the RO as a public utility under section 205.⁶⁰

Option 4. *The EIM GB becomes an RO, a separate legal entity; the RO houses the Markets Rules in a separate RO tariff over which the RO has sole 205 filing rights and operates the market. CAISO has no involvement with decision-making or administration of the RO tariff, nor with operating the energy market. An interface agreement of some sort may be required between the RO and CAISO.*

CA Analysis. Absent legislative change, Option 4 carries a high risk of noncompliance with California law because it removes entirely the Board from managing "related energy markets" in Section 345.5.

- This analysis is uncertain and difficult due to CAISO's longstanding efforts to establish and manage the EIM and EDAM. Option 4 essentially carves this function out of CAISO.
- CAISO's Articles of Incorporation state that, "The specific purpose of this corporation is to ensure efficient use and reliable operation of the electric transmission grid pursuant to the Statute." While the Articles mention only the "transmission grid" and not "energy markets," the "Statute" refers to Cal. Public Utilities Code Section 303, which generally promotes deregulated power markets. Moreover, Section 345.5 arguably requires CAISO to manage the energy markets related to the transmission grid, not simply manage them in a particular way if CAISO decides to manage them. There are good arguments that CAISO cannot simply ignore this function.

FERC Analysis: Option 4 presents the same FERC regulatory risk as Option 3.

⁶⁰ See, e.g., *Northwest Power Pool*, 182 FERC ¶ 61,063 (2023) (accepting tariff setting forth the framework for the Western Resource Adequacy Program ("WRAP") filed by an entity that was not independently a public utility under the FPA but became a public utility upon FERC's acceptance of the WRAP tariff); see also *Hartford*, 131 F.2d at 961; *Golden Spread*, 39 FERC ¶61,322, at 62,022.

EXHIBIT A

Option Comparison Table

	Status Quo	Option 0	Option 0.5	Option 1	Option 2	Option 2.5	Option 3	Option 4
New Corporate Entity	No	No	No	Yes (RO)	Yes (RO)	Yes (RO)	Yes (RO)	Yes (RO)
Market Rules Governance	Joint	EIM Primary	EIM Sole	RO Primary	RO Sole	RO Sole	RO Sole	RO Sole
CAISO Veto Rights (Market Rules)	Yes (sole filer; Exigent Circumstances)	Time-Critical Exigent Circumstances	Time-Critical Exigent Circumstances	Time-Critical Exigent Circumstances	No	No	No	No
205 Filing Legal Rights	CAISO	CAISO	CAISO	CAISO	RO Sole	RO Sole	RO Sole	RO Sole
Vesting of Authority	Delegation	Delegation	Delegation	Delegation	Delegation or Transfer	Transfer	Transfer	Transfer
Dispute Resolution Outcome	Single CAISO filing	CAISO files both EIM GB and Board proposals	CAISO files EIM GB proposal	CAISO files both EIM GB and Board proposals	N/A	N/A	N/A	N/A
Market Tariff Administration	CAISO	CAISO	CAISO	CAISO	CAISO	CAISO	RO Sole	RO Sole
Market Operation	CAISO	CAISO	CAISO	CAISO	CAISO	CAISO	CAISO	RO Sole
CAISO/RO Relationship	Tariffed	Tariffed	Tariffed	Tariff / Market Services Agreement	Tariff / Market Services Agreement	Tariff / Market Operating Agreement	Market Operating Agreement	None
CA Legal Risk								
FERC Legal Risk								