UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

KES Kingsburg, L.P.	)	Docket No. ER21-1816-000

MOTION TO INTERVENE AND PROTEST OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. §§ 385.212 and 385.214, the California Independent System Operator Corporation ("CAISO") hereby submits a motion to intervene and protest in response to the April 30, 2021 filing by KES Kingsburg, L.P. ("Kingsburg") of an unexecuted Reliability Must-Run Service Agreement between Kingsburg and the CAISO ("RMR Agreement"). The CAISO requests the Commission accept the RMR Agreement for filing, permit it to become effective on May 1, 2021, the date requested by Kingsburg, subject to refund, and set the filing for hearing and settlement procedures.

I. MOTION TO INTERVENE

The CAISO is a non-profit public benefit corporation organized under the laws of the State of California. The CAISO is the balancing authority responsible for the reliable operation of the electric grid comprising the transmission systems of a number of utilities. As part of its mandate to operate the electric grid, the CAISO's FERC-approved Tariff gives it the authority to designate units as necessary for reliability purposes and enter into reliability must-run agreements. Therefore, the CAISO has an interest in this proceeding that cannot be represented adequately by any other party, and it requests that the Commission permit it to intervene in this proceeding.

The CAISO requests that communications and notices concerning this motion and these proceedings be provided to:[1]

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II. BACKGROUND AND DESCRIPTION OF PROCEEDING

The CAISO is responsible for the reliability of the CAISO controlled grid. Reliability must-run agreements ("RMR Agreements") are among the tools the CAISO has to ensure reliability. In the event a resource needed for reliability submits a retirement or mothball notice, the CAISO has tariff authority to prevent resource retirement and require the resource owner to propose rates and terms for providing service under the CAISO's *pro forma* RMR Agreement. The Commission approved the CAISO's current *pro forma* RMR Agreement at the end of 2019.[2]

On April 30, 2021, Kingsburg submitted, pursuant to Section 205 of the Federal Power Act,[3] the unexecuted Agreement for Kingsburg's 34.5 MW natural gas-fired

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[1] These individuals are designated to receive service pursuant to Rule 203(b) (3) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.203(b)(3).

[2] *See California Independent System Operator Corp.*, 168 FERC ¶61,199 (2019) (order accepting tariff revisions).

[3] 16 U.S.C. § 824d.

facility (the "Facility"). It had historically operated as qualifying facility under the Public Utilities Regulatory Policies Act ("PURPA"), providing both power and steam. Thereafter, Kingsburg operated as a Utility Prescheduled Facility pursuant to a power purchase agreement ("PPA") with Pacific Gas & Electric Company ("PG&E") that was authorized and approved by the California Public Utilities Commission for combined heat and power resources following the end of the PURPA mandatory purchase requirement in California.

This post-PURPA PPA terminated on April 7, 2021. Prior to that date, on October 7, 2020, Kingsburg had notified the CAISO of the impending termination of the PPA and of its intent to retire the unit effective April 8, 2021. On March 24, 2021, the CAISO Board of Governors denied the retirement notice, approved the designation of the Facility as an RMR unit and instructed CAISO staff to negotiate an RMR Agreement with Kingsburg.[4]

In deciding to designate the Facility for RMR service, the CAISO followed the procedures specified in its Tariff, which involved conducting studies to determine whether absence of the Facility would create unacceptable reliability impacts. The CAISO found the Facility is required to meet 2021 system-wide reliability needs and there are no available alternatives for meeting these requirements.[5]

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4 http://www.caiso.com/Documents/Decision-Kingsbury-Cogen-Reliability-Must-Run-Designation-Presentation-Mar-2021.pdf; http://www.caiso.com/Documents/Agenda-Board-Governors-Meeting-Mar-24-25-2021.pdf; http://www.caiso.com/Documents/Decision-on-Kingsbury-Cogen-Reliability-Must-Run-Designation-Memo-Mar-2021.pdf.

5 *Id.*

There was insufficient time between the RMR designation date and Kingsburg's April 30, 2021 filing date for the CAISO and Kingsburg to reach agreement on Kingsburg's rates for providing RMR service. However, the performance requirements for an RMR unit are all clearly established elements of the *pro forma* RMR Agreement. Thus, the CAISO supported Kingsburg's filling of the unexecuted RMR Agreement so that service could commence on May 1, 2021, recognizing that the rates are in dispute and will have to be determined in this proceeding.

Because the parties could not agree on the rate and all of the terms of service proposed by Kingsburg and because the CPUC and load-serving entities responsible for bearing the costs of this facility also have an interest in this matter, the CAISO requests the Commission set Kingsburg's filing for hearing and establish settlement procedures so the parties can attempt to reach a final resolution on just and reasonable rates and terms for Kingsburg's provision of RMR service.

III. PROTEST

The CAISO supports Kingsburg's right to recover in rates the prudently incurred, reasonable costs of providing service under the RMR Agreement. However, the CAISO believes that certain elements of the rates Kingsburg filed may not be appropriate or warranted. More specifically, as set forth in greater detail below, the CAISO believes some elements of the Kingsburg rates are not justified, and it requires further information to make a determination with respect to other elements of the filing.[6]

A. Kingsburg Has Used an Inappropriate Historic Cost Year.

The RMR *pro forma* specifies that cost recovery is based on a specific historic Cost Year, a term which is defined in Schedule F of the RMR *pro forma*:[7]

> "Cost Year" means the twelve-month period ended June 30 to which this Formula is applied to determine the Annual Fixed Revenue Requirements and Variable O&M Rate for a Subject Resource to be applicable during the next succeeding calendar year.

Ignoring this plain directive, Kingsburg has chosen to use the calendar year of 2020 for its historic cost year, explaining that this was the most recent data was available, and therefore, it is "more appropriate" to use that data.[8]

Kingsburg does not argue that the calendar year costs it uses were more representative or that the Cost Year called for in the RMR *pro forma* would result in unrepresentative costs. To the contrary, Kingsburg argues 2020 calendar year costs are not representative, and it details a long list of adjustments to those costs that it says are necessary to reflect what it anticipates will be required for operation as an RMR unit.[9] Kingsburg also suggests "cost calculations under any future year RMR designation would revert to the pro forma 12-month period ending on June 30."[10] This means that

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6 In addition to the specifically identified items discussed herein, the CAISO will be seeking discovery to better understand certain other elements of Kingsburg's filing, including how Kingsburg calculated some of the values in its Schedule F submittal and the basis for its depreciation, and to obtain documentation to support some of the cost elements in the filing.

7 Kingsburg Filing, Attachment A, RMR Agreement, Schedule F, Part C Section 2.F (filed April 30, 2021).

8 Kingsburg Transmittal letter at 7.

9 *Id.* at 7 – 8.

10 *Id.* at 6.

costs for the period January 1 to June 30, 2020 would be used a second time for 2022 rates if Kingsburg continues as an RMR unit.

Nothing in the RMR *pro forma* supports this approach, particularly in view of the fact that Kingsburg acknowledges that its 2020 calendar year costs are not representative. In evaluating the reasonableness of a proposed departure from a Commission-approved *pro forma*, the Commission requires the proposed modification be "consistent with or superior to the Commission-approved *pro forma*."[11] Kingsburg has not shown its approach is either consistent with or superior to the *pro forma*, and thus Kingsburg should be held to the same historic Cost Year basis for its revenue requirement calculations that all other RMR units are.[12]

B. Kingsburg Has Not Adequately Justified Its Proposed Run Hours.

Kingsburg has arbitrarily based its revenue requirements on an assumption of 1,400 run hours, which it indicates is based on its 2015 operations. Its operations, maintenance, repairs and labor costs are all based on that assumption of 1,400 run hours.[13] Yet, Kingsburg has not explained how that assumption of hours or year of operation relates to likely RMR operations. As such, its choice has not been shown to be just and reasonable.

Running at an annualized rate of 1,400 hours translates to almost *4 hours a day every day* of the year. The CAISO does not expect this RMR unit to be called with

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11 *See* Pac. Gas & Elec. Co., 135 FERC ¶ 61094 (2011) (citing Clean Coalition March 23, 2011 Protest, Docket No. ER11-3004-000 at 8-9; IREC Protest at 8 (citing *e.g*., Order No. 2006, FERC Stats. & Regs. ¶ 31,180 at P 546; *Pac. Gas & Elec. Co*., 113 FERC ¶ 61,021, at P 1 (2005); *So. Cal. Edison Co*., 113 FERC ¶ 61,022, at P 5 (2005)).

12 The CAISO will need discovery to understand how Kingsburg's use of 2020 calendar year costs, with its claimed adjustments, affected its rates.

13 Kingsburg Transmittal letter at 8.

anything approaching that frequency. Moreover, Kingsburg asserted that the reliability studies that resulted in its designation as an RMR unit showed it was needed for reliability principally during peak summer demand.[14] In fact, the studies that supported the RMR designation for Kingsburg showed the reliability need was in the month of September, during times of high demand and low solar availability.[15] Of course, this study does not mean that Kingsburg will be called only during September or only when solar availability is low. And the CAISO cannot predict with certainty how many hours Kingsburg will be called in 2021. Nevertheless, the study provides a context within which Kingsburg's assumption it will have a run rate of 1,400 hours should be judged. Because on its face the assumption of 1,400 run hours seems excessive, the current record does not support the reasonableness of the costs Kingsburg has based on a 1,400-hour run rate.

Additionally, it is not just the assumed run hours that are a problem here. Kingsburg has adjusted its Cost Year fixed costs to account for additional costs for operations and maintenance, due to its assumption of 1,400 run hours. While it has claimed that these adjustments are for higher run hours, it has not provided justification for why such costs should be considered part of the annual fixed revenue requirement and not as variable costs, which can be recovered through bidding and dispatch in the CAISO market, based on actual operations. The CAISO will need additional

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[14] *Id.* at 3 – 4.

[15] Kingsburg Filing Attachment F, Attachment 1, 2021 Reliability during the net demand period.

information to determine what level and type of adjustments would be just and reasonable and why any such costs should be treated as fixed costs.

C. Kingsburg's Transition Cost Claims Are Not Just and Reasonable.

Kingsburg proposes to recover in its 2021 rates certain costs it labels "transition costs," including operational costs of $424,291 incurred between April 8, 2021 and April 30, 2021, poorly explained "outage costs" of $250,000 "needed to have plant perform reliable service," and legal and consulting costs of $300,000 associated with its RMR filing.[16] All told, these costs amount to just under $975,000. While the CAISO believes that at least some of these costs are ultimately recoverable, the RMR *pro forma* does not authorize recovery of "transition costs" as such.[17]

As explained above, under the RMR Agreement, cost recovery operates based on a historic Cost Year, the immediately prior period of July 1 to June 30. Reasonable plant costs for April 2021 and legal and regulatory costs associated with providing RMR service are recoverable under the Agreement. However, the costs that Kingsburg labels transition costs were or will be incurred after the end of the historic Cost Year. Thus, under the *pro forma* RMR Agreement, they are not recoverable until 2022 – as part of Cost Year costs that will form the basis for that year's rates.

Kingsburg argues it should recover these costs in 2021 because the CAISO may not extend the RMR Agreement for the Facility for 2022.[18] The CAISO acknowledges

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[16] Kingsburg Filing, Attachment G, Transition Costs tab.

[17] The CAISO will be seeking discovery as to what all of the transition costs were costs were for which Kingsburg seeks recovery, when they were incurred, and why it is appropriate to assess them as RMR costs at all given that they were incurred prior to the effective date of the RMR Agreement.

[18] Kingsburg Filing Statement at 10.

that these costs may have been incurred in connection with providing RMR service. Therefore, assuming the amounts for these costs are shown to be just and reasonable, if Kingsburg's RMR designation is not extended for 2022, the CAISO would be prepared, as part of a settlement agreement, to treat RMR-related costs in accordance with Section 2.5 of the RMR Agreement, *i.e.,* as part of a termination payment.[19] However, there is no justification under the *pro forma* RMR Agreement for recovery of those costs in 2021 under the label transition costs.

D. Kingsburg Is Not Entitled to Include an Asset Retirement Charge in RMR Rates

Kingsburg seeks to recover $71,611, the amount by which it estimates its retirement costs will increase during its RMR service. Neither the RMR Agreement nor any preceding RMR unit retirements within the history of CAISO operations support this charge.

The RMR Agreement does not allow recovery of asset retirement costs. The FERC Uniform System of Accounts recognizes this type of cost for standard utility rates. However, the RMR rate formula specifically narrows the recoverable cost categories to only those associated with providing RMR service.[20] Plant retirement charges are not associated with RMR service because the costs of plant retirement would have been incurred had the Facility never become an RMR unit. Kingsburg has presumably been accumulating an asset retirement account from the time it began

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19 To the extent these costs are not for capital items, and it appears most or all of them are not, the CAISO would support a lump sum termination payment to cover them, rather than the 36-month pay-out envisioned by Section 2.5 for unrecovered capital costs.

20 Schedule F, Section B, to the RMR Agreement identifies recoverable costs. *See* Kingsburg Filing, Attachment A.

operations in 1990. That account should grow enough during the period of RMR service to cover any increased costs associated with retirement. And Kingsburg merely speculates the Facility's retirement will occur after only eight months of RMR service.

E. Kingsburg Has Not Shown that Its Allocation of Administrative and General Overhead Costs to the Facility Is Just and Reasonable.

Kingsburg has included in its Annual Fixed Revenue Requirement costs for Administrative and General Overhead ("A&G") of $450,000. This assumes 100 percent of the time of each of a lawyer, an accountant and a human resources ("HR") person will be devoted to Kingsburg.[21] For a plant that will operate under an RMR Agreement and have staffing of only 10 people, these claimed costs appear to be excessive. Kingsburg's expert witness, Mr. Lovinger, offers explanations for why other FERC-approved formulas for A&G costs are not appropriate here.[22] But he does not adequately justify, or show a connection between, the $450,000 allocation Kingsburg incorporates in its cost formulas and the scope of the duties that will be required under the RMR Agreement.[23]

The CAISO agrees with Mr. Lovinger that some allocation of the parent costs for accounting, legal and HR services is appropriate, but those costs should reasonably relate to the services required to perform under the RMR Agreement. Kingsburg has separately charged the legal costs associated specifically with the RMR filing as "transition costs," as discussed above. With respect to HR, the CAISO acknowledges

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21 Attachment C to Kingsburg filing at 18.

22 Attachment C to Kingsburg filing at 16-19.

23 *See Transcontinental Gas Pipe Line Corp.*, 106 FERC ¶ 61, 299, 62, 136 (Mar. 26, 2004) (finding shippers failed to show a link between A&G costs and contract functions and citing the Commission's longstanding policy that there be significant relationship between A&G costs and specific functions of labor, labor related, plant, or plant related costs).

that some re-hiring was required to staff the plant adequately to meet the "must offer" obligation of an RMR unit, but Kingsburg has not demonstrated that charging the costs of a full-time HR person and a full-time accountant for the entire duration of the RMR Agreement is just and reasonable. Kingsburg must document the level of effort reasonably required to support RMR operations before its claimed A&G costs can be approved.[24]

F. Kingsburg's Adjustment to Its Depreciated Tax Basis May Not Be Just and Reasonable

Kingsburg explains through its expert, Mr. Lovinger, that Kingsburg has more remaining tax depreciation than book depreciation and, on that basis, Kingsburg has added $4,394,776 to rate base.[25] Without more information, the CAISO cannot determine whether Kingsburg's voluntary choice to depreciate its plant at a faster rate on its books than it was permitted to do for tax purposes – a choice it made presumably in its economic self-interest – can justify a significant upward adjustment of its rate base for RMR purposes. The CAISO recognizes that there are circumstances when an adjustment to rate base may be appropriate to take account of Accumulated Deferred Income Tax.[26] Here, however, Kingsburg's voluntarily chose to tie its depreciation rate to its PPA was unrelated to its subsequent designation as an RMR unit. It now seemingly seeks to effectively reverse course and impose the resulting cost burden on RMR ratepayers.

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24 *Id*.

25 Kingsburg Filing, Attachment C at 12 – 13.

26 Kingsburg Filing, Attachment A, Schedule F, section 3.

Further, the RMR Agreement specifies "ADIT is accumulated provision for deferred income taxes, as properly recorded in Accounts 190, 281, 282, 283, and 255, that are reasonably assignable or allocable to the investment in, or operation of, the Subject Resource." Here, however, Kingsburg has instead used a calculated value based on outstanding depreciation balances and current tax rates that do not reflect actual deferred income taxes properly recorded in allowed FERC accounts. Additionally, these balances do not appear to align with expectations for a facility at the end of its service life. Because Kingsburg has failed to provide an adequate justification for its adjustment to the depreciated tax basis of the Facility, its adjustment may be unjust and unreasonable. The CAISO will be seeking discovery on this issue.[27]

G. Kingsburg Has Not Established an Adequate Basis for Setting a Return on Equity Premised on a High Risk Associated with Providing RMR Service.

The CAISO will not comment on the specific return on equity that is appropriate for Kingsburg. However, the CAISO takes issue with Kingsburg's assertion that operation as an RMR unit represents a high risk, a risk higher than that for companies included in the proxy group described in the testimony of Mr. Haag.[28] Contrary to units that operate in the market, as an RMR unit, Kingsburg is assured it will recover all of its costs of providing RMR service – whether fixed or variable, whether for capital items or for expenses.[29] The RMR *pro forma* is designed specifically on a cost-of-

[27] *See Commonwealth Edison Co.,* 171 FERC ¶ 61,217 (2020) (on rehearing) (noting that the Commission had determined in *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,163, at PP 6-8 (2017) that BGE had failed to demonstrate that its proposed mechanism for recovery of previously incurred tax was just and reasonable and affirmed that decision).

[28] *See* Kingsburg Filing, Attachment D at 28 – 32.

[29] The RMR Agreement requires maintaining an RMR unit is accordance with good utility practice, and it includes provisions to cover the costs of doing so. Kingsburg Filing, Attachment A,

service model. It also includes provision for a return on undepreciated investment or for a management fee where an RMR unit has been fully depreciated.[30] While units operating in the market may have the opportunity to realize higher returns, they also face the risk market prices will not allow them to fully cover their costs and they will therefore lose money. Kingsburg faces no such risk. Thus, no ROE for Kingsburg's RMR operations should be premised on the theory RMR operations entail high risk.

IV. CONCLUSION

For the foregoing reasons, the CAISO requests that the Commission grant CAISO's motion to intervene, accept the Kingsburg RMR Agreement for filing, effective May 1, 2021, subject to refund, and set the matter for hearing and settlement procedures.

Respectfully submitted,

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May 21, 2021

RMR Agreement, Article 7. The CAISO does not know at this time whether the Facility will be required in 2022 and thereafter, but the obligation to maintain the Facility to assure its reliability exists in any event, and the costs it incurs in doing so are recoverable under the RMR Agreement.

[30] While both categories of costs are recoverable under the RMR Agreement, the CAISO needs additional information to judge whether the amounts Kingsburg proposes for a management fee and for Scheduling Coordinator charges are just and reasonable.

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of May 2021, caused to be served a copy of the forgoing Motion to intervene and Comments upon all parties listed on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

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