

171 FERC ¶ 61,080  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick, Bernard L. McNamee,  
and James P. Danly.

Marsh Landing LLC

Docket No. ER20-1074-001

ORDER ACCEPTING AND SUSPENDING BLACK START AGREEMENT,  
SUBJECT TO REFUND, AND ESTABLISHING HEARING AND SETTLEMENT  
JUDGE PROCEDURES

(Issued April 28, 2020)

1. On February 25, 2020, as amended on March 30, 2020, Marsh Landing LLC (Marsh Landing) filed, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> an executed agreement for Black Start Service<sup>2</sup> between Marsh Landing and the California Independent System Operator Corporation (CAISO) (Agreement).<sup>3</sup> In this order, we accept the Agreement, suspend it for a nominal period, to become effective April 26, 2020, as requested, subject to refund, and establish hearing and settlement judge procedures.

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<sup>1</sup> 16 U.S.C. § 824d (2018).

<sup>2</sup> Marsh Landing will provide black start capability, which “refers to the ability of a generating unit or station to begin operating and delivering electric power without external assistance from the electric system.” *Cal. Indep. Sys. Operator Corp.*, 161 FERC ¶ 61,116, at P 2 (2017) (CAISO 2017 Black Start Order).

<sup>3</sup> The Agreement is designated as Marsh Landing’s Rate Schedule No. 1. On March 30, 2020, Marsh Landing corrected an eTariff filing error by updating its tariff record so that the entire Agreement was available in eTariff. Marsh Landing March 30 Transmittal at 1.

## I. Background

2. In Order No. 749, the Commission approved North American Electric Reliability Corporation's (NERC) Reliability Standards that require each Transmission Operator to develop and implement a restoration plan approved by its Reliability Coordinator.<sup>4</sup> These reliability standards require CAISO to have a system restoration plan that provides black start capability.<sup>5</sup> Marsh Landing explains that, in 2016, CAISO conducted a review of its system restoration plan and determined that it needed additional black start capability to ensure adequate service restoration time in the San Francisco Bay Area. CAISO instituted an initiative to secure new black start capability for the Bay Area on a cost of service basis.<sup>6</sup>

3. Marsh Landing further explains that, prior to the CAISO 2017 Black Start Order, CAISO had been authorized to contract annually for black start services.<sup>7</sup> CAISO consolidated its black start authorities into section five of its tariff in 2017.<sup>8</sup> As part of that 2017 filing, CAISO proposed, and the Commission accepted, tariff revisions establishing provisions for technical requirements and performance testing for black start capability, designating the cost of procured black start capability as reliability services costs, and allocating the cost to the participating transmission owner in whose service area the black start generators are located.<sup>9</sup>

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<sup>4</sup> *Sys. Restoration Reliability Standards*, Order No. 749, 134 FERC ¶ 61,215, at P 1 (2011).

<sup>5</sup> The current reliability standards for System Restoration from Black Start Resources are described in NERC standard EOP-005-3 at: <https://www.nerc.com/pa/Stand/Reliability%20Standards/EOP-005-3.pdf>.

<sup>6</sup> Marsh Landing Transmittal at 2.

<sup>7</sup> See CAISO, eTariff, Procurement of Ancillary Services (8.0.0), § 8.3.1 (providing that, prior to being superseded on November 1, 2017, CAISO will “procure Black Start capability through individual contracts with Scheduling Coordinators for Reliability Must-Run Units and other Generating Units that have Black Start capability.”).

<sup>8</sup> See CAISO 2017 Black Start Order, 161 FERC ¶ 61,116 at PP 12, 17 (“CAISO states that these modifications do not change CAISO’s authority to contract for black start capability.”).

<sup>9</sup> *Id.* P 35.

4. In June 2017, CAISO issued a request for proposals for black start capability,<sup>10</sup> and received proposals from four prospective black start providers. One of the two projects selected through this process is the battery electric storage system (BESS) proposed by Marsh Landing.<sup>11</sup>

## II. Marsh Landing's Filing

5. Marsh Landing is an indirect, wholly owned subsidiary of Clearway Energy, Inc. (Clearway Energy). Marsh Landing states that it owns and operates an existing 760 MW natural gas-fired generating facility in Antioch, California (the Facility), which is directly interconnected to transmission facilities owned by Pacific Gas and Electric Company (PG&E).<sup>12</sup> According to Marsh Landing, the entire output of the Facility is committed to PG&E under a power purchase agreement (PPA) with a term through April 2023.

6. Marsh Landing proposes to install a custom designed and newly constructed lithium ion BESS at the site of the Facility. Marsh Landing states that the BESS will be capable of restarting either the Unit 3 or Unit 4 gas turbine located at the Facility, enabling energization of a dead 230 kV bus on the CAISO grid.<sup>13</sup> Marsh Landing further states that the BESS will be a seven MW battery, designed to allow at least three start attempts without requiring recharging, and installed with sufficient capacity to meet the minimum technical requirements for the Agreement's five-year term.<sup>14</sup> Lastly, Marsh Landing notes that the BESS is designed to remain fully charged in anticipation of a black start event and it is not designed to operate for any other purpose (i.e., it cannot and will not be used to offer energy or ancillary services into the CAISO market and will not be used to enhance the capability of Unit 3 or Unit 4 to offer energy or ancillary services into the CAISO market).<sup>15</sup>

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<sup>10</sup> CAISO Market Notice, *Black Start & Sys. Restoration Phase 2 Request for Proposal Final Documents Posted* (June 15, 2017), <http://www.caiso.com/Documents/BlackStart-SystemRestorationPhase2Request-ProposalFinalDocumentsPosted.html>.

<sup>11</sup> CAISO Comments at 7.

<sup>12</sup> Marsh Landing Transmittal at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.* at 3-4. Marsh Landing further asserts that there is no potential for double recovery because it will not provide any market-based service during the term of the

7. The Agreement requires Marsh Landing to demonstrate initial black start capability by completing a performance test<sup>16</sup> and by completing performance tests when requested by CAISO as needed to comply with NERC requirements, and to demonstrate that it is maintaining the capability to provide black start service.<sup>17</sup> The Agreement also provides that the parties shall each operate and maintain a 24-hour, seven days a week control center with real-time scheduling and control functions.<sup>18</sup> In addition, the Agreement provides that Marsh Landing must meet specified performance requirements throughout the five-year term of the Agreement.<sup>19</sup>

8. Marsh Landing states that the Agreement establishes the rates, terms, and conditions under which Marsh Landing will provide black start service for the five-year term.<sup>20</sup> Marsh Landing states that the total estimated investment cost to construct the Black Start project is approximately \$20.89 million,<sup>21</sup> which includes costs to supply and install the BESS and related equipment, sales tax, insurance and contingency, as well as costs related to design and engineering, permitting, site preparation, retrofits for certain motors to allow softer starts, related switchgear and certain limited control system modifications.<sup>22</sup> While Marsh Landing acknowledges that a number of these activities involve modifications to the existing Facility, it asserts that they serve no other purpose than enabling the operation of the BESS when required and would not be undertaken

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Agreement and the project does not include metering, controls, or other modifications necessary for CAISO market participation. *Id.* at 6-7.

<sup>16</sup> Agreement § 3.1.3.

<sup>17</sup> *Id.* § 5.2.

<sup>18</sup> *Id.* § 5.5.

<sup>19</sup> *Id.* § 4.2.

<sup>20</sup> Marsh Landing Transmittal at 4.

<sup>21</sup> *See* Marsh Landing Filing, Attachment B (Testimony of Dennis W. Bethel) at 7:19-7:22 (Bethel Testimony) (stating that most of the black start facility cost will be incurred under an engineering, procurement and construction contract with Siemens to supply the equipment and labor to construct and install the Black Start project).

<sup>22</sup> *Id.*

absent the Black Start project.<sup>23</sup> To recover the investment, plus a return thereon, Marsh Landing proposes to collect \$ \$6,572,609 million annually for five years.<sup>24</sup> Marsh Landing states that the Agreement's non-rate terms and conditions are identical in all material respects to that approved by the Commission in Docket No. ER19-2800-000, which addressed a similar agreement for black start service in the San Francisco Bay Area between CAISO and Russell City Energy Company, LLC.<sup>25</sup>

9. Marsh Landing proposes to recover the fixed costs of its investment through a fixed monthly charge included in Schedule 5 of the Agreement.<sup>26</sup> Marsh Landing states that the fixed costs include fixed O&M costs and capital investment costs. Marsh Landing explains that the O&M costs include estimated annual costs of: (1) maintaining the battery in a state of readiness to support at least three starts potentially over a three-hour period; (2) testing costs, maintenance costs, taxes, and cost attributed to supporting black start service; and (3) training and compliance costs reasonably incurred to enable efficient operation of the black start project, including costs to comply with NERC standards. Marsh Landing also states that the capital investment costs are based on actual amounts, or amounts estimated as of the execution date of the Agreement, as well as allowance for funds used during construction (AFUDC).<sup>27</sup>

10. Marsh Landing states that it has adopted a five-year depreciation rate for the entire black start project, which reflects the useful life of the project.<sup>28</sup> With regard to capital structure, Marsh Landing proposes using a 100% equity capital structure.<sup>29</sup> Marsh Landing notes that its parent, Clearway Energy, is providing an equity infusion into Marsh Landing for the sole purpose of making black start service available to CAISO, in order to make certain the Agreement ensures that PG&E retains all rights to the

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<sup>23</sup> Marsh Landing notes that ongoing operations and maintenance (O&M) costs of operating and maintaining the BESS will include the costs to acquire charging energy to operate the BESS and to meet training and NERC compliance requirements.

<sup>24</sup> Marsh Landing Filing, Attachment B, Ex. No. ML-3 at Part & Line No. E.

<sup>25</sup> Marsh Landing Transmittal at 5 (citing *Russell City Energy Co., LLC*, 169 FERC ¶ 61,193 (2019) (*Russell City Settlement*)).

<sup>26</sup> *Id.*; Agreement, Schedule 5, §§ 3, 5, Table 1.

<sup>27</sup> Marsh Landing Transmittal at 5 (citing 18 C.F.R. pt. 101, Electric Plant Instruction (17) (2019)).

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.* at 7.

scheduling and dispatch of the existing Facility under the PPA.<sup>30</sup> Marsh Landing recognizes that a 100% equity capital structure is atypical, but asserts that the Commission has recognized that an overly rigid approach to evaluating proposed capital structures could discourage development and is appropriate under these circumstances.<sup>31</sup>

11. Marsh Landing also proposes adopting a return on equity (ROE) of nine percent.<sup>32</sup> Marsh Landing asserts that Commission precedent would generally allow it to use the authorized return of the interconnected utility; however, PG&E does not have a Commission approved rate of return because its rates are based on a black box settlement, which do not specify an ROE.<sup>33</sup> Marsh Landing asserts that nine percent is reasonable because Marsh Landing faces risks greater than those faced by a typical independent power producer due to PG&E's bankruptcy and the possibility that its PPA may be rejected. Marsh Landing also states that other transmission owners have Commission-approved rates higher than nine percent.<sup>34</sup> Marsh Landing also states that the proposed nine percent ROE is based on a 100% equity capital structure, and so, if the Commission were to modify the capital structure to anything other than 100% equity, then Marsh Landing would need to adjust its ROE and adopt one higher based on an appropriate transmission owner proxy.<sup>35</sup>

12. Marsh Landing also proposes to assess a variable cost payment, calculated according to the formula in Schedule 5, which is the sum of a fired-hours charge, a fuel charge, an emissions charge, and equivalent start charge.<sup>36</sup> In addition, Marsh Landing states that the Agreement provides for a power plant outage cost reimbursement which is

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 8.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (citing *Pac. Gas & Elec. Co.*, 157 FERC ¶ 61,108 (2016)).

<sup>34</sup> *Id.* (citing *S. Cal. Edison Co.*, Offer of Settlement, Docket No. ER18-169-002 (filed Sept. 16, 2019)).

<sup>35</sup> *Id.* at 9.

<sup>36</sup> *Id.* See also Agreement § 3.12 (stating that these costs include the reasonable incremental operating costs, testing costs, and maintenance costs that can be attributed to supporting Black Start Service for a Black Start Generating Unit when Energy is not delivered to the CAISO Controlled Grid under a Black Start Instruction, and which would be recovered in the Variable Black Start Payment calculated as set forth in Schedule 5).

determined under a formula specified in Schedule 6 of the Agreement.<sup>37</sup> Moreover, Marsh Landing states that following a black start event, when Marsh Landing is delivering energy to the CAISO grid, Marsh Landing will receive all market revenues and other compensation payable under the CAISO Tariff, including payments of locational marginal price, payments of administrative prices for energy established by the CAISO, and all bid cost recovery payments (Market Revenues).<sup>38</sup> During these periods, Marsh Landing states, the variable cost payment under Schedule 5 would not be payable to Marsh Landing, except to the extent that Market Revenues are less than the Variable Cost Payment that would have been paid under Schedule 5. Thus, Marsh Landing states that the market revenue shortfall is recoverable by Marsh Landing under the Agreement.<sup>39</sup>

13. The Agreement allows for termination under several circumstances, such as: (1) by either party upon providing one-year's notice; (2) by Marsh Landing if the Commission sets the Agreement for hearing or settlement and the parties are not able to reach a mutually satisfactory settlement; (3) by Marsh Landing if it sells the Facility to a buyer to whom the Agreement will not be assigned; (4) by Marsh Landing if its permits or other governmental authorizations are terminated or modified such that it becomes illegal, uneconomical, or impractical to continue operation; (5) if Marsh Landing requests and CAISO allows retirement of the Facility; (6) in the event of an uncontrollable force that cannot be reasonably resolved by a remediation plan; and (7) by either party in the event of a default.<sup>40</sup> Once effective, the Agreement will remain in effect for five years and may be extended by CAISO, upon 180-days' notice prior to the end of the term, for up to an additional five years with rates, terms, and conditions for such an extension subject to future negotiations and approval by the Commission subject to FPA section 205.<sup>41</sup> Marsh Landing states that the Agreement will become effective when the Commission permits it to become effective with rates not subject to refund and without material modification or condition.<sup>42</sup>

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<sup>37</sup> Marsh Landing Transmittal at 10; *see also* Agreement, Schedule 6 (enumerating the Marsh Landing power plant outage cost reimbursement calculation as the verifiable costs incurred by Marsh Landing under its PPA, as a result of a Power Plant Outage).

<sup>38</sup> Marsh Landing Transmittal at 10.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 11; Agreement art. 2.

<sup>41</sup> Marsh Landing Transmittal at 10-11; Agreement § 2.2.

<sup>42</sup> Marsh Landing Transmittal at 10.

### III. Notice, Interventions, and Responsive Pleadings

14. Notice of the filing was published in the *Federal Register*, 85 Fed. Reg. 12,780 (Mar. 4, 2020), with interventions and comments due on or before March 17, 2020.<sup>43</sup> A notice of intervention and protest was filed by the California Public Utilities Commission (CPUC). Timely motions to intervene and comments were submitted by CAISO and PG&E. On March 31, 2020, CAISO and Marsh Landing submitted answers to CPUC's protest. On April 20, 2020, CPUC submitted an answer to the answers of Marsh Landing and CAISO.

15. CAISO and PG&E support the Agreement, commenting that additional black start capability will significantly improve system restoration capabilities in Northern California, especially in the San Francisco Bay Area.<sup>44</sup> CAISO states that currently, restoration times in the San Francisco Bay Area are twice as long as in Los Angeles and San Diego, and the black start service offered by Marsh Landing will dramatically reduce the time to restore service in the event of a widespread system outage.<sup>45</sup> CAISO explains that restoring the grid following an outage requires a controlled process that balances the addition of generation with the addition of load. CAISO states that this process can take a long time when a black start resource is located remotely from other resources or loads. In the case of the San Francisco Bay Area, CAISO states that restoration requires additional facilities to be restored prior to energizing a 230 kV electric bus on the backbone of the 230 kV substation loop within the San Francisco Bay Area, and that Marsh Landing's location near the 230 kV substation loop will greatly improve system restoration.<sup>46</sup>

16. CAISO and PG&E explain that CAISO engaged an independent evaluator to assist it in assessing the costs of equipment and labor required to install black start services.<sup>47</sup> According to CAISO and PG&E, the independent evaluator concluded that, although Marsh Landing's costs were higher than the nominal estimate it developed, the costs were within a reasonable range given the complexity of the project. CAISO and PG&E also

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<sup>43</sup> Notice of Marsh Landing's amendment was published in the *Federal Register*, 85 Fed. Reg. 19,466 (Apr. 7, 2020), with comments due on or before April 6, 2020. None were filed.

<sup>44</sup> CAISO Comments at 1, 5; PG&E Comments at 1.

<sup>45</sup> CAISO Comments at 6.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 9; PG&E Comments at 3.



note that the Agreement's rates, terms, and conditions of service are the result of extensive negotiations between CAISO, PG&E, and Marsh Landing.<sup>48</sup>

17. CPUC protests Marsh Landing's filing and requests that the Commission set it for hearing and settlement judge procedures. As an initial matter, CPUC argues that Marsh Landing's reliance on *Russell City* and the agreement that was approved in that proceeding is misplaced because that contract, as a product of a settlement, did not establish precedent.<sup>49</sup> CPUC argues that the Marsh Landing Agreement contains three problematic terms and conditions: (1) a 100% equity capital structure with a corresponding nine percent ROE; (2) a five-year depreciation schedule for all plant assets; and (3) an illusory contract extension term.<sup>50</sup>

18. CPUC's protest focuses on five main points.<sup>51</sup> First, CPUC argues that the Commission should reject Marsh Landing's proposed use of a 100% equity capital structure because it does not reflect the company's actual debt to equity ratio.<sup>52</sup> According to CPUC, the Commission's established policy with regard to capital structure is that a company may use its actual capital structure only if it "(1) issues its own debt without guarantees, (2) has its own bond rating, and (3) has a capital structure within the range of capital structures approved by the Commission."<sup>53</sup> If these requirements are not met, as CPUC argues is the case here, then CPUC asserts that the Commission will use the consolidated capital structure of the parent company or a hypothetical capital structure. Thus, CPUC claims that the Commission's three-pronged standard dictates that Marsh Landing either use its parent company's actual capital structure, i.e., 25% equity and 75% debt, or an appropriate hypothetical capital structure. CPUC asserts that a capital structure reflecting Clearway Energy's actual equity-debt capital structure would reduce the revenue requirement by \$3,056,640 over the five-year term of the Agreement.<sup>54</sup>

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<sup>48</sup> CAISO Comments at 1-2; PG&E Comments at 3.

<sup>49</sup> CPUC Protest at 3 (citing *Russell City Settlement*, 169 FERC ¶ 61,193 at P 4).

<sup>50</sup> *Id.* at 10, 12.

<sup>51</sup> *Id.* at 4-5.

<sup>52</sup> *Id.* at 13-20.

<sup>53</sup> *Id.* at 16 (quoting *Interstate & Intrastate Nat. Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, 162 FERC ¶ 61,226, at P 35 (2018)).

<sup>54</sup> *Id.* at 19.

19. Second, CPUC asserts that Marsh Landing is not entitled to an ROE higher than nine percent.<sup>55</sup> CPUC does not contest the requested ROE, but it opposes the possibility that Marsh Landing is entitled to an ROE above nine percent if the capital structure is modified. CPUC asserts that Marsh Landing's allegations of facing substantial risks are exaggerated because, unlike a typical independent power producer who receives revenues through markets, Marsh Landing would be receiving its revenues through cost-based rates.<sup>56</sup> CPUC argues that the Commission's rule that allows an independent power producer to use the ROE of its interconnected transmission utility as a proxy is grounded in the premise that the power producer faces greater risks because it relies on the markets to determine its revenues and has no guaranteed customers.<sup>57</sup> CPUC argues that before the Commission can permit Marsh Landing to adopt a proxy ROE, the Commission must assess whether the proxy utility's risk profile is dissimilar from Marsh Landing's risk profile.<sup>58</sup> CPUC also contends that Marsh Landing's reliance on ROEs established in Opinion No. 569<sup>59</sup> and settlements is inapposite because the former established an ROE based on data from several years ago and the latter is non-precedential.<sup>60</sup>

20. Third, CPUC argues that the Commission should reject Marsh Landing's proposed five-year depreciation schedule for all plant assets aside from the battery itself because it unjustly and unreasonably imputes a five-year service life to the majority of plant assets.<sup>61</sup> CPUC contends that the BESS facility is comprised of many other major components apart from the battery that would presumably have service lives longer than five years, including the inverter, the requisite software, and the enclosure.<sup>62</sup> Rather than cherry-picking a single component to determine the depreciation schedule, CPUC argues the BESS should be depreciated based on the average service life of all of the components taken together, allocating the service value of the entire asset, not just one

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<sup>55</sup> *Id.* at 20-25.

<sup>56</sup> *Id.* at 21.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 22.

<sup>59</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019).

<sup>60</sup> CPUC Protest at 23-24.

<sup>61</sup> *Id.* at 26-29.

<sup>62</sup> *Id.* at 26.

single component, over its service life.<sup>63</sup> CPUC also asserts that, given the substantial cost of the facility, the BESS should be operational for 10 years to ensure that PG&E's ratepayers get the appropriate value, and notes that the Agreement contemplates a five-year extension.<sup>64</sup> Thus, CPUC urges the Commission to adopt a schedule that depreciates the cost of the battery itself over a five-year term and depreciates the cost of the rest of the BESS components over a 10-year term.<sup>65</sup> CPUC states that if CAISO does not renew the Agreement at the end of the initial five-year term, the parties could modify the contract to provide that CAISO will make a lump sum payment to Marsh Landing consisting of the unamortized and undepreciated balance of the BESS net investment. CPUC believes that this could save ratepayers between approximately \$4.3 million to \$6.4 million during the initial five-year term.<sup>66</sup>

21. Fourth, CPUC argues that the Commission should reject the Agreement's contract extension option because it yields complete market power to Marsh Landing to negotiate a brand new agreement for a subsequent five-year term, although ratepayers would have already paid for the vast majority of plant assets needed to operate the black start facility by the end of the initial five-year term.<sup>67</sup> CPUC argues that CAISO's extension option is illusory because it would actually allow Marsh Landing to reject an extension "request."<sup>68</sup> CPUC proposes modifying the extension provision in the Agreement so that the Agreement may be renewed "for an additional five-year term at the *sole option* of CAISO, and that Marsh Landing may recover additional, prudently incurred costs-of-service, including any unamortized or undepreciated costs associated with the original investment, during the extended five-year term, subject to Commission approval."<sup>69</sup>

22. Fifth, CPUC argues that, given Marsh Landing's failure to include essential and rudimentary information necessary to review its rate filing, such as an explanation of why PG&E's ratepayers should invest in an unproven option for providing black start service or the cost of the most critical component of the project (i.e., the battery), the Commission should set this matter for hearing and allow discovery so that the

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<sup>63</sup> *Id.* at 27.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 28.

<sup>66</sup> *Id.* at 29.

<sup>67</sup> *Id.* at 29-33.

<sup>68</sup> *Id.* at 30 (citing Marsh Landing Transmittal at 7).

<sup>69</sup> *Id.* at 32-33.

Commission and stakeholders have an opportunity to assess whether Marsh Landing's application for rate recovery proposes to prudently incur project costs.<sup>70</sup> CPUC states that battery storage systems do not have a proven track record for operational reliability for black start services, and that recent studies demonstrate that batteries must be oversized in order to provide reliable black start service, with some studies demonstrating that a capacity equal to or greater than 10% of the capacity of the generator.<sup>71</sup> By comparison, CPUC notes that the Marsh Landing BESS capacity will be less than four percent of the generators it is designed to energize.<sup>72</sup> CPUC asserts that Marsh Landing has failed to identify the costs of key components of the BESS, including the inverter, battery cells, enclosure, and software.<sup>73</sup> CPUC states that this information is particularly relevant when designing the depreciation schedule for all plant assets, particularly when Marsh Landing is basing that schedule on a single component for which it has not provided the cost.<sup>74</sup> CPUC also raises issues regarding Marsh Landing's alleged O&M costs and states that CAISO should provide its technical consultant's cost analysis.<sup>75</sup>

23. On March 31, 2020, CAISO and Marsh Landing filed answers to CPUC's protest. Marsh Landing states that CPUC's protest (1) argues that Marsh Landing must justify the installation of the BESS and demonstrate that it is cost effective when compared to a more traditional technology, such as an on-site diesel generator; and (2) requests that the Commission require Marsh Landing to modify the Agreement to allow CAISO to extend it for another five-year term at its sole discretion.<sup>76</sup> Marsh Landing argues that neither is permissible under FPA section 205.<sup>77</sup> Marsh Landing also argues that CPUC's protests

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<sup>70</sup> *Id.* at 33-40.

<sup>71</sup> *Id.* at 35.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 36.

<sup>74</sup> *Id.* at 37.

<sup>75</sup> *Id.* at 38-39.

<sup>76</sup> Marsh Landing Answer at 2.

<sup>77</sup> *Id.* (citing 16 U.S.C. § 824d (2018); *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 115 (D.C. Cir. 2017)).

relating to the five-year depreciation schedule, capital structure, and ROE elements of the Agreement should be rejected.<sup>78</sup>

24. CAISO argues that Marsh Landing has designed a battery storage system capable of providing the needed black start capability.<sup>79</sup> CAISO further argues that CPUC's protest fails to acknowledge the risk associated with deploying black start service at the Facility, including development and operational risk.<sup>80</sup> CAISO also asserts that CPUC's proposed modifications to the depreciation schedule would create greater commercial risk. CAISO states that it continues to believe a straight-line depreciation schedule of the capital investment over the five-year term of the Agreement remains a commercially reasonable approach, as it recognizes that the BESS is an integrated set of components.<sup>81</sup> CAISO also objects to CPUC's characterization of Marsh Landing's market power.

25. On April 20, 2020, CPUC filed an answer to the answers submitted by Marsh Landing and CAISO. CPUC argues that the Agreement contains many of the same problematic terms as the agreement filed by Russell City,<sup>82</sup> and that Marsh Landing has not met its burden under section 205 of the FPA to show that the Agreement is just and reasonable.<sup>83</sup> Specifically, CPUC argues that Marsh Landing has not shown that the proposed 100% equity capital structure,<sup>84</sup> the Agreement's extension provision,<sup>85</sup> the proposed five-year depreciation schedule,<sup>86</sup> and capital costs for the Black Start project are just and reasonable.<sup>87</sup> Moreover, CPUC contends that Marsh Landing has not demonstrated that the project relies on proven technology or that it will be a cost-

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<sup>78</sup> *Id.* at 3, 7-16.

<sup>79</sup> CAISO Answer at 4-8.

<sup>80</sup> *Id.* at 8.

<sup>81</sup> *Id.* at 12.

<sup>82</sup> CPUC Answer at 3-6.

<sup>83</sup> *Id.* at 7-9.

<sup>84</sup> *Id.* at 9.

<sup>85</sup> *Id.* at 10-17.

<sup>86</sup> *Id.* at 19-34.

<sup>87</sup> *Id.* at 18, 34-39.

effective application of battery storage technology.<sup>88</sup> CPUC also asserts that, if Marsh Landing requests an ROE above nine percent, an evidentiary hearing will be necessary.<sup>89</sup> Finally, CPUC argues that Marsh Landing and CAISO mischaracterize CPUC's concerns about the project here as being inconsistent with CPUC's general support of battery storage projects.<sup>90</sup>

#### **IV. Discussion**

##### **A. Procedural Matters**

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept CAISO's, Marsh Landing's, and CPUC's answers because they have provided information that assisted us in our decision-making process.

##### **B. Substantive Matters**

28. Our preliminary analysis indicates that the proposed Agreement has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Specifically, Marsh Landing has not provided required justification for its proposed capital structure or ROE. Furthermore, Marsh Landing has not provided sufficient cost support underlying the proposed rates. For example, as CPUC points out, Marsh Landing's application fails to identify the costs of key components of the BESS, including the inverter, the battery cells, the enclosure, and the software. The design, construction, and installation of these components of the BESS are provided for in an engineering, procurement, and construction (EPC) contract.<sup>91</sup> However, as the filing fails to identify the cost of each of these components or to include the EPC contract in the record of this proceeding, it is not possible for the Commission to determine whether such costs are just and reasonable. Moreover, although Marsh Landing, CAISO, and PG&E represent that they exchanged information with CPUC during their negotiations of the Agreement, that information has not been submitted into

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<sup>88</sup> *Id.* at 39-42, 43-48.

<sup>89</sup> *Id.* at 48-50.

<sup>90</sup> *Id.* at 50-51.

<sup>91</sup> *See* Bethel Testimony at 7:19-7:22.

the record of this proceeding and therefore is not available to evaluate in determining whether the proposed rates are just and reasonable. Hence, we find that the filing raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Therefore, we accept the proposed Agreement for filing, suspend it for a nominal period, to become effective on April 26, 2020, as requested, subject to refund, and set it for hearing and settlement judge procedures.

29. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures commence. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>92</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.<sup>93</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) The proposed Agreement is hereby accepted for filing and suspended for a nominal period, to become effective April 26, 2020, as requested, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the proposed Agreement, as discussed in

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<sup>92</sup> 18 C.F.R. § 385.603 (2019).

<sup>93</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2019), the Chief Judge is hereby directed to appoint a settlement judge in this proceeding within 45 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five days of the date of this order.

(D) Within 30 days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within 15 days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426, or telephonically, as appropriate. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.