

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Mirant Delta, LLC ) Docket No. ER04-227-000  
Mirant Potrero, LLC )

**MOTION FOR LEAVE OF  
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION  
TO FILE REPLY AND REPLY TO MIRANT**

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.213 (2003), the California Independent System Operator Corporation (“ISO”) respectfully seeks leave to reply and submits this reply in opposition to the Answer of Mirant Delta, LLC and Mirant Potrero, LLC (collectively “Mirant”) in this proceeding.

**I. Motion for Leave to Reply to Mirant’s Answer**

The ISO requests leave to reply to Mirant’s unauthorized Answer. The Commission has permitted replies where, as here, they provide further explanation of the issues or otherwise help to ensure the existence of a full and complete record. <sup>1/</sup> By filing this Reply, the ISO seeks to provide useful and relevant information that will assist the Commission’s analysis in this proceeding. Mirant’s Answer to the Joint Provisional Protest mischaracterizes the RMR Agreement and, in contravention of the RMR Agreement, requests that the Commission direct the parties to use the ADR procedures provided for under the RMR Agreements. The

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<sup>1/</sup> See, e.g., Dominion Transmission, Inc., 105 FERC ¶ 61,173 (2003); New England Power Pool and ISO New England, Inc., 105 FERC ¶ 61,211 (2003); Bangor Hydro-Electric Co. et al., 96 FERC ¶ 61,063, at 61,256 (2001); and Pacific Gas & Elect. Co., 93 FERC ¶ 61,322 (2000).

ISO seeks leave to reply in order to clarify the facts and assist the Commission in reaching a decision in this proceeding. For these reasons, the ISO respectfully requests, for good cause shown, that the Commission waive Rule 213 of its regulations and accept the ISO's reply.

## II. Background

On November 25, 2003, Mirant filed, pursuant to Section 205 of the Federal Power Act ("FPA"), revisions to the Rate Schedules under its RMR Agreements with the ISO for Contract Year 2004 for Mirant's must-run generation facilities. <sup>2/</sup> Mirant's Section 205 Filing proposes a number of changes to the rate schedules for the RMR Agreements including the: (1) Air Emissions Limitations; (2) Contract Service Limits; (3) Hourly Availability Charges and Penalty Rates; (4) Capital Item Charges and Penalty Rates for the RMR; (5) Prepaid Start-up Costs; and (6) Outage Hours.

On December 16, 2003, the ISO, Pacific Gas and Electric Company, the California Electricity Oversight Board, and the California Public Utilities Commission (collectively the "California Parties") filed motions to intervene and a Joint Provisional Protest. The Joint Protest identified those portions of Mirant's Section 205 filing for which Mirant failed to provide adequate supporting data to justify or demonstrate the reasonableness of the proposed rate revisions. The

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<sup>2/</sup> Because the facilities covered by these agreements must operate at certain times for the reliability of the transmission grid, they are referred to as "reliability must-run" or RMR units and the agreements covering them are referred to as "RMR Agreements." Other capitalized terms that are not defined in this filing have the same meaning set forth in the RMR Agreements or in the Master Definitions Supplement, Appendix A to the ISO Tariff.

California Parties requested that the Commission either issue a deficiency letter requiring Mirant to file the requisite supporting data or accept the rate schedules for filing effective January 1, 2004, suspend the rate schedules subject to hearing, and hold the hearing in abeyance for 45 days to allow the parties time to informally resolve the protest issues.

### III. Answer

Mirant requests that the Commission accept the revised RMR rate schedule for filing, suspend the rate schedules subject to refund and direct the parties to utilize the ADR procedures provided for in the RMR Agreements. <sup>3/</sup> Mirant's requested relief is contrary to the RMR Agreement and the Commission's regulations. Specifically, Mirant has mischaracterized the ADR provisions of the RMR Agreements. Schedule K of the RMR Agreement governing dispute resolutions does provide in § 1.1 that "*except as limited below or otherwise as limited by law, these ADR Procedures shall apply to (a) all disputes between parties which arise under this Agreement. . . .*" The referenced limitation applies to § 205 proceedings pending before the Commission. In particular, § 1.1.2 of Schedule K provides: "Schedule K [dispute resolution procedures] *shall not apply to disputes as to whether rates and charges under the [RMR] Agreement are just and reasonable under the Federal Power Act except as provided in Schedule F.*" [Emphasis added.]

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<sup>3/</sup> Mirant Answer at 3.

The only exception provided for in Schedule F is inapplicable to Mirant's § 205 Filing in this case. <sup>4/</sup>

Mirant's proffered justification for using the ADR process is that it is the course of action taken with respect to Mirant's 2003 RMR filing in Docket No. ER03-215. <sup>5/</sup> The protracted and yet unresolved settlement process in Docket ER03-215 underscores why § 205 rate proceedings are explicitly excluded from the RMR ADR process and left to the Commission's jurisdiction.

In Mirant's 2003 RMR filing, Mirant requested that the Commission direct the parties to resolve any disputes through the ADR process citing to § 1.1 of the RMR Agreement, the same incomplete cite Mirant uses in its Answer. The Commission accepted Mirant's representation of the RMR Agreement's ADR procedures and directed the parties to address the "limited contested issues" <sup>6/</sup> raised by protestors in Docket No. ER03-215 pursuant to the RMR Agreement's ADR process. <sup>7/</sup> One year later, the result is a yet unresolved Section 205

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<sup>4/</sup> Schedule F provides: "Protests to the Information Package challenging arithmetic calculations or conformity to the Rate Formula, not resolved by summary disposition of the FERC, shall be resolved by the use of the Alternative Dispute Resolution procedures in Schedule K of the RMR contract." First, this exception applies to Schedule F Informational Filings not revisions to rate schedules filed with the Commission pursuant to § 205, as is Mirant's case. Second, the ADR procedures are available only if the Commission does not resolve Schedule F Informational Filing disputes. This exception does not apply to this case.

<sup>5/</sup> Mirant Answer at 2.

<sup>6/</sup> The issues raised by the California Parties in the 2003 RMR filing, namely Mirant's failure to provide adequate supporting documentation to justify proposed rate revisions, continue to plague the ISO with respect to Mirant's RMR filing as they are the same concerns the California Parties have with the 2004 RMR filing.

<sup>7/</sup> Mirant Delta, LLC and Mirant Potrero, LLC, 102 FERC ¶ 61,040 at P 15 (2003).

proceeding. It is never in the public interest for parties to engage in protracted proceedings over rate changes which are in effect but subject to refund.

The Commission's regulations, 18 C.F.R. Part 35, plainly set forth the appropriate process in § 205 cases and should be applied to this case. Section 35.5 states that a rate filing that fails to comply with Part 35 may be rejected by the Commission. 8/ Where the Commission's preliminary analysis indicated that the proposed revised rate schedules have not been shown to be just and reasonable, the Commission sets the matter for hearing. 9/ The Commission may hold the hearing in abeyance in order to provide the parties with the opportunity to resolve the matters at issue among themselves, or may appoint a settlement judge pursuant to Rule 603 of the Commission's Rules of Practice and Procedure. 10/ Given Mirant's position in its Answer, the ISO believes it would be beneficial for the Commission to direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules.

#### **IV. Conclusion**

For the foregoing reasons, the ISO respectfully request that the Commission (i) grant it leave to file this Reply to Mirant's Answer; (ii) reject Mirant's unjustified proposal to resolve the contested issues in this proceeding using the ADR process set forth in the RMR Agreement; and (iii) grant the relief requested by the California Parties in their Joint Provisional Protest dated

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8/ 18 C.F.R. § 35.5(b).

9/ See, Section 205 and 206 of the Federal Power Act, and the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act, 18 C.F.R. Chapter I.

10/ 18 C.F.R. § 385.603 (2003).

December 16, 2003; specifically, issue a deficiency letter requiring Mirant to file supporting data in a compliance filing within fifteen (15) days of the issuance of the deficiency letter; or in the alternative, rule that the rate schedules set forth in Mirant's filing have not been shown to be just and reasonable; suspend the rate schedules subject to hearing, establish a refund date equal to the proposed effective date, January 1, 2004, and hold the hearing in abeyance for forty-five (45) days and direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules to assist the parties in concluding a settlement.

Dated: January 8, 2004

Respectfully submitted

/s/ Mary Anne Sullivan

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## CERTIFICATE OF SERVICE

I hereby certify that I have this 8<sup>th</sup> day of January, 2004 caused to be served a copy of the forgoing Motion For Leave Of California Independent System Operator Corporation To File Reply And Reply To Mirant upon all parties listed on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in these proceedings.

/s/ Karin L. Larson  
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