UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Mirant Delta, LLC,	)	
Mirant Potrero, LLC,	)	
	)	
v.	)	**Docket No. EL01-35-000**
	)	
California Independent System Operator Corporation	)	

ANSWER OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION TO COMPLAINT AND REQUEST FOR FAST-TRACK PROCESSING OF MIRANT DELTA, LLC AND MIRANT POTRERO, LLC

I. INTRODUCTION AND SUMMARY

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. §§ 385.213 (2000) and the Commission's February 8, 2001 Notice of Complaint, the California Independent System Operator Corporation ("ISO")[1] hereby submits its Answer to the Complaint and Request for Fast-Track Processing ("Complaint") filed by Mirant Delta, LLC, and Mirant Potrero, LLC, (collectively, "Mirant") on February 6, 2001. For the reasons described below, the Commission should find that the Complaint is unfounded and should be dismissed.

The Complaint is largely an untimely and collateral attack on Amendment No. 36 to the ISO Tariff. As such, the Complaint is mooted by the Commission's recent Order in Docket Nos. ER01-889 *et al.* accepting Amendment No. 36 in

[1] Capitalized terms not otherwise defined herein are defined in the Master Definitions Supplement, Appendix A to the ISO Tariff.

part. Issues related to Amendment No. 36 are more properly raised in the Commission proceeding concerning Amendment No. 36.

In the Complaint, Mirant requests that it be excused from its obligations under both the Participating Generator Agreements that it has signed and the ISO Tariff. This request is based in part on the ISO's request for waiver of the notice requirement in implementing Amendment No. 36 -- a request that the Commission has since approved. Mirant claims that the responsibilities of generation owners that have chosen to become Participating Generators are somehow contingent upon the ISO not filing to amend the provisions of the ISO Tariff governing the credit requirements for entities that submit forward transmission schedules to the ISO. The ISO is permitted to make unilateral filings under Section 19 of the ISO Tariff. The written obligation of Participating Generators to comply with the applicable provisions of the ISO Tariff is an obligation to comply with those provisions as they are amended from time to time. Moreover, Mirant neither has acknowledged, nor made any effort to avail itself of the prescribed termination right under the Participating Generator Agreements. In the meantime, Mirant continues to enjoy all the benefits of a Participating Generator, including the ability to have energy from its generators scheduled over the ISO Controlled Grid. Mirant thus attempts to avoid its obligations as a Participating Generator without foregoing any of the associated benefits. The Commission must reject this attempt.

Mirant further claims that the ISO has failed to enforce the payment obligations under the ISO Tariff and that, as a result, it will be "difficult, if not

impossible, for Mirant and other sellers" to obtain payment for Energy provided to serve Load in California. Mirant identifies no specific Tariff provisions related to payment that the ISO has failed to enforce. The ISO has, in fact, satisfied all of its obligations related to payment and payment defaults. Under the ISO Tariff, as well as general principles of agency law, it is Mirant and the other sellers of Energy that have the right to institute actions or proceedings against a Scheduling Coordinator that has defaulted on payments due under an ISO-issued settlement invoice. Mirant and the other sellers have chosen not to exercise these rights to date. It is completely inappropriate for Mirant to request that the Commission impose a new requirement on the ISO to enforce rights that Mirant itself has chosen not to exercise.

Lastly, Mirant requests a variety of remedies based on the fact that the California legislature has recently restructured the ISO's Governing Board. Mirant ignores the fact the ISO is currently preparing revised bylaws, reflecting the composition of the reconstituted Board, to be filed at FERC and that the ISO has invited public comments on the proposed bylaw changes prior to their final adoption and filing with the Commission. The Complaint is therefore premature. Moreover, the remedies sought by Mirant in the "governance" portion of the Complaint are highly inappropriate and are largely unrelated to the ISO's governance structure.

II. ANSWER

A. The ISO's Implementation of Modified Scheduling Coordinator Credit Provisions As Proposed in Amendment No. 36 Was Justified And Has Been Accepted By the Commission

The bulk of Mirant's Complaint is nothing more than an expansion of Mirant's protest of Amendment No. 36 to the ISO Tariff. Mirant has had a full opportunity to raise its concerns with that amendment in Docket No. ER01-889, and there is no justification for allowing Mirant to re-litigate issues related to Amendment No. 36 in the instant proceeding.

The ISO submitted Amendment No. 36 to the Commission on January 4, 2001, after it became apparent that the financial well-being of Southern California Edison Company ("SCE") and Pacific Gas and Electric Company ("PG&E") was deteriorating rapidly. A downgrade in the credit rating of those companies, and of the California Power Exchange ("PX"), which represented SCE and PG&E as a Scheduling Coordinator (and whose financial well-being in this capacity is linked to that of SCE and PG&E), was inevitable. Under Section 2.2.7.3 of the ISO Tariff, such a downgrade would preclude the ISO from accepting any advance transmission schedules submitted by the Scheduling Coordinators representing those entities, unless the Scheduling Coordinator in question first posted financial security in accordance with Section 2.2.3.2.[2] As of January 5, 2001, such security for the PX, as Scheduling Coordinator for SCE and PG&E,

[2] Section 2.2.3.2 provides in relevant part that a Scheduling Coordinator, Utility Distribution Company, or Metered Subsystem that does not maintain an Approved Credit Rating "shall be subject to the limitations on trading set out in Section 2.2.7.3" of the ISO Tariff. Under Section 2.2.7.3, the only limitations on trading concern the ability of such entities to have their schedules accepted by the ISO.

would have exceeded $2.25 billion, an amount far in excess of the amount that the PX could have provided, either alone or with the support of both SCE and PG&E.

Since the ISO, as Control Area operator for the Service Areas of SCE and PG&E, remains responsible for ensuring that there is sufficient Energy in real-time to serve the Load associated with the customers of SCE and PG&E, the ISO was concerned that the inability of SCE and PG&E to forward schedule with the ISO would seriously threaten the reliability of the California electric grid. In Amendment No. 36, the ISO therefore proposed to waive temporarily the restriction on forward scheduling if these entities were unable to satisfy the creditworthiness provisions of its Tariff in order to allow SCE and PG&E to continue to schedule with the ISO during an interim period while these utilities and the State of California undertook various efforts to improve their financial status. Due to the grave circumstances precipitating the filing of Amendment No. 36, the ISO requested waiver of the Commission's prior notice requirement so that the ISO would be permitted immediately to implement the procedures proposed therein.

Pursuant to the Commission's Notice of Filing issued on January 9, 2001, comments, protests and interventions concerning Amendment No. 36 were due by January 25, 2001. On January 23, 2001, Mirant filed its Motion to Intervene and Protest concerning Amendment No. 36 in Docket No. ER01-889 (hereafter "Protest"). Many of the arguments in that Protest were later included, verbatim in some instances, in the Complaint that gives rise to the instant proceeding, which

was submitted more than two weeks after the deadline for comments or protests on Amendment No. 36.

On February 14, 2001, the Commission issued its "Order Addressing Creditworthiness Tariff Provisions" in Docket Nos. ER01-889 *et al.*[3] In the February 14 Order, the Commission accepted Amendment No. 36 insofar as it applies to the ability of SCE and PG&E to self-schedule their own resources and found good cause to grant limited waiver of the Commission's notice requirements. The February 14 Order also discussed the concerns raised by Mirant and others about the need to ensure that financial protections are in place for suppliers of Energy and rejected Amendment No. 36 to the extent that it would permit the ISO to accept schedules that include Energy provided by third-party suppliers that have not received adequate assurances of payment. The February 14 Order requires the ISO to submit a compliance filing. Nowhere in the February 14 Order did the Commission alter or condition the ISO's ability to issue emergency dispatch instructions to balance the system in real-time.

As noted above, Mirant's Complaint is simply an expanded and more vehement version of its Protest of Amendment No. 36. Mirant even concedes as much in the Complaint itself.[4] The Commission has already addressed the main arguments raised by the Complaint in its February 14 Order. If Mirant were permitted to raise these arguments again in a separate proceeding simply

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[3] *California Independent System Operator Corp., et al.*, 94 FERC ¶ 61,132 (2001) ("February 14 Order").

[4] *See, e.g.,* Complaint at 12 n.24 ("In its initial protest in this docket, Mirant took a more moderate position towards Amendment No. 36 in an effort to provide PG&E, Edison, and the ISO the opportunity to reach a solution to these credit problems. Such a result, however, does not appear to be forthcoming and, thus, Mirant believes that more directed assistance by the Commission is now warranted.").

because Mirant has re-styled its Protest as a "complaint," the Commission would be opening itself to a flood of similar "complaints" that would challenge the finality of the Commission's orders in any contested proceeding.

The primary remedy sought in Mirant's Complaint is "for the Commission to restore the prior Tariff provisions [relating to Scheduling Coordinator credit requirements] and mandate their application to all market participants." Complaint at 12. The requested remedy is contrary to the Commission's partial acceptance of Amendment No. 36 in the February 14 Order. Mirant has the opportunity to challenge the Commission's decision through a request for rehearing of that order, but Mirant should not be permitted a "second bite at the apple" in the instant proceeding. In fact, Mirant has already chosen to respond to the Commission's February 14 Order in Docket Nos. ER01-889 *et al.*. On February 22, 2001, Mirant joined with a number of other "California Generators" in a Request for an Emergency Order related to the February 14 Order filed in that proceeding. The ISO is preparing a separate response to that Request.

The Complaint makes much of the ISO's "unilateral action" in implementing Amendment No. 36 and argues that it "would be unconscionable for the Commission to grant the waiver requested in the ISO's filing and permit it [sic] implement these waivers of credit provisions prior to any Commission action on this matter." Complaint at 11-12. The ISO recognizes that implementation of a Section 205 filing prior to Commission acceptance for filing is not to be taken lightly, but the Commission has allowed system operators to do just that in the

past when emergency circumstances justified such actions.[5] By approving Amendment No. 36 to become effective, in part, as of January 4, 2001, the Commission has already agreed that circumstances in California warranted the ISO's request for such a waiver. In the February 14 Order, the Commission was even kind enough to "commend the ISO for striving to meet its primary obligation, ensuring system reliability, during times of severe electrical supply and financial instability in the California market." February 14 Order, slip op. at 10.

Mirant argues in the Complaint that "the ISO's action to waive the security provisions of its tariff prior to Commission approval violates the Filed Rate Doctrine." Complaint at 10. This claim is inconsistent with Commission precedent. As noted above, the Commission has on a number of occasions permitted the implementation of Tariff revisions prior to issuance of an order on those revisions without violating the Filed Rate Doctrine. In fact, Mirant's only argument as to how the "Filed Rate Doctrine" applies to this circumstance is the following statement: "Entities subject to the Commission's jurisdiction can operate only under tariffs filed with and accepted by the Commission," which is followed by a footnote citation to two cases related to that doctrine: Complaint at 11. The exact same statement is included in Mirant's Protest of Amendment No. 36, only without the footnote or reference to the "Filed Rate Doctrine." Mirant Protest at 6. Substantively, there is no difference between the arguments in the

[5] *See, e.g.*, *California Independent System Operator Corp.*, 88 FERC ¶ 61,146 (1999) (waiving prior notice requirements in order to allow the ISO to implement market rules relating to Congestion Management two days after the date of filing); *ISO New England, Inc.*, 88 FERC ¶ 61,304 (1999) (granting petitioner's request for waiver of prior notice requirements in order to permit the petitioner to implement emergency measures as of the day after filing); *ISO New England, Inc.*, et al., 89 FERC ¶ 61,211 (1999) (granting petitioner's request for waiver of prior notice requirements in order to allow revisions to market rules to take effect prior to date of filing).

Complaint and the ones in the Protest – these are arguments that the Commission has already acted upon in the February 14 Order.

Mirant's claim that the ISO's immediate implementation of Amendment No. 36 is contrary to Section 19 of the ISO Tariff is similarly groundless. As Mirant acknowledges in the Complaint, Section 19 provides that "[a]ny amendment or other modification or any provision of this ISO Tariff . . . shall be effective upon the date it is permitted to become effective by FERC." This provision in no way precludes the possibility that the effective date approved by the Commission may be prior to the date of a Commission order on a proposed Tariff revision.

Mirant's Complaint also includes arguments that the Commission should require that some form of alternative credit support mechanism be developed. Mirant raised the same issue in its Protest of Amendment No. 36 and the issue was addressed in the February 14 Order. Mirant has already received full consideration of its arguments on this issue, and the Commission need not and should not consider them further in the instant proceeding.

B. Mirant Must Comply With the ISO Tariff and Its Participating Generator Agreements

In the Complaint, Mirant argues that, if the ISO engages in actions that constitute a "material breach" of the ISO Tariff and/or the Participating Generator Agreements ("PGAs"), "Mirant would not be required to perform under the ISO Tariff and the PGAs, and the ISO Tariff and the PGAs would not be enforceable against Mirant." Complaint at 12. The specific breach alleged by Mirant is the ISO's "failure" to comply with the credit provisions of the ISO Tariff. There is no

basis for this allegation since the ISO has complied with all such provisions of the Tariff and has also complied with Commission procedures for modifying such provisions. Even if the ISO had failed to enforce the credit provisions of the ISO Tariff, however, such an action would not excuse Mirant from its obligations as a Participating Generator.

Mirant claims that enforcement of the pre-Amendment No. 36 Scheduling Coordinator credit provisions of the ISO Tariff would protect Participating Generators from the consequences associated with the deteriorating financial status of SCE and PG&E. Such is not the case. Since SCE and PG&E, or their Scheduling Coordinator, would have been unable to satisfy the credit requirements for Scheduling Coordinators, the ISO would have been precluded from accepting schedules from these entities prior to implementation of Amendment No. 36. This would only have exacerbated the need for the ISO to procure Energy at the last moment to serve California Load in real-time. As the Commission has recognized many times, most recently in the February 14 Order, the ISO's "primary obligation [is] ensuring system reliability." This obligation includes the responsibility to take all necessary steps to "keep the lights on," *i.e.*,

to prevent blacking out end-use customers in the ISO's Control Area, including the Service Areas of SCE and PG&E.[6]

One of the primary obligations of Participating Generators under the ISO Tariff and the PGA is to comply with ISO emergency dispatch instructions "when a System Emergency is imminent or threatened." *See* Section 5.6.1 of the ISO Tariff. This obligation is completely unrelated to the Scheduling Coordinator credit provisions of the Tariff. Had the ISO not implemented Amendment No. 36, the need for emergency dispatch instructions, and therefore the potential burden on Participating Generators, would have been even greater. The Commission recognized as much in the February 14 Order:

> . . . the unresolved creditworthiness issues relate to the UDCs' residual load that is served through the ISO's imbalance energy market. Under current conditions, there is a bid insufficiency in the ISO's energy imbalance market causing the ISO to issue emergency dispatch instructions in order to meet this residual load and balance the system.

February 14 Order, slip op. at 13.

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[6] Specifically, the ISO is obligated to comply with applicable reliability criteria established by the North American Electric Reliability Council ("NERC") and the Western System Coordinating Council ("WSCC"). For example, Section 2.3.1.1.6 of the ISO Tariff states that the ISO should be WSCC security coordinator for the ISO Controlled Grid. Section 2.1 of the Dispatch Protocol of the ISO Tariff provides that the ISO shall exercise control in compliance with all Applicable Reliability Criteria including the standards established by NERC and the WSCC. The NERC Operating Manual states in Policy 5 on Insufficient Generating Capacity that "[a] Control Area anticipating an operating capacity emergency shall bring on all available generation, postpone equipment maintenance, schedule interchange purchases well in advance, and prepare to reduce load." Under a heading called "Requirements," the control area is to use generation and transmission facilities "to the fullest extent practicable" and only if "all other steps prove inadequate" should the control area implement manual load shedding. The WSCC Minimum Operating Reliability Criteria (MORC) provide on page 8 that "[c]ontinuity of service to load is the primary objective of the Minimum Operating Reliability Criteria. In MORC Section 5 on Emergency Operations under part C on insufficient generating capacity it states that a control area is considered deficient when (1) all available generating capacity is loaded, (2) all operating reserve is utilized, (3) all interruptible load and interruptible exports have been interrupted, (4) all emergency assistance from other control areas is fully utilized and Area Control Exchange is negative and cannot be returned to zero in the next ten minutes -- in this case "it will be necessary to shed firm load without delay."

The responsibilities and associated rights of Participating Generators are well defined in both the ISO Tariff and the Participating Generator Agreements, both of which have been filed with and accepted by the Commission. Section 5 of the ISO Tariff provides that:

> The ISO shall not be obligated to accept Schedules or Adjustment Bids or bids for Ancillary Services relating to Generation from any Generating Unit interconnected to the ISO Controlled Grid unless the relevant Generator undertakes in writing to the ISO to comply with all applicable provisions of this ISO Tariff *as they may be amended from time to time.* [emphasis added]

Thus, execution of a Participating Generator Agreement and compliance with the terms of that agreement and the ISO Tariff are a Commission-mandated requirement for a generator to schedule Energy over the ISO Controlled Grid or to participate in the ISO's markets. Mirant and all other Participating Generators are well aware of this requirement. Section 4.2 of the Participating Generator Agreement also makes it clear that Participating Generators are subject to the terms of the ISO Tariff. All entities that signed PGAs with the ISO did so with full awareness of these requirements and of the ISO's unilateral right to file to modify the Tariff from time to time. Nonetheless, they choose to willingly enter into these agreements and obligations in order to enjoy the benefits and opportunities afforded to Participating Generators.

There is no provision in the ISO Tariff or the Participating Generator Agreement that suggests that any breach (or an alleged breach) by one party to the Agreement automatically excuses the obligations of another party to the Agreement. In fact, the Participating Generator Agreement clearly sets forth the steps that must be taken if a Participating Generator wishes to be relieved of its

obligations under the PGA and the Tariff. If Mirant truly believes that Amendment No. 36 has so fundamentally altered its risks that it no longer wishes to participate in the ISO's markets or schedule transactions on the ISO Controlled Grid, then it can file to seek permission to terminate the Participating Generator Agreement. Section 3.2.2 of the PGA provides that in the event that Mirant no longer wishes to participate in the ISO's markets, "it may terminate this Agreement, on giving the ISO ninety (90) days written notice . . . With respect to any notice of termination given pursuant to this Section, the ISO must file a timely notice of termination with FERC. . . . This Agreement shall terminate upon acceptance by FERC of such notice of termination." The 90 day notice period, which the Commission has approved in its acceptance of the *pro forma* Participating Generator Agreement[7] and the PGAs with Mirant, is necessary because the ISO relies on its rights to call on Participating Generators during Emergency conditions to satisfy its obligations to maintain system reliability.

Mirant has not chosen to take the steps necessary to seek termination of its PGAs with the ISO. In fact, Mirant continues to exercise all of the rights which come only with being a Participating Generator – including the ability to schedule transactions over the ISO Controlled Grid.

The remedy that Mirant seeks in the Complaint is to be relieved of its obligations to comply with the ISO Tariff and the PGA while retaining all of the benefits associated with the PGA. While the ISO acknowledges the right of Mirant and other Participating Generators to file a complaint with respect to either

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[7] *California Independent System Operator Corp.*, 90 FERC ¶ 61,176 (2000).

the ISO Tariff or the PGA, such a complaint can only prevail if the complainant proves that the ISO has engaged in some unjust and unreasonable conduct. If this can be demonstrated, then the remedy sought must be consistent with the balance of rights and obligations between the ISO and the Participating Generator. Mirant does not come close to satisfying its initial burden to demonstrate that the ISO has acted improperly. The obligations imposed on Participating Generators, including the obligation to respond to emergency dispatch instructions, are nothing more than a *quid pro quo* for the benefits enjoyed by Participating Generators. Even if Mirant had satisfied its initial burden, the remedy proposed by Mirant is far too one-sided to be justified under any circumstances.

C. The ISO Has Fulfilled Its Obligations With Respect to Payment Defaults and Mirant Has Failed to Exercise Its Rights To Seek Recovery Of Outstanding Amounts Owed To It By ISO Debtors

Mirant claims that the "ISO's failure to enforce the payment obligations under its tariff" while holding Participating Generators to their obligations under the ISO Tariff constitutes an "arbitrary administration of the tariff." Complaint at 13, 14. "Even-handed, non-discriminatory application of the tariff is critical in this instance and the Commission should so order." *Id.* at 14. Tellingly, Mirant identifies no specific Tariff provisions related to payment that the ISO has failed to enforce.[8] Not only has the ISO satisfied all applicable provisions of the ISO

[8] Insofar as the ISO's alleged "failure" to enforce the ISO Tariff relates solely to the modification of the Scheduling Coordinator credit provisions in Amendment No. 36, the Commission has already addressed this issue and supported the ISO's actions in its February 14 Order.

Tariff related to payment and payment defaults, it has taken great pains to inform all Market Participants of its efforts in this regard.

As Mirant notes in the Complaint, a number of Scheduling Coordinators, including the PX as Scheduling Coordinator for SCE and PG&E, defaulted on payments due to the ISO on February 2, 2001 under ISO market invoices. Complaint at 6. Section 11 of the ISO Tariff and the Tariff's Settlement and Billing Protocol set forth specific steps that the ISO must take in the event a Scheduling Coordinator defaults on a payment due to the ISO. These steps include *pro rata* payments to all ISO Creditors based on the payments the ISO did receive and funds available in the ISO's Reserve Account. On February 2, hours after the default, the ISO provided all Market Participants with a Market Notice which included details on the payment default, excerpts from the applicable provisions of the Tariff, and an explanation of the steps the ISO had taken in compliance with these provisions ("February 2 Notice"). This notice is provided as Attachment A to this Answer. The following week, the ISO received additional payments from parties that had defaulted on February 2. The ISO again disbursed these funds in accordance with the applicable provisions of the Settlement and Billing Protocol. A Market Notice detailing these steps was distributed on the following Monday, February 12, and is provided as Attachment B to this Answer.

The Complaint suggests that the ISO must take some undefined additional steps to collect the amounts owed by SCE and PG&E under ISO invoices. This suggestion ignores the fact that the ISO is a revenue-neutral, pass-through

entity. The ISO's responsibility is to ensure that sufficient Energy and related services are available to serve Load in California. The ISO undertakes this responsibility on behalf of Load-serving entities (*i.e.*, Scheduling Coordinators) in California, and the financial obligation to pay for such Energy and services rests with those Load-serving entities. The ISO also submits the bills for such Energy and services to the Load-serving entities on behalf of the suppliers of such Energy and services. The rights to pursue payment for such Energy and services rest with the suppliers. The ISO's role is that of an intermediary, acting as an agent for both the suppliers and the Load-serving entities.

The ISO Tariff explicitly recognizes this agency relationship. In the event of a default, the Tariff is designed to facilitate direct actions against an ISO Debtor by an ISO Creditor.[9] Thus, Section 11.20.2 of the Tariff provides that:

> The ISO shall, on request, certify in writing the amounts owed by an ISO Debtor that remain unpaid and the ISO Creditors to whom such amounts are owed and shall provide certified copies of the relevant Preliminary and Final Settlement Statements, invoices, and other documentation on which the ISO's certificate was based to the ISO Debtor and the relevant ISO Creditors. An ISO certificate given under this Section 11.20.2 may be used as prima facie evidence of the amount due by an ISO Debtor to ISO Creditors in any legal proceeding.

In the February 2 Notice provided as Attachment A to this Answer, all Market Participants were notified that the ISO is prepared to respond to any requests made under this provision. Since February 2, the ISO has provided

[9] A Scheduling Coordinator or Participating TO that is required to make payments pursuant to an ISO-issued invoice is defined as an "ISO Debtor" while a Scheduling Coordinator or Participating TO to whom such payments are ultimately due is defined as an "ISO Creditor."

such certifications to a number of parties requesting them. The only condition upon an ISO Creditor initiating actions or court proceedings against an ISO Debtor is the requirement in Section 11.19 of the Tariff that the ISO Creditor give prior notice of such efforts to the ISO.[10]

Nothing in the Complaint suggests that Mirant or other sellers have chosen to exercise their rights against defaulting Load-serving entities. The ISO does not suggest that Mirant or others should be required to do so. Given the tenuous financial situation of the California electric utilities, there may be quite valid reasons why suppliers have chosen not to bring legal action against Load-serving entities that are currently in default, but which may soon have the ability to cure that default. What is completely inappropriate, however, is for Mirant to request that the Commission impose a new requirement on the ISO to enforce the rights that Mirant itself has chosen not to exercise. There is no reason for the ISO to do anything other than what it has been doing to date – complying with the payment and default provisions of its Tariff.

Mirant suggests that the *pro rata* payments it has received to date for November invoices are "confiscatory." Complaint at 6-7. This statement is completely unsupported in light of the fact that Mirant has failed to avail itself of even its most basic legal remedies against the parties responsible for those payments. Moreover, Mirant's current situation lacks the fundamental criteria to

[10] Section 11.20.1 does provide the ISO with the *discretion* to bring proceedings against an ISO Debtor, but even under that provision the ISO would only do so "on behalf of those Scheduling Coordinators who have indicated to the ISO their willingness for the ISO first so to act" and then only if certain agreements related to indemnification of the ISO are reached with those Scheduling Coordinators.

constitute an uncompensated governmental taking. In this context, the United States Supreme Court has said:

> The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597, 17 S.Ct. 198, 205-206, 41 L.Ed. 560 (1896) (A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law"); FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 585, 62 S.Ct. 736, 742, 86 L.Ed. 1037 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense"); FPC v. Texaco Inc., 417 U.S. 380, 391-392, 94 S.Ct. 2315, 2392, 41 L.Ed.2d 141 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level"). If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.

Duquesne Light Co. v. Barasch, 488 U.S. 299, 307-08 (1989). First, in this instance, the Commission has not imposed confiscatory rates. Indeed, Mirant is authorized to sell at market-based rates. Mirant, however, has *chosen* to sell at those rates through the mechanisms provided in using the ISO Tariff, and in doing so has agreed to abide by the ISO Tariff, as it may be amended from time to time. Moreover, it is impossible to assert that subjecting Mirant to delayed payment, for a limited period, following a period in which Mirant and other Generators enjoyed unparalleled profits in the California markets,[11] is "so unjust as to *destroy* the value of [the] property for all the purposes for which it was acquired." *Id.* at 307 (emphasis added).

[11] According to the January 31, 2001, *Foster Electric Report*, Mirant's earnings increased by 36 percent during the past year.

Subject to the possibility that the Commission might order refunds, Mirant has a right to be paid those prices that it may enforce. As noted earlier, the ISO, upon request, is required to certify the amounts owed to an ISO Creditor and the certification may be used as *prima facie* evidence of amounts due in any legal proceeding. Thus, assuming Commission approval of the prices to be paid to Mirant, the issue is not whether Mirant should be paid, but when.

D. Mirant's Complaint Concerning Governance Is Premature and Provides No Justification For the Requested Remedies

At the end of its Complaint, Mirant argues that the ISO has failed to comply with the Commission's recent order concerning ISO Governance and further claims that various extraordinary remedies are justified as a result of this alleged failure. In its December 15, 2000 order in Docket Nos. EL00-95 *et al.*,[12] the Commission directed that the ISO Governing Board, then-organized as a 26-member stakeholder Board, be replaced by a new, non-stakeholder Governing Board. Specifically, the Commission mandated that the previous Board relinquish its decision-making power by January 29, 2001. The December 15 Order renders the ISO's existing bylaws that were inconsistent with the Order "null and void" as of that date.[13] The Commission also established a procedure involving consultation with State authorities to ensure that a new Governing Board be put into place by April 27, 2001.

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[12] *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange*, *et al.*, 93 FERC ¶ 61,294 (2000).

[13] The ISO has filed a request for rehearing and motion for stay related to this aspect of the December 15 Order. As noted in that request for rehearing, the ISO needs a duly constituted Board to be in place in order to comply with California corporations law and, therefore, any governance solution requires that the ISO be under the management of a Board of Directors.

As the Commission is aware, in late January the California legislature passed Assembly Bill 5X, which reconstituted the ISO Governing Board. The new Governing Board consists of five members appointed by the Governor and endorsed by the Electricity Oversight Board. On January 25, 2001, the previous stakeholder Board resigned their positions.

Mirant raises various issues related to the membership of the new Board as well as the process through which its membership was selected. These issues are entirely premature. The ISO's actions with respect to governance are consistent with the procedures and deadlines set forth in the December 15 Order. That order dictated that the previous stakeholder Board step down by January 29 of this year, and they have done so. That order also provided a period from January 29 through April 27 for a dialogue between the Commission and State representatives concerning the new Board. Thus, the December 15 Order contemplates a role for the State of California in determining the appropriate governance structure of the ISO. *See also* December 15 Order, C. Hébert concurring, slip op. at 5.

The ISO is currently preparing a revised version of its bylaws to reflect the recent State legislation. At the February 21, 2001 meeting of the reconstituted Governing Board, the new Board directed that a draft of these revised bylaws be made available for public review and comment. As required by the original bylaws, the ISO also issued a public notice on February 22, 2001 of its intention to modify the bylaws no sooner than 30 days after issuance of the notice. Mirant and all other interested parties will therefore have the opportunity to comment on

these revised bylaws. The ISO intends to file the revised bylaws with the Commission in advance of the April 27 deadline established by the December 15 Order.

Insofar as Mirant requests that the Commission take action with respect to the new Governing Board, there is no basis for such a request. Mirant must first participate in the bylaw review process before raising any concerns about governance or requesting Commission action.

There is also no justification for certain specific remedies requested in the "governance" section of the Complaint. For example, Mirant requests that the Commission "direct the Board to seek Commission *preapproval* for *any actions* undertaken pursuant to the ISO Tariff." Complaint at 17 (emphasis in original). This request is ridiculous on its face. Virtually every action the ISO takes every single day with respect to the ISO's Energy and Ancillary Services markets, the scheduling of transactions, and operation of the ISO Controlled Gird, *inter alia*, are "undertaken pursuant to the ISO Tariff." It would be an administrative impossibility for the ISO to request Commission pre-approval for each of these actions. In addition, the Commission has *already* approved actions undertaken pursuant to the ISO Tariff by approving the various provisions of the ISO Tariff over the years. The only legitimate concern would be with actions of the ISO that are *contrary* to the ISO Tariff, but Mirant does not suggest that the new Board or the ISO has undertaken such actions.

In an argument that is similarly absurd, Mirant claims that "the Commission should find that decisions by the ISO since these Board members

were appointed are voidable under applicable law; thus . . . the ISO's actions permit Mirant to withdraw from its PGAs." Complaint at 17. In other words, Mirant wants *every* decision made by the ISO in the past month to be voidable. There is no basis for such a claim. The Complaint includes no evidence that any specific decisions made by the ISO during that period are illegal, unreasonable or even inappropriate. The one decision that Mirant does take issue with elsewhere in the Complaint – the filing and implementation of Amendment No. 36 – was made prior to designation of the reconstituted Board and has since been approved in relevant part by the Commission. In addition, the December 15 Order explicitly contemplates that the ISO would be able to exercise decision-making power and operating control after the previous Board stepped down.

To the extent Mirant contends that it should be permitted to withdraw from its PGAs, it can seek permission to do so pursuant to the termination procedures discussed above.

In sum, Mirant has provided no justification for any of the remedies or Commission actions requested in the Complaint, and none of them should be granted.

III. COMMUNICATIONS

Communications regarding this docket should be sent to the following individuals, whose names should be entered on the official service list established by the Secretary for this proceeding:

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IV. CONCLUSION

For the foregoing reasons, the ISO respectfully requests that the Commission summarily dismiss the Complaint filed by Mirant in this proceeding.

Respectfully submitted,

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Dated: February 26, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all parties on the official service list compiled by the Secretary in the above-captioned proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Washington, DC this 26th day of February, 2001.

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Sean A. Atkins