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February 6, 2001

Hon. David P. Boergers, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

RE: *Mirant Delta, LLC and Mirant Potrero, LLC*
v. California Independent System Operator Corp.
Docket No. EL01-35-000

Dear Secretary Boergers:

Please accept for filing in the above-referenced dockets an original and 14 copies of the joint "Complaint and Request for Fast Track Processing of Mirant Delta, LLC and Mirant Potrero, LLC." Enclosed are two extra copies; please date/time stamp the same and provide them to the courier in attendance.

Any questions regarding this filing should be directed to the undersigned. Thank you for your cooperation regarding this matter.

Very Truly Yours,

James C. Beh

Attorney for Mirant Delta, LLC and
Mirant Potrero, LLC

Enclosures

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Mirant Delta, LLC, Mirant Potrero, LLC	)	
	)	Docket No. EL01-35-000
Complainants,	)	
v.	)	
California Independent System Operator Corporation,	)	Request for Fast Track Processing
Respondent.	)	

COMPLAINT AND REQUEST FOR FAST TRACK PROCESSING OF MIRANT DELTA, LLC AND MIRANT POTRERO, LLC

Pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. § 385.206 (2000), Mirant Delta, LLC and Mirant Potrero, LLC (collectively, "Mirant") respectfully submit this Complaint and Request for Fast Track Processing ("Complaint") against the California Independent System Operator Corporation ("ISO").

While Mirant continues to comply with a federal order to supply power to California despite the rapid deterioration in prospects for payment, it has been subjected to a series of actions of California state agencies that openly flout the exclusive authority of the Commission to regulate in the national interest and to treat energy producers and consumers fairly. By unilaterally implementing a tariff amendment removing all semblance of payment security in flagrant violation of the filed rate doctrine, the California agencies have effectively hijacked

Mirant's assets. The Commission must act with utmost expedition to protect and enforce its authority and jurisdiction and to restore fairness and stability to national energy policy and to efforts to resolve the power crisis in California.

I. SUMMARY OF ARGUMENT AND REQUESTS FOR RELIEF.

In response to the escalating power crisis in California, Mirant has continually made every effort, consistent with health and environmental safety, to keep its generation units on-line and available to meet the critical need for power. Moreover, Mirant has continued to deliver power at historically high availability levels notwithstanding the likelihood of non-payment from the California utilities which are the largest purchasers in the California market.

While Mirant is willing to do its fair share to meet the needs of the California marketplace, the commercial reality is that few other parties appear willing to do the same. Through its stubborn insistence to maintain retail rates at levels below 1996 levels, the California Public Utilities Commission ("CPUC") has made the deliberate choice not to require retail customers to pay the actual costs of wholesale power. Moreover, faced with the deteriorating credit quality of its largest purchasers, the ISO has chosen to ignore the provisions of its tariff that are intended to protect Mirant and other sellers from the obvious consequences of large-scale transactions with uncreditworthy buyers. Further, when the easily-foreseeable defaults occurred, the ISO's response was to issue demand letters to the non-defaulting parties requesting assurances that they would continue to perform without regard for the defaults and with no apparent mechanism for payment for their continuing service. Thus, the ISO is using its authority to order generators to sell into a market with absolutely no hope of being paid. It is wholly arbitrary and unreasonable for any seller to be compelled to continue to provide service indefinitely with no provision for payment, and it is all the more outrageous when the party

seeking to force such a result – in this case the ISO – is itself in material breach of its own obligations.

The relief sought by Mirant is simple. Through this Complaint, Mirant respectfully requests: (a) that it be required to sell wholesale power only on commercially reasonable terms that provide for adequate assurances of payment; (b) that the Commission order the ISO not to change its rates unilaterally in violation of the Filed Rate Doctrine; and (c) that the Commission require that the ISO adhere to the specific provisions of its tariff and Commission orders. These requests seek nothing more than action by the Commission to restore the balance and integrity of the market in order to provide a stable platform upon which longer-term solutions may be based.

II. COMMUNICATIONS.

All correspondence and communications with respect to this proceeding should be addressed to the following:

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Mirant Potrero (formerly Southern Energy Potrero, L.L.C.) is a Delaware limited liability company with a direct 100-percent ownership interest in the 363 MW Potrero Power Plant located at Potrero Point in San Francisco, California. It received Commission authority to sell power and ancillary services at market-based rates through a letter order dated March 31, 1999, in Docket No. ER99-1833-000. Mirant Delta (formerly Southern Energy Delta, L.L.C.) is a Delaware limited liability company with a direct 100-percent ownership interest in the Pittsburg

and Contra Costa Power Plants, which are located respectively in Pittsburg and Antioch, California ("Delta Plants"). The Delta Plants have an aggregate generating capacity of approximately 2,702 MW. Mirant Delta received Commission authority to sell power and ancillary services at market-based rates through a letter order dated March 31, 1999, in Docket No. ER99-1842-000. Mirant Americas Energy Marketing, LP, an affiliate of Mirant Delta, and Mirant Potrero, acts as their scheduling coordinator with the ISO.

III. BACKGROUND.

The Commission is well aware of the state of the California energy markets and of the financial condition of Pacific Gas & Electric Company ("PG&E") and Southern California Edison Company ("Edison"). While the causes of the current market turmoil are the subject of much debate, it is beyond dispute that a substantial supply shortage has resulted from the combination of an increase in demand, the failure of the California utilities to construct any new generation plants or major transmission facilities for more than a decade, and the implementation of a state-regulated restructuring program that coupled generation divestiture with reliance on spot markets. Moreover, wholesale prices, which had languished at low levels for several years, have risen markedly since June 2000, due to a host of contributing factors, including extreme weather, aging plants, substantial increases in natural gas prices, and unforeseen increases in demand. These events and circumstances are well documented in the Commission's two orders in Docket Nos. EL00-95-000, *et al.*,[1] as well as recent filings before the Commission.[2]

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[1] *San Diego Gas & Elec. Co. v. All Sellers of Energy and Ancillary Svcs.*, 93 FERC ¶ 61,294 (2000) ("December 15 Order"); *San Diego Gas & Elec. Co. v. All Sellers of Energy and Ancillary Svcs.*, 93 FERC ¶ 61,122 (2000) ("November 1 Order").

[2] *See, e.g.*, Answer of the California Power Exchange Corporation to the Motion of PG&E to Stay Liquidation of Its Block Forward Contracts Pending an Accounting and Further Order, Docket No. ER01-1045-000, Jan. 26, 2001.

While the California utilities' wholesale costs have increased, the CPUC has consistently resisted allowing retail rates to rise to reflect the actual costs of wholesale power.[3] As a result, PG&E and Edison have incurred substantial unrecovered costs and are nearing insolvency, according to recent audits conducted by the CPUC and statements of the utilities themselves.[4] (Further, while the CPUC has shielded retail customers from these wholesale price increases, customers in other states have been less fortunate, seeing the impacts of California's regulatory decisions drive up their prices through no fault of their own.) Ultimately, as the California utilities' credit problems began to drive suppliers from the California market, the United States Department of Energy was forced to intervene and exercise extraordinary emergency powers to compel suppliers continue to sell power into California.[5]

In response to the looming credit problems of PG&E and Edison, the ISO, rather than acting to enforce the credit support provisions of its own tariff against the faltering utilities, chose instead to ignore the application of these provisions with regard to PG&E and Edison,[6] whose credit ratings have since plummeted to so-called "junk" status or lower.[7] (As detailed

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[3] While the CPUC did authorize a modest rate increase in January of 2001, this increase of approximately nine percent was far less than the increase in wholesale costs and has done little to remedy the California utilities' financial difficulties.

[4] *See, e.g.*, PG&E Corporation, Securities and Exchange Commission Filing 8-K, Jan. 17, 2001; Edison International, Securities and Exchange Commission Filing 8-K, Jan. 19, 2001.

[5] *See, e.g.*, Dep't of Energy Press Release R-01-028, *Energy Secretary Abraham Extends Emergency Orders to Provide Natural Gas and Electricity to California Utilities*, Jan. 23, 2001.

[6] *See* January 4, 2001, filing in Docket No. ER01-889-000, Amendment No. 36 to the ISO Tariff. These provisions, set out at section 2.2.3.2 of the ISO tariff, require Scheduling Coordinators to maintain an Approved Credit Rating or to provide additional security. Scheduling Coordinators that do not meet these standards are subject to limitations on trading set out at section 2.2.7.3 of the ISO tariff.

[7] *See Moody's Cuts Pacific G&E and Parent to Junk Status*, Reuters, Jan. 17, 2001 (noting rating cut for PG&E on Jan. 17, 2001, and for Edison on Jan. 16, 2001, by both Moody's Investor Services and Standard & Poor's).

infra, in so doing the ISO acted unilaterally and without prior Commission approval.) Not surprisingly, the combination of the ISO ignoring its tariff's credit support provisions and the increasing inability of PG&E and Edison to satisfy their growing debts, has led to the inevitable defaults. PG&E and Edison have both recently defaulted on sizable payments to commercial creditors and on hundreds of millions of dollars owed to the PX,[8] further placing into doubt their ability to satisfy debts for prior energy deliveries, not to mention future ones.[9] These early defaults have been followed by even larger defaults in the ISO markets, and the utilities have indicated that they are likely to default on additional payments in coming days and weeks unless the situation changes dramatically.[10] Further, the ISO recently saw its own credit rating cut to "Default" status as a result of its inability to make timely payments to market participants, including generators.[11]

The impact of these defaults on Mirant is material. On February 2, 2001, as a result of the payment defaults of PG&E and Edison, Mirant was paid only approximately $1 million out of a total of $62 million due to it by the ISO. Clearly, the $1 million payment to Mirant – less than

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[8] PG&E has said that it will pay only 15 percent of the $1.048 billion it owes generators, the PX, and the ISO. Jonathan Stempel, *Calif. Utility Pacific G&E Defaults*, Reuters, Feb. 1, 2001. *See also Calif. Assembly OKs Power Bill as Pacific Gas Defaults on Debt*, Investor's Business Daily, Feb. 2, 2001, at A9 ("Investor's I"); *SoCal Edison Defaults on Commercial Paper*, Reuters, Jan. 19, 2001 (noting commercial paper defaults of Edison on Jan. 19, 2001, and of PG&E on Jan. 17, 2001).

[9] In the meantime, Edison reportedly made all interest payments on tax-exempt bonds backed by the utility due February 1, 2001. Jacob Fine, *Edison Staved Off Default on Feb. 1*, The Bond Buyer, Feb. 5, 2001.

[10] *See* Investor's I. *See also* PG&E Corporation, Securities and Exchange Commission Filing 8-K, Feb. 1, 2001 (indicating its intent to make a total payment of only $161 million towards over $1 billion in debts with QFs and the PX and also stating that it will default on certain commercial paper obligations as they come due); Edison International, Securities and Exchange Commission Filing 8-K, Feb. 5, 2001 (identifying additional default on PX debt and estimating that an additional $733 million of payments to the ISO, PX, and QFs will come due by the end of February 2001).

[11] *See S&P Cuts Calif. ISO Debt Rating to Default*, Reuters, Feb. 5, 2001.

five percent of the amount owed – is confiscatory and in violation of the Federal Power Act. This payment fails to cover even Mirant's fuel costs associated with energy production, much less fixed costs and a return of or on investment. At this point it is uncertain when and to what extent Mirant may recover its outstanding receivables from the ISO. Given that the California utilities have no apparent ability to pay for power, action by the ISO to compel suppliers to continue to serve is no different that a party plugging into the system and taking power without paying. As noted above, Mirant is doing everything it can to have power available to Californians. All it seeks is to have a creditworthy buyer as the counterparty to these transactions.

Yet even in the face of these unprecedented defaults, the ISO has failed to act to protect the interests of the sellers that are expected to continue to deliver power. Indeed, despite the near insolvency of PG&E and Edison and lack of collateral behind their ISO purchases, on January 31, 2001, the ISO sought to secure assurances from suppliers that they will continue to provide energy to the ISO, regardless of payment defaults to such suppliers. In its letters, appended hereto as Appendix 1, the ISO requested that each party "confirm in writing that it will continue to comply in all respects with the terms and conditions of its [Participating Generator Agreement ("PGA")] with the ISO and, particularly its agreement to comply with the ISO Tariff, including section 2.3.2, 2.5.3.4 and 5 of the ISO Tariff."

In those same letters, the ISO acknowledged that Mirant will not receive full payment for electricity provided to the ISO, stating that:

> As you are probably aware, recent Securities and Exchange Commission filings by [the California utilities] indicated that the ISO may not be paid in full when settlement payments fall due on February 2, 2001. In that event, ISO will make only pro rata payments to suppliers for these services as provided in the Tariff.

> Despite these circumstances, the ISO is committed to carrying out its mission of ensuring reliable, continuing service to California consumers and so asks for your commitment to comply with any and all dispatch instructions to units covered by the PGA.

On February 2, 2001, Mirant responded to the ISO, stating that "it intends to continue to conduct its affairs in California in compliance with its contractual obligations and in accordance with applicable law." Mirant added that it "does not intend to prejudice or to waive in any way any rights it may have under its contracts or applicable law," and that it "expects that the ISO will conduct its affairs in accordance with governing law, including, but not limited to, the specific provisions of its FERC-approved tariff." Copies of Mirant's February 2, 2001 letters are appended hereto as Appendix 2.

In addition to ignoring its tariff with regard to credit protections, the ISO has also violated specific provisions of the Commission's December 15 Order with regard to the composition of the ISO Governing Board. The Commission's order provided that the existing ISO Board be replaced with a non-stakeholder Board whose members are independent of market participants.[12] On January 18, 2001, however, Governor Gray Davis of California signed a bill, AB 5, that created a five member, governor-appointed ISO Board to replace the 26-member stakeholder Board.[13] On January 24, 2001, Gov. Davis announced the appointment of the five members to the redesigned Board.[14] Lastly, on January 25, 2001, the then-current stakeholder Board

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[12] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 93 FERC ¶ 61,294 (2000).

[13] Martha McNeil Hamilton, *Low Reserves Forced Early Decision to Power Down*, Wash. Post, Jan. 19, 2001, at A15.

[14] *Gov. Davis Names Members of ISO Board*, Assoc. Press, Jan. 24, 2001 ("AP I"). Among the members appointed by the Governor are: (i) Carl Guardino, president of the Silicon Valley Manufacturing Group, (ii) Michael Florio, senior attorney for The Utility Reform Network, a consumer group focusing on utility issues; (iii) Maria Contreras-Sweet, Gov. Davis's cabinet-level advisor on business, transportation and housing, and (iv) Tal Finney, Gov. Davis's policy director. *Id.*

members resigned from their respective positions, after California Attorney General Bill Lockyer sought a court order demanding that the stakeholder Board leave.[15] As demonstrated in detail below, these actions of the State of California are in direct violation of the Commission's December 15 Order and disregard the Commission's exclusive regulatory authority over the ISO.

IV. ARGUMENT.

A. The Commission Should Act Immediately To Restore the Credit Provisions of the ISO Tariff Or Should Require The Posting Of Equivalent Security. Mirant Should Not Be Required To Perform Under The ISO Tariff And The PGAs Unless And Until The ISO Complies With The Credit Requirements Of The ISO Tariff And The PGAs.

The credit support provisions of the ISO Tariff, and their appropriate implementation, are critical to the stable and efficient operation of California's energy markets. Because the ISO does not operate a traditional commodity market for energy, but rather pools supply and load, it is necessary that the ISO impose certain credit requirements and minimum standards on both buyers and sellers. The ISO itself admits that this type of protection is necessary for parties to be willing to trade in the ISO markets.[16] However, rather than attempting to retain the even-handed credit provisions that serve to protect all market participants, the ISO simply waives the application of these protections for the two largest buyers in the market – namely, PG&E and

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[15] Jim McLain, *State Revamps Power Distribution Board, Area Businessmen, 25 Others Resign So Davis Can Appoint 5-Member Panel*, Ventura County Star, Jan. 27, 2001, at A10.

[16] The ISO's transmittal letter accompanying Amendment No. 36 states:

> The creditworthiness provisions of the ISO Tariff were the product of intensive negotiations. They were intended to provide Market Participants with the financial security that they consider necessary in order to operate in California markets. These requirements that Scheduling Coordinators [of Participants] provide security were deemed necessary because the ISO is not itself the purchaser of electricity in the ISO's markets....

Transmittal Letter to Initial Filing, *California Independent System Operator Corp.*, Docket No. ER01-889-000, at 3 (Jan. 4, 2001) ("Amend. No. 36 Transmittal Letter").

Edison. To this effect, the ISO unilaterally imposes great risk on market sellers who either choose to or are required to supply energy to the ISO, without any assurance that the ISO's two largest buyers can ultimately pay for this energy.

The ISO, however, makes no showing, or even attempted showing, of why alternative credit support mechanisms cannot be developed. It appears that instead of seeking ways to provide credit and stability to the market by creating a credit support mechanism comparable to its creditworthiness standards, the ISO has chosen to take the path of least resistance and simply change the rules, ignoring all rationale for their existence in the first place.[17] It would be unconscionable to permit the ISO to waive credit provisions for buyers while continuing to require sellers to provide power unconditionally, knowing that it has no ability to pay sellers at this point in time. While it is well-recognized that the ISO's ultimate goal is to keep lights on in California, its power to accomplish this task does not extend to the ability to confiscate suppliers' property. Indeed, some mechanism must be developed to ensure that sellers are paid for the power that California's customers are using. For the ISO to force suppliers to provide power for which the ISO has no ability to pay is no different that a party plugging into the system and taking power without paying.

Apart from its substantive flaws, the ISO's action to waive the security provisions of its tariff prior to Commission approval violates the Filed Rate Doctrine, as well as the ISO Tariff. As noted above, the credit ratings of PG&E and Edison have recently fallen to "junk" levels or lower. Under the ISO's current FERC-approved tariff, these entities would not now be permitted to schedule transactions through the ISO, as a result of their low credit ratings and lack of

[17] Waiver of these security obligations impacts not just in-state sellers such as Mirant, but also those located outside of California, who will not be willing to sell to the ISO without adequate credit assurances.

sufficient substitute collateral.[18] Nonetheless, the ISO has continued to permit PG&E and Edison to continue schedule transactions through the ISO.[19] Entities subject to the Commission's jurisdiction can operate only under tariffs filed with and accepted by the Commission.[20] In this regard, ISO waiver of its tariff prior to any Commission action, let alone approval, is a violation of this principle and should not be tolerated.[21]

Not only do the ISO's actions permitting PG&E and Edison to continue to schedule transactions violate the Filed Rate Doctrine, but they also violate key provisions of the ISO's own tariff. Section 19 of the Tariff states: "Any 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."[22] The Tariff goes on to state: "If any provision of this Tariff is inconsistent with any obligation imposed on any person or federal entity by federal law or regulation to that extent, it shall be inapplicable to that person or federal entity."[23] It would be unconscionable for the Commission to grant the waiver requested in the ISO's filing and permit it implement these

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18 ISO Tariff §§ 2.2.3.2, 2.2.7.3.

19 *See* Amend. No. 36 Transmittal Letter at 2 (noting that the ISO implemented Amendment No. 36 in accordance with its requested effective date of January 4, 2001, "without waiting for Commission action"). It is troubling, to say the least, that such unilateral action by ISOs to implement jurisdictional tariff changes absent Commission approval is becoming increasingly common, and the Commission has done little to stop such behavior.

20 *See, e.g.*, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *City of Cleveland v. FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976).

21 While Mirant California recognizes the gravity of the problems facing Edison, PG&E, and their customers, the ISO's unilateral action has not resolved any of these problems, and appears to have made the supply situation even worse. Thus, if the Commission is to consider accepting Amendment No. 36 at all, it must impose appropriate conditions to ensure the continued sale of power into the ISO market.

22 ISO Tariff § 19 (emphasis added).

23 *Id.* § 20.8.

waivers of credit provisions prior to any Commission action on the matter, particularly in light of the ISO's present inability to pay suppliers for energy provided.

The remedy for such conduct is for the Commission to restore the prior tariff provisions and mandate their application to all market participants. Alternatively, the Commission could provide the ISO and market participants greater latitude to fashion an equivalent security provision, such as a third party guarantee or a mutually-acceptable arrangement for sales to a third party, such as the arrangements under which Mirant and other sellers have provided energy to the California Department of Water and Power.[24] As Mirant has made clear, it is prepared to provide wholesale power on commercially reasonable terms that provide for adequate assurances of payment. Absent the effective restoration of the security requirements of the ISO tariff, the ISO's actions would constitute a material breach of the ISO Tariff and the governing PGAs between Mirant's subsidiaries Mirant Delta and Mirant Potrero and the ISO. As a result of that material breach, 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, unless and until the ISO complies with the credit requirements of the ISO Tariff and the PGAs.

B. The ISO's Actions Unilaterally Change Rates In Violation Of The Filed Rate Doctrine And Are Not Just And Reasonable With The Meaning Of The Federal Power Act.

As noted above, while the ISO has sought assurances of performance from non-defaulting parties, it is unclear to what extent the ISO is attempting to enforce the provisions of its tariff to recover amounts due by the parties that have defaulted. The ISO's rates are considered formula

[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.

rates, and the results produced by the application of the computer algorithms employed by the ISO in its operation of the markets are the operable rates to be charged by the ISO.[25] Suppliers to the ISO's energy markets are paid for their wholesale energy sales according to the ISO's formula rate. In the instant case, however, the ISO has failed both to collect the appropriate formula from buyers and to pay sellers the filed formula rate. The ISO's failure to enforce the payment obligations under its tariff will render it difficult, if not impossible, for Mirant or other sellers to recover the lawful just and reasonable rate for energy sold to the ISO, in clear violation of the Federal Power Act. As noted above, Mirant has been paid only $1 million of the $62 million it is presently owed by the ISO. Indeed, this amount fails to cover even Mirant's fuel costs. Mirant should not be continued to be compelled to into the ISO markets with little, if any, hope of being paid.

In addition, the ISO's failure to pursue full payment for moneys owed to suppliers without any mechanism in place to ensure that suppliers are ultimately made whole also amounts to a unilateral rate change in wholesale electric rates is a clear violation of the Filed Rate Doctrine. For parties such as PG&E and Edison, which have argued unsuccessfully for a wide range of wholesale rate changes, including the imposition of hard rate caps and the use of cost-based rates, the Commission should stop these parties from accomplishing this same end via "self-help" by simply withholding payment. In a related setting, the Commission has recently

[25] *See NRG Power Marketing, Inc. v. New York Independent System Operator, Inc.*, 91 FERC ¶ 61,346 at 62,165 (2000).

ordered that a wholesale customer must make full payment to an ISO during a billing dispute related to alleged overcharges for Operating Reserves.[26]

In this case, the Commission should mandate that the ISO seek collection of the full amount owed by both PG&E and Edison, using any and all available remedies. (As noted in recent reports, certain defaults by PG&E and Edison represent a choice by the defaulting party to breach its payment obligations in order to reserve available cash to use for other purposes.) Not only is it discriminatory for the ISO to assent to PG&E's and Edison's defaults while aggressively holding Mirant and other non-defaulting parties to the strict terms of the ISO Tariff, but such arbitrary administration of the tariff may have broader consequences as well, including chilling development of new facilities and of sales of power into California by out-of-state entities. Even-handed, non-discriminatory application of the tariff is critical in this instance and the Commission should so order.

C. The Commission Should Restructure The ISO Because Of The Blatant Disregard For The Commission's December 15 Order Regarding The Appointment Of New Board Members.

The Commission's December 15 Order requires that members of the reformulated ISO Board be completely independent of market participants: "[We] will require, as proposed in the November 1 Order, that the ISO Governing Board be replaced with a non-stakeholder Board, and that the members selected to serve on the new Board be independent of market participants."[27] Further, the Order states that it is inappropriate for the State of California to have plenary authority over the Board appointments:

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[26] *New York Independent System Operator, Inc. v. New York State Electric & Gas Corp.*, 94 FERC ¶ 61,019 (2001).

[27] December 15 Order, *mimeo* at 61.

> State selection of all the board members is not a reasonable position in light of our prior determinations and the current procedures which only allow the state to veto approximately half of the prospective candidates. However, the Commission believes that the state may have an appropriate role in board selection as long as the independence of the board members can be assured (*e.g.*, candidates were limited to the slate provided by the independent consultant).[28]

Despite these clear directives of the Commission, the State of California failed to comply with the Order by appointing a five-member Board entirely of its own choosing, with at least four members who fail to meet this independence requirement. Thus, the present ISO Board's composition fails to comply with the Commission's clear directive in the December 15 Order and, further, any actions taken by it are also violative of federal law.[29]

Former Commission Chairman James Hoecker commented on the appointment of the State-Appointed Board members in a January 18, 2001 concurring opinion in Docket Nos. EL00-95-000, *et al.*:

> California's recent legislation changing the ISO governance board reflects, in my view, another triumph of expedience over cooperation and understanding of the electric system. While stacking the board of a FERC-jurisdictional public utility with state political appointees may not raise ire in California, it is an unacceptable intrusion – not unlike the mistakes of AB 1890 – into federally regulated power markets. Such a measure surely imperils the California ISO's eligibility as an RTO under Order No. 2000. Because the state is now clearly a market participant, the independence of the board is bound to be compromised. Consequently, the state's decisions are no longer entitled to the kind of deference we have accorded it since AB 1890. More than

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[28] *Id.*

[29] Further, to the extent that any Board actions fall outside the scope of the ISO's powers, as delineated in its Articles of Incorporation, such actions are *ultra vires* and thus void. *See McDermott v. Bear Film Co.*, 33 Cal. Rptr. 486 (Cal. App. 1963). *Cf. Marsh Valley Hydro Elec. Co.*, 51 FERC ¶ 61,306 (1990) (Commission will not grant a hydropower license to an entity lacking corporate authority to develop hydropower).

> that, this action evinces a bald disregard for federal jurisdiction and a rejection of cooperative solutions. On December 15, the FERC delayed making a final ruling on governance in order to consult with state authorities on this matter. This is their apparent response. I do not think the legislation offers any meaningful chance to negotiate a deal. Therefore, I recommend that the Commission seek to enjoin this technically flawed and unlawful usurpation of its authority.[30]

As noted by former Chairman Hoecker, there are two consequences of the appointment of ISO Board members in contravention of the December 15 Order. First, the seating of the Board members appears to be invalid because the state law pursuant to which Governor Davis appointed these members is contrary to, and therefore preempted by, the December 15 Order. Second, many of the current Board members – including Messrs. Guardino and Florio – have vested interests in the California energy markets, as they have close business or other financial connections to energy consumer interests. Further, two additional members – appointees Contreras-Sweet and Finney – are not independent as they are employed by the State of California, which presently is itself a participant in the California energy marketplace by virtue of soliciting forward energy purchase contracts and directing its Department of Water and Power to purchase large amounts of power with state funds on behalf of PG&E and Edison. These associations demonstrate conclusively the Board's lack of independence.

When the PX recently failed to comply with the specific directives of the Commission's December 15 Order, the Commission was not so forgiving.[31] Instead, in an order issued January 29, 2001, the Commission specifically directed to implement the December 15 Order, recalculate rates as of January 1, 2001, and file a compliance report by the end of February. There is no

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[30] December 15 Order, Chairman Hoecker Further Concurrence (Jan. 18, 2001) (emphasis added).

[31] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Svcs.*, 94 FERC ¶ 61,085 (2001).

reason why the Commission should continue to defer to the ISO in this case, in light of the ISO's willful violations of the Commission's order.

Once again, the remedy is to order the ISO to follow the Commission's directives and comply with the December 15 Order. First and foremost, the Commission must order the present ISO Board be disbanded and replaced with a true independent Board of Governors, as originally directed in the December 15 Order. Second, the Commission must direct the current ISO Board to comply fully with the specific provisions of the December 15 Order. Third, the Commission must direct the Board to seek Commission preapproval for any actions undertaken pursuant to the ISO Tariff. Given the Board's present illegitimacy, only Commission preapproval of any and all actions by the Board will provide its actions the needed authority to carry out necessary business. Fourth, the Commission should find that decisions by the ISO since these Board members were appointed are voidable under applicable law; thus, Mirant asserts, the ISO's actions permit Mirant to withdraw from its PGAs.

In all, the Commission should take the opportunity at this time to once and for all restructure the ISO as well as its market structure and operations. Clearly, the problems in California are growing rapidly, and only fundamental change at this juncture will prevent utter collapse of the system.

D. Additional Requirements of Rule 206 and Fast Track Processing.

1. 18 C.F.R. §§ 385.206(b)(1)-(2).

As detailed above, the ISO has violated the Federal Power Act through its failure to comply with the Commission's December 15 Order or with its own tariff.

2. 18 C.F.R. §§ 385.206(b)(3)-(5).

The ISO's actions impact the commercial interests of participants to the ISO's markets and also has operational and practical impacts on energy market participants throughout the western United States. The financial impact or burden cannot be calculated at this time due the unforseeability of action that the ISO Board may take in the near future.

3. 18 C.F.R. § 385.206(b)(6).

With the exception of the issues pending before the Commission in Docket No. ER01-889-000, discussed *supra*, the issues presented in this Complaint are not pending in an existing Commission proceeding or a proceeding in any other forum in which Mirant is a party.

4. 18 C.F.R. § 385.206(b)(7).

For relief, Mirant requests that the Commission issue an order: (i) restoring the credit provisions of the ISO Tariff or requiring the posting of equivalent security; (ii) requiring the ISO to pursue all available remedies against defaulting participants; and (iii) directing the replacement of the current ISO Board with one that complies with the December 15 Order.

5. 18 C.F.R. § 385.206(b)(8).

All information needed to support the Complaint is publicly available or described in the foregoing. Additional information is attached in Appendices 1 and 2.

6. 18 C.F.R. §§ 385.206(b)(9), (11).

Mirant requests fast track processing because the standard complaint resolution process is inadequate to provide timely relief. The injury complained of herein represents a continuing financial risk to market participants and a continuing threat to regional electricity reliability. The Complaint presents a discrete issue, resolution of which is supported by Commission precedent. Given the time-sensitive nature of the injury and the real potential for material actions by the illegitimately comprised ISO Board, Mirant has not sought to make use of the Enforcement

Hotline or Dispute Resolution Service and does not believe these approaches would provide adequate relief.

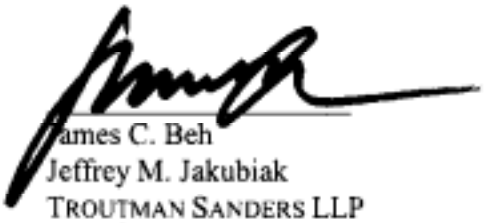
7. 18 C.F.R. § 385.206(b)(10).

A form of notice suitable for publication in the Federal Register is attached in hard copy and enclosed in electronic format on 3 ½" diskette.

V. CONCLUSION.

WHEREFORE, for the foregoing reasons, Mirant respectfully requests that the Commission grant the relief requested herein.

Respectfully submitted,



James C. Beh
Jeffrey M. Jakubiak
TROUTMAN SANDERS LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004
(202) 274-2950

Attorneys for Mirant Delta, LLC and
Mirant Potrero, LLC

Dated: February 6, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, by first class mail, a copy of the foregoing document on each party named in the official service list in Docket No. ER01-889-000. Further, I hereby certify that I have this day served, via facsimile a copy of the foregoing on the California Independent System Operator Corporation, its counsel, and the California Public Utilities Commission.

Dated at Washington, D.C., this 6th day of February, 2001.

Jeffrey M. Jakubiak
TROUTMAN SANDERS LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004
(202) 274-2950

Form of Notice

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Mirant Delta, LLC, Mirant Potrero, LLC	)	
Complainants,	)	Docket No. EL01-___-000
v.	)	
California Independent System Operator Corporation,	)	Request for Fast Track Processing
Respondent.	)	

Notice of Complaint
(February __, 2001)

Take notice that on February 6, Mirant Delta, LLC and Mirant Potrero, LLC (collectively, Mirant) tendered for filing a complaint alleging that the California Independent System Operator violated the Federal Power Act and prior Commission orders through seating a non-independent governance board and failure to adequately pursue payments from market participants. Mirant requested fast track processing for this complaint.

Copies of the filing were served upon the ISO, its counsel, the California Public Utilities Commission, and other interested parties. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission s Rules of Practice and Procedure (18 C.F.R. §§ 385.211 & 385.214). All such motions and protests should be filed on or before _____. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202-208-2222 for assistance).

David P. Boergers
Secretary

Appendix 1

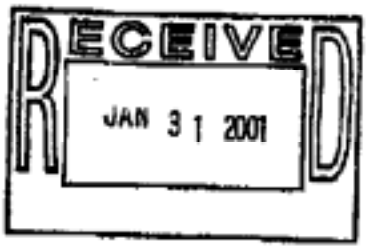
CALIFORNIA ISO

California Independent System Operator

Charles F. Robinson
Vice President and General Counsel

January 31, 2001

Fax: (925) 947-9004



Robert L. Lamkin, Vice President
Southern Energy Delta, L.L.C.
1350 Treat Blvd., Suite 500
Walnut Creek, CA 94596

Re: Participating Generator Agreement

Dear Mr. Lamkin:

In order to undertake critical operations planning, the ISO requires that Southern Energy Delta confirm in writing that it will continue to comply in all respects with the terms and conditions of its Participating Generator Agreement ("the PGA") with the ISO and, particularly, its agreement to comply with the ISO Tariff, including section 2.3.2, 2.5.3.4 and 5 of the ISO Tariff.

As you are probably aware, recent Securities and Exchange Commission filings by the IOUs indicate that the ISO may not be paid in full when settlement payments fall due on February 2, 2001. In that event, ISO will make only pro rata payments to suppliers for these services as provided in the Tariff. Despite these circumstances, the ISO is committed to carrying out its mission of ensuring reliable, continuing service to California consumers and so asks for your commitment to comply with any and all dispatch instructions to units covered by the PGA.

Please fax your response to me at 916-351-2350, no later than 3:00 p.m. PST on February 1, 2001. Given the gravity of the current electricity situation, we hope that you will appreciate that the ISO will have no choice but to interpret a failure to respond affirmatively and unequivocally as an indication that performance may not be forthcoming.

Very truly yours,

Charles F. Robinson

CALIFORNIA ISO

California Independent
System Operator

January 31, 2001

Re: Department of Energy Order Pursuant to Section 202(c) of the Federal Power Act, Issued January 11, 2001, and as Amended January 23, 2001 ("the Order")

Dear Generator:

In order to undertake critical operations planning, the ISO requires that your company confirm in writing that it will continue to comply in all respects with the terms and conditions of the above referenced Order for so long as the Order is in effect.

As you are probably aware, recent Securities and Exchange Commission filings by the IOUs indicate that the ISO may not be paid in full when settlement payments fall due February 2, 2001. In that event, ISO will make only pro rata payments to suppliers for these services as provided in the Tariff. Despite these circumstances, the ISO is committed to carrying out its mission of ensuring reliable, continuing service to California consumers and so asks for your commitment to compliance with the Order.

Please fax your response to me at 916-351-2350, no later than 3:00 p.m. PST on February 1, 2001. Given the gravity of the current electricity situation, we hope that you will appreciate that the ISO will have no choice but to interpret a failure to respond affirmatively and unequivocally as an indication that compliance with the Order may not be forthcoming.

Very truly yours,

Charles F. Robinson
Vice President and General Counsel

Appendix 2

TROUTMAN SANDERS LLP
ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

401 9TH STREET, N.W. - SUITE 1000
WASHINGTON, D.C. 20004-2134
www.troutmansanders.com
TELEPHONE: 202-274-2950

James C. Beh
james.beh@troutmansanders.com

Direct Dial: 202-274-2939
Fax: 202-654-5602

February 1, 2001

Via Facsimile

Charles F. Robinson, Esquire
Vice President and General Counsel
California Independent System Operator Corp.
151 Blue Ravine Rd.
Folsom, California 95630

Dear Mr. Robinson:

Mirant Americas Energy Marketing, LP ("Mirant")[1] is in receipt of your January 31, 2001 letter regarding the obligations imposed upon Mirant pursuant to the Department of Energy's Order Pursuant to Section 202(c) of the Federal Power Act, issued January 11, 2001, as amended.

The circumstances in the California market are dynamic and Mirant continues to monitor developments and evaluate matters on a daily basis. Mirant has – and will continue – to work with the ISO and others to attempt to reach a solution to the on-going energy and financial crisis in California. In response to your specific inquiry, please be advised that Mirant intends to continue to conduct its affairs in California in compliance with its contractual obligations and in accordance with applicable law. By this response, Mirant does not intend to prejudice or to waive in any way any rights it may have under its contracts or applicable law.

At the same time, Mirant expects that the ISO will conduct its affairs in accordance with governing law, including, but not limited to, the specific provisions of its FERC-approved tariff. To that end, Mirant expects that the ISO will administer its tariff in accordance with its current terms and in a non-discriminatory manner, and that the ISO will pursue all available remedies for defaults by other parties of their obligations to the ISO.

Very truly yours,

James C. Beh

Attorney for Mirant Americas Energy Marketing, LP

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[1] Effective January 19, 2001, Southern Company Energy Marketing LP was renamed Mirant Americas Energy Marketing, LP.

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A LIMITED LIABILITY PARTNERSHIP

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TELEPHONE: 202-274-2950

James C. Beh
james.beh@troutmansanders.com

Direct Dial: 202-274-2939
Fax: 202-654-5602

February 1, 2001

Via Facsimile

Charles F. Robinson, Esquire
Vice President and General Counsel
California Independent System Operator Corp.
151 Blue Ravine Rd.
Folsom, California 95630

Dear Mr. Robinson:

Mirant Delta, LLC ("Mirant")[1] is in receipt of your January 31, 2001 letter regarding the obligations imposed upon Mirant pursuant to its Participating Generator Agreement with the California Independent System Operator Corporation ("ISO").

The circumstances in the California market are dynamic and Mirant continues to monitor developments and evaluate matters on a daily basis. Mirant has – and will continue – to work with the ISO and others to attempt to reach a solution to the on-going energy and financial crisis in California. In response to your specific inquiry, please be advised that Mirant intends to continue to conduct its affairs in California in compliance with its contractual obligations and in accordance with applicable law. By this response, Mirant does not intend to prejudice or to waive in any way any rights it may have under its contracts or applicable law.

At the same time, Mirant expects that the ISO will conduct its affairs in accordance with governing law, including, but not limited to, the specific provisions of its FERC-approved tariff. To that end, Mirant expects that the ISO will administer its tariff in accordance with its current terms and in a non-discriminatory manner, and that the ISO will pursue all available remedies for defaults by other parties of their obligations to the ISO.

Very truly yours,

James C. Beh

Attorney for Mirant Delta, LLC

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1 Effective January 19, 2001, Southern Energy Delta, L.L.C. was renamed Mirant Delta, LLC.

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James C. Beh
james.beh@troutmansanders.com

Direct Dial: 202-274-2939
Fax: 202-654-5602

February 1, 2001

Via Facsimile

Charles F. Robinson, Esquire
Vice President and General Counsel
California Independent System Operator Corp.
151 Blue Ravine Rd.
Folsom, California 95630

Dear Mr. Robinson:

Mirant Potrero, LLC ("Mirant")[1] is in receipt of your January 31, 2001 letter regarding the obligations imposed upon Mirant pursuant to its Participating Generator Agreement with the California Independent System Operator Corporation ("ISO").

The circumstances in the California market are dynamic and Mirant continues to monitor developments and evaluate matters on a daily basis. Mirant has – and will continue – to work with the ISO and others to attempt to reach a solution to the on-going energy and financial crisis in California. In response to your specific inquiry, please be advised that Mirant intends to continue to conduct its affairs in California in compliance with its contractual obligations and in accordance with applicable law. By this response, Mirant does not intend to prejudice or to waive in any way any rights it may have under its contracts or applicable law.

At the same time, Mirant expects that the ISO will conduct its affairs in accordance with governing law, including, but not limited to, the specific provisions of its FERC-approved tariff. To that end, Mirant expects that the ISO will administer its tariff in accordance with its current terms and in a non-discriminatory manner, and that the ISO will pursue all available remedies for defaults by other parties of their obligations to the ISO.

Very truly yours,

James C. Beh

Attorney for Mirant Potrero, LLC

[1] Effective January 19, 2001, Southern Energy Potrero, L.L.C. was renamed Mirant Potrero, LLC.