

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Mirant Delta, LLC) Docket No. ER05-343-000
Mirant Potrero, LLC)

**JOINT PROTEST OF
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORP., PACIFIC GAS
AND ELECTRIC COMPANY, CALIFORNIA ELECTRICITY OVERSIGHT
BOARD, AND CALIFORNIA PUBLIC UTILITIES COMMISSION**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”), 18 C.F.R. § 385.211 (2004), the California Independent System Operator Corporation (“ISO”), Pacific Gas and Electric Company (“PG&E”), the California Electricity Oversight Board (“EOB”), and the California Public Utilities Commission (“CPUC”) (collectively the “Parties”) submit this Protest. 1/ In support of this Protest, the Parties state as follows:

I. Background

On December 16, 2004, 2/ Mirant Delta, LLC (“Mirant Delta”) and Mirant Potrero, LLC (“Mirant Potrero”) (collectively “Mirant”) filed, pursuant to Section 205 of the Federal Power Act (“FPA”), a Limited 205 Filing setting forth proposed rate schedule revisions for Contract Year 2005 to its Must-Run Service

1/ Each of the Parties has filed a separate Motion to Intervene.

2/ On October 29, 2004, Mirant, the ISO and PG&E filed a Motion for Extension of Time to allow Mirant until December 16, 2004 “to submit to the Commission its Limited 205 Filing and Schedule F Filings for 2005.” By Notice issued on November 4, the Commission granted the requested extension of time.

Agreements (“RMR Agreements”) with the ISO for the generation units currently owned by Mirant Delta, the Contra Costa Power Plant Units 4, 5 and 7, and Pittsburg Power Plant Units 5 and 6, and those currently owned by Mirant Potrero, the Potrero Power Plant Units 3, 4, 5 and 6 (collectively the “RMR Units”). ^{3/} Mirant’s Limited 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; (6) Outage Hours; (7) Owner’s Repair Cost Obligations; (8) Annual Fixed Revenue Requirements (“AFRRs”); and (9) Variable O&M Rates (“VOM Rates”). Mirant requested an effective date of January 1, 2005. On December 23, 2004, the Commission issued a “Notice of Filing” setting January 6, 2005, as the date for interventions, comments and protests.

As noted in Mirant’s December 16, 2005 Transmittal Letter, Mirant, ISO and PG&E have been engaged in settlement negotiations regarding Mirant’s 2005 RMR Filing. Mirant, ISO and PG&E anticipate filing an Offer of Partial Settlement in the near future which resolves all issues in this proceeding related to (i) Owner’s Repair Cost Obligations; (ii) AFRRs; and (iii) VOM Rates. This Protest is limited to issues that have not been resolved by the Partial Settlement.

^{3/} Because the generation units covered by these agreements must operate at certain times for the local 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.

II. Protest

Based on its initial review of Mirant's 2005 RMR Filing, the Parties have identified the following items they believe have not been shown to be just and reasonable.

1. Surcharge Payment Factor.

Mirant incorrectly used what it claims is its Fixed Option Payment Factor (50 percent) as the applicable Surcharge Payment Factor for all of its Capital Items (projects), for the purpose of calculating the Hourly Capital Item Charges for Contract Year 2005 in Table B-2 of its proposed rate schedule sheets. Schedule B of the Schedules to the RMR Agreements provides that, for Units operated under Condition 1, the Surcharge Payment Factor for all Capital Items except those covered by the Small Project Budget shall be as agreed to by Owner (Mirant) and ISO. If the Owner and ISO do not agree on the Surcharge Payment Factor, the Surcharge Payment Factor generally equals the Fixed Option Payment Factor. In 2003, the ISO approved three large capital projects 4/ and stated as part of its approval a Surcharge Payment Factor of three percent. Mirant did not respond or object to the ISO's approval letter that set forth the three percent Surcharge Payment Factor. Thus, the Parties understand Mirant to have accepted the three percent Surcharge Payment Factor and, accordingly, that should be the applicable factor to be applied to the three 2003 Capital Items listed in footnote 4.

4/ 2003_5_L_Mirant_CC_C (for Contra Costa Unit 7); 2003_28_L_Mirant_PP_5 (for Pittsburg Unit 5); and 2003_30_L_Mirant_PP_C (for both Pittsburg Units 5 & 6).

Moreover, Mirant has failed to justify why a Fixed Option Payment Factor of 50 percent is just and reasonable. The issue of how to set an appropriate Fixed Option Payment Factor under RMR Agreements is pending before the Commission in Docket Nos. ER98-495-000 *et al.* 5/ Although the Commission has not acted on the matter, and thus the issue has not yet been finally resolved, there has been no acceptance of Mirant's claimed 50 percent Fixed Option Payment Factor. 6/

There is a further reason why Mirant's use of 50 percent as the Surcharge Payment Factor for the three identified 2003 Capital Items is not warranted. Before Mirant is allowed to collect any Surcharge Payment Factor greater than that already approved by the ISO (three percent), Mirant must document the basis for doing so. Rates under the RMR Agreements are cost-based in order to mitigate an Owner's ability to use locational market power, which exists at times when the ISO dispatches RMR units for local reliability, to command monopoly rents. And, an RMR unit operating under Condition 1 is normally expected to participate in energy markets from which the RMR Unit Owner can obtain revenues to cover some or all of the units' fixed costs including Capital Item

5/ The appropriate Fixed Option Payment Factor for Mirant's Contra Costa, Pittsburg and Potrero RMR Units is the principal issue in these proceedings, along with the appropriate determination of Surcharge Payment Factors and Repair Factors. *Pacific Gas and Electric Co.*, 91 FERC ¶ 63,008 (2000) (Initial Decision)

6/ Mirant's use of 50 percent as its Fixed Option Payment Factor is permitted strictly as an interim arrangement, subject to adjustment following Commission decision in Docket No. ER98-495-000, under the settlement approved in Docket Nos. ER98-441-000 *et al. Calif. Indep. Sys. Operator Corp.*, 87 FERC ¶ 61,250 (1999). No such interim arrangement exists with respect to Surcharge Payment Factors, other than for Capital Items within the Small Project Budget not at issue here.

costs. Under Section 205 of the FPA, when the Owner and the ISO do not agree on a Surcharge Payment Factor, the Owner must present sufficient information to make a *prima facie* case that a particular factor is just and reasonable. This may involve showing that under Condition 1, the unit will not be reasonably likely to recover all fixed costs from projected merchant sale revenues, leading to some allocation of Capital Item costs to charges under the RMR Agreement and, therefore, to a specific Surcharge Payment Factor.

Accordingly, the Parties urge the Commission to issue a deficiency letter requiring Mirant to file within fifteen (15) days an explanation supporting the proposed 50 percent Surcharge Payment Factor applied to the three 2003 Capital Items identified above; or in the alternative, to issue an initial order stating that the proposed Surcharge Payment Factor has not been shown to be just and reasonable, suspending the proposed rate schedule changes subject to hearing and establishing a refund date the same as the proposed effective date, January 1, 2005. Should the Commission suspend the rate schedules, the Parties request that the Commission defer further action in this proceeding for 45 days to give the Parties time to review Mirant's explanation and engage in settlement negotiations in order to resolve this issue.

2. Revisions to Reflect Termination of Pittsburg Power Plant Units.

Mirant appears to have inadvertently failed to strike all references to the Pittsburg Power Plant Units 1 through 4 and 7 in Schedule A, Section 3 in its revised rate schedule sheets. As Mirant indicated in its transmittal letter, the ISO has terminated the RMR status of these units which necessitates that the

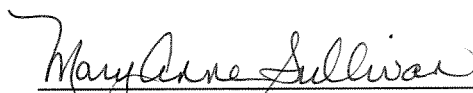
references to these units be struck from Schedule A, Section 3 of the RMR Agreements. The Parties request that Mirant revise and refile the affected tariff sheets.

III. Conclusion

For the foregoing reasons, the Parties respectfully request that the Commission issue a deficiency letter requiring Mirant to (i) refile revised tariff sheets to remove all references to Pittsburg Power Plant Units 1 through 4 and 7 in Schedule A, Section 3 and (ii) file an explanation supporting the Surcharge Payment Factor within fifteen (15) days of the issuance of the deficiency letter; or in the alternative, issue an initial order stating that the Surcharge Payment Factor has not been shown to be just and reasonable, suspending the proposed rate schedule changes subject to hearing, establishing a refund date equal to the proposed effective date, January 1, 2005, and deferring action on the 2005 RMR Filing for 45 days to give the Parties and Mirant time to attempt to resolve this issue.

Dated: January 6, 2005

Respectfully submitted



Mary Anne Sullivan
Karin L. Larson
Hogan & Hartson L.L.P
555 13th Street, N.W.
Washington, D.C. 20004

Counsel for California Independent
System Operator Corporation

Stuart K. Gardiner
Pacific Gas and Electric Company

Law Department, B30A
P.O. Box 7442
San Francisco, CA 94120

Attorney for Pacific Gas
and Electric Company

Kenneth L. Glick
California Electricity Oversight Board
770 L Street; Suite 1250
Sacramento, CA 95814

Attorney for the California Electricity
Oversight Board

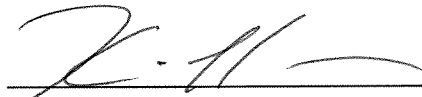
and

Nicholas Sher
Public Utilities Commission of the
State of California
505 Van Ness Avenue, Room 5131
San Francisco, CA 94102

Attorney for the Public Utilities
Commission of the State of California

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of January, 2005 caused to be served a copy of the forgoing Joint Protest upon all parties listed on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in these proceedings.



Karin L. Larson
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-6861 (tel)
(202) 637-5910 (fax)