200505135032 Received FERC OSEC 05/13/2005 03:00:00 PM Docket# EL00-98-118, ET AL.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Co., *Complainant,*	)	Docket No. EL00-95-000, *et al.*
v.	)	
Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, *Respondents*.	)	
Investigation of Practices of the California Independent System Operator and the California Power Exchange	)	Docket No. EL00-98-000, *et al.*
California Independent System Operator Corporation	)	Docket No. ER01-889-000
Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC	)	Docket No. ER01-1455-000
California Independent System Operator Corporation	)	Docket No. ER01-3013-000
California Independent System Operator	)	Docket No. ER03-746-000
Public Utilities Commission of the State of California	)	Docket No. EL02-60-000
v.	)	
Sellers of Long Term Contracts to the California Department of Water Resources	)	
California Electricity Oversight Board	)	Docket No. EL02-62-000
v.	)	
Sellers of Energy and Capacity Under Long-Term Contracts with the California Department of Water Resources	)	

Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC	)	Docket No. EL03-158-000
Enron Power Marketing, Inc. and Enron Energy Services Inc., *et al.*	)	Docket No. EL03-180-000
Pacific Gas and Electric Company	)	Docket Nos. ER98-495-000 ER98-1614-000 ER98-2145-000 ER99-3603-000
Mirant Delta, LLC and Mirant Potrero, LLC	)	Docket No. ER03-215-000
Mirant Delta, LLC and Mirant Potrero, LLC	)	Docket No. ER04-227-000
Mirant Delta, LLC and Mirant Potrero, LLC	)	Docket No. ER05-343-000
Southern Company Energy Marketing, Inc. and Southern Company Services, Inc.	)	Docket No. ER97-4166-000
Southern Energy California, L.L.C.	)	Docket No. ER99-1841-000
Southern Energy Delta, L.L.C.	)	Docket No. ER99-1842-000
Southern Energy Potrero, L.L.C.	)	Docket No. ER99-1833-000
Mirant Americas Energy Marketing, LP	)	Docket No. ER01-1265-000
Mirant California, LLC	)	Docket No. ER01-1267-000
Mirant Delta, LLC	)	Docket No. ER01-1270-000
Mirant Potrero, LLC	)	Docket No. ER01-1278-000

State of California, *ex rel*. Bill Lockyer, Attorney General of the State of California	)	Docket No. EL02-71-000
v.	)	
British Columbia Power Exchange Corp., Coral Power, LLC, Dynegy Power Marketing, Inc., Enron Power Marketing, Inc., Mirant Americas Energy Marketing, Inc., Reliant Energy Services, Inc., Williams Energy Marketing & Trading Co.	)	
Puget Sound Energy, Inc.	)	Docket No. EL01-10-000
v.	)	
All Jurisdictional Sellers of Energy and/or Capacity in the Pacific Northwest	)	
Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices	)	Docket No. PA02-2-000
Mirant Americas Energy Marketing, LP	)	Docket No. PA03-8-000
Investigation of Anomalous Bidding Behavior Docket And Practices in the Western Markets	)	Docket No. IN03-10-000

JOINT REQUEST OF THE CALIFORNIA RMR PARTIES FOR REHEARING OF TERMINATION OF THE MIRANT RELIABILITY MUST-RUN CASE

In its "Order On Settlement Agreement" issued in the above-captioned proceedings on April 13, 2005,[1] the Commission terminated as moot the proceedings in *Pacific Gas and Electric Company*, Docket Nos. ER98-495-000, ER98-1614-000, ER98-2145-000 and ER99-3603-000

[1] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services Into Markets Operated by the Calif. Indep. Sys. Operator and the Calif. Power Exchange*, 111 FERC ¶ 61,017 (2005).

(the "Mirant RMR Case").[2] As described in detail below, those dockets involve setting certain lawful rates under Section 205 of the Federal Power Act ("FPA") for certain generating units ("RMR Units") under three Must-Run Service Agreements (reliability must-run or "RMR Agreements"). The RMR Agreements are between the California Independent System Operator Corporation ("CAISO") and Mirant Delta, LLC (two contracts), and Mirant Potrero, LLC (one contract), which are affiliates of the Mirant Corporation (together, "Mirant Owners" or "Mirant"). Because the Mirant RMR Case is not moot, pursuant to Rule 713, 18 C.F.R. § 385.713 (2004), the California RMR Parties[3] respectfully request that the Commission reverse that part of the Settlement Order in the above-captioned proceedings terminating the Mirant RMR Case and promptly issue an order resolving the issues in that case.[4]

I. SPECIFICATION OF ERROR

Termination of the Mirant RMR Case as moot in the Settlement Order was arbitrary, capricious and an abuse of discretion because the Commission failed to provide a reasoned explanation, based on record evidence in this or the Mirant RMR Case, for its conclusion that the

---

[2] *San Diego Gas & Elec. Co., et al*., 111 FERC ¶ 61,017 (2005) ("Settlement Order"), Ordering Paragraph (E) .

[3] "California RMR Parties" refers to the following: California Electricity Oversight Board ("CEOB"), CAISO, California Public Utilities Commission ("CPUC"), Pacific Gas and Electric Company ("PG&E"), San Diego Gas & Electric Company ("SDG&E") and Southern California Edison Company ("SCE").

[4] In addition to asking the Commission to reverse its termination of the Mirant RMR Case, this Request for Rehearing also seeks prompt Commission action on the merits of that case. For PG&E, this is intended to satisfy its obligation under Section 8.1 of the Global Settlement approved in the Settlement Order: "PG&E and the Mirant Parties agree to cooperate to request, promptly after the Settlement Effective Date, that FERC issue an order in FERC Docket Nos. ER98-495, ER98-1614, ER98-2145 and ER99-3603 regarding the initial decision of the Administrative Law Judge in those proceedings, 91 FERC ¶ 63,008 (2000) at the earliest possible date thereafter." In satisfaction of its obligation, the California RMR Parties understand that Mirant also is filing a request for rehearing that asks the Commission to issue an order on the Initial Decision in the Mirant RMR Case.

Mirant RMR Case is moot. Moreover, termination of the Mirant RMR Case is plain error because that case is, in fact, not moot.[5] No lawful rate for operation of the Mirant RMR Units under Condition 1 of the RMR Agreements has been set, but these contracts are still in force, with all Mirant RMR Units currently or soon to be operating under Condition 1. Therefore, there remain issues to be decided in the Mirant RMR Case that will affect the legal rights and obligations of various parties. Most particularly, the outcome of the Mirant RMR Case will have a direct impact on PG&E's transmission tariff and thus directly affect the rates that PG&E's transmission-only customers pay. As also described below, the evolution of the California markets towards a "resource adequacy" regime does not change this result, nor render the issues moot.

II. PROCEDURAL HISTORY

A. Origin of the RMR Agreements and The Mirant RMR Case

Because several independent system operators and regional transmission operators now control large portions of the electric transmission grid in the United States, the Commission is familiar with the phenomenon of transmission constrained areas, sometimes called "load pockets." Generation located in a transmission constrained area has locational market power and thus can obtain monopoly rents if such market power is not mitigated or eliminated.

The means used by the CAISO since its inception in 1998 to help assure reliable service in load pockets while mitigating locational market power is the RMR Agreement. Under its open-access transmission tariff, the CAISO can designate any generating unit using the [CA]ISO Controlled Grid for delivering energy as an RMR Unit. That unit's owner (the "Owner" under

[5] The California RMR Parties do not seek rehearing of any other element of the Settlement Order.

the *pro forma* RMR Agreement currently in use) is obligated to either enter into an RMR Agreement with the CAISO or file an unexecuted RMR Agreement with the Commission. The RMR Agreement, described in more detail below, requires the Owner to dispatch an RMR Unit when directed to do so by the CAISO, including keeping such a Unit in operation and at a specified level of output if the Unit already is generating for the market. In return, the CAISO pays the Owner—on a cost-of-service basis—for keeping the Unit available for local reliability dispatch and actually dispatching the Unit at the CAISO's direction.

The Mirant RMR Case originated with PG&E's filing in October 1997 of several unexecuted RMR Agreements, each for a generating facility whose units were designated for RMR status. The Commission accepted the proposed agreements and their rates for filing, suspended them to become effective when the CAISO began commercial operation, and made the rates subject to refund. *Pacific Gas and Elec. Co., et al*., 81 FERC ¶ 61,322 (1997). Extensive settlement efforts, guided by the Chief Administrative Law Judge, ensued.

B. The April 1999 Settlement And Current *Pro Forma* RMR Agreement

After extensive negotiations involving the California RMR Parties, generators who had purchased various facilities with RMR Units from PG&E, SCE or SDG&E, and Commission Staff, a partial settlement of many issues concerning RMR Agreements was reached on April 2, 1999 ("1999 Settlement") and subsequently approved by the Commission. *California Indep. Sys. Operator Corp.*, 87 FERC ¶ 61,250 (1999).[6] The 1999 Settlement included a new *pro forma* RMR Agreement that, with limited modifications for things like RMR Unit-specific characteristics, has been used for CAISO RMR Agreements. These agreements are for a one-

[6] During the same month the 1999 Settlement was filed, Mirant's predecessors in interest as Owners of the RMR Units, Southern Energy Delta, L.L.C. and Southern Energy Potrero, L.L.C., bought from PG&E the facilities that include these Units.

year term, renewable each year at the sole discretion of the CAISO. Many RMR Agreements, including the three held by Mirant, have been renewed every year since 1998, although not every RMR Unit at a given facility has been on RMR status each year.

Relevant to this Request For Rehearing are the two alternative Conditions under which an RMR Unit can operate.[7] Condition 1 allows the RMR Unit to participate fully in markets and bilateral contracts, i.e., as a merchant unit. When called upon by the CAISO to be dispatched, the RMR Unit must be available to produce energy or ancillary services and must generate the required output. If already producing output for a transaction, the Unit must continue to generate the specified output for the period required by the CAISO unless a greater output is called for by the CAISO, in which case the Unit must ramp up to that higher level. Under Condition 2 an RMR Unit is no longer operated as a merchant unit. It produces energy or ancillary services only when dispatched by the CAISO for local reliability. In exchange, the RMR Agreement specifies that Owners of RMR Units under Condition 2 are paid their full cost of service, i.e., all variable and fixed operating costs and return of and on capital. The Owner cannot retain any market or non-RMR contract revenue it receives for the output of units under Condition 2. Fixed cost payments for Condition 2 RMR Units are not being determined in the Mirant RMR Case.

Also of relevance to this Request For Rehearing are the three charges at issue in the Mirant RMR Case. Under the RMR Agreements these charges provide for recovery of fixed costs incurred by the Owner to keep the RMR Unit available for dispatch by the CAISO when needed for local reliability. The first is the Fixed Option Payment (the annual sum of Monthly Availability Payments), which in the *pro forma* RMR Agreement (and Mirant's RMR Agreements) is the product of a Fixed Option Payment Factor ("FOPF"), and the RMR Unit's

[7] The choice between Condition 1 and Condition 2 is made by the Owner.

Annual Fixed [cost] Revenue Requirement ("AFRR").[8] The other fixed cost charges are the Monthly Surcharge Payment, which recovers costs of capital improvements or replacements made subsequent to determination of the AFRR and needed to keep the RMR Unit available in proper working order. The Surcharge Payment Factor is the analogue to the FOPF and represents the portion of the total cost of capital items payable under Condition 1. There is also the Repair Payment, usually a lump sum, which covers the non-amortized costs of major repairs needed to keep the RMR Unit operating properly. Like the FOPF, a Repair Payment Factor between 0 and 1 is applied to yield the portion of the repair paid under Condition 1. In all three cases, the factor used under Condition 2 is 1.0, since the CAISO pays all fixed (and other) costs of operating the RMR Unit.

The 1999 Settlement locked in place most rates for a period ending December 31, 2001 (the "Rate Freeze Period"). This included the FOPF, which as part of that settlement was established on an interim basis, pending resolution through litigation or settlement, and subject to either refund or surcharge depending on the final FOPF and resulting adjustment, if any, to the Fixed Option Payment. Some other rates, though not the FOPF, as well as certain Unit operating characteristics and limits were subject to annual adjustment under specific provisions of the RMR Agreement.

C. Partial Settlements and the Initial Decision

The FOPFs for all RMR Units *other* than those owned by Mirant were set under various settlements entered into in 1999 and 2000 and approved by the Commission. Consistent with the

[8] The RMR Agreement uses the Monthly Availability Payment, while the 1999 Settlement refers to the Fixed Option Payment. In addition to the basic formula stated above, the availability payment is adjusted for actual availability of the RMR Unit, e.g., an Owner is paid less when its unit is not available when called upon by the CAISO.

terms of the 1999 Settlement, these rates were subject to change via proceedings under FPA Section 205 or Section 206 with proposed effective dates after December 31, 2001, the end of the Rate Freeze Period.

After several days of hearings and post-hearing briefs, the Presiding Administrative Law Judge issued an initial decision in the Mirant RMR Case on June 7, 2000. *Pacific Gas and Elec. Co.*, 91 FERC ¶ 63,008 (2000) ("Initial Decision"). Most of the Initial Decision is devoted to examination of the alternative rate methodologies presented by the parties, with the conclusion that the "net incremental cost" method advocated by the California RMR Parties should be used to determine the Fixed Option Payment, unless "going forward" cost reimbursement is required for an uneconomic RMR Unit. Initial Decision at 65,113 and nn. 25 and 27.

The Presiding Judge considered "appropriate RMR compensation in a market-based rate scenario without revenue credits … *an issue of first impression with potentially important policy implications.*" *Id.* at 65,116-117 (emphasis added). Consequently, the Initial Decision stated that "in addition to case-specific rulings it is appropriate to make generic rulings on some of the issues addressed." *Id.* at 65,117. These generic rulings addressed: (a) the nature of RMR obligations as local market power mitigation mechanisms rather than "a discrete product or service," (b) that such obligations are a necessary condition precedent for units in constrained areas to charge market based rates, (c) that RMR Owners should be compensated without unnecessarily creating financial advantages or disadvantages relative to other market participants, and (d) concluded that the net incremental cost methodology is the appropriate one to use to determine RMR compensation. *Id*. It is noteworthy that the Initial Decision devoted far more consideration and text to the appropriate *methodology* for RMR Fixed Option Payments, a subject applicable to *any* Owner whose RMR Agreement is the *pro forma* version or

substantially similar, than it did to specific characteristics and facts associated with Mirant's RMR Units. The Initial Decision does not specify the dollar level of the Fixed Option Payments for Mirant; instead, it drew the road map for how to determine them by adopting a specific rate methodology.[9]

D. Subsequent Developments, Including the Global Settlement

1. Related RMR Complaints and Settlements

Near the end of 2001, the California RMR Parties filed a complaint under FPA Section 206 against several RMR Owners, seeking lower Fixed Option Payments for many RMR Units. *See* Joint Complaint, Docket No. EL02-15-000 (November 2, 2001).[10] Following issuance of the Initial Decision, with its detailed consideration of and conclusion as to appropriate FOP methodology, the California RMR Parties' Complaint asked the Commission to set a refund effective date of January 1, 2002, but thereafter defer further proceedings until it issued its order on the exceptions filed by Mirant to the Initial Decision. Those parties' expectation was that the Commission's decision in the Mirant RMR Case "will provide relevant precedent in the resolution of the issues raised by the instant complaint." *Id*. at 21.

A year later, a similar complaint was filed jointly by the CAISO, CEOB, CPUC and SDG&E against Cabrillo Power I LLC, in Docket No. EL03-22-000. And in a limited-term

[9] In this regard, the generic analysis and conclusions of the Initial Decision could not be more different from how it was portrayed, as completely Mirant-specific, by some Owners (other than Mirant) in their comments on the proposed Global Settlement. *See* Comments of Calpine Corporation, Geysers Power Company, Delta Energy Center, LLC, and Williams Power Company, Inc., on Joint Offer of Settlement at 22 (February 22, 2005) ("Calpine-Williams Comments"); Reply Comments of Dynegy Power Marketing, Inc., *et al*. On The Joint Offer of Settlement at 4 (March 2, 2005).

[10] A similar complaint was filed jointly soon afterwards against PG&E as an RMR Owner by the CAISO, CEOB and CPUC. That proceeding, Docket No. EL02-20-000, was settled by being withdrawn. *Pacific Gas and Elec. Co.*, 110 FERC ¶ 61,308 (2005).

settlement of rates under a new, unexecuted RMR Agreement filed by Delta Energy Center, LLC (an affiliate of Calpine Corporation) in Docket No. ER03-510-000, the parties, including the CAISO and PG&E, agreed to defer litigation in that proceeding of the Monthly Availability Payment for the earlier of more than two years or the issuance of an order on rehearing in the Mirant RMR Case. In the interim, the Owner's proposed rates went into effect subject to refund.[11] This deferral was to allow for the possibility that the Commission would find its order on the Initial Decision in the Mirant RMR Case applicable to issues in the *Delta Energy Center* case.

2. Several Mirant RMR Units are operating under Condition 1.

In order to sell capacity and energy to PG&E under a power sale contract ("Wraparound Agreement") between the Mirant Owners and PG&E, Mirant currently operates three of its RMR Units under Condition 1. Beginning July 1, 2005, *all* Mirant RMR Units, including the four units currently under Condition 2, will operate under Condition 1.[12]

3. RMR Aspects of the Mirant-California Global Settlement

After lengthy negotiations among Mirant Corporation and its affiliates, and various California parties[13] involved in the California Refund and related cases at the Commission (Docket Nos. EL00-95-000, *et al.*), and representatives of the Commission's Office of Market Oversight and Investigations, a settlement was reached on January 14, 2005, and filed as an offer

[11] The deferral period expires September 30, 2005.

[12] Unless terminated earlier, the First Wraparound Agreement followed by the Second Wraparound Agreement will continue through 2012. Because, as noted above, Mirant cannot sell power from an RMR Unit under Condition 2 and retain the revenue in addition to its RMR contract payments from the CAISO, these RMR Units will remain under Condition 1 for the term of the Wraparound Agreement except for those that may no longer be on RMR status.

[13] Including all the California RMR Parties except the CAISO, which was not a party to the Global Settlement.

of settlement in the above-captioned dockets on February 4, 2005 ("Global Settlement"). Among the matters resolved were rights to refund or other claims through September 30, 2004, in the Mirant RMR Case[14] as well as any other claims under or in connection with any Mirant RMR Agreement. Global Settlement, Section 8.2. In a separate provision, Section 8.4, the settlement parties agreed to file an offer of settlement resolving some issues in the rate change filing Mirant was obligated by the RMR Agreements to make for 2005.[15]

The Global Settlement also provided that Mirant and PG&E would enter into two, sequential-term Wraparound Agreements, one for 2005 and the second for 2006-2012. Under these contracts, which essentially are tolling agreements, PG&E has the right to call upon the capacity and energy from each Mirant RMR Unit while that unit is on RMR status.

As noted above, the settling parties, notably Mirant and PG&E, did not understand the Global Settlement to have resolved all issues in the Mirant RMR Case. This is evidenced by both the limitation to September 30, 2004, for the release of claims for refund and other claims, as well as the express obligation for both Mirant and PG&E to seek prompt resolution of the Mirant RMR Case from the Commission at the "earliest possible date" following the effective date of the Global Settlement.[16]

Among the comments on the proposed Global Settlement were those jointly of Calpine Corporation, two of its affiliates, and Williams Power Company. Those comments focused entirely on arguing that the Mirant RMR Case should be dismissed as moot because "essentially"

---

[14] Referred to in the Global Settlement as the "FERC RMR Proceedings."

[15] This offer of partial settlement was approved as an amendment to Mirant's original rate filing. *Mirant Delta, LLC, and Mirant Potrero, LLC*, 110 FERC ¶ 61,136 (2005).

[16] Global Settlement, Section 8.1. This section also sets January 1, 2005, as the first date on which an order on the merits of the Mirant RMR Case can affect rates under the RMR Agreements.

all issues would be resolved by the Global Settlement and there would be no remaining issues for the Commission to decide in the RMR case.[17] Much of that argument was based on the Wraparound Agreements. Calpine and Williams claimed, because Mirant will receive payments from the Wraparound Agreement which, when combined with those from its RMR Agreements, equal what it would have been paid under Condition 2 of the RMR Agreements, that Mirant is indifferent to the outcome of the RMR Case and therefore there is no remaining issue to decide. *Id*. at 15. These comments also made a variety of claims never addressed in the record or briefs in the Mirant RMR Case, such as those that the Initial Decision is based on circumstances that no longer exist and is inconsistent with what Calpine and Williams assert is current Commission policy on RMR matters. *Id*. at 5. The settling parties pointed out in their reply comments that (a) the Mirant RMR Case would not be made moot by approval of the Global Settlement because a lawful Condition 1 rate is still required and (b) the Commission had no need to address the procedural status of the Mirant RMR Case when ruling on the offer of settlement in the Global Settlement.[18] Nevertheless, although the Settlement Order did not adopt many of the Calpine-Williams arguments, the Commission concluded that the Mirant RMR Case was moot because "the [Global] Settlement resolves all claims with respect to the Mirant Parties that are addressed in the RMR Initial Decision," and that any order on the Initial Decision would be nothing more than advisory, something the Commission had no interest in issuing. Settlement Order at PP. 19-20.

[17] Calpine-Williams Comments at 4-5.

[18] Joint Reply Comments Of The Mirant Parties, The California Parties And OMOI In Support Of Joint Offer Of Settlement at 14-15 (March 2, 2005).

III. LEGAL STANDARD FOR MOOTNESS

A case is moot if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). However, even when some issues become moot, "the remaining live issues supply the constitutional requirement of a case or controversy." *Id.* at 497. This rule applies to agency decisions as well as to federal courts. *See Tucson Medical Center v. Sullivan*, 947 F.2d 971, 978 (D.C.Cir. 1991). Therefore, even when most but not all issues in a rate case have been resolved by an approved offer of settlement, those that remain are sufficient to preclude mootness. *See Connecticut Light & Power Co. v. FERC*, 627 F.2d 467, 469-470 (D.C.Cir. 1980); *cf. Central Lincoln Peoples' Util. Dist. v. Johnson*, 735 F2d. 1101, 1109 n.4 (9th Cir. 1984) (issues concerning superseded rates not moot for rates collected subject to refund).

IV. BECAUSE SOME RATES UNDER THE MIRANT RMR AGREEMENTS ARE NOT FINAL, THE MIRANT RMR CASE IS NOT MOOT AND AN ORDER ON THE MERITS MUST BE ISSUED.

Under relevant legal authority, the Mirant RMR Case cannot be terminated as moot because there are unresolved issues, and the rights and obligations of CAISO, Mirant and PG&E will be affected by the resolution of these issues. The financial effect of the Wraparound Agreements on Mirant does not make the case moot. Nor can the possibility that the RMR Agreements may change as part of the CAISO's lengthy market redesign process make live issues moot, especially because the rates remaining to be set are being charged on an interim basis under the RMR Agreements and will be charged at least through 2006. The just and reasonable levels of three types of rates applicable to operation of Mirant RMR Units under Condition 1 addressed in the Initial Decision have not been determined by final Commission order, and there are several Mirant units operating under Condition 1. The Global Settlement did *not* define the rate levels to be followed in the Mirant RMR Case or the methodology to be used

to define the rate levels. It only settled Mirant's potential refund obligation through 2004. Without such lawful rates, the CAISO will have no basis on which to pay Mirant some of the charges under Condition 1 of the RMR Agreements. To make a rate determination, the Commission must decide the basis on which these rates will be set, *i.e.*, what rate methodology will be used, which is an issue of first impression under the CAISO's RMR Agreements. If the Commission decides to update the record, it needs to do so after determining the applicable rate methodology, so the parties can present specific evidence about Mirant's RMR Units as applied to that methodology.

A. Three Types Of Condition 1 Rates Under The Mirant RMR Agreements Have Not Yet Been Set By The Commission As Final And Lawful.

The FOPF for each Mirant RMR Unit under Condition 1, used since June 1999 to determine the Monthly Availability Payment, is an interim rate. Under the terms of the 1999 Settlement, those payments are subject to refund or surcharge when a final, lawful rate is set in the Mirant RMR Case.[19] So are the Surcharge Payment Factor and Repair Payment Factor. Although the Global Settlement resolved the amounts that might be due from one party to another in the Mirant RMR Case through December 31, 2004, as mentioned earlier many (and soon all) of Mirant's RMR Units are operating under Condition 1. The 1999 Settlement provides for the use of interim rates only until there is final Commission action on the rate case. Therefore, to avoid Mirant having no lawful Payment Factors to charge the CAISO under the RMR Agreements, the Commission must set just and reasonable rates in accordance with Section

[19] *See* Stipulation and Agreement, Docket Nos. ER98-441-000, *et al.*, Section II.B.3(b) at 20-21 (April 2, 1999).

205.[20] Moreover, because Mirant is collecting Fixed Option Payments and Surcharge Payments currently for Condition 1 units under interim rates, the CAISO and PG&E may be entitled to refunds of some of these amounts, depending on the difference between interim and final rates. There is no lawful basis for summarily abolishing that right to refund, which is a statutory right under Section 205 as well as a contract right under the 1999 Settlement.

B. The Existence Of The Wraparound Agreements Does Not Make The Mirant RMR Case Moot Or A Decision On Mirant RMR Rates Merely Advisory.

The Settlement Order references the existence of the Wraparound Agreements when concluding that the Global Settlement "resolves all claims with respect to the Mirant Parties that are addressed in the RMR Initial Decision." Settlement Order at P. 19, n.38. The Settlement Order does not explain *how* the Global Settlement resolved all such claims. The absence of any explanation, based on record evidence, for this conclusion is a legal defect and renders the Settlement Order arbitrary and capricious agency action. The statement in the Settlement Order appears to be based at least in part on the assertion by Calpine and Williams that because the "effect of these Wraparound Agreements, and specifically the payment mechanisms by which Mirant will receive Condition 2 revenues, is to keep Mirant financially whole as to its RMR Units, regardless of the outcome on the merits of the RMR Initial Decision"[21], there can be no further issue or change in a party's position in the Mirant RMR Case. That is untrue.

---

[20] Because no Fixed Option Payment for an RMR Unit under a CAISO RMR Agreement has been set as the result of a rate case litigated to a final decision by the Commission, the Mirant RMR Case is one of first impression as to this issue. *See* Initial Decision at 65,109. Therefore, when providing its reasoned explanation for the rates approved as just and reasonable rates, the Commission's explanation must specify the method used to set these rates, as the Presiding Judge did in the Initial Decision.

[21] Settlement Order at P. 16.

A rate case under the FPA cannot be declared moot and terminated because the utility subsequently has entered into one or more contracts that generate revenue in addition to the revenue obtained under the RMR Agreements whose rates are at issue in the case. Rate cases become moot, short of decision on the merits, either because the parties settle or because some event occurs which makes decision on the merits incapable of defining the lawful rights or obligations of the parties under the statute. Here Mirant and PG&E expressly did *not* settle the Mirant RMR Case.[22] Nor have the Wraparound Agreements made a decision on the merits meaningless. Although the Wraparound Agreements are *related* to the RMR Agreements, by virtue of determining some prices with reference to payments under the latter and by designating the source of capacity and energy supplied as Mirant's RMR Units, the Wraparound Agreements *have no impact* on the legal rights or obligations of Mirant, the CAISO or PG&E in relation to the RMR Agreements. Those rights and obligations remain to be decided by the Commission in the Mirant RMR Case.

The position taken by Calpine and Williams, and apparently relied upon in the Settlement Order, is that furnishing Mirant with revenue from another contract to equal the amount of revenue Mirant would have received under the RMR Agreement if it had not entered into the Wraparound Agreements makes it unnecessary for the Commission to set a rate under the RMR Agreements. The absurdity of this proposition can be illustrated by assuming that instead of PG&E (or the CAISO), another entity had entered into a tolling agreement with Mirant for the output of Mirant's RMR Units, with its price terms identical to those of the Wraparound Agreements: the difference between Mirant's revenue under the RMR Agreement before the tolling agreement and after the tolling agreement, i.e., the difference between Mirant's revenue

[22] *See* Global Settlement, Section 8.1.

under Condition 2 and Condition 1. Nothing in such a tolling agreement with a party unrelated to the RMR Agreements affects what Mirant may lawfully charge the CAISO (and ultimately PG&E) under the RMR Agreements; instead, that is among Mirant's legal obligations that can only be determined in the Mirant RMR Case. The fallacy of the Calpine/Williams position is further illustrated by assuming alternately that the price terms under the hypothetical tolling agreement produce more or less revenue for Mirant than do the Wraparound Agreements. This could be the result of Mirant having bargained more (or less) effectively than it did for the Wraparound Agreements, or there could be any number of reasons why the contract terms were different. But nothing about those terms, price or otherwise, changes Mirant's rights and obligations under the RMR Agreements. For this reason, nothing about the Wraparound Agreements can alter or especially eliminate the issues remaining to be decided in the Mirant RMR Case.

And even if it *were* permissible to treat the effect of the Wraparound Agreements as settling issues as to Mirant in its RMR Case, as Calpine and Williams themselves concede, the level of the Fixed Option Payment paid ultimately by PG&E represents the amount of cost allocable to PG&E's transmission customers.[23] Currently the Commission treats the cost of RMR Agreements as transmission expense, not as generation, yet the costs of the Wraparound Agreements—for capacity and energy—are just as certainly generation expense. This means that PG&E's transmission-only customers will be directly and differentially affected by the outcome in the Mirant RMR Case for as long as the units in question operate under RMR Agreements. Thus, in order to observe the Commission's long-standing policy that cost causation should be aligned with cost recovery, the existence of the Wraparound Agreements cannot justify

[23] Calpine and Williams Comments at 15, n.24.

abandoning the proper allocation between functions of revenues associated with entirely different contracts involving Mirant's RMR Units.

C. Possible Changes To The RMR Agreements, Or Their Replacement By Other Means Of Local Market Power Mitigation, Is Too Indefinite And Remote To Warrant Terminating The Mirant RMR Case.

In directing that the proceedings in the Mirant RMR Case be terminated (Settlement Order at P. 20), the Commission indicated that a ruling on remaining issues would be merely advisory because RMR contracts will change significantly under CAISO's revised market structure. The Commission's reasoning in this respect is both premature and speculative.

Although it is certainly possible that RMR contracts will change when both the resource adequacy requirements of the CPUC (applicable to PG&E, SCE and SDG&E) and the CAISO's market redesign are fully implemented, the existing RMR Agreements with Mirant and other generators will be required through 2006 at a minimum. Indeed, the Mirant RMR Agreements are vital to assuring reliable service to load pockets such as the San Francisco Bay Area that often cannot be served completely by other generating resources. Although the CAISO's annual determination of the resources needed for local reliability is repeated each year, there is little doubt that several Mirant units will once again be designated as RMR, as many have been every year since Mirant acquired them. For the near term then, the remaining rate issues are neither moot nor merely advisory. During 2005 and 2006, PG&E, via the CAISO, expects to pay Mirant about $88 million under the RMR Agreements in Monthly Availability Charges and other fixed cost payments at current (interim) rates.

Moreover, for the period beyond 2006, there is no assurance as to when the changes under resource adequacy and market redesign as they relate to local reliability will be implemented and what form they will take. Indeed, there has not even been any preliminary determination of the nature of any new agreements that may be needed to assure local reliability

needs can be met without the exercise of undue market power with respect to units like the Mirant units at issue here. Although initially there had been some thought that local reliability dispatch might be totally usurped by resource adequacy, more recently there has been a recognition that the process of assuring resource adequacy alone may not be sufficient to mitigate the market power of units critical to meeting local reliability needs. Given the ongoing debate about how best to mitigate the market power associated with such units,[24] it is unknown and unknowable whether the current RMR contracts will be modified only slightly or entirely rewritten.

In short, there is no uncertainty about the continued relevance of current RMR Agreements and their rates for Mirant and other Owners during at least 2005 and 2006, and the FOPF is a fundamental element of RMR rates. Moreover, although there is uncertainty about the role of RMR Units in California beyond 2006, it is unwarranted to discard the Initial Decision in the Mirant RMR Case, which is the product of a fully litigated record and a considered opinion, without even eliciting the views of the parties and examining the details of the decision to determine whether subsequent changes in other aspects of the CAISO market render its particular conclusions "stale" or moot as applied specifically to Mirant and potentially to other, similarly situated RMR Owners. The intent of the Global Settlement provision that the Commission has precipitously ignored (Section 8.1) was designed to ensure that such an examination occurred in the proceeding where the original record and findings reside.

[24] *Order Instituting Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning*, R.04-04-003 (CPUC, April 1, 2004).

D. If The Commission Concludes The Record Should Be Reopened, It Should Do So After Issuing Its Decision On Rate Methodology.

Because the Settlement Order concluded that the record in the Mirant RMR Case is stale (Settlement Order at P. 20), as part of issuing an order on the merits of that case the Commission may decide to reopen the record. If it does so, the Commission should first issue its decision on the methodology to be used to determine just and reasonable rates (FOPF and other Payment Factors) because there is ample, non-stale evidence in the record from which to make this determination and because it will provide important guidance to the parties in supplementing the record on matters that might arguably be considered stale, such as the specific costs, expected revenues and operating characteristics of Mirant's RMR Units or such other unit-specific information as may be needed to properly apply the rate methodology found by the Commission to lead to just and reasonable RMR rates. Given the extensive record developed in this case, exemplified by the painstaking analysis in the Initial Decision, the Commission has ample basis to reach a decision on methodology without reopening the record for that purpose, which would amount to re-litigating the entire case even though the *pro forma* RMR Agreement has not changed since 2000.[25]

CONCLUSION

For the reasons presented above, the Commission should reverse its decision to terminate the Mirant RMR Case, Docket Nos. ER98-495-000, et al., and should issue a decision on the merits of that case as soon as possible. If the Commission decides to reopen the record with regard to matters specific to Mirant's RMR Units, it should first issue a decision on the merits of the method for determining just and reasonable FOPF and other Payment Factors.

[25] Some changes to the version adopted by the 1999 Settlement resulted from a further settlement filed August 14, 2000. *See California Indep. Sys. Operator Corp.*, 93 FERC ¶ 61,089 (2000).

Respectfully submitted,

/s/ Kenneth L. Glick
Erik N. Saltmarsh
Chief Counsel
Kenneth L. Glick
Staff Counsel
California Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, California 95814

Attorneys for the California Electricity Oversight Board

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

Attorney for the California Independent System Operator Corporation

/s/ Nicholas Sher
Randolph L. Wu
General Counsel
Arocles Aguilar
Lawrence G. Chaset
Nicholas Sher
Public Utilities Commission of the State of California
505 Van Ness Avenue
San Francisco, California 94102

Attorneys for the Public Utilities Commission of the State of California

/s/ Stuart K. Gardiner
Mark D. Patrizio
Stuart K. Gardiner
Pacific Gas and Electric Company
77 Beale Street, B30A
Post Office Box 7442
San Francisco, California 94120

Attorneys for Pacific Gas and Electric Company

/s/ Nicholas W. Fels
Nicholas W. Fels
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

James F. Walsh
San Diego Gas & Electric Company
101 Ash Street
San Diego, California 92101

Attorneys for San Diego Gas & Electric Company

/s/ Richard L. Roberts
Richard L. Roberts
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Anna J. Valdberg
Southern California Edison Company
2244 Walnut Grove Avenue
Rosemead, California 91770

Attorneys for Southern California Edison Company

Dated: May 13, 2005

200505135032 Received FERC OSEC 05/13/2005 03:00:00 PM Docket# EL00-98-118, ET AL.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon each person designated on the official service list for these proceedings in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at San Francisco, California this 13th day of May, 2005.

/s/ Joanne M. Myers
Joanne M. Myers

200505135032 Received FERC OSEC 05/13/2005 03:00:00 PM Docket# EL00-98-118, ET AL.

Submission Contents