UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Mirant Americas Energy Marketing, LP	**)**	
Mirant California, LLC	**)**	**Docket No. EL03-158-000**
Mirant Delta, LLC, and	**)**	
Mirant Potrero, LLC	**)**	

COMMENTS OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION ON AGREEMENT AND STIPULATION

To: Presiding Administrative Law Judge Carmen A. Cintron

On September 30, 2003, Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, Mirant Potrero, LLC (together, "Mirant") and the Federal Energy Regulatory Commission Trial Staff ("Staff") submitted an Agreement and Stipulation ("Agreement") to the Commission in full and final resolution of all issues related to Mirant set for hearing on June 25, 2003 in *American Electric Power Service Corp., et al.*, 103 FERC ¶ 61,345 (2003) (the "Gaming Order" or "Order"). Pursuant to Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602 (2003), the California Independent System Operator Corporation ("CAISO") timely submits these comments on the Agreement.

I. Background

The Gaming Order required Mirant to show cause why it should not be found to have engaged in False Import, Cutting Non-Firm, Circular Scheduling, Load Shift, Paper Trading and Double Selling, as those practices were described in the Order. In the Agreement, Mirant and Staff propose to settle the proceeding by having Mirant pay $332,411.00. Agreement at ¶ 4.2.

II. Discussion

Although the CAISO does not oppose approval of the agreement with respect to, Cutting Non-Firm, Circular Scheduling, Load Shift, and Paper Trading, subject to the caveat concerning paragraph 4.4 of the Agreement, discussed below, the CAISO does object to the Agreement's proposed treatment of the practices of False Import and Double Selling.

The amount Mirant proposes to pay in settlement represents Mirant's total revenues from transactions that potentially are instances of Cutting Non-Firm ($20,273),[1] Circular Scheduling ($105,069),[2] Load Shift ($193,777),[3] and Paper Trading ($13,292).[4] *See* Agreement at ¶¶ 2.3, 2.4, 2.5, 2.6. The CAISO believes payment of these total revenue amounts represents a settlement of these practices that is in the public interest.

[1] The amount is based on the CAISO's June Report at 28, Table 11. *See* Agreement at n.13.
[2] The amount is based on the CAISO's June Report at 17, Table 4. *See* Agreement at n.22.
[3] The amount is based on Mirant's calculation of revenues received from two transactions associated with tape transcripts provided by another entity in Staff's western markets investigation. *See* Agreement at ¶ 2.5.
[4] The amount is based on Mirant's calculation of revenues received from one transaction that Dr. Fox-Penner suggested might have been a Paper Trade. *See* Agreement at ¶ 2.6.

With respect to False Import, the Agreement, which requires Mirant to pay nothing to settle with respect to this practice, rests on Staff's interpretation of the Gaming Show Cause Order. In Staff's view, a False Import transaction requires that a seller (i) engage in a transaction involving export of energy from and re-import of energy into the State of California, (ii) involve a third party in the export-plus-import chain, and (iii) sell the allegedly imported power to the CAISO at a price above the then-applicable price cap in the CAISO's Real Time Market. Moreover, Staff's position is that the Commission made subject to the Show Cause Order only those False Imports that occurred between May 1, 2000 and October 2, 2000. The CAISO disagrees with this interpretation. In our Request for Rehearing and/or Clarification of the Order, filed on July 25, 2003, we asked the Commission to clarify that the investigation into potential False Import transactions would include all exports scheduled on a Day-Ahead or Hour-Ahead basis that could be associated with a subsequent sale of real time energy as an import, which is the screen that the CAISO's Department of Market Analysis used to identify potential False Import transactions in the CAISO Report.[5] As we explained therein, limiting the scope of inquiry to only those transactions that involved an export from the State of California, a third-party, and a sale to the CAISO above the then-applicable price cap would be inconsistent with the Commission's rationale for concluding that False Import transactions constitute a Gaming Practice in the first place. The rationale was that they involved a misrepresentation to the CAISO that the

[5] On July 11, 2003, the California Parties filed a motion for expedited clarification of the Order, in which they also requested that the Commission clarify that the investigation into potential False Import transactions would include all transactions where power was exported or claimed to be exported from California via any market other than Real-Time, and then re-imported in Real-Time. California Parties' Motion for Expedited Clarification of Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior," Docket Nos. EL03-137, *et al*. (filed July 11, 2003) at 5-13.

applicable power had been imported from outside the CAISO system, when, in fact, the generation was California generation that had never left the CAISO system. We also noted that the Commission compiled its list of entities that appear to have engaged in False Import based on those entities that were named in the CAISO Report as possibly having engaged in Ricochet (*i.e.,* false import) transactions. We therefore urge the Commission, at this time, not to approve the Agreement with respect to the issue of False Import. Instead, we respectfully request that the Commission decline to address the Agreement until it renders a decision on the appropriate scope of the investigation into the practice of False Import in response to the Requests for Rehearing and/or Clarification of the Order that are currently pending before it.

The Agreement includes no payment for Double Selling, but leaves for resolution in Docket No. ER03-746-001 ("Amendment No. 51 proceeding") the issue whether Mirant should have payments to it rescinded based on that practice, and if so, in what amount. Agreement at ¶ 3.7. The CAISO objects to this proposal for two reasons. First, it is not certain that the Commission will approve the CAISO's proposal in the Amendment No. 51 proceeding to rescind payments to those suppliers who did not make Ancillary Services available when they were obligated to do so. Several parties, including Mirant, as part of the California Generators group, filed comments opposing the CAISO's proposal, on various grounds.[6] *See* California Generators Protest of Cal ISO's July 9, 2003 Compliance Addendum Filing, filed in Docket No. ER03-746-001 (July 24, 2003). If the Commission does not accept the CAISO's proposal in the Amendment No. 51 proceeding, the only remaining avenue of relief for Double Selling will be through the instant proceeding. Moreover, the basis for relief in the instant

proceeding, violation of the anti-gaming provisions of the CAISO Tariff, is different from the basis for relief in the Amendment No. 51 proceeding, which turns on whether suppliers are entitled to payment for services that they did not provide.

Moreover, even if the Commission does accept the CAISO's proposal in the Amendment No. 51 proceeding, the remedy that the CAISO has requested there is different from the remedy that the Commission has made available for Double Selling in this proceeding. In the Amendment No. 51 proceeding, the CAISO proposes only to rescind the Ancillary Services payments made to those suppliers that did not satisfy their obligations to hold capacity available as required. On the other hand, in the Gaming Order, the Commission has indicated that the remedy for engaging in Double Selling, as with other behavior found to have constituted gaming, is disgorgement of the profits associated with that practice. Because Double Selling involves two transactions, a sale of Ancillary Services, and then a sale of Energy from the same capacity that was committed to remain unloaded to provide those Ancillary Services, disgorgement would presumably entail the payment of the profits received from *both* the Ancillary Services sale and the sale of Energy. The Commission should not foreclose this separate remedy for a practice that it has found to constitute gaming in violation of the CAISO Tariff. Therefore, the CAISO urges the Commission to reject the terms of the Agreement as they relate to the practice of Double Selling.

Paragraph 4.4 of the Agreement purports to make it a condition of the Agreement that the Commission, in addition to accepting the Agreement as a final resolution of the issues related to Mirant that were set for hearing in the Gaming Order, also grant Mirant a release from all potential claims under various statutes, rules, regulations, orders and

[6] For instance, the Generators argue that the ISO's proposal violates the filed rate doctrine. *Id*. at 2-5.

tariffs based on or arising out of, in whole or in part, “any conduct that is the subject of” this docket or the Staff’s investigation in PA02-2-000. This purported condition, in which Staff did not join, should be expressly rejected by the Commission in any order approving the agreement. Mirant has suggested no rationale for why this patently over-broad release would be in the public interest, and there clearly is none. Settlement with respect to the specific transactions that are the subject of the Gaming Order with respect to Mirant is all that Mirant has offered and all that the Commission should approve. The Commission should make clear in any order that neither the Agreement, the Commission’s order, nor payment of the amount called for by the Agreement, will affect Mirant’s potential liability under any other proceeding now ongoing, or prevent the institution of future Show Cause or other proceedings against Mirant based on time periods, practices or transactions different from those made relevant to Mirant in the Gaming Order.

III. Conclusion

The CAISO does not object to approval of the Agreement with respect to Cutting Non-Firm, Load Shift, Circular Scheduling, and Paper Trading. The CAISO does, however, object to the terms of the Agreement as they relate to the practice of Double Selling. Moreover, the CAISO requests that the Commission not rule on the Agreement before it addresses the requests for rehearing and motions for clarification pending on the issue of False Import. Finally, the CAISO objects to paragraph 4.4 of the Agreement.

Respectfully submitted,

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