105 FERC ¶ 61, 074
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

California Independent System Operator Corporation — Docket No. ER03-1221-000

ORDER ON TARIFF AMENDMENT NO. 56

(Issued October 17, 2003)

1. In this order we reject tariff revisions submitted by the California Independent System Operator Corporation (ISO) as tariff Amendment No. 56 to its Open Access Transmission Tariff. The ISO states that the proposed Amendment is necessary because its existing procedures for the bidding, scheduling, and dispatching of Reliability Must-Run (RMR) energy has become unworkable as a result of the demise of the California Power Exchange (PX). Since the demise of the PX, this RMR generation has been scheduled to dummy load, a violation of the ISO's Market Monitoring and Information Protocol (MMIP).

I. Background

2. The ISO's initial market design, as modified by the Commission,[1] called for Dispatching RMR Units "after the PX preferred schedule is set, prior to congestion management." However, due to limitations of the PX's computer systems, the ISO could not accommodate this timing and instead, the ISO dispatched RMR Units after issuing its final Day-Ahead schedules.

3. The ISO states that this practice created two problems. First, even though RMR Energy has to be produced to maintain the reliability of the ISO Controlled Grid, the ISO Tariff did not require that RMR Energy be included in any Market Participant's Final Schedule, and it generally was not included. The ISO claims that the unscheduled RMR Energy would appear in real-time, thereby forcing the ISO, in order to balance supply and demand, to accept large volumes of decremental bids to accommodate this essential but unscheduled Energy. Second, the ISO states that this RMR Energy depressed the real-

[1] Pacific Gas & Electric Co., et al., 81 FERC ¶ 61,122 at 61,556 (1997).

time imbalance Energy price and encouraged Load-Serving Entities to under-schedule their demand in the day-ahead market in order to capitalize on the depressed real-time prices.

4. In March 2000, the Commission approved the ISO Tariff Amendment No. 26 to address these concerns.[2] Amendment No. 26 modified the Tariff to allow the ISO to dispatch RMR Units (i.e., notify the RMR Owners of the unit-specific hourly requirements for the next day) two hours before the deadline for submitting bids to the PX (pre-dispatch). Amendment No. 26 allowed RMR Owners to elect from two options how they would be compensated for their RMR Energy: (Condition 1) sales in the market, via a bilateral contract or through an exchange; or (Condition 2) at the terms prescribed in the RMR Contract. If an RMR Owner elected Condition 1, it was not required to schedule the RMR Energy in the Day-Ahead Market, but was required to schedule it by the close of the Hour-Ahead Market. However, if an RMR Owner elected Condition 2, it was required to bid the RMR Energy into the PX Day-Ahead Market at a price of $0/MWh to provide the greatest opportunity for that Energy to be scheduled in the Day-Ahead Market. Amendment No. 26 also provided that if an Owner failed to schedule the RMR Energy as required, the Owner was not entitled to any payment for the RMR Energy, either under the RMR Contract or through the market sales.

5. On December 15, 2000, the Commission issued an order eliminating the requirement that California's investor-owned utilities serve their demand through the PX.[3] The PX subsequently announced it would cease operations effective January 31, 2001. On January 18, 2001, the ISO filed Tariff Amendment No. 37, which waived the RMR pre-dispatch requirements for RMR Owners to bid into PX if they were unable to do so. In March 2001, the Commission approved Amendment No. 37 to be effective on January 18, 2001.[4] We note that the Order approving Amendment No. 37 directed the ISO to develop revisions to RMR contracts to recognize the suspension of the PX markets and that the ISO neglected to follow through with this directive.

6. Despite Amendment No. 37, the ISO states that the PX's demise created two problems. First, the PX Day-Ahead market served as a sizable source of demand against which to schedule or "sink" RMR Energy, which was lost when the PX ceased operations. Second, the PX Day-Ahead price served as a transparent index for the market value of the RMR Energy. In that regard, when an RMR Owner elects to receive payment for RMR Energy under the RMR Contract, it receives two payments – one from the market for the market value of the RMR Energy, and a second payment from the ISO

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[2] California Independent System Operator, Inc., 90 FERC ¶ 61,345 (2000).

[3] San Diego Gas & Electric Co., <u>et al.</u>, 93 FERC ¶ 61,294 (2000).

[4] California Independent System Operator, Inc., 94 FERC ¶ 61,265 (2001).

for the RMR Contract price for that Energy. The RMR Owner is then required to credit back the market value of the Energy on its invoice in exchange for payment under the RMR Contract. If the RMR Contract price exceeded the market value, the Participating Transmission Owner (PTO) responsible for RMR Contract charges paid the difference. If the market value of the RMR Contract Energy exceeded the RMR Contract price, the Responsible Utility (or the PTO) earned a credit. The ISO stresses that the transparent credit-back price (the PX Day-Ahead price) was no longer available when the PX ceased operations.

7. The ISO states that, despite the loss of the PX, and the inability of the ISO and stakeholders to develop alternate provisions, RMR pre-dispatch continued.[5] However, the ISO states that recent developments have made further operation under the terms of Amendment No. 37 impracticable. The ISO points out that the Commission's June 25, 2003 Show Cause Order indicated that over-scheduling demand constituted a violation of the ISO's MMIP.[6] Consequently, certain RMR Owners will not be able to schedule bilateral transactions and/or schedule against "dummy" load to satisfy the ISO's balanced scheduling requirement. Subsequently, on July 15, 2003, Mirant filed for bankruptcy protection. Shortly thereafter, Mirant notified the ISO that it was having trouble finding a buyer for its pre-dispatched RMR Contract Energy.

8. On July 29, 2003, Commission staff convened a technical conference to discuss three possible solutions for these issues.[7] At the technical conference, the ISO agreed to file tariff changes proposing a way to retain the operational and contractual benefits of the pre-dispatch provisions but address problems of those RMR Owners who are unable to find a buyer for their pre-dispatched RMR Contract Energy. The ISO filed Amendment No. 56 to fulfill that pledge. The ISO states that Amendment No. 56 benefits the ISO by requiring that RMR Contract Energy be scheduled against demand before real-time, and benefits the Responsible Utilities[8] responsible for paying RMR

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[5] The ISO states that both the ISO and RMR Owners have been able to operate under pre-dispatch by substituting bilateral transactions for bids formally made into the PX Day Ahead markets.

[6] American Electric Power Service Corp., et al., 103 FERC ¶ 61,345 (2003).

[7] The three possible solutions that were discussed included: 1) waiving the ISO's balanced schedule requirement; (2) authorizing the scheduling of dummy load; and 3) mandating that RMR Energy be scheduled against some party's real load in the Day-Ahead time frame and assign a pre-determined price.

[8] The ISO Tariff defines a Responsible Utility as "[t]he utility which is a party to the Transmission Control Agreement in whose Service Area the Reliability Must-Run

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Contract charges by establishing a consistent and transparent credit-back price for RMR Contract Energy.

II. Notice and Interventions

9. Notice of the ISO's filing was published in the Federal Register, 68 Fed. Reg. 52,194 (2003), with motions to intervene and protests due on or before September 8, 2003. The following parties filed motions of intervention: the Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California (Southern Cities), Automated Power Exchange, Inc. (APX), the Independent Energy Producers Association (IEP), the California Municipal Utilities Association (CMUA), Turlock Irrigation District (Turlock), the California Electricity Oversight Board (Board) and the California Department of Water Resources (DWR).

10. Timely motions to intervene, comments, and protests were filed by the Public Utilities Commission of the State of California (CPUC), the Northern California Power Agency (NCPA), the State Water Project of the California Department of Water Resources (SWP), Reliant Energy Services, Inc. (Reliant), Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Petrero, LLC (collectively, Mirant), Southern California Edison Company (Edison), Duke Energy North America LLC and Duke Energy Trading and Marketing LLC (collectively, Duke Energy), the California Electricity Oversight Board (Board), Dynegy Power Marketing, Inc., El Segundo Power, LLC, Long Beach Generation LLC, Cabrillo Power I LLC and Cabrillo Power II LLC (collectively, Dynegy), Sempra Energy (Sempra), Williams Power Company, Inc. (Williams), the Metropolitan Water District of Southern California (Metropolitan), and Pacific Gas and Electric Company (PG&E). On September 9, 2003, NRG Power Marketing, Inc. and NEO California Power LLC (collectively NRG) filed a motion for late intervention.

11. On September 23, 2003, the ISO and Edison each filed an answer to the protests and comments.

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Unit is located or whose Service Area is contiguous to the Service Area in which a Reliability Must-Run Unit owned by an entity outside of the ISO Controlled Grid is located."

III. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[9] the timely, unopposed motions to intervene of the movants listed above serve to make them parties to the proceeding. Regarding the untimely motion to intervene of NRG, given its interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay from granting late intervention, we will grant this party's intervention. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[10] prohibits an answer to a protest and an answer to an answer unless otherwise permitted by the decisional authority. Given the issues presented here and our reliance on the answers submitted by the ISO and Edison, we will accept the answers for good cause shown because they provide additional information that assists us in the decision-making process.

B. ISO's Proposed Tariff Revisions

13. Under the ISO's proposal, the Scheduling Coordinator (SC) for each RMR Unit that has elected to receive the RMR Contract price shall schedule that RMR Contract Energy requirement via an Inter-Scheduling Coordinator energy trade (Inter-SC trade) with the SC for the Utility Distribution Company (UDC) affiliated with the Responsible Utility for the RMR Unit. The Responsible Utility pays for the RMR Contract Energy associated with the RMR Units dispatched to meet its local reliability requirement. For the purposes of the credit against the RMR invoice, this Inter-SC trade shall be deemed to take place at $0/MWh. If an RMR Unit is located so as to provide service to more than one Responsible Utility, the ISO shall make a Section 205 filing to allocate how the RMR Contract Energy is to be shared between Applicable UDC SCs. The ISO states that this allocation is consistent with how the ISO Tariff directs that costs for an RMR Unit that provides service to more than one Responsible Utility is treated. (See ISO Tariff, Section 5.2.8).

14. The ISO also proposes to notify the RMR Owner of its RMR Energy requirements for the operating day at 5:00 AM on the day before the operating day. The RMR Owner will have forty-five minutes to elect the payment option[11] for its RMR Energy and must

[9] 18 C.F.R. § 385.214 (2003).

[10] 18 C.F.R. § 385.213(a)(2) (2003).

[11] RMR Owners currently have one hour within which time to elect a payment option, i.e., either be paid the price specified in the RMR contract or be paid through the market for their RMR energy.

notify the ISO of that election. The ISO will then notify the Applicable UDC SC of the amount of RMR Contract Energy by 6:00 AM, four hours before the deadline for submitting Initial Preferred Schedules to the ISO. According to the ISO, any RMR Energy that is dispatched after 6:00 AM is not required to be scheduled against Demand.

15. To allow the Applicable UDC SC to better plan how to use its resources to serve its load, the ISO proposes to provide the Applicable UDC SC, on a monthly basis, with a rolling 12-month non-binding forecast of hourly RMR Energy requirements from all RMR Units for which the affiliated Responsible Utility pays the RMR Contract charges. The ISO will provide a forecast of total RMR Energy. The ISO states that it cannot predict what amount of this RMR Energy will be RMR Contract Energy or RMR Market Energy because the RMR Owner makes that election.

16. The ISO proposes to add a tariff provision waiving penalties and charges that might accrue if an Applicable UDC SC inflated its demand schedule in order to submit a balanced schedule after taking “commercially reasonable efforts” to accommodate the RMR Contract Energy. To verify that the Applicable UDC SC made such efforts, the ISO proposes that the Applicable UDC SC provide information to the ISO as to why it could not accommodate this energy. If the UDC SC makes such “commercially reasonable” efforts and is unable to match all the RMR contract path energy with load, then the UDC SC may nonetheless submit a balanced schedule where demand is artificially increased to match all the RMR energy. The UDC SC must notify the CAISO by the deadline for submitting Day-Ahead Initial Preferred Schedules of the preliminary amount of RMR contract path energy for each hour that is not matched to load. The CAISO shall accept the “balanced schedule” as if the load portion of the balanced schedule represented an accurate forecast and the CAISO will waive any charge or penalty that may be associated with a deviation from a balanced schedule caused solely by the Applicable UDC accepting RMR contract path energy.

17. The ISO requests that the provisions of this Amendment be put into effect 60 days from the date of filing.

C. Comments

18. Sempra notes that Amendment No. 56 does not resolve the issue of determining the fair market value of the RMR energy for purposes of setting retail transmission rates. Similarly, Edison states that the disparity between the trading value of $0 of RMR Energy and the actual value that the RMR Contract Energy may have in the markets could cause disputes between parties regarding the value that should be assigned to the RMR Contract Energy, and how that value is properly distributed among market participants.

19. Dynegy states that the ISO fails to provide any policy reasons why a zero price should be used and notes that deeming the price of the trade to be zero essentially requires the Responsible Utility to pay for 100 percent of the RMR costs. As Dynegy explains, the ISO's existing practices allow for the RMR owner to sell power at arms-length in bilateral markets. The price of the power sold is market-based and the resulting revenues are netted against RMR contract revenues. In this way, the Responsible Utility essentially pays and recovers in transmission rates only the reliability related portion of the RMR contract costs. Dynegy points out that, under the ISO's proposal, all RMR energy costs will be paid by the Responsible Utility and asserts that transmission rates paid by load will be needlessly increased.

20. Dynegy opposes moving, to 5:45 AM, the deadline for RMR Owners to elect either the Contract Option or the Market Option, at least for Condition 1 units. Dynegy explains that day-ahead markets for power and natural gas are at the height of their activity during the period 6:00 AM to 6:15 AM. Dynegy believes that the ISO's proposal, and the loss of 15 minutes, will cause RMR Owners to have substantially less information when making the decision of which Option to take. Dynegy states that possessing less information will likely result in an increase in the number of days RMR Owners of Condition 1 units choose the Contract Option. Dynegy observes that such an effect will exacerbate the problem of placing market risk on load. Dynegy further states that, while it can understand the need for the Applicable UDC SCs to have information as to how much supply it will be required to absorb, it should not come at the expense of forcing RMR Owners to make decisions when insufficient information is available. Dynegy requests that, at a minimum, the timeline should be left unchanged for owners of Condition 1 units.

21. Mirant argues that requiring that the Inter-SC trade take place at 6:00 AM provides the UDC SC with near-perfect market information during the height of the trading period. Mirant states that moving the deadline for the Inter-SC trade from 6:00 AM to 6:45 AM would allow market participants to consummate most bilateral transactions within their portfolio before the 6:45 AM deadline. Mirant further states that allowing the RMR Owner the opportunity to market the RMR contract energy prior to the deadline should reduce the amount of RMR contract energy that is provided to the Inter-SC trade. In turn, the Applicable UDC SC will be required to market less RMR Contract energy and would still have over three hours to market the remaining RMR energy before submitting its Preferred Day-Ahead Schedule. Mirant offers that any RMR Contract energy that is not sold and included in the Preferred Day-Ahead Schedule could still be marketed during the day and included in the Preferred Hour-Ahead Schedule.

22. Mirant submits that the ISO's proposal to provide a rolling 12-month average of RMR energy requirements to the Applicable UDC SC would violate Order No. 889's standards of conduct and should be rejected. Mirant explains that the ISO's proposal would allow one set of market participants the access to market data that is not available

to the rest of the market. Similarly, Dynegy requests that the total RMR pre-dispatch, the RMR energy to be sold into bilateral markets, and unit specific dispatch information must remain confidential. Dynegy states that the ISO's tariff is not specific in this regard.

23. Mirant requests that the ISO's proposal to waive penalties based on a "commercially reasonable efforts" standard be rejected, because the standard (1) will be extremely difficult to administer, with various parties interpreting the standard differently and with the ISO forced to require voluminous amounts of information to be submitted and turned over to the ISO for scrutiny when a UDC SC thinks the ISO was wrong in failing to waive a penalty, or (2) would allow the UDCs unbounded latitude to seek waivers and permit the ISO to act in an unduly discriminatory fashion in granting waivers. Dynegy expresses a similar concern.

24. PG&E argues that the ISO should not be allowed to impose the burden and cost of disputing penalties upon the PTO's UDC when the ISO assesses an RMR Contract-related penalty or charge based on no evidence of non-compliance. Specifically, PG&E states that the Amendment's proposed new Section 2.2.12.2.2.1 will allow the UDC to submit a balanced schedule despite some energy that is not matched with load, and the ISO will waive the resulting penalties and charges as long as the UDC provides data about its efforts to sell the energy or redispatch other UDC resources.

D. Commission Decision

25. The Commission agrees with the ISO that its tariff's RMR scheduling provisions are inadequate and must be modified. We also recognize that the ISO's proposal is an interim measure to address the problems associated with RMR scheduling, and that such problems will be ultimately solved with the implementation of Integrated Forward Markets in Phase 2 of the ISO's Comprehensive Market Design. However, upon review of the ISO's proposed tariff amendment, the Commission rejects the ISO's proposal finding that it may produce unjust and unreasonable results. The ISO's proposal is overly complex, requiring changes to the existing scheduling timelines and introducing new procedures to waive penalties based on a commercially reasonable efforts standard.

26. Additionally, we do not agree with the ISO that assigning an arbitrary value of $0/MWh to Inter-SC trades in any way provides transparency as to the market value of the RMR Energy. Valuing a bid at $0/MWh might facilitate scheduling, as it would ensure that the bid is chosen, but provides no useful information as to the market value of the energy. As the ISO points out (transmittal letter at p. 6), "the lack of transparency on the amounts credited back is not an operational issue of concern to the ISO, but a financial issue that should be of concern to the Responsible Utilities," and we agree.

27. Moreover, the ISO states in its answer that despite what appeared to be general agreement at the end of the technical conference on ways to address these problems, both

Mirant (the largest RMR owner) and PG&E (the responsible utility for Mirant's RMR Units) now recommend that the Commission reject the ISO's proposal. The Commission believes that a simpler approach to resolve the scheduling problem would be for the ISO to develop a procedure allowing RMR Owners who do not enter into a bilateral trade to schedule their RMR Energy to a load point designated by the ISO that would specifically be used for RMR Contract Energy.

28. This solution would allow RMR Owners to pre-schedule their generation without requiring changes to the scheduling timeline or establishing an arbitrary zero price for the SC credit. In addition, the Commission clarifies that such scheduling of RMR Contract Energy to designated load points would not violate the MMIP, as there is no false scheduling or fraud and the ISO will clearly know that this is RMR Energy. The Commission believes that such a solution would appropriately address issues related to the scheduling of RMR Energy. We therefore direct the ISO to revise its tariff consistent with this discussion.

E. Mirant Bankruptcy

29. On September 12, 2003, the Bankruptcy Court for the Northern District of Texas issued a "Temporary Restraining Order Against the Federal Energy Regulatory Commission" ("TRO") in *In re Mirant Corp. (Mirant Corp. v. FERC),* Adversary Proceeding No. 03-4355, which enjoins the Commission "from taking any action, directly or indirectly, to require or coerce the [Mirant] Debtors to abide by the terms of any Wholesale Contract [to which a Mirant Debtor is a party] which Debtors are substantially performing or which Debtors are not performing pursuant to an order of the Court unless FERC shall have provided the Debtors with ten (10) days' written notice setting forth in detail the action which FERC seeks to take with respect to any Wholesale Contract which is the subject of this paragraph."

30. Should the TRO be converted into a preliminary injunction, an action that the Commission opposes, the Commission will appeal that order. Despite the Commission's disagreement with the validity of the TRO and its expectation that the TRO (or a preliminary injunction) will be vacated on appeal, the Commission must comply with it until vacated. The TRO requires ten days' written notice before the Commission takes a proscribed action with respect to a covered Mirant Wholesale Contract. Accordingly, to the extent that this Order requires Mirant to act in a manner proscribed by the TRO, the Order will provide written notice to Mirant of the action that FERC will take with respect to a covered Mirant Wholesale Contract, which action will not become effective until ten (10) days after issuance of this Order. In all other respects, this Order is effective immediately.

<u>The Commission orders</u>:

(A) The ISO's filing is hereby rejected as discussed in the body of this order.

(B) The ISO is directed to submit tariff modifications, consistent with the discussion in the body of this order, within 30 days of the date of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.