

UNITED STATES OF AMERICA 106 FERC ¶ 61,031
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Mirant Delta, LLC
Mirant Potrero, LLC

Docket No. ER04-227-000

ORDER ACCEPTING AND SUSPENDING PROPOSED REVISIONS TO
RELIABILITY MUST-RUN AGREEMENTS AND ESTABLISHING HEARING
AND SETTLEMENT PROCEDURES

(Issued January 23, 2004)

1. In this order, the Commission accepts for filing and suspends for a nominal period proposed revisions by Mirant Delta, LLC (Mirant Delta) and Mirant Potrero, LLC (Mirant Potrero) (collectively, Mirant) to their Reliability Must-Run Agreements (RMR Agreements)¹ with the California Independent System Operator Corporation (CAISO) for the Contra Costa, Pittsburg, and Potrero power plants.² The order also sets this matter for hearing but holds the hearing in abeyance so that the parties may engage in settlement discussions. This order benefits customers because it allows Mirant to continue providing must-run generation to the CAISO while encouraging the parties to resolve outstanding issues through direct settlement negotiations.

¹ Mirant's RMR Agreements follow a generic, standard form that was agreed to as part of a settlement approved by the Commission in a letter order issued on May 28, 1999. See California System Operator Corporation, et al., 87 FERC ¶ 61,250 (1999).

² Specifically, Mirant Delta owns the Contra Costa and Pittsburg power plants and Mirant Potrero owns the Potrero power plant. The following units of those facilities will be subject to RMR Agreements during the calendar year 2004: units 4, 5, and 7 of Contra Costa, units 5-7 of Pittsburg, and units 3-6 of Potrero. Because those units must operate at certain times for the reliability of the transmission grid, they are referred to as RMR units.

I. Background

2. RMR Agreements provide the rates, terms, and conditions by which Mirant and other power plant owners in California provide RMR service to the CAISO by dispatching designated units at certain power plants at the direction of the CAISO. Those agreements require that, whenever the CAISO extends the terms of an RMR Agreement for an additional calendar year, the owner of a designated RMR unit must file with the Commission updates to certain rates and terms of service under the RMR Agreements.³

3. The CAISO designated Mirant's facilities for RMR service for the 2004 calendar year (Year 2004). As a result of that designation, on November 25, 2003, Mirant submitted,⁴ pursuant to section 205 of the Federal Power Act, certain annual updates as provided for in the RMR Agreements (Section 205 Filing). Specifically, Mirant's Section 205 Filing proposes a number of changes to the rate schedules for its RMR Agreements, including: (1) Schedule A of the RMR Agreements to reflect updated air emission limitations for the RMR units; (2) Schedule B to take into account the updated contract service limits, hourly availability charges, and capital

³ The annual updates are usually made in two separate filings. First, an informational filing that contains the Annual Fixed Revenue Requirements (AFRRs) and Variable Operation and Maintenance Rates (VOM rates). Second, a rate filing made pursuant to section 205 of the Federal Power Act, 18 U.S.C. § 824d (2000), reflecting the annual updates provided for in an RMR Agreement. On February 5, 2003, the Commission approved a settlement agreement between Mirant, the CAISO, and Pacific Gas and Electric Company (PG&E) that revised Mirant's RMR Agreements and, in pertinent part, provided that Mirant would not seek an effective date of earlier than January 1, 2005 for revisions to various terms of the RMR Agreements (without the consent of both the CAISO and PG&E), including the AFRRs and VOM rates. See *Mirant Delta, LLC and Mirant Potrero, LLC*, 102 FERC ¶ 61,130, order on clarification, 102 FERC ¶ 61,178 (2003). Because that settlement agreement established Mirant's AFRR values and VOM rates for the calendar year 2004, Mirant has not made an Informational Filing in this proceeding to update the AFRR values and VOM Rates under its RMR Agreements. Instead, it is only making its annual rate filing.

⁴ Mirant is required by Section 8 of its RMR Agreements to make its annual Section 205 Filing by October 31 of each year. However, the Commission granted Mirant an extension of time (until November 25, 2003) to file its Section 205 Filing for Year 2004 to permit Mirant more time to incorporate in that filing the terms of any settlement reached as a result of the settlement negotiations regarding Mirant's Section 205 Filing for the calendar year 2003. See *Notice of Extension of Time*, Docket No. ER03-215-000 (Oct. 31, 2003).

item charges and penalty rates for the Year 2004; (3) Table B-5 of the RMR Agreements to reflect Mirant's planned outage hours for the Year 2004; and (4) Schedule D to show revised prepaid start-up costs for the RMR units. In addition, Mirant has revised the tariff sheets in its RMR Agreements to reflect that the CAISO has chosen not to extend the term of the Mirant Delta RMR Agreement as it pertains to unit 6 of the Contra Costa power plant. Mirant requests waiver of the Commission's 60-day prior notice requirement⁵ to allow a January 1, 2004 effective date for its filing.

II. Notice of Filing and Responsive Pleadings

4. Notice of Mirant's filing was published in the Federal Register, 68 Fed. Reg. 69,080 (2003), with interventions and protests due on or before December 16, 2003. The Public Utilities Commission of the State of California (CPUC), the State of California Electricity Oversight Board, PG&E, and the CAISO filed motions to intervene. In addition, those parties (collectively, the Protestors) filed a joint protest. Mirant filed an answer to that protest, and the CAISO filed an answer to Mirant's answer.

III. The Joint Protest

5. The Protestors state that Mirant fails to provide adequate information regarding: (1) whether Mirant has used, consistent with its RMR Agreements, the appropriate energy pricing as a basis for calculating its proposed prepaid start-up costs; and (2) its monthly usage data, as required under Section 4.11 of its RMR Agreements, to support its proposed changes to the contract service limits and other outage hours. The Protestors claim that it is impossible to determine the accuracy and reasonableness of Mirant's calculations without that data. They also maintain that: (1) the emission limits for the Contra Costa power plant are not clearly identified with a specific unit; (2) they have not had sufficient time to verify that the long-term planned outage hours were properly requested and approved for the Year 2004; and (3) they have been unable to determine whether the capital item costs used to determine the hourly capital item charges for Mirant's RMR units exceed approved amounts.

6. According to the Protestors, the Commission's regulations require that a filing for a rate schedule change include supporting information and that such a filing is deficient absent that information or waiver of those regulations for such information.⁶

⁵ 18 C.F.R. § 35.11 (2003).

⁶ See Joint Protest at 3-4 (citing 18 C.F.R. § 35.5 (2003)).

Therefore, based on Mirant's failure to provide supporting data in its Section 205 filing, the Protestors ask that the Commission issue a deficiency letter requiring Mirant to file such data. In the alternative, they request that the Commission suspend the rates subject to hearing. If the Commission suspends the rates, the Protestors ask that the hearing be held in abeyance until January 30, 2004 in order to give the parties time to resolve the outstanding issues between them.

IV. Discussion

A. Procedural Matters

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the CPUC's notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 384.213(a)(2) (2003), generally prohibits answers to protests and answers to those answers, unless otherwise permitted by the decisional authority. We are not persuaded to allow Mirant's answer and the CAISO's answer to Mirant's answer; accordingly, we reject them.

B. The Commission's Response

8. The Protestor's concerns, which are identified above, raise factual questions concerning Mirant's Section 205 Filing that we cannot summarily decide on the record before us. These concerns are best addressed in the hearing and settlement judge procedures that we order herein. In addition, based on our review of Mirant's Section 205 Filing, we find that its proposed revisions to its RMR Agreements have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, we accept the proposed revisions to Mirant's RMR Agreements for filing, suspend them for a nominal period, and set them for hearing, to become effective, subject to refund, on the date requested by Mirant. In this regard, we find good cause to grant Mirant's request for waiver of the Commission's 60-day prior notice requirement to permit an effective date of

January 1, 2004 for its Section 205 Filing,⁷ which is the effective date set forth in Mirant's RMR Agreements for their annual renewal.

9. While we are setting this proceeding for a trial-type, evidentiary hearing, we will hold the hearing in abeyance and direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, in order to assist the parties in resolving this matter. If the parties desire, they may, by mutual agreement, request a specific judge as a settlement judge in this proceeding; otherwise, the Chief Administrative Law Judge will select a judge for this purpose. The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

C. Notice to Mirant

10. 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." The TRO was subsequently extended by the bankruptcy court in orders issued on September 22 and October 1, 2003, and is still in effect.

11. On October 9, 2003, the United States District Court for the Northern District of Texas granted the Commission's motion to withdraw the reference to the bankruptcy court regarding the TRO. The district court found in a related proceeding

⁷See Central Hudson Gas & Electric Corp., 60 FERC & 61,106, reh'g denied, 61 FERC & 61,089 (1992); see also Florida Power Corp., 76 FERC ¶ 61,070 at 61,436 (1996) (stating that "the Commission generally will grant waiver for filings that increase rates if the rate change and effective date are prescribed by contract, such as annual rate revisions required by contract to become effective on a date specified in the contract"); accord Florida Power and Light Co., 74 FERC ¶ 61,038 at 61,092-93 (1996); Consolidated Edison Company, 68 FERC ¶ 61,230 at 62,090 (1994).

that “neither [the district court] nor the bankruptcy court has the authority to enjoin FERC from performing its regulatory functions,”⁸ but has not yet applied that finding to the TRO orders noted above. The Commission has moved the district court to lift the TRO, and expects a ruling shortly.

12. Nevertheless, the Commission must comply with the TRO until it is 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.

The Commission orders:

(A) Mirant’s Section 205 Filing is hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2004, subject to refund, as discussed in the body of this order.

(B) Mirant’s request for waiver of the Commission’s 60-day prior notice requirement is hereby granted.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly Sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the proposed revisions to the RMR Agreements. As discussed in the body of this order, the hearing shall be held in abeyance to provide time for the parties to resolve the outstanding issues through settlement judge procedures

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2003), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge within 15 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge.

⁸ In re Mirant Corp., No. 4-03-CV-1242-A, 2003 U.S. Dist. LEXIS 23600, at 35 (N.D. Tex. Dec. 23, 2003).

(E) Within 60 days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their efforts, or if appropriate, provide for a formal hearing by assigning the case to a presiding judge. If the parties are given additional time to continue their efforts, they shall file a report at least every 30 days thereafter, informing the Commission and the Chief Judge of their progress toward resolving the outstanding issues.

(F) If the discussions between the parties fail, and a formal hearing is to be held, a presiding judge to be designated by the Chief Judge shall convene a conference in this proceeding to be held within approximately 15 days of the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(G) The rate schedule designations are shown in the Attachment.

(H) Mirant is hereby given notice of the action that the Commission is taking with respect to a covered Mirant Wholesale Contract, which action will not become effective until ten days after issuance of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

Attachment

Mirant Delta, LLC and Mirant Potrero, LLC
Docket No. ER04-227-000
Rate Schedule Designations
Effective Date: January 1, 2004

<u>Designation</u>	<u>Description</u>
(1) FERC Electric Rate Schedule No. 4 – First Revised Sheet Nos. 95, 96A, 103A, and 104A; Second Revised Sheet Nos. 96, 97, and 98; Third Revised Sheet Nos. 94 and 161; Fourth Revised Sheet No. 126; Fifth Revised Sheet Nos. 101, 103, and 104; Seventh Revised Sheet No. 99.	Year 2004 annual updates to Mirant Delta, LLC’s Reliability Must Run Agreement with the CAISO for the Contra Costa power plant.
(2) FERC Electric Rate Schedule No. 5 -- First Revised Sheet Nos. 105A and 106A; Second Revised Sheet Nos. 96, 96A, and 105; Third Revised Sheet No. 164; Fifth Revised Sheet No. 104; Sixth Revised Sheet Nos. 107 and 129; Seventh Revised Sheet No. 106; Eighth Revised Sheet No. 101.	Year 2004 annual updates to Mirant Delta, LLC’s Reliability Must Run Agreement with the CAISO for the Pittsburg power plant.
(3) FERC Electric Rate Schedule No. 3 – First Revised Sheet Nos. 103A and 104A; Second Revised Sheet No. 96; Third Revised Sheet No. 161; Fourth Revised Sheet No. 126; Fifth Revised Sheet Nos. 101, 103, and 104; Seventh Revised Sheet No. 99.	Year 2004 annual updates to Mirant Potrero, LLC’s Reliability Must Run Agreement with the CAISO for the Potrero power plant.