

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Mirant Delta, LLC and Mirant Potrero, LLC

Docket Nos. ER05-343-000
ER05-343-001

ORDER ACCEPTING AND SUSPENDING FILING AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued February 11, 2005)

1. In this order, we accept the proposed revisions to the Must-Run Service Agreements (RMR Agreements) of Mirant Delta, LLC (Mirant Delta) and Mirant Potrero, LLC (Mirant Potrero) (collectively, Mirant)¹ for filing, suspend them for a nominal period, make them effective as requested, subject to refund, and set them for hearing and settlement judge procedures. This order benefits customers by providing the parties with a forum in which to resolve their concerns.

Background

2. On December 16, 2004, Mirant filed, pursuant to section 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d (2000), proposed rate schedule revisions for its RMR Agreements with the California Independent System Operator Corporation (CAISO) for the Contra Costa Power Plant, Pittsburg Power Plant and Potrero Power Plant for 2005 (2005 RMR Agreement Filing). The 2005 RMR Agreement Filing includes revisions to the following: (1) air emission limitations; (2) contract service limits; (3) hourly availability charges and penalty rates; (4) capital item charges and penalty rates for the

¹ Mirant Delta owns Units 4, 5 and 7 at the Contra Costa Power Plant and Units 5 and 6 at the Pittsburg Power Plant. Mirant Potrero owns Units 3-6 at the Potrero Power Plant.

RMR units; (5) prepaid start-up costs; (6) outage hours; (7) owner's repair cost obligations; (8) annual fixed revenue requirements; and (9) variable operation and maintenance (O&M) rates. Mirant requests waiver of the Commission's 60-day prior notice requirement to permit an effective date of January 1, 2005. Mirant states that good cause for waiver exists because it will permit the revised tariff sheets to become effective on the date of the RMR Agreements' annual renewal.

3. On January 7, 2005, Mirant amended its 2005 RMR Agreement Filing (Amendment) due to its settlement of the following three issues: (1) owner's repair cost obligations; (2) annual fixed revenue requirements; and (3) variable O&M rates. Mirant requests a separate effective date for the Amendment.

Notices of Filings and Responsive Pleadings

4. Notices of the filings were published in the *Federal Register*, 69 Fed. Reg. 78,406 (2004) and 70 Fed. Reg. 3,694 (2005), with protests and interventions due on or before January 18, 2005. That date was subsequently extended to February 2, 2005. The California Public Utilities Commission (California commission) filed a notice of intervention. The California Electricity Oversight Board (CEOB), the CAISO and Pacific Gas and Electric Company (PG&E) filed timely motions to intervene.

5. The CAISO, PG&E, the CEOB and the California commission also filed a joint protest with respect to the 2005 RMR Agreement Filing. The protest is limited to addressing two issues: (1) the applicable surcharge payment factor for capital items that is used to calculate the hourly capital item charges for contract year 2005; and (2) the failure to strike all references to the Pittsburg Power Plant Units 1 through 4 and 7 in schedule A, section 3 of the RMR Agreements to reflect the termination of these units' RMR status. The protestors request that the Commission issue a deficiency letter that directs Mirant to file support for the proposed surcharge payment factor or, in the alternative, set the issue for hearing and settlement judge procedures.

6. Mirant filed an answer in which it responds that: (1) the proposed surcharge payment factor is based upon an April 2, 1999 settlement in Docket No. ER98-441-000, *et al.*; and (2) the references to Pittsburg Power Plant Unit 7 in schedule A, section 3 of the RMR Agreements are necessary because they relate to a permit condition that must be taken into consideration when dispatching Mirant's units; however, Mirant agrees to remove the references to Pittsburg Power Plant Units 1 through 4 in the section at issue.

Discussion

A. Procedural Matters

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Mirant's answer because it has provided information that assisted us in our decision-making process.

B. Amendment

9. In the Amendment, Mirant states that Mirant, the CAISO, CEOB and PG&E (Supporting Parties) have reached agreement on: (1) owner's repair cost obligations; (2) annual fixed revenue requirements; and (3) variable O&M rates. Specifically, the Supporting Parties have agreed to the following: (1) new annual fixed revenue requirements for Contra Costa Power Plant Unit 7, Pittsburg Power Plant Units 5-6 and Potrero Power Plant Units 3-6; (2) the continuation of the annual fixed revenue requirements for Contra Costa Power Plant Units 4-5 set forth in the November 2002 stipulation and agreement filed in Docket Nos. ER02-64-000 and ER02-198-000 (2002 Agreement) and approved by the Commission on February 5, 2003;² (3) the continuation of the variable O&M rates for all RMR units set forth in the 2002 Agreement; (4) new owner's repair cost obligations for all RMR units; and (5) revised rate schedule sheets to be effective January 1, 2005 through December 31, 2005.

10. Mirant states that the terms of the Amendment may be extended without modification through December 31, 2008 by providing notice of such extension to the Commission. Mirant adds that the Supporting Parties have been authorized to represent that the California commission does not oppose the Amendment.

11. Mirant requests that the Amendment be effective on the later of: (1) the date the Amendment is approved by the United States Bankruptcy Court for the Northern District of Texas, Forth Worth Division (Bankruptcy Court), or (2) if modified or conditioned by the Bankruptcy Court, upon the date of acceptance of the modifications or conditions contained in such order by all of the Supporting Parties.

² *Mirant Delta, LLC*, 102 FERC ¶ 61,130 (2003).

12. We accept the terms agreed to in the Amendment, to become effective as requested. Although Mirant states that the Supporting Parties agreed to revised rate schedule sheets, those sheets were not included in the Amendment. Therefore, we direct Mirant to file revised tariff sheets reflecting these terms within thirty days of the date of this order.

C. Hearing Procedures

13. Notwithstanding our determination on the Amendment, the 2005 RMR Agreement Filing otherwise raises issues of material fact (such as the applicable surcharge payment factor for capital items and the references to the Pittsburg Power Plant Units in schedule A, section 3 of the RMR Agreements) that cannot be resolved based on the record before us and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

14. Our preliminary analysis indicates that the 2005 RMR Agreement Filing has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Therefore, we will accept the 2005 RMR Agreement Filing for filing, suspend it for a nominal period, make it effective on January 1, 2005,³ as requested, subject to refund, and set it for hearing and settlement judge procedures. (However, we note that the issues resolved in the Amendment are not to be addressed in the hearing procedures ordered below.)

15. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁴ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁵ The settlement judge

³ See *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106 at 61,338, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

⁴ 18 C.F.R. § 385.603 (2004).

⁵ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of 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.

The Commission orders:

(A) The 2005 RMR Agreement Filing is hereby accepted for filing and suspended for a nominal period, to become effective on January 1, 2005, subject to refund, as discussed in the body of this order.

(B) The Amendment is hereby accepted for filing, to become effective as requested, as discussed in the body of this order.

(C) Mirant is hereby directed to file a compliance filing within thirty (30) days of the date of this order, as discussed in the body of this order.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the 2005 RMR Agreement Filing. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in paragraphs (E) and (F) below.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (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. If the parties decide to request a specific judge, they must make their request to the Chief Judge by telephone within five (5) days of the date of this order.

(F) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on 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, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement

discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(G) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall within fifteen (15) days of the date of the presiding judge's designation, convene a conference in these proceedings, in a hearing room of the 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.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.