

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Mirant Americas Energy Marketing, LP,
Mirant California, LLC, Mirant Delta LLC, and
Mirant Potrero, LLC

Docket No. EL03-158-005

ORDER DENYING REHEARING

(Issued October 11, 2006)

1. On July 27, 2005, the Port of Seattle, Washington (Port), and CALifornians for Renewable Energy, Inc. (CARE) filed requests for rehearing of the Commission's June 27, 2005 order,¹ which approved contested settlements between Commission Trial Staff (Trial Staff) and Mirant Americas Energy Marketing, LP; Mirant California, LLC; Mirant Delta LLC; and Mirant Potrero, LLC (collectively, Mirant). In this order, the Commission denies rehearing.

Background

2. On September 30, 2003, Trial Staff and Mirant filed a settlement agreement (September 30 Settlement) that resolved all issues, except the issue of double selling, involving Mirant that were set for hearing in Docket No. EL03-158-000.² Under the terms of the September 30 Settlement, Mirant agreed to pay \$332,411 with respect to those issues.

¹*Mirant Americas Energy Marketing, LP*, 111 FERC ¶ 61,488 (2005) (*Mirant*).

²*American Electric Power Service Corporation*, 103 FERC ¶ 61,345 (2003) (Gaming Order), *reh'g denied*, 106 FERC ¶ 61,020 (2004) (Gaming Order Rehearing).

3. On December 19, 2003, Trial Staff and Mirant filed a further settlement agreement resolving the issue of double selling (December 19 Settlement). Under terms of the December 19 Settlement, Mirant agreed to an “allowed pre-petition claim” in its pending bankruptcy proceeding in the amount of \$3,665,811.59.
4. The Settlements together resolve all issues involving Mirant that were set for hearing in the Gaming Order.
5. Port and others (but not CARE, we note) filed timely comments in opposition to both the September 30 Settlement and the December 19 Settlement.³ Trial Staff and Mirant filed reply comments to the opposing parties’ comments.
6. On March 11, 2004, the presiding judge certified the Settlements to the Commission as contested, but recommended their approval subject to conditions.⁴ And, as noted above, in *Mirant* the Commission approved the Settlements.⁵ Port and CARE subsequently filed requests for rehearing.

Discussion

7. For the reasons given below, we deny rehearing.

Port’s Request for Rehearing

Appropriate Standard

8. Port claims that the Commission did not apply the appropriate standard in approving these Settlements. The Port of Seattle states that *Mirant* simply refers

³ See *Mirant*, 111 FERC ¶ 61,488 at P 2-4. In that order, we denied CARE’s March 29, 2004 motion for intervenor status. *Id.* at P 4 n.5. In fact, however, it appears that by order issued August 6, 2003 the presiding judge had already granted CARE intervenor status. Hence CARE is a party to this proceeding.

⁴ *Id.* at P 3. In that order, we mistakenly identified the presiding judge’s certification as a June 1, 2004 certification rather than a March 11, 2004 certification.

⁵ See *supra* note 1.

to the Settlements as being a “reasonable” resolution of the issues, and does not find that there are no genuine issues of material fact in dispute or that there is sufficient record evidence to resolve those issues of material fact that are in dispute.⁶

9. Port states that the record demonstrates that Port and California Independent System Operator Corporation (CAISO) raised numerous issues of material fact as to the Settlements for which there is no record support and/or for which the Commission’s order makes no determination—pointing particularly (and only, we note) to “the level of payment for double-selling.”⁷ Port adds that the Commission has no basis in the record for finding that the result under the settlements would be “a better resolution than could be achieved in litigation.”⁸

Commission Response

10. In instituting this proceeding, the Commission identified particular conduct in a particular time period that should be investigated.⁹ And the Commission indicated that the monetary remedy would be “disgorgement of unjust profits.” The Settlements provide for a payment of \$332,411 and an allowed pre-petition claim of \$3,665,811.59 —both amounts reflect total revenues, not just unjust profits. The Settlements therefore provide for more relief than would result if litigation were to continue and if Port were to prevail; total revenues, by definition, would exceed any profits (just and unjust both) from the transactions at issue. Moreover, the record before us, identified and explained at length in the presiding judge’s certification¹⁰ and laid out in even greater length in the underlying pleadings and other documents referenced by the presiding judge,

⁶ 18 C.F.R. § 385.602 (2005).

⁷ Port of Seattle Rehearing at 4.

⁸ *Id.* at 4-5.

⁹ *See supra* note 2.

¹⁰ *Mirant Americas Energy Marketing, LP*, 106 FERC ¶ 63,028 at P 13-25, 42-47, 64-67, 72-78 (2004) (*Mirant Certification*).

provided a more than sufficient basis to find that the settlements represented a reasonable resolution with regard to Mirant's actions at issue.¹¹

Delegation of Authority to Bankruptcy Court

11. Port notes the amount to be paid under the December 19 Settlement is not fixed, but will be determined by the bankruptcy court. In this regard, Port argues that the Commission should not have delegated to the bankruptcy court the authority to determine the amount to be paid under the December 19 Settlement. .

Commission Response

12. We did not delegate to the bankruptcy court. Rather, we recognized that Mirant was in bankruptcy and the bankruptcy court has a role to play in any resolution of this proceeding; we did not have the discretion to do otherwise.¹²

13. Additionally, we note that the Commission did not authorize the bankruptcy court at its discretion to determine an appropriate remedy, as Port essentially claims, but instead provides for the bankruptcy court to approve the settlements.¹³ In this regard, the December 19 Settlement involves events that occurred prior to Mirant's entering bankruptcy. We note, as Trial Staff did in its

¹¹ Port's contrary evidence is testimony of a witness sponsored by the California Parties, *compare* Port of Seattle Rehearing at 4 *with id.* at 6 & n.18, and the California Parties did not seek rehearing of our earlier order in this proceeding and in fact have settled and withdrawn that testimony. *Enron Power Marketing, Inc.*, 113 FERC ¶ 63,002 at 9 (describing settlements as providing for, among other things, withdrawal with prejudice of exhibits, testimony and requests for relief), *settlement approved*, 113 FERC ¶ 61,171 (2005), *reh'g denied*, 115 FERC ¶ 61,032 (2006). This evidence is, therefore, not a basis to find that we should not have approved the Settlements.

¹² *San Diego Gas & Electric Co.*, 115 FERC ¶ 61,032 at P 34 (2006). Moreover, if this proceeding were to go to trial and if Port of Seattle were successful, such litigation would result in a similar pre-petition claim and be equally subject to bankruptcy court review. *See Mirant*, 111 FERC 61,488 at P 13 n.16; *Mirant Certification*, 106 FERC ¶ 63,028 at P 77.

¹³ *Id.* at P 9-11.

January 20, 2004 reply comments,¹⁴ that once Mirant entered bankruptcy on July 14, 2003, its payment of debts became subject to bankruptcy law, which provides that pre-petition debts must be paid in accordance with schedules approved by the bankruptcy court.

Amount and Description of Pre-petition Claim

14. Port claims that the Commission's order should not have approved \$3,665,811.59 as the allowed pre-petition claim for double selling. Port also argues that the Commission should not have departed from the terms of the December 19 Settlement in describing the pre-petition claim. Port states that the settlement refers to an "*allowed* pre-petition claim." Port argues that the Commission's reference to the "pre-petition claim," creates ambiguity as to whether the settlement specifically provides that the subject pre-petition claim will be an "allowed" claim.

Commission Response

15. As to the first argument, we address that above; the Settlements provide for refunds tied to total revenues and not just unjust profits.¹⁵ As to the second argument, our short-hand reference to the amount as a pre-petition claim was just that, a short-hand reference; the claim is an allowed pre-petition claim.¹⁶

16. We further note that Trial Staff, in its January 20, 2004 reply comments to Port's January 8, 2004 comments, addresses Port's contention. Trial Staff explained and documented how the total allowed pre-petition claim against Mirant

¹⁴ Trial Staff Reply Comments at 10.

¹⁵ As noted *supra* note 11, the evidence cited by Mirant, *see* Port of Seattle Rehearing Request at 6 n.18, was sponsored by the California Parties—who did not seek rehearing of our earlier order in this proceeding and who have since settled and withdrawn with prejudice their exhibits, testimony and requests for relief. Moreover, where Port of Seattle faults Trial Staff (and the Commission) seemingly for failing to find California Parties' witness Fox-Penner was not in error, *see id.* at 6-7, we note that Port of Seattle does not itself demonstrate or even seek to demonstrate that Trial Staff (or the Commission) was wrong—beyond offering what amounts to an unsubstantiated allegation to that effect.

¹⁶ *Mirant Certification*, 106 FERC ¶ 63,028 at P 49.

in the amount of \$3,665,811.59 was reached and why this amount is reasonable and supported by the record in this case and we see no reason to address this issue further here.¹⁷

Ninth Circuit Decision

17. Port claims that our order approving the Settlements violates the September 9, 2004 opinion of the United States Court of Appeals for the Ninth Circuit in *State of California ex rel. Bill Lockyer v. FERC*,¹⁸ which directs that the Commission consider whether refunds are appropriate for transactions that occurred prior to the refund period the Commission had established in Docket No. EL00-95-000. Port explains that the order approving the Settlements was issued after *Lockyer* and, contrary to the *Lockyer* opinion, failed to consider whether the calculations under either of the settlement agreements should have been based on additional Mirant transactions that pre-date January 1, 2000.

Commission Response

18. We note that this proceeding was directed at Mirant's actions for a particular defined period,¹⁹ and its actions prior to that defined period are not within the scope of this proceeding. Moreover, Mirant's actions prior to that defined period were the subject of a further settlement, which we have since approved.²⁰

Scope of Proceeding

19. Port claims that *Mirant* does not address "many of the valid challenges" to the Settlements raised by Port and others in contesting those settlements. Port notes that the California Parties' comments opposing the September 30 Settlement, which include affidavits, were adopted—except as to comments on

¹⁷ Trial Staff January 20, 2004 Reply Comments at 8-18.

¹⁸ 383 F.3d 1006 (9th Cir. 2004), *pet. for reh'g en banc denied*, (Aug. 1, 2006) (*Lockyer*).

¹⁹ *See supra* note 2.

²⁰ *San Diego Gas & Electric Co.*, 111 FERC ¶ 61,017, *reh'g denied*, 111 FERC ¶ 61,354 (2005).

distribution of settlement proceeds—by Port in Port’s October 20, 2003 comments. Port states that those comments set out numerous challenges to the September 30 Settlement, “many of which raised disputed issues of material fact.” Port adds that the California Parties’ comments of January 8, 2004, also including affidavits, were also adopted by Port in Port’s January 8, 2004 comments. Port notes that those comments set out numerous challenges to the December 18 Settlement, many of which raised disputed issues of material fact.

20. Port argues that *Mirant* does not specifically address “any of the issues raised in [its] comments.” Rather, Port argues that the Commission dismissed all of its comments with the statement that those comments for “unexplained reasons” addressed the scope of the proceeding.

21. Port claims that neither Port nor a reviewing court should have to guess which of Port’s challenges were deemed by the Commission to address issues of scope. Port states that the Commission is obligated to make specific findings to specific challenges.

Commission Response

22. Initially, we note that Port seeks not to incorporate by reference arguments raised in its prior pleadings, but to incorporate by reference arguments made by other parties in their prior pleadings. Moreover, the incorporation of arguments by reference from prior pleadings in a rehearing request is inconsistent with section 313 of the Federal Power Act²¹ which states that “[t]he application for rehearing shall set forth specifically the ground or grounds upon which such application is based.”²² Furthermore, such an incorporation by reference in a rehearing request places the Commission in the untenable position of determining which arguments are still relevant (and how, and to what degree) following the issuance of a Commission order on the issues. In essence, Port would force the Commission not just to respond to its (or, here, the California Parties’) arguments, but also to make the very arguments that it must respond to. For these reasons, we do not consider the arguments Port seeks to incorporate by reference here.²³

²¹ 16 U.S.C. § 8251 (2000).

²² See *Standardization of Generator Interconnection Agreements and Procedures*, 109 FERC ¶ 61,287 at P 47 n.17 (2004).

²³ *City of Santa Clara v. Enron Power Marketing*, 112 FERC ¶ 61,280 at P 8 n.4 (2005); accord *Constellation Energy Commodities Group, Inc. v. FERC*, No. (continued...)

23. Moreover, the parties whose arguments Port would have us respond to, the California Parties, have since settled and their exhibits, testimony, and requests for relief have been withdrawn with prejudice.²⁴

24. In our order denying rehearing of the Gaming Order, we declined to broaden the scope of the proceeding, noting our prosecutorial discretion to pursue certain activities and not pursue others. The presiding judge viewed the comments objecting to the Settlements as seeking rehearing of the Gaming Order.²⁵ We did not, in response, change that determination in our earlier order approving the Settlements. We likewise see no reason, in response, to change that determination here. To the extent that Port still objects to the scope of the proceeding, and given the nature of its request for rehearing it is hard to know what it argues, its request for rehearing is essentially a second and belated request for rehearing of the Gaming Order and will be denied. In this regard, we note, first, that requests for rehearing must be filed within 30 days of the date of the order being challenged and the requests for rehearing at issue here were filed well after 30 days from the date of the Gaming Order Rehearing, and, second, that a request for rehearing of an order denying rehearing is not allowed and the Gaming Order Rehearing denied rehearing of the Gaming Order on the issue of the scope of these proceedings.²⁶ As to the reasonableness of the Settlements, we have addressed that argument above, and we add that the claims originally made in the comments (and according to Port still alive here) that the Settlements were inadequately supported were

02-1367, *et al.* slip op. at 14 (D.C. Cir. July 18, 2006) (“Each quoted passage states a conclusion; neither makes an argument. Parties are required to present their arguments to the Commission in a way such that the Commission knows ‘specifically . . . the ground on which rehearing [i]s being sought.’”).

²⁴ See *supra* note 15.

²⁵ See *Mirant Certification*, 106 FERC ¶ 63,028 at P 80 (noting that various objections made in settlement amount to rehearing of the Gaming Order).

²⁶ 16 U.S.C. § 8251(a) (2000) (requests for rehearing must be filed within 30 days); *e.g.*, *Texas-New Mexico Power Co. v. El Paso Electric Co.*, 107 FERC ¶ 61,316 at P 22 & nn.13-14 (2004) (requests for rehearing must be filed within 30 days); *AES Warrior Run, Inc. v. Potomac Edison Co.*, 106 FERC ¶ 61,181 at P 1 & n.3 (2004) (party cannot seek rehearing of an order denying rehearing).

persuasively responded to by Trial Staff's October 30, 2003 and January 20, 2004 reply comments to California Parties' comments (which were adopted by Port).²⁷

Release-of-Liability Language

25. Port argues that the December 19 Settlement is conditioned on the Commission releasing, acquitting, and forever discharging Mirant from any claims under any authority "based on, arising out of, in whole or in part, over any conduct related to the issue of Double Selling" for any period. Port claims that the provision is overly broad if it is interpreted to absolve Mirant from responsibility even for illegal conduct "beyond that which was set for hearing in this proceeding" in the Gaming Order.

Commission Response

26. The two Settlements at issue here and our orders to date,²⁸ and the subsequent settlement in Docket No EL00-95-131, *et al.* and the orders approving that settlement²⁹ together resolve all matters as to Mirant.³⁰

27. Moreover, this release of liability language here was and is no more than a part of the negotiations, the give-and-take, necessary to resolve the matters at issue and to provide for the monetary relief that Mirant has agreed to provide. And the other proceedings that Port is concerned may be affected by the release of liability have, as we have just noted, since settled. Accordingly, we find that the contested

²⁷ See *supra* note 10.

²⁸ *E.g.*, *Mirant*, 111 FERC ¶ 61,488 at P 14.

²⁹ *San Diego Gas & Electric Co.*, 111 FERC ¶ 61,017, *order on reh'g*, 111 FERC ¶ 61,354 (2005).

³⁰ Subsequent to the filing of the requests for rehearing addressed here, the D.C. Circuit issued its decision in *Public Utilities Commission of the State of California v. FERC*, No. 01-71051, *et al.* (D.C. Cir. Aug. 2, 2006). That decision addressed appeals of, and affirmed in part and remanded in part, a series of other Commission orders. We do not read the court's decision as dictating any change in our underlying orders; nothing the court did dictates that we now should reverse our earlier orders and reject the settlements.

settlements, including the release of liability provisions here, are just and reasonable.

28. Should a court direct the Commission to initiate a further investigation in the future, we would do as the court directs; it would be for the parties to argue to the court whether the release of liability should stay the court's hand.

CARE's Request for Rehearing

29. CARE objects to the Commission's order because it "fail[s] to hold retail ratepayers harmless." CARE fails to note two critical facts. First, the Commission's jurisdiction extends to wholesale sales and not to retail sales of electric energy.³¹ Second, the Mirant transactions that were at issue were transactions in wholesale and not retail electric markets.³² As a consequence, the Commission's actions in approving the settlements – which provide for refunds to wholesale customers – was both all that the Commission could properly do and also what the Commission should properly do.³³

The Commission orders:

Port's and CARE's requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

³¹ 16 U.S.C. § 824 (2000).

³² *See supra* note 2.

³³ *San Diego Gas & Electric Co.*, 111 FERC ¶ 61,186 at P 29-30 (2005).