

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 Kendall, LLC and
Mirant Americas Energy Marketing, L.P.

Docket No. ER05-26-000

ORDER ACCEPTING RELIABILITY MUST RUN AGREEMENT, ORDERING
COMPLIANCE FILING AND ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES

(Issued November 26, 2004)

1. On October 7, 2004, Mirant Kendall, LLC (Mirant Kendall) and Mirant Americas Energy Marketing, L.P. (MAEM) (collectively, Mirant) filed an unexecuted Reliability Must Run Agreement (RMR Agreement) between Mirant and the Independent System Operator New England, Inc. (ISO-NE), concerning Mirant Kendall's 19 megawatt steam turbine, 22 megawatt steam turbine and 20 megawatt jet turbine (collectively, Kendall RMR Units) located at a generating facility, Kendall Station, in Cambridge, Massachusetts. In this order, the Commission accepts and suspends the RMR Agreement, as modified, to become effective October 8, 2004, sets the proposed rates for hearing and holds the hearing in abeyance so that the parties may engage in settlement discussions. This order benefits customers by further ensuring that generating units needed for grid reliability will continue to operate.

I. Background

2. Prior to the development of RMR agreements in certain constrained areas in New England, the Commission issued a series of orders rejecting the widespread use of RMR agreements as a default tool to provide cost recovery to generating facilities that must run for reliability because the units' cost of service under such contracts are recovered through payments outside the market. The Commission directed ISO-NE to establish new bidding mechanisms, including the Peaking Unit Safe Harbor (PUSH) mechanism, to

provide those generators an opportunity to recover their costs through the market.¹ In a subsequent proceeding, the Commission determined that some generators that are required to run for reliability purposes may not achieve sufficient revenues under the PUSH mechanism and, therefore, ISO-NE may need to implement RMR agreements on a temporary basis for these units in congested areas not receiving adequate revenues from existing market mechanisms. Mirant initially sought to recover costs under the PUSH mechanism for certain of its units.²

3. Mirant's Kendall Station is comprised of three steam units, two jet units, and one combustion turbine. On April 1, 2004, Mirant Kendall filed applications pursuant to section 18.4 of the Restated NEPOOL Agreement to deactivate the three steam units and the combustion turbine located at the Kendall Station as of October 1, 2004. On June 10, 2004, Mirant Kendall filed a section 18.4 application to deactivate the remaining two jet turbines located at the Kendall Station as of August 9, 2004. On June 25, 2004 and July 27, 2004, ISO-NE approved the deactivation of the units with the exception of two of the steam units and one jet turbine respectively, concluding that these Kendall RMR Units were needed to ensure the reliability of the NSTAR Electric and Gas Corporation (NSTAR) system until completion of certain proposed distribution improvements.

4. On June 25, 2004, ISO-NE directed Mirant Kendall and NSTAR to agree on the selection of which two of the three steam units would remain in operation, thus permitting the deactivation of the remaining steam unit as requested.

II. The Filing

5. Mirant requests approval of the Kendall RMR agreement to permit the Kendall RMR Units to continue operation. Mirant states that following notification by ISO-NE that certain units were needed for reliability, it negotiated the unexecuted RMR Agreement with ISO-NE in good faith pursuant to section 18.5 of the Restated NEPOOL Agreement. Mirant maintains that the RMR Agreement is, with limited exceptions that reflect the specific circumstances of the Kendall RMR Units, substantially similar to the Form of Cost-of-Service Agreement attached as Exhibit 4 to ISO-NE's Market Rule 1 (the Pro Forma COS Agreement).

¹ *Devon Power LLC, et al.*, 102 FERC ¶ 61,314; *Devon Power LLC, et al.*, 103 FERC ¶ 61,082; *reh'g granted in part and denied in part*, 104 FERC ¶ 61,123 (2003) (*Devon Power*); *See also, PPL Wallingford Energy LLC*, 103 FERC ¶ 61,085; *reh'g granted in part and denied in part*, 105 FERC ¶ 61,324 (2003).

² *Mirant Kendall, LLC*, 104 FERC ¶ 61,219 (2003) (*Mirant PUSH Order*).

6. As proposed in the unexecuted RMR Agreement, in return for the reliability services provided by the Kendall RMR Units, Mirant Kendall will receive its fixed costs for the Kendall RMR Units through the ISO-NE monthly settlement process. Through the monthly settlement process, ISO-NE will charge the Applicable Participant, NSTAR, for the Kendall RMR Units fixed costs. Also, under the proposed agreement, MAEM will bid energy and ancillary services from the Kendall RMR Units into the NEPOOL markets based on the characteristics of the units and using Stipulated Bid Costs as formulated in the RMR Agreement. Mirant proposes a rate methodology to derive the Kendall RMR Units' Annual Fixed Revenue Requirement which is translated into a monthly fixed cost charge. The proposed method credits certain revenues against the monthly fixed cost charge. These revenues include: (1) installed capacity (ICAP) revenues; (2) fixed fees and capacity charges received for sales of steam from the RMR units; (3) revenues for sales of emissions credits from units at the Kendall Station; (4) revenues from release of firm transportation arrangements; and (5) revenues resulting from clearing prices in excess of Kendall RMR Units' Stipulated Bid Costs.

7. Additionally, Mirant states that the forced outage provisions of the unexecuted agreement require that Mirant notify ISO-NE of a forced outage of any of the Kendall RMR Units and the availability of any previously deactivated Kendall RMR Unit to replace the one on forced outage. This notification is proposed to include the costs necessary to bring such substitute unit back into service. Mirant also states that the Kendall RMR Units will be subject to a non-performance penalty for unavailability which is based on the rate of unavailability of the unit during the time in which the resource is subject to dispatch instructions, and the amount of requested MWhs, under the dispatch instructions, which are not ultimately delivered.

8. Mirant proposes that the RMR Agreement will expire, consistent with Commission direction, on the day that a locational ICAP mechanism applicable to the Kendall RMR Units becomes effective. Also, under the proposed agreement, if ISO-NE determines that a Kendall RMR Unit is no longer needed for reliability, ISO-NE may terminate the RMR Agreement with respect to such unit upon 120 days' written notice to Mirant Kendall.

III. Discussion

A. Procedural Matters

9. Notice of Mirant's filing was published in the *Federal Register*, 69 Fed. Reg. 63,380 (2004), with interventions, comments and protests due on or before October 28, 2004. ISO-NE, USGen New England, Inc., and the Attorney General of Massachusetts filed timely motions to intervene, with no substantive comments. Milford Power Company, LLC and PSEG Energy Resources and Trade LLC filed motions to intervene

out-of-time that have not been opposed. NSTAR and New England Power Pool Participants Committee (NEPOOL) filed timely interventions and comments. On November 12, 2004, Mirant filed an answer to NSTAR's comments.

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given the lack of undue prejudice and the parties' interests, we find good cause to grant under Rule 214, the unopposed, untimely motions to intervene in this proceeding.

11. 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. Waiver of Notice and Application of Suspension Period

12. Mirant requests waiver of the Commission's 60-day prior notice requirement to permit an October 8, 2004 effective date.

13. NSTAR requests that the Commission deny waiver of the 60-day notice requirement. In addition, NSTAR requests that the rates under the RMR agreement be suspended for the full statutory period of five months. In support of these requests, NSTAR states that, even taking into account the unsuccessful RMR negotiations between NSTAR and Mirant, Mirant could have made the filing one month earlier than it did. In addition, NSTAR states that the proposed rates are egregious and would place an unnecessary burden on NSTAR's customers.

Commission Determination

14. Consistent with *Central Hudson Gas & Electric Corp.*,³ which provides that waiver of the 60-day prior notice requirement will generally be appropriate when a change in rates is prescribed by an agreement on file with the Commission, we find good cause to grant Mirant's request for waiver. Here, as explained above, the filing at issue is provided for by section 18.5 of the Restated NEPOOL Agreement. We are also aware that the proposed filing is the outcome of a negotiated agreement between Mirant and the ISO-NE with substantial participation by NSTAR in selection of the units to be placed under the RMR Agreement.

³ 60 FERC ¶ 61,106, at 61,337, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

15. Additionally, we have granted waiver for good cause where: (1) agreements are intended to permit a generator needed to assure system reliability to operate; (2) the applicant may only learn upon very short notice which units will be RMR units; and (3) the applicant may not be able to file 60 days prior to the commencement of service due to short notice.⁴ We find good cause to grant waiver since these relevant factors are present in this proceeding. We note that Mirant could not file the RMR agreement until it had received the proper approvals from ISO-NE and negotiated the units to be deactivated and those to be designated RMR units.⁵ Mirant's submission demonstrates that Mirant calculated and filed the necessary cost-of-service exhibits on the RMR units and filed the unexecuted RMR agreement within two weeks of receiving the required ISO-NE authorization to deactivate Steam Unit 3. Thus, we find, because of extraordinary circumstances, that Mirant could not file the proposed RMR rates at least 60 days in advance of the commencement of the RMR service, as NSTAR indicates.

16. In *West Texas Utilities Company*,⁶ we explained our standard for determining whether a rate increase is excessive as compared to the rate on file and thus may require maximum suspension. Here, we note that NSTAR does not argue that Mirant's proposed RMR rate is excessive as compared with the current rate on file, rather NSTAR compares Mirant's proposed rate to NSTAR's "corrected" calculation of the rate.⁷ Since Mirant's current rate on file for the Kendall RMR units is not a cost of service rate, we find that the test in *West Texas* is not applicable. We reiterate that this is a short-term agreement, necessary to remedy a reliability concern. Although NSTAR acknowledges that these units are needed for reliability, NSTAR alternately requests that the rates for the service not be effective for the majority of the term of the agreement. Accordingly, under the unique circumstances of this proceeding, we will accept the proposed RMR rates for filing, suspend them for a nominal period, subject to refund, and set them for hearing, as discussed further in the order.

⁴ See *Mirant Americas Energy Marketing, L.P., et al.*, 105 FERC ¶ 61,359 (2003).

⁵ It was not until September 14, 2004, that Mirant and NSTAR had agreed on the unit to deactivate, and September 23, 2004 when ISO-NE had issued a letter accepting the requested deactivation of Steam Unit No. 3, approving the plan for implementation. Attachment C, Letter from Stephen G. Whitley, Senior Vice President, ISO-NE to Peter D. Fuller, Dir., Market Affairs, Mirant Americas (Sept. 23, 2004).

⁶ 18 FERC ¶ 61,189 (1982) (*West Texas*).

⁷ NSTAR at 11.

C. Penalty, Termination and Audit Provisions of the Pro Forma Agreement

17. NSTAR asserts that portions of ISO-NE's pro forma RMR Agreement are inappropriate as applied to Mirant's resources. NSTAR maintains that since RMR agreements take the place of market-based operations for a defined period at a stipulated price, the agreements should be modified to reflect the principles of immediacy, accountability and transparency.

18. NSTAR requests that ISO-NE be permitted to terminate Mirant's RMR Agreement on thirty days notice rather than the longer 120-day period required in the pro forma RMR Agreement. NSTAR states that this change from the pro forma RMR Agreement would not create any inequities because there is a finite period of need, less than a year, for the Kendall RMR Units.

19. NSTAR further requests that the non-performance penalty in the pro forma RMR Agreement be revised to take into account that the Kendall RMR Units are peaking resources with low capacity factors. Specifically, NSTAR states that although the pro forma non-performance penalty is adequate for a base load unit, it is not adequate in terms of peaking units with a low capacity factor, such as Mirant's. NSTAR states that this is because Mirant's peaking unit is essentially credited with 100% availability in all non-outage hours in which it is not given dispatch instructions. Thus, NSTAR asserts that planned outages, *Force Majeure* outages, and deratings do not count in calculating the penalty. NSTAR asserts that a meaningful penalty for such units should not credit the Kendall RMR Units with availability in the hours that they are not dispatched, and a more meaningful non-performance penalty would deduct from the Monthly Fixed-Cost Charge the percentage thereof equal to 1 minus the ratio of the actual output of the resource for the month to the requested output of the month.

20. Finally, NSTAR requests that Mirant be required to file monthly reports stating costs actually incurred and all streams of revenue received. NSTAR, as the single NEPOOL participant impacted by the RMR Agreement, requests audit rights and explicit recognition in the agreement that it is the intended third-party beneficiary.

Commission Response

21. We reject NSTAR's request to shorten the pro forma termination notice to 30 days. We are not convinced that the defined timeframe of this Agreement justifies a unique deviation from a region-wide practice, particularly when ISO-NE has not requested or endorsed this deviation from its market rules. ISO-NE has not identified any concern to justify deviation from the ISO-NE pro forma RMR Agreement shortening the notice timeframe in which ISO-NE may be permitted to terminate, from 120 days to 30 days. Even if we accept NSTAR's assertion that its proposed shorter notice of termination

provision would not create inequities, NSTAR has failed to meet the burden of showing that the provisions of the pro forma RMR Agreement are not just and reasonable as applied to the Kendall RMR Units.

22. NSTAR's requested non-performance penalty is also rejected. NSTAR contends that because these RMR Units provide peaking service and are therefore not 100% utilized, the non-performance penalty should be deducted from the monthly fixed charge at a percent equal to 1 minus the ratio of actual output for the month to the requested output for the month. The pro forma non-performance penalty for these types of agreements is directly linked to a generating unit not responding to a specific dispatch instruction, not to capacity factors. NSTAR has not demonstrated why one type of generating unit should be penalized more heavily than another type of generating unit, when the intent of the penalty is universal. The penalty is intended to apply in times when any generating unit does not perform during requested dispatch periods, and intended consequence for non-performance under these types of agreements is the same regardless of the nature of the unit.

23. NSTAR requests that Mirant be required to file monthly reports, stating costs actually incurred, and requests that NSTAR should have audit rights. We note that Mirant has submitted an unexecuted RMR Agreement that does not vary substantively from the pro forma agreement in its cost reporting and auditing requirements. We also note that ISO-NE, as party to the proposed RMR agreement, retains audit rights to Mirant's books and records to verify the accuracy of the charges covered by this agreement. Mirant also has the obligation under the agreement to make periodic reports to ISO-NE of certain costs that are not publicly available. Because NSTAR is not a party to the RMR Agreement and because the pro forma RMR provides only for reporting requirements and audit rights by ISO-NE, we reject NSTAR's request for access to such information. NSTAR has failed to meet the burden of showing that the provisions of the pro forma RMR Agreement are not just and reasonable as applied to the Kendall RMR Units.

24. We note that NSTAR is a beneficiary of the RMR Agreement in that the Kendall RMR Units will provide necessary reliability services to the NSTAR service area until NSTAR completes distribution system improvements. Nevertheless, NSTAR is not a party to this agreement. NSTAR had the opportunity to negotiate a bilateral agreement with Mirant to secure the output of the Kendall RMR Units for the period that NSTAR will rely on these units for reliability. Having failed to reach such agreement and relying instead on the regulatory solution set up to ensure reliability for the entire ISO-NE grid, NSTAR is not in the same position as a party to the RMR Agreement. Further, NSTAR provides no support for its request to amend the beneficiary rights clause of the Agreement to clarify that NSTAR is a third party beneficiary of the agreement. We will therefore reject NSTAR's request.

D. Additional Expenses to Recover From Forced Outages

25. Article 5.2.2(e) of the proposed RMR Agreement outlines that in the event of a shut-down of any of the RMR units, there may be Additional Expenditures to bring the unit into service, or bring a substitute unit into service, contingent upon applicable approvals that the ISO must obtain. Article 5.2.2(e) also provides that if the ISO does not agree as to the amount stated by Mirant for Additional Expenses it may collect, such disputed amounts shall be paid subject to refund pending alternative dispute resolution in accordance with the NEPOOL System Rules.

26. NEPOOL states that it neither supports nor opposes the proposed RMR Agreement and that the proposed cost-based rates were not reviewed within the NEPOOL process. However, NEPOOL notes that Article 5.2.2(e) of the RMR Agreement, addressing the payment of approved additional expenses for recovery of units in forced outage, should be corrected to refer to the Applicable Participant (i.e. NSTAR) rather than simply to Participants in the NEPOOL Market. NEPOOL states that such a change would conform with the rationale for the RMR Agreement.

Commission Determination

27. We find that any Additional Expenditures not already on file with the Commission would constitute a change in the filed rate, and are required to be filed with this Commission under 18 C.F.R. §35.13. We also direct Mirant to make NEPOOL's requested change from "Participant" to "Applicable Participant" in Article 5.2.2(e) so that the RMR Agreement retains internal consistency with regard to ISO settlement of costs for the RMR Agreement. We direct Mirant to file revised tariff sheets reflecting this modification within 30 days of the completion of the settlement and hearing proceedings set forth herein.

28. We also note that certain of these units included in the Agreement are designated as PUSH units. We found in *Devon Power* that a unit covered by an RMR contract could not also operate in the market as a PUSH Unit.⁸ Therefore, Mirant's prior PUSH agreements for the RMR units are hereby superceded by the RMR contract.⁹

⁸ *Devon Power* at P 57.

⁹ Mirant is directed to file cancellation sheets reflecting the cancellations of its PUSH agreements to the extent applicable. Also, while Mirant has filed designated tariff sheets in this instant proceeding, the proposed designations do not comport with Order No. 614 (FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,096 (2000)). Therefore, Mirant is directed to file updated tariff sheets within 30 days of the completion of the settlement and hearing proceedings set forth herein. See *Boston Edison Company, on reh'g*, 98 FERC ¶ 61,292 (2002).

E. Cost of Service

29. Mirant filed cost of service data in this proceeding to derive the Annual Fixed Revenue Requirement of \$13,661,118 per year, for the RMR units. Consistent with the Commission's direction in the *Mirant PUSH Order* and *Devon Power*, Mirant used a return on equity (ROE) of 10.88 percent and annual fixed operations and maintenance (O&M) expenses of \$6,773,108. Mirant also used the methodology directed by the Commission in *Devon Power* (Devon Methodology) to calculate its annual administrative and general (A&G) expenses.

30. Because Mirant is an Exempt Wholesale Generator pursuant to the Public Utility Holding Company Act of 1935, as amended, and has been authorized to sell energy and capacity at market-based rates, Mirant does not report general financial and plant-specific information to the Commission. Therefore, Mirant proposes to calculate the revenue requirement using its own income statement data and the most recent Form 1 data for the generating units, which is Cambridge Electric Company's 1997 Form 1 data, prior to Mirant's purchase of the units from Cambridge Electric Company in 1998.

31. NSTAR maintains that Mirant's cost calculations are overstated. Specifically, NSTAR states that Mirant incorrectly allocates O&M costs because it fails to allocate a portion of O&M costs to the units at the Kendall Station that were deactivated. NSTAR states that the deduction of \$500,000 from fixed O&M by Mirant is grossly insufficient to account for the allocation of O&M to the deactivated units. NSTAR also asserts that Mirant erroneously uses the Devon Methodology to approximate A&G from Form 1 data instead of using actual A&G expenses. In addition, NSTAR asserts that Mirant's rate base cost calculations are flawed because Mirant erroneously allocates Materials, Supplies and Prepaid Expenses, General Plant and Intangible Plant only to the Kendall RMR Units rather than including the deactivated Kendall Station units in the allocation. NSTAR recalculates Mirant's revenue requirement using a different state income tax rate.

32. Further, NSTAR asserts that Mirant improperly proposes to allocate excessive fixed costs to the Kendall RMR Units from costs properly allocated to the deactivated units. NSTAR maintains that certain costs included by Mirant, i.e. depreciation and property tax expenses, would have been incurred by Mirant even if the Kendall RMR Units were deactivated as proposed. NSTAR argues that only the incremental costs of providing reliability service should be included in the RMR agreement and that depreciation and property tax expenses should be excluded from the Mirant's Annual Fixed Revenue Requirement. Following the same reasoning on incremental costs, NSTAR submits that to the extent O&M and A&G are fixed costs, these cost should also be excluded from the revenue requirement.

33. NSTAR asserts that Mirant inaccurately calculates offsets for revenues Mirant receives from the sale of steam derived as a byproduct of its electrical generation.

NSTAR suggests that the provisions of the RMR agreement allowing for offsets should include variable energy revenues as well as fixed fees from steam sales.

34. Finally, NSTAR protests the discrepancy between 2002 cost data submitted for Mirant's jet unit in a PUSH mechanism proceeding and the cost Mirant proposes for the same unit in its RMR Agreement.

35. In its answer, Mirant states that the RMR Agreement accurately reflects the Kendall RMR Units' full cost of service and should not be set for evidentiary hearing. Mirant states that allocation of the O&M costs in the RMR Agreement accurately reflects that two of the units that were shut down had very little maintenance performed in 2002 and that no new O&M costs were attributable to the CT unit during the commencement of its commercial operation in 2002. Additionally, Mirant states that it appropriately used the Devon Methodology and that to do otherwise would result, contrary to NSTAR's assertion, in an increase in allocated A&G costs. Also, Mirant answers that the costs of fuel consumed to provide steam sales from the Kendall RMR Units is not reflected in the RMR Agreement and thus a credit for the variable revenues from steam sales is not appropriate. Finally, Mirant asserts that NSTAR erroneously used a utility corporation state income tax rate in its analysis rather than the appropriate corporate excise tax and surtax that Mirant used in its cost of service calculation.

Commission Response

36. NSTAR's request that the Commission exclude the O&M, A&G, depreciation and property tax expenses from Mirant's revenue requirement is rejected. The Commission has historically permitted recovery of fixed costs for the discrete period in which the specified RMR units are in operation. Despite NSTAR's assertion that Mirant would have foregone these revenues had the RMR units shut down as originally proposed, the fact remains that the units have not shut down. Further these fixed costs are essential costs of a service that Mirant will be providing to NSTAR's customers during the term of the Agreement, and as such, we reject NSTAR's incremental cost approach.

37. We will set the issue of whether Mirant properly offsets steam sale revenues that it receives under Article 3.1.2 of the cost of service agreement for the settlement and hearing proceedings set forth herein.

38. NSTAR raises other factual questions concerning the proposed RMR rates 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. The Commission's preliminary analysis indicates that the proposed RMR rates have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, the Commission will accept and suspend the proposed revisions to the RMR Agreements, to be effective October 8, 2004,

subject to refund and set them for hearing. In addition, while we set for hearing the issue of the correct state income tax rate, we note that consistent with the Commission's direction in the *Mirant Push Order* and in *Devon Power*, Mirant has correctly applied an ROE of 10.88 percent.¹⁰

39. In order to provide the parties an opportunity to resolve these matters among themselves, 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.¹¹ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹² 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 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) Mirant's RMR Agreement is hereby accepted for filing, as modified, suspended for a nominal period, to be effective October 8, 2004, subject to refund.

(B) 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 Mirant's proposed tariff revisions. As discussed in the body of this order, the hearing will be held in abeyance to give the parties time to conduct settlement judge negotiations.

(C) 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 authorized to

¹⁰ *Mirant PUSH Order* at 9. *Devon Power* at 49.

¹¹ 18 C.F.R. § 385.603 (2003).

¹² If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone a (202) 502-8500 within five days of the date 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).

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 in writing or by telephone within five (5) days of the date of this order.

(D) 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.

(E) If the 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 convene a conference in this proceeding to be held within approximately fifteen (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.

(F) Mirant is hereby directed to make a compliance filing reflecting the modifications discussed in the body of this order within 30 days of the completion of the settlement and hearing proceedings set forth herein.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.