

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

<b>New York Independent System Operator, Inc.</b>	)	<b>Docket No. ER01-181-000</b>
	)	
	)	
<b>Mirant Americas Energy Marketing, L.P., Mirant New York, Inc. Mirant Bowline, LLC, Mirant Lovett, LLC, and Mirant NY-Gen, LLC</b>	)	
	)	
<b>Complainants</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. EL01-55-000</b>
	)	
<b>New York Independent System Operator, Inc.</b>	)	
	)	
<b>Respondent</b>	)	

**NEW YORK INDEPENDENT SYSTEM OPERATOR INC.’S  
ANSWER TO MIRANT AMERICAS ENERGY MARKETING, L.P., ET AL.,  
COMPLAINT AND REQUEST FOR FAST TRACK PROCESSING**

Pursuant to Rules 206(f) and 213 of the Commission’s Rules of Practice and Procedure,<sup>1</sup> and consistent with the Commission’s *Notice* issued on March 20, 2001, the New York Independent System Operator, Inc. (“NYISO”) hereby answers the motion to intervene, answer and complaint filed by Mirant Americas Energy Marketing, L.P., Mirant New York, Inc., Mirant Bowline, LLC, Mirant Lovett, LLC, and Mirant NY-Gen, LLC, (collectively, the “Mirant Companies”) in the above referenced proceedings on March 16, 2001 (“Complaint”).

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<sup>1</sup> 18 C.F.R. §§ 385.206(f) and 213 (2000).

On March 9, 2001, the NYISO filed a Notice of Withdrawal (“Withdrawal Notice”) requesting permission from the Commission to withdraw the NYISO Board of Directors’ (“NYISO Board”) October 11, 2000 filing (“October Filing”) under Section 206 of the Federal Power Act (“FPA”)<sup>2</sup> in Docket No. ER01-181-000. The NYISO Board’s October Filing proposed to extend the duration of the currently effective \$1,000 MWh bid caps in certain NYISO-administered markets until such time as the NYISO was able to successfully develop, test and implement a “superior market protective mechanism.” The intended purpose of such a mechanism was to enable the NYISO to detect more quickly and mitigate the bidding behavior of Market Participants whose conduct demonstrated an ability to set and sustain market prices that are not consistent with competitive market conditions.

The NYISO Board’s Withdrawal Notice informed the Commission that it was requesting permission to withdraw its October Filing for two reasons. First, the Board had accepted a bid cap extension proposal approved by the NYISO’s Management Committee at the Committee’s March 1, 2001 monthly meeting.<sup>3</sup> Second, the Board explained in its Withdrawal Notice that the NYISO Staff is automating a step within the NYISO’s Commission-approved Market Mitigation Measures<sup>4</sup> which will obviate the need for the “superior market protective mechanism” referenced in the Board’s October Filing. The Withdrawal Notice further explained that automation of the existing Market Mitigation Measures would effectively eliminate the present

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<sup>2</sup> 16 U.S.C. ¶ 824e (1998).

<sup>3</sup> The NYISO submitted a separate Section 205 filing under the FPA, 16 U.S.C. ¶824d (1998), on March 9, 2001 requesting to extend the duration of the \$1,000 MWh bid caps for an additional 18 month period beyond the current bid caps expiration date of April 30, 2001. Docket No. ER01-1517-000.

<sup>4</sup> *Central Hudson Gas & Electric Corp., et al.*, 89 FERC ¶ 61,196 (1999).

one-day delay in mitigating conduct that would otherwise set non-competitive market energy prices in the next day's Day-Ahead Market ("DAM").

In their Complaint, the Mirant Companies erroneously characterize the NYISO's automation of its existing Market Mitigation Measures as a substantive and material change to the NYISO's approved Market Monitoring Plan ("MMP"). Contrary to Mirant's assertions, the NYISO's Automated Mitigation Procedures ("AMP") do not entail modification of the rates, terms and conditions of service under the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff"), but rather constitutes a permissible automated application of the approved Market Mitigation Measures. Thus, the Mirant Companies fail to establish the predicate for their argument that the NYISO's implementation of its planned automation process requires a filing with the Commission pursuant to Section 205 or 206 of the FPA.

The Mirant Companies are correct that the key issue is whether the NYISO's planned AMP "reflect substantive and material changes"<sup>5</sup> to the NYISO Market Monitoring Plan ("MMP"), as implemented by the Market Mitigation Measures ("MMM") (Addendum A to the MMP). The Mirant Companies assert that the AMP deviate from the MMP and the NYISO's Market Monitoring Measures for essentially two reasons. According to the Complaint, the AMP do not conform to the procedural requirements of the Market Monitoring Measures governing the NYISO's obligation to discuss changes in bidding behavior with the relevant Market Participant. The Mirant Companies further assert that the AMP impose a new threshold for the imposition of mitigation measures that does not presently appear in the NYISO's approved Market Mitigation Measures. To buttress these assertions, the Mirant Companies allege that the NYISO bypassed its governance procedures in implementing the AMP.

Neither of the Mirant Companies' two substantive assertions is correct, and their allegation that the NYISO has bypassed its members is simply untrue. The AMP will not change any provision of the NYISO's MMP or its Market Mitigation Measures. Instead, the AMP will implement a procedure to test whether certain conduct results in a material change in price using the NYISO's Security Constrained Unit Commitment ("SCUC") model for the DAM, as specified in § 3.2(b) of the Market Mitigation Measures. Hence, the AMP insert an additional step within the SCUC model to determine whether, according to the existing Market Mitigation Measure thresholds, any energy bids that exceed the conduct thresholds would cause prices in the DAM to exceed the market impact thresholds.<sup>6</sup> If the thresholds are exceeded, the AMP will immediately substitute the relevant Market Participant's Reference Prices in place of the excessive bids and then complete the remaining iterations of the SCUC on that basis. Reference Prices for the Market Participant in question will be determined and applied as specified in the Market Mitigation Measures. The SCUC process will thus produce DAM prices that reflect mitigation of any bids that exceed the standards specified in the MMM.

Accordingly, the only difference made by the AMP is one of timing rather than substance. Under the current manual procedures, the NYISO is only able to identify conduct and pricing impacts that exceed the MMM standards after the SCUC runs for a given DAM have been completed, which means that mitigation cannot be implemented until the next day's DAM. This means that the DAM for which the MMM standards are first exceeded evades mitigation, merely because of the time required to implement manual mitigation. This loophole can result in tens of

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<sup>5</sup> Complaint at 2.

<sup>6</sup> See Complaint at 8-9, (acknowledging that the Market Mitigation Measures apply conduct (bidding level) and market impact thresholds to determine if mitigation is warranted).

millions of noncompetitive overcharges potentially escaping mitigation and being passed on to buyers.<sup>7</sup> Under the automated procedures of the AMP, non-competitive bidding behavior will be mitigated prospectively, as currently authorized in the MMP, but the mitigation will occur within the SCUC runs in which the conduct and price effect thresholds of the Market Mitigation Measures are crossed, without the one day delay that occurs under the current manual procedures. By accelerating the mitigation process through automation, the NYISO will be able to mitigate non-competitive bids before these bids can affect posted DAM prices for a given day.

As shown more fully below, under the AMP, Market Participants can consult with the NYISO about legitimate justifications for bids that would otherwise trigger mitigation under the MMM. The consultation provisions protect the rights of Market Participants, while enabling the NYISO to upgrade from manual to automated mitigation. As also shown below, the AMP do not incorporate any new substantive mitigation thresholds, and Mirant apparently overlooks the fact that the NYISO's Market Mitigation Measures do not limit implementation to the initial manual procedures utilized by the NYISO. To the contrary, the Market Mitigation Measures specifically contemplate evolution to automated mitigation procedures. Finally, even though the AMP do not make substantive changes to the existing Market Mitigation Measures, the AMP have been reviewed in detail at meetings with the NYISO members, including meetings of a specially-created Working Group, and meetings of both the Business Issues Committee and the Management Committee. In sum, since the AMP can be implemented within the four corners of the NYISO's existing MMP and its Market Monitoring Measures, a Section 205 or 206 filing with the Commission is not required.

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<sup>7</sup> For example, this one day delay in mitigating non-competitive conduct resulted in an impact in excess of \$100 million in the New York energy markets on June 26, 2000.

## I. Communications

Copies of all pleadings and other correspondence in connection with this proceeding should be addressed to:

Robert E. Fernandez,  
General Counsel and Secretary  
Gerald R. Deaver,  
Senior Attorney  
John P. Buechler,  
Director of Regulatory Affairs  
New York Independent System  
Operator, Inc.  
3890 Carman Road  
Schenectady, NY 12303  
Tel: (518) 356-6153  
Fax: (518) 356-4702  
rfernandez@nyiso.com  
gdeaver@nyiso.com  
jbuechler@nyiso.com

William F. Young  
Ted J. Murphy  
Hunton & Williams  
1900 K Street, NW  
Washington, D.C. 20006  
Tel: (202) 955-1500  
Fax: (202) 778-2201  
byoung@hunton.com  
tmurphy@hunton.com

## II. Answer

### A. The AMP Conform to the Procedural Requirements of the Market Mitigation Measures

Under the present manual implementation of the NYISO's Market Mitigation Measures, the NYISO generally will contact a Market Participant that has submitted bids that trigger the conduct thresholds of the MMM to determine whether there is a valid justification for the suspect bids. The NYISO's practice conforms to Section 3.3 of the Market Mitigation Measures, which states:

If through the application of an appropriate index or screen or other monitoring of market conditions, conduct is identified that (i) exceeds an applicable threshold, and (ii) has a material effect, as specified above, on one or more prices or guarantee payments in a

New York Electric Market administered by the NYISO, the Market Monitoring Unit shall, as and to the extent specified in the Plan, contact the Market Party engaging in the identified conduct to request an explanation of the conduct. If the explanation indicates to the satisfaction of the NYISO, in consultation with the Market Advisor, that the questioned conduct is consistent with competitive behavior, no further action will be taken.

NYISO Market Monitoring Plan, Addendum A – Market Mitigation Measures, April 18, 2000.

Section 3.3 makes it clear, however, that the NYISO’s obligation to “contact the Market Party engaging in the identified conduct” is “as and to the extent specified in the [Market Monitoring] Plan.” Section 11.1 of the MMP specifies that the NYISO may:

[T]ake the following actions as appropriate to remedy any actual or potential abuse of market power or restriction on competition in any of the New York Electric Markets . . .

c) Implement any applicable mitigation or remedial measures the NY ISO is authorized to use by the FERC or the provisions of this Plan, with or without prior discussions or a demand letter as may be appropriate.”

NYISO Market Monitoring Plan, Section 11.1 – Initial Procedures, July 26, 1999) (emphasis added).

Under the NYISO’s planned AMP, discussions with a Market Participant after it has submitted bids that cross the conduct thresholds but before mitigation measures are imposed will not be feasible, since evaluation of the bids and imposition of mitigation will occur automatically within the SCUC process. Indeed, consultation on that schedule is not always feasible or desirable even under the current manual procedure. In the vast majority of cases currently, the NYISO contacts Market Participants engaged in conduct that exceeds the Market Mitigation Measures thresholds well before the market conditions occur that would likely cause the conduct to have a material effect on prices. Similarly, under the AMP, any Market Participant that anticipates that its bids in an upcoming DAM will exceed an applicable conduct threshold can contact the NYISO in advance of submitting its bids to provide information demonstrating

legitimate reasons for its bids. Thus, a consequence of the move to AMP is a shift in the initiation of contact with the NYISO. This shift is necessary because the accelerated timeline of automated mitigation mandates that any consultation occur prior to bids being submitted rather than after. This shift is also entirely reasonable because the Market Mitigation Measures' conduct thresholds are based on a Market Participant's historic bidding practices or other information that is known to that Participant. Moreover, it is the Market Participant, rather than the NYISO, that will know whether changes in its bidding behavior will trigger the conduct thresholds, and it is the Market Participants that will have the incentive to initiate timely consultations. If any such consultations are timely requested, they will continue to be in advance of any bid mitigation, as is the case under the manual procedures.

In the rare instance in which, notwithstanding the opportunity for consultation, mitigation may be applied to a justifiable bid, a Market Participant whose bids are mitigated can utilize the NYISO's Discretionary Acts Committee dispute resolution process to justify its bids and ensure that it is paid at least its operating costs for the bidding period in question. While this procedure would not retroactively correct clearing prices upward for other market participants whose bids were not mitigated, any such sellers would have submitted bids that were inframarginal at the mitigated clearing price, and thus would receive a price higher than their bid and be in a very different posture. The relatively high levels of both the conduct and the price impact thresholds provided for in the Market Mitigation Measures, which require significant market effects before they are triggered, allow substantial room for Market Participants to vary their bids in response to market conditions without triggering mitigation. Thus, any inframarginal unmitigated seller will be adequately compensated relative to its own bids, and will have the benefit of the range of clearing prices that can occur below the mitigation thresholds.



In short, the AMP will not deprive Market Participants of a meaningful opportunity to consult with the NYISO about legitimate reasons for elevated bids. Instead, the AMP reflect an appropriate exercise of the NYISO's discretion under the MMP to adjust the consultation process to an appropriate before-the-fact procedure, consistent with the before-the-fact timetable of the automated mitigation procedures. In an effort to support their argument that the AMP require a Section 205 or Section 206 filing, the Mirant Companies seek to elevate the consultation procedures appropriate for the current manual implementation of the Market Mitigation Measures into an immutable requirement that would effectively bar the use of any automated mitigation measures by the NYISO. As shown above, this contention is inconsistent with both the words and the intent of the Commission-approved MMP.

**B. The AMP Do Not Impose a New Threshold for Mitigation**

Contrary to the Mirant Companies' Complaint, the AMP do not attempt to establish a mitigation threshold that does not exist in the Market Mitigation Measures. The Mirant Companies assert, at page 14 of the Complaint, that under the AMP, "if the energy price in any zone for any time exceeds the threshold level of \$150 MWh, then the [AMP] will be invoked and mitigation of suspect market behavior is automatic if the conduct and impact thresholds are also surpassed." This states the use of the \$150 MWh price test backwards. The purpose of the \$150 MWh standard is to set a floor below which the AMP will *not* be used. If the initial SCUC run results in prices below \$150 MWh, the prices will, as is the case now, remain subject to possible mitigation by the Market Monitoring Unit on a manual basis, but will not trigger the additional SCUC passes necessary for the automated mitigation process. Correspondingly, prices above \$150 MWh will result in AMP evaluation of price impacts, but any actual mitigation will only occur if the thresholds approved in the Market Mitigation Measures are met.

As a practical matter, the NYISO Market Monitoring Unit's oversight and mitigation authority should include reasonable discretion to select an appropriate starting point for deploying the computer and other resources needed to conduct automated mitigation. Given that average LBMPs in the New York energy markets during 2000 were \$58.15 MWh,<sup>8</sup> that the MMM price impact threshold requires increases of 200% or \$100, that the price spikes that have been of concern in New York have been at levels well in excess of \$150, and that \$150 MWh approximates the end of the relatively flat portion of the supply curve in New York (*i.e.*, the point at which prices become more sensitive to withholding), it is unlikely that mitigation will be triggered when prices are below \$150 MWh. The \$150 MWh test is thus not a substantive mitigation threshold but merely a matter of administrative convenience intended to avoid performing additional SCUC iterations in situations that are deemed by the NYISO Market Advisor to be unlikely to result in the imposition of mitigation measures. In every case, whether or not prices are at the \$150/MWh level, mitigation is *only* applied when the approved Market Mitigation Measure thresholds are exceeded. The \$150 MWh price test simply reflects an appropriate exercise of administrative discretion by the NYISO's Market Monitoring Unit to avoid use of the AMP at pricing levels at which mitigation measures are very unlikely to be triggered. If the Mirant Companies are opposed to automated mitigation, they should applaud, rather than oppose, the NYISO's efforts to limit unnecessary use of the AMP.

C. **Atlantic City Electric Does Not Support the Result Urged by the Mirant Companies**

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<sup>8</sup> See "Status of the NYISO and Future Direction" presented at the January 22 and 23, 2001 NYISO technical conference.

Contrary to their assertion, *Atlantic City Electric Co., et al.*,<sup>9</sup> cited in the Complaint at page 16, does not support the result urged by the Mirant Companies. *Atlantic City Electric* involved a claim that certain changes proposed by PJM to its manuals involved changes to the rates, terms and conditions for tariffed service and thus should have been filed as part of the relevant PJM tariff. The Commission found that the changes involved provisions in the PJM Manuals governing credits and charges for operating reserves, and the formula for calculating those credits, and held that “PJM should have set forth these provisions in the PJM Tariff.”<sup>10</sup> Accordingly, the Commission held that PJM could not assert that it was only changing its manuals, avoiding the need to make a tariff filing, when the provisions at issue were a change in rates that should have been in the tariff in the first place.<sup>11</sup>

Here, the Mirant Companies have not identified any provisions in the AMP that should have been filed in a tariff, and the AMP will not make any change to the rates, terms or conditions for the determination of market prices for energy under either the NYISO’s Commission-approved Market Mitigation Measures or the MMP. The AMP will apply the conduct and market impact thresholds already approved by the Commission. As a result of the continuing evolution and improvement of its market monitoring procedures as contemplated by the Commission and by most Market Participants since the NYISO’s inception, the NYISO is simply enhancing the speed and timing of the application of approved conduct and impact thresholds. Instead of being applied manually and after-the-fact, the NYISO will apply the

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<sup>9</sup> *Atlantic City Electric Co., et al.*, 91 FERC ¶ 61,063 (2000).

<sup>10</sup> *Id.* at 61,219.

<sup>11</sup> *Id.*

thresholds to suspected bids on an automated basis and during-the-fact while determining the next day's DAM energy prices.

The MMP and its Market Mitigation Measures recognize that the NYISO would, from its inception, strive to improve its market oversight activities. The Market Mitigation Measures expressly contemplate, at Section 3.2, the evolution of the manual application of mitigation measures to the automated application reflected in the AMP, stating:

When it has the capability to do so, the Market Monitoring Unit, in consultation with the Market Advisor, shall determine the effect on prices or guarantee payments of questioned conduct through the use of sensitivity analyses performed using the NYISO's Security Constrained Unit Commitment computer model ("SCUC") or the NYISO's Security Constrained Dispatch computer model ("SCD"), and such other computer modeling or analytic methods as the Market Monitoring Unit or the Market Advisor shall deem appropriate.

NYISO Market Monitoring Plan, Addendum A – Market Mitigation Measures, April 18, 2000.

As anticipated in the Market Mitigation Measures, the AMP represent nothing more than an evolution of the NYISO's ability to automatically determine the effects on market energy prices of questioned conduct, and to respond to that conduct immediately.

**D. The NYISO Consulted Extensively with Its Members in Designing the AMP**

Since the AMP do not represent a substantive or material change to the rate, terms or conditions of service under the Services Tariff, the NYISO governance procedures regarding Section 205 or 206 filings are not applicable. Nevertheless, the NYISO consulted extensively with Market Participants, the Business Issues Committee, the Management Committee, and the NYISO Board during the development of the AMP. At pages 10 and 16 of their Complaint, the Mirant Companies assert that the NYISO has made no attempt to present the AMP to the NYISO

Management Committee for either formal or informal consideration, and imply that the NYISO has not sought the input of its members on the AMP. The Mirant Companies' assertion is false.

Between November 2000 and January 2001, the NYISO participated in a series of eight "Circuit Breaker Working Group" ("Working Group") meetings at which every market sector was represented. Various proposals for developing a superior market protective device were discussed and debated at each of these meetings, including, the question of whether such a device should be implemented at all. While the Working Group did not develop a single consensus approach to recommend to the Business Issues Committee, the NYISO did take from the process a preference from most sectors for a device that would be integrated within the SCUC process, as opposed to a new stand-alone market protective measure. The Working Group discussions also addressed automated measures advocated by a number of members that would have significantly lowered or altered the conduct and market impact thresholds of the existing Market Mitigation Measures.

Similar discussions were also held at a meeting of the Business Issues Committee itself on January 25, 2001. In designing the AMP, the NYISO carefully considered the proposals for much more restrictive automated measures, as well as the positions of those opposed to any automated measures, and concluded that a case for departing from the Market Mitigation Measures approved by the Commission, or a case for continuing to rely only on manual mitigation, had not been made.

After formulating its AMP proposal, the NYISO made a detailed presentation on the AMP to the Management Committee at its regular monthly meeting on February 1, 2001. The Agenda for the February 1 meeting and a draft Minutes of Meeting are posted on the NYISO's

website.<sup>12</sup> The AMP were introduced and discussed under topic number four of the Agenda, entitled “Circuit Breaker.”

As the Minutes of Meeting note, the President and Chief Executive Officer of the NYISO – Mr. William Museler – introduced the topic and explained that based on reviews of the AMP design by both internal and outside counsel, the NYISO had concluded that it could act within its existing tariff authority to automate the MMP’s existing features. The NYISO’s independent Market Advisor – Dr. David Patton – explained the operation of the AMP, and Mr. Museler further clarified that the AMP will utilize the conduct and impact thresholds currently specified in the NYISO’s MMP. Mr. Museler also asked the Market Participant sectors to consider the matter during the sector caucuses and to respond to the NYISO Board’s request for input from each of the sectors on the desirability and content of the AMP.

Thus, the NYISO is implementing its AMP within both the letter and the spirit of the governing procedures of the NYISO. No formal vote of the Management Committee was held, because the NYISO had concluded, after consideration of the extensive debate at Working Group and Committee meetings, that the AMP should automate the existing Market Mitigation Measures rather than create new measures that would potentially be inconsistent with the existing measures, and thus a new tariff filing would not be required. Nonetheless, the AMP were brought before the Management Committee for full consideration short of a vote, and the opinions of all sectors, as expressed after their caucuses at the February meeting, were conveyed to the NYISO Board for its consideration in connection with adoption of the AMP. In addition, the NYISO and its Market Advisor offered to meet individually with any sector, and four such

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<sup>12</sup> See [www.nyiso.com](http://www.nyiso.com).

meetings were held to discuss the AMP. The Mirant Companies effort to find fault with the procedures by which the AMP were developed is simply without merit.

### **III. Compliance with Rule 213(c) of the Commission's Rules of Practice and Procedure**

#### **A. Admissions and Denials of Disputed Material and Factual Allegations**

- The NYISO denies the Mirant Companies' allegation that the AMP require formal approval by the Management Committee.
- The NYISO denies the Mirant Companies' allegation that no attempt was made to present the proposed AMP to the Management Committee for its consideration and input.
- The NYISO denies the Mirant Companies' allegation that the NYISO offered a selective picture to the Commission when it stated in its Withdrawal Notice that the AMP merely automate the existing mitigation measures under the NYISO's MMP.
- The NYISO denies the Mirant Companies' allegation that the AMP reflect a number of material and substantive changes to the MMP that relate to rates, terms and conditions of service under the Services Tariff.
- The NYISO denies the Mirant Companies' allegation that the MMP does not permit the NYISO to impose mitigated bids on a Market Participant whose market behavior has exceeded the thresholds applicable to the conduct and impact criteria unless the Market Participant has been contacted by the NYISO and failed to explain satisfactorily why its behavior was not an exercise of market power.
- The NYISO denies the Mirant Companies' allegation that it is implementing the AMP to serve as a selective bid mitigation mechanism that would be activated when the NYISO unilaterally determines that market conditions may not be workably competitive.

- The NYISO denies the Mirant Companies' allegation that the AMP create a new presumption in favor of mitigating certain bids.
- The NYISO denies the Mirant Companies' allegation that the AMP eliminate a mandatory consultation procedure.
- The NYISO denies the Mirant Companies' allegation that it is attempting to eliminate the existing procedural due process set forth in the MMP.
- The NYISO denies the Mirant Companies' allegation that limiting compensation to individual bidders for their improperly mitigated bids will impose new substantial risks on other suppliers and on the market generally.
- The NYISO denies the Mirant Companies' allegation that the AMP establish a new threshold that, when exceeded, permits the NYISO to mitigate suspect market behavior.
- The NYISO denies the Mirant Companies' allegation that the AMP do not take into account that increased prices may be the result of scarcity rather than the exercise of market power.

**B. Law Upon Which This Answer Relies**

- *Central Hudson Gas & Electric Corp., et al.*, 89 FERC ¶ 61,196 (1999) (accepting the NYISO's Market Mitigation Measures)
- *New York Independent System Operator, Inc.*, 90 FERC ¶ 61,317 (2000) (accepting the NYISO's MMP)

**C. Attachments**

- None



#### IV. Conclusion

WHEREFORE, for the foregoing reasons, the New York Independent System Operator, Inc. respectfully asks that the Commission to deny the Mirant Companies the relief requested in their complaint.

Respectfully submitted,

NEW YORK INDEPENDENT  
SYSTEM OPERATOR, INC.

By \_\_\_\_\_  
Counsel

Robert E. Fernandez, General Counsel and Secretary  
Gerald R. Deaver\*, Senior Attorney  
New York Independent System Operator, Inc.  
3890 Carman Road  
Schenectady, NY 12303

William F. Young  
Ted J. Murphy  
Hunton & Williams  
1900 K Street, N.W., Suite 1200  
Washington, DC 20006-1109  
Of Counsel

March 28, 2001

\*Admitted in State of Washington

cc: Mr. Daniel L. Larcamp, Director Office of Markets, Tariffs and Rates, Room 8A-01,  
Tel. (202) 208-2088  
Ms. Alice M. Fernandez, Director Office of Markets, Tariffs and Rates – East Division,  
Room 82-15, Tel. (202) 208-0089  
Ms. Andrea Wolfman, Office of the General Counsel, Room 101-29,  
Tel. (202) 208-2097

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure 18 C.F.R. § 2010 (1999).

Dated at Washington, D.C. this 28<sup>th</sup> day of March, 2001.

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Edwin G. Kichline  
Hunton & Williams  
1900 K Street, N.W.  
Washington, D.C. 20006-1109  
(202) 955-1595