

**RESPONSE OF MIRANT NEW YORK, INC. TO THE REQUEST OF THE
NYISO BOARD OF DIRECTORS TO ADDRESS WHETHER ITS APPEAL OF
THE MANAGEMENT COMMITTEE’S SEPTEMBER 7, 2005 ACTION HAS
BEEN RENDERED MOOT BY THE SUBSEQUENT ACTIONS OF ORANGE &
ROCKLAND UTILITIES, INC.**

In accordance with the e-mail notice distributed to Market Participants by the New York Independent System Operator, Inc. (“NYISO”) on October 20, 2005, Mirant New York, Inc. (“Mirant”) hereby submits its response to the request of the NYISO Board of Directors to address whether Mirant’s appeal of the Management Committee’s (“MC”) September 7, 2005 action has been rendered moot by the subsequent actions of Orange and Rockland Utilities, Inc.

SUMMARY OF POSITION

On September 21, 2005, Mirant appealed the MC’s September 7, 2005 decision (“MC Decision”) to approve a proposal addressing the terms and conditions for compensation to existing local providers of Black Start and System Restoration Services (“Black Start Services”) in Load Zone J only without also addressing such terms for the two other existing local providers that are located in the Lower Hudson Valley (“Appeal”). In its Appeal, Mirant pointed to the undisputed fact that no local provider had received any payment whatsoever for Black Start Services since the NYISO’s inception in November, 1999. Mirant established that the dispute concerning Black Start Services inextricably involved both the issue of payment for past periods as well as the issue of payment going forward. Thus, Mirant requested that the Board take actions to ensure that both issues would be resolved for all local providers of Black Start Services contemporaneously.

On September 29, 2005, Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. (“Con Edison” and “O&R,” respectively and collectively, the “TOs”) filed a motion in opposition to Mirant’s Appeal (“Motion”). In their Motion, the TOs directly address the issue of payments for the past period as well as the issue of the need for – or, based on new facts referenced in the motion, the lack of a need for – a revised Black Start Services structure for the O&R service territory.

As reflected in the Motion, on September 27, 2005, O&R sent Mirant a letter notifying Mirant that, effective immediately, O&R would no longer “require or request black start capability or services” from Mirant’s units (“September 27th Letter”).¹ In the September 27th Letter, O&R further notified Mirant that it had filed a revised local black start plan with the NYISO which excluded the Mirant units for the first time (“Revised Plan”). At the October 11, 2005 MC meeting, NYISO Staff reported that it had received the Revised Plan from O&R. Stating that it did not believe that any additional action was required from O&R, NYISO Staff further reported that it had replaced the then existing O&R local black start plan (“Original Plan”) -- which included the Mirant units -- with the Revised Plan.

Given the actions taken by O&R, effective September 27, 2005, Mirant no longer is providing Black Start Services. As Mirant was the only listed Local Provider under the O&R local black start plan, it no longer is necessary to develop a prospective plan for testing and payment for Black Start Services in the O&R service territory at this time. However, O&R’s actions only resolve one piece of this overall issue. No party has

¹ The following Mirant units were listed on the O&R local black start plan from the inception of the NYISO’s markets in November, 1999 until September 26, 2005: (i) the Hillburn Gas Turbine; (ii) the Shoemaker Gas Turbine; (iii) Swinging Bridge Hydroelectric Station Units 1 and 2; (iv) Rio Hydroelectric Station Units 1 and 2; and (v) Mongaup Hydroelectric Station Units 1, 2, 3 and 4.

disputed -- or indeed can provide credible evidence refuting -- the fact that Mirant's units were included in the Original Plan from the inception of the NYISO's market until September 27, 2005. Nor has -- or could -- any party dispute that Mirant has not received any payment for this past period. This aspect of the Appeal remains unsettled and must be addressed by the Board expeditiously.

ARGUMENT

A. BACKGROUND

As explained more fully in Mirant's underlying Appeal, the compensation formula for Black Start Services that has been in place in the NYISO's Market Administration and Services Tariff ("Services Tariff") since the NYISO's inception provides for suppliers of this service, *inter alia*, to submit "FERC Form No. 1 data or its equivalent." All five existing local providers of Black Start Services ("Local Providers") are merchant generators that do not compile information in the FERC Form No. 1 format. Hence, it simply was not possible for any of the Local Providers to provide data in that format.

In 2002, the core issue of the form of data that should be submitted by Local Providers and the associated issue of payment structure rose to the level of consideration by the Market Structures Working Group. Given that this issue involved a small subsection of Market Participants but needed to be addressed quickly because past payments were being delayed and future payments also were directly being affected, the decision was made to form the Black Start Task Force. The role of the Black Start Task Force was two-fold: (i) to calculate the level of past payments that should be made to the

Local Providers; and (ii) to determine the terms and conditions for Black Start Services that would be applied to the Local Providers prospectively.

The Black Start Task Force began to hold meetings in early 2003. These meetings continued through most of 2003. Throughout this period, Local Providers were assured by NYISO Staff that they would receive payment for Black Start Services from the beginning of the NYISO markets.² Although the Local Providers made several good faith attempts at these meetings, no agreement ultimately was reached on the form of data to be submitted by Local Providers or, concomitantly, the rate to be paid for past or future Black Start Services. Thus, by the end of 2003, Local Providers were no closer to addressing these issues than before the Task Force meetings were convened. Notwithstanding the failure to address these issues, the Local Providers all remained listed on the local black start plans and remained prepared to provide this service, if needed.

As explained in Mirant's Appeal, because a key issue that could not be resolved affected only the Load Zone J parties – namely the number of MWs that were needed to provide Black Start Services in New York City, the other two existing Local Providers agreed to allow NYISO Staff to hold separate discussions with Consolidated Edison Company of New York, Inc. (“Con Edison”) and the three In City Local Providers to attempt to break this impasse. With NYISO Staff working closely with these parties for the better part of a year and a half, this effort ultimately resulted in a global agreement in principle to address all open In City Black Start Services issues – including both the past and prospective payment issues - and the submission of a motion to the MC that led to

² During this time period, action was taken at FERC concerning the New England black start rates. Based on NYISO Staff's assurances, Mirant and the other Local Providers refrained from filing a complaint at the FERC, and instead, sought to address these issues through the stakeholder process.

the MC Decision. Based upon statements made during public meetings, it is Mirant's understanding that addressing the issue of the amount of payment for past periods that must be made to each of the Local Providers was an integral part of, and was inextricably tied together in, this global agreement in principle.

Beginning in late August, NYISO Staff also sought to resolve the Black Start Services issues for the two existing Local Providers outside New York City. This effort has included, as a core component, determining the level of payments to be made to the Local Providers for the past periods. Notwithstanding NYISO Staff's efforts, these discussions reached an impasse during a conference call held on October 7, 2005.³

B. THE NYISO MUST MEET ITS TARIFF OBLIGATION TO MAKE PAYMENTS TO LOCAL PROVIDERS FOR BLACK START SERVICES

Section 1.0 of Rate Schedule 5 of the NYISO's Services Tariff establishes the NYISO's obligations to make payments for Black Start Services. Specifically, this Section provides, in pertinent part, "Where the Transmission Owner's restoration plan requires additional Black Start service, the ISO will make payments for local area Black Start Capability directly to the Generators that provide that service, under the terms of this Rate Schedule." (See NYISO Services Tariff, Original Sheet No. 312.) Section 2.0 of Rate Schedule 5 of the NYISO's Services Tariff goes on to base payment on "FERC Form No. 1 or equivalent data." (Id.)

³ Notwithstanding the fact that Mirant had received no payment for this service since the inception of the NYISO's markets, Mirant nonetheless continued to take steps with respect to this service. Specifically, continuing the practices that had been in place when the units were owned by O&R, Mirant maintained all associated equipment at each of the five sites to ensure that the equipment remained ready for operation should the need arise.

To Mirant's knowledge, certain facts are not controverted by any party that is involved in this issue. First, no Local Provider has yet to receive any payment for Black Start Services from the NYISO. Second, Mirant's units were listed on the O&R local black start plan as Local Providers from the inception of the NYISO's markets until September 27, 2005, when O&R unilaterally elected to file the Revised Plan with the NYISO removing the Mirant units effective immediately. Third, merchant generators do not now - and never before have - compiled FERC Form No. 1 data. Fourth, while discussions proceeded concerning the form for "equivalent data" to be submitted by Local Providers, this issue was not addressed for the In City providers until September, 2005 and has never been addressed for the other two existing Local Providers.

Most recently, efforts between Mirant and O&R -- moderated by NYISO Staff -- to address these issues and determine the payment for the past period to be made to Mirant have reached deadlock. The fact that deadlock has been reached, however, cannot justifiably lead to this issue remaining unresolved. Indeed, allowing such a result to occur effectively would prevent a Market Participant from receiving payments that the NYISO is required to make to it under its Services Tariff based on the whims -- and financial interests -- of another Market Participant.

Payment for past periods was an integral component of the Black Start Services issue. It was a core part of the discussions and meetings that took place on this issue. It was raised by Mirant on Appeal and was responded to by the TOs in their Motion. Five years have passed since the NYISO began operations in New York. Mirant was listed as a Local Provider under the O&R local plan throughout this period until September 27,

2005. Payment to Mirant for Black Start Services simply must not be delayed any longer; the NYISO must satisfy its obligations under its Services Tariff.

Thus, Mirant requests that the NYISO Board issue a decision on this Appeal directing its Staff within 30 days: (i) to apply the “equivalent data” provisions of its Services Tariff for payment to Mirant for Black Start Services for the past periods; and (ii) to meet the NYISO’s obligations under its Services Tariff by remitting payment to Mirant for Black Start Services through and including September 26, 2005.

CONCLUSION

For the foregoing reasons, Mirant respectfully requests that the NYISO Board find that its Appeal has not been rendered moot by O&R’s unilateral actions. Mirant further respectfully requests that the NYISO Board direct its Staff to take the following actions within 30 days: (i) apply the “equivalent data” provisions of its Services Tariff to calculate the Black Start Services payment to Mirant for the past periods; and (ii) remit payment to Mirant under that structure.

Respectfully submitted,

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