

122 FERC ¶ 61,007  
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 Energy Trading, LLC,  
Mirant Chalk Point, LLC,  
Mirant Mid-Atlantic, LLC, and  
Mirant Potomac River, LLC

Docket No. EL08-8-000

v.

PJM Interconnection, LLC

ORDER ON COMPLAINT AND SETTING CASE FOR  
HEARING AND SETTLEMENT JUDGE PROCEEDINGS

(Issued January 4, 2008)

1. On November 8, 2007, Mirant Energy Trading, LLC, Mirant Chalk Point, LLC, Mirant Mid-Atlantic, LLC, and Mirant Potomac River, LLC (jointly, Mirant) filed a complaint against PJM Interconnection, LLC (PJM). The complaint alleges that the default rate for the Third Incremental Auction as part of PJM's Reliability Pricing Model (RPM) is unjust and unreasonable and requests that the Commission institute a new default rate for the auction to be held January 7, 2008.
2. The Commission grants, in part, and dismisses, in part, the complaint. The Commission finds that Mirant has made a sufficient showing that the prices resulting from the RPM program's Third Incremental Auction may be unjust and unreasonable and may need to be replaced. However, as Mirant's own answer indicates, even if the existing pricing structure is found unjust and unreasonable, there is a significant dispute as to the appropriate just and reasonable replacement. The Commission therefore sets the RPM market rules relating to the Third Incremental Auction for hearing, but holds the hearing in abeyance pending settlement judge proceedings. Because this proceeding will extend

beyond the auction to be held on January 7, 2008, the Commission cannot make a finding on this matter before that auction is held, and refunds would not be appropriate, the Commission dismisses Mirant's complaint with respect to that auction.

## **I. Background**

### **A. RPM**

#### **1. Auction Mechanism to Set the Price of Capacity**

3. As discussed extensively in prior Commission orders,<sup>1</sup> the Commission found that PJM's capacity market as it existed prior to RPM was unjust and unreasonable. On August 31, 2005, PJM and several of its customers filed a proposed settlement establishing the RPM market mechanism. The settlement proposed a capacity market under which capacity sellers would offer, and PJM would purchase, capacity on a multi-year forward basis through an auction mechanism, and that prices for capacity would be derived through these forward auctions.

4. Under RPM, PJM conducts multiple auctions in advance of each Delivery Year to procure capacity for that year. PJM first conducts a Base Residual Auction (BRA) three years in advance of the Delivery Year. Capacity sellers offer capacity into the BRA, and the offers create a demand curve that determines the price of capacity (absent mitigation, which will be discussed *infra*). Thus, the offers submitted into the market determine a single clearing price for all capacity (i.e., the highest-priced offer accepted by PJM sets the price for all the capacity that PJM purchases).<sup>2</sup>

5. After the BRA for each Delivery Year, PJM conducts three incremental auctions for that year, to enable market participants to obtain additional capacity that may be needed for that Delivery Year, either to replace previously-committed resources that have

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<sup>1</sup> See *PJM Interconnection, LLC*, 119 FERC ¶ 61,318 (2007) (June 25 Order); *PJM Interconnection, LLC*, 117 FERC ¶ 61,331 (2006) (December 22 Order) and *PJM Interconnection, LLC*, 115 FERC ¶ 61,079 at P 9-17 (2006) (April 20 Order).

<sup>2</sup> Additionally, the RPM mechanism provided that different locations within PJM might have different prices, if necessary to reflect the amount of capacity that must be acquired within each separate location.

become unavailable, or to accommodate an increase in the forecasted load.<sup>3</sup> The Third Incremental Auction (conducted four months prior to the start of the Delivery Year) allows capacity sellers to make available additional MWs of capacity for sale (either generation that did not clear an earlier auction, or generation that has newly become available due to an increase in PJM's rating of a unit's capacity), and also allows capacity buyers to obtain replacement capacity resources before the Delivery Year, if made necessary by the derating of a unit (i.e., the determination that that unit is no longer able to produce some or all of its previously determined capacity) or a decrease in PJM's rating of a unit's capacity. The cost of capacity purchased through the BRA and the Second Incremental Auction are allocated among load-serving entities (LSEs) within PJM. The costs of the First and Third Incremental Auctions are assessed to the capacity buyers purchasing replacement resources in those auctions.<sup>4</sup>

6. To ensure that capacity resources provide the capacity to which they have committed, PJM imposes a Capacity Resource Deficiency Charge on any capacity seller that is unable to deliver its full amount of committed capacity for some or all of that Delivery Year. For each day that the seller is deficient, the deficiency charge is equal to the Daily Deficiency Rate (the greater of: (a) two times the Capacity Resource Clearing Price, or (b) the Net Cost of New Entry) multiplied by the megawatt quantity of deficiency below the level of capacity committed in the sell offer.

## 2. Mitigation Measures

7. The RPM mechanism also includes mitigation measures to protect customers from the exercise of market power by generators in the RPM auctions. So as to prevent the withdrawal of capacity from the market in order to increase prices, generation capacity

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<sup>3</sup> Mirant states (Complaint at 6-7, footnotes omitted):

The First Incremental Auction is conducted . . . 23 months prior to the start date of the Delivery Year, and allows Capacity Market Sellers that committed resources in the BRA for such Delivery Year to submit Buy Bids for replacement capacity. . . . The Second Incremental Auction is conducted only if necessary for PJM to secure additional capacity resource commitments to satisfy an increase in the projected peak load for the PJM Region. If held, the Second Incremental Auction is conducted in April, 13 months prior to the Delivery Year.

<sup>4</sup> Complaint at 7, footnotes omitted.

resources are required to submit all available capacity in the BRA for a Delivery Year. If a generation resource does not clear in the BRA, that capacity must be offered into the subsequent incremental auctions for that year.

8. Further, if the PJM area (or a local delivery area within PJM) fails the Market Structure Test conducted by the PJM market monitor (i.e., if the monitor determines that one or more sellers may be able to exercise market power), then all sellers in the area are subject to Market Seller Offer Caps for the applicable auction for that Delivery Year.

9. The Offer Cap is based on either (a) the Avoided Cost Rate (ACR), which approximates the total cost of operating a particular generating unit, or (b) the Opportunity Cost for the resource. The Opportunity Cost is defined as "the documented price available to an existing generation resource in a market external to PJM."<sup>5</sup>

#### **B. Mitigation in PJM's First BRA and Third Incremental Auction**

10. PJM and its stakeholders are currently in a period of transitioning to full implementation of RPM. For Delivery Years during this transitional period, PJM will conduct BRAs, and some (but not all) of the incremental auctions. The Third Incremental Auction will be the last opportunity for parties to adjust their capacity positions through an auction before the applicable Delivery Year begins. The Third Incremental Auction for the 2008-2009 Delivery Year is scheduled to be held in January 2008.

11. To date, PJM has conducted three BRAs. On August 16, 2007, the PJM Market Monitor issued a report that analyzed the first BRA, conducted for the 2007-2008 Delivery Year.<sup>6</sup> The report stated that "[a]ll participants in the RPM auction failed the market structure tests with the result that offer caps were applied to all sellers."<sup>7</sup> PJM has

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<sup>5</sup> PJM Open Access Transmission Tariff, Attachment DD, section 6.7(d)(ii).

<sup>6</sup> PJM Market Monitoring Unit, Analysis of the 2007-2008 RPM Auction (Aug. 16, 2007) (PJM Report), available at: <http://www.pjm.com/markets/market-monitor/reports.html>.

<sup>7</sup> According to the Report, 1,090 Capacity Resources submitted Sell Offers in the BRA. Of those 1,090 Capacity Resources, the MMU calculated unit-specific offer caps for 125 units, 392 offers used the default offer caps values posted by the MMU, and 510 offers were price takers. Three offers were based on the seller's documented Opportunity Cost. See PJM Report at 1, 4, 5.

not yet conducted an Incremental Auction. However, the Third Incremental Auction for the 2008-2009 Delivery Year is scheduled to begin on January 7, 2008.

**C. Mirant's Complaint**

12. On November 8, 2007, Mirant filed the instant complaint against PJM under section 206 of the Federal Power Act (FPA).<sup>8</sup> Mirant alleges that the prices yielded in the Third Incremental Auction are "almost certainly going to be unjust and unreasonable,"<sup>9</sup> and requests the Commission to direct PJM to modify the definition of Opportunity Cost in Section 6.7(d)(ii) of the RPM market rules so that, for the Third Incremental Auction only, Opportunity Cost is defined as the higher of the Daily Deficiency Rate or the documented price for exports.<sup>10</sup>

13. Mirant states that the combination of the must-offer requirement for Capacity Resources and what it considers to be the almost certain ACR-based capping of Sell Offers in the Third Incremental Auction will result in market-clearing prices far below competitive market values and far below levels necessary to compensate Capacity Market Sellers for the risks they are compelled to incur.

14. Mirant states that three factors pertaining to the Third Incremental Auction are likely to produce clearing prices at or near ACRs, which Mirant considers to be below prices that would be produced in a competitively workable market. First, Capacity Market Sellers that have newly available capacity are required to offer that capacity into the Third Incremental Auction, and may not hold any capacity as a physical hedge. Second, prices in the Third Incremental Auction will be based on the Sell Offers of Capacity Market Sellers who have additional capacity to sell and the Buy Bids of buyers who need to procure replacement capacity. Third, because there is no comparable Opportunity Cost that reflects the actual opportunity cost associated with supplying the incremental MWs offered in the Third Incremental Auction, Market Seller Offer Caps will be based on ACRs.

15. Mirant asserts that "there is no real doubt" that ACR rates will be applied as Offer Caps in the next several Delivery years, and that all existing Generation Capacity

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<sup>8</sup> 16 U.S.C. § 824e (2000).

<sup>9</sup> Complaint at 13-14.

<sup>10</sup> *Id.* at 14.

Resources will be subject to such offer cap mitigation.<sup>11</sup> Mirant states that buyers in the Third Incremental Auction will know, based on the published results of the BRA for a given Delivery Year, and the fact that PJM does not intend to calculate new ACRs for the Third Incremental Auction, what approximate ACR prices are for those sellers that have positive ACRs. Mirant states that with this knowledge, Capacity Market Buyers can, and likely will, submit Buy Bids with a price equal to or slightly below ACRs, knowing that their bids will clear because Capacity Market Sellers are capped at that level.

16. Mirant states that the price that should result in a workably competitive market is one where the market price equals the opportunity cost of the marginal supplier. Mirant asserts that the economic value of retaining the capacity as uncommitted (which Capacity Suppliers are not permitted to do) is the incremental risk associated with deficiency charges that can be assessed in a given Delivery Year for incremental capacity offered in the Third Incremental Auction. As a result, Mirant states that Sellers will be forced to sell their physical hedge against penalties assessed (at a Daily Deficiency Rate) for a small fraction (the ACR rate) of what their incremental capacity is worth to them.<sup>12</sup>

17. Mirant states that the current definition of Opportunity Cost in the RPM market rules does not provide a solution to the problem of artificially depressed prices in the Third Incremental Auction, because Market Sellers have limited ability to obtain an Opportunity Cost-based Offer Cap due to their limited access to markets external to PJM. Mirant further states that nothing in the Opportunity Cost provision permits Capacity Market Sellers to hedge against the increased risk of paying deficiency charges potentially incurred for incremental capacity committed in the Third Incremental Auction.

18. Accordingly, Mirant requests that the Commission direct PJM to modify the definition of Opportunity Cost to read:

ii. Opportunity Cost:

a) Opportunity Cost shall be the documented price available to an existing generation resource in a market external to PJM ....

b) In the Third Incremental Auction, Opportunity Cost shall be calculated, at the election of the existing generation resource, either:

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<sup>11</sup> *Id.* at 16-17.

<sup>12</sup> *Id.* at 19.

(i) based on the methodology set forth in (a) above, or (ii) based on the Daily Deficiency Rate for the relevant Delivery Year as calculated by the Office of Interconnection at the time Sell Offers are required to be submitted for the Third Incremental Auction. In the event that the existing generation resource owner chooses option (b), the Market Seller Offer Cap applicable to Sell Offers relying on such generation resource shall be the Daily Deficiency Rate for the relevant Delivery Year.

19. Mirant states that its requested change to the definition of Opportunity Cost would not raise market power concerns. Mirant states that in the Third Incremental Auction, unlike the BRA and other incremental auctions: (1) the price is established by sell offers, not the Variable Resource Requirement curve used in the BRA, (2) participation is limited to Capacity Market Sellers, so Capacity Market Buyers, not Load Serving Entities, pay for MWs cleared, (3) the amount of MWs being offered as additional supply by other market participants is not easily known, (4) there is no direct link between a supplier's share of installed capacity and its share of offered capacity, and (5) a supplier has no material information about the amount of MWs that may be offered by other market participants. Given these distinguishing characteristics of the Third Incremental Auction, Mirant concludes that, because sellers will compete to have their offers cleared, they can be expected to bid at prices below the Offer Cap level of the Daily Deficiency Rate, especially since they will be factoring in their own assessment of the risk of penalty charges in determining what the capacity is "worth" to them as a physical hedge.<sup>13</sup>

20. Mirant states that this topic was first raised with the PJM RPM Working Group (RPMWG) on August 10, 2006. Despite several months of discussions and presentations on this issue, the RPMWG still has not reached consensus with respect to whether and how mitigation for the Third Incremental Auction should be modified.

21. Mirant requested Fast Track processing, asking the Commission to act on its Complaint before January 7, 2008.

#### **D. Answers and Comments**

22. Notice of Mirant's complaint was published in the *Federal Register*, with answers, motions to intervene and comments due on or before November 29, 2007.<sup>14</sup> PJM filed an

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<sup>13</sup> *Id.* at 24.

<sup>14</sup> 72 Fed. Reg. 65,320 (2007).

answer, Allegheny Energy Services Company (Allegheny), EME Companies *et al.* (EME), PPL and Constellation Parties (PPL/Constellation), the Borough of Chambersburg, PA (Chambersburg), the Old Dominion Electric Cooperative and PJM Industrial Customer Coalition (ODEC/PJMICC), the Southern Maryland Electric Cooperative (SMEC), PEPCO Holdings (PEPCO), the Tenaska Fund Entities (Tenaska) and Tenaska Power Services (Tenaska Power) filed timely comments and protests, and Reliant Energy, Inc., Dayton Power and Light Company, Exelon Corporation, FPL Energy Generators, the Office of the People's Counsel of the District of Columbia, American Electric Power Service Corporation, Dynegy Power Marketing, Inc., North Carolina Electric Membership Corporation, Duke Companies, NRG Companies, the Public Service Commission of Maryland, the Pennsylvania Office of Consumer Advocate, Dominion Resources Services, Inc., the Maryland Office of People's Counsel, and PSEG Companies filed timely motions to intervene. The New Jersey Board of Public Utilities filed a motion to intervene out of time on December 6, 2007. Indicated Buyers filed an answer to the preceding filings on December 4, 2007,<sup>15</sup> and Mirant filed an answer on December 10, 2007.

23. PJM, in its answer, agrees with Mirant's view that because sellers will be required to offer all available capacity into the Third Incremental Auction, and could be compensated at levels well below the value of that capacity to the seller as replacement capacity for its own possible later-occurring deficiencies, the current mitigation provisions are unjust and unreasonable. PJM explains that prospective buyers may either bid up to the level of the deficiency charges they avoid by securing replacement capacity, or they may anticipate that sell offers will be capped and therefore, may have an incentive to submit buy bids consistent with the anticipated range of price-capped sell offers. These anticipated price-capped sell offers will be far below the Daily Deficiency Rate sellers will incur if they become unable to deliver previously committed capacity after the Third Incremental Auction. PJM notes that the Third Incremental Auction will not change prices to load, and only involves a small amount of capacity.

24. PJM clarifies that the mere presence of an incremental auction clearing price lower than the BRA clearing price is not indicative of a market flaw. Rather, it is the possibility that such an outcome could result due to the combination of the must-offer requirement, cost-based mitigation, and buyer knowledge of offer cap levels. PJM states that Mirant's

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<sup>15</sup> Indicated Buyers consist of ODEC, PJMICC, SMEC, Portland Cement Association, Mittal Steel, North Carolina Electric Membership Corporation, the Office of the People's Counsel of the District of Columbia, Pennsylvania Office of the Consumer Advocate, the Public Power Association of New Jersey, and Chambersburg.

proposed solution properly preserves both the must-offer rule and price caps, but seeks to include within those caps an added component to reflect the seller's lost opportunity to use its available capacity to avoid or mitigate capacity deficiencies it may experience.

25. PJM suggests that it may not be possible to determine the precise appropriate price cap for sell offers, and that the Commission could consider setting the price cap somewhere between the BRA clearing price and the maximum deficiency charge that a seller might risk paying (the relief requested by Mirant). PJM asks the Commission to address this problem before PJM conducts the Third Incremental Auction on January 7, 2008.

26. EME Companies *et al.* supported Mirant's complaint, stating that the proposed solution appears to be reasonable, as the modification to the Opportunity Cost definition would permit capacity market sellers with additional capacity deemed available in the Third Incremental Auction to submit sell offers that better reflect the actual opportunity cost of selling into that auction and becoming subject to PJM penalties that are tied to the Daily Deficiency Rate. Tenaska Power also supported Mirant's complaint, explaining that, absent the change sought by Mirant, sellers will be required to sell supply capacity at rates well below their actual opportunity costs, which raises the possibility of confiscatory ratemaking.

27. Other parties oppose Mirant's complaint. Allegheny points out that if the Commission now changes the rules regarding mitigation, those changes should apply to all auctions rather than just the Third Incremental Auction, and should not be applied now, in the middle of an auction cycle, for which parties made commitments and chose to participate based on their understanding of the rules currently in place. Allegheny argues that Mirant is asking the Commission to make a finding that the existing market mitigation rules for the Third Incremental Auction, which it found to be just and reasonable by approving the Settlement Agreement<sup>16</sup> are all of a sudden unjust and unreasonable, before being put into effect.

28. PPL states that Mirant has not demonstrated that it will be injured, arguing that Mirant could hedge its own exposure by buying capacity (presumably through bilateral agreements). PPL states that the proposed remedy benefits sellers with excess capacity and burdens buyers and could also encourage gaming in RPM as capacity providers might try to sell as little capacity as possible in the BRA and hold capacity back to sell in the Third Incremental Auction. PPL argues that under Mirant's proposed remedy, if

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<sup>16</sup> *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006), *order on reh'g*, 119 FERC ¶ 61,318 (2007).

buyers expect they will be subject to the Deficiency Rate (either by buying replacement capacity, or as a result of being deficient), they may be discouraged from making an advance purchase in the Third Incremental Auction, which could have potential reliability consequences. PPL points out that another flaw in Mirant's proposal is that if prices are expected to be higher in the Third Incremental Auction, sellers will have an incentive to maintain as much capacity as possible to sell in the Third Incremental Auction, thereby discouraging the forward commitment aspect of RPM. ODEC/PJMICC similarly argue that Mirant's complaint is premature, and that its predicted outcome of the Third Incremental Auction is not a certainty. ODEC/PJMICC also point out that Mirant was a party to the RPM Settlement and that Mirant agreed to very clear provisions, including mitigation and the must offer requirement.

29. PEPCO states that Mirant understood the risk it now seeks to remedy, at least as of August 14, 2007. PEPCO points out that capacity market sellers may elect to sell its available capacity bilaterally and avoid the Third Incremental Auction altogether. PEPCO further protests Mirant's proposed remedy because, it states, capacity sellers in the BRA have the same Opportunity Cost and exposure to Daily Deficiency Rates as those in the Third Incremental Auction, yet the remedy only addressed the Third Incremental Auction.

30. The Borough of Chambersburg protests Mirant's proposal on the basis that it has the potential to incent capacity sellers to engage in economic and physical withholding. It further argues that the fundamental basis of the Mirant complaint, that the ACR will distort competitive rates that would prevail in the absence of mitigation, misses the point that because of pervasive market power, offers must be mitigated in order to prevent anti-competitive prices.

31. Several parties suggest that this problem should be resolved through a PJM stakeholder process rather than a complaint proceeding.

## **II. Discussion**

### **A. Procedural Matters.**

32. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene of the entities that filed them make them parties in this proceeding. Under Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2007), the Commission may grant late-filed motions to intervene, and it does so here.

33. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to an answer or protest unless otherwise

ordered by the decisional authority. We will accept the answers filed by Indicated Buyers and Mirant because they have provided information that assisted us in our decision-making process.

## **B. Analysis**

34. Based on the information provided, the Commission finds that the existing tariff may result in prices that are unjust and unreasonable, and establishes hearing and settlement judge procedures to resolve this matter.

35. The Market Seller Offer Cap set at the level of ACR may not appropriately reflect the selling generators' risks in the Third Incremental Auction. This auction which takes place four months before the Delivery Year begins, is the last market opportunity for generators to sell or procure capacity for that year.<sup>17</sup> Under the RPM rules, generators are not able to withhold any of their capacity for their own use, but must offer that capacity into the market. Since the Third Incremental Auction is the final opportunity to procure replacement capacity by auction, a generator that is forced to sell all of its capacity in that auction and which subsequently becomes unable to deliver that capacity, has no opportunity to purchase replacement capacity in a subsequent incremental auction. Thus, if the generator cannot arrange a private purchase of capacity, it will be required to pay the deficiency charge. The possibility of being assessed the deficiency charge is a risk that generators face when bidding into the RPM Auctions, but the cost associated with that risk is not reflected in the ACR. Thus, under the current rules, generators are required to offer capacity into the Third Incremental Auction at prices that may not compensate them for their full potential risk.<sup>18</sup>

36. We do not, however, agree with Mirant that the solution to this problem is to modify the definition of Opportunity Cost to include the deficiency charge. To do so would, in essence, immediately raise the floor for all mitigated prices up to the level of

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<sup>17</sup> After the Third Incremental Auction, generators may still sell or procure capacity through bilateral contracts, assuming that they can find a counterparty that close to the time of delivery.

<sup>18</sup> This situation is most likely to be critical in the Third Incremental Auction. A generator that discovers prior to the Third Incremental Auction that it is unable to deliver may avoid the deficiency charge by acquiring replacement capacity in one of the incremental auctions and paying the market clearing price in that auction. Thus, the same argument for revising the ACR mitigation rate as the mitigated bid price does not apply to the earlier auctions.

the deficiency charge, the highest price that could result from the auction. Setting the Market Seller Offer Cap at the deficiency charge appears to establish too high a mitigated offer cap because the risk of each generator being unable to meet its capacity obligation clearly is less than 100 percent. Setting a Market Seller Offer Cap at the deficiency charge, therefore, might permit the exercise of market power by generators.<sup>19</sup> No party has presented evidence in this proceeding to document the risk that a generator committed to provide capacity will be unable to meet its capacity obligation. The PJM Market Monitor also has recognized that the existing Market Seller Offer Cap may be too low and has proposed that, if the Commission determines that the offer cap should be modified for this Third Incremental Auction pending a stakeholder process, the clearing price from the BRA could be used as the price of capacity transactions in this auction, although only in the event that the price would otherwise be low or zero.<sup>20</sup>

37. Because there is reason to believe that the existing rate is not just and reasonable and because we have no evidence to establish a just and reasonable replacement rate, we will set this matter for settlement judge and trial-type hearing. At hearing, we will direct the parties to examine the likelihood that resources (or particular classes of resources) will be unable to provide its committed capacity when demanded, and thus, the likelihood that the owner of that resource will be required to pay a deficiency charge. The parties may also consider alternative mechanisms that would mitigate the potential risks suppliers face in the Third Incremental Auction without modifying the offer cap, including but not limited to examining other possible hedging mechanisms.

38. We will dismiss the complaint with respect to the auction to be conducted on January 7, 2008. Given the timing of this filing, the issues raised, and Mirant's own recognition that its initially proposed replacement rate may not be just and reasonable, we cannot resolve this proceeding prior to January 7, 2008. Moreover, because this is a market-determined result, refunds based on a subsequently determined Market Seller

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<sup>19</sup> For instance, if there were a complete monopoly in a local delivery area (with only one generator participating in the auction) and that generator had excess capacity, allowing the generator to bid the deficiency charge would set the price at the deficiency charge even though the generator did not face a reasonable risk of being unable to deliver.

<sup>20</sup> PJM MMU Response to Mirant Complaint re RPM auction, attachment to Indicated Buyers answer, at 9.

Offer Cap could not be accurately calculated.<sup>21</sup> However, we instruct the Administrative Law Judge (ALJ) and the parties to set a hearing schedule that will leave sufficient time for an initial decision and Commission review prior to the next Third Incremental Auction.

39. PJM has already been pursuing settlement of its issue through its RPM Working Group.<sup>22</sup> To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>23</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>24</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, 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.

40. Pursuant to section 206(b) of the FPA, the Commission must establish a refund effective date that is no earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. Because, as discussed above, the results of the hearing cannot be applied to the January 7, 2008 auction, the Commission will establish a refund effective date of 5 months from the date of the complaint. The

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<sup>21</sup> Moreover, both equity and the desire to protect market certainty counsel against applying the result in this case to the January 7 auction, since, as several protesters pointed out, all parties entered this first cycle of RPM auctions with the expectation that the market rules agreed to in the RPM settlement would remain in place.

<sup>22</sup> PJM notes that it has discussed this matter at the RPM Working Group on August 14, 2007, October 10, 2007, and October 25, 2007, and that "[c]onsideration of possible changes to the offer caps in the incremental auctions . . . has been assigned a 'high' priority by the working group." PJM answer at 6-7.

<sup>23</sup> 18 C.F.R. § 385.603 (2007).

<sup>24</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at 202-502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience ([www.ferc.gov](http://www.ferc.gov) - click on Office of Administrative Law Judges).

Commission is also required by section 206 to indicate when it expects to issue a final order. The Commission expects to issue a final order in this section 206 investigation within 180 days of the date this order issues.

The Commission orders:

(A) Mirant's complaint is hereby granted, in part, and dismissed in part, as discussed above.

(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 Section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held in Docket No. EL08-8-000 to examine the justness and reasonableness of the calculation of the mitigated bid rate for the Third Incremental Auction as discussed in the body of this order.

(C) The hearing established in Ordering Paragraph (B) is hereby held in abeyance pending the outcome of the settlement proceedings described in the body of this order.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(E) Within 30 days of the appointment of the settlement judge, the settlement judge shall file a report with the Chief Judge and the Commission 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 30 days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15)

days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a 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.

(G) The Secretary is directed to publish a copy of this order in the Federal Register.

(H) The refund effective date in Docket No. EL08-8-000 established pursuant to section 206(b) of the Federal Power Act is 5 months from the date of the filing of the complaint.

By the Commission

( S E A L )

Kimberly D. Bose,  
Secretary.