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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

<b>In re:</b>	)	<b>Chapter 11</b>
	)	
<b>MIRANT CORPORATION, et al.,</b>	)	<b>Case No. 03-46590(DML)</b>
	)	<b>Jointly Administered</b>
<b>Debtor and Debtor in Possession.</b>	)	

**LIMITED OBJECTION OF PUD NO. 1 OF CHELAN COUNTY TO DEBTORS'  
MOTION FOR INTERIM ORDER AUTHORIZING THE DEBTORS TO (I) COMPLY  
WITH TERMS OF PREPETITION TRADING CONTRACTS, (II) ENTER INTO  
POSTPETITION TRADING CONTRACTS IN THE ORDINARY COURSE OF  
BUSINESS, (III) PROVIDE CREDIT SUPPORT RELATING TO BOTH PRE AND  
POSTPETITION TRADING CONTRACTS, AND (IV) AUTHORIZING THE  
ASSUMPTION OF PREPETITION TRADING CONTRACTS**

TO THE HONORABLE UNITED STATE BANKRUPTCY JUDGE LYNN:

Public Utility District No. 1 of Chelan County (“Chelan PUD”), files this Limited Objection to Debtors' Motion for Interim Order Authorizing the Debtors to (i) Comply with Terms of Prepetition Trading Contracts, (ii) Enter into Postpetition Trading Contracts in the Ordinary Course of Business, (iii) Provide Credit Support Relating to Both Pre and Postpetition Trading Contracts, and (iv) Authorizing the Assumption of Prepetition Trading Contracts (the “Objection” and the underlying motion, the “Motion”), and in support thereof states as follows:

**I. PRELIMINARY STATEMENT**

1. In response to the Motion, on July 14, 2003, this Court issued its Interim Order Authorizing Debtors to (i) Comply with Terms of Pre-Petition Trading Contracts, (ii) Enter into Post-Petition Trading Contracts in the Ordinary Course of Business, (iii) Provide Credit Support Relating to Both Pre and Post-Petition Trading Contracts, and (iv) Setting a Final Hearing to Consider the Entry of a Final Order Affirming Interim Order and Authorizing Assumption of Pre-Petition Trading Contracts (the “Interim Order”) in the above-captioned case. On August 6, 2003, this Court issued its Notice of Final Hearing on the Motion for Interim Order Authorizing the Debtors to (i) Comply with Terms of Prepetition Trading Contracts, (ii) Enter into Postpetition Trading Contracts in the Ordinary Course of Business, (iii) Provide Credit Support Relating to Both Pre and Postpetition Trading Contracts, and (iv) Authorizing the Assumption of Prepetition Trading Contracts (the “Notice of Final Hearing”). Unless otherwise defined herein, capitalized terms used herein shall have the meaning ascribed to such terms in the Interim Order.

2. Chelan PUD objects to the Motion to the extent that in applying the relief requested the Debtors are seeking to exclude Chelan PUD from the protections granted to other, similarly situated trading counterparties of Debtors. Whether or not the Debtors are seeking to exclude Chelan PUD from those protections is unclear. Nothing in the Motion or

Interim Order suggests an intent to discriminate among counterparties. By the terms of the Motion, Chelan PUD appears to have the option of becoming a Protected Counterparty by entering a Postpetition Assurance Agreement. (*See*: Motion, ¶ 30). Likewise, the Interim Order provides numerous protections for “Counterparties,” defined as, “the non-Debtor party to a Prepetition Trading Contract or a Postpetition Trading Contract, as the case may be.” Interim Order at 8, ¶ 1. Under that definition, Chelan PUD is a Counterparty. Nevertheless, Chelan PUD’s Trading Contract is not listed in Exhibit 4 to the Notice of Final Hearing as one of the contracts Debtors seek to assume. The reason for this omission is not clear.

3. It is possible that the Debtors believe, incorrectly, that Chelan PUD is a “governmental unit” as defined in Sec. 101 of the United States Bankruptcy Code (the “Code”). Notwithstanding the unambiguous terms of the Motion and Interim Order, it is also possible the Debtors intended that the Motion and Interim Order reach only “forward contract merchants,” as defined in the Code, and that governmental units are not forward contract merchants under the Code, and so not entitled to the protections of the Interim Order or any final order.

4. Chelan PUD has two responses to that contention: first, it is a forward contract merchant. It transacted with the Debtors under the provisions of a “master agreement” with written confirmations. The master agreement is the Western Systems Power Pool Agreement (the “WSPPA”). A copy of the WSPPA is attached as Exhibit C to the *Limited Objection* filed by Seattle City Light in this matter. The WSPPA deems all parties thereto to be forward contract merchants, as that term is used in the Code. Based upon the provisions of the WSPPA, and upon other facts and applicable law, Chelan PUD contends that it is a forward contract merchant within the meaning of the statute, Chelan PUD reserves all arguments on this point if the Debtors dispute it.

5. Second, even if it is later determined that Chelan PUD is not a forward contract merchant because it is a governmental unit, that is not sufficient reason to discriminate against Chelan PUD and in favor of “private” Counterparties who trade with the Debtors under the

same master agreements and on the same terms. Accordingly, Chelan PUD objects to the Motion to the extent that it requests protections be afforded only to Counterparties to Debtors' Prepetition Trading Contracts that are not "governmental units." Whether or not it is a governmental unit, Chelan PUD is an active participant in the forward energy market and engages in the same transactions as other participants. Whether or not it is found to be a governmental unit, Chelan PUD should be afforded the same protections afforded all other Counterparties to Prepetition Trading Contracts, and any other result is inequitable and unjustified.

## **II. FACTUAL BACKGROUND**

### **A. Chelan PUD's Business**

6. Chelan PUD, owns and operates two hydroelectric dams on the Columbia River and one on the Chelan River in the State of Washington. It produces an average of 24,000 megawatt hours of power per day. Approximately 75% of that power is sold to its customers and wholesale purchasers. Approximately 25% is sold on the open market through the "Mid-Columbia Hub" - the largest power trading hub in the Western United States. Chelan PUD's Mid-Columbia Hub sales represent approximately 10% of the power sold as daily sales through that Hub.

7. Chelan PUD, as a utility engaged in the buying and selling of electricity to balance its loads and resources, has bought and sold energy through the Mid Columbia Hub for over 30 years. These transactions have included daily, real time, and, after the emergence of the forward market, forward purchases and sales.

8. Existing transmission infrastructure allows delivery of power from generators located throughout the Western System Coordinating Council. All trades in this market are bilaterally negotiated under the WSPPA, rather than going through a central power exchange or system operator. Participants in the Pacific Northwest power market transact business in the

hourly, or real-time market, the preschedule or day-ahead market, monthly and for varying delivery periods of longer than one day.

**B. Chelan PUD's Prepetition Trading Contract**

9. Chelan PUD has engaged in trading with Mirant since its inception. Chelan PUD and Debtor Mirant Americas Energy Marketing, L.P. ("MAEM") are parties to the WSPPA, which generally governs transactions between its various signatories. Parties to the WSPPA transact their business together by entering into Confirmation Agreements.

10. The WSPPA expressly states both that all transactions conducted thereunder form a single agreement and that the parties thereto are forward contract merchants, as follows: "The Parties acknowledge and agree that all transactions under the Agreement and Confirmation Agreement(s) are forward contracts and that the Parties are forward contract merchants, as those terms are used in the Bankruptcy Code. The Parties acknowledge and agree that all of their transactions, together with this Agreement and the related Confirmation Agreement(s) form a single, integrated agreement, and agreements and transactions are entered into in reliance on the fact that the agreements and each transaction form a single agreement between the Parties." WSPPA, § 35.

11. Prior to the Debtors' bankruptcy, Chelan PUD and MAEM engaged in numerous individual transactions under the WSPPA. Between May 30, 2003 and June 14, 2003, Chelan PUD and MAEM entered into five "Power Physical Confirmations" pursuant to which Chelan PUD sold and delivered power from June 1, 2003 to June 16, 2003 (the "May/June Confirmations"). The Confirmations and the WSPPA collectively constitute a "Prepetition Trading Contract" as defined in paragraph F of the Interim Order. Debtors have not paid for the power delivered under the May/June Confirmations, in the total amount due of \$93,840.

12. Paragraph I of the Interim Order specifically finds that the Prepetition Trading Contracts are executory contracts.

### III. DISCUSSION

#### **The Interim Order and Any Final Order Should Not Exclude Governmental Units That Trade With the Debtors Under the Same Master Agreements / Confirmations As Other Counterparties.**

13. Debtors have made a unilateral decision not to include Chelan PUD's Trading Contract in the list of contracts to be assumed (which is attached as Exhibit 4 to the Notice of Final Hearing). As discussed above, the reasons for this are unclear. If it is because Debtors contend Chelan PUD is not a forward contract merchant, they should say so clearly, and Chelan PUD should be given the opportunity to put on its evidence and make its arguments. Further, even if Chelan PUD was found to be a governmental unit, nothing in the Motion puts this Court or interested parties on notice that Debtors intended to except governmental units from the Motion's reach.

14. Chelan PUD hereby adopts and incorporates the arguments set forth by City of Seattle acting through its City Light Department ("Seattle City Light") on this point. Like Chelan PUD, Seattle City Light is also a party with MAEM to the WSPPA and traded with MAEM pursuant to written confirmations. Seattle City Light argues persuasively why the protections of the Interim Order and any final order should be extended to the Debtors' trading partners who, although they may be governmental units in a literal reading of the statute, trade under the same master agreements, on the same market terms, with the same impact on the Debtors' estates, as any other trading partner.

15. Even assuming, for purposes of argument, that Chelan PUD cannot avail itself of the remedies under Sections 362(b)(6) and 556, Chelan PUD does have the remedy of recoupment available to it and intends to exercise that remedy in respect to any future confirmations with MAEM under the WSPPA. Recoupment permits a creditor to offset a claim that arises from the same transaction as the debtor's claim without reliance on the setoff

provisions and limitations of Section 553 of the Code. Davidovich v. Welton (In re Davidovich), 901 F.2d 1533, 1537 (10<sup>th</sup> Cir. 1990); see also United States Abatement Corp. v. Mobil Explor. & Produc'g Corp. (In re United States Abatement Corp.), 79 F.3d 393, 398 (5<sup>th</sup> Cir. 1996).<sup>1</sup>

16. Chelan PUD's recoupment analysis would allow it to recoup the amounts due under the May/June Confirmation Agreements against any future transactions with MAEM, since pursuant to Section 35 of the WSPPA, all the parties "acknowledge and agree that all of their transactions, together with this Agreement [the WSPPA] and the related Confirmation Agreement(s) form a single, integrated agreement, and agreements and transactions are entered into in reliance on the fact that the agreements and each transaction form a single agreement between the Parties," thus satisfying the "same transaction" requirement for recoupment.

17. Chelan PUD has a substantial prepetition claim, which will prompt Chelan PUD to exercise its recoupment rights in respect to future confirmations. Therefore, Debtors have the same motivation to offer Chelan PUD a reason not to act on its rights under the law as they do with respect to other Counterparties to the Prepetition Trading Contracts with whom they wish to continue trading.

18. In essence, the Debtors are seeking permission to pay the prepetition claims of some of their Counterparties because if they don't, those Counterparties will refuse to trade with Debtors, causing "irreparable harm" to Debtors' estates. Motion, ¶ 16. This same "rule of necessity" would apply to the Debtors' trading counterparties who happen to be governmental units. The Debtors cannot force such counterparties to waive their rights of recoupment. To the extent that the Debtors desire to continue trading with their "governmental unit" counterparties under their prepetition master agreements, Debtors will, through recoupment if not otherwise, be required to pay prepetition claims that arise under the same integrated agreements.

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<sup>1</sup> Chelan PUD cites 10<sup>th</sup> Circuit law here because the WSPPA is governed by the laws of the State of Utah. WSPPA, § 24.


#### IV. RELIEF REQUESTED

For the foregoing reasons, Chelan PUD asks that this Court's final order on the Motion protect Chelan PUD in the same way that all other Counterparties are protected. In addition, Chelan PUD requests that the May/June Confirmation Agreements, collectively with the WSPPA, be added to the list of Prepetition Trading Contracts that Debtors are seeking approval to assume.

DATED this 14<sup>th</sup> day of August, 2003.

Respectfully submitted,

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