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 12
 13 IN THE UNITED STATES BANKRUPTCY COURT
 14 FOR THE NORTHERN DISTRICT OF TEXAS
 15 FORT WORTH DIVISION

16 In re) Case No. 03-46590(DML)11
)
 17) **MOTION FOR CLARIFICATION OF**
 18 MIRANT CORPORATION, et al.,) **AUTOMATIC STAY OR IN THE**
) **ALTERNATIVE RELIEF FROM**
 19) **AUTOMATIC STAY AND**
 20) **MEMORANDUM OF POINTS AND**
 Debtors) **AUTHORITIES IN SUPPORT THEREOF;**
 21) **CERTIFICATE OF CONFERENCE;**
 22) **[PROPOSED] ORDER; PROOF OF**
) **SERVICE**
 23)
) Date: August 18, 2004
 24) Time: 10:30 a..m.
 25) Judge: Honorable D. Michael Lynn

1 TO THE ABOVE COURT AND THE PARTIES HEREIN:

2 PLEASE TAKE NOTICE that on August 4, 2004, at 1 p.m., in the United States
3 Bankruptcy Court for the Northern District of Texas, Fort Worth Division, Eldon B.
4 Mahon U.S. Courthouse, 501 W. Tenth Street, Fort Worth, TX 76102-3643, Californians
5 for Renewable Energy (CARE) will move this Court for an Order finding that CARE's
6 pending Motion to Revoke Market-Based Rates and to Order Complete Refunds
7 Retroactive to Date of Issuance of Order(s) Granting Authority to Sell at Market-Based
8 Rates filed on July 21, 2004, in the Federal Regulatory Energy Commission's
9 ("FERC's") refund proceeding under docket number EL00-95-000 *et al.*, does not violate
10 section 362 of the Bankruptcy Code nor this Court's Order Directing Parties to Comply
11 with Sections 362 and 525 of the Bankruptcy Code filed on July 16, 2003, in this
12 proceeding.

13 The grounds for this motion for clarification are that CARE's motion in the FERC
14 proceeding is exempt from the automatic stay provision of section 362(a) by virtue of
15 section 362(b)(4), which preserves the authority of governmental units such as FERC to
16 enforce their police or regulatory power over power companies such as Mirant
17 Corporation and its subsidiaries. These grounds are elucidated in the annexed supporting
18 memorandum.

19 DATED: August 5, 2004

Respectfully submitted,

20 LAW OFFICES OF STEPHAN C. VOLKER
21 LAW OFFICES OF WENDEL WITHROW

22 By: /S/

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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**
2 **OF MOTION FOR CLARIFICATION OF AUTOMATIC STAY OR**
3 **IN THE ALTERNATIVE RELIEF FROM AUTOMATIC STAY**

4 **INTRODUCTION**

5 CALifornians for Renewable Energy (CARE) respectfully requests an order
6 clarifying that the automatic stay in the present proceeding does not bar CARE’s pending
7 Motion to Revoke Market-Based Rates and to Order Complete Refunds Retroactive to
8 Date of Insurance of Orders Granting Authority to Sell at Market-Based Rates (“Rate
9 Refund Motion”) filed by CARE in the Federal Energy Regulatory Commission’s
10 (“FERC’s”) refund proceeding in Docket No. EL00-95-000 (“FERC proceeding”).
11 CARE bases this motion on Bankruptcy Code section 362(b)(4), which provides in
12 pertinent part that the automatic stay of section 362(a) does not apply to “the
13 commencement or continuation of an action or proceeding by a governmental unit . . . to
14 enforce such governmental unit’s . . . police and regulatory power .” In the alternative,
15 CARE requests relief from the automatic stay under Bankruptcy Code section 362(d),
16 which provides that “[o]n request of a party in interest and after notice and a hearing, the
17 court shall grant relief from the stay provided under subsection (a) of this section (1) for
18 cause”

19 **DISPUTE**

20 On July 21, 2004, CARE filed its Rate Refund Motion in the FERC refund
21 proceeding under docket number EL00-95-000 *et al.* In the refund proceeding, FERC is
22 attempting to determine the amount of refunds due to various California parties for
23 improper activities by energy companies during the recent California energy crisis.
24 Mirant, as a participant in the FERC proceeding, is subject to CARE’s motion, as are all
25 of the other energy companies currently participating in the refund proceeding.

26 On July 25, 2004, CARE’s counsel received a voice mail message from Debra
27 Bolton, Associate General Counsel for Mirant Corporation. In her message, Mrs. Bolton
28 conveyed Mirant’s position that CARE’s FERC Rate Refund Motion violated the

1 automatic stay order issued in the present bankruptcy proceeding.

2 After exchanging multiple telephone and e-mail messages, CARE's counsel spoke
3 with Mrs. Bolton on July 27, 2004. CARE expressed its view that the FERC Motion is
4 protected by the governmental regulatory exemption set forth in section 362(b)(4) of the
5 Bankruptcy Code. Mirant responded that the FERC motion is outside of the exemption
6 and threatened to seek sanctions against CARE if it does not withdraw its FERC motion
7 as to Mirant. A follow-up email confirmed Mirant's position and gave a deadline of July
8 30, 2004.

9 In a good faith effort to avoid any unnecessary litigation expense, CARE requested
10 legal authority from Mirant that would demonstrate the validity of its position. Mirant
11 has provided no such authority, prompting CARE to seek protection from this Court.

12 CARE does not wish to violate this Court's Order Directing Parties to Comply
13 with Sections 362 and 525 of the Bankruptcy Code filed July 16, 2003, nor the automatic
14 stay provided by section 362(a) of the Bankruptcy Act of 1978. CARE, however, does
15 not believe that the stay limits in any way its participation in the FERC proceeding. The
16 FERC proceeding has been underway under the relevant exemption, 11 U.S.C. §
17 362(b)(4), for over a year.

18 LEGAL ANALYSIS

19 **Clarification of Stay**

20 The present dispute centers on the following provisions of section 362 of the
21 Bankruptcy Code:

22 (a) *Except as provided in subsection (b)* of this section, a petition filed
23 under section 301, 302, or 303 of this title, or an application filed under
24 section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as
a stay, applicable to all entities, of--

25 (1) the commencement or continuation, including the issuance or
26 employment of process, of a judicial, administrative, or other action or
27 proceeding against the debtor that was or could have been commenced
28 before the commencement of the case under this title, or to recover a claim

1 against the debtor that arose before the commencement of the case under
2 this title;

3 * * *

4 (b) The filing of a petition under section 301, 302 or 303 of this title . . .
5 *does not operate as a stay-*

6 * * *

7 (4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section,
8 *of the commencement or continuation of an action or proceeding by a*
9 *governmental unit . . . to enforce such governmental unit's or organization's*
10 *police and regulatory power, including the enforcement of a judgment*
11 *other than a money judgment, obtained in an action or proceeding by the*
12 *governmental unit to enforce such governmental unit's or organization's*
13 *police or regulatory power;*

14 * * *

15 11 U.S.C. § 362(b)(4), emphasis added. Section 362(b)(4) is commonly referred to as the
16 governmental regulatory exception and allows government entities to continue the
17 important job of regulation despite any bankruptcy proceedings. *In re Crockett*, 204 B.R.
18 705, 709 (Bkrcty.W.D.Tex., 1997).

19 CARE has been unable to find any authority that would permit Mirant to thrust this
20 Court into an exempt regulatory proceeding for the purpose of policing the filings of
21 individual participants. While CARE was unable to find any authority for Mirant's
22 position, settled law confirms the broad authority of administrative entities to exercise
23 their police or regulatory powers without interference from the bankruptcy courts. In
24 *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc., et al*, 502
25 U.S. 32 (1991), for example, the U.S. Supreme Court held that bankruptcy courts lacked
26 jurisdiction to stay regulatory proceedings and only had authority to review judicial
27 enforcement of final regulatory orders. Its reasoning is fully applicable here:

28 It is possible, of course, that the Board proceedings, like many other
enforcement actions, may conclude with the entry of an order that will
affect the Bankruptcy Court's control over the property of the estate, but
that possibility cannot be sufficient to justify the operation of the stay

1 against an enforcement proceeding that is expressly exempted by §
2 362(b)(4). To adopt such a characterization of enforcement proceedings
3 would be to render subsection (b)(4)'s exception almost meaningless. If and
4 when the Board's proceedings culminate in a final order, and if and when
5 judicial proceedings are commenced to enforce such an order, then it may
6 well be proper for the Bankruptcy Court to exercise its concurrent
7 jurisdiction under 28 U.S.C. § 1334(b). We are not persuaded, however,
8 that the automatic stay provisions of the Bankruptcy Code have any
9 application to ongoing, nonfinal administrative proceedings.

10 *MCorp Financial*, 502 U.S. at 41. The Supreme Court's determination that the automatic
11 stay provision has no application to "ongoing, nonfinal administrative proceedings"
12 forecloses Mirant's attempt to interject this Bankruptcy Court into the nonfinal,
13 administrative FERC proceedings in the present case.

14 Mirant may argue in the alternative that CARE's Rate Refund Motion seeks a
15 remedy outside the FERC proceedings. Such a contention likewise fails. CARE's motion
16 does nothing of the kind. It seeks an order from FERC, not from a court. CARE's FERC
17 motion is a vital part of an ongoing debate among the participants in FERC's regulatory
18 proceeding regarding the scope and timing of the refunds FERC will order.

19 In effect, Mirant is asking for unjustified bankruptcy protection in hopes of
20 silencing one side of the refund debate. CARE is entitled to have its motion determined
21 by FERC, which has ample expertise in this complex regulatory arena. FERC officials
22 overseeing the case are in the best position to determine whether or not CARE's motion
23 properly falls within the scope of the exempt FERC proceeding.

24 The exemption for governmental regulatory proceedings should not be brushed
25 aside in the cavalier manner urged by Mirant. If Mirant's tactics were allowed,
26 bankruptcy judges would be forced to scrutinize complex administrative proceedings
27 involving hundreds of parties to adjudge the propriety of literally thousands of motions by
28 participants therein. Such a cumbersome, invasive and disruptive procedure would defy
29 FERC's clear statutory authority to regulate.

30 In summary, Mirant threatens to disrupt an important FERC regulatory proceeding

1 that is exempt from the Bankruptcy Code’s stay provision. Mirant wishes to reach inside
2 the exempt FERC proceeding to block CARE’s full participation therein. Because
3 CARE’s FERC motion was properly filed in the exempt FERC proceeding, the motion
4 does not violate the automatic stay provision of the Bankruptcy Code. CARE’s full
5 participation in the FERC proceeding is protected by the exemption of the refund
6 proceeding *in toto*.

8 **Relief from Stay**

9 In the alternative, if this Court determines that CARE’s FERC motion is not
10 exempt from the bankruptcy stay, then CARE respectfully requests relief from the stay for
11 cause, as provided under 11 U.S.C. § 362(d). “‘Cause’ as used in § 362(d)(1) has no clear
12 and limited definition and, therefore, is determined on a case by case basis. ‘Cause’ is an
13 intentionally broad and flexible concept that permits the Bankruptcy Court, as a court of
14 equity, to respond to inherently fact-sensitive situations.” *In re Texas State Optical, Inc.*,
15 188 B.R. 552, 556 (Bkrcty.E.D.Tex., 1995), *citing In re MacDonald*, 755 F.2d 715, 717
16 (9th Cir. 1986), and *In re Sentry Park, Ltd.*, 87 B.R. 427, 430 (Bkrcty.W.D.Tex., 1988).
17 Under the facts of this case, ample good cause exists to grant relief from the automatic
18 stay, as the following discussion demonstrates.

19 The landmark case of *In re Curtis*, 40 B.R. 795 (Bkrcty. D.Utah 1984) establishes
20 the factors that govern whether to lift a stay. The *Curtis* factors are: (1) whether relief
21 would result in a partial or complete resolution of the issues; (2) lack of any connection
22 with or interference with the bankruptcy case; (3) whether the other proceeding involves
23 the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise
24 has been established to hear the cause of action; (5) whether the debtor's insurer has
25 assumed full responsibility for defending it; (6) whether the action primarily involves
26 third parties; (7) whether litigation in another forum would prejudice the interests of other
27 creditors; (8) whether the judgment claim arising from the other action is subject to
28 equitable subordination; (9) whether movant's success in the other proceeding would

1 result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and
2 the expeditious and economical resolution of litigation; (11) whether the parties are ready
3 for trial in the other proceeding; and (12) impact of the stay on the parties and the balance
4 of harms. *In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1286 (2d Cir. 1990). According
5 to the legislative history of section 362(d) as reviewed by the Fifth Circuit Court of
6 Appeals, “a desire to permit an action to proceed to completion in another tribunal may
7 provide another cause.” *Matter of Mendoza*, 111 F.3d 1264, 1271 (5th Cir.,1997), *citing*
8 H.R.Rep. No. 95-595, at 343 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6300.

9 The *Curtis* factors clearly support relief from the automatic stay here. Factor four,
10 whether a specialized tribunal with the necessary expertise has been established to hear
11 the cause of action, is plainly satisfied. CARE is a participant in a complex and
12 comprehensive FERC proceeding that seeks to resolve the multitude of claims arising out
13 of the California energy crisis. The complexity of the issues involved in the FERC
14 proceeding demonstrates that the best forum to hear CARE’s motion is the FERC
15 proceeding, EL00-95-000, *et al.* Accordingly, under *Mendoza*, this Court should grant
16 relief for cause to “permit an action to proceed to completion in another tribunal.”
17 *Mendoza, supra*, 111 F. 3d at 1271.

18 *Curtis* factors seven and ten, whether the interests of other creditors, judicial
19 economy, and the expeditious and economical resolution of litigation favor lifting the
20 stay, are likewise satisfied. One of the principal purposes of the FERC proceeding is to
21 consolidate and resolve in one proceeding all creditors’ claims stemming from the
22 California energy crisis. CARE’s motion is a key part of that process. As such it should
23 not be stayed, lest FERC’s regulatory process be fundamentally disrupted.

24 Factor eleven also demonstrates that a stay of CARE’s motion is inappropriate.
25 Factor eleven asks the court to determine whether the parties are ready for trial in the
26 other proceeding. Here FERC, Mirant, CARE, and all of the other parties to EL00-95-
27 000, *et al.* are currently actively participating in the refund proceeding. To limit CARE’s
28 participation at this time, while the proceedings are ongoing, is contrary to factor eleven’s

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13 IN THE UNITED STATES BANKRUPTCY COURT
14 FOR THE NORTHERN DISTRICT OF TEXAS
15 FORT WORTH DIVISION

16 In re) Case No. 03-46590(DML)11
17)
18)
18 MIRANT CORPORATION, et) **[PROPOSED] ORDER**
al.,)
19)
20)
Debtors) Date: August 18, 2004
21) Time: 10:30 a.m.
22) Judge: Honorable D. Michael Lynn

23
24 GOOD CAUSE APPEARING from the motion submitted by petitioner
25 CALifornians for Renewable Energy and the arguments of the parties thereon,
26 IT IS HEREBY ORDERED that the Motion to Revoke Market-Based Rates and to
27 Order Complete Refunds Retroactive to Date of Issuance of Order(s) Granting Authority
28 to Sell at Market-Based Rates filed by CALifornians for Renewable Energy in the Federal

1 Regulatory Energy Commission's refund proceeding under Docket No. EL00-95-000 *et*
2 *al.* does not violate Bankruptcy Code section 362(a) nor this Court's automatic stay of
3 adjudicatory proceedings against debtor, Mirant Corporation, *et al.*

4 IT IS SO ORDERED.

5 DATED: August __, 2004

6 _____
7 D. MICHAEL LYNN
8 JUDGE OF THE UNITED STATES
9 BANKRUPTCY COURT FOR THE NORTHERN
10 DISTRICT OF TEXAS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re) Case No. 03-46590(DML)11
)
) **PROOF OF SERVICE**
MIRANT CORPORATION, et al.,)
) Date: August 18, 2004
) Time: 10:30 a..m.
Debtors) Judge: Honorable D. Michael
) Lynn
)
)

I am a resident of the United States and of the State of California. I am employed in the County of Alameda. My business address is 436 - 14th Street, Suite 1300, Oakland, California 94612. My business telephone number is (510) 496-0600, and fax number is (510) 496-1366. I am over the age of eighteen years. I am not a party to the within action or proceeding.

On August 5, 2004, I served the following documents:

