

The United States of America, on behalf of the Bonneville Power Administration ("BPA"), a power marketing administration within the United States Department of Energy, files this Response to Certain Objections to Debtor's Motion for Interim Order Authorizing the Debtors to (i)

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE LYNN:

**RESPONSE OF THE UNITED STATES OF AMERICA TO CERTAIN OBJECTIONS TO DEBTORS' MOTION FOR INTERIM ORDER AUTHORIZING THE DEBTORS TO COMPLY WITH TERMS OF PREPETITION TRADING CONTRACTS, (II) ENTER INTO POSTPETITION TRADING CONTRACTS IN THE ORDINARY COURSE OF BUSINESS, (III) PROVIDE CREDITOR SUPPORT RELATING TO BOTH PRE AND POSTPETITION TRADING CONTRACTS, AND (IV) AUTHORIZING THE ASSUMPTION OF PREPETITION TRADING CONTRACTS**

CASE NO. 03-46590(DML)  
JOINTLY ADMINISTERED  
CHAPTER 11  
Hearing Date and Time: August 21, 2003  
2:30 p.m. (Central Time)

In re:  
MIRANT CORPORATION, ET AL.,  
Debtors.

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

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Bonneville Power Administration

3. On July 14, 2003, this Court entered its Interim Order Authorizing Debtors to (i) Comply with Terms of Prepetition Trading Contracts, (ii) Enter into Ordinary Course of Business, (iii) Provide Credit Support Relating to Both Pre and Postpetition 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"). 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

Pool ("WSP") in 1987.

2. BPA's power sales account for approximately forty-five percent of the electric power consumed in the Pacific Northwest, and BPA markets surplus power (power produced in excess of the requirements of the Northwest) outside the Pacific Northwest. BPA has participated in the bulk wholesale power market since the 1980s and was a founding member of the Western System Power

Bonneville Power Admin., 126 F. 3d 1158, 1163 (9<sup>th</sup> Cir. 1997).

1. BPA is a federal power marketing agency created by Congress in 1937, to market low-cost electric power from the Federal Columbia River Power System in the Pacific Northwest. 16 U.S.C. §§ 832-832m. BPA markets power generated at thirty-one federal hydroelectric projects in the Pacific Northwest, and some nonfederal projects. See Association of Public Agency Customers v.

### FACTUAL BACKGROUND

Contracts (the "Motion"), and in support hereof respectfully states as follows:

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

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 Postpetition Trading Contracts, pursuant to which objections to the Motion are to be filed on or before August 14, 2003, and a final hearing on the Motion is scheduled for August 21, 2003.<sup>1</sup>

4. On August 14, 2003, the City of Seattle acting through its City Light Department ("City Light") and Public Utility District No. 1 of Chelan County ("Chelan PUD") filed limited objections to the Motion (Docket Nos. 443 and 444, respectively, and together, the "Objections").

5. The Objections request that the Court's final order on the Motion protect City Light and Chelan PUD in the same manner that all other counterparties are protected and that their Confirmation Agreements with Debtor Mirant Americas Energy Marketing, L.P. ("MAEM") be included on the list of Prepetition Trading Contracts that the Debtors are seeking to assume.<sup>2</sup>

6. Per the Objections, Debtors' contend that City Light and Chelan PUD are not forward contract merchants because they are governmental units, City Light Obj. at para. 14; Chelan PUD Obj. at para. 3, and are therefore not entitled to terminate their contracts with Debtors or setoff their claims thereunder under 11 U.S.C. §§ 362(b)(6) and 556.

7. As with City Light and Chelan PUD, BPA and the Debtors are parties to the WSPPA Agreement ("WSPPA"), the umbrella agreement governing transactions between its various signatories.<sup>3</sup>

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<sup>1</sup> Unless otherwise defined herein, capitalized terms used herein shall have the meaning ascribed to such terms in the Interim Order.

<sup>2</sup> City Light Obj. at ¶ 28; Chelan PUD Obj. at ¶ 8.

<sup>3</sup> The WSPPA is attached as Exhibit C to City Light's objection.

<sup>4</sup> As City Light and Chelan PUD point out, the WSPPA, the Enabling Agreement and the Confirmation Agreement all constitute a single, integrated contract. WSPPA § 35; City Light Obj. at ¶ 11; Chelan PUD Obj. at ¶ 10.

8. In addition to the WSPPA sections that City Light and Chelan PUD cite, e.g., section 35, section 22.1(c) of the WSPPA provides that an event of default includes:  

The institution, with respect to the Defaulting Party, by the Defaulting Party, or by another person or entity of a bankruptcy, reorganization, moratorium, liquidation or similar insolvency proceeding or other relief under any bankruptcy or insolvency law affecting creditor's rights or a petition is presented or instituted for its winding-up or liquidation.
9. On May 5, 2000, BPA and Southern Energy Company Marketing, L.P., MAEM's predecessor in interest, entered into an Agreement to Enable Future Purchases, Sales, and Exchanges of Power and Other Services No. 99PB-10588 (the "Enabling Agreement"), which provided a contractual mechanism for the parties' future purchases, sales and exchanges of power (both firm and nonfirm) and attached and incorporated the WSPPA.
10. Pursuant to the Enabling Agreement and the WSPPA, BPA and MAEM entered into a Confirmation Agreement No. 01PB-42000 (the "Confirmation Agreement") pursuant to which BPA purchased a three year one time call option to purchase a set amount of firm power from MAEM for each year from 2004 through 2006. BPA paid MAEM the purchase price for the option when the parties entered into the Confirmation Agreement.<sup>4</sup>
11. By letter dated July 30, 2003 (the "Termination Letter"), BPA terminated the Confirmation Agreement pursuant to its terms, including section 22.1(c) of the WSPPA, and 11 U.S.C. § 556. A copy of the termination letter is attached hereto as Exhibit A.

12. Because BPA terminated the Confirmation Agreement, as allowed under 11 U.S.C. § 556, Debtors cannot assume it, and the relief requested in the Motion does not impact it. Accordingly, BPA does not object to the Motion.
13. The Objections request that City Light's and Chelan PUD's confirmation agreements be subject to the Motion and included in the list of Petition Trading Contracts to be assumed-relief to which the BPA does not object, but which it also expressly does not desire for itself.
14. However, City Light's and Chelan PUD's request is apparently unacceptable to Debtors because they believe those entities are governmental units not entitled to the protections afforded in the Interim Order or 11 U.S.C. §§ 362(b)(6) and 556, and hence, Debtors have no need to assume them at this time or provide governmental units the same protections afforded other Counterparties to Petition Trading Contracts.
15. For the reasons stated in the Objections, BPA disagrees with Debtor's contention and agrees with City Light and Chelan PUD that they, BPA and all other governmental units are forward contract merchants entitled to the protections of 11 U.S.C. §§ 362(b)(6) and 556, as well as the remedy of recoupment.<sup>5</sup>
16. Moreover, Debtors clearly understood that the United States would be sellers and/or purchasers under the WSPPA when they agreed in section 24 thereof that "if the Seller or Purchaser is an agency of or part of the United States Government, then the laws of the United States of
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- <sup>5</sup> Debtors' reliance on the definition of person in 11 U.S.C. 101(41) is misplaced. Congress excluded governmental units from that definition only "to avoid any confusion that may arise if, for example, a municipality is incorporated and thus is legally a corporation as well as a governmental unit." 11 U.S.C. § 101(41) (historical and statutory notes). That is not the case here.

6 Section 556 also protects against a debtor assuming or rejecting a forward contract pursuant to section 365, "possibly a significant period of time after performance by the debtor was required under the terms of the commodity or forward contract (thus affording the debtor the benefit of knowing the market price of the commodity or other subject of a contract before making its determination whether to complete the transaction at the contract price)." Lawrence P. King, 5 *Collier on Bankruptcy* ¶ 556.01 at 556-2.

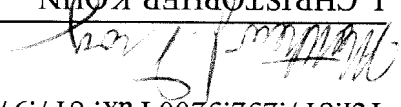
members of the clearing chain.");<sup>6</sup>

to meet its obligations to make margin payments, all of which could adversely affect the other for large losses with respect to those positions and the consequent inability of the broker or merchant of an insolvent customer would expose a commodity broker or forward contract merchant to liability contract. See *In re R.M. Cordova Int'l, Inc.*, 77 B.R. at 448 ("The failure to liquidate open positions ¶ 556.01 at 556-2 (15th ed rev. 2002), including its right to terminate, or close out, its forward under a commodity contract upon a bankruptcy filing, Lawrence P. King, 5 *Collier on Bankruptcy* vulnerable in several respects to loss of, or interference with, its bargained for rights and remedies market."). Absent that section, a party to a commodity or forward contract with a debtor would be or security firm from spreading to other firms and possibly threatening the collapse of the affected nature of the markets, certain protections are necessary to prevent the insolvency of one commodity ("Because of the structure of the clearing systems in these industries and the sometimes volatile 441, 448 (Bankr. D.N.J. 1987); see also, H.R. Rep. No. 97-420, 97th Cong 1 (2d Sess. 1982) or forward contract merchant may lead to that of another." *In re R.M. Cordova Int'l, Inc.*, 77 B.R. 17. Finally, section 556 "minimizes the likelihood that the insolvency of one commodity broker contract merchants under the Bankruptcy Code.

acknowledgments in the WSPPA, upon which BPA relied, regarding the parties' status as forward America shall govern." Debtors should not be permitted now to refute their express

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Respectfully submitted,  
PETER D. KEISLER  
Assistant Attorney General

This 19th day of August 2003.

U.S.C. §§ 362(b)(6) and 556.

BPA agrees with the Objections that the plain language of the WSPFA should govern and that governmental units are forward contract merchants thereunder entitled to the protections of 11

CONCLUSION

18. Given the number of governmental units that are parties to the WSPFA, City Light Obj. at para. 21, adoption of Debtors' position regarding governmental units could have the very effect that Congress sought to avoid in enacting section 556—the injection of uncertainty, risk, and volatility into an already volatile market.

**EXHIBIT A**

**Department of Energy**

Bonneville Power Administration  
P.O. Box 3621  
Portland, Oregon 97208-3621

POWER BUSINESS LINE



July 30, 2003

In reply refer to: PT-5

Mr. Greg Oetting, Manager  
Mid Market Trading  
Mirant Americas Energy Marketing L.P.  
1155 Perimeter Center West Drive  
Atlanta, Georgia 30338

Dear Mr. Oetting:

The Bonneville Power Administration (BPA) has been notified that Mirant has filed in the United States Bankruptcy Court for the Northern District of Texas. This action by Mirant constitutes an Event of Default under Confirmation Agreement No. 01PB42000 (Existing Confirmation Agreement) entered into between BPA and Mirant under our Agreement to Enable Future Purchases, Sales, and Exchanges of Power and Other Services (Agreement), Contract No. 99PB10588 as described in section 22.1(c) of Attachment C of the Agreement. Per Section 35 of Attachment C of the Agreement, Mirant and BPA agreed that each is a forward contract merchant, and the Agreement and Existing Confirmation Agreement are forward contracts, for purposes of 11 U.S.C. 556.

As a result of this Event of Default, and in accordance with 11 U.S.C. 556, BPA hereby terminates all transactions under the Agreement including the Existing Confirmation Agreement. BPA has calculated a Termination Payment as prescribed by section 22.3 of Attachment C of the Agreement. The amount of the Termination Payment is \$1,085,040. A summary of this calculation is attached. BPA currently has accounts payable with Mirant under Confirmation Agreements completed in July with an outstanding balance of \$552,014. BPA will withhold payment for those obligations at this time. The net amount due from Mirant to BPA is \$533,026. Pursuant to Attachment C of the Agreement, this amount is due within three (3) business days of receipt of this letter. If this amount is paid, BPA will release the \$523,389 paid by Mirant to BPA on July 7, 2003, as further assurance of performance.

This termination letter constitutes a contracting officer's final decision pursuant to section 605 of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.* The Contract Disputes Act specifies you may appeal this decision within ninety days from date of receipt of this letter at the Department of Energy Contract Board of Appeals, pursuant to 41 U.S.C. § 607, or within twelve months from date of receipt of this letter at the United States Court of Federal Claims, pursuant to 41 U.S.C. § 609.

For any further questions regarding the calculation of these payments, please contact me at 503 230-5458.

Sincerely,



Lawrence E. Kitchen

Senior Account Executive/Contracting Officer

cc:

Mr. John O'Neal, Chief Commercial Officer  
Mr. Jim Shandalov, Director Marketing & Development  
Mr. Steve Brown, Director, Credit and Counterparty Risk  
Mr. Stephen Fischer, Senior Marketing Mgr., Western Region  
Emily B. Tindel, Senior Credit Analyst  
Matthew Troy, Department of Justice

**Summary of Termination Payment**

Existing Confirmation Agreement

Market Quotes for Replacement Transactions on July 30, 2003

Avista \$1.05 bid and \$1.65 offered

Constellation \$1.25 bid and \$2.25 offered

Termination Payment =  $(\$1.65 \times 3 \text{ years} \times 8760 \text{ hours/year} \times 25 \text{ MW}) + (\$1.65 \times 24 \text{ hours} \times 25 \text{ MW}) = \$1,085,040$

Administrative hold for July Purchases by BPA = \$552,014

Net Amount Due by Mirant to BPA = \$533,026

CERTIFICATE OF SERVICE

I hereby certify that on this the 19th day of August 2003 a true and correct

copy of the foregoing pleading was served via facsimile as follows:

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