111 FERC ¶ 61,425
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Mirant Corporation and Its Public Utility Subsidiaries Docket No. EC05-58-000

ORDER AUTHORIZING DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued June 17, 2005)

I. Introduction

1. On March 11, 2005, Mirant Corporation (Mirant) and its public utility subsidiaries (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA)[1] requesting Commission authorization for an indirect disposition of jurisdictional facilities as part of a proposed intra-corporate restructuring (Restructuring). The Restructuring is an internal transfer that would be a precursor to a future transfer of Mirant's assets to all or some of its current creditors in connection with a Plan of Reorganization (Plan) filed by Mirant and certain of its wholly-owned subsidiaries (Mirant Debtors) with the United States Bankruptcy Court (Bankruptcy Court).[2] Applicants state that as a result of the Restructuring, substantially all Commission-regulated jurisdictional facilities indirectly owned by Mirant will either be indirectly owned by New Mirant, the new corporate parent of the Mirant Debtors business enterprise, and/or will remain indirectly owned by the existing Mirant.[3]

[1] 16 U.S.C. § 824b (2000).

[2] Mirant Debtors include all but two of its public utility subsidiaries. Applicants state that the transfer of Mirant assets to creditors will be the subject of a separate, subsequent section 203 filing.

[3] Applicants state that it is possible that Mirant Americas Energy Marketing, L.P. (Mirant Marketing) may be held separately in a trust being created under the Plan and therefore, would be neither a subsidiary of New Mirant nor a subsidiary of Mirant.

2. The Commission will approve the proposed disposition of jurisdictional facilities, because it will not have an adverse effect on competition, rates or regulation, and will be consistent with the public interest.

II. **Background**

A. **General**

3. Mirant, an international energy company, was originally incorporated as a wholly-owned subsidiary of The Southern Company (Southern). By April 2001, Southern had distributed all of the common stock of Mirant either through a public offering or by distribution to Southern shareholders, so Mirant became an independent entity.

4. Mirant, through its direct and indirect subsidiaries, owns or leases approximately 18,000 megawatts (MW) of electric generating capacity. Mirant manages its business through two principal operating segments: International and North America. The International segment of Mirant includes power generation businesses in various locations overseas. The North America segment of Mirant consists of: (i) the ownership and operation of power generation facilities, including those owned by Mirant Americas Generation, LLC (Mirant Generation), a direct, wholly-owned subsidiary of Mirant Americas, Inc. (Mirant Americas); and (ii) energy trading and marketing operations, principally conducted through Mirant Marketing and its wholly-owned subsidiary, Mirant Energy Trading, LLC (Mirant Trading), both indirect, wholly-owned subsidiaries of Mirant Americas. In the aggregate, Mirant directly or indirectly owns 20 public utility subsidiaries that operate generation facilities and sell wholesale power at market-based rates. These facilities are dispersed throughout many regions of the United States.

5. In December, 2000, the Commission authorized a disposition of jurisdictional facilities as part of a transaction in which subsidiaries of Southern that were the predecessors of Mirant acquired all of the generating assets of Potomac Electric Power Company (Pepco) and most of the power purchase agreements that Pepco had entered into to obtain power from other suppliers.[4] Certain suppliers of power to Pepco, however, refused to consent to the assignment of Pepco's wholesale purchase obligations under their contracts to Mirant. To address this situation, Pepco and Mirant entered into an agreement, the Back-to-Back Agreement, under which Pepco would continue to buy

[4] *Potomac Electric Power Company* (Pepco), 93 FERC ¶ 61,240 (2000).

the power under the unassigned contracts at the rates specified therein and resell it to Mirant (or Mirant's subsidiaries) at the same rates. The Back-to-Back Agreement became a part of the Asset Purchase and Sale Agreement between Pepco and Mirant covering the transfer of Pepco's generating assets and purchase agreements.

B. Events Leading to Applicants' Bankruptcy Filing

6. Applicants state that events growing out of the California energy crisis that began in Summer, 2000, ultimately led to a failure of many wholesale customers to meet obligations owed to power generators, including Mirant Marketing. In addition, certain of the Applicants are defendants in a number of lawsuits arising from the California utility crisis. The right of energy marketers, including some Applicants, to receive and retain payment for energy deliveries in 2000 and 2001 was challenged, and customers sought affirmative remedies against some suppliers. On December 2, 2001, Enron Corporation (Enron) filed for relief under Chapter 11 of the Bankruptcy Code. This led to greatly reduced liquidity in certain energy-related markets in which Applicants had participated. It also hurt credit ratings in the energy industry. Subsequently, Moody's Investor Services downgraded the credit ratings of Mirant, Mirant Generation and Mirant Marketing to below investment grade. Counterparties began exercising collateral and margin call rights, eventually causing Applicants to drastically cut back on their business operations. Applicants (except for Mirant Trading and one generating subsidiary) filed for Chapter 11 relief with the Bankruptcy Court on July 14, 2003.

C. The Plan and the Restructuring

7. The Plan sets forth Applicants' proposed post-bankruptcy structure and how the claims of Applicants' creditors and stockholders would be treated. Under the Plan, Applicants' business would continue to be operated in substantially its current form, with certain internal structural changes, which Applicants state will improve operational efficiency, optimize the ability to meet financing requirements, and accommodate their debt structure expected when they emerge from bankruptcy.

8. Applicants state that because of the complex and dynamic nature of Applicants' reorganization under the Bankruptcy Code, and the uncertain nature of the confirmation process for the Plan in the Bankruptcy Court, the exact method of implementing the Restructuring may deviate from what is currently anticipated.[5] However, the end result will be the same – the Commission-regulated jurisdictional facilities owned by Mirant

[5] *See* Applicants' March 11, 2005 Application Seeking Approval of Internal Assets Transfers and Corporate Restructuring at 18.

will be ultimately indirectly owned by Mirant and/or New Mirant. The Restructuring does not involve the transfer of direct or indirect ownership or control of any Commission-regulated jurisdictional facilities to creditors or potential upstream owners of Mirant and/or New Mirant, and Applicants are not requesting approval for any transfer to creditors at this time.

9. On the effective date of the Plan, Mirant will transfer substantially all of its assets to New Mirant, which will issue new equity and debt securities to the Mirant Debtors' creditors and will thereafter be owned by creditors. Applicants state that they expect the initial New Mirant stockholders to be a diversified group of banks, note-holders, and other creditors, and that no one party is likely to have outright control of New Mirant. The Plan is not now before the Commission.

10. A significant feature of the Plan is its treatment of the Back-to-Back Agreement, under which Mirant is obligated to buy from Pepco the energy Pepco purchases under the unassigned contracts (the contracts that the suppliers refused to let Pepco assign to Mirant when Mirant purchased Pepco's generating assets and purchase agreements in 2000). Applicants note that the Back-to-Back Agreement (and the Asset Purchase and Sale Agreement, of which the Back-to-Back Agreement is a part) will not be transferred to New Mirant, if the Bankruptcy Court does not allow Mirant to reject the Back-to-Back Agreement (or the Asset Purchase and Sale Agreement) before the Bankruptcy Court's confirmation of the Plan. Essentially, the Back-to-Back Agreement would "ride through" the bankruptcy, i.e., would survive bankruptcy and not be assumed by the estate or transferred to New Mirant; it would remain an obligation of the existing Mirant. After filing the section 203 application, Mirant amended the Disclosure Statement filed with the Bankruptcy Court to eliminate the "ride-through" reference and to suggest that the Back-to-Back Agreement purchase obligations may be treated as pre-petition debt obligations subject to compromise under the Plan.

III. Notice of the Filing

11. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 13493, with comments, protests or interventions due on or before April 1, 2005.

12. Several parties filed timely motions to intervene, notices of intervention and protests (with the exception of Owner Lessors/Participants, these will be hereinafter known collectively as Protestors). They include the following: Pepco, which filed a timely motion to intervene and a protest; Owner Lessors/Participants, who filed a timely motion to intervene; Maryland Public Service Commission (Maryland Commission), which filed a timely notice of intervention; and the Maryland Office of People's Counsel (collectively, Maryland Agencies), which filed a timely motion to intervene, with both timely filing a joint protest and/or request for hearing; additionally, the California Power

Exchange Corporation (CalPx) filed a timely motion to intervene and comments while the Office of the People's Counsel of the District of Columbia (DC People's Counsel) filed a timely motion to intervene and protest.

13. After the comment date, several filings were made. The out-of-time filings began with the Official Committee of Unsecured Creditors of Mirant Corporation (Mirant Unsecured Creditors) filing a motion to intervene out of time on April 5, 2005 and a Motion for Leave to Answer, and Answer to Protests of Potomac Electric Power Company on April 18, 2005. On that same date, Applicants filed a motion for leave to file an answer and answer.

14. Then, the Public Service Commission of the District of Columbia (DC Commission) filed a motion for leave to intervene out of time and protest on April 22, 2005. In response, Applicants filed a Request for Rejection of Late Intervention and Protest and Answer on April 26, 2005.

15. On April 28, 2005, the DC People's Counsel filed a response to Mirant's April 18 Answer. This was followed by the Maryland Agencies filing an answer on May 3, 2005. Applicants then filed an Opposition to Motion for Leave to Answer and, in the Alternative, Motion for Leave to File Answer and Answer on May 6, 2005. On May 11, 2005, the DC Commission filed an answer to the motion for rejection of Mirant Corporation. On May 13, 2005, the Maryland Agencies filed an answer. On May 16, 2005, Mirant filed a motion for leave to answer and answer.

IV. Discussion

A. Procedural Issues

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given their interest in this proceeding and the absence of any undue delay or prejudice, the Commission will grant Mirant Unsecured Creditors' untimely and unopposed motion to intervene. Additionally, the Commission will grant the DC Commission's untimely motion to intervene, notwithstanding Applicants' opposition, because there appears to be good cause to do so. Rule 214(c)(2) and (d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.214(c)(2), (d) (2004), expressly allows the Commission to grant opposed and untimely motions to intervene and make the entities that filed them parties to a proceeding. In its filing, the DC Commission has shown that, consistent with Rule 214(b)(2)(ii) of the Commission's Rules of Practice and Procedure, it has interests that may be directly affected by the outcome of this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept the answers of Applicants, Mirant Unsecured Creditors, the Maryland Agencies, the DC Commission, and the DC People's Counsel because they have provided information that assisted us in our decision-making process.

B. Consistency with Public Interest

18. Section 203(a) of the FPA provides that the Commission must approve a proposed disposition if it finds that the disposition "will be consistent with the public interest."[6] The Commission generally takes account of three factors in analyzing proposed dispositions of facilities: (a) the effect on competition; (b) the effect on rates; and (c) the effect on regulation. As discussed below, we will approve the proposed disposition of jurisdictional facilities as consistent with the public interest. Initially, however, we will take up Protestors' claim that the filing is premature or deficient and should be rejected.

1. Whether The Proposed Reorganization Is Too Vague For Commission Action.

19. Protestors insist that the Commission should reject the application as premature and/or deficient, without prejudice for refiling after the Bankruptcy Court has acted on the Plan. They argue that without certainty over which New Mirant or Mirant entities will own jurisdictional assets, the Commission should not act. Protestors argue that without knowing the precise details regarding the upstream ownership of the jurisdictional facilities in question, the Commission cannot grant approval of an application under section 203. The DC Commission, for example, says that the Commission cannot determine the competitive effect of the transaction. It notes that Applicants admit that because of the numerous contingent disputed or unliquidated claims brought against Mirant Debtors, they are not able to identify precisely the upstream owners of Mirant or New Mirant.

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[6] 16 U.S.C. § 824b (a) (2000).

20. However, the Commission has approved such applications in several instances. It has stated before that it does not need to know how a transferee will be formed, or know the precise corporate structure of such a transferee to determine whether the proposed transaction is consistent with the public interest.[7] Also, the Commission has previously authorized the disposition of jurisdictional facilities without knowing who the upstream owner would be at the time of authorization.[8]

21. Also, the Mirant subsidiaries that directly own the jurisdictional facilities generally would not change with the Restructuring. The exception is that the jurisdictional facilities of one subsidiary are transferred to another subsidiary and after the Restructuring, Mirant Marketing may be held in a trust being created under the Plan and thus not be a subsidiary of either Old Mirant or New Mirant. Thus, the Commission finds that the structure and details of the proposed transaction are identified sufficiently to allow us to examine its effect on the public interest.

2. Effect on Competition

22. Applicants state that the proposed transaction will not adversely affect competition. They note that the proposed transaction involves only internal asset transfers and an intra-corporate reorganization. They further note that the Restructuring itself does not provide for the transfer of any Mirant asset to Mirant's current creditors. Although the Plan contemplates the ultimate transfer of Mirant assets to creditors, changes in ownership or controlling interests in Mirant's assets that would occur as a result would be brought before the Commission if and as required under section 203 of the FPA. As a result, Applicants state that there will not be an increase in concentration in any relevant market from the Restructuring.

23. The Commission finds that the Restructuring will not adversely affect competition. It is only an internal transfer of assets and therefore cannot increase concentration in any relevant market. Competitive concerns that may arise from the transfer of Mirant's assets to creditors will be addressed in any subsequent section 203 filing involving creditors becoming owners of jurisdictional facilities.

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[7] *See Commonwealth Edison Co.*, 91 FERC ¶ 61,033 at 61,113-14 (2000).

[8] *See also LenderCo*, 110 FERC ¶ 61,044 (2005).

3. Effects on Rates and Regulation[9]

a. Applicants' Initial Arguments

24. Applicants state that rates will not be adversely affected because all sales of energy made by them will continue to be made at market-based rates. They also state that none of the Applicants have any captive wholesale power customers or transmission customers whose rates would be affected by the Restructuring.

25. Applicants also assert that neither Commission nor state regulation will be adversely affected. They note that the transaction does not involve the formation of a registered holding company under the Public Utility Holding Company Act of 1935, so Commission's regulatory authority will not be affected. Applicants state that New Mirant's public utility subsidiaries will continue to be subject to the same Commission regulation as before. They also state that the transaction does not require the approval of state regulatory authorities, although limited filings with such authorities will be made to transfer retail licenses currently held by a Mirant subsidiary that operates at retail.

b. Protestors' Arguments

26. Protestors argue first that the Commission has broad flexibility to determine what is in the public interest and thus is free to consider possible effects on retail rates, as will be discussed later in this order. The reason for Protestors' concern is that the Back-to-Back Agreement would be held by a company with no assets, the old Mirant, and that Old Mirant would not be able to meet its obligations to purchase power from Pepco under the Back-to-Back Agreement. This could raise Pepco's retail rates by forcing Pepco to recover costs from retail customers that it would otherwise recover from its wholesale customers, Mirant and Mirant Marketing. The Protestors assert that the Bankruptcy Court's standard for determining whether to allow contract rejection invites the Commission to present a public interest analysis before the Bankruptcy Court decision is made.

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[9] The Commission usually discusses the rates and regulation factors separately. However, in this case, the concerns expressed by intervenors concerning potential effects on rates are often commingled with arguments that state regulation will be unable to address these effects.

27. Second, Protestors say that the Maryland and DC Commissions do not have authority to act on the transaction, to enforce Mirant's performance of its obligation under the Back-to-Back Agreement, or to regulate wholesale sales. They argue that the Merger Policy Statement says that when a state lacks authority to act on a merger and raises concerns about the effect on regulation, the Commission will consider on a case-by-case basis whether to set the issue for hearing.

28. Third, Protestors argue that this section 203 filing would, in effect, terminate a rate schedule, and that the Commission should apply a *Mobile-Sierra* standard to the potential consequences of contract abrogation, such as increased retail rates and/or an increased cost of capital for Pepco.

29. Fourth, Protestors claim that since the negotiation of the Asset Purchase and Sale Agreement and Back-to-Back Agreement and the authorization of the disposition of the facilities in question under section 203 in 2000 was acknowledged to have public interest benefits by reducing rates, the restructuring would effectively allow the benefits previously bargained for and approved to be negated.

30. Fifth, Pepco requests that the Commission state that its authorization does not allow Mirant to terminate its obligations without satisfying applicable public interest standards. The Maryland Agencies and DC Commission request that a full evidentiary hearing be held.

31. Sixth, Protestors assert that the Commission's sections 205 and 206 jurisdiction is also implicated in this filing. They argue that if the Back-to-Back Agreement is characterized as a loan rather than as a wholesale power contract in interstate commerce, the Commission would be giving up rate-making jurisdiction over that agreement because the Commission does not have jurisdiction over a debt obligation.

c. Answers

32. Applicants and Mirant Unsecured Creditors[10] contend that Protestors' arguments are beyond the scope of the Commission's section 203 review and are simply an attempt to gain leverage in the bankruptcy proceeding. They assert that uncertainty about who will be the ultimate owner of the jurisdictional facilities here is irrelevant for purposes of

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[10] The Unofficial Committee of the Unsecured Creditors of Mirant, similar to Applicants, regards the protests filed by the Maryland Parties, Pepco, DC People's Counsel and DC Commission as an effort to gain special treatment for Pepco and offers many of the same rebuttals.

section 203 review, since the ultimate ownership or control will not change as a result of the Reorganization. In the past, the Commission has allowed internal transfers and made public interest determinations without needing to know the precise corporate structure. In this case, the change in the amended disclosure statement involves non-jurisdictional inactions, specifically, a non-transfer of a non-jurisdictional right to purchase.

33. Second, Applicants and Mirant Unsecured Creditors argue that the matters protestors raise are mostly contractual disputes, are beyond the scope of the Commission's section 203 review, and do not show that the reorganization will adversely affect competition, rates or regulation. They argue that there will be no effect on Pepco's wholesale rates; that the Commission should not deny or condition the reorganization based on potential rate impacts that have not yet occurred and are far from certain to occur; that the state commissions have the authority to decide whether costs associated with bankruptcy should be passed on to retail customers; and finally, that Pepco's own recent Securities and Exchange Commission filing states that the Mirant bankruptcy is not expected to have a material adverse effect on the financial condition of Pepco.

34. Third, Applicants and Mirant Unsecured Creditors contend that Protestors' request that the Commission require Applicants to meet the *Mobile-Sierra* standard as part of the section 203 review would conflict with the Commission's jurisdiction and the Fifth Circuit's Mirant decision on jurisdiction in bankruptcy proceedings.[11] They claim that section 203's standard is consistency with the public interest, while contract abrogation under section 205 is allowed only where the public interest demands such action. They add that the Fifth Circuit also ruled that rejection of a contract would be a breach of contract, not a modification that would draw in the Commission's exclusive jurisdiction under the FPA.[12] Finally, they assert that Protestors are also attempting to provide Pepco what it did not bargain for, a security interest in the Back-to-Back Agreement or Asset Purchase and Sale Agreement, by making sure that its contract with Applicants is honored despite its having only an unsecured interest.

35. Fourth, Applicants and Mirant Unsecured Creditors contend that the Commission cannot impose conditions on its section 203 approval that it could not otherwise directly require under section 203: there must be a nexus between an alleged harm and the proposed transaction before a condition is imposed to remedy the harm. Protestors

[11] *See Mirant Corp. v. Potomac Electric Power Co. (In re Mirant Corp.)*, 378 F.3d 511 (5th Cir. 2004).

[12] *Id.* at 518.

cannot show a nexus between the reorganization and the concerns regarding the ultimate treatment of the Back-to-Back Agreement and APSA in the bankruptcy proceeding, so conditions cannot be imposed to ensure performance under those contracts. If anything, since Pepco is the seller, not the buyer, under the Back-to-Back Agreement, if the Back-to-Back Agreement is rejected, Pepco would have more power, not less, available to meet its obligations.

36. Fifth, Applicants and Mirant Unsecured Creditors argue that the Commission has recognized that it does not have exclusive jurisdiction over contract disputes and should decline to assert jurisdiction here. They assert that in another section 203 case involving a restructuring associated with a bankruptcy filing, the Commission determined that collection of pre-petition debt is an issue for the Bankruptcy Court.[13]

d. Commission Determination on Rates and Regulation

37. We do not agree with Applicants that we should ignore the possible effect of this transaction on retail rates. The Merger Policy Statement provides that the Commission will address a merger's effect on retail markets where a state commission lacks adequate authority under state law and asks the Commission to do so.[14] Also, if a state commission lacks the authority to act on a merger and raises concerns about the effect on effect on regulation, the Commission will decide whether to set the issue of regulation for hearing based on case-by-case examination of the circumstances.

38. The decision of Pepco to enter into the Back-to-Back Agreement is best viewed as a matter of business judgment where the risk of non-performance was a factor to be considered, among many other factors, in deciding whether to sell facilities at certain prices. Pepco could have negotiated for greater security of its revenues, but did not, and now finds itself an unsecured creditor under an executory contract with a bankrupt estate.

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[13] *See Cajun Elec. Power Corp., Inc. v. Gulf States Utils. Co.*, 70 FERC ¶61,005 at P 25 (1995).

[14] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996); FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-Dec. 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001) (Merger Filing Requirements).

The Protestors are, in essence, asking us to do indirectly what we could not do directly, namely, to assure that Pepco obtains full recovery of its contract revenues at the expense of other creditors and, perhaps, the successful emergence of a reorganized company from bankruptcy. In these circumstances, the Commission is not convinced that such action is consistent with the public interest.

39. We are not persuaded that the local regulatory agencies have no practical choice but to allow Pepco to recover any lost revenues through higher rates. As explained above, the potential effects on retail rates and Pepco's financial condition have not been substantiated as to relative significance. More significantly, while Protestors have argued that the local regulatory agencies would be likely to approve rate increases, such a decision is not a certainty. The Chairman of the Maryland Commission indicated that while the Maryland Commission would strongly consider any request by Pepco to recover unpaid purchased power costs from its customers, it would have to hold a formal proceeding to address many factors before acting on Pepco's request, if one is made.

40. Our authorization of the internal asset transfers is based on a determination that the Restructuring will not change the status quo with respect to competition, rates and regulation. Protestors have suggested that the Restructuring, by allowing Mirant to place the Back-to-Back Agreement in an entity that will be incapable of performance, will effectively allow Mirant to avoid its obligations under the Back-to-Back Agreement, thereby decreasing Pepco's revenues. If that occurs, the potential exists that (1) Pepco will seek to raise its retail rates to avoid a deterioration in its financial condition and (2) regulators, because they lack the authority to prevent the restructuring or to condition its approval, will approve a retail rate increase to prevent an increase in the cost of capital for either Pepco or other regulated utilities. These consequences are all necessarily speculative. It is not certain that the regulatory agencies will grant retail rate increases if Pepco makes a request or that the denial of a rate increase would severely affect Pepco's cost of capital so as to require a rate increase.

41. The decision of Pepco to enter into the Back-to-Back Agreement is best viewed as a matter of business judgment where the risk of non-performance was a factor to be considered, among many other factors, in deciding whether to sell facilities at certain prices. Pepco could have negotiated for greater security of its revenues, but did not.[15] In these circumstances, the Commission is not convinced that it should intercede to enhance the likelihood that Pepco will receive the contract revenues from Mirant.

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[15] *Allegheny Supply Company, LLC*, 101 FERC ¶ 61,278 at P25 (2002).

42. Several of the Protestors have claimed that if Pepco were not allowed to recover the revenues lost through retail rates due to Mirant's non-performance, Pepco's financial health could be impaired, causing its cost of capital to increase. However, Pepco has not made this claim and, indeed, stated in its most recent 10-K filed with the Securities and Exchange Commission that it does not expect the Mirant Bankruptcy to have a "material" effect on its financial condition.[16] Again, other than assertions, Protestors have offered little evidence as to the likelihood of these consequences on retail rates and thus cannot claim that Pepco will necessarily seek to pass on the purchased power costs to retail customers.

43. Protestors have offered little evidence on retail rates if Mirant fails to perform under the Back-to-Back Agreement. According to DC People's Counsel, the examiner in the bankruptcy proceeding estimated that if Mirant ceases to perform, Pepco would be deprived of payments, discounted to present value, of more than \$550 million. It is not clear whether this estimate, although apparently based on estimated future losses,[17] takes account of any money that might be recovered through the bankruptcy process. In any case, Protestors have offered no evidence as to how much current retail rates would be affected if Pepco were allowed to recover all of the estimated \$550 million through higher rates.

44. Protestors have further suggested that the ability or effectiveness of local regulatory authorities to address any rate consequences of the Restructuring is very limited. They state that the retail regulatory agencies do not have the authority to deny the Restructuring, to condition the Restructuring to mitigate retail rate concerns or to enforce Mirant's obligations under the Back-to-Back Agreement. They also note that under the FPA, retail regulatory agencies are required by federal law to permit utilities to recover Commission-approved power supply costs from retail customers. The Executive Director of the Maryland Commission (Executive Director) offered testimony to the effect that the Maryland Commission is likely to approve Pepco's recovery of unpaid purchased power costs under the Back-to-Back Agreement from its customers.

45. The purchased power costs at issue under the Back-to-Back Agreement were originally incurred by Pepco under power purchase agreements that the Maryland Commission determined to be necessary to serve Pepco's customers. That is, the Maryland Commission approved Pepco's signing the power supply contracts that initially

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[16] Pepco Holdings, Inc., Form 10-K for the fiscal year ending December 31, 2004 at 65, 109, 210 and 270.

[17] DC People's Counsel's Protest at 3.

obligated Pepco to pay the purchased power costs.[18] The Executive Director testified that Pepco was authorized to recover the costs from its customers, although it is not clear whether the recovery of costs was authorized as a direct consequence of the law that permits a utility to recover a Commission-approved purchased power costs from its customers or as a direct determination or order of the Maryland Commission. In any case, the Executive Director has testified that Mirant's assumption of the purchased power costs was intended to relieve Pepco's customers of the liability for those costs.[19]

4. CalPX's Concerns

46. CalPX alleges that the complexity of the restructuring and uncertainty about which entities will ultimately own certain assets make it difficult to definitively determine whether the transaction will materially affect the CalPX's ability to perform its wind-up functions or to recover any portion of wind-up fees from Mirant Marketing or CalPX's recovery of claims in the bankruptcy proceeding. CalPX also notes that if the Commission approves a proposed settlement filed by Mirant in Docket No. EL00-95-00, *et al*., it will be difficult for CalPX to determine the effect of the restructuring on non-settling parties and whether the flexibility to move assets from Mirant will affect the ultimate pay-out of any claims of CalPX. CalPX requests that the Commission evaluate the application to determine whether the transaction could undermine CalPx's ability to complete its wind-up functions. However, Applicants and Mirant Unsecured Creditors argue that the CalPX does not explain how the reorganization could either affect its own activities or its bankruptcy claims.

47. The Commission recently approved the settlement in EL00-95-000, et al., finding that CalPX's concerns about the settlement's implications for the prosecution of claims in the bankruptcy proceeding were without merit and noting that the settlement will not become effective without the approval of the Bankruptcy Court. We concluded that CalPX's concerns as expressed therein were more appropriately addressed by the

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[18] Maryland Agencies' Protest, Exhibit 1 at Paragraph No. 16.

[19] Maryland Agencies' Protest, Exhibit 2 at Paragraph Nos. 8-10. The Executive Director also states that the Maryland Commission staff regarded the assumption by Mirant and its effect on Pepco's customers as fair and reasonable in the context of the overall divestiture. He further states that under an agreement approved by the Maryland Commission, Pepco was obligated to refund part of its cash proceeds from the sale of its plants to its customers and that Mirant's assumption of the purchased power costs reduced these cash proceeds and thus the amounts refunded to Pepco's customers.

Bankruptcy Court and not at the Commission.[20] We regard CalPx's concerns in this proceeding in the same vein and conclude that the Bankruptcy Court is the appropriate forum for addressing CalPx's concerns.

The Commission orders:

(A) The proposed transaction is authorized upon the terms and conditions and for the purposes set forth in the application;

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates, or determinations of cost, or any other matter whatsoever now pending or which may become before the Commission;

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted;

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate;

(E) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the transaction; and

(F) Applicants shall notify the Commission within 10 days of the date that the disposition of jurisdictional facilities has occurred.

By the Commission. Commissioner Kelly dissenting with a separate statement to be issued later.

(S E A L)

Magalie R. Salas,
Secretary.

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[20] *See San Diego Gas & Electric Co. v. Sellers*, 111 FERC ¶ 61,186 (2005) *order on reh'g*, *San Diego Gas & Electric Co. v. Sellers*, 111 FERC ¶ 61,017 at P 37 (2005).