

129 FERC ¶ 61,138
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Chairman;
Suedeem G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Harbinger Capital Partners Master Fund I, Docket No. EC08-59-002
Ltd.
Harbinger Capital Partners Special
Situations Fund, L.P.

ORDER GRANTING CLARIFICATION
AND GRANTING REHEARING IN PART AND DENYING REHEARING IN PART

(Issued November 19, 2009)

1. In an order issued November 5, 2008 the Commission authorized under section 203(a)(1) of the Federal Power Act (FPA)¹ the disposition of up to 25 percent of the outstanding voting securities of Mirant Corporation (Mirant) to Harbinger Capital Partners Master Fund I, Ltd. (Harbinger Master Fund) and Harbinger Capital Partners Special Situations Fund, L.P. (Harbinger Special Situations Fund) (collectively, Harbinger) (Proposed Transaction).² Harbinger filed a request for rehearing, or in the alternative, clarification, of the November 5 Order. In this order, we grant in part and deny in part rehearing of the November 5 Order. We also clarify certain conditions that were imposed on the Proposed Transaction.

I. Background

2. In the November 5 Order, the Commission authorized the Proposed Transaction, finding it to be consistent with the public interest with the conditions imposed. Because the Proposed Transaction would result in a disposition of up to a 25 percent interest in Mirant and could therefore result in a change in control of a public utility, the Commission asserted jurisdiction over the Proposed Transaction under FPA section 203(a)(1).

¹ 16 U.S.C. § 824b (2006).

² *Harbinger Capital Partners Master Fund I, Ltd.*, 125 FERC ¶ 61,145 (2008) (November 5 Order).

3. Based on the facts presented in Harbinger's request for authorization and subject to certain conditions, the Commission concluded that the Proposed Transaction would not adversely affect competition in terms of horizontal market power. It noted that, although it had found that Harbinger has the ability to control Calpine,³ Harbinger's market power analysis indicated that the changes in market concentration increase the Herfindahl-Hirschman Index (HHI) by less than 50 points in all seasons/load conditions, indicating no failure of the Commission's competitive analysis screen.

4. In determining that the Proposed Transaction would not adversely affect competition in terms of horizontal market power, the Commission explained that Harbinger had made the representation that it will not have the ability to manage, direct or control the day-to-day wholesale power sales activities conducted by Mirant relating to Mirant's public utility subsidiaries, or have rights that would constitute control. The Commission stated that since it had already concluded that the Proposed Transaction could give Harbinger the ability to exercise control of Mirant, it will interpret Harbinger's representation to be a commitment that it will not exercise any ability it could have to control Mirant.

5. The November 5 Order accepted Harbinger's commitment not to cast any votes or take any actions that dictate the price at which power is sold from Mirant's generating facilities or that direct how and when power generated by the facilities will be sold unless it makes an appropriate filing under section 203 and that filing is accepted by the Commission. It also accepted Harbinger's commitment to have its investment advisor retain detailed books and records of securities trades and holdings on behalf of Harbinger for a period of not less than five years.

6. The Commission also concluded that the Proposed Transaction did not raise any vertical market power concerns, would not have an adverse effect on rates, and would not have any adverse effect on the effectiveness of federal or state regulation. Based on the facts presented, it found that the Proposed Transaction would not result in cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company.

³ November 5 Order, 125 FERC ¶ 61,145 at P 32 (citing *Entegra Power Group, LLC*, 125 FERC ¶ 61,143 (2008)).

7. Consistent with Commission precedent in similar cases,⁴ the November 5 Order required Harbinger to file with the Commission, for informational purposes, within 45 days of the end of each calendar quarter, a quarterly report of utility holdings by both Harbinger Master Fund and Harbinger Special Situations Fund stated in terms of the number of the shares held at the end of the quarter and as a percentage of the outstanding shares. The Commission also directed Harbinger to file with the Commission any filing it makes at the Securities and Exchange Commission (SEC) pertaining to Mirant on Schedule 13G or Schedule 13D. Any changes in the information provided on the initial Schedule 13G or 13D must be reflected in an annual amended filing due within 45 days of the end of each calendar year. Harbinger must also file with the Commission any comment or deficiency letters received from the SEC that concerns Schedule 13G- or 13D-related compliance audits conducted by the SEC.

II. Request for Rehearing

8. In its request for rehearing, Harbinger argues that its commitment not to exercise “control” over Mirant was made in the context of a specific definition of “control,”⁵ which is limited to dictating the price at which power is sold from Mirant’s generating facilities, or directing how and when power generated by the facilities of Mirant’s jurisdictional subsidiaries will be sold. Harbinger contends that if the meaning of “control” is not limited in this way, it unduly restricts Harbinger’s rights as a Mirant shareholder to vote shares and protect its investment interest.⁶ Harbinger therefore requests that the Commission clarify that its commitment not to exercise control over Mirant is limited to activities involving day-to-day operational control or that otherwise represent an exercise of market power.

⁴ See, e.g., *Legg Mason, Inc.*, 121 FERC ¶ 61,061 (2007); *Goldman Sachs Group, Inc.*, 121 FERC ¶ 61,059 (2007), *order on clarification*, 122 FERC ¶ 61,005 (2008); *Morgan Stanley*, 121 FERC ¶ 61,060 (2007), *order on clarification*, 122 FERC ¶ 61,094 (2008).

⁵ Harbinger December 5, 2008 Rehearing Request, Docket No. EC08-59-002, at 5 (citing *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 53) (2007).

⁶ Harbinger December 5, 2008 Rehearing Request at 7 (citing *Horizon Asset Management, Inc.*, 125 FERC ¶ 61,209, at P 62 (2008); *Mid-Continent Area Power Pool*, 102 FERC ¶ 61,226 (2003)). Harbinger does not specify what actions it may take to “protect its investment interest.”

9. Harbinger requests clarification of the condition that it must file with the Commission any filing it makes at the SEC pertaining to Mirant on Schedule 13G or Schedule 13D. It requests that the Commission clarify that Harbinger is only required to file comment or deficiency letters received from the SEC concerning Schedule 13G- or 13D- related compliance audits by the SEC that pertain to Harbinger's investment in Mirant, and only to the extent that such letters are public.

10. Harbinger also argues that the Commission erred in failing to indicate that the conditions set forth in the November 5 Order apply only to the extent Harbinger owns 10 percent or more of Mirant's voting securities and thus is holding securities pursuant to the authorization granted in the November 5 Order. It contends that imposing conditions on Harbinger's share acquisitions that are made pursuant to blanket authorizations, rather than the November 5 Order, when such conditions are not imposed on others, would be unduly discriminatory. In addition, Harbinger argues that the Commission did not provide adequate reasoning to justify the imposition of conditions on Harbinger's acquisition of Mirant when Harbinger's application to acquire up to 25 percent of Mirant's outstanding voting securities raised no competitive issues.

III. Commission Determination

11. We reject Harbinger's argument that the Commission did not provide adequate reasoning to justify the imposition of conditions on Harbinger's acquisition of Mirant's voting securities. We note that several of the conditions imposed in the November 5 Order were commitments that were proffered by Harbinger and accepted by the Commission.⁷ Further, in the November 5 Order, the Commission explained that, because the Proposed Transaction involved the disposition of 10 percent or more of voting interests in Mirant, it could result in a change in control of a public utility. Accordingly, the Commission asserted jurisdiction over the Proposed Transaction under FPA section 203(a)(1). The Commission has the responsibility to impose conditions on its approval of a transaction if the conditions are necessary to ensure that the transaction is in the public interest,⁸ and to require compliance filings to show that such conditions have been satisfied. We continue to find that the conditions in the November 5 Order imposing reporting requirements are necessary for this purpose. The Commission imposes reporting requirements to monitor the status of completed transactions. Since the acquisition of Mirant voting securities by Harbinger will take place over time, the

⁷ November 5 Order, 125 FERC ¶ 61,145 at P 33. *See also* Harbinger July 28, 2008 Response to Deficiency Letter at 3, 5-6.

⁸ 16 U.S.C. § 824b (2006).

Schedule 13 reporting requirements allow the Commission to track the status of the Proposed Transaction without causing undue burden on the Applicants.

12. We grant Harbinger's request for clarification that Harbinger is required only to file comment or deficiency letters received from the SEC concerning Schedule 13G- or 13D- related compliance audits by the SEC that pertain to Harbinger's investment in Mirant. In addition, we clarify that the conditions set forth in the November 5 Order apply only to the extent Harbinger holds 10 percent or more of Mirant's outstanding voting securities, and thus is holding such securities pursuant to the authorization granted in the November 5 Order.

13. However, we will deny Harbinger's request that it only be required to file comment or deficiency letters received from the SEC concerning Schedule 13G- or 13D- related compliance audits pertaining to Harbinger's investment in Mirant to the extent that such letters are public. Harbinger provides no support for this request. It is effectively asking this Commission to draw a distinction based on a sister agency's determinations of whether its communications should be public. Because we are relying on Harbinger's SEC filings, in part, to support compliance with conditions imposed in furtherance of our responsibilities under section 203 of the FPA, it is important that this agency receive all relevant filings, not just the public ones. Harbinger may file the documents that the SEC has designated as confidential with this Commission with a request for confidential treatment. This should address Harbinger's concerns with making the matter public.

14. Finally, we will relieve Harbinger of the condition imposed in the November 5 Order that Harbinger not exercise any ability it could have to control Mirant. We find that this change is appropriate in light of our previous finding that Harbinger's acquisition of up to 25 percent of Mirant's voting securities would not create competitive concerns in any market even if Harbinger controlled Mirant, and would not adversely affect rates or regulation or raise concerns about inappropriate cross-subsidization.

The Commission orders:

Harbinger's request for clarification and/or rehearing is hereby granted in part and denied in part.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.