UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc., *et al.*)	**Docket Nos.**	**ER00-1969-000, ER00-1969-002, ER00-1969-003, ER00-1969-004, ER00-1969-011, EL00-57-000, EL00-57-002, EL00-60-000, EL00-60-002, EL00-63-000, EL00-63-002, EL00-64-000, and EL00-64-002.**

MOTION OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC. FOR LEAVE TO RESPOND AND RESPONSE TO MOTION TO INTERVENE AND ANSWER OF MIRANT COMPANIES

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.213, the New York Independent System Operator, Inc. ("NYISO"), by counsel, respectfully requests leave to submit a response, and submits this response, to the Motion to Intervene and Answer of the Mirant Companies to Motions to Establish Hearing and Discovery Procedures ("Mirant Motion"). The Mirant Motion was submitted on August 2, 2004, by Mirant Americas Energy Marketing, L.P., Mirant Bowline, LLC, Mirant Lovett, LLC and Mirant NY-Gen LLC (together, the "Mirant Companies").

I. Introduction and Request for Leave to Respond

The Mirant Motion is styled as a Motion to Intervene and Answer, but in substance raises new issues relating to the Mirant Companies' bankruptcy proceedings, and affirmatively requests relief from refunds in the above dockets on the basis of the newly-raised bankruptcy issues. Since the Mirant Motion requests substantive relief, it constitutes a motion to which the NYISO

is entitled to respond under Rule 213. Alternatively, the NYISO submits that good cause exists for the Commission to waive its proscription on answers to answers. The Mirant Motion raises new issues to which the NYISO would not otherwise have an opportunity to respond. Granting the NYISO this opportunity to respond will assist the Commission in its decisionmaking, will clarify issues in dispute, and provide a more complete basis for resolution of the issues raised by Mirant.

II. Answer

A. *The Proceedings in these Dockets are not Barred by the Automatic Stay*

The Mirant Companies assert that any proceedings in these dockets relating to the Mirant Companies are barred by the automatic stay of § 362(a)(1) of the Bankruptcy Code.[1] That assertion does not withstand scrutiny. Section 362(a)(1) bars

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

These dockets do not, however, involve an "administrative, or other . . . proceeding *against the debtor*," *i.e.,* against the Mirant Companies. As can be seen from the prior filings in these dockets and the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Consolidated Edison Co. of N.Y. v. FERC,* 347 F.3d 964 (2003) ("*ConEdison*"), the refunds at issue arise from complaints filed by various load-serving entities ("LSEs").[2] The court in

[1] 11 U.S.C. § 362

[2] Niagara Mohawk Power Corporation, FERC Docket No. EL00-57-000, New York State Electric & Gas Corporation, FERC Docket No. EL00-63-000, and Rochester Gas and Electric Corp., FERC Docket No. EL00-64-000; in addition, a Motion to Intervene in Support of the Suspension of Market Based Rates, Request for Investigation, and Request for Retroactive Relief (continued…)

ConEdison directed the Commission to reconsider certain issues first raised by the LSEs in their complaints and interventions, and subsequently pursued by them on appeal. Those complaints, however, all were complaints against the NYISO, not the Mirant Companies or any of them. Nothing in the Mirant Companies' bankruptcy proceedings can or should bar the NYISO from responding to complaints against it. Moreover, while certain other operating reserves refund issues were raised by the NYISO in its initial filing in Docket No. ER00-1969, the Commission's determination of those issues was not remanded by the D.C. Circuit; and in any event, the NYISO's filing was not a complaint against the Mirant Companies but a request for authorization for certain tariff amendments and for the NYISO to take certain actions under the NYISO's tariffs. Thus, § 362(a)(1) by its terms simply does not apply to the operating reserves remand proceeding.

In addition, the Mirant Motion also overlooks the fact that § 362(a)(1) serves to stay only proceedings "to recover a claim against the debtor . . . ." That is not the case here. Even viewed in the light most favorable to the Mirant Motion, the ultimate result of these remand proceedings will be an order from the Commission to the NYISO directing the NYISO to employ certain methodologies in determining operating reserves refunds for the Relevant Period. Thereafter, the NYISO will act as directed to determine the refund for any individual seller of operating reserves, and will incorporate such a determination in the NYISO's billing and settlement process. Only at that point would there be any action "to recover a claim against the debtor." Prior to that time, any assertions by the Mirant Companies premised, as must be the case here, on barring action "to recover a claim" is premature. Indeed, it is only by permitting the instant

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of the LSE Interventors was filed by the foregoing entities and Consolidated Edison Company of New York, Inc. and Orange & Rockland Utilities, Inc.

proceedings to reach a conclusion that any action "to recover the claim" could be taken. While any such refund determination may ultimately be subject to collection through the Mirant Companies' bankruptcy proceedings, in the Commission's proceedings the Mirant Motion's reliance on the automatic stay is entirely misplaced.

B. *This Proceeding is Exempt from the Automatic Stay under § 362(b)(4) of the Bankruptcy Code*

In addition to not being within the language of § 362(a)(1), the remand proceedings are exempt from the automatic stay under § 362(b)(4) of the Bankruptcy Code,[3] which places outside the automatic stay "the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power . . . ." The issue in these remand proceedings is the proper rate under the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff") for operating reserves sold and purchased pursuant to the Services Tariff during the period from January 29, 2000, to March 27, 2000 ("Relevant Period"). This is particularly so with respect to any refunds from the Mirant Companies, which are identified in the NYISO's proposed refund determinations only as a seller of spinning reserves, as to which the D.C. Circuit held that the NYISO price floor at non-spinning reserves prices was not authorized by the Services Tariff. The spinning reserves remand issue is thus the determination of the appropriate spinning reserves rates required by the Services Tariff after removing the invalidated price floor.

The application of § 362(b)(4) to such regulatory agency rate setting has been recognized in a number of cases. For example, the ability of the U.S. Department of Energy ("DOE") to order refunds or fines based upon violations of its regulations has been held to fall within the

[3] 11 U.S.C. § 362(b)(4).

police power exception to the automatic stay.[4] Much like the present proceeding, these cases involved a refund or fine arising from violation of a pricing regulation.

It is important for the Commission to recognize that the NYISO is not asking the Commission to *enforce* a refund claim against the Mirant Companies, but rather to set the appropriate spinning reserves rates and to authorize the NYISO to determine and seek refunds from all sellers of spinning reserves during the Relevant Period based on those rates. The Bankruptcy Code recognizes a distinction between adjudicating a refund requirement, and enforcing a judgment for the refund amount. Although the Bankruptcy Code does not define "enforcement" of a judgment, the courts have held that a governmental agency may issue a monetary judgment against a debtor without violating the automatic stay so long as it does not attempt to enforce that judgment by collecting against the debtor's assets.[5] Moreover, this remand proceeding would not result in a "judgment" against the Mirant Companies, but rather an order directed at the NYISO establishing the appropriate rate-setting methodology to be employed by the NYISO in calculating, and subsequently seeking to obtain, operating refunds for the Relevant Period. Thus, the Commission's actions in setting the relevant rates and the

[4] *See Kellogg v. United States Dept. of Energy (In re Compton Corp.)*, 90 B.R. 798, 804 (N.D. Tex. 1988) (holding that DOE's liquidation of damages against an oil supplier for pre-petition price over-charges in violation of DOE's regulations fell within the police powers exception of Section 362(b)(4)); *and CPI Crude, Inc. v. United States Dept. of Energy*, 77 B.R. 320, 323-24 (D.C. Cir. 1987).

[5] *See In re Compton*, 90 B.R. at 804-05 (finding that DOE could seek judgment against the debtor because "enforcement of any such judgment would come later, *i.e.*, when funds are equitably dispersed [sic] to [the debtor's] creditors"); s*ee also CPI Crude*, 77 B.R. at 323-24 ("[T]he assessment of the amount of money owed for violation of a given statutory provision, if it is not to be immediately enforced, will do little to interfere with the orderly resolution of the debtor's legitimate financial concerns.").

resulting refund that may be owed by the Mirant Companies to the purchasers of spinning reserves fall within the police powers exception contained in § 362(b)(4).

C. *Motion in the Bankruptcy Proceeding for Relief from the Automatic Stay*

To avoid any doubt about the scope of the automatic stay in the Mirant Companies' bankruptcy proceedings, the NYISO intends to make a filing in those proceedings asking the court to confirm that the automatic stay does not bar the Commission's determination of an appropriate level of operating reserves refunds for the Relevant Period, or in the alternative asking the court to lift the automatic stay as applicable to such determination. Any such filing in the bankruptcy proceeding, however, should not deter the Commission from exercising its independent authority to determine that the automatic stay is not applicable to the proceedings now before it.

D. *The Ultimate Enforceability of a Refund Claim Against the Mirant Companies Is for Determination by the Bankruptcy Court, and Could Not Now be Determined by the Commission*

The Mirant Companies also argue that the NYISO is barred from ever enforcing against them a refund claim arising out of this proceeding because the NYISO did not file such a claim by the claims bar date in their bankruptcy proceeding. The United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") has exclusive jurisdiction over claims asserted against the Mirant Companies.[6] Thus, the Bankruptcy Court, and not this Commission, is the appropriate forum for adjudication of the validity and enforceability of any refund claim that may arise from the proceedings currently before the Commission.

[6] *See* 28 U.S.C. §§ 157(b) and 1334.

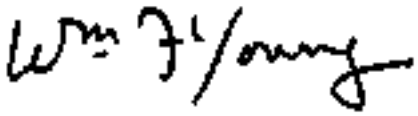
Moreover, even if it were appropriate for the Commission to consider the validity and enforceability of operating reserves refund claims, there is no basis for the Commission now to conclude that any refund authorized by the Commission could not be recovered against the Mirant Companies based on claim requirements in the bankruptcy proceeding. The NYISO timely filed two proofs of claim in the bankruptcy proceeding. Those claims encompass any spinning reserves refund claim, which would arise from the ordinary course of the operating reserves markets, and are subject to amendment. In addition, the Services Tariff is an executory contract between the NYISO and the Mirant Companies, and the Mirant Companies have not yet determined whether to assume or reject it. If the Mirant Companies reject the Services Tariff, the NYISO will then have the right to file a claim for rejection damages, including any refund claim arising out of this proceeding. Alternatively, if the Mirant Companies assume the Services Tariff, the NYISO will then have the right to assert any refund claim as part of the amounts the Mirant Companies must pay in assuming the Services Tariff. In short, the Commission does not have jurisdiction to adjudicate the ultimate enforceability of a refund claim, and the proof of claim defenses raised by the Mirant Companies are premature and in no way affect the need or the ability of the Commission to move forward with this proceeding.

III. Conclusion

Accordingly, for the reasons set forth above, the NYISO respectfully requests that the Commission deny the Mirant Motion, to the extent that it asserts that proceedings in these dockets are in any way barred by the automatic stay of the Bankruptcy Code, or asserts that an operating reserves refund from any of the Mirant Companies would be barred by proof of claim requirements.

Respectfully submitted,

NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.



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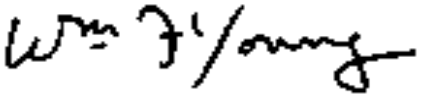
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2003).

Dated at Washington, DC this 17th day of August, 2004.



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Submission Contents