

Nos. 04-10001; No. 04-10004; No. 04-10094

In The United States Court Of Appeals
For The Fifth Circuit

IN THE MATTER OF: MIRANT CORPORATION, *ET AL.*,

Debtors/Appellants

MIRANT CORPORATION, *ET AL.* AND THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF MIRANT CORPORATION,

Appellants

v.

POTOMAC ELECTRIC POWER COMPANY AND
FEDERAL ENERGY REGULATORY COMMISSION,

Appellees

Relating to Appeals from
Case Nos. 4:03-CV-1242-A , 4:03-CV-944-A and 4:03-CV-1174-A
In The United States District Court For The Northern District Of Texas
United States District Judge John H. McBryde

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STATEMENT REGARDING ORAL ARGUMENT

The appeal involves the scope and extent of bankruptcy jurisdiction and the ability of bankruptcy courts to administer property of the estate. The resolution of such issues is of prime importance to the parties to this particular bankruptcy—one of the largest and most complex Chapter 11 cases ever filed.¹ The issues are likewise of profound importance to the public at large and the orderly workings of complex bankruptcy matters throughout the nation. For the foregoing reasons, the Committee respectfully requests that the Court entertain oral argument in determining this case on the merits.

¹ Indeed, the resolution of these issues involves a difference of hundreds of millions of dollars to the bankruptcy estate and thus impacts the prospects for a successful reorganization. It also impacts numerous other companies either in bankruptcy or contemplating bankruptcy who have FERC-regulated contracts.

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REFERENCES TO THE PARTIES AND THE RECORD

<u>REFERENCE</u>	<u>MEANING</u>
RE22:2	Committee Record Excerpt 22 at page 2.
94R1:5	Record in Fifth Circuit Cause No. 04-10094 at volume 1, page 5.
6X5	Volume 6 of Exhibits submitted in support of Debtors' Motions for Temporary And Preliminary Injunctive Relief at Exhibit No. 5 (contained in the record for Fifth Circuit Cause No. 94-10001, Box 3).
The Committee	The Official Committee of Unsecured Creditors of Mirant Corporation
Appellants	The Committee and the Debtors
PEPCO	Potomac Electric Power Company
FERC	Federal Energy Regulatory Commission
Appellees	PEPCO and FERC

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I. JURISDICTIONAL STATEMENT

These consolidated appeals arise from three cause numbers in the District Court relating to the Debtors' motion to reject a contract central to this dispute.³ The District Court had jurisdiction under 28 U.S.C. § 1334(a), (b) & (e).

The District Court refused to authorize rejection in Cause No. 4:03-CV-1242-A (Fifth Circuit No. 04-10001) on December 23, 2003, and ordered the Debtors and the Committee to show cause why the injunctive relief previously entered by the Bankruptcy Court should not be dissolved.⁴ The Court dismissed the action on January 6, 2004.⁵ The Debtors filed a notice of appeal on January 5, 2004⁶ and an Amended Notice of Appeal on

³ Those three case numbers are: (1) No. 4:03-CV-944-A (an adversary proceeding styled *Mirant Corporation, et al. v. FERC and PEPCO*); (2) No. 4:03-CV-1242-A, the style of which includes the court-ordered caption: "Matter of Debtors' Motion for Order Authorizing the Debtors to Reject the Back-to-Back Agreement Dated December 19, 2000, and Amendments Thereto, With Potomac Electric Power Company as Executory Contracts"; and (3) No. 4:03-CV-1174-A (an adversary proceeding styled *Mirant Corporation, et al. v. FERC*).

⁴ RE2:28-29.

⁵ RE4.

⁶ RE3.

January 6, 2004.⁷ The Committee filed a notice of appeal on January 6, 2004.⁸ This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

In Cause No. 4:03-CV-944-A (Fifth Circuit No. 04-10004), the District Court dissolved the injunctive relief previously entered by the Bankruptcy Court⁹ and entered a final judgment on January 6, 2004.¹⁰ The Debtors and the Committee filed notices of appeal on January 6, 2004.¹¹ This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 & 1292(a).

In Cause No. 4:03-CV-1174-A (Fifth Circuit No. 04-10094), the District Court granted FERC's motion to dissolve the TRO and entered a final judgment therein on January 26, 2004.¹² The Debtors filed a notice of appeal on January 28, 2004.¹³ The Committee filed its notice of appeal on

⁷ RE5.

⁸ RE6.

⁹ *See* RE8; RE9; RE10; RE11.

¹⁰ RE12; RE13.

¹¹ RE14; RE15.

¹² RE18; RE19.

¹³ RE20.

January 29, 2004.¹⁴ This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 & 1292(a).

II. STATEMENT OF ISSUES

The Bankruptcy Code and related provisions of the Judicial Code vest the bankruptcy tribunal with “exclusive jurisdiction” over bankruptcy cases and over the property of the debtor and the bankruptcy estate. The Bankruptcy Code likewise allows a debtor to reject “any executory contract” with no exception made for the type of contract at issue here.

- A. Did the District Court err in concluding it lacked jurisdiction to determine Debtors’ rejection motion?
- B. Did the District Court err in dissolving the Bankruptcy Court’s injunctions based upon its conclusion that it lacked jurisdiction over the rejection dispute?
- C. Did the District Court err in refusing to authorize rejection?

III. STATEMENT OF THE CASE

A. Nature Of The Case

This dispute arises from the Debtors’ efforts to reject a contract with PEPCO referred to as the “Back-to-Back Agreement” pursuant to Section 365 of the Bankruptcy Code and the Appellees’ contention that the District

¹⁴ RE21.

Court does not have jurisdiction to order such relief.¹⁵ The Committee has provided a copy of the Back-to-Back Agreement as Record Excerpt 22 (“RE22”).

B. Course Of Proceedings And Disposition Below

Beginning on July 14, 2003, Mirant Corporation and certain of its affiliates each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.¹⁶ By Motion dated August 28, 2003, the Debtors sought authority from the Bankruptcy Court to reject the Back-to-Back Agreement.¹⁷ The Debtors filed adversary proceedings against FERC and PEPCO, seeking injunctive relief to prevent FERC and PEPCO from taking any action or issuing any order requiring the Debtors to perform under the Back-to-Back Agreement pending the Bankruptcy Court’s ruling on the rejection motion.¹⁸ After conducting several hearings and reviewing the

¹⁵ RE2:20-27.

¹⁶ 1R5:2, 31. The Debtors are operating their businesses and managing their properties as debtors in possession under 11 U.S.C. §§ 1107 & 1108. The Office of the United States Trustee appointed the Committee on July 25, 2003 pursuant to 11 U.S.C. § 1102(a) and amended the appointment on February 10, 2004.

¹⁷ 1R4:297.

¹⁸ 4R1:174; 94R1:93.

evidence presented, the Bankruptcy Court issued the requested injunctive relief.¹⁹

In search of greener pastures, FERC and PEPCO asked the District Court to withdraw the reference to the Bankruptcy Court and decide the rejection motion and related adversary proceedings sitting as a court of original jurisdiction.²⁰ The District Court withdrew the Bankruptcy Court reference concerning the adversary proceedings and the rejection motion.²¹ On December 23, 2003, the District Court denied the Debtors' motion to reject the Back-to-Back Agreement on the basis that FERC had exclusive jurisdiction, and ordered the parties to show cause why all injunctive relief entered by the Bankruptcy Court should not be dissolved.²² On January 6,

¹⁹ RE11; RE17.

²⁰ 94R1:24; 4R1:1; 1R1:1. Subject to enumerated exceptions, the Judicial Code vests a district court with original and exclusive jurisdiction over all bankruptcy cases. *See* 28 U.S.C. § 1334(a) (1993 & Supp. 2003). A bankruptcy court inherits jurisdiction when the case is referred to it under 28 U.S.C. § 157(a). The United States District Court for the Northern District of Texas has a standing order referring all bankruptcy cases to the Bankruptcy Court. Concerning the motion to withdraw the reference in this case, the Bankruptcy Court issued a written report recommending that the District Court withdraw the reference with respect to the adversary proceedings, but not with respect to the rejection motion. 4R1:37; 94R1:24-25. The District Court, however, withdrew the reference over all matters now consolidated before this Court. 4R4:995; 94R2:325.

²¹ 4R4:995; 94R2:325.

²² RE2:28-29.

2004, the District Court entered an order dissolving all injunctive relief in Cause No. 4:03-CV-944-A.²³ On January 26, 2004 (and without an opportunity for the Committee to be heard),²⁴ the District Court dissolved the TRO against FERC that was issued in Case No. 4:03-CV-1174-A.²⁵

IV. STATEMENT OF FACTS

A. PEPCO Auctioned Off Its Power Generation Assets

PEPCO is a public utility company that services retail customers in the District of Columbia and a portion of Maryland.²⁶ As it relates to this appeal, PEPCO is a party to two power purchase agreements (“PPAs”), one with Panda and one with Ohio Edison.²⁷ Regardless of what happens here, however, *the PPAs are inviolate and will be fully enforced.* Neither Panda

²³ The District Court likewise refused to stay its order, prompting the need for emergency motion practice before this Court. This Court granted an emergency stay on January 9, 2004, which was later dissolved in favor of an expedited briefing schedule.

²⁴ Although the Committee requested a stay pending appeal in its opposition to the dissolution of this TRO (filed January 28, 2004), the District Court dissolved the TRO on January 26, 2004, before the Committee’s response to FERC’s motion to dissolve was due.

²⁵ RE18.

²⁶ RE23:2.

²⁷ 5X2; 6X3.

nor Ohio Edison are parties to this appeal and nothing that is done or that remains undone here will negate their PPAs.

This appeal involves the so-called Back-to-Back Agreement by which PEPCO attempted to relieve itself of its burdens under the PPAs. In 1999, PEPCO sought to divest itself of its generating assets and certain PPAs.²⁸ PEPCO pursued a divestiture plan contemplating an auction sale with an Asset Purchase and Sale Agreement (“APSA”) between PEPCO and the winning bidder.²⁹ Mirant was the “winner,” so, in an agreement dated June 7, 2000, PEPCO sold its electric generation facilities to Southern Energy, Inc., predecessor-in-interest to Mirant.³⁰

B. Unable To Assign All Of Its Power Purchase Agreements, PEPCO Entered Into The Back-to-Back Agreement

The APSA contemplated the assignment of numerous contracts including several PPAs.³¹ The terms of the Panda and Ohio Edison PPAs, however, prohibited their outright assignment to Mirant without the

²⁸ RE23:2.

²⁹ RE23:2.

³⁰ RE23:2; RE24.

³¹ RE24 at § 2.1 (purchase of Auctioned Assets); RE24 at § 2.2(a)(iv) (defining Auctioned Assets as including contracts and agreements); RE24 at § 2.3(a)(i) (buyer assumes PPA liabilities).

consent of Panda or Ohio Edison.³² Panda and Ohio Edison each withheld consent.³³

PEPCO and Mirant, however, had entered into the Back-to-Back Agreement to ensure that the APSA could be consummated notwithstanding the actions of third parties like Panda or Ohio Edison. The Back-to-Back Agreement is an alternative to outright assignment of any PPA not successfully assigned to Mirant as of the closing date,³⁴ and it has two main features relevant to this dispute:

- Mirant is to purchase from PEPCO “all capacity, energy, ancillary services and other benefits” that PEPCO received from Panda and Ohio Edison under the PPAs.³⁵
- Mirant is to pay PEPCO the amount PEPCO owed to Panda and Ohio Edison under the PPAs.³⁶

Essentially, PEPCO can pass through the cost of all energy that is delivered by Panda or Ohio Edison at the same price that PEPCO is obligated to pay Panda or Ohio Edison. Mirant describes these as the “take or pay”

³² RE23:3.

³³ RE23:3.

³⁴ RE23:3.

³⁵ RE22 at § IIB.

³⁶ RE22 at § IIC.

provisions of the agreement.³⁷ PEPCO and the Debtors activated the Back-to-Back Agreement by way of letter agreement dated December 19, 2000.³⁸

C. The Back-To-Back Agreement Was Only Peripheral To FERC's Action On The Divestiture

The APSA and the Back-to-Back Agreement were filed with FERC as part of the divestiture transaction. Specifically, on September 20, 2000, Southern and PEPCO filed with FERC a joint application for authorization of the divestiture transaction under the Federal Power Act (the "FPA").³⁹ The record shows that the Back-to-Back Agreement was one of the many agreements that were filed with the Application.

Panda intervened and protested,⁴⁰ claiming that FERC should either (1) reject the Back-to-Back Agreement (a/k/a Schedule 2.4) as unjust and

³⁷ The Back-to-Back Agreement had a third aspect providing that the Debtors would act as PEPCO's representative "for all purposes to the fullest extent permitted under the unassigned PPAs." This feature, however, was struck down in separate, state litigation between PEPCO and Panda as being equivalent to an impermissible assignment in derogation of the PPAs' anti-assignment provisions. *Pub. Serv. Comm'n v. Panda-Brandywine, L.P.*, 825 A.2d 462, 472 (Md. 2003). The Maryland court made no ruling concerning the other aspects of the Back-to-Back Agreement. See *infra* at n.53.

³⁸ RE22.

³⁹ RE25.

⁴⁰ RE26:4.

unreasonable absent Panda's *consent* or (2) suspend the agreement pending a hearing.⁴¹ FERC, however, disposed of the challenge on the grounds that the PPAs remained essentially unchanged by the Back-to-Back Agreement:

Since PEPCO *will remain the purchaser* under the proposed transactions for the unassigned PPAs, Panda's concerns are misplaced. PEPCO will resell the PPA entitlements to [Mirant] at a rate equal to its payment obligations in the PPAs, therefore the Commission will accept Schedule 2.4. as just and reasonable. Consistent with PEPCO's proposal, we will accept Schedule 2.4 as an unexecuted service agreement under [PEPCO's] Market-Based Rate Tariff and direct PEPCO to file an executed service agreement covering Schedule 2.4 once it has reached agreement with the PPAs.⁴²

As required, PEPCO separately filed the Back-To-Back Agreement under *PEPCO's own* electric tariff.⁴³ To this day, PEPCO remains the purchaser of electricity under the PPAs, and it will remain the purchaser whether or not the Back-to-Back Agreement is rejected. Likewise, PEPCO

⁴¹ RE26:12-13.

⁴² RE26:13 (emphasis added).

⁴³ RE27:1.

pays the filed rates to Panda or Ohio Edison, and it will continue to do so whether or not the Back-to-Back Agreement is rejected.

D. The Debtors Applied Their Business Judgment To Properly Reject A Burdensome Contract

As set out more completely hereafter, the Bankruptcy Code allows a debtor to analyze its contractual relationships in order to reject (*i.e.*, efficiently breach) and stop performing those agreements that are unfavorable to the bankruptcy estate or the debtor's prospects for reorganizing. To that end, Mirant conducted a thorough analysis of the impact of continued compliance with the Back-to-Back Agreement on the Debtors' business⁴⁴ through performance of financial analyses and sensitivity studies concerning the impact of the Back-to-Back Agreement.⁴⁵

The analysis revealed that unless the Back-to-Back Agreement was rejected, the Debtors would be required to buy power from PEPCO at prices substantially higher than market prices.⁴⁶ The difference between the market price and the price payable under the Back-to-Back Agreement

⁴⁴ RE23:6.

⁴⁵ RE23:6.

⁴⁶ RE23:6-7.

amounts to millions and, in some cases, tens of millions of dollars in losses each month.⁴⁷ Between September 2003 and December 2005, for example, losses under the Back-to-Back Agreement are estimated to exceed \$340 million.⁴⁸ The losses during the full term of the Back-to-Back Agreement, the Panda portion of which runs until 2021, are much greater. Nevertheless, Panda and Ohio Edison will continue to sell their power to PEPCO whether or not Mirant successfully rejects the Back-to-Back Agreement because (as FERC previously found) PEPCO remains the purchaser under the unassigned PPAs pursuant to rates filed under its own tariff.⁴⁹ For Mirant's part, however, the Debtors moved to reject the Back-to-Back Agreement as a result of the Debtors' business judgment analysis.⁵⁰ If permitted, the Debtors' rejection would create a claim in the Mirant bankruptcy on behalf of PEPCO that would be calculated based upon the rates PEPCO continues to pay Panda and Ohio Edison.⁵¹

⁴⁷ RE23:7.

⁴⁸ RE23:7.

⁴⁹ RE26:13.

⁵⁰ 1R4:297.

⁵¹ See 11 U.S.C. §§ 365(g) & 502(g) (1993 & Supp. 2003); see *infra* § VI.E.1.

E. Reversing Its Prior Position, PEPCO Now Points To FERC To Avoid Rejection

PEPCO understandably wants to collect the \$500 million value it places on the Back-to-Back Agreement⁵² rather than pursue a breach claim in bankruptcy. Thus, PEPCO looks to FERC as a more favorable forum than the Bankruptcy Court for coercing continued compliance and vaulting ahead of its fellow creditors. PEPCO has previously litigated the validity of the Back-to-Back Agreement in Maryland's courts.⁵³ Notwithstanding that litigation over the contract in a forum other than the FERC, PEPCO *now* argues that the same Back-to-Back Agreement is within FERC's

⁵² RE28:1-2.

⁵³ Even before the APSA transaction closed, Panda initiated litigation in Maryland, challenging the Back-to-Back Agreement as an improper assignment. RE23:4; *Panda-Brandywine*, 825 A.2d at 463. Tellingly, PEPCO litigated these issues in state court with no intervention by or appeal to FERC. The Maryland Public Service Commission entered an order declaring that the Back-to-Back Agreement was not an improper assignment (*Panda-Brandywine*, 825 A.2d at 463); however, the Circuit Court and Court of Special Appeals held that it was. *Panda-Brandywine*, 825 A.2d at 463-64. Maryland's high court agreed, holding that Section 2.4D of the agreement, appointing the Debtors as PEPCO's "representative for all purposes" in administering the Panda PPA, "constitute[d] an assignment of rights and obligations under the PPA in contravention of § 19.1 of that agreement and that it is therefore invalid and unenforceable." *Panda-Brandywine*, 825 A.2d at 472. PEPCO's delegation of the right of control over operations made the arrangement "more than just a 'back to back' resell agreement." *Panda-Brandywine*, 825 A.2d at 470-71. Thus, PEPCO participated in and FERC allowed three years of litigation in four levels of state courts, resulting in a finding that *another* portion of this contract, supposedly subject to FERC's exclusive jurisdiction, was unenforceable.

exclusive jurisdiction over wholesale power rates. After withdrawing the matter from the bankruptcy court, the District Court, the Hon. John McBryde presiding, agreed.⁵⁴ The District Court neither cited the leading Supreme Court authority on the question⁵⁵ nor construed Section 365 of the Bankruptcy Code and its exceptions in the manner required by Supreme Court authority.⁵⁶ In fact, the District Court did little more than simply adopt the Appellees' position that the rejection motion was an attack on rates approved by FERC. On that basis, the District Court concluded that exclusive jurisdiction resided in an administrative body rather than an Article III court exercising bankruptcy jurisdiction.⁵⁷ This appeal followed.

V. SUMMARY OF THE ARGUMENT

Section 365 of the Bankruptcy Code is unmistakably clear—a bankruptcy court may entertain a debtor's motion to reject *any* executory contract. While Congress expressly excepted certain contracts from

⁵⁴ RE2.

⁵⁵ *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

⁵⁶ *Bildisco*, 465 U.S. at 521-22; *see also United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (holding that plain meaning should govern in interpreting the Bankruptcy Code).

⁵⁷ RE2:19-20.

bankruptcy court jurisdiction in Section 365, it conspicuously omitted any exception for wholesale power contracts. If, as the Appellees claim, these provisions are repugnant to the FPA, they also post-date the FPA and therefore take precedence over it.

In fact, the Appellees' efforts to create a conflict between FERC and the bankruptcy courts distort the nature of rejection and FERC's jurisdictional grant. Rejection is *nothing* like a rate alteration. The contracted rates in the PPAs remain the same and those exact rates will be used to compute PEPCO's claim for rejection damages under the Back-to-Back Agreement. Thus, Sections 205 and 206 of the FPA are not even implicated by a bankruptcy court's consideration of a motion to reject. Moreover, Sections 205 and 206 of the FPA do not deprive the bankruptcy court of its exclusive jurisdiction. Unlike other sections of the FPA, Congress did not carve out wholesale power contracts in Sections 205 and 206 as an exception to a bankruptcy court's jurisdiction to authorize rejection. As a result, no such limitation was intended.

The factual record in the court below supporting the merits of rejection was undisputed and in favor of rejection. The District Court's sole basis for denying rejection and dissolving the Bankruptcy Court's

injunctions was its erroneous jurisdictional conclusion. Because the District Court had jurisdiction, the Debtors are entitled both to reject the agreement and to an injunction protecting the Debtors' decision to reject from regulatory interference.

VI. ARGUMENT

A. Standard Of Review

Findings of fact made by the district and bankruptcy courts are reviewed for clear error, and conclusions of law are reviewed *de novo*. See *Williams v. Int'l Bhd. of Elec. Workers Local 520 (In re Williams)*, 337 F.3d 504, 508 (5th Cir. 2003); *In re El Paso Refinery, L.P.*, 302 F.3d 343, 348 (5th Cir. 2002); *In re Davis*, 170 F. 3d 475, 477 (5th Cir. 1999). A court's interpretation of the Bankruptcy Code is considered a conclusion of law subject to *de novo* review. See *In re Davis*, 170 F.3d at 477. The same is true for a review of a bankruptcy court's exercise of jurisdiction. See *In re El Paso Refinery, L.P.*, 302 F.3d at 348. *De novo* review affords no deference to the lower court's legal analysis or conclusions. See *Reich v. Lancaster*, 55 F.3d 1034, 1045 (5th Cir. 1995). Only legal conclusions are at issue in this appeal, and the *de novo* standard of review is thus applicable.

B. The Plain Language Chosen By Congress Grants Authority To The Bankruptcy Tribunal To The Exclusion Of FERC

This Court is called upon to harmonize and construe the Judicial Code, which gives the bankruptcy tribunal exclusive jurisdiction over the bankruptcy estate, the Bankruptcy Code, which authorizes the rejection of “any” executory contract, and the FPA, which gives FERC jurisdiction over wholesale power rates. The District Court denied the rejection motion and all injunctive relief based upon a single, jurisdictional conclusion: that the Bankruptcy Code did not create an exception *to FERC’s* exclusive authority. Comparing the District Court’s ruling with the language of the relevant jurisdictional statutes demonstrates that the analysis is upside down. The starting point is the more recent enactment granting exclusive jurisdiction *to the bankruptcy tribunal*.⁵⁸

The Court’s function in construing the statutes is to discern the intent of Congress, and the best indication of that intent is the plain language of the statutes themselves. *See Patterson v. Shumate*, 504 U.S. 753, 757 (1992);

⁵⁸ Again, either the district court or the bankruptcy court may exercise bankruptcy jurisdiction depending upon whether the case is “referred” or the reference is withdrawn by the district court. *See* 28 U.S.C. §§ 157 & 1334 (1993 & Supp. 2003). The Committee uses the term “bankruptcy tribunal” to denote a court in which a bankruptcy is pending when no distinction between a district court and an Article I bankruptcy court is necessary.

Toibb v. Radloff, 501 U.S. 157, 160 (1991)⁵⁹. When the language is plain and the results are not absurd, the sole function of the courts is to enforce the statute as written. *Lamie v. United States Tr.*, 124 S. Ct. 1023, 1030 (2004)⁶⁰. Here, the plain language dooms the Appellees' position.

1. *The bankruptcy tribunal has “exclusive jurisdiction” over the Debtors’ property and estate—including the Debtors’ contracts*

In 1984, Congress enacted 28 U.S.C. § 1334. In passing 28 U.S.C. § 1334, “Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.” *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). Thus, bankruptcy court jurisdiction is very broad. *Celotex*, 514 U.S. at 308; *Kelly v. Nodine (In re Salem Mortgage Co.)*, 783 F.2d 626, 632-34 (6th Cir. 1986); *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984).

Section 1334 provides

⁵⁹ See also *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *Conserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 486 (5th Cir. 2003).

⁶⁰ See also *Ron Pair*, 489 U.S. at 241; *United States v. Vargas-Duran*, 356 F.3d 598, 602 (5th Cir. 2004) (“[T]he words of a statute will be given their plain meaning absent ambiguity.”).

(a) Except as provided in subsection (b) of this section, the district court shall have *original and exclusive jurisdiction* of all cases under title 11.

* * *

(e) The district court in which a case under title 11 is commenced or is pending shall have *exclusive jurisdiction of all of the property*, wherever located, of the debtor as of the commencement of such case, *and of property of the estate*.

28 U.S.C. § 1334 (emphasis added).

The plain meaning of “exclusive” can hardly be subject to debate. Indeed, the *exclusive* jurisdictional grant in bankruptcy is so powerful that this Court has specifically ruled that it *deprives* another tribunal of jurisdiction, even where that jurisdiction was invoked prior to the bankruptcy. See *Slay Warehousing Co. v. Modern Boats, Inc. (In re Modern Boats, Inc.)*, 775 F.2d 619, 620 (5th Cir. 1985). In *Slay Warehousing*, this Court found:

The admiralty court’s previous acquisition of *in rem* jurisdiction . . . did not defeat the bankruptcy court’s jurisdiction in this case. On the contrary, the petition for reorganization *withdrew* jurisdiction from the admiralty court and lodged it exclusively in the district court - “the court where the Title 11 proceeding was pending.”

Id. (emphasis added).

It is thus axiomatic that if a contract is either (i) property of the debtor, or (ii) property of the estate,⁶¹ the same is subject to the exclusive jurisdiction of the District Court, to the exclusion of all others. *See In re United States Brass Corp.*, 110 F.3d 1261, 1268 (5th Cir. 1997) (“section 1334(d) [renumbered as 1334(e) in 1994] was intended to eliminate jurisdictional disputes arising from the equity principle that makes *in rem* jurisdiction over an item of property exclusive in the first court to assert such jurisdiction over it”); *Cook v. Cook*, 220 B.R. 918, 923 (Bankr. E.D. Mich. 1997) (“[t]hus, pursuant to § 1334(e) . . . the home court has jurisdiction over property of the debtor and property of the estate to the exclusion of all other courts”). Here, the law provides and no one has contested that an executory contract is property of the estate under Section 541 of the Bankruptcy Code, is subject to the bankruptcy tribunal’s exclusive jurisdiction, and is therefore subject to rejection. *Alert Holdings, Inc. v.*

⁶¹ Upon the filing of a bankruptcy petition, an estate is created. Section 541(a)(1) of the Bankruptcy Code provides that this estate “is comprised of all . . . legal or equitable interests of the debtor in property as of the commencement of the case,” wherever located and by whomever held. 11 U.S.C. § 541(a) (1993). “The scope of this paragraph is broad. It includes all kinds of property, including tangible and intangible property, causes of action . . . and all other forms of property The debtor’s interest in property also includes ‘title’ to property, which is an interest, just as are a possessory interest, or leasehold interest, for example.” H.R. Rep. No. 85-595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323.

Interstate Protective Servs. (In re Alert Holdings, Inc.), 148 B.R. 194, 202 (Bankr. S.D.N.Y. 1992); *Cohen v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 138 B.R. 687, 701-02 (Bankr. S.D.N.Y. 1992).

The Bankruptcy Code provision that speaks to rejection of executory contracts is fully as broad as the jurisdictional grant. The statutory language permits no credible argument that rejection of the Back-to-Back Agreement escapes the bankruptcy tribunal's exclusive jurisdiction in favor of *any* other tribunal.

2. *The bankruptcy tribunal is exclusively empowered to authorize the rejection of "any executory contract"*

Chapter 11 of the Bankruptcy Code allows a debtor to reorganize its business in order to prevent "an attendant loss of jobs and possible misuse of economic resources." *Bildisco*, 465 U.S. at 528. Section 365 of the Bankruptcy Code is one tool that may be used in bringing about these goals.

Section 365 allows a Chapter 11 debtor to "assume or reject *any* executory contract or unexpired lease." 11 U.S.C. § 365(a) (1993) (emphasis added). The plain meaning of "any" is hardly subject to debate, even less so after the Supreme Court's decision in *Bildisco*. Section 365 "by its terms

includes *all executory contracts . . .*” *Id.* at 521 (emphasis added). “All” means all. That’s all “all” means. Congress’ enumeration of specific exceptions to Section 365, none of which apply to FERC, reinforces that conclusion.

C. The Express Exceptions Contained In Section 365 Foreclose The Creation Of Implied Exceptions

The Appellees protest that “exclusive” cannot really mean “exclusive” and “all” cannot really mean “all” because the Back-to-Back Agreement is *different*. This contract, they claim, is subject to FERC’s exclusive jurisdiction. FERC, however, neither possesses nor has it previously claimed exclusive jurisdiction over “contracts.” *See infra* at 35-37. Rather, FERC’s exclusive jurisdiction is limited to jurisdiction over *rates*. *See, e.g., Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 371 (1988). Moreover, Congress is presumed to have had complete knowledge of FERC’s jurisdiction and acted with reference to it when Congress vested the bankruptcy tribunal with exclusive jurisdiction over property of the estate and the power to authorize rejection. *See Rush Truck Ctrs. of Tex. L.P.*

v. Bouchie (In re Bouchie), 324 F.3d 780, 784 (5th Cir. 2003).⁶² Congress' intentional omission of a FERC exception notwithstanding this knowledge forecloses the creation of any exception by the judiciary.

Although a debtor may “assume or reject *any* executory contract or unexpired lease,”⁶³ this power is subject to a number of specific exceptions. See 11 U.S.C. §365(a) (authorizing rejection “[e]xcept as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section”). None of these listed exceptions, however, apply to the Back-to-Back Agreement. Where, as here, Congress explicitly enumerates certain exceptions, additional exceptions are not to be implied. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001).⁶⁴ The proper inference is that Congress

⁶² See also *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (“We assume that Congress is aware of existing law when it passes legislation.”); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (“We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.”); *United States v. Zavala-Sustaita*, 214 F.3d 601, 607 n.8 (5th Cir. 2000) (“Congress must be presumed to have knowledge of its previous legislation when making new laws . . .”).

⁶³ 11 U.S.C. § 365(a) (emphasis added).

⁶⁴ See also *Midland Telecasting Co. v. Midessa Television Co.*, 617 F.2d 1141, 1145 n.7 (5th Cir. 1980) (“The existence of an explicit exemption covering certain acts is evidence that Congress did not intend to grant immunity to other acts not covered by the explicit exemptions.”); *Hollywood Golf Estates, Inc. v. Nello L. Teer Co.*, 353 F.2d 485, 489 (5th Cir. 1965) (“[T]his Court will not read an exception into a statute clear on its face.”); *Stuyvesant Ins. Co. of N.Y. v. Nardelli*, 286 F.2d 600, 604 (5th Cir. 1961) (same); *De Freese v. United States*, 270 F.2d 730, 736 (5th Cir. 1959) (same).

considered the issue of exceptions and, in the end, limited the statute to the ones set forth. *United States v. Johnson*, 529 U.S. 53, 58 (2000).

Any attempt to catalogue the application of this rule to federal statutes would defy comprehensive citation. Even a sampling shows that courts have regularly applied it to a wide variety of federal enactments, including the Federal Communications Act,⁶⁵ the Fair Credit Reporting Act,⁶⁶ the federal sentencing guidelines,⁶⁷ the Anti -Assignment Act,⁶⁸ the Federal Food, Drug, and Cosmetic Act,⁶⁹ the False Claims Act,⁷⁰ the

⁶⁵ *Midland Telecasting*, 617 F.2d at 1145 n.7.

⁶⁶ *TRW*, 534 U.S. at 28; *Rylewicz v. Beaton Seros., Ltd.*, 888 F.2d 1175, 1181 (7th Cir. 1989).

⁶⁷ *Johnson*, 529 U.S. at 58; *United States v. Pettus*, 303 F.3d 480, 484-85 (2d Cir. 2002); *United States v. Goldbaum*, 879 F.2d 811, 813-14 (10th Cir. 1989).

⁶⁸ *Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344, 1350 (Fed. Cir. 2002).

⁶⁹ *United States v. Rutherford*, 442 U.S. 544, 551-52 (1979).

⁷⁰ *United States v. NEC Corp.*, 931 F.2d 1493, 1502-03 (11th Cir. 1991).

Soldiers' and Sailors' Civil Relief Act,⁷¹ the Internal Revenue Code,⁷² and the Judicial Code.⁷³

With regard to the Bankruptcy Code in particular, the rule against adding exceptions to those listed by Congress has been consistently applied to a variety of situations, including

- Serial filings by corporate debtors under Section 109;⁷⁴
- Defining property of the estate under Section 541;⁷⁵
- Setting out the trustee's avoidance powers under Sections 547 and 548;⁷⁶

⁷¹ *Detweiler v. Pena*, 38 F.3d 591, 594 (D.C. Cir. 1994).

⁷² *St. Charles Inv. Co. v. Comm'r of Internal Revenue*, 232 F.3d 773, 776-77 (10th Cir. 2000); *Greene v. United States*, 79 F.3d 1348, 1355 (2d Cir. 1996).

⁷³ *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1255-56 (11th Cir. 2003).

⁷⁴ *In re Jartran*, 87 B.R. 525, 528 (N.D. Ill. 1988) ("Congress clearly knows how to exclude certain types of repeat debtors from the Bankruptcy Code; its failure to exclude repeat corporate debtors from section 109 indicates that generally corporations may file sequential bankruptcy petitions"), *aff'd*, 886 F.2d 859, 870 (7th Cir. 1989)

⁷⁵ *Austein v. Schwartz (In re Gerwer)*, 898 F.2d 730, 732 (9th Cir. 1990) ("[E]xpress enumeration indicates that other exceptions should not be implied."); *In re Butler*, 271 B.R. 867, 872 (Bankr. C.D. Cal. 2002) ("The fact that Congress created an exception under § 541(b)(2) applying expressly to the interest in an expired lease of nonresidential property suggests that Congress intended possessory interests in residential property to be included in property of the estate.").

⁷⁶ *Pulaski Highway Express, Inc. v. Cent. States Southeast & Southwest Areas Health & Welfare Pension Fund (In re Pulaski Highway Express, Inc.)*, 41 B.R. 305, 310 n.9 (Bankr. M.D. Tenn. 1984) ("The enumerated exceptions to the recovery of preferences outlined in 547(c) are exclusive and a bankruptcy court is without authority to judicially

- The extent of tax priorities under Section 507;⁷⁷
- The availability of post-petition interest under Section 506;⁷⁸ and
- The revocation of a license under Section 525.⁷⁹

In fact, the United States Supreme Court has applied this very rule of construction specifically to Section 365.

create additional exceptions.”) (internal citations omitted); *In re Candor Diamond Corp.*, 76 B.R. 342, 352 (Bankr. S.D.N.Y. 1987) (“As a general rule of statutory construction, where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of contrary legislative intent Nothing in the Code or in the argument advanced impels us to the conclusion that the good faith exception [to the trustee’s Section 548 avoidance powers] is non-exclusive.”) (internal citations omitted); *McColley v. M. Fabrikant & Sons, Inc. (In re Candor Diamond Corp.)*, 26 B.R. 850, 851 (Bankr. S.D.N.Y. 1983) (“As a general rule of statutory construction, where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”).

⁷⁷ *In re Shank*, 240 B.R. 216, 224-25 (Bankr. D. Md. 1999) (“When, as now, a law itself contains an enumeration of applicable exemptions, the maxim ‘expressio unius est exclusio alterius’ ordinarily applies. Under that maxim, a legislature’s affirmative description of certain powers or exemptions implies denial of nondescribed powers or exemptions. Therefore, this court will not extend the scope of § 507(a)(8)(A)(iii) to exempt the post-petition taxes at issue here.”) (internal citations omitted).

⁷⁸ *Liberty Nat’l Bank & Trust Co. v. George*, 70 B.R. 312, 315 (W.D. Ky. 1987) (“If Congress had intended for the solvency exception to relate to secured claims as well as unsecured . . . it could have included such an exception in § 506(b).”).

⁷⁹ *FCC v. Nextwave Personal Communications Inc.*, 537 U.S. 293, 302 (2003) (“[W]here Congress has intended to provide regulatory exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly . . .”).

Two decades ago, the United States Supreme Court first determined that the unmistakably clear language of Section 365 was made even clearer by the inclusion of specific exceptions to its all-encompassing rule. *See Bildisco*, 465 U.S. at 521-22. In *Bildisco*, the Supreme Court held that a debtor could reject a collective bargaining agreement over the protests of the NLRB. *See id.* at 521. The Court noted, “[o]bviously, Congress knew how to draft an exclusion for collective bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to *all* collective bargaining agreements covered by the NLRA.” *Id.* at 522-23 (emphasis added). Thus, Section 365 “by its terms includes *all* executory contracts except those expressly exempted.” *Id.* at 521 (emphasis added).

As here, the Supreme Court was faced in *Bildisco* with a federal regulatory regime (the NLRA), its interaction with the Bankruptcy Code, and actions by an agency (NLRB) that would have had the practical effect of requiring performance of a rejected contract. The Supreme Court recognized that “the authority to reject an executory contract is vital to the basic purpose to a Chapter 11 reorganization.” *Bildisco*, 465 U.S. at 528. NLRB’s desired action, requiring the debtor to adhere to the agreement,

ran “directly counter to the express provisions of the Bankruptcy Code and to the Code’s overall effort to give a debtor-in-possession some flexibility and breathing space.” *Id.* at 532 (citations omitted).

Like the NLRB in *Bildisco*, the Appellees here are trying to end-run the express Congressional language and intent, depriving the Debtors of their Congressionally-given statutory right to divest themselves of their obligations under the Back-to-Back Agreement. Forcing the Debtors’ compliance with the Back-to-Back Agreement notwithstanding a rejection of the agreement robs the Debtors of a right that is “vital to the basic purpose to a Chapter 11 reorganization.” *Id.* at 528. The Appellee’s effort should not be countenanced or tolerated by this Court in light of the unambiguous statutory language and the underlying purposes and policies of the Bankruptcy Code.

Bildisco is not the only case in which the Supreme Court has rejected an agency’s request for an implied exception to the Bankruptcy Code. Section 525 of the Bankruptcy Code prohibits a governmental unit from revoking a license for failure to pay dischargeable debts. In *FCC v. Nextwave Personal Communications Inc.*, the FCC argued that it should be granted an exception because it had a valid regulatory purpose for

revoking the debtors' PCS licenses. 537 U.S. 293, 302 (2003). The Supreme Court rejected such an implied exception to the Code: "Besides the fact that such an exception would consume the rule, it flies in the face of the fact that, where Congress has intended to provide regulatory exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly, rather than by a device so subtle as denominating a motive or cause." *Id.*

The holdings in *Bildisco* and *Nextwave* clearly establish that exceptions to the Bankruptcy Code will not be implied; rather, all exceptions must be explicitly delineated by Congress. This rule of law becomes all the more clear when the Bankruptcy Code is compared with the statutory predecessor it replaced.

D. Implied Exceptions Violate The History And Purpose Of The Bankruptcy Laws

Under prior bankruptcy law, Congress was aware of the interests of the public sector and accounted for those interests in the rejection statutes. Thus, for example, Congress vested the Interstate Commerce Commission with express authority concerning the formulation of reorganization plans

for bankrupt railroads.⁸⁰ Likewise, concerning corporate reorganization, Congress conferred power on the bankruptcy tribunal to “permit the rejection of executory contracts of the debtor except contracts in the public authority”⁸¹

When repealing these provisions in favor of the more detailed, modern Bankruptcy Code, Congress clearly knew how to (and did) express its intent to subordinate *some* rejection powers to interests of federal administrative agencies.⁸² Congress also knew how to (and did) limit the rejection power as applied to *some* contracts filed with federal agencies.⁸³ Indeed, Congress knew how to ensure that certain obligations go unaltered by bankruptcy.⁸⁴ PEPCO argues for a similar right to have its particular agreement remain immune from the Bankruptcy Code; however PEPCO argues for an exception Congress did not express in the Code.

⁸⁰ Bankruptcy Act of 1898 (as amended), Ch. 8, § 77, 47 Stat. 1467, 1474-82 (1933).

⁸¹ Bankruptcy Act of 1898 (as amended), Ch. X, § 16(1), 52 Stat. 840, 884-85 (1938).

⁸² See 11 U.S.C. § 365(o) (Supp. 2003) (requiring immediate cure of any deficit under commitments with banking depository institutions and banking regulators).

⁸³ See *id.* at § 365(n) (dealing with patents and copyrights).

⁸⁴ See 11 U.S.C. §§ 523 & 1141 (1993 & Supp. 2003) (exceptions to discharge).

Adding such written exceptions, however, runs afoul of the primary purposes of the bankruptcy laws:

[H]istorically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another. And the corporate reorganization statutes look to a ratable distribution of assets among classes of stockholders as well as creditors.

Young v. Higbee Co., 324 U.S. 204, 210 (1945).

Although espoused by the Supreme Court over 50 years ago, this purpose remains primary and applies with equal force under today's bankruptcy regime.⁸⁵ There is, therefore, "a general presumption in bankruptcy favoring equality in distribution such that 'if one claimant is to be preferred over others, the purpose *should be clear from the statute.*'" *In re Jack/Wade Drilling, Inc.* 258 F.3d 385, 387-88 (5th Cir. 2001) (emphasis added). Here, PEPCO seeks (and indeed received from the District Court)

⁸⁵ See *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991) (recognizing that the preference provisions of the bankruptcy code "facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor" (quoting H.R. Rep. No. 95-595, at 177-78 (1977), reprinted in 1978 U.S.C.C.A.N. 6137, 6138)); *Haber Oil Co. v. Swinehart* (*In re Haber Oil Co.*), 12 F.3d 426, 435 (5th Cir. 1994) ("It has been well and often said that 'ratable distribution among all creditors is one of the strongest policies behind the bankruptcy laws.'").

special treatment over its fellow creditors without any support for such priority treatment in the Bankruptcy Code.

The District Court's decision and the arguments advanced by Appellees would have Mirant's creditors bear the full brunt of economic sacrifice so that *just one* creditor (PEPCO) may remain unscathed. This vaults PEPCO to the position of a priority creditor receiving 100% of its claim. The result of PEPCO's leapfrogging is so contrary to the intent behind Chapter 11 that it should not be implemented or tolerated absent a clear and explicit Congressional statement to that effect. *See Jack/Wade Drilling*, 258 F.3d at 387-88; *Bachman v. Commercial Fin. Servs., Inc. (In re Commercial Fin. Servs., Inc.)*, 246 F.3d 1291, 1293 (10th Cir. 2001) ("[P]riorities are strictly construed, however, 'because the presumption in bankruptcy cases is that the debtor's limited resources will be equally distributed among the creditors.'" (citations omitted)). The Bankruptcy Code expresses no such intention, and as demonstrated below, the intention is likewise absent from the FPA.

E. The Federal Power Act Does Not Deprive The Bankruptcy Court Of Its Exclusive Jurisdiction Over The Bankruptcy Estate

In attempting to deprive the District Court of jurisdiction over the Debtors' rejection motion, Appellees argue that Sections 205 and 206 of the FPA grant exclusive jurisdiction to FERC. The argument is odd, because the Appellees lose even if the argument is right.

Courts long ago established that where provisions of Congressional enactments are in irreconcilable conflict, the later act impliedly repeals the earlier act to the extent of the conflict. *See Jackson v. Stinnett*, 102 F.3d 132, 136 (5th Cir. 1996).⁸⁶ This result logically follows because, once again, Congress is presumed to have been aware of FERC's jurisdiction and functioning when it created the exclusive jurisdiction and the power to authorize rejection in the bankruptcy tribunal.⁸⁷ Likewise, Congress expressly made certain exceptions to this power and is presumed to have

⁸⁶ *See also United States v. Wilson*, 306 F.3d 231, 236 (5th Cir. 2002) (same); *Marcello v. Ahrens*, 212 F.2d 830, 836 (5th Cir. 1954) ("It is fundamental that a prior statute must yield to a subsequent valid act of Congress, insofar as the statutes are repugnant.").

⁸⁷ *See Rush Truck Ctrs.*, 324 F.3d at 784; *see also Miles*, 498 U.S. at 32; *Goodyear Atomic Corp.*, 486 U.S. at 184-85; *Zavala-Sustaita*, 214 F.3d at 607 n.8.

intended none other.⁸⁸ Thus, assuming the FPA and the Bankruptcy Code vested “exclusive” jurisdiction in two different places, the later bankruptcy laws prevail.

Of course, there is no need to resort to the disfavored doctrine of repeals by implication. A proper application of the FPA involves no conflict between rejection of a contract and FERC’s ratemaking. Indeed, the Appellees’ attempt to construct such a conflict does violence both to the nature of rejection and to the FPA itself.

1. *Rejection does not alter FERC’s rates*

The District Court believed that rejection ran afoul of the rates filed with FERC because it somehow abrogated or collaterally attacked FERC’s ratemaking judgment.⁸⁹ Such a conclusion frankly misapprehends the very nature of rejection in bankruptcy.

Section 365 essentially “allows debtors to pick and choose among their agreements and assume those that benefit their estates and reject those that do not.” *River Prod., Co. v. Webb (In re Topco, Inc.)*, 894 F.2d 727, 741 (5th Cir. 1990). Just as important, and what the District Court failed to

⁸⁸ *TRW*, 534 U.S. at 28; *Johnson*, 529 U.S. at 58.

⁸⁹ RE2:20.

realize, is what Section 365 *does not* permit. Section 365 *does not* allow a debtor to wholly avoid its contractual obligations, nor does it permit a debtor to unilaterally impose more favorable terms. *See O’Neill v. Cont’l Airlines, Inc. (In re Cont’l Airlines, Inc.)*, 981 F.2d 1450, 1459 (5th Cir. 1993) (“Section 365(g)(1) speaks only in terms of ‘breach.’ The statute does not invalidate the contract, or treat the contract as if it did not exist.”). On the contrary, Section 365 merely provides a debtor with the ability to commit an economically efficient breach of a contract *and pay damages* when business judgment suggests continued performance of the contract would frustrate reorganization. *See* 11 U.S.C. § 365(g); *Bildisco*, 465 U.S. at 528; *Century Indem. Co. v. Nat’l Gypsum Co. Settlement Trust (In re Nat’l Gypsum Co.)*, 208 F.3d 498, 505 (5th Cir. 2000).

The concept and favorability of an “efficient breach” has long existed in American jurisprudence. Oliver Wendall Holmes wrote: “The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.” *See* Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (*quoted in* CORBIN ON CONTRACTS § 7.12). Judge Posner of the Seventh Circuit Court of Appeals has also written extensively on this subject. For example, in *Patton*

v. Mid-Continent Systems, Inc., Judge Posner explained, “[e]ven if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee’s actual losses.” 841 F.2d 742, 750 (7th Cir. 1988).

After rejection (and consistent with the concept of efficient breach), the non-breaching party may file a claim against the bankruptcy estate to recover the damages sustained as a result of the breach. 11 U.S.C. §§ 365(g) & 502(g); *see also Bildisco*, 465 U.S. at 529-30; *In re Nat’l Gypsum Co.*, 208 F.3d at 505. Because the breach is deemed to have occurred immediately prior to the filing of the debtor’s bankruptcy petition, the non-breaching party’s claim is treated as a general pre-petition unsecured claim (*see id.*), fulfilling the policy of equality among creditors.

Thus, rejection is simply a breach of the agreement, not a challenge to the rates set by FERC. As previously indicated, PEPCO’s claim for rejection damages, if rejection is authorized, will necessarily be based upon the filed rates in PEPCO’s PPAs that are, in turn, passed through in the Back-to-Back Agreement. Thus, there is no attempt by the Debtors or anyone else to interfere with, modify or collaterally attack FERC’s rulings

concerning rates. The only question is whether a contract having some nexus to wholesale power may be rejected or otherwise breached.

In other fora, FERC has expressed no reservation in allowing the courts to handle disputes concerning such agreements. Indeed, FERC *regularly* declines to interpret contracts which are, in its view, “jurisdictional,” and leaves such interpretation to state courts.⁹⁰ Similarly, FERC has acknowledged that even matters directly addressed in jurisdictional tariffs on file with FERC nonetheless fall within the Bankruptcy Court’s jurisdiction. For example, in *Tennessee Gas Pipeline Co.*,

⁹⁰ *Niagara Mohawk Power Corp. v. Rochester Gas & Elec. Corp.*, 98 F.E.R.C. ¶ 61,307 (2002) (state court could review and interpret whether asset sales violated terms of a FERC jurisdictional agreement); *see also Chesapeake Panhandle L.P. v. Natural Gas Pipeline Co. of Am.*, 102 F.E.R.C. ¶ 61,229 (2003); *Kan. Gas Serv. v. Enbridge Pipelines KPC*, 100 F.E.R.C. ¶ 61,111 (2002); *Trigen–Syracuse Energy Corp.*, 95 F.E.R.C. ¶ 61,326 (2001); *S. Cal. Water Co. v. S. Cal. Edison Co.*, 94 F.E.R.C. ¶ 61,286 (2001); *S. Co. Energy Mktg., L.P.*, 86 F.E.R.C. ¶ 61,131 (1999); *Anadarko Petroleum Corp. v. PanEnergy Pipe Line Co.*, 86 F.E.R.C. ¶ 61,040 (1999); *Duquesne Light Co.*, 84 F.E.R.C. ¶ 61,309 (1998); *Mo. Basin Mun. Power Agency*, 82 F.E.R.C. ¶ 61,138 (1998); *Rio Grande Elec. Coop., Inc. v. Cent. Power & Light Co.*, 77 F.E.R.C. ¶ 61,245 (1996); *Portland Gen. Elec. Co.*, 72 F.E.R.C. ¶ 61,009 (1995); *Doswell Ltd. P’ship v. Va. Elec. & Power Co.*, 61 F.E.R.C. ¶ 61,196 (1992); *Tenn. Gas Pipeline Co.*, 59 F.E.R.C. ¶ 61,045 (1992); *Villages of Edgerton & Montpelier, Ohio v. Ohio Power Co.*, 49 F.E.R.C. ¶ 61,306 (1989); *DeNovo Oil & Gas, Inc.*, 45 F.E.R.C. ¶ 62,150 (1988); *Windward Energy & Mktg. Co.*, 45 F.E.R.C. ¶ 61,243 (1988); *Shell Offshore Inc.*, 44 F.E.R.C. ¶ 62,105 (1988); *Cimarron Transmission Co.*, 44 F.E.R.C. ¶ 61,116 (1988); *El Paso Natural Gas Co.*, 44 F.E.R.C. ¶ 61,065 (1988); *Royal Res. Exploration, Inc. v. Pac. Gas & Elec. Co.*, 43 F.E.R.C. ¶ 61,049 (1988); *Christmann v. Northwest Pipeline Corp.*, 41 F.E.R.C. ¶ 61,148 (1987); *Williston Basin Interstate Pipeline v. ARCO Oil & Gas Supply*, 37 F.E.R.C. ¶ 61,159 (1986); *Crystal Oil Co.*, 33 F.E.R.C. ¶ 62,213 (1985); *Okla. Natural Gas Co.*, 19 F.E.R.C. ¶ 61,289 (1982).

FERC ruled: “[o]nce a shipper has filed for bankruptcy, the Bankruptcy Court has jurisdiction” with respect to amounts owed to a pipeline. 103 FERC ¶ 61,275 at p. 62,067 (2003). In another instance, an interstate pipeline attempted to collect amounts due from Enron after the latter’s bankruptcy. There, FERC ruled that “recovery of these amounts will be determined *in Enron’s bankruptcy proceeding.*” *Kern River Gas Transmission Co.*, 101 FERC ¶ 61,374 at 62,556 (2002) (emphasis added). FERC *agreed* “that Enron’s bankruptcy petition . . . created an automatic stay [and] . . . gave Enron the right to determine, *at its sole discretion*, whether to reject or accept” the contract for transportation service. *Kern River Gas*, 101 FERC ¶ 61,374 at 62,556. FERC takes the opposite position here, and in so doing runs afoul of this Court’s precedent as well as its own.

This Court has expressly held that the federal courts may exercise jurisdiction over claims arising out of FERC-regulated contracts, and may even set such contracts aside without interfering with FERC’s jurisdiction or authority. *See Gulf States Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465 (5th Cir. 1987). Specifically, this Court explained that even though setting aside a FERC-regulated contract for fraud “would affect the filed rates by

eliminating them,” this Court did “not believe ... that Congress meant through the FPA to preempt such indirect effects.” *Id.* at 1472 n.9.

This case is even one step removed from the jurisdiction permitted in *Gulf States*. The bankruptcy tribunal was not asked to change a single provision of the Back-to-Back Agreement, much less the rates approved by FERC. The question presented in the rejection motion is whether the Debtors have made a sufficient showing under their business judgment that the Back-to-Back Agreement should be rejected and treated as breached. If the showing has been made, the FERC-filed rates under the Panda and Ohio Edison PPAs, which are mirrored in the Back-to-Back Agreement, will be used to compute the amount of PEPCO’s rejection damages claim. Whether or not rejection is authorized, PEPCO will continue to pay (and Panda or Ohio Edison will continue to receive) the rates required by the PPAs under PEPCO’s tariff. Thus, rejection is not a collateral attack on FERC’s filed rates and no threat to its rightful exercise of power.

Nevertheless, PEPCO would have FERC essentially order specific performance of the payment of money, rather than allow a bankruptcy tribunal to adjudicate this payment obligation as it does any other. PEPCO

and FERC maintain these positions notwithstanding their positions taken in prior litigation in state court in which PEPCO recognized, and FERC implicitly acceded to, state court jurisdiction over the Back-to-Back Agreement notwithstanding FERC's exclusive jurisdiction over rates. That is, PEPCO directly, and FERC indirectly, recognized that contractual issues arising in the context of this pass-through agreement were not subject to FERC's exclusive jurisdiction over rates. PEPCO's and FERC's current opposite position is clearly nothing more than a financially driven change of heart, which distorts the FPA itself.

2. *FERC's statutory jurisdiction cannot be expanded to create a conflict where none exists*

FERC, as an administrative agency and a creation of the legislative branch, does not start with a presumption of jurisdiction in its favor. The United States Court of Appeals for the District of Columbia, which has a unique role in reviewing administrative actions of all types, has "repeatedly admonished federal agencies that jurisdiction may not be presumed based solely on the fact that there is not an express withholding of jurisdiction." *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1088 (D.C. Cir. 2002) (citing *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8-9 (D.C. Cir.

2002)); *Mich. v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001); *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119-20 (D.C. Cir. 1995); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995)). “It is *statutory authorization alone* that gives FERC the authority to regulate” *ExxonMobil Gas Mktg.*, 297 F.3d at 1088 (emphasis added). Thus, FERC, “like all statutory and administrative agencies, is governed strictly by the statute from which it derives its existence, and equitable considerations in support of its jurisdiction are inappropriate for judicial inquiry where such jurisdiction was not properly invoked or does not otherwise exist.” *NLRB v. Atlanta Metallic Casket Co.*, 205 F.2d 931, 936 (5th Cir. 1953).

Nothing in the statutes themselves authorizes FERC to interfere in the rejection of the contract at issue here. Section 205 of the FPA, advanced by the Appellees, pertains to a public utility’s *filing* of rates, proposed *changes* to those rates by the utility, and the appropriate FERC response to such activity. Specifically, Section 205 reads, in relevant part:

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charges classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days’ notice to the Commission and to the public.

FPA § 205(d), 16 U.S.C. § 824d(d) (2000). Section 205 further provides:

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service. . . .

FPA § 205(e), 16 U.S.C. § 824d(e) (2000). Section 205 is *silent* on the issue of the breach of an agreement like the Back-to-Back Agreement or the resulting damages.

Section 206 of the FPA empowers FERC to set appropriate rates in wholesale electricity contracts, stating specifically:

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

FPA § 206(a), 16 U.S.C. § 824e(a) (2000). Again, Section 206 is silent on breach, damages or the power of a bankruptcy tribunal. That silence is telling.

3. *Congress knew how to make exceptions to bankruptcy jurisdiction in the Federal Power Act—it did not do so here*

When Congress intended to create exceptions to bankruptcy jurisdiction in the FPA, it created such exceptions expressly. It did not do so here. “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” See *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))). Likewise, where Congress expressly makes some exceptions, it is presumed to have intended none other. *TRW*, 534 U.S. at 28; *Johnson*, 529 U.S. at 58.

For example, Section 8 of the FPA (unlike Sections 205 and 206) contains an express limitation on bankruptcy court authority. Section 8 limits the transfer of licenses held by hydroelectric power projects and

applies only to hydroelectric licensees under Part I of the FPA.⁹¹ Section 8 provides:

No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, *judicial sale*, *foreclosure sale*, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor as assign were the original licensee under this chapter.

FPA § 8, 16 U.S.C. § 801 (2000) (emphasis added). Although this section expressly limits what a court may do with a hydroelectric license, there is no similar limitation in Sections 205 and 206, nor in Part II of the FPA in which Sections 205 and 206 appear.

Similarly, the language and history of companion legislation to the FPA (the Public Utility Holding Company Act (“PUHCA”)) demonstrates the care and intention Congress uses when it acts to divest bankruptcy

⁹¹ Because the “Back-to-Back Agreement” does not involve a licensed hydroelectric facility, it is not subject to § 8 of the FPA.

courts of jurisdiction.⁹² Under PUHCA, the SEC may be appointed sole receiver of an electric utility company by a bankruptcy court, and a reorganization plan shall not become effective absent SEC approval in certain circumstances. *See* 15 U.S.C. § 79k(f) (1997).⁹³ In other words, when Congress intended to diminish the jurisdiction of the bankruptcy courts relative to federal regulatory agencies, it knew how to do so and it did so expressly. Congress conspicuously did not do so in Sections 205 and 206 of the FPA, and it is not the function of the courts to engraft exceptions that do not exist.

F. Rejection And An Injunction To Protect The Ruling Were Proper

The District Court's only basis for denying the Debtors' rejection motion was its mistaken conclusion that only FERC could authorize rejection, and that "[r]ejection of the agreement would have the potential to expose Debtors to adverse action by the FERC as well as whatever damage claims would be created from their breach of the agreement, but not relieve Debtors of their regulatory obligations to pay the rates contemplated by the

⁹² *Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1990) (stating that FPA and companion legislation should be read together).

⁹³ PUHCA also carefully delineates other instances in which the bankruptcy court's authority over energy companies has been diminished.

agreement.”⁹⁴ Such reasoning is profoundly circular—removing the injunction so that FERC can act and then finding that nothing could be gained by rejection because FERC could potentially act. The District Court should have left the injunctions in place, and rejection of the Back-to-Back Agreement is the only result possible under the record in this case.

1. *The Court was authorized to enjoin regulatory interference with its jurisdiction*

As previously demonstrated, the Bankruptcy Court was vested with exclusive jurisdiction. It therefore had the power under the Bankruptcy Code to protect that jurisdiction.

In the ordinary litigation context, district courts possess inherent power to enjoin a litigant from filing a related lawsuit in another district court. *See Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952); *Schauss v. Metals Depository Corp.*, 757 F.2d 649, 654 (5th Cir. 1985). The general purpose of this power is to avoid duplicative litigation. *See id.* The All Writs Statute also cloaks district courts with the authority to enjoin a party from attempting to re-litigate a matter over which the district court presides. *See* 28 U.S.C. §1651 (1994); *N.Y. Life Ins. Co. v. Deshotel*, 142 F.3d

⁹⁴ RE2:27.

873, 879 (5th Cir. 1998). In situations where one dispute is brought before multiple courts, the case filed first will ordinarily be the one allowed to proceed. See *W. Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 729-30 (5th Cir. 1985). Pursuant to Section 157(a) of the Bankruptcy Code, bankruptcy courts also possess the above-described power. See 28 U.S.C. §157(a) (1993); *United States ex rel. Wright v. Fid. & Deposit Co. (In re N. Am. Oil & Gas Co.)*, 130 B.R. 482, 484 (W.D. Tex. 1991). That is the power the Bankruptcy Court used here.

Section 105 of the Bankruptcy Code provides that the bankruptcy court “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a) (1993). Section 105 is an omnibus provision phrased in such general terms as to be the basis for a broad exercise of power in the administration of a bankruptcy case. *Exquisito Servs., Inc. v. United States (In re Exquisito Servs., Inc.)*, 823 F.2d 151, 155 (5th Cir. 1987). Under it, the court has broad power to ensure that the debtor is not unduly denied benefits that inure to it under the Bankruptcy Code. *Id.* One use of this power is protecting the assets of the bankruptcy estate. See *SEC v. First Fin. Group*, 645 F.2d 429, 439-40 (5th Cir. 1981).

This Court's precedent contemplates that a bankruptcy court's Section 105 power specifically includes the authority to enjoin arms of the government, including federal regulatory agencies, from interfering with bankruptcy court jurisdiction. *See First Fin.*, 645 F.2d at 440 ("To the extent that the [SEC's receiver] threatens the assets of the debtor's estate, the bankruptcy court may issue a stay of [the SEC enforcement action]."); *In re Exquisito Servs.*, 823 F.2d at 155 (affirming injunction issued by bankruptcy court against United States Air Force to remedy discrimination proscribed by 11 U.S.C. § 525(a)).⁹⁵ Many other courts have similarly concluded that Section 105 grants a bankruptcy court the discretion and authority to enjoin regulatory proceedings, especially when those proceedings threaten the assets of the debtor's estate.⁹⁶

⁹⁵ This Court has expressly reserved deciding the issue of whether Section 105 may be used to enjoin ongoing, *state* regulatory proceedings while noting there exists "significant authority . . . suggesting that courts may properly invoke § 105(a) to enjoin proceedings that are excepted from the automatic stay under § 362(b)(4)." *La. Pub. Serv. Comm'n v. Mabey (In re Cajun Elec. Power Corp.)*, 185 F.3d 446, 449-50, 457-58 n. 18 (5th Cir. 1999).

⁹⁶ *See Corporacion de Servicios Medicos Hospitalarios de Fajardo v. Mora (In re Corporacion de Servicios Medicos Hospitalarios de Fajardo)*, 805 F.2d 440, 449 (1st Cir. 1986) (noting that a bankruptcy court can enjoin administrative proceedings in certain circumstances pursuant to Section 105); *Carlton v. Firstcorp, Inc.*, 967 F.2d 942, 944 (4th Cir. 1992) (recognizing that Section 105 allows a bankruptcy court to enjoin the continuation of ongoing judicial and administrative proceedings); *Mo. v. United States*

Most closely applicable to this dispute, a sister circuit has issued relief against a federal agency specifically for the purpose of protecting its order authorizing rejection under Section 365 of the Bankruptcy Code. *See NLRB v. Superior Forwarding, Inc.*, 762 F.2d 695, 699-700 (8th Cir. 1985) (“[W]e agree with the district court that the language in *Bildisco*, by direct implication, supports the proposition that a bankruptcy court can enjoin the Board from filing or processing unfair labor practice charges.”). The Eighth Circuit’s reasoning was adopted straight from *Bildisco*: “[I]t would defeat the purpose of allowing debtors-in-possession to reject executory

Bankr. Ct., 647 F.2d 768, 777 (8th Cir. 1981) (“[E]ven if the automatic stay provisions did not apply to the Missouri proceedings, the bankruptcy court possesses power in its discretion to enjoin state courts, officials, and agencies from interfering with the assets in custody of the bankruptcy court.”) *In re Shippers Interstate Serv., Inc.*, 618 F.2d 9, 13 (7th Cir. 1980) (“If regulatory proceedings threaten the assets of the estate, the decision to issue a stay can then be made on a discretionary basis.”); *In re Bel Air Chateau Hosp., Inc.*, 611 F.2d 1248, 1251 (9th Cir. 1979) (recognizing authority for discretionary stay of regulatory proceedings that threaten the assets of the estate); *In re Bulldog Trucking, Inc.*, 150 B.R. 912, 916 (W.D.N.C. 1992) (enjoining Interstate Commerce Commission); *Gumport v. Interstate Commerce Comm’n (In re Transcon Lines)*, 147 B.R. 770, 775-76 (Bankr. C.D. Cal. 1992) (enjoining Interstate Commerce Commission); *Richmond Paramedical Servs., Inc. v. United States Dep’t of Health & Human Servs. (In re Richmond Paramedical Servs., Inc.)*, 94 B.R. 881, 882 (Bankr. E.D. Va. 1988) (enjoining Department of Health and Human Services); *In re Hunt*, 93 B.R. 484, 491-98 (Bankr. N.D. Tex. 1988) (enjoining Commodities Futures Trading Commission); *Hudtwalker v. United States Dep’t of Energy (In re Vantage Petroleum Corp.)*, 25 B.R. 471, 477 (Bankr. E.D.N.Y. 1982) (enjoining Department of Energy); *In re Brada Miller Freight Sys. Inc.*, 16 B.R. 1002, 1012 (N.D. Ala. 1981) (“[T]his Court concludes that the bankruptcy court had authority to issue a discretionary stay of the NLRB’s unfair labor practice proceedings against the appellee”), *vacated on other grounds*, 702 F.2d 890 (11th Cir. 1983).

collective-bargaining-contracts if the Board nevertheless were allowed to proceed with hearings on charges which were filed as a result of the debtor's unilateral modifications of those agreements." *Id.* at 699 (citing *Bildisco*).

Similarly, in this case, it is of little use to recognize that Congress has given the bankruptcy tribunal exclusive jurisdiction over the Debtors' estates, to recognize that Congress has given the bankruptcy tribunal authority to authorize rejection of the Back-to-Back Agreement, and then to stop. The lawful jurisdiction of the bankruptcy tribunal is illusory if the losing party (PEPCO) or the jilted agency (FERC) can ignore the bankruptcy tribunal and order continued compliance notwithstanding a rejection order. The injunctions below were narrowly tailored and calculated to foreclose a collateral attack on a rejection order, and the bankruptcy court was clearly clothed with authority to protect its own jurisdiction.

2. Rejection of the Back-to-Back Agreement is the only outcome supported by this record

The legal standard for rejecting a contract is easily met, and this record admits of no dispute that the standard is satisfied here. "It is well

established that ‘the question whether a [contract] should be rejected . . . is one of business judgment.’” See *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303,1309 (5th Cir. 1985). Rejection is permitted if, in the debtor’s business judgment, an executory contract is burdensome to the estate such that the rejection of the contract may benefit the estate. *Control Data Corp. v. Zelman (In re Minges)*, 602 F.2d 38, 43 (2d Cir. 1979). A debtor’s business judgment will be disturbed only upon a finding that the debtor’s “decision was one taken in bad faith or in gross abuse of the bankrupt’s retained business discretion.” *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047 (4th Cir. 1985); see also *Richmond Leasing*, 762 F.2d at 1309. No such showing can be made here.

It is undisputed that the Back-to-Back Agreement forces the Debtors to purchase power at prices in excess of what the market will bear. As such it will drain hundreds of millions of dollars from the estate unless it is rejected. As a matter of law, relieving a debtor’s estate of such a monumental cash drain is a reasonable exercise of business judgment, not the result of bad faith, whim, or caprice. Thus, the Court should remand with instructions that rejection be authorized as a matter of law.

VII. CONCLUSION AND PRAYER

*“This language by its terms includes all executory contracts except those expressly exempted”*⁹⁷

In *Bildisco*, the Supreme Court held that Congress was perfectly capable of using the English language and that Congress meant exactly what it said in Section 365 of the Bankruptcy Code. Now, this Court must decide whether the Supreme Court meant exactly what it said, or rather, was the District Court authorized to single out PEPCO for special treatment by virtue of exceptions implied from Congressional silence.

Such an exception would have to be created by the judiciary, because Congress did not include it among the many exceptions it grafted into the Bankruptcy Code. No fig leaf of legislative intent can be stitched together from the jurisdiction granted to FERC in the FPA. Congress knew how to limit the power of bankruptcy courts when it wanted to, and it did not do so here.

WHEREFORE, PREMISES CONSIDERED, Appellants respectfully request that this Court reverse the judgment of the District Court, render judgment that the injunctive relief previously issued by the Bankruptcy

⁹⁷ *Bildisco*, 465 U.S. at 521.

Court re-issue, order that rejection be authorized, and grant the Appellants such other and further relief to which the Appellants shall show themselves entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2004, two copies of the foregoing Brief Of Appellants The Official Committee Of Unsecured Creditors Of Mirant Corporation in written form, and one copy in PDF format on a 3.5 inch disk, labeled in accordance with 5TH CIR. R. 31.1, were served by overnight commercial carrier (FedEx) and email upon the following counsel of record:

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