

Case No. 04-10001,
Consolidated with Case No. 04-10004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In The Matter Of: **MIRANT CORP.**,
Debtor,

(Matter of Debtors' Motion for Order Authorizing the Debtor to Reject the
Back-to-Back Agreement Dated December 19, 2000, and Amendments Thereto,
With Potomac Electric Power Company as Executory Contracts)

**MIRANT CORP.; MLW DEVELOPMENT LLC; MIRANT AMERICAS ENERGY MARKETING LP;
MIRANT AMERICAS GENERATION LLC; MIRANT MID ATLANTIC LLC, ET AL. and
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MIRANT CORPORATION,**

Appellants,

v.

POTOMAC ELECTRIC POWER CO.; FEDERAL ENERGY REGULATORY COMMISSION,

Appellees,

and

OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS,

Intervenor

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Intervenor

Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division
Civil Action No. 4-03-CV-1242-A and Civil Action No. 4-03-CV-944-A

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REFERENCES TO THE PARTIES

<u>REFERENCE</u>	<u>MEANING</u>
Amicus	Office of the People’s Counsel for the District of Columbia.
Appellants	The Committee And The Debtors.
Appellees	PEPCO And FERC.
The Committee	The Official Committee Of Unsecured Creditors Of Mirant Corporation.
FERC	Federal Energy Regulatory Commission.
PEPCO	Potomac Electric Power Company.

REFERENCES TO THE RECORD

<u>REFERENCE</u>	<u>MEANING</u>
App:64	Appendix Of Exhibits In Support Of Opposition And Brief Of Potomac Electric Power Company To Debtors’ Motion To Reject A Part Of The Back-To-Back Arrangement Under The Asset Purchase And Sale Agreement With Potomac Electric Power Company At Bates No. App. 64 (District Court Cause No. 4-03-CV-1242-A).
Amicus:9	Amicus Brief of Office of the People’s Counsel for the District of Columbia at page 9.
Committee:20	Brief Of Appellant The Official Committee of Unsecured Creditors of Mirant Corporation at page 20.

FERC:5 Brief Of Appellee Federal Energy Regulatory Commission at page 5.

PEPCO:3 Brief Of Appellee Potomac Electric Power Company at page 3.

94R1:5 Record in Fifth Circuit Cause No. 04-10094 at volume 1, page 5.

RE22:2 Committee Record Excerpt 22 at page 2.

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. 04-10001, Box 3).

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I. INTRODUCTION AND SUMMARY

In a dispute that is solely about money, Appellees are in search of a public interest to justify administrative interference with the Debtors' statutory right to reject a burdensome contract. Absent such an interest there is no reason to hesitate before applying *Bildisco*. Thus, Appellees act as if rejection of the Back-To-Back Agreement is a threat to the power supply of "The White House, the U.S. Capitol and most of the executive and agency headquarters of the Federal government . . . ,"¹ and of "hundreds of thousands of electric ratepayers in the District of Columbia and Maryland."² Appellees' contentions, however, are nothing more than a litigation-induced fiction.

Mirant is not a *seller* of power seeking to reject an *obligation* to serve Washington, D.C. or anywhere else. Rather, as FERC readily admits, Mirant is seeking to reject a contract under which Mirant's only obligation is to pay money.³ In addition, Appellees' suggestion that the fates of "hundreds of thousands of electric ratepayers" are hanging in the balance

¹ FERC:38-39.

² PEPCO:5.

³ FERC:38-39.

is supported only by a bald statement in its own brief below.⁴ There is no evidence to support Appellees' (or the Amicus') claims that rejection of the Back-To-Back Agreement will result in increased rates for District of Columbia and Maryland ratepayers. PEPCO can only raise its retail rates if local regulators in D.C. and Maryland allow it. At this point, any such action is pure speculation. Appellees' preference for strawmen demonstrates that they are unable to join issue on the real battlefield.

None of Appellees' arguments present any basis for avoiding the Supreme Court's clear holding in *Bildisco*:

- The Debtors' decision to reject the Back-To-Back Agreement does not rescind or excuse their payment obligation and is therefore not a collateral attack on any rate filed with FERC.
- A breach of Mirant's obligation to pay money is neither a modification of the rates nor a termination of service; thus, the *Mobile-Sierra* arguments fail.⁵
- Rejection is not a collateral attack on FERC's order authorizing PEPCO's divestiture. FERC made no inquiry into the value of the purchase price or the Back-To-Back payments. Indeed, no such inquiry is even relevant to FERC's criteria under FPA

⁴ PEPCO:5 (citing 1R1:190).

⁵ *See infra* § II.B.3.

§ 203.⁶ Rejection of the Debtor’s remaining obligations to PEPCO would not, in any event, affect the divestiture.

As a result, notwithstanding the *legerdemain* and parlor tricks aimed at making this a complicated question, the Appellees have not even succeeded in making it a close one. The Debtors’ obligation to pay money can be rejected like “any executory contract,” just as the Supreme Court stated in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 521 (1984).

II. REPLY ARGUMENTS

A. The Appellees’ Position Conflicts With *Bildisco* and *NextWave*

The law governing this case was clearly set out by the Supreme Court in *Bildisco*—given the existence of express exceptions, implied exceptions to Section 365 of the Bankruptcy Code *will not be created, period*.⁷ Unless expressly excepted, a debtor may reject “*any* executory contract.”⁸ Similarly, Appellees cannot restrict *NextWave* by claiming that the “Supreme Court simply found that the FCC, in exercising its jurisdiction,

⁶ See *infra* § II.C. Indeed, the Back-To-Back Agreement is severable as a matter of law from the divestiture. See *infra* § II.D.

⁷ See Committee:28.

⁸ Committee:22.

failed to give proper effect to 11 U.S.C. § 525.”⁹ The significance of the *NextWave* decision is its refusal to imply an exception for federal agencies to another section of the Bankruptcy Code, a holding which Appellees chose to ignore.¹⁰ *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 . . .”).

If one were to wrongly assume that FERC has exclusive jurisdiction over “power” or “contracts” rather than wholesale rates, Appellees thus would *still* be required to point the Court to an express exception in the Bankruptcy Code. For example, disputes regarding breach of Railway

⁹ PEPCO:43.

¹⁰ Based on *NextWave*, PEPCO also argues that when a statute grants an agency exclusive jurisdiction, the agency (rather than the courts) has power to apply bankruptcy and regulatory regimes. PEPCO:43. The first line of *NextWave* makes clear that jurisdiction was not at issue, and was not decided by the Supreme Court. That said, the Supreme Court unwound the very regulatory actions enshrined by the earlier Second Circuit authority upon which PEPCO relies. *NextWave*, 537 U.S. at 295 (“In these cases, we decide whether § 525 of the Bankruptcy Code, 11 U.S.C. § 525, prohibits the [FCC] from revoking licenses held by a debtor in bankruptcy upon the debtor’s failure to make timely payments . . .”). Moreover, the Second Circuit’s decision, *FCC v. NextWave Personal Communications, Inc. (In re NextWave Personal Communications, Inc.)*, 200 F.3d 43 (2d Cir. 1999), does not help Appellees. Unlike *NextWave*, FERC has not issued an order or decision that is subject to collateral attack, and no regulatory licenses or governmental grants are in dispute. [CFR](#)

Labor Act collective bargaining agreements are subject to the exclusive jurisdiction of administrative bodies; yet, Congress included an express exception for those types of agreements.¹¹ No such exception was granted to FERC with respect to contracts for wholesale power sales, but even more, Appellees have not established that FERC's exclusive jurisdiction over rates extends far enough to trump core bankruptcy jurisdiction.

B. FERC Does Not Have Jurisdiction Over Rejection Of Contracts

Appellees attempt to expand the filed rate doctrine to claim FERC has exclusive jurisdiction "in every case where such relief is sought for FERC-jurisdictional contracts."¹² FERC then claims that bankruptcy law is trumped by the FPA by arguing that Section 1334's "general jurisdictional grant does not supersede an agency's specific statutory grant of jurisdiction."¹³ FERC cannot seriously believe its own argument, because it

¹¹ See *Consol. Rail Corp. v. Ry. Labor Executives, Ass'n*, 491 U.S. 299, 303 (1989) (Minor disputes such as breach of a collective bargaining agreement under the RLA are "subject to compulsory and binding arbitration before the National Railroad Adjustment Board, § 3, or before an adjustment board established by the employer and the unions representing the employees."). See also 11 U.S.C. § 1167 (creating RLA exception in bankruptcy).

¹² FERC:22; see also PEPCO:20 ("FERC . . . has exclusive jurisdiction over Mirant's electric service obligations. . .").

¹³ FERC:20.

regularly relies on courts to interpret FERC-jurisdictional contracts.¹⁴ In fact, FERC repeatedly has recognized that bankruptcy courts will determine the amount due to a seller/service provider and that bankruptcy courts have authority to authorize rejection of contracts for the sale of power and natural gas.¹⁵ An honest interpretation of the FPA, and review of FERC's own actions in other cases, reveal that FERC's exclusive jurisdiction is limited to rates, not contracts.¹⁶ In particular, two analogous lines of Supreme Court authority reject the Appellees' attempt to bloat FERC's FPA power.

1. *The law of contract, not regulatory coercion, is the basis of the FPA policy*

In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), a utility was subject to civil antitrust claims in federal district court. These claims went to the heart of federally-regulated service, *e.g.*, alleged refusals to sell power at wholesale, and refusals to provide transmission in interstate commerce ("wheeling"). *Id.* at 388. The federal district court ordered the

¹⁴ Committee:36, n.90

¹⁵ See *San Diego Gas & Elec. Co.*, 106 F.E.R.C. ¶ 61,263, at *4 (2004); *Tenn. Gas Pipeline Co.*, 103 F.E.R.C. ¶ 61,275, at p. 62,067 (2003); *Kern River Gas Transmission Co.*, 101 F.E.R.C. ¶ 61,374, at p. 62,556 (2002).

¹⁶ See Committee:40-41.

utility to make wholesale sales of power to the previously-denied entity and provide transmission service. *Id.* *Otter Tail* appealed to the Supreme Court, contending that “by reason of the [FPA] it is not subject to antitrust regulation with respect to its refusal to deal.” *Id.* at 372.

The Supreme Court disagreed that the FPA could be stretched so far as to exempt parties from court supervision of their commercial and contractual conduct. The Court characterized the Commission as having “limited authority” over the utility’s transmission service. *Id.* at 374.¹⁷ In particular:

It is clear . . . that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by *business judgment* and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies

Id. (emphasis added).

Thus, activities “which come under the jurisdiction of a regulatory agency nonetheless may be subject to scrutiny under the antitrust laws.”

¹⁷ The Court deferred for another day the issue of whether, in the event of direct conflict where the federal district court ordered an interconnection and the Commission denied such service, “the antitrust remedy may override the power of the Commission under § 202(b). . . .” *Id.* at 376-77.

Id. at 372. In *Otter Tail*, courts—not just FERC—could direct a utility to make wholesale sales, notwithstanding the claims (as here) that FERC has “exclusive jurisdiction” over sales and service. Like the federal antitrust laws in *Otter Tail*, the Bankruptcy Code represents fundamental federal policy that has to be harmonized with, not subordinated to, the FPA.

Like *Otter Tail*, the *Mobile-Sierra* line of cases recognizes that national regulation of the electric industry is founded in the first instance on the existence of privately negotiated individual contracts. See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 338 (1956). Federal energy legislation “permits the relations between the parties to be established initially by contract” subject to supervision within the limits Congress has directed. *Id.* at 338. As demonstrated below, FERC’s authority within the limited realm of rate-making cannot be expanded to engulf the rejection of contracts.

2. Rejection does not collaterally attack FERC’s rate-making

Simply stated, the filed rate doctrine provides that a court cannot change the rate on file with an agency.¹⁸ Mirant, however, is not asking

¹⁸ See *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Ark. La. Gas Co. v. Hall*, 453

anyone to change any rates on file with FERC. Mirant also is not complaining that the FERC-authorized rate is too high and should be lowered.¹⁹ Rather, Mirant is claiming that the Back-To-Back Agreement imposes a substantial burden upon the estate's cash flow and, therefore, the agreement should be rejected based upon the exercise of sound business judgment. If rejection is authorized, PEPCO will be entitled to damages calculated upon the very rate that FERC has authorized, a procedure FERC readily has accepted in other circumstances.²⁰

Long-standing precedent and the Bankruptcy Code clearly establish that rejection under Section 365 is a breach of contract—nothing more.²¹ Breach and rejection *are not* the same as termination, regardless of how many times and how many ways the Appellees try to argue to the contrary. See *Eastover Bank for Sav. v. Sowashee Venture (In re Austin Dev. Co.)*, 19 F.3d 1077, 1082-83 (5th Cir. 1994) (“Congress was not confused in its differing uses of the terms rejection, breach and termination [B]reach and

U.S. 571 (1981); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951); *Gulf States Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465 (5th Cir. 1987).

¹⁹ FERC:3, 20, 22, 31-32.

²⁰ Committee:35.

²¹ See Committee:33-34.

termination of . . . executory contracts are not synonymous terms under state law.”);²² *cf. Gulf States Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1471 (5th Cir. 1987) (unlike here, party sought to *excuse* obligation to pay FERC-filed rates).

Appellees attempt to avoid this precedent by claiming that Debtors are attempting to terminate or otherwise avoid a *service* obligation.²³ The Bankruptcy Code has no “service obligation” exception, but in any event Mirant is not providing a service here. Appellees’ principal line of purported authority, *NRG*, is distinguishable on this basis,²⁴ in addition to being completely wrong. Rejection of the Back-To-Back Agreement is a mere breach of a payment obligation, and this Court’s *Gulf States* decision

²² See also Committee:33-34. Beyond this, the Bankruptcy Code specifically contemplates that a plan of reorganization may alter rates subject to *later* approval by the regulatory agency. See 11 U.S.C. § 1129(a)(6). Rejection, however, neither modifies rates nor excuses a party’s contractual obligations.

²³ See, e.g., PEPCO:18 (“This appeal arises out of Mirant’s request that the Bankruptcy Court enjoin FERC from requiring Mirant to perform its electric *service obligations*.”) (emphasis added); see also PEPCO:24, 26.

²⁴ See *Blumenthal v. NRG Power Mktg., Inc.*, 104 F.E.R.C. ¶ 61,211, 61,741-42 (2003) (“[A] rejection of an executory contract might constitute a breach of the contract, as opposed to an abrogation. However, the Commission determined that a breach still results in the *abrogation of service* of a FERC-jurisdictional contract and has the same effect. . . .”) (emphasis added). The amicus’ authority is equally inapplicable. *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 422-23 (1952) (applying FPA § 205 to changes in service).

controls. *See Gulf States*, 824 F.2d at 1472 & n.9 (noting that contract can be set aside without interfering with FERC's rate-making powers). Here, the contract is not being set aside, but rather, its payment obligation will be enforced (in the context of rejection damages) by the Bankruptcy Court.

Even assuming that rejection was akin to terminating and rescinding a contract, and even assuming this case involved termination of service, Appellees cannot point to a single provision of the FPA that requires FERC authorization to abandon service under a contract. To fill this void, Appellees construct a makeshift jurisdictional argument based upon *In re Columbia Gas Sys., Inc.*, a case interpreting the Natural Gas Act ("NGA").²⁵ The NGA contains an express provision, Section 7(b), that bars a natural gas company from abandoning service without first having obtained FERC authorization to do so. The Federal Power Act, however, "contains no counterpart to section[] 7(b)," the relevant section at issue in *Columbia Gas*. *See Mun. Elec. Util. Ass'n v. Fed. Power Comm'n*, 485 F.2d 967, 972 n.20 (D.C. Cir. 1973). Thus, even if the NGA requires FERC to authorize abandonment, the FPA does not.

²⁵ *See* PEPCO:47. PEPCO also relies upon *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137 (1960), another case involving the NGA.

The Amicus contends that “numerous courts have refused to allow debtors to use bankruptcy to escape utility regulation”, and then string cites four cases with misleading parentheticals. Amicus: 9, n.16. Each of those cases—*Cajun Electric*, *Enron*, *PG&E* and *Boone County*—are distinguishable in significant ways from these appeals.

Cajun Electric, *NRG*, *Boone County*, and *PG&E* all involved attempts by a debtor or trustee to affect a previously-issued regulatory order (or a portion thereof), or preclude conclusion of a previously commenced regulatory investigation, that related specifically to the regulated entity’s finances/financial condition.²⁶ Here, FERC has not issued any order on the matters before this Court, and the Debtors have not sought to enjoin any validly-initiated FERC proceedings. *Enron* has absolutely nothing to do with contract rejection under Section 365, and merely states general propositions of law regarding the filed rate doctrine. *Enron Power Mktg.*,

²⁶ See *La. Pub. Serv. Comm’n v. Mabey (In re Cajun Elec. Power Coop., Inc.)*, 185 F.3d 446, 449-50 (5th Cir. 1999); *NRG Power Mktg., Inc. v. Blumenthal (In re NRG Energy, Inc.)*, No. 03 CIV 3754 RCC, 2003 WL 21507685, at *1-2 (S.D.N.Y. June 30, 2003); *Boone County Utils., Inc. v. State of Ind. (In re Boone County Utils., Inc.)*, Case No. 03-16707-AMJ-11, Adv. No. 03-0584 (Bankr. S.D. Ind. Sept. 26, 2003), Slip Op. at ¶¶2, 4, 7 (denying injunction for preexisting regulatory proceeding where debtor had already participated in the regulatory proceeding for over a year); *Pac. Gas & Elec. Co. v. Cal. Pub. Utils. Comm’n (In re Pac. Gas & Elec. Co.)*, 263 B.R. 306, 308-309 (Bankr. N.D. Cal. 2001) (“PG&E”).

Inc. v. Nev. Power Co. (In re Enron Corp.), Case No. 01 B 16034 (AJG), Adv. No. 02-2520 (Bankr. S.D.N.Y. Aug. 28, 2003). Similarly, in *Cajun Electric*, this Court never reached the issue of whether a regulator could be enjoined—only whether, under the circumstances there presented, an injunction was appropriate.²⁷ Thus, the Amicus’ blanket attack on the power of bankruptcy courts to handle core matters involving regulated contracts finds no support in the precedents.

3. *The “Mobile-Sierra doctrine” does not trump Bildisco*

PEPCO relies upon the *Mobile-Sierra* doctrine to argue that FERC has to determine whether “service” can be terminated.²⁸ Again, even FERC recognizes that “Mirant’s only obligation” under the “service” characterization was to pay money.²⁹ The *Mobile-Sierra* doctrine gives PEPCO’s position no support.

²⁷ *Cajun Electric*, 185 F.3d 449-50. The Court limited its decision to the facts before it, concluding that the injunction was an abuse of discretion “in these circumstances.” *Id.* at 452-53 and n.10. The Court did not address 28 U.S.C. § 1334(e), *id.* at 456 n.13, and most importantly, the Court “[did] not consider the scope of a court’s power to enjoin administrative proceedings that are excepted from the automatic stay.” *Id.* at 457-58 n.18. The Court did, however, state that there is “significant authority . . . suggesting that courts may properly invoke § 105(a) to enjoin proceedings that are excepted from the automatic stay under § 362(b)(4).” *Id.* at 457-58 n.18 (citations omitted).

²⁸ PEPCO:46-47.

²⁹ FERC:38-39.

The *Mobile-Sierra* doctrine is simple. The FPA (NGA) does not create private rights. Neither the FPA nor the NGA abrogate the sanctity of the private law of contract to authorize unilateral rate changes where the contract itself would prohibit them. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid. See Carmen L. Gentile, *The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future*, 21 ENERGY L.J. 353, 358 (2000). Put another way, if the underlying contract allows a party to unilaterally change a rate, such a change may be accomplished. If not, it cannot.³⁰

When correctly stated, *Mobile-Sierra* is of no value to PEPCO. First, no party is asserting a right to unilaterally change the contract. What is at issue is a court-supervised process concerning whether a payment obligation can be discharged in bankruptcy, like any other debt. Second, the *Mobile-Sierra* cases recognize that enactment of the FPA changed the contractual and commercial *status quo* to the minimum extent necessary. Bankruptcy procedures were well known to the Congress and were an

³⁰ See *Mobile Gas*, 350 U.S. at 342-43 (“If the purported change is one the natural gas company has the power to make, the ‘change’ is completed upon compliance with the notice requirement The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.”).

accepted part of the commercial landscape when Congress enacted the FPA.³¹ Nothing in the *Mobile-Sierra* line of cases suggests that Congress intended to discontinue those regimes.³² Consequently, PEPCO's citation to cases involving the *Mobile-Sierra* doctrine is irrelevant here.

C. Rejection Is Not A Collateral Attack Upon FERC's Order In The Divestiture Transaction

The Appellees likewise cannot validly claim that rejection would collaterally attack FERC's approval of PEPCO's divestiture under FPA § 203. For its part, PEPCO flatly admits that "FERC has not issued any rulings with respect to Mirant's electric service obligations to PEPCO and its consumers. . . ."³³ This admission completely undercuts the claim that there is any existing order that is being collaterally attacked. FERC nonetheless claims that the proposed rejection "threatens to upset the

³¹ At the time, Congress was well aware of the notorious financial collapse of the Insull utility empire, the national high rate of receiverships among utilities as well as bankruptcy courts' traditional and pre-existing role. See Charles F. Phillips, Jr., *The Regulation of Public Utilities*, at 239 (3d ed. 1993) (53 holding companies subject to bankruptcy proceedings or placed into receivership during 1929-1936); see also 79 Cong. Rec. 10414, 10415-16 (1935).

³² In fact, the exact opposite may be inferred. See *Mobile Gas*, 350 U.S. at 344 ("By preserving the integrity of contracts, [the NGA] permits the stability of supply arrangements."). By implication, preserving the integrity of contracts leaves the parties with their respective rights – in this case the right of rejection.

³³ PEPCO:43.

overall balance that led to FERC's reasonableness conclusion regarding the APSA."³⁴ In reality, FERC made no "reasonableness conclusion regarding the APSA," and FERC's test under FPA § 203 does not contemplate such a determination.

Section 203 requires FERC to determine if a divestiture transaction is "consistent with the public interest." 16 U.S.C. § 824b(a).³⁵ FERC uses three factors to make a determination under FPA § 203: (a) the effect on competition; (b) the effect on rates; and (c) the effect on regulation.³⁶ Here, no part of the Section 205 analysis involved a determination of the reasonableness of the price paid under the APSA.

For all the Appellees' noise about alleged rate increases to retail rate customers, FERC only regulates *wholesale* rates, not retail rates or matters regulated by the states. See FPA § 201(a) & (b)(1). Thus, FERC restricted its analysis in the divestiture to whether the transaction would potentially

³⁴ FERC:36.

³⁵ See also APP:64 (FERC Order).

³⁶ APP:64 (citing The Commission's Merger Policy Statement, Order No. 592, FERC Stats. & Regs. ¶ 31,044 at 30,117-18).

increase rates *PEPCO* charged to its *wholesale* customers.³⁷ FERC accepted PEPCO's position that those rates were locked-in by contractual terms that would remain unaltered by the divestiture, meaning the divestiture would have no impact on PEPCO's wholesale rates.³⁸ FERC entirely disposed of the public interest factors without either mentioning or considering the Back-To-Back Agreement.³⁹

Indeed, the only reason the Back-To-Back Agreement warranted mention at all was FERC's *refusal* to hold a "just and reasonable" hearing. In the joint application, *PEPCO* expressly took the position that "Commission authorization for it to assign these PPAs or resell energy and capacity that it obtains under the PPAs to Mirant *is not necessary.*"⁴⁰ Panda intervened and protested,⁴¹ claiming that FERC should either

³⁷ APP:67-69.

³⁸ APP:42-43 & 67-69.

³⁹ In that respect, the statement by the Amicus that "Pepco rate payers have already paid Mirant \$260 million to compensate Mirant for agreeing to the Back-to-Back Agreement as part of the APSA" (Amicus: 5) has no evidentiary support in this record. Nor is there support for contentions that (i) the reduction in consideration paid by Mirant to PEPCO under the APSA was somehow actually paid by PEPCO retail customers or (ii) if Mirant had paid an additional \$260 million, PEPCO retail ratepayers necessarily would have received the benefit of all or any portion of that \$260 million.

⁴⁰ RE25:6-7 n.10 (emphasis added).

⁴¹ RE26:4.

(1) reject the Back-To-Back Agreement as unjust and unreasonable absent Panda's *consent* or (2) suspend the agreement pending a hearing.⁴² FERC, however, denied Panda's request on the ground that the PPAs remained unchanged by the Back-To-Back Agreement.⁴³ As a result, no hearing was required and no separate determination needed. Any contention that rejection contradicts FERC's non-determination is FERC's revisionist history.

D. The Appellees Cannot Entangle The APSA With This Dispute

Beyond FERC's reinventing its own rulings in the divestiture, PEPCO goes so far as to overstate the rulings below by claiming that the District Court held the APSA and the Back-To-Back Agreement to be non-severable.⁴⁴ The District Court made no such ruling.⁴⁵ What the District Court actually said was – had it gotten to the merits of severability – “there might well be reason for the bankruptcy court or this court to consider a

⁴² RE26:12-13.

⁴³ RE26:13.

⁴⁴ PEPCO:4.

⁴⁵ The statement PEPCO snips is from the portion of the District Court's memorandum entitled “Overview of Pertinent Facts.” RE2:3.

motion . . . to reject the contractual commitments” of the Back-To-Back Agreement.⁴⁶

The Appellees’ chosen tactic is particularly odd because the argument buys them no success. Even if the APSA and the Back-To-Back Agreement are actually one contract, this makes the APSA itself executory and subject to rejection. Rejection does not terminate or rescind the agreement; rather, the parties’ remaining executory obligations under the Back-To-Back Agreement end, and are resolved in the plan of reorganization.⁴⁷ Thus, for all the Appellees’ heat, there is no light. The result is the same.

Undaunted, PEPCO carries its fiction even further, contending that the District Court’s factual “finding” of nonseverability must be “reviewed for clear error.”⁴⁸ Wrong again. Where, as here, the agreements are

⁴⁶ RE2:27-28.

⁴⁷ *Austin Dev.*, 19 F.3d at 1082-83; 11 U.S.C. § 365(g).

⁴⁸ PEPCO:16, 51.

unambiguous, severability is a question of law.⁴⁹ Equally clear is the answer.

The Back-To-Back Agreement is divisible from the APSA based on the unambiguous language of the agreements, most notably the APSA's express severability clause.⁵⁰ The presence of a severability clause "demonstrates that the parties intended for the contract to be severable." *Frankenmuth Mut. Ins. Co. v. Escambia County, Fla.*, 289 F.3d 723, 729 (11th Cir. 2002). Similarly, the parties anticipated severance of the PPAs if the Back-To-Back Agreement was later found to be unenforceable, and allocated specific adjustments in the asset purchase price depending upon whether the PPAs could be successfully transferred to Debtors.⁵¹ See *Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co.*, 83 F.3d 735, 740 (5th Cir. 1996) (contract is severable "[w]here the subject matter . . . is divisible and the consideration is apportioned" among the "types of rights

⁴⁹ *Sisk v. Parker*, 469 S.W.2d 727, 732 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.) ("The determination of whether a contract is divisible or not is usually a question of law"); *Howard Univ. v. Durham*, 408 A.2d 1216, 1219 (D.C. App. 1979) ("Where a contract is unambiguous . . . the resolution of the divisibility issue is a question to be decided by the court.").

⁵⁰ 4X1:55, § 12.11.

⁵¹ RE24:14-15, § 3.4.

granted.”); *Holiday Homes, Inc. v. Briley*, 122 A.2d 229, 232 (D.C. 1956) (same).⁵² Thus, the Appellees’ efforts to mesh the agreements are both wrong and inconsequential.

E. The Appellees Have Not Managed To Wriggle Free Of The Bankruptcy Code

1. The Back-To-Back Agreement Is Property Under The Exclusive Jurisdiction Of The Bankruptcy Court

Having failed to establish FERC’s own exclusive jurisdiction, the Appellees vainly attempt to argue that the Bankruptcy Court has none because property of the estate is not at issue. The Bankruptcy Code and the case law will not support such a claim.

Section 541(a) of the Bankruptcy Code states that “[e]xcept as provided in subsections (b) and (c)(2) of this section, *all legal or equitable interests of the debtor in property as of the commencement of the case*” are

⁵² The Back-to-Back Agreement and the APSA are severable not only by design, but by their very nature. One is for the immediate lump-sum sale of hard assets; the other for the ongoing reimbursement of fixed power-purchase payments. 4X1:11, § 3.1; RE22:61-62. They were executed as separate agreements at separate times and subject to separate amendments. RE24:1; RE22:1; Mirant RE26-27. The parties did not assent to all the promises “as a single whole.” *Durham*, 408 A.2d at 1219. Agreements far less distinct than these are routinely held to be severable. *In re Cafeteria Operators, L.P.*, 299 B.R. 384, 389-92 (Bankr. N.D. Tex. 2003) (master sublease with lump-sum basic rent payment); *In re Plitt Amusement Co. of Wash., Inc.*, 233 B.R. 837, 845-46 (Bankr. C.D. Cal. 1999) (simultaneously executed purchase agreement and long-term leases); *In re Cent. Fla. Fuels, Inc.*, 89 B.R. 242, 244-45 (Bankr. M.D. Fla. 1988) (asset purchase agreement that was conditioned on lease of premises).

“property of the estate.” 11 U.S.C. § 541(a)(1) (emphasis added). The Supreme Court has instructed that the concept of “property of the estate” is broad and expansive. See *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203-04 (1983); see also *Equinox Oil Co. v. Official Unsecured Creditor’s Comm.* (*In re Equinox Oil Co.*), 300 F.3d 614, 618 (5th Cir. 2002) (stating that “[s]ection 541 is read broadly and is interpreted to ‘include all kinds of property, including tangible or intangible property’ ”). This view prevails in virtually all circuit Courts of Appeals and encompasses a vast array of property.⁵³ In particular, executory contracts are property of the Debtors’ estate. See *Cinicola v. Scharffenberger*, 248 F.3d 110, 123 (3d Cir. 2001) (“The broad definition of property of the bankruptcy estate encompasses ‘all legal or equitable interests of the debtor,’ and includes executory contracts.”); see also *Computer Communications, Inc. v. Codex Corp.* (*In re Computer Communications, Inc.*), 824 F.2d 725, 730-31 (9th Cir. 1987); *In re El Paso Refinery, L.P.*, 220 B.R. 37, 41 (Bankr. W.D. Tex. 1998); 2 William L.

⁵³ See, e.g., *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 497-98 (3d Cir. 1998) (franchise agreement); *In re Prudential Lines, Inc.*, 928 F.2d 565, 572-73 (2d Cir. 1991) (interests whose values are speculative and interests that involve intangible rights subject to regulation); *Fed. Aviation Admin. v. Gull Air, Inc.* (*In re Gull Air, Inc.*), 890 F.2d 1255, 1259-60 (1st Cir. 1989) (landing slots); *In re Pester Ref. Co.*, 845 F.2d 1476, 1481 (8th Cir. 1988) (debtor’s contractual right to purchase goods stopped in transit).

Norton, Jr., NORTON BANKRUPTCY LAW AND PRACTICE 2D § 37:16 (1978) (explaining that executory contracts constitute property of the estate).⁵⁴

The Appellees rely upon *MCorp*⁵⁵ and *Braniff*⁵⁶ in arguing to the contrary, but neither case will bear the weight. PEPCO contends that, like the landing slots in *Braniff*, “FERC’s regulatory rules associated with the parties’ electric service agreement” are not property of the estate.⁵⁷ No party to this appeal has claimed that FERC’s rules and regulations are somehow property of the estate. Unlike *Braniff*, this case involves contractual rights between two private parties. It is the Back-To-Back Agreement *itself* that is property of the estate. It is therefore subject to the bankruptcy court’s exclusive jurisdiction under 28 U.S.C. § 1334(e).

⁵⁴ Indeed, even the Debtors *rights* under the agreement before it is assumed are property of the estate. See *In re Mirant Corp.*, 303 B.R. 319, 328 (Bankr. N.D. Tex. 2003). In *Mirant*, the Bankruptcy Court distinguished *In re Tonry*, 724 F.2d 467 (5th Cir. 1984), noting that courts regularly treat executory contracts as property of the estate prior to their assumption. *Id.* at 328. In addition, the Bankruptcy Court explained that *Tonry* relied in part on an outdated version of COLLIER ON BANKRUPTCY containing language (relied on by the *Tonry* court) which has since been deleted. *Id.*

⁵⁵ See *MCorp Fin., Inc. v. Bd. of Governors Fed. Reserve Sys. of the United States*, 900 F.2d 852 (5th Cir. 1990) (“*MCorp I*”) and *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32 (1991) (“*MCorp II*”).

⁵⁶ *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 942 (5th Cir. 1983).

⁵⁷ PEPCO:34.

The Appellees likewise cannot save themselves with *MCorp*. First, *MCorp* involved a statutory regime that (unlike here) expressly provided that courts were without jurisdiction of any kind to interfere.⁵⁸ Second, interference with property of the estate was not yet ripe in *MCorp*, which involved only a regulatory investigation and not an enforcement action requiring the payment of funds.⁵⁹ Notably, the Supreme Court *expressly recognized* that the bankruptcy court had exclusive jurisdiction over property of the estate, which at some future point might merit protection.⁶⁰ Unlike the regulatory investigation at issue in *MCorp*, any activity at FERC concerning the nature or disposition of the Back-To-Back Agreement or any of the Debtors' cash is, of necessity, an exercise of control over property of the estate, directly in conflict with the Bankruptcy Court's exclusive jurisdiction.

⁵⁸ *MCorp II*, 502 U.S. at 39 (“[N]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate or set aside any such notice or order.”) (quoting 12 U.S.C. § 1818(i)(1)).

⁵⁹ In *MCorp II*, the Board's proceedings were commenced to determine whether *MCorp* had violated specific statutory and regulatory provisions. *Id.* at 41.

⁶⁰ *Id.* at 42 (“the prosecution of the Board proceedings, prior to the entry of a final order and prior to the commencement of any enforcement action, *seems unlikely to impair the Bankruptcy Court's exclusive jurisdiction over the property of the estate protected by 28 U.S.C. § 1334(d)* [presently section 1334(e)]” (emphasis added)).

2. *The Appellees can find no solace in the amendments to the Bankruptcy Code*

PEPCO next points to various amendments to 28 U.S.C. § 1334 contending that “despite having multiple opportunities to do so in the course of enacting and amending section 1334, Congress never evinced a specific intent to displace FERC’s exclusive jurisdiction.”⁶¹ PEPCO should have read the amendments.

Nearly 30 years after Congress enacted the FPA, which Appellees wrongly claim gave FERC exclusive jurisdiction over “contracts,” Congress enacted what is now 28 U.S.C. § 1334. Section 101 of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (“BAFJA”), Pub. L. No. 98-353, 98 Stat. 333, enacted 28 U.S.C. § 1334(d), effective as of July 10, 1984 (*see* BAFJA section 122), provided:

(d) 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 the estate.

(Emphasis added).

⁶¹ PEPCO:36.

None of the subsequent amendments to which PEPCO points touched on the exclusive jurisdiction granted in the original enactment and upon which the Appellants rely.⁶² The clear and unequivocal words “exclusive jurisdiction of all of the property, wherever located” have always been part of section 1334(d) (now section 1334(e)), and there has been no need to modify, clarify or amend them.

3. *The “police power” exception to the automatic stay grants FERC no authority here*

Section 362(b)(4) of the Bankruptcy Code likewise does not save Appellees’ arguments. Section 362(b)(4) defines a narrow set of regulatory actions that are exempt from the operation of *some* components of the automatic stay, but not from others. *See* 11 U.S.C. § 362(b)(4) (exempting action by governmental unit from sections 362(a)(1), (2), (3) or (6), but *not* from sections 362(a)(4), (5), (7) or (8)). Whatever regulatory power the

⁶² 28 U.S.C. § 1334(d) was amended in 1986 by section 144(e) of the Bankruptcy Judges, U.S. Trustees, & Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3096, by replacing the words “and of the estate” in the last line with the words “and of property of the estate”. The words “exclusive jurisdiction” were not changed. In 1988 Congress amended FPA section 206, 16 U.S.C. § 824e (Pub. L. No. 100-473, 102 Stat 2300). The word “exclusive” was not added and still does not appear in that section. Finally, in 1994, Congress re-designated 28 U.S.C. § 1334(d) as section 1334(e); no textual changes were made.

exception permits, it stops short of imposing monetary obligations on the estate.

For example, section 362(b)(4) explicitly states that a governmental unit may *not* enforce a money judgment. 11 U.S.C. § 362(b)(4).⁶³ Permitting FERC to essentially require the Debtors to assume the Back-To-Back Agreement is tantamount to FERC enforcing a judgment on behalf of PEPCO and adjudicating the rights of a private party, conduct which is unquestionably subject to the automatic stay. *See Chao v. BDK Indus., L.L.C.*, 296 B.R. 165, 168 (C.D. Ill. 2003). “This is especially the case when a successful suit would result in a pecuniary advantage to certain private parties vis-à-vis other creditors of the estate, contrary to the Bankruptcy Code’s priorities.” *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 390 (6th Cir. 2001). The phrase “police or regulatory power” does not extend to or encompass “regulatory laws that directly conflict with the control of the res

⁶³ See also 3 COLLIER ON BANKRUPTCY ¶362.05[5][a] p. 362-56 to 57 (15th ed. 2002) (“[a] governmental unit may pursue actions against the debtor or the estate, but it may not enforce a money judgment or seize or seek control over property of the estate without first obtaining relief from the stay” (citing, *inter alia*, *MCorp II*)); *id.* at ¶362.05[5][b], p. 362-61 to 62 (discussing *MCorp II* and the Supreme Court’s recognition of “the distinction between prosecution of an administrative or regulatory action, which is permitted, and enforcement of a resulting judgment or order, which may be stayed if it affects control over property of the estate.”).

or property by the bankruptcy court.” *Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.)*, 128 F.3d 1294, 1297 (9th Cir. 1997); *Cash Currency Exch., Inc. v. Shine (In re Cash Currency Exch., Inc.)*, 762 F.2d 542, 555 (7th Cir. 1985).

Furthermore, section 362(b)(4) does not allow conflict with other provisions of the Bankruptcy Code. For example, the Bankruptcy Code provides a debtor with a discharge of “*any* debt that arose before the date of [plan] confirmation”, except as otherwise provided elsewhere in section 1141, in the plan or in the confirmation order. 11 U.S.C. § 1141(d)(1)(A) (emphasis added). A FERC order of compliance would not only create a *de facto* exception to section 1141(a), but would make FERC, rather than the Bankruptcy Court, the arbiter of the Debtors’ right to a discharge.

Similarly, the Bankruptcy Code provides a first priority in payment for “the actual, necessary costs and expenses of preserving the estate” 11 U.S.C. § 503(b)(1)(A). A FERC order of compliance would give PEPCO payment in full, in cash, in accordance with the terms of an agreement that has been determined not to be beneficial to the estate. FERC would therefore be making decisions about bankruptcy payment priorities that contravene legal standards concerning what costs are entitled to

administrative expense status. As one can see, FERC's grab for authority renders a gap in the Bankruptcy Code in addition to being unauthorized under the FPA.

F. This Court Can And Should Render Judgment Rather Than Remand

The Appellees expend as much effort stumping for a remand as they expend in search of an exclusive regulatory prerogative. Here, however, there is nothing requiring the further attention of the District Court.

There is no dispute that the Back-To-Back Agreement is executory, because PEPCO seeks to enforce the remaining obligations thereunder. Likewise, there is no dispute (and can be no dispute) concerning the rates contained in the Back-to-Back Agreement; they are the rates approved by FERC. As a result, there is no issue of material fact warranting remand.⁶⁴ Mirant's rejection decision is warranted under the very permissive "business judgment rule."⁶⁵

⁶⁴ Alternatively, the jurisdictional question having been resolved by this Court, there is no need to remand to the District Court for the core bankruptcy matter of determining the motion to reject. The Bankruptcy Court is uniquely equipped to handle such matters.

⁶⁵ Committee:49-50.

Where, as here, the record permits only one factual inference, this Court's authority to render the appropriate judgment rather than remand is both "well-established" and "clear." *In re Hellenic Lines, Ltd. (Hellenic Carrier v. Prudential Lines, Inc.)*, 813 F.2d 634, 638 (4th Cir. 1987); *Avery v. Homewood City Bd. of Educ.*, 674 F.2d 337, 341 n.5 (5th Cir. 1982).⁶⁶ This Court and others have exercised this power in a wide variety of cases where the data in the record is undisputed and judicial economy bespeaks no need for further proceedings below. *See C&B Sales & Serv., Inc. v. McDonald*, 177 F.3d 384, 389 (5th Cir. 1999) (citing ten examples from this and other circuits). Here, the only interest promoted by ordering remand is the Appellees' indecent desire to prolong these proceedings, to waste the assets of the bankruptcy estate, and to obstruct confirmation of a plan. This Court has the power to prevent those actions, and under this record, it should do so.⁶⁷

⁶⁶ See also 28 U.S.C. § 2106; *Grosso v. United States*, 390 U.S. 62, 71-72 (1968).

⁶⁷ The Appellees' obsession with the scope of the Bankruptcy Court's injunctions, based largely upon phantom "service obligations" not present here, becomes moot once rejection is ordered. In any event, once the jurisdictional issues are resolved, any arguments about the scope of the injunctions can be addressed to and resolved by the Bankruptcy Court, subject to review in the ordinary course.

III. CONCLUSION

Appellees seek to expand FERC's "exclusive jurisdiction" over wholesale rates to exclusive jurisdiction over all matters related to FERC-jurisdictional contracts, no matter how attenuated. Their arguments, however, rely upon law that is absent from the statutes and facts that are absent from the record. The Bankruptcy Code clearly distinguishes between rate changes under a chapter 11 plan (Section 1129(a)(6)) and rejection under Section 365 or in a chapter 11 plan (1123(b)(2)). They are not the same. Under Section 1129(a)(6), rate changes require agency authorization; rejection, on the other hand, does not. The only authority that would permit such a contradiction of the Code was written by FERC itself (*NRG*). Neither FERC's position nor its decisions can be reconciled with *Bildisco* and the plain meaning of the Code.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2004, two copies of the foregoing Reply Brief Of Appellant 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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In addition, I hereby certify that on April 19, 2004, one original and eight copies of the foregoing Reply Brief Of Appellant 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 sent by overnight commercial carrier (FedEx) to the Clerk of the United States Court of Appeals for the Fifth Circuit:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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Dated: April 19, 2004