Nos. 04-10001; 0-10004; 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 THE 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, Forth Worth Division United States District Court Judge John H. McBryde

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BRIEF OF APPELLEE FEDERAL ENERGY REGULATORY COMMISSION

DENNIS LANE
BETH G. PACELLA

FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

APRIL 7, 2004

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the Certificate of Interested Persons contained in the Brief of Appellants Mirant Corporation *et al*. lists the persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.2. I have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

_____

Dennis Lane
Attorney of Record for Federal
Energy Regulatory Commission

April 7, 2004

STATEMENT REGARDING ORAL ARGUMENT

In accordance with Fifth Circuit Rule 28.2.4 and Federal Rule of Appellate Procedure 34(a)(1), the Federal Energy Regulatory Commission submits that oral argument would be helpful to the Court's disposition. Oral argument is needed to provide an opportunity for the Court to question counsel about the important matters raised by this appeal.

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COUNTERSTATEMENT OF JURISDICTION

Appellants, Mirant Corporation, *et al.*, ("Mirant" or "Debtors") and Official Committee of Unsecured Creditors, assert that the District Court had jurisdiction under 28 U.S.C. §§ 1334(a), (b), and (e). Mir. Br. 1; Ctee. Br. 1.[1] The District Court dismissed the adversary proceedings at issue for failure to state a claim on which relief can be granted. *E.g.*, Mir. RE 15: 6-7.[2] Dismissal was based on a determination that the injunctive relief against FERC requested by Appellants, and granted by the Bankruptcy Court, would "interfere with the performance by FERC of its regulatory function of oversight over the purchase or sale of electric energy at wholesale in interstate commerce." *Id*. at 4. As the District Court concluded, "neither it nor the bankruptcy court has any authority to enjoin FERC from performing its regulatory functions." Mir. RE 12: 27.

Accordingly, the district court and the bankruptcy court lacked jurisdiction to hear the matters raised by the adversary proceedings at issue. Those matters fall within FERC's exclusive jurisdiction under the Federal Power Act

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[1] Citations to Appellant Mirant's Brief will be designated "Mir. Br." Citations to Appellant Official Committee's Brief will be designated "Ctee. Br."

[2] Citations to Mirant's Record Excerpts will be designated "Mir. RE."

("FPA"), 16 U.S.C. § 824 *et seq.*, and the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq.*

STATEMENT OF ISSUES

Did the District Court properly determine that neither it nor its referral court, the Bankruptcy Court, had jurisdiction to enjoin FERC from carrying out its statutory duties under the FPA and the NGA related to the wholesale sale and transmission of electric energy and transportation of natural gas by Mirant?

Did the District Court properly vacate all the injunctive relief granted by the Bankruptcy Court on grounds that (a) the Bankruptcy Court lacked authority to enjoin FERC and (b) that no showing had been made to justify injunctive relief?

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

Despite Appellants' efforts to make it appear that the adversary proceedings below involved only the Back-to-Back Agreement, *e.g.*, Mir. Br. 5; Ctee. Br. 3; Amicus Br. 3,[3] the Bankruptcy Court, from the moment the first adversary proceeding was filed, enjoined FERC "from taking any action to require or coerce

[3] Citations to Amicus' Brief will be designated "Amicus Br."

the Debtors to abide by the terms of the Back-to-Back Agreement *or other agreements* of the Debtors." Ctee. RE 8:4 ¶ B (emphasis added).[4] As the District Court found, this injunctive relief impaired FERC's "ability to exercise the regulatory jurisdiction vested in it by Congress as to *prices* and *rates* contemplated *by hundreds of [Mirant's] executory contracts.*" Mir. RE 15:3 (emphasis added). Thus, and contrary to Appellants' indications, the Bankruptcy Court's injunctions were not restricted to a single contractual dispute between private parties, but, as FERC's vigorous opposition pointed out, broadly intruded into FERC's regulatory process without any legal or factual justification.

Mirant filed the first adversary proceeding, docketed by the District Court as No. 4:03-CV-944-A, on August 28, 2003, along with a motion for an *ex parte* temporary restraining order ("944 TRO"). Although the alleged facts and contentions related to only the Back-to-Back Agreement and sought an injunction only as to that agreement (*see* Ctee. RE. 8: 2-3 ¶ 1 (recitation of allegations and requested relief)), the Bankruptcy Court expanded the requested relief to enjoin FERC "from taking any action to require or coerce the Debtors to abide by the

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[4] Citations to Appellant Official Committee's Record Excerpts will be designated "Ctee. RE."

terms of the Back-to-Back Agreement or other agreements of Debtors." *Id*. at 4, ¶ B. The Bankruptcy Court then extended the 944 TRO to remain "in full force and effect until the conclusion of the preliminary injunction hearing and the entry of any resultant order." Ctee. RE. 9.

Mirant filed a second adversary complaint against FERC on September 11, 2003, docketed by the District Court as No. 4: 03-CV-1174-A. This complaint was accompanied by a motion for a temporary restraining order, which the Bankruptcy Court granted on September 12, 2003 ("1174 TRO"). Mir. RE. 17.

The 1174 TRO enjoined FERC from taking any action related to "any Wholesale Contract" of Debtors without FERC giving Debtors 10 days "written notice setting forth in detail the action which FERC seeks to take with respect to the Wholesale Contract." *Id*. at 4 ¶ 1. The TRO defined "Wholesale Contract" as "numerous executory contracts for (a) the purchase or sale of electric energy, capacity or ancillary service at wholesale in interstate commerce, (b) the transmission of electric energy in interstate commerce and (c) the transportation or storage of natural gas in interstate commerce." *Id*. at 3 ¶ 2. In sum, the 1174 TRO covered all Mirant's hundreds of FERC-jurisdictional contracts on file with FERC. The 1174 TRO was extended by orders of September 22 and October 1, pending action by the District Court on the motion to withdraw the reference.

The Bankruptcy Court converted the 944 TRO into a preliminary injunction on September 25, 2003. Ctee. RE. 11. The injunction precluded FERC "from commencing or continuing any proceeding outside of this Court with respect to the Back-to-Back Agreement." *Id*. at 2 ¶ C.[5]

As a result of the 944 TRO and the 1174 TRO, as extended, from commencement of the adversary proceedings until their dismissal by the District Court, FERC was enjoined from taking any action on any and all contracts to which Mirant was a party and which involved the wholesale sale or transmission of electric energy or power in interstate commerce or the transportation or storage of natural gas in interstate commerce. As this involved many hundreds of contracts that are subject to FERC's exclusive jurisdiction under the FPA or the NGA, the restraining orders issued by the Bankruptcy Court constituted a severe and inappropriate intrusion into the area that Congress designated as solely within FERC's domain.

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[5] This injunction also restrained FERC from taking any action related to "two Transition Power Agreements" ("TPAs"), *id*. ¶ D, but that matter has since settled.

FERC moved to withdraw the reference in both adversary proceedings,[6] which the District Court granted in companion orders on October 9, 2003. Mir. RE:10 and 11. Both the Bankruptcy and District Courts agreed that "the reference must be withdrawn as to the adversary," and while the Bankruptcy Court did not recommend that the motion for rejection be withdrawn, the District Court found withdrawal of the motion was also warranted. *Id*. RE 10: 2.

The District Court next addressed pleadings before it related to (1) the proposed rejection of the Back-to-Back Agreement and (2) vacation or extension of the injunctive relief against FERC. *See* Mir. RE 12 ("Memorandum Opinion and Order" setting out issues and ruling). After reviewing the arguments and the pertinent law, the District Court denied the motion to reject, denied Mirant's motion for injunctive relief, and required Mirant to show cause why the injunctions related to the Back-to-Back Agreement should not be dissolved. *Id*. 28-29. After reviewing the responsive pleadings filed by Appellants, the District Court set aside and vacated the several injunctions related to the Back-to-Back Agreement, denied Appellants' motions for stay pending appeal, and dismissed the adversary proceeding in No. 4: 03-CV-944-A. Mir. RE 13.

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[6] FERC filed a joint motion with Pepco to withdraw the reference in the adversary proceeding designated by the District Court as No. 4:03-CV-944-A.

Shortly after those rulings, FERC moved to set aside and to vacate the injunctions and to dismiss the adversary proceeding in No. 4: 03-CV-1174-A. The District Court granted the requested relief by a "Memorandum Opinion and Order" issued January 26, 2004. Mir. RE 15.

Appellants filed the several appeals that this Court consolidated in the instant proceeding. Appellants also sought a stay of the District Court orders, which this Court denied on January 27, 2004.

II. STATEMENT OF FACTS

FERC has exclusive jurisdiction over all rates and charges and over any rule, regulation, practice, or contract affecting rates or charges[7] related to: (1) the transmission and wholesale sale of electric energy in interstate commerce under FPA §§ 201, 205, and 206, 16 U.S.C. §§ 824, 824d, and 824e, and (2) the sale for resale and transportation of natural gas in interstate commerce under NGA §§ 1, 4, and 5, 15 U.S.C. §§ 717, 717c, and 717d. All of the contracts covered by the Bankruptcy Court's injunctive relief are FERC-jurisdictional, as they involve

[7] In general, courts have compressed all these terms into the generic term "rate." *E.g., Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 447 n. 1 (D.C.Cir. 1988) (noting term "rate" includes "contractual provisions, methodologies for allocating costs, restrictions on availability of the [service] as well as quantity and price terms"); *Northern Natural Gas Co. v. Kansas Corp. Comm'n*, 372 U.S. 84,90-91 (1963)(same).

either the wholesale sale and transmission of electric energy in interstate commerce or the transportation (including storage) of natural gas in interstate commerce. *See* Mir. RE 17: 3 ¶ 2 (defining Wholesale Contracts). Such contracts, including executory contracts, must be filed with FERC in accordance the statutory filing requirements of FPA § 205(c), 16 U.S.C. § 824d(c), or NGA § 4(c), 15 U.S.C. § 717c(c). Also, each Debtor here is subject to FERC's jurisdiction as a "public utility," FPA § 201(e), 16 U.S.C § 824(e), or a "natural gas company," NGA § 2(5), 15 U.S.C. § 717b(5).

Recognizing FERC's exclusive jurisdiction over the contracts at issue, Mirant filed them with and sought approval of them from FERC. This is illustrated by Mirant's treatment of the Back-to-Back Agreement. That Agreement "arose out of the divestiture by PEPCO of its generating assets and power purchase agreements" under a state electric restructuring legislation. Mir. RE 20: 2 ¶ 5 (affidavit of Debtors' witness). Mirant was the winning bidder for the purchase of Pepco's "assets and the power purchase agreements (which were sold as a block)." *Id.* The sale "was effectuated by an Asset Purchase and Sale Agreement" ("APSA"), which provided, among other things, "for the assignment to Mirant of several of PEPCO's Power Purchase Agreements," ("PPA"). *Id.* at 2-3 ¶6.

The counterparties to two of the more significant PPAs, the Panda PPA and the Ohio Edison PPA, refused to consent to their PPAs' assignment to Pepco. *Id.* "The APSA anticipated this possibility," however, by setting up the Back-to-Back Agreement (Schedule 2.4 of the APSA), under which Mirant "would make PEPCO whole for its financial obligation pursuant to the unassigned [PPAs] and accept from PEPCO the power delivered pursuant to those [PPAs]." *Id*. at 3 ¶ 7. "PEPCO and Mirant activated the Back-to-Back provisions of the APSA by way of letter agreement date December 19, 2000." *Id*.[8]

Pepco and Mirant jointly filed for FERC approval of the entire APSA, including Schedule 2.4. *Potomac Electric Power Co*., 93 FERC ¶ 61,240 (2000). In reviewing the APSA, FERC considered each of its provisions to determine whether

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[8] Panda commenced litigation questioning the validity of Schedule 2.4. Due to litigation uncertainty, Pepco and Mirant agreed that "a purchase price adjustment will be made" in the event that the litigation prevented the assignment of the Panda PPA to Mirant. *Id*. at 4 ¶ 10. Section 3.4 of the APSA required that, should closing involve only "the Auctioned Assets other than the Panda PPA," Mirant would put approximately $260,000,000 in escrow to be retained by Pepco if the Panda PPA could not be assigned to Mirant. Mir. RE 23: 14-15 § 3.4 ("PPA-Related Purchase Price Adjustment"). In other words, "if Debtors were released from obligations related to the Panda PPA, and if that PPA was not assigned to Debtors under the provisions of schedule 2.4, Debtors would make an additional cash payment to PEPCO of approximately $260 million." Mir.RE 12: 5; *see also* Mir.RE 25: 2 ¶ 3 ("Unwind Agreement for the Panda PPA").

it was just and reasonable in the context of the entire APSA. *Id*. at 61,779-80. To comply with then-recently-implemented filing requirements and because certain of the agreements were unexecuted, the Commission required that Pepco refile Schedule 2.4 and other agreements as conforming rate schedules. *Id*. & n. 23; *see* 93 FERC at 61,784 ¶ (K) (requiring submission of revised conforming tariff sheets for the several agreements).

Panda argued that FERC should not approve Schedule 2.4 because it purportedly would alter Panda's bargained-for risks and deprive Panda of significant economic benefit. 93 FERC at 61,780. FERC disagreed, finding that even though Pepco "will resell the PPA entitlements to [Mirant], at a rate equal to its payment obligations in the PPAs," because Pepco "remain[s] the purchaser under the proposed transaction," Panda's risks or economic benefit would not change. *Id.*

In sum, although none of the terms of the PPA changed and Pepco remained the purchaser, Mirant recognized FERC's exclusive jurisdiction over all provisions of the APSA when it filed for FERC approval of the Back-to-Back provisions as "just and reasonable," *id*., the governing statutory standard. FPA § 205(a), 16 U.S.C. § 824d(a). FERC exercised its exclusive jurisdiction over the Back-to-Back provisions when it found that they were just and reasonable within the context of

the APSA. In the same way, FERC exercised its exclusive jurisdiction, and brought to bear its expertise and its experience, over all of Mirant's Wholesale Contracts when it determined that they, too, were just and reasonable under the FPA or the NGA.

As soon as Mirant filed the initial adversary complaint, the bankruptcy court acted to shut down FERC's ability to exercise its statutory and regulatory responsibilities with regard to "the Back-to-Back Agreement or other agreements of Debtors." 944 TRO, Ctee. RE 8: 4 ¶ B. Later, this injunction was carried forward in the 1174 TRO, Ctee. RE: 17, which made explicit that the injunction applied not only to all Mirant's FERC-jurisdictional electric contracts, but also to all of Mirant's FERC-jurisdictional natural gas transportation and storage agreements. The Bankruptcy Court included in the injunctive relief a requirement that FERC give Debtors 10-days notice setting forth in detail any proposed action that might affect, directly or indirectly, *id*. at 4 ¶ 1, any of the Wholesale Contracts. The hiatus was to allow Mirant to seek a stay from the Bankruptcy Court before a proposed FERC action went into effect. The injunctive relief severely disrupted FERC's ability to carry out its regulatory responsibilities on jurisdictional matters as: Mirant has hundreds of Wholesale Contracts (Ctee. RE 18: 3); Mirant's FERC-

jurisdictional operations are of national scope, and, many FERC actions have industry-wide effects.

FERC moved to withdraw the reference in both adversary proceedings. The Bankruptcy Court and the District Court agreed that the reference should be withdrawn with respect to the adversary proceedings. Mir. RE 10: 2. As the District Court noted "the interplay between the Federal Power Act and the Bankruptcy Code in a case like this one has not been the subject of a Supreme Court opinion. The law to be applied is far from clear." *Id*.; *see* Mir. RE 11 (order withdrawing the reference in second adversary).

The District Court then issued a "Memorandum Opinion and Order" (Mir. RE 12) that addressed the motion to reject the Back-to-Back Agreement and the related injunction. In its recitation of the facts, the District Court, quoting from Mirant's and Pepco's joint application to FERC, noted that the resale of electric energy from Pepco to Mirant contemplated by the Back-to-Back Agreement "is a wholesale sale subject to Section 205 of the FPA," which would be implemented by a service agreement under Pepco's (the seller's) market-based rate tariff for wholesale sales of electric energy in interstate commerce. *Id*. at 7 (citation omitted). Included with Pepco's conforming rate schedule to make the Back-to-Back Agreement effective was "an executed acknowledgement by Debtors that

[section 2.4 of the APSA] sets forth the respective rights and obligations of the parties as to the matters contained therein." *Id*. at 9.

After summarizing the positions of the parties and amici, *id*. at 9-15, the District Court analyzed the pertinent statutes and case law related to the "thrust of Debtors' motion to reject [:] that they should be permitted to reject the Back-to-Back Agreement because the rates, or prices, they are required by that agreement to pay for wholesale electric energy are too high." *Id*. at 19. Based on its review of the case law, particularly from the Supreme Court and this Circuit, *id*. at 16-19, the District Court concluded that "the FPA denies courts, other than a court authorized to review FERC orders, the authority to grant a claim if the claim is based on a contention that the filed rate is more or less than desirable or appropriate." *Id*. at 19. Debtors' rejection motion claim that the current rates for the Back-to-Back Agreement are too high was thus "precisely the kind of contention the cited statutory authorities indicate the [District] court is prohibited from entertaining [because] it is a collateral attack on the filed rates and FERC's December 2000 order [93 FERC ¶ 61,240] approving the Back-to-Back Agreement as just and reasonable." *Id*. at 20.

The District Court next addressed Debtors' contention that Section 365 of the Bankruptcy Code when read with 28 U.S.C. § 1334(e) "give the court the

power to authorize Debtors to reject the Back-to-Back Agreement notwithstanding the exclusive authority given FERC by the FPA." *Id*. at 20. For guidance, the Court looked to *In re NRG Energy, Inc.*, 2003 WL 21507685 (S.D.N.Y. June 30, 2003), where the bankruptcy court, after authorizing rejection of a FERC-jurisdictional agreement, "declined to enjoin FERC or to vacate a FERC order requiring plaintiff to continue to provide service under the agreement." Mir. RE 12: 21. Finding the district court in *NRG* was faced with arguments "[s]imilar to Debtor[s'] arguments here," *id*., the District Court here appropriately considered the *NRG* reasoning that "'under the elaborate statutory scheme created by the FPA, only a federal court of appeals may exercise jurisdiction to review a FERC decision.'" *Id*. at 22 (quoting *NRG* at *4).

The District Court then looked at Debtors' purported distinction, that while *NRG* addressed a recent FERC order requiring continuation of service, "[n]o such recent order has been made by FERC in the instant action." *Id*. at 23. The District Court found this to be "not a determinative distinction" because a ruling by a bankruptcy or district court that Debtors could be relieved of "their obligations under the Back-to-Back Agreement . . . would be just as much an affront to the authority of the FERC (December 2000 order approving the Back-to-Back Agreement as just and reasonable and its acceptance of the agreement as filed

rates) as a ruling by the *NRG* court at variance with the FERC order there at issue would have been." *Id*. at 23. As both courts recognized, the only proper forum to challenge a FERC order is the Court of Appeals. *Id*. at 24. Accordingly, the District Court ruled that it "would not appear to be the proper forum for Debtors to challenge the rates that have already been filed with and approved by FERC." *Id*.

On the strength of *Gulf States Utilities Co. v. FERC*, 824 F.2d 1465, 1472 (5th Cir. 1987), the District Court left open the possibility that if Debtors sought rejection for a reason "entirely separate from and independent of" the filed rates, the Court "would have authority to authorize the rejection." *Id*. As Debtors were not seeking rejection on a basis other than the filed rate, the Court properly determined "it should not entertain" their request, but, as the *NRG* court had determined, that Debtors "should go to FERC" to seek the relief they were pursuing. *Id.* at 25. The Court noted relevant case law establishing that FERC regularly addresses matters, and courts regularly review FERC determinations, regarding Debtors' proposed relief. Thus, "as Congress had in mind, FERC would be able to bring to bear on the problem the knowledge and expertise it has in the regulation of the transmission and sale at wholesale of electric energy in interstate commerce in deciding the effect, if any, the solution proposed by Debtors would have on the public interest." *Id*.

Based on that analysis, the District Court concluded that its exclusive jurisdiction "over all the property of Debtors and their estates," does not give it the power "to disregard the congressional mandate that FERC have exclusive responsibility for sales of electric energy at wholesale in interstate commerce nor does the court's power to approve rejection of an executory contract prevail over FERC's regulatory authority." *Id*. at 27. Although the District Court, as noted above, recognized that circumstances other than those presented here might give it power to approve rejection, it found that Debtors' proposal for "changing the regulatory rate scheme as to the power purchases contemplated by the Back-to-Back Agreement is beyond the authority of this court and the bankruptcy court." *Id.*

Accordingly, if Debtors were "relieved by FERC of their regulatory obligations related to" the Back-to-Back provisions, then a motion for authorization to reject "the contractual commitments of the agreement" might be appropriately considered by the courts. *Id*. at 27-28. In the present circumstances, however, the District Court could not find "rejection of the agreement would be consistent with good business judgment of the Debtors;" not only would Debtors be subject to normal damages claims related to rejection, but also they would not

be relieved of their regulatory obligations under the agreement and would be subject to FERC action to enforce those obligations. *Id*. at 27.

The Court's opinion did not rule on the validity of the 944 TRO, but asked for further briefing. *Id.* at 29. After receiving responses, the Court issued an Order setting aside and vacating the injunctive relief related to the 944 TRO. Mir. RE 13. Subsequent to that Order, FERC moved to vacate the 1174 TRO, which encompassed all Debtors' Wholesale Contracts filed with and approved by FERC. A Memorandum Opinion and Order, dated January 26, 2004 (Mir. RE 15), addressed FERC's motion.

The District Court explained the relationship between Debtors' first adversary complaint against Pepco and FERC and Debtors' second adversary complaint against FERC alone. "Adversary # 1 complimented Debtors' motion [to reject] by seeking, *inter alia*, injunctions prohibiting FERC from taking any action . . . [related to] the Back-to-Back Agreement." Mir. RE 15: 2. The injunctive relief sought in Debtors' adversary complaint against FERC alone was "more expansive, seeking injunctive relief against FERC that would impair its ability to exercise the regulatory jurisdiction vested in it by Congress as to prices and rates contemplated by hundreds of executory contracts." *Id*. at 3, citing Debtors' complaint at 5 ¶ 13.

Although Debtors' second adversary proceeding had a more expansive scope than their first, the District Court saw a parallel effort in both adversaries. "While Debtors couch their allegations in terms of preventing FERC from requiring them to continue to perform under executory contracts, Debtors are in effect asking the court to interfere with the performance by FERC of its regulatory functions of oversight over the purchase or sale [or transmission] of electric energy [and the wholesale sale or transportation of natural gas] in interstate commerce." *Id*. at 4; *see, e.g.*, Mir. RE 12: 19-20 (indicating that thrust of Debtors' motion to reject collaterally attacks FERC's regulatory rulings). Such interference, the Court found, "frustrate[es] the appellate procedure prescribed for review of actions taken by FERC." Mir. RE 15: 4.

Further, the District Court found a complete absence of the necessary factual predicate for issuance of injunctive relief:

> So far as the [district] court can determine, the temporary restraining order was granted on the basis of the bare allegations of the complaint, which purports to be verified. However, the complaint is not "verified" in any legal sense. It is not accompanied or supported by an affidavit or a declaration - - rather, the "verification" consists of an unsworn statement that the allegations in the complaint are true and correct to the best of the knowledge of the person who signed it and that the allegations are asserted "upon information and belief." Compl. at 10. Thus, the allegations of the complaint could not provide the factual basis for the grant of injunctive relief.

Id. at 5 n. 2; *see also id*. at 6 n. 4 (apparently, "there was no evidentiary support for the finding upon which the bankruptcy court premised the grant of the relief").

In addition, the District Court relied on "the reasons given in the December 23 order" (Mir. RE 12) for the legal analysis as to why Debtors' efforts to interfere with FERC's performance of its regulatory oversight function must fail. Mir. RE 15: 6. Based on the lack of any factual support for the injunctive relief requested and the legal proscriptions against the Bankruptcy or District Courts granting Debtors' requested relief that interferes with FERC's regulatory functions, the District Court concluded that all the injunctive orders in the second adversary (what is referred to in this brief as the 1174 TRO) should be vacated, and that "the complaint in this action does not state a claim upon which relief can be granted." *Id*. at 6. As a result, the District Court ordered that the 1174 TRO be vacated and set aside and that the complaint be dismissed for failure to state a claim upon which relief can be granted. *Id*. at 7; *see also* Mir. RE 16 (Final Judgment).

SUMMARY OF ARGUMENT

This case involves injunctive relief, which is reviewed under an abuse of discretion standard. The District Court's findings of fact are reviewed for clear error, while its legal conclusions are reviewed *de novo.*

Bankruptcy courts do not have an unbounded grant of jurisdiction under 28 U.S.C. § 1334. That statute's general jurisdictional grant does not supersede an agency's specific statutory grant of jurisdiction. Moreover, the section's language governs jurisdiction between courts, not between a bankruptcy court and an agency. Likewise, a bankruptcy court's jurisdiction over the property of the estate does not give it power to enjoin an agency from carrying out its regulatory duties.

Power to authorize rejection under § 365 of the Code, coupled with § 1334, did not give the Bankruptcy Court authority to stay FERC because Debtors' proposed rejection claims that rates for FERC-jurisdictional contracts are too high. The District Court properly distinguished between claims based on filed rates being too high, which are preempted by the FPA/NGA, and rejection claims that are based on grounds separate and apart from the reasonableness of the filed rate, which may be heard by courts. Mirant's claim that rates are too high collaterally attacks FERC's December 2000 Order approving the APSA as a whole, including its Back-to-Back provisions, as in the public interest with just and reasonable rates that would not adversely affect customers. Because such a challenge can be heard only by FERC, Mirant must file with FERC to obtain its requested relief.

Mirant's assertion that rejection constitutes a breach without abrogating or modifying the filed rate cannot withstand scrutiny. Here, that assertion overlooks

the parties' representations to FERC that the APSA should be approved as a whole, and that it would have no adverse effect on rates or competition. The District Court offered the Back-to-Back provisions as one example of how the APSA's individual components working together led to a just and reasonable result, even though the components separately might not produce that result. The Back-to-Back provisions stated that Pepco would take a lower price for its assets in return for Mirant's purchasing Pepco's PPA entitlements. Such offsetting benefits in the APSA as a whole justified FERC's finding that the APSA was just and reasonable and in the public interest. The proposed rejection threatens to upset that balance.

Because approval of the APSA and its rates represent the filed rate in this case, any proposal that would upset that balance must be reviewed and judged by FERC. Under the Back-to-Back Agreement, Pepco, immediately upon receipt, resells its PPA entitlements to Mirant, whose only obligation is to pay Pepco the same price that Pepco is charged for those entitlements. Rejection would effectively terminate that obligation. This would adversely affect Pepco's customers, who would ultimately bear any increased costs, unless Mirant could guarantee full payment to Pepco in accordance with the terms and conditions of Schedule 2.4. As Mirant has not made such a guarantee, rejection would reduce Mirant's payments below the filed rate level, and would increase the costs of the

APSA to Pepco's customers in contravention of the December 2000 Order's finding that customers would not be adversely affected.

Because protecting customers from unreasonable rates lies at the heart of FERC's regulatory duty, and that duty is no less compelling in the face of Mirant's bankruptcy filing, FERC alone, consistent with the FPA/NGA and the filed rate doctrine, has the authority to determine whether Mirant's proposed relief from rates that it claims are too high is just and reasonable. Congress envisioned that FERC would bring its expertise and experience to bear in every case where such relief is sought for FERC-jurisdictional contracts. As FERC's analysis examines a number of factors, including a public utility's financial integrity, FERC would consider the effect of the bankruptcy in judging whether the filed rates should be changed. Those considerations, all noted by the District Court, justified the Court's conclusion that Mirant should file with FERC to seek its proposed relief.

Appellants' proposal to have a bankruptcy court decide such questions fails to harmonize the FPA/NGA and the Code; rather, they assert that the Code should trump the FPA/NGA. The premise of their argument, that rejection is not a change or modification of a filed rate, is invalid because the motion here is based on the claim that the filed rate is too high, a matter within FERC's exclusive jurisdiction. Further, the injunctive relief that was granted effectively prevents FERC from

carrying out its statutory duties regarding Mirant's Wholesale Contracts, which goes well beyond the limited jurisdiction granted bankruptcy courts and conflicts with the broad discretion granted FERC. The FPA/NGA's judicial review provisions offer the sole means to challenge a FERC ruling.

Although Appellants contend that *MCorp, Bildisco*, and *NextWave* support their view that the Code should trump, those cases offer no support for that position. *MCorp* make clear that broad, preemptive relief enjoining an agency from acting on potential and ongoing agency proceedings, like that issued here, violates the limited jurisdiction granted bankruptcy courts and contravenes the police or regulatory power exemption of § 362(b)(4). Despite Appellants' insistence that *Bildisco* deals with an issue over which the NLRB has exclusive jurisdiction, that phrase does not appear in the decision, and other cases indicate that the NLRB does not have exclusive jurisdiction to decide those issues. That contrasts sharply with the many cases that repeatedly emphasize the exclusive jurisdiction granted FERC by the FPA/NGA and the filed rate doctrine over questions, like those presented here, of whether rates are too high.

During the course of the *NextWave* litigation, a bankruptcy court enjoined the FCC from taking action within the FCC's regulatory purview. The Second Circuit overturned the injunction and, as the District Court did here, told the

applicant to seek relief from the agency. After the FCC ruled on the requested relief, appeal was sought in accordance with the judicial review procedures of the Communications Act (which are very close to those in the FPA/NGA). The FCC's order was reversed on an issue that is not present here, and remanded to the FCC, not to a bankruptcy court.

Besides the legal deficiencies in Appellants' position that should have precluded issuance of the injunctive relief, there was an utter lack of any factual support for the relief. As the District Court specifically found, the factual allegations of harm were unverified and unsupported by any evidence in the complaint on which the Bankruptcy Court relied.

ARGUMENT

I. STANDARD OF REVIEW

As the adversary complaints here sought injunctive relief against FERC which was granted by the Bankruptcy Court,[9] and the District Court's orders addressed whether that injunctive relief was properly granted, the question posed is whether the District Court properly vacated the injunctive relief granted by the

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[9] *See* Ctee. RE 8: 2 ¶ 1 ("944 TRO")(noting that Debtors filed a complaint for declaratory and injunctive relief and summarizing in subsections D.–G. injunctive relief sought) *and id.* at 4 (ordering injunctive relief); *see also* Mir. RE 17: 2 ¶ A (noting complaint sought preliminary and permanent injunction and quoting injunctive relief sought) *and id*. at 4 (ordering injunctive relief).

Bankruptcy Court. That question is reviewed under an abuse of discretion standard. *E.g., New York Life Insurance Co. v. Gillispie*, 203 F.3d 384, 386 (5th Cir. 2000); *Wildmon v. Berwick Univ. Pictures*, 983 F.2d 21, 23 (5th Cir. 1992).

The District Court's factual findings (*e.g.*, Mir. RE 15: 5 n. 2) made in deciding whether to vacate the injunctive relief are reviewed for clear error, while its legal conclusions are reviewed *de novo*. *Action Industries v. U.S. Fidelity & Guar. Co.*, 358 F.3d 337, 339 (5th Cir. 2004); *Ayers v. Thompson*, 358 F.3d 356, 368 (5th Cir. 2004). The District Court's dismissal of the complaints for failure to state a claim is reviewed under a *de novo* standard. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

II. FERC IS NOT DIVESTED OF JURISDICTION BY 28 U.S.C. § 1334

Mirant states that the "starting point of this Court's analysis should be section 1334 of title 28." Mir. Br. 24. As Mirant sees it, "Section 1334(e), as currently drafted, clearly and expressly grants exclusive jurisdiction over the property of the estate to the bankruptcy court." *Id*.; *see also* Ctee. Br. 19 (relying on Sections 1334(a) and (e) for the proposition that the "plain meaning of 'exclusive' can hardly be subject to debate"). This Court, as affirmed by the Supreme Court, directly rejected these points. *MCorp Financial, Inc. v. Bd. of Governors*, 900 F.2d 852, 854-56 (5th Cir. 1990), *aff'd sub nom, Bd. of Governors*

v. MCorp Financial, Inc., 502 U.S. 32 (1991). Thus, Section 1334 does not divest FERC of jurisdiction to act. *See also In re Starnet, Inc.*, 355 F.3d 634, 639 (7th Cir. 2004)("It is a considerable overstatement to call the bankruptcy court's jurisdiction exclusive").

Section 1334(a) is not, as the Committee seems to think (Br. 18-19), an unrestricted grant of jurisdiction to a district court, but is expressly limited by § 1334(b). After reviewing the legislative history of the subsection, this Court rejected a claim, virtually identical to that made here (Mir. Br. 24, Ctee. Br. 19) "that § 1334(b) grants bankruptcy courts pervasive jurisdiction over all matters and proceedings that arise in or in connection with bankruptcy cases." 900 F.2d at 855. Instead, this Court found no intent in the history "that the bankruptcy court's jurisdiction supersede the exclusive jurisdiction of an administrative agency." *Id*.

This ruling was expressly affirmed by the Supreme Court: "Section 1334(b) concerns the allocation of jurisdiction between bankruptcy courts and other 'courts,' and, of course, an administrative agency such as the Board is not a 'court.'" *MCorp.*, 502 U.S. at 41-42. Thus, § 1334(a), as limited by subsection (b), offers no solace to Appellants. As this Court found, "[t]he plain language of § 1334(b) does not purport to give the district court exclusive jurisdiction over matters arising under Title 11 *to the exclusion of administrative agencies*; rather, §

1334(b) grants the district court concurrent jurisdiction over matters that otherwise would be within the exclusive jurisdiction of another *court*." *MCorp*., 900 F.2d at 855 (emphasis added).

Appellants' claims (Mir. Br.24-25; Ctee. Br. 19-20) that § 1334(e), which gives a district (bankruptcy) court jurisdiction over the property of the estate, divests an agency, such as FERC, of its exclusive jurisdiction was also rejected by this Court:[10]

> According to MCorp, because the bankruptcy court has exclusive control of MCorp's assets, it necessarily follows from § 1334[(e)] that the Board has no jurisdiction over MCorp. But the Board has not sought control over the property of MCorp's estate in this action, only the opportunity to go forward with administrative proceedings. Nor at this early stage do we find the Board's enforcement action to be sham proceedings, brought as a means of controlling the debtor's assets.

MCorp, 900 F.2d at 856. The Supreme Court agreed, finding that § 1334(e) does not foreclose future agency action:

> It is possible, of course, that [agency] proceedings . . . may conclude with the entry of an order that will offset the Bankruptcy Court's control over the property of the estate, but the *possibility* cannot be sufficient to justify the operation of the stay against [an agency proceeding] that is expressly exempted by § 362(b)(4). To adopt such a characterization of [agency] proceedings would render subsection (b)(4)'s exception almost meaningless."

MCorp, 502 U.S. at 41 (emphasis in original).

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[10] *MCorp* addressed § 1334(d), which is now § 1334(e).

Here, the issue is whether FERC should be allowed the opportunity to go forward with its own regulatory proceedings without being restricted by the bankruptcy court's injunction, which preemptively prevented FERC from taking any regulatory action related to Debtors' Wholesale Contracts. Even assuming FERC's regulation of the Wholesale Contracts could be considered an effort to exercise control over the property of the estate, which FERC disputes, FERC has been unable to regulate those Contracts due to the injunctive relief. No party has suggested that FERC would engage in sham proceedings.[11] Thus, § 1334(e) does not apply here.[12]

III. THE DISTRICT COURT FOLLOWED THIS COURT'S TEACHING

Appellants couple their § 1334 assertions with a claim that the language of 11 U.S.C. § 365 allows the Bankruptcy Court to reject the Back-to-Back Agreement, and, by implication, allows that Court to stay an action by FERC on the hundreds of other Wholesale Contracts merely on the possibility that Debtors may decide at some indeterminate date to reject those Contracts as well. Mir. Br.

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[11] Indeed, FERC counsel have repeatedly indicated in papers and argument that they do not know how the Commission would rule on these matters.

[12] The Committee's reliance (Br. 19) on *In re Modern Boats*, 775 F.2d 619 (5th Cir. 1985), is, as it was in *MCorp*, "misplaced because [FERC's] proceedings do not directly concern the debtor's property." 900 F.2d 856.

25 *et seq.*; Ctee. Br. 21 *et seq.* As Appellants view it, § 365 coupled with § 1334 "give the court the power to authorize Debtors to reject the Back-to-Back Agreement notwithstanding the exclusive authority given FERC by the FPA." Mir. RE 12: 20. The District Court found that reading to be inconsistent with statutory and case law as interpreted by this and other Courts.

A. Rejection Here Collaterally Attacks Prior FERC Orders

Appellants argue that rejection of any of the Wholesale Contracts, including the Back-to-Back provisions, is not a collateral attack on FERC's filed rates and no threat to its rightful exercise of power because rejection purportedly "does *not* serve to modify, change, or terminate the contract, let alone the pricing terms (or rates) embodied therein." Mir. Br. 31-32 (emphasis in original); *see* Ctee. Br. 35 and 38(same). For this proposition, Appellants rely on the fact that whether or not the Back-to-Back agreement is rejected, "PEPCO will continue to pay (and Panda or Ohio Edison will continue to receive) the rates required by the PPAs under PEPCO's tariff." Ctee. Br. 38.

The latter point is of no moment. First, statements about the PPAs between Pepco and Panda or Ohio Edison say nothing about the hundreds of other Wholesale Contracts at issue here. Further, just as Pepco and the Debtors recognized that it was necessary to obtain FERC approval when service under the

Back-to-Back provisions were initiated, so, too, it is necessary now to obtain FERC approval to terminate service under those provisions, notwithstanding that Pepco continued to pay the rates under the PPAs in both situations. Thus, even though rejection of the Back-to-Back Agreement would not affect Pepco's obligations under the PPAs, rejection would affect Pepco's and Debtors' rights and obligations related to service under FERC-jurisdictional Schedule 2.4, the Back-to-Back Agreement, which was approved as part of the APSA.

B. Debtors' Ground for Rejection Falls Within FERC's Jurisdiction

Rejection of the Back-to-Back Agreement collaterally attacks FERC's December 2000 Order, which concluded, in the context of the entire APSA, 93 FERC at 61,780, that the resale of the PPA entitlements from Pepco to Debtors for the entire term contemplated by Schedule 2.4 was just and reasonable.

> The thrust of Debtors' motion to reject is that they should be permitted to reject the Back-to-Back Agreement because the rates, or prices, they are required by that agreement to pay for wholesale electric energy purchases are too high . . . . This is precisely the kind of contention the cited statutory and case authorities indicate the court is prohibited from entertaining – it is a collateral attack on the filed rates and FERC's December 2000 order approving the Back-to-Back Agreement as just and reasonable.

Mir. RE 12: 19-20.[13]

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[13] This also refutes the Committee's contention that "[t]he District Court's

The District Court appropriately distinguished Debtors' attack on FERC's December 2000 Order on their claim that the rates are too high from a case where a debtor might seek rejection on grounds "entirely separate from and independent of" matters within FERC's exclusive jurisdiction. *Id*. at 24, citing *Gulf States Utilities Co v. Alabama Power Co*., 824 F.2d 1465, 1472 (5th Cir. 1987). In *Gulf States*, this Court declined, just as the District Court did, to decide jurisdiction based on the label given by parties to their claims, but, instead, looked to whether the gravamen (or thrust) of the claim required action by FERC. "At this early stage in the litigation, GSU has not explained whether commercial impracticability, frustration, or any other defense applies (1) because of high rates (in which case the FPA would preempt) or (2) because of reasons unrelated to rates." *Id*.; *see also id.* ("The FPA would preempt a claim that frustration occurs because of high rates; the FPA would not preempt a claim that frustration occurs by buying any electricity from Southern at any price.").

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only basis for denying the Debtors' rejection motion was its mistaken conclusion that only FERC could authorize rejection." Ctee.Br. 44; *see id.* 16 (same). Rather, the District Court denied the rejection motion because Debtors based it on a claim that their rates were too high, "and the court ha[d] no doubt that *changing the regulatory rate scheme* as to the power purchases contemplated by the Back-to-Back Agreement is beyond the authority of this court and the bankruptcy court." Mir.RE 12:27 (emphasis added).

The District Court appropriately followed that precedential analysis by focusing on whether the thrust of Debtors' rejection claim was based on claimed high rates or on some other reason. The District Court found that Debtors' rejection motion asked the "court to set aside their contract to purchase electric energy on the theory that PEPCO's rates are too high." Mir. RE 12: 24-25. Appellants do not, and cannot, dispute this finding. *See, e.g.*, Mir. Br. 12 ("the amount that Mirant pays for power received under the Back-to-Back Agreement is significantly higher than the price it obtains reselling that power.")(citation omitted): Ctee. Br.11 (absent rejection, "the Debtors would be required to buy power from PEPCO at prices substantially higher than market prices"). These claims reinforce the District Court's finding that Debtors' motion for authorization to reject rests on their claim that the prices they pay are too high. Following the *Gulf States* analysis, 824 F.2d at 1472, the District Court correctly perceived the Debtors sought rejection "because of high rates," and correctly decided "the FPA would preempt" such claims, and, therefore "if Debtors wish to pursue relief *of that kind*, they should go to FERC." Mir. RE 12:25 (emphasis added).

C. Debtors' Collateral Attack Improperly Attempts to Substitute Their Judgment For FERC's

Appellants contend that the District Court's analysis, discussed above, contains a "central flaw" in that it fails "to distinguish a debtor's business

judgment decision to pursue rejection of a FERC-jurisdictional contract under the Code from a collateral attack on the reasonableness of a FERC-filed rate." Mir. Br. 32; *see* Ctee. Br. 33-34 (same). Appellants assert that the filed rate doctrine is not implicated by the proposed rejection because "rejection is simply a breach of the agreement, not a challenge to the rates set by FERC." Ctee. Br. 35; Mir. Br. 31-32 (same). As Appellants see it, the proposed rejection does not seek to change the underlying rates set by FERC, but "acknowledges Pepco's claim for damages after rejection will be based on the terms and conditions of the Back-to-Back Agreement as written." Mir. Br. 32; *see* Ctee. Br. 35 (claim for rejection damages "will necessarily be based upon the filed rates in PEPCO's PPAs"[14]).

Appellants are wrong; the filed rate doctrine is directly implicated by the proposed rejection because, as the District Court properly recognized, Debtors' rejection would substitute their judgment on the filed rates for FERC's. Moreover, the District Court's analysis is not flawed because Debtors' business judgment decision to move for rejection of the Back-to-Back Agreement is indistinguishable from a collateral attack on FERC's December 2000 Order (93 FERC ¶ 61,240) approving the APSA, including Schedule 2.4. *See, e.g.*, Mir. RE 12:19-20 (District

[14] The PPAs are not subject to FERC's jurisdiction, and thus they cannot constitute the filed rate in this matter.

Court collateral attack finding). Debtors' proposed rejection attempts to change, without FERC review, what FERC already had reviewed and concluded is just and reasonable and in the public interest.

FERC's December 2000 Order responded to a request that the APSA as a whole be approved. *See, e.g.*, Ctee. RE 25: 7 ("to assist the Commission in its evaluation of the Divestiture Transaction as a whole, this Application demonstrates that the entire transaction is consistent with the public interest"). Included in the application, "[a]mong many other things," were the Back-to-Back provisions. Mir. RE 20: 2 ¶ 6 (Debtors' witness); *see also* Mir. RE 12: 3 (same). As the District Court noted, Debtors supported their request for approval of the APSA on grounds "that the APSA would have no adverse effect on consumers and that it was in the public interest in that it 'will not adversely affect competition, will not adversely affect wholesale or retail rates, and will not adversely affect regulation.'" Mir. RE 12: 7 (citation omitted). Those representations were consistent with Pepco's and Mirant's view that, regardless of how individual provisions appear in isolation, when all the components were balanced together, the overall impact of the APSA was reasonable. 93 FERC at 61,778-79.

The interrelationship of the APSA's components is demonstrated by the District Court's discussion of the Back-To-Back provisions. Because assignment

of the Panda PPA under Schedule 2.4 was subject to litigation uncertainty, "section 3.4 of the APSA, titled 'PPA-Related Purchase Price Adjustments,' . . , in effect, provided that if Debtors were released from the obligations related to the Panda PPA, and if that PPA was not assigned to Debtors under the provisions of schedule 2.4, Debtors would make an additional cash payment to PEPCO of approximately $260 million." Mir. RE 12:5; *see* Mir. RE 23: 14-15 (Section 3.4). In other words, Pepco had agreed to take a lower price for its other assets because it would receive an offsetting benefit from Schedule 2.4. *See* Mir. RE 20: 4 ¶ 8 (noting that the "Purchase Price Adjustment 'should compensate PEPCO for the termination of the benefit of the back-to-back arrangement'"); Mir. RE 25: 2 ¶ 3 (same). Thus, while looking at either the purchase price or the Back-to-Back provision in isolation might have suggested that Pepco and its customers or Mirant and its customers, respectively, were receiving an unreasonable result, the interrelationship of Schedule 2.4 and Section 3.4, which set out the parties' contractual arrangement, provided a reasonable result.

In reviewing the joint APSA application, FERC, as required (*see* 93 FERC at 61,776 (setting out test)), considered the rate effects of the APSA on Pepco's and Mirant's customers. The "[a]pplicants state[d] that the [APSA] will not have an adverse effect on rates," and FERC agreed. *Id.* at 61,778-79. Notwithstanding

the separate consideration given to Schedule 2.4 under FPA § 205 for technical reasons (*see* Mir. RE 12:7 (applicants' discussion of need for separate consideration)), FERC considered its rate impact in conjunction with the purchase price adjustment as part of the determination that the APSA as a whole led to just and reasonable rates for all affected customers and was in the public interest.

Mirant's proposed rejection threatens to upset the overall balance that led to FERC's reasonableness conclusion regarding the APSA. Neither the APSA nor Schedule 2.4 contains a provision allowing a party to terminate the service contemplated therein upon filing for bankruptcy protection or for any other reason.[15] Thus, FERC's reasonableness calculus included a factor that the parties would honor all their obligations throughout the duration of the applicable contractual term. Mirant's proposed rejection would remove that factor from the calculus. Without FERC review and approval, Mirant would be able to retain its APSA benefits (*e.g.*, the lower price it paid for Pepco's generating resources)

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[15] In contrast, where parties have included a provision that allows termination of service upon filing for bankruptcy protection, FERC has both approved, and then honored, the provision. *See Vermont Public Power Supply Authority v. PG&E Energy Trading, et al.*, 104 FERC ¶ 61,185 at ¶ 2 (2003) (denying complaint to continue service because the parties' "contract provide[d] that it shall automatically terminate if either party is the subject of a bankruptcy proceeding").

without the corresponding Back-to-Back Agreement obligations on the basis that Debtors see this as a reasonable result based on their view of bankruptcy law. *See, e.g.*, Mir. Br. 20-21 (asserting that "non-rejection" in these circumstances creates a windfall for Pepco); Ctee. Br. 34-35 ("efficient breach" concept justifies rejection).

D. The Injunctive Relief Violated The Filed Rate Doctrine

Mirant's proposed rejection also violates the filed rate doctrine. *See* Mir. RE 15:4 (District Court ruling that injunctions requested by Debtors "interfere with the performance by FERC of its regulatory function" and "seek[] to manipulate the judicial system by frustrating the appellate procedure" prescribed by the FPA and NGA). Mirant's actions in moving to reject and instituting adversary proceedings to enjoin FERC parallel plaintiff's attempt to evade the filed rate in *Montana-Dakota Utils. Co. v. Northwestern Pub. Svc. Co.*, 341 U.S. 246, 251-52 (1951), which was the genesis of the filed rate doctrine. There, the Supreme Court rejected an attempt to have a court replace rates approved by the Commission, finding that no court, outside the FPA or NGA review process, can replace rates set by FERC:

> [A litigant] cannot separate what Congress has joined together. *It cannot litigate in a judicial forum its general right to a reasonable rate*, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable amount of discretion. . . . We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, *the court can assume no right to*

> *a different one on the ground that, in its opinion, it is the only or the more reasonable rate.*

Id. (emphasis added); *see* Mir. RE12: 16-17 (adopting this holding).

Mirant's rejection motion, as the District Court found (Mir. RE 12:24-25), seeks to litigate in a judicial forum its right to what it considers a more reasonable rate by eliminating its obligation to continue to pay the filed rate approved by FERC. Appellants' claim -- that a "breach in this context implies a debtor's refusal to perform a commitment found in the agreement, not terminating or seeking to change the terms thereof" Mir. Br. 31; *see* Ctee. Br. 35 (same) -- does not help them. A "breach" by Debtors here would terminate or change the terms of the APSA and the Back-to-Back Agreement. Debtors and Pepco informed FERC that Debtors' only commitment under the Back-to-Back Agreement was to purchase Pepco's entitlements under the PPAs at the price Pepco pays under the PPAs. *See* 93 FERC at 61,780 ("PEPCO proposes that for those PPAs that are unassigned after closing, it will continue to purchase the PPA entitlements . . . and immediately resell those entitlements to [Debtors] at a price equivalent to PEPCO's payment obligations under the unassigned PPAs."); *see also id*. ("The Commission agrees . . . PEPCO will resell the PPA entitlements to [Mirant], at a rate equal to [Pepco's] payment obligations in the PPAs, therefore the Commission will accept Schedule 2.4 as just and reasonable."). Rejection would effectively

terminate Mirant's only obligation, which was the basis for FERC's just and reasonable finding.

Appellants claim this is a "no harm, no foul" situation because rejection will "transform [Pepco] into a pre-petition creditor with a damages claim for breach of contract predicated on the contract rate." Mir. Br. 32; Ctee. Br. 35 (same). Their claim that the filed rate doctrine thus will not be implicated could stand factually (and could never stand legally) only if Debtors could guarantee full payment to Pepco of all rejection damages under the terms and conditions of Schedule 2.4, which Debtors have not done.[16]

Anything less than full payment will mean that Mirant has changed the terms and conditions of the Back-to-Back provisions by reducing the amount it must pay under those provisions. The difference between the filed rate and a less-than-full payment would be borne ultimately by Pepco's customers, thereby "hav[ing] an adverse effect on rates" in contravention of assurances by Debtors and Pepco that approval of the APSA would not do so. 93 FERC at 61,778. In that way, authorizing rejection would implicate, and be contrary to, the filed rate as well as to FERC's approval of the APSA, as a whole, as in the public interest. A

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[16] If Debtors are guaranteeing full payment to Pepco under the terms and conditions of the back-to-back provisions, then one has to wonder why Debtors would propose to reject the provisions.

court has no authority to approve such action. "No court may substitute it own judgment on reasonableness for the judgment of the Commission." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). Here, the Bankruptcy Court's enjoining FERC "undercut the clear purpose of the congressional scheme [in the NGA and the FPA]: granting the Commission an opportunity *in every case* to judge the reasonableness of the rate." *Id.* at 582 (citation omitted; emphasis added).[17]

The Court has repeatedly emphasized FERC's "exclusive authority to determine the reasonableness of wholesale rates" as a principle that "binds both state and federal courts." *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 371 (1988); *see* Mir. RE 12: 16-18 (discussing cases). Further, "the filed rate

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[17] The Supreme Court's statement responded to a claim virtually indistinguishable from Debtors' claim here that "Congress did not intend FERC's jurisdiction to extend to matters involving the administration or interpretation of existing contracts, including breach claims." Mir.Br. 35; *compare Hall*, 453 U.S. at 582 (this "theory of the case would give inordinate importance to the role of contracts between buyers and sellers in the federal scheme for regulating the sale of natural gas"); *compare also Gulf States*, 824 F.2d 1465 (cited Mir.Br. 35 on this point) at 1472 (differentiating between claims based "on high rates (in which case the FPA would preempt) or (2) because of reasons unrelated to rates"). Likewise, Debtors overstate (Mir. Br. 34-35) the importance of the *Mobile-Sierra* rule as undercutting the applicability of the filed rate doctrine in every case. *Compare Hall*, 453 U.S. at 582 (the *Mobile-Sierra* "rule does not affect the supremacy of the Act itself, and the filed rate doctrine[;] when there is a conflict between the filed rate and the contract rate, the filed rate controls").

doctrine is not limited to 'rates' *per se*." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986); *see Northern Natural Gas Co. v. Kansas Corp. Comm'n*, 372 U.S. 84, 90-91 (1963)(doctrine applies even though "the orders do not deal in terms of prices or volumes of purchases"). Thus, it applies to FERC's approval of the APSA as a whole along with FERC's finding that the rates paid by Debtors under Schedule 2.4 are just and reasonable.

E. The Need For Regulatory Review Does Not End When A Utility Files For Bankruptcy Protection

This Court has recognized that the need for regulatory review and approval does not end when a utility has sought bankruptcy protection. To hold otherwise "ignores the reasons which mandate [public utility commission] regulation in the first instance. The [commission] is entrusted to safeguard the compelling public interest in the availability of electric service at reasonable rates. That public interest is no less compelling during the pendency of a bankruptcy than at other times." *In re Cajun Elec. Power Coop.*, 185 F.3d 446, 453 n. 11 (5th Cir. 1999)(citation omitted; alterations in original).[18] As FERC's principal statutory purpose is "to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices," *NAACP v. FERC*, 425 U.S. 662,

[18] This is consistent with the regulatory or police power exception in 11 U.S.C. § 362(b)(4).

669-70 (1976), that reasoning defeats the Bankruptcy Court's attempt to commandeer all FERC-jurisdictional decisions regarding Debtors' Wholesale Contracts to itself by enjoining FERC from acting on those Contracts.

Appellants' reliance on cases in which FERC has determined that courts may resolve certain issues, Mir. Br. 35-36; Ctee. Br. 35-36 & n. 90, is undermined by the injunctive relief granted here. In each cited case, FERC, not a court, decided in the first instance how an issue was best addressed. *See* Ctee. Br. 36 n. 90 (all listed cases are citations from the FERC reporter). The injunctive relief preemptively granted here precluded FERC from making such determinations. Indeed, FERC counsel do not know how the Commission would react if Mirant filed to end its obligation under the Back-to-Back provisions or under any of the hundreds of its Wholesale Contracts because the instant injunctions have prevented such issues from reaching the Commission. Despite its protestations to the contrary, Mirant acknowledges, Mir. Br. 36-37, that "bankruptcy courts have routinely authorized the rejection of FERC-jurisdictional contracts without interference, much less protest, from FERC."

While Mirant's acknowledgement demonstrates the complete absence of harm necessary to justify issuance of the injunctive relief, the differing reactions by FERC to rejection motions does not "belie[] the notion that FERC possesses

exclusive jurisdiction that compels it to independently authorize rejection of any and all FERC-jurisdictional contracts." Mir. Br. 37. Rather, the differing reactions confirm the District Court's finding that, because Debtors are seeking to reject based on a claim that their rates are too high, there is "no reason why Debtors cannot seek from FERC basically the same relief they are seeking here." Mir. RE 12: 25.

As the District Court recognized, FERC will consider whether a rate impairs a utility's ability to continue service as part of "its function of determining whether the rate contemplated by the contract is at a level that adversely affects the public interest." *Id* Further, in this review, "as Congress had in mind, FERC would be able to bring to bear on the problem the knowledge and expertise it has in the regulation" of matters within its exclusive jurisdiction "in deciding the effect, if any, the solution proposed by Debtors would have on the public interest." *Id*. at 26. The different reactions do not undermine the importance and need for FERC review of rate questions raised by a debtor's proposed rejection of a contract within the purview of FERC's exclusive jurisdiction, but show that FERC takes a hard look at each case.

IV. APPELLANTS FAIL TO HARMONIZE THE FPA AND THE CODE

Debtors assert that "the Code and the FPA can be interpreted in harmony without doing violence to either." Mir. Br. 38. Debtors' harmonization assertion rests on the faulty premise that "rejection is not a change or modification of a filed rate," from which Debtors surmise that rejection "does not trespass on FERC's jurisdiction over changes or modifications to wholesale power rates." *Id*. at 39; *see* Ctee. Br. 33 (same). If this blanket assertion does not avoid a conflict, then Appellants contend that the Code should prevail. Mir. Br. 40; Ctee. Br. 16.

As Appellants' premise is faulty, their conclusion is invalid. The proper starting point, as the District Court, relying on *Gulf States*, 824 F.2d at 1472, found (Mir. RE 12: 19 and 24), is whether Debtors' basis for seeking rejection challenges the reasonableness of FERC-approved rates. *See id.* (thrust of Debtors' rejection claim is that rate is too high). If, as here, it does, then the courts have no authority to authorize rejection, and the reasonableness of the rates must be decided by FERC. If the rejection motion rests on other grounds, then a court may authorize it. *Gulf States,* 824 F.2d at 1472 & n. 9; Mir. RE 12: 24 & n.7.

The disharmony created by Appellants' theory is highlighted by the injunctive relief granted here. The Bankruptcy Court prevented FERC from acting freely on hundreds of Mirant Wholesale Contracts for which no rejection motion

was even pending. Rather than harmonizing the Code and the FPA/NGA, the injunctive relief improperly preempted any role for FERC and arrogated to the Bankruptcy Court an oversight role neither contemplated nor authorized by Congress.

This Court was faced with the issuance of very similar, preemptive injunctive relief in *MCorp*, 900 F.2d at 854, where the debtors sought and were granted an injunction against the Board's "prosecuting its administrative proceedings against the debtors, and from initiating further administrative proceedings against the debtors without prior approval of the bankruptcy court."[19] That injunction did not harmonize the Code with the agency statute, 12 U.S.C. § 1818(i), at issue; instead the injunction "effectively repealed § 1818(i), negat[ing] its basic sense and purpose of preventing early interference with administrative proceedings. This interpretation invested the district court, sitting in bankruptcy, with equitable power withheld from every other court by the language of [the

[19] Here, both the 944 and 1174 TROs required FERC to give Debtors "ten (10) days' written notice setting forth in detail" any action FERC proposed to take. Mir.RE 17: 4 ¶ 1 and Mir.RE 18:3 ¶ E. The 10-day notice was intended to give Debtors time to seek a stay from the Bankruptcy Court before the proposed action became effective.

provision]." *MCorp*, 824 F.2d at 855.[20] The same is true here as to the effect of the Bankruptcy Court's injunctive relief on the FPA/NGA.

The Supreme Court, in upholding this ruling, went further to restrict a bankruptcy court's intrusion into not-yet-started or ongoing agency proceedings. "MCorp's broad reading of the stay provisions would require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against the bankrupt entity. Such a reading is problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts." *MCorp*, 502 U.S. at 40; *see In re Southmark Corp*., 49 F.3d 111, 116 (5th Cir. 1995)(11 U.S.C. § 105 "does not empower bankruptcy courts to act as 'roving commission[s] to do equity'")(footnote listing citations omitted). The FPA and the NGA, like the statute in *MCorp*, provide "in the Court of Appeals, an unquestioned right to review of both the regulation and its

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[20] To be sure, the language of § 1818(i) differs from the review provisions of FPA § 313, 16 U.S.C. § 825*l*, and NGA § 19, 15 U.S.C. § 717r. But those differences are not material because, while § 1818(i) states that "no court shall have jurisdiction" to stay or to review certain actions, the FPA and the NGA limit judicial review and stay powers to particular United States Courts of Appeals under specified, and jurisdictional, prerequisites. NGA § 19(b) and (c) and FPA § 313(b) and (c). The material point for the instant questions is that none of the three statutes vests any authority or jurisdiction in a bankruptcy (or district) court to stay the agency.

application," where a debtor is aggrieved by agency action. 502 U.S. at 43-44. In short, the proper course was not for the Bankruptcy Court to take matters in its own hands by enjoining FERC action unless the Bankruptcy Court had first vetted that action, but to require, as the District Court did, that Debtors follow the review process set out by the FPA/NGA.

Appellants' claim that the Code, as the later enacted statute, trumps the FPA/NGA, Ctee. Br. 32, is unavailing. This Court rejected that very same claim in *MCorp*, 900 F.2d at 856-57: "Absent some clear intention to the contrary, however, a specific statute will not be controlled by a general one regardless of the priority of enactment. Congress revealed no intent to supersede the specific jurisdictional bar of § 1818(i) in the legislative history of the Bankruptcy Reform Act, nor in [FIRREA]. We decline to imply any affirmative powers to the bankruptcy court from Congress' failure to act in this area." (citations omitted). In similar fashion, Congress has shown no intent to supersede the specific mandates of the FPA or the NGA.

This statement also answers Mirant's unsupported assertion that "a general grant of jurisdiction to an agency" is insufficient to forestall application of the Code. Mir. Br. 43. The FPA and the NGA are specific grants of exclusive jurisdiction to FERC on matters within those statutes' purview and, thus, control

over the Bankruptcy Code's general jurisdictional grant. *See MCorp*, 502 U.S. at 40 (a stay, like the one here, allowing a bankruptcy court to scrutinize every administrative action brought against a bankrupt entity "conflicts with the broad discretion Congress has expressly granted many administrative entities and . . . is inconsistent with the limited authority Congress has vested in bankruptcy courts."). The exclusive jurisdictional grant to FERC has been further strengthened by the filed rate doctrine, which as applied to federal courts is "a rule of administrative law designed to ensure that federal courts respect the decisions of federal administrative agencies." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986). Contrary to Mirant's claim, the Code does not forestall application of the FPA and the NGA by FERC to rates and conditions of Wholesale Contracts within its exclusive jurisdiction.

V. PRECEDENT DOES NOT MANDATE THAT THE CODE PREVAIL OVER THE FPA/NGA

Mirant asserts that "the congressional grant of exclusive authority to the bankruptcy courts, the clear language of the Code, and the absence of any congressionally legislated exception to the contrary mandate that the Code trumps the FPA." Mir. Br. 40. As support for its assertion, Mirant looks to *NLRB v. Bildisco & Bildisco*, 465 U.S. 51 (1984), *FCC v. NextWave Pers. Comms.*, 537 U.S. 293 (2003), and *MCorp*, 502 U.S. at 39. *Id*.; Ctee. Br. 26-28 (same).

Turning first to *MCorp*, far from supporting Mirant's trump claim, this Court's and the Supreme Court's opinions (as discussed throughout this brief) support the opposite conclusion.[21] As the Court explained, broad-based claims that the Code trumps agency regulatory action ignore that regulatory actions "fall squarely within § 362(b)(4), which expressly provides that the automatic stay will not reach proceedings to enforce a governmental unit's police or regulatory power." 502 U.S. at 39-40 (footnote omitted). Appellants fail to mention § 362(b)(4), let alone explain how Congress' intent that the commencement or continuation of regulatory action not be stopped by the mere filing for bankruptcy protection fits with their view that the Code trumps.

The broad injunctive relief granted by the Bankruptcy Court here, which prevented FERC from starting or continuing any matter regarding any of Mirant's FERC-jurisdictional contracts without Bankruptcy Court overview, operates to repeal the (b)(4) exemption, and thus to render it "meaningless" as to Mirant's FERC-jurisdictional contracts. *MCorp*, 502 U.S. at 41. Similarly, this Court has come very close to saying "there will never be a case where a court should issue a

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[21] This is highlighted by Mirant's pinpoint citation to "*MCorp*, 502 U.S. at 39." Mir.Br. 40. That page, however, offers no solace to Mirant: after summarizing MCorp's arguments as to why the Code supposedly trumped there, the Court stated, "[w]e find no merit in either argument."

§ 105 stay to stop proceedings that are exempted from the automatic stay." *Commonwealth Oil Refining Co., Inc.*, 805 F.2d 1175, 1190 (5th Cir. 1986). This and other Courts allow such stays only in "*exceptional* circumstances," *In re Corporacion de Servicios Medicos Hospitalarios de Fajardo*, 805 F.2d 440, 449 (1st Cir. 1986)(emphasis in original), such as "to prevent a governmental unit's bad faith exercise of its police or regulatory power," where the presumption that regulatory officials act in good faith has been rebutted. *In re Javens*, 107 F.3d 359, 366 (6th Cir. 1997).[22] No claim of bad faith has been, or could be, made here. Thus, Mirant's proposition that the Code trumps the FPA and the NGA has no legal or factual support in the instant case.

Despite Mirant's insistence that the NLRB in *Bildisco* had "'exclusive jurisdiction' over the subject matter of the contract" at issue there, Mir. Br. 41; *see id*. at 40 and 43 (same), the phrase "exclusive jurisdiction" appears nowhere in that opinion. Further, the National Labor Relations Act does not vest exclusive jurisdiction in the NLRB over the matter at issue in *Bildisco*. *See Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1962)("The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining agreement . . . is

[22] Both *Corporacion* and *Javens* were cited with approval in *Cajun Elec. Coop.*, 185 F.3d at 457-58 n. 18.

not exclusive and does not destroy the jurisdiction of the courts . . . ."); *see also NLRB v. Superior Forwarding Inc.*, 762 F.2d 695, 700 (8th Cir. 1985)(disagreeing that the NLRB "is the 'exclusive forum' for determining whether an alleged unfair labor practice falls within the Bildisco protected conduct").[23] By contrast, the FPA and the NGA vest FERC with exclusive jurisdiction over the rates of FERC-jurisdictional contracts.

Mirant's reliance on *NextWave*, 537 U.S. 293, is misplaced as well. In that case, the bankruptcy court enjoined the FCC from canceling licenses "as a violation of various provisions of the Bankruptcy Code." 537 U.S. at 299. The Second Circuit overturned that injunction, holding that "'[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals' under 47 U.S.C. § 402, and that since the reauction decision was regulatory, proclaiming it to be

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[23] *International Union of Operating Engineers v. Jones*, 460 U.S. 669, 680-81 (1999) (cited at Mir. Br. 43), is not to the contrary although it finds matters "within the exclusive jurisdiction of the Board are normally for it, not a state court, to decide." That decision followed the *Garmon* guidelines, set forth in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S 236 (1969), to determine when a state law claim may be brought regarding conduct that falls under the NLRA. *Operating Engineers*, 460 U.S. at 675-76. Contrast the use of a test there with the unequivocal statements regarding the exclusivity of FERC's jurisdiction under the filed rate doctrine. *E.g.*, *Miss. Power & Light*, 487 U.S. at 371 ("principle binds both state and federal courts"); *Arkansas Louisiana Gas Co.*, 453 U.S. at 580 ("when Congress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce.'") (citation omitted). *See also* Mir. RE 12: 16-18.

arbitrary was 'outside the jurisdiction of the bankruptcy court.'" *Id*., quoting *In re FCC*, 217 F.3d 125, 139, 136 (2d Cir.), *cert. denied*, 531 U.S. 1029 (2000). In response, NextWave sought "reconsideration of the license cancellation" from the FCC. 537 U.S. at 299. It was the FCC's decision to deny reconsideration that was later reversed by the D.C. Circuit and the Supreme Court. *Id*.

The Second Circuit's reasoning in overturning the bankruptcy court injunction supports the District Court's decision here to do the same, and to require that Mirant seek relief from FERC for its claim that the rates under the Back-to-Back Agreement were too high. *See* Mir. RE 12: 22 (relying, in part, on *NextWave*, 217 F.3d 125). In both cases the issue fell within an agency's exclusive jurisdiction, which required that it be decided by the agency, not the bankruptcy court, in the first instance. After agency decision, a court of appeals, consistent with the governing statutory review provisions, may review it. Nothing in the *Nextwave* history suggests that a bankruptcy court, to protect its jurisdiction over the estate, may, or need, preemptively enjoin an agency from acting. *See Cajun Elec. Coop*., 185 F.3d at 453-54 ("'the general bankruptcy policy of fostering the rehabilitation of debtors [will not] serve to preempt otherwise applicable state laws dealing with public safety and welfare.'") (citations omitted; alteration in original).

VI. MIRANT DID NOT MEET THE TEST FOR INJUNCTIVE RELIEF

Even if the Court were to find that the Bankruptcy Court had the power to enjoin FERC preemptively from taking action regarding Mirant's Wholesale Contracts, Mirant failed to make the necessary irreparable injury showing to justify issuance of the injunctive relief granted here. Accordingly, the District Court properly set aside the injunctive relief.

Although Mirant in its *ex parte* motion for a TRO asked that FERC and Pepco be enjoined regarding the Back-to-Back Agreement only, Ctee. RE 8: 2-3 ¶ 1 (944 TRO), the Bankruptcy Court expanded the injunction to include "other agreements of Debtors." *Id*. at 4 ¶¶ A and B. Mirant's claimed harm of reduced assets for the estate absent an injunction was undercut by the fact that its cash flow increased after it filed for bankruptcy protection even though it was still performing under the Back-to-Back Agreement. Besides, expansion of the stay to cover Debtors' other contracts lacked any factual showing, as none was made. Likewise, no factual showing was made to justify the 1174 TRO, as the District Court found:

> So far as the court can determine, the [1174 TRO] was granted on the basis of the bare allegations of the complaint, which purports to be verified. However, the complaint is not "verified" in any legal sense. It is not accompanied or supported by an affidavit or a declaration - - rather, the "verification" consists of an unsworn statement, that the allegations in the complaint are true and correct to the best of the knowledge of the person who signed it and that the allegations are asserted "upon

> information and belief." Compl. at 10. *Thus, the allegations of the complaint could not provide the factual basis for the grant of injunctive relief.*

Mir. RE 15: 5 n. 2 (emphasis added).

In short, the indispensable irreparable injury showing was not presented to the Bankruptcy Court to justify issuance of injunctive relief. Accordingly, the District Court's decision to vacate properly relied on this omission.

CONCLUSION

For the reasons stated, the District Court's December 23, January 6, and January 26 Orders should be affirmed in all respects.

Respectfully submitted,

Dennis Lane
Solicitor

Beth G. Pacella
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Telephone: (202) 502-6600
Fax: (202) 273-0901

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