115 FERC ¶ 61,374
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

City of Vernon, California Docket No. EL06-3-000

ORDER DISMISSING PETITION

(Issued June 28, 2006)

1. On October 12, 2005, the City of Vernon, California (Vernon) submitted a petition pursuant to section 1290 of the Energy Policy Act of 2005 (EPAct 2005)[1] requesting that the Commission exercise its exclusive jurisdiction to review a claim for a $14 million termination payment, plus interest, granted, subject to a pending appeal, to Mirant Americas Energy Marketing, L.P. (Mirant) in a bankruptcy complaint proceeding.[2] In the alternative, Vernon requests that the Commission exercise its primary jurisdiction to declare Mirant's claim for a termination payment to be unjust and unreasonable or contrary to the public interest under sections 205 and 206 of the Federal Power Act (FPA).[3] For the reasons discussed below, we find that the termination payment claim at issue in this case arises under a contract that is not eligible for relief under section 1290 and that does not otherwise warrant the Commission's assertion of its primary jurisdiction. Accordingly, we dismiss Vernon's petition.

Background

2. Vernon states that on or about September 19, 2000, it entered into a power sales agreement (Agreement) with Mirant's predecessor in interest, Southern Company Energy Marketing (hereafter, Mirant), governed by the terms of a standard form agreement prepared by the Western Systems Power Pool (WSPP).[4] Vernon states, however, that on

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[1] Pub. L. No. 109-58, 119 Stat. 594, 984 (2005).

[2] *See Mirant Americas Energy Marketing, L.P. v. City of Vernon*, Final Judgment, Case No. 03-04440 (DML) (Bankr. N.D. Tex., Nov. 15, 2004) (*Vernon Adversary Proceeding Order*), *aff'd, In re Mirant Corp.,* 2005 WL 1206881, slip op (N.D. Tex. May 17, 2005), *appeal pending*, Case No. 05-10734 (5th Cir. filed June 1, 2005).

[3] 16 U.S.C. §§ 824d and 824e (2000).

[4] The WSPP standard form was approved by the Commission in 1991 to facilitate the sale of wholesale power throughout the region served by the Western Electricity

(continued)

December 19, 2001, it learned that Mirant's credit rating had been downgraded by market analysts to below investment grade, prompting Vernon to request from Mirant an assurance of creditworthiness pursuant to section 27 of the Agreement. Vernon states that Mirant declined to provide such assurance based on Mirant's contention that Vernon lacked reasonable grounds to make its request. Thereafter, on January 25, 2002, Vernon states that it exercised its termination rights under section 22 of the Agreement.[5] Vernon states, however, that Mirant rejected its notice, attempted to make continued deliveries under the Agreement and that, when Vernon refused to receive these deliveries, gave notice, in a letter dated February 1, 2002, that *Mirant* was terminating the Agreement.

3. Vernon states that Mirant's corporate parent later filed for bankruptcy (on July 13, 2003) and that in that proceeding, on October 23, 2003, Mirant initiated an adversary action, seeking to recover, from Vernon, a contract termination payment.[6] Vernon states that the bankruptcy judge, in a ruling issued November 15, 2004, found in favor of

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Coordinating Council. Under the Agreement, Mirant was required to deliver 25 MW of firm energy at a fixed rate of $59.45/MWh, Monday through Saturday during peak hours (certain holidays excluded) for a six-year term ending December 31, 2006. Vernon states that it required this long-term supply of energy in order to perform its duties as a load-serving municipal utility.

[5] Section 22.1(d) of the Agreement provides that "[an 'Event of Default' shall mean with respect to a Party ('Defaulting Party'):] the failure by the Defaulting Party to provide adequate assurances of its ability to perform all of its outstanding material obligations to the Non-Defaulting Party under the Agreement or Confirmation Agreement pursuant to section 27 of the Agreement or any substitute or modified provision in the Confirmation Agreement." In addition, section 22.2 provides, in relevant part, that "[i]f an Event of Default occurs, the Non-Defaulting Party shall possess the right to terminate all transactions between the Parties under this Agreement upon written notice (by facsimile or other reasonable means) to the Defaulting Party[.]"

[6] Mirant's claim for a termination payment is based on section 22 of the Agreement. In particular, section 22.2 provides, in relevant part, that "[u]pon termination, the Non-Defaulting Party shall liquidate all transactions as soon as practicable. . . . [;] [t]he payment association with termination ("Termination Payment") shall be calculated in accordance with section 22.2 and section 22.3."

Mirant.[7] Vernon states that it has appealed this ruling, first, to a federal district court, which denied the appeal,[8] and thereafter to the U.S. Court of Appeals for the Fifth Circuit, where the matter is now pending.[9]

4. Vernon states that following the denial of its appeal by the district court, EPAct 2005 was signed into law, giving the Commission exclusive jurisdiction, under section 1290, to consider, here, whether Mirant's termination payment claim may be recovered. Section 1290 provides as follows:

> (a) Application – This section applies to any contract entered into in the Western Interconnection prior to June 20, 2001, with a seller of wholesale electricity that the Commission has --
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> > (1) found to have manipulated the electricity market resulting in unjust and unreasonable rates; and
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> > (2) revoked the seller's authority to sell any electricity at market-based rates.
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> (b) Relief – Notwithstanding section 222 of the Federal Power Act (as added by section 1262 [sic]), any provision of title 11, United States Code, or any other provision of law, in the case of a contract described in subsection (a), the Commission shall have exclusive jurisdiction under the [FPA] (16 U.S.C. 791a, *et seq*.) to determine whether a requirement to make termination payments for power not delivered by the seller, or any successor in interest of the seller, is not permitted under a rate schedule (or contract under such a schedule) or is otherwise unlawful on the grounds that the contract is unjust and unreasonable or contrary to the public interest.

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[7] *See Vernon Adversary Proceeding Order.* The ruling was issued on a summary judgment motion filed by Mirant. For purposes of summary judgment, the bankruptcy court assumed as correct Vernon's claim that Mirant, not Vernon, had defaulted under the Agreement, giving Vernon the right to terminate the Agreement. The bankruptcy judge nonetheless found that the Agreement required Vernon to make a termination payment to Mirant.

[8] *In re Mirant Corp.,* 2005 WL 1206881 (N.D. Tex. May 17, 2005).

[9] Case No. 05-10734 (5th Cir., filed June 1, 2005). The appeal has been stayed pending the outcome of this case.

(c) Applicability – This section applies to any proceeding pending on the date of enactment of this section involving a seller described in subsection (a) in which there is not a final, nonappealable order by the Commission or any other jurisdiction determining the respective rights of the seller.

5. Vernon argues that the Agreement is a contract eligible for relief under section 1290. Specifically, Vernon notes that the Agreement was entered into prior to June 20, 2001 and that while it has been the subject of a litigated proceeding, no final, nonappealable order has been issued in that proceeding.[10] Vernon argues that the Agreement can also satisfy the section 1290(a) requirement that the contract apply to a seller "found to have manipulated the electricity market resulting in unjust and unreasonable rates." Vernon states that while the Commission has made no such finding, to date, the Commission has previously been presented with evidence that Mirant may have manipulated the electricity market during the course of the western energy crisis of 2000-2001.[11] Vernon further relies on the Commission's findings that manipulation of spot market prices during the course of the western energy crisis resulted in unjust and unreasonable rates.[12] Vernon argues that this evidence is sufficient to support a finding, here, that Mirant engaged in market manipulation and that this conduct resulted in unjust and unreasonable rates.

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[10] *See* note 2, *supra.*

[11] Vernon petition at 20, *citing* petition at attachment L (affidavit of Dr. Fox-Penner). Dr. Fox-Penner notes in his affidavit, however, that while there is evidence that Mirant may have engaged in manipulative behavior during the western energy crisis, all proceedings in which Mirant's conduct was examined by the Commission have been settled. *Id.* at 1, *citing San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange,* 111 FERC ¶ 61,017 (*Global Settlement Order*), *order on reh'g*, 111 FERC ¶ 61,354 (2005). Dr. Fox-Penner notes, accordingly, that the Commission adopted no findings of fact or conclusions of law regarding the effects of Mirant's alleged behavior. *See* Vernon petition at attachment L, p. 1.

[12] *Id.* at 4. Dr. Fox-Penner notes that while the Commission did not make a similar finding with respect to forward markets, a study prepared by the Commission's Staff found that dysfunction in the spot markets affected the price in the forward markets. *Id*. at 4, n.11, *citing Final Report on Price Manipulation in Western Market: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Prices*, Docket No. PA02-2-000, V-1. Dr. Fox-Penner concludes that as, a general matter, "some forward markets were substantially and adversely affected by the breakdown in the California spot markets."

6. Vernon claims that the Agreement can also satisfy the section 1290(a) requirement that the contract apply to a seller whose "authority to sell . . . electricity at market-based rates" has been revoked by the Commission. Vernon acknowledges that while Mirant's market-based rate authority has not been revoked, to date, revocation is warranted here because the grant of market-based rate authority includes an implicit presumption that a company's behavior will not involve fraud, deception or misrepresentation. Vernon argues that Mirant has flouted these standards, as evidenced by new facts revealed for the first time by Mirant, in a bankruptcy complaint filed against the Southern Company (Southern), Mirant's corporate parent at the time the Agreement was executed.[13] Vernon states that Mirant, in its complaint proceeding, concedes that it was insolvent at the time it entered into the Agreement, as the result of certain alleged fraudulent transfers as between Southern and Mirant. Vernon further argues that both Mirant and Southern were aware of these facts at the time the Agreement was executed and that in spite of this knowledge, Mirant fraudulently represented to Vernon that it was solvent. Vernon argues that Mirant's fraud warrants the retroactive revocation of Mirant's market-based rate authority.[14]

7. Vernon submits that Mirant's market-based rate authority may also be retroactively revoked based on a theory that Mirant exercised market power under the Agreement. Vernon notes, however, that the economic parameters for determining the presence or absence of a functional competitive market have not been articulated by the Commission, to date, and therefore reserves its rights to present evidence on this issue, pending Commission guidance with respect to the standard that may be applied by the Commission.

8. Vernon also argues that it is entitled to relief under section 1290 because the termination payment demanded by Mirant is unlawful and because the Agreement itself is invalid. In support of this finding, Vernon relies, in part, on the same facts supporting

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[13] *See* Vernon petition at attachment E (Amended Complaint, *Mirant Corporation v. The Southern Company,* Case No. 03-46590 (DML) (Bankr. N.D. Tex filed July 6, 2005).

[14] Vernon states that in addition to raising these new facts, here, it also filed, on October 20, 2005, in Mirant's bankruptcy proceeding, under Rule 60(b) of the Federal Rules of Civil Procedure, a request for relief from that court's order requiring Vernon to make the termination payment claim to Mirant. In addition, Vernon states that in its now pending appeal at the Fifth Circuit, it has requested a dismissal or (at minimum) a stay of the proceedings, subject to the outcome of its petition in this proceeding, or in the alternative, subject to the ruling of the bankruptcy court, on remand. As noted above, the appeal has been stayed.

its request that Mirant's market-based rate authority be retroactively revoked, *i.e.*, because of Mirant's representations regarding its solvency at the time the Agreement was executed. In addition, Vernon argues that Mirant should be barred from collecting a termination payment given its failure to provide assurances under section 27 of the Agreement and given its failure to properly calculate the termination payment. Vernon argues that these errors and omissions render the Agreement unjust and unreasonable or contrary to the public interest. Based on these facts, Vernon requests that an order be issued in this case, pursuant to section 1290, barring Mirant's claim to recover a termination payment under the Agreement.

9. Alternatively, Vernon requests that the Commission exercise its primary jurisdiction under section 205 and 206 of the FPA to deny Mirant's claim for a termination payment as unjust and unreasonable and contrary to the public interest. In support of its alternative request, Vernon asserts that the termination payment demanded by Mirant must be denied because: (i) the Agreement was fraudulently procured by Mirant and is therefore voidable;[15] (ii) Mirant enagaged in unlawful misconduct in refusing to provide reasonably satisfactory assurances of its creditworthiness, as required by the Agreement; (iii) Mirant provided an erroneous calculation of the termination payment that omitted any offsets for losses and costs as required by the Agreement; and (iv) Mirant offered an erroneous proof of damages that consisted of an unsubstantiated calculation.

Notice of Filing and Responsive Pleadings

10. Notice of Vernon's petition was published in the *Federal* Register with interventions, protests and comments due on or before November 1, 2005.[16] Motions to intervene were timely filed by Mirant; Western Power Trading Forum; Public Utility District No. 1 of Snohomish County, Washington (Snohomish);[17] and the City of Santa

[15] Vernon also asserts that the Agreement may be invalidated because its fraudulent inducement, as alleged, or its market power, warrant the retroactive revocation of Mirant's market-based rate authority.

[16] 70 Fed. Reg. 61,278 (2005).

[17] On December 2, 2005, Snohomish filed to amend its intervention to include a statement of issues.

Clara, California (Santa Clara). Comments in support of Vernon's petition were filed by Snohomish and a protest was filed by Mirant. On November 3, 2005, a motion to intervene out-of-time was filed by Enron Power Marketing, Inc. (Enron).[18]

11. In its protest, Mirant argues that section 1290 cannot be applied in this case. Mirant argues that the Commission may only exercise jurisdiction, under section 1290, over termination payments demanded by a seller that the Commission *has found* to have manipulated the electricity market resulting in unjust and unreasonable rates and only if the Commission *has revoked* that seller's authority to sell electricity at market-based rates. Mirant points out that the Commission has neither "found" Mirant to have engaged in market manipulation nor "revoked" Mirant's market-based rate authority. Mirant adds that respecting verb-tense, in this regard, is a well-established rule of statutory construction.[19] Mirant argues that even if there were any ambiguity in the plain language of section 1290, the legislative history of this provision makes plain that its scope was intended to extend to Enron alone.[20]

12. Mirant also takes issue with Vernon's alternative request for relief, *i.e.*, that the Commission is authorized to exercise its primary jurisdiction over the issues in dispute under its section 205 and section 206 authority. Mirant argues that any such exercise of jurisdiction would be barred by the automatic stay provisions of the bankruptcy code.[21] Mirant asserts that even assuming that Vernon is not automatically stayed from pursuing its claim, the Commission has no basis to assert its primary jurisdiction in this case

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[18] On November 15, 2005, Vernon submitted an answer in opposition to Enron's motion to intervene. Vernon argues that Enron's motion to intervene fails to appropriately state Enron's position, fails to sufficiently identify Enron's interest, or otherwise provide a good cause showing supporting its intervention.

[19] Mirant protest at 17, *citing U.S. v. Wilson,* 503 U.S. 329 (1992) (*Wilson*).

[20] Mirant protest at 18, *citing* 151 Cong. Rec. S7271 (remarks of Sen. Cantwell):

> [Section 1290] is only applicable to contracts entered into during the electricity crisis with sellers of electricity that manipulated the market to such an extent that they brought about unjust and unreasonable rates. There is only one such seller, and that is Enron, and there are only a handful of terminated contracts with Enron that haven't been resolved as of this date.

See also Mirant protest at 18, n.68, *citing* 151 Cong. Rec. S7273 (remarks of Sen. Murray) ("[Section 1290] merely picks the proper forum for determining whether Enron complied with its tariff").

[21] 11 U.S.C. § 362(b) (2000).

because the issues presented are ordinary contract law issues that do not require the Commission's specialized expertise, do not raise matters that require uniformity of interpretation, or implicate important regulatory responsibilities.[22]

13. Mirant argues that even assuming that the Commission determines that Vernon's petition should be decided on the merits, Vernon's claims are baseless. First, Mirant argues that Vernon's market manipulation claims are based on unsubstantiated allegations never adopted by the Commission.[23] Mirant further asserts that while it was the subject of a show cause order concerning gaming and/or anomalous market behavior in the western energy markets, that proceeding resulted in settlement agreements releasing Mirant of all such claims.[24] Mirant adds that, more recently, the Commission has accepted Mirant's triennial market power analysis filing, finding that the Mirant satisfies the Commission's generation market power standard for market-based rate authority.[25] Mirant states that Vernon did not contest or seek rehearing of either the *Show Cause Settlement Order* or the order in Mirant's triennial market review.

14. Mirant also disputes Vernon's claims regarding fraud in the inducement (as based on the alleged "new revelations" concerning Mirant's insolvency). Mirant argues that Vernon provides no evidence that Mirant knew it was insolvent at the time the parties entered into the Agreement and that Vernon mischaracterizes the bankruptcy complaint on which it relies. Specifically, Mirant argues that nothing in its bankruptcy complaint states that either it or its corporate parent knew Mirant was insolvent on the date the Agreement was executed. Mirant adds that the paragraphs in the complaint cited by Vernon state only that Mirant's parent was rendered insolvent through certain actions taken by Southern.

15. Regardless, Mirant argues that fraud with respect to solvency, even if shown, is a contract-specific finding that would not warrant revocation of its market-based rate

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[22] Mirant protest at 24, *citing Arkansas Louisiana Gas Co. v. Hall,* 7 FERC ¶ 61,175 (1979) (*Arkla*), *reh'd denied*, 8 FERC ¶ 61,031 (1979).

[23] *Id.* at 29, *citing* Notice of Withdrawal of the California Parties, Docket Nos. EL00-95-000, *et al*. (April 22, 2005).

[24] *Id.* at 30-31, *citing Mirant Americas Energy Marketing, L.P.,* 111 FERC ¶ 61,488 (2005) (*Show Cause Settlement Order*), *reh'g pending*.

[25] *Mirant Americas Energy Market, LP.*, 111 FERC ¶ 61,252 (2005).

authority.[26] Mirant argues that, instead, the fraud at issue must be shown to affect the workings of the wholesale power markets as a whole. Mirant adds that there is sound policy rationale supporting this approach because, in the case of a fraudulent inducement claim, there are existing contractual remedies under state laws to address these concerns. Mirant asserts that, regardless, the Commission's authority to act in this case would be limited by the requirements of section 206 of the FPA, *i.e.*, that any rate relief or tariff revision could be implemented on a prospective basis only.

16. Finally, Mirant requests a finding that Vernon waived its right to pursue its claims given its failure to satisfy the requirements of Order No. 663, *i.e.*, given the petition's omission of a statement of issues.[27]

Answers

17. On November 15, 2005, Vernon filed an amended and restated petition for declaratory order in which it seeks to amend its petition to include a statement of issues. Vernon also on that date filed an answer to Mirant's answer. In its answer, Vernon responds to Mirant's claim that section 1290(a) requires a prior showing regarding a seller's market manipulation and a prior revocation of the seller's market-based rate authority. Vernon submits that Mirant's interpretation of section 1290(a) reads additional language into this provision, requiring it to read that the "the Commission has [found market manipulation and revoked the seller's market-based rate authority] *prior to August 2005."* Vernon argues that the word "has," in this context, cannot be read to mean "has as of August 8, 2005," *i.e.*, the date of enactment of EPAct 2005. Rather, Vernon argues that "has" only describes what must exist when the Commission seeks to exercise its grant of exclusive jurisdiction under section 1290.

18. Vernon also responds to Mirant's argument that section 1290 was intended to apply to one entity alone, *i.e.*, to Enron. Vernon argues that any such provision would constitute an unconstitutional bill of attainder. Specifically, Vernon argues that a law may not single out an individual or group for unfavorable treatment and then impose

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[26] Mirant protest at 34, *citing Saracen Energy LP*, 110 FERC ¶ 61,332 at PP 9 and 11 (finding that demonstration of creditworthiness is outside the scope of the requirements that the Commission evaluates in granting market-based rate authority and affirming that none of the four standards for market-based rate authority involve demonstrating creditworthiness).

[27] *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, 70 Fed. Reg. 55, 723 (2005), FERC Stats. & Regs. Regulations Preambles ¶ 31,193 (2005), *Final Rule,* Order No. 663-A, 114 FERC ¶ 61,284 (2006).

punishment for an "irreversible act committed by [that individual or group]."[28] In addition, Vernon argues that there is a presumption in favor of finding a statute to be both lawful and constitutional, meaning here, that section 1290 must be construed as applying to more than a single entity.[29]

19. Vernon also responds to Mirant's assertion that there is no evidence in this case that Mirant acted fraudulently and thus no basis supporting Vernon's request that Mirant's market-based rate authority be retroactively revoked. Vernon argues that, in fact, its fraud claim is supported by the judicial admissions made by Mirant's parent in its bankruptcy proceeding, and goes beyond a solvency issue because Mirant, in effect, defrauded the Commission itself when it sought and obtained its market-based rate authority.[30] Vernon argues that according to Mirant's own judicial admissions, Mirant and its affiliates were mere alter egos of Southern and that, as such, Mirant was not a viably independent legal entity. Vernon adds that under the alter ego doctrine, courts disregard the corporate entity when there exists such unity between the corporation and the individual that the corporation ceases to be separate from its owners.

20. Vernon also argues that the scope of Mirant's fraud is significant: more than $2 billion in fraudulent transfers; and out-of-market contracts with long-term liabilities in excess of $2.3 billion. Vernon adds that the Commission is permitted to act retroactively under section 205,[31] or in this case, to treat Mirant's market-based rate authority as void *ab initio*. Vernon also disputes Mirant's claim that, assuming section 1290 does not apply, the automatic stay provisions of the bankruptcy code bar the Commission from exercising its primary jurisdiction. Vernon argues that action by the Commission will not interfere with any of the ongoing court proceedings. Vernon argues that in requesting a finding that the termination payment sought by Mirant is unlawful and invalid, it is seeking relief that can only be granted by the Commission. Moreover, Vernon argues

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[28] Vernon answer at 10, *citing Selective Service System v. Minnesota Public Interest Research Group,* 468 U.S. 841, 848 (1984).

[29] *Id.*, *citing Meinhold v. U.S. Dept. of Defense,* 34 F.3d 1469 (9th Cir. 1994); U.S. v. Marshall, 908 F.2d 1312 (7th Cir. 1990), *aff'd*, 500 U.S. 453 (1991); *In re Butcher*, 125 F.3d 238 (4th Cir. 1997).

[30] *See supra* P 6.

[31] Vernon answer at 10, *citing State of California v. FERC*, 383 F.3d 1006, 1016 (9th Cir. 2003) (*Lockyer*).

that the Commission possesses broad powers to exercise this authority retroactively, under section 205, as held by the U.S. Court of Appeals for the Ninth Circuit in *State of California, ex rel. Lockyer v. FERC.*[32]

21. On November 30, 2005, Mirant filed an answer to Vernon's answer in which it responds to Vernon's argument that section 1290 must be interpreted to apply to more than a single entity. Mirant responds that this reading would be contrary to the legislative history of this provision (as noted above). Mirant also argues that section 1290 cannot be characterized as an unconstitutional bill of attainder because a law can only be struck down as such where that law "legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protection of a judicial trial."[33] Mirant argues that, regardless, the Commission cannot re-write section 1290.

22. Mirant also responds to Vernon's suggestion that Mirant existed as an alter ego of Southern and, as such, defrauded the Commission when it sought and obtained its market-based rate authority. Mirant argues that its status as a subsidiary of Southern was disclosed to (and taken into consideration by) the Commission in Mirant's application for authority to make sales at market-based rates. Mirant adds that in granting Mirant market-based rate authority, the Commission did not limit its analysis to generation or transmission owned by Mirant, but instead assessed the generation and transmission facilities owned by all of Mirant's and Southern's affiliates.

23. Mirant further argues that Vernon may not rely on *Lockyer* to support its request for retroactive revocation of Mirant's market-based rate authorization. Mirant argues that *Lockyer* is currently pending on rehearing and thus remains non-final,[34] that it is contrary to established decisions by the Supreme Court and other federal courts interpreting the FPA, and that, regardless, it only addresses retroactive *refunds* rather than revocation of an entity's market-based rate authorization.

24. On December 13, 2005, Vernon filed an answer to Mirant's answer, in which it argues, among other things, that legislative history cannot be considered in this case for any purpose, given the lack of ambiguity in section 1290. Specifically, Vernon argues

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[32] *Lockyer,* 383 F.3d 1006 at 1015-16 (finding that the power to order retroactive refunds is inherent in the Commission's authority to approve market-based rates where material non-compliance with applicable reporting requirements eviscerates the tariff).

[33] Mirant answer at 13, *citing Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 469 (1977).

[34] *See* Case No. 02-73093 (9th Cir., filed Sept. 25, 2002).

that section 1290 unambiguously permits the Commission to decide when (and whether) the requirements of the statute have been satisfied. Vernon further argues that while *Lockyer* supports its request for retroactive relief in this case, retroactive relief is not the only remedial tool that can be relied on, here, because under *Lockyer*, Mirant's failure to notify the Commission of its alter ego status can be held to eviscerate its tariff. Vernon also disputes Mirant's suggestion that the Commission endorsed Mirant's alter ego status when it issued and renewed Mirant's market-based rate authority. Vernon argues that the Commission's orders cannot be read as an endorsement of Mirant's fraud.

25. On February 2, 2006, Vernon filed an additional answer attaching an order issued January 27, 2006 by the U.S. District for the Southern District of New York, in which the court held that section 362(b)(4) of the bankruptcy code exempts a federal agency like the Commission from the automatic stay provision of the bankruptcy code.[35]

26. On March 21, 2006, Vernon filed a motion for partial summary disposition in which it reiterates certain of its prior arguments, as summarized above, and makes several new arguments. In particular, Vernon alleges that Mirant's fraudulent conduct violates the Commission's market manipulation rules, as set forth in Order No. 670 (PEMM Rules).[36] Vernon argues that Mirant violated the PEMM Rules when it failed to disclose material information that it was under a duty to disclose and when it stood behind a sham entity for the purpose of defrauding others.[37] Vernon also asserts that Mirant breached representations in the Agreement stating that Mirant had the necessary authority to enter into the Agreement and that Mirant's performance under the Agreement would not conflict with any laws or Commission rules. Based on these assertions, Vernon requests that the Commission: (i) exercise its exclusive jurisdiction under section 1290 and primary jurisdiction under the FPA; (ii) find that Mirant manipulated the market; (iii) revoke Mirant's market-based rate authority; and (iv) deny Mirant's termination payment claim.

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[35] *See California Dept. of Water Resources v. Calpine Corp.*, Memorandum and Order (S.D.N.Y. Jan. 27, 2006) (*Calpine*).

[36] *See Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202 (2006), *reh'g denied*, 114 FERC ¶ 61,300 (2006). Order No. 670 implemented new section 4A of the Natural Gas Act and new section 222 of FPA, as added to the statutes by EPAct 2005. *See* EPAct 2005, 119 Stat. 594, sections 315 and 1283, respectively.

[37] Vernon notes that while Mirant's violations of the Commission's PEMM Rules may entitle Vernon to damages (and thus implicate issues of fact), it's request for partial summary judgment is directed to the issue of liability alone.

27. On April 5, 2006, Mirant submitted an answer to Vernon's motion. Mirant argues that Vernon has previously litigated and lost its fraud-based claims in two other fora and has also raised these same issues in its pending appeal before the Fifth Circuit.[38] Mirant argues that, as such, there is no reason for the Commission to hear a case regarding fraud in the inducement or breach of contract, where the courts have already issued, or have pending before them, proceedings based on the same claims.

28. Mirant also responds to Vernon's allegations regarding the Commission's PEMM Rules, noting that the alleged conduct in this case pre-dated the legal effectiveness of these rules.[39] Mirant also argues that regardless of Vernon's new claims, its motion for summary disposition fails because, at a minimum, material issues of fact exist regarding the issue of whether Mirant misled Vernon regarding its solvency. Mirant asserts that it has not and does not concede that it engaged in any such misrepresentations. In addition, Mirant argues that the alleged fraud in this case, which relates to Mirant's solvency, is not the type of fraud that is the subject of the PEMM Rules, which are directed to fraudulent conduct that could impair, obstruct or defeat a well-functioning market.[40]

29. Mirant also challenges Vernon's assertion that Mirant breached representations in the Agreement regarding its authority to enter into the Agreement and its ability to abide by all applicable laws and regulations. Mirant asserts that, in fact, it was and is a valid legal entity that possesses and may exercise such powers and privileges as are necessary

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[38] Mirant points out, in particular, that on November 23, 2005, the bankruptcy court found that none of Vernon's fraud claims supported Vernon's motion requesting relief from that court's order requiring Vernon to make a termination payment. Mirant further points out that on March 24, 2006, the district court affirmed the bankruptcy court's decision.

[39] Mirant further notes that Vernon's charges would be similarly barred under the Commission's Market Behavior Rules, which required complainants to file their complaints within 90 days from the end of the calendar quarter in which the violation was alleged to have occurred, unless a complainant can show that it did not know or should not have known of the behavior which forms the basis for its complaint within this time period. *See Order Amending Market-Based Rate Tariffs and Authorizations,* 105 FERC ¶ 61,218 (2003), *reh'g denied*, 107 FERC ¶ 61,175 (2004).

[40] *See* Mirant April 5, 2006 answer at 19, *citing* Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 37 ("The Commission expects parties to continue to resolve most contract disputes, including those based on claims of fraud in the inducement, without the involvement of the Commission, relying on state and federal courts to apply contract law as appropriate").

or convenient to the conduct, promotion or attainment of its business, purposes, or activities. Mirant argues that, as such, it possess the necessary corporate, governmental and legal authority to undertake its rights and obligations under the Agreement.

30. Finally, Mirant takes issue with Vernon's assertion that Mirant was required to inform the Commission of its financial status in its quarterly transaction reports filed with the Commission. Mirant argues that, in fact, it was only required to provide information regarding its market-based rate transactions, not broad information regarding Mirant's financial status.

Discussion

A. Procedural Matters

31. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[41] the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will also grant Enron's motion to intervene out-of-time, based on its interests in this proceeding, its demonstration of good cause supporting its intervention, the early stage of the proceeding, and the lack of undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[42] prohibits an answer to a protest, or an answer to answer, unless otherwise permitted by the decisional authority. We will accept each of the above-noted answers because they have provided information that assisted us in our decision-making process.[43]

B. Analysis

32. We will dismiss Vernon's petition, based on our findings below that: (i) the Commission lacks jurisdiction under EPAct 2005, section 1290, to review Mirant's termination payment claim; and (ii) regardless of whether the Commission may hear

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[41] 18 C.F.R. § 385.214 (2005).

[42] 18 C.F.R. § 385.213(a)(2) (2005).

[43] We further note that our acceptance of these pleadings is required in order to respond to each of Vernon's arguments, as presented in this case in their many installments. We remind Vernon, however, that a petitioner's case-in-chief should be presented in its initial filing and that if a supplementary pleading is deemed to be necessary, it should not be accompanied by a restatement of its prior arguments.

Vernon's remaining claims given the effect of the automatic stay provisions of the bankruptcy code, Vernon's remaining claims do not warrant an assertion of our primary jurisdiction.

33. First, we consider Vernon's claim that the termination payment dispute at issue in this case arises under a contract eligible for relief under EPAct 2005, section 1290. Section 1290(a) identifies the class of contracts to which section 1290 may apply. As relevant here, it requires, first, a prior Commission finding (*i.e.*, an order in which the "Commission has . . . found") that the seller "manipulated the electricity market resulting in unjust and unreasonable rates." Second, it requires a prior order in which the Commission "has . . . revoked the seller's authority to sell . . . electricity at market-based rates." Vernon acknowledges that the Commission has issued no such orders regarding Mirant. That is, Vernon concedes that the Commission has not found that Mirant manipulated the electricity market resulting in unjust and unreasonable rates and has not revoked Mirant's authority to sell electricity at market-based rates. Vernon argues, nonetheless, that the Commission can make these findings here *contemporaneous* with its order granting relief under section 1290.

34. We disagree. Vernon's argument, in effect, is that the section 1290(a) use of the past tense -- and its unavoidable substantive implications (limiting the application of section 1290 to cases in which the Commission "has found" that a seller manipulated the electricity market and "has revoked" the seller's market-based rate authority) -- can simply be ignored in this case by converting these past tense limitations into a present tense allowance (*i.e.*, by expanding the application of section 1290 to cases in which the Commission "finds" that a seller manipulated the electricity market and "revokes" the seller's market-based rate authority). However, we cannot re-write the words of a statute, nor can we ignore its plain, unambiguous meaning, particularly where, as here, the requested interpretation would have the effect of transforming a statutory limitation into its exact opposite – *i.e.*, a broad regulatory license.[44]

35. Accordingly, because we construe section 1290 to be unambiguous, in this regard,, we need not consider the parties' competing assertions regarding the legislative history of section 1290. Nor are we required to consider Vernon's contention that section 1290, if it is construed to apply to only Enron, is unconstitutional. Regardless of whether, or to what extent, section 1290 may be applied to a contract to which Enron is a party, it may

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[44] *See Wilson,* 503 U.S. at 331 ("Congress' use of verb tense is significant in construing statutes"); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 63-64, n.4 (1987); *U.S. v. Bombardier Corp.,* 380 F.3d 488, 493 (D.C. Cir. 2004).

not be applied to Mirant. Finally, we are not required to address, under section 1290, whether Mirant manipulated the western energy markets or whether Mirant's market-based rate authority can or should be revoked retroactively.

36. We next consider Vernon's alternative request that the Commission exercise its primary jurisdiction, under the FPA, to deny Mirant's claim for a termination payment as unjust and unreasonable or contrary to the public interest. Vernon requests that we deny Mirant's termination payment claim on these grounds because: (i) the Agreement was fraudulently procured by Mirant, thus rendering the Agreement void;[45] (ii) Mirant refused to provide reasonably satisfactory assurances of its creditworthiness, as required by the Agreement; (iii) Mirant erroneously calculated the termination payment by omitting any offsets for losses and costs, as required by the Agreement; (iv) Mirant's proof of damages consisted of an unsubstantiated calculation; and (v) Mirant breached representations in the Agreement stating that Mirant had the necessary authority to enter into the Agreement and that Mirant's performance under the Agreement would not conflict with any laws or Commission rules.

37. Mirant argues that the automatic stay is triggered with respect to these claims because they constitute pre-petition claims against Mirant's bankruptcy estate.[46] Vernon, on the other hand, relies on the exception to this automatic stay provision, which permits "a governmental unit . . . to enforce [its] police and regulatory powers."[47] However, we

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[45] As noted above, Vernon restates and realleges this same argument (as accompanied by the same requested remedy – the voiding of the Agreement) in three alternative forms. First, Vernon asserts that fraud in the inducement would support the retroactive revocation of Mirant's market-based rate authority, thus revoking the tariff pursuant to which the Agreement was executed and thus, in turn, rendering the Agreement void on these grounds. Second, Vernon asserts that a fraud finding would support a corollary finding that Mirant manipulated the market and thus exercised market power, thus voiding the Agreement on these grounds. Third, in Vernon's March 21, 2006 motion, Vernon asserts that Mirant's alleged fraud (and failure to disclose it) constitutes a violation of the PEMM Rules, thus rendering the Agreement void on these grounds.

[46] The bankruptcy code provides that a petition for bankruptcy operates as a stay of "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." *See* 11 U.S.C. § 362(a)(2) (2000).

[47] *Id.* at § 362(b)(4).

need not decide here whether the automatic stay or its exceptions apply in this case, given our finding, below, that Vernon's claims do not warrant the exercise of our primary jurisdiction.

38. We begin with the observation that Vernon's claims are, in their essence, contract claims that arise under the Agreement. In other words, the merits of Vernon's claims, as alleged, could not be addressed by the Commission without reference to the parties' rights and obligations under the Agreement and/or to the parties' negotiations leading up to the Agreement, and could not be remedied, as Vernon requests, without either revising the Agreement, in whole or in part, or finding the Agreement to be void or otherwise unenforceable. This is so, for example, even with respect to Vernon's alternative theories for avoiding Mirant's termination payment claim. Specifically, even assuming that we could, or should, retroactively revoke Mirant's market-based rate authority, or determine that Mirant's alleged manipulations regarding its solvency gave it market power, or find that Mirant violated the PEMM Rules by failing to disclose its alleged fraud, we could not make any of these findings, under Vernon's own theory of the case, without first determining whether the Agreement was fraudulently induced, *i.e.* without first deciding this contract issue.

39. Moreover, while Vernon alludes to market-wide implications of Mirant's alleged insolvency, it does so without reference to any market-wide rate impacts or to existence of any other market imperfections, without identifying any other supply contracts other than the Agreement itself that may have been tainted by this alleged fraud, and without identifying any other aggrieved parties who have not already settled their claims against Mirant.[48] Vernon, in this regard fails to make out a *prima facie* case in support of any market-wide claims it intended to make. As such, we construe Vernon's request that we exercise our primary jurisdiction in this case as a request relating to, and arising under, the Agreement, *i.e.*, as a contractual matter.

40. Whether the Commission should assert primary jurisdiction over a contractual matter otherwise litigable in another forum turns on a consideration of three issues: first, whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; second, whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, third, whether the case is important in relation to the regulatory responsibilities of the Commission.[49] We find that Vernon's contractual claims fail to satisfy these standards.

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[48] *See infra* P 43.

[49] *Arkla*, 7 FERC ¶ 61,175 at 61,322.

41. First, the Commission possesses no special expertise over the contractual issues raised by Vernon's petition, including Vernon's allegations regarding Mirant's insolvency, creditworthiness, and alleged fraud in inducing Vernon to enter into the Agreement. These issues, rather, turn on standard contract and/or tort principles and do not address matters arising under the FPA. In fact, Vernon has raised these very issues in both its appeal of the *Vernon Adversary Proceeding Order* before the U.S. Court of Appeals for the Fifth Circuit and in its motion in the bankruptcy court for relief from the bankruptcy court's final judgment. As such, Vernon's contract claims appear to be not only "litigable" in another forum; in fact, they appear to have been already "litigated."[50]

42. Even assuming that there are residual contract claims that Vernon has not litigated in this case, we find, under the second-prong of our *Arkla* analysis, that there is no need for uniformity of interpretation with respect to the resolution of these issues, as they relate exclusively to the parties' rights and obligations under the Agreement. We note, in this regard, that while Vernon alleges certain market-wide implications stemming from Mirant's alleged misconduct, the "market" in this case, and the Commission itself, has settled all outstanding claims against Mirant concerning Mirant's conduct over the relevant time period.

43. On June 25, 2003, the Commission issued an order to show cause and established hearing procedures, in Docket No. EL03-158-000, regarding Mirant's alleged gaming and/or anomalous market behavior in the western markets.[51] On September 30, 2003 and December 19, 2003, settlement agreements were filed by Mirant and Commission Trial Staff resolving all issues set for hearing. The Commission, in approving these settlements, discharged Mirant from "any and all claims of any nature . . . based on, or arising out of, in whole or in part . . . any conduct related to the issue[s] . . . as alleged or addressed in FERC Docket Nos. EL03-158-000, PA02-2-000, and ER03-746-000, *et al*."[52] In addition, on January 31, 2005, following extensive litigation by numerous active

[50] As pointed out by Mirant, in its April 4, 2006 answer (*see* note 38, *supra*), the bankruptcy court has now determined, in an order issued November 23, 2005, that Vernon's fraud claims did not warrant the grant of its motion requesting relief from the bankruptcy court's prior order requiring Vernon to make a termination payment. Moreover, the district court has now affirmed this ruling in an order on appeal issued March 24, 2006.

[51] *See American Electric Power Service Corporation,* 103 FERC ¶ 61,345 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004).

[52] *See Show Cause Settlement Order*, 111 FERC ¶ 61,488.

parties, a settlement agreement was filed by Mirant, the California Parties,[53] and the Commission's Office of Market Oversight and Investigations, in Docket Nos. EL00-95-131, *et al*., to resolve all matters and claims relating to Mirant's conduct in the western markets (Global Settlement). The Commission approved the Global Settlement in an order issued April 13, 2005. While Vernon points out that it was a non-party to the Global Settlement, and thus is not bound by its terms, Vernon's preservation of rights in that proceeding does not support its contention that it should be permitted to re-litigate in this proceeding issues that it was required to pursue, if at all, in Docket No. EL00-95-131, *et al.*[54]

44. Third, Vernon's contractual claims, because they arise under a now terminated contract with a seller whose conduct in the western energy markets is now the subject of multiple settlement agreements approved by the Commission, do not address matters of significance in relation to the regulatory responsibilities of the Commission. These claims, rather, concern only Vernon's rights and obligations under the Agreement. For all these reasons, even if the automatic stay and its exceptions were not at issue, we would decline to exercise our primary jurisdiction over the contractual claims raised by Vernon's petition.

45. Finally, we reject Vernon's argument that Mirant's behavior in this case violated our anti-manipulation rule. In that rule, we stated that our market behavior guidelines would be given prospective application only.[55]

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[53] The California Parties are comprised of: (i) the Attorney General of the State of California; (ii) the California Department of Water Resources; (iii) the California Energy Oversight Board; (iv) the California Public Utilities Commission; (v) Pacific Gas and Electric Company; (vi) Southern California Edison Company; and (vii) San Diego Gas & Electric Company.

[54] We further note that Vernon's claim that new evidence exists concerning Mirant's creditworthiness at the time the Agreement was executed would not have been a factor considered by the Commission in granting Mirant market-based rate authority and would not support the revocation of those authorizations here.

[55] *See Conditions for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, 71 Fed. Reg. 9,695 (Feb. 27, 2006), FERC Stats. & Regs. ¶ 31,208 (2006).

The Commission orders:

Vernon's petition is hereby dismissed, as discussed in the body of this order.

By the Commission. Commissioner Brownell voted present; see attached statement.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

City of Vernon, California Docket No. EL06-3-000

(Issued June 28, 2006)

BROWNELL, Commissioner, voting present:

For these reasons set forth in Public Utility District No. 1 of Snohomish County, Washington, 115 FERC ¶ 61,375 (2006), I respectfully vote present.

Nora Mead Brownell
Commissioner