UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MEGAN-RACINE ASSOCIATES, INC.	CASE NO. 92-00860
Debtor	Chapter 11

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion filed on November 12, 1996, by the Federal Deposit Insurance Corporation ("FDIC"), as receiver for the New Bank of New England ("BNE"), seeking a determination whether Niagara Mohawk Power Corporation ("NIMO") violated the automatic stay by seeking approval by the Federal Energy Regulatory Commission ("FERC") of certain interconnection charges it wishes to assess against Megan-Racine Associates, Inc. ("Debtor") for the years 1991-1994. On November 15, 1996, NIMO filed opposition to FDIC's motion and also filed a cross-motion on shortened notice seeking clarification of the Court's prior Order, dated May 16, 1995 ("May 1995 Order"), which authorized NIMO to present to the FERC "all issues as to which the FERC has primary jurisdiction." In the alternative, NIMO requests relief from the automatic stay to permit it to bring certain issues before the FERC. On November 25, 1996, Debtor's counsel filed an affirmation in support of the FDIC's motion and in opposition to NIMO's cross-motion.

The motion and cross-motion were heard at the Court's regular motion term in Utica, New York, on November 26, 1996. Following oral argument by counsel representing the parties, the matter was submitted for decision as of that date.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of these contested matters pursuant to 28 U.S.C. §§ 1334, 157(a), 157(b)(1) and (b)(2)(A), (G) and (O).

FACTS

Debtor was incorporated on March 31, 1987, for the purpose of developing and operating a gas-fired cogeneration facility ("Facility") in Canton, New York. On November 21, 1987, Debtor entered into a Power Purchase Agreement ("PPA") with NIMO for the sale and purchase of electric power produced at the Facility. Debtor thereafter filed an Application for Commission Certification of Qualifying Status of a Cogeneration Facility with the FERC, and in January 1989 the FERC issued an order granting Debtor's application. Construction financing for the Facility was originally provided by BNE. As collateral security for the financing, Debtor assigned the PPA to BNE. In August 1989, NIMO executed a consent ("Consent") in favor of BNE in which NIMO acknowledged and consented to the assignment. FDIC succeeded to and currently holds all right, title and interest formerly held by BNE in and to the PPA and the Consent.

The Facility commenced commercial operation in May 1991. On March 17, 1992, Debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). NIMO commenced an adversary proceeding by filing a complaint against the Debtor and the FDIC on or about August 1, 1994. NIMO alleged that beginning in 1991 the Facility was not a "qualifying facility" ("QF") within the meaning of paragraph FIRST of the PPA and if

proven, NIMO was entitled to a declaratory judgment that the PPA was null and void. Trial of the matter was initially scheduled to commence in March 1995; however, prior to that date Debtor and the FDIC filed motions for summary judgment, or in the alternative, for a stay of the adversary proceeding pending resolution by the FERC of the issue of whether the Facility was a QF.

On March 24, 1995, the Court issued its Memorandum-Decision, Findings of Fact, Conclusions of Law and Order ("Decision") in connection with the motions. See *In re Megan-Racine Associates, Inc.*, 180 B.R. 375 (Bankr. N.D.N.Y. 1995). The Court *sua sponte* modified the automatic stay imposed by Code § 362(a), allowing NIMO to make application to the FERC for the determination of the discrete QF issues identified therein. *See id. at 383.* The Court expressly modified the automatic stay to allow NIMO to bring the following issues to the FERC:

> (1) Whether the Facility maintained the federal operating and efficiency standards necessary to qualify as a QF in calendar years 1991, 1992, 1993 and 1994?
>
> (2) *Assuming arguendo*, the Facility did not meet the federal operating and efficiency standards necessary to qualify as a QF for any or all of the above calendar years, then is the Facility "decertified" for the calendar year(s) it did not meet QF status?

Id. Following FERC's resolution of all QF issues, the parties were directed to return to the Court for a determination of the remaining issues in the adversary proceeding. *See id.*

On April 21, 1995, NIMO filed a decertification petition with the FERC, seeking a declaration that Debtor failed to meet QF standards for calendar years 1991-1994 and asking that Debtor's QF status be revoked. On April 24, 1995, Debtor filed a motion with this Court seeking a determination that NIMO had violated the automatic stay by filing the application with the FERC. Debtor argued that NIMO's request that the FERC revoke Debtor's QF status went

beyond the relief provided by the Court in its Decision. NIMO took the position that the Court's Decision "deferred to the FERC the determination of all those QF issues embraced within the two identified questions, and the Court reserved no QF issues for itself." *See* NIMO's opposition, filed May 2, 1995, at Footnote 5.

Debtor's motion was denied at a hearing held on May 2, 1995, in Syracuse, New York. Counsel for NIMO presented the Court with an Order on May 12, 1995, which was signed by the Court on May 16, 1995 ("May 1995 Order"). In addition to denying Debtor's motion, the May 1995 Order also clarified the Court's Decision by authorizing NIMO to present to the FERC "all issues as to which the FERC has primary jurisdiction." The Court further clarified its Decision by specifically authorizing NIMO "to request the FERC to revoke the qualifying status" of the Facility.

On December 14, 1995, the FERC issued its decision in which it concluded that the Debtor had not met QF operating and efficiency requirements for 1991 and 1992 and did not satisfy QF efficiency standards for 1993 and 1994. Thereafter, on or about March 5, 1996, NIMO filed a motion for partial summary judgment against Debtor and the FDIC in connection with the adversary proceeding pending in this Court. On or about March 6, 1996, the FDIC filed a motion for summary judgment dismissing Count II of NIMO's complaint, and Debtor filed a cross-motion for partial summary judgment against NIMO on or about March 20, 1996. The Court heard oral argument on April 2, 1996, and rendered a decision denying all motions on January 6, 1997.

In the interim, on or about September 27, 1996, NIMO filed with the FERC a copy of the PPA, along with a proposed tariff for interconnection services between NIMO and the Debtor

("Application").[1] In a letter to the FERC, dated September 26, 1996 ("Letter") (*see* Exhibit "A" of FDIC's Motion), NIMO indicates that it is seeking to recover "the fair value (quantum meruit) of the interconnection services it has performed and continues to provide" based on NIMO's belief that the Debtor does not have a valid agreement to sell power to NIMO. It is NIMO's contention, as asserted in its complaint in the adversary proceeding, that the PPA is a nullity.[2]

ARGUMENTS

FDIC makes the argument that by filing its Application with the FERC on September 27, 1996, NIMO has violated the automatic stay. FDIC contends that the Decision and subsequent May 1995 Order authorized NIMO to request that the FERC determine the QF status of the Debtor but did not authorize NIMO to request the FERC to fix the amount of prepetition claims.[3] FDIC asserts that NIMO never filed a proof of claim and the bar date has since passed.

NIMO takes the position that pursuant to the May 1995 Order, the Court's authorization extended to NIMO's Application since approval of interconnection charges involves issues within the FERC's specialized competence. However, FDIC contends that the May 1995 Order specifically provided that the issues to be referred to the FERC were only those addressing the QF status of the Debtor for which the FERC had primary jurisdiction. FDIC, as well as the

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[1]According to an order issued by the FERC on November 27, 1996, NIMO submitted for filing its interconnection agreement with the Debtor on September 30, 1996.

[2]In the Letter to the FERC, NIMO indicates that the agreement to interconnect is found under paragraph "TENTH" of the PPA.

[3]In the Letter to the FERC, NIMO states, "Any claim for payment based on a Commission order will be presented to the Bankruptcy Court for consideration." *See* Footnote 6 of the Letter.

Debtor, makes the argument that the payment of interconnect charges is a contract issue under the PPA and is a matter for which the FERC does not have primary jurisdiction. Instead, FDIC asserts that FERC has concurrent jurisdiction with the Court to address contract issues and NIMO should have sought relief from the automatic stay before filing its Application with the FERC.

NIMO seeks clarification from the Court of its May 1995 Order. It also asserts that if it misunderstood the May 1995 Order, then it requests that it be granted relief from the automatic stay to proceed with its Application with the FERC. FDIC points out that NIMO has in the past asserted that the Debtor does not have the ability to pay NIMO's alleged administrative claim of over $50 million and, therefore, it does not make sense to adjudicate an additional $1 million claim as it would only increase the expenses of the Debtor in having to defend the action. Therefore, FDIC takes the position that NIMO should not be granted relief from the stay.

Finally, the FDIC directs the Court to NIMO's actions in the past, which the FDIC contends demonstrate NIMO's lack of respect for this Court's jurisdiction. In particular, FDIC makes reference to NIMO's December 1995 unilateral determination not to pay at the six cent rate as set forth in New York Public Service Law § 66-c(2) but rather to pay at NIMO's avoided cost rate. On February 2, 1996, this Court issued a decision in which it concluded that NIMO's "self-help" in placing those monies into its escrow account violated the automatic stay. *See In re Megan-Racine Associates, Inc.*, 202 B.R. 873, 1996 WL 752536 (Bankr. N.D.N.Y. 1996), *rev'd* 198 B.R. 650 (N.D.N.Y. 1996), *rev'd* 102 F.3d 671 (2d Cir. 1996). In that decision, which was ultimately affirmed by the Court of Appeals for the Second Circuit this Court ordered NIMO to turn over the escrowed funds to the Debtor. *Id.* at *10.

DISCUSSION

"It is a fundamental axiom of bankruptcy law that the automatic stay is pervasive and exemptions from the stay are strictly construed." *See id.* at *8. "All proceedings are stayed, including arbitration, license revocation, administrative and judicial proceedings. Proceedings in this sense encompasses civil actions as well, and all proceedings even if they are not before governmental tribunals." H.R.Rep.No. 595, 95th Cong., 2d Sess. 340 (1978), U.S.C.C.A.N. 5963, 6297.

The initial question to be addressed by this Court is whether NIMO violated the automatic stay by filing its Application with the FERC. NIMO defends its actions by indicating that said filing was required by the FERC once it had been determined that the Debtor was not a QF for the period from 1991-1994. Relying on the language in the May 1995 Order authorizing NIMO to present to the FERC "all issues as to which the FERC has primary jurisdiction," NIMO contends that there has been no violation of the stay.

In interpreting the Order, it is necessary that the Court examine the context from which it emanated. In March 1995 in connection with the Debtor's motion for summary judgment in the adversary proceeding commenced by NIMO, Debtor argued that the Facility's QF status could only be determined by the FERC. *See Megan-Racine*, 180 B.R. at 381. Acknowledging that resolution of QF issues was central to the litigation, the Court stayed the adversary proceeding and allowed NIMO to bring "certain discrete QF issues to the FERC for determination" based on what it determined to be the FERC's primary jurisdiction. *See id.* The Court also found that it was appropriate that pending QF issues be decided by the FERC based

on the doctrine of exhaustion of administrative remedies. *See id.* at 382 (emphasis added). The Court indicated that upon the FERC's "resolution of all QF issues," the parties were to return to this Court for a determination of the remaining issues in the adversary proceeding. *See id.* at 383 (emphasis added). The Court also noted that since it had core jurisdiction over the adversary proceeding, issues involving "compliance with contractual promises, rights and duties" were appropriately addressed by the Court. *See id.* at 382, n. 4.

In its Decision, issued March 24, 1995, the Court modified the automatic stay in order to allow the FERC to determine the pending QF issues. NIMO took the position that the Court had "deferred to the FERC the determination of all those QF issues embraced within the two identified questions and the Court reserved no pending QF issues for itself." *See* NIMO's opposition, filed May 2, 1995, at Footnote 5. The transcript of the hearing held on May 2, 1995, at which the Court was asked to clarify its prior Decision referring QF issues to the FERC, makes no mention of any issues involving interconnection charges. Indeed, the hearing focused on whether there was a distinction between "decertification" and "revocation." The Court's Decision had asked that the FERC address the question of whether the Facility was "decertified" if it failed to meet QF status. The Debtor and the FDIC took the position that the NIMO request that the FERC revoke Debtor's QF status exceeded the declaratory relief granted by the Court in its Decision. The Court agreed with NIMO that for purposes of referring discrete QF issues to the FERC there was no distinction between "decertification" and "revocation" and even if there was, NIMO was authorized to seek both.

It was never the intent of the Court to grant NIMO blanket authorization to initiate any other matters with the FERC once the FERC had rendered its decision without first seeking

approval of this Court. Certainly if read in a vacuum, without familiarity with the prior proceedings before this Court, the Court might find merit to NIMO's position concerning the interpretation of the May 1995 Order. However, as pointed out by Judge Learned Hand, "There is no surer way to misread any document than to read it literally." *See Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944), *aff'd sub nom. Gemsco, Inc. v. Walling*, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945). "[W]ords acquire scope and function from the history of events which they summarize." *See Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 186, 61 S.Ct. 845, 848, 85 L.Ed. 1271(1941) (J. Frankfurter). In this case, NIMO has been an active participant in the proceedings since filing its complaint in August 1994, and was familiar with the "history of events" when it drafted the May 1995 Order for the Court's signature. The May 1995 Order was intended to clarify those issues raised at the hearing on May 2, 1995. It was not intended to allow NIMO to have the FERC determine any and all QF issues that might arise in this case. The Court modified the stay to permit NIMO to seek a determination from the FERC of those QF issues which were pending in the adversary proceeding at the time. In its Decision, the Court found that FERC was "presumably most familiar with the complex regulations and shifting policies that are relied upon in determining whether a particular facility has met its standards." *Megan-Racine*, 180 B.R. at 382. It was never the intent of this Court in its May 1995 Order to allow NIMO to initiate ancillary proceedings before the FERC once there had been a determination that the Debtor was not a QF between 1991 and 1994. It is clear from the Decision that the Court anticipated that following an expedited hearing before the FERC that the parties would return to this forum for a determination of the remaining issues in the adversary proceeding. *See id.* at 383. Accordingly, the Court concludes that NIMO violated the automatic stay by filing its

Application with the FERC without first seeking authorization of this Court.

Having reached that conclusion, the Court must also address NIMO's cross-motion requesting that the stay be modified to allow it to seek a determination from the FERC concerning interconnection charges. In this regard, Code § 362(d)(1) allows a party in interest to request relief from the stay for "cause". In determining whether cause exists to permit "litigation" to continue in another forum, the bankruptcy court is said to have broad discretion, which is to be exercised within the framework of the so-called "Curtis factors." *See In re Sonnax Indust., Inc.*, 907 F.2d 1280, 1286 (2d Cir. 1990). These include

> (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms.

See id., citing *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D.Utah 1984).

In this case, only some of these factors are particularly relevant to the matter before the Court. For instance, the first factor requires consideration of whether relief would result in a partial or complete resolution of the issues. NIMO's Application requests that the FERC determine "the fair value (quantum meruit) of the interconnection services it has performed . . ." based on NIMO's belief that the PPA is a nullity. Until this Court makes a determination regarding the validity of the PPA, it appears premature to allow NIMO to seek a determination

from the FERC of the value of the interconnection services rendered by it between 1991 and 1994. Certainly such a determination at this stage of the adversary proceeding would not result in a complete resolution of the issues presented to this Court in NIMO's complaint. Indeed, the issue of the value of the interconnection services is not even mentioned in the complaint, except perhaps indirectly in NIMO's request for damages in the event that it is successful in the adversary proceeding.

The second factor requires a determination by this Court that the action pending at the FERC would interfere with the bankruptcy case should it be allowed to go forward; the tenth factor requires the Court to take into account the interests of judicial economy and the expeditious and economical resolution of litigation. While the FERC has determined that it has jurisdiction over the interconnection agreement between NIMO and the Debtor, as set forth in paragraph "TENTH" of the PPA, for the period of QF non-compliance, the interests of judicial economy require that there first be a determination by this Court whether the PPA is null and void as NIMO contends. There is nothing to be gained at this juncture by allowing the parties to become embroiled in a proceeding before the FERC prior to a determination by this Court concerning the validity of the PPA. The Debtor should not be placed in a position of having to incur additional expenses at this stage of the case in order to protect its interests. While NIMO may believe that the PPA is null and void, there has been no finding by this Court to that effect.

Finally, the twelfth factor requires the Court to balance the harms to the parties if relief from the stay is granted. As discussed above, modifying the stay to allow NIMO to continue the proceeding before the FERC would of necessity require the Debtor to incur additional expenses in defending its interests. NIMO has presented no evidence that it would in any way be

prejudiced if the Court were to deny its request at this time. Therefore, the Court finds it appropriate based on the above analysis, to deny NIMO's request without prejudice.

Based on the foregoing, it is hereby

ORDERED that FDIC's motion seeking a determination that NIMO violated the automatic stay is granted[4]; it is further

ORDERED that NIMO's filing of its Application with the FERC seeking approval of certain interconnection charges is null and void; and it is further

ORDERED that NIMO's cross-motion seeking relief from the automatic stay is denied without prejudice.

Dated at Utica, New York

this 27th day of February 1997

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[4]The FDIC also seeks to recover attorneys' fees and expenses associated with responding to NIMO's Application. As the Court has made no finding of maliciousness or lack of a good faith argument by NIMO in connection with its violation of the stay, it is determined inappropriate to impose sanctions pursuant to Code § 105. *See generally In re Chateaugay Corp.,* 920 F.2d 183, 185-186 (2d Cir. 1990).