

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)**

In re:

*

**NATIONAL ENERGY & GAS
TRANSMISSION, INC. (f/k/a PG&E
NATIONAL ENERGY GROUP, INC.), et
al.**

* Case No.: 03-30459 (PM) and 03-30461 (PM)
through 03-30464 (PM) and 03-30686 (PM)
* through 03-30687 (PM)
Chapter 11

*

Debtors.

(Jointly Administered under
* Case No.: 03-30459 (PM))

* * * * *

**BRIEF IN SUPPORT OF
NATIONAL ENERGY & GAS TRANSMISSION, INC.'S
MOTION FOR SUMMARY JUDGMENT ON (1) ITS MOTION TO ENFORCE
SUBROGATION RIGHTS AGAINST NEGT ENERGY TRADING - POWER, L.P. ON
ACCOUNT OF GUARANTEE PAYMENT TO LIBERTY ELECTRIC POWER LLC;
AND (2) OBJECTIONS OF NEGT ENERGY TRADING-POWER, L.P. THERETO**

National Energy & Gas Transmission, Inc. (“**NEGT**”) submits this Memorandum of Law in support of its Motion for Summary Judgment (the “**Motion**”) on (1) its Motion to Enforce Subrogation Rights Against NEGT Energy Trading - Power, L.P. (“**ET Power**”) on Account of Guarantee Payment to Liberty Electric Power LLC (“**Liberty**”);¹ and (2) ET Power’s Objections thereto (“**Objections**”).²

¹ Docket No. 4161, filed March 9, 2009. Unless otherwise stated, references to the “Docket” refer to documents filed in the above-referenced jointly-administered bankruptcy case, Case No. 03-30459. For ease of reference, certain documents or excerpts of particular significance are attached as exhibits to this Motion.

² Docket No. 4184, filed April 20, 2009.

SUMMARY OF THE ARGUMENT

1. After many years of litigation before this and other Courts related to the original Tolling Agreement between Liberty and ET Power, those parties have finally settled all of their claims. The vast majority of Liberty's claim—\$140 million—was paid pursuant to a guarantee provided by a subsidiary of NEGT, Gas Transmission Northwest Corporation (“GTN”).³ This \$140 million payment created a right of subrogation under Bankruptcy Code § 509(a) now held by NEGT, which NEGT seeks to exercise. Alternatively, NEGT has a right of equitable subrogation. Absent subrogation, ET Power and its creditors would receive a windfall and would be unjustly enriched to the detriment of NEGT and its creditors.

2. ET Power now seeks to block subrogation based on two meritless arguments.⁴ First, according to ET Power, Liberty has not been paid in full, and the guarantee at issue requires that Liberty be paid in full before any right of subrogation can be exercised. As the evidence demonstrates, however, all obligations to Liberty have been fully satisfied, and Liberty does not currently have any unsatisfied claims against ET Power. Second, ET Power contends that NEGT expressly waived subrogation rights that NEGT, as assignee, acquired through the payment under the GTN Guarantee. But this argument, which is based on the “Enforcement”

³ Both NEGT and GTN had guaranteed ET Power's obligation to Liberty. True and correct copies of the NEGT Guarantee and the GTN Guarantee are attached hereto as Exs. 1 and 2, respectively.

⁴ In its Objections, ET Power asserted a third argument—that NEGT was not entitled to subrogation because a party other than GTN purportedly paid the \$140 million. *See, e.g.*, Objections at ¶ 43. However, as specifically ordered by this Court in its May 18, 2005 Order, *see* Ex. 3 hereto, “no party shall hereafter have the right to assert that the [\$140 million] Payment was not a payment made by GTN under the GTN Guarantee. . . .” Order at 4. Apparently recognizing the frivolous nature of its argument, ET Power formally withdrew the argument on January 15, 2010. *See* Notice of Partial Withdrawal With Regard to Objection of NEGT Energy Trading - Power, L.P. to Motion of National Energy & Gas Transmission, Inc. to Enforce Subrogation Rights Against NEGT Energy Trading Power, L.P. on Account of Guarantee Payment to Liberty Electric Power LLC, Docket No. 4216.

clause of the separate NEGТ Guarantee, fails for several reasons: (1) NEGТ is not seeking to enforce the subrogation rights arising out of *NEGТ* Guarantee, but instead, as the assignee of the *GTN* Guarantee; as such, any defenses that might be applicable to NEGТ in its individual capacity pursuant to the NEGТ Guarantee cannot be asserted against NEGТ in its capacity as assignee asserting rights under the *GTN* Guarantee; (2) the NEGТ Guarantee has already been fully discharged and thus the Enforcement provision cannot be applied by ET Power, a non-party to that Guarantee, in this instance; and (3) the nonsensical reading applied by ET Power today is not supported by the plain language of the Guarantee. For these and other reasons discussed in greater detail below, ET Power's objections should be overruled.

3. In addition, ET Power should be estopped from objecting to NEGТ's enforcement of subrogation rights given its prior conduct. ET Power affirmatively represented to NEGТ and world that it expected to be ultimately responsible for the debt to Liberty. According to ET Power's Plan Administrator, however, ET Power secretly concluded that that NEGТ was *not* entitled to assert subrogation rights if a payment were made to Liberty pursuant to the *GTN* Guarantee. Knowing this, however, ET Power sat silently by as NEGТ acquiesced in a payment of \$140 million to Liberty under the *GTN* Guarantee, for which NEGТ believed would be entitled to a pro rata distribution through this subrogation action. Had NEGТ known of ET Power's adversity on this issue, it could have taken steps to protect its subrogation rights and, at a minimum, would not have allowed the \$140 million payment without adequate safeguards. Moreover, after the payment was made to Liberty, ET Power and NEGТ, jointly represented by the same counsel, worked together on two additional disputes with Liberty—the post-petition interest dispute and the pre-petition invoice dispute. But, unknown to NEGТ, ET Power had secretly concluded that it would use a favorable outcome on those issues *against* NEGТ in this

subrogation dispute. Again, had ET Power notified NEGТ of its true intentions, NEGТ could have taken steps to protect its interests. In light of ET Power's conduct, which induced NEGТ allow the release of \$140 million in funds that otherwise would be part of the NEGТ estate, ET Power should be estopped from objecting to NEGТ's exercise of subrogation rights.

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Liberty Tolling Agreement

4. Liberty and ET Power were parties to a Tolling Agreement dated April 14, 2000. Under the Tolling Agreement, ET Power was granted, among other things, the right to purchase energy from Liberty's electric power generating facility in exchange for a monthly capacity payment as well as the payment of certain other costs to Liberty.⁵ In connection with the Tolling Agreement, Liberty procured a separate limited guaranty of payment from NEGТ, ET Power's corporate parent ("**NEGТ Guarantee**"), and another from a sister subsidiary, GTN ("**GTN Guarantee**" and collectively with the NEGТ Guarantee, the "**Guarantees**").⁶ Pursuant to the Guarantees, NEGТ and GTN each partially guaranteed ET Power's payment obligations to Liberty under the Tolling Agreement. The Guarantees contained a \$140 million cap on potential liability and any payments made on account of one guarantee would dollar-for-dollar apply to reduce or discharge the maximum potential liability under the other guarantee.

5. On July 8, 2003, several years later, ET Power, NEGТ and other related entities filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.⁷ By order dated

⁵ See Ex. 4, Memorandum of Decision of Bankruptcy Court, entered June 27, 2005, for a discussion of the general underlying facts.

⁶ See Exs. 1 and 2, respectively. While both the NEGТ and GTN Guarantees originally guaranteed up to \$150 million of ET Power's obligation to Liberty, that amount was later reduced to \$140 million. See Ex. 4, Memorandum of Decision, at 2.

⁷ See Docket No. 1. The Debtors are the following entities: (i) NEGТ, (ii) NEGТ Energy Trading Holdings Corporation f/k/a PG&E Energy Trading Holdings Corporation, (iii) NEGТ

July 8, 2003, the Initial Debtors' cases were consolidated for procedural purposes.⁸ Almost immediately, all debtors sought permission to employ two law firms to represent all debtors jointly: Willkie Farr & Gallagher, as general bankruptcy counsel, and Sutherland, Asbill & Brennan LLP, as special energy counsel.⁹

6. On the petition date, ET Power also filed a motion seeking to reject the Liberty Tolling Agreement, and the Court approved this rejection.¹⁰ The rejection resulted in a breach of the Tolling Agreement and Liberty sought a "termination payment" as well as certain unpaid pre-petition invoices. Liberty filed proofs of claim against ET Power for breach of the Tolling Agreement and against NEGТ to enforce the NEGТ Guarantee (the "**Liberty Claims**").¹¹ Ultimately, the dispute between ET Power and Liberty was referred to arbitration.¹²

B. GTN Sale

7. During the course of the Liberty arbitration, NEGТ sold 100 percent of the stock of GTN, a non-debtor NEGТ subsidiary, to TransCanada Pipeline and related entities, and the

Energy Trading - Gas Corporation f/k/a PG&E Energy Trading - Gas Corporation, (iv) NEGТ ET Investments Corporation f/k/a PG&E ET Investments Corporation, (v) ET Power (together with other "Energy Trading" entities, the "**ET Debtors**"), (vi) Energy Services Ventures, Inc. f/k/a PG&E Energy Services Ventures, Inc., and (vii) Quantum Ventures (collectively, the "**Quantum Debtors**").

⁸ See Docket No. 17.

⁹ See Debtors' Application to Employ and Retain Willkie Farr & Gallagher as Attorneys for Debtors in Possession, Docket No. 29, filed July 8, 2003; Order Authorizing Retention of Willkie Farr & Gallagher as Attorneys for Debtors and Debtors in Possession, Doc. 192, filed August 6, 2003; Application of the Debtors Pursuant to Sections 327(e) and 328(a) of the Bankruptcy Code for Authorization to Employ Sutherland Asbill & Brennan LLP as Energy Counsel for the Debtors, Docket No. 36, filed July 8, 2003; Order Pursuant to Sections 327(e) and 328(a) of the Bankruptcy Code for Authorization to Employ Sutherland Asbill & Brennan LLP as Energy Counsel for the Debtors Nunc Pro Tunc to the Date of the Petition, Docket No. 209, filed August 7, 2003.

¹⁰ See Docket Nos. 35 and 250, respectively.

¹¹ See Ex. 4, Memorandum of Decision, entered June 27, 2005, at 2 and note 1.

¹² *Id* at 2-3.

Court approved this sale.¹³ At the time of closing, GTN was still a party to the GTN Guarantee of ET Power's obligation to Liberty and to certain other guarantee agreements. To address GTN's contingent guarantee obligations, the parties to the sale entered into the Post-Closing Escrow Agreement ("**Escrow Agreement**"), pursuant to which \$241 million of the GTN purchase price was placed in escrow (the "**Escrow Account**") to cover GTN's potential obligations.¹⁴ Any amount remaining in the Escrow Account after all guarantee obligations were satisfied was to be distributed to NEGT.¹⁵ Moreover, under the Escrow Agreement, TransCanada and GTN assigned to GTN Holdings, the immediate parent of GTN but still a subsidiary of NEGT, all subrogation rights of GTN or TransCanada, including those that would arise if GTN were called upon to pay Liberty under the GTN Guarantee.¹⁶

¹³ See Order Pursuant to Sections 105(a), 363 and 1146(c) of the Bankruptcy Code and Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure: (I) Authorizing and Approving Stock Purchase Agreement and Related Agreements; and (II) Authorizing Consummation of the Transactions Contemplated Therein ("**Sale Order**"), Docket No. 1479, dated May 13, 2004. This Sale Order, *inter alia*, authorized and approved the Stock Purchase Agreement ("**Purchase Agreement**") dated February 24, 2004 among TransCanada Corporation, TransCanada Pipeline USA Ltd., and TransCanada American Investments Ltd. and NEGT, Gas Transmission Corporation ("**GTC**"), and GTN Holdings LLC ("**GTN Holdings**"). As reflected on page 1 of the Purchase Agreement, which is attached to the Sale Order: (i) NEGT owned 100% of GTC; (ii) GTC owned 100% of GTN Holdings; and (iii) GTN Holdings owned 100% of GTN.

¹⁴ See Ex. 5, Escrow Agreement, dated November 1, 2004. But for this escrow, the \$241 million would have flowed to NEGT for distribution to its creditors.

¹⁵ See, *e.g.*, Ex. 6, Excerpts of Debtors' Brief to District Court at 19.

¹⁶ See Ex. 5, Escrow Agreement, at 9, ¶ 7 ("Buyer [TransCanada] and the Company [GTN] shall hereby assign to Seller [GTN Holdings] (and Seller shall accept such assignments) any and all rights the Company or Buyer may have pursuant to which the Company or Buyer are subrogated to any rights of the Recipient [Liberty] against the primary obligor [ET Power] or the primary guarantor under any Guarantee in respect of any amounts paid to such Recipient [Liberty] out of the Escrow Amount in accordance with this Agreement.")

C. Liberty Arbitration Award, Subsequent Litigation, Appeals, and Settlement

8. Months after the Escrow Account had been established in connection with the GTN sale, ET Power continued to represent in its Disclosure Statement that recoveries by its creditors would depend largely on the outcome several tolling agreement disputes, including the Liberty dispute.¹⁷ By including Liberty in this disclosure, ET Power represented that it would ultimately be responsible for such claims.¹⁸ Shortly thereafter, the Court entered an order on April 19, 2005, confirming the First Amended Plan of Liquidation for the ET Debtors and the Quantum Debtors (“**ET Plan**”), which became effective on May 2, 2005.¹⁹

9. At about the same time, the arbitrators in the Liberty/ET Power arbitration issued their award against ET Power in the amount of \$162,725,436.59 (“**Arbitral Award**”).²⁰ Liberty then filed motions to confirm the award, to allow its claim, and to dismiss the related adversary proceeding. On May 18, 2005, the Court issued an order paving the way for the \$140 million payment to Liberty from the Escrow Account in satisfaction of the GTN Guarantee and, by its terms, the NEGT Guarantee (“**Liberty Payment**”).²¹

¹⁷ See Ex. 7, Excerpts of Disclosure Statement for First Amended Plan of Liquidation for the Energy Trading Debtors and the Quantum Debtors (“**ET Disclosure Statement**”), at 21-24.

¹⁸ See Ex. 17, Deposition of Matthew A. Feldman, corporate representative of Willkie Farr & Gallagher, dated January 28, 2010 (“**Feldman Dep.**”), at 45:16-47:20.

¹⁹ See Docket No. 2995, Order Confirming Plan.

²⁰ See Arbitral Award, issued March 29, 2005, attached as Ex. G to the Declaration in support of Liberty’s Memorandum of Law in Support of Motion to Confirm Arbitration Award, Docket No. 32, Adversary Proceeding No. 03-03104, filed April 1, 2005. This award represents the aggregate of (i) \$140,000,000 in principal awarded in the arbitration, (ii) the Invoice Amount of \$5,428,045.82 for pre-petition unpaid and undisputed invoices, and (iii) \$17,297,390.68 in accrued interest.

²¹ See Ex. 3, Order. The Liberty Payment was made for the benefit of ET Power in late May 2005 to abate the accrual of additional interest, which continued to accumulate at the rate of approximately \$33,000 per day. See Ex. 8, Excerpts of May 12, 2005 Hearing, at 41:1 – 42:24. Remarkably, ET Power allowed this payment to be made while secretly knowing that it would challenge NEGT’s exercise of subrogation rights in the future. See *infra* note 52.

10. Several weeks later, this Court confirmed the Arbitral Award in favor of Liberty and further held that Liberty was free to allocate the Liberty Payment to interest first, then principal.²² ET Power and NEGT appealed the allocation issue to the District Court, arguing that such an allocation would result in Liberty receiving an post-petition interest, which ordinarily was not recoverable in a bankruptcy case. Nevertheless, the District Court affirmed this Court's order, and NEGT and ET Power then jointly appealed to the Fourth Circuit Court of Appeals.²³

11. In July 2007, the Fourth Circuit issued an Opinion that held, *inter alia*, that Liberty was barred from recovering the additional \$17 million because those funds constituted post-petition interest.²⁴ The case was then remanded. *Id.* On remand, an additional dispute arose as to the amount of Liberty's allowed claim. After briefing and oral argument, this Court issued an order stating that Liberty was entitled to an allowed claim of \$145,428,046, with a maximum distribution of up to \$5,428,046.²⁵ ET Power and NEGT appealed, and the District Court affirmed. Thereafter, NEGT, ET Power, and Liberty compromised and settled the remaining issues, and that settlement was approved by the Court.²⁶ As a result of this settlement, Liberty's claims related to the Tolling Agreement were fully satisfied. *Id.*

²² See Ex. 4, Memorandum of Decision, entered June 27, 2005.

²³ See Ex. 9, *In re: Nat'l Energy & Gas Transmission, Inc.*, 492 F.3d 297, 299 (4th Cir. 2007), *cert. denied*, Liberty Elec. Power, LLC v. Nat'l Energy & Gas Transmission, Inc., 128 S. Ct. 1445 (2008).

²⁴ *Id.*

²⁵ See Ex. 10, Order Granting Request of Liberty Electric Power LLC for Pro Rata Distributions Of Up To \$5,428,046 On Its Allowed Claim, entered April 18, 2008.

²⁶ See Ex. 11, Motion for Entry of An Order Authorizing and Approving Settlement of Liberty Electric Power, LLC's Allowed Claim ("**Motion to Approve Settlement**"); and Order Approving Motion for Entry of an Order Authorizing and Approving Settlement of Liberty Electric Power, LLC's Allowed Claim.

SUMMARY JUDGMENT STANDARD

12. Under the Federal Rules of Civil Procedure, summary judgment shall be awarded “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). “[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 519 (4th Cir. 2003). If this showing is made, the burden then shifts to the non-moving party, which must convince the Court that a triable issue does in fact exist. *Id.*

13. Neither “unsupported speculation,” nor evidence that is “merely colorable” or “not significantly probative,” will suffice to defeat a motion for summary judgment; rather, if the adverse party fails to bring forth facts showing that “reasonable minds could differ” on a material point, then, regardless of any proof or evidentiary requirements imposed by the substantive law, summary judgment shall be entered. *Id.* (quoting FED. R. CIV. P. 56(e) and *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987)).

ARGUMENT AND AUTHORITIES

I. NEGТ IS ENTITLED TO BE SUBROGATED TO THE RIGHTS OF LIBERTY AND RECEIVE A PRO RATA DISTRIBUTION FROM THE ET POWER ESTATE ON ACCOUNT OF THE \$140 MILLION PAID UNDER THE GTN GUARANTEE

A. NEGТ Is Entitled To Subrogation Under Bankruptcy Code § 509(a)

14. Section 509(a) of the Bankruptcy Code provides

(a) Except as provided in subsection (b) or (c) of this section, an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment.

11 U.S.C. § 509(a).

15. Pursuant to the GTN Guarantee, GTN was liable with ET Power for a substantial portion of Liberty's Allowed Claim.²⁷ Given the possibility that GTN would have to pay under the GTN Guarantee, the Purchase Agreement and the Escrow Agreement provided, *inter alia*, that \$140 million of the purchase price otherwise payable to NEGТ would be escrowed.²⁸ Thereafter, the \$140 million was paid from the Escrow Account to Liberty, rather than being released to NEGТ, thereby reducing NEGТ's consideration under the Purchase Agreement and reducing the funds available to the NEGТ estate and thus NEGТ's creditors.²⁹

²⁷ See Ex. 2, GTN Guarantee; *see also* Ex. 12, Excerpts of Responses and Objections of NEGТ Energy Trading – Power, L.P. to NEGТ's Second Set of Discovery Requests, served January 25, 2010, (“**ET Power Discovery Responses**”) at 4 (“Requests for Admission 12: GTN was liable with ET Power on a claim of Liberty Electric against ET Power. Response: Admitted” and “Request for Admission 13: NEGТ was liable with ET Power on a claim of Liberty Electric against ET Power. Response: Admitted”).

²⁸ See Ex. 5, Post-Closing Escrow Agreement.

²⁹ See, e.g., Ex. 13, Excerpts of Opening Brief of NEGТ and ET Power before Fourth Circuit Court of Appeals, filed May 15, 2008, at 14 (“In accordance with the terms of the GTN Sale, the face amount of the GTN Guarantee (\$140 million) was reserved in escrow and held back from the purchase price . . . Pursuant to the terms of the GTN Sale agreement, any liability of GTN to

16. Because the \$140 million was paid pursuant to GTN's guarantee of ET Power's obligations to Liberty, GTN acquired a vested right of subrogation as set forth in Bankruptcy Code § 509(a) as of payment. Under the Escrow Agreement, however, GTN assigned its subrogation rights to GTN Holdings, GTN's immediate parent. Subsequently, as part of its wind-down process, and in accordance with Delaware law, GTN Holdings distributed its assets to GTC (its parent company), which then distributed its assets to the ultimate parent, NEGT.³⁰ As a result, NEGT now holds the right of subrogation arising from the GTN Guarantee, and pursuant to Bankruptcy Code § 509, NEGT is legally entitled to collect the remaining pro rata distributions attributable to the \$140 million paid under the GTN Guarantee.

B. Alternatively, NEGT Has A Right Of Equitable Subrogation As A Result Of The \$140 Million Payment To Liberty

17. Even if this Court concludes that NEGT is not entitled to subrogation under Bankruptcy Code § 509, NEGT nevertheless has common-law equitable subrogation rights against ET Power for up to \$140 million. Common-law equitable subrogation, created by state law, is based on "principles of natural reason and justice" and is "highly favored doctrine" that is "expansively applied." *Taylor v. Furnace Associates, Inc. (In re Taylor)*, Bankr. No. 07-10799-TJC, Adv. No. 07-00718-TJC, 2008 WL 4225761, *4 (Bank. D. Md. Sept. 10, 2008) *quoting* *Finn v. First Union Nat'l Bank*, B.R. 401, 408 (D. Md. 1995). Here, the GTN right to

Liberty on account of the GTN Guarantee would be paid directly from the Liberty Escrow, while any remaining balance would be released to NEGT.").

³⁰ ET Power stipulates that NEGT is the holder of the subrogation rights associated with the GTN Guarantee. *See* Ex. 16, Deposition of Charles R. Goldstein, Plan Administrator for ET Power, dated January 29, 2010 ("**Goldstein Dep.**"), at 51:4-10; 161:10-18.

subrogation was created and explicitly recognized by Section 9 of the GTN Guarantee, which is to be “construed in accordance with the laws of the State of New York.”³¹

18. Under applicable law, equitable subrogation is “designed to further justice and to prevent unjust enrichment.” 23 N.Y. Jur., 2d Ed., *Contribution, Indemnity and Subrogation* § 114 (2006). In particular:

Pursuant to the doctrine of equitable subrogation, where property of one person is used to discharge an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lienholder.

Id. The doctrine of equitable subrogation “must be administered in such a manner as to accomplish what is just and fair between the parties. It has been adopted to compel the ultimate discharge of an obligation by the person who in justice, equity, and good conscience ought to pay it.” *Id.*

19. These principles compel application of the doctrine of equitable subrogation in this proceeding. Property of, ultimately, NEGТ (namely, GTN itself) was used to discharge the obligation owed by ET Power to Liberty. ET Power and its creditors would be unjustly enriched if they were allowed to retain the benefit conferred on them by the payment of the \$140 million.³² “In justice, equity, and good conscience,” NEGТ is entitled to assert a claim for the \$140 million it spent satisfying ET Power’s obligations and receive the *pro rata* distribution on that claim.

³¹ See Ex. 2, GTN Guarantee, Paragraph 12. Because of the similarities between New York and Maryland laws, NEGТ does not believe that application of Maryland law would compel any different result.

³² See Ex. 16, Goldstein Dep. at 152:18-155:22 (acknowledging that ET Power will have benefited from the \$140 million payment if “those funds don’t have to be paid back to NEGТ.”).

II. ET POWER'S ARGUMENTS AGAINST SUBROGATION ARE MERITLESS

20. In its Objections, ET Power asserted three arguments against subrogation, although it has since withdrawn one of those arguments.³³ As demonstrated below, neither of the remaining two arguments bars subrogation.

A. The Liberty Obligation Has Been Fully Satisfied

21. First, ET Power relies on Paragraph 9 of the GTN Guarantee, which restricts a guarantor's subrogation rights until after Liberty has been paid in full.³⁴ According to ET Power, NEGТ cannot now recover the \$140 million from ET Power because Liberty never received \$17 million in interest it was seeking. However, ET Power, which was not a party to this Guarantee, does not have standing to raise this argument. *Grant Thornton v. Syracuse Sav. Bank*, 961 F.2d 1042, 1047 (2d Cir. 1992) ("the rule against partial subrogation does not apply if the subrogor acquiesces in the subrogation"); *Mid-States Ins. Co. v. Am. Fid. & Cas. Co.*, 234 F.2d 721, 731 (9th Cir. 1956) (if creditor does not object to partial subrogation pro tanto, "no one else is entitled to object"). The rule against partial subrogation is designed solely to protect the ability of Liberty, as the obligee in this case, to enforce its claims against the limited resources of the primary obligor, here ET Power, without interference from the competing enforcement by the guarantor. See RESTATEMENT, *Suretyship and Guaranty*, § 27, cmt. b. (1996). Thus, ET Power, as the primary obligor, was not the party to be protected by this provision and they cannot now twist this provision into grounds for barring NEGТ's subrogation rights.

22. Even if ET Power had standing to raise this argument, the argument would nevertheless fail, because Liberty has been fully satisfied and has already obtained everything it can recover related to the original Tolling Agreement. Indeed, it is undisputed that Liberty does

³³ See *supra* note 4.

³⁴ See ET Power's Objections, ¶¶ 22-24, 37; see also Ex. 2, GTN Guarantee, ¶ 9.

not have any further right to obtain additional payment from any source related to the original Tolling Agreement.³⁵ While Liberty sought to collect approximately \$17 million in additional funds, those efforts were rejected by the Fourth Circuit Court of Appeals.³⁶ Moreover, Liberty further settled the remaining issues and released ET Power from “all causes of action, claims, liabilities, and demands of every kind and nature, whether known or unknown, asserted or unasserted, suspected or unsuspected, accrued or which may thereafter accrue” pursuant to a settlement agreement approved by the Bankruptcy Court.³⁷ That court-approved settlement sufficiently discharges any obligation to Liberty. *Aetna Cas. & Surety Co. v. LTV Steel Co., Inc. (In re Chateaugay Corp.)*, 94 F.3d 772, 780 (2d Cir. 1996). As a result, ET Power cannot defeat NEGТ’s subrogation rights on the ground that Liberty purportedly was not “paid in full.”

³⁵ See Ex. 12, ET Power Discovery Responses, at 4 (“Request for Admission 11: Liberty Electric has released all claims relating to the Tolling Agreement against ET Power. Response: Admitted”); see also Stipulation Approving Settlement of Liberty Electric Power, LLC’s Allowed Claim, attached to Ex. 11, Motion to Approve Liberty Settlement (“Liberty’s Allowed Claim shall be *satisfied* by ET Power’s cash distribution to Liberty of \$5,156,643.70, which amount constitutes ninety-five percent (95%) of the maximum distributable amount”) and page 6 (release by Liberty of all claims “arising out of or relating to the Adversary Proceeding, the related appeals or Liberty’s Allowed Claim.”); Ex. 14, Reply Brief of NEGТ and ET Power in Appeal to Fourth Circuit, at 9 (“Both guarantees were in the same dollar amount, and any amounts paid in satisfaction of the NEGТ Guarantee would have caused a dollar-for-dollar reduction in the GTN Guarantee as well, and *vice versa*. . . . With *the principal claim having been satisfied in full*, no claim would lie against ET Power . . .”) (emphasis added). In addition, New York courts consider “satisfied” the equivalent of “payment in full.” See, e.g., *William A. White/Tishman East Inc. v. Banko*, 171 A.D. 2d 401, 402 (N.Y.A.D. 1 Dept. 1991); *In re Continental Vending Machine Corp.*, 517 F.2d 997, 1000 (2d Cir. 1975); see also Ex. 18, Deposition of Steven Wilamowsky, corporate representative of Bingham McCutchen LLP, dated January 27, 2010 (“**Wilamowsky Dep.**”) at 19:22-20:4; 68:3-11; Ex. 17, Feldman Dep. at 29:11-31:4.

³⁶ See Ex. 9, *In re Nat’l. Energy & Gas Transmission, Inc.*, 429 F.3d 297 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 1445 (2008).

³⁷ See Ex. 11, Stipulation attached to Motion to Approve Settlement, at ¶ 7, page 6.

B. NEGOT Did Not Waive Its Right To Bring This Subrogation Action

23. Next, ET Power relies on language in the NEGOT Guarantee to bar enforcement of subrogation rights that arise under the GTN Guarantee. Specifically, ET Power reads Paragraph 4 of the NEGOT Guarantee in an unintended manner to produce an anomalous result that would permit NEGOT or GTN to assert their own respective subrogation rights, but inexplicably not those of each other.³⁸ This argument fails for several independent reasons.

24. First, NEGOT is not seeking to enforce the subrogation rights arising out of *NEGOT* Guarantee, but instead, as *the assignee of the GTN Guarantee*. Thus, any defenses that might be applicable to NEGOT in its individual capacity and pursuant to the NEGOT Guarantee cannot be asserted against NEGOT in its capacity as assignee asserting *GTN's* rights under the GTN Guarantee. *Logan v. JKV Real Estate Services (In re Bogdan)*, 414 F.3d 507, 514 (4th Cir. 2005) (assignee stands in the shoes of the assignor and is subject only to defenses that could have been asserted against the assignor). On this basis alone, ET Power's waiver argument fails.

25. Second, ET Power improperly attempts to breathe new life into a provision of the NEGOT Guarantee that has already been fully discharged. Under the terms of both Guarantees, any payments made on account of one guarantee would dollar-for-dollar reduce the maximum potential liability under the other guarantee.³⁹ Thus, the \$140 million payment under the GTN Guarantee simultaneously discharged any obligation to pay that amount under the NEGOT

³⁸ See ET Power's Objection, ¶¶ 16-21; see also Ex. 1, NEGOT Guarantee, Paragraph 4, "Enforcement".

³⁹ See Ex. 1, NEGOT Guarantee, at ¶ 2 ("NEG Guarantor liability under this Guarantee is limited to the aggregate of [US \$140,000,000] as reduced . . . (ii) by any amounts aid by the GTN Guarantor pursuant to the GTN Guarantee and not returned to the GTN Guarantor by or on behalf of the Guaranteed Party"); Ex. 2, GTN Guarantee, at ¶ 2 (same).

Guarantee.⁴⁰ *See, e.g., Reserve Ins. Co. v. Gayle*, 393 F.2d 585, 589 (4th Cir. 1968) (“once a creditor has applied a payment to an obligation for which a surety or guarantor is bound, the latter is discharged to the extent of the payment. . . .”). With the full amount paid under the GTN Guarantee, Liberty has no right to enforce through Paragraph 4 the payment of any additional amounts under the NEGТ Guarantee. And, as demonstrated above, Liberty has already received all it was entitled to receive in connection with the original Tolling Agreement and the related Guarantees.⁴¹ As a result, all obligations under the “Enforcement” paragraph of the NEGТ Guarantee have been fully discharged, and it cannot form the basis barring NEGТ’s subrogation rights.

26. Third, as the NEGТ Guarantee itself reflects, Paragraph 4 was never intended to preclude NEGТ from asserting subrogation rights against ET Power once Liberty’s claims were satisfied. By its terms, Paragraph 4, the “Enforcement” paragraph, provides generally that Liberty was permitted to unconditionally pursue NEGТ without first exhausting any other remedies.⁴² The Paragraph lists specific examples of arguments NEGТ could not use to delay or defeat Liberty’s pursuit of NEGТ, including the existence of the GTN guarantee. The clear intent of this paragraph was to benefit Liberty (as opposed to ET Power) by removing all

⁴⁰ In addition, in several instances, joint counsel for NEGТ and ET Power argued in briefs to this Court that the payment obligation under the Guarantees had been satisfied when the \$140 million was paid to Liberty. *See, e.g.,* Memorandum of Law with Respect to Allowance of Outstanding Claim, Docket No. 77, Adv. Proc. 03-03104, filed Feb. 15, 2008, at 3 (“Pursuant to the terms of the GTN sale agreements, any liability of GTN to Liberty on account of the GTN guarantee would be paid directly from the Liberty escrow account, and any remaining balance would be released to NEGТ. . . . As such, \$140 million was paid to Liberty in full and final satisfaction of the GTN guarantee and, by its terms, the NEGТ guarantee.”); *see also* Ex. 3, Order, at 3 (stating that “(a) the Payment shall be deemed to be a payment made by GTN under the GTN Guarantee; (b) receipt of the Payment by Liberty shall be in full and final satisfaction of GTN’s obligations under the GTN Guarantee . . .”).

⁴¹ *See supra* section II. A. at 13-14.

⁴² *See* Ex. 1, NEGТ Guarantee.

potential barriers to Liberty's immediate enforcement of the Guarantee. Indeed, nothing in the Guarantees suggests that ET Power was the intended beneficiary of Paragraph 4—ET Power was not even a party to the Guarantees. As such, ET Power cannot rely on this paragraph to prevent NEGТ from recovering the amounts paid to Liberty on ET's behalf.⁴³ Moreover, all payment obligations under the original Tolling Agreement and under the Guaranties have been fully discharged, and as a result, Paragraph 4's Enforcement provision is likewise discharged. Therefore, NEGТ is free to pursue subrogation rights as provided in Paragraph 9 of the GTN Guarantee.

27. In contrast to this straight-forward reading of the NEGТ Guarantee, ET Power instead argues that NEGТ and Liberty intended that NEGТ forever waive its ability to assert subrogation rights under the GTN Guarantee (but not under its own guarantee), although ET Power cannot offer any rational explanation for why the parties would have agreed to such a bizarre limitation.⁴⁴ ET Power acknowledges that, GTN, as the deemed payor under the GTN Guarantee, would have been entitled to assert subrogation rights against ET Power pursuant to Paragraph 9 of the GTN Guarantee.⁴⁵ Similarly, GTN Holdings, the immediate parent to which GTN assigned its subrogation rights through the Escrow Agreement, also would have been entitled to assert subrogation rights against ET Power. Even GTN Holding's parent, Gas Transmission Corporation, would have been entitled to assert these subrogation rights against ET Power. But NEGТ, the ultimate parent of all of those entities (whose creditors would ultimately

⁴³ To qualify as a third-party beneficiary, ET Power must show that the NEGТ Guarantee was intended for its benefit in a direct, not incidental, fashion. *Edge Management Consulting, Inc. v. Blank*, 25 A.D.3d 364, 368 (1st Dep't 2006). Here, the NEGТ Guarantee was clearly intended for the benefit of Liberty, not ET Power, particularly because Section 9 of the Guarantee explicitly provided for NEGТ's ability to enforce subrogation rights against ET Power.

⁴⁴ See Ex. 16, Goldstein Dep. at 157:4-160:8.

⁴⁵ See Objection, ¶ 19.

benefit from the exercise of subrogation rights by any subsidiary), is purportedly barred from asserting those very same rights. However, if NEGТ were to transfer those rights to any other entity, that transferee *could* assert those rights, because the waiver language ET Power relies upon applies only to NEGТ. ET Power can offer no logical explanation or policy justification that would support such an anomalous result. *Matter of Lipper Holdings v. Trident Holdings, LLC*, 1 A.D.3d 170, 766 N.Y.S.2d 561 (N. Y. App. Div. 2003) (“A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties”).

28. Ultimately, ET Power’s waiver argument is meritless and fails as a matter of law.

III. ET POWER SHOULD BE ESTOPPED FROM CHALLENGING NEGТ’S SUBROGATION RIGHTS

29. Finally, ET Power should be estopped from challenging NEGТ’s subrogation rights. A party is equitably estopped under general bankruptcy law if: 1) the party to be estopped knew the relevant facts; 2) that party intended for its conduct to be acted or relied upon, or the party acting had the right to believe the conduct was intended; 3) the acting party was ignorant of the true facts; and 4) the acting party relied on the conduct to its injury. *First Union Comm. Corp. v. Nelson, Mullins, Riley & Scarborough*, 81 F.3d 1310, 1317 (4th Cir. 1996). New York and Maryland both recognize the doctrine of equitable estoppel, and while they articulate their standards in somewhat different terms, the general application is the same. *General Elec. Capital Corp. v. Armadora*, 37 F.3d 41, 45 (2d Cir. 1994) (applying New York law); *Petroleum Traders Corp. v. Baltimore Cty.*, No. 06-cv-444, 2009 WL 2982942, at * 6 (D. Md. Sept. 14, 2009). Under either standard, silence by one who has a duty to speak up or knows that another is making a contrary assumption may constitute a concealment of facts or false misrepresentation

for estoppel purposes. *First Union*, 81 F.3d at 1317; *General Elec.*, 37 F.3d at 45 (estopping party from offering competing interpretation of contractual language).

30. Here, ET Power affirmatively represented early on that it would ultimately bear the responsibility for any payments made to Liberty under the GTN Guarantee. Specifically, in a March 9, 2004 presentation by ET Power to NEGT senior management, ET Power affirmatively represented that if Liberty were paid under the GTN Guarantee, then subrogation claims to recover that payment would be made against ET Power.⁴⁶ Then, in its Disclosure Statement filed in connection with its Plan of Liquidation, ET Power discussed at length the potential effect of several tolling agreements, including the agreement with Liberty.⁴⁷ After discussing the details of the Liberty dispute, as well as disputes with others, ET Power analyzed the potential “Impact on Creditor Recoveries” of such matters:

The outcome of the arbitrations against Liberty, Southaven and Caledonia (collectively, the “Tolling Arbitrations”) likely will be the single most decisive factor in determining the percentage recoveries to creditors of ET Power (Class 6) and ET Holdings (Class 5). As noted above, the Liberty arbitrator will select one of the parties’ baseball arbitration offers [Liberty’s offer was \$145 million and ET Power’s offer was \$95 million]. . . . If the Debtors prevail entirely in the Tolling Arbitrations . . . then the percentage recovery for holders of Allowed Class 5 Claims likely will range from 90% to 100% and the percentage recovery for holders of Allowed Class 6 Claims likely will range from 90% to 100%. Conversely, if the Debtors are entirely unsuccessful in the Tolling Arbitrations (*i.e.*, Liberty’s baseball arbitration offer is selected and the Southaven/Caledonia arbitrators determine that ET Power must satisfy the asserted claims in full), then the percentage recovery for holders of Allowed Class 5 Claims likely will range

⁴⁶ See Ex. 15, March 9, 2004 Presentation Slides, at 26 (stating under “ET Power Recovery Assumptions and Qualifications” heading, that “Guarantee claims assume counterparty goes through beneficiary entity first, then issuing entity subsequent *except for GTN claims, which are paid in full by GTN. GTN then files claims for paid amounts against ET Power*”) (emphasis added). This document reflects the participation of Sutherland, Asbill & Brennan, which was special energy counsel to all debtors at that time. Remarkably, Sutherland is currently representing ET Power *against* NEGT in this dispute.

⁴⁷ See Ex. 7, Excerpts of ET Disclosure Statement, Section 9, pages 21-24.

from 25% to 30% and the percentage recovery for holders of Allowed Class 6 Claims likely will range from 35% to 45%.⁴⁸

At best, if ET Power *prevailed* in the “Baseball arbitration,” *it would still owe Liberty \$95 million. Id.* at 22. By including the discussion of the Liberty obligation in this analysis, ET Power acknowledged that the outcome of the Liberty dispute would affect its creditors’ recoveries, and this would be true only if ET Power, rather than its guarantors, would ultimately shouldered the burden of the Liberty obligation.⁴⁹ ET Power’s own lawyers, who also represented NEGТ, testified that it was assumed that ET Power would ultimately be responsible for any payment made by either NEGТ or GTN under their respective Guarantees.⁵⁰ Moreover, ET Power’s current Plan Administrator, who previously advised the Unsecured Creditor’s Committee, acknowledged that he and the Committee had a role in preparing the ET Power Disclosure Statement.⁵¹

31. Although ET Power had publicly acknowledged through its Disclosure Statement that it expected to be responsible for the Liberty obligation, it now claims that it had secretly concluded that it would challenge future exercise of NEGТ’s subrogation rights. In fact, ET Power now claims that it reached this conclusion *before* NEGТ allowed the \$140 million to be released from the Escrow Account to satisfy the GTN Guarantee.⁵² However, ET Power failed

⁴⁸ *Id.*, at 23-24 (internal footnote omitted).

⁴⁹ ET Power’s Plan Administrator recognized this obligation and has maintained a reserve of at least \$140 million to cover that obligation since the effective date of the Plan. *See* Ex. 16, Goldstein Dep. at 124:17-140:25.

⁵⁰ *See* Ex. 17, Feldman Dep. at 45:16-47:20.

⁵¹ *See* Ex. 16, Goldstein Dep. at 51:12-55:20; *see also* Ex. 7, ET Power Disclosure Statement, at 55 (acknowledging involvement of the Unsecured Creditors Committee, for which Charles Goldstein, the current Plan Administrator, was a financial advisor).

⁵² According to Charles Goldstein, who previously advised the ET Power Unsecured Creditors Committee and later became (and remains) ET Power’s Plan Administrator, he was aware *before* Plan Confirmation in early May 2005 and *before* payment of the \$140 million, of the arguments

to notify either NEGТ or their joint counsel, Willkie Farr, of this material divergence in interests.⁵³ Had NEGТ or Willkie Farr been notified of ET Power's position, the sale of GTN and the payment of the \$140 million could have been structured differently to protect NEGТ's subrogation rights.⁵⁴ For example, NEGТ could have been denominated the payor under the NEGТ Guarantee, which would provide exactly the same benefits to the creditors of both the NEGТ and ET Power estates while also protecting NEGТ's subrogation rights.⁵⁵ At a minimum, NEGТ could have arranged for separate counsel to fully protect its interests. But, instead, ET Power was perfectly willing to silently watch its primary creditor, Liberty, be satisfied through a payment from another, knowing that NEGТ expected to exercise GTN's subrogation rights, and knowing it secretly intended to challenge those rights.

32. Although ET Power had early on formed its conclusion about NEGТ's subrogation rights, it remained silent, and continued to allow NEGТ to change its position to its detriment. In another unseemly exercise of "gotcha" litigation tactics, ET Power now twists a

ET Power is currently making against subrogation of NEGТ. *See* Ex. 16, Goldstein Dep. at 7:8-11; 22:2-7; 26:24-27:2; 31:12-32:6; 44:14-46:23; 61:13-25; 62:4-12; 67:14-25 ("Q. So you say that it's always been the creditors committee's position that it could assert the arguments it is asserting now against the exercise of subrogation rights under either of those two guarantees? A. There were discussions at -- as part of the plan assessment that was done, there was activity -- or not activity, there was discussion of the subrogation cases, not just within Liberty but within Southaven and Caledonia, guarantees that were included there also. So... Q. ***And when you say there were discussions, this was discussions at the creditor committee level?*** A. ***Yes.*** Q. ***And this is back prior to plan confirmation?*** A. ***Yes.*** Q. ***And at that point the creditors committee was aware of the arguments that ET Power is currently making today?*** A. ***Absolutely.***"). (emphasis added).

⁵³ *See* Ex. 17, Feldman Dep. at 24:10-22; 32:23-33:7; Ex. 18, Wilamowsky Dep. at 28:21-29:25; 33:15-34:3; Ex. 16, Goldstein Dep. at 67:14-25; 82:24-83:10; 83:23-84:9. *See also* Ex. 8, Excerpts of May 12, 2005 hearing before Bankruptcy Court, at 24:4-5 (counsel for ET Power and NEGТ stated his belief that there "was an exact identity of interest between GTN and ET Power").

⁵⁴ *See* Ex. 18, Wilamowsky Dep. at 54:1-55:5; Ex. 17, Feldman Dep. at 32:23-34:20.

⁵⁵ *See* Ex. 17, Feldman Dep. at 24:10-25:17; 33:8-34:20.

joint victory against Liberty into an argument against NEGТ's subrogation rights. As referenced above, after Liberty received the \$140 million under the GTN guarantee, it allocated that payment in such a way that Liberty then argued that it was entitled to an additional payment of approximately \$17 million. Believing that its interests were aligned with ET Power's, NEGТ joined ET Power in challenging this position (and shared the cost of those efforts), arguing that the amount at issue constituted unrecoverable post-petition interest.⁵⁶ Ultimately, these joint efforts culminated in an appeal to the Fourth Circuit, which ruled favor of NEGТ and ET Power.⁵⁷ Now, ET Power points to this joint victory as a basis for *denying* NEGТ's subrogation rights, claiming that Liberty was not "paid in full" because it did not recover the additional \$17 million.⁵⁸ Even counsel representing ET Power and NEGТ (Willkie Farr and later Bingham McCutchen) were unaware that ET Power would use the favorable outcome of the \$17 million post-petition interest issue to argue *against* NEGТ's recovery on a \$140 million claim.⁵⁹ Had NEGТ known of this material conflict, it could have taken steps to protect its interests.

33. Throughout this process, NEGТ reasonably expected, based on ET Power's affirmative representations, that it would be subrogated to the rights of Liberty. The sale of GTN to TransCanada, the conduct of the Liberty arbitration, litigation, and appeals, and the plans of reorganization and liquidation of the debtors were all premised on NEGТ's ability to assert

⁵⁶ See *supra* notes 20-22 and accompanying text, at 7-8. See also Ex. 17, Feldman Dep. at 24:10-25:17 (stating that Willkie Farr successfully represented both ET Power and NEGТ in the post-petition appeals, not knowing of any conflicts of interests between the two clients caused by the outcome on those issues).

⁵⁷ See Ex. 9, *In re: Nat'l Energy & Transmission, Inc.*, 429 F.3d 297 (4th Cir. 2007), *cert. denied*, Liberty Elec. Power, LLC v. Nat'l Energy & Gas Transmission, Inc., 128 S.Ct. 1445 (2008); see also Ex. 18, Wilamowsky Dep. at 15:23-17:19.

⁵⁸ See Objections, ¶¶ 22-24; see Ex. 16, Goldstein Dep. at 85:17-87:11.

⁵⁹ See Ex. 17, Feldman Dep. at 24:10-26:10; Ex. 18, Wilamowsky Dep. at 41:17-42:22; 43:9-46:8.

subrogation rights against ET Power based on the satisfaction of ET Power's obligation to Liberty. Given ET Power's conduct, basic equity principles, in addition to the legal reasons outlined above, compel the rejection of ET Power's arguments. *See Taylor v. Furnace Assocs., Inc. (In re Taylor)*, 2008 WL 4225761, at * 4 (Bankr. D. Md. Sept. 10, 2008) ("Based on 'principles of natural reason and justice, [equitable] subrogation is a highly favored doctrine and expansively applied.'").

CONCLUSION

34. NEGТ has a right of subrogation under Bankruptcy Code § 509(a) or, alternatively, has a right of equitable subrogation. As a result, NEGТ is entitled to receive a *pro rata* distribution from the ET Power estate on account of the \$140 million paid under the GTN Guarantee. A contrary result would provide a windfall to ET Power's creditors, to the detriment of NEGТ's creditors.

WHEREFORE, NEGТ respectfully requests that the Court grant its Motion for Summary Judgment and award NEGТ such other and further relief as this Court may deem just or proper.

Respectfully submitted,

VINSON & ELKINS L.L.P.

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**SPECIAL COUNSEL FOR NATIONAL
ENERGY GAS TRANSMISSION, INC.**

CERTIFICATE OF SERVICE

I hereby certify that, on February 5, 2010, a copy of the foregoing pleading was (i) filed with the Court for the United States Bankruptcy Court of the District of Maryland by using the CM/ECF system; (ii) served electronically by the Court's CM/ECF system on all parties registered to receive electronic noticing in this case; and (iii) served by first class U.S. mail, postage prepaid, to counsel for ET Power.

/s/ Tonya M. Ramsey
One of Counsel

256695v.2

EXHIBIT 1

GUARANTEE

GUARANTEE dated as of February 6, 2001 by PG&E National Energy Group, Inc., a Delaware corporation (the "NEG Guarantor"), in favor of Liberty Electric Power, LLC, a Delaware limited liability company (hereafter the "Guaranteed Party").

WHEREAS, Guaranteed Party and PG&E Energy Trading - Power, L.P., a Delaware limited partnership and a wholly-owned indirect subsidiary of the NEG Guarantor ("Subsidiary"), have entered into that certain Tolling Agreement dated April 14, 2000 (as amended, the "Agreement");

WHEREAS, pursuant to the terms of the Agreement, PG&E Corporation (the "Original Guarantor"), a parent company of the Subsidiary, provided a guarantee (the "Original Guarantee") for the benefit of the Guaranteed Party on April 24, 2000;

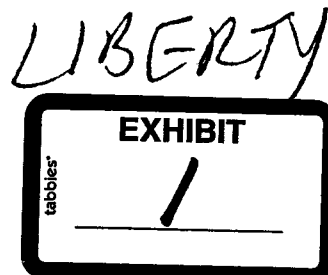
WHEREAS, Subsidiary desires (i) to provide a guarantee of the NEG Guarantor and a guarantee of PG&E Gas Transmission, Northwest Corporation (the "GTN Guarantor") for the benefit of the Guaranteed Party and (ii) to obtain the release and discharge of the Original Guarantor from the Original Guarantee;

WHEREAS, concurrently with the execution and delivery of this Guarantee, (i) the GTN Guarantor and the Guaranteed Party are executing and delivering a guarantee of the GTN Guarantor for the benefit of the Guaranteed Party (the "GTN Guarantee") and (ii) the Guaranteed Party is releasing and discharging the Original Guarantor from any and all liabilities and obligations under the Original Guarantee.

NOW, THEREFORE, NEG Guarantor agrees as follows:

1. Guarantee. Subject to the terms herein, the NEG Guarantor absolutely, unconditionally and irrevocably guarantees to the Guaranteed Party, its successors and assigns, as primary obligor and not merely as surety, the prompt payment when due, in accordance with the terms of the Agreement, of all amounts payable by Subsidiary under the Agreement and any amendments thereto, including without limitation, Tolling Fees, Termination Payment, liquidated damages, indemnity obligations, and damage awards arising by reason of Subsidiary's breach of its performance obligations under the Agreement or otherwise (collectively, the "Obligations"). The obligation to make payments under this Guarantee is a guarantee of payment and not of collection. If Subsidiary fails to pay any Obligation, NEG Guarantor will pay such Obligation directly for Guaranteed Party's benefit within five (5) Business Days from Guaranteed Party's demand therefor in accordance with the provisions hereof. Capitalized terms used and not defined herein shall have meaning given such terms in the Agreement.

2. Extent of Liability & Term. NEG Guarantor's liability under this Guarantee is limited to the aggregate of US\$150,000,000, as reduced (i) pursuant to Section 8.1(b) of the Agreement and (ii) by any amounts paid by the GTN Guarantor pursuant to the GTN Guarantee and not returned to the GTN Guarantor by or on behalf of the Guaranteed Party (the "Guarantee Cap"). NEG Guarantor shall not be obligated to monitor the amount of Subsidiary's Obligations to Guaranteed Party, and Guaranteed



Party will bear the risk that the aggregate amount of the Obligations exceeds the Guarantee Cap and only payments made by NEG Guarantor pursuant to a demand for payment in accordance with Section 7 hereof shall reduce the amount of the Guarantee Cap. No payments will be made hereunder unless and until a Payment Demand has been issued by the Guaranteed Party in accordance with Section 7 hereof. Except as the same comprise Obligations under the Agreement, NEG Guarantor shall not be liable hereunder for special, consequential, exemplary, tort or other damages. NEG Guarantor agrees to pay all out-of-pocket expenses (including the reasonable fees and expenses of Guaranteed Party's counsel) incurred for the enforcement of the rights of Guaranteed Party hereunder, provided, that NEG Guarantor shall not be liable for any such expenses if no payment under this Guarantee is due and such payments shall be subject to the Guarantee Cap.

3. Nature of Guarantee. The NEG Guarantor's obligations hereunder with respect to any Obligation shall not be affected by the existence, validity, enforceability, perfection, or extent of any collateral for such Obligations. The Guaranteed Party shall not be obligated to file any claim relating to the Obligations owing to it if Subsidiary becomes subject to a bankruptcy, reorganization or similar proceeding and the failure of the Guaranteed Party to so file shall not affect the NEG Guarantor's obligations hereunder. If any payment to the Guaranteed Party with respect to any Obligations is rescinded or must otherwise be returned for any reason whatsoever, the NEG Guarantor shall remain liable hereunder with respect to such Obligations as if such payment had not been made. The Guaranteed Party agrees that the NEG Guarantor shall not be in default hereunder, and the Guaranteed Party shall have no remedies against the NEG Guarantor hereunder, if (a) a Payment Demand (as defined below) has been made hereunder and has not been satisfied, (b) a Payment Demand (as defined in the GTN Guarantee) has been made under the GTN Guarantee in respect of such unsatisfied Payment Demand hereunder, and (c) the GTN Guarantor has satisfied in full such Payment Demand under the GTN Guarantee.

4. Enforcement. The NEG Guarantor hereby agrees that this Guarantee may be enforced by the Guaranteed Party (or its assigns) without first resorting to any action against the Subsidiary, or exhausting any other remedies against the Subsidiary, and without protest, presentment, notice or demand whatsoever. NEG Guarantor hereby waives any rights it may have to require any such prior protest, presentment, notice, demand, enforcement or exhaustion of remedies. Without limiting the generality of the foregoing, NEG Guarantor unconditionally agrees that it hereby waives (i) any and all rights to be subrogated to the position of Subsidiary or to have the benefit of any lien, security interest or other guaranty, if any, now or hereafter held by the Guaranteed Party for the obligations guaranteed by NEG Guarantor hereunder or to enforce any remedy which the Guaranteed Party now has or hereafter may have against Subsidiary, GTN Guarantor or any other person, (ii) any acceptance of this Guarantee, (iii) any set-offs or counterclaims against the Guaranteed Party which would otherwise impair the Guaranteed Party's rights against Subsidiary, (iv) any notice of the disposition of any collateral security, if any, and any right to object to the commercial reasonableness of the disposition of any such collateral security, if any, and (v) any requirement of diligence on the part of anyone. NEG Guarantor further agrees that none of the following acts, omissions or occurrences shall diminish or impair the liability of NEG Guarantor in any

respect (all of which acts, omissions or occurrences may be done without notice to NEG Guarantor of any kind): (i) any extension, modification, indulgence, compromise, settlement or variation of any of the terms of the Agreement, (ii) the discharge or release of any obligations of Subsidiary or GTN Guarantor by reason of bankruptcy or insolvency laws, (iii) the acceptance or release by the Guaranteed Party of any collateral security or other guaranty or any settlement, compromise or extension with respect to any collateral security or other guaranty (including the GTN Guarantee), and (iv) to the extent permitted by law, any release or discharge, by operation of law, of NEG Guarantor from the performance or observance of any obligation, covenant or agreement contained in this Guarantee.

5. NEG Guarantor to Maintain its Corporate Existence. The NEG Guarantor agrees that during the term of this Guarantee, it will not dissolve or otherwise dispose of all or substantially all of its assets and will not consolidate with or merge into another corporation or permit one or more corporations (other than one or more subsidiaries of the NEG Guarantor) to consolidate with or merge into it; provided, that the NEG Guarantor may, without violating the agreement contained in this Section, consolidate with or merge into another corporation, or permit one or more corporations to consolidate with or merge into it (other than one or more subsidiaries of the NEG Guarantor), or sell or otherwise transfer to another corporation all or substantially all of its assets as an entirety, provided, (a) the surviving, resulting or transferee corporation, as the case may be, (i) is subject to service of process in the State of Pennsylvania and (ii), if not the NEG Guarantor, assumes in writing all of the obligations of the NEG Guarantor under this Guarantee; (b) such substitute guarantor executes a guarantee agreement in substantially the form of this Guarantee and provides the Guaranteed Party with an opinion of counsel to the substitute guarantor addressed and reasonably acceptable to the Guaranteed Party to the effect that such corporate guarantee agreement has been duly authorized by such substitute guarantor and constitutes the legal, valid and binding obligation of such substitute guarantor, enforceable against such substitute guarantor in accordance with its terms (subject to limitations on the enforcement thereof by bankruptcy, insolvency and other similar laws affecting the rights of creditors generally and to the application of principles of equity); and (c) the senior unsecured long term debt rating of such substitute guarantor is rated not less than Baa2 (or its then equivalent) by Moody's or BBB (or its then equivalent) by S&P or such substitute guarantor is acceptable to the Guaranteed Party. Upon satisfaction of the requirements set forth in this Section 5, this Guarantee shall be deemed automatically and immediately released by the Guaranteed Party.

6. Substitutions of Guarantee. In addition to the rights of substitution provided for in Section 5 hereof, the NEG Guarantor may at any time substitute as the NEG Guarantor for all or a portion of the Guarantee Cap an irrevocable letter of credit and in form and substance satisfactory to the Guaranteed Party issued by United States Bank or United States Branch of a foreign bank that is and remains rated "A" or better by Moody's and S&P. Upon the satisfaction of the requirements set forth in this Section 6, the NEG Guarantor's obligations with respect to that portion of the Guarantee Cap assumed by a substitute guarantor or letter of credit provider shall be deemed automatically and immediately released by the Guaranteed Party.

7. Demands and Notice. If Subsidiary fails to pay any Obligations, and Guaranteed Party elects to exercise its rights under this Guarantee, Guaranteed Party shall make a written demand on NEG Guarantor (a "Payment Demand"). A Payment Demand shall identify the amount and the basis of the demand and shall contain a statement that Guaranteed Party is calling upon NEG Guarantor under this Guarantee. A Payment Demand conforming to the foregoing requirements shall be sufficient notice to NEG Guarantor to pay under this Guarantee. Notices under this Guarantee shall be deemed received if sent to the address specified below: (i) on the day received if served by overnight express delivery, (ii) on the next business day if served by facsimile transmission when sender has machine confirmation that facsimile was transmitted to the correct fax number listed below, and (iii) four business days after mailing if sent by certified, first class mail, return receipt requested. Any party may change its address to which notice is given hereunder by providing notice of same in accordance with this Section 7.

To NEG Guarantor:
PG&E National Energy Group, Inc.
7500 Old Georgetown Rd.
Bethesda, MD 20814-6161
Attn.: General Counsel
Fax: 301-280-6900

To Subsidiary:
PG&E Energy Trading-Power, L.P.
7500 Old Georgetown Road
Bethesda, MD 20814-6161
Attn.: Chief Financial Officer
Fax: 301-280-6900

To Guaranteed Party:
Liberty Electric Power, LLC
c/o Orion Power Holdings, Inc.
7 East Redwood Street, 10th Floor
Baltimore, Maryland 21202
Attention: General Counsel
Fax: (410) 234-0994

8. Consent to Modifications, Waivers. The Guaranteed Party and Subsidiary may mutually agree to modify the Agreement, extend the time of payment or otherwise modify the terms of payment of any of the Obligations, without in any way impairing or affecting this Guarantee. The Guaranteed Party may resort to the NEG Guarantor for payment of any of the Obligations, whether or not the Guaranteed Party shall have resorted to any collateral security, or shall have proceeded against Subsidiary, GTN Guarantor or any other obligor principally or secondarily obligated with respect to any of the Obligations. NEG Guarantor hereby waives notice of acceptance of this Guarantee, and also presentment, protest and notice of protest or dishonor of any evidences of indebtedness hereby guaranteed.

9. Subrogation. NEG Guarantor waives any rights of subrogation or reimbursement from Subsidiary or GTN Guarantor that may accrue to NEG Guarantor with respect to the payment of any Obligation by NEG Guarantor to Guaranteed Party under this Guarantee until the time that all Obligations owing to the Guaranteed Party are fully and indefeasibly paid to Guaranteed Party. Upon such full and indefeasible payment of all the Obligations owing to the Guaranteed Party, NEG Guarantor shall be

subrogated to the rights of the Guaranteed Party against Subsidiary, and the Guaranteed Party agrees to take at NEG Guarantor's expense such steps as NEG Guarantor may reasonably request to implement such subrogation.


10. Consent to Collateral Assignment. NEG Guarantor acknowledges that Guaranteed Party may borrow funds from one or more Lenders for the development, construction, operation or maintenance of the Facility and hereby consents to Guaranteed Party's assignment of this Guarantee to Liberty Electric PA, LLC, the sole member of Liberty Electric Power, LLC and to any Lender as security for Guaranteed Party's obligations to the Lender(s). In addition, NEG Guarantor consents to assignment by such Lender(s) of this Guarantee in connection with the exercise of remedies available to such Lender(s) under its agreements for financing with Guaranteed Party. Except as provided in this Section 10, this Guarantee may not be assigned without the prior written consent of the other party, and any purported assignment without such consent shall be null and void.

11. Representations and Warranties. NEG Guarantor hereby represents and warrants that, as of the date hereof, (i) it is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation, (ii) the execution, delivery and performance by NEG Guarantor of this Guarantee are within its corporate powers, have been duly authorized by all necessary corporate action and do not violate NEG Guarantor's charter or by-laws or any law, order or contractual restriction binding on NEG Guarantor, (iii) this Guarantee constitutes NEG Guarantor's legal, valid and binding obligation, enforceable against it in accordance with its terms (except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws, affecting enforcement of creditors' rights in general and general principles of equity), and (iv) after giving effect to this Agreement and the transactions contemplated hereby, (a) it is not insolvent or will not be rendered insolvent, as such term is used and defined in the United States Bankruptcy Code and other applicable laws, (b) it will not have unreasonably small capital to engage in its business, and (c) it is able to pay its debts and other liabilities, contingent obligations and other commitments as they mature.

[Remainder of Page Intentionally Left Blank]

12. Miscellaneous. No provision of this Guarantee may be amended or waived except by a written instrument executed by NEG Guarantor and Guaranteed Party. This Guarantee shall bind and benefit the successors and permitted assigns of NEG Guarantor and Guaranteed Party. This Guarantee shall be construed in accordance with the laws of the State of New York, excluding its choice of law provisions.

PG&E NATIONAL ENERGY GROUP, INC.

By: 
Name: John R. Cooper
Title: Senior Vice President

Agreed and Accepted:

LIBERTY ELECTRIC POWER, LLC

By: Liberty Electric PA, LLC, its sole Member

By: Mid-Atlantic Liberty Corporation,
a Member Manager

By: _____
Name:
Title:

12. Miscellaneous. No provision of this Guarantee may be amended or waived except by a written instrument executed by NEG Guarantor and Guaranteed Party. This Guarantee shall bind and benefit the successors and permitted assigns of NEG Guarantor and Guaranteed Party. This Guarantee shall be construed in accordance with the laws of the State of New York, excluding its choice of law provisions.

PG&E NATIONAL ENERGY GROUP, INC.

By: _____
Name:
Title:

Agreed and Accepted:

LIBERTY ELECTRIC POWER, LLC

By: Liberty Electric PA, LLC, its sole Member

By: Mid-Atlantic Liberty Corporation,
a Member Manager

By: Jack A. Fusco
Name: Jack A. Fusco
Title: President & CEO

EXHIBIT 2

GUARANTEE

GUARANTEE dated as of February 6, 2001 by PG&E Gas Transmission, Northwest Corporation, a California corporation (the "GTN Guarantor"), in favor of Liberty Electric Power, LLC, a Delaware limited liability company (hereafter the "Guaranteed Party").

WHEREAS, Guaranteed Party and PG&E Energy Trading - Power, L.P., a Delaware limited partnership and an affiliate of the GTN Guarantor ("Affiliate"), have entered into that certain Tolling Agreement dated April 14, 2000 (as amended, the "Agreement");

WHEREAS, pursuant to the terms of the Agreement, PG&E Corporation (the "Original Guarantor"), a parent company of the Affiliate, provided a guarantee (the "Original Guarantee") for the benefit of the Guaranteed Party on April 24, 2000;

WHEREAS, Affiliate desires (i) to provide a guarantee of the GTN Guarantor and a guarantee of PG&E National Energy Group, Inc. (the "NEG Guarantor") for the benefit of the Guaranteed Party and (ii) to obtain the release and discharge of the Original Guarantor from the Original Guarantee;

WHEREAS, concurrently with the execution and delivery of this Guarantee, (i) the NEG Guarantor and the Guaranteed Party are executing and delivering a guarantee of the NEG Guarantor for the benefit of the Guaranteed Party (the "NEG Guarantee") and (ii) the Guaranteed Party is releasing and discharging the Original Guarantor from any and all liabilities and obligations under the Original Guarantee.

NOW, THEREFORE, GTN Guarantor agrees as follows:

1. Guarantee. Subject to the terms herein, the GTN Guarantor absolutely, unconditionally and irrevocably guarantees to the Guaranteed Party, its successors and assigns, as primary obligor and not merely as surety, the prompt payment when due, in accordance with the terms of the Agreement, of all amounts payable by Affiliate under the Agreement and any amendments thereto, including without limitation, Tolling Fees, Termination Payment, liquidated damages, indemnity obligations, and damage awards arising by reason of Affiliate's breach of its performance obligations under the Agreement or otherwise (collectively, the "Obligations"). The obligation to make payments under this Guarantee is a guarantee of payment and not of collection. If Affiliate fails to pay any Obligation, GTN Guarantor will pay such Obligation directly for Guaranteed Party's benefit on the terms and subject to the conditions set forth in Section 7. Capitalized terms used and not defined herein shall have meaning given such terms in the Agreement.

2. Extent of Liability & Term. GTN Guarantor's liability under this Guarantee is limited to the aggregate of US\$150,000,000, as reduced (i) pursuant to Section 8.1(b) of the Agreement and (ii) by any amounts paid by the NEG Guarantor pursuant to the NEG Guarantee and not returned to the NEG Guarantor by or on behalf of

EXHIBIT

2

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the Guaranteed Party (the "Guarantee Cap"). GTN Guarantor shall not be obligated to monitor the amount of Affiliate's Obligations to Guaranteed Party, and Guaranteed Party will bear the risk that the aggregate amount of the Obligations exceeds the Guarantee Cap and only payments made by GTN Guarantor pursuant to a demand for payment in accordance with Section 7 hereof shall reduce the amount of the Guarantee Cap. No payments will be made hereunder unless and until a Payment Demand has been issued by the Guaranteed Party in accordance with Section 7 hereof. Except as the same comprise Obligations under the Agreement, GTN Guarantor shall not be liable hereunder for special, consequential, exemplary, tort or other damages. GTN Guarantor agrees to pay all out-of-pocket expenses (including the reasonable fees and expenses of Guaranteed Party's counsel) incurred for the enforcement of the rights of Guaranteed Party hereunder, provided, that GTN Guarantor shall not be liable for any such expenses if no payment under this Guarantee is due and such payments shall be subject to the Guarantee Cap.

3. Nature of Guarantee. The GTN Guarantor's obligations hereunder with respect to any Obligation shall not be affected by the existence, validity, enforceability, perfection, or extent of any collateral for such Obligations. The Guaranteed Party shall not be obligated to file any claim relating to the Obligations owing to it if Affiliate becomes subject to a bankruptcy, reorganization or similar proceeding and the failure of the Guaranteed Party to so file shall not affect the GTN Guarantor's obligations hereunder. If any payment to the Guaranteed Party with respect to any Obligations is rescinded or must otherwise be returned for any reason whatsoever, the GTN Guarantor shall remain liable hereunder with respect to such Obligations as if such payment had not been made.

4. Enforcement. Except as expressly provided in Section 7, the GTN Guarantor hereby agrees that this Guarantee may be enforced by the Guaranteed Party (or its assigns) without first resorting to any action against the Affiliate or NEG Guarantor, or exhausting any other remedies against the Affiliate or NEG Guarantor, and without protest, presentment, notice or demand whatsoever. The GTN Guarantor hereby waives any rights it may have to require any such prior protest, presentment, notice, demand, enforcement or exhaustion of remedies. Without limiting the generality of the foregoing, GTN Guarantor unconditionally agrees that it hereby waives (i) any and all rights to be subrogated to the position of Affiliate or to have the benefit of any lien, security interest or other guaranty, if any, now or hereafter held by the Guaranteed Party for the obligations guaranteed by GTN Guarantor hereunder or to enforce any remedy which the Guaranteed Party now has or hereafter may have against Affiliate, NEG Guarantor or any other person, (ii) any acceptance of this Guarantee, (iii) any set-offs or counterclaims against the Guaranteed Party which would otherwise impair the Guaranteed Party's rights against Affiliate, (iv) any notice of the disposition of any collateral security, if any, and any right to object to the commercial reasonableness of the disposition of any such collateral security, if any, and (v) any requirement of diligence on the part of anyone. GTN Guarantor further agrees that none of the following acts, omissions or occurrences shall diminish or impair the liability of GTN Guarantor in any respect (all of which acts, omissions or occurrences may be done without notice to GTN Guarantor of any kind): (i) any extension, modification, indulgence, compromise, settlement or variation of any of the terms of the Agreement, (ii) the discharge or release of any obligations of Affiliate or

NEG Guarantor by reason of bankruptcy or insolvency laws, (iii) the acceptance or release by the Guaranteed Party of any collateral security or other guaranty or any settlement, compromise or extension with respect to any collateral security or other guaranty (including the NEG Guarantee), and (iv) to the extent permitted by law, any release or discharge, by operation of law, of GTN Guarantor from the performance or observance of any obligation, covenant or agreement contained in this Guarantee.

5. GTN Guarantor to Maintain its Corporate Existence. The GTN Guarantor agrees that during the term of this Guarantee, it will not dissolve or otherwise dispose of all or substantially all of its assets and will not consolidate with or merge into another corporation or permit one or more corporations (other than one or more subsidiaries of the GTN Guarantor) to consolidate with or merge into it; provided, that the GTN Guarantor may, without violating the agreement contained in this Section, consolidate with or merge into another corporation, or permit one or more corporations to consolidate with or merge into it (other than one or more subsidiaries of the GTN Guarantor), or sell or otherwise transfer to another corporation all or substantially all of its assets as an entirety, provided, (a) the surviving, resulting or transferee corporation, as the case may be, (i) is subject to service of process in the State of Pennsylvania and (ii), if not the GTN Guarantor, assumes in writing all of the obligations of the GTN Guarantor under this Guarantee; (b) such substitute guarantor executes a guarantee agreement in substantially the form of this Guarantee and provides the Guaranteed Party with an opinion of counsel to the substitute guarantor addressed and reasonably acceptable to the Guaranteed Party to the effect that such corporate guarantee agreement has been duly authorized by such substitute guarantor and constitutes the legal, valid and binding obligation of such substitute guarantor, enforceable against such substitute guarantor in accordance with its terms (subject to limitations on the enforcement thereof by bankruptcy, insolvency and other similar laws affecting the rights of creditors generally and to the application of principles of equity); and (c) the senior unsecured long term debt rating of such substitute guarantor is rated not less than Baa2 (or its then equivalent) by Moody's or BBB (or its then equivalent) by S&P or such substitute guarantor is acceptable to the Guaranteed Party. Upon satisfaction of the requirements set forth in this Section 5, this Guarantee shall be deemed automatically and immediately released by the Guaranteed Party.

6. Substitutions of Guarantee. In addition to the rights of substitution provided for in Section 5 hereof, the GTN Guarantor may at any time substitute as the GTN Guarantor for all or a portion of the Guarantee Cap an irrevocable letter of credit and in form and substance satisfactory to the Guaranteed Party issued by United States Bank or United States Branch of a foreign bank that is and remains rated "A" or better by Moody's and S&P. Upon the satisfaction of the requirements set forth in this Section 6, the GTN Guarantor's obligations with respect to that portion of the Guarantee Cap assumed by a substitute guarantor or letter of credit provider shall be deemed automatically and immediately released by the Guaranteed Party.

7. Demands and Notice. If Affiliate fails to pay any Obligations and Guaranteed Party elects to exercise its rights under this Guarantee, Guaranteed Party shall make a written demand on GTN Guarantor (a "Payment Demand"); provided that the

Guaranteed Party may exercise its rights under this Guarantee without having made a Payment Demand on NEG Guarantor if the Guaranteed Party is unable to make such Payment Demand under the NEG Guarantee as a result of any order or decree of a court of competent jurisdiction in connection with a bankruptcy or similar proceeding with respect to the NEG Guarantor. Subject to the proviso in the preceding sentence, a Payment Demand under this Guarantee may not be made before, and the GTN Guarantor's obligation to make payment hereunder shall only become due on the first Business Day after, the date which is five Business Days after Guaranteed Party shall have made a Payment Demand on NEG Guarantor under the NEG Guarantee, provided that the Guaranteed Party shall have simultaneously therewith submitted a copy of such Payment Demand under the NEG Guarantee to the GTN Guarantor. For purposes of this Guarantee, "Business Day" means any day on which Federal Reserve member banks in New York City, New York are open for business. A Payment Demand shall identify the amount and the basis of the demand and shall contain a statement that (i) Guaranteed Party is calling upon GTN Guarantor under this Guarantee, (ii) at least five Business Days have elapsed since Guaranteed Party made a Payment Demand on NEG Guarantor under the NEG Guarantee, unless the Guaranteed Party is unable to make a Payment Demand under the NEG Guarantee as described above, and (iii) the Payment Demand under the NEG Guarantee remains unpaid and setting forth the amount unpaid, unless the Guaranteed Party is unable to make a Payment Demand under the NEG Guarantee as described above. A Payment Demand conforming to the foregoing requirements shall be sufficient notice to GTN Guarantor to pay under this Guarantee. Notices under this Guarantee shall be deemed received if sent to the address specified below: (i) on the day received if served by overnight express delivery, (ii) on the next business day if served by facsimile transmission when sender has machine confirmation that facsimile was transmitted to the correct fax number listed below, and (iii) four business days after mailing if sent by certified, first class mail, return receipt requested. Any party may change its address to which notice is given hereunder by providing notice of same in accordance with this Section 7.

To GTN Guarantor:
 PG&E Gas Transmission, Northwest Corporation
 7500 Old Georgetown Road
 Bethesda, MD 20814-6161
 Attn.: General Counsel
 Fax: 301-280-6900

To Affiliate:
 PG&E Energy Trading-Power, L.P.
 7500 Old Georgetown Road
 Bethesda, MD 20814-6161
 Attn.: Chief Financial Officer
 Fax: 301-280-6900

To Guaranteed Party:
 Liberty Electric Power, LLC
 c/o Orion Power Holdings, Inc.
 7 East Redwood Street, 10th Floor
 Baltimore, Maryland 21202
 Attention: General Counsel
 Fax: (410) 234-0994

8. Consent to Modifications, Waivers. The Guaranteed Party and Affiliate may mutually agree to modify the Agreement, extend the time of payment or otherwise

modify the terms of payment of any of the Obligations, without in any way impairing or affecting this Guarantee. The Guaranteed Party may resort to the GTN Guarantor for payment of any of the Obligations, whether or not the Guaranteed Party shall have resorted to any collateral security, or shall have proceeded against Affiliate or any other obligor principally or secondarily obligated with respect to any of the Obligations. GTN Guarantor hereby waives notice of acceptance of this Guarantee, and also presentment, protest and notice of protest or dishonor of any evidences of indebtedness hereby guaranteed.

9. Subrogation. GTN Guarantor waives any rights of subrogation or reimbursement from Affiliate or NEG Guarantor that may accrue to GTN Guarantor with respect to the payment of any Obligation by GTN Guarantor to Guaranteed Party under this Guarantee until the time that all Obligations owing to the Guaranteed Party are fully and indefeasibly paid to Guaranteed Party. Upon such full and indefeasible payment of all the Obligations owing to the Guaranteed Party, GTN Guarantor shall be subrogated to the rights of the Guaranteed Party against Affiliate or NEG Guarantor, and the Guaranteed Party agrees to take at GTN Guarantor's expense such steps as GTN Guarantor may reasonably request to implement such subrogation.

10. Consent to Collateral Assignment. GTN Guarantor acknowledges that Guaranteed Party may borrow funds from one or more Lenders for the development, construction, operation or maintenance of the Facility and hereby consents to Guaranteed Party's assignment of this Guarantee to Liberty Electric PA, LLC, the sole member of Liberty Electric Power, LLC and to any Lender as security for Guaranteed Party's obligations to the Lender(s). In addition, GTN Guarantor consents to assignment by such Lender(s) of this Guarantee in connection with the exercise of remedies available to such Lender(s) under its agreements for financing with Guaranteed Party. Except as provided in this Section 10, this Guarantee may not be assigned without the prior written consent of the other party, and any purported assignment without such consent shall be null and void.


11. Representations and Warranties. GTN Guarantor hereby represents and warrants that, as of the date hereof, (i) it is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation, (ii) the execution, delivery and performance by GTN Guarantor of this Guarantee are within its corporate powers, have been duly authorized by all necessary corporate action and do not violate GTN Guarantor's charter or by-laws or any law, order or contractual restriction binding on GTN Guarantor, (iii) this Guarantee constitutes GTN Guarantor's legal, valid and binding obligation, enforceable against it in accordance with its terms (except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws, affecting enforcement of creditors' rights in general and general principles of equity), (iv) Affiliate has paid, or caused the payment of, certain fees to the GTN Guarantor, constituting reasonably equivalent value, in exchange for the issuance of this Guarantee and (v) after giving effect to this Agreement and the transactions contemplated hereby, (a) it is not insolvent or will not be rendered insolvent, as such term is used and defined in the United States Bankruptcy Code and other applicable laws, (b) it will not

have unreasonably small capital to engage in its business, and (c) it is able to pay its debts and other liabilities, contingent obligations and other commitments as they mature.

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12. Miscellaneous. No provision of this Guarantee may be amended or waived except by a written instrument executed by GTN Guarantor and Guaranteed Party. This Guarantee shall bind and benefit the successors and permitted assigns of GTN Guarantor and Guaranteed Party. This Guarantee shall be construed in accordance with the laws of the State of New York, excluding its choice of law provisions.

PG&E GAS TRANSMISSION, NORTHWEST CORPORATION

By: 
Name: John R. Cooper
Title: Chief Financial Officer and Treasurer

Agreed and Accepted:

LIBERTY ELECTRIC POWER, LLC

By: Liberty Electric PA, LLC, its sole member

By: Mid-Atlantic Liberty Corporation,
a Member Manager

By: _____
Name: _____
Title: _____

FEB-08-2001 THU 03:52 PM UNION POWER HOLDINGS

FOR THE TELETYPE

12. Miscellaneous. No provision of this Guarantee may be amended or waived except by a written instrument executed by GTN Guarantor and Guaranteed Party. This Guarantee shall bind and benefit the successors and permitted assigns of GTN Guarantor and Guaranteed Party. This Guarantee shall be construed in accordance with the laws of the State of New York, excluding its choice of law provisions.

PG&E GAS TRANSMISSION, NORTHWEST CORPORATION

By: _____
Name:
Title:

Agreed and Accepted:

LIBERTY ELECTRIC POWER, LLC

By: Liberty Electric PA, LLC, its sole member

By: Mid-Atlantic Liberty Corporation,
a Member Manager

By: Jack A. Fusco
Name: Jack A. Fusco
Title: President & CEO

EXHIBIT 3

Entered: May 18, 2005

Case 03-03104 Doc 43 Filed 05/18/05 Page 1 of 5

Signed: May 17, 2005

SO ORDERED



Paul Mannes

PAUL MANNES

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

In re:

NATIONAL ENERGY & GAS
TRANSMISSION (f/k/a PG&E NATIONAL
ENERGY GROUP, INC.), *et al.*

Debtors.

Case No.: 03-30459 (PM) and 03-
30461(PM)
through 03-30464(PM)
Chapter 11
(Jointly Administered under
Case No.: 03-30459 (PM))

NATIONAL ENERGY & GAS
TRANSMISSION, INC.
(f/k/a PG&E NATIONAL
ENERGY GROUP, INC.); NEGT ENERGY
TRADING POWER - L.P.
(f/k/a PG&E ENERGY
TRADING - POWER, L.P.); and
GAS TRANSMISSION
NORTHWEST CORPORATION,

Plaintiffs,

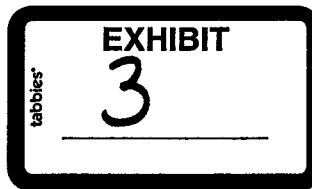
Adversary Proceeding

No. 03-03104

v.

LIBERTY ELECTRIC POWER, LLC

Defendant.



**ORDER IN RESPECT OF MOTIONS FILED BY LIBERTY
ELECTRIC POWER, LLC SEEKING: (I) CONFIRMATION OF
ARBITRATION AWARD; AND (II) DISMISSAL OF
ADVERSARY PROCEEDING AND OBJECTION TO CLAIMS**

Upon the following motions filed by Liberty Electric Power, LLC (“Liberty”) in the above-captioned adversary proceeding: (i) Motion to Confirm an Arbitration Award (docket no. 31) (the “Arbitration Award Motion”), and (ii) Motion to Dismiss Adversary Proceeding and Objection to Claims (docket no. 34) (the “Dismissal Motion,” and together with the Arbitration Award Motion, the “Liberty Motions”); and upon the Limited Objection of the debtors in the above-captioned cases (collectively, the “Debtors”)¹ to the Liberty Motions (the “Limited Objection”); and upon the Reply of Liberty to the Limited Objection (the “Reply”); and upon the Response of the Debtors to the Reply; and a hearing having been held before this Court on May 12, 2005; and the Court having reserved decision on the Liberty Motions except to the extent set forth herein; it is by the United States Bankruptcy Court for the District of Maryland, hereby

ORDERED, that capitalized terms used but not defined herein have the meanings ascribed to them in the Limited Objection; and it is further

ORDERED, that each of NEGT and Gas Transmission Northwest Corporation (“GTN”) is authorized and directed to take all actions necessary or appropriate to cause \$140 million (the “Payment”) to be released from that certain escrow account, governed by that certain Post-Closing Escrow Agreement, dated as of November 1, 2004 (the “Post-Closing Escrow

¹ The Debtors are the following entities: (i) National Energy & Gas Transmission, Inc. f/k/a PG&E National Energy Group, Inc. (“NEGT”), (ii) NEGT Energy Trading Holdings Corporation f/k/a PG&E Energy Trading Holdings Corporation (“ET Holdings”), (iii) NEGT Energy Trading - Gas Corporation f/k/a PG&E Energy Trading - Gas Corporation (“ET Gas”), (iv) NEGT ET Investments Corporation f/k/a PG&E ET Investments Corporation (“ET Inv.”), (v) NEGT Energy Trading - Power, L.P. f/k/a PG&E Energy Trading - Power, L.P. (“ET Power,” together with ET Holdings, ET Gas and ET Inv., the “ET Debtors,” and collectively with NEGT, the “Initial Debtors”) and (vi) Energy Services Ventures, Inc. f/k/a PG&E Energy Services Ventures, Inc. (“ESV”) and (vii) Quantum Ventures (together with ESV, the “Quantum Debtors”).

Agreement), by and among NEGТ, Gas Transmission Corporation, GTN Holdings LLC, TransCanada American Investments Ltd., GTN and JPMorgan Chase Bank, as escrow agent, and indefeasibly paid to Liberty, as quickly as reasonably practicable, but in no event later than two (2) business days after the date of entry of this Order; and it is further

ORDERED, that: (a) the Payment shall be deemed to be a payment made by GTN under the GTN Guarantee; (b) receipt of the Payment by Liberty shall be in full and final satisfaction of GTN's obligations under the GTN Guarantee; and (c) upon receipt of the Payment (and without any further action by this Court, NEGТ, ET Power, Liberty, GTN or any other party) (1) Liberty and Liberty Electric PA, LLC shall have no other or further claims against GTN arising under or related to the GTN Guarantee and (2) GTN shall be irrevocably and unconditionally released in full from any and all liabilities under and in respect of the GTN Guarantee; and it is further

ORDERED, that, because no claim or right was preserved under the confirmed plan of liquidation of the ET Debtors under section 547 or 550 of the Bankruptcy Code or otherwise against GTN with respect to any transfer or payment that was made to, or for the benefit of, Liberty or Liberty Electric PA, LLC, the underlying obligation with respect to which is or was covered by the GTN Guarantee, a Preference Release Event (as defined in the Post-Closing Escrow Agreement) has occurred; and it is further

ORDERED, that within five (5) business days of receipt of the Payment, Liberty shall: (a) take whatever actions are necessary or appropriate to cause the dismissal with prejudice of those certain actions entitled Liberty Electric Power, LLC v. PG&E Gas Transmission, Northwest Corporation, Case No.: 03-CV-3646, and Liberty Electric Power, LLC v. PG&E Gas Transmission, Northwest Corporation, Case No.: 03-CV-3649, pending in the United States District Court for the Southern District of Texas; and (b) return to GTN the original GTN

Guarantee stamped “cancelled” or “terminated” or, if applicable, certify in writing to GTN that none of Liberty, its affiliates, or JPMorgan Chase Bank (f/k/a The Chase Manhattan Bank), as collateral agent under the Consent and Agreement, dated as of February 6, 2001, among GTN, Liberty and JPMorgan Chase, has in its possession the original GTN Guarantee; and it is further

ORDERED, that nothing in this Order shall be deemed to alter, amend, impair or prejudice the rights of any party with regard to: (a) the proper nature or characterization of all or any portion of the Payment (including, without limitation, whether any portion of the Payment constitutes a payment by GTN of interest, fees or expenses), except that no party shall hereafter have the right to assert that the Payment was not a payment made by GTN under the GTN Guarantee; (b) Liberty’s right (if any) to apply any portion of the Payment to interest, fees or expenses that may be owed by GTN or to any other liabilities or obligations of any party; or (c) the effect of the Payment on the allowable amount (if any) of any claims asserted against one or more of the Debtors by Liberty, all of which rights shall be fully preserved; and it is further

ORDERED, that this Court shall retain jurisdiction respecting all matters arising from or relating to the implementation of the Liberty Motions.

END OF ORDER

cc: Paul M. Nussbaum, Esq.
Martin T. Fletcher, Esq.
Whiteford, Taylor & Preston, LLP
Seven Saint Paul Street, Suite 1400
Baltimore, Maryland 21202-1626

Matthew A. Feldman, Esq.
Steven Wilamowsky, Esq.
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019-6099

John L. Daugherty, Esq.
Assistant United States Trustee

6305 Ivy Lane, Suite 600
Greenbelt, MD 20770

EXHIBIT 4

Entered: June 27, 2005

Date signed June 24, 2005



Paul Mannes

PAUL MANNES
U. S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
at Greenbelt

In re:	)	Case Nos. 03-30459PM; 03-30461PM
	)	through 03-30464PM
NATIONAL ENERGY & GAS)	
TRANSMISSION, INC. (f/k/a	)	Chapter 11
PG&E NATIONAL ENERGY)	
GROUP, INC.), <i>et al.</i>,	)	Jointly Administered under Case No. 03-
	)	30459PM
Debtors.)	
<hr/>		
NATIONAL ENERGY & GAS	)	Adversary Proc. No. 03-03104
TRANSMISSION, INC. (f/k/a)	
PG&E NATIONAL ENERGY)	
GROUP, INC.); NEGT ENERGY)	
TRADING POWER - L.P. (f/k/a)	
PG&E ENERGY TRADING -)	
POWER, L.P.; and GAS)	
TRANSMISSION NORTHWEST)	
CORPORATION,)	
)	
Plaintiffs,)	
v.)	
)	
LIBERTY ELECTRIC POWER,)	
LLC,)	
)	
Defendant.)	

MEMORANDUM OF DECISION

Before the court are two motions of the defendant Liberty Electric Power, LLC ("Liberty"), a "Motion to Confirm an Arbitration Award" and a "Motion to Dismiss Adversary

EXHIBIT

4

Proceeding and Objection to Claims, and for Related Relief” and the opposition thereto. This court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(a), 28 U.S.C. § 157(a) and Local Rule 402 of the United States District Court for the District of Maryland, referring all cases under Title 11 of the United States Code to the Bankruptcy Judges of this District. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

Background

In April 2000, Liberty and NEGT Energy Trading-Power, L.P. (f/k/a PG&E Energy Trading-Power, L.P.) (“ET Power”) entered into a Tolling Agreement that granted, among other things, ET Power first access to production capacity of Liberty’s electric power generating facility. PG&E Gas Transmission, Northwest Corporation (“GTN”) guaranteed ET Power’s obligations in February, 2001. The guarantee was capped at \$150,000,000 and later reduced to \$140,000,000.

ET Power allegedly defaulted under the Tolling Agreement, resulting in unpaid invoices for June and July, 2003, totaling \$5,428,045.82. On July 8, 2003, ET Power filed a bankruptcy case under chapter 11. ET Power’s rejection of the Tolling Agreement was approved by this court by order dated August 6, 2003 (amended by order dated August 11, 2003). The rejection resulted in a breach of the Tolling Agreement. Liberty sought payment of the unpaid invoices and a “Termination Payment” pursuant to § 14.2(a) of the Tolling Agreement from ET Power. Liberty also sought payment from GTN, the non-debtor guarantor.

When GTN did not honor the guarantee, Liberty filed an action in the United States District Court for the Southern District of Texas. Liberty also filed Proofs of Claim in both the ET Power and National Energy & Gas Transmission, Inc. (f/k/a PG&E National Energy Group, Inc.) (“NEGT”) cases.¹ The claims were objected to by each debtor.

In September, 2003, plaintiffs commenced this adversary proceeding. Ultimately, the action against GTN was stayed and the dispute was arbitrated, resulting in an award in Liberty’s

¹ Liberty asserted a general unsecured claim against ET Power in the amount of \$182,198,749.90, plus additional amounts, and a general unsecured claim against NEGT in the amount of \$140,000,000.

favor and against ET Power.² In the arbitration proceeding, Liberty sought compensation for the Termination Payment, the unpaid invoice amounts, costs and fees and interest. The panel found that Liberty was entitled to a \$140,000,000 Termination Payment, plus interest accruing from July 8, 2003, the stipulated date of breach. The panel declined to rule upon the accrual of interest on the unpaid and undisputed invoice amounts and concluded that each party was to bear its own costs.

Discussion

The arbitration award will be confirmed by this court in accordance with § 9 of the Federal Arbitration Act (9 U.S.C. § 1 *et. seq.*). Plaintiffs do not object to the entry of an order confirming the panel's award of \$140,000,000. The court is informed that, in accordance with an order entered May 18, 2005, \$140,000,000 was wired to Liberty on May 19, 2005, in full and final satisfaction of the GTN Guarantee.³ However, there remains disputed issues for decision that do not involve confirmation of the award but ultimately affect the amounts of the judgment to be entered and the resolution of the contested matter.

(1) The Parties' Positions.

Liberty asserts that GTN is liable for all of the ET Power-guaranteed obligations under the Tolling Agreement, including costs and fees and interest, subject to the \$140,000,000 cap.⁴ Liberty further contends that it may simultaneously assert claims against ET Power and NEGT, without any reduction for payment, until paid in full. It argues that it may apply the payment

² The arbitration proceeding was before the American Arbitration Association in the *Matter of Liberty Electric Power, LLC, Claimant, v. NEGT Electric Trading - Power, L.P., Respondent*, Case No. 70 198 Y 00228 04.

³ In May, 2004, NEGT sold 100% of the GTN stock to TransCanada Corporation. The sale agreement required that a sum equal to the full amount of the GTN Guarantee be placed in an escrow account. Pursuant to the agreements executed at the time of sale, any liability of GTN to Liberty would be paid from this escrow.

⁴ Liberty sets forth ET Power's approximate liabilities as:

Principal - \$140,000,000
Invoices - \$5,400,000
Interest (on the Termination Payment and the unpaid invoice) - \$16,800,000
Collection costs/fees - \$3,700,000

from GTN first to interest, then to costs and fees and lastly to principal and that plaintiffs do not have standing to direct application.

Plaintiffs' position is murkier but boils down to Liberty is entitled to only the payment of the Termination Payment and the unpaid invoice amounts. As to the undisputed invoice amounts, plaintiffs consented to the allowance of Liberty's claims (excluding interest) against NEGТ and ET Power but, in a later responsive pleading, by footnote, reversed this position as to NEGТ. As to the arbitration award, they take the position that since Liberty has been paid the \$140,000,000 Termination Payment, there exists no further liability as to NEGТ or ET Power – no postpetition interest owed pursuant to 11 U.S.C. § 502(b)(2) despite the arbitration panels' award and no chargeable costs and fees. Plaintiffs argue that once the amount of the GTN Guarantee cap has been paid, no further funds can be charged to GTN or, by virtue of the NEGТ Guarantee⁵, to NEGТ. Plaintiffs posit further assent that Liberty must apply the \$140,000,000 guarantee payment first to principal.

(2) Postpetition Interest.

Liberty seeks \$16,181,086 in interest from July 8, 2003 to March 30, 2005, on the Termination Payment, together with interest accruing at \$33,162.00 per day. It also seeks \$6,027,273 in interest through March 30, 2005, on the unpaid invoiced amounts, interest accruing at \$238 per day. Whether Liberty is entitled to collect this interest from plaintiffs involves the interpretation of paragraphs 1 and 2 of the GTN Guarantee. Paragraphs 1 and 2 of the Guarantee state:

1. Guarantee. Subject the terms herein, the GTN Guarantor absolutely, unconditionally and irrevocably guarantees to the Guaranteed Party, its successors and assigns, as primary obligor and not merely as surety, the prompt payment when due, in accordance with the terms of the Agreement, of all amounts payable by Affiliate under the Agreement and any amendments thereto, including without limitation, Tolling Fees, Termination Payment, liquidated damages, indemnity obligations, and damage

⁵ Plaintiffs assert that there is no basis for any claim against NEGТ, citing to the NEGТ Guarantee. NEGТ's liability arose from its Guarantee, dated February 6, 2001. Plaintiffs argue that, pursuant to paragraph 2, NEGТ's liability is reduced by any amounts paid by GTN under the GTN Guarantee – *i.e.*, once the \$140,000,000 is paid by GTN, no further liability exists. Liberty asserts that pursuant to section 7 of the NEGТ Guarantee, it may make a demand on NEGТ for any obligations that remain unpaid, subject to the cap.

awards arising by reason of Affiliate's breach of its performance obligations under the Agreement or otherwise (collectively, the "Obligations"). The obligation to make payments under this Guarantee is a guarantee of payment and not of collection. If Affiliate fails to pay any Obligation, GTN Guarantor will pay such Obligation directly for Guaranteed Party's benefit on the terms and subject to the conditions set forth in Section 7. Capitalized terms used and not defined herein shall have meaning given such terms in the Agreement.

2. Extent of Liability & Term. GTN Guarantor's liability under this Guarantee is limited to the aggregate of US\$150,000,000, as reduced (i) pursuant to Section 8.1(b) of the Agreement and (ii) by any amounts paid by the NEG Guarantor pursuant to the NEG Guarantee and not returned to the NEG Guarantor by or on behalf of the Guaranteed Party (the "Guarantee Cap"). GTN Guarantor shall not be obligated to monitor the amount of Affiliate's Obligations to Guaranteed Party, and Guaranteed Party will bear the risk that the aggregate amount of the Obligations exceeds the Guarantee Cap and only payments made by GTN Guarantor pursuant to a demand for payment in accordance with Section 7 hereof shall reduce the amount of the Guarantee Cap. No payments will be made hereunder unless and until a Payment Demand has been issued by the Guaranteed Party in accordance with Section 7 hereof. Except as the same comprise Obligations under the Agreement, GTN Guarantor shall not be liable hereunder for special, consequential, exemplary, tort or other damages. GTN Guarantor agrees to pay all out-of-pocket expenses (including the reasonable fees and expenses of Guaranteed Party's counsel) incurred for the enforcement of the rights of Guaranteed Party hereunder; provided, that GTN Guarantor shall not be liable for any such expenses if no payment under this Guarantee is due and such payments shall be subject to the Guarantee Cap.

Paragraph 1 of the GTN Guarantee provides Liberty with assurance that if ET Power fails to pay for any "Obligations" due under the Tolling Agreement, GTN will pay. These "Obligations" include interest under Section 14.2(a) of the Tolling Agreement. The GTN Guarantee merely limits GTN's liability to \$140,000,000. It does not limit ET Power's liability under the Tolling Agreement. ET Power and NEGT (derivatively by virtue of its Guarantee) are liable to Liberty for interest.

Plaintiffs argue, nonetheless, that as an unsecured creditor, Liberty is not entitled to postpetition interest on its claims against ET Power and NEGT pursuant to 11 U.S.C.

§ 502(b)(2). Plaintiffs also allege that interest cannot be charged to GTN because the GTN Guarantee does not provide for interest – thereby limiting the liability of all parties to the \$140,000,000 paid by GTN.

Liberty argues that GTN's obligation to pay interest is not tolled or eliminated by the application of 11 U.S.C. § 502(b)(2), asserting that its claim against a third party does not lose its interest-bearing quality during the postpetition period. Liberty maintains that application of 11 U.S.C. § 502(b)(2) would, in essence, grant the non-debtor GTN a discharge contrary to 11 U.S.C. § 524(e).

The court believes that the issue is one of novel impression and would be an ideal case for certification to the United States Court of Appeals for the Fourth Circuit pursuant to the revisions to 28 U.S.C. § 158(d)(2) made by § 1233 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (effective October 17, 2005). Nonetheless, 11 U.S.C. § 502(b)(2) provides:

- (b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim in lawful currency of the United States in such amount, except to the extent that—
 - (2) such claim is for unmatured interest.

Plaintiffs cite no authority for the proposition that a non-debtor guarantor is exempt from liability to pay interest accruing after the petition date of the debtor-primary obligor. They rely on what they term as an “analytically identical body of law” addressing recoveries on claims limited by 11 U.S.C. § 502(b)(6) and, by analogy, on the opinions of three courts.⁶

The court finds the analogy inappropriate. The limitation of 11 U.S.C. § 506(b)(6) on the amount that a landlord may recover on account of a rejected lease has long been a part of bankruptcy jurisprudence.

⁶ *Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters., Inc.)*, 324 F.3d 197, 209 (CA3 2003); *Redback Networks, Inc. v. Mayan Networks Corp. (In re Mayan Networks Corp.)*, 306 B.R. 295, 300 (BAP CA9 2004); see also *SBTI Liquidating Trust v. EOP-Colonmade of Dallas, LP (In re Stonebridge Tech. Inc.)*, 291 B.R. 63, 70-72 (BC N.D. Tex. 2003).

As noted in the Legislative History of the Bankruptcy Reform Act of 1978, this section is:

[d]erived from current law, limits the damages allowable to a landlord of the debtor. The history of this provision is set out at length in *Oldden v. Tonto Realty Co.*, 143 F.3d 916 (CA2 1944). It is designed to compensate the landlord for his loss while not permitting a claim so large (based on a long-term lease) as to prevent other general unsecured creditors from recovering a dividend from the estate. The damages a landlord may assert from termination of a lease are limited to the rent reserved for the greater of one year or ten percent of the remaining lease term, not to exceed three years, after the earlier of the date of the filing of the petition and the date of surrender or repossession in a chapter 7 case and 3 years least payments in a chapter 9, 11, or 13 case. The sliding scale formula for chapter 7 cases is new and designed to protect the long-term lessor. This subsection does not apply to limit administrative expense claims for use of the leased premises to which the landlord is otherwise entitled.

This paragraph will not overrule *Oldden*, or the proposition for which it has been read to stand: to the extent that a landlord has a security deposit in excess of the amount of his claim allowed under this paragraph, the excess comes into the estate. Moreover, his allowed claim is for his total damages, as limited by this paragraph. By virtue of proposed 11 U.S.C. § 506(a) and § 506(d), the claim will be divided into a secured portion and an unsecured portion in those cases in which the deposit that the landlord holds is less than his damages. As under *Oldden*, he will not be permitted to offset his actual damages against his security deposit and then claim for the balance under this paragraph. Rather, his security deposit will be applied in satisfaction of the claim that is allowed under this paragraph.

S.Rep. 95-989, 63-64 (1978). However, 11 U.S.C. § 502(b)(2) is based upon entirely different reasoning. As Justice Black explains in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 163-64 (1946), allowing interest would create a nightmare of continuous recomputation that is avoided by § 502(b)(2). See *In re Fesco Plastics Corp., Inc.*, 996 F.2d 152, 155 (CA7 1993).

The court finds that the *Oldden* doctrine carried into the Bankruptcy Reform Act of 1978 by § 506(b)(7), now § 506(b)(6), is not relevant to the current situation. The rationale of § 506(b)(6) found in most situations has no application here. The guarantee of GTN does not function as a security deposit and thus provide an "endrun" around § 502(b)(2) as described in *PPI Enterprises, Inc.*, 324 F.3d at 209 (No collateral of either NEG-T or ET Power secures GTN).

The payment of interest by GTN does not diminish this estate). The capping of recovery and application of security deposits for landlords is *sui generis*.⁷

Here, the claim of Liberty against GTN, a jointly and severally liable non-debtor, suffers no limitation as that posited by Justice Black. GTN's obligation is to pay no more than the \$140,000,000 cap. The court finds the cap no impediment to Liberty's right to be paid in full from all sources.

(3) Liberty's Costs and Fees.

Liberty seeks its fees and costs in connection with this action, totaling \$3,656,113.06 through February, 2005. Plaintiffs' argue that Liberty incurred costs in enforcing the Tolling Agreement and not the GTN Guarantee and that the GTN Guarantee allows costs only for expenses incurred for the enforcement of the GTN Guarantee. Further, plaintiffs note that the arbitration panel specifically held that each party to the Tolling Agreement shall bear their own costs. The court finds that the costs and fees incurred by Liberty were not in enforcing the GTN Guarantee, but in enforcing the Tolling Agreement. Accordingly, Liberty is not entitled to its costs and fees.

(4) Plaintiffs' Standing to Direct Application of Payments Under the GTN Guaranty.

This court holds that, absent an agreement to the contrary, Liberty may apply the funds in a manner that it finds commercially reasonable.

Counsel for Liberty is directed to submit an appropriate order confirming the arbitration award and dismissing this adversary proceeding, an appropriate judgment and an appropriate order dispensing of the contested matter consistent with this Memorandum.

⁷ The court is astounded that the International Council of Shopping Centers, perhaps Washington's most potent lobbyist on bankruptcy issues, was not able to improve its situation as to allow its absorption of security deposits, as it improved its position with respect to 11 U.S.C. § 365(d)(4) in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

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End of Memorandum of Decision

EXHIBIT 5

Execution Version

POST-CLOSING ESCROW AGREEMENT

This Post-Closing Escrow Agreement (this "Agreement"), dated as of November 1, 2004, is by and among National Energy & Gas Transmission, Inc., a Delaware corporation ("Parent"), Gas Transmission Corporation, a Delaware corporation ("GTC"), GTN Holdings LLC, a Delaware limited liability company ("Seller" and, together with Parent and GTC, the "Seller Parties"), TransCanada American Investments Ltd., a Delaware corporation ("Buyer"), Gas Transmission Northwest Corporation, a California corporation (the "Company"), and JPMorgan Chase Bank, as escrow agent (the "Escrow Agent").

WHEREAS, Buyer, TransCanada Corporation, a corporation organized under the laws of Canada, and TransCanada PipeLine USA Ltd., a Nevada corporation, have entered into a Stock Purchase Agreement, dated as of February 24, 2004, as amended (the "Purchase Agreement"), with the Seller Parties, for the purchase of all of the issued and outstanding shares of capital stock of the Company (capitalized terms used herein and not otherwise defined herein have the meaning assigned to such terms in the Purchase Agreement);

WHEREAS, pursuant to Section 2.2(a) of the Purchase Agreement, Buyer is required to transfer at the Closing \$241,000,000 (the "Escrow Amount") by confirmed wire transfer of immediately available funds to the Escrow Agent;

WHEREAS, the Escrow Amount is intended to cover certain obligations of the Acquired Companies in connection with the Covered Guarantees (as defined in the Purchase Agreement), each of which is listed on Schedule A together with the Full Face Amount as set forth on Schedule 4.19(a) of the Purchase Agreement, as amended through and including the date hereof; and

WHEREAS, Buyer and the Seller Parties desire that the Escrow Agent hold the Escrow Amount as provided in this Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto, intending to be legally bound, do hereby agree as follows:

1. **Establishment of Escrow.**

(a) On the date hereof, Buyer shall wire transfer in immediately available funds to the Escrow Agent an amount equal to the Escrow Amount in accordance with Section 2.2(a) of the Purchase Agreement.

(b) The Escrow Agent hereby agrees to act as escrow agent and to hold, safeguard and disburse the Escrow Amount pursuant to the terms and conditions hereof. For all purposes hereof, "Escrow Amount" shall be the initial Escrow Amount (x) as reduced by (i) any

EXHIBIT

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payments made or funds released from time to time to Recipients (as defined below) and/or Seller pursuant to Section 3(b), Section 3(c) or Section 3(d), (ii) any payments made or funds released from time to time to Recipients and/or the Company pursuant to Section 3(c) or Section 3(d), and (iii) any losses on investments in excess of the income and interest earned prior to termination of this Agreement and (y) as increased by any Supplemental Deposits (as defined below) made pursuant to Section 3(d). For all purposes under this Agreement, with respect to payments to be made, or funds released, to the Company, the Company shall have the right to direct the Escrow Agent to make such payments or release such funds to any designee of the Company; provided that it shall have provided the Escrow Agent with reasonable advance written notice of such direction (including appropriate wiring instructions for such designee). The Escrow Amount shall not include any income or interest on the Escrow Amount in excess of the losses on investments prior to the termination of this Agreement, which excess shall be the property of Seller and paid pursuant to Section 2. In no event shall any portion of the Escrow Amount be deemed to be property of Parent's or its subsidiaries' bankruptcy estates unless and until it is released to Seller in accordance with the terms of this Agreement; provided, however, Seller shall pay all income, withholding and any other taxes imposed on or measured by income, to the extent attributable to the Escrow Amount or to interest or earnings thereon and shall file, or cause to be filed, all tax and information returns applicable thereto.

2. Investment of Escrow Amount. The Escrow Amount shall be invested and reinvested by the Escrow Agent through a separate account in the JPMorgan Prime Money Market Fund, as fully described in the Prospectus for the JPMorgan Money Market Funds, dated December 29, 2003. Buyer and the Seller Parties hereby reserve the right to direct the Escrow Agent, upon joint written directions from Buyer and Seller, to invest and reinvest the Escrow Amount, from time to time, as directed. In no event shall the Escrow Agent use all or any portion of the Escrow Amount to offset any amounts that may be owed to the Escrow Agent or any of its affiliates, as a result of any other transaction, agreement or claim, by the parties to this Agreement or by their affiliates. The Escrow Agent shall only have the right to liquidate any investments held in order to provide funds necessary to make required payments under this Agreement. Any income and interest on the Escrow Amount in excess of the losses on investments prior to the termination of this Agreement shall be paid to Seller at such time as the Full Face Amount of each Covered Guarantee has been reduced to zero.

3. Release of the Escrow Amount and Portions Thereof to Recipients, Seller or the Company.

(a) General. The Escrow Agent shall hold the Escrow Amount in its possession until instructed to deliver the Escrow Amount (or any specified portion thereof) in accordance with (i) joint written instructions from Seller and Buyer; (ii) a Section 3(b) Notice (as defined below) provided unilaterally by the Seller Parties; (iii) a Section 3(c) Notice (as defined below) provided unilaterally by Buyer; (iv) a Section 3(d) Notice (as defined below) provided unilaterally by Buyer; or (v) a Relevant Order (as defined below). The Escrow Agent shall be authorized to act on any document reasonably believed to be genuine and to be signed by the proper party or parties, and, subject to Section 6 of this Agreement, will incur no liability in so acting.

(b) Releases Pursuant to Unilateral Instructions of the Seller Parties. Subject to the provisions of this Section 3(b), the Escrow Agent shall release all or a portion of the Escrow Amount to one or more third parties (including, without limitation, the debtors in the Bankruptcy Cases, the obligations of which are secured by any Covered Guarantee (the "ET Debtors"), any trust or other disbursement account established for the benefit of the creditors of the ET Debtors, and any beneficiary under a Covered Guarantee) (each such third party, a "Recipient") and/or Seller upon receipt of a Section 3(b) Notice. A "Section 3(b) Notice" means unilateral written instructions delivered by the Seller Parties to the Escrow Agent, in substantially the form of Exhibit C, specifying the following: (1) that, subject only to the receipt by a Recipient or Recipients of the stated Payment Amount (as defined below), if applicable, (A) a Preference Release Event (as defined below) has or, subject only to the receipt by such Recipients of the stated Payment Amount, will occur with respect to the DTE-Georgetown Guarantee, (B) both a Preference Release Event and a Termination Release Event (as defined below) have or, subject only to the receipt by such Recipients of the stated Payment Amount, will occur with respect to the Liberty Guarantee, or (C) a Termination Release Event has or, subject only to the receipt by such Recipients of the stated Payment Amount, will occur with respect to an Other Guarantee; (2) the specific Covered Guarantee subject to such Termination Release Event and/or Preference Release Event; (3) the Full Face Amount of such Covered Guarantee as of the date such instructions are delivered; (4) the portion of the Escrow Amount, if any, to be released to such Recipients in respect of such Covered Guarantee, which shall not in any event be more than the Full Face Amount of such Covered Guarantee as of such date (the "Payment Amount"); provided, however, that if no amount is so payable to a Recipient, the instructions shall specify such Payment Amount to be zero; (5) wiring instructions, if any, to direct any Payment Amount to be paid to any Recipient entitled to receive the same in accordance with the terms of the Covered Guarantee or the settlement or other resolution of the same, as determined by the Seller Parties in their sole discretion; and (6) the Section 3(b) Difference Amount (as defined below) or the Interim Disbursement Amount (as defined below), if any, to be released to Seller. A copy of any Section 3(b) Notice shall be delivered to Buyer simultaneously with the delivery of such Section 3(b) Notice to the Escrow Agent and such copy shall be accompanied by true, accurate and complete copies of the applicable release, discharge, written settlement, judicial determination, arbitration decision, certified Order and any other document or supporting information as Buyer may deem necessary, in its reasonable discretion, to evidence the Preference Release Event and/or Termination Release Event.

The "Full Face Amount" of a Covered Guarantee as of any date means the full face amount set forth opposite such Covered Guarantee on Schedule A less the sum of all amounts with respect to such Covered Guarantee that have been released from the Escrow Amount prior to such date, whether to Recipients, Seller or the Company. The Full Face Amount of each then-remaining Covered Guarantee shall be reduced proportionately each time that an Excess Cost Amount is released from the Escrow Amount. Buyer and/or the Seller Parties shall be responsible for calculating the Full Face Amount of a Covered Guarantee as of any date.

A "Preference Release Event" means, with respect to the DTE-Georgetown Guarantee or the Liberty Guarantee, any of the following: (i) the occurrence of the effective date under a plan of reorganization or liquidation ("ET Plan") for each of the ET Debtors that provides for the (A) payment in full of all allowed claims filed by unsecured creditors of the ET Debtors in their

Bankruptcy Cases and/or (B) waiver by each ET Debtor and its estate of any rights to recover or avoid preferential transfers under Section 547 of the Bankruptcy Code related to such Covered Guarantee; (ii) the expiration of the relevant statute of limitations period with respect to any action to avoid or recover a preferential transfer under Section 547 of the Bankruptcy Code that may be brought by any ET Debtor or its estate with respect to any amount paid with respect to the underlying obligations that are or were secured by such Covered Guarantee; (iii) an irrevocable and unconditional release in full (by written release and discharge, written settlement, judicial determination, arbitration or otherwise) by each ET Debtor and its estate of all rights to recover or avoid preferential transfers under Section 547 of the Bankruptcy Code that may be brought with respect to any amount paid or payable with respect to the underlying obligations that are or were secured by such Covered Guarantee; or (iv) the occurrence of an interim, periodic or final distribution to holders of allowed general unsecured claims under the ET Plan, provided the ET Plan (A) provides that any and all claims held by any Acquired Company against the ET Debtors that arise as a result of the recovery of an avoided transfer or transfers under Section 547 of the Bankruptcy Code resulting from the payment of any debt secured by any Covered Guarantee are allowable as general unsecured claims and not subject to subordination, (B) requires that such claims be treated and satisfied in the same manner as allowed general secured claims against the ET Debtors, and (C) provides for adequate distribution reserves with respect to such claims of the Acquired Companies that may be allowed after the effective date of the ET Plan.

A "Termination Release Event" means, with respect to the Liberty Guarantee or an Other Guarantee, an irrevocable and unconditional release in full (by written release and discharge, written settlement, judicial determination, arbitration or otherwise) of the Acquired Companies from any liability under such Covered Guarantee pursuant to which each Acquired Company is fully and finally released and, as a result, will have no further obligations under such Covered Guarantee.

The Escrow Agent has no duty to determine the Full Face Amount of any Covered Guarantee or if a Preference Release Event or Termination Release Event has occurred and shall be entitled to rely upon the representations made by Buyer and/or the Seller Parties with respect thereto.

If, within ten (10) business days after receipt by the Escrow Agent and Buyer of a Section 3(b) Notice:

(i) the Escrow Agent shall not have received a written objection to such Section 3(b) Notice from Buyer, then the Escrow Agent shall promptly, but in no event later than the next following business day, (A) release the relevant Payment Amount, if any, to the Recipient in accordance with such instructions, (B) in the case of a Termination Release Event or any Preference Release Event specified in clauses (i) through (iii) of the definition thereof, release to Seller the difference, if any, between (1) the Payment Amount and (2) the Full Face Amount of such Covered Guarantee (such difference, the "Section 3(b) Difference Amount"), (C) in the case of a Preference Release Event specified in clause (iv) of the definition thereof, release to Seller an amount equal to the product of (1) the Full Face Amount of such Covered Guarantee *less*

the Payment Amount and (2) the percentage distribution then made to holders of allowed general unsecured claims under the ET Plan (such amount, the "Interim Disbursement Amount"), and (D) in the case of each of (A) through (C) hereof, notify Buyer in writing of the release of such amounts; or

(ii) the Escrow Agent shall have received a written objection to such Section 3(b) Notice from Buyer (a copy of which objection shall be sent simultaneously to the Seller Parties) (a "Buyer Objection Notice"), in substantially the form of Exhibit D, then such Payment Amount, Section 3(b) Difference Amount and Interim Disbursement Amount, as the case may be, shall be deemed to be a "Buyer Disputed Payment" and the Escrow Agent shall only release such amounts upon the receipt by the Escrow Agent of (x) joint written instructions from Buyer and the Seller Parties, or (y) a Final Determination (as defined below) with respect to such Buyer Disputed Payment, in which case the Escrow Agent shall release (A) to the relevant Recipients, the Payment Amount, if any, provided in such Final Determination and (B) to Seller, the Section 3(b) Difference Amount, if any, or the Interim Disbursement Amount, if any, provided in such Final Determination.

(c) Releases Pursuant to Unilateral Instructions of Buyer. Subject to the provisions of this Section 3(c), the Escrow Agent shall release all or a portion of the Escrow Amount to the Company and/or, if applicable, Seller upon receipt of a Section 3(c) Notice. A "Section 3(c) Notice," in substantially the form of Exhibit E, means unilateral written instructions delivered by Buyer to the Escrow Agent, with a copy delivered simultaneously to the Seller Parties, specifying the following: (1) that Buyer has provided to Parent notice of the initial communication relating to a Covered Guarantee in accordance with Section 7.18(c) of the Purchase Agreement; (2) that within five (5) business days from the receipt of such notice Parent either (x) has not responded to such notice or (y) has instructed Buyer in writing (which written communication shall be provided to the Escrow Agent) that it will not pursue a Guarantee Settlement Action (as defined in the Purchase Agreement) in connection with such Covered Guarantee; (3) that any Acquired Company irrevocably paid to a Recipient an amount (a "Company Payment Amount") in connection with the obligations that are or were secured by such Covered Guarantee, which Company Payment Amount shall not exceed the Full Face Amount of such Covered Guarantee (such amount, the "Reimbursement Amount"); and (4) the Section 3(c) Difference Amount (as defined below), if applicable, to be released to Seller. A "Section 3(c) Notice" shall also include unilateral written instructions delivered by Buyer to the Escrow Agent, with a copy delivered simultaneously to the Seller Parties, specifying that the Acquired Companies have incurred Company Stay/Appeal Costs in excess (the amount of such excess, the "Excess Costs Amount") of the Supplement Deposit(s) made by the Seller Parties with respect to a Relevant Order.

If, within ten (10) business days after receipt by the Escrow Agent and the Seller Parties of a Section 3(c) Notice:

(i) the Escrow Agent shall not have received a written objection to such Section 3(c) Notice from the Seller Parties, then the Escrow Agent shall promptly, but in no event later than the next following business day, release the Reimbursement Amount

or the Excess Costs Amount, as the case may be, to the Company in accordance with such instructions, and notify the Seller Parties in writing of the release of such amount; or

(ii) the Escrow Agent shall have received a written objection to such Section 3(c) Notice from the Seller Parties (a copy of which objection shall be sent simultaneously to Buyer) (a "Seller 3(c) Objection Notice"), in substantially the form of Exhibit F, then such Reimbursement Amount or Excess Costs Amount, as the case may be, shall be deemed to be a "Seller Disputed Payment" and the Escrow Agent shall only release such Reimbursement Amount or Excess Costs Amount to the Company and/or, if applicable, Seller, as the case may be, upon the receipt by the Escrow Agent of (x) joint written instructions from Buyer and the Seller Parties or (y) a Final Determination with respect to such Seller Disputed Payment.

If a Reimbursement Amount is released to the Company pursuant to this Section 3(c) and (A) the applicable Covered Guarantee is the DTE-Georgetown Guarantee and the related Company Payment Amount constituted a Preference Release Event, (B) the applicable Covered Guarantee is the Liberty Guarantee and the related Company Payment Amount constituted both a Preference Release Event and a Termination Release Event, or (C) the applicable Covered Guarantee is an Other Guarantee and the related Company Payment Amount constituted a Termination Release Event, then the Escrow Agent shall release to Seller the difference, if any, between (1) the Reimbursement Amount and (2) the Full Face Amount of such Covered Guarantee as of such date, as provided in Exhibit E.

(d) Release upon Relevant Order. If the Escrow Agent shall have received, either from the Seller Parties or from Buyer, (which party shall have simultaneously delivered a copy to each other party hereto), a notice substantially in the form of Exhibit G accompanied by a certified copy of a final decision of any Governmental Entity (as defined in the Purchase Agreement) of competent jurisdiction (a "Relevant Order"), instructing any Acquired Company to pay any amount to one or more Recipients (A) under any Covered Guarantee or (B) pursuant to a finding that an Acquired Company, DTE Georgetown, LLC or Liberty Electric Power, LLC has received a preferential transfer within the meaning of Section 547 of the Bankruptcy Code that is recoverable from an Acquired Company under Section 550 of the Bankruptcy Code, including in either case any interest, fine, penalty, award, damages or other amount in addition to any amount due under such Covered Guarantee or with respect to such preferential transfer, then, unless the Escrow Agent is not permitted to release such amount pursuant to the penultimate sentence of this paragraph, the Escrow Agent shall release on the 11th day (or the next following business day, if such 11th day is not a business day) after the date on which such Relevant Order is entered all or a portion of the Escrow Amount to such Recipients designated in such Relevant Order (or, if Buyer can provide the information provided in the Section 3(c) Notice, to the Company). The Seller Parties or Buyer shall provide the Escrow Agent with the notice substantially in the form of Exhibit G within a reasonable time of their receipt of a Relevant Order, and such notice shall indicate that date on which the Escrow Agent shall release any funds directed to be released. The Seller Parties shall have the right, in their sole discretion subject to the terms of this Section 3(d), to elect to pursue a stay or appeal of a Relevant Order (such election, a "Stay/Appeal Election"); provided, however, that the Seller Parties' right to make a Stay/Appeal Election in respect of a Relevant Order is conditioned upon the Seller Parties having

(A)(i) provided written notice of such Stay/Appeal Election, substantially in the form of Exhibit H, to each of Buyer, the Company and the Escrow Agent within ten (10) days after the date on which such Relevant Order is entered, and (ii) agreed in writing to post any bond required in connection with such stay or appeal and to indemnify each Acquired Company against any costs, expenses, fines, penalties, interest, award, damages or other amount in excess of that provided for in such Relevant Order reasonably incurred by such Acquired Company in connection with, or as a result of, the pursuit by the Seller Parties of the stay or appeal of such Relevant Order ("Company Stay/Appeal Costs") and (B) supplemented the Escrow Amount by the deposit from time to time (each, a "Supplemental Deposit") of amounts determined by Buyer in its reasonable discretion (which discretion may include consideration of the Escrow Amount then remaining hereunder relative to the Full Face Amounts of the Guarantees secured hereby as of the date of such Stay/Appeal Election) sufficient to secure the Seller Parties' indemnification obligations in respect of such Stay/Appeal Election. The Seller Parties shall promptly deliver to Buyer a certified copy of the applicable stay Order related to any Relevant Order with respect to which the Seller Parties delivered a Stay/Appeal Election. In the event that the Seller Parties make a timely Stay/Appeal Election, the Escrow Agent shall not release any amounts from the Escrow Amount with respect to the applicable Relevant Order pending a final resolution or abandonment of such stay or appeal effort by the Seller Parties unless, notwithstanding such efforts by the Seller Parties, the Company shall deliver written instructions to the Escrow Agent in substantially the form of Exhibit I stating that the Company is nevertheless required pursuant to the terms of such Relevant Order to make a payment. Subject to the provisions of the following sentence, the Escrow Agent shall release all or a portion of the Supplemental Deposits to the Company upon receipt of a written notice from Buyer (with a copy sent simultaneously to the Seller Parties) setting forth in reasonable detail the Company Stay/Appeal Costs incurred (the "Company Stay/Appeal Amount") by any Acquired Company (a "Section 3(d) Notice"), in substantially the form of Exhibit J.

If, within ten (10) business days after receipt by the Escrow Agent and the Seller Parties of a Section 3(d) Notice:

(i) the Escrow Agent shall not have received a written objection to such Section 3(d) Notice from the Seller Parties, then the Escrow Agent shall promptly, but in no event later than the next following business day, (A) release the relevant Company Stay/Appeal Amount to the Company in accordance with such instructions, and (B) release to Seller the difference, if any, between (1) the Company Stay/Appeal Amount and (2) the Supplemental Deposit(s) made with respect to such Stay/Appeal Election; or

(ii) the Escrow Agent shall have received a written objection to such Section 3(d) Notice from the Seller Parties (a copy of which objection shall be sent simultaneously to Buyer) (a "Seller 3(d) Objection Notice", and together with any Seller 3(c) Objection Notice, a "Seller Objection Notice"), in substantially the Form of Exhibit K, then such Company Stay/Appeal Amount shall be deemed to be a "Seller Disputed Payment" and the Escrow Agent shall only release the amounts specified in the Section 3(d) Notice to the Company and/or, if applicable, Seller, as the case may be, upon the receipt by the Escrow Agent of (x) joint written instructions from Buyer and the Seller Parties or (y) a Final Determination with respect to such Seller Disputed Payment.

If the applicable Covered Guarantee is the DTE-Georgetown Guarantee and a Preference Release Event shall have occurred as a result of a Relevant Order, then the Escrow Agent shall also release to Seller the difference, if any, between (A) all amounts paid to Recipients and/or the Company pursuant to the Relevant Order with respect to the DTE-Georgetown Guarantee and (B) the Full Face Amount with respect to the DTE-Georgetown Guarantee as of such date.

If the applicable Covered Guarantee is the Liberty Guarantee and both a Termination Release Event and a Preference Release Event shall have occurred as a result of a Relevant Order, then the Escrow Agent shall also release to Seller the difference, if any, between (A) all amounts paid to Recipients and/or the Company pursuant to the Relevant Order with respect to the Liberty Guarantee and (B) the Full Face Amount with respect to the Liberty Guarantee as of such date.

If the applicable Covered Guarantee is an Other Guarantee and a Termination Release Event shall have occurred as a result of a Relevant Order, then the Escrow Agent shall also release to Seller the difference, if any, between (A) all amounts paid to Recipients and/or the Company pursuant to the Relevant Order with respect such Other Guarantee and (B) the Full Face Amount with respect to such Other Guarantee as of such date.

4. Final Determination. If Buyer or the Seller Parties shall have delivered a timely Buyer Objection Notice or Seller Objection Notice, as the case may be, then Buyer and the Seller Parties shall use good faith efforts to reach written agreement within 20 days thereafter as to the Buyer Disputed Payment or the Seller Disputed Payment, as the case may be. If the Buyer Disputed Payment or the Seller Disputed Payment shall not have been resolved within such 20-day period, then determination of the Buyer Disputed Payment or the Seller Disputed Payment shall be submitted by the parties to binding arbitration by an independent nationally recognized accounting firm without any material financial relationship to any party, as mutually selected by Buyer and the Seller Parties within ten (10) days after the end of such 20-day period. The fees and expenses of such arbitration shall be borne 50% by the Seller Parties, on the one hand, and 50% by Buyer, on the other hand. The determination of any Buyer Disputed Payment or Seller Disputed Payment by such arbitration shall be final and binding upon Buyer and the Seller Parties. Any final resolution of a Buyer Disputed Payment or Seller Disputed Payment pursuant to the terms of this Section 4 shall be a "Final Determination" and written notice of such Final Determination shall be given to the Escrow Agent by the Seller Parties and Buyer immediately upon resolution thereof.

5. Termination of Escrow; Resignation or Removal of Escrow Agent. This Agreement shall terminate at such time as there is no longer any Escrow Amount. The provisions of Sections 6 and 7 shall survive a termination of this Agreement or the removal or resignation of the Escrow Agent. Upon the resignation of the Escrow Agent, the parties hereto shall consent to the appointment of a mutually acceptable successor escrow agent. The Escrow Agent shall not be removed without the consent of Buyer and the Seller Parties to such removal and the appointment of a successor escrow agent by Buyer and the Seller Parties. Any reference hereunder to the Escrow Agent shall, following the appointment of a successor escrow agent pursuant to this Section 5, be deemed to refer to such successor escrow agent as if such successor

escrow agent were an original signatory hereto (provided that such successor escrow agent shall not have any liability with respect to actions of its predecessor(s) hereunder).

6. Indemnity. The Seller Parties and Buyer shall indemnify and hold the Escrow Agent harmless against any loss, claim, damage, liability, or expense incurred in connection with any action, suit, proceeding, claim or alleged liability arising from this Agreement; provided, however, that the Escrow Agent shall not be so indemnified or held harmless for its negligence or acts in bad faith by it or any of its agents or employees, nor for its breach of this Agreement. The Seller Parties and Buyer, to the extent permitted by applicable law, hereby waive any rights or claims against the Escrow Agent for special, indirect or consequential loss or damage of any kind (including, but not limited to, lost profits), even if the Escrow Agent has been advised of the likelihood of such loss or damage and regardless of the form of action. The parties hereby grant the Escrow Agent a lien on, right of set-off against and security interest in the Escrow Amount for the payment of any claim for indemnification, compensation, expenses and amounts due hereunder.

7. Assignment of Subrogation Rights. Buyer and the Company shall hereby assign to Seller (and Seller shall accept such assignments) any and all rights the Company or Buyer may have pursuant to which the Company or Buyer are subrogated to any rights of the Recipient against the primary obligor or the primary guarantor under any Guarantee in respect of any amounts paid to such Recipient out of the Escrow Amount in accordance with this Agreement.

8. Expenses. The Escrow Agent shall be entitled to be paid a fee for its services pursuant to the fee schedule attached as Exhibit A hereto and to be reimbursed for all reasonable, actual, out-of-pocket expenses incurred by the Escrow Agent in the administration of this Agreement (including reasonable legal costs incurred by the Escrow Agent). Such fees and expenses shall be shared equally by the Seller Parties, on the one hand, and Buyer, on the other hand. Any expenses incurred by any Seller Party or Buyer in connection with this Agreement shall be borne by the party incurring the expenses.

9. Notices. All notices and other communications required or permitted to be given or made hereunder shall be in writing and shall be deemed to have been duly given or made if (i) delivered personally, (ii) transmitted by first class registered or certified mail, postage prepaid, return receipt requested, (iii) delivered by prepaid overnight courier service, or (iv) delivered by confirmed telecopy or facsimile transmission to the parties at the following addresses (or at such other addresses as shall be specified by the parties by similar notice):

If to Buyer or the Company:

c/o TransCanada Corporation
TransCanada PipeLines Tower
450 First Street, S.W.
Calgary, Alberta T2P5H1

Attention: Albrecht W.A. Bellstedt, Q.C., Executive Vice President,
Law and General Counsel

Facsimile: (403) 920-2410

with a copy to:

Mayer, Brown, Rowe & Maw LLP
190 South LaSalle Street
Chicago, IL 60603
Attention: Marc F. Sperber, Esq.
Facsimile: (312) 701-7711

If to any Seller Party:

National Energy & Gas Transmission, Inc.
7600 Wisconsin Avenue
Bethesda, MD 20814, USA
Attention: Sanford L. Hartman
Facsimile: (301) 280-6319

with a copy to:

Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019
Attention: William H. Gump, Esq.
Jeffrey R. Poss, Esq.
Facsimile: (212) 728-8111

If to the Escrow Agent:

JPMorgan Chase Bank
4 New York Plaza, 21st Floor
New York, NY 10004
Attention: Joe Morales
Telephone: (212) 623-5078
Facsimile: (212) 623-6165

Notices shall be effective (i) if delivered personally or sent by courier service, upon actual receipt by the intended recipient, (ii) if mailed, upon the earlier of five days after deposit in the mail or the date of delivery as shown by the return receipt therefore, or (iii) if sent by telecopy or facsimile transmission, when the answer back is received.

10. Duties of the Escrow Agent. The duties and responsibilities of the Escrow Agent shall be limited to those expressly set forth herein. The Escrow Agent shall have no liability under and no duty to inquire as to the provisions of any agreement other than this Agreement and the Deposit Escrow Agreement. In the event that the Escrow Agent shall be uncertain as to its duties or rights hereunder or shall receive instructions, claims or demands from any party hereto which,

in its opinion, conflict with any of the provisions of this Escrow Agreement, it shall be entitled to refrain from taking any action and its sole obligation shall be to keep safely all property held in escrow until it shall be directed otherwise in writing by all of the other parties hereto, by a Final Determination or by a final order or judgment of a Governmental Entity of competent jurisdiction.

11. Assignment; Amendment. No party may assign its rights or obligations under this Agreement without the prior written consent of all other parties hereto and upon 30 days prior written notice to the Escrow Agent. This Agreement may not be amended except by a written agreement executed by each of the parties hereto.

12. Governing Law; Jurisdiction; Waiver of Jury Trial. This Agreement shall be construed, performed and enforced in accordance with, and governed by, the laws of the State of New York, without giving effect to the principles of conflicts of laws thereof. Except for disputes with respect to Buyer Disputed Payments and Seller Disputed Payments, which shall be subject to resolution as contemplated by Section 4 hereof, the Bankruptcy Court shall retain exclusive jurisdiction to enforce the terms of this Agreement and to decide any claims or disputes that may arise under this Agreement. Notwithstanding the foregoing, if the Bankruptcy Cases to which Parent is a party have closed, except for disputes with respect to Buyer Disputed Payments and Seller Disputed Payments, each of the parties irrevocably (i) submits to the jurisdiction of the courts of the State of New York and the federal courts of the United States located in New York, New York regarding any such claim or dispute; (ii) agrees that all claims and disputes shall be heard and determined in such courts; (iii) waives, to the fullest extent permitted by applicable law, any objection that they may now or hereafter have to the venue of any such claim or dispute brought in such court or any defense of inconvenient forum for the maintenance of such claim or dispute; and (iv) agrees that a judgment in any claim or dispute may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by applicable law. Each party hereby knowingly, voluntarily and intentionally waives any right it may have to a trial by jury in respect of litigation arising out of, under or in connection with this Agreement or the transactions contemplated hereby.

13. Miscellaneous. This Agreement and, with respect to Buyer and the Seller Parties, the Purchase Agreement and the Related Agreements embody the entire agreement and understanding of the parties concerning the Escrow Amount. The headings in this Agreement are intended solely for convenience or reference and shall be given no effect in the construction or interpretation of this Agreement. This Agreement shall bind and inure to the benefit of the parties hereto and their respective, heirs, personal representatives, successors and permitted assigns, and nothing in this Agreement is intended to or shall confer upon any other Person any rights or remedies.

14. Severability. If any provision of this Agreement is held by a court or other competent authority to be void or unenforceable, in whole or part, this Agreement shall continue to be valid as to the other provisions hereof and the remainder of the affected provision.

15. Counterparts. This Agreement may be executed in two or more counterparts (including by facsimile), and each such executed counterpart shall be, and shall be deemed to be, an

original, but all of which shall constitute, and shall be deemed to constitute, in the aggregate but one and the same instrument.

16. Security Procedures. In the event funds transfer instructions are given (other than in writing at the time of execution of this Agreement), whether in writing, by telecopier or otherwise, the Escrow Agent is authorized to seek confirmation of such instructions by telephone call-back to the person or persons designated on Exhibit B hereto, and the Escrow Agent may rely upon the confirmation of anyone purporting to be the person or persons so designated. The persons and telephone numbers for call-backs may be changed only in a writing actually received and acknowledged by the Escrow Agent. The Escrow Agent and the beneficiary's bank in any funds transfer may rely solely upon any account numbers or similar identifying numbers provided by the Buyer or the Seller Parties to identify (i) the beneficiary, (ii) the beneficiary's bank, or (iii) an intermediary bank. The Escrow Agent may apply any of the escrowed funds for any payment order it executes using any such identifying number, even when its use may result in a person other than the beneficiary being paid, or the transfer of funds to a bank other than the beneficiary's bank or an intermediary bank designated. The parties to this Agreement acknowledge that these security procedures are commercially reasonable.

17. TINs. Upon execution of this Agreement, the parties hereto shall provide the Escrow Agent with a fully executed W-8 or W-9 form. In addition, all interest or other income earned under this Agreement shall be allocated and/or paid as set forth herein and reported by the recipient to the Internal Revenue Service or any other taxing authority. Notwithstanding such written directions, the Escrow Agent shall report and, as required withhold any taxes as it determines may be required by any law or regulation in effect at the time of the distribution. In the event that any earnings remain undistributed at the end of any calendar year, the Escrow Agent shall report to the Internal Revenue Service or such other authority such earnings as it deems appropriate or as required by any applicable law or regulation or, to the extent consistent therewith, as directed in writing by Buyer and the Seller Parties. In addition, Escrow Agent shall withhold any taxes it deems appropriate and shall remit such taxes to the appropriate authorities.

[SIGNATURE PAGES FOLLOW]

To evidence their agreement, the parties have caused this Agreement to be executed on the date first written above.

GTN HOLDINGS LLC

By: P. Chrisman Iribre
Name: P. Chrisman Iribre
Title: President

GAS TRANSMISSION CORPORATION

By: P. Chrisman Iribre
Name: P. Chrisman Iribre
Title: President

**NATIONAL ENERGY & GAS
TRANSMISSION, INC.**

By: P. Chrisman Iribre
Name: P. CHRISMAN IRIBE
Title: EXECUTIVE VICE PRESIDENT

**TRANSCANADA AMERICAN
INVESTMENTS LTD.**

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

**JPMORGAN CHASE BANK
As Escrow Agent**

By: _____
Name: _____
Title: _____

To evidence their agreement, the parties have caused this Agreement to be executed on the date first written above.

GTN HOLDINGS LLC

By: _____
Name: _____
Title: _____


GAS TRANSMISSION CORPORATION

By: _____
Name: _____
Title: _____

**NATIONAL ENERGY & GAS
TRANSMISSION, INC.**

By: _____
Name: _____
Title: _____

**TRANSCANADA AMERICAN
INVESTMENTS LTD.**

By:  _____
Name: Russell K. Girling
Title: Chief Financial Officer

By:  _____
Name: Ronald B. Anderson
Title: Vice-President

**JPMORGAN CHASE BANK
As Escrow Agent**

By: _____
Name: _____
Title: _____

FROM

(THU) 10. 28' 04 11:38/ST. 11:38/NO. 4863517725 P 2

To evidence their agreement, the parties have caused this Agreement to be executed on the date first written above.

GTN HOLDINGS LLC

By: _____
Name:
Title:

GAS TRANSMISSION CORPORATION

By: _____
Name:
Title:

**NATIONAL ENERGY & GAS
TRANSMISSION, INC.**

By: _____
Name:
Title:

**TRANSCANADA AMERICAN
INVESTMENTS LTD.**

By: _____
Name:
Title:

By: _____
Name:
Title:

**JPMORGAN CHASE BANK
As Escrow Agent**

By: *John C. DeMauro*
Name:
Title:

**GAS TRANSMISSION
NORTHWEST CORPORATION**

By: P. Chrisman Iribe
Name: P. Chrisman Iribe
Title: President

Exhibit A

\$3,500 per year without pro-ration for partial years.

Exhibit B

**Telephone Number(s) for Call-Backs and
Person(s) Designated to Confirm Funds Transfer Instructions**

If to Buyer or the Company:

	<u>Name</u>	<u>Telephone Number</u>
1.	<u>Richard Blakemore</u>	<u>(403) 920-2515</u>
2.	<u>Donald Marchand</u>	<u>(403) 920-2525</u>
3.	<u>Ron Anderson</u>	<u>(403) 920-2299</u>

If to Seller Parties:

	<u>Name</u>	<u>Telephone Number</u>
1.	<u>Charles P. Hollands</u>	<u>(301) 280-6594</u>
2.	<u>John C. Barpoulis</u>	<u>(301) 280-6964</u>

Telephone call-backs shall be made to each Buyer and Seller Parties if joint instructions are required pursuant to this Agreement.

Exhibit C

Form of Section 3(b) Notice.

The undersigned hereby provide this Section 3(b) Notice in accordance with Section 3(b) of the Post-Closing Escrow Agreement, dated November __, 2004 by and among National Energy & Gas Transmission, Inc., Gas Transmission Corporation, GTN Holdings LLC, Gas Transmission Northwest Corporation, TransCanada American Investments Ltd. and JPMorgan Chase Bank (the "Post-Closing Escrow Agreement"), and hereby inform the Escrow Agent that:

Subject to the receipt of the payment amount by the Recipient set forth below:

- ☐ A Preference Release Event has or will occur with respect to the DTE-Georgetown Guarantee;
- ☐ Both a Preference Release Event and a Termination Release Event have or will occur with respect to the Liberty Guarantee; or
- ☐ A Termination Release Event has or will occur with respect to an Other Guarantee.

The specific Covered Guarantee subject to such Termination Release Event or Preference Release Event is Guarantee number __, as set forth on Schedule A.

The Full Face Amount of the specific Covered Guarantee as of the date hereof is \$_____.

Subject to the provisions of Section 3(b)(i) and (ii) of the Post-Closing Escrow Agreement, the Escrow Agent is hereby directed to release \$_____ to _____ (the Recipient).

The wiring instructions for such release are:

Subject to the provisions of Section 3(b)(i) and (ii) of the Post-Closing Escrow Agreement, the Escrow Agent is hereby directed to release \$_____, representing the Section 3(b) Difference Amount or the Interim Disbursement Amount, to Seller.

Exhibit D

Form of Buyer Objection Notice.

The undersigned hereby provides this Buyer Objection Notice in accordance with Section 3(b) of the Post-Closing Escrow Agreement, dated November __, 2004 by and among National Energy & Gas Transmission, Inc., Gas Transmission Corporation, GTN Holdings LLC, Gas Transmission Northwest Corporation, TransCanada American Investments Ltd. and JPMorgan Chase Bank (the "Post-Closing Escrow Agreement"), and hereby informs the Escrow Agent that:

In accordance with the provisions of Section 3(b) of the Post-Closing Escrow Agreement, Buyer hereby objects to Seller's Section 3(b) Notice, dated _____ with respect to Covered Guarantee number ____, as set forth on Schedule A.

The Escrow Agent is hereby precluded from releasing any funds pursuant to the Section 3(b) Notice, dated _____, unless and until the Escrow Agent receives joint written instructions from Buyer and Seller or a Final Determination, as defined in the Post-Closing Escrow Agreement.

Exhibit E

Form of Section 3(c) Notice.

The undersigned hereby provides this Section 3(c) Notice in accordance with Section 3(c) of the Post-Closing Escrow Agreement, dated November __, 2004 by and among National Energy & Gas Transmission, Inc., Gas Transmission Corporation, GTN Holdings LLC, Gas Transmission Northwest Corporation, TransCanada American Investments Ltd. and JPMorgan Chase Bank (the "Post-Closing Escrow Agreement"), and hereby informs the Escrow Agent that:

Buyer has provided Notice to Parent of the initial communication relating to Covered Guarantee number __, as set forth in Schedule A, in accordance with Section 7.18(c) of the Purchase Agreement.

Parent has

- ☐ not responded to such notice within 5 days, or
- ☐ instructed Buyer in writing (which is attached to these instructions) that it will not pursue a Guarantee Settlement Action.

The Recipient, as set forth in Covered Guarantee number __, as set forth on Schedule A, has been paid \$_____ by _____, which is an Acquired Company, as defined in the Purchase Agreement.

[Note: The preceding three paragraphs shall not be required for a Section 3(c) Notice covering only an Excess Costs Amount.]

Subject to the provisions of Section 3(c)(i) and (ii) of the Post-Closing Escrow Agreement, the Escrow Agent is hereby directed to release \$_____ (the Reimbursement Amount), to the Company.

In the event that the Reimbursement Amount is released, the Escrow Agent is hereby directed to release \$_____ (the Section 3(c) Difference Amount) to Seller.

Subject to the provisions of Section 3(c)(i) and (ii) of the Post-Closing Escrow Agreement, the Escrow Agent is hereby directed to release \$_____ (an Excess Costs Amount) to the Company.

Exhibit F

Form of Seller 3(c) Objection Notice.

The undersigned hereby provide this Section 3(c) Objection Notice in accordance with Section 3(c) of the Post-Closing Escrow Agreement, dated November __, 2004 by and among National Energy & Gas Transmission, Inc., Gas Transmission Corporation, GTN Holdings LLC, Gas Transmission Northwest Corporation, TransCanada American Investments Ltd. and JPMorgan Chase Bank (the "Post-Closing Escrow Agreement"), and hereby inform the Escrow Agent that:

In accordance with the provisions of Section 3(c) of the Post-Closing Escrow Agreement, the Seller Parties hereby object to Buyer's Section 3(c) Notice, dated _____ with respect to Covered Guarantee number _____, as set forth on Schedule A.

The Escrow Agent is hereby precluded from releasing any funds pursuant to the Section 3(c) Notice, dated _____, unless and until the Escrow Agent receives joint written instructions from Buyer and Seller or a Final Determination, as defined in the Post-Closing Escrow Agreement.

Exhibit G

Form of Instructions to Escrow Agent instructing the release of funds in accordance with Section 3(d) of the Post-Closing Escrow Agreement.

The undersigned, in accordance with Section 3(d) of the Post-Closing Escrow Agreement, dated November __, 2004 by and among National Energy & Gas Transmission, Inc., Gas Transmission Corporation, GTN Holdings LLC, Gas Transmission Northwest Corporation, TransCanada American Investments Ltd. and JPMorgan Chase Bank (the "Post-Closing Escrow Agreement"), hereby informs the Escrow Agent that:

A Relevant Order, as defined in the Post-Closing Escrow Agreement, with respect to Covered Guarantee number __, as set forth on Schedule A, has been entered by a Governmental Entity of competent jurisdiction, and a certified copy thereof is attached hereto.

The Post -Closing Escrow Agreement, the Escrow Agent is hereby directed to release \$_____ to _____ (the Recipient).

The wiring instructions for such release are:

The amount, if any, to be released to Seller is \$_____.

The amount, if any, to be released to Buyer is \$_____.

The Escrow Agent shall release funds pursuant to this notice on _____, which is 11 days after the date on which the Relevant Order was entered, unless the Escrow Agent receives a Stay/Appeal Election (as defined in the Post-Closing Escrow Agreement) from the Seller Parties prior to such date.

Exhibit H

Form of Stay/Appeal Election.

The undersigned, in accordance with Section 3(d) of the Post-Closing Escrow Agreement, dated November __, 2004 by and among National Energy & Gas Transmission, Inc., Gas Transmission Corporation, GTN Holdings LLC, Gas Transmission Northwest Corporation, TransCanada American Investments Ltd. and JPMorgan Chase Bank (the "Post-Closing Escrow Agreement"), hereby inform the Escrow Agent that:

In accordance with the provisions of Section 3(d) of the Post Closing Escrow Agreement, Seller hereby makes a Stay/Appeal Election.

The Escrow Agent is hereby precluded from releasing any funds as previously directed in the instructions, dated _____, issued pursuant to Section 3(d) with respect to Guarantee number _____, as set forth on Schedule A.

As required by Section 3(d), Seller hereby posts a Supplemental Deposit, in the amount of \$_____.

Such Supplemental Deposit shall be held by the Escrow Agent for the benefit of Buyer, and released in whole or in part to Buyer only upon the provision of a notice, substantially in the form of Exhibit J to the Post-Closing Escrow Agreement.

**AFFIRMED AS TO THE SUPPLEMENTAL
DEPOSIT AMOUNT:
TRANSCANADA AMERICAN
INVESTMENTS LTD.**

By: _____ Name:
Title:

By: _____ Name:
Title:

Exhibit I

Form of Notice to Be Delivered by Buyer pursuant to Section 3(d) after a Stay/Appeal Election.

The undersigned, in accordance with Section 3(d) of the Post-Closing Escrow Agreement, dated November __, 2004 by and among National Energy & Gas Transmission, Inc., Gas Transmission Corporation, GTN Holdings LLC, Gas Transmission Northwest Corporation, TransCanada American Investments Ltd. and JPMorgan Chase Bank (the "Post-Closing Escrow Agreement"), hereby informs the Escrow Agent that:

The Seller Parties timely made a Stay/Appeal Election on _____ with respect to the Relevant Order delivered to the Escrow Agent on _____ by [Buyer/Seller]. Notwithstanding the Seller Parties' efforts to obtain a stay of such Relevant Order, an Acquired Company is nevertheless required to pay \$_____ pursuant to the terms of such Relevant Order.

In accordance with Section 3(d) of the Post-Closing Escrow Agreement, the Escrow Agent is hereby directed to release \$_____ to _____, as provided in the Relevant Order.

The wiring instructions for such release are:

The amount, if any, to be released to Seller is \$_____

The amount, if any, to be released to Buyer is \$_____

Exhibit J

Form of Section 3(d) Notice.

The undersigned hereby provides this Section 3(d) Notice in accordance with Section 3(d) of the Post-Closing Escrow Agreement, dated November __, 2004 by and among National Energy & Gas Transmission, Inc., Gas Transmission Corporation, GTN Holdings LLC, Gas Transmission Northwest Corporation, TransCanada American Investments Ltd. and JPMorgan Chase Bank (the "Post-Closing Escrow Agreement"), and hereby provides notice to the Escrow Agent that:

In accordance with the provisions of Section 3(d), the Escrow Agent is hereby directed to release to the Company \$ _____, to be deducted from the Supplemental Deposit deposited by Seller in connection with the Notice dated _____, and as provided for by Seller with respect to Covered Guarantee number __, as set forth on Schedule A.

The amount, if any, to be released to Seller is \$ _____.

Exhibit K

Form of Seller 3(d) Objection Notice.

The undersigned hereby provide this Seller 3(d) Objection Notice in accordance with Section 3(d) of the Post-Closing Escrow Agreement, dated November __, 2004 by and among National Energy & Gas Transmission, Inc., Gas Transmission Corporation, GTN Holdings LLC, Gas Transmission Northwest Corporation, TransCanada American Investments Ltd. and JPMorgan Chase Bank (the "Post-Closing Escrow Agreement"), and hereby inform the Escrow Agent that:

In accordance with the provisions of Section 3(d) of the Post Closing Escrow Agreement, Seller hereby objects to Buyer's Section 3(d) Notice dated _____ with respect to Covered Guarantee number ____, as set forth on Schedule A.

The Escrow Agent is hereby precluded from releasing any funds pursuant to Buyer's instructions, dated _____, unless and until the Escrow Agent receives joint written instructions from Buyer and Seller or a Final Determination with respect to such Seller Disputed Amount, as defined in the Post-Closing Escrow Agreement.

SCHEDULE A

1. Guarantee by PG&E Energy Trading Holdings Corporation, PG&E National Energy Group, Inc., and the Company, in favor of BP Energy Company, BP Amoco Corporation, BP Canada Energy Marketing Corporation and BP Canada Energy Company, dated March 26, 2001 and amended by the First Amendment dated July 22, 2002. Full Face Amount of Guarantee \$40,000,000.
2. Guarantee by PG&E Corporation, in favor of El Paso Natural Gas Company, Tennessee Gas Pipeline Company, Midwestern Gas Transmission Company, Mohave Pipeline Company, El Paso Field Services, dated April 26, 1999, as amended by the First Amendment to the Guarantee, dated April 26, 1999. Assigned to the Company in the Assignment and Assumption Agreement between the Company and PG&E Corporation, dated December 28, 2000. Full Face Amount of Guarantee \$12,000,000.
3. Guarantee by PG&E Corporation, in favor of Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company, dated August 31, 2000, as amended by the Second Amendment, dated March 1, 2002. Assigned to the Company in the Assignment and Assumption Agreement, between the Company and PG&E Corporation, dated January 19, 2001. Full Face Amount of Guarantee \$5,000,000.
4. Guarantee by the Company in favor of Liberty Electric Power, LLC, dated February 6, 2001. Consent and Agreement between the Company, Liberty Electric Power, LLC and The Chase Manhattan Bank, dated February 6, 2001. Full Face Amount of Guarantee \$140,000,000.
5. Guarantee by PG&E Corporation, in favor of Southern Company Energy Marketing L.P. (name change to: Mirant Americas Energy Marketing LP), dated January 23, 1999, as amended by the First Amendment, dated January 5, 2001. Assigned to the Company in the Assignment and Assumption Agreement, between PG&E Corporation and the Company, dated December 28, 2000. Full Face Amount of Guarantee \$20,000,000.
6. Guarantee originally executed by PG&E in favor of DTE Georgetown, LLC, dated May 24, 2000, which was assigned to the Company on January 19, 2001. Full Face Amount of Guarantee \$24,000,000.

EXHIBIT 6

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

Civil No. 05-cv-2531 PJM

In re: National Energy & Gas Transmission, Inc., *et al.*,

Debtors.

National Energy & Gas Transmission, Inc., *et al.*,

Appellant,

v.

Liberty Electric Power, LLC,

Appellee.

**APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND**

(Paul M. Mannes, Judge)

BRIEF OF APPELLANT, NATIONAL ENERGY & GAS TRANSMISSION, INC., ET AL.



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Steven Wilamowsky, Esq.
Jessica S. Etra, Esq.
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(212) 728-8000

-and-

WHITEFORD, TAYLOR & PRESTON L.L.P.
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(410) 347-8700
Co- Counsel for the Debtors

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settlement during the mediation and the matter proceeded to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

After discovery and exchange of expert reports, the parties submitted their “baseball arbitration” offers.⁵ Liberty’s baseball arbitration offer was approximately \$155 million and ET Power’s baseball arbitration offer was approximately \$72 million. The hearings took place in November and December 2004. Revised offers were submitted to the arbitration panel at the close of the hearings. Liberty’s revised baseball arbitration offer was \$140 million and ET Power’s revised baseball arbitration offer was \$90 million. In a decision dated March 30, 2005, the arbitration panel selected Liberty’s offer of \$140 million plus interest.

E. The Liberty Escrow

On February 24, 2004, NEGТ and certain of its non-debtor subsidiaries entered into a stock purchase agreement with TransCanada Corporation and certain of its affiliates (collectively, “TransCanada”), whereby the parties agreed that all of the issued and outstanding shares of GTN would be sold to TransCanada (the “GTN Sale”). The GTN Sale was approved by the Bankruptcy Court on May 13, 2004 and consummated on November 1, 2004. In accordance with the terms of the GTN Sale, the face amount of the GTN Guarantee (\$140 million) was reserved in escrow and held back from the purchase price (the “Liberty Escrow”). Pursuant to the terms of the GTN Sale agreements, any liability of GTN to Liberty on account of the GTN Guarantee would be paid directly from the Liberty Escrow, while any remaining balance would be released to NEGТ.

⁵ In a baseball arbitration, each party, prior to the arbitration, submits a proposed award amount to the arbitrator. The arbitrator must then choose one of the proposed offers as the final award.

D. THE BANKRUPTCY COURT ERRED IN CONCLUDING THAT THE DEBTORS' ESTATES WOULD NOT BE DIMINISHED BY PERMITTING LIBERTY TO UNILATERALLY APPLY FUNDS RECEIVED IN SATISFACTION OF THE GUARANTEE TO THAT PORTION OF LIBERTY'S CLAIM SUBJECT TO DISALLOWANCE BY SECTION 502(B)(2) OF THE BANKRUPTCY CODE

The Bankruptcy Court incorrectly concluded that "[t]he payment of interest by GTN does not diminish the estate." Memorandum of Decision at p. 8. For whatever reason, the Bankruptcy Court appears to have disregarded the fact that GTN was fully protected by a cash account containing *debtor funds* (i.e., the Liberty Escrow)⁸ from which the \$140 million payment of the Award was made, in full and final satisfaction of any claims against GTN.⁹ Thus, every dollar paid to Liberty to date has come from funds of the Debtors that would otherwise be available to be distributed to unsecured creditors. Because the principal amount of the Award already has been paid to Liberty, Liberty's remaining claim against ET Power, as provided under the Order, will enable Liberty to collect both principal and post-petition interest from the Debtors, in contravention of section 502(b)(2) of the Bankruptcy Code.

Significantly, the key factor supporting the Mayan Networks decision was that court's consideration of whether the debtor, rather than the non-debtor third-party, would have been affected by the landlord's desired allocation of the letter of credit proceeds. Mayan Networks, 306 B.R. at 299 ("There is nothing in the statute or in case law that suggests that the limitation in section 502(b)(6) applies only to amounts that are paid directly from property of the

⁸ As noted above, the Liberty Escrow was created entirely out of monies otherwise payable to NEG.T. Moreover, GTN at no time had any claim to the funds in the Liberty Escrow. By its own terms, any funds in the Liberty Escrow not ultimately payable to Liberty were to be returned to NEG.T.

⁹ As GTN's liability was capped at \$140 million, GTN has no further obligation to Liberty.

estate. Rather, the appropriate analysis looks to the impact that the draw upon the letter of credit has on property of the estate.”).

GTN’s obligation under the GTN Guarantee was fully collateralized by the Liberty Escrow, just as the bank’s obligation was fully collateralized in Mayan Networks and, like the bank in Mayan Networks, GTN therefore has no resulting claim against the Debtors’ estates. See 306 B.R. at 300. Thus, like Mayan Networks, “we do not have a true third party obligor who bears substantial risk.” Id. As such, it is not GTN, but rather the Debtors and their creditors -- the very parties that the section 502(b)(2) limit is intended to benefit -- that have borne the cost of the Award, and that will bear the cost of post-petition interest if the Order is not reversed.

The Order, which permits payment of post-petition interest, will have the effect of diminishing the Debtors’ estates and, consequently, reducing recoveries for other unsecured creditors. This result runs counter to the purposes of the Bankruptcy Code. See Loewen, 274 B.R. at 444 (“Allowing Claimants to recover post-petition interest would benefit the Claimants at the expense of other unsecured creditors who will not recover the full amount of their claims. Such a result is contrary to the principle that similarly-situated creditors be treated equally.”)

E. THE BANKRUPTCY COURT ERRED BY ALLOWING LIBERTY TO OBTAIN INDIRECTLY WHAT IT WAS PROHIBITED FROM OBTAINING UNDER SECTION 502(B)(2) OF THE BANKRUPTCY CODE

By permitting Liberty to collect the *full amount* of its claim from the Debtors *in addition to post-petition interest*, the Bankruptcy Court is enabling Liberty to circumvent section 502(b)(2) of the Bankruptcy Code and, therefore, accomplish indirectly what it could not accomplish directly. Courts have routinely held that creditors are prohibited from evading the Bankruptcy Code’s provisions in this manner. See, e.g., In re Hart Ski Mfg. Co., Inc., 7 B.R.

Pursuant to the Order, the Judgment confirming the Award is \$162,725,436.59 (the "Judgment Amount"). The Judgment Amount represents the aggregate of the principal amounts of the Award, the June and July Invoices, plus post-petition interest accrued through the date of payment from the Liberty Escrow. Because \$140,000,000 was released to Liberty from the Liberty Escrow on May 19, 2005, the Judgment Amount and the Liberty's claim should be reduced by this amount.

Thus, even assuming that the Bankruptcy Court did not err as a matter of its interpretation of section 502(b)(2), the Bankruptcy Court nonetheless erred in allowing a claim against ET Power in excess of what Liberty is owed.

CONCLUSION

For the foregoing reasons, the Bankruptcy Court's order granting the Motions should be reversed.

Dated: September 29, 2005

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and

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Co-Counsel for the Debtors

CERTIFICATE OF SERVICE

I certify that on the 29th day of September, 2005, I served the foregoing pleading by overnight mail and electronic mail to the following parties:

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/s/ Susan Jaffe Roberts
Susan Jaffe Roberts

EXHIBIT 7

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)**

In re:

**NATIONAL ENERGY & GAS
TRANSMISSION, INC. (f/k/a PG&E
NATIONAL ENERGY GROUP, INC.),
*et al.***

Debtors.

*

* Case No.: 03-30459 (PM) and 03-30461 (PM)
through 03-30464 (PM) and 03-30686 (PM)
* through 03-30687 (PM)
Chapter 11

*

(Jointly Administered under
* Case No.: 03-30459 (PM))

* * * * *

March 3, 2005

**DISCLOSURE STATEMENT FOR FIRST AMENDED PLAN OF LIQUIDATION
FOR THE ENERGY TRADING DEBTORS AND THE QUANTUM DEBTORS**

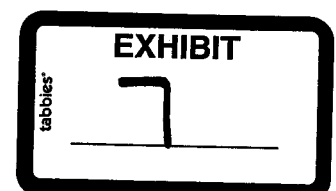
IMPORTANT DATES

Date by which Objections to Confirmation of the Plan Must Be Filed and Served:	April 5, 2005 at 4:00 p.m (EDT)
Date by which Ballots Must Be Received:	April 5, 2005 at 4:00 p.m. (EDT)
Hearing on Confirmation of the Plan:	April 13, 2005 at 10:30 a.m. (EDT)

**WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019-6099
(212) 728-8000**

**WHITEFORD, TAYLOR & PRESTON L.L.P.
Seven Saint Paul Street, Suite 1400
Baltimore, Maryland 21202
(410) 347-8700**

**Co-Counsel for the Debtors and Debtors in
Possession,
National Energy & Gas Transmission, Inc. *et al.***



proposed settlement agreement to the ET Committee.²² The ET Committee has ten (10) business days to approve or disapprove the settlement.

If the ET Committee approves a particular proposed settlement or does not disapprove it in writing during the ten-business-day period, the ET Debtors file a notice of the settlement with the Court (the "Settlement Notice"). If a net payment is due *to* the ET Debtors under a particular proposed settlement, such payment is collected by the ET Debtors and the appropriate releases are entered into among the ET Debtors and the counterparty. If a net payment is due *from* the ET Debtors, no payment is made immediately (exclusive of any portion of such claim that first arose postpetition), but the counterparty may have a liquidated claim in the actual amount of any such net payment payable to such counterparty.

8. Mediation Protocol

On December 3, 2003, the ET Debtors filed a motion to approve procedures (the "Mediation Protocol") for the mediation of disputes arising under, among other things, the Trading Contracts and the Tolling Agreements (collectively, the "ET Agreements"). The Mediation Protocol was approved by Order dated January 7, 2004. Under the Mediation Protocol, objections to claims and adversary proceedings (*i.e.*, lawsuits filed in the Bankruptcy Court) arising under the ET Agreements are stayed for a period of time so that the parties may attempt to consensually resolve their disputes with the aid of a court-approved mediator. To the extent NEGT has exposure with respect to any trading guarantees, it may participate in the Mediation Protocol.

9. Tolling Agreement Disputes

As of the Petition Date, ET Power was the non-owner party to three separate Tolling Agreements (see Article II.B above) with the following parties: (i) Liberty Electric Power, LLC ("Liberty"); (ii) Southaven Power, LLC ("Southaven"); and (iii) Caledonia Generating, LLC ("Caledonia"). These Tolling Agreements were long-term contracts, with terms varying from approximately 15 to 25 years. The tolling fee paid by ET Power to each plant owner was fixed and specified by contract, subject to an escalation clause tied in part to inflation. Given the expected growth in demand for electricity in the long term, the Tolling Agreements were projected to be profitable for the ET Debtors in later years. In the short term, however, a decline in electricity demand and prices, coupled with an increase in fuel prices, made the Tolling Agreements unprofitable or otherwise not useful to ET Power. The monthly payments under the Tolling Agreements represented an enormous drain on the cash flow of the ET Debtors. On the Petition Date, the Debtors filed a motion to reject the Tolling Agreements, which motion was approved by the Bankruptcy Court by orders dated August 4, 2003 and August 6, 2003.

²² If NEGT has exposure under a Trading Contract (*i.e.*, a guaranty or other obligation), the ET Debtors also submit the proposed settlement to the official committee in the NEGT case as well.

a. **Liberty**

ET Power and Liberty entered into a Tolling Agreement (the "Liberty Agreement") on or about April 14, 2000. Under the Liberty Agreement, ET Power had the right but not the obligation to call on the use of the generating facility (*i.e.*, provide fuel to the plant and take the resultant electricity and capacity). In exchange, ET Power was obligated under the Liberty Agreement to make monthly payments, or tolling fees, based on a contractually-based pricing formula. By guarantee dated February 6, 2001, Gas Transmission Northwest Corporation ("GTNC"), one of NEG's non-debtor subsidiaries, guaranteed ET Power's obligations under the Liberty Agreement. In addition, by guarantee dated February 6, 2001, NEG also guaranteed ET Power's obligations under the Liberty Agreement. As noted above, the Bankruptcy Court approved the Debtors' motion to reject the Liberty Agreement.

In a letter dated July 30, 2003, Liberty stated that ET Power owed Liberty \$176,770,704 for the forward value of the Liberty Agreement, plus certain additional amounts, as a termination payment for the rejection of the Liberty Agreement. In addition, on September 11, 2003, Liberty filed two suits against GTNC in the United States District Court in Texas. In the first suit, Liberty seeks GTNC's payment of \$140 million under the guarantee associated with Liberty's purported rejection damages. In the second suit, Liberty seeks \$5.4 million from GTNC under the Liberty guarantee related to tolling payments that ET Power allegedly failed to make prior to ET Power's bankruptcy filing.

On September 23, 2003, ET Power provided Liberty with its calculation of the termination payment. Also on September 23, 2003, ET Power, NEG and GTNC filed an adversary proceeding (the "Adversary Proceeding") against Liberty, seeking declaratory relief, injunctive relief and damages from Liberty for failure to make payments under the Liberty Agreement.

The Bankruptcy Court subsequently ruled that: (i) it would refer the Adversary Proceeding to mandatory mediation, and that during such mediation period the Adversary Proceeding would be stayed; *but* (ii) if the mediation failed, the dispute would proceed to arbitration pursuant to the terms of the Liberty Agreement. The parties did not reach a settlement during the mediation and currently are arbitrating the dispute.

On October 15, 2004, the parties submitted their "baseball arbitration" offers.²³ Liberty's baseball arbitration offer was \$167.4 million and ET Power's baseball arbitration offer was \$78 million. The hearings took place in November and December 2004. Revised offers were submitted to the arbitration panel at the close of the hearings. Liberty's revised baseball arbitration offer was approximately \$145 million and ET Power's revised baseball arbitration offer was approximately \$95 million. The parties expect that the dispute will be resolved sometime during the first quarter of 2005.

²³

In a baseball arbitration, each party, prior to the arbitration, submits a proposed award amount to the arbitrator. The arbitrator must then choose one of the proposed offers as the final award.

b. Southaven/Caledonia

ET Power entered into separate Tolling Agreements (collectively, the "Agreements") with Southaven and Caledonia, dated as of June 1, 2000 and September 20, 2000, respectively. Pursuant to the Agreements, Southaven and Caledonia were to deliver and sell to ET Power, and ET Power was to purchase, all of the electrical capacity, ancillary services, fuel conversion services and various other products from electric generating facilities in Mississippi. NEGT guaranteed ET Power's obligations under the Agreements.

On November 12, 2002, ET Power notified Southaven and Caledonia of an event of default as a result of their failure to meet certain requirements respecting the ability of the facility to inject output into the applicable control area. ET Power contended that Southaven and Caledonia were not able to cure their defaults within the period specified in the Agreements and, accordingly, on February 4, 2003, ET Power provided notice to Southaven and Caledonia of its termination of the Agreements.

On February 7, 2003, Southaven and Caledonia filed emergency petitions against ET Power in the Circuit Court for Montgomery County, Maryland (the "State Court Action") to compel arbitration or, in the alternative, for a temporary restraining order. On March 3, 2003, Southaven and Caledonia obtained an order requiring ET Power to continue to perform its obligations under the Agreements. ET Power filed an appeal and, on March 24, 2003, ET Power commenced arbitration proceedings against Southaven and Caledonia. The arbitration and the State Court Action were stayed as of the Petition Date.

The Agreements provide for damages in the event of material breach (*i.e.*, a termination payment), subject to a \$500 million cap. Determination of the termination payment is based on a formula that takes into account a number of factors, including such market conditions as the price of power and the price of fuel. Because of changes in market conditions over time, it is difficult to precisely quantify the amount of any potential termination payment.

On August 26, 2004, ET Power and NEGT filed a motion to approve a stipulation with Southaven and Caledonia (the "Tolling Stipulation"), pursuant to which the parties agreed to proceed to arbitration in order to resolve the tolling disputes. In an order dated September 27, 2004, the Bankruptcy Court approved the Tolling Stipulation. Arbitrators have been selected, and the initial pre-hearing conference took place on February 22, 2005. The arbitration hearings have been scheduled for October 2005.

c. Impact on Creditor Recoveries

The outcome of the arbitrations against Liberty, Southaven and Caledonia (collectively, the "Tolling Arbitrations") likely will be the single most decisive factor in determining the percentage recoveries to creditors of ET Power (Class 6) and ET Holdings (Class 5). As noted above, the Liberty arbitrator will select one of the parties' baseball arbitration offers. The Southaven and Caledonia arbitrations will not be

structured as baseball arbitrations and, accordingly, the arbitrators will be free to make their own determinations as to the amount of damages. Southaven filed a proof of claim against ET Power in the amount of \$500 million. Caledonia filed an unliquidated proof of claim against ET Power. The Debtors vigorously contest these claims and believe that they do not owe any damages to Southaven or Caledonia. Among other things, the Debtors believe that Southaven and Caledonia breached the agreements well before the commencement of the Chapter 11 Cases and, therefore, the agreements were validly terminated by ET Power prior to the Petition Date. Due to the sensitive nature of the ongoing litigation and the importance of maintaining confidentiality of the Debtors' internal litigation analyses, the Debtors cannot provide any prediction regarding the likely outcomes of the arbitrations with Southaven and Caledonia.

If the Debtors prevail entirely in the Tolling Arbitrations (*i.e.*, ET Power's baseball arbitration offer is selected and the Southaven/Caledonia arbitrators determine that Southaven and Caledonia are not entitled to damages), then the percentage recovery for holders of Allowed Class 5 Claims likely will range from 90% to 100% and the percentage recovery for holders of Allowed Class 6 Claims likely will range from 90% to 100%. Conversely, if the Debtors are entirely unsuccessful in the Tolling Arbitrations (*i.e.*, Liberty's baseball arbitration offer is selected and the Southaven/Caledonia arbitrators determine that ET Power must satisfy the asserted claims²⁴ in full), then the percentage recovery for holders of Allowed Class 5 Claims likely will range from 25% to 30% and the percentage recovery for holders of Allowed Class 6 Claims likely will range from 35% to 45%.

10. Employee Litigation

Six former employees of ET Holdings have contested claims pending against ET Holdings for bonus payments allegedly due them. These six employees are: Judith Tanselle, Matthew Vincent, Matthew Schweider, Adam Hoffman, Adam Mirick and Benoit Vallieres. In each case, ET Holdings has denied that the former employees are entitled to any additional bonus payments. Four of the former employees (Tanselle, Hoffman, Mirick and Vallieres) also have made claims for deferred compensation. The underlying deferred compensation claims are not contested, but entitlement to any additional damages under the Maryland Wage Payment Act is contested.

Three of the six former employees, Tanselle, Vincent and Schwieder, are pursuing their claims as part of a single case in the Circuit Court for Montgomery County, Maryland. *Tanselle v. PG&E Energy Trading Holdings, Corp. et al.*, Civil Docket No. 242876-V (the "State Court Action"). This case had been removed to the United States Bankruptcy Court for the District of Maryland, but was remanded to state court in February 2004. The other three former employees, Hoffman, Mirick and Vallieres, filed separate proofs of claim in the Maryland bankruptcy court after that court

²⁴ As noted above, Caledonia filed an unliquidated claim. For purposes of this discussion, the Debtors assumed that Caledonia's asserted claim is \$500 million (the amount of the cap under the agreement).

ARTICLE VI.

CONCLUSION

**THE DEBTORS AND THE ET COMMITTEE URGE ALL
HOLDERS OF CLAIMS IN CLASSES 1, 3, 4, 5, 6, and 7 TO VOTE TO ACCEPT
THE PLAN BY RETURNING THEIR BALLOTS SO THAT THEY ARE
RECEIVED BY NEGT BALLOTING CENTER, c/o BANKRUPTCY SERVICES
LLC, 757 THIRD AVENUE, NEW YORK, NEW YORK 10017, BY 4:00 P.M.
(EASTERN DAYLIGHT TIME) ON APRIL 5, 2005.**

Respectfully submitted,

NEGT Energy Trading Holdings Corporation

By: R.W. Banon
President

NEGT Energy Trading - Gas Corporation

By: R.W. Banon
President

NEGT Energy Trading - Power, L.P.

By: NEGT Energy Trading Holdings Corporation,
its sole general partner

By: R.W. Banon
President

NEGT ET Investments Corporation

By: R.W. Banon
President

Quantum Ventures

By: _____
President

Energy Services Ventures, Inc.

By: _____
President

Case 03-30459 Doc 2798 Filed 03/03/05 Page 64 of 109

Respectfully submitted,

NEGT Energy Trading Holdings Corporation

By: _____
President

NEGT Energy Trading - Gas Corporation

By: _____
President

NEGT Energy Trading – Power, L.P.

By: NEGТ Energy Trading Holdings Corporation,
its sole general partner

By: _____
President

NEGT ET Investments Corporation

By: _____
President

Quantum Ventures

By: P. Chisman Lube
President

Energy Services Ventures, Inc.

By: P. Chisman Lube
President

EXHIBIT 8

1 UNITED STATES BANKRUPTCY COURT
2 FOR THE DISTRICT OF MARYLAND

3 IN RE: * Case No. 03-30459PM
4 *
5 * Chapter 11
6 NATIONAL ENERGY AND *
7 GAS TRANSMISSION, INC., ET AL. *
8 *
9 * Greenbelt, Maryland
10 Debtor * May 12, 2005
11 *
12 * * * * *
13 *
14 NEG T ENERGY TRADING-POWER, LP, ET AL. * Adv. No. 03-03104PM
15 Plaintiff *
16 vs. *
17 *
18 LIBERTY ELECTRIC POWER, LLC *
19 Defendant *
20 * * * * *
21 * * * * *
22 * * * * *
23 * * * * *
24 * * * * *
25 * * * * *

TRANSCRIPT OF HEARINGS ON:

MAIN CASE:

- STATUS CONFERENCES AND HEARINGS HELD RE: OBJECTION TO CLAIM FILED BY DEBTOR NATIONAL ENERGY & GAS TRANSMISSION, INC. (P. 2866)
- OBJECTION TO CLAIM FILED BY DEBTOR NATIONAL ENERGY & GAS TRANSMISSION, INC. (P. 2497)
- OBJECTION TO CLAIM FILED BY DEBTOR NATIONAL ENERGY & GAS TRANSMISSION, INC. (P. 2867)
- RESPONSE FILED BY INTERESTED PARTY OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF USGEN NEW ENGLAND, INC. (P. 2981)
- OBJECTION TO CLAIM FILED BY DEBTOR NATIONAL ENERGY & GAS TRANSMISSION, INC. (P. 2868)
- OBJECTION TO CLAIM FILED BY DEBTOR NATIONAL ENERGY & GAS TRANSMISSION, INC. (P. 2870)

1 - GENERIC MOTION FILED BY DEBTOR NATIONAL ENERGY & GAS
TRANSMISSION, (P. 2886)

2 - OBJECTION TO CLAIM FILED BY DEBTOR NATIONAL ENERGY & GAS
TRANSMISSION, (P. 2858)

4 - OBJECTION TO CLAIM FILED BY DEBTOR NATIONAL ENERGY & GAS
TRANSMISSION, (P. 2865)

5 - OBJECTION TO CLAIM FILED BY DEBTOR NATIONAL ENERGY & GAS
TRANSMISSION, (P. 2498)

7 - RESPONSE FILED BY CREDITOR MATTHEW S. SCHWIEDER (P. 2991)

8 - RESPONSE FILED BY CREDITOR MATTHEW D. VINCENT (P. 2992)

9 - OMNIBUS OBJECTION FILED BY U.S. TRUSTEE (P. 2729)

10 **ADVERSARY CASE:**

11 - MOTION TO CONFIRM AN ARBITRATION AWARD FILED BY LIBERTY
12 ELECTRIC POWER, LLC (P. 31), MEMORANDUM OF LAW IN SUPPORT
(P. 32), AND SUPPORT DOCUMENT THERETO (P. 33)

13 - MOTION TO DISMISS ADVERSARY PROCEEDING AND OBJECTION TO CLAIMS
14 AND FOR RELATED RELIEF FILED BY LIBERTY ELECTRIC POWER, LLC (P.
34); RESPONSE THERETO ON BEHALF OF NEGTE ENERGY TRADING-POWER,
15 LP, ET AL (P. 37); REPLY ON BEHALF OF LIBERTY ELECTRIC POWER,
LLC (P. 40); AND RESPONSE TO REPLY ON BEHALF OF NATIONAL ENERGY
16 & GAS TRANSMISSION, INC., ET AL (P. 41)

17
18 BEFORE THE HONORABLE PAUL MANNES
UNITED STATES BANKRUPTCY JUDGE

19 **APPEARANCES:**

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and ET Debtors:

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19 Proceedings recorded by electronic sound recording, transcript
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INDEX

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>	<u>Further Redirect</u>
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(No witnesses were presented for testimony.)

<u>Exhibit No.</u>	<u>Description</u>	<u>Marked</u>	<u>Received</u>
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(No exhibits were marked for identification.)

1 (Call to Order of the Court)

2 COURT CLERK: On the 12:00 docket, the case of
3 National Energy & Gas Transmission, Incorporated, Case Number
4 03-30459, Adversary Number 03-3104.

5 Counsel, please identify yourselves for the record.

6 MR. SHAFFER: Good afternoon, Your Honor. Dennis
7 Shaffer of Whiteford, Taylor & Preston on behalf of the NEGT and
8 ET Debtors.

9 MR. WILAMOWSKY: Good afternoon, Your Honor. Steven
10 Wilamowsky, Willkie Farr & Gallagher, LLP, on behalf of the NEGT
11 Debtors. And next to me is Mr. Matthew Wargin. He's one of our
12 associates, also from Willkie Farr, and also on behalf of the
13 NEGT Debtors.

14 THE COURT: Very well.

15 MR. HANDELSMAN: Good afternoon, Your Honor. Lawrence
16 Handelsman from Stroock & Stroock & Lavan for Liberty Electric
17 Power. And with me is Melvin Brosterman, my partner from
18 Stroock & Stroock & Lavan, and Harold Olsen, one of our
19 colleagues.

20 MS. DEVAN: Your Honor, if I might just put my
21 appearance on the record. Deborah Devan on behalf of Southaven
22 Power, the claimant of these Debtors.

23 THE COURT: Very well.

24 MR. SHAFFER: Good afternoon, Your Honor. Dennis
25 Shaffer again for the record.

1 thought it was important to point out that it is not at all
2 clear that it is as Liberty says. And particularly in this
3 case, where we're talking about contract rejection damages, and
4 the duty to mitigate, which, by the way, is the duty to mitigate
5 it under the tolling agreement by its express terms as well,
6 that in coming to whatever the claim should be against the
7 Debtor, it should be mitigated by whatever source of recovery
8 there is available elsewhere, and then you come to the number of
9 the claim, not -- you know, even if it was true that -- if it
10 was just a bank loan, or something like that, that wasn't a
11 rejected executory contract, even if it was true that you'd be
12 able to assert the full amount of the claim, I think that given
13 the rules regarding mitigation in the Section 365 contract
14 rejection analysis, it becomes more compelling to say that they
15 should be required to deduct whatever recoveries they're getting
16 from any other source before coming to the amount of their
17 claim.

18 Again, this shouldn't be relevant because there
19 shouldn't be any claim against NEG. And the claim against ET
20 Power we don't disagree is the five million dollar
21 approximately, whatever the amount of that -- the June and July
22 invoices.

23 And then on a more procedural note, Your Honor, I just
24 want to make sure I get a chance to say this just because I --
25 if Your Honor is -- obviously, based on the briefing that Your

1 Honor is permitting, Your Honor is prepared to reserve decision.
2 If that is occurring, we've got a concern just because although
3 we're very confident in our position, \$33,000 a day is a lot of
4 money.

5 So, what we would ask is if Your Honor can -- perhaps
6 we could maybe settle an order. If Your Honor can enter an
7 order just directing that money out of the GTN escrow --

8 THE COURT: The 140?

9 MR. WILAMOWSKY: The 140. Without prejudice to any of
10 these arguments that have been made now, but just let's get that
11 money out.

12 THE COURT: Your client doesn't have any problem
13 walking out of here with 140 million, does it?

14 MR. HANDELSMAN: I don't think so, Your Honor. We've
15 been asking for it, so --

16 MR. WILAMOWSKY: No. Well, that's not exactly trite.

17 THE COURT: Let's upload that today.

18 MR. WILAMOWSKY: Okay.

19 THE COURT: And get that out.

20 MR. WILAMOWSKY: Okay. Well, the only concern about
21 uploading it -- I mean, we will upload it today. The only
22 problem about getting it entered today is probably we would want
23 -- I don't want GTN saying it's coming back later and saying --
24 or tomorrow, when they see it, or something, and saying that
25 they've got a notice issue, because they're not here in court

1 today.

2 I'd like to perhaps upload the order maybe on notice.

3 THE COURT: I'm perfectly willing --

4 MR. WILAMOWSKY: Okay.

5 THE COURT: I think it's -- you know, it's horrible,
6 Your Honor, for me, and it takes me six months to decide the
7 case to have, you know, somebody paying \$33,000 a day for every
8 day that I'm contemplating.

9 MR. WILAMOWSKY: Okay. Thank you, Your Honor. We
10 will upload an appropriate order, on notice, to GTN.

11 THE COURT: All right. Thank you very much. Why
12 couldn't you have done that earlier?

13 MR. WILAMOWSKY: Oh, on the --

14 THE COURT: 140 million.

15 MR. WILAMOWSKY: Oh. The issue on the 140 million
16 dollars is this, Your Honor. There are two ways under the --

17 THE COURT: Well, no, I understand. I was just
18 wondering.

19 MR. WILAMOWSKY: I would love to do it. I was dying
20 to do it. GTN said we'll do it, but we need a full release
21 discharge and satisfaction from Liberty to be signed. They
22 didn't want to sign it.

23 THE COURT: Very well.

24 MR. WILAMOWSKY: So, that's where we are.

25 THE COURT: Counsel?

1 THE COURT: I'll let you both file anything you want
2 by Friday next.

3 MR. WILAMOWSKY: Okay. That's exactly what I want.

4 THE COURT: Both, whatever you want. This is a
5 wonderful case. You all have taken the heat off of me by paying
6 out this 140 million dollars, so it could well be the end of
7 summer before I deal with this conundrum that you all have
8 produced.

9 It's a fascinating issue. I ought to call one of my
10 law school professors and have him put her class on it or
11 something like that.

12 MR. WILAMOWSKY: Thank you, Your Honor.

13 THE COURT: So be it. Thank you very much. Have a
14 good day.

15 (Proceedings concluded at 2:55 p.m.)
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EXHIBIT 9

IN RE NAT. ENERGY & GAS TRANSMISSION, INC.

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Cite as 492 F.3d 297 (4th Cir. 2007)

In re NATIONAL ENERGY & GAS TRANSMISSION, INCORPORATED, formerly known as PG & E National Energy Group, Inc., Debtor.

National Energy & Gas Transmission, Inc. (f/k/a PG & E National Energy Group, Inc.); NEGT Energy Trading Power, L.P. (f/k/a PG & E Energy Trading Power, L.P.), Plaintiffs–Appellants,

and

Gas Transmission Northwest Corporation, Plaintiff,

v.

Liberty Electric Power, LLC, Defendant–Appellee,

John L. Daugherty, Trustee, Trustee–Appellee.

No. 06–1459.

United States Court of Appeals, Fourth Circuit.

Argued: March 13, 2007.

Decided: July 10, 2007.

Background: Creditor that was awarded \$140,000,000, plus interest, in arbitration proceeding arising from Chapter 11 debtor's rejection of contract asserted claims against debtor and debtor-parent company for same amount after it allocated \$17,000,000 of \$140,000,000 payment received from non-debtor guarantor to interest, rather than principal. Debtor and parent objected. The Bankruptcy Court allowed claim against debtor but limited distribution to \$17,000,000. Debtor and parent appealed. The United States District Court for the District of Maryland, Peter J. Messitte, J., affirmed. Debtor and parent appealed.

Holdings: The Court of Appeals, Shedd, Circuit Judge, held that:

- (1) as a matter of bankruptcy law, debt to creditor was not reduced by amount that creditor received from non-debtor guarantor, and
- (2) bankruptcy statute barring recovery of unmatured interest precluded creditor from recovering \$17,000,000 sought from debtor and parent.

Reversed.

Wilson, District Judge, concurred in the judgment and filed a separate opinion.

Duncan, Circuit Judge, dissented and filed a separate opinion.

1. Bankruptcy \S 3782

Court of Appeals reviews questions of law de novo. (Per Shedd, Circuit Judge, with one judge concurring in the judgment.)

2. Bankruptcy \S 2673

As a matter of bankruptcy law, Chapter 11 debtor's debt to creditor was not reduced by amount that creditor received from non-debtor guarantor. (Per Shedd, Circuit Judge, with one judge concurring in the judgment.)

3. Guaranty \S 74

Under New York law, guarantor was "surety" for debtor's obligations to creditor, despite language in guarantee purporting to make guarantor a co-obligor, and therefore value of debtor's debt to creditor under state law was not reduced by \$140,000,000 payment received by creditor from guarantor. (Per Shedd, Circuit Judge, with one judge concurring in the judgment.) N.Y. McKinney's General Obligations Law \S 15–103.

See publication Words and Phrases for other judicial constructions and definitions.



4. Bankruptcy ⇌ 2836

Purpose of bankruptcy statute providing that claim will not be allowed to the extent that it is for unmatured interest is two-fold: (1) avoidance of unfairness among competing creditors, and (2) avoidance of administrative inconvenience. (Per Shedd, Circuit Judge, with one judge concurring in the judgment.) 11 U.S.C.A. § 502(b)(2).

5. Bankruptcy ⇌ 2836

Application of bankruptcy statute's bar on unmatured interest is to be guided by principles of equity. (Per Shedd, Circuit Judge, with one judge concurring in the judgment.) 11 U.S.C.A. § 502(b)(2).

6. Bankruptcy ⇌ 2921

In applying bankruptcy statute barring unmatured interest, court has a duty to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankruptcy estate. (Per Shedd, Circuit Judge, with one judge concurring in the judgment.) 11 U.S.C.A. § 502(b)(2).

7. Bankruptcy ⇌ 2125

Bankruptcy Code provides parameters within which courts must exercise their equitable powers in administering an estate. (Per Shedd, Circuit Judge, with one judge concurring in the judgment.)

8. Bankruptcy ⇌ 2836

Bankruptcy statute barring recovery of unmatured interest precluded creditor from recovering from Chapter 11 debtors \$17,000,000 that it was owed on debt arising from debtor's rejection of contract when creditor had already received full value of \$140,000,000 debt that was owed on petition date from non-debtor guarantor, notwithstanding creditor's contention that \$17,000,000 sought from debtors was unpaid principal, due to its allocation of payment from guarantor first to

\$17,000,000 interest obligation and then to principal. (Per Shedd, Circuit Judge, with one judge concurring in the judgment.) 11 U.S.C.A. § 502(b)(2).

9. Bankruptcy ⇌ 2836

In cases in which the allowance of postpetition interest will not result in administrative inconvenience or unfairness to creditors, postpetition interest may be allowed. (Per Shedd, Circuit Judge, with one judge concurring in the judgment.) 11 U.S.C.A. § 502(b)(2).

ARGUED: Steven Wilamowsky, Bingham & McCutchen, L.L.P., New York, New York, for Appellants. Lawrence M. Handlesman, Stroock, Stroock & Lavan, New York, New York, for Appellee. **ON BRIEF:** Jessica S. Etra, Matthew V. Wargin, Willkie, Farr & Gallagher, L.L.P., New York, New York; Kenneth Oestreicher, Susan J. Roberts, Whiteford, Taylor & Preston, L.L.P., Baltimore, Maryland, for Appellants. Lisa Bittle Tancredi, Venable, L.L.P., Baltimore, Maryland; Melvin A. Brosterman, Harold A. Olsen, Stroock, Stroock & Lavan, New York, New York, for Appellee.

Before SHEDD and DUNCAN, Circuit Judges, and SAMUEL G. WILSON, United States District Judge for the Western District of Virginia, sitting by designation.

Reversed by published opinion. Judge SHEDD wrote the opinion. Judge WILSON wrote an opinion concurring in the judgment. Judge DUNCAN wrote a dissenting opinion.

OPINION

SHEDD, Circuit Judge.

In this bankruptcy appeal, we must decide whether a creditor may allocate a

IN RE NAT. ENERGY & GAS TRANSMISSION, INC.

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Cite as 492 F.3d 297 (4th Cir. 2007)

payment made by a non-debtor guarantor first to interest then to principal, thus preserving the unpaid principal for collection in bankruptcy. Because we find that the allocation of a payment in this manner would permit the creditor to collect an amount otherwise disallowed as post-petition interest, we reverse the judgment of the district court which permitted collection of the additional amount.

I

National Energy & Gas Transmission Energy Trading Power, L.P. ("ET Power"), a debtor here, previously operated as an energy marketing and trading company. As such, it bought and sold electric power, natural gas, coal, and other physical energy commodities. ET Power also engaged in energy-based financial and hedging transactions such as future contracts, swaps, options, and derivatives. As part of its regular course of business, ET Power entered into an electricity tolling agreement (the "Agreement") with Liberty Electric Power, LLC ("Liberty"), an energy-generating company. Under the Agreement, ET Power obtained an option to purchase energy from Liberty in return for a monthly payment to Liberty as well as certain other variable costs based on the actual amount of energy which ET Power purchased. In essence, this permitted ET Power to provide natural gas necessary to generate electricity and then to purchase the electricity which was generated.

To back up its agreement with ET Power, Liberty obtained two guarantees: one

from National Energy & Gas Transmission, Inc. ("NEGT"), ET Power's corporate parent (and also a debtor in this bankruptcy); and one from Gas Transmission Northwest Corporation ("GTN"), a subsidiary of NEGТ (and a non-debtor). Each guarantee contained the same terms, and in each the respective guarantor guaranteed:

[A]s primary obligor and not merely as surety, the prompt payment when due, in accordance with the terms of the Agreement, of all amounts payable by [ET Power] under the Agreement . . . including . . . Termination Payment . . . and damage awards arising by reason of [ET Power's] breach of its performance obligations under the Agreement or otherwise.

J.A. 98. Each guarantor's liability was capped at \$140 million.

On July 8, 2003, NEGТ, ET Power, and other debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code and a motion seeking to reject the Agreement.¹ After ET Power and Liberty consented, the bankruptcy court granted the motion rejecting the Agreement. As a result of the rejection, Liberty sought \$140 million as a termination payment and approximately \$5.4 million in unpaid invoices. Liberty's claim for \$140 million proceeded to arbitration pursuant to the terms of the Agreement, and an arbitration panel awarded Liberty the full \$140 million plus interest accruing from the date of the Agreement's rejection and continuing subsequent to the arbitration award.²

1. As the remaining debtors are not parties to this appeal, we refer herein to NEGТ and ET Power as "the debtors." However, we note that the bankruptcy court denied Liberty's claim against NEGТ, and Liberty does not appeal this denial.

2. The debtors stipulated to the amounts owed pursuant to the unpaid invoices, and these claims were not submitted to the arbitration panel. Both the bankruptcy court and the district court allowed a claim for these debts in the amount of \$5,428,046, and the debtors do not contest this claim on appeal. Thus, in

During the pendency of the arbitration proceedings, NEGT agreed to sell GTN to TransCanada Corporation. As part of the transaction, \$140 million was reserved in escrow to provide for any liability to Liberty under the guarantee. After the arbitration award, the dispute between Liberty and the debtors shifted back to the bankruptcy court, while interest continued to accrue on the \$140 million arbitration award. To stop the accrual of interest, which had reached approximately \$17 million, the parties agreed that Liberty should receive immediate payment of the amount held in escrow after the GTN sale, and the bankruptcy court approved this disbursement. Accordingly, Liberty was paid \$140 million from the GTN sale escrow in full and final satisfaction of the GTN guarantee.

Upon receipt of payment from GTN, Liberty allocated the \$140 million first to interest, then to principal. Meanwhile, Liberty continued to assert claims in bankruptcy against NEGT and ET Power for \$140 million each.³ Liberty reasoned that it could continue to assert the full value of the award against the debtors, notwithstanding the fact that it had already received payment of \$140 million from GTN, because the debtors remained jointly and severally liable until it received full payment of the total debt. At the same time, Liberty recognized that it could not collect more than the approximately \$17 million needed to make it whole on ET Power's debt. In seeking this amount, Liberty

contended that the amount did not represent disallowed post-petition interest but rather unpaid principal—the interest portion of the award having been paid by GTN.

The debtors objected to Liberty's claims, arguing that the \$17 million which Liberty sought to collect had to constitute post-petition interest because Liberty had already received \$140 million from GTN. Additionally, the debtors maintained that Liberty should not be permitted to assert a claim for \$140 million when it had received \$140 million and currently was owed only an additional \$17 million. Otherwise, the judgment would not accurately reflect what Liberty was owed.

[1] The bankruptcy court agreed with Liberty's position, allowing the claim for \$140 million against ET Power but providing that the "maximum amount of distribution payable to Liberty" would be limited to the additional \$17 million which it seeks to collect. J.A. 322. On appeal to the district court, the bankruptcy court order was affirmed. The debtors once again appeal. Because this appeal presents only questions of law, our review is *de novo*. *In re Bunker*, 312 F.3d 145, 150 (4th Cir. 2002).

II

A.

We initially consider the debtors' contention that the value of Liberty's claim

reversing the district court's order, we do not reverse the allowance of this claim.

3. Liberty set forth ET Power's approximate liabilities as: \$140 million in principal, \$5.4 million in unpaid invoices, \$16.8 million in interest on the principal and invoice amounts, and \$3.7 million in collection costs and fees. Liberty recognized that it could not collect the \$16.8 million in interest from the debtors, and the invoice amount and collection costs and

fees are not at issue in this appeal. For simplicity, we focus on the \$140 million at issue here. Likewise, we recognize that Liberty actually seeks to collect approximately \$22 million from the estate but that approximately \$5 million of this amount (the unpaid invoices) is not at issue. Thus, again for simplicity, we refer herein to the additional \$17 million which Liberty seeks and which is now at issue.

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must be reduced by the \$140 million it received from GTN in order to reflect accurately the amount currently owed to Liberty. Because Liberty is currently owed only approximately \$17 million, the debtors argue its claim should be limited to this amount.

[2] The debtors' argument is foreclosed by the combination of *Ivanhoe Building & Loan Ass'n of Newark v. Orr*, 295 U.S. 243, 55 S.Ct. 685, 79 L.Ed. 1419 (1935), and New York law, which governs pursuant to the Agreement. In *Ivanhoe*, the Supreme Court held that a creditor need not deduct from his claim in bankruptcy an amount received from a non-debtor third party in partial satisfaction of an obligation. Thus, as a matter of bankruptcy law, ET Power's debt to Liberty is not reduced by the amount which Liberty received from GTN. However, this merely leads to the question of what the value of ET Power's debt is, and New York law provides the answer to this question. See *Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, — U.S. —, 127 S.Ct. 1199, 1205, 167 L.Ed.2d 178 (2007) (“[W]e have long recognized that the basic federal rule in bankruptcy is that state law governs the substance of claims [.]” (internal punctuation omitted)).

[3] New York law provides:

The amount or value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint, or of joint and several obligors, in whole or in partial satisfaction of their obligations, shall be credited to the extent of the amount received on the obligations of all co-obligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety.

N.Y. Gen. Oblig. L. § 15–103. Under this statute, whether GTN's payment to Liberty must be deducted from ET Power's

obligation turns on whether GTN was a surety or a co-obligor.

In *Chemical Bank v. Meltzer*, 93 N.Y.2d 296, 690 N.Y.S.2d 489, 712 N.E.2d 656 (1999), the New York Court of Appeals concluded that the relationship between the guarantor and the primary obligor must determine the guarantor's status as a co-obligor or a surety, notwithstanding language in the contract purporting to render the guarantor a co-obligor. Using this approach, the court found that a suretyship existed. The relationship between ET Power and GTN is nearly identical to that of the guarantor and primary obligor in *Meltzer*. Therefore, we conclude that, despite language in the guarantee purporting to make GTN a co-obligor, GTN was a surety for ET Power's obligations to Liberty. Accordingly, the value of ET Power's debt to Liberty under state law is not reduced by the \$140 million received from GTN.

B.

[4–8] We next turn to the more fundamental question presented by this appeal: whether the Bankruptcy Code bars Liberty from collecting the \$17 million it now seeks. Section 502(b)(2) of the Code provides that a claim shall not be allowed “to the extent that . . . [it] is for unmatured interest[.]” 11 U.S.C. § 502(b)(2). The purpose of this section is two-fold: (1) the avoidance of unfairness among competing creditors, and (2) the avoidance of administrative inconvenience. *Bruning v. United States*, 376 U.S. 358, 362, 84 S.Ct. 906, 11 L.Ed.2d 772 (1964). As with all sections of the Code, § 502(b)(2) exists to guide the court in the administration of a bankruptcy estate so “as to bring about a ratable distribution of assets among the bankrupt's creditors.” *Vanston Bondholders Protective Committee v. Green*, 329 U.S.

156, 161, 67 S.Ct. 237, 91 L.Ed. 162 (1946); see also *In re A.H. Robins Co., Inc.*, 972 F.2d 77, 82 (4th Cir.1992) (noting that bankruptcy court possesses “broad equity powers”). Indeed, § 502(b)(2) itself reflects the equitable nature of the Code, and our application of its bar on post-petition interest is to be guided by principles of equity. *Vanston Bondholders*, 329 U.S. at 165, 67 S.Ct. 237 (“It is manifest that the touchstone of each decision on allowance of interest in bankruptcy . . . has been a balance of equities between creditor and creditor or between creditors and the debtor.”). Thus, in applying § 502(b)(2), we have a duty to “sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate.” *Smith v. Robinson*, 343 F.2d 793, 801 (4th Cir.1965).⁴

In this case, Liberty seeks to collect \$17 million from ET Power notwithstanding the fact that it has already received the full value—\$140 million—of the debt which it was owed by ET Power on the petition date. In so doing, Liberty classifies the additional \$17 million which it seeks as unpaid principal. It reaches this result by applying GTN’s payment of \$140 million first to interest then to principal. Therefore, Liberty maintains that it is coming into bankruptcy to assert a claim for, and to collect only the remaining portion of, the \$140 million which it was owed as of the petition date.

We believe that § 502(b)(2) prevents Liberty from collecting the additional \$17 million it seeks despite Liberty’s classification of that amount as principal. On the date the debtors filed their bankruptcy petition, the Agreement was effectively re-

jected and Liberty sustained damages, although the value of the damages was then unknown and disputed. Subsequently, through arbitration, Liberty’s damages were determined to be \$140 million. Thus, Liberty’s damages and ET Power’s debt to Liberty on the petition date was \$140 million, and by the terms of § 502(b)(2), Liberty could not collect in bankruptcy any additional amounts added due to the accrual of interest. *Nicholas v. United States*, 384 U.S. 678, 682, 86 S.Ct. 1674, 16 L.Ed.2d 853 (1966) (“[T]he accumulation of interest on claims against a bankrupt estate is suspended as of the date the petition in bankruptcy is filed.”). This result is not altered simply because Liberty holds a guarantee from a non-debtor third party. Accordingly, the arbitration panel’s award of interest on the \$140 million in damages, while perhaps appropriate under the Agreement and as a matter of non-bankruptcy law, is not collectable from the debtors in bankruptcy by virtue of § 502(b)(2).

The § 502(b)(2) bar to collection of interest is not overcome by Liberty’s classification of the \$17 million it now seeks as principal. Regardless of how Liberty classifies GTN’s payment for its own purposes, we must “sift the circumstances surrounding” the claim to determine the reality of the transaction for purposes of the bankruptcy proceeding. *Smith*, 343 F.2d at 801. Because ET Power’s debt was capped at \$140 million by the filing of the bankruptcy petition and because the debt was increased only by the accrual of interest pursuant to the arbitration award, we view Liberty’s claim for an additional \$17 million as disallowed post-petition interest no matter how Liberty chooses to classify

4. The Bankruptcy Code, of course, provides parameters within which courts must exercise their equitable powers in administering an

estate. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988).

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it.⁵

A contrary result would permit Liberty, or any other creditor, to classify a payment on a debt from a non-debtor guarantor as non-principal, thus preserving the full value of the principal for collection in bankruptcy. If, for example, Liberty had classified GTN's payment of \$140 million not as a payment on the debt but as consideration received in return for a covenant not to sue, we would certainly look behind the transaction and would not allow collection as principal of the full \$140 million. We must likewise look behind Liberty's claim here to find that the claim really constitutes post-petition interest disguised as unpaid principal.

[9] Our construction of Liberty's claim is reinforced by the policy interests represented by § 502(b)(2). As we noted earlier, the general purpose of § 502 is "to ensure the fair allocation of assets between creditors[.]" *In re Kielisch*, 258 F.3d 315, 325 (4th Cir.2001). Thus, in cases where the allowance of post-petition interest will not result in administrative inconvenience or unfairness to creditors, post-petition interest may be allowed. *See, e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 246, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (noting pre-Bankruptcy Code rule permitting the award of post-petition interest where estate is solvent); *Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860, 869 (4th Cir.1994) (referring to rule permitting an over-secured creditor to collect

interest to the extent of his over-security).

In contrast, allowing Liberty to collect the additional amount it seeks *will* have an impact on ET Power's creditors: namely, the loss of \$17 million from the estate which would otherwise be available for distribution. This being so, the purpose of § 502(b)(2) is best served by barring Liberty's collection of an additional \$17 million from the estate.

III

For these reasons, we conclude that § 502(b)(2) prevents Liberty from collecting the additional \$17 million which it seeks from the estate. Accordingly, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion. In so doing, we do not reverse the allowance of Liberty's claim for unpaid invoices, which is not before us in this appeal.

REVERSED

WILSON, District Judge, concurring in the judgment:

As I view it, the overarching issue in this appeal is reduced to this: does Liberty's contractual right with GTN, a third party, to allocate principal and interest, that is, to call payments from that guarantor what it wants to call them, preclude the Bankruptcy Court from calling those payments what they are vis-à-vis the bankrupt

5. Liberty claims that we must accept its classification of GTN's payment as interest rather than as principal because bankruptcy proceedings cannot affect the liability of a non-debtor on a debt. *See, e.g., In re Stoller's, Inc.*, 93 B.R. 628, 635-36 (Bankr.N.D.Ind. 1988) (finding that guarantors remained liable for post-petition interest as allowed by terms of guarantee). Thus, Liberty argues that preventing it from collecting the additional \$17 million it seeks will essentially relieve GTN of its obligation to pay interest.

We disagree. Liberty is free to classify GTN's payment as interest or to pursue collection from GTN at any time. Any limitation of Liberty's right to recover from GTN the full amount it is owed is due to the terms of GTN's guarantee or to non-bankruptcy law, not to our decision here. We merely hold that Liberty may not affect the rights of a party in bankruptcy by its classification of a payment received from a non-debtor guarantor.

debtor. That is, can Liberty allocate its way around § 502(b)(2)'s disallowance of unmatured interest. In my view to do so is to simply call a rose by another name.* Accordingly, I concur in the judgment.

DUNCAN, Circuit Judge, dissenting:

As the bankruptcy court succinctly stated in an order summarily affirmed by the district court, the debtors here proffer no authority "for the proposition that a *non-debtor* guarantor is exempt from liability to pay interest accruing after the petition date of the debtor-primary obligor" under 11 U.S.C. § 502(b)(2). *Nat'l Energy & Gas Transmission, Inc. v. Liberty Elec. Power, LLC (In re Nat'l Energy & Gas Transmission, Inc.)*, No. 03-03104, at *6 (Bankr.D. Md. June 27, 2005) (emphasis added). Because the majority advances no support for its conclusion that bankruptcy law governs the contractual relationship between a creditor and a non-debtor guarantor—and ample authority exists to the contrary—I respectfully dissent.

As the majority explains, an arbitration panel awarded Liberty \$140 million plus approximately \$17 million in interest accrued after the debtors' bankruptcy petition had been filed. Liberty collected \$140 million from GTN, which was the maximum amount for which GTN could be liable under the terms of its guarantee. Liberty characterized GTN's payment as first, a payment of the \$17 million interest, and next, a payment of part of the \$140 million principal.

* Two preliminary observations simplify the playing field for me. First, I do not believe that Judge Shedd's opinion challenges Liberty's contractual rights under its guarantee from GTN to allocate principal and interest in any fashion it sees fit in relation to GTN. Second, we are not compelled to explore Liberty's right to recover from NEGТ under NEGТ's guarantee because the Bankruptcy

Liberty continued to assert its claim in bankruptcy against the debtors for the full \$140 million, recognizing, however, that it could not collect more than the approximately \$17 million needed to satisfy the debt. In Liberty's view, this \$17 million represented principal for which the debtors remained jointly and severally liable, even though they had filed for bankruptcy.¹

Proper analysis of Liberty's claim begins with the basic principle of contract law that Liberty is entitled to be paid in full, including interest, by its jointly and severally liable debtors. When one or more debtors file a bankruptcy petition, as here, it is undisputable that § 502(b)(2) bars a creditor from recovering interest not yet accrued as of the date of the bankruptcy petition against such a debtor. See Majority Op. at 301-03. However, it is also well-settled that § 502(b)(2) has no impact on the accrual of unmatured interest against non-debtors, including non-debtor guarantors. See, e.g., *Bruning v. United States*, 376 U.S. 358, 362 n. 4, 84 S.Ct. 906, 11 L.Ed.2d 772 (1964) (explaining that claims do not "los[e] their interest-bearing quality" in bankruptcy, but that post-petition interest is disallowed as a "rule of distribution"); *Kielisch v. Educ. Credit Mgmt Corp. (In re Kielisch)*, 258 F.3d 315, 323 (4th Cir.2001) ("Section 502 bars creditors from making *claims* from the bankruptcy estate for unmatured interest," but "does not purport to limit the *liability* on those claims, i.e., 'debts.'"); *In re El Paso Refining, Inc.*, 192 B.R. 144,

Court disallowed Liberty's claim against NEGТ and Liberty did not appeal. Indeed, at the risk of oversimplification, NEGТ seems to be little more than a cheerleader for ET Power or a surrogate for GTN in this appeal. The real dispute, therefore, is only between the primary obligor and its creditor.

1. As the majority notes, only Liberty's claim against ET Power is at issue in this appeal.

IN RE NAT. ENERGY & GAS TRANSMISSION, INC.

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Cite as 492 F.3d 297 (4th Cir. 2007)

146 (Bankr.W.D.Tex.1996) (holding that § 502(b)(2) only bars “unmatured interest from becoming an allowed claim against the debtor’s [bankruptcy] estate” and that “the obligation to pay interest vis-a-vis a guarantor is not tolled or eliminated by operation of section 502(b)(2)” (emphasis omitted)).

The majority intermingles these independent principles to arrive at its holding: that the \$17 million that Liberty seeks to recover from ET Power represents “disallowed post-petition interest no matter how Liberty chooses to classify it.” Majority Op. at 302. This approach, however, has the effect of limiting the non-debtor guarantor’s liability for interest accruing after the debtor’s bankruptcy petition. That is, the majority would have the bar to recovery of interest from the debtor swallow the accrual of interest on the debt across all parties liable for it. There is simply nothing in the Bankruptcy Code, applicable case law, the relevant guarantee agreement, or nonbankruptcy law to support the jettisoning of basic contract law principles in favor of an expansive reading of § 502(b)(2).²

In fact, the majority’s approach actually seems to run counter to another section of the Bankruptcy Code. Section 524(e) provides that the “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any

other entity for, such debt.” See also *El Paso*, 192 B.R. at 146 (holding that § 524(e) mandated that the independent obligations of a guarantor were unaffected by the bankruptcy of the principal obligor); *Stoller’s, Inc. v. Peoples Trust Bank (In re Stoller’s, Inc.)*, 93 B.R. 628, 635–36 (Bankr. N.D.Ind.1998) (holding guarantors liable for post-petition interest). The majority’s holding appears to expressly violate § 524(e) by allowing the bankruptcy filing of the debtors to dictate how Liberty accounts for its contractual payment from GTN, or, in other words, allowing the “discharge of a debt of the debtor [to] affect the liability of [GTN] on . . . such debt,” § 524(e).

Furthermore, in contrast to the majority’s contention, I do not believe that a creditor’s receipt of payment from a non-debtor guarantor implicates either of the purposes of § 502(b)(2): (1) avoiding “unfairness as between competing creditors” and (2) minimizing the “administrative inconvenience” that repeated recomputation of interest requires, *Bruning*, 376 U.S. at 362, 84 S.Ct. 906. With respect to the first, I fail to see the unfairness in the fact that Liberty bargained, outside of bankruptcy, for a guarantee of payment. That other creditors may not have secured such a guarantee, and therefore might ultimately recover proportionally less than Liberty, strikes me as no injustice. Second, even

2. The majority attempts to justify its result by invoking this court’s duty to “‘sift the circumstances surrounding’ the claim to determine the reality of the transaction for purposes of the bankruptcy proceeding.” Majority Op. at 302 (citing *Smith v. Robinson*, 343 F.2d 793, 801 (4th Cir.1965)). There is no reason, however, to allow “sift[ing] the circumstances” to engulf even basic principles of contract law by restructuring the private contracts of non-debtors.

The majority also seeks to place the blame for Liberty’s inability to collect the full

amount of its debt on the guarantee itself, which caps GTN’s liability at \$140 million. See *id.* at 303 n. 5. If GTN’s liability under the guarantee were unlimited, the majority apparently reasons, Liberty could collect the full value of its claim from GTN. As a matter of contract law, the majority is correct. But, as the bankruptcy court noted, “the cap [on GTN’s liability in its contract with Liberty is] no impediment to Liberty’s right to be paid in full from all sources” where the debtors are jointly and severally liable for the principal debt. *Nat’l Energy & Gas Transmission, Inc.*, No. 03-03104, at *8.

the debtors do not argue that the bankruptcy court's order below would require burdensome recomputation of interest, as it specifies the allowed amount of Liberty's claim as determined in the arbitration proceeding.

Therefore, because neither bankruptcy law nor the contract governing Liberty's relationship with the non-debtor guarantor GTN limits Liberty's right to allocate its recovery from GTN in any manner that it wishes, I would affirm the district court.



UNITED STATES of America,
Plaintiff-Appellee,

v.

Hugh Douglas DENTLER,
Defendant-Appellant.

No. 06-50272.

United States Court of Appeals,
Fifth Circuit.

July 3, 2007.

Background: Defendant was convicted in the United States District Court for the Western District of Texas, Samuel Fred Biery, Jr., J., of federal bank robbery, and sentenced to 240 months of imprisonment. Defendant appealed.

Holdings: The Court of Appeals, Dennis, Circuit Judge, held that:

- (1) any insufficiency of indictment was harmless;
- (2) jury instructions did not work an impermissible constructive amendment; but

- (3) defendant's offense was not crime of violence under career offender provisions.

Affirmed in part, and vacated and remanded in part.

1. Criminal Law ⚖️1139

Challenge to sufficiency of indictment is reviewed *de novo*.

2. Indictment and Information ⚖️60

Grand jury indictment must set forth each essential element of offense.

3. Indictment and Information ⚖️71.2(2)

Valid indictment must set forth alleged offense with sufficient clarity and certainty to apprise accused of crime with which he is charged.

4. Indictment and Information ⚖️60, 71.2(3, 4)

In determining whether indictment is sufficient, court does not ask whether indictment could have been better drafted, but whether it conforms to minimal constitutional standards; these minimum constitutional standards are met where indictment alleges every element of crime charged and in such a way as to enable accused to prepare his defense and to allow accused to invoke double jeopardy clause in any subsequent proceeding. U.S.C.A. Const.Amend. 5.

5. Criminal Law ⚖️1167(1)

Even if indictment for attempted bank robbery was inadequate in not sufficiently alleging that the felony defendant intended to commit at time he entered bank "affected the bank," and in not stating that attempted taking involved "the use of force or violence," such error was harmless; indictment gave defendant sufficient notice of crime with which he was charged by plainly stating that defendant stood accused of attempt to enter bank to commit

EXHIBIT 10

Entered: April 18, 2008

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Signed: April 16, 2008

SO ORDERED



Paul Mannes

PAUL MANNES
U. S. BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)**

In re:

**NATIONAL ENERGY & GAS
TRANSMISSION (f/k/a PG&E NATIONAL
ENERGY GROUP, INC.) *et al.***

Debtors,

**NATIONAL ENERGY & GAS
TRANSMISSION INC. (f/k/a PG&E
NATIONAL ENERGY GROUP, INC.); NEGT
ENERGY TRADING POWER, L.P.) (f/k/a
PG&E ENERGY TRADING POWER, L.P.) and
GAS TRANSMISSION NORTHWEST
CORPORATION,**

Plaintiffs,

v.

LIBERTY ELECTRIC POWER, LLC.,

Defendant.

)
)
)
) Case No.: 03-30459 PM and 03-
) 30461 (PM)
) through 03-30464(PM)
) Chapter 11
) (Jointly Administered under
) Case No.: 03-30459 (PM))
)

) Adversary Proceeding
)

) No.: 03-03104
)
)
)
)
)
)
)
)
)
)

**ORDER GRANTING REQUEST OF LIBERTY ELECTRIC
POWER, L.L.C. FOR *PRO RATA* DISTRIBUTIONS
OF UP TO \$5,428,046 ON ITS ALLOWED CLAIM**

This matter having been remanded to this Court by order dated October 2, 2007 (the "Remand Order") of the United States District Court for the District of Maryland at Greenbelt ("District Court"); and the Remand Order having been issued in accordance with the Order dated July 10, 2007 of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") remanding the matter to the District Court; and the Fourth Circuit having issued the mandate to the District Court on August 14, 2007; and this Court having held a status conference on November 7, 2007 and requesting briefing of the issues presented; and counsel for Liberty Electric Power, LLC ("Liberty") and NEGT Energy Trading-Power, L.P. ("ET Power") having entered into a Stipulation and Consent Order, "so ordered" on January 17, 2008, modifying the previously established briefing schedule; and the parties having filed concurrent opening briefs on February 15, 2008 and reply briefs on March 14, 2008; and the Court having held a hearing on April 1, 2008; and counsel for Liberty and ET Power having appeared and argued at the hearing; and the Court having set forth its opinion on the record after considering the briefs submitted by the parties and the arguments made at the hearing; and sufficient cause appearing therefor, it is hereby

ORDERED that Liberty's allowed claim is not reduced by the \$140 million it received from its guarantor; and it is further

ORDERED that consistent with this Court's prior order of August 10, 2005, Liberty's allowed claim, for purposes of computing its entitlement to distributions, shall be, and it hereby is, the sum of \$145,428,046; and it is further

ORDERED that ET Power's representatives shall make *pro rata* distributions to Liberty from ET Power's assets in respect of Liberty's \$145,428,046 allowed claim, up to the aggregate amount of \$5,428,046.

cc:

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END OF ORDER

EXHIBIT 11

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)**

In re:

**NATIONAL ENERGY & GAS
TRANSMISSION, INC. (f/k/a PG&E
NATIONAL ENERGY GROUP, INC.), et
al.**

Debtors.

*
* Case No.: 03-30459 (PM) and 03-30461 (PM)
* through 03-30464 (PM) and 03-30686 (PM)
* through 03-30687 (PM)
* Chapter 11
*
* (Jointly Administered under
* Case No.: 03-30459 (PM))

* * * * *

**MOTION FOR ENTRY OF AN ORDER AUTHORIZING AND APPROVING
SETTLEMENT OF LIBERTY ELECTRIC POWER, LLC'S ALLOWED CLAIM**

National Energy & Gas Transmission, Inc. ("NEGT") and NEGTEnergy Trading - Power, L.P. ("ET Power") and together with NEGTEnergy Trading, the "Debtors"), two of the debtors in the above-captioned main case¹ and two of the plaintiffs in Adversary Proceeding No. 03-03104,² through undersigned counsel, hereby file their Motion for Entry of an Order Authorizing and Approving Settlement of Liberty Electric Power, LLC's Allowed Claim (the "Motion"), and respectfully state as follows:

Introduction

Following over four years of litigation concerning the filed claim of Liberty Electric Power, LLC ("Liberty") against ET Power, including the original arbitration of the claim, and

¹ The debtors are the following entities: (i) National Energy & Gas Transmission, Inc. ("NEGT"), (ii) NEGTEnergy Trading Holdings Corporation f/k/a PG&E Energy Trading Holdings Corporation ("ET Holdings"), (iii) NEGTEnergy Trading - Gas Corporation f/k/a PG&E Energy Trading - Gas Corporation ("ET Gas"), (iv) NEGTEnergy Trading Investments Corporation f/k/a PG&E Energy Trading Investments Corporation ("ET Inv."), (v) ET Power (together with ET Holdings, ET Gas and ET Inv., the "ET Debtors," and collectively with NEGTEnergy Trading, the "Initial Debtors") and (vi) Energy Services Ventures, Inc. f/k/a PG&E Energy Services Ventures, Inc. ("ESV") and (vii) Quantum Ventures (together with ESV, the "Quantum Debtors").

² Adversary Proceeding No. 03-03104 is the underlying adversary proceeding related to the settlement reached among the parties and described herein and in the Stipulation (defined below).



proceedings at the Bankruptcy Court, District Court and Circuit Court of Appeals levels, the Debtors and Liberty have resolved all remaining issues related to the allowance of Liberty's claim and the manner in which distributions from ET Power are to be made thereon. This resolution is embodied in a stipulation entered into among the parties, as more fully set forth herein. By this Motion, the Debtors respectfully request the Court approve the Stipulation as it is in the best interest of the Debtors' respective estates and creditors and is a sound exercise of the Debtors' business judgment.

Jurisdiction

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This Motion is a core proceeding within the meaning of 28 U.S.C. § 157.

2. The statutory predicate for the relief sought herein is section 105 of title 11 of the United States Code (the "Bankruptcy Code"), Rule 9019(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), as well as the authority granted in Section 12.1 of the ET Plan (defined below)³ and Section 10.01 of the NEGT Plan (defined below).⁴

BACKGROUND

The Chapter 11 Cases

3. On July 8, 2003 (the "Petition Date"), each of the Initial Debtors, including NEGT and ET Power, filed a voluntary petition for relief under chapter 11 of the Bankruptcy

³ Pursuant to Article XII §12.1(i) of the ET Plan, the Bankruptcy Court retained jurisdiction for, among other things, "(i) Resolution of disputes concerning Disputed Claims," "Disputed Claim" is defined in Article I § 1.28 of the ET Plan as "any Claim that is not an allowed Claim as of the relevant date."

⁴ Pursuant to Article X §10.01(i) of the NEGT Plan, the Bankruptcy Court retained jurisdiction for, among other things, "(i) Resolution of disputes concerning Disputed Claims," "Disputed Claim" is defined in Article 1 § 1.31 of the NEGT Plan as "a Claim (or any portion thereof) as to which: (a) an objection has been timely filed,...."

Code. By order dated July 8, 2003, the Initial Debtors' cases were consolidated for procedural purposes. On July 29, 2003, each of the Quantum Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. By order dated August 7, 2003, the Quantum Debtors' cases were consolidated with the Initial Debtors' cases for procedural purposes.

4. By order dated May 3, 2004, this Court confirmed NEGТ's Modified Third Amended Plan of Reorganization (the "NEGТ Plan"). The NEGТ Plan became effective on October 29, 2004.

5. By order entered on April 19, 2005, this Court confirmed the First Amended Plan of Liquidation for the ET Debtors and the Quantum Debtors (the "ET Plan"), which plan became effective on May 2, 2005.

The Liberty Claim and the Claim Objection

6. Prior to the Petition Date, ET Power engaged in energy-based financial and hedging transactions such as future contracts, swaps, options, and derivatives. In April 2000, Liberty entered into an agreement (the "Tolling Agreement") with ET Power, under which ET Power secured the right to purchase energy from Liberty in exchange for a monthly capacity payment.

7. Liberty procured a limited guaranty of payment from NEGТ, and from Gas Transmission Northwest Corporation ("GTN"), which was then a non-debtor subsidiary of NEGТ, in which both parties guaranteed ET Power's obligations under the Agreement. The guarantees were subject to a cap on potential liability that was \$140 million as of the Petition Date, and by the terms of the respective agreements, any payments made on account of one guarantee would apply to reduce the maximum potential exposure under the second guarantee.

8. On the Petition Date, the Debtors filed a motion seeking to reject the Tolling Agreement, which motion was granted by the Court on August 6, 2003. On January 8, 2004,

Liberty timely filed proof of claim number 323 (the "Liberty Claim"), asserting a general unsecured claim against ET Power in the amount of \$182,198,749.70, plus additional amounts. On March 30, 2004, the Debtors filed an objection to the Liberty Claim.

The Arbitration, Bankruptcy Court Decision and Subsequent Appeals

9. The objection to the Liberty Claim was arbitrated, resulting in an award (the "Arbitral Award") in favor of Liberty in the amount of \$162,725,436.59 (the "Judgment Amount"). This Court affirmed the Arbitral Award by Order entered August 10, 2005. In so doing, the Court held that Liberty was free to allocate the payment of \$140,000,000 it received from the non-debtor GTN (the "Liberty Payment") to interest first, then principal, and ruled that Liberty held an allowed claim against ET Power in the amount of \$145,428,046 (the "Allowed Claim"), provided that the maximum distributable amount on such claim did not exceed \$22,725,436.59 (the Judgment Amount minus the \$140,000,000 Liberty Payment).

10. On appeal by the Debtors, the United States District Court for the District of Maryland (the "District Court") affirmed this Court's decision. The Debtors appealed the decision of the District Court to the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit"). The Fourth Circuit, among other things, held that Liberty was barred from recovering \$17 million of the \$22,725,436.59 maximum distribution allowed by this Court because Liberty's claim actually constituted post-petition interest disguised as unpaid principal. The Fourth Circuit did not reverse the allowance of Liberty's claim for \$5,428,046 for certain unpaid invoices that were part of the Liberty Claim. Liberty believes the Fourth Circuit also ruled the value of Liberty's Allowed Claim is not reduced by the Liberty Payment. ET Power believes the Fourth Circuit made no such ruling. The Fourth Circuit remanded the case to the District Court for proceedings consistent with its opinion. The District Court, in turn, remanded the case back to this Court.

11. On remand, a dispute arose between Liberty and the Debtors as to the actual amount of Liberty's allowed claim. Liberty maintained that its allowed claim was \$145,428,046 with a maximum distributable amount of \$5,428,046. The Debtors maintained that Liberty's Allowed Claim must be reduced by the \$140 million paid by GTN, leaving an allowed claim of \$5,428,046, upon which distributions would be made.

12. Following briefing and oral argument, the Bankruptcy Court issued an Order on April 18, 2008 (the "April 2008 Order"), holding that (i) Liberty's Allowed Claim is not reduced by the \$140 million it received from GTN; (ii) Liberty's Allowed Claim, for purposes of computing its entitlement to distributions, is \$145,428,046; and (iii) ET Power's estate must make *pro rata* distributions to Liberty from ET Power's assets in respect of Liberty's Allowed Claim of \$145,428,046, up to the aggregate amount of \$5,428,046. The Debtors appealed the April 2008 Order to the District Court. Following briefing and oral argument, on November 25, 2008, the District Court affirmed this Court's April 2008 Order in all respects (the "District Court 2008 Order").

The Settlement Agreement

13. The Debtors respectfully disagree with the interpretation of the Fourth Circuit's decision that is reflected in this Court's April 2008 Order and the District Court 2008 Order. Given these rulings, however, and recognizing the attendant risks and costs involved in pursuing a reversal by the Fourth Circuit, the outcome of which is uncertain, the Debtors believe in their sound business judgment that the proposed settlement is a fair resolution of their remaining disputes with Liberty. The settlement ensures a \$271,402 reduction in what otherwise might be the maximum distribution payable to Liberty, and eliminates the expense of a further appeal to the Fourth Circuit. Moreover, because the precise percentage distribution to be received by ET Power creditors remains unknown at this time, the amount that, as a practical matter, is subject to

dispute (*i.e.*, the difference between a 100% distribution on the invoices claim and a *pro rata* distribution on account of such claim), is not clear. In addition, the Debtors have an interest in avoiding further litigation delay at this stage in their chapter 11 cases. Accordingly, as a result of recent settlement discussions among the parties, the Debtors and Liberty have agreed upon a stipulation (the “Stipulation”) resolving all remaining issues between them related to the Liberty Claim. Pursuant to the Stipulation, ET Power will make a distribution in cash to Liberty of 95% of the \$5,428,046 amount, or \$5,156,643.70. A copy of the Stipulation is annexed hereto as **Exhibit A.**

RELIEF REQUESTED

14. By this motion, NEGТ and ET Power seek the entry of an order, pursuant to section 105 of the Bankruptcy Code and Bankruptcy Rule 9019, authorizing and approving the Stipulation. Section 6.05 of the NEGТ Plan requires Bankruptcy Court approval of the Stipulation.⁵

15. Section 105(a) of the Bankruptcy Code provides, in pertinent part, that “[t]he court may issue any order . . . necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” In turn, Rule 9019(a) provides that “[o]n motion by the [debtor-in-possession] and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bankr. P. 9019(a). “[T]he decision whether to approve a compromise under Rule 9019 is committed to the sound discretion of the Court, which must determine if the compromise [or

⁵ Pursuant to Article VI, § 6.05 of the NEGТ Plan provides that, “Subsequent to the Effective Date, the Reorganized Debtor shall have the authority to resolve any Disputed Claim for an Allowed Claim of less than \$1,000,000.00 without further Bankruptcy Court order and subject only to the filing of a notice of such settlement with the Bankruptcy Court.” Because the amount in controversy, \$5,428,046, exceeds the \$1,000,000 threshold for settling claims on only a notice, the Debtors are seeking Court approval of the Stipulation.

settlement] is fair, reasonable, and in the interest of the estate.” In re Louise’s, Inc., 211 B.R. 798, 801 (D. Del. 1997).

16. Bankruptcy Rule 9019 thus empowers this Court to approve compromises and settlements if they are in the “best interest[s] of the estate.” In re Marvel Entertainment Group, Inc., 222 B.R. 243 (D. Del. 1998) (holding that proposed settlement was in the best interest of the estate). Factors the Court should consider when evaluating a settlement under Bankruptcy Rule 9019 include: (i) the probability of success in the litigation; (ii) the complexity, expense and likely duration of the litigation; (iii) all other factors relevant to making a full and fair assessment of the wisdom of the proposed compromise; and (iv) whether the proposed compromise is fair and equitable to the debtors, their creditors, and other parties in interest. See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968); In re Martin, 91 F.3d 389, 393 (3d Cir. 1996) (stating that “[t]o minimize litigation and expedite the administration of a bankruptcy estate, compromises are favored in bankruptcy” and citing criteria set forth above in determination of reasonableness of particular settlements) (internal quotation marks and citation omitted); Official Committee of Unsecured Creditors v. White Plains Joint Venture, 1994 U.S. App. LEXIS 1282 *10 (4th Cir. January 26, 1994) (compromises are favored in bankruptcy). Basic to the process of evaluating proposed settlements, then, is “the need to compare the terms of the compromise with the likely rewards of litigation.” TMT Trailer Ferry, 390 U.S. at 425.

17. Moreover, “[t]he court is not supposed to have a ‘mini-trial’ on the merits, but should ‘canvass the issues to see whether the settlement falls below the lowest point in the range of reasonableness.’” In re Jasmine, Ltd., 258 B.R. 119, 123 (D. N.J. 2000) (citing In re Neshaminy Office Building Assocs., 62 B.R. 798, 803 (E.D. Pa. 1986)); see also Shaia v. Three Rivers Wood, Inc. (In re Three Rivers Wood, Inc.), 2001 Bankr. LEXIS *17-18 (Bankr. E.D. Va.

March 20, 2001) (In evaluating a proposed settlement, “the court’s fundamental determination is whether the settlement falls below the lowest point in the range of reasonableness. ... [B]y no means is a bankruptcy judge required to conduct a full evidentiary hearing or mini-trial on the compromise motion before court approval can be reached.”) (citations and internal quotation marks omitted).

18. The Stipulation is in the best interest of NEGTE, ET Power, their estates and their creditors. The Stipulation resolves the dispute as to whether Liberty is entitled to distribution on an allowed claim of \$145,428,046, up to a maximum amount of \$5,428,046, or to distribution on an allowed claim of \$5,428,046, without the cost and risk of further appeals. The Stipulation secures a \$271,402.30 reduction in the maximum distribution that otherwise could be made to Liberty, and spares the Debtors the expense of an appeal to the Fourth Circuit.⁶

Request to Shorten Time and Waiver of Ten Day Stay Under Bankruptcy Rule 6004(g)

19. Pursuant to the terms of the Stipulation, the Stipulation is not effective until approved by the Court. Further, the payment of the distribution from ET Power to Liberty thereunder (the “Settlement Payment”) must be made by no later than January 13, 2009, if payment is made by check, or January 14, 2009, if payment is made by wire. This requirement in turn necessitates the consideration of the relief requested herein by the Court on slightly shortened notice. The Debtors hereby request that the response period to the Motion be shortened to fifteen days (January 8, 2009) in order to allow the Court sufficient time to consider the Motion and rule on it in advance of the Settlement Payment deadline. The Debtors remain available to present the Motion to the Court should the Court desire to hold a hearing on the

⁶ On December 23, 2008 the Debtors filed a notice of appeal with the Fourth Circuit. The Stipulation provides that the appeal shall be dismissed after the occurrence of the Settlement Effective Date provided for in the Stipulation.

Motion. However, the Debtors respectfully request that the Court consider the Motion without a hearing and on the expedited basis as set forth herein.

20. The Stipulation also requires that the order approving the settlement shall become effective immediately upon entry notwithstanding the 10 day stay provided for in Bankruptcy Rule 6004(g). Rule 6004(g) provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, *unless the court orders otherwise.*” Fed. R. Bankr. P. 6004(g) (emphasis added). Pursuant to the plain language of Rule 6004(g), this Court may waive the ten (10) day stay period. See also In re Perry Hollow Mgmt. Co., Inc., 297 F.3d 34, 41 (1st Cir. 2002) (explaining that “[a]lthough Rule 6004(g) provides for a ten-day stay, it also clearly states that the court can order otherwise” and that the court has “discretion” to waive the ten-day stay). Cause exists to waive the ten (10) day stay period in this case because the Stipulation requires that the payment to Liberty be made by January 13 or 14, 2009. Accordingly, the Debtors respectfully request that the Court waive the ten (10) day stay period required by Bankruptcy Rule 6004(g).

21. Accordingly, based on the foregoing, NEGТ and ET Power believe that the Stipulation fairly and reasonably resolves all issues relating to the Liberty Claim, that the resolution described herein and in the Stipulation reflect the sound exercise of NEGТ and ET Power’s business judgment, and that the Stipulation falls well within the range of reasonableness required for its approval. Further, the request to shorten the response period is reasonable under the circumstances given that it is unlikely any party in interest would object to the resolution of the dispute between the parties which results in a significant savings to ET Power.

CONCLUSION

WHEREFORE, NEGТ and ET Power respectfully request that the Court: (a) enter an order, substantially in the form attached hereto approving the Stipulation; and (b) grant such other and further relief as this Court may deem just or proper.

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and

WHITEFORD, TAYLOR & PRESTON L.L.P.
/s/ Dennis J. Shaffer
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Power, L.P.

CERTIFICATE OF SERVICE

I hereby certify that, on December 24, 2008 a copy of the foregoing pleading was sent electronically via the Court's ECF system upon each party receiving ECF notice in this case, and via overnight mail to the following parties:

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s/ Dennis J. Shaffer
Dennis J. Shaffer

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
• (Greenbelt Division)**

In re:)	
)	
NATIONAL ENERGY & GAS)	
TRANSMISSION (f/k/a PG&E NATIONAL	)	Case No.: 03-30459 PM and 03-
ENERGY GROUP, INC.) <i>et al.</i>	)	30461 (PM)
	)	through 03-30464(PM)
Debtors,	)	Chapter 11
	)	(Jointly Administered under
	)	Case No.: 03-30459 (PM))
)	
<hr style="width: 40%; margin-left: 0;"/>)	
NATIONAL ENERGY & GAS)	
TRANSMISSION INC. (f/k/a PG&E)	
NATIONAL ENERGY GROUP, INC.); NEGT)	
ENERGY TRADING POWER, L.P.) (f/k/a)	
PG&E ENERGY TRADING POWER, L.P.) and))	
GAS TRANSMISSION NORTHWEST)	
CORPORATION,	)	Adversary Proceeding
)	
Plaintiffs,	)	No.: 03-03104
)	
v.)	
)	
LIBERTY ELECTRIC POWER, LLC.,)	
)	
Defendant.)	
)	

**STIPULATION APPROVING SETTLEMENT OF
LIBERTY ELECTRIC POWER, LLC's ALLOWED CLAIM**

This Stipulation is entered into by Liberty Electric Power, LLC (“Liberty”), National Energy & Gas Transmission, Inc. (“NEGT”) and NEGT Energy Trading-Power, L.P. (“ET Power” and, together with NEGT, the “Debtors”).

RECITALS:

A. On January 8, 2004, Liberty timely filed in these chapter 11 cases proof of claim number 323, asserting a general unsecured claim against ET Power in the

amount of \$182,198,749.70 plus additional amounts. Debtors filed an objection to this claim on or about March 30, 2004.

B. Following an arbitral award in Liberty's favor ("Arbitral Award"), Liberty filed (i) a motion to confirm the Arbitral Award, as well as (ii) a motion to allow Liberty's claim and to dismiss Adversary Proceeding No. 03-03104 Debtors had commenced in the United States Bankruptcy Court for the District of Maryland as part of the litigation over Liberty's claim (the "Adversary Proceeding").

C. In a Memorandum of Decision entered June 27, 2005 and by Order entered August 10, 2005, the United States Bankruptcy Court for the District of Maryland ("Bankruptcy Court"): (i) confirmed the Arbitral Award in favor of Liberty and against ET Power, in the amount of \$162,725,436.59 (the "Judgment Amount"); (ii) held that Liberty was free to allocate the Liberty Payment¹ to interest first, then principal; and (iii) ruled that Liberty holds an allowed claim against ET Power in the amount of \$145,428,046 ("Liberty's Allowed Claim"), provided the maximum distributable amount on such claim did not exceed \$22,725,436.59 (that is, the Judgment Amount minus the Liberty Payment). The United States District Court for the District of Maryland ("District Court") affirmed the August 10, 2005 Order on or about March 6, 2006. Debtors appealed that Order to the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit").

D. On July 10, 2007, the Fourth Circuit issued an Opinion and separate Judgment disposing of Debtors' appeal. The Fourth Circuit held, among other

¹ The "Liberty Payment" was a \$140 million payment made to Liberty from an escrow established pursuant to that certain Post-Closing Escrow Agreement dated November 1, 2004, by and between NEGT, Gas Transmission Corporation, GTN Holdings, LLC, TransCanada American Investments, Ltd., Gas Transmission Northwest Corporation, and JPMorgan Chase Bank, as escrow agent.

things, that Liberty was barred from recovering \$17 million of the \$22,725,436.59 the Bankruptcy Court ruled was recoverable because the \$17 million was properly characterized as postpetition interest disguised as unpaid principal. The Fourth Circuit opinion, by its express terms, did not reverse the allowance of Liberty's claim for \$5,428,046 (the "Invoices Amount"), which ET Power agreed that it owed. Liberty believes the Fourth Circuit also ruled the value of Liberty's Allowed Claim is not reduced by the Liberty Payment. ET Power believes the Fourth Circuit made no such ruling. The Fourth Circuit then remanded the case to the District Court for proceedings consistent with its opinion, and the District Court, in turn, remanded the matter to the Bankruptcy Court.

E. On remand, a dispute arose between Debtors and Liberty as to the amount of Liberty's Allowed Claim. Liberty maintained that its allowed claim was \$145,528,046, with a maximum distributable amount of \$5,428,046 (i.e., the Invoices Amount). Debtors maintained that Liberty's Allowed Claim must be reduced by the \$140 million it had received from GTN, thereby leaving an allowed claim of only \$5,428,046.

F. After briefing and oral argument, the Bankruptcy Court issued an Order on April 18, 2008 (the "April 2008 Order") holding that (i) Liberty's Allowed Claim is not reduced by the \$140 million it received from GTN; (ii) Liberty's Allowed Claim, for purposes of computing its entitlement to distributions is \$145,428,046; and (iii) ET Power's estate must make *pro rata* distributions to Liberty from ET Power's assets in respect of Liberty's Allowed Claim of \$145,428,046, up to the aggregate

amount of \$5,428,046. Thereafter, Debtors appealed the April 2008 Order to the District Court.

G. Following briefing and oral argument, on November 25, 2008 (the "District Court 2008 Order"), the District Court affirmed the Bankruptcy Court's April 2008 Order in all respects. On December 23, 2008, the Debtors filed with the District Court a notice of appeal in respect of the District Court 2008 Order (the "Notice of Appeal").

I. Liberty and Debtors desire to settle their dispute in accordance with the terms of this Stipulation (the "Settlement").

NOW, THEREFORE, subject to Bankruptcy Court approval, the parties hereby stipulate and agree as follows (including and incorporating the recitals set forth above):

AGREEMENT:

1. Liberty's Claim. Liberty's Allowed Claim shall be satisfied by ET Power's cash distribution to Liberty of \$5,156,643.70, which amount constitutes ninety-five percent (95%) of the maximum distributable amount (the "Distribution Amount").

2. Payment of Distribution Amount. The payment of the Distribution Amount will be timely and the Settlement deemed effective only if the Distribution Amount is (i) wire transferred by ET Power to Liberty in immediately available cash funds on or before noon on January 14, 2009 (pursuant to the wiring instructions attached as Exhibit A hereto) or (ii) paid by ET Power to Liberty by certified check or bank check on or before noon on January 13, 2009 (collectively, the "Payment Deadlines"). The date

upon which Liberty receives the Distribution Amount shall be the "Settlement Effective Date".

3. Adversary Proceeding Dismissed. Promptly after the occurrence of the Settlement Effective Date, the Adversary Proceeding shall be dismissed, with prejudice, with Liberty and Debtors to bear their own costs.

4. Appeal Dismissal. The Notice of Appeal shall be dismissed promptly after the occurrence of the Settlement Effective Date, with prejudice, with Liberty and Debtors to bear their own costs.

5. Termination. If ET Power fails to remit the Distribution Payment on or before the Payment Deadlines, then this Stipulation shall be automatically and immediately canceled and terminated, and the Settlement set forth herein shall be null and void, and the parties restored to their original positions. The parties expressly reserve their rights if this Stipulation is canceled and terminated.

6. Release by Debtors. Upon the Settlement Effective Date, the Debtors and their estates release and discharge Liberty and its parents, subsidiaries, and affiliates and their present and former officers, directors, shareholders, administrators, agents, and employees, and their representatives, predecessors, successors, and assigns ("Liberty Released Parties") from all causes of action, claims, liabilities, and demands of every kind and nature, whether known or unknown, asserted or unasserted, suspected or unsuspected, accrued or which may thereafter accrue that the Debtors and their estates, and each of their representatives, successors, and assigns, ever had, now have, or may have, against the Liberty Released Parties or any of them by reason of any act, omission,

transaction, or occurrence, arising out of or relating to the Adversary Proceeding, the related appeals or Liberty's Allowed Claim.

7. Release by Liberty. Upon the Settlement Effective Date, Liberty releases and discharges the Debtors and their estates and their present and former officers, directors, shareholders, administrators, agents, and employees, and their representatives, predecessors, successors, and assigns ("Debtors' Released Parties") from all causes of action, claims, liabilities, and demands of every kind and nature, whether known or unknown, asserted or unasserted, suspected or unsuspected, accrued or which may thereafter accrue, that Liberty and its representatives, successors, and assigns, ever had, now have, or may have, against the Debtors' Released Parties or any of them by reason of any act, omission, transaction, or occurrence, arising out of or relating to the Adversary Proceeding, the related appeals or Liberty's Allowed Claim.

8. Additional Documents. Each party shall execute and deliver such additional documents and instruments and take such actions as are reasonably necessary to effect the intent and purposes of this Stipulation.

9. Entire Agreement. This Stipulation constitutes the entire agreement between and among the parties and there are no other understandings, representations, or agreements, oral or otherwise, concerning the subject matter of this Stipulation.

10. Authorization. Each person executing the Stipulation on behalf of a party represents that such person is duly authorized and empowered to execute the Stipulation on behalf of such party. Upon the Settlement Effective Date, the Stipulation will be binding upon and will inure to the benefit of the parties and their respective

representatives, successors, and assigns, including any trustee, examiner, or other similar person appointed in this or any subsequent bankruptcy case or to act on behalf of the Debtors or their estates.

11. Only Written Amendments. This Stipulation may be modified or amended only by a writing executed by the parties.

12. No Admission. Neither this Stipulation nor any statement made, action or position taken, or document prepared in connection with the negotiation, execution, or implementation of this Stipulation is, or will be deemed to be or construed as, an admission by any party to this Stipulation of any liability, act, or matter or that any claim or defense has or lacks merit. No statement made or action taken in connection with the negotiation of this Stipulation shall be offered in any legal action or administrative proceeding among or between the parties hereto, other than as may be necessary: (a) to obtain approval of the Stipulation; or (b) enforce the parties' respective rights thereunder. In addition, notwithstanding anything contained herein to the contrary, NEGTECH, its existing and former subsidiaries and their respective estates, representatives, predecessors, successors and assigns expressly reserve and retain any and all of their respective rights, claims and causes of action against ET Power and its estate arising from or relating to the Liberty Payment, Liberty's Allowed Claim, the underlying guarantee agreements and the subject matter of Liberty's Allowed Claim, including without limitation, any and all rights, claims and causes of action for reimbursement, contribution and/or subrogation; *provided, however*, that ET Power makes no concession or waiver that any such rights, claims or causes of actions in fact exist. In addition, notwithstanding anything contained herein to the contrary, ET Power, its existing and former subsidiaries

and their respective estates, representatives, predecessors, successors and assigns expressly reserve and retain any and all of their respective rights, claims and defenses against NEGТ and its estate arising from or relating to the Liberty Payment, Liberty's Allowed Claim, the underlying guarantee agreements and the subject matter of Liberty's Allowed Claim; *provided, however*, that NEGТ makes no concession or waiver that any such rights, claims or defenses in fact exist.

13. Governing Law. This Stipulation will be governed by and construed and enforced in accordance with the laws of the State of New York except for any conflict of law provisions in those laws that may otherwise require the application of the laws of a jurisdiction other than that of the State of New York to the performance, validity, construction, or enforcement of this Stipulation.

14. Continuing Jurisdiction. The parties irrevocably submit to the exclusive jurisdiction and venue of the Bankruptcy Court solely for the limited purpose of any suit, action, proceeding, case, controversy, or dispute relating to this Stipulation and the performance or breach of it. The parties are barred and enjoined from commencing or continuing any suit, action, proceeding, case, controversy, or dispute relating to this Stipulation and the performance or breach of it, in any state or federal court or other tribunal other than the Bankruptcy Court. Solely for purposes of such suit, action or proceeding, to the fullest extent that they may effectively do so under applicable law, the parties irrevocably waive and agree not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of the Bankruptcy Court, or that the Bankruptcy Court is, in any way, an improper venue or an inconvenient forum.

15. Fees and Costs. In the event of a suit, action, or proceeding arising from or related to the negotiation, approval, performance or breach of this Stipulation, the Bankruptcy Court will award attorneys' fees and costs to the prevailing party.

16. Notices. All notices to the parties shall be sent by first class U.S. Mail, by hand delivery, or by facsimile, to their respective counsel, at the addresses indicated on the signature page below.

17. Assignment. Neither party may assign its rights or delegate its duties under this Stipulation without the prior written consent of the other party. Any purported assignment in violation of this section is void.

18. Interpretation and Construction. The parties have fully participated in the preparation, negotiation, review and approval of all provisions of this Stipulation. Therefore, if any provision of this Stipulation requires interpretation or construction, this Stipulation will be interpreted or construed without any presumption that the provisions of this Stipulation are to be strictly construed against any party, each of whom was represented by sophisticated counsel.

19. Effect of Stipulation on Third Parties; No Waiver. This Stipulation does not create any rights for the benefit of any person who is not a party to it. This Stipulation is by and among the parties only, and nothing in it is in any way intended to alter, waive or release any claim, counterclaim, action, or defense of Debtors against other parties in Debtors' bankruptcy proceedings.

20. Bankruptcy Court Approval. This Stipulation shall be of no force or effect until an order approving it has been entered by the Court. The proposed order approving the Stipulation shall provide that, notwithstanding Rule 6004(g) of the Federal

Rules of Bankruptcy Procedure, the order shall be effective immediately and not stayed for ten days after entry of such order.

21. Counterparts. This Stipulation may be signed by the parties in counterpart originals with the same force and effect as if fully and simultaneously signed on a single original document. Facsimile signatures will be considered valid signatures as of the date of this Stipulation, although the original signature pages may be appended at a later date to this Stipulation.

Dated: December __, 2008
New York, New York

By: _____
Martin J. Bienenstock, Esq.
Judy G. Z. Liu, Esq.

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Attorneys for Liberty Electric Power, LLC

By: _____
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Fax: (212) 752-5378

Attorneys for the Debtors

Exhibit A

Wiring Instructions

Wire Routing Transit Number: 021000021
Bank Name: JPMorgan Chase, N.A.
City, State: New York, NY
Account# 304666246
Account Name: Liberty Electric Generation
Holdings LLC (FKA SVMF 4 LLC)

1832328

Signed: January 06, 2009

SO ORDERED



Paul Mannes

PAUL MANNES
U. S. BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)**

In re:

*

**NATIONAL ENERGY & GAS
TRANSMISSION, INC. (f/k/a PG&E
NATIONAL ENERGY GROUP, INC.), *et
al.***

* Case No.: 03-30459 (PM) and 03-30461 (PM)
through 03-30464 (PM) and 03-30686 (PM)
* through 03-30687 (PM)
Chapter 11

*

Debtors.

(Jointly Administered under
* Case No.: 03-30459 (PM))

* * * * *

**ORDER APPROVING MOTION FOR ENTRY OF AN ORDER AUTHORIZING AND
APPROVING SETTLEMENT OF LIBERTY ELECTRIC POWER, LLC'S ALLOWED CLAIM**

Upon consideration of the Motion for Entry of an Order Authorizing and Approving Settlement of Liberty Electric Power, LLC's Allowed Claim (the "Motion") by and among National Energy & Gas Transmission, Inc. ("NEGT") and NEGTEnergy Trading-Power, L.P. ("ET Power") on the one hand, and Liberty Electric Power, LLC ("Liberty") on the other hand; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334, and pursuant to section 12.1 of the First Amended Plan of

Liquidation for the ET Debtors and the Quantum Debtors and section 10.01 of the Third Amended Plan of Reorganization for National Energy & Gas Transmission, Inc.; and it appearing that due and proper notice of the Motion and the relief requested therein having been given; and no other or further notice need be given; and the relief requested in the Motion being in the best interests of ET Power and NEGT, and their estates and creditors; and the Court having reviewed the Motion; and the Court having considered any objections to the Motion; and the Court having determined that the factual bases set forth in the Motion establish just cause for relief granted herein; and sufficient cause appearing therefore, the United States Bankruptcy Court for the District of Maryland it is hereby:

ORDERED that the Motion is granted in all respects; and it is further

ORDERED that the settlement by and among the Debtors and Liberty, as set forth in the Stipulation annexed to the Motion as Exhibit A, is authorized and approved pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure; and it is further

ORDERED that the Debtors are authorized to execute, deliver, implement and fully perform any and all obligations, instruments, documents and papers and to take any and all actions reasonably necessary to consummate the Stipulation and perform any and all obligations contemplated therein; and it is further

ORDERED that the stay of this Order provided by the Bankruptcy Rules (including Bankruptcy Rule 6004) whether for ten (10) days or otherwise shall not be applicable to this Order, and this Order shall be effective and enforceable immediately upon entry; and it is further

ORDERED that the Stipulation is effective as of the date of the entry of this Order; and it is further

ORDERED that the Court shall retain jurisdiction to interpret, implement, and enforce the provisions of this Order.

END OF ORDER

cc:

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Assistant United States Trustee
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Greenbelt, MD 20770

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Dennis J. Shaffer, Esq.
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1830918

Notice Recipients

District/Off: 0416-0

User: pNeal

Date Created: 1/6/2009

Case: 03-30459

Form ID: pdfparty

Total: 7

Recipients of Notice of Electronic Filing:

aty Dennis J. Shaffer dshaffer@wtplaw.com

TOTAL: 1

Recipients submitted to the BNC (Bankruptcy Noticing Center):

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	Office of the United States Trustee	Jeanne M. Crouse, Esq.	Assistant United States Trustee	6305 Ivy Lane, Suite 600 Greenbelt, MD 20770
	Ronald S. Liebman, Esq.	Dewey & LeBoeuf LLP	1101 New York Avenue, NW	Washington, DC 20005-4213

TOTAL: 6

EXHIBIT 12

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MARYLAND
Greenbelt Division**

In re:	§	Chapter 11
	§	
NATIONAL ENERGY & GAS TRANSMISSION, INC., et al.	§	Case No. 03-30459 (PM) and
	§	03-30461 (PM) through 03-30464 (PM)
	§	and 03-30686 (PM) through 03-30687
	§	(PM)
Debtors.	§	
	§	Jointly Administered as 03-30459 (PM)

**RESPONSES AND OBJECTIONS OF NEGТ ENERGY TRADING – POWER, L.P.
TO NEGТ’S SECOND SET OF DISCOVERY REQUESTS**

NEGТ Energy Trading Power, L.P. (“ET Power”), without waiving any objections or admitting the relevance or materiality of the information sought, responds to National Energy & Gas Transmission, Inc.’s (“NEGТ”) Second Set of Discovery Requests (the “Requests” and each a “Request”) as follows:

General Objections

1. The following responses are based on the information available as of the date of these responses. These responses are necessarily subject to revision.
2. ET Power objects to the Definitions in the Requests insofar as they purport to define words in a way not consistent with their generally understood meanings and to the extent that they attempt to impose upon ET Power any obligations in excess of those imposed by Rules 26, 33, 34 and 36 of the Federal Rules of Civil Procedure, as made applicable to this contested matter by Rules 9014(c), 7026, 7033, 7034 and 7036 of the Federal Rules of Bankruptcy Procedure.
3. ET Power objects to each Request to the extent that it would require ET Power to provide any information protected from disclosure by the attorney-client privilege, the work



product doctrine, or any other applicable privilege, immunity, or exception. If ET Power should produce any document or information that is subject to such a privilege or immunity from discovery, such production will be inadvertent and shall not be intended to be a waiver of the applicable privilege or protection. ET Power expressly reserves the right to demand, in the event of such an inadvertent production, that NEGOT return and/or destroy any document or information inadvertently produced, and all copies and derivative works therefrom.

4. ET Power's decision to provide information or documents pursuant to the Requests, notwithstanding the objectionable nature of any of the Requests or Definitions, should not be construed as: (a) an acknowledgement that the information is relevant; (b) a waiver of the general or specific objections asserted thereto; or (c) an agreement that subsequent discovery requests for similar information will receive similar treatment. ET Power specifically reserves all objections as to competency, relevancy, materiality, and admissibility of the information provided, all objections as to burden, vagueness, unintelligibility, overbreadth, and ambiguity, and all rights to object to the use of any documents or information in any subsequent proceeding, including, without limitation, this, or any other, action.

5. ET Power objects to each Request to the extent that it seeks information that is publicly available, or information the discovery of which is cumulative, duplicative, or can be obtained from some other source that is more convenient, less burdensome or less expensive.

6. ET Power objects to each Request to the extent that it seeks information of which ET Power does not have possession, custody or control, or to which NEGOT already has access.

7. ET Power objects to each Request to the extent that it seeks information that is neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence.

8. ET Power objects to each Request to the extent that it is vague or ambiguous, rendering impossible a precise interpretation or response.

9. The following responses and objections are made subject to these General Objections, which are incorporated by reference therein:

Specific Responses and Objections

A. Requests for Admission

Request for Admission 1. ET Power was a party to a Tolling Agreement dated April 14, 2000.

Response: Admitted.

Request for Admission 2. GTN partially guaranteed ET Power's payment obligations to Liberty Electric under the Tolling Agreement.

Response: Admitted.

Request for Admission 3. NEGT partially guaranteed ET Power's payment obligations to Liberty Electric under the Tolling Agreement.

Response: Admitted.

Request for Admission 4. As of February 24, 2004, the general partner of ET Power was NEGT Energy Trading Holdings Corporation.

Response: Admitted.

Request for Admission 5. As of February 24, 2004, Sanford Hartman was a director of NEGT Energy Trading Holdings Corporation.

Response: Admitted.

Request for Admission 6. As of February 24, 2004, Sanford Hartman was the general counsel of NEGТ.

Response: Admitted.

Request for Admission 7. As of November 1, 2004, the general partner of ET Power was NEGТ Energy Trading Holdings Corporation.

Response: Admitted.

Request for Admission 8. As of November 1, 2004, Sanford Hartman was a director of NEGТ Energy Trading Holdings Corporation.

Response: Admitted.

Request for Admission 9. As of November 1, 2004, Sanford Hartman was the general counsel of NEGТ.

Response: Admitted.

Request for Admission 10. GTN paid \$140 million to Liberty as partial satisfaction of Liberty Electric's claim against ET Power

Response: ET Power admits that \$140 million was paid to Liberty as partial satisfaction of Liberty Electric's claim against ET Power, and that the U.S. Bankruptcy Court for the District of Maryland (the "Bankruptcy Court") has ordered that such payment shall be deemed to have been made by GTN.

Request for Admission 11. Liberty Electric has released all claims relating to the Tolling Agreement against ET Power.

Response: Admitted.

Request for Admission 12. GTN was liable with ET Power on a claim of Liberty Electric against ET Power.

Response: Admitted.

Request for Admission 13. NEGТ was liable with ET Power on a claim of Liberty Electric against ET Power.

Response: Admitted.

Request for Admission 14. GTN paid in part the claim of Liberty Electric against ET Power.

Response: ET Power admits that the claim of Liberty Electric against ET Power was paid in part through a transfer of money that the Bankruptcy Court has ordered to be deemed as made by GTN.

Request for Admission 15. The claim of Liberty Electric against ET Power was paid in full.

Response: Denied.

Request for Admission 16. The property of GTN was used to discharge an obligation owed by ET Power.

Response: Denied.

Request for Admission 17. The property of NEGТ was used to discharge an obligation owed by ET Power.

Response: Denied.

Request for Admission 18. GTN paid in part the debt owed by ET Power to Liberty.

Response: ET Power admits that the debt owed by ET Power to Liberty was paid in part through a transfer of money that the Bankruptcy Court has ordered to be deemed as made by GTN.

Request for Admission 19. ET Power's debt to Liberty was paid in full.

Response: Denied.

Request for Admission 20. ET Power was benefited by GTN's payment of some or all of Liberty Electric's claim against ET Power.

Response: Denied.

Request for Admission 21. ET Power would be enriched if it is allowed to retain the benefit conferred by the discharge of its obligation to Liberty Electric.

Response: Denied.

Request for Admission 22. ET Power would receive a windfall if it is allowed to retain the benefit conferred by the discharge of its obligation to Liberty Electric.

Response: Denied.

Request for Admission 23. The NEGТ Guarantee dated February 6, 2001 provided NEGТ with a right of subrogation from ET Power if it fully and indefeasibly paid any obligation of ET Power to Liberty Electric.

Response: ET Power admits that, subject to the waiver language contained in Sections 4 and 9, the NEGТ Guaranty provided NEGТ with a right of subrogation if it fully and indefeasibly paid obligations of ET Power to Liberty. To the extent that Request for Admission 23 seeks any further admissions, they are denied.

B. Interrogatories

Interrogatory No. 1. What are the specific facts supporting your contention that NEGТ is not entitled to assert subrogation rights against ET Power relating to Liberty Electric's claims against ET Power.

Response:

A. On July 8, 2003 (the "Petition Date"), NEGТ, ET Power and several of their affiliates (collectively, the "Debtors") filed voluntary petitions for protection under chapter 11 of the Bankruptcy Code.

B. ET Power and Liberty Electric Power LLC ("Liberty") were parties to that certain Tolling Agreement (the "Tolling Agreement") dated April 14, 2000. Both NEGТ and Gas Transmission Northwest Corporation ("GTN"), NEGТ's non-debtor affiliate, furnished guaranties of ET Power's payment obligations to Liberty under the Tolling Agreement. As of the Petition Date, the aggregate liability of NEGТ and GTN under each of the guaranties was capped at the amount of \$140 million.

C. Under the terms of the guaranty furnished by NEGТ (the "NEGТ Guaranty"), NEGТ agreed, among other things, to waive the benefit of the guaranty furnished to Liberty by GTN (the "GTN Guaranty"). Section 4 of the NEGТ Guaranty provides, in pertinent part, that, NEGТ "... unconditionally agrees that it hereby waives (i) any and all rights ... to have the benefit of any ... other guaranty ... now or hereafter held by [Liberty] for the obligations guaranteed by [NEGТ] hereunder...."

D. NEGТ and GTN also agreed, under the terms of section 9 of their respective guarantees that they each waived "... any rights of subrogation or reimbursement from [ET Power] ... with respect to the payment of any Obligation ... to [Liberty] ... until the time that all Obligations^[1] owing to [Liberty] are fully and indefeasibly paid to [Liberty]."

¹ "Obligations" is defined in both guaranties to mean "... all amounts payable by [ET Power] under the [Tolling] Agreement ..., including without limitation, Tolling Fees, Termination Payment, liquidated damages, indemnity obligations, and damage awards arising by reason of [ET Power's] breach of its performance obligations under the [Tolling] Agreement, or otherwise...." NEGТ Guaranty, § 1; GTN Guaranty, § 1.

E. Liberty, the Debtors and GTN engaged in protracted litigation concerning ET Power's rejection of the Tolling Agreement and Liberty's resulting claims for damages arising from the breach. After an arbitration proceeding and related litigation before this Court, Liberty obtained a judgment against ET Power in the amount of \$162,725,436.59 (the "Judgment Amount").

F. On May 13, 2004, before the conclusion of the Liberty litigation, the Court entered its Order Pursuant to Sections 105(a), 363 and 1146(c) of the Bankruptcy Code and Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure: (I) Authorizing and Approving Stock Purchase Agreement and Related Agreements; and (II) Authorizing Consummation of the Transactions Contemplated Therein (the "Sale Order"). Pursuant to the Sale Order, NEGT, GTN and GTN Holdings LLC (collectively, the "Seller Parties") consummated the sale of GTN to TransCanada American Investments Ltd. ("TransCanada").

G. As part of the sale of GTN, the Seller Parties, the Buyer and GTN entered into a Post-Closing Escrow Agreement (the "Escrow Agreement") dated November 1, 2004, with JPMorgan Chase Bank as escrow agent (the "Escrow Agent").

H. Pursuant to the Escrow Agreement, TransCanada transferred \$241 million (the "Escrow Amount") to the Escrow Agreement on November 1, 2004.

I. Subsequently, the Escrow Agent paid Liberty \$140 million (the "Escrow Payment"), pursuant to the terms of the Escrow Agreement, leaving \$22,725,436.59, the difference between the Escrow Payment and the Judgment Amount, unpaid.

J. On April 18, 2008, the Court entered an Order Granting Request of Liberty Electric Power, L.L.C. for Pro Rata Distributions of up to \$5,428,046 on Its Allowed Claim (the "Distribution Order"). In the Distribution Order, the Court noted that the amount of Liberty's allowed claim remained \$145,428,046. In light of the Escrow Payment, however, the Court

ordered ET Power to make *pro rata* distributions to Liberty up to the aggregate amount of \$5,428,046.

K. On January 6, 2009, the Court entered an order approving the Stipulation Approving Settlement of Liberty Electric Power, LLC's Allowed Claim (the "Stipulation"). In the Stipulation, the Debtors and Liberty agreed that ET Power would pay Liberty \$5,156,643.70 (the "Settlement Payment") to settle Liberty's \$5,428,045.82 claim.

Interrogatory No. 2. What are the names, addresses, and telephone numbers of the persons with knowledge of each of the facts described in your answer to Interrogatory No. 1?

Response:

In addition to the General Objections set forth above, ET Power objects to this Request on the grounds that it is unduly burdensome and unreasonable in light of the nature of certain of the facts described in the answer to Interrogatory No. 1.

Interrogatory No. 3. What documents evidence the facts described in your answer to Interrogatory No. 1?

Response: The documents evidencing the facts described in the answer to Interrogatory No. 1 are specified in the answer to Interrogatory No. 1.

Interrogatory No. 4. Would the denial of NEGT's ability to pursue subrogation from ET Power in connection with Liberty Electric's claim against ET Power be equitable? Why or why not?

Response: In addition to the General Objections set forth above, ET Power objects to this Request on the grounds that it is vague and ambiguous with regard to the meaning of the term "in connection with" in the context of this Interrogatory. Notwithstanding the foregoing, ET Power provides the following response: Yes. The denial of NEGT's ability to pursue subrogation

rights would be equitable because NEGТ, a sophisticated business party, entered into a binding contract in which the waiver of such rights was a bargained-for component of the guaranty.

Interrogatory No. 5. Did you ever inform NEGТ prior to 2008 that it would not be able to seek subrogation from ET Power in connection with Liberty Electric's claim against ET Power? If you did, please identify the date of each such communication, the parties to the communication, and the manner of the communication.

Response: In addition to the General Objections set forth above, ET Power objects to this Request on the grounds that it is vague and ambiguous with regard to the meaning of the term "in connection with" in the context of this Interrogatory. Notwithstanding the foregoing, ET Power provides the following response: Pursuant to Rule 33(d) of the Federal Rules of Civil Procedure, ET Power has made its business records available to NEGТ for purposes of obtaining an answer to this Interrogatory.

Interrogatory No. 6. When and how did you determine that you were not subject to liability for subrogation relating to the satisfaction of Liberty Electric's claim against ET Power, and what are the names, addresses, and telephone numbers of the persons who were involved in that determination?

Response: In addition to the General Objections set forth above, ET Power objects to this Request on the grounds that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. In addition, ET Power objects to this Request to the extent it seeks production of privileged attorney-client communications or protected work product. ET Power further objects to this Request on the grounds that the meaning of the term "determine" is vague and ambiguous in the context above.

Notwithstanding the foregoing, the name, address and telephone number of the person most involved in the determination is:

Charles Goldstein, Protiviti Inc., 1 East Pratt Street, Suite 800, Baltimore, MD 21202, (410) 454-6830.

Interrogatory No. 7. What documents support the statements and calculations referenced in Article II(G)(9)(c), "Impact on Creditor Recoveries," of your March 3, 2005 Disclosure Statement for First Amended Plan of Liquidation?

Response: Pursuant to Rule 33(d) of the Federal Rules of Civil Procedure, ET Power has made its business records available to NEGT for purposes of obtaining an answer to this Interrogatory.

Interrogatory No. 8. When and how did you rely on the language of Paragraph 4(i) of the February 6, 2001 Guarantee provided by NEGT to Liberty Electric.

Response: In addition to the General Objections set forth above, ET Power objects to this Request on the grounds that it is vague and ambiguous with regard to the meaning of the term "rely."

Interrogatory No. 9. Detail all communications you had with any person regarding the payment to Liberty of the funds in the account governed by the November 1, 2004 Post-Closing Escrow Agreement, including the identity of any documents reflecting or referring to such communications.

Response: Pursuant to Rule 33(d) of the Federal Rules of Civil Procedure, ET Power has made its business records available to NEGT for purposes of obtaining an answer to this Interrogatory.

Interrogatory No. 10. What are the names, addresses, telephone numbers, and dates of representation of each lawyer who represented you in connection with the payment of any sums,

including escrowed funds and settlement amounts, to discharge your obligations to Liberty Electric?

Response:

In addition to the General Objections set forth above, ET Power objects to this Request on the grounds that it is vague and ambiguous with regard to (a) the meaning of the term “in connection with” in the context of this Interrogatory, and (b) the entity whose obligations were discharged as a result of the release of escrowed funds.

C. Request for Production

Request for Production No. 18. Produce all documents referenced in your answers to the foregoing interrogatories by January 27, 2010 at the offices of Special Counsel for NEGТ.

Response: In addition to the General Objections set forth above, ET Power objects to this Request on the grounds that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. ET Power further objects on the ground that the request is vague and ambiguous to the extent that the underlying interrogatories are vague and ambiguous. Moreover, any documents in ET Power’s possession, custody, or control responsive to this Document Request should already be in the possession, custody, or control of NEGТ, thus causing any search by ET Power for these documents to be unduly burdensome and unreasonable. ET Power further objects to the extent that that the Document Request is unduly burdensome and unreasonable. In addition, ET Power objects to this Document Request to the extent it seeks production of privileged attorney-client communications.

Notwithstanding the foregoing, ET Power will produce responsive, non-privileged documents, to the extent that (a) copies of such documents have not already been produced to NEGT, and (b) such documents are not publicly available.

Date: January 25, 2010
Washington, DC

SUTHERLAND, ASBILL & BRENNAN LLP

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Counsel for NEGT Energy Trading -- Power L.P.

8833863.5

Certificate of Service

I hereby certify that on this 25th day of January, 2010, a copy of the foregoing Responses and Objections was served by electronic mail on counsel for National Energy Gas Transmission, Inc.

/s/ Mark D. Sherrill
Mark D. Sherrill

EXHIBIT 13

No. 06-1459

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re: National Energy & Gas Transmission, Inc., *et al.*,

Debtors.

National Energy & Gas Transmission, Inc., *et al.*,

Appellants,

v.

Liberty Electric Power, LLC,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(PETER J. MESSITTE, JUDGE)

BRIEF OF APPELLANT, NATIONAL ENERGY & GAS TRANSMISSION,
INC., ET AL.,

EXHIBIT

13

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(410) 347-8700

Co- Counsel for the Debtors

CORPORATE DISCLOSURE STATEMENT FOR
APPELLANT NATIONAL ENERGY & GAS TRANSMISSION, INC.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Energy & Gas Transmission, Inc. who is appellant,
(name of party/amicus) (appellant/appellee/amicus)

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐ YES ☒ NO
2. Does party/amicus have any parent corporations?
☐ YES ☒ NO
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
☐ YES ☒ NO
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
☐ YES ☒ NO
5. Is party a trade association?
☐ YES ☒ NO
6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors' committee:
No trustee was appointed and the Creditor's Committee has been dissolved.

CORPORATE DISCLOSURE STATEMENT FOR
APPELLANT NEGT ENERGY TRADING POWER, L.P.

Pursuant to FRAP 26.1 and Local Rule 26.1,

NEGT Energy Trading - Power, L.P. who is appellant,
(name of party/amicus) (appellant/appellee/amicus)

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐ YES ☒ NO
2. Does party/amicus have any parent corporations?
☐ YES ☒ NO
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
☐ YES ☒ NO
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
☐ YES ☒ NO
5. Is party a trade association?
☐ YES ☒ NO
6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors' committee:

No trustee was appointed and the Creditor's Committee has been dissolved.

3. Whether the District Court erred by accepting the Bankruptcy Court's conclusion that allowing Liberty Electric Power, LLC ("Liberty") to apply funds received from the Liberty Escrow to post-petition interest obligations did not diminish the Debtors' estates.

4. Whether the District Court erred by characterizing Liberty's remaining claim against NEGT Energy Trading Power, L.P. ("ET Power") as an allowable claim for principal rather than a claim for post-petition interest disallowed under section 502(b)(2) of the Bankruptcy Code.

5. Assuming that the District Court did not otherwise err, whether the District Court erred by affirming the entry of a judgment for Liberty against ET Power in an amount greater than the amount Liberty was owed.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal by NEGT and ET Power (together, the "Debtors")¹ seeking the reversal of the order (the "District Court Order") entered on March 7, 2006 by the Honorable Peter J. Messitte, United States District Judge.²

¹ Additionally, the following entities are also debtors in the chapter 11 cases: (i) NEGT Energy Trading Holdings Corporation ("ET Holdings"); (ii) NEGT Energy Trading - Gas Corporation ("ET Gas"); (iii) NEGT ET Investments Corporation ("ET Investments"); (iv) Quantum Ventures ("Quantum"); and (v) Energy Services Ventures, Inc. ("ESV"). ET Power, ET Holdings, ET Gas and ET Investments are collectively referred to herein as the "ET Debtors."

The District Court Order affirmed the order (the "Bankruptcy Court Order"), entered on August 10, 2005, by the Honorable Paul Mannes, United States Bankruptcy Judge,³ in the Debtors' chapter 11 cases, Adversary Proceeding No. 03-03104 (the "Adversary Proceeding"). The Bankruptcy Court Order granted the following motions filed by Liberty: (i) Motion to Confirm an Arbitration Award (the "Arbitration Award Motion"); and (ii) Motion to Dismiss Adversary Proceeding and Objection to Claims and for Related Relief (the "Dismissal Motion," and together with the Arbitration Award Motion, the "Liberty Motions").

B. Course of the Proceedings.

On April 1, 2005, after the conclusion of arbitration proceedings between ET Power and Liberty, Liberty filed the Arbitration Award Motion with an accompanying memorandum of law (the "Liberty Memorandum of Law"), pursuant to which Liberty sought: (i) an order confirming an arbitration award dated March 29, 2005, in the principal amount of \$140 million (the "Award")⁴; and (ii) an entry of judgment purportedly conforming to the Award, "including the stipulated amounts due and payable under invoices for services rendered in June

² A copy of the District Court Order is Exhibit 12 in the Joint Appendix.

³ A copy of the Bankruptcy Court Order is Exhibit 9 in the Joint Appendix.

⁴ A copy of the Award is Exhibit 6 in the Joint Appendix.

and July of 2003, along with interest on such amounts.” Liberty Memorandum of Law at 1-2.

On April 8, 2005, Liberty filed the Dismissal Motion, pursuant to which Liberty sought, among other things: (i) dismissal of the Adversary Proceeding and the Debtors’ objections to the claims filed by Liberty against ET Power and NEGT; (ii) the allowance of Claim 323 filed against ET Power as a general unsecured claim in the amount of the Award “less any interest not allowable under 11 U.S.C. § 502(b)(2)”; and (iii) the allowance of Claim 325 filed against NEGT as a general unsecured claim in the amount of \$140 million.⁵ Dismissal Motion at 3 and 14. In the Dismissal Motion, Liberty also reserved its right to assert the full amount of its claims on a joint and several basis against ET Power, NEGT, and Gas Transmission Northwest Corporation (“GTN”), a non-debtor guarantor of ET Power’s obligations under the tolling agreement between ET Power and Liberty (the “GTN Guarantee”).⁶ By its terms, the GTN Guarantee was subject to a \$140 million liability cap. See GTN Guarantee § 2, Joint

⁵ Claim 325 was filed on account of NEGT’s guarantee of ET Power’s obligations under the tolling agreement between ET Power and Liberty (the “NEGT Guarantee”). The maximum aggregate liability on such guarantee, together with the GTN Guarantee, was capped at \$140 million. See NEGT Guaranty § 2; Joint Appendix at 98; Liberty Agreement (defined below) § 8.1(b), Joint Appendix at 28. A copy of the NEGT Guarantee is Exhibit 3 in the Joint Appendix.

⁶ A copy of the GTN Guarantee is Exhibit 4 in the Joint Appendix.

Appendix at 105; Liberty Agreement (defined below) § 8.1(b), Joint Appendix at 28.

On April 22, 2005, the Debtors filed a limited objection to the Liberty Motions, in which they did not oppose confirmation of the Award, but contended, inter alia, that Liberty could not collect post-petition interest on account of the Award, whether directly or indirectly, from NEGT or ET Power. The Debtors did not object to the claim against ET Power (totaling \$5,428,045.82) for amounts due and payable under invoices for services rendered in June and July 2003 (the "June and July Invoices").

On May 9, 2005, Liberty filed a reply to the Debtors' limited objection, pursuant to which it argued: (i) that it could unilaterally allocate any funds received under the GTN Guarantee to postpetition interest and costs of collection prior to applying any portion of those funds to principal; and (ii) that it could simultaneously assert a claim against ET Power for the entire principal amount of the Award and the June and July Invoices plus a guarantee claim for the same amount (subject to the \$140 million cap) against NEGT, without reduction, until its claim is paid in full, inclusive of postpetition interest, fees, and costs.

On May 10, 2005, the Debtors filed a response to Liberty's reply, in which they asserted, inter alia, that section 502(b)(2) of the Bankruptcy Code prevents Liberty from collecting post-petition interest on its claim from any of the

Debtors, whether directly or indirectly. In support of their position, the Debtors relied on a substantial body of law supporting an analogous result in the context of claims limited by section 502(b)(6) of the Bankruptcy Code.

On May 12, 2005, the Bankruptcy Court held a hearing to consider the Liberty Motions (the "Hearing").⁷ In a Memorandum of Decision (the "Bankruptcy Court Decision"), entered on June 27, 2005,⁸ the Bankruptcy Court noted that it believed that the issue regarding post-petition interest was one of "novel impression" worthy of review by this Court, Bankruptcy Court Decision at 6, Joint Appendix at 315, but concluded that: (i) Liberty could apply funds received under the GTN Guarantee first to post-petition interest and then assert a claim against ET Power for the entire principal amount of the Award; and (ii) Liberty is not entitled to costs and fees. Bankruptcy Court Decision at 8, Joint Appendix at 317. Upon direction of the Bankruptcy Court, Liberty submitted an order and judgment to the Bankruptcy Court, both of which were entered on August 10, 2005.

⁷ At the conclusion of the Hearing, the Bankruptcy Court reserved decision and gave both Liberty and the Debtors additional time to file supplemental pleadings with the Bankruptcy Court in connection with the Liberty Motions. Both parties filed supplemental responses summarizing their respective positions on May 20, 2005.

⁸ A copy of the Bankruptcy Court Decision is Exhibit 8 in the Joint Appendix.

Pursuant to the Bankruptcy Court Order: (i) the Award was confirmed; (ii) the Clerk of the Court was directed to enter judgment confirming the Award in the amount of \$162,725,436.59 (i.e., the aggregate principal amounts of the Award, the June and July Invoices, plus accrued interest through the date of payment from the Liberty Escrow (defined below)); (iii) the Adversary Proceeding was dismissed; (iv) Liberty's claim against ET Power was allowed in the amount of \$145,428,046, with a proviso limiting the maximum distribution on account of such claim at \$22,725,436.59; (v) Liberty's claims for costs and legal fees were denied; and (vi) Liberty's claim against NEGT was expunged.⁹ See Bankruptcy Court Order, Joint Appendix at 321-22.

On August 23, 2005, the Debtors timely filed a notice of appeal of the Bankruptcy Court's Order. The Debtors filed their appeal brief with the District Court on September 29, 2005 ("Debtors D. Ct. Brief"). In their brief the Debtors argued, inter alia, that the Bankruptcy Court had incorrectly interpreted section 502(b)(2) of the Bankruptcy Code and erred in allowing a claim against ET Power for amounts equal to postpetition interest on the Award notwithstanding that Liberty had already received payment equal to the full principal amount of the Award. See Debtors D. Ct. Brief at 12-19. On October 14, 2005, Liberty filed its

⁹ Apparently, after the Bankruptcy Court Decision was issued, Liberty decided not to pursue the allowance of a separate claim against NEGT.

response brief ("Liberty D. Ct. Brief"). On October 28, 2005, the Debtors filed their reply to Liberty's response. On March 6, 2006, following oral argument, the District Court issued an oral decision affirming the Bankruptcy Court Order. See Transcript of Motions Hearing Before the Honorable Peter J. Messitte United States District Judge, dated March 6, 2006 at pp. 53-61 (the "Transcript"), Joint Appendix at 377-85.¹⁰ The District Court Order was entered on March 7, 2006.

STATEMENT OF THE FACTS

A. The Chapter 11 Cases

On July 8, 2003 (the "Petition Date"), NEGТ and each of the ET Debtors (collectively, the "Initial Debtors") filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. By order dated July 8, 2003, the Initial Debtors' cases were consolidated for procedural purposes. On July 29, 2003, Quantum and ESV (the "Quantum Debtors") filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. By order dated August 7, 2003, the Quantum Debtors' cases were consolidated with the Initial Debtors' cases for procedural purposes.

On May 3, 2004, the Bankruptcy Court confirmed the Modified Third Amended Plan of Reorganization for NEGТ, and such plan became effective on October 29, 2004. By order entered on April 19, 2005, the Bankruptcy Court

¹⁰ A copy of the Transcript is Exhibit 11 of the Joint Appendix.

confirmed the First Amended Plan of Liquidation for the ET Debtors and the Quantum Debtors, and such plan became effective on May 2, 2005.

B. Business Activities of ET Power

Prior to the Petition Date, ET Power was an energy marketing and trading company, buying and selling electric power, natural gas, coal, and other physical energy commodities, as well as engaging in energy-based financial and hedging transactions such as futures contracts, swaps, options, and derivatives. These contracts, including tolling agreements, constituted the vast majority of ET Power's assets and liabilities. Because the value of each contract fluctuates daily as forward and futures markets change, financial reporting rules require that derivative-style contracts, including the Liberty Agreement (described below), be accounted for on a "fair-value" basis. Under these accounting rules, the profits and losses on these derivative-like contracts were reflected in ET Power's books and records based on the fair value of the contracts on a regular basis.

C. Liberty Tolling Agreement and Guarantees

An electricity tolling agreement gives a party the right, but not the obligation, to provide fuel to a generating facility and then to acquire, typically for re-sale, the electricity generated thereby. In exchange for the non-owner's right to use the facility to convert its fuel into electricity, the facility owner is paid a regular "tolling fee." The non-owner party to the agreement benefits by securing

the ability to operate the facility using fuel it owns and by controlling the related electricity generation output without incurring the capital expense of owning the generating facility. The facility owner, on the other hand, benefits from the stable revenues of the tolling fee.

ET Power and Liberty¹¹ entered into a tolling agreement (the "Liberty Agreement") on or about April 14, 2000.¹² The Liberty Agreement essentially gave ET Power a "call option" on the output of Liberty's electric generation facility. In return, ET Power paid a monthly capacity payment, as well as certain variable costs based on the actual output that ET Power received. Because ET Power provided the natural gas necessary to generate the electricity, ET Power could profit from the Liberty Agreement based on the fluctuations of the relative prices and predicted prices for natural gas and power – what is commonly referred to as the "spark spread." The term of the Liberty Agreement extended to September 30, 2016, with an option for ET Power to extend the agreement for an additional two years.

By guarantee dated February 6, 2001, GTN, one of NEGOT's non-debtor subsidiaries, guaranteed ET Power's obligations under the Liberty

¹¹ Liberty is a special-purpose entity formed by the energy company Reliant Resources, Inc. to own a power plant located in Eddystone, Pennsylvania.

¹² A copy of the Liberty Agreement is Exhibit 2 in the Joint Appendix.

Agreement (as defined above, the "GTN Guarantee"). In addition, by guarantee dated February 6, 2001, NEGТ also guaranteed ET Power's obligations under the Liberty Agreement (as defined above, the "NEGТ Guarantee"). The GTN Guarantee and the NEGТ Guarantee were each subject to a cap on potential liability, and by the terms of the respective guarantee agreements, any payments made on account of one guarantee would also apply to reduce the maximum potential exposure under the second guarantee. See GTN Guarantee §2, Joint Appendix at 105; NEGТ Guarantee § 2, Joint Appendix at 98.

On the Petition Date, the Debtors filed a motion pursuant to section 365(a) of the Bankruptcy Code seeking to reject the Liberty Agreement. To resolve the rejection motion consensually, ET Power and Liberty negotiated and agreed upon a form of order granting that motion. The Bankruptcy Court entered the order approving the rejection on August 6, 2003 (as amended by an order dated August 11, 2003).

D. The Arbitration

On September 11, 2003, Liberty filed two suits against GTN in the United States District Court in Texas. In the first suit, Liberty sought payment of \$140 million under the GTN Guarantee associated with Liberty's purported rejection damages. In the second suit, Liberty sought \$5.4 million from GTN

under the GTN Guarantee related to tolling payments that ET Power allegedly failed to make prior to ET Power's bankruptcy filing.

On September 23, 2003, ET Power, NEGT and GTN filed the Adversary Proceeding against Liberty, seeking declaratory relief, injunctive relief and damages from Liberty in connection with the Liberty Agreement. On October 8, 2003, Liberty filed a motion seeking to compel arbitration and dismiss or stay the Adversary Proceeding. In response, the Debtors filed an objection, by which, among other things, the Debtors asked that the dispute be resolved pursuant to Court-approved mediation procedures.

The Bankruptcy Court subsequently ruled that: (i) it would refer the Adversary Proceeding to mandatory mediation, and that during such mediation period the Adversary Proceeding would be stayed; but (ii) if the mediation failed, the dispute would proceed to arbitration pursuant to the terms of the Liberty Agreement. The parties did not reach a settlement during the mediation, and the matter proceeded to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

After discovery and exchange of expert reports, the parties submitted their "baseball arbitration" offers.¹³ Liberty's baseball arbitration offer was approximately \$155 million and ET Power's baseball arbitration offer was approximately \$72 million. The hearings took place in November and December 2004. Revised offers were submitted to the arbitration panel at the close of the hearings. Liberty's revised baseball arbitration offer was \$140 million and ET Power's revised baseball arbitration offer was \$90 million. In a decision dated March 30, 2005, the arbitration panel selected Liberty's offer of \$140 million plus interest.

E. The Liberty Escrow

On February 24, 2004, NEGT and certain of its non-debtor subsidiaries entered into a stock purchase agreement (the "Stock Purchase Agreement")¹⁴ with TransCanada Corporation and certain of its affiliates (collectively, "TransCanada"), whereby the parties agreed that all of the issued and outstanding shares of GTN would be sold to TransCanada (the "GTN Sale") for

¹³ In a baseball arbitration, each party, prior to the arbitration, submits a proposed award amount to the arbitrator. The arbitrator must then choose one of the proposed offers as the final award.

¹⁴ A copy of the Stock Purchase Agreement was annexed as Exhibit A to the motion to approve the GTN Sale filed in the Bankruptcy Court (the "GTN Sale Motion"). A copy of the GTN Sale Motion including Exhibit A is Exhibit 5 in the Joint Appendix.

“\$1,203,000,000 in cash subject to certain purchase price adjustments, plus the assumption of \$500 million of debt” See GTN Sale Motion ¶ 17(ii), Joint Appendix at 120. The GTN Sale was approved by the Bankruptcy Court on May 13, 2004 and consummated on November 1, 2004. In accordance with the terms of the GTN Sale, the face amount of the GTN Guarantee (\$140 million) was reserved in escrow and held back from the purchase price (the “Liberty Escrow”). See Stock Purchase Agreement § 2.2, Joint Appendix at 170. Pursuant to the terms of the GTN Sale agreements, any liability of GTN to Liberty on account of the GTN Guarantee would be paid directly from the Liberty Escrow, while any remaining balance would be released to NEGТ.

Pursuant to the Bankruptcy Court’s order, dated May 17, 2005, the full face amount of the GTN Guarantee, in the amount of \$140 million, was paid to Liberty out of the Liberty Escrow, by wire transfer made on May 19, 2005, in full and final satisfaction of the GTN Guarantee and, by its terms, the NEGТ Guarantee.

STANDARD OF REVIEW

The standard of review for findings of fact is clear error and the standard of review for legal determinations is de novo. See Cooper v. Productive Transp. Servs. (In re Bulldog Trucking, Inc.), 147 F.3d 347, 351 (4th Cir. 1998); In

postpetition interest. However, as the above demonstrates, because the funds in the Liberty Escrow were property of NEGT's estate, Liberty is prohibited by section 502(b)(2) from applying those funds to its claim for postpetition interest. Thus, the full principal amount of Liberty's claim on account of the Award has been satisfied.¹⁷ All that remains (other than the June and July Invoices) is Liberty's claim for interest, which Liberty also is prohibited from recovering from ET Power. See 11 U.S.C. § 502(b)(2).

B. THE DISTRICT COURT'S EMPHASIS ON WHETHER THE ESCROWED FUNDS WERE PROPERTY OF THE DEBTORS' ESTATES WAS MISPLACED

Cases decided under section 502(b)(6) of the Bankruptcy Code confirm that Liberty's allowable claim should be reduced by the amounts Liberty received from the Liberty escrow without regard to whether the funds in escrow were, as a technical matter, property of any of the Debtors' estates. Under section 502(b)(6), a lessor's claim for damages for termination of an unexpired lease is subject to a statutory cap. See 11 U.S.C. § 502(b)(6). It is well settled that a security deposit held by a lessor on a rejected lease must be applied to the

¹⁷ This conclusion is particularly compelling under the facts peculiar to the instant case: Pursuant to the terms of the GTN Guarantee, satisfaction of the NEGT Guarantee would automatically constitute satisfaction of the GTN Guarantee as well. Accordingly, the payment of the \$140 million from the Liberty Escrow can just as easily be said to have been in satisfaction of the NEGT Guarantee as it was of the GTN Guarantee.

*

REQUEST FOR ORAL ARGUMENT

The Debtors, by their undersigned counsel, hereby request the honor
of oral argument before this Court.

Dated: June 9, 2006

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Co- Counsel for the Debtors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of June, 2006, the required number of copies of the Brief of Appellants and Joint Appendix were dispatched for delivery to the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, Patricia S. Connor, Clerk, 1100 East Main Street, Suite 501, Richmond, Virginia 23219-3517, by Federal Express, overnight delivery.

I HEREBY CERTIFY that on this 9th day of June, 2006, copies of the Brief of Appellants and Joint Appendix were mailed, first-class mail, postage prepaid, to:

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and

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co-counsel for Liberty Electric Power LLC, Appellee.

/s/ Susan J Roberts
Susan J. Roberts

EXHIBIT 14

Case 03-03104 Doc 91-8 Filed 05/15/08 Page 1 of 45

No. 06-1459

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re: National Energy & Gas Transmission, Inc., *et al.*,

Debtors.

National Energy & Gas Transmission, Inc., *et al.*,

Appellants,

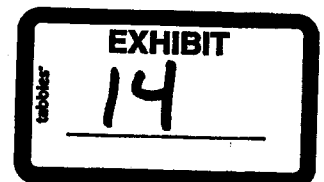
v.

Liberty Electric Power, LLC,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(PETER J. MESSITTE, JUDGE)

REPLY BRIEF OF APPELLANT, NATIONAL ENERGY & GAS
TRANSMISSION, INC., ET AL.



Case 03-03104 Doc 91-8 Filed 05/15/08 Page 2 of 45

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reasons, both of section 502(b)(2)'s policies would be undermined if the lower courts' orders are not reversed.

C. The Form In Which The GTN Guarantee Was Satisfied Should Not Affect Liberty's Remaining Claim

Liberty argues that "the happenstance that GTN's guaranty obligation was satisfied first should not affect the result." Liberty Brief at 14. The Debtors agree. By their terms, the GTN Guarantee and the NEGT Guarantee were interrelated. See Debtor's Brief at 11; see also GTN Guarantee §2, Joint Appendix at 105; NEGT Guarantee § 2, Joint Appendix at 98. Both guarantees were in the same dollar amount, and any amounts paid in satisfaction of the NEGT Guarantee would have caused a dollar-for-dollar reduction in the GTN Guarantee as well, and vice versa. Id. Thus, had Liberty's \$140 million claim against the guarantees been satisfied by NEGT directly instead of out of the Liberty Escrow, even Liberty would have been forced to concede that it could not recover post-petition interest. The payment from NEGT, a debtor, could not have been applied to post-petition interest by the plain terms of section 502(b)(2) and necessarily would have been applied to principal. With the principal claim having been satisfied in full, no claim would lie against ET Power, which, as a debtor, would not be subject to a claim for post-petition interest, pursuant to section 502(b)(2). Meanwhile, the GTN Guarantee would have been deemed satisfied by its own terms as a result of the satisfaction of the NEGT Guarantee and, accordingly, there would have been

no non-debtor party against whom Liberty could assert a post-petition interest claim either.

As Liberty's own reasoning implies, the Debtors' ability to enjoy the benefits of section 502(b)(2) should not turn on the purely technical issue of whether the payment from the Liberty Escrow should be deemed as having come from GTN or NEGT.⁴

⁴ Liberty attempts a counter-argument along the same line of reasoning as the Debtors', but its argument fails. Liberty argues that had it "first asserted its claim for principal only in the bankruptcy of ET Power and received a pro-rata bankruptcy distribution thereon, it would have been free to pursue GTN, as co-obligor" for the full amount of its uncapped claim (subject to the \$140 million limit of the guarantee and the single satisfaction rule). Liberty Brief at 15. Even assuming that Liberty's assertion of what it could have done is otherwise correct (after all, NEGT might have made a substantial distribution in the interim, which could have foiled or mitigated Liberty's maneuver), any such action would have come at a substantial cost: Liberty's recovery would have been delayed for several years as it waited for ET Power to complete the wind-down of its estate before pursuing GTN. In addition, it would have been taking a gamble on GTN's own credit risk, given that the GTN Guarantee was itself an unsecured obligation of GTN. Thus, Liberty's immediate pursuit of GTN was a matter of substance, not simply technical form as Liberty suggests. Liberty should not be permitted to have its cake and eat it, by securing the benefit of an immediate recovery on the GTN Guarantee and an allowed claim against ET Power at the same time that pretends the recovery never happened.

on account of the GTN Guarantee would be paid directly from the Liberty Escrow, while any remaining balance would be released to NEGT. Accordingly, GTN was fully protected with respect to the GTN Guarantee by a cash account containing funds in which NEGT held a residual interest.

As the funds in the Liberty Escrow were funds to which NEGT, but not GTN, was otherwise entitled, GTN has not and cannot assert a claim for reimbursement against ET Power. Instead, it is NEGT that is in a position to seek subrogation or reimbursement from ET Power on account of the \$140 million payment to Liberty from the Liberty Escrow. If NEGT seeks subrogation to Liberty's claim as a co-obligor, NEGT's subrogation claim would be subordinated to the extent of any distributions to which Liberty is entitled. See 11 U.S.C. §§ 509(a) and (c). Accordingly, any distributions that Liberty receives from ET Power would directly diminish NEGT's recovery from ET Power. Thus, under this analysis, NEGT, a debtor in its own right entitled to the protections of section 502(b)(2), would bear the ultimate burden of Liberty's claim for post-petition interest.

On the other hand, NEGT, in lieu of subrogation, may choose to assert a direct indemnification claim against ET Power pursuant to section 502(e)(2) of

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Dated: July 28, 2006

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of July, 2006, the required number of copies of the Reply Brief of Appellants were dispatched for delivery to the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, Patricia S. Connor, Clerk, 1100 East Main Street, Suite 501, Richmond, Virginia 23219-3517, by Federal Express, overnight delivery.

I HEREBY CERTIFY that on this 28th day of July, 2006, copies of the Reply Brief of Appellants were mailed, first-class mail, postage prepaid to:

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co-counsel for Liberty Electric Power LLC, Appellee.


Susan J. Roberts

EXHIBIT 15

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

In re:

*

**NATIONAL ENERGY & GAS TRANSMISSION,
INC. (f/k/a PG&E NATIONAL ENERGY
GROUP, INC.), et al.**

* Case No.: 03-30459 (PM) and 03-30461 (PM)
through 03-30464 (PM) and 03-30686 (PM)
* through 03-30687 (PM)
Chapter 11
*

Debtors.

(Jointly Administered under
* Case No.: 03-30459 (PM))

* * * * *

DECLARATION OF WILLIAM RUNGE

1. My name is William Runge. I am over the age of 18 years and am fully competent to make this Declaration. I have personal knowledge of each statement made in this Declaration, and each statement is true and correct.

2. I am a Managing Director at Alvarez & Marsal Holdings, LLC ("A&M"). In 2004, I served as Chief Financial Officer of National Energy & Gas Transmission, Inc. ("NEGT"), a debtor-in-possession.

3. In that capacity, I attended a presentation on or about March 9, 2004 conducted by the ET Recovery Oversight Group responsible for the liquidation of certain NEGТ subsidiaries, including NEGТ Energy Trading -- Power, L.P. ("ET Power"). That presentation was conducted by lawyers at Sutherland Asbill & Brennan LLP, other employees of A&M, and ET Power officers.

4. Attached hereto as Exhibit 1 is a true and correct copy of the slideshow that was presented at this meeting. I believe the handwriting on this exhibit is mine.



5. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED on February 5, 2010.

/s/ William Runge
WILLIAM RUNGE

1) Resumption issues

NEGT ENERGY TRADING (ET) LIQUIDATION STATUS AND UPDATE

Presentation to:
Senior Management
National Energy & Gas Transmission, Inc.
by
ET Recovery Oversight Group (ROG)

March 9, 2004

Sutherland Asbill
& Brennan LLP

ET Management
and Counsel

Alvarez and
Marsal, Inc.

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EXHIBIT

tabbles

Discussion Topics

- **Cash Balance Update**
- **Proofs of Claim Review**
- **LCs, Taxes, Inter-Company Obligations and FERC**
- **Tolls Update**
- **Recovery Analysis Update**
- **GTN Sale and Guarantee Exposure**
- **2004 Operations and Timeline**

Cash Balance Update

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Cash Balance

	<u>7-8-03</u>	<u>2-20-04</u>
Net Unrestricted Available Cash	\$209.5M	\$272.4M
Plus Restricted Cash	34.9	35.0
Plus NEG'T International Balance	<u>80.8</u>	<u>81.7</u>
Gross Cash Balance	<u>\$325.2M</u>	<u>\$389.1M</u>

Cash Inflows and Outflows

Gross Cash Balance (7/8/03) \$325.2M

Receipts	67.0
Disbursements	(6.6)
Interest Income	1.4
Other (Canadian GST)	2.1

Gross Cash Balance (2/20/04) \$389.1M

Significant Cash Receipts Since Bankruptcy

➤ Significant receipts received to date

- \$21.6M return of PJM collateral
- \$10.8M return of NYMEX Margin
- \$4.0M from Equilon as partial payment towards outstanding AR balance
- \$2.7M from Reliant for termination of gas positions
- \$2.2M from IMO – collateral/transmission
- \$2.0M from Allegheny for outstanding AR balance
- \$1.9M from IQ2 Power Sale
- \$1.8M from Constellation for TCC's in NYISO
- \$1.0M from ConocoPhillips for termination of positions

➤ Significant receipts expected (not included in 02-20-04 cash balance)

- \$8.7M from Valero
- \$8.0M from Coral
- \$7.2M from VPEM (Restricted to Unrestricted; Signed)
- \$7.0M from Equilon
- \$4.0M from Sprague
- \$3.5M from NYSEG
- \$1.6M from ANR/Tennessee Gas Pipeline
- \$1.0M return MISO collateral

NEGT International, Inc. Cash

- Approximately \$76.8M held by NEGT International, \$1.0 held by Overseas Holdings I and \$3.9M held by PG&E Corporation Australian Holdings
 - Included in gross cash balance
- Australian Holdings current tax liability – approx. \$0.7M
 - Liquidator unwilling to disperse monies until tax issues resolved
- For Overseas Holding loan of \$76.8M to International to be unwound, loans at subsidiaries must be unwound
 - For Malaysian subsidiary to unwind loan requires Malaysian court approval
- \$81.0M in expected case recovery analysis; \$52.6M in conservative case

Proofs of Claim Review

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ET Proofs of Claim Summary: Overview

	<u>Count</u>	<u>Amount</u>
Total Claims Filed	247	\$1,178.2M
Double Claims	17*	(117.0M)**
Amendments	12	(49.5M)
Unspecified	73	??M
Net Claims		\$1,011.7M

*Count for Double Claims is the number of counterparties that filed double (or more) of the same claims

**Amount for Double Claims is the amount that would NOT have been filed if only one claim had been submitted

ET Proofs of Claim Summary: Overview by Type

	<u>Count</u>	<u>Amount</u>
Tolls	3	682.2*
Trading	99	152.5
Other	63	149.3
Employee	51	27.2
Taxes	31	0.5
Total Claims Filed	247	\$1,011.7M

* Amount of toll claims does not reflect any claim amount for Caledonia toll; Caledonia Generating filed an unliquidated claim.

Note: All categories include unspecified claims in count total. No estimate of claim is made for unspecified claims

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ET “Trading” Proofs of Claim Summary*
(net of amendments)

	<u>Claim Amount</u>	<u>ET Estimate</u>
BPA	24.0	24.0
CL10	15.0	7.4
Utility Choice, LLC	14.5	0
Enron	13.2	0
Vermont Public Power	12.8	8.3
Yankee Gas	9.9	1.7
H.Q. Energy Services (U.S.) Inc.	8.2	4.6
*Top 6 represent	\$97.6M	64.0%

ET “Other” Proofs of Claim Summary*

	<u>Claim Amount</u>	<u>ET Estimate</u>
Fireman’s Insurance	46.6	0
Farallon (5 claims)	22.3	0
JP Morgan Chase (ET Facility)	22.1	6.9
Bank of Montreal	19.1	0
General Electric Capital Group	10.0	0
Valley Center Municipal Water District	6.9	0
* Top 6 represent	\$127.0M	85.1%

Employee Proofs of Claim

<u>Count</u>	<u>Claim Amount</u>	<u>ET Estimate</u>
6 (Bonuses & Damages)	\$22.3M	\$0.5M
15 (Deferred Comp.)	4.9	4.9
30 (D&O Liability)	Unspecified	0

Note: No estimate of claim amount is made for unspecified claims

Proofs of Claim by Entity

	<u>Power</u>	<u>Gas</u>	<u>Holdings</u>
Total Claims	\$889.7M	\$124.8M	\$163.7M
Amended	(16.7)	(16.8)	(15.9)
Net Total Claims	873.0	108.0	147.8
Toll related	682.2	-0-	-0-
Non-Toll*	190.8	108.0	147.8
*Top 15 represent	89.3%	92.9%	78.0%

LCs, Taxes, Inter-Company Obligations and FERC

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Letters of Credit Outstanding (ET Related Only)

Letters of Credit outstanding as of 7-8-03	\$147.0M
LCs Returned	(44.0)
LCs Drawn	<u>(78.8)</u>

Letters of Credit outstanding as of 3-1-04	<u>\$24.2M*</u>
---	------------------------

***\$5.2M at JP Morgan Chase Bank – (NYISO and Glencore)**
\$19.0M at Bank of Montreal - Posted to support ET's obligation to CalPX. ET has no contractual obligations to CalPX, but may have refund obligations pursuant to future FERC orders; not likely to be determined until mid to late 2004

Potential Tax Receivables/Payables Affecting Recovery*

- **ET Investments Corp. net receivable from NEGT for \$19.3M**
- **ET Gas net receivable from NEGT for \$22.0M**
- **ET Holdings net receivable from NEGT for \$43.9M**
- **NEGT International payable to NEGT for (\$27.8)**

*Current expectation is that NEGT and all NEGT subsidiaries will recognize all inter-company tax receivables and payables.

Notable Affiliate Obligations Affecting Recovery

- **Intra-Company (ET Entities)**
 - \$326.1M Note due to ET Gas from ET Holdings
 - \$43.5M Note due to ET Investments from ET Holdings
 - \$141.5M Note due to ET Holdings from ET Power
 - \$26.6M Receivable due to ET Power from ET Gas
- **Inter-Company (NEGT Companies)**
 - \$61.3M Notes Receivable due to ET Power from Enterprise (Bungee)
 - NEG T Creditors' Committee may object to Enterprise Note and seek to recharacterize as a dividend
 - \$38.8M due to NEG T from ET Gas for LC draws
 - \$34.8M due to NEG T from ET Power for LC draws
 - \$17.1M due to ET Power from Athens
 - \$10.0M due to Spencer Station from ET Power for Denton Claim

FERC Investigations

➤ Cal ISO & PX

- Claims for refunds for sales into Cal ISO and PX spot markets from Oct. 2, 2000 to June 20, 2001
- Based on ALJ proposed findings regarding refunds
 - ET owes ISO \$26M; ET owes PX \$1M
 - ET owed \$16M by ISO; ET owed \$6M by PX
 - Net liability, \$5M
- FERC adopted changes to ALJ pricing methodology
 - Likely increases ET's net liability (ET estimate: \$6M)
 - ET exploring possibility of cost-of-power defense
 - Cal ISO holds \$19M LOC as collateral

➤ Additional Investigations

- FERC Gaming Investigation, FERC Market Manipulation Investigation, FERC Northwest Investigation, Montana PSC
 - Combined expected exposure approx. \$1M

Tolls Update

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Liberty Toll: Risk Assessment Scenarios

Conservative	Expected
(\$100M)	(\$50M)

- Undisputed payable to Liberty of \$5.4M
- Parties in mediation
 - ET settlement offer to pay Liberty \$17M, plus receivable
 - Liberty has offered \$164M, plus receivable
- Key valuation issues
 - Single discount rate, extrinsic value, volatility, carbon tax
- If parties do not settle in mediation, dispute goes to baseball arbitration
 - Expected case is ET estimate of reasonable settlement value and likely baseball number for arbitration
 - Conservative case is arbitration number we estimate Liberty may use in arbitration
 - Arbitrators can only pick one number or the other

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Caledonia and Southaven Tolls: Risk Assessment Scenarios

	Conservative*	Expected*
Caledonia	(\$100M)	\$(75M)
Southaven	(\$150M)	\$(100M)

- Caledonia Generating filed an un-liquidated claim against ET Power
- Southaven Power filed a \$500M claim against ET Power
- Desire is for Caledonia/Southaven to proceed directly to arbitration; no mediation
 - Two-phase arbitration
 - 1.) Liability – focus on validity of pre-petition termination by ET Power
 - 2.) Valuation – if necessary, focus on valuation issues (single discount rate, extrinsic value, volatility, and carbon tax)

***Assumes unsuccessful liability results in arbitration**

Recovery Analysis

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Significant Variables of Recovery Scenarios (Millions)

	Conservative	Expected
Net Cash Balance	\$341.0	\$369.4
ITM Positions*	\$67.0	\$67.0
USGenNE settlement	\$36.8	\$52.6
G&A and Restructuring Costs	(\$22.5)	(\$22.5)
ESTIMATED FUNDS AVAILABLE	\$428.0	\$472.2
Net Counterparty Claims	(\$86.1)	(\$68.9)
Liberty Toll	(\$105.4)	(\$55.4)
Caledonia Toll	(\$100)	(\$75)
Southaven Toll	(\$150)	(\$100)
Unspecified Claims	(\$25)	(\$25)
TOTAL ESTIMATED CLAIMS:	(\$580.6)	(\$402.9)
ESTIMATED RECOVERY %	73.7%	100%
ESTIMATED DISTRIBUTION TO NEGT	\$0	\$69.2

*ITM recovery estimated based on ET assessment of likely individual counterparty recovery:
No longer based on 30% decrease from mid-market MTM

Handwritten notes and calculations:

- Top right: $19.7 \text{ billion} \times 30\% = 5.91 \text{ billion}$
- Below that: $250 \times 30\% = 75 \text{ million}$
- Bottom right: 32.1

ET Recovery Assumptions and Qualifications

- Net cash balance excludes:
 - Collateral posted: Bank of Montreal/CalPX LC [\$19.0M]
 - \$700k tax liability is included in analysis for repatriation of Caymans (\$81.7M) cash in the expected case; \$29.0M in estimated taxes to be paid in the conservative case
- G&A and Restructuring Costs estimated at \$22.5M (2004 Budget of \$19.2M, Accruals of \$2.3M, 2005 Estimated Wind-up Cost of \$5.0M & Interest Income of \$4M)
- Recovery rate at USGenNE of 50% in the expected case, 35% in the conservative case; assumes mutual release approved in both cases
- All outstanding balances b/t ET entities and UsGenNE are netted before application of UsGenNE recovery rate
- Negotiated settlements of ITM positions based on ET's estimate of recovery
- Contemplates return of collateral from ISOs and Pools using exposure numbers from ISO and Pools and ET's estimate of recovery
- Excludes certain receivables due from NEG-T affiliates
- Conservative case assumes an additional 25% increase for ET negotiated claim settlements of Forward OTM positions
- All cash collateral specific to trading exposure is applied against OTM claims on a counterparty by counterparty basis.
- Includes \$25M for unspecified and/or un-liquidated claims

ET Recovery Assumptions and Qualifications (II)

- Recovery analysis contemplates return of NYISO and Glencore LOCs (\$5.2M total)
- Includes certain payables/obligations to Non-ET affiliates
- Recovery rate at NEG-T of 50% in both cases; and LOC draws on NEG-T line posted on behalf of ET paid at 50%
 - Assumes NEG-T claim against ET is for amounts paid on LOC draw
- Tax benefits and tax liabilities including accruals are excluded from analysis except tax on repatriation of International cash
- Guarantee claims assume counterparty goes through beneficiary entity first, then issuing entity subsequent except for GTN claims, which are paid in full by GTN. GTN then files claims for paid amounts against ET
- \$61.3M note from PG&E Enterprises to ET Power is excluded from analysis
- Assumes claims against affiliates are not subordinated
- FERC liability assumed to be capped at \$19M BMO LOC. Assumes no return of BMO cash collateral
- Assumes only deferred compensation and bonus accrual amounts owed are recognized in the employee claims
- No value (Book Value of \$2.5M) assigned to Property, Plant and Equipment at ET



GTN Sale and Guarantees Exposure

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GTN Sale and Guarantees Exposure

- Sale of GTN Announced
 - Concerns regarding ET preference claim against GTN
 - Inter-affiliate releases in settlement agreements
- GTN Potential Exposure under Guarantees
 - Liberty – Face value of guarantee is \$140M.
 - Morgan Stanley – Face value of guarantee is \$30M (March 11 hearing to approve settlement payment of \$4.1M).
 - GPU – Face value of guarantee is \$5M. Claim negotiations in progress. ET's estimate of potential exposure is \$1.65M.
 - Mirant – Face value of guarantee is \$20M. Bankruptcy claims, net of collateral, indicate maximum exposure of approximately \$5M. ET's estimate of potential exposure is -0-.

continued

GTN Sale and Guarantees Exposure (II)

- **El Paso Natural Gas** – Face value of guarantee is \$12M. Released and discharged on February 11, 2004.
- **J. Aron** – Face value of guarantee is \$25M. Settlement in process of being documented. No exposure under guarantee. Settlement will discharge and release guarantee.
- **BP** – Face value of guarantee is \$40M. ET recently sent letters demanding \$6M payment. ET's estimate of potential exposure is -0-.
- **NYSEG** – Face value of guarantee is \$10M. Settlement in process of being documented. No exposure under guarantee. Settlement will discharge and release the guarantee.

2004 Operations and Timeline

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ET - 2004 EXPENSE BUDGET (thousands)

Personnel	\$ 3,664
G & A	1,118
Professional Fees	14,138
Corporate Allocations	267
TOTAL	<u>\$ 19,186*</u>

* Does not reflect 2003 related accruals: Severance and Retention of \$398K and Professional fees of \$1,865K

Note: Interest Income of Approximately \$4,000K projected for 2004

ET - 2004 PROJECTED HEADCOUNT

	<u>Actual</u>		<u>Projected</u>		
	<u>7-8-03</u>	<u>3-1-04</u>	<u>4-1-04</u>	<u>7-1-04</u>	<u>10-01-04</u>
Wind-down	26	4	4	4	4
Accounting*	27	12	10	6	4
Credit/Risk	4	1	1	1	1
Total Headcount	<u>57</u>	<u>17</u>	<u>15</u>	<u>11</u>	<u>9</u>

*Includes one (1) contract employee

Anticipated Timeline in Liquidation

- Liquidating Chapter 11 plan for all ET debtors likely to be filed by Summer 2004
- ET either will continue to exist for the purpose of wind-down and liquidation without the need of a trust or trustee or will emerge as a liquidating trust – too early to determine
- Expect to achieve bulk of liquidation by end of 2004
 - Some matters may require additional time to resolve — *e.g.*, additional 12 months
- Q1 2004
 - Analyze Counterparty proofs of claim and begin to negotiate
 - Continue to negotiate ITM positions
 - Initiate adversary proceedings; mediation
- Timeline highly dependent on success of settlement process v. CP litigation
 - Some CPs may perceive tactical advantage from delay
 - Toll litigations likely resolved by end of Q3 2004

EXHIBIT 16

CHARLES R. GOLDSTEIN**January 29, 2010**

1 (Pages 1 to 4)

1	3
<p>1 UNITED STATES BANKRUPTCY COURT</p> <p>2 DISTRICT OF MARYLAND</p> <p>3 Greenbelt Division</p> <p>4 -----X Chapter 11</p> <p>5 In re: : Case No. 03-30459(PM)</p> <p>6 : and 03-30461(PM)</p> <p>7 NATIONAL ENERGY & GAS : through 03-30464(PM)</p> <p>8 : and 03-30686(PM)</p> <p>9 TRANSMISSION, INC., et al., : through 03-30687(PM)</p> <p>10 : Debtors. : Jointly Administered</p> <p>11 : as 03-30459(PM)</p> <p>12 -----X</p> <p>13 Baltimore, Maryland</p> <p>14 Friday, January 29, 2010</p> <p>15 Deposition of CHARLES R. GOLDSTEIN, a</p> <p>16 witness herein, called for examination by counsel</p> <p>17 for NEGT in the above-entitled matter, pursuant to</p> <p>18 notice, the witness being duly sworn by ANN L.</p> <p>19 BLAZEJEWSKI, a Notary Public in and for the State</p> <p>20 of Maryland, taken at the offices of Protiviti, 1</p> <p>21 East Pratt Street, Suite 800, Baltimore, Maryland</p> <p>22 21202, at 8:58 a.m., Friday, January 29, 2010, and</p> <p>23 the proceedings being taken down by Stenotype by</p> <p>24 ANN L. BLAZEJEWSKI, Registered Merit Reporter and</p> <p>25 Certified Realtime Reporter, and transcribed under</p> <p>her direction.</p>	<p>1 CONTENTS</p> <p>2 WITNESS PAGE</p> <p>3 CHARLES R. GOLDSTEIN</p> <p>4 Examination by Ms. Payne 4</p> <p>5 EXHIBITS</p> <p>6 EXHIBIT PAGE</p> <p>7 12 * Deposition Notice 7</p> <p>8 13 NEGT Energy Trading Liquidation</p> <p>9 Status and Update March 9, 2004 69</p> <p>10 14 NEGT Energy Trading Liquidation</p> <p>11 Status and Update October 21, 2004 71</p> <p>12 15 Settlement Communications Letter</p> <p>13 Dated December 15, 2008 102</p> <p>14 16 Declaration of Charles Goldstein 105</p> <p>15 17 Verified Statement of Charles Goldstein 115</p> <p>16 18 NEGT Energy Trading Liquidating Debtors</p> <p>17 Quarterly Report, May 2, 2005, to</p> <p>18 August 31, 2005 124</p> <p>19 19 NEGT Energy Trading Liquidating Debtors</p> <p>20 Quarterly Report, June 1, 2006, to</p> <p>21 August 31, 2006 128</p> <p>22 20 NEGT Energy Trading Liquidating Debtors</p> <p>23 Quarterly Report March 1, 2007, to</p> <p>24 May 31, 2007 132</p> <p>25 21 NEGT Energy Trading Liquidating Debtors</p> <p>Quarterly Report June 1, 2007, to</p> <p>August 31, 2007 133</p> <p>22 NEGT Energy Trading Liquidating Debtors</p> <p>Quarterly Report September 1, 2007, to</p> <p>November 30, 2007 134</p> <p>23 NEGT Energy Trading Liquidating Debtors</p> <p>Quarterly Report March 1, 2008, to</p> <p>May 31, 2008 135</p> <p>24 NEGT Energy Trading Liquidating Debtors</p> <p>Quarterly Report September 1, 2008, to</p> <p>November 30, 2008 138</p> <p>25 25 NEGT Energy Trading Liquidating Debtors</p> <p>Quarterly Report December 1, 2008, to</p> <p>February 28, 2009 139</p> <p>* Exhibit 12 retained by Ms. Payne</p>
2	4
<p>1 APPEARANCES:</p> <p>2 On behalf of NEGT:</p> <p>3 CAROL C. PAYNE, ESQ.</p> <p>4 Vinson & Elkins</p> <p>5 Trammel Crow Center</p> <p>6 2001 Ross Avenue, Suite 3700</p> <p>7 Dallas, Texas 75201</p> <p>8 (214) 220-7947 (214) 999-7947 FAX</p> <p>9 cpayne@velaw.com</p> <p>10 On behalf of ET Power:</p> <p>11 RICHARD G. MURPHY, JR., ESQ.</p> <p>12 Sutherland, Asbill & Brennan LLP</p> <p>13 1275 Pennsylvania Avenue, N.W.</p> <p>14 Washington, D.C. 20004-2415</p> <p>15 (202) 383-0635 (202) 637-3593 FAX</p> <p>16 rick.murphy@sutherland.com</p>	<p>1 CHARLES R. GOLDSTEIN,</p> <p>2 called for examination by counsel for NEGT, and</p> <p>3 having been duly sworn by the Notary Public, was</p> <p>4 examined and testified as follows:</p> <p>5 - - - -</p> <p>6 EXAMINATION BY COUNSEL FOR NEGT</p> <p>7 BY MS. PAYNE:</p> <p>8 Q. Could you please state your name for</p> <p>9 the record.</p> <p>10 A. Charles Goldstein.</p> <p>11 Q. Mr. Goldstein, my name is Carol Payne,</p> <p>12 I'm a lawyer with Vinson & Elkins, and I represent</p> <p>13 a company National Energy & Gas Transmission,</p> <p>14 Inc., for purposes of this current dispute. Do</p> <p>15 you understand that?</p> <p>16 A. I do.</p> <p>17 Q. Okay. And I do want to get at the</p> <p>18 beginning of our deposition here a couple of names</p> <p>19 and acronyms on the record.</p> <p>20 A. Sure.</p> <p>21 MR. MURPHY: If I may, I assume we're</p> <p>22 going to have sort of standard stipulations?</p> <p>23 MS. PAYNE: Well, I don't know what you</p> <p>24 consider standard stipulations.</p> <p>25 MR. MURPHY: Well, reserve all</p>

CSI GLOBAL DEPOSITION SERVICES**972-719-5000****EXHIBIT**

tabbles

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2 (Pages 5 to 8)

5

1 objections except as to form or responsiveness of
2 the answer.

3 MS. PAYNE: We're going to take this
4 under the rules, yes.

5 MR. MURPHY: Okay.

6 MS. PAYNE: Unless you have --

7 MR. MURPHY: No, I don't have anything
8 special.

9 MS. PAYNE: We'll take it under the
10 rules.

11 BY MS. PAYNE:

12 Q. For purposes of clarity, when I refer
13 to NEGT, I'm referring to National Energy & Gas
14 Transmission, Inc. Do you understand that?

15 A. Yes.

16 Q. All right. And I know that other
17 people at times have referred to it slightly
18 differently. If there's any question in your mind
19 as to which entity we're discussing, please feel
20 free to ask me.

21 A. Absolutely.

22 Q. Now, there's a second entity which is
23 known as NEGT Energy Trading Power LP, correct?

24 A. Yes.

25 Q. And this has generally been referred to

6

1 in this current dispute as ET Power, correct?

2 A. Yes.

3 Q. So throughout the deposition I will
4 refer to it either as ET or ET Power.

5 A. That's fine.

6 Q. I know there are other entities that
7 have very similar names. Again, unless we stated
8 otherwise, the entity to which we're referring
9 when we say ET or ET Power is NEGT Energy Trading
10 Power LP.

11 A. Fine.

12 Q. Do we have that agreement?

13 A. Sure.

14 Q. Throughout this, I anticipate we're
15 also going to be referencing a company known as
16 Liberty Electric. Are you familiar with that
17 company?

18 A. Yes.

19 Q. That is a company with whom ET Power
20 had a tolling agreement, correct?

21 A. Yes.

22 Q. So for shorthand purposes, I'll
23 probably end up referring to it as just Liberty,
24 but you understand I'm talking about Liberty
25 Electric, correct?

7

1 A. That's fine.

2 Q. All right. As we go through this, to
3 the extent we refer to something other than its
4 formal name, if there is any dispute or any
5 misunderstanding, lack of clarity, please let me
6 know, and I will try make everything clear.

7 A. Absolutely, I will.

8 Q. Could you please tell me what your
9 current role is with respect to ET Power.

10 A. Yes. I'm the plan administrator for
11 the ET Power bankruptcy plan.

12 (Exhibit No. 12 was marked
13 for identification.)

14 BY MS. PAYNE:

15 Q. All right. I'm handing you what we
16 have marked as Plaintiff's Exhibit Number 12.
17 Have you seen this before?

18 A. I believe I have, but I don't have any
19 great memory of it. But I know why I'm here.

20 Q. Right. This is the deposition notice
21 that requested your presence in this deposition,
22 correct?

23 A. Yes, uh-huh.

24 Q. All right. First of all, tell me what
25 your background is generally. Let's start with

8

1 college. I assume you have a college degree.

2 A. I do.

3 Q. Okay. Tell me about that.

4 A. Undergraduate in economics, University
5 of Maryland, I'm a JD/MBA from University of
6 Maryland. Professionally I'm a CPA, I have a
7 certified insolvency and restructuring
8 certification, I'm a certified forensic
9 investigator -- that's a certification issued by
10 the AICPA. That's probably professionally what I
11 have.

12 Q. All right. I think within there I
13 heard you say that you have a JD/MBA?

14 A. Yes.

15 Q. Can you explain to me what that is?

16 A. I was a -- well, I have each degree
17 from the University of Maryland also, it was a
18 joint program where you're able to exist in both
19 schools for a four-year period and end up with two
20 degrees, so you save I guess one year in the total
21 program.

22 Q. Okay, and a JD is a law degree,
23 correct?

24 A. It is.

25 Q. Have you ever practiced law?

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3 (Pages 9 to 12)

<p style="text-align: right;">9</p> <p>1 A. I have not.</p> <p>2 Q. Have you ever been admitted to the bar</p> <p>3 of any state?</p> <p>4 A. I have avoided that.</p> <p>5 Q. Okay.</p> <p>6 A. I was -- just for clarity on the</p> <p>7 record, I had a job with Price Waterhouse before I</p> <p>8 got out of the program that fall before, and</p> <p>9 decided to do the business route versus the legal</p> <p>10 route.</p> <p>11 Q. Okay. All right. So when did you</p> <p>12 graduate from college, undergraduate?</p> <p>13 A. 1981.</p> <p>14 Q. Okay. And then did you go straight</p> <p>15 into the graduate program?</p> <p>16 A. I did.</p> <p>17 Q. All right. When did you graduate from</p> <p>18 your graduate programs?</p> <p>19 A. 1985.</p> <p>20 Q. And this was the JD/MBA?</p> <p>21 A. Yes.</p> <p>22 Q. What did you do upon graduation from</p> <p>23 the JD/MBA program?</p> <p>24 A. I started working at Price Waterhouse.</p> <p>25 Q. What were you doing at Price</p>	<p style="text-align: right;">11</p> <p>1 there was the public housing bubble, there was</p> <p>2 some -- the owner of my company had underwritten</p> <p>3 the loan from DOS with some holdings, real estate</p> <p>4 holdings in Texas, some public housing stuff, and</p> <p>5 that went belly up, so his collateral went away,</p> <p>6 we had to liquidate, and that was my first</p> <p>7 introduction to troubled companies at that point.</p> <p>8 Q. So how long did your work with DOS</p> <p>9 Computer --</p> <p>10 A. About two years.</p> <p>11 Q. Okay. And you left when that company</p> <p>12 went out of business?</p> <p>13 A. Well, basically it was sold.</p> <p>14 Q. It was sold?</p> <p>15 A. Yes, it was sold over a New Year's</p> <p>16 holiday. So we came back on that whatever the</p> <p>17 first day, January 2nd, and the president's office</p> <p>18 was cleared out, he had sold the company over that</p> <p>19 weekend.</p> <p>20 Q. And didn't notify you ahead of time?</p> <p>21 A. Not anybody. If I knew then what I</p> <p>22 know now, I would have raised all the employee</p> <p>23 issues that I could have. I didn't know those</p> <p>24 things then, so...</p> <p>25 Q. So DOS Computer folded up and --</p>
<p style="text-align: right;">10</p> <p>1 Waterhouse?</p> <p>2 A. I was a consultant, auditor. We did</p> <p>3 not -- at that time Price Waterhouse had a group</p> <p>4 that was a comprehensive group for middle market</p> <p>5 companies in that they provided the audit tax</p> <p>6 consulting work, all by the same team of</p> <p>7 professionals.</p> <p>8 Q. And how long were you employed by Price</p> <p>9 Waterhouse?</p> <p>10 A. Approximately two years, when I took a</p> <p>11 job with a client called DOS Computer Centers.</p> <p>12 Q. D-O-S?</p> <p>13 A. Capital D, capital O, capital S</p> <p>14 Computer Centers. And it was a retailer</p> <p>15 wholesaler. We had some significant operations in</p> <p>16 Florida, and I was sort of the southeast area, and</p> <p>17 then we distributed to others, so it was about a</p> <p>18 \$150 million distributor, somewhere in that range,</p> <p>19 but it was a client of mine, and I basically</p> <p>20 joined them because they were going to go public,</p> <p>21 and I wanted to be the director of finance of a</p> <p>22 company that was going to go public.</p> <p>23 Unfortunately -- well, you would know</p> <p>24 since you're from Texas. In the late '80s, at</p> <p>25 that point, that would have been like '87, '88</p>	<p style="text-align: right;">12</p> <p>1 A. Well, it was sold. Sold to a company</p> <p>2 called Inacomp.</p> <p>3 Q. It was sold as of year end --</p> <p>4 A. A going concern.</p> <p>5 Q. What day? What year and what year?</p> <p>6 A. I guess at the end of -- let's see, if</p> <p>7 I take my time -- '89.</p> <p>8 Q. Okay. So in 1989 what did you do at</p> <p>9 that point professionally?</p> <p>10 A. And that was when I joined the ranks of</p> <p>11 consultants in the troubled company world. I</p> <p>12 joined up with a former partner of Coopers &</p> <p>13 Lybrand practice in Baltimore, and we started up a</p> <p>14 consulting group in a regional accounting firm</p> <p>15 named C.W. Amos & Company.</p> <p>16 Q. How many people were in that consulting</p> <p>17 group?</p> <p>18 A. Well, there was two of us. He</p> <p>19 initially, he rolled out from Coopers to that. I</p> <p>20 guess he actually maybe had an interim stage with</p> <p>21 a turnaround firm, but he basically came back by</p> <p>22 himself, maybe spent three or four months, and I</p> <p>23 was his first hire into the practice, and it was</p> <p>24 just the two of us initially.</p> <p>25 Q. How long were you with this consulting</p>

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4 (Pages 13 to 16)

<p>13</p> <p>1 group?</p> <p>2 A. Let's see. '89... I guess 1998.</p> <p>3 Q. What happened in 1998?</p> <p>4 A. We rolled our consulting practice out</p> <p>5 of the audit firm and formed a company called</p> <p>6 PENTA Advisory Services.</p> <p>7 Q. And how long -- well, let me ask this:</p> <p>8 PENTA is a consulting practice that was rolled</p> <p>9 into Protiviti at some point; is that correct?</p> <p>10 A. Well, that was PENTA 2.</p> <p>11 Q. Okay. Well, then, why don't you go</p> <p>12 ahead.</p> <p>13 A. Yes.</p> <p>14 Q. I might be skipping some steps here.</p> <p>15 A. No problem.</p> <p>16 Q. So tell me about PENTA 1.</p> <p>17 A. PENTA 1, basically we had grown our</p> <p>18 practice to approximately 50 people, with offices</p> <p>19 in Richmond and D.C., Baltimore, and we rolled</p> <p>20 ourselves out, interesting enough, because the</p> <p>21 audit practice thought that the consulting</p> <p>22 practice was more risky than they were.</p> <p>23 Q. Ironically.</p> <p>24 A. Yes. And so we basically bought our</p> <p>25 receivables and got some space in another part of</p>	<p>15</p> <p>1 Q. When you say you do financial advisory</p> <p>2 services for troubled companies, that could be</p> <p>3 work that you do before a company files for</p> <p>4 bankruptcy?</p> <p>5 A. Absolutely.</p> <p>6 Q. Or to help it avoid filing for</p> <p>7 bankruptcy?</p> <p>8 A. Yes.</p> <p>9 Q. And then if a company ends up in</p> <p>10 bankruptcy, you can do work to assist it during</p> <p>11 that process?</p> <p>12 A. That's correct.</p> <p>13 Q. And the work that you would do after a</p> <p>14 company has filed for bankruptcy includes what</p> <p>15 generally?</p> <p>16 A. After they file?</p> <p>17 Q. Yes.</p> <p>18 A. There are, I guess, administrative</p> <p>19 tasks that the company needs to do, file monthly</p> <p>20 operating reports, deal with the claims objection</p> <p>21 process. There's some what I call end-game</p> <p>22 issues, preference/avoidance actions and the like</p> <p>23 that we help out with. On the more substantive</p> <p>24 side of it, we deal with plan negotiation,</p> <p>25 development with the company strategy regarding</p>
<p>14</p> <p>1 the building.</p> <p>2 Q. And what kind of work did you do both</p> <p>3 at the earlier consulting group and the group that</p> <p>4 was rolled into PENTA 1, and then at PENTA itself,</p> <p>5 tell me a little bit about the kind of work you</p> <p>6 did.</p> <p>7 A. Sure. Well, the original, back in the</p> <p>8 Price Waterhouse days, it was typical business</p> <p>9 consulting. We could be anywhere from systems to</p> <p>10 operational improvements, accounting control</p> <p>11 issues. So it was more on the straight ahead</p> <p>12 accounting, risk kind of work. The work, when I</p> <p>13 started at C.W. Amos, was the work I'm doing now</p> <p>14 and have been doing since 1989, and that is the</p> <p>15 financial consulting, financial advisory work</p> <p>16 within the troubled company context, and as well</p> <p>17 complex litigation and forensic investigations,</p> <p>18 and that's what we did or what I did starting with</p> <p>19 C.W. Amos in '89 as I guess a staff member at that</p> <p>20 point when I started and moved my way up to</p> <p>21 partner by the time we exited.</p> <p>22 Q. Let me see if I understand this. If I</p> <p>23 say something that's not entirely correct, please</p> <p>24 correct me because I'm trying to understand.</p> <p>25 A. Sure.</p>	<p>16</p> <p>1 what's the appropriate form going out. I should</p> <p>2 say that it's not just for the company we work</p> <p>3 for, as most professionals in our industry do that</p> <p>4 work for any side of the matter.</p> <p>5 Q. Right. That was actually going to be</p> <p>6 my next question. Is there a particular type of</p> <p>7 party that you do work for? I mean, is it</p> <p>8 typically debtors or is it certain creditors, is</p> <p>9 it committees?</p> <p>10 A. We're pretty well -- I mean, I've taken</p> <p>11 the position that we should be balanced in our</p> <p>12 portfolio, and I think it provides more value to</p> <p>13 our clients if we've actually represented</p> <p>14 creditors or financial institutions and debtors,</p> <p>15 so we have a full understanding of what happens at</p> <p>16 each of those -- with each of those constituents.</p> <p>17 So we're pretty well balanced with that. Any</p> <p>18 particular year it could lean more debtor work or</p> <p>19 more creditors committee work, but there has been</p> <p>20 no focus to get this work versus any other type of</p> <p>21 work.</p> <p>22 Q. All right. I gather that what you just</p> <p>23 explained about having this balanced focus, that</p> <p>24 that applies to the company. Does that also apply</p> <p>25 to you individually or has your practice focused</p>

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<p style="text-align: right;">17</p> <p>1 on one area more than others?</p> <p>2 A. I've been across the board. I mean,</p> <p>3 I've represented creditors committees, debtors,</p> <p>4 financial institutions.</p> <p>5 Q. Now, in the course of all this, I</p> <p>6 gather from what you said earlier about not ever</p> <p>7 having been licensed to practice law, all of this</p> <p>8 work is consulting work but not legal work?</p> <p>9 You're not practicing law, right?</p> <p>10 A. Right. The closest I get to having any</p> <p>11 legal judgments are when I serve in these</p> <p>12 fiduciary roles, when I have -- I'll be presented</p> <p>13 with issues and certainly try to understand what</p> <p>14 the lawyers are telling me on those things. I'm</p> <p>15 also a panel trustee, so I do have that practice</p> <p>16 within the Bankruptcy Court.</p> <p>17 Q. What is a panel trustee?</p> <p>18 A. A Chapter 7 panel trustee, so the</p> <p>19 independent -- are you a bankruptcy practitioner</p> <p>20 at all?</p> <p>21 Q. No, but I'm familiar to some degree.</p> <p>22 A. Okay. There's -- the Bankruptcy Court</p> <p>23 allocates some of its duties to outside</p> <p>24 professionals to sort of basically do the intaking</p> <p>25 questioning of debtors. It's as close as I get to</p>	<p style="text-align: right;">19</p> <p>1 to sell it or whatever might be the appropriate</p> <p>2 end course.</p> <p>3 Q. Are those different roles you just</p> <p>4 mentioned, are those really different titles for</p> <p>5 the same role or are those really different roles?</p> <p>6 A. In my mind, they're pretty close to the</p> <p>7 same role. Every one of them has -- you know, for</p> <p>8 example, in the ET case there's a plan</p> <p>9 administrator agreement that dictates, you know,</p> <p>10 what it is I should do and what I have authority</p> <p>11 to do. So sometimes there are particular</p> <p>12 limitations or extensions of abilities for me to</p> <p>13 work from, but typically it starts with the role</p> <p>14 of a trustee and the authority of a trustee, and</p> <p>15 then they'll either -- you know, they'll pull some</p> <p>16 stuff away from that if the groups who are trying</p> <p>17 to appoint me want to have some remaining control.</p> <p>18 Q. Okay. So you mentioned that in your</p> <p>19 current role you owe fiduciary duties. To whom do</p> <p>20 you owe fiduciary duties?</p> <p>21 A. To the --</p> <p>22 MR. MURPHY: Objection. That calls for</p> <p>23 a legal conclusion.</p> <p>24 MS. PAYNE: Well, he just mentioned</p> <p>25 he's got a law degree and that he owes fiduciary</p>
<p style="text-align: right;">18</p> <p>1 pro bono work. You know, we get like \$60 a case.</p> <p>2 It's really a service to the community. There are</p> <p>3 some asset cases that I get out of it, but over</p> <p>4 the last 15 years they've been few and far</p> <p>5 between.</p> <p>6 Q. These would be small matters?</p> <p>7 A. They're mostly individuals. Very few</p> <p>8 businesses. Mostly individuals who, you know,</p> <p>9 have \$50,000 credit card debt, have a house under</p> <p>10 water, are losing their car, don't have a job,</p> <p>11 those types of scenarios.</p> <p>12 Q. I understand. All right. You</p> <p>13 mentioned a moment ago these fiduciary roles.</p> <p>14 Explain to me what you meant by that.</p> <p>15 A. Well, in this particular case, I'm the</p> <p>16 plan administrator of the case, which is the</p> <p>17 responsible party for seeing to the wind-down of</p> <p>18 the activities of the particular entity.</p> <p>19 Sometimes the position is titled trustee. It</p> <p>20 could be a litigation trust, and I would be the</p> <p>21 trustee of that. It could be just the straight</p> <p>22 ahead bankruptcy trustee and continuing with my</p> <p>23 role. It could be as a chief restructuring</p> <p>24 officer, and sort of the end of that</p> <p>25 responsibility is to liquidate out the company or</p>	<p style="text-align: right;">20</p> <p>1 duties, and he uses his degree to understand those</p> <p>2 issues. So I want to get his understanding as to</p> <p>3 who he owes his fiduciary duty to.</p> <p>4 THE WITNESS: To the estate.</p> <p>5 BY MS. PAYNE:</p> <p>6 Q. Okay. And to anybody -- any person or</p> <p>7 entity other than the estate?</p> <p>8 A. To the estate.</p> <p>9 Q. Okay. And that would be the estate for</p> <p>10 ET Power?</p> <p>11 A. Yes.</p> <p>12 Q. All right.</p> <p>13 A. And just so -- there are a number of</p> <p>14 other debtors within these cases that I'm also the</p> <p>15 plan administrator for, but as to this particular</p> <p>16 matter, it's just Liberty -- I mean it's just ET.</p> <p>17 Q. ET, okay. Understood. Understood.</p> <p>18 A. Okay.</p> <p>19 Q. You mentioned earlier that there's -- I</p> <p>20 believe you called it a plan administrator</p> <p>21 agreement?</p> <p>22 A. Yes.</p> <p>23 Q. And that agreement outlines what your</p> <p>24 obligations are as plan administrator?</p> <p>25 A. I guess it would be authority and</p>

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<p style="text-align: right;">21</p> <p>1 obligations.</p> <p>2 Q. Authority and obligations, okay, fair</p> <p>3 enough. Is this something that is filed with the</p> <p>4 Bankruptcy Court?</p> <p>5 A. I believe it was.</p> <p>6 Q. And it identifies all the entities on</p> <p>7 which you have this role?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. All right. We've covered</p> <p>10 generally your, I guess your professional</p> <p>11 background really as a -- not particularly how it</p> <p>12 relates to the ET Power matter.</p> <p>13 A. Right.</p> <p>14 Q. I want to talk now specifically about</p> <p>15 the ET Power matter and really -- and you</p> <p>16 understand that there were multiple bankruptcies</p> <p>17 filed --</p> <p>18 A. Yes.</p> <p>19 Q. -- of which ET Power is one of the</p> <p>20 entities that filed for bankruptcy. Just for</p> <p>21 shorthand, I'm going to refer to those as the NEG</p> <p>22 T bankruptcies.</p> <p>23 A. Okay.</p> <p>24 Q. The NEG T parent company and certain</p> <p>25 subsidiaries?</p>	<p style="text-align: right;">23</p> <p>1 A. Sure.</p> <p>2 Q. Now, were you specifically, Charles</p> <p>3 Goldstein, hired or was your firm hired and you</p> <p>4 became involved in it as a result of that?</p> <p>5 A. I guess when we were going through the</p> <p>6 whole series of companies, I don't think I</p> <p>7 mentioned Navigant in there. There was a point in</p> <p>8 the process. We can go back to that so it all</p> <p>9 lines up for you.</p> <p>10 Q. Okay.</p> <p>11 A. There was a point in PENTA's life where</p> <p>12 we joined Navigant, and that would have been maybe</p> <p>13 I think in the fall of '98.</p> <p>14 Q. Okay.</p> <p>15 A. Yeah, I think so. And so we were --</p> <p>16 when this case came on board -- maybe it was even</p> <p>17 a little bit later than that. When this case came</p> <p>18 on board, I was working for Navigant Consulting.</p> <p>19 Q. Okay.</p> <p>20 A. And --</p> <p>21 Q. Did it come in through you or did it</p> <p>22 come in through somebody else?</p> <p>23 A. It came in through me.</p> <p>24 Q. Did you know somebody or --</p> <p>25 A. There were two attorneys who were</p>
<p style="text-align: right;">22</p> <p>1 A. U.S. Gen and all the rest of them.</p> <p>2 Q. When was the first time you had any</p> <p>3 involvement in any aspect of the NEG</p> <p>4 T bankruptcies?</p> <p>5 A. When we were engaged as the financial</p> <p>6 advisor to the unsecured creditors committee of</p> <p>7 the I'll call them the ET debtors.</p> <p>8 Q. Can you say that one more time?</p> <p>9 A. The ET debtors.</p> <p>10 Q. You were engaged as the?</p> <p>11 A. Financial advisor.</p> <p>12 Q. Okay.</p> <p>13 A. To the unsecured creditors committee --</p> <p>14 Q. All right.</p> <p>15 A. -- of the ET debtors.</p> <p>16 Q. Right. And the ET debtors would</p> <p>17 include ET Power, correct?</p> <p>18 A. Yes, power holdings, investments,</p> <p>19 international.</p> <p>20 Q. I'm going to focus on ET Power unless</p> <p>21 there is some reason that we need to focus on some</p> <p>22 of the other ET debtors.</p> <p>23 A. That's fine.</p> <p>24 Q. I'm going to focus on the ET Power</p> <p>25 debtor itself.</p>	<p style="text-align: right;">24</p> <p>1 representing certain creditors. Well, there was</p> <p>2 the attorney who was representing the creditors</p> <p>3 committee, David Kuney at Sidley Austin, who --</p> <p>4 Q. How do you spell his last name?</p> <p>5 A. K-u-e-n-e-y? K-u --</p> <p>6 MR. MURPHY: Don't know.</p> <p>7 THE WITNESS: If you ever run into him,</p> <p>8 don't tell him that I didn't know how to spell his</p> <p>9 name. I think it's K-u-n-e-y.</p> <p>10 MS. PAYNE: Okay.</p> <p>11 THE WITNESS: David Kuney. And two of</p> <p>12 the members of the committee were represented by</p> <p>13 attorneys that I know. Ben Hawfield at Moore &</p> <p>14 Van Allen in Charlotte, and Michael Colglazier,</p> <p>15 who was at Hogan & Hartson. So they both knew me.</p> <p>16 David Kuney was representing the committee, and I</p> <p>17 basically interviewed for the job and was selected</p> <p>18 to serve in that role.</p> <p>19 BY MS. PAYNE:</p> <p>20 Q. And about when was that? Do you</p> <p>21 remember what month or year?</p> <p>22 A. When was the case filed?</p> <p>23 Q. I believe it filed in 2003. July-ish</p> <p>24 of 2003.</p> <p>25 A. I think maybe it was the beginning of</p>

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<p style="text-align: right;">25</p> <p>1 '04, in the spring of '04 might be when we 2 started. There was a period of time where they 3 were -- they did not have an FA obviously, a 4 financial advisor, and it came to the point where 5 they were having discussions that required the 6 hiring of a financial advisor to assist them in 7 assessing the debtor's operations and what they 8 were being offered in the plan. 9 Q. Okay. And by "they," you mean the -- 10 A. Unsecured creditors. 11 Q. -- unsecured creditors committee for 12 the ET debtors? 13 A. Yes, yes. 14 Q. All right. As we go through this, it's 15 easier for our court reporter if we don't speak 16 over each other. 17 A. Yep. 18 Q. So let me try to get my question out, 19 and I'll try to let you get your full answer out. 20 A. No problem. 21 Q. It will be a cleaner transcript. All 22 right. So -- 23 A. She was kicking me here, so I... 24 THE REPORTER: I was about to. 25 BY MS. PAYNE:</p>	<p style="text-align: right;">27</p> <p>1 started in 2004. 2 A. Right. 3 Q. And it sounds like it shifted at one 4 point to you becoming, you individually becoming 5 the plan administrator, correct? 6 A. Right. The nature of a bankruptcy case 7 is to have an initial filing, and then for the 8 company to determine whether there's business to 9 reorganize or not, and I think fairly early the 10 concept here was that there was not an entity that 11 was going to reorganize, this was going to be a 12 controlled liquidation. And as to that, typically 13 the unsecured creditors will have a say in how 14 that liquidation goes or at least have an 15 oversight responsibility. So our initial role 16 when we came on board was to look at what had 17 happened from even before the filing but to look 18 at the liquidation scenarios that were being 19 administered by the debtor, assess how they were 20 doing things, report back to the committee our 21 thoughts on that, and to monitor the activity of 22 the case up through when a plan was being 23 developed, and at that point we certainly 24 participated with the debtors in developing the 25 plan and --</p>
<p style="text-align: right;">26</p> <p>1 Q. Okay. Starting in early 2004 was when 2 you and your firm became involved in the ET 3 debtors creditors committee. What were you 4 looking at or what -- strike that. Let me start 5 over. 6 Well, to finish out the chronology -- 7 A. Sure. 8 Q. So at some point you're at Navigant. 9 And then Navigant turned in to -- 10 A. Then we pulled ourselves out of 11 Navigant. 12 Q. And became PENTA 2? 13 A. Became PENTA again. Then were PENTA 14 for approximately two years, and then joined 15 Protiviti in '07. 16 Q. All right. So even though the name of 17 the entity for whom you work for changed over 18 time, you and your team generally remained the 19 same with respect to who was acting as financial 20 advisors to the ET Power unsecured creditors 21 committee? 22 A. Yes, and then after serving, me, as my 23 financial advisor for the plan administrator, yes. 24 Q. Okay. So now tell me about your roles 25 with the ET debtors creditor committee. It</p>	<p style="text-align: right;">28</p> <p>1 Q. Okay. So in early 2004 your task at 2 hand was to do what? 3 A. It would be to monitor and report to 4 the committee. 5 Q. To the creditors committee? 6 A. Yes. 7 Q. And the purpose of the creditors 8 committee is to do what? 9 A. It's an efficiency argument that if one 10 committee representing all creditors has rights 11 within the bankruptcy proceeding, every creditor 12 doesn't need to have separate counsel doing the 13 same thing. So there's an efficiency argument to 14 that so that the professionals that are 15 representing the committee, legal and financial, 16 can be spread across the whole creditor body, the 17 benefit of that work. 18 Q. Okay. And at a very basic level is the 19 goal of the creditors committee to try to make the 20 estate as large as they can because then there is 21 more money to distribute to the various creditors? 22 A. Well, that's the goal of really 23 everybody. The debtor has that same obligation 24 also. I mean, everybody is there to maximize the 25 return for the estate. The debtors have their</p>

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<p style="text-align: right;">29</p> <p>1 fiduciary obligations to do that, the committee is 2 obligated to do that for the benefit of the 3 unsecured creditors, their particular 4 constituency. 5 Q. Okay. And who does the debtor owe 6 fiduciary duties to? 7 A. The debtor owes it to the estate, so 8 which would be the full level, the full range of 9 constituents. 10 Q. The debtor owes fiduciary duties to its 11 estate? 12 A. Yes. 13 Q. Does it also owe fiduciary duties to 14 creditors? 15 A. There wouldn't -- 16 MR. MURPHY: I'm going to object to 17 this line. It is calling for legal conclusions, 18 and the witness is not a licensed lawyer. 19 BY MS. PAYNE: 20 Q. He's not a licensed lawyer, but he is a 21 lawyer, and he did say earlier that that helps him 22 in determining which fiduciary duties he has. So 23 I want to know what your understanding was as to 24 fiduciary duties you and your firm held and others 25 that were acting in the course of the ET Power</p>	<p style="text-align: right;">31</p> <p>1 is going out? 2 A. They were terminating agreements or 3 agreements had been terminated, so there were 4 negotiations going on between the debtor and the 5 various counterparties on a long series of 6 transactions, and we just monitored what was going 7 on, how that was going, talking to the debtors' 8 financial advisors as to the prospect of things 9 that hadn't been settled and just tried to get a 10 good understanding of what was going to happen in 11 the liquidation. 12 Q. All right. Now, at some point I know 13 that you became the plan administrator for the ET 14 debtors, correct? 15 A. Yes. 16 Q. And when did that occur? 17 A. I don't know if you have the order 18 appointing me. I don't remember the exact date, 19 when that was. Do you remember when the plan was 20 confirmed? It would have been around that time. 21 Q. I believe it was confirmed around May 22 of 2005. 23 A. Okay. So it would have been coincident 24 with that. 25 Q. Okay. So it would be tied to whenever</p>
<p style="text-align: right;">30</p> <p>1 bankruptcy. So did you understand my question 2 what I was asking? 3 A. Well, why don't we go back and you can 4 pose the question again. 5 Q. All right. Does the debtor have 6 fiduciary duties to its creditors, to your 7 understanding? 8 A. It has duties to the estate, and within 9 the estate's constituents are its creditors. 10 Q. Okay. So it could have fiduciary 11 duties to more than just its creditors because the 12 estate could be broader than just creditors? 13 A. Well, we have unsecured creditors, we 14 potentially have secured creditors. 15 Q. But they're all creditors, right? 16 A. They're all creditors. 17 Q. All right. So early 2004 you're 18 monitoring and reporting to the creditors 19 committee about what? 20 A. Just the activity of the liquidation. 21 Q. In other words, from a day-to-day 22 perspective, how it's going, where the money is 23 going -- 24 A. That's right. 25 Q. -- what money is coming in, what money</p>	<p style="text-align: right;">32</p> <p>1 the plan was confirmed? 2 A. Yes. 3 Q. All right. And so prior to the date -- 4 and for simplicity purposes, let's just say May of 5 2005. 6 A. Great. 7 Q. Whatever it might be. But I believe 8 that's correct. 9 A. Uh-huh. Yes. 10 Q. So prior to May of 2005 when you became 11 plan administrator, was you and your company's 12 role between early 2004 to the confirmation of the 13 plan the same as you just explained, that you 14 monitored and reported to the creditors committee, 15 you were financial advisors to the creditors 16 committee, that role stayed generally the same? 17 A. Right. As I stated earlier, the role 18 from a monitoring and assessment move to a 19 negotiation of the plan terms, as we approached 20 the confirmation hearing. 21 Q. And what do you mean by negotiation of 22 plan terms? 23 A. Just the nature of the liquidation 24 where potential -- one of the issues was the -- 25 could the committee nominate a person to serve as</p>

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<p style="text-align: right;">33</p> <p>1 the plan administrator.</p> <p>2 Q. Evidently so.</p> <p>3 A. That's right.</p> <p>4 Q. Okay. All right.</p> <p>5 A. You know, because the argument was that</p> <p>6 if it's a liquidation, the beneficiaries of the</p> <p>7 liquidation will be the creditors, so they might</p> <p>8 as well have some control over their, the results</p> <p>9 of the liquidation.</p> <p>10 Q. Okay. Can you explain to me what it</p> <p>11 means to be the plan administrator for the ET</p> <p>12 debtors in this instance?</p> <p>13 A. Sure. It's very similar, and the</p> <p>14 authority that I'm provided is very similar to</p> <p>15 those provided to a bankruptcy trustee. There</p> <p>16 might be a couple of tweaks. I have some</p> <p>17 reporting, periodic reporting requirements. I am</p> <p>18 restricted to settlements of certain dollar amount</p> <p>19 to settle without going to the court for approval,</p> <p>20 but other than that, there was very little</p> <p>21 difference between being a plan administrator and</p> <p>22 the duties and obligations and authority of a</p> <p>23 trustee.</p> <p>24 Q. So do you report to anybody? Do you</p> <p>25 report to a board or anything of that nature?</p>	<p style="text-align: right;">35</p> <p>1 A. Yes.</p> <p>2 Q. And you took over -- is it fair to say</p> <p>3 that you took over the major role in overseeing</p> <p>4 the final aspects of this liquidation?</p> <p>5 A. Yes.</p> <p>6 Q. Are you considered to be sort of a</p> <p>7 spokesperson for ET now? Are you the person that</p> <p>8 can speak on its behalf?</p> <p>9 A. I would say that's accurate. Although</p> <p>10 I should say that I haven't been doing much</p> <p>11 spokespersonship.</p> <p>12 Q. Why do you say that?</p> <p>13 A. The press hasn't come and asked for</p> <p>14 comments from me for anything related to this.</p> <p>15 Q. Right. Now, before you became involved</p> <p>16 in early 2004, who were the decision-makers at ET</p> <p>17 Power? Was it the ET management, the people who</p> <p>18 were involved --</p> <p>19 A. Yes.</p> <p>20 Q. -- in running the company generally?</p> <p>21 A. Yes.</p> <p>22 Q. All right. Now, once you became</p> <p>23 involved and the bankruptcy petition had been</p> <p>24 filed, so the early 2004 to the plan confirmation</p> <p>25 date, which I believe is May of 2005, who were the</p>
<p style="text-align: right;">34</p> <p>1 A. There's not a board.</p> <p>2 Q. There's no board at any of the ET</p> <p>3 debtors any longer?</p> <p>4 A. Well, there's not an outside board, an</p> <p>5 independent board. Just Brian Cejka and myself</p> <p>6 are the two directors of all of the ET debtors.</p> <p>7 Q. Okay.</p> <p>8 A. And we hold a variety of officer</p> <p>9 positions according to what state requirements</p> <p>10 are.</p> <p>11 Q. Okay. And so the board or the</p> <p>12 management of what had been ET Power, for example,</p> <p>13 is no longer controlling matters with respect to</p> <p>14 ET Power at this point?</p> <p>15 A. That is correct.</p> <p>16 Q. All right. Was that true also prior to</p> <p>17 plan confirmation in the early 2004 to plan</p> <p>18 confirmation date?</p> <p>19 A. No. There was the remnants of the</p> <p>20 NEG/ET group of folks who were internal former</p> <p>21 employees or employees at that point who were</p> <p>22 staying on to finish up the work.</p> <p>23 Q. All right. And after the plan was</p> <p>24 confirmed, whatever role those people had ceased,</p> <p>25 and you were instated as the plan administrator?</p>	<p style="text-align: right;">36</p> <p>1 decision-makers with respect to matters related to</p> <p>2 ET Power?</p> <p>3 A. Well, Bob Barrin was the main contact</p> <p>4 for us at the company level.</p> <p>5 Q. And he was an ET management internal</p> <p>6 employee?</p> <p>7 A. Yes. I believe he was president at</p> <p>8 that point. And there were a series of other</p> <p>9 folks that we met with, but most of our</p> <p>10 interaction other than with Bob was with the</p> <p>11 Alvarez & Marsal folks.</p> <p>12 Q. And what did Alvarez & Marsal do?</p> <p>13 A. They were the financial advisor to the</p> <p>14 debtor, the ET debtors.</p> <p>15 Q. All right.</p> <p>16 A. Well, actually they were the financial</p> <p>17 advisor to all the NEG/ET entities. There was a</p> <p>18 separate team, from my recollection, that was</p> <p>19 handling the ET debtor cases as compared to the</p> <p>20 U.S. Gen case or the NEG/ET case.</p> <p>21 Q. All right. Help me understand the</p> <p>22 roles of Alvarez & Marsal, your firm, which I'm</p> <p>23 just going to refer to as Protiviti, if that's</p> <p>24 okay.</p> <p>25 A. That's fine. Sure.</p>

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1 Q. Whatever they were known as at the
2 time. And then anybody else who might have been
3 doing financial advising. Can you explain to me
4 how those roles broke down and who did what at
5 what time?

6 A. Sure.

7 Q. Because I think I have, based on our
8 conversations already, I have an understanding as
9 to what you, Protiviti, were doing, but you just
10 mentioned Alvarez & Marsal, so can you explain
11 what they were doing.

12 A. Sure. When we talked about sort of the
13 general practice earlier, we talked about services
14 to the company, the debtor, and whether there were
15 services prior to a filing and working with them.
16 Alvarez was in early with the debtors.

17 Q. And when you say debtors, you mean all
18 the debtors, the entire --

19 A. All the debtors.

20 Q. -- you know, the entire group of
21 NEGOT-related debtors?

22 A. I believe they were in every single
23 case. I think they and Willkie.

24 Q. Okay. And that would include the ET
25 Power specifically and the, quote, ET Power

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1 debtors, correct?

2 A. Yes. Yes.

3 Q. But you also had a role with respect to
4 the ET debtors, so to some degree your firm and
5 Alvarez & Marsal shared the financial advising
6 role?

7 A. No. Okay, I'll be clear. It's really
8 -- not that we're on the opposite sides, but they
9 were representing the company during the time
10 prior to my appointment. That is Alvarez --

11 Q. Okay, they were representing which
12 company?

13 A. Well, we'll just use ET Power just to
14 make it clear. So Alvarez & Marsal was
15 representing ET Power as its financial advisor
16 with Willkie serving as counsel, and Protiviti or
17 whatever the predecessor entity was representing
18 -- was a financial advisor to the creditors
19 committee, with Sidley Austin serving as counsel,
20 general counsel for the creditors committee.

21 Q. Okay. So prior to plan confirmation,
22 the Alvarez & Marsal -- or, I'm sorry, the
23 Protiviti role was limited to its role with
24 respect to the creditors committee?

25 A. Exactly.

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1 Q. And that role shifted, to some degree,
2 and with the plan confirmation, at which point
3 you, backed up by your company, I presume --

4 A. Yes.

5 Q. -- became the plan administrator for
6 the estate itself?

7 A. Yes.

8 Q. And so does the creditors committee
9 continue to exist?

10 A. It does not.

11 Q. It does not. So with plan
12 confirmation, the creditors committee disbands?

13 A. Right.

14 Q. And you become the plan administrator
15 for the estate going forward?

16 A. Yes.

17 Q. Okay. Now, ET -- I'm sorry, strike
18 that. Alvarez & Marsal, what was its role post
19 plan confirmation, so post-May of 2005, when you
20 became plan administrator?

21 A. Just transitional issues. We had
22 worked with them prior to my appointment to do
23 that, to transition. So it was foreseeable that
24 I, in May of 2005 was going to be the plan
25 administrator. So in April we started to come in

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1 and work through a transition plan to us so that
2 when I was appointed, it would be a clean break,
3 and then the Alvarez folks were then available to
4 us on a consulting basis going forward.

5 Q. So at some point they transitioned out,
6 you took over the major aspects of being the plan
7 administrator, but if you had questions, you would
8 consult with them --

9 A. Yes.

10 Q. -- on specific issues that you would
11 raise?

12 A. That's right.

13 Q. Otherwise they were not involved in
14 your role as plan administrator?

15 A. That's right.

16 Q. Okay. All right.

17 A. And I should say, though, that when we
18 talk about Alvarez, Tom Baldesare and Cory Shupp
19 were the two Alvarez employees that we worked
20 closely with in that role. When it came to plan
21 administrator role and the co-director position,
22 that was really the first time I ran in to Brian
23 Cejka, so Brian came in as through his NEGOT hat to
24 sit on the board with me.

25 Q. And do you know why -- strike that. So

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<p style="text-align: right;">41</p> <p>1 if I understand what you're saying, Brian with</p> <p>2 his, quote, NEGТ hat, he was somebody that was</p> <p>3 sort of a representative of NEGТ, which is the</p> <p>4 parent company of ET Power, correct?</p> <p>5 A. Yes.</p> <p>6 Q. All right. And so the idea was to have</p> <p>7 on this two-person board for ET Power after plan</p> <p>8 confirmation a representative of NEGТ, and then I</p> <p>9 guess really a representative or what you had been</p> <p>10 a representative of the creditors committee,</p> <p>11 correct?</p> <p>12 A. Right.</p> <p>13 Q. And that you two together became the</p> <p>14 board, but you individually were the plan</p> <p>15 administrator and the person who made things</p> <p>16 happen with respect to ET --</p> <p>17 A. Exactly.</p> <p>18 Q. -- debtors? Okay.</p> <p>19 A. Well said.</p> <p>20 Q. Now, given your background in</p> <p>21 bankruptcies and all that, can you tell me what</p> <p>22 you understand a reorganization to be?</p> <p>23 A. Sure.</p> <p>24 Q. I mean just briefly.</p> <p>25 A. Basically a company adjusts its capital</p>	<p style="text-align: right;">43</p> <p>1 could sell off certain assets which would include,</p> <p>2 you know, maybe subsidiaries, that sort of thing?</p> <p>3 A. Absolutely. That could be used as the</p> <p>4 capital to create the reorganized entity. That</p> <p>5 happens often. In this particular case, this was</p> <p>6 a liquidating plan. It was not a conversion to a</p> <p>7 trustee or a Chapter 7. It was a plan, a</p> <p>8 liquidating plan.</p> <p>9 Q. Are you talking about for ET Power?</p> <p>10 A. Yes, uh-huh, what we're talking about</p> <p>11 today.</p> <p>12 Q. So the idea for ET Power was just to</p> <p>13 liquidate and ultimately distribute --</p> <p>14 A. The proceeds.</p> <p>15 Q. -- the proceeds to the creditors,</p> <p>16 whereas there were others in this NEGТ umbrella</p> <p>17 bankruptcy that expected to survive bankruptcy in</p> <p>18 some organized form?</p> <p>19 A. I think the only operating entity that</p> <p>20 survived was U.S. Gen in the family of entities.</p> <p>21 I believe NEGТ was also, is just liquidating out</p> <p>22 its assets, so I don't believe it's continued to</p> <p>23 operate anything.</p> <p>24 Q. Okay. All right. I want to talk a</p> <p>25 little bit about ET Power's current position in</p>
<p style="text-align: right;">42</p> <p>1 structure. Typically the bankrupt entities will</p> <p>2 have lost money prior to the filing, and the</p> <p>3 reorganization process permits them to improve its</p> <p>4 operations to get rid of what are called executory</p> <p>5 contracts that might be overbearing, things that</p> <p>6 are losers and they want to get rid of without</p> <p>7 having to absorb the full deficiency costs of</p> <p>8 that, and again to improve operations, to take</p> <p>9 care of their contractual arrangements as well as</p> <p>10 to adjust their debt structure, so that if there's</p> <p>11 a secured creditor -- and this is sort of</p> <p>12 generally.</p> <p>13 Q. Sure.</p> <p>14 A. You know, you might take a secured</p> <p>15 creditor down to its secured position so that they</p> <p>16 might have \$100 million, but their collateral is</p> <p>17 now \$60 million.</p> <p>18 Q. So we only owe you 60?</p> <p>19 A. We only owe you 60, and the \$40 million</p> <p>20 becomes an unsecured claim. So it's all that sort</p> <p>21 of negotiation process that's permitted and that</p> <p>22 the company can come out on the other side and</p> <p>23 emerge from bankruptcy reorganized into a</p> <p>24 healthier entity.</p> <p>25 Q. That can also include -- a company</p>	<p style="text-align: right;">44</p> <p>1 this dispute, all right?</p> <p>2 A. Okay.</p> <p>3 Q. And by "this dispute," I mean this</p> <p>4 subrogation argument between NEGТ and ET Power, we</p> <p>5 understand that?</p> <p>6 A. Yes.</p> <p>7 Q. All right. Has it always been ET</p> <p>8 Power's position that it would not be required to</p> <p>9 repay either NEGТ or GTN amounts paid under</p> <p>10 guarantees to Liberty? Do you understand what I'm</p> <p>11 saying? Do you want me to restate that? I kind</p> <p>12 of got off track.</p> <p>13 A. Yeah.</p> <p>14 Q. You recall that there were two</p> <p>15 guarantees of the tolling agreement between ET</p> <p>16 Power and Liberty, correct?</p> <p>17 A. There were.</p> <p>18 Q. And one is referred to as the GTN</p> <p>19 guarantee?</p> <p>20 A. Right.</p> <p>21 Q. And GTN was a subsidiary of NEGТ?</p> <p>22 A. I believe so, yes.</p> <p>23 Q. Is that correct?</p> <p>24 A. Uh-huh.</p> <p>25 Q. And then there was a guarantee by NEGТ</p>

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<p style="text-align: right;">45</p> <p>1 itself?</p> <p>2 A. Yes.</p> <p>3 Q. And do you remember any details about</p> <p>4 the structure of those two guarantees?</p> <p>5 A. The only thing I recall or understand</p> <p>6 is that they went back to 2001, and that was</p> <p>7 obviously a number of years before I was even</p> <p>8 involved in the matter, so I don't know anything</p> <p>9 about the genesis of the agreements, but I do</p> <p>10 understand that there are those two guarantees in</p> <p>11 the language contained.</p> <p>12 Q. And has it always been ET Power's</p> <p>13 position that if either of those guarantors were</p> <p>14 required to pay Liberty that that guarantor was</p> <p>15 not entitled to look back to ET Power to recover</p> <p>16 the monies that were paid to Liberty?</p> <p>17 A. One, you say always, so as I said</p> <p>18 before I don't know the always.</p> <p>19 Q. Well, since you've been involved.</p> <p>20 A. Since I've been involved? We've really</p> <p>21 never assessed, so -- this issue was one that I</p> <p>22 was aware of. We always thought, that is from the</p> <p>23 creditors committee side, that there would be no</p> <p>24 claim back, no ability to have a claim back based</p> <p>25 primarily on the arguments that we're making now</p>	<p style="text-align: right;">47</p> <p>1 GTN guarantee, correct?</p> <p>2 A. That is my understanding.</p> <p>3 Q. So you don't dispute that?</p> <p>4 A. I do not dispute that.</p> <p>5 Q. Now, you understand that NEGТ, as a</p> <p>6 successor in interest to the subrogation rights of</p> <p>7 GTN, has the right to pursue subrogation, to</p> <p>8 exercise the subrogation rights that emanate from</p> <p>9 that GTN contract, correct?</p> <p>10 MR. MURPHY: Objection. That calls for</p> <p>11 a legal conclusion.</p> <p>12 THE WITNESS: Counsel -- there is a</p> <p>13 number of things you said in there that I -- your</p> <p>14 premise I can't agree with or I didn't understand</p> <p>15 your premise.</p> <p>16 BY MS. PAYNE:</p> <p>17 Q. Well, let's break it down. What don't</p> <p>18 you agree with?</p> <p>19 A. Why don't you read back the question.</p> <p>20 Q. All right. Well, let me ask it</p> <p>21 differently or let me restate it, see if I can do</p> <p>22 a better job at it.</p> <p>23 A. Uh-huh.</p> <p>24 Q. Do you dispute that NEGТ is the current</p> <p>25 holder of the subrogation rights that arise out of</p>
<p style="text-align: right;">46</p> <p>1 as well as some other arguments.</p> <p>2 Q. Okay. So you say that it's always been</p> <p>3 the creditors committee's position that it could</p> <p>4 assert the arguments it is asserting now against</p> <p>5 the exercise of subrogation rights under either of</p> <p>6 those two guarantees?</p> <p>7 A. There were discussions at -- as part of</p> <p>8 the plan assessment that was done, there was</p> <p>9 activity -- or not activity, there was discussion</p> <p>10 of the subrogation cases, not just within Liberty</p> <p>11 but within Southaven and Caledonia, guarantees</p> <p>12 that were included there also. So...</p> <p>13 Q. And when you say there were</p> <p>14 discussions, this was discussions at the creditor</p> <p>15 committee level?</p> <p>16 A. Yes.</p> <p>17 Q. And this is back prior to plan</p> <p>18 confirmation?</p> <p>19 A. Yes.</p> <p>20 Q. And at that point the creditors</p> <p>21 committee was aware of the arguments that ET Power</p> <p>22 is currently making today?</p> <p>23 A. Absolutely.</p> <p>24 Q. Now, you understand, don't you, that</p> <p>25 \$140 million was paid to Liberty pursuant to the</p>	<p style="text-align: right;">48</p> <p>1 the payment under the GTN guarantee?</p> <p>2 A. Again --</p> <p>3 MR. MURPHY: I'm going to object again.</p> <p>4 THE WITNESS: I think we've teed this</p> <p>5 up for the judge to determine all of these things.</p> <p>6 MS. PAYNE: That's what I'm trying to</p> <p>7 determine, what you dispute and what you don't</p> <p>8 dispute. If there's not a dispute on something,</p> <p>9 then, great, we can move on.</p> <p>10 MR. MURPHY: I'm going to object to the</p> <p>11 whole line. The objection speaks for itself. The</p> <p>12 papers the judge will see will outline the legal</p> <p>13 arguments. There's really no point in asking this</p> <p>14 lay witness to argue the case.</p> <p>15 MS. PAYNE: I'm not asking him to argue</p> <p>16 the case. I'm just trying to figure out which</p> <p>17 facts that you guys -- that we are on the same</p> <p>18 page on and which facts we're not. And I'm</p> <p>19 perfectly entitled to do that. Let me ask my</p> <p>20 questions. If you want to object, you're welcome</p> <p>21 to object. So let's break it down further.</p> <p>22 BY MS. PAYNE:</p> <p>23 Q. I know that one of the objections that</p> <p>24 was made on ET's behalf has to do with the fact</p> <p>25 that funds were paid out of the GTN escrow</p>

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13 (Pages 49 to 52)

<p style="text-align: right;">49</p> <p>1 account. Do you know what I'm talking about</p> <p>2 there? Do you understand?</p> <p>3 A. Well, I mean, I would need to have</p> <p>4 really all the pleadings back and forth and want</p> <p>5 to refer to those because I would not want to</p> <p>6 exclude anything, and plus I think, as counsel</p> <p>7 stated, that's why I have counsel, is to make</p> <p>8 these arguments. I'm aware generally of the</p> <p>9 argument that's being made by your claim and our</p> <p>10 argument against the allowance of the claim or at</p> <p>11 least the subrogation of the claim, not</p> <p>12 subrogation but subordination of the claim, and --</p> <p>13 but I would defer to my counsel to have the</p> <p>14 specifics of that.</p> <p>15 Q. All right. Does NEGT, in your eyes,</p> <p>16 have the right to pursue subrogation rights</p> <p>17 against ET Power? And I'm not saying whether the</p> <p>18 subrogation rights, whether you -- I'm leaving</p> <p>19 whether NEGT will actually prevail on it to</p> <p>20 another day, but what I'm asking you is, I'm</p> <p>21 focusing on NEGT's ability to pursue that claim.</p> <p>22 Do you believe that -- do you dispute that NEGT</p> <p>23 has that ability?</p> <p>24 MR. MURPHY: I've got to object to that</p> <p>25 again. It calls for a legal conclusion, and I'm</p>	<p style="text-align: right;">51</p> <p>1 MS. PAYNE: Sure.</p> <p>2 (Discussion off the record.)</p> <p>3 MR. MURPHY: Let's go back on. Miss</p> <p>4 Payne and I have agreed to a stipulation. ET</p> <p>5 Power will stipulate that NEGT is the holder, is</p> <p>6 the current holder of whatever rights GTN</p> <p>7 possessed as the GTN guarantor with respect to</p> <p>8 payments made to Liberty. Is that acceptable?</p> <p>9 MS. PAYNE: That's acceptable. Thank</p> <p>10 you.</p> <p>11 BY MS. PAYNE:</p> <p>12 Q. I want to show you what has been</p> <p>13 previously marked as Exhibit 8, and this is the --</p> <p>14 can you tell me what this is, Exhibit 8?</p> <p>15 A. Sure. It has the title, states in the</p> <p>16 -- I'll use the shorthand -- NEGT Inc. case,</p> <p>17 Disclosure Statement For First Amended Plan Of</p> <p>18 Liquidation For the Energy Trading Debtors And the</p> <p>19 Quantum Debtors.</p> <p>20 Q. Can you explain to me what a disclosure</p> <p>21 statement like this is designed to do, what the</p> <p>22 purpose of it is?</p> <p>23 A. Generally it's to provide sufficient</p> <p>24 information to creditors or other parties about</p> <p>25 the plan that's being proposed by the debtors so</p>
<p style="text-align: right;">50</p> <p>1 not sure I understand the question.</p> <p>2 MS. PAYNE: No, I'm asking what your</p> <p>3 position is.</p> <p>4 BY MS. PAYNE:</p> <p>5 Q. Are you claiming that NEGT cannot</p> <p>6 pursue subrogation, the subrogation argument that</p> <p>7 it's currently pursuing?</p> <p>8 A. I think our papers speak for</p> <p>9 themselves, so --</p> <p>10 Q. Not on this issue.</p> <p>11 A. I believe so, but --</p> <p>12 Q. Well, then, tell me what your position</p> <p>13 is. Do you believe that NEGT is the current owner</p> <p>14 of the right that emanated out of the GTN</p> <p>15 guarantee?</p> <p>16 A. And I did not prepare today to go into</p> <p>17 any of those arguments. I mean, that's why I have</p> <p>18 counsel.</p> <p>19 Q. So are you -- do you know the answer to</p> <p>20 my question and you are just refusing to tell me</p> <p>21 or you don't know the answer?</p> <p>22 A. I do not know the answer sufficiently</p> <p>23 to provide one today.</p> <p>24 MR. MURPHY: Let's go off the record</p> <p>25 for a second. If we may.</p>	<p style="text-align: right;">52</p> <p>1 that they will be able to vote one way or the</p> <p>2 other versus -- you know, in regard to the plan.</p> <p>3 So this will be sent out ahead of the request to</p> <p>4 vote.</p> <p>5 Q. All right. And it's usually in</p> <p>6 conjunction with the plan, correct?</p> <p>7 A. It is a first step. So you'll have a</p> <p>8 disclosure statement, it will be distributed, and</p> <p>9 there will be disclosure -- well, there will be a</p> <p>10 disclosure statement hearing where the judge will</p> <p>11 state whether there is sufficient information, and</p> <p>12 it's adequate to send out to creditors, and then</p> <p>13 there's a confirmation hearing sometime down the</p> <p>14 line after that where the -- in between time the</p> <p>15 creditors vote on whether they accept or don't</p> <p>16 accept the plan, and then the judge rules on</p> <p>17 whether the elements of a confirmation have been</p> <p>18 met and the plan is confirmed.</p> <p>19 Q. Were you involved -- as the, I guess,</p> <p>20 financial advisor for the creditors committee for</p> <p>21 the ET debtors, were you involved in the</p> <p>22 preparation of Exhibit 8?</p> <p>23 A. Exhibit 8?</p> <p>24 Q. Yes.</p> <p>25 A. We were not involved in the preparation</p>

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<p style="text-align: right;">53</p> <p>1 other than working with the company and working 2 with the creditors committee counsel to bring 3 issues up as to, you know, what the creditors' 4 thoughts were. I mean, we didn't draft it. This 5 wasn't our document. This was a debtor document. 6 Q. Okay. So if I understand your answer, 7 then, the creditors committee would have provided 8 information or reviewed certain portions of what 9 ultimately ended up as Exhibit 8, although 10 somebody else actually put the document together 11 from a word processing standpoint, is that fair? 12 MR. MURPHY: Objection. That 13 misstates -- 14 MS. PAYNE: And if I haven't accurately 15 reflected what your answer is, then please correct 16 me because I'm trying to understand. I'm not 17 trying to misstate your answer. 18 THE WITNESS: Sure. Absolutely. The 19 disclosure statement aspect of it was not 20 necessarily a negotiated item, but it certainly 21 was one that was reviewed by the committee after 22 it was filed, and the plan was more of a 23 negotiation; that is, what actually the new 24 contract entered into between the company and the 25 creditors and the constituents that the court</p>	<p style="text-align: right;">55</p> <p>1 filing of this finalized disclosure statement, 2 Exhibit Number 8? 3 A. I believe -- I don't have any, one 4 hundred percent concrete -- 5 MR. MURPHY: I would caution the 6 witness against speculation. 7 THE WITNESS: I believe we did. I'm 8 reading here. There was collaboration on this. I 9 mean, basically it says at the conclusion the 10 debtors and ET committee urge all holders of 11 claims in classes, whatever -- 12 THE REPORTER: I'm sorry? 13 THE WITNESS: I'm just reading page -- 14 THE REPORTER: I know, but I'm not 15 going to have that. 16 THE WITNESS: I'm just going to say the 17 conclusion on page 55 of the plan indicates that 18 there was involvement of the committee. 19 BY MS. PAYNE: 20 Q. All right. And certainly is it fair to 21 say that a committee such as yours, the ET 22 creditors committee, would have reviewed this 23 carefully and objected had there been any material 24 inaccuracies contained in the document? 25 A. I think we would have worked through</p>
<p style="text-align: right;">54</p> <p>1 approved is more of the item that was a negotiated 2 item. This is information. 3 BY MS. PAYNE: 4 Q. Information that allows you to 5 accurately negotiate the various issues that would 6 be contained in the plan document, which is a 7 separate document, correct? 8 A. Well, not to negotiate, but it provides 9 creditors and the other constituents with 10 sufficient information to say whether they will -- 11 they approve of the plan or if they think the plan 12 should be altered to some extent and object to it. 13 So it gives them the ability, you know, sufficient 14 information to make those types of judgments. 15 Q. And so obviously if it's -- strike 16 that. If the goal of the disclosure statement is 17 to provide accurate information to the various 18 people or entities that are interested in it -- 19 A. Right. 20 Q. -- the goal is obviously to provide 21 accurate information, correct? 22 A. Yes. 23 Q. All right. Would the creditors 24 committee have had an opportunity to review a 25 draft of the disclosure statement prior to the</p>	<p style="text-align: right;">56</p> <p>1 whatever would have been material inaccuracies, 2 yes. 3 Q. Whether through formal objections or 4 some other process. So in -- is it your 5 understanding that the information contained in 6 Exhibit 8 was accurate and complete as of the time 7 it was prepared and filed, to the best of your 8 abilities? 9 A. I would suggest that the court approved 10 it, so -- 11 Q. And what does that mean? 12 A. The court found that it was sufficient 13 for the purpose of the disclosure statement. 14 Q. Right. Would it have been part of your 15 job as a financial advisor to the ET creditors 16 committee to review Exhibit 8 to identify any 17 inaccuracies and bring that to light if that were 18 the case? 19 A. I would say for those inaccuracies that 20 would be related to the work that we did, yes. 21 Q. I want you to turn to page 21, which is 22 flagged right there. And there's a section that 23 deals with tolling agreement disputes. Do you see 24 that, number 9? 25 A. I do.</p>

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<p style="text-align: right;">57</p> <p>1 Q. And the Liberty Electric agreement is</p> <p>2 one of these tolling agreement disputes, correct?</p> <p>3 A. It is.</p> <p>4 Q. And in fact it's referenced in that</p> <p>5 first paragraph in Section 9?</p> <p>6 A. It is.</p> <p>7 Q. On page 22 there is a specific</p> <p>8 discussion about Liberty and the status of the</p> <p>9 Liberty dispute with -- between ET Power and</p> <p>10 Liberty at that time?</p> <p>11 A. Yes.</p> <p>12 Q. All right. And had you had an</p> <p>13 opportunity to review this? Well, was this</p> <p>14 something you were involved in, given your role</p> <p>15 with the ET creditors committee?</p> <p>16 A. I certainly didn't do any of the</p> <p>17 drafting of this. I would have read it and</p> <p>18 understood, you know, the nature of the Liberty</p> <p>19 claim and the status as of the date of the</p> <p>20 disclosure statement.</p> <p>21 Q. And separate -- setting aside the</p> <p>22 disclosure statements, were you actually involved</p> <p>23 in any way in the dispute between Liberty and ET</p> <p>24 Power as the dispute was progressing?</p> <p>25 A. No.</p>	<p style="text-align: right;">59</p> <p>1 Q. All right. As I read Section C, it</p> <p>2 tells me that what happens in the Liberty dispute</p> <p>3 would ultimately affect the size of the estate.</p> <p>4 Is that an accurate general description of what's</p> <p>5 in those paragraphs on page 23 and 24?</p> <p>6 A. I think the discussion is that it may</p> <p>7 impact it, yes.</p> <p>8 Q. All right. And so there's some --</p> <p>9 underlying that discussion is the conclusion that</p> <p>10 the debt owed to Liberty will ultimately affect</p> <p>11 the size of the estate, correct?</p> <p>12 A. It was a possibility.</p> <p>13 Q. Okay. And why do you say it was just a</p> <p>14 possibility?</p> <p>15 A. I think as we talked about earlier, the</p> <p>16 thoughts of any of the subrogation issues, the</p> <p>17 committee didn't believe there was going to be any</p> <p>18 impact of that.</p> <p>19 Q. All right. So if the committee</p> <p>20 believed that there wasn't going to be any impact</p> <p>21 on that, why was Liberty included in this</p> <p>22 discussion on page 23 and 24 which indicates that</p> <p>23 there would be an impact on the ET estate?</p> <p>24 A. This is the debtors document.</p> <p>25 Q. Okay. You'll have to explain your</p>
<p style="text-align: right;">58</p> <p>1 Q. Did you merely monitor its progression?</p> <p>2 A. Yes.</p> <p>3 Q. Were you in contact with lawyers for ET</p> <p>4 that were handling the Liberty arbitration and</p> <p>5 litigation?</p> <p>6 A. I was not.</p> <p>7 Q. That was not one of your roles?</p> <p>8 A. That's right.</p> <p>9 Q. But you were kept apprised of the</p> <p>10 status as it would affect the financial aspects of</p> <p>11 ET Power, correct?</p> <p>12 A. That's true.</p> <p>13 Q. Now, turn to page 23. At the bottom of</p> <p>14 page 23 there's a subsection C which discusses</p> <p>15 impact on creditor recoveries. You see that?</p> <p>16 A. Yes.</p> <p>17 Q. And there's two paragraphs. It rolls</p> <p>18 over on to page 24.</p> <p>19 A. Yes.</p> <p>20 Q. Have you read these paragraphs?</p> <p>21 A. I can read them again. I'm sure I read</p> <p>22 them.</p> <p>23 Q. If you want to take a moment and read</p> <p>24 them, I have a couple questions for you.</p> <p>25 A. Okay.</p>	<p style="text-align: right;">60</p> <p>1 answer.</p> <p>2 A. Okay. Well, the debtor drafted this.</p> <p>3 Q. Okay.</p> <p>4 A. This is the debtor's language as to the</p> <p>5 range of outcomes.</p> <p>6 Q. Okay.</p> <p>7 A. This is not the committee's position on</p> <p>8 that.</p> <p>9 Q. Okay. So as of the date, let's say</p> <p>10 March 3rd, 2005, as of the date of the filing, the</p> <p>11 debtor believed that it had some obligation</p> <p>12 related to the Liberty dispute that would</p> <p>13 ultimately impact the size of its estate?</p> <p>14 A. I can only -- I mean, the words are</p> <p>15 written here. I'm not -- I don't know what was in</p> <p>16 the minds of the debtor at that point.</p> <p>17 Q. All right. Now at some point -- I</p> <p>18 believe that the plan was confirmed around May of</p> <p>19 2005. So a few months after this was filed you</p> <p>20 became plan administrator, and as you said earlier</p> <p>21 effectively a spokesperson for ET Power.</p> <p>22 Did you have a belief as to whether the</p> <p>23 Liberty dispute would affect the size of the ET</p> <p>24 estate at that point?</p> <p>25 A. When I took over initially, the focus</p>

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<p style="text-align: right;">61</p> <p>1 was not on really any of these tolling issues. We 2 were worried about the administration, the 3 operations, and winding down the operations. 4 There was a timetable for this litigation to run 5 its course, so there really wasn't a focus, I 6 think you had pointed out, right when I took over, 7 as to what was going to go on with Liberty or 8 Caledonia or Southaven. None of that came out 9 other than these are down the line, and we're 10 going to have to deal with them. 11 Q. Okay. My question was slightly 12 different than what your focus was. My question 13 was, what was your belief, all right? As I 14 understood your testimony earlier that your 15 belief, based on your work for the creditors 16 committee was that ET Power would not be liable 17 for any payment made under the GTN and NEG 18 guarantees to Liberty? 19 A. That's right. 20 Q. All right. Did you carry that belief 21 with you when you stopped working for the 22 creditors committee and became the plan 23 administrator in the May 2005 time frame? 24 A. There was nothing that changed my 25 position.</p>	<p style="text-align: right;">63</p> <p>1 resulted in the distribution of the \$140 million 2 to Liberty? 3 A. I don't recall when the final -- I 4 don't recall when the payment was made. So if you 5 can show me something as to that, but I don't have 6 a recollection sitting here. 7 MS. PAYNE: I can show you what has 8 been marked as Exhibit 6, I believe. Here's 9 Exhibit 6. And this is an order that the court 10 entered in mid-May 2005, which was a few days 11 before the funds were actually released from the 12 escrow account. Take a minute to read it, and 13 I'll have some questions for you. 14 MR. MURPHY: This is another one we may 15 be able to solve with a stipulation because we've 16 withdrawn that argument, as you know. 17 MS. PAYNE: Yeah, but that's not what 18 I'm getting into. 19 MR. MURPHY: Oh, okay. Frankly, I 20 didn't know about this. And none of us did, so... 21 THE WITNESS: Okay. 22 BY MS. PAYNE: 23 Q. Let me talk briefly about this escrow 24 account. You're familiar with the escrow account 25 I was talking about, aren't you?</p>
<p style="text-align: right;">62</p> <p>1 Q. So you continued to have the position 2 that -- strike that. Let me start over. 3 A. Sure. 4 Q. So several months after the filing of 5 these disclosure statements which suggest that the 6 outcome of the Liberty dispute would ultimately 7 affect the size of the ET Power estate, you became 8 plan administrator, and your belief was that the 9 outcome of the ET dispute with Liberty would not 10 affect the Liberty -- excuse me, the ET Power 11 estate? 12 A. Right. 13 Q. Now, in approximately May of 2005 there 14 were discussions between several parties -- 15 Liberty, ET, the Bankruptcy Court -- about 16 releasing \$140 million from the escrow account 17 that had been set up in connection with the GTN 18 transaction? 19 A. I recall there was some discussion 20 about that, yes. 21 Q. So you're generally familiar with the 22 discussions that I'm speaking of? 23 A. Yes. 24 Q. Did you have any role in that process, 25 in the Bankruptcy Court process that ultimately</p>	<p style="text-align: right;">64</p> <p>1 A. I am just in a general way. 2 Q. And I have a copy if you would like to 3 see it, I have a copy of what's called the 4 Post-Closing Escrow Agreement. 5 A. Okay. 6 Q. And is it your recollection that that 7 agreement was put into place in connection with 8 the sale of GTN to another entity known as 9 TransCanada? 10 A. Just generally. I was not involved 11 with the transaction; that was an NEG 12 activity. So just afterward I became familiar. 13 Q. Okay. Were you aware that a certain 14 sum of money had been set aside because GTN had 15 issued seven or eight guarantees similar to the 16 Liberty guarantee of different issues, and so a 17 pot of money was set aside to deal with those 18 guarantees in due course? 19 A. Just vaguely. 20 Q. All right. And so at the point at 21 which it became -- well, in May of 2005 there were 22 discussions about releasing \$140 million from that 23 escrow account -- 24 A. Yes. 25 Q. -- to satisfy GTN's guarantor</p>

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<p style="text-align: right;">65</p> <p>1 obligations as it related to the Liberty ET Power 2 tolling agreement. Do you recall that? 3 A. Yes, I do. 4 Q. And were you involved in these 5 proceedings before the Bankruptcy Court? 6 A. I was not involved prior to. I believe 7 the date of the order is after my appointment 8 as -- 9 Q. I believe that's right, I believe it's 10 after confirmation. 11 A. Right. And so I do recall speaking 12 with counsel regarding this and participating in 13 at least one of the points of clarification in the 14 order. 15 Q. And which point was that? 16 A. That is to the application of the 17 payment. 18 Q. What paragraph or what -- 19 A. I think it's B, Liberty's right to 20 apply any portion of the payment to interest fees 21 or expenses, and it goes on. 22 Q. And this is a reference to what later 23 became known as the post-petition interest 24 dispute; is that correct? 25 A. Yes.</p>	<p style="text-align: right;">67</p> <p>1 Q. All right. So Willkie represented all 2 debtors, I think with the exception of is it the 3 U.S. Gen New England was not? 4 A. U.S. Gen. 5 Q. But they represented all the debtors, 6 and it just was that your point person that you 7 contacted for these ET-related issues was Steve 8 Wilamowsky? 9 A. Yes. 10 Q. Did you attend the hearing on the issue 11 that ultimately resulted in this May 8th, 2005, 12 order, Exhibit Number 6? 13 A. I do not believe so. 14 Q. Did you have any discussion with Mr. 15 Wilamowsky -- at the time that they were working 16 to release the \$140 million to Liberty to satisfy 17 the GTN guarantee, did you tell Steve Wilamowsky 18 that you, ET Power, did not believe that there 19 would be any rights of subrogation if that payment 20 were made? 21 A. I don't recall a conversation like 22 that. 23 Q. So you do not recall a conversation 24 like that? 25 A. I do not.</p>
<p style="text-align: right;">66</p> <p>1 Q. All right. And I'll talk to you a 2 little bit about that in a minute, but before we 3 get to that, so as of the date that this order was 4 entered, you were plan administrator for ET Power, 5 correct? 6 A. Yes. 7 Q. And you mentioned a moment ago that you 8 had had some discussions with counsel for which 9 party? 10 A. For ET. 11 Q. All right. And do you recall which 12 lawyer that was or which law firm? 13 A. I think at that point that was Willkie, 14 and Steve Wilamowsky was counsel. 15 Q. Steve Wilamowsky was representing -- 16 strike that. Steve Wilamowsky and Willkie Farr at 17 that point were representing all debtors, correct? 18 A. They were. However, Steve was 19 specifically assigned to the ET debtors. 20 Q. Okay. What do you mean by that? 21 A. He was my contact. He was the 22 debtor's, when you would say debtor's counsel. 23 Although Matt Feldman and others from Willkie were 24 involved with the ET activity, Steve was the point 25 person, I would say, for them.</p>	<p style="text-align: right;">68</p> <p>1 (Interruption for phone ringing.) 2 MS. PAYNE: Okay. Do you want to go 3 off the record? 4 MR. MURPHY: Yes. 5 (Recess.) 6 MS. PAYNE: All right, I think I've 7 sort of forgotten where we were exactly. 8 MR. MURPHY: The last question was, the 9 answer was he did not recall ever having a 10 conversation with Steve Wilamowsky about no 11 subrogation rights. 12 BY MS. PAYNE: 13 Q. All right. Were you involved in 14 presentations concerning ET Power regarding its, 15 you know, current financial status, its -- you 16 know, where it expected it was going with its 17 bankruptcy? Were you involved in presentations 18 either to the NEGOT board or other entities? 19 A. I did not participate in any NEGOT board 20 meetings. The only meetings that were intended to 21 provide those types of updates were prior to my 22 appointment as plan administrator, and the period 23 of time from when I was hired to the confirmation 24 date we would receive periodic reports from the 25 debtor regarding how things were going. I think</p>

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<p style="text-align: right;">69</p> <p>1 as I talked about earlier, that was part of the</p> <p>2 monitoring process.</p> <p>3 Q. Okay. So your role as financial</p> <p>4 advisor to the creditors committee was not one</p> <p>5 that would involve you in presentations to NEGT or</p> <p>6 management concerning ET Power. That would have</p> <p>7 been a role taken by the debtor, correct?</p> <p>8 A. That's right, the debtor would have</p> <p>9 made those presentations. Well, it's not even --</p> <p>10 the NEGT board was -- and the NEGT case was a</p> <p>11 wholly different case, so I had no interaction</p> <p>12 with that board.</p> <p>13 Q. Sure. But the NEGT board had an</p> <p>14 interest in what was going on at ET Power because</p> <p>15 ET Power was its subsidiary, correct?</p> <p>16 A. I don't know what it had an interest</p> <p>17 in.</p> <p>18 Q. Okay. All right. But you can see how</p> <p>19 a parent company would have an interest in the</p> <p>20 bankruptcy proceedings of its subsidiary, correct?</p> <p>21 A. Generally I can say that, but I don't</p> <p>22 know any specifics as to this particular matter.</p> <p>23 (Exhibit No. 13 was marked</p> <p>24 for identification.)</p> <p>25 BY MS. PAYNE:</p>	<p style="text-align: right;">71</p> <p>1 Q. Did you have any involvement in the</p> <p>2 recovery oversight group?</p> <p>3 A. I did not.</p> <p>4 (Exhibit No. 14 was marked</p> <p>5 for identification.)</p> <p>6 BY MS. PAYNE:</p> <p>7 Q. All right. I want to show you what I'm</p> <p>8 marking as Exhibit Number 14. Have you seen</p> <p>9 Exhibit Number 14 before?</p> <p>10 A. I don't recall necessarily seeing this</p> <p>11 particular thing. It was six years ago.</p> <p>12 Q. Sure. But it says NEGT Energy Trading</p> <p>13 (ET), so this is ET Power's liquidation status and</p> <p>14 update?</p> <p>15 A. Yes.</p> <p>16 Q. And it has ET creditors committee?</p> <p>17 A. Yes.</p> <p>18 Q. So this appears to me to be a</p> <p>19 presentation to the ET creditors committee or by</p> <p>20 the ET creditors committee?</p> <p>21 A. I see what it says.</p> <p>22 Q. But you don't know?</p> <p>23 A. I mean, sitting here, recognizing this</p> <p>24 -- I do recall there were meetings in 2004 with</p> <p>25 the committee. This very well could have been</p>
<p style="text-align: right;">70</p> <p>1 Q. I'm handing you a document I am marking</p> <p>2 as Exhibit Number 13. Have you seen this document</p> <p>3 before?</p> <p>4 A. I haven't seen this document, no.</p> <p>5 Q. All right. Have you seen documents</p> <p>6 similar to this?</p> <p>7 A. I would have to flip through it to see</p> <p>8 if any of the information might have been</p> <p>9 information I've seen before, but I did not attend</p> <p>10 this meeting nor was I provided this --</p> <p>11 Q. This particular one?</p> <p>12 A. -- this document.</p> <p>13 Q. This reflects that -- it appears to be</p> <p>14 some sort of PowerPoint presentation or slides</p> <p>15 related to a March 9, 2004, meeting, correct?</p> <p>16 A. That's what it states on the face of</p> <p>17 the cover.</p> <p>18 Q. All right. And your understanding</p> <p>19 would be that because this involves ET management</p> <p>20 and counsel and Alvarez & Marsal, that this must</p> <p>21 be a document that was prepared by the debtor</p> <p>22 itself as opposed to the creditors committee?</p> <p>23 A. Right. I think it's -- the title says</p> <p>24 Presentation to Senior Management of NEGT, Inc. by</p> <p>25 this ET recovery oversight group.</p>	<p style="text-align: right;">72</p> <p>1 what was presented, but I don't, sitting here now,</p> <p>2 have a recollection that these were the pages that</p> <p>3 were handed out.</p> <p>4 Q. Now, on the lower left-hand corner,</p> <p>5 Sutherland, Asbill & Brennan is referenced,</p> <p>6 correct?</p> <p>7 A. Yes.</p> <p>8 Q. And Sutherland is currently your</p> <p>9 lawyers for this subrogation dispute, correct?</p> <p>10 A. They are.</p> <p>11 Q. And in this instance, Sutherland is --</p> <p>12 do you know who Sutherland's client was when this</p> <p>13 presentation was prepared?</p> <p>14 A. Yes, ET.</p> <p>15 Q. Sutherland was ET's client?</p> <p>16 A. Yes.</p> <p>17 Q. Or, I'm sorry --</p> <p>18 MR. MURPHY: Other way around.</p> <p>19 THE WITNESS: Yes.</p> <p>20 BY MS. PAYNE:</p> <p>21 Q. So Sutherland was representing ET when</p> <p>22 this was prepared, correct?</p> <p>23 A. Yes.</p> <p>24 Q. All right. Can you explain to me,</p> <p>25 then, why is it on Exhibit 13 -- so Sutherland is</p>

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19 (Pages 73 to 76)

<p style="text-align: right;">73</p> <p>1 representing ET here as well, correct?</p> <p>2 A. Yes.</p> <p>3 Q. On Exhibit 13. And so Sutherland with,</p> <p>4 I guess, ET management counsel and Alvarez &</p> <p>5 Marsal prepared these presentations that were</p> <p>6 presented to the different groups?</p> <p>7 A. Again, I don't know anything about</p> <p>8 this. On the face of it, it looks like --</p> <p>9 MR. MURPHY: This meaning Exhibit 13?</p> <p>10 THE WITNESS: Exhibit 13, thank you. I</p> <p>11 can talk to Exhibit 14, and say that it is the</p> <p>12 type of document that would have been provided to</p> <p>13 us. I just don't recognize or recall.</p> <p>14 BY MS. PAYNE:</p> <p>15 Q. Now, in Exhibit 13, can you turn to</p> <p>16 page 26.</p> <p>17 A. Yes.</p> <p>18 Q. And it's a slide entitled ET Recovery</p> <p>19 Assumptions and Qualifications. Do you see that?</p> <p>20 A. Okay, yes.</p> <p>21 Q. I want to refer you to the little</p> <p>22 bullet point, the fifth one down that talks about</p> <p>23 the guarantee claim. Read that real quickly, and</p> <p>24 I have a question for you.</p> <p>25 A. Okay, I see that.</p>	<p style="text-align: right;">75</p> <p>1 Q. Anytime prior to you becoming plan</p> <p>2 administrator.</p> <p>3 A. Prior to? I don't think I had any</p> <p>4 discussions with the Sutherland counsel before</p> <p>5 that. Maybe just on some of these presentations,</p> <p>6 but nothing directly.</p> <p>7 Q. Okay. Did you have discussions with</p> <p>8 Sutherland after you became plan administrator</p> <p>9 regarding the ability of NEGТ to pursue -- to</p> <p>10 exercise its subrogation rights pursuant to the</p> <p>11 GTN guarantee?</p> <p>12 A. Yes.</p> <p>13 Q. Can you tell me when you first had</p> <p>14 those discussions? Don't tell me about the</p> <p>15 discussions, but tell me when you had those</p> <p>16 discussions.</p> <p>17 A. Sure. It would have been probably</p> <p>18 within a day or so of when the motion was filed by</p> <p>19 NEGТ for the subrogation claim.</p> <p>20 Q. The motion that was filed recently,</p> <p>21 which was, I want to say, March of 2009?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. And so your recollection is that</p> <p>24 was the first time that you discussed with</p> <p>25 Sutherland that you wanted to -- you as plan</p>
<p style="text-align: right;">74</p> <p>1 Q. So as of March 9, 2004, ET and its</p> <p>2 lawyers Sutherland Asbill were representing to</p> <p>3 NEGТ and others that there would be subrogation</p> <p>4 rights associated with a payment of the \$140</p> <p>5 million to satisfy the Liberty claim, correct?</p> <p>6 MR. MURPHY: Objection. The witness</p> <p>7 has stated that he doesn't know anything about</p> <p>8 this document. The document speaks for itself.</p> <p>9 BY MS. PAYNE:</p> <p>10 Q. Is that what it appears?</p> <p>11 A. I mean, you can certainly read the</p> <p>12 words that are there.</p> <p>13 Q. Okay. While you were -- prior to you</p> <p>14 becoming plan administrator, had you been informed</p> <p>15 by Sutherland Asbill that they believed that there</p> <p>16 were rights or that -- strike that. Let me start</p> <p>17 over.</p> <p>18 Prior to you becoming plan</p> <p>19 administrator, did Sutherland Asbill, as lawyers</p> <p>20 for ET Power, inform you that there was an</p> <p>21 expectation that if the \$140 million was paid to</p> <p>22 Liberty pursuant to the GTN guarantee, that NEGТ</p> <p>23 could then pursue subrogation rights and recover</p> <p>24 that \$140 million?</p> <p>25 A. And when was -- at what point?</p>	<p style="text-align: right;">76</p> <p>1 administrator for ET Power wanted to contest,</p> <p>2 object to NEGТ's exercise of subrogation rights to</p> <p>3 recover the \$140 million paid to Liberty?</p> <p>4 A. I think more simply, to respond to the</p> <p>5 motion that was filed by NEGТ regarding the</p> <p>6 subrogation claims.</p> <p>7 Q. All right. Well, then, I'm not sure</p> <p>8 you and I are on the same page.</p> <p>9 A. Okay.</p> <p>10 Q. My earlier question was when was the</p> <p>11 first time you discussed with Sutherland that you,</p> <p>12 as the ET plan administrator, believed that NEGТ</p> <p>13 was not entitled to recover the \$140 million paid</p> <p>14 to Liberty pursuant to the GTN guarantee?</p> <p>15 A. It would have been after Sutherland</p> <p>16 agreed to take the -- the representation.</p> <p>17 Q. And when was that?</p> <p>18 A. Probably would have been within a</p> <p>19 couple weeks or so of, maybe a month of the filing</p> <p>20 of the motion, maybe a couple -- probably a couple</p> <p>21 weeks if I recall.</p> <p>22 Q. So the first time you talked to</p> <p>23 Sutherland about the subrogation issue was within</p> <p>24 a few weeks, a few weeks after the subrogation</p> <p>25 motion was filed?</p>

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20 (Pages 77 to 80)

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1 A. I talked to them about representing the
2 estate right after it was filed, and then the
3 specifics, any substantive discussions were
4 delayed until Sutherland said they would represent
5 the estate.

6 Q. So you didn't have any discussions with
7 Sutherland about the subrogation issue prior to
8 NEGТ filing the subrogation motion in March of
9 2009?

10 A. That's right. It was never an issue.

11 Q. Well, let me explore that. So when you
12 say it wasn't an issue, you didn't have any
13 discussions with any lawyers, not just Sutherland,
14 but any lawyers concerning subrogation until NEGТ
15 filed its subrogation motion in March of 2009,
16 trying to recover the amounts that were paid by --
17 through GTN's guarantee?

18 A. And when you say any discussions, I'm
19 confused.

20 Q. What's confusing about it?

21 A. The issue as to any of these
22 subrogation claims has been out there, that is
23 Brian has -- Brian Cejka and I have had
24 discussions about these if he was going to file
25 them, when he was going to file them. We

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1 he was going to file it, probably should do it
2 sooner than later, since our own interests are to
3 get the estate closed in somewhat of a reasonably
4 timed manner.

5 Q. All right. When was the first time
6 that you recall telling anybody outside of the
7 creditors committee that you had a belief that
8 NEGТ was not entitled to recover the \$140 million
9 it now seeks?

10 A. I don't recall the first discussion.

11 Q. All right. Had you discussed with
12 Brian Cejka or anybody that was a representative
13 of NEGТ at the time of the hearing, you know, and
14 proceedings that resulted in Exhibit 6, the order
15 that required payment of the \$140 million?

16 A. There was no discussion I believe at
17 that time between Brian and myself on that issue.
18 I think as we talked about, the main focus at that
19 point was on the application of the payment.

20 Q. All right. We spoke briefly about this
21 post-petition interest issue, correct?

22 A. Right.

23 Q. Tell me what you recall about that.

24 A. Generally that the Liberty constituency
25 or the Liberty -- just Liberty was claiming that

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1 anticipated or I anticipated that there might be,
2 that that claim might be filed. The decision I
3 guess on his part was to not file one until that
4 point. So there was no substantive discussion.
5 We're talking four years after my appointment the
6 motion is finally filed. So it was dormant.

7 Q. All right. I guess I want to -- I
8 understood from your earlier answers, though, that
9 you didn't -- strike that.

10 Prior to the filing in March 2009 of
11 NEGТ's subrogation motion, is it your testimony
12 that you didn't have, you didn't consult with
13 lawyers about the subrogation issue until that
14 motion was filed?

15 A. Not on any substantive basis.

16 Q. But if I understood your earlier
17 testimony, you had discussions here and there with
18 Brian Cejka acknowledging that there was an issue
19 of subrogation that needed to be resolved at some
20 point, but that didn't really come to a head until
21 March of 2009 when NEGТ filed its motion?

22 A. I think that's fairly accurate. I
23 believe that we -- the discussions that Mr. Cejka
24 and I had were -- one, I told him I did not
25 believe there was a claim to be made, but also if

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1 it had a claim higher than the \$140 million that
2 was set aside. I believe there was some interest,
3 it might have been in excess of 150, 160, maybe
4 \$162 million was the total claim, which included
5 the \$140 million plus interest plus some what I'll
6 call accounts payable, just normal --

7 Q. Pre-petition invoice issues?

8 A. That's right, totaling to the \$162
9 million. The issue was, one, whether they were
10 entitled to any interest post-petition, and our
11 contention was that they were not entitled to any
12 interest post-petition. We then had some issues
13 as to documentation of the post -- of the
14 pre-petition invoices amount, so we had some
15 discussion about those things and what the ET
16 estate should do.

17 Q. Okay. I want to focus briefly on the
18 interest issue.

19 A. Sure.

20 Q. I've reviewed the papers that were
21 filed and related to that particular issue, and
22 it's my understanding that the Bankruptcy Court,
23 after briefing and hearing the issue, ruled that
24 Liberty was entitled to that additional amount.
25 Do you recall that?

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21 (Pages 81 to 84)

<p style="text-align: right;">81</p> <p>1 A. I think that was in the opinion, yes.</p> <p>2 Q. And there was a discussion or a</p> <p>3 decision that was made at some level to appeal</p> <p>4 that decision. Do you recall that?</p> <p>5 A. That was my decision.</p> <p>6 Q. Okay. You were involved in that</p> <p>7 discussion?</p> <p>8 A. Well, I am the plan administrator of</p> <p>9 the estate that filed the appeal, so, yes.</p> <p>10 Q. And so that interest issue was then</p> <p>11 appealed to the District Court, correct?</p> <p>12 A. Yes.</p> <p>13 Q. And the District Court affirmed the</p> <p>14 bankruptcy judge?</p> <p>15 A. Yes.</p> <p>16 Q. And then it was appealed again?</p> <p>17 A. Yes.</p> <p>18 Q. To the Fourth Circuit. And ET</p> <p>19 prevailed at that point?</p> <p>20 A. Yes.</p> <p>21 Q. And the Fourth Circuit held that ET was</p> <p>22 not entitled to recover that additional amount</p> <p>23 which was deemed to have been post-petition</p> <p>24 interest?</p> <p>25 A. Liberty was not entitled.</p>	<p style="text-align: right;">83</p> <p>1 notify NEGТ or the lawyers that were representing</p> <p>2 ET and NEGТ in those appeals that you, as the</p> <p>3 spokesperson for ET Power, did not believe that</p> <p>4 NEGТ had the ability to recover the \$140 million</p> <p>5 that was paid pursuant to the GTN guarantee?</p> <p>6 A. As I stated earlier, other than maybe</p> <p>7 some comments to Mr. Cejka, there was no</p> <p>8 affirmative statement, correspondence regarding</p> <p>9 that. There was nothing pending for me to respond</p> <p>10 to.</p> <p>11 Q. When you say that there were</p> <p>12 discussions with Mr. Cejka, were these detailed</p> <p>13 discussions as to the basis for your argument that</p> <p>14 there was no subrogation rights or was it just the</p> <p>15 acknowledgment that there were intercompany issues</p> <p>16 that needed to be dealt with at some point?</p> <p>17 A. The latter.</p> <p>18 Q. Okay. And there are a number of</p> <p>19 intercompany issues, correct?</p> <p>20 A. There are.</p> <p>21 Q. And Liberty is not the only one?</p> <p>22 A. That's true.</p> <p>23 Q. Did you ever specifically discuss with</p> <p>24 Mr. Cejka prior to, you know, let's say mid-2007</p> <p>25 when the Fourth Circuit opinion came out, that you</p>
<p style="text-align: right;">82</p> <p>1 Q. Liberty was not entitled, I'm sorry?</p> <p>2 A. Yes.</p> <p>3 Q. Let me say it then correctly, make sure</p> <p>4 this is correct on the record. The Fourth Circuit</p> <p>5 then held that Liberty could not recover the</p> <p>6 additional \$17 million or so because that was</p> <p>7 deemed to be post-petition interest, that's your</p> <p>8 understanding?</p> <p>9 A. Yes.</p> <p>10 Q. That process, not surprisingly, took</p> <p>11 some time, correct?</p> <p>12 A. It did.</p> <p>13 Q. And it's my understanding that the</p> <p>14 Fourth Circuit -- I guess the Fourth Circuit</p> <p>15 appeal ended -- do you recall when it ended?</p> <p>16 A. I do not.</p> <p>17 Q. It appears to be summer of 2007. Does</p> <p>18 that sound right?</p> <p>19 A. I --</p> <p>20 Q. You don't know either way?</p> <p>21 A. Yeah.</p> <p>22 Q. Okay. It's immaterial for my purposes.</p> <p>23 A. Okay.</p> <p>24 Q. What I want to know, though, is during</p> <p>25 the pendency of those various appeals, did you</p>	<p style="text-align: right;">84</p> <p>1 had a specific belief that the Liberty -- that</p> <p>2 NEGТ was not entitled to recover the \$140 million</p> <p>3 paid to Liberty pursuant to the GTN guarantee?</p> <p>4 A. I think we had -- and I don't again</p> <p>5 recall specifics, so that in 2007, I can't tell</p> <p>6 you I know it was at that time frame.</p> <p>7 Q. So you don't recall? You can't recall</p> <p>8 either way?</p> <p>9 A. Right.</p> <p>10 Q. All right. Now, one of the arguments</p> <p>11 that you're making against subrogation today is</p> <p>12 that Liberty was not paid in full. Do you</p> <p>13 understand that?</p> <p>14 A. I do.</p> <p>15 Q. And specifically Liberty was -- you</p> <p>16 argued that Liberty was not paid in full because</p> <p>17 Liberty didn't pay the \$17 million in interest?</p> <p>18 A. That GTN or any of the entities paid</p> <p>19 that.</p> <p>20 Q. Right. Right. But they just didn't</p> <p>21 recover it?</p> <p>22 A. They didn't recover.</p> <p>23 Q. This is the same interest issue that</p> <p>24 was resolved with the Fourth Circuit's opinion,</p> <p>25 correct?</p>

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22 (Pages 85 to 88)

<p style="text-align: right;">85</p> <p>1 A. Yes.</p> <p>2 Q. And so up until July 2007 when the</p> <p>3 Fourth Circuit opinion came out, did you notify</p> <p>4 anybody at NEGT or the lawyers that were handling</p> <p>5 the matter jointly for NEGT and ET that you</p> <p>6 believed if ET Power were successful on the</p> <p>7 post-petition interest issue, that that would be</p> <p>8 an argument you would turn around and use against</p> <p>9 NEGT in the subrogation claim?</p> <p>10 A. Maybe I don't understand. The argument</p> <p>11 being?</p> <p>12 Q. Did you ever tell them?</p> <p>13 A. Did I tell them that I believed there</p> <p>14 was no subrogation of the \$140 million?</p> <p>15 Q. Okay, let me back up.</p> <p>16 A. Yeah, I'm --</p> <p>17 Q. All right. You understand that one of</p> <p>18 your current arguments against subrogation today</p> <p>19 is that ET Power didn't recover post-petition</p> <p>20 interest?</p> <p>21 A. Yes.</p> <p>22 Q. And this was the same post-petition</p> <p>23 interest that was the subject of the appeals that</p> <p>24 resulted in the Fourth Circuit opinion, correct?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">87</p> <p>1 A. For denying the -- for either</p> <p>2 subordinating or not allowing that portion. I</p> <p>3 don't think it's the same -- it's not the same</p> <p>4 argument. One argument is, are you allowed</p> <p>5 interest post-petition on this claim. The other</p> <p>6 is, as a function of that, that whether that</p> <p>7 entity was paid or not paid in full, those are not</p> <p>8 related.</p> <p>9 Q. You don't think they're related?</p> <p>10 A. I think they're two different,</p> <p>11 completely different issues.</p> <p>12 Q. Well, isn't one view that in order to</p> <p>13 recover \$140 million, perhaps NEGT should have</p> <p>14 just paid or required ET to pay the \$17 million in</p> <p>15 interest? That's one view, correct?</p> <p>16 A. I think that they would have -- that</p> <p>17 that was not, would not have been for the benefit</p> <p>18 of the ET estate, and we -- I certainly wouldn't</p> <p>19 have permitted that.</p> <p>20 Q. Did you notify -- strike that.</p> <p>21 If I understand your testimony, though,</p> <p>22 you've stated that you did not notify Willkie Farr</p> <p>23 or NEGT about your plans to use the successful</p> <p>24 outcome of the Fourth Circuit appeal to later</p> <p>25 argue against NEGT's recovery of the \$140 million</p>
<p style="text-align: right;">86</p> <p>1 Q. And you understand that both NEGT and</p> <p>2 ET Power were jointly represented by Willkie Farr</p> <p>3 because Willkie Farr was under the impression that</p> <p>4 there was no conflict of interest at that point,</p> <p>5 correct?</p> <p>6 A. I don't know what Willkie Farr's</p> <p>7 thoughts about conflicts were.</p> <p>8 Q. Well, we talked to them yesterday. We</p> <p>9 know what -- we've got that on the record.</p> <p>10 A. Okay.</p> <p>11 Q. So the testimony was that they were</p> <p>12 never notified that there was a divergence in</p> <p>13 interest at that point.</p> <p>14 A. I'm not sure what the divergence as to</p> <p>15 that issue was. I mean, there was --</p> <p>16 Q. Why do you say that?</p> <p>17 A. There was interest, and either the</p> <p>18 interest was going to be allowed or not. That is,</p> <p>19 the NEGT estate benefited by the interest not</p> <p>20 being allowed because then there would be more</p> <p>21 money available for their pro rata share of the ET</p> <p>22 estate.</p> <p>23 Q. But you're now using that same failure</p> <p>24 to pay the \$17 million as a basis to deny recovery</p> <p>25 for \$140 million, correct?</p>	<p style="text-align: right;">88</p> <p>1 that was paid pursuant to the GTN guarantee?</p> <p>2 MR. MURPHY: Objection as to form. The</p> <p>3 question assumes that Mr. Goldstein had an</p> <p>4 obligation to, quote, notify, close quotes.</p> <p>5 MS. PAYNE: You can answer.</p> <p>6 THE WITNESS: And I would flip it on</p> <p>7 its head. I received no notification from NEGT</p> <p>8 that they were going to make the subrogation</p> <p>9 claim. There was nothing pending for me to even</p> <p>10 consider or respond to.</p> <p>11 BY MS. PAYNE:</p> <p>12 Q. Okay. So you had no understanding that</p> <p>13 NEGT was going to seek to recover the \$140</p> <p>14 million?</p> <p>15 A. They hadn't up until that point. Up</p> <p>16 until when you filed that motion.</p> <p>17 Q. Okay. And so your testimony is that up</p> <p>18 until the motion was filed, you had no idea that</p> <p>19 ET or NEGT was going to seek to recover the \$140</p> <p>20 million that was paid to Liberty on ET's behalf?</p> <p>21 A. The no idea part is not accurate</p> <p>22 because I think, as I said earlier, that Brian,</p> <p>23 Mr. Cejka and I had discussions about whether they</p> <p>24 were or were not. Clearly, all the way through</p> <p>25 that point there was no decision on the NEGT part</p>

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23 (Pages 89 to 92)

<p style="text-align: right;">89</p> <p>1 to file that claim.</p> <p>2 Q. And so because the claim hadn't been</p> <p>3 filed, you believed that it was unnecessary for</p> <p>4 you, as the plan administrator to ET, to notify</p> <p>5 either Willkie Farr or NEGТ that you intended to</p> <p>6 use a favorable outcome from the Fourth Circuit</p> <p>7 appeal to ET's advantage and NEGТ's disadvantage?</p> <p>8 MR. MURPHY: Objection as to form. The</p> <p>9 question assumes facts not in evidence, and that</p> <p>10 is that Mr. Goldstein knew that he was going to</p> <p>11 have that theory to exercise at that time.</p> <p>12 THE WITNESS: As to notice or</p> <p>13 discussion, Mr. Cejka and I had these discussions</p> <p>14 again, as I stated earlier, in no detail at all as</p> <p>15 to the nature of what their claim was, that is the</p> <p>16 NEGТ claim, versus any defenses or objections to</p> <p>17 that claim.</p> <p>18 BY MS. PAYNE:</p> <p>19 Q. Okay. I thought when you testified</p> <p>20 earlier, you said that the ET creditors committee</p> <p>21 had come to the conclusion that there was no</p> <p>22 subrogation rights against ET related to the</p> <p>23 payment of the \$140 million?</p> <p>24 A. The committee came to that conclusion.</p> <p>25 Q. Right. What was the basis for that</p>	<p style="text-align: right;">91</p> <p>1 generally asserting two arguments against</p> <p>2 subrogation at this point; is that correct?</p> <p>3 A. I believe so, yes.</p> <p>4 Q. The first one is this Liberty hasn't</p> <p>5 been paid in full argument, correct?</p> <p>6 A. Right.</p> <p>7 Q. And the second is a waiver argument</p> <p>8 based on the language of the GTN and NEGТ</p> <p>9 guarantees, correct?</p> <p>10 A. Yes.</p> <p>11 Q. When did you first become aware that</p> <p>12 you can recall at this point, when did you first</p> <p>13 become aware of those specific arguments?</p> <p>14 A. I believe in general context --</p> <p>15 obviously the full breadth of the objection to the</p> <p>16 claim and legal discussion and research was done</p> <p>17 after the claim was filed.</p> <p>18 Q. Okay.</p> <p>19 A. But in the creditors committee time</p> <p>20 frame, there was the discussion of -- you know,</p> <p>21 the arguments were similar when I heard them</p> <p>22 raised four years later, they -- my recollection</p> <p>23 was that they were similar to what I had heard</p> <p>24 back when during the committee days, although --</p> <p>25 so that --</p>
<p style="text-align: right;">90</p> <p>1 conclusion? What arguments were considered at</p> <p>2 that point? Or was that just a general conclusion</p> <p>3 that it didn't -- subrogation rights didn't exist</p> <p>4 without any analysis of that issue?</p> <p>5 A. I don't recall the specifics of the</p> <p>6 discussions with the committee, and I'm wondering</p> <p>7 whether that's even protected. I don't recall,</p> <p>8 again, the details of the discussion. The results</p> <p>9 I recognize or recall that was that the committee</p> <p>10 when considering the payout scenarios believed</p> <p>11 that there would not be the subrogation claims or</p> <p>12 they would not be valid if made.</p> <p>13 Q. All right. And so as you sit here</p> <p>14 today, you have no recollection of the legal basis</p> <p>15 for that conclusion?</p> <p>16 MR. MURPHY: I will caution the</p> <p>17 witness, if you're talking about advice from</p> <p>18 counsel of the committee, that would be</p> <p>19 privileged.</p> <p>20 THE WITNESS: That's my point. I mean,</p> <p>21 I don't have any specific recollection of the</p> <p>22 elements of it, but there certainly was discussion</p> <p>23 as to the legal aspects of those guarantee claims.</p> <p>24 BY MS. PAYNE:</p> <p>25 Q. Okay. As I understand it, you're</p>	<p style="text-align: right;">92</p> <p>1 Q. Okay. I'm sorry, I guess I'm not</p> <p>2 clear. So you first became aware of these</p> <p>3 specific arguments, the Liberty hasn't been paid</p> <p>4 in full and the waiver argument, after NEGТ filed</p> <p>5 its motion, but they were similar to what you</p> <p>6 recall back from your creditor committee days?</p> <p>7 A. Well, again, I don't have any detailed</p> <p>8 recollection. I'm saying I didn't find them when</p> <p>9 -- they were raised by Sutherland to me when I</p> <p>10 asked them to research the issue, and they came</p> <p>11 back to me with what you find in the papers.</p> <p>12 Those issues, you know -- I recall some of those</p> <p>13 discussions. I don't recall specifically about</p> <p>14 them. And, again, it was in the context of</p> <p>15 counsel to the committee providing that</p> <p>16 discussion. So other than saying that --</p> <p>17 Q. And I'm not asking for communications</p> <p>18 with committee counsel. What I'm asking for is</p> <p>19 what you knew, and what the source is isn't that</p> <p>20 important to me. What's important is what you</p> <p>21 knew. What I understood your earlier statement to</p> <p>22 say, and correct me if I state this incorrectly,</p> <p>23 that you -- you didn't focus on the two specific</p> <p>24 arguments that you're making today, that is that</p> <p>25 Liberty was not paid in full and the waiver</p>

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24 (Pages 93 to 96)

<p style="text-align: right;">93</p> <p>1 argument, until sometime after NEGT filed its 2 motion in March of 2009, but they were -- they 3 appeared to be similar to you to arguments that 4 you recall knowing about from your time on the 5 creditors committee, which was pre-plan 6 confirmation?</p> <p>7 A. Right, which was four years earlier.</p> <p>8 MS. PAYNE: Okay. Why don't we take a 9 break for a few minutes. I can't find something 10 I'm looking for.</p> <p>11 MR. MURPHY: Sure. 12 (Recess.) 13 BY MS. PAYNE:</p> <p>14 Q. Back to the post-petition interest 15 issue.</p> <p>16 A. Yes.</p> <p>17 Q. What was Sutherland's role in that, do 18 you know?</p> <p>19 A. I'm not sure they had a role in that.</p> <p>20 Q. And who were the lawyers that were 21 handling that?</p> <p>22 A. It was Steve Wilamowsky.</p> <p>23 Q. Willkie Farr?</p> <p>24 A. Willkie, and then he left Willkie to go 25 to Bingham, and then that work moved with him.</p>	<p style="text-align: right;">95</p> <p>1 there was no work to be done because we didn't 2 have anything that was pending.</p> <p>3 Q. Now, did Mr. Cejka ever indicate to you 4 that NEGT would not pursue the subrogation rights?</p> <p>5 A. All I knew was that he hadn't or that 6 the NEGT entity had not filed it, and it was four 7 years, so --</p> <p>8 Q. But you had been having discussions 9 with him, and issues concerning subrogation 10 continued to come up, correct?</p> <p>11 A. Discussions. We had certainly, over 12 the five-year period, maybe had two or three times 13 where that issue came up. The rest of the time 14 with Mr. Cejka has been discussions as to the rest 15 of the hundreds or so of issues that were 16 outstanding, of which maybe a handful were between 17 NEGT and ET.</p> <p>18 Q. All right. Did Mr. Cejka ever tell you 19 directly that NEGT did not intend to pursue 20 recovery of the \$140 million that was paid 21 pursuant to the GTN guarantee?</p> <p>22 A. There was no comment from my 23 recollection one way or the other.</p> <p>24 Q. But the issue would come up with him 25 from time to time, correct?</p>
<p style="text-align: right;">94</p> <p>1 Q. All right. Now, you said you -- well, 2 let me back up. You hired Sutherland when to 3 handle the subrogation issue?</p> <p>4 A. It would have been after the filing of 5 the claim. I mean, they had been my general 6 energy counsel post-confirmation.</p> <p>7 Q. All right. So since the confirmation 8 in May of 2005?</p> <p>9 A. Right.</p> <p>10 Q. Sutherland had been representing you as 11 the plan administrator continuously since that 12 time?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. But it was only in March of 2009 15 when the subrogation issue was raised?</p> <p>16 A. Well, raised in a -- at a level of 17 great detail, from my recollection. That is, 18 we've always had the discussion. I can't say --</p> <p>19 Q. What do you mean by that?</p> <p>20 A. Well, I'm saying we've had -- the issue 21 of subrogation claims coming in or not was a -- 22 you know, we had a discussion about those. I 23 mean, it's been -- when Brian Cejka and myself had 24 those discussions, that certainly was -- counsel 25 was made aware of those discussions, although</p>	<p style="text-align: right;">96</p> <p>1 A. Yes.</p> <p>2 Q. All right. Which indicated that there 3 was an interest to pursue that, correct?</p> <p>4 A. No.</p> <p>5 Q. No? So why would you draw the 6 conclusion that NEGT was not interested in 7 pursuing subrogation rights to recover the \$140 8 million?</p> <p>9 A. The four years that transpired between 10 when I became plan administrator and the time when 11 it was filed.</p> <p>12 Q. Okay. Are there any other factors that 13 led you to a conclusion that NEGT was not 14 interested in pursuing the \$140 million that was 15 paid to Liberty on ET's behalf?</p> <p>16 A. That was the main one.</p> <p>17 Q. Okay. Now, earlier when we were 18 talking about the Liberty -- I'm sorry, the 19 post-interest -- let me start over. Strike that.</p> <p>20 Earlier when we were talking about the 21 appeal of the post-petition interest issue, you 22 mentioned that you were the decision-maker on 23 behalf of ET Power as to whether the appeal should 24 go forward, correct?</p> <p>25 A. Yes.</p>

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<p style="text-align: right;">97</p> <p>1 Q. And obviously the decision was made to</p> <p>2 go forward with the appeal?</p> <p>3 A. Yes.</p> <p>4 Q. I'm handing you what was marked as</p> <p>5 Exhibit Number 7 yesterday.</p> <p>6 A. Yes.</p> <p>7 Q. And this is a memo to you and Mr. Cejka</p> <p>8 from Steve Wilamowsky, correct?</p> <p>9 A. Yes.</p> <p>10 Q. You're welcome to take time to read it</p> <p>11 all. I really just want to focus your attention</p> <p>12 on the second paragraph, but take a look at it and</p> <p>13 tell me when you're ready.</p> <p>14 A. Okay.</p> <p>15 Q. Do you recall receiving this memo from</p> <p>16 Steve Wilamowsky?</p> <p>17 A. I believe I asked Steve to draft it.</p> <p>18 Q. Did you have any discussions with Mr.</p> <p>19 Wilamowsky about this topic in general or this</p> <p>20 memo in specific?</p> <p>21 A. Yes, I had discussions with him.</p> <p>22 Q. All right. Were they joint discussions</p> <p>23 in which you and Mr. Goldstein -- excuse me, in</p> <p>24 which you and Mr. Cejka spoke concurrently with</p> <p>25 Mr. Wilamowsky or were they separate discussions?</p>	<p style="text-align: right;">99</p> <p>1 no claim, and between -- regarding Liberty or</p> <p>2 between NEGТ and ET regarding the Liberty matter.</p> <p>3 Q. Okay. So you understood this to mean</p> <p>4 that if the interest issue was out of the picture,</p> <p>5 that there was no intercompany issue with respect</p> <p>6 to the original \$140 million that was paid?</p> <p>7 A. That is, there would be no -- I mean, I</p> <p>8 read it there would be no claim.</p> <p>9 Q. Okay. All right. Did you discuss that</p> <p>10 with Mr. Wilamowsky in any way, do you recall?</p> <p>11 A. My recollection was that back in the</p> <p>12 creditors committee time frame, when this was</p> <p>13 discussed, that that was his take on it; that</p> <p>14 there was, for whatever reason -- I don't remember</p> <p>15 the specifics of it, but there was a position that</p> <p>16 the subrogation claim did not exist.</p> <p>17 Q. All right. So let me see if I</p> <p>18 understand your testimony. You're saying back at</p> <p>19 the creditor committee days. That's</p> <p>20 pre-confirmation?</p> <p>21 A. I'm trying to -- now I'm checking my</p> <p>22 recollection of this. It might have been post.</p> <p>23 It might have been when he was dealing with these</p> <p>24 Liberty appeal issues. I don't recall whether it</p> <p>25 was within the committee role or post that.</p>
<p style="text-align: right;">98</p> <p>1 A. Both.</p> <p>2 Q. Okay. And with respect to the topic</p> <p>3 that's discussed in paragraph 2 of Exhibit 7, I</p> <p>4 want to direct you to that last sentence in</p> <p>5 paragraph two where it says, Winning on appeal</p> <p>6 would also eliminate any inter-debtor issues</p> <p>7 between NEGТ and ET Power associated with the</p> <p>8 Liberty claim.</p> <p>9 Did you discuss that topic with Mr.</p> <p>10 Wilamowsky or Mr. Cejka?</p> <p>11 A. I don't recall that particular point</p> <p>12 being discussed in any great detail.</p> <p>13 Q. Okay. And what is your understanding</p> <p>14 as to what this sentence meant or what did that</p> <p>15 say to you?</p> <p>16 A. Well, this sentence is two parts, I</p> <p>17 guess or really a comparison. If there is a win,</p> <p>18 that is, the interest is disallowed, that it was</p> <p>19 Steve's comment that it would eliminate any</p> <p>20 inter-debtor issues between ET -- between NEGТ and</p> <p>21 ET Power.</p> <p>22 Q. All right. And what did you understand</p> <p>23 that to mean?</p> <p>24 A. My take on it was that there would be</p> <p>25 no inter-company issue remaining, that there was</p>	<p style="text-align: right;">100</p> <p>1 Q. Would that make a difference you to, if</p> <p>2 it had been pre or post?</p> <p>3 A. No, no.</p> <p>4 Q. Okay. So at some point -- right now</p> <p>5 you think it's after?</p> <p>6 A. Well, it's at least here.</p> <p>7 Q. So at some point, approximately March</p> <p>8 of 2006, you recall Mr. Wilamowsky telling you.</p> <p>9 that NEGТ had no claim to the \$140 million paid on</p> <p>10 behalf of the NEGТ -- excuse me, the GTN</p> <p>11 guarantee?</p> <p>12 A. That was my understanding of that</p> <p>13 sentence there.</p> <p>14 Q. All right. My question was slightly</p> <p>15 different. Are you saying that Mr. Wilamowsky</p> <p>16 told you that?</p> <p>17 A. Again, I can't remember from four years</p> <p>18 ago what specifically was stated, and to the</p> <p>19 extent he told me anything, I would imagine I</p> <p>20 still have my privilege related to that, but the</p> <p>21 conclusion that he has here, my recollection of it</p> <p>22 is that once we got rid of the interest issue,</p> <p>23 there was no claim, claw-back claim possible.</p> <p>24 Q. Okay. And so you did not see it as --</p> <p>25 at that point, so this is about March of 2006, you</p>

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<p style="text-align: right;">101</p> <p>1 did not view it as a likely scenario that ET Power 2 would be required to pay the \$140 million back to 3 NEGТ in connection with the payment that was made 4 to Liberty? 5 A. Again, likely it was the position that 6 the ET estate would have if and when a claim was 7 made by NEGТ regarding the Liberty claw-back claim 8 that our position would be there is no claim. 9 Q. I guess I'm trying to figure out, at 10 what point did you think that, you know, well, 11 it's just not a likely scenario that we're ever 12 going to have to pay the \$140 million? 13 A. I would say every day that passed, the 14 passage of time made me believe that possibly the 15 NEGТ folks had come to that conclusion because I 16 didn't -- most of the claims had already been 17 filed in the case, the bar dates are past. 18 Q. Okay. So if I understand your 19 testimony, you understood that there was a 20 possibility that NEGТ could still pursue a claim 21 for the \$140 million. I mean, it was still 22 possible, correct? 23 A. Well, there's a proof of claim that was 24 filed by NEGТ in the ET case that has within the 25 listing of items that could be part of their claim</p>	<p style="text-align: right;">103</p> <p>1 THE WITNESS: Do you want me to order 2 some sandwiches or how's your timing? 3 MS. PAYNE: Let's go off the record for 4 a minute. 5 (Off the record discussion.) 6 THE WITNESS: Okay. 7 BY MS. PAYNE: 8 Q. You said earlier that the first time 9 Sutherland looked into this subrogation issue was 10 after NEGТ had filed its motion in March of 2009, 11 correct? 12 A. I guess I do recall that, but now 13 looking at this, there must have been some 14 correspondence or some inkling, maybe there were 15 some letters that Mr. Heath had with counsel 16 regarding the issue before that. 17 Q. And what Exhibit Number 15 shows us is 18 that at least as early as December 15th, 2008, 19 Sutherland had spent significant time researching 20 the issue and crafting an argument against 21 subrogation, which was ultimately sent to my 22 partner, Paul Heath, at Vinson & Elkins, correct? 23 MR. MURPHY: Objection as to form, 24 assumes facts not in evidence, and that is that 25 Sutherland spent significant time researching the</p>
<p style="text-align: right;">102</p> <p>1 were these types of subrogation claims. 2 Q. Okay. So there was still a risk that 3 ET Power would be required to pay that? 4 A. You know how the courts are. 5 Q. Well, I'm asking you. 6 A. That is, it's in the -- Right. I would 7 say yes, that is -- 8 Q. You viewed that as a risk, that ET 9 Power may have to pay that in the future? 10 A. Not necessarily have to pay that, but 11 that it would become an allowed claim. 12 Q. Fair enough. Fair enough. Okay. 13 (Exhibit No. 15 was marked 14 for identification.) 15 BY MS. PAYNE: 16 Q. I'm handing you what I've marked as 17 Exhibit Number 15. Have you ever seen this letter 18 before? 19 A. I am cc'ed on this. I assume that I 20 did get it. I have to read it again just to 21 refresh my recollection. 22 Q. Sure. 23 THE WITNESS: While we're taking this, 24 what time do you have? 25 MR. MURPHY: I have 11:17.</p>	<p style="text-align: right;">104</p> <p>1 issue. 2 MS. PAYNE: Perhaps they spent an 3 insignificant amount of time researching the 4 issue, either way. 5 MR. MURPHY: Brilliant lawyer probably 6 knew all the arguments just the minute he got the 7 letter from Paul Heath. 8 THE WITNESS: There clearly was work 9 done by Sutherland to generate the letter. 10 BY MS. PAYNE: 11 Q. All right. Now, this is an argument 12 that has since been withdrawn, correct, the 13 argument that's presented in this letter? 14 A. This one issue, yes. 15 Q. Right. But this letter does not 16 contain any arguments related to the fact, the 17 allegation that you stated that Liberty has not 18 been paid in full or the waiver argument, correct? 19 A. Right. I think this is just addressing 20 the one issue, yes. 21 Q. All right. So at that point had you 22 not, I guess -- I can draw one of two conclusions 23 from the lack of discussion of those two points in 24 this letter. Either you knew about it and it 25 wasn't put in the letter or you didn't know about</p>

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<p style="text-align: right;">105</p> <p>1 it. Do you know which one it was?</p> <p>2 A. I didn't draft the letter. Mr. Murphy</p> <p>3 drafted the letter.</p> <p>4 Q. Well, I'm asking what you knew. Were</p> <p>5 you aware that there were two other arguments, and</p> <p>6 as it turned out apparently probably better</p> <p>7 arguments given that this one was barred by the</p> <p>8 May 15th -- May 18th, 2005, order. But there were</p> <p>9 two other arguments that you ultimately made.</p> <p>10 A. Right.</p> <p>11 Q. Were you aware of the existence of</p> <p>12 those two other arguments at the time that this</p> <p>13 letter was received?</p> <p>14 A. I don't recall.</p> <p>15 (Exhibit No. 16 was marked</p> <p>16 for identification.)</p> <p>17 BY MS. PAYNE:</p> <p>18 Q. I'm handing you what I've marked as</p> <p>19 Exhibit Number 16. Do you recognize this?</p> <p>20 A. I do.</p> <p>21 Q. What is it?</p> <p>22 A. It's my declaration.</p> <p>23 Q. And what does it relate to?</p> <p>24 A. Let me read through it first.</p> <p>25 Okay.</p>	<p style="text-align: right;">107</p> <p>1 discussions took place in the July time frame as</p> <p>2 per the affidavit or the declaration.</p> <p>3 Q. Okay. I'm not sure I understand your</p> <p>4 answer, so let me ask you a couple questions.</p> <p>5 A. Sure.</p> <p>6 Q. And I don't want to know the content of</p> <p>7 any of your discussions with Mr. Turner or Mr.</p> <p>8 Murphy or anybody else.</p> <p>9 A. Right.</p> <p>10 Q. But did I understand your testimony to</p> <p>11 be that the basis of your statement in paragraph 2</p> <p>12 that you hired Sutherland Asbill to advise and</p> <p>13 represent ET Power on this subrogation dispute in</p> <p>14 July of 2008, that that was based on some</p> <p>15 discussions that you had with lawyers at</p> <p>16 Sutherland or was it something else?</p> <p>17 A. I believe I had -- my recollection is I</p> <p>18 had asked them to maybe do some preliminary work</p> <p>19 on the issue, and I guess it's earlier than I had</p> <p>20 recalled. I realize this is earlier than what I</p> <p>21 stated earlier that when the claim was filed.</p> <p>22 However, I believe there was some conflicts or</p> <p>23 some issues that they were clearing in house</p> <p>24 regarding representing me on this issue, and this</p> <p>25 was the time frame as to when they responded that</p>
<p style="text-align: right;">106</p> <p>1 Q. All right. In paragraph 2 there's some</p> <p>2 highlighted language concerning when you hired</p> <p>3 Sutherland to advise ET --</p> <p>4 A. Right.</p> <p>5 Q. -- on the subrogation dispute. Do you</p> <p>6 see that?</p> <p>7 A. I do.</p> <p>8 Q. So previously you testified it was in</p> <p>9 or around March of 2009. A moment ago you said it</p> <p>10 was around December of 2008, but this document</p> <p>11 suggests that it may have been July of 2008.</p> <p>12 A. Well, first, I didn't say it was in</p> <p>13 December. They started representing me at that</p> <p>14 point. And it looks as I was more on top of it</p> <p>15 even than I thought and had some preliminary work</p> <p>16 done starting in July of 2008.</p> <p>17 Q. Okay. What is the basis for your</p> <p>18 statement in this declaration? In other words, is</p> <p>19 this pure memory or did you refer to any documents</p> <p>20 or what did you do in order to come up with this</p> <p>21 July 2008 date?</p> <p>22 A. I believe there was correspondence --</p> <p>23 not correspondence but discussions with -- I don't</p> <p>24 believe whether it was Mr. Turner, you know, just</p> <p>25 regarding the representation. So I guess the</p>	<p style="text-align: right;">108</p> <p>1 they could represent the estate in the matter.</p> <p>2 MS. PAYNE: Okay. I still think we may</p> <p>3 not be connecting on my question here.</p> <p>4 MR. MURPHY: Listen to the question.</p> <p>5 BY MS. PAYNE:</p> <p>6 Q. Yeah, what I'm asking is not -- I'm not</p> <p>7 asking about what happened in July of 2008. I'm</p> <p>8 asking that -- you know, you prepared this</p> <p>9 declaration it looks like ten days ago?</p> <p>10 A. Uh-huh.</p> <p>11 Q. And when you prepared this declaration,</p> <p>12 I'm trying to find out the source of the date</p> <p>13 here. I mean, did you just pull that out of your</p> <p>14 memory? Did you pull it out of a document? Did</p> <p>15 you talk to somebody? Where did you get the July</p> <p>16 of 2008?</p> <p>17 A. I probably had my associate, Rob</p> <p>18 Patrick, who I think you've met, probably go</p> <p>19 through some, back through our records to see</p> <p>20 maybe when some of this discussion would have</p> <p>21 taken place with counsel.</p> <p>22 Q. Okay. So did you do any sort of</p> <p>23 analysis to determine whether this July 2008 date</p> <p>24 is an appropriate date or not?</p> <p>25 A. Well, I did. In fact, as I said, I had</p>

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<p style="text-align: right;">109</p> <p>1 Mr. Patrick confirm the facts. He provided me 2 sufficient support for the dates that were 3 included here. 4 Q. Okay. That's what I'm getting at. 5 What support did he provide to you? 6 A. There could have been some e-mail 7 exchange. I'm trying to recall what it is that he 8 showed me. I think there was some e-mail 9 exchanges or something along the way. So I can -- 10 I'm not sure whether counsel will permit me to 11 provide those or not. 12 Q. And I'm not asking you to provide them. 13 So did he provide you a document that you looked 14 at or did he just say, you know, July 2008 is the 15 right date, and you took it at face value? 16 A. I'm trying to recall. I know it was 17 only about a week or so ago that he showed it to 18 me. I believe there might have been some e-mail 19 exchanges that occurred. 20 Q. Like e-mails at the time that 21 reflected, e-mails back in the July 2008 time 22 frame or just current e-mails? 23 A. E-mails back in the July time frame. 24 Q. Okay. And that gave you sufficient 25 comfort that you were providing a declaration</p>	<p style="text-align: right;">111</p> <p>1 July? 2 A. Maybe the discussions -- maybe I had 3 some discussion with Brian that was, you know, 4 reaching a higher level. I think we were 5 obviously coming to the end of the estate and 6 trying to do our final calculations, and this 7 being one of the issues that was open, I wanted to 8 get a little head start on it. What I'm thinking, 9 better than what I testified earlier, is just 10 starting on this investigation. I'm not sure 11 whether you guys maybe generated a letter to us 12 with that. Again, I'm trying to go back in time 13 to recall what was going on in July of '08. 14 Q. Okay. During the progression of all 15 the bankruptcies, the NEGТ entire umbrella of 16 bankruptcies, was it the understanding of the 17 professionals involved that there would likely be 18 some inter-company or inter-debtor issues between 19 ET and NEGТ or NEGТ and certain other debtors? 20 Was there some understanding that that was likely 21 to occur at some point? 22 A. The thought was that we would -- where 23 we could be aligned, we would continue to stay 24 aligned, it was more efficient to do it that way. 25 And then when we ended up with contested issues,</p>
<p style="text-align: right;">110</p> <p>1 under the penalty of perjury that this date was 2 correct? 3 A. Yeah. As I said before, they had 4 represented the estate from the point of my 5 appointment. 6 Q. All right. And so were they -- 7 A. So this was just as to this issue. 8 Q. Okay. So there was a continuing 9 attorney-client relationship from the plan 10 confirmation date forward. 11 A. Right. 12 Q. But as to this issue, the best 13 recollection is that July 2008 -- 14 A. Right. 15 Q. -- was the start date for that 16 determination, and that there was some sort of 17 discussion as to whether or not there could be, 18 Sutherland could represent you from a conflict of 19 interest standpoint? 20 A. I asked them to verify that they could 21 work for me on that issue. I don't recall why in 22 July -- you know, what was going on in July that 23 raised this -- 24 Q. That was actually going to be my next 25 question. Why in July? Why did you raise this in</p>	<p style="text-align: right;">112</p> <p>1 we would try to push those, you know, sort of 2 further down into the case, yes. 3 Q. So there was an agreement of sorts or 4 an understanding that everybody would take things 5 as far as they could, and then towards the end, 6 deal with these inter-company disputes? 7 A. Just as we've had here. 8 Q. Just as we are today. 9 A. You were engaged, Sutherland was 10 engaged for this one issue. Yes. 11 Q. Okay. Are you familiar with the term 12 conflicts counsel in a bankruptcy proceeding 13 context? 14 A. I am. 15 Q. Okay. What does that mean to you? 16 A. Typically the debtor or creditors 17 committee is represented, representing an estate, 18 representing some constituent. There might come a 19 time in that general representation where there's 20 a conflict between the -- or the counsel has some 21 -- a party they can't go against, but that their 22 constituent needs to. So my firm will come in and 23 serve as conflicts counsel for that one particular 24 specific issue. 25 Q. And in the context of this case, for</p>

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<p style="text-align: right;">113</p> <p>1 example, NEGТ, most of the debtors, with a few</p> <p>2 exceptions, were represented by Willkie Farr,</p> <p>3 correct?</p> <p>4 A. They were in the general bankruptcy</p> <p>5 context, yes.</p> <p>6 Q. In the general bankruptcy context. And</p> <p>7 also as special energy counsel, all of the debtors</p> <p>8 were represented by Sutherland Asbill, correct?</p> <p>9 A. I'm not sure if all of the debtors. I</p> <p>10 certainly know the ET debtors were.</p> <p>11 Q. And NEGТ as well, correct?</p> <p>12 MR. MURPHY: Objection.</p> <p>13 MS. PAYNE: If you know.</p> <p>14 THE WITNESS: I don't know.</p> <p>15 BY MS. PAYNE:</p> <p>16 Q. Now, once the subrogation issue came</p> <p>17 up, Willkie Farr did not continue to represent</p> <p>18 NEGТ, correct?</p> <p>19 A. That is true.</p> <p>20 Q. And, in fact, Willkie Farr or others</p> <p>21 elected not to go forward and conflicts counsel,</p> <p>22 my firm, was hired, correct?</p> <p>23 A. If I recall, yes, there was some</p> <p>24 discussion as to that.</p> <p>25 Q. Can you tell me why you elected to hire</p>	<p style="text-align: right;">115</p> <p>1 that they could go forward.</p> <p>2 MS. PAYNE: Okay. I'm going to mark as</p> <p>3 Exhibit Number 17 -- I think that's the only copy</p> <p>4 I have, I'm sorry.</p> <p>5 (Exhibit No. 17 was marked</p> <p>6 for identification.)</p> <p>7 BY MS. PAYNE:</p> <p>8 Q. Can you tell me what this is?</p> <p>9 A. It appears to be a verified statement.</p> <p>10 Okay.</p> <p>11 Q. All right. Can you tell me what this</p> <p>12 is?</p> <p>13 A. It's a -- it states here, a verified</p> <p>14 statement, my verified statement related to</p> <p>15 basically a sharing of the defense fees or not</p> <p>16 defense fees, I guess representation fees in the</p> <p>17 arbitration of Caledonia and Southaven as well as</p> <p>18 the Liberty tolling agreement activity or</p> <p>19 litigation.</p> <p>20 Q. Is any of this related in any way to</p> <p>21 the Liberty matter?</p> <p>22 A. Other than there were fees associated</p> <p>23 with the Liberty matter that were purportedly</p> <p>24 shared between the entities.</p> <p>25 Q. Okay. Can you turn to -- it's a little</p>
<p style="text-align: right;">114</p> <p>1 a firm that had represented all debtors in the</p> <p>2 underlying bankruptcy?</p> <p>3 MR. MURPHY: Objection. Assumes a fact</p> <p>4 not in evidence; to wit, that Sutherland</p> <p>5 represented all of the debtors.</p> <p>6 THE WITNESS: One, I'm not aware of</p> <p>7 that. Two, the reason I selected Sutherland was</p> <p>8 that they had extensive energy experience and had</p> <p>9 an understanding of the tolling agreements that</p> <p>10 were underlying the subrogation claims.</p> <p>11 BY MS. PAYNE:</p> <p>12 Q. Have you seen the application filed at</p> <p>13 the beginning of the bankruptcy to allow the</p> <p>14 debtors to hire Sutherland Asbill as special</p> <p>15 energy counsel to all debtors, have you seen that</p> <p>16 application?</p> <p>17 A. I think that was probably filed before</p> <p>18 my involvement.</p> <p>19 Q. Okay. Have you seen the order</p> <p>20 approving that application?</p> <p>21 A. Same with that.</p> <p>22 Q. Would that be information you would</p> <p>23 want to know before hiring counsel?</p> <p>24 A. I made the inquiry to counsel to</p> <p>25 represent me in that matter, and they determined</p>	<p style="text-align: right;">116</p> <p>1 hard because this doesn't have page numbers, but I</p> <p>2 believe in Exhibit 5 there's a page -- let's see.</p> <p>3 It's about the fifth page back.</p> <p>4 A. Right.</p> <p>5 Q. It looks like this.</p> <p>6 A. Okay.</p> <p>7 Q. All right. And this is a spreadsheet</p> <p>8 that says, you know, disbursements to</p> <p>9 professionals involved with Southaven, Caledonia,</p> <p>10 and Liberty tolling arbitrations, and it has</p> <p>11 certain amounts that have been paid, and then in</p> <p>12 the second to the right column there's a percent</p> <p>13 attributed to NEGТ?</p> <p>14 A. Right.</p> <p>15 Q. And that's 30 percent across the board,</p> <p>16 correct?</p> <p>17 A. Yes.</p> <p>18 Q. Now, can you tell me what these</p> <p>19 professional fees were generated in connection</p> <p>20 with?</p> <p>21 A. The fees were generated in the</p> <p>22 representation in the Southaven, Caledonia or</p> <p>23 Liberty matters.</p> <p>24 Q. Okay. I'm trying to figure out what</p> <p>25 the -- what that includes or what it doesn't</p>

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<p style="text-align: right;">117</p> <p>1 include. Would all of this be fees that were 2 generated prior to confirmation of the plan? 3 A. I think what it says, the two -- well, 4 the second and third columns are labeled 5 pre-effective date, post-effective date. 6 Q. You're right. Okay. It's got the 7 amounts. 8 A. Right. 9 Q. So then, for example, looking three 10 from the bottom is the Sutherland Asbill amount. 11 A. It is there. 12 Q. All right. It's about -- in fact, it 13 looks to me to be one of the largest numbers. \$3 14 million something? 15 A. Yes. 16 Q. What work does this cover? 17 A. My understanding, it dealt with the 18 Liberty tolling agreement or tolling litigation. 19 Q. And so what does the Liberty tolling 20 litigation include? For example, would that 21 include the post-petition interest appeals? 22 A. I do not believe so. 23 Q. Well, then, what's your understanding 24 as to what it includes? 25 A. The litigation related to the</p>	<p style="text-align: right;">119</p> <p>1 been a different time. 2 Q. Okay. 3 A. There's an employment -- the fee 4 application that Sutherland will need to file and 5 it needs to be approved by the court and all that 6 kind of fun stuff. 7 Q. So your understanding is that all of 8 the fees related on this page is related to the 9 actual arbitration proceedings and nothing else? 10 A. I don't know. I mean, I'm not for sure 11 about that, but I believe that the -- that it 12 relates to that arbitration. There's certainly 13 details behind that. I can figure that out. 14 Q. And are those details provided to Mr. 15 Cejka, who I assume is the party that would on 16 behalf of NEGT pay whatever amounts are ultimately 17 deemed to be due? 18 A. He is given periodic reports from us 19 regarding all the receipts and disbursements in 20 the post-confirmation period. 21 Q. Okay. And would those reports contain 22 the detail and the back-up information that would 23 reflect what these bills were actually covering, 24 what work it was attributed to? 25 A. No. As a matter of course, we would</p>
<p style="text-align: right;">118</p> <p>1 termination claim. 2 Q. So this would include only the 3 arbitration? 4 A. I believe so. 5 Q. Okay. My understanding was the 6 arbitration was completed pre-petition. I'm 7 sorry, let me say that again. 8 My understanding is that it was, the 9 arbitration was completed prior to the 10 confirmation of ET's plan. 11 A. And I don't recall the timing of 12 whether it was completed or not. This column 13 relates to the payment made, so there could have 14 been a lag between the provision of services and 15 payment. 16 Q. Sure. We know from Exhibit Number 6, 17 which is the order that deals with the payment of 18 the \$140 million -- 19 A. Right. 20 Q. -- that the Liberty arbitration award 21 would have come prior to that May 18th, 2005, 22 order, correct? 23 A. My point is, it's not whether it's 24 anything related to the order, it's when the fees 25 were approved by the court to be paid could have</p>	<p style="text-align: right;">120</p> <p>1 provide the report. If he had any detail 2 questions, "show me some details on this or that," 3 we would send him further details. 4 Q. So if Mr. Cejka wants to see what work 5 that would -- for any of these professionals, what 6 specific work, he could, for example, request the 7 billing records or, you know, ask you to point him 8 to the fee applications that covered -- 9 A. Absolutely. 10 Q. Okay. When you were at -- I guess ever 11 since the plan was confirmed and you became plan 12 administrator, is one of your duties as plan 13 administrator to manage the reserves that are set 14 aside to cover contingent or disputed claims? 15 A. Yes. 16 Q. And is it your job to -- 17 A. Is there something down there? Are you 18 seeing the President? 19 (Recess.) 20 BY MS. PAYNE: 21 Q. All right. Before we took our little 22 break, we spoke briefly about reserves. 23 A. Right. 24 Q. And tell me what your understanding of 25 reserves are?</p>

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<p style="text-align: right;">121</p> <p>1 A. Well, what the reserves are for me</p> <p>2 generally is any claim that is a potential claim,</p> <p>3 regardless of the amount or the probability of</p> <p>4 being paid is an amount that I'll reserve for. As</p> <p>5 a general rule, I don't want to disgorge money</p> <p>6 already paid out. That's a hard thing to do. So</p> <p>7 I err on the side of being very conservative in</p> <p>8 reserving amounts so that I don't have to go</p> <p>9 through that process of disgorging funds for</p> <p>10 people.</p> <p>11 Q. When you say disgorging, that means</p> <p>12 that you paid funds out and then you --</p> <p>13 A. And it ended up being too much.</p> <p>14 Q. An oops moment and you have to pull it</p> <p>15 back?</p> <p>16 A. Well, and it's sometimes very difficult</p> <p>17 to pull money back.</p> <p>18 Q. Understood. And so if there is a risk,</p> <p>19 even a small risk, of a claim, your practice then</p> <p>20 is to reserve the amount of the claim until that</p> <p>21 claim has been resolved, and then those funds can</p> <p>22 be used for distributions or whatever other cost?</p> <p>23 A. Depending on the case, at times I'll</p> <p>24 reserve the full amount or others I'll reserve</p> <p>25 what was the distributable amount, that is if I</p>	<p style="text-align: right;">123</p> <p>1 is it's a possibility, even remote.</p> <p>2 Q. And at what point will you release</p> <p>3 reserves?</p> <p>4 A. When the claim is determined, either</p> <p>5 allowed or disallowed or -- and if allowed, in</p> <p>6 what amount. So when I have an established</p> <p>7 understood claim amount, then I will make that pro</p> <p>8 rata distribution.</p> <p>9 Q. Is there some other point, for example</p> <p>10 let's say the claim is never actually disallowed,</p> <p>11 but the claim is never actually pursued, does the</p> <p>12 passage of time cause you to conclude that it's</p> <p>13 not a viable claim anymore?</p> <p>14 A. What will typically happen is if</p> <p>15 somebody has filed a proof of claim, and we either</p> <p>16 have objected or not objected to it, it will -- it</p> <p>17 sits out there until there's some adjudication of</p> <p>18 it. If there is a scheduled amount that there's</p> <p>19 no proof of claim required, we would have paid on</p> <p>20 that. There's no passage of time that makes</p> <p>21 something allowed or disallowed.</p> <p>22 Q. I guess the only passage of time would</p> <p>23 be that you've wrapped up the entire liquidation</p> <p>24 process, at which point there would be no</p> <p>25 future --</p>
<p style="text-align: right;">122</p> <p>1 was distributing \$100 million, and that claim</p> <p>2 would have generated \$5 million of that</p> <p>3 distribution, let's say it was 5 percent of the</p> <p>4 total, then that \$5 million would be reserved.</p> <p>5 Q. Okay. So in this instance, though,</p> <p>6 related to the GTN guarantees, the amount paid was</p> <p>7 \$140 million, correct?</p> <p>8 A. Yes.</p> <p>9 Q. And what was your practice with respect</p> <p>10 to reserves related to that?</p> <p>11 A. I included the \$140 million in my -- if</p> <p>12 we look at our numerator, being the dollars</p> <p>13 available, and the denominator being the total</p> <p>14 claim amount, it was in my denominator, the total</p> <p>15 claim amount.</p> <p>16 Q. And that's because there was some risk</p> <p>17 that a court might determine at some point that ET</p> <p>18 is required to pay that amount or that NEGТ is</p> <p>19 entitled to a claim for that amount?</p> <p>20 A. Well, I think it was more, one -- I</p> <p>21 mean, that's one part of it. And the other part</p> <p>22 is, as we talked about, I had discussions with Mr.</p> <p>23 Cejka regarding that, that it was a potential</p> <p>24 possible -- and we didn't have any detailed</p> <p>25 descriptions or discussions of it. And the other</p>	<p style="text-align: right;">124</p> <p>1 A. Well, that's right. I mean, what would</p> <p>2 happen is, for those proofs of claims that were</p> <p>3 filed that were not objected to up until that</p> <p>4 point until a final resolution, that probably with</p> <p>5 the final notice of distribution would be the</p> <p>6 final objections, saying, okay, here are the four</p> <p>7 or five that are remaining, we're objecting to</p> <p>8 them, and then you would set up a time for that</p> <p>9 process. I would reserve against those and</p> <p>10 distribute the rest of the money.</p> <p>11 Q. Okay. I want to go through a few</p> <p>12 documents here. I think we can do this quickly.</p> <p>13 A. Sure.</p> <p>14 (Exhibit No. 18 was marked</p> <p>15 for identification.)</p> <p>16 BY MS. PAYNE:</p> <p>17 Q. Marking as Exhibit 18 a document</p> <p>18 entitled NEGТ Energy Trading Liquidating Debtors</p> <p>19 Quarterly Report for the period of May 2, 2005,</p> <p>20 through August 31, 2005.</p> <p>21 A. Yes.</p> <p>22 Q. Are you familiar with this document?</p> <p>23 A. I am.</p> <p>24 Q. Did you prepare this document or who</p> <p>25 would have prepared the document?</p>

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<p style="text-align: right;">125</p> <p>1 A. It was prepared under my direction.</p> <p>2 Q. Okay. And the May 2nd, 2005, time</p> <p>3 frame, is that about the time that the plan was</p> <p>4 confirmed and you became the plan administrator?</p> <p>5 A. This is most likely the first quarterly</p> <p>6 report.</p> <p>7 Q. All right. And I want you to turn to I</p> <p>8 guess it's Exhibit J, which is about four pages</p> <p>9 from the back.</p> <p>10 A. Okay.</p> <p>11 Q. Probably the easiest way to look at it</p> <p>12 is page 36 of 39 up here at the top. Do you see</p> <p>13 that?</p> <p>14 A. I have it.</p> <p>15 Q. All right. About halfway down there's</p> <p>16 a line item for Liberty Electric Power. Do you</p> <p>17 see that?</p> <p>18 A. Yes.</p> <p>19 Q. And what was the claim amount?</p> <p>20 A. \$182 million and change.</p> <p>21 Q. Okay. Do you know how that number was</p> <p>22 calculated?</p> <p>23 A. I believe there was a proof of claim</p> <p>24 filed. When it says claim number, if you go to</p> <p>25 the far left, there's a debtor, there's a claim</p>	<p style="text-align: right;">127</p> <p>1 numbers were developed with discussions with</p> <p>2 responsible parties, so if there was -- we</p> <p>3 probably talked to Wilamowsky at that point</p> <p>4 because I think he was dealing with the appeal</p> <p>5 process, so we probably talked to folks at Willkie</p> <p>6 and said what was -- what number should we put</p> <p>7 there, what do you think is our outside risk?</p> <p>8 Obviously, they understated the total outside</p> <p>9 risk, but that was a number that was done after</p> <p>10 consultation.</p> <p>11 Q. What do you mean that they understated</p> <p>12 the total amount of outside risk?</p> <p>13 A. Well, I think, that's right, the</p> <p>14 reserve that I would have put on there would have</p> <p>15 been the assessment of my professionals as to what</p> <p>16 the outside risk would be, yes.</p> <p>17 Q. And I may have misunderstood your prior</p> <p>18 statement, but did you say that it's your belief</p> <p>19 that the outside professionals understated the</p> <p>20 amount that was owed?</p> <p>21 A. Well, I think the number is less than</p> <p>22 what the final award was, so the estimate at that</p> <p>23 point was under what the final award was, yes.</p> <p>24 Q. And the final award that you're</p> <p>25 referring to is which award?</p>
<p style="text-align: right;">126</p> <p>1 number, I would believe on the claim number it</p> <p>2 listed that \$182 million.</p> <p>3 Q. Now, at some point the arbitrators</p> <p>4 issued an award for something in the neighborhood</p> <p>5 of \$162 million. Do you recall that?</p> <p>6 A. Yes.</p> <p>7 Q. All right. So was there an additional</p> <p>8 amount, approximately \$20 million on top of that</p> <p>9 162 that was owed or was it just adjudicated that</p> <p>10 Liberty wasn't owed that amount?</p> <p>11 A. The latter.</p> <p>12 Q. So Liberty initially asked for \$182</p> <p>13 million?</p> <p>14 A. Right.</p> <p>15 Q. And then the arbitrators determined</p> <p>16 that at most they were entitled to \$162 million?</p> <p>17 A. Yes.</p> <p>18 Q. And what was the amount that you</p> <p>19 determined to reserve at that point?</p> <p>20 A. At that point we reserved \$155 million.</p> <p>21 Q. And do you recall why -- how you came</p> <p>22 to that number? What are the components of that</p> <p>23 \$155 million?</p> <p>24 A. I don't recall specifically what the</p> <p>25 build-up was for that reserve. All of these</p>	<p style="text-align: right;">128</p> <p>1 A. The 160 whatever million.</p> <p>2 Q. Okay. So this 182 number --</p> <p>3 A. That's obviously in excess of it, but</p> <p>4 what we're talking about is what did I actually</p> <p>5 reserve, and the reserve is \$155 million at that</p> <p>6 point.</p> <p>7 Q. Which is less than the 162?</p> <p>8 A. Yes.</p> <p>9 Q. Which was out there. And as you sit</p> <p>10 here today, you don't recall the rationale for</p> <p>11 coming in below the \$162 million?</p> <p>12 A. I don't recall the build-up of that,</p> <p>13 that's right.</p> <p>14 Q. But would the \$140 million that was</p> <p>15 ultimately paid on behalf of the GTN guarantee,</p> <p>16 that's included in the \$155 million total</p> <p>17 reserves, right?</p> <p>18 A. That would have been within that</p> <p>19 number, yes.</p> <p>20 Q. Okay.</p> <p>21 (Exhibit No. 19 was marked</p> <p>22 for identification.)</p> <p>23 BY MS. PAYNE:</p> <p>24 Q. I'm handing you a similar document,</p> <p>25 Exhibit Number 19. Can you identify this for me,</p>

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<p style="text-align: right;">129</p> <p>1 please?</p> <p>2 A. Yes. This is the quarterly report from</p> <p>3 June through August of 2006.</p> <p>4 Q. Okay. There's again a header at the</p> <p>5 top that tells you which page, and I'm looking</p> <p>6 right now at page 17 of 21, if you could turn to</p> <p>7 that, please.</p> <p>8 A. I'm there.</p> <p>9 Q. There's again a line item for Liberty</p> <p>10 Electric.</p> <p>11 A. Right.</p> <p>12 Q. With the same claim amount of \$182</p> <p>13 million, but the total reserves has now increased</p> <p>14 to \$162 million.</p> <p>15 A. Yes.</p> <p>16 Q. Can you explain the basis for that</p> <p>17 change?</p> <p>18 A. We must have been more aware of what</p> <p>19 the total claim amount was at that point.</p> <p>20 Q. Well, but at the time that Exhibit 18</p> <p>21 was filed with the court, it was actually filed in</p> <p>22 November of 2005, correct?</p> <p>23 A. Yes, uh-huh.</p> <p>24 Q. All right. And that is some months</p> <p>25 after the \$140 million had been paid out under the</p>	<p style="text-align: right;">131</p> <p>1 reserve to increase?</p> <p>2 A. Other than again, as you stated --</p> <p>3 well, yes. I don't know what made the change from</p> <p>4 -- that there was any -- what event occurred</p> <p>5 between November of '05 and September of '06.</p> <p>6 Q. Okay. And in Exhibit Number 19, the</p> <p>7 reserve amount of \$162 million would include the</p> <p>8 \$140 million that was paid out to Liberty,</p> <p>9 correct?</p> <p>10 A. Yes.</p> <p>11 Q. And so there was some -- this is a</p> <p>12 reflection of the fact that you acknowledged that</p> <p>13 there's some risk that NEGT would pursue</p> <p>14 subrogation rights and would seek repayment of</p> <p>15 that amount to NEGT, correct?</p> <p>16 A. I think with all the caveats that I</p> <p>17 stated earlier regarding the likelihood or not,</p> <p>18 that even if it was a remote chance, yes, I will</p> <p>19 put the reserve in.</p> <p>20 Q. And this is a significant amount of</p> <p>21 reserves, correct?</p> <p>22 A. It is a significant amount of money,</p> <p>23 yes.</p> <p>24 Q. And so if this were truly a de minimis</p> <p>25 risk of -- that this amount were at issue, would</p>
<p style="text-align: right;">130</p> <p>1 GTN guarantee, correct?</p> <p>2 A. Right.</p> <p>3 Q. And certainly that payment would not</p> <p>4 have been made if the arbitrators hadn't come out</p> <p>5 with their ruling, correct?</p> <p>6 A. The \$140 million?</p> <p>7 Q. That at least \$140 million was owed,</p> <p>8 correct?</p> <p>9 A. Yes.</p> <p>10 Q. And so certainly as of this first</p> <p>11 Exhibit Number 18, by the time this came out, the</p> <p>12 arbitrators' award of approximately \$162 million</p> <p>13 was already out there, correct?</p> <p>14 A. I believe that the award was out there,</p> <p>15 but again speaking with counsel regarding that,</p> <p>16 the reserve that we placed on it was that amount.</p> <p>17 Q. Okay. Can you tell me what caused the</p> <p>18 reserves to increase to \$162 million as of the</p> <p>19 filing of Exhibit 19?</p> <p>20 A. I don't know what specifically happened</p> <p>21 other than at that point counsel's take on it --</p> <p>22 that would have been Mr. Wilamowsky -- is that</p> <p>23 that was the appropriate amount to reserve.</p> <p>24 Q. Okay. So as you sit here today, you're</p> <p>25 not aware of any specific event that caused that</p>	<p style="text-align: right;">132</p> <p>1 you still have reserved it?</p> <p>2 A. Absolutely.</p> <p>3 Q. Okay. So the fact is whether there was</p> <p>4 a risk at all, correct?</p> <p>5 A. Yes.</p> <p>6 Q. And so you've acknowledged that there</p> <p>7 was a risk?</p> <p>8 A. I am risk averse as far as disgorgement</p> <p>9 issues.</p> <p>10 (Exhibit No. 20 was marked</p> <p>11 for identification.)</p> <p>12 BY MS. PAYNE:</p> <p>13 Q. Handing you Exhibit Number 20, which is</p> <p>14 a similar document, this is a similar quarterly</p> <p>15 report through May 31, 2007, filed on July 17,</p> <p>16 2007, correct?</p> <p>17 A. Yes.</p> <p>18 Q. If you could turn, please, to page 14.</p> <p>19 A. Okay.</p> <p>20 Q. And this document reflects that the</p> <p>21 reserves have been reduced from what had been \$160</p> <p>22 million -- 62 million down to \$140 million,</p> <p>23 correct?</p> <p>24 A. Yes.</p> <p>25 Q. Can you tell me the reason or the basis</p>

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<p style="text-align: right;">133</p> <p>1 for that decrease in the reserves as of that date?</p> <p>2 A. Maybe if we go back, I'm not sure when</p> <p>3 the appeal -- we won on appeal. Do you know what</p> <p>4 that date was?</p> <p>5 Q. In fact, if you could turn to page 17</p> <p>6 of 18, I believe there's a note on there, towards</p> <p>7 the bottom, last paragraph.</p> <p>8 A. Yes. So that's the reason for the</p> <p>9 reduction.</p> <p>10 Q. All right. So now the total amount</p> <p>11 reserved is limited to the \$140 million that would</p> <p>12 be at issue in the subrogation dispute?</p> <p>13 A. Right.</p> <p>14 (Exhibit No. 21 was marked</p> <p>15 for identification.)</p> <p>16 BY MS. PAYNE:</p> <p>17 Q. I'm handing you what's been marked as</p> <p>18 Exhibit Number 21. If you could turn to page 16.</p> <p>19 A. Okay.</p> <p>20 Q. The reserves have now increased from</p> <p>21 \$140 million up to 145 and change.</p> <p>22 A. Right.</p> <p>23 Q. Do you recall the basis for that</p> <p>24 increase in reserves?</p> <p>25 A. I believe that was the \$5 million we</p>	<p style="text-align: right;">135</p> <p>1 correct?</p> <p>2 A. Right.</p> <p>3 Q. If you could turn to page 14 of Exhibit</p> <p>4 Number 22.</p> <p>5 A. Right.</p> <p>6 Q. There's been now another increase in</p> <p>7 the reserves from the prior amount up to 165. Can</p> <p>8 you explain that increase?</p> <p>9 A. I'm just seeing if there was a note at</p> <p>10 that point, going back. I'm not sure what the</p> <p>11 intervening event would have been. The date again</p> <p>12 of the final appeal was back in? The interest was</p> <p>13 back here. I'm not particularly sure why that</p> <p>14 went, our reserve went back up on that.</p> <p>15 (Exhibit No. 23 was marked</p> <p>16 for identification.)</p> <p>17 BY MS. PAYNE:</p> <p>18 Q. I'm handing you Exhibit Number 23, a</p> <p>19 similar report, later time frame. This one was</p> <p>20 filed on August 11, 2008, covering the time frame</p> <p>21 March 1, 2008, through May 31, 2008. Is that</p> <p>22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. Again, turn back to Exhibit J, which is</p> <p>25 page 14.</p>
<p style="text-align: right;">134</p> <p>1 talked about regarding the invoices. I assume</p> <p>2 between that period of time we received the proof</p> <p>3 of those invoices and placed a reserve on those</p> <p>4 amounts.</p> <p>5 Q. And, frankly, the issue revolving</p> <p>6 around those invoices actually existed when</p> <p>7 Exhibit 20 was filed, correct?</p> <p>8 A. I believe it existed at that point, but</p> <p>9 we had received no proof of it, if I recall some</p> <p>10 of the details, so we had placed the amount at the</p> <p>11 140.</p> <p>12 Q. Okay. But now as of Exhibit 21, the</p> <p>13 amount has increased up to 145, but this still</p> <p>14 includes the \$140 million that would be subject to</p> <p>15 this subrogation dispute, correct?</p> <p>16 A. It does, yes.</p> <p>17 (Exhibit No. 22 was marked</p> <p>18 for identification.)</p> <p>19 BY MS. PAYNE:</p> <p>20 Q. I'm handing to you Exhibit Number 22,</p> <p>21 which is another quarterly report filed on January</p> <p>22 15, 2008, correct?</p> <p>23 A. Yes.</p> <p>24 Q. And this covers the time frame from</p> <p>25 September 1, 2007, through November 30th, 2007,</p>	<p style="text-align: right;">136</p> <p>1 A. Right.</p> <p>2 Q. And this reflects that the reserves</p> <p>3 have jumped back down to the \$145 million?</p> <p>4 A. Right. And again, as I stated, the</p> <p>5 movement of those amounts were based on discussion</p> <p>6 with counsel, so there must have been something</p> <p>7 that came up in the intervening period where those</p> <p>8 assessments were adjusted.</p> <p>9 Q. Do you recall specifically any of the</p> <p>10 discussions you had with counsel?</p> <p>11 A. As it states, Mr. Lambdin typically</p> <p>12 prepared the detail reports for me and my review.</p> <p>13 Q. This is David Lambdin, who is listed on</p> <p>14 the last page?</p> <p>15 A. Yes.</p> <p>16 Q. So is it your practice that Mr. Lambdin</p> <p>17 would make the necessary inquiries to prepare this</p> <p>18 report?</p> <p>19 A. That's right, and then I would review</p> <p>20 and take a look. I just don't recall his</p> <p>21 explanation for the change. Really the one that</p> <p>22 is at issue is why it went back up to the \$160</p> <p>23 million here; the 145 makes sense to me. So right</p> <p>24 now I can't recall that one, but --</p> <p>25 Q. Now, did -- was it Mr. Lambdin's job to</p>

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35 (Pages 137 to 140)

<p style="text-align: right;">137</p> <p>1 set the reserves or was it his job to simply</p> <p>2 report what the reserves were in this quarterly</p> <p>3 report?</p> <p>4 A. No, it's my job to set the reserves.</p> <p>5 Mr. Lambdin went about doing the calculations for</p> <p>6 that and gathered the information to support the</p> <p>7 appropriate reserve levels.</p> <p>8 Q. Okay. So separate and apart from</p> <p>9 preparing the quarterly report that's filed with</p> <p>10 the court, Mr. Lambdin would do whatever analysis</p> <p>11 was necessary and make a recommendation to you --</p> <p>12 A. Yes.</p> <p>13 Q. -- and based on the information that</p> <p>14 was available, you would then determine what</p> <p>15 reserves were appropriate?</p> <p>16 A. Yes.</p> <p>17 Q. And then Mr. Lambdin would reflect that</p> <p>18 reserve amount in his report?</p> <p>19 A. That's correct.</p> <p>20 Q. How often were reserves adjusted?</p> <p>21 A. They were adjusted, as a matter of</p> <p>22 course, quarterly. However, if an event occurred,</p> <p>23 you know, there was a settlement or something</p> <p>24 happened, we would go into the database of claims</p> <p>25 and make that change.</p>	<p style="text-align: right;">139</p> <p>1 Q. All right. Now, if you can turn to the</p> <p>2 traditional items on page 26, the fourth paragraph</p> <p>3 down discusses Liberty, correct?</p> <p>4 A. Right.</p> <p>5 Q. And this reflects the Liberty</p> <p>6 settlement; is that right?</p> <p>7 A. That's true.</p> <p>8 Q. And so now once the Liberty settlement</p> <p>9 is paid out, then what would happen to the reserve</p> <p>10 figure on page 24?</p> <p>11 A. Well, the \$5 million of that would have</p> <p>12 been reduced, the 140 would remain because the</p> <p>13 settlement was only as to those invoices.</p> <p>14 Q. Okay. And the reason the 140 would</p> <p>15 remain is because that was the amount that would</p> <p>16 be related to the subrogation claim made by NEGT</p> <p>17 related to the GTN guarantee, correct?</p> <p>18 A. Potentially, yes.</p> <p>19 (Exhibit No. 25 was marked</p> <p>20 for identification.)</p> <p>21 BY MS. PAYNE:</p> <p>22 Q. I'm handing you Exhibit 25, which is</p> <p>23 the last of my quarterly reports. This report was</p> <p>24 filed April 16, 2009, for period December 1, 2008,</p> <p>25 to February 28th, 2009, correct?</p>
<p style="text-align: right;">138</p> <p>1 Q. So part of the preparation of the</p> <p>2 quarterly report caused you to look at the</p> <p>3 established reserves to determine whether any</p> <p>4 adjustment was appropriate?</p> <p>5 A. That's right.</p> <p>6 Q. Although other events might occur in</p> <p>7 interim time frames that would cause you to do</p> <p>8 that on a separate basis?</p> <p>9 A. Exactly.</p> <p>10 Q. I gotcha. Okay.</p> <p>11 (Exhibit No. 24 was marked</p> <p>12 for identification.)</p> <p>13 BY MS. PAYNE:</p> <p>14 Q. I'm handing you Exhibit Number 24,</p> <p>15 which is an additional quarterly report filed</p> <p>16 January 15, 2009, for the period September 1,</p> <p>17 2008, through November 30th, 2008. Is that</p> <p>18 correct?</p> <p>19 A. Yes.</p> <p>20 Q. If you turn to page 24, there's a line</p> <p>21 item for Liberty Electric, correct?</p> <p>22 A. Yes.</p> <p>23 Q. And it appears that at this point the</p> <p>24 total reserve number has stayed the same?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">140</p> <p>1 A. Yes.</p> <p>2 Q. And if you turn to page 15, there's a</p> <p>3 line item for Liberty Electric, and this reflects</p> <p>4 an allowed amount of \$145 million, an additional</p> <p>5 amount, correct?</p> <p>6 A. Right.</p> <p>7 Q. And it reflects total reserves in that</p> <p>8 same amount with a footnote A, correct?</p> <p>9 A. Yes, uh-huh.</p> <p>10 Q. And in footnote A this reflects that</p> <p>11 while Liberty has an allowed claim for the total</p> <p>12 amount, it is only entitled to receive a</p> <p>13 distribution of \$5.1 million?</p> <p>14 A. Yes.</p> <p>15 Q. But it also reflects that there is a</p> <p>16 continuing risk related to the subrogation claim</p> <p>17 that could be made by NEGT, correct?</p> <p>18 A. Yes.</p> <p>19 Q. All right. And this is the same \$140</p> <p>20 million that has existed in the reserves since the</p> <p>21 original report, Exhibit Number 18, correct?</p> <p>22 A. Yes.</p> <p>23 Q. All right. Do you know what the amount</p> <p>24 is that is currently reserved for that line item?</p> <p>25 A. It's in the \$140 million range.</p>

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<p style="text-align: right;">141</p> <p>1 Q. All right. I have a few questions for</p> <p>2 you about recent discovery responses that were</p> <p>3 sent to us on ET's behalf.</p> <p>4 A. Okay.</p> <p>5 Q. I'm not going to mark these, but --</p> <p>6 Turn to page 5. Request for admission</p> <p>7 15 is denied, do you see that?</p> <p>8 A. For 15?</p> <p>9 Q. Yes.</p> <p>10 A. Yes.</p> <p>11 Q. And it says the request for admission</p> <p>12 is the claim of Liberty Electric against ET Power</p> <p>13 was paid in full, correct?</p> <p>14 A. Yes.</p> <p>15 Q. And what is the basis for your denial</p> <p>16 of this request for admission?</p> <p>17 A. I think we went through the report. We</p> <p>18 saw two things; one, that the claim for the five</p> <p>19 million and change was not paid in full, as well</p> <p>20 the interest was not paid.</p> <p>21 Q. Is it your position that if GTN</p> <p>22 tomorrow paid those amounts to Liberty, that that</p> <p>23 claim would be paid in full?</p> <p>24 A. I don't have an opinion as to that.</p> <p>25 Q. Why not?</p>	<p style="text-align: right;">143</p> <p>1 full for your purposes?</p> <p>2 MR. MURPHY: I renew my objection as to</p> <p>3 form.</p> <p>4 THE WITNESS: And as a professional who</p> <p>5 has been doing this for 20 years, I would consult</p> <p>6 with counsel and get the benefit of that work</p> <p>7 before I would answer the question.</p> <p>8 BY MS. PAYNE:</p> <p>9 Q. Request for admission number 16 says</p> <p>10 the property of GTN was used to discharge an</p> <p>11 obligation owed by ET Power, and that was denied.</p> <p>12 What was the basis for denying that, the factual</p> <p>13 basis?</p> <p>14 A. I'm trying to recall.</p> <p>15 Can I talk to counsel for a second?</p> <p>16 Q. Not while the question is pending, no.</p> <p>17 MR. MURPHY: If you don't know the</p> <p>18 answer --</p> <p>19 THE WITNESS: Yeah, I don't know the</p> <p>20 answer.</p> <p>21 BY MS. PAYNE:</p> <p>22 Q. Turn to number 20 on page 6. Request</p> <p>23 for admission 20 says ET Power was benefited by</p> <p>24 GTN's payment of some or all of Liberty Electric's</p> <p>25 claim against ET Power, and that was denied. Can</p>
<p style="text-align: right;">142</p> <p>1 MR. MURPHY: Objection. It's a</p> <p>2 hypothetical question.</p> <p>3 THE WITNESS: And whatever the legal</p> <p>4 impact, that's not my determination.</p> <p>5 BY MS. PAYNE:</p> <p>6 Q. Okay. Then let me ask it a slightly</p> <p>7 different way. If ET and NEGTEC had not been</p> <p>8 successful in the Fourth Circuit appeal, and</p> <p>9 Liberty was paid the amount of post-petition</p> <p>10 interest that was at issue, and Liberty was paid a</p> <p>11 hundred percent of the pre-petition invoice issue,</p> <p>12 then they would be paid in full. Is that your</p> <p>13 position?</p> <p>14 MR. MURPHY: Objection as to form.</p> <p>15 It's a hypothetical question.</p> <p>16 THE WITNESS: I haven't thought that</p> <p>17 through, and it's a legal issue that I would have</p> <p>18 consulted counsel with.</p> <p>19 BY MS. PAYNE:</p> <p>20 Q. Okay. So as you sit here today, as a</p> <p>21 professional and someone with a law degree and</p> <p>22 someone who's done this for as many years as</p> <p>23 you've done it, and you have no opinion whatsoever</p> <p>24 on whether if Liberty had prevailed on those two</p> <p>25 issues, whether Liberty would be deemed paid in</p>	<p style="text-align: right;">144</p> <p>1 you explain the factual basis for that.</p> <p>2 A. I don't have a factual basis, no.</p> <p>3 Q. Well, aside from the answer to this,</p> <p>4 let me ask you, based on your understanding as the</p> <p>5 plan administrator and your other involvement in</p> <p>6 this case, did ET Power benefit when the funds in</p> <p>7 the GTN escrow account were distributed to</p> <p>8 Liberty?</p> <p>9 A. No. I mean, I guess I understand the</p> <p>10 answer and am sort of slow in the early afternoon</p> <p>11 now. There's no claim. There was no benefit</p> <p>12 because there was no obligation. If that was</p> <p>13 paid, there was going to be no claim coming</p> <p>14 against the estate, so it really didn't matter</p> <p>15 whether those funds were paid or not paid.</p> <p>16 Q. All right. Let me see if I understand</p> <p>17 your answer. Liberty Electric asserted a claim</p> <p>18 against ET Power, correct?</p> <p>19 A. Among others.</p> <p>20 Q. Among others. And instead of ET Power</p> <p>21 being responsible for \$140 million of that claim,</p> <p>22 the \$140 million came out of escrow and satisfied</p> <p>23 part of that claim, correct?</p> <p>24 A. That claim was reduced by the payment,</p> <p>25 yes.</p>

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<p style="text-align: right;">145</p> <p>1 Q. And is that a benefit to ET Power?</p> <p>2 A. It's not a benefit to ET Power because</p> <p>3 that payment -- there was no claim associated with</p> <p>4 that. That is, the position is that the payment</p> <p>5 of the guarantee, it was -- as the funds sat there</p> <p>6 in escrow, whether they're paid or not paid has no</p> <p>7 impact on the estate, on the ET estate. That is,</p> <p>8 because our position was there was no subrogation</p> <p>9 right to the claim in the first place. So when</p> <p>10 it's paid, there's no benefit to us, I mean to the</p> <p>11 ET estate. I'm not being clear.</p> <p>12 Q. No, you're not.</p> <p>13 A. Yeah.</p> <p>14 Q. Let me see if I can ask it a different</p> <p>15 way because what you're saying to me makes no</p> <p>16 sense.</p> <p>17 A. Okay.</p> <p>18 Q. ET Power currently has an obligation to</p> <p>19 Liberty. Liberty has filed a proof of claim in</p> <p>20 the amount of approximately \$182 million, correct?</p> <p>21 That's what your quarterly reports were showing.</p> <p>22 A. They had a --</p> <p>23 Q. They filed a proof of claim --</p> <p>24 A. They filed a proof of claim, yes.</p> <p>25 Q. -- for \$182 million.</p>	<p style="text-align: right;">147</p> <p>1 certain sums under the tolling agreement under</p> <p>2 certain conditions, and one condition, as</p> <p>3 determined by the arbitrators, they determined</p> <p>4 that \$162 million was owed?</p> <p>5 A. Yes.</p> <p>6 Q. Correct? And there were two guarantors</p> <p>7 of that obligation to Liberty, correct?</p> <p>8 A. Yes.</p> <p>9 Q. One was NEG?T?</p> <p>10 A. Right.</p> <p>11 Q. And one was GTN?</p> <p>12 A. Right.</p> <p>13 Q. And \$140 million came out of an escrow</p> <p>14 account to pay off the GTN obligation --</p> <p>15 A. Right.</p> <p>16 Q. -- under that guarantee.</p> <p>17 A. Yes.</p> <p>18 Q. And you're saying that's not beneficial</p> <p>19 to ET Power?</p> <p>20 A. Again, I'm trying to be clear in my</p> <p>21 answer because obviously it wasn't working before.</p> <p>22 Well, I guess, sitting here, I don't have an</p> <p>23 answer for you. I don't have the factual basis</p> <p>24 for that.</p> <p>25 Q. You can't tell me whether you think ET</p>
<p style="text-align: right;">146</p> <p>1 A. They did.</p> <p>2 Q. It was reduced down to \$162 million by</p> <p>3 the arbitration, correct?</p> <p>4 A. Right.</p> <p>5 Q. And GTN -- or NEG?T, through the GTN</p> <p>6 guarantee, paid \$140 million of that debt that was</p> <p>7 owed by ET, correct?</p> <p>8 MR. MURPHY: Objection as to form. It</p> <p>9 assumes facts not in evidence.</p> <p>10 THE WITNESS: There was many parties</p> <p>11 who owed that money.</p> <p>12 BY MS. PAYNE:</p> <p>13 Q. There were many parties who owed that</p> <p>14 money. What do you mean by that?</p> <p>15 A. That is, you're saying -- it was a debt</p> <p>16 of a number of parties, the guarantors had --</p> <p>17 Q. Okay, setting aside the guarantors --</p> <p>18 let's back up a little bit. You've got the</p> <p>19 tolling agreement, correct?</p> <p>20 A. Right.</p> <p>21 Q. You understand that the tolling</p> <p>22 agreement was an agreement between ET Power and</p> <p>23 Liberty Electric?</p> <p>24 A. Yes.</p> <p>25 Q. And ET Power was obligated to pay</p>	<p style="text-align: right;">148</p> <p>1 Power benefited by GTN as guarantor paying \$140</p> <p>2 million? You can't tell me that? In all your</p> <p>3 experience doing what you do, you can't tell me</p> <p>4 that?</p> <p>5 A. Again, I'm going to say that I don't</p> <p>6 have the factual basis for that and can certainly</p> <p>7 supplement this.</p> <p>8 Q. So you're refusing to answer my</p> <p>9 question?</p> <p>10 A. I'm not refusing. I'm telling you I</p> <p>11 don't have the factual basis.</p> <p>12 Q. You're telling me you can't answer my</p> <p>13 question?</p> <p>14 A. I can't answer your question.</p> <p>15 Q. Okay. Let me ask you this: Was it</p> <p>16 harmful to ET for the \$140 million to be paid on</p> <p>17 the GTN guarantee? Can you tell me whether you</p> <p>18 think it was harmful?</p> <p>19 A. I don't have an opinion as to its harm</p> <p>20 or benefit. I mean, I don't have the facts</p> <p>21 supporting that.</p> <p>22 Q. What facts do you need?</p> <p>23 A. Whether -- I would have a discussion</p> <p>24 with counsel as to -- potentially some discussion</p> <p>25 as to the agreements and the benefit or the harm</p>

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<p style="text-align: right;">149</p> <p>1 associated with those.</p> <p>2 Q. And what facts would you need in order</p> <p>3 to get that information from counsel? What</p> <p>4 questions would you have that you would want to</p> <p>5 cover with counsel?</p> <p>6 A. That would be privileged.</p> <p>7 Q. I'm not asking what you're talking</p> <p>8 about. You're telling me you need facts, and --</p> <p>9 A. I would need to have their</p> <p>10 interpretation of the agreement as to why a</p> <p>11 payment or a lack of a payment would be of benefit</p> <p>12 or a detriment to the bankruptcy estate.</p> <p>13 Q. Well, wouldn't you have done that</p> <p>14 analysis way back when the money was going to be</p> <p>15 paid? I mean, why didn't you do that then?</p> <p>16 A. Why didn't I do --</p> <p>17 Q. Well, back in May of 2005, right after</p> <p>18 you become plan administrator, and you've got</p> <p>19 fiduciary duties to the estate and to perhaps</p> <p>20 others, but wasn't it your obligation then to</p> <p>21 determine whether a payment of \$140 million</p> <p>22 through the GTN guarantee to Liberty was a good</p> <p>23 thing for ET Power or a bad thing for ET Power?</p> <p>24 Was that something you should have done way back</p> <p>25 in May of 2005?</p>	<p style="text-align: right;">151</p> <p>1 paid out of the GTN-related escrow account,</p> <p>2 correct?</p> <p>3 A. I'm aware of that, yes.</p> <p>4 Q. And the GTN guarantee related to the ET</p> <p>5 Power and the Liberty tolling agreement, correct?</p> <p>6 A. I think -- well, it related to their</p> <p>7 guarantee of that obligation.</p> <p>8 Q. Fair enough. And it was your</p> <p>9 obligation, as plan administrator for ET Power, to</p> <p>10 determine whether steps taken by Willkie Farr or</p> <p>11 other professionals for ET Power would be good for</p> <p>12 ET Power or bad for ET Power, correct? I mean,</p> <p>13 Willkie wasn't just out there making decisions on</p> <p>14 its own without any --</p> <p>15 MR. MURPHY: I object to that. No, I</p> <p>16 object to form because it assumes that there was</p> <p>17 an action taken with respect to ET Power in</p> <p>18 connection with the GTN guarantee. That's a fact</p> <p>19 not in evidence.</p> <p>20 BY MS. PAYNE:</p> <p>21 Q. Okay, do you understand my question?</p> <p>22 A. Well, at the time of the order related</p> <p>23 to the payment or the release of those funds, I</p> <p>24 certainly worked with counsel, Steve Wilamowsky,</p> <p>25 and -- but didn't have any involvement in the</p>
<p style="text-align: right;">150</p> <p>1 A. Well, as to the timing of doing</p> <p>2 anything, we fully reserved the amounts, so it</p> <p>3 wasn't a good thing or a bad thing because we</p> <p>4 completely -- we continued to reserve fully for</p> <p>5 that payment. I mean -- so I'm not sure whether</p> <p>6 -- you're trying to tell me I needed to make a</p> <p>7 decision by a certain point, and I'm not -- I</p> <p>8 don't know if I have to make any decision for the</p> <p>9 estate's purpose. What I've done for the estate</p> <p>10 is I fully reserved the amount that I thought was</p> <p>11 appropriate and haven't distributed anything of</p> <p>12 those potential distributions to Liberty or to</p> <p>13 whoever the guarantor claimant might be, so</p> <p>14 there's been no harm to the estate, and that's why</p> <p>15 I fully reserved for it. So --</p> <p>16 Q. But certain actions were taken back in</p> <p>17 May of 2005 with respect to the GTN guarantee,</p> <p>18 correct? \$140 million was paid out to Liberty,</p> <p>19 correct?</p> <p>20 A. Of which I had --</p> <p>21 MR. MURPHY: Objection. Are you</p> <p>22 suggesting that Mr. Goldstein took actions with</p> <p>23 respect to the GTN guarantee?</p> <p>24 BY MS. PAYNE:</p> <p>25 Q. You understood that \$140 million was</p>	<p style="text-align: right;">152</p> <p>1 release of the money. I mean, that wasn't my -- I</p> <p>2 had no control over that. That wasn't in the</p> <p>3 estate that I was the plan administrator for.</p> <p>4 Q. Okay. If releasing those funds would</p> <p>5 have been harmful to ET Power, would you have</p> <p>6 spoken up? Would it have been your obligation to</p> <p>7 speak up at that point?</p> <p>8 A. If there was -- if counsel or if I</p> <p>9 determined financially, but if there was a legal</p> <p>10 argument and there was some negative result, I</p> <p>11 would have had my opportunity to object to that.</p> <p>12 In fact, as we talked about, I had impact or an</p> <p>13 influence on that interest issue, that is the</p> <p>14 application of the money we did see as a potential</p> <p>15 issue, and we raised that with the parties and we</p> <p>16 received the language that was included in that</p> <p>17 order.</p> <p>18 Q. So are you telling me that back around</p> <p>19 the time that the \$140 million was released, you</p> <p>20 and professionals with whom you worked did not</p> <p>21 analyze whether that would be a beneficial event</p> <p>22 for ET Power or a neutral event or a harmful</p> <p>23 event?</p> <p>24 A. I think by the very nature of what</p> <p>25 happened was we -- that the order as approved was</p>

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<p style="text-align: right;">153</p> <p>1 acceptable to the estate.</p> <p>2 Q. And it was acceptable because it was</p> <p>3 helpful, correct?</p> <p>4 A. It either -- it's acceptable. It</p> <p>5 doesn't have to be helpful.</p> <p>6 Q. If it was acceptable -- would you have</p> <p>7 had --</p> <p>8 A. It could have been that's what was the</p> <p>9 outcome. I mean, you know, things that you don't</p> <p>10 have any control over happen, and just because you</p> <p>11 understand they're going to happen doesn't mean</p> <p>12 it's acceptable to you or is of benefit to you.</p> <p>13 It just might be you accept this as what's going</p> <p>14 to happen. In this particular matter, you know,</p> <p>15 we didn't go through that whole gyration. We saw</p> <p>16 the one issue.</p> <p>17 Q. What's the one issue?</p> <p>18 A. The one issue about the application of</p> <p>19 the payment, whether it would go to interest first</p> <p>20 and the whole concept at the appellate level, and</p> <p>21 that's all that -- that was the main issue of</p> <p>22 concern that the ET estates had as to that</p> <p>23 payment.</p> <p>24 Q. All right. I'm still not sure I</p> <p>25 understand your answer fully, so let me ask my</p>	<p style="text-align: right;">155</p> <p>1 Q. I don't know what that means. My</p> <p>2 question --</p> <p>3 A. It's been neutral as to the estate, as</p> <p>4 to the \$140 million.</p> <p>5 Q. So at some point in the future you</p> <p>6 might sit down to determine whether or not that</p> <p>7 was a helpful or harmful event, but you just</p> <p>8 haven't done it yet?</p> <p>9 A. Well, it's fairly clear if we win and</p> <p>10 it's subrogated or it's subordinated or not</p> <p>11 allowed, then it was a benefit that the payment</p> <p>12 was made, right?</p> <p>13 Q. Okay.</p> <p>14 A. But if we lose, then it's no benefit.</p> <p>15 Q. Okay, I see what you're saying. So if</p> <p>16 you can retain the funds, if those funds don't</p> <p>17 have to be paid back to NEG, then ET Power was</p> <p>18 benefited by the GTN payment?</p> <p>19 A. Right.</p> <p>20 Q. And if it has to pay those funds to</p> <p>21 NEG, then it was a neutral event?</p> <p>22 A. Right.</p> <p>23 Q. So -- I gotcha.</p> <p>24 Do you think it would be fair if NEG</p> <p>25 does not recover the \$140 million that was paid on</p>
<p style="text-align: right;">154</p> <p>1 question as simply as I can.</p> <p>2 A. Okay.</p> <p>3 Q. At the time the payment was being made,</p> <p>4 did you as plan administrator, along with any of</p> <p>5 the professionals, analyze whether the \$140</p> <p>6 million payment under the GTN guarantee would be a</p> <p>7 helpful, harmful or neutral event for ET Power?</p> <p>8 Did you do that analysis?</p> <p>9 A. I didn't think we looked at it in that</p> <p>10 way. We knew the funds were there. We knew they</p> <p>11 were going to be paid out, and our concern -- so</p> <p>12 we had no control; good, bad, whatever. There was</p> <p>13 no control over the payment of those funds. What</p> <p>14 we had control over was as to the claim and the</p> <p>15 application of those funds toward the claim, and</p> <p>16 that's what we raised our issues about.</p> <p>17 Q. Okay. Since the payment in May of 2005</p> <p>18 of the \$140 million, have you or professionals</p> <p>19 with whom you've worked as plan administrator for</p> <p>20 ET Power ever analyzed whether the payment of</p> <p>21 those funds was a helpful, harmful or neutral</p> <p>22 event for ET Power?</p> <p>23 A. Well, I think consistent with all the</p> <p>24 reports we've gone through, we've maintained the</p> <p>25 \$140 million reserve.</p>	<p style="text-align: right;">156</p> <p>1 ET's behalf pursuant to the GTN guarantee, do you</p> <p>2 think that's fair?</p> <p>3 MR. MURPHY: Objection as to form.</p> <p>4 Fair in what context? And what do you mean by</p> <p>5 fair?</p> <p>6 MS. PAYNE: Do you understand the</p> <p>7 question?</p> <p>8 THE WITNESS: I would have asked fair</p> <p>9 to who. Fair to NEG as compared to fair to ET?</p> <p>10 Fair to the world as we sit here?</p> <p>11 BY MS. PAYNE:</p> <p>12 Q. Well, let's break it down. Okay. Do</p> <p>13 you think it is fair to NEG?</p> <p>14 A. Yes.</p> <p>15 Q. Why?</p> <p>16 A. They entered into an agreement that</p> <p>17 restricted their abilities to take certain</p> <p>18 actions.</p> <p>19 Q. And by that you're talking about the</p> <p>20 GTN NEG guarantee, correct?</p> <p>21 A. That's -- more in that case as to the</p> <p>22 NEG guarantee.</p> <p>23 Q. I'm sorry, say that one more time.</p> <p>24 A. More in that case as to the NEG</p> <p>25 guarantee.</p>

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<p style="text-align: right;">157</p> <p>1 Q. Okay. And you're referring to the</p> <p>2 waiver argument?</p> <p>3 A. Yes.</p> <p>4 Q. All right. Do you have any idea as to</p> <p>5 what the purpose of that waiver provision would be</p> <p>6 in that guarantee?</p> <p>7 A. I think, as we stated earlier, those</p> <p>8 agreements dated back to 2001, and I was not a</p> <p>9 party to the agreement.</p> <p>10 Q. So you certainly weren't aware of the</p> <p>11 intent of the parties because you weren't there,</p> <p>12 you weren't involved, but as a professional who's</p> <p>13 I'm sure run into guarantees a number of times</p> <p>14 over the course of your professional career, can</p> <p>15 you come up with any argument as to why two</p> <p>16 parties would agree to read those guarantees in</p> <p>17 the manner in which you currently read them?</p> <p>18 MR. MURPHY: Objection as to form.</p> <p>19 Calls for speculation.</p> <p>20 THE WITNESS: Again, I wasn't there, I</p> <p>21 don't know. I can talk -- generally in my</p> <p>22 experience, there were all sorts of benefits and</p> <p>23 costs associated with transactions, and --</p> <p>24 BY MS. PAYNE:</p> <p>25 Q. Can you identify any benefit to NEGТ to</p>	<p style="text-align: right;">159</p> <p>1 have been, you know, all these clauses are back</p> <p>2 and forth negotiations between the parties, very</p> <p>3 sophisticated, well represented parties, so I'm --</p> <p>4 so I have to take it that those words were what</p> <p>5 the parties intended them to mean.</p> <p>6 Q. Okay. So what I hear you saying is</p> <p>7 that it must have meant something, but as you sit</p> <p>8 here today you can't identify any business reason</p> <p>9 or rationale for including that language?</p> <p>10 MR. MURPHY: Objection. That</p> <p>11 mischaracterizes the witness's response.</p> <p>12 BY MS. PAYNE:</p> <p>13 Q. If you can identify a rationale or</p> <p>14 business reason for including it, then --</p> <p>15 MR. MURPHY: Objection, it calls for</p> <p>16 speculation. He was not a party to the</p> <p>17 transaction.</p> <p>18 THE WITNESS: I mean, I stated earlier,</p> <p>19 I was not there, I don't know. You're asking me</p> <p>20 my experience, and I'm telling you my experience</p> <p>21 generally is that between -- inside of</p> <p>22 negotiations between sophisticated parties, there</p> <p>23 are trade-offs back and forth and things, and</p> <p>24 clauses and parts of an agreement end up there</p> <p>25 because they are negotiated and they end up there</p>
<p style="text-align: right;">158</p> <p>1 reading that, those agreements in the manner in</p> <p>2 which you currently read them?</p> <p>3 A. Sure.</p> <p>4 Q. What are they?</p> <p>5 A. By implication that clause would not be</p> <p>6 in there unless it was agreed to by all the</p> <p>7 parties and it was an important and necessary part</p> <p>8 of the agreement.</p> <p>9 Q. Okay, but that's not my question. My</p> <p>10 question is what is the business reason? What's</p> <p>11 the rationale for NEGТ to read those agreements in</p> <p>12 the manner in which you currently read them?</p> <p>13 MR. MURPHY: Objection as to form. It</p> <p>14 calls for speculation. The witness has testified</p> <p>15 he was not party to that transaction.</p> <p>16 BY MS. PAYNE:</p> <p>17 Q. I'm not asking you what NEGТ meant.</p> <p>18 I'm asking you for -- you just said there's all</p> <p>19 kinds of reasons why parties might do something.</p> <p>20 Well, give me some of those reasons why NEGТ might</p> <p>21 agree to documents that contain a provision that's</p> <p>22 being read in the manner in which you are</p> <p>23 currently reading them.</p> <p>24 A. As I said earlier, it may be because</p> <p>25 that was included in the agreements, so it had to</p>	<p style="text-align: right;">160</p> <p>1 because people understand what the ramification</p> <p>2 is. Those words are pretty clear.</p> <p>3 BY MS. PAYNE:</p> <p>4 Q. Okay. So you believe that there must</p> <p>5 have been a reason, but you cannot articulate for</p> <p>6 me today what that reason would be?</p> <p>7 A. I don't know the reason because I</p> <p>8 wasn't there.</p> <p>9 Q. All right. Did ET Power ever -- at the</p> <p>10 time that the \$140 million was being paid out of</p> <p>11 the escrow accounts in May of 2005, if I</p> <p>12 understood your testimony earlier, there was -- ET</p> <p>13 Power did not analyze at that time issues related</p> <p>14 to the GTN or NEGТ guarantees; is that correct?</p> <p>15 A. When you say analyze, I mean we -- from</p> <p>16 the beginning, we had the claim listed in the</p> <p>17 reserves, so I'm not sure --</p> <p>18 Q. Well, had you analyzed the language of</p> <p>19 the GTN and NEGТ guarantees, you as plan</p> <p>20 administrator or any professional on your behalf?</p> <p>21 A. As of that point, I do not -- I don't</p> <p>22 recall whether I had asked Mr. Wilamowsky to</p> <p>23 investigate, look at those issues.</p> <p>24 Q. When is the first time you can recall</p> <p>25 being aware of the language in the NEGТ guarantee?</p>

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<p style="text-align: right;">161</p> <p>1 I believe it's paragraph 4 that contains the</p> <p>2 waiver language. When was the first time you</p> <p>3 became aware of that?</p> <p>4 A. I don't recall the first time. It</p> <p>5 could have dated as early as the creditors</p> <p>6 committee discussions.</p> <p>7 MS. PAYNE: Why don't I take a few</p> <p>8 minutes. Let's go off the record.</p> <p>9 (Discussion off the record.)</p> <p>10 MR. MURPHY: Just a slight</p> <p>11 clarification, the stipulation we gave earlier in</p> <p>12 this proceeding, in this deposition, ET Power</p> <p>13 stipulates that NEGТ has the right to enforce all</p> <p>14 rights that GTN had as the GTN guarantor under the</p> <p>15 GTN guarantee subject, of course, to NEGТ's</p> <p>16 obligations under paragraph 4 of the NEGТ</p> <p>17 guarantee. Is that acceptable?</p> <p>18 MS. PAYNE: Understood.</p> <p>19 MR. MURPHY: Okay, thank you.</p> <p>20 MS. PAYNE: Let's take a quick break</p> <p>21 and let me go through my notes, and we can wrap</p> <p>22 this up.</p> <p>23 MR. MURPHY: Okay.</p> <p>24 (Recess.)</p> <p>25 BY MS. PAYNE:</p>	<p style="text-align: right;">163</p> <p>1 debtors that I was claim administrator for.</p> <p>2 Q. Correct. And were you -- because that</p> <p>3 escrow account was an account from which the \$140</p> <p>4 million would be paid to Liberty on ET's behalf,</p> <p>5 did you have any focus at all on the escrow</p> <p>6 account --</p> <p>7 MR. MURPHY: Objection as to form;</p> <p>8 assumes the --</p> <p>9 MS. PAYNE: Let me get my question out.</p> <p>10 -- or the post closing account?</p> <p>11 MR. MURPHY: Objection as to form. It</p> <p>12 assumes that the \$140 million was paid on ET's</p> <p>13 behalf. It was paid on GTN's guarantee.</p> <p>14 THE WITNESS: I certainly have said</p> <p>15 that earlier. I'm not familiar with that</p> <p>16 agreement, sitting here.</p> <p>17 BY MS. PAYNE:</p> <p>18 Q. You weren't familiar with it back then</p> <p>19 nor are you now?</p> <p>20 A. That's right.</p> <p>21 Q. Okay. Did you get a copy of it at</p> <p>22 anytime back at the time frame?</p> <p>23 A. I don't know, you know. There was lots</p> <p>24 of stuff that was provided to me, but that was not</p> <p>25 an item that I reviewed.</p>
<p style="text-align: right;">162</p> <p>1 Q. All right. I want to talk to you real</p> <p>2 briefly about the post-closing escrow agreement,</p> <p>3 which was related to the GTN sale.</p> <p>4 A. Okay.</p> <p>5 Q. Do you understand what I'm talking</p> <p>6 about?</p> <p>7 A. I haven't read that agreement, so...</p> <p>8 Q. All right. Back at the time that this</p> <p>9 was happening, what was your role with respect to</p> <p>10 the escrow account that maintained the funds that</p> <p>11 was actually at some point \$140 million was paid</p> <p>12 out to Liberty? You understand what escrow</p> <p>13 agreement?</p> <p>14 A. Yes, absolutely.</p> <p>15 Q. This post-closing escrow agreement</p> <p>16 governed that escrow account, correct?</p> <p>17 A. I don't know. I mean, I had no --</p> <p>18 Q. That's what I'm trying to find out.</p> <p>19 A. -- no part in that at all.</p> <p>20 Q. So at the time that any of this was</p> <p>21 going on, did you get a copy of the post-closing</p> <p>22 escrow agreement? Did you have any involvement in</p> <p>23 anything related to it?</p> <p>24 A. I had no involvement at all with that</p> <p>25 escrow account. It was not an asset of the</p>	<p style="text-align: right;">164</p> <p>1 Q. Now, were you familiar with the</p> <p>2 structure of -- strike that.</p> <p>3 As plan administrator for the ET</p> <p>4 debtors, who do you report to, if anybody?</p> <p>5 A. I guess I report to the court,</p> <p>6 providing the quarterly reports. I report to the</p> <p>7 board, I report to myself and to Mr. Cejka.</p> <p>8 Q. Okay. How often do you report to the</p> <p>9 court?</p> <p>10 A. Just the quarterly reports.</p> <p>11 Q. And how often do you report to the</p> <p>12 board, which would be you and Mr. Cejka?</p> <p>13 A. We have periodic discussions. We</p> <p>14 really don't have formal board meetings per se.</p> <p>15 We've been in regular contact throughout the</p> <p>16 period of time that I've been the plan</p> <p>17 administrator.</p> <p>18 Q. Okay. So nothing like quarterly</p> <p>19 reports to the court, but you have discussions</p> <p>20 with Mr. Cejka from time to time?</p> <p>21 A. That's right.</p> <p>22 Q. And that those discussions in your mind</p> <p>23 satisfy your obligations under -- as reporting to</p> <p>24 the board?</p> <p>25 A. Yes.</p>

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42 (Pages 165 to 168)

<p style="text-align: right;">165</p> <p>1 Q. Okay. And is there anybody else that</p> <p>2 you report to?</p> <p>3 A. There is not.</p> <p>4 Q. Do you have to get board approval in</p> <p>5 order to take certain steps or certain actions as</p> <p>6 plan administrator or do you just report to the</p> <p>7 board what you have done?</p> <p>8 A. The context of what I can do and can't</p> <p>9 do is in the plan administrator agreement. It</p> <p>10 basically lays out most of it -- most of the</p> <p>11 limitations are on settlements that I would reach</p> <p>12 and also whether I wanted to receive comfort from</p> <p>13 the court as to settlements that are reached. So</p> <p>14 there is a dollar amount, a threshold that if it's</p> <p>15 below that I can settle it without coming to the</p> <p>16 court. There are other amounts. I forget what</p> <p>17 the scope is. I think it might be a million</p> <p>18 dollars, that if it's above that, then I need to</p> <p>19 go to the court, and I have gone to the court and</p> <p>20 asked for comfort orders regarding those</p> <p>21 settlements.</p> <p>22 Q. Okay. But other than settlements, you</p> <p>23 don't need to get approval to pursue certain</p> <p>24 arguments such as you are pursuing in this case,</p> <p>25 correct?</p>	<p style="text-align: right;">167</p> <p>1 MR. MURPHY: Well, I'll object first on</p> <p>2 the grounds of relevance and second on -- it's</p> <p>3 been asked and answered.</p> <p>4 THE WITNESS: I think the latter.</p> <p>5 BY MS. PAYNE:</p> <p>6 Q. You have an opinion, but you don't want</p> <p>7 to disclose it?</p> <p>8 A. Right.</p> <p>9 Q. You understand that your deposition has</p> <p>10 been noticed in this case and that you are under</p> <p>11 oath?</p> <p>12 A. Right.</p> <p>13 Q. What is the basis for your refusing to</p> <p>14 answer this question?</p> <p>15 A. It's discussion with counsel, it's a</p> <p>16 privileged discussion.</p> <p>17 Q. Okay. So you're telling me that the</p> <p>18 only way you know this information is through your</p> <p>19 discussions with your attorney?</p> <p>20 MR. MURPHY: I'm going to object to the</p> <p>21 whole line of questioning. First, it's not</p> <p>22 relevant. Secondly, it's asking for a legal</p> <p>23 conclusion from this witness, and it's been asked</p> <p>24 and answered.</p> <p>25 MS. PAYNE: Well, but he can still</p>
<p style="text-align: right;">166</p> <p>1 A. That's right.</p> <p>2 Q. Now, you don't report to a creditors</p> <p>3 committee because the committee was disbanded,</p> <p>4 correct?</p> <p>5 A. It was, as of a matter of the</p> <p>6 confirmation of the plan.</p> <p>7 Q. We were talking a bit earlier about the</p> <p>8 waiver language in the NEGТ guarantee, and I</p> <p>9 believe you're generally familiar with that,</p> <p>10 correct?</p> <p>11 A. Yes.</p> <p>12 Q. Is it your position, then, that if any</p> <p>13 entity other than NEGТ owned those rights that</p> <p>14 came out of the GTN guarantee, that any other</p> <p>15 entity could seek subrogation from ET Power?</p> <p>16 A. That is a hypothetical, and I haven't</p> <p>17 consulted counsel regarding that.</p> <p>18 Q. Well, is your argument, your waiver</p> <p>19 argument peculiar to NEGТ or does it apply to</p> <p>20 other parties?</p> <p>21 A. Well, I think it would be discussion</p> <p>22 I've had with counsel regarding that.</p> <p>23 Q. So as you sit here today, you don't</p> <p>24 know the answer to that question or do you know it</p> <p>25 and you don't want to tell me?</p>	<p style="text-align: right;">168</p> <p>1 answer the question and then the judge can sort</p> <p>2 out those objections unless you're instructing him</p> <p>3 not to answer.</p> <p>4 MR. MURPHY: I'm going to instruct him</p> <p>5 not to answer.</p> <p>6 MS. PAYNE: Okay. All right.</p> <p>7 BY MS. PAYNE:</p> <p>8 Q. Was ET Power a party to the NEGТ</p> <p>9 guarantee?</p> <p>10 A. If you want to show me the --</p> <p>11 MS. PAYNE: I think this is the NEGТ</p> <p>12 guarantee.</p> <p>13 MR. MURPHY: It is.</p> <p>14 BY MS. PAYNE:</p> <p>15 Q. I'll ask you the same question with</p> <p>16 respect to the GTN guarantee.</p> <p>17 A. Let me read -- one at a time. I'll do</p> <p>18 this one first.</p> <p>19 MR. MURPHY: Well, I will object but</p> <p>20 not instruct him not to answer. The documents</p> <p>21 speak for themselves in terms of the parties.</p> <p>22 MS. PAYNE: Okay.</p> <p>23 THE WITNESS: Well, he's instructing me</p> <p>24 not to answer.</p> <p>25 MR. MURPHY: No, I did not instruct you</p>

CHARLES R. GOLDSTEIN

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43 (Pages 169 to 171)

<p style="text-align: right;">169</p> <p>1 not to answer.</p> <p>2 THE WITNESS: Oh, you didn't?</p> <p>3 MR. MURPHY: You can answer, but the</p> <p>4 documents speak for themselves.</p> <p>5 BY MS. PAYNE:</p> <p>6 Q. I can shorten this. It's my</p> <p>7 understanding that ET is not a party to those</p> <p>8 agreements. I'm not trying to trick you.</p> <p>9 A. Yeah, no. I'm just -- I'm looking</p> <p>10 here, I'm seeing the party. I was going to read</p> <p>11 through them, but I'll take your word for that.</p> <p>12 Q. All right. Are you aware of any</p> <p>13 consideration that ET would have paid to any of</p> <p>14 the parties in connection with these particular</p> <p>15 guarantees?</p> <p>16 A. I'm not aware of any payment.</p> <p>17 Q. Okay. Any consideration, whether it</p> <p>18 was payment or otherwise?</p> <p>19 A. Well, I think as we discussed, I mean,</p> <p>20 ET was a party to the tolling agreement.</p> <p>21 Q. Okay.</p> <p>22 A. And the tolling agreement had as a</p> <p>23 component of it the guarantees.</p> <p>24 Q. Right.</p> <p>25 A. And so it's the whole concept of, you</p>	<p style="text-align: right;">171</p> <p>1 CERTIFICATE OF NOTARY PUBLIC</p> <p>2 I, ANN L. BLAZEJEWSKI, the officer before</p> <p>3 whom the foregoing deposition was taken, do hereby</p> <p>4 certify that the witness whose testimony appears</p> <p>5 in the foregoing deposition was duly sworn by me;</p> <p>6 that the testimony of said witness was taken by me</p> <p>7 in stenotypy and thereafter reduced to typewriting</p> <p>8 under my direction; that said deposition is a true</p> <p>9 record of the testimony given by said witness;</p> <p>10 that I am neither counsel for, related to, nor</p> <p>11 employed by any of the parties to the action in</p> <p>12 which this deposition was taken; and, further,</p> <p>13 that I am not a relative or employee of any</p> <p>14 counsel or attorney employed by the parties</p> <p>15 hereto, nor financially or otherwise interested in</p> <p>16 the outcome of this action.</p> <p>17</p> <p>18</p> <p>19 <u>ANN L. BLAZEJEWSKI</u></p> <p>20 Notary Public in and for</p> <p>21 the State of Maryland</p> <p>22 My Commission Expires:</p> <p>23 July 18, 2012</p> <p>24</p> <p>25</p>
<p style="text-align: right;">170</p> <p>1 know, what was given on one side versus the other</p> <p>2 to get the deal done, these are the elements that</p> <p>3 were required.</p> <p>4 Q. Well, did ET provide consideration to</p> <p>5 either NEGOT or GTN to obtain those guarantees?</p> <p>6 A. They entered into the agreement.</p> <p>7 Q. Okay. So that's the only consideration</p> <p>8 of which you're aware?</p> <p>9 A. And all the requirements in that</p> <p>10 agreement, yes.</p> <p>11 MS. PAYNE: I think that's all I have.</p> <p>12 MR. MURPHY: I have nothing.</p> <p>13 THE WITNESS: Okay.</p> <p>14 (Whereupon, at 1:00 p.m., the taking of</p> <p>15 the instant deposition ceased.)</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20 SUBSCRIBED AND SWORN to before me this _____ day</p> <p>21 of _____, _____.</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">_____ Signature of the Witness</p> <p style="text-align: center;">_____ Notary Public</p> <p>My Commission Expires: _____</p>	

EXHIBIT 17

MATTHEW A. FELDMAN
January 28, 2010

Page 1

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MARYLAND - GREENBELT DIVISION

-----X

In re: (Chapter 11
(Case No. 03-30459 (PM)
NATIONAL ENERGY & (and 03-30686 (PM) through
GAS TRANSMISSION, (03-30464 (PM) and 03-30686
INC., et al, ((PM) through 03-30687 (PM)
(
DEBTORS, (Jointly Administered as
(03-30459 (PM)

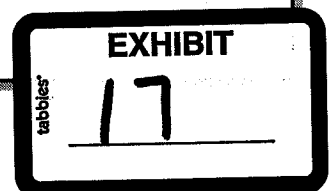
-----X

DATE: January 28, 2010

TIME: 9:30 a.m.

EXAMINATION BEFORE TRIAL of the
Non-Party Witness, MATTHEW A. FELDMAN, taken by
the Respective Parties, held at the offices of
Willkie Farr & Gallagher, 787 Seventh Avenue, New
York, New York 10019, before a Notary Public of
the State of New York.

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972-719-5000



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MATTHEW A. FELDMAN
January 28, 2010

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1 APPEARANCES:

2 VINSON & ELKINS, LLP.
3 Attorneys for NATIONAL ENERGY & GAS
4 TRANSMISSION
5 Trammell Crow Center
6 2001 Ross Avenue
7 Suite 3700
8 Dallas, Texas 75201-2975
9 BY: CAROL C. PAYNE, ESQ.

10 WILLKIE FARR & GALLAGHER, LLP.
11 Attorney for the Witness
12 787 Seventh Avenue
13 New York, New York 10019
14 BY: ROGER NETZER, ESQ.

15 SUTHERLAND ASBILL & BRENNAN, LLP.
16 Attorneys for NEGT ENERGY TRADING-POWER,
17 L.P.
18 1275 Pennsylvania Avenue, NW
19 Washington, D.C. 20004
20 BY: MARK D. SHERRILL, ESQ.

21 PROTIVITI
22 For NEGT ENERGY TRADING-POWER, L.P.
23 One East Pratt Street
24 Suite 800
25 Baltimore, Maryland 21202
BY: ROBERT L. PATRICK

* * *

Page 4

1 as either ET or ET Power and that entity is
2 formerly known as NEGT Energy-Trading Power, L.P.,
3 I believe I got that right, Energy Trading-Power
4 L.P. so when I talk about ET or ET Power that's
5 the entity that I'm referring to. If we need to
6 talk about any other ET-related entities let's try
7 to use the full name as opposed to ET or ET Power.

8 MR. NETZER: It might have happened
9 before I got here but can we note the
10 appearances.

11 MS. PAYNE: Sure.

12 MR. NETZER: What you just said I will
13 take as the appearance.

14 MR. SHERRILL: Mark Sherrill on behalf
15 of ET Power, Sutherland Asbill Brennan.

16 Q. Mr. Feldman, I'm handing you Exhibit
17 Number 9, we're sequentially numbering deposition
18 exhibits and this is number 9 which is the
19 subpoena directed to Willkie Farr & Gallagher,
20 LLP.

21 (Whereupon, the aforementioned subpoena
22 was marked as Exhibit 9 for identification as
23 of this date.)

24 Q. Is this the subpoena pursuant to which
25 you are appearing this morning, correct?

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1 MATTHEW A. FELDMAN, called as a
2 witness, having been first duly sworn by a Notary
3 Public of the State of New York, was examined and
4 testified as follows:

5 EXAMINATION BY

6 MS. PAYNE:

7 Q. Please state your name for the record.

8 A. Matthew A. Feldman.

9 Q. Where do you work?

10 A. 787 Seventh Avenue, New York, New York
11 10019.

12 Q. Mr. Feldman, my name is Carol Payne.
13 I'm a lawyer with Vinson & Elkins and we represent
14 an entity that we referred to as NEGT. Do you
15 understand that?

16 A. I do.

17 Q. And when I refer to NEGT because there
18 are so many entities that have similar names I
19 want to make sure for the record we're all clear
20 on what entities we're talking about. When I
21 mention NEGT I am referring to National Energy &
22 Gas Transmission, Inc., okay?

23 A. Okay.

24 Q. All right. There's a second entity that
25 I'm going to refer to I think for most of the day

Page 5

1 A. What was the question?

2 Q. Is this the subpoena under which you're
3 appearing here today?

4 A. It is.

5 Q. You are the designated representative of
6 Willkie Farr Gallagher, correct?

7 A. I am.

8 Q. You also have personal involvement in
9 the NEGT bankruptcy and that of the related NEGT
10 entities, correct?

11 A. Yes.

12 Q. If I could please I would like to get an
13 understanding from you as to what your involvement
14 was really going back to the beginning. I
15 understand the bankruptcies were filed in
16 September 2003; is that correct?

17 A. I believe that's correct.

18 Q. Can you explain your involvement, at
19 what point Willkie Farr and you became involved.

20 A. In November of 2002 I received a
21 telephone call from a gentleman by the name of
22 Sandy Hartman and Bruce Worthington. At the time
23 Bruce was general counsel of Pacific Gas &
24 Electric Holding Company and a board member of NEG
25 which was the predecessor to NEGT, Sandy Hartman I

2 (Pages 2 to 5)

MATTHEW A. FELDMAN

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1 think at that time was senior counsel to NEG.
 2 They were in the midst of a restructuring and they
 3 had counsel they were looking to potentially
 4 replace and would I and Willkie be interested in
 5 the engagement. I flew to California the week of
 6 Thanksgiving of that year, I interviewed with
 7 them, Willkie was retained, the work was
 8 transitioned to Willkie and beginning in December
 9 of 2002 we became restructuring counsel to NEG
 10 and its subsidiaries.

11 Q. Once the bankruptcy petitions were filed
 12 Willkie Farr as I understand it applied to the
 13 bankruptcy court to be counsel as I understand it
 14 for all debtors; is that correct?

15 A. That's not correct.

16 Q. Okay.

17 A. NEG had a large number of subsidiaries,
 18 many of whom filed but some of which did not but
 19 among the groups of filers in addition to NEG was
 20 a subsidiary called US Gen New England which was a
 21 utility providing power to the New England states.
 22 Willkie was not counsel to US Gen New England. US
 23 Gen New England had separate counsel but those
 24 cases were filed at the same time and ran parallel
 25 to the NEG family of cases.

Page 7

1 Q. And when you refer to NEG is that the
 2 way you typically refer to what I refer to as
 3 NEG?

4 A. No, I usually refer to NEG also but NEG
 5 is the predecessor. NEG is the successor to NEG.
 6 The name ultimately changed.

7 Q. Other than the US --

8 A. US Gen New England.

9 Q. US Gen New England Willkie Farr was
 10 otherwise retained as counsel for the debtors for
 11 all other NEG-related debtors?

12 A. That is correct.

13 Q. Just to make sure I understand where the
 14 fences are you started essentially before the
 15 filing around November 2002. Has that
 16 attorney/client relationship with the debtors
 17 ended or is it ongoing as of today?

18 A. It's ongoing as of today.

19 Q. All right. And does Willkie Farr still
 20 represent the same group of debtors that it
 21 originally represented or has the attorney/client
 22 relationship with any of those debtors been
 23 terminated?

24 A. I'm not aware of the attorney/client
 25 relationship being terminated with any of the

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1 debtors, now reorganized debtors.

2 Q. All right. Can you tell me what your
 3 involvement was, personal involvement was or focus
 4 was during the process of these various bankruptcy
 5 proceedings.

6 A. I was the lead lawyer for the law firm
 7 with respect to all of the NEG and subsidiary
 8 bankruptcies. There was a large team working
 9 underneath me including partners and associates
 10 across lots of disciplines but I was the lead
 11 person.

12 Q. In your role were you involved in
 13 matters related to what I'll refer to as a dispute
 14 between ET Power and Liberty Electric?

15 A. I was involved in that, yes.

16 Q. And I'll probably end up referring to
 17 Liberty Electric throughout this as Liberty. You
 18 understand what we're talking about, correct?

19 A. I understand.

20 Q. The original dispute arose out of a
 21 tolling agreement between ET Power and Liberty
 22 Electric, correct?

23 A. That's my understanding.

24 Q. Were you involved in the initial
 25 litigation and then what ultimately turned into an

Page 9

1 arbitration? Were you involved in those
 2 proceedings? Tell me what your involvement was.

3 MR. SHERRILL: Before he does let me
 4 interrupt here to get something clear.
 5 Obviously we're talking about representation
 6 that Willkie was engaged in and Mr. Feldman in
 7 particular was engaged in and it may be that
 8 in the course of this deposition some of the
 9 questions either directly or indirectly list
 10 what might be confidential or privileged
 11 information and it's my understanding that the
 12 parties who would possess that privilege are
 13 in this room and therefore to the extent that
 14 there's an objection I will assume that it's
 15 going to be asserted by them since Willkie
 16 Farr and Mr. Feldman have no problem with
 17 disclosing to those parties themselves
 18 privileged information but it's something that
 19 since those parties are now engaged in a
 20 dispute that probably Willkie may offer some
 21 guidance and would probably be the ultimate
 22 arbiter of that so I'm going to assume that
 23 absent objection there isn't an objection and
 24 if there's an objection naturally we'll take
 25 it from there.

3 (Pages 6 to 9)

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1 MR. SHERRILL: Well, ET Power would note
2 that it has not waived the privilege and we
3 assume that you'll advise your client
4 accordingly if the circumstance comes up where
5 that's a concern.

6 MR. NETZER: Okay but I assume also that
7 since you are currently representing them that
8 your responsibility for asserting that
9 privilege doesn't end just with that statement
10 so I'm looking for -- all I'm saying is I'm
11 looking for guidance, we'll accept guidance.

12 MS. PAYNE: I appreciate your statement.
13 Let me make one point that I believe we've
14 made to both Willkie Farr in general and the
15 lawyers for ET Power is that given that this
16 was a joint client relationship and under
17 applicable law there really is no privilege to
18 matters that relate at this joint client
19 relationship so we can deal with those issues
20 later should it come up but I understand your
21 position.

22 MR. SHERRILL: Not to belabor it but it
23 is certainly the case that Willkie represented
24 both entities. Whether or not, at the same
25 time whether the conclusion of what remains or

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1 Q. Okay. And it's your understanding
2 though that Sutherland handled I guess the initial
3 litigation and then what ultimately turned into an
4 arbitration which Sutherland took the lead role in
5 the arbitration, correct?

6 A. That's my understanding.

7 Q. Were you involved in the decision that
8 lead up to Sutherland taking that role as opposed
9 to Willkie Farr taking that role?

10 A. No, I don't believe I was.

11 Q. Who was involved in making a decision
12 that Sutherland would take that role as opposed to
13 Willkie Farr?

14 A. Management of NEGТ and ET made the
15 decision on what roles the law firms would play.

16 Q. Did you advise the management in that
17 issue?

18 A. No.

19 Q. Did you have any input?

20 A. Management came to us and asked us what
21 expertise we had across various needs that they
22 had, across various issues that they had the
23 required legal help and we do not have significant
24 expertise in energy swaps and that type of
25 transaction.

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1 is not privileged is not one that Willkie
2 wants to be the arbiter of or should be so
3 that's all. Obviously the issue is
4 potentially a sensitive one and we don't want
5 to lose any of our present clients.

6 MS. PAYNE: I understand.

7 Q. Mr. Feldman, back to I believe where we
8 were you were involved at least to some degree in
9 the matters relating to the Liberty and ET Power
10 tolling agreement, correct?

11 A. I received regular reports and
12 remonitored that situation.

13 Q. Can you tell me, at some point it's my
14 understanding that the law firm of Sutherland
15 Asbill Brennan took some role in handling some
16 aspect of the dispute between Liberty and ET
17 Power. Can you explain to me how the work was
18 divided between those two law firms.

19 A. Specifically with respect to Liberty?

20 Q. With respect to the dispute between
21 Liberty and ET Power.

22 A. I don't recall what role Sutherland took
23 specifically. Willkie's role was really
24 monitoring what was going on in that lawsuit
25 originally and then mediation.

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1 Q. So energy swaps, that's your
2 understanding of what the dispute that Liberty
3 Electric concerned?

4 A. It's a broader category referring to the
5 kinds of trading activities that NEGТ engaged in
6 prior to bankruptcy including the Liberty toll
7 agreement.

8 Q. What was your view of the potential
9 impact of the judgment or verdict in the
10 arbitration? Which entity would that impact, do
11 you recall?

12 A. My recollection is that there would be
13 three entities impacted by that. One would be ET,
14 one would be NEGТ and one would be GTN which was
15 the pipeline company that NEGТ owned that was not
16 at the time a debtor in bankruptcy.

17 Q. Can you explain how those three entities
18 would be affected by that outcome of the
19 arbitration.

20 A. My memory is that while ET had a direct
21 contractual relationship with Liberty both NEGТ
22 and GTN had provided guarantees of ET's either
23 payment or performance, I don't recall which. I
24 don't recall the details of the guarantee as I sit
25 here but there was a guarantee that NEGТ and GTN

4 (Pages 10 to 13)

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1 had provided.
2 Q. Was there any analysis or discussion
3 about whether ET Power would pay any resulting
4 judgment or if Liberty would be looking to the
5 guarantors to pay?
6 A. Discussion with whom?
7 Q. Fair enough. Do you recall any
8 discussions frankly with anybody concerning
9 whether ET Power would pay the amount to Liberty
10 directly or whether GTN or NEGT as guarantors
11 would be required to pay?
12 MR. NETZER: I take it there's no
13 objection to the witness answering that
14 question.
15 Go ahead.
16 A. I do recall some conversations about
17 that.
18 Q. Can you tell me about that.
19 A. You know, the conversation arose in the
20 context of NEGT selling its stock in GTN to
21 TransCanada or whoever turned out to be the
22 highest bidder but it ultimately turned out to be
23 TransCanada.
24 Q. And what was the content of those
25 discussions?

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1 A. TransCanada which was buying the stock
2 of GTN did not want to acquire the liability that
3 might arise under the guarantee.
4 Q. And at some point was it understood that
5 Liberty would be looking to GTN to satisfy the
6 obligation of the GTN guarantee?
7 A. At least on the NEGT and perhaps
8 TransCanada side that was viewed as a risk.
9 Q. I'm not sure I understand that answer.
10 A. It was certainly a risk to TransCanada
11 and frankly to NEGT that at some point Liberty to
12 the extent they had a claim under the guarantee
13 would assert it.
14 Q. Okay. And what point did Liberty make
15 it clear which entity it was looking towards to
16 pay? It had three choices as I understand it. It
17 could look to ET Power, it could look to NEGT,
18 both of whom are debtors and it could look to GTN.
19 At what point did it make its I guess focus clear
20 as to which entity it was seeking payment from?
21 A. I suppose the first time I was aware of
22 who they were going to seek payment from was when
23 they filed the lawsuit in Texas state court.
24 Q. And that was one of the lawsuits that
25 was pending that ultimately got wrapped into the

Page 16

1 arbitration, correct?
2 A. That's my belief.
3 Q. Okay. Was there any analysis prior to
4 the arbitration award date so any time prior to an
5 actual arbiter award, was there any discussion
6 among the Willkie Farr lawyers or the Sutherland
7 lawyers or management that dealt with who was
8 ultimately responsible for the debt to Liberty?
9 A. I don't recall any discussions, specific
10 discussions.
11 Q. Are you saying that you don't recall any
12 or that they might have happened, you just don't
13 remember them as you sit here today?
14 A. I don't recall whether there were
15 discussions.
16 Q. Were there any assumptions on your part
17 as to where that debt ultimately would lie?
18 MR. NETZER: Before you answer I'm not
19 going to keep doing this but when I don't hear
20 objections I'm not going to constrain the
21 witness.
22 Go ahead.
23 A. Can you repeat the question. I got
24 lost.
25 MS. PAYNE: Can you repeat the question

Page 17

1 please.
2 (Whereupon, the referred to question was
3 read back by the Reporter.)
4 A. Yes.
5 Q. And what was that assumption?
6 A. I certainly believed that ET would be,
7 that that debt would turn into a claim in the ET
8 case.
9 Q. At any point did ET say or do anything
10 that challenged that assumption, in other words
11 did they indicate to you that they did not think
12 that they would be responsible for the debt if
13 NEGT or GTN were to pay under either of the
14 guarantees?
15 A. Not that I recall.
16 Q. Okay. When was the first time you
17 recall hearing anything that indicated that ET
18 Power believed that they were not responsible for
19 the payment that was paid under the GTN guarantee?
20 A. I couldn't tell you the specific even
21 year when I first heard that.
22 Q. Was it recently?
23 A. In context it was after each of the
24 cases had confirmed their plans and it arose in
25 connection with a discussion at an NEGT board

5 (Pages 14 to 17)

MATTHEW A. FELDMAN

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1 meeting but I don't recall when it was.
 2 Q. Do you recall any specifics about the
 3 NEGТ board meeting at which it arose?
 4 A. No.
 5 Q. I want to go back through some of the
 6 events that occurred, and I know that it's been a
 7 long time and you had other cases since then but I
 8 want to try to give you some framework in which to
 9 place your recollections. The arbitrators came
 10 out with an award for 140 million in favor of ET
 11 Power. Do you recall that?
 12 A. I'm sorry, 140 in favor of ET Power?
 13 Q. Actually it was more than that if I
 14 recall. It was approximately 162 or something
 15 like in that nature. Do you recall that? The
 16 arbitrators came out in favor of ET Power. Do you
 17 recall that?
 18 A. No.
 19 MR. NETZER: I suspect, I think you may
 20 be misspeaking.
 21 MS. PAYNE: You're right, I am.
 22 Q. The arbitrators came out with an award
 23 in favor of Liberty --
 24 A. That I recall.
 25 Q. Let's make sure the record's clear on

Page 19

1 that. So there was an arbitrator's award in favor
 2 of Liberty against ET Power on the tolling
 3 agreement issue, correct?
 4 A. That's my belief.
 5 Q. All right. And based on what you had
 6 been told about and you'd been informed in your
 7 supervisor role about that arbitration were you
 8 surprised at the outcome?
 9 A. Yes.
 10 Q. And why is that?
 11 A. I had been involved in discussions where
 12 lower numbers were talked about and felt that that
 13 was the high end of the potential range so even
 14 though it was within the range it was somewhat
 15 surprising.
 16 Q. And these discussions were between you
 17 and who else?
 18 A. Primarily management of the company.
 19 Q. All right. And do you know where
 20 management got its information concerning the
 21 numbers that it expected in the arbitration?
 22 A. I believe I know, yes.
 23 Q. And where did they get those numbers?
 24 A. They told me they were in discussions
 25 with the counsel that was handling the matter

Page 20

1 directly.
 2 Q. Which was Sutherland Asbill, correct?
 3 A. I don't recall at that time if it was
 4 Sutherland or someone else but it certainly could
 5 have been Sutherland.
 6 Q. Was management surprised, do you know
 7 whether management was surprised by the outcome?
 8 A. I don't know.
 9 Q. Do you recall a board meeting in which
 10 that outcome was addressed?
 11 A. I don't recall a board meeting.
 12 Q. Do you recall a meeting?
 13 A. Yeah, I do recall a meeting.
 14 Q. Can you tell me about that meeting.
 15 A. I think the discussion at the meeting
 16 was that this was the result from the arbitration
 17 and it was at the high end of the range and it was
 18 going to impact recoveries under the plans and
 19 there was a discussion around what that impact
 20 might be.
 21 Q. And who specifically do you recall was
 22 at that meeting?
 23 A. The only person I recall specifically
 24 was Joe Bondy who was CEO of NEGТ.
 25 Q. Were you involved in any meetings with

Page 21

1 ET Power management about the amount of the
 2 arbitrator's award or were they involved in that
 3 same meeting?
 4 A. I don't recall. I don't recall anyone
 5 from ET Power being there, don't recall.
 6 Q. Now, a part of that award was what I'll
 7 refer to in shorthand as the post-petition
 8 interest portion of the award based on how Liberty
 9 wanted to allocate portions of that award. Do you
 10 recall that issue generally?
 11 A. That I do recall.
 12 Q. Okay. And what's your recollection
 13 about Willkie Farr's involvement with that
 14 particular issue?
 15 A. That issue we were more directly
 16 involved in.
 17 Q. All right. Why was Willkie Farr now
 18 involved in the issue with respect to the
 19 post-petition interest, yet not previously
 20 involved in the arbitration?
 21 A. Well, one of the areas we do have
 22 expertise in are bankruptcy-related areas and
 23 entitlement to post-petition falls much more
 24 squarely under the bankruptcy rule book.
 25 Q. Who from your team was primarily

6 (Pages 18 to 21)

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1 involved with the dispute concerning post-petition
2 interest?

3 A. The partner who had most direct
4 involvement was Steve Wilamowsky.

5 Q. And Steve Wilamowsky left Willkie Farr
6 as of January 2007 and is now with Bingham
7 McCutchen, correct?

8 A. I believe that's correct.

9 Q. Did you have any sort of role or
10 supervision over Mr. Wilamowsky's work on that
11 post-petition interest proceeding?

12 A. I did.

13 Q. What do you recall about those
14 proceedings generally?

15 A. You know, all I recall was that we
16 confronted the issue in the bankruptcy court and
17 it wound up being appealed up to the fourth
18 circuit and then coming back down and if memory
19 serves it went either all the way up or part way
20 up a second time and I believe it was ultimately
21 -- strike that. I don't recall whether it was
22 ultimately settled or the court resolved it, I
23 just don't recall.

24 Q. The post-petition interest appeal, you
25 had the initial bankruptcy court ruling, then it

Page 23

1 was appealed up to the district court, correct,
2 and then it was appealed again to the fourth
3 circuit?

4 A. That's my understanding.

5 Q. And the bankruptcy court had initially
6 ruled against ET Power and in Liberty's favor, is
7 that your recollection?

8 A. I don't recall.

9 Q. Okay. Would there have been a need to
10 appeal that decision up to the district court had
11 the ruling been in favor of ET Power?

12 A. There would not have been a need by ET
13 Power.

14 Q. Okay. And is it your recollection that
15 the appeal was done by ET Power?

16 A. I don't recall.

17 Q. Okay. But you do recall that, and I'm
18 trying to do this the easy way so I don't have to
19 bring out a bunch of documents, I'm hoping we
20 don't have to do that but do you recall that the
21 argument that Willkie Farr was making was that the
22 17 million or so in post-petition interest should
23 not be paid to Liberty? Do you recall that
24 generally?

25 A. I recall that was the thrust of the

Page 24

1 argument ET Power was making through the court
2 process, correct.

3 Q. And that ultimately the fourth circuit
4 court of appeals ruled and held that the interest
5 was not payable, the post-petition interest was
6 not recoverable?

7 A. I recall, again I couldn't remember
8 whether it was a ruling or settlement but a
9 decision it was not going to be paid.

10 Q. Okay. During that time frame Willkie
11 Farr was representing both ET Power and NEGТ,
12 correct?

13 A. We had concurrent representations,
14 correct.

15 Q. Let me ask you this: If it was your
16 understanding that there was any divergence of
17 interest between ET Power and NEGТ in connection
18 with the appeals related, proceedings related to
19 the post-petition interest issue would Willkie
20 have continued representing both parties?

21 A. We would have not wanted to represent
22 both parties if there was a diversion of interest.

23 Q. What was the process that's available in
24 these sorts of situations under bankruptcy
25 proceedings if there's a divergence of interest?

Page 25

1 A. There's a number of different ways it
2 could have been handled. You could have brought
3 in special counsel, you could have seeded the
4 authority's creditors' committee counsel, the
5 credit risk committee, the ET and NEGТ, they could
6 have had separate creditors' committees, could
7 have gotten written consent of all the parties to
8 continue the representation notwithstanding the
9 potential conflict. There would have been a lot
10 of options.

11 Q. All right. But none of those were
12 utilized in this instance because the perception
13 was that the interests of the two parties were
14 fully aligned on the post-petition interest
15 dispute, correct?

16 A. I was not aware of a conflict over the
17 post-petition interest issue.

18 Q. All right. Are you aware today that one
19 of the arguments that ET Power is making against
20 NEGТ's exercise of subrogation rights is that
21 Liberty was not paid in full because it did not
22 receive the 17 million or so in post-petition
23 interest? Are you aware today that they are
24 currently making that argument?

25 A. I read that in ET's pleading.

7 (Pages 22 to 25)

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1 Q. Were you aware at any time during
2 Willkie's representation of NEGT and ET on the
3 post-petition interest issue that ET either
4 intended to make that argument or had decided to
5 make that argument in the future?

6 A. I was not aware of that argument until I
7 read the ET pleading.

8 Q. When did you read it? Was that
9 recently?

10 A. Within the last month.

11 Q. If ET Power knew it was intending to
12 make that argument in the future is that
13 information that you would have liked to have
14 known?

15 A. Generically I would like to know
16 everything that was going with ET and NEGT. They
17 were my clients and I certainly was interested in
18 their views in all these issues.

19 Q. In fact it would be important to know as
20 a lawyer if there were conflicting interests of
21 your joint clients, correct?

22 A. I don't know whether the
23 characterization important is right or not right.
24 I would have been good to them.

25 Q. All right. Now, after the post-petition

Page 27

1 interest issue was decided there was a subsequent
2 issue I think you alluded to a moment ago which
3 concerned what I'll call a prepetition invoice and
4 there was an invoice of about 5.4 million dollars
5 that was a prepetition invoice that ET was also
6 seeking a recovery on. Do you recall any
7 specifics about that work that was done?

8 A. Yeah, I recall there'd been an invoice
9 for I forgot if it was one or two months and
10 Liberty asserted that that was part of their
11 claim/recovery.

12 Q. And who handled that matter on behalf of
13 Willkie Farr? Do you recall?

14 A. I believe that was Mr. Wilamowsky.

15 Q. As with the post-petition interest
16 issue, ET is currently making the argument that
17 the amount that Mr. Wilamowsky was able to
18 essentially save the estates related to that 5.4
19 million dollar prepetition invoice issue is now a
20 basis for claiming that Liberty was not paid in
21 full in this and that's a basis for refusing to
22 pay the 140 million back under the GTN guarantees.
23 Were you aware of that?

24 A. I am aware of that.

25 Q. Were you aware at the time that

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1 Mr. Wilamowsky on behalf of Willkie Farr was doing
2 that work, that that was a position ET Power was
3 going to take against NEGT in the future?

4 A. I'm sorry, I don't understand the
5 question.

6 Q. What don't you understand?

7 A. I'm not sure I understand which work and
8 I'm not understanding what time frame you're
9 referring to with Mr. Wilamowsky.

10 Q. Okay. At that point he was at Bingham,
11 correct? Is that what you're referring to?

12 A. No.

13 Q. Okay.

14 A. I think at the very end he was with
15 Bingham but for much of the time he was still
16 there. The question had multiple parts to it and
17 I just couldn't follow it.

18 Q. All right. You recall the 5.4 million,
19 and I'm using round numbers here, prepetition
20 invoice issue, correct?

21 A. I do.

22 Q. And while that work was being done were
23 you aware that ET Power would use that argument,
24 would use any savings that was acquired through
25 those arguments against NEGT in its efforts to

Page 29

1 exercise subrogation rights?

2 A. I was not aware of it at that time.

3 Q. And when was the first time you were
4 aware that that argument would be made?

5 A. When I read it in ET's pleading.

6 Q. You referenced earlier that there was a
7 settlement or you believe that there was a
8 settlement of issues between Liberty and ET Power.
9 Do you recall that?

10 A. No, I don't recall.

11 Q. I'm handing you documents that have been
12 marked as Exhibits 10 and 11.

13 (Whereupon, the aforementioned documents
14 were marked as Exhibits 10 and 11 for
15 identification as of this date by the
16 Reporter.)

17 Q. Can you tell me what those are.

18 A. Exhibit 10 is a pleading including a
19 settlement agreement between ET Power and Liberty
20 and Exhibit 11 appears to be an order approving
21 that settlement.

22 Q. There's a file up at the top that says
23 December 24, 2008 and then the order was issued in
24 January, early January of '09, correct?

25 A. That's what the document said.

8 (Pages 26 to 29)

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1 Q. Okay. And you don't have any reason to
2 dispute that, correct?

3 A. I do not.

4 Q. If you could turn to page 6 of the
5 stipulation that's attached to Exhibit 10 and look
6 at paragraph 7 for me that's entitled Release By
7 Liberty. Have you had a chance to read it?

8 A. I've read it.

9 Q. After this release or this order was
10 filed, signed by the court are you aware of any
11 claim that Liberty might have against ET Power
12 relating to the original tolling agreement?

13 A. Are you asking me my opinion or for a
14 legal conclusion?

15 Q. We'll start with the first. What's your
16 opinion?

17 A. I'm not aware of any claim.

18 Q. Okay. The second was the legal
19 conclusion. Do you think that Liberty in light of
20 this release provision and the settlement and the
21 court's order which is Exhibit 11 would Liberty
22 have any sort of claim against ET Power relating
23 to the original tolling agreement?

24 A. It does not appear so to me.

25 Q. So in your view Liberty has been paid in

Page 31

1 full on all of its obligations relating to the
2 original tolling agreement with ET Power?

3 A. Again my opinion would be they've been
4 paid in full.

5 Q. Okay. Were you familiar with the
6 original guarantees that are at the bottom of all
7 this?

8 A. I've read them and certainly at the time
9 was familiar with them.

10 Q. And I have them here, I can let you read
11 them some more if you'd like but if you can do
12 this on recollection even better. Do you recall
13 that there were two guarantees, one was from GTN
14 and one was from NEGT?

15 A. I do recall that.

16 Q. Do you recall that a payment on the
17 amount of one would dollar for dollar reduce any
18 obligation for the other?

19 A. That was my understanding of how the
20 guarantees worked.

21 Q. Okay. And there was a cap on the total
22 amount owed, correct?

23 A. Correct.

24 Q. And at the time that the Liberty dispute
25 arose it was 140 million. Do you recall that?

Page 32

1 A. Yeah. My memory is that it had
2 originally been slightly higher but it was reduced
3 to 140 million prior to this dispute arising.

4 Q. Were you involved in any of the
5 decision-making back in May of 2005 to release 140
6 million in funds to Liberty to satisfy the GTN
7 guarantee obligations?

8 A. I was part of the group that was dealing
9 with that, yes.

10 Q. And what do you recall about that
11 generally?

12 A. My recollection is that TransCanada in
13 particular was focused on ensuring that to the
14 extent the money got released out of escrow that
15 there not be any liability back to TransCanada.

16 Q. Do you have any recollection about why
17 the funds were released in May of 2005 as opposed
18 to some other time?

19 A. My recollection is that there was
20 interest ticking away and there was a desire to
21 reduce the amount of interest that would
22 potentially be payable to Liberty.

23 Q. Did ET Power indicate to you or anybody
24 else that you're aware of at the time that the
25 preparations were being made to release the 140

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1 million in funds to Liberty pursuant to the GTN
2 guarantee, did ET indicate that it intended to
3 contest NEGT's ability to recover or assert a
4 claim for 140 million dollars?

5 A. At that time?

6 Q. Yes.

7 A. Not that I recall.

8 Q. If ET Power had made it clear in the May
9 2005 time frame that it did not intend to repay
10 NEGT for the amounts that were paid under the GTN
11 guarantee would you have allowed those funds to be
12 released?

13 A. I don't know the answer to that.

14 Q. Why not?

15 A. I don't think it was up to me to allow
16 or not allow.

17 Q. Would you have advised NEGT to release
18 those funds?

19 A. I don't know.

20 Q. Would you have taken other steps to
21 protect NEGT's interest, subrogation interest at
22 that point?

23 A. The issue would have been raised
24 directly at that point.

25 Q. And what do you mean by that?

9 (Pages 30 to 33)

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1 A. I think had me, had everyone understood
2 the position that ET was taking with respect to
3 subrogation rights at that point there would have
4 been an obvious conflict and parties could have
5 made their own determinations about how they
6 wanted to proceed and maybe it would have
7 proceeded just the way it did or maybe it would
8 have proceeded differently.

9 Q. But certainly the parties would have had
10 an opportunity to address it at that point before
11 the 140 million dollars was distributed, correct?

12 A. I believe that's correct.

13 Q. If it had been known prior to May of
14 2005 when the funds were released that ET Power
15 intended to challenge NEGT's right to assert
16 subrogation rights to recover the amounts paid
17 under the GTN guarantee there are ways in which
18 the GTN transaction itself could have been
19 restructured, correct?

20 A. That's correct.

21 Q. I want to show you what has been
22 previously marked as Exhibit Number 6. This is an
23 order by the court relating to the distribution of
24 the 140 million dollars in May of 2005 and in
25 particular I want to address your attention to the

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1 the two guarantees operate by their terms is that
2 payment under one, for example the GTN guarantee
3 would discharge any payment obligation by NEGT by
4 its terms, correct?

5 A. That's my memory of how the guarantees
6 work.

7 Q. And as a result of that then Liberty
8 could not seek to enforce payment under the NEGT
9 guarantee?

10 A. I mean you're asking for a legal
11 conclusion. That's my belief. Somebody's going
12 to have to decide that at some point.

13 Q. But that is your belief and
14 understanding?

15 A. That's my understanding and belief.

16 Q. And frankly then it makes any specific
17 reference to NEGT in this paragraph on page 3
18 really unnecessary, correct?

19 A. Legally I think that's correct.

20 Q. It's your understanding then and was
21 back at the time that the payment of 140 million
22 dollars under the GTN guarantee discharged any
23 payment obligations for NEGT under the NEGT
24 guarantee?

25 A. It was my understanding that payments

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1 first full paragraph on page 3 but take your time
2 and read the whole thing if that's helpful.

3 A. I've read it.

4 Q. That first full paragraph on page 3 of
5 Exhibit Number 6 there's some language in there
6 focusing on the GTN guarantee, correct, and in
7 particular that towards the bottom of the
8 paragraph it states that, "upon receipt of the
9 payment the 140 million dollars, (1), Liberty and
10 Liberty Electric shall have no other further
11 claims against GTN arising under or relating to
12 NEGT and, (2), GTN shall be irrevocable in
13 unconditional release in full from any and all
14 liabilities under any respect of the GTN
15 guarantee." Do you see that line?

16 A. I do.

17 Q. Do you know why similar language related
18 to NEGT was not included?

19 A. I don't know specifically.

20 Q. Okay. Do you know which party was a
21 proponent of this particular language, page 3 on
22 Exhibit 6?

23 A. Yeah, it was TransCanada which at that
24 time owned GTN.

25 Q. But it's your understanding based on how

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1 under the GTN guarantee would reduce the amounts
2 payable under the NEGT guarantee dollar for
3 dollar.

4 MS. PAYNE: Off the record.

5 (Whereupon, an off-the-record discussion
6 was held.)

7 Q. I have a few follow up questions but I
8 think we can do this quickly. I'm going to hand
9 you what has previously been marked as Exhibit
10 Number 4 and this is the post-closing escrow
11 agreement and are you familiar with this document
12 generally?

13 A. Yeah, I'm familiar that it was signed.

14 Q. Okay. And this post-closing escrow
15 agreement, Exhibit Number 4 was a part of the
16 documents related to the sale of GTN to
17 TransCanada, correct?

18 A. That's my understanding.

19 Q. And the idea was that 241 million
20 dollars would be put into an escrow account to
21 allow the various parties to work through
22 guarantee obligations that GTN had?

23 A. I think it also related to purchase
24 price adjustments but I don't recall for sure
25 whether that's the case.

10 (Pages 34 to 37)

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1 Q. All right. And it was out of the escrow
2 account that was governed by this post-closing
3 escrow agreement that the 140 million that was
4 paid to Liberty, correct?
5 A. If you're asking whether the 241
6 included 140 million earmarked or allocated for
7 Liberty that's correct.
8 Q. Now, if you can turn to page 9, and I've
9 actually tabbed there for you, there's a paragraph
10 7 that talks about assignment of subrogation
11 rights. Can you read that quickly please. I
12 don't know whose handwritten notations those are.
13 A. I've read it.
14 Q. Okay. So as a part of the overall GTN
15 transaction in this post-closing escrow agreement
16 it was clear that any subrogation rights
17 associated with the GTN guarantee related to the
18 Liberty matter would be transferred to the seller
19 entity, correct?
20 A. That would be my opinion.
21 Q. And that appears to be what paragraph 7
22 calls for, correct?
23 A. That's why that would be my opinion. I
24 agree.
25 Q. Okay. I want to hand you a document

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1 that was previously marked as Exhibit Number 7.
2 Can you tell me what Exhibit Number 7 is.
3 A. It's a memo authored by Steve Wilamowsky
4 when he was at Willkie Farr to Charles Goldstein
5 and Brian Cejka.
6 Q. And who is Charles Goldstein?
7 A. Charles is in charge of ET's
8 liquidation. I don't candidly recall what
9 capacity whether he's an officer or outside
10 consultant or what he is.
11 Q. Who is Brian Cejka?
12 A. Brian plays the same role for NEGTE.
13 Q. And you were copied on this particular
14 memo, right?
15 A. My name suggests I was copied on the
16 memo.
17 Q. Do you recall receiving the memo?
18 A. I do not recall.
19 Q. Do you have any reason to believe that
20 you did not receive it?
21 A. I don't have any reason to believe I did
22 not receive it.
23 Q. I want to direct you to paragraph 2 and
24 in particular on the first page and in particular
25 the last sentence on paragraph 2. If you could

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1 look that over I have a question for you.
2 A. I've read it.
3 Q. Exhibit 7 deals with what we were
4 discussing earlier and referred to as the
5 post-petition interest appeal, correct?
6 A. That's correct.
7 Q. All right. And as this memo indicates
8 Judge Manus, he's a bankruptcy judge, correct?
9 A. That's correct.
10 Q. Judge Manus had permitted Liberty to
11 collect 17 million from ET Power in what we
12 consider to be post-petition interest, correct?
13 A. Yes.
14 Q. This memo was addressing whether there
15 should be an appeal of that adverse order.
16 A. That's the topic of the memo, that's
17 correct.
18 Q. Now, the memo is generally providing
19 Mr. Goldstein and Mr. Cejka with Mr. Wilamowsky's
20 assessment of whether an appeal, factors that
21 should be used in determining whether an appeal
22 should be pursued. Is that a fair assessment?
23 A. I think Mr. Wilamowsky was speaking in
24 behalf of the firm but yes, he's the author of the
25 memo.

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1 Q. In paragraph 2 that very last sentence
2 says, "winning on appeal would also eliminate any
3 interdebtors issues between NEGTE and ET Power
4 associated with Liberty's claim." What's your
5 understanding as to the meaning of that sentence?
6 A. Without talking to Steve I'm not sure I
7 want to speculate what I think he was getting at.
8 Q. I guess I'm not asking what he was
9 thinking, I'm asking what do you draw from that
10 sentence. What do you understand it to mean?
11 A. I believe that how the 17 million would
12 be allocated between the two cases because that
13 amount was in excess of the base amount would have
14 been an issue in ET Power and NEGTE cases.
15 Q. When you say the 17 million was an
16 amount above the base amount what do you mean by
17 base amount? Is that the 140 million?
18 A. That's what I mean.
19 Q. And so the suggestion there is that
20 there is no dispute as to how the 140 million
21 would be dealt with but there might be a dispute
22 how the 17 million would be dealt with if there
23 were an adverse judgement?
24 A. That's a way to read what it said. That
25 implication exists from that sentence.

11 (Pages 38 to 41)

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1 Q. Based on what I think you said earlier
2 was that your assumption certainly through the
3 work that was done on this post-petition interest
4 issue was that the responsibility, the ultimate
5 responsibility for the 140 million dollars paid on
6 the Liberty claim would rest with ET Power,
7 correct?

8 A. ET Power would have a claim against it
9 in its case for 140 million dollars. That is what
10 I believe.

11 Q. And to put it a slightly different way
12 it was your understanding at that point that NEG
13 would not be the party that would be ultimately
14 responsible for that 140 million dollars as ET
15 currently contends?

16 A. That was my belief.

17 Q. And this memo reenforced that belief,
18 correct?

19 A. I think it's consistent with that
20 belief.

21 Q. Fair enough. Mr. Feldman, I've handed
22 you Exhibit Number 8 which was previously marked.
23 Let me ask you this: What is Exhibit 8?

24 A. It is a copy of the disclosure statement
25 for ET and its related debtors.

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1 A. It typically -- a disclosure statement
2 is vetted by all the professionals for the various
3 entities, the management of the entities,
4 sometimes the board of directors looks carefully
5 at it and if you're working cooperatively with one
6 or more committees those committees might have
7 input and review the over the disclosure
8 statement.

9 Q. When you say committees would that
10 include creditors' committees?

11 A. Among other potential committees yes.

12 Q. Do you recall in the preparation of this
13 particular disclosure statement, Exhibit Number 8
14 which was prepared for ET Power, do you recall who
15 had input in this particular document or passed
16 off on it, approved it?

17 A. I assume that beyond Willkie Farr and
18 Whiteford Taylor.

19 Q. Correct.

20 A. I don't recall who else had input on it.

21 Q. Certainly though if for example the ET
22 creditor committee was unhappy with anything that
23 was in this disclosure statement they had an
24 opportunity to make that known?

25 A. Certainly either before it was filed

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1 Q. All right. You're familiar with these
2 things known as disclosure statements because it's
3 something that's commonly required or I think
4 required in every bank.

5 A. In order to confirm a plan you have to
6 have an approved disclosure statement.

7 Q. Okay. When you say it has to be
8 approved who does it have to be approved by?

9 A. The judge supervising the case.

10 Q. All right. And on the first page of
11 Exhibit 8 there's Willkie Farr & Gallagher, a
12 second firm and would these two firms be the only
13 people who would prepare this document prior to
14 its filing with the court?

15 A. No.

16 Q. Who would be involved in the preparation
17 of a document such as this?

18 A. Management, financial advisers, if the
19 company had special counsel, special counsel might
20 be involved.

21 Q. Is it fair to say that in preparing a
22 disclosure statement that prior to filing that it
23 is distributed to, reviewed by and passed off on
24 by virtually everybody that's involved in the
25 matter?

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1 which I believe to have been the case or after
2 it's filed there's an objection process or if the
3 parties want to change the disclosure statement or
4 add additional disclosure they're given an
5 opportunity to do that.

6 Q. Do you know if that was done in this
7 case?

8 A. There were objections and statements
9 were made in the disclosure based on those
10 objections.

11 Q. Do you recall who made the objections?

12 A. I don't recall.

13 Q. But that would all be reflected in the
14 docket sheet, correct?

15 A. Correct.

16 Q. I want to refer you to page 21. There's
17 a section that starts on that page, section number
18 9 entitled Tolling Agreement Disputes?

19 A. Yes.

20 Q. Is the Liberty dispute with ET Power,
21 does that fall into the category of the tolling
22 agreement disputes?

23 A. I believe it does.

24 Q. And in fact it's listed there in the
25 first part of paragraph 9, correct?

12 (Pages 42 to 45)

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1 A. That's correct.
 2 Q. On page 22 there's an entire
 3 subparagraph entitled Liberty, correct?
 4 A. That's correct.
 5 Q. And the intention, is this a correct
 6 statement, was the intention of the disclosures
 7 with respect to Liberty here, the intention was to
 8 identify the current status of that matter as of
 9 that time?
 10 A. At least the current status and
 11 typically a disclosure statement will also try to
 12 describe the potential outcomes of the matter.
 13 Q. Turning to page 23 in subparagraph C
 14 there's a discussion entitled Impact on Creditor
 15 Recoveries. Do you see that?
 16 A. I do.
 17 Q. Can you read the two paragraphs under
 18 that section and then I have a couple of questions
 19 for you.
 20 A. I've read the paragraph.
 21 Q. All right. These paragraphs and
 22 particularly the second paragraph in subparagraph
 23 C indicate that ET Power would be responsible or
 24 the assumption was here that ET Power would be
 25 responsible whatever the outcome was in Liberty,

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1 whether it was the preferred outcome in which case
 2 there would be a larger distribution or the not
 3 preferred outcome in which case the estate would
 4 be smaller. Is that a fair statement?
 5 A. Yeah, I believe that's correct.
 6 Q. And by including Liberty in the
 7 discussions in this paragraph ET was indicating
 8 that it believed that it was responsible for
 9 payments made to Liberty, whatever those payments
 10 were ultimately adjudicated to be, correct?
 11 A. Can you repeat the question.
 12 Q. Sure.
 13 MS. PAYNE: Can you read back the
 14 question.
 15 (Whereupon, the referred to question was
 16 read back by the Reporter.)
 17 A. If there's nothing else in the
 18 disclosure statement which I have not read in a
 19 long time that would take the other position then
 20 I believe that's correct.
 21 Q. Was Willkie Farr involved in providing
 22 advice to NEGT concerning the effect of the GTN
 23 guarantees and the NEGT guarantees?
 24 A. Yes.
 25 Q. Was Willkie Farr involved in providing

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1 analysis, advice or disclosures concerning
 2 subrogation rights related to payments pursuant to
 3 the GTN guarantee and the NEGT guarantee?
 4 A. Providing advice to who?
 5 Q. Let's start with NEGT.
 6 A. I don't recall.
 7 Q. Do you recall providing advice of that
 8 nature to ET Power?
 9 A. I don't recall.
 10 Q. Earlier you mentioned something that I
 11 think was referred to as conflicts counsel,
 12 correct?
 13 A. I did reference that, yes.
 14 Q. Was there an assumption along the way
 15 that there would be, there would likely be
 16 intercompany issues between NEGT and ET Power that
 17 would require Willkie Farr to bring in what you
 18 refer to as conflicts counsel? Is that fair?
 19 A. When the case is filed we had separate
 20 counsel for US Gen New England because we knew
 21 there was a significant conflict between NEGT and
 22 US Gen New England. With respect to ET I would
 23 say we were going to feel our way forward and if
 24 that arose we would find a way to deal with it,
 25 either the conflicts counsel, creditors'

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1 committee, disclosure, whatever it might be.
 2 Q. The issue of NEGT pursuing subrogation
 3 rights against ET Power arose, and this is the
 4 issue that Vinson & Elkins is assisting with,
 5 Willkie Farr made the determination that it would
 6 not be involved in that progression, correct?
 7 A. I don't recall whether NEGT and ET made
 8 that determination or we made the determination
 9 but the determination was made that we should not
 10 be involved.
 11 Q. At this point ET Power is currently
 12 represented by Sutherland Asbill & Brennan in
 13 connection with this subrogation dispute. Do you
 14 understand that?
 15 A. That's my understanding.
 16 Q. Were you involved in any discussions in
 17 which a decision was made by either management or
 18 counsel that would allow Sutherland to go forward
 19 instead of obtaining conflicts counsel?
 20 A. I wasn't involved in any discussions
 21 around that.
 22 Q. As you sit here today do you have any
 23 opinions as to whether NEGT should be entitled to
 24 enforce subrogation rights against ET Power?
 25 A. I'm not deep enough into this to have an

13 (Pages 46 to 49)

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1 opinion on that.
2 Q. Do you recall whether Willkie Farr
3 provided any advice or analysis concerning the
4 assignment of GTN's subrogation rights?
5 A. I'm sorry, I don't understand the
6 question.
7 Q. All right. As we discussed earlier
8 there was an assignment of subrogation rights
9 pursuant to the post-closing escrow agreement?
10 A. I recall seeing it, yes.
11 Q. What do you recall about what advice,
12 analysis or disclosures was conducted by Willkie
13 Farr with respect to the assignment of those
14 rights?
15 A. I don't recall, I don't recall.
16 Q. Okay. There might have been some, you
17 just don't remember as you sit here?
18 A. That's correct.
19 Q. Were you involved in the GTN transaction
20 itself? Were you part of the deal team that put
21 that transaction together?
22 A. Yes.
23 Q. And so you were involved in actually
24 coming up with the form of the structure of the
25 transaction?

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1 A. That's correct.
2 MS. PAYNE: I'll pass the witness.
3 MR. SHERRILL: Can we have a short break
4 to talk for just a few moments.
5 (Whereupon, a break was taken from 10:50
6 until 11:00.)
7 EXAMINATION BY
8 MR. SHERRILL:
9 Q. Mr. Feldman, as we discussed my name is
10 Mark Sherrill. I'm with Sutherland Asbill &
11 Brennan. I have just a few questions.
12 You said at one point in your view
13 Liberty was paid in full as a result or following
14 the eventual settlement agreement. Can you tell
15 us what you mean by that.
16 A. I don't think I said Liberty was paid in
17 full. I said that I believe GTN had paid the
18 amounts it owed in full and NEGТ had paid the
19 amounts it owed in full. I think that's what I
20 was asked. I think the settlement with Liberty
21 suggested, said it was paid in full and had no
22 further claims.
23 Q. You're aware that the arbitral award in
24 favor of Liberty against ET Power was
25 approximately 162 million, correct?

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1 A. I'm aware of that, yes.
2 Q. And the ultimate resolution was for
3 Liberty to be paid approximately 140 million
4 dollars plus the invoice amount which was
5 approximately five million dollars; is that
6 correct?
7 A. That's my understanding.
8 Q. Okay. We spent some time talking about
9 the joint representation of NEGТ and ET by
10 Willkie --
11 MR. NETZER: I'll object to the form of
12 that question. I'll tell you why if you want
13 me to or I'll be quiet if you want me to.
14 Q. Strike that. With respect to the joint
15 representation of NEGТ and ET by Willkie is it
16 fair to say that your focus was on maximizing
17 assets and minimizing claims?
18 MR. NETZER: Again for the same reason I
19 object to form.
20 Go ahead.
21 A. I think I said it was a concurrent
22 representation. Yes, we were focused on
23 maximizing the recovery on the assets and making a
24 deliberation of those assets to legitimate claim
25 holders.

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1 Q. With regard to Exhibit 8 which was the
2 disclosure statement of the ET debtors and
3 specifically with regard to the portions that we
4 talked about on pages 21 through 23, the impact on
5 creditor recoveries, do you recall who performed
6 the calculations underlying that analysis?
7 A. I don't specifically.
8 Q. In a typical bankruptcy case what entity
9 would perform the calculations that would underlie
10 the analysis that you see in the disclosure
11 statement?
12 MS. PAYNE: Object to form.
13 A. In my experience it would be either the
14 management, the company or some financial adviser
15 to the company that would perform those
16 calculations.
17 Q. And do you recall what entity was the
18 financial adviser to the debtors?
19 A. The debtors had more than one financial
20 adviser is my recollection.
21 Q. Do you recall who those were?
22 A. The debtors had retained Lazard and
23 Alvarez & Marsal.
24 Q. Do you recall whether Lazard was
25 involved in the calculations and the impact on

14 (Pages 50 to 53)

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1 creditor recoveries?
 2 A. I don't recall.
 3 Q. Do you recall whether Alvarez & Marsal
 4 was involved in those calculations?
 5 A. I don't recall.
 6 Q. Can you describe what Lazard's role was
 7 in the course of these bankruptcies.
 8 A. They were financial adviser to NEG, ET
 9 and US Gen New England. They took the lead on the
 10 M & A transactions for both US Gen New England as
 11 well as NEG and they played the role as sort of
 12 general financial adviser to NEG and its related
 13 subsidiaries with respect to debtor and possession
 14 financing, credit recoveries, sort of the typical
 15 role that you would expect to see.
 16 Q. And can you describe the role that
 17 Alvarez & Marsal played.
 18 A. Once the filing occurred and even in the
 19 short period of time before the filing A & M came
 20 in as sort of crisis managers and assumed a
 21 management role at the company and were also sort
 22 of charged with, you know, overseeing the cash at
 23 the company and the finances of the company.
 24 Q. Did Lazard provide restructuring
 25 services to the debtor entity, to the ET debtors?

Page 55

1 A. To the best of my recollection.
 2 Q. Did Alvarez provide restructuring
 3 services to the ET debtors?
 4 A. To the best of my recollection they did.
 5 Q. Has Willie ever been retained by ET or
 6 NEG to give advice on subrogation rights?
 7 A. Not that I recall specifically.
 8 Q. Have you performed any analysis or
 9 research with regard to specific application of
 10 the loss of subrogation rights to the facts
 11 involving NEG and the payments to Liberty?
 12 A. Not that I recall.
 13 MR. SHERRILL: No further questions.
 14 MS. PAYNE: I have nothing further.
 15 Thank you very much.
 16 (Whereupon, at 11:10 a.m., the
 17 Examination of this Witness was concluded.)
 18
 19
 20
 21
 22
 23
 24
 25

MATTHEW FELDMAN

Subscribed and sworn to before me
 this ____ day of ____ 2010.

NOTARY PUBLIC

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EXHIBITS

EXHIBITS:

EXHIBIT NUMBER	EXHIBIT DESCRIPTION	PAGE
9	Subpoena	4
10, 11	Documents	29

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CERTIFICATE

STATE OF NEW YORK)

: SS.:

COUNTY OF NEW YORK)

I, SHAVON KOLB, a Notary Public for and
within the State of New York, do hereby certify:

That the witness whose examination is
hereinbefore set forth was duly sworn and that
such examination is a true record of the testimony
given by that witness.

I further certify that I am not related
to any of the parties to this action by blood or
by marriage and that I am in no way interested in
the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set
my hand this 28th day of January, 2010.

SHAVON KOLB

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EXHIBIT 18

STEVEN WILAMOWSKY
January 27, 2010

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MARYLAND - GREENBELT DIVISION

-----X

In re: (Chapter 11
(Case No. 03-30459 (PM)
NATIONAL ENERGY & (and 03-30686 (PM) through
GAS TRANSMISSION, (03-30464 (PM) and 03-30686
INC., et al, ((PM) through 03-30687 (PM)
(
DEBTORS, (Jointly Administered as
(03-30459 (PM)

-----X

DATE: January 27, 2010

TIME: 9:30 a.m.

EXAMINATION BEFORE TRIAL of the
Non-Party Witness, STEVEN WILAMOWSKY, taken by the
Respective Parties, held at the offices of Bingham
McCutchen, LLP., 399 Park Avenue, New York, New
York 10022, before a Notary Public of the State of
New York.

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STEVEN WILAMOWSKY
January 27, 2010

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1 APPEARANCES:

2
3 VINSON & ELKINS, LLP.
4 Attorneys for NATIONAL ENERGY & GAS
5 TRANSMISSION
6 Trammell Crow Center
7 2001 Ross Avenue
8 Suite 3700
9 Dallas, Texas 75201-2975
10 BY: CAROL C. PAYNE, ESQ.

11
12 BINGHAM McCUTCHEN, LLP.
13 Attorney for the Witness
14 399 Park Avenue
15 New York, New York 10022
16 BY: TIMOTHY J. STEPHENS, ESQ.

17 SUTHERLAND ASBILL & BRENNAN, LLP.
18 Attorneys for NEGOT ENERGY TRADING-POWER,
19 L.P.
20 1275 Pennsylvania Avenue, NW
21 Washington, D.C. 20004
22 BY: MARK D. SHERRILL, ESQ.

23
24
25 PROTIVITI
For NEGOT ENERGY TRADING-POWER, L.P.
One East Pratt Street
Suite 800
Baltimore, Maryland 21202
BY: ROBERT L. PATRICK

* * *

1 NEGOT stands for?

2 A. Yes, correct.

3 Q. And we're also going to refer to an
4 entity as ET or ET Power and that entity is
5 formerly known as NEGOT Energy Trading-Power, L.P.
6 Is that your understanding as well?

7 A. Yes, although I think I would prefer if
8 you use the term ET Power because we've used ET in
9 the past to refer to ET Holdings. There are three
10 ET entities.

11 Q. Fair enough. I will try to use ET
12 Power. If I slip and say just ET I do mean ET
13 Power and if --

14 A. If the context is clear.

15 Q. If there's some other entity, ET entity
16 I will expressly state that in a different way but
17 my intent is that ET or ET Power means this
18 entity.

19 Liberty Electric, do you know what
20 company I'm talking about when I say Liberty
21 Electric?

22 A. Yes.

23 Q. I might refer to them as Liberty so we
24 have that agreement.

25 A. That's fine.

Page 3

Page 5

1 STEVEN WILAMOWSKY, called as a
2 witness, having been first affirmed by a Notary
3 Public of the State of New York, was examined and
4 testified as follows:

5 EXAMINATION BY

6 MS. PAYNE:

7 Q. Please state your name for the record.

8 A. Steven Wilamowsky.

9 Q. Where do you reside?

10 A. 60 Sealy Drive, Lawrence, New York
11 11559.

12 Q. Mr. Wilamowsky, my name is Carol Payne.
13 I represent NEGOT. You and I have not met before,
14 have we?

15 A. No.

16 Q. We've talked on the phone, haven't we?

17 A. Correct.

18 Q. Before we get going there's a few
19 defined terms, I want to be sure everything's
20 clear on the record as to what they mean and I've
21 talked to Mr. Sherrill about it. When I say NEGOT
22 I am referring to the entity known as National
23 Energy and Gas Transmission, Inc., all right?

24 A. Correct.

25 Q. And that is your understanding of what

1 Q. You are appearing today pursuant to a
2 subpoena, correct?

3 A. Yes.

4 Q. I'm handing you a copy, we're going to
5 mark this as Exhibit Number 5.

6 (Whereupon, the aforementioned subpoena
7 was marked as Exhibit 5 for identification as
8 of this date.)

9 Q. We're marking them sequentially based on
10 a series of exhibits. I'm handing you what has
11 now been marked as Exhibit 5. Is this a copy of
12 the subpoena that is to your firm Bingham
13 McCutchen for which you are appearing as a
14 representative, correct?

15 A. I believe so, yes.

16 Q. You've had an opportunity to look at it
17 and look at the attachments, Exhibit A and Exhibit
18 B?

19 A. Yes.

20 Q. Now, have you ever given your deposition
21 before?

22 A. I don't think so.

23 Q. Okay. You certainly taken depositions
24 but you've never actually given one?

25 A. Certainly defended depositions. I can't

2 (Pages 2 to 5)

STEVEN WILAMOWSKY
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<p style="text-align: right;">Page 6</p> <p>1 remember if I've taken depositions. 2 Q. All right. But you're familiar with the 3 protocol, if you want a break to tell me, I'll 4 give you a break. If you don't understand a 5 question, just let me know and I'll try to 6 rephrase it and make sure we're on the same page. 7 The only thing is it's helpful if I can have oral 8 answers instead of an uh-huh, uh-uh; makes it easy 9 for the court reporter. 10 With that can you -- 11 A. I'm not sure if I've defended 12 depositions. I sat in on a lot of depositions 13 representing for various parties but I'm not sure 14 if I've actually defended a deponent. 15 Q. Fair enough. Now, at some point in time 16 it's your understanding or you're familiar with 17 the fact that NEGT and certain of its subsidiaries 18 have filed for bankruptcy protection, correct, 19 back in I believe 2003? 20 A. 2003 is correct. 21 Q. And at the time that this happened you 22 were working for the law firm of Willkie, Farr & 23 Gallagher? 24 A. Correct. 25 Q. Can you tell me when you individually</p>	<p style="text-align: right;">Page 8</p> <p>1 witness is a 30 (B)(6) witness so I would 2 appreciate if you're asking about the witness 3 as an individual or Bingham McCutchen as a 4 firm. 5 MS. PAYNE: I will try to. If it's not 6 clear please feel free to tell me. 7 MR. STEPHENS: I will do my level best. 8 A. I think in both cases it would have been 9 about at the same time since I was the attorney 10 here spending, I'm responsible for about probably 11 95 percent of the time it was billed or 90 percent 12 of the time it was billed in the late stage of 13 this appeal, i.e., settling the final stipulated 14 matter and that would have been, when that 15 stipulation was entered by the court which 16 resolved the final five plus million dollar claim 17 that had been outstanding and we received 18 confirmation that that payment was made, at some 19 point thereafter we sent out a final bill. 20 Q. And when you're talking about that 21 stipulation settlement you're talking about the 22 settlement that involved Liberty Electric? 23 A. Yes. 24 Q. According to the documents I have that 25 would be in the December '08 or early January '09</p>
<p style="text-align: right;">Page 7</p> <p>1 first became involved in any aspect of those 2 proceedings, either for NEGT, Inc. or for any of 3 its subsidiaries. 4 A. That would have been shortly before the 5 chapter 11 filing. Maybe a month before. I'm 6 guessing but it was in the immediate period 7 preceding the filing of the chapter 11 cases. We 8 were called in fairly short, fairly short period of 9 time before the filing. 10 Q. And can you tell me who you and Willkie 11 Farr represented at that point. 12 A. We represented all of the chapter 11 13 debtors that filed ultimately including -- 14 Q. And that's NEGT, ET Power -- 15 A. Correct. 16 Q. -- and there were several other debtors 17 and it was all consolidated into a single case? 18 A. It was procedurally consolidated. 19 Q. Fair enough. Are you still continuing 20 to work on that, on any aspect of that bankruptcy? 21 A. No. 22 Q. All right. When did you cease providing 23 services, you individually or your firm Bingham? 24 MR. STEPHENS: I was going to ask you to 25 clarify, Counsel. When you say you, the</p>	<p style="text-align: right;">Page 9</p> <p>1 time frame? 2 A. Yes. 3 Q. That sound right? 4 A. Sounds about right. This was a residual 5 matter that we had settled relating to a claim 6 that the main appeal had already concluded some 7 time before. 8 Q. Once that Liberty settlement concluded 9 that was the tail end of your involvement and then 10 you and your firm Bingham have ceased involvement 11 in this NEGT consolidated bankruptcy? 12 A. Correct. 13 Q. Fair enough. Can you tell me just so I 14 understand, I've looked at aspects of this file so 15 I think I know generally what your involvement 16 might have been on certain aspects of it but I 17 want to confirm that so before you came to Bingham 18 can you tell me what certain jobs, I know a lot of 19 people have different pieces of the aspects of 20 this NEGT global bankruptcy. What parts did you 21 work on? 22 A. Very generally I worked on the 23 bankruptcy aspect, aspects relating to the 24 bankruptcy code, specifically relating to things 25 that typically would involve the court process so</p>

3 (Pages 6 to 9)

STEVEN WILAMOWSKY
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1 dealing with motions either contested or
2 uncontested, settlement stipulations within
3 contested matters, much more on the -- I'm sort of
4 a straight down the middle kind of bankruptcy
5 practitioner but in this case I would say I was
6 more involved in the litigation side of it rather
7 than on the transactional side.

8 Q. So for example when there's a
9 transaction involving an entity being referred to
10 as GTN are you familiar with that transaction?

11 A. I'm generally familiar with that
12 transaction although I was not involved in
13 documenting that transaction.

14 Q. Okay. So you know it occurred.

15 A. Right.

16 Q. That wasn't a piece you were responsible
17 for?

18 A. We had corporate lawyers that were
19 involved in it.

20 Q. Okay. Are you familiar with the dispute
21 between ET Power and Liberty that arose from a
22 tolling agreement between those two entities?

23 A. Yes.

24 Q. What was your involvement in the
25 bankruptcy matter with respect to that topic?

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1 MR. STEPHENS: You're asking again prior
2 to --

3 MS. PAYNE: Correct.

4 MR. STEPHENS: -- his arrival at Bingham
5 McCutchen?

6 MS. PAYNE: That's right. I'm trying to
7 get an understanding as to what his role was.

8 A. I was, additionally at that point I was
9 the senior associate that was tasked to deal with
10 the Liberty matter and when I say Liberty matter
11 let me make it clear, their motion in the
12 bankruptcy court.

13 Q. When you say their --

14 A. Their motion in the bankruptcy court to,
15 they wanted to, you know, they moved to enforce
16 the arbitration clause. They went down a path in
17 the bankruptcy court trying to ensure that their
18 claim would not, the substance of their claim
19 would not get litigated in the bankruptcy court.

20 Q. This is Liberty that you're talking
21 about?

22 A. This is Liberty.

23 Q. So as a result it ended up in
24 arbitration as I understand it?

25 A. It ended up in arbitration, that's

Page 12

1 correct. I was not involved in anything that was
2 in those arbitration proceedings and I was not in
3 the sense of being, you know, at litigating or
4 arbitrating those matters. That was sort of
5 something separate that was being handled by
6 Sutherland, by the Sutherland firm and I was not
7 involved for example -- I wasn't primarily
8 involved when they went down and they sued GTN in
9 district court in Texas for example. We hired
10 local district counsel.

11 Q. When Liberty sued GTN other counsel was
12 hired, that was not something you handled
13 personally?

14 A. Correct. They filed in district court
15 in Texas.

16 Q. Who did you report to? You said you
17 were senior associate on the matter.

18 A. I reported to a number of partners. I
19 mean NEGT at the time called NEG and that case
20 involving all the subsidiaries was a huge case.
21 It was now by today's standards a small case but
22 at that time it was the largest case filed in 2003
23 I believe and so I reported to a number of
24 partners, primarily Shelly Chapman and Matt
25 Feldman.

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1 Q. Do you know why lawyers from Willkie
2 Farr did not handle the Liberty arbitration and
3 instead that Liberty arbitration was handled by
4 Sutherland?

5 MR. STEPHENS: Counsel, let me stop you.
6 The 30 (B)(6) notice is directed to Bingham
7 McCutchen and is directed to an engagement by
8 Bingham McCutchen with NEGT and ET Power both
9 of whom are represented at this table but as
10 you said earlier in the deposition there are
11 other debtor entities. I am not aware of the
12 representation of those entities and I'm not
13 aware that those entities are aware of this
14 deposition so I think that counsel might be
15 proceeding down a path whereby attorney/client
16 privilege of those clients which Bingham has
17 nothing to do with might be imperiled if
18 you're asking about Willkie Farr's internal
19 deliberations and about which this deposition
20 is not directed so I would ask counsel to
21 confine her questions to the Bingham
22 engagement because that is what the deposition
23 calls for.

24 MS. PAYNE: Right. Certainly what
25 Mr. Wilamowsky did while he was at Bingham is

4 (Pages 10 to 13)

STEVEN WILAMOWSKY
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1 informed by what occurred prior to his coming
2 to Bingham because it was a matter that
3 straddled his move so I need to go into some
4 degree with what happened before because then
5 it makes more sense with what happened later.

6 MR. STEPHENS: If your questions do not
7 invoke -- I've counsel given latitude. If
8 your questions do not call for divulging some
9 kind of privileged conversation or
10 deliberation at Willkie Farr by all means but
11 I think the answers go to both Willkie if you
12 want to know what happened --

13 MS. PAYNE: We are tomorrow.

14 Q. If you're concerned about that then --

15 A. Let me say one thing in response to the
16 question. It may answer your question and if not
17 it won't but without getting into any internal
18 deliberations at least at that time at the time
19 that I was at Willkie, Willkie did not have an
20 energy practice to speak of. Sutherland does.
21 That's the answer to your question.

22 Q. At some point I guess after the
23 arbitration award was made in connection with the
24 Liberty/ET dispute, at some point you became
25 involved in an aspect of that, that ongoing

Page 15

1 dispute, correct?

2 A. Correct.

3 Q. Can you tell me what you recall about
4 when that was and at what point you became
5 involved in this Liberty/ET dispute since prior to
6 that it had been handled by Sutherland in
7 arbitration.

8 A. When we lost the arbitration. I mean I
9 was following what was going on but Sutherland was
10 leading the charge with that arbitration. It was
11 more just sort of being kept abreast of what's
12 going on in terms of the schedule. There may have
13 been some bankruptcy matters that came up in terms
14 of scheduling over the course of the arbitration
15 proceedings but the arbitration was being
16 principally and primarily handled by Sutherland
17 who knew a lot more about sparks price than we did
18 and so where we became involved again was only
19 after the arbitration was, after the decision came
20 down and the decision was made not to take any
21 steps to overturn that decision, the arbitration
22 ruling.

23 Q. All right. But at that point other
24 decisions were made with respect to positions that
25 were being taken by Liberty after the arbitration

Page 16

1 award, correct? I'm referring primarily to the
2 post-petition interest issue.

3 A. Yes, so at some point thereafter, after
4 the decision was reached and after the decision
5 was made not to try to, you know, appeal the
6 arbitration decision in any way Liberty took the
7 position which frankly surprised us at the time
8 that they were entitled to post-petition interest
9 and we didn't see it the same way and that led to
10 the litigation that I think you've reviewed and is
11 a matter of public record.

12 Q. Right, right. And ultimately you were
13 able to while the bankruptcy court and the
14 district court ruled in a way that will allow
15 Liberty to recover what I think you considered to
16 be post-petition interest, that issue was appealed
17 to the fourth circuit and again this is still
18 Willkie Farr, correct?

19 A. Yes.

20 Q. Were able to prevail on that issue?

21 A. No, that's not Willkie Farr. I joined
22 Bingham and took responsibility for the appeal in
23 the middle so.

24 Q. Fair enough.

25 A. Bingham won that one.

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1 Q. Okay. Fair enough. Willkie lost the
2 first two but Bingham won the last one.

3 A. Correct. It was actually fully briefed
4 by the time I left Willkie and it was just -- I
5 started -- we had fully briefed it, I started with
6 Bingham on January 1 of 2007, an oral argument was
7 in March so oral argument as already a Bingham
8 lawyer. When it was briefed originally I was
9 Willkie and the post-trial briefing was done from
10 this office, post-hearing briefing, I'm sorry.

11 Q. Now, the appeal was on behalf of NEGTE
12 and ET Power, correct?

13 A. Correct.

14 Q. And the debtors collectively prevailed
15 on that issue?

16 A. Correct.

17 Q. And it was determined that Liberty was
18 not entitled to post-petition interest?

19 A. Correct.

20 Q. Then at some point there was an
21 additional issue with respect to what I'll refer
22 to as a prepetition invoice. Do you recall what
23 I'm referring to?

24 A. Yes.

25 Q. It's a little over five million dollars.

5 (Pages 14 to 17)

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<p style="text-align: right;">Page 18</p> <p>1 A. Correct.</p> <p>2 Q. And there was again some adverse</p> <p>3 decision, what appeared to be an adverse decision</p> <p>4 in the bankruptcy court and appeal up to the</p> <p>5 district court.</p> <p>6 A. Right.</p> <p>7 Q. That was what was ultimately settled,</p> <p>8 correct?</p> <p>9 A. Correct.</p> <p>10 Q. After that settlement are you aware of</p> <p>11 any claim that Liberty has against any debtor</p> <p>12 related to the tolling agreement between ET</p> <p>13 Power --</p> <p>14 A. Am I aware of any claim that Liberty has</p> <p>15 against any debtor once it was paid the 5.1</p> <p>16 million dollars?</p> <p>17 Q. Let me restate my question. Are you</p> <p>18 aware once the settlement was made and the 5.1 or</p> <p>19 whatever the amount that was agreed to be</p> <p>20 exchanged pursuant to that settlement was actually</p> <p>21 made, are you aware of any claim that Liberty</p> <p>22 would have against any debtor that arose out of</p> <p>23 the original tolling agreement between Liberty and</p> <p>24 ET Power?</p> <p>25 MR. STEPHENS: Object to the form. Are</p>	<p style="text-align: right;">Page 20</p> <p>1 MR. STEPHENS: Object to the form.</p> <p>2 You can answer it if you are able.</p> <p>3 A. I'm not aware of any outstanding claim</p> <p>4 by Liberty.</p> <p>5 Q. Are you aware of ET's current</p> <p>6 contentions concerning whether NEGT is entitled to</p> <p>7 be subrogated to Liberty's original debt and</p> <p>8 recover 140 million dollars from ET Power?</p> <p>9 A. I read the motion and the objection that</p> <p>10 were filed in connection with what I believe to be</p> <p>11 the impetus for this deposition.</p> <p>12 Q. All right.</p> <p>13 A. So I've kind of read through it, I</p> <p>14 didn't read it through it the way I would do it if</p> <p>15 I actually had an interest in the outcome.</p> <p>16 Q. Fair enough. But you are aware</p> <p>17 generally that NEGT is seeking to recover from ET</p> <p>18 Power the 140 million dollars that was paid out of</p> <p>19 an escrow account to Liberty?</p> <p>20 A. I had thought that they were trying to</p> <p>21 have it to get a claim for 140 million dollars but</p> <p>22 I could be wrong.</p> <p>23 Q. What?</p> <p>24 A. I thought they wanted an allowed claim</p> <p>25 for 140 million dollars against the ET Power</p>
<p style="text-align: right;">Page 19</p> <p>1 you asking is the witness aware of any claim</p> <p>2 or any claim that they might have? They are</p> <p>3 two different questions.</p> <p>4 MS. PAYNE: I'm not sure I understand</p> <p>5 why there's two different questions. I'm</p> <p>6 trying to figure out if he was aware of any</p> <p>7 claim or if Liberty has been paid in full</p> <p>8 related to issues that emanate from the</p> <p>9 original tolling agreement and ET Power. I'm</p> <p>10 focusing on the ET Power/Liberty tolling</p> <p>11 agreement in any claim that Liberty might have</p> <p>12 after the settlement that was entered in late</p> <p>13 '08, early '09.</p> <p>14 MR. STEPHENS: I still object to the</p> <p>15 form. The question keeps changing. It's a</p> <p>16 matter of whether the witness is aware or</p> <p>17 whether the witness as a Bingham</p> <p>18 representative is aware of a Liberty claim</p> <p>19 versus using the witness' expertise and</p> <p>20 analysis to figure out whether there could be</p> <p>21 a claim.</p> <p>22 Q. I'm asking if you are aware, you,</p> <p>23 Bingham or I guess Mr. Wilamowsky individually are</p> <p>24 aware of any claims of the proceedings you've been</p> <p>25 involved in and the settlement.</p>	<p style="text-align: right;">Page 21</p> <p>1 estate but I could be wrong.</p> <p>2 Q. Fair enough. But you are generally</p> <p>3 aware of that dispute?</p> <p>4 A. Yes.</p> <p>5 Q. All right. Back in May of '05 I believe</p> <p>6 that you were involved in proceedings that</p> <p>7 ultimately resulted in the payment of 140 million</p> <p>8 dollars from the escrow account that was set up as</p> <p>9 part of the GTN transaction, 140 million dollars</p> <p>10 were taken out of that escrow account and paid to</p> <p>11 Liberty pursuant to the GTN guarantee. Do you</p> <p>12 recall that?</p> <p>13 A. Yes.</p> <p>14 Q. And you were involved in proceedings</p> <p>15 related to that, correct?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. At the time that you were</p> <p>18 involved in those proceedings were you aware that</p> <p>19 ET Power either was taking the position or would</p> <p>20 take the position later that if those funds were</p> <p>21 paid that NEGT was not entitled to be subrogated</p> <p>22 to Liberty's original claim?</p> <p>23 MR. STEPHENS: I object to the form of</p> <p>24 the question. I again counsel the witness not</p> <p>25 to divulge something that would reveal the</p>

6 (Pages 18 to 21)

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1 attorney/client privilege of anyone not
2 represented at this table. Counsel has said
3 she's deposing Willkie tomorrow. This
4 question is for Willkie, not Bingham which
5 became involved in 2007, not 2005.
6 Q. You can answer. Do you want me to
7 restate the question?
8 MR. STEPHENS: If you can answer without
9 violating my caveat please do so.
10 THE WITNESS: Let me do that.
11 MS. PAYNE: ET Power has counsel here
12 and if ET Power is concerned about an answer
13 of attorney/client privilege they're certainly
14 welcome to assert that privilege and they've
15 not done so.
16 MR. STEPHENS: I'm not talking about
17 just ET Power for the record. I am not fully
18 aware of the dynamic of how many debtors were
19 involved and I understand there were more
20 debtors.
21 MR. SHERRILL: ET Power does assert the
22 privilege and does not intend to waive it in
23 any form.
24 MS. PAYNE: So you're asserting
25 privilege with respect to the discussions that

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1 occurred back in May of 2005?
2 MR. SHERRILL: Yes.
3 Q. If you can answer the question --
4 MR. STEPHENS: Just so I'm clear,
5 Counsel, can you elaborate on that. You've
6 read my letter and the purpose of my letter
7 was to make that claim that there is now a
8 dispute between NEGT and ET Power. By my
9 lights the attorney/client discussions
10 relating to ET Power and NEGT provided by
11 Bingham because you have both subpoenaed us
12 and you are both at the table you will have
13 both waived that with respect to any questions
14 that would elicit that testimony so I would
15 just like to have your position on the record.
16 MR. SHERRILL: Understood, and I
17 think --
18 MR. STEPHENS: I don't think you're
19 trying to jeopardize me or Bingham by doing
20 that. I think you're trying to preserve your
21 rights. I would like some explanation.
22 MR. SHERRILL: That's right. To the
23 extent there are any communications between
24 Bingham and ET Power solely when they assert
25 the privilege in that circumstance and beyond

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1 that it's a matter of safeguarding the
2 privilege.
3 MR. STEPHENS: Okay. I'm not sure even
4 that would hold but I understand what you're
5 saying.
6 Q. Back to my question I'm asking if you
7 were aware of a particular point and that point
8 being whether ET had ever indicated as of the May
9 2005 time frame when the funds were going to be
10 distributed that if those funds were distributed
11 it was ET Power's position that NEGT could not
12 assert subrogation rights and if you are unaware
13 of that by telling me that you're not disclosing
14 privileged information.
15 A. It was well-known that there were any
16 number of intercompany, interdebtor issues that
17 would have to be dealt with hopefully by
18 settlement but if not through the engagement of
19 conflicts counsel and in that context we as
20 Willkie Farr other than, you know, recognizing the
21 existence of certain, you know, of that fact that
22 there were such claims did not, because we were
23 representing all the debtors were not about to get
24 into a position where we were going to be either
25 taking sides or really delving deeply into any of

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1 these issues on behalf of any of the debtors
2 because we didn't know which way they were going
3 to cut so I think that the thinking all along was,
4 and that remained this is really a Bingham answer,
5 it runs through the entire litigation that we did
6 is, we wanted to defeat Liberty. Let's make the
7 pie as big as possible and then it's easier to
8 divide the pie if there's more to go around and as
9 between the estates as a whole in collectively and
10 Liberty we wanted to get the Liberty amount, the
11 amount that Liberty would suck out of the estates
12 to be as little as possible and then I had every
13 expectation and I think everyone did that the
14 parties would sit down and work it out among all
15 the other intercompany issues that they had and
16 I'm actually a little surprised to be here today
17 having learned that they were unable to do so.
18 Q. You're surprised in what way?
19 A. That the parties -- I would have
20 expected this to have been resolved consensually.
21 Q. Was that expectation based on an
22 assumption that NEGT would have subrogation rights
23 against ET Power?
24 A. It wasn't based on any specific
25 expectation. It was based on the fact that there

7 (Pages 22 to 25)

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1 were numerous claims running back and forth among
2 the estates and that everybody was experienced as
3 bankruptcy professionals, professional fiduciaries
4 who have done it before and presumably know that
5 litigation is expensive and would have tried to
6 get something done consensually without having to
7 hire, you know, Vinson & Elkins and Sutherland and
8 whoever.

9 Q. You mentioned earlier that it was
10 well-known that there were intercompany debtor
11 issues and I believe you said that the expectation
12 was that you, Willkie Farr would not handle it and
13 it would be handled through conflicts counsel,
14 correct?

15 A. Correct.

16 Q. And by conflicts counsel you mean
17 somebody that doesn't represent all of the
18 debtors?

19 A. Correct.

20 Q. And Vinson & Elkins for example is an
21 example of conflicts counsel?

22 A. Correct.

23 Q. They weren't otherwise involved in the
24 bankruptcy. Would you classify Sutherland as
25 conflicts counsel in this instance?

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1 A. I think you have to ask Sutherland or
2 ask ET Power. I have not been involved in these
3 cases certainly since the appeal, certainly since
4 we concluded our representation but even before my
5 since I got to Bingham my representation has been
6 very narrow and very focused so I don't know
7 whether Sutherland sort of has expanded to do a
8 lot of things for ET Power that would not
9 otherwise present a conflict for NEGT. My
10 impression is maybe they have. I don't know. I
11 would be speculating. I assume Whiteford, Taylor
12 & Preston is doing work for ET. My understanding
13 is with respect to this particular matter
14 certainly Sutherland is representing ET Power.
15 What else they're doing for ET Power I don't know.

16 Q. Is it your understanding that Sutherland
17 represented all debtors at some point during the
18 bankruptcy, correct?

19 A. Yes.

20 Q. In the same way that Willkie Farr
21 represented all debtors --

22 A. Yes.

23 Q. And Willkie Farr certainly felt that
24 these intercompany debtor issues were something
25 that ought to be handled by outside firms?

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1 A. Well, again we, at least I and I think,
2 that's my impression of what everybody else felt
3 but at least my feeling was wouldn't it be a great
4 thing and it was kind of our -- really our opened
5 hope and expectation that given the caliber of the
6 professionals that we were dealing with and that
7 we are dealing with that people would sort of sort
8 through the issues on a business level having had
9 experience with intercompany issues and bankruptcy
10 before and would hopefully maybe work it out
11 without the need to, you know, without the need
12 for conflicts counsel especially since I was not,
13 I didn't know exactly what was going on with the
14 arbitration. I didn't know what our chances of
15 winning or losing were so at that time early on we
16 were hoping that Liberty maybe would not have a
17 claim at all and the whole thing would go away so
18 we really didn't give a lot of thought to what
19 would happen later on if it unraveled a certain
20 way.

21 Q. Okay. When was the first time that you
22 heard or understood that ET was taking the
23 position that NEGT was not entitled to enforce
24 subrogation rights related to the payment of the
25 140 million dollars to Liberty?

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1 MR. STEPHENS: You're asking again the
2 witness individually?

3 MS. PAYNE: Well, this certainly would
4 span his time both at Bingham and at Willkie
5 Farr.

6 A. I think that there was a meeting that I
7 became aware of while I was at Bingham at which
8 Brian Cejka I believe met with either Mr. Patrick
9 or Mr. Goldstein or both, I just don't know. It
10 was going to be a meeting between the
11 professionals for each entity at which they were
12 going to try to work out a number of claims,
13 intercompany claims that I have no particular
14 knowledge of but that I thought included this
15 matter. The first I really knew that ET was
16 definitively taking this position was probably
17 after that meeting or maybe, I don't remember
18 exactly the timing but it would have been when we
19 were having difficulty having Brian Cejka sign on
20 to the stipulation and I found out that the reason
21 for that holdup involved this disagreement.
22 Before then I didn't know one way or the other
23 what position ET Power was taking. I had never
24 heard that they were going to take the position
25 one way or the other way.

8 (Pages 26 to 29)

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1 Q. Now, based on your statements there a
2 minute ago I want to try to pin down the time
3 frame.

4 A. Okay.

5 Q. When you say this is when Brian Cejka
6 was not willing to sign on to the stipulation
7 that's a stipulation that was prepared in
8 connection with the Liberty settlement, correct?

9 A. Let's call it the prepetition invoice
10 settlement. Can we call it that?

11 Q. With Liberty that dealt with the five
12 million dollar --

13 A. The five million so I want to be clear.

14 Q. Absolutely.

15 A. Because we had sort of discovery
16 stipulations. We had all kinds of stipulations.

17 Q. As I understand that process, that
18 settlement process of that prepetition invoice
19 claim was in December of '08 and I think the order
20 confirming the settlement was in January of '09.

21 A. That's right. I remember that clearly
22 because, well, first of all I looked at the E-mail
23 again but because Liberty was very keen on getting
24 paid by year end so December sounds like the right
25 month.

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1 Q. All right. So it was approximately
2 December of '08 or maybe a month or so before then
3 that you first had any inkling that ET was taking
4 the position that NEGТ was not entitled to enforce
5 subrogation rights relate to the 140 million
6 dollars?

7 A. No.

8 MR. STEPHENS: Objection to the form of
9 the question.

10 A. Any inkling is a very strong term. I
11 talk to Rob and Brian all the time in connection
12 with the matter. I probably -- it would be
13 speculating so I don't want to do it but the only
14 thing I will say is probably there was some time
15 period before this December date that I think I
16 had an inkling that, you know, that ET wasn't
17 going to necessarily take the same position as any
18 GTN position.

19 Q. Now, as I look back at my notes I think
20 you said you first knew I believe you said
21 definitively that ET was taking that position in
22 December.

23 A. Right, that's why I said definitively
24 very deliberately.

25 Q. As I understood what you just said you

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1 suspected that perhaps that might be the case
2 maybe a month or two before then?

3 A. I don't know if it was a month or two or
4 several months. It was some period of time before
5 that.

6 Q. It wasn't years before that?

7 A. It's telephonic body language when you
8 talk about, you know, yeah, we're getting together
9 to meet about the intercompany claim. Well, if
10 there's still issues about intercompany claims and
11 they relate to Liberty I could probably guess that
12 it relates to this issue so I really am -- now I'm
13 getting into an area where I'm going past what I
14 can actually recall more into speculating what I
15 might think happened so.

16 Q. And I understand that it gets a little
17 bit fuzzy and it's hard to place precisely when
18 stuff happened but you certainly didn't have that
19 suspicion back in let's say the 2005 time frame at
20 the time the funds were being released from the
21 escrow account, correct?

22 MR. STEPHENS: I object to the form of
23 the question. You're asking the witness
24 individually to speculate what is speculation?

25 MS. PAYNE: No. I'm asking him what he

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1 recalls.

2 MR. STEPHENS: If you recall.

3 A. What date was the escrow released?

4 Q. The escrow release was approximately May
5 of 2005.

6 MS. PAYNE: I'm going to mark this as
7 Exhibit 6.

8 MR. SHERRILL: What is that?

9 MS. PAYNE: I'm marking as Exhibit 6 the
10 May 18, 2005 order from the court.

11 (Whereupon, the aforementioned May 18,
12 2005 order was marked as Exhibit 6 for
13 identification as of this date.)

14 A. Can you repeat the question.

15 Q. Yes. You said earlier that at some
16 point you knew that ET was taking the position
17 that NEGТ was not entitled to enforce subrogation
18 rights related to the payment of 140 million
19 dollars. You said you suspected that at least a
20 few months before that, it's hard to tell when you
21 actually formed that suspicion so my question is
22 do you recall having that suspicion back in the
23 May of 2005 time frame which is the date of this
24 court's order and also the date that the 140
25 million dollars was released from the escrow

9 (Pages 30 to 33)

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1 account.

2 A. I do not recall having that suspicion as
3 of that date.

4 Q. Do you recall having that suspicion at
5 the time that you were pursuing the various
6 appeals related to the post-petition interest
7 issue including by that I mean the appeal to the
8 district court as well as the appeal to the fourth
9 circuit?

10 MR. STEPHENS: Just to be clear,
11 Counsel, I'd like you to confine or at least
12 make clear your time frame. This is again a
13 30 (B)(6) deposition of Bingham McCutchen
14 which began its engagements in early 2007. To
15 the extent the appeals overlap that period I'd
16 like at least the witness to make sure what
17 he's talking about if the answer is different
18 for either period.

19 Q. Do you want me to restate my question?

20 A. Sure.

21 Q. Do you recall during the time that you
22 were pursuing the appeals related to the
23 post-petition interest issue which spanned your
24 time at Willkie Farr and rolled into the time you
25 were at Bingham McCutchen, do you recall during

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1 that time frame having any suspicion that ET would
2 take the position that NEGT was not entitled to
3 enforce subrogation rights related to the 140
4 million dollar payment to Liberty?

5 A. We actually specifically recognized and
6 left open the notion, the question as to which
7 estate would be hurt if Liberty or would
8 ultimately bear the cost if Liberty was successful
9 in its post-position interest claim which is why
10 we were very careful to put it into our brief.
11 Liberty -- let me back up. Liberty had argued
12 that, you know, that ET, I think this is the
13 argument, ET, you're not going to have, you're not
14 going to sustain any loss because you don't have
15 to pay out more than one claim because whatever
16 money we had to get out of you is less money than
17 NEGT is going to be able to get out of you. I
18 believe that's the essence. If you boil it down
19 that's what Liberty was arguing.

20 Q. Can you say that one more time.

21 A. I believe that Liberty was arguing, and
22 this is again my current characterization based on
23 my recollection what Liberty was arguing at some
24 point in their briefs was we were making the
25 argument that, we meaning the estates were making

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1 the argument that you shouldn't let them play this
2 smoke and mirrors game. They're characterizing
3 it, what they're seeking principal, not interest
4 but we know they got their principal so they can
5 call it whatever they want but it's really
6 interest and it's not interest they're getting
7 from some third-party, it's interest that's coming
8 out of the estates and it's hurting the estates
9 and it's getting them interest at a time when
10 other unsecured creditors are not getting paid in
11 full and so Liberty as part of their response to
12 that argument said Court, wrong, it's really not
13 affecting, you know, our claim was against the
14 primary obligor -- well, they were saying it's
15 really not affecting the estate because whatever
16 claim we increased recovery we get against ET
17 Power is that much less of a recovery that NEGT
18 would be able to get from ET Power and
19 therefore -- and ET Power is never going to have
20 to pay out one single recovery on one claim and
21 therefore this whole notion of hurting the estates
22 is just incorrect to which we responded and we
23 were careful to respond in a particular way
24 because our goal was to win the appeal. Our goal
25 was not to get involved in the interdebtor dispute

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1 and create a need for separate counsel and it was
2 really beside the point because we really,
3 everyone agreed that the good thing would be to
4 win vis-a-vis Liberty so what we put into our
5 brief is Judge, doesn't really matter, somebody's
6 getting hurt. Both these parties are debtors.
7 NEGT's a debtor, ET Power's a debtor. They both
8 availed themselves of chapter 11, they're both
9 entitled to protection to chapter 11 of the
10 bankruptcy code, one of which is a bar on
11 post-petition interest so I think we say, you
12 know, while it's true, I think we say in, I'm
13 paraphrasing but we say something in our brief
14 like while it's true that NEGT would probably
15 agree with Liberty's characterization of the way
16 things should fall out, you know, ET Power may
17 take a different position and nothing in this
18 brief, nothing stated or contained herein, we had
19 a little footnote, should be deemed to prejudice any
20 party's position with respect to that, something
21 like that.

22 Q. So --

23 A. So we were aware that this was an issue
24 and we specifically did not want to deal with that
25 issue because we wanted to have a united front

10 (Pages 34 to 37)

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1 against Liberty and try to get rid of the 17
2 million dollar exposure.
3 Q. And by saying you wanted to have a
4 united front you just wanted to try to keep the 17
5 million dollars in the bankruptcy estates?
6 A. Collectively.
7 Q. Collectively.
8 A. Right.
9 Q. And let them duke it out later with
10 respect to how it should be?
11 A. Correct.
12 Q. You viewed any dispute over the 17
13 million as one of these potential intercompany
14 disputes?
15 A. Correct.
16 Q. I want to show you what I'm going to
17 mark as Exhibit 7 and I want to direct your
18 attention to the second paragraph and specifically
19 the last line in the second paragraph.
20 (Whereupon, the aforementioned document
21 was marked as Exhibit 7 for identification as
22 of this date.)
23 MR. STEPHENS: You should read the whole
24 thing.
25 Q. Take your time, let me know when you're

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1 ready.
2 A. (Witness complies.) I have read it.
3 Q. I want to direct your attention to the
4 second paragraph and particularly the last
5 sentence in the second paragraph which states,
6 "winning on appeal would also eliminate any
7 intercompany debtor issues between NEGT and ET
8 Power associated with Liberty claim." Is that
9 speaking to the same issue you've just testified
10 about?
11 A. It is speaking -- well, if the 17
12 million dollar additional claim is allowed then
13 that would raise an additional basis for dispute
14 between Liberty and, I'm sorry, between ET Power
15 and NEGT, in other words if you assume that NEGT
16 is permitted to subrogate into the claim or if you
17 assume that NEGT would be entitled to a claim for
18 140 million dollars against ET Power, if you make
19 that assumption the next question would be, and
20 another potential basis for dispute that I think
21 was identified in what I just said is okay, let's
22 just pick a number, let's just say ET Power was
23 paying 50 cents on the dollar so let's say 140
24 million dollar claim against ET Power should
25 generate a 70 million dollar recovery for NEGT.

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1 Again assuming that the subrogate claim exists
2 then what ET Power would then turn around and
3 argue and say I don't have to give you 70 million
4 dollars because I should never be forced to pay
5 more than one single distribution on a claim and I
6 already paid 17 million dollars out to Liberty so
7 your recovery should not be 70 million, it should
8 be 70 million minus 17 approximately, you know,
9 these are round numbers but would be probably 63
10 million dollars and that is the issue that was
11 eliminated when we were successful in the fourth
12 circuit appeal.
13 Q. Now, Exhibit 7, just to proof this up,
14 can you tell us what this is.
15 A. Exhibit 7 is a memo that was sent to the
16 respective fiduciaries for NEGT and ET, ET Power.
17 Q. And that's Charles Goldstein and Brian
18 Cejka?
19 A. Charles Goldstein and Brian Cejka.
20 Charles Goldstein on behalf of ET, Brian Cejka on
21 behalf of NEGT -- well, actually Brian Cejka for
22 Alvarez & Marsal on behalf of NEGT. Charles
23 Goldstein I think in his individual capacity
24 because I think that he's individually plan
25 administrator, I think that's correct and the

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1 issue was having lost at the bankruptcy court and
2 then again having lost at the district court
3 should we go forward with an appeal to the fourth
4 circuit and this memo was designed to give an idea
5 of the costs that would be involved with pursuing
6 such an appeal as well as the benefits.
7 Q. Were you aware either during your time
8 at Willkie Farr or your time at Bingham during
9 which you were pursuing this appeal related to the
10 post-petition interest issue that ET Power would
11 later point to the success in the fourth circuit
12 as a basis for trying to evade repayment of the
13 140 million dollars pursuant to subrogation rights
14 in this intercompany dispute?
15 A. I'm not even sure how to answer that
16 question. Can you ask it again.
17 Q. Let me break that down a little bit.
18 Are you aware from reading the objections filed
19 recently by ET Power that one of the bases on
20 which they're claiming that NEGT is not entitled
21 to certain subrogation rights is that Liberty was
22 not paid in full? Do you understand the
23 arguments --
24 A. I noticed that.
25 Q. And one of the primary bases for that is

11 (Pages 38 to 41)

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1 that they're saying that because Liberty was not
2 paid the 17 million dollars in interest that you
3 fought so hard to keep inside the estate that that
4 is a basis on which NEGT cannot now pursue
5 subrogation rights to recover the 140 million
6 dollars or assert a claim for 140 million dollars.
7 Were you aware --
8 A. No.
9 Q. -- of that at the time that this appeal
10 was being pursued?
11 A. No.
12 Q. So ET Power never notified you either
13 while you were at Willkie Farr or while you were
14 at Bingham that success on this post-petition
15 interest issue would work to the advantage of ET
16 Power, to the disadvantage of NEGT when it came to
17 this intercompany dispute?
18 A. No.
19 MR. STEPHENS: Object to form.
20 A. Again the goal was to maximize the size
21 of the pie and have the parties work it out. We
22 were never, that never came up in any context.
23 Q. When was the first time that you learned
24 they were using that as an argument against
25 exercise of subrogation rights by NEGT?

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1 A. A couple of weeks ago. When did you
2 send me that -- whenever you sent it to me.
3 Q. Very recently.
4 A. Mr. Patrick it actually sent it to me at
5 some point after it was filed as well but I just
6 never got around to reading it so I think I read
7 it the first time when you sent me the pile of
8 PDFs.
9 Q. If ET Power had notified you or Matt
10 Feldman or others at Willkie Farr or you while you
11 were at Bingham McCutchen that they intended to
12 use essentially your efforts in this appeal as a
13 basis for trying to deny recovery to NEGT under
14 the subrogation argument would you have continued
15 to pursue the appeal in the manner in which you
16 were going forward?
17 MR. STEPHENS: Object to the form. It
18 calls for speculation.
19 A. We would have acted consistent with our
20 duties. I mean whenever a conflict would come up,
21 and there weren't many that required intervention.
22 Before Vinson & Elkins I think that NEGT had hired
23 Kirkland at some point and made almost no use of
24 Kirkland I think so there weren't a lot of
25 occasions on which it came up but we would have

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1 acted consistent with our duties as attorneys and,
2 you know, beyond that would be speculation. Each
3 side, you know, was aware that there would be
4 issues in which conflict counsel would need to be
5 retained.
6 Q. If they had made that argument known
7 then in your mind would that create a conflict
8 between the two arguments that could be made?
9 MR. STEPHENS: I object. That question
10 calls for expert testimony of a witness, not a
11 factual analysis or a factual re-call by the
12 witness.
13 Q. You are a bankruptcy practitioner and
14 have been for a number of years, correct?
15 A. Correct.
16 Q. And throughout the course of your
17 practice is it fair to say that you've developed
18 the judgment necessary to be able to identify when
19 it's appropriate to engage conflicts counsel?
20 A. Yes.
21 Q. Is this an instance in which you believe
22 conflicts counsel would have been required had ET
23 Power made it clear that they were planning to use
24 the outcome, a successful outcome in that appeal
25 to the detriment of NEGT that was also a party of

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1 that appeal?
2 MR. STEPHENS: I object. It calls for
3 expert testimony in a hypothetical situation.
4 Q. You can answer.
5 MR. STEPHENS: I advise the witness to
6 keep his answers to the facts and not to
7 speculation.
8 You're not here as an expert witness.
9 You're here as a 30 (B)(6) witness. I've
10 given counsel a lot of latitude today.
11 A. Repeat the question so I could see if
12 there's anything in there that I can answer.
13 Q. Sure. I'm trying to try to pare it
14 down. I don't want to create difficulties here.
15 A. Okay.
16 Q. But had you been aware during the time
17 in which, I think it was primarily you and others
18 at Willkie Farr and then Bingham McCutchen were
19 pursuing the appeal related to the post-petition
20 interest issue would you have done things
21 differently had you been aware that ET Power would
22 have, would use the successful outcome of that
23 appeal to the detriment of NEGT in connection with
24 the subrogation argument?
25 MR. STEPHENS: Objection. Calls for

12 (Pages 42 to 45)

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1 speculation.
2 A. The only thing I would say I would have
3 acted appropriately under the circumstances.
4 Whether that would have been telling parties to
5 talk to their conflicts counsel, whether that
6 would mean knocking heads together saying you
7 should work it out I don't know what I would have
8 done at that point.

9 Q. Is the information that ET Power would
10 use a successful outcome of that appeal of the
11 post-petition interest issue to NEG's
12 disadvantage in this subrogation dispute, is that
13 information you would have liked to have known at
14 the time that you were pursuing those appeals?

15 MR. STEPHENS: Note an objection. Calls
16 for speculation.

17 A. Repeat the question please.

18 MS. PAYNE: Read the question back
19 please.

20 (Whereupon, the referred to question was
21 read back by the Reporter.)

22 A. Let me answer the question in the least
23 speculative way possible.

24 Q. Sure.

25 A. I'd like to know as much as I can know

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1 because the more information I have the better
2 suited I am to make the decision. Whether
3 anybody, you know, whether anybody could make a
4 legal argument, anybody can try to craft an
5 argument. Whether or not that argument would have
6 been something that I would have said it's a real
7 argument, we need to get NEG that NEG needs to
8 worry about I probably would have said well, I
9 couldn't advise NEG on that point but the point
10 is anybody can craft an argument and whether or
11 not to give it to credence or discount it and say
12 it's not really an argument that carries any
13 weight is something that, you know, lawyers have
14 to think about every day and so if someone had
15 presented that argument to me way back I may have
16 had a view on it that's different than the view
17 that the parties to this litigation are taking
18 with respect to it so I'd like to have as much
19 information as possible.

20 Q. And at a minimum had you obtained such
21 information that information would have been
22 conveyed to NEG, correct?

23 A. I am careful about reporting conflicts
24 issues to clients when I notice them.

25 Q. Had you identified a conflicts issue

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1 that is a matter of significant importance that
2 should be disclosed to the client, correct?

3 A. Generally when a conflicts issue arises
4 it is something that should be reported to the
5 client if it's material.

6 (Whereupon, a break was taken from 10:40
7 until 10:52.)

8 Q. Mr. Wilamowsky, right before we went on
9 our break we were talking about whether ET Power
10 had indicated to you, either while you were at
11 Willkie or while you were at Bingham that your
12 success on the post-petition interest issue might
13 be used as a basis for argument that Liberty was
14 not paid in full in the subrogation dispute to the
15 detriment of ET. Do you recall that discussion?

16 A. I recall the discussion we just had.

17 Q. I'm going to ask you the same question
18 with respect to the settlement of the prepetition
19 five million dollar dispute and in that instance
20 it's my understanding that Liberty was seeking
21 payment of a prepetition invoice in approximately
22 the amount of I believe 5.4 million dollars. Do
23 you understand that?

24 A. Yes.

25 Q. And ultimately as a part of the

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1 settlement of that issue that occurred in the
2 December of 2008 time frame, that claim was
3 compromised to the point where Liberty I believe
4 was paid 95 percent of the amount of those
5 invoices, do you recall?

6 A. That is correct.

7 Q. And ET is pointing to that 5 percent
8 that was compromised in the same way it's pointing
9 to your success on the interest issue as being a
10 basis for non-payment under the subrogation
11 dispute. At the time that the Liberty settlement
12 was occurring were you aware that that was a basis
13 for their argument to pay the subrogation rights
14 of NEG?

15 A. No. As I said I didn't see their
16 arguments until a couple of weeks ago.

17 Q. All right. I want to talk to you about
18 the NEG and GTN guarantees. Do you know the
19 documents of which I speak?

20 A. I believe I do.

21 Q. I've got copies if you want to see them.

22 A. To avoid the need for that but just to
23 make sure we're clear it is two guarantees that
24 were the subject of the appellate litigation.

25 Q. Right. The Liberty dispute, in other

13 (Pages 46 to 49)

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1 words those were the guarantees, one of the
2 guarantees, the GTN guarantee was the basis of the
3 140 million dollar payment that came out of the
4 GTN-related escrow account?
5 A. Right.
6 Q. I think we're on the same page. Do you
7 recall that payment on one of the guarantees would
8 reduce the obligations of the other party with
9 respect to the other guarantees?
10 A. Very well.
11 Q. Why do you say that?
12 A. Because it was one of our arguments that
13 we made in our pleadings was -- in our appellate
14 pleadings was that if the debtors were not debtors
15 who were prohibited from paying prepetition claims
16 then NEGT could have satisfied that guarantee
17 claim and the GTN claim would have gone away by
18 its terms so one of the arguments we made to the
19 court is we shouldn't get a different result now
20 that GTN ended up paying the guarantee
21 effectively.
22 Q. If I understand what you just said, that
23 as it turned out the payment was made pursuant to
24 the GTN guarantee but it could have been
25 structured such that it would have been made under

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1 Liberty, correct?
2 MR. STEPHENS: I object to the form of
3 the question. It calls for expert testimony
4 regarding the analysis of guarantee
5 instruments. If you're asking what arguments
6 were made then as the witness said you will
7 refer to the briefs but in terms of a current
8 analysis of different arguments that we made
9 under instruments I think that question calls
10 for expert testimony. This witness is not
11 here as an expert. This witness is here as a
12 fact witness pursuant to the 30 (B)(6)
13 subpoena.
14 Q. I'm asking about your factual
15 recollection.
16 A. Limiting it to the factual recollection
17 it was our argument, and I don't think it was
18 seriously contested, that by their terms, by their
19 expressed terms a dollar of payment on one
20 guarantee would reduce the exposure by one dollar
21 on the other guarantee as well because it was a
22 cap guarantee. It was an aggregate cap.
23 Q. Because 140 million dollars was paid
24 under one of the guarantees then Liberty could not
25 turn around and seek enforcement of the other

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1 the NEGT guarantee, is that what you're --
2 MR. STEPHENS: I object to the form.
3 Calls for speculation.
4 Q. If that's not correct --
5 A. I would refer you to the briefs that we
6 filed because Liberty made a specific argument
7 about the equities and we made some kind of a
8 counterargument about the equities, says what are
9 you talking about equities. We could have had,
10 you know -- NEGT could have paid it and you
11 wouldn't be anywhere except for the fact that we
12 filed for bankruptcy, you know, but for the fact
13 that we didn't pay it because, you know,
14 non-debtor guarantors typically are the people who
15 are authorized, who are entitled to make payments,
16 not debtor guarantors but if it would have come a
17 different way you would have gotten the interest.
18 Again rather than rely on my now vague
19 recollection of what we put into the brief I would
20 commend you to read it. I think it's pretty well
21 written.
22 Q. Your understanding both then and today
23 is that payment of the 140 million dollars for
24 example on the GTN guarantee discharges the
25 obligation of NEGT to pay that same sum to

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1 guarantee for that amount, correct?
2 A. At one point they made this kind of, I
3 don't want to characterize arguments but it was
4 almost frivolous or frivolous but at some point
5 they made that kind of argument very early on in
6 the bankruptcy court level they would be entitled
7 to do that and they quickly dropped it by the time
8 we got to the district court briefs.
9 Q. You said earlier that you were not
10 involved in the preparation or I guess the
11 structuring of the GTN transaction, correct?
12 A. That's correct.
13 Q. You certainly though because of this
14 payment of the 140 million dollars you were at
15 some point, you became familiar with what we refer
16 to as the post-closing escrow agreement?
17 A. Yes. I don't remember it right now much
18 about it but I certainly read it at that time to
19 the extent necessary to accomplish what we were
20 trying to do which was to get the 140 million
21 dollars paid to Liberty.
22 Q. You didn't have any role in preparing or
23 structuring that escrow agreement, you just sort
24 of operated under it?
25 A. I dealt with it after the fact, correct.

14 (Pages 50 to 53)

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1 Q. Back in the May of 2005 time frame which
2 is about when the 140 million came out of the
3 escrow account that was governed by the
4 post-closing escrow agreement was there any
5 analysis or discussion concerning how the payment
6 being made and the way it was being made might
7 affect future subrogation rights?

8 A. None --

9 MR. STEPHENS: I will direct the witness
10 not to answer in the sense that it would
11 disclose privilege of parties not at this
12 table.

13 Q. I'm only asking if you had discussions.
14 Right now I'm not asking what they were.

15 A. I don't recall having such discussions.

16 Q. With anybody?

17 A. Correct.

18 Q. Do you recall anyone doing any sort of
19 analysis of how a payment out of the escrow
20 account of the 140 million might impact future
21 subrogation rights, any analysis of that issue?

22 A. Not that I recall. The only issue that
23 came up was that Liberty was very eager to have it
24 characterized a particular way and we were eager
25 to have Liberty pay to stop -- at that time we

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1 have no other further claims against GTN arising
2 under or related to the GTN guarantee." Is it
3 your understanding that similarly they wouldn't
4 have any claims against NEGT under the NEGT
5 guarantee given that the full 140 million had been
6 paid and that that would therefore reduce the
7 allocation of the NEGT guarantee?

8 MR. STEPHENS: Object to form.

9 A. I think the document speaks for itself.

10 Q. The document doesn't reference NEGT --

11 A. The NEGT guarantee I think speaks for
12 itself. I think I've testified what we understood
13 and what we argued in terms of everybody's
14 understanding of what those documents do and this
15 order says that payment in full of the GTN
16 guarantee, I think that you're just as capable as
17 I am of drawing a conclusion as to what that does
18 to the NEGT guarantee.

19 Q. I'm trying to get back to what your
20 thought process was at the time for not including
21 similar language with respect to NEGT. Do you
22 recall why that was not included?

23 MR. STEPHENS: I object to the form of
24 the question.

25 A. I don't recall.

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1 didn't know we were going to win on post-petition
2 interest so we were interested to have the
3 post-petition interest clock potentially stopped
4 so we were inclined to try to accommodate them in
5 terms of how they wanted it characterized.

6 Q. I put Exhibit 6 in front of you. When
7 you say Liberty wanted it characterized a
8 particular way are you referring to a paragraph on
9 page 3 of Exhibit 6? Look at the first full
10 paragraph on page 3.

11 A. Yes, although now that I'm recollecting
12 it may have been, may have not been Liberty's
13 concern, it may have been TransCanada's concern.
14 It's a third-party concern but as I'm reading it
15 I'm realizing maybe it was TransCanada as owner of
16 GTN at that time wanted to make sure it was to the
17 satisfaction the GTN guarantee.

18 Q. Read it through and then I have a couple
19 of questions for you.

20 A. (Witness complies.) Yes. It certainly
21 looks like the paragraph that was done with focus
22 on protecting GTN.

23 Q. All right. I guess the four lines from
24 the bottom of that paragraph it starts with the
25 numeral I, "Liberty and Liberty Electric shall

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1 Q. You don't recall?

2 A. I don't recall. This was a special
3 interest paragraph that was put in at the request
4 and demand of TransCanada, GTN in order to get
5 them to release the money. They didn't ask for
6 NEGT because they didn't care about NEGT.

7 Q. And you didn't ask for NEGT to be
8 covered by that paragraph either?

9 A. Apparently not.

10 Q. Fair enough. Did you review at any
11 point the disclosures made by ET in connection
12 with its plan that was ultimately confirmed?

13 A. Are you referring to the disclosure
14 statement?

15 Q. Yes.

16 A. Yes.

17 Q. I'm going to mark this as Exhibit Number
18 8.

19 (Whereupon, the aforementioned document
20 was marked as Exhibit 8 for identification as
21 of this date.)

22 Q. I want to turn you to pages 21, 22 and
23 23 and there's a section 9 there's a heading on
24 the bottom of page 21 references tolling agreement
25 disputes, correct?

15 (Pages 54 to 57)

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1 A. Yes.
 2 Q. And the Liberty dispute falls under this
 3 category of tolling agreement disputes, correct?
 4 A. Correct.
 5 Q. Now, on page 22 there's actually a
 6 specific discussion about Liberty.
 7 A. Correct.
 8 Q. And it explains I guess the way things
 9 were as of this date which it was filed on March
 10 3, 2005.
 11 A. Correct.
 12 Q. And then on page 23 there is a
 13 discussion of another tolling matter which I'm not
 14 concerned with at this point and then at the
 15 bottom of 23 there's a section C that says impact
 16 on creditor recoveries. Could you read that real
 17 quickly and I have a couple of questions for you.
 18 A. (Witness complies.) I read it.
 19 Q. Does this section on pages 23 and 24 of
 20 Exhibit A indicate to you that there was some
 21 expectation that amounts paid to Liberty as per
 22 this tolling dispute would ultimately be paid by
 23 ET Power?
 24 MR. STEPHENS: I object to the form. It
 25 says what it says.

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1 A. I think it says that the aggregate
 2 outcome of bad adverse rulings with respect to all
 3 three arbitrations versus success on all three
 4 arbitrations that delta is, you know, what I see,
 5 90 to a hundred versus 95 to 45. There is no
 6 break down in the calculations that I see to
 7 reflect what the particular hit would be as a
 8 result of, you know, what the particular delta
 9 would be in recoveries solely on a Liberty-only
 10 basis.
 11 Q. During your work on this bankruptcy
 12 proceeding of NEGТ and the related companies so
 13 the entire process --
 14 A. Right.
 15 Q. -- did you form any opinion as to
 16 whether the amounts paid by either NEGТ or GTN
 17 under the guarantees to Liberty would ultimately
 18 be borne by ET Power? Did you ever form an
 19 opinion on that or was that something you didn't
 20 focus on?
 21 MR. STEPHENS: I object to the form of
 22 the question to the extent that this calls for
 23 an expert witness opinion. The witness is
 24 here as a fact witness. I've given a lot of
 25 latitude with regard to the Willkie days.

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1 You're taking Willkie's deposition tomorrow.
 2 I would advise the witness to keep response to
 3 the appearance today as a 30 (B)(6) witness
 4 for Bingham McCutchen and its engagement in
 5 2007.
 6 Q. And my question is to clarify. Did you
 7 form an opinion. I haven't asked what the opinion
 8 was if you didn't have one.
 9 A. I have an opinion. I'm not an -- I
 10 haven't been retained and I'm not prepared to give
 11 that opinion. I'd be conflicted if I was to give
 12 advice so I have an opinion but beyond that.
 13 Q. Let me ask this: Did you form the
 14 opinion recently in connection with this
 15 deposition and receiving the papers related to
 16 ET's objections or did you form an opinion prior
 17 to that during your active representation of NEGТ
 18 and our parties in connection with the NEGТ
 19 bankruptcies?
 20 A. I think it's safe to say I've had an
 21 opinion going back for some time.
 22 Q. Okay. And did you have the opinion when
 23 you were at Willkie Farr or did you have an
 24 opinion or did you form that opinion after you
 25 came to work at Bingham?

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1 A. I don't think there's anything that
 2 happened the day I joined with Bingham that would
 3 have caused me to suddenly have an opinion that I
 4 hadn't had before.
 5 Q. I'm not suggesting that your joining
 6 Bingham caused an opinion but certainly your work
 7 spanned that time. I'm trying to find out if you
 8 had it early or if you had it when you came to
 9 Bingham.
 10 A. The best way to respond I think it's
 11 probably true or correct to say that I had an
 12 opinion and probably, I can't put a date on it but
 13 probably, you know, probably I had an opinion
 14 going back well deep into the point that I was at
 15 Willkie working on this.
 16 Q. And you carried that opinion forward to
 17 the point to which you were at Bingham?
 18 A. I think I carried that opinion forward,
 19 on the other hand I haven't looked into
 20 particular, I haven't necessarily looked at
 21 arguments in the same degree and manner the way
 22 the parties to this current litigation have so
 23 yes, I have a view and it may or may not be one
 24 that was formed with an eye toward the exact same
 25 things as the parties to this litigation.

16 (Pages 58 to 61)

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1 Q. With that caveat what is your opinion
2 regarding the arguments presented by ET Power in
3 opposition to the attempt exercise subrogation of
4 NEGТ?

5 MR. STEPHENS: I direct the witness not
6 to answer. He's not here for that.

7 A. I'm not going to answer that question.

8 Q. You as a representative of Bingham
9 McCutchen are refusing to identify what opinions
10 Bingham you as a partner at Bingham currently hold
11 with respect to ET Power's arguments against
12 NEGТ's attempted --

13 A. Yes, because I think it is irrelevant to
14 the beginning engagement which has concluded but I
15 think that as I've said the goal of Bingham was to
16 minimize the amount of money that would come out
17 -- to win the appeal, minimize the amount of money
18 that Liberty would get from the estates as a whole
19 with the expectation that it would be better
20 result for everybody and easier to settle matters
21 if there was more money in the collective estates
22 than less money and let the parties work out how
23 that gets divided up so because my goal is and
24 was, not only my goal but the marching orders of
25 my engagement was to defeat Liberty and minimize

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1 the amount of Liberty's recovery I think that it
2 was, is irrelevant to Bingham's engagement as to
3 whether, you know, as between ET and NEGТ who
4 should be getting this money.

5 Q. And I just want to make a record in case
6 if we have to go there which I hope we won't but
7 just to make it clear you have an opinion but on
8 the advice of your lawyer you're refusing not to
9 provide that opinion.

10 A. I think I'm refusing yes to provide that
11 information. That was a double negative.

12 Q. You're currently refusing to give the
13 opinion that I'm asking you to provide?

14 A. Correct.

15 MR. STEPHENS: Correct.

16 Q. Okay, all right. Have you had any
17 recent discussions with lawyers or representatives
18 from ET Power regarding the subrogation dispute?

19 A. None whatsoever.

20 Q. Have you talked to Mr. Patrick?

21 A. I think that it's probably been two
22 months, I don't know, since the last time I spoke
23 to Mr. Patrick. I have not spoken to Mr. Patrick
24 since the time that I received this subpoena and
25 for some period before. I think since before you

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1 contacted me --

2 Q. Okay.

3 A. -- the first time.

4 Q. At some point I understood you said
5 Mr. Patrick sent to you a copy of their objections
6 to NEGТ's motions before subrogation, correct?

7 A. Correct. I think shortly after it was
8 filed he thought correctly and if I was less busy
9 I think he thought I'd be interested in seeing it
10 and interested in reading it and I was I think on
11 the phone with him talking to him about the Ravens
12 at one point and he said oh, by the way we filed
13 it, take a look at it and he sent it over to me
14 and I'm embarrassed to say since he's sitting in
15 the room here in front of me that I just sort of
16 let it with the best of intentions I let it
17 marinate in my inbox without actually reading it.

18 Q. So you received a copy of the objections
19 and did you have any other E-mails or
20 communications or phone discussions with anybody
21 concerning that until this deposition?

22 MR. STEPHENS: You mean at ET Power?

23 Q. Yes, from ET Power.

24 A. From what point in time?

25 Q. Well, I believe that they filed their

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1 objections in April of 2009 and so if you sent it
2 too shortly thereafter so we've got almost all of
3 2009 and now we're in 2010.

4 MR. STEPHENS: They were talking about
5 the Ravens so I'm not sure if it's that point
6 in time. Football season is in the fall.

7 MS. PAYNE: Fair enough.

8 MR. STEPHENS: Only if you remember.

9 Q. You might have had discussions?

10 A. Put it this way: I may have gone out
11 for I remember one time in New York, here in New
12 York Brian Cejka was in town and we went out and
13 got a drink and, you know, he may have, you know,
14 said something to me about, you know, how ET is
15 being, you know, hard-nosed or difficult in
16 negotiations and I probably would have being a
17 good lawyer that I am I probably would have
18 sympathetically nodded and then if at any point
19 Rob made the same complaint I would have
20 sympathetically nodded as well but I didn't get
21 involved in -- I didn't want to go there because I
22 don't get paid enough to get involved in that kind
23 of dispute so yes, I was aware that there was
24 intention and I always, you know, every time I see
25 either one of them I would always say when are you

17 (Pages 62 to 65)

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1 guys going to work this out and then --
2 Q. Please don't draw me into it.
3 A. Please don't draw me into it and when
4 they subpoenaed me I said, really, well, I sent
5 Rob an E-mail saying why can't you guys settle
6 this or something like that but that's about it.
7 Q. I want to run down very quickly, and I
8 think I'm almost done, the deposition topics that
9 I don't believe we've covered to this point.
10 A. Okay.
11 Q. Were you involved in any advice or
12 analysis or disclosures to anybody regarding the
13 GTN guarantees or the NEGТ guarantee?
14 MR. STEPHENS: I object to the form of
15 the question.
16 A. I'm not sure I understand the question.
17 Say it again.
18 Q. Well, did you ever give advice or
19 disclosures or analyze the GTN guarantee or the
20 NEGТ guarantee and provide that information to
21 NEGТ?
22 A. Any advice I would have given would have
23 been to everyone and I'm sure I did along with the
24 Liberty litigation along the lines for example
25 when Liberty was making what I consider its

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1 frivolous claim about somehow being able to claim
2 against both guarantees without reduction I think
3 I would have looked at the guarantees at the time,
4 we looked at them carefully and we certainly did
5 analyze the guarantees for the purpose of pursuing
6 the appeal.
7 Q. Did you ever look at the guarantees with
8 respect to issues concerning subrogation?
9 A. I don't recall but I don't believe so.
10 Q. Other than what we provided with respect
11 to the post-closing escrow agreement did you
12 provide NEGТ or ET Power with any advice
13 concerning the post-closing escrow agreement and
14 how that might affect subrogation rights?
15 A. No.
16 Q. Were you involved in providing any
17 advice concerning the assignment of GTN
18 subrogation rights? You understand that they were
19 assigned, correct?
20 A. As part of the sale? The assignment of
21 the GTN subrogation to NEGТ you mean?
22 Q. Yes.
23 A. I was not involved in those discussions.
24 Q. But you were aware that GTN was
25 assigning its subrogation rights as part of the

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1 post-closing escrow agreement?
2 A. I was aware of that.
3 Q. Do you know if ET Power has any
4 obligations to Liberty after the entry of the
5 January 6, 2009 order approving the Liberty
6 settlement?
7 MR. STEPHENS: I object to the extent it
8 calls for expert analysis.
9 If you know it factually you can answer.
10 A. I think the stipulation speaks for
11 itself and I think that it resolves all claims so.
12 Q. Of the lawyers here at Bingham who
13 worked with you on any aspect of the NEGТ/GTN
14 matters who were they?
15 A. To my knowledge the only people that
16 helped out were an appellate litigator in Boston,
17 senior associate who has done, specializes almost
18 in appellate work with a couple of associates more
19 junior that work with her to help me.
20 Q. What was her name?
21 A. Reba Ruthcowsky who worked on the
22 post-hearing briefing at the fourth circuit and
23 who were the primary draftsmen of the papers in
24 opposition to cert.
25 MS. PAYNE: Off the record.

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1 (Whereupon, an off-the-record discussion
2 was held.)
3 Q. Mr. Wilamowsky, thank you very much.
4 MS. PAYNE: I think I'm done with my
5 questions. I'll pass the witness.
6 EXAMINATION BY
7 MR. SHERRILL:
8 Q. My name is Mark Sherrill from Sutherland
9 Asbill Brennan. We've dealt with each other
10 previously a little bit in this case.
11 A. Yes. I'm not sure if we've ever met in
12 person.
13 Q. I will have a handful of questions for
14 you and I think we can be done pretty quickly
15 here.
16 A. Okay.
17 Q. In the course of your testimony about
18 the arguments Liberty made, the equitable
19 arguments I think you characterized them as
20 through which it suggested that NEGТ would make
21 payments if GTN did not on the guarantees, was
22 Liberty successful in those arguments?
23 A. I'm not sure I understand the question.
24 Liberty argued that -- yeah, at some point you're
25 right. Liberty argued that really ET is my

18 (Pages 66 to 69)

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1 obligor, ET is who I should be fine with, ET
2 shouldn't care because NEGT is going to pay,
3 something like that, some variant of that and so
4 your question is, could you repeat it.

5 Q. Was Liberty successful with that
6 argument?

7 A. Ultimately they were not successful with
8 that argument. The basis of the bankruptcy court
9 decision was very hard to decipher. It was not a
10 well -- let's stop right there.

11 MR. STEPHENS: We're on the record.

12 A. Let's stop right there.

13 Q. With respect to the affect that the
14 Liberty litigation and appeals had on the
15 subrogation issues you testified at one point that
16 you would have liked to have more information from
17 ET Power; is that correct?

18 MR. STEPHENS: I object to the form.

19 Q. I can clarify. Why don't we just strike
20 it. You were asked how it would have affected how
21 you handled the Liberty litigation and appeals had
22 you known what ET Power's position would be on the
23 subrogation issues and I think your response was
24 something to the effect of you would always like
25 to have more information or you would have liked

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1 portion of it?

2 A. I can't tell you. I mean as in terms of
3 putting this whole thing together clearly it was
4 Willkie Farr that was the lead and probably got
5 some help on Whiteford Taylor sort of holistically
6 let's prepare this disclosure statement. It was
7 Willkie and then secondarily Whiteford. With
8 respect to any particular item that involved
9 specialized knowledge or knowledge of a particular
10 aspect of the case it would be, and this is just
11 testifying as to what the ordinary course would
12 be, I don't have a specific recollection but it
13 would be our ordinary course to say you guys
14 worked on the sales transaction so even though
15 you're transactional guys it would be great if one
16 of your associates could talk about that because
17 we don't know as much about it. We might have,
18 might have gone to Sutherland or might have, I
19 don't remember, and we might have said guys, can
20 you write something up about the Liberty tolling.
21 I just do not have any recollection as to whether
22 we did that or not but in the ordinary course we
23 would have gone to outside non-lead bankruptcy
24 counsel sometimes and said can you prepare a
25 particular paragraph for a particular piece.

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1 to have more information.

2 A. Yes. I think the response was present
3 tense. My general as a general matter yes, and
4 probably specifically relating to this case or
5 anything as a lawyer I like to have as much
6 information as I can before making a decision.

7 Q. I think that answer probably goes to
8 what I wanted to ask you about but isn't that true
9 of every situation in the past, you always wanted
10 to be armed with information that you had in the
11 future?

12 A. I want to be armed with as much relevant
13 information as possible and as little irrelevant
14 information as possible.

15 Q. We talked a little bit about the ET
16 Power disclosure statement which I believe is
17 Exhibit 8.

18 A. Exhibit 8.

19 Q. Entered as exhibit and you were
20 specifically asked about the portion of that
21 disclosure statement at pages 21 through 23
22 regarding creditor recoveries.

23 A. Yes.

24 Q. Which law firms were involved in the
25 preparation of that disclosure statement and that

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1 Q. And which financial advisers would have
2 been involved in the preparation?

3 A. It would have been, at that time it
4 would have been A & M on behalf of the debtors
5 including the ET debtors at that time I believe.
6 In close consultation, at that point everything
7 was being done in close consultation with the
8 creditors' committee and at that time the
9 creditors' committee adviser was Abigant or was it
10 Penta, I don't remember but it was whichever firm
11 Messrs. Patrick and Goldstein were at.

12 Q. And you said Alvarez & Marsal were
13 representing the debtors. Can you be more
14 specific who Alvarez, I said represented but they
15 were financial advisers for which entities?

16 A. All of them.

17 Q. All of the debtor entities?

18 A. Yes.

19 Q. That would be include NEGT and GT Power?

20 A. Yes.

21 Q. Is it fair to say that if any financial
22 adviser were to have the analysis of what went
23 into those creditor recovery statements it would
24 be financial adviser to the debtors?

25 MR. STEPHENS: Object to the form.

19 (Pages 70 to 73)

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1 MS. PAYNE: Objection.

2 A. I don't know what would be fair to say
3 hypothetically. I can say that with respect to
4 this particular disclosure statement and this
5 particular debtor I would expect given the
6 cooperation that I seem to recall existed by that
7 time I would expect these numbers to have been
8 signed off on by, not necessarily agreed to in
9 every particular detail but at least agree that
10 this was adequate disclosure and fair disclosure
11 by all the professionals involved, counsel for the
12 committee, counsel to the debtors to the extent
13 that things fall in within the legal and to the
14 extent that things fall within the financial and
15 the number crunching I would expect there to be
16 some broad consensus between the committee's
17 financial adviser and the debtors' financial
18 adviser so yes, I would expect them to know, I
19 would expect them to have some belief, to be able
20 to believe in the numbers that they put into the
21 disclosure agreement.

22 Q. But with respect to generating the
23 numbers would that be more likely to have been
24 generated by debtors' financial advisers?

25 MR. STEPHENS: Object to the form. It

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1 calls for speculation.

2 MS. PAYNE: Same objection.

3 A. Let me see if I have a specific
4 recollection. I would expect it but I have no
5 specific recollection.

6 Q. Okay. We talked a little bit about the
7 existence of your opinion on subrogation issues.
8 Were you ever retained to provide any advice to
9 NEGOT or ET Power on subrogation rights?

10 A. Never.

11 Q. Have you performed any research or
12 analysis on the legal issues underlying NEGOT and
13 ET Power's legal position with respect to
14 subrogation issues?

15 A. In my 15 years as a lawyer I've
16 certainly looked at subrogation issues and
17 therefore have been able to sort of form a seat of
18 the pants opinion perhaps but of the relative
19 merits of each of the briefs that were filed, that
20 you guys filed but I have not like I said I didn't
21 even read it when Rob sent it to me and again I
22 apologize for that.

23 Q. So just to make sure I understand you
24 you have done no research or analysis with regard
25 to the specific issues beyond just typical

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1 subrogation issues that arise in the bankruptcy
2 context, nothing specific to these parties'
3 issues?

4 A. Let me say this: I've done no research
5 or even engaged deeply in thought regarding
6 anything, any of the specific arguments that were
7 on either side's briefs.

8 Q. And so without having given that deep
9 thought or done the specific research is it fair
10 to say your analysis on those issues would be
11 incomplete?

12 MR. STEPHENS: I object to the form.

13 MS. PAYNE: Same objection.

14 A. I have an opinion but if I was retained
15 to provide an opinion letter I would do more
16 research. I think that there are various degrees
17 of completeness so unless you want to ask a
18 different question I think that's the way I would
19 respond.

20 Q. We talked a little bit about the
21 communications between you and Robert Patrick
22 after the time that the parties filed their papers
23 in this matter.

24 A. Right.

25 Q. I believe you said that Mr. Patrick sent

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1 you ET Power's objection. Did he also send you
2 NEGOT's motion concerning subrogation records?

3 A. You know, because I didn't read it I
4 don't remember. I just don't remember.

5 Q. I refer to Exhibit 6 which is the order
6 in respective motions filed by Liberty Electric
7 Power seeking confirmation of arbitration award.

8 A. Yes.

9 Q. And we talked about the first full
10 paragraph on page 3 of that exhibit. Is this
11 document leading to which your name is attributed?

12 A. This is a court order.

13 Q. In your experience as a bankruptcy
14 lawyer is there anything to be attributed to the
15 lawyers involved in a matter from the language of
16 a court order?

17 MR. STEPHENS: Form objection.

18 You can answer to the extent you are
19 able.

20 A. Maybe yes but only if you know who
21 drafted, only if you know what the drafting on
22 that was because then you'll know which lawyer put
23 in what, otherwise it's hard.

24 MR. SHERRILL: I think we have no
25 further questions.

20 (Pages 74 to 77)

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1 MS. PAYNE: I have a few follow up.

2 EXAMINATION BY

3 MS. PAYNE:

4 Q. With respect to the order Exhibit Number
5 6 do you know who prepared the form of order the
6 court ultimately signed?

7 A. It was probably a joint effort in terms
8 of whose document management system it started on.
9 It probably started on Willkie's and at some point
10 turned into, went to Whiteford because I can tell
11 from the way the document was drafted that this
12 was coming ultimately at the time it was uploaded
13 it came from Whiteford's system I believe and who
14 took the first shot at the draft order that was
15 circulating --

16 Q. I'm not concerned with that. Let me ask
17 it slightly differently. When the form of order
18 was submitted to the court had the parties reached
19 an agreement on the language of the form of order
20 or were there disputes among the party and the
21 court came up with its own version? Do you
22 understand sort of the distinction between the
23 two?

24 MR. STEPHENS: Which parties do you
25 mean?

1 agreed to do it without the judge's prodding I
2 think ultimately this was a consensual form of
3 order.

4 Q. Understood. Thank you. Another issue
5 Mr. Sherrill raised a moment ago was he asked you
6 a couple of questions about the ET disclosure
7 statement, which financial advisers had input and
8 that sort of thing.

9 A. Right.

10 Q. And you made a comment and I want to
11 make sure I understand your comment. I think you
12 said at some point drafts of disclosure statements
13 in this instance were submitted I think to you
14 said all of the professionals and all the
15 professionals had some input into whether it was
16 appropriate and if I understood it right then does
17 that mean for example a draft of this was
18 submitted to various creditors' committees or was
19 there only one in this instance?

20 A. There were two creditors' committees in
21 the cases but I don't think that the NEG
22 creditors' committee would have had any interest
23 at that point so I assume --

24 Q. So there was an ET creditors' committee
25 and the draft of this was submitted to the ET

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1 Q. Whatever parties had an interest in what
2 was going on with respect to this order. You said
3 TransCanada --

4 A. There was an order -- this was not part
5 of what I prepared, what I refreshed my
6 recollection on for today's hearing but I know
7 there was an order, letter-writing campaign to the
8 court. We had a telephone conference. We were
9 trying to get the money. Bottom line is that
10 TransCanada was trying to, you know, was trying to
11 in its view protect itself from any possible, you
12 know, what we call from horrible imaginings as to
13 what might happen. They had no upside really to
14 the money. It was either neutral or downside one
15 way or the other so they were being as difficult
16 as you could imagine and ultimately something the
17 court said on the telephone conference, we had a
18 telephonic hearing or something and he essentially
19 told TransCanada too bad on you and then I don't
20 know what happened in terms of how he got to this
21 order but I think by the time this order was
22 entered it was consensual, at least in light of
23 the judge's telling TransCanada they were going to
24 have to part with the money it became a consensual
25 order. Whether or not TransCanada would have

1 creditors' committee and they had to approve it in
2 some way before it was filed; is that correct?

3 A. I don't remember the dynamic exactly but
4 I can't imagine in this context, we're talking
5 about the liquidation case where the primary
6 beneficiaries are going to be the unsecured
7 creditors, I can't imagine if we even filed a
8 draft with the court, if we would have even filed
9 an initial version of the draft with the court
10 without having the creditors' committee on board
11 in substantially in all aspects.

12 Q. In professionals that were involved with
13 the ET creditors' committee if I understood your
14 testimony that included Mr. Patrick's firm under
15 whatever name it was then but it's now currently
16 known as Protiviti, correct?

17 A. You'll have to talk to Mr. Patrick about
18 the characterization of that. The group of
19 professionals that had been, that are now working
20 at Protiviti, the ones that I know had previously
21 been at a couple of different firms and moved
22 along as a group whether or not, I don't know,
23 whether it was a merger or they just moved or I
24 don't know.

25 Q. I don't want to get caught up in that

21 (Pages 78 to 81)

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1 issue. Let me ask slightly differently. Were
2 Mr. Patrick and Charles Goldstein and perhaps
3 others that are currently at Protiviti, and
4 Mr. Goldstein as you know is the plan
5 administrator for ET Power currently, were they
6 some of the professionals to whom you referred
7 earlier that would have been connected in some way
8 to ET's creditors' committee?

9 A. Yes.

10 Q. They would have been in the normal
11 course of things able to review a draft of the
12 disclosure statement prior to the filing of the
13 court?

14 A. Yes. I would just say that I don't know
15 that I necessarily or somebody at my firm
16 transmitted anything directly to Mr. Goldstein or
17 Mr. Patrick or anybody else at the financial
18 adviser because typically we might share it with
19 Sidley who was counsel to the creditors' committee
20 and say here's our draft and then Sidley might do
21 an internal distribution that would include the
22 financial adviser. I just don't remember. I
23 don't remember either whether we got, the blessing
24 came directly because I spoke to Charles or
25 somebody and I got the blessing or we got the

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1 blessing through, you know, collective comments
2 that came up through Sidley. I would not be
3 surprised if it was the latter.

4 Q. Certainly had it been filed without the
5 ET creditors' committee's approval the creditors'
6 committee had a mechanism through which it could
7 object, correct, or in some way --

8 A. Creditors' committee is a party that is
9 given standing section 11.09 of the bankruptcy
10 code.

11 Q. Is that yes, they had the ability to
12 object if they felt that was important?

13 A. I think that's a legal opinion but I
14 think that's fairly straightforward.

15 Q. Going back to Mr. Sherrill's first
16 discussion with you he went back to arguments that
17 Liberty made in the appeal of the post-petition
18 interest issue and in the discussion of that issue
19 before the bankruptcy court initially and if I
20 understood your testimony --

21 A. I apologize. I'm nodding but I'm
22 thinking about my next engagement.

23 Q. You testified earlier and Mr. Sherrill
24 asked you a few questions about an argument that
25 Liberty made I believe to the bankruptcy court

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1 initially that it was an equitable argument that
2 had something to do with NEGT would have to make
3 payments that ET Power didn't need to be concerned
4 with if the post-petition interest issue were
5 adversely decided to ET Power. Do you recall
6 something of that nature?

7 A. I recall something of that nature. I'm
8 not sure -- let's call it an argument. They made
9 some equitable arguments in that broad context but
10 I'm not sure if that's a legal argument or an
11 equitable argument but that particular one.

12 Q. A number of arguments were made and you
13 mentioned that bankruptcy court opinion didn't
14 rule on that particular argument; is that correct?
15 Is that a fair statement?

16 A. The bankruptcy court opinion ruled in
17 favor of Liberty.

18 Q. On the global issue?

19 A. On the global issue.

20 Q. And it did not address this particular
21 argument; is that correct?

22 A. Yes, I'm pretty sure that that is
23 correct. I haven't read the opinion. I read it
24 probably a month ago and I skimmed it again but
25 I'm pretty sure it wasn't absolutely clear.

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1 Q. So when Mr. Sherrill asked you was
2 Liberty successful on that argument all you can
3 say is from what the bankruptcy court did is that
4 the bankruptcy court on the global issue ruled in
5 favor of Liberty but didn't address that specific
6 issue; is that correct?

7 A. I think that's right.

8 MS. PAYNE: I have nothing further.

9 MR. STEPHENS: I have no questions.

10 MR. SHERRILL: I don't think we have
11 any.

12 MS. PAYNE: I need this expedited. I'd
13 like to get a copy, final copy by next Monday
14 if possible and an E-mail version is requested
15 as well.

16 MR. SHERRILL: We would like the same by
17 next Monday in an E-mail version if possible.
18
19

20 (Continued on next page to include jurat.)
21
22
23
24
25

22 (Pages 82 to 85)

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MS. PAYNE: I don't need the rough if
you can give me the final E-mail electronic
version.

MR. STEPHENS: Counsel will provide it
to me.

MS. PAYNE: Yes.
(Whereupon, at 12:05 p.m., the
Examination of this Witness was concluded.)

STEVEN WILAMOWSKY

Subscribed and sworn to before me
this ____ day of ____ 2010.

NOTARY PUBLIC

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EXHIBITS

EXHIBITS:

EXHIBIT NUMBER	EXHIBIT DESCRIPTION	PAGE
-------------------	------------------------	------

5	Subpoena	5
6	May 18, 2005 order	33
7	Document	38
8	Document	57

CERTIFICATE

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

I, SHAVON KOLB, a Notary Public for and
within the State of New York, do hereby certify:

That the witness whose examination is
hereinbefore set forth was duly sworn and that
such examination is a true record of the testimony
given by that witness.

I further certify that I am not related
to any of the parties to this action by blood or
by marriage and that I am in no way interested in
the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set
my hand this 28th day of January, 2010.

SHAVON KOLB

23 (Pages 86 to 89)

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