

**FTAA**

***Funds***

***Transfer***

***Agent***

***Agreement***

Presenter: Will Johnson

**Visage**  
**ENERGY CORP.**

# *DOE Promotes The Gas Company's Financing Concept*



*Reprint 12/96*

- *DOE finance panel: (left to right)*
  - *Jeff Thorsen - Southern California Gas Company*
  - *Bill Cunningham - Creative Investment Resources*
  - *Will Johnson - Visage Energy*
  - *Wally Roth - Union Bank of California*
  - *Jeff Boling - Amoco Energy Trading Company*

# *GISB Considers Contract Provision To Assist Minority Marketers*



*Reprint 09/97*

- *At the July 21 meeting of GISB's Contracts Subcommittee are: (left to right)*
  - *Carolyn Hazel - Conoco*
  - *Jeff Thorsen - Southern California Gas Co.*
  - *Will Johnson - Visage Energy*
  - *Christopher Freitas - the Department of Energy*

***North  
American  
Energy***

***Standards  
Board***



<http://www.naesb.org>

## *Doors opened for minority energy brokers*

post-gazette.com 

Reprint 11/2001

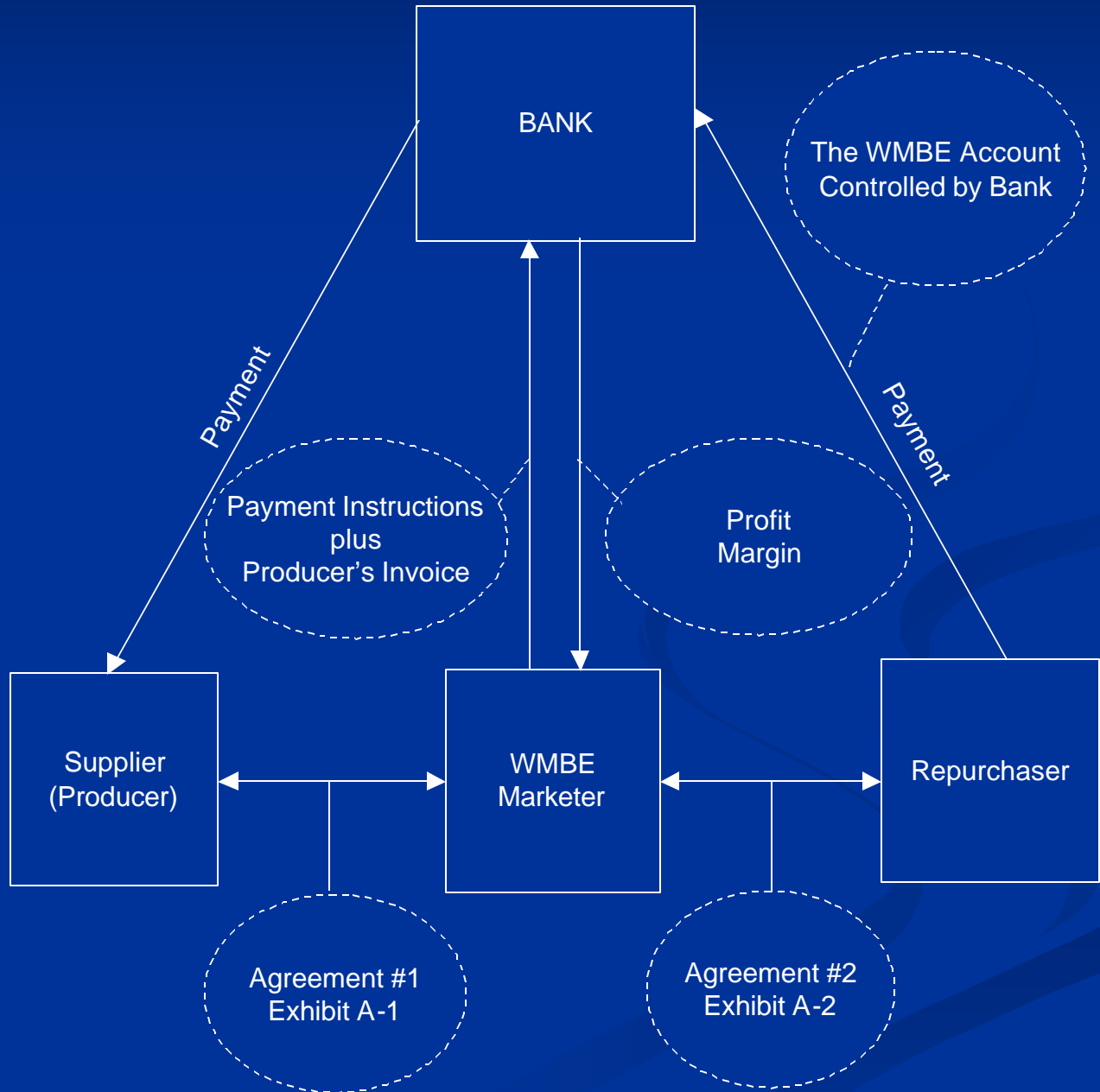
### **Business News**

- *A pilot program that will let minority- and women-owned businesses try their hand at serving as energy brokers was unveiled yesterday in Pittsburgh.*
- *Fueled with a \$300,000 grant from the U.S. Department of Energy, the African American and Hispanic Chambers of Commerce of Western Pennsylvania will work with regional nonprofits to identify potential participants in the small-business community.*
- *The agreement is a joint initiative of the local African American and Hispanic chambers, the U.S. Department of Energy and the National Energy Technology Laboratory.*

# *Funds Transfer Agent Agreement*

- *The FTA Agreement is composed of two basic documents:*
  - *Agreement #1 between the Producer, the WMBE and the Bank*
  - *Agreement #2 between the Repurchaser and the WMBE*
- *The Bank's administration of these documents occur at two different phases of each transaction:*
  - *the Transaction Confirmation Phase of Exhibit A-1 and Exhibit A-2*
  - *the Funds Transfer Phase*

# Flow of Funds of FTAA



Transaction Confirmation is subject to the Base Contract between Seller and Buyer dated \_\_\_\_\_.  
 Terms of this Transaction Confirmation are binding unless disputed in writing within 2 Business Days of Receipt unless  
 otherwise specified in the Base Contract.

SELLER: <i>[Supplier]</i> _____ _____ _____ _____ Contract No.: _____	BUYER: <i>[Marketer]</i> _____ _____ Attn: _____ Phone: _____ Fax: _____ Base Contract No.: _____
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Performance Obligation:     Firm (Fixed)     Interruptible    (2)A-1

Daily Quantity	(4)A-1 Delivery Point(s)	(5)A-1 Price \$/MMBtu (Dth)	(6)A-1 Delivery Period

Condition: FTA Confirmation Statement

<span style="border: 1px solid black; padding: 2px;">(7)A-1</span>	Buyer: _____ By: _____ Title: _____ Date: _____
	<span style="border: 1px solid black; padding: 2px;">(8)A-1</span>

**BUYER AND SELLER AGREE THAT THE PAYMENT INSTRUCTIONS MAY NOT BE MODIFIED DURING THE OPERATIVE PERIOD OF THIS BINDING TRANSACTION CONFIRMATION.**

Confirmation Statement:

The Funds Transfer Agent (FTA), has reviewed the foregoing Transaction Confirmation and hereby confirms to Seller and Buyer that it shall make payment on behalf of Buyer to Seller for the gas delivered subject to this Transaction Confirmation pursuant to the terms and conditions to its FTA Agreement with Buyer and Seller. FTA further confirms that it is contracted for the repurchase of a corresponding quantity of gas at the Delivery Point(s) identified above, under the same Performance Obligation and at a price greater than the price set out above, and that Buyer's Repurchaser has agreed to make payments for such gas directly to FTA.

*[Bank]*  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

Transaction Confirmation is subject to the Base Contract between Seller and Buyer dated \_\_\_\_\_. The terms of this Transaction Confirmation are binding unless disputed in writing within 2 Business Days of unless otherwise specified in the Base Contract.

Seller: <i>[Marketer]</i> _____ _____ _____ _____ Contract No.: _____	BUYER: <i>[Repurchaser]</i> _____ _____ Attn: _____ Phone: _____ Fax: _____ Base Contract No.: _____
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Performance Obligation: \_\_\_\_\_ Firm (Fixed)    \_\_\_\_\_ Interruptible (2)A-2

Daily Quantity	<span style="border: 1px solid black; padding: 2px;">(4)A-2</span> Delivery Point(s)	<span style="border: 1px solid black; padding: 2px;">(5)A-2</span> Price \$/MMBtu (Dth)	<span style="border: 1px solid black; padding: 2px;">(6)A-2</span> Delivery Period

Condition: FTA Confirmation Statement

_____ <span style="border: 1px solid black; padding: 2px;">(7)A-2</span>	Buyer: _____ By: _____ Title: _____ Date: _____	_____ <span style="border: 1px solid black; padding: 2px;">(8)A-2</span>
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BUYER AND SELLER AGREE THAT THE PAYMENT INSTRUCTIONS MAY NOT BE MODIFIED DURING THE OPERATIVE PERIOD OF THIS BINDING TRANSACTION CONFIRMATION.

Confirmation Statement:  
 \_\_\_\_\_ as the Funds Transfer Agent (FTA), has reviewed the foregoing Transaction Confirmation and confirms that Seller is contracted for delivery of a corresponding quantity of gas at the Delivery Point(s) identified above, under the same Performance Obligation and at a price no greater than the price set out above. FTA will accept payment from Buyer on behalf of Seller under the terms and conditions of the Base Contract.

*[Bank]*  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

# **FTAA**

## ***Transaction Confirmation Process***

- *The Transaction Confirmation process should be completed by the end of the month preceding the month of Delivery.*
  - *The Producer will have received from the FTA Bank a fully executed Exhibit A-1 prior to the flow of gas on the first day of the Delivery month.*
- *The Bank will verify (as shown in the verification process):*
  - *eight (8) items on the Exhibit A-1*
  - *eight (8) items on the Exhibit A-2*
- *After the verification process has been completed, the Bank:*
  - *signs the bottom of the Exhibit A-2 and faxes it back to the Repurchaser and the WMBE*
  - *signs the bottom of the Exhibit A-1 and faxes it back to the Producer and the WMBE*
- *This completes the Transaction Confirmation phase.*
  - *This repeats once a year for one-year deals and once a month for one-month deals.*

# FTAA Verification Process

- **(1) A-1** & **(1) A-2**  
*the Transaction Confirmation number is the same on both Exhibits.*
- **(2) A-1** & **(2) A-2**  
*the Performance Obligation is the same, both "Firm Fixed" or both "Interruptible" on both Exhibits.*
- **(3) A-1** & **(3) A-2**  
*the Daily Quantity is the same on both Exhibits.*
- **(4) A-1** & **(4) A-2**  
*the Delivery Point is at the same place on both Exhibits.*
- **(5) A-1** & **(5) A-2**  
*the (5) A-2 price is greater than the (5) A-1 price, so that the deal is on at a positive profit margin.*
- **(6) A-1** & **(6) A-2**  
*the Delivery Period is for the same time period on both Exhibits.*
- **(7) A-1** & **(7) A-2**  
*both Exhibits have been signed by the Sellers, as provided for.*
- **(8) A-1** & **(8) A-2**  
*both Exhibits have been signed by the Buyers, as provided for.*

## ***Flow of Funds of FTAA***

- *On the 25th of the month following the Delivery month:*
  - *the Repurchaser will transfer funds into the "WMBE Account Controlled by Bank"*
- *On the next business day:*
  - *the Bank will receive Payment Instructions and a copy of the Producer's Invoice from the WMBE*
  - *the Bank will transfer to the Producer the indicated amount of funds*
- *The remainder of the funds (i.e., the Profit Margin):*
  - *will be transferred to the WMBE from the "WMBE Account Controlled by Bank"*
- *This transfer of funds will occur:*
  - *each month following a month in which gas was delivered in accordance with the operative Exhibit A-1 and Exhibit A-2.*

# Diagram of FAX Movement

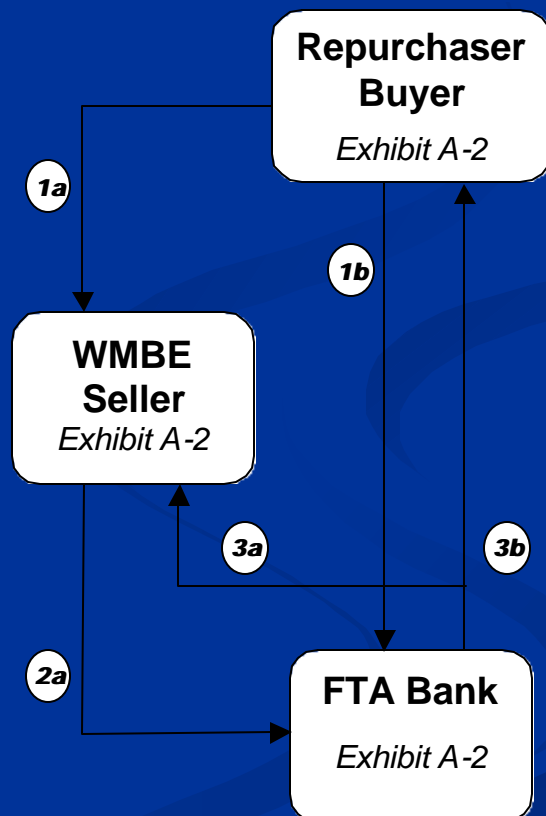
## NAESB Funds Transfer Agent Agreement

*Participants:*  
Supplier, WMBE & FTA Bank  
**Agreement #1 & Exhibit A-1**



## Special Provisions to the NAESB Base Contract

*Participants:*  
WMBE & FTA Bank  
**Agreement #2 & Exhibit A-2**



# FAX Movement Instructions

Step	<b>NAESB Funds Transfer Agent Agreement</b> <i>Participants:</i> Supplier, WMBE & FTA Bank <b>Agreement #1 &amp; Exhibit A-1</b>	<b>Special Provisions to the NAESB Base Contract</b> <i>Participants:</i> WMBE & FTA Bank <b>Agreement #2 &amp; Exhibit A-2</b>
1		<b>1a</b> and <b>1b</b> : Repurchaser/Buyer faxes signed Exhibit A-2 to the WMBE Seller and the FTA Bank.
2		<b>2a</b> : The WMBE Seller signs Exhibit A-2, and faxes it to the FTA Bank.
3	<b>1a</b> and <b>1b</b> : The WMBE Buyer faxes signed Exhibit A-1 to the Supplier and the FTA Bank, utilizing the same Confirmation Number that appeared on the Exhibit A-2.	
4	<b>2a</b> and <b>2b</b> : The Supplier signs the Exhibit A-2, and faxes it to the WMBE Buyer and the FTA Bank.	
5	<i>Now the Bank has received Exhibit A-1, which has been signed by the WMBE Buyer and the Supplier, and the Exhibit A-2, which has been signed by the WMBE Seller and the Repurchaser. The FTA Bank will verify that all items match, in accordance with "FTA Agreement Instructions," and that <b>(5) A-2</b> price is greater than <b>(5) A-1</b> price. Also, the FTA Bank will confirm that the Supplier is on the Repurchaser's Authorized Supplier List.</i>	
6		<b>3a</b> and <b>3b</b> : The FTA Bank signs the lower portion of the Exhibit A-2, and faxes it to the WMBE Seller and the Repurchaser.
7	<b>3a</b> and <b>3b</b> : The FTA Bank signs the lower portion of the Exhibit A-1, and faxes it to the WMBE Buyer and the Supplier.	

# Legal Opinion, 10-Jun-1999

Whitman Breed Abbott & Morgan LLP

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WRITER'S DIRECT NUMBER  
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Frankfurt

June 10, 1999

## VIA FACSIMILE

Will J. Johnson  
President  
Visage Energy Corp.  
6345 Green Valley Circle  
Suite 216  
Culver City, California 90230

Re: Funds Transfer Agreement

Dear Will:

This letter is written with respect to the arrangement Visage Energy Corp. ("Visage") has with its suppliers, the repurchasers of its product, and Union Bank of California (the "Bank"), whereby the Bank handles transfers of funds for the purchase and sale of natural gas. You have asked us to evaluate the risk that, in the event of a bankruptcy by Visage, funds subject to the arrangement would be part of Visage's bankruptcy estate, and the gas supplier would not be paid. The following analysis responds to this request. Please note that this letter and the analysis contained herein is furnished to you solely for your benefit, and is not to be relied upon by any other person or entity.

Our analysis is based on the following facts and assumptions. Visage purchases natural gas from suppliers (the "Supplier(s)") and markets and resells the gas to third parties (the "Repurchaser(s)"). A portion of the consideration paid to Visage by the Repurchaser is paid to the Supplier, and the balance is retained by Visage as its profit on the sale. As part of the transaction the parties enter into two agreements with the Bank. First, a Model Funds Transfer Agent Agreement (an "Agreement") is entered into among Visage, the Bank, and the Supplier. Under the Agreement, when Visage and the Supplier strike a deal, the parties notify the Bank, and the Bank confirms the transaction and agrees that it shall make payment to the Supplier from funds received from Visage's Repurchaser. A second Agreement is entered into among Visage, the Bank, and the Repurchaser, in which the Repurchaser agrees to pay for the

# Legal Opinion, 10-Jun-1999 (pg.2)

Whitman Breed Abbott & Morgan llp

Will J. Johnson

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June 10, 1999

goods by depositing the purchase price with the Bank. The Bank agrees that, for the benefit of visage, it will utilize funds received to pay the Supplier. At the time of the sale, the Repurchaser wires funds to a Bank Control Account maintained at the Bank. On the next business day after receiving the funds the Bank (1) wires to the Supplier its purchase price, and (2) remits the balance remaining after this payment to Visage.

The Bank Control Account is a type of account having certain characteristics. According to internal Bank documents, funds deposited into the account are held for a specific purpose and disbursements are controlled by the Bank. The only authorized signatories on the account are Bank officers, and the Bank is only authorized to disburse the funds in accordance with the applicable Agreements. At no time does Visage have control over funds in the account intended for the Supplier. The Bank's written instructions for opening a Bank Control Account state that the Bank's name must appear in the account title, and give the following example: "ABC Co., Union Bank of California Control Account, Trustee." In the case of the Bank Control Account established for Visage, the account is variously titled "Union Bank of California as Transfer Agent for Visage Energy Corp." (in the Bank-Depositor Agreement) and "Visage Energy Corp, Union Bank of California NA Ttee, Control Account" (on Bank statements).

As noted above, under the Agreements, the funds the Bank receives from the Repurchaser are disbursed on the next business day. Thus, any funds received are in the Account for only one day. Nevertheless, from time to time Suppliers have expressed concern that in the event Visage were to file bankruptcy the same day funds are deposited into the Account by a Repurchaser, the funds would be part of Visage's bankruptcy estate, and the Supplier would not be paid. You have asked us to evaluate the likelihood of this occurring.

Property held in trust by a bankruptcy debtor for another is not property of the debtor's bankruptcy estate available for use by the debtor or distribution to creditors. In our view, there is a substantial likelihood that a court would find that the Agreements and Bank Control Account (collectively, the "FTA") create a trust, that Visage holds a portion of funds deposited into the Bank Control Account as trustee for the benefit of the Supplier, and that the Supplier's beneficial interest in, and right to, the funds would be undisturbed by a bankruptcy of Visage.

The four essential elements of a trust are (a) a trust property, (b) a trust purpose, (c) one or more beneficiaries, and (d) the intention to create a trust. The FTA seems to satisfy each of the four requirements. First, the funds deposited into the Bank Control Account undoubtedly qualify as

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Whitman Breed Abbott & Morgan llp

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June 10, 1999

trust property. Second, the purpose of the trust can be defined as to give the Supplier an immediate beneficial interest in the funds, thereby eliminating the step of having legal and equitable title vest simultaneously in Visage. Third, it is not difficult to identify the Supplier as a beneficiary of the arrangement.

Finally, the FTA indicates the parties' intention to create a trust. Although the FTA does not explicitly state that the deposited funds are held in trust, it appears that the transaction is structured as it is in order to give the Supplier an interest in the funds from the moment they are deposited. The Repurchaser deposits the funds with the explicit understanding that a portion of the funds are intended for the Supplier. Visage also has this understanding, and essentially disclaims any beneficial interest in funds intended for the Supplier. The Supplier clearly expects to have an interest in, or right to, the funds from the moment the deposit is made. The role of the Bank as transfer agent can be viewed as a mechanism for assuring the Supplier that Visage will act in accordance with its duty as trustee to disburse the funds to the Supplier. This is accomplished by Visage irrevocably instructing the Bank, as its agent, to disburse a specific portion of the funds to the Supplier.

Aside from the overall expectations of the parties, specific provisions and references in the documents establishing the Bank Control Account also indicate the intention of Visage to create a trust. For example, the account is variously titled "Visage Energy Corp., Union Bank of California NA TTEE" (on the bank statements) and "UB CL -- Union Bank as Transfer Agent for Visage Energy Corp." (on the Bank-Depositor Agreement). In addition, the only authorized signatories on the account are officers of the Bank, and the Bank acknowledges that funds deposited are held for a specific purpose. The Bank also has instructed its officers that it is appropriate for a Bank Control Account to reflect the Bank as trustee.

Because of references to the Bank as trustee, a case may also be advanced that the FTA creates a trust having the Bank - rather than Visage -- as trustee. However, neither the Supplier nor the Repurchaser are privy to these references. In addition, the Agreements include a provision whereby the parties specifically appoint the Bank as their agent, and consistently refer to the Bank as an agent. It is our view that the references to the Bank as a trustee in the Bank's internal documents, and in documents to which only Visage is privy, are not likely to overcome the intention expressed in the Agreements that the Bank is acting merely as an agent.

There are additional doctrines that could be employed to preserve the right of the Supplier to claim funds on deposit in

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Whitman Breed Abbott & Morgan llp

Will J. Johnson

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June 10, 1999

the account. However, we view the trust theory outlined above as the most straightforward.

The FTA nowhere states explicitly that funds received are held in trust for the Supplier, leaving the door open to arguments that there was no intention to create a trust. The parties, who are experienced in business, could have plainly and forthrightly stated their intention to create a trust. The fact that they did not do so would lend support to the conclusion that a trust relationship was not intended. However, to the extent there is any doubt regarding the parties, intention, the Agreements could be modified to expressly state that the funds deposited by the Repurchaser are held (albeit for one day only) by Visage in trust for the benefit of the Supplier. This would remove any uncertainty and enhance the likelihood of a court finding the existence of a trust, without altering the economics or essence of the transaction. For example, a sentence could be added to Section 3.1 that reads, "Funds received from the Buyer's repurchaser shall be held in trust by the Buyer for the benefit of the Seller to the extent of the purchase price owing from the Buyer to the Seller."

Please call if you have any questions, or wish to discuss the foregoing.

Very truly yours,



Maita Deal Prout

: MDP

# Legal Opinion, 30-Jun-1999

Whitman Breed Abbott & Morgan llp

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New York  
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June 30, 1999

VIA FACSIMILE

Will J. Johnson  
President  
Visage Energy Corp.  
6345 Green Valley Circle  
Suite 216  
Culver City, California 90230

Re: Funds Transfer Agreement

Dear Will:

It was disappointing to learn that you are still having a hard time convincing your suppliers that, if Visage Energy filed a bankruptcy, the suppliers are protected against having those funds in the Bank Control Account which are intended for them drawn into Visage's bankruptcy estate. I am surprised that they apparently are not even willing to discuss modification of the terms of the Funds Transfer Agreement and Bank Control Account to tighten the existing protections. Section 541 of the Bankruptcy Code, and cases decided under this Section, unambiguously provide that property held in trust by the debtor for another is not property of the debtor's bankruptcy estate. In fact, we are unaware of a case where a court has found that property held by a debtor in trust is available for use by the debtor or a bankruptcy trustee. If the Bank Control Account and Funds Transfer Agreements are revised to expressly provide that the purchase price, when deposited into the Bank Control Account, is held by Visage Energy in trust for the supplier, there should be no credible legal theory by which the funds could be characterized as property of Visage's bankruptcy estate.

This letter and the above analysis are furnished to you solely for your benefit, and are not to be relied upon by any other person or entity. However, I would be available to discuss with your suppliers or their counsel the theory they believe would permit the funds in question to be pulled into Visage's bankruptcy estate. If there is a particular case that raises concerns we would be happy to review it,

## *Legal Opinion, 30-Jun-1999 (pg.2)*

Whitman Breed Abbott & Morgan llp

Will J. Johnson

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June 30, 1999

and see if there is a way to structure the transaction to address any risks the suppliers believe the case presents.

Please call if you have any questions.

Very truly yours,



Maita Deal Prout

: MDP

# Legal Opinion, 26-Sep-2001

Law Offices

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September 26, 2001

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Will Johnson  
Visage Energy Corp.  
6345 Green Valley Circle  
Suite 216  
Culver City, California 90230

Re: Funds Transfer Agreement

Dear Will:

This letter is a follow up to Whitman Breed Abbott & Morgan's letter to you of June 10, 1999, addressing the bankruptcy concerns relating to the arrangement Visage Energy Corp. ("Visage") has with its suppliers, the repurchasers, of its product, and Union Bank of California (the "Bank"), whereby funds for the purchase and sale of natural gas are handled through an account maintained at Union Bank. You have asked whether, in connection with one or more specific transactions under the arrangement that Visage may enter into in the future, Holland & Knight LLP can issue an opinion along the lines of Whitman Breed Abbott & Morgan's letter.

As a preliminary matter, I note that at such time as a specific transaction is contemplated we would only be able to issue an opinion if we are retained, and if it would not be a conflict of interest for Holland & Knight LLP (or waivers of any conflicts were obtained). Assuming there is no conflict, Holland & Knight LLP would be capable of opining on the likelihood, in the event of a bankruptcy of Visage, of funds in the account being determined to be property of Visage's bankruptcy estate. Of course, we would need to review the underlying transaction documents and other relevant facts, and confirm the status of the law at the time. Based on the status of the law today, we would expect that if the parties document their intention that funds on deposit are held in trust for the benefit of

## *Legal Opinion, 26-Sep-2001 (pg.2)*

Will J. Johnson  
Visage Energy Corp.  
September 26, 2001  
Page 2

the party supplying product to Visage, and there is no commingling of funds from other sources in the account, that we would conclude that a court would find the funds are not property of Visage's bankruptcy estate. We must emphasize, however, that the language of the documents would need to be examined, any other relevant facts (such as whether funds of more than one supplier are commingled in the account) would need to be considered, and the law as in effect on the date of the opinion applied. While we do not foresee a major change in the law, the law in effect at the time is determinative of the conclusions in any opinion.

Also enclosed for your information are some materials about Holland & Knight LLP. As you can see, we have a broad based business practice, with expertise in many areas of the law.

Please let me know if you have any questions.

Very truly yours,

HOLLAND & KNIGHT LLP



Maita Deal Prout

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