

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

In re)	Chapter 11 Case
MIRANT CORPORATION, <u>et al.</u> ,)	Case No. 03-46590-DML
)	Jointly Administered
Debtors.)	
)	

**AGREED ORDER BY AND AMONG MIRANT AMERICAS
ENERGY MARKETING, L.P AND THE ELECTRIC RELIABILITY COUNCIL OF
TEXAS, INC. PROVIDING FOR THE SET-OFF OF PREPETITION CLAIMS AND
SET-OFF AGAINST CERTAIN COLLATERAL**

Upon the Motion of the Debtors for an Order Enforcing the Automatic Stay and Directing the Turnover of Property of the Estate (the "Turnover Motion"), Mirant Americas Energy Marketing, LP ("MAEM") and the Electric Reliability Council of Texas, Inc. ("ERCOT"), by and through their undersigned counsel, hereby agree as follows:

RECITALS

1. Commencing on July 14, 2003 and concluding in the early morning hours of July 15, 2003 (the "Petition Date"), Mirant Corporation ("Mirant") and certain of its affiliated debtors, including MAEM (collectively, the "Initial Debtors"), filed voluntary petitions in the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended (the "Bankruptcy Code").¹ From time to time thereafter, certain of Mirant's other affiliates have

¹ Concurrently, Mirant caused two of its Canadian subsidiaries, Mirant Canada Energy Marketing, Ltd and Mirant Canada Energy Marketing Investments, Inc. (collectively, the "Canadian Debtors") to commence plenary insolvency proceedings in the Court of Queen's Bench of Alberta Judicial District of Calgary (the "Canadian Court") pursuant to the *Companies' Creditors Arrangement Act*. The Canadian Debtors are subject to the sole and exclusive jurisdiction of the Canadian Court.

filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (collectively, the "New Debtors" and, together with the Initial Debtors, the "Debtors").

2. On July 15, 2003, this Court granted the Initial Debtors' motion for an order requesting that their bankruptcy estates be jointly administered. From time to time thereafter, the Court entered orders approving joint administration of the chapter 11 cases of the New Debtors with those of the Initial Debtors. The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. On July 18, 2003, the Office of the United States Trustee for the Northern District of Texas announced the formation of two official unsecured creditors' committees; one for the Debtors (the "Mirant Committee") and the other for Mirant Americas Generation, LLC (the "MAGI Committee" and, together with the Mirant Committee, the "Creditors' Committees").

4. On September 18, 2003, the Office of the United States Trustee for the Northern District of Texas announced the formation of the Official Committee of Equity Security Holders of Mirant Corporation (the "Equity Committee" and, collectively with the Creditors' Committees, the "Committees").

5. Mirant and its direct and indirect subsidiaries, including MAEM, comprise one of the world's largest generators and marketers of electricity. MAEM buys and sells electricity throughout the United States, including within the electric power grid located in Texas.

6. ERCOT is an independent, non-profit organization that manages a major portion of the Texas electric power grid (the "ERCOT System"). The ERCOT System is a bulk electric system located totally within the state of Texas that serves about 85% of Texas'

geographic area and comprises more than 70,000 megawatts of generation and more than 37,000 miles of transmission lines.

7. ERCOT is also one of ten regional reliability councils in North America. Its members include retail consumers, investor and Municipally Owned Utilities², rural electric co-ops, river authorities, independent generators, Power Marketers and Retail Electric Providers. Pursuant to Section 1.2 of the ERCOT Protocols, ERCOT acts solely as an agent on behalf of its members in the provision, procurement, purchase, deployment or dispatch of energy or Ancillary Services or any other similar action.

8. ERCOT is not subject to the jurisdiction of the Federal Energy Regulatory Commission. ERCOT and its Market Participants are overseen and regulated by the Public Utility Commission of Texas ("PUCT") as the ERCOT Region lies completely within the borders of the state of Texas and ERCOT does not interconnect synchronously across state lines to import or export power with neighboring states.

9. ERCOT and MAEM entered into a Standard Form Qualified Scheduling Entity Agreement effective March 19, 2001 (the "QSE Agreement") providing for MAEM's participation in the ERCOT Region as a Qualified Scheduling Entity (the "QSE") as defined in the ERCOT Protocols pursuant to which MAEM submits schedules consisting of projected interval energy obligations and projected interval energy supply that includes its obligations for Ancillary Services within the ERCOT Region.

10. ERCOT and MAEM entered into a Standard Form TCR Account Holder Agreement effective as of January 30, 2002 (the "TCR Agreement," and collectively with the QSE Agreement, the "Agreements") providing for MAEM's participation in the ERCOT System

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the ERCOT Protocols as approved by the Public Utility Commission of Texas ("PUCT") in Docket No. 23220.

as a TCR Account Holder pursuant to which MAEM may purchase or sell transmission congestion rights ("TCRs").

11. The Agreements each incorporate and are governed by the ERCOT Protocols in effect as of the date of entry into each of the Agreements. The ERCOT Protocols, as amended from time to time, contain, among other things, the scheduling, operating, planning, reliability and settlement policies, rules, guidelines, procedures, standards and criteria for the ERCOT System.

12. Section 16.2 of the ERCOT Protocols requires that a QSE satisfy ERCOT's creditworthiness requirements to participate in the ERCOT Region and Section 16.2.5.1.2(4) of the ERCOT Protocols allows such creditworthiness requirements to be met by the deposit of security, including cash, in an account designated by ERCOT, with the understanding that ERCOT may draw part or any and all the cash so deposited to satisfy any overdue payments owed by the QSE to ERCOT.

13. As of the Petition Date, MAEM had provided ERCOT with cash deposits in the amounts of \$6,741,693 as collateral under the QSE Agreement (the "QSE Collateral") and \$861,327.84 as collateral under the TCR Agreement (the "TCR Collateral") to satisfy such creditworthiness requirements under the QSE Agreement, the TCR Agreement and incorporated Protocols (collectively, the "Collateral").

14. Pursuant to the Protocols, ERCOT's invoicing processes are designed to consolidate all transactions within a given billing period; therefore, gross amounts are not produced in the normal course of business. The resulting invoiced amount reflects the net activity for the respective billing cycle. Because MAEM is required to operate under and comply with the ERCOT Protocols prior to and subsequent to the Petition Date, ERCOT alleges that it has the right to set-off the gross amounts owed by MAEM to ERCOT relating to

transactions between the parties occurring prior to the Petition Date (the "ERCOT Claims") against the gross amounts owed by ERCOT to MAEM relating to transactions between the parties occurring prior to the Petition Date (the "MAEM Claims") and to withhold paying MAEM Claims subsequent to the Petition Date. ERCOT further alleges that the Collateral secures the Prepetition Claims (as defined below).

15. MAEM and ERCOT agree that on a net basis, after applying the ERCOT Claims against the MAEM Claims that ERCOT has claims against MAEM in the approximate net amount of \$3,802,897 billed through October 30, 2003 for the period prior to Petition Date, together with any Initial, Final, True-up or Resettlement amounts owed amongst the parties related to the period prior to the Petition Date invoiced as the date of entry of this Order, the "Prepetition Claims." ERCOT alleges that the QSE Collateral secures the Prepetition Claims.

16. As a result of the filing of the Debtors' chapter 11 cases and imposition of the automatic stay under the Bankruptcy Code, ERCOT has not yet applied the QSE Collateral against the Prepetition Claims (causing ERCOT to "short pay" the market for generated energy for the dates covered by the Prepetition Claims). Unless ERCOT is permitted to apply the QSE Collateral against the Prepetition Claims, ERCOT will be required to shift the Debtors' financial responsibility within the ERCOT System to other Market Participants, potentially disrupting the efficient operation of the ERCOT System.

17. MAEM continues to perform and participate in the ERCOT System post-petition under the terms of their respective Agreements and ERCOT Protocols.

18. There is a bonafide dispute as to whether the set-off of the QSE Collateral against the Prepetition Liabilities and the netting of the ERCOT Claims against the MAEM Claims would be the set-off of a mutual obligation as would be permitted by section 553 of the

Bankruptcy Code, subject to obtaining relief from the Bankruptcy Court from the automatic stay provisions of section 362 of the Bankruptcy Code.

19. On September 4, 2003, the Debtors filed the Turnover Motion seeking to among other things, (i) enforce the automatic stay to prohibit certain parties, including ERCOT, from effectuating offsets with respect to certain debts and claims incurred by, or owing to, MAEM in respect of energy spot market purchases and sales made prior to the Petition Date and (ii) directing the turnover of undisputed amounts owing to MAEM which currently are being withheld by one entity. ERCOT filed a response arguing that it had the right to effectuate the setoffs and withhold funds to preserve its alleged right of setoff.

20. To resolve the Turnover Motion as it relates to ERCOT and the other matters set forth herein, the Debtors and ERCOT believe that provisionally allowing ERCOT to apply the QSE Collateral to the Prepetition Liabilities and net the ERCOT Claims against the MAEM Claims, subject to the terms and conditions provided for in this Order is in the best interest of the parties.

AGREED ORDER

IT IS HEREBY:

1. ORDERED that the netting by ERCOT of the ERCOT Claims against the MAEM Claims is provisionally approved subject to the provisions of paragraph 7 below.
2. ORDERED that ERCOT may provisionally apply the QSE Collateral to the Prepetition Claims subject to the provisions of paragraph 7 below.
3. ORDERED that the TCR Collateral shall immediately be returned to MAEM.

4. ORDERED that after application of such QSE Collateral to the Prepetition Claims as calculated herein, the remaining portion of the QSE Collateral (the "Excess Collateral") shall be immediately returned to MAEM.

5. ORDERED that in exchange for the immediate return of the Excess Collateral to MAEM and as adequate protection under section 361(1) of the Bankruptcy Code for any unliquidated and/or contingent Initial, Final, True-Up, and/or Resettlement amounts related to the period prior to the Petition Date, (the "Prepetition Reconciliation"), ERCOT shall be entitled to the payment of and MAEM agrees to pay as they come due in the ordinary course any Prepetition Reconciliation amounts, except that in no event shall the aggregate payment of any Prepetition Reconciliation by MAEM pursuant to this Order exceed the amount of the Excess Collateral (although the parties realize that the amount of the Prepetition Claims may exceed the amount of the Excess Collateral). To the extent that the Prepetition Reconciliation exceeds the amount of the Excess Collateral, ERCOT shall be entitled to file a proof of claim against MAEM's estate for such unpaid Prepetition Reconciliation up to 30 days after such final determination of the amount of the unpaid Prepetition Reconciliation determined in accordance with the terms of the QSE Agreement and the ERCOT Protocols.

6. ORDERED that ERCOT shall pay all postpetition amounts owed MAEM pursuant to the ERCOT Protocols as they come due in the ordinary course. MAEM shall pay all postpetition amounts owed ERCOT pursuant to the ERCOT Protocols as they come due in the ordinary course.

7. ORDERED that the Committees shall each have forty-five days from the date of entry of this Order to file an objection (the "Objection Deadline") with the Bankruptcy Court contesting ERCOT's ability and authorization to (i) apply the QSE Collateral to the Prepetition Claims plus any Prepetition Reconciliation amounts and (ii) set-off the ERCOT

Claims against the MAEM Claims. If no objection is filed by the Objection Deadline, each Committee failing to timely object shall be deemed to waive and be forever barred from raising any objection as it relates to ERCOT to the (i) application of the QSE Collateral to the outstanding Prepetition Claims, (ii) the payment of the Prepetition Reconciliation in accordance with the terms of the Order, and (iii) the set-off of the ERCOT Claims against the MAEM Claims. The entry of this Order, however, shall not be deemed a waiver of any rights to contest the validity of any portion of the Prepetition Claims, the ERCOT Claims, or any Prepetition Reconciliation in accordance with the terms of the Agreement or the ERCOT Protocols.

8. ORDERED that if the Court sustains a timely filed objection following a hearing to consider such, MAEM shall return the Excess Collateral to ERCOT and ERCOT shall not be entitled to the adequate protection under section 361(1) of the Bankruptcy Code for any Prepetition Reconciliation set forth in Paragraph 5 above.

9. ORDERED that this Order shall constitute neither an assumption nor rejection of any of the Agreements pursuant to section 365 of the Bankruptcy Code and the Debtors' rights with respect thereto are expressly reserved.

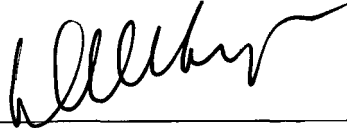
10. ORDERED that any of the parties' rights and remedies against all Market Participants and each other provided for under the Bankruptcy Code, the Agreements and/or the ERCOT Protocols, including the right to seek repayment of any of the ERCOT Claims authorized to be set-off shall be expressly reserved.

11. ORDERED that except to the extent necessary to enforce this Order, this Order shall not be admissible in any other proceeding or litigation. Without in any way limiting the foregoing, nothing herein shall be construed to compromise, discharge, or limit any legal argument or positions of any party with respect to any objection filed pursuant to paragraph 7 above.

12. ORDERED that the Court shall retain sole and exclusive jurisdiction with respect to any matters arising from or related to the implementation of this Order.

IT IS SO ORDERED.

Dated: December 30, 2003



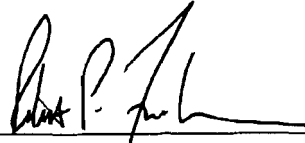
HONORABLE D. MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

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