

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

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

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**AGREED ORDER BY AND AMONG MIRANT AMERICAS  
ENERGY MARKETING, LP AND ISO NEW ENGLAND, INC. PROVIDING FOR THE  
SET-OFF OF CERTAIN PREPETITION CLAIMS**

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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 ISO New England Inc. ("NE-ISO") by and through their undersigned counsel, hereby agree as follows:

**RECITALS**

A. 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 and the Affiliate Members (as hereinafter defined) (collectively, the "Initial Debtors"), filed voluntary petitions in the United States Bankruptcy Court for the Northern District of Texas (the "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").<sup>1</sup> From time to time

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<sup>1</sup> 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.

**ORIGINAL**

thereafter, certain of Mirant's other affiliates have filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (collectively, the "New Debtors" and, together with the Initial Debtors, the "Debtors").

B. 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.

C. 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").

D. 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").

E. NE-ISO is a not-for-profit organization whose purpose is to ensure the reliable, safe and efficient operation of major transmission systems and administer an open, competitive and nondiscriminatory wholesale market for electricity in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont (the "NE-ISO System").

F. 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 in the NE-ISO System.

G. NE-ISO works together with the New England Power Pool ("NEPOOL"), a voluntary reliability and central dispatch organization including more than 200 entities, to implement the market rules, procedures and transmission tariff for the New England market.

H. MAEM and Mirant Canal LLC ("Mirant Canal"), Mirant Kendall LLC ("Mirant Kendall"), Mirant New England LLC ("Mirant New England" and collectively with Mirant Canal and Mirant Kendall, the "Affiliate Members") are members of NEPOOL. As NEPOOL members, MAEM and the Affiliate Members are signatories to the Restated New England Power Pool Agreement (as amended from time to time, the "NEPOOL Agreement").

I. The NEPOOL Agreement governs the relationship between NEPOOL and its members, as well as members' rights and obligations, including requirements for payment and financial assurances. The NEPOOL Agreement incorporates the terms of and conditions of the NEPOOL Open Access Transmission Tariff (as amended from time to time, the "OATT"), which sets out the parameters of transmission services.

J. In addition to the NEPOOL Agreement, MAEM and the Affiliate Members were required to execute (i) a Service Agreement pursuant to the NE-ISO FERC Tariff for Transmission Dispatch and Power Administration Services (the "NE-ISO Tariff" and together with the OATT, the "Tariffs") and (ii) a Service Agreement pursuant to the OATT (collectively, together with the NEPOOL Agreement and the Tariffs, the "Agreements").

K. Pursuant to the NEPOOL Agreement, prior to the Petition Date, MAEM and the Affiliate Members elected single participant status, whereby NE-ISO asserts that each entity is jointly and severally liable for all of the obligations of MAEM and the Affiliate Members, and whereby MAEM alone receives one bill each month that reflects all of the amounts owed by it and the Affiliate Members and owed to it and the Affiliate Members under the Agreements, with the net amount due to or due from MAEM and the Affiliate Members reflected on that bill. Pursuant to the Agreements, NE-ISO's invoicing processes are designed to consolidate all transactions within a given billing period. The resulting invoiced amount reflects the net activity for that monthly billing cycle.

L. Upon the Petition Date, all monthly bills that had been invoiced prior thereto had been paid. NE-ISO proceeded to bifurcate the single monthly bill for July 2003 and each subsequent month into two monthly bills, one for transactions in the period prior to the Petition Date (the "Prepetition Period") and one for transactions thereafter. NE-ISO alleges that, because MAEM and the Affiliate Members are required to operate under and comply with the Agreements prior to and subsequent to the Petition Date, NE-ISO has the right to continue to send net monthly bills as set forth above, and that such action does not constitute a set-off of amounts owed by MAEM and the Affiliate Members against amounts owed to MAEM and the Affiliate Members relating to transactions occurring during the Prepetition Period.

M. The Debtors and NE-ISO agree that as of November 30, 2003, on a net basis under the Agreements, NE-ISO, in its individual capacity and as agent for NEPOOL, had claims against MAEM (for which, NE-ISO asserts the Affiliate Members are jointly and severally liable) for the Prepetition Period (the "Liquidated Prepetition Claims"), and NE-ISO owed amounts to MAEM with respect to the Prepetition Period, as follows:

- a. For the July 2003 billing period, \$1,600,259.17 was due and owing to NE-ISO. NE-ISO drew upon a letter of credit that was in place to assure such payment, and no amount is due and owing at this time.
- b. For the August 2003 billing period, \$68,391.65 was due and owing to MAEM and the Affiliate Members, and such amount was paid to MAEM in a timely manner.
- c. For the September 2003 billing period, \$87,207.49 was due and owing to MAEM and the Affiliate Members, and such amount was paid to MAEM in a timely manner.
- d. For the October 2003 billing period, \$60,956.74 was due and owing to NE-ISO. NE-ISO drew upon a letter of credit that was in place to assure such payment, and no amount is due and owing at this time.
- e. For the November 2003 billing period, \$127,259.67 was due and owing to NE-ISO. NE-ISO used the proceeds of a previous draw upon a letter of credit that was in place to assure such payment to make such payment, and no amount is due and owing at this time.

N. MAEM and the Affiliate Members continue to perform and participate in the NE-ISO System post-petition under the terms of their respective Agreements.

O. The Debtors dispute whether the netting that occurs in the monthly bills is permissible, or whether instead each such bill constitutes a netting of amounts due from MAEM against amounts due to MAEM which is not permissible under section 553 of the Bankruptcy Code absent relief by the Bankruptcy Court from the automatic stay provisions of section 362 of the Bankruptcy Code.

P. 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 NE-ISO, 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.

Q. To resolve the Turnover Motion as it relates to NE-ISO and the other matters set forth herein, the Debtors and NE-ISO believe that provisionally allowing NE-ISO to continue with the single net monthly bill arrangements under the Agreements, subject to the terms and conditions provided for in this Order, is in the best interest of the parties.

### **AGREED ORDER**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The practice by NE-ISO of issuing a single net monthly bill to MAEM for transactions associated with the Prepetition Period, whether or not it constitutes the netting by NE-ISO of claims due to NE-ISO against claims due to MAEM, is provisionally approved subject to the provisions of paragraph 3 below;

2. NE-ISO shall pay all undisputed amounts owed MAEM and the Affiliate Members as they come due in the ordinary course whether arising prepetition or postpetition except that NE-ISO shall be entitled to offset any amounts owed to MAEM and the Affiliate Members arising prepetition but becoming due and owing postpetition as a result of postpetition recalculations of prepetition transactions that were not already the subject of a single net bill in determining the Liquidated Prepetition Claims or any subsequently billed prepetition claim (the "True-ups") against any unpaid due and owing prepetition amounts owed by MAEM and the Affiliate Members to NE-ISO; otherwise such True-ups shall be paid to MAEM. MAEM and the Affiliate Members shall pay, in accordance with and subject to the terms and conditions of the Agreements, all postpetition amounts owed NE-ISO as they come due in the ordinary course;

3. The Committees shall each have forty-five (45) days from the date of entry of this Order to file an objection (the “Objection Deadline”) with the Bankruptcy Court contesting NE-ISO’s ability and authorization to (i) issue single net monthly bills as set forth in paragraph 1 above, and (ii) offset any True-ups against any unpaid prepetition claims as set forth in paragraph 2 above. If no objection is filed by the Objection Deadline, each party failing to timely object shall be deemed to waive and be forever barred from raising any objection to the relief set forth in sub clauses (i) and (ii) above. The entry of this Order shall not be deemed a waiver of any rights to contest the validity of any portion of the prepetition amounts set forth in paragraph M above, any line items on the single net monthly bills previously rendered whether in favor of NE-ISO or MAEM or any True-ups owed by either MAEM, any of the Affiliate Members, NE-ISO and/or any NEPOOL Participant in accordance with the terms of the Agreements or the NE-ISO Protocols;

4. If the Court sustains a timely filed objection following a hearing to consider the same, NE-ISO shall take all necessary actions to comply with this Court’s order;

5. This Order shall not constitute a concession by NE-ISO that any of the NE-ISO’s practices set forth in paragraphs 1 and 2 above require the approval of the Bankruptcy Court or that the Affiliate Members are not jointly and severally liable for the MAEM Claims;

6. Nothing herein shall be construed to constitute an assumption or rejection of any of the Agreements pursuant to section 365 of the Bankruptcy Code and the Debtors’ rights with respect thereto are expressly reserved;

7. Except as specifically set forth herein, the rights of the parties hereto under the Agreements are reserved.

8. The rights of any party against any entity participating in the markets administered by NE-ISO and/or NEPOOL are reserved.

9. 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 3 above.

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

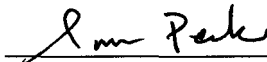
IT IS SO ORDERED.

Dated: January 7, 2004



HONORABLE D. MICHAEL LYNN  
UNITED STATES BANKRUPTCY JUDGE

APPROVED AS TO FORM AND CONTENT:



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ATTORNEYS FOR THE DEBTORS

ATTORNEYS FOR ISO NEW ENGLAND, INC.

10. 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.

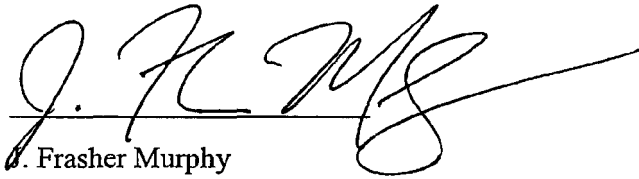
Dated: January \_\_, 2004

HONORABLE D. MICHAEL LYNN  
UNITED STATES BANKRUPTCY JUDGE

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