

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

PROCEDURAL BACKGROUND

2. The Cases. On July 14, 2003 and various dates thereafter (collectively, the “Petition Date”), the Debtors filed voluntary chapter 11 petitions. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of title 11 of the United States Code (the “Bankruptcy Code”).

3. The Cases are Jointly Administered. This Court has entered orders approving the joint administration of the Debtors’ chapter 11 cases.

4. The Committees. The Office of the United States Trustee for the Northern District of Texas in these administratively consolidated cases appointed an official committee of equity security holders and two official unsecured creditors’ committees (collectively, the “Committees”).

FACTUAL BACKGROUND

A. Mirant Texas

5. Mirant Texas provides electricity for sale to various wholesale purchasers. Mirant Texas owns approximately 270.813 acres of land (the “Real Property”) located on FM 56, Bosque County, Texas on which Mirant Texas operates a natural gas powered electric generating plant (the “Plant”). The Plant mainly consists of two (2) simple cycle gas turbines each rated at

154 MW output, and a 1x1 combined cycle generating unit that is rated at a total output of 230 MW. Mirant Texas generated revenues for 2003 of \$33,670,701.

6. As defined by the terms of the Settlement Agreement enumerated below, the property subject to this compromise (the “Subject Property”) consists of the buildings, structures, fixed machinery and equipment, office space and related fixed improvements located on the Real Property. The Subject Property is currently identified on Bosque County’s Property Tax Rolls as Account No. P29200.

7. In the tax year 2003, the Subject Property had an appraised value of \$131,200,980, and received a pollution control tax exemption that reduced the valuation of the Subject Property to \$118,196,970 (the “2003 Assessed Value”). The total amount of property taxes assessed against the Subject Property in 2003, based on the 2003 Assessed Value, was \$2,255,192.47, of which \$403,996.22 was due to Bosque County and \$1,851,196.25 was due to the Clifton Independent School District. Beginning February 1, 2004, those amounts have accrued interest at the statutory rate of 1% per month.

B. Summary of the Settlement Agreement

8. Bosque County asserts that the amounts owed were due on or before January 31, 2004. Mirant asserts that, pursuant to the Bankruptcy Code, Mirant would not have to pay the amounts owed prior to confirmation of a plan of reorganization. In April 2004, Mirant Texas LP and Bosque County successfully reached a compromise on the amount due for the 2003 taxes and the timing of that payment, as well as for how taxes will be calculated for the next seven tax years. This settlement (the “Settlement Agreement”) is memorialized in this Motion and the attached proposed order, and is subject to this Court’s approval.

9. Under the terms of the Settlement Agreement, the appraised value (the “Appraised Value”) of the Subject Property is the fair market value of the Subject Property as defined by the Bosque County Appraisal District. The assessed value (the “Assessed Value”) of the Subject Property is the Appraised Value less the amount of the exemption that the Subject Property receives under the Texas Property Tax Code §11.31, Pollution Control Property (the “Pollution Control Tax Exemption”). The taxable value (the “Taxable Value”) is the Assessed Value of the Subject Property less the amount of the exemption provided by this Settlement Agreement and authorized by Texas Property Tax Code, Chapter 312 (the “Tax Abatement Exemption”).

10. Under the terms of the Settlement Agreement, for the tax years 2004 through 2010, Mirant will receive from Bosque County the Tax Abatement Exemption in the amount of 60% of the Assessed Value of the Subject Property when computing the amount of taxes due Bosque County.¹ The Tax Abatement Exemption, however, is subject to a “soft floor” of \$139,000 per year. Thus, if the Subject Property's Taxable Value is greater than \$40.667 million (assuming the 2003 Bosque County property tax rate), Mirant Texas will pay the greater of (i) the taxes due on the Taxable Value of the Subject Property; or (ii) \$139,000. If the Taxable Value of the Subject Property is less than \$40.667 million (assuming the 2003 Bosque County property tax rate), Mirant Texas will pay the lesser of (i) the actual taxes due on the Assessed Value or (ii) \$139,000. At current tax rates, Mirant Texas will receive tax savings (and economic benefit) over the status quo if the Taxable Value of the Subject Property is greater than \$40.667 million. Mirant Texas is economically indifferent if the Taxable Value of the Subject

¹ The taxes assessed by and due to the Clifton Independent School District are neither subject to nor affected by the Tax Abatement Exemption.

Property is less than \$40.667 million because the taxes due under the Tax Abatement Exemption are the same as would be paid without the Tax Abatement Exemption in place.

11. The Taxable Value on the Subject Property was \$118,196,670 last year. Using the 2003 taxable value and the tax rate, this Settlement Agreement would have represented a tax savings to Mirant Texas of \$242,398 for tax year 2003 alone. Although the actual tax savings may fluctuate from year to year depending on the tax rate and the Appraised Value of the Subject Property, Mirant Texas anticipates substantial tax savings for each year the Settlement Agreement is in place.

12. Upon final court approval of the Settlement Agreement, Mirant will pay to Bosque County and the Clifton Independent School District the property taxes due for tax year 2003 in the amount of \$2,263,496.28 plus interest.² Under Texas law, property taxes constitute a secured claim that would be paid at 100% upon Mirant's emergence from bankruptcy. In the interim, interest is accruing at 1% per month or 12% per year, which is approximately \$22,000 per month total.

C. Terms of the Agreement

13. Within three (3) days of the date the Court's order (the "Order") approving the Settlement Agreement is non-appealable, Bosque County shall provide an invoice to Mirant Texas, and Mirant Texas shall pay to the Tax Assessor-Collector of the County of Bosque, Texas \$2,263,496.28, plus interest as provided by §33.01, Texas Tax Code (the "Payment"), of which the sum of \$405,483.77 plus interest is due to Bosque County, and the sum of \$1,858,012.51 plus interest is due to the Clifton Independent School District.

² An additional tax of \$8,303.81 was assessed in 2003 on the 270.813 acres of Real Property. The property taxes on the Real Property are not subject to this Tax Abatement Exemption.

14. If Mirant makes the Payment within ten (10) days of the date the Court's Order approving the Settlement Agreement is non-appealable, Mirant will receive the property Tax Abatement Exemption, as authorized by the Texas Property Redevelopment and Tax Abatement Act, Texas Tax Code, Chapter 312, from Bosque County that will provide for a Tax Abatement Exemption subject to the following terms and conditions:

- a) Subject Property. The subject property ("Subject Property") is an electrical generating facility on approximately 270.813 acres owned by Mirant that is located on FM 56, Bosque County, Texas. The Subject Property shall constitute the buildings, structures, fixed machinery and equipment, office space and related fixed improvements located on Mirant's land. The Subject Property is currently identified on Bosque County's Property Tax Rolls as Account No. P29200.
- b) Tax Abatement Exemption
 - i. Terms and Definitions. For the purposes of calculating the value of the Subject Property and the amount of the Tax Abatement Exemption provided by this Settlement Agreement the following terms shall be defined to mean:
 - 1) The Appraised Value shall be the fair market value of the Subject Property as determined by the Bosque County Appraisal District. In the tax year 2003, the Appraised Value of the Subject Property was \$131,200,980.
 - 2) The Assessed Value shall be the Appraised Value less the amount of the exemption that the Subject Property receives under the Pollution Control Tax Exemption.³ In the tax year 2003, the amount of the Pollution Control Exemption was \$13,004,310, and the Assessed Value of the Subject Property was \$118,196,670.
 - 3) The Taxable Value shall be the Assessed Value of the Subject Property less the amount of the exemption provided by this Settlement Agreement and authorized by Texas Property Tax Code, Chapter 312, *i.e.*, the Tax Abatement Exemption.

³ The Tax Abatement Exemption and Settlement Agreement are not intended to and do not preclude Mirant Texas from asserting its rights to any further local, city, county, or state tax exemptions for which it may be or may become eligible.

- ii. Amount. Mirant Texas shall receive a Tax Abatement Exemption of sixty percent (60%) of the Assessed Value of the Subject Property, as determined by the Bosque County Appraisal District, except as provided below.
 - iii. Term. Mirant Texas' Tax Abatement Exemption shall be for a term of seven (7) years (the "Term"), commencing with the tax year 2004 and continuing through the tax year 2010. Unless terminated sooner as provided below, the Tax Abatement Exemption will terminate in the tax year 2011, and upon termination, the Subject Property will be appraised and taxed as provided by the Texas Property Tax Code.
 - iv. Notwithstanding the amount of the Tax Abatement Exemption provided above, if in any year during the Term, the amount of the Tax Abatement Exemption reduces the Taxable Value of the Subject Property such that the resulting tax assessment to Bosque County is less than \$139,000, the amount of Mirant Texas' Tax Abatement Exemption shall be adjusted so that the resulting Taxable Value of the Subject Property when multiplied by Bosque County's tax rate for that year results in a tax assessment of \$139,000; provided, however, that in no instance shall Mirant Texas' tax assessment for any tax year during the Term exceed the amount of taxes that would be due by calculating the tax assessment based on the Assessed Value of the Subject Property.
- c) Events of Default; Termination and Recapture
- i. During the Term, Mirant Texas shall timely pay all property taxes levied against the Subject Property by any taxing authority. It shall be considered an Event of Default if Mirant allows the property taxes assessed against the Subject Property by Bosque County or any other taxing authority to become delinquent and fails to timely and properly follow the legal procedures for their protest and/or contest.
 - ii. It will be an Event of Default if Mirant's fixed machinery or equipment is removed from the Subject Property and is not replaced with fixed machinery or equipment of like value within a reasonable time. It is understood and agreed that it shall not be an Event of Default if Mirant Texas removes:
 - 1. Miscellaneous pieces of equipment, that are not material to the operation of the Subject Property;
 - 2. One or both of its simple cycle gas turbines each rated at 154 MW output and associated equipment.

- iii. Notice of Default, Termination. Should Bosque County determine that Mirant Texas is in default under section i. or ii. above, it shall send written notification to Mirant identifying the Event of Default and that if such default is not cured within sixty (60) days from the date of such Notice of Default the Tax Abatement Exemption shall terminate. In the event Mirant Texas fails to cure said default within sixty (60) days of receipt of Notice of Default from Bosque County, the Tax Abatement Exemption will terminate effective in the year of the Event of Default. The taxes otherwise abated for that calendar year shall be paid to Bosque County within sixty (60) days from the date of termination.
- iv. Recapture. In the event that this Tax Abatement Exemption is terminated for a default under section i. (but not section ii.) above, in addition to the termination provided above and payment of abated taxes in the year of the termination, all taxes for all years that have been abated by virtue of this Settlement Agreement will be recaptured. Bosque County shall notify Mirant Texas of the amount of all taxes previously abated by virtue of this Settlement Agreement. Said abated taxes will be delinquent if not paid by the first day of the next month following the expiration of sixty (60) days from the date of receipt of such tax notice. If the abated taxes are not paid at that time penalty and interest shall begin to accrue on the abated taxes in accordance with Sections 33.01, 33.07 and 33.08 of the Texas Tax Code.
- d) Inspection. Mirant Texas shall allow employees and/or representatives of Bosque County to have access to the Subject Property during the Term of this Tax Abatement Exemption to inspect the Subject Property and to determine compliance with the terms and conditions of this Settlement Agreement. All inspections will be made only upon five days prior notice and will only be conducted in such manner as to not unreasonably interfere with the operation of the facility. All inspections shall be conducted in accordance with all Subject Property safety procedures.
- e) Termination on Sale or Conveyance. The Tax Abatement Exemption provided herein is only for the benefit of Mirant or any of its subsidiaries; the Tax Abatement Exemption may be assigned to a new owner of the Subject Property only upon the expressed written consent of the Bosque County Commissioner's Court.
- f) Mirant Texas reserves its right to follow the legal procedures to protest or contest assessed taxes.
- g) The effectiveness of the Settlement Agreement is conditioned upon the Debtors obtaining the Court's approval.

RELIEF REQUESTED

15. By this Motion, the Debtors request that the Court enter an order pursuant to 9019(a) of the Bankruptcy Rules, in substantially the form submitted herewith, authorizing Mirant and Bosque County to enter into the Settlement Agreement and perform thereunder.

APPLICABLE AUTHORITY

16. Bankruptcy Rule 9019(a) provides, in relevant part, that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bankr. P. 9019(a); 11 U.S.C. § 1107. Bankruptcy Rule 9019(a) empowers a bankruptcy court to approve compromises and settlements if they are “‘fair and equitable and in the best interest of the estate.’” *In re Cajun Elec. Power Coop., Inc.*, 119 F.3d 349, 355 (5th Cir. 1997) (quoting *In re Foster Mortgage Corp.*, 688 F.3d 914, 917 (5th Cir. 1995) (citation omitted)); *see also In re Zale Corp.*, 62 F.3d 746, 754 (5th Cir. 1995) (stating that “the ‘fair and equitable’ determination does not give the bankruptcy court jurisdiction over settlement conditions that do not bear on the court’s duties to preserve the estate and protect creditors.”).

17. A decision to accept or reject a compromise or settlement is within the sound discretion of the Court. *See* 9 Collier on Bankruptcy ¶ 9019.02 (15th ed. Rev. 2001). “‘Compromises are favored in bankruptcy’” because they minimize the costs of litigation and further the parties’ interest in expediting administration of a bankruptcy estate. *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996) (quoting 9 Collier on Bankruptcy ¶ 9019.03[1] (15th ed. Rev. 1993)).

18. Furthermore, the settlement need not result in the best possible outcome for the debtor, but must not “‘fall beneath the lowest point in the range of reasonableness.’” *In re*

Drexel Burnham Lambert Group, Inc., 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991) (quoting *In re Debtors’ Motion Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure for Order Approving Settlement Between Mirant Texas, LP and Bosque County*

W.T. Grant Co., 699 F.2d 599, 608 (2nd Cir. 1983)). 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.” *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 425 (1968).

19. To determine whether a settlement is fair and equitable, this Court should consider and evaluate the following factors: (i) the probability of success in the litigation, with due consideration for uncertainty in fact and law; (ii) the complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and (iii) all other factors bearing on the wisdom of the compromise. *See Cajun Electric*, 119 F.3d at 356 (citations omitted).

20. After extensive analysis, the Debtors have determined that entering into the proposed Settlement Agreement is in the best interest of the Debtors’ estates and their creditors. The Settlement Agreement is the product of many hours of good faith negotiation between Mirant Texas and Bosque County. Mirant Texas and Bosque County believe that they are both better served if the Settlement Agreement is approved. The Settlement Agreement will result in considerable tax savings to the Debtors’ estates in the years 2004 through 2010 and will stop the accrual of interest on the amount due for 2003.

21. While the Settlement Agreement does require Mirant to pay a prepetition claim prior to confirmation of a plan of reorganization, that claim is secured and ultimately would have to be paid in full. The Debtors believe that the early payment of the past due taxes with the statutorily mandated interest in exchange for the Tax Abatement Exemption in future years will benefit their estates and their creditors. The Debtors are concerned that, absent entry into the Settlement Agreement, the Debtors will have to pay Bosque County taxes assessed on the full

value of the Subject Property not only for 2003, but for all subsequent years. In light of the foregoing, and given the substantial benefits that the Debtors, the Debtors' estates and their creditors will derive under the proposed Settlement Agreement, the Debtors seek the Court's prompt approval of the Motion.

CONCLUSION

WHEREFORE, based upon the foregoing, the Debtors request that the Court enter an order, substantially in the form submitted herewith, granting the relief requested herein, and any further relief that is necessary and proper.

Dated: Fort Worth, Texas
May 10, 2004

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ATTORNEYS TO THE DEBTORS
AND DEBTORS IN POSSESSION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he provided a true and correct copy of the forgoing to Bankruptcy Services, LLC and directed them to effect service upon all persons on the Limited Service List via first class U.S. mail, and the addresses set forth below via first class U.S. mail on the 10th day of May 2004.

/s/ Frances A. Smith

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ATTORNEYS FOR THE DEBTORS AND DEBTORS IN POSSESSION

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

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

**ORDER GRANTING DEBTORS' MOTION PURSUANT TO RULE 9019 OF THE
FEDERAL RULES OF BANKRUPTCY PROCEDURE FOR ORDER APPROVING
SETTLEMENT BETWEEN MIRANT TEXAS, LP AND BOSQUE COUNTY**

Upon the Motion¹ (the "Motion") dated May 10, 2004 filed by Mirant Corporation ("Mirant") and its affiliated debtors, as debtors and debtors in possession (collectively, the "Debtors"), pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure for entry of an order approving the settlement (the "Settlement Agreement") between Mirant Texas, LP ("Mirant Texas") and Bosque County, Texas ("Bosque County"), and it appearing that the Court has jurisdiction over this matter; and it appearing that due notice of the Motion has been

¹ Unless otherwise defined herein, capitalized terms have the same meaning ascribed to them in the Motion.

provided, and that no other or further notice need be provided; upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefore,

It is hereby

ORDERED, that the Motion is hereby GRANTED; and it is further

ORDERED that within three (3) days of the date this Order is non-appealable, Bosque County shall provide an invoice to Mirant Texas, and Mirant Texas shall pay to the Tax Assessor-Collector of the County of Bosque, Texas \$2,263,496.28, plus interest as provided by §33.01, Texas Tax Code (the “Payment”), of which the sum of \$405,483.77, plus interest is due to Bosque County, and the sum of \$1,858,012.51 plus interest is due to the Clifton Independent School District.

ORDERED upon timely receipt of the Payment, to be no later than ten (10) days after this Order is non-appealable, Mirant Texas will receive a Property Tax Abatement Exemption, as authorized by the Texas Property Redevelopment and Tax Abatement Act, Texas Tax Code, Chapter 312, from Bosque County that provides for a Tax Abatement Exemption subject to the following terms and conditions:

- a) **Subject Property.** The subject property (“Subject Property”) is an electrical generating facility on approximately 270.813 acres owned by Mirant that is located on FM 56, Bosque County, Texas. The Subject Property shall constitute the buildings, structures, fixed machinery and equipment, office space and related fixed improvements located on Mirant’s land. The Subject Property is currently identified on Bosque County’s Property Tax Rolls as Account No. P29200.
- b) **Tax Abatement Exemption**
 - i. Terms and Definitions. For the purposes of calculating the value of the Subject Property and the amount of the Tax Abatement Exemption provided by this Order the following terms shall be defined to mean:
 - 1) The Appraised Value shall be the fair market value of the Subject Property as determined by the Bosque County Appraisal District. In the

tax year 2003, the Appraised Value of the Subject Property was \$131,200,980.

2) The Assessed Value shall be the Appraised Value less the amount of the exemption that the Subject Property receives under the Texas Property Tax Code §11.31, Pollution Control Property (the "Pollution Control Tax Exemption").² In the tax year 2003, the amount of the Pollution Control Exemption was \$13,004,310, and the Assessed Value of the Subject Property was \$118,196,670.

3) The Taxable Value shall be the Assessed Value of the Subject Property less the amount of the exemption provided by this Order and authorized by Texas Property Tax Code, Chapter 312 (the "Tax Abatement Exemption").

ii. Amount. Mirant Texas shall receive a Tax Abatement Exemption of sixty percent (60%) of the Assessed Value of the Subject Property, as determined by the Bosque County Appraisal District, except as provided below.

iii. Term. Mirant Texas' Tax Abatement Exemption shall be for a term of seven (7) years (the "Term"), commencing with the tax year 2004 and continuing through the tax year 2010. Unless terminated sooner as provided below, the Tax Abatement Exemption will terminate in the tax year 2011, and upon termination, the Subject Property will be appraised and taxed as provided by the Texas Property Tax Code.

iv. Notwithstanding the amount of the Tax Abatement Exemption provided above, if in any year during the Term, the amount of the Tax Abatement Exemption reduces the Taxable Value of the Subject Property such that the resulting tax assessment to Bosque County is less than \$139,000, the amount of Mirant Texas' Tax Abatement Exemption shall be adjusted so that the resulting Taxable Value of the Subject Property when multiplied by Bosque County's tax rate for that year results in a tax assessment of \$139,000; provided, however, that in no instance shall Mirant's tax assessment for any tax year during the Term exceed the amount of taxes that would be due by calculating the tax assessment based on the Assessed Value of the Subject Property.

c) Events of Default; Termination and Recapture

i. During the Term, Mirant Texas shall timely pay all property taxes levied against the Subject Property by any taxing authority. It shall be

² The Tax Abatement Exemption and Settlement Agreement are not intended to and do not preclude Mirant Texas from asserting its rights to any further local, city, county, or state tax exemptions for which it may be or may become eligible.

considered an Event of Default if Mirant Texas allows the property taxes assessed against the Subject Property by Bosque County or any other taxing authority to become delinquent and fails to timely and properly follow the legal procedures for their protest and/or contest.

- ii. It will be an Event of Default if Mirant Texas' fixed machinery or equipment is removed from the Subject Property and is not replaced with fixed machinery or equipment of like value within a reasonable time. It is understood and agreed that it shall not be an Event of Default if Mirant removes:
 - 1. Miscellaneous pieces of equipment, that are not material to the operation of the Subject Property;
 - 2. One or both of its simple cycle gas turbines each rated at 154 MW output and associated equipment.
 - iii. Notice of Default, Termination. Should Bosque County determine that Mirant is in default under section i. or ii. above, it shall send written notification to Mirant identifying the Event of Default and that if such default is not cured within sixty (60) days from the date of such Notice of Default the Tax Abatement Exemption shall terminate. In the event Mirant fails to cure said default within sixty (60) days of receipt of Notice of Default from Bosque County, the Tax Abatement Exemption will terminate effective in the year of the Event of Default. The taxes otherwise abated for that calendar year shall be paid to Bosque County within sixty (60) days from the date of termination.
 - iv. Recapture. In the event that this Tax Abatement Exemption is terminated for a default under section i. (but not section ii.) above, in addition to the termination provided above and payment of abated taxes in the year of the termination, all taxes for all years that have been abated by virtue of this Order will be recaptured. Bosque County shall notify Mirant of the amount of all taxes previously abated by virtue of this Order. Said abated taxes will be delinquent if not paid by the first day of the next month following the expiration of sixty (60) days from the date of receipt of such tax notice. If the abated taxes are not paid at that time penalty and interest shall begin to accrue on the abated taxes in accordance with Sections 33.01, 33.07 and 33.08 of the Texas Tax Code.
- d) Inspection. Mirant shall allow employees and/or representatives of Bosque County to have access to the Subject Property during the Term to inspect the Subject Property and to determine compliance with the terms and conditions of this Order. All inspections will be made only upon five days prior notice and will only be conducted in such manner as to not unreasonably interfere with the

operation of the facility. All inspections shall be conducted in accordance with all Subject Property safety procedures.

- e) Termination on Sale or Conveyance. The Tax Abatement Exemption provided herein is only for the benefit of Mirant or any of its subsidiaries; the Tax Abatement Exemption may be assigned to a new owner of the Subject Property only upon the expressed written consent of the Bosque County Commissioner's Court. All inspections shall be conducted in accordance with all Subject Property safety procedures.
- f) Mirant Texas reserves its right to follow the legal procedures to protest or contest assessed taxes.

Dated: June ____, 2004

D. Michael Lynn,
United States Bankruptcy Judge