

Thomas E Lauria
State Bar No. 11998025
Craig H. Averch
State Bar No. 01451020
WHITE & CASE LLP
Wachovia Financial Center
200 South Biscayne Blvd.
Miami, FL 33131
Telephone: (305) 371-2700
Facsimile: (305) 358-5744

Robin Phelan
State Bar No. 15903000
Judith Elkin
State Bar No. 06522200
HAYNES AND BOONE, LLP
901 Main Street
Suite 3100
Dallas, TX 75202
Telephone: (214) 651-5000
Facsimile: (214) 651-5940

ATTORNEYS FOR THE DEBTORS AND DEBTORS-IN-POSSESSION
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re	)	Chapter 11 Case
MIRANT CORPORATION, <u>et al.</u>,	)	Case No. 03-46590-DML
	)	Jointly Administered
Debtors.)	
	)	Hearing Date and Time: May 26, 2004;
	)	10:30 a.m.

**MOTION OF THE DEBTORS PURSUANT TO 11 U.S.C. §§ 105 AND 363 FOR
AUTHORIZATION TO MAKE CERTAIN CORPORATE COMMUNITY
CONTRIBUTIONS IN THE ORDINARY COURSE**

TO THE HONORABLE D. MICHAEL LYNN, UNITED STATES BANKRUPTCY JUDGE:

Mirant Corporation and its affiliated debtors (collectively, the “Debtors”), as debtors-in-possession, file this motion pursuant to 11 U.S.C. §§ 105 and 363 (the “Bankruptcy Code”) for entry of an order authorizing the Debtors make certain corporate community contributions (the “Corporate Community Contributions”) in the ordinary course of business (the “Motion”). In support thereof the Debtors respectfully represent as follows:

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. Three official committees (collectively, the “Committees”) have been appointed by the Office of the United States Trustee for the Northern District of Texas in these administratively consolidated cases.

5. The Examiner. On April 7, 2004, this Court authorized the UST to appoint an examiner in these cases to analyze certain potential causes of action and act as a referee with respect to certain disputes that arise among the Debtors, the Committees, or other parties in interest. The UST appointed William K. Snyder as the examiner in these cases.

BACKGROUND

6. The Debtors have traditionally made annual Corporate Community Contributions to certain non-profit organizations in the ordinary course of business.¹ For example, the Debtors' Corporate Community Contributions for (i) 2003 were \$415,097.00 in the aggregate² and (ii) 2002 were \$1,598,640.00 in the aggregate. The contributions were made to further the Debtors' goal of strengthening the communities in which they do business and focused on areas that are core to the Debtors' policies and philosophies, such as education, environmental stewardship, and health and safety.

7. The Debtors seek approval herein to make Corporate Community Contributions in significantly reduced amounts than those made historically, but otherwise consistent with past practice and pursuant to internal corporate policies, as set forth in the Corporate Community Contributions Guidelines (the "Guidelines"). The Guidelines are attached hereto as Exhibit A. In the past, certain Debtors made Corporate Community Contributions informally guided by the Debtors' policies and philosophies. In keeping with the Debtors' goal of improved central oversight and corporate governance, the Debtors have drafted the Guidelines. The Guidelines are based on past practices, reflect the Debtors' policies and philosophies, and focus on the Debtors' core areas of interest. The Debtors submit that it is common practice for large corporations to make donations and Corporate Community Contributions to various non-profit organizations similar to those requested herein in the ordinary course of business. Corporations such as Mirant recognize the important role donations

¹ None of the non-profit organizations to which the Debtors traditionally contribute are politically affiliated.

² This aggregate reflects contributions made between January and June 2003.

play in building the communities in which they operate and enhancing stature. Mirant is informed and believes that the Guidelines are consistent with the practices of other large corporations as well as the Debtors' own past practices.

8. The Debtors have prepared a spreadsheet of Corporate Community Contributions the Debtors would like to make for 2004 (the "2004 Contributions List"), which is attached hereto as Exhibit B. The aggregate amount of the proposed contributions is \$465,275.00, which represents a significant reduction compared to past contributions on a yearly basis. As demonstrated by a review of Exhibit A, the proposed donations are well in keeping with the Debtors' business operations, company policies and corporate citizenship objectives. The vast majority of these donations are in amounts of approximately \$5,000 or less.

9. These contributions include (i) youth programs such as the Boy Scout Council and Girl Scout Council; (ii) educational sponsorship of public schools and libraries; (iii) environmental stewardship through groups such as Clean Air Partners and the Chesapeake Bay Foundation; and (iv) health/safety outreach programs, which include sending a health van to poor communities in close proximity to the Debtors' power plants and making contributions to the Red Cross. The Corporate Community Contributions also encompass other various community outreach activities.

10. All of the Corporate Community Contributions further the purposes of the Debtors' corporate policies, focusing on the core areas of education, environmental stewardship, and health and safety, as well as enhancing employee engagement. An example of the type of activities the Debtors support are the four "community outreach" events that will be held in Atlanta, Georgia. These events are organized in partnership with various non-profit organizations and are held on weekends. Mirant employees volunteer their time to organize and

execute these outreach events. In addition, Mirant has traditionally contributed a small donation to the partner organization at the conclusion of the community outreach event. At the most recent event, Mirant employees worked with an organization called “Rebuilding Together – Atlanta,” and participated in National Rebuilding Day on April 24, 2004. Individuals participating in this event spent their Saturday rehabilitating the home of a low-income homeowner so that she may continue to live independently in a safe and comfortable home. These activities enhance employee engagement and strengthen Mirant’s reputation as a “good corporate citizen,” both internally and externally. All of the foregoing salutary effects enhance the estate and benefit the creditor body as a whole.

The Public Utility Holding Company Act of 1935 Promotes Charitable Contributions in Certain Instances

11. The Debtors that own generating facilities located in the United States have all qualified as exempt wholesale generators pursuant to section 32 of the Public Utility Holding Company Act of 1935 (as amended by the Energy Policy Act of 1992, “PUHCA”), 15 U.S.C.A. § 79z-5a. Without such qualification, those Debtors would be considered “public utilities” under PUHCA, and the significant regulations imposed under PUHCA on public utility holding companies and their subsidiaries would apply to all the Debtors and to any Mirant subsidiaries not in bankruptcy. Among other things, such regulations would restrict the business activities in which the Debtors could potentially engage, would require the approval of the Securities Exchange Commission (the “SEC”) for any new financing activity, and would require SEC approval of any plan of reorganization for the Debtors. The SEC would limit the businesses in which Mirant could invest and would subject Mirant to tightened restrictions vis-à-vis its affiliates. Based on the foregoing, the Debtors have determined that it is important for Mirant to

maintain its status as an exempt wholesale generator (“EWG”). In addition, many of the Debtors’ existing contacts include a provision representing that Mirant is not a holding company.

12. In order for a power plant to retain its EWG status, the power plant must be *exclusively engaged* in the business of owning and/or operating eligible facilities and selling electricity at wholesale. See 15 U.S.C.A. § 79z-5a. In a 2001 decision issued against several non-debtor entities, attached hereto as Exhibit C, the Federal Energy Regulation Commission (the “Commission”), which determines qualifications for EWG status under PUHCA, held that certain business activities that did not relate to the generation or sale of electricity, which activities would otherwise violate PUHCA’s exclusivity requirements for an EWG, would not violate the exclusivity requirement if the proceeds of these non-electric business activities were donated to charity.³

13. The requirements of PUHCA for status as an EWG are applicable to the Debtors’ plants in the United States, including their Mid-Atlantic Plants (“Mid-Atlantic Plants”), the Canal Plant (“Canal”), the Bowline Plant (“Bowline”) and the Apex Plant (“Apex” and, collectively with the Mid-Atlantic Plants, Canal, and Bowline, the “Plants”). Mirant Canal, LLC receives approximately \$50,000 annually and Mirant Bowline, LLC receives approximately \$15,000 annually in proceeds from the lease of property for the placement of cellular telephone towers at their respective plants. Similarly, subsidiaries of Mirant Mid-Atlantic, LLC receive approximately \$200,000.00 to \$250,000.00 each year from various sources that might be viewed as unrelated to the generation and/or sale of electricity. Finally, Mirant Las Vegas, LLC recently

³ The Commission also found that transferring the “business activities,” in that case agricultural leases, oil and gas leases, and mineral rights, to an affiliate would not suffice because, although the EWGs would not receive the proceeds, they would continue to own the land and thus still be engaged in prohibited business activities.

entered into a lease agreement for 14 acres in Nevada at the Apex Plant and anticipates receiving approximately \$70,000 in rental payments during 2004. These entities anticipate receiving a total of approximately \$335,000.00 in funds that could be viewed as not related to the generation and/or sale of electricity during 2004. The foregoing represents 72% of the contributions proposed herein.

**CORPORATE COMMUNITY CONTRIBUTIONS MADE IN THE
ORDINARY COURSE SHOULD BE AUTHORIZED**

14. The Debtors seek authorization, pursuant to sections 105 and 363 of the Bankruptcy Code, to make certain Corporate Community Contributions during 2004 in the aggregate amount of \$465,275.00, to the organizations set forth on Exhibit A, in the ordinary course of business. The Debtors also seek authorization to make Corporate Community Contributions in the ordinary course of business and consistent with the Guidelines, on or after January 1, 2005, without further approval from this Court.

15. Section 105(a) of the Bankruptcy Code allows this Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a). Under Section 105(a) of the Bankruptcy Code, the Court has expansive equitable power to fashion any order or decree that is in the interest of preserving or protecting the value of the debtor’s assets. *See, e.g., Coie v. Sadkin (In re Sadkin)*, 36 F.3d 473, 478 (5th Cir. 1994) (“Section 105(a) authorizes a bankruptcy court to fashion such orders as are necessary to further the substantive provisions of the Bankruptcy Code.”) (quotation omitted); *Chinichian v. Campolongo (In re Chinichian)*, 784 F.2d 1440, 1443 (9th Cir. 1986) (“Section 105 sets out the power of the bankruptcy court to fashion orders as necessary pursuant to the purposes of the Bankruptcy Code.”) (citation omitted). *See also Bird v. Crown Convenience (In re NWFEX, Inc.)*, 864 F.2d 588, 590 (8th Cir. 1988) (“The overriding

consideration in bankruptcy . . . is that equitable principles govern.”) (citations omitted); *In re Cooper Properties Liquidating Trust, Inc.*, 61 B.R. 531, 537 (Bankr. W.D. Tenn. 1986) (“[T]he Bankruptcy Court is one of equity and as such it has a duty to protect whatever equities a debtor may have in property for the benefit of its creditors so long as that protection is implemented in a manner consistent with the bankruptcy laws.”) (citation omitted).

16. The Debtors submit that the Corporate Community Contributions are an important element of the Debtors’ on-going business operations and should be authorized as ordinary course transactions pursuant to section 363 of the Bankruptcy Code. The Corporate Community Contributions are a means of involving the Debtors in the lives of their employees and the communities in which they are located and constitute an ordinary course activity. Such activities enhance employee engagement and allow the Debtors to establish a positive presence in their communities for the betterment of society.

17. Although the Bankruptcy Code does not explicitly authorize Corporate Community Contributions, the 1998 Religious Liberty and Charitable Donation Protection Act (the “Charity Act”) demonstrates that Congress intended to encourage and allow Corporate Community Contributions. The Charity Act modified sections 544 and 548 of the Bankruptcy Code to prevent the avoidability of prepetition charitable donations by individuals as fraudulent transfers. Specifically, revised 548(a)(2) provides that a good faith charitable contribution is deemed to provide “reasonably equivalent value” if the contribution did not exceed 15% of the debtors’ gross annual income or the contribution was in keeping with the debtor’s usual practices. While the Charity Act does not apply directly in this case, the Debtors submit that it reflects Congressional intent to support charitable donations and good citizenship, even in chapter 11 proceedings.

18. Moreover, continuing the Corporate Community Contributions benefits the Debtors by highlighting the Debtors' continued operations as a going concern. Local community involvement is important to the Debtors' maintaining and developing relationships and business connections. The Corporate Community Contributions serve the dual purpose of increasing the Debtors' goodwill in the community and establishing the Debtors as good corporate citizens. This enhances the perception of the Debtors' standing in their respective communities. The Debtors submit that such positive public perception is especially crucial at this time, as the Debtors work through these chapter 11 cases.

19. The Corporate Community Contributions also provide the Debtors with free positive publicity through newspaper or magazine articles and the internet. The Debtors devote a section of their website, www.mirant.com, to corporate community contributions. Under the title "Commitment," the Debtors provide information about various initiatives the Debtors have been involved in. For example, the web site currently has a notice regarding the Debtors' work with The Greenlining Institute, a non-profit consumer protection advocate for low-income communities in California. Working together, the Debtors and The Greenlining Institute developed innovative means of promoting energy education, conserving energy and helping 2,000 families reduce their energy bills by approximately 20%.

20. Finally, the Debtors submit that the Corporate Community Contributions will not prejudice the creditors in these chapter 11 cases. The Debtors have balanced the legitimate creditor concern of maximizing these chapter 11 estates with the benefits, as described above, of the Corporate Community Contributions. The Debtors submit that the remaining funds necessary to continue the Corporate Community Contributions will ultimately benefit these chapter 11 estates by enhancing employee engagement and increasing positive public awareness

of the Debtors as a going concern that is committed to enhancing local communities and helping them grow and thrive.

CONCLUSION

WHEREFORE, the Debtors respectfully request entry of an order granting the relief requested herein and such other and further relief as is just.

Dated: April 29, 2004

HAYNES AND BOONE, LLP
901 Main Street
Suite 3100
Dallas, TX 75202
(214) 651-5000

By /s/ Judith Elkin
Judith Elkin
State Bar No. 06522200
Robin Phelan
State Bar No. 15903000
Ian Peck
State Bar No. 24013306

-and-

Thomas E Lauria
State Bar No. 11998025
Craig H. Averch
State Bar No. 01451020
WHITE & CASE LLP
Wachovia Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131
(305) 371-2700

ATTORNEYS FOR THE DEBTORS AND
DEBTORS-IN-POSSESSION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she 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 (without exhibits) via U.S. mail, and the addressees set forth below via U.S. mail (with exhibits) on the 29th day of April, 2004.

/s/ Judith Elkin

Eric J. Taube
Mark C. Taylor
Hohmann, Taube & Summers, L.L.P.
100 Congress Avenue
Suite 1600
Austin, TX 78701

Howard L. Siegel
Brown Rudnick Berlack Israels LLP
City Place I, 185 Asylum Street
Hartford, CT 06103-3401

William R. Baldiga
Brown Rudnick Berlack Israels LLP
One Financial Center
Boston, MA 02111

Edward S. Weisfelner
Leslie H. Scharf
Brown Rudnick Berlack Israels LLP
120 West 45th Street
New York, NY 10036

Paul N. Silverstein
Andrews & Kurth, L.L.P.
805 Third Avenue
New York, NY 10022

Jason S. Brookner
Andrews & Kurth, L.L.P.
1717 Main Street
Suite 3700
Dallas, TX 75201

Deborah D. Williamson
Thomas Rice
Cox & Smith Incorporated
112 East Pecan Street
Suite 1800
San Antonio, TX 78205-1505

Bruce R. Zirinsky
Gregory Petrick
Cadwalader, Wickersham & Taft
100 Maiden Lane
New York, NY 10038

Mark Thompson
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, NY 10017-3954

William K. Snyder
13355 Noel Road
Suite 1825
Dallas, Texas 75240

EXHIBIT A

Community Contributions Guidelines

General Requirements: As in past years, contributions must be (1) consistent with and further the purposes of relevant Mirant Corporation policies, such as the Mirant Mindset, the Environmental Policy, and Safety & Health Policy, and (2) consistent with normal course of business objectives and decision-making.

Core Areas of Focus : Contributions should support the core areas of education, the environment, and health and safety. These three subjects generally encompass the vast majority of contributions from prior years and are considered the best aligned with our business, company policies and corporate citizenship objectives. However, in limited cases, contributions that do not directly fall within these 3 categories may be directed to organizations with a more general civic focus, provided these guidelines are otherwise satisfied and the relevant organization provides a significant community service and represents an important element of the business unit's or Mirant's corporate citizenship program.

Contributions Criteria:

- With the following limited exception for contributions for an appropriate general civic purpose, all contributions should be directed to organizations or programs that serve core objectives of education, environmental stewardship, or safety and health. Reasonable efforts should be made to develop a corporate citizenship plan that allocates a generally equal percentage of contributions among the 3 focus areas.
- Up to 10% or \$20,000, whichever is greater, of a business unit's contributions budget may be directed to organizations with a more general civic focus, provided these guidelines are otherwise satisfied and the relevant organization provides a significant community service and represents an important element of the business unit's or Mirant's corporate citizenship program.
- We will not make commitments to multi-year contributions.
- The applicant organization must be an accepted or registered non-profit organization, must be well managed, and must not be solely dependent on Mirant for its income.
- Request for funding must be for public benefit as opposed to private or personal benefit.

Other Specific Limitations

- Contributions must be consistent with Mirant Corporation's Compliance Policy and Code of Ethics.
- Contributions may not be made to fulfill a multi-year commitment made prior to filing for chapter 11. These should be treated as pre-petition claims.
- The total amount of contributions by Mirant Corporation and its U.S. business units will not exceed \$465,275 during 2004 and is not expected to exceed \$500,000 in 2005.

Planning and Approvals

During the first quarter of each year, corporate and North America business units will work together to develop community contribution plans, providing as much detail as possible at that time regarding specific contributions. Any opportunities for programs or initiatives across business units or with corporate will be identified and considered.

In past years, the vast majority of single contributions were less than \$5,000. Single contributions or contributions to a single organization by a business unit of up to \$5,000 must be approved by the business unit president or a member of the management council. Single contributions or contributions to a single organization by corporate of up to \$5,000 must be approved by the VP of Environmental, Safety & Health or a member of the management council. All corporate contributions must be reviewed by the Manager of Environmental Policy and Corporate Citizenship. At least during the period of the bankruptcy, single contributions or contributions to a single organization greater than \$5,000 will require prior approval per the following guideline:

- \$5,000 < corporate or NA business unit contribution < \$25,000: VP Environmental, Safety & Health, with input from the Manager of Environmental Policy and Corporate Citizenship
- \$25,000 < corporate contribution: SVP Administration, with input from the Manager of Environmental Policy and Corporate Citizenship
- \$25,000 < NA business unit contribution: EVP and CEO North America, with input from the Manager of Environmental Policy and Corporate Citizenship

The request for approval should include a description of the organization and its purposes and work and the relevance to Mirant's policies and corporate citizenship program.

Reporting

Business units and corporate will generate quarterly reports on community contributions and employee participation in community outreach activities. Business units will provide a copy of quarterly report to the Manager of Environmental Policy and Corporate Citizenship.

EXHIBIT B

West Region

Entities - Mirant Delta, LLC, Mirant Potrero, LLC, Mirant California, LLC, Mirant Las Vegas, LLC, Mirant Texas, LP and Mirant Wichita Falls, LP

Description	Donation Amount	Category
Educational grant to parcel out in \$500-\$1,000 increments	\$135,000	education
Health and Safety training in the communities - health van to poor neighborhoods near the plants	\$25,000	health & safety
Economic development contributions	\$20,000	civic/economic
West Region 2004 Budget	\$180,000	

Mid-Atlantic/Mid-Continent Region

Entities - Mirant Mid-Atlantic, LLC, Shady Hills Power Company, LLC, Mirant Sugar Creek, LLC, West Georgia Generating Company, LLC, Mirant Zeeland, LLC, General Activities

Job Shadowing	\$1,000	education
Open Houses	\$1,200	civic
Holiday Drives	\$800	civic
Project Sponsorships		
Alliance for the Chesapeake Bay	\$3,000	environment
Clean Air Partners - Media Sponsorship	\$10,000	environment
Maryland Envirothon	\$3,000	environment
Maryland Waterman's Assn - Chesapeake		
Appreciation Days	\$500	environment
National Wild Turkey Federation	\$2,000	environment
Oyster Recovery Partnership		in kind environment
Potomac Conservancy	\$3,000	environment
Quail Unlimited	\$2,000	environment
Maryland Chamber of Commerce	\$750	business
Virginia Chamber of Commerce	\$750	business
Other Project Sponsorships	\$1,500	civic
Memberships		
Alliance for the Chesapeake Bay	\$5,000	environment
Chesapeake Bay Foundation	\$3,000	environment
National Wild Turkey Federation	\$500	environment
Potomac Conservancy	\$2,000	environment
Quail Unlimited	\$500	environment
Wildlife Habitat Council	\$5,000	environment
Maryland Chamber of Commerce	\$2,400	business
Virginia Chamber of Commerce	\$1,000	business
USGO	\$300	civic
Other memberships	\$1,500	civic

Chalk Point/Brandywine***Project Sponsorships***

Local schools	\$500 education
Environmental Education Center	\$500 env
Town of Eagle Harbor	\$500 civic
Cedar Haven Community	\$250 civic
Prince George's Chamber Events	\$2,750 business
Other plant sponsorships	\$5,000 civic

Memberships

Friends of Jug Bay - Earth Day Activity	\$2,000 environment
North Keys Civic Assn	\$250 civic
Prince George's Chamber of Commerce	\$3,500 business

Dickerson/Westland***Project Sponsorships***

Poolesville High School	\$1,000 education
Environmental Education Center	\$500 environment
Potomac Sojourn	\$250 environment
John Poole Middle School	\$250 education
Poolesville Elementary School	\$150 education
Montgomery County Chamber Events	\$2,750 business
Other plant sponsorships	\$5,000 civic

Memberships

Montgomery County Chamber of Commerce	\$1,500 business
Poolesville Chamber of Commerce	\$250 business
Dickerson Community Assn	\$250 civic

Morgantown/Faulkner***Project Sponsorships***

Envirothon	\$500 environment
Lower Potomac Tributary Team	\$250 environment
Earth Day Activity	\$1,000 environment
Environmental Education Center	\$500 environment
Local Schools	\$500 education
Charles County Chamber Events	\$2,750 business
Other plant sponsorships	\$5,000 civic

Memberships

Charles County Chamber of Commerce	\$1,000 business
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Mirant Service Center***Project Sponsorships***

Local Schools	\$500 education
Crispin Woods Homeowners Assn	\$200 civic
Darcy Woods Homeowners Assn	\$200 civic
Other facility sponsorships	\$1,000 civic

Memberships

Little Washington Civic Association	\$225 civic
Westphalia Civic Association	\$225 civic

Potomac River Generating Station***Project Sponsorships***

Alexandria Education Partnership	\$250 education
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Alexandria Red Cross - Alexandria Waterfront Festival	\$2,000 health & safety
Environmental Policy Foundation - Alexandria Earth Day	\$1,000 environment
Friends of the Potomac - Bass Tournament	\$1,000 environment

Local Schools - Education/Environmental Projects	\$500 environment
Alexandria Chamber Events	\$2,750 business
Other plant sponsorships	\$5,000 civic

Memberships

Alexandria Seaport Foundation	\$5,000 environment
Alexandria Chamber of Commerce	\$4,000 business

Shady Hills

Pasco Economic Development Council	\$3,000 business
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Sugar Creek

Vigo County Chamber of Commerce	\$1,000 business
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West Georgia

Thomaston/Upson County Chamber	\$750 business
Red Cross	\$500 health & safety
Boy Scouts of America	\$500 education
American Heart Association	\$150 health & safety
Pike County High School Band	\$100 education
Upson County Schools - book fair, elementary edu teacher appreciation, etc	\$25,575 education
American Cancer Society	\$150 health & safety
Families and Youth Services	\$50 civic

Zeeland

Library Fund (ongoing contribution)	\$20,000 education
Youth Recreation Dept.	\$500 education
Fire Dept	\$3,000 health & safety
Tulip Festival	\$3,000 civic
Pumpkin Festival	\$600 civic

Mid-Atlantic 2004 Budget \$172,075

Northeast Region

New England

Entities - Mirant New England, Inc., Mirant Canal LLC, Mirant Kendall LLC

Rockland Police Association	\$2,000 civic
East End House	\$1,500 civic
Heritage Plantation	\$1,500 civic
Sandwich Youth Football	\$1,500 education
Sandwich Police Assoc.	\$2,000 civic
Sandwich Youth Basketball	\$1,500 education
Father Bill's Place	\$1,500 civic
Barnstable Professional Firefighters	\$2,000 civic
Environmental League of Massachusetts	\$1,500 environment

Massachusetts Vietnam Vets	\$1,500 civic
Charles River Watershed	\$1,500 environment
RHCI – Walkathon	\$2,000 civic
Total	\$20,000

New York

Entities - Mirant New York, Inc., Mirant Bowline LLC, Mirant Lovett LLC, Ny Gen LLC

Girl Scout Council of Rockland County	\$1,000 education
Boy Scout Council of Rockland County	\$1,000 education
West Haverstraw Senior Citizens Club	\$500 civic
United Hospice of Rockland County	\$1,500 health & safety
Arts Council of Rockland County	\$1,000 civic
Dominican College Foundation	\$6,000 education
Rockland Community College Foundation	\$3,000 education
Meals-on-Wheels of Rockland	\$1,000 health & safety
Arts Alliance of Rockland	\$1,000 civic
New York Environmental Conservation League – Education Fund.	\$1,000 environmental
American Cancer Society	\$500 health & safety
Wayne Hose Fire Company	\$1,000 health & safety
S.W. Johnson Fire Company	\$1,000 health & safety
American Legion Post 130	\$500 civic
North Rockland Lions Club	\$500 civic
St. Thomas Aquinas College	\$5,000 education
Rockland County Volunteer Firemen’s Assoc.	\$1,000 health & safety
Jawonio Foundation	\$1,500 civic
Rockland Teacher’s Association	\$1,000 education
Rockland County Social Services	\$1,000 civic

Total \$30,000

Northeast Region 2004 Budget \$50,000

Corporate Office

United Way Campaign	\$20,000
Contributions to ATL organizations that we partner with on volunteer activities	\$40,000
Corporate Office 2004 Budget	\$60,000

Mirant 2004 Budget Total \$465,275

EXHIBIT C

COMM-OPINION-ORDER, 95 FERC ¶61,405, PSEG Fossil, LLC, Docket No. EG01-42-000, PPL Montour, LLC, Docket No. EG01-43-000, Constellation Power Source Generation, Inc., Docket No. EG01-45-000, Reliant Energy Mid-Atlantic Power Holdings, L.L.C., Docket No. . . ., (June 14, 2001)

PSEG Fossil, LLC, Docket No. EG01-42-000, PPL Montour, LLC, Docket No. EG01-43-000, Constellation Power Source Generation, Inc., Docket No. EG01-45-000, Reliant Energy Mid-Atlantic Power Holdings, L.L.C., Docket No. EG01-211-000

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[¶61,405]

PSEG Fossil, LLC, Docket No. EG01-42-000
PPL Montour, LLC, Docket No. EG01-43-000
Constellation Power Source Generation, Inc., Docket No. EG01-45-000
Reliant Energy Mid-Atlantic Power Holdings, L.L.C., Docket No. EG01-211-000

Order Regarding Redetermination of Status as Exempt Wholesale Generators

(Issued June 14, 2001)

Before Commissioners: Curt Hébert, Jr., Chairman; William L. Massey, Linda Breathitt, Pat Wood, III, and Nora Mead Brownell.

Summary

In this order the Commission finds, based on commitments described below, that PSEG Fossil, LLC, (PSEG Fossil), PPL Montour, LLC (PPL Montour), Constellation Power Source Generation, Inc. (Constellation) and Reliant Energy Mid-Atlantic Power Holdings, L.L.C. (Reliant) (collectively, Applicants or Keystone Station Owners) are engaged exclusively in the business of owning and/or operating eligible facilities and selling electric energy at wholesale. The Commission finds that certain activities (agricultural leases, oil and gas leases, and mineral rights) that otherwise would violate the exclusivity requirement will not violate the exclusivity requirement in this case because Applicants commit to donate the proceeds from those activities to charity. It, therefore, grants their requests for a redetermination that they are exempt wholesale generators (EWG).

Applicants have filed requests for redetermination that they are EWGs.¹ Applicants state that they own various interests in the Keystone Electric Generating Station (Keystone Station) and the Conemaugh Generating Station (Conemaugh Station), each of which is an approximately 1,700 MW electric generation facility located in Pennsylvania. PPL Montour states

[62,506]

that it also owns a 100 percent interest in the Montour Steam Electric Station (Montour SES), an approximately 1,500 MW electric generation station also located in Pennsylvania.²

Applicants are seeking redetermination as EWGs in light of: (a) leases that relate to a proposed new fuel supply arrangement for the Keystone Station and Montour SES; and (b) existing lease and land commitment arrangements that they recently realized had not been disclosed in their original applications.

Notices of the applications were published in the *Federal Register*, 65 *Fed. Reg.* 27,497, 27,641, and 28,454 (2001), with interventions or comments due on or before June 6, 2001. None was received.

These applications raise the question of whether Applicants are engaged *exclusively* in the business of

owning and/or operating eligible facilities and selling electric energy at wholesale, as required by Section 32(a)(1) of the Public Utility Holding Company Act of 1935 (PUHCA), as amended by the Energy Policy Act of 1992.³

I. Lease Arrangements Relating to New Fuel Supply Arrangements

The Keystone Station owners intend to enter into a synthetic fuel supply contract with SynFuel Co. under which SynFuel Co. will supply synthetic fuel for use in the production of electric energy at the Keystone Station. Except in limited circumstances, (*e.g.*, *force majeure*, noncompliance of the fuel with contract specifications or outages), the Keystone Station Owners must purchase the entire output of the synthetic fuel facilities. There will be a similar arrangement at Montour SES. In both cases the owners of Keystone and Montour SES will lease land to SynFuel so that it can construct the necessary facilities to supply the synthetic fuel. Applicants state that the leases to SynFuel Co. are “a critical component of Keystone Station’s and Montour SES’s respective proposed fuel supply strategies.”⁴ The owners of Keystone Station will receive monthly lease payments from SynFuel Co. of \$12,500.⁵

We note that the lease of land to SynFuel is so that SynFuel can construct and operate synthetic fuel manufacturing facilities that are essential to Applicants’ fuel supply. Since a fuel supply is essential to Applicants’ business as generators of electric energy at wholesale, and the SynFuel operations are sized no larger than the amount of fuel applicants expect to need, the receipt of lease payments as the result of an activity to obtain that fuel supply does not violate the exclusivity requirement.⁶

II. Other Lease Arrangements

A. Lease Arrangements Involving Either No Rent or \$1 Lease Payments

The Keystone owners lease 65 acres to Keystone Coal Mining Corp. (KCMC) for coal handling facilities and electrical transmission lines; KCMC uses these facilities to process coal for Keystone Station. KCMC pays no rent for this lease. Applicants state that this lease is “directly related” to Keystone Station’s fuel supply.⁷

The Conemaugh Station Owners have entered into or are pursuing lease arrangements pursuant to which they will lease to a third party truck receiving facilities and land that the third party will use to provide services to the Conemaugh Station Owners for their power plant operations. The Conemaugh Station Owners will not receive any rent under these lease arrangements.⁸

The Keystone Station Owners have licensed and granted rights of way on a rent-free basis for parties to site electric, water, phone and gas lines and related equipment, water wells, dam gauges for Keystone Lake, railroad tracks, coal and ash hauling, and signs advertising local businesses. The Keystone Station Owners receive no fees for these licenses or rights of way.⁹

The 1000-acre Keystone Lake is on Keystone Station property. The Keystone Station Owners have leased 2,641 acres (including the lake) to the Pennsylvania Fish & Boat Commission for the public to use for recreational purposes. The annual rental fee is \$1.00. Again, Applicants maintain that the lease is on property that is essential for the business of owning and/or operating eligible facilities and selling electric

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energy at wholesale, so the lease is merely a by-product of that activity.

PPL Montour leases at either no compensation or at a nominal fee of \$1 land for an Environmental Center, a clubhouse, a church, two orchards, wildlife habitat and hunting. PPL Montour maintains that these leases are incidental to its operation of an EWG facility.

Applicants receive no lease payments or fees for the KCMC coal lease, easements (for electric, water,

phone, and gas lines, *etc.*) and truck receiving facilities described above. Applicants receive either no compensation or only a nominal \$1 rent for the leases involving Keystone Lake, the Environmental Center, the clubhouse, the church, the orchards, wildlife habitat and hunting. Applicants obviously do not engage in these activities for profit and these activities patently do not constitute a business. Since Applicants receive either no money or only a nominal \$1 fee from these activities, they cannot interfere with Applicants' exclusive ownership and/or operation of eligible facilities and sale of electric energy at wholesale.

B. Provision of Warm Water to Greenhouse Operators

PPL Montour sells warm water to greenhouse operators, which PPL Montour asserts is a permissible sale of a byproduct. We agree that the warm water that PPL Montour provides to greenhouse operators is a by-product of its electric generation. We have held that sale of a by-product of electric generation does not violate the exclusivity requirement, since it would make no sense to require an entity to waste by-products of electric generation in order to qualify for EWG status.¹⁰ Thus, this activity does not violate the exclusivity requirement.

C. Agricultural Leases, Oil and Gas Leases, Mineral Rights and Various Other Leases

The Keystone Owners lease 65 acres to 4 neighborhood farmers under leases that have existed since 1969. The annual rental fee for the 4 leases is \$300. Applicants maintain that the leases are on property that is a buffer zone essential for the ownership and/or operation of eligible facilities and the sale of electric energy at wholesale, so the leases are merely a by-product of that activity.¹¹ Applicants also state that the revenue that they receive from these leases is *de minimis* when compared with the revenues that they expect to receive from Keystone Station power sales. But Applicants state that, if the leases might interfere with their status as EWGs, they would be willing to either transfer the leases to an affiliate or give the proceeds of the leases to charity.¹²

The Keystone Station Owners are parties to 17 oil and gas leases under which lessees drill wells on leased land or have agreed to cap wells. The Keystone Station Owners receive an average of \$16,500 annually from these leases.¹³ Applicants claim that they must maintain the land to which these leases relate as a buffer zone in order to generate and sell electric energy at wholesale, the Commission should find that the leases and the revenue that they derive from the leases are incidental to the wholesale sale of electric energy. Applicants also state that the revenue that they receive from these leases is *de minimis* when compared with the revenues that they expect to receive from Keystone Station power sales.¹⁴ Applicants further state that, were the Commission to find that these leases transgress the exclusivity requirement, Applicants are willing, in order to maintain their EWG status, either to transfer their interest in the leases to an affiliate or to donate the revenues associated with these leases to charity.¹⁵

The Keystone Station Owners receive payments for the sale of coal mineral rights under the land near Keystone Station. They are paid \$.03/ton on all coal mined and sold from the premises and such payment will cease when either coal production stops or the Keystone Station Owners have received an aggregate amount of \$130,000 from such payments. Last year, the aggregate payment was approximately \$7,600. Applicants maintain that these

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lease payments are “not a prohibited EWG activity.”¹⁶

On land belonging to Montour SES, PPL Montour leases buildings such as cottages, houses and barns, trailers, land for crop reserves and other agricultural purposes, boat storage space, railroad loading area and miscellaneous equipment, such as an air monitor and a signboard (Montour SES leases). PPL Montour is transferring title to the leased parcels of land to an affiliate. PPL Montour asks that, if it is unable to transfer title to any of these parcels, the Commission find that the leases are incidental to making wholesale sales of electric energy. PPL Montour states that the lease revenues for these activities are less than .05 percent of the revenues from wholesale generation of the Montour SES. In the alternative, PPL Montour is

willing, in order to maintain its EWG status, either to transfer its interest in the leases to an affiliate or to donate the revenues associated with these leases to charity.¹⁷

In our view, the revenues that Applicants receive from these activities (agricultural leases--\$300, oil and gas leases --\$16,000,¹⁸ mineral rights--\$7,600 last year, unspecified revenues from Montour SES leases), make these activities business operations. Applicants cannot engage in these activities and still be considered to be engaged *exclusively* in the business of owning and/or operating eligible facilities and selling electric energy at wholesale.

Applicants argue, among other things, that the revenues they receive from these leases are *de minimis* when compared with their revenues from the sale of electric energy.¹⁹ We have never held that the fact that the revenues received from activities not related to the generation and sale of electric energy are *de minimis* is, by itself, sufficient to satisfy the exclusivity requirement. In the cases that Applicants cite,²⁰ the leases related to activities essential or reasonably necessary to the generation of electric energy.²¹ That is not the case here. Applicants cannot receive more than nominal fees for these activities and maintain their status as EWGs.

Applicants also argue that the leases are a reasonable by-product of the generation of electric energy because they occur on land that Applicants need in order to engage in that activity.²² We disagree. While ownership of additional land creates a buffer against activities on near-by property, this argument proves too much. By this argument, EWG Applicants could lease their land for *any* revenue-generating use, including essentially any residential, commercial or even industrial purpose. We cannot reconcile such a result with the statutory requirement that EWGs must be directly and exclusively engaged in the business of owning or operating eligible facilities and selling electric energy at wholesale. The Applicants' activities that occur on the additional land are not reasonably necessary to the business of owning and/or operating eligible facilities and selling electric energy at wholesale.

Applicants' proposal to transfer these leases to an affiliate is not sufficient. Applicants would still own the property that yields the revenues from these business activities and would, therefore, still be engaged in prohibited business activities. While Applicants propose to transfer their interest in the leases to a non-EWG affiliate for \$1 and the affiliate would then receive the revenues from the existing users of the land, acceptance of the \$1 lease arrangements with an affiliate as satisfying the exclusivity requirement would elevate form over substance. However, if Applicants do give the proceeds to charity, then they would not be engaged in other business activities and would be EWGs.²³ Based on this commitment by Applicants,

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we find that Applicants will continue to satisfy the EWG requirements.

III. Constellation's Additional Activities

A. Easement to Baltimore Gas and Electric Company (BG&E) for Access to Building and Associated Parking Space

Constellation intends to lease an easement to its affiliate, BG&E, so that BG&E's employees will have access to a building and an associated parking area. Constellation will give the proceeds of the lease to charity. Since Constellation will give the proceeds of the lease to charity, it will not be engaged in leasing property as a business. The lease will not, then, violate the exclusivity requirement.

B. Barging Coal for Third Parties

Constellation intends to use its barge fleet to barge coal for third parties at times when the fleet has idle capacity. Constellation only owns barges that are reasonably needed to transport coal to its own facilities and only contracts for towing services with respect to the barges it owns. We have found that the sale or lease of excess capacity does not violate the exclusivity requirement, as long as the amount of capacity the

applicant has is reasonable for it to meet its own needs.²⁴ Accordingly, to the extent that it has extra capacity, Constellation may use its barge fleet to transport coal for third parties without violating the requirement that it be engaged exclusively in the business of owning and/or operating eligible facilities and selling electric energy at wholesale.

C. Purchase and Sale of Western Maryland Coal

Constellation purchases Western Maryland coal and sells it to others.²⁵ Constellation stresses that it engages in this activity solely for the receipt of certain state tax credits, which reduce the costs of generation from its facilities. Constellation explains that the State of Maryland has established these tax credits to make Maryland's high-sulfur coal more competitive, thus promoting job growth and economic development in Western Maryland.²⁶ Constellation states that, according to the Maryland Coal Association, if the Maryland Coal Tax Credit was terminated, the amount of coal mined in Maryland would decrease by approximately 75 percent and over 350 jobs would be lost. Constellation states that BG&E, before divesting its fossil-fired generation to Constellation, purchased approximately half of the coal sold under this state program.

Because Constellation does not use this coal in its own operations, this activity is not reasonably necessary to Constellation's generation of electric energy. The business of buying and selling Western Maryland coal thus violates the exclusivity requirement. Constellation cannot, then, engage in this activity and be an EWG.

Constellation argues that this activity furthers an important state policy objective and, by generating tax credits, offsets Constellation's costs of obtaining coal to generate power. However, the exclusivity requirement imposed by Congress does not allow us to authorize other activities because of state policy. Also, Constellation's ability under this program to reduce its costs of generating power, if adopted as an exception to the exclusivity requirement, could justify virtually any income-producing activity. This exception would swallow the rule.

Constellation commits to discontinue this activity if necessary to maintain its EWG status.²⁷ Based on this commitment, we find that Constellation will continue to satisfy the EWG requirements.

D. Findings

Although, as detailed above, many of Applicants' leases and other activities do not violate the exclusivity requirement, the leases that do not relate to the generation and sale of electric energy and from which Applicants receive more than a nominal amount of money are independent businesses that preclude Applicants from engaging exclusively in the ownership and/or operation of eligible facilities and the sale of electric energy at wholesale. The Commission will find that Applicants are EWGs only on the condition that they contribute all of the proceeds of such activities to charity, as Applicants have indicated that they will do.

The Commission orders:

The applications for redetermination that Applicants are EWGs are hereby granted, based on the commitments specified in this order. A copy of this order will be sent to the Securities and Exchange Commission.

-- Footnotes --

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¹ PSEG Fossil filed its request on December 6, 2000, and amended it on January 18, 2001

The Commission has found that these entities are EWGs. See *PSEG Fossil*, 89 FERC ¶62,237 (1999); *PPL Brunner Island, LLC, et al.*, [91 FERC ¶61,228](#) (2000) (*PPL Montour*); *Constellation Power Source Generation, Inc.*, [92 FERC ¶61,043](#) (2000); *Reliant Energy Mid-Atlantic Power Holdings, L.L.C.*, [93 FERC ¶62,023](#) (2000).

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and May 9, 2001. PPL Montour filed its request on December 5, 2000, and amended it on January 18, and 29, and May 9, 2001. Constellation filed its request on December 5, and amended it on January 19, and May 8, 2001. Reliant filed its request on December 4, 2001 and amended it on January 22, and May 10, 2001.

² PPL Montour Application at 3.

³ [15 U.S.C. §79](#) -z 5a (1994).

⁴ See e.g., Montour Application at 16. See also, Reliant Application at 10-11 (SynFuel lease is directly and integrally connected to the Keystone Station fuel supply).

⁵ Applicants' annual receipts from these payments are as follows: PSEG Fossil (\$34,360); PPL Montour (\$18,500); Constellation (\$31,485); Reliant (\$25,500).

⁶ See *Crown Energy, L.P.*, [69 FERC ¶61,224, at p. 61,861](#) (1994); *Vista Energy, L.P.*, [69 FERC ¶61,225, at p. 61,862](#) (1994).

⁷ See e.g., PPL Montour Application at 20; Constellation Application at 14-15; Reliant Application at 14.

⁸ PPL Montour Application at 17 n.31.

⁹ See PPL Montour Application at 28-29; Constellation Application at 22; Reliant Application at 21-22. Applicants cite *Midwest Generation LLC*, [89 FERC ¶61,147](#) (1999).

¹⁰ See *Selkirk Cogen Partnership, L.P.*, [69 FERC ¶61,037, at p. 61,181](#) (1994); *Sithe Framingham, LLC*, [83 FERC ¶61,106, at p. 61,504](#) (1998); *Richmond Power Enterprises, L.P.*, [62 FERC ¶61,157, at p. 62,098](#) (1993); *Erie Boulevard Hydropower*,

See, e.g., PSEG Fossil Application at 23; Reliant Application at 21; PPL Montour Application at 23 (stating revenues from these leases not as a dollar amount but as a percentage of expected Keystone Station power sales).

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L.P., [87 FERC ¶61,378](#), at p. [62,407](#), n.10 (1999).

¹¹ *See, e.g.*, PSEG Fossil Application at 14-17; PPL Montour Application at 17-21.

¹² *See, e.g.*, PPL Montour Application at 25; PSEG Fossil Application at 17-21; Reliant Application at 14-18.

¹³ *See, e.g.*, PSEG Fossil Application at 23; Reliant Application at 19-20. Applicants do not set forth the annual amount received by each Applicant under these leases.

¹⁴ PPL Montour Application at 26-28 & n.60; PSEG Fossil Application at 23-24 and n.51; Reliant Application at 19-21.

¹⁵ *Id.*

¹⁶ *See* PPL Montour Application at 29, n.62; Reliant Application at 21.

¹⁷ PPL Monitor Application at 29-30, & n.66.

¹⁸ Applicants do not set forth the annual amount received by each Applicant under the oil and gas leases, but they do state that the Keystone Owners receive about \$16,500 from these leases annually. *See, e.g.*, Reliant Application at 19-20; PPL Montour Application at 27; Constellation Application at 21.

¹⁹ *See, e.g.*, PPL Montour Application at 21, 23, 27; Reliant Application at 23 n.72.

²⁰ Applicants cite *Safe Harbor Water Power Corporation*, [84 FERC ¶61,318](#) (1998) (*Safe Harbor*) and *Killingholme Generation Ltd.*, [90 FERC ¶61,194](#) (2000) (*Killingholme*).

²¹ In *Safe Harbor* the recreational use facilities leases were incidental to the Commission-

approved recreational use plan adopted in its Project License, without which it could not operate its facility. In *Killingholme* the lease was of a training facility that was essential to Killingholme's operation of its enterprise but that was available for use by others about five weeks per year.

²² See, e.g. PPL Montour Application at 17-22; Constellation Application at 13-20.

²³ See, e.g., *Killingholme*, [90 FERC at p. 61,632](#) (no violation of the exclusivity requirement where applicant received no revenues from agricultural leases); *Collins Trust I, et al.*, [89 FERC ¶61,148, at p. 61,428](#) (1999) (rent-free lease of property does not violate the exclusivity requirement).

²⁴ See *Selkirk Cogen Partners, L.P.*, [69 FERC ¶61,037, at p. 61,168](#) (1994); *Killingholme*, [90 FERC at p. 61,630](#) (2000); *PP&L Colstrip III, LLC*, [88 FERC ¶61,281, at pp. 61,868 -869](#) (1999).

²⁵ Constellation Application at 23.

²⁶ Constellation Application at 26.

²⁷ Constellation Application at 23 n.56.

Thomas E Lauria
State Bar No. 11998025
Craig H. Averch
State Bar No. 01451020
WHITE & CASE LLP
Wachovia Financial Center
200 South Biscayne Blvd.
Miami, FL 33131
Telephone: (305) 371-2700
Facsimile: (305) 358-5744

Robin Phelan
State Bar No. 15903000
Judith Elkin
State Bar No. 06522200
HAYNES AND BOONE, LLP
901 Main Street
Suite 3100
Dallas, TX 75202
Telephone: (214) 651-5000
Facsimile: (214) 651-5940

ATTORNEYS FOR THE DEBTORS AND DEBTORS-IN-POSSESSION

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

In re)	
	)	Chapter 11 Case
)	
MIRANT CORPORATION, <u>et al.</u>,	)	Case No. 03-46590 (DML)
	)	Jointly Administered
Debtors.)	
	)	Date and Time: May 26, 2004
	)	10:30 a.m.

**ORDER GRANTING MOTION OF THE DEBTORS PURSUANT TO 11 U.S.C. §§
105 AND 363 FOR AUTHORIZATION TO MAKE CERTAIN CORPORATE
COMMUNITY CONTRIBUTIONS IN THE ORDINARY COURSE**

Upon the motion,¹ dated April 29, 2004 (the “Motion”) of Mirant Corporation (“Mirant”) and its affiliated debtors, as debtors-in-possession (collectively, the “Debtors”), pursuant to 11 U.S.C. §§ 105 and 363 (the “Bankruptcy Code”) for entry of an order authorizing the Debtors to make certain corporate community contributions in the ordinary course of business; 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 this Court, having jurisdiction over the Motion and the relief requested therein; after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED:

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

ORDERED, that the Debtors are authorized to make Corporate Community Contributions in the aggregate amount of \$465,275.00, to the organizations set forth on Exhibit A of the Motion; it is further

ORDERED, that the Debtors are authorized to make Corporate Community Contributions in the ordinary course of business and consistent with the Guidelines set forth as Exhibit B of the Motion, on or after January 1, 2005, without further approval from this Court; it is further

ORDERED, this Court shall, and hereby does, retain jurisdiction with respect to all matters arising or related to the implementation of this Order.

IT IS SO ORDERED.

Dated: May ____, 2004

D. Michael Lynn,
United States Bankruptcy Judge