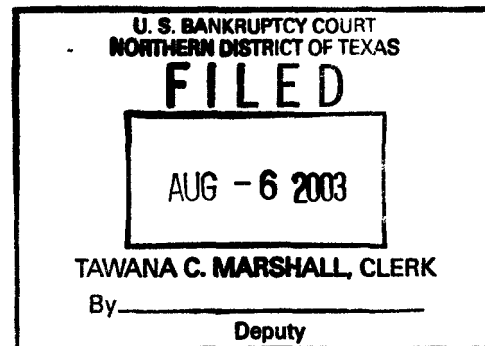


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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

In re:

MIRANT CORPORATION, et al.,

Debtors.

Chapter 11

Case No. 03-46590 (DML)

(Jointly Administered)

**PRELIMINARY HEARING  
DATE: AUGUST 28, 2003  
PRELIMINARY HEARING  
TIME: 9:30 A.M.**

**MOTION OF ENTERGY SERVICES FOR (I) RELIEF FROM THE  
AUTOMATIC STAY TO EXERCISE SETOFF AND/OR RECOUPMENT  
RIGHTS PURSUANT TO SECTION 553 OF THE BANKRUPTCY  
CODE AND (II) OTHER RELATED RELIEF**

**NOTICE:**

**THE TRUSTEE (IF ONE HAS BEEN APPOINTED) OR THE DEBTOR SHALL FILE A RESPONSE TO ANY MOTION FOR RELIEF FROM THE AUTOMATIC STAY WITHIN 12 DAYS FROM THE SERVICE OF THE MOTION. THE DEBTOR'S RESPONSE SHALL INCLUDE A DETAILED AND COMPREHENSIVE STATEMENT AS TO HOW THE MOVANT CAN BE "ADEQUATELY PROTECTED" IF THE STAY IS TO BE CONTINUED. IF THE DEBTOR DOES NOT FILE A RESPONSE AS REQUIRED, THE ALLEGATIONS IN THE CREDITOR'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY SHALL BE DEEMED**

**ADMITTED, UNLESS GOOD CAUSE IS SHOWN WHY THESE ALLEGATIONS SHOULD NOT BE DEEMED ADMITTED, AND AN ORDER GRANTED THE RELIEF SOUGHT MAY BE ENTERED BY DEFAULT.**

Entergy Services, Inc. ("Entergy Services"), in its capacity as agent for Entergy Arkansas, Inc. ("EAI"), Entergy Gulf States, Inc. ("EGSI"), Entergy Louisiana, Inc. ("ELI"), Entergy Mississippi, Inc. ("EMI"), Entergy New Orleans, Inc. ("ENOI," and together with EAI, EGSI, ELI and EMI, the "Entergy Operating Companies") (the Entergy Operating Companies and Entergy Services shall be collectively referred to as "Entergy"), by and through their undersigned counsel, hereby submit this Motion For (I) Relief From The Automatic Stay to Exercise Setoff and/or Recoupment Rights Pursuant to Section 553 of the Bankruptcy Code, and (II) Other Related Relief (the "Motion"). In support of the Motion, Entergy respectfully states as follows:

**INTRODUCTION**

1. On July 14, 2003 (the "Petition Date") the above-captioned debtors (the "Debtors"), including Mirant Americas Energy Marketing, LP ("MAEM"), filed voluntary petitions seeking relief under Chapter 11 of the Bankruptcy Code and an Order for relief was entered.

2. The Debtors continue to operate their businesses and manage their properties as a debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

## **BACKGROUND**

3. Entergy is, inter alia, a leading buyer and seller of electrical power and a provider of electric transmission services to wholesale customers. Entergy's relationship with the Debtors encompasses several areas, including: (i) the provision of electric transmission services to certain Debtors, particularly MAEM, under various agreements and (ii) the buying of electrical power from certain Debtors, particularly MAEM. The applicable agreements and relationships for the purposes of this Motion are set forth below.

### **The Point to Point Transmission Service Agreements**

4. Entergy Services and debtor MAEM are parties to certain Point to Point Transmission Service Agreements (as amended and modified, the "Point to Point Agreements"). The Point to Point Agreements incorporate Entergy's Open Access Transmission Tariff (the "Tariff"). Under the Point to Point Agreement, Entergy provides electric power transmission services to MAEM whereby MAEM is able to transmit electric power over Entergy's comprehensive electric power transmission system. Under this relationship, Entergy Services would invoice MAEM, and MAEM would remit payment to Entergy Services.

5. As of the Petition Date, MAEM owes Entergy Services approximately **\$236,535.52** for services provided to MAEM under the Point to Point Agreements (the "Point to Point Claim").

### **The Power Trade Agreements**

6. Entergy Services and debtor MAEM, among numerous other parties, entered into the Western Systems Power Pool Agreement (as amended and modified, the "Master Agreement"). Pursuant to the terms of the Master Agreement, Entergy Services and MAEM engaged in multiple power trade transactions (the "Power Trade Transactions") whereby Entergy Services and MAEM bought and sold electric power amongst each other in order to assist in

meeting their respective electric power requirements. As of the Petition Date, Entergy Services owed MAEM approximately **\$3,361,794.25** under the applicable Power Trade Transactions (the “Power Trade Payable”).

### **RELIEF REQUESTED**

7. By this Motion, Entergy Services seeks an Order of the Court granting it relief from the automatic stay to allow the immediate exercise of setoff and/or recoupment rights by Entergy Services against MAEM of (a) the Point to Point Claim against (b) the Power Trade Payable.

### **BASIS FOR RELIEF**

#### **Entergy Services is Entitled to Relief From the Automatic Stay to Exercise Its Right of Setoff and/or Recoupment Rights**

8. Section 362(a)(7) of the Bankruptcy Code provides that the filing of the Debtors’ voluntary petition operates as an automatic stay, applicable to all parties, against “the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor.” 11 U.S.C. § 362(a)(7). However, Section 362(a)(7) “does not affect the right of” a creditor to setoff. H.R. Rep. No. 595, 95th Cong., 1st Sess., at 342 (1977); S. Rep. No. 989, 95th Cong., 2d Sess., at 51 (1978). Section 362(a)(7) “simply stays its enforcement pending an orderly examination of the debtors’ and creditors’ rights.” *Id.* Thus, a party may still exercise its right to setoff in a bankruptcy proceeding but must first obtain relief from the automatic stay or obtain an order allowing setoff prior to exercising any right to setoff. In re NTG Industries, Inc., 103 B.R. 195, 197 (Bankr. N.D. Ill. 1989).

9. By necessitating a motion for relief to effect a setoff, Section 362 creates a mechanism by which setoff, which is usually marked by no event at all other than perhaps an accounting adjustment, can be subject to an orderly examination by the Court and the creditors of

the estate. See Matter of Corland Corp., 967 F.2d 1069, 1076 (5th Cir. 1992); In re Women's Technical Institute, Inc., 200 B.R. 77, 82 (Bankr. D. Mass. 1996).

10. Section 553 of the Bankruptcy Code governs setoffs in bankruptcy. In relevant part, Section 553 provides:

[T]his title does not affect any right of a creditor to a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case.

11 U.S.C. § 553(a). Essentially, the right to setoff allows entities that have mutual obligations to apply their mutual debts against each other, thereby avoiding “the absurdity of making A pay B when B owes A.” In re Gordon Sel-Way, Inc., 270 F.3d 280, 290 (5th Cir. 2001) (citing Citizens Bank v. Strumpf, 516 U.S. 16, 18 (1995)).

11. Thus in order for a creditor to establish its right to setoff, it must demonstrate one of the following:

- (a) a debt exists from the creditor to the debtor and that debt arose prior to the commencement of the case;
- (b) the creditor has a claim against the debtor that arose prior to the commencement of the bankruptcy case; and
- (c) the debt and the claim are mutual obligations.

See, e.g. In re Nerland Oil, Inc., 303 F.3d 911 (8th Cir. 2002); United States v. Gerth, 991 F.2d 1428, 1431 (8th Cir. 1993); Braniff Airways, Inc. v. Exxon Co., U.S.A., 814 F.2d 1030, 1035 (5th Cir. 1987). Debts are mutual when the debts and credits are in the same right and are between the same parties, standing in the same capacity. See In re Bennett Funding Group, Inc.,

146 F.3d at 139; In re Drexel Burnham Lambert Group, Inc., 113 B.R. 830, 847 (Bankr. S.D.N.Y. 1990).

12. In contrast, “[t]he Bankruptcy Code does not contain a recoupment provision.” Cooper-Jarrett, Inc. v. Central Transport, Inc., 726 F. 2d 93, 96 (3d Cir. 1984). Although the Bankruptcy Code does not specifically provide for recoupment, “[t]he common law doctrine of recoupment provides an exception to setoff in bankruptcy cases.” Id. “Recoupment ‘is the setting up of a demand arising from the same transaction as the plaintiff’s claim or cause of action, strictly for the purpose of abatement or reduction of such claim.’” Id. at 1079 (quoting 4 Collier on Bankruptcy, §553.03 at 553-15 to 553-17); see also Reiter v. Cooper, 113 S. Ct. 1213, 1218 (1993) (defining recoupment as “the setting off against asserted liability of a counterclaim arising out of the same transaction”); In re Jones, 122 B.R. 246, 249 (W.D. Pa. 1990). “[S]o long as the creditor’s claim arises out of the identical transaction as the debtor’s, that claim may be offset against the debt owed to the debtor, without concern for the limitations put on the doctrine of setoff by Code § 553.” In re University Medical Ctr., 973 F. 2d 1065, 1080 (3d Cir. 1992); In re Flagstaff Realty Assocs., 1995 WL 447934, at 4 (3d Cir. 7/31/94) (requiring “single integrated transaction”). Therefore, a creditor may assert “recoupment claims ‘against pre-petition debts to the debtor, post-petition debts, or some combination of these.’” Reading Co. v. City of Philadelphia, 155 B.R. 890, 910 (E.D.Pa. 1993).

13. The “typical situation in which equitable recoupment can be invoked involves a credit and debt arising out of a transaction for the same goods or services.” In re University Medical Ctr., 973 F. 2d at 1080. “[A]n express contractual right is not necessary to effect a recoupment.” In re University Medical Ctr., 973 F. 2d at 1080. Finally, although a creditor must obtain relief from the automatic stay to exercise a right of setoff, recoupment

constitutes “a non-statutory, equitable exception to the automatic stay.” Id.; accord In re Rooster, Inc., 127 B.R. at 570.

14. Thus, “[w]hile recoupment deals with situations in which a single transaction is at issue, setoff applies where the debt and credit arise from different transactions between the same parties.” In re Metropolitan Hosp., 131 B.R. at 289. In addition, “recoupment permits no affirmative recovery.” In re Rooster, Inc., 127 B.R. at 569. Although setoff permits affirmative recovery, e.g., Hill v. Port Auth. Transit Sys., 137 Pa. Commw. 132, 585 A.2d 1129, 1133 (1991), aff’d per curiam without opinion, 613 A. 2d 1206, 1207 (Pa. 1992), recoupment is only an affirmative defense and does not permit affirmative recovery, see In re Flagstaff Realty Assocs., 60 F.3d 1031, 1035 (3d Cir. 1995); In re H. Wolfe Iron & Metal Co., 64 B.R. 754, 758 (Bankr. W.D.Pa. 1986); In re Rooster, Inc., 127 B.R. at 568-69; Household Consumer Discount Co. v. Vespaziani, 490 Pa. 209, 219, 415 A. 2d 689, 694 (1980) (“Recoupment...is a doctrine of an intrinsically defensive nature...”).

**Entergy Services Is Entitled to Setoff/ Recoup the Point to Point Claim  
Against the Power Trade Payable**

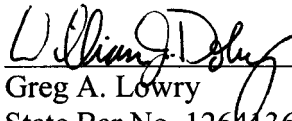
15. The Point to Point Claim and the Power Trade Payable arise out of the Point to Point Agreement and the Power Trade Transactions. The claims and debts qualify as mutual obligations of Entergy Services on the one hand and MAEM on the other. Furthermore, both claims and debts arose prior to the commencement of these bankruptcy cases. In addition, there is no substantial dispute as to the amounts due and owing between the parties. Therefore, Entergy Services is entitled to relief from the automatic stay so that it may immediately setoff and/or recoup the Point to Point Claim of **\$236,535.52** against the Power Point Payable of **\$3,361,794.25**.

**NOTICE**

16. Notice of this Motion has been given to (i) counsel to the Debtors, (ii) counsel to the Official Committee of Unsecured Creditors, (iii) the Office of the United States Trustee, and (iv) those parties requesting notice pursuant to Fed. R. Bankr. P. 2002. Entergy Services submits that no further notice of this Motion need be given. No previous motion for the relief sought herein has been made to this or any other Court.

**WHEREFORE**, Entergy Services respectfully requests that this Court enter an order, substantially in the form attached: (i) granting the Motion; (ii) authorizing the immediate exercise of setoff and/or recoupment rights by Entergy Services against MAEM of (a) the Point to Point Claim against (b) the Power Trade Payable; and (iii) granting such further and other relief as the Court deems just.

Respectfully submitted,

  
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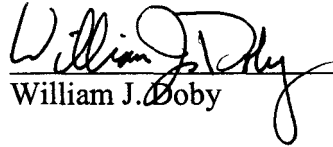
**CERTIFICATE OF CONFERENCE**

I hereby certify that on August 6, 2003, I contacted Robin Phelan, counsel for the Debtor to discuss the relief requested in the Motion and left a message. As of the time of the filing of this Motion, Mr. Phelan had not returned my call. I therefore assume the Debtor opposes the relief requested in this Motion.

  
\_\_\_\_\_  
William J. Doby

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the parties identified below by first class United States mail, postage prepaid, on this 6th day of August , 2003.

  
\_\_\_\_\_  
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