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ATTORNEYS FOR PERRYVILLE ENERGY PARTNERS LLC

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

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In re	)	Chapter 11 Case
	)	Case No. 03-46590 (DML)
	)	Jointly Administered
MIRANT CORPORATION, <u>et al.</u> ,	)	Hearing Date and Time: <b>12/3/03 10:30a.m.</b>
	)	
Debtors.	)	

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**MOTION OF PERRYVILLE ENERGY PARTNERS LLC FOR ALLOWANCE  
AND IMMEDIATE PAYMENT OF ADMINISTRATIVE EXPENSE**

**ANY WRITTEN RESPONSE OR OBJECTION TO THIS MOTION MUST BE FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT 501 WEST 10TH STREET, FORT WORTH, TEXAS 76102, AND SERVED UPON THE UNDERSIGNED PROFESSIONAL BEFORE CLOSE OF BUSINESS ON DECEMBER 1, 2003, WHICH IS MORE THAN TWENTY (20) DAYS FROM THE DATE OF SERVICE HEREOF. IF A RESPONSE OR OBJECTION IS FILED, A HEARING WILL BE HELD ON DECEMBER 3, 2003 AT 10:30 A.M., BEFORE THE HONORABLE D. MICHAEL LYNN, IN HIS COURTROOM LOCATED AT 501 WEST 10TH STREET, FORT WORTH, TEXAS 76102, AT WHICH YOU MUST APPEAR.**

**IF NO RESPONSES OR OBJECTIONS ARE FILED ON OR BEFORE DECEMBER 1, 2003, THE RELIEF REQUESTED IN THIS MOTION SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT WITHOUT FURTHER NOTICE.**

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

Perryville Energy Partners LLC ("PEP"), by and through its undersigned counsel, as and for its Motion For Allowance And Immediate Payment Of Administrative Expense (the "Motion"), respectfully represents as follows:

### **INTRODUCTION**

1. Mirant Americas Energy Marketing LP ("MAEM"), a debtor in these cases, entered into a Tolling Agreement with PEP, dated April 30, 2001, as amended by the First Amendment, dated as of February 1, 2002, and the Second Amendment, dated as of August 23, 2002 (the "Tolling Agreement"). Pursuant to the Tolling Agreement, MAEM acquired tolling rights which provided it with certain output generated by a power facility owned by PEP, located in Perryville, Louisiana (the "Facility"), in exchange for certain payments to PEP. The Tolling Agreement expires by its terms on December 31, 2022. The Facility was specifically designed and built in consideration of the Tolling Agreement and PEP historically received all of its revenues from MAEM under the Tolling Agreement.

2. On July 14, 2003 (the "Petition Date"), Mirant Corporation ("Mirant") and certain of its affiliates, including MAEM, (collectively, the "Debtors") filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code. The

Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. On July 15, 2003, this Court granted the Debtors' motion for an order requesting that the Debtors' bankruptcy cases be jointly administered.

4. On July 25, 2003, the Office of the United States Trustee for the Northern District of Texas announced the formation of two official unsecured creditors' committees; one for Mirant and the other for Mirant Americas Generation, LLC. The appointment lists of members of both unsecured creditors' committees were filed in their respective chapter 11 cases on July 25, 2003.

### **JURISDICTION**

5. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of this matter is a core proceeding pursuant to 28 U.S.C. § 157(b).

6. Venue for these cases and this matter in the United States Bankruptcy Court for the Northern District of Texas is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

7. The statutory predicates for the relief requested herein are 11 U.S.C. §§ 105 and 503(b).

## BACKGROUND

8. On August 14, 2003, this Court entered an Amended Order Regarding Motion of Debtors for an Order Pursuant to Sections 365 and 554 of the Bankruptcy Code Authorizing and Approving A Procedure for the Rejection of Certain Executory Contracts (the "Rejection Procedures Order"). The Rejection Procedures Order provides that the Debtors, in the exercise of their business judgment, may reject any executory contract or unexpired lease that they determine to be unnecessary and/or burdensome to the Debtors' ongoing business operations, following ten (10) business days from service of a motion to reject, via facsimile or overnight mail, to: (i) the counterparty under the respective contract or lease at the last known address available to the Debtors; (ii) counsel for the counterparty under the respective contract or lease who has appeared in these cases and who has specifically requested notice of any rejection notice; and (iii) counsel for any statutory committees appointed in these cases. If an objection to a motion to reject is filed by a counterparty to a contract or lease, or by any Committee, and timely served upon, and actually received by, counsel to the Debtors prior to the expiration of the ten (10) business day notice period, the Debtors are required to seek a hearing to consider the objection at the Court's earliest convenience.

9. On August 29, 2003, a Motion of Debtors to Reject an Executory Contract Between Mirant Americas Energy Marketing, LP and Perryville Energy Partners, LLC (the "Rejection Motion") was filed with this Court. Pursuant to the Rejection Motion, the Debtors sought to reject the Tolling Agreement. Although no hearing before this Court was held on the Rejection Motion, Mirant asserts that pursuant

to the Rejection Procedures Order, the Tolling Agreement is deemed rejected as of September 15, 2003 (the "Rejection Date").<sup>1</sup>

10. During the period from the Petition Date through the Rejection Date, PEP, with the Debtors' knowledge and consent, continued to provide services to MAEM pursuant to the terms and conditions of the Tolling Agreement (the "Postpetition Services"). Meanwhile, MAEM chose not to reject the Tolling Agreement prior to the Rejection Date because of (i) MAEM's entitlement to dispatch the unit and market the power output of the Facility during the lucrative summer months of July through September, and (ii) the potential to preserve the financial benefits of a certain pre-petition termination agreement (the "Termination Agreement"). Under the pre-petition Termination Agreement, PEP had agreed, in connection with the closing of an anticipated sale transaction of the Facility, to let MAEM terminate the Tolling Agreement in a manner that would have saved Mirant hundreds of millions of dollars in future obligations to PEP. Even after the Petition Date, completion of the sale would have eliminated the need to reject the Tolling Agreement and avoid the very substantial claims against MAEM and certain other related entities that would have resulted from the rejection. Ultimately, PEP was unable to reach a financial arrangement on the sale, the

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<sup>1</sup> PEP does not believe that it was served with the Rejection Motion in strict conformity with the Rejection Procedures Order.

Termination Agreement expired by its terms and MAEM sought rejection of the Tolling Agreement.

11. During the postpetition period, MAEM made and PEP received payments in full for the services rendered from the Facility for the period of July 15, 2003 through July 31, 2003. Moreover, based on conversations that representatives of PEP had with the Debtors, PEP concluded that the Debtors would pay PEP for the Postpetition Services at the rate specified on the Tolling Agreement. Based on this understanding, PEP determined not to challenge the Debtor's motion to reject the Tolling Agreement. PEP has received no further payments for the Post petition Services and is consequently owed \$7,165,631.77 from MAEM.

12. Pursuant to the express terms of the Tolling Agreement, MAEM is required to pay to PEP the sum of \$7,165,631.77 for the Post-petition Services from August 1, 2003 through the Rejection Date. Moreover, it is indisputable that MAEM benefited from the postpetition continuation of the Tolling Agreement because a sale of the facility by PEP, if consummated while the Tolling Agreement continued in full force and effect, would have eliminated hundreds of millions of dollars in damage claims against the Debtors that have now resulted from the rejection of the Tolling Agreement. Nevertheless, MAEM has now informed PEP that it is currently unwilling to pay any of this amount, leaving an administrative claim due and owing in the amount of \$7,165,631.77 (the "Administrative Claim"). There is no reason why MAEM should treat PEP differently than any other administrative expense creditor providing goods and services to the Debtors in the ordinary course of business. Since the Rejection Date, PEP

has been unable to dispatch its facility. It therefore has no revenues to offset its costs and service its credit obligations. Given the devastating effects that rejection has had on PEP, it is inequitable for MAEM to delay payment of its pre-Rejection Date obligations.

13. Accordingly, PEP seeks the immediate payment of the Administrative Claim, which represents the outstanding obligations of MAEM to PEP for the Postpetition Services pursuant to the terms of the Tolling Agreement.

### **RELIEF REQUESTED**

14. By this motion, PEP requests the immediate payment of the Administrative Claim pursuant to 11 U.S.C. § 503(b). PEP submits that such claim is entitled to an administrative priority because it arises out of MAEM's postpetition obligations for the Postpetition Services. In view of (i) the unambiguous language of the Tolling Agreement, (ii) the Debtors' postpetition defaults, (iii) the Debtors' misrepresentations to PEP, and (iv) the fact that the rejection has left PEP with no steady source of revenue and in severe financial distress while MAEM reaped the benefits of the summer tolling services provided by PEP, PEP respectfully requests that the Court immediately order the payment of the Administrative Claim.

### **APPLICABLE AUTHORITY**

15. Section 365(a) of the Bankruptcy Code permits a debtor-in-possession to "assume or reject any executory contract." 11 U.S.C. § 365(a). During the period of time from the date that the debtor files its bankruptcy petition through the date that the

agreement is rejected, the non-debtor party to an executory contract is entitled to the payment of an administrative expense for the goods and services it provides to the debtor. See 11 U.S.C. § 503(b)(1)(a); see also, NLRB v. Bildisco & Bildisco, 465 U.S. 513, 531 (1984); In re El Paso Refinery, L.P., 220 B.R. 37, 43 (Bankr. W.D. Tex. 1998). In the instant case, PEP provided the Postpetition Services to MAEM during the time period from the Petition Date through the Rejection Date. Accordingly, PEP is entitled to the payment of the Administrative Claim.

16. In determining the amount of an administrative expense claim for the period between the petition date and the rejection date of a contract, there is a presumption in favor of the non-debtor party to the contract that it is entitled to the rate specified in the contract. See, e.g., Memphis-Shelby County Airport Auth. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 783 F.2d 1283, 1285 (5th Cir. 1986); see also In re Washington -St. Tammany Electric Coop., Inc., 111 B.R. 555, 559 (Bankr. E.D. La. 1989); Bethlehem Steel Corp. v. BP Energy Co. (In re Bethlehem Steel Corp.), 291 B.R. 260, 264 (Bankr. S.D.N.Y. 2003). Unless the Debtor provides contrary evidence that the contract rate should not govern, the Court should not independently evaluate the transaction and award the creditor an administrative claim at the contract rate. In re Beverage Canners International Corp., 255 B.R. 89 (Bankr. S.D. Fla. 2000). This approach is consistent with the underlying goal of the Bankruptcy Code to incentivize non-debtors to continue to deal with the Debtor-in-possession. In re Jartan, Inc., 732 F.2d 584, 586 (7th Cir. 1984).

17. Further, principles of equity dictate that if a non-debtor is induced into providing postpetition services to a debtor based upon assurances that the non-debtor will be paid at the rate specified in a contract, the debtor is estopped from arguing that the payment of an administrative expense is not at the rate specified in the contract. See Bethlehem Steel, 291 B.R. at 265-266 ("any assertion of a legal right by a debtor that is inconsistent with the debtor's prior words or acts is improper as a matter of law, where a non-debtor relied upon such prior words or acts.").

18. In Bethlehem Steel, prior to filing bankruptcy, the debtors entered into two contracts with utility companies. On their petition date, the debtors filed an ex parte motion seeking an order, which the court subsequently entered, preventing the utility companies from terminating services to the debtors and providing that the debtors would continue to pay their postpetition obligations to the utility companies as billed and when due. Id. at 262. Thereafter, the utility companies continued to provide services to the debtors and the debtors paid the invoices as billed. The debtors then filed a motion, which was subsequently granted, seeking an order authorizing the retroactive rejection of the contracts with the utility companies. Thereafter, the debtors filed a complaint seeking to obtain, among other things, a determination that the administrative claims of the utility companies should not be based upon the rates in the contracts. The utility companies filed a cross motion seeking an order directing, among other things, that the debtors provide them with an administrative payment based upon the rates specified in the contracts. The bankruptcy court determined that the debtors were estopped from arguing against the rates set forth in the contracts because the debtors paid the contract rate for the

services provided in prior post-petition periods. Further, in addition to the payment for the postpetition services at the contract rate, the debtors also had given the utility companies assurances that they would be provided with an administrative expense payment at the rate specified in the contracts. Id. at 265-266.

19. As was the case in Bethlehem Steel, the Debtors should be estopped from arguing that PEP is not entitled to an administrative expense claim for the Postpetition Services based upon the rate specified in the Tolling Agreement. As discussed above, PEP received payments in full, at the rate expressed in the Tolling Agreement, for the Postpetition Services for the period of July 15, 2003 through July 31, 2003. Further, based on conversations that representatives of PEP had with the Debtor, PEP concluded that payments for the services rendered under the Tolling Agreement would continue to be governed by the Tolling Agreement and the rates set forth therein. PEP provided the Postpetition Services and did not object to the Rejection Motion based on this understanding. Allowing the Debtors to argue against the rate specified in the Tolling Agreement would unjustly prejudice PEP. Accordingly, the Debtors should be estopped from arguing that the administrative payment due to PEP as a result of the Postpetition Services should be at a rate other than the rate specified in the Tolling Agreement.

20. Furthermore, PEP is entitled to the immediate payment of the Administrative Claim. Given MAEM's conduct, it would be inequitable to permit MAEM to further delay the payment of the Administrative Claim. The timing of the payment of an administrative expense claim is within the sound discretion of the court.

See Toma Steel Supply, Inc. v. TransAmerican Natural Gas Co. (In re TransAmerican Natural Gas Corp.), 978 F.2d 1409, 1418 (5th Cir. 1992); In re Mr. Gatti's, Inc., 164 B.R. 929, 943 (Bankr. W.D. Tex. 1994) (court has wide discretion under section 105 of the Bankruptcy Code to authorize immediate payment of administrative expense claim). In the present situation, there clearly appears to be sufficient funds available to pay all anticipated administrative expense claims in the Debtors' cases. Moreover, PEP, the non-debtor party, will suffer a devastating financial effect if the administrative expense is not timely paid. Finally, PEP had a good faith belief that it was going to be paid timely at the rate set forth in the Tolling Agreement. Thus, the equities of this case dictate that PEP is entitled to the immediate payment of the Administrative Claim.

#### **NOTICE**

21. PEP has served notice of this Motion on (i) counsel to the Debtors; (ii) counsel to the Creditors' Committees; (iii) the Office of the United States Trustee; and (iv) all parties that filed a notice of appearance with the Clerk of this Court pursuant to Bankruptcy Rule 2002 and requested such notice. PEP submits that such notice constitutes appropriate notice under the circumstances and is adequate and sufficient for entry of an order approving this Motion.

**CONCLUSION**

WHEREFORE, PEP hereby respectfully requests that this Court (i) enter the annexed order authorizing the immediate payment of an administrative expense to PEP in the amount of \$7,165,631.77; and (ii) grant such other and further relief as is just and equitable.

Dated: November 7, 2003

Respectfully submitted,

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*\* by permission  
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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing document has been forwarded to all parties on the attached service list by regular, first-class mail on this the 7th day of November, 2003.

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