

therefor and due and appropriate notice of the Motion having been given, this Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

A. The Debtors comprise an expansive enterprise with numerous subsidiaries, facilities, and items of personal property related to the energy business. In the ordinary course of its business, Debtor MAEM acquired “tolling rights”² prepetition to two of the four generating units located at a combustion turbine facility in Bosque County, Texas (the “Bosque Facility”) owned by Debtor, Mirant Texas. MAEM’s tolling rights were evidenced by a tolling agreement (the “Original Tolling Agreement”) between MAEM and Mirant Texas.³

B. In regard to the Bosque Facility, MAEM is party to the following four prepetition contracts with Gulfterra for the transportation of gas to the Bosque Facility: (a) Firm Gas Transportation Agreement for Intrastate Service (Transporter Contract No. TA00-011) dated May 1, 2000, (b) Firm Gas Transportation Agreement for NGPA Section 311 Service (Transporter Contract No. TE00-001), dated May 1, 2000, (c) Parking and Lending Agreement for Intrastate Service, Contract No. 5626 (Parking) and 5627 (Lending) dated August 1, 2002 and (d) Parking and Lending Agreement for NGPA Section 311 Service, Contract No. 5624 (Parking) and 5625 (Lending) dated August 1, 2002 (the contracts listed in (a)-(d) above, are hereinafter collectively referred to as the “Gulfterra Contracts”). The Gulfterra Contracts

² Tolling rights provide an acquirer with rights to certain designated output generated by a facility in exchange for, among other things, certain fixed and variable payments. In addition, the acquirer of tolling rights is generally responsible for providing all fuel necessary to operate the tolled portion of the facility.

³ Historically, MAEM optimized the output of the remaining two generation units, pursuant to service agreements between it and Mirant Texas.

essentially provide for the provision and transportation of gas to the Bosque Facility for operation of the plant. MAEM has posted a post-petition letter of credit in the principal amount of \$1,516,500 (the “Letter of Credit”) for the benefit of Gulfterra as collateral for MAEM’s obligations under the Gulfterra Contracts.

C. MAEM is current in its obligations under the Gulfterra Contracts and MAEM is not in default thereunder with respect to any defaults of the type described in Bankruptcy Code section 365(b). Gulfterra has indicated its consent to the assumption by MAEM of the Gulfterra Contracts, and the assignment thereof to Wharton, as requested in the Motion.

D. In the course of this Bankruptcy case, MAEM determined that the Original Tolling Agreement was “out of the money” as to MAEM. Accordingly, on April 12, 2004, MAEM filed the “Debtors’ Motion to Reject Bosque Tolling Agreement Between Debtor Mirant Americas Energy Marketing, LP And Debtor Mirant Texas, LLC” (the “Bosque Rejection Motion”).

E. On June 2, 2004, this Court held a hearing on the Bosque Rejection Motion and made the following determinations with respect thereto: (i) the rejection of the Original Tolling Agreement and the rejection damages claim would be left open to allow the parties time to negotiate an amicable resolution; (ii) if the parties were unable to resolve their differences regarding the rejection and the rejection claim, the Court would issue an opinion on the matter; and (iii) the parties were relieved of their obligations under the Original Tolling Agreement to allow Mirant Texas to enter into a new tolling agreement with a third party.

F. In order to maximize the value of its estate, Mirant Texas has entered into the Wharton Tolling Agreement with Wharton. Under the Wharton Tolling Agreement, Mirant

Texas is obligated sell to Wharton the entire capacity of the Bosque Facility (the “Capacity”) through December 31, 2006.⁴ The Wharton Tolling Agreement also requires MAEM to assume and assign to Wharton the Gulfterra Contracts.

G. Wharton is obligated under the Wharton Tolling Agreement to make payments comprised of amounts for the demonstrated capacity of the Bosque Facility as well as certain variable costs for start-up and run-hour charges. Mirant Texas would provide a guarantee of minimal capacity levels during “summer” (May 15-September 15) and “non-summer” (January 1-May 14; September 16-December 31) portions of the year. The Wharton Tolling Agreement contains terms for bonus payments to Mirant Texas when capacity is greater than the guaranteed amounts. Under certain circumstances (e.g., mechanical outages), Wharton is only liable for the amount of capacity that is actually available by the Bosque Facility.⁵

H. In connection with its efforts to enter into a tolling agreement with a third party, the Debtors engaged in a thorough marketing effort and discussed tolling the Bosque Facility with more than a dozen different entities. After such negotiations, the Debtors concluded, in their reasonable business judgment, that the decision of Mirant Texas to enter into the Wharton Tolling Agreement and to work with Wharton, an experienced counterparty, was sound and economically beneficial to the Debtors and their estates. The benefits of the Wharton Tolling Agreement are that (a) Mirant Texas is able to hedge its output generation for the term of the

⁴ Because the Wharton Tolling Agreement contains certain conditions, including approval by this Court, the Debtors have represented that it cannot be determined with certainty when the term of the agreement will commence. However, Debtors expect that the term will likely begin around August 11, 2004.

⁵ The foregoing provision is standard industry practice for tolling agreements. Although the economic particulars of the proposed transaction have not been provided, the Debtors have provided the economic particulars of the Wharton Tolling Agreement to the Committees, none of which have raised an objection to the Motion.

agreement, (b) MAEM minimizes its obligations to Gulfterra under the Gulfterra Contracts; and (c) the Letter of Credit will be terminated.

I. The Debtors are good faith sellers and Wharton is a good faith purchaser within the meaning of Bankruptcy Code section 363(m) and each of the Debtors and Wharton is entitled to the protections of section 363(m). The Wharton Tolling Agreement is the product of substantial and good faith negotiations that were conducted at arm's length and without collusion.

J. Approval of the Wharton Tolling Agreement (and assumption and assignment of the Gulfterra Contracts) is in the best interest of the Debtors, the Debtors' estates, creditors, and other parties in interest. The Debtors have articulated good and sufficient business reasons justifying the Wharton Tolling Agreement and the assumption and assignment of the Gulfterra Contracts. The economic terms of the Wharton Tolling Agreement that will inure to the benefit of Mirant Texas and its estate constitute full and adequate consideration and reasonably equivalent value for the obligations and performance of Mirant Texas with respect to the Wharton Tolling Agreement.

K. Wharton has required, as a condition to entering into the Wharton Tolling Agreement, entry of an Order of this Court which contains the provisions set forth in the "Order" hereinbelow, which the Court finds are reasonable, necessary and appropriate under the circumstances.

L. All findings of fact that are conclusions of law shall be deemed to be conclusions of law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the Motion, this Chapter 11 case, and of the property of the Debtors and their respective bankruptcy estates under 28 U.S.C. §§ 1334 and 157(b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (M), (N) and (O). Venue of this Chapter 11 case and the Motion is proper under 28 U.S.C. §§ 1408 and 1409.

2. All requirements of Bankruptcy Code sections 363(b) and (f) (and applicable Federal Rules of Bankruptcy Procedure and other applicable law) relating to the Motion have been satisfied. All requirements of Bankruptcy Code section 365 (and applicable Federal Rules of Bankruptcy Procedure and other applicable law) relating to the assumption and assignment of the Gulfterra Contracts have been satisfied. No cure amount is owing to Gulfterra under section 365(b); provided however, reconciliation of certain “true-ups” shall occur between MAEM and Gulfterra after the date hereof.

3. The transactions contemplated by the Wharton Tolling Agreement undertaken by the Debtors and Wharton are at arms’ length, without collusion and in good faith within the meaning of Bankruptcy Code section 363(m) and the parties are entitled to the protections afforded by Bankruptcy Code section 363(m). Wharton has agreed to pay reasonably equivalent value to Mirant Texas for the consideration provided to Wharton under the Wharton Tolling Agreement.

4. The transfers to Wharton under the Wharton Tolling Agreement (including the assignment of the Gulfterra Contracts) (a) are or will be legal, valid and effective transfers to Wharton, and (b) any and all property conveyed (or to be conveyed) to Wharton is conveyed free and clear of all liens, claims, encumbrances, and interests pursuant to Bankruptcy Code section

363(f).

5. Proper, timely, and adequate notice of the Motion and the transactions contemplated thereunder has been provided in accordance with Sections 363 and 365 and other applicable law, such notice was good and sufficient and appropriate under the particular circumstances, and no other or further notice of the Motion or the transactions contemplated thereunder is required. This Court specifically finds that service of the Motion upon the Limited Service List, Wharton (and its counsel) and Gulfterra (and its counsel) is reasonable, satisfactory, and sufficient for purposes of Federal Rule of Bankruptcy Procedure 2002(a)(2).

6. A reasonable opportunity to object or to be heard with respect to the Motion and the relief requested therein has been afforded to all interested parties and entities, including Gulfterra.

ORDER

IN ACCORDANCE WITH, AND BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY:

ORDERED, that the Motion is GRANTED in its entirety; it is further

ORDERED, that Mirant Texas is authorized, pursuant to Bankruptcy Code section 363(b) to enter into, and perform its obligations under the Wharton Tolling Agreement and all the terms and conditions thereof are hereby approved; it is further

ORDERED, that pursuant to Section 363(f) of the Bankruptcy Code, the property and property rights conveyed in connection with the Wharton Tolling Agreement are conveyed free

and clear of any and all liens, claims, encumbrances and interest and any such interest shall attach to the proceeds of the transaction received by Mirant Texas, with the same validity, force and effect as they presently have.

ORDERED, that MAEM is authorized, pursuant to Bankruptcy Code section 365(a), (f) to assume and assign the Gulfterra Contracts to Wharton and to execute any and all agreements, instruments, or documents necessary to effect the assignment of such contracts. There are no defaults under the Gulfterra Contracts and there are no cure amounts that must be paid thereunder under Bankruptcy Code section 365(b); provided, however, that the reconciliation of certain “true-ups” between MAEM and Gulfterra under the Gulfterra Contracts shall occur after the date hereof. Notwithstanding anything herein to the contrary, Wharton shall not be liable for any default or cure amount under, relating to, or arising out of the Gulfterra Contracts that occurred prior to the effective date of the assignment of such contracts (including, but not limited to, any “true-up” payments owing by MAEM to Gulfterra on account of events which occurred prior to the date of the assignment of the Gulfterra Contracts to Wharton). This Court specifically authorizes MAEM to enter into an assignment in the form of the Assignment Agreement attached to the Motion as Exhibit B, and perform its obligations thereunder. The Gulfterra Contracts shall remain valid and binding and in full force and effect in accordance with their respective terms for the benefit of Wharton, notwithstanding any provision in such contracts that prohibits, restricts, or conditions such assignment or transfer pursuant to Bankruptcy Code section 365(f) (provided that such prohibitions, restrictions or conditions of assignment or transfer shall be negated only with respect to the assignment effected pursuant to the Wharton Tolling Agreement and that any such prohibitions, restrictions and conditions of assignment shall otherwise remain in full force and effect and a part of the Gulfterra Contracts so assigned); it is

further

ORDERED, that (except with respect to the reconciliation of the “true-ups” which may be owing by, and recoverable only from, MAEM relating to events that occurred prior to the date of the assignment of the Gulfterra Contracts to Wharton) Gulfterra is forever barred from asserting that it is owed a cure amount under the Gulfterra Contracts and shall be forever barred and estopped from asserting or claiming against the Debtors, Wharton, or any other assignee of the Gulfterra Contracts that any additional amounts are due or defaults exist or conditions to assignment must be satisfied under the Gulfterra Contracts; it is further

ORDERED, that in the event the Gulfterra Contracts revert back to MAEM as a result of early termination of the Wharton Tolling Agreement, and notwithstanding the entry of this Order, such contracts shall be treated for all purposes as prepetition executory contracts which may be rejected, assumed, or assumed and assigned by MAEM under Bankruptcy Code section 365; it is further

ORDERED, that in the event of a default by Mirant Texas under the Wharton Tolling Agreement (and subject to any cure period set forth therein), without further notice, hearing, or order, the automatic stay of Bankruptcy Code section 362 is shall be immediately terminated, and Wharton may exercise any and all of its rights and remedies under such agreement; it is further

ORDERED, that any claim for damages caused by Mirant Texas and incurred by Wharton under the Wharton Tolling Agreement shall be treated as an administrative expense claim against Mirant Texas and its estate under Bankruptcy Code section 503(b)(1)(A); it is further

ORDERED, that any Chapter 11 plan or sale, settlement, or other transaction into which the Debtors enter shall not be inconsistent with the terms of the Wharton Tolling Agreement or interfere with or limit in any way Wharton's rights and remedies under the Wharton Tolling Agreement, it is further

ORDERED, that no person or entity, including, without limitation, Mirant Services and MAEM (without regard to whether Mirant Texas has breached or breaches any present or future obligation to Mirant Services or MAEM), shall, by action or omission, indirectly or directly, disturb, limit, prevent, interfere with, or otherwise enjoin consummation of the transactions contemplated in or by or Mirant Texas' performance under the Wharton Tolling Agreement, Wharton's exercise of its rights and remedies or enjoyment of its benefits under the Wharton Tolling Agreement, or this Order; it is further

ORDERED, that immediately effective on the date hereof, and with respect to the Wharton Tolling Agreement (and the Gulfterra Contracts assumed and assigned to Wharton herein), each of Wharton and the Debtors shall be entitled to the protection of Bankruptcy Code section 363(m). The transactions contemplated by the Wharton Tolling Agreement are undertaken by the Debtors (including Mirant Texas and MAEM) and Wharton in good faith, as that term is used in Bankruptcy Code; it is further

ORDERED, that this Court retains jurisdiction to enforce and implement the terms and provisions of this Order and any dispute arising out of the Wharton Tolling Agreement or the Assignment Agreement; it is further

ORDERED, the terms of this Order shall be binding on and inure to the benefit of the Debtors, the Debtors' creditors, Wharton, and all other parties in interest, and any successors of

the Debtors and Wharton, including in the case of the Debtors, any trustee or examiner appointed in this Chapter 11 case or any subsequent or converted bankruptcy case of the Debtors; it is further

ORDERED, that notwithstanding the fact that this Court has taken the Bosque Rejection Motion under advisement, this Order shall be effective and enforceable immediately upon entry. No subsequent order of this Court relating to the Bosque Rejection Motion shall in any way impact the effectiveness of this Order, the relief granted herein, or the Wharton Tolling Agreement. The ten (10) day stay set forth in Federal Rules of Bankruptcy Procedure 6004(g) and 6006(d) is hereby waived.

Dated: August 4, 2004



D. Michael Lynn,
United States Bankruptcy Judge