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ATTORNEYS FOR THE DEBTORS AND DEBTORS-IN-POSSESSION

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

_____	)	Chapter 11 Case
In re	)	
	)	Case No. 03-46590(DML)11
MIRANT CORPORATION, <u>et al.</u> ,	)	Jointly Administered
	)	
Debtors.	)	Hearing Date and Time: April 28, 2004;
_____	)	12:00 p.m.

**MOTION OF THE DEBTORS PURSUANT TO 11 U.S.C. §1121(d) FOR ORDER  
FURTHER EXTENDING THE EXCLUSIVITY PERIODS IN WHICH TO PROPOSE  
AND SOLICIT ACCEPTANCES TO A PLAN OR PLANS OF REORGANIZATION  
AND REPORT PURSUANT TO LOCAL BANKRUPTCY RULE 3016.1**

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

Mirant Corporation (“Mirant”) and its 82 affiliated debtors (collectively, “Mirant” or the “Debtors”), as debtors-in-possession, file this motion (the “Motion”) for the entry of an order pursuant to section 1121(d) of title 11, United States Code, 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”) further extending the periods during which only the Debtors may propose a plan or plans of reorganization and solicit acceptances thereof. In support of the Motion, the Debtors respectfully represent the following:

## I. PRELIMINARY STATEMENT

These cases comprise one of the largest chapter 11 cases in U.S. history. Hanging in the balance is the recovery of over \$10 billion of claims, the employment of over 6,000 people and the preservation of electrical generating capacity sufficient to power over 20 million homes. The difficulty of the Debtors' reorganization exercise is compounded by the fact that it must be accomplished in the turbulent, uncharted waters of significant competition in a regulated industry. Many of the markets in which the Debtors participate suffer from material over-capacity.<sup>1</sup> At the same time, the promise of open competition has given way to Keynesian anomalies where receipts in a rising market can be capped on an *ex post facto* basis in the name of public interest, while losses in a falling market are, in many instances, unlimited. That dynamic, along with a host of other complicating factors discussed herein, have placed an incredible strain, both internally and externally, prior to and during the pendency of these cases.

Indeed, few cases can rival the complexity of these jointly-administered chapter 11 cases. Before this Court are 83 affiliated debtors that, through an intricate matrix of inter-company relationships, operate (as their core businesses) in the highly-regulated U.S. power generation industry. The context of these cases has required the appointment of no fewer than three committees; the employment of numerous financial and legal professionals; and weekly hearings before this Court on a host of matters necessary just to defend the Debtors from the actions of third parties and to preserve their assets. Nevertheless, significant progress has been made. Various strategic initiatives, such as the operational performance initiative formulated

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<sup>1</sup> On March 29, 2004, utility company TXU Corporation stated that its TXU Energy division would be permanently shutting down eight (8) Texas power plants and temporarily mothballing four (4) other units.

with the assistance of McKinsey & Company, have been launched. A quantitative business plan was just completed and is in the process of being presented to the Committees for their comments. Various key “gating items” are being diligently pursued, including:

- Consideration by the Fifth Circuit Court of Appeals of the Debtors’ request to reject the Back-to-Back Agreement with PEPCO and related Federal Energy Regulatory Commission (“FERC”) issues;
- Resolution of various claims asserted against the Debtors (as well as other generators and energy marketers) arising out of the California energy crisis of 2000 and 2001 that are asserted in various FERC proceedings and a multitude of court proceedings, including litigation in which the attorney general for the State of California seeks divestiture by certain Debtors of its California power generation assets;
- Significant claims against Pacific Gas & Electric (“PG&E”) in its chapter 11 case and against the California Power Exchange Corporation in its chapter 11 case, and defense of refund claims;
- Completion of the State of New York tax litigation involving hundreds of millions of dollars in excess taxes charged to various Debtors owning generating facilities in New York;
- Resolution of the inter-company claims issues;
- Analysis and potential pursuit of claims against various third parties, including The Southern Company;
- Analysis of the complexities of and alternatives for the MIRMA leases; and
- Evaluation of the pros and cons of various levels of substantive consolidation among the Debtors.

The Debtors are simply not in a position, at this time, to formulate a plan of reorganization (or 83 plans of reorganization), let alone draft a plan (or 83 plans) along with accompanying disclosure statements, and circulate such plan or plans to solicit acceptances. The Debtors, accordingly, seek an extension of the existing periods during which they may propose a plan or plans of reorganization (*i.e.*, April 30, 2004) and solicit acceptances (*i.e.*, June 30, 2004) to January 31, 2005 and April 1, 2005, respectively.

## **II. JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The relief requested in the Motion is authorized under section 1121(d) of the Bankruptcy Code, Rule 3016(b) of the Federal Rules of Bankruptcy Procedure, and Local Bankruptcy Rule 3016.1.

## **III. PROCEDURAL BACKGROUND**

2. The Cases. On July 14, 2003 and various dates thereafter (the “Petition Dates”), Mirant Corporation and 82 of its direct and indirect subsidiaries 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 the Bankruptcy Code.

3. The Cases are Jointly Administered. Orders have been entered by this Court 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.

## **IV. FACTUAL BACKGROUND**

### **A. The Initial Exclusivity Periods Were Extended by Consensus.**

5. As of the Petition Date, pursuant to subsections 1121(b) and (c)(3) of the Bankruptcy Code, the Debtors had: (a) 120 days after the Petition Dates within which to file their plans of reorganization (the “Filing Period”); and (b) 180 days after the Petition Dates within which to solicit acceptances of those timely-filed plans (the “Solicitation Period” and together with the Filing Period, the “Exclusivity Periods.”) before other parties-in-interest were

permitted to file plans. The initial Filing Period and the initial Solicitation Period expired on November 11, 2003 and January 9, 2004, respectively.

6. Prior to the expiration of the initial Exclusivity Periods, the Debtors filed a motion (the “First Exclusivity Motion”) seeking an extension of the initial Exclusivity Periods. Only two parties—the creditors’ committee appointed in the chapter 11 case of Mirant Americas Generation LLC (“MAG”) and M.H. Davidson, an individual bondholder of MAG—objected to the motion. Notwithstanding the Debtors’ omnibus response to both objections, the Debtors’ professionals focused primarily on negotiating a compromise with the two objecting parties and the other two committees with respect to extending the Exclusivity Periods. These negotiations resulted in a mutually beneficial compromise between the Debtors and the Committees.

7. On December 9, 2003, an order (the “First Exclusivity Order”) was entered approving a compromise pursuant to which: (a) the Filing Period and the Solicitation Period were extended through April 30, 2004 and June 30, 2004, respectively; and (b) the Debtors agreed to meet certain key milestones (the “Milestones”) for the completion and presentation of the Debtors’ business plan and an initial analysis of inter-company claims to the Committees.

8. The Milestones specified that: (a) the Debtors were to present the Committees with a qualitative business plan by January 15, 2004; (b) the Debtors were to present to the Committees an analysis of inter-company claims by March 1, 2004; and (c), the Debtors were to present the Committees with their quantitative business plan (with projections) by March 1, 2004. Each of the Milestones has been timely met.

**B. Report Pursuant to Local Bankruptcy Rule 3016.1 Regarding Why Plans Have Not Yet Been Filed, Timetable for Submission of Plans, and Likelihood that Plans Can Be Filed.**

9. As discussed above, the Debtors' cases are extremely complex, involving 83 debtors, a highly-regulated industry and hundreds of thousands of stakeholders. What distinguishes these cases from many other large chapter 11 cases is that within the massive group of stakeholders are various creditors, state and federal regulatory agencies, municipalities and other interest holders. This Court is not the only forum within which the Debtors are adjudicating matters that affect the Debtors' assets and liabilities, future debt capacity, and the ultimate feasibility of a plan or plans of reorganization. Although there have been (and will continue to be) hundreds of matters resolved by this Court, the Debtors cannot formulate a definitive plan of reorganization until certain "gating" issues are resolved, some of which must be resolved in alternative forums. Set forth below is a description of those gating items.

**1. Rejection of the Pepco Back-To-Back Agreement.**

10. Currently, one of the Debtors' primary business and legal objectives is to obtain relief from an out-of-market contract with Potomac Electric Power Company ("Pepco") that represents a \$600 million liability incurred in conjunction with Mirant's December 2000 entry into an Asset Purchase and Sale Agreement ("APSA") with Pepco. In connection with APSA, Mirant Americas Energy Marketing, LP ("MAEM") entered into a "Back-to-Back Agreement" with Pepco whereby MAEM agreed to purchase from Pepco (at Pepco's cost) power purchased by Pepco under five (5) power purchase agreements (the "PPAs") pursuant to which Pepco was obligated to purchase large amounts of power from third parties at above-market rates—effectively assuming Pepco's obligations under the PPAs. The PPAs are costing Mirant in excess of \$12 million per month above prevailing market rates for electricity, with an

aggregate projected out-of-market cost of exceeding \$600 million over the term of the agreement.

11. To obtain relief, the Debtors determined, in the exercise of their reasonable business judgment, to reject the Back-to-Back Agreement pursuant to section 365 of the Bankruptcy Code. In most chapter 11 cases, rejecting burdensome contracts—such as the Back-to-Back Agreement—would be a routine matter. However, just a few months before the Debtors commenced these cases, FERC had thwarted the efforts of NRG Energy, Inc. (“NRG”) (also a debtor in its own chapter 11 case pending in the Southern District of New York) to reject a major power purchase contract with Connecticut Light & Power (“CL&P”).<sup>2</sup> Consequently, the Debtors’ major objective was (and is) to prevent FERC from issuing any specific performance order—such as that entered in the NRG case—and to secure a ruling establishing that the Bankruptcy Court, not FERC, should decide whether the Debtors may reject FERC-jurisdictional contracts under section 365 of the Bankruptcy Code.

12. On August 28, 2003, the Debtors moved to reject the Back-to-Back Agreement. The Debtors simultaneously commenced an adversary proceeding seeking: (a) preliminary and permanent injunctive relief against FERC with respect to the Back-to-Back

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<sup>2</sup> In NRG, FERC issued a preemptive order requiring NRG to continue to perform the CL&P agreement until FERC could complete a full-blown regulatory review (under an extremely stringent standard) to determine whether NRG should be relieved of its performance obligations under the contract. Essentially, FERC’s position was that, notwithstanding the Bankruptcy Court’s exclusive jurisdiction over the assets of the estate and over core bankruptcy proceedings such as those related to section 365, FERC ultimately had the “final say” over whether NRG should be required to perform under the contract. Both the bankruptcy and the district courts refused to change the outcome, finding that since FERC had issued an order, the Court could not enjoin FERC due to the operation of section 313(b) of the Federal Power Act (which specifies that only the Courts of Appeals may review extant FERC orders). NRG was unsuccessful in securing a stay or any form of emergency relief from either the Second Circuit or the District of Columbia Circuit. FERC ultimately ruled against NRG, and NRG settled on unfavorable terms with CL&P before the appeals on the merits were resolved.

Agreement; (b) declaratory judgment that the Back-to-Back Agreement was rejectable; and (c) disgorgement of postpetition out-of-market payments under the Back-to-Back Agreement (the “Pepco Adversary Proceeding”). On August 28, 2003, this Court granted a temporary restraining order (“TRO”) preventing FERC from taking any action that would force Debtors to perform under the Back-to-Back Agreement.

13. This Court’s favorable ruling gave the Debtors the opportunity to extend the protection against unilateral FERC actions to all of the Debtors’ FERC-jurisdictional contracts. The day after receiving the first TRO related to the Back-to-Back Agreement, the Debtors commenced a second adversary proceeding and petition for emergency injunctive relief seeking to enjoin FERC from taking preemptive action against any of the Debtors’ other FERC-jurisdictional contracts, absent ten days’ notice (the “FERC Adversary Proceeding”). This Court also granted that relief.

14. On September 25, 2003, this Court converted the first TRO related to the Back-to-Back Agreement to a preliminary injunction (the “Preliminary Injunction”) finding that: (a) it had the jurisdiction to enjoin FERC from interfering with its duties as a Bankruptcy Court, including the decision of whether to authorize rejection of an executory contract; and (b) the Debtors had established that injunctive relief was appropriate under the circumstances. On October 1, 2003, this Court extended the Preliminary Injunction pending completion of a hearing on the Preliminary Injunction.

15. On September 5, 2003 (after this Court entered the TRO), FERC and Pepco moved to withdraw the reference of the proceedings from this Court to the District Court. This Court adjourned and Pepco agreed to the effective date of rejection as of September 18, 2003. Although the reference was ultimately withdrawn on October 9, 2003, additional

activity— including full briefing of the jurisdictional issues before the District Court (in context of the pending motion to reject the Back-to-Back Agreement)—at the District Court was required.

16. On December 23, 2003, the District Court issued a decision and order (the “December 23 Decision”) ruling in favor of FERC on the jurisdictional arguments, effectively reversing this Court. As part of its ruling, the District Court ordered the Debtors to show cause as to why the injunction regarding the Back-to-Back Agreement should not be dissolved. The Debtors filed a response and asked, alternatively, for a stay of any such dissolution order pending appeal. The District Court ordered the dissolution of the injunction and denied the Debtors’ request for a stay pending appeal.

17. On January 6, 2004, the Debtors sought expedited appeal from the District Court’s orders with respect to the Pepco Adversary Proceeding and the Preliminary Injunction. Pepco and FERC each opposed the Debtors’ motion for an expedited appeal and a stay of the District Court’s order pending resolution of the appeal. On January 27, 2004, the Fifth Circuit granted the Debtors’ motion for an expedited appeal, but denied the Debtors’ stay motion. On January 28, 2004, the Debtors appealed the District Court’s January 26 Order in which it had dismissed the FERC Adversary Proceeding and dissolved the TRO. On February 18, 2004, the Fifth Circuit granted FERC’s motion to consolidate the Debtors’ appeal of the January 26 Order with the Debtors’ appeal of the District Court’s other orders. The Debtors filed their Fifth Circuit appellate brief on March 8, 2004. The Debtors’ appeal is currently proceeding on an expedited briefing schedule, with oral agreement set for May 5, 2004. At this time, the Debtors cannot predict when a decision will be rendered or what form any subsequent remand might take.

**2. Resolution of FERC-Jurisdictional Matters.**

18. Beyond the immediately-apparent effects of the District Court’s December 23 Decision on the Debtors’ disputes with Pepco, the ruling has called into question the Debtors’ ability to address numerous other issues in the bankruptcy process relating to FERC jurisdictional contracts, and may have implications beyond the final disposition of the Back-to-Back Agreements. The Debtors have requested expedited consideration of their appeal to the Fifth Circuit Court of Appeals and remain optimistic that they will prevail. Nevertheless, at the least, the Debtors’ ability to avail themselves of the protections of section 365 of the Bankruptcy Code with respect to FERC-jurisdictional contracts remains uncertain at this time.

19. In that regard, the Debtors have made considerable efforts to identify all “out of the money” executory contracts that are arguably subject to FERC jurisdiction and have developed action plans with respect to the most material of these contracts. Nevertheless, the issue of whether any or all of these contracts may be rejected prior to any plan confirmation remains uncertain. Given the potential scope and breadth of the December 23 Decision, the Debtors have devoted significant time to the pursuit of alternative remedial strategies and, indeed, have been able to sidestep the FERC jurisdictional issue through agreements with counterparties stipulating to the Debtors’ rejection of certain contracts or favorable assumptions thereof.

**3. State of New York Property Tax Issues.**

20. At the Petition Dates, certain Debtors conducting business in New York State (the “New York Debtors”) were petitioners or parties to 41 proceedings, pending in the New York State Supreme Court, challenging real property tax assessments made by various municipalities in the State of New York. In these actions, the New York Debtors are seeking refunds of property taxes levied upon what the New York Debtors contend are inflated and

erroneous tax assessments. The Debtors believe that they are entitled to refunds of over \$250 million, not including interest, related primarily to overpaid property taxes for the Bowline and Lovett generating facilities, both located in Rockland County, New York. An ultimate determination with respect to the Debtors' New York property tax obligations directly impacts the long-term viability of the New York Debtors. Absent sufficient tax relief, Bowline and Lovett generating facilities may not be able to sustain themselves economically, requiring the exploration of various "mothball," permanent shutdown, and other disposition alternatives, including demolition. Further, the potential refunds associated with the taxes on these assets are in excess of \$250 million, representing a significant asset and a potential source of recovery for both the New York Debtors and their parent organizations.

21. Given the importance of these issues and the impact on the development of a plan or plans of reorganization with respect to the New York Debtors' assets, the Debtors sought to have this Court resolve all the New York state tax issues in one consolidated form by: (a) filing a motion for relief pursuant to section 505 of the Bankruptcy Code (the "505 Motion"); and (b) removing the state court proceedings to federal district court and seeking to transfer those cases to the Bankruptcy Court.

22. The Debtors removed each of the 41 pending state tax cases to the United States District Court for the Southern District of New York in early October 2003, and shortly thereafter, filed motions to transfer those cases to the Northern District of Texas, where they could be heard in conjunction with the 505 Motion that involves virtually identical issues. In response, the municipalities filed motions to remand the state court cases. Following oral argument, the Honorable Adlai Hardin of the United States Bankruptcy Court for the Southern

District of New York denied the motions to transfer and granted the motions to remand. All 41 cases were subsequently remanded to state court.

23. Meanwhile, matters proceeded before this Court with respect to the 505 Motion. Several of the municipalities filed motions: (a) challenging the Bankruptcy Court's jurisdiction to hear and adjudicate any of the state tax claims raised in the 41 actions; and (b) seeking mandatory or permission abstention. Following a hearing on December 10, 2003, this Court entered an order (the "Section 505 Order") retaining jurisdiction on the tax matters, but indicating that the Court would abstain from hearing any tax dispute, provided that the trial of that particular tax proceeding began by August 1, 2004. In the event that trial did not so commence in State Court, the Bankruptcy Court's hearing of the 505 Motion would commence on September 20, 2004. The Towns of Haverstraw, Stony Point, and Ramapo filed motions for leave to appeal the Section 505 Order. These motions are currently pending before the District Court. The Towns of Haverstraw and Stony Point also filed motions for reconsideration of the Section 505 Order, which this Court denied on March 24, 2004.

24. Due to the Section 505 Order, litigation of the tax matters in the State of New York has begun to move forward. Some, but not all, of the state court cases have been scheduled for trial, the earliest to begin in July 2004.

#### **4. California RMR Contracts and Related Disputes.**

25. All of the Debtors' power generation facilities in California (the "California Facilities") are subject to reliability-must-run ("RMR") agreements entered into between various Debtors conducting business in the State of California (the "California Debtors") and the California Independent System Operator ("CAISO"). The RMR agreements require the California Debtors run their California generation assets at the request of CAISO in

order to support the reliability of the electric transmission system, primarily in the San Francisco Bay Area.

26. Under the RMR agreements, the California Debtors are able to operate the California Facilities under either “Condition One” or “Condition Two.” Under Condition One, the California Debtors are generally entitled to recover a fixed percentage of the California Facilities’ annual revenue requirements (the “FOP”) from CAISO, and, in addition, are permitted to sell the power generated by the California Facilities at market prices. Under Condition Two, the California Debtors are entitled to sell power to CAISO on a cost-of-service basis only. Under the cost-of-service approach, the California Debtors are entitled to recover all of their annual revenue requirements, plus a reasonable return on investment.

27. The RMR agreements, which were in existence at the time that the Debtors acquired the California Facilities, left open the question of what FOP should be recovered by an RMR owner operating under Condition One. The parties agreed to determine the proper FOP through subsequent negotiations or litigation at FERC. The CAISO agreed that, pending final resolution, the FOP would be fifty percent of annual revenue requirement, with the amount recovered being subject to refund if the FERC later found that a lower FOP was appropriate. The California Debtors could not reach agreement with the CAISO regarding the proper FOP to be paid under their RMR agreements and the matter ultimately was submitted to FERC for adjudication.

28. In June 2000, a FERC administrative law judge (the “ALJ”) issued an initial decision finding that the amount of FOP the California Debtors should be allowed to charge under the RMR agreements was approximately three and one-half percent of the annual revenue requirement for the California Facilities. The ALJ’s initial decision is advisory and,

because briefs on exception were filed, such initial decision has no legal effect until acted upon by FERC. FERC has yet to adopt this initial decision and can reject the conclusions of the ALJ in full or modify the ALJ's opinion in its order addressing the initial decision.

29. The California Debtors operated all of the California Facilities under Condition One from approximately 1999 through 2001. The California Debtors elected Condition Two for the Potrero Plant for 2002 and for all their California units except Pittsburg Unit 5 in 2003. Pursuant to the agreement described above, the California Debtors collected fifty percent of the annual revenue requirement for the California Facilities from the CAISO during that time period. Beginning in 2003, the California Debtors have generally operated the California Facilities under Condition Two, under which the FOP is not relevant. FERC's approval of the ALJ's initial decision, therefore, could result in a liability to the California Debtors comprised of the difference between the fifty percent FOP of the annual revenue requirements collected between 1999 and 2002, and the three and one-half percent FOP provided under the ALJ's initial decision. Such liability could exceed \$320 million and will have a significant affect on any plan of reorganization to be proposed by the California Debtors and by various other Debtors in connection with restructuring of their California operations.

30. In addition to the RMR dispute discussed above, the Debtors are embroiled in other disputes relating to California and its energy markets, including, without limitation, disputes concerning:

- (a) FERC proceedings concerning the amount that the Debtors are owed as a result of PG&E and Southern California Edison's failure to pay for power provided by the Debtors in 2000 and 2001 (which could exceed \$321 million, exclusive of setoffs); and
- (b) analysis of the various claims outstanding against Mirant Potrero LLC and Mirant Delta LLC and the manner in which such claims could be classified in a plan of reorganization.

**5. Resolution of Inter-company Transactions.**

31. As the Court and parties-in-interest are aware, since being spun-off from The Southern Company, Mirant and its direct and indirect subsidiaries have operated their business enterprises through an intricate matrix of inter-company agreements and relationships. For example, trading and marketing activities have largely been pursued through MAEM on behalf of various Mirant affiliates and most employees that perform services on behalf of assorted Mirant entities are actually employees of Mirant Services, LLC. Numerous inter-company transfers were made between the affiliated companies in order to compensate one another for services rendered, supplies procured, or power sold. Additionally, Mirant, MAG, and certain other subsidiaries of Mirant incurred indebtedness to finance the business activities of various members of the enterprise.

32. Both major creditor constituencies, the Mirant Corporation Committee and the MAG Committee, have already asserted the potential existence of billions of dollars of inter-company transactions. Each Debtors entity has its own creditors and parties-in-interest, none of who wish to see assets of their respective Debtor diverted to pay creditors of affiliates that are perceived by the creditors to be financially weaker. Any litigation that could flow from claims concerning inter-company transactions would have the impact of potentially stalling the plan process. As such, the Debtors require ample time to work with their professionals and creditor constituencies to consensually resolve the inter-company transaction issues before the Debtors can propose a plan.

33. As noted, the Debtors complied with the Milestone requiring the analysis and preparation of a report of inter-company transactions for the Committees. The primary objective of this report was to identify, summarize, and explain material inter-company relationships and movements of value among Mirant and its significant U.S. subsidiaries and

affiliates. Although the inter-company transactions report was prepared and presented to the Committees in a timely manner, all parties recognize that there is much additional work and analysis to be performed in connection with the Debtors' resolution of inter-company claims.

34. The Debtors and their advisors have spent months examining thousands of voluminous and complicated documents. The Debtors' review includes analysis of over 3,000 contracts and other documents, as well as board minutes and related materials. In connection with this process, the Debtors have gathered and examined voluminous financial and accounting data relating to inter-company transactions and have collected facts relating to the major events leading up to the Petition Dates.

35. Due to the complexity of the data, documents, and other information collected, the Debtors (together with their advisors) have spent considerable time organizing the matters discussed in the inter-company transactions report. In addition, the Debtors and their professionals have dedicated a significant amount of time and effort to meeting with the Committees' professionals and responding to their numerous inquiries and requests for additional information. As such, the confidential report that was presented to the Committees is preliminary. In addition, the Debtors' 2003 audit process remains open, and it is imperative that the audit process proceeds on schedule. The Debtors' audit process will include a review of their accounting and cash management systems. Notably, such a review could be relevant to an analysis of inter-company transactions, including those discussed in the report.

**6. Formulation and Finalization of the Business Plan.**

36. As discussed, the Debtors also timely presented the Committees with drafts of the qualitative and quantitative business plan in compliance with the First Exclusivity Order. The business plan is a document that is designed to foster a lively debate on the future capital structure of the reorganized Debtors. As the Committees will most certainly agree, this

debate has only just begun. The Debtors' business plan will form the basis for a plan or plans of reorganization in these cases. It is therefore necessary for the Debtors to continue and complete discussions with creditor and shareholder constituencies concerning the business plan before the Debtors can propose a confirmable plan of reorganization. It is, therefore, unrealistic to assume that the Debtors could complete this process and propose a plan or plans of reorganization by April 30, 2004.

**7. Analysis of MIRMA Leases.**

37. Among the significant issues facing the Debtors, generally, and MIRMA, in particular, are the "MIRMA Leases." The "MIRMA Leases" are, in fact, far more than simple agreements to pay rent for specified premises for a term of years. The term "MIRMA Leases" was coined to describe an extremely complex leveraged-lease transaction designed to exploit sophisticated accounting and tax-planning devices in connection with Mirant's intended acquisition of two electric power plants from Pepco, as documented in the APSA. The two power plants are the "Morgantown Plant" located in Charles County, Maryland and the "Dickerson Plant" located in Montgomery County, Maryland (collectively, the "Subject Plants").

38. At this time, the Debtors must still resolve numerous issues in connection with the MIRMA Leases, including:

- (a) what are the Debtors' requirements under the collection of documents referred to as the "MIRMA Leases;"
- (b) whether the MIRMA Leases are more properly characterized as financing arrangements as opposed to "true" leases, and if so, what the advantages and disadvantages to recharacterization are when the Owner Lessors have perfected liens on the "lease" assets (*i.e.*, the Facility, etc.);
- (c) what documents included among the "MIRMA Leases" comprise the "lease" for purposes of section 365 of the Bankruptcy Code;

- (d) whether and to what extent MIRMA is required to perform the affirmative and negative covenants contained in the MIRMA Leases (or any part of them) pending assumption, rejection or recharacterization;
- (e) whether MIRMA and the other Debtors can be bound post-assumption by all the terms and provisions of the approximately 300 documents comprising the MIRMA Leases, including prohibitions on any modification of \$220,000,000 in notes payable by two subsidiaries of Mirant to MIRMA;
- (f) if the MIRMA Leases were “true” leases and were rejected, what are the ramifications of such rejection, including the cap on leasehold damages and what payment obligations described in the MIRMA Leases as “Supplemental Rent” are properly included in the definition of “rent” for purposes of section 365;
- (g) what is the standing of the so-called “Pass Through Certificate Holders” or the Indenture/Pass Through Trustee to make various demands upon MIRMA pursuant to the Lease Documents;
- (h) what are the consequences of rejecting only a portion of the MIRMA Lease documents; and
- (i) what are the tax consequences of each of the foregoing alternatives.

39. The complexity of the MIRMA Leases and the importance of the

Morgantown and Dickerson Plants to the operation of the Debtors were recently the subject of a fairly intense dispute between the Debtors, on the one hand, and the Owner Lessors and the Indenture/Pass Through Trustee, on the other hand, at the continued hearing on the Debtors’ motion to extend the time to assume or reject the MIRMA Leases on March 24, 2004. The outcome of this hearing was that the Debtors are granted an extension of time to assume or reject the MIRMA Leases and are given until September 1, 2004 to commence an action to seek recharacterization of the MIRMA Leases (subject to the ability to request an extension for cause.)

**C. Status of Chapter 11 Cases.**

40. The Debtors' progress to date in these cases represents a significant set of accomplishments. During the early stages of these cases, as set forth in more detail in the First Exclusivity Motion, the Debtors focused on, among other things: (a) complying with the rigorous requirements of the Office of the United States Trustee, including but not limited to, the preparation of the Schedules of Assets and Liabilities and Statement of Financial Affairs and Monthly Operating Reports for each of the Debtors; (b) addressing the demands of the newly-formed Committees; (c) preserving the value of the Debtors' trading operations and trading book, including negotiating post-petition assurance agreements with trading counterparties and conducting due diligence and engaging in extensive negotiations with the Committees' advisors regarding the Debtors' risk management policy; (d) commencing proceedings in connection with the Pepco/FERC litigation, including proceedings involving the Debtors' efforts to reject the Back-to-Back Agreement; (e) negotiating, drafting, and obtaining Court approval of a \$500,000,000.00 debtor-in-possession credit facility; (f) developing a framework for analyzing and seeking assumption or rejection of unexpired leases and executory contracts; (g) addressing the cash management issues among all the Debtors and particularly those that arose with respect to the relationship between Mirant Canada and Mirant; (h) establishing the administrative solvency of the Debtors, in part to establish adequate assurance of future performance as required by section 366 of the Bankruptcy Code and avoid the need to pay numerous utilities security deposits; (i) researching, drafting, and litigating the "NOL Motion;" (j) responding to the efforts principally of the MAG Committee to commence litigation against various parties in the Bankruptcy Court; and (k) managing state court litigation, including the facilitation of the filing of suggestions in bankruptcy in the scores of state and federal court civil litigation suits pending nationwide.

41. Since filing the First Exclusivity Motion, although the resources of the Debtors and their professionals continued to be consumed with the administrative burdens imposed upon them as chapter 11 debtors and the demand of third parties in these chapter 11 cases, the Debtors' focus has shifted toward, among other things: (a) implementing a set of operational improvements that will ultimately reduce overhead and improve operations at the plant level, (b) developing and vetting with the Committees a long-term business plan that will form the basis for a plan (or plans) of reorganization; and (c) beginning an analysis of claims, including inter-company claims and proofs of claim filed against the Debtors' estates. Set forth below is a status report of some of the primary matters that have consumed the Debtors' resources since the First Exclusivity Motion.

**1. Operational and Corporate Initiatives.**

**a. Development of a Long-Term Business Plan.**

42. As noted, the development and presentation of the Debtors' long-term business plan has consumed a significant amount of the resources of the Debtors and their professionals.

**b. Analysis of Inter-company Transactions.**

43. In order to meet the First Exclusivity Order's milestone pertaining to the delivery of a report of inter-company transactions, the Debtors were required to appoint a dedicated team of professionals to conduct due diligence and review thousands of documents, forming the basis for the 400-page preliminary report of inter-company transactions produced to the Committees on or about March 1, 2004.

**c. Operational Improvements at the Plant Level.**

44. In October 2003, with the aid of McKinsey & Company ("McKinsey"), the Debtors launched an Operational Performance Initiative ("Project OPI") designed to further

improve operating efficiency and results at the plant level. Project OPI is a systematic, detailed effort to improve plant operations in order to achieve a step-change improvement in operational performance and cash flow in the near-term. Project OPI is expected to yield strong results and improvements from all areas of the organization, including: operations expense, capital requirements, and gross margin (*e.g.*, heat rate, delivered fuel costs). Project OPI will ultimately build long-term capabilities for success, transforming the Debtors into a consistent, effective operating culture and promoting the sharing of ideas and best practices across the entire generation assets.

45. Project OPI is being implemented in two “phases,” with Phase II having two “waves.” Project OPI includes analysis and implementation of improvements at six (6) of the Debtors’ generating plants. The Debtors have already completed Phase I and Wave I of Phase II of Project OPI. During the Wave I of Phase II, McKinsey generated over 2,000 improvement ideas. The Debtors will likely implement over 500 ideas at three (3) of the Debtors’ plants, resulting in an annual full run-rate EBIT improvement of between \$35 and \$50 million, excluding capital reduction. That savings nearly doubles McKinsey’s original estimate of \$20 to \$30 million. In addition, McKinsey and the Debtors conducted capital reviews across the portfolio designed to re-scope, eliminate, or delay projects that are not economically viable. This capital review process will result in an approximate \$416 million reduction (or 32%) of the capital budget from 2004 through 2008. Of this amount, \$160 million represented project eliminations or re-scoping.

**d. The Corporate Overhead Initiative.**

46. The Debtors have appointed a cross-functional team to assess and implement opportunities to streamline overhead through cost reductions and process improvement. In connection with this project, commonly referred to as the Corporate Overhead

Initiative (the “COI”), the Debtors, with the aid of Deloitte & Touche, have developed a methodology to more accurately allocate corporate overhead. This new allocation method will more accurately reflect the costs of individual business units whereby allowing the Debtors to more correctly assess profitability and to subsequently make proper strategic decisions. Although the COI is still in the preliminary stage, the Debtors’ business plan assumes that the COI will result in a reduction in total annual overhead costs by \$5 million in 2004 and \$25 million in 2005.

e. **Improvements in Financial Reporting and Compliance with Sarbanes-Oxley.**

47. With the aid of professionals, the Debtors’ management has been focused on implementing improvements in the Debtors’ financial reporting practices. In addition, a significant amount of the Debtors’ resources has been directed at Sarbanes-Oxley compliance issues.

2. **Bankruptcy Court Activity.**

48. As this Court is aware, the activity in the Bankruptcy Court during the period following the First Exclusivity Motion remained steady, and in fact most likely increased.

a. **Successful Efforts of the Contract Assessment Team.**

49. During the past several months, with the aid of their professionals, the Debtors have increased efforts to conduct and complete business judgment analyses in connection with their executory contracts and unexpired leases. To ensure consistency in this process, the Debtors have appointed a dedicated team of personnel and professionals, commonly referred to as the “contract assessment” or “CAT” team, who meet regularly to examine and make strategic decisions concerning the disposition of the Debtors’ over 13,000 executory contracts and unexpired leases. The CAT team operates on a priority basis and routinely

commences negotiations with counterparties to the more burdensome or necessary executory contracts concerning the future assumption or rejection of those contracts. These efforts have been a huge success and the Debtors have successfully negotiated meaningful compromises pursuant to which parties have agreed on an effective rejection date and a cap of rejection damages. For example, the Debtors successfully negotiated compromises concerning, among others, the following burdensome executory contracts: (a) Pepco Energy Services, Inc. (estimated savings of \$6.5 million on a present value basis); (b) Natural Gas Pipeline Company of America (estimated savings of \$17.3 million on a present value basis); and (c) Kern River Gas Transmission Company (estimated savings of \$17.9 million on a present value basis).

50. The Debtors believe that negotiating resolution of rejection damage claims under rejected executory contracts will result in a significant reduction of the time and expense associated with the reconciliation of these claims.

51. The CAT team's efforts have also resulted in the modification of necessary but burdensome contracts, including the following three sets of agreements:

(i) **Negotiations with GE Concerning Long-Term Service Agreements.**

52. The Debtors and their professionals worked for months to re-negotiate the Debtors' long-term service agreements (the "LTSAs") with General Electric International Inc. ("GE"). The LTSAs are critical to the operation of the Debtors' generating plants. The Debtors' analysis of the LTSAs revealed opportunities for cost reductions and significant changes. After conducting due diligence and exploring several different scenarios, the Debtors determined to commence negotiations with GE to modify the LTSAs on terms more consistent with the Debtors' overall strategic objectives.

53. The Debtors initiated discussions with GE in September 2003. After months of negotiation, the Debtors reached an agreement with GE regarding the consensual rejection of the LTSAs concurrently with the consummation of replacement LTSAs. The Debtors' motion for approval of this agreement is currently pending before the Court.

(ii) **Negotiations with Pepco Concerning the Disposition of the TPA Agreements.**

54. The CAT team also successfully negotiated a compromise with Pepco concerning the disposition of two transition power agreements (the "TPAs") with Pepco. The TPAs require MAEM to supply capacity and energy requirements to Pepco at fixed prices below market prices during the term of the TPAs. Notably, the TPAs were scheduled to expire in June 2004 and January 2005 for the Maryland and Washington, D.C. markets, respectively. The Debtors entered into negotiations with Pepco in the second half of 2003 and reached a settlement approved by this Court on November 19, 2003. The settlement increases the contracted power price paid to the Debtors by \$6.40/MWh and grants Pepco an unsecured claim of approximately \$105 million. The value to the Debtors as a result of the price increase is estimated at approximately \$120 million over the remaining 16-month period.

(iii) **Negotiation of the Amended Headquarters Lease.**

55. The Debtors lease 363,025 square feet of office space as their headquarters in Atlanta, Georgia. This space is comprised of a 12-story tower and a trading center. As of the Petition Dates, the average net rent of the lease was \$20.14 per square foot and the lease was set to expire in May 2015. Due to the significant reduction of their square footage requirements and the weak Atlanta office lease market, the Debtors commenced negotiations with the landlord to modify the lease. The result of those negotiations was a new lease on more favorable terms: (a) a reduction in the terms of the lease from approximately 136 months to 36 months, (b) a

reduction in the total square footage from 363,025 to 215,541, along with the options to give back to the landlord 25,221 square feet after the 12th and 24th months of the remaining lease term; and (c) a reduction in annual net rent payments from \$20.14 to \$10.00 per square foot. The modifications of the lease resulted in a decrease in total commitments on a net present value basis over the remaining term of the lease from \$90.2 million to \$12.2 million, an aggregate \$78 million savings. The amended lease became effective on February 1, 2004.

**b. Development of a Key Employee Retention Program.**

56. Concerned about their ability to maximize the value of their estates without the services of certain high-performing employees and to militate against the pressures driving key employee attrition in these chapter 11 cases, the Debtors expended a significant amount of resources developing and obtaining this Court's approval of a key employee retention program ("KERP"). The KERP consists of two phases. The first phase of the KERP ("Phase I"), which was approved by the Court on February 17, 2004 (the "KERP Phase I Order"), entails the implementation of a stay bonus designed to provide an incentive to certain key employees, exclusive of the Chief Executive Officer and the Management Council. Pursuant to the KERP Phase I Order, the Debtors are authorized to make the first stay bonus payment after June 30, 2004.<sup>3</sup>

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<sup>3</sup> The second phase of the KERP ("Phase II") will be the subject of a future motion, but entails the implementation of: (a) performance-based bonuses for the Chief Executive Officer and Management Council, each of which is not participating under Phase I, and certain other employees otherwise receiving reduced stay bonuses under Phase I; and (b) enhanced severance for all key employees participating under either Phase I or Phase II.

**c. Continued Prosecution and Defense of Adversary Proceedings.**

57. Since the Petition Dates, the defense and prosecution of the following nine (9) adversary proceedings, that have been commenced in these cases, have consumed a significant amount of the Debtors' resources:

<b>Adversary Proceeding Number</b>	<b>Plaintiff</b>	<b>Defendant</b>	<b>Status</b>
03-04342-dml	Mirant Corporation, et al.	Potomac Electric Power Company, et al.	Reference Withdrawn
03-04348-dml	El Paso Merchant Energy, L.P.	Mirant Americas Energy Marketing, LP	Settled
03-04349-dml	Mirant Corporation	California Independent System Operator Corp.	Pending
03-04350-dml	Oak Mountain Products, LLC	Mirant Mid-Atlantic, LLC	Settled
03-04355-dml	Mirant Corporation	Federal Energy Regulatory Commission	Reference Withdrawn
03-04359-dml	Mirant Americas Energy Marketing, LP	Metromedia Energy, Inc.	Pending Arbitration
03-04440-dml	Mirant Americas Energy Marketing, LP	City of Vernon	Pending
04-04040-dml	Mirant Americas Energy Marketing, LP, et al.	Kern Oil & Refining Co. et al.	Pending
04-04073-dml	Mirant Peaker, LLC, et al.	Southern Maryland Electric Cooperative, Inc., et al.	Pending

**d. Formulation and Implementation of the Claims Resolution Process.**

58. The Debtors have created a dedicated team, consisting of company personnel and professionals, devoted to the analysis of the approximate 7,850 proofs of claim

that have been filed against their estates. This team's focus has been to: (a) identify significant claims involving difficult substantive factual and/or legal issues; (b) prepare detailed analyses of the universe of claims against the estates; and (c) develop comprehensive procedures for filing omnibus objections to proofs of claim in these cases. The team holds regular meetings to determine the factual and legal issues that arise during the claims analysis and to develop strategic alternatives to efficiently and effectively liquidate such claims in a cost efficient manner.

59. To date, approximately 7,850 proofs of claim have been filed against the estates asserting approximately \$242 billion in claims against the Debtor entities.<sup>4</sup> Of that amount, approximately \$227 billion represents claims that are either redundant or duplicative of one another. The claims reconciliation team will focus on reconciling and pursuing objections to thousands of claims and working to reduce the total claims against the estates to the amount the Debtors believe constitute their total liabilities.

60. The Debtors will begin the claims resolution process by seeking Court approval of comprehensive procedures governing the claim objection process. Upon receipt of such Court approval, the claims resolution process will begin and continue through the plan process.

## V. **RELIEF REQUESTED.**

61. Pursuant to section 1121(d) of the Bankruptcy Code, the Debtors seek the entry of an order further extending the Exclusivity Periods under sections 1121(b) and (c) of the Bankruptcy Code to file and solicit chapter 11 plans to and including January 31, 2005 and April

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<sup>4</sup> Perryville's claim alone is well in excess of \$1 billion.

1, 2005, respectively, without prejudice to their right to seek additional and further extensions of these periods as may be appropriate under the circumstances then prevailing. The requested extensions are realistic and necessary given the multiple tasks to be completed and issues to be resolved before confirmable plans can be proposed and negotiated. Shorter exclusivity extensions would simply result in yet another meaningless request for extensions, thus, requiring the unnecessary expenditure of fees, expenses, and the limited resources of the Debtors' estates that could otherwise have been devoted to resolution of the gating items. This request for extensions of the Exclusivity Periods is without prejudice to the Debtors' request of any further extensions.

## **VI. ARGUMENT**

### **A. The Exclusivity Periods.**

62. Section 1121(b) of the Bankruptcy Code provides for an initial period of 120 days after the commencement of a chapter 11 case during which a debtor has the exclusive right to file a chapter 11 plan. Section 1121(c)(3) of the Bankruptcy Code provides that if the debtor proposes a plan within the 120-day exclusive period, it has a period of 180 days after the commencement of the chapter 11 case to obtain acceptances of such plan. As noted, this Court extended the Filing Period and the Solicitation Period in the First Exclusivity Order from November 11, 2003 and January 9, 2004, respectively, to April 30, 2004 and June 30, 2004, respectively.

63. Pursuant to section 1121(d) of the Bankruptcy Code, the Court may, upon a demonstration of cause, extend a debtor's Exclusivity Periods. As demonstrated below, cause exists for extending the Debtors' Exclusivity Periods.

**B. Exclusivity Periods May be Extended for Cause.**

64. The paramount objectives of a chapter 11 case are the rehabilitation of a debtor's business and the negotiation, development, proposal, confirmation and consummation of a chapter 11 plan. The Exclusivity Periods under section 1121 of the Bankruptcy Code were intended to afford a debtor a full and fair opportunity to achieve these objectives without the disruption of its business that might be caused by the filing of competing plans.

65. Section 1121(d) of the Bankruptcy Code permits the Court to extend a debtor's Exclusivity Periods upon a demonstration of cause:

(d) On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120 day period or the 180-day period referred to in this section.

11 U.S.C. § 1121(d).

66. "The hallmark of . . . section [1121(d)] is flexibility." *In re Perkins*, 71 B.R. 294, 297 (W.D. Tenn. 1987). Congress intended that the period during which only the debtor may file a chapter 11 plan be of adequate length for the debtor to formulate, negotiate and draft a consensual plan and solicit acceptances thereof. As is reflected in the legislative history of section 1121 of the Bankruptcy Code, section 1121(d) "allows the flexibility in individual cases" to extend the Exclusivity Periods "to allow the debtor to reach an agreement." H.R. Rep. No. 595, 95th Cong., 1st Sess. 232 (1977); see *In re Newark Airport/Hotel L.P.*, 156 B.R. 444, 451 (Bankr. D.N.J. 1993), *aff'd*, 155 B.R. 93 (D.N.J. 1993); *In re Public Serv. Co. of New Hampshire*, 88 B.R. 521, 534 (Bankr. D.N.H. 1988) ("the legislative intent . . . [is] to promote maximum flexibility").

67. In circumstances where the initial Exclusivity Periods prove inadequate for the debtor to negotiate and file a plan, the bankruptcy court has the discretion to, and in the

context of large chapter 11 cases, routinely does, extend the debtor's Exclusivity Periods for substantial periods of time. In determining whether cause exists to extend a debtor's exclusivity periods, courts generally consider whether:

- (a) the debtor's case is sizable and complex;
- (b) there is good faith progress towards rehabilitation and the development of a consensual plan of reorganization;
- (c) the debtor is seeking to use the exclusivity periods to pressure creditors into accepting a plan of reorganization; and
- (e) the debtor is generally making required postpetition payments as they come due and is effectively managing its business and preserving the value of its assets.

*See In re McLean Indus., Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987); *In re Express One Intern, Int'l, Inc.*, 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996); and *In re United Press Int'l, Inc.*, 60 B.R. 265, 269 (Bankr. D.D.C. 1986). Cause may also include instances where there is recalcitrance among the creditors and where there is a major obstacle in the path of a successful reorganization, such as an acrimonious relationship among the principal parties. *See Texas Extrusion Corp. v. Palmer, Palmer, & Coffee (In re Texas Extrusion Corp.)*, 68 B.R. 712, 725 (N.D. Tex. 1986), *aff'd* 844 F.2d 1142 (5th Cir. 1988).

68. The legislative history of section 1121 notes that "if an unusually large company were to seek reorganization under chapter 11, the court would probably need to extend the time in order to allow the debtor to reach an agreement." H.R. Rep. No. 595, 95th Cong., 2d Sess. 231-32 (1978) (footnotes omitted). The legislative history has been interpreted as a virtual mandate for extension in unusually large cases, and courts have routinely granted extensions in such cases. The facts and circumstances of these cases and the express terms of section 1121(d) amply support the extension of the Exclusivity Periods requested herein. *See Express One Int'l, Inc.*, 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996) (large size of debtor and concomitant difficulty

in formulating a plan of reorganization are traditional grounds for extension); *In re Pine Run Trust, Inc.*, 67 B.R. 432, 435 (Bankr. E.D. Pa. 1986) (“[t]he traditional ground for cause [is] the large size of the debtor and the concomitant difficulty in formulating a plan of reorganization...”).

69. Bankruptcy courts routinely allow debtors in large, complex cases multiple extensions of the Exclusivity Periods. *See In re Hoffinger Industries, Inc.*, 292 B.R. 639 (8th Cir. BAP 2003) (granting a third extension of the exclusive period for five months, resulting in a total extension of approximately 360 days); *In re Global Crossings*, 295 B.R. 726 (Bankr. S.D.N.Y. 2003) (granting a second extension of the exclusive period for a period of five months, resulting in a total extension of approximately 240 days). Moreover, the extension sought by the Debtors is reasonable when compared to the extensions granted by other courts in large reorganization cases. *See, e.g., In re UAL Corp.*, Case No. 02-B-48141 (Bankr. N.D. Ill. February 06, 2004); (second extension of exclusive periods for five months); *In re Kmart Corp.*, Case No. 02-2474 (Bankr. N.D. Ill. February 25, 2003) (second extension of exclusivity periods to more than 18 months after petition date); *In re WorldCom, Inc.*, Case No. 02-13533 (Bankr. S.D.N.Y. June 10, 2003) (second extension of exclusivity periods until 14 months after petition date); *In re Adelpia Business Solutions, Inc.*, Case No. 02-11389 (Bankr. S.D.N.Y. November 26, 2002) (second extension of exclusivity periods until 16 months after petition date); *In re Global Crossing*, Case No. 02-40188 (Bankr. S.D.N.Y. July 8, 2003) (fifth extension of exclusivity periods until 21 months after petition date); *In re Enron Corp.*, Case No. 01-16034 (Bankr. S.D.N.Y. September 26, 2002) (second extension of exclusivity periods for five months).

C. **Ample Cause Exists to Grant the Limited Extensions Requested by the Debtors.**

70. The Debtors believe that ample cause exists to support the requested extensions. These chapter 11 cases are undoubtedly large and complex. As this Court is aware, the Debtors are among the world's largest generators and marketers of electricity, employing thousands of employees worldwide and generating approximately \$6.4 billion in annual operating revenues. As noted, for the first several months of these chapter 11 cases, the Debtors expended significant time and energy towards stabilizing their operations that were negatively impacted by the financial crises in the U.S. power industry and ensuring a smooth transition into chapter 11. Once the Debtors completed their transition into chapter 11, they began focusing on addressing many of the hurdles that must be overcome before a plan or plans can be negotiated with the relevant constituencies.

1. **The Size and Complexity of the Cases.**

71. As was noted above, both Congress and the courts have recognized that the size and complexity of a debtor's case alone may constitute cause for the extension of a debtor's exclusive period to file a plan and the period to solicit acceptances of such a plan. Thus, in *In re Texaco, Inc.*, the court stated:

The large size of a debtor and the consequent difficulty in formulating a plan of reorganization for a huge debtor with a complex financial structure are important factors which generally constitute cause for extending the exclusivity periods.

76 B.R. 322, 326 (Bankr. S.D.N.Y. 1987).

72. The Debtors' cases are certainly large and complex by any standard. Many publications have represented that the Debtors' cases are among the ten largest in the history of the United States, and collectively they are larger than any case filed prior to 2001.

Thus, the size and complexity of these chapter 11 cases compel the requested extension of the Exclusivity Periods.

2. **Developing and Implementing Operational Improvements Within the Company, Complying with the Milestones and Continuing to Respond to Third Party Litigation Have Consumed the Debtors' Resources in These Chapter 11 Cases.**

73. Early in their chapter 11 cases, the Debtors and their professionals were consumed with stabilizing the businesses and responding to third party litigation and the demands of parties-in-interest in these cases. As noted, third party demands and litigation continue to consume the Debtors and their professionals. As summarized above, the Debtors, have, nevertheless, managed to make significant progress toward reorganizing their businesses from the ground up by instituting certain operational initiatives designed to reduce overhead and improve operations at the plant level. Since the First Exclusivity Motion, the Debtors and their professionals have been focused on:

- continuing compliance with the rigorous requirements of the Office of the United States Trustee;
- addressing the demands of the three separate official Committees;
- continuing to preserve the value of the Debtors' trading operations and trading book;
- attending to matters related to the Pepco/FERC litigation, including proceedings with respect to the Debtors' efforts to reject the Back-to-Back Agreement;
- litigating the tax proceedings pending in the State of New York and the attempted removal of those matters to the Bankruptcy Court and the related motions under Section 505 of the Bankruptcy Code;
- continuing to analyze unexpired leases and executory contracts, resulting in the assumption of some, the rejection of hundreds of contracts and leases (not including motions related to the Pepco contracts), and negotiated resolutions others, such as the corporate headquarters lease;
- launching a systematic, expansive effort across the organization to improve plant operations;

- appointing a cross-functional team to assess and implement opportunities to streamline overhead through cost reductions, and process improvement, leading to a more efficient company;
- beginning the analysis of over 7,850 proofs of claim asserting approximately \$242 billion of claims, in the aggregate, that were filed against the Debtors' estates (and commencing efforts to reduce that amount to approximately \$9 billion);
- conducting an extensive search for key members of management, including a Chief Financial Officer;
- litigating matters related to the MIRMA Leases and defending the myriad challenges brought by the owner Lessors and the Indenture/Pass Through Trustee;
- addressing the cash management issues among all the Debtors and particularly those that arose with respect to the relationship between Mirant Canada and Mirant;
- addressing the California ratepayer proceedings, including litigating issues of stay applicability, researching various issues arising in ongoing ratepayer litigation and responding to discovery requests regarding California Public Utility Commission matters;
- litigating and then arbitrating the claims of MAEM against Metromedia for more than \$30 million for gas delivered by MAEM to Metromedia in accordance with a Master Aggregator Sale/Purchase Agreement;
- addressing motions for relief from stay by, among others, CSX Transportation, the Trustee, Vernon J. Gregory, Southern California Edison, Nicholson & Hall, Northeast Maryland Waste Disposal, Predator Development Company, and Entergy;
- pursuing and preserving the claims of Mirant against third parties which are themselves in bankruptcy, including PG&E, Enron, NRG, Perryville and Mobile Energy Services Corporation;
- defending adversary proceedings commenced against the Debtors and prosecution of other adversary proceedings against third parties;
- managing litigation arising out of the intent to reject of three (3) of the hundreds of contracts or leases thus far rejected, including the Kern Oil, Perryville, and Brazos matters;
- negotiating with the IRS and The Southern Company in an attempt to obtain anticipated federal income tax refunds of at least \$32 million (plus related state income tax refunds) that relate to taxable periods during which Mirant was a

member of The Southern Company's consolidated group for tax purposes (*i.e.*, prior to the April 2, 2001 spinoff);

- moving to extend the deadline to assume or reject unexpired leases of nonresidential real property;
- continuing to pursue and monitor the interests of the Debtors in a proceeding before the California Public Utilities Commission ("CPUC") in which the CPUC proposes to implement and enforce certain standards for the operation and maintenance of electricity generating facilities in California; and
- coordinating the efforts of the Debtors' professionals retained in the chapter 11 case and in the ordinary course of their business.

**3. The Debtors Have Made Progress in Resolving the Gating Issues and Other Issues Facing Their Estates.**

74. Extensions of a debtor's exclusivity period to file a plan and the period to solicit acceptances for such plan are justified by progress in the resolution of issues facing the debtor's estate. *See, e.g., In re Service Merchandise, Inc.*, 256 B.R. 744, 753-54 (M.D. Tenn 2000); *In re Amko Plastics, Inc.*, 197 B.R. 74, 77 (Bankr. S.D. Ohio 1996); *In re McLean Indus. Inc.*, 87 B.R. 830, 835 (Bankr. S.D.N.Y. 1987); and *In re Texaco, Inc.*, 76 B.R. 322, 327 (Bankr. S.D.N.Y. 1987). The Debtors have made substantial progress in addressing the "gating issues" described above. As noted, however, much of the progress related to those gating items is dependant on the decisions of forums other than this Court. This progress could be negatively affected if the Debtors are not granted an extension of the Exclusivity Periods. *See In re Global Crossings*, 295 B.R. at 742 (noting that termination of exclusivity could result in harm to debtors by undermining public confidence and interfering with on-going litigation).

**4. The Debtors Are in the Process of Evaluating the Business Plan with the Committees.**

75. Given that the Debtors have only recently presented the Committees with the business plan and the various aspects of this business plan are still being negotiated among

the Debtors and the Committees, it would be unrealistic for the Debtors to file a plan or plans of reorganization, based on this business plan, by April 30, 2004.

76. The formulation of a business plan was especially difficult in the Debtors' cases because of the significant changes that have occurred in the energy sector. As set forth in more detail in the First Exclusivity Motion, the Debtors' prepetition business plans assumed free market competition as a result of the deregulation of the energy sector that occurred in the 1990s. However, the contemplated deregulation of the electric markets has never fully developed and the Debtors are forced to compete with regulated utilities that have consistent rate-payer revenue streams. Moreover, the Debtors anticipate additional regulation as a result of the California energy crises, the Enron debacle, and the power outage this year in the Northeastern United States. Thus, with the aid of their professionals, the Debtors have re-formulated their existing business plans. The implementation of the Debtors' new business plan cannot be truly tested (and thereby validated) until the summer season (third quarter) of 2004. Additional time is clearly necessary. *See In re Hoffinger Industries, Inc.*, 292 B.R. at 644 (evidence that debtor was in process of appraising assets demonstrated progress towards filing a plan of reorganization); *In re Public Service Co. of New Hampshire*, 88 B.R. at 541 (discussions with financial advisors regarding possible plans of reorganization demonstrated progress towards reorganization).

**5. The Debtors Must Still Engage in the Process of Claims Reconciliation.**

77. As noted, the Debtors are in the process of conducting a comprehensive review and reconciliation of proofs of claim with the goal of identifying particular categories of proofs of claim that may be targeted for disallowance and expungement, reduction and allowance, or reclassification and allowance. As all parties are aware, the claims resolution process in cases of this magnitude may take years.

**6. Extensions of Time Will Not Harm the Parties-In-Interest.**

78. The extensions of the Exclusivity Periods will afford the Debtors and all other parties-in-interest an opportunity to fully develop the grounds upon which serious negotiations toward a plan or plans of reorganization can be based. Affording the Debtors a full opportunity to undertake an extensive review and analysis of their businesses and properties, so as to develop a plan of reorganization that satisfies the requirements of chapter 11, will only help the creditors and other parties-in-interest. Terminating the Exclusivity Periods before this process is complete and the process of negotiation has been fully developed would defeat the purpose of section 1121 of the Bankruptcy Code—to afford the Debtors a meaningful and reasonable opportunity to negotiate with creditors and propose and confirm a consensual plan of reorganization.

79. Moreover, expiration of the Exclusivity Periods and the threat of multiple plans filed by other parties would likely lead to adversarial situations that would cause a deterioration in the Debtors' business operations, the value of their assets and their ability to negotiate a consensual restructuring. *See In re Global Crossings*, 295 B.R. at 747 (all creditors benefit by filing of a mutual plan).

80. The requested extensions of the Exclusivity Periods are reasonable under the circumstances. Shorter exclusivity extensions would simply result in yet another meaningless request for extensions, thus, requiring the unnecessary expenditure of fees, expenses, and the limited resources of the Debtors' estates that could otherwise have been devoted to resolution of the gating items.

7. **The Debtors Have Paid Postpetition Debts As They Have Become Due.**

81. Finally, a debtor's payment of postpetition obligations as they come due militates towards a finding that the debtor is not abusing its exclusivity period. *See, e.g., Trainer's*, 17 B.R. at 247; *McLean*, 87 B.R. at 834. Significantly, the Debtors' reorganization efforts have not come at the expense of their administrative creditors. The Debtors have met postpetition obligations as they come due. As a result, the extensions requested in this Motion will not result in accruing significant administrative liabilities.

82. Accordingly, the Debtors should be afforded a full and fair opportunity to negotiate, propose, and seek acceptance of a chapter 11 plan. The Debtors believe that the requested extension of the Exclusivity Periods is warranted and appropriate under the circumstances. The Debtors submit that the requested extension is realistic and necessary; will not prejudice the legitimate interest of creditors and other parties-in-interest; and will afford the Debtors a meaningful opportunity to pursue a feasible business plan and a consensual plan of reorganization, all as contemplated by chapter 11 of the Bankruptcy Code.

**VII. CONCLUSION**

**WHEREFORE**, the Debtors respectfully request that the Court grant this motion and issue and order: (a) extending the Exclusivity Periods within which the Debtors can file a plan or plans of reorganization and solicit the acceptance thereof through January 31, 2005 and April 1, 2005, respectively; and (b) granting other relief that is consistent with the foregoing.

Dated: April 5, 2004

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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 on April 5, 2004 and directed them to effect service upon all persons on the Limited Service List (and the addressees below) via U.S. mail.

/s/ Michelle C. Campbell