

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TERRANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

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

_____)	
In re)	Chapter 11 Case
MIRANT AMERICAS ENERGY)	
MARKETING, L.P., <u>et al.</u> ,)	Case No. 03-46591-DML
Debtors.)	Jointly Administered
_____)	Hearing Date and Time: July 14, 2003

**SUPPLEMENTAL ORDER IMPLEMENTING THE INTERIM ORDER
AUTHORIZING THE DEBTORS TO (i) COMPLY WITH TERMS OF PRE-PETITION
TRADING CONTRACTS, (ii) ENTER INTO POST-PETITION TRADING
CONTRACTS IN THE ORDINARY COURSE OF BUSINESS, (iii) PROVIDE CREDIT
SUPPORT RELATING TO BOTH PRE- AND POST-PETITION TRADING
CONTRACTS, AND (iv) SETTING A FINAL HEARING TO CONSIDER THE ENTRY
OF A FINAL ORDER AFFIRMING INTERIM ORDER AND AUTHORIZING
ASSUMPTION OF PRE-PETITION TRADING CONTRACTS**

On July 14, 2003, the Court entered an order (the "Interim Order") granting the above-captioned debtors and debtors in possession (the "Debtors") motion seeking (A) an Interim Order Authorizing the Debtors to (i) Comply with Terms of Pre-Petition Trading Contracts, (ii) Enter Into Post-Petition Trading Contracts in the Ordinary Course of Business, and (iii) Provide Credit Support Relating to Both Pre- and Post-Petition Trading Contracts, and (B) a Final Order Authorizing on a Final Basis the Relief Set Forth in the Interim Order and Authorizing Assumption of Pre-Petition Trading Contracts (the "Motion")¹; and in aid of the Interim Order (the terms and provisions of which are incorporated herein by reference) and in furtherance of the relief granted therein, the Court hereby

¹ Any capitalized term not otherwise defined in this Interim Order shall have the meaning ascribed to such term in the Motion.

ORDERED that the Debtors are authorized to enter into Postpetition Assurance Agreements substantially in the form attached hereto as Exhibit "A"; and it is further

ORDERED that the form of the Postpetition Assurance Agreement attached hereto, including without limitation, the termination, ^{(as construed by the court),} liquidation, and netting provisions contained therein, is approved, and it is further

ORDERED that any counterparty executing the attached form of Postpetition Assurance Agreement will be characterized as a Protected Counterparty within the meaning of the Interim Order, and entitled to all rights, benefits and protection afforded to a Protected Party; and it is further

ORDERED that to the extent that the terms of the attached Postpetition Assurance Agreement are more favorable than those provided to any other counterparty that previously executed a Postpetition Assurance Agreement, such counterparty may obtain any additional protections provided in the Postpetition Assurance Agreement attached hereto by giving notice to the Debtors.

DATED: July 15, 2003



HONORABLE D. MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

POSTPETITION ASSURANCE AND AMENDMENT AGREEMENT

This Postpetition Assurance and Amendment Agreement (this "Agreement") is entered into as of July __, 2003, by and between Mirant Americas Energy Marketing, LP ("Mirant") and _____ (the "Counterparty") (the Counterparty and Mirant, each a "Party" and collectively the "Parties").

RECITALS:

A. The Parties are engaged in substantial business transactions and trading relationships. Specifically, the Parties have entered into various industry standard trading contracts, including, but not limited to, ISDA, EEI, MEPSA, GISB, and/or NAESB master agreements and various other master agreements, Long-Form Confirmations (as defined and described below), netting agreements, master netting agreements, collateral agreements, and/or credit support agreements or annexes relating thereto (including all related schedules, exhibits, annexes, and confirmations), as may have been or may be amended, restated, supplemented, or otherwise modified from time to time, and have entered or may enter into various transactions pursuant to those agreements (collectively, the "Trading Contracts").

B. In addition, the Parties may enter into transactions evidenced by longform confirmations for the purchase, sale and/or exchange of physical commodities (including, without limitation, natural gas, crude oil, fuel oil, gasoline, petroleum-related products, electric power, electric capacity, and natural gas liquids, coal, and emissions), goods (as such term is defined in the Uniform Commercial Code), swaps, options, derivatives, or any other security, contract right, instrument or item (whether similar or dissimilar to the foregoing) that is currently bought, sold, and/or exchanged or capable of being bought, sold and/or exchanged in the future ("Longform Confirmations").

C. On July 14, 2003, Mirant, filed its voluntary petition for relief under chapter 11 (the "Court Supervised Restructuring") of title 11 of the United States Code (the "Bankruptcy Code").

D. Immediately after the filing of the Court Supervised Restructuring, Mirant filed a motion seeking to limit the risks and uncertainties that may arise with respect to the Trading Contracts under the Bankruptcy Code and create an environment conducive to continuation of the business and free of any need to terminate transactions upon the occurrence of a Court Supervised Restructuring. This motion, among other things, requested assumption of the Trading Contracts upon regular notice **and**, pending a hearing on the requested assumption, immediate entry and approval of an interim order (the “Interim Court Order”) providing that, at a minimum, the following relief with respect to the Counterparty if the Counterparty elects to accept the terms of the Interim Court Order and enter into this agreement:

(i) Mirant will make all payments required by the Trading Contracts, including without limitation payments due for prepetition deliveries, postpetition deliveries on prepetition contracts, monthly settlement payments, or contract damages for failure to perform under the Trading Contracts;

(ii) All postpetition performance will be paid at the prices specified in the Trading Contracts;

(iii) Mirant will continue to post collateral to the Counterparty (including an actual transfer of the collateral to the Counterparty’s account) in accordance with the Trading Contracts (as amended by this Agreement), which collateral shall not be subject to any prior liens, claims, or encumbrances;

(iv) Authority to recognize, enforce, and allow any offset, netting, or cross-netting provisions in any of the Trading Contracts;

(v) The Counterparty shall receive superpriority administrative claim status pursuant to § 364(c)(1) of the Bankruptcy Code for amounts owed by Mirant to the Counterparty on the account of postpetition trades under the Trading Contracts subject only to super-priority administrative claims granted in respect of any debtor in possession financing facility;

(vi) Notwithstanding section 362(a) of the Bankruptcy Code, Counterparty shall have the right to exercise any and all contractual remedies upon prospective defaults or terminations under the Trading Contracts;

(vii) In the event of a the rejection of any Trading Contract pursuant to section 365 of the Bankruptcy Code, providing that the determination of any settlement payments or terminations payments owing under such Trading Contract shall be made pursuant to the terms of the Trading Contract as of the date such contract is actually terminated;

(viii) In the event of a termination of any or all of the Trading Contracts, if provided under the Trading Contracts, the Counterparty shall have the immediate and unconditional right to cause the liquidation of such agreements and to exercise recoupment, setoff and collateral foreclosure rights (including setoff within and between Trading Contracts, if provided under the Trading Contracts) with damages to be measured in accordance with the Trading Contracts, and both these rights and the right to variation or maintenance margin payments received from Mirant with respect to open contracts shall not be stayed, avoided or otherwise limited by operation of any law or by court order;

(ix) Contain findings and protections consistent with section 364(e) of the Bankruptcy Code; and,

(x) The benefits and protections of the Interim Court Order shall also apply to all new transactions executed following entry of the Interim Court Order, regardless of whether the transaction matures after the expiration of the Interim Court Order.

F. After hearing the motion, the Bankruptcy Court granted the immediate relief requested and signed and entered the Interim Court Order. The Interim Court Order also provided that it shall remain in effect for a minimum of fifty-five (55) days or until entry of the Final Order (defined below).

AGREEMENT:

NOW THEREFORE, for and in consideration of the mutual agreements herein made and other good and valuable consideration, including certain amendments to the Trading Contracts, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Amendment of the Trading Contracts.** The Trading Contracts are hereby amended as provided in this Agreement and to give purpose and effect to the intent of the Parties and terms of this Agreement.

2. **The Final Order.** Within 55 days following the entry of the Interim Court Order, Mirant shall seek and obtain the entry of a final court order (the "Final Court Order") containing, in substance, the same relief provided in the Interim Court Order, but also approving assumption of the Trading Contracts as executory contracts under § 365(a) of the Bankruptcy Code.

3. **Deferral and Delay of Enforcement or Termination.**

(a) **Delay and Deferral Period.** For the period of time the Interim Court Order is in full force and effect (but not to exceed 55 days from the entry of the Interim Court Order), the "Delay and Deferral Period", the Counterparty expressly agrees to defer and delay (but does not waive) the utilization or enforcement of any contractual right to cause the liquidation of a commodity contract or forward contract as such terms are used in section 556 of the Bankruptcy Code or termination of a swap agreement as such terms are used in section 560 of the Bankruptcy Code, each because of a condition of the kind specified in section 365(e)(1) of the Bankruptcy Code (the "Delayed Remedies"). For the avoidance of doubt and without limitation, the Delayed Remedies shall apply to the following types of provisions: cross-default, cross-acceleration, adequate assurance, ratings triggers, bankruptcy default, and no contemplation of bankruptcy representations.

(b) **Automatic Termination.** The Trading Contracts shall terminate upon the expiration of the Delay and Deferral Period without further action **unless** the Final Court Order is signed and entered during Delay and Deferral Period.

(c) **Waiver upon entry of the Final Court Order.** If the Final Court Order is entered within the Delay and Deferral Period, the Counterparty expressly agrees to permanently waive, relinquish, and discharge any further utilization and enforcement of the Delayed Remedies during the Court Supervised Restructuring.

4. **Recognition of Safe Harbor Contracts.** Mirant expressly acknowledges that the Trading Contracts are, and continue to be and remain after this Agreement, contracts within the meaning of, and given the protections provided in, Sections 556 and/or 560 of the Bankruptcy Code (the "Safe Harbor Provisions"). Mirant expressly acknowledges and agrees that the Safe Harbor Provisions permit, with respect to a debtor under the protection of the Bankruptcy Code, counterparties (like Counterparty) to exercise rights and remedies that would otherwise be prohibited by the automatic stay imposed by section 362 of the Bankruptcy Code or invalidated *ipso facto* clauses pursuant to section 365 of the Bankruptcy Code.

5. **Termination Provisions.**

(a) **Termination Rights Upon Failure To Post, or Timely To Post, Variation Margin.** If Mirant fails to honor its margining requirements as provided in the Trading Contracts, the Counterparty may, at its option, and notwithstanding any notice

requirements in the Trading Contracts, and in addition to any other rights and remedies which it may have under the Trading Contracts, any other agreement, at law or in equity, elect to terminate and liquidate any and all Trading Contracts and any and all transactions provided under such Trading Contract. This option may be exercised immediately, without prior notice, but notice must promptly follow. This option will expire seven (7) days following the failure to honor the margining requirements; provided, however, the option will not expire as to any uncured and/or continuing failures to honor margining requirements.

(b) Termination Rights Upon Failure to Obtain the Final Court Order. If Mirant fails to obtain the Final Court Order as required above, the Counterparty may, at its option, and notwithstanding any notice requirements in the Trading Contracts, and in addition to any other rights and remedies which the Counterparty may have under the Trading Contracts, any other agreement, at law or in equity, elect to terminate and liquidate any and all Trading Contracts and any and all transactions under such Trading Contract as if an event of default had occurred thereunder. This option may be exercised immediately, without prior notice, but notice must promptly follow.

(c) Rejection. If Mirant moves to reject a Trading Contract or a Trading Contract is rejected under section 365(a) of the Bankruptcy Code, such event shall constitute an event of default under such Trading Contract, and Counterparty shall be entitled to exercise all remedies under those agreements without prior notice, including, but not limited to its right to terminate extant transactions and to cause the liquidation of such agreements and to exercise recoupment, setoff and collateral foreclosure rights (and, if provided by such Trading Contract), setoff within and between Trading Contracts with damages to be measured in accordance with such Trading Contract, and both these rights and the right to margin payments received from Mirant with respect to open contract shall not be stayed, avoided or otherwise limited by operation of any law or by court order.

(d) Modification of Existing Bankruptcy Proceeding Event of Default. To the extent any Trading Contracts contains a right of termination tied to bankruptcy, a bankruptcy proceeding, being bankrupt (including a general inability to pay debts as they become due), or the like, then with respect to Mirant only, the definition of that event shall be deleted in its entirety and replaced with the following: "At any point during the course of the Court Supervised Restructuring, one of the following events occurs (i) Mirant is declared administratively insolvent by the Bankruptcy Court, (ii) such proceeding is converted to a Chapter 7 proceeding, (iii) a Chapter 11 trustee is appointed, (iv) an examiner with expanded powers is appointed, (v) any debtor-in-possession financing facility under which Mirant is obligated to perform is accelerated by the lender or the lender's agent or otherwise matures and remains unpaid, (vi) has a receiver, custodian, trustee or liquidator appointed over all or a substantial portion of its assets or is subject to such an appointment or to any similar proceeding under the laws of any jurisdiction, or (vii) any order is entered in the Court Supervised Restructuring or elsewhere that affects, impairs or limits Counterparty's rights under this Agreement.

(e) Other Termination Rights Under Existing Trading Contracts. All other default, suspension and termination provisions in the Trading Contracts, including without limitation, those relating to breaches of representations, failures to pay or perform, or otherwise, shall remain in effect and upon any such event, Counterparty shall be entitled to exercise all remedies under those agreements without prior notice, including but not limited to its right to terminate extant transactions and to cause the liquidation of such agreements and to exercise recoupment, setoff and collateral foreclosure rights (including setoff within and between the Trading Contracts with damages to be measured in accordance with the Trading Contracts), and both these rights and the right to margin payments received from Mirant with respect to open contracts shall not be stayed, avoided or otherwise limited by operation of any law or by court order.

(f) Retention Of Rights And Remedies. All rights and remedies available to the Counterparty under the terms of the Trading Contracts, any other agreements, or at law or in equity, other than those necessarily modified by the provisions of Paragraph 5, are unaffected by this Agreement.

(g) Calculation of Damages Upon Termination. If Counterparty exercises any rights of termination or liquidation referred to in this Section 5, the determination of any settlement payments or termination payments under any Trading Contracts shall be made pursuant to the terms of such Trading Contracts and calculated as of the date or dates of such termination or liquidation.

(h) No Grace Period for Failure to Pay. Notwithstanding anything to the contrary in any Trading Contract, each Trading Contract shall be amended to provide that Mirant's failure to make any payment, including without limitation a margin payment, when due shall be an immediate event of default under such Trading Contract and no grace period shall apply.

(i) Further Termination Rights. Notwithstanding anything herein or in any Trading Contract to the contrary, Counterparty shall not be obligated to terminate and liquidate any Trading Contract or transaction thereunder to the extent that, in the good faith opinion of Counterparty, (i) such termination and liquidation is not permitted under applicable law or (ii) Counterparty cannot enter into or liquidate offsetting transactions in a commercially reasonable manner or at commercially reasonable prices. In addition, Counterparty may, at its election, take a reasonable amount of time to complete any aspect of the termination and liquidation.

6. Additional Waiver of the Automatic Stay. Although Mirant agrees that the Trading Contracts are, and continue to be after this Agreement, within the scope of Safe Harbor Provisions, as additional consideration to the Counterparty if Mirant or its Affiliates are the subject of a Court Supervised Restructuring, Mirant acknowledges and agrees that the Counterparty is entitled to the automatic and absolute lifting of any automatic stay as to the enforcement of its remedies under the Trading Contracts, including specifically, but not limited to, any stay imposed by Section 362 of the Bankruptcy Code. Mirant hereby consents to the

immediate lifting of any such automatic stay, and will not contest any motion by the Counterparty to lift such stay (if any such motion is required).

7. **Letter of Credit Draw.** Unless Mirant has provided substitute collateral, if any outstanding letter of credit held by Counterparty as collateral for Mirant's obligations will expire within 30 days, then Counterparty shall have the right to draw all or any part of the available balance of such letter of credit. Mirant's failure to renew the letter of credit shall not, in and of itself (and as distinct from a failure to post variation margin as required), result in an event of default under the Trading Contracts. Mirant authorizes the Counterparty to make whatever certifications to the issuer it deems necessary to effectuate a letter of credit draw in accordance with this Paragraph 7. Cash proceeds received by the Counterparty from drawing on a letter of credit under this provision shall be held as collateral just as though Mirant had originally posted cash to support its margin obligations.

8. **Authorization.** Each Party represents and warrants to the other that (a) it is duly authorized to execute and deliver this Agreement and to perform its obligations hereunder and has taken all necessary actions to authorize such execution, delivery, and performance, (b) the individual signing this Agreement on its behalf is duly authorized to do so on its behalf, (c) this Agreement constitutes its legal, valid, and binding obligation, enforceable against it in accordance with its terms, and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law).

9. **Governing Law.** This Agreement shall be governed by, and construed in accordance with the laws of the State of New York (without reference to its choice of law doctrine).

10. **Assignment.** Upon Counterparty's written consent, which consent shall not be unreasonably withheld or delayed, Mirant shall be entitled to assign all Trading Contracts and all transactions thereunder to an Affiliate (as that term is defined in section 101(2) of the Bankruptcy Code).

11. **Expiration.** Paragraphs 3, 4, and 5, of this Agreement shall terminate upon Mirant's substantial consummation of a confirmed plan of reorganization in the Court Supervised Restructuring.

12. **Inconsistency; Ratification.** Notwithstanding anything to the contrary in the Trading Contracts and any other agreement between any of the Parties hereto prior to the date hereof, to the extent, if any, that the provisions of this Agreement are inconsistent with any of the provisions of the Trading Contracts, and any such other agreement, the provisions of this Agreement shall control. Except to the extent provided in this Agreement, the Trading Contracts are in all respects ratified and confirmed, and the terms and conditions thereof, amended as herein set forth, shall remain in full force and effect.

13. **Fully Negotiated.** The parties hereby admit and agree that this Agreement was fully negotiated, with each party having the able assistance of separate counsel, and therefore

that any rule of contract interpretation or construction pursuant to which a contract, or any ambiguity therein, should be construed against the draftsman, will be deemed inapplicable.

14. **Valuation, Credit Support Arrangement and Accelerated Payment of Damages.** Any valuation, credit support arrangements and accelerated payment of damages provisions in the Trading Contracts may be amended in such manner as shall be mutually agreed by Mirant and Counterparty.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by facsimile or original signatures and in multiple counterparts, each of whom is deemed an original and effective as one document, all as of the date first written above.

MIRANT AMERICAS ENERGY MARKETING, LP

By: **MIRANT AMERICAS DEVELOPMENT, INC.**
Its general partner

BY: _____
PRINTED NAME: _____
TITLE: _____

BY: _____
PRINTED NAME: _____
TITLE: _____