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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**

In re)	Chapter 11 Case
MIRANT CORPORATION, <u>et al.</u> ,)	Case No. 03-46590 (DML)
)	Jointly Administered
Debtors.)	
)	Date and Time: July 7, 2004 at
)	10:30 a.m.

**DEBTORS' MOTION TO REJECT (1) THE MAPP CENTER AGREEMENT
WITH MAPPCOR, A MINNESOTA NONPROFIT CORPORATION
AND (2) THE RESTATED AGREEMENT WITH MAPP,
A MINNESOTA CORPORATION**

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

Mirant Corporation ("Mirant") and its affiliated debtors (collectively, the "Debtors"), as debtors and debtors-in-possession, file this Motion (the "Motion") pursuant to section 365(a) of title 11, United States Code (11 U.S.C. §§ 101 et seq., as amended) (the "Bankruptcy Code") for authority to reject (1) the Mapp Center Agreement (the "MAPPCOR Contract") between Mappcor, a Minnesota nonprofit corporation ("MAPPCOR") and Mirant Americas, Inc., as successor-in-interest to Southern Energy Trading and Marketing, Inc. ("MAI"),

which is described below in greater detail and attached hereto as Exhibit A¹ and (2) the Restated Agreement (the “MAPP Contract” together with the MAPPCOR Contract, the “Contracts”) between Mapp, a Minnesota nonprofit corporation (“MAPP”) and MAI.² In support thereof the Debtors represent as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

II. PROCEDURAL BACKGROUND

2. The Cases. On July 14, 2003 and various dates thereafter (collectively, the “Petition Date”), Mirant Corporation and 82 of its direct and indirect subsidiaries (collectively, the “Debtors”) 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 title 11 of the United States Code (the “Bankruptcy Code”).

3. The Cases are Jointly Administered. This Court has entered orders 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 (“UST”) in these administratively consolidated cases.

5. The Examiner. On April 7, 2004, this Court authorized the UST to

¹ Not all parties were served with the Exhibit. Any party may request a copy of the Exhibit by making a written request therefor to the Debtors’ counsel.

² A copy of the MAPP Contract is available via the Internet at <http://www.mapp.org/content/MAP.shtml>.

appoint an examiner in these cases to analyze certain potential causes of action and act as a referee with respect to certain disputes that arise among the Debtors, the Committees, or other parties in interest. The UST appointed William K. Snyder as the examiner in these cases.

III. FACTUAL BACKGROUND

6. MAPP is a voluntary association of companies that includes a power market or “pool.” MAPP is dedicated to maintain reliability of energy supply within the upper Midwest region of the United States. MAPPCOR is a separate organization which contracts with MAPP to operate the pool and furnishes facilities, equipment, personnel and services to assist member committees, councils, task forces, and providing educational programs, material and information to the public, governmental bodies, the National Electric Reliability Council, and others.

7. The Debtors had originally contract with MAPP to be included in the pool so as to be able to participate in the market in which MAPP operates. However, the Debtors do not currently operate generating assets located within MAPP’s area and do not foresee doing so.

IV. RELIEF REQUESTED

8. By this Motion, the Debtors hereby seek approval of the rejection of the Contracts under section 365 of the Bankruptcy Code. The Debtors specifically direct this Court’s attention to the fact that the MAPP Contract (and possibly the MAPPCOR Contract) is a contract over which FERC has certain jurisdictional authority. However, as discussed below, the Debtors submit that there is no jurisdictional impediment to this Court granting the Motion.

9. The Debtors submit that the rejection of the Contracts may, and should, be approved by this Court.

V. BASIS FOR RELIEF

10. Section 365(a) of the Bankruptcy Code provides that a debtor-in-possession, “subject to the court’s approval, may assume or reject an executory contract of the debtor.” 11 U.S.C. § 365(a). An executory contract is defined as one where material performance is due on both sides such that the failure of either party to complete performance would constitute a material breach of the contract excusing performance of the non-breaching party. *See In re Liljeberg Enterprises, Inc.*, 304 F.3d 410, 436 (5th Cir. 2002); *In re Murexco Petroleum, Inc.*, 15 F.3d 60, 62-63 (5th Cir. 1994).

11. The Contracts are both clearly executory contracts. The MAPP Contract requires: (a) MAPP to grant privileges to MAI and (b) MAI to pay for those privileges and services by paying an annual fee. Similarly, the MAPPCOR Contract obligates: (a) MAPPCOR to provide services to MAI and (b) MAI to pay for those privileges and services in the form of annual dues. Therefore, the Contracts are undoubtedly executory contracts that may be rejected under section 365 of the Bankruptcy Code. *See, e.g., In re El Paso Refinery, L.P.*, 220 B.R. 37, 39 n.1 (Bankr. W.D. Tex. 1998) (contract requiring debtor to provide jet fuel to government held to be executory); *In re Cajun Power Cooperative, Inc.*, 230 B.R. 693, 702 (Bankr. D. La. 1999) (supply contracts entered into by debtor electric cooperative held executory). Further, “[s]ection 365 allows a [debtor] to relieve the bankruptcy estate of burdensome agreements which have not been completely performed.” *Stewart Title Guaranty Co. v. Old Republic National Title Insurance Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (quoting *In re Murexco Petroleum, Inc.*, 15 F.3d 60, 62 (5th Cir. 1994)).

Rejection Of the Contracts Is Within the Debtors’ Business Judgment.

12. As noted previously, rejection of an executory contract requires court

approval. A debtor's decision to assume or reject will be approved, provided that it meets the "business judgment" test, pursuant to which rejection of an executory contract is appropriate if such rejection would benefit the estate. See *Richmond Leasing v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985); *In re G.I. Indus., Inc.*, 204 F.3d 1276, 1282 (9th Cir. 2000) ("[A] bankruptcy court applies the business judgment rule to evaluate a trustee's rejection decision..."); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 567 n. 16 (8th Cir. 1997) (debtor's request to assume or reject contract should be approved where not manifestly unreasonable or made in bad faith).

13. The "business judgment" test is satisfied where the assumption or rejection of an executory contract enhances the value of the estate. See *Richmond Leasing*, 762 F.2d at 1309. Upon a finding that a debtor has exercised sound business judgment in determining whether to assume or reject an executory contract, a court should approve the decision pursuant to section 365(a) of the Bankruptcy Code. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984). "The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Bildisco*, 465 U.S. at 528 (citing H.R.Rep. No. 95-595, p. 220 (1977)).

14. The Debtors have determined, in their reasonable business judgment, that the Contracts should be rejected as uneconomical and an impediment to their ongoing business operations. The rejection of the Contracts would enhance the value of the estates of the Debtors. The Debtors have no generating assets located within MAPP and have no intent to operate in the region governed by MAPP. Membership in the MAPP pool and services from MAPPCOR are unnecessary and will continue to be unnecessary. Absent a rejection of the Contracts, the Debtors would be obligated to continue paying an annual fee under both Contracts and receive no benefit in return. Thereby, depleting resources and adding nothing of value to the estates of

the Debtors. The Debtors have no need for the Contracts, individually or collectively, at any price.

15. By rejecting the Contracts now, the Debtors avoid future losses associated with the Contracts. Therefore, the Debtors have determined that it is in their best interest to reject the Contracts at this time.

VI. CONCLUSION

WHEREFORE, based upon the foregoing, the Debtors request that the Court grant the relief requested herein, and any other relief that is necessary and proper.

Dated: June 11, 2004

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Ian Peck
State Bar No. 24013306

-and-

By: /s/ Michelle C. Campbell

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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 and directed them to effect service upon all persons on the Limited Service List (without exhibit) via U.S. mail, and the addressees set forth below (with exhibit) via U.S. mail, on the 11th day of June, 2004.

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/s/ Michelle C. Campbell

EXHIBIT B

MAPP CENTER AGREEMENT

THIS AGREEMENT ("Agreement") is dated and executed on December 18, 1997, (the "Effective Date") between MAPPCOR, a Minnesota nonprofit corporation, and Southern Energy Trading and Marketing, Inc. ("Member"), a Corporation, under the laws of State of Delaware.
(type of entity)

WITNESSETH:

WHEREAS, Member is a party to the Restated Agreement and is a member of MAPP;

WHEREAS, MAPPCOR will provide services to Member as described in this Agreement; and

WHEREAS, the Restated Agreement requires each member of MAPP to enter into an agreement with MAPPCOR for the services to be provided by MAPPCOR under the Restated Agreement; and

WHEREAS, Member desires to receive the services to be provided by MAPPCOR;

NOW, THEREFORE, the parties hereto agree as follows:

ARTICLE ONE DEFINITIONS

Section 1.01. Definitions. Capitalized terms used in this Agreement, but not defined herein, shall have the meaning assigned to such terms in the Restated Agreement.

ARTICLE TWO MAPP CENTER

Section 2.01. MAPP Center. MAPPCOR shall maintain and operate the MAPP Center, which shall furnish the facilities, equipment, personnel and services appropriate to carrying out the Restated Agreement, including assisting the MAPP committees, councils, task forces, subcommittees, working groups, and other persons or entities to satisfy the obligations and responsibilities of the Members of MAPP under the Restated Agreement, and providing educational programs, material and information to the public, MAPP Members, government regulatory bodies, NERC and others.

ARTICLE THREE LIMITATION OF LIABILITY; RELEASE

Section 3.01. Limitation of Liability. Member shall retain sole responsibility for the operation of its system and the utilization of information provided by MAPPCOR. MAPPCOR makes no warranties, express or implied, or representations as to the accuracy of the information supplied by it, MAPPCOR shall not be liable to Member whether in contract, tort, warranty, or otherwise, for any claims by Member that result in any manner whatsoever from the operation of the MAPP Center, or the information provided, or the services rendered hereunder, except claims resulting from willful acts or omissions of MAPPCOR.

Section 3.02. Schedule F, Release. In consideration of the provision by MAPPCOR of the services specified in Schedule F of the Restated Agreement, Member as a Transmission Provider or a Transmission Customer, as the case may be, to the maximum extent permitted by law, releases and discharges, and shall indemnify and hold harmless, MAPPCOR from any and all liability for any and all damage or other claim Member may have, or that may be asserted on behalf or in the name of Member, to the extent any such claim arises out of or relates to the administration of this Schedule F, or otherwise relates to transmission service provided or sought under such Schedule, including but not limited to (i) unintentional, consequential, direct, compensatory, punitive, special, indirect, or incidental damages, (ii) damages arising from loss of or damage to property and loss of life or personal injury, or (iii) any claims arising from any loss of interchange or coordination sales or revenues, loss of profits, costs or substitute power or transmission service, costs or additional operating expenses, or suits by third parties; provided, however, that MAPPCOR shall not be released, discharged, indemnified or held harmless with respect to any liability for damages or other claims arising from any action by MAPPCOR that is unlawful, undertaken in bad faith, grossly negligent or the product of willful misconduct.

ARTICLE FOUR **FINANCIAL**

Section 4.01. Billing for Costs. MAPPCOR shall bill Member for dues, and costs as allocated and assigned by the Executive committee of MAPP in accordance with and at the times provided in the Restated Agreement.

Section 4.02. Payment. Member shall pay each bill submitted by MAPPCOR within the time provided in the Restated Agreement; or, if no time is so provided, within 30 days of the date of the bill.

Section 4.03. Accounting. MAPPCOR will maintain its books and records in accordance with generally accepted accounting practices and procedures. Member, at its sole expense, may audit the books and records of MAPPCOR relevant to the transactions contemplated by this Agreement, during normal business hours of MAPPCOR.

Section 4.04. Credit. For the purpose of determining the ability of Member to meet its obligations under this Agreement, MAPPCOR may from time to time require reasonable credit review procedures in accordance with standard commercial practices, including, without limitation, audited or unaudited financial statements. Member authorizes MAPPCOR to conduct such credit investigation of Member as MAPPCOR, in its sole discretion, deems necessary and appropriate.

ARTICLE FIVE **SUCCESSORS; ASSIGNS**

Section 5.01. Successors. This Agreement shall be binding upon the successors of Member, and upon the surviving entity in any merger, consolidation, or acquisition involving Member in which Member is not a surviving entity.

Section 5.02. Assignment. Except for the assignment or pledge of an interest in this Agreement to the United States acting through the Rural Utilities Service, Member shall not assign this Agreement without the consent, in writing, of the board of directors of MAPP COR, which consent shall only be withheld if the assignee is not a member of MAPP, or upon a determination that there is a substantial likelihood that the assignee will not fulfill the obligations of Member under this Agreement, or that the Executive Committee of MAPP has not consented to the assignment of Member's interest in the Restated Agreement.

ARTICLE SIX
TERM

Section 6.01. Term. The term of this Agreement shall commence on the Effective Date and shall continue until the termination of Member's membership in MAPP, subject, however, to Member continuing financial obligations upon suspension, withdrawal or termination, or the successor to Member that ceases to be a Member of MAPP as a result of a merger or consolidation pursuant to Section 5.3.2 of the Restated Agreement.

ARTICLE SEVEN
MEMBER'S REPRESENTATIONS

Section 7.01. Representations. Member represents and warrants that the following are true in all respects:

- (a) Member is an entity described in the preamble of this Agreement, duly organized, validly existing, and in good standing under the laws specified in the preamble.
- (b) The execution, delivery and performance of this Agreement by Member has been duly authorized by all necessary governance action and is enforceable in accordance with its terms.
- (c) Such execution, delivery and performance does not, and the transactions contemplated will not (i) result in a material breach or constitute a material default under any agreement or instrument to which Member is a party or by which it is bound, or (ii) require the consent or approval of any other person or governmental agency or authority.

ARTICLE EIGHT
NEGOTIATION; ARBITRATION

Section 8.01. Negotiation. The parties shall attempt in good faith to resolve any controversy or claim arising out of or relating to this Agreement promptly by negotiation between representatives appointed by the parties who have authority to settle the controversy. The disputing party shall give the other party written notice of the dispute. Within 20 days after receipt of said notice, the receiving party shall submit to the other a written response. The notice and response shall include (a) a statement of each party's position and a summary of the evidence and arguments supporting its position, and (b) the name and title of the person who will represent that party.

The representatives shall meet at a mutually acceptable time and place within 30 days of the date of the disputing party's notice and thereafter as often as they reasonably deem necessary to exchange relevant information and to attempt to resolve the dispute.

Section 8.02. Arbitration. If the dispute has not been resolved within 60 days of the disputing party's notice, or if the party receiving the notice will not meet within 30 days, any remaining unresolved controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association by three arbitrators, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction. The place of arbitration shall be Hennepin County, Minnesota. The arbitrators are not empowered to award damages in excess of actual damages, including punitive damages, nor are the arbitrators empowered to modify or alter any express condition or provision of this Agreement or to render an award that by its terms has the effect of altering or modifying any express condition or provision of this Agreement. The provisions of this Section 8.02 are not applicable to a party that does not have legal authority to engage in binding arbitration.

ARTICLE NINE **GENERAL PROVISIONS**

Section 9.01. Choice of Law. Subject to the provisions of Sections 13.15 (compliance with Applicable Laws) and 13.16 (Effect of Canadian Laws) and to the extent permitted by law, the laws of the State of Minnesota, with the exception of its laws governing choice of law, or United States federal law or Canadian Laws as applicable, shall control the obligations established by this Agreement and the performance and enforcement thereof.

Section 9.02. Incorporation by Reference. The provisions of Sections 13.15 (Compliance with Applicable Laws) and 13.16 (Effect of Canadian Laws) are incorporated herein by reference and made a part hereof.

Section 9.03. Waiver. The waiver of any of the rights or remedies arising pursuant to this Agreement on any one occasion by any party shall not constitute a waiver of any rights or remedies in respect to any subsequent breach or default of the terms of this Agreement.

Section 9.04. Entire Agreement. This Agreement supersedes any prior agreements and contains the entire agreement of the parties and all representations with respect to the subject matter hereof. Any prior correspondence, memoranda or agreements are replaced in total by this Agreement, including any agreement entitled "Coordination Center Agreement".

Section 9.05. Amendments. Any amendments to this Agreement shall be in writing and signed by all parties hereto.

Section 9.06. Counterparts. This Agreement may be executed in counterparts, any one of which shall be deemed to be an original, but such counterparts when taken together shall constitute but one agreement.

Section 9.07. Captions. Captions are for convenience only and shall not be deemed part of the contents of this Agreement.

Section 9.08. Parties in Interest. This Agreement shall be binding upon and enure solely to the benefit of the parties hereto and their permitted assigns, and nothing in this Agreement, expressed or implied, is intended to confer upon any other person any rights or remedies of any nature under or by reason of this Agreement.

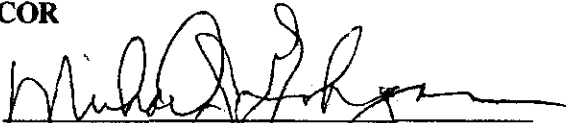
Section 9.09. Currency. All payments to be made pursuant to this Agreement shall be in lawful money of the United States.

Section 9.10. Uncontrollable Forces. A party shall not be considered to be in default in respect of any obligation hereunder if prevented from fulfilling such obligation by reason of Uncontrollable Forces, except that the obligation to pay money in a timely manner is absolute and shall not be subject to this section. A party unable to fulfill any obligation by reason of Uncontrollable Forces will exercise due diligence to remove such debility with reasonable dispatch, but such obligation shall not require the settlement of a labor dispute except in the sole discretion of the party experiencing such labor dispute.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their authorized representatives.


MAPPCOR

By:


Name: Michael J. Gahagan
Title: Interim General Manager

SOUTHERN ENERGY TRADING AND MARKETING, INC.

By:


Name: Gary Morsches
Title: Vice President