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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: September 24, 2003
		10:30 a.m.

**DEBTORS' MOTION FOR AN ORDER PURSUANT TO 11 U.S.C. § 365(A) AND
F.R.B.P. 6006 AND 9014 AUTHORIZING THE DEBTORS TO REJECT THE
(1) POWER PURCHASE AND EXCHANGE, FACILITIES OPERATION AND
MAINTENANCE, AND FUEL SUPPLY AGREEMENT DATED OCTOBER
8, 1998 AND (2) THE SETTLEMENT AGREEMENT DATED JUNE 28, 2003
WITH BRAZOS ELECTRIC POWER COOPERATIVE, INC.**

**A HEARING WILL BE CONDUCTED ON THIS MATTER ON
SEPTEMBER 24, 2003 AT 10:30 A.M. IN COURTROOM NO. 128,
UNITED STATES BANKRUPTCY COURT, 501 WEST 10TH STREET,
FORT WORTH, TEXAS. IF YOU OBJECT TO THE RELIEF
REQUESTED, YOU MUST RESPOND IN WRITING, SPECIFICALLY
ANSWERING EACH PARAGRAPH OF THIS PLEADING. UNLESS
OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR
RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT
WITHIN TWENTY DAYS FROM THE DATE YOU WERE SERVED
WITH THIS PLEADING. YOU MUST SERVE A COPY OF YOUR
RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE;
OTHERWISE, THE COURT MAY TREAT THE PLEADING AS
UNOPPOSED AND GRANT THE RELIEF REQUESTED.**

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

Mirant Corporation (“Mirant”) and its affiliated debtors (collectively, the “Debtors”) hereby move for the entry of an order pursuant to section 365 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended (the “Bankruptcy Code”) and Rules 6006 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) authorizing the Debtors to reject (1) the “Power Purchase and Exchange, Facilities Operation and Maintenance, and Fuel Supply Agreement” dated as of October 8, 1998 (the “Supply Agreement”) and (2) the “Settlement Agreement” dated as of June 28, 2003 (the “Amendment,” together with the Supply Agreement, are hereinafter referred to collectively as the “Contracts”), both of which Contracts are between Brazos Electric Power Cooperative, Inc. (“Brazos Electric”) and Debtor Mirant Americas Energy Marketing, LP (“MAEM”). Notwithstanding the rejection of the Contracts, the Debtors are willing to continue to provide electrical energy to Brazos Electric (at its option) in excess of the energy available to Brazos Electric from the Brazos Electric generating facilities and Brazos Electric’s long-term contracts, through December 31, 2003, at market-based rates.

In support of their Motion, the Debtors respectfully represent as follows:

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.

PROCEDURAL BACKGROUND

2. The Cases. Commencing on July 14, 2003, and concluding in the early morning hours of July 15, 2003, (the "Petition Date"), certain of the Debtors filed voluntary petitions in this Court for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C.

§§ 101-1330, as amended.¹ On August 18, 2003, Mirant EcoElectrica Investments I, Ltd. and Puerto Rico Power Investments, Ltd. commenced chapter 11 cases under the Bankruptcy Code (collectively, the “New Debtors”). 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. On July 15, 2003, this Court granted the Debtors’ motion for an order requesting that the Debtors’ bankruptcy estates be jointly administered. A motion for joint administration of the cases of the New Debtors with the Debtors’ cases was filed with this Court on August 20, 2003 and is currently pending.

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

THE DEBTORS’ BUSINESS OPERATIONS

5. Mirant and its direct and indirect subsidiaries comprise one of the world’s largest generators and marketers of electricity. Through its direct and indirect subsidiaries, Mirant produces, sells and delivers reliable energy products and services to utilities, municipal systems, aggregators, electric-cooperative utilities, producers, generators, marketers and large industrial customers in North America, the Philippines and the Caribbean. Mirant’s core business centers on the production and sale of electricity and electrical capacity (essentially the

¹ Concurrently, Mirant caused two of its Canadian subsidiaries, Mirant Canada Energy Marketing, Ltd. and Mirant Canada Energy Marketing Investments, Inc. (collectively, the "Canadian Debtors") to commence plenary insolvency proceedings (the "Canadian Proceedings") in the Court of Queen's Bench of Alberta Judicial District of Calgary (the "Canadian Court") pursuant to the Companies' Creditors Arrangement Act (the "CCAA"). The Canadian Debtors are subject to the sole and exclusive jurisdiction of the Canadian Court.

ability to produce electricity on demand). Mirant currently owns or controls more than 21,800 megawatts of electric generating capacity around the world, of which more than 18,000 megawatts is located in the United States. In 2002, Mirant produced 73 million megawatt-hours of electricity, sold 312 million megawatt-hours of electricity and sold or marketed an aggregate average of 21 billion cubic feet per day of natural gas.

6. Mirant employs in excess of 7,000 employees worldwide. Approximately 1,100 employees are based at Mirant's corporate headquarters in Atlanta, and approximately 5,900 employees are based at operating facilities. In 2002, Mirant recorded a \$542 million loss in earnings before interest, taxes and depreciation ("EBITDA") on a consolidated basis. Its 2002 operating revenues were approximately \$6.4 billion.

FACTS RELEVANT TO THE MOTION

The Supply Agreement.

7. Brazos Electric is an electric generation and transmission cooperative that supplies the wholesale electric requirements of its wholesale customers. Brazos Electric and MAEM are parties to the Supply Agreement pursuant to which MAEM is entitled to dispatch and receive the output of Brazos Electric's generating facilities and MAEM provides Brazos Electric with the capacity and electric energy needed to meet the requirements of Brazos Electric's load, subject to certain exclusions set forth in the Supply Agreement.

The Amendment.

8. On June 28, 2002, Brazos Electric and MAEM entered into the Amendment whereby the parties clarified responsibility for certain costs under the Supply Agreement in light of changes that had occurred in the structure of the wholesale electricity market in Texas since 1998 and MAEM agreed to commit the output of certain resources to satisfy its obligations to Brazos Electric in return for increased payments. The Supply Agreement also originally set forth the obligations of MAEM with respect to the operation and

maintenance of the “Owned Resources”² (the “O&M Obligations”). Under the Settlement Agreement, MAEM’s O&M Obligations were terminated and MAEM is no longer required to perform those O&M Obligations or otherwise manage Brazos Electric’s generating resources.³ MAEM is still obligated to supply the energy (and fuel) to Brazos Electric required under the Contracts.⁴

RELIEF REQUESTED⁵

9. The Debtors hereby move for entry of an order pursuant to section 365(a) of the Bankruptcy Code and Bankruptcy Rules 6006 and 9014 authorizing the Debtors to reject the Contracts. The Debtors have determined, after due inquiry, that the Contracts are burdensome to their estates and constitute an impediment to their ongoing business operations. The resources necessary for the Debtors to service the Contracts could be put to more efficient use and generate greater income for the Debtors’ estates.

² “Owned Resources” is defined as the Miller Plant and the North Texas Plant. Both plants are owned by Brazos Electric and are electric generating stations with combined summer-rated electric generation capacity of 686.5 MW.

³ Although styled as a “Settlement Agreement,” the Amendment is in essence an amendment to the Supply Agreement and forms a part of the Supply Agreement. For example, the Supply Agreement states at the sixth Recital: “WHEREAS, the Parties desire . . . (iii) to amend the [Supply] Agreement to better align their interests and to identify clearly the responsibilities of each Party with respect to charges for transmission congestion and other charges that are significantly different from the circumstances that existed when the [Supply] Agreement was executed, . . .”

⁴ The Contracts are voluminous and, therefore, not attached. Parties in interest may request a copy of such documents by making a request for same of Debtors’ counsel.

⁵ The Debtors specifically note that they are not moving pursuant to, and this Motion is not being filed in accordance with, the “Amended Order Regarding Motion of Debtors for an Order Pursuant to Sections 365 and 544 of the Bankruptcy Code Authorizing and Approving a Procedure for the Rejection of Certain Executory Contracts” entered by the Bankruptcy Court on August 14, 2003 (the “Rejection Procedures Order”). The Rejection Procedures Order contains expedited procedures for the rejection of certain contracts and leases. Unlike rejection of contracts and leases pursuant to the Rejection Procedures Order, the rejection of the Contracts described herein will only be effective upon entry of an order by the Bankruptcy Court specifically approving the relief requested in this Motion.

10. The Debtors have determined that rejection of the Contracts is necessary because they are likely to suffer market losses of at least \$3,300,000 (and perhaps as much as \$7,000,000) for the months of September 1 through December 31, 2003 in connection with the Contracts. The Debtors suffered market losses of approximately \$7,000,000 for the months of July 14 through August 31, 2003 which losses are attributable to the Contracts.

11. MAEM posted \$15 million cash as collateral with the Electric Reliability Council of Texas in connection with its activities related to the Contracts, which will be returned to MAEM upon rejection.

12. The Contracts are not essential service contracts of the Debtors.

13. Notwithstanding the rejection of the Contracts, the Debtors are willing to continue providing to Brazos Electric (at its option) the energy it requires in excess of the energy available from Brazos Electric's generating plants and Brazos Electric's existing long-term power purchases from other parties through December 31, 2003, at market based rates. Therefore, there is no threat to Brazos Electric, or its customers, that its access to electricity will be suddenly interrupted.

14. As a result, the Debtors believe that it is well within their business judgment to reject the Contracts.

BASIS FOR RELIEF

The Contracts Are Executory Contracts that Should Be Rejected.

15. 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. *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).

16. The Contracts are executory contracts because they require the MAEM to provide electricity to the customers of Brazos Electric on an ongoing basis, and Brazos Electric is required to pay for such electricity supply. Moreover, MAEM's failure to continue to provide such electricity (or Brazos Electric's failure to pay for such electricity) would constitute a material breach of the Contracts, excusing the performance of the other party. Therefore, the Contracts are undoubtedly executory contracts that may be rejected under Bankruptcy Code section 365. *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).

Rejection Of The Contracts Is Within the Debtors' Business Judgment.

17. 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. *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). The "business judgment" test is satisfied where the assumption or rejection of an executory contract enhances the value of the estate. *Richmond Leasing*, 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).

18. “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)).

19. In this case, the rejection of the Contracts is well within the sound business judgment of the Debtors. The Contracts will cause the Debtors to suffer market losses of at least \$3,300,000 through December 31, 2003 (the termination date of the Contracts). By rejecting the Contracts now, the Debtors avoid such postpetition losses. The Contracts are not essential to the Debtors’ operations and the Debtors will receive \$15,000,000 of cash collateral upon rejection that can immediately be used for the benefit of the Debtors’ estates. Finally, the Debtors recognize the importance of continued electricity generation to Brazos Electric and its customers. To minimize the impact caused by rejection, the Debtors are willing to continue providing electricity to Brazos Electric (at its option) at market rate prices. The foregoing is reasonable and justified under the circumstances. The Motion should be granted.

NOTICE

20. Bankruptcy Rules 6006 and 9014 generally require that any request to reject an executory contract must be made only by motion and upon notice to the other party to the contract, other parties in interest, and the United States Trustee. As indicated on the attached Certificate of Service, the Debtors have complied with such rules. No previous motion for the requested relief has been made to this or any other court.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has authorized BSI as service agent to cause to serve a true and correct copy of the foregoing document upon all parties listed below via email, facsimile and/or overnight courier (as designated below) and upon all persons on the Limited Service List via United States first class mail, postage prepaid, on the 2nd day of September, 2003 in accordance with the Federal Rules of Bankruptcy Procedure:

Via Facsimile, e-mail, and overnight courier

Office of the United States Trustee
1100 Commerce Street
Room 9C60
Dallas, Texas 75242
Fax: 214.767.8971
george.f.mcelreath@usdoj.gov

Via Facsimile and overnight courier

Brazos Electric Power Cooperative, Inc.
P.O. Box 2585
Waco, TX 76702-2585
Attn: Executive Vice President
Facsimile: (254) 750-6393

Via overnight courier

Brazos Electric Power Cooperative, Inc.
2404 LaSalle Avenue
Waco, TX 76702-2585
Attn: Accounting and Legal Department

Via Facsimile, e-mail, and overnight courier

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/s/ Ian T. Peck