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ATTORNEYS FOR THE DEBTORS AND DEBTORS-IN-POSSESSION

**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) 11
	)	Jointly Administered
Debtors.	)	
		Hearing Date: <b>July 30, 2003</b>
		Hearing Time: <b>1:30 p.m.</b>

**RESPONSE OF DEBTORS TO OBJECTIONS TO DEBTORS' MOTION  
FOR AN ORDER APPROVING A PROCEDURE FOR THE REJECTION  
OF CERTAIN EXECUTORY CONTRACTS**

Mirant Corporation and its affiliated debtors (collectively, the "Debtors"), as debtors in possession, hereby file this response to certain written objections filed with respect to the Debtors' Motion Pursuant to Sections 365 and 554 of the Bankruptcy Code Authorizing and Approving a Procedure for the Rejection of Executory Contracts, dated July 14, 2003 ("the "Motion"), and hereby represent as follows:

## PREMININARY STATEMENT

1. On July 15, 2003, this Court orally granted the Motion, but withheld entry of a final order pending the resolution of certain objections discussed herein. The Motion itself seeks the implementation of certain facially non-controversial procedures for the Debtors' rejection of executory contracts and unexpired leases in light of the number of such agreements involved in these cases and the low threshold for such relief under applicable authorities.

2. As of July 25, 2003, the Debtors have received four written objections to the motion. These objections generally seek to extend (i) the list of persons who will receive notice of a particular rejection and (ii) the period during which objecting parties may lodge objections to a rejection of any of their contracts with the Debtors, should such a rejection ever be sought. Certain points are non-controversial and may be incorporated into a revised final form of order proposed herewith. However, certain other objections – particularly those asserting that this Court does not have exclusive jurisdiction over all executory contracts of these Debtors' estates – are exceedingly controversial. Given the significance of these assertions, which if adopted would severely curtail this Court's subject matter jurisdiction, over core matters, the Debtors' view is that issue should not be joined until rejection is sought. To the extent that any objecting party seeks additional time to set forth its contentions in respect of any particular contract, those views - - and the Debtors' categorical rejection thereof - - are better addressed if and when the Debtors seek to reject any of the relevant agreements.

## **BACKGROUND**

3. Commencing on July 14 and continuing through the early morning hours of July 15, 2003 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). On the Petition Date, the Debtors filed the Motion.

4. The Motion requests that the Court authorize a procedure for the Debtors to reject executory contracts and unexpired leases. Among other things, the proposed procedure would have permitted the Debtors, in the exercise of their business judgment, to reject unnecessary or burdensome executory contracts or unexpired leases on five (5) business days' written notice to the counterparty under the respective executory contract or unexpired lease. Notice was to be given to the counterparty at the last known address available to the Debtors and to counsel to any statutory committee of unsecured creditors. If no timely objection was received, the contract was deemed rejected as of the date of the notice; if a timely objection was received, the Debtors were required to set the matter for hearing.

5. As of July 25, 2003, the Debtors received the following written objections (the "Objections") to the Motion and the procedures set forth therein: (i) the Objection of Potomac Electric Power Company ("Pepco"), dated July 16, 2003; (ii) the Objection of Kern Oil & Refining Co., dated July 23, 2003; (iii) the Objection of Washington Gas Energy Services, Inc., dated July 23, 2003; and (iv) the Objection of Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company and Nstar Gas Company (collectively, "Nstar"), dated July 25, 2003 (the parties filing such Objections are referred to collectively

herein as the “Objecting Parties”). Pepco has since withdrawn its Objection upon the Debtors’ commitment to carve out Pepco from the effects of any final Order on the Motion.

6. Based upon the Objections, there does not seem to be any dispute that the Objecting Parties’ agreements are “executory contracts” within the meaning of Section 365 of the Code.

7. To date, the Debtors have not yet made a decision as to whether they will seek to reject any of the Objecting Parties’ agreements.

### **ARGUMENT**

#### **A. The Rejection Procedures are Generally Reasonable.**

8. Each Objecting Party, in its own fashion has sought to challenge the five-day time limit for responding to a rejection notice as being too short to allow them to make a rational response to the Court or to seek alternate contractual arrangements.

9. In assessing the merits of such objections, the Court should keep in mind the breadth of a debtor’s discretion in seeking to reject an executory contract or unexpired lease. Simply put, in order to relieve the bankruptcy estate of burdensome executory contracts, a debtor’s decision to reject an executory contract is within the debtor’s business judgment, and the debtor need only show that rejection will benefit its estate for rejection to be proper. See Stewart Title Guaranty Co. v. Old Republic Nat’l Title Ins. Co., 83 F.3d 735, 741 (5<sup>th</sup> Cir. 1996) (“This provision allows a [debtor] to relieve the bankruptcy estate of burdensome agreements which have not been completely preformed”); Sharon Steel Corp. v. National Fuel Gas Distrib. Corp., 872 F.2d 36, 39-40 (3<sup>rd</sup> Cir. 1989); In re Stable Mews Assoc., 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984). In fact, “[a] debtor’s decision to reject an executory contract must be

summarily affirmed unless it is the product of ‘bad faith, or whim or caprice.’” In re T.W.A. Airlines, Inc., 261 B.R. 103, 121 (Bankr. D. Del. 2001) partially quoting, Wheeling-Pittsburgh Steel Corp. v. W. Penn Power Co., 72 B.R. 845, 849-50 (Bankr. W.D. Pa. 1987).

10. As a result of the liberal standard set forth above, the grounds for objecting to a debtor’s decision to reject an executory contract are limited at best. In fact, “whether the debtor is making the best or even a good business decision is not a material issue of fact under the business judgment test.” Wheeling-Pittsburgh Steel Corp., 72 B.R. at 849. Nor is the effect of rejection upon the counterparty generally relevant to the propriety of rejection. See T.W.A., 261 B.R. at 123 (considering potential burden imposed by rejection irrelevant and unnecessary); Wheeling-Pittsburgh Steel Corp., 72 B.R. at 849 (harm to non-debtor party not relevant in determining propriety of decision to reject). In light of the Debtors’ extremely broad discretion with respect to rejection, a five-business day objection period is well within reason.

11. In any event, the period for a counterparty to lodge an objection as provided for in the proposed order merely set a deadline for objecting to a particular rejection. Under the proposed arrangement, if an objection was timely received, the Debtors were required to set the matter for hearing, at which time an objecting party could fully present its objections to the Court.

12. In any event, with respect to the temporal objections raised by the Objecting Parties, the Debtors do not object to entry of a final order (i) extending the final order’s notice period to ten (10) business days; (ii) providing for the service of any rejection notice on the counterparty as well as counsel for any counterparty which has appeared in these cases and has specifically requested notice of any rejection notice; and (iii) providing for any rejection to be

effective at the latter of (a) the expiry of the notice period if no objection is filed, (b) the entry of an order ultimately approving rejection if an objection to rejection is filed, and (c) such other date upon which the debtor and the objecting party may agree. (An alternate proposed form of order is appended hereto as Exhibit A.) The Debtors believe that these modifications fairly address the bulk of the Objections.

**B. The Rejection Procedures are Fair with Respect to Any Wholesale Power Agreements.**

13. Leaving aside any procedural objections, Nstar, like Pepco before it withdrew its Objection, has attempted to interject a decidedly substantive issue into the fray, arguing that the proposed rejection procedures facially interfere with the regulation of wholesale electricity contracts by the Federal Energy Regulatory Commission (“FERC”). Ostensibly, Nstar contends that this Court may not approve a rejection of its agreements unless and until FERC has had an opportunity to assess the business case for rejection and has specifically ceded jurisdiction to this Court. As an initial matter, we again note that whether or not a particular motion will require additional time to reach what an objecting party sees as a “final” resolution is irrelevant to the establishment of rejection procedures. If a rejection notice has been filed, and if an adjournment is needed and supportable, an adjournment will be granted. For the record, however, the Debtors strenuously object to the contention that some other adjudicative body has jurisdiction to grant or withhold approval of a debtor’s decision to reject a particular burdensome contract under section 365 of the Bankruptcy Code. What Nstar seems to be attempting through its objection is to condition the Court, before the Debtors ever seek rejection, on the issue of an alleged intersection of this Court’s exclusive jurisdiction over the rejection of executory contracts and

FERC's jurisdiction over wholesale energy markets. We trust that the Court will see through these tactics and will await the Debtors' decidedly contrary views on the issue.

**CONCLUSION**

WHEREFORE, the Debtors respectfully request that this Court enter the relief requested in the Motion as well as such further relief as is just and proper.

Dated: Fort Worth, Texas  
July 28, 2003

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By: /s/ Robin E. Phelan  
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-and-

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ATTORNEYS FOR THE DEBTORS AND  
DEBTORS IN POSSESSION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has authorized BSI as service agent to cause to serve a true and correct copy of the foregoing upon all parties on the Limited Service List and those parties identified below via facsimile and/or electronic mail or by overnight mail where facsimile and electronic mail are not available, on the 28th day of July, 2003 in accordance with the Federal Rules of Bankruptcy Procedure.

/s/ Robin E. Phelan

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**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-11
Debtors.	)	)	Jointly Administered

**ORDER REGARDING MOTION OF DEBTORS FOR AN ORDER PURSUANT TO  
SECTIONS 365 AND 554 OF THE BANKRUPTCY CODE AUTHORIZING AND  
APPROVING A PROCEDURE FOR THE REJECTION OF CERTAIN  
EXECUTORY CONTRACTS**

Upon the Motion of Debtors for an Order Pursuant to Sections 365 and 554 of the Bankruptcy Code Authorizing and Approving a Procedure for the Rejection of Certain Executory Contracts (the “Motion”) filed by the above-captioned debtors and debtors-in-possession (collectively, the “Debtors”) in these Chapter 11 cases; and it appearing that this Court has jurisdiction over this matter; and it appearing that due and proper notice has been given; and upon due deliberation and sufficient cause appearing therefor, it is hereby

**ORDERED** that the Motion is granted; and it is further

**ORDERED** that the Rejection Procedures referenced on Exhibit “A” attached hereto are hereby approved; and it is further

**ORDERED** that this Court shall, and hereby does, retain jurisdiction with respect to all matters arising or related to the implementation of this Order; and it is further

**ORDERED** that the last date to file timely proofs of claim against the Debtors arising from the rejection of any Contracts and Leases (the “Rejection Claims Deadline”) will be and hereby is the later of: (i) the deadline for filing proofs of claims established by this Court; and (ii) thirty (30) days after the expiration of the ten-day notice period described in the

Rejection Procedures unless otherwise agreed, in writing, by the Debtors and the counterparty to a particular Contract or Lease; and it is further

**ORDERED** that any holder of a claim allegedly arising from the rejections authorized in accordance with the Rejection Procedures who fails to timely file a proof of such claim on or prior to the expiration of the Rejection Claims Deadline be: (i) forever barred from asserting such claim against any of the Debtors or their estates; (ii) forever barred from sharing in any distribution of the Debtors' estates or assets under any plan of reorganization confirmed in these chapter 11 cases or order of the Court authorizing distributions from the Debtors' estates; and (iii) bound by the terms of any plan of reorganization confirmed in these chapter 11 cases and/or any order of the Court authorizing distributions from the Debtors' estates; and it is further

**ORDERED** that the procedures established by this Order shall not apply to any executory contract or unexpired lease between any of the Debtors and Potomac Electric Power Company.

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HONORABLE D. MICHAEL LYNN  
UNITED STATES BANKRUPTCY JUDGE

Exhibit "A"

**Rejection Procedures**

- a. Unless a timely objection is filed, any Contract or Lease determined by the Debtors, in the exercise of their business judgment, to be unnecessary and/or burdensome to the Debtors' ongoing business operations shall be deemed rejected ten (10) days from service of a motion to reject such Contract or Lease (the "Rejection Motion"), via facsimile or overnight mail, to: (i) the counterparty under the respective Contract or Lease at the last known address available to the Debtors; and (ii) counsel for any statutory committees appointed in these cases (each, a "Committee").
- b. The Rejection Motion shall be substantially in the form of the Rejection Motion attached hereto as Exhibit A-1 and shall include a copy of the Order approving this Motion.
- c. If an objection to a Rejection Motion is filed by a counterparty to a Contract or Lease, or by any Committee, and timely served upon, and actually received by, counsel to the Debtors prior to the expiration of the ten (10) day notice period, the Debtors will seek a hearing to consider the objection at the Court's earliest convenience.
- d. If no objections by either a counterparty to a Contract or Lease, or by any Committee, are timely received, then the applicable Contract or Lease shall be deemed rejected as of the expiration of the ten-day notice period described above (the "Effective Date") unless otherwise agreed, in writing, by the Debtors and the counterparty to a particular Contract or Lease.
- e. If an objection to a Rejection Motion is timely received, and the Court ultimately upholds the Debtors' determination to reject the applicable Contract or Lease, then the applicable Contract or Lease shall be deemed rejected as of the date of the Order unless otherwise agreed, in writing, by the Debtors and the counterparty to the applicable Contract or Lease.
- f. Claims arising out of the rejection of Contracts and Leases must be filed with the Bankruptcy Court or any Court approved claims processing agent by the later of (i) the deadline for filing proofs of claim established by this Court or (ii) thirty (30) days after the Effective Date or the date of the Order of the Court upholding the Debtors' determination to reject the applicable Contract or Lease, unless otherwise agreed, in writing, by the Debtors and the counterparty to a particular Contract or Lease.

**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-11
	)				Jointly Administered
Debtors.	)				
	)				

**MOTION OF DEBTORS TO REJECT EXECUTORY CONTRACTS OR  
UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY  
OF [NAME OF COUNTERPARTY]**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Mirant Corporation ("Mirant") and its affiliated debtors (collectively, the "Debtors"), as 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.) (the "Bankruptcy Code") for authority to reject certain executory contracts (each, a "Contract") or unexpired leases of real property (each, a "Lease"), and in support thereof 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. On July 14 and 15, 2003, Mirant Corporation and seventy-four of its affiliates filed voluntary petitions in this court for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors continue to manage and operate

their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. Joint Administration Request is Pending. The Debtors have moved the court to jointly administer the bankruptcy estates of the Debtors.

4. The Creditors' Committee. No creditors' committee has yet been appointed in these cases by the United States Trustee. Further, no trustee or examiner has been requested or appointed in any of the Debtors' chapter 11 cases.

### **RELIEF REQUESTED**

5. By this Motion, the Debtors respectfully request pursuant to 11 U.S.C. § 365(a) authority to reject certain Contracts and/or Leases listed below, effective not later than 10 (ten) days from the date upon service of this Motion.

### **BASIS FOR RELIEF**

6. On \_\_\_\_\_, 2003, the Court entered an order (the "Order") approving procedures (the "Rejection Procedures") for the rejection of Contracts and Leases from time to time in furtherance of the reorganization efforts of the Debtors.

7. In summary, the procedures Order allows the Debtors, in the exercise of their business judgment, to reject any Contract or Lease determined to be unnecessary and/or burdensome to the Debtors' ongoing business operations following ten (10) days service via facsimile or overnight mail, to: (i) the counterparty under the respective Contract or Lease at the last known address available to the Debtors; and (ii) counsel for any statutory committees appointed in these cases. A copy of the Order is attached hereto as Exhibit "A".

8. Pursuant to the terms of the Order and N.D. TX L.B.R. 9014.1, unless a written objection hereto is filed and served in accordance with the terms of the Order, the

following Leases and/or Contracts will be deemed rejected pursuant to 11 U.S.C. section 365(a) effective upon the expiration of the ten-day notice period described above (the “Effective Date”):

**Title of Lease/Contract:  
Effective Date of Rejection:  
Parties to the Lease/Contract  
and Contact Information:**

9. If an objection to this Motion is timely filed and served upon: White & Case, LLP, Wachovia Financial Center, 200 South Biscayne Blvd., Miami, Florida 33131, Attention: Thomas E Lauria, Esq. and Haynes and Boone, LLP, 901 Main Street, Suite 3100, Dallas, Texas 75202, Attention: Judith Elkin, Esq., counsel for the Debtors, not later than ten (10) days from the date of service of this Motion, the Debtors shall seek a hearing on the objection at the Court’s earliest convenience. If such an objection to a Rejection Motion is timely received, and the Court ultimately upholds the Debtors’ determination to reject the applicable Contract or Lease, then the applicable Contract or Lease shall be deemed rejected as of the date of such determination by the Court unless otherwise agreed, in writing, by the Debtors and the counterparty to the applicable Contract or Lease.

10. Pursuant to the Order, claims arising out of the rejection of Contracts and Leases must be filed with the Court, or any Court approved claims processing agent, by the later of: (i) the deadline for filing proofs of claims established by this Court or (ii) thirty (30) days after the Effective Date, or the date of the Order of the Court upholding the Debtors’ determination to reject the applicable Contract or Lease, unless otherwise agreed, in writing, by the Debtors and the counterparty to a particular Contract or Lease (the “Rejection Claims Deadline”).

11. Pursuant to the Order, any holder of a claim allegedly arising from the rejection of a Contract or Lease who fails to timely file a proof of such claim on or before the

expiration of the Rejection Claims Deadline shall be (a) forever barred from asserting such claim against any of the Debtors; (b) forever barred from sharing in any distribution of the Debtors' estates or assets under any confirmed plan of reorganization or order of the Court authorizing distributions from the Debtors' estates; and (c) bound by the terms of any plan of reorganization confirmed in these chapter 11 cases and any order of the Court authorizing distributions from the Debtors' estates.

**CONCLUSION**

WHEREFORE, the Debtors respectfully request the relief requested herein and such other and further relief as this Court deems just and proper.

Dated: Fort Worth, Texas  
\_\_\_\_\_, 2003

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By \_\_\_\_\_

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