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PROPOSED 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, <i>et al.</i> ,	)	Case No. 03-46590(DML)11
Debtors.	)	Jointly Administered
	)	Hearing Date and Time: To Be Set

**DEBTORS' MOTION FOR AN ORDER ESTABLISHING AND  
AUTHORIZING PROCEDURES FOR RELEASE OR OTHER  
DISPOSITION OF FIRM CAPACITY UNDER NATURAL GAS  
TRANSPORTATION AND STORAGE AGREEMENTS**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Mirant Corporation ("Mirant") and its affiliated debtors (collectively, the "Debtors"), as debtors-in-possession, respectfully submit this motion (the "Motion") for an order establishing procedures for the release or other disposition of firm capacity under natural gas transportation and storage agreements and, in support thereof state 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, 2003 (the "Petition Date"), each of the Debtors filed a voluntary petition in this court for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended (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. Concurrently with the filing of the Motion, 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. The Debtors are parties to firm transportation and storage agreements with numerous entities that own or operate interstate natural gas pipelines. Pursuant to such agreements, the Debtors reserved capacity on the pipelines to transport natural gas to the Debtors' power generation facilities and customers or reserved capacity in storage facilities. While some reserved capacity is necessary for the continued operation of the Debtors' power generation facilities, a substantial portion of the Debtors' reserved capacity has been utilized historically by the Debtors' gas marketing and proprietary trading businesses. Due to the commencement of these cases, the Debtors anticipate that initially their volume of gas marketing and proprietary trading activity may be reduced substantially from historic levels. By this Motion, to maximize the value of the capacity and minimize any potential claims against the estates, the Debtors seek to be authorized, but not directed, to release unused transportation and

storage capacity in the ordinary course of business and in accordance with the regulations of the Federal Energy Regulatory Commission (“FERC”), and that such permanent releases will effectuate a termination of the contract. Upon such permanent release, the Debtors will have no further liability associated with the contracts.

**The Firm Natural Gas Transportation and Storage Agreements**

6. Pursuant to the governing FERC regulations, interstate pipeline owners or operators that offer transportation services on a firm basis must provide a capacity release mechanism, so that shippers, such as the Debtors, can voluntarily reallocate all or part of their firm transportation rights to another entity that desires to acquire that capacity. If capacity is released on a permanent basis in accordance with the FERC regulations, the shipper has no further liability for costs associated with the released capacity. A permanent release is one for the remaining term of the agreement and is to an assignee whose credit is acceptable to the owner or operator of the pipeline. Capacity release is governed by the FERC regulation set forth at 18 C.F.R. § 284.8, a copy of which is attached to this Motion as Exhibit A.

7. The governing FERC regulation provides two methods for capacity release. First, a shipper electing to release capacity could post its offer of capacity for bid (which includes the volumes of capacity available, the location of the capacity, and a period for which the capacity is available, as well any other conditions) on the website of the pipeline owner or operator so that all interested parties may bid on the offered capacity. Once the bid is posted, the bid period begins and, at the end of the period, the highest bidder is awarded the capacity. Alternatively, the shipper could post on the website of the pipeline owner or operator a prearranged agreement for the release of capacity to a party acceptable to the pipeline. If the prearranged release is not at the maximum rate for the pipeline, another party could submit a

higher bid for the capacity. In most cases where capacity is released, the owner or operator of the pipeline then bills the releasing shipper for its firm capacity, simultaneously credits the releasing shipper for the amount bid by the replacement shipper, and bills the replacement shipper for the amount of its bid. Similar procedures govern the release of storage capacity.

### **BASIS FOR RELIEF**

#### **A. Need to Utilize FERC Capacity Release Procedures**

8. Utilization of the FERC procedures to release pipeline capacity would be of substantial benefit to the Debtors' estates and would not prejudice any party. First, the procedures would permit the Debtors to expeditiously release unused capacity, thereby relieving the bankruptcy estates of further financial liability on account of that capacity. The procedures would further relieve the Debtors of the financial and administrative burden of rejecting the transportation or storage agreements each time the Debtors decide that it would be in the estates' interest to release capacity.

#### **B. Release of Capacity Pursuant to FERC Procedures Is An Ordinary Course Transaction**

9. Section 363 of the Bankruptcy Code provides, in relevant part, that a debtor in possession "may enter into transactions . . . in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing." 11 U.S.C. § 363(c)(1).

10. "Section 363 is designed to serve the 'overriding goal of maximizing the value of the estate' by striking the optimal balance between the interests of the debtor and the creditors." Habinger, Inc. v. Metropolitan Cosmetic and Reconstructive Surgical Clinic, P.A., 124 B.R. 784, 786 (Bankr. D. Minn. 1990) (quoting United States ex rel. Harrison v. Estate of Deutscher, 115 B.R. 592 (Bankr. M.D. Tenn., 1990)). Moreover, "[t]he 'ordinary course of

business' standard is intended to allow a debtor 'the flexibility it needs to run its business and respond quickly to changes in the business climate.'" Harbinger, 124 B.R. at 786.

11. The FERC capacity release procedures are available to all shippers for use in the ordinary course of business to ensure efficiency in the energy markets. Accordingly, the Debtors believe they can continue using such procedures in the ordinary course of business notwithstanding the commencement of these cases. See Medical Malpractice Ins. Assoc. v. Hirsch (In re Lavigne), 114 F.3d 379, 384 (2d Cir. 1997) (finding that "ordinary course of business" is meant "to embrace the reasonable expectations of interested parties of the nature of transactions that the debtor would likely enter in the course of its normal, daily business") (quoting In re Watford, 159 B.R. 597, 599 (M.D. Ga. 1993)); In re Roth American, Inc., 975 F.2d 949, 952 (3rd Cir. 1992) (stating that section 363 of the Bankruptcy Code is designed to allow a debtor in possession "flexibility to engage in ordinary transactions without unnecessary ... oversight"); In re Coordinated Apparel, Inc., 179 B.R. 40, 43 (Bankr. S.D.N.Y. 1995). The Debtors, have, however, filed this Motion in the abundance of caution to confirm both their continuing authority to effect releases and as that a release in accordance with the FERC capacity release procedures eliminates all obligations of the Debtors for charges attributable to periods after the release.

12. To the extent this Court finds that releasing capacity pursuant to the FERC procedures is not within the Debtors' ordinary course of business, the Court should nevertheless authorize the Debtors to release capacity in accordance with the FERC capacity release procedures pursuant to sections 105(a) and 363(b) of the Bankruptcy Code. Section 105(a) provides that the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." See 11 U.S.C. § 105(a).

13. The Fifth Circuit has acknowledged that section 105 confers broad powers on bankruptcy courts:

[Section] 105 [is] ‘an omnibus provision phrased in such general terms as to be the basis for a broad exercise of power in the administration of a bankruptcy case. The basic purpose of § 105 is to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction. . . .’

Davis v. Davis (In re Davis), 170 F.3d 475, 492 (5th Cir. 1999) (citation omitted).

14. Section 363(b)(1) of the Bankruptcy Code provides:

The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

11 U.S.C. § 363(b)(1). See Cajun Electric Power Cooperative, Inc. v. Official Comm. Of Unsecured Creditors (In re Cajun Electric Power Cooperative, Inc.), 119 F.3d 349, 354 (5th Cir. 1997); Institutional Creditors of Continental Airlines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.), 780 F.2d 1223, 1226 (5th Cir. 1986). The FERC release procedures represent an efficient mechanism for the reallocation of firm capacity when a shipper, such as the Debtors, determines in its business judgment that such capacity is not currently needed. Accordingly, authorizing the Debtors to release capacity pursuant to FERC mandated procedures is clearly an appropriate use of this Court’s powers under sections 105(a) and 363(b). Such procedures will enhance the efficient administration of the Debtors’ cases and permit the Debtors to relieve expeditiously the estates of the liability associated with unused capacity.

#### **NOTICE**

15. Notice of this Motion has been provided to the Office of the United States Trustee for the Northern District of Texas; the holders of the fifty largest unsecured claims against the Debtors on a consolidated basis; and certain governmental entities, counsel and

parties-in-interest; all as set forth in more detail on the Certificate of Service attached hereto.

The Debtors submit that no other or further notice need be provided.

**CONCLUSION**

WHEREFORE, the Debtors respectfully request entry of an order authorizing and establishing procedures for the release of unused transportation and storage capacity in the ordinary course of business and in accordance with the regulations of the Federal Energy Regulatory Commission and granting such other and further relief as is just and proper.

Dated: Fort Worth, Texas  
July 15, 2003

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

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In re

MIRANT CORPORATION, et al.,

Debtors.

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)  
) Chapter 11 Case  
)

) Case No. 03-46590(DML)11  
) Jointly Administered  
)  
)

**ORDER ESTABLISHING AND AUTHORIZING PROCEDURES FOR  
RELEASE OF NATURAL GAS PIPELINE CAPACITY UNDER FIRM  
TRANSPORTATION AND STORAGE AGREEMENTS**

Upon the motion, dated July 15, 2003 (the "Motion"), of Mirant Corporation and its affiliated debtors (collectively, the "Debtors"), as debtors-in-possession, for an order establishing and authorizing procedures for the release of natural gas pipeline capacity under firm transportation and storage agreements, as more fully set forth in the Motion; and upon consideration of the Affidavit of John W. Ragan in Support of First Day Motions and

Applications sworn to on the 14th day of July, 2003; and it appearing that the Court has jurisdiction over this matter; and it appearing that due notice of the Motion has been provided as set forth in the Motion, and that no other or further notice need be provided; and it further appearing that the relief requested in the Motion is in the best interests of the Debtors and their estates and creditors; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor, it is

**ORDERED**, that the Motion is granted in all respects; and it is further

**ORDERED**, that the Debtors are hereby authorized to utilize the FERC procedures for the release of natural gas transportation and storage capacity held to a contract with the owner or operator of an interstate natural gas pipeline; and it is further

**ORDERED**, that the Debtors are hereby authorized to execute and deliver all instruments and documents, and take such other actions as may be necessary or appropriate to implement and effectuate the FERC procedures; and it is further

**ORDERED**, that upon the effectiveness of a permanent release, pursuant to this Order, of transportation or storage capacity for the full term of the contract and for the contract rate, the contract will be terminated. The Debtors will have no further liability, including, but not limited to, liability for charges or damages associated with the capacity, for periods after the release date. The permanent release of capacity requires neither a rejection nor an assumption of the contract; and it is further

**ORDERED**, that the effect of a termination or settlement agreement shall be as set forth in the respective agreement; and it is further

**ORDERED**, that this Order is without prejudice to the Debtors' right to seek further, other or different relief concerning their contracts with natural gas pipeline companies.

### End of Order ###

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**PROPOSED ATTORNEYS FOR THE DEBTORS  
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**EXHIBIT A**

Finding Aids section of the printed volume and on GPO Access.

**§ 284.8 Release of firm capacity on interstate pipelines.**

(a) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part must include in its tariff a mechanism for firm shippers to release firm capacity to the pipeline for resale by the pipeline on a firm basis under this section.

(b) Firm shippers must be permitted to release their capacity, in whole or in part, on a permanent or short-term basis, without restriction on the terms or conditions of the release. A firm shipper may arrange for a replacement shipper to obtain its released capacity from the pipeline. A replacement shipper is any shipper that obtains released capacity.

(c) Except as provided in paragraph (h) of this section, a firm shipper that wants to release any or all of its firm capacity must notify the pipeline of the terms and conditions under which the shipper will release its capacity. The firm shipper must also notify the pipeline of any replacement shipper designated to obtain the released capacity under the terms and conditions specified by the firm shipper.

(d) The pipeline must provide notice of offers to release or to purchase capacity, the terms and conditions of such offers, and the name of any replacement shipper designated in paragraph (b) of this section, on an Internet web site, for a reasonable period.

(e) The pipeline must allocate released capacity to the person offering the highest rate (not over the maximum rate) and offering to meet any other terms and conditions of the release. If more than one person offers the highest rate and meets the terms and conditions of the release, the released capacity may be allocated on a basis provided in the pipeline's tariff, provided however, if the replacement shipper designated in paragraph (b) of this section offers the highest rate, the capacity must be allocated to the designated replacement shipper.

(f) Unless otherwise agreed by the pipeline, the contract of the shipper releasing capacity will remain in full force and effect, with the net proceeds

from any resale to a replacement shipper credited to the releasing shipper's reservation charge.

(g) To the extent necessary, a firm shipper on an interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part is granted a limited-jurisdiction blanket certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act solely for the purpose of releasing firm capacity pursuant to this section.

(h)(1) A release of capacity by a firm shipper to a replacement shipper for any period of 31 days or less, or for any term at the maximum tariff rate applicable to the release, need not comply with the notification and bidding requirements of paragraphs (c) through (e) of this section. A release under this paragraph may not exceed the maximum rate. Notice of a firm release under this paragraph must be provided on the pipeline's electronic bulletin board as soon as possible, but not later than forty-eight hours, after the release transaction commences.

(2) When a release under paragraph (h)(1) of this section is at less than the maximum tariff rate, a firm shipper may not roll-over, extend, or in any way continue the release at less than the maximum tariff rate without complying with the requirements of paragraphs (c) through (e) of this section, and may not re-release to the same replacement shipper under this paragraph at less than the maximum tariff rate until twenty-eight days after the first release period has ended.

(1) *Waiver of maximum rate ceiling.* Until September 30, 2002, the maximum rate ceiling does not apply to capacity release transactions of less than one year. The provision of paragraph (h)(1) of this section providing an exemption from the posting and bidding requirements for transactions at the applicable maximum tariff rate for pipeline services will not apply as long as the waiver of the rate ceiling is in effect. With respect to releases of 31 days or less under paragraph (h) of this section, the requirements of paragraph (h)(2) of

## § 284.9

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this section will apply to all such releases regardless of the rate charged.

[Order 636, 57 FR 13318, Apr. 16, 1992, as amended by Order 636-A, 57 FR 36217, Aug. 12, 1992; Order 577, 60 FR 16983, Apr. 4, 1995; Order 577-A, 60 FR 30187, June 8, 1995. Redesignated and amended by Order 637, 65 FR 10220, Feb. 25, 2000; Order 637-A, 65 FR 35765, June 5, 2000]

### § 284.9 Interruptible transportation service.

(a) *Interruptible transportation availability.* (1) An interstate pipeline that provides firm transportation service under subpart B or G of this part must also offer transportation service on an interruptible basis under that subpart or subparts and separately from any sales service.

(2) An intrastate pipeline that provides transportation service under Subpart C may offer such transportation service on an interruptible basis.

(3) *Service on an interruptible basis* means that the capacity used to provide the service is subject to a prior claim by another customer or another class of service and receives a lower priority than such other classes of service.

(b) The provisions regarding non-discriminatory access, reasonable operational conditions, and limitations contained in § 284.7 (b), (c), and (f) apply to pipelines providing interruptible service under this section.

(c) *Reservation fee.* No reservation fee may be imposed for interruptible service. A pipeline's rate for any transportation service provided under this section may not include any minimum bill provision, minimum take provision, or any other provision that has the effect of guaranteeing revenue.

[Order 436, 50 FR 42494, Oct. 18, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 284.9, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

### § 284.10 Rates.

(a) *Applicability.* Any rate charged for transportation service under subparts B and G of this part must be established under a rate schedule that is filed with the Commission prior to commencement of such service and

that conforms to the requirements of this section.

(b) *Rate objectives.* Maximum rates for both peak and offpeak periods must be designed to achieve the following three objectives:

(1) Rates for service during peak periods should ration capacity;

(2) Rates for firm service during off-peak periods and for interruptible service during all periods should maximize throughput; and

(3) The pipeline's revenue requirement allocated to firm and interruptible services should be attained by providing the projected units of service in peak and off-peak periods at the maximum rate for each service.

(c) *Rate design*—(1) *Volumetric rates.* Except as provided in § 284.7(e), any rate filed for service subject to this section must be a one-part rate that recovers the costs allocated to the service to the extent that the projected units of that service are actually purchased and may not include a demand charge, a minimum bill or minimum take provision or any other provision that has the effect of guaranteeing revenue. Such rate must separately identify cost components attributable to transportation, storage, and gathering costs.

(2) *Based on projected units of service.* Any rate filed for service subject to this section must be designed to recover costs on the basis of projected units of service. The fixed costs allocated to capacity reservations, as determined in accordance with § 284.7(e), should be used along with the projected nominations accepted by the pipeline to compute the unit reservation fee. The remaining fixed costs and all variable costs should be used to determine the volumetric rate computed on the basis of projected volumes to be transported. The units projected for the service in rates filed under this section may be changed only in a subsequent rate filing under section 4 of the Natural Gas Act.

(3) *Differentiation due to time and distance.* Any rate filed for service subject to this section must reasonably reflect any material variation in the cost of providing the service due to:

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that she provided true and correct copies of the foregoing to Bankruptcy Services, LLC and directed them to effect service upon all persons on the attached Service Lists via facsimile and email transmission, where indicated, or via overnight courier, on the 15th day of July, 2003.

s/s Judith Elkin

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