

Elm Road II & III Facility Lease Excerpts

Structural Modifications Shown in Black-line Comparison Format to the
Elm Road I Facility Lease

(Editorial conformance changes are not presented in this document)

- Sections:
1. Modifications Common to the Elm Road II & III Facility Leases
 2. Modifications Unique to the Elm Road II Facility Lease
 3. Modifications Unique to the Elm Road III Facility Lease

May 20, 2003

1. Modifications Common to the Elm Road II & III Facility Leases

§2.1 (d) If at any time prior to the Lease Effective Date Lessor transfers a portion of its Unit ~~1 Ownership Interest and New Common Facilities~~ 2 Ownership Interest to MGE Power and/or WPPI or their respective Affiliates, then Lessor shall, within five (5) days after such transfer, pay to Lessee an amount equal to the aggregate amount of the costs described in Section 2.1(b)(~~i~~), (~~ii~~), (~~iv~~) and (~~v~~) and such portion of the Unit 2 Adjustment Amount which are reimbursed to Lessor by such new Owner(s). If at any time after the Lease Effective Date Lessor transfers a portion of its Unit ~~1~~ 2 Ownership Interest and New Common Facilities Ownership Interest to MGE Power and/or WPPI or their respective Affiliates, then the “PPA” component of the Basic Rent formula in Schedule 7.1 shall be adjusted, for the month following any such transfer, to accommodate the amount equal to the aggregate amount of the costs described in Section 2.1(b)(~~i~~),(~~ii~~), (~~iv~~) and (~~v~~) and such portion of the Unit 2 Adjustment Amount which are reimbursed to Lessor by such new Owner(s).

§3.1 (d) The Parties shall use commercially reasonable efforts to coordinate Lessor’s activities (including access to and use of the common facilities for construction and Testing) contemplated under Article 3 and Article 4 with Lessee’s ongoing operation and maintenance of the Existing Units; and, if applicable, Unit 1 and Unit 3, in accordance with Good Utility Practice; provided, however, that such coordination shall not materially interfere with or impair the Lessee’s operation and use of the Existing Units; and, if applicable, Lessee’s operation of Unit 1 and Unit 3.

§5.2 Notice of Purchase Price. If the Lease Effective Date has not occurred by the Required Lease Effective Date, then within fifteen (15) days after the Required Lease Effective Date, Lessor shall deliver to Lessee a written notice (the “Purchase Price Notice”) in which Lessor shall indicate (a)(i) the Aggregate Construction Costs incurred by or on behalf of Lessor as of the Required Lease Effective Date, (ii) the aggregate amount of outstanding Return on Capital with respect to the Aggregate Construction Costs, calculated as of the Required Lease Effective Date, (iii) the aggregate amount of outstanding Monthly Management Services Costs incurred by or on behalf of Lessor as of the Required Lease Effective Date ~~and~~, (iv) the aggregate amount of outstanding Monthly CIMC incurred by or on behalf of Lessor as of the Required Lease Effective Date and (v) the Unit 2 Adjustment Amount (collectively, the “Purchase Price”) and (b) the Damages Amount which the Parties acknowledge and agree shall be paid as liquidated damages and not as a penalty.

§7.4 Common Facilities Adjustment. ~~Upon the occurrence of any~~

(a) Upon the Lease Effective Date or early termination of this Facility Lease in accordance with Article 5, Lessor shall allocate, in accordance with Schedule 7.4, a portion of its ownership interest in the New Common Facilities (such portion, the “Transferred Common Facilities Interest”) to Unit 2. The Transferred Common Facilities Interest shall be released from the Elm Road I Facility Lease and shall be subject to this Facility Lease.

(b) Upon the occurrence of the following events, the New Common Facilities, which are used in common by two or more of Unit 1, Unit 2, Unit 3 and the Existing Units, will be adjusted and the rent formulas in Schedule 7.1 and Schedule 14.2, respectively, will be adjusted as provided below: (i) the “Lease Effective Date” or termination pursuant to Article 5 of the Elm Road ~~II Facility Lease~~, ~~(ii) the “Lease Effective Date” or termination pursuant to Article 5 of the Elm Road-III Facility Lease~~ or ~~(iii)~~ if Lessor transfers or sells to or purchases from another Owner or its Affiliates, an interest in the New Common Facilities (each, a “New Common Facilities Adjustment Event”):

§14.2 (b) Notwithstanding anything to the contrary in Article 14, in no event shall a Renewal Term extend beyond the earlier of: (i) (A) in the case of the First Renewal Term, the date as of which the Appraised FMV, as determined by the Unit Appraiser pursuant to Section 4.6, or (B) in the case of any Renewal Term (other than the First Renewal Term), the date as of which the Appraised FMV as determined by the Independent Appraiser pursuant to Section 14.1(b) or the Early Renewal Independent Appraiser pursuant to Section 14.3(b), as the case may be, is equal to or is less than twenty percent (20%) of the total Construction Costs incurred by or on behalf of Lessor to construct and commission ~~the Unit 1 Facility~~ **Unit 2 and is equal to or is less than twenty percent (20%) of the Unit 2 Adjustment Amount**, and (ii) the date as of which (A) in the case of the First Renewal Term, the sum of the Base Term and the First Renewal Term shall equal eighty percent (80%) of the Economic Useful Life of the Unit ~~1~~ **2** Facility as determined by the Unit Appraiser pursuant to Section 4.6 and (B) in the case of any Renewal Term (other than the First Renewal Term), the sum of the Base Term, any previous Renewal Terms and the subsequent Renewal Term shall equal eighty percent (80%) of the Current Economic Useful Life of the Unit ~~1~~ **2** Facility, as determined by the Independent Appraiser pursuant to Section 14.1(b) or the Early Renewal Independent Appraiser pursuant to Section 14.3(b), as the case may be; it being the intent of the Parties that Lessee’s right to renew this Facility Lease shall not conflict with the Parties’ intent regarding the tax ownership of the Leased Facility for federal and state income tax purposes as more fully described in Section 6.2. If a Renewal Term would extend beyond the earlier of (i) and (ii) above, then the duration of such Renewal Term shall automatically and without any action on the part of the Parties be reduced so as to ensure that the provisions of this Section 14.2(b) are met, notwithstanding that the duration of such Renewal Term may be shorter than the duration prescribed for the Renewal Term in Section 14.2(a).

BASIC RENT – NEW COMMON FACILITIES COMPONENT

AALFNC = ~~Approved~~Allocated Amount ~~for the Leased Facility attributable to the~~of New Common Facilities ~~Ownership Interest component of the Leased~~completed and in-service with the Unit 1 Facility and later distributed to the Unit 2 Facility in accordance with the provisions of Schedule 7.4 of this Facility Lease (in \$);

2. Modifications Unique to the Elm Road II Facility Lease

SCHEDULE 1.1 TO THE FACILITY LEASE

DEFINITIONS; INTERPRETATION

“New Common Facilities Ownership Interest” shall mean, as of any date, the ownership interest in a Component of the New Common Facilities that Lessor holds as of such date pursuant to Schedule 7.4 of the Facility Lease, as the same may be adjusted from time to time pursuant to Schedule 7.4 of the Facility Lease. For the avoidance of doubt, Lessor **shall have no New Common Facilities Ownership Interest for any Component unless and until it receives the Transferred Common Facilities Interest, at which point Lessor**’s New Common Facilities Ownership Interest ~~for~~in each Component shall be equal to the ~~entire New~~**Transferred Common Facilities Interest, if any, in such Component, and shall remain as such** unless and until Lessor has sold or transferred a portion of its New Common Facilities Ownership Interest in such Component to one or both of the new Owners, if any, to ERGS IGCC or to Lessee pursuant to the Elm Road ~~II Facility Lease or the Elm Road III~~I Facility Lease.

“New Common Facilities Ownership Percentage” shall mean, as of any date, Lessor’s percentage ownership interest in a Component of the New Common Facilities as of such date pursuant to Schedule 7.4 of the Facility Lease, as the same may be adjusted from time to time pursuant to Schedule 7.4 of the Facility Lease. For the avoidance of doubt, Lessor **shall have no New Common Facilities Ownership Percentage for any Component unless and until it receives the Transferred Common Facilities Interest, at which point Lessor**’s New Common Facilities Ownership Percentage ~~for~~in each Component shall be ~~one hundred percent (100%)~~**equal to the percentage associated with the Transferred Common Facilities Interest, if any, in such Component, and shall remain as such** unless and until Lessor has sold or transferred a portion of its New Common Facilities Ownership Percentage **in such Component** to one or both of the new Owners, if any, to ERGS IGCC, or to Lessee pursuant to the Elm Road ~~II Facility Lease or the Elm Road III~~I Facility Lease.

“Required Lease Effective Date” shall mean the date falling ~~sixty two (62)~~**seventy four (74)** months after the Decommissioning Completion Date.

“Scheduled Commercial Operation Date” shall mean the date falling ~~fifty~~**sixty two (62)** months after the Decommissioning Completion Date, as such date may be extended by a reasonable amount of time attributable to any delay in achieving Commercial Operation caused by Force Majeure or an Excused Event (or the acts or omissions of Lessee or the failure of Lessee to perform any of its obligations under this Facility Lease or any other Lease Document to which it is a party).

“Transferred Common Facilities Interest” shall have the meaning given to such term in Section 7.4(a) of the Facility Lease.

CONSTRUCTION MILESTONE SCHEDULE

Each of the Milestones and their respective Milestone Dates shall be as follows (unless adjusted pursuant to Section 3.2(d) or Section 3.6(a) of the Facility Lease or by mutual agreement of the Parties):

<u>Milestone Dates</u>	<u>Milestones</u>
Decommissioning Completion Date	March 1, 2004
Date on which the steam turbine is delivered to Parcel 1 <u>2</u>	June 1, 2006 <u>2007</u>
Date on which the boiler first fires	Dec. 1, 2007 <u>2008</u>
Scheduled Commercial Operation Date	May 1, 2008 <u>2009</u>

3. Modifications Unique to the Elm Road III Facility Lease

WITNESSETH:

WHEREAS, ~~Unit 1~~ **ERGS will either lease or sell to Lessor, upon the Lease Effective Date or early termination of this Facility Lease, a portion of the New Common Facilities to be used by Unit 3;**

SCHEDULE 1.1 TO THE FACILITY LEASE

DEFINITIONS; INTERPRETATION

“Approved Amount” shall mean the total amount of Construction Costs incurred by or on behalf of Lessor as of the Lease Effective Date not to exceed an amount equal to (a) the total amount of Construction Costs which Lessor is permitted to recover from Lessee pursuant to the CPCN Approval, plus (b) any additional Construction Costs prudently incurred by or on behalf of Lessor above the amount in (a) above and approved by the PSCW (not to exceed ~~ten~~ **ten fifteen** percent (150%) of such amount in (a) above) plus (c) any additional Construction Costs incurred by or on behalf of Lessor due to an Excused Event, Force Majeure or change made pursuant to Section 3.6(a) of the Facility Lease, but in no event more than such additional Construction Costs actually incurred by or on behalf of Lessor.

“New Common Facilities Ownership Interest” shall mean, as of any date, the ownership interest or leasehold interest in a Component of the New Common Facilities that Lessor holds as of such date pursuant to Schedule 7.4 of the Facility Lease, as the same may be adjusted from time to time pursuant to Schedule 7.4 of the Facility Lease. For the avoidance of doubt, Lessor~~s~~ **shall have no** New Common Facilities Ownership Interest for **any Component unless and until it receives the Transferred Common Facilities Interest, at which point Lessor’s New Common Facilities Ownership Interest in** each Component shall be equal to the ~~entire~~ **New Transferred** Common Facilities **Interest, if any, in such Component, and shall remain as such** unless and until Lessor has sold or transferred a portion of its New Common Facilities Ownership Interest in such Component to one or both of the new Owners, if any, ~~to ERGS-IGCC or to Lessee pursuant to the Elm Road II Facility Lease or the Elm Road III Facility Lease.~~

“New Common Facilities Ownership Percentage” shall mean, as of any date, Lessor’s percentage ownership interest or leasehold interest in a Component of the New Common Facilities as of such date pursuant to Schedule 7.4 of the Facility Lease, as the same may be adjusted from time to time pursuant to Schedule 7.4 of the Facility Lease. For the avoidance of doubt, Lessor **shall have no New Common Facilities Ownership Percentage for any Component unless and until it receives the Transferred Common Facilities Interest, at which point Lessor’s** New Common Facilities Ownership Percentage ~~for~~ **in** each Component shall be ~~one hundred percent (100%)~~ **equal to the percentage associated with the Transferred Common Facilities Interest, if any, in such Component, and shall remain as such** unless and until Lessor has sold or transferred a portion of its New Common Facilities Ownership

Percentage in such Component to one or both of the new Owners, if any, ~~to ERGS IGCC, or to Lessee pursuant to the Elm Road II Facility Lease or the Elm Road III Facility Lease.~~

“Required Decommissioning Completion Date” shall mean the date falling ~~ninety~~thirty six (~~90~~36) ~~days~~months after the Execution Date.

“Required Lease Effective Date” shall mean the date falling sixty ~~two~~six (~~62~~66) months after the Decommissioning Completion Date.

“Scheduled Commercial Operation Date” shall mean the date falling ~~fifty~~forty eight (~~50~~48) months after the Decommissioning Completion Date, as such date may be extended by a reasonable amount of time attributable to any delay in achieving Commercial Operation caused by Force Majeure or an Excused Event (or the acts or omissions of Lessee or the failure of Lessee to perform any of its obligations under this Facility Lease or any other Lease Document to which it is a party).

“Transferred Common Facilities Interest” shall have the meaning given to such term in Section 7.4(a) of the Facility Lease.

DEVELOPMENT PROTOCOL

Lessor shall design, engineer, procure, permit, construct and commission a ~~615~~530 MW net nominal ~~supercritical pulverized coal~~integrated coal gasification combined cycle electrical generating unit and related facilities (as further described in Exhibit A to the Facility Lease) on Parcel ~~1~~3 in accordance with this Development Protocol (the “Project”).

ARTICLE 1: PLANNING

1.2 Selection Process. Lessee shall participate in the selection of the following:

(c) the major components for ~~the Unit 1 Facility, 3,~~ including ~~boiler, air quality control systems, ash handling~~air separation unit, coal gasification, syngas clean up, sulfuric acid plant, combustion turbines/generators, heat recovery steam generators, steam turbine/ generator, ~~condenser, coal and material handling, coal preparation, water intake structures, ship loading facilities, plant control systems, plant electrical systems and~~and all related auxiliary equipment to support these systems.

1.3 Warranties. Lessor shall enter into contracts for procurement of equipment, materials, ~~boiler, air quality control systems, ash handling~~air separation unit, coal gasification, syngas clean up, sulfuric acid plant, combustion turbines/generators, heat recovery steam generators, steam turbine / generator, ~~condenser, coal and material handling, coal preparation, water intake structures, ship loading facilities, plant control system, plant electrical systems~~ and all related auxiliary equipment to support these systems for ~~the Unit 1 Facility 3~~ with original equipment manufacturers which contracts include assignable, commercially reasonable warranties for the products purchased which are consistent with Good Utility Practice.

1.4 Training. Lessor shall provide training for Lessee’s personnel from the Project’s original equipment manufacturers and gasification technology licensor. Such training is intended to prepare Lessee’s engineering, supervisory, operation, maintenance and technical personnel to operate ~~the Unit 1 Facility 3~~ on the Lease Effective Date.

ARTICLE 5: INDEPENDENT EVALUATOR

5.1 Initial Construction Report. No later than thirty (30) days after the approval of this Facility Lease by the PSCW, Lessor shall submit to Lessee, with a copy to the PSCW, a written list of approved Inspection Engineers and within ten (10) days of receipt of the list, Lessee shall select one (1) of the Inspection Engineers from Lessor’s list and give written notice thereof to Lessor and the PSCW. The PSCW shall either approve the Inspection Engineer selected by Lessee or choose a different Inspection Engineer from Lessor’s list. The Inspection

Engineer selected in accordance with this Section 5.1 of Schedule 3.1(a) (the “Independent Evaluator”) shall review and inspect the Project during the Construction Term. Lessor shall make all plans and contracts related to the construction of the Project as well as the Elm Road Site, available to be reviewed or inspected by the Independent Evaluator, at Lessee’s sole cost, at any time during the Construction Term. No later than ninety (90) days after PSCW approval or appointment, the Independent Evaluator shall deliver a written report (the “Initial Construction Report”) to Lessor and Lessee, with a copy to the PSCW, in which the Independent Evaluator shall opine as to whether the Project’s plans, contracts (including any warranties ~~but excluding the Earth Work Contract, the Boiler, Steam Turbine Generator, Boiler Feed Pump Drives, Air Quality Control Systems (including baghouse, wet flue gas desulfurization system, wet electrostatic precipitator, mercury control and associated ductwork)~~) and Project work at the Elm Road Site are consistent with Good Utility Practice, are commercially reasonable and are likely to produce ~~the Unit 1 Facility~~³ described in Exhibit A with Aggregate Construction Costs equal to or less than the Approved Amount. The Independent Evaluator shall also report any adjustments which need to be made in order for the Project to be completed consistent with the CPCN Approval, Good Utility Practice and commercial reasonableness and with Aggregate Construction Costs equal to or less than the Approved Amount. Lessor may file a response to the Initial Construction Report with the PSCW.

SCHEDULE 3.2(a)
TO THE FACILITY LEASE

CONSTRUCTION MILESTONE SCHEDULE

Each of the Milestones and their respective Milestone Dates shall be as follows (unless adjusted pursuant to Section 3.2(d) or Section 3.6(a) of the Facility Lease or by mutual agreement of the Parties):

<u>Milestones</u>	<u>Milestone Dates</u>
Decommissioning Completion Date	March <u>May</u> 1, 2004 <u>2007</u>
Date on which the steam turbine is delivered to Parcel 1	June 1, 2006
Date on which the boiler first fires	Dec. 1, 2007
<u>First syngas production</u>	<u>Nov. 19, 2010</u>
<u>First electrical generation on syngas</u>	<u>Jan. 21, 2011</u>
Scheduled Commercial Operation Date	May 1, 2008 <u>2011</u>

SCHEDULE 3.3
TO THE FACILITY LEASE

SCHEDULED COMMERCIAL OPERATION DATE DAMAGES

For each calendar day after the Scheduled Commercial Operation Date that Lessor fails to achieve Commercial Operation, Lessor shall pay to Lessee pursuant to Section 3.3 of the Facility Lease, the following amounts of delay damages (the “Scheduled Commercial Operation Date Damages”) not to exceed in the aggregate the “Delay Damages Cap” set forth below :

January 1- December 31 calendar day	Lessor’s Percentage of \$ 150,000 <u>30,000</u> per
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Delay Damages Cap	Lessor’s Percentage of \$ 55,000,000 <u>15,000,000</u>
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COMMERCIAL OPERATION TEST

1.1 Definitions.

~~“Minimum Load” shall mean operation of the generators at 50% of nameplate rating.~~

1.2 Commercial Operation Test.

(c) The Unit Operability Test shall demonstrate that ~~the Unit 1 Facility can sustain operation at or above Minimum Load and up to full load for a 100 hour period. The Unit Operability Test will consist of a 100 hour period selected by the Lessor to demonstrate the Equivalent Availability Factor. During this period the Unit 1 Facility shall maintain an Equivalent Availability Factor of ninety percent (90%) or higher.~~ Unit 3 can successfully start and demonstrate operation at Maximum Load capability. For purposes of this Schedule 4.2, “Maximum Load” shall mean operation of the combustion turbines at full load on the temperature control curves, with operation of the steam turbine in sliding pressure mode.

(d) The Net Unit Output Test shall demonstrate that ~~the Unit 1 Facility~~3 can achieve at least the Minimum Net Electrical Output, measured in MW at the Metering Point. ~~Each~~The test shall consist of operating ~~the Unit 1 Facility for a continuous 4 hour period.~~ 3 for 2 uninterrupted periods of 4 hours in duration. The tests shall be conducted at full load rate necessary to achieve Guaranteed Net Electrical Output. The tested output shall be corrected for ambient and operating conditions to the Referenced Site Conditions ~~per ASME PTC 6—1996, using correction tables~~ using a heat balance computer model developed by Lessor ~~in accordance with the following: Lessor will provide and which follows methods and procedures of ASME PTC 46-1996. The corrections to~~ capacity and heat rate ~~correction tables that shall~~ quantify impacts ~~on heat rate and output~~ caused by ~~unit loading,~~ ambient air temperature, relative humidity, barometric pressure, combustion turbine fired hours of operation, generator reactive power ~~and turbine back pressure.~~ ~~The correction tables described above shall be developed by Lessor using,~~ fuel composition, and lake cooling water inlet temperature. The heat balance computer model shall include manufacturer supplied equipment data, ~~a computer based heat balance program,~~ and construction contractor’s guarantees using ~~the higher heating value of fuel (as supplied by the mine or, if available,~~ Referenced Site Conditions and fuel composition (as measured by laboratory analyses of fuel samples collected during ~~testing~~the test). The data behind the correction ~~tables~~ process described above shall be subject to verification by audit by Lessee at Lessee’s expense. The use of installed station instrumentation shall be maximized during the test. For measurements required where no station instrumentation is installed, calibrated test class

instrumentation mutually agreed to by Lessee and Lessor shall be used. The Net Unit Output Test results will be considered the numerical average of the test run results.

(e) The Net Unit Heat Rate Test shall be conducted concurrently with the Net Unit Output Test and shall demonstrate that ~~the Unit 1 Facility3~~ can achieve a heat rate of not more than the Maximum Net Heat Rate, measured in Btu/kWh, when corrected ~~for ambient and operating conditions~~ to the Referenced Site Conditions and other appropriate parameters ~~per ASME PTC 6—1996~~, using ~~correction tables~~ procedures developed by Lessor in accordance with the preceding paragraph of this Schedule 4.2. The use of installed station instrumentation shall be maximized during the test. For measurements required where no station instrumentation is installed, calibrated test class instrumentation mutually agreed to by Lessee and Lessor shall be used. Each test shall consist of operating ~~the Unit 1 Facility3~~ for 42 uninterrupted periods, ~~each being 2 of 4~~ hours in duration. The Net Unit Heat Rate Test results will be considered the numerical average of the ~~consistent individual tests for each condition. If the~~ test run results. If Unit ~~1 Facility3~~ has met the Minimum Net Electrical Output requirement and does not meet the Guaranteed Net Electrical Output requirement, for purposes of determining successful completion of the Net Unit Heat Rate Test, the results of the Net Unit Heat Rate Test shall be compared to the ~~capacity and heat rate correction tables developed by the Lessor in accordance with 1.2(d) above at the output level~~ heat rate of Unit 3 as determined by the heat balance computer model using the Net Unit Output Test results.

1.3 Minimum Performance Levels. The Minimum Performance Levels are as follows:

(a) “Maximum Net Heat Rate” shall mean a net heat rate of ~~the Unit 1 Facility3~~ of no greater than 1020% above the ~~Lessor Supplied~~ heat rate curve determined by the heat balance computer model measured in Btu/kWh, which shall represent the maximum Unit ~~1 Facility3~~ heat rate which Lessee will accept for commercial operability.

(b) “Minimum Net Electrical Output” shall mean a net electrical output of ~~the Unit 1 Facility3~~ no less than 553424 MW, and shall represent Lessor’s guarantee of the minimum rate at which ~~the Unit 1 Facility3~~ is designed to deliver energy at the Metering Point for a continuous 4 hour period, when corrected for ambient and operating conditions to the Referenced Site Conditions.

(c) “Maximum Emissions Levels” shall mean a demonstrated ~~SO₂, NO_x, and CO~~ emissions performance consistent with the Unit ~~1 Facility3~~ air permit.

GUARANTEED PERFORMANCE LEVELS

1.1 Guaranteed Performance Levels. The Guaranteed Performance Levels are as follows:

(a) “Guaranteed Net Electrical Output” shall mean a guaranteed net electrical output of ~~the Unit 1-Facility3~~ equal to ~~615~~530 MW, which shall represent the minimum rate at which ~~the Unit 1-Facility3~~ is designed to deliver energy at the Metering Point over a 4-hour period, when corrected to Referenced Site Conditions.

(b) “Guaranteed Net Heat Rate” shall mean a guaranteed net heat rate of ~~the Unit 1-Facility3~~ of no greater than ~~8850~~9500 Btu/kWh, which shall represent the design quantity of Btus as determined by mine or laboratory analysis, required by ~~the Unit 1-Facility3~~ to produce one KWh of energy, at ~~the Unit 1-Facility3~~’s full load, as measured at the Metering Point, using the higher heat value of the delivered fuel as corrected to Referenced Site Conditions.

1.2 Guaranteed Performance Level Damages. For the purposes of the Facility Lease, the following amounts shall be herein referred to as the “Guaranteed Performance Level Damages”:

Guaranteed Net Electrical Output	Lessor’s Percentage of 750 <u>375</u> /kw
Guaranteed Net Heat Rate	Lessor’s Percentage of
\$30,000 <u>15,000</u> /btu/kWh	

1.3 Performance Damages Cap. For the purposes of the Facility Lease, the following amounts shall be herein referred to as the “Performance Damages Caps”:

Guaranteed Net Heat Rate Performance Damages Cap	Lessor’s Percentage of	\$5 <u>2.5</u>
million		
Guaranteed Net Electrical Output Performance	Damages Cap	
million	Lessor’s Percentage of	\$10 <u>5</u>

TAX INDEMNITY

2.2 Exclusions to Indemnification. Notwithstanding the foregoing, Lessee shall not be obligated to pay or indemnify Lessor for any Taxes to the extent such Taxes are attributable to the following:

(m) Taxes resulting from or attributable to the transactions contemplated by a lease of the New Common Facilities or the existence or exercise of any of Lessor's rights and obligations thereunder, but only to the extent of a resulting increase in Lessee's indemnity obligations; or

ARTICLE 3: INCOME TAX INDEMNITY

3.1 Tax Assumptions. The transactions contemplated by the Lease Documents have been entered into on the basis of the following tax assumptions (the "Tax Assumptions"):

(a) True Lease. For purposes of federal income tax, the Facility Lease will be a "true lease" under which Lessor will be treated as the owner and lessor of the Leased Facility and Lessee will be treated as lessee thereof. Furthermore, it is assumed for federal income tax purposes and for the purposes of this Article 3, that Lessor is the owner and lessor of the New Common Facilities to the extent of its New Common Facilities Ownership Percentage and Lessee is the lessee thereof, but only so long as Lessor and ERGS are disregarded as entities separate from their owners and have the same single owner. Notwithstanding the foregoing, for any period during which Lessor and ERGS are not disregarded as entities separate from their owners or have different owners, Lessor shall not be treated as the owner of the New Common Facilities, but instead, shall be treated as lessee and sublessor of the New Common Facilities to the extent of its New Common Facilities Ownership Percentage and Lessee as sublessee thereof.

3.2 Lessee's Tax Representations and Covenants. For purposes of this Article 3, Lessee hereby represents and covenants:

(c) During the Basic Term, neither Lessee nor any sublessee or user of the Leased Facility (a "Lessee Person") (other than Lessor or its affiliates other than Lessee) will (i) make any claim (including, without limitation, filing a tax return) predicated on ownership of the Leased Facility, or take any action or position inconsistent with the Tax Assumptions or the status of Lessor as the sole owner of the Leased Facility for federal, state and local income tax

purposes (subject to the assumption in Section 3.1(a) regarding ownership of the New Common Facilities), or (ii) claim deductions for Basic Rent for federal, state or local income tax purposes during the Base Term for any period other than the period to which such Basic Rent is allocated pursuant to Section 8.1, unless, in the case of either (i) or (ii), such position is inconsistent with a Final Determination which is binding on Lessor or Lessee.

(e) Limited Use Property. Neither Lessee, nor any sublessee, assignee, agent or user (other than Lessor) of the Leased Facility will construct or install on the Leased Facility any component, improvement, alteration, or addition if the construction or installation will cause the Leased Facility to constitute limited use property within the meaning of Revenue Procedure 2001-28, 2001-19 I.R.B. 1156.

An indemnity payment hereunder shall be the only remedy for the inaccuracy of any representation or covenant set forth in this Section 3.2. No representation or warranty of Lessee contained in any of the Lease Documents shall be construed as a representation or warranty that the Facility Lease will constitute a “true lease,” that Lessor will be treated as the tax owner of the Leased Facility, (or lessee as the case may be with respect to the New Common Facilities) or that the Leased Facility has a specified value or economic useful life.

3.4 Excluded Events. Lessee shall not be required to make any payment in respect of an Inclusion Event to the extent such Inclusion Event results from one or more of the following events:

(o) imposed as a result of or attributable to the transactions contemplated by the lease of the New Common Facilities or the existence or exercise of any of Lessor’s rights and obligations thereunder.