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ATTORNEYS FOR THE
MirMA LANDLORDS

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

IN RE:

**MIRANT CORPORATION, et al,

DEBTORS**

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Chapter 11 Case

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

**Hearing Date and Time:
April 21, 2004 @ 12:00 PM**

MOTION TO COMPEL DEBTOR'S COMPLIANCE WITH SECTION 365(d)(3)

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

The MirMA Landlords¹ submit this motion seeking an order of the Court compelling Mirant Mid-Atlantic, LLC ("MirMA") to comply with its statutory duties under Section 365(d)(3) of the Bankruptcy Code by providing to the MirMA Landlords certain operating and financial information concerning two power plants required to be provided under the operative leases, and show the Court as follows:

¹ The MirMA Landlords are comprised of the following: (1) SEMA OP4 LLC, SEMA OP5 LLC, SEMA OP6 LLC, SEMA OP7 LLC, Morgantown OL3 LLC, Morgantown OL4 LLC, Dickerson OL2 LLC, and Dickerson OL3 LLC, all of which are special purpose entities affiliated with Bank One, NA; (2) SEMA OP1 LLC, SEMA OP2 LLC, SEMA OP3 LLC, Morgantown OL1 LLC, Morgantown OL2 LLC, and Dickerson OL1 LLC, all of which are special purpose entities affiliated with Verizon Capital Corp.; and (3) SEMA OP8 LLC, SEMA OP9 LLC, Morgantown OL5 LLC, Morgantown OL6 LLC, Morgantown OL7 LLC, and Dickerson OL4 LLC, all of which are special purpose entities affiliated with UnionBanCal Corporation.

I. JURISDICTION AND VENUE

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

II. FACTUAL BACKGROUND

2. The MirMA Landlords own certain power generating units commonly known as the Morgantown Base-Load Units 1 and 2 and Dickerson Base-Load Units 1, 2 and 3 (collectively the “Power Plants”) presently leased to, and operated by, MirMA.

3. The Power Plants were leased by the MirMA Landlords to MirMA through a set of written leases and related agreements (the leases and related agreements are collectively referred to as the “Leases”).² The Power Plants generate millions of dollars of profits for MirMA. Pursuant to the Leases, MirMA is required to make lease payments and to perform various other material obligations contained within the Leases.

4. On July 14-15, 2003, MirMA, in addition to seventy-four separate Mirant Corporation (“Mirant”) entities (collectively the “Debtors”), filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code (the “Code”). On July 15, 2003, this Court granted the Debtors’ motion requesting joint administration of the Debtors’ bankruptcy estates. The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to Sections 1107 and 1108 of the Code. The Leases have not been assumed or rejected by MirMA pursuant to Section 365(a) of the Code and the Debtors have filed a second motion to extend the time to assume or reject under Section 365(d)(4) of the Code (the “Motion”).³ A hearing to consider the

² The MirMA Landlords reserve all rights regarding the classification of the Leases as either real or personal property leases.

³ To the extent applicable, the MirMA Landlords oppose the relief requested in the Debtors’ Motion.

Debtors' Motion, which is opposed in part by the MirMA Landlords, is scheduled for March 24th at 12:00 PM.

5. MirMA and the Debtors have failed to provide vital financial and operational information on the Power Plants as required by the Leases.

6. The Leases (specifically including, but not limited to, Sections 5.1 and 5.3 of the Participation Agreements)⁴ provide that the MirMA Landlords shall periodically receive from MirMA certain vital financial and operational information (the "Information") pertaining to the Power Plants. While MirMA has provided some selective information to the MirMA Landlords,⁵ it has failed to provide important portions of the Information required by the Leases.

7. On February 10th and 11th, pursuant to the MirMA Landlords requests and consistent with their rights under the Leases, MirMA permitted the MirMA Landlords to participate in on-site tours of the Power Plants. The MirMA Landlords representatives at these tours included Stone & Webster, an engineering firm.

8. Prior to these tours, the MirMA Landlords had requested certain specific information regarding the Power Plants' operations, all in accordance with the Information they were entitled to receive under the Leases. The requested information was not provided prior to the tours.

⁴ True and correct copies of Sections 5.1 and 5.3 of Participation Agreements for both Morgantown and Dickerson are attached as Exhibit 1.

⁵ The Court has designated the MirMA Landlords as "quasi-committees." As such, with several noticeable exceptions, MirMA and the Debtors provide the MirMA Landlords with general financial information similar to that provided to the statutory committees.

9. During the tours, the MirMA Landlords again requested that the information be provided to them, explicitly requesting information specific to the Power Plants, and were promised by MirMA's representatives that they would receive the information after the site tours. The requested information was not provided to the MirMA landlords.

10. Upon not receiving the information shortly thereafter the site tours, the MirMA Landlords renewed their request for information regarding the Power Plants, this time memorializing the request in writing to the designated representative of Alix Partners. A copy of these requests is attached as Exhibit 2. Following the submission of these requests, the MirMA Landlords were assured that the information was both available and would be provided promptly.

11. The information requested in Exhibit 2 was not only reasonable, but necessary to the MirMA Landlords' evaluation of the Power Plants **which they own**. Moreover, the information is required to be provided to the MirMA Landlords pursuant to the Leases. Nevertheless, the information was not provided to the MirMA Landlords. By not providing this, and other portions of the Information, MirMA has failed to perform all of its obligations under the Leases.

III. ARGUMENT AND AUTHORITIES

A. 11 U.S.C. § 365(d)(3)

12. Section 365(d)(3) of the Code places a statutory obligation upon a bankruptcy debtor leasing nonresidential real property to “... *timely perform all the obligations of the debtor, except those specified in Section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected*”

13. The “exceptions list” referenced in Section 365(b)(2) (i.e., the list of obligations the debtor does *not* have to perform) is comprised of three well-known contractual ipso facto provisions (i.e., insolvency/financial condition, commencement of a bankruptcy case, and

appointment of a trustee or custodian to take possession) . . . and, newly added in 1994, sub-part (D): “the satisfaction of any **penalty rate or provision** relating to a **default** arising from any failure by the debtor to perform **nonmonetary obligations** under the executory contract or unexpired lease.” (emphasis added). None of the four exceptions in this list applies in the circumstances of this Motion for the reasons set forth below.

B. All Non-Monetary Obligations Under The Leases, Including Providing The MirMA Landlords With The Financial And Operational Information Called For Under The Leases, Must Be Performed

14. When interpreting the meaning of a statute, courts must first focus on the clear language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”)

15. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)) (internal citations omitted); *United States v. Ron Pair Enters.*, 489 U.S. 235, 240-41, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (“[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.”).

16. The plain language of Section 365(d)(3) unequivocally requires a debtor-in-possession to perform all obligations under its leases from the date of entry of the order of relief until the date that the lease is assumed or rejected, subject only to the possible applicability of the exceptions list in Section 365(b)(2). The statute does not otherwise allow any latitude as to

which obligations must be timely performed by the debtor. All must be performed, and performed timely, unless they fall within the exceptions list.

17. Moreover, “all obligations” is an expression that does not permit differentiation between *monetary* and *nonmonetary* obligations generally. Again, “all” means “all,” unless an obligation falls within the express exceptions list. *See Cukierman v. Uecker (In re Cukierman)*, 242 B.R. 486 (9th Cir.BAP 1999), *rev’d on other grounds*, 265 F.3d 846 (9th Cir. 2001) (citations omitted) (“Section 365(d)(3) requires the trustee to “perform *all* obligations” under the lease. By its own language, the Section is not limited to the obligation to pay rent.”); *SCS Company v. Peter J. Schmitt, Co. (In re Peter J. Schmitt)*, 1995 WL 1772010, at *2 (D.Del. 1995) (“[i]t does not appear that the bankruptcy court has the equitable discretion under § 365(d)(3) to disallow an obligation of the debtor arising under an unexpired lease after the order for relief until the lease is assumed or rejected”).

18. ***The “exceptions list.”*** The only “carve outs” permitted by Congress (to the otherwise absolute rule that all obligations of leases must be performed by debtors until the leases are assumed or rejected) are provided by the section’s cross-reference to Section 365(b)(2). The exceptions listed there will have equal applicability to Section 365(d)(3).

19. Since the first three sub-parts to Section 365(b)(2) are clearly inapplicable to the circumstances of the instant case and Motion, only the fourth exception, exception (D), is addressed here. The controversy arises in the arguments advanced by some that Congress’s choice of words creates an ambiguity. In short, they ask, does the word “penalty” modify only “rate” or does it modify both “rate” and “provision”?

20. The common sense approach to finding the answer to that question is to set aside Section 365(d)(3) for the moment and confine our inquiry to the meaning and construction of

Section 365(b)(2) in the context of the entire subsection 365(b). The correct grammatical construction of Section 365(b)(2) will, by cross-reference, apply equally to Section 365(d)(3).

21. Generally speaking, Code Section 365(b) explains the steps a debtor must take in order to assume an executory contract or unexpired lease of the debtor if there is an existing “default.” It provides that such a default must be cured, and the party compensated, etc. But not all defaults give rise to the curative and compensatory provisions of paragraph (1) of Section 365(b).

22. Paragraph 2 (the “exceptions list”) states, in part, that if the default in question is a *“breach of a provision relating to ... the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease”* . . . then the default need not be cured, nor the party compensated, etc., as described in paragraph (1) of Section 365(b).

23. Those who claim to see ambiguity here contend that the phrase has two possible meanings. The first would be (where penalty modifies both rate and provision) that the debtor’s failure to satisfy *penalty rates* or *penalty provisions* in a contract which arise in connection with *nonmonetary* obligations under the contract would not be the kind of default that need be cured and compensated for, etc. The second possible meaning, they argue, would be (where penalty modifies only the word rate) that the defaults exempted from the requirement for cure and compensation are (a) any failure by the debtor to satisfy a *penalty rate*, and/or (b) any failure by the debtor to satisfy *any* nonmonetary obligations under the contract.

24. In other words, they argue, if the default in question is “nonmonetary” (e.g., the debtor’s failure to ship conforming goods under a contract of sale, or the debtor’s refusal to provide repair services in an equipment maintenance contract . . . each a “nonmonetary” default),

then the contract or lease may be assumed without any curative or compensatory actions on the part of the debtor.

25. The first construction is only reasonable one. It makes common sense in the context of a collective proceeding in bankruptcy, saving the estate only from having to cure and compensate for certain *penalty* provisions in a contract which the debtor needs to assume. Conversely, the second interpretation reaches a broadly absurd result, allowing contract and lease assumptions without requiring any cure or compensation for nonmonetary defaults, even if they constitute the fundamental core and purpose of the agreement. The result of such an interpretation would create unthinkable chaos in the principles and structures of bankruptcy.

26. Any material nonmonetary breach must be cured and compensated by the debtor, as applicable and appropriate, before assumption will be allowed by the court. *See In re Claremont Acquisition Corp., Inc.*, 113 F.3d 1029, 1033 (9th Cir. 1997) (debtors are not relieved from the obligation to cure non-monetary defaults as a prerequisite to the assumption of a lease); *In re New Breed Realty Enterprises, Inc.*, 278 B.R. 314, 317, 321 (Bankr.E.D.N.Y. 2002) (same).

27. Resolving that Congress, in fact, created no ambiguity in § 365(b)(2)(D), and that the word penalty was intended to apply to both prepositional objects (rate and provision) equally, also resolves the question, under Section 365(d)(3), of which kinds of *performance obligations* in a lease are “carved out” of the general rule that “all the obligations of the debtor” must be performed. If the obligation in question is the satisfaction of some form of *penalty* arising from a nonmonetary contractual provision, then the satisfaction of that penalty need *not* be “performed” by the debtor under the general rule of Section 365(d)(3).

28. In the matter at bar, MirMA’s nonmonetary obligation to provide the Information to the MirMA Landlords is the obligation at issue. It has nothing to do with a penalty. It is a

practical need of landlords to understand the status and operations of their lessees. As such, the obligation falls squarely within the general rule of Section 365(d)(3), and the MirMA Landlords are well within their statutory and contractual rights to seek the Court's intervention to force MirMA to perform its own contractual duties by providing such Information to their landlords.

29. Supporting the interpretation of Section 365(d)(3) to require performance of nonmonetary obligations of the debtor is the policy stated by the Ninth Circuit's opinion in *Cukierman v. Uecker (In re Cukierman)*, 265 F.3d 846 (9th Cir. 2001), and the Ninth Circuit BAP's opinion in *Coleman Oil Company Inc., v. Circle K Corp. (In re Circle K Corp.)*, 190 B.R. 370 (BAP 9th Cir. 1996).

30. In *Cukierman*, the Ninth Circuit stated that “[i]nterpreting § 365(d)(3) as a bright-line rule, encompassing all obligations contained in a bargained-for agreement, ensures prompt performance of lease obligations....The simplicity of this rule prevents delays and disputes caused by uncertainty over whether the provision applies to any given lease obligation.” 265 F.3d at 851.

31. The Ninth Circuit BAP echoed this policy in *Circle K* when it stated that “[t]he purpose behind § 365 is to balance the state law contract right of the creditor to receive the benefit of his bargain with the federal law equitable right of the debtor to have an opportunity to reorganize. This is accomplished by forcing the debtor to abide by the contract provisions during pendency of the bankruptcy and cure any prepetition defaults upon assumption while prohibiting the creditor from enforcing any prepetition default remedies.” 190 B.R. at 376 (citations omitted).

32. Bolstering the rejection of three cases interpreting Section 365(d)(3) to *exclude* performance of non-monetary obligations⁶ is the opinion in *In re Exchange Resources, Inc.*, where the court stated the following:

The courts that reject such a straightforward application of the statute often do so with an undercurrent of horror over the potential damage to the process of reorganization.... These courts do generally give lip service to the main mandate of § 365(d)(3): the reorganizing debtor's clear duty to live up to its monetary and nonmonetary covenants under an unexpired lease, pending its acceptance or rejection, and timely so. Their analysis falls short, however.... If the debtor does not default in a substantive lease covenant, its landlord has no cause to complain, and no basis for the commencement of proceedings under § 365(d)(3). This makes the accrual of such obligations wholly avoidable--by a simple compliance with § 365(d)(3). The imposition of such obligations, then, is a strong incentive for such compliance.

215 B.R. 366, 370 (Bankr.D.Minn. 1997). Thus, the opinions in *Cukierman*, *Circle K*, and *Exchange Resources* reinforce the plain language interpretation that, pursuant to Section 365(d)(3), MirMA and the Debtors must perform all their obligations under the Leases, including their non-monetary obligation to provide the Information to the MirMA Landlords, up and until the time the Leases are assumed or rejected.

IV. CONCLUSION

33. Pursuant to the plain language of Section 365(d)(3) and case law interpreting Section 365(d)(3), MirMA and the Debtors are required to perform all obligations under the Leases, including all nonmonetary obligations, during the time MirMA and the Debtors are determining whether to assume or reject. Therefore, MirMA and the Debtors must comply and

⁶ See *In re Ernst Home Center, Inc.*, 209 B.R. 955 (Bankr.W.D.Wash. 1997); *In re R.H. Macy & Co., Inc.*, 152 B.R. 869 (Bankr.S.D.N.Y. 1993); *In re Food City, Inc.*, 95 B.R. 451 (Bankr.W.D.Tex. 1988). However, these cases are distinguishable in that the non-monetary obligations found to be non-enforceable were "going dark" clauses, which required the debtors to remain open for business. 209 B.R. at 961; 170 B.R. at 72-77; 95 B.R. at 454-46. The *Macy* court opined that enforcing an obligation that forces the debtor to maintain operations would be inconsistent with the duty to maximize estate assets, which might require the debtor to shut down certain operations. 170 B.R. at 74. Here, no similar policy is implicated as MirMA and the Debtors are only called upon to perform the non-monetary obligations during the period of time prior to assuming or rejecting the Leases. Thus, if MirMA rejects the Leases, it will not be forced to maintain operations when they should be shut down to preserve or maximize the estate's assets. Conversely, if MirMA assumes the Leases, then it will have decided that performing

perform by providing the MirMA Landlords with the financial and operational Information called for in the Leases.

Date: March 22, 2004.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

A conference was held prior to the filing of the Motion with Robin Phelan, counsel for the Debtors. The Debtors could not agree to the relief requested and to that extent, the motion is opposed.

/s/ Kristian W. Gluck

Kristian W. Gluck

these under the Leases preserves and maximizes the assets of the estate.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served, by United States first class mail, postage prepaid, on March 22, 2004, upon the Official Master Service List as attached hereto and upon the following parties by facsimile:

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Section 4.28 Title Policy Assignment. SEMA shall have assigned, pursuant to an assignment and assumption agreement reasonably satisfactory to the Owner Participant, to the Owner Participant SEMA's rights to the proceeds of SEMA's title insurance policy in an amount equal to the Equity Investment.

SECTION V AFFIRMATIVE COVENANTS OF SEMA

SEMA covenants and agrees that it will perform the obligations set forth in this Section 5.

Section 5.1 Financial Information; Other Information. SEMA will furnish to the Pass Through Trustee the information required to be delivered pursuant to Rule 144A(d)(4) under the Securities Act. In addition, SEMA will provide to the Owner Participant, Lease Indenture Trustee, each Rating Agency and each Pass Through Trustee, and to prospective purchasers of Certificates, the following:

(i) audited annual financial statements of SEMA and its Subsidiaries (excluding SE Potomac River and SE Peaker) on a consolidated basis within 120 days following the end of each fiscal year of SEMA and unaudited quarterly financial statements of SEMA and its Subsidiaries on a consolidated basis within 60 days following the end of each of the first three Fiscal Quarters of SEMA;

(ii) unaudited annual financial statements of SE Potomac River and SE Peaker on a consolidated basis within 120 days following the end of each fiscal year of SE Potomac River and SE Peaker and unaudited quarterly financial statements of SE Potomac River and SE Peaker on a consolidated basis within 60 days following the end of each of the first three Fiscal Quarters of SE Potomac River and SE Peaker;

(iii) together with the financial statements delivered in clause (i), an officer's certificate as to the absence or existence, in each case to the best of such officer's knowledge of any Significant Lease Default or any Lease Event of Default, Lease Indenture Event of Default or Pass Through Event of Default; and

(iv) prompt notice of any litigation or claim against or concerning SEMA, any Designated Subsidiary or the Facility or the Facility Site which could reasonably be expected to have a Material Adverse Effect.

The Pass Through Trustee will, upon request (which may include a request to receive such information for subsequent financial reporting periods on an ongoing basis), furnish all such information directly to Certificateholders and to prospective purchasers of Certificates designated by the Certificateholders.

MORGANTOWN PARTICIPATION AGREEMENT (L2)

Section 5.2 Notice of Events of Default. SEMA will advise the Owner Participant, the Equity Investor, the OP Guarantor, the Pass Through Trustee and the Lease Indenture Trustee promptly in writing of the occurrence of any Significant Lease Default, Lease Event of Default or Pass Through Event of Default and, as soon as practicable thereafter, will provide a description thereof and a statement as to the actions the Facility Lessee proposes to take with respect thereto.

Section 5.3 Information Concerning the Facility. The Facility Lessee shall, to the extent reasonably requested, deliver to the Owner Lessor, the Owner Participant and their respective authorized representatives, information from time to time with respect to the condition, use, operation and maintenance of the Facility, and such other financial or operating information which is routinely made available to creditors of the Facility Lessee, and other matters with regard to the Facility or the Retained Assets or the generation, transmission or sale of power therefrom, including any information to support the calculations set forth in the certificate delivered pursuant to Section 6.8(D), as may be reasonably requested by such Person; *provided*, that, except for delivery of quarterly and annual financial statements required pursuant to Section 5.1(i) and (ii) above and the related certificate with respect to defaults described in Section 5.1(iii), the Facility Lessee reserves the right not to provide to any transferee Owner Participant which is not an Affiliate of the Owner Participant any information that is not otherwise publicly available, if the Facility Lessee reasonably believes in its good faith judgment that such transferee Owner Participant is a Competitor or is an Affiliate of a Competitor; *provided, further*, that the Facility Lessee shall have no obligation under this Section 5.3 to the Owner Lessor, the Owner Participant or any of their representatives unless and until such Person has executed a confidentiality agreement in form and substance satisfactory to the Facility Lessee.

Section 5.4 Maintenance of Existence and Properties. Except as permitted under Section 6.1, SEMA will, and will cause each Designated Subsidiary to, (i) do or cause to be done all things necessary to preserve, renew and keep in full force and effect the legal existence of SEMA and the Designated Subsidiaries; (ii) do or cause to be done all things reasonably necessary to preserve, renew and keep in full force and effect the rights, Governmental Approvals, and franchises material to the conduct of the business of SEMA and the Designated Subsidiaries; (iii) keep and maintain all property material to the conduct of business of SEMA and the Designated Subsidiaries in good working order and condition, *force majeure* excepted and (iv) operate and maintain the property and assets of SEMA and the Designated Subsidiaries (other than the Facility, it being acknowledged that the maintenance obligations in respect thereof are governed by Section 7 of the Facility Lease) in good condition, repair and working order and in any event in all material respects (a) in compliance with all Requirements of Law of any Governmental Authority having jurisdiction, including without limitation, all Environmental Laws, unless such noncompliance could not reasonably be expected to result in a Material Adverse Effect, subject to *force majeure*, and (b) in accordance with Prudent Industry Practice. The foregoing shall not prohibit any merger consolidation, liquidation, dissolution or other transaction permitted under the Operative Documents.

MORGANTOWN PARTICIPATION AGREEMENT (L2)

Section 4.28 Title Policy Assignment. SEMA shall have assigned, pursuant to an assignment and assumption agreement reasonably satisfactory to the Owner Participant, to the Owner Participant SEMA's rights to the proceeds of SEMA's title insurance policy in an amount equal to the Equity Investment.

SECTION V AFFIRMATIVE COVENANTS OF SEMA

SEMA covenants and agrees that it will perform the obligations set forth in this Section 5.

Section 5.1 Financial Information; Other Information. SEMA will furnish to the Pass Through Trustee the information required to be delivered pursuant to Rule 144A(d)(4) under the Securities Act. In addition, SEMA will provide to the Owner Participant, Lease Indenture Trustee, each Rating Agency and each Pass Through Trustee, and to prospective purchasers of Certificates, the following:

- (i) audited annual financial statements of SEMA and its Subsidiaries (excluding SE Potomac River and SE Peaker) on a consolidated basis within 120 days following the end of each fiscal year of SEMA and unaudited quarterly financial statements of SEMA and its Subsidiaries on a consolidated basis within 60 days following the end of each of the first three Fiscal Quarters of SEMA;
- (ii) unaudited annual financial statements of SE Potomac River and SE Peaker on a consolidated basis within 120 days following the end of each fiscal year of SE Potomac River and SE Peaker and unaudited quarterly financial statements of SE Potomac River and SE Peaker on a consolidated basis within 60 days following the end of each of the first three Fiscal Quarters of SE Potomac River and SE Peaker;
- (iii) together with the financial statements delivered in clause (i), an officer's certificate as to the absence or existence, in each case to the best of such officer's knowledge of any Significant Lease Default or any Lease Event of Default, Lease Indenture Event of Default or Pass Through Event of Default; and
- (iv) prompt notice of any litigation or claim against or concerning SEMA, any Designated Subsidiary or the Facility or the Facility Site which could reasonably be expected to have a Material Adverse Effect.

The Pass Through Trustee will, upon request (which may include a request to receive such information for subsequent financial reporting periods on an ongoing basis), furnish all such information directly to Certificateholders and to prospective purchasers of Certificates designated by the Certificateholders.

DICKERSON PARTICIPATION AGREEMENT (L1)

Section 5.2 Notice of Events of Default. SEMA will advise the Owner Participant, the Equity Investor, the OP Guarantor, the Pass Through Trustee and the Lease Indenture Trustee promptly in writing of the occurrence of any Significant Lease Default, Lease Event of Default or Pass Through Event of Default and, as soon as practicable thereafter, will provide a description thereof and a statement as to the actions the Facility Lessee proposes to take with respect thereto.

Section 5.3 Information Concerning the Facility. The Facility Lessee shall, to the extent reasonably requested, deliver to the Owner Lessor, the Owner Participant and their respective authorized representatives, information from time to time with respect to the condition, use, operation and maintenance of the Facility, and such other financial or operating information which is routinely made available to creditors of the Facility Lessee, and other matters with regard to the Facility or the Retained Assets or the generation, transmission or sale of power therefrom, including any information to support the calculations set forth in the certificate delivered pursuant to Section 6.8(D), as may be reasonably requested by such Person; *provided*, that, except for delivery of quarterly and annual financial statements required pursuant to Section 5.1(i) and (ii) above and the related certificate with respect to defaults described in Section 5.1(iii), the Facility Lessee reserves the right not to provide to any transferee Owner Participant which is not an Affiliate of the Owner Participant any information that is not otherwise publicly available, if the Facility Lessee reasonably believes in its good faith judgment that such transferee Owner Participant is a Competitor or is an Affiliate of a Competitor; *provided, further*, that the Facility Lessee shall have no obligation under this Section 5.3 to the Owner Lessor, the Owner Participant or any of their representatives unless and until such Person has executed a confidentiality agreement in form and substance satisfactory to the Facility Lessee.

Section 5.4 Maintenance of Existence and Properties. Except as permitted under Section 6.1, SEMA will, and will cause each Designated Subsidiary to, (i) do or cause to be done all things necessary to preserve, renew and keep in full force and effect the legal existence of SEMA and the Designated Subsidiaries; (ii) do or cause to be done all things reasonably necessary to preserve, renew and keep in full force and effect the rights, Governmental Approvals, and franchises material to the conduct of the business of SEMA and the Designated Subsidiaries; (iii) keep and maintain all property material to the conduct of business of SEMA and the Designated Subsidiaries in good working order and condition, *force majeure* excepted and (iv) operate and maintain the property and assets of SEMA and the Designated Subsidiaries (other than the Facility, it being acknowledged that the maintenance obligations in respect thereof are governed by Section 7 of the Facility Lease) in good condition, repair and working order and in any event in all material respects (a) in compliance with all Requirements of Law of any Governmental Authority having jurisdiction, including without limitation, all Environmental Laws, unless such noncompliance could not reasonably be expected to result in a Material Adverse Effect, subject to *force majeure*, and (b) in accordance with Prudent Industry Practice. The foregoing shall not prohibit any merger consolidation, liquidation, dissolution or other transaction permitted under the Operative Documents.

DICKERSON PARTICIPATION AGREEMENT (L1)

DOCUMENT REQUEST LIST

Operating Reports

Monthly Operating/Production Reports since Mirant acquired the facilities that provide information on the production, reliability, O&M costs, fuel consumptions and costs, heat rate, outage information (scheduled, planned and forced), safety incidents, and any other operating issues.

Annual O&M Plan

Annual O&M Plan including O&M and capital expense budgets and year end actuals since Mirant acquired the facilities.

Staffing plan showing current and approved staffing by primary responsibility (e.g., shift supervisor, control room operator, mechanic, I&C tech, etc.) plus staffing levels by plant for 2000, 2001, 2002, and 2003. Include organization chart for each plant as well as for the service center. As discussed in the meetings, we also would like to understand the staff retirements anticipated by Mirant at the plants (by year if possible), and the measures planned to recruit and train replacements. We would like to see an example(s) of the Incentive Compensation Plan.

Current spare parts inventory plus spare inventory values for 2000, 2001, 2002, and 2003.

Annual actual budget performance for 2000, 2001, 2002, and 2003 by line item per the attached file from RW Beck. Actual O&M details for 2000 through 2003 in a format similar to that provided in the attached file from S&W.

Actual capital expenses for 2000 through 2003 by major project, as well as the 5 or 10 year capital expense forecast.

Outages

Planned outage schedule for the next five years. Scope of work for outages conducted in 2000, 2001, 2002, and 2004. Scope of work for outages planned in 2004. Date of last major and minor boiler outage for each unit, expected year of next major and minor boiler outage for each unit, date of last major steam turbine generator outage (by HP/IP/LP is outages performed at different times for each section), and expected year of next steam turbine generator outage.

Fuel Plan/Contracts

Current fuel plan including source of fuel and fuel supply costs, transportation modes and costs, contracting strategy and approach, fuel specifications, and any SO₂ allowances associated with the fuel purchase.

Current fuel supply and transportation contracts.

Fuel specification for each facility plus typical fuel specification for current fuels burned.

Plant Performance

Original and Periodic Performance Tests

Heat Balances and Performance Curves

Condition Assessment

Recent Equipment Outage Reports for major components (prepared internally and/or vendor/contractor)

Inspection reports and recent condition assessment reports

Historic boiler tube failure data for 2000 through 2003 and forced outage rates during this time period associated with boiler tube failures.

Boiler water and feedwater chemistry records.

Date of last boiler chemical cleaning by unit and the expected year for the next boiler chemical cleanings.

Incident logs for Morgantown in 2003 (we received the Dickerson 2003 incident logs during the site visit).

As discussed in our meetings, we would like an update of the information contained in the "Equipment Condition Report" prepared by PEPCO as part of the sale of the facilities to include major equipment repairs/replacements/upgrades since Mirant acquired the facilities.

Technical Descriptions/Drawings:

Dickerson - Short technical description of the baghouse and the SOFA retrofits plus a description of the Foster Wheeler burner retrofits and the guaranteed and performance test summaries of the low NOx burners and SOFA. Technical information on the ESPs (SCA, number of fields, etc.)

Morgantown - Technical information on the ESPs (SCA, number of fields, etc.)

Plot plan

Boiler cross section

Steam turbine cross section

One line electrical and electrical interconnection

Additional Operation Questions:

Does Mirant have spare turbine blades for either the Morgantown or Dickerson steam turbine (HP, IP, and LP)?

What is the estimated time and cost of fabrication for a complete set of blades for one unit at both Morgantown and Dickerson?

In the case of a catastrophic steam turbine blade failure on a given unit, what is the deductible time period and dollar amount for the BI insurance?

By unit for Morgantown and Dickerson, what is the time frame for scheduled steam turbine blade replacement?

Environmental

Environmental Site Assessment Reports

Permits

Notices of Violations

Consent Orders

Part 316B Studies

Multi-Pollutant Compliance Plan; specifically identify potential retrofits at each plant included in the Plan with associated costs for each.

Ash Disposal Plan including timing for development of new lined areas in the ash storage areas, permitted capacity and remaining capacity, quantity and type of ash reused and market for reused ash.

Accounting of SO₂ allowances for years 2001, 2002 and 2003 including allocated allowances, emitted tons of SO₂, emission rates in lb/MMBtu comparable to what was passed out at the meetings for NO_x emissions.

Purchases/Sales/Transfers of SO₂ and NO_x allowances for 2001, 2002, and 2003.

Confirm that allowance costs/revenues are included in the production costs described at our meetings. If so, identify magnitude of costs/revenues included

If engineering planning cost estimates were made for adding dry scrubbers or wet scrubbers on the Dickerson Plant, provide such estimates

Revenues

Electricity
Capacity
Additional Revenue (Nox credits, ash sales)
Subtotal

Operating Costs

Fuel Cost
Supplemental Fuel Cost
Ash Disposal Cost
Nox Allowance Expense
SO2 Allowance Expense
Chemicals
Other variable expenses

O&M Expense

Labor
Operator Fee and Bonus
Operation Expense (transmission and
purchased power)
Power Block Maintenance Expense
BOP Maintenance Expenses
Major Maintenance Utilization
Major Maintenance Deposit
Other Operating Expense
Plant G&A Expense
Contingency
Subtotal

Indirect Expenses

Financing Expense
Insurance
Property and Other Tax
Owner G&A/fees

TYPICAL O&M DETAILS

Generation

Unit 1
Unit 2
Unit 3

Fuel

Coal	tons
Coal	MMBtu
Coal	\$000
Other Fuel	MMBtu
Other Fuel	\$000
SO2 Allowances Purchased (Sold)	tons
SO2 Allowances Cost	\$000
NOx Allowances Purchased (Sold)	tons
NOx Allowances Cost	\$000

Non-Fuel O&M

Labor (including OT and Benefits)	\$000
Fuel Handling	\$000
Routine Plant O&M	\$000
Utilities	\$000
Variable - Consumables	\$000
Variable - Ash	\$000
O&M Projects	\$000
Outage - Contractor	\$000
Outage - Service Center	\$000
Transmission/Interconnect Charges	\$000
Plant G&A	\$000

Indirect Expenses

Insurance	\$000
Property Taxes	\$000
Corporate Direct Support	\$000
Corporate Allocations	\$000