

810  
3

LAW OFFICES

ALVORD AND ALVORD

200 WORLD CENTER BUILDING

918 SIXTEENTH STREET, N.W.

WASHINGTON, D.C.

20006-2973

RECORDATION NO. 1 5361/B  
FIRM 1425

OF COUNSEL  
JESS LARSON  
JOHN L. INGOLDSBY  
URBAN A. LESTER

CABLE ADDRESS  
"ALVORD"

TELEPHONE  
AREA CODE 202  
393-2266

TELEX  
440367 A AND A

ELIAS C. ALVORD (1942)  
ELLSWORTH C. ALVORD (1964)

ROBERT W. ALVORD\*  
CARL C. DAVIS\*  
CHARLES T. KAPPLER  
JOHN H. DOYLE\*  
GEORGE JOHN KETO\*  
MILTON C. GRACE\*  
JAMES C. MARTIN, JR.\*

\* NOT A MEMBER OF D.C. BAR  
\* ALSO ADMITTED IN NEW YORK  
\* ALSO ADMITTED IN OHIO  
\* ALSO ADMITTED IN MARYLAND

NOV 2 1987 - 10 55 AM

INTERSTATE COMMERCE COMMISSION

November 2, 1987

7-306A013

Ms. Noreta R. McGee  
Secretary  
Interstate Commerce Commission  
Washington, D.C.

No. \_\_\_\_\_  
Date NOV 2 1987  
Fee \$ 10.00  
ICC Washington, D.C.

NOV 2 10 47 AM '87  
MOTOR OPERATING UNIT  
THE SECRETARY  
ICC OFFICE OF

Dear Ms. McGee:

Enclosed for recordation pursuant to the provisions of 49 U.S.C. §11303(a) are the original and one copy of an Assignment and Security Agreement dated as of October 1, 1987, a primary document as defined in the Commission's Rules for the Recordation of Documents.

The names and addresses of the parties to the enclosed document are:

Debtor: Wheelabrator Coal Services Company  
Liberty Lane  
Hampton, New Hampshire 03842

Secured Party: The Connecticut Bank and Trust Company,  
National Association  
One Constitution Plaza  
Hartford, Connecticut 06115

A description of the railroad equipment covered by the enclosed document is:

Three hundred ninety (390) 4,240 cubic foot capacity 100-ton gondola cars manufactured by ACF Industries bearing reporting mark RTPX and numbers 11001 through 11004 and 11100 through 11485, each both inclusive.

*CT. Kappler*  
*Charles T. Kappler*

Ms. Noreta R. McGee  
Secretary  
Interstate Commerce Commission  
November 2, 1987  
Page Two

Also enclosed is a check in the amount of \$10 payable to the order of the Interstate Commerce Commission covering the required recordation fee.

Kindly return a stamped copy of the enclosed document to Charles T. Kappler, Esq., Alvord and Alvord, 918 Sixteenth Street, N.W., Washington, D.C. 20006.

A short summary of the enclosed primary document to appear in the Commission's Index is:

Assignment and Security Agreement dated as of October 1, 1987 from Wheelabrator Coal Services Company to The Connecticut Bank and Trust Company, National Association, Trustee, covering 390 gondola cars marked and numbered RTPX 11001 - 11004 and 11100 - 11485.

Very truly yours,

  
Charles T. Kappler

Enclosures

1 5361, B

RECORDATION NO. \_\_\_\_\_ FILED 1429

NOV 2 1987 - 10 55 AM

INTERSTATE COMMERCE COMMISSION

---

---

**ASSIGNMENT AND SECURITY AGREEMENT**

Dated as of October 1, 1987

FROM

**WHEELABRATOR COAL SERVICES COMPANY**

TO

**THE CONNECTICUT BANK AND TRUST COMPANY,  
NATIONAL ASSOCIATION, TRUSTEE**

---

---

## TABLE OF CONTENTS

Section	Heading	Page
PARTIES .....		1
RECITALS .....		1
GRANTING CLAUSES .....		3
HABENDUM .....		4
1.	GENERAL COVENANTS AND WARRANTIES. ....	6
1.1.	Representations of the Company .....	6
1.2.	Ownership of Collateral .....	6
1.3.	Legal Existence, etc. ....	6
1.4.	Business and Property of the Company; No Subsidiaries. ....	6
1.5.	Maintenance of Lien; Recording; Opinions of Counsel. ....	7
1.6.	Further Assurances; After-Acquired Property. ....	7
1.7.	Maintenance of Property. ....	8
1.8.	Insurance. ....	8
1.9.	Advances. ....	9
1.10.	Payment of Taxes and Other Charges; Compliance with Laws. ....	9
1.11.	Limitation on Liens. ....	10
1.12.	Sale of Assets or Merger. ....	11
1.13.	Permitted Indebtedness. ....	11
1.14.	Transactions with Affiliates. ....	12
1.15.	Financial and Business Information. ....	12
2.	ENJOYMENT, USE AND RELEASE OF PROPERTY. ....	14
2.1.	Company's Right of Enjoyment and Control .....	14
2.2.	Actions With Respect to Collateral .....	14
3.	DEFAULTS AND REMEDIES THEREFOR .....	15
3.1.	Events of Default .....	15
3.2.	Remedies .....	15
3.3.	Application of Proceeds .....	16
3.4.	Waiver of Extension, Appraisalment, Stay Laws .....	17
3.5.	Effect of Discontinuance of Proceedings .....	17
3.6.	Delay or Omission Not a Waiver .....	18
3.7.	Remedies Subject to Provisions of Law .....	18

4.	AMENDMENTS; WAIVERS .....	18
4.1.	Amendments and Waivers Without Holders' Consent .....	18
4.2.	Amendments and Waivers With Holders' Consent .....	18
4.3.	Notice of Amendment or Waiver .....	19
5.	MISCELLANEOUS .....	19
5.1.	Non-Recourse Nature of the Company's Obligations .....	19
5.2.	Successors and Assigns .....	20
5.3.	No Assumption of Duties .....	20
5.4.	Severability .....	20
5.5.	Addresses for Notices and Demands .....	20
5.6.	Headings and Table of Contents .....	20
5.7.	Release of Agreement and Collateral .....	21
5.8.	Limitation on Interest .....	21
5.9.	Subrogation .....	21
5.10.	Subordination to Service Agreement, Conditional Service Agreement .....	21
5.11.	Governing Law .....	22
5.12.	Counterparts .....	22

SIGNATURES .....	22
------------------	----

**ATTACHMENTS TO AGREEMENT:**

- Annex 1 - Definitions
- Annex 2 - Additional Liens

THIS ASSIGNMENT AND SECURITY AGREEMENT dated as of October 1, 1987 (this "Agreement") from WHEELABRATOR COAL SERVICES COMPANY, a Delaware corporation (the "Company"), as assignor and debtor, having its principal office at Liberty Lane, Hampton, New Hampshire 03842, to THE CONNECTICUT BANK AND TRUST COMPANY, NATIONAL ASSOCIATION, TRUSTEE, a national banking association (the "Secured Party"), as assignee and secured party, and as Trustee under the hereinafter-described Indenture, whose post office address is One Constitution Plaza, Hartford, Connecticut 06115.

R E C I T A L S:

A. The Company is the lessee under that certain Indenture of Lease dated as of October 1, 1987 (the "Facility Lease") from Wheelabrator Energy Leasing Company, a Delaware corporation ("WELCO"), pursuant to which the Company has leased from WELCO the Facility, as defined in Annex 1 hereto.

B. WELCO acquired the Property which is the subject of the Lease from the Company in 1981.

C. In order to acquire the funds required to purchase the property which is the subject of the Lease, WELCO borrowed from certain institutional lenders, on an interim basis, approximately \$26,250,000 (the "Interim Financing"). In order to facilitate the Interim Financing, the Company pledged as security for said borrowing, among other things, all right, title and interest of the Company in and to the Service Agreement and the Conditional Service Agreement, each as defined in Annex 1 hereto.

D. In the event that WELCO is unable to refinance the Interim Financing with permanent financing prior to the expiration of the Interim Financing, the non-payment of all amounts due with respect to the Interim Financing would permit the lenders thereunder to prosecute foreclosure proceedings against the property which is the subject of the Facility Lease and terminate the Facility Lease.

E. The Company is desirous that the Facility Lease not be terminated prior to the express termination date thereof by virtue of the failure of WELCO to obtain permanent financing to replace the Interim Financing, it being necessary that the Facility Lease be in effect in order for the Company to perform its obligations under the above-referenced Service Agreement and Conditional Service Agreement.

F. In order to provide the permanent financing referred to above, Connecticut General Life Insurance Company, Horace Mann Life Insurance Company and Aetna Insurance Company (collectively, the "Purchasers") and WELCO have executed and delivered the separate and several Note Purchase Agreements, each dated as of October 1, 1987 (the "Note Purchase Agreements"), providing for the commitment of the Purchasers to purchase the 9.75% Secured Notes, due August 15, 1999 (the "Notes") of WELCO in an aggregate principal amount not exceeding \$24,500,000, said Notes to be dated the date of issue, to be expressed to bear interest from the date of issue until maturity at the rate of 9.75% per annum and at the rate of 11.75% per annum (or such lesser rate as may be the maximum not prohibited by applicable law) on any overdue principal and premium and (to the extent permitted by law) on any overdue

interest, to be expressed to mature in 140 equal monthly installments, including both principal and interest, payable on the fifteenth day of each calendar month, commencing December 15, 1987, to and including July 15, 1999, followed by a final installment payable on August 15, 1999, in an amount equal to the entire principal and interest remaining unpaid thereunder as of said date, and to be otherwise substantially as set forth in Exhibit A to the Trust Indenture hereinafter referred to. An installment of interest accrued on the Notes from the date of issuance thereof shall be due and payable on November 15, 1987.

G. To the extent that this Agreement is a Security Agreement and Financing Statement under the Uniform Commercial Code of the State of Texas and in compliance therewith the following information is set forth:

The names and addresses of the debtor and the secured party for purposes of the Uniform Commercial Code are:

Debtor: Wheelabrator Coal Services Company  
Liberty Lane  
Hampton, New Hampshire 03842  
Attention: Chief Financial Officer

Secured Party: The Connecticut Bank and Trust Company,  
National Association, Trustee  
One Constitution Plaza  
Hartford, Connecticut 06115  
Attention: Corporate Trust Department

H. The Notes are to be issued under and equally and ratably secured as provided in the Trust Indenture dated as of October 1, 1987 (the "*Indenture*") from WELCO to the Secured Party.

I. The Notes and all principal thereof, prepayment premium, if any, and interest thereon, and all additional amounts and other sums at any time due and owing from and required to be paid by WELCO or the Company under the terms of the Notes, the Note Purchase Agreements, the Indenture, this Agreement or any other mortgage or deed of trust executed and delivered by WELCO or the Company pursuant to the Note Purchase Agreements and the Indenture are hereinafter sometimes referred to as the "*Subject Indebtedness*".

J. The Company is duly authorized under all applicable provisions of law and its Certificate of Incorporation and By-laws to execute and deliver this Agreement and to mortgage, convey and assign the Collateral to the Secured Party as security for the Notes, and all corporate action and all consents, approvals and other authorizations and all other acts and things necessary to make this Agreement the valid, binding and legal instrument for the security of the Notes and all other Subject Indebtedness have been done and performed.

K. Unless otherwise defined herein or the context hereof shall otherwise require, the capitalized terms used in this Agreement shall have the respective meanings specified in Annex 1 hereto.

NOW, THEREFORE, THIS ASSIGNMENT AND SECURITY AGREEMENT WITNESSETH: That the Company, in consideration of the premises, the purchase and acceptance of the Notes by the Purchasers and of the sum of Ten Dollars received by the Company from the Secured Party and other good and valuable consideration, receipt whereof is hereby acknowledged, and in order to provide a means of payment of and to secure the payment of the principal of, premium, if any, and interest on the Notes, and to provide a means of payment of and to secure the payment of all other Subject Indebtedness and the performance and observance of all the covenants, agreements and conditions contained in the Notes, this Agreement, the Note Purchase Agreements and the Indenture does hereby warrant, mortgage, pledge, assign, bargain, hypothecate, convey, grant a security interest in, transfer and set over unto the Secured Party and its successors in trust and assigns, all and singular the following described properties, rights, interest and privileges and all of the Company's estate, right, title and interest therein, thereto and thereunder (all of which properties hereby assigned and pledged or intended so to be are hereinafter collectively referred to as the "Collateral"):

#### GRANTING CLAUSE FIRST

All right, title, interest, claims and demands (but not any of the duties, responsibilities and liabilities) of the Company as Operator in, to and under the Service Agreement and the Conditional Service Agreement, together with all rights, powers, privileges, options and other benefits of the Company under any of the foregoing, including, without limitation, the immediate and continuing right to receive and collect all service fee payments, rent, income, revenues, issues, profits, insurance proceeds, condemnation awards and other payments, tenders and security now or hereafter payable to or receivable by the Company under the Service Agreement and the Conditional Service Agreement pursuant thereto (provided that, so long as no Event of Default shall have occurred and be continuing, all service fee payments due under the Service Agreement or the Conditional Service Agreement as Operating and Maintenance Costs (but without giving effect to the credit provided for in the last sentence of Section 6(a) of the Service Agreement and the Conditional Service Agreement) shall not be required to be paid to the Beneficiary), the right to make all waivers and agreements, to give and receive duplicate copies of all notices and other instruments or communications, to take such action upon the occurrence of a default thereunder, including the commencement, conduct and consummation of legal, administrative or other proceedings, as shall be permitted thereby or by law, and to do any and all other things which the Company is or may be entitled to do thereunder. NOTWITHSTANDING ANY PROVISION OF THIS AGREEMENT OR ANY OF THE OTHER OPERATIVE DOCUMENTS WHICH MIGHT BE CONSTRUED TO THE CONTRARY, THE FOREGOING ASSIGNMENT OF SERVICE FEE PAYMENTS UNDER THE SERVICE AGREEMENT AND THE CONDITIONAL SERVICE AGREEMENT IS INTENDED TO BE A PRESENT, ABSOLUTE ASSIGNMENT; SUCH ASSIGNMENT IS NOT AN ASSIGNMENT FOR SECURITY PURPOSES ONLY. EFFECTIVE IMMEDIATELY, SUCH SERVICE FEE PAYMENTS SHALL, EXCEPT AS PROVIDED ABOVE, BE PAID BY THE PAYOR UNDER THE APPLICABLE SUCH AGREEMENT

DIRECTLY TO THE SECURED PARTY TO BE APPLIED AGAINST THE SUBJECT INDEBTEDNESS.

### GRANTING CLAUSE SECOND

All right, title, interest, claims and demands (but not any of the duties, responsibilities and liabilities) of;

- (1) the lessee under the Facility Lease;
- (2) the lessee under the Railroad Equipment Lease; and
- (3) the Company under any and all other contracts and agreements relating to the Facility or any rights or interests therein to which the Company is now or may hereafter be a party;

(The Service Agreement, the Conditional Service Agreement, the Facility Lease, the Railroad Equipment Lease and each of the contracts and agreements described in clause (3) of this Granting Clause Second being hereinafter collectively referred to as the "Assigned Agreements"), together with all rights, powers, privileges, licenses, easements, options and other benefits of the Company under each thereof, including, without limitation, the right to make all waivers and agreements, to give and receive duplicate copies of all notices and other instruments or communications, to take such action upon the occurrence of a default thereunder, including the commencement, conduct and consummation of legal, administrative or other proceedings, as shall be permitted thereby or by law, and to do any and all other things which the Company is or may be entitled to do thereunder.

### GRANTING CLAUSE THIRD

Any other moneys and securities held by the Secured Party under this Agreement.

### GRANTING CLAUSE FOURTH

All proceeds of any of the foregoing.

### GRANTING CLAUSE FIFTH

Any and all other property of every kind and nature from time to time hereafter, by delivery or by writing of any kind, conveyed, pledged, assigned or transferred as and for additional security hereunder by the Company or by anyone in its behalf to the Secured Party which is hereby authorized to receive the same at any time as additional security hereunder.

SUBJECT, HOWEVER, to Permitted Encumbrances;

TO HAVE AND TO HOLD the Collateral unto the Secured Party, and its successors in trust and assigns forever for the purpose of providing a means of payment of and securing performance of each agreement, covenant and warranty of the Company contained herein and payment of the Subject Indebtedness. It is understood and agreed that this Agreement is to provide a means of payment of and to secure the payment of, including, without limitation, all sums due with respect to those Notes of even date herewith and those to be executed in the future as specified in the Note Purchase Agreements and/or the Indenture.

PROVIDED, NEVERTHELESS, and these presents are upon the express condition that (a) if the Company and/or WELCO performs the covenants herein contained and pays to the Secured Party, its successors in trust and assigns, the full amount of the Subject Indebtedness, the Secured Party shall release this Agreement at the Company's expense, and shall execute and deliver to the Company any releases, reconveyances or other instruments reasonably required by the Company to evidence of record such releases, the entirety of the estate, together with all right and interest of the Secured Party in the property hereby conveyed, shall cease and this Agreement shall become null and void, but otherwise to remain in full force and effect and (b) the Secured Party shall not exercise any of the remedies provided in Section 3.2 hereof, and shall not exercise any of its rights under any of the Assigned Agreements in such a manner as to interfere with the conduct of the business of any of the parties thereto, unless an Event of Default has occurred and is continuing.

It is agreed and understood by the parties hereto that:

1. Any part of the security herein described, and any security described in any other mortgage or deed of trust or other instrument now or hereafter given to secure the indebtedness which is secured by this Agreement, may be released by the Secured Party without affecting the lien hereof or the assignment contained herein on the remainder or the Subject Indebtedness and any person acquiring any direct or indirect interest in the security herein described or in any security described in any other mortgage or deed of trust or other instrument now or hereafter given to secure the Subject Indebtedness shall take the same subject to all of the provisions hereof.

2. The obligations of the Company under this Agreement and the validity of the pledge and assignment of the Collateral under this Agreement shall be absolute and unconditional irrespective of:

(a) any lack of validity or enforceability of all or any of the Subject Indebtedness or of any other agreement or instrument relating thereto (collectively the "Related Documents");

(b) any change in the time, manner or place of payment of, or in any other terms of, all or any of the Subject Indebtedness, or any other amendment or waiver of or any consent to departure from all or any of the Related Documents;

(c) any exchange, release or non-perfection of any collateral for all or any of the Subject Indebtedness; or

(d) any other circumstance which might otherwise constitute a defense available to, or a discharge of, WELCO or the Company in respect of the Subject Indebtedness.

3. Neither the obligations of the Company hereunder nor the validity of the pledge and assignment provided for hereby shall in any way be affected or impaired by any acceptance by any holder of any of the Subject Indebtedness of any direct or indirect security for any of the Subject Indebtedness or by any failure, delay, neglect or omission by any such holder to realize upon or protect any of the Subject Indebtedness or the Notes or any other instruments evidencing the Subject Indebtedness or any direct or indirect security therefor or by any approval, consent, waiver, or other action taken, or omitted to be taken, by any such holder.

## **SECTION 1. GENERAL COVENANTS AND WARRANTIES.**

The Company covenants, warrants and agrees as follows:

1.1. *Representations of the Company.* The Company represents and warrants that all of its representations set forth in the form of Closing Certificate attached to the Note Purchase Agreements as Exhibit D-1 are true and correct as of the date hereof.

1.2. *Ownership of Collateral.* The Company covenants and warrants that it has full right, title and interest in, under and to the Service Agreement, the Conditional Service Agreement, the Railroad Equipment Lease and the Facility Lease, free and clear of all Liens, charges and encumbrances whatever except the Lien of this Agreement, and the Company has full right, power and authority to assign the same to the Secured Party for the uses and purposes in this Agreement set forth; and the Company will warrant and defend the interest of the Secured Party therein against all claims and demands whatsoever.

1.3. *Legal Existence, etc.* The Company will preserve and keep in force and effect its legal existence and all licenses and permits necessary to the proper conduct of its business; provided, that the foregoing shall not prevent any transaction permitted by Section 1.10 hereof. Without limiting the foregoing the Company will maintain in good standing all licenses, franchises, exemptions and permits necessary to operate the Facility.

1.4. *Business and Property of the Company; No Subsidiaries.* The Company will engage in no business other than the operation of the Facility and the coal handling facility (the "Other Facility") located in Potter County, Texas, including in such operation all activities necessary or appropriate to enable the Company to unload, handle, process and convey coal, and will own no property other than personal property necessary or appropriate to the ownership and operation of the Facility and the Other Facility. The Company will not create any Subsidiaries.

1.5. *Maintenance of Lien; Recording; Opinions of Counsel.* (a) The Company will, at its expense, take all necessary action to maintain and preserve the assignment and Lien of this Agreement so long as any principal of or premium or interest on any Notes is outstanding.

(b) The Company will, forthwith after the execution and delivery of this Agreement and thereafter from time to time, cause this Agreement and any related financing statements to be filed, registered and recorded in such manner and in such places as may be required by law in order to publish notice of and fully to protect the assignment and Lien of this Agreement in respect of, upon, and the title of the Secured Party to, the Collateral; and the Company will cause all re-recording and refiling, including, without limitation, continuation statements required by the Uniform Commercial Code, in respect of this Agreement to be timely filed at the expense of the Company in such manner and in such places as may be required by law in order to fully preserve and protect the rights of the holders of the Notes. From time to time the Company will perform or cause to be performed any other act as provided by law and will execute or cause to be executed any and all further instruments that may be required by law or requested by the Secured Party for such protection. To the extent permitted by applicable law, the Company will pay or cause to be paid all filing, registration and recording taxes and fees incident to such filing, registration and recording, and all expenses incident to the preparation, execution and acknowledgment of this Agreement, and of any instrument of further assurance, and all federal or state stamp taxes and other taxes, duties, imposts, assessments and charges arising out of or in connection with the execution and delivery of this Agreement and any such instrument of further assurance.

(c) The Company will, at its expense, furnish to the Secured Party (i) promptly after the execution and delivery of any supplement or amendment to this Agreement, an Opinion of Counsel stating that in the opinion of such counsel, such supplement to this Agreement (or a financing statement, continuation statement or similar notice thereof if and to the extent required by applicable law) has been properly recorded or filed for record in all public offices in which recording or filing is necessary to protect the right, title and interest of the Secured Party hereunder, or to perfect the Lien provided by this Agreement as a valid first Lien in the Collateral, and (ii) within 30 days prior to October 1 in each year beginning in 1988, an Opinion of Counsel stating that this Agreement (or financing statements or similar notices thereof if and to the extent required by applicable law) have been properly recorded or filed for record in all public offices in which such recording or filing is necessary to protect the right, title and interest of the Secured Party and to perfect the security interest provided by this Agreement as a valid Lien in the Collateral, and stating the requirements of applicable law with respect to the rerecording or refiling of this Agreement (or financing statements, continuation statements or similar notices thereof to the extent required by applicable law) prior to October 1 of the succeeding year in order to protect and maintain such Lien of the Secured Party.

1.6. *Further Assurances; After-Acquired Property.* (a) The Company will do, execute, acknowledge and deliver, or cause to be done, executed, acknowledged and delivered, all such further acts, deeds, conveyances, mortgages, assignments, transfers and assurances as the Secured Party reasonably may require for the perfection of the Lien being herein provided for. Without limiting the foregoing, but to provide a

means of payment of the Subject Indebtedness, the Company covenants and agrees that it will notify TUCO and SPS, respectively, of this Agreement and that it will direct TUCO and SPS to make all payments due and to become due under the Service Agreement and the Conditional Service Agreement, directly to the Secured Party or as the Secured Party may direct no later than 11:00 a.m., Hartford, Connecticut time, on or before each date such payments are due; provided, that, so long as no Event of Default shall have occurred and be continuing, all amounts payable under the Service Agreement or the Conditional Service Agreement as Operating and Maintenance Costs (but without giving effect to the credit provided for in the last sentence of Section 6(a) of the Service Agreement or the Conditional Service Agreement) shall not be required to be paid to the Secured Party.

(b) All right, title and interest of the Company in and to all extensions, improvements, betterments, renewals, substitutes and replacements of, and all additions and appurtenances to, the Collateral, or any part thereof, hereafter constructed or acquired by the Company, immediately upon such construction or acquisition, and without any further mortgaging, conveyance or assignment, shall become and be part of the Collateral and shall be subject to the Lien of this Agreement as fully and completely and with the same effect as though now owned by the Company, but at any and all times the Company will execute and deliver to the Secured Party any and all such further assurances, mortgages, conveyances or assignments thereof and other instruments with respect thereto as the Secured Party may reasonably require for the purpose of expressly and specifically subjecting the same to the Lien of this Indenture.

1.7. *Maintenance of Property.* The Company will at all times maintain, preserve and keep its Property in good condition and make all necessary renewals, replacements, additions, betterments and improvements thereto.

1.8. *Insurance.* In addition to the requirements contained in the Facility Lease relating to the maintenance of insurance, the Company will maintain with financially sound and reputable insurers, insurance with respect to its Properties and business against such casualties and contingencies, of such types (including fire and extended coverage, and general comprehensive public liability insurance) and in such amounts as is customary (under commercially reasonable terms and cost) in the case of corporations engaged in the same or a similar business and similarly situated. Where applicable, policies of insurance will contain deductibles reasonably and commercially available and similar to those provided under policies insuring other facilities similar in size, nature and operation. Without limiting the foregoing, the Company will:

(1) maintain all such workmen's compensation or similar insurance as may be required by law; and

(2) maintain comprehensive general public liability insurance against claims for bodily injury, death or property damage occurring on, in or about the Property of the Company and liability insurance, covering the operations of the Company with single-limit coverage of not less than \$1,000,000 and with umbrella coverage of not less than \$10,000,000. Such policies of insurance shall provide that (i) the Secured Party and the holders of the Notes shall be named as additional insured parties thereunder, and (ii) such policies shall not be cancelled without at least 30 days' prior written notice to the Secured Party.

The Company shall, on or before the Closing Date, furnish the Note Purchasers and the Secured Party with certificates or other satisfactory evidence of maintenance of the insurance required hereunder and shall with respect to any renewal policy or policies, furnish certificates evidencing such renewal not less than ten days prior to the expiration date of the original policy or policies. Each such certificate or other evidence of insurance shall identify the insurance carrier, the type of insurance, the coverage limits and the policy term. On or before the Closing Date and on or before October 1 of each year thereafter while any of the Notes are still outstanding, the Company will deliver to each holder of the Notes and the Secured Party a report by a firm of independent insurance brokers (which may be the Company's regular insurance agency) chosen by the Company and satisfactory to each holder of the Notes and the Secured Party setting forth the insurance obtained by the Company pursuant to this Section 1.8 and then in effect and stating whether, in the opinion of such firm, such insurance complies with the requirements of this Section 1.8.

**1.9. Advances.** If the Company shall fail to comply with the covenants contained herein with respect to the keeping of the Collateral free of other Liens (other than Permitted Encumbrances), the Secured Party may (but shall not be obligated to) make advances to perform the same; and the Company agrees to repay all sums so advanced upon demand with interest at 11.75% per annum after demand (or such lesser rate as may be the maximum not prohibited by applicable law); and all sums so advanced, with interest, shall be secured hereby, but no such advance shall be deemed to relieve the Company from any default hereunder.

**1.10. Payment of Taxes and Other Charges; Compliance with Laws.**

(a) The Company, will pay, before they become delinquent:

(i) all taxes, assessments and governmental charges or levies imposed upon it or its Property, and

(ii) all claims or demands of materialmen, mechanics, carriers, warehousemen, landlords and other like Persons which, if unpaid, might result in the creation of a Lien upon its Property;

*provided that, except as otherwise provided in this Agreement with respect to the Collateral, items of the foregoing description need not be paid while being contested in good faith and by appropriate proceedings so long as adequate book reserves have been established with respect thereto and the Company's title to and its right to use its Property is not materially and adversely affected thereby.*

(b) The Company will not be in violation of any laws, ordinances or governmental rules or regulations to which it is subject and will not fail to obtain any licenses, permits, franchises or other governmental authorizations necessary to the ownership, use or operation of its Properties or to the conduct of its business, which violation or failure to obtain might materially and adversely affect the business, prospects, profits, Properties or condition (financial or otherwise) of the Company; *provided that nothing contained in this Section 1.10(b) shall require compliance with any law, ordinance, rule or regulation the validity or applicability of which is being contested in good faith and by appropriate proceedings so long as the Company's title to and its right to use its Property is not materially and adversely affected thereby.*

1.11. *Limitation on Liens.* The Company will not create or incur or suffer to be incurred or to exist, any Lien of any kind upon any of its Property including the Collateral or any of the items of machinery, equipment and other personal property located therein or thereon, whether now owned or hereafter acquired, or upon any income or proceeds therefrom, except the following:

(a) Liens for property taxes and assessments or governmental charges or levies and Liens securing claims or demands of mechanics and materialmen, provided that payment thereof is not overdue or, if overdue, is being contested in good faith by a Permitted Contest;

(b) Liens of or resulting from any judgment or award, the time for the appeal or petition for rehearing of which shall not have expired, or in respect of which the Company shall at any time in good faith be prosecuting an appeal or proceeding for a review and in respect of which a stay of execution pending such appeal or proceeding for review shall have been secured;

(c) Liens, charges, encumbrances and priority claims incidental to the conduct of business or the ownership of properties and assets (including warehousemen's and attorneys' liens and statutory landlords' liens) and deposits, pledges or liens to secure payment of premiums on insurance purchased in the usual course of business or in connection with workmen's compensation, unemployment insurance or social security legislation, or to secure the performance of bids, tenders or trade contracts, or to secure statutory obligations, surety or appeal bonds or other liens of like general nature incurred in the ordinary course of business and not in connection with the borrowing of money, provided in each case, the obligation secured is not overdue or, if overdue, is being contested in good faith by a Permitted Contest;

(d) minor survey exceptions or minor encumbrances, easements or reservations of, or rights of others for, rights-of-way, utilities and other similar purposes, or zoning or other restrictions as to the use of real properties, which encumbrances, easements, reservations, rights and restrictions do not in the aggregate materially detract from the value of said properties or materially impair their use in the operation of the business of the Company;

(e) the Lien of mortgages, conditional sale agreements, financing leases, security interests, or other similar title retention or lien arrangements ("Purchase Money Liens") given concurrently with or within 180 days of the date of the acquisition, construction or improvement of the fixed assets concerned to secure the payment of the purchase price or the construction or improvement of fixed assets, useful and intended to be used in carrying on the business of the Company, provided that (i) the Purchase Money Lien shall attached solely to the fixed assets acquired, constructed or improved, (ii) at the time such Purchase Money Lien is entered into the aggregate amount remaining unpaid on all Indebtedness secured by Liens on such fixed assets shall not be in excess of 80% of the lesser of the total purchase price (including construction or improvement cost) or fair market value at the time of acquisition of such fixed assets (as determined in good faith by the Board of Directors of the Company), and (iii)

after giving effect to the creation or issuance of the Indebtedness secured by any such Liens, the aggregate amount of Indebtedness of the Company secured by all such Liens shall not exceed \$1,500,000;

- (f) the Lien of this Agreement; and
- (g) such other Liens, if any, described on Annex 2 hereto.

1.12. *Sale of Assets or Merger.* The Company will not (a) sell, lease, transfer or otherwise dispose of all or any substantial part of its assets, (b) sell, lease, transfer or otherwise dispose of any of the Collateral except in compliance with this Agreement, or (c) consolidate with or be a party to a merger with any other Person; provided, however, that the Company may sell, lease, transfer or otherwise dispose of substantially all of its assets or consolidate with or be a party to a merger with any other Person if, (i) the Person which results from such sale, lease, transfer or other disposition, consolidation or merger (the "Surviving Entity"), if other than the Company, (w) is a corporation which is duly organized under, and substantially all the business and assets of which are conducted and located in, the United States of America or any state thereof, (x) effectively and expressly assumes, in writing (in a manner satisfactory to the holders of not less than 66-2/3 in aggregate principal amount of the Notes then outstanding) all obligations of the Company, under and in respect of this Agreement in accordance with the terms hereof, and (ii) at the time of such transaction and after giving effect thereto (1) no Default or Event of Default shall have occurred and be continuing, (2) the Lien of this Agreement shall not be adversely affected by such transaction, and (3) the Surviving Entity shall have a net worth, as determined in accordance with GAAP, not less than the Company immediately prior to such transaction.

As used in this Section 1.12, a sale, lease or other disposition of assets shall be deemed to be a "substantial part" of the assets of the Company if

- (1) the book value of such assets when added to the book value of all other assets sold, leased or otherwise disposed of by the Company (other than in the ordinary course of business) during the same fiscal year, exceeds 5% of the net assets of the Company determined as of the end of the immediately preceding fiscal year; or
- (2) during the fiscal year then most recently ended, the sum of the portions of gross revenues of the Company which were contributed during such year by such assets and all other assets sold, leased or otherwise disposed of by the Company (other than in the ordinary course of business) during such fiscal year constituted more than 5% of the gross revenues of the Company during such fiscal year.

1.13. *Permitted Indebtedness.* The Company will not create, guarantee, assume or suffer to exist, or in any manner be or become liable in respect of, any Indebtedness of any kind or character, except Indebtedness of the Company outstanding on the Closing Date and described on Schedule II to the Closing Certificate attached to the Note Purchase Agreements as Exhibit D-1, and Indebtedness secured by Liens permitted under Section 1.11 hereof.

1.14. *Transactions with Affiliates.* The Company will not enter into any transaction, including without limitation, the purchase, sale or exchange of Property or the rendering of any service, with any Affiliate except in the ordinary course of and pursuant to the reasonable requirements of the Company's business and upon fair and reasonable terms no less favorable to the Company than would obtain in a comparable arm's-length transaction with a Person not an Affiliate. Any advances, including any accrued interest thereon made to the Company by any Affiliate shall be made expressly subordinated to the Secured Party's rights and interests under this Agreement.

1.15. *Financial and Business Information.* (a) The Company will maintain its financial statements in a manner which fairly presents the financial condition of the Company, the results of its operations and changes in its financial position in accordance with generally accepted accounting principles consistently applied. The Company will deliver to the Secured Party and to each Institutional Holder of the then outstanding Notes:

(i) as soon as practicable after the end of each calendar quarter (except the last), and in any event within 30 days thereafter, two copies of:

(1) a balance sheet of the Company as at the end of such quarter, and

(2) statements of income and retained earnings and changes in financial position of the Company for such quarter, and for the portion of such fiscal year ending with such quarter,

setting forth in each case in comparative form the figures for the corresponding periods in the previous fiscal year, all in reasonable detail and certified as complete and correct, subject to changes resulting from year-end adjustments, by a duly authorized officer of the Company;

(ii) as soon as practicable after the end of each fiscal year of the Company, and in any event within 90 days thereafter, two copies of:

(1) a balance sheet of the Company as at the end of such year, and

(2) a statement of income and retained earnings and changes in financial position of the Company for such year,

setting forth in each case in comparative form the figures for the previous fiscal year, all in reasonable detail and accompanied by an opinion thereon of Arthur Andersen & Co. or other independent certified public accountants of recognized national standing selected by the Company and not objected to by 66-2/3% of the holders of the outstanding Notes, which opinion shall state that such financial statements fairly present the financial condition of the Company, have been prepared in accordance with generally accepted accounting principles consistently applied (except for changes in application in which such accountants

concur) and that the examination of such accountants in connection with such financial statements has been made in accordance with generally accepted auditing standards, and accordingly, included such tests of the accounting records and such other auditing procedures as were considered necessary in the circumstances;

(iii) promptly upon receipt thereof, one copy of each other report relating to the financial condition of the Company submitted to the Company by independent accountants in connection with any annual, interim or special audit made by them of the books of the Company;

(iv) promptly upon their becoming available, one copy of each financial statement, report, notice or other communication made public by the Company, and of each regular or periodic report and any registration statement, prospectus or written communication (other than transmittal letters) in respect thereof filed by the Company with, or received by the Company in connection therewith from, any securities exchange or the Securities and Exchange Commission or any successor agency;

(v) immediately upon becoming aware of the existence of any condition or event which constitutes a Default or an Event of Default, a written notice specifying the nature and period of existence thereof and what action the Company is taking or proposes to take with respect thereto;

(vi) immediately upon becoming aware that the holder of any Note or of any evidence of indebtedness or other Security of the Company has given notice or taken any other action with respect to a claimed Default or Event of Default, a written notice specifying the notice given or action taken by such holder and the nature of the claimed Default or Event of Default and what action the Company is taking or proposes to take with respect thereto; and

(vii) with reasonable promptness, such other data and information as the Secured Party or any Institutional Holder of the outstanding Notes from time to time may reasonably request.

(b) Each set of financial statements delivered to the Secured Party and any Institutional Holder of the Notes pursuant to Section 1.15(a)(i) or (ii) will be accompanied by an Officers' Certificate stating that the signers are familiar with the provisions of this Agreement and have made, or caused to be made, under their supervision, a review of the transactions and conditions of the Company from the beginning of the accounting period covered by the income statements being delivered therewith to the date of the certificate and that such review has not disclosed the existence during such period of any condition or event which constitutes a Default or an Event of Default or, if any such condition or event existed or exists, specifying the nature and period of existence thereof and what action the Company has taken or proposes to take with respect thereto.

(c) The Company will permit the Secured Party or the representatives of any Institutional Holder of the Notes, at the Secured Party's (subject to the provisions of Section 4.4 hereof) or such holder's expense, to visit and inspect any

of the Properties of the Company, to examine all its books of account, records, reports and other papers, to make copies and extracts therefrom, and to discuss its affairs, finances and accounts with its officers, employees, consultants and independent public accountants (and by this provision, the Company authorizes said accountants to discuss the finances and affairs of the Company) all at such reasonable times and as often as may be reasonably requested.

All information which is furnished to or obtained by any holder of Notes pursuant to this Section 1.15(c) shall be received and held in confidence unless or until the same has been publicly disclosed; *provided, however*, that any holder of Notes shall not in any way be inhibited in the use of such information in order to enforce compliance with the terms and conditions of this Indenture or take any lawful action which it deems necessary to protect its interests herein and in the Notes, and *provided, further*, that any holder of any Notes may furnish any such information in compliance with any court order or to any regulatory body, agency, authority or commission to whose jurisdiction such holder may be subject, to any shareholder, director or other Person to whom such holder owes any duty of disclosure or to any prospective purchaser of the Notes held by such holder or to any consultant to such holder. It is understood that no holder of the Notes shall be liable to the Company or to any other Person in damages for failure to comply with the undertaking contained in this paragraph except in any case involving gross negligence, willful misconduct or fraudulent misconduct by such holder.

## **SECTION 2. ENJOYMENT, USE AND RELEASE OF PROPERTY.**

**2.1. *Company's Right of Enjoyment and Control.*** Provided no Default or Event of Default has occurred and is continuing, the Company shall be suffered and permitted to remain in full and exclusive enjoyment and control of the Collateral (other than all Service Fee Payments, income, revenues, issues, profits, insurance proceeds, condemnation awards and other amounts payable under the Service Agreement or the Conditional Service Agreement) subject always to the observance and performance of the terms of this Agreement.

**2.2. *Actions With Respect to Collateral.*** The Company will not without the written consent of the Secured Party:

(a) terminate, modify, amend or accept a surrender of, or offer or agree to any termination, modification, amendment or surrender of, any Assigned Agreement, or by affirmative act consent to the creation or existence of any assignment or Lien (other than the assignment and Lien of this Agreement) to secure the payment of indebtedness upon the Company's right, title and interest under and to the Assigned Agreements and any attempt to do so shall be void;

(b) receive or collect or permit the receipt or collection of any amounts payable to the Company under any Assigned Agreement prior to the date for payment thereof provided for by such agreement, or assign, transfer or hypothecate (other than to the Secured Party hereunder) any payment then due or to accrue in the future under any Assigned Agreement; or

(c) sell, mortgage, transfer, pledge, assign or hypothecate (other than to the Secured Party hereunder) its interest in the Facility or any part thereof or in any amount to be received by it from the use or disposition of the Facility, or its interest under any Assigned Agreement and any attempt to do so shall be void.

### SECTION 3. DEFAULTS AND REMEDIES THEREFOR.

3.1. *Events of Default.* The Company acknowledges and agrees, without limitation, that each and all of the terms and provisions of Section 6.1 of the Indenture have been and are incorporated into this Agreement by reference to the same extent as though fully set out herein and that the term Event of Default wherever used in this Agreement shall mean either an Event of Default as defined in Section 6.1 of the Indenture or the failure of the Company to comply with any covenant, agreement or warranty contained in this Agreement within 30 days after such failure shall first become actually known to the Company.

3.2. *Remedies.* When any Event of Default has occurred and is continuing, the Secured Party may exercise any one or more or all, and in any order, of the remedies hereinafter set forth, it being expressly understood that no remedy herein conferred is intended to be exclusive of any other remedy or remedies; but each and every remedy shall be cumulative and shall be in addition to every other remedy given herein or now or hereafter existing at law or in equity or by statute:

(a) The Secured Party may declare the entire unpaid balance of the Notes to be immediately due and payable in the manner provided in the Indenture;

(b) The Secured Party personally or by agents or attorneys may exercise all rights, privileges and remedies of the Company under any or all of the Assigned Agreements, including, without limitation, the Service Agreement and the Conditional Service Agreement, collect the earnings and income therefrom, pay all principal charges including taxes and assessments levied thereon and operating and maintenance expenses and all disbursements and liabilities of the Company hereunder and apply the net proceeds arising from any such operation of the Collateral as provided in Section 3.3 hereof. In furtherance of the remedies provided for in this Section 3.2, when any Event of Default has occurred and is continuing, the Secured Party is hereby irrevocably appointed the true and lawful attorney-in-fact of the Company, in its name and stead or in the name of the Secured Party, to make all advances, assignments, transfers and deliveries of all or any part of the Collateral, and for that purpose the Secured Party may execute all necessary deeds and instruments of assignment and transfers, and may substitute one or more Persons with like power, the Company hereby ratifying and confirming all that its said attorney or such substitute or substitutes shall lawfully do by virtue hereof. Nevertheless, the Company, if so requested in writing by the Secured Party, shall ratify and confirm any such sale or sales permitted hereunder by executing and delivering

to the Secured Party or to such purchaser or purchasers all such instruments as may be advisable, in the judgment of the Secured Party, for the purpose and as may be designated in such request. This power of attorney is coupled with an interest and shall be irrevocable so long as any of the Subject Indebtedness remains outstanding.

(c) The Secured Party may proceed to protect and enforce its rights by a suit or suits in equity or at law, or for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein or therein granted, or for the foreclosure of this Agreement, or for the enforcement of any other appropriate legal or equitable remedy. Upon the bringing of any suit to foreclose this Agreement or to enforce any other remedy available hereunder, the plaintiff shall be entitled as a matter of right, without notice and without giving bond to the Company or anyone claiming under, by or through it, and without regard to the solvency or insolvency of the Company or the then value of the premises, to have a receiver appointed of all the Collateral and of the earnings, income, rents, issues, profits and proceeds thereof, with such power as the court making such appointment shall confer, and the Company does hereby irrevocably consent to such appointment.

(d) In addition to the foregoing, the Secured Party shall have the rights, powers, options and remedies of a secured party under the applicable Uniform Commercial Code with respect to any portion of the Collateral constituting property of the type in respect of which realization on a lien or security interest granted therein is governed by such Uniform Commercial Code. Any requirement of said Code for reasonable notification shall be met by making written notice to the Company at its address above set forth at least ten days prior to the sale or other event for which such notice is required.

(e) In case of any sale of the Collateral, or of any part thereof, pursuant to any judgment or decree of any court or otherwise in connection with the enforcement of any of the terms of this Agreement, the Secured Party may bid and become the purchaser, and the Secured Party, for the purpose of making settlement for or payment of the purchase price, shall be entitled to credit the Subject Indebtedness on the purchase price.

It is understood and agreed that all rights, remedies and powers provided by this Section 3.2 may be exercised only to the extent that the exercise thereof does not violate any applicable provision of law in the State of Texas and all provisions of this Section 3.2 are intended to be subject to all applicable mandatory provisions of law which may be controlling in the premises and to be limited to the extent necessary so that they will not render this Agreement invalid or unenforceable or not entitled to be recorded, registered or filed under the provisions of any applicable law.

**3.3. Application of Proceeds.** The proceeds and the avails of any remedy hereunder and any amounts received by the Secured Party under any of the Assigned Agreements, shall be paid to and applied as follows:

(a) first, to the payment pro rata of costs and expenses of foreclosure or suit, if any, and of such sale, and to the extent permitted by applicable law,

the reasonable compensation of the Secured Party, its agents, attorneys and counsel, and of all proper expenses, liability and advances incurred or made hereunder by the Secured Party, and of all taxes, assessments or liens superior to the lien of these presents, except any taxes, assessments or other superior lien subject to which said sale may have been made;

(b) *second*, to the payment of the amount then owing or unpaid on the Notes for principal, interest and prepayment premium, if any, in the manner provided in Section 2.4 of the Indenture; and

(c) *third*, to the payment of the surplus, if any, to WELCO, the Company, the successors and assigns of either thereof, or to whomsoever may be lawfully entitled to receive the same.

**3.4. Waiver of Extension, Appraisal, Stay, Laws.** The Company will not at any time insist upon, or plead, or in any manner whatever claim or take any benefit or advantage of, any stay or extension law whenever enacted, now or at any time hereafter in force, which may affect the covenants and terms of performance of this Agreement; nor claim, take or insist upon any benefit or advantage of any law now or hereafter in force providing for the valuation or appraisal of the Collateral hereunder, or any part thereof, prior to any sale or sales thereof which may be made pursuant to any provision herein contained, or pursuant to the decree, judgment or order of any court of competent jurisdiction; nor after any such sale or sales, claim or exercise any right under any statute heretofore or hereafter enacted by the United States of America or by any state or territory, or otherwise, to redeem the Property so sold or any part thereof; and the Company (to the extent that it may lawfully do so) hereby expressly waives all benefits or advantage of any such stay, extension, valuation or appraisal law or laws, and covenants not to hinder, delay or impede the execution of any power herein granted or delegated to the Secured Party, but to suffer and permit the execution of every power as though no such stay, extension, valuation or appraisal law or laws had been made or enacted.

Any sale, whether under any power of sale hereby given or by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim and demand whatsoever, either at law or in equity, of the Company in and to the property sold and shall be a perpetual bar, both at law and in equity, against the Company, its successors and assigns, and against any and all persons claiming the property sold or any part thereof under, by or through the Company, its successors or assigns; *provided, however*, that nothing in this paragraph shall, as between the Company and the Secured Party, affect the entitlement of the Company to any payment of surplus proceeds under Section 3.3 of this Agreement or Section 2.4 of the Indenture upon the sale of any of the Collateral.

**3.5. Effect of Discontinuance of Proceedings.** In case the Secured Party shall have proceeded to enforce any right under this Agreement in any manner, and such proceedings shall have been discontinued or abandoned for any reason or shall have been determined adversely, then and in every such case the Company and the Secured Party shall be restored to their position and rights hereunder as they existed immediately prior to the commencement of such proceedings with respect to the property subject to the lien of this Agreement. Upon the request of the Secured Party,

the Company will execute an appropriate reinstatement agreement confirming the foregoing.

3.6. *Delay or Omission Not a Waiver.* No delay or omission of the Secured Party to exercise any right or power arising from any default on the part of the Company shall exhaust or impair any such right or power or prevent its exercise during the continuance of such default. No waiver by the Secured Party of any such default, whether such waiver be full or partial, shall extend to or be taken to affect any subsequent default, or to impair the rights resulting therefrom, except as may be otherwise provided herein. No remedy hereunder is intended to be exclusive of any other remedy but each and every remedy shall be cumulative and in addition to any and every other remedy given hereunder or otherwise existing. Nor shall the giving, taking or enforcement of any other or additional security, collateral or guaranty for the payment of the indebtedness secured under this Agreement operate to prejudice, waive or affect the security of this Agreement or any rights, powers or remedies hereunder; nor shall the Secured Party be required to first look to, enforce or exhaust such other or additional security, collateral or guaranties.

3.7. *Remedies Subject to Provisions of Law.* All rights, remedies and powers provided by this Section 3 may be exercised only to the extent that the exercise thereof does not violate any applicable provision of law, and all the provisions of this Section 3 are intended to be subject to all applicable mandatory provisions of law which may be controlling in the premises and to be limited to the extent necessary so that they will not render this Agreement invalid or unenforceable or not entitled to be recorded, registered or filed under the provisions of any applicable law.

#### **SECTION 4. AMENDMENTS; WAIVERS.**

4.1. *Amendments and Waivers Without Holders' Consent.* The Company and the Secured Party from time to time and at any time, subject to the restrictions in this Agreement contained, may, without consent of the holders of the Notes, enter into a written instrument amending this Agreement for any one or more or all of the following purposes:

(a) to add to the covenants and agreements to be observed by, and to surrender any right or power reserved to or conferred upon, the Company; or

(b) to subject to the Lien of this Agreement additional Property hereafter acquired by the Company or others and intended to be subjected to the Lien of this Agreement, and to correct or amplify the description of any Property subject to the Lien of this Agreement;

No restriction or obligation imposed upon the Company may, except as otherwise provided in this Agreement, be waived or modified by such written instruments, or otherwise.

4.2. *Amendments and Waivers With Holders' Consent.* Upon the waiver or consent of the holders of at least 66-2/3% in aggregate principal amount of the Notes at the time outstanding (a) the Company may take any action prohibited, or omit the taking of any action required, by any of the provisions of this Agreement, or (b) the Company and the Secured Party may enter into a written instrument amending this Agreement for the purpose of adding, changing or eliminating any provisions of this

Agreement or modifying in any manner the rights and obligations of the holders of the Notes and the Company; provided that no such written instrument shall:

(i) permit the creation of any Lien prior to, or on a parity with, the Lien of this Agreement with respect to any of the Collateral, without the consent of the holders of all the Notes at the time outstanding,

(ii) effect the deprivation of any holder of the Notes of the benefit of the Lien of this Agreement upon all or any part of the Collateral without the consent of such holder of the Notes,

(iii) reduce the percentage of the aggregate principal amount of Notes the holders of which are required to waive any provision or consent to the taking of any such action or the execution of any written instrument pursuant to this Section, without the consent of the holders of all of the Notes at the time outstanding, or

(iv) modify the rights, duties or immunities of the Secured Party without its consent.

4.3. *Notice of Amendment or Waiver.* Promptly after the execution by the Company and the Secured Party of any amendment or waiver pursuant to the provisions of Section 4.1 or 4.2 hereof, the Company shall give written notice, setting forth in general terms the substance of such amendment or waiver, together with a conformed copy thereof, mailed first class postage prepaid, to each holder of Notes at its address set forth in the Register. Any failure of the Company to give such notice, or any defect therein, shall not, however, in any way impair or affect the validity of any such amendment or waiver.

## SECTION 5. MISCELLANEOUS.

5.1. *Non-Recourse Nature of the Company's Obligations.* Notwithstanding any other provision of this Agreement, the Notes, any other Operative Document or any other agreement, document, instrument or certificate executed or delivered in connection herewith or therewith, the Company shall not be liable, whether by virtue of any constitutional provision, statute or rule of law, or by enforcement of any penalty or assessment or otherwise, for the payment of any deficiency or any other sum owing on account of the Indebtedness evidenced by the Notes or any other sum, other than any fees, expenses and repayments of advances owing to the Secured Party under this Agreement or any other Operative Document, owing under this Agreement or any other Operative Document or any other agreement, document, instrument or certificate executed or delivered in connection herewith or therewith from any source other than the Collateral hereunder or under the Deed of Trust or the Trust Property under the Indenture and the income and proceeds thereof. By its acceptance thereof, each holder of the Notes waives and releases any personal liability of the Company and any stockholder, officer or director of the Company for and on account of such Indebtedness or other sums, and the holders of the Notes (and any agents or trustees for the holders of the Notes) shall look solely to the Collateral hereunder or under the Deed of Trust or the Trust Property under the Indenture and the income and proceeds thereof for the payment of said Indebtedness or other sums; provided, however, that nothing herein contained shall limit, restrict or impair the right of the holders of the Notes (or any agents or trustees for the holders of the Notes) to accelerate the maturity of the

Notes upon the occurrence of an Event of Default, to bring suit and obtain judgment against the Company for purposes of realizing upon the Collateral hereunder or under the Deed of Trust or the Trust Property under the Indenture and to exercise all rights and remedies provided under the Operative Documents or otherwise with respect thereto. Nothing in this Section 5.1, however, shall be deemed to limit the liability of the Company with respect to payments received by the Company under the provisions of any Operative Documents, which payments the Company wrongfully fails to apply to the Indebtedness evidenced by the Notes in the manner contemplated herein.

5.2. *Successors and Assigns.* Whenever any of the parties hereto is referred to, such reference shall be deemed to include the successors and assigns of such party; and all the covenants, premises and agreements in this Agreement contained by or on behalf of the Company, or by or on behalf of the Secured Party, shall bind and inure to the benefit of the respective successors and assigns of such parties whether so expressed or not.

5.3. *No Assumption of Duties.* No provision of this Assignment Agreement shall be construed to impose upon the Secured Party or any assignee or successor of the Secured Party, any duties, responsibilities or liabilities of the Company under any of the Assigned Agreements, all of which duties, responsibilities and liabilities are hereby declared to be expressly retained by the Company.

5.4. *Severability.* The unenforceability or invalidity of any provision or provisions of this Agreement shall not render any other provision or provisions herein contained unenforceable or invalid.

5.5. *Addresses for Notices and Demands.* All communications provided for herein shall be in writing and shall be deemed to have been given (unless otherwise required by the specific provisions hereof in respect of any matter) when delivered personally or when deposited in the United States mail, registered or certified, postage prepaid, addressed as follows:

If to the Company:

Wheelabrator Coal Services Company  
Liberty Lane  
Hampton, New Hampshire 03842  
Attention: Chief Financial Officer

If to the Secured  
Party:

The Connecticut Bank and Trust Company,  
National Association, Trustee  
One Constitution Plaza  
Hartford, Connecticut 06115  
Attention: Corporate Trust Department

or as to either party at such other address as any such party may designate by notice duly given in accordance with this Section 5.5 to the other parties.

5.6. *Headings and Table of Contents.* The headings of the sections and paragraphs of this Agreement and the table of contents are inserted for purposes of convenience only and shall not be construed to affect the meaning or construction of any of the provisions hereof.

5.7. *Release of Agreement and Collateral.* The Secured Party shall release and discharge this Agreement and the assignment and Lien hereof at the Company's expense by proper instrument or instruments upon presentation of satisfactory evidence that all Subject Indebtedness has been fully paid or discharged or that all conditions precedent to such release provided for in the Indenture have been fully complied with and the Secured Party shall so release and discharge this Agreement and the assignment and Lien thereof or any of the Collateral held hereunder to the extent and upon the terms and upon compliance with the conditions provided for in any written consent given thereto at any time or from time to time the holder or holders of all of the then outstanding Notes.

5.8. *Limitation on Interest.* All agreements between the Company and the Secured Party or the Purchasers, whether now existing or hereafter arising and whether written or oral, are hereby limited so that in no contingency, whether by reason of demand for payment of or acceleration of the maturity of any of the Subject Indebtedness or otherwise, shall the interest contracted for, charged or received by the Beneficiary or the Purchasers exceed the maximum amount permissible under applicable law. If, from any circumstance whatsoever, interest would otherwise be payable to the Secured Party or the Purchasers in excess of the maximum lawful amount, the interest payable to the Secured Party or the Purchasers shall be reduced to the maximum amount permitted under applicable law; and if from any circumstance the Secured Party or the Purchasers shall ever receive anything of value deemed interest by applicable law in excess of the maximum lawful amount, an amount equal to any excessive interest shall be applied to the reduction of the principal balance of the Subject Indebtedness and not to the payment of interest or, if such excessive interest exceeds the unpaid balance of principal of the Subject Indebtedness, such excess shall be refunded to the Company. All interest paid or agreed to be paid to the Secured Party or the Purchasers shall, to the extent permitted by applicable law, be amortized, prorated, allocated, and spread throughout the full period until payment in full of the principal of the Subject Indebtedness (including the period of any renewal or extension thereof) so that the interest thereon for such full period shall not exceed the maximum amount permitted by applicable law. This paragraph shall control all agreements between the Company and the Secured Party or the Purchasers.

5.9. *Subrogation.* To the extent that proceeds of the Subject Indebtedness are used to pay any outstanding Liens, affecting the Collateral, such proceeds have been advanced by the Secured Party or the Purchasers at the Company's request, and the Secured Party or the Purchasers, as the case may be, shall be subrogated to all rights, interests and Liens owned or held by any owner or holder of such outstanding Liens, irrespective of whether such Liens, are released of record; provided, however, that the terms and provisions hereof shall govern the rights and remedies of the Secured Party or the Purchasers and shall supersede the terms, provisions, rights, and remedies under the lien or Liens to which the Secured Party or the Purchasers are subrogated hereunder.

5.10. *Subordination to Service Agreement, Conditional Service Agreement.* The parties hereto hereby agree that, irrespective of the order of recording or filing for record in any office of this Agreement, the Service Agreement or the Conditional Service Agreement (or any other instruments, documents or financing statements relating to any of the foregoing), this Agreement shall be subordinate and junior to the Service Agreement or the Conditional Service Agreement.

5.11. *Governing Law.* This Agreement shall be governed by and construed in accordance with the laws of the State of Texas.

5.12. *Counterparts.* This Agreement may be executed, acknowledged and delivered in any number of counterparts, each of such counterparts constituting an original but all together only one Agreement.

IN WITNESS WHEREOF, the Company has caused this Assignment and Security Agreement to be executed in its behalf by its Vice President all as of the day and year first above written but actually executed on October 28, 1987.

**WHEELABRATOR COAL SERVICES  
COMPANY**

(SEAL)

ATTEST:

By   
Its Vice President

  
Its Assistant Secretary

Wheelabrator Coal Services Company

Assignment and Security Agreement

STATE OF NEW HAMPSHIRE )

COUNTY OF ROCKINGHAM )

BEFORE ME, the undersigned authority, on this day personally appeared David L. Schmitt, Vice President, and Dennis W. Alexander Assistant Secretary, of WHEELABRATOR COAL SERVICES COMPANY, a corporation, known to me to be the persons and officers whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed, in the capacity therein stated, and as the act and deed of said corporation.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this the 28 day of October, 1987.

Laurel A McKenna  
Notary Public in and for  
Rockingham County, New Hampshire  
My commission expires: 9/11/90

## DEFINITIONS

The following terms shall have the following meanings for all purposes of the Operative Documents referred to below, unless otherwise defined in an Operative Document or the context thereof shall otherwise require. In the case of any conflict between the provisions of this Definition Annex and the provisions of the main body of any Operative Document, the provisions of the main body of such Operative Document shall control the construction of such Operative Document.

References to agreements shall, unless the context otherwise requires, be deemed to mean and include such agreements as the same may be amended and supplemented from time to time. References to parties to agreements, shall, unless the context otherwise requires, be deemed to mean and include successors and assigns of such parties in respect of such agreements.

*"Affiliate"* of any Person shall mean any other Person (i) which directly or indirectly through one or more intermediaries controls, or is controlled by, or is under a common control with such Person, (ii) which beneficially owns or holds 5% or more (by number of votes) of any class of the Voting Stock of such Person or (iii) 5% or more (by number of votes) of the Voting Stock (or in the case of a Person which is not a corporation, 5% or more of the equity interest) of which is beneficially owned or held by such Person. The term *"control"* means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

*"Amendment to Conditional Service Agreement"* shall mean the Amendment to Conditional Coal Service Agreement dated as of October 1, 1987 by and between SPS and the Lessee.

*"Amendment to Facility Agreement"* shall mean the Amendment to Restatement of Coal Processing Facility Agreement dated as of October 1, 1987 by and between SPS and the Company.

*"Amendment to Facility Lease"* shall mean the Amendment to Indenture of Lease dated as of October 1, 1987 by and between the Company and the Lessee.

*"Amendment to Railroad Equipment Lease"* shall mean the Amendment to Railroad Equipment Lease dated as of October 1, 1987 by and between the Lessee and Signal Capital Corporation, formerly Pullman.

*"Amendment to Service Agreement"* shall mean the Amendment to Coal Service Agreement dated as of October 1, 1987 by and between TUCO and the Lessee.

*"Amendments"* shall mean, collectively, the Amendment to Conditional Service Agreement, the Amendment to Facility Agreement, the Amendment to Facility

Lease, the Amendment to Railroad Equipment Lease and the Amendment to Service Agreement.

"Assigned Agreements", when used in the Assignment Agreement or the Deed of Trust, shall have the respective meanings set forth therein, and when used in any other document, shall mean, unless otherwise specified, all agreements or other documents described as "Assigned Agreements" under either the Assignment Agreement or the Deed of Trust.

"Assignment Agreement" shall mean the Assignment and Security Agreement dated as of October 1, 1987 from the Lessee to the Trustee, as secured party, as the same may from time to time be amended or supplemented.

"Beneficiary" shall have the meaning specified at the outset of the Deed of Trust.

"Business Day" shall mean any day other than a Saturday, Sunday or a legal holiday for banks in Texas or Connecticut.

"Closing Date" shall have the meaning specified in Section 4 of the Note Purchase Agreements.

"Coal Supply Agreement" shall have the meaning specified in Section 1 of the Note Purchase Agreements.

"Code" shall mean the Internal Revenue Code of 1986, as amended, or any comparable successor law.

"Collateral", when used in the Assignment Agreement or the Deed of Trust, shall have the respective meanings set forth therein and, when used in any other document, shall mean, unless otherwise specified, all Property (tangible or intangible) described as "Collateral" under either the Assignment Agreement or the Deed of Trust.

"Company" shall mean Wheelabrator Energy Leasing Company, a Delaware corporation.

"Conditional Service Agreement" shall mean that certain Conditional Coal Service Agreement dated as of December 30, 1981 between the Lessee and SPS, as the same from time to time may be amended or supplemented.

"Constituent Companies" shall mean the Company and the Lessee, collectively.

"Deed of Trust" shall mean the Deed of Trust and Security Agreement dated as of October 1, 1987 from the Company to the Trust Deed Trustee and the Beneficiary in respect of certain real estate located in Lamb County, Texas, and the other Collateral thereunder, as the same may from time to time be amended or supplemented.

"*Default*" under any agreement shall mean any event which would constitute an Event of Default under such agreement if any requirement in connection therewith for the giving of notice or the lapse of time, or the happening of any further condition, event or act, had been satisfied.

"*Direct Placement Memorandum*" shall mean the Direct Placement Memorandum dated June 25, 1987 provided by Signal Capital Corporation pertaining to the issuance of the Notes.

"*Easement Agreement*" shall mean the Easement and License Agreement dated as of December 30, 1981 by and between SPS and the Lessee, as the same may from time to time be amended or supplemented.

"*Employee Plan*" means an employee benefit plan or other plans covered by Title I of ERISA.

"*ERISA*" shall mean the Employee Retirement Income Security Act of 1974, as amended, together with rules and regulations promulgated thereunder, as in effect from time to time.

"*Event of Default*" under the Assignment Agreement is defined in Section 3.1 thereof.

"*Event of Default*" under the Conditional Service Agreement is defined in Section 16 thereof.

"*Event of Default*" under the Deed of Trust is defined in Section 4.1 thereof.

"*Event of Default*" under the Indenture is defined in Section 6.1 thereof.

"*Event of Default*" under the Service Agreement is defined in Section 16 thereof.

"*Facility*" shall mean the coal handling systems located in Lamb County, Texas as more fully described in Exhibit B to the Deed of Trust, including (i) the coal unloading equipment, conveyors and related transportation equipment, crusher building and crusher equipment and storage bunkers described in said Exhibit B, (ii) all other equipment and improvements, if any, constructed or installed on the Facility Real Property for use as or in connection with such Facility, and (iii) any and all appliances, parts, instruments, appurtenances, accessories and other equipment and improvements of whatever nature from time to time incorporated in or installed as part of the Facility which are the property of the Company.

"*Facility Agreement*" shall mean that certain Restatement of Coal Processing Facility Agreement dated as of December 30, 1981 between the Company (as assignee of the Lessee) and SPS, as the same may from time to time be amended or supplemented.

**"Facility Lease"** shall mean that certain Indenture of Lease dated as of December 30, 1981 between the Company, as lessor, and the Lessee, as lessee, as the same may from time to time be amended or supplemented.

**"Facility Real Property"** shall have the meaning specified in Section 1 of the Note Purchase Agreements.

**"Indebtedness"** of any Person shall mean and include all obligations of such Person which in accordance with generally accepted accounting principles shall be classified upon a balance sheet of such Person as liabilities of such Person, and in any event shall include all (i) obligations of such Person for borrowed money or which has been incurred in connection with the acquisition of property or assets, (ii) obligations secured by any lien or other charge upon property or assets owned by such Person, even though such Person has not assumed or become liable for the payment of such obligations, (iii) obligations created or arising under any conditional sale or other title retention agreement with respect to property acquired by such Person, notwithstanding the fact that the rights and remedies of the seller, lender or lessor under such agreement in the event of default are limited to repossession or sale of property, and (iv) capitalized rentals under any capitalized lease. For the purpose of computing the Indebtedness of any Person, there shall be excluded any particular Indebtedness to the extent that, upon or prior to the maturity thereof, there shall have been deposited with the proper depository in trust the necessary funds (or evidences of such Indebtedness, if permitted by the instrument creating such Indebtedness) for the payment, redemption or satisfaction of such Indebtedness; and thereafter such funds and evidences of Indebtedness so deposited shall not be included in any computation of the assets of such Person.

**"Indenture"** shall mean the Trust Indenture dated as of October 1, 1987 between the Company and the Trustee, as the same may from time to time be supplemented or amended.

**"Institutional Holder"** shall mean each of the Note Purchasers and any other holder of a Note which is a bank, savings institution, trust company, national banking association, charitable foundation, insurance company, a pension, retirement or profit sharing trust or fund for which any bank, trust company, national banking association or investment advisor registered under the Investment Advisors Act of 1940, as amended, is acting as trustee or agent or any investment company, as defined in the Investment Company Act of 1940, as amended.

**"Interim Financing"** shall mean financing existing under the Loan Agreement dated as of January 21, 1982 between RepublicBank Dallas, N.A., Amarillo National Bank and the Company.

**"Lessee"** shall mean Wheelabrator Coal Services Company, a Delaware corporation.

**"Lien"** shall mean any interest in Property securing an obligation owed to, or a claim by, a Person other than the owner of the Property, whether such interest is based on the common law, statute or contract, and including but not limited to the security interest lien arising from a mortgage, encumbrance, pledge, conditional sale or trust receipt or a lease, consignment or bailment for security purposes and security

interests governed by the Uniform Commercial Code. The term "Lien" shall include reservations, exceptions, encroachments, easements, rights-of-way, covenants, conditions, restrictions, leases and other title exceptions and encumbrances affecting Property. For the purposes of the Operative Documents, the Company shall be deemed to be the owner of any Property which it has acquired or holds subject to a conditional sale agreement, financing lease or other arrangement pursuant to which title to the Property has been retained by or vested in some other Person for security purposes.

"*Note Purchase Agreements*" shall mean the separate Note Purchase Agreements each dated as of October 1, 1987 entered into by the Company with each of the Purchasers, as the same may from time to time be amended or supplemented.

"*Note Purchasers*" shall mean Connecticut General Life Insurance Company, Horace Mann Life Insurance Company and Aetna Insurance Company, as the original purchasers of the Notes under the Note Purchase Agreements, and the successors and assigns thereto.

"*Notes*" shall mean the 9.75% Secured Notes due August 15, 1999, in an aggregate principal amount not exceeding \$24,500,000 issued pursuant to the Note Purchase Agreements.

"*Officers' Certificate*" shall mean a certificate signed by the Chairman of the Board, the President or any Vice President and the Treasurer or an Assistant Treasurer of any corporation or a general partner of any partnership or the trustee of any trust.

"*Operative Documents*" shall mean and include the Note Purchase Agreements, the Indenture, the Deed of Trust, the Assignment Agreement, the Amendments, the Conditional Service Agreement, the Facility Agreement, the Facility Lease, the Railroad Equipment Lease, the Easement Agreement and the Service Agreement.

"*Opinion of Counsel*" shall mean an opinion in writing signed by legal counsel who shall be satisfactory to the Trustee, and who may be counsel to the Company.

The term "*outstanding*" when used with reference to Notes shall mean, as of any particular time, all Notes executed and delivered by the Company and authenticated by the Trustee, except:

(a) Notes theretofore cancelled by the Trustee or delivered to the Trustee for cancellation;

(b) Notes in lieu of or in substitution for which other Notes shall have been authenticated and delivered pursuant to the terms of Section 2.6 of the Indenture; and

(c) Notes held or acquired by the Company or any Affiliate of the Company.

**"Permitted Contest"** shall mean a contest by the Company or the Lessee, as the case may be, by appropriate legal proceedings of the legality, validity or amount of any of the taxes, assessments, levies, fees or other governmental charges, or other impositions provided under any of the Operative Documents to be paid thereby; but no such contest shall be carried on or maintained by the Company or the Lessee after the time limit for the payment of any such taxes, assessments, levies, fees, charges or other impositions unless the Company or the Lessee, as the case may be, at its option, (i) shall pay the amount involved under protest, or (ii) shall procure and maintain a stay of all proceedings to enforce any collections of such taxes, assessments, levies, fees, charges or other impositions, together with all penalties, interest, costs and expenses, by a deposit of a sufficient sum of money or by a good and sufficient undertaking as may be required or permitted by law to accomplish such stay, or (iii) shall deposit with the Trustee, as security for the performance by the Company or the Lessee, as the case may be, of its obligations under the Operative Document or Documents in question with respect to such taxes, assessments or other impositions, an amount equal to the principal of the contested taxes, assessments or other impositions, plus such further amounts as the Trustee may reasonably require from time to time to cover all penalties, interests, costs and expenses that may accrue during the period of the contest. In the event any such contest is made by the Company or the Lessee, the Company or the Lessee, as the case may be, shall, within five (5) days after final determination thereof adversely to it, fully pay and discharge the amount involved in or affected by any such contest, together with all penalties, fines, interest, costs or expenses that may have accrued thereon or that may result from any such action by it, whereupon the Trustee shall return to the Company or the Lessee, as the case may be, all amounts, if any, deposited by the Company or the Lessee in accordance with the next preceding sentence.

**"Permitted Encumbrances"**, when used in the Assignment Agreement, shall mean the Liens permitted by Section 1.11 thereof, when used in the Indenture or the Deed of Trust, shall mean the Liens permitted by Section 3.9 of the Indenture, and, when used in any other document, shall mean all such Liens described above.

**"Person"** shall mean an individual, partnership, corporation, trust or unincorporated organization, and a government or agency or political subdivision thereof.

**"Property"** shall mean any interest in any kind of property or asset, whether real, personal or mixed, or tangible or intangible.

**"Pullman"** shall mean Pullman Leasing Company, a Delaware Corporation, now named Signal Capital Corporation.

**"Railroad Equipment"** shall have the meaning specified in Section 1 of the Note Purchase Agreements.

**"Railroad Equipment Lease"** shall have the meaning specified in Section 1 of the Note Purchase Agreements.

**"Register"** shall have the meaning specified in Section 2.4 of the Indenture.

"Security" shall have the same meaning as in Section 2(1) of the Securities Act of 1933, as amended.

"Service Agreement" shall mean that certain Coal Service Agreement dated as of December 30, 1981 between the Lessee and TUCO, as the same may from time to time be amended or supplemented.

"Service Fee Payments" shall have the meaning specified in Section 1 of the Service Agreement or the Conditional Service Agreement, as applicable.

"SPS" shall mean Southwestern Public Service Company, a New Mexico corporation.

"Subject Indebtedness", when used in the Assignment Agreement or the Deed of Trust, shall have the respective meanings set forth therein and, when used in any other document, shall mean, unless otherwise specified, all Indebtedness described as "Subject Indebtedness" under either the Assignment Agreement or the Deed of Trust.

"Subsidiary" shall mean as to any particular parent corporation, any corporation, trust or association of which more than 50% (by number of votes) of the Voting Stock at the time outstanding shall at the time be owned, directly or indirectly, by such parent corporation or by any other corporation, association or trust which is itself a Subsidiary within the meaning of this definition, or collectively by such parent corporation and any one or more such Subsidiaries.

"Substantial Part" shall have the meaning specified in Section 3.10 of the Indenture.

"Suspension Period" shall have the meaning specified in Section 8(c) of the Service Agreement or the Conditional Service Agreement, as applicable.

"Trigger Event" shall have the meaning specified in Section 5(a) of the Facility Agreement.

"Trust Deed Trustee" shall have the meaning specified at the outset of the Deed of Trust.

"Trustee" shall mean The Connecticut Bank and Trust Company, National Association, a national banking association.

"TUCO" shall mean TUCO Inc., a Delaware corporation.

"Voting Stock" shall mean Securities of any class or classes of a corporation, the holders of which are ordinarily, in the absence of contingencies, entitled to elect a majority of the corporate directors (or Persons performing similar functions).

**ADDITIONAL LIENS**

**(None)**

**ANNEX 2**