

Master Coal Purchase and Sale Agreement

Table of Contents

Article	Page
Article 1: General Terms and Definitions	1
Article 2: Term	3
Article 3: Quantity	3
Article 4: Delivery and Transportation	3
Article 5: Title and Risk of Loss; Equipment Damage	7
Article 6: Coal Quality Specifications	7
Article 7: Sampling and Analysis	9
Article 8: Weighing	13
Article 9: Price and Price Adjustments	15
Article 10: Invoices, Payments, and Setoffs	18
Article 11: Force Majeure	20
Article 11A: Changes in Environmental-Related Requirements	22
Article 12: Records, Audits, and Access	24
Article 13: Default, Remedies, and Termination	25
Article 14: Notices	28
Article 15: Cooperation	29
Article 16: Warranty, Limitation on Liability, Duty to Mitigate & Indemnification	29
Article 17: Limitation on Waiver	30
Article 18: Confidentiality	30
Article 19: Entirety, Amendments	31
Article 20: Successors and Assigns	31
Article 21: Governing Laws	32
Article 22: Interpretation	32
Article 23: Resale and Buyer's Obligations	32
Article 24: Survival	33

MASTER COAL PURCHASE AND SALE AGREEMENT

This MASTER COAL PURCHASE AND SALE AGREEMENT ("Agreement") is entered into and is effective as of _____, between _____ ("Seller"), a _____ corporation, and _____ ("Buyer"). Seller and Buyer are sometimes hereinafter referred to separately as a "Party" or collectively as the "Parties."

RECITALS:

WHEREAS, each Party is engaged in the sale or purchase of Powder River Basin ("PRB") Coal (as hereinafter defined), and the Parties believe it is mutually beneficial to set forth the terms and conditions under which such Coal sales and purchases may be made between them.

IN CONSIDERATION of the mutual covenants and promises set forth hereafter, the Parties, intending to legally bind themselves, hereby agree as follows:

ARTICLE 1. GENERAL TERMS AND DEFINITIONS

- 1.01** The terms of this Agreement shall govern all purchases and sales of Coal between the Parties (hereinafter "Transactions") or options thereon during the term of this Agreement unless the Parties expressly indicate otherwise. All amendments, modifications, revisions, and changes to this Agreement or any related Transaction or option must be in writing and signed by both Parties. If the Parties enter into an option concerning the purchase and sale of Coal, the terms and conditions of this Agreement and the Confirmation (as hereinafter defined) shall govern the Transaction once the option has been exercised.
- 1.02** For individual Transactions, the Parties shall enter into a written confirmation letter ("Confirmation") that sets forth the following: the base price, price adjustments, quantity, term, quality specifications, mine(s), and any other Transaction-specific provisions mutually agreed upon by the Parties. All Confirmations shall be in writing, and no Confirmation shall be effective unless it is signed by both Parties. The Parties intend that the provisions of each individual Confirmation and the provisions of this Agreement shall be construed as one single integrated agreement and that without a written Confirmation, the Parties would not otherwise enter into a Transaction. Any in-

consistency or conflict between provisions of the individual Confirmation and provisions of this Agreement shall be resolved in favor of any provisions of the Confirmation.

1.03 Each of the following terms, when used in this Agreement, shall have the meaning given to it in this Section 1.03:

- (a) "**Actual Btu**" means the monthly Ton-weighted average as-received calorific value (stated in Btu/lb.) of Coal supplied under a Transaction.
- (b) "**Applicable Confirmation**" means the Confirmation that applies to a particular Transaction.
- (c) "**Claim**" means all claims or actions threatened or filed that directly or indirectly relate to the subject matter of indemnity under this Agreement (including, without limitation, the resulting losses, damages, expenses, reasonable attorneys' fees, and costs).
- (d) "**Coal**" means any and all Coal to be sold by Seller and purchased by Buyer pursuant to the terms and conditions of this Agreement.
- (e) "**Loading Provisions**" means the terms and conditions of Buyer's transportation contracts or excerpts thereof that are attached as Annex A to this Agreement. If Buyer's transportation contract is amended or replaced, the Parties shall supplement Annex A by attaching relevant portions of any such amendment or replacement as part of, or as a new, Annex A.
- (f) "**Quarter**" means each three (3)-month period that occurs during a calendar year with respect to each Transaction. The first Quarter of each calendar year shall begin on January 1 and end on March 31; the second Quarter of each calendar year shall begin on April 1 and end on June 30; the third Quarter of each calendar year shall begin on July 1 and end on September 30; and the fourth Quarter of each calendar year shall begin on October 1 and end on December 31.
- (g) "**Standard Btu**" means the standard calorific value (stated in Btu/lb.) that is set forth in a Confirmation and is the basis for a price adjustment as described in Section 9.04.
- (h) "**Ton**" means two thousand (2,000) pounds avoirdupois.

ARTICLE 2. TERM

2.01 This Agreement shall begin on the date first set forth above and shall continue in effect until terminated by either Party as provided in this Section 2.01. Either Party may terminate this Agreement by giving the other Party a written notice of termination, which shall specify the effective date of termination and shall be given at least sixty (60) days prior to such date; and such right of termination shall be each Party's absolute right to exercise. Termination of this Agreement under this Section 2.01 shall not affect either Party's rights and obligations with respect to any Transactions that have been agreed to in writing in a Confirmation prior to termination, and the terms of this Agreement shall continue to apply to such Transactions until such Transactions are completed or terminated.

ARTICLE 3. QUANTITY

3.01 Buyer shall be obligated to purchase and pay for, and Seller shall be obligated to sell and tender for delivery, the amount of Coal set forth in a Confirmation, except as may be limited by Article 11 or 11A of this Agreement.

3.02 Unless otherwise limited in the Confirmation, Buyer has the right to ship or use the Coal supplied under a Transaction at any location or for any purpose designated by Buyer.

ARTICLE 4. DELIVERY AND TRANSPORTATION

4.01 For each Transaction, Seller agrees to tender to Buyer, and Buyer agrees to accept from Seller, Coal in such quantity and of such quality as are set forth in the Applicable Confirmation. Seller shall tender the Coal to Buyer in accordance with reasonable monthly delivery schedules to be submitted by Buyer in writing to Seller in accordance with this Agreement and the Applicable Confirmation. Schedules shall be based on a ratable monthly basis unless otherwise agreed to by both Parties. In addition, Buyer shall provide Seller with monthly schedules in writing at least sixty (60) days prior to the beginning of each applicable month. If Seller objects to a schedule submitted by Buyer, Seller shall notify Buyer of Seller's objections in writing within fifteen (15) days of Seller's receipt of such schedule; and within fifteen (15) days after Buyer has received such notice of Seller's objections, the Parties shall work together, in good faith, to agree on a rea-

sonable and mutually acceptable schedule. The mine(s) used to source the Coal supplied under a Transaction shall be any mine set forth in the Applicable Confirmation.

- 4.02** Buyer shall supply the appropriate unit train railcars to transport Coal from the mine(s) to Plant _____ or other destination designated by Buyer. Such railcars shall be of a size compatible with the Loading Provisions. Unit train sizes may vary from 100 to 135 railcars per train; provided, however, that depending on railcar availability, shorter or longer trains may occasionally be operated by mutual agreement of the Parties.
- 4.03** Unless excused by Article 11 of this Agreement, if Buyer fails in any Quarter to provide the appropriate unit trains for delivery of the amount of Coal scheduled to be supplied during that Quarter pursuant to the provisions of Section 4.01 ("Scheduled Amount") under a Transaction or otherwise to accept the Scheduled Amount for that Quarter, Seller shall have the right, at Seller's sole option, to reduce the quantities of Coal to be supplied under that Transaction by the amount of the deficit ("Deficit Amount"), which shall be determined by the difference between (i) the Scheduled Amount for that Quarter and (ii) the amount of Coal actually supplied under that Transaction ("Actual Amount") during that Quarter. If Seller elects to exercise this right, Seller shall give Buyer written notice thereof within thirty (30) days after the end of the Quarter in which such deficit occurred ("Deficit Quarter"), which notice shall specify the Deficit Amount and the remaining quantities (as so reduced) to be supplied under that Transaction; and thereafter Seller shall have no obligation to supply to Buyer, and Buyer shall have no obligation to accept from Seller, the Deficit Amount for that Deficit Quarter. This right shall be in addition to any other rights or remedies available to Seller under this Agreement.
- 4.04** Unless excused by Article 11 of this Agreement, if Seller fails in any Quarter to tender for delivery the Scheduled Amount for that Quarter under a Transaction, Buyer shall have the right, at Buyer's sole option, either (i) to reduce the quantities of Coal to be supplied under that Transaction by the Deficit Amount or (ii) to require Seller to make up the Deficit Amount at a later time as provided in this Section 4.04. The Deficit Amount for that Quarter shall be determined by the difference between the Scheduled Amount for that Quarter and the Actual Amount for that Quarter. The following provisions shall apply to Buyer's rights under this Section 4.04:

- (a) If Buyer elects to exercise its right to reduce the quantities of Coal to be supplied under that Transaction, Buyer shall give Seller written notice thereof within thirty (30) days after the end of the Deficit Quarter, which notice shall specify the Deficit Amount and the remaining quantities (as so reduced) to be supplied under that Transaction; and thereafter Buyer shall have no obligation to accept from Seller, and Seller shall have no obligation to supply to Buyer, the Deficit Amount for that Deficit Quarter.
- (b) If Buyer elects to exercise its right to require Seller to make up the Deficit Amount, Buyer shall give Seller written notice thereof within thirty (30) days after the end of the Deficit Quarter, which notice shall specify the Deficit Amount and the time period (up to but not exceeding twelve (12) calendar months after the end of the Deficit Quarter) in which such makeup shall occur.
- (c) Buyer's rights under Section 4.04 shall be in addition to any other rights or remedies available to Buyer under this Agreement.

4.05 Seller shall cause Coal to be loaded and delivered at the loading facilities into railcars supplied by Buyer. Seller agrees to comply with the Loading Provisions; provided, however, that Seller's compliance with the Loading Provisions is subject to Seller's ability to load the required net tonnages in Buyer's railcars without significant risk of spillage or exceeding railcar load limits specified in the Loading Provisions. Buyer shall give Seller written notice of any changes to the Loading Provisions at least seventy-two (72) hours prior to the time that such changes become effective. If the changes to the Loading Provisions are inconsistent with Seller's commitments as otherwise set forth in this Agreement and Seller's then-current operating practice and such changes impose loading requirements that are materially different from or more burdensome on Seller than the Loading Provisions, Seller shall not be liable for noncompliance with such changes unless expressly accepted by Seller. In the event that (i) the obligations as set forth in this Article 4 are not met, (ii) Buyer incurs costs under its transportation contract(s) with the rail carrier(s) as a direct result of Seller's not meeting its obligation hereunder, and (iii) such failure is not the fault of either Buyer or the rail carrier(s), then Seller shall reimburse Buyer for any such costs, as set forth in the Loading Provisions, that have been invoiced to Buyer by the rail carrier(s).

- 4.06** All Coal supplied under a Transaction shall be loaded F.O.B. in Buyer-provided railcars at the delivery point located at each individual mine ("Delivery Point"). Buyer's railcars and unit train shall be compatible with Seller's trackage, storage, and loading facilities; and Buyer's railcars shall be clean, in good mechanical condition, and ready to load upon arrival at the Delivery Point. Seller shall load each railcar at Seller's expense and shall complete the loading of all railcars in each unit train within four (4) hours after the first empty railcar is actually placed by the rail carrier under Seller's loading chute. Unless excused by Article 11 or due to actions of Buyer or its rail carrier, Seller shall be responsible for demurrage or other charges invoiced to Buyer by its rail carrier that result directly from Seller's failure to load Buyer's trains as provided in this Section 4.06 and Sections 4.05 and 4.07.
- 4.07** Seller shall load each railcar of Coal supplied under a Transaction to the gross weight(s) designated in the Applicable Confirmation; provided, however, that under no circumstances shall the gross weight exceed the maximum limit set forth in the Loading Provisions. If Seller loads any railcar on Buyer's behalf outside of these specified limits, Seller shall assume any and all reasonable costs that may be charged by the rail carrier(s) and paid by Buyer as a direct result of such underloading or overloading of these railcars.
- 4.08** At the Delivery Point, Seller shall use an automatic equipment identification ("AEI") system to identify and list all railcars in the AEI system during the loading process. The weight for each railcar and the total unit train weight shall be automatically entered into the AEI system. Upon completion of loading and by the end of the next business day, Seller shall cause a shipping notice (in the form of a 404 bill of lading) to be transmitted to the rail carrier and to Buyer by way of electronic data interchange ("EDI"). Each shipping notice sent by EDI shall provide standard format information; provided, however, that (i) the Parties shall cooperate to resolve any discrepancies in the information transfer process and (ii) Seller shall make reasonable efforts to provide information in a format that is acceptable to Buyer.

ARTICLE 5. TITLE AND RISK OF LOSS; EQUIPMENT DAMAGE

- 5.01** For each unit train containing Coal supplied under a Transaction, all risk of loss of Coal in the unit train shall pass to Buyer upon completion of loading of all railcars in the unit train at the Delivery

Point; but title to the Coal shall not pass to Buyer until the unit train has arrived at Plant _____ or other destination designated by Buyer.

- 5.02** Seller shall be responsible for, and shall indemnify Buyer for, any and all direct reasonable costs resulting from damage to the following: (a) Buyer's or its rail carriers' equipment if such equipment is damaged while on Seller's property, except to the extent such damage is caused by the negligence or recklessness of Buyer or its rail carrier; and (b) Buyer's equipment (including, without limitation, mobile railcars and stationary equipment at Plant _____ or other destination designated by Buyer) if such equipment is damaged as a result of non-Coal material having been interspersed with the tendered Coal prior to leaving Seller's property.

ARTICLE 6. COAL QUALITY SPECIFICATIONS

- 6.01** Each Confirmation for a Transaction shall set forth the following requirements for the Transaction: (a) typical monthly Ton-weighted average Coal quality specifications ("Typical Specifications"); (b) monthly Ton-weighted average Coal quality suspension limits ("Suspension Limits"); and (c) per-shipment Coal quality rejection limits ("Rejection Limits").
- 6.02** At the Delivery Point, all tendered Coal shall be raw, substantially free of magnetic material and other foreign material impurities, and crushed to a maximum top size as set forth in the Applicable Confirmation as determined in accordance with applicable American Society of Testing and Materials ("ASTM") standards, shall substantially conform to the Typical Specifications, and shall conform to the Suspension Limits and the Rejections Limits.
- 6.03** In order to comply with the nitrogen oxide ("NOx") provisions of the Clean Air Act Amendments of 1990, as amended, judicial and administrative interpretations thereof, and regulations promulgated thereunder ("Clean Air Requirements"), Buyer may analyze one or more shipments of Coal supplied under each Transaction to determine (in Buyer's reasonable judgment) whether the Coal, when used at Plant _____, causes Plant _____ to exceed applicable NOx emission limitations of the Clean Air Requirements. In performing such analysis, Buyer may evaluate the combination of (i) the percent nitrogen, (ii) the ratio of fixed carbon to volatile matter, and (iii) other quality characteristics of the Coal by using an Electric Power Research Institute product referred to as the EPRI NOx/LOI Predictor (EPRI TR-109208 or subsequent versions). Buyer may also consider its actual

operating experience with the Coal and the amount of NOx emissions produced by using the Coal at Plant _____. In the event that Buyer reasonably determines, as provided in this Section 6.03, that the Coal has caused or is causing Plant _____ to exceed applicable NOx emission limitations of the Clean Air Requirements, Buyer may terminate the Transaction(s) by giving Seller written notice thereof, which shall specify the effective date of termination and shall be given at least thirty (30) days prior to such date. Seller shall have the right to substitute alternate Coal that complies with the Typical Specifications to remedy any violation of the NOx emission limitations of the Clean Air Requirements, whether such violation has actually occurred or is reasonably perceived by Buyer as likely to occur.

6.04 The Parties recognize that during the performance of a Transaction, changes in Environmental-Related Requirements (as defined in Section 11A.01) may occur. In the event of any such change, the provisions of Article 11A shall apply.

6.05 If any shipment of Coal exceeds one or more of the Rejection Limits specified in the Applicable Confirmation (a "Non-Conforming Shipment"), Buyer shall have the option, within twenty-four (24) hours of Buyer's receipt of the quality analysis of the Coal contained in the Non-Conforming Shipment (such analysis shall be performed and transmitted by Seller as provided in Section 7.03), of either (i) rejecting the Non-Conforming Shipment prior to unloading the Coal or (ii) accepting the Non-Conforming Shipment and reducing the base price of Coal for such Non-Conforming Shipment by 10% of the base price. If Buyer fails to timely exercise its rejection rights under this Section 6.05 as to a Non-Conforming Shipment, Buyer shall be deemed to have waived such rejection rights with respect to that shipment only. Buyer's failure to timely exercise such rejection rights shall not constitute a waiver of its right to any price adjustment provided for herein or in the Applicable Confirmation. If Buyer timely rejects a Non-Conforming Shipment, Seller shall be responsible for promptly transporting the Non-Conforming Shipment to an alternative destination determined by Seller and, if applicable, promptly unloading such Coal. Seller shall reimburse Buyer for all reasonable costs and expenses associated with the transportation, storage, handling, and removal of the Non-Conforming Shipment. Buyer shall cooperate with

Seller in minimizing Seller's cost of redirecting the Non-Conforming Shipment. Seller shall replace the Non-Conforming Shipment within a reasonable period of time.

6.06 If (i) three (3) or more shipments of Coal are supplied during a calendar month under a Transaction and the Ton-weighted average of all shipments during such month exceeds one or more of the Suspension Limits specified in the Applicable Confirmation or (ii) three (3) Non-Conforming Shipments, whether rejected or not, are supplied under a Transaction during any Quarter or (iii) two (2) out of four (4) consecutive shipments under a Transaction are Non-Conforming Shipments, Buyer may suspend future shipments from Seller, except those shipments already loaded into railcars or are in the process of being loaded into railcars, by giving Seller a written notice of suspension. Seller shall, within twenty (20) days after Seller has received such notice, provide Buyer with reasonable assurances that subsequent deliveries of Coal shall comply with the Suspension Limits set forth in the Applicable Confirmation. If Seller fails to provide such assurances within that twenty (20)-day period, Buyer shall have the right (i) to terminate the Transaction without further obligation to Seller with respect to such Transaction and (ii) to exercise such other remedies as are provided to Buyer under Section 13.01(b). Buyer's waiver of such rights for any one incident shall not constitute a waiver for any subsequent incident(s). If Seller provides such assurances to Buyer's reasonable satisfaction, deliveries under that Transaction shall resume; and any tonnage deficiencies resulting from suspension may be made up, at Buyer's sole option, on a schedule that is mutually agreeable to the Parties. Buyer shall not unreasonably withhold its acceptance of Seller's assurances nor unreasonably delay the resumption of shipments.

ARTICLE 7. SAMPLING AND ANALYSIS

7.01 Seller shall cause, at its expense, the Coal in each unit train that is loaded for delivery to Buyer to be sampled and analyzed in accordance with applicable ASTM standards and the requirements of Section 7.02. Buyer shall have the right, at its own risk and expense, to have a representative present at any and all times to observe sampling, sample preparation, and analysis procedures performed by Seller or its designee; and Seller shall have the right, at its own risk and expense, to have a representative present at any and all times to observe analysis procedures performed by Buyer or its designated laboratory.

7.02 At each Delivery Point, Seller shall provide a mechanical sampling system and shall use the sampling system to collect a representative sample of Coal in each unit train that is loaded for delivery to Buyer under a Transaction. The following provisions shall apply to the sampling system and the collection of samples:

- (a) The design and operation of the sampling system and the procedures used for sample preparation shall, at a minimum, meet the requirements of ASTM D-2234 "Standard Test Method for Collection of a Gross Sample of Coal" and ASTM D-2013 "Standard for Preparing Coal Samples for Analysis." The sampling system shall be enclosed to minimize moisture loss and shall be designed for one stage of sample-crushing to the four (4)-mesh sieve size. The sample flow rates through the sampling system shall be sufficient to minimize moisture loss.
- (b) All sample increments shall be collected in the mechanical sampling system in compliance with ASTM D-2234, Condition IB1. All mechanical sampling systems shall be inspected regularly by the independent third-party operator of the mine-site laboratory in accordance with ASTM D-4702. Upon Buyer's request, Seller shall make available to Buyer the inspection reports prepared by such third-party operator. If an action item is identified during an inspection by such third-party operator, Seller shall immediately take all reasonable measures to correct it.
- (c) Using bias test procedures approved by Buyer, Seller shall cause such sampling system to be tested periodically, at Seller's expense, for bias against stopped-belt reference samples. Such testing shall be scheduled such that when each shipment of Coal is sampled, the most recent bias test results are dated by no more than three (3) previous years. Seller shall give Buyer written notice of the scheduled date of each bias test; and Buyer or its representative shall have the right to be present during such test and to observe and inspect sample collection, sample preparation, and laboratory analysis of bias test samples. If a bias is detected by such test, Seller shall immediately take all reasonable measures to correct or remove the source of the bias; and Buyer shall have the right to suspend shipments of Coal under one or more Transactions until (i) the source of the bias is removed and (ii) such sampling system is re-tested for bias.

- (d) Using an enclosed riffle and following the procedures of ASTM D-2013 with respect to each shipment under a Transaction, Seller shall cause the final sample to be divided into at least four (4) laboratory sample splits, with each split weighing a minimum of four thousand (4,000) grams, and shall cause each split to be put in suitable airtight containers. Seller shall cause one (1) sample split to be sent to Buyer's designated laboratory for Buyer's analysis, which shall be used to determine payment for the shipment, and shall cause one (1) sample split to be analyzed to provide the information required under Section 7.03 with respect to the shipment. Seller or its designee shall retain one (1) of the remaining sample split(s), as a reserve sample, in an airtight container (properly sealed and labeled) for a period of at least thirty (30) days after the date of sample collection. Each sample split shall be clearly labeled as to mine, date of sampling, date of preparation, and other identification as to shipment (such as train identification number); and each sample split prepared for Buyer's analysis shall be sent within forty-eight (48) hours of train loading to the address listed in the Applicable Confirmation, unless a different address is provided by Buyer to Seller in writing.
- (e) In the event that a sampling system at the Delivery Point for a Transaction ceases to operate properly, then Seller shall notify Buyer and shall immediately cease using such sampling system to sample shipments to Buyer; provided, however, that until the malfunction has been corrected, Seller may use any other properly operating and bias-free sampling system on the site of the Delivery Point to sample shipments to Buyer. If the sampling system malfunctions during the loading of any shipment under a Transaction, Buyer may, at its option, use a weighted average analysis of the last two (2) shipments loaded prior to such malfunction to determine the analysis of the shipment being loaded at the time of such malfunction. If all of the sampling systems at the Delivery Point cease to operate in accordance with the requirements of this Agreement at any time during the term of a Transaction, Buyer's representative may direct Seller to delay or stop the loading of any one or more shipments under that Transaction. After any such direction is given, the following provisions shall apply:
- (i) Seller shall immediately delay or stop, as the case may be, the loading of such shipment(s).
 - (ii) Seller shall repair the sampling systems as soon as practical, and Seller shall not use any

malfunctioning system to sample shipments under that Transaction until repairs to such sampling system are completed.

- (iii) Notwithstanding the foregoing provisions of this Section 7.02(e), if Seller is unable to repair such sampling system within a reasonable period of time, Seller may complete the loading of any shipment that was in the process of being loaded when the malfunction occurred; and the Parties shall then mutually agree on the quality analysis of such shipment.

7.03 For each unit train that is loaded with Coal for delivery to Buyer under a Transaction, Seller shall cause the following data to be provided to Buyer, within forty-eight (48) hours after train loading, at each location specified in the Applicable Confirmation by a mutually agreed upon method of electronic data transmission: (a) tonnage (gross, net, and tare average for each railcar and the unit train in total) (the "Tonnage Report"); and (b) the average calorific value, % moisture, % ash, % sulfur, and % Na₂O in ash (if set forth in the Applicable Confirmation) (the "Short Proximate Analysis"). If the forty-eight (48)-hour period after train loading ends on a weekend or holiday, Seller shall cause the Tonnage Report and the Short Proximate Analysis to be transmitted to Buyer by the end of the next business day following the end of such period; provided, however, that the Tonnage Report and the Short Proximate Analysis for each unit train shall be transmitted to Buyer before the unit train arrives at Plant _____ or other destination designated by Buyer. Any additional analysis requested by Buyer that exceeds the information provided in the Short Proximate Analysis shall be provided by Seller at Buyer's expense. Buyer may refuse to unload a unit train until Buyer has received the Short Proximate Analysis required under this Section 7.03 concerning Coal contained in that unit train.

7.04 Buyer, at its expense, shall analyze the sample splits sent to Buyer's designated laboratory in accordance with ASTM standards; and the results of such analysis shall be used for the governing purposes of each Transaction, except as otherwise provided in this Agreement. Buyer shall e-mail a copy of each such analysis to Seller's representative at _____ within three (3) working days after the sample is received at the designated laboratory, which may be Buyer's Central Laboratory in _____, or a qualified independent coal-testing laboratory selected by Buyer. If

Buyer elects to employ an independent coal-testing laboratory, Seller shall not be liable for any costs incurred by Buyer, except as otherwise provided in this Agreement.

- 7.05** In the event that (i) a dispute arises between Buyer and Seller within thirty (30) days of Buyer's analysis of a shipment due to a difference between Buyer's analysis and Seller's Short Proximate Analysis of the shipment and (ii) the difference exceeds the ASTM interlab reproducibility limits, an independent testing laboratory, mutually agreeable to the Parties, shall analyze the reserve sample. The Party whose analysis for the disputed parameter of the shipment is closest to the independent analysis for such parameter shall prevail, and such Party's analysis of the shipment shall govern for the shipment in question. In such case, the cost of the analysis made by such independent testing laboratory shall be borne by the Party whose analysis is furthest from the independent analysis and, therefore, not used. In the event that both Parties' analyses for the disputed parameter of the shipment differ from the independent testing laboratory's result by the same amount, the independent testing laboratory's result shall govern for the shipment in question; and the Parties shall share equally the cost of the independent testing and analysis. In the event that significant differences occur between Buyer's analyses of ten (10) or more shipments and Seller's analyses of the same shipments, the Parties shall cooperate to determine the cause of such differences and to resolve the matter equitably.

ARTICLE 8. WEIGHING

- 8.01** Seller shall cause, at its expense, each unit train that is loaded with Coal for delivery to Buyer under a Transaction to be weighed on certified commercial scales at Seller's train-loading facility at the Delivery Point. The net weight of Coal contained in each unit train, as determined from such weighing system, shall be reflected in the Tonnage Report provided pursuant to Section 7.03 and shall be used to determine payment for the shipment and for governing purposes of that Transaction. Buyer shall have the right, at its own risk and expense, to have a representative present at any and all times to observe weighing and loading operations performed by Seller or its designee.
- 8.02** All scales that are used to weigh unit trains loaded with Coal for delivery to Buyer under a Transaction shall be calibrated, tested, and operated in accordance with the rules and regulations contained in the then-current "Scale Handbook" of the Association of American Railroads, which are

based on the National Institute of Standards and Technology "Handbook 44" entitled "Specifications, Tolerances and Other Technical Requirements for Commercial Weighing and Measuring Devices." Upon Buyer's request, Seller shall provide copies of calibration and testing reports related to Seller's weighing system to Buyer. The following provisions shall also apply to Seller's weighing system:

- (a) The weighing system shall be tested and certified on a semi-annual basis and shall be maintained at all times as close as practicable to the condition established during the certification tests. If a coupled-in-motion ("CIM") track scale is used, it shall be tested as-used with a ten (10)-car train in accordance with Handbook 44.
- (b) Seller shall promptly notify Buyer or its representative, orally or in writing, of any significant modifications to the weighing system.
- (c) In the event that (i) the weighing system at the Delivery Point for a Transaction ceases to operate properly and cannot be repaired prior to arrival of one of Buyer's unit trains and (ii) no other properly functioning certified scale is available to weigh the shipment to be loaded for delivery to Buyer, then Seller shall immediately notify Buyer or its representative, orally or in writing, to determine the course of action to be taken concerning subsequent shipments under that Transaction; and Buyer's representative may direct Seller to delay or stop the loading of any one or more shipments under that Transaction. After any such direction is given, the following provisions shall apply:
 - (i) Seller shall immediately delay or stop, as the case may be, the loading of such shipment(s).
 - (ii) Seller shall repair the weighing system as soon as practical, and Seller shall not use the weighing system to weigh shipments under that Transaction until such repair is completed or the Parties mutually agree on a method for weighing shipments under that Transaction.
 - (iii) Notwithstanding the foregoing provisions of this Section 8.02(c), Seller may complete the loading of any shipment that was in the process of being loaded when the weighing system ceased to operate properly; and the Parties shall then mutually determine the net weight of such shipment.

- 8.03** If Seller's scales are not available to determine the valid net weight of all of the railcars in a unit train loaded with Coal for delivery to Buyer, the Parties shall mutually determine the net weight for each of the unweighed railcars in such train. Until Seller's scale has been certified to operate in accordance with Handbook 44, no future shipments shall be weighed over that scale for delivery to Buyer without Buyer's consent.

ARTICLE 9. PRICE AND PRICE ADJUSTMENTS

- 9.01** For all Coal delivered under a Transaction, Buyer shall pay Seller the base price of Coal ("Base Price") set forth in the Applicable Confirmation, as adjusted where appropriate under Section 9.03.
- 9.02** Seller shall be solely responsible for all assessments, fees, costs, expenses, and taxes relating to the mining, production, sale, use, loading, and tender of Coal to Buyer or in any way accruing or levied prior to transfer of title to the Coal to Buyer under a Transaction (including, without limitation, severance taxes, royalties, ad valorem taxes, black lung fees, reclamation fees, and other costs, charges, and liabilities). The Base Price for each Transaction includes reimbursement to Seller of all environmental, land restoration, and regulatory costs (including, without limitation, any reclamation costs required under applicable federal, state, or local law) as of the date on which the Applicable Confirmation for that Transaction was issued ("Confirmation Date"). Buyer shall be responsible for any sales or use tax unless Buyer provides Seller an appropriate exemption certificate or similar document.
- 9.03** The Base Price for each Transaction shall be subject to adjustments for (i) changes in existing laws and regulations (including, without limitation, changes in levies and rates), (ii) new laws or regulations, or (iii) changes in interpretations of existing laws and regulations or new laws or regulations (collectively, "Governmental Impositions") if such changes in Governmental Impositions are enacted or occur after the Confirmation Date for that Transaction and change Seller's costs of producing Coal for delivery during the term of that Transaction. The Base Price set forth in the Applicable Confirmation includes Seller's costs of compliance, as of the Confirmation Date, with all applicable Governmental Impositions and all other taxes, fees, and obligations imposed by any federal or state laws or regulations known or in effect as of the Confirmation Date. The following provi-

sions shall apply to adjustments, if any, for Governmental Impositions with respect to the Base Price for a Transaction:

- (a) No adjustment shall be made under Section 9.03 for costs associated with any applicable Governmental Imposition or other tax, fee, or other obligation imposed by any federal or state law or regulation that is in effect as of the Confirmation Date or is known as of the Confirmation Date (but not effective until thereafter), regardless of whether Seller's costs as of the Confirmation Date fully reflected such costs.
- (b) To the extent not prohibited by or inconsistent with other provisions of Section 9.03, adjustments shall be made for changes in Governmental Impositions that directly affect coal actually supplied to Buyer under a Transaction and result from the following: (i) amendments after the Confirmation Date to presently applicable laws or regulations; (ii) requirements of entirely new laws or regulations that are enacted or promulgated after the Confirmation Date; or (iii) final judgments, orders, or decrees issued by any court or regulatory body after the Confirmation Date that reflect new and different interpretations of law; provided, however, that no price adjustment shall be made for costs related to any civil or criminal fine or penalty imposed as the result of Seller's failure to comply with any law or regulation or any judgment, order, or decree of any court or regulatory body.
- (c) In the event that, after the Confirmation Date, any change in a federal or state law or regulation or interpretation thereof imposes a new Governmental Imposition or removes, increases, or decreases an existing Governmental Imposition, Seller shall promptly give Buyer written notice thereof and shall specify the amount and effective date of any claimed adjustment to the Base Price that results from such change. In addition, such notice shall contain sufficient documentation and data to enable Buyer to review and quantify the effect of such change on Seller's costs and to substantiate the amount of the claimed adjustment. Within sixty (60) days after Buyer has received such notice from Seller, the Parties shall jointly estimate and attempt, in good faith, to agree on the costs or savings resulting from such new Governmental Imposition or such removal, increase, or decrease in an existing Governmental Imposition during the remaining term of the Transaction. If the Parties agree on the amount of such costs or savings, the

Base Price shall be adjusted to reflect fifty percent (50%) of the amount of such costs or savings.

- (d) Any adjustment pursuant to Section 9.03(c) that results in a price increase shall become effective on the later of the following: (i) the date on which the new Governmental Imposition or increase in an existing Governmental Imposition takes effect; or (ii) the date on which Buyer received the notice from Seller as required by Section 9.03(c). Any adjustment pursuant to Section 9.03(c) that results in a price decrease shall become effective on the date on which the removal or decrease in an existing Governmental Imposition takes effect.
- (e) Notwithstanding the foregoing provisions of Section 9.03, no price adjustment shall occur under Section 9.03 with respect to a Transaction until the cumulative effect of all such changes in costs or savings equals or exceeds \$0.05 per Ton for any calendar year under that Transaction.
- (f) Notwithstanding the foregoing provisions of Section 9.03, if the cumulative effect of a claimed adjustment under Section 9.03 with respect to a Transaction and all prior price adjustments under Section 9.03 with respect to that Transaction would result in an adjusted Base Price that is more than ten percent (10%) greater than the original Base Price for that Transaction, the Parties shall negotiate, in good faith, for a period of thirty (30) days ("Negotiation Period") in an effort to reach a mutually acceptable resolution regarding an adjusted Base Price. If the Parties are unable to reach a mutually acceptable resolution during the Negotiation Period, Seller may elect to absorb the excess costs resulting from the change in Governmental Impositions by giving Buyer written notice of such election within fifteen (15) days after the end of the Negotiation Period. If Seller does not elect to absorb such excess costs, either Party may terminate that Transaction by giving the other Party a written notice of termination, which shall specify the effective date of termination and shall be given (i) no later than thirty (30) days after the end of the Negotiation Period and (ii) at least sixty (60) days prior to the effective date of termination.

9.04 The Base Price under a Transaction may also be adjusted to reflect variations in the calorific value, sulfur content, or other qualities of the Coal as set forth in the Applicable Confirmation.

ARTICLE 10. INVOICES, PAYMENTS, AND SETOFFS

10.01 For each unit train containing Coal delivered to Buyer under a Transaction, Buyer shall prepare an invoice ("Shipment Invoice"); and each Shipment Invoice shall be based on the net weight of Coal contained in the shipment (as determined according to Article 8) and the Base Price set forth in the Applicable Confirmation, as adjusted where appropriate under Section 9.03. Within thirty (30) days after the end of each calendar month during the term of a Transaction, Buyer shall prepare an invoice ("Monthly Invoice") for quality adjustments, as provided in the Applicable Confirmation; and each Monthly Invoice shall be based on Buyer's analyses of shipments received under that Transaction during the calendar month involved. Buyer shall clearly indicate Buyer's applicable purchase order number on all Shipment Invoices and all Monthly Invoices. Each Monthly Invoice shall state for each trainload of Coal received during the calendar month involved the following information: (a) the quantity of Coal delivered; (b) the Actual Btu; (c) the SO₂ content (stated in lbs. SO₂/mmBtu); (d) % Na₂O in ash (if set forth in the Applicable Confirmation); and (e) any required quality adjustments. Buyer shall e-mail a copy of each Shipment Invoice and each Monthly Invoice to Seller's representative at _____.

Seller shall transmit any invoices that are submitted by Seller to Buyer with respect to a Transaction to the following address:

10.02 For all Shipment Invoices related to a Transaction, Buyer shall make interim payments to Seller on the twentieth (20th) and twenty-eighth (28th) days of each calendar month for shipments received and unloaded prior to such dates. After preparing each Monthly Invoice, Buyer shall apply the quality adjustments reflected in the Monthly Invoice to determine the actual amount to be paid for shipments under that Transaction. Where interim payments to Seller for one or more shipments have resulted in an underpayment or overpayment for such shipments, the difference be-

tween (i) the actual amount to be paid for such shipments and (ii) the interim payments for such shipments shall be applied to Seller's account. Buyer shall transmit all payments related to a Transaction by electronic transfer of funds to the following account (unless changed by written notice from Seller to Buyer):

Payment Detail: To ensure proper allocation of payments to appropriate invoice, Buyer shall e-mail invoice numbers and amounts paid to Seller's representative at _____.

- 10.03** In the event that Seller, in good faith, disputes part or all of a Shipment Invoice or a Monthly Invoice, Seller shall give Buyer written notice of the disputed portion, with reasons for dispute, within sixty (60) days after the date of the Shipment Invoice or the Monthly Invoice, as the case may be. All invoices related to a Transaction shall be final and not subject to further adjustments or correction unless objection to the accuracy of such invoices is made within the period of one (1) year after the termination of that Transaction; and no additional payments (including, without limitation, payments related to price adjustments under Section 9.03) shall be due or payable with respect to that Transaction after such one (1)-year period has expired.
- 10.04** If a Party is required to pay an amount to the other Party in the same invoice period, then such amounts with respect to each Party may be aggregated; and the Parties may discharge their obligations to pay through netting, in which case the Party owing the greater aggregate amount shall pay to the other Party the difference between the amounts owed.
- 10.05** Each Party reserves to itself all rights, setoffs, counterclaims, and other remedies and defenses to the extent not expressly denied or waived herein that such Party has or may be entitled to arising from or out of this Agreement. All outstanding Transactions and the obligations to make payment in connection under this Agreement may be offset against each other, set off, or recouped therefrom.
- 10.06** If a Party fails to pay amounts owed under a Transaction within twenty (20) days after such amount is due and payable, unless such amount is the subject of a dispute as provided above or

is excused by Article 11, in addition to the rights and remedies otherwise provided in this Agreement, the aggrieved Party ("Aggrieved Party") shall have the right to suspend performance under any or all Transactions under this Agreement. If the Aggrieved Party exercises its right to suspend performance as provided in this Section 10.06, the Aggrieved Party shall give the other Party written notice thereof, which shall specify the amount then due and payable. If such failure to pay continues for an additional twenty (20) days after the other Party has received such notice, the Aggrieved Party may terminate this Agreement and all Transactions under this Agreement by giving the other Party a written notice of termination, which shall specify the effective date of termination and shall be given at least five (5) days prior to such date. Thereafter, the Aggrieved Party shall be entitled to all other rights and remedies provided in this Agreement.

ARTICLE 11. FORCE MAJEURE

- 11.01** The term "Force Majeure" as used herein shall mean an act or event that is not reasonably within the control and without the fault or negligence of the Party claiming Force Majeure and includes, without limitation, the following: acts of God; acts of the public enemy; insurrections; riots; labor disputes; boycotts; fires; explosions; floods; breakdowns of or damage to major components or equipment of Plant _____, other generating plants owned by or affiliated with Buyer, Seller's mine, transmission systems, or Buyer's transportation; embargoes; acts of judicial or military authorities; acts of governmental authorities; inability to obtain necessary permits, licenses, and governmental approvals after applying for same with reasonable diligence; or other causes of a similar or dissimilar nature that prevent the producing, processing, or loading of Coal by Seller or the receiving, accepting, unloading, or use of Coal by Buyer at Plant _____ or other generating plants owned by or affiliated with Buyer at which Coal is being use. Force Majeure also includes, without limitation, the failure of a Party's contractor(s) to furnish labor, services, Coal, materials, or equipment in accordance with its contractual obligations (but solely to the extent such failure is itself due to Force Majeure).
- 11.02** If, because of Force Majeure, either Party fails to perform any of its obligations under this Agreement (other than the obligation of a Party to pay money) and if such Party shall promptly give to the other Party written notice of such Force Majeure, then the obligation of the Party giving such

notice ("Claiming Party") shall be suspended to the extent made necessary by such Force Majeure and during its continuance; provided, however, that the Claiming Party shall use good-faith efforts to eliminate such Force Majeure, insofar as reasonably possible, with a minimum of delay. If the situation of Force Majeure exceeds sixty (60) consecutive days, the Party not claiming Force Majeure ("Non-Claiming Party") may, at its option, terminate the Transaction, in whole or in part, by giving the Claiming Party written notice thereof, which shall specify the effective date of termination and shall be given at least sixty (60) days prior to such date. On the effective date of such termination, neither Party shall have any further obligation to the other Party regarding that portion of the Transaction terminated, except with respect to (i) shipments made prior to the effective date of such termination or (ii) other obligations or liability that may have accrued prior to the effective date of such termination. Any deficiencies in deliveries of Coal caused by an event of Force Majeure shall be made up, at the sole discretion of the Non-Claiming Party, on a mutually agreeable schedule. The Claiming Party shall provide suitable proof to the Non-Claiming Party to substantiate any claim made under this Article 11.

- 11.03** Both Parties agree that significant capital expenditures and settlement of strikes and lockouts shall be entirely within the discretion of the Party having the difficulty. The above requirement that any Force Majeure shall be remedied with all reasonable dispatch shall not require significant capital expenditures or settlement of strikes and lockouts by acceding to the demands of the opposing party when such course is inadvisable in the discretion of the Party having the difficulty.
- 11.04** The loss of Buyer's markets or Buyer's inability to economically use Coal purchased under a Transaction, the loss of Seller's supply or Seller's ability to sell Coal to a market at a more advantageous price, the change in the market price of Coal or price of power, or regulatory or contractual disallowance of the pass-through of the costs of Coal or other related costs shall not constitute events of Force Majeure under this Agreement.

ARTICLE 11A. CHANGES IN ENVIRONMENTAL-RELATED REQUIREMENTS

- 11A.01** The term "Environmental-Related Requirement," whether in the singular or the plural, means the following:

- (a) any environmentally related prohibition, restriction, or limitation regarding the use of Coal at Plant _____;
- (b) any prohibition, restriction, or limitation regarding (i) the quality of Coal (including, without limitation, any constituent specification) that may be used at Plant _____ or (ii) the type or amount of emissions from Plant _____;
- (c) any rule or requirement affecting the permissible means for complying with any such prohibition, restriction, or limitation; or
- (d) any environmentally related imposition of a cost, fee, tax, or other economic burden on Buyer related to (i) the production of electricity by means of coal-fired electric generation, (ii) the quantity of Coal purchased for or used at Plant _____, (iii) any constituent specification of Coal purchased for or used at Plant _____, (iv) the type or amount of emissions from Plant _____, or (v) the installation of any type of environmental-related equipment required by any regulatory authority to which Buyer is subject.

In addition, the term shall be deemed to include, without limitation, Buyer's strategy, as determined by Buyer in its reasonable judgment, for compliance with Environmental-Related Requirements.

11A.02 A change in Environmental-Related Requirements shall be deemed to have occurred in any one or more of the following circumstances:

- (a) there is any increase or decrease in existing Environmental-Related Requirements;
- (b) Buyer decides, in its reasonable judgment, to change its environmental compliance strategy to comply with any existing Environmental-Related Requirements; provided, however, that Buyer shall not deem changes in economic coal market conditions to be the determining factor in making its reasonable judgment determination to change its compliance strategy; or
- (c) a new Environmental-Related Requirement is imposed on Buyer as a result of any federal or state law, administrative regulation or ruling, local ordinance, court order or decision, or any revision in the interpretation or implementation of such law, regulation, ruling, ordinance, order or decision.

The Parties acknowledge and agree that a change in Environmental-Related Requirements may occur even though (i) such requirement is stated as a restriction, limitation, or obligation imposed on Buyer and its affiliates or some other group of utilities or (ii) such requirement affects Buyer in a general way and is not directed at specific plants, fuels, fuel supplies, or other operating conditions.

11A.03 The Parties acknowledge and agree that the provisions of Article 11A are intended to provide rights not provided under Article 11 and that the price, quality specifications, quantity, and destination(s) of Coal to be supplied under each Transaction are predicated on Environmental-Related Requirements that are known and in effect as of the Confirmation Date for the Transaction. For purposes of this Section 11A.03, an Environmental-Related Requirement shall not be deemed to be "known" if it relates to any federal or state law, administrative regulation or ruling, local ordinance, or court order

or decision or interpretation of such law, regulation, ruling, ordinance, order, or decision (collectively, "Legal Requirements") that is being challenged in any administrative or judicial proceeding ("Legal Proceeding") as of the Confirmation Date for the Transaction. Upon the final resolution of the Legal Proceeding (including any appeals related to the Legal Proceeding), Buyer shall determine, in its reasonable judgment, if the Legal Requirements (whether changed or unchanged as a result of the Legal Proceeding) constitute a change in Environmental-Related Requirements.

11A.04 In the event that a change in Environmental-Related Requirements occurs after the Confirmation Date for a Transaction, then Buyer shall determine, in its reasonable judgment, (i) how to comply with such change and (ii) whether such change has had or may have an adverse impact on the use of Coal to be supplied under one or more Transactions at Plant _____. Any change in Environmental-Related Requirements that has one or more of the following effects shall be deemed to have an adverse impact on the use of Coal at Plant _____, even though such requirements may allow Buyer a choice of options for complying with such requirement (which choice may include, for example, the payment of a fee or tax in lieu of the installation of equipment, the use of coal of different constituent specifications, or the reduction in the overall use of Coal at Plant _____):

- (a) the change imposes a cost, fee, tax, or other economic burden on Buyer concerning (i) the constituent specifications of Coal purchased for or used at Plant _____ or (ii) the type or amount of emissions from Plant _____;
- (b) the change directly prevents or restricts the use of Coal to be supplied under one or more Transactions at Plant _____;
- (c) the change requires Buyer to install equipment (including, without limitation, flue gas desulfurization equipment, selective catalytic reduction equipment, selective non-catalytic reduction equipment, equipment for co-firing with natural gas or particulate removal equipment) at Plant _____ in order to comply with such change; or
- (d) the change requires or permits Buyer to use Coal of a quality (including, without limitation, sulfur) different from the quality specifications set forth in the Applicable Confirmation.

11A.05 If Buyer determines that a change in Environmental-Related Requirements has had or may have, at a future date, an adverse impact on the use of Coal to be supplied under one or more Transactions, Buyer shall so notify Seller in writing. Upon receipt of such notice, Seller may propose, within thirty (30) days after receipt of such notice, any steps available to Seller in processing the Coal, supplying substitute Coal, or other measure that would result in as low a delivered cost of fuel at Plant

_____ as Buyer could obtain by purchasing reasonably available substitute fuel (taking into account any fees, taxes, costs, or other economic burdens imposed on the use of Coal at Plant _____). If Buyer determines, in its reasonable judgment, that Seller cannot achieve this result, Buyer may terminate the Transaction(s) by giving Seller written notice thereof, which shall specify the effective date of termination and shall be given at least ninety (90) days prior to such date. Buyer may give such notice either before or after a change in Environmental-Related Requirements becomes effective.

11A.06 If, at any time during the term of this Agreement and regardless of whether a change in Environmental-Related Requirements has occurred, Buyer determines, in its reasonable judgment, that any environmental compliance problem has resulted from the components or characteristics of Coal supplied under one or more Transactions or the products of its combustion (including, without limitation, nitrogen oxide emissions, mercury emissions, chlorine emissions, particulate emissions, and carbon emissions) or any other constituent or property of the Coal not otherwise specified herein, the Parties shall immediately enter into discussions in a good-faith effort to resolve the problem. If such discussions fail to resolve such problem in a manner that, in Buyer's judgment, is reasonable and would not impose an unreasonable additional expense on Buyer, Buyer may terminate the Transaction(s) by giving Seller written notice thereof, which shall specify the effective date of termination and shall be given at least ninety (90) days prior to such date.

ARTICLE 12. RECORDS, AUDITS, AND ACCESS

12.01 Seller shall maintain books and records relating to the supply of Coal under this Agreement and the applicable Transaction in accordance with generally accepted accounting principles and shall retain such books and records for a period of not less than two (2) years after the end of each calendar year for all Coal tendered during such calendar year.

12.02 Upon reasonable notice and during normal business hours, Buyer or Buyer's independent auditors shall have the right to inspect Seller's books and records relating to all provisions of this Agreement that include Coal quality, quantity shipped, and price adjustments or as may be necessary to satisfy inquiries from governmental or regulatory agencies, but only to the extent necessary to verify the accuracy of any statement, charges, or computations made pursuant to this

Agreement or a Transaction. Seller shall make a reasonable effort to facilitate Buyer's inspection of such records in Seller's possession. Buyer and its auditors, to the extent permitted by law or regulation, shall treat all such information as confidential.

- 12.03** Buyer or its representatives, at any time during normal operation of the mine(s) listed in the Applicable Confirmation, may enter such mine(s) or other appropriate locations, at Buyer's own risk and expense, for any of the following purposes: (a) to inspect and examine the method and manner of, and equipment used in, mining, producing, washing, storing, loading, unloading, transporting, sampling, weighing, analyzing, or other handling of Coal to be supplied under that Transaction; (b) to take samples of Coal for Buyer's analyses; or (c) in connection with any accounting, audit, or examination of Seller's records. Prior to entering such mine(s), Buyer's representative shall check in with appropriate personnel at the entrance to the mine(s). No such inspection by Buyer or its representatives shall be deemed a waiver of any of Buyer's rights or relieve Seller of any obligations under that Transaction or this Agreement.

ARTICLE 13. DEFAULT, REMEDIES, AND TERMINATION

- 13.01** The remedies set forth in this Section 13.01 shall cover the non-defaulting Party's remedies for the defaulting Party's failure to perform prior to any termination for default that may occur; provided, however, that such remedies may be available to a non-defaulting Party after termination of a Transaction when so provided in this Agreement.

- (a) As an alternative to the damages provisions in Section 13.01 (b) and 13.01(c), if the Parties mutually agree in writing, the non-performing Party may schedule deliveries or receipts, as the case may be, pursuant to such terms as the Parties agree in order to discharge some or all of the obligation to pay damages. In the absence of such agreement, the damages provisions of this Article 13 shall apply.
- (b) Unless excused by other provisions of this Agreement, if Seller fails in any Quarter to tender for delivery the Scheduled Amount for that Quarter under a Transaction and Buyer does not exercise its right under Section 4.04 to reduce the quantities of Coal to be supplied under that Transaction or to require Seller to make up the Deficit Amount for that Quarter, Buyer may

purchase replacement coal and hold Seller liable for the cover cost of replacement coal under the following circumstances and conditions:

- (i) Buyer shall first determine the amount of the Deficit Amount for that Quarter (calculated as provided in Section 4.04) and shall give Seller written notice of the Deficit Amount. Buyer may then buy replacement coal (of substantially similar, but not exactly the same, quality) from one or more third parties in an amount up to (but not exceeding) the Deficit Amount and arrange to have such replacement coal supplied at such times as Buyer deems appropriate during the six (6)-month period after the end of the Deficit Quarter.
 - (ii) Seller shall be liable to Buyer for the following amounts: (A) the difference between (1) the actual delivered cost incurred by Buyer (including, without limitation, the costs of transportation, SO₂ emission allowances, NO_x emission allowances (if applicable), and taxes) to obtain such replacement coal and (2) the delivered cost of Seller's Coal (including, without limitation, the costs of transportation, SO₂ emission allowances, NO_x emission allowances (if applicable), and taxes) as of the end of the Deficit Quarter; and (B) Buyer's incidental expenses. Notwithstanding the foregoing provisions of this Section 13.01(b)(ii), any expenses saved as a consequence of Seller's failure to deliver shall be deducted from the sum of amounts (A) and (B) above; and if the net amount calculated pursuant to this Section 13.01(b)(ii) is negative, then Seller shall not have any obligation to make any payment to Buyer with respect to the Deficit Amount under Section 13.01(b).
 - (iii) After Buyer has determined the amounts for which Seller is liable under Section 13.01(b)(ii), Buyer shall promptly prepare and submit to Seller an invoice for such amounts. Seller shall pay the amounts reflected in such invoice within thirty (30) days after Seller has received such invoice. If Seller fails to pay such amounts within such thirty (30)-day period, Buyer may exercise its rights under Sections 10.04 and 10.05 with respect to such amounts and may recover any remaining amounts from Seller as provided by law.
- (c) Unless excused by other provisions of this Agreement, if Buyer fails in any Quarter to accept delivery of the Scheduled Amount for that Quarter under a Transaction and Seller does not exercise its right under Section 4.03 to reduce the remaining quantities of Coal to be supplied

under that Transaction, Seller may require Buyer to pay to Seller an amount for each ton of the Deficit Amount under the following circumstances and conditions:

- (i) Seller shall first determine the amount of the Deficit Amount for that Quarter (calculated as provided in Section 4.03) and shall give Buyer written notice of the Deficit Amount.
- (ii) Buyer shall be liable to Seller for the following amounts: (A) the difference between (1) the Base Price set forth in the Applicable Confirmation and (2) the highest reasonable market price on an equivalent per mmBtu SO₂ adjusted basis at which Seller is able, or would be able, to sell or otherwise dispose of the Coal within the six (6)-month period after the end of the Deficit Quarter; and (B) Seller's incidental expenses. Notwithstanding the foregoing provisions of this Section 13.01(c)(ii), any expenses saved as a consequence of Buyer's failure to accept shall be deducted from the sum of amounts (A) and (B) above; and if the net amount calculated pursuant to this Section 13.01(c)(ii) is negative, then Buyer shall not have any obligation to make any payment to Seller with respect to the Deficit Amount under Section 13.01(c).
- (iii) After Seller has determined the amounts for which Buyer is liable under Section 13.01(c)(ii), Seller shall promptly prepare and submit to Buyer an invoice for such amounts. Buyer shall pay the amounts reflected in such invoice within thirty (30) days after Buyer has received such invoice. If Buyer fails to pay such amounts within such thirty (30)-day period, Seller may exercise its rights under Sections 10.04 and 10.05 with respect to such amounts and may recover any remaining amounts from Buyer as provided by law.
- (d) Buyer and Seller shall be subject to commercially reasonable good-faith obligations to mitigate any damages recoverable under this Agreement. The remedies available to Buyer under Section 13.01(b) and the remedies available to Seller under Section 13.01(c) shall apply where an Event of Default (as defined in Section 13.02) has occurred (including, without limitation, a suspension under Section 6.06) and without regard to whether the Transaction involved has been terminated or expired; provided, however, that such remedies shall not apply in the event of a termination as described in Section 13.04.

13.02 The occurrence of any of the following shall constitute an "Event of Default":

- (a) A Party fails to pay any amounts due under this Agreement ("Payment Failure"), and the Payment Failure has continued for a period of fifteen (15) days after the non-defaulting Party has given written notice of the Payment Failure to the defaulting Party.
- (b) Either Party breaches any material contractual obligation under this Agreement.
- (c) Either Party (i) makes any general assignment or any general arrangement for the benefit of creditors, (ii) files a petition or otherwise commences, authorizes, or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy or similar law for the protection of creditors or has such a petition involuntarily filed against it and such petition is not withdrawn or dismissed within thirty (30) days after such filing, (iii) otherwise becomes bankrupt or insolvent (however evidenced), or (iv) is unable to pay its debts as they fall due.

13.03 In addition to the non-defaulting Party's remedies under this Article 13, in the Event of Default with respect to a specific Transaction, the non-defaulting Party shall have the same rights with respect to such specific Transaction as the non-defaulting Party has under this Agreement in addition to the right to exercise all other rights and remedies available under applicable law.

13.04 A termination of one or more Transactions pursuant to Section 6.03, 9.03(f), 11.02, 11A.05, or 11A.06 shall not be construed as, or deemed to be, a breach or default under this Agreement or the Transactions(s) terminated. Upon any such termination, neither Party shall have any further obligations or liability regarding the Transaction(s) terminated, except with respect to (i) shipments made prior to the effective date of such termination or (ii) other obligations or liability that may have accrued prior to the effective date of such termination.

ARTICLE 14. NOTICES

Except as expressly provided otherwise, any notice, election, or other correspondence required or permitted under this Agreement shall become effective upon receipt and, except invoices and payments, shall be deemed to have been properly given or delivered when made in writing and (i) delivered by hand to the Party to whom directed, (ii) sent by United States certified mail (with all necessary postage prepaid and a return receipt requested) and addressed to the Party to whom directed at the address(es) listed in this Article 14, or (iii) sent by a nationally recognized overnight delivery service (with charges fully prepaid) and addressed to the Party to whom directed at the address(es) listed in this Article 14.

Notices to Seller:

Notices to _____ Power:

Vice President
Fuel Services 14N-8160
Southern Company Services, Inc.
P.O. Box 2641
Birmingham, Alabama 35291-8160

with a copy to:

Manager, Fuel Services
Southern Company Services, Inc.

The addresses may be changed upon written notice in the manner provided above, and no amendment hereof shall be required for a change of address under this Article 14.

ARTICLE 15. COOPERATION

Each Party agrees to take all further action that may be reasonably necessary to perform and to effectuate the purposes and intent of this Agreement, each Confirmation, and each Transaction.

ARTICLE 16. WARRANTY, LIMITATION ON LIABILITY, DUTY TO MITIGATE & INDEMNIFICATION

16.01 In no event shall either Party be liable to the other Party for consequential or punitive damages however and wherever arising out of, or in connection with, this Agreement or any Transaction.

16.02 Seller represents and warrants that: (a) Seller has the right and authority to sell Coal produced from the mine(s) set forth in the Applicable Confirmation; (b) at the time each unit train is loaded with Coal for delivery to Buyer, Seller shall have good and marketable title, free and clear of all liens and encumbrances, to all Coal contained in such unit train; and (c) Seller shall defend Buyer's title to all Coal supplied under each Transaction and shall indemnify the Plant _____ Co-Owners against all Claims related to such title. **EXCEPT FOR THE WARRANTIES SET FORTH ABOVE IN THIS SECTION 16.02, SELLER MAKES NO OTHER EXPRESS WARRANTIES AND MAKES NO IMPLIED WARRANTIES UNDER THIS AGREEMENT, INCLUDING WITH-**

OUT LIMITATION ANY WARRANTIES OF MERCHANTABILITY AND WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, RELATED TO THIS AGREEMENT OR AN APPLICABLE CONFIRMATION.

- 16.03** Seller shall indemnify, defend, and hold the Plant _____ Co-Owners harmless from any Claims arising from an act or incident occurring when risk of loss to the Coal purchased and sold under this Agreement is vested in Seller. Buyer shall indemnify, defend, and hold Seller harmless from any Claims arising from an act or incident occurring when risk of loss to the Coal purchased and sold under this Agreement is vested in Buyer.
- 16.04** Each Party agrees that it has a duty to mitigate damages and covenants under this Agreement. Each Party shall use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this Agreement (except that neither Party shall be required to enter into a replacement transaction under this Agreement).
- 16.05** Seller shall indemnify, defend, and hold the Plant _____ Co-Owners harmless from and against any and all Claims arising out of or resulting from the willful acts, recklessness, or negligence of Seller or its agents or employees. Buyer shall indemnify, defend, and hold Seller harmless from and against any and all Claims arising out of or resulting from the willful acts, recklessness, or negligence of Buyer or its agents or employees.

ARTICLE 17. LIMITATION ON WAIVER

No waiver by either Party of any one or more defaults of the other Party in the performance of this Agreement or any Transaction shall operate or be construed as a waiver of any future default or defaults, whether of a like or different character.

ARTICLE 18. CONFIDENTIALITY

- 18.01** This Agreement and each Confirmation are deemed confidential. The Parties shall protect the confidentiality of the terms of this Agreement; and neither this Agreement nor any of its terms shall be disclosed to any other person unless such disclosure is: (i) agreed to in writing by the Parties prior to release; (ii) required by law; (iii) required by jurisdictional regulation pursuant to the request of any regulatory authorities (including, without limitation, state utility commissions or

boards, the Federal Energy Regulatory Commission, the U.S. Securities and Exchange Commission, and tax authorities); (iv) made to the Plant _____ Co-Owners; or (v) made to the respective attorneys, auditors, consultants, or other outside experts of the Parties or the Plant _____ Co-Owners. Where the law requires such disclosure, notice shall be given to the other Party; and to the extent possible, such notice shall be given in advance of disclosure.

- 18.02** Notwithstanding the provisions of Section 18.01, a Party may disclose information contained in this Agreement and each Confirmation to (i) a prospective purchaser of the stock or assets of that Party or of the corporate parent(s) of that Party or (ii) a lender in connection with a financing transaction; provided, however, that any such prospective purchaser or lender shall be bound by the provisions of this Article 18.

ARTICLE 19. ENTIRETY, AMENDMENTS

This Agreement constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement. This Agreement may not be amended except in a written instrument making reference hereto signed by the Parties.

ARTICLE 20. SUCCESSORS AND ASSIGNS

- 20.01** This Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and assigns; provided, however, that this Agreement may not be assigned by either Party without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. Any purported assignment without such consent shall be null and void. Such restrictions shall also apply to any successor of either Party.
- 20.02** Notwithstanding the provisions of Section 20.01, Buyer may assign its rights, duties, obligations, and interests under and in this Agreement to a subsidiary, affiliate, or sister corporation, to one or more of the Plant _____ Co-Owners, or to any successor agent of the Plant _____ Co-Owners; provided, however, that Buyer shall not be thereby relieved of its duties or obligations under this Agreement. In addition, Seller may assign its rights, duties, obligations, and interests under and in this Agreement to a parent, subsidiary, affiliate, or sister corporation; provided, however, that Seller shall not be thereby relieved of its duties or obligations under this Agreement. Seller may al-

so assign monies due or to become due under this Agreement in connection with any financing transactions.

20.03 Nothing in Section 20.01 shall be construed to limit or restrict Buyer's right under Section 3.02 to direct shipments to destinations other than Plant _____ without Seller's consent and at no additional cost to Seller.

ARTICLE 21. GOVERNING LAWS

This Agreement shall be governed by and construed in accordance with the laws in the State of _____.

ARTICLE 22. INTERPRETATION

The Parties acknowledge that each Party and its counsel have reviewed this Agreement and that the rule of construction to the effect that any ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Agreement.

ARTICLE 23. RESALE AND BUYER'S OBLIGATIONS

23.01 The Parties agree, unless specifically provided otherwise in a specific Confirmation, that Buyer may resell the Coal purchased under each Transaction to another party ("Buyer's Customer"). The Parties agree that Buyer's Customer may perform some of Buyer's obligations but that Buyer shall remain liable for all of Buyer's obligations under this Agreement and that Buyer shall indemnify and hold Seller harmless from and against any and all Claims made by Buyer's Customer against Seller. In addition, Buyer agrees to the following with respect to any sale(s) to Buyer's Customer:

- (a) Buyer shall inform Seller, at least seventy-two (72) hours in advance of arrival of each unit train at the mine, of the identification of Buyer's Customer and the destination of the unit train.
- (b) The loading of such unit train shall be in accordance with the Loading Provisions unless (i) Buyer notifies Seller in advance of different loading provisions and (ii) such different loading provisions are in general accordance with general operating parameters in the mine's region and do not, in Seller's reasonable opinion, impose an undue operating or economic burden on Seller.

- (c) All information to be supplied by Seller to Buyer under this Agreement (including, without limitation, analysis, weights, train manifest, and invoicing information) shall be supplied to Buyer; and Buyer shall be responsible for transmitting such information to Buyer's Customer. Buyer is specifically released from its confidentiality obligations under Article 18 with respect to quality and weighing information and other relevant information provided by Buyer to Buyer's Customer.
- (d) If Buyer claims a Force Majeure event at or associated with Plant _____, such claim shall not apply to Coal supplied under this Agreement and sold by Buyer to Buyer's Customer; provided, however, that Buyer shall have no obligation to arrange a sale as permitted under this Article 23 in the event of a Force Majeure event at or associated with Plant _____. Force Majeure events occurring at or associated with generating stations or other facility to which Buyer has resold Coal shall not affect Buyer's obligations under this Agreement.

ARTICLE 24. SURVIVAL

The provisions of Article 10, Articles 12 through 22, and Article 24 shall survive the termination of this Agreement.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their respective authorized officers effective as of the date first above written.

[Insert Seller's name]

_____ **Power Company**

By: _____

By: _____

Title: _____

Title: _____

Date Executed: _____

Date Executed: _____

Example Only

Annex A

SUMMARY OF RELEVANT PROVISIONS OF TRANSPORTATION CONTRACT

In addition to other terms defined elsewhere in this Agreement, the following definitions shall apply in this Annex A:

(1) "Actual Placement" means the time when a Unit Train has arrived at the Designated Notification Point at Origin and the Unit Train crew has requested loading instructions for a shipment of coal under this Agreement.

(2) "Coal Car" means a standard aluminum bottom-dump rapid-discharge coal railcar, with a capacity of 4000 cubic feet or greater and a loading capacity of 286,000 pounds gross weight capable of chambering at least 116 tons, and approved for use by the Railroad.

(3) "Constructive Placement" means the time when a Unit Train has arrived at a hold point, as determined by the Railroad, as a result of Seller's inability to accept the Unit Train at the Origin due to any cause attributable to Seller.

(4) "Designated Notification Point at Origin" means that point on Seller's trackage at the Origin where the Unit Train crew requests loading instructions from Seller and receives permission to advance the Unit Train to the loadout facility.

(5) "Destination" means Plant _____ or such other unloading point as is designated by Buyer.

(6) "Loading Facility" means the equipment and facilities operated by Seller for loading coal into Unit Trains at the Origin. The Loading Facility includes the following: rail trackage; raw coal hopper; crusher, processing, or preparation plants; coal storage facilities; and conveyor systems from raw coal hopper through all intermediate phases to the loading chute(s).

(7) "Origin" means Seller's mine or any other Point of Delivery Point at which Coal is loaded and delivered to Buyer under this Agreement.

(8) "Railroad" means the Burlington Northern Santa Fe Railway Company and any assignee or successor organization.

(9) "Unit Train" means a specialized shuttle-type train that operates in a continuous cycle between an Origin and a Destination for the transportation of Coal shipments under this Agreement. Each loaded Unit Train moves on one 404 Bill of Lading from the Origin to the Destination.

Operation of the Loading Facility

Seller shall install, maintain, repair, and operate a Loading Facility at each Origin that conforms to industry standards and the Railroad's requirements. The Railroad's Unit Train crew, Seller's Unit Train loading crew, or a third-party contractor hired by Seller shall move empty Coal Cars under the loading chutes at the Loading Facility at a controlled speed that shall allow for proper loading of each Coal Car in a Unit Train. Seller shall provide for the safe, timely, and efficient loading of the Coal Cars at no expense to Buyer. Seller shall be responsible for the weighing of loaded Coal Cars at Origin(s) at no charge to Buyer. Weighing shall be performed on scales inspected in accordance with the then-current AAR specifications for such scales, and such inspections shall be subject to verification by Buyer and the Railroad.

Railroad Loading Free Time

At the Origin, Seller shall be allowed the first four (4) hours to load all Coal Cars in the Unit Train after Actual Placement or Constructive Placement by the Railroad at no cost or charge to Seller ("Loading

Example Only

Annex A

Free Time"). Seller shall be assessed by Buyer an Origin Detention Charge of \$492.25 per hour (as of January 1, 2004) when the Railroad's locomotives remain with the Unit Train for each hour, or fraction thereof, that a Unit Train is delayed or held in excess of the Loading Free Time until such time as the Railroad receives notice that the Unit Train can be released for movement.

Hold Charge

If Buyer is assessed a Hold Charge by the Railroad as a result of Seller's action(s) or inaction(s), Seller shall pay to Buyer the Hold Charge. The Hold Charge is \$492.25 per hour (as of January 1, 2004) for each hour or fraction thereof that each Unit Train is held.

Release Charge

If Buyer is assessed a Release Charge by the Railroad as a result of Seller's action(s) or inaction(s), Seller shall pay to Buyer the Release Charge. The Release Charge is \$1,839.48 per occurrence per Unit Train (as of January 1, 2004).

Coal Car Storage Charge

If Buyer is assessed a Coal Car Storage Charge by the Railroad as a result of Seller's action(s) or inaction(s), Seller shall pay to Buyer the applicable Coal Car Storage Charge times the applicable storage time. The Coal Car Storage Charge is \$2.08 per Coal Car per day (as of January 1, 2004).

Escalation of Charges

The Origin Detention Charge, the Hold Charge, the Release Charge, the Coal Car Storage Charge, and other charges by the Railroad shall be adjusted annually on January 1 of each calendar year during the term of this Agreement by a portion of the percentage change in the Rail Cost Adjustment Factor without the adjustment for productivity ("RCAFU"), as published by the Association of American Railroads, by comparing the RCAFU for the first quarter of the current calendar year to the RCAFU for the first quarter of the previous calendar year; provided, however, that no such charge shall be reduced to an amount that is less than the amount of such charge set forth in this Annex A.

Minimum Tons per Coal Car

Unless Buyer notifies Seller in writing of a lower minimum tonnage requirement, the minimum tons loaded per Coal Car shall be 115 tons multiplied by the number of Coal Cars in the Unit Train ("Minimum Tonnage Requirement"), provided that each Coal Car in the Unit Train has sufficient available capacity at the time of loading to accommodate 115 tons. If Buyer notifies Seller in writing of a maximum gross weight limit lower than 286,000 pounds, as provided in the paragraph below entitled "Maximum Gross Load Limit," the minimum tons loaded per Coal Car shall be automatically lowered on a proportionate basis. The tons upon which transportation charges are paid are accrued to Buyer's Minimum Tonnage Requirement under the applicable transportation contract. Seller shall reimburse Buyer for any charges actually incurred by Buyer and paid to the Railroad as a result of Seller's failure to satisfy the Minimum Tonnage Requirement for any Unit Train.

Maximum Gross Load Limit

Unless Buyer notifies Seller in writing of a lower maximum gross load limit per Coal Car, the maximum gross weight for any loaded Coal Car shall be 286,000 pounds ("Maximum Gross Load Limit"). Seller shall not load any Coal Car in excess of the Maximum Gross Load Limit. If the weight is in excess of the Maximum Gross Load Limit for any Coal Car ("Excess Coal"), it shall be the responsibility of Seller; and Seller shall bear all costs to remove the Excess Coal.

Example Only

Annex A

Scheduling

For each month during the term of this Agreement in which Buyer requires Seller to load Coal for delivery to Buyer, Seller and Buyer shall establish a schedule for the required shipments of Coal during such month ("Monthly Schedule") through the Railroad's web-based National Coal Transportation Association ("NCTA") coal forecasting tool. If allowed under the Applicable Confirmation, Seller may change the Origin for a Unit Train from that which is specified in the Monthly Schedule by giving Buyer notice by telephone, confirmed in writing, of such change at least six hours prior to the departure of the empty Unit Train from the Railroad's designated holding point ("Minimum Schedule Change Time"). If Seller desires to change the Origin for a Unit Train from that which is specified in the Monthly Schedule, but Seller has failed to give telephone notice in compliance with the Minimum Schedule Change Time, Seller may request that Buyer have the Railroad quote an Origin Alteration Fee, which shall be intended to cover the Railroad's additional cost, if any, of moving the Unit Train to the newly designated Origin. Upon Seller's verbal agreement to pay the Origin Alteration Fee (which verbal agreement Seller shall promptly confirm in writing), Buyer shall arrange for the Railroad to transport a Unit Train to the newly designated Origin.

Transportation Instructions

Seller shall provide to the Railroad by telephone, promptly confirmed to the Railroad in writing, the following information ("Transportation Instructions") for each Unit Train in a form acceptable to the Railroad: (a) within two hours after loading of the Unit Train terminates, individual railcar weight (if available) and train weight (both net and gross), and any special instructions; and (b) by the end of the next business day after loading of the Unit Train terminates, the fact that the train is being transported under this Agreement, the Origin, the Destination, date and time at which loading of the Unit Train terminated, route, railcar initials and numbers, and individual railcars weights not furnished previously.

If Seller does not provide the Transportation Instructions for a Unit Train, the Railroad may hold the Unit Train; and Seller shall be subject to a Hold Charge as previously described in this Annex A for such time that the Unit Train was delayed due to Seller's failure to provide the Transportation Instructions to the Railroad.