

## **TERMS AND CONDITIONS OF COAL PURCHASE**

The following information is given to assist you in the preparation of your proposal and contains key terms and conditions that would be included in any contract with a Southern Company affiliate for the purchase and sale of coal. (In these terms and conditions, any such contract is referred to as the "Agreement"; Southern Company Services, as agent for the Southern Company affiliates, is referred to as "Purchaser"; and the coal supplier is referred to as "Seller.")

### **PRICE, BILLING AND PAYMENT**

The price for coal to be supplied under the Agreement (the "Base Price") shall be stated in U.S. dollars per ton f.o.b. railcar at Seller's loading facility (or such other delivery point as may be applicable) and includes all costs of mining, processing, marketing and quality control work necessary to meet the quantity and quality specifications of the Agreement. The Base Price is fixed (unless otherwise agreed to by Purchaser) and is not subject to adjustment except as provided in the Agreement. The Base Price also includes all sums to be borne by Seller for all federal, state, and local taxes of every nature (but not including sales and use taxes to be paid by Purchaser) which are assessed or may be assessed as a result of the production, shipment, or sale of coal pursuant to the Agreement. Seller's acceptance of the amounts paid by Purchaser for coal delivered under the Agreement shall constitute full and final settlement of any and all claims by Seller for costs or expenses (including, without limitation, taxes, fees, governmental impositions, assessments, premiums, and penalties) incurred or paid by Seller, either while the Agreement is in effect or at any time in the future, with respect to the production, shipment, or sale of coal pursuant to the Agreement. Seller shall defend, indemnify, and hold Purchaser harmless from and against any claim or liability for any such taxes, fees, governmental impositions, assessments, premiums, or penalties.

Seller shall prepare and submit to Purchaser a shipping notice for each shipment of coal under the Agreement promptly after the shipment is loaded. Purchaser shall use the shipping notice to prepare an invoice for the shipment and shall remit an interim payment for the shipment to Seller within thirty (30) days after the shipment is received. Seller shall not submit invoices for payment. After Purchaser has analyzed a sample of the shipment collected by Seller, Purchaser shall apply the quality adjustments (as hereinafter described) and shall pay any balance due, based upon the determination of quality adjustments, as soon as practical after such determinations are made for coal shipped during each month. In the event the total amount payable resulting from these determinations is less than the amount previously paid by Purchaser, the overpayment shall be deducted from subsequent payments to Seller; or if no subsequent payments become due, Seller shall reimburse Purchaser promptly upon receipt of such overpayment. Purchaser shall have the right to deduct or set-off against payments due Seller under the Agreement any sum of money due to Purchaser from Seller under the Agreement.

### **COAL SPECIFICATIONS**

Each Shipment under this Agreement shall be uniformly blended; shall be two inches and under in size (2" x 0"), as determined by the then-current American Society for Testing and Materials ("ASTM") D-4749 "Standard Test Method for Performing the Sieve Analysis of Coal and Designating Coal Size"; shall not contain more than fifty percent (50%) of particles less than one-quarter (1/4) inch in size (if, in Purchaser's sole judgment, coal-handling problems occur at the Designated Plant because of size consistency, Seller shall take reasonable corrective action acceptable to Purchaser to resolve such problems); and shall be substantially free of bone, slate, shale, rock, dirt, and clay and free of extraneous material (including, without limitation, plastic, rubber, metal, wood, and other waste materials). In addition, Shipments under this Agreement shall conform to the "as received" specifications identified in the Agreement.

If Purchaser determines, in good faith, that any coal supplied by Seller has caused plant performance, operating, receiving, or handling difficulties, even if such coal meets the specifications set forth in the

Agreement, Purchaser shall give Seller written notice of such difficulties (a "Notice of Difficulties"); and at the same time, Purchaser shall have the right to suspend all further Shipments under this Agreement by including a notice of suspension in the Notice of Difficulties. Promptly after the Notice of Difficulties is delivered to Seller, the Parties shall meet and attempt, in good faith, to reach a mutually agreeable solution. If the Parties are unable to reach a mutually agreeable solution within thirty (30) days after delivery of the Notice of Difficulties to Seller, then Purchaser may terminate this Agreement by giving Seller written notice thereof, which shall specify the effective date of termination and shall be given at least two (2) days prior to such date. In the event of a termination under this Agreement, the provisions of the Agreement shall apply as of the effective date of such termination

In order to comply with the nitrogen oxide ("NOx") provisions of the Clean Air Act Amendments of 1990, as amended, CAA, regulations promulgated under the CAA, and judicial and administrative interpretations of the CAA and related regulations (collectively, the "Clean Air Requirements"), Purchaser may analyze the coal supplied under the Agreement to determine, in Purchaser's sole judgment, whether such coal, when used at one or more of the destination plants, causes one or more of the destination plants to exceed applicable NOx emission limitations of the Clean Air Requirements. In performing such analysis, Purchaser may evaluate the combination of (i) the percent nitrogen, (ii) the ratio of fixed carbon to volatile matter, and (iii) other coal quality characteristics of Seller's coal by using an Electric Power Research Institute product referred to as the EPRI NOx/LOI Predictor (EPRI TR-109208 or subsequent versions). Purchaser may also consider its actual operating experience with such coal and the amount of NOx emissions produced by using such coal at one or more of the destination plants. In the event that Purchaser determines that the coal supplied under the Agreement has caused or is causing one or more of the destination plants to exceed applicable NOx emission limitations of the Clean Air Requirements, then Purchaser may terminate the Agreement 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.

### **CALORIFIC VALUE ADJUSTMENT**

The amount to be paid for Shipments during each calendar month under each purchase order issued by Purchaser with respect to the Agreement shall be adjusted on a monthly basis according to the actual monthly weighted average "as received" calorific value (hereinafter referred to as the "MWACV") of such Shipments, as determined from samples taken and analyzed in accordance with the Agreement. Each such adjustment shall be calculated as follows:

(1) The MWACV (stated in Btu/lb.) of such Shipments shall first be divided by the Calorific Value Guarantee (Btu/lb). The resulting quotient shall be known as the "Calorific Adjustment Factor" for such Shipments.

(2) Next the then-current Billing Price applicable to such Shipments (hereinafter referred to as the "Applicable Price") shall be determined and used to make the following calculations:

(i) If the Calorific Adjustment Factor for such Shipments is greater than 1.0000, the Applicable Price shall be multiplied by the Calorific Adjustment Factor. The Applicable Price shall then be subtracted from the resulting product, and the resulting difference shall be known as the "Calorific Adjustment Amount" for such Shipments. The Calorific Adjustment Amount (a positive number in this situation) shall then be added to the Applicable Price, and the resulting sum shall be known as the "Calorific Value Adjusted Price" for such Shipments.

(ii) If the Calorific Adjustment Factor for such Shipments is less than 1.0000, the Applicable Price shall be added to the actual transportation cost (stated on a per-Ton basis) borne by Purchaser (including, without limitation, railcar costs if such Shipments were transported in railcars owned or leased by Purchaser). The resulting sum shall be known as the "Delivered Cost." The Delivered Cost

shall then be multiplied by the Calorific Adjustment Factor. Next the Delivered Cost shall be subtracted from the resulting product, and the resulting difference shall constitute the Calorific Adjustment Amount for such Shipments. The Calorific Adjustment Amount (a negative number in this situation) shall then be added to the Applicable Price, and the resulting sum shall constitute the Calorific Value Adjusted Price for such Shipments.

For each purchase order issued by Purchaser with respect to the Agreement, Purchaser shall calculate a separate MWACV and a separate Calorific Value Adjusted Price for Shipments that are supplied under such purchase order and received during the calendar month involved.

### **EXCESS ASH ADJUSTMENT**

In addition to other adjustments, the amount to be paid for Shipments during each calendar month under each purchase order issued by Purchaser with respect to the Agreement shall be adjusted on a monthly basis if the actual monthly weighted average "as received" ash content (hereinafter referred to as the "MWAAC") of such Shipments, as determined from samples taken and analyzed in accordance with the Agreement, exceeds the Ash Guarantee (stated as a percentage). Each such adjustment shall be made after the calorific value adjustment for such Shipments and shall be calculated as follows:

(1) From the MWAAC (stated as a percentage) of such Shipments, Ash Guarantee shall first be subtracted. The difference (stated as a percentage) shall be multiplied by 100 (to eliminate the percentage in further calculations), and the resulting product shall be known as the "Ash Adjustment Factor" for such Shipments.

(2) The Ash Adjustment Factor for such Shipments shall then be multiplied by \$1.00 per Ton, and the resulting product shall be subtracted from the Calorific Value Adjusted Price for such Shipments.

(3) No adjustment under this Section shall be made if the MWAAC of such Shipments is less than or equal to Ash Guarantee.

For each purchase order issued by Purchaser with respect to the Agreement, Purchaser shall calculate a separate MWAAC and a separate excess ash adjustment, if any, for Shipments that are supplied under such purchase order and received during the calendar month involved.

### **EXCESS MOISTURE ADJUSTMENT**

In addition to other adjustments, the amount to be paid for Shipments during each calendar month under each purchase order issued by Purchaser with respect to the Agreement shall be adjusted on a monthly basis if the actual monthly weighted average "as received" moisture content (hereinafter referred to as the "MWAMC") of such Shipments, as determined from samples taken and analyzed in accordance with the Agreement, exceeds the Moisture Guarantee (stated as a percentage). Each such adjustment shall be made after the calorific value adjustment and any excess ash adjustment for such Shipments and shall be calculated as follows:

(1) From the MWAMC (stated as a percentage) of such Shipments, the Moisture Guarantee shall first be subtracted. The difference (stated as a percentage) shall be multiplied by 100 (to eliminate the percentage in further calculations), and the resulting product shall be known as the "Moisture Adjustment Factor" for such Shipments.

(2) The Moisture Adjustment Factor for such Shipments shall then be multiplied by \$0.25 per Ton; and the resulting product shall be subtracted from the Calorific Value Adjusted Price, as reduced by any excess ash adjustment, for such Shipments.

(3) No adjustment under this Section shall be made if the MWAMC of such Shipments is less than or equal to the Moisture Guarantee.

For each purchase order issued by Purchaser with respect to the Agreement, Purchaser shall calculate a separate MWAMC and a separate excess moisture adjustment, if any, for Shipments that are supplied under such purchase order and received during the calendar month involved.

#### **ASH FUSION TEMPERATURE ADJUSTMENT**

In addition to other adjustments, the amount to be paid for a Shipment under any purchase order issued by Purchaser with respect to the Agreement shall be adjusted if the actual "as received" ash fusion temperature (H=W reducing atmosphere) (hereinafter referred to as the "AFT") of such Shipment or portion thereof (but not less than 1000 Tons), as determined from samples taken and analyzed in accordance with the Agreement, is less than the AFT Guarantee (stated in degrees F). Each such adjustment shall be made after the calorific value adjustment and any excess ash, excess moisture, and grindability adjustments for such Shipment and shall be calculated as follows:

(1) The AFT (stated in degrees Fahrenheit) of such Shipment or portion thereof (but not less than 1000 Tons) shall first be subtracted from the AFT Guarantee. The number of degrees Fahrenheit reflected in the resulting difference shall be known as the "AFT Adjustment Factor" for such Shipment.

(2) The AFT Adjustment Factor for such Shipment shall then be multiplied by \$0.01 per Ton; and the resulting product shall be subtracted from the Calorific Value Adjusted Price, as reduced by any excess ash and excess moisture adjustments, for such Shipment.

(3) No adjustment under this Section shall be made if the AFT of such Shipment or portion thereof (but not less than 1000 Tons) is greater than or equal to the AFT Guarantee.

#### **GRINDABILITY ADJUSTMENT**

In addition to other adjustments, the amount to be paid for a Shipment under any purchase order issued by Purchaser with respect to the Agreement shall be adjusted if the actual "as received" Hardgrove Grindability Index ("HGI") value (hereinafter referred to as the "HGIV") for such Shipment, as determined from samples taken and analyzed in accordance with the Agreement, is less than the HGI Guarantee. Each such adjustment shall be made after the calorific value adjustment and any excess ash and excess moisture adjustments for such Shipment and shall be calculated as follows:

(1) The HGIV for such Shipment shall first be subtracted from the HGI Guarantee, and the resulting difference shall be known as the "HGI Adjustment Factor" for such Shipment.

(2) The HGI Adjustment Factor for such Shipment shall then be multiplied by \$0.25 per Ton; and the resulting product shall be subtracted from the Calorific Value Adjusted Price, as reduced by any excess ash, excess moisture, and ash fusion temperature adjustments, for such Shipment.

(3) No adjustment under this Section shall be made if the HGIV for such Shipment is greater than or equal to the HGI Guarantee.

#### **EXCESS SULFUR ADJUSTMENT**

In addition to other adjustments, the amount to be paid for Shipments during each calendar month under each purchase order issued by Purchaser with respect to the Agreement shall be adjusted on a monthly basis if the actual monthly weighted average "as received" sulfur content (hereinafter referred to as the "MWASC") of such Shipments exceeds the Sulfur Guarantee (stated as a percentage). Each such

adjustment shall be made after the calorific value adjustments and any excess ash, excess moisture, grindability, and ash fusion temperature adjustments for such Shipments and shall be calculated as follows:

(1) For purposes of the calculations under this Section 4.7(a), the monthly weighted average "as received" sulfur content (hereinafter referred to as "MWASC") of Shipments during the calendar month involved shall be stated in lbs. SO<sub>2</sub>/MMBtu; the MWACV (actual monthly weighted average "as received" calorific value) of such Shipments shall be stated in Btu/lb.; the Monthly SO<sub>2</sub> Content of such Shipments shall be stated in lbs. SO<sub>2</sub>/MMBtu; and the Total Sulfur Adjustment shall be stated in US\$ per Ton. The Parties acknowledge that Total Sulfur Adjustment under this Section 4.7(a) for Shipments during each calendar month shall be based on the As Received Monthly Weighted Average Requirement for maximum sulfur content, as set forth in the table of parameters in Section 10.1(a).

(2) The excess sulfur adjustment ("Total Sulfur Adjustment") shall be the sum of the Sulfur Adjustment I and Sulfur Adjustment II (both as stated in US\$ per ton). For purposes of calculating the Sulfur Adjustment I and Sulfur Adjustment II, 4.65 lbs. SO<sub>2</sub>/MMBtu shall be subtracted from the MWASC of Shipments during the calendar month involved of such Shipments; and the number of lbs. SO<sub>2</sub>/MMBtu reflected in the resulting difference (stated in pounds alone) shall be known as the "Sulfur Adjustment Factor" for such Shipments. Sulfur Adjustment I and Sulfur Adjustment II shall then be calculated according to the following formulas:

$$\text{Sulfur Adj. I} = \frac{\text{Sulfur Adjustment Factor}}{1,000,000 \text{ Btu}} \times \text{MWACV} \times \text{MSO}_2\text{AV}$$

Where:

MWACV = actual weighted average calorific value (stated in Btu/lb.) of Shipments during the calendar month involved

MSO<sub>2</sub>AV = average value (stated in US\$ per Ton) of SO<sub>2</sub> Allowances for the calendar month involved, which shall be determined by the average prices of SO<sub>2</sub> Allowances as shown in the Monthly Price Index published by BGC Environmental Brokerage Services, L.P. on or about the 25th day of such calendar month

$$\text{Sulfur Adj. II} = \text{Sulfur Adjustment Factor} \times \text{OCAF}$$

Where:

OCAF = Operational Cost Adjustment Factor (stated in \$/Ton of operational cost per incremental coal lb. SO<sub>2</sub>/MMBtu) at the Designated Plant. OCAF = US\$1.00/Ton (as an example - may be adjusted by plant) fixed for the two (2) year term of the Agreement.

(4) The amount of the Total Sulfur Adjustment (stated in \$/Ton) shall then be subtracted from the Calorific Value Adjusted Price for Shipments during the calendar month involved, as reduced by any excess ash, excess moisture, grindability, and ash fusion temperature adjustments for such Shipments.

(5) Notwithstanding the foregoing provisions of this section, no excess sulfur adjustment shall be made if the MWASC of Shipments during the calendar month involved is less than or equal to the Sulfur Guarantee.

(6) The Parties acknowledge and agree that as of the Effective Date, the Market Price Index specified in this section for use in calculating excess sulfur adjustments under this section is representative of the current SO<sub>2</sub> Allowance market prices. In the event that (i) such Market Price Index becomes unavailable or (ii) the Parties agree, at any time during the term of this Agreement, that such Market Price Index less accurately represents the then-current SO<sub>2</sub> Allowance market prices than other SO<sub>2</sub> Allowance price indices, the Parties shall mutually agree to an alternative or replacement SO<sub>2</sub> Allowance price index for the calculations required under this Section.

(7) The Parties acknowledge and agree that during the term of this Agreement, changes may occur with respect to the Clean Air Interstate Rule ("CAIR") or CAIR-related regulations. If, after the Effective Date, any legislation is enacted or a final regulation is issued (or signed by the Administrator of the EPA or his/her representative), rescinded, amended, or vacated or an order, opinion, or mandate is issued by the D.C. Circuit or any other U.S. federal appellate court that has or reasonably may be expected to have the effect of (i) materially changing the definition or value of an SO<sub>2</sub> Allowance for purposes of compliance with the Clean Air Act, (ii) materially altering, suspending, or discontinuing the transferability, interstate trading, or eligibility of SO<sub>2</sub> Allowances for use in compliance with the Clean Air Act, or (iii) suspending, vacating, or terminating the trading of SO<sub>2</sub> Allowances under CAIR, the Parties shall negotiate in good faith and use their best efforts to reform the provisions of Section 4.7(a) such that the calculation of excess sulfur adjustments shall be modified accordingly to give effect to the original intent of the Parties with respect to such calculation.

(b) In addition to other adjustments (including, without limitation, any adjustment that may be available under this section), Purchaser may adjust the amount to be paid for any Shipment that is accepted by Purchaser in which the actual "as received" sulfur content is greater than or equal to 3.00%. Each such adjustment shall be subject to the following provisions:

(1) The amount of such adjustment shall be 20% of the then-current Billing Price applicable to the Shipment, and such amount shall be deducted from the then-current Billing Price as liquidated damages for administrative costs and other incidental expenses related to the handling and disposition of the Shipment. The Parties hereby agree that such amount is a reasonable pre-loss estimate of Purchaser's damages, which are difficult to measure, and that such amount is not intended as a penalty.

(2) Such adjustment shall be made only if the Shipment is accepted by Purchaser; and Seller acknowledges that the remedy provided in this section shall in no way obligate Purchaser to accept the Shipment nor prevent Purchaser from exercising other rights and remedies with respect to the Shipment (including, without limitation, the right to reject the Shipment).

## **SHIPMENTS**

Purchaser, at its sole discretion, may direct that coal purchased under the Agreement be delivered by the carrier to the plant(s) or location(s) specified in the Agreement or to any other location specified by Purchaser; provided, however, that Purchaser shall remain liable for payment of the purchase price of the coal directed to such other location(s).

### **A. Scheduling of Shipments**

No later than fifteen (15) calendar days prior to the beginning of each calendar month during the term of the Agreement, the Parties shall mutually establish and agree upon a loading schedule for all Shipments to be made during such calendar month. The schedule shall include, without limitation, loading dates and loading facilities designated as loading points for such Shipments and shall be established by the Parties' respective transportation coordinators. Seller's failure to comply with the shipping instructions

may result in rejection of shipments or other sanctions. Seller shall be responsible for all monetary charges this rejection or other action may cause, be it carrier imposed or otherwise.

## B. Delivery by Rail

All shipments of coal under the Agreement shall be loaded f.o.b. railcar at the loading point specified in the Agreement, and the loading facility shall be available to load shipments on a 24 hour/day basis, seven (7) days per week. Seller agrees not to permit coal to be loaded in railcars, which contain foreign material. Seller shall bear all expenses and costs associated with delivery of coal to, and the loading of coal into railcars at, the loading facility and shall fully defend and indemnify Purchaser against any claim made against Purchaser for any cost, expenses or damage (either liquidated or unliquidated) which may be asserted against Purchaser arising out of or resulting from such delivery and loading of coal under the Agreement. In the event that (i) Seller fails to deliver coal in the quantity or at the rate as provided in the Agreement or (ii) Purchaser cancels the Agreement or suspends further shipments pursuant to the Agreement, Seller shall pay Purchaser any freight charges (including without limitation, demurrage, car lease costs, storage fees, etc.) incurred by Purchaser.

### 1. Shipping Notice and "As Loaded" Coal Quality Analysis

Promptly after each shipment is loaded, Seller shall prepare and transmit via File Transfer Protocol ("FTP") a file containing shipment detail information to the Purchaser for processing electronically ("Shipment Detail File"). The Shipment Detail File will be used by the Purchaser to prepare invoices and remit payment to the Seller. Upon completion of loading and prior to the train's departure from the loading facility, Seller shall also cause a shipping notice to be transmitted electronically to the rail carrier by way of electronic data interchange ("EDI") ("Shipping Notice") that is consistent with standard industry practices. Each Shipping Notice 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 commercially reasonable efforts to provide and demonstrate that the information is in a format that is acceptable to Purchaser. The Shipping Notice shall provide the following information: the rail carrier's name, Seller's name, the loading facility's name and SPLC number, Purchase Order number, destination, quantity of tons shipped, SES train number, number of railcars in the train, rail transportation contract number, train arrival date and time, loading start date and time, loading finish date and time, total loading time, date and time of release of the bill of lading to the rail carrier, and total train consist (including reporting marks and railcar numbers).

In addition to the required Shipment Detail File and Shipping Notice, Seller shall perform an "as loaded" coal quality analysis (with respect to the calorific value, ash content, moisture content, and sulfur content) of each Shipment after the Shipment is loaded ("As Loaded Quality Analysis"). Within twenty-four (24) hours after loading, and in all cases prior to the Shipment's arrival at the Designated Plant (or Other Destination), Seller shall provide to Purchaser an As Loaded Quality Analysis by way of FTP. Purchaser may refuse to unload or accept any Shipment until Purchaser has received the required Shipment Detail File, Shipping Notice, and As Loaded Quality Analysis File, and Seller shall reimburse Purchaser for any demurrage or costs incurred and paid by Purchaser as a result of Seller's failure to provide the Shipment Detail File, Shipping Notice and As Loaded Quality Analysis to Purchaser. Purchaser shall use required As Loaded Quality Analysis required in determining whether to accept or reject the Shipment.

### 2. Passage of Title; Risk of Loss

Risk of loss shall pass from Seller to Purchaser when the rail carrier accepts consignment; and, unless otherwise specified in the Purchase Order, passage of title shall occur upon Purchaser's

acceptance at the destination plant from the rail carrier, except that Seller shall remain liable for coal bought on a delivered basis until it is accepted at destination for unloading.

3. Demurrage Liability and Other Costs

Seller shall be liable for and shall defend, indemnify, and hold harmless Purchaser from any demurrage charges, excess freight charges, deficiency freight charges, or other transportation costs incurred by Purchaser as a result of Seller's failure to satisfy loading or shipping requirements.

4. Minimum Shipment Size Requirement

For each train (whether consisting of aluminum railcars, steel railcars, or a combination of aluminum railcars and steel railcars), the following provisions regarding minimum train weight ("MTW") shall be determined by multiplying the number of railcars loaded by 106 Tons per railcar.

If the actual weight of the train is less than the MTW for such train, Purchaser shall calculate an adjustment for such train as follows:

(1) Purchaser shall first subtract the actual weight of the train from the MTW for such train. The resulting difference (stated in Tons) shall be known as the "MTW Adjustment Factor" for such train.

(2) The MTW Adjustment Factor for such train shall then be multiplied by the then-current transportation rate (stated on a per-Ton basis) applicable to the Shipment (as determined from the Rail Contract). The resulting product shall be known as the "MTW Adjustment" for such train.

Purchaser shall provide Seller with a copy of calculations related to any MTW Adjustment and shall deduct the amount of such MTW Adjustment from any subsequent payment due to Seller for Shipments under the Agreement. The Parties hereby agree that such amount is a reasonable pre-loss estimate of Purchaser's damages, which are difficult to measure, and that such amount is not intended as a penalty.

5. Overloaded Railcars

It is the sole obligation and responsibility of Seller to be aware of and conform to all rail carrier restrictions relating to maximum allowable gross railcar weights. If cars are found to be overloaded, Seller shall be responsible for any associated costs for reducing the weight of cars to comply with the applicable rail carrier's restrictions and shall be obligated to provide Purchaser with corrected governing weight documentation. Seller shall be responsible for any damage resulting from overloaded cars. Maximum weight restrictions by carrier are provided in the attached page titled "Railcar Weight Matrix."

6. Loading of Shipments

At Seller's Loading Facility, Seller shall provide rail trackage sufficient for efficient and dependable loading of unit trains consisting of up to 120 railcars and shall provide loading equipment capable of loading railcars that are up to 58 feet in length and 13.8 feet in height. Seller shall ensure that Seller's Loading Facility shall be available for loading operations twenty-four (24) hours per day, seven (7) days per week and in compliance with relevant provisions of the Rail Contract. (A summary of such provisions available as of the Effective Date will be attached and made a part of this Agreement.)

C. Delivery by Barge

Where coal is to be delivered by barge to Purchaser, all shipments of coal under the Agreement shall be supplied either f.o.b. barge at the shipping point or f.o.b. barge at the destination, as specified in the Purchase Order.

1. Loading Arrangements at Shipping Point

For coal purchased f.o.b. barge at the shipping point, Seller shall provide or designate one or more loading points that have adequate and accessible mooring and barge-loading facilities sufficient to load coal properly within the appropriate loading time. Purchaser shall designate the carrier to tow loaded barges from the loading point to the unloading point. Seller shall pay all costs to transport coal from the mine to the loading point (including, without limitation, barge-loading charges); and Purchaser shall pay barge freight costs to transport coal from the loading point to the unloading point. Purchaser shall arrange for the necessary barges to be available at the loading point so as to permit loading by Seller in an orderly manner and shall coordinate the arrival of barges at the loading point with Seller. Purchaser shall arrange for the barge carrier to give Seller reasonable notice, either orally or in writing, of the expected arrival date of empty barges at the loading point. Seller shall reimburse Purchaser for all demurrage charges and other transportation costs that are incurred by Purchaser as a result of (i) the breakdown of the barge-loading facilities or (ii) Seller's failure to furnish and load coal at the loading point at the proper times and in the proper quantities.

2. Loading Restrictions

Seller shall not allow coal that contains foreign material or excessive amounts of water to be loaded into any barge for delivery to Purchaser.

3. Risk of Loss; Passage of Title

For coal purchased f.o.b. barge at the shipping point, Seller shall bear all risk of loss for each shipment until the loaded barges have been picked up by the barge carrier and have begun their movement from the loading point to the unloading point; and title to each shipment shall pass from Seller to Purchaser upon Purchaser's acceptance of the shipment from the barge carrier at the unloading point. Claims for coal lost en route shall be filed by Purchaser for the barge carrier's account. For coal purchased f.o.b. barge at the destination, Seller shall bear all risk of loss for, and shall retain title to, each shipment until the shipment has been received at the destination or unloading point specified in the Purchase Order.

4. Shipping Notice

For each shipment of coal by barge, Seller shall use an Automatic Equipment Identification ("AEI") system to correctly identify each barge in the system during the loading process. The total net weight for each barge shall be automatically entered into the AEI system from mine-governing scales; or if enroute or destination weights apply under the Agreement, an estimated weight shall be used. Data for each loaded barge shall be retained in the AEI system; and upon completion of loading, Seller shall prepare a computer-generated shipping notice (in a form approved by Purchaser) and shall promptly cause the shipping notice to be transmitted electronically to Purchaser. Seller shall also cause a copy of the shipping notice to be transmitted by fax to the fax numbers for the destination plant and other locations listed on the attached Fax Numbers List.

The shipping notice shall provide the following information: the barge carrier's name, Seller's name, Purchaser's name, the name of the dock (loading point), the barge number, the shipment number, Purchase Order number, the barge carrier's contract number, destination, load to maximum draft, actual or estimated actual tons (as applicable), barge arrival date and time at the

loading point, loading start date and time, loading finish date and time, and condition of barge prior to loading.

5. Demurrage and Other Costs

Seller shall reimburse Purchaser for all demurrage charges, excess freight charges, deficiency freight charges, and other transportation costs that are incurred by Purchaser under any applicable transportation contract as a result of Seller's failure to satisfy the loading, shipping, or tonnage requirements stated in the Purchaser Order. Seller shall load all barges in accordance with any special loading provisions stated in the Purchase Order and shall reimburse Purchaser for such charges or costs that are incurred by Purchaser as a result of Seller's failure to comply with such special loading provisions.

D. Delivery by Ocean Vessel

Where coal is to be delivered by ocean vessel to Purchaser, Purchaser may elect to have the coal delivered to, and loaded into an acceptable type of vessel at, a loading port of safe berth or may elect to have the coal delivered to a discharge port designated by Purchaser. Purchaser shall have the right to have a representative present to observe the loading of each ocean vessel with coal to be supplied under the Agreement. Seller shall act as importer of record for all shipments of coal delivered by ocean vessel under the Agreement.

Payment for each shipment of coal delivered by ocean vessel shall be made on the "as received" calorific value (stated in Btu/lb.) less a deduction for quality adjustments, if applicable. Purchaser shall pay to Seller ninety percent (90%) of the purchase price for the shipment within fifteen (15) days after the shipment is unloaded at the discharge port. Within thirty (30) days after the shipment is unloaded at the discharge port, Purchaser shall pay the balance of ten percent (10%) of the purchase price for the shipment, less any costs that are incurred by Purchaser in connection with the shipment (including, without limitation, demurrage charges and other transportation costs).

1. For coal purchased at loading port

(a) Unless otherwise specified in the Purchase Order or otherwise agreed by the Parties, Seller shall arrange for a representative sample of each shipment of coal to be collected at the loading port by an independent laboratory approved by Purchaser and shall arrange for each sample to be collected in accordance with applicable procedures of the American Society for Testing and Materials ("ASTM"). Each sample shall be prepared as provided in the Agreement; and Seller shall cause one of the laboratory sample splits to be analyzed in accordance with applicable ASTM procedures to provide an "as loaded" coal quality analysis (with respect to calorific value, ash content, moisture content, and sulfur content) of the shipment after the shipment is loaded. The remaining laboratory sample splits shall be sent or stored as provided in the Agreement.

(b) Seller shall arrange for the weight of each shipment of coal to be determined at the loading port by a draft survey conducted by a certified marine surveyor acceptable to Purchaser. The surveyor conducting the draft survey shall have a procedure approved by Southern Company Services and on file at its offices in Birmingham, Alabama. Seller shall notify Purchaser of the results of such weight determination by fax or e-mail within one (1) day after the loading of the shipment is completed. Except as otherwise provided in this section, the weight of the shipment, as so determined, shall be accepted as the quantity of coal in the shipment and shall be used to calculate the amount of the payment for the shipment. Purchaser may have a designated representative present at any and all times that measurements and calculations are made in the drafting of a vessel. Purchaser reserves the right to draft any vessel using a certified marine surveyor at the discharge port; and if a discrepancy greater than two and one-half percent (2.5%) occurs with respect to a shipment's weight determination at the loading port and the shipment's

weight determination at the discharge port, then the average of the two draft weights shall be used to calculate the amount of the payment for the shipment.

2. For coal purchased at discharge port

(a) Unless otherwise specified in the Purchase Order or otherwise agreed by the Parties, Purchaser shall arrange for a representative sample of each shipment of coal to be collected at the discharge port and shall arrange for each sample to be collected in accordance with applicable ASTM procedures. Each sample shall be prepared as provided in the Agreement; and Purchaser shall cause one of the laboratory sample splits to be analyzed as provided in the Agreement. The remaining laboratory samples splits shall be stored as provided in the Agreement. In the event that Purchaser is unable to obtain a sample of any shipment for analysis, then the analysis of such shipment shall be deemed to be the average of the analyses of all other shipments supplied under the Agreement during the preceding thirty (30) day period.

(b) Purchaser shall arrange for the weight of each shipment of coal to be determined, for all purposes under the Agreement, by the methods and devices employed at the discharge port. In the event that Purchaser is unable to obtain the weight of any shipment at the discharge port, then the weight of the shipment shall be determined from the "as loaded" weight of the vessel at the loading port.

3. Risk of Loss; Passage of Title

Unless otherwise specified in the Purchase Order, Seller shall bear all risk of loss for, and shall retain title to, each shipment until the shipment is unloaded from the vessel at the discharge port.

E. Delivery by Truck

Where coal is to be delivered by truck to Purchaser, dump trucks and dump trailers shall be used to transport the coal to the destination(s) specified in the Purchase Order.

1. Requirements for Truck Shipments

Dump trucks and dump trailers used to transport shipments of coal shall not have cross beams installed in the cargo area that could damage a sampling auger. All trucks and trailers operated on Purchaser's properties shall comply with all applicable federal and state safety standards and weight restrictions. Whenever required by Purchaser, each vehicle shall be furnished an identification number, which shall be affixed to the vehicle, to gain admittance to the designated destination. Seller shall employ or use only competent commercially licensed truck drivers and shall be responsible for compliance by such drivers with Purchaser's rules and requirements (including, without limitation, speed limits and weight restrictions) concerning roads within Purchaser's properties. Such drivers shall comply with the requirements for loading, transporting, weighing, sampling, and unloading of coal supplied under the Agreement in such manner and at such locations on Purchaser's properties as are designated by the manager of the designated destination or his/her representative; and such drivers shall cooperate with Purchaser's coal-receiving employees and other suppliers in a manner so as not to interfere with any of Purchaser's operations. Coal may be delivered to the designated destination according to the then-current operating schedule for coal receipts in effect at the destination, and Seller shall be responsible for determining the schedule in effect and shall comply therewith in all respects.

2. Weight Restrictions

Vehicles used by Seller to transport truck shipments of coal shall comply with the weight restrictions set forth in this section and any other weight restrictions imposed by federal, state, or local laws.

With respect to Purchaser's properties in the State of Alabama, coal shall be delivered to such properties in dump trucks or dump trailers with gross vehicle weights (including cargo) that do not exceed the following limits: 44,000 pounds for vehicles with two (2) axles; 66,000 pounds for vehicles with three (3) axles; 82,500 pounds for vehicles with four (4) axles; 88,000 pounds for vehicles with five (5) axles; and 92,400 pounds for vehicles with six (6) axles.

With respect to Purchaser's properties in the State of Georgia, coal shall be delivered to such properties in dump trucks or dump trailers with gross vehicle weights (including cargo) that do not exceed the following limits: 40,680 pounds for vehicles with two (2) axles; 61,020 pounds for vehicles with three (3) axles; 70,000 pounds for vehicles with four (4) axles; 73,280 pounds to 80,000 pounds (depending on the distance from the center of the front axle to the center of the rear axle) for vehicles with five (5) axles; and 74,000 pounds to 80,000 pounds (depending on the distance from the center of the front axle to the center of the rear axle) for vehicles with six (6) axles.

In the event that any truck shipment of coal delivered to Purchaser exceeds the applicable gross vehicle weight, Purchaser may, at its sole option, either (i) reject the shipment or (ii) refuse to pay for the quantity of coal that causes the vehicle to exceed the applicable gross vehicle weight limit.

3. Risk of Loss; Passage of Title

Seller shall bear all risk of loss for, and shall retain title to, each truck shipment of coal until the shipment is unloaded and received by Purchaser at the destination specified in the Purchase Order. Purchaser may direct shipments of coal to a location other than the destination specified in the Purchase Order; provided, however, that Purchaser shall pay any additional costs that are incurred by Seller as a result of Purchaser's direction of shipments to such other location.

4. Shipping Notices; Weight Tickets

Seller shall provide a properly completed shipping notice (on a form furnished by Purchaser) for each truck shipment of coal. Purchaser shall weigh each shipment on a certified scale at the destination and shall issue a weight ticket for the shipment and provide a copy of the weight ticket, along with a copy of the shipping notice, to the truck driver.

## WEIGHING, SAMPLING AND ANALYSIS

Purchaser or its designated representative may observe any loading where the governing weighing, sampling, or sample preparation is performed by Seller. Purchaser's representative shall have the right to delay or stop coal loading in the event that Seller's weighing or sampling system malfunctions. Seller shall pay all costs or expenses incurred by Purchaser as a result of any weighing or sampling system malfunction. Loading shall be resumed when weighing or sampling system repairs are completed or when mutually agreed by Purchaser and Seller. Purchaser agrees to work in a reasonable and expeditious manner to facilitate resumption of loading.

For each unit train that is loaded with Coal for delivery to Purchaser under a Transaction, Seller shall cause the following data to be provided to Purchaser, within forty-eight (48) hours after train loading, at each location specified in the Applicable Confirmation by EDI: (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 % Na<sub>2</sub>O in ash (if set forth in the Applicable Confirmation) (the "Short Proximate Analysis"). The 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 commercially reasonable efforts to provide and demonstrate that the information is in a format that is acceptable to Purchaser. 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

Purchaser 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 Purchaser within the 48-hour period reference above. Any additional analysis requested by Purchaser that exceeds the information provided in the Short Proximate Analysis shall be provided by Seller at Purchaser's expense. Purchaser may refuse to unload a unit train until Purchaser has received the Short Proximate Analysis required concerning Coal contained in that unit train.

## **WEIGHING**

Unless the Parties otherwise agree, Seller shall determine the net weight of each Shipment on a certified scale located at the Loading Point specified in this Agreement or other approved, final loading point which has been inspected and accepted by Purchaser and the applicable certifying authority. Seller shall bear all costs related to obtaining an acceptable and accurate weight for each Shipment and all associated costs of maintaining, testing and certifying the weighing system. Seller shall report the weight on the shipping notice provided for the Shipment pursuant to the Agreement.

Seller shall ensure that the weighing system at the Loading Point specified in this Agreement or other approved, final loading point is operated in a manner that complies with applicable law and is acceptable to Purchaser and the rail or barge carrier. Seller shall maintain, operate and test the weighing system in accordance with the rules and regulations contained in the most current published Association of American Railroads' "Scale Handbook" and the National Institute of Standards and Technology's "Handbook 44" entitled "Specifications, Tolerances and Other Technical Requirements for Weighing and Measuring Devices." The following provisions shall also apply to the operation of the weighing system:

- A. The weighing system shall be tested and certified on a semiannual 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, an initial "as used" test shall be performed using the number of railcars normally tendered. The "as used" test shall be conducted in two parts: (i) the test shall first be performed to certify the CIM scale to weigh a unit train with empty railcars; and (ii) the test shall then be performed to certify the CIM scale to weigh a unit train with loaded railcars. Subsequent certification tests utilizing a smaller number of railcars may be acceptable if such tests are demonstrated to represent the "as used" test. Stenciled tare weights shall not be used in calculating the net weight of any Shipment.
- B. Seller shall promptly notify Purchaser, orally (with a written statement to follow) or in writing, of all maintenance work on the weighing system, other than routine maintenance activities, or any modifications to the system.
- C. Purchaser or its representative may observe the weighing of any Shipment under this Agreement and shall have the right to inspect and verify weighing systems, procedures and testing.
- D. In the event that the weighing system ceases to operate properly, Seller shall immediately notify Purchaser or its representative, orally and in writing, to determine the course of action to be taken concerning subsequent Shipments under this Agreement. Seller shall repair the weighing system as soon as practical, and Shipments under this Agreement shall not resume until (i) such repair is completed or (ii) the Parties mutually agree on a method for weighing Shipments under this Agreement.
- E. In the event that Seller fails to provide the net weight of any rail Shipment, then the net weight of the Shipment shall be determined by the rail carrier at Seller's expense. In the event that the rail carrier is unable to or fails to weigh the Shipment in question, the net weight of such Shipment shall be determined by using the average weight per railcar, for the same size railcars, for the previous five (5) Shipments for which an actual scale weight is available.

- F. In the event that Seller fails to provide the net weight of any barge Shipment, the net weight of the Shipment shall be determined by a barge draft survey performed by a qualified, independent marine surveyor at Seller's expense. Seller and the qualified independent marine surveyor must provide to Purchaser a written barge draft survey procedure that meets industry standards and shall be followed in weighing Shipments. Purchaser must approve the survey procedure in advance of any draft survey of Shipments under this paragraph. In the event that Seller is unable to weigh such barge Shipment or fails to determine the net weight of such barge Shipment, the weight of such barge Shipment shall be determined by mutual Agreement. No subsequent Shipments shall be made without Purchaser's prior consent when the designated weighing system is unavailable.

In addition to its own representative, Purchaser may have members of regulatory bodies having jurisdiction over the weighing system present to observe the weighing of any Shipment under this Agreement. If Purchaser at any time questions the accuracy of the weight of any Shipment, Purchaser shall promptly notify Seller in writing; and Seller shall then permit Purchaser's representative to test Seller's weighing system or weighing methods; provided, however, that such testing shall not interfere with Seller's loading activities at the designated facility. If such tests show that the weighing system is out of tolerance (as established by the applicable standards), Seller shall reimburse Purchaser's expenses of performing the tests and take appropriate steps to adjust the weighing system to an accurate condition. In the event that the Parties are unable to agree upon such tests and adjustments to the weighing system and weighing methods, then a qualified third party, mutually chosen by the Parties, shall test and adjust the weighing system and weighing methods to a condition of accuracy; and the Parties shall bear equally the cost of such testing and adjustment.

If the tests conducted pursuant to this section show that the weighing system is out of tolerance (as established by the applicable standards), the Parties shall mutually determine an appropriate adjustment to be made to the affected weights and related invoices and payments. Such adjustment shall be made (i) retroactively to a date midway between the date on which the weighing system was last certified and the date on which the accuracy of weights related to the out-of-tolerance condition was first questioned (unless an analysis of prior valid weights on the weighing system identifies the date on which the out-of-tolerance condition began, in which event such date shall be used) and (ii) prospectively until the date on which the out-of-tolerance condition is corrected.

#### **SAMPLING AND SAMPLE PREPARATION**

- A. Unless the Parties otherwise agree, Seller shall collect a representative sample of each Shipment as the Shipment is loaded at the Loading Point (or at such other loading facility as may become applicable to this Agreement) and shall bear all costs related to obtaining an acceptable sample of the Shipment. Purchaser shall have the option, which may be exercised from time to time during the term of this Agreement, to obtain samples of Shipments, for governing purposes and at Purchaser's expense, at a Designated Plant or such other point as is specified by Purchaser in accordance with the provisions of this Agreement.
- B. At the Loading Point (and at such other loading facility as may become applicable to this Agreement), Seller shall provide a mechanical sampling system and shall use the sampling system to collect a representative sample of each Shipment at the Loading Point (or at such other loading facility).
- C. If Shipment is by truck, each truck in a day's deliveries of Shipments shall be sampled by Purchaser (Seller) at the Plant (Point of Origin) at Purchaser's (Seller's) expense. Three samples shall be prepared as follows: (i) one for Purchaser; (ii) one for Seller; and (iii) one as a reserve sample for a referee analysis as provided in this section. The samples shall be analyzed for contract administration at Purchaser's designated laboratory.

D. The following provisions shall apply to Seller's sampling system:

1. The design and operation of Seller's sampling system and the procedures used for sample preparation shall, at a minimum, meet the requirements of the most current published ASTM D-7430 "Standard Practice for Mechanical Sampling of Coal" and ASTM D-2013 "Standard Practice 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 No. 4 sieve size (as determined by Purchaser based on the most current published ASTM D-4749 "Standard Test Method for Performing the Sieve Analysis of Coal and Designating Coal Size"). The sample flow rates through the sampling system shall be sufficient to minimize moisture loss. The Parties shall use their best efforts to agree on modifications of procedures and equipment to meet any future revisions of ASTM D-7430 and ASTM D-2013.
2. All sample increments collected at all stages of sampling in the sampling system shall cut the full stream of coal presented. Upon Purchaser's request, Seller shall make available to Purchaser the values of current measurements of sampling system cutter openings, cutter velocities, belt speeds and sample flow rates on Seller's sampling system, which shall be subject to Purchaser's review and acceptance but such acceptance shall not be unreasonably withheld.
3. Seller shall monitor the sampling ratio of its sampling system in a manner that meets ASTM standards and published addenda and is acceptable to Purchaser and, upon Purchaser's request, shall make sampling ratio data available to Purchaser. Out of control conditions or excessive variation must be promptly investigated by the Party responsible for operation of the sampling system.
4. Using bias test procedures that, at a minimum, meet the requirements of the most current published ASTM D-7430 "Standard Practice for Mechanical Sampling of Coal," Seller shall require Seller's sampling system to be tested periodically, no less than every three (3) years, at Seller's expense, for bias against stopped-belt reference samples. Such testing shall be scheduled such that when each Shipment is sampled, the most recent bias test results are dated by no more than three (3) previous years. Seller shall give Purchaser or its representative sufficient written notice of the scheduled date of each bias test, and the Parties shall mutually agree on the coal characteristics for testing and the acceptable confidence interval widths for each characteristic prior to the start of the bias test. Purchaser or its representative may be present during such test and may observe and inspect sample collection, sample preparation, and laboratory analysis of bias test samples. If a bias is detected by the test, Seller shall immediately take all reasonable measures to correct or remove the source of the bias; and Purchaser may suspend Shipments under this Agreement until (i) the source of the bias is corrected or removed and (ii) the sampling system is re-tested for bias. If major changes are made to the equipment or major changes are made to the sample flow rates through the system, a new bias test shall be performed.
5. Prior to the installation of any new sampling system at the Loading Point (or at such other loading facility as may become applicable to this Agreement) or a major modification of an existing sampling system at the Loading Point (or at such other loading facility), Seller shall notify Purchaser of the planned installation of a new sampling system or the modification of an existing sampling system and allow Purchaser to review and approve

the design drawings, specifications and sample extraction parameters for the new or modified sampling system, approval of which shall not be unreasonably withheld.

- E. Using an enclosed riffle and following the procedures of ASTM D-2013 with respect to each Shipment, Seller shall divide the final sample of No. 4 sieve size into at least four (4) laboratory sample splits, with each split of coal weighing a minimum of 4,000 grams. The procedure shall not include any extra steps to "homogenize" the sample such as, but not limited to, by mixing the sample in a cement-type mixer or by making extra passes through a riffle. Seller shall promptly send one laboratory sample to Purchaser's designated laboratory and shall promptly analyze one (1) laboratory sample to provide the "as loaded" coal quality analysis as required by Sections A - D above. Seller shall retain the two (2) remaining laboratory samples for at least sixty (60) days for coal from the date of the Shipment as reserve samples. Reserve samples shall be heat sealed in 6-mil plastic bags or double-bagged 4-mil bags, adequately labeled and stored in a clean, cool and secure location.
- F. Purchaser or its representative may observe any sampling or sample preparation performed by Seller; and Seller or its representative may observe any sampling or sample preparation performed by Purchaser's designated laboratory.
- G. In the event that Seller's sampling system ceases to operate properly and after making all commercially reasonable efforts to put system in full working condition as quickly as possible, then Seller shall immediately notify Purchaser or its representative, orally or in writing, to determine the course of action to be taken concerning subsequent Shipments under this Agreement. If the sampling system malfunctions during the loading of any Shipment, Purchaser 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 the sampling system ceases to operate in accordance with the requirements of this Agreement, Purchaser's representative may direct Seller to delay or stop the loading of any one or more Shipments under this Agreement. After any such direction is given, the following provisions shall apply:
  - 1. Seller shall immediately delay or stop, as the case may be, the loading of such Shipment(s); and Seller shall pay all charges and costs incurred by Purchaser as a result of such delay or stoppage in the loading of such Shipment(s).
  - 2. Seller shall repair the sampling system as soon as practical, and Shipments under this Agreement shall not resume until such repair is completed.
  - 3. In the event that the duration for repair becomes lengthy, the Parties may agree to another method to determine the quality of Shipments until such repair is completed.

#### **ANALYSIS**

A. Purchaser, at its expense, shall analyze the laboratory samples sent to Purchaser's designated laboratory in accordance with current ASTM standards (see "COAL SAMPLE PREPARATION AND ANALYSIS PROCEDURES" below), and the results of such analyses shall be used for the governing purposes of the Agreement. Purchaser shall e-mail a copy of such analysis to Seller within twenty (20) working days after the sample is received at the designated laboratory, which shall be Purchaser's Central Laboratory in Varnons, Alabama or in Smyrna, Georgia, or a qualified independent coal-testing laboratory selected by Purchaser. If Purchaser elects to employ an independent coal-testing laboratory, Seller shall not be liable for any costs incurred by Purchaser except as otherwise provided in the Agreement.

B. If Seller disputes the accuracy of Purchaser's analysis of a given shipment, Seller shall notify Purchaser in writing within thirty (30) days after Seller has received the Shipment's analysis from Purchaser. Promptly after giving such notice, Seller shall send one of the reserve samples to a

qualified independent laboratory (selected jointly by Purchaser and Seller) which shall conduct a referee analysis of such reserve sample in accordance with current ASTM standards. The cost of any such analysis shall be borne by Seller. With respect to a dispute pertaining to a calorific value analysis, Purchaser's analysis shall be deemed to have been confirmed, and no further adjustment in billing calculations shall be made, if the dry basis calorific value analysis by such independent laboratory differs from Purchaser's analysis by no more than 100 Btu/lb. With respect to disputes over other items of analysis, Purchaser's analysis shall be deemed to have been confirmed, and no further adjustment in billing calculations shall be made, if the analysis by the independent laboratory differs from Purchaser's analysis by no more than the applicable tolerances in the most current published ASTM reproducibility standards for moisture, ash, volatile matter, sulfur <2.0%, sulfur >2.0%, ash fusion temperature (H-W reducing atmosphere) and grindability.

### **COAL SAMPLE PREPARATION AND ANALYSIS PROCEDURES**

Procedures used by Purchaser for coal sample preparation and analysis shall be performed manually or by utilization of automated equipment that conforms to the most current published ASTM standards for the below:

1. Total Moisture in Coal (Air drying will be continued for predetermined time necessary to achieve a loss in weight of no more than 0.1 percent per hour.)
2. Preparing Coal Samples for Analysis
3. Moisture in the Analysis Sample of Coal
4. Ash in the Analysis Sample of Coal
5. Calorific Value of Coal
6. Total Sulfur in the Analysis Sample of Coal Using High Temperature Tube Furnace Combustion Method
7. Volatile Matter in the Analysis Sample of Coal
8. Fusibility of Coal Ash
9. Grindability of Coal by the Hardgrove Grindability Machine Method (No. 4 coal samples shall be used for this analysis.)
10. Fixed Carbon is a calculated value. Fixed Carbon is the resultant of the summation of percentage moisture, ash, and volatile matter subtracted from 100. All percentages used in the calculation must be on the same moisture basis.
11. Nitrogen in the Analysis Sample of Coal
12. Calculating Coal Analyses from As-Determined to Different Basis

### **REJECTION OF SHIPMENTS**

In addition to and not as a limitation upon Purchaser's other rights and remedies under the Agreement, Purchaser may refuse and reject any Shipment prior to unloading under any one or more of the

following circumstances: (i) the shipment fails by analysis (including, without limitation, the "as loaded" coal quality analysis) to comply with any one or more of the As Received Rejection Limits set forth in the Agreement; (ii) the shipment fails in any manner to comply with the coal size specifications set forth in the Agreement; (iii) the shipment is delivered in equipment other than as agreed to; (iv) the shipment contains extraneous material; (v) the shipment fails to comply with the loading requirements set forth in the Agreement; or (vi) the shipment contains coal that was or is being mined or produced from a seam or source other than the Coal Property (as defined in the Agreement) without obtaining Purchaser's prior written consent. Purchaser shall give Seller prompt notice of any rejection of a shipment. After receipt of such notice, Seller shall not resume shipments until coal quality or other deficiency has been corrected to Purchaser's satisfaction. In the event that Purchaser rejects a Shipment, then Seller shall immediately remove, at Seller's expense, the Shipment from Purchaser's facilities or from transportation equipment and shall reimburse Purchaser for all transportation and handling charges and costs incurred and paid by Purchaser in connection with the Shipment. Any Shipment that is rejected and not accepted by Purchaser shall not be included in determining the quality of Shipments under this Agreement on a monthly or quarterly basis or any price adjustments based on the quality of such Shipments.

In the event that Purchaser rejects any Shipment under this Agreement, Seller shall, if Purchaser so requests, make up such Shipment within the next twelve (12) months following receipt of Purchaser's notice of rejection in accordance with a mutually agreeable schedule. The price of such makeup Shipment shall be determined according to the Billing Price in effect at the time the Shipment was rejected. If (i) Seller is unable to make up a rejected Shipment within such twelve-month period and (ii) Purchaser acquires replacement coal as cover for such deficiency, Seller shall pay to Purchaser an amount determined in accordance with the terms of the Agreement.

In the event that Purchaser, in its sole discretion, accepts any shipment in which the "as received" analysis exceeds any one or more of the As Received Rejection Limits set forth in the Agreement, the following price adjustments shall apply and shall be in addition to the calorific value, excess ash, and excess moisture adjustments, if any, for such shipment:

Calorific Value Adjustment:	\$2.00 per ton for each 100 Btu or fraction thereof less than the As Received Rejection Limit for minimum calorific value
Ash Adjustment:	\$3.00 per ton for each 1% or any fraction thereof in excess of the As Received Rejection Limit for maximum ash content
Moisture Adjustment:	\$3.00 per ton for each 1% or any fraction thereof in excess of the As Received Rejection Limit for maximum moisture content

Purchaser's election to accept any shipment that fails to comply with any one or more of the As Received Rejection Limits set forth in the Agreement and to apply one or more of the price adjustments as stated above shall not affect any of Purchaser's other rights and remedies (including, without limitation, Purchaser's right to reject subsequent Shipments that fail to comply with any one or more of the Rejection Limits set forth in the Agreement).

In addition to the provisions set forth in the section regarding sampling, Purchaser shall have the right to take samples of one or more shipments while they are in transit and to analyze such samples for the purpose of determining whether to accept or to reject such shipment(s) for failure to comply with the specifications set forth in the Agreement or other terms and conditions of the Agreement. In the case of any shipment which is accepted, the samples of such shipment taken in transit and the results of such analyses shall not be used for other purposes; and the foregoing provisions in the Weighing, Sampling, and Analysis sections shall apply.

## **SUSPENSION OF SHIPMENTS**

In addition to and not as a limitation upon Purchaser's other rights under the Agreement, Purchaser shall have the right to suspend shipments immediately, by giving verbal or written notice to Seller, under any one or more of the following circumstances: (i) any shipment fails to comply with any one or more of the As Received Suspension Limits set forth in the Agreement; (ii) any shipment is not substantially free of extraneous material; (iii) any shipment fails to comply with the loading requirements set forth in the Agreement; or (iv) any shipment contains coal that was or is being mined or produced from a seam or source other than the Coal Property (as defined in the Agreement) without obtaining Purchaser's prior written consent. Shipments in transit at the time such notice is given may be accepted at Purchaser's sole option. Three or more suspensions during any ninety-day period shall be deemed a material breach of the Agreement, for which Purchaser shall have the unilateral right, exercised in its sole discretion, to terminate the Agreement by giving notice of the termination to Seller.

After notice of any suspension, Purchaser may terminate the Agreement unless Seller gives adequate assurance, within thirty (30) days after receipt of such notice, that Seller will and can comply with the specifications set forth in the Agreement and the other requirements of the Agreement. Such assurance may, at Purchaser's option, be provided by means of a complying test shipment scheduled and sampled by such method as shall be acceptable to Purchaser or by other means acceptable to Purchaser. All special handling costs (including, without limitation, costs related to stockpile segregation and transportation) associated with any such test shipment shall be borne by Seller. If Purchaser's analysis of the test shipment shows it to be in compliance with each of the requirements of the Agreement, shipments of coal under the Agreement shall resume. The Parties thereafter shall mutually determine whether or not to make up any tonnage shortfall that is caused by a notice of suspension. If the Parties elect to make up the tonnage shortfall, the Parties shall agree on a schedule that shall allow the tonnage shortfall to be supplied within a period no longer than twelve months after shipments have resumed; and the term of the Agreement may be extended to accommodate such schedule. The price to be paid for any such makeup tons shall be determined according to the billing price in effect during the period in which shipments were suspended.

If Purchaser does not receive, within thirty (30) days after Seller's receipt of a notice of suspension, adequate assurance of Seller's ability to supply coal which complies with the requirements of the Agreement or if any test shipment made fails to comply with such requirements, Purchaser shall so notify Seller of such failure and may, at Purchaser's option, cancel the remaining shipments to be supplied under the Agreement and may terminate the Agreement immediately by giving notice of the termination to Seller. In the event that Purchaser suspends shipments followed by termination of the Agreement, Seller shall reimburse Purchaser for all charges and costs (including, without limitation, freight charges and transportation costs related to the suspension and special handling costs associated with a test shipment under the Agreement) incurred by Purchaser in connection with the suspension. Purchaser's rights of rejection, suspension, and termination are in addition to any other remedies available to Purchaser under the Agreement, at law, or in equity for Seller's failure to supply coal in compliance with the Agreement.

## **TERMINATION OF AGREEMENT FOR COAL QUALITY DEFICIENCIES**

In addition to and not as a limitation upon Purchaser's other rights under the Agreement, Purchaser shall have the right to terminate the Agreement if 30% of all shipments of coal supplied under the Agreement during a period of thirty (30) consecutive days, following a notice of suspension, fails to comply with any one or more of the "as received" monthly weighted average requirements set forth in the Agreement. Such failure shall be deemed a material breach of the Agreement, for which Purchaser may terminate the Agreement immediately by giving notice of the termination to Seller.

In the event that Purchaser terminates the Agreement or in the event that Purchaser suspends shipments, and in addition to Purchaser's other rights and remedies under the Agreement or as provided at law or in equity,

Seller shall be liable to Purchaser for breach of the Agreement and shall reimburse Purchaser for any and all costs incurred by Purchaser under the Agreement and other contracts with transportation companies which result from such termination or suspension of shipments.

### **CANCELLATION**

In addition to and not as a limitation upon Purchaser's other rights under the Agreement, Purchaser shall have the right to cancel the remaining shipments of coal to be supplied under the Agreement and to terminate the Agreement by giving written notice of the termination to Seller under any one or more of the following circumstances: (i) 30% of all Shipments during the thirty-day period following a notice of suspension, fail to comply with any one or more of the "as received" monthly (or other period) weighted average requirements set forth in the Agreement; (ii) shipments, when averaged over three consecutive calendar months, fail to comply with any one or more of the "as received" monthly (or other period) weighted average requirements set forth in the Agreement; (iii) the sulfur content of shipments, when averaged over two contract years, exceeds the agreed upon limit, (v) Seller fails to deliver at least 75 percent of the quantity of coal to be supplied in any quarter and such failure is not excused by force majeure; or (v) Seller has engaged in any fraudulent or illegal conduct in connection with its performance under the Agreement.

### **TERMINATION FOR UNREMEDIED DEFAULT**

In the event of the failure of either party to comply in good faith with any or all of its respective obligations as set forth in the Agreement, the party not in default shall have the right to terminate the Agreement at any time by giving notice of its intention to do so to the other party, which notice shall specify the default. At the expiration of sixty (60) days after the date of such notice, unless the party in default shall have cured such default, the party not in default shall have the right, at its sole election, to terminate the Agreement immediately with no liability therefor; provided, however, that the failure of the parties to agree on a price adjustment shall not constitute grounds for termination of the Agreement.

In addition to and not as a limitation upon other rights of Purchaser or Seller under the Agreement, a non-defaulting party may elect, at its sole option, to forego its right to terminate the Agreement upon the other party's default under the Agreement and may require, in lieu of termination, the other party to perform its obligations according to the terms and conditions of the Agreement.

### **FORCE MAJEURE**

The term "Seller's Force Majeure" means a cause reasonably beyond the control of Seller that, wholly or in substantial part, prevents or restricts the mining, processing, loading, or delivery of Seller's coal; and the term "Purchaser's Force Majeure" means a cause reasonably beyond the control of Purchaser that, wholly or in substantial part, prevents or restricts the delivery, unloading, storing, or use of Seller's coal at one or more of the Designated Plants. Examples (without limitation) of force majeure are the following: acts of God; acts of the public enemy; insurrections; riots; labor walkouts or strikes; fires; explosions; floods or underground flooding; electric power failures or extended outages in the supply of electric power; breakdowns of or damage to generating or preparation plants; interruptions to or contingencies of transportation or loading (including, without limitation, an event of force majeure under the [Barge, Rail or Truck] Contract); embargoes; and orders or acts of civil or military authority (including, without limitation, a city or county ordinance, an act of a state legislature, or an act of the United States Congress); provided, however, that for purposes of this Agreement, force majeure shall not include, and neither Party shall be excused from performance because of, (i) the development or existence of economic conditions that may adversely affect the anticipated profitability of a Party's activities under this Agreement, (ii) acts or omissions of a Party that constitute fraud on the part of such Party, or (iii) reduced productivity of labor

employed by a Party in its activities under this Agreement (unless such reduced productivity results from a labor dispute).

If, because of Purchaser's Force Majeure, Purchaser is unable to carry out its obligations under this Agreement and if Purchaser intends to claim that such force majeure excuses Purchaser's inability to perform, Purchaser shall give Seller written notice of the event giving rise to such force majeure within fifteen (15) days after the onset of such event. If such notice is timely given, the obligations of Purchaser and the corresponding obligations of Seller shall be suspended to the extent made necessary by and during the continuance of such force majeure; *provided, however*, that Purchaser shall exercise commercially reasonable efforts to eliminate the disabling effects of such force majeure as soon as and to the extent practicable (except that Purchaser, in its sole discretion, may settle its own labor disputes or strikes or terminate any of its own lockouts).

If, because of Seller's Force Majeure, Seller is unable to carry out its obligations under this Agreement and if and if Seller intends to claim that such force majeure excuses Seller's inability to perform, Seller shall give Purchaser written notice of the event giving rise to such force majeure within fifteen (15) days after the onset of such event. If such notice is timely given, the obligations of Seller and the corresponding obligations of Purchaser shall be suspended to the extent made necessary by and during the continuance of such force majeure; *provided, however*, that Seller shall exercise commercially reasonable efforts to eliminate the disabling effects of such force majeure as soon as and to the extent practicable (except that Seller, in its sole discretion, may settle its own labor disputes or strikes or terminate any of its own lockouts).

After an event of force majeure has ended, the Party not invoking force majeure shall determine whether to make up any Tonnage Shortfall that is caused by the event. If that Party elects to make up a Tonnage Shortfall as provided in this Section 14.1(d), the Parties shall agree to a schedule that shall allow the Tonnage Shortfall to be supplied within a period no longer than twelve (12) months after the end of the event; and the term of this Agreement may be extended to accommodate such schedule. The price to be paid for any such makeup tons shall be determined according to the Billing Price in effect during the force majeure event(s) related to the Tonnage Shortfall.

The Parties acknowledge and agree that if any valid law, ordinance, or regulation of a municipality, county, state, or United States government or any final judicial decision, judgment, or order is adopted, passed, or issued after the Effective Date that either (i) directly prohibits the mining, processing, loading, or delivery of Seller's coal as contemplated under this Agreement or (ii) directly prohibits the unloading or use of such coal at one or more of the Designated Plants, then the existence and implementation of such law, ordinance, regulation, decision, judgment, or order shall constitute an event of permanent force majeure; and the Party so affected may then terminate this Agreement by giving the other 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.

Notwithstanding the other provisions of Section 14.1, a Party not claiming force majeure may terminate this Agreement whenever all of the following circumstances exist: (i) an event of force majeure occurs that causes the Parties' mutual obligations to be suspended with respect to the total quantity of coal to be supplied under this Agreement; (ii) such event, alone or extended by other events of force majeure, continues so that the Parties' mutual obligations remain suspended for a period of six (6) consecutive months; and (iii) at the end of such six-month period or at any time thereafter, the Party not claiming force majeure concludes that there is little likelihood of ending the event(s) in the immediate future. The Party not claiming force majeure may exercise such right of termination by giving the other 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.

#### **CHANGES IN ENVIRONMENTAL-RELATED REQUIREMENTS.**

- A. The term "Environmental-Related Requirement," whether in the singular or the plural, means the following:
- (1) any environmentally related prohibition, restriction, or limitation regarding the burning of coal at one or more of Purchaser's electric-generating plants that are designated by Purchaser to receive coal supplied under the Agreement (the destination plants);
  - (2) any prohibition, restriction, or limitation regarding (i) the quality of coal which Purchaser may burn (including, without limitation, any constituent specification) at one or more of the destination plants or (ii) the type or amount of emissions from such plant(s);
  - (3) any rule or requirement affecting the permissible means for complying with any such prohibition, restriction, or limitation; or
  - (4) any imposition of a cost, fee, tax, or other economic burden on Purchaser related to (i) the production of electricity (either generally or by means of coal-fired electric generation), (ii) the quantity of coal purchased or burned by Purchaser at one or more of the destination plants, (iii) any constituent specification of coal purchased or burned by Purchaser at such plant(s), (iv) the type or amount of emissions from such plant(s), or (v) the installation of any type of environmental-related equipment required by any regulatory authority to which Purchaser is subject.

In addition, the term shall be deemed to include Purchaser's strategy, as determined by Purchaser in its reasonable judgment, for compliance with Environmental-Related Requirements.

- B. A change in Environmental-Related Requirements shall be deemed to have occurred in any one or more of the following circumstances: (i) there is any increase or decrease in existing Environmental-Related Requirements; (ii) Purchaser decides, in its reasonable judgment, to change its strategy for compliance with any existing Environmental-Related Requirements; or (iii) a new Environmental-Related Requirement is imposed on Purchaser 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. A change in Environmental-Related Requirements may occur even though such requirement is stated as a restriction, limitation, or obligation imposed on Purchaser and its affiliates or some other group of utilities or such requirement affects Purchaser in a general way and is not directed at specific plants, fuels, fuel supplies, or other operating conditions.
- C. The provisions of this section are intended to provide rights in addition to the rights provided in the Force Majeure section; and the price, specifications, quantity, and destination(s) of coal to be supplied under the Agreement are predicated on Environmental-Related Requirements which are known and in effect as of the Effective Date. For purposes of this paragraph, 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") which is being challenged in any administrative or judicial proceeding ("Legal Proceeding") as of the Effective Date. Upon the final resolution of the Legal Proceeding (including any appeals related to the Legal Proceeding), Purchaser 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.
- D. In the event that a change in Environmental-Related Requirements occurs after the Effective Date, then Purchaser 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 Purchaser's use of coal to be supplied under the Agreement at one or more of the destination plants. Any change in Environmental-Related Requirements which has one or more of the following effects shall be deemed to have an adverse

impact on Purchaser's use of coal to be supplied under the Agreement at such plant(s), even though such requirements may allow Purchaser 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 such plant(s)):

- (1) the change imposes a cost, fee, tax, or other economic burden on Purchaser concerning (i) the constituent specifications of coal purchased for or burned at such plant(s) or (ii) the type or amount of emissions from such plant(s);
- (2) the change directly prevents or restricts Purchaser from using coal to be supplied under the Agreement at such plant(s);
- (3) the change requires Purchaser 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 such plant(s) in order to comply with such change; or
- (4) the change requires or permits Purchaser to use coal of a quality (including, without limitation, sulfur) different from the specifications set forth herein.

- E. If Purchaser 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 the Agreement, Purchaser shall so notify Seller in writing. Upon receipt of such notice, Seller shall have the option to propose, within thirty (30) days after receipt of such notice, any steps available to Seller in its mining and processing of the coal, in the supply of substitute coal, or other measure which would result in as low a delivered cost of fuel at the destination plants as Purchaser could obtain by purchasing reasonably available substitute fuel, taking into consideration any fees, taxes, costs, or other economic burdens imposed on the use of coal at the destination plants. In the event that Purchaser determines, in its reasonable judgment, that Seller cannot achieve this result, then Purchaser may terminate the Agreement by giving Seller written notice thereof at least ninety (90) days prior to the effective date of termination. Purchaser may give such notice either before or after a change in Environmental-Related Requirements becomes effective.
- F. If, at any time during the term of the Agreement and regardless of whether a change in Environmental-Related Requirements has occurred, Purchaser determines, in its reasonable judgment, that any operational or environmental compliance problem has resulted from the components or characteristics of Seller's coal 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, Purchaser and Seller 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 which, in Purchaser's judgment, is reasonable and would not impose an unreasonable additional expense on Purchaser, then Purchaser may terminate the Agreement by giving Seller written notice thereof at least ninety (90) days prior to the effective date of termination. No expense contemplated by this section shall be deemed reasonable if it would result in a delivered cost of coal under the Agreement which exceeds the delivered cost of competitive fuels or sources then available to Purchaser.

#### **ADJUSTMENT FOR CHANGES IN GOVERNMENTAL IMPOSITIONS**

- A. The term "Governmental Imposition," whether in the singular or the plural, means taxes, fees, or costs that (i) are imposed on Seller or its affiliates by any government or any governmental or regulatory agency pursuant to Laws or Regulations (as hereinafter defined) and (ii) result in costs or savings that directly affect the mining or processing of coal from the Coal Property. The term "Laws or

Regulations," whether in the singular or the plural, means any of the following: (1) mining-related statutes enacted by a legislative body; (2) interpretations of mining-related statutes by a governmental or regulatory agency or a court of competent jurisdiction; (3) mining-related regulations, rules, or final administrative decisions issued by a governmental or regulatory agency; and (4) judgments, orders, or decisions affecting mining that are issued by a court of competent jurisdiction. Notwithstanding the foregoing provisions of this section, the following provisions shall apply in determining whether a particular tax, fee, or cost qualifies as a Governmental Imposition under this section:

- (1) The tax, fee, or cost must be imposed on Seller or one or more of its affiliates who are directly involved in the mining or processing of coal from the Coal Property for supply under this Agreement and must require that Seller or such affiliate(s) pay a monetary amount to a government or a governmental or regulatory agency.
  - (2) The tax, fee, or cost must apply to coal produced from mines that are part of the Coal Property, as described in the Agreement. If the tax, fee, or cost applies to mines that are not listed in the Agreement, such tax, fee, or cost shall not qualify as a Governmental Imposition under this section; *provided, however*, that (i) if the Parties mutually consent to add any mines as sources of supply under this Agreement after the Effective Date, the Parties shall amend or replace the relevant section of the Agreement to identify such mines and (ii) if, and only if, such mines are identified in an amendment or replacement of relevant section of the Agreement, any tax, fee, or cost related to such mines may qualify as a Governmental Imposition under this section, except as otherwise provided in the Agreement.
  - (3) For the purpose of illustration (and not limitation), Governmental Impositions do not include any of the following: (a) income taxes, ad valorem taxes, unmined mineral taxes, or sales or use taxes (even if imposed on materials and supplies used in the mining or processing of coal supplied under this Agreement); (b) taxes, fees, assessments, or contributions for unemployment compensation or worker's compensation or for employee retirement benefits, employee health benefits, or other employee benefits; (c) costs incurred to comply with insurance requirements under Laws or Regulations; (d) labor costs or costs for loss of productivity resulting from compliance with Laws or Regulations; (e) attorney's fees or legal expenses incurred in connection with legal proceedings or enforcement actions brought by or against governmental or regulatory agencies (including, without limitation, administrative proceedings involving the Coal Property); (f) voluntary contributions to a governmental or regulatory agency or any third party in connection with reviews, reports, studies, or investigations made by, or at the request of, any governmental or regulatory agency; (g) costs for goods, services, consumables, materials, or equipment that are or may be used for commercial or industrial purposes other than the mining or processing of coal from the Coal Property; and (h) indirect costs incurred to comply with Laws or Regulations. In addition, Governmental Impositions do not include any changes that occur during the term of this Agreement with respect to the amounts or rates of the foregoing items listed in this section.
  - (4) In the event that (i) Seller or any of its affiliates fails to comply with any Law or Regulation or any judgment, order, or decision issued by a court or a governmental or regulatory agency and (ii) any civil or criminal fine, penalty, or assessment is imposed on Seller or any of its affiliates as a result of such failure or any increased cost is incurred by Seller or any of its affiliates as a result of such failure, then such fine, penalty, or assessment or such increased cost shall not qualify as a Governmental Imposition under this section.
- B. The Base Price, as set forth in the Agreement, includes all costs incurred, or to be incurred, by Seller and its affiliates to comply with (i) all Governmental Impositions that apply to the mining or processing of coal from the Coal Property as of the Effective Date and (ii) all other taxes or fees that are imposed on Seller or its affiliates by Laws or Regulations that are in effect as of the Effective

Date. Accordingly, no adjustment of the Base Price shall be made under any provision of this section for any such costs. For purposes of clarification, the limitations on price adjustments set forth in this section or other provisions of this section shall also apply to costs related to any Governmental Imposition or any other tax or fee that is known as of the Effective Date (but not effective until thereafter) or that is expressly included in the Base Price as provided in the Agreement, regardless of whether the Base Price fully reflected such costs or such other tax or fee as of the Effective Date.

- C. For purposes of this section, the Base Price shall be deemed to include all costs incurred, or to be incurred, by Seller or its affiliates with respect to each of the following:
- (1) Costs to comply with the requirements of (i) the Federal Mine Safety and Health Act of 1977, as amended (30 U.S.C. § 801 *et seq.*) (the "Mine Safety Act") and as in effect on the Effective Date, and (ii) rules and regulations promulgated under the Mine Safety Act that are in effect as of the Effective Date;
  - (2) Costs to comply with the requirements of (i) the Surface Mining Control and Reclamation Act of 1977, as amended (30 U.S.C. § 1201 *et seq.*) (the "Surface Mining Act") and as in effect on the Effective Date (if the Surface Mining Act applies to the Coal Property as of the Effective Date), and (ii) rules and regulations promulgated under the Surface Mining Act that are in effect as of the Effective Date;
  - (3) Costs to obtain permits or authorizations from governmental or regulatory agencies to conduct the operations of Seller or its affiliates on the Coal Property as required under Laws or Regulations that are in effect as of the Effective Date; and
  - (4) Costs related to inspections of the Coal Property and the operations of Seller or its affiliates on the Coal Property by governmental or regulatory agencies pursuant to Laws or Regulations that are in effect as of the Effective Date and any corrective actions required as a result of such inspections.
- D. Unless prohibited by the foregoing or subsequent provisions of this section, the Base Price shall be adjusted for changes in Governmental Impositions that directly affect coal actually supplied to Purchaser under this Agreement and that result from the following (each a "GI Change"): (1) amendments after the Effective Date to Laws or Regulations that are in effect as of the Effective Date; (2) requirements of entirely new Laws or Regulations that are enacted or promulgated after the Effective Date; (3) changes that occur after the Effective Date in the enforcement of Laws or Regulations that are in effect as of the Effective Date; or (4) final judgments, orders, or decisions that (i) are issued by a court of competent jurisdiction or a governmental or regulatory agency after the Effective Date and (ii) reflect new and different interpretations of Laws or Regulations that are in effect as of the Effective Date. Notwithstanding the foregoing provisions of this Section 4.3(d), no adjustment of the Base Price or the Adjusted Base Price shall be made with respect to any change in the interpretation or enforcement of Laws or Regulations unless such change has national application (in the case of a federal Law or Regulation) or state-wide application (in the case of a state Law or Regulation).
- E. In the event that after the Effective Date, any GI Change imposes a new Governmental Imposition or increases, decreases, or removes an existing Governmental Imposition, then Seller shall give Purchaser written notice of the GI Change (a "GI Change Notice"), which shall be sent to Purchaser within sixty (60) days after the effective date of the GI Change; *provided, however*, that in no event may a GI Change Notice be sent after the expiration or termination of this Agreement. The following provisions shall apply to the GI Change Notice and any claim for an adjustment of the Base Price or the Adjusted Base Price, as the case may be, under this section (a "GI Claim"):

- (1) With respect to a GI Change that expressly imposes costs on a per-ton basis, Seller shall give Purchaser written notice of any GI Claim that Seller intends to make as a result of the GI Change (a "GI Claim Notice"), which shall be sent to Purchaser within sixty (60) days after the effective date of the GI Change. The GI Claim Notice shall set forth the amount (on a per-ton basis) and effective date of the claimed adjustment of the Base Price or the Adjusted Base Price, as the case may be, and shall contain sufficient documentation and data to enable Purchaser to verify the amount of the claimed adjustment.
  - (2) With respect to a GI Change that does not expressly impose costs on a per-ton basis, Seller shall give Purchaser a GI Claim Notice, if any, within twelve months after the effective date of the GI Change. The GI Claim Notice shall set forth the amount (on a per-ton basis) and effective date of the claimed adjustment of the Base Price or the Adjusted Base Price, as the case may be, and shall contain information that describes the change in costs resulting from the GI Change. The GI Claim Notice shall also contain sufficient documentation and data (i) to substantiate the effect of the GI Change on Seller's or its affiliates' costs and (ii) to enable Purchaser to review Seller's computation of the change in costs and to verify the amount of the claimed adjustment. The documentation and data shall be based on an adequate period of experience in compliance with the GI Change, but in no case shall such period exceed twelve months. Notwithstanding the foregoing provisions of this section, if Seller has timely sent a GI Change Notice prior to the expiration or termination of this Agreement and intends to submit a GI Claim after such expiration or termination, the GI Claim Notice shall be sent to Purchaser within sixty (60) days after such expiration or termination.
  - (3) Within sixty (60) days after Purchaser has received a GI Claim Notice, the Parties shall jointly estimate and attempt, in good faith, to agree on the amount of costs or savings resulting from the GI Change. If the Parties agree on the amount of such costs or savings, the Base Price or the Adjusted Base Price, as the case may be, shall be adjusted for the remaining term of this Agreement to reflect 50% of such amount; and if the Parties do not agree on the amount of such costs or savings, either Party may seek judicial resolution of the claimed adjustment. Notwithstanding the foregoing provisions of this section, no adjustment shall be made for any of the following: (a) costs incurred by Seller or its affiliates to comply with a GI Change more than twelve months prior to the date of the GI Claim Notice related to the GI Change; (b) costs resulting from a GI Change for which Seller failed to send a GI Claim Notice within the applicable time limit specified in the Agreement; or (c) costs incurred by Seller or its affiliates after the expiration or termination of this Agreement to comply with a GI Change (even if the effective date of the GI Change occurs prior to such expiration or termination).
  - (4) In the event that Seller fails to send Purchaser a GI Change Notice within sixty (60) days after the effective date of a GI Change, Purchaser shall have the right, but not the obligation, to give Seller written notice of the GI Change; and upon receipt of such notice from Purchaser, Seller shall evaluate the GI Change and submit a GI Claim Notice to Purchaser. In such case, the Base Price or the Adjusted Base Price, as the case may be, shall be adjusted as provided in the foregoing provisions of this Section 4.3(e); *provided, however*, that the time limits set forth in this section shall not apply to prevent or restrict (i) a reduction in the Base Price or the Adjusted Base Price, as the case may be, or (ii) a refund of amounts paid by Purchaser to Seller for coal supplied under this Agreement prior to the effective date of such reduction.
- F. Notwithstanding the provisions of this section, the following limitations shall apply to price adjustments for GI Changes:
- (1) Purchaser shall have no obligation to review or approve a GI Claim Notice sent by Seller if the amount of the claimed adjustment set forth in the GI Claim Notice is less than \$0.05 per ton for Shipments from the Loading Point under this Agreement.

- (2) In the event that the Base Price or the Adjusted Base Price, as the case may be, is adjusted after the Effective Date pursuant to (i) any market price review provision in this Agreement, (ii) any price reopener provision in this Agreement, or (iii) any other price adjustment negotiated by the Parties (excluding price adjustments for GI Changes), then a price adjustment under Section 4.3(e) shall be made only with respect to a GI Change that takes effect after the effective date of such adjustment of the Base Price or the Adjusted Base Price, as the case may be.
  - (3) Unless the Parties otherwise agree, any price adjustment under this section shall be stated in U.S. dollars per ton and shall be made by increasing or decreasing, as appropriate, the Base Price or the Adjusted Base Price, as the case may be, by the amount of such adjustment. Such adjustment shall become effective as provide in this section.
- G. Any price adjustment under this section that results in a price increase or decrease shall become effective on the date on which the GI Change takes effect; *provided, however*, that for any GI Change that is imposed on a retroactive basis, such retroactive effect shall not be considered, for purposes of this Agreement, to extend beyond a period of six months prior to the date on which the GI Change takes effect. Notwithstanding the foregoing provisions of this section, if a GI Change Notice is not sent within sixty (60) days after the effective date of the GI Change, regardless of whether the GI Change is expressly imposed on a per-ton basis or not, then the price adjustment shall become effective as follows: (1) if the GI Change results in an increase in Seller's or its affiliates' costs, the adjustment shall become effective on the date on which a GI Claim Notice for such increase is received by Purchaser; and (2) if the GI Change results in a decrease in Seller's or its affiliates' costs, the adjustment shall become effective on the date on which the GI Change takes effect.
- H. Notwithstanding the foregoing provisions of this section, the following provisions shall apply to each GI Change:
- (1) Purchaser shall have the option of accepting or rejecting, wholly or in part, a claimed adjustment under this section if the cumulative amount of (i) such claimed adjustment (stated in U.S. dollars per ton) and (ii) all prior price adjustments (stated in U.S. dollars per ton), if any, under this section exceeds 5% of the then-current Base Price or Adjusted Base Price, as the case may be, of Shipments from the Loading Point under this Agreement. If Purchaser rejects the full amount of such claimed adjustment, Seller shall have the right to terminate this Agreement. If Seller elects to exercise its right of termination under this section, Seller shall give Purchaser written notice thereof, which shall specify the effective date of termination and shall be given at least ninety (90) days prior to such date.
  - (2) In the event that Seller exercises its right of termination under the Agreement, Purchaser shall have the option, upon the receipt of Seller's notice of termination and prior to the effective date of termination specified in such notice, to nullify such termination by accepting, in writing, the full amount of the price adjustment specified in the GI Claim Notice or otherwise requested by Seller.
  - (3) In the event of a termination under this section, such termination shall not constitute a breach or default under the Agreement.

### **REPLACEMENT COAL COST**

Purchaser may buy replacement coal and hold Seller liable for the cost of replacement coal under the following circumstances and conditions:

- A. In the event that Purchaser terminates the Agreement as a result of a breach by Seller, then the following provisions shall apply:
1. Purchaser shall first determine the remaining quantity of coal to be supplied under the Agreement as of the effective date of termination and give Seller written notice of the amount of the remaining quantity. Purchaser may then buy replacement coal (of similar, but not exactly the

same, quality) from one or more third parties in an amount up to (but not exceeding) the amount of the remaining quantity and arrange to have such replacement coal supplied at such times as Purchaser deems appropriate prior to the expiration date set forth in the Agreement.

2. Seller shall be liable to Purchaser for the difference between (i) the actual delivered cost incurred by Purchaser (including, without limitation, the costs of transportation, SO<sub>2</sub> emission allowances, NO<sub>x</sub> emission allowances (if applicable), and taxes) to obtain such replacement coal and (ii) the delivered cost of Seller's coal (including, without limitation, the costs of transportation, SO<sub>2</sub> emission allowances, NO<sub>x</sub> emission allowances (if applicable), and taxes) as of the effective date of termination.
- B. In the event that (i) Seller fails to supply at least 90% of the quarterly amount during any quarter and (ii) such failure does not result from an event of force majeure or a cause or circumstance within Purchaser's control, then the following provisions shall apply:
1. Purchaser shall first determine the amount of the tonnage shortfall during the quarter involved (the "Shortfall Quarter") and give Seller written notice of such amount. Purchaser may then buy replacement coal (of similar, but not exactly the same, quality) from one or more third parties in an amount up to (but not exceeding) the amount of the tonnage shortfall and arrange to have such replacement coal supplied at such times as Purchaser deems appropriate during the twelve-month period after the end of the Shortfall Quarter.
  2. Seller shall be liable to Purchaser for the difference between (i) the actual delivered cost incurred by Purchaser (including, without limitation, the costs of transportation, SO<sub>2</sub> emission allowances, NO<sub>x</sub> emission allowances (if applicable), and taxes) to obtain such replacement coal and (ii) the delivered cost of Seller's coal (including, without limitation, the costs of transportation, SO<sub>2</sub> emission allowances, NO<sub>x</sub> emission allowances (if applicable), and taxes) as of the end of the Shortfall Quarter.
- C. After Purchaser has determined the amount of replacement costs for which Seller is liable, Purchaser shall promptly prepare and submit to Seller an invoice for such amounts. Seller shall pay the amounts reflected in such invoice within fourteen (14) days after Seller has received such invoice. If Seller fails to pay such amounts within such fourteen-day period, Purchaser may immediately set off such amounts against, and deduct such amounts from, one or more payments due from Purchaser to Seller under the Agreement. Purchaser may retain all sums deducted under this section as satisfaction of the amounts owed by Seller to Purchaser under the Agreement and may recover any remaining amounts from Seller as provided by law.

#### **MAKEUP OF TONNAGE SHORTFALL**

With respect to any Shortfall Quarter, Purchaser may elect, in its sole discretion, to require Seller to make up the tonnage shortfall under the following circumstances:

- A. Purchaser may exercise such right in the event that (i) Seller fails to supply 100% of the quarterly amount during any quarter and (ii) such failure does not result from an event of force majeure or cause or circumstance within Purchaser's control. Therefore, if the amount of the tonnage shortfall exceeds 10% of the quarterly amount, Purchaser may elect to forego its right to buy replacement coal and may exercise its right to require Seller to make up the tonnage shortfall as provided in this section.
- B. Purchaser shall first determine the amount of the tonnage shortfall during the Shortfall Quarter and shall give Seller written notice of such amount, which shall set forth a proposed loading schedule for makeup of the tonnage shortfall. Upon Seller's receipt of such notice, Purchaser and Seller shall immediately enter into discussions in a good-faith effort to establish a loading schedule for makeup of the tonnage

shortfall. If such discussions fail to establish, within sixty (60) days after the end of the Shortfall Quarter, a loading schedule that is mutually acceptable to Purchaser and Seller, Purchaser may then buy replacement coal and hold Seller liable for the cost of replacement coal as provided in the Replacement Coal Cost section.

### **SELLER'S WARRANTIES**

Seller represents and warrants as follows: (i) Seller or its affiliates own or lease the Coal Property (as defined in the Agreement) and shall continue to own or lease the Coal Property during the term of the Agreement; (ii) all coal shipped pursuant to the Agreement shall be shipped free and clear of all liens, encumbrances, and claims of all third parties; (iii) the Coal Property contains commercially recoverable coal of a quality and in quantities sufficient to satisfy the requirements of the Agreement; (iv) coal shall not be used or sold from the Coal Property so as to result in an inability of Seller to deliver to Purchaser coal in the quantities and quality and at the times provided in the Agreement; (v) coal shipped under the Agreement shall be mined and produced from the Coal Property; and (vi) no substitute coal shall be shipped by Seller to Purchaser under the Agreement without prior written approval of Purchaser.

### **PURCHASER'S RIGHTS OF INSPECTION**

#### **A. Access to Seller's Records**

Seller shall maintain accurate records relating to shipments under the Agreement in accordance with generally accepted accounting principles and shall retain such records for at least three years after the Agreement is terminated or expires. Seller shall make such records available to Purchaser, its accountants, auditors, or other authorized representatives, who shall be given access to and be permitted to examine such records at reasonable times. If an audit determines that any payments previously made under the Agreement ("Previous Payments") were not properly calculated, adjustments shall be promptly made in amounts to be paid in the future for shipments under the Agreement ("Future Payments") and to reflect the proper amounts of such adjustment; or if no Future Payments are then due, payments shall be promptly made to reflect the difference between the Previous Payments and the proper amounts determined by audit. The provisions of this section shall survive the termination or expiration of the Agreement.

#### **B. Access to Coal Property**

Purchaser or its representatives, at any time during normal Coal Property operation, may enter upon the Coal Property or other appropriate locations, at Purchaser's sole expense, for any of the following purposes: (i) 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 the Agreement; (ii) to take samples of coal for Purchaser's analyses; or (iii) in connection with any accounting, audit, or examination of Seller's records. Prior to entering the Coal Property, Purchaser's representative shall check in with appropriate personnel at the entrance to the Coal Property. No such inspection by Purchaser shall be deemed a waiver of any of Purchaser's rights or relieve Seller of any obligations under the Agreement.

### **OTHER PROVISIONS**

The Agreement shall also contain other provisions, including those concerning the following: (i) mining plans for the Coal Property; (ii) Seller's compliance with applicable laws and regulations; (iii) other remedies not otherwise specified herein that are available to Purchaser in the event of Seller's breach of the terms and conditions of the Agreement; (iv) restrictions on the disclosure of confidential and proprietary information; and (v) such other terms as are mutually acceptable to Purchaser and Seller.

## **RAILCAR WEIGHT MATRIX**

Weight limitations on railcars must meet two criteria; design limitations and track standards. Railcars should be loaded to full visible capacity, if possible, but must not exceed the lesser of the two criteria below:

1.
  - All private aluminum railcars are designed to withstand a maximum of 286,000 pounds gross weight on rail ("GWR").
  - All private steel railcars are designed to withstand a maximum of 272,000 pounds GWR.
  - Railroad-owned railcars must be loaded in accordance with stenciled weights on railcars unless otherwise specified by the rail carrier.
2. In addition to the general constraints of Item 1, all railcars shall be loaded to full visible capacity but within each rail carrier's load limits for maximum GWR.