

**MEMORANDUM**

**TO:** MAYOR AND CITY COMMISSION  
**FROM:** CITY ATTORNEY'S OFFICE  
**DATE:** February 1, 2016  
**RE:** **Coal Supply Purchase with Hamilton County Coal, LLC**

Attached hereto for your consideration is an agreement with Hamilton County Coal, LLC, a subsidiary of Alliance Coal, LLC (Hamilton) for the purchase of coal from Hamilton Mine #1 located in Hamilton, Illinois. Currently, the majority of coal supplied to the McIntosh Power Plant comes from the Illinois Basin region as the railroad transportation rates were designed to target this area in an effort to lower Lakeland Electric's fuel costs.

The Hamilton Mine #1 coal is similar in chemical composition to other Illinois Basin coals that Unit 3 has been able to successfully burn. The purchase of this coal enables the City to lower its fuels cost on Unit 3 and produce competitively priced power, thereby resulting in the more efficient and economical utilization of Unit 3.

The City's Purchasing Department issued a Request for Proposal in November 2015 on behalf of Lakeland Electric's Fuels Department seeking vendors to supply coal for the 2016 year. In reviewing the proposals from potential vendors, the Fuels Department utilized industry software known as "VISTA" that was programmed using detail information about Unit 3 components to evaluate the coal based on performance, emissions and how it would affect Unit 3's maintenance and availability. Upon evaluation, the Hamilton Mine #1 coal will provide the greatest potential to burn by itself or to reduce Lakeland Electric's current blending of Colombian coal. As such, staff entered into negotiations with Hamilton to purchase coal.

Pursuant to this Agreement, Alliance will provide a minimum of 250,000 tons up to 400,000 tons of coal at a base price of \$32.00 per ton, or \$62.49 per ton including rail transportation, for a minimum total cost of \$15,625,000 and maximum of to \$25,000,000. The purchase of the Hamilton coal is included in Lakeland Electric's FY 2016 fuel budget. Upon approval by the City Commission, the Agreement shall be effective from February 1, 2016 and continue through February 28, 2017, with coal deliveries scheduled to occur following Lakeland Electric's 2016 Spring outage, or by June 1, 2016, whichever is earlier.

It is recommended that the appropriate City officials be authorized to execute a Coal Supply Agreement with Hamilton for the purchase of coal.

RS  
attachment

## COAL SALES AGREEMENT

**Seller:** Hamilton County Coal, LLC  
1717 South Boulder Avenue, Suite 400  
Tulsa, OK 74119-4886

**Buyer:** City of Lakeland, a Florida Municipal corporation  
Lakeland Electric a department of the City  
501 East Lemon Street  
Lakeland, FL 33801

**Term of Agreement:** The term of this Agreement shall commence February 1, 2016 and continue through February 28, 2017, unless terminated earlier or extended in accordance with the provisions herein. The delivery of coal shall begin once the Buyer's coal unit has completed its spring scheduled outage or no later than June 1, 2016, whichever occurs first.

**Entire Agreement:** The Terms & Conditions attached hereto, are hereby made a part of this Agreement.

**Delivery Schedule:** The Contract quantity shall be delivered within the term of this Agreement in accordance with a delivery schedule mutually agreed upon by both parties.

**Base Price:** The Base Price to be paid by Buyer for coal delivered hereunder shall be \$32.00 per ton.

**BTU & Ash Premium/Penalty** Actual Btu/lb. / 11,650 Btu Guaranteed X \$32 Base Price= Net Price Per Ton.  
Review Calorific Adjustment under Terms & Conditions for example and for other terms regarding premium/penalty calculations.

**Quantity:** Seller agrees to sell and deliver to the Buyer and Buyer agrees to purchase and accept from Seller, F.O.B at the Point of Delivery a minimum of 250,000 tons up to a maximum of 400,000 tons during the Term of this Agreement. A "Shipment" shall be defined as at least 12,100 tons per Unit Train under Buyer's current CSX agreement. Buyer will provide Seller written notice of shipments required in accordance with a mutually agreeable delivery schedule.

**Source:** The source of the coal to be delivered pursuant to the Agreement shall be the Hamilton Mine #1 (referred to as the "Mine") located in Hamilton County, Illinois. Pursuant to the Terms & Conditions, section "Warranty" of this Agreement, Seller may, subject to written approval from Buyer, supply coal from other sources provided such coal conforms to the coal quality requirements of this Agreement. The cost of such substitute coal shall not exceed the delivered cost per ton or the delivered cost in cents per million Btu for coal to be supplied from the Mine. Any substitute coal that Seller may provide shall be sold to Buyer under the same Terms & Conditions of this Agreement. Seller's right to furnish substitute coal shall not affect its rights to claim force majeure as set forth in this Agreement.

**Delivery:** Seller shall sell and deliver coal to Buyer F.O.B. loaded into Buyer's railcars at a railcar loading facility at Seller's Train Loadout located near the Mine (which operates on the EVWR line in Epworth, IL). Title and risk of loss shall pass from Seller to Buyer after the coal is loaded into the railcars.

**Weighing:** The weight of coal delivered hereunder shall be determined via certified batch weighing system or Seller's certified scales at the delivery point. If a certified weighing system is not available at the Delivery Point, then certified railroad weights will govern. Cost of weighing to be for Seller's account. Seller represents that scales shall be tested periodically and upon request shall provide to Buyer a copy of the annual certified scale report.

Specifications:

Each Shipment shall conform to the Specification identified below.

Hamilton Coal Quality:	Guaranteed Shipment Average	Expected Specifications	Rejection Limits	
			Min	Max
Heat Content (BTU/lb.)	11,650		<11,300	>13,500
Hardgrove Grindability	55		<41	>60
<b>Proximate Analysis</b>				
<b>(% by weight)</b>				
Volatile Matter	35.0		<27	>39
Fixed Carbon	43.0		<41	>50
Ash	8.6		<6	>12
Moisture	12.1	12.1	<4	> 13.25*
<b>Ultimated Analysis</b>				
<b>(% by weight)</b>				
Carbon		63.80	<50	>82
Hydrogen		4.00	<3.5	>6.0
Sulfur	2.61		<0.6	>3.0
Oxygen		7.80	<3.0	>9.5
Nitrogen	1.47		<0.4	>1.7
Chlorine	0.28*			>.28*
Fluorine (PPM)	73.00			270.00
<b>Mineral Analysis of Ash</b>				
<b>(% by weight)</b>				
Ferric Oxide		16.20	<5.0	>20
Calcium Oxide		1.76	<2.0	>20
Magnesium Oxide		0.93	<0.10	>2.0
Sodium Oxide		1.24	<0.10	>1.6
Potassium Oxide		2.48	<0.10	>5.0
Silica Dioxide		52.71	<30	>58
Aluminum Oxide		21.90	<18	>36
Titanium Oxide		1.14	<0.3	>3.0
Sulfur Trioxide		1.54	<0.10	>7.0
Phos Pentoxide		0.10	<0.10	>1.3
Undetermined				
<b>Trace Elements (PPM)</b>				
Arsenic	3.50			>10
Mercury	0.06*			>0.06*
Tungsten	NA			>15.0
Vanadium	35.30			>300
<b>Ash Fusion Temperature (degree F)</b>				
Initial Deformation	2075			
Softening	2105			
Hemispherical	2135			
Fluid	2355			
Coal size:	2" to 4.5"		2" to 4.5"	
	<48.0%* less than ¼"		>50% less than ¼"	
Percentage of coal less than 28 mesh	20%		<20%	
Coal being offered	0% run of mine		100% washed	

\*For those Specifications above marked with an (\*), Buyer agrees to accept Seller's limits.

**Payment Terms:**

Buyer shall pay Seller within 30 days following the receipt of invoice. Payment for all invoices under this Agreement shall be made in United States funds and timely sent to Seller via ACH/wire transfer to the following account:

Hamilton County Coal, LLC  
Bank Name: Fifth Third Bank, Cincinnati, OH  
ABA#: 042000314  
Account #: 7021290650  
Or such other account as Seller may designate upon written notice to Buyer.

**Notices:**

All notices, invoices, and other formal communications which either Party may give to the other or in connection with this Agreement shall be in writing and shall be sent by any of the following methods: hand delivery; United States mail, reputable overnight courier; or with respect to communications other than payments by facsimile or email sent to the following address.

**To Buyer**

The City of Lakeland  
Lakeland Electric  
501 E Lemon Street  
Lakeland, FL 33801  
Attn: Tory Bombard, Fuels Manager  
Phone: (863) 834-6207  
Fax: (863) 834-8393  
Email: [Tory.Bombard@Lakelandelectric.com](mailto:Tory.Bombard@Lakelandelectric.com)  
Invoices Email: [Fuelinvoices@Lakelandelectric.com](mailto:Fuelinvoices@Lakelandelectric.com)

**To Seller:**

Hamilton County Coal, LLC  
Attn: Vice President –  
Contract Administration  
1717 South Boulder Avenue  
Tulsa, OK 74119-4886  
Phone: (918) 295-7619  
  
Fax: (918) 295-7360  
Email: [Brad.Shellenberger@arlp.com](mailto:Brad.Shellenberger@arlp.com)

**With copies to:**

Hamilton County Coal, LLC  
Attn: Steve Perkins  
General Manager – Sales  
426 Upper Stanley Road  
P.O. Box 637  
Stanley, NC 28164  
Phone: (704) 263-7231  
Fax: (704) 263-9642  
Email: [Steve.Perkins@arlp.com](mailto:Steve.Perkins@arlp.com)

Buyer: The City of Lakeland, FL

By: \_\_\_\_\_

Printed Name: R. Howard Wiggs

Title: Mayor

Date: \_\_\_\_\_

Seller: Hamilton County Coal, LLC

By: \_\_\_\_\_

Printed Name: Timothy J. Whelan

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Attest: \_\_\_\_\_

Printed Name: Kelly S. Koos\_\_\_\_\_

Title: City Clerk

Approved as to form and correctness:

\_\_\_\_\_  
Timothy J. McCausland, City Attorney

## Terms & Conditions

### **Governing Documents**

These Terms & Conditions and, the Coal Sales Agreement, as agreed to by the parties hereto, shall constitute the entire Agreement (hereinafter the "Agreement") between City of Lakeland on behalf of its municipal utility Lakeland Electric ("Buyer") and Hamilton County Coal, LLC (Seller) as to coal produced and sold under the Coal Sales Agreement. No additional or different terms stated by Seller in an acceptance or written confirmation of the Agreement shall be effective unless Buyer specifically accepts such terms in writing. No modification of the agreement shall be effective unless the same shall be reduced to writing and signed by the duly authorized agents of the Parties.

### **Warranty**

Seller represents and warrants that it, or its producer identified in the Producer-Broker Statement, owns or controls the Coal Property described in the Purchase Order and that all coal shipped pursuant to the Agreement is shipped free and clear of all liens, encumbrances, and claims of all third parties; that such Coal Property contains economically recoverable coal of a quality and in quantities sufficient to satisfy the requirements of this Agreement; that coal will not be used or sold from such Coal Property so as to result in an inability of Seller to deliver to Buyer the coal in the quantities, quality and at the times provided in the Agreement; and that the coal shipped under the Agreement will be mined and produced from said Coal Property and that no substitute coal shall be shipped by Seller to Buyer under the Agreement without prior written approval of Buyer.

### **Inspection**

Buyer or its designated agent shall upon reasonable notice have the right at all reasonable times to enter upon the Coal Property and/or other appropriate location and to inspect and examine the method, equipment, and manner of mining, producing, storing, washing, blending, crushing, loading, unloading, transporting, sampling, analyzing, weighing and other handling of coal to be sold and delivered under the Agreement, and to take samples of coal for Buyer's analyses. No inspection by Buyer shall be deemed a waiver of any Buyer's rights or relieve Seller of any obligation or agreement assumed by the Agreement. During such inspection Buyer shall adhere to all safety policies and regulations required by Seller and by applicable law.

### **Quantity**

Seller shall sell and deliver to Buyer and Buyer shall purchase and receive the quantity of coal within the period of time specified in the Purchase Order. Seller shall not deliver more than the quantity of coal stated in the Purchase Order without prior approval of Buyer. All coal sold under the Agreement shall be delivered in reasonably equal shipments and at regular intervals over the term of the Purchase Order or in such other manner as may be specifically stated in the Purchase Order or as mutually agreed upon by both Parties. Unless Seller is excused from delivery by force majeure and in addition to any other remedies at law or equity, Buyer shall have the right immediately to terminate the Agreement should Seller at any time fail to ship at least seventy-five percent (75%) of the quantity of coal agreed to be shipped in any thirty (30) day period, unless such failure is a result of Buyer's failure to provide railcars in a timely manner.

### **Coal Size and Quality**

Unless otherwise specified in the Purchase Order, coal delivered pursuant to the Agreement shall not exceed a maximum lump size of 4.5" in any dimension and shall contain no more than fifty percent (50%) of particles less than 1/4" in size, and shall be the whole mine product (or whole washed product) with no intermediate size fractions added or removed. All shipments shall be substantially free from excess moisture, bone, fireclay, rock, loose clay, shale, and shall not contain pond fines, washer refuse, roots, wood, debris, iron or any other metals, plastic, rubber or other extraneous material. Buyer may reject any shipment, in Buyer's reasonable judgment, not complying with the aforesaid requirement.

### **Delivery by Rail**

Where delivery of coal is by rail, Seller will provide railcar-loading facilities sufficient to load the coal properly and within the appropriate loading time. In addition to any other damages, Seller shall be liable for and shall pay Buyer for any transportation costs or detention charges incurred by Buyer which may be occasioned by the failure of Seller to furnish and load coal at the loading point within the proper times and in the proper quantities as specified in the applicable tariff or agreement. Seller shall pay all costs of transportation from the mine to the rail-loading facility including rail-loading charges. Buyer shall pay costs of rail freight from loading point to unloading point.

### **Shipping Notice**

A "short prox" analysis and a bill of lading or waybill form must be sent by email or facsimile to arrive at the destination plant before coal is received. In the event that telecopy equipment or email is not available to the Seller, a telephone call must be placed to the aforementioned personnel for the purpose of reporting shipments no later than the end of the first working day after shipment takes place. The shipping document for rail coal must give the Purchase Order number, the name of Seller, train number, railcar numbers of each car shipped to Buyer, and the date of shipment. In addition, a copy of this document must be sent to the following personnel:

Tory Bombard  
Lakeland Electric  
501 East Lemon Street  
Lakeland, FL 33801-5079  
Fax No. 863.834.8207  
Email [Tory.Bombard@lakelandelectric.com](mailto:Tory.Bombard@lakelandelectric.com)  
Email Invoices: [Fuelinvoices@lakelandelectric.com](mailto:Fuelinvoices@lakelandelectric.com)

### **Weighing - Rail Coal**

The weight of the coal sold and delivered hereunder shall be determined from Seller's certified scales batch weigh system or scales owned or approved by the participating Railroad. Any scale used to measure the coal shall be maintained and operated in accordance with procedures acceptable to Buyer and shall be certified at intervals of no less than six (6) months to be in conformity with the most current Scale Handbook published by the Association of American Railroads.

### **Sampling & Analysis**

The point of sampling and the party responsible for analyzing coal under the Agreement shall be as approved by the Buyer prior to the loading of the first shipment. The sampling and analyzing of the coal shall be in accordance with the applicable standards of the American Society of Testing Materials (ASTM) or its successor organization. The Seller shall maintain its mechanical sampling system in good working condition. The system shall be capable of "cutting the full coal stream" in order to produce a representative sample of each shipment of coal. The final sample of 8-mesh coal from the sampling system shall be reduced to three (3) 2000-gram laboratory samples in accordance with ASTM D-2013, using enclosed riffles to minimize moisture loss. One laboratory sample shall be sent to Buyer's designated laboratory, which Buyer shall designate in writing from time to time, one laboratory sample will be retained by Seller for forty-five (45) days from date of shipment as a referee sample and one laboratory sample will be analyzed by Seller with results sent to Buyer.

Buyer or its designated representative, at its sole risk and expense, may observe and inspect the sampling and analysis and the actual analytical procedures and equipment to be used by Seller.

Seller, from its laboratory sample, shall determine the moisture, ash, BTU and sulfur values for each shipment of coal sold hereunder. The results of such analyses shall be used for adjustment of the Base Price for coal quality as provided herein. Seller shall provide Buyer notification of its sample analysis as within forty-eight (48) hours of completion of loading by telephone, facsimile or email transmission with written verification of follow immediately hereafter. Seller shall use best efforts to provide notification of analysis prior to the unloading of the coal shipment at Buyer's facility. Seller shall send Buyer a monthly Delivery of Coal analysis composite report within fourteen (14) working days following the end of each month. The composite report must include Proximate Analysis, Ultimate Analysis, Mineral Analysis and Trace elements as listed under Shipment Rejection limits.

In the event a dispute arises over the results of Seller's analysis, a third party analysis of the referee laboratory sample shall be made in accordance with ASTM standards by an independent qualified commercial testing laboratory mutually agreed upon, in writing, by the Seller and Buyer. The analysis results produced from the referee laboratory sample shall be used for payment purposes for the coal if the results of such referee analysis fall outside the ASTM tolerances for reproducibility of Seller's moisture, ash, BTU, chlorine, mercury and sulfur short proximate results and the cost of the referee analysis shall be borne by Seller. If the analysis results produced from the referee analysis fall within the ASTM tolerances for reproducibility of results when compared against Seller's moisture, ash, BTU, chlorine, mercury and sulfur short proximate results, the Seller's moisture, ash, BTU, chlorine, mercury and sulfur short proximate results shall govern for payment purposes for the coal and the cost of the referee analysis shall be borne by Buyer. Buyer or its representatives are authorized to add a seal to the referee sample.

### **Calorific Adjustment and Ash Adjustment**

As soon as practicable after the end of each month, the weighted average calorific value, in BTU per pound, and the weighted average ash content, in percent, shall be determined from the analyses of the coal shipped that month. The premiums and penalties resulting from the calorific and ash adjustments described in the following paragraphs will be made by on each invoice.

#### **Calorific Adjustment**

The price per ton of coal shall be increased or decreased to compensate for variations in the calorific value of the coal shipped. The BTU content shall be determined on actual "as received" basis. If the actual average heating value of the coal shipped by Seller on each shipment is one hundred (100) BTU per pound, or more, in excess or fifty (50) BTU per pound, or more, below the Guaranteed Specification, the base price per ton will be adjusted in accordance with the following formula:

**Actual Btu/lb./Guaranteed 11,650 X Base Price= Net Price Per Ton**

Base Price \$32 and 11,650 Guaranteed as stated in this Agreement

**Example**

11,750 Btu/lb/11,650 Btu/lb=1.008584 x \$32 ton=\$32.27

11,600 Btu/lb/11,650 Btu/lb=.995708 x \$32 ton=\$31.86

**Ash Adjustment**

The price per ton of coal shall be decreased if the monthly weighted average percent of ash is greater than the ash guarantee as set forth in the Seller's coal specifications. The price per ton reduction shall be \$0.30 per ton for each percent, fractions pro rata, by which the weighted average of the "as received" ash content for the coal delivered that month exceeds the guaranteed level. No credits will be given if the "as received" ash content is less than the guaranteed level. The ash penalty adjustment shall be made in accordance with the following formula:

**Actual Ash % – Guaranteed Ash 8.60 % = Excess Ash % x 100 x \$.30 per ton = Ash penalty per ton**

**Example**

9.60% Ash – 8.60% = 1.00% x 100 = 1.00 x \$.30 per ton = \$.30 Ash penalty per ton

**Price, Billing, Payment**

Invoices shall be in a form satisfactory to the Buyer and be of sufficient detail to provide the Buyer all reasonable information necessary to confirm their accuracy. Payment of each invoice shall be made by wire or check payable to the Seller within forty-five (45) days after receipt of invoice in accordance with Florida Statute §218.74 et, seq., the Local Government Prompt Payment Act, unless otherwise provided for in this Agreement. All such invoices shall be issued at the then current Base Price with any quality adjustments calculated and included on the invoice. Buyer's obligations to pay for coal delivered to Buyer shall survive the expiration or termination of this Agreement. Invoices can be mailed to Buyer address or transmitted electronically to Buyer at the e-mail address fuelinvoices@lakelandelectric.com.

**Failure to Remit Timely Payment**

The payments specified herein shall be paid in United States funds. Overdue payments shall accrue interest from the due date at the rate of one percent (1%) in accordance with Florida Statute §218.74 et. seq, the Local Government Prompt Payment Act, but in no event shall exceed the maximum lawful rate. Any dispute as to the amount owed to Seller for the delivery of coal hereunder, including without limitation disputes regarding the quality and tonnage of coal loaded for Buyer and/or the parties' submission of samples for a Referee Analysis, shall fall under Florida Statute §218.76, improper payment request or invoice; resolution of disputes.

**Other Rights of Seller**

Noncompliance with terms of payment shall give the Seller the right to suspend further shipments until payment is made for all previous shipments. Further, if in the judgment of the Seller the financial responsibility of the Buyer shall at any time become impaired from any bankruptcy or insolvency laws, including any assignment of benefit of creditors, the Seller shall have the right to suspend further shipments until adequate security for payment is furnished or, if such security is not promptly furnished and thereafter maintained, to cancel this Agreement with respect to shipments not made. An alternative for security for payment will be prepayment, two (2) days prior to loading. The foregoing remedies of Seller are not to be considered exclusive but shall be cumulative and be in addition to any other remedies in favor of Seller as provided herein or law.

**Rejection of Coal**

Buyer shall have the right to refuse and reject any coal shipment, (a) which contains excessive amounts of extraneous material, (b) that the coal was or is being mined or produced from a seam or source other than the coal property described in the Coal Sales Proposal and/or Purchase Order without securing prior written approval of Buyer, (c) which is delivered in equipment other than as specified herein, (d) does not conform to the rejection specifications as agreed upon by the Parties or (e) shipment fails to comply with the coal size rejection specifications.

If a shipment or a portion of a shipment is rejected, Buyer, in its sole discretion shall be entitled to receive a credit or refund from Seller for freight costs and any other costs borne by Buyer for such rejected shipment. If, however, for any reason Buyer unloads any such coal shipment, Seller agrees to pay for all extra costs of the unloading and handling.

If a Shipment triggered by rejection limits is rightfully rejected by Buyer, disposal of the Shipment shall be for Seller's account. Title to all coal rejected by Buyer, if already passed, shall revert to the Seller. If a shipment or a portion of a shipment is rejected, Buyer, in its sole discretion shall be entitled to receive a credit or refund from Seller for freight costs and any other costs borne by Buyer for such rejected shipment. If, however, for any reason Buyer unloads any such coal shipment, Seller agrees to pay for all extra costs of

the unloading and handling.

In addition to and not a limitation upon its termination rights, Buyer shall have the right to reject any Shipment should the quality of coal of that Shipment by composite analysis which provides more details than a short proximate analysis shows failure to comply with the rejection limits for other specifications as set forth in the Coal Quality schedule.

Buyer shall give prompt written notice to Seller of any rejection of Shipments hereunder. In the event that Buyer rejects any coal, Seller shall immediately remove said coal from Buyer's facilities or from transportation equipment at Seller's expense and shall reimburse Buyer all its costs and expenses, including transportation cost or Buyer's imputed equipment lease cost, incurred in connection with the coal, all of which costs Buyer may deduct from any sum owed by Buyer to Seller.

If coal delivered hereunder does not satisfy the Guaranteed Shipment Average specifications for two consecutive Shipments such as it exceeds the maximum or minimum Guaranteed Shipment Average specifications in the entire coal spec with great weight focused on Heat Content (Btu/lb.), Ash, Moisture, Chlorine, Mercury and Sulfur, by more than the repeatability limit for the same specifications, then Buyer shall have the right to suspend further deliveries by notice to Seller. If Seller is unable to provide adequate assurances to Buyer within thirty (30) days following Purchaser's notice that all future deliveries of coal will satisfy the Shipment specification, then Buyer may rescind the suspension or Buyer may terminate this Agreement automatically without further liability or obligation of either Party.

### **Suspension/Cancellation**

In addition to the Rejection rights set forth above, Buyer shall have the right to suspend or cancel coal shipments immediately by giving verbal or written notice, in the event (a) that the coal shipped fails to meet the size rejection specifications or any one of the other suspension/cancellation quality specifications, (b) that the coal was or is being mined or produced from a seam or source other than the coal property described in this Agreement without securing prior written approval from Buyer (c) that any coal shipment contains excessive amounts of extraneous material. After receipt of such notice, Seller shall immediately take action to correct the deficiencies stated. After Seller has determined that coal is in compliance with the Coal Sales Agreement, Seller will so notify Buyer and an inspection and/or test shipment of coal may be scheduled or other determination of compliance provided, at Buyer's option. If compliance is not demonstrated, Buyer will have the option to allow further determination of compliance or to cancel the Agreement.

Buyer may terminate this Agreement without further liability or obligation of either party, except for payment of the railcar shipments received, in the event (a) the state or federal law/regulation relating to carbon emissions has a materially adverse effect on Buyer's ability to operate its coal unit in order to ensure regulatory compliance, Buyer shall provide no less than sixty (60) days written notice to Seller of the occurrence of such event, (b) Buyer determines the coal purchased at the beginning of the contract does not have the ability to burn within Buyer's coal unit to operate within environmental compliance standards, (c) Buyer is without a new CSX transportation contract which expires 12/31/2016.

### **Force Majeure**

Force majeure as used herein shall mean a cause reasonably beyond the control of the Seller or Buyer, as the case may be, which wholly or in substantial part prevents the mining, loading, or delivery of coal at or from the mine, or the transporting to or the unloading, storing, or burning of coal by Buyer at its destination. Examples (without limitations) of force majeure, but only if reasonably beyond the control of the Seller or Buyer, as the case may be, are the following: acts of God, acts of the public enemy, insurrection, riots, strikes, labor disputes, work stoppages, fires, explosions, floods, equipment breakdown, mine roof falls, build-up of methane gas requiring evacuation from Seller's Mine, electric power failures, maintenance and emergency outages (both scheduled and unscheduled) of equipment or facilities to avoid breakdowns thereof and damage thereto, interruptions to or contingencies of transportation, embargoes, and orders or acts of any government (including, without limitation, a city or county ordinance, an act of a state legislature, an act of the United States Congress and final judicial decision, order or decree based upon orders or acts of governmental authorities) or military, provided; however, force majeure, for the purposes of this Agreement, shall not include, without limitation, the development or existence of economic conditions which may adversely affect the anticipated profitability of the mining activities of Seller hereunder, acts or omissions constituting negligence or mismanagement on the part of the party claiming force majeure.

If because of force majeure either Buyer or Seller is unable to carry out its obligations under the Agreement, and if such party promptly gives the other Party written notice of the conditions giving rise to such force majeure, the obligations and liabilities of the Party giving such notice and the corresponding obligations of the other Party shall be suspended to the extent made necessary by and during the continuance of such force majeure: provided, however, that the Party suffering the disabling effects of such force majeure shall make reasonable efforts to eliminate, as soon as and to the extent possible, the events giving rise to the force majeure, except that either Party may settle any of its own labor disputes, strikes or terminate any of its own lockouts in its sole discretion. Deliveries so suspended for force majeure may, at the sole discretion of the party not claiming force majeure be canceled without liability to either



Party or may be made up, but the Agreement shall otherwise remain in full force and effect; provided, however, that if a condition of force majeure occurs which causes a suspension of obligations under the Agreement for a continuous period equal to thirty percent (30%) or more of the term of the Agreement, Non-Claiming Party may terminate the Agreement by giving written notice of termination to the Claiming Party.

After an event or condition of force majeure has ended, Buyer shall determine whether to make up any Tonnage Shortfall that is caused by Seller's Force Majeure; and Seller shall determine whether to make up any Tonnage Shortfall that is caused by Buyer's Force Majeure. If a Party elects to make up a Tonnage Shortfall 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 or condition; 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) or condition(s) related to the Tonnage Shortfall.

#### **Non Performance Penalty**

In the event of a breach for which Seller has not delivered the amount of coal required under this Coal Sales Agreement, Seller shall be liable to Buyer for twenty percent (20%) of the f.o.b. prices times the number of minimum tons Seller fails to deliver. This remedy shall be in addition to other remedies for breach available to Buyer.

In the event of a breach for which Buyer has not purchased the amount of coal required under this Coal Sales Agreement, Buyer shall be liable to Seller for twenty percent (20%) of the f.o.b. prices times the number of minimum tons Buyer fails to purchase. This remedy shall be in addition to other remedies for breach available to Seller.

#### **Damages**

Unless excused by Force Majeure or Buyer's failure to perform, if Seller fails to deliver all, or a portion, of the specified quantity of coal to be delivered hereunder in accordance with the Delivery Schedule and such shortfall is not made up within thirty (30) days, Seller shall pay Buyer for each ton of such deficiency (the "Deficiency") an amount equal to the positive difference, if any, obtained by subtracting the specified Base Price for the Deficiency from the Replacement Price, as well as Costs reasonably incurred by Buyer. "Replacement Price" means the price at which Buyer, acting in a commercially reasonable manner, purchases substitute coal for the Deficiency (plus additional transportation or other reasonable charges, if any, incurred by Buyer as a result of taking delivery of substitute coal at a location other than the specified Delivery Point) or, absent such a purchase, the market price for such quantity of coal (F.O.B., Delivery Point) as determined by Buyer in a commercially reasonable manner; provided, however, in no event shall the Replacement Price include any penalties or similar charges. Such payment shall be paid within ten (10) days after an invoice is received by Seller from Buyer. It is expressly agreed that Buyer shall not be required to enter into a replacement transaction in order to determine the Replacement Price.

Unless excused by an event of Force Majeure or Seller's failure to perform, if Buyer fails to accept all, or a portion, of the specified quantity of coal to be delivered hereunder in accordance with the Delivery Schedule and such shortfall is not made up within thirty (30) days, Buyer shall pay Seller for each ton of the Deficiency an amount equal to the positive difference, if any, obtained by subtracting the Sales Price from the Base Price, as well as Costs reasonably incurred by Seller. "Sales Price" means the price at which Seller, acting in a commercially reasonable manner, resells (if at all) the Deficiency (including additional transportation or other reasonable charges, if any, incurred by Seller as a result of delivering coal at a location other than the specified Delivery Point) or, absent such a sale, the market price for such quantity of coal (F.O.B., Delivery Point), as determined by Seller in a commercially reasonable manner; provided, however, in no event shall the Sales Price include any penalties or similar charges. Such payment shall be paid within ten (10) days after an invoice is received by Buyer from Seller. It is expressly agreed that Seller shall not be required to enter into a replacement transaction in order to determine the Sales Price.

Each Party hereby stipulates and agrees that the payment obligations set forth are reasonable due to the complexities of anticipated damages and the difficulty in determining the estimation or calculation of actual damages; therefore each party hereby waives the right to contest such payment for said damages as unenforceable as a matter of law. The remedy set forth shall be the sole and exclusive remedy of the aggrieved party for the failure of the other party to deliver or receive, as the case may be, the quantity of coal specified herein, and all other damages and remedies are hereby waived as to such failure(s).

Both Parties shall be subject to commercially reasonable good faith obligations to mitigate any damages or any other provision of this Agreement.

#### **Governing Law, Remedies Cumulative, Waiver,**

The remedies stated herein are cumulative and in addition to those provided by law or equity. Waiver of any one or more defaults shall not be deemed a waiver of any prior or subsequent default. All questions relating to the execution, construction, performance, or breach of this Agreement shall be resolved under the laws of the State of Florida. The parties agree to the jurisdiction and venue of the Courts of Polk County, Florida or the United States District Court in and for the Middle District of Florida, Tampa Division in

connection with any action or proceeding arising out of or relating to this Agreement.

### **Right To Resell**

Buyer has the unqualified right to re-sell the coal referenced herein.

### **Indemnity**

Seller agrees to indemnify and save harmless Buyer, its officials, officers, directors, employees, and representatives from any responsibility and liability for any and all claims, demands, losses (including reasonable attorney's fees at the trial and appellate level) arising out of or resulting from the acts of commission, omission, negligence or fault of the Seller. In no event shall Seller have any obligation to indemnify and save harmless the Buyer, its officials, officers, directors, employees, and representatives from any responsibility and liability for any and all claims, demands, losses (including reasonable attorney's fees) arising out of or resulting from any acts of commission, omission, negligence or fault of Buyer.

### **Freeze Conditioning**

If requested by the Buyer, the Seller shall freeze condition the coal delivered under this Agreement with a product mutually acceptable to both Parties. Prior to freeze conditioning the coal, the Seller shall consult with the Buyer regarding the desired freeze conditioning production. Seller shall advise Buyer of the cost of the freeze-proofing agent and need written approval from Buyer of the cost before purchasing it and invoicing the Buyer. The cost of the freeze conditioning agent is not included in and shall be in addition to the Base Price.

### **Assignment**

Neither party shall assign this Agreement without the prior written consent of the other party.

### **Confidentiality**

Each party acknowledges that this Agreement contains confidential information which would put them at a competitive disadvantage if disclosed to the public. Therefore, the terms of this Agreement shall be kept confidential by the parties, except (x) a party (the "Disclosing Party") may disclose the terms of this Agreement to its directors, officers, employees, agents and advisors (each, a "Representative") so long as the Disclosing Party advises such Representative of the confidential nature of such information and the Disclosing Party will be responsible for, and, to the extent permitted by law, will indemnify the other party against, any losses arising out of or related to, its Representative's breach of this Section and (y) to the extent disclosure may be required by law, regulation, or judicial or administrative order including Florida Statute Chapter 119, the Florida Public Records Act. With respect to such disclosure required by law, regulation or judicial or administrative order, the Parties each agree (a) to appropriately limit their respective disclosure to the minimum necessary to comply with the applicable law, regulation or judicial or administrative order, (b) to provide the other party timely notice of such disclosure requirement so that such party can seek protection of such confidential information by contesting such disclosure requirement, and (c) to undertake such steps as may be available to protect the confidentiality of such confidential information required to be disclosed.

### **Public Records**

Seller shall comply with Florida Statute Chapter 119, the Florida Public Records Act as it relates to records kept and maintained by Seller in performance of services pursuant to this Agreement. In accordance with Florida Statute §119.0701., Seller shall be required to provide public access to such records at a cost that does not exceed the statutory requirements or as otherwise provided by law. In the event any such records are exempt or confidential from public records disclosure Seller shall ensure that those records are not disclosed except as authorized by law. Seller shall meet all requirements for retaining public records and shall transfer at no cost to the Buyer, all public records in possession of the Seller upon termination of the Agreement and destroy duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. All records stored electronically must be provided to the Buyer in a format that is compatible with the information technology system of the Buyer.