

KYPSC CASE NO. 2016-00005
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**Duke Energy Kentucky
Case No. 2016-00005
Staff Third Set Data Requests
Date Received: March 18, 2016**

STAFF-DR-03-001

REQUEST:

In its monthly fuel adjustment clause ("FAC") backup files, Duke Kentucky provides an analysis of coal purchases that includes a state and coal district number for the source of the coal.

- a. Confirm that Duke Kentucky is using District No. 8 (for eastern Kentucky) and District No. 9 (for western Kentucky) when identifying Kentucky coal districts in its FAC backup filings.
- b. State whether the state and coal district numbers are those utilized by the Mine Safety and Health Administration. If not, state the entity that designates the coal district numbers utilized by Duke Kentucky in its FAC backup filings.
- c. For the entity identified in part b. above, provide a map showing the current coal districts.
- d. Provide the date of the last change made by the entity identified in part b. above to the coal district numbering. If Duke Kentucky did not begin using the new coal district numbering when the change was made, explain why.
- e. Explain the input and review process for the state and coal district numbers provided in the monthly analysis of coal purchase schedule and how Duke Kentucky ensures that the information is accurate.

RESPONSE:

- a. Duke Energy Kentucky confirms that it is using District 8 for various counties in eastern Kentucky and District 9 for various counties in western Kentucky when identifying Kentucky coal districts in its FAC backup filings.
- b. The state numbers are those utilized by the Mine Safety and Health Administration. However, the coal district numbers are not those utilized by the Mine Safety and Health Administration. The coal district numbers are those required by FERC for Form 423 reporting (with district numbers ranging from 1 to 55).
- c. Duke Energy Kentucky is not aware of a map. Please see STAFF-DR-03-001 Attachment which includes a table that describes each district
- d. There has not been a change to the coal district numbers required for FERC Form 423 reporting.
- e. The input and review process for the state numbers involves determining the mine name for where the coal is mined and then locating that mine name on the Mine Safety and Health Administration's "Mine Data Retrieval System" website (<http://arlweb.msha.gov/drs/drshome.htm>) to look-up its corresponding Mine ID which is a seven digit code that includes the state code. The input and review process for the coal district numbers involves determining the mine name and/or County for where the coal is mined and then locating that mine name and/or County on Staff-DR-03-001 Attachment and entering the corresponding district number in the Company's fuel management system (Comtrac).

PERSON RESPONSIBLE: Brett Phipps

**FERC Form No. 423
 Coal Producing Districts**

District	States	Counties/Mines
District 1	<p>Maryland</p> <p>Pennsylvania</p> <p>West Virginia</p>	<p>All mines in the State.</p> <p>All mines in the following counties: Bedford, Blair, Bradford, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Elk, Forest, Fulton, Huntingdon, Jefferson, Lycoming, McKean, Mifflin, Potter, Somerset, and Tioga. Selected mines in the following counties: Armstrong County (part), all mines east of the Allegheny River, and those mines served by the Pittsburgh and Shawmut Railroad located on the west bank of the river; Fayette County (part), all mines located on and east of the line of Indian Creek Valley branch of CSX Transportation, Inc. (formally the Baltimore and Ohio Railroad); Indiana County (part), all mines not served by the Saltsburg branch of the Consolidated Rail Corporation; and Westmoreland County (part), all mines served by the Consolidated Rail Corporation from Torrance, east.</p> <p>All mines in the following counties: Grant, Mineral, and Tucker.</p>
District 2	Pennsylvania	<p>All mines in the following counties: Allegheny, Beaver, Butler, Greene, Lawrence, Mercer, Venango, and Washington. Selected mines in the following counties: Armstrong County (part), all mines west of the Allegheny River except those mines served by the Pittsburgh and Shawmut Railroad; Fayette County (part), all mines except those on and east of the line of Indian Creek Valley branch of CSX Transportation, Inc. (formally the Baltimore and Ohio Railroad); Indiana County (part), all mines served by the Saltsburg branch of the Consolidated Rail Corporation; and Westmoreland County (part), all mines except those served by the Consolidated Rail Corporation from Torrance, east.</p>
District 3	West Virginia	<p>All mines in the following counties: Barbour, Braxton, Calhoun, Doddridge, Gilmer, Harrison, Jackson, Lewis, Marion, Monongalia, Pleasants, Preston, Randolph, Ritchie, Roane, Taylor, Tyler, Upshur, Webster, Wetzel, Wirt, and Wood. Selected mines in Nicholas County (part), all mines served by or north of CSX Transportation, Inc. (formally the Baltimore and Ohio Railroad).</p>
District 4	Ohio	All mines in the State.

District	States	Counties/Mines
District 8	Kentucky	All mines in the following counties in eastern Kentucky: Bell, Boyd, Breathitt, Carter, Clay, Clinton, Elliott, Estill, Floyd, Greenup, Harlan, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, McCreary, Magoffin, Martin, Menifee, Morgan, Owsley, Perry, Pike, Pulaski, Rockcastle, Wayne, Whitley, and Wolfe.
	North Carolina	All mines in the State.
	Tennessee	All mines in the following counties: Anderson, Campbell, Claiborne, Cumberland, Fentress, Morgan, Overton, Putnam, Roane, and Scott.
	Virginia	All mines in the following counties: Dickenson, Lee, Russell, Scott, and Wise. Selected mines in the following counties: Buchanan County (part), all mines in the county, except in that portion on the headwaters of Dismal Creek, east of Lynn Camp Creek (a tributary of Dismal Creek) and in that portion served by the Richlands-Jewell Ridge branch of the Norfolk & Western Railroad (a subsidiary of the Norfolk Southern Corp.); and Tazewell County (part), all mines in the county except in those portions served by the Dry Fork branch of the Norfolk & Western Railroad (a subsidiary of the Norfolk Southern Corp.) and branch from Bluestone Junction to Boissevain of Norfolk & Western Railroad (a subsidiary of the Norfolk Southern Corp.) and Richlands-Jewell Ridge branch of the Norfolk & Western Railroad (a subsidiary of the Norfolk Southern Corp.).

District	States	Counties/Mines
District 8	West Virginia	All mines in the following counties: Boone, Cabell, Clay, Kanawha, Lincoln, Logan, Mason, Mingo, Putnam, and Wayne. Selected mines in the following counties: Fayette County (part), all mines west of the Gauley River except mines served by the Gauley River branch of CSX Transportation, Inc. (formally the Chesapeake & Ohio Railroad); McDowell County (part), all mines west of and not served by the Dry Fork branch of the Norfolk & Western Railroad (a subsidiary of the Norfolk Southern Corp.); Nicholas County (part), all mines in that part of the county south of and not served by CSX Transportation, Inc. (formally the Baltimore & Ohio Railroad); Raleigh County (part), all mines on the Coal River branch of CSX Transportation, Inc. (formally the Chesapeake & Ohio Railroad) and north thereof; and Wyoming County (part), all mines in that portion served by the Guyandot branch of the Norfolk & Western Railroad (a subsidiary of the Norfolk Southern Corp.) lying west of the mouth of Skin Fork of Guyandot River.
District 9	Kentucky	All mines in the following counties in western Kentucky: Butler, Caldwell, Christian, Crittenden, Daviess, Edmonson, Grayson, Hancock, Henderson, Hopkins, Logan, McLean, Muhlenberg, Ohio, Simpson, Todd, Union, Warren, and Webster.
District 10	Illinois	All mines in the State.
District 11	Indiana	All mines in the State.
District 12	Iowa	All mines in the State.
District 13	Alabama	All mines in the State.
	Georgia	All mines in the State.
	Tennessee	All mines in the following counties: Bledsoe, Grundy, Hamilton, Marion, McMinn, Rhea, Sequatchie, Van Buren, Warren, and White.
District 14	Arkansas	All mines in the State.
	Oklahoma	All mines in the following counties: Haskell, Le Flore, and Sequoyah.

District	States	Counties/Mines
District 15	Kansas	All mines in the State.
	Louisiana	All mines in the State.
	Missouri	All mines in the State.
	Oklahoma	All mines in the following counties: Coal, Craig, Latimer, McIntosh, Muskogee, Nowata, Okmulgee, Pittsburg, Rogers, Tulsa, and Wagoner.
	Texas	All mines in the State.
District 16	Colorado	All mines in the following counties: Adams, Arapahoe, Boulder, Douglas, Elbert, El Paso, Jackson, Jefferson, Larimer, and Weld.
District 17	Colorado	All mines except those included in District 16.
	New Mexico	All mines except those included in District 18.
District 18	Arizona	All mines in the State.
	California	All mines in the State.
	New Mexico	All mines in the following counties: Grant, Lincoln, McKinley, Rio Arriba, Sandoval, San Juan, San Miguel, Santa Fe, and Socorro.
District 19	Idaho	All mines in the State.
	Wyoming	All mines in the State.
District 20	Utah	All mines in the State.
District 21	North Dakota	All mines in the State.
	South Dakota	All mines in the State.

District	States	Counties/Mines
District 22	Montana	All mines in the State.
District 23	Alaska	All mines in the State.
	Oregon	All mines in the State.
	Washington	All mines in the State.
District 24	Pennsylvania	All mines in the following counties: Berks, Carbon, Columbia, Dauphin, Lackawanna, Lebanon, Luzerne, Northumberland, Schuylkill, Sullivan, and Susquehanna. All anthracite mines in Bradford County.
District 25	Imported Coal	Poland
District 30	Imported Coal	South Africa
District 35	Imported Coal	Australia
District 40	Imported Coal	Canada
District 45	Imported Coal	Columbia
District 50	Imported Coal	Venezuela
District 55	Imported Coal	Indonesia

**Duke Energy Kentucky
Case No. 2016-00005
Staff Third Set Data Requests
Date Received: March 18, 2016**

**PUBLIC STAFF-DR-03-002
As to Attachment Only**

REQUEST:

Refer to Duke Kentucky's response to the Commission's February 5, 2016 Request for Information, Item 25. The question should have asked whether all fuel contracts related to commodity and/or transportation had been filed with the Commission instead of specifying long-term contracts. State whether all contracts have been filed.

RESPONSE:

CONFIDENTIAL PROPRIETARY TRADE SECRET (AS TO ATTACHMENT ONLY)

Duke Energy Kentucky has not filed its spot purchase contracts previously. The Company understood the requirement to file fuel contracts as applying to long term (one year or longer) contracts. Transportation contracts were last filed with the Commission on August 18, 2015. There was an amendment to the transportation contract signed in October 2015. Please see Confidential Attachment to Staff DR-03-002a, being filed with the Commission under a Petition for Confidential Treatment, for the transportation contract. Additionally, Duke Energy Kentucky has found coal contracts that it does not have a record of previously submitting. Please see Attachment to Staff DR-03-002b for the coal contracts. If the Commission wishes that the Company file all contracts, including any spot purchases, then the Company will do so going forward.

PERSON RESPONSIBLE: Brett Phipps

CONFIDENTIAL PROPRIETARY TRADE SECRET

SIXTH AMENDMENT To The Barge Transportation Agreement

This Sixth Amendment (this "Sixth Amendment") dated as of September __, 2015 to that certain Barge Transportation Agreement dated as of December 15, 2011 (the "Original Agreement") by and between Duke Energy Business Services, LLC as agent for and on behalf of Duke Energy Kentucky, LLC., a Kentucky limited liability company ("DEK"), Duke Energy Indiana, Inc., an Indiana corporation ("DEI"), Duke Energy Carolinas, LLC, a North Carolina limited liability company ("DEC"), Duke Energy Progress, LLC, a North Carolina limited liability company ("DEP") and Duke Energy Florida, LLC, a Florida limited liability company ("DEF"), all having offices located at 526 South Church Street, Charlotte, North Carolina, 28202 (each of DEK, DEI, DEC, DEP and DEF are sometimes hereinafter referred to as "Buyer" and sometimes collectively as "Buyers") and Crouse Corporation, a Kentucky corporation with its principal place of business at 400 Marine Way Paducah, Kentucky 42003 (hereinafter "Carrier"). Buyer and Carrier may be hereinafter referred to individually as a "Party" or collectively referred to as the "Parties".

WHEREAS the Carrier and Buyer, entered into the Original Agreement, with an effective date of January 1, 2013 and amended the Original Agreement by that certain First Amendment dated December 14, 2012, by Second Amendment dated February 26, 2014, by Third Amendment dated April 3, 2014, by Fourth Agreement dated March 30, 2015, and by Fifth Agreement dated May 15, 2015 (the Original Agreement and such amendments are herein sometimes collectively referred to as the "Agreement"); and

WHEREAS, the Parties desire to amend the Agreement by adding a new DEC barge transportation rate all under the terms of this Sixth Amendment.

NOW THEREFORE, in consideration of the promises and mutual covenants exchanged by the Parties and herein contained, the Parties agree to amend the Agreement as follows:

1. **New Base Rate.** The coal barge base rate provided to DEC under this Sixth Amendment (the "Sixth Amendment Rate") shall be a new rate for the origin and destination as set forth below:

Coal Barge Base Rates

	<u>Origins</u>		<u>Destinations</u>	<u>Rate</u>
River	MP From	MP To		
Ohio			(Base Rate - per ton	\$

The Sixth Amendment Rate shall be subject to all adjustments for the Base Rates in the Agreement and shall adjust accordingly during the Term of the Agreement. Except for this new rate for the above origins and destinations, all under Base Rates set forth in this Agreement continue to be effective.

2. Except as modified and amended herein, the Agreement is hereby ratified and shall remain in full force and effect.
3. This Sixth Amendment shall be effective on September 28, 2015.

CONFIDENTIAL PROPRIETARY TRADE SECRET

4. All other terms and conditions of the Agreement shall remain in full force and effect. Unless otherwise defined in the Sixth Amendment, all defined terms used herein shall have the meanings set forth in the Agreement. This Sixth Amendment shall prevail in the event of an inconsistency between the Agreement and this Sixth Amendment

IN WITNESS WHEREOF, the Parties hereto have caused this Sixth Amendment to be executed by their duly authorized representatives on the date first written above.

CROUNSE CORPORATION

DUKE ENERGY BUSINESS SERVICES, LLC
as agent for and on behalf of Duke Energy Kentucky, LLC, Duke Energy Indiana, Inc., Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, and Duke Energy Florida, LLC

By: Rob McClure
Title: Manager - Sales & Customer Service
Date: 9/24/15

By: Luiz V. A. [Signature]
Title: SVP, FSO
Date: 10/7/15

MASTER AGREEMENT FOR THE SALE AND PURCHASE OF COAL

BETWEEN

DUKE ENERGY KENTUCKY, INC.

AND

TUNNEL RIDGE, LLC

DATED AS OF MAY 06, 2011

MASTER AGREEMENT FOR THE SALE AND PURCHASE OF COAL

THIS MASTER AGREEMENT FOR THE SALE AND PURCHASE OF COAL (the "Agreement") is entered into effective as of May 6, 2011 (the "Effective Date") between **Duke Energy Kentucky, Inc.**, a Kentucky corporation, having an address at 526 South Church Street, Charlotte, North Carolina 28202 ("Duke" or "Buyer"), and **Tunnel Ridge, LLC**, having an address at 1717 South Boulder Avenue, Suite 400, Tulsa, Oklahoma 74119 ("Seller"), each a "Party" and collectively the "Parties."

SECTION 1. TRANSACTIONS AND CONFIRMATIONS

- 1.1 The terms of this Agreement shall govern all purchases and sales of Coal between the Parties (hereinafter "Transactions"), entered into on or after the Effective Date of this Agreement unless the Parties expressly indicate otherwise. All amendments, modifications, revisions and changes to this Agreement or any related Transaction must be in writing and signed by both Parties. The Parties expressly agree this Agreement and all Transactions entered into hereunder are separate from and have no effect on prior contractual agreements entered into between the Parties before the Effective Date.
- 1.2 For individual Transactions, the Parties shall enter into a written Confirmation Letter (hereinafter "Confirmation") that sets forth and defines the following: the Quote Date, the Contract Price, Quality Price adjustments, Contract Quantity, Term, Specifications, Source(s), rejection and suspension limits if applicable and any other Transaction-specific provisions mutually agreed upon by the Parties. If an option is included, the Confirmation shall also include the strike price, the option premium, and the exercise date. All Confirmations shall be in writing, signed by both Parties. A sample Confirmation is included as **Exhibit A**. The Parties intend the provisions of each individual Confirmation and the provisions of this Agreement be construed as one single integrated agreement and that without a written Confirmation the Parties would not otherwise enter into a Transaction. Any inconsistency or conflict between provisions of the individual Confirmation and provisions of this Agreement shall be resolved in favor of any provisions of the Confirmation.

SECTION 2. TERM

The term of this Agreement (the "Term") shall commence on May 06, 2011 and shall remain in effect until terminated by either Party; provided however, that such termination shall not affect or excuse the performance of any Party under any provision of this Agreement that by its terms survives any such termination, and this Agreement and relevant Confirmations shall remain in effect with respect to any Transaction(s) entered into on or prior to the date of the termination until each Party has fulfilled all of its obligations with respect to all such Transactions.

SECTION 3. CONTRACT QUANTITY

- 3.1 **Quantity.** Seller shall mine, sell and deliver, and Buyer shall purchase, accept, and pay for, the Contract Quantity of Coal agreed to in a Confirmation for a Transaction.

- 3.2 **Scheduling.** Prior to the Month of delivery, the Parties will work together in good faith to agree upon a reasonable and mutually acceptable delivery schedule (the “**Delivery Schedule**”) for the succeeding Month. The Delivery Schedule shall set forth the quantity, dates of delivery, Delivery Point, destination, route, any special loading requirements, Carrier to be utilized, and other relevant details as applicable as set forth in the Confirmation. Unless otherwise specified in the Confirmation, deliveries will occur in approximately ratable monthly amounts over the Term. Reasonable consideration will be given for expected holidays and vacations for Seller and coal handling outages and lock outages (if applicable) for Buyer.
- 3.3 **Source and Sufficient Supply.** The source of the Coal delivered hereunder (the “**Source**”) shall be set forth in the Confirmation.
- 3.4 **Mining Plans.** At Buyer’s request, Seller shall allow Buyer to review the most recent mining plans for the Source, and such mining plans shall be treated as confidential information subject to Section 18.4 hereof.

SECTION 4. CONTRACT PRICE

- 4.1 The Contract Price shall be set forth in the Confirmation. Seller’s cost of scheduling deliveries of Coal, loading Coal for delivery, providing Seller’s weights and analysis, providing shipping notices or other applicable notices, taxes imposed on Seller, and all other preparations and activities (excluding freeze-proofing set forth in Section 4.4) required to produce and ship Coal are included in the Contract Price.
- 4.2 **Compliance with Laws.** Except as provided in Section 4.3, the Contract Price includes (and is not subject to adjustment for) all costs of compliance by Seller with all applicable Laws as they may be amended from time to time. Seller represents that it is, and agrees that at all times during the term of the Transaction it shall be, in full compliance with all Laws, except for any failure to comply that does not impair the ability of Seller to perform its obligations under any Confirmation or this Agreement.
- 4.3 **Government Imposition.** “**Government Imposition**” means (i) taxes or fees imposed by any federal, state or local government or government agency upon the production, severance, preparation or sale of Coal hereunder, including, but not limited to, royalties and severance taxes on Coal produced or sold hereunder, and ad valorem taxes on Seller’s land, improvements, machinery, equipment and the like and (ii) the enactment or amendment of any Laws; and includes any amendment of any Governmental Imposition or change in interpretation of any Governmental Imposition or the imposition of new requirements other than a change in interpretation or imposition resulting from discretionary action of an MSHA, or other regulatory inspector and affecting only the Source. The term does not include impositions such as federal or state income taxes; employee benefits or payroll taxes such as employer’s Social Security, unemployment or worker’s compensation taxes or payments, or any civil or criminal money fine or penalty imposed as the result of failure to comply with any Laws.

Seller shall be entitled to an adjustment to the Contract Price in the event Seller's direct costs per Ton to mine Coal shipped under this Agreement increase due to a Governmental Imposition after the Quote Date in the Confirmation. Seller shall give prompt notice to Buyer of the amount of any such increased or decreased cost per Ton of Coal sold hereunder incurred by reason of a Governmental Imposition along with detailed documentation supporting such change in cost. For the avoidance of doubt, no claim for an adjustment to the Contract Price shall include any claims for indirect costs, including but not limited to claims for lost profit or lost opportunity costs. Any adjustment to the Contract Price under the provisions of this Section 4.3 shall include adjustments to offset Seller's change in costs for royalty, severance tax, and any other surcharge, if any, measured as a percentage of the Contract Price.

No claim for adjustments to the Contract Price shall be submitted more than one year after the occurrence of the event giving rise to the claim or 90 days after the end of the year in which such event occurred, whichever is later.

If the claim for adjustment or the annual aggregate of claims for adjustment to the Contract Price would increase the overall cost per Ton to Buyer by more than five percent (5%) in any year over the then-existing Contract Price, Buyer shall have the option in its discretion and exercisable within fifteen (15) Days of such notice of claim or aggregation of such claims, to terminate this Agreement; provided that Seller shall have the right to rescind the claim(s) for adjustment to the extent it exceeds five percent (5%) over the then existing Contract Price and avoid such termination.

Seller shall use generally accepted accounting principles to either capitalize or expense the costs, as appropriate, and Buyer shall have the right to audit any proposed Government Imposition submitted by Seller. If Buyer determines in good faith that it does not agree either with the legitimacy of the claim, the amount of the claim or the method Seller has used to capitalize or expense the claim, it shall so notify Seller in writing. Upon such notice, the Parties shall negotiate in good faith in an attempt to resolve the dispute. If the Parties are unable to resolve the dispute within ninety (90) Days from the date of Seller's notice of the claim, either Party may submit the dispute to arbitration pursuant to Section 16. The failure to agree upon a claim for Government Imposition shall in all cases be considered a Dispute under Section 16 hereof. During the pendency of the Dispute, each Party shall continue to perform its obligations under this Agreement.

In the event of a decrease in cost, Seller shall notify Buyer of such decrease, and Buyer shall be entitled to bring a claim for a decrease in the Contract Price. The same process above shall be followed. The Contract Price shall be decreased by an amount equal to the decrease in Seller's cost caused by Government Imposition enacted after the Quote Date in the Confirmation.

Any adjustment to the Contract Price under this Section 4.3 will be effective as of the date the Government Imposition is effective.

- 4.4 **Freeze Proofing.** Buyer shall have the right to require that Seller apply a freeze prevention agent ("FPA") to the Coal being delivered under the Transaction and a side release agent ("SRA") to the railcars supplied by the Buyer wherever applicable to promote its handling in freezing weather. The FPA and the SRA shall be collectively referred to as freeze proofing ("Freeze Proofing"). Buyer shall give Seller notice of the quantity to be applied and of the types of material the Seller is not allowed to use. Buyer shall provide Seller with reasonable advance notice of the dates for starting and ending the Freeze Proofing program. Buyer shall pay Seller the actual cost for the Freeze Proofing, plus ten percent (10%), for Seller's labor and equipment application cost to apply the FPA and SRA, and shall be agreed to by the Parties promptly after Buyer's request. The cost of the Freeze Proofing shall be invoiced separately by Seller with such invoice to be received by Buyer within ten (10) Days following the end of the Month in which Freeze Proofing was applied. Seller shall provide sufficient information to enable Buyer to verify the amounts of Freeze Proofing applied and the total direct costs associated with such amounts. Buyer shall have the right to review and approve the Freeze Proofing invoices prior to payment. Payment for Freeze Proofing shall be made in accordance with Section 9.1.

SECTION 5. DELIVERIES

- 5.1 **Delivery Point.** The Delivery Point shall be set forth in the Confirmation. Coal shall be delivered to Buyer F.O.B. at the Delivery Point, and title and risk of loss of the Coal shall pass to Buyer upon loading of the coal F.O.B. at the Delivery Point. Buyer shall furnish suitable trucks, barges or rail cars, whichever applicable, for loading and delivery of Coal. Such transportation equipment shall be compatible with Seller's Loading Facilities and shall be properly prepared to receive Coal. Coal haulage or transportation equipment provided by either Seller or Buyer, as the case may be, shall be clean and suitable for the transportation of Coal.
- 5.2 **Loading.** All Coal delivered hereunder by barge or vessel shall be loaded and delivered by Seller into barges or vessels at Seller's Loading Facilities, at the loading times established under the Delivery Schedule. Seller will load a minimum of 1,500 tons into each open hopper rack jumbo barge and a minimum of 1,700 tons into each open hopper box jumbo barge. If Seller fails to load a barge to meet these minimums, then Seller will pay to Buyer the difference between the minimum tonnage and the actual tonnage times the barge rate (\$/ton) to Buyer's destination. Seller will ensure that Coal is available and that the Coal is loaded within 72 hours of placement. Seller will pay any demurrage charges resulting from failure to load barges within 72 hours of placement.
- 5.3 **Fleeting and Harbor Services.** Except as otherwise expressly set forth herein, the Contract Price includes the following services and fees: (i) inspecting the barges for the existence of any foreign material, (ii) watchman services, (iii) temporary storage of the Coal by Seller until it is loaded into Buyer's barges, (iv) harbor, fleeting, switching and any other miscellaneous expenses associated with handling barges in its harbor, and (v) all other costs incurred by Seller for compliance with existing laws and regulations,

including taxes, permitting and other government regulations governing the dock or the harbor. To further clarify, Seller shall be responsible for all harbor, fleet and switching services charged by marine services at the dock.

SECTION 6. QUALITY

The Coal delivered to Buyer hereunder will meet the Specifications and:

- (i) shall be free-flowing at temperatures above freezing and crushed to a size of 2" X 0" or smaller size. The Fines content of the Coal shall be as set forth in the Specifications in the Confirmation;
- (ii) shall not have a temperature in excess of 120 Degrees F.;
- (iii) shall be free from impurities, such as clay, non-carbonaceous rock, wood, or metals, that can be kept out or removed with the exercise of reasonable care during mining, processing, preparation or loading;
- (iv) shall be loaded in a manner that will ensure reasonably uniform consistency as to size and quality; and
- (v) shall not contain slurry pond material (washer tailings), gob piles (mine refuse), asphalt, petroleum-coke, synthetic material, synthetic fuel, or blends of such materials.
- (vi) The SO₂ content per MMBtu shall be determined by the following formula:

$$\text{["As Received" Percent Sulfur x 20,000] / "As Received" Btu Per Pound = Pounds SO}_2 \text{ Per MMBtu}$$

SECTION 7. WEIGHT, SAMPLING, ANALYSIS

7.1 **Seller's Short Proximate Analysis.** Within 24 hours from the time of each Shipment of Coal, Seller is required to fax or electronically mail ("email") to both Buyer's Coal Procurement Department and the receiving Station, Seller's Short Proximate Analysis for such Coal. Preparation of the gross sample taken at the Loading Facilities and analysis of that sample for the purposes of this section shall be performed by an independent third party testing laboratory chosen by Seller and approved by Buyer. ASTM Standard Methods and Practices shall be used for the sample preparation and analysis. If Seller fails to provide this data as required and a Shipment arrives at the receiving Station, Buyer shall have the right to hold such Shipment in detention until said data is properly received. Seller shall be responsible for charges associated with such detention assessed to Buyer by Carrier.

7.2 **General Procedure.** For Coal to be delivered by Barge, Coal shall be weighed and sampled by the Seller at the Seller's expense. The Seller shall use its certified truck scale or belt scale ("Seller Scales" or "Scales") to determine the weights and shall use its

ASTM 1-B-1 mechanical sampling systems (" Sampling Systems") to obtain representative samples for all Shipments. Unless otherwise agreed, the weight of Coal delivered by barge shall be determined by draft survey in the absence of certified belt scales. The Seller shall cause the samples to be analyzed by a mutually agreed upon independent commercial testing laboratory at the Seller's expense.

- 7.3 **Weights.** The weights determined by the Seller's certified Scales or by draft survey, as the case may be, shall govern for payment purposes for the Coal.
- 7.4 **Additional Sampling Requirements.** Seller shall subdivide each Sample into three (3) sample splits, following the standards contained in ASTM D7430. One of the sample splits will be sent by Seller to the independent commercial testing laboratory retained by the Seller (Seller's Split Sample"). One of the sample splits will be retained by Seller for at least ninety (90) days to be sent by Seller to Buyer upon Buyer's request ("Buyer's Split Sample"). The final sample split shall be retained by Seller for at least ninety (90) days to be used as a referee sample split ("Referee Split Sample"). If Buyer disagrees with Seller's Short Proximate Analysis for any Shipment of Coal, then Buyer shall have the right to have a referee analysis performed on the Referee Split Sample by a mutually agreed upon independent commercial testing laboratory. The analysis results produced from the Referee Split 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 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 Short Proximate Analysis), the Seller's Short Proximate Results shall govern for payment purposes for the Coal and the cost of the referee analysis shall be borne by Buyer.

If requested by Buyer, Seller shall collect composite samples each week of the Coal loaded for the Buyer. The composite sample shall be analyzed for Chlorine Content and results will be provided to Buyer by the end of business on Friday of the week following the collection of the composite sample (or earlier). Buyer shall have the option of requesting chlorine analysis on an individual barge basis for an additional \$0.03 / ton to be added to the contract price.

- 7.5 **General Scale Standards.** The Seller shall test, calibrate and successfully complete an Official Test (as defined in the National Institute of Standards and Technology Handbook 44) of its Scales no less frequently than annually to maintain accuracy ("Scale Standards"). Seller shall use commercially reasonable efforts to notify the Buyer as soon as it knows the date and time for such official testing and calibration. Buyer shall have the right, but not the duty, to witness such official testing and calibration of Seller's Scales. Buyer shall have the right to have a representative present at its own risk and expense at any and all times to observe weighing of the Coal. If Buyer at any time questions the accuracy of the Scales, such Party may request a prompt official test and adjustment (if needed) of such Scale(s) at Seller's expense by a mutually agreed upon entity.

7.6 **General Sampling System Standards.** Sampling shall be performed by an ASTM 1-B-1 Sampling System in full compliance with methods contained in ASTM D7430 or such other methods as may be mutually agreed upon by the Parties ("Sampling System Standards"). Buyer shall have the right to have a representative present at its own risk and expense at any and all times to observe the Seller's sampling of the Coal and to ensure compliance with current applicable ASTM or other such methods as agreed upon by the Parties. If Buyer at any time questions the accuracy of the Sampling Systems, Buyer may request an inspection and audit of such Sampling System(s) at Seller's expense by a mutually agreed upon entity.

7.7 **General Problem With Scales or Sampling Systems.**

- (i) If Seller's Scales and Seller's Sampling Systems are unavailable, inoperable, or not in compliance with the Scale Standards or the Sampling System Standards (for both Scales and Sampling Systems, such condition of unavailability, inoperability, out of compliance with relevant Standards, or not certified shall be referred to hereinafter as "unavailable"), and Buyer's Scales and Sampling Systems are available, operable, in compliance with relevant Standards, and certified (for both Scales and Sampling Systems, such condition of availability, operability, in compliance with relevant Standards, and certified, such condition shall be referred to hereinafter as "available"), then Buyer's weights and sample and analysis shall govern for payment purposes for such period of time Seller's Scales and Seller's Sampling Systems are unavailable.
- (ii) If Seller's Scales are available but its Sampling System is unavailable, and Buyer's Scales are unavailable but its Sampling System is available, Seller's weights and Buyer's sample and analysis shall govern for payment purposes.
- (iii) If Seller's Scales are unavailable but its Sampling System is available, and Buyer's Scales are available but its Sampling System is unavailable, Buyer's weights and Seller's sample and analysis shall govern for payment purposes.
- (iv) If Seller's Scales and Sampling System are unavailable, and Buyer's Scales and Sampling System are unavailable, the Parties shall mutually agree to method of weighing, sampling, and analyzing the Coal.

7.8 **Seller Sampling and Analysis Requirements.** If Buyer is required to perform sampling and analysis of the Coal pursuant to Section 7.7, it shall do so pursuant to the Sampling System Standards.

SECTION 8. PRICE ADJUSTMENT, REJECTION, QUALITY ISSUES

8.1 **Quality Price Adjustments.**

If Coal delivered hereunder varies from the Specifications but Buyer does not have or does not exercise rejection rights under Section 8.2, Coal quality adjustments pursuant to

this Section 8.1 shall be made increasing or decreasing the Contract Price of the Coal to compensate for variations in the "As Received" monthly weighted average Btu content, Ash content and SO₂ content of such Coal from the Btu content, Ash content and SO₂ content set forth in the Specifications. Price Adjustments shall be made to the nearest \$0.0001.

8.1.1 Btu Contract Price Adjustment.

If the "As Received" weighted average actual Btu content per pound of Coal in any Month is either less than or greater than the Btu content per pound of Coal as set forth in the Specifications, an adjustment increasing or decreasing the Contract Price per Ton of such Coal shall be calculated as follows:

$$[(\text{"As Received" Monthly Weighted Average Actual Btu content per pound} / \text{Specification Btu per pound}) \times \text{Contract Price}] - \text{Contract Price} = \text{Btu Contract Price adjustment per Ton of Coal}$$

8.1.2 Ash Contract Price Adjustment.

There shall be no Ash Contract Price adjustment increasing the Contract Price per Ton of Coal if the "As Received" Monthly weighted average actual Ash content in such Coal is equal to or less than the Ash content as set forth in the Specifications.

If the "As Received" weighted average actual Ash content of Coal in any Month is greater than the Ash content as set forth in the Specifications, an adjustment decreasing the Contract Price per Ton of such Coal shall be calculated as follows:

$$\$0.25 \times (\text{Specification Ash Content} - \text{"As Received" Monthly Weighted Average Actual Ash Content}) = \text{Ash Contract Price adjustment per Ton of Coal.}$$

8.1.3 SO₂ Contract Price Adjustment.

Buyer shall have the right to utilize all or part of the Coal at electric generating units which have flue gas desulfurization systems ("scrubbed coal") or electric generating units which do not have flue gas desulfurization systems ("non-scrubbed coal").

There shall be no SO₂ Contract Price adjustment increasing the Contract Price per Ton of Coal if the "As Received" Monthly weighted average actual SO₂ content per MMBtu of such Coal is equal to or less than the SO₂ content per MMBtu as set forth in the Specifications.

If the "As Received" weighted average actual SO₂ content per MMBtu of Coal in any Month is greater than the SO₂ content per MMBtu as set forth in the

Specifications, an adjustment decreasing the Contract Price per Ton of such Coal shall be calculated as follows:

$$\begin{aligned} & [((\text{Specification Lbs. SO}_2/\text{MMBtu} - \text{Monthly Weighted Average Actual "As Received" Lbs. SO}_2/\text{MMBtu}) \times (\text{Monthly Weighted Average Actual Average "As Received" Btu/Lb.} \times .002) / 2000) \times (\text{"SO}_2 \text{ Emission Allowance Price"}) \times 0.05] + \\ & [((\text{Specification Lbs. SO}_2/\text{MMBtu} - \text{Monthly Weighted Average Actual "As Received" Lbs. SO}_2/\text{MMBtu}) \times (\text{Monthly Weighted Average Actual "As Received" Btu} \times .002) / 2000) \times (\text{Buyers Actual Cost To Scrub}) \times (\text{"SO}_2 \text{ Emission Allowance Price"}) \times 0.95] = \text{SO}_2 \text{ Contract Price adjustment per Ton of Coal} \end{aligned}$$

The "SO₂ Emission Allowance Price" to be used in the SO₂ Contract Price Adjustment formulas under this subsection shall be the result determined in Step 2 of the following two step process:

Step 1 – Calculate the simple average of the three applicable SO₂ emission allowance prices published in the table entitled "SO₂ Assessments" published in the Argus Air Daily - US Emissions Market Prices, News and Analysis, or its successor publication ("Air Daily"), on the 3rd, 4th and 5th Business Days of the Month following the Month in which the Coal was delivered to Buyer at the receiving Station. To determine the applicable SO₂ emission allowance price, if the Air Daily publication contains SO₂ emission allowance pricing for more than one vintage year, then the vintage year that matches the calendar year for the Month in which the Coal was delivered to Buyer at the Station shall be used. For example, the SO₂ Emission Allowance Prices to be used for Coal delivered in January of 2011 would be the vintage 2011 SO₂ Emission Allowance Prices contained in Air Daily on February 3, 4 and 5 of 2011.

Step 2 – For Coal that is delivered in calendar years 2011 through 2014, the average price determined in Step 1 (with no rounding) shall be divided by 0.5 and then rounded to two (2) decimal places. For Coal that is delivered in calendar years 2015 and later, the average price determined in Step 1 (with no rounding) shall be divided by 0.35 and then rounded to two (2) decimal places. In the event that the market pricing published in the Argus Air Daily publication ceases to exist, an acceptable alternative source of market pricing shall be mutually agreed to by both Parties.

- 8.2 **Rejection of Shipments.** If any one or more of the quality characteristics of any Shipment of Coal, based on Seller's Short Proximate Analysis, exceed any of the Rejection Limits or if a Shipment is materially contaminated with foreign materials or fails to conform to items (i) through (v) of Section 6 (a "Non-Conforming Shipment"), Buyer shall have the option to reject such Non-Conforming Shipment by notice delivered to Seller by fax or email. In the case of a Non-Conforming Shipment in which a Rejection Limit is exceeded, such notice shall be delivered within 48 hours of Buyer's receipt of Seller's Short Proximate Analysis or any additional analysis of the Coal agreed to by the Parties and prior to unloading. In the case of a Non-Conforming Shipment

which is contaminated with foreign materials or fails to conform to items (i) through (v) of Section 6, Buyer may reject the entire Shipment or discrete portions of such Shipment during the unloading of the Coal, and Buyer shall provide notice to the Seller of its rejection of an entire Shipment or of discrete portions of a Shipment as soon as is reasonably possible. If Buyer fails to exercise timely its rejection rights under this Section 8.2 as to a Shipment, Buyer shall be deemed to have waived such rights with respect to the rejection of that Shipment only and Buyer shall have the right to apply the pricing adjustments as set forth in Section 8.1 to such Shipment. If Buyer timely rejects the Non-Conforming Shipment, Seller shall be responsible for promptly transporting the rejected Coal to an alternative destination and shall reimburse Buyer for all reasonable out-of-pocket costs and expenses incurred by Buyer associated with the transportation, storage, handling, removal, demurrage fees and any re-consignment fees assessed by the Carrier of the Non-Conforming Shipment. If such rejected Coal is loaded in trucks, barges or system railroad equipment, Seller shall have the option to select the alternative destination in its sole discretion. If such rejected Coal is loaded in Buyer's private railcars, Buyer and Seller shall move the Coal to a mutually agreed upon alternate destination. Seller shall, at Buyer's option, replace the rejected Coal as soon as possible, provided that Buyer gives notice to Seller of Buyer's desire for replacement Coal within five (5) Days after rejection of the Non-Conforming Shipment.

- 8.3 **Nonconformance to Suspension Limits.** If any Coal delivered to Buyer fails to conform to one or more of the Suspension Limits for a period of two (2) out of three (3) consecutive Months, Buyer shall have the right to suspend all further deliveries of Coal from any or all Sources (as determined by Buyer) by giving notice thereof to Seller and such suspension shall continue until Buyer receives assurances from Seller reasonably satisfactory to Buyer that future deliveries will conform to the Specifications. Seller's assurances shall include a written analysis of Seller's Coal, performed by Standard Laboratories, Inc. in Charleston, West Virginia, or by another independent commercial testing laboratory mutually agreed upon by the Parties and paid for by Seller, indicating conformity of such Coal with the Suspension Limits. If Seller does not give such satisfactory assurances within one Month following Buyer's notice of suspension, this shall constitute an Event of Default by Seller. If Seller does give such satisfactory assurances, but the Coal delivered during the immediate six months thereafter fails to conform to one or more of the Suspension Limits for two (2) out of three (3) consecutive Months, this shall constitute an Event of Default by Seller.
- 8.4 **Reserved**
- 8.5 **Foreign Matter Damage.** If Buyer determines, in good faith, that any foreign matter in the Coal delivered by Seller causes damage to operating, receiving or handling equipment at the Station, Buyer shall have the right to suspend all further deliveries of Coal by Seller by giving notice thereof to Seller and promptly after such notice is delivered, the Parties shall meet to mutually investigate the extent of the damage and to attempt in good faith to resolve the matter. Buyer shall document the damage due to the foreign matter and shall make such documentation available for Seller's review during such time as the Parties are attempting in good faith to resolve the matter. If it is established that foreign matter in Seller's Coal is responsible for any of the damage, then the Parties shall attempt in good faith to agree upon the cost of repair or replacement, as the case may be, of

damaged equipment, which cost, to the extent such damage was caused by Seller's Coal, shall be paid by Seller to Buyer. If the Parties cannot resolve the matter within forty-five (45) Days after Buyer's notice of the damage is given to Seller, Seller shall remain liable to Buyer for the cost of repair or replacement, as the case may be, of damaged equipment and for all other costs and expenses relating to such damage, to the extent such damage was caused by Seller's Coal, and determination of the amount shall be treated as a "Dispute" under Section 16 hereof. Buyer's right to suspend deliveries under this Section 8.5 shall end at such time the cause of foreign matter contamination has been determined and corrected.

- 8.6 **Freight Charges.** For any Month during which deliveries are suspended under this Section 8, Buyer shall not be liable for failing to purchase any minimum Contract Quantity of Coal as set forth in Section 3. If Buyer suspends deliveries under this Section 8, Seller shall promptly pay Buyer any excess freight charges thereby incurred under the applicable tariff and/or contract with the Carrier as a result of such reduced Shipments. The Parties shall thereafter coordinate scheduling to provide for Shipments not suspended pursuant hereto.
- 8.7 **Option to Make Up Deliveries.** Buyer shall have the right to require Seller to make up any or all deliveries affected by a suspension under this Section 8. If Buyer exercises such right, then each delivery of make up quantities of Coal shall be scheduled for no later than thirty (30) Days following Buyer's notice to Seller to resume deliveries.
- 8.8 **No Waiver.** Buyer's failure to exercise any right to suspend any deliveries of Coal or to terminate the Transaction as provided in this Section 8 shall not constitute a waiver of any subsequent right to suspend Coal deliveries or to terminate the Transaction as provided in this Section 8.
- 8.9 **Exclusive Remedies.** The price adjustments and remedies set forth in this Section 8 (including pursuit of remedies for an Event of Default under Section 8.3) shall be Buyer's sole and exclusive remedies for Seller's failure to deliver coal meeting the requirements of Section 6.

SECTION 9. PAYMENT

- 9.1 **Payment Terms.** Buyer shall self-invoice and pay Seller the Contract Price, as adjusted pursuant to this Agreement, for the Coal Shipments accepted and received at the receiving Station hereunder, and for Freeze Proofing requested and applied to such Coal pursuant to Section 4.4 to such Coal as follows:
- (i) for Shipments received and accepted at the Station during the first through the fifteenth Day of each Month, payment for such Coal will be made on or before the thirtieth Day of the Month, except the last day of the Month in February, in which the Coal was received. If the thirtieth Day of the Month is not a business Day, then payment will be made on the next available business Day,

- (ii) for Shipments received and accepted at the Station during the sixteenth through the last Day of the Month, payment for such Coal will be made on or before the fifteenth Day of the Month following the Month in which the Coal was received. If the fifteenth Day of the Month is not a business Day, then payment will be made on the next available business Day,
- (iii) Coal Quality Price Adjustments associated with Coal Shipments, calculated as set forth in Section 8.1, and if applicable the Confirmation, shall be paid or netted, as the case may be, by Buyer along with payments for Coal received at the receiving Station on or before the thirtieth Day of the Month following the Month in which the Coal was loaded, and
- (iv) Freeze Proofing, if applicable, shall be paid by Buyer along with payments for Coal Shipments. If there are no Coal payments applicable, then Buyer shall pay for Freeze Proofing not later than thirty (30) Days following Buyers receipt of Seller's approved and accepted invoice.

Buyer or Seller, if applicable, shall pay, by wire transfer in immediately available United States funds, the amount due Seller or Buyer as the case may be. Final payments for Coal and Coal Price Adjustments shall be made to the nearest \$0.01. No claims regarding payments, incorrect invoices, or Coal Quality Price Adjustments may be made after ninety (90) Days of the date of the applicable payment or invoice giving rise to the claim, unless such claims are under dispute or subject to audit and adjustment as provided elsewhere in this Agreement.

9.2 **Disputes.** Buyer shall have the right to withhold payment (or any portion thereof) on any Transaction (or portion thereof) which Buyer, in good faith, disputes. Buyer shall give Seller notice promptly upon making a determination that it, in good faith, disputes any Transaction (or portion thereof). If Buyer intends to withhold any payment under this section, such notice shall also set forth its intent to withhold payment and detail the amount and basis of any dispute. Thereafter, the Parties shall engage in good faith negotiations in an effort to resolve the dispute. Payment for any portion of the Transaction that is not in dispute shall be made by the original payment due date. Payment for any portion of the Transaction that remains in dispute shall be paid promptly upon final resolution. If any dispute is not settled by the Parties within fifteen (15) Days following Buyer's notice to Seller of such dispute, then either Party shall have the right to refer the matter to arbitration pursuant to Section 16.

9.3 **Electronic Transfer.** All payments due by Buyer to Seller pursuant to this Agreement shall be remitted to Seller by electronic transfer of immediately available funds.

Buyer billing contact: Mr. Larry Carter
Duke Energy Corp.
Atrium II - Mail code EA606
221 East Fourth St.
Cincinnati, OH 45202

Phone: 5134196927
Fax: 513 419 5683

Seller billing contact: Brenda Craven or Kelly Cahill
Tunnel Ridge, LLC
1717 South Boulder Avenue, Suite 400
Tulsa, OK 74119
Brenda Craven Phone: 918-295-7609
Kelly Cahill Phone: 918-295-7618
Fax: 918-295-7358

- 9.4 **Netting and Setoff.** If the Parties are required to pay any amount on the same Day or in the same Month under any Transactions under this Agreement, then such amounts with respect to each Party may be aggregated and the Parties may discharge their obligations to pay through netting, in which case the Party, if any, owing the greater aggregate amount may pay to the other Party the difference between the amounts owed.

SECTION 10. ADEQUATE ASSURANCE

- 10.1 **Financial Information.** If requested by Buyer, Seller's Guarantor or Seller shall deliver (i) within 120 Days following the end of each fiscal year, a copy of Seller's Guarantor's or Seller's annual report containing audited consolidated financial statements for such fiscal year and (ii) within 60 Days after the end of each of its first three fiscal quarters of each fiscal year, a copy of Seller's Guarantor's or Seller's quarterly report containing unaudited consolidated financial statements for such fiscal quarter.
- 10.2 **Credit Assurances.** If at any time during the term of this Agreement, a Material Adverse Change has occurred with respect to either Party, or the other Party's guarantor, as the case may be, then the insecure Party (the "**Insecure Party**") may require the other Party (the "**Impaired Party**") to provide credit enhancements as are described below ("**Adequate Assurance**"). The Impaired Party shall deliver such Adequate Assurance within five (5) Days of such request. The Insecure Party may hold such Adequate Assurance for so long as it has a commercially reasonable good faith belief that the ability of the Impaired Party, or the Impaired Party's guarantor, to perform its obligations is materially impaired. Adequate Assurance may include either (i) the posting of a Letter of Credit in a form reasonably acceptable to the Insecure Party from a bank rated at least A- by S&P or A3 by Moody's or (ii) cash collateral. With the consent of the Insecure Party, such Adequate Assurance may also include either (i) a corporate guarantee or (ii) other collateral security acceptable to the Insecure Party. Any cash collateral provided pursuant to this Section 10 shall accrue interest at the Federal Funds Overnight Rate. "**Federal Funds Overnight Rate**" means the rate for that Day opposite the caption "**Federal Funds (Effective)**" as set forth in the weekly statistical release designated as H.15(519), or any successor publication, published by the Board of Governors of the Federal Reserve System.

- 10.3 **Guaranty.** The obligation of Seller shall be secured by a Guaranty from Alliance Resource Partners, L.P. ("Seller's Guarantor") in a form reasonably acceptable to Buyer. The parties agree to negotiate in good faith for amendments to increase or decrease the total value of the Guaranty, as necessary, to reflect expiring or additional Transactions included under this Agreement.

SECTION 11. INSPECTIONS AND AUDIT

- 11.1 **Inspections.** Buyer shall have the right, at its expense and risk, to send its employees and/or representatives to Seller's Coal mines, Coal processing facilities, and Seller's Loading Facilities and other Seller facilities for the purpose of inspection, review and audit of Seller's operations during normal business hours. In connection with such inspection, review and audit, Seller shall make available its management personnel to discuss with Buyer's employees and/or representatives Seller's operations. Seller shall at all times schedule its production and carry out its operations according to good mining, processing, preparation, management, and engineering practices in the industry in order to produce Coal consistent with its obligations hereunder.
- 11.2 **Audit.** Seller shall maintain accurate records relating to Coal sales made pursuant to this Agreement. Such records shall be retained for a period of at least two (2) years after completion or termination of the relevant Transaction. Buyer (and its representatives) has the right, at its sole expense during normal working hours and upon reasonable advance notice, to examine the records of the Seller, but only to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to a Transaction. If requested, Seller shall provide to Buyer statements evidencing the quantities of Coal delivered at the Delivery Point. Examination of records hereunder shall be limited to one examination per year for each Transaction. If any such examination reveals any inaccuracy in any statement, the necessary adjustments in such statements and the payments thereof will be promptly made and shall bear interest calculated at the Interest Rate from the date the overpayment was made until paid. This Article will survive any termination of a Transaction or this Agreement.

SECTION 12. FORCE MAJEURE; CHANGE IN LAWS

- 12.1 **General.** "Force Majeure" shall mean any act, event or condition that causes delay in, or failure of, performance obligations under a Transaction (other than payment obligations) which is beyond the reasonable control and without the fault or negligence of the Party claiming the Force Majeure (or any person or entity over whom that Party has control), including acts of God, war, riots, civil insurrection, acts of the public enemy, strikes, lockouts, natural disasters, geological conditions, transportation delays caused by such above events of Force Majeure, or any limitation or prohibition on, or inability to obtain governmental permits or approvals required by law and necessary to, the mining, transporting, storing, handling or burning of Coal and any other similar or dissimilar events beyond the reasonable control and without the fault or negligence of the Party claiming the Force Majeure (or any person or entity over whom that Party has control),

and in all events only to the extent the same cannot be overcome by the prompt exercise of reasonable diligence by the Party relying on it (or any person or entity over whom that Party has control). A change in market conditions including the ability of Seller to sell Coal at a higher price, or Buyer to buy Coal at a lower price, whether or not foreseeable, shall not be a Force Majeure. If either Party is prevented from performing or delayed in performing any of its obligations hereunder because of Force Majeure, and if such Party gives notice and full details to the other Party of the nature and estimated duration of such Force Majeure, then the obligations 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 affected Party shall make all reasonable efforts to eliminate the cause of such Force Majeure and shall keep the other Party informed as to the continuance of the Force Majeure, provided however, that this provision shall not require Seller to deliver, or Buyer to receive, the Coal at points other than the Delivery Point, nor shall it require the Party claiming Force Majeure to make significant capital expenditures or to settle strikes or lockouts to remedy the Force Majeure when doing so is inadvisable in that Party's sole discretion.

- 12.2 **Make Up.** If an event of Force Majeure persists for a period of ten (10) Days or less, then the Party not claiming Force Majeure shall have the option of requiring that the affected Contract Quantity of Coal be shipped, so long as notice of the intent to make-up such shipments is provided within ten (10) Days of the notice of termination of such Force Majeure event. In the event of a Force Majeure greater than ten (10) Days, delivery of the affected Contract Quantity of Coal shall not be made up except by mutual agreement of the Buyer and Seller. The Parties shall mutually agree on a schedule for such make-up shipments.
- 12.3 **Equitable Proration.** If an event of Force Majeure affects some but not all of the production or the delivery of Coal, Seller shall equitably prorate any Coal produced from the Source only among Buyer and each other purchaser of Coal with whom Seller has a written agreement in effect at the time of the event of Force Majeure and obligating Seller to sell Coal to such purchaser. Seller shall not enter into any new contracts for the sale of Coal from the Source which would be delivered while Buyer is receiving prorated deliveries, unless Seller has first offered such Coal to Buyer and Buyer has rejected such offer. If an event of Force Majeure affects some but not all of Buyer's use of the Coal at the Station, Buyer shall equitably prorate Coal purchased by Buyer for use at the same Station only among Seller and each other producer of Coal with whom Buyer has a written agreement for Coal to be delivered to the respective Station in effect at the time of the event of Force Majeure and obligating Buyer to purchase Coal from such producer.
- 12.4 **Termination.** If an event of Force Majeure suspends the obligations of a Party, in whole or in part, for more than three (3) Months, the Party not asserting Force Majeure may, at its option, terminate the Transaction without liability of either Party to the other.
- 12.5 **Change in Laws.** The Parties recognize that legislative, regulatory, administrative or other governmental bodies or the courts may impose new environmental Laws or amend existing environmental Laws after the Effective Date that may prevent Buyer from

burning the quantity or quality of Coal set forth in the Transaction at any one or more of its Stations or make doing so commercially impracticable.

If any such Law is imposed or amended, Buyer shall give notice to Seller, and Buyer and Seller shall consider what steps can be taken by Buyer in the handling, transportation and use of such Coal or by Seller in the production, processing, preparation and loading of Coal. If no such practicable solution to the problem is implemented by either Buyer or Seller at least three Months prior to the effective date of the new or revised Law, the foregoing shall constitute an event of Force Majeure that shall operate to excuse Buyer's purchasing obligations hereunder to the extent such obligations are required to be reduced by the imposition or amendment of such Laws.

SECTION 13. DAMAGES FOR FAILURE TO DELIVER OR ACCEPT COAL

- 13.1 **Damages Owed to Buyer.** During the Term, unless excused by Force Majeure or Buyer's failure to perform, if Seller fails to deliver all or any part of the Contract Quantity of Coal to be delivered hereunder, Seller shall pay Buyer for each Ton of such deficiency an amount equal to the positive difference, if any, obtained by subtracting the Contract Price for the deficiency from the Replacement Price plus (i) any additional transportation costs incurred by Buyer due to such failure, and (ii) Legal Costs incurred by Buyer in connection with such failure and replacement. "**Replacement Price**" means the price, determined by Buyer in a commercially reasonable manner, at which Buyer purchases (if at all and following reasonable notice to Seller that Buyer intends to make purchases) substitute Coal which meets the Specifications or, absent such purchase, the market price for such quantity and quality of Coal, FOB Delivery Point.
- 13.2 **Damages Owed to Seller.** During the Term, unless excused by Force Majeure or Seller's failure to perform, if Buyer fails to accept all or any part of the Contract Quantity of Coal to be delivered hereunder, Buyer shall pay Seller for each Ton of such deficiency an amount equal to the positive difference, if any, obtained by subtracting the Sales Price for the deficiency from the Contract Price for the deficiency plus (i) any additional transportation costs incurred by Seller due to such failure, and (ii) Legal Costs incurred by Seller in connection with such failure and resale. "**Sales Price**" means the price, determined by Seller in a commercially reasonable manner, at which Seller resells (if at all and following reasonable notice to Buyer that Seller intends to make such resales) the Coal, or, absent such sale, the market price for such quantity and quality of Coal, FOB Delivery Point.
- 13.3 **Payment of Damages.** Payment of amounts, if any, determined under this Section 13 shall be made within ten (10) Days following receipt of notice from the Party owed. All such determinations shall be made in a commercially reasonable manner and the Party owed shall not be required to enter into any actual replacement transaction in order to determine the Replacement Price or Sales Price as appropriate, provided however, that the Party owed shall take reasonable steps to mitigate its damages.

- 13.4 **Extension of Term.** If a delivery or acceptance deficiency of less than five percent (5%) exists at the end of the Term, the Term shall be extended automatically by one month to allow shipment of such tonnage deficiency; provided, however, that any deficiency remaining at the end of the first calendar month following the end of the original Term shall be deemed to be part of the Seller Deficiency for which damages are payable pursuant to Section 13.1 or part of the Buyer Deficiency for which damages are payable pursuant to Section 13.2, as applicable.

SECTION 14. DEFAULT AND REMEDIES

- 14.1 **Events of Default.** An event of default (“Event of Default”) with respect to a Party (the “Defaulting Party”) shall mean any of the following:

- (i) the failure of Defaulting Party to pay when due any required payment and such failure is not remedied within five (5) Days after notice thereof, provided the payment is not subject to a good faith dispute as described in Section 9.2;
- (ii) the failure of the Defaulting Party to deliver or to accept delivery of at least ninety percent (90%) of the Contract Quantity of Coal to be delivered hereunder during any calendar quarter per the agreed upon schedule set forth in Section 3.2, unless excused by Force Majeure or the other Party’s failure to perform;
- (iii) the occurrence of an Event of Default as described in Section 8.3 concerning nonconformance to the Suspension Limits;
- (iv) the Defaulting Party or its guarantor, if applicable, shall be subject to a voluntary or involuntary Bankruptcy Proceeding;
- (v) any representation or warranty made by Seller herein shall prove to be untrue in any material respect when made;
- (vi) the failure of the Defaulting Party to comply with any material obligation under the Transaction (other than those described specifically in this Section 14.1 above, and the failure by Seller to deliver coal meeting the requirements of Section 6) and such failure continues uncured for five Days after notice thereof, provided that if it shall be impracticable or impossible to remedy such failure within such five (5) Day period, the cure period shall be extended for an additional period reasonably necessary to remedy such failure subject to the condition that during the additional period, the Defaulting Party shall be diligently pursuing a remedy for the failure; or
- (vii) the Impaired Party fails to establish, maintain, extend or increase Adequate Assurance when required pursuant to Section 10.

- 14.2 **Remedies.** Upon the occurrence and during the continuance of an Event of Default, as to the Defaulting Party, the other Party (the “Non-Defaulting Party”) may (i) withhold any

payments due to the Defaulting Party until such Event of Default is cured, (ii) suspend performance of its obligations under the Transaction until such Event of Default is cured, (iii) terminate by written notice the Transaction as of any date specified by the Non-Defaulting Party ("**Early Termination Date**") within thirty (30) Days after such notice is given; however, such notice shall not be required where Defaulting Party (or Defaulting Party's guarantor, if applicable) files for a voluntary Bankruptcy Proceeding. In such case, the Non-Defaulting Party may terminate the Agreement immediately upon receiving notice of said filing; and (iv) recover from the Defaulting Party damages as set forth in Section 14.3 and any other amounts owed by the Defaulting Party under the Transaction.

14.3 Damages Upon Early Termination

14.3.1 Damages Owed to Buyer. If Buyer is the Non-Defaulting Party and establishes an **Early Termination Date**, then Seller shall pay Buyer for each Ton which Seller would have been obligated to deliver between the **Early Termination Date** and the end of the Term but for the early termination an amount equal to the positive difference, if any, obtained by subtracting the Contract Price for such Tons from the Replacement Price for such Tons plus (i) any additional transportation costs incurred by Buyer due to such failure, and (ii) Legal Costs incurred by Buyer in connection with the Event of Default and replacement.

14.3.2 Damages Owed to Seller. If Seller is the Non-Defaulting Party and an **Early Termination Date** has been established, then Buyer shall pay Seller for each Ton which Buyer would have been obligated to purchase between the **Early Termination Date** and the end of the Term but for the early termination an amount equal to the positive difference, if any, obtained by subtracting the Sales Price for such Tons from the Contract Price for such Tons plus (i) any additional transportation costs incurred by Seller due to such failure, and (ii) Legal Costs incurred by Seller in connection with the Event of Default and resale.

14.3.3 Payment of Early Termination Damages. Payment of amounts, if any, determined under this Section 14 shall be made within ten (10) Days following receipt of notice from the Party owed. All such determinations shall be made in a commercially reasonable manner and the Party owed shall not be required to enter into any actual replacement transaction in order to determine the Replacement Price or Sales Price as appropriate, provided however, that the Party owed shall take reasonable steps to mitigate its damages.

14.3.4 Damages Cumulative. Damages recoverable under this Section 14.3 are for Tons which would have been delivered or purchased after an **Early Termination Date** and are recoverable in addition to any damages which may be recoverable under Section 13 for deficiencies during the Term.

SECTION 15. INDEMNIFICATION

Seller shall defend, indemnify and hold harmless Buyer and its affiliates, directors, officers, employees and agents from and against all claims (including claims brought by a third party to protect the interests of a Party), demands, losses, damages, liabilities, obligations and costs (including reasonable attorneys' and other litigation fees and expenses) (collectively "Claims") arising out of or relating to personal injury or property damage resulting from the acts or omissions of Seller or its agents in the performance of this Agreement, except to the extent such injury or damage arises out of the negligent acts or omissions of Buyer or its agents. Buyer shall defend, indemnify and hold harmless Seller and its directors, officers, employees and agents from and against all Claims arising out of or relating to personal injury or property damage resulting from the acts or omissions of Buyer or its agents in the performance of this Agreement, except to the extent such injury or damage arises out of the negligent acts or omissions of Seller or its agents.

SECTION 16. ARBITRATION

- 16.1 **Demand for Arbitration.** Except as set forth in Section 16.2 below, all claims, disputes and other controversies arising out of or relating to this Agreement ("Disputes") shall be fully and finally settled by binding arbitration. All arbitration proceedings shall take place in Charlotte, North Carolina under the auspices of the American Arbitration Association ("AAA") in accordance with the AAA Commercial Arbitration Rules then in effect, and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16. For all Disputes where the amount in controversy is less than \$500,000, the arbitration proceeding shall be conducted by a single arbitrator selected by the Parties (or the AAA if the Parties cannot agree). For all Disputes where the amount in controversy between the Parties is equal to or more than \$500,000, the arbitration proceeding shall be conducted by a panel of three (3) neutral arbitrators. If the Parties have not so agreed on such three arbitrator(s) on or before thirty (30) Days following the delivery of a demand for arbitration to the other Party, then the AAA will designate the remaining arbitrator(s) pursuant to its Commercial Arbitration Rules. No demand for arbitration shall be made or permitted after the date when the institution of a civil action based on the Dispute would be barred by the applicable statute of limitations or repose.
- 16.2 **Expedited Arbitration.** Upon mutual agreement of the parties, any dispute may be submitted to an expedited arbitration proceeding under the Expedited Procedures of the Commercial Arbitration Rules of the AAA. No demand for expedited arbitration shall be made or permitted after the date when the institution of a civil action based on the dispute would be barred by the applicable statute of limitations or repose. The arbitrator selected shall be knowledgeable of the subject matter of the arbitration. Judgment may be entered on the expedited arbitration award in any court having jurisdiction. Unless otherwise agreed in writing by Buyer and Seller, performance of their respective obligations under this Agreement shall be continued in full by the Parties during the arbitration process. The Parties stipulate that this Agreement constitutes a contract evidencing a transaction involving commerce and that this section is enforceable under the Federal Arbitration Act (9 U.S.C.A. §§ 1 et seq.). If the Parties are unable to agree to an expedited arbitration proceeding, the dispute, if arbitrated, must be submitted to arbitration pursuant to Section 16.1 above.

- 16.3 **Consolidation.** No arbitration arising under the Agreement shall include, by consolidation, joinder or any other manner, any Person not a party to the Agreement unless (a) such Person is substantially involved in a common question of fact or Laws, (b) the presence of the Person is required if complete relief is to be accorded in the arbitration, and (c) the Person has consented to be included.
- 16.4 **Equitable Remedies.** The procedures specified in this Section 16 shall be the sole and exclusive procedures for the resolution of Disputes between the Parties arising out of or relating to this Agreement; **provided, however,** that a Party may file a complaint in a court of competent jurisdiction on issues of statute of limitations or repose or to seek injunctive relief, sequestration, garnishment, attachment, or an appointment of a receiver. Preservation of these remedies does not limit the power of the arbitrator(s) to grant similar remedies, and despite such actions, the Parties will continue to participate in good faith in and be bound by the dispute resolution procedures specified in this Section 16.
- 16.5 **Award; Binding Nature.** The arbitrator(s) may not through the award compromise any difference between the positions of the Parties. Instead, the Parties shall each submit to the arbitrator(s) a proposed award at least three (3) days before any arbitration is scheduled to commence. The arbitrator(s) shall endorse as the final award either the award proposed by one Party or the other. No other award may be made. The arbitration decision shall be by majority vote and shall be issued in a writing that sets forth in separately numbered paragraphs all of the findings of fact and conclusions of law necessary for the decision. Findings of fact and conclusions of law shall be separately designated as such. The arbitrator(s) shall not be entitled to deviate from the construct, procedures or requirements of this Agreement. Any decision rendered by the arbitrator(s) in any arbitration shall be final and binding upon the Parties, and judgment may be entered on the award in any court of competent jurisdiction. The cost of the arbitration shall be borne equally by the Parties.
- 16.6 **Discovery.** Subject to the applicable rules of the AAA, either Party may apply to the arbitrator(s) for the privilege of conducting discovery. The right to conduct discovery shall be granted by the arbitrator(s) in his/her sole discretion with a view to avoiding surprise and providing reasonable access to necessary information or to information likely to be presented during the course of the arbitration, provided that such discovery period shall not exceed ninety (90) Days.

SECTION 17. NOTICES

All notices, consents, invoices and other communications required or permitted to be made pursuant to this Agreement shall be made in writing and sent by (i) registered or certified mail, postage prepaid and return receipt requested, (ii) reputable overnight courier, or (iii) facsimile (fax) or email, and promptly confirmed in writing as set forth in (i) or (ii) above, and properly addressed as follows:

- (i) If the notice is to Buyer:

Duke Energy

526 South Church Street
P. O. Box 1002
Charlotte, NC 28201-1002
ATTENTION: Managing Director, Regulated Fuels
Mail Code: EC11Z
FAX: (704) 382-4568

(ii) If the notice is to Seller:

Tunnel Ridge, LLC
1717 South Boulder Avenue, Suite 400
Tulsa, OK 74119
ATTENTION: Vice President – Contract Administration
FAX: (918) 295-7360

Notices shall become effective when received by the other Party. Either Party may from time to time change the information with respect to it in Section 17 by giving the other Party written notice thereof.

SECTION 18. GENERAL

18.1 **Insurance.** Seller shall maintain the following insurance:

- (1) Workers' Compensation and Employer's Liability Policy, which shall include:
 - A) Workers' Compensation (Coverage A), with statutory limits, and in accordance with the laws of the state where the services are performed or Statutory Longshore and Harbor Workers' Compensation Act Insurance or Jones Act (Maritime Employers Liability) whichever is applicable, covering Seller's responsibilities with respect to all workers at the docks and fleets at all Delivery points utilized by Seller;
 - B) Employer's Liability (Coverage B) with minimum limits of One Million Dollars (\$1,000,000) Bodily Injury by Accident, Each Accident, \$1,000,000 Bodily Injury by Disease, each Employee;
 - C) Thirty (30) Day Cancellation Clause;
 - D) Broad Form All States Endorsement; and

- (2) Commercial General Liability Policy, which shall have minimum limits of One Million Dollars (\$1,000,000) each occurrence; Two Million Dollars (\$2,000,000) General Aggregate; One Million Dollars (\$1,000,000) Products/Completed Operations Aggregate; One Million Dollars (\$1,000,000) Personal and Advertising Injury, and including:
 - A) Thirty (30) Day Cancellation Clause;
 - B) Blanket Written Contractual Liability to the extent covered by the policy against liability assumed by FCD under this Agreement;
 - C) Broad Form Property Damage; and

- (3) Commercial Automobile Liability Insurance covering the use of all owned, non-owned, and hired automobiles, with a bodily injury, including death, and property damage combined single minimum limit of One Million Dollars (\$1,000,000) each occurrence with respect to vehicles assigned to or used in performance of services under this Agreement; and
- (4) Umbrella/Excess Liability Insurance with minimum limits of Two Million Dollars (\$2,000,000) per occurrence; Two Million Dollars (\$2,000,000) aggregate, to apply to employer's liability, commercial general liability, and automobile liability; and
- (5) Wharfinger's insurance with basic coverage of not less than \$5,000,000.

Seller shall provide thirty (30) day advance notification to Buyer in the event of termination of or a material reduction in coverage of insurance.

All insurance policies shall be endorsed to add Buyer as an additional insured, except for workers compensation and employers liability, and shall include waivers of any right of subrogation of the insurers against Buyer.

- 18.2 **Clear Title.** Seller represents and warrants that the Coal delivered under this Agreement shall be delivered free and clear from any covenants, restrictions, liens or other encumbrances of any nature whatsoever upon delivery to Buyer, provided that nothing contained in this section shall preclude Seller from granting a security interest in accounts receivable which may be due to Seller from Buyer hereunder. Buyer may require reasonable documentation requirements upon any holder of such lien(s) before recognition of the assignment of the right to receive proceeds hereunder.
- 18.3 **Assignment.** This Agreement and the rights and obligations hereunder shall inure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns. Neither Party may assign any of its rights, obligations or interest herein without the prior written consent of the other Party, which consent shall not be unreasonably withheld; except that Buyer may assign this Agreement to any affiliated entity without Seller's consent. In the event of an assignment by Buyer to an affiliate without the consent of Seller, if the assignee's long-term credit rating is not rated above BBB- (S&P) or Baa3 (Moody's) and Buyer has not otherwise provided Seller with evidence reasonably sufficient and satisfactory to Seller that the assignee has the financial capability to fulfill its obligations hereunder, Seller shall be entitled to require that the obligations under this Agreement be secured by a guarantee of Duke Energy Kentucky, Inc or such other financially capable entity that the parties mutually agree. In addition, if Buyer sells or transfers operating control over one or more Stations that collectively have been the primary receiving Stations of Coal covered by this Agreement (receiving more than 50% of the Coal under this Agreement), Buyer may assign this Agreement to the purchaser of such Station(s) without Seller's consent; provided, however, that in the event of in any such assignment by Buyer without the consent of Seller, if the assignee's long-term credit rating is not rated above BBB- (S&P) or Baa3 (Moody's) and Buyer has

not otherwise provided Seller with evidence reasonably sufficient and satisfactory to Seller that the assignee has the financial capability to fulfill its obligations hereunder, such assignment shall be deemed a Material Adverse Change with respect to Buyer and Seller shall be entitled to Adequate Assurance under Section 10.2.

- 18.4 **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Kentucky, excluding its conflict of law principles.
- 18.5 **Confidential Information.** Each Party shall retain confidential information obtained from the other Party hereunder in strict confidence and shall not disclose it to any third party, except for any information that (i) is at the time of such disclosure known to the public or thereafter becomes so known through no violation of this Agreement; (ii) was in its possession or known to it prior to disclosure hereunder; or (iii) is required by Law to be so disclosed. Notwithstanding the foregoing, either Party may communicate such information to its directors, officers, employees, affiliates, attorneys, partners in ownership of a generation facility, consultants and other representatives who have a need to know such information, subject to the confidentiality provisions of this section, provided that (x) such parties agree to be bound by the confidentiality provisions of this Agreement as if it were the receiving Party and (y) such Party shall be liable for any breach by such parties of the confidentiality provisions of this section.
- 18.6 **Confidentiality of Terms.** The Parties shall keep the price, Contract Quantity and other terms of this Agreement confidential and shall not disclose the same without the prior written consent of the other Party, unless required by Law to do so, and provided that Buyer shall have the right, without Seller's consent, to make such disclosure to a prospective purchaser of, or to a lender in connection with the financing of, all or a material portion of any Station supplied by Seller hereunder, and each Party shall have the right, without the other Party's consent, to make such disclosure to a prospective purchaser of all or a material portion of the assets or equity of the Party; provided in each case that the party to whom the information is disclosed agrees in writing to be bound by confidentiality provisions at least as restrictive as those in this Agreement.
- 18.7 **Remedies Cumulative.** Except as provided in Section 8.9 of this Agreement, the remedies provided in this Agreement are cumulative, not exclusive, and are in addition to any other rights and remedies provided at law or in equity, and may be exercised concurrently or cumulatively.
- 18.8 **Entire Agreement; Non-Waiver.** The terms and conditions set forth herein are intended by Seller and Buyer to constitute a final, complete and exclusive statement of their agreement with respect to the subject matter hereof and all prior proposals, communications, negotiations, understandings and representations, whether oral or written, relating to that same subject matter are hereby superseded. This Agreement shall not be supplemented, modified, or amended except in writing and signed by the Party to be bound thereby. Waiver by either Party of any default of the other Party hereunder shall not be deemed a waiver of any other default. Either Party may at any time insist upon strict compliance with these terms and conditions notwithstanding any previous custom, practice, or course of dealing to the contrary.

- 18.9 **Consequential Damages.** Without limiting any remedy expressly set forth herein, neither Party shall be liable to the other Party for any special, consequential or punitive damages arising out of the performance, breach or nonperformance, irrespective of any legal theory under which the same may otherwise be asserted, except to the extent that third party claims with respect to which a Party is indemnified hereunder are deemed to constitute such damages.
- 18.10 **Severability.** If any provision of this Agreement or the application of this Agreement to any circumstance shall to any extent be held invalid or unenforceable by a court of competent jurisdiction or an arbitrator under Section 16, the remainder of the Agreement and the application of that provision to circumstances other than those as to which it is specifically held invalid or unenforceable shall not be affected, and every remaining provision of this Agreement shall be valid and binding to the fullest extent permitted by law.
- 18.11 **Headings.** The section headings of this Agreement are for reference purposes only and are to be given no effect in the construction or interpretation hereof. "Including" shall mean including without limitation.
- 18.12 **Joint Preparation.** The preparation of this Agreement has been a joint effort of the Parties and the resulting document shall not be construed more severely against one of the Parties than against the other.
- 18.13 **Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
- 18.14 **Forward Contract.** The Parties agree that this Agreement constitutes a "forward contract" and that the Parties are "forward contract merchants" within the meaning of the United States Bankruptcy Code.

SECTION 19. DEFINITIONS

- 19.1 **"AAA"** shall have the meaning set forth in Section 16.1.
- 19.2 **"Adequate Assurance"** shall have the meaning set forth in Section 10.
- 19.3 Reserved.
- 19.4 **"As Received"** means the state and condition of the Coal when received by Buyer at the scheduled receiving Station.
- 19.5 **"ASTM"** means the American Society for Testing and Materials.
- 19.6 **"Bankruptcy Proceeding"** means with respect to a Party or entity, such Party or entity (a) makes an assignment or any general arrangement for the benefit of creditors, (b) files