



Effective as of April 2013

**GENERAL TERMS AND CONDITIONS FOR THE  
PURCHASE AND SALE OF COAL  
Part 2**

The following General Terms and Conditions ("GT&Cs") apply to purchases and sales of Coal between **Freepoint Commodities LLC ("Freepoint")** and Counterpart (as defined in the confirmation of the Transaction attached hereto) until such time that these GT&Cs are superseded by a master trading agreement for the purchase and sale of Coal between the parties. For each Transaction, the parties shall have agreed upon which party is the Buyer and which is the Seller, and upon the Contract Price, Contract Quantity, Delivery Point, Delivery Period, payment date of the Contract Price and Specifications of such Transaction. References in these GT&Cs to "Part One" shall mean Part One of the confirmation of a Transaction.

**1. Definitions**

- 1.1 "**Affiliate**" of any person means a person which controls, is controlled by, or is under common control with, such person; without limiting the term control, more than 50% ownership (voting or equity) is control for this purpose;
- 1.2 "**Agreement**" means these GT&Cs and all Transactions between Freepoint and Counterpart;
- 1.3 "**ASTM**" means the American Society for Testing and Materials;
- 1.4 "**BTU**" means the amount of energy required to raise the temperature of one (1) pound of pure water one (1) degree Fahrenheit from 59.5° Fahrenheit to 60.5° Fahrenheit at a constant pressure of 14.73 pounds per square inch absolute;
- 1.5 "**Buyer**" means the party receiving Coal under any Transaction as specified in Part One;
- 1.6 "**Business Day**" means a day on which Federal Reserve member banks in New York City are open for business unless such day is a Holiday; and a Business Day shall open at 8:00 a.m. and close at 5:00 p.m. Eastern Prevailing Time;
- 1.7 "**Coal**" means crushed, bituminous coal unless a Transaction specifies PRB (Powder River Basin) Coal, in which case it means crushed, sub-bituminous coal, to be sold by Seller and purchased by Buyer, the quality of which conforms to the Specifications and which does not trigger Buyer's Rejection Rights under Section 4 of these GT&Cs, or is otherwise accepted by Buyer under a Transaction, and which contains no synthetic fuels, is substantially free from any extraneous materials (including, but not limited to mining debris, bone, slate, iron, steel, petroleum coke, earth, rock, pyrite, wood or blasting wire), is substantially consistent in quality throughout a Shipment, meets the size required, and has no intermediate sizes (including fines) added or removed;
- 1.8 "**Contract Price**" means the price per Ton agreed to be paid for Coal by Buyer to Seller pursuant to a Transaction as specified in Part One;
- 1.9 "**Contract Quantity**" means the total quantity of Coal agreed to be sold, delivered purchased and received pursuant to a Transaction as specified in Part One;
- 1.10 "**Delivery Point**" means the agreed point or points where Seller delivers and Buyer receives Coal under any Transaction;
- 1.11 "**Delivery Period**" means the agreed calendar period during which deliveries shall be made pursuant to a Transaction as specified in Part One;
- 1.12 "**FOB**" shall have the meaning given to such term in the Uniform Commercial Code of the State of New York;
- 1.13 "**Force Majeure**" means an event or circumstance which prevents one party from performing its obligations under a Transaction,



which event or circumstance was not anticipated as of the date of the affected Transaction, which is not within the reasonable control of, or the result of the negligence of, the claiming party and which, by the exercise of due diligence, the claiming party is unable to overcome or cause to be avoided. Force Majeure shall not be based on (i) the loss of Buyer's markets; (ii) Buyer's inability economically to use or resell the Coal purchased hereunder; (iii) the loss or failure of Seller's supply; or (iv) Seller's ability to sell the Coal at a price greater than the Contract Price. 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 considered a Force Majeure event;

- 1.14 **"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;
- 1.15 **"Non-Conforming Shipment"** means any Shipment of Coal that triggers any of the Rejection Limits specified in Part One;
- 1.16 **"Prime Rate"** means the Prime Rate as published in *The Wall Street Journal* under "Money Rates";
- 1.17 **"Rejection Limits"** means the quality characteristics for the Coal as specified in Part One that give rise to a Rejection Right of Buyer pursuant to Section 4 of these GT&Cs;
- 1.18 **"Seller"** means the party delivering Coal under any Transaction as specified in Part One;
- 1.19 **"Shipment"** means, as applicable, one Unit Train load, one barge or vessel load, or the aggregate of the truckloads that are loaded on any one day in accordance with the applicable Transportation Specifications;
- 1.20 **"SO<sub>2</sub>"** means sulfur dioxide;
- 1.21 **"Source"** means the mine(s), mining complexes, loadout river dock(s) or other point(s) of origin that Seller and Buyer agree are acceptable origins for the Coal;
- 1.22 **"Specifications"** means the quality characteristics for the Coal on an "as received" basis, using ASTM standards, as specified in Part One;
- 1.23 **"Ton"** means 2,000 pounds;
- 1.24 **"Transaction"** means a particular agreed purchase and sale of Coal between the parties;
- 1.25 **"Transportation Specifications"** means the agreement(s) made by Seller, Buyer, or any party's designee with its respective Transporter(s), as amended from time to time, covering the requirements for each Shipment, which agreements, including the timing and tonnage requirements thereunder, shall be no more restrictive than typical agreements for transport of Coal on rail lines, highways, vessels or barges transporting Coal to or from the Delivery Point(s) for third parties or to and from other delivery points in the vicinity of the Delivery Point. Such Transportation Specifications, or relevant portions therein, shall be made available upon request to the extent authorized within the relevant transportation agreement; and shall be no more restrictive than typical agreements for transport of Coal on rail lines, highways, vessels or Barges transporting Coal to or from Delivery Point(s) for third parties or to and from other delivery points in the vicinity of the Delivery Point;
- 1.26 **"Transporter" or "Transporters"** mean the entity or entities transporting Coal on behalf of Seller to and at the Delivery Point or on behalf of Buyer from the Delivery Point;
- 1.27 **"Unit Train"** means a train with capacity sufficient to hold the number of Tons of Coal for delivery from the Source(s) as specified in the relevant Confirmation.



## 2. Obligations

**2.1 Obligations for Purchase and Sale of Coal.** During the Delivery Period, Seller agrees to sell and deliver to Buyer, and Buyer agrees to purchase and accept from Seller, the Contract Quantity of Coal to be delivered at the Delivery Point.

**2.2 Scheduling/Shipping Notices.** Except as otherwise provided in Part One, Buyer will advise Seller on or before the 20<sup>th</sup> day of each calendar month preceding scheduled Shipments of the number of Unit Trains, trucks or barges it desires to load during the succeeding month to fulfill the Contract Quantity and Buyer's desired loading dates and delivery schedule. Seller will advise Buyer on or before the 25<sup>th</sup> day of the month preceding Shipment of its Source mine(s)/loadout(s) for the scheduled monthly Shipment(s). Seller and Buyer shall cooperate to agree on a mutually acceptable Delivery Schedule throughout the term of the Transaction. For delivery by vessel, barge, truck, or rail, Seller shall supply Buyer with a shipping notice which shall include the vessel name, train or barge or truck number, Source from which supplied, tonnage shipped, shipping date, destination, time loading commenced and finished, along with the analysis information required under Section 3.4 and any other information reasonably required by Buyer and agreed to by Seller (the "Shipping Notice"). Seller shall within forty-eight (48) hours of loading or prior to arrival of the vessel, barge, truck or train (as applicable) at the destination following loading of such Shipment (whichever comes first), send the Shipping Notice to Buyer by telecopy or other means as agreed to between Buyer and Seller. The Delivery Period shall begin no earlier than the first day of the delivery month and at least seven (7) days before the end of that month. Delivery must be completed by the last day of the delivery month.

### 2.3 Delivery.

**(a) Barge or vessel deliveries.** For barge or vessel deliveries, the Coal shall be delivered to Buyer FOB barge or vessel at the Delivery Point. Title to and risk of loss of the Coal will pass to Buyer upon each barge or vessel being fully loaded and trimmed. Buyer or its Transporter shall furnish suitable barges or vessels for delivery of the Coal. Such barges or vessels shall be compatible with the Source's coal loading facilities to be utilized by Seller 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, dry and suitable for the transportation of Coal. Seller shall arrange for and pay all costs of transporting the Coal to the Delivery Point and handling and loading the Coal into barges or vessels to the proper draft and proper distribution in such barges or vessels. Buyer shall arrange for and pay all costs for transporting the Coal by barge or vessel from and after the Delivery Point to its destination. If the Delivery Point is such that the Coal will have been transported by barge or vessel prior to delivery, then title to and risk of loss of the Coal will pass to Buyer upon the earlier to occur of (i) the safe and proper mooring of the barge(s) or vessel(s) at the Delivery Point loading dock or discharge point or (ii) other transfer of the custody and control of the barge(s) or vessel(s) to Buyer or Buyer(s) Transporter.

**(b) Rail or truck deliveries.** For rail or truck deliveries, the Coal shall be delivered to Buyer FOB Unit Train(s) or FOB truck(s) at the Delivery Point. For rail deliveries, title to and risk of loss of the Coal will pass to Buyer upon completion of loading all railcars in each Unit Train and release of the Unit Train to the railroad. For truck deliveries, title to and risk of loss of the Coal will pass to Buyer upon completion of loading of each individual truck and release of the truck to proceed to the destination point. Buyer shall furnish suitable Unit Trains or trucks for loading and delivery of the Coal. Such Unit Trains or trucks shall be compatible with the coal loading facilities utilized by the Seller 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, dry and suitable for the transportation of Coal. If the Delivery Point is such that the Coal will have been transported by Unit Train or truck prior to delivery, then title to and risk of loss of the Coal will pass to Buyer upon the earlier to occur of (i) the safe and proper placement of the Unit Trains or trucks at the Delivery Point or (ii) other transfer of the custody and control of the Unit Trains or trucks to Buyer or Buyer's Transporter.

### 2.4 Additional Charges

**(a) Additional Transportation Charges.** If a Party is charged for any increased transportation charges, penalties or other costs, including demurrage, attributable to the other Party's failure to (i) timely and appropriately load or unload the Coal, (ii) comply with the timing and tonnage requirements of the Transportation Specification or (iii) provide the short proximate analysis in accordance with the time periods in Section 3.4(c) of these GT&C, and if such failure is not due to Force Majeure, such failing party shall promptly reimburse the other for such actual charges, if such charges are usual and customary, after written notice thereof.

**(b) Additives.** Seller shall make commercially reasonable efforts to treat Coal with freeze control agents or other additives as directed by Buyer. Buyer shall thereafter reimburse Seller for the actual cost of materials, including taxes, fees and reasonable application costs as charged by the Source for application of the freeze control agents or other additives. Seller shall invoice Buyer and Buyer shall pay Seller for such freeze conditioning in accordance with Section 5.1.



**2.5 Title and Indemnity.** Seller warrants that at the time of delivery it will have title to the Coal, and it will deliver to Buyer the Coal free and clear of all liens, security interests, claims, encumbrances or any interest therein or thereto by any person arising prior to the Delivery Point. Each Party shall indemnify, defend and hold harmless the other Party from and against any Claims arising from or out of any event, circumstance, act or incident first occurring or existing during the period when control and title to Coal is vested in such Party.

**2.6 Taxes and Other Liabilities.** Seller shall be solely responsible for all assessments, fees, costs, expenses and Taxes imposed by governmental authorities or other third parties ("Third Party Impositions") relating to the mining, beneficiation, production, sale, use, loading and delivery of Coal to Buyer or in any way accrued or levied prior to the transfer of title to the Coal to Buyer, and including, without limitation, all severance taxes, royalties, black lung fees, reclamation fees and other costs, charges and liabilities. Buyer shall be solely responsible for Third Party Impositions relating to the Coal accrued or levied at or after the transfer of title to the Coal to Buyer, (other than ad valorem, franchise or income taxes which are related to the sale of the Coal and are, therefore, the responsibility of Seller), including, but not limited to, sales or use tax if applicable. In the event Seller is required by law or regulation to remit or pay Third Party Impositions which are Buyer's responsibility hereunder, Buyer shall promptly reimburse Seller for such Third Party Impositions. If Buyer is required by law or regulation to remit or pay Third Party Impositions which are Seller's responsibility hereunder, Buyer may deduct the amount of any such Third Party Impositions from the sums due Seller. Nothing shall obligate or cause a Party to pay or be liable to pay any Third Party Impositions for which it is exempt under the law. Buyer agrees to furnish Seller with all applicable tax exemption certificates and documentation where exemption from applicable taxes is claimed.

**2.7 Failure to Deliver or Receive Coal.** The remedies set forth in this Article 2.7 shall be the Affected Party's exclusive remedies for the Non-Performing Party's failure to deliver or receive a Shipment of Coal as set forth in this Master Agreement:

**(a) Rescheduling.** As an alternative to the damages provision below, if the Parties mutually agree in writing, the Affected Party may schedule deliveries or receipts, as the case may be, pursuant to such terms as the Parties agree in order to discharge some or all of the obligation to pay damages. In the absence such agreement, the damages provision of this Article shall apply.

**(b) Liquidated Damages.**

(i) Seller Failure to Deliver. Unless excused by Force Majeure or Buyer's failure to perform, if Seller fails to deliver all or part of the Contract Quantity for the relevant delivery month in accordance with this Transaction, Seller shall pay to Buyer within five (5) Business Days of invoice receipt, an amount for each Ton of Coal of such deficiency equal to (A) the commercially reasonable market price at which Buyer is able, or absent an actual purchase at the time of Seller's breach, would be able (FOB Delivery Point) to purchase or otherwise receive comparable supplies of Coal of comparable quality on an equivalent  $\text{¢/MMBTU}$ , SO<sub>2</sub> adjusted basis plus (i) costs reasonably incurred by Buyer in purchasing such substitute Coal and (ii) additional transportation charges, if any, reasonably incurred by Buyer as a result of taking delivery of substitute Coal at a location other than FOB Delivery Point ("Replacement Price") minus (B) the Contract Price agreed to for the specific Transaction; except that if such difference is zero or negative, then neither Party shall have any obligation to make any deficiency payment to the other.

(ii) Buyer Failure to Accept Delivery. Unless excused by Force Majeure or Seller's failure to perform, if Buyer fails to accept delivery of all or part of the Contract Quantity for the relevant delivery month in accordance with this Transaction, Buyer shall pay to Seller, within five (5) Business Days of invoice receipt, an amount for each ton of Coal of such deficiency equal to (A) the Contract Price agreed to for the specific Transaction plus any storage, transportation or other costs reasonably incurred by Seller in reselling the Coal minus (B) the commercially reasonable market price at which Seller is able, or absent an actual sale, would be able (FOB Delivery Point), to sell or otherwise dispose of the Coal at the time of Buyer's breach, ("Sales Price"); except that if such difference is zero or negative, then neither Party shall have any obligation to make any deficiency payment to the other.

**(c) Duty to Mitigate.** Both Parties shall be subject to a commercially reasonable good faith obligation to mitigate any damages hereunder; provided however that in no event shall either party be required to utilize or change its utilization of its controlled assets or its market position to minimize the other party's liability.

**(d) Payment.** Payment of amounts, if any, determined under this Section 2.7 shall be made in accordance with Section 5.1. All such determinations shall be made in a commercially reasonable manner and the affected party shall not be required to enter into any actual replacement Transaction in order to determine the Replacement Price or Sales Price as appropriate.

**(e) Damages Stipulation.** Each Party stipulates that the payment obligations set forth in this Article 2.7 for the damages incurred are a reasonable approximation of the anticipated harm or loss and acknowledges the difficulty of estimation or calculation of actual damages, and each Party hereby waives the right to contest such payments as unenforceable, an unreasonable penalty or otherwise.



### **3. Specifications, Weighing, Sampling and Analysis**

**3.1 Specifications.** Seller shall cause all Coal delivered to Buyer pursuant to a Transaction to comply with the Specifications set forth in Part One.

**3.2 Unit Train or Truck Weighing.** Shipments delivered into Unit Trains or trucks shall be weighed at Seller's expense by means of a certified batch weighing system or certified track or truck scale or in the absence of a batch weighing system or track scales for rail or truck scales, as set forth below. All scales shall be tested, calibrated, certified and maintained in accordance with applicable state regulations and the guidelines outlined in the National Institute of Standards and Technology Handbook #44. The weights determined thereby (absent manifest error) will be the basis on which invoices will be rendered and payments made hereunder. If the scales at the Source are not installed or are determined to be inoperative, then the weight of such Coal delivered shall be determined by: (a) for train delivery(ies) by (i) railroad weights, if available, or (ii) if railroad weights are not available, the average net weight per railcar shall be determined by the terms of the governing freight contract; or (b) for truck delivery(ies) by (i) Seller's scales or (ii) if such scales are not available, then (in the following order of priority) the scales of Buyer or the immediately preceding 30 day average net loading weight for each truck.

**3.3 Barge and Vessel Weighing.** Shipments delivered by barge(s) or vessel(s) shall be weighed at Seller's expense as determined by a certified belt scale or, if not available, by draft survey taken at the Delivery Point prior to the departure of the barge(s) or vessel(s) from the Delivery Point at Seller's expense. The weights thereby determined (absent manifest error) will be the basis on which invoices will be rendered and payments made hereunder. All such draft surveys at the Delivery Point shall be conducted by an independent surveyor (certified commercial marine surveyor for vessels) experienced in the conduct of draft surveys selected by mutual agreement of the Parties, or failing agreement, by Seller.

#### **3.4 Sampling and Analysis.**

(a) Seller will pay for and perform, or cause to be performed, the sampling of the Coal as required herein. Coal samples shall be taken by mechanical sampler that is in working condition and that has been bias tested in accordance with ASTM standards by an independent certified third party prior to delivery. Samples shall be taken on an "as-loaded" basis, and analyzed on an "as-received" basis. All sampling, sample preparation and analysis shall be performed in accordance with then current published applicable ASTM standards.

(b) The Seller's samples of Coal representing each Shipment and the analysis thereof as set forth above, shall be used to determine quality adjustments pursuant to Section 4.1 and any rejection rights pursuant to Section 4.2. Each sample shall be divided into three (3) parts in accordance with the then current ASTM standards and placed in separate airtight containers. One (1) part of each sample will be analyzed by the mutually selected independent certified laboratory; one (1) part shall be retained by the Seller or the independent certified laboratory (on Seller's behalf) for a period of forty-five (45) days or shipped as Buyer directs; and one (1) part shall be retained by Seller or the independent certified laboratory (on Seller's behalf) for a period of forty-five (45) days to be used for a referee analysis, if necessary.

(c) The parties shall select an independent certified laboratory by good faith agreement to perform a short proximate analysis on an "as-received" basis, which shall include total moisture, ash, BTU, sulfur and other data as required in Part One. Seller shall report, or shall cause to be reported, the results of the short proximate analysis to the Buyer, along with the Shipping Notice, by fax, telephone (to be confirmed promptly by fax) or other electronic means as soon as available, but in any event within forty-eight (48) hours of the completion of the loading of each Shipment.

(d) By notice to the Seller within one (1) Business Day after delivery of the Shipping Notice and analysis, and in any event prior to unloading of the Coal at the destination, Buyer may object to the analysis, and if so, Seller shall submit a retained sample to an independent testing laboratory selected by and unaffiliated with Buyer for an independent analysis. If the results of the independent analysis are within ASTM (interlaboratory) Reproducibility Limits, the original short proximate analysis and, as appropriate, any other Specification as set forth in Part One, shall control and the costs of the independent analysis shall be paid by Buyer. If such results for any Specification are not within such Reproducibility Limits, the results of the independent analysis shall control and the costs of the independent analysis shall be borne by Seller.

**3.5 Representative Presence.** Each Party has the right to have a representative present, at such party's expense, to observe the loading, weighing and sampling of the Coal. If either party should at any time question the accuracy of the scales at the Source, such party may request a prompt test and adjustment of such track or truck scales or batch weighing system at its expense by an entity mutually agreed upon by Buyer and Seller.





#### **4. Quality Adjustments; Rejection and Suspension Rights**

**4.1 Quality Adjustments.** If Coal delivered under a Transaction varies from the Specifications set forth in Part One and Buyer does not exercise its rejection rights under Section 4.2, quality adjustments shall be calculated pursuant to the formulas set forth in Part One.

**4.2 Buyer's Rejection Rights.** Upon delivery of a Non-Conforming Shipment, Buyer shall have the option, exercisable by notice to Seller within one (1) Business Day of Buyer's receipt of the short proximate analysis and additional analysis, if any, of the Coal provided pursuant to Section 3.4, of either (i) rejecting such Non-Conforming Shipment at the Delivery Point or en route, but prior to unloading from Transporter's equipment or (ii) accepting any Non-Conforming Shipment with a Contract Price adjustment agreed to between Buyer and Seller in a commercially reasonable manner. If Buyer fails to timely exercise its Rejection Rights under this Section 4.2 as to a Shipment, Buyer shall be deemed to have waived such rights to reject with respect to that Shipment only and the provisions of Section 4.1 shall apply. Buyer's failure to timely exercise such notice does not, however, constitute a waiver of its right to any adjustment provided for herein or in Part One with respect to such Non-Conforming Shipment. If Buyer timely rejects a Non-Conforming Shipment, title and risk of loss shall revert to Seller. Seller shall, at Buyer's election, replace the rejected Coal within a reasonable period of time but said period shall not exceed thirty (30) days after the rejection, provided that Buyer gives written notice to Seller of its desire for replacement Coal within two (2) Business Days after rejection of the Non-Conforming Shipment. In all events, Buyer and Seller shall cooperate to minimize the costs associated with the rejection of the Non-Conforming Shipment, all of which shall be for Seller's account.

#### **5. Settlements**

##### **5.1 Billing and Payment.**

**(a)** After the end of each month during the Delivery Period, Buyer and Seller shall provide the other with an invoice, setting forth, as appropriate, (i) the aggregate Contract Price owed to Seller for the Coal actually delivered to Buyer at each Delivery Point during the applicable month; (ii) any quality adjustments and supporting calculations determined pursuant to Section 4.1; and (iii) any Transportation or other charges owed by Buyer or Seller to the other pursuant to the Transactions. The receiving Party shall pay, by wire transfer, electronic funds transfer or other mutually agreeable method, in immediately available United States funds, the amount set forth on such invoice along with the necessary information enabling reconciliation to the relevant Shipment to the applicable payment address provided in Part One on or before the tenth (10th) day after receipt of a party's invoice (or if such day is not a Business Day, the immediately following Business Day). Notwithstanding anything to the contrary, either Party may send an invoice to the other Party at any time for liquidated damages pursuant to Sections 2.7 of these GT&Cs and payment shall be due within two (2) Business Days of the owing Party's receipt of such invoice. Any amounts not paid by the due date will be deemed delinquent and will accrue interest at the Prime Rate plus 2%, such interest to be calculated from and including the due date but excluding the date the delinquent amount is paid in full.

**(b)** A Party may, in good faith, dispute any invoice or any adjustment to an invoice rendered or adjust any invoice for any arithmetic or computational error within twelve (12) months of the date the invoice, or adjustment to an invoice, was rendered. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section 5.1(b) within twelve (12) months after the invoice is rendered or any specific adjustment to the invoice is made. If an invoice is not rendered within twelve (12) months after the end of the Delivery Period, the right to payment for such performance is waived. If the receiving Party in good faith reasonably disputes an invoice, it shall provide a written explanation specifying in detail the basis for the dispute and pay any undisputed portion no later than the due date. If any amount disputed by the receiving Party is subsequently determined to be due, pursuant to this Section 5.1, it shall be paid within two (2) Business Days of such resolution along with interest accrued at the Prime Rate plus 2% from and including the original due date but excluding the date paid. If after such determination any Party fails to pay amounts under any Transaction when due, in addition to the rights and remedies provided in this Agreement, the aggrieved Party shall have the right to: (i) suspend performance under any and all Transactions until such amounts plus interest at the Prime Rate have been paid, and/or (ii) exercise any remedy available at law or in equity to enforce payment of such amount plus interest at the Prime Rate.

**5.2 Netting.** The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing to each other on the same date through netting, in which case all amounts owed by each party to the other party during each billing period, including any related damages calculated pursuant to Section 2.7, interest, and payments or credits, shall be netted so that only the excess amount remaining due shall be paid by the party who owes it.



## **6. Force Majeure**

**6.1** To the extent either party is prevented by Force Majeure from carrying out, in whole or part, its obligations under a Transaction and that party (the "Claiming Party") gives notice and details of the Force Majeure to the other Party as soon as practicable, but not later than forty-eight (48) hours after the inception of the Force Majeure, then both parties shall be excused from the performance of its obligations (other than the obligation to make payments then due or becoming due with respect to performance prior to the Force Majeure). The party affected by the Force Majeure shall remedy the Force Majeure with all reasonable dispatch and will keep the other party advised as to the continuance of the Force Majeure event; provided however, that this provision shall not require Seller to deliver, or Buyer to receive, Coal at points other than the Delivery Point for the authorized Source including allowable substitutions under the Transaction. The non-Claiming Party shall not be required to perform or resume performance of its obligations to the Claiming Party corresponding to the obligations of the Claiming Party excused by Force Majeure.

**6.2** If Seller claims Force Majeure and is unable to meet all of its sales obligations under this or any other coal sales Transaction involving coal of a similar type and quality as the Coal, or if Buyer claims Force Majeure and is unable to meet all of its purchase obligations under this or any other of its coal purchase Transaction involving coal of a similar type and quality as the Coal, then any reductions in Seller's deliveries or Buyer's purchases (as applicable) shall be allocated on a pro rata basis among this Transaction and such other coal supply or purchase Transactions involving coal of the same type and quality as the Coal to the extent contractually permitted by this Transaction and such other coal supply or purchase Transactions.

**6.3** It is understood and agreed that settlement of strikes and lockouts shall be entirely within the discretion of the Party having the difficulty, and that the above requirement that any Force Majeure shall be remedied with all reasonable dispatch shall not require settlement of strikes and lockouts by acceding to the demands of the opposing party when such course is inadvisable in the discretion of the Party having said difficulty.

**6.4** If a Party's performance of a single-delivery, or spot Transaction is suspended due to an event of Force Majeure in excess of thirty (30) days from the date that notice of such event is given, and so long as such event is continuing, either Party, in its sole discretion, may terminate the Transaction by written notice to the other Party, and neither Party shall have any further liability to the other Party in respect of such Transaction except for the rights and remedies previously accrued.

**6.5** If a Party's performance of a multiple-delivery, or term Transaction is suspended due to an event of Force Majeure, either Party, in its sole discretion, may terminate affected deliveries or any portion thereof under such Transaction by written notice to the other Party, and neither Party shall have any further liability to the other Party in respect of such affected deliveries or portions thereof except for the rights and remedies previously accrued; provided that an event of Force Majeure lasting in excess of ninety (90) days from the date that notice of such event is given, and so long as such event is continuing, the non-claiming Party may, in its sole discretion, terminate the Transaction by written notice to the other Party, and neither Party shall have any further liability to the other Party in respect of such Transaction except for the rights and remedies previously accrued.

**6.6** The following shall not be considered Force Majeure Events, whether or not foreseeable: (i) a change in market conditions including the ability of Seller to sell Coal at a higher price, or Buyer or Buyer's customer to buy Coal at a lower price; (ii) the Party claiming excuse failed to remedy the condition and to resume performance under this Agreement with reasonable dispatch; (iii) a regulatory agency disallowing, in whole or in part, the pass through of costs resulting from this Agreement; (iv) the loss of Buyer's market(s) or Buyer's inability to use or resell Coal purchased hereunder; or (v) loss, failure, or depletion of Seller's Coal supply.

## **7. Events of Default and Early Termination**

**7.1** Notwithstanding any other provision of this Coal Transaction or any other agreement between the parties, in the event (each a "Default") either party (the "Defaulting Party") shall (A) become bankrupt or insolvent, however evidenced, or be unable to pay its debts as they fall due, (B) file a petition or otherwise commence a proceeding under any bankruptcy, insolvency, reorganization or similar law or have a petition under any bankruptcy, insolvency, reorganization or similar law filed or proceeding commenced against it, (C) have a liquidator, administrator, receiver or trustee appointed with respect to it or any substantial portion of its property or assets, (D) fail to pay any obligation to the other party (the "Performing Party") when due and such failure continues for more than one (1) Business Day, whether arising hereunder, or otherwise, (E) default with respect to any other agreement between the parties or (F) fail to provide adequate assurance of its ability to perform all of its outstanding obligations to the Performing Party hereto, whether hereunder, or otherwise, within 48 hours (but at least one Business Day) of a demand therefor when the Performing Party has reasonable grounds for insecurity; then in any such event the Performing Party may, at its sole discretion, immediately withhold and/or suspend deliveries or



payments upon notice and/or, by not more than 20 days' notice to the Defaulting Party specifying the Default, designate a day not earlier than the day such notice is effective as an early termination date in respect of all transactions and may terminate and liquidate all Transactions then outstanding by:

(i) Closing out and terminating each Transaction being liquidated, so that such Transaction is cancelled, and calculating a Settlement Payment (as defined below) for such Transaction payable to one party from the other, as appropriate, and any Breakage Costs (as defined below) incurred by the Performing Party and

(ii) Setting off (a) all such Settlement Payments owing to the Defaulting Party plus (at the Performing Party's election) any amount held as margin by the Performing Party, plus any or all other amounts due to the Defaulting Party hereunder or under any Transaction against (b) all such Settlement Payments owing to the Performing Party plus any or all Breakage Costs, plus (at the Performing Party's election) any amount held as margin by the Defaulting Party, plus any or all other amounts due to the Performing Party hereunder or under any Transaction, so that all such amounts shall be netted to a single liquidated amount payable by one party to the other; provided that any amount not then due which is included in such setoff shall be discounted to present value as at the time of setoff (to take account of the period between the time of setoff and the date on which such amount would otherwise have been due) at the applicable Federal Funds Rate for that period as determined by the Performing Party in any commercially reasonable manner. Such net amount shall be paid by the close of business in New York on the Business Day following the date of such termination, liquidation and set-off.

**7.2** The Performing Party's rights under this Non-Performance clause shall be in addition to, and not in limitation or exclusion of, any other rights which the Performing Party may have (whether by agreement, operation of law, in equity or otherwise).

**7.3** "Settlement Payment " means, with respect to an outstanding Transaction, an amount representing the outstanding Transaction's net present value (in U.S. Dollars) to the party entitled to receive compensation for the early termination thereof, determined as of or about the time such Transaction is liquidated by the Performing Party in any commercially reasonable manner.

**7.4** "Breakage Costs" means all costs and losses determined in a commercially reasonable manner, which the Performing Party may incur as a result of its terminating and liquidating a Transaction under this Non-Performance clause, including, without limitation, costs and losses incurred in maintaining, terminating and/or re-establishing any hedge or related trading positions, except for amounts covered by the Settlement Payment for such Transaction.

## **8. Miscellaneous**

**8.1** In the event that any provision (or portion of a provision) of this Agreement is declared to be illegal, invalid or otherwise unenforceable by a court of competent jurisdiction, the remainder of this Agreement (and of such provision) shall not be affected except to the extent necessary to delete such illegal, invalid or unenforceable provisions (or portion thereof), unless the deletion of such provision (or portion thereof) shall substantially impair the benefits of the remaining portions of this Agreement. Section headings contained herein are for convenience of reference only and shall not affect the interpretation hereof. Time is of the essence in all aspects of each party's performance hereunder and under any Transaction.

**8.2** Neither Party shall assign its rights or interests or delegate its obligations under a Transaction in whole or in part without the express written consent of the other Party, which consent shall not be unreasonably withheld, provided, however, that no consent shall be required for (i) the transfer of an interest in any Transaction to an affiliate by assignment, merger or otherwise or (ii) the transfer or assignment by Seller or its assign of all or a portion of its right to receive and obtain payment under a Transaction in connection with securitization or bank funding arrangements. The transferor shall remain jointly and severally liable with the transferee for the full performance of the transferor's obligations under this Transaction unless the transferee (i) assumes in writing all of the obligations of the transferor and (ii) provides the other Party with evidence of financial responsibility at least equal to that of the transferor. For the avoidance of doubt, the transferee shall only be liable for the full performance of the transferor's obligations so transferred or assigned, if any.

**8.3** Each party represents and warrants to the other party that, on the date hereof and at the time it enters into a Transaction: (a) it possesses all power, authority and applicable approvals (if any) necessary for it to enter into this Agreement and each Transaction; (b) this Agreement constitutes the valid and binding obligation of such party enforceable against it in accordance with the respective terms thereof, except as the enforceability may be limited by the effect of any applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity; (c) the execution, delivery and performance hereof or thereof





will not cause such party to be in violation of any other agreement or law, regulation, order or court process or decision to which it is a party or by which it or its properties are bound or affected; and (d) it has and will maintain all regulatory authorizations, certificates and documentation as may be necessary and legally required for it to transport, buy, sell or make sales for resale of Coal sold or purchased under a Transaction in interprovincial or international commerce. The parties agree that the Transaction hereunder constitutes a "forward contract" within the meaning of the United States Bankruptcy Code and that Buyer and Seller are each "forward contract merchants" within the meaning of the United States Bankruptcy Code. Each representation and warranty under these GT&C shall survive any delivery and payment under and termination of these GT&Cs and any Transaction.

**8.4** This Agreement may not be amended, modified or supplemented, except by a writing signed by both parties or by telecopies evidencing mutual agreement sent by each party to the other. No delay on the part of either party in exercising any right or remedy under this Agreement shall operate as a waiver thereof, nor shall any waiver on the part of either party, nor any single or partial exercise of any right under this Agreement, preclude any other or further exercise thereof or any other right under this Agreement. Each party's rights and remedies under this Agreement are cumulative and are not exclusive of any rights and remedies provided for by law, in equity or otherwise. Each party reserves to itself all rights, setoffs, counterclaims and other remedies which such party has or may be entitled to arising from or out of this Agreement.