**(3-23-2016)**

**Perkins Thompson Comparison of Major Provisions of MRC and PERC Agreements**

|  |  |  |
| --- | --- | --- |
| **Topic** | **MRC Agreement** | **PERC Agreement** |
| **Parties** | “Joining Member” and MRC | “Municipality” and PERC |
| **1. Term of Agreement** | Section 2.1. 15-year Initial Term with up to five 5-year Extension Terms (on 12 months’ notice, subject to MRC termination or Fiberight decision not to extend) for up to 40 years total. | Section 6 and Schedule A. Begins April 1, 2018 and there are two options: 10 years or 15 years, with an automatic renewal for the same duration unless terminated by either party with at least 12 months’ notice. |
| **2. Waste Delivery Commitment** | Section 3.1. “Joining Member shall deliver, or cause to be delivered, to the [Fiberight] Facility under the Master Waste Supply Agreement on an exclusive basis all Acceptable Waste generated within its borders the collection and disposition of which is under its control.”  Acceptable Waste is under Joining Member’s control if collected and delivered directly by Joining Member or by a hauler under contract and at direction of Joining Member.  Joining Member and MRC discuss and arrive at an “Estimated Delivery Amount” for annual delivery of Acceptable Waste. No penalty for failure to deliver Estimated Delivery Amount of Acceptable Waste itself, but:  -Penalty if Acceptable Waste is diverted to other facilities (Delivery Diversion charge).  -If MRC does not deliver 150,000 TPY to Facility, it owes a Delivery Sufficiency Payment to Fiberight and can assess a Delivery Diversion charge on Joining Member.  Joinder Agreement calls this a “commitment.”  States that Town is not required to use “solid waste flow control” ordinance to direct solid waste to Facility, but likely could not use flow control to direct waste to a privately owned facility (either Fiberight or PERC). | Obligation and an estimate:  Section 3.)(a) and (c) “The Municipality shall deliver all Acceptable Waste under its control that is generated within the Municipality to the PERC Facility.”  Section 3.)(c) “The Municipality shall deliver to the PERC Facility the available estimated tonnage of Solid Waste under its direct control; and (2) pay to PERC the tipping fee (the “Tipping Fee”) for each ton of Solid Waste delivered by the Municipality to the PERC Facility ....”  Acceptable Waste is deemed to be under the control of the Municipality if it is collected and delivered directly by the Municipality or by a hauler under Contract and at its direction.  Schedule A 3.) Requires Municipality to state an “Estimated Tonnage” – annual tonnage of MSW to be delivered by the Municipality. Parties acknowledge and agree not a guarantee Municipality will deliver minimum tonnage annually. “Estimated tonnage” a “good faith estimate of annual tonnage Municipality believes will be generated within it and is under Municipality’s direct control, and is subject to change due to increased recycling.” However, “Notwithstanding the fact the Estimated Tonnage is not a commitment” to deliver a minimum amount of MSW to PERC Facility, “the Municipality acknowledges and agrees” it is signing the Agreement in good faith “and that PERC is relying upon the Municipality’s commitment to deliver to the PERC Facility the post-recycled Solid Waste generated within the Municipality and under its direct control.”  If PERC becomes aware Municipality is not delivering all its waste under Direct Control to PERC Facility, and if unable to resolve issue, PERC has right to consider this a Deemed Termination, terminate Agreement and assess penalty. |
| **3. Tipping Fees and Adjustments** | Section 4.1. $70 per ton plus annual CPI adjustment. Except for force majeure or actions contrary to Agreements, no amendment to Tipping Fee unless Joining Member authorizes MRC to amend it by amending this Joinder Agreement. Joining Member agrees to consider in good faith amendment that is found reasonable and necessary by MRC. | Schedule A. 2.) and 4.) 15 years (2018-2033), $84.36; 10 years (2018-2028), $89.57, adjust annually by change in CPI; renewal terms are on same basis. A contract for fewer than 10 years priced on case-by-case basis at market rate. |
| **4. Existing and New or Expanded MSW Recycling and Reduction Programs** | Section 3.4. May continue existing MSW recycling and reduction programs. Must provide notice of new and expanded MSW recycling, reuse or reduction programs to MRC, and consult with MRC; if program involves organic MSW, may continue existing programs “substantially” as now, but must obtain prior consent of Fiberight for new and expanded programs. May institute “pay as you throw” without prior approval of MRC so long as all MSW generated within its borders and under its control continues to be delivered to Fiberight. | Schedule A. 3.)(a) Recognizes that Estimated Tonnage is subject to change due to Municipality engaging in “increased recycling, repurposing and composting” in accordance with the State’s solid waste hierarchy, and acknowledges that Municipality’s efforts to reduce its Estimated Tonnage through solid waste reduction, reuse and recycling do not violate the Agreement and will not result in a penalty. |
| **5. Unacceptable Waste** | Section 3.5. Joining Member shall not deliver Unacceptable Waste to the Facility and shall use reasonable efforts to offer local options for household hazardous waste disposal. Joining Member shall pay its full cost for and indemnify and hold harmless MRC and Fiberight from any liability, claim or damage arising from its delivery of Unacceptable Waste to the Facility. | Section 3.)(a) “The Municipality agrees to use its best efforts to avoid delivering any Unacceptable Waste to the PERC Facility and shall not knowingly mix any Unacceptable Waste with Acceptable Waste.” |
| **6. Alternative Waste Disposal Arrangements** | Section 6.2. Acceptable Waste that cannot be accepted at Fiberight Facility: 1) between expiration of PERC Agreement and Fiberight Commercial Operation Date is called “Bridge Capacity Waste”; and 2) after Commercial Operation Date, is called “Bypass Waste.” Both go to Backup Facility, Crossroads Landfill in Norridgewock, under 10-year agreement with Waste Management. Crossroads currently has capacity through 2025 and will apply for expansion permit. Fiberight investor Covanta could provide additional backup at Haverhill, MA facility, but no written agreement. Tipping Fee for Bypass is same as for Acceptable Waste; for Bridge Capacity, is in accordance with Agreement at MRC’s direction. Joining Member pays for transportation of Bridge Capacity Waste to backup facility. Fiberight pays for transportation costs to bring Bypass Waste to Backup Facility. | Bypass Waste goes to Juniper Ridge Landfill (“JRL”) in Old Town; if for temporary EPRC shutdown for maintenance repair, at regular MSW tipping fee; if for PERC permanent closure then at $60/ton. However, if MSW goes to JRL because of PERC’s permanent closure, it is MSW and not “bypass.” JRL is limited to 81,800 TPY of MSW until March 31, 2018 under current DEP permit. PERC is in process of amending agreement to allow use of other Casella facilities for additional backup, but no written agreement. |
| **7. Conditions to Commencement of Operations -- What happens if insufficient commitment of waste or lack of financing? When?** | MRC asks for commitment by May 1, 2016; under site lease, date for closing on construction financing and for commencement of construction is no later than January 1, 2017. Under Master Waste Supply Agreement, if Fiberight fails to commence Commercial Operation before January 1, 2020, that Agreement terminates automatically unless parties agree to extension. | Section 5.) recites that “After signing this Agreement,” such parties acknowledge and agree that PERC requires commitment from other municipalities and private businesses to assure continued operation of PERC Facility, and that PERC must receive commitments by February 18, 2017 to deliver in the aggregate, 180,000 TPY of “Acceptable Solid Waste.”  Section 7.) (c). Either party may terminate PERC Agreement if PERC receives insufficient written commitments to deliver Acceptable Waste. |
| **8. Oversight** | MRC is to oversee Fiberight operation. | No MRC oversight role contemplated. PERC to hold at least one municipal outreach meeting every 12 months between PERC management and non-owner municipal customers to exchange information. |
| **9. Indemnification, Dispute Resolution** | Section 8.1 and 8.2. Reciprocal indemnifications.  Joining Member to defend, indemnify and hold harmless MRC, each other Joining Member and their members, directors, elected officials, officers, agents and employees against claims resulting directly from any failure by Joining Member to perform fully in any respect, its obligations under the Joinder Agreement.  MRC to defend, indemnify and hold harmless Joining Member and its elected and appointed officials, officers, agents and employees from claims resulting directly from MRC’s willful or negligent act or omission, and its failure to perform fully, in any respect, its obligations under the Joinder Agreement.  Section 8.5 requires the parties to resolve disputes by good faith informal resolution during 14 days following written notice of dispute, followed by submittal of the dispute to binding arbitration under the American Arbitration Association’s commercial arbitration rules before a single arbitrator, unless they cannot agree, in which case there will be a panel of three arbitrators.  Section 8.7 contains a limitation of liability provision that bars a party’s recovery of indirect and consequential damages except for fraud.  Section 8.8 contains statement that Joining Member does not waive any immunities, defenses or limitations on liability by signing Agreement. | Section 8.) Broad reciprocal indemnity; PERC and Municipality each mutually agrees to indemnify, defend and hold harmless the other from all loss, liability, damage and expense caused by breach of Agreement, negligent or willful act or omission, or violation of applicable laws, regulations, permits or licenses. Indemnifying party controls conduct of litigation, but no settlement can be entered into without written consent of both parties.  Includes provision that Municipality does not waive any immunities, defenses or limitations on liability by signing Agreement.  Section 10.)(c) any issues arising under or related to the Agreement shall be litigated in State and federal courts having jurisdiction over the parties.  Section 10.) (d) limitation on liability - excludes liability for special, incidental, exemplary, punitive or consequential damages. |
| **10. Termination** | Section 10.  Agreement terminates upon expiration of the Master Waste Supply Agreement, but could terminate sooner.  Either party may terminate upon event of default of other party that is not cured within 30 days.  MRC has a right to terminate on 9 months’ notice at end of Initial Term or any Extension Term. (If Joining Members do not extend in sufficient numbers and MRC terminates Joinder Agreement, Master Supply Agreement and Site Lease, MRC must offer Fiberight notice of its option to sell building to MRC or to purchase Site from MRC. | Section 7.) Agreement terminates at end of term as stated in Schedule A unless automatically renewed upon expiration of term; or terminates:  -Upon parties’ mutual agreement;  -Upon a party’s material breach not cured within 60 days after receipt of notice of breach;  -Upon “Deemed Termination” by the Municipality (for failure to deliver all solid waste to PERC Facility);  -By either party if PERC receives insufficient written commitments to deliver Acceptable Waste (should it take a party asking to terminate if the deadline and commitments aren’t met?); or  -By either party in event of bankruptcy or insolvency proceedings.  Schedule A. 6.) also provides for early termination by Municipality on 90 days’ notice to PERC, but in case of such Municipality Termination or Deemed Termination, but within 30 days must pay amount equal to three times the average annual amount of Tipping Fees paid in the two years immediately preceding termination. |
| **11. Sharing of Rebates** | Section 4.0. Under the Master Waste Supply Agreement, Fiberight pays a rebate based on 30% of Tipping Fees and recovered material revenues that exceed the baseline revenues; the rebate is paid quarterly to MRC, which, under the Joinder Agreement, manages payment of rebates to Joining Members or offsets rebates against any amounts owed by Joining Members. | None under PERC Agreement, but separate Limited Partnership Agreement would be extended for remaining 20 to 25-year useful life of PERC Facility (as estimated by its engineer). Municipality would be part of limited partnership unless it transferred its interests subject to the Limited Partnership Agreement. |
| **12. For Charter Municipalities, fate of current PERC Funds (1) if leave MRC; (2) If remain in MRC; PERC Limited Partnership Interests.** | Exhibit B. Current Reserve Accounts with $26.6 million and Operating Accounts with less than $1 million are to be allocated by MRC:  - Site Capital Costs ($5 million);  - Departing Municipalities (Equity Charter Municipalities);  - Building Reserve ($7 million);  - Delivery Sufficiency Reserve Fund ($3 million)  - Reserve Fund (PERC Partnership costs, $1.167 million);  - Bridge Waste Transportation Fund ($1 million);  - Target Value Reserve Fund (remaining amounts to reduce Tipping Fees for 36 months). | Sixth Amended and Restated Agreement of Limited Partnership:  - Extends partnership by 25 years (to Dec. 31, 2043);  - Capital Accounts maintained for each partner;  - General Partners may make Quarterly Distributions;  - Partnership may make Tax Distributions and Liquidating Distributions.  Limited Partners may transfer interests. |