EXTRACTED From Mary’s email.

Now that we have the draft of the revised Agreement with UVDS, I more or less took a deep dive into it so I could understand it better and in particular so I could grasp the rate methodology. At our last meeting we discussed the prospect of Board Members sending in some comments on the Agreement. I have a few to offer. They are listed below in no particular order of importance. I wanted to get them to you ahead of our meeting on Monday.

1. General Organization. Although an amendment and restatement, the document clearly appears as an old contract with additional material added onto the end. I’d suggest that it be reorganized in the format of a normal agreement, with all the miscellaneous provisions in Section 5 moved to the end where they belong.

This could be done, but would be expensive (perhaps 16 hours of Counsel time, and a similar amount from the Agency Manager and Auditor). The time consuming part would be ensuring paragraph re-numbering and internal cross referencing was all properly updated. This can be done, but the agreement has worked well in its current form and Staff would prefer to work within the framework of the existing conditions, but seeks the Board’s input.

2. IOCR and CDP (Primarily Section 18). It appears that the concept of IOCR came about during formulation of the CDP, the concept being that the Agency might authorize IOCR to function more or less as a sinking fund to pay for CDP costs.

This comment is correct in that IOCR was created in conjunction with the CDP, and as a way to pay for the capital costs of the project, and for future capital projects. It is more appropriate to call it a capital projects fund than a “sinking fund”.

a. As I understand it, the Contractor deposits 99% of Agency authorized IOCR quarterly (minus some allowance for taxes?) into a separate account that earns interest.

That is correct.

i. Who can draw on that account and for what purpose? Are there funds on deposit? Can they be drawn on for Phase Two?

The Company can draw on the account, but only with the express permission of the UVA Board and only for specific projects as approved by the UVA Board. There is presently approximately $305,000 on account, of which $300,000 has been designated by the Board to Phase 2. This completes UVA’s commitment to Phase 2. The small amount of remaining funds will remain on account until the Board determines a future use for them.

b. How does IOCR factor into the rate methodology? (18.3(d) in particular is confusing to me)

Effectively, it does not for calculation purposes. Base rates are determined in accordance with the methodology. Should the Board choose to collect IOCR in any given year, the additional funds identified by the Board are added to the base rate. For instance, if the base rate indicated the need for a 2% rate increase, and the Board wanted to collect an additional $100,000, which is approximately equivalent to a 1% increase, the customer then would actually see a 3% rate increase.

c. Per 18.3(c), it appears that IOCR that is not created by action of the agency drops through to the Contractor. Is that correct? Is this an addition to what the Contractor earns pursuant to the Operating Ratio?

IOCR is created by the Agency by Board action and kept in trust for Agency use. If the Agency foregoes creating the IOCR then excess revenue is utilized in reducing the rates for the next year.

d. Generally, all of Section 18 appears to have been written years ago when CDP was established. We also appear to be nearing the Phase TWO CDP. It seems to me that Sections 18.4 - 18.6 in particular should be revised to speak in present terms. In that regard, I’d also like an explanation as to why revenues and expenses are split 75%/25% between Contractor and Clover Flat, however, Clover Flat pays no Phase Two costs. See in particular, 18.2(b). I realize this was likely a previously negotiated term, but can you give me some background on why this exception was made? Unless I am missing something, the relocation from the temporary to a permanent space for CDP frees up landfill space which I think would benefit Clover Flats.

Section 18 will be re-written in present tense. The 75%/25% split was based on the percentage volumes of waste entering the facility, i.e. most of the waste was from UVDS customers, while a smaller percentage was self-haul. Thus UVDS rate payers payed for the larger percentage of the costs. For Phase 2, UVA is paying for $300,000 of the roughly $2M costs, while CFL is picking up the rest. It is correct that moving the Phase 1 CDP is beneficial in that it frees up landfill space. It was placed in that location originally because the final location would not be available for many years. Thus this move was factored into the costing for the facility.

3. Diversion. Help me understand which party is ultimately responsible for complying with diversion requirements. If it is the Agency, we appear to have no direct contract with UVR and thus very little control over whether diversion requirements can be met, and no remedy if they are not. Related to that issue, I do see that in 17.7(b-c) you are apparently authorized to make some decisions with respect to diversion. I’d suggest that you provide a recommendation to the Agency which then acts to formally approve or disapprove. Revenue from sale of diverted material is included in setting rates. How does that happen if UVR is the one selling the stuff and collecting the revenue?

Diversion requirements per AB 939 are the responsibility of the Agency. We do so by setting the requirements in the contract for what needs to be diverted. For instance, food waste is diverted from the landfill because the contract provides funds and requires UVDS to develop a program to do so. If UVDS fails to implement those programs, they are in violation of their contract. UVAs responsibilities largely stop once the material is transferred to a legitimate third party recycler, such as UVR or dozens of other outside vendors. For instance, if wood chips are diverted from the landfill and sold to a waste to energy plant in good faith that subsequently decides not to use them, that is not a UVA issue.

Specific to UVR and the rates, at the beginning of the rate set process UVR provides a fixed cost for their services based on the known market (revenue) and their expenses. During the year if market prices change dramatically UVR benefits or loses based on that, and UVA is not effected. Of course, the next year in setting rates UVR’s fixed cost will change, and in that way the recycling market’s cost ultimately impact the rates.

4. Affiliates. Clover Flats and UVR are affiliates of UVDS. I suggest we add a definition of Affiliate to the Agreement. I also suggest that we add provisions that allow the Contractor to enter into agreements with Affiliates but stipulate that they should be arms length and on market rate terms. I am not as concerned about the current situation as I might be with a subsequent approved assignee of this agreement.

All agreements are expected to be done at market rate, but we have added additional definitions and provisions to make this clearer.

5. Section 2.3(a). It doesn’t seem necessary to include the data in this section, merely state that each Member gets a credit, particularly since the data is not current. Agreed

6. Section 2.3(b). I would like express language that clarifies that street sweeping services are not Solid Waste Handling Services. I think it is evident in the document but given that St Helena may enter into discussions with the Contractor for street sweeping services I want to confirm and clarify that those two parties are free to enter into a separate agreement on terms mutually agreeable to those two parties. Agreed

7. Section 4. Term. At the end there is a statement that provisions of Section 6 remain in force. Specifically what provisions? I’m not sure what this relates to and Section 6 is quite lengthy itself. Essentially, all provisions. Jeff has made changes to clarify.

8. Section 6. Has anyone reviewed the amount of the required performance bond to determine its adequacy? For example, I assume it might be called upon to pay liquidated damages and for other breaches. I’d appreciate some explanation regarding how the amount was determined. Amount came from similar agreements; increased from $25K to $100K; also added a percentage multiplier to account for inflation over time.

9. Section 6.2. Performance reviews. I suggest that 6.2(a)(1) be revised to allow the Agency top designate an independent third party to conduct the review, provided that party has knowledge of the industry. We believe it already does that, but will add words to clarify.

10. Section 6.3(a). This references Exhibit D , the liquidated damages provision. The obligation to maintain a complaint log is referenced in 9.3 I’d suggest we add language to require periodic reporting regarding the logs (perhaps quarterly) to the Agency. Agreed

a. 6.3(b), third paragraph. This paragraph effectively tolls termination that would be effective 5 days after notice. To be complete, it needs more dates, specifically how many days after request the meeting must take place, and how many days the Manager has to provide the written explanation. Have modified to make clearer.

b. 6.3(e). The same tolling provision appears in the liquidated damages section. If the parties have already agreed to liquidated damages for certain service items and the amount, why are we establishing a procedure to dispute them? The dispute idea is really contrary to the whole idea of liquidated damages. Propose leave as is. The Company would not be grieving the amount of the penalty, but they have the right to grieve if imposition of the penalty is fair.

c. If the Agency takes possession and performs services under 6.3(h) and contracts to have the work performed, where is the Agency’s right to collect costs? Also, note that there is no subparagraph (2) in this section; it goes from (1) to (3) Will make clear and fix the numbering.

11. Section 7.5. Arbitration. Considering it is the parties’ apparent intent, I suggest we add language that arbitration is the exclusive remedy available to the parties. (Staff believes the proper reference is to Para 7.1) The contractor is limited by this paragraph as written. However the Agency reserves the right to go to court in a health emergency. Will make clear.

12. It seems to me that there is not much to arbitrate in the case of some of the defaults in 6.3(g). In particular I refer to (5-7), (9) (10), (11). We recommend leaving in as the contractor has due process rights in all cases.

13. Section 15. Add a provision stating how long records must be kept. In most cases, 5 years. Will do.

a. What are route audits? I don’t know that we’ve ever received any report on them but I could very well be wrong on that. 15.2 What is a route audit? Don’t know I’ve seen one.

We (they agency) have not done one recently, but a route audit would be to look at the route a truck is taking and to determine if that is the most efficient route. The Company does these regularly.

14. 17.6(b). The second sentence is incomplete. Will fix

15. Exhibit B. I don’t see any definition of Development Expenses. It appears we also need a definition for Allowable Fuel Expense. Removed Development Expenses from example. Changed title of definition from “Adjusted Allowable Fuel Expenses” to “Allowable Fuel Expenses”

a. The list of Major Recoverable Expenses in the definition includes amounts to satisfy bond covenants. However the lead in statement to the definition of Major Recoverable Expenses does not include Bond Covenants. Which is it? Added “Financial Covenants to the Definition of Major Recoverable, changed title of subsection c. under Major Recoverable to Financial Covenants and updated the last line of the subsection to Financial Covenants.

b. Other Allowable Non-Fuel Expenses. Can we discuss (f) Leases? Specifically what is the difference between third party and inter-company? Third party is unrelated to UVDS. Inter-company – changed to affiliate. Are intercompany leases between UVDS and UVR and Clover Flats? (Perhaps this is the place where we should specify they must be on arms length terms and for market rates.) How does this provision relate to the terms in “Other Recoverable Expenses” (d) which sets a reasonableness standard related to the cost of third party leases? Revised set up of Leases in “Other Allowable Non-Fuel Expenses”

c. I don’t understand the effect of (g) which makes landfill expenses in excess of $1,120,000 “Recoverable but not allowable for the application of the Operating Ratio.” In 2007 we instituted a maximum, adjusted by CPI, on the amount UVDS could receive profit on. In 2007 the parent company (owners), received profit twice. Once from UVDS rate payers and again when UVDS hauled to CFL.

d. Please clarify how the Operating Ratio is determined and paid. The Operating Ratio is the amount of profit (11.5%) UVDS is guaranteed to receive on Allowable Expenses. At the outset, it appears that the percentage is used to back into the rate structure after tallying up allowable expenses and revenues. But then there are some exclusions such as found in the definition of “Recoverable Expenses”. Perhaps an example would help. See Section IV of Exhibit B, step 9 for the example of how the Operating Ratio is utilized in the calculation of rates.

e. Attachment 2 to Exhibit B should be updated to include a more recent and complete calculation in order to aid in understanding the methodology. Replaced.

Member Mohler Comments:

Hi Steve,

Finally completed review of UVDS contract. I appreciate the incorporation of the amendments into one document. However, most of my comments relate to these old amendments in that some old language is carried over that is no longer relevant and can be eliminated/modified. Overall the concept of the agreement is good but let’s take this opportunity to bring it up-to-date so it will last for another 10+ years.

Item 7 below discusses the reason for the San Anselmo attachment.

1. Previous information about credits not needed in section 2.3 just current. Agreed, same as Mary 5
2. Section 6.1 – should we include some type of simple escalator provision for performance bond? Seems like a big increase from $25 to 100K but I understand the increase is large because we had not revised contract for some time. Agreed, same as Mary 8
3. Section 6.2(a)(2) – add language that a consultant to the Board may be used for audit. Agreed, same as Mary 9
4. Section 15.1 – specify general parameters for the record keeping, e.g., record management, location, number of retention years, etc. Agreed, same as Mary 13
5. Section 17.7(b) Board should approve changes to diversion programs—agreed, will add
6. Section 18 is so confusing. Do we need to discuss Phase 1 since we refer to 2007 agreement? Does IOCR only fund CDP? Need a mechanism for reporting IOCR with annual rate setting resolution. Agreed, See Mary 2
7. Rate Methodology – this section uses actual numbers that are out of date and not helpful. The use of formulas is confusing not beneficial. This is an opportunity to clarify this section by using wording that clarifies and better describes this process. I have read numerous agreements from other jurisdictions/JPA and found that the Town of San Anselmo does a nice job of describing their methodology which is very similar to ours (I think). I would suggest using their example and making appropriate modifications to update this section….mostly cutting and pasting

The Town of San Anselmo’s methodology would require the need to return to a detail review on all expenditures and does not appear to address allocated costs amongst our haulers various affiliates.

When the UVDS methodology was switched to a hybrid consisting of a detail review and Consumer Price Indexing (CPI), a detail examination was performed at the time of the allocations amongst the companies and the costs that would be subject to CPI. The goal with the current UVDS methodology is to find a balance between a detail review and the use of CPI to minimize the cost to the Agency of the UVDS rate review and to focus the review on the higher risk areas.

1. It is confusing how IOCR is factored into Rate Methodology – clarification needed. See Mary 2.b
2. Are recycled diverted waste included in rates? I thought UVR received profits and losses? Am I missing something here? See Mary 3
3. My preference is to prepare a near-final draft of this contract, move to CFL contract, then approve them together. –Staff agrees

Margie