



# UNION COUNTY UTILITIES AUTHORITY

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Resolution: 32-2015

Date: April 15, 2015

## RESOLUTION OF THE UNION COUNTY UTILITIES AUTHORITY AUTHORIZING PAYMENT TO COVANTA UNION, INC. OF UNDISPUTED AMOUNT OF THE SHORTFALL PAYMENT FOR 2014 PURSUANT TO THE AMENDED AND RESTATED WASTE DISPOSAL AGREEMENT FOR THE OPERATION OF THE UNION COUNTY RESOURCE RECOVERY FACILITY

APPROVED AS TO FORM:

Joseph C. Bodek  
Clerk of the Authority

APPROVED AS TO SUFFICIENCY OF FUNDS

YES  NO  NONE REQUIRED  
UNION COUNTY UTILITIES AUTHORITY

By: Joseph C. Bodek

By: Thomas M. Brennan  
THOMAS M. BRENNAN  
Deputy Executive Director-Comptroller

	PRESENT	ABSENT	AYE	NAY	ABSTAIN	MOTION	SECOND
<i>Badri</i>	7		7			7	
<i>Jackus</i>	7		7				
<i>Kahn</i>	7		7				
<i>Kennedy, (Secretary)</i>		7					
<i>Kulish</i>	7		7				
<i>People (Treasurer)</i>	7		7				
<i>Scutari</i>	7		7				
<i>Erdos (Vice-chair)</i>	7		7				7
<i>Eastman (Chairman)</i>	7		7				
<i>Bonanno (Alternate)</i>	7		7				
<i>Lombardo, (Alternate)</i>	7						

**RESOLUTION OF THE UNION COUNTY UTILITIES AUTHORITY  
AUTHORIZING PAYMENT TO COVANTA UNION, INC. OF UNDISPUTED  
AMOUNT OF THE SHORTFALL PAYMENT FOR 2014 PURSUANT TO THE  
AMENDED AND RESTATED WASTE DISPOSAL AGREEMENT FOR THE  
OPERATION OF THE UNION COUNTY RESOURCE RECOVERY FACILITY**

**WHEREAS**, pursuant to the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq. (the “Act”), each county within the State of New Jersey is designated a solid waste management district with responsibility for the development of a solid waste management plan setting forth the solid waste disposal strategy to be applied in the district; and

**WHEREAS**, the County of Union (“County”) has previously developed the Union County District Solid Waste Management Plan (“County Plan”) in accordance with the Act for the purpose of, among other things, managing the disposal and/or recycling of solid waste generated within the County; and

**WHEREAS**, the Union County Board of Chosen Freeholders (“Freeholders”) has designated the Union County Utilities Authority (“Authority”) as implementing agency for the County Plan, in accordance with the Act; and

**WHEREAS**, the County Plan was amended in response to Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, et al., 112 F. 3d 652 (3d Cir. 1997), cert. den. 522 U.S. 966 (1997) (“Atlantic Coast”) to, among other things, define the County's disposal strategy, based upon voluntary contracts, as to Solid Waste Types 10 and 25, including the lease by the UCUA to Ogden Martin Systems of Union, Inc. (now known as Covanta Union, Inc.) of the Union County Resource Recovery Facility (“UCRRF”) and the real property and improvements upon which the UCRRF is constructed; and

**WHEREAS**, on prior occasion pursuant to formal resolution, the County and the Authority authorized negotiations with Covanta to amend the Facility Lease, and Amended and Restated Waste Disposal Agreement (“Disposal Agreement”) to extend their respective terms in exchange for modifications of the provisions, among other things, for annual lease payments and sharing of revenues generated at the UCRRF; and

**WHEREAS**, the Authority and Covanta successfully concluded the negotiations, resulting in amendments of the Facility Lease and Disposal Agreement, and a refunding or refinancing of certain outstanding Authority solid waste facility bonds and the issuance of new bonds as well as the extension of, and various modifications to, the Facility Lease and the Disposal Agreement; and

**WHEREAS**, as a result of a Verified Petition filed by the Authority with NJDEP and the Division of Local Government Services within the Department of Community Affairs, pursuant to the McEnroe Act, N.J.S.A. 13:1E-136 et seq., a Conditional Order of Approval was issued on October 13, 2011 authorizing modifications to agreements with Covanta that provided for the lease and operation of the UCRRF primarily for the processing and disposal of certain solid waste generated within the County; and

**WHEREAS**, coincident with the modifications of the Facility Lease and Waste Disposal Agreement, the County adopted an amendment to the County Plan reaffirming regulatory flow control over the delivery of all Processible Waste generated with the County to the UCRRF for disposal consistent with the holding of the United States Supreme Court in United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330, 127 S. Ct. 1786, 1797 (2007), that permits a publicly-owned facilities to direct solid waste for disposal consistent with the Commerce Clause of the United States Constitution; and

**WHEREAS**, pursuant to the Disposal Agreement, as amended, the Authority and Covanta have correlative responsibilities for the delivery and processing of solid waste and are required to confirm payment obligations for each calendar year of their contractual relationship; and

**WHEREAS**, in connection with the Disposal Agreement, the Authority is permitted to review the records and information made available to it by Covanta to assess and confirm the extent to which Covanta has mitigated or sought to mitigate projected shortfalls in acceptable waste delivered to the UCRRF on behalf of the Authority during a given year; and

**WHEREAS**, Covanta notified the Authority in 2015 that, pursuant to Section 4(b) of the Disposal Agreement, the Tonnage Shortfall Amount for 2014 totaled \$2,645,555.00; and

**WHEREAS**, on prior occasion pursuant to duly adopted resolution, the Authority retained the accounting firm of Lerch, Vinci & Higgins, LLP ("LVH") to assist it in reviewing and analyzing the above-mentioned records and information made available by Covanta for the delivery of solid waste to the UCRRF during calendar year 2014; and

**WHEREAS**, LVH is currently in the process of completing its review and analysis of Covanta records and information pertaining to solid waste deliveries and the obligations of the parties under the Disposal Agreement, and will issue a Report detailing the shortfall payment due to Covanta for 2014; and

**WHEREAS**, LVH was authorized to perform a similar review and analysis of Covanta records and information pertaining to solid waste deliveries and the obligations of the parties under the Disposal Agreement for 2013, and determined in a Report, dated January 21, 2015, that the shortfall payment due to Covanta for 2013 was \$939,746; and

**WHEREAS**, pursuant to Section 4.09 of the Disposal Agreement, in the event of a dispute as to an amount due and owing pursuant to the terms of Disposal Agreement, after notice to the party to whom the payment is due as to the disputed amount, the other party is required to pay the undisputed amount and place the disputed amount in escrow with the Trustee, pending a resolution by the parties of the amount in dispute; and

**WHEREAS**, on prior occasion pursuant to duly adopted resolution, the Authority approved the remittance of a partial undisputed payment to Covanta in the amount of \$500,000 pending agreement between Covanta and the Agreement as to the disputed balance remaining due for 2013; and

**WHEREAS**, in light of the Report subsequently issued by LVH establishing the shortfall payment amount for 2013 at \$939,746 consistent with the obligations of the parties under the Disposal Agreement, the Authority authorized by duly adopted resolution an additional payment to Covanta of \$439,746 as the undisputed amount due for the shortfall payment in 2013, subject to further discussions between the parties to resolve the amount in dispute based upon Covanta's demand for \$2,064,138; and

**WHEREAS**, the methodology for the calculation by Covanta of the Tonnage Shortfall Amount for 2014 was similar to the methodology utilized by Covanta to determine the 2013 Tonnage Shortfall Amount, and the Authority believes undisputed portion of the Tonnage Shortfall Amount for 2014 will be at least equal to the amount of \$939,746 determined by LVH to be undisputed for 2013; and

**WHEREAS**, in order to fulfill its obligations pursuant to Section 4.09 of the Disposal Agreement, the Authority wishes to authorize the payment by the Trustee to Covanta the sum of \$939,746 as and for the undisputed amount due to Covanta for 2014, subject to the findings of LVH after its review and analysis of Covanta records and information pertaining to solid waste deliveries, and any additional amounts as may be deemed to be undisputed, and retaining the disputed amount in escrow with the Trustee, pending a resolution by the parties of the amount in dispute for 2014; and

**WHEREAS**, the Authority believes that the authorization of the payment by the Trustee to Covanta the amount of \$939,746 as and for the undisputed amount due to Covanta for 2014, subject to the findings of LVH after its review and analysis of Covanta records and information pertaining to solid waste deliveries, and any additional amounts as may be deemed to be undisputed, is consistent with its contractual obligations under the Disposal Agreement and is necessary for its efficient operations and to continue to provide effective solid waste disposal services in the County at reasonable rate;

**NOW, THEREFORE, BE IT RESOLVED** by the Union County Utilities Authority as follows:

- 1) The Authority hereby authorizes a payment by the Trustee to Covanta of \$939,746 as and for the undisputed amount of the shortfall payment due for solid waste disposal services provided in 2014 consistent with the terms of the Disposal Agreement, subject to the findings of LVH after its review and analysis of Covanta records and information pertaining to solid waste deliveries in 2014, and any additional amounts as may be deemed to be undisputed, and retaining the disputed amount in escrow with the Trustee.
- 2) This resolution shall take effect immediately