

ISSUES RAISED BY AMERICAN PUBLIC POWER ASSOCIATION FOR SALES TO PUBLIC POWER ENTITIES

Some WSPP public power and rural electric cooperative entities (largely through the American Public Power Association) have raised issues that they have faced in using the WSPP Agreement to buy physical power, not just hedges. Some of these issues may be addressed by a “bolt-on” WSPP addendum (not part of the filed WSPP Agreement, but available for optional use) while others may be more appropriately addressed as possible amendments to the Agreement.

The Administrative Committee solicits Members’ views about whether WSPP should pursue these matters. The following issue description is not intended to reflect any views of the WSPP itself. At the OC meeting, we will ask for views about whether the Contract Subcommittee should address these issues.

1. Giving Parties the Option to Declare Failure to Deliver or Receive an Event of Default (WSPP Section 22.1)

Under the WSPP Agreement, the failure of the Seller to deliver power is not a default (though it is non-performance necessitating payment of damages). This result is not attractive for some Purchasers and can be inconsistent with their desire and need for actual delivery. Default, which could be defined to occur after, for example, a series of failures, would trigger a much stronger remedy.

2. Change Default Provision to Have Money Due Only From Defaulting Party (Sometimes Known as “One way Termination”) (WSPP Section 22.3)

The WSPP Agreement provides for a mark-to-market approach upon Default by either party; that is, even if the Seller commits the Default, the Purchaser may have to come up with the money to mark the transaction to market if the Seller is “in the money” at the time of its default. Apart from a bankruptcy scenario, this risk is realized if the Purchaser elects termination/liquidation, which it is not obligated to do, but if there is Seller Default and Seller is in the money, then Purchaser has no Default remedy. Note, current Agreement allows payout over time in some circumstances.

3. Risk of Collateral Calls (WSPP Sections 22.1, 22.3 & 27)

The WSPP Agreement allows Seller to call for collateral when there is a right to credit assurances under § 27, which may arise when Seller is “in the money” (particularly if the delta is substantial) and the Purchaser is “out of the money.” A concern is expressed that a situation could arise where Purchaser is in compliance with all of its payment obligations but be put in violation by a call for collateral which may be more than it can meet. Load serving entities such as smaller municipals and cooperatives are typically not structured to hold large amounts of unencumbered assets because their function is to provide power to their members on a non-profit basis at the lowest possible price.

4. Governing Law (WSPP Section 24)

In some cases, municipals or other public power entities are precluded by applicable law from agreeing to a contract interpreted according to the law of another state.

5. The Ability for Purchaser to Run Other Generation to Cover (WSPP Section 21.3(d))

There is a concern that the WSPP Agreement is not clear as to whether a Purchaser can get paid for running its own generation to cover a failure to deliver by a supplier.

This issue appears relevant to a discussion the Contract Subcommittee has addressed without consensus: additional remedies for cuts shortly before or during the delivery hour.

6. Conform WSPP Agreement Section 4.4 with EAct 2005 Amendments to Federal Power Act

Existing WSPP Section 4.4 is not technically in conformance with the EAct 2005 amendments to the Federal Power Act as it should also refer to “other cooperatives” rather than just “Rural Utilities Service cooperatives.”