

# WSPP Inc.

Operating Committee Meeting Fall 2008

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**WSPP BASIC TRAINING**

**WSPP AND**

**THE WSPP AGREEMENT**

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**Note: Every attempt was made to assure the accuracy of these training materials. They contain no legal opinions or formal contract interpretations of WSPP, and contain no evidence of what the Agreement means.**

# WSPP INC.

## INTRODUCTORY CONCEPTS

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- WSPP is a not-for-profit, income tax exempt, Utah corporation. WSPP has members (no shareholders) and officers, but has no operating office or employees. WSPP has funds, the WSPP Agreement, and an OATT.
- WSPP has existed on a permanent basis since 1991.
  - An early experiment in market rates, the organization evolved from the experiment, to a contiguity requirement, to today's open membership.

# WSPP INC.

## INTRODUCTORY CONCEPTS

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- WSPP Agreement is a widely-used master power sales agreement, for physical delivery (what do we mean by physical, and why emphasize it?)
  - Physical (forwards) versus futures; and what about daisy chains and bookouts?
- What does “WSPP” stand for?
  - Previously “Western Systems Power Pool,” but “Western” was a misnomer. Because the Agreement is used in many parts of the U.S., the corporation renamed itself WSPP.

# WSPP INC.

## INTRODUCTORY CONCEPTS

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- Over 300 members (fewer active members) from all market sectors – IPPs, IOUs, electric cooperatives, and public utilities – members are both FERC jurisdictional and non-jurisdictional.
- WSPP Agreement is FERC filed and approved. What does this mean and what doesn't this mean?
  - Members need their own market based tariffs (or can cost-based trade under the Agreement).

# WSPP INC.

## INTRODUCTORY CONCEPTS

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- More conceptually, from commercial and regulatory standpoints, what function does WSPP serve?
    - Enhances market liquidity (ease and extent) in bilateral markets. Liquidity means more counterparties, and enhanced competition.
    - FERC promotes competition generally and in many regions via RTOs and ISOs. How does bilateral market compare to centralized (RTP-ISO markets)?
    - Products and pricing.
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# WSPP INC.

## INTRODUCTORY CONCEPTS

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- Why an OATT?
  - Order No. 888 required that WSPP file an OATT. This tariff is available to non-members as well as members. It applies only to members' facilities which are not subject to an open access transmission tariff.
- WSPP operates a website containing all of its basic documents, educational documents, postings by any member, listings of members and their traders and representatives, and a page to post power for sale or offers to trade. [www.wspp.org](http://www.wspp.org)

# WSPP CORPORATE AND GOVERNANCE

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- Not-for-profit corporation, under Utah law.
  - Articles of incorporation; bylaws (§ 8.1.1)
  - Members; not shareholders
  - EC is the Board of Directors. EC elects officers (which also are the administrative committee).
  - OC is extra-legal, but no less important.

# WSPP CORPORATE AND GOVERNANCE

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- Each of EC and OC consist of representatives and alternates of all members. EC (§ 8.1) and OC (§ 8.2) govern WSPP (officers govern day to day). Article 7 (Administration); Article 8 (EC and OC).
- Each member receives one vote on each Committee. WSPP Committees vote on changes to Agreement. No amendments except upon a 90% affirmative vote of voting members (present or by proxy).
- Is 90% productive or unproductive?
- Is 90% OC approval of an amendment required for EC to consider? See §§ 8.2.2 and 8.2.3.

# WSPP CORPORATE AND GOVERNANCE

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- Operating Committee meetings are well attended and provide opportunities for traders to meet and greet, develop new trading relationships, and discuss possible transactions.
- Contract subcommittee of Operating Committee meets to address and develop revisions to the WSPP Agreement to ensure that the agreement contains up to date terms and satisfies needs of members. Current contract issues and cases are also discussed.
  - Open involvement
- Task forces and other ad hoc groups.

# WSPP CORPORATE AND GOVERNANCE

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- Administrative Committee (officers) prepares budgets. § 7.2. Operating expenditures have been limited. Members have not been assessed operating costs for many years (but can be assessed under § 7.3); costs have been funded by new members' fees of \$25,000 each.
- Books and records available for inspection. § 7.6
- Antitrust awareness.

# CONTRACT LAW FRAMEWORK

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- You've joined WSPP, or you've just become a trader. Now what?
  - WSPP Agreement enables you to trade, meaning, enter into contracts for transactions, under terms WSPP terms and additional terms to which you and counterparty agree in a Confirmation.
- To understand the WSPP Agreement, you should understand how a contract is formed, breaches, and remedies. So, let's pack a one-year law contracts course into an hour or less. We will cover the contract law framework, and then discuss WSPP Agreement against that framework.

# CONTRACT FORMATION

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- What is a contract? A binding agreement to do, or refrain from doing, a thing, such that one party is entitled in law to a remedy if the other party fails to perform.
- Who is bound? Only the counterparties, which have “privity” with each other. No other parties (e.g., in a daisy chain) have rights or obligations with respect to the counterparties’ contract.

# CONTRACT FORMATION

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- Offer and Acceptance
    - A deal is enforceable only if a K (law school term: “K” means contract) between counterparties.
    - K requires (a) agreement = offer and acceptance (meeting of the minds/mutuality) as to material terms and (b) consideration (an exchange of value)
    - If offer expires or is revoked before acceptance, no K can arise; an offer can be made open ended, or can expire on its own terms.
    - Rejection of an offer terminates the offer, even if ahead of the expiration point.
    - Solicitation of bids is not an offer, but bids usually are offers.
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# CONTRACT FORMATION

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- Uniform Commercial Code: What is it; how relate to power sales? (U.C.C. Article 2- sale of goods—is wholesale power goods?)
- UCC Variant: UCC provides that a definite and seasonable expression of acceptance constitutes legal acceptance, even if the acceptance states terms additional to or different from those offered or agreed upon, but if acceptance to the additional or different terms is made subject to assent, it is a counteroffer (U.C.C. 2-207(1)).

# CONTRACT FORMATION

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- UCC Effect of additional terms consistent with offered terms (Merchants): If the parties are both merchants, proposed additional terms become part of the contract unless (i) the offer expressly limits acceptance to the terms of the offer; (ii) the additional terms would materially alter the contract; or (iii) the offeror notifies the offeree within a reasonable time that he objects to the additional terms (U.C.C. 2-207(2)). WSPP provisions pin this down.

# CONTRACT FORMATION

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- But, terms that contradict offer provisions do not become part of the contract; contract is the offer, the terms agreed in the acceptance, plus terms implied by the UCC to replace conflicting terms (U.C.C. 2-207(2)).
- So, under UCC a signed written offer by a merchant to buy or sell goods, which gives assurance that it will be held open, is not revocable for lack of consideration during the time stated (or if no time stated, for a reasonable time), provided that the period of irrevocability can in no event exceed three months (U.C.C. 2-205).

# CONTRACT FORMATION

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- Material terms.
  - Agreements to agree are unenforceable – “General Motors” agrees to sell its Cadillac Division at a price to be negotiated. Why? Lack of material terms.
  - But, if a material term is to be set by an objective standard, e.g., a discernible market value such as an index, that term will be enforced. Similarly, quantity can float, e.g., all-requirements contracts or all-output contracts.

# CONTRACT FORMATION

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- Consideration: Exchange of Money or other Value = Mutuality
  - Agreement is enforceable only if supported by value: money or mutual performance obligations, or reliance.
  - Consideration is equivalent to a “bargain” (i.e., an exchange of promises or a promise for performance where each party gives something to receive something in return)—essence of the requisite mutuality.

# CONTRACT FORMATION

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- Additional formation issue: Statute of Frauds.
  - The Statute of Frauds requires that certain types of contracts be in writing, or at least evidenced by a signed, written memorandum of essential terms. The basic purpose of the Statute is to prevent fraud and perjury.
  - UCC contracts for the sale of goods: Contracts for the sale of goods at \$500 or more must be in writing (U.C.C. 2-201). Under WSPP Agreement, we agree that electronically recorded telephone calls and emails satisfy the Statute of Frauds. Not instant messenger services, except by agreement.

# CONTRACT FORMATION

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- Some exceptions: The buyer accepts and receives all or part of the goods (whereupon the contract becomes enforceable as to the goods accepted and received) (U.C.C. 2-201(3)(c)); the contract is between merchants and within a reasonable time a written confirmation (which satisfies the Statute as to the sender) is sent and the receiving party does not dispatch a written objection within 10 days (U.C.C. 2-201(2)).
- Where does WSPP Agreement address formation?
  - § 32 Transaction Specific Terms and Oral Agreements

# PERFORMANCE AND BREACH

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- A few words about contract interpretation: judges and juries (and sometimes FERC, which has concurrent and sometimes primary jurisdiction (what is that?) construe and interpret contracts. Following are doctrines of construction and interpretation: Plain meaning of contract terms; give meaning to each word; construe provisions harmoniously; parole evidence rule (no inconsistent extrinsic evidence).

# PERFORMANCE AND BREACH

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- **Obligation to Perform in Good Faith:** Generally, each party has an obligation to perform in good faith.

# PERFORMANCE AND BREACH

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- **Material versus Minor Breach:** A breach of contract at the time performance is due gives rise to an immediate claim for damages. A breach will excuse the counterparty's duty to perform only if the breach is a material breach.
- **Effect of Material Breach:** A material breach always gives rise to an immediate cause of action (lawsuit) for breach of the entire contract. And, if the performance was also a condition precedent or concurrent to the other party's duty to perform, that duty is excused—meaning the contract is over and damages will be measured.

# PERFORMANCE AND BREACH

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- Effect of a Minor Breach: A minor breach gives rise to an immediate cause of action for whatever damages were caused by the breach, but not a cause of action on the entire contract. If the performance was also a condition precedent or concurrent, the minor failure may suspend, but does not excuse, the counterparty's duty to perform.
- Distinguishing Material from Minor Breach: Various factors distinguish between minor and material breach (take that law school course or ask me later).

# PERFORMANCE AND BREACH

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- **Prospective Inability to Perform:** This occurs when circumstances make it appear that one party will be unable to perform. Prospective inability to perform excuses the other party's duty to perform. If prospective inability to perform arises from voluntary conduct, it may also constitute anticipatory breach (a breach in itself). Examples include where a vendor encumbers property after contracting to sell it to another, and where a party who was to get credit has become insolvent.

# PERFORMANCE AND BREACH

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- Performance Assurance: Under the UCC, either party can demand assurances if reasonable grounds for insecurity exist and may suspend performance until assurances are given. Unjustified failure to give assurances within 30 days constitutes a repudiation (U.C.C. 2-609).
- Excuse: Force Majeure (impossibility, impracticability). Excuse is implied as a matter of law, but is often included as a written condition in contracts.

# PERFORMANCE AND BREACH

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- Where do these matters arise under the WSPP Agreement?
  - § 9 Payment
  - § 10 Uncontrollable Force
  - § 27 Creditworthiness (assurances)
  - § 32 Confirmation terms
  - Schedules A, B, C
  - § 30 Confidentiality
  - § 38 Floating Prices
  - § 33 and § 37 Representations and Warranties
  - § 34 Dispute Resolution

# REMEDIES

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- Purpose of remedies generally is to return the non-breaching party to the position it would have been in but for the breach.
- Expectation damages: Are based on the contract price, and are to put the non-breaching party in the position he would have been in if the promise had been performed. In other words, through a damages award the performing party obtains the benefit of the bargain.

# REMEDIES

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- Direct Damages versus Consequential (Special) Damages: Principle of Hadley v. Baxendale: A party injured by breach should recover only those damages that (i) should reasonably be considered as arising naturally or in the usual course of things or (ii) might reasonably have been contemplated by the parties at the time the contract was made.
- What does this mean? If the dry cleaner destroyed your suit and consequently you missed a job interview, direct damages are the lost value of the suit, and consequential damages are the lost earnings from the job you didn't get.

# REMEDIES

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- Duty to Mitigate: An injured party cannot recover damages that it could have avoided by reasonable efforts. If a buyer fails to cover (buy substitute goods) when she could have, she will not be permitted to recover consequential damages that could have been avoided by covering (U.C.C. 2-715(2)).
- Damages need to be reasonably certain. Up to the jury, but evidence, not speculation, is required.

# REMEDIES

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- Liquidated Damages. These are a set number, e.g., \$1,000 for each day of delayed delivery after a contract delivery date. The law used to frown on these, as they removed authority from the jury, but now widely accepted. Cannot be punitive, generally should apply only when an actual damages measure may be hard to assess, can cover a component of damages with other components not liquidated at all.
- WSPP approach is NOT liquidated; it is formulaic.

# REMEDIES

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- Other remedies? Injunctive relief, where money damages will not suffice (stop circulating confidential information).
  - Rescission. Put the parties back where they were pre-contract. Not often sought or used.
- Netting. Not just to move less cash around. Setoff means that if your counterparty owes you \$100 and goes bankrupt, but you owe the counterparty \$125, you can keep the \$100 and pay the \$25. Otherwise, you would pay \$125 and have an unsecured (worthless claim) for \$100.

# REMEDIES

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- Where does the WSPP Agreement address:
  - Article 21 Damages
  - Article 22
  - Article 28 Netting
  - Article 35 Forward Contract merchant
  - Arbitration

# WSPP AGREEMENT ORGANIZATION

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- Understanding the Agreement. The following breaks down the articles into (a) administrative, (b) deal terms, (c) contract interpretation, and (d) regulatory matters.
- Administrative and Governance Provisions:
  - § 5 Joining WSPP and withdrawing
  - § 14 Transferring membership
  - § 7 Administration
  - § 8 EC (§ 8.1) and OC (§ 8.2); 90% (§ 8.3); notice of meetings; requirement of representative designation (§ 8.5); officers (§ 8.7)
  - § 16 Membership

# WSPP AGREEMENT ORGANIZATION

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- Transaction Terms:
  - § 4 Definitions
  - § 32 Transaction Specific Agreements (Confirmations)
  - § 38 Floating Prices
  - § 33 Title, Warranties
  - § 37 Additional Representations and Warranties
  - § 6 Service schedules, other products (§ 32.8), the OATT (also § 31)

# WSPP AGREEMENT ORGANIZATION

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- § 9 Payment
- § 29 Taxes
- § 10 Uncontrollable Forces
- § 21 Liability and Damages
- § 22 Default; Liquidation
- § 27 Creditworthiness
- § 28 Netting
- § 35 Forward Contracts
- § 36 Trade Option Exception
- § 30 Confidentiality
- § 34 Dispute resolution

# WSPP AGREEMENT ORGANIZATION

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- Contract notices and contract construction:
  - § 11 Waiver (meaning, no waiver)
  - § 12 Notices
  - § 15 Severability
  - § 17 Parties' relationship (no jv, partnership, etc.)
  - § 20 No third-party beneficiaries

# WSPP AGREEMENT ORGANIZATION

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- § 23 No restriction on members entering other agreements.
- § 24 Governing law: Utah, or Canada if buyer/seller are there, or US law if buyer or seller is US government.
- § 25 Deferral to a party or the EC's determinations on certain members
- § 26 Complete agreement (no side deals outside the Confirmation). Also § 32.4 with respect to Confirmation.
- § 39 Amendment
- § 40 Execution by counterparts

# WSPP AGREEMENT ORGANIZATION

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- Regulatory Matters:
  - § 13 Regulatory approvals; FERC jurisdiction; BPA
  - § 18 No dedication of facilities
  - § 19 No retail services

## A Note about § 4 Definitions –

Use of Capitalized Terms in the Agreement indicates that they are defined in the Agreement. The definitions are critical to the meaning of the language, and the language might not make sense unless you read the definition. When you see a Capitalized Term, refer to the definition.

# CONTRACT FORMATION

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- Agreement to and specification of material terms.
- § 32.1.1 Confirmation process is to confirm (make binding) counterparties' agreement to price, quantity, delivery point, delivery period, and any other provisions.
  - Confirmation must be made by Documentary Writing or Electronic Writing (for statute of frauds). Details to follow.
- § 32.2.2 Confirmation can include modifications of any term of the WSPP Agreement ("Non-Standard Confirmation Provisions").

# CONTRACT FORMATION

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- Confirmation procedure for Standard Provisions (not modifying WSPP Agreement terms).
- § 32.2.1 Transactions with duration under a week, by Documentary Writing or Electronic Writing, BUT, if transaction to commence within one week of agreement, a proposed Documentary Writing will not vary the terms of the Electronic Writing, unless both parties sign the Documentary Writing. In other words, the written confirmation will not vary the recorded telephone deal unless both parties sign the written.

# CONTRACT FORMATION

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- § 32.2.2 Transactions with duration of one week or more, only by Documentary Writing.
- § 32.2.3 Seller shall propose Documentary Writing within 5 Business Days of the agreement. Purchaser has 5 Business Days to respond; no response is acceptance.
- If Seller fails to propose the Documentary Writing within 5 Business Days, then Purchaser has 5 Business Days to propose, and Seller has 5 Business Days to respond; failure to respond is acceptance.

# CONTRACT FORMATION

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- Confirmation procedure for Non-Standard Provisions (modifying WSPP Agreement terms).
  - § 32.3.1 Transactions with duration under a week, by Electronic Writing or Documentary Writing executed by both Parties.
  - § 32.3.2 Transactions with duration of one week or more, only by Documentary Writing executed by both Parties.
  - § 32.3.3 Absent Confirmation under § 32.3.1 or § 32.3.2, the WSPP Agreement applies as filed (it is not varied for the transaction).

# CONTRACT FORMATION

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- § 32.4.2 Until Confirmation process is completed, oral agreement remains binding. § 32.5 waives the statute of frauds as necessary.
- § 32.10 Master Confirmations between Counterparties are permissible, which would apply to all further Confirmations between the applicable parties.
- § 38 Floating Prices can be incorporated into a transaction, and additional procedures, for Market Disruption, calculation, and index corrections are provided.

# CONTRACT FORMATION

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- Products.
  - § 6.1 Service Schedules A, B, C are incorporated into the Agreement as product definitions. Schedules may be added or removed.
  - § 32.8 Other products, including products defined under “any other document or form of agreement” (e.g. CAISO Tariff, ERCOT agreement or EEI, can be a product.) Unless otherwise agreed, the product definitions and force majeure shall have the meaning of the other agreement.

# CONTRACT FORMATION

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- Firm (Service Schedule C).
  - Capacity or capacity with energy
  - LD provision applies to this product for failure to deliver or purchase.
  - Interruptible in the following circumstances without paying damages:
    - Force Majeure
    - Within recall time, if agreed
    - Other agreed to circumstances

# CONTRACT FORMATION

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- Interruption is allowed for Seller to meet its public utility or statutory obligations to native load, but Seller would be responsible for payment of damages in those circumstances.
- Obligation on Seller to schedule the power as firm.
- Much discussion of “backed by Seller’s capacity reserves” in context of WECC contingency reserves interpretation.
- A seller with a single resource can sell C.

# CONTRACT FORMATION

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- Schedule B.
- Parties may negotiate the terms associated with scheduling, interruptions or rely on the terms in Service Schedule B.
- Interruptions allowed:
  - By Seller by giving proper recall notice.
  - By Seller when all or a portion of the output of the unit is unavailable.
  - By Seller to prevent system separation during an emergency if Seller has exercised all prudent operating alternatives prior to interruption.

# CONTRACT FORMATION

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- By the Seller to meet public utility or statutory obligations.
- By either party due to the unavailability of transmission.
- Transactions are to be prescheduled. Energy schedules may be modified with not less than 30 minutes notice.

# PERFORMANCE AND BREACH

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- The Confirmation sets out transaction-specific performance obligations, to which the following additional matters apply.
- § 33.1 Performance. Seller shall deliver, and Purchaser shall receive, per the Confirmation.

# PERFORMANCE AND BREACH

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- Warranties.
  - § 33.2 Title and risk of losses passed from Seller to Purchaser at delivery point (or, if a Federal agency, per applicable law).
  - § 33.3 Seller warrants good title and disclaims all other warranties.
  - § 37 Additional warranties of legal capacity, no violation of law, solvency (customary contract provisions).

# PERFORMANCE AND BREACH

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- 10 Excuse.
  - Uncontrollable Force as defined, excuses performance. Is an event that (a) prevents performance; (b) which is “not within the reasonable control of, or the result of negligence of,” the party claiming the excuse, and (c) “which by the exercise of due diligence” could not have been avoided.
  - Non-exclusive examples are customary “force majeure,” that is, irresistible force.

# PERFORMANCE AND BREACH

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- Exclusions are Seller's cost of obtaining the energy or capacity; or Purchaser's inability due to price to use or resell.
- Party claiming excuse must give notice and exercise due diligence to remove. Impact of this phrase is the excuse = the extent of the Uncontrollable Force.
- Transmission cuts: not always an excuse.

# PERFORMANCE AND BREACH

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- Transmission cuts excuse performance only if (a) parties agreed on a specific transmission path at the time of the transaction (Confirmation), (b) firm transmission was obtained, and (c) that firm transmission was interrupted.
- If no firm path agreed in the Confirmation, then a cut excuses performance only if (a) the party obligated to provide for transmission arranged for firm service with Transmission Provider, (b) the Transmission provider cut transmission due to an event of Uncontrollable Force, and (c) the party which arranged cannot arrange substitute service by due diligence.

# PERFORMANCE AND BREACH

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- It follows that of non-firm transmission is not a performance excuse (not Uncontrollable Force).

# PERFORMANCE AND BREACH

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- Payment Matters.
  - Billing/Payment/Disputes
    - Monthly billing; payable 20th day of month received or 10 days, whichever is later. Premiums on options payable in 3 days. Late payment earns interest 2% above WSJ prime.
    - Dispute of invoice must be written, stating basis, but entire bill must be paid when due. Disputes must be initiated within 2 years of invoice. A party may request the other party's records within that 2 years. (§ 9.6)
    - Bills failed to be issued must be issued within 2 years of the proper issue date.

# PERFORMANCE AND BREACH

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- § 28 Netting. If parties sign on to the netting agreement, then payments due shall be netted against amounts owed.
- § 29 Taxes. Price is deemed to include all Seller's tax obligations incurred up to the Delivery Point. If Purchaser required to pay, it may deduct from the price. Purchaser pays taxes assessed after the Delivery Point.

# PERFORMANCE AND BREACH

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- § 30 Confidentiality. Transaction terms shall be confidential unless disclosure is (a) required in a regulatory proceeding or in any other litigation, or to NERC or a regional reliability council, (b) parties agree to disclosure, or (c) to developer of an index of power prices (see § 30.2, requiring further confidentiality protections).

# PERFORMANCE AND BREACH

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- Credit.
  - WSPP Agreement itself does not include provisions for extension of credit or provision of collateral. A Collateral Annex developed outside of Agreement; available, useful, not widely used.
  - § 27 If a party's creditworthiness becomes unsatisfactory to the other party in that party's "reasonably exercised discretion," that party may require the other Party to provide assurance of payment: a letter of credit, cash prepayment, other acceptable collateral, a guarantee, or other acceptable resolution.

# PERFORMANCE AND BREACH

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- Amount is limited to a reasonable estimate of damages for non-performance.
- § 27 provides 5 examples that support dissatisfaction.
- Other party has 3 Business Days to respond, or has committed an Event of Default under § 22 (allowing contract liquidation).

# REMEDIES FOR NON-PERFORMANCE AND DEFAULT

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- Two relevant Articles. Article 21 addresses remedies for non-performance without the contract terminating and liquidating. Article 22 addresses Event of Default, imposing liquidation remedy and procedures.
- § 21.1 Remedies specified in WSPP Agreement are exclusive:
  - No consequential or punitive damages.
  - Liability of Federal agency consistent with Federal law (potentially interesting point).

# REMEDIES FOR NON-PERFORMANCE AND DEFAULT

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- § 21.2 Where to press your claim under 21 or 22? Any forum having “competent jurisdiction,” which may be a court (state or Federal) or FERC, and without prior mediation.
- A party can seek specific performance (injunctive relief) of terms not pertaining to delivery (e.g., breach of confidentiality requirement).
- § 21.3 Schedule A is interruptible, and there is no remedy for interruption (delivery or receipt) unless parties agree to damages in the Confirmation.

# REMEDIES FOR NON-PERFORMANCE AND DEFAULT

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- § 21.3 Formulaic damages, often referred to as liquidated damages.
- For seller's failure to deliver, Seller will pay damages equal to (a) purchaser's replacement price, (b) less the contract price, (c) plus additional transmission costs incurred in replacing the power, (d) less transmission savings.
- For a purchaser's failure to receive, Purchaser will pay damages equal to (a) seller's Resale Price, (b) less the contract price, (c) plus additional transmission costs incurred in reselling, (d) less transmission savings.

# REMEDIES FOR NON-PERFORMANCE AND DEFAULT

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- § 21.3(d) allows bookouts between counterparties in lieu of damages. Distinguish, however, from chains where bookouts may be between entities lacking contractual privity.
- Each party has duty to minimize damages in a commercially reasonable manner.
- Disputes of the damages calculation (only) (not liability) go to informal mediation and then to binding dispute resolution under the WSPP dispute resolution procedures.

# REMEDIES FOR NON-PERFORMANCE AND DEFAULT

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- Article 22 Liquidation.
  - In times of substantial market swings, Article 22 liability can bet the company.
  - Arises upon “Event of Default,” which is failure to (a) pay an amount due if not remedied in 2 days, (b) provide clean title, (c) provide assurances, (d) bankruptcy filing. Analogous events for Guarantor.
  - Failure to deliver or purchase is not an Event of Default so long as the non-performing party makes the required payments under § 21.

# REMEDIES FOR NON-PERFORMANCE AND DEFAULT

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- No general provision that the failure to perform any term in the contract is an Event of Default due to severity of the remedy.
- § 22.2 If an Event of Default, within 30 days, the non-defaulting party may terminate all WSPP transactions between the parties.
- All transactions are liquidated (except Schedule A), and calculation formula is set forth to determine the liquidated amounts plus costs. Present value of contract revenue versus market value.

# REMEDIES FOR NON-PERFORMANCE AND DEFAULT

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- Performing party has unilateral right, but not obligation, to terminate and liquidate. This matters, because if performing party is out of the money (e.g., it is a buyer at a Contract Price above market value), it will not want to terminate and pay the defaulting party.
- Performing party out of money can terminate and make payments over duration of the contract being terminated.

# REMEDIES FOR NON-PERFORMANCE AND DEFAULT

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- Disputes on the calculation methodology (not liability) go to mediation and then to arbitration under the WSPP process.
- Detailed mediation/arbitration procedures in Exhibit D of Agreement.
- § 35 Forward Contracts. Allows liquidation in the event of bankruptcy of a party, under limited conditions as specified in the Bankruptcy Code.

# QUESTIONS?

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- Any questions about what we covered?
- Any other questions about the WSPP Agreement?
- What else should we cover (or omit) in the next Basic Training?