

WSPP Agreement for Credit and Risk Professionals

North American Power Credit Organization

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General

- This is intended to be interactive- please ask questions whenever you have them.
- This is **NOT** intended to trash the WSPP
 - Some of my best friends are WSPP people
 - Including many people here today
 - I hope to tempt you to get involved
- This is not legal advice- consult your counsel!

Today's Outline

- What is the WSPP Agreement?
- WSPP Documentation
- What Drives Change
- WSPP Credit Terms
 - WSPP Netting
 - WSPP Optional Security Documents
 - Adequate Assurances
- Master Agreement Gap Risk
- Diligence using the WSPP
- Get Involved

What is the WSPP Agreement?

- What is the WSPP?
 - Executive, Operating, and Contract committees
 - Operating Committee meetings
 - Change from Western Systems Power Pool to WSPP, Inc.
- Membership Agreement
 - Multilateral, not bilateral
 - Cost; associate membership
- FERC filed tariff
- Varies over time; continuously revised on 90% vote
- Responses to Market Developments

WSPP Documentation

- WSPP Agreement
 - http://wspp.org/filestorage/current_effective_agreement_041115.doc
 - Schedules
 - Exhibits
 - Governed by Utah law
- Master Confirmation Agreements
 - To address some of the deficiencies we'll discuss
- Confirmations
 - Including one-off credit terms for specific transactions
- Other agreement reach-through clauses for schedules
 - Schedule C most popular
 - A “firm” product with “firm” undefined
 - Schedule R
 - California provisions

What Drives Change

- “Full” self-governance relatively recent
 - This is a controversial statement
- Accretion
- Responses to Market Developments
 - [CAISO] MRTU Amendment
 - REC Schedule R
 - Exhibit C-SS Specified Source Confirmation
 - Service Schedules D and E
- Legal Developments,
 - FERC Order 890
 - Dodd-Frank Act
- “Constitutional Convention”

What Are the WSPP's Credit Terms?

- Section 9 payment provisions
- Section 27:
 - Should a Party's creditworthiness, financial responsibility, or performance viability become unsatisfactory to the other Party in such other Party's reasonably exercised discretion with regard to any transaction pursuant to this Agreement and any Confirmation, the dissatisfied Party (the "First Party") may require the other Party (the "Second Party") to provide, at the Second Party's option (but subject to the First Party's acceptance based upon reasonably exercised discretion), either (1) the posting of a Letter of Credit, (2) a cash prepayment, (3) the posting of other acceptable collateral or security by the Second Party, (4) a Guarantee Agreement executed by a creditworthy entity; or (5) some other mutually agreeable method of satisfying the First Party. The Second Party's obligations under this Section 27 shall be limited to a reasonable estimate of the damages to the First Party (consistent with Section 22.3 of this Agreement) if the Second Party were to fail to perform its obligations. Events which may trigger the First Party questioning the Second Party's creditworthiness, financial responsibility, or performance viability include, but are not limited to, the following:
 - (1) The First Party has knowledge that the Second Party (or its Guarantor if applicable) are failing to perform or defaulting under other contracts.
 - (2) The Second Party has exceeded any credit or trading limit set out in any Confirmation or other agreement between the Parties.
 - (3) The Second Party or its Guarantor has debt which is rated as investment grade and that debt falls below the investment grade rating by at least one rating agency or is below investment grade and the rating of that debt is downgraded further by at least one rating agency.
- Utah law, so UCC 2609 adequate assurances may apply
- Section 28/Exhibit A netting
- Section 22.3(e) Termination Payment tenor
- Optional Security Documents

WSPP Netting

- Exhibit A v. “Netting Agreements”
- Exhibit A issues
 - Under Section 28.1, a party can “turn off” the netting
 - To whom does Exhibit A specifically apply?:
 - Exh. A: If the **Purchaser** and **Seller** are each required to pay an amount on the payment due date in the same month for transactions under the Agreement and Confirmation(s), then such amounts with respect to **each Party** will be aggregated and the **Parties** will discharge their obligations to pay through netting, in which case the Party owing the greater aggregate amount will pay to the other party the difference between the amounts owed consistent with the payment times in Section 9.2 of the Agreement, unless the Parties have otherwise agreed to a different payment time as allowed by the Agreement.
 - WSPP Section 1: The Parties to this WSPP Agreement (hereinafter referred to as "Agreement") are those entities that have executed this Agreement, hereinafter sometimes referred to individually as "Party" and collectively as "Parties,"
- WSPP Section 28.2 allows additional or separate netting agreements

WSPP Optional Security Documents

- Collateral Annex
 - Cover Sheet
 - Thresholds
- Guaranty
 - Form made available; use your own instead
- Security Agreement
 - Form made available; use your own instead

Adequate Assurances: UCC Art. 2: Sales

- Contract gap-filler provisions and rules
- If the contract is for “goods,” Article 2 imports provisions the parties don’t cover in their contracts.
- Gas is a “good”; how about electricity?
 - EPMI v. Nevada Power- NY court says Utah says it’s a good
http://jweinsteinlaw.com/pdfs/03cv9318_opinion_101204.pdf
 - Norcon v. NiMo – NY court says not in NY
 - Bankruptcy Code 503(b)(9)
- **UCC 2609:** (1) A contract for sale imposes an obligation on each party that the other’s expectation of receiving due performance will not be impaired. When **reasonable grounds for insecurity** arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may **if commercially reasonable suspend any performance** for which he has not already received the agreed return. (2) Between merchants the **reasonableness** of grounds for insecurity and the adequacy of any assurance offered shall be determined according to **commercial standards**. ... (4) After receipt of a **justified demand** failure to provide within a **reasonable time** not exceeding thirty days such assurance or due performance as is **adequate under the circumstances** of the particular case is a repudiation of the contract.
- Is there a “gap” for UCC 2609 given Section 27?

Master Agreement “Gaps”

- Buying under one agreement and selling under another
 - E.g., WSPP v. EEI or ISDA with Power Annex
 - E.g. WSPP Schedule C v. EEI Firm (LD)
 - Market practice v. contract terms
- Pledging collateral under one agreement with collateral pledged under another
- Relying heavily on work performed by the International Energy Credit Association led by, and using prior work by, Craig Enochs
 - New, current IECA project focusing on credit annexes
- WSPP has the especial gap risk within itself for WSPP transactions over time due to self-amendments.

Adequate Assurances

EEI Version 2.1 (2000)	WSPP Agreement
<p>Articles 8.1 (b) (Party B's requirement to provide Performance Assurance) and 8.2 (b) (Party A's requirement to provide Performance Assurance) – Elective provisions on the Cover Sheet. Parties elect to apply the provisions per party.</p> <p>Reasonable grounds that creditworthiness or performance has become unsatisfactory: request in writing “Performance Assurance” in an amount determined by the requesting party in a commercially reasonable manner.</p> <p>“Performance Assurance” means collateral in the form of either cash, Letters of Credit, or other security acceptable to the Requesting Party.</p>	<p>§ 27. If a party's creditworthiness, financial responsibility or performance viability becomes unsatisfactory, the dissatisfied party ("First Party") can require the other party ("Second Party") to provide adequate assurance of performance.</p> <p>Events which may trigger a request for adequate assurances include, but are not limited to: (i) Second Party or its Guarantor failing to perform or defaulting under other contracts; (ii) Second Party has exceeded trading limits; (iii) Second Party or Guarantor is downgraded; (iv) Other material adverse change in Second Party's financial condition; or (v) Substantial changes in market prices which materially, adversely affect Second Party's ability to perform.</p> <p>Amount of adequate assurances is limited to First Party's reasonable estimation of the Termination Payment (if any) that would be owed by the Second Party as if it had defaulted and the Agreement terminated early.</p> <p>§ 27 - The Second Party can elect which form of adequate assurance to provide, subject to the First Party's acceptance in its reasonably exercised discretion: (i) letter of credit, (ii) cash prepayment, (iii) posting of other acceptable collateral, (iv) guaranty, or (v) other mutually agreeable method of satisfying the First Party.</p>

Netting

ISDA® 1992 Master Agreement	ISDA® 2002 Master Agreement	EEI Version 2.1 (2000)	WSPP Agreement
<p>Yes, under § 2(c). If on a date amounts are payable in the same currency and in respect of the same Transaction, the amounts payable are netted.</p> <p>Parties may elect (in the Schedule or a Confirmation) to net amounts payable on the same date and in the same currency in respect to two or more Transactions.</p>	<p>Yes, under § 2(c). If on a date amounts are payable in the same currency and in respect of the same Transaction, the amounts payable are netted.</p> <p>Parties may elect (in the Schedule or a Confirmation) for "Multiple Transaction Payment Netting" to apply. If applicable, the parties may net amounts payable on the same date and in the same currency in respect to two or more Transactions.</p>	<p>Article 6.4. Payments of all undisputed charges across all transactions are netted into one amount, except for accelerated payments for cover damages.</p>	<p>§ 28 - Netting of payments is not required but is allowed via Exhibit A to the Agreement or within a Confirmation or some other agreement setting out the terms in addition or in lieu of Exhibit A. Exhibit A allows electee to designate a date when netting becomes effective. Once Exhibit A is agreed to, the party must provide at least 30 Days withdrawal notice on a change in netting status. Concurrently notice must be provided to all parties that have ongoing or committed future transactions with. § 28.1 - The Parties' obligations to net include the netting of all payments received by the Parties in the same calendar month.</p>

Setoff

ISDA® 1992 Master Agreement	ISDA® 2002 Master Agreement	EEI Version 2.1 (2000)	WSPP Agreement
<p>Not contained in 1992 ISDA although it is often incorporated in the Schedule.</p>	<p>Addition of Set-off to the 2002 version as § 6(f)</p> <p>§ 6(f) - Setoff occurs where there is:</p> <ol style="list-style-type: none"> 1. Default, 2. A credit event upon merger, or 3. A termination event that includes all outstanding transactions <p>(1) Who can setoff? Only the two parties can setoff between each other, but it does not distinguish between the defaulting party paying the non-defaulting party and vice versa.</p> <p>(2) What can be setoff? Any other amounts payable, regardless of whether they arise under the same agreement, can be setoff.</p> <p>The non-defaulting party shall give notice to the defaulting party of their choice to effect setoff under this section.</p> <p>Any obligation to be included in setoff that is not ascertained may be included through a good faith estimate.</p> <p>This provision is without prejudice to any right of setoff otherwise provided for.</p>	<p>Article 5.6- There are 3 options for parties to elect in the Cover Sheet:</p> <p><i>Option A:</i></p> <ol style="list-style-type: none"> 1) Who can setoff? The Non-Defaulting Party. 2) What can be setoff? Any other agreement, instrument, or undertaking. This option is without prejudice to rights of setoff that exist in law, contract or otherwise. <p><i>Option B:</i></p> <ol style="list-style-type: none"> 1) Who can setoff? The Non-Defaulting Party or its Affiliates can setoff from the Defaulting Party or its Affiliates. 2) What can be setoff? Any other agreements, instruments or undertakings between the Defaulting Party and the Non-Defaulting Party or any of their Affiliates. This option is without prejudice to any other rights of setoff. <p><i>Option C:</i></p> <p>No set-off - Neither option A or B applies.</p>	<p>§ 22.3(d) - Non-defaulting party can setoff, at its election, amounts owing between the parties under the Agreement and any Confirmation against Termination Payment so that all amounts are aggregated and/or netted into a single liquidated amount.</p> <p>Such net termination amount is due within 3 Business Days after the date notice of termination is received.</p>

Pre-Termination Suspension Rights

	ISDA® Master Agreement	NAESB	EEl	WSPP Agreement
Contractual Right to Suspend Performance without Terminating Trades	Yes (§ 2(a)(iii)(1)). “Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default of Potential Event of Default with respect to the other party has occurred and is continuing.”	Set out under § 10.2. Non-Defaulting Party has the right “to immediately withhold and/or suspend deliveries or payments.”	Yes, under Article 5.7.	Yes - § 22.2(a).
Triggering Events	Event of Default or Potential Event of Default has occurred and is continuing.	Only Events of Default. 2002 doesn't, 2006 does, contain reference to “Additional Event of Default.”	Event of Default or Potential Event of Default has occurred and is continuing.	If an Event of Default has occurred and is continuing, § 22.2(a).
Time Limitation on Right to Suspend	No.	No.	10 NERC Business Days (suspension shall not continue for longer than this time period).	In no event will a suspension continue for longer than ten (10) Business Days; such suspension is available only once for each default. This ten (10) day suspension period does not affect the thirty (30) day period for exercising a right of termination under § 22.2(b). The Non-Defaulting Party has the unilateral right to exercise its rights including its termination rights at any time within the suspension period.

Default/Termination Events

	ISDA® 1992 Master Agreement	ISDA® 2002 Master Agreement	EEl	WSPP Agreement
Failure to pay	Yes - § 5(a)(i). 3 Local Business Day cure period after notice of default.	Yes - § 5(a)(i). Same as 1992 ISDA, except 1 Local Business Day cure period after notice of default.	Yes. Event of Default if failure is not remedied within 3 Business Days.	Under § 22.1 - Yes - within 2 Business Days after written notice.
False representation or warranty	Yes - § 5(a)(iv). No cure period.	Same as 1992 ISDA. No cure period.	Yes. No cure period.	Under § 22.1 - if not cured within 5 Business Days after written notice.
Failure to perform	Yes - § 5(a)(ii). 30 day cure period after notice of default.	Yes - § 5(a)(ii). 30 day cure period after notice of default. Adds new Event of Default if a party disaffirms, disclaims, repudiates, rejects or challenges the validity of the Master Agreement, any Confirmation or Transaction. No cure period	Yes (except as provided in Article 4). Event of Default if such failure is not remedied within 3 Business Days after written notice.	No language on failure to perform explicitly - just failure to provide clear and good title or to have made accurate representations and warranties.
Bankruptcy	Yes - § 5(a)(vii). 30 day cure period for involuntaries.	Yes - § 5(a)(vii). 15 day cure for involuntaries.	Yes. No cure period.	Under § 22.1 - institution of proceedings indicating bankruptcy or insolvency.
Default under specified transaction	Yes - § 5(a)(v).	Yes - § 5(a)(v). Similar to 1992 ISDA "Specified Transaction" definition broadened	N/A	N/A
Illegality	Yes - § 5(b)(i).	Yes - § 5(b)(i).	N/A	N/A

Termination Payment

	ISDA® 1992 Master Agreement	ISDA® 2002 Master Agreement	EEI Version 2.1 (2000)	WSPP Agreement
Declare Early Termination Date	For Events of Default, § 6(a) permits the non-defaulting party to declare an Early Termination Date by not more than 20 days notice.	Same as 1992 ISDA.	Article 5.2 permits the Non-Defaulting Party to designate a date, no earlier than the day such notice is effective and no later than 20 days after such notice is effective, as an Early Termination Date.	§ 22.2(b): The Non-Defaulting party can terminate all transactions upon written notice to the Defaulting Party. Non-Defaulting Party must terminate within 30 days following the date the Event of Default becomes known to it
Withhold payments to Defaulting Party and Suspend Performance	Yes, under § 2(a)(iii)	Yes, under § 2(a)(iii) -	Yes, under Article 5.2(ii) and (iii).	Yes § 22.2(a) and (b):
Termination all v. less than all transactions?	For Events of Default, all; for Termination Events, only "Affected Transactions "Early Termination Date.	Generally the same as 1992 ISDA, for Illegality and Force Majeure Termination Events, a new "Waiting Period" applies. See § 6(b)(iv)(2) and def. of "Waiting Period"	Article 5.2. All Transactions.	§ 22.2(b): all
Calculation of Termination/Settlement Payment	either Market Quotation or Loss and either First Method or Second Method).	"Close-Out Amount"	Non-Defaulting Party calculates a Settlement Amount for each Terminated Transaction.	§ 22.3(a): Non-Defaulting Party calculate the Termination Payment; some sui generis provisions

Other Operational Risk Gaps

- Notice Provisions
- Confidentiality Provisions
- Dodd-Frank compliance

Diligence Using the WSPP

- Transaction Tenor
 - Two way termination (v. long term)
 - Documentation risks we just explored, including
 - Section 22.2(b) 30 day limit on termination rights
 - No jury trial waiver, no Mobile-Sierra waiver
- Members
- Popularity with POUs
 - No equivalent of WSPP Schedule M or ISDA Muni provisions
- Agents/managers
 - Diligence on agency agreements
- Counterparty name changes
 - Prince did not get out of his mortgage by becoming



Get Involved

- <http://wspp.org/>
- Contracts Sub-Committee
 - Reach out to Jim Barnes of PGE
- Operating Committee Meetings