

TROUTMAN SANDERS LLP
MEMORANDUM

TO: NAESB WEQ Master Services Agreement Task Force

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RE: Executive Summary: WSPP/EEI Standardized Master Comparison Chart

DATE: February 17, 2003

EXECUTIVE SUMMARY

The EEI Master Power Purchase and Sale Agreement (“EEI”) and WSPP Agreement (“WSPP”) have many similarities, but also several differences. One major difference is the fact that the WSPP is a membership agreement, whereby parties may transact under the WSPP once they become members thereunder; on the other hand, parties use the EEI for bilateral transactions and each EEI is individually applicable (and most likely tailored) to that relationship. The other key differences, highlighted below, can be grouped into three categories: (1) credit issues; (2) legal issues and (3) administrative/operational issues. The agreements do contain other differences that are detailed in the comparison chart, but this summary tries to focus on the major issues.

Credit Issues

- **Events of Default:** the WSPP fails to include several standard energy trading defaults, such as Cross-Default (which is tied to defaults in loan agreements), Merger without Assumption and Breach of Covenants; furthermore, the WSPP bankruptcy default does not include the general inability to pay debts as they become due. The absence of these defaults seems to heighten the credit risk, but a party could try to run these defaults through the adequate assurance default (whereby such defaults have created reasonable insecurity); the issue then becomes one of timing - the adequate assurances default can be saved through the posting of collateral and requires a waiting period for such posting - which could be critical if a counterparty is going under.
- **Margin Requirements:** the WSPP does not require margin while the EEI gives parties an option to require margin under its “Collateral Threshold” provisions. This potentially exposes a party to credit risk. Again, a party may mitigate this risk through internal credit limits and by use of the adequate assurances provision; however, without a mark-to-market mechanism and with large potential volatilities, the adequate assurances provision may be inadequate.
- **Setoff:** the WSPP does not provide for setoff outside of the contract, whereas the EEI gives three options for setoff, two of which are outside of the contract; the ability of a non-

defaulting party to setoff amounts owed to it under other agreements is very important, especially in the bankruptcy context; the goal of most energy contracts is to net all amounts owed under the agreement to a single amount owed by one party, and if by bad luck that party happens to be the non-defaulting party, the non-defaulting party would then be able to further reduce the termination payment with amounts owed to it, thereby helping both parties - the defaulting party would no longer have to make certain payments and the non-defaulting party (if it is lucky) would not need to make the termination payment.

Legal Issues:

- **Indemnity:** the WSPP does not include an indemnity provision, whereas the EEI includes an indemnity provision that is split at the delivery point; gas is certainly more explosive than electricity, but electricity certainly can cause severe damage and presents a litigation risk; it seems the EEI and WSPP divide many legal risks at the delivery point, but the WSPP does not focus on this litigation risk.
- **Security:** the EEI provides for a security interest in the collateral held by a party, but the WSPP has no similar provision, begging the question of what interest does a party have in collateral held as adequate assurance? Furthermore, the EEI is very clear that collateral held cannot be netted against payment obligations, again begging the question whether a party required to make a payment under the WSPP can net that payment with the collateral already being held as adequate assurance.
- **Dispute Resolution:** the WSPP includes both negotiation and arbitration as its automatic dispute resolution mechanisms, but the EEI includes no such dispute resolution; parties can make changes to either contract, though, and determine what dispute resolution is best for their relationship.
- **Governing Law:** the EEI uses New York law; the WSPP uses Utah law. New York judges (and lawmakers) have fully vetted out many of the issues underlying netting and setoff and other energy trading agreement issues; Utah law has not.

Administrative Issues:

- **Suspension of Performance:** the EEI allows a party to suspend performance if an Event of Default or Potential Event of Default has occurred; the WSPP has no such provision, thus opening the door to a party having to potentially perform (i.e. sell power) to a “death spiraling” company who will have little ability to pay once all is said and done.
- **Disputed Payments:** the WSPP requires disputed payment amounts to be paid in full whereas the EEI requires only the undisputed portion be paid; in the default scenario both agreements provide for payment of the disputed termination payment, but in the payment scenario, it is not clear who should bear the risk of a miscalculation and subsequent true-up.
- **Market Disruptions:** the WSPP has a provision that takes into account market disruptions with regard to floating prices; the EEI does have similar provisions on its website that parties may use, but these provisions are not part of the standard contract.
- **Recording of Conversations:** the EEI has a fuller consent to recording provision that may be more protective in potential “dual consent” states; the WSPP does include consent between the parties, but does not require the obtaining of consent from employees, therefore potentially opening the door to civil claims, and more importantly, criminal charges.

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