FIA Forum: Commodities 2024

Make Your Trading Documentation Work for You

1. Traditional Commodities – Oil & Gas Contracts
2. Master Agreements
3. Environmental Commodities
4. Force Majeure
5. Common Mistakes and Best Practices

September 17, 2024 // Houston, Texas

Oil and Gas Hedging

Oil and Gas Hedging

- Commodity hedging is a risk management tool.
  - Allows the oil/gas producer to protect itself (and its lenders) from some portion of market risk.
  - Requires that the owner give up some amount of potential upside to the hedge counterparty.
  - Can be financially or physically settled.
- Market risks hedged:
  - Price of oil – oil prices can be volatile for a variety of reasons including time of year, time of day, availability, extreme weather, outages and other events;
  - Price of gas – natural prices can be volatile for similar reasons. In addition, the delivered cost of natural gas (i.e., commodity + transportation) can be different in different locations depending on location of sources and pipeline infrastructure; or
  - Combination of both.
- Types of oil and gas hedging transactions:
  - Over-the-counter (OTC) transactions.
  - Exchange-traded transactions.
- Monetization strategies

Pricing Mechanisms and Reference Pricing

- Pricing Mechanisms in OTC transactions
  - Swap contracts and futures contracts have the effect of locking in price received by producer in the market for all or a specified portion of future oil or gas production, but prevent producer from benefiting from price hikes
  - Options contracts establish the minimum price a producer receives in the market, thereby providing protection from price declines while allowing the producer to benefit from price hikes in exchange for a premium
- Physically-settled OTC transactions
  - Involves the actual delivery of physical commodities that have been purchased or sold
  - Oil and gas typically sold at an indexed price rather than a fixed price
  - Physical settlement involves host of considerations (e.g., ensuring producer has sufficient product to meet its obligations, determining which party is responsible for transportation costs, determining the point at which title transfer occurs, etc.)
- Financially-settled OTC transactions
  - Involves only payment obligations between the parties and not actual delivery of the physical commodity
  - Payment obligations are derived from the value of the underlying oil or gas, as determined based on an agreed pricing mechanism (e.g., price determined by reference to a specified pricing source like Henry Hub)

Contract Specifications and Risk Management

- Documentation for purchase/sale of oil and gas (discussed in detail in next section):
  - The general terms and conditions (GTCs) of individual energy companies
  - The Base Contract for Sale and Purchase of Natural Gas published by the North American Energy Standards Board (NAESB)
  - The Master Agreement published by the International Swaps and Derivatives Association, Inc. (ISDA) and related Annexes (i.e., North American Gas Annex, North American Oil Annex/U.S. Crude Oil and Refined Petroleum Products Annex, etc.)
- Key Terms
  - Quality and Quantity Specifications
  - Delivery Specifications
  - Risk Allocations
  - Payment Dates
- Managing Risks Associated with OTC oil and gas transactions
  - Credit risk (e.g., settlement risk and bankruptcy risk)
    - Credit support terms to mitigate risk
    - Forward contracts and swap agreements afforded safe harbor in bankruptcy
  - Production risk
    - Production of oil or gas may be highly variable depending on several factors
    - Projection of quantity to be produced potentially susceptible to increased risk the further into the future the projection extends
  - Basis risk
    - In financial hedges, could be basis risk to oil and gas producers if there is not an exact alignment between the price received under the physical sale contract and the price on which the obligations under the hedging contract are determined
- Monetization strategies

Master Agreements

Master Agreements - Overview

- Master agreements facilitate bilateral transactions through pre-agreement by parties on non-commercial terms
  - Standard terms (e.g., transacting procedures, reps & warranties, events of default, remedies) are negotiated in anticipation of a trading relationship
  - Individual transactions under the master are (typically) binding when parties reach agreement on the commercial terms
  - Remain in effect until terminated by the parties
- Documentation often follows a common structure:
  - Standard terms published by an industry group provide the foundation for the agreement (master agreement, general terms)
  - Elections and modifications allow parties to adjust the standard terms to fit their needs (schedule, cover sheet, special provisions, optional annexes)
  - Optional credit support terms may be used to address exposure (credit support annex, collateral annex)
  - Confirmations are entered into to record the commercial terms of each transaction

Key Considerations when Choosing a Master Agreement

- Is a master agreement appropriate:
  - Do the parties contemplate an ongoing trading relationship?
  - How customized are the contemplated transactions?
  - Does the market use master agreements for the commodity?
- Intended transaction types:
  - Financially settled? Physically settled? Both?
  - If physically settled, which commodities? Single or multiple commodities?
  - Will the trading relationship expand over time?
- Credit support requirements:
  - How will exposure be managed?
  - Is margining feasible? Is it desired?
- Who is my counterparty:
  - Degree of sophistication?
  - Regulatory considerations?
- Other considerations:
  - What documentation is used for other counterparties?
  - Tolerance of gap risks between forms?

Choosing a Master Agreement

- ISDA Master Agreement
  - Greatest amount of flexibility, but may be more complex than is needed
  - Only master designed for financially settled transactions
  - Optional annexes allow for physically settled commodity transactions (e.g., power, gas, emissions, RECs), often used in combination
  - Robust and widely used credit support annex terms
- EEI Master Power Purchase & Sale Agreement
  - Designed for physical power transactions
  - Optional annexes for gas and REC transactions, but less commonly used
- NAESB Base Contract for Sale and Purchase of Natural Gas
  - Designed for physical natural gas transactions
- Other master agreement templates
  - Bespoke forms are not uncommon for environmental products
  - Other industry groups may focus on specific markets (e.g., LEAP)

Environmental Commodities

Environmental Commodities

- Are developed through sustainable practices and represent the environmental benefits of those procedures.
- Can take various forms, including carbon credits, and renewable energy certificates.
- Are based on the underlying principle of incentivizing and rewarding sustainable practices through a market-driven approach.

Financial Power Purchase Agreements (FPPA) & Power Purchase Agreements (PPA)

A Power Purchase Agreement is a contract under which a power supplier/seller agrees to sell and deliver physical power to an off-taker/purchaser (who agrees to take delivery) at a specific delivery point at an agreed price.

A Financial Power Purchase Agreement is a contract between a power supplier/seller and a purchaser – BUT there is no delivery of physical power. The contract is financially settled.

With both agreements, there is a sale/purchase of power (although one is financially settled) and, if applicable, a transfer of Renewable Energy Credits (RECs).

PPAs are governed by the Federal Energy Regulatory Commission (FERC), while FPPAs are subject to Dodd-Frank regulatory requirements.

Renewable Energy Credits – RECs

A Renewable Energy Certificate (REC) represents one megawatt-hour of electricity generated and supplied to the grid from an eligible renewable energy resource (hydro, wind, solar, etc.).

Compliance RECs vs Voluntary RECs

- The original purpose of RECs was for tracking compliance with legislated electric utility renewable generation quotas (i.e., Renewable Portfolio Standards, or RPSs).
- Voluntary REC buyers choose to purchase RECs based on no regulatory requirement. They are often environmentally conscious organizations with commitments to reducing greenhouse gas emissions and reducing their carbon footprint.

Bundled vs Unbundled RECs

- If RECs are sold with their associated energy then they are known as bundled RECs. If they are sold separately from the underlying energy then they are known as Unbundled RECs.
- Power Purchase Agreements and Financial Power Purchase Agreements are considered by many to be much stronger in terms of additionality* than the purchase of unbundled RECs. A long-term contract to buy a project's renewable energy is a critical factor in enabling the financing and construction of a new renewable energy project.

*_**Additionality**_ means that a project or activity that reduces green house gases would not have happened without the offset buyer or collective buyers in the market.

FPPA Documentation

Contracting structure – EEI? Power Annex? ISDA with RECs Annex? or Base Agreement with Structured Confirmation?

There is not a industry standard form but industry groups are moving to a recommended structure.

Key considerations:

- Mechanism for RECs delivery;
- Project Commercial Operations – Capacity, Operations Dates, Project Maintenance, Standards
- Force Majeure
- Cash Settlement and Possible Negative Pricing

Carbon Offsets

A carbon offset credit is a tradeable certificate purchased by a party for reduction in emissions of carbon dioxide or other greenhouse gases (GHG) in order to compensate for emissions made elsewhere. Carbon offsets are typically measured in tonnes of carbon dioxide-equivalent (CO2-e).

Compliance Market and Voluntary Market

There are generally two types of markets for carbon offsets, the compliance market and the voluntary market.

- In the compliance market, companies, governments and other entities purchase carbon offsets in order to comply with caps on amount of carbon dioxide or other GHG that they are allowed to emit.
- In the voluntary market, individuals, companies, governments or other entities purchase carbon offsets to compensate for emissions caused by their activities.

Tracking

Registries track offset projects and issue offset credits for each unit of emission reduction or removal that is verified and certified. Registries record the ownership of credits by assigning a serial number to each verified offset credit. When a credit is sold, the serial number for the reduction is transferred from the account of the seller to an account for the buyer. If the buyer “uses” the credit by claiming it as an offset against their own emissions, the registry retires the serial number so that the credit cannot be resold.

US Compliance Markets

- In the Northeast region, several states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Virginia) participate in the Regional Greenhouse Gas Initiative (RGGI), a carbon trading program aimed at the power sector.
- California currently has a comprehensive compliance cap and trade program.
- Washington State has cap and investment legislation set to take effect in November 2024; however, Initiative 2117 will be on the state ballot and if passed, will repeal the current legislation and will bar implementation of any similar programs to reduce greenhouse gas emissions in the future.

Voluntary Carbon Credit Projects

A carbon credit is generated from a project that proves a reduction. Projects include those:

- Avoiding green house gas (GHG) emissions by producing energy using clean, renewable resource that eliminates the need to produce the same energy from fossil fuel (the burning of which releases GHG into the atmosphere), for example wind power project;
- Removing GHG emissions from the atmosphere or preventing their emission into the atmosphere, for example, planting more trees, which sequester - or capture - carbon from the atmosphere and store it in liquid or solid form, and
- Capturing and destroying GHG that would otherwise be emitted into the atmosphere, for example project involving methane gas capture from wastewater.

Carbon Credit Documentation

Compliance Credit Documentation

- ISDA – standard documentation for financially settled transactions.
- ISDA with Emission Annex for physically settled transactions.
- Bespoke agreements for spot settled transactions.
- Bespoke agreements for forward transactions.

Voluntary Credit Documentation

- ISDA – standard documentation for financially settled transactions.
- ISDA -Emission Annex for physically settled transactions.
- ISDA – Structured Confirmation with VCC Definitions.
- Bespoke agreements for spot settled transactions.
- Bespoke agreements for forward transactions.

Environmental Commodities Compared to Physical Commodities

	Environmental Commodities	Traditional Physical Commodities
Regulation	Governed by regulations – such as Dodd Frank, Banking Authority Regulation, Etc. In addition, Environmental Commodities are created by regulation.	Governed by many of the same regulations as Environmental Commodities, plus additional regulations promulgated by the FERC, CFTC, and state law.
Delivery	Delivery is performed by tracking and appropriate account entries	Delivery may require service agreements, insurance, scheduling expertise, and licensing.
Reputational Risk	Reputational risk resulting from verification failures and green washing claims.	Reputational risk exists related to environmental issues/accidents and scarcity/gouging claims.
Volume	Volume is generally smaller because of the limited Compliance Market in the US and the still emerging voluntary market.	Generally larger volumes – which limits the impact of any one market participant's action.
Price Impact	Price affected more by the politics and legislative changes.	Price affected more by the economic conditions, technological advances and geopolitical events.

Market Trends

National Politics – Election Results - Status quo? Increased regulations and possible federal C02 cap and trade? or Roll back of current green regulation)?

Additional State Disclosure Laws – Similar to California AB 1305 which imposes disclosure requirements for businesses that market or sell carbon offsets and for businesses that use or purchase carbon offsets as a way to achieve carbon neutrality.

Greenwashing Events and Public Perception – Companies may be criticized for using carbon credits without making enough of an investment in removing GHGs from their own actions.

Force Majeure

FIA FORUM

Overview of Force Majeure

- Origin in US law - Taylor v. Caldwell
  - English law, contract to rent a music hall for 4 days in 1861
  - Hall burned down before the event
  - Court held that the lessor was excused
  - Holding was closer to an impossibility or frustration of purpose analysis, which are similar to FM but different
  - Note – no requirement of substitution

FIA FORUM

Overview of Force Majeure (cont.)

- General NY law*
  - An extraordinary event prevents performance
  - Event must be out of the claiming party's control and not due to that party's negligence
  - Impracticality or economic difficulty is not sufficient
  - FM clauses are interpreted narrowly and are confined to things of the same kind or nature as those specifically set forth in the clause
    - "[t]he general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned." (at p. 903)
- ***See Kel Kim Corp. v. Central Markets, Inc. (70 N.Y.2d 900, N.Y. 1987).

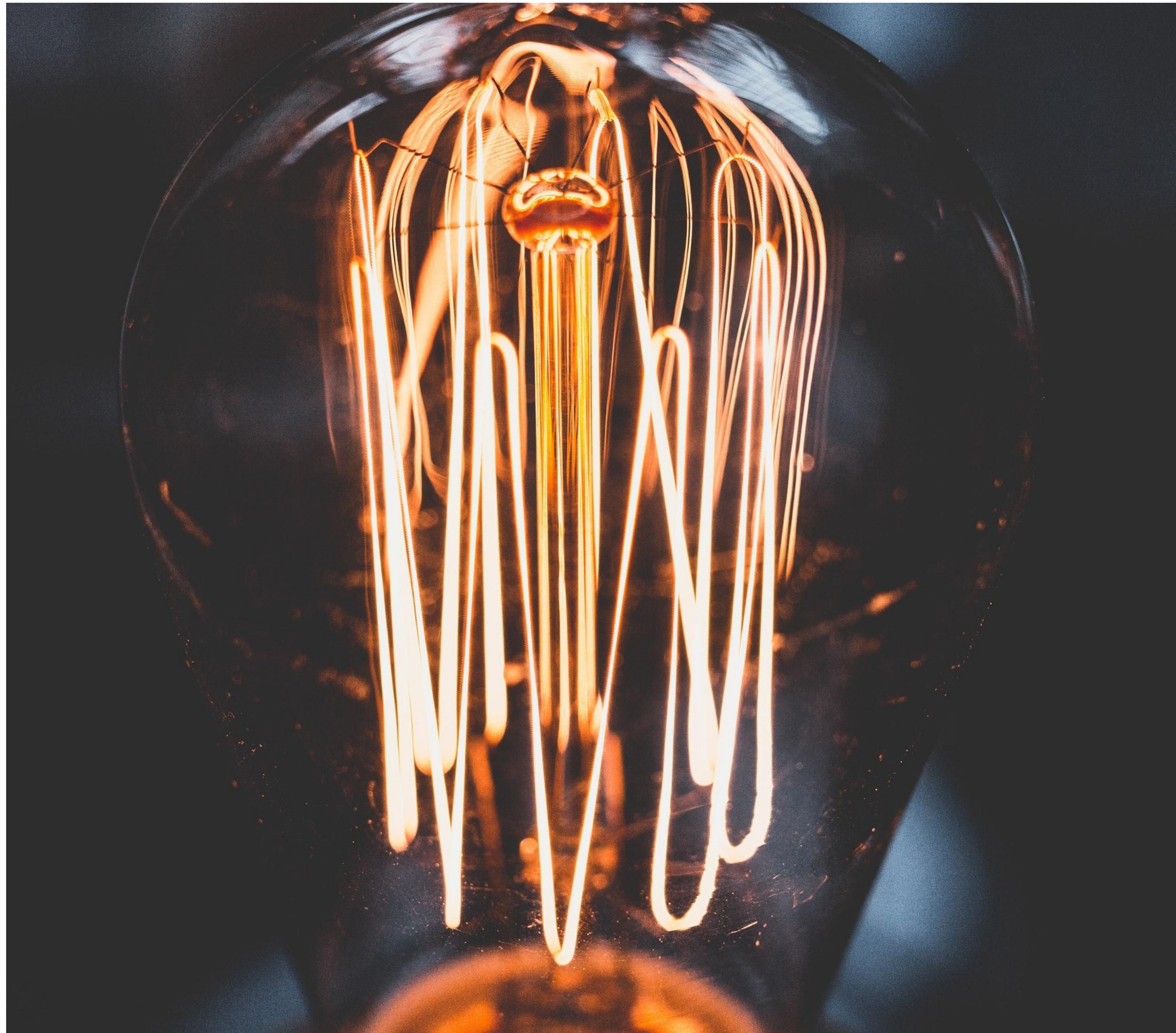
Analysis of FM under the NAESB

- Section XI
  - FM is “[a]ny cause not reasonably within the control of the party claiming suspension”.
  - FM does not excuse obligations to make payments for invoiced amounts, liquidated damages, imbalance charges, and early termination payments
  - FM includes Acts of God (primarily weather); weather-related events affecting an entire region; interruption or curtailment of Firm transportation; acts of others including strikes, sabotage, wars and terrorism; and governmental actions

Analysis of FM under the NAESB (cont.)

- Section XI (cont.)
  - FM does <u>not</u> include:
    - the curtailment of interruptible or secondary Firm transport unless primary Firm is interrupted or curtailed;*
    - if the claiming party failed to cure or remedy the FM with reasonable dispatch;
    - economic hardship, including seller being able to sell at a higher price or buyer buying for a lower price;
    - the loss of buyer's markets; and
    - seller's loss of supply unless due to a permitted FM condition
    - * See BP case below

Analysis of FM under the NAESB (cont.)



- Section XI (cont.)
  - Notice of FM must be given
    - Initial notice may be given orally
    - "written Notice with reasonably full particulars of the event or occurrence is required as soon as reasonably possible"
  - Once notice is given, performance is excused dated back to the onset of the FM, <u>not</u> from the date of the notice

Analysis of FM under the EEI

- EEI FM provision is short
- §3.3 is the only FM provision
- Contains standard FM language – it can affect all or part of the obligations, notice must be given as soon as practicable, must be remedied with all reasonable dispatch
- The definition though is very different from most contracts and very narrow
  - §1.23 – "Force Majeure shall not be based on (i) the loss of Buyer's markets; (ii) Buyer's inability economically to use or resell the Product purchased hereunder; (iii) the loss or failure of Seller's supply; or (iv) Seller's ability to sell the Product at a price greater than the Contract Price. Neither Party may raise a claim of Force Majeure based in whole or in part on curtailment by a Transmission Provider unless (i) such Party has contracted for firm transmission with a Transmission Provider for the Product to be delivered to or received at the Delivery Point and (ii) such curtailment is due to "force majeure" or "uncontrollable force" or a similar term"
  - Essentially, FM is limited to transmission interruptions caused by FM and even then the utility must declare FM under its tariff
  - This was a surprise to many when Winter Storm Uri hit and led to much litigation as generators tried to claim FM rights that did not exist in the EEI or in their PPA that used EEI FM terms.
- While the ISDA contains a FM provision, it does not apply to physical commodity transactions and the Power Annex FM provision is word for word identical to the EEI

➢ see later recap of EEI, ISDA and NAESB FM provisions

Case Law

1. **VPEM v. Apache Corp. (Tex. App. – Houston [14th Dist.] 2009)**
    - Apache supplied gas to VPEM under a TX law NAESB
    - Hurricane hit and interrupted Gulf of Mexico supply
    - Apache declared FM
    - VPEM covered on an exchange at a higher price and was matched with Apache
    - Apache claimed FM based on its upstream supply being disrupted in the Gulf and supplied the cover transaction from storage gas that the downstream delivery point
    - Court upheld the FM and held there was no obligation to cover the FM volumes from storage supply
    - The court held that when contract language is specific to the delivery point, Texas law does not require a supplier invoking force majeure to attempt delivery at some different delivery point.
        - Apache could have delivered to VPEM at a different point (Transco65 rather than the damaged Tennessee L-500) but the contract language did not expressly provide for this, and the court was unwilling to place this duty upon Apache.

Case Law (cont.)

2. Tejas Power Corp. v. Amerada Hess Corp. (Tex. App. – Houston [14th Dist.] 1999)

- Hess supplied gas to Tejas
- Hess declared FM during abnormally cold weather in 1996.
- The court held that where an FM affects only a part of a supplier’s capacity to perform, the supplier may allocate deliveries in any manner which is fair and reasonable.
- Court held that Hess’ ranking of its customers in a reasonable manner, leaving TPC last in priority, was consistent with the FM provision.

Case Law (cont.)

3. **Hess Corp. v. ENI Petroleum US, LLC (N.J. S. Ct, [App. Div.] 2014)**
   - ENI supplied gas to Hess
   - ENI claimed FM due to an unforeseen leak in the underwater Independence Trail Pipeline
   - The court held that because neither the NAESB Base Contract nor the transaction confirmations specified the source of the gas, FM was not a valid defense where a specific transporter, Enterprise, could not get gas to the delivery point, Tennessee 500
   - This is the outlier case on the topic and from a NJ court that is not binding on disputes in NY or TX, the typical venues for NAESB disputes

Case Law – Winter Storm Uri

1. **MIECO LLC v. Pioneer Nat. Res. USA, Inc. (Northern Dist. - TX, 2023)**
   - Pioneer supplied gas to MIECO under a NAESB using NY law
   - Pioneer declared FM pursuant to the NAESB clause covering "a loss or failure of Pioneer's gas supply caused by low temperatures that affect[s] an entire geographic region and caus[es] freezing or failure of wells or lines of pipe"
   - The court applied NY FM rules and held that the scope and effect of an FM clause depends on the specific contract language, not on common definitions.
   - Here, the contract language was unambiguous and specifically addressed the event that prevented Pioneer from performance under the contract.
   - The court rejected MIECO's argument as, in effect, claiming the force majeure provision applied only when no gas is available "anywhere in the world, at any price".

@ This is consistent with the earlier case law stating that there is no obligation to replace supply from other sources if the intended supply source is affected by FM

Case Law – Winter Storm Uri (cont.)

2. LNG Ams., Inc. v. Chevron Nat. Gas (Southern District - Texas, 2023)

- Chevron supplied gas to LNG
  - 90,000 MMBtu/day Firm at Katy OASIS
- Chevron declared FM based on Uri freezing wellhead production
- Plaintiff argued Chevron had an obligation to replace from other supply
- The court held that:
  - FM only requires impracticability, not impossibility
  - FM does not require the supplier to purchase available replacement gas
    - Court cited VPEM v. Apache

Case Law – Winter Storm Uri (cont.)

3. Ark. Okla. Gas Corp. v. BP Energy Co. (W. Dist. - Arkansas, Fort Smith Div., 2023)

- BP agreed to supply up to 30,000 MMBtu/day firm on demand no notice under a TX law NAESB
- AOG never called for that much over a period of years
- As a result, BP arranged for its estimate of AOG's supply and then filled in the rest buying spot gas or using park and loan volumes
    - The park and loan service was interruptible
- Uri hit and BP declared FM
- AOG argued it was not FM because the NAESB requires firm transport to be interrupted before interruptible service can be excused by FM
    - The pipeline never interrupted firm service

@ Court ruled there was no FM

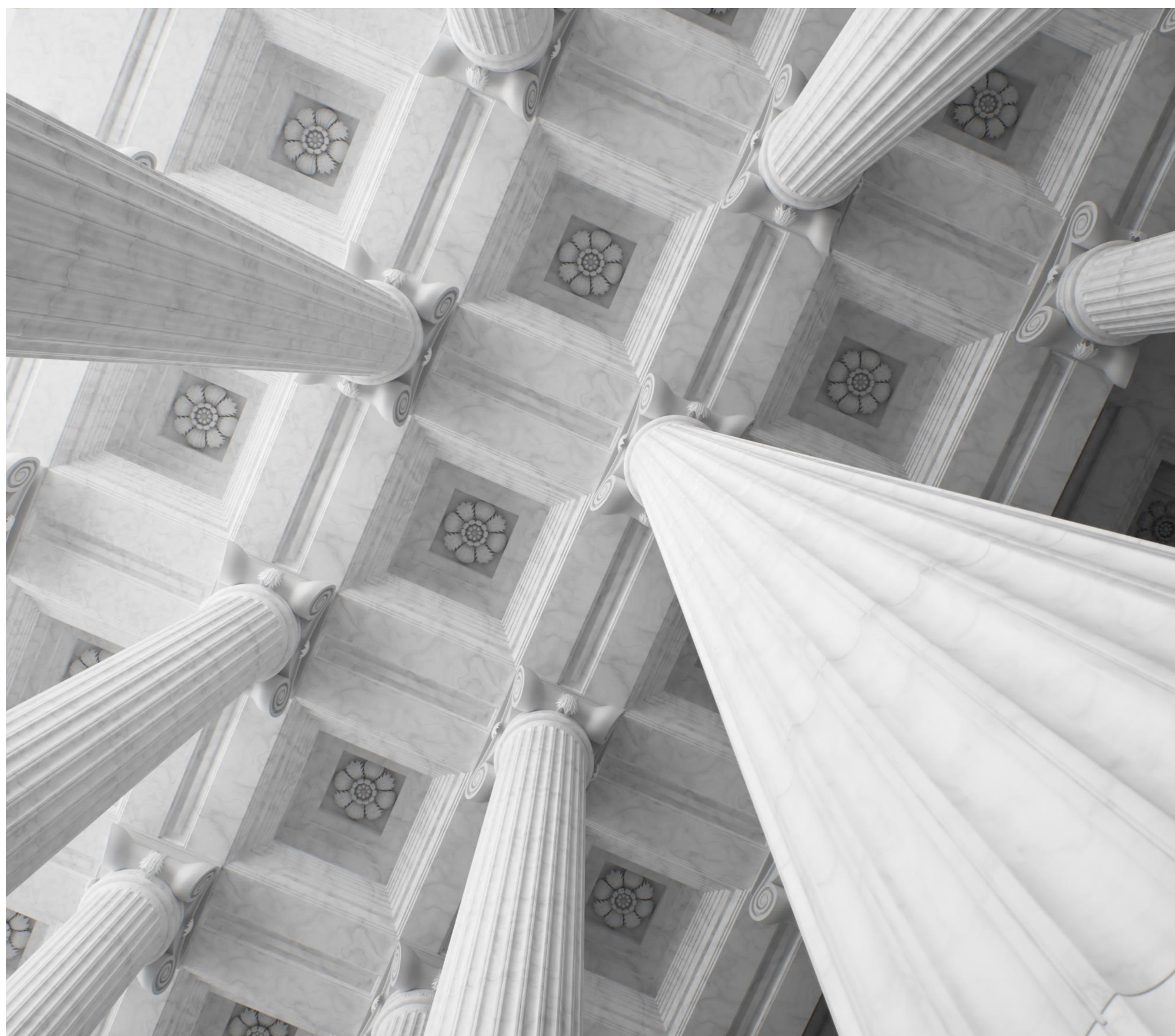
Case Law – Winter Storm Uri (cont.)

4. **Canadian Breaks LLC v. JPMorgan Chase Bank, N.A. (N. Dist – TX, Sept. 9, 2023)**
    - CB operated a wind farm and sold power to JPMC under an ISDA Power Annex using NY law
        - Daily fixed quantities at a fixed price of $19.55 for 11 years
        - Financially settled without physical delivery of the power
        - Special Provisions added “Force Majeure shall not be based on an event of curtailment of production at the Project, or an inability to deliver energy from the Project to the ERCOT system.”
        - FM provision contained standard language that “Force Majeure shall not be based on . . . (iii) the loss of failure of Seller’s *supply*”.

Case Law – Winter Storm Uri (cont.)

4. **Canadian Breaks LLC v. JPMorgan Chase Bank, N.A. (N. Dist – TX, Sept. 9, 2023) – cont.**
    - CB argued “supply” meant equipment and parts required to operate the facility
    - The magistrate granted JPMC’s MSJ interpreting “supply” to mean “seller’s generated energy”.
        - Magistrate looked to two earlier Uri cases with similar FM language, *JPMorgan Ventures Energy Corp. v. Miami Wind I*, LLC, 179 N.Y.S.3d 892, *2 (Sup. Ct. 2022), and *Stephens Ranch Wind Energy, LLC v. Citigroup Energy Inc.*, Index No. 652078/2021, NYSCEF No. 143 83-84 (Sup. Ct. Apr. 8, 2021), as well as Mieco, to reach this conclusion
    - The magistrate also held that force majeure will be determined by the terms of the contract, not common definition.
        - As a result, CB was not able to declare force majeure.

Case Law Summary



- The FM cases generally come down to the producer v. the marketer
  - For the most part, producers are winning
- Despite *ENI*, parties typically do not specify transportation paths in confirms
- Pool gas and pool power are very different products because of force majeure
- In response to the Uri disputes, NAESB held meetings to discuss whether the FM language in the NAESB should be changed
  - There was no consensus and no motion to change the FM language was approved

NAESB Force Majeure Provisions

Section 11 (NAESB Base Contract)

- Section 11.1 provides that except with regard to a party's obligation to make payment(s) and Imbalance Charges, neither party shall be liable to the other for failure to perform a Firm obligation, to the extent such failure was caused by Force Majeure. The term "Force Majeure" as employed herein means any cause not reasonably within the control of the party claiming suspension.

Exclusion of Force Majeure

- Section 11.3 of NAESB further states that neither party shall be entitled to the benefit of the provisions of Force Majeure to the extent performance is affected by any or all of the following circumstances: (i) the curtailment of interruptible or secondary Firm transportation unless primary, in-path, Firm transportation is also curtailed; (ii) the party claiming excuse failed to remedy the condition and to resume the performance of such covenants or obligations with reasonable dispatch; or (iii) economic hardship, to include, without limitation, Seller's ability to sell Gas at a higher or more advantageous price than the Contract Price, Buyer's ability to purchase Gas at a lower or more advantageous price than the Contract Price, or a regulatory agency disallowing, in whole or in part, the pass through of costs resulting from this Contract; (iv) the loss of Buyer's market(s) or Buyer's inability to use or resell Gas purchased hereunder, except, in either case, as provided in Section 11.2; or (v) the loss or failure of Seller's gas supply or depletion of reserves, except, in either case, as provided in Section 11.2. The party claiming Force Majeure shall not be excused from its responsibility for Imbalance Charges.
- Important to note that parties may agree to alternative Force majeure provisions in a Transaction Confirmation executed in writing by both parties.

ISDA Force Majeure Provisions

Section 5 ISDA Master Agreement

- Section 5(b)(ii) 2002 ISDA Master Agreement - After giving effect to any applicable provision, disruption fallback or remedy specified in, or pursuant to, the relevant Confirmation or elsewhere in this Agreement, by reason of force majeure or act of state occurring after a Transaction is entered into, on any day: -

1) the Office through which such party makes and receives payments or deliveries with respect to such Transaction is prevented from performing any absolute or contingent obligation to make a payment or delivery in respect of such Transaction, from receiving a payment or delivery in respect of such Transaction or from complying with any other material provision of this Agreement relating to such Transaction (or would be so prevented if such payment, delivery or compliance were required on that day), or it becomes impossible or impracticable for such Office so to perform, receive or comply (or it would be impossible or impracticable for such Office so to perform, receive or comply if such payment, delivery or compliance were required on that day); or

Section 5 ISDA Master Agreement (Contd.)

2) such party or any Credit Support Provider of such party is prevented from performing any absolute or contingent obligation to make a payment or delivery which such party has under any Credit Support Document relating to such Transaction, from receiving a payment or delivery under such Credit Support Document or from complying with any other material provision of such Credit Support, or it becomes impossible or impracticable for such party to perform, receive or comply, so long as the force majeure or act of state is beyond the control of such Office, and such party could not, after using all reasonable efforts (which will not require such party to incur a loss, other than immaterial, incidental expenses), overcome such prevention, impossibility or impracticability;

EEI Force Majeure Provisions

Section 3.3 EEI Master Power Purchase & Sale Agreement

- Section 3.3 states that to the extent either party is prevented by Force majeure from carrying out, in whole or part, its obligations under the Transaction and such Party (the "Claiming Party") gives notice and details of the Force Majeure to the other Party as soon as practicable, then, unless the terms of the Product specify otherwise, the Claiming Party shall be excused from the performance of its obligations with respect to such Transaction (other than the obligation to make payments then due or becoming due with respect to performance prior to the Force Majeure). The Claiming Party shall remedy the Force Majeure with all reasonable dispatch. The non-Claiming Party shall not be required to perform or resume performance of its obligations to the Claiming Party corresponding to the obligations of the Claiming Party excused by Force Majeure..

Exclusion of Force Majeure

- Section 1.23 of EEI states that Force Majeure shall not be based on (i) the loss of Buyer's markets; (ii) Buyer's inability economically to use or resell the Product purchased hereunder; (iii) the loss or failure of Seller's supply; or (iv) Seller's ability to sell the Product at a price greater than the Contract Price. Neither Party may raise a claim of Force Majeure based in whole or in part on curtailment by a Transmission Provider unless (i) such Party has contracted for firm transmission with a Transmission Provider for the Product to be delivered to or received at the Delivery Point and (ii) such curtailment is due to "force majeure" or "uncontrollable force" or a similar term as defined under the Transmission Provider's tariff; provided, however, that existence of the foregoing factors shall not be sufficient to conclusively or presumptively prove the existence of a Force Majeure absent a showing of other facts and circumstances which in the aggregate with such factors establish that a Force Majeure as defined in the first sentence hereof has occurred.

Force Majeure- Takeaways

- FM provisions in the contract will prevail over common law FM concepts
- FM provisions should specifically and clearly enumerate what constitutes FM, especially if NY law is used
  - Impracticality and impossibility will not be analyzed if specific FM provisions are used
  - NY and TX law differ in how much specificity is required
  - Similarity in FM exclusion provisions among master agreements.

Common Mistakes and Best Practices

- Financial and physical transactions have different risks, considerations, and regulatory frameworks.
- Pay attention to regulatory considerations at the outset!
- Are you negotiating a single transaction or a portfolio?

Thank you!