Chapter 6

Force Majeure Under Coal Supply Contracts

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§ 6.01. Introduction.

During the performance of a coal supply contract, it is not uncommon for one or both parties to be unable to perform their obligations for brief periods of time because of unexpected mechanical breakdowns, accidents, floods or other natural disasters or unexpected events. These have commonly become known as events of "force majeure." While virtually every coal supply contract has such a clause, like snowflakes, none seem to be the same. Yet business people often treat these clauses as legal "boilerplate"
and lawyers often negotiate them with little or no coordination with their client. Frequently, there is no negotiation of the clause at all with large utility buyers. This chapter examines the limited appellate caselaw available on this issue, identifies how the clause is usually constructed in coal supply contracts, considers the impact of force majeure declarations, and finally offers some aids to drafting such clauses and some examples of recently used clauses in coal supply contracts.


In early common law, unconditional promises made by the parties to a contract gave rise to absolute liability. Gradually, the law began to recognize physical impossibility as an excuse for nonperformance. By the mid-nineteenth century, the analysis had begun to move away from objective impossibility to recognition of the parties’ contractual assumptions. It was not until after the turn of the last century, however, that courts began to recognize the economics of nonperformance as the doctrine of “commercial impracticability.”


In the face of an inhospitable common law, parties quickly recognized that excuses for nonperformance had to be written into the contract. The French term force majeure comes from the Code Napoléon and as a civil law concept, has no real meaning under common law. English contract law adopted the term to refer to those events upon which contracting parties agreed would excuse nonperformance. The Kings Bench in Matsoukis v.

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6 Alphonse M. Squillante & Felice M. Congalton, “force majeure” 80 Com. L.J. 4, 5 (1975)(“[t]here is no ground for damages and interest, when by consequence of a superior force or of a fortuitous occurrence, the debtor has been prevented from [performing]...”) (quoting § 1148 of the French Civil Code from which the concept of force majeure is derived.).
Priestman & Co.\textsuperscript{7} interpreted the term \textit{force majeure} as having a broader meaning than “act of God” or the literal French interpretation “\textit{vis major}.” The dictionary defines “act of God” as an event happening independently of human volition, which human foresight and care could not reasonably anticipate or avoid.\textsuperscript{8} The U.S. Supreme Court has stated that \textit{force majeure} generally refers to circumstances that are “beyond the control and without the fault or negligence” of the non-performing party.\textsuperscript{9}

\section*{§ 6.03. Relationship of Force Majeure Clauses to Common Law and UCC.}

\subsection*{[1] — Force Majeure as a Contract Term}

\textit{Force majeure} clauses are really nothing more than contractual excuse terms and thus subject to interpretation and enforcement under settled contract law. \textit{Force majeure} or “contractual excuse” clauses have been recognized for centuries. However, it is often useful, and at times, convenient to interpret \textit{force majeure} events in light of the case law that has developed around the common law doctrines of impossibility and commercial impracticability. And because coal contracts are governed by the Uniform Commercial Code (UCC), Section 2-615 of those statutes is also almost always applicable unless the parties agree otherwise. Whether the parties to a contract allocated the risk of non-performance due to certain contingencies by means of a \textit{force majeure} clause is a question of contract interpretation itself which determines whether the impracticability defense of UCC Section 2-615 is applicable.\textsuperscript{10}

\subsection*{[2] — Restatement (Second) of the Law of Contracts Section 261.}

The doctrine of commercial impracticability was acknowledged in the Restatement (First) of the Law of Contracts in 1932. Section 454 of that Restatement provided that “In the Restatement of this Subject impossibility

\textsuperscript{7} Matsoukis v. Priestman & Co., 1 K.B. 681 (Eng. 1915).
\textsuperscript{8} See \textit{The Oxford Companion to Law} 478 (1980).
means not only strict impossibility but impracticability because of extreme
and unreasonable difficulty, expense, injury or loss involved.” In 1938,
Professor Samuel Williston published an extensive review and analysis of
excuse cases up until that time.11

The pre-UCC cases that Professor Williston analyzed generally fell into
two broad classifications: (a) contractual excuse clauses (force majeure)
and (b) commercial impracticability. The cases providing an excuse under
a force majeure clause are actually contract interpretation cases and do not
implicate the common law doctrine of excuse so much as the plain language
of the contract.

The pre-UCC excuse cases specifically involving the sales of goods
generally broke down into three sub-classes:

(i) impossibility due to change of law;

(ii) impossibility due to fortuitous destruction or change in character
of something to which the contract related or which – pursuant to
the contract – was made a necessary means of performance, and

(iii) impossibility due to the failure of a means of performance
contemplated by the parties but perhaps not expressly stated in the
contract.12

If a contract is silent on the type of extraordinary events which will
excuse a party’s performance, and if the UCC is not otherwise applicable,
Section 261 of the Restatement (Second) of the Law of Contracts expresses
the black letter law:

§ 261 Discharge by Supervening Impracticability

Where, after a contract is made, a party’s performance is made
impracticable without his fault by the occurrence of an event the non-
occurrence of which was a basic assumption on which the contract
was made, his duty to render that performance is discharged, unless
the language or the circumstances indicate the contrary.

1938). Professor Williston was also the Reporter for the Restatement.
12 Id. at 5419.
The current statement of the common law as expressed in Section 261 relieves parties, under certain circumstances from the “you are bound by what you signed” rule. Because it developed only after centuries of harsh outcomes, it is not surprising that *force majeure* clauses find their earliest roots in attempts to contractually ameliorate the common law doctrine. Indeed, the current state of the common law of commercial impracticability likely evolved from the older contract excuses from performance called impossibility and frustration of purpose.

A party may, by express agreement, assume a greater obligation through a *force majeure* clause than the standard established in Section 261.13

[a] — Harshness of Early Common Law.

As early as 1366, cases were reporting that harsh outcomes resulting from the rule of absolute performance could be avoided through the use of contractual excuse clauses. In *Y. B. Hill*,14 the attorney for a lessor of property argued to the lessee’s attorney that “you could have made provision in advance for such sudden events and excluded such liability by express covenant” in an action against the lessee for his failure to return buildings to the possession of the lessor in the same condition as when they were leased. The buildings had been damaged at the end of the term of the lease which damage the lessee claimed had been caused by a “great wind.”

[b] — Physical Impossibility.

Under ancient common law, unconditional promises made by the parties to a contract gave rise to absolute liability:

when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightening, or thrown down by enemies, yet he ought to repair it.15

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13 Restatement (Second) of Contracts § 261, Comment C (1981).
14 *Y. B. Hill*, 40 Edw. 3, fo. 6a (1366).
Gradually, the law began to recognize an excuse for nonperformance due to the physical impossibility to perform the promisor’s duty. When an “Act of God or the King’s Enemies” thwarted performance, the promisor was excused. The earliest known assertion of impossibility in reported sales cases was in *Hinde v. Whitehouse.*

In *Hinde,* the buyer purchased a single lot of sugar at auction which was then in storage at a warehouse. The terms of the sale were that the sugar would be at the buyer’s risk “from the time of sale.” The sugar was destroyed in a fire before the buyer took possession, and the seller subsequently sued for the price. The court held that “risk follows title,” and that title passed to the buyer upon the seller’s acceptance of the buyer’s bid and was therefore obligated for the purchase price.

[c] — Recognition of Parties’ Contractual Assumptions.

By the mid-nineteenth century, courts had began to look for ways to soften the harsh consequences of the absolute performance rule. The English case of *Taylor v. Caldwell,* an 1863 decision by the Court of Queens Bench, is generally considered to be the genesis of that doctrine that came to be known as the excuse of “physical impossibility.” In this case a music hall had been rented by a group of entertainers for a performance. However, a fire shortly before the scheduled performance destroyed the music hall. In what has come to be called the “Music Hall” case, the court held that the performers had no remedy against the owner of the building for non-performance. The court reasoned that since the parties did not reference the existence of the Music Hall in their contract, it must have been a basic assumption of the parties’ agreement:

Where, from the nature of the contract, it appears that the parties must from the beginning have known that [the contract] could not be fulfilled unless when the time for the fulfillment of the contract

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arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done.

The case held that excuse for performance exists upon the destruction of a thing whose continued existence was the foundation of the parties’ contract.

[d] — Commercial Impracticability.

The doctrine of impracticability later expanded to recognize the economics of non-performance as an excuse. “Commercial impracticability” was first coined as a term in 1916 in the case of Mineral Park Land Co. v. Howard.19 In Mineral Park, the defendants had agreed to remove and haul approximately 114,000 yd$^3$ of rock and earth from the property for the construction of a bridge. After removing only little more than 50,000 yd$^3$, the defendants halted their work, arguing that removing the remainder could only be accomplished at a cost of 10 to 12 times as much as the usual cost per yard of excavation. The court stated:

> Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost . . . . Where the difference in cost is so great as here . . ., of making performance impracticable, the situation is not different from that of a total absence of earth and gravel.20

Finally, the court reasoned that “a thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.”21 Thus was born the commercial reality that the economics of strict performance could provide an excuse for non-performance of contract obligations.

[e] — Lack of Forseeability.

Under the common law, the event must not have been foreseeable, a requirement that has often led to rather subjective, sometimes harsh and often

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20 Id. at 459-60.
21 Id.
inconsistent results.22 “Courts generally view the occurrence of a foreseeable contingency on the presumption that the burdened party implicitly agreed to bear the risk occasioned by the event.”23 Perhaps the most important objective of drafting a force majeure clause is to escape the requirement of foreseeability.

The sale of coal is expressly covered under the Uniform Commercial Code (UCC). Specifically the UCC covers goods to be severed from realty and states “a contract for the sale of minerals or the like (including oil and gas) . . . to be removed from realty is a contract for the sale of goods within [the UCC] if they are to be severed by the seller . . . .”24 The UCC provides the most commonly cited language establishing the excuse of commercial impracticability for the sale of goods:

§ 2-615. Excuse by Failure of Presupposed Conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller’s capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

The first question in any analysis of Section 2-615 is whether “a seller may have assumed a greater obligation” under a contractual force majeure clause.25 If the court determines that a party has assumed a greater obligation, then the analysis of whether an event constitutes an excuse for performance will be exclusively determined by its contractual agreement, or force majeure clause. If it is determined that the non-performing party did not assume a greater obligation under the contract, a court will proceed to apply Section 2-615.

The party claiming excuse under UCC Section 2-615 has the burden of proof on each of three necessary elements to establish the defense of impracticability: (1) the seller must not have assumed the risk of the contingency; (2) nonoccurrence of the contingency must have been a basic assumption underlying the contract; and (3) the occurrence of the contingency must have made performance commercially impracticable.26 Whether or not a greater obligation was assumed is actually an aspect of foreseeability – the obligation could not have been assumed if it was not foreseeable.

Foreseeability is perhaps the most subjective factor in the analysis of impracticability, relying as it does on a “hindsight” view of the facts. In Eastern Airlines, the foreseeability of the dramatic increase in crude oil prices in 1973-74 was at issue. The court held that, even absent the abundant

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25 Although drafted to apply to sellers, it is generally accepted that section 2-615 also applies to buyers, and thus by application then it is possible that a buyer has also assumed a greater obligation than established in this section.

FORCE MAJEURE UNDER COAL SUPPLY CONTRACTS § 6.04

record evidence, it could have taken judicial notice of the fact that oil had
been used as a political weapon by some producing nations for several years.
The court stated that the oil company was well aware of and assumed the
risk that the OPEC nations might do exactly what they did. The court thus
rejected the defense by the oil company that an “unforeseen” contingency
had rendered performance of the contract impracticable.27


Certain international agreements and treaties will also serve to
provide excuses for nonperformance in export coal contracts under limited
circumstances, in the absence of a negotiated force majeure clause. Most
international contracts for the sale of goods are governed by the United
Nations Convention on Contracts for the International Sale of Goods
(“CISG”).28 If no force majeure clause is included in an international
contract, Article 79 of the CISG which deals with changed circumstances
under the contract will apply. Although a discussion of Article 79 is beyond
the scope of this chapter, suffice it to say that at least one prominent authority
on commercial contracts has suggested that drafters include a contract
provision expressly excluding Article 79.29

§ 6.04. Elements of a Force Majeure Clause30

Parties may expand or limit those events (and the effect of those events)
that would excuse nonperformance, by including a carefully drafted force
majeure clause. This allows the parties to contract out of the default rules

1995).
28 United Nations Convention on Contracts for the International Sale of Goods, April 11,
29 E. Allan Farnsworth, “Review of Standard Forms or Terms Under the Vienna
between force majeure and international law, see e.g., Theo Rauth, “Legal Consequences of
& Policy 151, 152 (1996).
30 A number of good articles have been written on force majeure and the doctrine of
commercial impracticability under coal supply contracts, although most are now more than
under common law or the UCC and provides more predictability. Such a clause should accomplish four goals: (i) to define the events that constitute force majeure; (ii) provide the procedural requirements to be followed to properly invoke the protection; (iii) specify the obligation of the party invoking the protection to correct the event; and (iv) describe the effect that invoking the protection has on remaining contract performance.


Perhaps the most useful element of using a force majeure clause is that the events do not necessarily have to be “unforeseeable.”31 Indeed, parties are free to define force majeure events that are not only foreseeable, but which are even contemplated and planned by the parties.32 Careful drafting of the force majeure clause should not, however, confuse the lack of a requirement for unforseeability with the requirement that the non-performing party not be at fault for the event. In Big Horn Coal Co. and Black Butte Coal Co. v. Commonwealth Edison Co.,33 the utility purchaser claimed two events of force majeure: (i) a conveyor break-down at its Joliet, Illinois station, and (ii) an I-beam failure that temporarily closed its generating station in Waukegan, Illinois.

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31 See Perlman v. Pioneer Ltd. P’ship, 918 F.2d 1244, 1248 (5th Cir. 1990) (“Because the clause labeled “force majeure” in the lease does not mandate that the force majeure event be unforeseeable or beyond the control of [the non-performing party] before performance is excused, the district court erred when it supplied those terms as a rule of law.”); Sabine Corp. v ONG W. Inc., 725 F. Supp. 1157, 1170 (W.D. Okla. 1989).


33 Big Horn Coal Co. and Black Butte Coal Co. v. Commonwealth Edison Co., 852 F.2d 1259 (10th Cir. 1988).
Edison’s Joliet station had two units, one on each side of the Des Plaines River.34 One receiving facility on the south side of the river served both units, with the unit on the north side of the river fed by a large conveyor belt.35 After 20 years of uninterrupted service, the conveyor belt failed that fed the North unit and was down for 16 days.36 The jury returned a special verdict finding that this conveyor breakdown was an event of force majeure under the contract.

In May 1983, a steel I-beam at the utility’s Waukegan generating station collapsed, “causing extensive boiler damage and placing the station out of service until early September 1983.”37 During discovery, it was learned that approximately 18 months before the collapse, Edison had discovered that hot gas escaping from a pipe was weakening the beam, and undertook certain repairs to stop the gas leak.38 And six months prior to the collapse, an Edison engineer recommended that the furnace area be redesigned and the I-beams replaced.39 In its special verdict, the jury determined that the I-beam collapse was not a valid force majeure event, apparently for reasons that the utility was at fault for that event.40 The jury awarded Big Horn $492,868 in damages against Edison for the coal it was unable to deliver during the outage.41 Thus regardless of foreseeability, the non-performing party must not cause the event or be negligent in its occurrence.

The decision in Big Horn raises the spectre that some force majeure events—particularly the significant ones—may ultimately not qualify as force majeure at all. Query whether a mine fire and explosion that shuts down an underground mine for months is actually a force majeure excuse if the mine had been cited on several previous occasions for violations of ventilation requirements the consequence of which was the very event

34 Id. at 1264.
35 Id.
36 Id. at 1264-65.
37 Id. at 1265.
38 Id.
39 Id.
40 Id.
41 After filing its appeal from the force majeure portion of the lower court’s judgment, the parties subsequently entered into a “Stipulation for Partial Dismissal of Appeal,” vacating and dismissing that portion of the trial court’s judgment. Id. at 1266 n. 10.
that occurred? And further, even though there had been recommendations that the ventilation system could easily have been changed, it would have required a temporary loss of production during a time of high spot market prices? Even if an explosion is a listed force majeure event, if it resulted from negligence or the greed of the non-performing party, there is a good argument that it is not excusable.


[a] — Traditional List of Events.

Virtually every force majeure clause (that lists examples) includes the following events: acts of God, war, riots, civil insurrection, acts of the public enemy, strikes, lockouts, fires, and explosions. Beyond that, parties to coal supply contracts will often add floods, electric power failures, interruption to transportation (including lack of rail cars), freeze-ups, governmental orders and governmental and/or environmental regulations. Almost all clauses also contain the requirement that the event “not be within the reasonable control” of the party asserting the event. One court has held that the term “reasonable control” requires a two-step analysis: first, the party asserting the event must not have caused it and second, a party may not assert an event if it could have taken reasonable measures to prevent the event.42

[b] — Effects of Disruptive Event Rather than List.

Some force majeure clauses focus on the effects of the disruptive event rather than attempting to provide a laundry list of specific events. “With such a clause, the courts are more likely to focus on the foreseeability resulting from a disruptive event, which is more likely to lead to a conclusion of unforeseeability, thereby satisfying the force majeure requirement.”43 Although it does not focus on the effects of the event, the force majeure clause in the current DTE Coal Services, Inc. “Coal Transaction Confirmation”44

42 Nissho-Iwai Co., Ltd., v. Occidental Crude Sales, Inc., 729 F.2d 1530, 1540 (5th Cir. 1984).
44 Included at § 6.08.[11] supra.
provides only that “if . . . either party (the ‘non-performing party’) is unable to perform any of its obligations hereunder . . . .” No causes or examples are enumerated. One reading of such a provision might be that it does not satisfy the requirement in UCC Section 2-615 that makes that provision applicable “[e]xcept so far as a seller may have assumed a greater obligation . . . .” Arguably the force majeure clause here does not supply the grounds for invoking the excuse but that remains subject to the requirements of UCC Section 2-615(a).45 Even when clauses are drafted to focus on the effects of a disruptive event, it is important to draft the language carefully.46

[c] — Economic Hardship.

What is almost never in a force majeure clause is the concept of economic hardship. Economic hardship and/or profitability as well as market fluctuations are considered normal risks of contractual obligations and within the control of the contracting parties. The “Terms and Conditions” for Southern Company Services’ current coal purchase orders now includes within the force majeure clause the express statement that it “shall not include the development or existence of economic conditions which may adversely affect the anticipated profitability of the mining activities of Seller hereunder . . . .”

[d] — Ejusdem Generis.

The interpretive rule of ejusdem generis is often applied by the courts to force majeure clauses. The Latin term literally means “of the same class,” so that when a general or “catch-all” phrase such as “any other cause” or “anything beyond the reasonable control of the parties” follows a specific

45 See P.J.M. Declercq, “Modern Analysis of the Legal Effect of Force Majeure in Situations of Commercial Impracticability,” 15 J.L. & Com. 213, 225 (1995)(noting that when a contract “includes only a standard, boilerplate, catch-all force majeure provision, it might be hard to distinguish the contract term from the legal [impracticability] doctrine” and that judges will assume “that the language of the excuse clause only duplicates the standards found in U.C.C. Section 2-615”).

46 See e.g., Cartan Tours, Inc. v. ESA Servs., Inc., 833 So. 2d 873, 874-75 (Fla. Dist. Ct. App. 2003)(finding that such a force majeure clause was ambiguous).
list of *force majeure* events, the catch-all phrase will instead be narrowly viewed as including only similar events to those in the list.47

In *PT Kaltim Prima Coal v. AES Barbers Point, Inc.*,48 the parties employed a rather general *force majeure* definition:

> [a]ny act or event which wholly or partially prevents or delays the performance of obligations arising under this Agreement if such act or event is not reasonably within the control of and not caused by the fault or negligence of the nonperforming Party.49

The court—not referring to *ejusdem generis*—held that it “is reasonable to conclude from the broad language of the *force majeure* provision that the parties intended to include labor strikes as *force majeure* events . . . .”50

In addition to *ejusdem generis*, a related maxim of statutory construction may also be employed—*expressio unius est exclusion alterius*. Under this doctrine, if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.51

Finally, some coal supply contracts have gone so far as to include specific language to prevent the exclusion of unrelated events to a list: “The doctrine of *ejusdem generis* shall not be applied to exclude any event dissimilar to the enumerated events, but which is beyond the reasonable control of a party.”52

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47 See Sharon Steel Corp. v. Jewell Coal & Coke Co., 735 F.2d 775, 778 (3d Cir. 1984) (since each of the listed events in the *force majeure* clause related to an occurrence that would reduce Sharon’s need for coke, court reasoned that the “any other cause” language was limited to other causes that would similarly affect Sharon’s needs for coke—and not intended to include a drop in the market price).
49 *Id.* at 480.
50 *Id.* at 481, n.4.

Most force majeure clauses require prompt notice to the non-declaring party when asserting an event, often in writing.53 One case, however, has determined that a three months’ delay in giving notice was arguably sufficient to raise a question of fact so as to avoid summary judgment.54


The party whose performance is affected by an event of force majeure must normally correct the event as soon as possible. Otherwise, there would be little ability of the other party to force a continuation of the contract. A good example of this requirement is the language from the DTE Energy “Additional Coal Confirmation Terms and Conditions” that states “During such event of Force Majeure, the Non-Performing Party shall use its reasonable and best efforts to remedy or eliminate such Force Majeure.” Generally excepted from this obligation, however, is the right of the defaulting party to settle labor disputes on terms within its sole discretion.


Many, although not all, force majeure clauses suspend both contracting parties’ obligations under the agreement “to the extent necessary caused by the force majeure” but do not normally suspend the obligation to pay under the contract. If the event only prevents the delivery of some—but not all—of the coal called for in the agreement, the parties are obligated to continue performance to the extent possible. Force majeure only prevents damages for non-performance, it does not otherwise suspend the opposing party’s ability to cancel the contract or demand adequate assurance of future performance under UCC Section 2-609. Indeed, the force majeure clause generally gives the other party additional rights to cancel the contract—to the extent it has such ability—if the force majeure event continues for as little as 30 days up to six months. A valid force majeure event arising after a party’s unexcused breach, however, would serve to relieve that party of damages for the breach after the date that event occurred.


One important aspect of the parties’ performance following a force majeure event that should be resolved quickly is whether the missed shipments may be made-up. Clauses that have been silent or ambiguous on this issue have led to litigation on the theory that “performance suspended” equals “performance postponed.”

§ 6.05. Regulatory, Environmental and Statutory Force Majeure Issues.


In recent years, force majeure clauses in some coal supply contracts have included an “environmental” and/or “regulatory” force majeure provision. These provisions generally only permit the buyer to cease performing under the contract if some type of environmental regulation, order or governmental decision makes it impossible or “commercially impracticable” to use the coal supplied. These provisions began to be more widely used after a $181 million judgment obtained by Carbon County Coal Co., a Powder River Basin producer, against the Northern Indiana Public Service Company (NIPSCO) for the invalid assertion of force majeure. That case arose when the Illinois Public Service Commission issued orders requiring NIPSCO to purchase cheaper electrical power than that which it generated from the coal it purchased under contract. Otherwise, the PSC said in its order that it could not pass its higher fuel costs onto its customers. NIPSCO declared force majeure and stopped taking delivery of Carbon County’s coal on the grounds that the orders prevented it from utilizing the coal. Judge Posner for the Seventh Circuit held that the issue of force majeure should not have been put to jury, since the orders did not prevent NIPSCO from using the coal, but that “it just prevents NIPSCO from shifting the burden of its improvidence or bad luck in having incorrectly forecasted its fuel needs to the backs of the hapless ratepayers.”

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55 See Delta Mining Corp. v. Big Rivers Elec. Corp., 18 F.3d 1398 (7th Cir. 1994) (court was sympathetic to “postponement” argument but other language in clause led to holding that make-up shipments would be by agreement only). Cf. W. Tex. Utils. Co. v. Exxon Coal USA, Inc., 807 P.2d 932 (Wyo. 1991) (holding that there was no language in the contract that gave one party a right to “carry over” a force majeured shipment credit).


57 Id. at 275.

Judge Posner wrote in NIPSCO that “[a] force majeure clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed price contract is that the market price will change.”58 Although the NIPSCO case did not directly implicate environmental regulations, it did not take utilities long to understand that with “foreseeable” changes to air pollution laws, they could be stuck with coal they could not use. Thus the “environmental” escape hatch. In Kansas City Power & Light Co. v. The Pittsburg and Midway Coal Mining Co.,59 the utility failed certain air pollution control tests well into a 30-year coal contract, partly due to certain changes in environmental monitoring requirements. The utility subsequently claimed force majeure due to its inability to use the coal. The coal company argued that its coal could be used and still comply with the emission standard by changing the plant’s emissions removal process or by constructing a new air quality control system. The utility argued that the latter was cost prohibitive at over $140 million. On motions for summary judgment, the court found that “material questions of fact remain about whether [the utility’s] nonperformance is excused by the force majeure clause.” This raised the spectre that significant modifications might be required and the utility subsequently settled the case, reportedly on very favorable terms to the coal producer. A modern buyer’s environmental or governmental regulation force majeure provision likely would have foreclosed this issue.


At least one state has passed an environmental compliance statute prohibiting the parties to a contract from invoking a force majeure provision to excuse performance. Although the statute applies narrowly only to sales and purchases of coal to or by a utility, the Indiana statute has the effect of nullifying the parties’ carefully drafted excuses for nonperformance.60 Texas, one of only five states to codify a force majeure definition, takes the unusual step of limiting events of force majeure to situations that cause a

58 Id.


threshold of more than a 10 percent cost increase or revenue decrease in any calendar year.\textsuperscript{61}

\section*{§ 6.06. Response to Invocation of \textit{Force Majeure}.}

\textbf{[1] — Investigation and Course of Performance.}

When a counter-party to your contract notifies you that an event of \textit{force majeure} prevents its performance, an appropriate response is to first request as much information as possible about the event and the steps being taken to correct the event. Under the UCC, parties will be establishing a course of performance for the remainder of the contract term, and a pattern of conduct will be established.

\textbf{[2] — Kentucky Utilities Co. v. South East Coal Co.}

The decision in \textit{Kentucky Utilities Co. v. South East Coal Co.}\textsuperscript{62} is most often cited for its analysis of unforeseen conditions, but is also instructive as to the court’s treatment of 36 disputed \textit{force majeure} events under a broadly worded clause. In the KU contract at issue, the parties defined \textit{force majeure} as:

\begin{quote}
    a cause reasonably beyond the control of the Seller or Purchaser, as the cause may be, which wholly or in substantial part prevents the completion of construction of the processing or loading facilities, the mining, loading or delivery of coal at or from the Coal Property, or the unloading, storing or burning of coal by Purchaser at its destination. Examples (without limitations) of \textit{force majeure} but only if reasonably beyond the control of the Seller or Purchaser, as the case may be, are the following: acts of God, acts of the public enemy; insurrections; riots; strikes; labor disputes; work stoppages; fires; explosions; floods; equipment breakdown or outage (including scheduled outages for maintenance); electric power failures; interruptions to or contingencies of transportation; embargoes; and orders or acts of civil (including, without limitation, a city or county ordinance, an act of a state legislature and an act of the United States Congress) or military authority. In the event \textit{force majeure}
\end{quote}

\textsuperscript{62} Kentucky Utilities Co. v. South East Coal Co., 836 S.W.2d 392 (Ky. 1992).
prevents the unloading, storing or burning of coal by Purchaser at the
destination or destinations to which the coal is then being shipped,
Purchaser shall consider what steps can be taken in the transportation
and utilization of the coal, including diversion of the coal to other
of its plants so as to allow the coal to be used by Purchaser, and
if such steps can be accomplished without unreasonable cost or
expense, in Purchaser’s sole opinion, Purchaser shall promptly take
such steps.63

The court found that the statute of limitations barred the first four events
and that South East had waived the next 16 events through its course of
performance by accepting or acquiescing in each one when declared.64 Of
the remaining events, the court determined:

Nos. 22, 28, 32 and 36 – barge unloader maintenance: found to be
force majeure but remanded to the trial court to determine if KU
considered alternate steps it could take without unreasonable cost
or expense to utilize South East’s coal;

Nos. 30 and 33 – partial outage for plant derating: held KU not
entitled to claim force majeure as the utility had failed to disclose
that during the derate it burned almost as much coal as the contract
called for from another party;

Nos. 21 (boiler tube maintenance), 23, 34 (boiler inspection), 24
(slag removal from boiler), 25, 27 (boiler tube failure), 26 (boiler
inspection and cleaning of tubes), 29, 31 (pipe hanger failure), and 35
(feed water heater, pipe hanger, boiler tube leak, and other repairs):
held to be permitted force majeures under the contract terms.

The court noted that KU was required to invoke force majeure in
good faith65 defined as “honesty in fact and the observance of reasonable
commercial standards of fair dealing in the trade.”66

63 Id. at 399.
64 South East had disputed them only when it filed a counterclaim in the subsequent civil
action regarding numerous other issues.
65 U.C.C. § 1-203.
66 Id. § 2-103(1)(b).

In a series of events not uncommon under coal supply contracts, the coal producer in Central Illinois Pub. Serv. Co. v. Atlas Minerals, Inc., 67 habitually failed to ship the required contract tonnages in each of several years. The utility would then pay the coal company the previous contract price the next year until the previous year’s commitment had been met. Early on in the relationship, the utility had rejected the producer’s invocation of force majeure but acquiesced in the “delayed” shipping schedule. When the contract ended, the producer had failed to deliver all of the amount under contract and alleged that the contract had been “amended” to allow it to ship beyond the termination date of the contract to “make up” what it had claimed was prevented by force majeure. The court subsequently denied the utility’s claim for damages for undershipments, finding that the parties had indeed waived the internal delivery schedule but found such conduct had not sufficiently amended the termination date.

§ 6.07. Drafting Aids and Considerations for the Practitioner.

A well-written force majeure clause that expressly recognizes the expectations of the parties will provide much better protection than the common law doctrine of “impracticability” or even the added predictability of UCC Section 2-615. Following are some considerations for the practitioner when drafting or interpreting these clauses.


Many modern force majeure clauses are overdrafted, attempting to restate well established rules of impracticability while often overlooking more important terms such as whether an event that only “hinders” performance rather than “preventing” it will qualify as force majeure and to what extent.

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Despite the events of 9/11, most coal supply contracts written today still do not excuse acts of terrorism.\(^68\) A wealth of case law in the insurance context suggests that courts will interpret “acts of God,” “insurrection” and “hostilities” narrowly and not apply them to guerilla or terrorist groups.\(^69\) Added to the standard *force majeure* clause should be the phrase “acts of terrorism” and further qualified by the language “whether actual or threatened.” While the term has not been judicially reviewed, it is at least broader than existing terms.


Specify clearly how and when an event of *force majeure* must be declared and conveyed to the other party. If verbal or facsimile notice is permitted, the clause should so state, and whether it must be followed by written notice, and within what time period.

Clearly define the defaulting party’s obligation to correct the events that led to the *force majeure* and specify the length of time during which the nonperforming party has to correct such conditions before the contract may be canceled.


Spell out precisely whether deliveries lost to *force majeure* may be “made-up” by the nonperforming party and whether it requires the mutual consent of both parties, and whether it will affect the termination date.

§ 6.08. Appendix.

**Sample Force Majeure Clauses.**

[1] — Typical, Simple *Force Majeure* Clause.\(^70\)

The term “*force majeure*” shall mean any cause beyond the control of the Buyer or Seller which wholly or partially prevents the mining, loading, or delivery of coal at or from a Supply mine, or the receiving, transporting, or delivery of coal by the railroads or the unloading, storing, or burning of coal by the Buyer at its destination. Examples (without limitation) of *force

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\(^{69}\) *Id.*

\(^{70}\) Short & Thomas, 1 *Ky. Min. Law* § 55.02(K)(1985).


*majeure* are the following: acts of God; acts of a public enemy; insurrections; riots, strikes; labor disputes; shortages of supplies; fires; explosions; floods; breakdowns of or damage to plants, mines, equipment, or facilities; unforeseen or unknown faults in coal seams; interruptions or contingencies of transportation, including determination of *force majeure* under provisions of the applicable tariff; embargoes; orders or acts of civil or military authorities; inability to obtain governmental permits or approvals required by law and necessary to the mining, transporting, storing, and handling of coal.

The Buyer or Seller, as the case may be, shall notify the other party promptly in writing of the occurrence of an event of *force majeure*, shall give full information concerning such event, and shall promptly exert due diligence to remove such cause.

The Seller shall not be liable for delay or reduction or suspension of shipments resulting from any cause beyond its reasonable control, and the Buyer shall not be liable for any inability to accept delivery of or consume coal under this contract resulting from any cause beyond its reasonable control, provided the affected party proves prompt written notice of such a cause, and the cause is eliminated with reasonable dispatch.

In the event of a *force majeure* limiting the amount of coal available, the Seller shall not reduce the deliveries of coal to the Buyer hereunder until it has suspended all other deliveries of similar quality coal to all of the Seller’s other customers, supplied from the identified properties. In the event of a *force majeure* at or affecting the Buyer’s plant, the Buyer shall not reduce its purchase of coal hereunder until all other purchases and deliveries of similar quality coal have been completely suspended. On the other hand, the Seller or Buyer may be required to apportion the coal delivered or accepted among all its regular contract customers according to the share of the total annual production or purchase of coal.


Section 17. Force Majeure

§ 17.01. Definition of Force Majeure. The term “*force majeure*” as used in this Agreement shall include acts of God, acts of the public enemy,

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insurrections, riots, terrorism, strikes, lockouts, labor disputes, disturbances or unrest, labor or material shortages, fires, explosions, landslides, earthquakes, storms, floods, breakdowns of or damage to plants, equipment or facilities, interruptions of transportation or shortages of transportation equipment, embargoes, blockades, inability to obtain permits or authorizations from any governmental agency, any laws, orders, rules, regulations, acts or restraints of any governmental authority, whether civil or military, unknown conditions in the coal seams, unexpected mining conditions which may arise, and any other cause, whether of the kind or character herein enumerated or otherwise, which is not within the control of the party claiming excuse, all as further provided in this section 17.

§ 17.02. Consequences of Force Majeure. Performance by either party hereto under this Agreement shall be excused to the extent such party’s performance is rendered impossible or impracticable by one or more events of force majeure as defined in section 17.01 hereof.

(a) Except as otherwise provided for hereinafter, an event of force majeure which excuses total performance and which is likely to be permanent shall entitle either party hereto to terminate this Agreement upon 60 days prior written notice. An event of force majeure which is “likely to be permanent” is one in which there is no reasonable prospect that the condition can be corrected or eliminated within one (1) year (or other time period which may be agreed to). (Other provisions relating to the mechanics, and consequences of termination can be added, if desired.)

(b) Except as otherwise provided for hereinafter, an event of force majeure which excuses partial performance which is likely to be permanent, as defined in section 17.02(a) hereof, shall excuse such portion of such performance for the remainder of the term of this Agreement.

(c) An event of force majeure which excuses total or partial performance which is not likely to be permanent (as defined in section 17.02(a) hereof) shall excuse such performance so long as such event of force majeure continues.

Performance by Seller means mining, preparing and delivering coal to buyer hereunder. Performance by buyer means the operation of its plant to utilize the coal to be supplied by Seller hereunder. Any obligation of a party hereto to make payments of money to the other party hereto under the terms of this Agreement shall not be excused by reason of any claim of force majeure hereunder.
§ 17.03.  *Force Majeure* Due to Legal Restrictions. In the event any restrictions are imposed by governmental agencies which restrict or prevent the burning of some or all of the coal to be supplied under this Agreement, any such restriction shall be deemed to be an event of *force majeure* under this Agreement unless its effect (“Effect”) can be avoided as hereinafter provided. Seller and Buyer agree that the following steps will be taken promptly in the order listed (or simultaneously if appropriate) in a good faith effort to avoid the Effect of such restriction and to permit the burning of the coal to be supplied hereunder.

(a) Buyer shall exhaust administrative remedies which may be available, such as variance procedures.

(b) Buyer shall consider what steps can be taken in the handling and combustion of the coal at its plant which are feasible and will not result in unreasonable expense to Buyer, such as the blending of coals and including the installation of equipment which is commercially available which will result in compliance with such restriction and Buyer shall take such steps as it considers feasible and which will not result in unreasonable expense to Buyer in Buyer’s sole judgment.

(c) Seller shall consider what steps can be taken in the mining and preparation of coal at its mine to avoid the Effect of such restriction, and if such steps are available at a reasonable additional cost in Buyer’s sole judgment, and Buyer is willing to reimburse Seller for such additional costs, Seller shall take such steps and the price of coal shall be adjusted accordingly.

(d) Seller shall consider what substitute coal it can deliver to Buyer hereunder which will avoid the Effect of such restriction. If such substitute coal is suitable for burning at Buyer’s plant and can be delivered at a reasonable delivered price in the sole judgment of Buyer, Seller shall deliver such substitute coal to Buyer and the price to be paid therefore shall be adjusted to take account of any differences in Seller’s costs of mining, preparing and delivering such substitute coal.

(e) In the event that the coal to be supplied under this Agreement remains unable to be burned at Buyer’s plant after the exhaustion of the aforesaid procedures, and the situation appears permanent within the meaning of section 17.02(a) hereof, this Agreement shall terminate.

(f) This Agreement shall remain in full force and effect and no *force majeure* shall be deemed to exist with respect to any such restriction if,
and to the extent, that such restrictions can be avoided through any of the foregoing steps.

§ 17.04. Meaning of Causes Beyond Control of a Party, and Efforts Required to Remedy Force Majeure.

As used in section 17.01 hereof, a cause shall be deemed to be beyond the control of the party claiming excuse if such party is unable to avoid or overcome such cause despite the exercise of due diligence or if the avoidance or overcoming of such cause is commercially impracticable. An act shall be deemed commercially impracticable hereunder when it can be accomplished only at an excessive and unreasonable cost. A strike or other labor disturbance shall be deemed to be beyond the control of the party whose performance is prevented by such strike or labor disturbance, and nothing in this Agreement shall be construed as requiring either party to accede to the demands of employees, whether or not represented by a union or other organization, which such party considers contrary to its interests. Subject to the foregoing, a party claiming excuse by reason of force majeure shall exercise good faith efforts to remedy the cause thereof as soon as practicable under all the circumstances.

§ 17.05. Notice of force majeure.

Unless the other party has actual notice of the event, the party claiming excuse shall send prompt written notice to the other party setting forth a brief description of the event of force majeure and the extent of the excuse claimed. Such notice of force majeure shall be deemed accepted by the recipient unless objected to in writing within thirty days after receipt thereof. In the case of sudden, material disruptions of performance, the term “prompt” shall mean within seventy-two hours (exclusive of non-business days) of the occurrence of the disruption. With respect to instances of force majeure which do not entail sudden, material disruptions but which cause a gradual diminution of performance, the requirement of prompt notice shall be satisfied by written notice given at such time as it shall become clearly apparent that performance has been materially diminished by such force majeure cause. The requirement of giving of prompt notice of an event of force majeure shall be a covenant only and shall not deemed to be a condition.

§ 17.06. Multiple Causation.

Whenever interrupted or diminished performance is traceable to two or more events or causes of force majeure, and whenever under such circumstances it is not feasible or practicable to trace a precise quantum
of performance to any one such cause, but only to all such causes in the aggregate, a showing of the effect of all such causes in the aggregate shall suffice as an excuse whenever each such cause would have been a *force majeure* cause by itself.

§ 17.07. Pro Rata Delivery.

In the event of reduced production at Seller’s mine(s) serving Buyer at the time of occurrence of the *force majeure*, Seller will deliver to Buyer, to the extent practicable for the period of reduced production, a percentage of unaffected production equal to the percentage of total mine production which Buyer would be entitled to receive, by contract, from said mine(s) during periods of full production.

§ 17.08. Requirement of Substitute Performance.

If Seller is excused from supplying coal from the mine or mines designated in this Agreement as the source of coal pursuant to this section 17, Seller shall not be required to substitute coal from any other sources. Likewise, if this section 17 excuses Buyer from taking coal for its ______ (Plant or Station), Buyer shall not be required to purchase coal hereunder for use in another plant.

§ 17.09. Duty to Supply or Purchase Quantities Excused.

In the case of performance which is excused due to permanent *force majeure* events, either partial or total, as provided in sections 17.02(a) and (b) hereof, Seller shall have no duty to supply quantities of coal excused from delivery thereby, and Buyer shall have no duty to purchase such quantities of coal from Seller. In the case of performance which is excused due to *force majeure* which is not permanent as provided in section 17.02(c) hereof, Seller shall in good faith endeavor to supply such quantities of coal not delivered by reason of such excuse if requested to do so by Buyer, but only to the extent Seller in good faith determines that it is able to produce, prepare and deliver additional coal in accordance with available equipment and its normal operating and delivery schedule. If Seller determines that it will incur additional costs or experience other problems in producing, preparing and delivering such coal, the sale thereof shall be on such terms and conditions as may be mutually agreeable.

*Force Majeure*

*Force majeure* as used herein shall mean a cause reasonably beyond the control of Seller or Purchaser, as the case may be, which wholly or in substantial part prevents the mining, loading, or delivery of coal at or from the Coal Property or the transportation to or the unloading, storing, or burning of coal by Purchaser at the destination plant or other delivery point. Examples (without limitation) of *force majeure*, but only if reasonably beyond the control of Seller or Purchaser, as the case may be, are the following: acts of God, acts of the public enemy, insurrections, riots, strikes, labor disputes, work stoppages, fires, explosions, floods, electric power failures, interruptions to or contingencies of transportation, coal frozen to railcar, embargoes, and orders or acts of any government (including, without limitation, a city or county ordinance, an administrative regulation or ruling, an act of a state legislature, an act of the United States Congress, and a final judicial decision, order, or decree based upon orders or acts of governmental authorities) or military; provided, however, that *force majeure*, for the purposes of the Agreement, shall not include the development or existence of economic conditions which may adversely affect the anticipated profitability of the mining activities of Seller hereunder, acts or omissions of Seller constituting negligence or mismanagement on the part of Seller, geologic conditions affecting mining, or reduced productivity of labor.

If because of *force majeure* either Purchaser or Seller is unable to carry out its obligations under the Agreement, and if such party promptly gives the other party written notice of the conditions giving rise to such *force majeure*, the obligations and liabilities of the party giving such notice and the corresponding obligations of the other party shall be suspended to the extent made necessary by and during the continuance of such *force majeure*; provided, however, that the party suffering the disabling effects of such *force majeure* shall make reasonable efforts to eliminate, as soon as and to the extent possible, the events giving rise to such *force majeure*, except that either party may settle any of its own labor disputes or strikes or terminate any of its own lockouts in its sole discretion. Purchaser, in its sole discretion, shall determine whether shipments not made because of

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72 Available at www.southerncompany.com/suppliers/pdf/041805spotterms.pdf.
force majeure or suspended because of force majeure shall be canceled without liability to either party or shall be made up; but the Agreement shall otherwise remain in full force and effect; provided, however, that if a condition of force majeure occurs which causes a suspension of obligations under the Agreement for a continuous period equal to 30 percent or more of the term of the Agreement, Purchaser may terminate the Agreement by giving written notice of termination to Seller.

[4] — City of Lakeland Florida Force Majeure Clause.73

Section 12. Force Majeure
12.1 Events of Force Majeure.

If because of Force Majeure or Environmental Force Majeure either party is unable, in whole or in part, to carry out any of its obligations under this Agreement, and if such party promptly gives notice to the other party of such Force Majeure or Environmental Force Majeure, then the obligations of the party giving such notice are suspended to the extent and for the period made reasonably necessary by such Force Majeure or Environmental Force Majeure; provided, however, that the notifying party proceeds with all reasonable dispatch to employ such diligence as is reasonably necessary to remedy the event causing such Force Majeure or Environmental Force Majeure.

As used herein, “Force Majeure” shall mean any event or cause beyond the reasonable control of a party that cannot be prevented or eliminated by the exercise of due diligence including but not limited to acts of God, strike, lockout or other labor dispute, sabotage, fire, storm, flood, war, riot or insurrection, explosion, accident, embargo, blockade, inability to secure supplies, fuel, governmental authorization or permit, unscheduled or forced outages at the Generating Station, malfunction, breakdown of or damage to machinery, plants or equipment, not the fault of the party claiming under

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73 Coal Supply Agreement Between City of Lakeland, Florida, and Cook & Sons Mining, Inc. at 12−13, dated March 3, 2003, included as an Exhibit to Docket Entry #207 Exhibit K in the matter styled In re: Cook & Sons Mining, Inc., Bankr. Proceeding No. 03−70789 (E.D. Ky.).
this section, interruption or shortage of transportation arrangements\textsuperscript{74} or equipment, regulation, rule, law, order act or restraint of any civil or military authority, or any other cause whether of the kind herein enumerated or otherwise.

As used herein, “Environmental Force Majeure” shall mean any law, regulation, policy or restriction enacted by any regulatory body having jurisdiction or any court decision having a similar effect relating to air pollution or other environmental matters which make it impossible or commercially impractical for Buyer to utilize coal delivered under this Agreement or like kind and quality of coal. In determining whether Buyer’s continued performance is commercially impractical, the terms shall mean that if production following Environmental Force Majeure would result in a total cost to Buyer in using Seller’s coal (including the cost of any equipment amortized over its useful life), in excess of the total cost of using purchased power and/or competitive fuels including, without limitation, coal from alternative sources which are reasonably available to Buyer which can be utilized in conformity with all such restrictions including the cost of any addition or modification to Buyer’s Generating Station necessary to permit the delivery and utilization of such fuel. The cost of using such fuels over the remainder of the term of this Agreement, including anticipated modifications, adjustments or additions to Buyer’s Generating Station shall be considered for the purpose of this section.

12.2 Suspension of Performance for Force Majeure or Environmental Force Majeure.

If a condition of Force Majeure or Environmental Force Majeure occurs the mutual obligations of both parties arising out of the event of Force Majeure or Environmental Force Majeure shall be suspended to the extent caused by the event. Should the condition of Force Majeure or Environmental Force Majeure continue for a period of six (6) months following notice by the party of the event, then either party may terminate this Agreement.

\textsuperscript{74} Although on its face this provision suggests the lack of rail cars for transport of the coal would be a valid event of force majeure, a separate provision of the contract in another section states “notwithstanding any provision to the contrary, any failure of performance or delay resulting from the unavailability, operation or condition of Buyer’s Railcars shall be excused . . . .”
without liability to the other thirty (30) days after notice has been provided in writing to the non-terminating party.

If as a result of the adoption of such laws, regulations, policies, or restrictions, or changes in the interpretation or enforcement thereof, Buyer decided that it will be impossible or commercially impractical for Buyer to utilize such coal, Buyer shall so notify Seller, and thereupon Buyer and Seller shall promptly consider whether corrective actions can be taken in the mining and preparation of the coal at Seller’s mine and/or in the handling and utilization of the coal at Buyer’s Generating Station; and if in Buyer’s judgment such actions will not, without unreasonable expense to Buyer, make it possible and commercially practical for Buyer to so utilize coal which thereafter would be delivered hereunder without violating any applicable law, regulation, policy or order, Buyer shall have the right, upon the later of sixty (60) days notice to Seller or the effective date of such restriction, to terminate this Agreement without further obligation hereunder on the part of either party.

In the event either party has been prevented in whole or in part from delivery of coal or acceptance of coal due to Force Majeure or Environmental Force Majeure, the Annual Quantity set forth in Section 5.1 shall be adjusted by such amount, or at Buyer’s election, may be added to future shipments pursuant to a reasonable schedule of additional shipments during the term of this Agreement. During any period of Force Majeure or Environmental Force Majeure, Buyer shall be entitled to purchase coal not delivered hereunder from other suppliers and Seller shall be entitled to sell any coal not delivered hereunder to other customers, each without liability to the other; provided however, that such sales by Seller shall not infringe or materially alter Seller’s ability to otherwise perform under the terms of this Agreement, or to perform upon the elimination of the condition of Force Majeure.

Buyer’s decisions and opinions with respect to this section shall be final in its sole discretion and not subject to dispute by Seller. In the event buyer exercises its termination right under this section, Seller shall have the right but not the obligation to offer a like quantity and quality of coal that will meet the restrictions adopted. The price for such coal will be the market price, as determined by a coal supply solicitation, for similar coal at the time of the adjustment. If Seller declines or does not accept within fifteen (15) days, this Agreement shall be terminated effective immediately.

Section 10. *Force Majeure*

§ 10.1 General *Force Majeure.*

If either party hereto is delayed in or prevented from performing any of its obligations or from utilizing the coal sold under this Agreement, in whole or in part, due to acts of God, war, riots, civil insurrection, acts of public enemy, strikes, lockouts, fires, floods or earthquakes, or other causes of a similar nature, which are beyond the reasonable control and without the fault or negligence of the party affected thereby, then the obligations of both parties hereto shall be suspended to the extent made necessary by such event; provided that the affected party gives written notice of the existence and probable duration of the *force majeure* event to the other party as early as practicable after the occurrence of the *force majeure* event. The party declaring *force majeure* shall exercise due diligence to avoid and shorten the *force majeure* event and will keep the other party advised as to the continuance of the *force majeure* event.

During any period in which Seller’s ability to perform hereunder is affected by a *force majeure* event, Seller shall not deliver any coal to any other buyers to whom Seller’s ability to supply is similarly affected by such *force majeure* event unless contractually committed to do so at the beginning of the *force majeure* event and further shall deliver to Buyer under this Agreement at least a pro rata portion (on a per ton basis) of its total contractual commitments in place at the beginning of the *force majeure* event to all its buyers to whom Seller’s ability to supply is similarly affected by such *force majeure* event. An event which affects the Seller’s ability to produce or obtain coal from a mine other than the Coal Property will not be considered a force majeure event hereunder.

Tonnage deficiencies resulting from Seller’s *force majeure* event shall be made up at Buyer’s sole option on a mutually agreed upon schedule. Tonnage deficiencies resulting from Buyer’s *force majeure* event shall be made up at Seller’s sole option on a mutually agreed upon schedule.

\(^75\) Coal Supply Agreement Between Kentucky Utilities Company and Coal Network, Inc. at § 10, dated December 30, 2002, included as an Exhibit to Docket Entry #207, Exhibit J in the matter styled *In re: Cook & Sons Mining, Inc.*, Bankr. Proceeding No. 03-70789 E.D. Ky.).
§ 10.2 Environmental Law Force Majeure.

The parties recognize that, during the continuance of this Agreement, legislative or regulatory bodies or the courts may adopt or reinterpret environmental laws, regulations, policies and/or restrictions which will make it impossible or commercially impracticable for Buyer to utilize as intended this or like kind and quality coal which thereafter would be delivered hereunder. If as a result of the adoption or reinterpretation of such laws, regulations, policies, or restrictions, or change in the interpretation of enforcement thereof, Buyer decides that it will be impossible or commercially impracticable (uneconomical) for Buyer to utilize such coal as intended, Buyer shall so notify Seller. Upon such notification, and thereupon Buyer and Seller shall promptly consider whether corrective actions can be taken in the mining and preparation of the coal at Seller’s mine and/or in the handling and utilization of the coal at Buyer’s generating station. If in Buyer’s sole judgment such actions will not, without unreasonable expense to Buyer, make it possible and commercially practicable for Buyer to so utilize coal which thereafter would be delivered hereunder without violating any applicable law, regulation, policy or order, Buyer shall have the right, upon the later of 60 days notice to Seller or the effective date of such restriction, to terminate this Agreement without further obligation hereunder on the part of either party.


A. Force Majeure

If, because of force majeure, any party shall be unable to carry out any of its obligations under this Agreement, then the obligation of that party shall be suspended to the extent made necessary by force majeure. The term “force majeure” shall mean acts of God, legislation or lawful regulation of any governmental body, acts of the public enemy, riots, strikes,

76 Coal Supply Agreement Between Commonwealth Coal Services, Inc. (Seller’s Agent), Cook & Sons Mining, Inc. (Seller) and Consumers Energy Company (Buyer), at Article XI.4, dated March 2002, included as an Exhibit to Docket Entry #_____ in the matter styled In re: Cook & Sons Mining, Inc., Bankr. Proceeding No. 03-70789 (E.D.Ky.).
FORCE MAJEURE UNDER COAL SUPPLY CONTRACTS

labor disputes, labor material shortages, unforeseen geological conditions that substantially impair coal production capability, fire, explosion, flood, breakdown or damage to plant, mines, equipment or facility, the interruption or reduction for any reason of electric generation by the generating plants receiving the coal, interruptions to transportation (including railroad car shortage), embargoes, contingencies of electric generation, limitation upon power requirements or any other cause beyond the control of the party affected which wholly or partly prevent the mining, processing, loading or shipment of coal provided for hereunder by the Seller or the transporting, receiving, unloading, storing or consuming of said coal by the Buyer at Buyer’s Plants.

If a force majeure situation which extends more than three (3) months is claimed by the Seller, Buyer shall, if replacement tonnage has already been purchased, have the option to reduce the scheduled tonnage from Seller by the amount of such replacement tonnage during the two (2) months period following the termination of the force majeure situation.

The party affected by force majeure shall give notice to the other parties as promptly as practicable of the nature and probable duration of such force majeure. Any deficiency in deliveries of coal caused by force majeure shall not be made up except by mutual consent, provided that Buyer shall share pro rata, during the period of suspension, in Seller’s production of coal herein described from Seller’s Mines, and Seller shall participate to the extent of its pro rata share in Buyer’s coal purchases for Buyer’s Plants during such period of suspension in the absence of legal restriction(s) which wholly or partly prevent Buyer form consuming the coal provided for hereunder at Buyer’s Plants. Except as provided in the preceding paragraph, the partial or complete suspension of shipments referred to in this Article XI shall not invalidate the remainder of the Agreement or reduce the tonnages to be purchased and sold in subsequent periods, but upon removal of the cause of such suspension, shipments shall be resumed at the specified rates; provided, however, that if the duration of such complete suspension of shipments exceeds six (6) consecutive months, Buyer may terminate this Agreement at any time thereafter, prior to the resumption of such shipments, by giving written notice to Seller.
8.1 Force Majeure

“Seller’s Force Majeure” as used herein shall mean a cause reasonably beyond the control of Seller which wholly or in substantial part prevents the mining, preparing, loading, shipping or delivery of coal. “Buyer’s Force Majeure” as used herein shall mean a cause reasonably beyond the control of Buyer which wholly or in substantial part prevents the unloading, storing or burning of coal by Buyer at its destination. Examples (without limitations) of force majeure for either party are the following: acts of God, acts of the public enemy, insurrections; riots; strikes; labor disputes; work stoppages; fires; explosions; floods; electric power failures; breakdowns of or damage to generating plants, mining equipment or preparation plant; interruptions to or contingencies of transportation; embargoes; and orders or acts of civil authority (including, without limitation, a city or county ordinance or order by a regulatory agency, an act of a state legislature, an act of the United States Congress) or military authority; provided, however, for the purposes of this Agreement force majeure shall not include, and neither party shall be excused from performance because of the development or existence of economic conditions which may adversely affect the anticipated profitability of the mining activities of Seller hereunder or which may adversely affect the use of coal by Buyer. Scheduled outages shall not be considered force majeure. Acts or omissions of either party which constitute mismanagement shall not be considered force majeure hereunder.

If because of Buyer’s Force Majeure, Buyer is unable to carry out its obligations under this Agreement, and if Buyer gives Seller prompt written notice of such force majeure, the obligations and liabilities of Buyer and the corresponding obligations of Seller shall be suspended to the extent made necessary by and during the continuance of such Buyer’s Force Majeure; provided; however, that the disabling effects of such force majeure shall be eliminated as soon as and to the extent possible (except that either party

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77 Coal Supply Agreement #C-13764-95 Between South Carolina Public Service Authority and Cyprus Cumberland Coal Corporation at Article 8.1, dated January 1, 1996, included as an Exhibit to Docket Entry #_____ in the matter styled In re: Horizon Natural Resources, Inc. Proceeding No. 02-14261 (E.D.Ky.).
may settle any of its own labor disputes, strikes, or terminate any of its own lockouts in its sole discretion).

Upon elimination of a Buyer’s *Force Majeure* condition, Seller may, at its sole option, elect to ship tonnage not received during the *force majeure* period at a shipping rate to be determined by Seller, but subject to Buyer’s ability to receive coal. In the alternative, Seller may, at its sole option, elect to have any tonnage not received during the *force majeure* period reduce the total tonnage to be shipped, as provided for in this Agreement.

If because of Seller’s *Force Majeure* Seller is unable to carry out its obligations under this Agreement, and if Seller gives Buyer prompt written notice of such *force majeure*, the obligations and liabilities of Seller and the corresponding obligations of Buyer shall be suspended to the extent made necessary by and during the continuance of such Seller’s *Force Majeure*; provided, however, that the disabling effects of such force majeure shall be eliminated as soon as and to the extent possible (except that either party may settle any of its own labor disputes, strikes, or terminate any of its own lockouts in its own sole discretion).

Upon elimination of a Seller’s *Force Majeure* condition, Buyer may, at its sole option, elect to receive tonnage not shipped during the *force majeure* period at a shipping rate to be determined by Buyer, but subject to Seller’s ability to perform. In the alternative, Buyer may, at its sole option, elect to have any tonnage not delivered during the *force majeure* period reduce the total tonnage to be shipped, as provided for in this Agreement.

It is agreed that in the event that any valid act, law, ordinance, order, rule or regulation of a municipality, regulatory agency, county, state or the United States government, or final judicial decision, judgment or order, is adopted or passed after the date of this Agreement, which (a) directly prohibits the mining contemplated hereunder, or (b) imposes significant burdens or restrictions upon the burning or use of such coal by Buyer (except for Environmental Related Requirements as pursuant to Section 8.2) to the extent that Buyer is unable or would not be allowed to utilize such coal or would be allowed to utilize such coal only after the installation or substantial renovation of plant equipment that would make Seller’s coal less economical than other available sources, then the existence and implementation of such act, law, ordinance, rule, regulation, judgment or order shall constitute an instance of permanent *force majeure* whereupon this Agreement may be terminated by the party so affected. If Buyer is required to replace coal, Seller shall have
the option to replace coal at the same Delivered Cost, in cents per million Btu, as other available sources. In the event Buyer, in its sole judgment, determines that Seller cannot achieve this result, then Buyer may terminate this Agreement.

Notwithstanding the provisions of this Section 8.1, if (a) a condition of force majeure occurs which causes the mutual obligations to be suspended as provided above with respect to the total quantity of coal to be supplied, and (b) such condition (alone or extended by other conditions of force majeure) continues so that the mutual obligations remain suspended for a period of six (6) Months, and (c) at the end of said six (6) Months or at any time thereafter, the party not claiming force majeure, in the exercise of reasonable judgment, concludes that there is little likelihood of ending the condition(s) in the immediate future, then the party not claiming force majeure may terminate this Agreement without liability to the other party by giving to the other ninety (90) Days notice in writing of its intention to terminate. In such event, neither party shall have any further obligation or liability under this Agreement or at law except with respect to coal delivered prior to said termination date or as otherwise provided.

8.2 Changes in Environmental Related Requirements

The term “environmental related requirements,” as used in this Agreement, means (i) any prohibition, restriction, or limitation related to the quality of coal which Buyer may burn, including any constituent specification, at any or all of its electric generating plants, or to the type or amount of emissions from any or all such plants; (ii) any rule or requirements affecting the permissible means for complying with any such prohibition, restriction or limitation; and, (iii) any imposition of a cost, fee, tax or other economic burden on Buyer relating to any constituent specification of coal purchased by it, or to the type or amount of emissions from its electric generating plants. A “change” in environmental related requirements shall be deemed to have occurred if there is any increase or decrease in an environmental related requirement or imposition of a new environmental related requirement on Buyer as a result of any federal or state statute, local ordinance, administrative regulation or ruling, court order, or any revision in any interpretation or implementation thereof. It is recognized that a change in environmental related requirements upon Buyer may occur even though stated as a restriction or limitation on, or requirement of, Buyer and its affiliates or with some other group of utilities. It is further recognized that
any change in environmental related requirements may affect Buyer in a
general way and may not be directed at specific plants, fuels, fuel supplies or
other operating conditions. In this event, Buyer shall, in its sole discretion,
determine the strategy for compliance, and whether Buyer’s use of the coal
to be supplied hereunder has been adversely impacted.

[8] — Union Pacific Unit Train Coal Common Carrier
Circular 111 (For Powder River Basin)(2005).78

IV. Force Majeure:
If any party is delayed in or prevented from the performance of its
obligations under this Circular for at least twenty-four (24) consecutive
hours, beginning from the time disability actually commenced, as a result
of an event beyond its control, including an Act of God; accumulation of
snow and/or ice or other adverse weather conditions sufficient to impede
the movement of trains or train crews; war; insurrection; riot or other civil
disturbance; explosion; fire, derailment; destruction of or damage to right-
of-way, including bridges; strike, lockout or other labor disturbance; the
failure of the Mine Operator to load requested Coal ("Force Majeure"),
such party’s obligations and those of such other parties affected thereby
shall be suspended for the duration of such Force Majeure; PROVIDED,
HOWEVER, that the parties shall make all reasonable efforts to continue
to meet their obligations for the duration of the Force Majeure.

In order for a declaration of Force Majeure to be effective, the party
experiencing the Force Majeure event shall notify in a timely fashion and in
writing all other parties as to the nature of the Force Majeure, when it began,
and its projected duration. Such party also shall notify in a timely fashion
and in writing all other parties upon the cessation of the Force Majeure.

The parties shall make all reasonable efforts to eliminate or abate such
Force Majeure and resume their obligations expeditiously upon its cessation,
except that no party hereto will be required to acquiesce to an unfavorable
settlement of any labor dispute.

The suspension of any obligations owing to a Force Majeure shall
neither cause the Term of any Volume Commitment Certificate to be
extended nor affect any rights accrued under any Volume Commitment

78 See www.uprr.com/customers/energy/attachments/circ111.pdf.
Certificate prior to the Force Majeure. The Minimum Volume Requirement shall be reduced by 1/365th and the Service Commitment Volume shall be reduced by 1/90th for each continuous 24-hour period during which the Force Majeure event existed.


Article 7: Force Majeure

7.1 – If a Party to a Transaction is delayed in or prevented from performing, in whole or in part, any of its obligations under a Transaction due to acts of God, war, riots, civil insurrection, acts of the public enemy, strikes, lockouts, natural disasters, breakdown of or damage to necessary facilities or equipment, transportation delays, or other causes that are beyond the reasonable control and without the fault or negligence of the Party affected thereby (such events being referred to herein as “Force Majeure”), and such Party gives oral notice and full details of the Force Majeure to the other Party as soon as reasonably practicable after the occurrence of the event of Force Majeure (such notice to be confirmed in writing), then during the pendency of such Force Majeure but for no longer period, the obligations of the Parties under such affected Transaction (other than obligations to make payments then due) shall be suspended to the extent required by the event. The Party affected by the Force Majeure shall remedy the Force Majeure with all reasonable dispatch and will keep the other Party advised as to the continuance of the Force Majeure event; provided however, that this provision shall not require Seller to deliver, or Buyer to receive, the Coal at points other than the Delivery Point for the authorized Source including allowable substitutions under the Transaction. A change in market conditions including the ability of Seller to sell coal at a higher price, or Buyer or Buyer’s customer to buy coal at a low price, whether or not foreseeable shall not be considered a Force Majeure event.

7.2 – If an event of complete or partial Force Majeure persists for a continuous period of sixty (60) days, then the Party not claiming Force Majeure shall have the option, upon three days’ prior written notice, to terminate the affected Transaction to the extent affected and the associated obligations of the Parties thereunder (other than payment obligations for prior performance thereunder). In the event of a Force Majeure, delivery of

79 See www.coaltrade.org/masteroct/main.html.
the affect quantity of Coal shall not be made up except by mutual agreement of the Buyer and Seller.

7.3 – If Seller claims \textit{Force Majeure} and is unable to meet all of its sales obligations under an affected Transaction and any other of its coal sales agreements involving coal of a similar type and quality as the Coal, or if Buyer claims \textit{Force Majeure} and is unable to meet all of its purchase obligations under an affected Transaction and any other of its coal purchase agreements involving coal of a similar type and quality as the Coal, then any reductions in Seller’s deliveries or Buyer’s purchases (as applicable) shall be allocated on a pro rata basis among the affected Transaction(s) and such other coal supply or purchase agreements involving coal of the same type and quality as the Coal to the extent contractually permitted by such Transaction and agreements.

7.4 – It is understood and agreed that significant capital expenditures and settlement of strikes and lockouts shall be entirely within the discretion of the party having the difficulty and that the above requirement that any \textit{Force Majeure} shall be remedied with all reasonable dispatch shall not require significant capital expenditure or settlement of strikes and lockouts by acceding to the demands of the opposing Party when such course is inadvisable in the discretion of the Party having difficulty.

[10] — NYMEX Central Appalachian Coal Futures Contract.\textsuperscript{80}

260.21 – \textit{Force Majeure}, Late Performance and Failure to Perform (A) DEFINITIONS. As used in this Rule 260.21 the following terms, as well as variations thereof, shall have the meanings described below.

(1) “\textit{Force Majeure}” shall mean any circumstance (including but not limited to a strike, lockout, national emergency, governmental action, or act of God) which is beyond the control of the buyer or seller, and which prevents the buyer or seller from making or taking delivery of coal or effecting payment when and as provided for in this Chapter and which by exercise of due diligence the affected Party could not have been reasonably

\textsuperscript{80} See www.nymex.com/rule_main.aspx.
expected to avoid and which by exercise of due diligence said Party is unable to overcome.

(2) “Late Performance” shall mean the failure of a buyer to make payment on the payment date as defined in Rule 260.18(A) or a buyer or seller to delivery inspection reports in accordance with Rule 260.12(l).

(3) “Failure to Perform” shall mean the failure of the seller to make or the buyer to receive delivery of coal in accordance with the requirements set forth in these Rules.

(4) “Contract Value” as used in this Rule 260.21 means the amount equal to the settlement price on the last day of trading in a futures contract times 1,550 (the number of tons per contract) times the number of contracts to be delivered.

(5) “Party” means a buyer or seller.

(6) “Other party” means the corresponding buyer when a seller has failed to perform and the corresponding seller when a buyer has failed to perform.

(B) Responsibilities of parties to the Delivery

(1) The parties to a delivery shall make commercially reasonable efforts to perform their respective delivery obligations at all times until a party has failed to perform.

(2) A party which has failed to perform its obligations may no longer perform such obligations.

(3) When a buyer is late in performance, the buyer shall be liable to the seller for any damages awarded pursuant to Section (E) of this Rule to the Exchange for any assessments made pursuant to Section (D) of this Rule.

(4) When a buyer or a seller has failed to perform, the buyer or the seller, respectively, through which the delivery is effected shall be liable to the other party for any damages awarded pursuant to Section (E) of this Rule and to the Exchange for any assessments made pursuant to Section (D) of this Rule.

C. Delivery Committee

(1) Force Majeure and Failure to Perform shall be determined by a Panel of the Delivery Committee as set forth below.

(2) The Chairman of the Delivery Committee shall appoint a panel, which shall consist of three (3) members of the Committee, to review a delivery;
FORCE MAJEURE UNDER COAL SUPPLY CONTRACTS § 6.08

(a) when the Chairman is advised by the President or any person designated by the President that it appears that a party to the delivery has failed or may fail to perform;
(b) upon the written request of both the buyer and seller;
(c) when the President or any person designated by the President requests such appointment; or
(d) if either party to the delivery notifies the Exchange that circumstances constituting force majeure prevent the performance of delivery obligations at the time and site designated by the parties.

(3) The Chairman shall not appoint to any Panel any in question. Each Panel Member shall disclose to the person who has a direct or indirect interest in the delivery Chairman any such interest which might preclude such Panel Member from rendering a fair and impartial determination. Any Panel so appointed shall retain jurisdiction over the delivery in question until the delivery has been completed or a party has been found to have failed to perform such delivery. Exchange Counsel shall serve as Advisor to the Panel.

(4) The Panel shall meet within one business day, or as soon thereafter as is reasonably practicable, of its notification of the circumstances set forth in Section (2). Unless good cause for delay exists, within one business day the Panel shall determine whether force majeure exists or whether a buyer or a seller has failed to perform its obligations as provided in the Rules, and advise the Compliance Department of such determination and its findings in support thereof immediately. The Panel shall cause its determination to be communicated to the parties to the delivery as expeditiously as possible.

(5) Upon a finding of a failed performance, the Panel shall:

(a) in the case of a failure to perform by a seller; (i) notify the President of its determination, who shall instruct the Exchange’s Clearing House to retain all delivery margins deposited by the seller for the delivery until any amounts determined to be due to the Exchange or the buyer pursuant to sections (D) or (E) of this Rule have been paid; and (ii) apprise the buyer of the remedies provided pursuant to Section (E) of this Rule.

(b) in the case of a failure to perform by a buyer; (i) notify the President of its determination, who shall instruct the Exchange’s Clearing House to issue a delivery margin call to the buyer in an amount equal to the original margin then in effect for a Coal futures contract carried at the Clearing house on the last day of trading in such contract times the number of contracts to be delivered and to retain such delivery margin until any amounts
determined to be due to the Exchange or the seller pursuant to Sections (D) and (E) of this Rule have been paid; and (ii) apprise the seller or the remedies provided pursuant to Section (E) of this Rule.

(6) Upon a finding of force majeure, the Panel may take any one or combination of the following actions as it deems suitable:

(a) grant an extension of time for delivery;
(b) change the delivery site to a site within the delivery location as defined in 260.07 (A) provided that the seller has coal or will have coal at such site in time for delivery
(c) allocate deliveries;
(d) modify the method or timing of payment; or
(e) refer the matter to the Board of Directors for consideration of emergency action pursuant to Article 7.

D. Exchange Action

(1) Whenever a buyer or seller is found by the Panel to have failed to perform a delivery, the Exchange, represented by the Compliance Department, shall issue a Notice of Assessment specifying the findings of the Panel with respect to the failed delivery and assessing a penalty of twenty percent of the contract value against such party to be paid to the Exchange.

(2) Whenever a long or short is late in performance, the Compliance Department shall issue a Notice of Assessment assessing a penalty to the buyer of $1,000.

(3) (a) A party may appeal a Notice of Assessment by filing a Notice of Appeal with the Hearing Registrar of the Exchange and by serving a copy of the same on the Exchange’s Compliance Counsel within two business days of receipt of Notice of Assessment from the Compliance Department. The party filing the appeal (“Appellant”) shall file, within twenty (20) days after filing the Notice of Appeal, a Memorandum of Appeal setting forth the factual and legal basis for the appeal. The Memorandum of Appeal must be filed with the Hearing Registrar and a copy of the same served upon the Exchange’s Compliance Counsel.

(b) The Compliance Department may file with the Appellant and the Hearing Registrar an Answering Memorandum to the Memorandum of Appeal within ten (10) days of receipt of that memorandum.
(c) Failure by the party to file a Notice of Appeal or a Memorandum of Appeal within the time specified in subsection (D)(3)(a) of this Rule shall constitute a waiver, and the penalties shall be paid within five days to the Exchange. Failure to pay such penalties in accordance with this Rule shall subject the party to the sanctions set forth in By-Law 106. In the event a party fails to appeal, or waives the opportunity to appeal a Notice of Assessment, the Assessment and findings of the Delivery Committee shall constitute a final disciplinary action of the Exchange.

(4) Within ten (10) days after receipt of the Compliance Department’s reply, the Appellant shall be entitled to examine all books, documents and other tangible evidence in possession or under the control of the Exchange that are to be relied on by the Compliance Department or are otherwise relevant to the matter.

(5) In the event of an appeal by a party, the Chairman of the Exchange, or his designee, shall appoint an Assessment Appeal Panel to hear and decide the appeal. The Panel shall be composed of three members of the Exchange, at least one of who shall be a member of the Board of Directors. No member of the Panel may have a direct or indirect interest in the matter under the appeal. Each Panel Member shall disclose to the Chairman any such interest which might preclude such Panel Member from rendering a fair and impartial determination. The formal Rules of Evidence shall not apply to such appeal, and the Panel shall be the sole Judge with respect to the evidence presented to it. Exchange outside counsel shall advise the Panel.

(6) The procedures for the hearing of the appeal before the Assessment Appeal Panel shall be as follows:

(a) At a date to be set by order of the Panel, and prior to such hearing, the Appellant and the Compliance Department shall furnish each other with a list of witnesses expected to be called at the hearing, and a list of documents and copies thereof expected to be introduced at the hearing.

(b) At such hearing the Appellant may appear personally and may be represented by counsel or other representative of his choice at the appeal.

(c) The Compliance Department shall be entitled to offer evidence relating to the delivery and shall be entitled to call witnesses and introduce documents in support thereof. It shall be the burden of the
Compliance Department to demonstrate, by the weight of the evidence, the appropriateness of the sanction set forth in the Notice of Assessment.

(d) The Appellant shall be entitled to rebut the Compliance Department’s evidence and shall be entitled to call witnesses and introduce documents in support thereof.

(e) The Compliance Department and the Appellant shall be entitled to cross-examine any witness called by the opposing party at the hearing.

(f) The Notice of Assessment, the Notice of Appeal, the Memorandum of Appeal, any Answering Memorandum, the stenographic transcript of the appeal, any documentary evidence or other material presented to and accepted by the Panel shall constitute the record of the hearing. The decision of the panel shall be based upon the record of hearing.

(g) The Panel shall have the power to impose a penalty against any person who is within the jurisdiction of the Exchange and whose actions impede the progress of a hearing.

(h) The Assessment Appeal Panel shall issue a written decision in which it may affirm, reduce or waive the charges assessed against the Appellant and shall state the reasons therefore.

(i) The decision of the Assessment Appeal Panel shall be a final decision of the Exchange, and shall constitute a final disciplinary action of the Exchange. The fine is payable on the effective date of the decision or as specified. The effective date shall be fifteen (15) days after a copy of the written decision has been delivered to the Appellant and to the Commission.

(7) The Assessment Appeal Panel shall consider and make recommendations to the Board concerning acceptance or rejection of, any offer of settlement submitted by Appellant. In the case of an offer of settlement, acceptance by the Board shall constitute the final disciplinary action of the Exchange.
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*Force Majeure.* If, because of *Force Majeure,* either party (the “Non-Performing Party”) is unable to perform any of its obligations, hereunder, and such Non-Performing Party promptly notifies the other party of its inability to perform its obligations thereof, then the obligations of the Non-Performing Party giving such notice shall be suspended to the extent necessary caused by such *Force Majeure.* During such event of *Force Majeure,* the Non-Performing Party shall use its reasonable and best efforts to remedy or eliminate such *Force Majeure.* Any deficiencies in deliveries caused by *Force Majeure* shall not be restored or reproduced except by mutual agreement between the affected parties. Should the *Force Majeure* continue for sixty (60) consecutive days, the party not claiming *Force Majeure* (the “Performing Party”) may, at its option, terminate this Agreement upon three (3) days prior written notice to the other party. “*Force Majeure*” means any cause(s) not reasonably within the control and without the fault or negligence, of the party affected thereby, which wholly or in part prevents the performance by that party of its obligations hereunder (except the receipt or remittance of funds due and payable), but only if such party is unable, in good faith, to obtain a commercially reasonable substitute therefore. In no event shall a *Force Majeure* be construed to relieve a party of any obligations under this Agreement solely because of increased costs or other adverse economic consequences that may be incurred by such party through performance of such obligations.

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81 See www.dtecs.com.