

Hurricanes and Force Majeure under the NAESB Contract

The meaning of the "Force Majeure" excuse with respect to hurricanes under the North American Energy Standards Board Base Contract for Sale and Purchase of Natural Gas ("NAESB") was addressed by the 14th Court of Appeals of Texas ("Court") on August 6, 2009 in *Virginia Power Energy Marketing, Inc. v. Apache Corp.* The Court affirmed in part, and reversed and remanded in part, a summary judgment by the 157th District Court in Harris County, Texas ("Trial Court").

Despite an obligation under the NAESB to use reasonable efforts to avoid the adverse impacts of a Force Majeure and to resolve the event, the Court affirmed the Trial Court's holding that a seller does not have an obligation to deliver natural gas to alternate delivery points, other than the specific ones the parties agreed to use. The Court affirmed because the buyer's interpretation would conflict with the parties' express agreement as to the delivery points and would frustrate their intent to excuse non-performance caused by a Force Majeure event.

With respect to the seller's claim that Force Majeure had caused a "loss or failure of its gas supply" which prevented delivery of the full contract amount to buyer at Transco Station 65, the Court reversed and remanded the issue because it held that the seller had not conclusively established its position. The Court considered whether "gas supply" meant (a) as argued by the seller, seller's internally designated specific supply sources (its equity production native to, or tied into, Transco Station 65) or (b) as claimed by the buyer, seller's uncommitted gas from the same geographic region. The Court determined that since the seller did not demonstrate that its definition of gas supply was either commonly understood in the industry or personally known to the buyer, the Court would define gas supply as the quantity of gas that was available to satisfy the buyer's contractual demands. Seller's evidence was limited to sources of gas that seller had internally earmarked to deliver to buyer and did not speak to any other sources of gas that might have been available to deliver to Transco Station 65. The Court noted that the seller had been able to deliver spot market gas to buyer at two other delivery points along the Transcontinental Pipeline, (from pooling areas AZ2 and AZ4 that appear to serve as geographic bookends to Transco Station 65, which is in the AZ3 pooling area). The Court held that the summary judgment evidence did not address whether seller's sources of gas from the other two gas pooling areas might have been available to meet the buyer's contract requirements.

The Court also held that the summary judgment evidence raises a fact issue as to whether the hurricanes or a "disproportionate" delivery to one purchaser prevented the seller from performing. The record indicates that the seller had delivered sufficient gas to Transco Station 65 to meet all its stated commitments, but that one purchaser received more than its proportionate share. The seller had given such purchaser a higher ranking with the pipeline than the other firm purchasers, but the Court noted that the summary judgment record did not explain the significance of the rankings.

Consequently, the natural gas industry will have to wait for further clarification of the meaning of Force Majeure under the NAESB by the Trial Court.

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