October 16, 2023

Submitted Via Electronic Mail (naesb@naesb.org)
North American Energy Standards Board
1415 Louisiana Street
Suite 3460
Houston, TX. 77002

RE: No Action Recommendation -- Standards Request R23001
Formal Comments of Coterra Energy Inc.

Ladies and Gentlemen:

Pursuant to the Notice issued by the North American Energy Standards Board ("NAESB") on September 15, 2023, Coterra Energy Inc. ("Coterra") hereby submits the following formal comments on the No Action Recommendation Regarding Standards Request RC23001 – "Proposed revisions to the NAESB Base Contract for Sale and Purchase of Natural Gas to improve the clarity associated with the force majeure provision in the contract."

Interest of Coterra

Coterra is an exploration and production company headquartered in Houston, Texas. Coterra's core assets are located in the Permian Basin, the Marcellus Shale, and the Anadarko Basin. Among other activities, Coterra sells natural gas to a variety of marketers, industrial end-users, and utilities, primaryily utilizing the NAESB Base Contract for the Sale and Purchase of Natural Gas (the "Base Contract"). In utilizing the Base Contract, Coterra also regularly negotiates special provisions that are tailored to the specific sale to the counterparty and modifies the Base Contract. Therefore, Coterra has a direct interest in any proposals to modify, add, or remove provisions in the Base Contract that would otherwise be negotiated on a case-by-case basis.

Background

On May 3, 2023, Southwest Powel Pool, PJM Interconnection, MISO Energy, Texas Competitive Power Association, UGI Utilities, and CenterPoint Energy (collectively, the "Requesting Parties"), submitted Standards Request RC23001 (the "Request"), which proposed:

> … revisions to the NAESB Base Contract for Sale and Purchase of Natural Gas to improve the clarity associated with the force majeure provisions in the contract. There are three primary areas of concern: clarity regarding repeated claims of force majeure for an avoidable situation; requirements that parties claiming force majeure should take actions to prevent the condition, and additional specificity regarding the force majeure events.[1]

[1] Request at 4.

As set forth below, the Request proposed numerous revisions to Section 11 of the Base Contract as well as a new definition of "gas supply."

On or about July 25, 2023, Sabine Pass Liquefaction, LLC, Corpus Christi Liquefaction, LLC, and Cheniere Creole Trail Pipeline, L.P. (collectively, "Cheniere") submitted its informal comments ("Comments") generally opposing the Request and submitting that "a vote on a motion for a no-action recommendation on the request is the appropriate procedural course by the Contracts subcommittee."[2]

On July 25, 2023, the WGQ Contracts Subcommittee met virtually to address the Request. Numerous companies participated at the meeting, including Coterra, other non-member entities, and members of the End Users, LDC, Pipelines, Producer, and Services segments. At the end of the meeting, it was decided that Cheniere's motion for no action would be taken up at the next subcommittee meeting scheduled on September 14, 2023. It was also determined that interested parties should submit informal comments on both the Request and Cheniere's Comments by September 5, 2023, and that such informal comments would be addressed at the September 14th meeting.

Numerous parties, including Coterra, filed informal comments addressing both the Request and Cheniere's Comments and motion for no action.

On September 14, 2023, the WGQ Contracts Subcommittee met virtually. After a brief discussion, a vote was taken regarding the motion for no action. The motion passed a simple majority balanced vote, with 6.666667 voting "yes" and 3.333333 voting "no."[3] It was determined that the no-action recommendation be posted for a thirty-day comment period, after which the recommendation and any formal comments addressing the recommendation would be submitted to and considered by the WGQ Executive Committee at its October 26, 2023, meeting.

Coterra Formal Comments

As it stated at the July 25th meeting and in its September 5, 2023, informal comments, Coterra is opposed to the proposed Base Contract revisions set forth in the Request. Accordingly, Coterra supported the no-action motion and submits that it was the proper course of action for the WGQ Contracts Subcommittee.

Coterra generally opposes the proposed revisions set forth in the Request for several reasons.

First, the revisions are unnecessary because parties to a Transaction are already free to negotiate modifications to the terms of the Base Contract's force majeure provisions.[4] Incorporating these force majeure revisions into the Base Contract is particularly unnecessary given that, as noted by

[2] Comments at 5.

[3] Coterra was among those parties voting "yes."

[4] In fact, Section 11.6 of the Base Contract states that, "Notwithstanding Sections 11.2 and 11.3, the parties may agree to alternative Force Majeure provisions in a Transaction Confirmation executed in writing by both parties."

several commenters at the July 25th meeting, the revisions are largely biased against producers or sellers of gas. As noted by Cheniere in its Comments:

> Cheniere believes that the General Terms should reflect a balanced approach among the various counterparties that utilize the NAESB because the respective entities have varying interests. The requested revisions would upset that balance by:
> (a) singularly focusing on winter weather events and winterization actions, to the exclusion of other types of weather events;
> (b) protecting end users at the expense of other competing entities, such as producers and others in the upstream natural gas supply chain; and
> (c) altering the legal standards for what constitutes Force Majeure in various contexts.[5]

The Base Contract is and should remain as neutral as possible and not favor one party over another. Again, parties to a Transaction are free to negotiate mutually agreeable revisions to the Base Contract to reflect the individual circumstances of the Transaction and the relative bargaining power of the parties, including revisions to the force majeure provisions.

Second, Coterra is concerned that revising the Base Contract's force majeure provisions in a pro-buyer way now would negatively affect numerous suppliers and producers that are actively litigating the issue of whether they properly invoked the force majeure during Winter Storm Uri.[6] Coterra is specifically concerned that the proposed revisions would be used as evidence to call into question or undercut those sellers' force majeure defenses.

Third, many of the proposed revisions set forth in the Request are not only unnecessary, but they are also contrary to settled law and practice and would complicate and delay the ability of an affected party to timely declare a force majeure event. In many cases, the proposed revisions would place an insurmountable burden on sellers affected by a force majeure event such that those sellers would be effectively precluded from declaring force majeure.

In addition to the foregoing, Coterra's specific comments on the Request's proposed revisions to the Base Contract are set forth below.

Proposal

We propose that a definition for "gas supply" be incorporated into the contract section 2, a potential definition could be:

2.21 "gas supply" shall mean the specific source of supply designated as the supply source in the transaction confirmation, and if no specific source of supply is designated, then the phrase refers to all reasonably available alternative sources of supply.

[5] Comments at 4.

[6] Coterra and its wholly-owned affiliate, Cimarex Energy Inc., are defendants in one such pending case. *CF Industries Nitrogen, LLC v. Cimarex Energy Co.*, Case No. CJ-2023-104, Dist. Ct., Rogers Cnty., Okla.

Coterra Response

As Cheniere pointed out in page 9 of its Comments, there is no need to establish a generic definition for "gas supply," as the parties to a Transaction can designate the source of the gas to be sold and are in the best position of doing so in their negotiations. Not only is this proposed language unnecessary, but it is also likely to create more issues than it purports to solve by inserting a new layer of ambiguity into the Base Contract. Specifically, the portion that states "if no specific source of supply is designated, then the phrase refers to all reasonably available alternative sources of supply" is so broad and vague as to be of no practical use. To begin with, if challenged in the court system, the term "reasonably available alternative sources" may not be enforced because it is well-established in many courts that "the terms of a contract cannot be so vague as to be unenforceable," *e.g.*, *City of Dardanelle v. City of Russellville*, 277 S.W.3d 562, 566 (Ark. 2008), and this term is undeniably vague. But even if a court determines that this language is not so vague as to be unenforceable, the court and the parties will be forced to grapple with what sources were "reasonably available."

This language is plainly intended to enable buyers to argue that any "alternative source of supply" was "reasonably available" at the time of a force majeure event, which effectively places a new affirmative burden on sellers experiencing a force majeure event to identify and explore all conceivable alternative sources of supply and to presumably purchase replacement gas. Adding this novel burden in the Base Contract would be especially problematic given that many suppliers and producers are not equipped to enter the market as a buyer in an attempt to obtain gas from an alternative source. To the extent the parties to a Transaction desire to negotiate such a term, nothing currently prevents them from doing so, but it is certainly not a common practice that should be a default requirement in the Base Contract.

Accordingly, Coterra opposes the proposed addition of Section 2.21.

Proposal

The following provide additional detail regarding these concepts and potential redlines to address them.

1. Clarity is needed regarding the ability to invoke the force majeure provision related to weather. While cold weather is certainly a potential cause for a force majeure situation, an appropriate level of preparation and communication is reasonably expected. Potential language to address weather related events be added to section 11.2 subsection (ii) "**however in no case shall this provision be interpreted to absolve a party from taking winterization actions or allow a claim of force majeure in absence of taking such preventative measures;**". During consideration of this request, we also suggest determining what "winterization actions" should be or how to make such a common determination.

Coterra Response

As a threshold matter, Coterra is constantly working to attempt to ensure that its facilities are protected, to the extent feasible, from the elements, whether it be extreme heat or cold. But as the Request recognizes, determining whether winterization actions or preventative measures are adequate is complicated and open to interpretation depending on the circumstances of each force majeure event. The proposed language only unnecessarily inserts ambiguity into the Base Contract by vaguely creating a new affirmative burden that parties must take "winterization actions" without explaining what that means or what actions would be adequate or reasonable. Further, although the proposed language purports to be neutral in that it does not expressly state that it applies only to sellers, it effectively requires a party to take certain unspecified "winterization actions" or forgo the ability to declare force majeure. It is unclear how this proposed language would ever apply to a buyer in practice.

Finally, as Cheniere's Comments noted, Sections 11.1 and 11.2 of the Base Contract already address the issue of whether a party has properly claimed force majeure:

> Further, this concept is already addressed more broadly by: (a) Section 11.1, which requires that Force Majeure cannot reasonably be within the control of the party claiming suspension; and (b) Section 11.2, which requires parties to make reasonable efforts to avoid the adverse impacts of a Force Majeure. If it is reasonable for parties to take preventative activities given industry intricacies, probability of events, etc., then the framework for disputing the claimed Force Majeure is already in place.[7]

Accordingly, Coterra opposes the proposed revision to Section 11.2(ii).

Proposal

2. Within section 11.3 there are three areas for improvement.
   The first is in subsection (ii) which clarifies that a party responsibility attempt to remedy the condition causing force majeure, including advance preparation:
   a. This could be achieved through the following, "(ii) the party claiming excuse failed to remedy **or reasonably prevent** the condition…".
   b. The second enhancement under section 11.3 helps clarify that a single supplier should not be able to claim force majeure when the force majeure cause does not interrupt other supplies from a pooling hub. This could be achieved by the addition of a subsection **(vi) interruption of specific supply or markets at "pooling points" or "hubs" without the hub or pooling point operator claiming Force Majeure**.
   c. The final is consideration of removing the phrase under 11.3.iv. "**except, in either case as provided in Section 11.2**"

Coterra Response

[7] Comments at 7.

As pointed out by Cheniere, the proposed revision to (a) would require the party seeking to declare force majeure to prevent the actual condition from occurring. This is a significant, new burden and one that, depending on the actual circumstances leading to the declaration of force majeure, could very well be impossible to satisfy and effectively removes the ability to declare force majeure. As Cheniere stated in its Comments:

> The types of conditions that may be caused by Force Majeure are numerous. And many conditions may be difficult, if not impossible, to prevent even at great cost. Thus, requiring a declaring party to prevent "the conditions" caused by Force Majeure creates a new expansive subjective basis on which a non-declaring party may contest Force Majeure, which greatly expands a declaring party's potential liability if its failure to perform is unexcused based on a failure to prevent "the condition."[8]

With respect to the proposed revision set forth in (b), Coterra knows of no instance in which a hub or pool operator has ever declared force majeure. Hubs or pools, whether they be physical or non-physical points, are merely the location at which gas is delivered or sourced (i.e. the Delivery Point) for purposes of the sale, and, as Cheniere noted in its Comments, "the disruption of the specified gas source, transportation path and/or market use would qualify as Force Majeure, even if the hub/pool operation has not declared Force Majeure."[9]

With respect to the proposed revision set forth in (c), Coterra agrees with Cheniere that the phrase "except, in either case as provided in Section 11.2" should not be deleted from Section 11.3(iv). The reference ensures that if the loss of Buyer's markets or Buyer's inability to use or resell the Gas purchased are prevented by force majeure as set forth in Section 11.2, then such event would qualify as force majeure.

Accordingly, Coterra opposes the proposed revisions to Section 11.3.

Proposal

3. When force majeure is a necessary action, there should be reasonable details provided by the party claiming force majeure. The current language indicates "reasonable" details; however, it is not clear what details should be included. This lack of clarity leaves a costly and time-consuming burden on the counterparties to determine the validity of the force majeure claim. As such, specific details associated with a force majeure claim should be included in the contract by appending the following to Section 11.5:

For purposes of this Section 11.5, reasonably full particulars as required for a valid Notice of Force Majeure shall include, but not be limited to, a detailed description of the Force Majeure event or occurrence with a full and specific explanation that clearly establishes:

[8] Comments at 8.
[9] *Id.*

(a) that the event constitutes a Force Majeure as defined in Sections 11.1 and 11.2;

(b) how, why, and to what extent the Force Majeure event actually and directly caused the affected party's non-performance of its Firm obligation, either wholly or partially;

(c) what immediate actions were and are being taken to avoid or limit the adverse effects of the Force Majeure on the performing party, what ongoing efforts are being made to remedy the Force Majeure condition and to resume full performance as quickly as possible, and how and why those actions were prompt and reasonable under the circumstances; and

(d) if interruptions or curtailments occurred at a delivery point that is a "pooling" point or "hub," that:

(i) the point or hub operator also claimed Force Majeure,

(ii) all curtailments or cuts in Firm deliveries or receipts of Gas that were made, to the extent permitted by applicable law, by the non-performing party were reasonably pro rata across all Firm obligations, and

(iii) the non-performing party did not execute incremental spot Gas sales or purchases after the onset and during the period of Force Majeure.

If applicable, as in the case of interruption or curtailment of Firm transportation or sequential or "cascading" events of Force Majeure upstream or downstream of the affected Delivery Point(s), the non-performing party's Notice shall include and be supported by copies of all notices, information, and documentation received by it from Transporters and/or Gas suppliers upstream or downstream of the affected Delivery Point(s).

Coterra Response

Coterra opposes these proposed revisions to Section 11.5 as both being unnecessary as well as creating significant burdens on the party attempting to declare force majeure that will surely lead undue delays to both the detriment of the producer and the buyer. Section 11.5 already states that the party experiencing the force majeure event may provide an initial notice orally, which generally, in Coterra's experience, consists of a short phone call notifying the other party of the issue. The declaring party then is contractually obligated to provide "written Notice with reasonably full particulars of the event or occurrence … as soon as reasonably possible."[10] Requiring a litany of additional information to be provided concurrently with the written notice places a significant burden on the declaring party and likely would delay the timing of the required written notice beyond what would be considered "reasonable." If after receiving a written force majeure notice, the non-declaring party believes that it is insufficient, then there are avenues to raise such concerns (e.g. further discussions, litigation). It is already in the declaring party's best interest to ensure that any written force majeure notice is complete enough to justify both the declaration of force majeure and the circumstances leading to such declaration.

[10] *See* Section 11.5 of Base Contract.

Moreover, as noted above, many if not all the currently pending cases in which the declaration of force majeure is an issue include allegations that the party declaring force majeure failed to adequately justify such declaration. A *post facto* pro-buyer revision to Section 11.5, while these cases are pending, could negatively affect sellers that are actively litigating the issue of whether they properly invoked the Base Contract's force majeure provisions. Coterra is concerned that any revisions to the force majeure provisions would be used as evidence in such lawsuits to call into question or undercut a seller's force majeure defense.

Finally, the specific proposed additions to Section 11.5 are either unnecessary or create new obligations on the declaring party that are inconsistent with the current Base Contract and settled law and practice.

(a) that the event constitutes a Force Majeure as defined in Sections 11.1 and 11.2;

As Chienere pointed out in its Comments, this requirement is already inherent in the obligation set forth in the current version of Section 11.5; namely, that a declaring party must provide the "reasonably full particulars of the event or occurrence." Accordingly, it is both unnecessary and, moreover, improperly requires a declaring party to prove that the event in question both meets the general force majeure definition in Section 11.1 and the more specific, itemized list of non-exclusive force majeure events in Section 11.2.

(b) how, why, and to what extent the Force Majeure event actually and directly caused the affected party's non-performance of its Firm obligation, either wholly or partially;

Again, this requirement is already set forth in the current version of Section 11.5. Moreover, and as noted by Cheniere in its Comments, the words "actually and directly" could act as a limitation on an affected party's ability to declare force majeure if the impact on such party was not "actual **and** direct." This conditioning clause would, therefore, impermissibly limit the broad scope of the right to claim force majeure set forth in Section 11.1 of the Base Contract, which is "to the extent such failure was caused by Force Majeure."

(c) what immediate actions were and are being taken to avoid or limit the adverse effects of the Force Majeure on the performing party, what ongoing efforts are being made to remedy the Force Majeure condition and to resume full performance as quickly as possible, and how and why those actions were prompt and reasonable under the circumstances; and

As pointed out by Cheniere:

> The concepts are already required under Sections 11.2 and 11.3. A declaring party is already required to provide reasonably full particulars of the event under Section 11.5. The request would actually create a conflict with the existing General Terms because it introduces a standard for returning to performance (i.e.,

"as quickly as possible"), which conflicts with the "reasonable efforts" required in Section 11.2.[11]

(d) if interruptions or curtailments occurred at a delivery point that is a "pooling" point or "hub," that:

(i) the point or hub operator also claimed Force Majeure,

As set forth above, Coterra knows of no instance in which a hub or pool operator has ever declared force majeure. Hubs or pools, whether they be physical or non-physical points, are merely the location at which gas is delivered or sourced (i.e. the Delivery Point) for purposes of the sale, and, as Cheniere noted in its Comments, "the disruption of the specified gas source, transportation path and/or market use would qualify as Force Majeure, even if the hub/pool operation has not declared Force Majeure."[12] This ignores the practical limitations and challenges facing any particular producer experiencing a force majeure event.

(ii) all curtailments or cuts in Firm deliveries or receipts of Gas that were made, to the extent permitted by applicable law, by the non-performing party were reasonably pro rata across all Firm obligations, and

As Cheniere pointed out in its Comments, the Base Contract "is consistent with industry standards requiring Interruptible Gas to be cut first, and Firm Gas to be cut second."[13] Moreover, the parties to a Transaction can specify how and to what extent firm deliveries and/or receipts should be curtailed in the event of a force majeure event.

(iii) the non-performing party did not execute incremental spot Gas sales or purchases after the onset and during the period of Force Majeure.

As pointed out by Cheniere in its Comments,[14] a party cannot declare force majeure and then continue to make sales or gas purchases at the same Delivery and/or Receipt Point(s). To do so would undercut any force majeure declaration.

If applicable, as in the case of interruption or curtailment of Firm transportation or sequential or "cascading" events of Force Majeure upstream or downstream of the affected Delivery Point(s), the non-performing party's Notice shall include and be supported by copies of all notices, information, and documentation received by it from Transporters and/or Gas suppliers upstream or downstream of the affected Delivery Point(s).

As Cheniere noted in its Comments, Section 11.5 already requires a force majeure notice to include "full particulars of the event or occurrence."[15] A declaring party's ability to provide

[11] Comments at 10.
[12] *Id.*
[13] *Id.*
[14] Comments at 11.

written notice of the force majeure event "as soon as reasonably possible" would be impacted by a requirement that such notice include "all notices, information, and documentation" received from any other entity impacted by the event both "upstream or downstream of the affected Delivery Point(s)." Again, if the non-declaring party believes that the declaration of force majeure is improper, it can seek additional documentation. It should also be noted that the proposal is not limited to written documentation and, therefore, is so broad as to be unmanageable.

Conclusion

Coterra supports the WGQ Contracts Subcommittee's recommendation of no action on the Request and urges the WGQ Executive Committee to approve the recommendation.

Respectfully submitted,
COTERRA ENERGY INC.

/s/ *Matthew M. Schreck*
Matthew M. Schreck
Attorney for Coterra Energy Inc.

[15] *Id.*