October 16, 2023

Submitted via Electronic Mail

North American Energy Standards Board
1415 Louisiana Street, Suite 3460
Houston, Texas 77002

RE: The Wholesale Gas Quadrant ("WGQ") Executive Committee should approve the recommendation of no action on the proposed "Enhancement to the NAESB Base Contract for Sale and Purchase of Natural Gas Force Majeure Terms," dated May 3, 2023 ("R23001").

Dear WGQ Executive Committee:

On September 14, 2023, after full discussions and on a record that included 19 sets of written comments from a broad range of interested parties, the WGQ Contracts Subcommittee passed a motion to recommend no action on R23001—a proposed "Enhancement to the NAESB Base Contract for Sale and Purchase of Natural Gas Force Majeure Terms"—on a majority vote. ONEOK, Inc.[1] asks that the WGQ Executive Committee also pass this no-action recommendation. The reasons are many.

A majority of the Subcommittee understood that the form of an industry standard contract is simply the wrong tool to try to push "winterization" in the natural-gas industry. The proposed modification to the Base Contract's *force majeure* provisions would not create clarity, value, or efficiency. It would stoke litigation, leaving courts and juries to define what "winterization" requires. The suggested revisions would thus erode confidence in and the unanimity of the Base Contract, which nearly all industry participants have come to accept—over decades—as neutral starting terms for natural-gas transactions.

[1] ONEOK is a leading midstream service provider that owns one of the nation's premier NGL systems (connecting NGL supply in the Rocky Mountain, Permian and Mid-Continent regions with key market centers) and an extensive network of gathering, processing, fractionation, transportation and storage assets. ONEOK applies its core capabilities of gathering, processing, fractionating, transporting, storing and marketing natural gas and NGLs through vertical integration across the midstream value chain to provide customers with premium services—while generating consistent and sustainable earnings growth.

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The proposed modifications to the *force majeure* language would degrade what has made the Base Contract widely successful. Gas sales contracts result from free negotiation between commercial parties. Nothing requires these well-resourced businesses to use the Base Contract. But they do. And they do because the Base Contract provides a neutral, well-understood baseline for their negotiations—a common starting point for discourse—thereby reducing the transactional costs for all involved (for now). The Base Contract's appeal derives from even-handedness. Its non-controversial nature is and always has been the allure. The proposed modifications would change that, driving the industry away from the Base Contract.

The proposed modifications to the *force majeure* language would—for the first time—inject highly controversial terms into the Base Contract. The proponents of these modifications ask for this Committee's endorsement of one-sided litigation positions of gas purchasers, taken after the recent winter storms, which gas suppliers oppose. And these proponents fail to mention that courts have roundly rejected these positions, both recently and in years past.[2] Their request to modify the *force majeure* provisions follows not on the heels of widespread acceptance, but from a wave of rejection by courts of law after often hard-fought litigation between certain suppliers and purchasers.

To allow one-sided, controversial terms into the Base Contract would nullify its primary utility as a neutral starting point. And while R23001 concerns only *force majeure*, the slopes often become slippery after a new precedent has been set. The Base Contract should remain a neutral, pragmatic document, and not the rope in tug-of-war between gas suppliers and purchasers.

And for this reason alone, the Executive Committee, like the Contracts Subcommittee, should pass the recommendation of no action on R23001. Even if the Executive Committee explored the proposal's mechanics, the suggested terms present myriad problems. Specifically, R23001 would place three entirely new default duties on gas suppliers under the terms of the Base Contract: (1) to perform with "reasonably available alternative sources of supply," (2) to "reasonably prevent" *force majeure* events, including by "winterization actions," and (3) to require a "full and specific explanation" in a *force majeure* notice. These proposed duties are unfairly one-sided, ignore other industry weather issues (such as heat, wind, and hurricanes), conflict with existing legal decisions

[2] *See Marathon Oil Co. v. Koch Energy Servs., LLC*, No. 21-CV-1262 (S.D. Tex. May 8, 2023); *LNG Am., Inc. v. Chevron Nat. Gas*, No. 21-CV-2226, 2023 WL 2920940 (S.D. Tex. Apr. 12, 2023); *MIECO LLC v. Pioneer Nat. Res. USA Inc.*, No. 21-CV-1781, 2023 WL 2064723 (N.D. Tex. Feb. 15, 2023); *Ergon-W. Va., Inc. v. Dynegy Mktg. & Trade*, 706 F.3d 419 (5th Cir. 2013); *Tejas Power Corp. v. Amerada Hess Corp.*, No. 14-98-00346-CV, 1999 WL 605550 (Tex. App.—Houston [14th Dist.] Aug. 12, 1999, no pet.).

on the Base Contract, and would serve to stoke further contentious litigation in the industry. Their practical effect would be to erode industry support for the Base Contract.

I. Amendments to Sections 2.21 and 11.3—To Perform with "Reasonably Available Alternative Sources of Supply.

R23001 adds a "gas supply" definition (in Section 2.21) that expands a supplier's performance obligation to "all reasonably available alternative sources of supply," unless the parties have designated a specific source in a transaction confirmation. And relatedly, R23001 amends Section 11.3 so that a supplier cannot declare *force majeure* based on "interruption of specific supply or markets at 'pooling points' or 'hubs,'" that is, unless "the hub or pooling point operator [also] claim[s] Force Majeure."

The proponents of R23001 want these revisions as support for arguing that, during a *force majeure* event, a supplier must purchase gas "reasonably available" on the daily market regardless of prices at the time or other considerations such as government directives to prioritize deliveries for human needs. Yet these suggestions pose at least two serious problems.

First, the proposed definition defies the plain meaning of "gas supply" as interpreted by courts. *See MIECO LLC v. Pioneer Nat. Res. USA Inc.*, No. 21-CV-1781, 2023 WL 2064723, at *8 (N.D. Tex. Feb. 15, 2023) ("[T]he Contract's use of the possessive 'Seller's' suggests the 'gas supply' is owned or possessed by Pioneer, something which cannot be said of the gas on the spot market."). It would add a "reasonably available" element—resulting in expensive litigation where parties hire competing expert witnesses to opine on what gas is, and is not, "reasonably available" in the market.

Second, the amendment to Section 11.3 misunderstands the nature of a pooling point, which is a virtual trading point on a pipeline or pipeline system where suppliers can aggregate gas from multiple sources. It is thus unclear what the proposed language means by pooling point "operator." If it is intended to refer to the pipeline company, such companies are historically unlikely to declare *force majeure* given their operational posture. Requiring a declaration by pipelines would restrict the availability of *force majeure* to gas suppliers without any reasoned basis.

II. Amendments to Section 11.2 and 11.3—To "Reasonably Prevent" *Force Majeure* Conditions, including by "Winterization Actions."

By amendments to Sections 11.2 and 11.3, R23001 would preclude a declaration of *force majeure* by any gas supplier if it could have "reasonably prevented" the *force majeure* event, particularly by "winterization actions." These amendments, if any supplier would ever agree to them, would pave

a sure path to highly contentious litigation over what "winterization actions" might have "reasonably prevented" a loss of gas supply. In that litigation, juries or courts would ultimately decide what "winterization" means, not a body with specialized knowledge on the subject. What this suggestion does, in other words, is impose amorphous, unpredictable winterization requirements that no industry participant would willing sign up for. Participation in the Base Contract will be lost. And R23001 would impose these open-ended "winterization" requirements while ignoring all other types of weather events impacting the industry, such as hurricanes.

And this language also ignores (1) regional differences and (2) the cascading effects of weather problems. First, no one-size-fits-all solution exists for "winterization" because needs vary drastically by region. Local legislatures and regulatory bodies are best positioned to address specific regional needs, and they have in fact done so. For example, in the wake of Winter Storm Uri, Texas placed new winterization requirements on infrastructure. The proposed changes entirely ignore such tailored efforts by policymakers.

Second, if producers are not producing, then the volumes delivered to midstream companies will fall. No amount of "winterization" by a midstream company would prevent that effect. For example, during Winter Storm Uri, most disruptions to the midstream sector came from loss of power and unavailability of gas. Similarly, while midstream companies take reasonable steps to guard against weather emergencies, they cannot completely eliminate the risk of pipes freezing during extreme cold when they contain gas with entrained liquids. The point is that the problem posed by severe weather cannot be solved by an indeterminate requirement in a form contract, which few, if any, suppliers will agree to.

III. Amendment to Section 11.5—Notice of *Force Majeure*.

Lastly, R23001's proponents would demand an incredibly detailed "Notice" in order to claim *force majeure* under the Base Contract, which more closely resembles discovery in litigation than good-faith communications between contract counterparties during a difficult situation. In an unfolding *force majeure* event—often an extreme circumstance outside a party's control—the gas supplier likely has neither the time, resources, nor information necessary to write the detailed report that R23001 would require. Surely, resources are better spent trying to ameliorate the actual *force majeure* situation than in writing a detailed report about what the *force majeure* is. What would the public think if, during Winter Storm Uri, the industry had collectively spent thousands of hours writing detailed reports to one another to formally declare *force majeure* instead of working to tirelessly resolve the issues causing power outages? The suggestions to the notice provision are out of touch.

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The Contracts Subcommittee passed the recommendation of no action for good reason. R23001 would erode trust in and use of the Base Contract. The Executive Committee should also pass the no-action recommendation.

Regards,

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Lindsey A. Lindsey
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