



# Gas Industry Standards Board

1100 Louisiana, Suite 3625, Houston, Texas 77002

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Home Page: www.gisb.org

**via email and posting**

**TO:** GISB Contract Subcommittee Participants & Posting for Interested Industry Participants

**FROM:** Rae McQuade, Executive Director  
Diane McVicker, Co-Chairman, GISB Contracts Subcommittee  
Cary Metz, Co-Chairman, GISB Contracts Subcommittee

**RE:** Final Minutes of the Contracts Subcommittee Meeting - April 23, 2001

**DATE:** April 23, 2001

## GAS INDUSTRY STANDARDS BOARD

### GISB CONTRACTS SUBCOMMITTEE MEETING - CONFERENCE CALL

**April 23, 2001 - 2:00 p.m. to 3:00 p.m. Central**

#### FINAL MINUTES

#### **I. Administrative**

Ms. Metz welcomed the participants and Ms. McQuade announced the attendees. Ms. Cary Metz read the antitrust statement. The agenda was adopted as posted with an addition to discuss the Enbridge work paper. The March 15 and April 2 minutes were adopted with changes identified in the meeting.

#### **II. Outstanding Issues**

It was determined to begin the review with the work paper provided by Mark Rae of Stroock & Stroock & Lavan (attached). The footnotes of the paper describe the changes resulting from the discussion on April 2.

SECTION	DISCUSSION
Section § 10 Check Boxes	Mr. Rae described the changes to the check boxes as presented in the paper and detailed below:
Paper provided by Stroock & Stroock & Lavan, 4/3/01	Two new check boxes will be added to the Base Contract to be located below the Section 7.2 Method Of Payment box and above the Section 13.5 Choice of Law box. The first new check box will be titled "Forward Contract Damages." The choice under the box would be:
Footnote 1	<p><input type="checkbox"/> If this Box is <u>not</u> checked, the provisions of Section 10.2.2 will be applicable in the event that an Early Termination Date is designated.</p> <p>The second new check box will be titled "Other Agreement Setoffs". The choice under the box would be:</p> <p><input type="checkbox"/> If this Box is not checked, the provisions of Section 10.2.4 will be applicable in the event that an Early Termination Date is designated. In the footnote, it was noted that both check boxes</p>



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## SECTION

## DISCUSSION

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would require the parties to a Base Contract to check the box if they do not want the Base Contract provision to which the check box relates to apply to their transactions. At the April 2<sup>nd</sup> meeting, a question was raised with respect to whether the presumption inherent in this structure should be changed to make the relevant Base Contract provisions inapplicable unless the relevant check boxes are checked. Because one of the proponents of the current structure did not participate in all of the April 2<sup>nd</sup> conference call, it was agreed that this question would be considered at the today's meeting of the Contracts Subcommittee.

In discussion, Mr. Cross explained that the above language is very clear that you have to check a box to avoid the default choice. After further discussion, to avoid any confusion, it was determined that there would be two boxes for each topic ("Forward Contract Damages" and "Other Agreement Setoffs") – one to indicate that the provision does apply and the other to indicate that the provision does not apply. In both topics, the box that indicates that the provision does apply would be the default.

There was conceptual agreement to the above decision to have two check off boxes for each topic, with the default being the box indicating that the section does apply. The default would be noted in the description of the check off box.

Section § 10 and  
Section § 2

Mr. Rae described the additional language in Section § 10.1 and Section § 2 for the Material Adverse Change:

Material Adverse  
Change

"10.1. When reasonable grounds for insecurity of payment or title to the Gas arise **with respect to a party (including, without limitation, the occurrence of a Material Adverse Change with respect to a party), the other** ~~either~~ party may demand adequate assurance of performance. Adequate assurance shall mean sufficient security in the form, amount and for the term reasonably specified by the party demanding assurance, including, but not limited to, a standby irrevocable letter of credit, a prepayment, a security interest in an asset acceptable to the demanding party or a performance bond or guarantee by a creditworthy entity."

Paper provided by  
Stroock & Stroock  
& Lavan, 4/3/01

Footnote 2

This change would be coupled with the addition of the following new definition of the term "Material Adverse Change" to Section § 2 of the Base Contract:

"Material Adverse Change" shall mean, with respect to a party or its guarantor, if any, a reduction in the rating of its long-term, senior, unsecured debt (not supported by a third party credit support obligation(s)) by Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc., to below "BBB-" or by Moody's Investor Services, Inc. to below "Baa3".



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SECTION	DISCUSSION
Section § 2 Contract Definition Paper provided by Stroock & Stroock & Lavan, 4/3/01 Footnote 4	<p>Mr. Rae described the amended definition of Contract in Section § 2 as a result of discussion held on April 2 for Sections §§ 10.1 and 10.2:</p> <p>The definition of the term "Contract" in Section 2 of the Base Contract also would be amended as follows:</p> <p>"Contract" shall mean the legally binding relationship established by (i) the Base Contract, (ii) the provisions contained in any and all effective Transaction Confirmations and (iii) where the parties have selected the Oral Transaction Procedure in Section 1.2 of the Base Contract, any and all transactions that the parties have entered into through an EDI transmission or by telephone, but that have not yet been confirmed in an effective Transaction Confirmation.</p>
Exxon Work Paper dated 4/4/01 Credit Support Obligation Section § 2	<p>ExxonMobil provided the following work paper for a definition of credit support obligation, which was changed during the course of the discussion and the changes are shown below in redline:</p> <p>"Credit Support Obligation(s) shall mean the legally binding obligation(s) <del>between a party to this Contract and a third party to</del> provide or establish credit <u>support for</u> <del>to</del>, or on behalf of, <del>said a</del> party to this Contract such as an irrevocable standby letter of credit, a prepayment, a security interest in an asset acceptable to the demanding party, a performance bond, guaranty, or other good and sufficient security of a continuing nature, satisfactory in form, issuer, term and amount to the <del>demanding-receiving</del> party, as determined by the <del>receiving-demanding</del> party in its reasonable discretion."</p> <p>In discussion, several on the conference call noted that the introductory language is too narrow. As such, the language was modified and can be seen above in redline format (deleted language is shown in strikethrough format and added language is shown in underline format). After discussion, to be more precise, it was determined that the parties should be referred to as "demanding parties" to differentiate them from parties requesting an adequate assurance of performance - which could take the form of updated financial statements. The above language is meant to apply to events of default.</p> <p>All were in support of the above language as a concept. The drafting team will put the language in the document.</p> <p>The drafting team may also consider more specific terms for "event of default" and "adequate assurance," both used in section 10.</p>
Enbridge Work Paper, dated 4/16/01 Sections §§ 1.2, 1.3 & 13.4	<p>In discussion of the work paper presented by Enbridge regarding the oral transaction procedure and the amendments that can be considered, concerns were raised that it was never intended that the oral transaction amendments apply to significant non-commercial amendments.</p> <p>Consensus was previously reached that in the oral confirmation</p>



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**SECTION****DISCUSSION**

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process, the parties would agree to price, quantity and transportation – but would not have amendments of non-commercial significance enacted as a result of a phone call. This is to avoid enacting changes for which there is not agreement from both parties – the amendments are discussed on the phone, submitted from one party to another for confirmation, and after the confirmation deadline is reached with no communication from the other party, have those amendments be considered binding provisions of the contract.

After further discussion, several on the phone noted that they required additional time to consider the types of changes that could be considered in an oral transaction process and the needed safeguards. As such this will be discussed on a subsequent call prior to the three-day meeting of the drafting group.

### **III. Adjourn**

The meeting adjourned at 3:30 pm central. The next telephone call will be held on May 7 from 2:00 p.m. to 3:30 p.m. central. There is only one item on the agenda – the issues raised by the Enbridge work paper specific to the types of changes that can be considered in the oral transaction process.



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## IV. Attendees

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Member?	Name	Company
<b>Services:</b>		
Y	Mitch Dutton	AEP
Y	Cathy Szasz	AEP
Y	Patty McLaughlin	AEP
Y	Janis Shaffer	AEP
Y	Scott Eckerman	Aquila Energy
Y	Gina McMahon	BTUWatch.com
N	Margaret Lester	Dynegy Marketing and Trade
Y	Stacey Dickson	Enron North America
Y	Sherry Stofer	Mirant Americas Energy Marketing
Y	Tracey Ruffeno	PanCanadian Energy Marketing
Y	Rhonda Alphin	Reliant
Y	Jennifer Minnis	Reliant
N	Mark Rae	Stroock & Stroock & Lavan
Y	David Hollingsworth	Williams Energy Marketing
<b>End Users:</b>		
Y	Janet Dixon	Calpine EMI Marketing
Y	Fay Collins	El Paso Merchant Energy LP
Y	Porter Ryan	El Paso Merchant Energy LP
Y	Cary Metz	Midland Cogeneration Ventures
<b>Producers:</b>		
Y	Matt Cross	ExxonMobil
Y	Vernon Sevier	ExxonMobil
Y	Carolyn Hazel	Conoco
<b>LDCs:</b>		
Y	Angie Ishikawa	SoCal Gas
Y	Rick Ishikawa	SoCal Gas

GISB membership for 2001 – membership is not a requirement to participate in this or any GISB meeting. Membership is not a requirement for voting in this subcommittee.



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Work Paper From Stroock & Stroock & Lavan

**DATE:** April 3, 2001  
**RE:** Proposed New Section 10  
**TO:** GISB Contract Subcommittee Participants  
**FROM:** Mark N. Rae, Marvin J. Goldstein, Scott Le Bouef

This working paper (the "Working Paper") summarizes the results of the discussion at the April 2, 2001 meeting (by conference call) of the GISB Contracts Subcommittee regarding certain proposed amendments to Section 10 of the Base Contract For Short-Term Sale and Purchase of Natural Gas (the "Base Contract"). The proposed amendments to Section 10 ("New Section 10") were contained in our prior Working Paper dated March 20, 2001.

The instant Working Paper shows the consensus changes that the participants in the April 2<sup>nd</sup> meeting agreed to make in Proposed New Section 10 and the related provisions of the Base Contract as bold, underlined language in the text of New Section 10 below. In its footnotes, this Working Paper also highlights certain additional issues that were discussed at that meeting.

The revised draft of New Section 10 and the related provisions of the Base Contract follow:

A. Proposed Changes to the Base Contract

Two new check boxes will be added to the Base Contract to be located below the Section 7.2 Method Of Payment box and above the Section 13.5 Choice of Law box. The first new check box will be titled "Forward Contract Damages." The choice under the box would be:

If this Box is not checked, the provisions of Section 10.2.2 will be applicable in the event that an Early Termination Date is designated.<sup>1</sup>

The second new check box will be titled "Other Agreement Setoffs". The choice under the box would be:

If this Box is not checked, the provisions of Section 10.2.4 will be applicable in the event that an Early Termination Date is designated.

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<sup>1</sup> This check box and the one that follows it both would require the parties to a Base Contract to check the box if they do not want the Base Contract provision to which the check box relates to apply to their transactions. At the April 2<sup>nd</sup> meeting, a question was raised with respect to whether the presumption inherent in this structure should be changed to make the relevant Base Contract provisions inapplicable unless the relevant check boxes are checked. Because one of the proponents of the current structure did not participate in all of the April 2<sup>nd</sup> conference call, it was agreed that this question would be considered at the next meeting of the Contracts Subcommittee.



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### B. Proposed New Section 10

10.1. When reasonable grounds for insecurity of payment or title to the Gas arise **with respect to a party (including, without limitation, the occurrence of a Material Adverse Change with respect to a party)**,<sup>2</sup> ~~the other~~ either party may demand adequate assurance of performance. Adequate assurance shall mean sufficient security in the form, amount and for the term reasonably specified by the party demanding assurance, including, but not limited to, a standby irrevocable letter of credit, a prepayment, a security interest in an asset acceptable to the demanding party or a performance bond or guarantee by a creditworthy entity. In the event (each an "Event of Default") either party (the "Defaulting Party") (A) shall: (i) make an assignment or any general arrangement for the benefit of creditors; (ii) file a petition or otherwise commence, authorize, or acquiesce in the commencement of a proceeding or case under any bankruptcy or similar law for the protection of creditors or have such petition filed or proceeding commenced against it; (iii) otherwise become bankrupt or insolvent (however evidenced); (iv) be unable to pay its debts as they fall due; (v) have a receiver, provisional liquidator, conservator, custodian, trustee or other similar official appointed with respect to it or substantially all of its assets; (vi) fail to pay or perform any obligation to the other party with respect to any credit support obligations<sup>3</sup> relating to the Contract; (vii) fail to give adequate assurance of performance under this Section 10.1 within forty-eight (48) hours but at least one (1) Business Day of a reasonable written request by the other party; **or** (viii) not have paid any amount due the other party hereunder on or before the second (2<sup>nd</sup>) Business Day following written notice that such payment is due; ~~(ix) have a Material Adverse Change, which shall mean with respect to a party or its guarantor, if any, a reduction in the rating of its long-term, senior, unsecured debt (not supported by a third party credit support obligation(s)) by Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc., to below "BBB-" or by Moody's Investor Services, Inc. to below "Baa3";~~ or (B) with respect to such party's guarantor, if any: (i) the occurrence of any of the events set forth in clauses (A)(i)-(v), **or** (vii) ~~or (ix)~~ above with respect to such guarantor; or (ii) the failure of the guarantor's guaranty to be in full force and effect (other than in accordance with its terms) prior to the satisfaction of all of the obligations of such party under each transaction to which such guaranty relates without the written consent of the other party; then the other party (the "Non-Defaulting Party") shall have the right, at its sole election, to immediately withhold and/or suspend deliveries or payments and/or to terminate and liquidate the Contract,<sup>4</sup> in the manner provided in Sections

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<sup>2</sup> This change would be coupled with the addition of the following new definition of the term "Material Adverse Change" to Section 2 of the Base Contract:

"Material Adverse Change" shall mean, with respect to a party or its guarantor, if any, a reduction in the rating of its long-term, senior, unsecured debt (not supported by a third party credit support obligation(s)) by Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc., to below "BBB-" or by Moody's Investor Services, Inc. to below "Baa3".

<sup>3</sup> Exxon Mobil has agreed to propose a definition of the term "credit support obligation" for consideration by the Contracts Subcommittee.

<sup>4</sup> The definition of the term "Contract" in Section 2 of the Base Contract also would be amended as follows:



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10.2, without prior notice, in addition to any and all other remedies available hereunder.

10.2. If an Event of Default has occurred and is continuing, the Non-Defaulting Party shall have the right, by notice to the Defaulting Party, to designate a day, no earlier **than** ~~that~~ the day such notice is effective and no later than 20 days after such notice is effective, as an early termination date (the "Early Termination Date") for the liquidation and termination of any and all transactions under the Contract (other than those transactions, if any, that may not be liquidated and terminated under applicable law or that are, in the reasonable opinion of the Non-Defaulting Party, commercially impracticable to liquidate and terminate), as follows:

10.2.1. Upon the designation of an Early Termination Date, the Non-Defaulting Party shall determine, in good faith and in a commercially reasonable manner, the amount owed, if any, by each party with respect to all Gas delivered and received between the parties under transactions on and before the Early Termination Date, and all other applicable charges relating to such deliveries and receipts (including without limitation any amounts due under Section 3.2), for which payment has not yet been made by the party that owes such payment under this Contract.

**Section 10.2.2 below will be applicable unless the parties have indicated otherwise in the Base Contract.**

10.2.2. Upon the designation of an Early Termination Date and in addition to Section 10.2.1 above, the Non-Defaulting Party shall determine, in good faith and in a commercially reasonable manner, the Market Value, as defined below, of each transaction closed out pursuant to Section 10.2. The Non-Defaulting Party shall (i) liquidate each closed-out transaction at its Market Value, as defined below, so that each such amount equal to the difference between such Market Value and the Contract Value, as defined below, of such transaction(s) shall be due to the Buyer under the transaction(s) if such Market Value exceeds the Contract Value and to the Seller if the opposite is the case; and (ii) discount each amount then due under clause (i) above to present value in a commercially reasonable manner as of the Early Termination Date (to take account of the period between the date of liquidation and the date on which such amount would have otherwise been due pursuant to the relevant transactions).

For purposes of this Section 10.2.2, "Contract Value" means the amount of Gas remaining to be delivered or purchased on a Firm basis under a transaction multiplied by the Contract Price, and "Market Value" means the amount of Gas remaining to be delivered or purchased on a Firm basis under a transaction multiplied by the market price determined by the Non-Defaulting Party in a commercially reasonable manner. To ascertain the Market Value, the Non-Defaulting Party may consider, among other valuations, any or all of the settlement prices of NYMEX Gas futures contracts, quotations from leading dealers in energy swap contracts, similar sales or purchases and any other bona fide third-party offers, all adjusted for the length of the term and differences in transportation costs. A party shall not be required to enter into a replacement transaction(s) in order to determine the Market Value. Any extension(s) of the term of a transaction to which the parties are not bound as of the Early Termination

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"Contract" shall mean the legally binding relationship established by (i) the Base Contract, (ii) the provisions contained in any and all effective Transaction Confirmations and (iii) where the parties have selected the Oral Transaction Procedure in Section 1.2 of the Base Contract, any and all transactions that the parties have entered into through an EDI transmission or by telephone, but that have not yet been confirmed in an effective Transaction Confirmation.



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Date (including but not limited to "Evergreen" provisions and options to extend) shall not be considered in determining Contract Values and Market Values. The rate of interest used in calculating net present value shall be determined by the Non-Defaulting Party in a commercially reasonable manner.

10.2.3. The Non-Defaulting Party shall net or aggregate, as appropriate, any and all amounts owing between the parties under Section 10.2.1 and, if applicable, Section 10.2.2, so that all such amounts are netted or aggregated to a single liquidated amount payable by one party to the other (the "Net Settlement Amount"). At its option, the Non-Defaulting Party may setoff any Net Settlement Amount owed to it against any margin or other collateral held by it in connection with any credit support obligation relating to this Contract.

**Section 10.2.4 below will be applicable unless the parties have indicated otherwise in the Base Contract.**

10.2.4. Upon the occurrence of an Early Termination Date, the Non-Defaulting Party may set-off, without prior notice to the Defaulting Party, any Net Settlement Amount payable to the Defaulting Party against any amount(s) payable by the Defaulting Party to the Non-Defaulting Party under any other agreement or arrangement between the parties.

10.2.5. If any obligation that is to be included in any netting, aggregation or setoff pursuant to Section 10.2.3 or, if applicable, Section 10.2.4 is unascertained, the Non-Defaulting Party may in good faith estimate that obligation and net, aggregate or set-off, as applicable, in respect of the estimate, subject to the Non-Defaulting Party accounting to the Defaulting Party when the obligation is ascertained. **Any amount not then due which is included in any netting, aggregation or setoff pursuant to Section 10.2.3 or, if applicable, 10.2.4 shall be discounted to net present value in a commercially reasonable manner determined by the Non-Defaulting Party.**

10.2.6 The Non-Defaulting Party shall give notice that a liquidation pursuant to Section 10.2 has occurred to the Defaulting Party no later than the Business Day following such liquidation, provided that failure to give such notice shall not affect the validity or enforceability of the liquidation or give rise to any claim by the Defaulting party against the Non-Defaulting Party. The net amount due pursuant to Section 10.2.3 or, if applicable, Section 10.2.4 shall be paid by the close of business on the fifth (5th) Business Day following notice of the Early Termination Date.

10.2.7. The parties agree that each transaction terminated and liquidated under Section 10.2 shall constitute a "forward contract" within the meaning of the United States Bankruptcy Code and that Buyer and Seller are each "forward contract merchants" within the meaning of the United States Bankruptcy Code.

10.3. The Non-Defaulting Party's remedies under this Section 10 are the exclusive and sole remedies of the Non-Defaulting Party with respect to the occurrence of any Early Termination Date. Each party reserves to itself all other rights, set-offs, counterclaims and other defenses which it is or may be entitled to arising from the Contract.