

MEMORANDUM

July 29, 1997

TO: Executive Committee

FROM: Duke Energy Interstate Pipelines
Cynthia A. Corcoran
Joyce Phillips

RE: Comments Regarding Electronic Data Interchange
Trading Partner Agreement - R97035 and R97060

In conjunction with the Contract Subcommittee's upcoming August meeting, the Duke Energy Interstate Pipelines (Panhandle Eastern Pipe Line Company, Texas Eastern Transmission Corporation, Trunkline Gas Company and Algonquin Gas Transmission Company, hereinafter the "Duke Pipelines") wish to voice their support for approval of the Electronic Data Interchange Trading Partner Agreement, known alternatively as Request R97060 and as Model 2. Model 2 is superior to its alternative, known alternatively as Request R97035 or Model 1, for a number of reasons outlined below. The Duke Pipelines consequently request that Model 2 become the recommended form of agreement from the Contract Subcommittee.

Model 2 is designed to increase accuracy of communication and certainty regarding the obligations and responsibilities between trading partners. Model 2 is a streamlined document that is specifically tailored to electronic transactions within the gas industry. Model 1, which is the Model Trading Partner Agreement ("MTPA") proposed by the American Bar Association ("ABA") several years ago, with only small technical modifications for Internet usage, is not created for transactions within the gas industry. Rather, the MTPA was designed for stand-alone electronic purchases and sales of goods and not, as is the case here, the arrangement of gas transportation services.¹

The fact that Model 1 is based closely on the ABA Model should not give Model 1 enhanced currency with this Subcommittee. The Electronic Messaging Services Task Force of the ABA, which prepared the original MTPA, with which Model 1 is closely associated, encouraged "independent judgment as to the effectiveness of the provisions of the Model Agreement and the advisability of their use in particular transactions." (*See American Bar Ass'n*, 45 Bus. Law. 1645 (June 1990)). The task force that prepared the MTPA stressed in its report that the agreement was designed for use only in connection with domestic purchase and sales transactions involving goods, and that suitable provisions would have to be developed for transactions involving the performance of services, such as transportation services. Finally, the report encouraged freedom of contract, noting that the ABA

¹Model 2 does not represent a complete rejection of the ABA Model. Where appropriate, the language of Model 2 is similar to, or identical with, the ABA Model. (*See, e.g.*, Sections 3.2 and 4.5 of Model 2).

Model agreement does not generally advocate particular solutions to what are essentially business issues. In sum, the ABA Model was developed nearly a decade ago, for an entirely different market, and was never intended by the ABA to be used without thought or modification. Rather, the ABA intended that its model would be adapted to meet the particular sets of trading circumstances for which the agreement would be used.

Such adaptation to particular trading circumstances is precisely the advantage of Model 2. Model 2 has been tailored to fit natural gas transportation transactions and assumes, consistent with current industry practice, that partners to a transaction in this setting already hold underlying agreements with one another. While the ABA/Model 1 approach supports completely free-standing agreements between trading partners, this approach does not reflect industry practice. Rights and obligations between parties are established primarily pursuant to FERC tariffs and underlying contracts, with the consequence that most contractual provisions typical to a transaction have already been specified elsewhere between the parties. Recognizing this, Model 2 narrowly focuses upon only those contractual elements necessary in effecting electronic communication between the parties to a potential transaction, and prevents contracts being entered into by unauthorized parties. Model 2 removes many of the ambiguities in relation to existing contract/tariff provision and current GISB standards, and streamlines communication between the contracting parties. Model 2 sets the proper focus of the EDI agreement upon how communication is to take place between parties that already hold agreements with one another, and accurately and expeditiously informs those parties when their communications have succeeded or failed.

Model 2 has been designed to comport with current GISB standards and protocols, and has had the benefit of substantial technical, legal and industry input. (Model 1, on the other hand, conflicts with the GISB Standards in a number of respects. For example, Section 2.5 of Model 1 provides for automatic retransmissions under certain circumstances, while Section 1.3.7 of the GISB Standards provide that each transmission is an original.) Model 2 simplifies the provisions concerning the communication chain and provides for clear and concise rules governing receipt and effectiveness of documents. In Section 2 of Model 2, for example, the agreement identifies each step in the process and the results attaching to communication success and communication failure in conjunction with the GISB standard. (Model 1 does not establish these steps with clarity.) Additionally, Model 2 protects the parties involved in a particular transaction against implied and statutory warranties that may be applied at law. (Model 1, however, carries no disclaimer of implied or statutory warranties that may apply to EDI communication devices.) Moreover, Model 2 simplifies the information that must be included in appendices and exhibits. For example, Model 2 provides that all party-specific contract level information be set forth only once in the Appendix. (Model 1 may require this information to be provided more than once.)

Much has been learned regarding the technology and implementation methodology in the last two years as pipelines and their customers have implemented GISB procedures. Model 2 reflects these changes, and offers a clear and legally sound way to implement GISB standards concerning EDI communications with simple, streamlined provisions, and without creating unwanted ambiguities and legal risks for parties undertaking such transactions.

Again, the Duke Pipelines support this Committee's selection of Model 2 (R97060) as the appropriate trading partner agreement for voluntary use within the industry, and looks forward to the August meeting when this matter will be discussed in full.

cc: Contract Subcommittee
GISB Office

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