

July 9, 1997

Gas Industry Standards Board
1100 Louisiana, Suite 4925
Houston, Texas 77002
Attention: Ms. R. McQuade

Re: Implementation of Standards for Electronic Communication under FERC
Order No. 587: Enron Capital & Trade Resources Corp. (ECT)
Comments to Forms of Electronic Data Interchange Trading Partner
Agreement

R97035: Current GISB Model Trading Partner Agreement Revised
for Internet (**Model 1**)

R97060: Proposal for Alternative GISB Model Trading Partner
Agreement, Including Internet and Other Future Technology Task Force
Recommendations (**Model 2**)

ECT offers the following comments to the industry (diskette included for
posting) regarding the captioned matter.

MODEL 1

ECT is of the opinion that Model 1 should **not be submitted for further use** by
the gas industry based upon the following reasons and issues.

1. Model 1 is largely based upon the first model electronic data interchange trading partner agreement developed by the American Bar Association (ABA) in 1990 to service the purchase order and sales of warehoused goods governed by the Uniform Commercial Code (UCC). The 1990 ABA agreement, together with syllabus comments thereto, may be found at 45 *The Business Lawyer* 1645 (1990). The ABA agreement was not drafted in light of gas transportation and gas transportation related services, nor the GISB Standards which did not exist at the time it was drafted. Further, the provision of gas transportation services and related services are not goods governed by the UCC. Finally, the ABA agreement is outdated in today's technological environment and, in certain respects, is not well crafted for the gas industry.

2. Model 1, relying to such a great extent on the ABA agreement, (i) does not coordinate well with the GISB Standards adopted long after the ABA agreement was

drafted, and (ii) is too broad in scope. The gas industry will be better served with a narrower agreement focused upon only effecting electronic communications related to gas transportation services and related services, not the buying and selling of goods under the UCC.

3. Model 1 includes many of the troublesome provisions of the ABA agreement which do not create clear and concise contract rules, rights and obligations. A few examples follow: the first Whereas clause suggests that the parties are agreeing to only use EDI communication by the use of "in substitution," and this may not be the case; Model 1 does not define or otherwise delineate "accessible" in Section 2.1 upon which proper receipt is dependent; the meaning of "unintelligible or garbled form" is unclear as used in Section 2.4; Section 2.2.5 and Section 2.4 allow the originating party's records to control in situations which are either incomprehensible or not appropriate; Section 2.5 provides for automatic retransmissions under certain circumstances, however, the GISB Standards provide that each transmission is an original; the definition of functional acknowledgment indicates that it may or may not indicate error, however, the term as used in other parts of the agreement, such as Section 2.4, would imply a meaning that a functional acknowledgment would issue only if there are no errors; under Section 3.1 anything can be bought or sold (widgets); Section 3.1 only adds ambiguity and conflicting issues within the context of the GISB Standards, tariffs and transportation arrangements among trading partners; Section 3.1 [B] is exceptionally troublesome since it is legally obtuse and so greatly out of context within the GISB Standards; Section 2.3 acceptance documents for the offer and acceptance of goods bought and sold are not necessary or appropriate to the utilization of a trading partner agreement under the GISB Standards; many references to Document in the Agreement are too limited since the term Document does not include HTTP responses or other time-stamp responses or electronic delivery mechanism error notifications, for example, Section 1.3; there are no provisions related to back-up or error mechanisms; parts of Section 3 are inappropriately limited to only Signed Documents when they should apply to any Document; and the severability clause is not appropriate in the narrow context of the agreement.

4. The exclusion of damages provision in Model 1 may not be enforceable under certain states' law as it is not conspicuous.

5. There is no disclaimer of implied or statutory warranties which may apply to EDI communication devices.

6. The public/private key issues are not adequately treated in Model 1.

7. Model 1 does not address version changes and the rights of the parties in respect of same.

8. In Model 1, the first sentence of Section 1.3 is an open-ended obligation requiring each party to maintain equipment, software, services and testing judged only on

the ability to "effectively and reliably transmit and receive Documents." This is a litigation prone provision and should not be included in the agreement in such a fashion. Any equipment malfunction, absent force majeure, could arguably result in liability.

9. In Model 1, Section 1.4 is another open-ended obligation requiring the parties to use security procedures "including those specified in the Appendix, if any, which are reasonably sufficient to ensure that all transmissions of Documents are authorized and to protect its business records and data from improper access." Since those specified in the Appendix are not the condition that the parties must meet, how does a party know what security procedures are required as being "reasonably sufficient to ensure that all transmissions of Documents are authorized and to protect its business records and data from improper access" until the issue is litigated. Another poorly drafted litigation prone provision.

10. The appendices and exhibits to Model 1 are overly confusing.

MODEL 2

ECT is of the opinion that Model 2 should **be submitted as a replacement for Model 1 for use** by the gas industry based upon the following reasons and issues.

Model 2 coordinates well with the GISB Standards while allowing for flexibility, simplifies and clarifies the provisions concerning the relationships within the communication chain, and provides for clear and concise rules governing the receipt and effectiveness of documents and obligations in respect thereof, all within the context of gas transportation and related gas transportation services. The construct of Model 2 is consistent with the actual flow of the communication chain; primarily see Section 2. Examples include understanding the purposes and effects of, and possible errors or failures related to, the HTTP response time-stamp and other time records, electronic delivery mechanism error notifications, encryption and decryption processes, public and private key processes, translation processes, functional acknowledgments and response documents.

1. Model 2 addresses each problem issue in respect of Model 1, some of which are described above under item 3, Model 1.

2. Model 2 adopts in Section 2 thereof a more precise delineation of the communication chain, identifying each step in the process and the results attaching to communication success and communication failure in conjunction with the GISB Standards.

3. Model 2 is not designed to facilitate the sale of goods (widgets) under the UCC and therefore eliminates extraneous provisions which inject ambiguity within the context of transportation and related services and the GISB Standards.

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4. Model 2 provides that all party specific contract level information be set forth only once in the Appendix. Separate concise exhibits are designed for either Internet or VAN usage, together with error and back-up functionalities.

For the foregoing reasons and issues, ECT requests that the GISB Executive Committee, upon appropriate review by each Committee member's legal counsel, propose to the GISB membership that it adopt **only** Model 2 as the form of GISB Model Electronic Data Interchange Trading Partner Agreement for prospective voluntary use by the industry. Alternatively, ECT requests that the GISB Executive Committee, upon appropriate review by each Committee member's legal counsel, propose to the GISB membership that it adopt Model 2 as one of two alternate forms of GISB Model Electronic Data Interchange Trading Agreement for prospective voluntary use by the industry.

Respectfully Submitted By
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