VIA E-MAIL

February 15, 2006

TO: North American Energy Standards Board (NAESB) Office (naesb@naesb.org); NAESB Wholesale Gas Quadrant Contracts Subcommittee Chairs, Keith Sappenfield (EnCana) and Suzanne Calcagno (UBS Warburg)

CC: Rae McQuade, NAESB President and COO

FROM: Interested LDCs[1]

RE: Comments of Interested LDCs Regarding Proposed Changes to date to the NAESB Base Contract for Purchase and Sale of Natural Gas

The Interested LDCs respectfully submit comments regarding the North American Energy Standards Board (NAESB) Wholesale Gas Quadrant (WGQ) proposed modifications to the existing NAESB Base Contract for Purchase and Sale of Natural Gas (Base Contract). They hereby offer general and specific comments that present concerns they have identified to date about the redlined version of the Base Contract, dated January 10, 2006.

The Interested LDCs request that these comments be considered thoroughly by the NAESB WGQ Contracts Subcommittee during its upcoming meeting. The comments provided herein are intended to articulate those significant positions that are shared by the Interested LDCs; however, each individual participant retains the right to advocate different or additional positions in further NAESB proceedings. Further, these comments by no means should be construed to represent an exhaustive set of comments or recommendations and do not preclude the Interested LDCs from submitting subsequent comments.

Section 10 – Financial Responsibility: The Interested LDCs find that the existing language within Section 10 of the Base Contract, coupled with the ability of parties to negotiate freely by means of special provisions, has worked very well throughout the natural energy industry. Thus, we do not support the revisions that have been proposed to this section except, conditionally, those made to Section 10.10, which offers new and specific information. The proposed language in general would be better suited for special provisions as negotiated between parties to the contract.

Section 10.2: Specifically, the language proposed in footnotes 93 and 94 would be better suited for inclusion in Special Provisions but not in the Base Contract. We therefore do not support the inclusion of such proposed language and propose maintaining the existing provision under Section 10.2.

Section 10.3.2: LDC support of footnote 99 is contingent upon the resolution of the issue of whether and how to include affiliates in setoff agreements. The language here would be better suited for special provisions (paragraph regarding triangular setoff).

Section 11 – Force Majeure: The Base Contract is intended to cover generic procedures or transactions, and the inclusion of LNG-specific events under Force Majeure implies that local events qualify as a legitimate cause for claiming protections from liability under the Force Majeure provisions of the contract.

[1] Interested LDCs: Ameren, Aquila, Avista Utilities, Baltimore Gas and Electric Co., Consolidated Edison Company of New York, Inc., Consumers Energy Company, Energy East, KeySpan Energy, National Fuel Gas Distribution Corporation, National Grid, New Jersey Natural Gas, Nicor Gas, NiSource Inc., NW Natural, Pacific Gas & Electric Company, PECO Energy, The Peoples Natural Gas Company (PA), PPL Energy Plus, LLC, Questar Gas Company, Southern California Gas Company, Southwest Gas Corporation, UGI Utilities, Inc., Washington Gas Light Company, Wisconsin Public Service Corp., Xcel Energy Inc, and Yankee Gas Services Company.

We believe that Force Majeure language should cover LNG-specific events only when it can be sourced to LNG, and in such a case, it should be handled in Special Provisions. At the very least, we believe that it would be premature to include provisions tied specifically to LNG at this point, with the current state of transparency and liquidity within the energy market. And at the most, the Interested LDCs share a concern that inclusion of LNG under Force Majeure would allow the counterparty to expand the definition of Force Majeure and could be used to suspend performance, which would pose a reliability risk for LDCs serving their customers. Therefore, the Interested LDCs at this time oppose the inclusion of language specifying LNG-specific events under Force Majeure provisions.

Section 12 - Term: We would support the revisions proposed under Section 12 (footnote 115), *if* references to Sections 13 (Limitations) and 14.10 (Miscellaneous) are deleted. Referencing Section 13 here implies that there is a legitimate concern that certain obligations would exist after the termination of the contract when they did not exist during the term of such contract. Such a concern is without merit and hence any mention of Section 13 would be unacceptable. In the same manner, applying this provision to Section 14.10 implies that the confidentiality requirements regarding the contract should last indefinitely. This contradicts the confidentiality clause under Section 14.10, which limits such obligations to "one year from the expiration of the transaction." Therefore, we strongly recommend deleting references to Section 13 and 14.10 in the proposed language for this section.

Section 14 – Miscellaneous:

Section 14.1: The Interested LDCs recommend keeping the parenthetical clause in the second sentence of Section 14.1 (footnote 116), as it tends to mitigate the prospect of litigation. Footnote 118 addresses the concept that is in footnote 117 albeit in greater detail; we recommend, however, conceptually mirroring this section with Section 10.1 by deleting footnote 117 and replacing footnote 118 with the phrase, "as long as such entity has provided Adequate Assurance of Performance in the manner required under Section 10.1." This clearly specifies the requirements for the assignor (or assigning party) with language that is analogous to Section 10.1.

The language in footnote 119 is partly already addressed in footnote 118 (or in the language proposed above to replace footnote 118) and thus is unnecessary. Furthermore, this proposal could apply only if the Credit Support Addendum used by the counterparties provides for a transfer of the Guaranty from the assignor (or assigning party) to the assignee (or non-assigning party). The Credit Support Addendum is well fitted for such particular provisions that reflect the specific requirements of individual parties. We therefore oppose inserting into the Base Contract such language that is concerned with particular rather than universal cases and is more appropriate for a special provision.

Section 14.3: The original language in this section constitutes standard wording that is widely used in contracts today. Furthermore, waivers are commonly made in the course of dealing, and there is no requirement in the law that such waivers be made in writing. We support maintaining the original language, as it accommodates the law and widespread practice.

Section 14.5: The concept of a waiver that is presented in footnote 123, and repeated in varying form in footnote 124, is not widely applicable. Waivers of jury trials may apply in particular circumstances; however the practice is certainly not applicable to most cases or in all jurisdictions. The existing provision reflects this fact. To the extent individual parties elect to waive a jury trial, they should negotiate such a waiver in special provisions to the contract. The Interested LDCs therefore do not support including such a waiver as a blanket practice into the Base Contract. We reject also the proposal in footnote 124 to uniformly submit all parties to a contract to the laws of a specific state and place the venue of Proceedings in the courts of that particular state.

Section 14.10: The inclusion of "Affiliates" (footnote 125) into the parenthetical exceptions to the provision under Section 14.10, thereby allowing disclosures of the terms of transactions to affiliates, is likely to conflict with existing state affiliate rules. Moreover, disclosure of the terms of individual deals to "credit reporting agencies" (footnote 126) runs counter to the spirit of this section which protects counterparties from the possible adverse consequences of disclosing sensitive information to third parties

by requiring prior written consent to such disclosures. Consent to such disclosures is best handled by exception and in writing. Footnote 128 also contradicts the intent of this section: The names of counterparties to individual transactions should not be disclosed, except when otherwise agreed to between the parties or required by law. Accordingly, we oppose the addition to the Base Contract of the language proposed in footnotes 125, 126 and 128.

While we support the revision in footnote 127 to include routine regulatory reporting requirements in the exceptions to non-disclosures, we suggest replacing the word "gas" with "fuel." Finally, the insertion of the clause regarding direct damages (footnote 129) appears to be a misplaced comment; thus we recommend deleting this language from this section.

Sections 14.11, 14.11.1, and 14.13: While the provisions in footnotes 132 and 133, which address market disruptions and pricing, conceptually make sense, it would be difficult to develop a standard methodology for determining pricing. In certain situations language of this type would have considerable merit, but because it is not suitable for standardization, we recommend it be placed in special provisions to the contract.

Section 14.12 (Various proposals):

We do not support the provision in *footnote 132*, which has to do with substitute pricing where a specific index is not available. While the concept is acceptable, the actual formula or methodology for determining a replacement Contract price due to a missing "Index Component" cannot be standardized or universally applied. Such specific approaches should be negotiated between counterparties as special provisions.

The proposed language in *footnote 133*, which deals with digital records as legal evidence, has some merit from a technologic perspective; as written, however, it could impair an attorney's ability to challenge the authenticity of the electronic record. We thus propose replacing this provision with the following language, which address the requirement for proper document authentication:

> *"Any original executed Base Contract, Transaction Confirmation or other related document may be digitally copied, photocopied stored on computer tapes and disks (the "Imaged Agreement"). The Imaged Agreement, if introduced as evidenced on paper, the Transaction Confirmation, if introduced as evidence in automated facsimile form, the Recording, if introduced as evidence in its original form and as transcribed onto paper, and all computer records of the foregoing, if introduced as evidence in printed format, in any judicial, arbitration, mediation or administrative proceedings will be admissible as between the parties to the same extent and under the same conditions as other business records originated and maintained in documentary form. Neither Party shall object to the admissibility of the recording, the Transaction Confirmation or the Imaged Agreement on the basis that such were not originated or maintained in documentary form under the hearsay rule, the best evidence rule or other rule of evidence but preserve all other objections as to admissibility."*

Finally, the Interested LDCs oppose the proposal in *footnote 134*, regarding representations and warranties of contracting parties, because (1) it is in part covered by the Adequate Assurance of Performance provision in Section 10.1, and (2) it characterizes the Base Contract as a "forward contract" and parties to it as "forward contract merchants"—something which may be determined only in the proper legal forum and might not be upheld by a court of law. Thus, while the protections this provision seeks in the form of warranties and representations might bind the counterparties to the agreement, it would not necessarily bind a third party, such as a court, to this agreement between the two parties.

Section 14.13: While arbitration (*footnotes 131 and 134 in part*) is one of many remedies sought in the industry to resolve disputes or breaches related to the Base Contract, it is not a universally adopted paradigm. Thus requirements for arbitration are not suitable as an industry standard and therefore should be left to Special Provisions as negotiated between the parties.

We suggest addressing the issue of disputes on what constitutes Adequate Assurance of Performance, beyond what is delineated in Section 10, by clarifying that disputing parties with respect to non-

performance should first follow the Base Contract, as addressed in Section 10 and the relevant definitions, and second, if there is a gap, the parties should look to the Uniform Commercial Code (UCC) for a resolution. Rather than cherry-pick provisions from the UCC (such as those having to do with arbitration), the Interested LDCs propose inserting an order of priority clause in Section 14 that would address how parties should resolve non-performance disputes. This general statement would clarify that, in the event of a dispute, to the extent it expressly provides for the matter, the NAESB Contract will prevail; otherwise, where the contract is silent, the UCC will prevail. On the other hand, to the extent the contract contradicts the UCC, the contract will prevail (i.e. it will not be overridden by the UCC). Accordingly, we proposed the following specific language as an inclusion under Section 14:

> *"Each party agrees that the provisions of this Base Contract supersede and replace in their entirety any requirements of law relating to adequate assurance of future performance, including without limitation Article 2 of the Uniform Commercial Code (UCC). This notwithstanding, the parties acknowledge that this Base Contract and the Special Provisions document the terms of a contract for the sale of goods and that the applicable provisions of Article 2 of the UCC shall apply to the Transactions set forth herein."*

The companies comprising the Interested LDC group are active participants in NAESB and appreciate the efforts of the NAESB WGQ Subcommittee and the opportunity to comment on the proposed revision to the NAESB Base Contract.

Respectfully submitted,

Ameren
Aquila
Avista Utilities
Baltimore Gas and Electric Co.
Consolidated Edison Company of New York, Inc.
Consumers Energy Company
Energy East
KeySpan Energy
National Fuel Gas Distribution Corporation
National Grid
New Jersey Natural Gas
Nicor Gas
NiSource Inc.
NW Natural
Pacific Gas & Electric Company
PECO Energy
The Peoples Natural Gas Company (PA)
PPL Energy Plus, LLC
Questar Gas Company
Southern California Gas Company
Southwest Gas Corporation
UGI Utilities, Inc.
Washington Gas Light Company
Wisconsin Public Service Corp.
Xcel Energy Inc.
Yankee Gas Services Company