**North American Energy Standards Board**

**Request for Initiation of a NAESB Business Practice Standard, Model Business Practice or Electronic Transaction**

**or**

**Enhancement of an Existing NAESB Business Practice Standard, Model Business Practice or Electronic Transaction**

**Instructions:**

 **1. Please fill out as much of the requested information as possible. It is mandatory to provide a contact name, phone number and fax number to which questions can be directed. If you have an electronic mailing address, please make that available as well.**

 **2. Attach any information you believe is related to the request. The more complete your request is, the less time is required to review it.**

 **3. Once completed, send your request to:**

 **Rae McQuade**

 **NAESB, President**

 **1415 Louisiana, Suite 3460**

 **Houston, TX 77002**

 **Phone: 713‑356‑0060**

 **Fax: 713‑356‑0067**

 **by either mail, fax, or to NAESB’s email address, naesb@naesb.org.**

**Once received, the request will be routed to the appropriate subcommittees for review.**

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 Date of Request: May 3, 2023

1. Submitting Entity & Address:

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2. Contact Person, Phone #, Fax #, Electronic Mailing Address:

 Name : Joshua Phillips

 Title : Principal Strategic Initiatives

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1. Title and Description of Proposed Standard or Enhancement:

Title:

Enhancement to the NAESB Base Contract for Sale and Purchase of Natural Gas Force Majeure Terms

Description:

This request proposes revisions to the NAESB Base Contract for Sale and Purchase of Natural Gas to improve the clarity associated with the force majeure provisions in the contract. There are three primary areas of concern: clarity regarding repeated claims of force majeure for an avoidable situation; requirements that parties claiming force majeure should take actions to prevent the condition; and additional specificity regarding the force majeure events.

**Cheniere comments**

Sabine Pass Liquefaction, LLC (Wholesale Gas Quadrant, End User Segment) submits the following comments to request R23001 on behalf of itself and its affiliated NAESB members Corpus Christi Liquefaction, LLC (Wholesale Electric Quadrant, End User Segment), and Cheniere Creole Trail Pipeline, L.P. (Wholesale Gas Quadrant, Pipeline Segment) (collectively, “***Cheniere***”).

Cheniere appreciates the request for proposed revisions to the NAESB Base Contract for Sale and Purchase of Natural Gas (“***NAESB***”), but respectfully submits that the force majeure (“***Force Majeure***”) concerns raised by the request are either generally already addressed in the General Terms and Conditions of the Base Contract for Sale and Purchase of Natural Gas (“***General Terms***”), or they raise specific issues that should be negotiated between counterparties in the Special Provisions and/or Transaction Confirmation.

No-Action Recommendation

Cheniere believes that the General Terms should reflect a balanced approach among the various counterparties that utilize the NAESB because the respective entities have varying interests. The requested revisions would upset that balance by:

(a) singularly focusing on winter weather events and winterization actions, to the exclusion of other types of weather events;

(b) protecting end users at the expense of other competing entities, such as producers and others in the upstream natural gas supply chain; and

(c) altering the legal standards for what constitutes Force Majeure in various contexts.

Accordingly, despite being a material end-user, Cheniere does not support the proposed Force Majeure revisions because the proposals would upset the relative balance among competing counterparties that is established by the current General Terms.

Apart from conducting its own analysis of the proposed request, Cheniere contacted a large number of its natural gas suppliers to elicit feedback. Many of those counterparties are producers, some of whom sit on NAESB’s Executive Committee for the Wholesale Gas Quadrant (“***WGQ***”). The counterparties, without exception, opposed the requests. The opposing counterparties also thought the proposals disrupted the balance of the General Terms in an unfair and unilateral manner.

In addition to the universal opposition, it also became apparent that the requested changes to the General Terms would not be able to achieve the votes needed at the WGQ Executive Committee to become a NAESB standard, even if the changes were approved by the Contracts Subcommittee. In order to become a NAESB standard, the proposed revision must receive at least 17 of the 25 votes of the WGQ Executive Committee, ***and at least two votes from each of the five segments of the WGQ***.

Cheniere submits that based on its outreach to counterparties, revisions of the type requested here will be unable to obtain the two votes required from the “producers” segment of the WGQ Executive Committee, and thus the proposal will not have the votes necessary to become a NAESB standard. In the interest of efficiency and best use of NAESB voluntary resources, Cheniere seeks to avoid prolonged discussions at the Contracts Subcommittee of requests that have no likelihood of ultimately being adopted as standards.

Accordingly, Cheniere respectfully submits that a vote on a motion for a no-action recommendation on the request is the appropriate procedural course by the Contracts Subcommittee.

Specific objections to the requested revisions

Requesters reference concerns regarding repeated claims of force majeure. However, an avoidable situation does not qualify as Force Majeure because the circumstance is reasonably within the control of the declaring party. Invalid Force Majeure declarations may be addressed by objecting to the Force Majeure declaration and seeking cover damages under Section 3.2 of the Contract.

Requesters also state concerns related to preventative actions and notice specificity related to Force Majeure. Cheniere submits that the General Terms address what qualifies as Force Majeure, what must be done to avoid the adverse impacts of Force Majeure, the standard for remedying the condition and resuming performance, as well as providing for what information is required in Force Majeure notices. All of the requests are already expressly addressed in Section 11 of the General Terms, and any desired additional specificity may be negotiated between the parties on a case-by-case basis in Special Provisions or Transaction Confirmations.

Cheniere provides additional detailed comments about each of the specific requests below.

We propose that a definition for “gas supply” be incorporated into the contract section 2, a potential definition could be:

2.21        “gas supply” shall mean the specific source of supply designated as the supply source in the transaction confirmation, and if no specific source of supply is designated, then the phrase refers to all reasonably available alternative sources of supply.

Cheniere comments: *Cheniere opposes this request.*

Consistent with our general comments above, designated sources of gas supply may be addressed in Special Provisions or Transaction Confirmations versus general drafting in the General Terms,and the current hierarchy already provides for the undertaking.

Also, Section 11.3 of the GT&Cs states that a declaring party is not entitled to any loss of seller’s “gas supply” except as provided in Section 11.2. Thus, under the proposal, a seller may not declare Force Majeure for loss of a defined gas supply unless the loss otherwise qualifies as Force Majeure under Section 11.2. An interruption of a specified gas supply should qualify as an event of Force Majeure, even if the event is not listed in Section 11.2.

Where Seller may designate its gas supply, Buyer should have a corresponding opportunity to designate its market or use for the subject Gas.

The following provide additional detail regarding these concepts and potential redlines to address them.

1. Clarity is needed regarding the ability to invoke the force majeure provision related to weather. While cold weather is certainly a potential cause for a force majeure situation, an appropriate level of preparation and communication is reasonably expected. Potential language to address weather related events be added to section 11.2 subsection (ii) “**however in no case shall this provision be interpreted to absolve a party from taking winterization actions or allow a claim of force majeure in absence of taking such preventative measures**;”. During consideration of this request, we also suggest determining what “winterization actions” should be or how to make such a common determination.

Cheniere comments: *Cheniere opposes this request.*

Cheniere believes this provision is unlikely to be widely adopted because it focuses on physical assets in the natural gas supply chain. The vast majority of Gas in the U.S. is sold by marketers who do not own physical assets. Accordingly, attempting to utilize this language to refute any claimed event of Force Majeure is only likely to be effective in the instance of a first sale of gas from a producer to a buyer. A marketer would be unable to take any winterization activities.

Further, this concept is already addressed more broadly by: (a) Section 11.1, which requires that Force Majeure cannot reasonably be within the control of the party claiming suspension; and (b) Section 11.2, which requires parties to make reasonable efforts to avoid the adverse impacts of a Force Majeure. If it is reasonable for parties to take preventative activities given industry intricacies, probability of events, etc., then the framework for disputing the claimed Force Majeure is already in place. Additionally, the request focuses on a single cause of Force Majeure, winter weather, and does not address other potential causes of Force Majeure, including other weather events like hurricanes, tornados, wildfires, earthquakes, etc. Any effort to require new “preventative mandates” should be more expansive; however, Cheniere submits that such efforts should be addressed in Special Provisions and/or a Transaction Confirmation. As a final point, any attempt to state that something is not Force Majeure should be addressed in Section 11.3.

1. Within section 11.3 there are three areas for improvement.

The first is in subsection (ii) which clarifies that a party responsibility attempt to remedy the condition causing force majeure, including advance preparation:

* 1. This could be achieved through the following, “(ii) the party claiming excuse failed to remedy **or reasonably prevent** the condition…”.

Cheniere comments: *Cheniere opposes this request.*

This request is a significant expansion of a non-declaring party’s right to contest Force Majeure, because the request would require the non-declaring party to prevent the condition caused by the event itself.

There is a general presumption of consistent usage in contract drafting and interpretation: a material variation in terms suggests a variation in meaning. Section 11.1 defines Force Majeure as any cause not reasonably within control of the party claiming suspension. Section of 11.2 lists specific events, acts, and actions that are included in Force Majeure. Contrastingly, Section 11.3 references that a declaring party is not entitled to the benefit of Force Majeure if it failed to remedy the condition with reasonable dispatch. Applying the presumption of consistent usage, the new term “condition” in Section 11.3 means something other than Force Majeure (i.e., it means something other than the causes, events, acts, and actions referenced in Sections 11.1 and 11.2). The reference to “remedying” the condition in Section 11.3 begs the interpretation that the condition means the condition caused by Force Majeure.

The types of conditions that may be caused by Force Majeure are numerous. And many conditions may be difficult, if not impossible, to prevent even at great cost. Thus, requiring a declaring party to prevent “the conditions” caused by Force Majeure creates a new expansive subjective basis on which a non-declaring party may contest Force Majeure, which greatly expands a declaring party’s potential liability if its failure to perform is unexcused based on a failure to prevent “the condition.”

* 1. The second enhancement under section 11.3 helps clarify that a single supplier should not be able to claim force majeure when the force majeure cause does not interrupt other supplies from a pooling hub. This could be achieved by the addition of a subsection **(vi) interruption of specific supply or markets at “pooling points” or “hubs” without the hub or pooling point operator claiming Force Majeure**.

Cheniere comments: *Cheniere opposes this request.*

Force Majeure analysis is based on the totality of the unique facts and circumstances of the asserted event based on the terms and conditions of the Contract, including importantly, the specific Delivery Point(s) set forth in the Transaction Confirmation. There may be circumstances where the gas supplies or markets at a hub/pool are significantly impacted such that a declaration of Force Majeure is justified for the specific Delivery Point. However, even during such an event, hub/pool operators are historically unlikely to declare Force Majeure with respect to the operations of the hub/pool. Accordingly, the adoption of this provision would result in the disallowance of valid declarations of Force Majeure.

Further, if a Contract with a Delivery Point at a hub/pool provides for a specific gas source and transportation path to the Delivery Point, or a specific market use or transportation path of Buyer’s Gas after the Delivery Point, then the disruption of the specified gas source, transportation path and/or market use would qualify as Force Majeure, even if the hub/pool operator has not declared Force Majeure.

* 1. The final is consideration of removing the phrase under 11.3.iv. “**except, in either case as provided in Section 11.2**”

Cheniere comments: *Cheniere opposes this request.*

While Cheniere opposes the request, it is unclear why the reference back to Section 11.2 should be deleted from Buyer’s inability to use or resell Gas in (iv), but not from Seller’s loss of gas supply in (v). Any request should be properly balanced between Buyer’s and Seller’s.

Further, the current reference back to Section 11.2 in both sections prevents unintended outcomes. For example, if the reference to Section 11.2 were deleted from Section 11.3(v) and Seller lost its intended supply due to freeze-off impacting the Delivery Point, the event would not qualify as Force Majeure even if the entire geographic region was impacted by the freezing temperatures. Such an outcome is clearly unfounded.

1. When force majeure is a necessary action, there should be reasonable details provided by the party claiming force majeure. The current language indicates “reasonable” details; however, it is not clear what details should be included. This lack of clarity leaves a costly and time-consuming burden on the counterparties to determine the validity of the force majeure claim. As such, specific details associated with a force majeure claim should be included in the contract by appending the following to Section 11.5:

**For purposes of this Section 11.5, reasonably full particulars as required for a valid Notice of Force Majeure shall include, but not be limited to, a detailed description of the Force Majeure event or occurrence with a full and specific explanation that clearly establishes:**

1. **that the event constitutes a Force Majeure as defined in Sections 11.1 and 11.2;**

Cheniere comments: *Cheniere opposes this request.*

Initially the request improperly suggests that in order to be a valid Force Majeure, the event needs to qualify under Sections 11.1 and 11.2. An event may qualify as Force Majeure under the general definition in Section 11.1 despite not being included in the examples listed in Section 11.2. Additionally, the request is a restatement of what is already required by Section 11.5 – i.e., “reasonably full particulars of the event or occurrence….”. Cheniere submits that if a party does not comply with the applicable provision, the appropriate approach is to object to the declaration of Force Majeure by the declaring party.

1. **how, why, and to what extent the Force Majeure event actually and directly caused the affected party’s non-performance of its Firm obligation, either wholly or partially;**

Cheniere comments: *Cheniere opposes this request.*

As previously stated, if a declaring party does not comply with the existing NAESB requirements, the appropriate action is to object to the validity of the Force Majeure declaration.

Further, the proposed language also provides an inappropriate outcome because it presumes that every Force Majeure event is the same. Where specified paths (e.g., designated gas supplies, transportation paths, and uses/markets) are included in the Contract, an interruption in the specified path qualifies as an event of Force Majeure, even if the event does not cause the non-performance “actually and directly.”

1. **what immediate actions were and are being taken to avoid or limit the adverse effects of the Force Majeure on the performing party, what ongoing efforts are being made to remedy the Force Majeure condition and to resume full performance as quickly as possible, and how and why those actions were prompt and reasonable under the circumstances; and**

Cheniere comments: *Cheniere opposes this request.*

The concepts are already required under Sections 11.2 and 11.3. A declaring party is already required to provide reasonably full particulars of the event under Section 11.5. The request would actually create a conflict with the existing General Terms because it introduces a standard for returning to performance (i.e., “as quickly as possible”), which conflicts with the “reasonable efforts” required in Section 11.2.

1. **if interruptions or curtailments occurred at a delivery point that is a “pooling” point or “hub,” that:**
	1. **the point or hub operator also claimed Force Majeure,**

Cheniere comments: *Cheniere opposes this request.*

Please refer to Cheniere’s comments above in Section 2(b) about Force Majeure requirements where the Delivery Point is at a hub/pool. Additionally, Section 11.5 of the General Terms already requires reasonably full particulars of the event or occurrence, so the request is unnecessary.

* 1. **all curtailments or cuts in Firm deliveries or receipts of Gas that were made, to the extent permitted by applicable law, by the non-performing party were reasonably pro rata across all Firm obligations, and**

Cheniere comments: *Cheniere opposes this request.*

The NAESB is consistent with industry standards requiring Interruptible Gas to be cut first, and Firm Gas to be cut second.

* 1. **the non-performing party did not execute incremental spot Gas sales or purchases after the onset and during the period of Force Majeure.**

Cheniere comments: *Cheniere opposes this request.*

The request is unnecessary because a party cannot properly declare Force Majeure at a Delivery Point while continuing to purchase or sell Gas at the same Delivery Point. If that occurs, the proper path for the non-declaring Party is to object to the declaration and seek cover damages under Section 3.2.

**If applicable, as in the case of interruption or curtailment of Firm transportation or sequential or “cascading” events of Force Majeure upstream or downstream of the affected Delivery Point(s), the non-performing party’s Notice shall include and be supported by copies of all notices, information, and documentation received by it from Transporters and/or Gas suppliers upstream or downstream of the affected Delivery Point(s).**

Cheniere comments: *Cheniere opposes this request.*

The request is unnecessary because Section 11.5 already requires the inclusion of “full particulars of the event or occurrence”. If a party is claiming that another party’s non-performance impacted its performance, the specific information related to how such third party’s non-performance qualifies as Force Majeure under the Contract is required.

4. Use of Proposed Standard or Enhancement (include how the standard will be used, documentation on the description of the proposed standard, any existing documentation of the proposed standard, and required communication protocols):

These revisions will be utilized by parties entering into the contract.

5. Description of Any Tangible or Intangible Benefits to the Use of the Proposed Standard or Enhancement:

The proposed modifications add clarity to the current force majeure language within the contract. The language enhancements will provide guidance regarding the details and reduce the likelihood of signatories misunderstanding force majeure claims.

6. Estimate of Incremental Specific Costs to Implement Proposed Standard or Enhancement:

Incremental costs will be based upon entities accepting the new language into their contracts. Additionally, these modifications may reduce the potentially litigious burden for parties claiming force majeure by providing additional transparency to the impacted parties.

7. Description of Any Specific Legal or Other Considerations:

This language will enhance the current force majeure language in the standard contract. Legal counsel for those entering the contract will need to review the new language that may be added to the contract. It is anticipated that those entities with an objection will modify the force majeure language similar to their practice today for this or any other section of the contract that requires alterations.

8. If This Proposed Standard or Enhancement Is Not Tested Yet, List Trading Partners Willing to Test Standard or Enhancement (Corporations and contacts):

No testing will be required for this modification.

9. If This Proposed Standard or Enhancement Is In Use, Who are the Trading Partners :

N/A

10. Attachments (such as : further detailed proposals, transaction data descriptions, information flows, implementation guides, business process descriptions, examples of ASC ANSI X12 mapped transactions):