

**UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION**

Further Definition of “Swap Dealer,”)
“Security-Based Swap Dealer,” “Major Swap Participant,”) RIN 3235–AK65
“Major Security-Based Swap Participant” and)
“Eligible Contract Participant”)

**COMMENTS OF
ATMOS ENERGY HOLDINGS, INC.**

Pursuant to the Notice of Proposed Rulemaking (“NOPR”) noticed in the Federal Register on December 21, 2010,¹ by the Commodity Futures Trading Commission (“CFTC” or “Commission”), Atmos Energy Holdings, Inc. (“Atmos”), respectfully submits these comments. Atmos believes that the Commission’s rulemaking to define some of the key terms of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)² should provide greater guidance regarding what entities are and are not Swap Dealers. Atmos also believes that the proposed *de minimis* exception for Swap Dealers is too narrowly tailored.

I. COMMUNICATIONS

All pleadings, correspondence and other communications filed or issued in this proceeding should be served on the following:

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¹ Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 75 Fed. Reg. 80174 (Dec. 21, 2010).

² Pub. L. No. 111-203 (July 21, 2010).

II. IDENTITY AND INTERESTS

Atmos is a wholly-owned subsidiary of Atmos Energy Corporation, which is a publicly traded company duly organized and existing under the laws of the State of Texas and the Commonwealth of Virginia. Atmos Energy Corporation is engaged in the natural gas distribution business in the states of Colorado, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Tennessee, Texas and Virginia. Atmos does not engage in the business of distribution of natural gas but is instead engaged, through various of its wholly-owned subsidiaries, in the marketing of natural gas at wholesale, and natural gas storage, transmission and gathering. Atmos is sometimes referred to as the non-utility segment of Atmos Energy Corporation.

Atmos Energy Marketing, LLC (“AEM”) is a wholly-owned subsidiary of Atmos. AEM is a wholesale natural gas marketing company providing supply, asset management and other related services to utilities, industrial facilities, power plants and gas producers. AEM manages approximately 1,800,000 dth/day of firm pipeline capacity and 40,000,000 dth of market area and production area storage.

Atmos, through AEM, uses a variety of financial and physical instruments to hedge its exposure in connection with the future gas needs of its customers, which includes both affiliated and unaffiliated entities. Accordingly, Atmos has a significant interest in how the Commission defines the term “Swap Dealer.”

III. COMMENTS

Swap Dealer Definition

Atmos understands that the Commission is proposing to use an “interpretive approach” to determine whether or not an entity is a Swap Dealer, focusing on factors

such as whether or not an entity (1) tends to accommodate demand for swaps from other parties; (2) is generally available to enter into swaps to facilitate other parties' interest in entering into swaps; (3) tends to enter into swaps on its terms; and (4) tends to be able to arrange customized terms for swaps upon request or to create new types of swaps at its own initiative.³ The NOPR states that the CFTC preliminarily believes that Swap Dealers may be identified by the functional role they fulfill in the swap markets.⁴ The NOPR also states Swap Dealers tend to accommodate demand and to be available to enter into swaps to facilitate other parties' interest in swaps.⁵ The problem with this "interpretive approach" proposed is that the wide variety of swaps and parties and purposes involved make it very difficult for the entities being regulated to know with certainty what regulations will apply to them. Although AEM does not make a market in swaps or hold itself out as a Swap Dealer, and considers itself an end-user of swaps, there is still enough uncertainty in the NOPR to concern Atmos.

AEM's customers are highly exposed to fluctuations in natural gas prices and these customers often require that AEM provide some degree of predictability for future gas prices by facilitating fixed prices for physical gas that the customers will consume during the term of the supply transaction. AEM will allow customers, subject to satisfaction of AEM's credit requirements, to fix the price on all or part of their physical gas commodity needs. AEM will then hedge its exposure relative to these fixed price transactions by entering into its own natural gas financial swap transactions with third parties, some of which are accomplished through the use of over-the-counter contracts. This gas price management program is a vital part of AEM's business model. It is

³ NOPR at 80,175.

⁴ *Id.* at 80,177.

⁵ *Id.*

important to note that AEM's primary purpose in entering into natural gas swaps is not to speculate but rather to mitigate AEM's considerable exposure to fluctuations in natural gas prices and its physical gas delivery obligations to its customers.

AEM generally does not make a market for counterparties looking to enter into swaps nor does AEM hold itself out as a swap dealer. From time to time, AEM may facilitate swap transactions with customers, but any such transactions are few and far between. Instead, AEM seeks out other parties with substantial financial strength that make markets in natural gas futures and/or who facilitate swap transactions on a regular basis. AEM is more akin to an end-user hedging its own gas needs to reduce the risks inherent in its own business than it is to a party who is more interested in capitalizing upon movements in the market, such as an investor. If any of AEM's activities in financial derivatives can be characterized as facilitating swap transactions, then the majority of that swap activity is conducted to hedge the physical natural gas needs of other Atmos non-utility subsidiaries that are affiliates of AEM. AEM routinely enters into intra-company transactions with some of these affiliates that are internally booked as swaps; however, AEM then enters into an additional offsetting swap transaction with an unaffiliated, traditional Swap Dealer.

Atmos is concerned that AEM may be deemed a Swap Dealer under the proposed definition and the Commission's interpretive approach. AEM believes that its activities are not tantamount to those performed by a Swap Dealer. AEM does not hold itself out as a Swap Dealer, make a market in swaps, or engage in activities that cause AEM to be known as a dealer or market-maker in swaps. Although AEM frequently enters into

swaps for its own account for hedging and to facilitate certain affiliate hedging, it does not do so in a manner contemplated by the Swap Dealer definition.

As previously described, Atmos uses swaps to hedge the commercial risks associated with providing natural gas services. Atmos understands that the CFTC intends to except “a person that enters into swaps for such person’s own account, either individually or in a fiduciary capacity, but not as a part of a regular business” from the definition of a Swap Dealer. It is Atmos’ belief that the proposed definition of a Swap Dealer, when coupled with the proposed “end-user” exception to the mandatory clearing of swaps will generally allow Atmos and similarly situated companies to continue to employ a wide variety of methods to hedge natural gas, without being considered Swap Dealers.

Atmos does not believe that the Dodd-Frank Act intended to force non-financial companies like Atmos to fundamentally change the way they mitigate commercial risks. In light of the purpose of Atmos’ swap activities, and the aggregate dollar amounts of those transactions, Atmos should not be subject to the same stringent requirements as Swap Dealers. Atmos requests that the Final Rule clarify that natural gas marketing companies providing supply and asset management services to their customers should not be treated as Swap Dealers if they do not make a market in natural gas swaps.

De Minimis Exception

The Dodd-Frank Act provides an exemption for a person who “engages in a *de minimis* quantity of swap dealing in connection with transactions with or on behalf of its customers.” The NOPR proposes that a person meet all of the following conditions in order to be exempt from the definition on the basis of *de minimis* activity:

- The aggregate effective notional amount, measured on a gross basis, of the swaps that the person enters into over the prior 12 months in connection with dealing activities must not exceed \$100 million.

- The aggregate effective notional amount of such swaps with “special entities” (as defined in CEA Section 4s(h)(2)(C) to include certain governmental and other entities) over the prior 12 months must not exceed \$25 million.

- The person must not enter into swaps as a dealer with more than 15 counterparties, other than security based swap dealers, over the prior 12 months.

- The person must not enter into more than 20 swaps as a dealer over the prior 12 months

Atmos believes that the CFTC should establish a threshold for the aggregate effective notional amount, measured on a gross basis, of the swaps that an entity enters into over the prior 12 months below which an entity will be considered to meet the *de minimis* exception for a Swap Dealer, regardless of the number of swap transactions that entity enters into or the number of counterparties involved. An end-user that enters into swaps solely to mitigate its business risks should not be a Swap Dealer. Based on the Dodd-Frank rulemakings issued so far, it appears that the costs of compliance for a Swap Dealer will be significantly higher than those for a non-Swap Dealer. If an entity engages in a minimal amount of swap dealing on a dollar basis, it seems inappropriate to make them spend more money on compliance than they do on the swaps themselves. Also, the current proposed *de minimis* standard is confusing. Would Atmos’ *bona fide* hedge transactions on its own behalf count towards the *de minimis* limitations? Since Atmos does not consider itself a dealer, how would it measure the “20 swaps as a dealer over the

prior 12 months” limitation? A single bright-line test based on the aggregate dollar amount of swaps entered into over a set time period would be an easier test to apply.

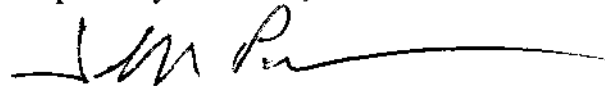
Atmos believes that it is the Commission’s intent to exclude intra-company transactions between affiliated companies from the limitations on both the number of transactions and number of counter-parties allowable over the prior 12 months for the purposes of the *de minimis* test. To the extent the Commission retains these limitations in the *de minimis* test, Atmos simply requests clarification that this is the CFTC’s intent.

IV. CONCLUSIONS

The Swap Dealer definition should not be so broad as to include natural gas marketing companies that do not make a market in natural gas swaps and primarily hedge to offset their risk. The *de minimis* exception for Swap Dealers should establish a clear limit for the aggregate effective notional amount, measured on a gross basis, of the swaps that an entity enters into over the prior 12 months irrespective of the number of transactions or counterparties involved.

Wherefore, for the reasons stated above, Atmos respectfully requests that the Commission consider these comments in this rulemaking.

Respectfully submitted,



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