



***PRIVILEGED & CONFIDENTIAL***

March 28, 2011

David A. Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

**Re: Comments of Niska Gas Storage LLC on the Proposed Rule on Position Limits for Derivatives, RIN 3038-AD15 and 3038-AD16**

Dear Secretary Stawick:

Niska Gas Storage LLC (“Niska”) submits these comments in response to the notice of proposed rulemaking (“NOPR”) issued by the U.S. Commodity Futures Trading Commission (“Commission”) on position limits for certain physical commodity derivatives.<sup>1</sup>

**I. Description of Niska Gas Storage LLC**

Niska, together with its affiliates, is the largest independent natural gas storage owner and operator in North America. In the United States, Niska’s subsidiaries own and are certificated to operate up to 65 billion cubic feet (“Bcf”) of working gas storage capacity at two intrastate facilities, Wild Goose Storage, LLC in Butte County, California and Salt Plains Storage, LLC in Grant County, Oklahoma.

In Canada, Niska’s subsidiaries own and operate the AECO Hub™, comprised of two facilities, Suffield and Countess, located in the province of Alberta. The facilities are 75 miles apart, but are operated as one hub with a combined storage capacity of 148 Bcf. AECO Hub™ is the largest natural gas storage provider in western Canada and the largest independent storage hub in North America. AECO Hub™ is located on TransCanada Pipeline’s Alberta System with direct access to western Canada natural gas supply and pipeline connections to most major United States and Canadian natural gas markets.

Niska enters into swap transactions to manage the commercial risks associated with its ownership and operation of these storage facilities.

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<sup>1</sup> *Position Limits for Derivatives*, 76 Fed. Reg. 4752 (Jan. 26, 2011).

## II. Comments

Niska does not take a position on whether the Commission should exercise its discretion to establish position limits for certain physical commodity derivatives pursuant to Section 4a of the Commodity Exchange Act as proposed in the NOPR. Niska provides the following comments on the NOPR should the Commission elect to issue a final rule in this proceeding.

### A. *Position Limits*

Niska has some concerns regarding the formulas that the Commission proposes to use to set specific position limits for each referenced contract in the second phase of its proposal to establish position limits.

#### 1. **Spot-Month Position Limits**

In the NOPR, the Commission proposes to set spot-month position limits for each referenced contract based on estimated deliverable supply. Although it may be appropriate to set the spot-month position limits for physical delivery contracts based on deliverable supply, Niska questions whether the spot-month position limits for cash-settled contracts should be based on deliverable supply. The Commission should explain why spot-month positions limits for cash-settled contracts should be linked to deliverable supply.

#### 2. **Non-Spot-Month Position Limits**

The Commission proposes to set non-spot-month position limits for each referenced contract based upon a percentage of open interest. In the NOPR, the Commission states that it is “proposing this approach, which would result in higher single-month limits, to incorporate a calendar spread exemption within the single-month limits (including an across crop year spread exemption) and remove the calendar spread exemption which would no longer be needed.”<sup>2</sup>

Despite the Commission’s intentions, Niska is concerned that the open interest calculation proposal does not fully accommodate the need for a calendar spread exemption, especially for those in the natural gas storage business whose positions are a series of calendar spreads. The natural position for a storage operator is a calendar spread. Niska encourages the Commission to consider whether a calendar spread exemption should be available to a trader that owns and operates a physical natural gas storage business.

### B. *Bona Fide Hedging Exemption*

Niska generally supports the Commission’s proposal to establish an exemption from position limits for *bona fide* hedging transactions. However, as discussed below, it encourages the Commission to reevaluate and/or modify certain parts of proposed § 151.5.

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<sup>2</sup> NOPR at 4759.

## 1. Frequency of Filings

The NOPR states that proposed § 151.5(b) would require a trader, upon exceeding a position limit pursuant to the *bona fide* hedging exemption, to submit a 404 filing not later than 9:00 a.m. on the business day following the day the limits were exceeded.<sup>3</sup> However, the proposed regulatory text of § 151.5(b) does not specify the date and time by which a 404 filing must be made by such a trader. Proposed § 151.5(d) would require a trader that exceeds a position limit to reduce the risks of certain swap transactions to submit a 404S filing not later than 9:00 a.m. on the business day following that to which the information pertains.

The Commission proposes to require 404 or 404S filings to be submitted for each business day, up to and including the day after the trader's position level is below the position limit that was exceeded. The NOPR requests comments on the frequency of such 404 and 404S filings. The Commission asks whether it should only require the reports to be submitted either when a trader's position either first exceeds a limit or when a trader's hedging need increases, with a monthly summary while the trader's position remains in excess of the limit.<sup>4</sup>

Niska believes that it may be unduly burdensome to require a trader that qualifies for the *bona fide* hedging exemption to submit a 404 or 404S filing for each day that its position exceeds a position limit. Niska encourages the Commission to revise the proposed rule to only require a trader to make a 404 or 404S filing when its position first exceeds a limit or when its hedging need increases, with an annual summary to be filed if the trader's position remains in excess of the position limit at the end of the relevant period.<sup>5</sup> Niska believes that this alternative would build upon the strengths of the process currently employed by IntercontinentalExchange, Inc. ("ICE") for exemptions from spot-month position limits for contracts that Commission has found to be significant price discovery contracts. If, after a suitable test period, the Commission finds that that an annual summary is not sufficient for its purposes, it would be free to institute a subsequent proceeding to explore requiring a trader to make a 404 or 404S filing when its position first exceeds a limit or when its hedging need increases, with a monthly summary if the trader's position remains in excess of the limit. Either way, the Commission should not require a trader to make a filing for each day that its position exceeds the limit.

## 2. Anticipatory Hedge Exemptions

Under proposed § 151.5(c), a trader who wished to exceed the position limits in order to hedge unsold anticipated commercial production or unfilled anticipated commercial requirements connected to a commodity underlying a referenced contract would be required to submit a 404A filing at least ten days in advance. The proposed regulation would also require an anticipatory trader to file a supplement to its 404 filing at least annually or whenever its anticipatory hedging needs increase beyond that in its most recent filing.

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<sup>3</sup> *Id.* at 4761.

<sup>4</sup> *Id.*

<sup>5</sup> Proposed § 151.4(h)(4) would require the Commission-established position limits to become effective on the 1st day of March immediately following the fixing date and remain effective up until and including the last day of the immediately following February. Thus, the annual summary would be required if the trader's position remained in excess of the position limit on the last day of February.

The Commission should clarify whether a 404A filing would be required ten days or ten business days in advance. Niska believes that ICE’s “Spot Month Exemption Request Form for Significant Price Discovery Contracts” provides a workable framework for the 404A filing.

### **3. Verification of Eligibility for Exemption**

The Commission proposes to require the counterparties to a swap transaction where at least one counterparty is relying on the *bona fide* hedging exemption to make a series of written representations and receipt confirmations. The requirements set forth in proposed § 151.5(g) are designed to enable the counterparties to verify that the swap transaction qualifies as a *bona fide* hedging transaction.

Requiring a party to disclose whether or not they are engaged in hedging activities will prejudice its position in the market place as counterparties will have additional information regarding the contemplated transaction and potential position of the party (long or short). This may present an impediment to transacting, in particular hedging, and may lessen the desirability of the type of transactions the Commission is seeking to promote.

If the Commission requires the disclosure that a party is relying on a *bona fide* hedging exemption, then Niska encourages the Commission to permit counterparties to use contractual representations to verify the eligibility of a swap transaction for the *bona fide* hedging exemption. Niska recommends that the Commission revise § 151.5(g) to permit the counterparties to represent in their transaction documents that a swap transaction qualifies for the *bona fide* hedging exemption.

### **4. Document Retention**

Proposed § 151.5(h) would require the written representations and receipt confirmations described in § 151.5(g) to be “retained” by the counterparties to the swap transaction and provided to the Commission upon request.

If the Commission revises § 151.5(g) as advocated by Niska, the Commission should make corresponding revisions to § 151.5(h) to require the counterparties to retain the “transaction documents” for a swap that qualifies as *bona fide* hedging transaction. The Commission should also clarify how long such transaction documents should be retained by the counterparties. Niska is aware that the Commission has proposed to require certain counterparties to keep records for five years following final termination of a swap transaction in another rulemaking proceeding.<sup>6</sup>

#### **C. Form and Manner of Reporting**

Under proposed § 151.10(b), a person would be required to submit filings and information required under Part 151 of the Commission’s regulations not later than 9:00 a.m. on

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<sup>6</sup> See *Swap Data Recordkeeping and Reporting Requirements*, 75 Fed. Reg. 76,574, 76,579 (Dec. 8, 2010).

the “next business day following the reporting or filing obligation is incurred”<sup>7</sup> with certain exceptions. In turn, proposed § 151.10(b)(2) provides that a 404 or 404S filing submitted pursuant to § 151.5 “must be submitted the day after a position limit is exceeded[.]”

The language in proposed § 151.5(b)(2) cited above appears inconsistent with the Commission’s statement in the NOPR that proposed § 151.5(b) would require a 404 filing to be made “not later than 9:00 a.m. on the business day following the day the limits were exceeded.” It is also inconsistent with proposed § 151.5(d) which would require 404S filings to be made “not later than 9:00 a.m. on the business day following that to which the information pertains.” Niska asks the Commission to clarify whether a trader would be required to submit a 404 or 404S filing on the “next day” or the “next business day.”

Niska is also concerned that the Commission’s proposal to require filings to be submitted by 9:00 a.m. on the next day or next business day may not provide traders with sufficient time to make the required filings. For example, traders located in western time zones may not have completed their overnight runs by 9:00 a.m. Niska encourages the Commission to revise the proposed regulations to enable a trader to submit filings at a later time. The Commission should also clarify that filings would need to be made by the specified time in a trader’s local time zone.

### **III. Conclusion**

Niska appreciates the opportunity to file comments on the NOPR. If the Commission elects to proceed with the rulemaking, Niska encourages the Commission to revise the proposed rule consistent with the comments and recommendations set forth above.

Respectfully submitted,

  
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<sup>7</sup> It appears that the cited text may be incomplete, and should be corrected to read “next business day following the date that the reporting or filing obligation is incurred” in any final rule adopted by the Commission.