

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

April 4, 2011

VIA ELECTRONIC SUBMISSION

David Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581

**Re: Commodity Options and Agricultural Swaps  
(RIN number 3038-AD21)**

Comments of the Staff of the Federal Energy Regulatory Commission

Dear Mr. Stawick:

On January 20, 2011, the Commodity Futures Trading Commission (CFTC) issued a notice of proposed rulemaking<sup>1</sup> pursuant to various provisions of the Commodity Exchange Act (CEA),<sup>2</sup> as recently amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).<sup>3</sup> This NOPR proposes to adopt or substantially amend existing rules relating to the regulation of agricultural swaps and options in all commodities. These comments are submitted by the staff of the Federal Energy Regulatory Commission (FERC).

The CFTC states that Dodd-Frank defines commodity options (other than options on futures) as swaps. We understand that a general purpose of the proposed rule is to subject commodity options to the same rules that apply to other categories of swaps.

We have previously submitted comments on other proposed Dodd-Frank implementing rules in which we explained that, depending on how broadly the term “swap” is construed, CFTC regulation of swaps could lead to inconsistent regulation of participants and transactions subject to FERC jurisdiction, and in particular the organized electricity markets.<sup>4</sup> For example, we noted that forward capacity sales in organized

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<sup>1</sup> 76 Fed. Reg. 6095 (Feb. 3, 2011).

<sup>2</sup> 7 U.S.C. § 1 et seq. (2006).

<sup>3</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>4</sup> We addressed these concerns in a letter dated February 22, 2011, submitted in response to the CFTC’s request for comments on various proposed swap-related definitions. That letter

markets (i.e., regional transmission organizations and independent system operators) could be subject to regulation as “swaps,” depending on how that term is defined. Under a typical forward capacity arrangement, the buyer has the right to call on (but not the obligation to take) the energy associated with a generating plant. Prior to the buyer’s exercise of its right to purchase the energy output, a capacity sales arrangement arguably could be construed as an option, even if both parties intend for the arrangement to result in physical delivery. Under the proposed rule, these and other such arrangements could be subjected to potentially conflicting regulation by the CFTC and FERC. Consistent with our prior comments in other CFTC rulemakings, we urge the CFTC to interpret and apply the CEA as amended by Dodd-Frank to ensure that CFTC jurisdiction and FERC jurisdiction neither overlap (except as determined by Congress in anti-manipulation contexts) nor leave regulatory gaps in energy markets.

The preamble to the proposed rule notes that certain commenters have argued that transactions such as embedded options in forward contracts and book-outs fall within the definition of an excluded forward contract rather than the definition of a swap. These commenters cite the statutory exclusion from the definition of a “swap,” for any “sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled.”<sup>5</sup> The preamble states that these issues are beyond the scope of this rulemaking. Thus, we may submit additional comments on these points in the relevant future rulemaking.

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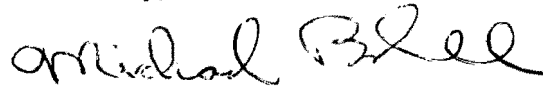
can be found among other comments submitted in comment file RIN 3235-AK65, and is incorporated herein by reference.

<sup>5</sup> On this point, Chairman Gensler testified last week before the House Committee on Agriculture that “it would be appropriate to interpret that exclusion in a manner that is consistent with the Commission’s previous history of the forward exclusion from futures regulation, including the Commission’s treatment of bookouts.” *Defining the Market: Entity and Product Classifications Under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act: Hearing Before the H. Comm. on Agriculture, 112th Cong. \_\_ (2011)* (statement of Gary Gensler, Chairman, Commodity Futures Trading Commission).

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FERC staff thanks the CFTC for soliciting comments on its proposal.

Sincerely,

A handwritten signature in black ink that reads "Michael Bardee". The signature is written in a cursive style with a large, stylized "B".

Michael Bardee  
General Counsel  
Phone: (202) 502-6000  
Email: [michael.bardee@ferc.gov](mailto:michael.bardee@ferc.gov)

Cc: Jon Wellinghoff, Chairman  
Marc Spitzer, Commissioner  
Philip D. Moeller, Commissioner  
John R. Norris, Commissioner  
Cheryl A. LaFleur, Commissioner