

April 4, 2011

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David A. Stawick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20581

**Re: Commodity Options and Agricultural Swaps (RIN No. 3038-AD21)**

Dear Mr. Stawick:

The associations of energy end-users<sup>1</sup> submit these comments in response to the Notice of Proposed Rulemaking on Commodity Options and Agricultural Swaps ("Proposed Rule")<sup>2</sup> issued by the Commodity Futures Trading Commission (the "Commission") as part of its implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").<sup>3</sup> The Proposed Rule provides that: (1) the trade option exemption will be repealed and commodity options (other than options on futures) will be regulated as "swaps;" and (2) swaps in any agricultural commodity will be subject to the same rules as swaps in other commodities. The Joint Associations' comments focus on the Commission's proposed treatment of physical commodity options as swaps.

As a threshold matter, the Proposed Rule is premature insofar as it would treat options on physical commodities as swaps before the Commission has even proposed the definition of what constitutes a swap pursuant to Section 712(d) of the Dodd-Frank Act (the "Swap NOPR"). The Joint Associations agree with the Commission's decision to

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<sup>1</sup> The Joint Associations include the Edison Electric Institute ("EEI") and the Electric Power Supply Association ("EPSA") (together, the "Joint Associations"). The Joint Associations' members include power generators and shareholder-owned electric utilities that use energy and energy-related "swaps" to manage the commercial risks inherent in their core energy business activities. The comments contained in this filing represent the position of the Joint Associations, but not necessarily the views of any particular member with respect to any issue. The Joint Associations or their members may submit additional comments in response to the Commission's proposed rules.

<sup>2</sup> Commodity Options and Agricultural Swaps, 76 Fed. Reg. 6095 (Feb. 3, 2011).

<sup>3</sup> Pub. Law 111-203, 124 Stat. 1376 (2010).

postpone addressing embedded options in forward contracts and book-outs until the anticipated Swap NOPR.<sup>4</sup> The Joint Associations also support Chairman Gensler's recent testimony stating that forwards and forwards with embedded options should remain excluded from the Commission's jurisdiction:

Under the Commodity Exchange Act, the CFTC does not regulate forward contracts. Over the decades, there has been a series of orders, interpretations and cases that market participants have come to rely upon regarding the exception from futures regulation for forwards and forwards with embedded options. Consistent with that history, the Dodd-Frank Act excluded from the definition of swaps "any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled." I believe 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.<sup>5</sup>

To avoid inconsistent outcomes and ensure consideration of an integrated and complete record on transactions to be regulated as swaps, the Commission should stay this proceeding insofar as it would define commodity options as swaps.

In the meantime, the Joint Associations oppose the Proposed Rule on three grounds: (1) the Commission incorrectly concludes that all options on physical commodities are swaps under the Dodd-Frank Act; (2) treating commodity options as swaps would have detrimental consequences for physical energy markets and the end-users and their customers who participate in and depend on those markets; and (3) the Commission has provided no basis for abandoning the trade option exemption.

## **I. DESCRIPTION OF THE JOINT ASSOCIATIONS AND THEIR INTEREST IN THE PROPOSED RULE**

EPSA is the national trade association representing competitive power suppliers, including generators and power marketers. These suppliers, who account for nearly 40 percent of the installed generating capacity in the United States, provide reliable and competitively-priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.

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<sup>4</sup> The Joint Associations plan to comment on these issues more fully in the Swap NOPR, but emphasize now that embedded options in forward contracts, book-outs, and options on physical commodities are not swaps.

<sup>5</sup> Statement of Gary Gensler, Chairman, Commodity Futures Trading Commission Before The House Committee On Agriculture, at 6 (Mar. 31, 2011).

EEl is the association of U.S. shareholder-owned electric companies. EEl's members serve 95 percent of the ultimate customers in the shareholder-owned segment of the U.S. electricity industry, and represent approximately 70 percent of the U.S. electric power industry. EEl also has more than 65 international electric companies as Affiliate members, and more than 170 industry suppliers and related organizations as Associate members.

The Joint Associations' members are not financial entities. Rather, they are physical commodity market participants. Regulations that make effective risk management tools and physical supply more costly for end-users of swaps and commodity options will result in higher and more volatile energy prices for retail, commercial, and industrial customers. As end-users of commodity options to ensure physical supply, the Joint Associations' members have a direct and significant interest in the Proposed Rule.

## II. BACKGROUND

The Commission is proposing to revise Part 32 of its regulations regarding off-exchange options to provide that all commodity options (other than options on futures) are swaps, and to apply to them all provisions of the CEA otherwise applicable to swaps.<sup>6</sup> The Proposed Rule also deletes references to exchange-traded options on physical commodities in Part 33, leaving only exchange-traded options on futures subject to that Part.<sup>7</sup>

Much of Part 32 is obsolete and/or is relevant only to agricultural options, but Section 32.4, known as the trade option exemption, remains a very important exemption for commodity options generally and physical energy options specifically. Section 32.4 authorizes the use of commodity options that are:

offered by a person which has a reasonable basis to believe that the option is offered to a producer, processor, or commercial user of, or a merchant handling, the commodity which is the subject of the commodity option transaction, or the products or by-products thereof, and that such producer, processor, commercial user or merchant is offered or enters into the commodity option transaction solely for purposes related to its business as such.<sup>8</sup>

With the proposed repeal of Section 32.4, and the resulting regulation of physical commodity options as swaps, this exemption for commercial entities would be eliminated entirely. Instead, the Commission proposes to regulate commodity options,

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<sup>6</sup> Proposed Rule at 6100.

<sup>7</sup> *Id.*

<sup>8</sup> 17 C.F.R. § 32.4 (2010).

including physical commodity options, like all other swaps. As such, end-users would have to qualify as eligible contract participants ("ECPs") to use off-exchange commodity options and, thereby, to satisfy certain minimum net worth or asset requirements.<sup>9</sup> There are no such thresholds for commercial entities under the trade option exemption.

### **III. CONGRESS DID NOT INTEND FOR PHYSICAL COMMODITY OPTIONS TO BE REGULATED AS SWAPS**

The Commission relies on an excerpt from the definition of "swap" provided in new CEA Section 1a(47) to conclude that Congress defined the term swap to include all options of any kind (other than options on futures), including options on physical commodities.<sup>10</sup> This is an incomplete and selective interpretation of the statute.

Options have never been regulated as swaps and the new regulatory regime under the Dodd-Frank Act does not change the fact that physically-settled options should be treated like forwards.<sup>11</sup> Indeed, Section 1a(47) includes an express exclusion 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>12</sup> This exemption for all nonfinancial, physically-settled contracts other than futures is at the root of what defines a swap for purposes of the CEA.

Put simply, swaps are financial instruments intended to shift financial risks.<sup>13</sup> More specifically, commodity swaps are financial instruments designed to transfer the price

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<sup>9</sup> 7 U.S.C. § 2(e)(establishing limitation on participation for non-ECPs).

<sup>10</sup> Proposed Rule at 6096 and 6097-98.

<sup>11</sup> While the Dodd-Frank Act has provided more color on the definition of a swap, the statute has not altered the importance of recognizing the difference between an option that results in physical delivery and one that cannot.

<sup>12</sup> CEA § 1a(47)(B)(ii). The addition of the qualifier "so long as the transaction is intended to be physically settled" distinguishes the meaning of "swap" from prior interpretations of the meaning of "deferred shipment or delivery" with respect to options.

<sup>13</sup> The Commission's glossary defines "swap" as follows:

In general, the exchange of one asset or liability for a similar asset or liability for the purpose of lengthening or shortening maturities, or otherwise shifting risks. This may entail selling one securities issue and buying another in foreign currency; it may entail buying a currency on the spot market and simultaneously selling it forward. Swaps also may involve exchanging income flows; for example, exchanging the fixed rate coupon stream of a bond for a variable rate payment stream, or vice versa, while not swapping the principal component of the bond. Swaps are generally traded over-the-counter.

See CFTC Glossary, "A Guide to the Language of the Futures Industry," available at [http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/glossary\\_s.html#swap](http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/glossary_s.html#swap) (Apr. 4, 2011).

risk associated with physical commodities from one party to another and involve no transfer of the physical commodity.<sup>14</sup> Neither party to such transaction may be capable of physically making or taking delivery of the subject commodity. Conversely, nonfinancial options on physical commodities specifically intend physical settlement and, therefore, are not swaps. In a typical option of this kind, after the option premium is paid at the outset, *the only kind of settlement that can occur is physical settlement*. In contrast, options on commodity swaps ("swaptions") should have to be treated as swaps, as they can only be settled financially.

Even if Congress had not included the express exclusion for physically-settled contracts, there is no evidence that Congress intended to do anything more than codify the commonly understood meaning of the term swap as it existed when the Dodd-Frank Act was enacted. To conclude – as the Proposed Rule does – that options on physical commodities are swaps even when the options may be physically-settled would be completely inconsistent with the regular usage of the term "swap," including the commonly understood meaning when the Dodd-Frank Act was passed.

Furthermore, since physical commodity options are physically settled, they cannot be cleared as if they were "swaps" under the Dodd-Frank Act. Physical settlement requires the ability to take and make physical delivery which is not in the charter of a clearinghouse. It is unlikely that Congress intended a class of physically-settled transactions that cannot be cleared to be treated as "swaps" under the Dodd-Frank Act.

In addition, if a clearinghouse could physically deliver electricity, it would be making a Federal Energy Regulatory Commission ("FERC")-jurisdictional sale for resale. In order to lawfully do so, the clearinghouse would need to become a FERC-regulated electric utility.

#### **IV. REGULATING PHYSICAL OPTIONS AS SWAPS WOULD HAVE DETRIMENTAL CONSEQUENCES FOR END-USERS AND THEIR CUSTOMERS**

The Commission states that "there would be little practical effect and no detrimental consequences in adopting the proposed revisions to the existing commodity options regime in Part 32."<sup>15</sup> The Joint Associations strongly disagree.

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<sup>14</sup> The Commission's glossary defines a "commodity swap" as "[a] swap in which the payout to at least one counterparty is based on the price of a commodity or the level of a commodity index." See CFTC Glossary, *available at* [http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/glossary\\_co.html#commodityswap](http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/glossary_co.html#commodityswap) (Apr. 4, 2011).

<sup>15</sup> Proposed Rule at 6101.

Commodity options are an integral part of the supply arrangements used by market participants and market operators to procure and deliver energy commodities and maintain system reliability, including by allowing market participants to: (1) segment pricing into fixed and variable components; (2) "toll" generating facilities; (3) cap the price they pay for commodities; (4) manage uncertainty as to production capabilities or consumption needs; or (5) lock in prices on physically-settled purchases and sales of nonfinancial commodities for deferred delivery.<sup>16</sup> For example, commodity options provide flexibility to energy market participants and their customers by enabling them to purchase incremental volumes of natural gas or power in advance of knowing the precise volumes they will need to accommodate changes in actual consumption.

The need to rely on commodity options is particularly pronounced for producers and consumers of electricity. Because electricity generally cannot be stored, the wholesale and retail markets have a wide array of products that allow market participants and infrastructure managers to maintain the ability to call upon supply to meet volatile demand on an as-needed basis. These products include ancillary services such as Regulation Service, Spinning Reserves, and Supplemental Reserves and generation capacity products that have traits that might cause them to resemble options. Electric transmission also is allocated using products where market participants pay a fee for the right to use transmission capacity, thereby resembling a physical commodity option. In both cases, the option-like product is inextricably tied to the physical product and the operation of the wholesale physical markets and the loss of such products may increase costs and/or reduce operating flexibility. Equally important, such products and services are subject to FERC oversight.<sup>17</sup>

Imposing the regulatory scheme applicable to swaps would create detrimental consequences. Congress clearly intended to avoid having the Dodd-Frank Act impose burdensome regulations on end-users. Energy end-users did not cause the financial crisis and commodity options do not increase systemic risk.<sup>18</sup> Interpreting the statute to regulate options on physical commodities such as swaps would be inconsistent with Congress' goals under the Dodd-Frank Act for the simple reason that, as discussed below, such an interpretation would be completely impractical and would impose

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<sup>16</sup> In energy markets, physical commodity options generally are not used for price discovery and typically are not traded by financial speculators who do not have the ability to make or take physical delivery, a process which is largely subject to the jurisdiction of FERC or a state public utilities commission ("PSC").

<sup>17</sup> FERC tariffs, rate schedules, rules and orders govern the specific rates, terms and conditions.

<sup>18</sup> See Treasury Deputy Secretary Neal S. Wolin, Remarks at the New England Council, Boston, Massachusetts (Aug. 5, 2010) ("Third, the reforms establish a comprehensive regulatory framework for the derivatives markets – the source of so much risk and uncertainty in the recent crisis. And at the same time, through a narrowly tailored end-user exemption, the reforms ensure that commercial firms will be able to hedge their risks effectively and efficiently.").

unnecessary burdens on physical markets that rely on options, including the end-users who rely on them.<sup>19</sup>

**A. *Treating Options On Physical Commodities As Swaps Would Be Overly Burdensome And Would Not Advance The Goals Of The Dodd-Frank Act***

The Commission is well aware of concerns in the industry that compliance with the new rules implemented under the Dodd-Frank Act will be costly. As the Commission concedes, Commodity options also would be subject to every other rule governing swaps – from record keeping, reporting, clearing, capital and margin, registration, position limits and the plethora of other regulations stemming from the Commission's implementation of the Dodd-Frank Act.<sup>20</sup> Treating commodity options as swaps would exacerbate the known costs of complying with the new rules.

Energy end-users would face other challenges as well. For example, the task of determining when and which transactions might qualify as a commodity option would become more difficult and costly if physical settlement cannot serve as a litmus test for contracts other than futures. Notably, many end-user companies either do not have a derivatives desk or have separate employees managing physical commodities from those handling derivatives. To force those companies to implement comprehensive compliance programs related to Commission rules and regulations simply to enable them to trade options on physical commodities would be an unfortunate outcome that could have the effect of reducing their desire or ability to use options.

Another example of the impracticality of treating commodity options as swaps is highlighted by having a market participant transformed into and out of being a swap dealer (should the Commission adopt the definition as proposed and the market participant engage in dealing activities) based on the positions it holds pre- and post-option exercise. Once the option is exercised, the Commission no longer has jurisdiction over the product, yet it would appear that the particular end-user could still be saddled with the designation, and the burdens, of being a swap dealer.

While the costs would be substantial, the benefits are unidentifiable. For example, unlike swaps, physically-settled options on energy commodities generally are not

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<sup>19</sup> Moreover, were the Commission to believe that the plain language of the statute defines the term "swap" to include physical options, Congress both authorized and required the Commission to further refine the definition of swap to fulfill the goals of the Dodd-Frank Act. See Section (d) of the Dodd-Frank Act ("Notwithstanding any other provision of this title ... [the Commission] and the Securities and Exchange Commission, in consultation with the Board of Governors, shall further define the term[] 'swap'"); see also Section 721(b) of the Dodd-Frank Act (authorizing the Commission to adopt a rule to modify and define any "term included in an amendment to the Commodity Exchange Act (7 U.S.C. 1 *et seq.*) made by this subtitle").

<sup>20</sup> Proposed Rule at 6100.

actively traded or used by speculators and do not serve a price discovery function. As such, position limits and real-time reporting requirements for commodity options would serve no purpose.

If the Commission is concerned that participants in the swaps markets will use options on physical commodities to manipulate or benefit from manipulation in those markets, there is no evidence to support that concern. Moreover, the Commission currently has the same kind of access to information regarding market participants' options on commodities as it has to information regarding their other cash positions.

***B. To Regulate Options On Physical Commodities Would Disrupt Markets And Impinge On FERC's Jurisdiction Over Physical Markets***

Products that have certain traits of commodity options play a special role in the procurement and transportation of power and natural gas pursuant to FERC-approved tariffs. As FERC has pointed out: "Any expansive interpretation of terms such as 'swap,' ... that would result in overlapping (and possibly inconsistent) regulation by the CFTC of RTOs and ISOs and transactions, such as FTRs, that are already subject to extensive FERC regulation by FERC would be a wasteful and unneeded distraction from the CFTC's important task of reforming the oversight of those products and trading environments that, prior to passage of the Dodd-Frank Act, were unduly opaque or inadequately supervised."<sup>21</sup>

For example, regulating options on physical commodities likely would disrupt implementation of FERC's natural gas pipeline capacity release rules. FERC requires any natural gas pipeline customer who wishes to release its capacity to an asset manager to include with the capacity release the right to call upon the asset manager to deliver to or accept from the customer natural gas up to the maximum available throughput. Were such put and call rights to be treated as swaps, the burdens associated with the arrangements could negatively impact the capacity release markets. This is particularly troublesome considering it would undermine FERC's efforts to promote asset management arrangements to enable producers and end-users to engage more capable marketers to manage their assets. Of course, these options cannot be cleared and are not subject to the type of documentation intended by the Commission for swaps.

For electricity, in traditional full-requirements power supply arrangements, a supplier would agree to sell electricity to a load-serving entity in whatever amount that entity needs to meet the demand of its customers. Because demand varies throughout the

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<sup>21</sup> See Comments of the Staff of the Federal Energy Regulatory Commission on *Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant"* and on *End-User Exception to Mandatory Clearing of Swaps* (submitted to the CFTC on Feb. 22, 2011).



day, the contract does not involve a set MWh volume, but rather consists of a call option on power. When the call option is exercised, the supplier must deliver power. Unlike a traditional swap, financial settlement is not possible. Similar to the gas pipeline example above, these options cannot be cleared or reasonably modified to meet the other regulatory requirements of swaps or swap dealers. One interesting issue raised by this example is the fact the market requirements for energy products are often administered by a state PSC implementing state retail competition programs for the ultimate benefit of ratepayers. While it is not clear if physically-settled options such as full requirements service are swaps, it would appear that the Commission could somehow take jurisdiction over PSCs as market administrators of such swaps when PSCs are merely implementing their mandate to oversee retail electricity.

Another example of an electricity-related physical option is a tolling agreement. Under a tolling agreement, a person pays a fee for the right, but not the obligation, to bring fuel to another person's power plant and convert such fuel into electricity which it will sell into the market. Such agreements have a "call/strike" structure for exercise. Of course, like any option, a tolling agreement is "struck" based upon market economics. While a tolling agreement appears to be a physical option, it is clear that it is not a swap. It is a non-clearable physical transaction designed to deliver physical electricity when struck. It is notable that a tolling agreement can be replicated in the form of a financially-settled swap, which would be subject to regulation under the Dodd-Frank Act as a swap because it *does* settle financially. For other examples, the Joint Associations refer the Commission to FERC's comments.<sup>22</sup>

The Joint Associations agree with FERC's view of the many problems with Commission regulation of products and services typically regulated by FERC:

Given FERC's oversight of wholesale sales and transmission/transportation in energy markets and the reliability of the grid, the CFTC should interpret and apply the CEA as amended by Dodd-Frank to ensure that CFTC jurisdiction and FERC jurisdiction do not overlap (except as determined by Congress in anti-manipulation contexts). In addition, regulatory gaps should be avoided in energy markets. Market participants should not be subjected to potentially duplicative and conflicting regulatory requirements. Otherwise, regulatory uncertainty could chill investment critically needed in our Nation's energy infrastructure, or unnecessarily add to the costs ultimately imposed on energy consumers.<sup>23</sup>

For this reason, options on physical commodities should not be regulated as swaps.

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<sup>22</sup> *Id.* at 6-7.

<sup>23</sup> *Id.* at 3.

**C. If The Commission Were To Include Options On Physical Commodities For Deferred Delivery, It Would Need To Revisit All Other Rulemakings Related To Swaps**

Because market participants could not have reasonably anticipated that the Commission would regulate options on physical commodities as swaps, adoption of the Proposed Rule would trigger a need to revisit most, if not all, of the rulemakings to date related to swaps. For example, market participants who are confident they are not major swap participants ("MSPs") or swap dealers might come to different conclusions under the Proposed Rule merely because buying and selling options on commodities that are at the heart of their business are suddenly swaps. Thus, the definitions for MSPs and swap dealers would need to be reconsidered. Other rulemakings, such as those relating to reporting, record retention, and business conduct standards, also would need to be re-opened. Revisiting the various rulemakings would be required to ensure that the Commission fulfills its notice obligations and to avoid unnecessary legal challenges and court remands.<sup>24</sup>

**V. THE COMMISSION SHOULD NOT CREATE A STRUCTURE WHERE PHYSICAL ENERGY ENTITIES DO NOT HAVE ACCESS TO PHYSICAL OPTIONS**

The Joint Associations' members qualify as ECPs. However, as proposed by the Commission, *both* purchasers and sellers of commodity options under revised Section 32.4 would have to qualify as ECPs.<sup>25</sup> If one of the counterparties to a commodity option does not qualify as an ECP, then the commodity option can only be traded on a Designated Contract Market ("DCM").<sup>26</sup> The Commission concludes that "treating options on physicals that are traded on a DCM as swaps would have little practical effect since anyone (including non-ECPs) could continue to trade such instruments on a DCM. In addition, qualified persons (ECPs) could trade similar options on physical commodities in the non-DCM environment, including on SEFs, subject to the same rules as other physical commodity swaps."<sup>27</sup>

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<sup>24</sup> The Commission also should use its numerous exemptive authorities to protect end-users from the adverse consequences that would arise from treating their physically-settled options as swaps. The Joint Associations would urge the Commission to: (1) Grant exemptions under Section 4(c) because there is no public interest or statutory basis for treating an option on a nonfinancial commodity for deferred delivery as a swap; (2) Grant a blanket clearing exemption, pursuant to CEA Section 2(h)(3)(C)(ii), for physically-settled options because end-users should not have to expend limited resources making decisions about which of their core business transactions might be options, or creating or maintaining records justifying such decisions; (3) Grant a jurisdictional waiver, pursuant to CEA Section 4(c), for all physically-settled options regulated by FERC or a PSC; and (4) Exclude physically-settled options from the market activity that the Commission would consider when designating a swap dealer.

<sup>25</sup> Proposed Rule at 6102.

<sup>26</sup> *Id.* at 6103.

<sup>27</sup> *Id.*

As stated above, physical commodity options generally cannot be cleared and, therefore, are unlikely to be traded on a DCM. As such, if regulation of swaps is extended to physically-settled energy options, the affected small, physical energy market participants will be unable to transact in physical options at all, regardless of the fact that such options have been a component of the mix of products supporting the small entities' businesses for decades. Any such "Catch 22" approach should not be allowed to occur.

In addition:

- The Commission would have to preclude non-ECPs from entering into commodity option transactions in FERC-jurisdictional RTOs or ISOs or associated with FERC-jurisdictional bilateral option transactions because these are not on DCMs.
- Any ECP that wants to enter into a transaction with a non-ECP would have to move their transactions onto a DCM in order to trade with the non-ECP. Because there are no such products, this essentially means the ECP could not enter into a commodity option with a non-ECP.
- Non-ECPs would be forced to over-purchase physical commodity supplies because they would no longer be permitted to purchase shaped products like full requirements services. In the alternative, they could wait until the last minute to secure supply, but would be leaning on the system. Both scenarios are costly, inefficient and could jeopardize reliability.
- Grid reliability would decrease because non-ECPs could not provide or secure the ancillary services that serve as an insurance product when contracted-for supply or transmission becomes unavailable.

The answer to the foregoing problem is obvious. The Commission must make clear that, unlike commodity swaptions, commodity options are not swaps.

## **VI. THE COMMISSION SHOULD MODIFY SECTION 32.9 TO INCORPORATE THE PROPER INTENT STANDARD**

The Commission proposes to leave Section 32.9 – Fraud in connection with commodity option transactions – unchanged.<sup>28</sup> Section 32.9(b) should be modified to include the requisite intent: (b) To ***knowingly with intent to defraud*** (i) make or cause to be made to any other person any false report or statement thereof or (ii) cause to be entered for any person any false record thereof.

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<sup>28</sup> Proposed Rule at 6102.

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## VII. CONCLUSION

The Joint Associations strongly oppose the Proposed Rule and its attempt to treat options on physical commodities as swaps. The Commission should define what constitutes a swap in a single comprehensive rulemaking, other than this one, and it should do so as soon as possible. Please contact us if you have any questions or concerns regarding these comments.

Respectfully submitted,



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