July 22, 2011

<u>VIA ELECTRONIC AND HAND DELIVERY</u>

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

Re: Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, RIN 3038-AD46

Dear Mr. Stawick:

I. <u>INTRODUCTION</u>

BG Americas & Global LNG ("BGA") respectfully submits these comments in response to the request for public comment regarding the Commodity Futures Trading Commission's (the "CFTC" or "Commission") and the Securities and Exchange Commission's (the "SEC") Joint Proposed Rule, *Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, as published in the *Federal Register* on May 23, 2011 (the "Swap NOPR").[1] The comments submitted by BGA in the above-referenced proceeding address the definition of "swap" as set forth in new Section 1a(47) of the Commodity Exchange Act ("CEA"), as adopted in Title VII, Subtitle A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act").[2]

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[1] *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, Joint Proposed Rules, 76 Fed. Reg. 29,818 (May 23, 2011), as corrected, 76 Fed. Reg. 32,880 (June 7, 2011) ("Swap NOPR").

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

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BGA is a business unit of the BG Group plc ("BG Group"), a global natural gas company based in the United Kingdom and a major producer and supplier of natural gas in the United States. BGA is responsible for all of BG Group's operations in North and South America, the Caribbean, the company's global marine operations and its global liquefied natural gas ("LNG") operations.

BG Group owns natural gas producing assets in Louisiana and Texas known as the Haynesville Shale and in Pennsylvania and West Virginia known as the Marcellus Shale. BG Group is one of the largest suppliers of LNG to the U.S. and owns import capacity rights at Southern Union Company's Lake Charles, Louisiana and El Paso Corporation's Elba Island, Georgia import terminals. BG Group also has an interest in associated liquids that are extracted from imported LNG at the Lake Charles LNG import terminal. BG Group's subsidiary, BG Energy Merchants, LLC ("BGEM"), is a major marketer of natural gas and electricity throughout the U.S., natural gas liquids in the isolated market between Texas and Mississippi, and oil produced by BG Group in offshore Brazil to worldwide markets. BGEM regularly engages in swaps to hedge the commercial risk associated with BG Group's production and marketing activities relating to its natural gas, liquids and oil businesses.

II. COMMENTS OF BG AMERICAS & GLOBAL LNG

A. Consumer and Commercial Agreements, Contracts, and Transactions

BGA supports the Commissions' statement that Congress did not intend to include customary consumer and commercial agreements, contracts, or transactions in the swap definition, to limit the types of persons that can enter into or engage in commercial agreements, or to otherwise subject these agreements or transactions to the regulatory scheme for swaps. [3] The Commissions state further that its interpretative guidance is intended to allow:

> "commercial and non-profit entities to continue to operate their businesses and operations without significant disruption and ensure that the swap definitions are not read to include commercial and non-profit operations that historically have not been considered to involve swaps or security-based swaps."

[3] *See* Swap NOPR at 29,832.

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BGA agrees with and supports the Commissions' interpretation of the intent of Congress, and, as the Commissions point out, this guidance is necessary to ensure that energy markets are not severely disrupted.

With respect to consumers, the Commissions believe that agreements, contracts, or transactions to purchase products or services at a fixed price or a capped or collared price at a future date or over a certain period of time (such as agreements to purchase home heating fuel) should not be considered swaps.[4] The Swap NOPR states further that:

> "[t]hese agreements, contracts, or transactions involve physical delivery which is deferred for convenience or necessity and thus can be viewed as being akin to forward purchase agreements (sometimes with embedded options, in the case of those with price caps), which were discussed above in the context of the exclusion from the swap definition for forward contracts in nonfinancial commodities. While the CFTC traditionally has viewed forward contracts in nonfinancial commodities as limited to commercial merchandising transactions, the Commissions view consumer agreements, contracts and transactions involving periodic or future purchases of consumer produces and services, such as agreements to purchase energy commodities to heat or cool consumers' homes, as transactions that are not swaps."[5]

BGA agrees with the Commissions' interpretation that these types of products and services should not be deemed to be swaps. Furthermore, BGA believes that the commonplace commercial physical transactions in the natural gas and electric power markets should also fall under the category of exemptions from the swap definition. For example, it is commonplace for energy suppliers to enter into commercial transactions with customers (local distribution companies, electric utility companies, industrial, commercial and residential customers, power plants, etc.), which provide volumetric, price and delivery-related flexibility and variability. These types of transactions include, but are not limited to, full requirements contracts, interruptible load agreements, capacity contracts, tolling agreements, energy management agreements, natural gas transportation contracts and natural gas storage contracts. BGA believes all these contracts are physical forwards, not swaps, and respectfully requests that the

4 *Id.*

5 *Id*. at n.104.

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Commissions confirm this understanding notwithstanding any optionality embedded within such transactions.

B. OPTIONS ON PHYSICAL COMMODITIES

As explained above, there are many physical commercial agreements for the supply and consumption of energy that provide volumetric and other types of flexibility. In many cases, these physical agreements effectively provide leases on flexible energy assets, such as tolls on power plants, transportation agreements on natural gas pipelines and natural gas storage agreements. These assets have the capability to turn on and off to meet fluctuating demand due to weather and other factors. The physical contracts around these assets transfer that delivery flexibility to the contract holder. These types of commercial arrangements, despite the necessary volumetric, delivery and other types of flexibility offered, are also forward contracts rather than swaps.

On the demand side, many physical commercial agreements provide the consumer with the flexibility to procure volumes when demand dictates (due to weather changes and other factors). Variability associated with an energy customer's physical demand is influenced by factors outside the control of the energy suppliers (and sometimes the consumers)[6] to energy commodity transactions, including, but not limited to, load growth, weather and certain operational considerations (e.g., available transportation capacity to deliver physical natural gas purchased on the spot market).[7] Options embedded in these commercial energy transactions provide customers with the flexibility needed to manage their demand for physical energy. These commonplace physical transactions, despite their delivery flexibility, are not swaps.

It should be noted that the embedded delivery options of these transactions do **not** in any way relate to the ability of the parties to financially settle such a transaction in lieu of making or taking physical delivery. The holder of these contracts cannot realize any value without actually making or taking physical delivery of the commodity.

[6] For example, a gas supplier being curtailed because of a pipeline outage, or a generator being curtailed by the Independent System Operator for operational reasons.

[7] These contracts include, but are not limited to, full requirements contracts, capacity contracts, reserve sharing agreements, tolling agreements, transportation agreements, and energy management agreements.

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Physical deals with embedded options that relate to volumetric, pricing, or delivery flexibility are not swaps and should not be regulated as such. It appears that the Commissions' interpretation would be consistent with BGA's view, but we seek confirmation out of an abundance of caution.

C. Book-Outs of Non-Financial Commodity Transactions

BGA supports the Commission's decision not to treat book-outs as swaps and to adopt the Brent Interpretation for "book-outs" of all non-financial commodity transactions. However, given that interpretive orders do not have the full force of a regulation, BGA respectfully requests that the Commission memorialize the Brent Interpretation in the Commission's rules, therein keeping in line with Congress's intent[8] and providing market participants with more legal certainty. Specifically, the Commission should adopt a rule that permits market transactions or contracts contemplating physical delivery to be excluded from the requirements of the CEA as a swap under the forward contract exclusion even if such transactions or contracts are subsequently booked-out. Intent to make or take delivery should be determined from the binding delivery obligation in the initial contract and should be sufficient to qualify such contract for the forward contract exclusion.

IV. CONCLUSION

BGA appreciates this opportunity to comment and respectfully requests that the Commission consider the comments set forth herein as it develops a final order in this proceeding.

Respectfully submitted,

/s/ Lisa Yoho____________
Lisa Yoho
Director, Regulatory Affairs

Matt Schatzman
Senior Vice President, Energy Marketing

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8 *See* Swap NOPR at n.70.

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