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VIA Online Filing Process: <http://comments.cftc.gov>

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

Re: Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (RIN No. 3235-AK65)

Dear Mr. Stawick:

Just Energy Group Inc. (“Just Energy”), on behalf itself and its subsidiaries, submits comments in response to the Notice of Proposed Rulemaking on the Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (“Proposed Rule”)¹ issued by the Commodity Futures Trading Commission (the “Commission”) and the Securities and Exchange Commission (“SEC”) to implement Section 721 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).² Just Energy’s comments are limited to swaps subject to the Commission’s jurisdiction, rather than those regulated by the SEC.

I. BACKGROUND

Just Energy, through its U.S. subsidiaries, is a leading independent supplier of electricity and natural gas to residential and small commercial consumers in 12 States. The Just Energy family of companies provide power in California, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, and Texas. They offer natural gas in California, Illinois, Indiana, Michigan, New York, Ohio, and Georgia. Just Energy also is the largest competitive green energy retailer in North America.

Just Energy purchases wholesale power and natural gas in order to secure supply to serve its obligations to its consumers. Just Energy also periodically sells wholesale power and natural gas

¹ Commodity Options and Agricultural Swaps, 76 Fed. Reg. 29,818 (May 23, 2011).

² Pub. L. No. 111-203, 124 Stat. 1376 (2010).

back into the wholesale markets in cases where it has more supply than needed to meet its consumers' demand. Just Energy's wholesale sales are regulated by the Federal Energy Regulatory Commission ("FERC").³

Just Energy provides power and natural gas to residential and commercial consumers under long-term fixed-price or price-protected contracts. It provides such services pursuant to State utility regulations for the 12 states in which it does business.⁴ Just Energy is not a traditional franchised utility with a state-approved service territory. Instead, it provides state-approved retail services in competition with franchised utilities as part of individual state efforts to open their power and natural gas markets to retail choice.

Just Energy is a classic end user. While it has personnel that execute transactions, this is solely for its core energy supply and delivery needs. Just Energy does not have a trading desk, does not engage in proprietary trading or take speculative positions.

Just Energy has not taken an active role in the Commission's Dodd-Frank Act implementation efforts, in large part, due to the belief that its core business would be unaffected – it is not a bank, a hedge fund, an exchange, dealer or broker. With the release of this NOPR, Just Energy has become concerned that the Commission could adopt a definition of the term "swap" that would encompass contracts it uses to meet its delivery obligations to consumers. Parties that supply and deliver natural gas and power to consumers need clear legal guidance on whether and which of their commercial transactions the Commission intends to regulate as swaps. The legal certainty that Just Energy seeks from the Commission is to ensure that U.S. consumers do not become unable to secure power and natural gas supply because the transactions have attributes that regulators say look like swaps (*e.g.*, delivery optionality or financial settlement) or that liquidity is lost as Just Energy's suppliers become unwilling to transact due to regulatory risk that a transaction could be unlawful or subject to regulatory burdens that the counterparty cannot, or will not, assume.

Just Energy knows that some transactions should be treated as swaps subject to regulation under the Dodd-Frank Act (*i.e.*, should it enter into a credit default swap). Such swaps rarely arise in Just Energy's core business. Just Energy is more concerned about:

- Forward contracts used to secure physical supply for consumers, including those that result in book-outs.
- Supply arrangements with consumers, especially those where the State-driven regulatory design that permits consumers to request service from competitive suppliers like Just Energy imposes some degree of financial settlement in order meet delivery obligations to consumers.

³ See, *e.g.*, *Just Energy (U.S.) Corp.*, Docket No. ER10-379 and *Commerce Energy, Inc.*, Docket No. ER97-4253.

⁴ See, *e.g.*, *Just Energy Texas LP*, REP Certificate No. 10052.

- Delivery options that exist as an inextricable part of meeting variable consumer and commercial demand for power and natural gas.
- Firm transmission rights and ancillary services that are required for aspects of the physical delivery of wholesale power over the transmission grid managed by Independent System Operators (“ISO”) and regulated by FERC, as well as for the physical delivery of trades executed in the bilateral wholesale energy markets outside of an ISO service area.
- Green credits that are required to provide renewable energy and meet State-mandated renewable energy procurement requirements.

Just Energy urges the Commission to consider these additional points when evaluating whether power and natural gas commodity transactions are swaps. Just Energy hedges to cover price risk associated with its customer’s physical receipt of a commodity. In some markets, Just Energy is a direct participant in the delivery (where it can take advantage of the forward contract exemption), however, other State-imposed market mechanisms preclude Just Energy from this direct activity even though Just Energy has a contractual obligation to supply power or gas to their consumers. Just Energy requests that since financial trades are used to facilitate physical participation under the applicable regulatory design, the Commission should carve such transactions out from the “swap” definition. In addition, hedging, even in physical delivery markets can be financial. However, in these markets, the physical commodity must be obtained so systematic risk is not apparent. For these reasons, Just Energy urges the Commission to except financial trades that cover a physical delivery.

The Commission also should grant the waivers that ISOs, market participants, state regulators and others in the power and natural gas industry may seek for products they offer. The Commission should extend these waivers to all trades that energy suppliers like Just Energy perform to meet their energy consumer supply obligations.

The other practical issue that the Commission should consider is that residential and commercial counterparties generally will not qualify as eligible contract participants (“ECPs”). If one of the counterparties to a commodity transaction does not qualify as an ECP and that transaction has attributes like supply optionality that could cause the Commission to treat the transaction as a swap, then the swap can only be traded on a designated contract market (“DCM”). Any public utility that qualifies as an ECP and wants to enter into a power and natural gas transaction with a non-ECP consumer 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 execute a transaction that looks like a swap with a non-ECP, including American families and small businesses who secure power and natural gas from companies like Just Energy.

The answer to the foregoing problem is obvious. The Commission must make clear in its final product definition rules that it will not regulate power and natural gas transactions as swaps merely because they have some swap-like traits.

II. INDIVIDUAL CONSUMER MARKETS – POWER

Just Energy breaks its U.S. power-related services into two representative categories: (a) verified scheduling; and (b) third-party.

A. *Verified Scheduling*

A verified scheduling model applies in the Texas market and the states permitting consumer choice in PJM. Just Energy is responsible for ensuring that the supply required by power consumers is scheduled to the grid. Here is an overview of how delivery is satisfied in this type of market:

- Just Energy forecasts customer requirements for a particular contract period by looking at hourly load profiles over the entire term of customer requirements. It is highly unlikely that any product is available that would satisfy the forecast customer requirements so the best available block to match the forecast requirement is purchased. Let us assume that an example forecast required 2.9 MW of energy per hour for each day of a 3-month period. In this circumstance, one of two products could be purchased: (a) a 3-month physical forward for 3 MW of energy for hours ending 1 through 24, or (b) a 3-month heat rate forward for 3 MW of energy which is physically settled but has a floating gas price together with a financial natural gas forward that covers the floating price natural gas that the heat rate requires.
- As the actual time to deliver gets closer, the forecast models are updated to reflect changes in weather and customer base to arrive at revised energy requirements forecast by hour for a 5-day period.
- If the above 5-day period is representative of the 3 months that were initially purchased and the changes are sufficiently far in advance such that the next term purchase can absorb the changes, the term purchase will be adjusted to accommodate the update to the forecast. For example, assume there is an average requirement for 2.6 MW of energy in the off-peak hours (hours ending 1-6 and 23-24) and an average requirement of 3.6 MW of energy in the peak hours. Given these figures and assuming they applied for the entire month of the term purchase, the term purchase would be adjusted by (0.4 MW) in the off-peak hours and 0.6 MW in the peak hours.
- If the above 5-day period is insufficiently far in advance to be contemplated in the next term purchase, Just Energy will: (a) examine the hourly profile to determine if more or less power is required for particular hours of delivery; and (b) purchase incremental power or sell extraneous power in the day-ahead market.
- Just Energy schedules the combination of the term purchases and day-ahead purchases into ERCOT. This schedule is verified by the counterparties that have transacted the term and day-ahead trades with Just Energy for physical flow.
- At the end of each month, the counterparties for the term and day-ahead transactions will prepare a settlement invoice and send this through to Just Energy for processing/payment. This settlement invoice includes all amounts of physical power that have been transacted and delivered by/to them (term and day-ahead) regardless of whether it is a purchase or a

sale transaction. Heat rates are part of this verification. Physical settlement is inherent in the contracts with Just Energy's counterparties for these types of markets.

B. Third Party Scheduling

This category is typified by Just Energy's New York markets, but also applies to CAISO and MISO. Similar to Texas, Just Energy is responsible for ensuring that its customer's load is scheduled to the grid, however due to onerous collateral requirements at the outset of Just Energy's entry to this market, a third-party scheduler was engaged to facilitate the scheduling and posting requirements. The New York market is complicated by the fact that there are several different zones involved and not all of them are liquidly traded. The following is an overview of how delivery to consumers is satisfied:

- Just Energy forecasts customer requirements for a particular contract period, looking at hourly load profiles over the entire term of customer requirements across each zone in New York. As only Zone A and Zone J are currently liquidly traded for the tenor of the contract that Just Energy desires, the forecast aggregates the customer requirements to these two Zones. Like in Texas, it is highly unlikely that any product is available that would satisfy the forecast customer requirements so Just Energy purchases the best available block to match the forecast requirement. As an example, if the requirements were amalgamated and rounded to 3 MW made up of .5 MW in each of Zones A, B, H, and I respectively with 1 MW in Zone J, this would result in a 1 MW purchase at Zone A and 2 MW purchase at Zone J. The term purchase is typically transacted through financial forwards at each of these two Zones or a basis swap (a sale of Zone A and a purchase of Zone J should Zone A be long and Zone J require the fixed price protection or vice versa). At this time, liquidity to the other Zones in New York precludes any economical purchases at anything other than these points on a forward basis. Furthermore, advance physical power is of limited availability for either long or short-term purchasing.
- As the actual time to deliver gets closer, the forecast models are updated and term trades are adjusted as necessary. At this time, there is no day-ahead trading carried out in these markets and, as mentioned above, there is very limited availability of physical power for short-term purchasing (month or day-ahead).
- Just Energy prepares a schedule of the supply it believes its customers require based on the most up-to-date forecast information which details each of the Zones in which the power needs to be scheduled. On a daily basis, Just Energy forwards its supply schedule to its third party scheduler for the market who then ensures that the physical electrons are scheduled into the grid. As mentioned above, this schedule will contemplate all the Zones in which Just Energy operates, not just Zones A and J where the financial forwards have been procured. The third-party scheduler is generally a counterparty with whom Just Energy has transacted some or all of its forward trades.
- At the end of each month, the counterparties for the term transactions will prepare a settlement invoice and send this through to Just Energy for processing/payment.
- At the end of each month, Just Energy settles with its scheduler for the physical power that it has delivered to the grid on Just Energy's behalf (day-ahead charges) net of the true up

required to reflect differences between the day-ahead schedule and the actual utilization of power by Just Energy's customers (real-time charges). The settlement is for the initial take at the past month's consumption together with a true up for actual consumption as adjusted for the prior 6-month and 2-month periods. Just Energy's cost of sales is impacted by any spot purchases or sales of energy that result from this invoice that are not covered through physical transactions with its counterparties.

It is Just Energy's position that these are physical trades because it procures its initial supply requirement using what is available in the market, it adjusts this initial requirement using what is available in the market at that time, it is responsible for physical scheduling on the grid and it settles physically through an invoice prepared by the contracted scheduler which reflects the volume scheduled per the instructions of Just Energy on the day-ahead market and the actual incremental/decremental usage by Just Energy's customers to this schedule in the real-time market.

However, other factors make drawing this line more difficult. Just Energy is concerned that the Commission might treat such an arrangement as though Just Energy is not responsible for physical settlement. For example, the financial forwards are: (a) used right up to the time of physical scheduling/settlement; (b) not for the exact physical zones where physical settlement is required due to liquidity issues in several of the zones meaning that the physical and financial settlements do not perfectly align, even should the scheduled hours be the actual hours used; and (c) the linkage to physical settlement requires a look at both the financial settlement of the forwards and the physical settlement with the third-party scheduler.

III. INDIVIDUAL CONSUMER MARKETS – GAS

On the natural gas side, there are basically two delivery methods, regardless of jurisdiction, that are required by the utilities for the gas markets. Each type requires physical delivery and in all cases, Just Energy is directly responsible for physical delivery to the utility. These methods are: (i) the flat delivery model; and (ii) the shaped delivery model with virtual storage/delivery bands. Each market will have its own anomalies in terms of delivery bands and storage capacity, however, the basic premises for contracting remain the same.

A. Flat Delivery Model

This model is typified by the Michigan market. The following is an overview of how these markets are satisfied:

- Just Energy forecasts customer requirements for a particular contract period, looking at historical usage of expected customers together with normal weather profiles over the entire term of estimated customer requirements. A physical or financial forward is purchased that best matches the volume of the estimated customer requirements over its term at the most liquid hub to serve the market (typically in Canada – AECO, in the US – NYMEX Henry Hub, however depends on geographical location). In this manner, the market risk is covered for the estimated volume needed by its customers, however, the basis risk between the liquid hub and the required delivery points for the utilities is not yet addressed. For

purposes of this example let us assume that 2,990 MMBtu/day is required for the next year (noting that volumes are set at the beginning of a one-year contract period for customers and may or may not be amended – depending on the utility, until the year is up). The purchase is likely to be rounded to 3,000 MMBtu/day and will be done so for purposes of this example.

- Basis is usually available in advance for various terms, including a 12-month strip commencing in November, an arrangement that Just Energy typically uses. Term trades for basis, usually transacted as physical swaps (sale of injection point, purchase of delivery point) or physical transport (space on a pipeline) are layered in over time as liquidity permits. These will rarely (if ever) match the actual delivery requirements as they generally need to be traded in large volumes. During prompt month balancing, Just Energy may be either short or long basis by the time physical delivery is required and additional requirements are either acquired or sold through the balancing step outlined below.
- The utilities track differences between what they request retailers to deliver for their customers and the actual usage of gas by those customers. Differences (which will feed whether customer pools are long or short) together with updates to the forecast models for weather, historical customer additions, consumption, attrition, etc. are incorporated into the next term purchase should there be sufficient time to do so.
- As the actual time to deliver gets closer, volume differences that could not be accommodated through term and basis trades are covered through short-term purchases and sales in order that the volume delivery requirements of the utility at each delivery point are met (balancing). These short-term trades will also incorporate any basis requirements and conversion from a financial to a physical contract so that the physical delivery takes place at the points at which the utilities will accept the gas.
- Using the above example, let us assume that the 3,000 was a physical purchase but the requirement has increased to 3,100 by the time delivery is required. This is split between delivery points: Consumers for 500, MichCon for 2,100 and St. Clair for 500 MMBtu/day. New contracts could see either a physical forward purchase at MichCon for 100 MMBtu/day then a physical sale of NYMEX Henry Hub for 3,000 MMBtu/day with physical forward purchases of 500, 2000 and 500 MMBtu/day at each of Consumers, MichCon and St. Clair respectively OR a purchase of 100 MMBtu/day at NYMEX Henry Hub with an increase to 3,100 MMBtu/day sold and 2,100 MMBtu/day purchased at each of NYMEX Henry Hub and MichCon, respectively. Should the requirement have been for 2,995 MMBtu/day, 5 MMBtu/day would be sold at NYMEX Henry Hub with the relevant basis swaps then transacted using the appropriate volumes. If the initial transaction was financial, as opposed to physical, the sale at NYMEX Henry Hub would likewise be financial rather than physical, as noted above.
- At the end of each month, the counterparties for the physical and financial transactions will prepare a settlement invoice and send this through to Just Energy for processing/payment. At the end of each month, the utility sends Just Energy payment for the amount of gas that Just Energy delivers to them.

Physical settlement is inherent in the final contracts with Just Energy's counterparties for these types of markets even if the initial contract is financial in nature as, by the time delivery is required, the financial contract has been replaced by a physical contract.

B. Shaped Delivery Model With Virtual Storage/Delivery Bands

This model is typified by the Illinois market served by NICOR, Columbia Gas of Ohio, and Dominion East Ohio. The following is a step by step of how these markets are satisfied:

- As before, Just Energy forecasts customer requirements for a particular contract period, looking at historical usage of customers together with normal weather profiles over the entire term of estimated customer requirements. A physical or financial forward is purchased that best matches the volume of the estimated customer requirements over its term at the most liquid hub to serve the market (in Illinois' case NYMEX or NGI Chicago). In this manner, Just Energy covers its market risk for the estimated volume needed by its customers, however the basis risk between the liquid hub and the required delivery points for the utilities is not yet addressed. The delivery requirements for this market change over the course of a year with the delivery in the summer being for more than customer requirements in order to build storage and the delivery in the winter being for less than customer requirements due to withdrawals. The forward estimated purchase will contemplate the required delivery to the utility. For purposes of this example, let us assume that the June delivery is for 1,500 MMBtu/day in order to satisfy 1,000 MMBtu/day of customer requirements and 500 MMBtu/day to satisfy the required storage delivery. Let us also assume that the January delivery is for 3,000 MMBtu/day in order to satisfy customer requirements of 4,000 MMBtu/day with the remainder of the customer requirements being satisfied through storage withdrawals.
- Basis is not heavily traded and is usually addressed through monthly balancing.
- The utilities track differences between what they request retailers to deliver and ensure it is within established bands. For example, if the utility requested a delivery on a particular day for 1,000 MMBtu and the delivery band for that day was +/- 5%, then Just Energy could deliver 1,050 MMBtu without penalty. There are both daily and monthly bands that must be met for the Illinois market. The utilities and Just Energy track the differences between the delivery and customer usage. Differences will impact the storage Just Energy has with the utility and thereby impact forecast delivery requirements. Just like the delivery bands, there are thresholds for the storage levels that Just Energy is required to maintain. This storage, and management's plan to reduce/increase it to meet utility requirements, together with updates to the forecast models for weather, historical customer additions, consumption, attrition, etc. are incorporated into the next term purchase should there be sufficient time to do so.
- As the actual time to deliver gets closer, volume differences that could not be accommodated through term trades are covered through short term purchases and sales in order that the volume delivery requirements of the utility are met. These short-term trades will also incorporate any basis requirements and conversion from a financial to a physical contract so that the physical delivery takes place at the points at which the utilities will

accept the gas. Using the above example for June, let us assume that the 1,500 MMBtu/day was a physical purchase but the requirement has increased to 1,510 MMBtu/day by the time delivery is required. This is split between NICOR for 910, Peoples for 300 and North Shore for 300 MMBtu /day. Since the revised requirement is within the +/- 5% delivery required, Just Energy may choose to deliver only the 1,500 that has previously been purchased. The basis would be traded through a sale at NGI Chicago for 600 MMBtu/day and a purchase of 300 MMBtu/day at each of Peoples and North Shore. The incremental utility requirement would then be applied against storage and, if necessary brought whole through incremental delivery on another day or offset by a decreased requirement from another day to achieve the appropriate monthly delivery band.

- At the end of each month, the counterparties for the physical and financial transactions (whether they be term or for the short term balancing) will prepare a settlement invoice and send this through to Just Energy for processing/payment.
- At the end of each month, the utility sends Just Energy payment for the amount of gas that Just Energy's customers have used and been billed during the most recent billing period at the fixed price at which Just Energy communicates should be billed to each of the customers contemplated in the delivery requirement. The only time at which the settlement with the utility contemplates a spot price is under a cash-out scenario. It should be noted that at a certain point, the utility will no longer take responsibility for billing and collecting delinquent customers. As these customers will have been cut off from Just Energy's service, the commodity settlement is not impacted.

Again, physical settlement is inherent in the contracts with Just Energy's counterparties for these types of markets even if the initial contract is financial in nature as, by the time delivery is required, the financial contract has been replaced by a physical contract. At all times, Just Energy's consumers expect that Just Energy will supply power or gas upon demand.

The discussion above is intended to highlight why the Commission must provide greater legal certainty around what is and is not a swap for entities that supply retail natural gas and power to consumers.

IV. THE COMMISSION SHOULD INCORPORATE THE CONSUMER AND COMMERCIAL TRANSACTION PROPOSAL IN ITS RULES

In the discussion of its proposed definition of a swap, the Commission explains it does not believe Congress intended to treat customary consumer and commercial transactions as swaps, to limit the types of persons that can enter into or engage in them, or to otherwise subject these transactions to swap regulation.⁵ Among the illustrative list of consumer arrangements covered by this guidance are agreements to purchase energy commodities to heat or cool consumers' homes – the Commission says they are not swaps.⁶ Similarly, the Commission stated that commercial and non-profit entities should be able to operate their businesses and operations

⁵ NOPR at 29,832.

⁶ NOPR at 29,833.

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.⁷

Just Energy applauds the Commission's interpretation. As for heating oil used to heat and cool homes, this interpretive guidance is applicable to the transactions that entities such as Just Energy use to meet residential and commercial power and natural gas supply obligations so those consumers can cool and heat their homes or enjoy all the other benefits of having energy available. The fact that the commodity is different should not matter. Just Energy, therefore, asks the Commission to definitively exclude from the definition of "swap" those commercial and consumer contracts that involve nonfinancial energy commodities. Without it, residential and commercial consumers could find themselves no longer able to secure natural gas and power supply from any energy retailer.

V. THE COMMISSION SHOULD ADOPT THE FORWARD CONTRACT EXCEPTION IN ITS RULES

The Dodd-Frank Act's statutory definition of a "swap" excludes "any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled."⁸ The CFTC has acknowledged this exclusion.⁹ The Commission goes on to explain that it reads the "intended to be physically settled" language in the swap definition reflects a directive that intent to deliver a physical commodity is a factor for determining whether a given contract is a forward contract or a swap.

Just Energy takes comfort from the Commission's attempt to provide clarity around what constitutes a forward contract, but asks the Commission to incorporate this interpretation in the swap definition rules rather than merely incorporating by reference its historical interpretation in its discussion of the proposed rules. Just Energy makes this request because the Dodd-Frank Act changed the CEA provisions reviewed in the Brent Interpretation, so more current guidance would better help industry. Moreover, natural gas and power suppliers and residential and commercial consumers need greater commitment that the Commission will follow the Brent Interpretation analysis for markets for all nonfinancial commodities.¹⁰ To meet Congressional intent in this regard, the actual rules must include a clear exclusion.

Just Energy also is concerned about the Commission's proposal to look at external facts to determine the parties' intent to deliver at the time the contract is executed. The Commission

⁷ *Id.*

⁸ 7 U.S.C. § 1a(27).

⁹ NOPR at 29,827-829 (noting that the underlying postulate of the [forward] exclusion is that the [CEA's] regulatory scheme for futures trading simply should not apply to private commercial merchandising transactions which create enforceable obligations to deliver but in which delivery is deferred for reasons of commercial convenience or necessity).

¹⁰ NOPR at 29,827.

should honor evidence of a contractual obligation to deliver and receive power and natural gas rather than conducting a “primary purpose” test or weighing factors outside the four corners of the binding legal contract. Otherwise retail consumers and upstream suppliers will be confused by their obligations. In addition, other than where there is evidence of fraud, Just Energy does not believe there is any need to look at factors such as of the frequency of actual delivery/receipt vs. bookout to confirm the forward contract nature of the trade. The agreement creating the bookout is sufficient.

VI. REGULATING PHYSICAL OPTIONS AS SWAPS WOULD HAVE DETRIMENTAL CONSEQUENCES FOR END-USERS AND CONSUMERS

The CFTC proposes in the NOPR to treat a forward contract that contains an embedded commodity option as an excluded nonfinancial commodity forward contract rather than a swap if the embedded option: (i) may be used to adjust the forward contract price, but does not undermine the overall nature of the contract as a forward contract; (ii) does not target the delivery term, so that the predominant feature of the contract is actual delivery; and (iii) cannot be severed and marketed separately from the overall forward contract in which it is embedded. Conversely, where the embedded option renders delivery optional, the predominant feature of the contract cannot be actual delivery and, therefore, the embedded option is not a forward contract for a nonfinancial commodity.¹¹ The CFTC would look to the specific facts and circumstances of the transaction to decide whether any embedded optionality operates on the price or delivery term of the contract, and whether an embedded commodity option is marketed or traded separately from the underlying contract, to determine whether that transaction qualifies for the forward contract exclusion.¹²

Just Energy reminds the Commission that consumer energy contracts contain embedded optionality in that they can be either “load following” where the contract quantity varies with the amount that they consume or can contain bandwidths wherein the contract quantity is permitted to vary within a certain percentage of their normal usage. These customers cannot qualify for the ECP exception and, under the current proposed rules, would not be able to enter into contracts to manage their commodity usage if the Commission will treat them as “swaps.” Just Energy urges the Commission to treat the options described above as forward contracts subject to Congress’ express forward contract exclusion.

The forward contract exclusion also should be clarified so that it captures load following arrangements where they are physical and captures bandwidth-type customers. The Commission has in other contexts relied on an excerpt from the definition of “swap” provided in 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. This is an incomplete and selective interpretation of the statute. Options have not been regulated as swaps

¹¹ NOPR at 29,830.

¹² *Id.*

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and the new regulatory regime under the Dodd-Frank Act does not change the fact that physically-settled options should be treated like forwards.

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 cap the price they pay for commodities, manage uncertainty as to production capabilities or consumption needs, or lock in prices on physically-settled purchases and sales of nonfinancial commodities for deferred delivery. For example, commodity options allow residential and commercial consumers 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. They provide suppliers to such consumers the same benefit.

Imposing the regulatory scheme applicable to swaps on transactions used to service residential and commercial energy consumers would create detrimental consequences. Congress clearly intended to avoid having the Dodd-Frank Act impose burdensome regulations on end-users. For the reasons explained in these comments, interpreting the statute to regulate options on physical commodities as swaps would be inconsistent with Congress' goals under the Dodd-Frank Act.

VII. CONCLUSION

Just Energy asks the Commission to define what constitutes a swap to reflect these comments. Please contact us if you have any questions or concerns regarding these comments.

Respectfully submitted,

/s/ Stephanie Bird

Stephanie Bird

Chief Financial Officer