



July 22, 2011

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

**Re: Comments on Joint Proposed Rules and Proposed Interpretations on Further Definition of “Swap,” “Security-Based Swap,” “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping**

Dear Mr. Stawick:

The PSEG Companies<sup>1</sup> hereby respectfully submit these comments to the Commodity Futures Trading Commission (the “Commission”) on the joint proposed rules and proposed interpretations issued on May 23, 2011 by the Commission and the Securities and Exchange Commission (the “SEC”) captioned **Further Definition of “Swap,” “Security-Based Swap,” “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping**<sup>2</sup> (the “May 23, 2011 Definition NOPR”) pursuant to the Wall Street Reform and Consumer Protection Act (the “Dodd-FrankAct”).

The PSEG Companies have assisted in the preparation of comments being filed contemporaneously herewith by “the Electric Trade Associations” which includes certain trade associations of which at least one of the PSEG Companies is a member. The PSEG Companies generally support the comments of the Electric Trade Associations and urge the Commission to consider those comments and to adopt the proposals made therein.

The PSEG Companies are filing brief additional comments to further elucidate one issue presented in the May 23, 2011 Definition NOPR. Question 35 asks for comments on specific types of contracts used in commercial settings including “full requirements contracts.” The PSEG Companies have extensive experience with this type

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<sup>1</sup> For the purposes of these comments, the PSEG Companies consist of Public Service Electric and Gas Company (“PSE&G”), PSEG Power LLC (“PSEG Power”) and PSEG Energy Resources & Trade LLC (“PSEG ER&T”).

<sup>2</sup> 76 Fed. Reg. 29,818 (May 23, 2011).

of contract, as it used in the electric industry, and believe that their experience could help the Commission more fully understand this type of commercial agreement.

As a matter of state law, PSE&G is obligated to provide “provider of last resort” (“POLR”) commodity supply in New Jersey to customers on its distribution system who have not elected to receive commodity service from a third party supplier. Since 2002, PSE&G and the other New Jersey utilities have procured energy, capacity and ancillary services under full requirements contracts for almost their entire load obligations. Under these arrangements the suppliers are responsible for fulfilling all the obligations of a load serving entity, including the obligation to follow demand as it fluctuates due to usage patterns or as it may vary when new customers are added or when existing customers leave the service. An outside agent conducts an auction process, held on behalf of the utilities and subject to state commission review, to identify the suppliers for these full requirements contracts. PSEG ER&T has entered into these contracts in all but one of the New Jersey auctions. PSEG ER&T has also entered into similar “full requirements”<sup>2</sup> arrangements to meet POLR obligations in other states, including Pennsylvania, Maryland, Massachusetts, Connecticut, New Hampshire and Rhode Island.

These arrangements should not be considered to be “swaps” by the Commission. As noted above, in these cases, the utility has a statutory obligation to provide electricity commodity service to load that does not choose a third party supplier and typically the utility will enter into full requirements contracts to meet this obligation. Although delivery is not optional under these contracts, the total volume of electricity delivery will vary depending on a variety of factors, including the extent to which load levels fluctuate due to weather and economic conditions as well as customers that leave utility service or elect to receive utility service. These attributes of the contracts, however, do not change their underlying purpose of effecting physical delivery of electricity. In this respect they are indistinguishable from a typical forward contract that requires physical delivery of a nonfinancial commodity and thus should be deemed to fall squarely within the nonfinancial commodity forward contract exclusion.<sup>3</sup>

These contracts are also subject to extensive regulatory oversight. In most cases, the contracts will be subject to oversight by *both* state and federal regulators. Typically, the contracts are initially approved by the state commission and then become subject to FERC jurisdiction after execution. As part of the process of designing the procurement, all potential participants will typically have the opportunity to propose changes or modifications to the form of agreement and to the procurement method to be used. Credit requirements such as trade valuation and margining rules are included as a part of these agreements.

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<sup>2</sup> Full requirements contracts are also known as provider of last resort (“POLR”) contracts, supplier of last resort contracts, and standard offer service (“SOS”) contracts.

<sup>3</sup> See *In the Matter of Cargill, Inc.* CFTC Docket No. 99-16, 2000 CFTC LEXIS 260; Comm. Fut. L. Rep. (CCH) P28,425 (Nov. 22, 2000) (“[a contract] satisfies the Commission's test for the forward contract exclusion, even though it includes a price conditional delivery requirement.”).

Moreover, some state authorities may exercise continuing oversight over these contracts. For example, in New Jersey the form of contract allows the state to impose more stringent credit requirements in the event of a credit rating downgrade by a rating agency. Additional regulation of these contracts as swaps is, therefore, inconsistent with the forward contract exclusion and unnecessary given the pervasive regulatory regimes currently in place.

Should you wish any additional information on this subject, please contact the undersigned.

Very truly yours,

*Kenneth R. Carretta*

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