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February 13, 2012

FILED ELECTRONICALLY

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

RE: Retail Commodity Transactions Under the Commodity Exchange Act
Comments of the Retail Energy Supply Association to Proposed
Interpretation of “Actual Delivery” (RIN 3038-AD64)

Dear Mr. Stawick:

We are submitting comments on behalf of the Retail Energy Supply Association (“RESA”)¹ which appreciates the opportunity to provide comments to the Commodity Futures Trading Commission (“CFTC” or “Commission”) on its proposed interpretation of the term “actual delivery” included in Section 2(c)(2)(D(ii)(III)(aa) of the Commodity Exchange Act (“CEA”) pursuant to Section 742(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.² RESA supports the comments filed on February 13, 2012 by Constellation Energy Group, Inc. (“Constellation”) in this docket RIN3038-AD64. RESA seeks clarification from the Commission that residential supply contracts (whether gas or electric) are not considered “leveraged contracts” under the CFTC’s Proposed Interpretation.

¹ RESA’s members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant and TriEagle Energy, L.P. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

² *Retail Commodity Transactions Under Commodity Exchange Act*, 76 Fed. Reg. 77670 (December 14, 2011) (“Proposed Interpretation”).

RESA is a non-profit trade association of independent companies that are involved in the competitive supply of electricity. RESA and its members are actively involved in retail electricity markets throughout the United States, including retail markets in each of the Federal Energy Regulatory Commission-approved Regional Transmission Organizations (“RTOs”).

Section 742(a), which adds new Section 2(c)(2)(D) to the Commodity Exchange Act, applies to “Retail Commodity Transactions” which the CFTC identifies as “any agreement, contract, or transaction in any commodity that is entered into with, or offered to (even if not entered into with), a non-eligible contract participant or non-eligible commercial entity on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis.”³ An exception to this definition is a sale contract that “results in actual delivery within 28 days or such other longer period as the Commission may determine by rule or regulation based on the typical commercial practice in cash or spot markets for the commodity involved.”⁴ Without a functional approach to interpreting the statute, residential supply contracts, where a supplier delivers gas or electricity to a consumer and that customer is billed 30 to 60 days later, could be considered a leverage contract and subject to regulation under the CEA. RESA’s members supply gas and electricity to residential, commercial and industrial customers. It is RESA’s belief that retail supply contracts with small commercial and industrial customers will fall under the second exemption for transactions “in connection with the line of business of the seller and buyer” and are, therefore, not encompassed by the statute. To the extent that the Commission disagrees with this interpretation, RESA submits that the same arguments in support of a conclusion that these arrangements are not leverage contracts applies to retail commercial and industrial supply contracts.

As described in more detail in Constellation’s comments, retail suppliers generally enter into gas or electric supply contracts with residential customers to provide the customers with their gas and/or electric requirements. The residential customer signs a contract and agrees to purchase its gas and/or electricity needs from the retail supplier for a stated term, generally 12-24 months or more.

The retail supply contract contains terms and conditions governing the date on which delivery will commence and when service will cease. In order for the retail customer to receive service from its chosen retail supplier, the supplier must be designated and registered by the local utility as the supplier. This designation/registration process can take up to two months.

Once the customer is enrolled to receive service from the retail supplier, the retail supplier provides gas and/or electric service to the customer. Gas and/or electricity is delivered

³ 76 Fed. Reg. at 77671.

⁴ 7 U.S.C. 2(c)(2)(D)(ii)(III)(aa).

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to the customer and the customer is billed on a 30 or 60 billing cycle. While there is often a delay in receipt of service of more than 28 days, the situation present with respect to retail supply contracts is not the same as a “rolling spot contract” that the legislation was addressing – referred to as the “*Zelener fraud fix*”.⁵

In addition, and as described in Constellation’s comments (at pp. 5-7), residential supply contracts are not leverage contracts as defined under CEA Section 19 and Part 31 of the CFTC’s regulation. Residential customers do not pay initial and margin payments on their accounts. They pay after they have received the gas or electricity. Residential supply contracts do not provide for the payment of “variable carrying charges.” Residential supply agreements pay a price for the gas or electricity, and any fees, charges, taxes, and delivery costs assessed by the local utility. Finally, the amount owed by the customer under a residential supply contract is not paid until after the customer has received and consumed the gas or electricity.

In sum, we appreciate the opportunity to provide comments on behalf of RESA. RESA respectfully requests that the Commission interpret a “transaction entered into, or offered (even if not entered into), on a leveraged or margined basis, or financed by the offeror” to exclude residential supply contracts of the type identified here and by Constellation in its comments. RESA respectfully requests that the Commission clarify that residential supply contracts are not leverage contracts within the meaning of the Commodity Exchange Act.

Respectfully submitted,

/s/Elizabeth W. Whittle
Counsel to
Retail Energy Supply Association

⁵ 76 Fed. Reg. at 77671.