

**VIA ELECTRONIC SUBMISSION**

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

**Re: Comments on Aggregation, Position Limits for Futures and Swaps (RIN 3038-AD82)**

Dear Mr. Stawick:

Atmos Energy Holdings (“Atmos”) respectfully submits these comments in response to the Commodity Futures Trading Commission’s (the “Commission”) Notice of Proposed Rulemaking issued May 30, 2012.<sup>1</sup> Atmos supports the Commission’s efforts to provide more workable position limits rules by expanding the aggregation exemption in response to industry stakeholders’ concerns. Atmos respectfully recommends that the Commission permit persons with ownership or equity interests in other entities to demonstrate a lack of effective control over owned entities in order to avoid mandatory aggregation of those entities’ positions. While Atmos agrees that the Commission should establish some ownership limit at which a rebuttable presumption of common control will be created, Atmos believes that any entity should be allowed the opportunity to rebut that presumption, regardless of the degree of ownership. It is common control, not mere commonality of ownership, which warrants aggregation of positions. Two commonly-owned entities that transact in markets with no knowledge of each other’s activities pose no greater risk than any other two unaffiliated entities.

Atmos also recommends that the Commission permit the sharing of lawyers, accountants, risk managers, compliance officers, and other personnel that are not involved in day-to-day

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<sup>1</sup> *Aggregation, Position Limits for Futures and Swaps*, 77 Fed. Reg. 31,767 (May 30, 2012) (“Notice”).

trading activities among entities with common ownership, notwithstanding the fact that such employees may possess some degree of knowledge of the entities' trading decisions.

Atmos supports the extension of the exemption from aggregation of positions to include circumstances where, through aggregation, entities face a reasonable risk of violating state laws, as well as rules and regulations imposed by a state commission or other regulatory authority.

## **I. COMMUNICATIONS**

All pleadings, correspondence, and other communications filed in this proceeding should be served on the following individual:

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## **II. IDENTITY AND INTERESTS**

Atmos is a wholly-owned subsidiary of Atmos Energy Corporation, which is a publicly traded company duly organized and existing under the laws of the State of Texas and the Commonwealth of Virginia. Atmos Energy Corporation is engaged in the natural gas distribution business in the states of Colorado, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Tennessee, Texas and Virginia. Atmos does not engage in the business of distribution of natural gas but is instead engaged, through several of its wholly-owned subsidiaries, in the marketing of natural gas at wholesale, and natural gas storage, transmission and gathering. Atmos is sometimes referred to as the non-utility segment of Atmos Energy Corporation.

Atmos Energy Marketing, LLC (“AEM”) is a wholly-owned subsidiary of Atmos. AEM is a wholesale natural gas marketing company providing supply, asset management and other related services to utilities, industrial facilities, power plants and gas producers. AEM manages approximately 1,800,000 dth/day of firm pipeline capacity and 40,000,000 dth of market area and production area storage. AEM uses a variety of financial and physical instruments to hedge its exposure in connection with the future gas needs of its customers, which includes both affiliated and unaffiliated entities.

Additionally, the utility segment of Atmos Energy Corporation also uses a variety of financial and physical instruments to hedge its exposure in connection with the future gas needs of its customers. As such, Atmos will be directly affected by the Commission’s final regulations governing position limits for futures and swaps, as well as the related regulations governing aggregation of positions.

### **III. COMMENTS**

In a final rule published on November 18, 2011,<sup>2</sup> the Commission set forth its position limits regime which generally provides that unless a particular exemption applies, a person must aggregate all positions for which the person has a ten percent or greater ownership interest in an account or position.<sup>3</sup> In the Notice, the Commission proposed to extend the exemption from aggregation under section 151.7(i) for instances where there is a reasonable risk of violation of federal law to include reasonable risks of violation of state, local and foreign laws.<sup>4</sup> The Commission also proposed to provide a procedure under which a person with a ten percent or greater ownership interest could disaggregate the positions of a separately organized entity upon

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<sup>2</sup> *Position Limits for Futures and Swaps*, 76 Fed. Reg. 71,626 (Nov. 18, 2011).

<sup>3</sup> See 17 C.F.R. § 151.7(a) & (b).

<sup>4</sup> 77 Fed. Reg. at pp. 31,771-72.

a sufficient demonstration of independence.<sup>5</sup> However, under the Commission's proposal, the ability to rebut the presumption of control and establish independence would not be available to persons with an ownership interest of greater than fifty percent.<sup>6</sup> This would effectively require wholly-owned subsidiaries to aggregate their positions, regardless of their relative independence.

Atmos believes that the Final Rule should not establish an un rebuttable presumption of control at any ownership level. Common ownership in and of itself does not increase risk. Rather, it is common control of trading that should dictate aggregation of positions. Limiting fully-independent entities that happen to have common ownership from fully participating in markets would serve no purpose.

The Commission's rulemakings to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>7</sup> should ensure that financial markets related to energy commodities function efficiently and protect the ability of persons to engage in risk-management activities for the benefit of energy consumers. Atmos supports the Commission's use of position limits regulations to reduce systemic risk, increase market transparency and promote market integrity within the financial system, provided the limits are applied in a manner designed to reduce risks and increase transparency without hampering the effective operation of energy markets. Further modifications to Part 151 of the Commission's regulations must be made to enable the management functions currently undertaken by gas utilities and marketers to continue. Atmos offers the following comments addressing the Commission's inquiries in the Notice regarding the feasibility, necessity and practicability of the proposed requirements.

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<sup>5</sup> *Id.* at pp. 31,772-72-75.

<sup>6</sup> *Id.*

<sup>7</sup> Pub. L. No. 111-203 (July 21, 2010).

**A. The Commission Should Eliminate Unrebuttable Presumptions of Control.**

The Commission's proposal in the Notice provides that persons with an ownership or equity interest in an entity (financial or non-financial) of less than ten percent need not aggregate the accounts or positions of the owned entity with any other accounts or positions. If the ownership interest is in-between ten and fifty percent, the proposal in the Notice would create a rebuttable presumption of control. A person would be required to aggregate its positions with those of its ten to fifty percent-owned entities unless it could demonstrate that there is a lack of control over the trading of the owned entities based on five indicia demonstrating independence of the trading decisions of the owned entities.<sup>8</sup> Under the Commission's proposal, persons would never be allowed to disaggregate positions if they have greater than a fifty percent ownership or equity interest in an owned entity, regardless of the level of independence of the trading decisions of the owned entities.<sup>9</sup> In other words, the Commission's proposal mandates aggregation in all cases where the person's ownership or equity interest in the owned entity is greater than fifty percent, regardless of whether the person has any knowledge or control over the trading decisions of the owned entity.

The Commission stated that the fifty percent threshold beyond which aggregation would be mandatory provides administrative certainty, and that to the extent the majority owner may have the ability and incentive to direct, control or influence the management of the owned entity, the proposed bright-line test would be a reasonable approach to the aggregation of owned accounts.<sup>10</sup> Atmos believes the Commission should take a closer look at how the central concept of risk should be addressed via aggregation. A person that does not have knowledge or control

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<sup>8</sup> See proposed § 151.7(b)(1)(i)(A) through (E).

<sup>9</sup> See proposed § 151.7(b)(1)(ii).

<sup>10</sup> 77 Fed. Reg. at p. 31,774.

over the trading decisions of an owned entity should not be required to aggregate positions regardless of its percentage of ownership or equity interest. If a person has no knowledge or control over the trading decisions of an owned entity, then there is no increased risk from allowing those two entities to disaggregate their positions. They function as separate market actors and should be treated as such.

Atmos recognizes that holding a majority interest in an entity may, as the Commission has expressed, provide an increased risk of direct or indirect influence over the trading of that owned entity,<sup>11</sup> however if the person can demonstrate that it lacks significant actual control, no regulatory purpose would be served by requiring such person to aggregate its positions with those of the owned entity. Accordingly, Atmos agrees that the Commission's aggregation rules should provide a clear method to determine which persons or entities may have the ability to control the trading decisions of their lower-tier or affiliated entities in a manner that could result in coordinated trading or market manipulating activity. Atmos recommends that the Commission maintain its ten percent threshold, above which a person must either aggregate the positions of its owned entities or make an affirmative demonstration that person lacks actual control over the trading decisions of its owned entities.

Atmos believes that such an approach would relieve the Commission of the administrative complexity of pre-determining what ownership structures do and do not present a situation of joint trading control among affiliated entities. Moreover, such approach would address industry concerns regarding an un rebuttable presumption of control and allow any person to demonstrate the circumstances under which ownership does not translate into common control or actual knowledge over trading decisions across affiliated entities. Further, Atmos

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<sup>11</sup> See *id.* at p. 31,775.

believes that this approach would give the Commission the flexibility to adopt a broader passive investment exemption that accommodates instances in which beneficial ownership in several otherwise unrelated accounts may be greater than ten percent but does not provide the owner(s) any control over those positions.

**B. The Commission Should Clarify That Persons May Share Employees Amongst Owned Entities And Still Remain Eligible For Disaggregation.**

Under the Commission's proposal, in order to demonstrate a lack of control over the trading decisions of an owned entity, a person must show that both the person and the owned entity: (i) do not have knowledge of the trading decisions of the other; (ii) trade pursuant to separately developed and independent trading systems; (iii) have and enforce written procedures to preclude each from having knowledge of, gaining access to, or receiving data about, the trades of the other; (iv) do not share employees that control the trading decisions of either; and (v) do not have risk management systems that permit the sharing of trades or trading strategy.<sup>12</sup> In the Notice, the Commission sought comment on whether the sharing of employees would compromise independence because it would provide each entity with knowledge of the other's trading decisions.<sup>13</sup>

Atmos believes that many types of employees may be permissibly shared between affiliated or commonly-owned entities without requiring those entities to aggregate their swap positions. Atmos recommends that the Commission look to the Standards of Conduct promulgated by the Federal Energy Regulatory Commission ("FERC") in considering when employees may be appropriately shared among entities and their affiliates without risk of

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<sup>12</sup> See proposed § 151.7(b)(1)(i)(A) through (E).

<sup>13</sup> 77 Fed. Reg. at p. 31,774.

common control.<sup>14</sup> FERC's Standards of Conduct contain several key factors: (1) Non-Discrimination; (2) Independent Functioning; (3) the No-Conduit Rule and (4) the Transparency Rule. FERC requires its regulated transmission providers (FERC-jurisdictional electric utilities and interstate natural gas pipelines) to treat both their affiliates and non-affiliates equally (non-discrimination) and to ensure that their transmission employees function independently from their marketing or wholesale merchant function employees or those of their affiliates (independent functioning).<sup>15</sup> FERC allows its regulated transmission providers to share support employees, senior officers and directors, risk management employees, and lawyers, etc., provided such employees do not act as a conduit for the sharing of confidential or prohibited information (no-conduit rule).<sup>16</sup> If a transmission provider discloses non-public information to its marketing or wholesale merchant affiliates, it must contemporaneously disclose such information to all market participants. Additionally, transmission providers are required to publicly post how they comply with the FERC's Standards of Conduct (transparency rule).<sup>17</sup>

Atmos believes a similar regime could be used by the Commission to ensure that entities with common ownership (but without common control) could safely be exempted from aggregating their positions. Atmos recommends that the Commission permit the sharing of

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<sup>14</sup> *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs., Reg. Preambles ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,161 (2004), *order on reh'g*, Order No. 2004-B, 108 FERC ¶ 61,118 (2004), *order on reh'g*, Order No. 2004-C, 109 FERC ¶ 61,325 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as applied to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006); *Standards of Conduct for Transmission Providers*, Order No. 690, 72 Fed. Reg. 2,427 (Jan. 19, 2007), FERC Stats. & Regs., Regs. Preambles ¶ 31,237 (2007), *order on clarification and reh'g*, Order No. 690-A, 72 Fed. Reg. 14,235 (Mar. 27, 2007), FERC Stats. & Regs., Regs. Preambles ¶ 31,243 (2007).

<sup>15</sup> See 18 C.F.R. Part 358.

<sup>16</sup> See 18 C.F.R. § 358.6.

<sup>17</sup> See 18 C.F.R. § 358.7.



personnel that are not involved in day-to-day activities of trading among persons and their owned entities. While such employees may have some knowledge of the entities' trading decisions, so long as they have no control or influence over those trading decisions, they present no need for the aggregation of positions.

**C. The Commission Should Provide For An Exemption Based on State Laws and Regulations.**

In the Notice, the Commission proposed to clarify the scope of the exemption to include circumstances where the sharing of information required to aggregate positions would create a reasonable risk of violation of federal law.<sup>18</sup> The Commission also proposed to extend this information sharing exemption to entities seeking relief based on a reasonable risk of violation of state law or regulations adopted thereunder.<sup>19</sup> The Commission sought comment on whether it should extend the exemption or alternatively adopt a case-by-case approach to granting exemptions under the petition process of Section 4a(a)(7) of the Commodity Exchange Act.<sup>20</sup> The Commission also inquired whether the proposed state law exemption should be limited to those laws that have a comparable provision at the federal level.<sup>21</sup>

Atmos is concerned that the currently-effective aggregation rules would require Atmos and its affiliated regulated utility operations to violate numerous state statutes and state commission policies. Accordingly, Atmos supports the Commission's proposal regarding the use of notice and opinion of counsel filings for entities to justify an exemption from the aggregation rule.<sup>22</sup> Gas utilities with corporate structures and operations that are split among state-regulated and independent market divisions within and across state lines will be able to present the

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<sup>18</sup> 77 Fed. Reg. at p. 31,771.

<sup>19</sup> *Id.* at p. 31,772.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See proposed §§ 151.7(h) and (i).

Commission with comprehensive examples of the various ways in which their relevant regulatory commissions and states preclude them from sharing information.

Atmos recognizes that the Commission remains concerned about the potential for evasion within the context of this exemption, particularly when the asserted regulatory impediment to the sharing of information arises from foreign, state, or local laws and/or regulations that the Commission does not directly administer.<sup>23</sup> However, these concerns must be balanced with the realities of long-standing state regulatory policies that serve to protect millions of Americans ratepayers. Accordingly, Atmos contends that the Commission should permit entities to make a showing, through the requisite opinion of counsel, that aggregation would present a reasonable risk of violation of state law or state regulations.

#### **IV. CONCLUSION**

Wherefore, for the reasons stated above, Atmos respectfully recommends that the Commission eliminate all rebuttable presumptions of control based on common ownership and permit persons with any ownership or equity interest in excess of ten percent to demonstrate a lack of effective control over the owned entity. Atmos also recommends that the Commission permit the sharing of lawyers, accountants, risk managers, compliance officers, and other personnel that are not involved in the day-to-day activities of trading among persons and their owned entities, notwithstanding the fact that such employees may have some knowledge of the entities' trading decisions. Further, Atmos supports the extension of the information-sharing exemption from aggregation of accounts to include circumstances where entities face a reasonable risk of violating state laws, as well as rules and regulations imposed by a state

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<sup>23</sup> See 77 Fed. Reg. at p. 31,771.

commission or other regulatory authority with jurisdiction, and that such exemption should not be limited to state laws that have a parallel in federal law.

Wherefore, for the reasons stated above, Atmos respectfully requests that the Commission consider these comments in this rulemaking.

Respectfully submitted,

/-s-/

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