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VIA ONLINE SUBMISSION AND E-MAIL

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RE: Request for Clarification and No-Action Relief Regarding Commission Application of the Forward Contract Exclusion to Transportation and Storage Agreements in Physical Commodities (RIN 3038-AD46)

The American Gas Association (“AGA”), American Petroleum Institute (“API”), the Independent Petroleum Association of America (“IPAA”), and the Natural Gas Supply Association and its members,¹ (collectively, “NGSA”) hereby request that the U.S. Commodity Futures Trading Commission (the “Commission”) provide clarification and no-action relief with respect to its application of the forward contract exclusion to transportation and storage agreements in natural gas and all other physical commodities under its Final Rule, *Further Definition of “Swap,” et al.*, 77 Fed. Reg. 48,208 (August 13, 2012) (the “Final Rule”).

¹NGSA’s members include, among others, the following companies and affiliates: Anadarko Petroleum Corporation, Anadarko Energy Services Company, BG Energy Merchants, LLC, BP Energy Co., Chevron Natural Gas, a division of Chevron U.S.A. Inc., ConocoPhillips Company, Devon Gas Service, L.P., ExxonMobil Gas & Power Marketing, a Division of Exxon Mobil Corporation, GDF Suez Gas NA Holdings, LLC, Marathon Oil Company, Shell Energy North America (US), L.P. and Shell US Trading Company, Southwestern Energy Company, Statoil Natural Gas LLC, and WPX Energy, Inc.

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The AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 71 million residential, commercial and industrial natural gas customers in the U.S., of which 92 percent – more than 65 million customers – receive their gas from AGA members. AGA is an advocate for local natural gas utility companies and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international gas companies and industry associates. Today, natural gas meets almost one-fourth of the United States' energy needs. Many gas utilities use a variety of financial tools, such as futures contracts traded on Commission-regulated exchanges and over-the-counter energy derivatives, to hedge and mitigate the commercial risks associated with providing natural gas service, in particular volatility in natural gas commodity costs. AGA members also participate in the physical natural gas market and contract for pipeline transportation, storage and asset management pipeline services; they are not financial entities. AGA members believe that the Commission must provide expedited clarification and no-action relief regarding the application of the forward contract exclusion to natural gas transportation and storage agreements, to avoid regulation of such agreements as swaps, which Congress and likely the Commission, never intended.

API is a national trade association that represents all segments of America's technology-driven oil and natural gas industry. Its more than 500 members – including

large integrated companies, exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms – provide most of the nation’s energy. The industry also supports 9.2 million U.S. jobs and 7.7 percent of the U.S. economy, delivers \$86 million a day in revenue to our government, and, since 2000, has invested over \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

IPAA represents the companies that drill 95 percent of America's onshore and offshore oil and natural gas wells. America’s independents produce 54 percent of American oil and produce 85 percent of American natural gas.

Established in 1965, NGSAs represent integrated and independent companies that produce and market approximately 40 percent of the natural gas consumed in the United States. NGSAs encourage the use of natural gas within a balanced national energy policy and promote the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers. NGSAs members are committed to compliance with the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Commission’s regulations implementing the Act, but believe that expedited clarification and no-action relief are required from the Commission regarding its application of the forward contract exclusion to transportation and storage agreements in physical commodities to avoid regulation of such agreements as swaps, which Congress and likely the Commission never intended.

REQUEST FOR CLARIFICATION AND NO-ACTION RELIEF

AGA, API, IPAA and NGSAs support the request for clarification and no-action relief filed by the Interstate Natural Gas Association of America and its members (“INGAA”) with the Commission on October 9, 2012 regarding application of the forward contract exclusion to natural gas pipeline and natural gas storage agreements. Moreover, AGA, API, IPAA and NGSAs believe that the clarification and relief requested by INGAA should be granted more generally with respect to storage and transportation contracts in addition to natural gas.

Requested Clarification and No-Action Relief

AGA, API, IPAA and NGSAs request that the Commission clarify that:

- (1) Agreements for the use of specific facilities for transportation or storage of physical commodities (*i.e.*, as distinct from sales or purchases of the commodities themselves), including agreements for transportation service on natural gas pipelines and the use of natural gas storage facilities, do not

have the characteristics of options and hence are not options subject to the swap definition; and

- (2) The paragraph on page 48,242 of the Final Rule beginning “However, in the alternative . . .”² (the “However Paragraph”) will be deleted or given no effect by the Commission in application of the forward contract exclusion to agreements for the use of specific facilities for transportation or storage of physical commodities.

AGA, API, IPAA and NGSa also request that the Commission issue immediate no-action relief stating that it will not regulate agreements for transportation service on natural gas pipelines or the use of natural gas storage facilities (along with all other agreements for the use of specific facilities for transportation or storage of any physical commodities) as swaps until it issues a final clarification, interpretation, rule revision, or response to the comments of AGA, API, IPAA and NGSa and others regarding this aspect of the Final Rule.

Because the Final Rule and several regulatory requirements dependent on the definition of the term “swap” in the Final Rule take effect on October 12, 2012, AGA, API, IPAA and NGSa request that the Commission issue the requested clarification and no-action relief before such date or as soon as reasonably possible. Importantly, AGA, API, IPAA and NGSa and other market participants in physical commodity markets had no notice that the Commission would provide the specific guidance it did concerning transportation and storage agreements in the However Paragraph. Therefore, good cause exists to provide expedited clarification and no-action relief.

Reasons for the Requested Clarification and Relief

AGA, API, IPAA and NGSa believe that Congress never intended for natural gas transportation and storage contracts, or transportation or storage contracts in other physical commodities, to be regulated as swaps and that the Commission did not intend to regulate them as such. Natural gas transportation and storage contracts do not resemble and have never been considered options, and the Commission has not identified transportation or storage contracts in other physical commodities that resemble or are considered options.

Transportation and storage contracts are significantly different from options and do not fit the Commission’s historic description of options. The Commission has identified that

² “However, in the alternative, if the right to use the specified facility is only obtained via the payment of a demand charge or reservation fee, and the exercise of the right (or use of the specified facility or part thereof) entails the further payment of actual storage fees, usage fees, rents, or other analogous service charges not included in the demand charge or reservation fee, such agreement, contract or transaction is a commodity option subject to the swap definition.” Final Rule at 48242.

[A]n option is a limited risk instrument. That is, the option purchaser is not liable for payment resulting from any adverse price movement of the commodity underlying the option. Rather, the option purchaser will benefit from a favorable price move and will not be liable for any other losses beyond the premium or other payment that the purchaser pays for the option.³

By contrast, the fees for natural gas transportation and storage are not designed to shift economic risk to the pipeline or storage facility owner or provide a loss-limiting instrument to the customer. They are simply reasonable economic means to pay for the fundamental service of building and maintaining infrastructure and providing for its use so that physical product can be moved and stored for commercial purposes according to demand levels.

The reservation fees under such natural gas transportation and storage contracts compensate the pipeline or storage owner for its investment and costs in making the facility available, in exchange for granting a shipper the right to use the facility for transportation or storage up to the volume specified. Generally speaking, under a Federal Energy Regulatory Commission-approved tariff, a reservation fee is designed to recover the owner's fixed costs with respect to a facility and is paid monthly over the term of a contract. The usage fees under transportation and storage contracts pay for the actual use of the facilities and are generally designed to cover the variable costs of the transportation or storage service. This two-part fee is a reasonable economic means to pay for the different components of the service, availability and use, provided under both transportation and storage contracts, and such fee structure should not be the basis for characterization of such contracts as options.

Option contracts are significantly different from such transportation and storage contracts. Option holders pay a premium that gives them the right to buy or sell the subject commodity some time in the future at a fixed price (the "strike price"), regardless of intervening changes in market price. The holder pays the option writer a "premium" to accept the resulting price risk. If the market price has moved in a direction favorable to the option holder with respect to the strike price, *i.e.* is "in the money," the holder will exercise the option to buy or sell at the strike price, profiting based on the difference between the market price and strike price. Transportation and storage contracts in natural gas and other physical commodity industries do not bear these characteristics and thus should not be considered "options."

In addition, AGA, API, IPAA and NGSa do not believe it is appropriate to treat the use or right to use specific transportation and storage facilities as "commodities."

³ *Characteristics Distinguishing Cash and Forward Contracts and "Trade" Options*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) P 22,718 (Sept. 30, 1985) (emphasis added) ("*1985 Interpretative Statement*").

Commodities are understood to be goods, or perhaps services, that are interchangeable and non-distinct. Natural gas transportation and storage contracts, by contrast, are contracts for services with respect to specific facilities in specific locations that are not interchangeable with other facilities in other locations. Therefore, contracts for the use of such facilities should not be treated as commodity options.

CONCLUSION

For these reasons, AGA, API, IPAA and NGSA support the request for clarification and no-action relief by INGAA and, further, requests that such clarification and no-action relief be granted more generally to transportation and storage contracts in all physical commodities. AGA, API, IPAA and NGSA request that this clarification and relief be granted in an expedited manner on, prior to, or effective as of the October 12, 2012 compliance date of many of the regulatory requirements affected. If we can provide any additional information, please do not hesitate to contact us.

Respectfully submitted,

American Gas Association
American Petroleum Institute
Independent Petroleum Association of America
Natural Gas Supply Association