

October 12, 2012



Via Electronic Submission

Stacy Yochum, Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Comments of Avista Corporation on Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (RIN 3235–AK65)

Dear Ms. Yochum:

Pursuant to the Commodity Future Trading Commission and Security Exchange Commission’s (together, the “Commissions”) request for comment on an interpretation on the Commission’s Joint final rule on Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (“Final Rule”),¹ Avista Corporation (“Avista”) respectfully submits these comments regarding the seven-part test enumerated in the Final Rule for embedded volumetric options, and the Commissions’ interpretation concerning certain physical commercial agreements, contracts or transactions.

Avista supports the comments of Edison Electric Institute (“EEI”) also submitted on October 12, 2012, in response to the Final Rule and adds the following additional comments. Specifically, Avista concurs with EEI’s comments that:

- Contracts with embedded volumetric optionality should be subject to the same three-factor test as contracts with embedded options as the predominant feature is actual delivery;
- In the alternative, contracts with embedded volumetric optionality should be considered forward contracts if they meet the first three elements of the seven-part test for contracts with embedded volumetric options. The remaining four elements and at a minimum the seventh factor of the test should be eliminated;
- If the Commissions do not apply the three-factor test for embedded option to contracts with embedded volumetric optionality, and eliminate the remaining four elements of the seven-factor test, the seven-factor test should be revised as proposed by EEI; and
- The Commissions should withdraw its interpretation regarding certain physical commercial agreements contracts or transactions. These contracts provide essential

¹ *Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 48208 (Aug. 13, 2012).

services to facilitate the physical delivery of commodities, which is the most basic element of transactions that Congress intended to be exempt from the regulatory framework established by the Dodd-Frank Act for swaps.

Avista is an investor owned utility that provides electric distribution and transmission in parts of eastern Washington and northern Idaho and gas distribution service in parts of Oregon, Washington, and Idaho. Avista supplies retail electric service to 360,000 customers and retail gas service to 321,000. Avista also engages in wholesale purchases and sales of electricity and natural gas as an integral part of energy resources management related to Avista's load-serving obligation.

Avista supports EEI's requests that, with regard to contracts with embedded volumetric optionality, that the Commissions apply the same three-factor test that is applied to contracts with embedded options, as the predominant feature is actual delivery, and that the Commissions delete the remaining four factors as proposed by EEI. In the alternative, factors four through seven of the seven-factor test should be revised. As noted by EEI, factors four through seven in the Final Rule serve no analytical purpose, contain redundancy, and have the potential of creating confusion. Such potential confusion could create substantial unintended consequences as entities that must comply attempt to craft policies and procedures to comply with the Commissions' rules. For example, to the extent that rules are ambiguous or confusing, entities charged with complying with such rules may adopt overly conservative policies and procedures to ensure they are in compliance. Such overly conservative policies and procedures will likely add substantial undue costs while at the same time restricting liquidity in the market.

In addition to supporting EEI's requests, Avista requests clarification that certain electric and gas contracts entered into for delivery of physical commodities, but that contain certain variable volume or variable price components, are forward contracts and are not swaps. Included in this request is the need for the Commissions to define the characteristics of "optionality" as used in the guidance previously provided.

As an investor-owned utility operating in the Pacific Northwest, Avista and other utilities in the region, including Special Entity utilities, rely on access to long-term power supply contracts for physical power from generating resources such as hydroelectric facilities. Often, the volumes in these contracts are variable as they are controlled in part or in whole by entities outside of the contract (and in total are not controlled by the purchaser or seller).² The application of the current seven-part test to prove that there is no volumetric optionality is subject to interpretation by the entity applying the seven-part test and, therefore, risk that the entity will incorrectly interpret and apply the test. In order to avoid confusion, Avista respectfully seeks clarification that these contracts are forward contracts and further requests clarification that such contracts are not properly considered as having embedded optionality. Such clarification is particularly important because utilities that are classified as Special Entities are often parties to these contracts. If the Commission does not clarify that these contracts are forward contracts, or are not to be considered as having volumetric "optionality", and thus not

² With regard to such contracts for physical power from hydroelectric generation facilities, volumes are dictated by multiple factors outside of the control of the parties to the contract. For example, facility maintenance, Corp of Engineers control of river flow for fish passage, flood control, Bonneville Power Administration (and others, including Canadian entities) control over the discharge from upstream projects, and weather all impact the volume of water that enters the Columbia River system and thus the generation available to the purchasers.

swaps, Avista and other utilities in the Pacific Northwest will need to include such contracts in their de minimis calculations. Also, because the Special Entity de minimis threshold is \$25 million, absent the requested clarification, Avista may not be able to enter into such contracts with Special Entities.³

In addition to contracts for physical power discussed above, Avista routinely enters into long-term contracts with various pipeline companies as a shipper to deliver natural gas to Avista's thermal plants for power generation and to city gates for delivery to Avista's retail customers. These contracts exist solely to deliver physical commodity (natural gas), but include a variable price component under Federal Energy Regulatory Commission tariffs. Accordingly, Avista requests that the Commissions provide clarification regarding volumetric pricing in pipeline transportation and storage contracts.

Finally, Avista also supports the comments of ConocoPhillips regarding Forwards with Embedded Volumetric Options, submitted on August 23, 2012. Specifically Avista concurs with ConocoPhillips comments that:

In Addition to concerns about the seven-part test for embedded options, we would like to highlight our concerns with the portion of the Final Rules that deals with "*Certain Physical Commercial Agreements, Contracts or Transactions*". This section of the Final Rules endeavors to address the regulatory treatment of agreements that provide for the usage of facilities such as pipelines, storage facilities or power stations. We believe that the statement in this section (set forth below) overly expands the scope of the definition of commodity option and should be clarified or removed. (Internal footnote omitted.)

Avista supports appropriate regulation as a necessary element of well-functioning over-the-counter derivative markets and we appreciate the effort the Commissions are making to bring greater transparency and stability to the global financial markets. We appreciate the opportunity to provide comments on these issues.

Respectfully submitted,

/s/Patrice K. Gorton

Patrice K. Gorton

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³ On July 23, 2012, Avista submitted comments in which it asserted that the Commissions' rule setting the de minimis threshold for Special Entities at \$25 million. Avista asserted that, unless amended, "[t]he special entity \$25 million de minimis threshold will therefore reduce the number of counterparties available to Avista and other regional utilities for swap transactions. This could lead to a reduction of the number of potential counterparties in the regional market and less competitive pricing that could impede the ability to hedge, manage, and mitigate commercial risks related to a load-serving obligation." Accordingly, Avista requested that the Commissions amend the rule to exclude "'utility operations related swaps' to which the counterparty is a 'utility special entity'."