

**VIA ELECTRONIC SUBMISSION**

Stacey Yochum  
Acting Secretary  
Commodity Futures Trading Commission  
1155 21st Street, N.W.  
Washington, D.C. 20581

October 12, 2012

**RE: Comments of Atmos Energy Holdings, Inc. on Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (RIN 3038-AD46)**

Atmos Energy Holdings, Inc. (“Atmos”) hereby submits the following comments to the U.S. Commodity Futures Trading Commission (the “Commission”) with respect to its definition of the forward contract exclusion as it applies to transportation and storage agreements for natural gas under its Final Rule, Further Definition of “Swap,” et al., 77 Fed. Reg. 48,208 (August 13, 2012) (the “Final Rule”).

All pleadings, correspondence and other communications filed or issued in this proceeding should be directed to the following:

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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 various 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. Atmos, through 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.

## **COMMENTS**

Atmos supports 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. Atmos shares the concerns articulated by INGAA and asks that the Commission consider INGAA’s request for clarification and no-action relief.

### **I. Background**

On August 13, the Commission published a joint final rule with the Securities and Exchange Commission further defining the terms “swap,” “security-based swap,” and

“security-based swap agreement.”<sup>1</sup> The rule provided interpretive guidance on whether certain transactions would be considered swaps. In particular, the rule provided guidance on how the Commission will apply a forward contract exclusion from swap regulations for certain commodity options embedded in forward contracts. The rule sets forth a seven-factor test to determine whether a particular transaction is a commodity option embedded in a forward contract, and thus excluded from regulation because it is not a swap.<sup>2</sup>

The Commission also provided swap interpretation regarding certain physical commercial agreements for the supply and consumption of energy that provide flexibility, including transportation agreements on natural gas pipelines and natural gas storage agreements.<sup>3</sup> The Commission concluded that these agreements would not be an option if the following three elements were satisfied: (1) the subject of the agreement is usage of a specified facility or part thereof rather than the purchase or sale of the commodity that is to be created, transported, processed or stored using the specified facility; (2) the agreement grants the buyer the exclusive use of the specified facility or part thereof during its term, and provides for an unconditional obligation on the part of the seller to grant the buyer the exclusive use of the specified facility or part thereof; and (3) the payment for the use of the specified facility or part thereof represents a payment for its use rather than the option to use it.<sup>4</sup> The Commission noted in particular that it would not consider actions such as scheduling gas transportation or injecting gas into storage to be

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<sup>1</sup> 77 Fed. Reg. 48,208 (Aug. 13, 2012).

<sup>2</sup> *Id.* at 48,238.

<sup>3</sup> *Id.* at p. 48,242.

<sup>4</sup> *Id.*

exercising an option if all three of these elements were met.<sup>5</sup> The Commission added, however, that “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 or reservation fee, such agreement, contract or transaction is a commodity option subject to the swap definition.”<sup>6</sup>

The Commission stated that its interpretation regarding forward contracts with volumetric options was an interpretation of the Commission that may be relied upon by market participants.<sup>7</sup> The Commission believed that it would benefit from further public comment on all aspects of its interpretation.<sup>8</sup> Accordingly, Atmos submits the following Comments:

## **II. Discussion**

### **a. Gas Marketers Should be Commercial Parties**

Under the sixth factor of the seven-factor test,<sup>9</sup> both the seller and the buyer in the transaction must be “commercial parties.”<sup>10</sup> In the Final Rule, the Commission interpreted the term “commercial” in the same manner as under the Brent Interpretation.<sup>11</sup>

The Commission clarified that under the Brent Interpretation a market participant would

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<sup>5</sup> *Id.*

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

<sup>7</sup> *Id.* at p. 48,241.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at p. 48,242.

<sup>10</sup> 77 Fed. Reg. at p. 48,238.

<sup>11</sup> *See id.* at p. 48,238 n. 338, referencing pp. 48,228-29, and *Statutory Interpretation Concerning Forward Transactions*, 55 Fed. Reg. 39,188 (Sep. 25, 1990), *Comm. Fut. L. Rep. (CCH)* ¶ 24,925 (Sept. 25, 1990) (“*Brent Interpretation*”).

be a “commercial” party if it regularly makes or takes delivery of a commodity in the ordinary course of their business.<sup>12</sup>

Atmos, as well as other gas marketers, routinely buys and sells natural gas. Atmos believes that it would be unnecessarily limiting and potentially disruptive to the market to restrict the types of entities that gas utilities and other market participants can contract with for physical supplies by only allowing certain entities to be considered “commercial parties” for purposes of the seven-factor test. In recognition of the current structure of today’s natural gas market and the numerous entities that are counterparties for natural gas purchase and sales transactions, Atmos contends that the term “commercial” should not be viewed so narrowly as to eliminate marketers and asset managers as “commercial parties” for purposes of the seven-factor test if they do not own production or distribution assets. For a variety of regulatory reasons, gas marketers are often organized as legally distinct entities that own no production or distribution assets.

FERC granted blanket authorization to all persons that are not interstate pipelines to make sales for resale of natural gas in interstate commerce at negotiated or market-based rates.<sup>13</sup> Atmos, pursuant to this FERC authorization, regularly makes and takes title to natural gas in the ordinary course of its gas marketing and asset management business. The Commission should not now also require marketers such as Atmos to own production or distribution assets in order to qualify as “commercial parties” so that their transactions with volumetric optionality may be exempt from swap regulation under the seven-factor test.

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<sup>12</sup> 77 Fed. Reg. at p. 48,229.

<sup>13</sup> See *Regulations Governing Blanket Marketer Sales Certificates*, Order No. 547, 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 30,957 (1992) (codified at 18 C.F.R. § 284.402).

**b. The Commission should clarify the seventh factor in its seven factor test**

The seventh factor of the seven-factor test requires that the exercise or non-exercise of an option must be based primarily on physical factors or regulatory requirements that are outside of the control of the parties.<sup>14</sup> The Commission explained that the predominant basis for not exercising the option must be that demand for the commodity that the optionality was intended to satisfy never materialized or materialized at a level below that for which the parties contracted due to physical factors or regulatory requirements outside the parties' control.<sup>15</sup> The Commission added that this "does not mean that absolutely all factors involved in the decision to exercise an option must be beyond the parties' control, but rather the decision must be predominantly driven by factors affecting supply and demand that are beyond a party's control."<sup>16</sup>

The decision to exercise the volumetric optionality in any particular natural gas peaking supply transaction for any given day cannot be viewed in isolation. Since these transactions are part of a portfolio of assets all designed to serve customer demand, gas marketers have choices and thus make decisions regarding which assets to use under the particular circumstances at hand. On any given day, therefore, a gas marketer will use a variety of supply assets in its portfolio to meet customer demand. In addition, the gas marketer may purchase gas on the spot market and have the volumes delivered to its customers' receipt and delivery points. Peaking supply transactions with volumetric optionality provide added flexibility to meet customer demand by making gas supplies available up to a maximum volume for a specific period of time.

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<sup>14</sup> *Id.* at p. 48,238.

<sup>15</sup> *Id.* at p. 48,238 n. 341.

<sup>16</sup> *Id.*

Atmos, therefore, contends that transactions with volumetric flexibility would satisfy the seventh factor, *i.e.*, the exercise of the volumetric optionality would be based primarily on factors outside the parties' control (to meet customer demand), even, in the case of gas supply peaking transactions where the gas marketer can choose which assets or transactions to use to meet customer demand. The fact that a gas marketer can choose which assets to use to serve customer demand does not undermine the overall nature of these transactions as needed to meet customer demand – customer demand constituting a factor outside the control of the marketer and the gas supplier and/or gas transporter. Accordingly, Atmos respectfully requests that the Commission clarify that a transaction with volumetric flexibility would satisfy the seventh factor notwithstanding the fact that the parties may have some control over whether to exercise the volumetric optionality if the overall nature of the transaction is a forward contract and the need for the optionality is driven primarily by factors outside the parties' control.

**c. The Commission Should Clarify That Gas Transportation And Storage Agreements Are Not Swaps.**

Under FERC regulations, natural gas firm transportation and storage contracts typically have both a reservation fee and a usage fee. State regulatory commission's also use this two-part rate structure. The purpose of the two-part rate is not to give parties an option that establishes legal rights to use a specified transportation or storage facility as of the time usage fees are paid, but rather to compensate the transportation or storage provider for the costs of providing the transportation or storage service.

When a shipper pays a reservation charge to a transportation or storage provider, that shipper is not purchasing an "option" to use that transportation or storage service at

some future date. The Shipper is paying the regulated tariff rate for firm transportation or storage service. The payment of these reservation charges is the only way for a shipper to contract for firm service on a pipeline or storage facility.

### **III. Conclusion**

Atmos appreciates the opportunity to provide comments on these aspects of the Final Rule. Wherefore, for the reasons stated above, Atmos respectfully requests that the Commission consider these comments.

Respectfully submitted,

/-s-/

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