October 12, 2012

VIA ELECTRONIC SUBMISSION

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

Re: Comments on Joint Final Rule and Interpretations on Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (RIN No. 3038-AD46)

Dear Secretary Yochum:

The Interstate Natural Gas Association of America and its members (collectively, "INGAA") submit these comments in response to the Commission's request for comments relating to certain interpretive guidance in the Commission's Swap Definition Final Rule.[1] INGAA offers these comments on the Commission's interpretation in subsection II.B.2.(b)(iii) ("Certain Physical Commercial Agreements, Contracts, or Transactions") of the Swap Definition Final Rule.[2] INGAA respectfully requests that the Commission, and to the extent necessary the Securities and Exchange Commission ("SEC"),[3] confirm that the Commission will follow the standards adopted in the *1985 Interpretative Statement* concerning the characteristics of an option in determining whether a transaction will be regulated as an option subject to the swap definition.[4] Consistent with the *1985 Interpretative Statement*, INGAA requests that the

---

[1] *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule*, 77 Fed. Reg. 48,208 (Aug. 13, 2012) (herein, "Swap Definition Final Rule").

[2] Subsection II.B.2.(b)(iii), at pages 48,242-43 of the Swap Definition Final Rule, provides guidance with respect to "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" (hereafter, "Facility Services Agreement Guidance").

[3] INGAA's comments relate only to those aspects of the Final Swap Definition that interpret the definition of "swap" and the exclusions therefrom in respect of commodities and services, not securities. These comments do not relate to provisions of the Final Swap Definition that apply in any way to "security-based swaps," "security-based swap agreements," "mixed swaps," or "security-based swap agreement recordkeeping." Accordingly, INGAA addresses its comments to the Commission, although a copy is being provided to the SEC. Although INGAA separately has sought clarification and/or no-action relief from the Commission with respect to certain issues addressed in this letter, INGAA seeks Commission action, as opposed to action by a division of the Commission, as needed to provide for regulatory certainty.

[4] *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*"). The *1985 Interpretative Statement* was issued by the Commission's General Counsel, but "has been consistently cited by both the Commission and courts as persuasive authority on the topics that it

Commission take the following specific actions concerning its Facility Services Agreement Guidance: (1) remove in its entirety or otherwise strike the three-part test on page 48,242 of the Swap Definition Final Rule (the "Three-Part Test"); (2) remove in its entirety or otherwise strike the paragraph on page 48,242 of the Swap Definition Final Rule referring to a "demand charge or reservation fee" and "usage fees" (the "However Paragraph"); and (3) as explained below, clarify that agreements for service on natural gas pipeline and storage facilities that do not have the characteristics of an option under the *1985 Interpretative Statement* and related precedent are not options subject to the swap definition and that the mere existence of a two-part fee structure is not determinative of whether a particular agreement is an option subject to the swap definition.

As explained below, the Commission's Facility Services Agreement Guidance expressly addresses natural gas transportation and storage agreements and could be applied, contrary to Commission precedent, to cause such agreements to be regulated as commodity options, despite the fact that these agreements do not contain any of the established characteristics of options and are not options under any recognized standard. In fact, natural gas transportation and storage agreements are structured to require service purchasers to carry the full risk of loss of their investments in the services to be rendered by the service provider. To the extent that the Commission intended to provide useful guidance consistent with its obligations under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") to further define the term "swap" consistent with the Commodity Exchange Act ("CEA") definition of "swap," such guidance with respect to the characterization of certain types of facility services agreements as options is patently inconsistent with established Commission and judicial precedent. While INGAA appreciates the efforts of the Commission in the Swap Definition Final Rule to provide guidance with respect to facility service agreements for "use" of a facility, INGAA respectfully urges the Commission to adopt the recommendations set forth in these comments.

I. The Commission's Facility Services Agreement Guidance

The Commission's Facility Services Agreement Guidance sets forth the Commission's 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."[5] The Commission's Three-Part Test purports to guide the industry with respect to how the Commission will interpret such agreements as options subject to the swap definition:

> The CFTC will interpret an agreement, contract or transaction not to be an option if the following three elements are satisfied: (1) The subject of the agreement, contract or

---

addresses." *In the Matter of Cargill*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) P 28,425 n.28 (Nov. 22, 2000) (citing authority), *aff'd mem.* Comm. Fut. L. Rep. (CCH) P 29,633 (Nov. 25, 2003). In determining whether an agreement is an option, the Commission has "carefully examined 'the economic reality of the transaction, not its name.'" *1985 Interpretative Statement* at P 22,718.

[5] 77 Fed. Reg. at 48,242.

> transaction 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, contract or transaction 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.[6]

The Commission then provides, in its However Paragraph, additional guidance with respect to facility services agreements that employ two payments consisting of a "demand" or "reservation" charge and "usage fees, rents, or other analogous services charges not included in the demand charge or reservation fee." The "However Paragraph" reads as follows:

> 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.[7]

II. Status of INGAA and INGAA's October 9, 2012 Letter for Clarification and No-Action

INGAA is a trade association and it, together with its 25 members, represents the vast majority of the interstate natural gas pipeline companies in the U.S. and comparable companies in Canada. INGAA's members operate approximately 200,000 miles of pipelines and serve as an indispensable transportation link between natural gas producers and consumers.[8]

On October 9, 2012, INGAA filed with the Commission a request for clarification and/or no-action relief ("October 9 Letter") related to the treatment of natural gas transportation and storage service agreements under the Facility Services Agreement Guidance, as written. In the October 9 Letter, INGAA requested clarification that natural gas transportation and storage agreements would not be treated as options subject to the swap definition, and also that the

---

6 *Id.*

7 *Id.*

8 INGAA's members are Alliance Pipeline Ltd., Boardwalk Pipelines, Carolina Gas Transmission Corporation, CenterPoint Energy, Cheniere Energy, Inc., Dominion Transmission, Inc., DTE Energy, Enbridge Energy Company, Inc., Energy Transfer, EQT Corporation, Iroquois Pipeline Operating Company, Kinder Morgan, National Fuel Gas Supply Corporation, National Grid, New Jersey Resources, NiSource Gas Transmission & Storage, ONEOK, Inc., Pacific Gas & Electric, Questar Pipeline Company, Sempra Pipelines and Storage, Southern Star Central Gas Pipeline, Inc., Spectra Energy Corp, TransCanada Corporation, WBI Energy Transmission, Inc., and Williams Gas Pipeline Company, LLC.

Commission would not look merely at whether an agreement has a two-part fee structure to determine whether an agreement is an option. A copy of the October 9 Letter is attached to these comments and incorporated herein.

III. INGAA's Recommendations

A. The Commission Should Remove the Three-Part Test in its Entirety

Under the CEA, as amended by the Dodd-Frank Act, the term "swap" is defined to include a "put, call, cap, floor, collar or similar option of any kind."[9] It therefore is clear that Congress intended that agreements considered to be options subject to the swap definition must, in fact, have the characteristics of options: namely characteristics, such as premium-based limited-risk elements, that distinguish agreements such as puts, calls, and "similar" elements from agreements that unconditionally bind one party to transfer goods or provide services and also unconditionally bind the other party to pay the full purchase price for those goods or services. The CEA, as amended by the Dodd-Frank Act, does not give the Commission authority to regulate as options subject to the swap definition, physical commercial agreements, including those for the supply and consumption of physical energy that have deliverability "flexibility" but that do not have the characteristics of, and are not known in the trade as, an option.

The *1985 Interpretative Statement* provides a straightforward test for determining whether an agreement has the characteristics of, and should be treated as, an option. As explained in *In the Matter of Cargill*:

> The *1985 Interpretative Statement* identifies three criteria indicative of an option. First, the instrument gives the buyer the right to take or make delivery of the commodity but does not obligate him to do so. Second, the buyer's losses are limited to a premium paid as consideration for the option seller's performance. Third, the instrument is purchased by offering a premium as opposed to a down payment on the eventual delivery price.[10]

The Commission should clarify that the industry should use this test in determining whether natural gas transportation and storage agreements are options subject to the statutory swap definition. Thus, in examining the "economic reality" of natural gas transportation and storage agreements, the test for whether an agreement is an option is whether (1) the instrument contains the right, but not the obligation, to acquire the subject of the agreement (in this case, the transportation or storage services), (2) the buyer's losses are limited to a premium paid as consideration for the option seller's performance, and (3) the instrument is purchased by offering a premium, as opposed to a down payment, on the eventual delivery price (in this case, the price for the transportation and storage services).[11] The Commission should use this longstanding test

---

[9] Dodd-Frank Act § 721(a)(2)(47)(A)(i), 7 U.S.C. § 1a (47)(A)(i) (2011).

[10] *In the Matter of Cargill* at P 28,425 (citing *1985 Interpretative Statement*).

[11] *Id*.

in determining whether natural gas transportation and storage agreements are options subject to the statutory swap definition.

In light of the statutory swap definition, and because there is established precedent setting forth the characteristics of options, INGAA submits that the Three-Part Test is not needed, is unnecessarily confusing, and should be removed in its entirety. First and foremost, natural gas transportation and storage agreements clearly are not options under longstanding Commission precedent. The reason that such agreements have never been considered as options historically is not due to the fact that they would pass the Three-Part Test, but simply because they do not contain any of the characteristics that the Commission has relied upon to define options subject to its jurisdiction since at least 1985. As stated in *In the Matter of Cargill*, an option establishes a right, but not an obligation to acquire the item specified of the agreement, "the buyer's losses are limited to a premium paid as consideration for the option seller's performance," and the instrument "is purchased by offering a premium as opposed to a down payment on the eventual delivery price."[12] As explained in detail in INGAA's October 9 Letter, natural gas transportation and storage services do not contain premiums, the buyer's losses are not limited to the premium paid, and the obligations of both service providers and service purchasers become legally binding at the time the agreements are entered into by the parties. For the sake of brevity, INGAA will not repeat the arguments in the October 9 Letter that establish that natural gas transportation and storage agreements are not options under the Commission's standards, but rather incorporates the October 9 Letter herein.

Furthermore, the first two prongs of the Three-Part Test limit the test's application to certain types of transactions, namely agreements for the use of a facility and not for the underlying commodity (prong 1), and agreements providing for the exclusive use of a facility or part thereof (prong 2). These first two prongs limit the applicability of the test without any explanation as to why the Commission believes such factors are needed to determine that an agreement is not an option. Nor is there any explanation as to how such factors are to be applied in the context of energy transportation and storage agreements. INGAA questions the purpose of these first two prongs when there is clear Commission and judicial precedent that, to be an option, a transaction *must* have the characteristics of an option. In fact, various agreements, regardless of whether they fit within the first two prongs of the Three-Part Test, should not be treated as options if they do not have the distinctive characteristics of options. INGAA thus questions the utility of providing such limited and unsupported guidance.

Similarly, the third prong of the Three-Part Test, that "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,"[13] does not appear to provide any guidance beyond what already is established law. If the payment under an agreement is for the services rendered or to be rendered, and is not a premium-type payment for the right, but not the obligation, to acquire the services, the instrument is not an

---

[12] *Id*.

[13] 77 Fed. Reg. at 48,242 (emphasis added).

option. This third prong thus must be read merely to affirm established precedent under the *1985 Interpretative Statement*. The Commission's explanation immediately following the Three-Part Test re-affirms this point. Explaining the Three-Part Test, the Commission stated as follows: "In such agreements, contracts and transactions, while there is optionality as to whether the person uses the specified facility, the person's right to do so is legally established, does not depend upon any further exercise of an option and merely represents a decision to use that for which the lessor already has paid."[14] Thus, the Commission reasoned, "[i]n this context, [it] would not consider actions such as scheduling . . . gas transportation or injection of gas into storage to be exercising an option if all three elements of the interpretation above are satisfied."[15] INGAA agrees that if an agreement establishes the legal right to use something for which the lessor has paid, and the use does not depend upon the further exercise of an option, it is not an option. However, the agreement is not an option because the agreement does not meet the definition of the term "option" in the CEA, as that term is interpreted by clear, established precedent, not because the agreement passes or fails the Three-Part Test. Likewise, INGAA agrees that scheduling gas to be transported on a facility, where the lessor already has contracted to pay for the service, is not exercising an option, regardless of whether the Three-Part Test has been met.[16] Such agreements are not options because they do not bear any of the characteristics of options.

In short, it is not clear how the Commission intends to apply the Three-Part Test, or why, and if so, how, it differs from established precedent or how the Three-Part Test will be harmonized with the statutory definition of the term "option" and existing precedent. INGAA submits that the Commission must act within the bounds of the statutory definition of swap and option, and the established characteristics of options as defined by the Commission and the courts. Furthermore, under the Administrative Procedure Act ("APA"), the Commission may not change its prior policy without providing adequate notice and opportunity for comment on the issue under consideration and supplying a reasoned analysis for departing from its prior policy.[17] In this case, the definition of option is established by statute, and the characteristics defining options have been established by the Commission and the courts. Under the circumstances, the simplest way to remedy the unnecessary and unduly confusing Three-Part Test is to remove it in its entirety.

If the Commission nevertheless decides to keep in place the Three-Part Test, it should, at a minimum, state affirmatively that the Three-Part Test is not intended to override the *1985 Interpretative Statement* and is only intended to provide *additional* guidance that is consistent with the *1985 Interpretative Statement*. According to the Swap Definition Final Rule, the Three-

---

[14] *Id.*

[15] *Id.*

[16] To use the service it has reserved, a pipeline or storage customer need only nominate gas to be scheduled for transportation on the pipeline or for injection/withdrawal from storage, in accordance with industry protocols, and in no manner does that change the contractual relationship between the service provider and its customer or relate to any form of a premium payment.

[17] 5 U.S.C. § 553 (2011).

Part Test may only be used to determine that a service agreement is *not* a swap or option. If a service agreement does not satisfy the Three-Part Test, it will not, without further analysis under the statute and the *1985 Interpretative Statement*, be considered a swap or option. In order to provide regulatory certainty to the industry, if the Commission retains the Three-Part Test, the Commission should clarify how the test will be applied in conjunction with the statutory definition of swap and option and the *1985 Interpretative Statement*.

While INGAA believes that it is simpler to apply the standards established in the *1985 Interpretative Statement* and subsequent cases, if the Commission seeks to provide any guidance concerning facility services agreements at all, its guidance should be supplemental, and conform to the standards of the *1985 Interpretative Statement*. This approach is consistent with the guidance given with respect to forward contracts in the Swap Definition Final Rule. In discussing its guidance on whether a contract is a forward contract excluded from the swap definition, the Commission re-affirms its precedent that a multi-factor, "facts and circumstances" test should be applied.[18] The Commission has consistently assessed the facts and circumstances and "economic reality" of an agreement when determining whether an agreement is an option, rather than applying a strict three-part or bright-line test focused on the structure of the agreement or its fee structure.[19] Thus, in this case, regardless of whether a particular agreement satisfies the Three-Part Test, if, under the facts and circumstances, it does not have the characteristics of an option, it should not be regulated as an option subject to the swap definition.

---

[18] 77 Fed. Reg. at 48,237, n.333 ("This facts and circumstances approach to determining whether a particular embedded option takes a transaction out of the forward contract exclusion for nonfinancial commodities is consistent with the CFTC's historical approach to determining whether a particular embedded option takes a transaction out of the forward contract exclusion from the definition of the term 'future delivery' in the CEA. *See id*. at *5 ('As we have held since *Stovall*, the nature of a contract involves a multi-factor analysis * * *.')"); *see also id*. at 48,228, n.214 (quoting *In re Wright*, CFTC Docket No. 97–02, 2010 WL 4388247: "[i]n distinguishing futures from forwards, the [CFTC] and the courts have assessed the transaction as a whole with a critical eye toward its underlying purpose. Such an assessment entails a review of the overall effect of the transaction as well as a determination as to what the parties intended.").

[19] In *In re Wright*, the CFTC affirmatively rejected the Division of Enforcement's request for a bright-line test for hedge-to-arrive contracts, a type of forward contract. *See Wright* at *10 ("In assessing the parties' expectations or intent regarding delivery, the Commission applies a 'facts and circumstances' test rather than a bright-line test focused on the contract's terms"); *id*. at *18, n.13 ("The Division argues that a bright-line test based on the terms of the contract is necessary to avoid legal uncertainty, i.e., to avoid the prospect of 'a single contract starting out as a forward contract, but winding up as a futures contract if the signer changed his or her mind and cancelled the contract,' or the same contract being a future for one signer and a forward for another, depending on how each intends to use it. *Id*. The Division argues that this situation 'would create legal uncertainty throughout the life of the contract as to what regulatory framework will apply at any given moment.' . . . We acknowledge the importance of avoiding legal uncertainty. The Division's bright-line test, however, is an approach we affirmatively rejected in our other cases. Our views of the appropriateness of a multi-factor analysis remain unchanged. The Division's approach, strictly applied, potentially may undermine the usefulness of HTA contracts to the agricultural industry and may hamper innovation.").

B. The Commission Should Remove the However Paragraph in its Entirety; Clarify that Natural Gas Transportation and Storage Agreements Are Not Options; and Clarify that the Mere Existence of a Two-Part Fee Structure Is Not Determinative of Whether an Agreement Is an Option

As explained in detail in the October 9 Letter, fees for natural gas transportation and storage services represent nothing more than compensation solely for the services being rendered by the pipeline or storage company. Often natural gas transportation and storage fees have two components: a reservation fee and a usage fee. The fees compensate the pipeline or storage operator for services rendered and to establish the customer's right to use the facility. No part of these fees provides any type of risk premium (i.e., payment for an independent option to contract for or otherwise obtain service at a future date). Regardless of the fee structure, under natural gas transportation and storage agreements, the obligations of both service providers and service purchasers become legally binding at the time the agreements are entered into by the parties.

As noted above, INGAA will not repeat the arguments in the October 9 Letter that natural gas transportation and storage agreements are not options under the Commission's standards, but rather incorporates its arguments herein. INGAA submits that the best way to remedy the inconsistencies between the However Paragraph and historical Commission precedent concerning options is to remove the However Paragraph in its entirety, as noted in note 31 of the October 9 Letter. The However Paragraph, as written, is unnecessary and conflicts with the statutory definition of a swap and an option, the established characteristics of an option, and the Commission's approach of analyzing the nature of contracts based on the "economic reality" of a transaction. While the Commission could attempt to remedy the However Paragraph by revising it or further describing what is meant by "demand charge," "reservation fee," and "usage fee" in that context, such actions likely would create further confusion, particularly for market participants who use such terms in agreements that bear no resemblance to instruments historically understood to be options.[20] As INGAA explained in the context of the Three-Part Test, the statute does not authorize the Commission to modify established standards, nor could it do so without supplying notice and opportunity for comment and a reasoned analysis for departing from its prior policy. In that regard, since the However Paragraph conflicts with the long-established test in the *1985 Interpretative Statement* for determining whether an agreement has the characteristics of an option, INGAA similarly asks the Commission to strike the However Paragraph in its entirety.

---

[20] A fundamental requirement of the APA is that interested persons be given notice of proposed substantive regulations and an opportunity to comment. *See* 5 U.S.C. § 553. If the Commission decides to alter the However Paragraph, it must provide adequate notice and opportunity for comment. Here, the However Paragraph was added to the final rule without any notice or opportunity for comment. Parties had no notice, in any of the proposed rulemakings or at any other step of the rulemaking process, that the Commission would provide specific guidance regarding the issue of whether two-part fee agreements would be commodity options subject to the definition of a "swap." Because the addition of the However Paragraph violated the core tenants of the APA, the Commission should simply strike the paragraph.

In addition, for the reasons stated in the October 9 Letter, INGAA requests that the Commission affirmatively make the following clarifications requested in the October 9 Letter:

- The Commission should clarify that agreements for service on natural gas pipeline and storage facilities or parts thereof (i.e., as distinct from sales or purchases of the gas commodity itself) do not have the characteristics of options and hence are not options subject to the swap definition; and

- The Commission should clarify that it will use its historical approach for determining whether an agreement has the characteristics of an option, rather than the mere existence of a two-part fee structure in the agreement, to determine whether a particular natural gas transportation or storage agreement is an option subject to the swap definition.

IV. The Commission and SEC Should Accept These Comments

INGAA recognizes that the Commission has solicited comments by October 12, 2012, on the guidance regarding forward contracts with embedded volumetric options.[21] For the following reasons, good cause exists to accept these comments. First, in connection with its comment request, the Commission asked the following question: "Is the interpretation sufficiently clear with respect to capacity contracts, transmission (or transportation) services agreements, peaking supply contracts, or tolling agreements? Why or why not?"[22] Because the Facility Services Agreement Guidance provides *additional* guidance relating to transportation services agreements such as natural gas transportation and storage agreements, these comments are directly related and inextricably linked to the subject of the Commission's comment request. Indeed, both subsections (ii) and (iii) of Section II.B.2.(b) relate to guidance concerning whether or not agreements, including those for the supply of energy, contain embedded commodity options, and it would be arbitrary to disregard directly relevant comments simply because the Commission chose to provide *additional* guidance on transportation services agreements in a separately titled sub-section.

In addition, both the Facility Services Agreement Guidance and the section on forward contracts with embedded volumetric options contain *new* multi-factor guidance tests that were *not included* in the proposed rulemaking and have never previously been published, announced

---

[21] 77 Fed. Reg. at 48,208, 48,241.

[22] *Id*. at 48,242.

or used by the Commission.[23] If the Commission considered it necessary to solicit additional comments on the novel Seven-Factor Test, it is also necessary to solicit additional comments on the equally novel Three-Part Test, as well as comments specifically on the However Paragraph, which can be read to establish yet another bright-line test. In fact, INGAA had no notice in the proposed rule that the Commission would provide specific guidance in the form of the Three-Part Test, let alone the However Paragraph that, as written, could be applied, contrary to precedent, to treat natural gas transportation and storage agreements with two-part fee structures as options; such application would treat natural gas transportation and storage agreements inconsistently with the way other contracts are viewed with respect to Commission jurisdiction and could be read, in effect, to overturn longstanding Commission precedent. Moreover, the Commission's Facility Services Agreement Guidance is not a logical outgrowth of prior proposed rules or prior proposed interpretations of Dodd-Frank Act section 721(a)(21) (defining the term "swap"). Neither the advance notice of proposed rulemaking nor the notice of proposed rulemaking discussed potentially regulating transactions involving two-part fee structures as swaps, and the Swap Definition Final Rule does not provide any explanation as to why the Commission is treating agreements with two-part fee structures differently from any other contracts.

Finally, these comments are based on the statutory definition of "swap" and "option," which includes "puts, calls," etc., as well as on longstanding Commission and court precedent regarding what distinguishes an option under the CEA from a non-option. The Commission does not have the authority to change the statutory definition of swap or option, nor does it have discretion to depart from its historic interpretation of, and long-standing precedent regarding, what characterizes an option without providing interested parties notice and an opportunity to comment, and without providing adequate justification for the departure. INGAA does not believe the Commission intended its Facility Services Agreement Guidance to vary from or in any way contradict the *1985 Interpretative Statement* and its progeny. Accordingly, the Commission should accept these comments.

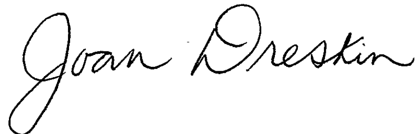
[23] The Commission proposes a new seven-part test in subsection II.B.2.(b)(ii) regarding forward contracts with embedded volumetric options. *Id*. at 48,238 (hereafter, "Seven-Factor Test"); *see also id*. at 48,239 n. 344 (focusing on these factors because "the CFTC has not previously expressed the view that an agreement, contract, or transaction with embedded volumetric optionality which affects the delivery term may qualify as a forward contract if these [intent to deliver and ability to make or take delivery] facts and circumstances are present"); *see Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, Proposed Rule, 76 Fed. Reg. 29,818 (May 23, 2011) ("Proposed Rule").

V. <u>Conclusion</u>

INGAA therefore respectfully requests that the Commission accept these comments and make the recommendations as detailed above.

If the Commission or its staff would like any additional information, please do not hesitate to contact me at the address and telephone number set out in this letter.

Respectfully submitted,



Joan Dreskin
General Counsel
Interstate Natural Gas Association of America
20 F Street, N.W., Suite 450
Washington, D.C. 20001
jdreskin@ingaa.org
(202) 216-5928

Cc: Secretary, Securities and Exchange Commission
Honorable Gary Gensler, Chairman
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott D. O'Malia, Commissioner
Honorable Mark P. Wetjen, Commissioner
Dan Berkovitz, General Counsel

Attachment