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October 11, 2012

VIA ELECTRONIC SUBMISSION

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Stacy Yochum, Secretary
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Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Request for Clarification and No-Action Relief Regarding Commission
Interpretative Guidance on Gas Service Agreements with Two-Part Fee Structures
Set Forth in the Commission's Swap Definition Final Rule

Dear Secretary Yochum:

Pursuant to Commission Rule 140.99,¹ the Gas Processors Association ("GPA") respectfully requests that that the Commodity Futures Trading Commission (the "CFTC" or "Commission") or its appropriate divisions grant no-action relief concerning certain interpretive guidance provided in the Commission's final rule further defining the term "swap."² Specifically, GPA requests that the CFTC provide clarification and no-action relief in connection with one paragraph included in the "Certain Physical Commercial Agreements, Contracts, or Transactions" subsection "Facility Service Agreement

¹ 17 C.F.R. § 140.99.

² *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Record Keeping; Final Rule*, 77 Fed. Reg. 48208 (Aug. 13, 2012) (hereafter, "Swap Definition Final Rule").

Guidance.”³ This particular paragraph suggests an agreement for the usage of a specific “facility service agreement,” which would be a physical forward agreement and not swap, will be subject to regulation as a commodity option solely based on the fact that it employs a “two-part” rate structure 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.”⁴ GPA urges immediate relief to ensure certainty about the definition of “swap” prior to the rule’s effective date of October 12, 2012.⁵ In addition, the GPA endorses the requests submitted by the Interstate Natural Gas Association of America (“INGAA”) on October 8, 2012, and the Texas Pipeline Association (“TPA”) on October 11, 2012, for clarification and no-action relief on this “However Paragraph.”

Background on GPA

GPA is a non-profit trade organization made up of 130 corporate members, all of whom are engaged in the processing of natural gas into merchantable pipeline gas, or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA’s membership accounts for approximately 92% of all natural gas liquids produced by the midstream energy sector in the United States. Our members also produce, gather, transmit, and market natural gas and natural gas liquids, and include a number of Canadian and international companies that produce natural gas liquids on a global scale.

Natural Gas Service Contracts Are Forwards, Not Swaps or Futures

Contracts for services such as gathering, transporting, processing, and storage of natural gas or natural gas liquids⁶ are best described as sales of nonfinancial commodities for deferred shipment or delivery that are intended to be physically settled. The parties to such contracts enter them in order to obtain and maintain a specific natural gas service.

³ The subsection entitled “Physical Commercial Agreements, Contracts, or Transactions,” 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”).

⁴ The paragraph, which will hereafter be referred to as 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.

77 Fed. Reg. at 48242.

⁵ GPA is aware that Edison Electric Institute (“EEI”), the American Gas Association (“AGA”), and the Electric Power Supply Association (“EPSA”) (collectively the “Joint Associations”) have filed a request for extension of the compliance dates or, in the alternative, for no-action relief with respect to Dodd-Frank regulations impacting non-swap dealer and non-major swap participants in the energy markets. GPA supports the Joint Associations’ position and believes that their request is fully consistent with the requested clarification and no-action relief sought herein. However, the relief requested by INGAA and supported by GPA is critical and necessary, even if the Commission grants the relief sought by the Joint Associations. Thus, notwithstanding the relief sought by the Joint Associations, GPA respectfully asks the Commission for prompt consideration of its request.

⁶ For purposes of this request, the term “natural gas” means natural gas or natural gas liquids.

This key characteristic of a physical settlement means such gas service contracts are forwards, not subject to the Commission's jurisdiction. In addition, natural gas contracts for services such as gathering, transporting, processing, and storage do not have the characteristics of options.

According to the CFTC's *1985 Interpretative Statement*, three criteria are indicative of an option:

1. The instrument gives the buyer the right to take or make delivery of the commodity but does not obligate him to do so.
2. The buyer's losses are limited to a premium paid as consideration for the option seller's performance.
3. The instrument is purchased by offering a premium as opposed to a down payment on the eventual delivery price.⁷

Contracts for natural gas services, such as natural gas gathering and processing agreements, include an obligation to make or take delivery, and they do not generally include any kind of premium payment for a right to the contracted services. The payment exchanged between the parties in these kinds of transactions is most often related to the service provided to gather or process a customer's gas, not a premium charged for the right to buy the service.

CFTC's Facility Service Agreement Guidance Requires Clarification

The Commission's Facility Service Agreement Guidance recognizes that although natural gas service agreements, such as gathering and processing agreements, may include flexibility, they are not necessarily options. The Commission explained that it would not consider a facility usage contract to be an option, if it satisfies the following three-part interpretation guidance ("Facility Usage 3-Part Test"):

1. The subject of the agreement, contract or 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.⁸

The Commission further explained:

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

⁷ *In the Matter of Cargill* at 28425.

⁸ Swap Definition Final Rule, 77 Fed. Reg. at 48242.

lessor already has paid. In this context the CFTC would not consider actions such as ... gas transportation or injection of gas into storage to be exercising an option if all three elements of the interpretation are satisfied.⁹

At this point, the Facility Service Agreement Guidance makes sense and is consistent with CFTC precedent and previous guidance like the *1985 Interpretative Statement*. It is the following paragraph in the Swap Definition Final Rule (which was not part of the proposed rule) that creates confusion and undermines the purpose of the Facility Usage 3-Part Test:

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.*" (emphasis added).¹⁰

The "However Paragraph" establishes a bright line test focused on the structure of a contract and is contrary to the Commission's intent and historic approach to determining whether an agreement is an option. Gas service contracts such as for gathering or processing services should not be subject to regulation as swaps solely based on the payment structure of the transactions. Typical gathering and processing contracts do not bear the characteristics of options, and treating them as options pursuant solely to the bright-line test set out in the "However Paragraph" ignores the facts and circumstances and economic realities of the subject contracts.

Gas Service Agreements with Two-Part Rates are Not Options

GPA maintains that the fee structures, if any, utilized in gas gathering and processing agreements, do not render them options. If a fee structure as described in the "However Paragraph" exists, the reservation fee or demand charge is related to the amount of capacity reserved on a gathering pipeline or at a processing facility for the duration of the agreement, regardless of a customer's actual use of the reserved capacity. A reservation fee or demand charge does not constitute consideration for the purchase of a right or option to later purchase a specified amount of capacity. A reservation fee or demand charge is the payment for the service to be delivered; it is not a risk premium. The further payment of usage fees, which are part of the underlying contract, allows the natural gas gathering pipeline or processing plant service provider to recoup costs associated with the actual use of the facility. Usage fees generally reflect variable costs

⁹ *Id.*

¹⁰ *Id.*

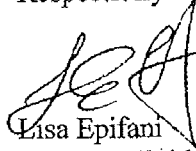
such as maintenance costs, fuel used to move or inject the gas, or other incidental costs related to providing the service. Usage fees are not "option" payments made to perfect the customer's right to use the capacity. Accordingly, gas service contracts such as gathering and processing contracts should not be subject to regulation as swaps solely based on the payment structure of the transactions.

Conclusion

Because the "However Paragraph" will result in the misapplication of Commission guidance and precedent, GPA respectfully asks that the Commission, the Commission's General Counsel, or an appropriate Division of the Commission issue no-action relief as requested above and by other similarly situated groups like INGAA and TPA pursuant to Commission Rule 140.99, 17 C.F.R. § 140.99, prior to October 12, 2012, stating a facility service agreement with a two-part rate will not be deemed a swap or subject to regulation as a commodity option based solely on the structure of the contract. It would be contrary to the public interest to impose new and unsupported obligations on natural gas service providers, in a manner contrary to the Commission's own historical interpretation of option agreements. Accordingly, good cause exists to issue timely and prompt no-action relief.

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,



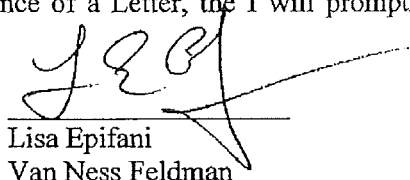
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cc: Honorable Gary Gensler, Chairman
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott D. O'Malia, Commissioner
Honorable Mark P. Wetjen, Commissioner
Dan Berkovitz, General Counsel

Title 17 C.F.R. Section 140.99 Certification

On behalf of the Gas Processors Association, I hereby certify that the material facts set forth in the attached letter dated October 10, 2012, are true and complete to the best of my knowledge.

In addition, I hereby agree that, if at any time prior to the issuance of a Letter (as defined by § 140.99(a)(4)) by the CFTC, any material representation made in the request ceases to be true and complete, I will ensure that Commission staff is informed promptly in writing of all materially changed facts and circumstances. If a material change in facts or circumstances occurs subsequent to issuance of a Letter, the I will promptly so inform Commission staff.



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