



July 2, 2014

Via Electronic Submission

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

**Re: Exclusion of Utility Operations-Related Swaps With Utility Special Entities
From De Minimis Threshold for Swaps With Special Entities RIN3038-AE19**

Dear Ms. Jurgens:

The Electric Power Supply Association (“EPSA”) respectfully submits these comments in support of the proposed rule published by the Commodity Futures Trading Commission (“CFTC”) on June 2, 2014 to amend CFTC Regulations 1.3(ggg) 4 to include definitions for the term “utility special entity” and “utility operations-related swap” thus exempting such transactions from the \$25 Million *de minimis* threshold for transactions with special entities that count toward a market participant’s determination as a swap dealer.¹

EPSA is the national trade association representing leading competitive power suppliers, including generators and marketers. These suppliers, who account for nearly 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.²

EPSA members are physical commodity market participants that rely on commodity swaps, futures, and options primarily to hedge and mitigate commercial risk and they often serve as counterparties for special entities in the electric and natural gas sectors. They are not financial entities, but commercial end-users that have a direct and significant interest in how the Commission regulates transactions in non-financial commodities, and in particular, swaps on non-financial commodities, including swaps with special entities.

On April 18, 2012, the Commission issued its Final Rule and Interim Final Rule on the Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,”

¹ *Exclusion of Utility Operations-Related Swaps With Utility Special Entities From De Minimis Threshold for Swaps With Special Entities*, 79 Fed. Reg. 31238 (June 2, 2014) (“Proposed Rule” or “NOPR”).

² The comments contained in this correspondence represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

“Major Security-Based Swap Participant,” and “Eligible Contract Participant.” (“Entity Definitions Final Rule”).³ The Final Rule defines the entities that are required to comply with the rules for participating in the swaps market under the Commodity Exchange Act (“CEA”) as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) and the Commission’s rules that are applicable to all “swaps.”⁴ In the Entity Definitions Final Rule, the Commission increased the overall *de minimis* threshold for consideration as a swap dealer to at least \$3 Billion with an initial phase-in amount of \$8 Billion. However, the *de minimis* threshold for swap-dealing transactions with special entities remained at \$25 Million during any 12-month period.⁵ Following the issuance of the Entity Definitions Final Rule, several special entity end users, including the American Public Power Association (“APPA”), the Large Public Power Council (“LPPC”), the American Public Gas Association (“APGA”), the Transmission Access Policy Study Group (“TAPS”), and the Bonneville Power Administration (“BPA”) filed a petition for rulemaking with the CFTC requesting that the CFTC undertake a rulemaking process and amend Regulation 1.3(ggg)(4) to exclude utility operations related swaps with utility special entities from the \$25 Million *de minimis* threshold for swap dealer consideration.⁶

In response to that Petition for Rulemaking and following two Staff No-Action Letters issued by the Commission’s Division of Swap Dealer and Intermediary Oversight (“DSIO”),⁷ the Commission published this Proposed Rule to amend the definitions section of the Entity Definitions Final Rule to include separate and distinct definitions for the term “utility special entity” and “utility operations-related swap.”

EPSA generally supports the Commission’s Proposed Rule to amend the Entity Definitions Final Rule to exclude “utility operations-related swaps” with “utility special entities” from the \$25 Million *de minimis* threshold for swap dealer consideration. Market participants in the physical energy sector, including EPSA members, enter into swaps and other financial transactions in order to hedge or mitigate the risks associated with the physical nature of their primary business, electric and natural gas markets. Under the current Entity Definitions Final Rule, an entity will not be considered a “Swap Dealer” if it engages in a *de minimis* amount of \$25 Million in swap dealing transactions with “special entities” or a total amount of \$8 Billion

³ Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” and “Eligible Contract Participant,” 77 Fed. Reg. 30596 (May 23, 2012).

⁴ Pub. L. No. 111-203 (2010).

⁵ 77 Fed. Reg. 30632 (May 23, 2012).

⁶ *Petition for Rulemaking to Amend CFTC Regulation 1.3(ggg)(4)*, July 12, 2012.

⁷ *Staff No-Action Relief: Temporary Relief from the De Minimis Threshold for Certain Swaps with Special Entities*, CFTC Letter No. 12-18 (October 12, 2012). *Staff No-Action Relief: Revised Relief from the De Minimis Threshold for Certain Swaps with Utility Special Entities*, CFTC Letter No. 14-34 (March 21, 2014). (Collectively, “Staff No-Action Letters”).

for the initial phase-in period. If a party engages in transactions with a “special entity” that exceeds that \$25 Million threshold, then those transactions must be counted in the analysis of whether such party is a “Swap Dealer,” and thus is subject to the more stringent capital, margin, reporting and recordkeeping requirements.

Due to the unique circumstances of the physical electric and natural gas markets, it is very possible that even one, relatively small swap contract would exceed the threshold amount of \$25 Million notional value. Under the current rules, just one contract could exceed the *de minimis* threshold for special entities and cause the counterparty to become a “Swap Dealer” thus subjecting the counterparty to increased capital and margin requirements, and more stringent and costly reporting and recordkeeping obligations.

The current \$25 Million *de minimis* threshold for special entities, including utility special entities, has led to a reduction in opportunities for competitive pricing in the physical energy markets and greatly reduced the utility special entities’ ability to hedge and mitigate commercial risks associated with the physical energy markets. This impact ultimately trickles down to the populations of consumers that these special entities serve. Reduced liquidity in electricity and natural gas contracts due to a reduction in the number of counterparties available to special entities, leads to increased costs for the ultimate consumers.

While EPSA supports the Commission’s actions in exempting “utility operations-related swaps” with “utility special entities” from the \$25 Million *de minimis* threshold for swap dealer consideration, we offer the following comments for the Commission’s consideration. EPSA recommends that the Commission conform the language in proposed section 1.3(ggg)(4)(i)(B)(3) of the Commission’s Regulations with the language found in the definition of an “Exempt Non-Financial Energy Transaction” found in the Commission’s Final Order Exempting Certain Transactions Between Entities Described in the Federal Power Act, and Other Electric Cooperatives.⁸ Conforming the language in the proposed definition of “utility operations-related swaps” with the language already approved by the Commission would provide greater clarity to market participants and allow for a much more seamless implementation since market participants are already familiar with the language of the “Exempt Non-Financial Energy Transaction” definition. Such an amendment would achieve the same objective with much more clarity and regulatory certainty since market participants are already familiar with that definition and operate using that definition.

Additionally, EPSA requests that the Commission eliminate the requirement in the proposed rule that a person file a one-time notice with the National Futures Association (“NFA”) in order to rely on the proposed exclusion. EPSA also requests that the Commission eliminate

⁸ *Order Exempting, Pursuant to Authority of the Commodity Exchange Act, Certain Transactions Between Entities Described in the Federal Power Act, and Other Electric Cooperatives*, 78 Fed. Reg. 19670 (April 2, 2013).

Melissa Jurgens, Secretary
July 2, 2014
Page 4

the proposed requirement that a person relying on the exclusion maintain, in accordance with CFTC Regulation 1.31, books and records that substantiate its eligibility to rely on this proposed exclusion. EPSA argues that both of these proposed requirements are unnecessary and burdensome. EPSA notes that, if a counterparty to a utility operations-related swaps with a utility special entities entered into the same transaction with a party not considered a “utility special entity,” then no notice would be required. EPSA sees no need or reason for notice to be provided when such a transaction is entered into solely because one of the parties is considered a “utility special entity.” In order to ensure that utility special entities will have access to all available counterparties, which was the intention behind the Staff No-Action Letters and the purpose of this Proposed Rule, the Commission should not impose any additional burdens on parties that wish to transact with utility special entities. Specifically, the recordkeeping requirement is unnecessary and redundant because, while under the proposed rule, utility operations-related swaps with utility special entities would not count towards the lower \$25 Million threshold, such transactions would still count towards the \$8 Billion *de minimis* threshold. Therefore, counterparties to those transactions would still need to maintain appropriate records for purposes of demonstrating compliance with that Swap Dealer threshold.

EPSA appreciates the Commission’s consideration of our comments supporting the Petitioners’ request to amend CFTC Regulation 1.3(ggg)(4)(i)(B)(2) and 1.3(ggg)(4)(i)(B)(3). For the reasons stated herein, we respectfully request that the Commission grant the Petitioners request and amend CFTC Regulation 1.3(ggg)(4).

We are happy to discuss any comments further. Please feel free to contact EPSA at the number listed below if you have any questions regarding these comments.

Respectfully submitted,



Melissa M. Mitchell
Director of Regulatory Affairs and Counsel
Electric Power Supply Association
1401 New York Avenue, NW
Suite 1230
Washington, DC 20005
202-349-0151
mmitchell@epsa.org