

July 2, 2014

Ms. Melissa Jurgens  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581

**Re:** Exclusion of Utility Operations-Related Swaps With Utility Special Entities From *De Minimis* Threshold for Swaps With Special Entities, RIN 3038-AE19

Dear Secretary Jurgens:

By a Notice of Proposed Rulemaking issued on June 2, 2014,<sup>1</sup> the Commodity Futures Trading Commission (“CFTC” or “the Commission”) has proposed to amend its regulations to permit a person to exclude utility operations-related swaps with entities that qualify as “utility special entities” from the calculation of the aggregate gross notional amount of the person’s swaps positions for purposes of the *de minimis* threshold for swap dealing with “special entities” pursuant to the Commission’s regulations implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).<sup>2</sup> The Coalition of Physical Energy Companies (“COPE”) hereby offers its comments on the NOPR.

COPE<sup>3</sup> is comprised of physical energy companies in the business of producing, processing, and merchandizing energy commodities at retail and wholesale. COPE members generally use swaps (including options and trade options) in conjunction with their physical businesses, most typically for hedging.

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<sup>1</sup> *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) (the “NOPR”).

<sup>2</sup> Public Law 111–203, 124 Stat. 1376 (2010).

<sup>3</sup> The members are: Apache Corporation; EP Energy LLC; Enterprise Products Partners, L.P.; Iberdrola Renewables, Inc.; Kinder Morgan; MarkWest Energy Partners, L.P.; Noble Energy, Inc.; Shell Energy North America (US), L.P.; SouthStar Energy Services LLC; and Targa Resources.

## Comments on the NOPR

COPE supports the Commission's proposal in the NOPR, and agrees with the Commission that the \$25 million *de minimis* threshold for Swap Dealer status with respect to swaps with "special entities" is not appropriate to apply to utility special entities.<sup>4</sup> In particular, COPE appreciates that the Commission has, through the NOPR, moved to codify in regulations the substance of the no-action relief that the Commission's staff had previously issued regarding the application of the special entity *de minimis* threshold to utility special entity swaps.<sup>5</sup> COPE members have been diligently following the Commission's implementation of Dodd-Frank since 2010, and have worked to develop and refine compliance programs tailored to the Commission's latest requirements. However, the reliance of the Commission's staff on seemingly ad hoc no-action letters and other similar actions that supplement, supersede, or temporarily replace Commission-issued codified regulations has made staying on top of compliance and implementation even more challenging than the complex process would otherwise be. Further, no-actions letters are not binding on the Commission and can simply be revoked. Thus, COPE strongly supports the move to codify the substance of previously-issued no-action relief into the Commission's regulations.

COPE requests, however, that the Commission address two particular issues in any final rule based on the NOPR: the Commission should make clear in any final regulation that a swap counterparty to a utility special entity can rely on representations from the utility special entity for the basis of the exclusion from the special entity *de minimis* calculation; and, the Commission should provide that the requirement to maintain books and records that substantiate an entity's eligibility to rely on the proposed exclusion would be satisfied by maintaining a record of the counterparty's representation.

Proposed revised Section 1.3(ggg)(4)(B) provides that the exclusion is available for swaps with "utility special entities" that are "utility operations-related swaps."<sup>6</sup> Whether an entity qualifies as a "utility special entity" and if a given swap meets the definition of a "utility operations-related swap" (whether the swap is being used to hedge risk as described in CFTC regulation 50.50(c)) is known only to the entity claiming to be a utility special entity, and not to its counterparty who wishes to rely on the exclusion proposed in the NOPR. The Commission should provide in the regulatory text of any final rule that an entity may rely on the exclusion from the special entity *de minimis* threshold if it receives written representations for such items

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<sup>4</sup> See NOPR at 31241 ("While the Special Entity De Minimis Threshold may represent a reasonable protection for other types of special entities that enter into swaps intermittently and whose activities do not depend on a consistent use of particular swaps . . . the Commission believes that its application to utility operations-related swaps with utility special entities is not as necessary for their regular operation.").

<sup>5</sup> See Staff Letter 12-18 (October 12, 2012); Staff Letter 14-34 (March 21, 2014).

<sup>6</sup> NOPR at 31247.

from the utility special entity counterparty. COPE appreciates that in the preamble to the NOPR, the Commission stated that it “intends to take the position” that a person may reasonably rely on such a representation by a special entity;<sup>7</sup> however, COPE strongly believes that this should be set forth explicitly in the actual regulatory text so that COPE members and other market participants will have regulatory comfort and certainty on this important aspect of the proposal.

This suggested approach is similar to the approach the Commission has taken in allowing Swap Dealers to rely on representations from their counterparties for purposes of compliance with the Swap Dealer external business conduct regulations.<sup>8</sup> As is the case with Swap Dealers, those entities undertaking transactions with Utility Special Entities should be able to rely upon representations unless there is a “red flag” to the contrary.

Additionally, the proposed rule provides that a person relying on the exclusion from the *de minimis* calculation for utility special entity swaps must “maintain books and records” that “substantiate its eligibility” to rely on that exclusion.<sup>9</sup> The Commission also asked for comment in the NOPR as to whether the Commission should “specify the books and records a person must maintain” to substantiate its eligibility for the exclusion.<sup>10</sup> COPE believes that the Commission should specify that a record of a counterparty’s representation that it is eligible for the exclusion should satisfy the records retention obligation, since COPE does not believe that a counterparty relying on such a representation would necessarily have any other records demonstrating that the exclusion applies.

By permitting reliance on written representations, and by making clear that such representations constitute the records that must be maintained, physical energy counterparties will have the certainty the NOPR is attempting to provide and can be confident that trading a *de minimis* amount of swaps with utility special entities that allow the utilities to hedge risk and provide efficient energy products and services to consumers will not inadvertently turn those counterparties into Swap Dealers despite their fundamentally physical energy businesses.

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<sup>7</sup> *Id.* at 31242.

<sup>8</sup> See 17 C.F.R. § 23.402(d) (“A swap dealer or major swap participant may rely on the written representations of a counterparty to satisfy its due diligence requirements under this subpart, unless it has information that would cause a reasonable person to question the accuracy of the representation.”).

<sup>9</sup> NOPR at 31247 (proposed § 1.3(ggg)(4)(i)(B)(5)).

<sup>10</sup> *Id.* at 31243.

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## **Conclusion**

COPE appreciates the Commission's NOPR and its move to codify the previously issued staff no-action relief in its regulations. COPE requests that the Commission include the revisions suggested herein in any final rule based on the NOPR.

Very truly yours,

/s/ David M. Perlman

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