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July 2, 2014

To: Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Attn: Ms. Melissa Jurgens
Secretary of the Commission

Re: Proposed Rule – Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold for Swaps with Special Entities (RIN 3038-AE19).

Dear Ms. Jurgens:

I. Introduction

EDF Trading North America, LLC ("EDFTNA") submits these comments in response to the Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold for Swaps with Special Entities (RIN 3038-AE19) proposed rule published by the Commodity Futures Trading Commission (the "CFTC" or the "Commission") in the June 2, 2014 edition of the Federal Register (the "Proposed Rule").[1]

EDFTNA is a wholly-owned indirect subsidiary of Eléctricité de France, S.A., a global leader in energy production and supply with over 140.4 Gigawatts of generation capacity and approximately 39 million customers world-wide. In addition to being the fifth largest marketer of natural gas in North America, EDFTNA is also a leading provider of energy management and risk management services and, directly and through its wholly owned subsidiaries, a provider of retail power and gas services to large-scale commercial and industrial customers.

[1] 79 FR 31238 (June 2, 2014).

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Prior to the July 23, 2012 effective date of Section 1.3(ggg) of Title 17 of the Code of Federal Regulations (the "CFTC Regulations") further defining the term "swap dealer" ("Swap Dealer") and the October 12, 2012 effective date of Section 1.3(xxx) of the CFTC Regulation further defining the term "swap", EDFTNA actively transacted swaps with counterparties that would satisfy the definition of "Utility Special Entity" as defined in the Proposed Rule. Considering the very low de minimis threshold that applied to swap dealing activity with counterparties that satisfied the "Special Entity" definition set forth in Section 4s(h)(2)(C) of the Commodity Exchange Act (the "CEA") and Section 23.401(c) of the CFTC Regulations ("Special Entities"), EDFTNA determined that the benefit that it could hope to derive from entering into swap transactions with Special Entities did not justify incurring the costs and burdens associated with registration as a Swap Dealer if it exceeded the de minimis threshold.. As such, EDFTNA, like many other similarly situated companies, curtailed its swaps activity with Special Entities following the effective date of Section 1.3(xxx) of the CFTC Regulations.

The policy of EDFTNA regarding transacting swaps with Special Entities was, unfortunately, unaffected by the publication by the Commission's Division of Swap Dealer and Intermediary Oversight of Staff Letter 12-18 (the "Original NAL"). As noted by the Commission in the Proposed Rule, many companies had reservations regarding the Original NAL that likely discouraged them from relying on the relief provided.[2] The concerns of EDFTNA that caused it to not rely on the Original NAL, however, were resolved in Staff Letter 14-31 (the "Current NAL"), which superseded the Original NAL. In reliance on the relief provided in the Current NAL, EDFTNA has started the process of amending its master agreements with counterparties that satisfy the "Utility

[2] *Id*. at 31240.

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Special Entity" definition included in the Current NAL in order to address the conditions of the Current NAL. Notably, given the nature of EDFTNA's business, the majority of its Special Entity counterparties should qualify as "Utility Special Entities" under the Current NAL.[3]

As evidenced by its response to the Current NAL, EDFTNA desires to transact eligible swaps with Special Entities that qualify as Utility Special Entities. EDFTNA is therefore particularly interested in the Proposed Rule, appreciates the Commission's efforts to implement amendments to Section 1.3(ggg) of the CFTC Regulations through an open and transparent process that encourages participation from market participants, and welcomes the opportunity to provide the following comments for the Commission's consideration.

II. Comments

a. The Commission should expressly include the safe harbor for reliance on representations and warranties referenced in the preamble of the Proposed Rule as part of Section 1.3(ggg)(4)(i)(B) in order to ensure consistency with analogous safe harbors included in Part 23 of the CFTC Regulations.

In the preamble to the Proposed Rule, the Commission stated that it "intends to take the position that a person seeking to rely on the (proposed) exclusion may reasonably rely upon a representation by the utility special entity that it is a utility special entity and that the swap is a utility operations related swap, as such terms are defined in proposed Regulation 1.3(ggg)(4)(i)(B), so long as the person was not aware, and should not reasonably have been aware, of facts indicating the contrary."[4] As noted by the Commission, market

[3] EDFTNA's Special Entity counterparties that it believes would not qualify as Utility Special Entities are typically large-scale Special Entity end-users of electricity and natural gas such as public university systems. EDFTNA is not enabled to transact with any ERISA plans or endowments.

[4] 79 FR 31238, 31242 (June 2, 2014).

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participants will often be unable to "establish with absolute certainty"[5] that the conditions required for reliance on the de minimis threshold exclusion rules are satisfied for any particular swap transaction.

Although appreciative of the Commission's statement regarding reliance on representations, EDFTNA notes that the failure of the Proposed Rule to expressly address reliance on representations is inconsistent with the approach adopted by the Commission in Part 23 of the CFTC Regulations. In situations where a Swap Dealer is permitted to rely on representations made by counterparties, the safe harbor for reliance is specifically set forth in the applicable rule. For example, Section 23.402(d) of the CFTC Regulations states that "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." Section 23.430(d) of the CFTC Regulations provides a similar safe harbor for reliance on representations made by counterparties with respect to Eligible Contract Participant and Special Entity status. The Proposed Rule, however, does not include a clause analogous to clause (d) of Sections 23.402 and 23.430 of the CFTC Regulations.

EDFTNA believes that the ability to reasonably rely on representations made by counterparties regarding satisfaction of the conditions of the de minimis threshold exclusion rule is essential to the successful implementation of any final de minimis threshold exclusion rule and that the safe harbor for reliance should be part of the final rule. Considering the risks and consequences associated with a swap transaction not satisfying the conditions for reliance – specifically the application of the $25 million de minimis threshold for Special Entities and potentially triggering an obligation to register as a Swap Dealer – many market participants may be

[5] *Id.*

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unwilling to rely on any final de minimis threshold exclusion rule that does not itself permit reasonable reliance on representations to satisfy the conditions of the rule. While the Commission's discussion of reliance in the preamble to the Proposed Rule is helpful, EDFTNA believes that the Commission should be consistent in its implementation of representation safe harbors throughout the CFTC Regulations. As such, EDFTNA encourages the Commission to expressly include a representation safe harbor similar to Sections 23.402(d) and 23.430(d) of the CFTC Regulations in any final rule relating to the de minimis threshold exclusion for qualifying swaps with Utility Special Entities.

b. The proposed requirement to provide notice to the National Futures Association ("NFA") is unnecessary because the Commission will be able to identify market participants that transact swaps with Utility Special Entities through swap data that must be reported to a swap data repository ("SDR") pursuant to Part 45 of the Commission's regulations.

EDFTNA agrees that the Commission should be able to identify the entities that elect to rely on special de minimis threshold exclusion rules applicable to qualifying swap transactions with Utility Special Entities. The ability to identify entities that rely on such de minimis threshold exclusion rules will likely facilitate the Commission's efforts to ensure that the exclusion serves the intended purpose of enabling utility special entities to manage operational risks in a cost-effective while simultaneously monitoring compliance with the Swap Dealer registration requirements. EDFTNA, however, does not believe that the Commission's objective of identifying relying entities will be served by requiring such entities to complete a notice filing with the NFA.

In particular, a notice filing obligation will not provide the Commission with any insight into whether or not a filing entity has in fact entered into any swap transactions with Utility Special Entities in reliance on the rule or, if it has, the gross notional value associated with such swap transactions. As such, the Commission will

be unable to distinguish, based on the notice filing alone, between an entity that transacted one small swap with a Utility Special Entity and an entity that regularly transacts swaps with Utility Special Entities. In lieu of the notice filing obligation, EDFTNA encourages the Commission to rely on the swap data information reported to SDRs pursuant to Part 45 of the CFTC Regulations. By reviewing data reported to SDRs, the Commission will be able to both identify those entities that may rely on any special Utility Special Entity de minimis threshold rules and assess the primary economic terms associated with swap transactions entered into with Utility Special Entities.

EDFTNA is also concerned that many market participants that would start transacting qualifying swaps with Utility Special Entities in reliance on the de minimis threshold exclusion rule may be discouraged from so transacting if required to provide notice to the NFA. The obligation to provide notice of reliance to the Commission included in the Original NAL was one of the reasons that many market participants elected not to rely on the Original NAL. In essence, many market participants were concerned that the obligation to file notice with the Commission would invite additional scrutiny from the Commission. Considering the uncertainty that still permeates the interpretation and application of many CFTC Regulations, some market participants may determine that the risk associated with specifically alerting the Commission to the fact that it is transacting swaps with Utility Special Entities in reliance on the de minimis threshold exclusion rule outweighs the benefits associated with such swap transactions. As a result, the availability of counterparties to Utility Special Entities may be needlessly constrained as a result of the Commission's desire that relying entities file notice with the NFA.

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c. The proposed requirement that the notice provided to the NFA include a statement that the person meets the criteria for the exclusion in CFTC Regulation 1.3(ggg)(4)(i)(B) should be eliminated because CFTC Regulation 1.3(ggg)(4)(i)(B) does not include any non-transaction related criteria that must be satisfied to establish eligibility for the exclusion.

The content of the required notice filing as set forth in the Proposed Rule is confusing and may discourage entities from transacting with Utility Special Entities in reliance on any final de minimis threshold exclusion rule. Specifically, as currently proposed the notice filing to the NFA must include "a statement signed by an individual with authority to bind the person that the person meets the criteria for the exclusion in Regulation 1.3(ggg)(4)(i)(B)." With the exception of the requirement that the relying entity is not already registered as a Swap Dealer, the Proposed Rule does not otherwise appear to include any special entity-specific qualifications that must be satisfied as a condition to reliance. As such, it is not apparent to what criteria a relying entity is representing that it meets in the notice filing submitted to the NFA. All requirements for reliance are transaction specific and, as such, are not properly the subject of a notice filing submitted on a one-time basis in advance of any actual transaction. That is, the ability of an entity to rely on the de minimis threshold exclusion rule with respect to a dealing swap transaction depends on whether or not its Special Entity counterparty qualifies as a Utility Special Entity, the character of the swap transaction entered into, and the purpose for which the Utility Special Entity enters into the transaction – all information that the relying entity could not reasonably represent in advance. In the event that the Commission retains the notice filing requirement as part of the final rule, EDFTNA encourages the Commission to eliminate any obligation that the filing entity represent that is satisfies special conditions that are not specified in the rule.

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d. The proposed obligation to maintain books and records that substantiate eligibility to rely on Section 1.3(ggg)(4)(i)(B) is unnecessary because counterparties not registered as a Swap Dealer or "major swap participant" ("MSP") are already required to maintain "full, complete, and systematic records" pursuant to Section 45.2(b) of the CFTC Regulations.

EDFTNA believes that the proposed obligation to maintain additional books and records necessary to substantiate eligibility for reliance on the de minims threshold exclusion rule for utility operations-related swaps with Utility Special Entities is unnecessary when considered in connection with generally applicable recordkeeping rules. Specifically, EDFTNA notes that the requirements of Section 45.2(b) of the CFTC Regulations already require market participants to "keep full, complete, and systematic records, together with all pertinent data and memoranda, with respect to each swap in which they are a counterparty…" To the extent that the eligibility to rely on the de minimis threshold exclusion rule depends on the qualification of the counterparty and the transaction, an entity relying on the exception is likely to require its counterparties to make representations and warranties regarding Utility Special Entity and utility operations-related swap status and the intended purpose of the transaction. These representations, whether included in swap data relationship documentation or in the confirmation of the swap, would be retained under Section 45.2(b) of the CFTC Regulations. To the extent that the Commission believes that the retention of books and records substantiating eligibility to rely on the de minimis threshold rules applicable to Utility Special Entities is important, the Commission could clarify in the preamble to any final rule that it believes that the general recordkeeping obligations of Section 45.2(b) of the CFTC Regulations include all records demonstrating that the market participant is eligible to rely on the de minimis threshold exclusion rule.

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e. The imposition of a de minimis threshold less than the general $8 billion de minimis threshold is unnecessary because it would (i) result in unnecessarily discrimination between Utility Special Entities and non-Special Entity utilities and (ii) impose a burden on market participants that would exceed the benefit associated with a lower de minimis threshold.

EDFTNA believes the final rule regarding exclusion of swap dealing activity with Utility Special Entities from the $25 million Special Entity de minims threshold should retain the general $8 billion de minimis threshold for Swap Dealer registration instead of applying a lower de minimis threshold. Ultimately, the election of the de minimis threshold to apply requires balancing the competing considerations of (1) ensuring adequate protection of Utility Special Entities that transact swaps and (2) promoting liquidity sufficient to allow the appropriate management of utility-related risk encountered by Utility Special Entities.

While a substantially lower de minimis threshold may offer more protection, it would likely also negatively affect the liquidity available to Utility Special Entities. As noted in the Proposed Rule, the Commission's understanding in connection with the issuance of the Current NAL, which used the $8 billion de minimis threshold, was that the expanded relief would protect the public interest by increasing the availability of swap counterparties to Utility Special Entities while not raising the risks that the Commission intends to prevent through Swap Dealer registration.[6] EDFTNA agrees with the Commission's understanding and, as such, believes that negative consequences associated with the imposition of a lower threshold would far outweigh any benefits that the Commission may expect. It is important that Utility Special Entities have as much choice as possible in seeking competitive offers for hedging their risks. The use of the $8 billion de minimis threshold will foster greater competition and innovation in meeting the needs of Utility Special Entities

[6] *Id*. at 31240.

and ensure that Utility Special Entities are not placed at a competitive disadvantage vis-à-vis similarly situated utilities that are not within the scope of the Special Entity definition.

Considering that swap dealing activity with Utility Special Entities will likely only account for a small fraction of all swap dealing activity undertaken by market participants not currently registered as a Swap Dealer, for a lower de minimis amount to offer any special protection to Utility Special Entities it would need to be set at a value so low that many market participants would be discouraged from transacting any swaps with Utility Special Entities. For example, EDFTNA doubts that any market participant not currently registered as a Swap Dealer would ever transact more than $3 billion of utility related swaps with Utility Special Entities during any twelve-month period. As a result it is extremely unlikely that any market participant will require registration as a Swap Dealer based on a $3 billion de minimis threshold. Certainly the Commission could impose a de minims threshold that would be lower than the expected gross notional value of utility operations-related swap dealing with Utility Special Entities. The imposition of such a de minimis threshold, however, would likely result in market participants electing to curtail their activity with Utility Special Entities rather than exceeding the applicable de minimis threshold and registering as a Swap Dealer. As a result, any reduction in the de minimis from the standard $8 billion threshold would, at best, impose the additional burden on market participants of tracking compliance with different de minimis threshold and, at worst, undercut the benefit to Utility Special Entities from the final de minimis threshold exclusion rule and the Current NAL by reducing the liquidity available to Utility Special Entities.

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f. The Commission should not impose limitations on the types of market participants eligible to rely on Section 1.3(ggg)(4)(i)(B) because such limitations would likely restrict the counterparties available to Utility Special Entities without providing an associated benefit and may introduce regulatory uncertainty that would discourage market participants from relying on Section 1.3(ggg)(4)(i)(B).

EDFTNA believes that there are no distinguishing attributes of market participants that should be used to limit the types of entities eligible to rely on a de minimis threshold exclusion rule for qualifying swaps with Utility Special Entities. As a threshold matter, it is unclear how attributes of an entity that are not related to the scope of the entity's dealing activity would be relevant to determining whether or not the Commission should permit the entity to exclude qualifying swaps with Utility Special Entities from the $25 million de minimis threshold for swap dealing transactions with Special Entities.

EDFTNA notes that the imposition in the Original NAL of the requirement that the entity not be a "financial entity" was a significant hurdle to transacting with swaps with Utility Special Entities in reliance on the Original NAL. Specifically, considering that the Commission had not clarified the application of the term "financial entity", many entities were unwilling to risk relying on the Original NAL because they were unable to definitively determine their status as a financial entity or non-financial entity. In the event that the Commission incorporates any similar qualification in the final rule, such incorporation would likely discourage market participants that are less than absolutely certain regarding their ability to satisfy the qualification from relying on the de minimis threshold exclusion rule. Considering the substantial costs and burdens associated with registration as a Swap Dealer, an entity with even the slightest reservation regarding its ability to rely on the rule will likely err on the side of caution and decline to transact otherwise qualifying swaps with Utility Special Entities. Likewise, by excluding entities that do not satisfy the condition, the Commission would

reduce the availability of counterparties potentially willing to transact swaps with Utility Special Entities without providing any apparent protective benefit to the affected Utility Special Entities.

g. The Commission should ensure that the final language defining "Utility Special Entity" and "utility operations-related swap" in Section 1.3(ggg)(4)(i)(B) follows as closely as possible the analogous provisions of the Current NAL in order to minimize the burden on counterparties in transitioning from reliance on the Current NAL to reliance on Section 1.3(ggg)(4)(i)(B).

As noted in the introduction to these comments, EDFTNA and other market participants have begun to implement swap relationship documentation amendments necessary to address the conditions of the Current NAL. To the extent that the qualifications for reliance on the special de minimis threshold rules deviate from the included language used in the Current NAL, market participants that anticipate or are relying on the Current NAL will likely need to implement additional amendments to address the differences between the Current NAL and the final rule. In particular, the Current NAL provides definitions of "Utility Special Entity" and "utility operations-related swap" that market participants have used as a template for drafting and negotiating amendments with Utility Special Entity counterparties. If these terms are defined differently in the final rule, amendments already implemented in response to the Current NAL may not be sufficient to satisfy the conditions of the final rule. As such, EDFTNA encourages the Commission to carefully evaluate any proposed deviation from the language of the Current NAL in order to determine whether the benefits associated with the deviation outweigh the costs and burden that market participants, including Utility Special Entities that have already negotiated amendments with counterparties, will need to incur in order to conform swap trading relationship documentation to the final rule.

III. Conclusion

EDFTNA appreciates the opportunity to provide the Commission with the foregoing comments in connection with the Proposed Rule. If you would like additional information or have any questions regarding this submission, please feel free to contact Mr. Paige Lockett, Manager of Regulatory Affairs for EDFTNA, at 281-921-9826.

Respectfully submitted,

EDF Trading North America, LLC

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