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March 30, 2015

<u>Via Electronic Submission</u>
Chris Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Supplemental Comments on Position Limits for Derivatives (RIN Number 3038-AD99)

Dear Mr. Kirkpatrick:

Southern Company Services, Inc., acting on behalf of and as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Southern Power Company (collectively, "Southern"), hereby submits Southern's comments in response to the Commodity Futures Trading Commission's ("Commission" or "CFTC") re-opening of the comment period[1] on the proposed rule[2] for position limits. As a member of the Energy and Environmental Markets Advisory Committee ("EEMAC"),[3] Southern raised a number of these comments during the EEMAC meeting on February 26, 2015. Depending on how the Commission resolves the issues described herein, the implementation of position limits could have a drastic, negative impact on the entire electric industry. Southern is, however, aware of Congress's mandate for the Commission to implement position limits from "time to time" and as "necessary" to address excessive speculation.[4] To assist the Commission in satisfying this congressional mandate, Southern's comments below outline an approach that will allow the Commission to: (i) better focus on speculative swap transactions; (ii) obtain the necessary data on an ongoing basis needed to gauge and identify excessive speculation; and (iii) implement meaningful position limits where necessary.

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[1] *Position Limits for Derivatives and Aggregation of Positions*, 80 Fed. Reg. 10,022 (February 25, 2015).
[2] *Position Limits for Derivatives*, 78 Fed. Reg. 75,680 (Dec. 12, 2013) ("Proposed Rule").
[3] Mr. Paul Hughes serves as an associate member on the EEMAC on behalf of Southern.
[4] CEA §4a(a)(1).

I. **Introduction**.

Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company are retail electric service providers, each regulated by the public service commission ("PSC") in its respective state, as well as by the Federal Energy Regulatory Commission ("FERC"). Southern Power Company operates a competitive generation business (also regulated by FERC) that helps meet the needs of municipalities, electric cooperatives and investor-owned utilities. Southern buys and sells in the wholesale electric power markets, pursuant to market-based rate authority granted by FERC. This authority requires Southern to transact in energy at "just and reasonable" prices regulated under the Federal Power Act. Southern seeks to provide excellent service to its customers at stable prices, and the comments made herein are aimed at being able to achieve this goal even after the Commission adopts its final rule on position limits.

Correspondence with respect to these comments should be directed to the following:

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II. **Comments on the Proposed Rule**.

Southern greatly appreciates the Commission's efforts to better understand energy markets and how position limits can be used as a tool for addressing excessive speculation. Southern believes that its participation on EEMAC, as a representative for the electric industry, provides Southern with an important role in assisting the Commission in this regard. Southern respectfully offers the following comments on how it believes the Commission should implement position limits.

1. The Commission Should Exclude Trade Options from Position Limits.

As Southern mentioned at the EEMAC meeting on February 26, 2015, including Trade Options in position limits is simply not workable.[5] Subjecting customized, bi-lateral, physical transactions (designed to transfer physical delivery and ownership from one party to another) to

[5] *See* Transcript of EEMAC Meeting, February 26, 2015, p. 219 (http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/emactranscript022615.pdf).

the same regulatory framework as standardized, exchange-traded futures and traditional financial swaps is not appropriate, particularly for a non-storable commodity like electricity.

Because of the unique and bespoke nature of Trade Options, Southern does not believe there is a clear methodology that could be utilized to convert these physical transactions into futures contract equivalents. Moreover, Southern believes that many entities in the electric industry, several of whom are only subject to CFTC's oversight because of their Trade Option contracts, may not have the technical capability to carry out such calculations requiring an adequate knowledge of the futures market.

A Trade Option is a physically-settled obligation that must be related to an offeree's commercial business,[6] and therefore is typically a non-speculative transaction. In addition, Trade Options do not generally represent hedge positions. Rather, these transactions are usually the risks that are being hedged and therefore they may fall outside of the bona fide hedge framework in the Proposed Rule that is intended to reduce the burden on commercial end-users. Forcing these unique, hybrid-like transactions (deemed "Trade Options") to comply with a regulatory regime designed for traditional, standardized, exchange-traded futures contracts adds unnecessary complexity and administrative burdens to commercial end-users that, ironically, are the entities these rules are designed to protect.

Should the Commission elect to move forward with the inclusion of Trade Options under the position limits regime, it will be implementing regulations that could limit a utility's ability to use Trade Options (at certain levels) to procure electricity supply or the fuel inputs needed to generate electricity. Southern does not believe the Commission, in its consideration of Trade Options or position limits, ever intended to impact the reliability of electric grid, however, the proposal in its current form creates this possibility.

2. A Specific Finding That Excessive Speculation Exists Should be Made Before Implementing Position Limits.

In its Proposed Rule, the Commission notes, "[f]rom the 1920s through 2009, a litany of official government investigations, hearings and reports document disruptive speculative behavior."[7] Yet, as evidence of this "litany," the Commission cites only two very unique examples within those ninety years. One of the examples, the Hunt Brothers, is from 1979, a time when the prime rate of interest climbed from 12% to 20%,[8] and gold climbed from $233 to more than $845 per Troy ounce.[9] The Hunt Brothers example concerned futures markets that were regulated by the Commission, and not over the counter swaps markets. The other example is the recent Amaranth hedge fund, which was operating heavily in futures markets as opposed to

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[6] 17 CFR 32.3(a)(2).
[7] 78 Fed. Reg. at 75,759.
[8] *See* Data from St. Louis Federal Reserve Bank at http://research.stlouisfed.org/fred2/data/PRIME.txt.
[9] *See* Data from St. Louis Federal Reserve Bank at http://research.stlouisfed.org/fred2/graph/?s[1][id]=GOLDAMGBD228NLBM#.

uncleared swaps markets. Southern does not believe the citing of these two cases justifies the implementation of permanent position limits for the subject 28 core referenced contracts listed in the Proposed Rule. As demonstrated below, this approach appears to directly conflict with what members of Congress have specifically requested from the Commission – that the Commission should first find excessive speculation before trying to addresses it.[10]

In the Proposed Rule, the Commission acknowledges that "studies show a lack of consensus regarding the … effectiveness of position limits."[11] Despite this acknowledgment, the Commission elected to "err[]on the side of caution"[12] and to proceed with establishing position limits as set forth in the Proposed Rule. However, establishing position limits interferes with normal market functions and is not an "err" on the side of caution, but rather an "err" on the side of disrupting normal market functions. If position limits harm competition and harm the functioning of efficient markets, "erring on the side of caution" would be to NOT establish position limits. This is especially the case when other government studies conducted after the passage of the Dodd-Frank Act, such as one undertaken by the Congressional Budget Office, have found that position limits are harmful to markets.[13]

Southern agrees with the statement in Section 4a(a)(1) of the Commodity Exchange Act ("CEA"), that:

> **Excessive speculation** in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets or derivatives transaction execution facilities, or swaps that perform or affect a significant price discovery function with respect to registered entities causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, **is an undue and unnecessary burden on interstate commerce in such commodity**.[14]

[10] *See* U.S. House, Committee on Agriculture, *Hearing to Review Implementation of Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act Relating to Position Limits* (Dec. 15, 2010) (statement from Congressman Jerry Moran to CFTC Chairman Gensler and Commissioner Chilton. "First, the Commission has never made an affirmative finding that position limits are appropriate to curtail excessive speculation. In fact, to date the only reports issued by the Commission or its staff failed to identify a connection between market trends and excessive speculation. This is not to say that there is no connection, but it does say the Commission does not have enough information to draw an affirmative conclusion.").
[11] 78 Fed. Reg. at 75,695.
[12] *Id*.
[13] For example: "This analysis finds that less restrictive limits would generally have a greater chance of addressing observers' concerns, with fewer negative effects, than outright prohibitions would," is the conclusion of the Congressional Budget Office in its December 2010 report written to address the potential of Dodd-Frank Act position limits in emissions allowance derivative markets, "Evaluating Limits on Participation and Transactions in Markets for Emissions Allowances" available at http://www.cbo.gov/publication/21967.
[14] CEA §4a(a)(1)(emphasis added).

Southern acknowledges the Commission's obligations under Section 4a(a)(1) of the CEA that:

> **For the purpose of diminishing, eliminating, or preventing such burden**, the Commission shall, ***from time to time,*** after due notice and opportunity for hearing, by rule, regulation, or order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person, including any group or class of traders, under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility, or swaps traded on or subject to the rules of a designated contract market or a swap execution facility, or swaps not traded on or subject to the rules of a designated contract market or a swap execution facility that performs a significant price discovery function with respect to a registered entity, **as the Commission finds *are necessary* to diminish, eliminate, or prevent such burden**.[15]

However, as required by Section 4a(a)(2)(A), such position limits should ONLY be implemented "as appropriate" to diminish, eliminate or prevent excessive speculation. In accordance with 4a(a)(2)(A):

> **In accordance with the standards set forth in paragraph (1)** of this subsection and consistent with the good faith exception cited in subsection (b)(2), with respect to physical commodities other than excluded commodities as defined by the Commission, the Commission shall by rule, regulation, or order establish limits on the amount of positions, **as appropriate**, other than bona fide hedge positions, that may be held by any person with respect to contracts of sale for future delivery or with respect to options on the contracts or commodities traded on or subject to the rules of a designated contract market.[16]

Accordingly, Southern respectfully submits that pursuant to the CEA, the Commission should take the additional time to analyze and review each of the core referenced futures contracts to determine whether speculative position limits are necessary and, if adopted, will (i) prevent excessive speculation; (ii) deter manipulation; (iii) allow for sufficient market liquidity for hedgers; and (iv) permit price discovery.[17] It would "err" to do otherwise.

Southern requests that the Commission "err" on the side of caution and undertake the respectfully recommended analysis, as opposed to relying on two anecdotal events, primarily in futures and not swaps markets, that are nearly 35 years apart. Such a cautious regulatory approach is consistent with the Dodd-Frank Act, the CEA and the congressional intent behind the implementation of position limits. This congressional intent is demonstrated by the

[15] CEA §4a(a)(1)(emphasis added).
[16] CEA §4a(a)(2)(A)(emphasis added).
[17] CEA §4a(a)(3).

following exchange among Chairman Gensler, Commissioner Chilton, and Representative Neugebauer at the House Committee on Agriculture hearing[18] on December 15, 2010:

> **Mr. NEUGEBAUER.** Thank you, Mr. Chairman. Thank you for holding this hearing. **I think that the part of the Dodd-Frank that called for a finding—the question is the Exchange really—you all really haven't done anything in the sense of coming up with a specific finding. And so when you send the rule out, you are going to send a rule out that says we just think there needs to be limits out there. We don't have any finding that those limits are needed. Am I understanding that correctly?**
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> **Mr. CHILTON.** Certainly Congress told us to put the limits in. We had the authority actually before this, but we didn't have support to do this. So we were instructed in the Dodd-Frank bill to put limits in. And the original purpose in the Commodity Exchange Act doesn't say that you have to jump some hurdle that proves beyond a shadow of a doubt in a court of law that speculators moved gas prices ten percent. The law says that we are to prevent and deter fraud, abuse, and manipulation; and so that is sort of the guiding onus that I look at, sir.
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> **Mr. NEUGEBAUER.** That is one of the things that we may have a disagreement on. **I don't necessarily know whether Congress told you to impose limits.**
>
> **Mr. CHILTON.** Section 737.
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> **Mr. NEUGEBAUER.** If you look at it, it says, as the Commission finds as necessary to diminish, eliminate, or prevent such burden. **In other words, in what you have told this Committee today you don't have data that says that there are abuses or excessive speculation going on. I think the intent of Dodd-Frank was, if you find it, address it certainly.** I agree with the gentleman from Missouri. The job for government is transparency and integrity. But what we haven't heard today—and several of the people on the panel have asked this question. **We haven't heard you say we have identified where there is excessive speculation going on that could manipulate the pricing in the marketplace.**
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> **Mr. CHILTON. Congressman, perhaps Congress should have put a finding in before we did it, but they didn't.**

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[18] U.S. House, Committee on Agriculture. *Hearing to Review Implementation of Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act Relating to Position Limits* (Dec. 15, 2010) (emphasis added).

> **Mr. NEUGEBAUER.** I know the story, and I agree with that. But since we didn't, **we kicked the ball to you and we said you should go out and address that issue and conduct an economic analysis.**

As noted by Representative Neugebauer, the CFTC has the ball and Southern believes that the two "findings" listed in the Proposed Rule are insufficient and do not satisfy the level of analysis that Congress intended for determining when and how to implement position limits.

Southern respectfully submits that such experiments by the CFTC with insufficiently analyzed position limits are <u>not</u> "erring on the side of caution." In this regard, moving forward, without sufficient data to assess the potential impacts of the Commission's Proposed Rule, could leave the Commission without an adequate baseline for knowing if the position limits are helping or hurting the impacted markets.[19] The result of the CFTC's experiment of imposing unstudied and unanalyzed position limits could have an expensive unintended consequence of reducing liquidity in the market to the level that bona fide hedging of commercial risks will no longer be a viable risk mitigation tool for energy companies and our economy.[20]

3. <u>Southern's Recommended Three Part Process For Implementing Position Limits</u>.

The approach to position limits in the Proposed Rule appears to be arbitrary, not based on applicable data, and overly burdensome. Accordingly, Southern believes that the position limits framework in the Proposed Rule is not appropriate for OTC markets. However, Southern believes that a solution does exist for OTC markets which would allow the Commission to have better data on the level of speculative positions and will enable the Commission to apply position limits in a more targeted and meaningful manner, rather than arbitrarily across the initial 28 core referenced contracts. Southern's proposal, which is provided in three parts below, attempts to build on existing Dodd-Frank infrastructure by utilizing already established processes and concepts previously endorsed by the Commission, and enables the Commission to implement position limits based on the presence of actual incidences of excessive speculation.

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[19] *See* U.S. House, Committee on Agriculture. *Hearing to Review Implementation of Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act Relating to Position Limits* (Dec. 15, 2010) (statement from Congressman Michael Conaway to CFTC Chairman Gensler and Commissioner Chilton: "Not beating the lack of data dead horse to even further pulverize it, but if you go ahead and move forward without the data, as may be the indication that is here, how quickly will you know you have gotten it wrong? Are there things that you will watch for to say that we have driven speculators off that side of the deal and that burdens on hedgers have increased?... how quickly will you know that you have done some harm, rather than just trying to ease into this thing without disrupting it and creating—going crazy, as Mr. Chilton said? What are your matrix or your benchmarks to say this one was too far?").

[20] *See* Transcript of EEMAC Meeting (February 26, 2015), statement of Mr. Paul Hughes, p. 221 ("We operate in some areas where I would say, historically, I would describe more so as large ponds of liquidity. There may not be a super amount of depth there, but there's been enough to where I can offset my risk. Well, this January when I'm looking to go offset risks in the past I would have been able to do it, there's no more players out there. Those ponds have dried up. And I think you can't necessarily attribute that to one specific rule, and I think to do so would be unfair, but I do think if you look at the order of the rules… I think Dodd-Frank has had an impact on the markets and we can't ignore that.").

A. Part 1: Expand the Current End-User Exception for Clearing to Position Limits

A reoccurring theme during the EEMAC meeting on February 26, 2015, was a concern that liquidity in the energy markets is decreasing, both on exchanges and in the OTC markets. A second, but related theme was that hedgers are bearing a significant amount of the burden created by the position limits framework in the Propose Rule. The establishment of new enumerated hedge criteria only exacerbates the burden placed on hedgers and end-users, particularly those participants in the OTC markets by adding even more complexity and uncertainty for those actively engaged in hedging. Ironically, it is these same market participants that the CFTC is attempting to protect. Therefore, a new approach for OTC swaps should be adopted.

Southern believes the framework established by the Commission in the *End-User Exception to the Clearing Requirement for Swaps* rule[21] appropriately alleviates burdens on the end-user community while still maintaining reasonable safeguards to protect the public and other market participants from excessive speculation. In this regard, market participants who elect the End-User Exception to clearing must attest, among other factors, that the transaction is "not used for a purpose that is in the nature of **speculation**, investing, or trading."[22] Accordingly, excluding these transactions from position limits would better enable the Commission to focus on speculative activity.

Rather than adopting the enumerated hedging criteria currently set out in the Proposed Rule, Southern requests that the Commission consider adopting a process that would allow a transaction that qualifies for the End-User Exception to clearing (and therefore meets the applicable requirements of 17 CFR 50.50) be considered a "bona fide hedge" for purposes of position limits as described in section 4a(a)2 – Establishment of Limitations.

The CEA instructs the Commission to define what constitutes bona fide hedging for purposes of implementing position limits. The criteria set forth by Congress is substantially similar to the criteria set forth to qualify for an End-User Exception to clearing in Rule 50.50(c). Southern does not believe this similarity is a mere coincidence. The Commission itself states in the Proposed Rule that "hedgers present a lesser risk of burdening interstate commerce as described in CEA section 4a because their positions are offset in the physical market."[23]

Because the criteria in 17 CFR 50.50(c) is substantially similar to the criteria utilized by Congress in its mandate to define a bona fide hedging transaction for position limits in the CEA,[24] the use of this existing framework will satisfy the CFTC's intent of protecting market participants and the public from excessive speculation in OTC markets while avoiding the creation of new administrative burdens.

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[21] *End-User Exception to the Clearing Requirement for Swaps*, 77 Fed. Reg. 42,560 (July 19, 2012).
[22] 17 CFR 50.50(c)(2)(emphasis added).
[23] 78 Fed. Reg. at 75,761.
[24] CEA §4a(a)(2).

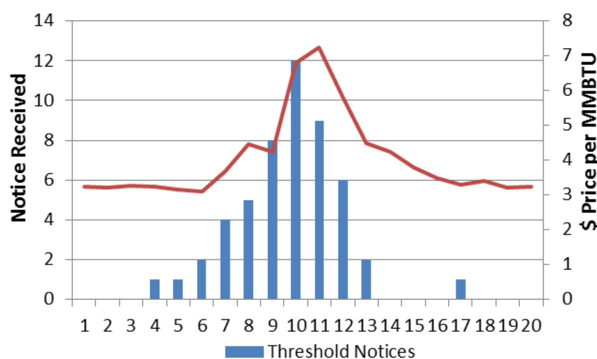
B. Part 2: Implement Speculative Notification Threshold(s)

As noted above, transactions that are speculative in nature would not be eligible for the "End-User Exception" to position limits being proposed herein. Accordingly, after applying the End-User Exception to position limits, the remaining transactions would be a company's speculative transactions. Focusing on these speculative transactions, Southern proposes that OTC market participants would be subject to "Speculation Notification Thresholds" that would initially be set for each of the 28 enumerated products (and could be expanded to other products as necessary).[25]

Under this approach, each time an OTC market participant crosses a Speculation Notification Threshold, the market participant would be required to send an email notification to the CFTC. The CFTC has successfully instituted a similar process to monitor the aggregate size of Trade Options entered into in a single year by an entity pursuant to the No-Action relief offered under CFTC Letter 13-08. Southern believes that such notifications can provide valuable insight into the speculative OTC markets using information that the Commission does not currently have. The frequency and number of the notifications received overlaid with price movements and other market data would give the Commission enough information needed for imposing position limits. Furthermore, the Commission could request additional details from a market participant that crossed the Speculation Notification Threshold.

Setting an appropriate Speculation Notification Threshold level is essential to this proposed framework. If the level is set too high, there may not be enough data to provide additional insight into the market. However, if the threshold is set too low, the amount of "noise" will dilute the value of the data. To this end, Southern believes that a threshold level based on a percentage of deliverable supply is most appropriate, although each enumerated product may require unique analysis. Southern has included the following illustration to demonstrate the value an appropriate Speculation Threshold Level can provide.

[25] Although some entities may view this as an additional administrative burden to keep up with the amount of their speculative positions, Southern believes that good risk management practices dictate the monitoring of speculative positions regardless of CFTC regulation.



As a hypothetical example (illustrated above), assume that natural gas prices spike from $3.00 per mmbtu to $7.00 per mmbtu over a four day period. If the Speculation Notification Threshold was in place, the CFTC could monitor the number of OTC market participants that exceeded the threshold before and during this price movement. If the Commission determined that a growing number of OTC market participants crossed the threshold during this same time period, the Commission could review other available information to determine if excessive speculation caused the price movement. If, however, using the same hypothetical example above, there were no notifications received that market participants crossed the Speculation Notification Threshold, the Commission would have evidence to support a conclusion that the price movement was not due to excessive speculation.

C. Part 3: Employ Position Limits, as Necessary, as a Tool, not as Permanent Policy

As shown in the example above, should existing market data, combined with Speculation Notifications identify potential excessive speculation, the CFTC could impose "self-expiring" position limits for a pre-defined period, such as 30, 60, or 90 days, depending on the nature of the specific market. When markets come back in balance, the position limit would be allowed to expire.

Southern believes that a plain reading of the CEA, as amended by Dodd-Frank, makes clear how position limits are to be utilized. The words, "from time to time," and "as appropriate" were intentionally included to provide that position limits were meant to be flexible and to be considered on an on-going basis instead of a one-time evaluation for a permanent policy. Southern believes position limits were intended to be a "tool"[26] utilized to suppress unreasonable or unwarranted changes in the price of a commodity. Distorting the intent of position limits as a permanent policy as opposed to a flexible tool (as described in the CEA) undermines Congress's directive to the Commission to use discretion in its application of the limits.[27]

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[26] *See* 78 Fed. Reg. at 75,761. ("Speculative position limits have been used as a **tool** to regulate futures markets for over seventy years. Since the Commodity Exchange Act of 1936, Congress has repeatedly expressed confidence in the use of speculative position limits as an effective means of preventing unreasonable and unwarranted price fluctuations.")(emphasis added).
[27] CEA § 4a(a)(3)(B).

Southern believes implementing position limits in the self-expiring manner described above is consistent with the CEA and will allow the Commission more flexibility to ensure that it does not inadvertently harm end-users by unnecessarily driving liquidity from the market, yet still retaining the ability to protect market participants from the burden of excessive speculation.

4. The Commission Should Consider Exempting Entities that Do Not Speculate.

In addition to the three part process for applying position limits proposed above, Southern believes that the Commission should provide an exemption for commercial end-users that do not engage in speculative transactions (or engage in only a de minimis amount of speculative transactions). As provided in the CEA, position limits are intended to address excessive speculation. If an entity engages in no (or in a de minimis amount of) speculative transactions, then it is impossible for such entities to participate in excessive speculation. To subject these types of commercial end-users to the position limits regime would result in unnecessary regulation and an unjustified burden. It would be analogous to requiring all childhood tricycles be retrofitted with an expensive speedometer to ensure that they do not exceed the speed limit.

Section 4a(a)(7) of the CEA provides:

> The Commission, by rule, regulation, or order, may exempt, conditionally or unconditionally, any person or class of person, any swap or class of swaps, any contract or a commodity for future delivery or class of such contracts, any option or class of options, or any transaction or class of transactions from any requirement it may establish under this section with respect to position limits.[28]

Accordingly, Southern respectfully requests that the Commission utilize its authority under Section 4a(A)(7) to exempt such commercial end-users from its final rule on position limits.

5. Reiterating Comments Previously Provided During the Prior Comment Periods.

In reviewing the comments submitted by other entities during the prior comment periods for the Proposed Rule, Southern believes it is worth reiterating the importance of certain issues that have the ability to significantly impact the electric industry. Rather than restate those comments here, Southern notes that it supports the prior comments offered by the Edison Electric Institute ("EEI") relating to (i) cross commodity hedges; (ii) enterprise-wide hedges, and (iii) anticipatory hedges. As noted by EEI, prohibiting these types of hedges will likely limit a company's ability to implement the hedging strategy it believes to be most beneficial for the company and its customers.

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[28] CEA § 4a(a)(7).

6. Reopening the Position Limits Rule Triggers the FERC MOU.

The CFTC/FERC Memorandum of Understanding ("MOU")[29] notes that it is intended to establish procedures for: "(1) applying the Participating Agencies' respective authorities in a manner so as to ensure effective and efficient regulation in the public interest; (2) resolving conflicts concerning overlapping jurisdiction between the Participating Agencies; and (3) avoiding, to the extent possible, conflicting or duplicative regulation."

Under the "Commitments of Participating Agencies" section, the MOU states: "**When the staff of either agency (the "Notifying Agency") becomes aware that** (i) an entity regulated or proposed to be regulated by that agency has filed a request for authorization or an exemption permitting such entity to engage in activities, or (ii) the agency is *sua sponte* considering such an authorization or exemption, which, in either case, may arguably fall within the overlapping jurisdiction of the other agency (the "Notified Agency"), staff of the Notifying Agency will promptly notify the staff contact of the Notified Agency of the matter."

When the Notified Agency expresses an interest after being notified, there are several procedural steps that must take place in accordance with the MOU, such as:

- "Staff of the Participating Agencies will meet and begin discussions with respect to the matter."
- "Staff of the Participating Agencies will diligently and cooperatively communicate to coordinate and develop an approach that meets both agencies' regulatory concerns."
- "Each agency shall, by Commission action, whether pursuant to a petition or *sua sponte,* issue such public orders as are necessary to address such overlap."
- "The CFTC may conclude that an activity, or an aspect of such activity: (1) is not subject to the CFTC's authority as provided in the Commodity Exchange Act, 7 U.S. C. § 1, *et seq.*; or (2) may be eligible for a public interest waiver exemption, whether conditional or unconditional, pursuant to Section 722 of Dodd-Frank and Section 4(c) of the CEA."
- "The CFTC and the FERC each agree to provide information as requested by the other agency to inform its determination pursuant to paragraph II(B)(2)."

The reopening of the position limits rule is a *sua sponte* agency action that falls, or at a minimum "arguably fall[s]," within the overlapping jurisdictions of FERC and CFTC because of the application of position limits to Trade Options, a large portion of which are FERC jurisdictional agreements. The application of position limits will result in similar overlapping regulations (because market shares are also monitored by FERC) and will impact the market's willingness to enter into FERC jurisdictional products. Accordingly, pursuant to the

[29] *See* http://www.ferc.gov/legal/mou/mou-ferc-cftc-jurisdictional.pdf.

CFTC/FERC MOU, FERC should be notified and invited to participate in the CFTC's position limits rulemaking process.

III. Conclusion.

Southern appreciates the opportunity to provide the foregoing comments and information to the Commission. As noted by Commissioner Bowen with regards to revisiting prior rulemakings, "[s]ometimes that may mean making the rules more cost-effective and leaner, but at other times that will mean making them stronger than before. Enhancing a rule can mean reducing burdens to business while strengthening protections for the public."[30] Southern supports Commissioner Bowen in this goal and hopes that its proposals herein will be viewed as meeting that standard.

Please contact us as indicated above if you would like to discuss these comments.

Yours truly,

Southern Company Services, Inc.

By: /s/ Paul Hughes
Title: Manager, Risk Control

[30] *Statement of Commissioner Sharon Y. Bowen Regarding the CFTC's Reopening the Comment Period for Position Limits Rulemaking*, http://www.cftc.gov/PressRoom/SpeechesTestimony/bowenstatement120114 (December 1, 2014).