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May 9, 2016

**Via Electronic Submission**

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

**Re: Comments on Proposed Guidance on Certain Natural Gas and Electric Power Contracts (RIN Number 3235-AL93)**

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 proposed guidance on certain natural gas and electric power contracts (“Proposed Guidance”) issued jointly by the Commodity Futures Trading Commission (“CFTC”) and the Securities and Exchange Commission (“SEC”) (collectively referred to as the “Commissions”).<sup>1</sup> As a member of the Energy and Environmental Markets Advisory Committee (“EEMAC”), Southern has provided several related comments on capacity contracts and similar products during prior EEMAC meetings. Southern appreciates the Commissions’ efforts to provide additional clarity through the Proposed Guidance that certain types of contracts “that historically have not been considered to involve swaps” should not be considered “swaps” under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). Southern agrees that many of these agreements are appropriately excluded from the swap definition because they are customary commercial arrangements. However, as stated in more detail below, Southern is concerned that the Proposed Guidance is too narrowly focused with respect to capacity contracts and that the Proposed Guidance does not go far enough when limiting the impact on the CFTC’s other interpretations.

**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

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<sup>1</sup> *Certain Natural Gas and Electric Power Contracts*, Proposed Guidance, 81 Fed. Reg. 20583 (April 8, 2016) (hereafter “Proposed Guidance”).

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 their customers at stable prices, and the comments made herein are aimed at being able to achieve this goal even after the Commissions finalize the Proposed Guidance.

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

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## **II. Comments on the Proposed Guidance.**

Southern greatly appreciates the Commissions’ efforts to better understand energy markets and to clarify which energy products should not be considered swaps. Southern believes that its participation on EEMAC, as a representative for the electric industry, provides Southern with an important role in assisting the Commissions in this regard. Southern respectfully offers the following comments on the Proposed Guidance.

Southern concurs with the comments submitted in response to the Proposed Guidance by the International Energy Credit Association (“IECA”) and the Joint Trade Associations<sup>2</sup>. Rather than restate those comments here, Southern notes that it supports the comments offered by the IECA and the Joint Trade Associations relating to (i) the narrow applicability of the Proposed Guidance; and (ii) and the impact of the Proposed Guidance on the CFTC’s other interpretations.

### **A. Narrow Applicability of the Proposed Guidance to Regulatory-Required Capacity**

In section II(A), the Commissions describe the type of electric capacity that is covered by the Proposed Guidance. The capacity product covered by the Proposed Guidance is where “the purchaser is purchasing the supplier’s capacity to produce, generate, and deliver the underlying electricity, thereby ensuring its ability to supply electricity in compliance with a regulatory requirement.”<sup>3</sup> However, the reasons included in the Proposed Guidance for excluding regulatory-required capacity from the swap

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<sup>2</sup> The “Joint Trade Associations” refer to the following entities: the Edison Electric Institute, the American Public Power Association and the National Rural Electric Cooperative Association.

<sup>3</sup> See 81 Fed. Reg. 20583, 20584 (emphasis added).

definition also apply to certain types of capacity that are not required by regulations.

The comments cited in the Proposed Guidance note that “state PUCs and the FERC generally do not treat a purchase of capacity in this context as a purchase of a financial instrument or an option, but rather as a purchase of the ability to ensure delivery of the underlying physical commodity.”<sup>4</sup> Southern agrees with this assessment of how state PUCs and FERC view capacity; however, Southern respectfully points out that this treatment is afforded to capacity regardless of whether or not it is purchased to meet a regulatory requirement. For example, under FERC’s requirements, if capacity is sold on a long-term firm basis, the capacity is not considered to be owned by the seller for market analysis purposes. Rather, it is deemed delivered to the buyer.<sup>5</sup> FERC’s requirements in this regard apply regardless of whether the capacity is being purchased to meet a regulatory requirement.

The comments cited in the Proposed Guidance also note that “[i]n this type of capacity contract...the purchaser is not procuring the right to profit from a change in the value of the underlying commodity, which the purchaser will then financially settle in order to offset the price volatility risk of some underlying physical transaction in the cash market.”<sup>6</sup> Southern agrees with this assessment; however, Southern respectfully points out that this applies to certain capacity contracts whether or not they are required by regulation.

Regarding the capacity contracts, the Proposed Guidance also refers to such contracts being entered into based on:

the need to maintain reliable supplies, and practical considerations of storage or transport which arise in the course of the normal operation of at least one party’s business. In this respect, the CFTC preliminarily believes that the contracts described in Part II.A. are similar to certain contracts—namely, sales, servicing and distribution arrangements, and contracts for the purchase of equipment or inventory—listed in the Products Release as commercial contracts that will not be considered swaps.<sup>7</sup>

Again, Southern agrees with this assessment; however, Southern respectfully points out that the need of “maintaining reliable supplies” is a reason utilities enter into certain capacity contracts whether or not they are required by regulation.

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<sup>4</sup> *Id.*

<sup>5</sup> See FERC Order 816, P29.

<sup>6</sup> See 81 Fed. Reg. 20583, 20584.

<sup>7</sup> See 81 Fed. Reg. 20583, 20586 (emphasis added).

Accordingly, for these reasons, and the reasons stated by the IECA and the Joint Trade Associations, Southern respectfully requests that the Commissions clarify that the types of capacity contracts that may be excluded from the definition of a swap as a customary commercial arrangement are not limited to the type described in Part II.A. According to the Commissions, “whether a particular commercial arrangement is a swap depends on the particular facts and circumstances of the arrangement.”<sup>8</sup> Accordingly, Southern requests that the Commissions clarify that other types of capacity contracts may be excluded from the swap definition depending on the contract-specific facts and circumstances.

**B. Impact of the Proposed Guidance on Prior Interpretations**

Southern appreciates the Commissions’ actions to limit the Proposed Guidance’s effect on other interpretations. In this regard, the Commissions stated, “the CFTC does not intend that the proposed guidance herein would affect the interpretation of when an agreement, contract, or transaction with embedded volumetric optionality would be considered a forward contract.”<sup>9</sup> Footnote 34 of the Proposed Guidance describes the prior interpretations that will not be impacted. Southern is concerned that Footnote 34 may be too limited. Accordingly, Southern respectfully requests that the Commissions clarify that the Proposed Guidance (when finalized) will not affect any other applicable interpretation issued by the CFTC.

**III. Comments in Response to Specific Questions Raised in the Proposed Guidance.**

- 1. Are there natural gas and electric power contracts that would not qualify as trade options within the scope of CFTC regulation 32.3 but which would be covered by the proposed guidance? If so, should the proposed guidance be limited so that it encompasses only contracts that do qualify as trade options? Why or why not?**

**Answer:** Southern is not aware of any contracts that would be covered by the Proposed Guidance that would not also qualify as a trade option (unless a party does not meet the entity requirements). However, Southern believes that the Proposed Guidance should not be limited only to contracts that qualify as trade options. For additional discussion, please see the comments submitted by the IECA.

- 2. Does the proposed guidance provide sufficient clarity on whether the specific types of natural gas and electric power contracts in question should or should not be considered to be swaps? If not, how should the guidance be revised to provide more clarity?**

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<sup>8</sup> See 81 Fed. Reg. 20583 at 20586.

<sup>9</sup> See 81 Fed. Reg. 20583, 20585-20585.

**Answer:** As discussed above, the Commissions should clarify that other types of capacity contracts may be excluded as customary commercial arrangements based on the facts and circumstances of the contract.

- 3. Are there other facts and circumstances that the CFTC should consider in determining whether the contracts described in Part II.A. are swaps? If so, what are these factors and how should they be considered?**

**Answer:** Yes, the “swap” definition in the Dodd-Frank Act specifically excludes contracts that are “intended to be physically settled.” In this regard, the United States Congress specifically amended the Commodity Exchange Act to state that “[t]he term ‘swap’ *does not* include...any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled.” Therefore, this part of the definition should be included in any related interpretations or guidance.

- 4. Are there contracts (other than those described in Part II.A.) that are entered into by participants in the electric power and natural gas markets and necessitated by, or closely tied to, compliance with regulatory obligations or frameworks that are similar to those described in Part II.A.?**

**Answer:** See response to Question 1.

- 5. Are there other types of commodity contracts, outside of the electric power and natural gas markets, which are necessitated by, or closely tied to, compliance with regulatory obligations or frameworks that should be considered under the interpretation in the Products Release? If so, please describe these contracts and the regulatory obligations and frameworks to which they are closely tied.**

**Answer:** Certain related products (such as coal, etc.) and by-products (such as gypsum, etc.) should be considered by the Commissions.

- 6. Are there public interest considerations regarding the natural gas and electric power contracts in question that should be reflected in the proposed guidance? If so, why and how?**

**Answer:** Southern supports the IECA’s comments with regards to this question.

- 7. Does the proposed guidance provide sufficient clarity that it does not supersede or modify the CFTC OGC FAQ referenced in footnote 34? Is there any potential overlap between the proposed guidance and the CFTC OGC FAQ that should be further clarified? If so, what elements of the proposed guidance should be clarified to indicate that the proposed guidance does not supersede or modify the CFTC OGC FAQ?**

**Answer:** As discussed above, Southern respectfully requests that the Commissions clarify that contracts that are otherwise excluded from the definition of a swap will not be subject to this interpretation.

8. **With respect to natural gas peaking contracts, are there natural gas providers other than LDCs, such as Intrastate and Interstate Natural Gas Pipelines (as those terms are defined by the Energy Information Administration), which are subject to regulatory obligations to prioritize and serve residential demand for natural gas, such that the providers are obligated to curtail service to electric utilities under certain circumstances? If so, please explain.**

**Answer:** Southern does not offer a comment on this question.

#### **IV. Conclusion.**

Southern appreciates the opportunity to provide the foregoing comments and information to the Commissions.

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

Yours truly,

*/s/ Paul Hughes*

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Southern Company Services, Inc.

By: Paul Hughes  
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