FINAL

May 9, 2016

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
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Re: Comments of the IECA on Commodity Futures Trading Commission's and Securities Exchange Commission's Proposed Guidance on *Certain Natural Gas and Electric Power Contracts*, 81 Fed. Reg. 20583, RIN 3235-AL93, published on April 8, 2016 ("Commercial Arrangements Guidance")

Dear Mr. Kirkpatrick:

On April 8, 2016, the Commodity Futures Trading Commission ("Commission" or "CFTC"), jointly with the Securities Exchange Commission ("SEC", collectively with the CFTC, the "Commissions"), published the above-captioned Commercial Arrangements Guidance as a notice of proposed guidance ("Proposal"). In the Proposal, the Commissions describe certain electric and natural gas contracts and preliminarily conclude that such contracts are not swaps because they are "customary commercial arrangements."[1] The Commissions invite comment on the preliminary conclusion and other matters. The International Energy Credit Association ("IECA") respectfully responds herein.

The IECA is an association of over 1,400 credit, risk management, legal and finance professionals that is dedicated to promoting the education and understanding of credit and other risk management-related issues in the energy industry. For over ninety years, IECA members have actively promoted the development of best practices that reflect the unique needs and concerns of the energy industry.

Following the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") and its amendments to the Commodity

[1] 81 Fed. Reg. 20583 at p. 20584. The "Products Release" referenced in the Commissions' quote from the Commercial Arrangements Guidance refers to the *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule*, 77 Fed. Reg. 48208 at 48239 (August 13, 2012) ("Products Release").

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Exchange Act ("CEA"), the IECA has filed numerous comments with the Commission on various proposed rulemakings affecting markets in energy commodities. The IECA seeks to protect the rights and advance the interests of the commercial end-user community that makes up the majority of its membership.

Many of the IECA's members are representatives of small to large physical energy companies that rely on financial commodity markets (i.e., futures contracts, options on futures, and swaps to hedge the risks of energy commodity price volatility) and physical commodity markets to achieve their fundamental mission of providing safe, reliable, and reasonably priced energy commodities that US businesses and consumers require for our economy and our livelihood.

I. Comments on Proposed Commercial Arrangements Guidance.

By these comments, the IECA wishes to thank the Commissions for their thoughtful consideration of the IECA's previously submitted comments, as referenced in the description of the Capacity Contracts-Electrical Power in Part II.A. of the Commercial Arrangements Guidance. We also wish to thank the Commissions for their proposed guidance that:

> "In view of all the facts and circumstances of the contracts described in Part II.A., the CFTC preliminarily believes that such contracts would satisfy this element of the Products Release, and therefore should be considered not to be swaps under the interpretation set forth in the Products Release because they are customary commercial arrangements of the type described in the Products Release." (Emphasis added.)[2]

The IECA also supports the Commissions' recent efforts to pursue their various mandates under the Dodd-Frank Act and the CEA, while simultaneously enhancing the Trade Options Final Rule and this proposed Commercial Arrangements Guidance. These enhancements will help ensure that agreements, contracts and transactions used by an energy market participant to assure a supply of an energy commodity it will need in the future, or the availability of a service it will need in the future, and not be subjected to regulations intended to apply to swaps that are used primarily to hedge against risks arising from a future change in price for that commodity or to serve other speculative or investment purposes.

[2] 81 Fed. Reg. 20583 at 20586.

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With the foregoing perspective, we endorse and support the statement of CFTC Chairman Massad, as set forth in his statement accompanying the proposed Commercial Arrangements Guidance, which said:

> "[T]hese contracts are entered into to assure availability of a commodity, not to hedge against risks arising from a future change in price of that commodity or for speculative, or investment purposes. They are typically entered into in response to regulatory requirements, the need to maintain reliable energy supplies, and practical considerations of storage or transport. All of these factors are consistent with what has been set forth in previous commission guidance."[3]

In addition, we offer the following comments regarding the proposed Commercial Arrangements Guidance, seek certain clarifications, and provide answers to several of the Commissions' enumerated questions as set forth in the Commissions' Proposal.

A. The Commissions' Legal Standard for Customary Commercial Arrangements in the Products Release and Its Application in this Commercial Arrangements Guidance to the "Facts and Circumstances" of the Two Contracts Described in Part II.A of the Proposal While Helpful, Does Also Create Some Uncertainty.

As the Commissions have stated in the Commercial Arrangements Guidance, their determination of "whether a particular commercial arrangement is a swap depends on the particular facts and circumstances of the arrangement."[4] In making a preliminary determination that the two contracts described in Part II.A. of the Proposal are not swaps, the Commissions reiterated the standard for customary commercial arrangements, as set forth in the Products Release,[5] and then applied that legal standard to the relevant "facts and circumstances" of the two contracts as described in Part II.A. of the Commercial Arrangements Guidance.

Based on such relevant facts and circumstances, the Commissions concluded that:

> "The CFTC understands, based on the commenters' descriptions, that the contracts described in Part II.A. above are not traded on an organized market or over-the-counter, and do not have severable payment obligations. Thus, the CFTC preliminarily believes that the contracts described in Part II.A. are consistent with the first two elements of the interpretation in the Products Release.

[3] 81 Fed. Reg. 20583 at 20587.
[4] 81 Fed. Reg. 20583 at 20586.
[5] 81 Fed. Reg. 20583 at 20585, referencing the Products Release, 77 Fed. Reg. at 48247.

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> The CFTC has also considered the contracts described in Part II.A. in light of the statement in the Products Release that, in order not to be considered swaps, the contracts should be entered into ''[b]y commercial or non-profit entities as principals (or by their agents) to serve an independent commercial, business, or non-profit purpose, and [o]ther than for speculative, hedging, or investment purposes.'' In view of all the facts and circumstances of the contracts described in Part II.A., the CFTC preliminarily believes that such contracts would satisfy this element of the Products Release, and therefore should be considered not to be swaps under the interpretation set forth in the Products Release because they are customary commercial arrangements of the type described in the Products Release.
>
> The CFTC notes that commenters have represented that the contracts described in Part II.A. are entered into in response to regulatory requirements, 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.
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> *****
>
> The CFTC observes that when an entity enters into a purchase contract, it is assured of a supply of the equipment or inventory it will need in the future. Similarly, a service contract assures the availability of a needed service in the future. The contracts described in Part II.A. are similar to the purchase and service contracts enumerated in the Products Release because they appear to satisfy the elements of commercial contracts, transactions or arrangements that are not considered swaps, including that they are entered into by commercial or non-profit entities to assure availability of a commodity, not to hedge against risks arising from a future change in price for the commodity or to serve a speculative or investment purpose." (Emphasis added.)[6]

The Commercial Arrangements Guidance then explicitly says: "As stated in the Products Release, whether a particular commercial arrangement is a swap depends on the particular facts and circumstances of the arrangement. This proposed guidance would not apply to any agreement, contract or transaction other than those described in Part II.A.,

[6] 81 Fed.Reg. 20583 at 20586.

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and would not preclude the CFTC from issuing further guidance considering other commodity contracts under the interpretation in the Products Release." (Emphasis added.)[7]

Based on the foregoing statements, the IECA understands that the CFTC's Commercial Arrangements Guidance is based on, and limited to, the specific "facts and circumstances" of the two contracts described in Part II.A. of the Commercial Arrangements Guidance.

What is "uncertain," however, is the extent to which another contract for the sale of capacity in the electricity markets, or another peaking supply contract for the sale of natural gas, must contain each and every one of the various facts and circumstances reiterated in Part II.A. of the Commercial Arrangements Guidance in order for the parties to that agreement, contract or transaction to be able to rely on the CFTC's "preliminary" conclusion that such a contract is "not a swap" because it is a "customary commercial arrangement."

B. Requests for Clarification.

First and foremost, the IECA's members seek the "legal certainty" that their agreements, contracts and transactions, which are entered into primarily to assure availability of a commodity they will need in the future (i.e., assure a supply of the equipment or inventory they will need in the future or assure the availability of a service needed in the future) - and which are not entered into primarily to hedge against risks arising from a future change in price for the commodity nor to serve a speculative or investment purpose,- will not be swaps.

We believe the Commissions intend for their proposed Commercial Arrangements Guidance to provide this same desired "legal certainty" to energy industry market participants. In the Proposal, the Commissions rely on their description of the customary commercial arrangements exclusion from swaps as described in the Products Release. In the Products Release, the Commissions made the following statement:

> The Commissions are stating that certain customary consumer and commercial transactions that have not previously been considered swaps or security-based swaps do not fall within the statutory definitions of those terms.[8]

[7] 81 Fed.Reg. 20583 at 20586.
[8] 77 Fed. Reg. 48208 at 48318.

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This was an important element of the Commissions' requisite cost-benefit analyses in the Products Release, which stated further that:

> The CFTC believes that the forgoing interpretation should mitigate costs because it increases legal certainty that specific customary consumer and commercial transactions are not swaps or security-based swaps subject to Dodd-Frank regulation. As a result of this interpretation, consumers and industry participants will not have to seek legal advice regarding whether these transactions are swaps or security-based swaps. (Emphasis added.)[9]

In order to ensure that the proposed Commercial Arrangements Guidance provides the level of "legal certainty" that appears to be desired mutually by the Commissions and the energy companies participating in the physical energy commodity markets, the IECA respectfully requests the following clarifications.

1. The Commissions Should Clarify that Satisfaction of Either a Regulatory Requirement or a Commercial Requirement Will Satisfy the Third Element of the Interpretation of a Customary Commercial Arrangement under the Proposed Commercial Arrangements Guidance, So Long as the Contract is Not Used for Hedging, Speculative or Other Investment Purposes.

The Commissions should clarify that a Capacity Contract (for electricity) or a Peaking Supply Contract (for natural gas) that satisfies the first two elements of the interpretation in the Products Release will not be a swap so long as such contract is entered into in response to either (a) a regulatory requirement or (b) a commercial need to maintain reliable supplies or services needed in the future, either of which arises in the course of the normal operation of the business of at least one of the contract's counterparties.

For example, with respect to a Capacity Contract (for electricity), a commercial party that enters into a Capacity Contract based on its determination that prudent operation of its business requires it to enter into contracts to purchase a specified quantity of electric capacity, even if that party is not under any explicit regulatory requirement to enter into such a contract for that quantity of capacity, has nevertheless entered into that capacity contract in order to assure itself of the supply of electric capacity it may need in the future. So long as such contract (i) satisfies the first two elements of the interpretation in the Products Release, and (ii) is not entered into for hedging, speculative or other investment purposes, the Commissions should clarify that such a capacity

[9] 77 Fed. Reg. 48208 at 48318.

contract will also satisfy the interpretation of customary commercial arrangements and not be a swap.

Similarly, with respect to a Peaking Supply Contract (for natural gas), a commercial party that enters into a Peaking Supply Contract based on its determination that prudent operation of its business requires it to enter into a contract that gives it the right to purchase an additional quantity of natural gas that would only be needed if its commercial operations experience a greater need for such supply during any "peak" period, then that need is not required to occur during a "peak" period only as a result of a local distribution company interrupting the natural gas supply that would otherwise be sold and transported by a local distribution company to that commercial business. Again, so long as such contract (i) satisfies the first two elements of the interpretation in the Products Release, and (ii) is not entered into for hedging, speculative or other investment purposes, the Commissions should clarify that such a peaking supply contract will also satisfy the interpretation of customary commercial arrangements and not be a swap.

2. If the Preceding Clarification is Not Acceptable, Then The Commissions Should Provide an Expedited No-Action Letter Approval Process, Whereby Other Capacity Contracts or Peaking Supply Contracts, Not Matching All the "Facts and Circumstances" Enumerated in Part II.A, Would Be Designated by the Commissions' Staffs as Customary Commercial Arrangements.

While not as desirable as the clarification requested in Section I.B.1 of these IECA Comments, the Commissions should consider establishing an expedited procedure whereby a commercial or non-profit entity seeking to enter into a capacity contract (for electricity) or a peaking supply contract (for natural gas) that does not contain one or more of the specific "facts and circumstances" of the two contracts enumerated in Part II.A. of the proposed Commercial Arrangements Guidance, but otherwise satisfies the three elements of a customary commercial arrangement as set forth in the Products Release, as reiterated in the proposed Commercial Arrangements Guidance, could request and receive expedited approval from the Commissions or their Staffs through a No-Action Letter.

Such relief could be issued in the form of No-Action Letters from the Commissions' Staffs and would be consistent with the statement in the Proposal, which says: "<u>This proposed guidance</u> would not apply to any agreement, contract or transaction other than those described in Part II.A., and <u>would not preclude the CFTC from issuing</u>

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further guidance considering other commodity contracts under the interpretation in the Products Release." (Emphasis added.)[10]

3. The Commissions Should Clarify that the Proposed Commercial Arrangements Guidance Would Not Affect any Other Interpretation Previously Provided by the Commissions.

If the foregoing Staff No-Action Letter procedure is determined by the Commissions to be the preferred process by which commercial or non-profit entities could obtain the "legal certainty" required for them to enter into such agreements, contracts or transactions without having to "seek legal advice regarding whether these transactions are swaps or security-based swaps," then some other regulatory compliance method would need to be available to such parties immediately to allow them to enter into such contracts as and when required to meet their operational requirements pending the review, approval and issuance of any such No-Action Letter by the Commissions' Staffs.

This demonstrates to the IECA why the Commissions should make clear that each of the regulatory compliance methods approved by the Commissions are unaffected by the proposed Commercial Arrangements Guidance. This would mean that the Commissions' proposed Commercial Arrangements Guidance would not affect (i) the interpretation of when an agreement, contract or transaction with embedded volumetric optionality would be considered a forward contract, (ii) the eligibility of a specific agreement, contract or transaction for treatment as a Trade Option under the Trade Option Final Rule, or (iii) any other rule, regulation or interpretation issued by either of the Commissions.

In addition, each such regulatory compliance method should be considered as a separate choice that may be chosen by the commercial or non-profit entities that are parties to such contracts without specifying that a contract's eligibility for one regulatory classification is dependent on the contract's satisfaction of any other regulatory classification.

For example, the IECA believes that the parties to a particular agreement, contract or transaction should be allowed to choose whether that agreement, contract or transaction will be designated as a Customary Commercial Arrangement or a Trade Option or a Forward Contract with acceptable levels of embedded volumetric optionality. On this basis, in response to Question #1 in the Proposal (see discussion below) the IECA

[10] 81 Fed.Reg. 20583 at 20586.

recommends that the Commissions NOT limit the proposed Commercial Arrangements Guidance "so that it encompasses only contracts that do qualify as trade options." Any such limitation would seem more likely to increase the risk that a contract "entered into by commercial or non-profit entities to assure availability of a commodity, not to hedge against risks arising from a future change in price for the commodity or to serve a speculative or investment purpose," could be categorized unnecessarily as a Swap.

For example, the IECA appreciates that the proposed Commercial Arrangements Guidance is simply that, a form of interpretive guidance rather than a rule or regulation, provided by the Commissions to assist commercial and non-profit entities with their efforts to operate their commercial or non-profit businesses in compliance with the Commissions' regulations.

In that light, some commercial or non-profit entities may prefer to rely on the Commissions' interpretive guidance that certain contracts are not swaps because they are Customary Commercial Arrangements based on the specific facts and circumstances of a particular contract, while another commercial or non-profit entity may wish to elect the regulatory classification which appears to provide the most "legal certainty" that their contracts would not be subject to full regulation as a swap, namely ensuring that their agreement, contract or transaction satisfies the Commissions' Trade Options exemption as set forth in the Trade Options Final Rule.[11]

The IECA believes this was the guidance that CFTC Commissioner Bowen sought to provide in her statement accompanying the issuance of the Trade Options Final Rule, which said:

> I fully recognize the difficulty in distinguishing between different types of physical contracts. If a particular contract or an element of a contract serves an economic purpose similar to an option, I believe the best course of action is to exercise caution and not assume your contract is outside of our jurisdiction based on an interpretation. While it may seem fine for a person using these contracts to hope that the interpretation is not called into question, I believe it would be wise, as a backstop, to make sure it also falls within the trade option exemption." (Emphasis added.)[12]

C. Specific Examples of Capacity Contracts (Electric) and Peaking Supply Contracts (Natural Gas) Needing Clarification.

[11] See *Trade Options Final Rule*, 81 Fed. Reg. 14966 (March 21, 2016).
[12] *Id.* at 14975.

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The IECA offers the following description of other commercial contracts, which we think could benefit from the Commission's review and determination that such contracts are not swaps, because they are customary commercial arrangements.

1. The Commissions Should Determine that Asset Management Agreements Are Not Swaps, Because They Are Customary Commercial Arrangements.

Natural gas asset management agreements structured to comply with the requirements of the Federal Energy Regulatory Commission ("FERC") Order No. 712 ("AMAs")[13] are frequently used by energy companies, but are not readily characterized under the CFTC's guidance regarding forward contracts and trade options. A FERC Order 712 AMA is fundamentally a services agreement that enables one party, the "shipper," which has a service agreement for transportation services with an interstate pipeline that is necessary to assure delivery to or from that shipper of a supply of natural gas that the shipper either produces (a "supply AMA") or consumes (a "consumer AMA"), to legally release that pipeline capacity to another party to that AMA, an "asset manager," who is better able to manage and optimize the use of that pipeline capacity on behalf of the releasing shipper.

Due to concerns that sham AMAs could be used to evade FERC's pipeline transportation capacity release rules, however, FERC determined that the releasing shipper in an AMA must have the right to direct the asset manager to buy and take delivery of (under a "supply AMA"), or sell and deliver (under a "consumer AMA"), a quantity of natural gas from (or to) the releasing shipper, up to the quantity of pipeline transportation capacity released to the asset manager, during each day for at least five months out of each twelve months period.[14]

The requirement in any AMA that the shipper has the power to require the asset manager to purchase the shipper's natural gas in a "supply AMA" or to require the asset manager to sell natural gas to the shipper in a "consumer AMA" is, at its core, necessary

[13] See *Promotion of a More Efficient Capacity Release Market*, 123 FERC ¶61,286 (73 Fed. Reg. 37058, June 30, 2008) ("FERC Order 712"), including orders on rehearing of FERC Order No. 712, namely Order No. 712-A, 125 FERC ¶61,216 (73 Fed. Reg. 72692, December 1, 2008), and Order No. 712-B, 127 FERC ¶61,051 (April 16, 2009).

[14] AMAs can be entered into by both consumers of natural gas and producers/sellers of natural gas. In the context of AMAs between producers and asset managers, so-called "supply AMAs", the obligation of the asset manager is to purchase and receive gas from the producer/seller that released its pipeline transportation capacity to the asset manager. In the context of AMAs between consumers and asset managers, so-called "consumer AMAs", the obligation of the asset manager is to sell and deliver gas to the consumer that released its pipeline transportation capacity to the asset manager. The discussion of AMAs in these IECA Comments is equally applicable to supply AMAs and consumer AMAs.

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to reconcile the collision between FERC's shipper-must-have-title rule, FERC's capacity release rules, and the shipper's requirement that this pipeline transportation service remain available to meet the shipper's commercial requirements to sell natural gas (in a "supply AMA") or to purchase natural gas (in a "consumer AMA"). Without this option for the asset manager to purchase gas from or sell gas to the releasing shipper, this AMA would violate FERC's shipper-must-have-title rule. As a result, this option is a requirement of any AMA due both to (i) the commercial necessity of the shipper's commercial business (as either a producer-supplier or consumer of natural gas) and (ii) FERC's regulatory requirement.

In its essence, the provisions of an AMA obligate the asset manager to: (a) purchase and take delivery from the shipper, or sell and deliver to the shipper, a quantity of natural gas in amounts up to the quantity of pipeline transportation capacity released to the asset manager by the shipper, when and as that supply of natural gas is made available by, or required by, the shipper for its commercial business, and (b) utilize the released pipeline transportation service to transport and sell natural gas into other markets whenever that natural gas transportation service is not required by the shipper for its commercial business. In so doing, the provisions of an AMA maximize the efficiency of the utilization of scarce pipeline transportation capacity by enabling the asset manager to utilize its skills as a marketer to maximize the utilization of the shipper's contracted-for pipeline transportation capacity on days when, from time to time, the shipper does not need that pipeline transportation service to meet the needs of the shipper's commercial business operations.

The IECA suggests that AMAs, as described herein, readily satisfy the common characteristics of customary commercial arrangements that are not swaps as set forth in the Products Release and in the proposed Commercial Arrangements Guidance. First, the payment obligations under an AMA, although they may be complex, are not severable from the AMA. Second, AMAs are not traded by market participants or investors on an organized market or over-the-counter and AMAs do not involve risk-shifting arrangements with financial entities. Third, AMAs are not entered into primarily for speculative, hedging or investment purposes.[15] On the contrary, because the primary

[15] *See Paragraph 122 of FERC ORDER No, 712, 73 Fed. Reg. 37058, at paragraph 122, which says:* "122. As virtually all the commenters on the NOPR agree, AMAs provide significant benefits to a variety of participants in the natural gas and electric marketplaces and to the secondary natural gas market itself. One of the most important aspects of AMAs is that they provide broad benefits to the marketplace in general. By permitting capacity holders to use third party experts to manage their gas supply arrangements and their pipeline capacity, AMAs provide for lower gas supply costs and more efficient use of the pipeline grid. Asset managers have resources and market knowledge not necessarily available to natural gas capacity holders, such as trading platforms, credit portfolios, hedge fund and risk management experience, cost containment and counterparty credit and contracting expertise, which allow asset managers to better maximize the value of the releasing party's assets and manage the associated risk. AMAs bring diversity to

purpose of any AMA is to secure the services of a particular asset manager, the assets under management are specific to the releasing shipper and the identity of the asset manager is an important consideration.[16]

On this basis, the IECA respectfully submits that the AMAs described herein are entered into in response to regulatory requirements, 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, the shipper. In this respect, the IECA respectfully requests that the CFTC determine that it preliminarily believes that the AMAs described herein 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 and that such AMAs will not be considered swaps.

2. To the Extent that Any of the Following Natural Gas Agreements are Not Already Excluded Forward Contracts under the Commissions' Interpretive Guidance in the Products Release, the Commissions Should Determine that Such Natural Gas Agreements Are Not Swaps, Because They Are Customary Commercial Arrangements.

Each of the following contracts are customarily used by market participants in the natural gas industry primarily to assure the availability of supplies of natural gas and access to services in the natural gas industry that will be needed in the future and are not primarily entered into to hedge against future changes in the price of natural gas nor for other speculative or investment purposes. The IECA herein requests that the Commissions consider each of the following natural gas contracts:

a. **Full Requirement Contracts** – These types of contracts are frequently entered into by utilities, chemical plants, refineries, and large industrial processing facilities in order to procure fuel required to perform the underlying commercial operations. Since the fuel demand may vary depending on many factors, including weather, market fundamentals, operational conditions, and

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the mix of capacity holders and customers that are served through the capacity release program, thus enhancing liquidity and diversity for natural gas products and services. AMAs result in an overall increase in the use of interstate pipeline capacity, as well as facilitating the use of capacity by different types of customers in addition to LDCs. AMAs benefit the natural gas market by creating efficiencies as a result of more load responsive gas supply, and an increased utilization of transportation capacity."

[16] See also pages 11 – 14 of the *Comments of EDF Trading North America, LLC*, submitted to the CFTC on December 22, 2014, with respect to *Proposed Interpretation – Forward Contracts with Embedded Volumetric Optionality* (RIN 3235-AK65).

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infrastructure demand, these types of customers prefer to enter into a flexible fuel supply rather than re-negotiate their fuel supply every time the business conditions change. In all circumstances, the intent is to physically deliver/receive commodity; it is entered into by a commercial market participant(s) (no hedge funds, or financial market participants that do not make/take physical delivery are permitted for this exception); and, that volumes actually taken (versus what was scheduled or nominated) depend on operational conditions or factors. These types of contracts can only be satisfied by physical delivery.

b. **Full Output Contracts** – The same analysis as above applies except that the seller would likely be the counterparty with volumetric flexibility (as opposed to the buyer in the example above). This example could include gas producers, gas processing plants, power generators, and similar energy assets and related agreements.

c. **Variable Baseload** – This type of agreement usually includes a transaction where a buyer needs to buy, for example, between 5,000-6,000 MMBtu of natural gas a day. For example, an industrial customer, a load serving entity, or a natural gas generator often needs flexibility to meet the (un)expected changes in the underlying demand. Most of these types of customers need operational flexibility to meet an occasional demand spike. As mentioned above, a physical delivery is the only way to satisfy the contract.

d. **Baseload + Swing Load** – This type of transaction would most likely involve a situation where the buyer needs a certain baseload supply and, also, wants to be able to call on additional volume if needed. The swing part of this transaction would constitute a volumetric flexibility (for operational reasons) and would only be called upon to meet the operational needs.

e. **Natural Gas and NGL Processing/NGL and Natural Gas Purchases/Sales/Exchanges** – This type of transaction frequently involves a natural gas producer delivering its production to a natural gas processing facility. These types of transactions could be structured in different ways. For example, a gas producer may elect to buy/back the dry, i.e., processed gas at the tail end of the processing plant, after the natural gas liquids ("NGLs") have been removed, and sell the NGLs to the processor. Alternatively, the natural gas producer may decide to keep the NGLs and sell the dry (processed) natural gas to the processor. Either way, the amount of natural gas and NGLs entering the gas processing facility will not be known in advance because the producers do not know the total output in advance. Rather, the amount of natural gas and NGLs entering the processing plant, and the amount of dry natural gas and NGLs

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purchased and sold after processing are contracted for on the basis of the "full production" or a particular well output.

f. **C&I** – Customary commercial and industrial transactions could involve any of the above listed transactions. Depending on the structure of a particular transaction, the same analysis as above would apply. In particular, all C&I contracts require physical delivery.

g. **Producer Services/Gathering Agreements** – These types of transactions involve midstream companies involved in gathering and/or processing natural gas. In the some areas, a gathering company in a particular geographic footprint must accept natural gas from any gas producers (in the same geographic footprint) even if the midstream company never anticipated or intended to contract with any natural gas producers. This, in turn, creates a circumstance where a gathering/midstream company may end up with much more gas to sell downstream than it had anticipated. To that end, a midstream company must take the gas and, subsequently, sell it downstream or otherwise dispose of it. Consequently, the volumes that a gathering/midstream receives can often vary significantly from the anticipated volumes. Rather than shutting the producers out of its system, a gathering/midstream company must have sufficient operational flexibility to meet the fluctuating demand.

In each of the foregoing natural gas contracts, the IECA suggests that such natural gas contracts, as described herein, readily satisfy the common characteristics of customary commercial arrangements that are not swaps as set forth in the Products Release and in the proposed Commercial Arrangements Guidance. First, the payment obligations under such natural gas contracts are not severable from such contracts. Second, such natural gas contracts are not traded by market participants or investors on an organized market or over-the-counter and such natural gas contracts do not involve risk-shifting arrangements with financial entities. Third, such natural gas contracts are not entered into primarily for speculative, hedging or investment purposes.

To the extent that any of the foregoing natural gas contracts are not already excluded Forward Contracts under the Commissions' Interpretive Guidance in the Products Release, the IECA respectfully requests that the Commissions determine that it preliminarily believes that such natural gas contracts 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 and that such natural gas contracts will not be considered swaps.

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II. Comments in Response to Specific Questions Raised in Commercial Arrangements 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: The IECA submits that the determination that an agreement, contract or transaction satisfies the Commissions' requirements for not being a swap, because it is a Customary Commercial Arrangement, should be considered to be a separate regulatory compliance category for commodity contracts that meet the Commissions' requirements for such classification. Similarly, the classification of a commodity contract as a Trade Option, or as a forward contract with an acceptable level of embedded volumetric optionality, should be seen as wholly separate regulatory compliance categories for commodity contracts.

A commercial or non-profit entity seeking "legal certainty" for the agreements, contracts and transactions it enters into from time to time with respect to its commercial business will want to rely on the Trade Options exemption provided in the CFTC's Trade Options Final Rule. On the other hand, there could be contractual arrangements which, for one reason or another, do not readily fit into the classification of a Trade Option, but which do satisfy the requirements of a Customary Commercial Arrangement.

Imposing an additional requirement that all Customary Commercial Arrangements that are not swaps must also satisfy the requirements for designation as a Trade Option under the Trade Options Final Rule would obviate the need for any determination by the Commissions that any particular agreement, contract or transaction is a Customary Commercial Arrangement.

As a result, we would not recommend that the Commissions limit the proposed Commercial Arrangements Guidance so that it encompasses only contracts that also qualify as Trade Options.

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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Answer: See the Requested Clarifications discussion in Section I.B. above in these IECA Comments.

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: Capacity contracts that are already exempt under the CFTC's exemption order issued on April 2, 2013 for various RTOs and ISOs (the "RTO-ISO Exemption Order")[17] and the CFTC Staff's related CFTC Letter No. 16-09, issued on February 12, 2016, providing similar relief to the Southwest Power Pool ("SPP Exemption Relief") would not be swaps. Although "resource adequacy" transactions are not RTO or ISO products, future regulatory capacity products could be.

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 discussion of AMAs and Other Natural Gas Contracts above in Sections I.C.1 and I.C.2 of these IECA Comments, as well as the discussion of Requested Clarifications above in Section I.B. of these IECA Comments and in response to the Commissions' Question #2 above.

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: The IECA will respectfully confine itself to its expertise and not answer.

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?**

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[17] 78 Fed. Reg. 19880 (Aril 2, 2013).

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Answer: The IECA believes that providing "legal certainty" for commercial and non-profit entities by narrowing the overly broad definition of swaps provided in the Dodd-Frank Act to exclude the physical supply contracts entered into by such entities to provide availability of supply or services that will be needed by such entities' commercial or non-profit operations in the future, and which contracts are not used to hedge against risks arising from a future change in prices for the commodity or other speculative or investment purposes, is itself supported by the public interest in ensuring that government agencies engage in reasoned decision-making under the Administrative Procedures Act, as well as providing guidance to enable such commercial and non-profit entities to structure such contracts to avoid unnecessary regulation of such contracts as financial swaps.

More and more of the nation's energy comes from renewable energy resources, from large-scale wind farms and solar facilities to distributed generation such as rooftop solar. The fundamental nature of renewable generation is its intermittency. Solar energy only arrives when the sun shines and a passing cloud will radically drop output. When that happens, natural gas plants or large scale hydro facilities ramp up to keep the electric grid functioning reliably. Those gas plants do not run at full capacity while the sun shines, as this is the point of renewable energy. But utilities need to know that they can ramp up those plants when they need to. Utilities are the ultimate consumers of capacity products that may pass through market hands on their way to ultimate "consumption." And that "consumption" can include never calling on the capacity if no eagles approach the wind turbines requiring them to be immediately stopped. Legal certainty for electric capacity products is an essential requirement for a 21st century electric grid seeking to incorporate renewable energy. Capacity products will also change in nature as the "holy grail" of large scale energy storage technology comes to fruition. Therefore, all physical energy capacity products acquired for the reliable functioning of the electric grid, not just the regulatory "resource adequacy" products described in Part II.A. of the Proposal, and not just the types of capacity products that existed when the Dodd-Frank Act was passed six years ago, should explicitly be "customary commercial arrangements."

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?**

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Answer: The proposed Commercial Arrangements Guidance is potentially inconsistent with the OGC FAQ. The OGC FAQ addresses tolling agreements and has determined that a toll on a power generating facility's capacity is an exempt forward contract under the OGC FAQ, while a capacity contract on the other hand is a customary commercial arrangement under the interpretation set forth in the Products Release and in the proposed Commercial Arrangements Guidance.

However, as discussed in Section I.B.3. above in these IECA Comments and in the IECA's response to Question #1 above, the IECA recommends that each of the Commissions' previously issued statements of interpretive guidance, this proposed Commercial Arrangements Guidance, the OGC FAQ, as well as the Trade Options Final Rule, should be unaffected by each other and should be seen as independent means of regulatory compliance that can be chosen by individual counterparties depending on their sense of the level of legal certainty provided by each such means of regulatory compliance and the applicability of each such means of regulatory compliance to the particular facts and circumstances of each such counterparty's specific agreement, contract, or transaction.

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: See discussion of clarifications requested above in Section I.B of these IECA Comments.

[SIGNATURE PAGE FOLLOWS]

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III. Conclusion.

The IECA appreciates the opportunity to provide these IECA Comments and would welcome the opportunity to discuss these comments further should you require any additional information on any of the topics discussed herein.

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Yours truly,
INTERNATIONAL ENERGY CREDIT ASSOCIATION

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