



No-Action Request; Rule 140.99

October 7, 2012

Richard Shilts, Acting Director
Division of Market Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Ananda Radhakrishnan, Director
Division of Clearing and Risk
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Gary Barnett, Director
Division of Swap Dealer and Intermediary
Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Stacy Yochum, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

**Re: Request for Interim No-Action Relief until the Commission Takes
Final Action on Petition for Rulemaking to Amend Commission Rule
1.3(ggg)(4)**

Gentlemen and Ms. Yochum:

Pursuant to Commission Rule 140.99,¹ the Petitioners² respectfully request that the appropriate divisions of the Commodity Futures Trading Commission (the “Commission”) grant no-action relief to all entities that offer to act or act as counterparties to “Utility Special Entities”³ in “Utility Operations-Related Swaps,”⁴ respecting the Commission’s Rule 1.3(ggg)(4)(i) which implements a “special entity sub-threshold”⁵ as part of the *de minimis* exception to the definition of a “swap dealer,” from requirements of the Commodity Exchange

¹ 17 C.F.R. § 140.99.

² The American Public Power Association (“APPA”), the American Public Gas Association (“APGA”), the Large Public Power Council (“LPPC”), the Transmission Access Policy Study Group (“TAPS”) and the Bonneville Power Administration (“BPA”) (the “Petitioners”). A copy of the Petition, filed with the Commission on July 12, 2012, is available at: <http://sirt.cftc.gov/sirt/sirt.aspx?Topic=PendingFilingsandActionsAD&Key=23845> (the “Petition”).

³ The term “Utility Special Entities” is defined at page 2 of the Petition.

⁴ The term “Utility Operations-Related Swaps” is defined at page 3 of the Petition.

⁵ The term “special entity sub-threshold” refers to the \$25 million sub-threshold, established by the Commission in Rule 1.3(ggg)(4)(i), as part of the *de minimis* exception to the definition of “swap dealer.”

Act (the “CEA”) and the Commission’s regulations thereunder applicable to “swap dealers” (other than the Commission’s general anti-fraud and anti-market manipulation provisions), for the interim period described below.

I. The Petitioners

APPA is the national service organization representing the interests of publicly-owned electric utilities in the United States. More than two thousand public power systems provide over fifteen percent of all kilowatt-hour sales to ultimate customers. APPA’s member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. Some publicly-owned electric utilities generate, transmit, and sell power at wholesale and retail, while others purchase power and distribute it to retail customers, and still others perform all or a combination of these functions. Public power utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a public power utility is to provide reliable and safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

APGA is the national association that represents government-owned natural gas distribution systems. There are approximately 1,000 public gas systems in 36 states and over 720 of these systems are APGA members. Government-owned natural gas distribution systems are not-for-profit entities owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other government agencies that have natural gas distribution facilities.

LPPC is an organization representing 26 of the largest government-owned electric utilities in the nation. LPPC members own and operate over 86,000 megawatts of generation capacity and nearly 35,000 circuit miles of high voltage transmission lines, representing nearly 90% of the transmission investment owned by non-Federal government-owned electric utilities in the United States.

TAPS is an association of transmission-dependent utilities in more than 35 states, promoting open and non-discriminatory access to the transmission grid and regulatory policies to facilitate the participation of smaller utilities in the electricity markets.

BPA is a self-financed, non-profit Federal agency created in 1937 by Congress that primarily markets electric power from 31 federally owned and operated projects, and supplies 35 percent of the electricity used in the Pacific Northwest. BPA also owns and operates 75 percent of the high-voltage transmission in the Pacific Northwest. BPA’s primary statutory responsibility is to market its Federal system power at cost-based rates to its “preference customers.”⁶ BPA also funds one of the largest wildlife protection and restoration programs in the world.

⁶ BPA has approximately 130 preference customers made up of electric utilities which are not subject to the jurisdiction of the Federal Energy Regulatory Commission, including Indian tribes, electric

II. Background

On May 23, 2012, the Commission and the Securities and Exchange Commission (the “SEC”) issued a Joint Final Rule, Joint Interim Final Rule, and certain Interpretations, further defining among other statutory terms the term “swap dealer” (the “Swap Dealer Release”).⁷ The Swap Dealer Release implemented a portion of Section 721(a)(21) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) in accordance with Section 712(d) of the Dodd-Frank Act.⁸ Pursuant to the Swap Dealer Release, the Commission implemented the “*de minimis* exception” to the definition of “swap dealer” in Rule 1.3(ggg)(4). In clause (i) of such Rule, the Commission established thereunder a \$25 million sub-threshold to the *de minimis* exception regarding swaps where one of the counterparties is a “special entity.”⁹ The “special entity sub-threshold” to the *de minimis* exception is not required by the Dodd-Frank Act.

On July 12, 2012, the Petitioners submitted the Petition, requesting that the Commission amend CFTC Rule 1.3(ggg)(4) in a narrowly-targeted way. The proposed rule amendment¹⁰ would allow Utility Special Entities to continue to engage in Utility Operations-Related Swaps with entities that are not registered “swap dealers,” and without such Utility Operations-Related Swaps being considered for purposes of the “special entity sub-threshold.” The proposed rule amendment would nonetheless have Utility Operations-Related Swaps with Utility Special Entities remain subject to the general *de minimis* exception.¹¹

Since the Petition was filed, a number of entities have filed comments with the Commission in support of the Petition.¹² Other concerned groups and persons, including members of Congress, have asked the Commission to provide the Utility Special Entities relief

cooperatives, and state and municipally chartered electric utilities, and other Federal agencies located in the Pacific Northwest.

⁷ Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 77 Fed. Reg. 30,596 (May 23, 2012).

⁸ Pub. L. No. 111-203 (2010).

⁹ As such term is defined in Section 4s(h)(2)(C) of the Dodd-Frank Act or in Commission Rule 23.401(c).

¹⁰ The Petitioners provided amended rule text in the Petition. See pages 2-3 of the Petition.

¹¹ In the interpretations provided in the Swap Dealer Release, the Commission explains that it has the ability to change the requirements of the *de minimis* exception by rule or regulation, noting the statutory basis for making such a change without a joint rulemaking with the SEC based on the language of Section 1a(49)(D), added to the Commodity Exchange Act by Section 721(a)(21) of the Dodd-Frank Act. See footnotes 464 and 465 of the Swap Dealer Release and the accompanying text.

¹² Many of the letters of support of which the Petitioners are aware appear as “associated documents” to the Petition, at the web address provided in footnote 2 above. The letters were filed by entities that act as counterparties to Utility Special Entities or trade associations representing such counterparties, not by entities associated with the Petitioners.

from the “special entity sub-threshold.” The Commissioners and Commission staff have met with the Petitioners, with individual Utility Special Entities and with some of the current counterparties to discuss the seriousness of the Utility Special Entities’ concerns. The Petitioners have provided the Commission staff with evidence that the Utility Special Entities’ access to Utility Operations-Related Swap is already being constrained. The Commission has not yet posted the Petition for comment or acted on the Petition.

III. The Request for No-Action Relief

Beginning October 12, 2012, the electric and natural gas industries, including Utility Special Entities and entities that act as counterparties to Utility Special Entities in Utility Operations-Related Swaps, will become subject to certain of the Commission’s new rules regulating “swaps,” issued to implement and interpret Section 721(a)(21) of the Dodd-Frank Act. The rules that will become effective October 12, 2012, include Commission Rule 1.3(ggg) and the “*de minimis* exception” in Rule 1.3(ggg)(4), as well as certain rules and regulatory interpretations issued August 13, 2012 in the “Product Definitions Release,” which implements and interprets the definition of “swap” and the exclusions therefrom, along with other terms found in Section 721(a)(21) of the Dodd-Frank Act.¹³ In the Product Definitions Release, the Commission sought public comment on a number of regulatory interpretations with respect to nonfinancial commodity transactions and, in particular, with respect to transactions commonly found in the electric and natural gas industries. Comments are due on October 12, 2012.

This request for no-action relief is filed in order to ensure that the Commission has sufficient time to consider fully the Petition and comments submitted with respect thereto, and to act on the Petition in light of the impending October 12, 2012 effective date. Moreover, the request for no-action relief is filed in order to ensure that the Commission has sufficient time to consider fully the comments on the Product Definitions Release, and to complete its regulatory proceeding in that docket.¹⁴

The Petitioners respectfully request that the appropriate divisions of the Commission grant no-action relief to all entities that offer to act or act as counterparties to “Utility Special Entities” in “Utility Operations-Related Swaps.” The Petitioners respectfully request that the no-action relief state that the Commission’s Divisions will not recommend that the Commission commence an enforcement action against any entity that offers to act or acts as a counterparty to Utility Special Entities in Utility Operations-Related Swaps for a failure to register as a “swap dealer,” or for failure to comply with any of the Commission’s regulations applicable to “swap dealers” (except for the anti-fraud and anti-manipulation provisions). The Petitioners respectfully request that the no-action letter specifically state that Utility Operations-Related

¹³ Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48207 (August 13, 2012) (“Product Definitions Release”).

Swaps offered or entered into with Utility Special Entities will ***not*** be counted for purposes of determining whether the counterparty exceeds the “special entity sub-threshold” for purposes of Rule 1.3(ggg)(4)(i), unless and until the Commission takes final action with respect to the Petition and the final action is effective.

The Petitioners respectfully request that the Commission post the no-action letter in an easily accessible place on the Commission’s website such that counterparties may be generally informed that the no-action letter is available for them to rely on in continuing to offer and enter into Utility Operations-Related Swaps with Utility Special Entities during the interim period.

The Petitioners and their members which are “Utility Special Entities” are a narrow category of special entities distinguishable by their electric energy and/or natural gas utility facilities, operations and public service obligations. None of the Utility Special Entities is a “financial entity;” all are nonfinancial entities and “commercial end users” as such term is used by Congress and regulatory policy makers.¹⁵ The Utility Special Entities enter into Utility Operations-Related Swaps solely to hedge or mitigate commercial risks arising from their electric and natural gas utility operations.

Without such interim no-action relief, the counterparties available to “Utility Special Entities” for Utility Operations-Related Swaps will not offer or enter into such swaps with Utility Special Entities after October 12, 2012 and until the regulatory uncertainty caused by the Commission’s “special entity sub-threshold” is resolved. Otherwise, the counterparties could unintentionally become subject to all of the requirements of the CEA and the Commission’s regulations applicable to “swap dealers.” Without such interim no-action relief, the Utility Special Entities will be denied uninterrupted access to the Utility Operations-Related Swaps necessary to hedge commercial risks arising from operations. Such a result would be directly contrary to Congress’ intent in enacting the Dodd-Frank Act.

The Petitioners also wish to point out that on September 24, 2012, the Joint Associations¹⁶ submitted a request for comprehensive relief from the rules being promulgated by the Commission to implement the Dodd-Frank Act in the form of an extension of ***all*** applicable effective dates and compliance dates or, in the alternative, comprehensive “no action” relief (“Joint Associations’ Request”).¹⁷ Certain of the Petitioners (APPA, LPPC and TAPS, collectively, the “NFP Electric Trade Associations”), on September 27, 2012, submitted a letter of support of that request (“Support Letter”).¹⁸ Therein, the NFP Electric Trade Associations

¹⁵ See Petition at page 5.

¹⁶ The Joint Associations include the Edison Electric Institute, the American Gas Association and the Electric Power Supply Association.

¹⁷ *See Request for an Extension of the Effective and Compliance Dates for Dodd-Frank Regulations Affecting Non-SD/MSP Energy Market Participants, or, in the Alternative, for No-Action Relief*, filed September 24, 2012.

¹⁸ *See Letter in Support of Request for Comprehensive Relief*, filed September 27, 2012.

requested that the comprehensive relief extend until the beginning of a Transition Period (as such term is defined in the Joint Association's request) that will commence only when all of the Commission's rulemakings required to implement the Dodd-Frank Act in respect of Energy Commodity Swaps have been completed, and all applicable rulemaking decisions have been published in the Federal Register and are effective.¹⁹ Because it is uncertain whether the Commission will grant that request, it is imperative that the Commission act on the Petitioners' request for no-action relief to ensure at a minimum that the Utility Special Entities can continue to engage in Utility Operations-Related Swaps in order to operate their electric and gas facilities, hedge the associated commercial risks and serve electric and natural gas customers without disruption.

For all of the aforementioned reasons, the Petitioners respectfully request that the appropriate divisions of the Commission grant the no-action relief requested. Please contact any of the individuals below or Patricia Dondanville, Reed Smith LLP, 10 South Wacker Drive, 40th Floor, Chicago Illinois 60606, telephone (312) 207-3911, or e-mail pdondanville@reedsmith.com, if you have questions regarding this request for no-action relief.

¹⁹ See Support Letter at pages 4-5.

REQUEST FOR NO-ACTION RELIEF- SPECIAL ENTITY SUB-THRESHOLD

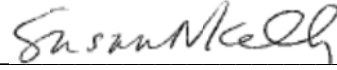
Respectfully submitted,

AMERICAN PUBLIC GAS ASSOCIATION



David Schryver
Executive Vice President
201 Massachusetts Avenue, NE
Suite C-4
Washington, D.C. 20002
Tel: (202) 262-0835
E-mail: dschryver@apga.org

AMERICAN PUBLIC POWER ASSOCIATION




Susan N. Kelly
Senior Vice President of Policy Analysis and General Counsel
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20009-5715
Tel: (202) 467-2933
E-mail: skelly@publicpower.org

LARGE PUBLIC POWER COUNCIL



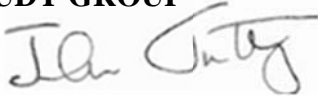
Noreen Roche-Carter
Chair, Tax and Finance Task Force
c/o Sacramento Municipal Utility District
6201 S Street
Sacramento, CA 95817-1899
Tel: (916) 732-6509
E-mail: nrohec@smud.org

BONNEVILLE POWER ADMINISTRATION




Virginia K. Schaeffer
Attorney
Bonneville Power Administration
Office of the General Counsel – LC-7
P.O. Box 3621
Portland, Oregon 98208-3621
Tel: (503)230-4030
Email: ykschaeffer@bpa.gov

TRANSMISSION ACCESS POLICY STUDY GROUP



John Twitty, Executive Director
Transmission Access Policy Study Group
4203 E. Woodland St.
Springfield, MO 65809
Tel: (417) 838-8576
Email: 835consulting@gmail.com

I hereby certify that the material facts upon which the Petitioners no-action request are based are true and complete to the best of my knowledge, information and belief. In addition, I hereby agree that, if any time prior to issuance of a no-action letter, any material statement made in this letter ceases to be true and complete, I will ensure that the Commission Staff is informed promptly in writing of all materially changed facts and circumstances.



Patricia Dondanville
Reed Smith LLP
10 South Wacker Drive, 40th Floor
Chicago Illinois 60606
Tel: (312) 207-3911
Email: pdondanville@reedsmith.com

Counsel for the Petitioners

cc: Honorable Gary Gensler, Chairman
Honorable Mark Wetjen, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner
Dan Berkovitz, General Counsel
Jeffrey P. Burns, Assistant General Counsel
Mark Fajfar, Assistant General Counsel
Julian E. Hammar, Assistant General Counsel
David E. Aron, Counsel
Joshua Kans, Senior Special Counsel, SEC