October 9, 2012

VIA ELECTRONIC SUBMISSION

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

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

Re: Request for Clarification and No-Action Relief Regarding Commission Interpretive Guidance on Transportation and Storage Agreements with Two-Part Fee Structures Set Forth in the Commission's Swap Definition Final Rule

Dear Ms. Yochum and Mr. Shilts:

The Interstate Natural Gas Association of America and its members (collectively, "INGAA")[1] hereby respectfully request that the Commodity Futures Trading Commission (the "Commission") provide clarification and no-action relief concerning certain interpretive guidance in the preamble to the Commission's final rule further defining the term "swap"[2] in accordance with section 712(d)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[3] Specifically, INGAA requests clarification and no-action relief in connection with specific interpretive guidance provided on pages 48,242-43 of the Swap Definition Final Rule.[4]

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1 INGAA's members are Alliance Pipeline Ltd., Boardwalk Pipelines, Carolina Gas Transmission Corporation, CenterPoint Energy, Cheniere Energy, Inc., Dominion Transmission, Inc., DTE Energy, Enbridge Energy Company, Inc., Energy Transfer Partners LP, EQT Corporation, Iroquois Pipeline Operating Company, Kinder Morgan, National Fuel Gas Supply Corporation, National Grid, New Jersey Resources, NiSource Gas Transmission & Storage, ONEOK, Inc., Pacific Gas & Electric, Questar Pipeline Company, Sempra Pipelines and Storage, Southern Star Central Gas Pipeline, Inc., Spectra Energy Corp, TransCanada Corporation, WBI Energy Transmission, Inc., and Williams Gas Pipeline Company, LLC.

2 *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Record Keeping; Final Rule*, 77 Fed. Reg. 48,208 (Aug. 13, 2012) (hereafter, "Swap Definition Final Rule").

3 Pub. L. 111-203, 124 Stat. 1376 (2010) (hereafter, "Dodd-Frank Act").

4 These pages, titled as subsection (iii), "Certain Physical Commercial Agreements, Contracts, or Transactions," provide guidance with respect to "certain physical commercial agreements for the supply and consumption of energy that provide flexibility," including "transportation agreements on natural gas pipelines, and natural gas storage agreements" (hereafter, "Facility Services Agreement Guidance").

INGAA appreciates the Commission's efforts to provide guidance on the definition of a "swap" with respect to facility services agreements for the "supply and consumption of energy." However, the Facility Services Agreement Guidance makes the application of longstanding Commission precedent concerning the characteristics of options more confusing, not less, in the facility services agreement context. One paragraph in particular in the Facility Services Agreement Guidance raises concern as to the application of the Commission's guidelines regarding facility usage agreements that employ "two-part" rate structures consisting of a "demand" or "reservation" charge and "usage fees, rents, or other analogous services charges not included in the demand charge or reservation fee."[5] As applied to natural gas transportation and storage agreements, contracts or transactions that use two-part rates, the However Paragraph is contrary to the Commission's intent and historic approach to determining whether an agreement, contract or transaction (collectively "agreement") is an option.

For the reasons explained below, INGAA respectfully requests the Commission clarify:

(1) that agreements for service on natural gas pipeline and storage facilities or parts thereof (i.e., as distinct from sales or purchases of the gas commodity itself) do not have the characteristics of options and hence are not options subject to the swap definition; and

(2) that the Commission will use its historical approach of determining whether an agreement has the characteristics of an option, rather than the mere existence of a two-part fee structure, to determine whether a particular natural gas transportation or storage agreement is an option subject to the swap definition.

Providing natural gas transportation and storage providers and their customers with the requested certainty concerning the definition of "swap" is critical prior to the rule's effective date of October 12, 2012, or as soon thereafter as reasonably possible. INGAA therefore respectfully urges the Commission, the Commission's General Counsel, or an appropriate Division of the Commission to issue no-action relief stating that the Commission will not take, or such Division of the Commission will not recommend, any enforcement action if the members of INGAA (and parties to facility agreements with INGAA's members) do not treat such facility agreements, including but not limited to natural gas transportation and storage agreements, as swaps or commodity options subject to the swap definition, for purposes of complying with the provisions of Title VII of the Dodd-Frank Act and the rules thereunder, solely because such agreements provide for a two-part fee structure. The requested no-action relief should be provided at least until such time as the Commission issues a final clarification, interpretation, rule revision, or

[5] The paragraph, which will hereafter be referred to as the "However Paragraph," reads as follows:

> However, in the alternative, if the right to use the specified facility is only obtained via the payment of a demand charge or reservation fee, and the exercise of the right (or use of the specified facility or part thereof) entails the further payment of actual storage fees, usage fees, rents, or other analogous service charges not included in the demand charge or reservation fee, such agreement, contract or transaction is a commodity option subject to the swap definition.

Id. at 48,242.

response to comments concerning the Swap Definition Final Rule and its applicability to such agreements.[6]

INGAA respectfully asks the Commission to issue the requested clarification and no-action relief on an expedited basis before October 12, 2012, or as soon thereafter as reasonably possible.[7]

I. Executive Summary

INGAA members provide natural gas transportation and storage services under agreements that do not meet the definition of an option under the Commodity Exchange Act, the Dodd-Frank Act, and Commission precedent and therefore should not be regulated as swaps. INGAA had understood, and continues to believe, that neither the Commission nor Congress intended to include natural gas transportation and storage service agreements as "swaps" or as "commodity options subject to the swap definition." These agreements do not contain the historical characteristics of options and they are not options under any recognized standard. In fact, these agreements are structured to require service purchasers to carry the full risk of loss of their investments in the services to be rendered by the service provider. Moreover, as explained below, the fee structures utilized in natural gas transportation and storage agreements are designed simply to compensate the pipeline and storage operator for the service rendered. Natural gas transportation and storage charges are not designed to be limited risk, premium-based fees that allow buyers to shift risk and give buyers the right, but not the obligation, to acquire service, which the Commission and the courts have held characterize options.

INGAA understands that the Facility Services Agreement Guidance is intended to be read consistently with the Commission's precedent, including its *1985 Interpretative Statement* and subsequent precedent setting forth the characteristics of an option.[8] Indeed, INGAA interprets

[6] INGAA intends to submit comments on October 12, 2012, suggesting revisions to the Facility Agreement Guidance, as well as seeking clarifications consistent with this letter.

[7] INGAA is aware that Edison Electric Institute ("EEI"), the American Gas Association ("AGA"), and the Electric Power Supply Association ("EPSA") (collectively the "Joint Associations") have filed a request for extension of the compliance dates or, in the alternative, for no-action relief with respect to Dodd-Frank regulations impacting non-swap dealer and non-major swap participants in the energy markets. INGAA supports the Joint Associations' position and believes that their request is fully consistent with the requested clarification and no-action relief sought herein. However, the relief requested by INGAA is critical and necessary even if the Commission grants the relief sought by the Joint Associations. Thus, notwithstanding the relief sought by the Joint Associations, INGAA respectfully asks the Commission for prompt consideration of its request.

[8] *Characteristics Distinguishing Cash and Forward Contracts and "Trade" Options*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) P 22,718 (Sept. 30, 1985) (emphasis added) (hereafter, "*1985 Interpretative Statement*"). The *1985 Interpretative Statement* was issued by the Commission's General Counsel, but "has been consistently cited by both the Commission and courts as persuasive authority on the topics that it addresses." *In the Matter of Cargill*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) P 28,425 n.28 (Nov. 22, 2000) (citing authority), *aff'd mem.* Comm. Fut. L. Rep. (CCH) P 29,633 (Nov. 25, 2003).

the Facility Services Agreement Guidance as incorporating this precedent, particularly since the Commission acknowledged that it would not interpret "actions such as scheduling" gas transportation and storage on facilities on which a customer has reserved capacity as equivalent to exercising an option.[9]

The Commission's Facility Services Agreement Guidance, however, includes one paragraph of interpretive language that could be read as contradicting the *1985 Interpretative Statement* to the extent it deems that natural gas transportation and storage agreements are commodity options, subject to regulation as swaps, solely because they employ a two-part fee structure.

The However Paragraph is inconsistent with the remainder of the Facility Services Agreement Guidance and it is contrary to (and neither recognizes nor incorporates) the Commission's precedent concerning the definition of an option. INGAA does not believe the Commission meant to have this limiting language apply to natural gas transportation and storage agreements, and similar facility usage agreements, which do not meet the definition of options. Because the effective dates for key swaps regulations are quickly approaching, INGAA seeks timely, near-term relief to clarify the application of this limiting language as requested herein, or, if such clarification cannot be made prior to October 12, 2012, to secure the no-action relief requested above pending removal of the However Paragraph or similarly permanent and comprehensive relief.

II. Background on INGAA and Natural Gas Transportation and Storage Services

INGAA is a trade association and it, together with its 25 members, represents the vast majority of the interstate natural gas pipeline companies in the U.S. and comparable companies in Canada. INGAA's members operate approximately 200,000 miles of pipelines and serve as an indispensable transportation link between natural gas producers and consumers.

The natural gas transportation network in the U.S. consists of approximately 300,000 miles of pipelines as well as natural gas storage facilities, which bring natural gas from producing regions to consuming regions. INGAA's members include the owners and operators of interstate pipelines and storage facilities, which are regulated by the Federal Energy Regulatory Commission ("FERC"). INGAA members own and operate approximately 200,000 miles of interstate pipeline.

Intrastate pipelines and storage facilities generally are regulated by state commissions. Some INGAA members have affiliates that own and operate intrastate pipelines and storage facilities that provide transportation and storage services that may be regulated by FERC under section 311 of the Natural Gas Policy Act or by state commissions.

[9] 77 Fed. Reg. at 48,242.

III. Status of the Swap Definition Final Rule

Pursuant to section 712(d)(1) of the Dodd-Frank Act, and following an advance notice of proposed rulemaking,[10] a notice of proposed rulemaking regarding the Swap Definition Final Rule was published in the Federal Register on May 23, 2011.[11] The comment period closed on July 22, 2011. Neither the advance notice of proposed rulemaking nor the notice of proposed rulemaking discussed potentially regulating transactions involving two-part fee structures. On August 13, 2012, the Swap Definition Final Rule was published in the Federal Register, marking the first time the two-part fee structure issue was included in the rulemaking process. The Swap Definition Final Rule will become effective on October 12, 2012, although phasing provisions and Commission orders are delaying the dates for compliance with certain aspects of the regulations.

INGAA recognizes that the Commission has solicited comments on certain aspects of the Swap Definition Final Rule, including the interpretation regarding forward contracts with embedded volumetric optionality. These comments are due on October 12, 2012.[12] In connection with its comment request, the Commission asked the following: "Is the interpretation sufficiently clear with respect to capacity contracts, transmission (or transportation) services agreements, peaking supply contracts, or tolling agreements? Why or why not?"[13]

While INGAA intends to submit comments by October 12, 2012, INGAA's members are in the very difficult position of having to respond to a final rule that also becomes effective on October 12, 2012, while also complying with other already effective rules that have compliance dates tied to the effective date of the Swap Definition Final Rule. They must respond and comply despite having no notice, in the advance notice of proposed rulemaking, the Proposed Rule or at any other step of the rulemaking process, that the Commission would provide specific guidance that could be read to conclusively determine that certain natural gas transportation and storage agreements are commodity options subject to the definition of a "swap."

The However Paragraph could have significant regulatory impacts on all INGAA members, as well as thousands of customers who receive natural gas transportation and storage services under transportation and storage agreements employing two-part rates, if the scope and applicability of that paragraph is not clarified or addressed in advance of the October 12, 2012 public comment closing date and effective date of the Swap Definition Final Rule (or at least very shortly thereafter). For this reason, good cause exists to provide the prompt and timely clarification and no-action relief INGAA requests.

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10 *See Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act,* 75 Fed. Reg. 51,429 (Aug. 20, 2010).

11 *See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, Proposed Rule, 76 Fed. Reg. 29,818 (May 23, 2011) (hereafter, "Proposed Rule").

12 77 Fed. Reg. at 48,208.

13 *Id*. at 48,242.

IV. Legal Standards

Under the Dodd-Frank Act, a "swap" is defined to include "options," defined as "any agreement, contract, or transaction . . . that is a put, call, cap, floor, collar or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more . . . commodities . . . ."[14] Thus, to be regulated as a swap, an agreement, contract, or transaction must either be a swap as defined in the statutory swap definition, or an option as defined in the statutory swap definition, which means it must have the characteristics of an option consistent with Commission precedent (that is, must have characteristics of a "put, call, cap, floor, collar or similar option").

As set forth in the *1985 Interpretative Statement*, in determining whether an agreement is an option, the Commission and courts "have carefully examined 'the economic reality of the transaction, not its name.'"[15] As explained in *In the Matter of Cargill*:

> The *1985 Interpretative Statement* identifies three criteria indicative of an option. First, the instrument gives the buyer the right to take or make delivery of the commodity but does not obligate him to do so. Second, the buyer's losses are limited to a premium paid as consideration for the option seller's performance. Third, the instrument is purchased by offering a premium as opposed to a down payment on the eventual delivery price.[16]

Furthermore, as recognized by the Commission, "an option is a limited risk instrument. . . . [T]he option purchaser will benefit from a favorable price move and will not be liable for any other losses beyond the premium or other payment that the purchaser pays for the option."[17] The Commission's glossary recognizes the limited risk nature of options, defining an option as "[a] contract that gives the buyer the right, but not the obligation, to buy or sell a specified quantity of a commodity or other instrument at a specific price within a specified period of time, regardless of the market price of that instrument."[18]

In sum, the statutory language (i.e., "put, call, cap, floor, collar or similar option"), together with this longstanding Commission and judicial precedent, makes it clear that options subject to Commission swaps jurisdiction must have characteristics of options, including the right, but not the obligation, to obtain the subject of the option (in this case, the transportation or storage service), that the buyer's losses are limited to a premium paid as consideration for the option seller's performance, and that the option is purchased by offering a premium as opposed to a down payment on the eventual delivery price (in this case, the total price for the services

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[14] Sec. 721(a)(2)(47)(A)(i).

[15] *1985 Interpretative Statement* at P 22,718.

[16] *In the Matter of Cargill* at P 28,425.

[17] *1985 Interpretative Statement* at P 22,718.

[18] *CFTC Glossary: A Guide to the Language of the Futures Industry*, CFTC.GOV, http://www.cftc.gov/ucm/groups/public/@educationcenter/documents/file/cftcglossary.pdf (last visited Oct. 8, 2012) (hereafter, "CFTC Glossary").

rendered). In its Facility Services Agreement Guidance, the Commission sets forth a three-part test to guide the industry as to how the Commission will interpret agreements, contracts and transactions for the "use" of a facility, but not for the purchase or sale of the commodity used, transported or stored in the facility (the "Three-Part Test"):

> The CFTC will interpret an agreement, contract or transaction not to be an option if the following three elements are satisfied: (1) The subject of the agreement, contract or transaction is usage of a specified facility or part thereof rather than the purchase or sale of the commodity that is to be created, transported, processed or stored using the specified facility; (2) the agreement, contract or transaction grants the buyer the exclusive use of the specified facility or part thereof during its term, and provides for an unconditional obligation on the part of the seller to grant the buyer the exclusive use of the specified facility or part thereof; and (3) the payment for the use of the specified facility or part thereof represents a payment *for its use rather than the option to use it.*[19]

The Commission then explained further: "In such agreements, contracts and transactions, while there is optionality as to whether the person uses the specified facility, the person's right to do so is legally established, does not depend upon any further exercise of an option and merely represents a decision to use that for which the lessor already has paid."[20] Thus, the Commission states, "[i]n this context, [it] would not consider actions such as scheduling . . . gas transportation or injection of gas into storage to be exercising an option if all three elements of the interpretation above are satisfied."[21]

Nevertheless, despite adopting guidance that distinguishes agreements in which the buyer pays for the use of a facility from agreements that depend upon the "further exercise of an option," the Commission proceeds to set out the However Paragraph, which, on its face is inconsistent with the *1985 Interpretative Statement* and the further guidance immediately preceding it in the Facility Services Agreement Guidance.

V. Request for Clarification and No-Action

A. Natural gas transportation and storage services are for the "usage" of the facility and are not commodity options

In the natural gas industry, transportation and storage fees pay for the service being rendered by the pipeline or storage company. Often the fee has two components: a reservation fee and a usage fee. The fees are designed to compensate the pipeline or storage operator for services rendered and to establish the customer's right to use the facility. These fees do not provide any type of risk premium (i.e., an independent option to contract for or otherwise obtain

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[19] 77 Fed. Reg. at 48,242 (emphasis added).

[20] *Id*.

[21] *Id*.

service at a future date). Regardless of fee structure, under natural gas transportation and storage agreements, the obligations of both service providers and service purchasers become legally binding at the time the agreements are entered into by the parties.

With respect to agreements with reservation fees and usage fees, such agreements legally obligate the customer to pay the reservation fee for the duration of the agreement, regardless of whether the customer uses the service on any particular day. Consistent with the Commission's position on the nature of these agreements in the Facility Services Agreement Guidance, "while there is optionality as to whether the person uses the specified facility, the person's right to do so is legally established, does not depend upon any further exercise of an option and merely represents a decision to use that for which the lessor already has paid."[22] The customer need only nominate gas to be scheduled for transportation on the pipeline or for injection/withdrawal from storage, in accordance with industry protocols.

As the Commission correctly notes, "actions such as scheduling" natural gas transportation and storage are not exercising an option. If scheduling gas under a transportation or storage agreement is not exercising an option, then the underlying agreement and collecting payment for services rendered under the agreement cannot be an option.

Natural gas transportation and storage agreements, on their face, are materially different from options. Unlike an option:

- Once entered into, transportation and storage agreements containing reservation and usage fees obligate the buyer (shipper) to pay the reservation fee for the amount of reserved capacity for the duration of the agreement, regardless of the shipper's actual use of the reserved capacity;

- The reservation fee in a transportation and storage agreement is not a limited-risk premium, nor does it constitute consideration for the purchase of a right or option to later purchase a specified amount of capacity; rather, it is the payment for the service;

- The right to use the specified amount of capacity for the term of the agreement is legally established upon signing the agreement, and the use of the facility does not depend on the further exercise of an option;

- The usage fee, together with the reservation fee, compensates the pipeline for the full costs of providing the buyer the service which the buyer has committed to pay for, and does not constitute a "strike" price or similar fee that is characteristic of an option; rather, the usage fee is in the nature of a reimbursement for the variable costs incurred by the operator in rendering the service; and

- The reservation and usage fees are payments for transportation and storage service and do not give the buyer the right to buy or sell a specified quantity of a commodity.

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22 *Id*.

Furthermore, the "economic reality" of natural gas transportation and storage agreements distinguishes them from commodity options. The fees for these services are designed solely to compensate the transportation or storage provider for the services that were sold to the customer. These fees are not designed or used to shift economic risk to the pipeline or to provide a limited-loss instrument to the customer. With an option, the option buyer is obligated only to pay the premium and has the right, but not the obligation, to acquire the service.[23] Thus, if the economics are unfavorable to the option buyer (e.g., the option is not at- or in-the-money),[24] the option buyer can walk away from the contract without further obligation, losing only the premium paid.[25] By contrast, in a natural gas transportation or storage agreement with a reservation fee and a usage fee, the customer commits to pay the reservation fee for the duration of the agreement, and the pipeline commits to provide the service up to the amount of reserved capacity; no matter how much the North American natural gas markets may change, both the service provider and the customer remain obligated under the agreement as originally agreed.

The economic reality of these agreements is starkly different from that of an option. Upon entering such a facility agreement, the operator sells the right to the service to the customer in consideration for the fixed obligation of the customer to pay the fees for the service; unlike as is the case with an option, the operator has not sold to the customer, upon the customer's payment of a limited-risk premium, any option-like right to buy a service from the operator that the customer may or may not exercise by paying an additional, more substantial fee to the operator.

The Commission's Facility Services Agreement Guidance appears to recognize that natural gas transportation and storage agreements do not have option-like features. In explaining the Three-Part Test, the Commission noted that in such facility agreements a person's right to use the facility "is legally established, [and] does not depend upon any further exercise of an option."[26] The Commission also states, "[i]n this context, [it] would not consider actions such as scheduling . . . gas transportation or injection of gas into storage to be exercising an option."[27] Because the However Paragraph could incorrectly be interpreted to hold that a natural gas transportation or storage agreement with a two-part fee structure is a commodity option, regardless of whether such agreement has the characteristics of an option, the Commission should clarify that agreements for service on natural gas pipeline and storage facilities or parts thereof (i.e., as distinct from sales or purchases of the gas commodity itself) do not have the characteristics of options and hence are not options subject to the definition of a "swap."

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[23] *See In the Matter of Cargill* at P 51,217.

[24] *See* CFTC Glossary ("At-the-Money: When an option's *strike price* is the same as the current trading price of the underlying commodity, the option is at-the-money"; "In-The-Money: A term used to describe an option contract that has a positive value *if exercised*") (emphasis added).

[25] *See In the Matter of Cargill* at P 51,217 ("the buyer's losses are limited to a premium paid as consideration for the option seller's performance").

[26] 77 Fed. Reg. at 48,242.

[27] *Id*.

B. The Commission should clarify that it will use its historical approach of determining whether the agreement has the characteristics of an option, rather than the mere existence of a two-part fee structure, to determine whether a particular natural gas transportation or storage agreement is an option subject to the swap definition

For the reasons discussed above, natural gas transportation and storage agreements are not options subject to the Swap Definition Final Rule. Indeed, INGAA does not believe the Commission intended its Facility Services Agreement Guidance to vary from or in any way contradict the *1985 Interpretative Statement* and its progeny. Nowhere does the Commission discuss changing its precedent, nor does the Commission announce or provide a reasoned analysis supporting any departure from its precedent in the case of facility services agreements. Elsewhere in the Swap Definition Final Rule, the Commission re-affirms its precedent when discussing how to characterize forward contracts.[28] In fact, because the term "swap" is defined to include a "put, call, cap, floor, collar or similar option of any kind," it is clear that Congress intended that options subject to the definition of a "swap" in fact have the recognized characteristics of options, namely, premium-based, limited-risk characteristics common to puts, calls, and "similar" options. Simply put, natural gas transportation and storage agreements do not have the characteristics of options as historically interpreted by the Commission and the courts.

In reviewing the Commission's Facility Services Agreement Guidance, INGAA believes that the Commission intended to incorporate the above-cited precedent into the further interpretive guidance the Commission provided. For example, the third part of the Three-Part Test states that "the payment for the use of the specified facility or part thereof represents a payment for its use rather than the *option* to use it."[29] The Commission further explained that in such agreements, "while there is optionality as to whether the person uses the specified facility, the person's right to do so is legally established, *does not depend upon any further exercise of an option* and merely represents a decision to use that for which the lessor already has paid."[30] This guidance appears to make it clear that if the agreement does not have the recognized characteristics of an option, as established by Commission precedent, the agreement will not be regulated as an option.

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28 *Id*. at 48,237, n.333 ("This facts and circumstances approach to determining whether a particular embedded option takes a transaction out of the forward contract exclusion for nonfinancial commodities is consistent with the CFTC's historical approach to determining whether a particular embedded option takes a transaction out of the forward contract exclusion from the definition of the term 'future delivery' in the CEA. *See id*. at *5 ('As we have held since *Stovall*, the nature of a contract involves a multi-factor analysis * * *.')"); *see also id*. at 48,228, n.214 (quoting *In re Wright*, CFTC Docket No. 97–02, 2010 WL 4388247: "[i]n distinguishing futures from forwards, the [CFTC] and the courts have assessed the transaction as a whole with a critical eye toward its underlying purpose. Such an assessment entails a review of the overall effect of the transaction as well as a determination as to what the parties intended.").

29 *Id*. at 48,242 (emphasis added).

30 *Id*. (emphasis added).

Nevertheless, despite providing guidance that incorporates the historically recognized characteristics of an option, the However Paragraph could be applied to conclude that natural gas transportation and storage agreements with two-part rates are options, a result directly contrary to Commission precedent, the Three-Part Test set forth in the Facility Services Agreement Guidance, and the Commission's traditional approach of analyzing the nature of contracts based on the "facts and circumstances" and the "economic reality" of the transaction. Unfortunately, the However Paragraph was never discussed prior to issuance of the Swap Definition Final Rule, so INGAA had no notice that the Commission would provide guidance regarding two-part rate structures that raises questions about its application to natural gas transportation and storage agreements.

Because the However Paragraph could result in misapplication of Commission guidance and precedent, INGAA respectfully asks the Commission, in addition to or in the alternative to the clarification in part V.A. above, to confirm that it will use its historical approach of determining whether the agreement has the characteristics of an option, rather than the mere existence of a two-part fee structure, to determine whether a particular natural gas transportation or storage agreement is an option subject to the swap definition.[31]

C. At a minimum, the Commission, the Commission's General Counsel or an appropriate Division of the Commission should issue no-action relief prior to October 12, 2012, or as soon thereafter as reasonably possible

INGAA respectfully asks that, at a minimum, the Commission, the Commission's General Counsel or an appropriate Division of the Commission issue no-action relief stating that the Commission will not take, or that such Division of the Commission will not recommend that the Commission take, any enforcement action if the members of INGAA and the other parties to facility agreements with INGAA's members do not treat such facility agreements, including but not limited to natural gas transportation and storage agreements, as "swaps" as defined in Section 1a(47) of the Commodity Exchange Act, as amended, and 17 C.F.R. § 1.3(xxx), or as commodity options subject to the swap definition, in each case, for purposes of complying with the provisions of Title VII, Part II of Dodd-Frank and the rules of the Commission adopted pursuant thereto, solely because such agreements provide for a two-part fee structure. The requested no-action relief should be provided at least until such time as the Commission issues a final clarification, interpretation, rule revision, or response to comments concerning the Final Swap Definition and its applicability to such agreements.

Based on the discussion above, the However Paragraph could result in misapplication of Commission guidance and precedent at a time when market participants require clarity in order to plan for overall compliance with the Dodd-Frank regulatory reforms. As explained in detail in the Joint Associations' request for extension and no-action relief, energy market participants face uncertainty because of numerous pending petitions for exemptive relief from various regulations

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31 INGAA notes that a straightforward way to achieve this result would be to strike the However Paragraph in its entirety.

that have not yet been published for public comment or granted; ambiguous provisions and unresolved material issues in final and interim final rules that prevent market participants from developing, testing and implementing policies to comply with the Commission's new regulations; numerous rules, or portions thereof, that have been issued as interim final rules without further guidance (an unclear status as "interim" final rules); and proposed rules that have not yet been finalized. It would be contrary to the public interest to impose new and unsupported obligations on natural gas transportation and storage providers, in a manner contrary to the Commission's own historical interpretation of option agreements, when the Commission, in INGAA's view, did not intend to construe all two-part fee agreements as options. Accordingly, good cause exists to issue timely and prompt no-action relief.

VI. <u>Conclusion</u>

INGAA therefore respectfully requests that the Commission, the Commission's General Counsel, or an appropriate Division of the Commission provide the above clarifications and no-action relief pursuant to Commission Rule 140.99, 17 C.F.R. § 140.99, or any other appropriate provision, prior to October 12, 2012, or as soon thereafter as reasonably possible.

If the Commission or its staff would like any additional information, please do not hesitate to contact me at the address and telephone number set out in this letter.

Respectfully submitted,

Joan Dreskin

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cc: Honorable Gary Gensler, Chairman
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott D. O'Malia, Commissioner
Honorable Mark P. Wetjen, Commissioner
Dan Berkovitz, General Counsel

Attachment

Attachment

I hereby certify that the material facts upon which the Interstate Natural Gas Association of America's October 9, 2012 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 Commission Staff is informed promptly in writing of all materially changed facts and circumstances.

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