



CFTC – 6351-01p
SEC – 8011-01p

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 241

[Release No. 33-10062; 34-77506; File No. S7-05-16]

RIN 3235- AL93

Certain Natural Gas and Electric Power Contracts

AGENCY: Commodity Futures Trading Commission; Securities and Exchange Commission.

ACTION: Proposed guidance.

SUMMARY: In accordance with section 712(d)(4) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), the Commodity Futures Trading Commission (the “CFTC”) and the Securities and Exchange Commission (“SEC”), after consultation with the Board of Governors of the Federal Reserve System (“Board of Governors”), are jointly issuing the CFTC’s proposed guidance on certain contracts that provide for rights and obligations with respect to electric power and natural gas. The CFTC invites public comment on all aspects of its proposed guidance.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments by any of the following methods:

- CFTC web site: <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Comments Online process on the web site.
- Mail: Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.
- Hand Delivery/Courier: Same as Mail, above.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Please submit your comments using only one of these methods.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to www.cftc.gov. You should submit only information that you wish to make available publicly. If you wish the CFTC to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the CFTC's regulations, 17 CFR 145.9.

The CFTC reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of a submission from www.cftc.gov that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the notice will be retained in the public comment file and will be considered as required under all applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: CFTC: David N. Pepper, Special Counsel, Division of Market Oversight, at (202) 418-5565 or dpepper@cftc.gov; or Mark Fajfar, Assistant General Counsel, Office of the General Counsel, at (202) 418-6636 or mfajfar@cftc.gov, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581. SEC: Carol McGee, Assistant Director, Office of Derivatives Policy, Division of Trading and Markets, at (202) 551-5870, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Introduction

In the final rule further defining the term “swap,” the CFTC and the SEC adopted an interpretation regarding the facts and circumstances in which certain agreements, contracts, or transactions entered into by commercial and non-profit entities should be considered not to be swaps because they are customary commercial arrangements.¹ Following adoption of this interpretation, the CFTC received public comments describing certain types of contracts that are closely tied to regulatory obligations in the markets for electric power and natural gas.²

Having reviewed these comments, the CFTC proposes to issue guidance regarding particular facts and specific circumstances in which these contracts should be

¹ See Further Definition of “Swap,” Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48207, 48246 (Aug. 13, 2012) (the “Products Release”).

² The comments were received in response to the CFTC’s proposed interpretation on Forward Contracts With Embedded Volumetric Optionality, 79 FR 69073 (Nov. 20, 2014) (comments available at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1541>), and the CFTC’s notice of proposed rulemaking on Trade Options, 80 FR 26200 (May 7, 2015) (comments available at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1580>). In addition, the CFTC’s Energy and Environmental Markets Advisory Committee discussed related issues at its meeting on July 29, 2015 (transcript available at http://www.cftc.gov/PressRoom/Events/opaevent_eemac072915).

considered not to be “swaps” for purposes of the Commodity Exchange Act (“CEA”).³

This proposed guidance applies the interpretation in the Products Release to the contracts described in Part II.A. of this document and the CFTC preliminarily concludes that such contracts should be considered not to be swaps because they are customary commercial arrangements.

II. Proposed Guidance

A. Commenters’ Description of Certain Contracts

Commenters described two types of contracts that are similar in some respects, but are used in different situations to provide for rights and obligations that are suitable to the parties’ particular needs in those situations, and which are closely tied to compliance with certain regulatory requirements and frameworks. Each is described briefly below.

1. Certain Capacity Contracts – Electric Power

The CFTC understands that certain types of capacity contracts in electric power markets are used in situations where regulatory requirements from a state public utility commission (“PUC”) obligate load serving entities (“LSEs”) and load serving electric utilities in that state to purchase “capacity” (sometimes referred to as “resource adequacy”)⁴ from suppliers to secure grid management and on-demand deliverability of

³ See 7 U.S.C. 1a(47). This proposed guidance is being issued jointly with the SEC pursuant to section 712(d)(4) of the Dodd-Frank Act but, given the specific types of contracts at issue, pertains only to the CFTC and swaps. Because the proposed guidance is limited to the particular facts and circumstances of the contracts at issue, the proposed guidance, if adopted, would not pertain to the SEC or security-based swaps.

⁴ The resource adequacy framework adopted by the California Public Utilities Commission (“CPUC”) is an illustrative example. The CPUC adopted a resource adequacy policy framework in 2004 in order to ensure the reliability of electric service in California. The CPUC established resource adequacy obligations applicable to all LSEs within the CPUC’s jurisdiction. The CPUC’s resource adequacy policy framework – implemented as the Resource Adequacy program – guides resource procurement and promotes infrastructure investment by requiring that LSEs procure capacity so that capacity is available to the California Independent System Operator (“ISO”) when and where needed. See generally the discussion of resource adequacy available at <http://www.cpuc.ca.gov/ra/>.

power to consumers. A commenter explained that the LSE or load serving electric utility will be recognized by the PUC and the Federal Energy Regulatory Commission (“FERC”) as having purchased capacity and, therefore, having satisfied that portion of its obligation to purchase the ability to supply the electricity when and as needed.⁵ In each of these instances, a commenter asserted, the purchaser, as required by law, will be considered to have purchased the supplier’s capacity to generate, produce and deliver electric power, regardless of whether the electricity underlying the capacity contract is called upon and delivered.⁶

A commenter said the purchaser does not treat this type of capacity contract as a “hedge” in the same sense as it would otherwise use a commodity option as a financial hedge.⁷ In this type of capacity contract, the commenter contended, the purchaser is not procuring the right to profit from a change in the value of the underlying commodity, which the purchaser will then financially settle in order to offset the price volatility risk of some underlying physical transaction in the cash market.⁸ Rather, the purchaser is purchasing a supplier’s capacity to produce, generate, and deliver the underlying electricity, thereby ensuring its ability to supply electricity in compliance with a

⁵ See letter from International Energy Credit Association (“IECA”) (June 22, 2015) at 9. The CFTC understands that this type of contract enables a Regional Transmission Organization (“RTO”) or ISO to call on resource adequacy capacity to ensure the reliability of electric service to end users or consumers. The LSE or load serving electric utility, which is required to purchase capacity contracts, cannot itself call on the supplier to deliver electricity – only the RTO or ISO can.

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

regulatory requirement.⁹ Certain commenters explained that they do not view these contracts as financial instruments, but rather as commercial agreements that enable the purchaser of capacity to ensure that the underlying electricity is delivered when needed by the purchaser to meet state- and/or federally-required reliability objectives.¹⁰ One commenter stated that state PUCs and the FERC generally do not treat a purchase of capacity in this context as a purchase of a financial instrument or an option, but rather as a purchase of the ability to ensure delivery of the underlying physical commodity.¹¹

A commenter explained how the payment structure under a capacity contract for resource adequacy is different from the payment structure under a financially-settled commodity option. According to this commenter, capacity contracts do not involve payment of a nominal option premium, followed by payment of the full market price of the electric power if and when the “option” is exercised.¹² Instead, the initial payment under the capacity contract frequently recovers for the seller the entire fixed cost of producing, generating, supplying or transmitting the electric power.¹³

2. Certain Peaking Supply Contracts – Natural Gas

Commenters requested further guidance on whether certain natural gas contracts, which commenters labeled as “peaking supply contracts,” and which are entered into by

⁹ One commenter contended that although this type of capacity contract may not impose a binding obligation on the parties to make and take delivery of a specific quantity of electricity, it does impose a binding obligation on the parties to make and take delivery of the capacity. See id. at 10.

¹⁰ See letter from IECA (June 22, 2015) at 10, and letter from Coalition for Derivatives End-Users (“CDEU”) (Dec. 22, 2014) at 7-8.

¹¹ See letter from IECA (June 22, 2015) at 10.

¹² See id. at 11.

¹³ See id. Resource adequacy capacity is not tied to a specific power price and the purchaser of capacity does not have access to the energy tied to the capacity requirement. The capacity purchased is essentially conferred or assigned to the RTO or ISO, and these entities can call the capacity.

electric utilities (with or without a minimum gas delivery requirement) should be regulated as swaps.¹⁴ The CFTC understands a peaking supply contract in this context to be a contract that enables an electric utility to purchase natural gas from another natural gas provider on those days when its local natural gas distribution companies (“LDCs”) curtail its natural gas transportation service. For example, one commenter, Linden, explained that it procures sufficient natural gas and gas transportation services to operate its cogeneration facility in the ordinary course through natural gas service agreements with its LDCs.¹⁵ Linden explained that its natural gas service agreements require Linden to take natural gas from the LDCs if they supply it. However, to ensure that the LDCs are able to meet their regulatory commitments to prioritize and serve residential demand for natural gas, the local board of public utilities (“BPU”) requires that the service agreements permit the LDCs to interrupt natural gas transportation service to Linden during certain specified conditions.¹⁶ Due to the LDCs’ tariff-based commitments to serve residential natural gas demand, the BPU will not allow the LDCs to provide a

¹⁴ See letter from American Gas Association (“AGA”) (Dec. 22, 2014) at 9-11, letter from AGA (June 22, 2015) at 2-5; and letter from Cogen Technologies Linden Venture, L.P. (“Linden”) (June 22, 2015) at 2-3. For purposes of this proposed guidance, the term electric utility means “all enterprises engaged in the production and/or distribution of electricity for use by the public, including investor-owned electric utility companies; cooperatively-owned electric utilities; government-owned electric utilities (municipal systems, federal agencies, state projects, and public power districts).” See Federal Energy Regulatory Commission (FERC) Glossary, available at <http://ferc.gov/resources/glossary.asp>.

¹⁵ Linden is an exempt wholesale generator selling electric power at market-based rates under the jurisdiction of the FERC, and owns and operates a combined cycle natural gas-fired cogeneration facility located in Linden, New Jersey. The electricity produced from Linden’s generator is sold, under a long-term power purchase agreement, to Consolidated Edison Company, which then uses the power to serve the electricity needs of consumers in New York City. Steam from Linden’s operation is sold, also under a long-term contract, to the co-located Bayway Refinery, the largest refinery on the East Coast, for its industrial processes. See letter from Linden (June 22, 2015) at 1-3.

¹⁶ See *id.*

“firmer” category of natural gas service to Linden.¹⁷ Because of the possibility of these interruptions of transportation service, Linden uses peaking supply contracts to ensure it has sufficient natural gas to operate its cogeneration facility during the interruptions.¹⁸

Linden represented that, under its natural gas service agreements, the LDCs determine when the conditions for interrupting Linden’s service are present, and Linden therefore has no control over such conditions. Thus, Linden does not have discretion as to whether and when an interruption of service as described above will occur.¹⁹

Linden explained that, under the terms of its natural gas service agreements, Linden is required to take natural gas from the LDCs if they supply it. There is no ability for financial settlement under Linden’s peaking supply contracts, and natural gas supplied under those peaking supply contracts cannot be re-sold by Linden.²⁰ Linden represented that the price for natural gas in its peaking supply contracts is based on the market cost of fuel at specified delivery points, plus a specified adjustment depending on delivery point.²¹ Thus, since Linden could not use that natural gas for any purpose other than to fuel its facility when an interruption of service occurs, Linden represented that it is practically limited to exercising its right to take delivery under its peaking supply contracts only in the event of an interruption of service, and that it has no discretion as to

¹⁷ See id.

¹⁸ See id.

¹⁹ See id. at 3.

²⁰ See letter from Linden (Dec. 22, 2014) at 6.

²¹ See letter from Linden (June 22, 2015) at 4, n. 12.

whether and when it will exercise the right to take delivery under its natural gas peaking supply contracts.²²

3. Common Characteristics Described by Commenters

As they have been described by commenters, the natural gas and electric power contracts discussed above are all entered into by commercial market participants, who contemplate physical settlement of the transactions, in response to regulatory requirements, the need to maintain reliable supplies, and practical considerations of storage or transport.²³ In each case, the particular commodities covered by the contract are needed by at least one of the parties for the normal operation of its business, and the specific identity of the counterparty is an important consideration because of, for example, concerns about reliability or the practicability of supply.²⁴

B. Products Release Discussion of Commercial Contracts

In the Products Release, the CFTC and the SEC (the “Commissions”) adopted an interpretation to assist commercial and non-profit entities in understanding whether certain agreements, contracts, or transactions that they enter into would or would not be regulated as swaps.²⁵ To that end, the Products Release listed several specific types of commercial agreements, contracts, and transactions that involve customary business arrangements (whether or not involving a for-profit entity) that will not be considered swaps, including: employment contracts; sales, servicing, or distribution arrangements;

²² See *id.* at 3-4.

²³ See letter from CDEU (Dec. 22, 2014) at 7, letter from EDF Trading North America, LLC (Dec. 22, 2014) at 13.

²⁴ See letter from AGA (Dec. 22, 2014) at 9.

²⁵ See Products Release, 77 FR at 48246.

certain fixed or variable interest rate commercial loans or mortgages; and certain agreements, contracts, or transactions related to business combination transactions, real property, intellectual property, and warehouse lending arrangements.²⁶ The Commissions stated their intent that this interpretation should “allow commercial and non-profit entities to continue to operate their businesses and operations without significant disruption and provide that the swap ... definition [is] not read to include commercial and non-profit operations that historically have not been considered to involve swaps.”²⁷

The Commissions also explained that the list provided in the Products Release was not intended to be exhaustive and that there may be other, similar types of agreements, contracts, and transactions that also should not be considered to be swaps.²⁸ The Commissions said that in determining whether similar types of agreements, contracts, and transactions entered into by commercial entities should not be considered swaps, they intend to consider the characteristics and factors that are common to the commercial transactions listed in the Products Release, which are:

- They do not contain payment obligations, whether or not contingent, that are severable from the agreement, contract, or transaction;
- They are not traded on an organized market or over-the-counter; and ...
- In the case of commercial arrangements, they are entered into:
 - By commercial or non-profit entities as principals (or by their agents) to serve an independent commercial, business, or non-profit purpose, and

²⁶ See *id.*, 77 FR at 48247.

²⁷ See *id.*

²⁸ See *id.*

—Other than for speculative, hedging, or investment purposes.²⁹

The Commissions concluded that in determining whether an agreement, contract, or transaction not enumerated in the Products Release is a swap, the agreement, contract, or transaction will be evaluated based on its particular facts and circumstances,³⁰ and the representative characteristics and factors set out in the Products Release “are not intended to be a bright-line test for determining whether a particular ... commercial arrangement is a swap.”³¹

In the Products Release, the CFTC also addressed certain capacity contracts and peaking supply contracts in the context of the CFTC’s interpretation of when an agreement, contract, or transaction with embedded volumetric optionality would be considered a forward contract.³² The CFTC stated that depending on the relevant facts and circumstances, capacity contracts and peaking supply contracts may qualify as forward contracts with embedded volumetric optionality if they met the elements of the CFTC’s interpretation of that provision.³³ This remains the case; the CFTC does not intend that the proposed guidance herein would affect the interpretation of when an agreement, contract, or transaction with embedded volumetric optionality would be considered a forward contract.³⁴

²⁹ See id.

³⁰ See id., 77 FR at 48248.

³¹ See id., 77 FR at 48250.

³² See id., 77 FR at 48238.

³³ See id., 77 FR at 48240.

³⁴ The CFTC has clarified this interpretation. See Forward Contracts With Embedded Volumetric Optionality, 80 FR 28239 (May 18, 2015). In this clarification, the CFTC addressed certain retail electric market demand-response programs, under which electric utilities have the right to interrupt or curtail service to a customer to support system reliability. See id., 80 FR at 28242, citing letter from the National

C. Proposed Guidance on Whether Certain Contracts Should be Considered to be Swaps

In response to the comments, described above, which were provided by market participants regarding certain capacity contracts for electric power and certain peaking supply contracts for natural gas, the CFTC has considered the specific facts and circumstances of these contracts in light of the interpretation in the Products Release of when a contract would be considered not to be a swap because it is a customary commercial arrangement.

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.³⁵

Rural Electric Cooperative Association, the American Public Power Association, the Large Public Power Association, and the Transmission Access Policy Study Group (Oct. 12, 2012) at 9.

The CFTC clarified that since a key function of an electricity system operator is to ensure grid reliability, demand response agreements, even if not specifically mandated by a system operator, may be properly characterized as the product of regulatory requirements within the meaning of the seventh element of the CFTC's interpretation regarding forward contracts with embedded volumetric optionality. For the avoidance of doubt, the CFTC reiterates that the proposed guidance herein would not affect this interpretation.

Also, the CFTC's interpretations regarding full requirements and output contracts, as provided in the Products Release, would be unaffected by the proposed guidance herein. See Products Release, 77 FR at 48239-40.

Furthermore, the CFTC does not intend that the proposed guidance would supersede or modify a document issued by the CFTC's Office of General Counsel – "Response to Frequently Asked Questions Regarding Certain Physical Commercial Agreements for the Supply and Consumption of Energy," available at http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/leaselike_faq.pdf – which continues to be the position of the CFTC's Office of General Counsel on the issues discussed in that document.

³⁵ See Products Release, 77 FR at 48247 (the contracts "do not contain payment obligations, whether or not contingent, that are severable from the agreement, contract, or transaction; [and] ... are not traded on an organized market or over-the-counter").

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.”³⁶ 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.³⁷ Also, in the Products Release the Commissions addressed commenters’ assertion that all commercial merchandising transactions hedge an enterprise’s commercial risks by stating that a commercial

³⁶ See id.

³⁷ See id.

arrangement undertaken for hedging purposes may or may not be a swap depending on the particular facts and circumstances of the arrangement.³⁸

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.

As stated in the Products Release, whether a particular commercial arrangement is a swap depends on the particular facts and circumstances of the arrangement.³⁹ This proposed guidance would not apply to any agreement, contract or transaction other than those described in Part II.A., and would not preclude the CFTC from issuing further guidance considering other commodity contracts under the interpretation in the Products Release.

III. Request for Comment

The CFTC believes that it would benefit from public comment about its proposed guidance, and therefore requests public comment on all aspects of its proposed guidance set forth above, and on the following questions:

³⁸ See *id.*, 77 FR at 48249.

³⁹ See *id.*, 77 FR at 48248.

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?

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?

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?

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.?

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.

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?

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?

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),⁴⁰ 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.

By the Securities and Exchange Commission.

Dated: April 4, 2016.

Brent J. Fields,
Secretary.

Issued in Washington, DC on April 4, 2016, by the Commodity Futures Trading
Commission.

Christopher J. Kirkpatrick,
Secretary of the Commission.

⁴⁰ See [Distribution of Natural Gas: The Final Step in the Transmission Process](https://www.eia.gov/pub/oil_gas/natural_gas/feature_articles/2008/ldc2008/ldc2008.pdf), Energy Information Administration, Office of Oil and Gas, June 2008, available at https://www.eia.gov/pub/oil_gas/natural_gas/feature_articles/2008/ldc2008/ldc2008.pdf.

Commodity Futures Trading Commission (CFTC) Appendices to Certain Natural Gas and Electric Power Contracts – Commission Voting Summary and Chairman’s Statement

Appendix 1 – Commodity Futures Trading Commission Voting Summary

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

Appendix 2 – Statement of CFTC Chairman Timothy G. Massad

Today, the CFTC and the Securities and Exchange Commission (SEC), have jointly proposed guidance relating to the appropriate treatment of certain peaking supply and capacity contracts. We are issuing this guidance after considering the useful input we have received from market participants expressing concern about this issue. I support this proposal, as it will properly clarify the treatment of contracts used by many businesses with respect to the supply and delivery of electric power and natural gas.

We have proposed that certain electric power and natural gas contracts should not be considered “swaps” under the Commodity Exchange Act. We have done so because we believe they are examples of customary commercial arrangements as described in the final rule defining the term “swap.”

For example, these 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.

Today's proposed guidance is an important complement to our final rule regarding Trade Options, which will reduce burdens on end-users and allow them to better address commercial risk. I thank my fellow Commissioners Bowen and Giancarlo for joining me in unanimously approving this proposal as well as that final rule.

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