



September 1, 2017

VIA ELECTRONIC MAIL

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Ontario Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

c/o:

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square-Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3
consultation-en-cours@lautorite.qc.ca

c/o:

Grace Knakowski
Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
comments@osc.gov.on.ca

Re: Comments on Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy

Dear Sir or Madam:

I. INTRODUCTION

Just Energy Corp. (“**Just Energy**”) respectfully submits this letter in response to the request for public comment from the Canadian Securities Administrators (“**CSA**”) on Proposed National Instrument 93-101 *Derivatives: Business Conduct* (“**Proposed NI 93-101**”) and the related Proposed Companion Policy (“**Proposed Companion Policy**”) (collectively, the “**Proposed Instrument**”).¹ Just Energy appreciates the CSA’s continuous efforts

¹ See CSA Notice and Request for Comment on Proposed National Instrument 93-101 *Derivatives: Business Conduct* and Proposed Companion Policy (Apr. 4, 2017) (“**CSA Notice**”), http://www.albertasecurities.com/Regulatory%20Instruments/5341884-v1-CSA_Note_and_Request_for_Comment_NI_93-101.PDF.

throughout the derivatives regulatory reform process and welcomes the opportunity to provide comments on the Proposed Instrument. Specifically, this comment letter focuses on the Proposed Instrument’s definition of “eligible derivatives party” (“**EDP**”). As an experienced end-user, Just Energy has concerns about the narrow scope of the Proposed Instrument’s EDP definition and its potential negative consequences.

Just Energy enters into a variety of financial derivatives as part of its business of purchasing and selling natural gas, electricity, and in connection with its JustGreen supply program. Just Energy enters into contracts with customers to provide electricity and natural gas at fixed prices and to provide comfort to certain customers that a specified amount of energy consumed will be derived from green generation or carbon destruction. These customer contracts expose Just Energy to changes in price of various commodities. To reduce its exposure to commodity market price changes, Just Energy uses financial derivatives and physical contracts to secure fixed-price commodity supply to cover its estimated fixed-price delivery and green commitments.

Just Energy’s objective when using financial derivatives is to minimize commodity related risk, other than consumption changes. Accordingly, it is Just Energy’s policy to hedge the estimated fixed-price requirements of its customers with offsetting hedges of natural gas and electricity at fixed prices for terms equal to those of the customer contracts.

II. COMMENTS OF JUST ENERGY

A. Potential Negative Implications if the Scope of the EDP Definition Is Not Modified.

To qualify as an EDP, a market participant like Just Energy must represent in writing that it has the “requisite knowledge and experience to evaluate the information provided to [it] about derivatives, the suitability of the derivatives for [it], and the characteristics of the derivatives to be transacted” and must have “net assets of at least \$25 million.”² As discussed further below, in comparison to current derivatives regulations, the Proposed Instrument’s EDP definition is too narrow in scope, which is problematic given that there are two key regulatory implications that hinge on the EDP definition. *First*, under the Proposed Instrument, the business conduct requirements applicable to a derivatives dealer’s particular transaction depend on the classification of the counterparty transacting with the derivatives dealer. Specifically, a derivatives dealer’s transactions with EDPs would be subject to substantially fewer requirements than its transactions with counterparties that are not EDPs (“**Non-EDPs**”).³ *Second*, limiting derivatives transactions to counterparties that are EDPs is one of the criteria that must be satisfied for an entity to qualify for the Proposed Instrument’s end-user exemption.⁴

Just Energy is concerned about the potential negative consequences if the scope of the EDP definition is not modified. Specifically, if the EDP definition is not modified, it may exclude experienced end-users that rely on efficient commodity derivative markets to manage the physical commodity risk associated with their business. As a result, such Non-EDP market participants will likely have fewer counterparty choices, and, consequently, will likely face higher prices, because (i) derivatives dealers that want to avoid more burdensome business conduct obligations may stop transacting with Non-EDPs and (ii) market participants seeking to qualify for the end-user exemption from the Proposed Instrument must not transact with Non-EDPs. Further, not only will this likely harm the Non-EDPs that rely on commodity derivatives markets, it may also have a negative impact on market liquidity and reduce the effective

² Proposed NI 93-101 at Section 1(1)(m).

³ See CSA Notice at 3-4; see also CSA Notice at Appendix B.

⁴ However, Just Energy suggests the CSA permit end-users that transact derivatives with Non-EDPs to qualify for the end-user exemption.

function of commodity derivatives markets. In short, by using a definition of “eligible derivatives party” that is too narrow, the CSA could unintentionally be harming the markets and market participants it is trying to protect.

B. The Proposed Instrument’s EDP Definition Is Too Narrow in Scope and Should Be Amended so That It Aligns with Similar Concepts in Current Derivatives Regulations.

The Proposed Instrument’s EDP definition should be amended so that it aligns with similar concepts in current derivatives regulations. In general, the EDP definition should be amended so that it is more aligned with the definition of: “qualified party” in the Exemption Blanket Orders;^{5,6} “accredited counterparty” under the Quebec Derivatives Act;^{7,8} and “eligible contract participant” under the U.S. Commodity Futures Trading Commission’s (“CFTC”) rules.^{9,10} Although the CSA generally found these concepts to be similar to that of an EDP,¹¹ Just Energy respectfully notes that the Proposed Instrument’s EDP definition is materially different in key aspects. To make the scope of the EDP definition consistent and to help avoid negative consequences, Just Energy respectfully suggest that the EDP definition should be amended so that it takes into consideration entities that use derivatives to manage their physical commodity risk.

For entities that use derivatives to manage their physical commodity risk, EDP qualification standards that acknowledge the fact that they are mitigating physical commodity risk are appropriate because: (i) such entities are likely to be experienced with respect to the risks associated with commodity derivatives since managing those risks is integral to the day-to-day management of their business (*e.g.*, a power plant managing its natural gas supply risk); and (ii) properly managing physical commodity risk should be encouraged.

There are a number of circumstances where an experienced market participant that does not need the extra protections provided to Non-EDPs still might not meet the proposed \$25 million net asset threshold to qualify as an

⁵ As used herein, “**Exemption Blanket Orders**” refers collectively to the following: Alberta Securities Commission Blanket Order 91-507 *Over-the-Counter Derivatives* (Jan. 23, 2017), http://www.albertasecurities.com/Regulatory%20Instruments/5330057%20%2091-507_OTC_Trades_in_Derivatives.pdf; British Columbia Securities Commission Blanket Order 91-501 *Over-the-Counter Derivatives* (Nov. 24, 1999), https://www.bsc.bc.ca/Securities_Law/Policies/Policy9/PDF/91-501_BCI/; Financial and Consumer Services Commission (New Brunswick) Local Rule 91-501 *Derivatives* (consolidated up to Jan. 11, 2015), http://www.nbsc-cvmb.ca/nbsc/uploaded_topic_files/91-501-LR-CONS-2015-01-11-E.pdf; Nova Scotia Securities Commission Blanket Order 91-501 *Over the Counter Trades in Derivatives* (Feb. 17, 2016), <https://nssc.novascotia.ca/sites/default/files/docs/Blanket%20Order%2091-501%20Feb%2017%202016%20OTC%20Derivatives.pdf>; Financial and Consumer Affairs Authority of Saskatchewan General Order 91-908 *Over-the-Counter Derivatives* (Feb. 29, 2016), <http://www.fcaa.gov.sk.ca/Default.aspx?DN=2fd89016-0cc1-41ca-9fab-91c69487703f>.

⁶ The Exemption Blanket Orders, among other things, effectively exempt a market participant from the obligation to register as a derivative dealer if it limits its derivatives counterparties to “qualified parties.”

⁷ See Quebec Derivatives Act at Section 3 (defining “accredited counterparty”), https://www.canlii.org/en/qc/laws/stat/cqlr-c-i-14.01/latest/cqlr-c-i-14.01.html#sec3_smooth.

⁸ Similar to the Exemption Blanket Orders, Section 7 of the Quebec Derivatives Act excludes transactions between “accredited counterparties” from consideration when determining whether an entity must register as a derivatives dealer.

⁹ See Commodity Exchange Act (“CEA”) Section 1a(18); CFTC Regulation 1.3(m).

¹⁰ In the United States, the CEA requires market participants to be “eligible contract participants” in order to enter into swaps. See CEA Section 2(e).

¹¹ CSA Notice at 5.

EDP. *First*, a large company might use a standalone central hedging entity to face the market and that central hedging entity might not have \$25 million in net assets on its own balance sheet. *Second*, a market participant might be a project entity within a larger company that holds specific assets (*e.g.*, a power plant or pipeline) and related liabilities, both of which might need to be hedged, but the project entity might not have \$25 million in net assets. *Third*, a market participant might be a marketing entity which markets a physical commodity, such as natural gas, and the derivatives that hedge that marketing activity may serve to offset the entity's assets in a way that, for accounting purposes, minimizes net assets of an otherwise robust company.

The EDP definition should account for entities that use derivatives to manage their physical commodity risk. Specifically, Just Energy suggests that the EDP definition be amended so that entities using derivatives to manage their physical commodity business can satisfy the EDP definition without any asset qualification test. This would be consistent with the definition of “qualified party” under the Exemption Blanket Orders¹² and “accredited counterparty” under the Quebec Derivatives Act.¹³ For example, the CSA could amend the EDP definition by including the language provided in the box directly below, which is from ASC Blanket Order 91-507.

A person or company that buys, sells, trades, produces, markets, brokers or otherwise uses a commodity in its business and that executes an over-the-counter trade in a derivative provided that a material component of the underlying interest of the derivative is any of the following:

- (i) a commodity that the person or company buys, sells, trades, produces, markets, brokers or otherwise uses in the ordinary course of its business;
- (ii) a commodity, security or variable that directly or indirectly affects the commodity that the person or company buys, sells, trades, produces, markets, brokers or otherwise uses in the ordinary course of its business;
- (iii) a commodity, security or variable for which there is a high degree of correlation between the movement in its value and the movement in the value of the commodity that the person or company buys, sells, trades, produces, markets, brokers or otherwise uses in the ordinary course of its business;
- (iv) another derivative which is not listed for trading on an exchange, where a material component of the underlying interest of that other derivative is a commodity, security or variable referred to in any of subparagraphs (i) to (iii).

As an alternative, the CSA could amend the EDP definition so that entities using derivatives to manage their physical commodity business can satisfy the EDP definition by meeting a significantly lower asset threshold, such as by meeting the threshold of either (i) total assets of at least \$10 million or (ii) a net worth of over \$1 million. This would be consistent with the approach taken with the definition of “eligible contract participant” under the CFTC rules.¹⁴

¹² See ASC Blanket Order 91-507 (paragraph p of the qualified party definition); BCSC Blanket Order 91-501 (paragraph p of the qualified party definition); FCSC NB Local Rule 91-501 (paragraph q of the qualified party definition); NSSC Blanket Order 91-501 (paragraph p of the qualified party definition); FCAA Saskatchewan General Order 91-908 (paragraph p of the qualified party definition, and page 5).

¹³ See Quebec Derivatives Act (paragraph 12 of the accredited counterparty definition).

¹⁴ See CEA Section 1a(18); CFTC Regulation 1.3(m).

As another alternative, the CSA could allow certain market participants, such as market participants hedging physical commodity risk, to “opt-in” to the EDP definition by representing that they do not need the extra protections received by Non-EDPs.

III. CONCLUSION

Just Energy appreciates this opportunity to provide input on the Proposed Instrument and respectfully requests that the comments contained herein are considered.

If you have any questions, please contact the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. Andani", is positioned above the typed name and title.

Amir Andani
VP and Chief Risk Officer