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Alberta Securities Commission
Authorité 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 Commission
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

Me Anne-Marie Beaudoin
Corporate Secretary
Authorité des marchés financiers
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Grace Knakowski
Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
comments@osc.gov.ca

Dear Sirs/Mesdames:

RE: Comments on Proposed National Instruments 93-101 *Derivatives: Business Conduct* and its proposed companion policy (the "Proposed Business Conduct Instrument"), and 93-102 *Derivatives: Registration* and its proposed companion policy (the "Proposed Registration Instrument", and collectively with the Proposed Business Conduct Instrument, the "Proposed Instruments")

Capital Power Corporation, together with its affiliates and subsidiaries (collectively, "**Capital Power**"), makes this submission in response to the Canadian Securities Administrators' April 19, 2018 request for comments on the Proposed Registration Instrument and June 14, 2018 second request for comments on the Proposed Business Conduct Instrument. Capital Power appreciates the opportunity to comment on

and commends the Canadian Securities Administrators ("**CSA**") not only for seeking public input on the Proposed Instruments but also for aligning the comment periods for the Proposed Instruments. Capital Power believes that the subject matter of the Proposed Instruments is so closely inter-related and inter-dependent that it is logical to develop them and move them forward together.

Capital Power is a growth-oriented North America power producer headquartered in Edmonton, Alberta. Capital Power develops, acquires, operates and optimizes power generation from a variety of energy sources, including coal, natural gas, biomass, solar and wind. Capital Power owns approximately 4500 megawatts of power generation capacity across 24 facilities in Canada and the United States and pursues contracted generation capacity throughout North America.

Capital Power hedges and optimizes its commodity portfolio using physical forward contracts for electricity, natural gas, environmental commodities (e.g. renewable energy certificates, carbon offsets and carbon credits), USD/CDN currency exchange, and financial derivative transactions based on those same commodities. Capital Power's trading counterparties include other power producers, utility companies, banks, hedge funds and other energy industry market participants. Trading activities take place primarily through electronic exchanges, such as ICE (Intercontinental Exchange) and NGX (Natural Gas Exchange), but also through third-party brokered transactions and directly with counterparties. Capital Power is a registered "market participant" in the Alberta wholesale electricity market constituted as the Alberta "Power Pool" under the *Electric Utilities Act* of Alberta (the "**EUA**") and is also a licensed "retailer" (as defined in the EUA) of electricity services to large commercial and industrial customers in the Alberta retail electricity market.

Capital Power generally supports the efforts of the CSA to establish a regulatory regime for the Canadian over-the-counter ("**OTC**") derivatives market, in order to address Canada's G-20 commitments. To that end, Capital Power respectfully urges the CSA to develop regulations that strike a balance between not unduly burdening derivatives market participants while at the same time addressing the need to introduce effective regulatory oversight of derivatives and derivatives market activities.

Capital Power is a member of the International Energy Credit Association ("**IECA**") and participated in drafting the IECA's comment letter to the Proposed Instruments. As such, Capital Power supports and recommends all of the IECA's comments with respect to the Proposed Instruments.

Capital Power is also aware of the comments submitted by Eversheds Sutherland (US) LLP, on behalf of The Canadian Commercial Energy Working Group, in a letter dated August 2, 2018 (the "**Sutherland Letter**"). Although Capital Power is not associated with The Canadian Commercial Energy Working Group, Capital Power supports the comments in the Sutherland Letter and respectfully urges the CSA to adopt the proposed revisions to the Proposed Registration Instrument set forth in the Sutherland Letter.

COMMENTS:

In addition to supporting the comments in the IECA's letter and the Sutherland Letter, Capital Power has the following specific and general comments regarding the Proposed Instruments:

Specific Comments:

1. Definition of "affiliated entity" (CSA Question 2 in Proprosed Registration Instrument).

In the Proposed Registration Instrument the CSA has defined "affiliated entity" on the basis of "control" and has set out certain tests for control. Additionally, the CSA has proposed an alternative definition of "affiliated entity", in Annex II of the Proposed Registration Instrument, based on the accounting concept of "consolidation". The CSA has asked for comments with respect to these two proposed definitions and Capital Power offers the comments below.

Capital Power believes that the definition of "affiliated entity" based on "control" is the preferable definition not only for both Proposed Instruments but also across all present and future instruments that the CSA may implement with respect to derivatives regulation. We prefer a control based definition of affiliation because that approach is consistent with definitions of affiliation found in business corporations' statutes across Canada and is therefore a concept with which businesses are familiar.

Capital Power believes that clarity and consistency among statutes, regulations and regulatory instruments, such as the Proposed Instruments, fosters compliance because it lessens the complexity and therefore the business costs and efforts required for compliance. For these reasons, Capital Power submits that the Proposed Instruments should be as consistent with other existing legal concepts as much as possible, unless deviation is warranted and justified for specific purposes. Capital Power does not believe that such deviation is warranted or justified within the Proposed Instruments for the "affiliated entity" definition, given that the legal concept of affiliation is already well and consistently established under Canadian business corporations' law.

General Comments:

1. Transition/implementation periods and effective dates for the Proposed Instruments.

Capital Power notes that the proposed transition/implementation period in Section 12 and the proposed effective date in Section 13 of the Proposed Registration Instrument are currently blank. Also, the italicized language in Section 45(1) of the Proposed Business Conduct Instrument suggests that it will become effective one year after the date of final publication. Capital Power supports the principle that each Proposed Instrument should have at least a one year implementation period, after date of final publication, before becoming effective.

Capital Power believes that a transition/implementation period of at least one year is reasonable and necessary given the complex and heavy compliance burden that will be placed on derivatives market participants who may be deemed to be derivatives dealers and therefore subject to both Proposed Instruments. Unless market participants are already registered as securities and/or swap dealers (or similar designations) under other Canadian or foreign laws, the compliance efforts required under the Proposed Instruments will be entirely new to most derivatives market participants.

Capital Power submits that most North American energy commodity derivatives market participants are not already registered dealers of any sort. Accordingly, any such market participants that become required to register as a result of the Proposed Instruments will not already have the required technological and human resources, and internal and external business processes, in place to comply with the Proposed Instruments. Putting those resources and process in place will take considerable time, effort and capital. Capital Power believes that a one-year transition/implementation period for the Proposed Instruments will allow newly deemed dealers the time necessary to ensure that they can be compliant with the Proposed Instruments.

2. Scaling-back dealing activity and avoiding registration.

According to the CSA's guidance, in the companion policies to both Proposed Instruments, a party should determine whether or not it is a derivatives dealer based on a "holistic analysis" considering, among other things, a list of "factors in determining a business purpose" (i.e. the "registration or business triggers"), discussed at length at pgs. 92-96 of the Proposed Registration Instrument companion policy and pgs. 100-103 of the Proposed Business Conduct Instrument companion policy. Both the IECA's comment letter and the Sutherland Letter address various aspects of the registration or business triggers and the need for further clarification concerning them.

In addition to supporting the call for further clarification, Capital Power submits that if an entity has conducted a holistic analysis of its derivatives-related activities and concluded that it is a derivatives dealer under the Proposed Instruments, and the level of its dealing activities exceeds any applicable de minimis threshold, such entity should not have to register as a dealer unless it materially (e.g. more than 20% over) exceeds the threshold for at least 3 consecutive months. Additionally, if the conditions in the preceding sentence are met, such entity should have the option of either: (i) having to register as a dealer within some reasonable time period (no earlier than 2 months) after having materially exceeded the threshold for such 3 month period; or (ii) scaling back its dealing activity such that it no longer materially exceeds the threshold in the following 3 consecutive month period.

Capital Power believes that this flexible approach to either requiring registration, or allowing dealers to reduce their dealing activities, would promote the regulatory goals of increased derivatives market oversight, risk mitigation, and robust investor protection, while at the same time avoid placing significant compliance burdens on market participants who may inadvertently exceed the de minimis dealing thresholds for limited periods of time and/or to an immaterial extent.

Conclusion:

Capital Power respectfully requests that the CSA consider its comments and again expresses its gratitude for the opportunity to provide comments. If you have any questions please contact Mr. Zoltan Nagy-Kovacs, Senior Counsel, at 403-717-4622 (znagy-kovacs@capitalpower.com).

Yours Truly,

"***CAPITAL POWER***"

Per: [redacted]

Zoltan Nagy-Kovacs
Senior Counsel