SOUTHERN COMPANY

600 North 18th Street
P.O. Box 2641
Birmingham, AL 35203

September 11, 2014

Elizabeth Mallett
Staff Attorney
North American Energy Standards Board
801 Travis, Suite 1675
Houston, TX 77002

Re: Southern Company's Comments to WGQ's 2014 Annual Plan Item 6

Dear Ms. Mallett:

Southern Company ("Southern") has reviewed the NAESB Dodd-Frank materials and is in general support of the WGQ's 2014 Annual Plan Item 6. Southern does have concerns, however, related to Exhibit B. As noted below, Exhibit B contains erroneous, vague and incomplete information that could result in confusion among the industry. Therefore, *Southern recommends that Exhibit B be deleted from the supporting materials* since it is not necessary for the WGQ's voting process. In this regard, the other supporting documents (which include a White Paper, Decision Tree and Supporting Documentation Reference Guide (Exhibit A)) are more than adequate to serve as the supporting materials.

To the extent NAESB decides to keep Exhibit B as a supporting document, Southern offers the following comments:

EXHIBIT B[1]

Contract Description - Issue/Concern	Delivery-Volumetric Optionality	77 FR reference	CFTC Interpretation	Comment	Southern Comments
NAESB Base Contract (Base Contract) is "forward contract"	Firm delivery		Forward Contract	Generally, CFTC states "it is well established that the intent to make or take delivery is the critical factor in determining whether a contact qualifies as a forward." *In re Wright*, and thus excluded from the definition of a "Swap".	This chart would serve as a better reference if the FR reference column is used to cite the applicable sections in the rules.

[1] Misspelled text is contained in original.

Contract Description - Issue/Concern	Delivery-Volumetric Optionality	77 FR reference	CFTC Interpretation	Comment	Southern Comments
NAESB Base Contract (Base Contract) is "forward contract"	Interruptible deliveries		Forward Contract	Generally, CFTC states "it is well established that the intent to make or take delivery is the critical factor in determining whether a contact qualifies as a forward." *In re Wright*, and thus excluded from the definition of a "Swap".	Why is "interruptible deliveries" listed as a Forward Contract? It appears the "Comment" is misplaced, because there is not the requisite "intent to make or take delivery" in these types of non-firm products. This appears to be inconsistent with the Swap Decision Tree document where if it's an interruptible product, then it's classified as "Not a Swap." Exhibit B needs to be updated to be consistent with the Decision Tree.
NAESB Base Contract (Base Contract) is "forward contract"	Swing deliveries		Forward Contract	Generally, CFTC states "it is well established that the intent to make or take delivery is the critical factor in determining whether a contact qualifies as a forward." *In re Wright*, and thus excluded from the definition of a "Swap".	
NAESB Base Contract (Base Contract) is "forward contract"	Full Requirements deliveries		Forward Contract	Generally, CFTC states "it is well established that the intent to make or take delivery is the critical factor in determining whether a contact qualifies as a forward." *In re Wright*, and thus excluded from the definition of a "Swap".	The "CFTC Interpretation" and "Comment" sections related to Full Requirements should reference the discussion in the Swap Definition Final Rule that states these types of transactions are generally excluded from the definition of a swap (The Final Rule states: "full requirements contracts…appear not to contain embedded volumetric options.").

Contract Description - Issue/Concern	Delivery-Volumetric Optionality	77 FR reference	CFTC Interpretation	Comment	Southern Comments
NAESB Base Contract (Base Contract) is "forward contract"	**Forward Contract Exclusion - 7 part test for "embedded volumetric commodtiy option" such as swing deliveries or full requirements deliveries**	77 FR 48238-40	Forward Contract	Seven Part Test is: (1) embbeded optionality does not undermine the overall nature of the contract as a forward; (2) perdominant feature of the contract is delivery; (3) embedded optionality cannot be severed and marketed separately; (4) seller intends to deliver the commodity, if the option is exercised; (5) buyer intends to take delivery if the option is exercised; (6) both parties are commerical parties; and (7) exercise or non-exercise of the embedded optionality is based primarily on physical factors or regulatory requirements that are outside the control of the parties. Typically, parts (1) to (6) are easily shown. However, part (7) requires further analysis of the transaction by counterparties to meet the test. The CFTC will look to the specific facts and circumstances of a transaction as a whole so the test could be met even if all seven parts are not satisfied.	Why does the reference to the 7-part test for volumetric commodity option state "such as swing deliveries or full requirements deliveries?" As noted in the row above, the Commission stated, "full requirements contracts…appear not to contain embedded volumetric options." Recommend rewording the last two sentences in the "Comment" section as follows: "However, part (7) requires further analysis of the transaction to meet the test. The CFTC will look to the specific facts and circumstances of a transaction as a whole, so additional information beyond what is reviewed as part of the 7-part test could impact the Commission's determination."
NAESB Base Contract (Base Contract) is "forward contract"	**Trade Option Exemption**	77 FR 25236	Forward Contract	Generally, CFTC states "it is well established that the intent to make or take delivery is the critical factor in determining whether a contact qualifies as a forward." *In re Wright*, and thus excluded from the definition of a "Swap". **See CFTC FAQs below. See Anadarko mutual representation provision imbedded below to conform NAESB optionality to the three "critical factors." Also see COP representations provision imbedded below.**	The Comment section should reference the benefits of the Trade Option Exemption. The Anadarko and COP examples should be deleted to avoid confusion as to what is being endorsed by the NAESB vote.

Contract Description - Issue/Concern	Delivery-Volumetric Optionality	77 FR reference	CFTC Interpretation	Comment	Southern Comments
NAESB Base Contract (Base Contract) is "forward contract"	**Trade Option Exemption - "commerical participant" and "Eligible Contract Participant (ECP)"**	77 FR 30596	Forward Contract	"Eligible Contract Participant (ECP)" is defined in Sec 1a(18) of the Dodd-Frank Act and final rules of joint SEC and CFTC rulemaking defining an ECP. "Commercial participant" is generally understood to be a producer, processor, commerical user of, or merchant handling, the underlying physical commodity.	
Base Contract with Liquidated Damages Provisions (Section 3) is "forward contract"	Not Applicable	77FR 48244	Forward Contract	CFTC interpretation generally agrees that liquidated damage provisions do not affect the forward contract exclusion.	
Evergreen Provision in contract causes contract not to be "forward contract"	Not Applicable		Forward Contract	CFTC interpretation generally agrees that an evergreen provision extending the deliveries do not affect the forward contract exclusion.	Consider rewording the Contract Description section. The following text is not correct: "Evergreen Provision in contract causes contract not to be 'Forward Contract.'"
Book-outs - Does a second Base Contract transaction to reduce deliveries under a prior transaction constitute a "book-out" or a separate "forward contract". If yes, a Book-out, then may the written book-out confirmation be included in the second transaction confirmation?	Not Applicable	77 FR 48228 - 48232	If Brent Interpretation applies - forward contract.	CFTC States; "what is relevant is that the book out occur through a subsequent separately negotiated agreement" and "such agreement must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form."	Consider incorporating the following text from the Swap Definition Final Rule (which appears to answer the question raised in the Contract Description section), "Such entities qualify for the forward exclusion from both the future delivery and swap definitions for their forward transactions in nonfinancial commodities under the Brent Interpretation even if they enter into a subsequent transaction to "book out" the contract rather than make or take delivery."

Contract Description - Issue/Concern	Delivery-Volumetric Optionality	77 FR reference	CFTC Interpretation	Comment	Southern Comments
Book-outs - "in the event of an oral agreement, such agreement must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form." **How do parties propose to confirm the typical oral agreement? What documentation?**	Not Applicable	77 FR 48230	Brent Interpretation applies.	Anecdotal information indicates that many parties reach agreement on book-outs by using Instant Messaging (IM) and that their planned practice is to retain the IMs to satisfy this requirement. ONE PARTY has suggested language to add to NAESB Base Contract as a Special Provision - "In course of scheduling the delivery of the volumes refereced above, or for other commercial reasons, the parties agreed and now document their agreement made subsequent to the execution of the transaction(s), that, rather than deliver and receive the product, the referenced volumes will be booked-out. Either party my break the book-out and restore all the original contract terms, including delivery and payment, all without liability to the other Party." **COP has different view per comment imbedded below.**	Recommend deleting highlighted text for consistency because as noted in the row above, "what is relevant is that the book out occur through a subsequent separately negotiated agreement."

Contract Description - Issue/Concern	Delivery-Volumetric Optionality	77 FR reference	CFTC Interpretation	Comment	Southern Comments
CFTC Interpretation Regarding Certain Physical Commercial Agreements, Contracts or Transactions: "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 o part therof) entails the further payment of actual storag fees, usage fees, rents, or other analogous service charges and not included in the demand charge or reservation fee, such agreement, contract or transaction is a commodity option subject to the swap definition."		77FR 48242	Transport, storage and similar agreements, transactions are swaps	See INGAA comments filed October 9, 2012 for best arguments for finding FERC transport and storage agreements with demand/commodity charges are not swaps. **On November 14, 2012, CFTC Office of General Counsel issued a response in a FAQ format that based on historical treatment of transport, storage and similar agreements these agreements are NOT a commodity option subject to the Swap Definition. See the imbedded document below for complete CFTC OGC issuance.**	The highlighted text should be deleted because it is misleading. The text should be reworded as: "On November 14, 2012, CFTC Office of General Counsel issued a response in a FAQ format that based on historical treatment of transport, storage and similar agreements these agreements are NOT a commodity option subject to the Swap Definition if certain enumerated conditions are met. See the imbedded document below for complete CFTC OGC issuance."

Contract Description - Issue/Concern	Delivery-Volumetric Optionality	77 FR reference	CFTC Interpretation	Comment	Southern Comments
Firm transport contract with demand and commodity rates			May be a swap where commodity charges represent payment for delivery option	See INGAA comments filed October 9, 2012 for best arguments for finding FERC transport and storage agreements with demand/commodity charges are not swaps. **On November 14, 2012, CFTC Office of General Counsel issued a response in a FAQ format that based on historical treatment of transport, storage and similar agreements these agreements are NOT a commodity option subject to the Swap Definition. See the imbedded document below for complete CFTC OGC issuance.**	The highlighted text should be deleted because it is misleading. The text should be reworded as: "On November 14, 2012, CFTC Office of General Counsel issued a response in a FAQ format that based on historical treatment of transport, storage and similar agreements these agreements are NOT a commodity option subject to the Swap Definition if certain enumerated conditions are met. See the imbedded document below for complete CFTC OGC issuance."
Firm storage contract with demand and commodity rates			May be a swap where commodity charges represent payment for delivery option	See INGAA comments filed October 9, 2012 for best arguments for finding FERC transport and storage agreements with demand/commodity charges are not swaps. **On November 14, 2012, CFTC Office of General Counsel issued a response in a FAQ format that based on historical treatment of transport, storage and similar agreements these agreements are NOT a commodity option subject to the Swap Definition. See the imbedded document below for complete CFTC OGC issuance.**	The highlighted text should be deleted because it is misleading. The text should be reworded as: "On November 14, 2012, CFTC Office of General Counsel issued a response in a FAQ format that based on historical treatment of transport, storage and similar agreements these agreements are NOT a commodity option subject to the Swap Definition if certain enumerated conditions are met. See the imbedded document below for complete CFTC OGC issuance."

Contract Description - Issue/Concern	Delivery-Volumetric Optionality	77 FR reference	CFTC Interpretation	Comment	Southern Comments
LNG tolling agreement with demand and commodity rates			May be a swap where commodity charges represent payment for delivery option	See INGAA comments filed October 9, 2012 for best arguments for finding FERC transport and storage agreements with demand/commodity charges are not swaps. **On November 14, 2012, CFTC Office of General Counsel issued a response in a FAQ format that based on historical treatment of transport, storage and similar agreements these agreements are NOT a commodity option subject to the Swap Definition. See the imbedded document below for complete CFTC OGC issuance.**	The highlighted text should be deleted because it is misleading. The text should be reworded as: "On November 14, 2012, CFTC Office of General Counsel issued a response in a FAQ format that based on historical treatment of transport, storage and similar agreements these agreements are NOT a commodity option subject to the Swap Definition if certain enumerated conditions are met. See the imbedded document below for complete CFTC OGC issuance."
Non-financial commodity		77FR 48232		CFTC "interprets the term "non-financial commodity" to mean a commodity that can be physically delivered and that is an exempt commodity."	
Exchange Transactions	Transaction(s) with another party to take delivery of natural gas at one delivery point in exchange for same quzantity of gas to be delivered to an alternative delivery point where the transactions constitute a pair of forward contracts that intend to go to physical delivery.	77FR 48235		CFTC interprets the described exchange transactions "as examples of transactions in nonfinancial commodities that are within the forward exclusion from the definition of "swap" and "future delivery"."	

Contract Description - Issue/Concern	Delivery-Volumetric Optionality	77 FR reference	CFTC Interpretation	Comment	Southern Comments
NAESB Retail Gas & Electric Contracts	Not applicable.	77FR 48246-48249	Excluded from swap definition	Generally, CFTC interprets that agreements to purchase nonfinancial energy commodities where the customer takes delivery of and uses the fuel is not a swap transaction. Several examples and interpretations are provided in the noted FR pages.	
NAESB Base Contract (Base Contract) - Canadian Addendum	Not applicable.		Excluded from swap definition	Generally, CFTC interprets that agreements to purchase nonfinancial physical energy commodities outside the US are not subject to the Dodd-Frank Act or CFTC Rules and regulations. Certain Canadian Provinces will soon roll out reporting on derivatives on a phased basis during October of 2014. See embedded ISDA summary.	
NAESB Master Agreement for Purchase, Sale or Exchange of Liquid Hydrocarbons (Master Agreement)	Applicable to the same extent as Base Contact for physical natural gas transactions.		Applicable to the same extent as Base Contact for physical natural gas transactions.	Generally, CFTC interprets that agreements to purchase any nonfinancial physical energy commodities are to be in compliance with Dodd-Frank Act and CFTC rules and regulations in the same manner per their historical treatment.	

Southern appreciates NAESB's efforts related to helping the industry monitor and implement the Dodd-Frank Act. If you have any questions regarding the enclosed comments, please contact the undersigned at (205) 257-3035.

Sincerely,

Paul C. Hughes

Paul C. Hughes
Manager, Risk Control