VIA EMAIL

August 25, 2017

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

Care of:

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

and

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 Members of the Canadian Securities Administrators:

Bruce Power L.P. hereby submits comments to the Canadian Securities Administrators (the "**CSA**") with respect to CSA Notice and Request for Comment on National Instrument 93-101 Derivatives: *Business Conduct and Proposed Companion Policy* dated April 4, 2017 (the "**Instrument**"). We thank you for providing interested parties with the opportunity to submit comments and look forward to further participation in this important process.

Bruce Power operates the world's largest nuclear site and is the source of roughly 30 per cent of Ontario's electricity. The company's site in Tiverton, Ontario is home to eight CANDU reactors, each one capable of generating enough low-cost, reliable, safe and clean electricity to meet the annual needs of a city the size of Ottawa. Formed in 2001, Bruce Power is an all-Canadian partnership among TransCanada Corporation, BPC Generation Infrastructure Trust (an investment entity of OMERS Administration Corporation), two trusts constituted by the Power Workers Union, a trust constituted by the Society of Energy Professionals and a trust through which a majority of Bruce Power's employees have invested in Bruce Power. Bruce Power is involved in the electricity wholesale market in Ontario and also sells electricity at the retail level in Ontario.

We have the following comments on the proposed Instrument. We would note that it has been more challenging to properly assess the impact of the Instrument without the benefit of having the opportunity to review the proposed National Instrument 93-102 *Derivatives Registration* (the "**Proposed Registration Instrument**"). The two documents appear to be closely connected. We look forward to the issuance of the Proposed Registration Instrument so that we can better understand the overall impact of both the dealer registration and business conduct requirements.

I. Derivatives Dealer & *De Minimis* Threshold

The Instrument applies to a derivatives dealer unless the exemptions for certain end-users as set out in Section 39 apply. A "derivatives dealer" is defined in Section 1 of the Instrument as, among other things, a company that engages in the business of trading in derivatives as principal or agent. The proposed Companion Policy to the Instrument (the "**Policy**") provides guidance on what type of activities should be considered in determining whether or not a company is in the business of trading in derivatives. These triggers enumerated in the Policy are quite broad and include engaging in frequent or regular transactions for profit and contacting others to solicit derivatives transactions. It would appear that most use of derivatives by a company, except on an infrequent basis, might result in that company being viewed as a derivatives dealer and, consequently, subject to the business conduct requirements of the Instrument.

As drafted, the end-user exemption in Section 39 provides a fairly narrow exemption from the requirements of the Instrument if, among other things, a company is an infrequent user of derivatives. Section 39(c) would exclude the application of the end-user exemption if a company regularly quotes prices at which they would be willing to transact in a derivative. The Policy suggests that the exemption might still apply if a company uses derivatives on a more frequent basis as long as derivatives are used in the ordinary course of their business to

hedge risk and the user receives, rather than offers, quotes at which they are willing to buy.

Although the Instrument, along with the Policy, provide some guidance on (i) what the CSA considers to be trading in derivatives and (ii) when the end-user exemption may apply, there is still some uncertainty. We believe that the introduction of a more objective *de minimis* threshold would provide much-needed clarity to derivatives users. Trades below the *de minimis* threshold would provide an exemption to the application of the requirements under the Instrument. By introducing a *de minimis* threshold, a company that trades either below or in excess of a specific threshold, whatever that threshold may ultimately be and however it may be measured, would know whether or not it would be viewed as a derivatives dealer and thus subject to the requirements of the Instrument.

Although we understand the rationale in the Instrument for providing less-sophisticated users of derivatives/consumers with broader protections, the rationale is less compelling for trades with an "eligible derivatives party" ("**EDP**").

Bruce Power strongly encourages the CSA to implement a *de minimis* exemption in a manner consistent with the approach adopted by the Commodity Futures Trading Commission ("**CFTC**"), with comparable levels. Since lower volumes of derivatives trading would arguably not give rise to a significant level of market risk, it seems reasonable that the registration requirements and the business conduct requirements should only be required for participants whose trading activity in the Canadian derivatives market is substantial. There should be a reasonable and proportionate balance between any regulatory/administrative burden and the risk that the regulatory regime purports to address.

In the absence of an objective *de minimis* threshold, it may well be that companies would take a conservative approach and assume that their use of derivatives could be viewed as engaging in the business of trading derivatives. The costs to a company of ensuring compliance with the requirements of the Instrument, to say nothing of the costs of registration as a derivatives dealer under the Proposed Registration Instrument, might outweigh the perceived benefits of engaging in these trades and deter some companies from participating in the derivatives market. This would be particularly true for many commercial, non-financial entities whose primary business involves the delivery or consumption of physical commodities or for non-financial entities that use derivatives to trade as a principal for their own account and engage in derivative trades with knowledgeable counterparties. A reduction in the number of market participants who engage in derivatives trades could lower market liquidity (especially in the commodity markets), increase volatility, impact pricing and consolidate risk with financial institutions.

II. Eligible Derivatives Party

The Instrument defines an EDP as, among other things, a company that has net assets of at least $25 million. We would suggest that the threshold be more in line with the $10 million in total assets set out in the definition of "eligible contract participant" in the U.S. *Commodity Exchange Act*. Alternatively, the CSA could allow market participants to affirmatively represent that they are qualified to evaluate the risks associated with derivatives transactions and consent to being treated as an EDP if they would not otherwise qualify as such. If the threshold for qualification for an EDP is set too high, some knowledgeable market participants who regularly use derivatives in the course of their business and who do not meet this threshold may encounter difficulties in continuing to transact using derivatives. Some counterparties may be reluctant to deal with a non-EDP, given the added costs that are associated with derivative transactions with a company that is not an EDP.

III. End-User Exemption

We would suggest that the end-user exemption be available to entities even if they regularly quote prices. The CSA states in the Policy that it "would not be reasonable for a person or company who regularly quotes prices on derivatives to other derivatives parties to claim that they are an end-user hedging business activities." In Bruce Power's view, it is possible in the commodity derivatives market to state a price at which a company would be willing to purchase and a price at which the company would be willing to sell. Prudent hedge management may result in an end-user taking an opposing position to its natural hedging position. The end-user exemption should be available to entities even if they regularly provide quotes on one or both sides of the market.

IV. Record Keeping

Bruce Power is concerned that the record-keeping requirements, as proposed, are too broad and will be overly burdensome for certain market participants. If no *de minimis* threshold of dealer activity is implemented in the Instrument and/or the Proposed Registration Instrument, the proposed record-keeping requirements may capture relatively small businesses that do not have the capability or resources to meet the requirements as drafted without undue burden. Bruce Power suggests that the recordkeeping requirement be limited to the obligation to retain records of communications when entering into *binding* obligations, that is, communications with a counterparty or broker that evidence binding acceptance, offer or instructions.

The Instrument requires that records be kept for a period of seven years following the termination/expiry date of the swap. This seven-year retention

period beyond the expiry of the transaction seems quite long in our view and exceeds the CFTC requirements. We would appreciate some clarification from the CSA on why this period of time was deemed to be appropriate and whether a shorter period may be more appropriate in the context of certain records (e.g., phone calls, to the extent that they are required to be recorded).

V. Implementation Period

The Instrument sets out a number of obligations and requirements that a derivatives firm will need to comply with. We would request that the CSA allow a sufficient implementation period so that companies that have not previously been regulated in a similar manner proposed by the CSA in the Instrument have adequate time to resource, design, and implement new processes to address these requirements. Bruce Power suggests a minimum of a one-year implementation period.

Bruce Power thanks the CSA for this opportunity to provide comments on the Instrument.

Yours truly,

William Schnurr
Assistant General Counsel