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Autorité des marchés financiers  
British Columbia Securities Commission  
Manitoba Securities Commission  
Financial and Consumer Affairs Authority of Saskatchewan  
Financial and Consumer Services Commission (New Brunswick)  
Nova Scotia Securities Commission  
Ontario Securities Commission

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Dear Sirs/Mesdames:

**RE: Canadian Securities Administrators (“CSA”) Consultation Paper 92-401 Derivatives Trading Facilities (“Paper 92-401”)**

Capital Power Corporation, together with its affiliates and subsidiaries (collectively “**Capital Power**”), makes this submission to comment on Paper 92-401 published by the Canadian Securities Administrators Derivatives Committee (the “**Committee**”) on January 29, 2015.

Capital Power appreciates the opportunity to comment, and commends the Committee for seeking public input, on Paper 92-401. 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 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 and wind. Capital Power owns more than 2700 megawatts of power generation capacity across 15 facilities in Canada and the United States, and owns 371 megawatts of capacity through power purchase arrangements. An additional 1020 megawatts of owned generation capacity is under construction or in advanced stages of development in Alberta and Ontario.

Capital Power optimizes and hedges its commodity portfolio using physical forward contracts for electricity, natural gas, environmental commodities (e.g. carbon offsets and 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 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 retail electricity services to large commercial and industrial customers in the retail electricity market in the Province of Alberta.

### **SPECIFIC COMMENTS TO QUESTIONS:**

Capital Power has the following specific comments in reply to specific questions posed in Paper 92-401:

***Question 5: Is the proposed regulatory framework for DTF's appropriate? And***

***Question 13: Is it appropriate that a DTF that does not exercise execution discretion be permitted to perform its regulatory and surveillance functions itself, or should it be required in all cases to engage a third-party regulation services provider for this purpose? Please explain.***

Capital Power considers Question 5 to encompass Question 13 and comments on them jointly. Capital Power is concerned about the regulatory, market surveillance and enforcement functions that the Committee proposes that DTF's would perform, regardless of whether or not DTF's would exercise any transaction execution discretion. Specifically, Capital Power submits that allowing, or requiring, DTF's to fulfill regulatory, market surveillance and enforcement functions creates a situation with an inherent and insurmountable conflict of interest for the DTF.

Capital Power has inferred from Paper 92-401, perhaps incorrectly, that the Committee envisions DTF's to be private for profit enterprises and not governmental agencies? Capital Power submits that the regulatory, market surveillance and enforcement functions that the Committee proposes for DTF's to perform would be most appropriately performed by a government agency, or other instrumentality of the state, such as the securities regulatory authorities in each province or territory. In any event, such functions should be performed by an entity independent from a DTF.

DTF's as private for profit enterprises would necessarily, and justifiably, have as their first and foremost goal the maximization of profits through the services they provide. Profits would be maximized by, among other things, providing more services to more "customers", that is, derivatives trading market participants. In that commercial context, Capital Power respectfully submits that it is both unrealistic and inappropriate for the Committee to expect DTF's to function, on the one hand, as promoters of their businesses and, on the other hand, as a combination of the police, judge, jury and executioner with respect to improper conduct of their customers.

Capital Power is particularly concerned about the proposals in Paper 92-401 that DTF's should have power to "discipline" their customers, including through "fines". Given that the relationship between a DTF and a customer would be based on a private contract between them, Capital Power is unsure how such fines would be enforceable outside of a successful judgment awarded by a court against a customer after a normal-course legal action brought by the DTF? Fines might be expressed within the contractual relationship as liquidated and/or pecuniary damages. Canadian courts typically do not award pecuniary damages and even non-pecuniary liquidated damages would have to be successfully claimed by the DTF through a trial process. At most, Capital Power submits that the power of a DTF to "discipline" its customers, in the event that the customer breaches the terms of the contract between it and the DTF, should be limited to the ability of the DTF to terminate the contractual relationship and thereby terminate the customer's access to the DTF's services.

Capital Power fully supports that DTF's, trading activities on DTF's and DTF customers should be subject to robust monitoring for improper, disruptive, manipulative, etc., trading activities. Capital Power also supports enforcement of trading rules designed to prevent such negative activities, including through suspensions and fines. As stated above however, Capital Power does not believe that such monitoring and enforcement functions should be carried out by a DTF itself because of the inherent conflict of interest between those functions and the DTF's profit and business growth goals. For the reasons discussed above, Capital Power respectfully submits that the regulatory, market surveillance and enforcement functions contemplated by Paper 92-401 should be performed not by DTF's but by independent entities such as government agencies or other instrumentalities of the state.

***Question 9: Is it appropriate to allow a DTF to require clearing of all trades on the DTF that are capable of being cleared?***

Capital Power submits that the requirement to clear particular derivatives trades, or classes of derivatives trades, should be based on a thorough and transparent analysis of the systemic risk, if any, posed by such trades and not simply transactional expediency on the part of a DTF. Accordingly, Capital Power submits that it is not appropriate to allow a DTF to require clearing of trades, which have not been mandated for clearing by the relevant securities regulator, simply because such trade would be capable of being cleared.

Except with respect to trades that have been mandated for clearing, Capital Power submits that allowing market participants discretion whether to clear trades or not preserves valuable transactional flexibility and liquidity in the market. Such flexibility and liquidity could be jeopardized if DTF's could require clearing of trades that had not been mandated for clearing by the regulators. In addition, Capital Power expects that the mandatory clearing of derivatives trades will likely result in a significant increase in capital requirements and transaction costs for such cleared trades. The increased costs associated with clearing may also result in decreased trading activity and a corresponding decrease in market liquidity. Derivatives markets, and market participants, should only be subjected to these adverse consequences to the extent justified in order to address systemically risky derivatives trades, or classes of derivative trades, which have been determined to be systemically risk by securities regulators after a thorough and transparent assessment process.

***Question 10: Is it appropriate to allow a DTF to require transactions executed on its facility to be cleared through a particular clearing agency and/or reported to a particular trade repository?***

Further to our comments above about preserving flexibility and liquidity, Capital Power submits that it is not appropriate to allow a DTF to require transactions executed on its facility to be cleared through a

particular clearing agency and/or reported to a particular trade repository. Allowing market participants to choose which DTFs', clearing agencies' and trade repositories' services they use should foster competition among those service providers. That competition should in turn lead to the optimization of efficiencies in service delivery by those entities and correspondingly lower prices for their customers.

**Question 11: *Is it appropriate for a DTF that exercises discretion in trade execution to be permitted to limit access to its facility? If so, on what grounds should it be permissible?***

Capital Power submits that it would be appropriate to permit a DTF, which exercises trade execution discretion, to limit access to its facility. Grounds for limiting such access could include the sophistication of a DTF's customer, the customer's credit rating and other financial metrics, technical capabilities, etc. Capital Power agrees with the comments in Paper 92-401 that denying DTF's such limiting ability could force DTF's into fiduciary-type relationships with persons with whom they would otherwise not choose to transact.

**Question 18: *What is the preferred method of real-time public reporting of transactions executed on a DTF (i.e. directly by a DTF, via trade repositories, or some other method)? What are the advantages and disadvantages of the proposed options?***

Capital Power submits that the preferred method of real-time public reporting of transactions executed on a DTF would be through trade repositories and not directly by a DTF or some other method. Capital Power notes that trade repository and trade data reporting rules, including public dissemination of trade data, are already in effect in Manitoba, Ontario and Quebec. Proposed trade repository and reporting rules have been published by regulators in five other provinces. Capital Power anticipates that well before any DTF related rules become effective trade repositories and trade reporting will likely be in effect across Canada. Given the regulatory framework being developed around trade repositories and trade reporting, Capital Power sees no value in requiring DTF's to duplicate the public reporting that trade repositories will already be doing. Capital Power urges the CSA to avoid any duplicative, or potentially conflicting, efforts or requirements among the various streams of rule developments that the CSA is undertaking.

**Question 22: *In addition to reporting trade information to a trade repository, should a DTF be required to disseminate trade information directly to all its participants, or only to counterparties to the trade? Should there be a minimum amount of post-trade information that is disseminated to all participants, containing less detail than the information provided to counterparties? Please specify.***

Further to our comments in response to Question 18 above, Capital Power submits that trade information dissemination should be addressed in the context of existing or proposed trade repository and trade data reporting rules. Accordingly, Capital Power does not believe that DTF's should function as public disseminators of trade data because that function will be performed by trade repositories. A DTF's trade reporting and dissemination functions should be limited to disclosing all pertinent trade details to the two counterparties to such trade.

Capital Power respectfully requests that the Committee consider its comments and again expresses its gratitude for the opportunity to provide comments. If you have any questions, or if we may be of further assistance, please contact Mr. Zoltan Nagy-Kovacs, Senior Counsel, at 403-717-4622 ([znagy-kovacs@capitalpower.com](mailto:znagy-kovacs@capitalpower.com))

Yours Truly,

**“CAPITAL POWER”**

Per: *“Zoltan Nagy-Kovacs”*  
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Senior Counsel