CARBON MARKET STUDY

December 17, 2010

Filed electronically via http://comments.cftc.gov

David A. Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Re: Comments on the "Study Regarding the Oversight of Existing and Prospective Carbon Markets," as Called for Under Section 750 of the Wall Street Reform and Consumer Protection Act

Dear Secretary Stawick:

The trade associations comprising the "Not-For-Profit Electric End User Coalition"[1] respectfully submit these comments to the Commodity Futures Trading Commission (the "Commission") in response to the Commission's request for Public Input for the Study Regarding the Oversight of Existing and Prospective Carbon Markets[2] (the "Market Oversight Study"), called for by Section 750 of the Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[3]

The coalition's members include municipal and cooperative electric utilities. None of the coalition's members anticipate being regulated by the Commission as "swap dealers" or "major

[1] The coalition includes the National Rural Electric Cooperative Association, American Public Power Association, and the Large Public Power Council. The comments contained in this filing represent the initial position of the Coalition, but not necessarily the views of any particular member with respect to any issue.

[2] 75 Fed. Reg. 72,816 (November 26, 2010).

[3] Public Law No: 111-203 (enacted July 21, 2010).

swap participants" ("MSPs") for any category, class or type of swap. None of the coalition's members is a "financial entity" to which the end user exception to clearing would be unavailable. The coalition's members use energy and energy-related "swaps" ("Energy Commodity Swaps")[4] solely to manage the commercial risks inherent in their core public service activities. None of the coalition's members "speculate" in Energy Commodity Swaps.[5]

The Market Oversight Study is intended to focus on market oversight issues in the existing and prospective carbon markets – to ensure that such markets are efficient, secure and transparent. The Market Oversight Study is not intended to open or reopen underlying environmental policy debates about regulation of carbon dioxide emissions, how to construct carbon markets, or how best to achieve the least-cost compliance with environmental policy goals. We urge the Commission (and the interagency study group) to focus carefully on the questions asked by Congress in Section 750(d) of the Dodd-Frank Act – are the existing carbon markets efficient, secure and transparent? And what, if any, incremental market oversight rules are necessary to ensure that prospective carbon markets are efficient, secure and transparent?

The "carbon markets" subject to the Market Oversight Study may include "Energy Commodity Swaps." For those "carbon markets," we refer the Commission to our comments in other rule-makings under the Dodd-Frank Act. Here, we focus solely on the narrow questions posed for the Market Oversight Study. The coalition respectfully requests the Commission to impose incremental regulatory market oversight on the "carbon markets" only to the extent necessary to protect against systemic risk. Any incremental regulatory market oversight should

[4] The coalition notes the energy industry's continuing concerns about the definition of the term "swap," as noted in the comments submitted by the Not-For-Profit Energy End Users dated September 20, 2010 in response to the Commission's Advance Notice of Proposed Rule-Making. A copy of that letter is attached for convenience of reference. The comments included in this letter are predicated on certain assumptions about how the Commission will define that term, and we reserve the right to change or expand our comments once the Commission's final rules in respect of that definition are issued. In this letter, we use the term "Energy Commodity Swap" to include (a) those non-cleared swaps referencing or derived on energy commodities such as electric energy, natural gas, and all other fuels for electric generation, including coal and heating oil, (b) those non-cleared swaps referencing or derived on transmission, transportation, generation capacity or storage concepts or services which are intrinsically related to the energy commodities used by our members in their core public service activities and which continue to be subject to the jurisdiction of regulators other than the Commission, and (c) those non-cleared swaps referencing or derived on the basis of commodities created by environmental or emissions regulations, or renewable energy or other environmental attributes, and which continue to be subject to the jurisdiction of regulators other than the Commission. All of these "Energy Commodity Swaps" are based on "nonfinancial commodities" and are intrinsically related to our members' core public service activities.

[5] The term "speculate" as used herein means deliberately taking a position, and then offsetting it with another position, for the purpose of profiting from favorable movements in market prices. Speculation is a risk-increasing activity in which commodity traders commonly engage. An NFP Electric End User may enter into a swap transaction that settles favorably (i.e., "in the money"). But that favorably-settling swap transaction offsets a correlated unfavorable price movement/settlement in the commercial risk being hedged.

be structured in such a way that the NFP Electric End Users can continue to use "carbon markets" to meet their environmental regulatory obligations while generating, transmitting and/or delivering reliable electric energy to American consumers and businesses. The Commission is respectfully asked to consider this NFP Electric End User perspective, and to facilitate and protect the continuing ability of the NFP Electric End Users to cost-effectively hedge their commercial risks using Energy Commodity Swaps, including non-cleared swaps referencing or derived on carbon or carbon dioxide emissions allowances, credits, offsets or other attributes.

I. THE COALITION MEMBERS

The coalition is comprised of three trade associations representing the interests of not-for-profit, consumer-owned electric utilities in the United States (collectively, the "NFP Electric End Users").[6] The primary business of these NFP Electric End Users has been for well over 75 years, and still is today, to provide reliable electric energy to their retail consumer customers every hour of the day and every season of the year, keeping costs low and supply predictable, while practicing good environmental stewardship. The NFP Electric End Users are public service entities, owned by and accountable to the American consumers they serve.

A. NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION ("NRECA")

Formed in 1942, NRECA is the national service organization for more than 900 not-for-profit rural electric utilities and public power districts that provide electric energy to approximately 42 million consumers in 47 states or 12 percent of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all electric energy sold in the United States. NRECA members generate approximately 50 percent of the electric energy they sell and purchase the remaining 50 percent from non-NRECA members. The vast majority of NRECA members are not-for-profit, consumer-owned cooperatives which distribute electricity to consumers. NRECA's members also include approximately 66 generation and transmission ("G&T") cooperatives, which generate and transmit power to 668 of the 846 distribution cooperatives. The G&T cooperatives are owned by the distribution cooperatives they serve. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost. All these cooperatives work together pursuant to their common public

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[6] The Coalition is grateful to the following organizations and associated entities who are active in the legislative and regulatory policy arena in support of the NFP Electric End Users, and who have provided considerable assistance and support in developing these comments. The Coalition is authorized to note the involvement of these organizations and associated entities to the Commission, and to indicate their full support of these comments and recommendations: ACES Power Marketing and The Energy Authority.

service mandate from their members, often without the type of contracts that exist between for-profit entities. Rather, many cooperatives deal with each other under take and pay "all requirements contracts" which set forth the terms of service/energy sales, but not necessarily the price for such service/energy sales. For example, as between a G&T cooperative and its distribution cooperative owner-members, the price is often determined based on a "cost of service" rate, with no market price component.

Electric cooperatives own approximately 43% of the distribution lines in the U.S., reaching some of the country's most sparsely populated areas, from Alaskan fishing villages to remote dairy farms in Vermont. In an electric cooperative, unlike most electric utilities, its owners -- called "members" of the cooperative -- are also customers, who are able to vote on policy decisions, directors and stand for election to the board of directors. Because its members are customers of the cooperative, all the costs of the cooperative are directly borne by its consumer-members.

B. AMERICAN PUBLIC POWER ASSOCIATION ("APPA")

APPA is the national service organization representing the interests of publicly-owned electric utilities in the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers and serve 45 million people. APPA's member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. These systems take various forms, including departments of a municipality; a utility board or a public utility district formed under state or local law; a joint action agency or joint power agency formed under state law to provide wholesale power supply and transmission service to distribution entity members; a state agency, authority or instrumentality; or other type of political subdivision of a state.

Public power utilities perform a variety of electric utility functions. Some generate, transmit, and sell power at wholesale and retail, while others purchase power and distribute it to retail customers, and still others perform all or a combination of these functions. All these systems work together pursuant to their common statutory and regulatory mandates. Some are "vertically integrated" electric utilities (engaging in generation, transmission, distribution and retail sales), while others are vertically integrated by contract with other "201(f) entities" (entities that are exempt from full Federal Power Act rate regulation under Section 201(f) of that statute), or by contract with third parties.

Public power utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a public power utility is to provide reliable, safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

C. LARGE PUBLIC POWER COUNCIL ("LPPC")

The Large Public Power Council is an organization representing 24 of the largest locally owned and operated public power systems in the nation. LPPC members own and operate over 75,000 megawatts of generation capacity and nearly 34,000 circuit miles of high voltage transmission lines. Collectively, LPPC members own nearly 90% of the transmission investment owned by non-federal public power entities in the U.S. Our member utilities supply power to some of the fastest growing urban and rural residential markets in the country. Members are located in 11 states and Puerto Rico -- and provide power to some of the largest cities in the country including Los Angeles, Seattle, Omaha, Phoenix, Sacramento, Jacksonville, San Antonio, Orlando and Austin.

Members of the LPPC are also members of APPA. LPPC members are larger in size than other APPA members due to the size and population density of the communities to which they provide power. LPPC members often require larger, more complex and more diverse types of resources to serve their communities as well, and therefore LPPC members own and operate more complex generation and transmission assets than many other APPA members. However, despite being larger in size and resources, LPPC members' public service mission remains the same -- to provide reliable, safe electricity service, keeping costs low and predictable for its customers while practicing good environmental stewardship.

D. THE COALITION'S MEMBERS ARE UNIQUE

The NFP Electric End Users represented by the coalition include public power utilities and rural electric cooperatives. Some are quite large, but most of these NFP Electric End Users are very small, reflecting the communities they serve, the success of those communities in providing reliable essential services for their citizens at the lowest reasonable rates and, in the case of rural electric cooperatives, the contribution to Americans' quality of life of the Rural Electrification Act of 1936.

Some NFP Electric End Users generate, transmit and sell electric energy to their fellow public power systems and cooperatives and to third parties at wholesale, while others purchase electric energy (from associated public power systems and cooperatives or from third parties), and distribute it to retail consumers. Still others perform all or a combination of these commercial functions. The coalition's members are unique among "end users" whose transactions are potentially subject to Commission regulation as "swaps" (even among those who are "end users" of Energy Commodity Swaps) in that the public power entities which are NFP Electric End Users have no stockholders and are accountable to elected and/or appointed officials, and ultimately to the consumers of their services. Similarly, the electric cooperatives which are NFP Electric End Users are directly accountable to their consumer-members and boards. Any costs incurred by an NFP Electric End User's to generate or purchase electricity and any environmental or market oversight regulatory costs associated therewith result in higher energy costs to American businesses and consumers. The NFP Electric End Users do not seek profit for shareholders or investors. Their public service mission is the singular purpose and reason for their existence, and the interconnected Federal, state and local system of laws and financial regulation within which they operate is designed specifically to support this public service mission.

The market for power in North America is comprehensively regulated at the Federal, state and local level, with a policy focus on reliability of service and regulated rates payable by the retail customer. The Federal Energy Regulatory Commission ("FERC") and state energy regulatory commissions, as well as the NFP Electric End Users' governing bodies, oversee these policy objectives. In addition, the electric industry (including the NFP Electric End Users) is subject to extensive environmental regulations and, in some states, renewable energy portfolio standards.

The electric industry, including the NFP Electric End Users, generates electricity by burning fossil fuels, including coal and natural gas. Approximately 45% of the power generated in the United States is fueled by coal. Fossil fuel combustion results in the release of numerous types of "emissions," some of which have been designated by the environmental regulators as "pollutants." Fossil fuel combustion from electric generation and industrial sources has been regulated by the U.S. Environmental Protection Agency (the "USEPA") and its state counterparts since the 1970s. Environmental regulation permeates every aspect of the process of generating electricity, and the electric industry is accustomed to working within that regulated environment. Environmental regulation is driven by the policy objective to reduce the adverse health impacts and/or adverse public welfare impacts from "pollutants," and so, in the past has focused on sulfur dioxide and nitrogen oxide emissions. The USEPA has developed successful market-based programs ("markets") for the reduction of these pollutants.

As a consequence of the environmental regulations to which they are subject, electric utilities, including the NFP Electric End Users, actively buy and sell emissions allowances (or participate in "auctions" or distributions of allowances by the environmental regulators), emissions credits and offsets and environmental derivative transactions, in order to cost-effectively fulfill their environmental regulatory obligations while continuing to fulfill their public service obligations to electric customers.

Unlike sulfur dioxide and nitrogen oxide, carbon dioxide has not been a focus of environmental regulation until recently. However, climate change concerns about greenhouse gas emissions (including carbon dioxide emissions) have led to legislative and regulatory policies focused on reducing and restricting carbon dioxide emissions. In the electric industry, cost-effective alternatives do not currently exist to fossil fuel generation for baseload (24/7) electric reliability. Therefore, the electric industry will likely burn fossil fuels for some time to come. In order to achieve environmental policy goals in the most cost effective manner, it is therefore also important for the electric industry to have access to efficient carbon market mechanisms to purchase carbon reductions from other sectors of the economy.

In requesting the Market Oversight Study, Congress did not intend the interagency study group to open or reopen, much less resolve, the ongoing and wide-ranging public policy debates in the environmental or energy regulatory arenas. The study is to focus on market oversight of existing and prospective carbon markets to ensure efficiency, security and transparency.[7]

II. COMMENTS ON THE MARKET OVERSIGHT STUDY[8]

A. LISTEN TO THE ELECTRIC INDUSTRY

The legislative and regulatory efforts in the United States to reduce carbon emissions focus heavily on the electric power industry and, in particular, on power generation units which burn coal or other fossil fuels to generate electricity. The NFP Electric End Users generate electricity (and pay the regulatory costs of compliance with environmental regulation), or purchase power (the cost of which includes the regulatory costs of environmental compliance by the generator), in order to fulfill their public service mission to provide reliable and affordable electric power to America's homes and businesses. The costs of achieving environmental policy goals are directly borne by the customers of the NFP Electric End Users.

The NFP Electric End Users are, and will be, among the primary "end user" market participants in any existing or prospective carbon markets in the United States. The NFP Electric End Users do not speculate or transact in such markets for profit. Instead, the NFP Electric End Users use, and will use, the "carbon markets" only to hedge or mitigate the commercial risks they face. The NFP Electric End Users are in the same "end user only" position they hold in the markets for other Electric Commodity Swaps.

B. EXISTING CARBON AND OTHER EMISSIONS MARKETS ARE EFFICIENT, SECURE AND TRANSPARENT

"Carbon markets," and similar markets for emissions, allowances and credits of other substances defined by the environmental regulators as "pollutants," presently exist in the United States. The NFP Electric End Users consider such markets to be efficient, secure and transparent, and we are not aware of any incidents of systemic risk related thereto.

For example, the USEPA oversees the "Clean Air Markets," which allow the trading of sulfur dioxide credits to reduce acid rain, and, since 1990, have cost-effectively decreased sulfur

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[7] Dodd-Frank Act Section 750(d).

[8] We concur with the comments made by the Edison Electric Industry in their comment letter filed today about the need, in any market oversight rules for carbon markets, to focus on: maintaining a low barrier to entry for market participants who need access to the carbon markets as end users, the need for flexible market oversight rules in order to promote innovation, and the need for regulatory certainty. We also agree strongly that the regulators in the interagency study group should work together to avoid overlapping and duplicative jurisdiction that will unnecessarily impose incremental market oversight costs and burdens on the end users in carbon markets.

dioxide emissions by 64% (http://www/epa.gov/airmarkets/progress/ARP09_1.html). The Clean Air Markets also allow the trading of nitrogen oxide allowances, and the success of those markets has resulted in a similar improvement in air quality. The Regional Greenhouse Gas Initiative (RGGI), in place in the Northeast states, has resulted in successful auctions of greenhouse gas emission (primarily carbon dioxide) allowances and significant revenue for state governments for use in energy efficiency and other programs. The NFP Electric End Users are participating in all these existing markets, and commend the regulators who provide oversight to these markets for the markets' efficiency, security and transparency. The NFP Electric End Users do not believe such markets warrant any incremental market oversight rules.

Other carbon markets are being established in various geographic regions: such as the market being established by the California Air Resource Board (CARB), which will be operational in 2012, the Western Climate Initiative, which applies to 11 states and Canadian provinces and involves 14 other U.S., Canadian and Mexican states and provinces, and the nascent Midwest Greenhouse Gas Reduction Accord which is in the process of developing an outline for a trading program. All of these prospective carbon market structures are being established in order to advance the environmental policy goals of reducing carbon dioxide emissions using market-based principles, and include market oversight rules to ensure transparency, efficiency and liquidity. All of these market structures are intended by the regulators who oversee them to be secure, and to appropriately and cost-effectively allocate the credit and counterparty credit risks inherent in the particular commercial and financial market environment.

The NFP Electric End Users believe that the Clean Air Markets have functioned well, and that these markets allow the electric industry to meet its existing environmental regulatory commitments at the state and Federal levels to reduce the level of sulfur dioxide and nitrogen oxide emissions at the least possible environmental compliance cost while achieving the energy regulatory goal of reliability and without risk to the market participants or to the United States financial system.

In recommending market oversight rules for prospective carbon markets, the Market Oversight Study should not be proscriptive, nor should it recommend just one type of market oversight structure. Although each of the existing carbon and emissions markets is different, each market is efficient, secure and transparent. The goal of market oversight for environmental commodities or swaps, including those derived or based on carbon dioxide emission reductions, allowances, offsets or credits, must be to keep incremental regulatory market oversight costs as low as possible, while maintaining efficient, secure and transparent markets.

C. <u>THE CARBON MARKETS ARE EFFECTIVELY AND PRIMARILY REGULATED BY ENVIRONMENTAL AND ENERGY REGULATORS, AND BY THE NFP ELECTRIC END USERS' GOVERNING BODIES</u>

The Commission must defer to the existing policy mandates of the USEPA and state environmental agencies, FERC, state public service commissions, local governing bodies and boards which regulate utility rates, and the laws which govern certain of the NFP Electric End Users' activities, when recommending any incremental market oversight rules for prospective carbon markets. These are not just commodity trading markets being established for traders -- or even primarily commodity trading markets. These markets are, and will be in the future, established to effect an environmental regulatory purpose (reduction of carbon dioxide emissions) and to ensure, in the process of achieving that environmental policy goal, that the energy regulators' mission to provide reliable and affordable electric energy to the American public is also achieved. The "goals of regulatory [market] oversight" mentioned in Question 1 of the Commission's Request for Comment MUST be tertiary considerations, and the Commission must defer to these other governmental and regulatory agencies' missions. Otherwise, financial trading markets for environmental commodities and swaps may function efficiently, securely and transparently, but it will be at such costs, or within such a constrained market oversight structure, that either the environmental goals or the energy regulatory goals will suffer.

D. <u>THE CARBON MARKETS MUST BE AVAILABLE TO NFP ELECTRICITY END USERS IN ORDER TO ALLOW SUCH END USERS TO CONTINUE TO COST-EFFECTIVELY HEDGE THEIR COMMERCIAL RISKS</u>

The same end user concerns exist, and will exist, in the "carbon markets" as are now being debated as the Commission structures commodity "swap markets." We are concerned about any incremental market oversight costs and about the overall regulatory cost/benefit analysis. To the extent that the carbon markets are deemed "commodity" or "swap" markets, these concerns include: end user exceptions to clearing and exchange-trading, protection of end users from direct or indirect costs of margin or capital requirements, and exemption of end users from incremental regulatory record-keeping, reporting and administrative costs.

The need for regulatory market oversight will be an even more complex challenge in the carbon markets. This is because carbon markets introduce a third set of regulatory goals (those of the environmental regulators) to the already competing goals of the energy regulators and financial market oversight regulators that we see in the discussion of other Energy Commodity Swaps. The complexity will be of geometric, not additive, proportion. The interagency study group must clearly allocate jurisdictional authority among the regulators, provide regulatory certainty for nascent and prospective carbon markets, and avoid imposing on end users duplicative or overlapping regulatory requirements. It is the electric industry (which does not necessarily choose to "trade new cash, secondary or derivatives products") that will be forced to bear any incremental market oversight regulatory costs.

The NFP Electric End Users urge the interagency study group to minimize any incremental market oversight costs or additional regulatory burdens. The interagency study group should recommend changes in oversight of the existing carbon markets, or imposition of new carbon market oversight rules, only where the interagency study group determines such costs and burdens are necessary to protect against systemic risk. There is no evidence that existing environmental markets pose systemic risk. The electric industry will continue to need to buy carbon and other emissions allowances, credits or offsets in order to mitigate the commercial risks associated with the generation, transmission and delivery of reliable electricity. For the NFP Electric End Users, any new, incremental regulatory market oversight costs will be borne directly by retail electric customers: the American businesses and consumers.

III. THE COMMISSION IS REQUESTED TO CLARIFY HOW ITS CURRENT RULE-MAKINGS WILL AFFECT THE EXISTING "CARBON MARKETS" AND OTHER EXISTING MARKETS FOR EMISSIONS ALLOWANCES, CREDITS, OFFSETS AND OTHER ENVIRONMENTAL ATTRIBUTES

Although Section 750 of the Dodd-Frank Act asks the interagency Market Oversight Study group to make determinations and recommendations about market oversight for existing and future carbon markets, other aspects of the Dodd-Frank Act imply that the Commission may already have jurisdiction over environmental "commodities" and "swaps," the facilities on or through which such commodities and swaps are transacted, and the companies who engage in such transactions. As outlined above, the NFP Electric End Users engage in such transactions today, and will need to do so the day after the effective date of the Dodd-Frank Act regulations. Therefore, the NFP Electric End Users respectfully request the Commission to clarify whether and which of the current transactions in the environmental regulatory arena are "commodities," which are "nonfinancial commodities," which are "swaps" and how the Dodd-Frank Act will affect the existing market-based mechanisms for achieving the environmental policy goals. We have raised these questions in other pending Commission rule-makings, and we stand ready to assist the Commission in responding to such requests by providing examples of current transactions in which the NFP Electric End Users routinely engage in the course of their public service activities.

IV. CONCLUSION

For the reasons stated above, the coalition respectfully urges the Commission and the interagency study group to consider the NFP Electric End Users' perspective in evaluating market oversight issues in existing and prospective "carbon markets." The coalition believes the existing markets are efficient, secure and transparent, and that there are many prospective market oversight structures which can achieve these regulatory market oversight goals. But environmental and energy regulatory policy goals must be respected as primary. Preserving NFP Electric End Users' ability to access the "carbon markets" to hedge and mitigate their commercial risks is fundamental to our members being able to continue to invest in energy infrastructure, provide affordable electricity to American consumers and businesses, and maintain the overall long-term reliability of the electric grid.

CARBON MARKET STUDY

Respectfully yours,

"NOT-FOR-PROFIT ELECTRIC END USER COALITION":

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

By: Russ Wasson
Russell Wasson
Director, Tax, Finance and Accounting Policy

AMERICAN PUBLIC POWER ASSOCIATION

By: ______________________
Susan N. Kelly
Senior Vice President of Policy Analysis and General Counsel

LARGE PUBLIC POWER COUNCIL

By: ______________________
Noreen Roche-Carter
Chair, Tax and Finance Task Force

cc: Honorable Gary Gensler, Chairman
Honorable Michael Dunn, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner

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Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner

COMMENT LETTER OF THE COALITION DATED SEPTEMBER 20, 2010

See Attached

September 20, 2010

David Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
Email to secretary@cftc.gov, dfadefinitions@cftc.gov and otcdefinitions@cftc.gov with Definitions in Subject line;

Re: Proposed Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Mr. Stawick:

The trade associations comprising the "Not-For-Profit Energy End User Coalition" (the "Coalition") respectfully submit these comments to the Commodity Futures Trading Commission (the "CFTC") in response to the Advanced Notice of Proposed Rulemaking entitled "Definitions contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act."[1] This rulemaking is part of the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). Given the nature of our members' commercial businesses, our comments focus primarily on the aspects of the definitions that will affect end users of energy and energy-related commodities.[2]

1 75 Fed. Reg. 51,429 (Aug. 20, 2010).

2 The comments contained in this filing represent the initial comments and recommendations of the organizations comprising the "Coalition," but not necessarily the views of any particular member with respect to any issue.

As the CFTC (along with the Securities and Exchange Commission and the prudential regulators) embarks on the complex and interrelated rule-makings necessary to implement the Act, the Coalition respectfully requests that the regulators keep in mind at each step along the way how these rule-makings will ultimately impact the commercial businesses that are "end users" of commodities and "swaps." These are not financial entities, and they have not previously been regulated by the CFTC. Under current law, if an end user chooses to buy or sell CFTC-regulated futures contracts or options or to utilize a CFTC-regulated clearing entity to manage its commercial risk, this represents one commercial choice among many. In many circumstances, small businesses in particular choose to manage their risks in less expensive ways. On the day after the effective date of the Act, each of these end users will still have a business to run, commercial risks to manage and customers to serve. The Act was intended by Congress to regulate the financial markets more effectively, and to provide regulatory oversight to financial entities. The rule-makings must not leave commercial businesses uncertain as to which of their ongoing activities will now be regulated by the CFTC. Nor should the rule-makings impose on these businesses unnecessary regulatory costs and burdens.

I. THE COALITION MEMBERS[3]

The Coalition is comprised of four trade associations representing the interests of not-for-profit, consumer-owned electric and gas utilities in the United States (collectively, the "NFP Energy End Users"). The primary business of these NFP Energy End Users has been for well over 75 years, and still is today, to provide reliable natural gas and/or electric energy to their retail consumer customers every hour of the day and every season of the year, keeping costs low and predictable, while practicing good environmental stewardship. The NFP Energy End Users are public service entities, owned by and accountable to the American consumers they serve.

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[3] The Coalition is grateful to the following organizations and associated entities who are active in the legislative and regulatory policy arena in support of the NFP Energy End Users, and who have provided considerable assistance and support in developing these comments. The Coalition is authorized to note their involvement to the CFTC, and to indicate their full support of these comments and recommendations: The Transmission Access Policy Study Group (an informal association of transmission dependent electric utilities located in more than 30 states), ACES Power Marketing and The Energy Authority.

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Electric cooperatives own approximately 43% of the distribution lines in the U.S., reaching some of the country's most sparsely populated areas, from Alaskan fishing villages to remote dairy farms in Vermont. In an electric cooperative, unlike most electric utilities, its owners -- called "members" of the cooperative -- are also customers, who are able to vote on policy decisions, directors and stand for election to the board of directors. Because its members are customers of the cooperative, all the costs of the cooperative are directly borne by its consumer-members.

The vast majority of NRECA's members meet the definition of "small entities" under the Small Business Regulatory Enforcement Fairness Act (the "SBREFA"). Only four distribution cooperatives and approximately 28 G&Ts do not meet the definition. Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). The RFA incorporates by reference the definition of "small entity" adopted by the Small Business Administration (SBA). The SBA's small business size regulations state that entities which provide electric services are "small entities" if they dispose of 4 million MWh or less per year. 13 C.F.R. §121.201, n.1.

B. AMERICAN PUBLIC POWER ASSOCIATION ("APPA")

APPA is the national service organization representing the interests of publicly-owned electric utilities in the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers and serve 45 million people. APPA's member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. These systems take various forms, including departments of a municipality; a utility board or a public utility district formed under state or local law; a joint action agency or joint power agency formed under state law to provide wholesale power supply and transmission service to distribution entity members; a state agency, authority or instrumentality; or other type of political subdivision of a state. Like the members of NRECA, the vast majority of APPA's members are considered "small entities" under the RFA.

Public power utilities perform a variety of electric utility functions. Some generate, transmit, and sell power at wholesale and retail, while others purchase power and distribute it to retail customers, and still others perform all or a combination of these functions. All these systems work together pursuant to their common statutory and regulatory mandates. Some are "vertically integrated" electric utilities (engaging in generation, transmission, distribution and retail sales), while others are vertically integrated by contract with other "201(f) entities" (entities that are exempt from full Federal Power Act rate regulation under Section 201(f) of that statute)[4], or by contract with third parties.

Public power utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a public power utility is to provide reliable, safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

C. AMERICAN PUBLIC GAS ASSOCIATION ("APGA")

The APGA is the national association for publicly-owned natural gas distribution systems. There are approximately 1,000 public gas systems in 36 states and over 720 of these systems are APGA members. Publicly-owned gas systems are not-for-profit, retail distribution entities owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities. The purpose of a public gas system is to provide reliable, safe and affordable natural gas service to the community it serves. Public gas systems depend on the physical commodity markets, as well as financial market transactions, to meet the needs of their consumers. Together, these markets play a central role in public gas utilities securing natural gas supplies at reasonable and stable prices. Specifically, many public gas utilities purchase firm gas supplies in the physical delivery market at prevailing market prices, and enter into OTC derivatives customized to meet their specific needs to hedge their customers' exposure to future market price fluctuations and stabilize rates. As with APPA-member systems, the APGA members work together pursuant to their common statutory and regulatory mandates, often without the types of contracts that exist between for-profit entities, but instead under tariff arrangements or all requirements contracts.

D. LARGE PUBLIC POWER COUNCIL ("LPPC")

The Large Public Power Council is an organization representing 24 of the largest locally owned and operated public power systems in the nation. LPPC members own and operate over 75,000 megawatts of generation capacity and nearly 34,000 circuit miles of high voltage transmission lines. Collectively, LPPC members own nearly 90% of the transmission investment owned by non-federal public power entities in the U.S. Our member utilities supply power to some of the fastest growing urban and rural residential markets in the country. Members are located in 11 states and Puerto Rico -- and provide power to some of the largest cities in the country including Los Angeles, Seattle, Omaha, Phoenix, Sacramento, Jacksonville, San Antonio, Orlando and Austin. Members of the LPPC are also members of APPA.

[4] For more discussion of 201(f) entities, see the comment in Section IIA3 below.

E. THE COALITION'S MEMBERS ARE UNIQUE, AS ARE THE "MARKETS" IN WHICH THEY TRANSACT, AND THE TRANSACTIONS IN WHICH THEY ENGAGE.

The NFP Energy End Users represented by the Coalition include public power entities, public gas entities and rural electric cooperatives. Some are quite large, but most of these NFP Energy End Users are very small, reflecting the communities they serve, the success of those communities in providing reliable essential services for their citizens at the lowest reasonable rates and, in the case of rural electric cooperatives, the contribution to Americans' quality of life of the Rural Electrification Act of 1936.

Some NFP Energy End Users generate, transmit and sell electric energy to their fellow public power systems and cooperatives at wholesale, while others purchase natural gas and/or electric energy, and distribute it to retail consumers. Still others perform all or a combination of these commercial functions. The Coalition's members are unique among "end users" whose transactions are potentially subject to CFTC regulation as "swaps" (even among those who are "end users" of energy and energy-related commodities and swaps) in that the public power and gas entities have no stockholders and are accountable to elected and/or appointed officials, and ultimately to the consumers of their services. Similarly, the electric cooperatives are directly accountable to their consumer-members and boards. The NFP Energy End Users' public service mission is the singular purpose and reason for their existence, and the interconnected Federal, state and local system of laws and financial regulation within which they operate is designed specifically to support this public service mission.

NFP Energy End Users have a different credit profile than your average "trader" or financial market participant. Due to their consumer-owned and public service nature, most do not have significant assets available to post as margin (due to statutory or government financing restrictions) or significant non-operating accounts, investments or lines of credit available to post "margin" for their long-term infrastructure transactions, especially in the volatile natural gas and power markets. In this way, the NFP Energy End Users are fundamentally different from other entities the CFTC regulates or is charged with regulating under its new jurisdiction.

The markets for natural gas and power in North America are comprehensively regulated at the Federal, state and local level, with a focus on reliability of service and regulated rates payable by the retail customer. In addition, the natural gas and electric industries in North America (including the NFP Energy End Users) are subject to extensive environmental regulations and, in many states, renewable energy standards. Unlike other markets for over-the-counter ("OTC") derivatives and/or "swaps" (as newly defined by the Act), these are not unregulated markets. They are comprehensively regulated, and any new regulatory structure must be carefully tailored so as not to conflict with existing regulatory structures.

A substantial number of the NFP Energy End Users manage the commodity and other commercial risks associated with their business by entering into "contracts, agreements and transactions" in energy and energy-related "exempt commodities," including, without limitation, transactions in electric power, natural gas and, in the case of electric utilities, other fuels for generation. Other commercial risks are managed using options on natural gas, power or other exempt commodities, or “swap agreements.” Some of these transactions are conducted through, “on” or “in” the “markets” operated by regional transmission organization or independent system operator (collectively, “RTOs”). These markets operate in certain geographic areas of the United States under a comprehensive regulatory structure established by the Federal Energy Regulatory Commission (“FERC”). The FERC markets are established by tariff in many instances, rather than by contract, and analogies between this system and the bilateral contract markets between independent and arm’s length third parties are inapt.

FERC’s mandate from Congress under the Federal Power Act and the Natural Gas Act is to regulate in the “public interest” -- which is interpreted as delivering reliable electric energy and natural gas to American consumers at “just and reasonable” rates. It is under this regulatory mandate that the RTOs (overseen by FERC) have established, and currently maintain and operate the FERC-regulated markets. The markets are intrinsically tied to the reliable physical transmission and ultimate delivery of electric energy in interstate commerce at just and reasonable rates.

All these energy contracts, agreements and transactions are currently conducted under exemptions or exclusions from the Commodity Exchange Act (the “CEA”), whether conducted in the bilateral over-the-counter contract market (as most are) or on exempt commercial markets. The participants in these markets are “eligible contract participants” either by virtue of their size and financial strength, or by virtue of their involvement in the underlying cash commodity markets relevant to their businesses (as “eligible commercial entities”). Other than a few large industrial companies, retail energy consumers do not participate in these markets directly. The physical and financial commodity transactions occur principal to principal, through agents and energy brokers, with a wide range of counterparties. As distinguished from other markets regulated by the CFTC, many of these energy transactions do not involve financial intermediaries. The transactions contain customized, non-standardized operating conditions, transmission or transportation contingencies, and operating risk allocations that one would expect between commercial businesses. They are commercial transactions, when viewed through the traditional lens of “goods” and “services” used by American businesses. It is only when they are viewed (as the Act does) through the financial markets lens that they are characterized with the financial market regulatory labels such as “exempt commodities,” “swap agreements,” “options, “swaps” or “nonfinancial commodities” -- and analogized to “futures contracts” or “positions” created by financial entities for profit or speculation, and potentially subject to regulation traditionally applicable to such financial market professionals.

The NFP Energy End Users currently have the risk management choice to conduct some of these everyday transactions on CFTC-regulated contract markets, or to clear the transactions through CFTC-regulated centralized clearing entities. But NFP Energy End Users make that choice relatively rarely. The exchanges have only recently begun to list a significant number of these types of contracts; and central clearing entities have only recently begun to clear energy transactions, especially those which are not standardized or “fungible” in financial market terms. Compared to markets for other commodities, natural gas, power and related transactions are often highly customized, and contain longer terms as necessary for these infrastructure businesses, as necessary to serve retail customers, and significant operating conditions or contingencies, reflecting the inherent physical and commercial nature of the business. As the CFTC-regulated financial markets have evolved, some of the larger NFP Energy End Users have chosen to manage certain of their commercial risks using exchange-traded and cleared instruments. But the vast majority of NFP Energy End Users' commercial commodity transactions are still conducted "the old fashioned way": under tariffs within the public power and cooperative systems or by contract with known and reliable suppliers and customers, and not with CFTC-regulated financial intermediaries or on exchanges or clearing entities.

Due to the wholesale deletion of applicable exemptions in the CEA, and the potentially sweeping nature of the new definitions, these everyday business transactions of the NFP Energy End Users may suddenly, unexpectedly, be redefined as "swaps." Physical forward commodity transactions, commercial option transactions, and option-like aspects of ordinary course "full requirements" natural gas and electric energy transactions could be captured within the new regulatory paradigm. Although Congress has repeatedly indicated that its intention was NOT to capture commercial transactions or to impose new costs on end users hedging risks of traditional commercial businesses, Congress is relying on the regulators to implement that intent and write clear rules. Congress did not intend for the regulators to read the expansive language of the Act without regard to legislative intent, nor to regulate and impose costs on end users as if they were professional financial market participants.[5]

The NFP Energy End Users are relying on the CFTC to draft clear rules, to make clear how current interpretations, no action positions and precedent under the CEA should be read in light of the Act's new and different regulatory structure, and to conduct all necessary exemption proceedings prior to the effective date of the Act (and with appropriate regulatory transition periods thereafter). We stand ready to help the CFTC understand our businesses, our industry and our "markets." If the CFTC ignores the effect of the Act on end users, NFP Energy End Users will face a wall of regulatory uncertainty on the day the Act is effective. Such a result would be a classic example of the unintended and harmful consequences of sweeping legislation and regulation drafted without careful attention to the potential adverse impacts for industries outside the traditional financial markets that Congress intended to stabilize.

II. COMMENTS

A. DEFINITION OF "SWAP"

The Coalition agrees with the comments and recommendations made regarding the definition of "swap" by the Edison Electric Institute in its comment letter to the CFTC dated September 20, 2010. In addition:

[5] See 156 Cong. Rec. H5248 (the "Dodd-Lincoln letter")

1. Definition of "nonfinancial commodity"

The Coalition respectfully requests that the CFTC define the term "nonfinancial commodity," which is not otherwise defined in the CEA. Moreover, the Coalition requests that the CFTC identify in its regulations (subject to public notice and industry comment) each of the cash "commodities," "nonfinancial commodities," and "swaps" now being transacted in the natural gas and electric energy industries in North America. The NFP Energy End Users are not financial market professionals. They manage ongoing commercial businesses and provide an essential service to American consumers and businesses. They transact in commercial goods and services every day, and they hedge commercial risks using the identifiable economic tools available to them in the marketplace. NFP Energy End Users do not "create" new transaction types or financially engineer "contracts" or take and trade "positions" to make a profit. They should not have to ask, transaction by transaction, for a CFTC determination as to whether a commonplace commercial transaction falls under the new CFTC jurisdiction. The NFP Energy End Users need regulatory certainty in order to continue conducting their business as usual on the day after the Act's effective date. The NFP Energy End Users should not have to engage in such transactions without being told, in advance, if the CFTC sees such a commercial transaction as a "commodity," or a "swap," or a "financial commodity" (as opposed to a nonfinancial commodity). The Coalition requests that the CFTC grant certainty to end users in the energy industry, by definitively stating in its rule-making which energy and energy-related products and services currently transacted in the marketplace are "commodities," which are "swaps," and which are "nonfinancial commodities."

The Coalition proposes that the definition of "nonfinancial commodities" should include all products and services related to the production, generation, transmission, transportation, storage, delivery or regulation of natural gas or electric energy delivered to North American consumers by commercial businesses in any part of that commodity chain, including all fuels used to produce electric energy, and all services, transactions, allowances, credits, licenses or intangibles defined by an energy or environmental regulator. These types of transactions are used to hedge, mitigate or manage the commercial risks inherent in physical (nonfinancial) delivery of energy commodities, including natural gas and electric energy. "Nonfinancial commodities" should also include all energy and energy-related products and services sold pursuant to "tariffs" approved by Federal, state or local energy regulators, a regulatory process focused on reliability and rate regulated service -- concepts in many ways inconsistent with the concepts that underlie financial market regulation. Finally, "nonfinancial commodities" should also include all contracts, agreements and transactions related to transmission, transportation and storage of energy and energy-related commodities.[6]

[6] We request that the CFTC clarify this point in the definition of "nonfinancial commodity," which appears in the exclusions to the definition of "swap." The ambiguity actually emanates from the CEA's definition of "commodity," where the word "services" appears. Services agreements in the energy industry, including transmission, transportation and

The NFP Energy End Users deserve clear guidance with respect to each type of energy transaction. Understanding which transactions fall under the new regulatory scheme will be critical to commercial decisions the NFP Energy End Users need to make now and continue to make on the day after the effective date. NFP Energy End Users cannot be expected to stop doing business, develop and submit a request to the CFTC for a rule-making or an exemption on each commercial transaction, and await the CFTC's decision. The energy industry deserves to know in advance, and as soon as possible, which transactions need to be cleared, which need to be transacted on exchanges or swap execution facilities, which need to be recorded for later reporting and in what form, which need to fit within regulatory compliance programs, and which need to be reported, when and to whom. Addressing these issues early in the CFTC regulatory rule-making process will allow NFP Energy End Users to understand the scope of changes that the Act will require to the way in which they conduct their businesses. It will also allow input from the other regulators who have authority over the NFP Energy End Users, their transactions and the energy markets they utilize.

2. Tariff Transactions -- Exemption Process

As part of the definition of "swap," the Coalition requests that the CFTC, in conjunction with FERC, the RTOs, the Texas Public Utilities Commission, the Electric Reliability Council of Texas ("ERCOT") and other government and quasi-government energy tariff regulators, articulate an industry-wide exemption process, filing procedures, timelines and other related matters for the "Tariff Transaction" exemption provided for in Section 722(f) of the Act (CEA section 4(c)(6)(A)(B)). Although this exemption is found in a different section of the Act from the definition of "swap," and it refers to the CEA Section 4(c) exemption process, it is unclear how the exemption process is intended to work for transactions which exist currently under tariffs and, in particular, under the RTO and ERCOT rules. There are hundreds, if not thousands, of such tariff transactions, and all electric utility industry participants, including NFP Energy End Users, doing business in the applicable geographic regions use them every day. It is burdensome and unreasonable to expect individual market participants who utilize RTO products and services to request individual 4(c) transaction exemptions, or even product-by-product exemptions from the CFTC. The CFTC should initiate a process similar to the process outlined in the Act for currently cleared "swaps." Good public policy requires a timely, orderly and comprehensive process for exempting already-regulated transactions from duplicative regulation.

Moreover, the industry-wide exemption process should take place well before the effective date of the Act, and should include input from the regulators who approved the tariffs, as well as industry-wide input and public hearings on any transactions for which the CFTC does NOT intend to grant an exemption. The public interest invoked in Section 722(f) of the Act echoes the "public interest" mission of FERC described in Section IE above -- the public interest in reliable natural gas and power, delivered to the American public at just and reasonable rates. The NFP Energy End Users will continue to need to engage in tariff transactions the day after the

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storage contracts, are commercial transactions which should in almost all circumstances be excluded from the CFTC's jurisdiction under the CEA's forward contract exclusion(s).

Act's effective date in order to deliver energy to their customers. They cannot be left to wonder if these products will be deemed "swaps" by the CFTC on that effective date or retroactively at some later date.[7] After the effective date, there should be a clear and expeditious process whereby such exemptions will be filed by the entity or regulator authorized to approve the tariff, and promptly acted upon by the CFTC, to enable the tariff energy markets to continue to function with a focus on the public interest in delivering reliable and affordable energy delivered to the American consumer.

3. FPA 201(f) Transactions -- Exemption Process

The Coalition requests that the CFTC grant a blanket exemption from all aspects of the Act for all transactions between entities exempted from FERC regulation under Section 201(f) of the Federal Power Act.[8] These transactions are between entities in the public power and cooperative community, with no possibility of or incentive for profit at the counterparty's expense. They facilitate the public power system's, or the electric cooperative system's, public service mission, and have been generally exempt from most aspects of FERC jurisdiction for decades on the express understanding and regulatory determination that they are critical to the delivery of power to the American consumer, and do not represent an opportunity to profit to the detriment of either the counterparty or the ultimate consumer. These transactions are clearly distinguishable from transactions between independent arm's length for-profit parties.

B. DEFINITION OF "SWAP DEALER"

The Coalition agrees with the comments and recommendations made regarding the definition of "swap dealer" by the Edison Electric Institute in its letter to the CFTC dated September 20, 2010.

[7] To be clear, the NFP Energy End Users believe such transactions should NOT be considered "swaps," as this would introduce burdensome, costly, duplicative and potentially conflicting regulation.

[8] FPA Section 201(f) can be found at 16 U.S.C. § 824, and states as follows:

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt. No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

C. DEFINITION OF "MAJOR SWAP PARTICIPANT"

The Coalition agrees with the comments and recommendations made regarding the definition of "major swap participant" by the Edison Electric Institute in its letter to the CFTC dated September 20, 2010. We agree with EEI's request that the CFTC define the term "commercial risk" for purposes of the definition of "major swap participant" and for consistent use throughout the CEA, as amended by the Act. We recommend the following definition:

> (___) **Commercial Risk**. This term means any risk that a person or governmental entity incurs, or anticipates incurring, in connection with operating a commercial business as distinguished from a financial entity, including, but not limited to: commodity risk; market risk, credit risk; operating risk; transportation and storage risk; liquidity risk; financial statement risk; regulatory risk; and any other risk that can be hedged or mitigated with a swap. Hedging and mitigating commercial risk does not include any activity undertaken to assume the risk of changes in the value of a commodity.

D. DEFINITION OF "ELIGIBLE CONTRACT PARTICIPANT"

1. "Eligible Contract Participants" that are also "Eligible Commercial Entities"

Under the changes to the CEA effected by the Act, it is unlawful for any person who is not an eligible contract participant ("ECP") to enter into a swap, unless the swap is entered into on a designated contract market. The NFP Energy End Users are public power and public gas entities, or electric cooperatives, that operate electric energy or natural gas utility businesses. They currently engage in contracts, agreements and transactions in energy and energy related "exempt commodities," which may or may not be determined to be "swaps" under the Act's sweeping definition. The NFP Energy End Users engage in such transactions in the course of their everyday commercial businesses to fulfill their obligation to deliver energy to retail consumers and to hedge, mitigate or manage commercial risk. It would not be cost-effective to conduct all their hedging transactions on an exchange. But some of these NFP Energy End Users do not meet the financial hurdles established in the definition of ECP due to their status as electric cooperatives or public power or gas entities. See the third paragraph of Section IE above. Accordingly, it is important that the CFTC confirm that such commercial entities qualify as ECPs, so that they can continue to engage in transactions which may be "swaps" under the Act, without transacting on an exchange. The NFP Energy End Users and other commercial entities will also need to be able to confirm the CFTC's interpretation to their counterparties and prospective counterparties.

For electric cooperatives, the relevant portion of the definition of "eligible contract participant" is found in clause (v) of Section 1a(18) of the CEA, which reads as follows:

> (v) *A corporation, partnership, proprietorship, organization, trust or other entity*
>
> (I) That has total assets exceeding $10,000,000;
>
> (II) The obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by an entity described in subclause (I), in clause (i), (ii), (iii), (iv), or (vii), or in subparagraph (C); or
>
> (III) *That --*
>
> *(aa) Has a net worth exceeding $1,000,000; and*
>
> *(bb) Enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business;* (*Emphasis added*)

Under this definition, an electric cooperative can qualify as an ECP if it has $1,000,000 net worth and engages in transactions to manage commercial risk. But some of the smallest NFP Energy End Users may not meet the financial test due to their status as a consumer-member owned entity. But such a small electric cooperative would meet the definition of "eligible commercial entity" ("ECE") but for the requirement that an ECE must also be an ECP. See below. Accordingly, we request that the CFTC interpret the definition of ECP so as to include electric cooperatives that satisfy any one of the criteria in clauses (i), (ii) or (iii) of Section 1a(17)(A) of the CEA.

For governmental entities who engage in the delivery of natural gas and/or power, the relevant portion of the definition of "eligible contract participant" is found in clause (vii) of Section 1a(18) of the CEA, which reads as follows:

> (vii) (I) *a governmental entity (including the United States, a State, or a foreign government) or political subdivision of a governmental entity;* (II) a multinational or supranational government entity; or (III) *an instrumentality, agency, or department of an entity described in subclause (I) or (II);*
>
> except that such term does not include an entity, instrumentality, agency, or department referred to in subclause (I) or (III) of this clause unless (aa) the entity, instrumentality, agency, or department is a person *described in clause (i), (ii), or (iii) of*

> *<u>paragraph (17)(A)</u>*[9]; (bb) the entity, instrumentality, agency, or department owns and invests on a discretionary basis $50,000,000 or more in investments; or (cc) the agreement, contract, or transaction is offered by, and entered into with, an entity that is listed in any of subclauses (I) through (VI) of section 2(c)(2)(B)(ii). *<u>(Emphasis added)</u>*

Under this definition, a public power or gas entity can qualify as an ECP if it qualifies as an ECE under Section 1a(17)(A)(i), (ii) or (iii).[10]

Each of the criteria in Section 1A(17)(A)(i), (ii) and (iii) is independent of the others, and a public power and/or gas entity can qualify as an ECE, and therefore an ECP, if it meets any one of them. We believe that a public power or gas entity that distributes electric energy or natural gas to the public at retail as its commercial business clearly meets the criteria found in Section 1a(17)(A)(i)-(iii) of the CEA in that it "has a demonstrable ability, directly or through separate contractual arrangements, to make or take delivery of the underlying commodity," and/or it "incurs risks, in addition to price risks, related to the commodity."

Finally, in clause (C) of the definition of ECP, the CFTC is given the authority to determine that any other person may be an ECP "in light of the financial or other qualifications of the person."

We respectfully request the CFTC to confirm that a public power or gas entity that meets one or more of the criteria set forth in Section 1a(17)(A)(i)-(iii) automatically qualifies as an ECP, regardless of its size or the value of assets that it owns or invests on a discretionary basis. In addition, we respectfully request that the CFTC determine, as permitted by Section 1a(18(C) of the CEA, that an electric cooperative that enters into a transaction to hedge, mitigate or

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9 See definition of "eligible commercial entity," below.

10 The relevant section defining an "exempt commercial entity" reads as follows:

"The term 'eligible commercial entity' means, with respect to an agreement, contract or transaction in a commodity -- (A) *<u>an eligible contract participant described in clause . . . (v)[electric cooperative] . . . or (vii)[public power and/or gas entity] . . . of paragraph (18)(A) that, in connection with its business --</u>*

(i) *<u>has a demonstrable ability, directly or through separate contractual arrangements, to make or take delivery of the underlying commodity;</u>*

(ii) *<u>incurs risks, in addition to price risk, related to the commodity</u>*; or

(iii) [not relevant to NFP Energy End Users]." *<u>(Emphasis added)</u>*

manage commercial risk associated with its business and meets one or more of the criteria set forth in Section 1a(17)(A)(i)-(iii) automatically qualifies as an ECP regardless of its net worth.

2. Related Comments Regarding Treatment of "Special Entities"

Although the CFTC has not, at this time, sought comments on the definition of "Special Entity," due to the interrelationship of this definition with the definition of "eligible contract participant," we submit these comments here and plan also to submit them to the CFTC's Task Force charged with Regulation of Swap Dealers and Major Swap Participants. The NFP Energy End Users must rely on the CFTC's staff to be mindful of the interrelationship of all of the regulations. We understand the complexity of the CFTC staff's challenge under the tight statutory timeframe for rule-makings. But the complexity of the provisions of the Act, and the lack of clarity as to how the various sections were meant to work both together and with the CEA as in effect prior to the Act, creates a challenge for NFP Energy End Users who are struggling to understand whether, how and why this new regulatory scheme will apply to their commercial businesses.

The term "special entity" is defined in the Act to include, among other entities, a State, State agency, city, county, municipality, or other political subdivision of a State. The Act imposes new duties on swap dealers and major swap participants in their dealings with special entities.

The Coalition believes that it is not necessarily an advantage to be treated as a special entity. To the extent that swap dealers or major swap participants face higher costs when dealing with special entities, they may choose not to deal with special entities for certain types of transactions, or they may increase the fees that they (directly or indirectly) charge special entities for engaging in swap transactions. We believe that an entity that is both an ECP and a special entity should be able to "opt out" of the protections afforded by whatever duties the CFTC may establish for swap dealers and major swap participants in their dealings with special entities. This approach is consistent with the traditional CEA use of the ECP definition, which identifies an ECP by financial strength and permits the ECP to act for itself in the exempt markets. It is also consistent with other provisions of the Act in which ECPs are allowed to engage in certain types of transactions that retail customers or smaller entities are not. This proposal would also be consistent with the ability that end users have to opt out of mandatory clearing for their swap transactions.

If the CFTC does not accept our recommendation that all ECPs should be able to opt out of being treated as a special entity, then at the very least an eligible commercial entity should not be treated as a special entity with respect to transactions in the commodities in respect of which the eligible commercial entity operates a commercial business. For example, a public gas or power entity that operates commercial businesses distributing natural gas and/or electric energy to retail consumers would potentially be both an eligible commercial entity (and so an ECP) and a special entity as those terms are defined under the CEA, as amended by the Act. In our view, the very fact that the public power entity is engaged in a commercial business activity involving the distribution of natural gas or electric energy means that it is not appropriate to treat the public power entity as a special entity with respect to swap transactions intrinsically related to its commercial energy activities. Being treated as a special entity would most likely make it more difficult (and certainly more expensive) for the public power or natural gas entity to engage in the types of hedging transactions it needs in order to protect against the risks associated with its commercial activities.

III. CONCLUSION

The Coalition strongly encourages the CFTC and the SEC to consider the effect on end users of "swaps" at every step of the regulatory rulemaking process. We respectfully request that, as the CFTC drafts its rules, it carefully consider the consequences to those who operate commercial businesses and are drawn into this new regulatory environment only because of the broad statutory language which could be read to redefine traditional commercial contracts as "swaps." All of the NFP Energy End Users' natural gas, electric energy and energy-related transactions are intrinsically tied to the physical commodities they deliver to American businesses and consumers -- there is no speculation and, given the NFP Energy End Users' not-for-profit public service business, they have no incentive to speculate. NFP Energy End Users transact only to obtain and deliver energy to retail consumers and to manage commercial risks, so that the ultimate cost of reliable natural gas and electric energy to consumers is as low and predictable as possible, consistent with their environmental stewardship standards. Any new regulatory burdens, direct or indirect costs or requirements will result, dollar for dollar, in higher costs to the NFP Energy End Users' customers and owners -- approximately 87 million (electric) and 5 million (gas) American retail consumers of electric energy and natural gas.

The NFP Energy End Users do not pose a threat to the United States banking or financial system. It was not Congress' intent that the Act should impose regulatory burdens on commercial business by treating them like the financial market professionals who participate voluntarily in CFTC-regulated markets. Regulatory policy-making and rule-making must be tailored to achieve Congressional objectives without creating uncertainty as to who will be regulated and what transactions will be regulated once the effective date for the Act arrives. The rules should be tailored to fit the differing market structures, and to exclude, exempt or treat appropriately, the business entities that engage in commercial transactions which might be determined to fall within the Act's sweeping new definitions.

If the CFTC decides not to clarify whether its regulations under the Act extend to commercial transactions that electric cooperatives and public power and gas systems utilize in their everyday business, the NFP Energy End Users respectfully request that an analysis be performed (pursuant to rule-making and with an opportunity for public hearing) on the potential impact of such regulations on "small entities" under the Regulatory Fairness Act, as noted above, to determine whether less burdensome alternative forms of regulation can be developed for small entities.

David Stawick, Secretary
September 20, 2010
Signature Page

Respectfully yours,

THE "NOT-FOR-PROFIT ENERGY END USER COALITION"

NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION

By: ______________________
Russell Wasson
Director, Tax, Finance and
Accounting Policy

AMERICAN PUBLIC POWER
ASSOCIATION

By: ______________________
Susan N. Kelly
Senior Vice President of Policy Analysis
and General Counsel

AMERICAN PUBLIC GAS ASSOCIATION

By: ______________________
Dave Schryver
Executive Vice President

LARGE PUBLIC POWER COUNCIL

By: ______________________
Name: ______________________
Its: ______________________

cc: Honorable Gary Gensler, Chairman
Honorable Michael Dunn, Commissioner
Honorable Jill E. Sommers, Commissioner

David Stawick, Secretary
September 20, 2010
Signature Page

Respectfully yours,

THE "NOT-FOR-PROFIT ENERGY END USER COALITION"

NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION

By: ______________________
Russell Wasson
Director, Tax, Finance and
Accounting Policy

AMERICAN PUBLIC POWER
ASSOCIATION

By: Susan N. Kelly
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By: ____________________
Dave Schryver
Executive Vice President

LARGE PUBLIC POWER COUNCIL

By: ____________________
Name: Noreen Roche-Carter
Its: Chair, LPPC Tax and
Finance Task Force

cc: Honorable Gary Gensler, Chairman
Honorable Michael Dunn, Commissioner
Honorable Jill E. Sommers, Commissioner

Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner
Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (File Number S7-12-10 or S7-16-10 (unclear in the Federal Register Notice) – filed by e-mail per Federal Register Notice