



**SWAP DATA REPOSITORIES  
RIN 3038-AD20**

February 22, 2011

David Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20581

**Re: Comments on Notice of Proposed Rulemaking on Swap Data  
Repositories, under Title VII of the Dodd-Frank Wall Street Reform  
and Consumer Protection Act (the “Act”)  
(17 CFR Part 49)**

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Dear Mr. Stawick:

The trade associations comprising the “Not-For-Profit Electric End User Coalition” (the “Coalition”)<sup>1</sup> respectfully submit these comments to the Commodity Futures Trading Commission (the “Commission”) on the **Notice of Proposed Rulemaking on Swap Data Repositories**, issued December 23, 2010 (the “SDR NOPR”).<sup>2</sup>

The Coalition submitted comments on the Commission’s notice of proposed rule-making on “Reporting and Recordkeeping for Swap Transaction Data” (75 Fed. Reg. 76,573, Dec. 8, 2010) (the “Data NOPR”) and the notice of proposed rule-making on “Real-Time Public Reporting of Swap Transaction Data” (75 Fed. Reg. 76,139 and errata 75 Fed. Reg. 76,930) (the

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<sup>1</sup> The National Rural Electric Cooperative Association, the American Public Power Association and the Large Public Power Council (see Section I for a description of the members of each such trade association). The comments contained in this filing represent the comments and recommendations of the organizations comprising the “Coalition,” but not necessarily the views of any particular member with respect to any issue.

<sup>2</sup> 75 Fed. Reg. 808,898 (Dec. 23, 2010).

“Real-Time Data NOPR” and, collectively with the Data NOPR, the “Prior Data NOPRs”). The Prior Data NOPRs each address data reporting topics. Each Prior Data NOPR proposes a separate set of rules on how counterparties to swaps are to interact with registered entities, including swap data repositories (“SDRs”). These Prior Data NOPRs are difficult if not impossible to reconcile from the perspective of non-financial entities that execute non-cleared swaps. Many of the provisions that the NFP Electric End Users found unworkable were in the Real-Time Data NOPR, due to two fundamental misreadings of the Act.

Now, compounding these misreadings of the Act, the Proposed Rules in Part 49 reference in several places “real-time public reporting data” or the “data reported for purposes of the real-time public reporting.” See Proposed Rules 49.10 and 49.11. Elsewhere, the Proposed Rules in Part 49 use terms from the Data NOPR (not the Real-Time Data NOPR) like “swap creation data” or “swap continuation data.” See Proposed Rule 49.10. And, as a catch-all, Proposed Rule 49.10 then references “and all other data and information required to be reported to such swap data repository.” The NFP Electric End Users respectfully comment that all swap data received by an SDR is just swap data to the SDR regardless of the source, media format or data type. In order for the SDR to be able to fulfill its obligations under the Act, the SDR must be able to track from what source it received that data. It is only data received from a source that the SDR can reasonably expect to confirm with such source. Moreover, the rules must clearly instruct the SDR on its obligations for protecting the confidentiality of swap data submitted to it by certain sources, and how to identify the data subject to such confidentiality obligations. Here too, the source of the data will be important to the SDR. CEA Section 2(a)(13)(E) is a critical provision for NFP Electric End Users and other non-financial entities in the markets for Energy Commodity Swaps, and the Commission is required to promulgate rules to implement it.

The SDR NOPR discusses “two streams” of data flowing into the SDR, without discussing from what sources those streams are flowing. See page 80,908. The Proposed Rules in Part 49 assume that the SDR will receive “real-time reporting data” from a variety of undifferentiated “reporting entity” sources -- the term is defined in Proposed Rule 49.2(a)(10) as including designated contract markets, swap execution facilities and derivatives clearing organizations (all “registered entities” under other Proposed Rules), swap dealers, major swap participants and “end users.”<sup>3</sup> The source of the data streams must be identified in order for the

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<sup>3</sup> This term is not defined in the Act, but is used to describe an entity which is not a “financial entity” (so we use the term “non-financial entity”), which utilizes swaps to hedge or mitigate commercial risk and notifies the Commission how it generally meets its financial obligations associated with entering into non-cleared swaps. CEA 2(h)(7)(A). Such a non-financial entity may except a “swap” to which it is a party from the clearing requirements of the Commodity Exchange Act, as amended by the Act (the “CEA”). In the Data NOPR, the Commission defines a category of swap party that is “non-SD/MSP counterparty,” which encompasses financial entities that are not swap dealers or major swap participants and non-financial entities. NFP Electric End Users are non-SD/MSP counterparties and non-financial entities, and the NFP Electric End Users anticipate utilizing the end-user exception in respect of all Energy Commodity Swaps to which they are parties. See Diagram #1. Therefore, the NFP

SDR to comply with its confirmation and other regulatory responsibilities. The Proposed Rules must be rewritten to deal differently with the many data streams and the many different sources (or “reporting entities”) that submit such data streams to the SDR. Otherwise the SDR has an undifferentiated pool of data and has no way to comply with the responsibilities given it under the Proposed Rules.

In addition to confusing what data is reported (or “submitted”) to the SDR by which reporting entity, the Proposed Rules then require the SDR to confirm certain data with swap counterparties (Proposed Rule 49.11), to report to the Commission if certain data is not received within time periods required by Proposed Rule 43.3(a)(3) (*i.e.*, to report an event that may occur outside its knowledge but only if the event *does not* occur), and to establish policies and procedures for confidentiality without mentioning the confidentiality provisions of new CEA Section 2(a)(13)(E). The NFP Electric End Users respectfully request that the Commission first reconcile Proposed Rules 43 and 45, and then revise and republish for comment Proposed Rule 49, so that the proposed rules as a whole articulate a clear flow of data from the counterparties executing a swap to a registered entity (and then to an SDR, if the first registered entity is not an SDR). A revised Part 49 should then set forth clear rules for the SDR as to its obligations in respect of each entity that reports (or submits) data to the SDR, with a specific rule to implement CEA Section 2(a)(13)(E).

The NFP Electric End Users in the Coalition also submitted comments today on the notice of proposed rule-making on the End-User Exception (75 Fed. Reg. 80,747, Dec. 23, 2010) (the “End-User Exception NOPR”). The End-User Exception NOPR contains proposed rules which require counterparties to swaps to submit certain “entity data” to registered entities, including SDRs.

In order to understand our concerns about the Prior Data NOPRs, and our recommendations for the way in which “entity data” for non-financial entities would flow to an SDR -- all as a basis for understanding our comments on this SDR NOPR -- we have attached to this comment letter copies of our comment letters on the Data NOPR and the Real-Time Data

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Electric End Users are the prototype for the proposed “end user only” sub-classification of “non-SD/MSP counterparties” that we recommend in the Prior Data NOPRs. In this SDR NOPR, we recommend the Commission revise the Proposed Rules in Part 49 (such as the definition of “reporting entity,” and Proposed Rule 49.10) to use either the term “SD/MSP counterparty” (and then distinguish between those SD/MSP counterparties that are and are not “financial entities”) or use the term “non-financial entity” rather than “end user.” The SDR will not know, when it receives “entity data,” whether a non-financial entity is or is not electing the end-user exception in respect of some or all of its swaps. When the SDR receives swap transaction data from a non-financial entity, it will not know beforehand whether that non-financial entity (or its counterparty) elected the end-user exception. In fact, when the SDR receives “swap data,” one of the data elements it will receive and record in respect of a non-cleared swap is whether one or both of the parties to the swap is electing the end-user exception. The use of the term “end user” in Part 49 is confusing and should be eliminated.

NOPR, and a copy of our comment letter on the End-User Exception NOPR. We recommend reading the comment letters in this order: (1) the Data NOPR letter, (2) the Real-Time Data NOPR letter, (3) the End-User Exception NOPR letter, and finally (4) this comment letter.

The Coalition's members are commercial enterprises, not swap dealers or major swap participants and not financial entities. Our members engage in swaps only to mitigate or hedge commercial risks that arise in the course of their public service activities. Therefore, our comments on the Proposed Rules under Part 45 (in the Data NOPR) and Part 43 (in the Real-Time Data NOPR) focus on requirements for a non-financial entity that executes non-cleared "swaps,"<sup>4</sup> of a type that the NFP Electric End Users define as "Energy Commodity Swaps,"<sup>5</sup> **to report data in respect of that swap** to a "registered entity." Our comments on the End-User Exception NOPR focus on the aspects of Proposed Rules under Part 39 that require a non-financial entity that executes non-cleared swaps to report data to an SDR **as a non-financial entity entitled to the end-user exception**. In this comment letter, we will focus on those swap

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<sup>4</sup> We have footnoted this term, and direct the reader to the comment letter submitted by the Not-For-Profit Energy End User Coalition dated September 20, 2010, submitted in response to the Commission's "Definitions ANOPR," and in particular to the comments on the definition of "swap" in that letter. A web link to such comment letter is [available at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26217&SearchText](http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26217&SearchText). The comments herein 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. We use the term "non-cleared" in this comment letter, rather than "uncleared," so that our comments to the Commission on different rulemakings on identical concepts are consistent. The Act, and the CEA as amended by the Act, use the terms interchangeably. We respectfully request that the Commission confirm in the Proposed Rules, for the sake of clarity, that the terms are synonyms.

<sup>5</sup> We use the term "Energy Commodity Swaps" to mean (a) those non-cleared swaps referencing or derived on energy commodities in which the NFP Electric End Users transact in the ordinary course of their core public service activities, such as electric energy, natural gas, and other fuels for electric generation, including coal and fuel oil (but excluding crude oil, gasoline or refined petroleum products (other than fuel oil) -- these commodities are not germane to the NFP Electric End Users' public service activities, and the markets for these commodities and related derivatives are distinguishable from the markets in which the NFP Electric End Users participate), (b) those non-cleared swaps referencing or derived on transmission, transportation, generation capacity or storage concepts or services related to the energy commodities described in (a), and (c) those non-cleared swaps referencing or derived on environmental or emissions regulations, or renewable energy or other environmental attributes, applicable to the NFP Electric End Users. All of these "Energy Commodity Swaps" reference or are derived on "nonfinancial commodities," are intrinsically related to our members' core public service activities, and many are subject to the continuing jurisdiction of regulators other than the Commission.

transaction data reporting requirements and those entity data reporting requirements, as they affect a non-financial entity's interaction with an SDR in the Proposed Rules in Part 49. In our comments on the Prior Data NOPRs we had three general themes. In our comments on the End-User Exception NOPR we added two more. All five themes are important in our comments on the SDR NOPR, so we will shorthand them here:

First, the subject matter of the two Prior Data NOPRs overlaps -- in requiring a reporting party to a swap **to report data in respect of a swap**. We believe that the flow chart attached as Diagram #1 gives an overview of what the Act requires of a reporting party (where no swap dealer or major swap participant is a party to the swap) in terms of reporting swap transaction data. The reporting party to a swap must have regulatory certainty as to what event triggers a reporting obligation, and what swap transaction data elements need to then be reported. The reporting party cannot otherwise report swap transaction data in a timely manner, much less "in real time" (for purposes of the Real-Time Data NOPR). If the counterparties to a swap execute that transaction on a designated contract market or a swap execution facility, or clear the swap on a derivatives clearing organization, the swap counterparties thereafter no longer have the "best data" on that swap. All post-swap events affecting such swaps should be reported by the registered entity on which the swap was executed or by which the swap was cleared. Post swap reporting should only be required of a swap counterparty for non-cleared swaps that are executed bilaterally and not cleared.

Second, in keeping with the "state" or "snapshot" data reporting approach chosen for Energy Commodity Swaps in the Data NOPR, any data reporting required of a reporting party after the initial reporting obligation should be periodic "state" or "snapshot" reporting for Energy Commodity Swaps **in the portfolio of the reporting party as an "entity."** We understand that this form of reporting is applicable to each non-SD/MSP counterparty which is a reporting party for one or more Energy Commodity Swaps, and the reporting obligation for this "entity data" continues during the life of the swap. We have requested that the Commission delete provisions in the Proposed Rules in Parts 43 and 45 which would impose reporting requirements in respect of Energy Commodity Swaps that are based on a swap-by-swap analysis (the "life cycle" approach) rather than based on the reporting entity (the "snapshot" approach). As the Commission notes in the Data NOPR at page 76,583, the reporting requirements must adopt either a "state/snapshot" reporting approach or a "life cycle" reporting approach, and not both.

Third, in our comments on the Data NOPR, we proposed a "CFTC-lite" method of registration, recordkeeping and reporting for non-SD/MSP counterparties that we believe will accomplish what the Act requires, and fulfill the Commission's need for data to monitor the markets. We used the concept in our comments on the Real-Time Data NOPR as well. Diagram #2 to the Prior Data NOPRs (also attached hereto as Diagram #2) describes this CFTC-lite method of regulation. We respectfully request that the Commission consider such an approach -- to recognize the differing burdens and costs being imposed by its new regulatory structure on non-SD/MSP counterparties which are "end users only" like the NFP Electric End Users. This "CFTC-lite" method of regulation will preserve access to the swap markets for end users hedging commercial risk, and not subject such end users to a "one-size-fits-all" regulatory scheme as if a

non-financial entity were a financial institution, a swap dealer, a major swap participant or even a hedge fund which wants full access to all swap asset classes in the global swap market. The Commission should lower barriers to entry, preserve access to the swap markets for non-financial entities hedging commercial risk, and should structure its regulation and costs of compliance to limit the burdens on non-financial entities.

Fourth, in our comments on the End-User Exception NOPR, we stated that experienced risk managers and market participants in the United States electric power and natural gas industries believe that there are now, and will be after the Act becomes effective, more Energy Commodity Swaps executed which do not involve a swap dealer, major swap participant or other financial entity as a party than swaps executed in other categories, classes and types (or asset classes) of swaps.<sup>6</sup> For the NFP Electric End Users, it is critical that these “end-user-to-end-

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<sup>6</sup> In several places in NOPRs issued to date, the Commission assumes that there are only a small number of swap transactions in which no swap dealer to major swap participant plays a role. See the End-User Exception NOPR at footnotes 9-13. See also footnote 18 in the Notice of Proposed Rule-making on Further Definition of Swap Dealer, Major Swap Participant and Eligible Contract Participant, 75 Fed. Reg. 80,174 at 80,180. The assumption is based on the Commission’s reliance on two publicly-available, but financial-entity dominated surveys of over-the-counter derivatives markets: first, the survey by the International Swaps and Derivatives Association (“ISDA”) of its members, and second, the quarterly surveys by the Office of the Comptroller of the Currency (the “OCC”) of regulated financial institutions. These surveys may reflect comprehensive information about the scope of the global swap markets **where at least one of the counterparties is a financial entity**. However, ISDA is a trade association comprised primarily of large financial institutions and other financial entities who transact regularly or act as dealers in the global derivatives markets. Only a few United States energy companies, other than major oil companies, are ISDA members. Moreover, in the Energy Commodity Swap markets, many non-financial entities transact using the ISDA master agreement without being members of the ISDA trade association. In fact, ISDA facilitates this practice by providing physical energy transaction and other annexes to the ISDA Master Agreement, so non-financial counterparties can engage in physical commodity and commodity derivatives transactions (that by their terms settle financially) under the same ISDA master agreement. An ISDA survey of its members would not capture many end-user-to-end-user transactions. The OCC surveys reflect the derivatives activities of the financial institutions regulated by the OCC. Therefore, in the case of the OCC surveys, no end-user-to-end-user transactions would be reflected. **As a result, the Commission’s underlying assumption that there are relatively few “end-user-to-end-user swaps” is inaccurate, and it results in a fundamental misunderstanding by the Commission of the markets for Energy Commodity Swaps.** For further discussion, see Section ID beginning on page 10 below for a description of these unique Energy Commodity Swap markets. We reserve the right to submit revised or additional comments once the Commission issues its final rules on the definition of “swap” and other definitions, including the definitions of “swap dealer” and “major swap participant.”

user” Energy Commodity Swaps take place with the minimum new regulatory costs and burdens in order to preserve the value of the end-user exception.

Fifth, in our comments on the End-User Exception NOPR, we recommend the Commission clearly define in its regulations which reporting requirements are **applicable to entities** and which reporting requirements are **applicable to swap transactions** (and, in respect of non-cleared swap transactions, distinguish between those decisions that are made when a master agreement is executed between two counterparties to non-cleared swaps, and those “swap-by-swap” decisions that must be made at the time the swap transaction is executed). We refer the Commission to Diagram #2 to our comment letter to the End-User Exception NOPR (which we have attached as Diagram #3 hereto), which gives our recommendation as to the notices, reports and data elements the Commission should require in periodic entity reports, in master agreement reports (as and when master agreements are executed) and in swap transaction data reports. These are three streams of data that we anticipate flowing to the SDR from non-financial entities that anticipate using the end-user exception. None of these three data streams is part of the “real-time public reporting data” stream. Even the swap transaction data stream from non-financial entities in respect of customized non-cleared end-user-to-end-user swaps will be submitted “in a timely manner,” as required by CEA Section 2(a)(13)(F), rather than “in real time.” See our comments on the Prior Data NOPRs.

As the Commission (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 its Proposed Rules will impact the commercial enterprises that are “end users” of commodities and swaps. These are not financial entities, and they have not previously been regulated by the Commission. On the day after the effective date of the Act, each of these non-financial entities will still have a commercial enterprise to run, commercial risks to manage and, for the NFP Electric End Users, retail energy customers to serve.

The Act was intended by Congress to regulate the financial markets more effectively, to provide regulatory oversight to financial entities and to reduce risk to the financial system. It was also intended to bring more transparency to the swap markets. We fully support these policy objectives. However, the regulations must tell commercial enterprises which of their ongoing activities will now be regulated by the Commission and how to comply with the Commission’s new rules. The regulations should not impose unnecessary new “one-size-fits-all” regulatory costs and burdens on these non-financial commercial enterprises.

## **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”).<sup>7</sup> The primary business of these NFP Electric End Users has been for well over

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<sup>7</sup> 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,

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 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.

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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 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.



The vast majority of NRECA's members meet the definition of "small entities" under the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). Only four distribution cooperatives and approximately 28 G&Ts do not meet the definition. SBREFA incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA"). The SBA's small business size regulations state that entities which provide electric services are "small entities" if their total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. 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 "small entities" under SBREFA.

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, AS ARE THE "MARKETS" IN WHICH THEY TRANSACT AND THE TRANSACTIONS IN WHICH THEY ENGAGE

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. 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 the Commission's regulation as "swaps" (even among those who are "end users" of energy and energy-related commodities and 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 gains or losses on an NFP Electric End User's energy transactions result in higher or lower 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. 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 focus on reliability of service and regulated rates payable by the retail customer. In addition, the electric industry in North America (including the NFP Electric End Users) is 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.

Some of the NFP Electric End Users’ energy transactions are conducted through, “on,” or “in” the “markets” operated by various regional transmission organizations or independent system operators (collectively, “RTOs”). Each RTO operates its “market” in a defined geographic area of the United States, and all RTOs operate under a comprehensive regulatory structure established by the Federal Energy Regulatory Commission (“FERC”). The FERC-regulated markets are established by tariff in many instances, rather than by contract, and analogies between these FERC-created/FERC-regulated “markets,” and the bilateral contract markets between independent and arm’s length third parties, are inapt. Although, in some ways, the markets conducted by the various RTOs are similar in structure, no two RTO markets are exactly alike and their “products” or “transactions” are not fungible between RTOs. Each RTO also has in place credit risk mitigation policies and procedures to protect market participants from credit risk from other market participants, and to protect the RTO markets from disruption due to market participant default. These RTO credit risk mitigation policies are established and maintained in accordance with the principles established by FERC.<sup>8</sup>

FERC’s mandate from Congress under the Federal Power Act is to regulate in the “public interest” -- which is interpreted as the delivery of reliable electric energy 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 RTO markets are intrinsically tied to the reliable physical transmission and ultimate delivery of electric energy in interstate commerce at just and reasonable rates.

Most of the Energy Commodity Swaps in which the NFP Electric End Users are engaged are currently conducted under exemptions or exclusions from the Commodity Exchange Act (the “CEA”), whether conducted in the bilateral OTC contract market (as most are, including RTO transactions) or on exempt commercial markets. The participants in these markets are “eligible contract participants” either by virtue of their size and financial characteristics, or by virtue of their use of underlying cash commodities relevant to their businesses (as “eligible commercial entities”). Other than a few large industrial companies, retail energy consumers generally 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.

NFP Electric End Users engage in a substantial number of non-cleared, “end-user-to-end-user” Energy Commodity Swaps.<sup>9</sup> Counterparties for these Energy Commodity Swaps are

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<sup>8</sup> Such policies were recently updated by FERC in its Final Rule on Credit Reforms in Organized Wholesale Electric Markets, 18 CFR Part 35, Docket No. RM10-13-000, Order No. 741 (issued October 21, 2010).

<sup>9</sup> See general Theme #4 and footnote 6. There will be an even higher percentage of these end-user-to-end-user swaps if the Commission does not clarify its definition of “swap” to

typically the NFP Electric End Users' traditional commercial (physical energy commodity) counterparties, rather than financial entities (whether financial intermediaries or financial institutions) from whom the NFP Electric End Users secure financing. In the markets for Energy Commodity Swaps, an end user may be a buyer one day and a seller the next, as its seasonal commercial needs for one or more energy commodities fluctuate. And the end user may be a buyer of one type of energy commodity or derivative, and a seller of another type of energy commodity or derivative. In the markets for Energy Commodity Swaps, a single energy company may buy natural gas swaps and sell electric energy swaps for the same month. Or it may buy natural gas swaps for one month and sell natural gas swaps for the next month. Most energy companies' commercial risks are geography-specific and seasonal, and risk management decisions are made based on changing long-term weather forecasts, generation availability and/or load projections. Some energy companies hedge multiple commodity risks, such as an electric utility hedging the commercial risks of its input (natural gas as fuel) and output (electric generation/deliverable electric energy). Cross-commodity hedging is also commonplace. There is no "sell-side/buy-side" dichotomy in the non-cleared Energy Commodity Swap market, and there are often no financial intermediaries -- many non-financial entities play multiple commercial end user roles.<sup>10</sup>

The transactions contain customized, non-quantitative operating conditions, transmission or transportation contingencies, and operating risk allocations that one would expect between commercial businesses. Although legal and administrative terms are standardized through the use of master agreements, the negotiated schedules to such master agreements and individual transaction confirmations are highly negotiated and differ based on the needs and preferences of each pair of counterparties. These are commercial transactions, when viewed through the traditional lens of "goods" and "services" used by American businesses. It is only when the transactions are viewed through the financial markets lens that these transactions are described using the financial market regulatory labels such as "exempt commodities," "swap agreements," "swaps" or "nonfinancial commodities" -- and analogized to "futures contracts" or "positions" created or engaged in by financial entities on a transaction-by-transaction basis for profit or speculation, and potentially subject to regulation traditionally applicable to such financial market transactions.

Credit risk management in the bilateral contract world of non-cleared Energy Commodity Swaps is grounded in broad-based, continuing and reciprocal commercial credit risk analysis and credit risk management between each set of counterparties, backstopped by credit support and

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exclude or exempt commercial energy and energy-related transactions in which the NFP Electric End Users engage every day. The NFP Electric End Users reserve the right to submit additional or revised comments once the Commission issues its final rules on the definition of "swap" and other definitions, including "swap dealer" and "major swap participant."

<sup>10</sup> See footnote 4. Please let us know if the NFP Electric End Users can provide the Commission with further information on this unique aspect of the markets for Energy Commodity Swaps.

collateralization principles. This type of credit risk management is not analogous to the transaction-by-transaction margining (without regard to counterparty identity) that takes place in today's CFTC-regulated futures and options markets.

The NFP Electric End Users currently have the commercial risk management choice to conduct some Energy Commodity Swap transactions on CFTC-regulated contract markets, or to clear some of these transactions through CFTC-regulated centralized clearing entities. CFTC-regulated exchanges have only recently begun to list these types of contracts; and central clearing entities have only recently begun to clear energy transactions. Listed and cleared transactions are typically those delivered at "hubs," in tradable increments and for tradable durations -- transactions or "products" that are "standardized" and "fungible" in financial market terms, and with sufficient contract trading liquidity to allow for financial markets to function. As the CFTC-regulated financial markets have evolved, some of the larger NFP Electric End Users have chosen to manage certain of their commercial risks using exchange-traded and cleared instruments. But the vast majority of NFP Electric End Users' commercial commodity transactions and Energy Commodity Swaps are still conducted "the old fashioned way:" under tariffs within the public power and cooperative systems or by contract with known and reliable physical commodity suppliers and customers, and not with CFTC-regulated financial intermediaries or on exchanges or with clearing entities. And the vast majority of NFP Electric End Users do not either post collateral to their counterparties or require that their counterparties post collateral to them.<sup>11</sup>

Due to the Act's wholesale deletion of applicable exemptions in the CEA, and the potentially sweeping nature of the Act's new definitions, these everyday business transactions of the NFP Electric End Users are at some risk of being redefined as "swaps." Although Congress has repeatedly indicated that its intention was NOT to reduce risk management options for end users or to impose new regulatory costs on end users hedging the risks of traditional commercial enterprises, Congress is relying on the regulators to implement understandable rules consistent with that intent. Congress did not intend for the regulators to read the expansive language of the

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<sup>11</sup> For examples of the diversity of credit support and collateral (or "margin") relationships which the NFP Electric End Users have in place with their Energy Commodity Swap counterparties, as well as the diversity of assets, load (customers served within the utility's geographic service territory), energy hedging and risk management policies, and swap usage within the Coalition's membership, see the profiles attached to the NFP Electric End Users' comment letter to the Capital and Margin Task Force, dated December 14, 2010 (such comment letter can be found at the following link: [http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission5\\_121410-0017.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission5_121410-0017.pdf)). None of these profiles purport to be "typical" of large, medium or small NFP Electric End Users (by number of customers). No NFP Electric End User is typical, given their diverse commercial profiles. However, the Commission's regulations have to work for all NFP Electric End Users who share the identical public service mission.

Act without regard to legislative intent or to regulate and impose costs on end users as if they were financial entities or professional financial market participants.<sup>12</sup>

## II. GENERAL COMMENTS<sup>13</sup>

Our recommendations reflect our experience, and the facts that are unique to the perspective of non-financial entities executing non-cleared Energy Commodity Swaps in the bilateral swap market, in comparison to market professionals (either for themselves or for “customers”) executing futures or exchange-traded options on the CFTC-regulated futures markets or other electronic or cleared market structures. Counterparties to a non-cleared swap (today and after the Act is effective) know each other’s identity in advance of the transaction. Between each pair of swap counterparties, certain legal contract provisions, including credit risk allocations, are made on a bilateral contract relationship basis (not a swap-by-swap, or transaction-by-transaction, basis) in master agreements. And, once the swap is executed and while it is outstanding as a contract between the two parties, the parties continue their bilateral relationship, exchanging information and, in some cases, collateral or other credit support, monitoring each other’s compliance with the contract during the life cycle of the swap.

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<sup>12</sup> The Commission should not, in its rule-making under the Act, be distracted by those commentators who intone or invoke the names “AIG” or “Enron,” without analysis. In fact, neither AIG nor Enron would be entitled to the end-user exception under the CEA as amended by the Act, and neither would be exempt from margin requirements applicable to cleared swaps by clearing entities. AIG, whose substantial positions in non-cleared credit default swaps allegedly endangered the financial system, would be registered and regulated as an MSP in credit default swaps. Enron, with its notorious “one-to-many” electronic interface offering to buy or sell swaps from energy to broadband, is the poster child for the Act’s definition of “swap dealer,” and would be registered and regulated as such. The NFP Electric End Users, and other end users hedging commercial risk with Energy Commodity Swaps and other types of non-cleared swaps, simply do not represent the types of systemic risk that the mere mention of those entities’ names implies.

<sup>13</sup> We refer the Commission to the comments the Coalition has previously submitted on data recordkeeping and reporting matters. See our comments on the “Interim Final Rule” dated November 15, 2010, our “pre-NOPR” comments to the Commission’s Data Recordkeeping and Reporting Task Forces, dated November 16, 2010, and our comments on the “Second” Interim Final Rule, dated January 18, 2011. Copies of these other comments on data recordkeeping and reporting issues can be found at the following links:

<http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26390&SearchText=wasson>

,  
[http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission17\\_122810-5.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission17_122810-5.pdf)

and  
[http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27187&SearchText=.](http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27187&SearchText=)

In contrast, in an exchange-traded transaction relationship, an entity “executing” a transaction does not know the counterparty’s identity, *i.e.*, the transaction is executed on an exchange. After the swap is executed, the party cannot affect the “executed transaction” (by amending its terms or “novating” it), without interacting with the registered entity. Similarly, if an over-the-counter Energy Commodity Swap is cleared, either simultaneously with execution or shortly thereafter, the counterparties are no longer in contractual privity with each other. Instead, the clearing entity becomes “the buyer to the seller and the seller to the buyer.” The counterparties that initially executed the swap are no longer the best source, or even a useful source, of post-clearing information about that swap. The execution details -- whether defined as “swap transaction data” or “swap creation data” -- and the post-swap events -- whether defined as “reportable swap transactions” or “required continuation data” -- are in the electronic records of a registered entity. The original terms between contract parties to the over-the-counter energy commodity swap are no longer relevant.

The “new” swap markets that the Commission has been authorized to establish and regulate under the Act will have some characteristics of each of these two distinct market structures. The Proposed Rules in Part 49, along with the Proposed Rules in Parts 39, 43, and 45 (in the Prior Data NOPRs and the End-User Exception NOPR), confuse the two market structures in way that are unworkable from the perspective of non-financial entities that will “execute” swaps in the new regulatory market structure. The Proposed Rules in Part 49 should be revised to structure the SDR’s obligations and other regulatory requirements differently depending on the “source” of the data submitted to the SDR, and to protect the “entity identity” rights of non-financial counterparties to swaps. In addition, we respectfully request that the SDR allocate its regulatory costs in keeping with the “CFTC-lite” protocol of regulation for non-SD/MSP counterparties.

A. THE PROPOSED RULES IN PART 49 SHOULD NOT USE THE TERM “END USER” AND SHOULD DIFFERENTIATE BETWEEN THE WAY IN WHICH AN SDR WILL INTERACT WITH DIFFERENT TYPES OF REPORTING ENTITIES (AT LEAST TO DISTINGUISH NON-FINANCIAL ENTITIES) – ALL “REPORTING ENTITIES” ARE NOT THE SAME AND SHOULD NOT BE TREATED THE SAME BY SDRs.

In Proposed Rule 49.2(a)(10), the term “reporting entity” is defined to include registered entities, financial entities and non-financial entities.<sup>14</sup> Throughout Part 49, the Proposed Rules use the defined term “reporting entity” or use the litany of entity types that comprise the defined term (see Proposed Rule 49.10). We respectfully recommend that Part 49 be revised to distinguish between the way in which an SDR interacts with non-financial entities (whether or not electing the end-user exception), and the way in which an SDR interacts with other reporting entities. The SDR will have to interact differently with non-financial entities, than the way the SDR deals with market professionals. Non-financial entities will be unlikely to have electronic

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<sup>14</sup> The definition should be revised to refer to “non-SD/MSP counterparties” or “non-financial entities.” See footnote 3 for the confusion caused by using the term “end user.”

data interfaces comparable to those maintained by financial entities and market infrastructure entities (as “registered entities”). Non-financial entities will be registering for Unique Counterparty Identifiers and submitting other “entity data” for purposes of the affiliate-tracking rules the Commission has proposed, and for other entity reporting purposes.

For end-user-to-end-user swaps, non-financial entities will be acting as “reporting party” or “reporting counterparty.” As we discussed in our comment letter on the End-User Exception NOPR, there will be many end-user-to-end-user Energy Commodity Swaps. As we discussed in our comment letters on the Prior Data NOPRs, data reporting with respect to these end-user-to-end-user swaps will be submitted within different time periods than swaps executed or cleared on a registered entity. The SDR will have certain obligations that are unique to its interactions with the non-financial entities, and certain confidentiality obligations in respect of non-financial entities’ data that will make it important for the SDR to know what data was submitted to it by non-financial entities.

**B. PROPOSED RULE 49.11 SHOULD ONLY REQUIRE THE SDR TO CONFIRM WITH “BOTH” SWAP COUNTERPARTIES SWAP TRANSACTION DATA FOR NON-CLEARED SWAPS WHICH ARE NOT EXECUTED ON A REGISTERED ENTITY**

The Act must be interpreted in the Commission’s rules in the context of the newly-regulated swap markets that are being created, not in the context of the over-the-counter swap markets that exist now. CEA Section 21(c)(2) provides that an SDR shall “confirm with **both counterparties** to **the swap** the accuracy of **the data** that was **submitted.**” The Commission should not interpret that truncated and ambiguous statutory language as requiring the SDR to confirm with swap counterparties the accuracy of **all “data and other regulatory information”** (whether or not the data has anything to do with either of the counterparties as entities or swap executors) about **all swaps** (whether or not “the swap” was executed on or cleared through a registered entity), whether or not the data was **submitted by one or the other of the counterparties or was submitted to the SDR by another “reporting entity.”** See Proposed Rule 49.11(b) and the SDR NOPR at 80,905.

The counterparties to a swap should not be required to confirm data for which neither counterparty was the source that submitted the data to the SDR. The Commission’s rules must interpret the Act in a sensible way, and not burden either the SDR or non-financial entities who are counterparties to swaps with unreasonable confirmation obligations. We recommend that Proposed Rule 49.11 be revised to require the SDR to establish policies and procedures to confirm with both counterparties to a non-cleared swap the swap transaction data submitted to the SDR by the reporting party to that swap. For data confirmation on other types of swaps, the registered entity that was the source of the data submitted to the SDR is the party to confirm that data. For entity data, the entity itself should confirm. And, for post-swap execution data for



non-cleared swaps (however that data is ultimately described consistently in the Proposed Rules), the reporting party should be the sole source, and the sole confirmation required.<sup>15</sup>

The language of Proposed Rule 49.11(b) should also be revised to eliminate the use of the ambiguous exception “except for data reported for purposes of real-time public reporting,” or to clarify the exception by identifying data by type or data element that falls within and outside the exception. For example, a standardized swap for which a non-financial party elected the end-user exception may have a majority of data elements that are vertically identical to a large notional swap. But the large notional swap contains customized terms such that it was not clearable, and the swap therefore was executed bilaterally by two non-financial parties and reported to the SDR. How does the SDR distinguish the reporting requirements applicable to swap #1 vs. those applicable to swap #2 when the swap is submitted to the SDR? Proposed Rule 49.11 does not circumscribe a workable exception to the data the SDR must confirm with “both counterparties.”<sup>16</sup>

When a non-financial entity executes a swap on a designated contract market or a swap execution facility, the information about the swap is, thereafter, in the electronic records of the registered entity. That registered entity, if required by regulation, can provide that information to an SDR, to the Commission, or to prudential regulators or other regulators with appropriate

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<sup>15</sup> The Act (and the Proposed Rules in Part 43, in the Data NOPR) requires one non-SD/MSP counterparty which executes a swap to which neither a swap dealer nor a major swap participant is the counterparty, to *timely report* the swap transaction data to a registered entity. See our comment letter on the Data NOPR and CEA Section 2(a)(13)(F) and 4r(l). Certain standardized swaps are reported “in real time” by executing the swap on registered entities such as designated contract markets and swap execution facilities. Other standardized (and fungible) swaps are reported in a timely manner by clearing the swaps on a derivatives clearing organization. Non-standardized, or “customized” swaps, which are *not required to be cleared* because they do not meet the requirements of CEA 2(h)(2)(D), and which are not executed on a swap execution facility, are to be reported in a timely manner in accordance with CEA Section 2(a)(13)(F) to an SDR (or to the Commission) under CEA Section 4r(l). The Commission should not require the parties to a swap to report swap transaction and pricing data “in real time” when the Act clearly allows “timely reporting.” The Commission should not require the parties to a swap to report a cleared swap (that is not executed on a swap execution facility) to an SDR, when the Act clearly considers submitting the swap for clearing with a derivatives clearing organization (a registered entity) to fulfill the reporting party’s reporting requirement. See our comment letter on the Real-Time Data NOPR and Diagram #1.

<sup>16</sup> On page 80,905 of the SDR NOPR, the Commission acknowledges that the counterparties should not have to confirm the accuracy of data with respect to swaps that are executed or cleared on a registered entity (and the data from which is therefore submitted to the SDR by such registered entity sources rather than by one of the swap counterparties). However, because of the imprecise language in Proposed Rule 49.11(b), the Proposed Rules themselves do not provide this clarity.

jurisdiction. But the responsibility of the non-financial entity counterparty with respect to reporting that swap is complete. In fact, the parties to the swap no longer have control over the swap such that it could be changed without the knowledge of a registered entity. In order for the parties to the swap to change the swap terms, or amend the swap, they would have to interact with the CFTC-registered entity on which they executed the swap. The registered entity has now become the “reporting party” and can monitor, keep electronic records and report all such post-swap events. And, thereafter, if the SDR wants to verify or confirm data in respect of that swap, the SDR (or the Commission) should inquire first of the registered entity, and only look to the non-financial entity counterparties for verification of the initial swap transaction data.

Furthermore, if the parties to an executed swap submit the swap for clearing by a designated clearing organization, that act of submitting (and reporting) the swap to a registered entity for clearing should fulfill the reporting requirements of the reporting party to the swap. Again, the swap is in the electronic records of the registered entity (the derivatives clearing organization), and that registered entity, if required by regulation, can become the “reporting party” for such swap and can provide that data to an SDR, the Commission, or to prudential regulators or other regulators with appropriate jurisdiction. Other than the Commission’s jurisdiction to monitor the end-user exception, none of these other regulators has direct jurisdiction over the non-financial entities that are counterparties to the swap. In fact, clearing the swap results in a legal “novation” of the swap (substituting the derivatives clearing organization as buyer to the seller and seller to the buyer).

Once the swap is cleared, thereafter the non-financial entity that initially assumed the reporting party obligations in respect of that swap no longer has “control” of, or the “best information” about, that swap. In fact, once a swap is cleared, even “state data” in the records of the reporting party about that swap would all reflect the same information (the cleared terms) that would otherwise be easily available to the SDR, to the Commission and to prudential regulators or other regulators with appropriate jurisdiction from the derivatives clearing organization. The non-financial entity cannot amend the terms of the cleared swap, nor will it any longer have information about post-swap events, that are not effected through the derivatives clearing organization. All information about the swap is in the control of the derivatives clearing organization. Neither the SDR nor the Commission should require any further reporting from the non-financial entity that initially assumed the “reporting party” obligations in respect of that cleared swap. Proposed Rule 49.11 should be revised to reflect that the only confirmation process the SDR needs to conduct with the counterparties to a swap is for non-cleared swaps that are not executed on a designated contract market or a swap execution facility.

**C. PROPOSED RULE 49.15 SHOULD BE REVISED TO CLARIFY WHAT INFORMATION THE SDR IS REPORTING TO THE COMMISSION ABOUT “DATA SUBMITTED TO MEET THE REAL-TIME SWAP DATA REPORTING OBLIGATIONS OF PART 43 OF THIS CHAPTER”**

Proposed Rule 49.15 imposes certain obligations on the SDR to report certain information to the Commission. But Proposed Rule 49.15 uses language that makes it impossible to understand how those obligations can be fulfilled by the SDR, or what use the

Commission may make of the information provided to it by the SDR. Consequently, the NFP Electric End Users are concerned about regulatory clarity. Due to the misreadings of the Act in Part 43 (proposed in the Real-Time Reporting NOPR), and the confused terms and reporting obligations in Parts 43 and 45, the NFP Electric End Users are not certain of their reporting obligations in respect of swaps that are neither executed nor cleared on a registered entity, and to which neither a swap dealer nor a major swap participant is a party (an end-user-to-end-user swap). Now, Proposed Rule 49.15 presumes the SDR will be making judgments about the timeliness of certain data reporting by “reporting entities,” when all the SDR can review is data received into its system, when that data arrived in its system, and whether that data is attributable to the source that submitted such data to the SDR. Whether or not real-time swap data was *not received* by the SDR within the time period required by Section 43.3(e)(3) requires the SDR to interpret the inconsistencies of Parts 43 and 45, and then report “a failure” of one reporting entity or another (presumably including non-financial entities) to comply with these inconsistent reporting obligations. The SDR’s reporting obligations in Proposed Rule 49.15 cannot be fulfilled without the SDR concluding that a non-financial entity reporting party has not fulfilled a “real-time reporting obligation” that the non-financial entity never had to begin with. See our comments on the Prior Data NOPRs. Proposed Rule 49.15 should be revised or deleted.

**D. THE COMMISSION’S PROPOSED RULES UNDER PART 49 SHOULD BE REVISED TO REQUIRE THE SDR TO DISTINGUISH WHAT DATA IT RECEIVES FROM OTHER REGISTERED ENTITIES, FROM SWAP DEALERS AND MAJOR SWAP PARTICIPANTS (WITH WHOM IT WILL LIKELY HAVE ELECTRONIC INTERFACES), AND WHAT DATA IT RECEIVES FROM NON-SD/MSP COUNTERPARTIES, INCLUDING NON-FINANCIAL ENTITIES, IN ORDER TO ENABLE THE SDR TO FULFILL ITS DIFFERENT OBLIGATIONS UNDER THE ACT IN RESPECT OF EACH “DATA STREAM”**

The Proposed Rules in Part 49 provide, in general terms, that the SDR will receive data from “reporting entities,” which includes registered entities, swap dealers, major swap participants, and “end users.”<sup>17</sup> But the SDR NOPR and the Proposed Rules then lead the SDR to assume that it can and should treat all these reporting entity sources of data as if they were equals in terms of the SDR’s obligations to comply with the Act. As we discussed in our comments to the Prior Data NOPRs, and in our comment letter on the End-User Exception NOPR, this is simply not the case.

Proposed Rule 49.16 describes the SDR’s responsibilities for confidentiality of the swap transaction data it accepts from “reporting entities” by referencing CEA Section 8, but without reference to CEA Section 2(a)(13)(E). This simplification of the SDR’s confidentiality responsibilities puts at risk the important policy objective of maintaining the confidentiality of swap counterparties’ identities while promoting price transparency in the swap markets. In particular, we call the Commission’s attention to our comments on the Real-Time Data NOPR’s treatment of large notional swaps. We respectfully request that Proposed Rule 49.16 be revised

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<sup>17</sup> See footnote 3.

or supplemented, or that the Commission identify where in its Proposed Rules it has ensured compliance with CEA Section 2(a)(13)(E).

On page 80,908, the SDR NOPR describes two “streams of data” that the SDR will receive: “real-time data” and “core data.” These terms are not defined in the Proposed Rules and it is unclear how such data can be identified by the SDR. This “two stream” approach is incomplete and incorrect, likely as a result of the SDR NOPR’s reliance on the Real-Time Data NOPR for its understanding of the data the SDR will receive, and the Real-Time Data NOPR’s two fundamental misreadings of the Act. See our comments on the Prior Data NOPRs for further explanation. The Proposed Rules also fail to take into account numerous other places in the Commission’s Proposed Rules (to date) where data will flow directly from counterparties to the swap into the SDR, and not from either another registered entity or from a swap dealer, major swap participant or other financial entity, or the other places in the Proposed Rules (again, to date) where data will flow from registered entities into the SDR. Finally, the Proposed Rules fail to take into consideration that a non-financial entity will have confidentiality rights in respect of its entity data and swap data, than will a financial entity transacting in the futures markets or other exchange-traded or cleared swap markets.

At the time a swap is executed, there is a “stream” of swap transaction data in addition to “real-time data” that will flow into the SDR -- data in respect of non-cleared, customized swaps that are not executed on either a designated contract market or a swap execution facility (including “large notional swaps”). If a swap dealer or major swap participant is not a party to this category of swap, the SDR must interface directly with the non-SD/MSP counterparty that is the reporting party to that swap. Some of these non-SD/MSP counterparties will not be financial entities, and some will be registering with the SDR for the first time as an “entity” subject to the Act, and electing the end-user exception for the swap. There will be a higher percentage of this type of Energy Commodity Swap than will be the case with other asset classes or types of swap.<sup>18</sup>

For this type of swap and this type of reporting party, the reporting obligation will not necessarily be seconds or minutes after the swap is executed. Proposed Rule 49.15 must be revised to reflect this. The swap transaction data elements reported may be simplified, and may not include the time the swap was executed. Such information is not always recorded in the non-cleared markets for Energy Commodity Swaps, where it is sometimes the case that neither execution nor “verification/confirmation” is electronic. This type of non-cleared swap will have several data elements relevant to the end-user exception included in the swap transaction data. The reporting party will not necessarily be a market professional, and either one or both parties

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<sup>18</sup> This statement will be even more true if the Commission does not clarify the definition of “swap” to exclude or exempt commercial energy and energy-related transactions in which the NFP Electric End Users engage every day, including physical forwards, commercial options, transmission, transportation, capacity or other energy services transactions. We reserve the right to submit revised or additional comments once this and other definitions, including the definitions of “swap dealer” and “major swap participant” are finalized.

to the swap may also need to register with the SDR and file “entity data” with the SDR before the swap can be accepted by the SDR. None of this is contemplated by the Proposed Rules in Part 49. We respectfully request that, in order to facilitate the acceptance by the SDR of this separate “stream” of swap transaction data directly from non-SD/MSP counterparties, some of whom will be non-financial entities, and to preserve the ability of non-financial entities to elect the end-user exception, Part 49 must be revised or supplemented to articulate the differences in SDR processes.

Another unique aspect of this data stream must be addressed in the Proposed Rules in Part 49. The data received by the SDR from non-SD/MSP counterparties (especially from non-financial entities) or about swaps to which such non-financial entities are parties must be treated by the SDR with due care in order to fulfill the requirement of CEA Section 2(a)(13)(E). In particular, it is likely that this data stream may contain a significant number of large notional swaps with highly customized terms executed in illiquid commodity markets, where disclosure of the geographic references in the swap’s terms, or disclosure of operating conditions or contingencies or product terms (“firmness,” or transmission contingencies related to the energy delivered) would disclose one or both of the swap counterparties’ identities. See our comments on the Real-Time Data NOPR on the issues surrounding “large notional swaps” for further information on this issue.

In addition, there will also be “entity data” streams submitted directly to the SDR by non-financial entities electing the end-user exception for some or all of the swaps they execute. There may be “master agreement data streams” submitted by pairs of counterparties to non-cleared swaps. See Diagram #3 for our overview of the types of data that non-financial entities will report directly to SDRs in respect of entities, affiliates, master agreements and non-cleared swaps. There may also be “state data” reports submitted to the SDR by reporting parties in respect of certain non-cleared reportable commodity swaps. For asset classes where “life cycle” data is required to be reported -- this is not for Energy Commodity Swaps -- there will be post-swap event reporting. The Proposed Rules in Part 49 must be revised to address this differentiation in post-swap reporting approach. See our comments on the Prior Data NOPRs.

We respectfully request the Commission to review our Diagram #1, which reflects our understanding of the non-SD/MSP counterparty’s reporting obligations for swap transaction data. We also respectfully request the Commission to review our Diagram #3 which reflects our recommendation in terms of “streams” of data that would flow from non-SD/MSP counterparties that are non-financial entities directly into the SDR. We recommend that the Proposed Rules in Part 49 be revised to require the SDR to track the source of each data “stream” and to structure the SDR’s interaction with non-financial entities in such a way that the SDR can fulfill its obligations under the Act without undue burdens and unreasonable expectations of the non-financial entities as “reporting entities.”

E. THE PROVISIONS OF CEA SECTION 49.17 SHOULD BE REVISED TO PROTECT THE CONFIDENTIALITY RIGHTS OF NON-FINANCIAL ENTITIES, WHICH HAVE NO “PRUDENTIAL REGULATORS,” TO PROTECT THE NON-FINANCIAL ENTITY’S “ENTITY DATA,” WHICH SHOULD ONLY BE USED FOR THE COMMISSION’S PURPOSES IN MONITORING THE END-USER EXCEPTION, AND TO IMPLEMENT CEA SECTION 2(A)(13)(E)

The Proposed Rules in Part 49 allow the SDR to give the Commission and other regulators access to data at the SDR in order to monitor the swap markets for violations of the Act and to monitor systemic risk. But the assumption underlying the Proposed Rules is that prudential regulators have jurisdiction over all the participants in the swap markets. This is not an accurate assumption with respect to non-financial entities such as the NFP Electric End Users.

Prudential regulators do not have jurisdiction over commercial enterprises. Such regulators should not have access to “entity data” in respect of such non-financial entities, nor should they have access to the non-financial entity’s identity as party to a swap unless and until such non-financial entity engages in the scope or size of swaps activity where it represents systemic risk, *e.g.* the non-financial entity registers as a major swap participant or a swap dealer. The Proposed Rules in Part 49 governing the responsibilities of an SDR should require the SDR to have in place policies and procedures to protect the data submitted to it by a non-financial entity from access by regulators which do not have jurisdiction over such non-financial entity, and policies and procedures to protect the identity of a non-financial entity party to a swap for purposes of CEA Section 2(a)(13)(E).

F. THE “NON-DISCRIMINATORY ACCESS AND FEES” APPROACH, AS REFLECTED IN PROPOSED RULE 49.27, WILL PLACE INEQUITABLE AND INAPPROPRIATE BURDENS ON THOSE NON-FINANCIAL ENTITIES THAT REQUIRE ONLY END USER ACCESS TO LIMITED PORTIONS OF THE SWAP MARKETS TO HEDGE COMMERCIAL RISKS

In our comments on the Prior Data NOPRs and the End-User Exception NOPR, we recommended that the Commission implement a “CFTC-lite” protocol for registration, recordkeeping and reporting for non-SD/MSP counterparties and, in particular for non-financial entities, in order to preserve access to the end-user exception for non-financial entities which execute swaps to mitigate or hedge commercial risks. We respectfully request that the “access and fees” provisions in Proposed Rule 49.27 be revised to reflect such an approach. See Diagram #2.

When the Commission was authorized to regulate the non-cleared swap markets under the Act, it was authorized to “enhance the Commission’s rulemaking and enforcement authorities *with respect to registered entities and intermediaries* subject to the Commission’s oversight (*emphasis added*).” See page 80,898 of the SDR NOPR. But Congress expressed its clear intent for the Commission to preserve access to the swap markets for non-financial entities hedging

commercial risk.<sup>19</sup> The Commission cannot treat all market participants “equally” without placing a disproportionate and inappropriate share of the new regulatory costs and burdens of the Act on non-financial entities which transact in only a small portion of the global swap market, and only to hedge commercial risks. See Diagram #2, and our comment letter on the Data NOPR and the End-User Exception NOPR for further discussion.

**III. ALL COMMENT PERIODS SHOULD REMAIN OPEN UNTIL ALL THE BASIC RULES UNDER TITLE VII OF THE DODD-FRANK ACT HAVE BEEN PROMULGATED. THEREAFTER, ONCE THE RULES ARE FINALIZED, THE COMMISSION SHOULD PROVIDE EXTENDED TRANSITION PERIODS TAILORED TO THE NEEDS OF NON-FINANCIAL ENTITIES IN THE DIVERSE MARKETS FOR DIFFERENT CATEGORIES, CLASSES AND TYPES OF SWAPS USED AS COMMERCIAL RISK MANAGEMENT TOOLS**

The Coalition urges the Commission to hold open the comment periods on all initial rules being promulgated under the Act, to enable various industries such as the energy industry, and various types of market participants in the diverse markets for swaps, to consider the regulations and the corresponding definitions as a whole. The rules are complex and interconnected, and create a new market structure within which end users will need to conduct their commercial enterprises and hedge their commercial risks. The Coalition appreciates the Chairman’s recent statement that the Commission has established a “31st rulemaking team” (in addition to the 30 task forces originally established by the Commission to draft rules under the Act), whose sole task is to review the regulations under the CEA as a whole, in light of the changes to the CEA made by the Act. We look forward to working with this new team to provide the perspective of the non-financial entity “end user” of non-cleared swaps -- a type of entity over which the Commission, prior to the Act, did not have jurisdiction in many respects. In reviewing the existing regulations, as well as in the current rule-makings, we encourage the Commission to assure that its rules, taken as a whole, are clear, consistent and understandable to entities like the NFP Electric End Users.

In the case of the markets for Energy Commodity Swaps, the new market structure will need to be integrated with the existing regulatory structures within which the energy companies currently conduct their commercial enterprises. Once the rules are finalized, the NFP Electric End Users will need substantial time to analyze their operations and install new systems, staffing and operating procedures and protocols to adapt to the new market structure, while continuing to seamlessly deliver reliable and affordable electricity to American consumers and businesses and comply with their existing regulatory and corporate recordkeeping and reporting requirements. We urge the Commission to allow time for comprehensive review of the new market structure prior to making the complex new rules effective, and transition times that are adequate for end users to adapt their commercial enterprises to the new market structure and regulatory protocols.

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<sup>19</sup> 156 Cong. Rec. H5248 (daily ed. June 30, 2010) (Dodd-Lincoln Letter).

#### **IV. THE COMMISSION MUST CONSIDER THE OVERALL IMPACT OF ITS RULES PROMULGATED UNDER THE ACT ON SMALL ENTITIES**

The Coalition's members include many "small entities" as that term is defined in the Small Business Regulatory Flexibility Act. 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). 13 C.F.R. §121.201, n.1. Each of the complex and interrelated regulations currently being proposed by the Commission has both an individual, and a cumulative, affect on such small entities. Whether a particular proposed regulation is required by the Act, or is proposed pursuant to the Commission's "interpretation" of the Act (such as the Real-Time Data NOPR), or is proposed pursuant to "implicit" authority or "to provide guidance and clarity" for the Commission's jurisdiction under the Act (see the Second Interim Final Rule, 75 Fed. Reg. 78,892, issued December 17, 2010, at 75,893), the Commission rule-makings under the Act constitute an accumulation of interrelated regulatory burdens and costs on non-financial small entities like the NFP Electric End Users, who seek to transact in Energy Commodity Swaps only to hedge the commercial risks of their not-for-profit public service activities. The NFP Electric End Users reserve their rights as small entities to assess the full impact of the initial rule-makings being promulgated by the Commission under the Act, and to require a SBREFA analysis be conducted with respect to those regulations as a whole.

In each of its ongoing rule-makings, the Commission acknowledges that it has no experience under the new requirements of the Act in regulating the swap markets or market participants such as the NFP Electric End Users. Each Proposed Rule addresses a different piece of the Commission's overall rule-making challenge under the Act. The Commission's cost-benefit analysis in each release includes assumptions about the number of non-cleared "swaps," the number of "swap dealers" and major swap participants," the number of "financial entities," the number of annual transactions, the number of end-user-to-end-user transactions, the number of calculations, valuations and disclosures, and what information the Commission needs about the non-cleared swap markets or each non-cleared swap transaction or each market participant. The NFP Electric End Users reserve the right to dispute all these assumptions, and request that the Commission fulfill its statutory requirements under SBREFA to provide economic data showing that the aggregate costs and cumulative regulatory burdens imposed on such small entities by the initial rule-makings to implement the Act are necessary, and that there are no alternatives to achieving the regulatory goals that would impose fewer burdens and less costs on the NFP Electric End Users and energy consumers.

#### **V. CONCLUSION**

The Coalition encourages the Commission to consider the perspective of non-financial entities using swaps to hedge commercial risk at every step of its regulatory rule-making process under the Act, and to ask whether its rules are clear to those who are not regular participants in the financial markets. We respectfully request that, as the Commission drafts its rules, it carefully consider the questions of and consequences to those who operate commercial enterprises and are drawn into this new regulatory environment only because of the Act's broad statutory language could be interpreted to redefine traditional commercial contracts as "commodities" or as "swaps." And we respectfully request that only the minimum, necessary



David Stawick, Secretary

February 22, 2011

Page 25

regulatory burdens and costs be applied to non-financial entities participating in the markets as “end users” hedging commercial risk. Each new direct or indirect cost or regulatory recordkeeping or reporting requirements will result, dollar for dollar, in higher costs to the NFP Electric End Users’ customers and owners -- approximately 87 million consumers of electric energy.

We stand ready to help the Commission understand our businesses, our industry and our markets, our transactions and documentation, and how our not-for-profit members use Energy Commodity Swaps to hedge the commercial risks inherent in their public service activities. Please contact any of the Coalition’s representatives for information or assistance.

David Stawick, Secretary  
February 22, 2011  
Signature Page

**SWAP DATA REPOSITORIES**

Respectfully yours,

**THE "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 & 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

David Stawick, Secretary  
February 22, 2011  
Signature Page

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*Susan N. Kelly*  
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**LARGE PUBLIC POWER COUNCIL**

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**NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION**

By:

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Russell Wasson  
Director, Tax, Finance and Accounting  
Policy

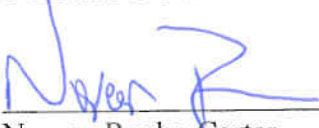
**AMERICAN PUBLIC POWER ASSOCIATION**

By:

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

**LARGE PUBLIC POWER COUNCIL**

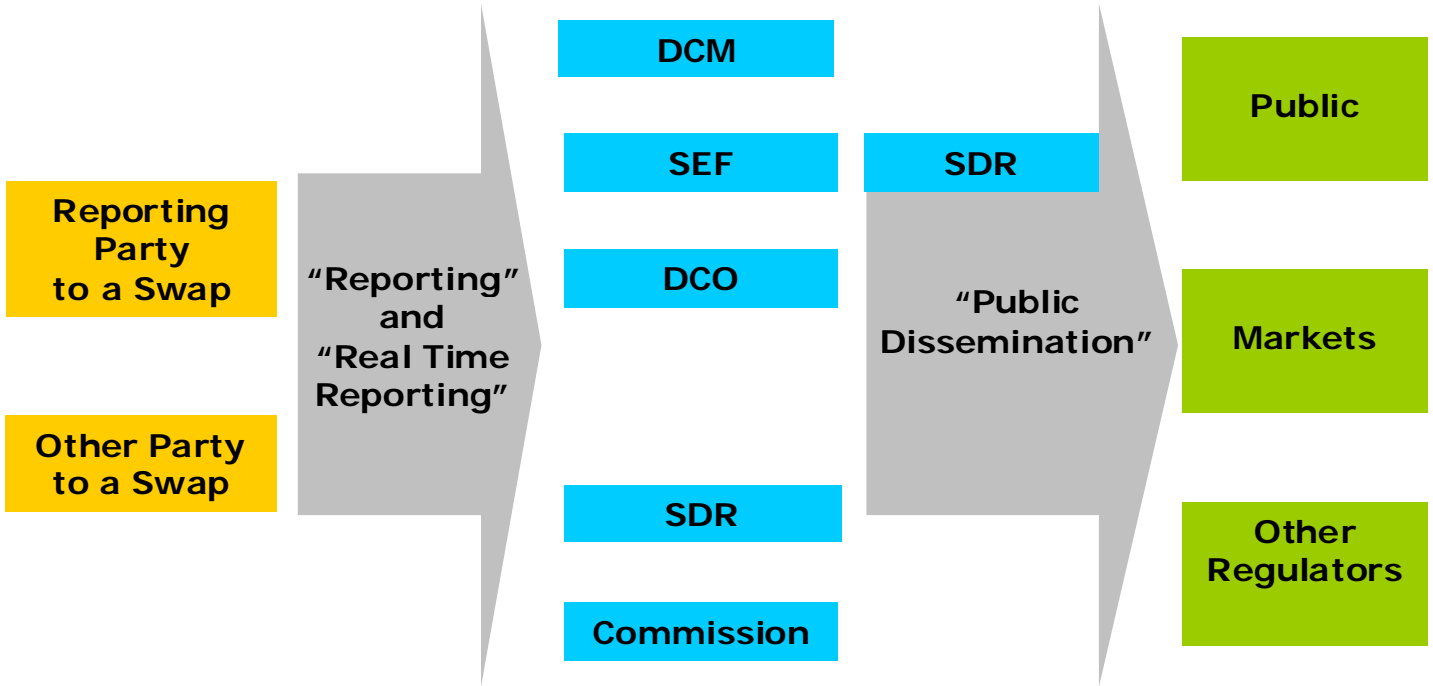
By:

  
\_\_\_\_\_  
Noreen Roche-Carter  
Chair, Tax & 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

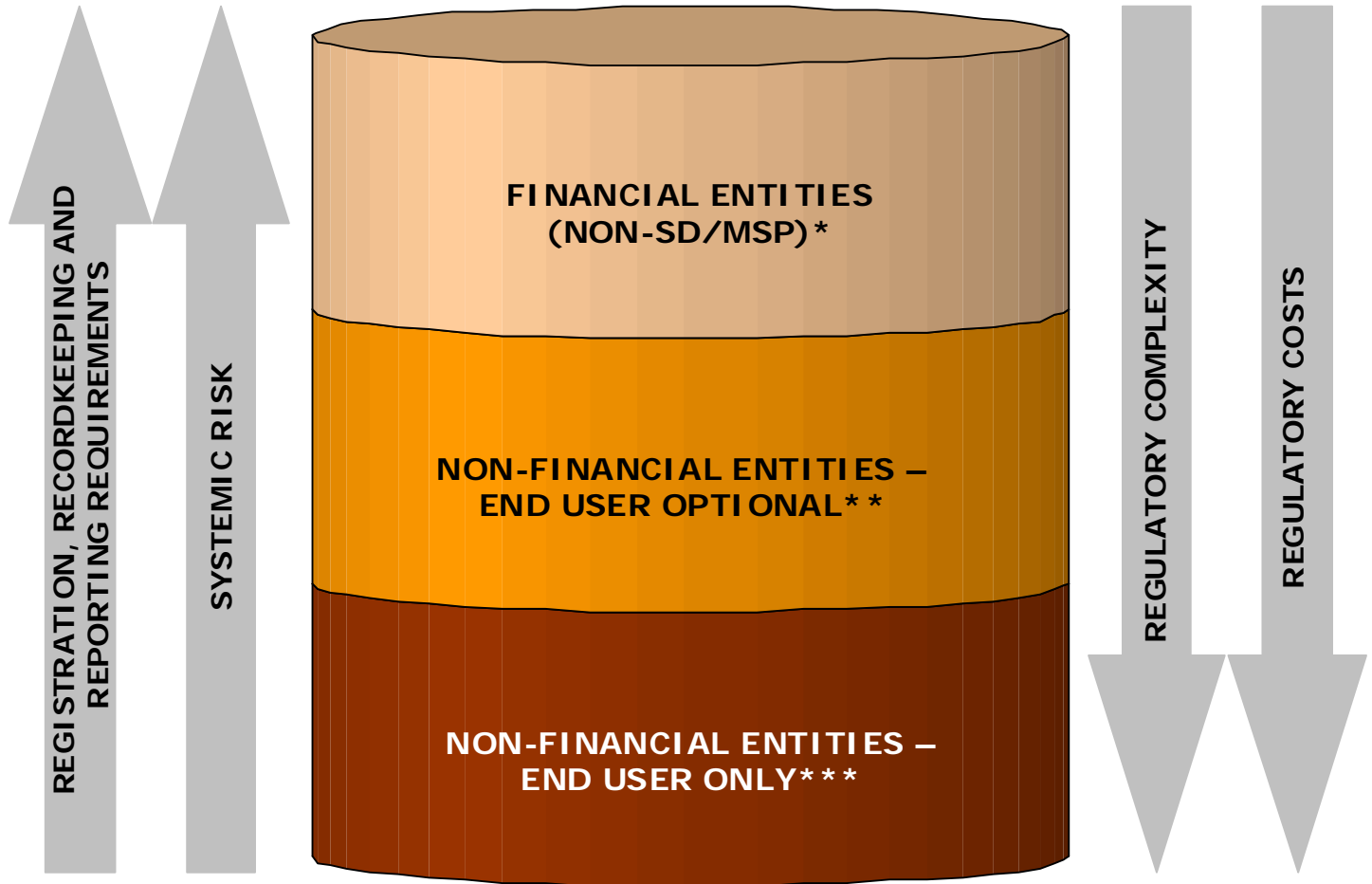
# Data Reporting and Public Dissemination – Diagram 1

*Swap Transaction Data Reporting  
for Non-SD/MSP Counterparties  
for Swaps Not Involving a Swap Dealer or a Major Swap Participant*



## Diagram 2

### *Non-SD/MSP Counterparty Sub-Classifications*



\*Includes "financial entities" (other than swap dealers and major swap participants), as defined in CEA Section 2(h)(7)(C)(i), including commodity pools, private investment funds, employee benefit plans and persons engaged in activities that are in the business of banking or that are financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956.

\*\*Includes entities which, because they are not financial entities, are entitled to use the end user exception for swaps used to hedge commercial risk. This category of "non-SD/MSP counterparties" chooses to make the end user exception decision on an asset class by asset class, or product-by-product, or swap-by-swap or other ongoing basis, as distinguished from the "Non-Financial Entities - End User Only" category below.

\*\*\*Includes entities which, because they are not financial entities, are entitled to use the end user exception for swaps used to hedge commercial risk. These entities choose a "CFTC-lite" form of registration under the Act. They use the end user exception for every swap to which the entity is a party. This classification would be used by commercial enterprises like the NFP Electric End Users -- who engage in swaps only to hedge commercial risks.

# Diagram 3

## *Data Submitted to SDR by Non-Financial Entities*

### PERIODIC ENTITY REPORTING

(For all Non-Financial Entities who anticipate using the end user exception for some or all swaps):

- Entity identity and affiliate relationships (per Data NOPR on Unique Counterparty Identifier); eligible contract participant and special entity certifications
- How generally meets financial obligations associated with non-cleared swaps (CEA 2(h))
- If public company -- Approval by appropriate Board Committee of decision to enter into non-cleared swaps (CEA 2(j))
- If a Reporting Party – Report of “state” data for “swaps” for which appointed Reporting Party

### MASTER AGREEMENT REPORTING

(When counterparties enter into a Master Agreement or amend an existing Master Agreement):

- Appointment of Reporting Party, Calculation Agent, Confirmation Party, etc.
- Negotiated choices as to credit risk mitigation, segregation of initial margin, etc.

### SWAP TRANSACTION DATA REPORTING

(If Reporting Party, when Execute a “Swap”\*):

- Counterparties and applicable Master Agreement, if any
- End User Exception Election (One or Both)
- If Affiliate or Agent, identify Non-Financial Entity Affiliate or Principal
- Asset class and type of swap
- Underlying commodity or commodities
- Price reference point(s) or Index(es), delivery point(s), if any
- Tenor
- Notional Quantity
- Price
- Other Terms/Bespoke Terms

SWAP DATA REPOSITORY

\* Note that, if the Commission does not clarify the definitions of “swap” to exclude or exempt commercial energy transactions in which the NFP Electric End Users engage every day -- such as physical forwards, commercial options, transmission, transportation, capacity or other energy services transactions or emissions or renewable energy credits -- this protocol will be inadequate for reporting data in respect of most of those commercial transactions, and these data elements will be inadequate to provide the markets with useable or useful data in respect of most of those commercial transactions. We reserve the right to submit additional, revised comments, and to dispute the ability of the majority of our members to comply with the Proposed Rules if the Commission requires electronic reporting of data elements summarizing the terms of such commercial energy and energy-related transactions.

**Copy of Comment Letter on Swap Transaction Data Recordkeeping**

See Attached.





**RECORDKEEPING AND REPORTING OF  
SWAP TRANSACTION DATA  
RIN 3038-AD19**

February 7, 2011

David Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20581

Dear Mr. Stawick:

**Re: Comments on Notice of Proposed Rulemaking on Swap Data  
Recordkeeping and Reporting Requirements, under Title VII of the  
Dodd-Frank Wall Street Reform and Consumer Protection Act  
(17 CFR Part 45)**

The trade associations comprising the “Not-For-Profit Electric End User Coalition” (the “Coalition”)<sup>1</sup> respectfully submit these comments to the Commodity Futures Trading Commission (the “Commission”) on the **Notice of Proposed Rulemaking on Swap Data Recordkeeping and Reporting Requirements**, issued December 8, 2010 (the “Data NOPR”).<sup>2</sup> In addition, the Coalition has submitted comments today on the Commission’s notice of proposed rule-making on “Real-Time Public Reporting of Swap Transaction Data” (75 Fed. Reg. 76,139 and errata 75 Fed. Reg. 76,930) (the “Real-Time Data NOPR”). These two NOPRs address many of the same topics on data reporting, and each proposes rules that are difficult if

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<sup>1</sup> The National Rural Electric Cooperative Association, the American Public Power Association and the Large Public Power Council (see Section I for a description of the members of each such trade association). The comments contained in this filing represent the comments and recommendations of the organizations comprising the “Coalition,” but not necessarily the views of any particular member with respect to any issue.

<sup>2</sup> 75 Fed. Reg. 76,573 (Dec. 8, 2010).

not impossible to reconcile with the other NOPR. Therefore, we are also submitting these comments as an attachment to our comment letter on the Real-Time Data NOPR, and we have attached to this comment letter a copy of our comment letter on the Real-Time Data NOPR. We recommend reading this comment letter first.

The Coalition's members are commercial enterprises, not financial entities and not swap dealers or major swap participants. Our members engage in swaps only to mitigate or hedge commercial risks that arise in the course of their public service activities. Therefore, our comments focus on the aspects of the Proposed Rules under Part 45 (in the Data NOPR) that would require an "end user"<sup>3</sup> of non-cleared "swaps,"<sup>4</sup> of a type that the NFP Electric End Users define as "Energy Commodity Swaps"<sup>5</sup> to retain records in respect of that swap and, if the end

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<sup>3</sup> This term is not defined in the Act, but is used to describe an entity which is not a "financial entity," which utilizes swaps to hedge or mitigate commercial risk and notifies the Commission how it generally meets its financial obligations associated with entering into non-cleared swaps. CEA 2(h)(7)(A). Such an "end user" may except a "swap" to which it is a party from the clearing requirements of the Commodity Exchange Act, as amended by the Act (the "CEA"). In this Data NOPR, the Commission defines a category of swap party that is "non-SD/MSP counterparty," which encompasses both "end users" and financial entities which are not swap dealers or major swap participants. NFP Electric End Users are both "non-SD/MSP counterparties" and non-financial entities, and the NFP Electric End Users anticipate utilizing the "end user exception" in respect of all Energy Commodity Swaps to which they are parties. Therefore, the NFP Electric End Users are a prototype for the proposed "end user only" classification of "non-SD/MSP counterparties" (see Section IIA2 below).

<sup>4</sup> We have footnoted this term, and direct the reader to the comment letter submitted by the Not-For-Profit Energy End User Coalition dated September 20, 2010, submitted in response to the Commission's "Definitions ANOPR," and in particular to the comments on the definition of "swap" in that letter. A weblink to such comment letter is available at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26217&SearchText>. The comments herein 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. We use the term "non-cleared" in this comment letter, rather than "uncleared," so that our comments to the Commission on different rulemakings on identical concepts are consistent. The Act, and the CEA as amended by the Act, use the terms interchangeably. We respectfully request that the Commission confirm, for the sake of clarity, that the terms are synonyms.

<sup>5</sup>We use the term "Energy Commodity Swaps" to mean (a) those non-cleared swaps referencing or derived on energy commodities in which the NFP Electric End Users transact in the ordinary course of their core public service activities, such as electric energy, natural gas, and other fuels for electric generation, including coal and fuel oil (but excluding crude oil, gasoline or refined petroleum products (other than fuel oil) -- these commodities are not germane to the NFP Electric End Users' public service activities, and the markets for these commodities and

user acts as the “reporting party” for the swap, **to report data in respect of that swap** to a “registered entity.” Our comments filed today on the Real-Time Data NOPR focus on the aspects of the Proposed Rules under Part 43 that would require an end user which acts as the reporting counterparty to a non-cleared Energy Commodity Swap **to report data in respect of that swap** to a registered entity “in real time.” We respectfully request that the Commission accept, in our comments, three major themes:

First, the subject matter of the two NOPRs overlaps -- in requiring a reporting party to a swap **to report data in respect of a swap**. We believe that the flow chart attached to the two comment letters as “Diagram #1” gives an overview of what the Act requires of a reporting party in terms of reporting swap transaction data in respect of a swap. We believe that, for a non-cleared swap, that reporting obligation triggers once, when a swap is “executed” between the parties. If a reporting obligation is intended to be triggered more than once for a non-cleared swap, the rules should be clear as to what that second trigger is. And, at one or both triggering events, it should be clear what data elements are to be reported. Where our comments on the two NOPRs address Theme #1, we will try to highlight that Theme #1. We respectfully request the Commission to reconcile the definitions, triggering events, and swap transaction data element reporting requirements used in the two NOPRs. The reporting party to a swap must have regulatory certainty as to what event triggers a reporting obligation, and what swap transaction data elements need to then be reported. The reporting party cannot otherwise report swap transaction data in a timely manner, much less “in real time” (for purposes of the Real-Time Data NOPR).

Second, we agree with the approach taken in this Data NOPR that any data reporting required of a reporting party after the initial obligation should be periodic “state” or “snapshot” reporting for Energy Commodity Swaps. We understand that this form of reporting is applicable to each non-SD/MSP counterparty which is a reporting entity for one or more Energy Commodity Swaps during the life of the swap. Periodic “state” data reporting is, conceptually, a “snapshot” of the data elements of the relevant (previously reported) Energy Commodity Swaps in the reporting party’s portfolio. However, there are many places in the Proposed Rules in Parts 43 and 45 which would impose reporting requirements that are conceptually relevant only to a “life cycle” or “event flow” approach to reporting. These reporting obligations “follow the swap” rather than take snapshots of the reporting party’s outstanding reportable swaps portfolio.

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related derivatives are distinguishable from the markets in which the NFP Electric End Users participate), (b) those non-cleared swaps referencing or derived on transmission, transportation, generation capacity or storage concepts or services related to the energy commodities described in (a), and (c) those non-cleared swaps referencing or derived on environmental or emissions regulations, or renewable energy or other environmental attributes, applicable to the NFP Electric End Users. All of these “Energy Commodity Swaps” reference or are derived on “nonfinancial commodities,” are intrinsically related to our members’ core public service activities, and many are subject to the continuing jurisdiction of regulators other than the Commission.

As the Commission notes in this Data NOPR at page 76,583, the reporting requirements must adopt either a “state” reporting approach or a “life cycle” reporting approach, and not both. It is the same data and each reporting party must design and implement its reporting (and recordkeeping) systems for a swap asset class based on one of these two distinct approaches, not both. We respectfully request that all references to “life cycle” reporting obligations in the two NOPRs be made clearly applicable only to those swap asset classes (credit and equity) to which the “life cycle” reporting approach applies.

Third, we have proposed in our comments on this Data NOPR, a “CFTC-lite” method of registration, recordkeeping and reporting for non-SD/MSP counterparties that we believe will accomplish what the Act requires, and fulfill the Commission’s need for data to monitor the markets. We have used the concept in our comments on the Real-Time Data NOPR as well. We respectfully request that the Commission consider such an approach -- to recognize the differing burdens and costs being imposed by its new regulatory structure on non-SD/MSP counterparties which are “end users only” like the NFP Electric End Users. As Congress and Chairman Gensler have recognized, “end users” are not professional financial market participants. They have other commercial and public service priorities. They are not financial institutions that are interconnected and represent systemic risk. This “CFTC-lite” method of regulation will preserve access to the swap markets for end users hedging commercial risk, and not subject such end users to a “one-size-fits-all” regulatory scheme as if the end user were a financial institution, a swap dealer, a major swap participant or even a hedge fund which may want full access to all swap asset classes in the global swap market. The Commission should lower barriers to entry and preserve access for end users, and structure its regulation and costs of compliance to limit the burdens on end users.

As the Commission (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 its Proposed Rules will impact the commercial enterprises that are “end users” of commodities and swaps. These are not financial entities, and they have not previously been regulated by the Commission. On the day after the effective date of the Act, each of these end users will still have a commercial enterprise to run, commercial risks to manage and, for the NFP Electric End Users, retail energy customers to serve.

The Act was intended by Congress to regulate the financial markets more effectively, to provide regulatory oversight to financial entities and to reduce risk to the financial system. It was also intended to bring more transparency to the swaps markets. We fully support these policy objectives. However, the regulations must tell commercial enterprises which of their ongoing activities will now be regulated by the Commission and how to comply with the Commission’s new rules. The regulations should not impose unnecessary new regulatory costs and burdens on these non-financial commercial enterprises.

## **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”).<sup>6</sup> 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 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

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<sup>6</sup> 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 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.



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 ("SBREFA"). 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). Only four distribution cooperatives and approximately 28 G&Ts do not meet the definition. The RFA incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA"). The SBA's small business size regulations state that entities which provide electric services are "small entities" if their total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. 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 "small entities" under SBREFA.

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, AS ARE THE “MARKETS” IN WHICH THEY TRANSACT AND THE TRANSACTIONS IN WHICH THEY ENGAGE

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. 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 the Commission’s regulation as “swaps” (even among those who are “end users” of energy and energy-related commodities and 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 gains or losses on an NFP Electric End User’s energy transactions result in higher or lower 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. 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 focus on reliability of service and regulated rates payable by the retail customer. In addition, the electric industry in North America (including the NFP Electric End Users) is 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 Dodd-Frank 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.

Some of the NFP Electric End Users’ energy transactions are conducted through, “on,” or “in” the “markets” operated by various regional transmission organizations or independent system operators (collectively, “RTOs”). Each RTO operates its “market” in a defined geographic area of the United States, and all RTOs operate under a comprehensive regulatory structure established by the Federal Energy Regulatory Commission (“FERC”). The FERC-regulated markets are established by tariff in many instances, rather than by contract, and analogies between these FERC-created/FERC-regulated “markets,” and the bilateral contract markets between independent and arm’s length third parties, are inapt. Although in some ways, the markets conducted by the various RTOs are similar in structure, no two RTO markets are exactly alike and their “products” or “transactions” are not fungible between RTOs. Each RTO also has in place credit risk mitigation policies and procedures to protect market participants from credit risk from other market participants, and to protect the RTO markets from disruption due to market participant default. These RTO credit risk mitigation policies are established and maintained in accordance with the principles established by FERC.<sup>7</sup>

FERC’s mandate from Congress under the Federal Power Act is to regulate in the “public interest” -- which is interpreted as the delivery of reliable electric energy 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 RTO markets are intrinsically tied to the reliable physical transmission and ultimate delivery of electric energy in interstate commerce at just and reasonable rates.

Most of the Energy Commodity Swaps in which the NFP Electric End Users are engaged are currently conducted under exemptions or exclusions from the Commodity Exchange Act (the “CEA”), whether conducted in the bilateral OTC contract market (as most are, including RTO transactions) or on exempt commercial markets. The participants in these markets are “eligible contract participants” either by virtue of their size and financial characteristics, or by virtue of

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<sup>7</sup> Such policies were recently updated by FERC in its Final Rule on Credit Reforms in Organized Wholesale Electric Markets, 18 CFR Part 35, Docket No. RM10-13-000, Order No. 741 (issued October 21, 2010).



their use of underlying cash commodities relevant to their businesses (as “eligible commercial entities”). Other than a few large industrial companies, retail energy consumers generally 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.

NFP Electric End Users engage in a substantial number of non-cleared, “end-user-to-end-user” Energy Commodity Swaps. Counterparties for these Energy Commodity Swaps are typically the NFP Electric End Users’ traditional commercial (physical energy commodity) counterparties, rather financial entities (whether financial intermediaries or financial institutions) from whom the NFP Electric End Users secure financing. In the markets for Energy Commodity Swaps, an end user may be a buyer one day and a seller the next, as its seasonal commercial needs for one or more energy commodities fluctuate. And the end user may be a buyer of one type of energy commodity or derivative, and a seller of another type of energy commodity or derivative. In the markets for Energy Commodity Swaps, a single energy company may buy natural gas swaps and sell electric energy swaps for the same month. Or it may buy natural gas swaps for one month and sell natural gas swaps for the next month. Most energy companies’ commercial risks are geography-specific and seasonal, and risk management decisions are made based on developing long-term weather forecasts, and generation availability and/or load projections. Some energy companies hedge multiple commodity risks, such as an electric utility hedging the commercial risks of its input (natural gas as fuel) and output (electric generation/deliverable electric energy). Cross-commodity hedging is also commonplace. There is no “sell-side/buy-side” dichotomy in the non-cleared Energy Commodity Swap market, and there are often no financial intermediaries -- many non-financial entities play multiple commercial end user roles.<sup>8</sup>

The transactions contain customized, non-quantitative operating conditions, transmission or transportation contingencies, and operating risk allocations that one would expect between commercial businesses. Although legal and administrative terms are standardized through the use of master agreements, the negotiated schedules to such master agreement and individual transaction confirmations are highly negotiated and differ based on the needs and preferences of each pair of counterparties. These are commercial transactions, when viewed through the traditional lens of “goods” and “services” used by American businesses. It is only when the transactions are viewed through the financial markets lens that these transactions are described using the financial market regulatory labels such as “exempt commodities,” “swap agreements,” “swaps” or “nonfinancial commodities” -- and analogized to “futures contracts” or “positions” created or engaged in by financial entities on a transaction-by-transaction basis for profit or speculation, and potentially subject to regulation traditionally applicable to such financial market professionals.

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<sup>8</sup> See footnote 4. The NFP Electric End Users reserve the right to submit additional or revised comments once the Commission’s definition of “swap” is finalized. Please let us know if the NFP Electric End Users can provide the Commission with further information on this unique aspect of the markets for Energy Commodity Swaps.

Credit risk management in the bilateral contract world of non-cleared Energy Commodity Swaps is grounded in broad-based, continuing and reciprocal credit risk analysis and credit risk management between each set of counterparties, backstopped by credit support and collateralization principles. This type of credit risk management is not analogous to the transaction-by-transaction margining (without regard to counterparty identity) that takes place in today's CFTC-regulated futures and options markets.

The NFP Electric End Users currently have the risk management choice to conduct some Energy Commodity Swap transactions on CFTC-regulated contract markets, or to clear some of these transactions through CFTC-regulated centralized clearing entities. CFTC-regulated exchanges have only recently begun to list these types of contracts; and central clearing entities have only recently begun to clear energy transactions. Listed and cleared transactions are typically those delivered at "hubs," in tradable increments and for tradable durations -- transactions or "products" that are "standardized" and "fungible" in financial market terms, and with sufficient contract trading liquidity to allow for financial markets to function. As the CFTC-regulated financial markets have evolved, some of the larger NFP Electric End Users have chosen to manage certain of their commercial risks using exchange-traded and cleared instruments. But the vast majority of NFP Electric End Users' commercial commodity transactions and Energy Commodity Swaps are still conducted "the old fashioned way:" under tariffs within the public power and cooperative systems or by contract with known and reliable physical commodity suppliers and customers, and not with CFTC-regulated financial intermediaries or on exchanges or with clearing entities. And the vast majority of NFP Electric End Users do not either post collateral to their counterparties or require that their counterparties post collateral to them.<sup>9</sup>

Due to the Dodd-Frank Act's wholesale deletion of applicable exemptions in the CEA, and the potentially sweeping nature of the Dodd-Frank Act's new definitions, these everyday business transactions of the NFP Electric End Users are at some risk of being redefined as "swaps." Although Congress has repeatedly indicated that its intention was NOT to reduce risk management options for end users or to impose new regulatory costs on end users hedging the

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<sup>9</sup> For examples of the diversity of credit support and collateral (or "margin") relationships which the NFP Electric End Users have in place with their Energy Commodity Swap counterparties, as well as the diversity of assets, load (customers served within the utility's geographic service territory), energy hedging and risk management policies, and swap usage within the coalition's membership, see the profiles attached to the NFP Electric End Users' comment letter to the Capital and Margin Task Force, dated December 14, 2010 (such comment letter can be found at the following link: [http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission5\\_121410-0017.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission5_121410-0017.pdf)). None of these profiles purport to be "typical" of large, medium or small NFP Electric End Users (by number of customers). No NFP Electric End User is typical, given their diverse commercial profiles. However, the Commission's regulations have to work for all NFP Electric End Users who share the identical public service mission.

risks of traditional commercial enterprises, Congress is relying on the regulators to implement understandable rules consistent with that intent. Congress did not intend for the regulators to read the expansive language of the Dodd-Frank Act without regard to legislative intent or to regulate and impose costs on end users as if they were financial entities or professional financial market participants.<sup>10</sup>

## **II. GENERAL COMMENTS<sup>11</sup>**

We begin our comments on this Data NOPR with Theme #3 -- our constructive recommendation that the Commission adopt a “CFTC-lite” form of registration, recordkeeping and reporting for non-SD/MSP counterparties, and in particular for non-financial entity “end users only.” This is consistent with the Congressional intent to preserve the ability of non-financial entities to access the swap markets in order to hedge their commercial risks. It is also consistent with the spirit of the recently-issued Executive Order directing regulatory agencies to eliminate costly and unnecessary regulatory mandates on American businesses and the

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<sup>10</sup> The Commission should not, in its rule-making under the Act, be distracted by those commentators who intone or invoke the names “AIG” or “Enron,” without analysis. In fact, neither AIG nor Enron would be entitled to the end user exception under the CEA as amended by the Act, and neither would be exempt from margin requirements applicable to cleared swaps by clearing entities. AIG, whose substantial positions in non-cleared credit default swaps allegedly endangered the financial system, would be registered and regulated as an MSP in credit default swaps. Enron, with its notorious “one-to-many” electronic interface offering to buy or sell swaps from energy to broadband, is the poster child for the Act’s definition of “swap dealer,” and would be registered and regulated as such. The NFP Electric End Users, and other end users hedging commercial risk with Energy Commodity Swaps and other types of non-cleared swaps, simply do not represent the types of systemic risk that the mere mention of those entities’ names implies.

<sup>11</sup> The coalition has reviewed the comments submitted in this docket by the Edison Electric Institute and the Electric Power Supply Association (the “EEI/EPSA Letter”), and we will concur by reference to Sections of that EEI/EPSA Letter herein as appropriate, rather than restating the comments. We also refer the Commission to the comments the Coalition has previously submitted on data recordkeeping and reporting matters. See our comments on the “Interim Final Rule” dated November 15, 2010, our “pre-NOPR” comments to the Commission’s Data Recordkeeping and Reporting Task Forces, dated November 16, 2010, and our comments on the “Second” Interim Final Rule, dated January 18, 2011. Copies of these other comments on data recordkeeping and reporting issues can be found at the following links: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26390&SearchText=wasson>, [http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission17\\_122810-5.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission17_122810-5.pdf) and <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27187&SearchText=>.

Regulatory Flexibility Act.<sup>12</sup> Such an approach would accomplish the Commission's statutory obligations under the Act, without requiring commercial enterprises like the NFP Electric End Users to invest in costly new recordkeeping and reporting systems, engage in unnecessary swap-by-swap exchange of information, and be responsible for extensive and continuous financial markets reporting.

Our recommendation reflects two facts unique to the non-cleared swap market (in comparison to the futures markets or other cleared market structures). Counterparties to a non-cleared swap know each other's identity in advance of the transaction. And, between each pair of non-cleared swap counterparties, certain legal contract provisions, including credit risk allocations, are made on a relationship (not a swap-by-swap, transaction-by-transaction) basis in master agreements. These two facts are distinguishing features of the non-cleared swaps markets that the Commission has been authorized to regulate under the Act.

A. THE COALITION RECOMMENDS THAT THE COMMISSION ADOPT TWO NEW "IDENTIFIER" CONCEPTS, CONSISTENT WITH THE COMMISSION'S "UNIQUE IDENTIFIER" METHOD OF IDENTIFYING BOTH SWAPS AND PARTIES TO A SWAP, FOR PURPOSES OF FACILITATING DATA RECORDKEEPING AND REPORTING REQUIREMENTS FOR NON-CLEARED SWAPS

The Commission's Proposed Rules anticipate that, before an entity can engage in a non-cleared swap, it must register pursuant to the CEA, and secure a "Unique Counterparty Identifier." The Unique Counterparty Identifier will allow non-cleared swaps to which that entity is a party to be reported (either by the entity or its counterparty). Presumably, before an entity can execute a swap on a designated contract market or swap execution facility, or before an entity can clear a swap on a derivatives clearing organization, the entity would also need to register for such Unique Counterparty Identifier, in order to access that registered entity's facilities.

In addition, the Commission's Proposed Rules contemplate that, before a pair of counterparties can "execute" or "report" a non-cleared swap, the swap transaction must be submitted to some "registered entity" and be assigned a "Unique Swap Identifier," which will also contain a "Unique Product Identifier." If the swap is executed on a designated contract market or a swap execution facility, these Identifiers will be issued by the registered entity. If the swap is cleared, these Identifiers will be issued by the derivatives clearing organization (also a registered entity). And, if the swap is non-cleared, these Identifiers will be issued by the swap data repository (also a registered entity) when the swap is reported.

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<sup>12</sup> Executive Order No. 13563 on Improving Regulation and Regulatory Review, issued January 18, 2011 (76 Fed. Reg. 3,821 (Jan. 21, 2011)), and the Regulatory Flexibility Act at 44 U.S.C. 3506(b)(1)(A)..

1. *The Commission should differentiate between types of entities within its defined term “non-SD/MSP counterparties” under the “Unique Counterparty Identifier” registration process.* The statute (and the proposed rule) describes three groups of parties to swaps: swap dealers, major swap participants, and “non-SD/MSP counterparties.”<sup>13</sup> These three groups are consistent with the way in which the futures markets view market participants -- entities are either market professionals (such as dealers, brokers and other entities regulated by the Commission, colloquially called the “sell side”) or “customers” (the “buy side”). But in the non-cleared swap markets, entity roles are more multi-faceted, especially for non-financial entities. See the description of roles in the markets for Energy Commodity Swaps in Section ID above. Many types of non-financial entities participate only in narrow segments of the non-cleared swaps markets, without a need for access to other markets or other swap asset classes. The Commission should recognize those multi-faceted roles and, within “non-SD/MSP counterparties,” the Commission should recognize the significant differences between types of non-SD/MSP counterparty types. The Commission should allow entities to register in one or more sub-classifications of the “non-SD/MSP counterparty” classification, depending on the registrant’s need for access to the commodity swap markets and, consequently, the registrant’s need for the Commission’s new regulatory structure for non-cleared swaps. We recommend that the Commission consider the sub-classifications shown on Diagram #2. The NOPRs purport to propose “equitable and non-discriminatory” rules and fees<sup>14</sup> to be applied to registrants in its new market structure. But the Proposed Rules ignore the fact that those non-financial entities which transact once or twice a year in swaps, or those end users which use a one asset class of swaps only to hedge commodity risks of their commercial enterprises should not be regulated or charged fees comparable to those applied to financial entities, which register to transact in all swap asset classes, and who transact as part of their for profit financial operations. We recommend that:
  - (a) Non-SD/MSP counterparties should be permitted to register for individual categories, classes and types of swaps (or for different asset classes or product types) to which they require access -- note that non-SD/MSP

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<sup>13</sup> In the Real-Time Data NOPR, these are sometimes referred to as “end users,” but this is inaccurate. See the Real-Time Data NOPR at 76,143 and at various places in Part 43, such as the definition of “US Person.” We respectfully request that the Proposed Rules under Parts 45 and 43 be reconciled to use the term “non-SD/MSP counterparty” and not use the term “end user.” See footnote 3.

<sup>14</sup> See this Data NOPR Proposed Rule 45.4 and the Real-Time Data NOPR Proposed Rule 43.3(j).



counterparties may register for different Counterparty Identifiers for different asset classes or product types of swaps, and

- (b) Non-SD/MSP counterparties should be permitted to register as “financial entity (non-SD/MSP),”<sup>15</sup> as “non-financial entity-end user optional,” or as “non-financial entity end user only.”<sup>16</sup> The first sub-classification includes hedge funds, pension funds and other “financial entities” not entitled to the end user exception in CEA 2(h). The second sub-classification includes commercial enterprises (non-financial entities) but notes that the end user exception is at their option. The third sub-classification includes entities like the NFP Electric End Users which engage in swaps only to hedge commercial risks.

Each of the sub-classifications within the non-SD/MSP counterparty’s “Unique Counterparty Identifier” could then carry certain choices, representations and verifications (to the registered entity which issues the Unique Counterparty Identifier, and ultimately to the Commission. This would make many swap-by-swap representations between swap counterparties unnecessary. These sub-classifications of non-SD/MSP counterparties could also be used to appropriately allocate the costs of the new Commission regulatory structure -- allocating costs more heavily to those entities whose activities reflect systemic risk, and to those entities who desire access to the full scope of the swap markets. Conversely, these sub-classifications would avoid imposing one-size-fits-all regulatory costs and burdens on end users that are disproportionate to their use of the swap market or their risks, and which will otherwise act as a significant barrier to entry or to continued access to these markets.<sup>17</sup>

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<sup>15</sup> This sub-classification would facilitate use of the reported data by prudential regulators (who have jurisdiction over financial entities, but not over commercial entities).

<sup>16</sup> These last three sub-classifications would facilitate the types of “entity reporting” the Act envisions -- such as the periodic notice required of an end user of its ability generally to meet its financial obligations in respect of non-cleared swaps.

<sup>17</sup> An analogy: a park district allows local residents to register for a variety of types of membership -- a young family of limited means might buy a “swim-only” membership that allows use of the outdoor pool, but not access to the golf course or the indoor tennis courts and sophisticated weight-training facilities. The family has no need for those amenities, and would not otherwise be able to afford a “full membership” to access just the pool in the summer months. The “full membership” dues level supports the upkeep of the golf course and the year-round upkeep and staffing for the tennis courts and weight-training facilities, and may also support other expensive facilities which full members want to access, but not the young family. In this analogy, the disparate allocation of park district dues or fees is not “inequitable or discriminatory.” It merely reflects the appropriate allocation of costs of access to the park district facilities for the different types of members. The Commission’s new registration,

Appropriately allocating the costs and burdens based on a “CFTC-lite” approach to registration, recordkeeping and reporting would reduce the barriers to entry for commercial enterprises, and preserve their ability to access the swap markets to manage commercial risks.

2. The Commission should allow pairs of registrants to establish one or more “Unique Master Agreement Identifiers” to recognize the contractual relationship “data elements” that are made at a “master agreement” level between each pair of non-cleared swap counterparties. As the NFP Electric End Users and other end users of non-cleared swaps have discussed with the Commission staff, many decisions on “data elements” relevant to non-cleared swaps are made once between each pair of counterparties when a master agreement is negotiated. These bilateral master agreements will often be used across multiple categories, classes or types of transactions. Some of the data elements which are typically established at the master agreement level include (or could include) credit support or collateralization, if any, of transactions under the master agreement, specific aspects of credit risk mitigation, such as whether physical as well as financial transactions are covered by the master agreement relationship, the method and frequency of calculation of net (unsecured) exposure (sometimes colloquially called “mark-to-market”), the method, frequency of exchange, type of collateral, rounding amounts and creation and perfection of security interests in collateral, if any, segregation of any initial margin for non-cleared swaps and custodian qualifications, rehypothecation and investment of cash collateral.<sup>18</sup> The master agreement will also identify which party will act as the reporting party, and other counterparty relationship-related choices, such as confirming party and calculation agent. Some pairs of counterparties may have multiple master agreements in place for different categories, classes or types of swaps, or with other unique contract choices. If, at any time, the counterparties want to change a decision (in other words, not enter into the next swap under the existing master agreement), they can either amend the Unique Master Agreement Identifier decisions, or negotiate a new and separately-identified master agreement. If no master agreement is in place between the parties, and all choices are for a single swap, then the identifier would be “No Master.” But the majority of Energy

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recordkeeping and reporting obligations, and the allocation of costs of such amenities for the global swaps market, must preserve access to those portions of the non-cleared swaps markets for end users who use such markets for limited, commercial risk mitigation purposes.

<sup>18</sup> See comments dated February 1, 2011 filed by the NFP Electric End Users on the Segregation of Initial Margin for Non-Cleared Swaps NOPR (75 Fed. Reg. 75,432). A link to such comment letter is <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27461&SearchText=>.

Commodity Swaps include the master agreement/transaction confirmation documentation structure.<sup>19</sup> This new Master Agreement Identifier protocol would significantly reduce swap-by-swap recordkeeping and reporting. Such a protocol would eliminate the potential for administrative errors, eliminate misunderstandings between swap counterparties at the time the commercial terms of a swap are being negotiated, and avoid potential inadvertent “recordkeeping and reporting” violations.

B. THE COMMISSION SHOULD ESTABLISH A DIFFERENT SCOPE, AND REQUIRE A DIFFERENT RECORDKEEPING FORMAT, APPLICABLE TO THE DIFFERENT CLASSIFICATIONS OF NON-SD/MSP COUNTERPARTIES

We concur with the comments in Section I of the EEI/EPSC letter on limiting the scope of recordkeeping required of non-SD/MSP counterparties to non-cleared swaps, and submit the following additional comments. The Commission should not presume that a non-financial entity that enters into Energy Commodity Swaps to hedge commercial risk has the recordkeeping capabilities of a financial entity.

1. *The Commission should reduce the recordkeeping requirements on non-SD/MSP counterparties to the minimum necessary.* The Commission should require that non-SD/MSP counterparties retain only the business records memorializing the legal terms of swaps. Moreover, for non-SD/MSP counterparties who are not financial entities and, in particular, for those who are registered as end user only, the Commission should allow records to be retained in a format allowing retrieval upon request by the Commission or other regulators with jurisdiction over such registrants within not less than 20 (not 3) business days, under the Commission’s authority in Proposed Rule 45.2(d)(3). For non-cleared, customized swaps between two non-SD/MSP counterparties, recordkeeping rules (beyond those electronic records required by a reporting party to perform its electronic data reporting obligations) should allow for retention of paper records.
2. *The Commission should phase in recordkeeping requirements for non-SD/MSP counterparties to reflect the time and costs of implementation of whatever*

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<sup>19</sup> See footnote 4. Note that, if the Commission’s definition of “swap” is not clarified to exclude or exempt commercial energy transactions in which the NFP Electric End Users engage every day from the CEA definition of “commodity” or the CEA definition of “swap” -- such as physical forwards, commercial options, transmission, transportation, capacity or other energy services transactions -- this protocol for Unique Master Agreement Identifiers will not be useful for reporting data in respect of most of those commercial energy transactions. We reserve the right to submit additional, revised comments, and to dispute the ability of the majority of our members to comply with the Proposed Rules if they require electronic reporting of such commercial energy transactions.



*electronic recordkeeping requirements the Commission adopts.* The effective dates for recordkeeping requirements should be later for those non-SD/MSP counterparties who are not financial entities, and later still for non-SD/MSP counterparties who are registered as “end user only.” The Commission should put more of the burdens and costs of its new regulatory regime on financial entities and on those who require full access to the global swap markets. In order to preserve the ability of the NFP Electric End Users to hedge commercial risk, minimal, graduated and phased-in recordkeeping requirements for non-SD/MSP counterparties should be one aspect of a “CFTC-lite” protocol of registration, recordkeeping and reporting. To do otherwise is to inappropriately burden the end user with the same burdens and costs of registration, recordkeeping and reporting as financial entities.

### C. SWAP TRANSACTION DATA REPORTING -- WHO REPORTS

We concur with the comments in Section II of the EEI/EPISA letter on limiting the scope of reporting required of non-SD/MSP counterparties to non-cleared swaps, and submit the following additional comments. See Diagram #2. For transactions where one non-SD/MSP counterparty is a “financial entity (non-SD/MSP),” the reporting obligation for swap transaction data should be imposed on that financial entity. For transactions between financial entities (non-SD/MSPs), or between non-financial entities that are non-SD/MSP counterparties, the parties can agree as to which party has the reporting obligation. As discussed in Section IIA2 above, that agreement may be at the Master Agreement level, if a master agreement is in place between the parties.

1. *We concur with the comments in Section IIA and IIB of the EEI/EPISA letter.* For transactions between non-SD/MSP non-financial entity counterparties entitled to the end user exception, the swap transaction data reporting should be streamlined.<sup>20</sup>

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<sup>20</sup> We are submitting comments today on the Real-Time Data NOPR as well, and we refer you to that comment letter (a copy of which is attached for convenience) for our additional comments on swap transaction data reporting by the reporting party to a non-cleared swap, whether the comments address timing of reporting of swap transaction data, or timing of reporting of post-transaction “state” data. We have attempted to submit comments in these two dockets that propose consistent solutions, from the perspective of a non-SD/MSP counterparty (a definition which we will use in both comment letters). However, some of the data reporting concepts in the two NOPRs, especially where they involve the triggering events for reporting and reportable data elements, as well as the timing of reports by non-SD/MSP counterparties, do not reflect a single Commission view on how data reporting rules should apply to non-SD/MSP counterparties to non-cleared Energy Commodity Swaps. We respectfully request that a single revised NOPR on these issues be published for comment, and we are eager and available to work with the Commission to reconcile the concepts and understand how the proposed swap reporting rules are intended to work.

2. *If the reporting party for a swap has an “End User Only” Counterparty Identifier, the reporting required for swap transaction data should be not more frequently than quarterly.* In order to preserve the ability of the NFP Electric End Users to hedge commercial risk, minimal, graduated and phased-in reporting requirements should be one aspect of a “CFTC-lite” registration, recordkeeping and reporting protocol. The Commission should not presume that a non-financial entity that is hedging commercial risk has the reporting capabilities of a financial entity, particularly a non-financial entity that hedges commercial risk and enters into only one or two swaps per year.<sup>21</sup>

D. THE COMMISSION’S RULES SHOULD BE CLEAR AND CONSISTENT WITH RESPECT TO THE TRIGGERING EVENT(S) FOR REPORTING SWAP TRANSACTION DATA, AND IDENTIFY WHAT SWAP TRANSACTION DATA ELEMENTS (FOR EACH CATEGORY, CLASS OR TYPE OF SWAP, FOR EACH ASSET CLASS AND FOR EACH SWAP PRODUCT TYPE) THE REPORTING PARTY MUST REPORT

Here, we refer the Commission to our general Theme #1. The Proposed Rules in Part 45 in this Data NOPR and the Proposed Rules in Part 43 in the Real-Time Data NOPR use different terms to describe triggering events for swap transaction data reporting, and different terms to describe the data elements which must be reported by a reporting party in respect of a swap. Although we understand that, in certain places, the Act itself uses inconsistent terminology, the regulations must reconcile the statutory concepts in a way that is understandable to those who must comply with the CEA and the rules as a whole. As set forth in our general Theme #1, the Act requires that, when a swap is “executed,” the reporting party must report swap transaction data (or, in the Real-Time Data NOPR, “swap transaction and pricing data”) to a registered entity.

For an Energy Commodity Swap which is not executed on a designated contract market or a swap execution facility, legal principles of contract apply. A swap is “executed” when the two parties agree on commercial terms and “execute” the contract. If the executed swap is later confirmed (or “verified”), it is unclear from the Proposed Rules whether a second reporting obligation is triggered and, if so, for what different or additional data elements. We respectfully request clarification. Confusing aspects of the two NOPRs include:

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<sup>21</sup> The Real-Time Data NOPR comments at 76,145, that “[t]he Commission believes that reporting parties [presumably including end users] should remain current with changes in technology and regularly update their technology infrastructure to decrease the time of transmission of swap transaction and pricing data to real-time disseminators.” The NFP Electric End Users respectfully submit that they have public service and energy regulatory obligations to deliver reliable, affordable energy to the American public, and to remain current with technology to enable performance of their public service obligations. “State of the art” financial market reporting technology must take a back seat to other priorities.

1. Triggering events for reporting. In this Data NOPR, the term “confirmation” seems to encompass “execution” in that it references the “legally binding” concept. Yet it also refers to a “previous agreement.” Another concept of “verification” is also defined. In the Real-Time Data NOPR, the defined terms “affirmation,” “execution,” “execution process,” “confirmation” and “confirmation by affirmation” are unclear as to the legal significance of steps prior to or after execution of the swap, and therefore they create uncertainty as to when a reporting obligation is triggered.
2. What data is reported? Several terms used in the definitions in this Data NOPR without further definition make the concept of what swap transaction data must be reported difficult to understand: see the definitions of “swap creation data,” “confirmation data,” “required swap continuation data,” “state data.” In the Real-Time Data NOPR, other terms are used: “primary economic term,” “all of the terms of a swap,” “complete swap terms,” “economic terms.” It is important that a reporting party know exactly when its reporting obligation arises and how it must be fulfilled, i.e., what data elements to report in respect of which swap transaction event, and to which registered entity the data elements must be reported.

#### E. TIMING OF SWAP TRANSACTION DATA REPORTING

We concur with Section III of the EEI/EPISA Letter that the reporting deadlines for swap transaction data listed are far too short if the reporting party is a non-financial entity. As this Data NOPR acknowledges at 76,593, transactions for which a non-SD/MSP counterparty is the reporting party are more likely to be neither electronically executed nor electronically “verified.” At the potential triggering event(s) for reporting, such swaps are likely to require manual intervention to assess and extract reportable data elements from a lengthy, customized, non-cleared end-user-to-end-user swap. Time must be allowed for accurate and verified input of the data elements into an electronic interface for reporting to a registered entity. The potential for inadvertent errors would be high, and, as the EEI/EPISA Letter points out, the market transparency benefits of such hurried data reporting would be minimal. The majority of the NFP Electric End Users have neither the systems nor the staff to meet such regulatory reporting deadlines.<sup>22</sup> If the Commission nonetheless imposes such requirements, the NFP Electric End Users request an extended implementation period for phase in of such requirements.

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<sup>22</sup> This comment reflects the diversity of the NFP Electric End Users’ commercial enterprises, assets and use of “swaps” to manage the commercial risks of their public service activities. Larger NFP Electric End Users, with more sophisticated financial reporting systems and fewer customized swaps, may be able to meet these deadlines. It will be more difficult for smaller NFP Electric End Users or those who engage in fewer or more customized swaps (which will be the greater in number, per capita, of NFP Electric End Users, although the lesser in

F. THE COMMISSION'S RULES SHOULD BE CLEAR AND CONSISTENT WITH RESPECT TO WHEN AND WHAT DATA (IN ADDITION TO SWAP TRANSACTION DATA) THE REPORTING PARTY MUST REPORT

Once a swap is executed and reported to a registered entity (or to the Commission), the reporting party's obligation in respect of reporting that swap's "swap transaction data" is fulfilled. For any additional or "post-swap transaction reporting," the NFP Electric End Users agree with the Data NOPR's choice in Proposed Rule 45.3(b)(2) of a "state" or "snapshot" approach to reporting, rather than a "life cycle" or "event flow" approach. This is our general Theme #2.

1. *In addition to reporting swap transaction data, any "state" reports (post-swap transaction reporting) for those swaps required of a reporting party should be at regular time intervals.* We concur with Section IV of the EEI/EPISA Letter that reporting of "state" data about swap by non-SD/MSP counterparties, as required by Proposed Rule 45.3(b)(2), should *not* be daily. However, we disagree that the frequency of "state" data reporting should be tied to any measure other than the passage of time. The concept that a non-SD/MSP counterparty would report a "change" in a reportable swap is consistent with the "life cycle" approach to data reporting, whereas the Proposed Rules in Part 45 provide that Energy Commodity Swaps will be reported in accordance with the "state" or "snapshot" approach. The way in which "a change" in a reportable Energy Commodity Swap appears to the reviewer of a "state" report is that the data elements attributed to that Unique Swap Identifier are different than the data elements that were attributed to that Unique Swap Identifier in the immediately prior "state" report.

After the time a swap is executed (and swap transaction data elements including price, have been reported to a registered entity, and linked to the Unique Swap Identifier), the reporting party reports, periodically, the "state data" attributable to the portfolio of these Unique Swap Identifiers. The reporting party does not keep track of post-transaction events during the "life cycle" of such reportable swaps for purposes of reporting to the Commission.

G. "STATE DATA" REPORTING BY A NON-SD/MSP COUNTERPARTY ABOUT NON-CLEARED SWAP FOR WHICH IT IS THE REPORTING PARTY SHOULD NOT BE REQUIRED DAILY

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volumetric quantity of swaps). Also, see footnote 4. This comment (and the NFP Electric End Users' ability to comply with such electronic reporting requirements and electronic reporting deadlines) will need to be reassessed, and we reserve the right to submit additional comments once the Commission's definition of "swap" is finalized. The broader the definition of "swap," the more difficulty non-SD/MSP counterparties such as NFP Electric End Users will have in complying with electronic reporting deadlines.

For state data reporting purposes, the Commission should not require non-SD/MSP counterparties which are not financial entities to report more frequently than quarterly. As the EEI/EPISA Letter describes in Section IV, given the relatively small number of swaps for which non-SD/MSP counterparties will be the reporting party, and the likely customized nature of these swaps, less frequent reporting should not have a significant affect on either market transparency or the ability of the Commission to monitor the swap market. Non-SD/MSP counterparties (especially those who are not financial entities) are not highly interconnected (see Section ID) and therefore represent less systemic risk.<sup>23</sup> Therefore, reducing the reporting burdens on these entities should not affect the regulators' ability to monitor either swaps or systemic risk. In order to preserve the ability of the NFP Electric End Users to hedge commercial risk, quarterly post-transaction "state" reporting requirements should be another aspect of a "CFTC-lite" registration, recordkeeping and reporting protocol. See Diagram #2.

H. THERE IS NO STATUTORY BASIS FOR REQUIRING NON-SD/MSP COUNTERPARTIES TO REPORT "VALUATION DATA" TO THE COMMISSION

We concur with Section IV of the EEI/EPISA Letter that there is no statutory basis in the Act for Proposed Rule 45.3(b) to require non-SD/MSP counterparties to report "valuation data," especially for those non-SD/MSP counterparties that are not financial entities.

I. FOR ANY ASSET CLASS OR SWAP PRODUCT TYPE, ONE SET OF DATA ELEMENTS AND ONE SET OF ELECTRONIC REPORTING PROTOCOLS MUST APPLY.

We concur with Section V of the EEI/EPISA Letter that reporting parties must be able to comply with one set of data reporting protocols for non-cleared swaps regardless of whether one or more swap data repositories accepts swap transaction data or "state" data reports for a particular swap asset class or product type. As we recommend in Section IIG of our comments to the Real-Time Data NOPR, we support the idea of Commission workshops with energy industry stakeholders, swap data repositories and experienced vendors to develop a standardized taxonomy and a standardized electronic interface.

J. THE COMMISSION SHOULD ALLOW NON-SD/MSP COUNTERPARTIES MAXIMUM FLEXIBILITY ON HOW THEY FULFILL SWAP TRANSACTION DATA REPORTING OBLIGATIONS

We concur with Section VI of the EEI/EPISA letter that the Commission should allow non-SD/MSP counterparties maximum flexibility in fulfilling their reporting obligations, through third party facilitators, agents, affiliates or otherwise. Since many, if not most, of the NFP Electric End Users do not currently have the financial markets reporting systems or staff

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<sup>23</sup> Opening Statement of Chairman Gary Gensler, at December 1, 2010 Open Commission Meeting.



available to meet these new regulatory obligations, the flexibility to report in the most cost efficient way is important.

**III. ALL COMMENT PERIODS SHOULD REMAIN OPEN UNTIL ALL THE BASIC RULES UNDER TITLE VII OF THE DODD-FRANK ACT HAVE BEEN PROMULGATED. THEREAFTER, ONCE THE RULES ARE FINALIZED, THE COMMISSION SHOULD PROVIDE EXTENDED TRANSITION PERIODS TAILORED TO THE NEEDS OF END USERS IN THE DIVERSE MARKETS FOR DIFFERENT CATEGORIES, CLASSES AND TYPES OF SWAPS USED AS COMMERCIAL RISK MANAGEMENT TOOLS**

The coalition urges the Commission to hold open the comment periods on all initial rules being promulgated under the Act, to enable various industries such as the energy industry, and various types of market participants in the diverse markets for swaps, to consider the regulations and the corresponding definitions as a whole. The rules are complex and interconnected, and create a new market structure within which end users will need to conduct their commercial enterprises and hedge their commercial risks.

In the case of the markets for Energy Commodity Swaps, the new market structure will need to be integrated with the existing regulatory structures within which the energy end users currently conduct their commercial enterprises. Once the rules are finalized, energy end users will need substantial time to analyze their operations and install new systems, staffing and operating procedures and protocols to adapt to the new market structure, while continuing to seamlessly deliver reliable and affordable electricity to American consumers and businesses and comply with their existing regulatory and corporate recordkeeping and reporting requirements. We urge the Commission to allow time for comprehensive review of the new market structure prior to making the complex new rules effective, and transition times that are adequate for end users to adapt their commercial enterprises to the new market structure and regulatory protocols.

**IV. THE COMMISSION MUST CONSIDER THE OVERALL IMPACT OF ITS RULES PROMULGATED UNDER THE ACT ON SMALL ENTITIES**

The Coalition's members include many "small entities" as that term is defined in the Small Business Regulatory Flexibility Act. 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). 13 C.F.R. §121.201, n.1. Each of the complex and interrelated regulations currently being proposed by the Commission has both an individual, and a cumulative, affect on such small entities. Whether a particular proposed regulation is required by the Act, or is proposed pursuant to the Commission's "interpretation" of the Act (such as the Real-Time Data NOPR), or is proposed pursuant to "implicit" authority or "to provide guidance and clarity" for the Commission's jurisdiction under the Act (see the Second Interim Final Rule, 75 Fed Reg. 78,892, issued December 17, 2010, at 75,893), the Commission rule-makings under the Act constitute an accumulation of interrelated regulatory burdens and costs on non-financial small entities like the NFP Electric End Users, who seek to transact in Energy Commodity Swaps only to hedge the commercial risks of their not-for-profit public service activities. The NFP Electric End Users reserve their rights as small entities to assess the full impact of the initial rule-makings

being promulgated by the Commission under the Act, and to require a SBREFA analysis be conducted with respect to those regulations as a whole.

In each of its ongoing rule-makings, the Commission acknowledges that it has no experience under the new requirements of the Act in regulating the swaps markets or market participants such as the NFP Electric End Users. Each Proposed Rule addresses a different piece of the Commission's overall rule-making challenge under the Act. The Commission's cost-benefit analysis in each release includes assumptions about the number of non-cleared "swaps," the number of "swap dealers" and major swap participants," the number of "financial entities," the number of annual transactions, the number of end-user-to-end-user transactions, the number of calculations, valuations and disclosures, and what information the Commission needs about the non-cleared swaps markets or each non-cleared swap transaction or each market participant. The NFP Electric End Users reserve the right to dispute all these assumptions, and request that the Commission fulfill its statutory requirements under SBREFA to provide economic data showing that the aggregate costs and cumulative regulatory burdens imposed on such small entities by the initial rule-makings to implement the Act are necessary, and that there are no alternatives to achieving the regulatory goals that would impose fewer burdens and less costs on the NFP Electric End Users and energy consumers.

## **V. CONCLUSION**

The Coalition encourages the Commission to consider the perspective of end users of "swaps" at every step of its regulatory rule-making process under the Act, and to ask whether its rules are clear to those who are not financial entities and not regular participants in the financial markets. We respectfully request that, as the Commission drafts its rules, it carefully consider the questions of and consequences to those who operate commercial enterprises and are drawn into this new regulatory environment only because of the Act's broad statutory language could be interpreted to redefine traditional commercial contracts as "commodities" or as "swaps." And we respectfully request that only the minimum, necessary regulatory burdens and costs be applied to non-financial entities participating in the markets as "end users" hedging commercial risk. Each new direct or indirect cost or regulatory recordkeeping or reporting requirements will result, dollar for dollar, in higher costs to the NFP Electric End Users' customers and owners -- approximately 87 million consumers of electric energy.

We stand ready to help the Commission understand our businesses, our industry and our markets, our transaction and documentation, and how our not-for-profit members use Energy Commodity Swaps to hedge the commercial risks inherent in their public service activities. Please contact any of the Coalition's representatives for information or assistance.

David Stawick, Secretary  
February 7, 2011  
Signature Page

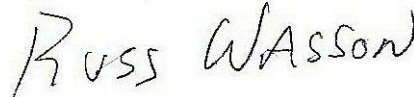
**REPORTING OF  
SWAP TRANSACTION DATA**

Respectfully yours,

**THE "NOT-FOR-PROFIT ELECTRIC 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

**LARGE PUBLIC POWER COUNCIL**

By:

\_\_\_\_\_  
Noreen Roche-Carter  
Chair, Tax & 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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**REPORTING OF  
SWAP TRANSACTION DATA**

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**Copy of Comment Letter on Reporting NOPR, Real-Time Reporting of Swap  
Transaction Data NOPR**

See Attached.



**REAL-TIME PUBLIC REPORTING OF  
SWAP TRANSACTION DATA  
RIN 3038-AD08**

February 7, 2011

David Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20581

**Re: Comments on Notice of Proposed Rulemaking on Real-Time Public Reporting of Swap Transaction Data, under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (17 CFR Part 43)**

Dear Mr. Stawick:

The trade associations comprising the “Not-For-Profit Electric End User Coalition” (the “Coalition”)<sup>1</sup> respectfully submit these comments to the Commodity Futures Trading Commission (the “Commission”) on the **Real-Time Public Reporting of Swap Transaction Data**, issued December 7, 2010 (“this NOPR” or “the Real-Time Data NOPR”).<sup>2</sup> In addition, the Coalition has submitted comments today on the Commission’s notice of proposed rulemaking on “Swap Data Recordkeeping and Reporting Requirements” (75 Fed. Reg. 76,573 Dec. 8, 2010) (the “Data NOPR”). These two NOPRs address many of the same topics on data reporting, and each proposes rules that are difficult if not impossible to reconcile with the other

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<sup>1</sup> The National Rural Electric Cooperative Association, the American Public Power Association and the Large Public Power Council (see Section I for a description of the members of each such trade association). The comments contained in this filing represent the comments and recommendations of the organizations comprising the “Coalition,” but not necessarily the views of any particular member with respect to any issue.

<sup>2</sup> 75 Fed. Reg. 76,139 (Dec. 7, 2010), errata 75 Fed. Reg. 76,930 (Dec. 10, 2010).

NOPR. Therefore, we are also submitting these comments as an attachment to our comment letter on the Data NOPR, and we have attached to this comment letter a copy of our comment letter on the Data NOPR. **We recommend reading the comment letter on the Data NOPR first.**

The Coalition's members are commercial enterprises, not financial entities and not swap dealers or major swap participants. Our members engage in swaps only to mitigate or hedge commercial risks that arise in the course of their public service activities. Therefore, our comments focus on the aspects of the Proposed Rules under Part 45 (in the Data NOPR) that would require an "end user"<sup>3</sup> of non-cleared "swaps,"<sup>4</sup> of a type that the NFP Electric End Users define as "Energy Commodity Swaps"<sup>5</sup> to retain records in respect of that swap and, if the end

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<sup>3</sup> This term is not defined in the Act, but is used to describe an entity which is not a "financial entity," which utilizes swaps to hedge or mitigate commercial risk and notifies the Commission how it generally meets its financial obligations associated with entering into non-cleared swaps. CEA 2(h)(7)(A). Such an "end user" may except a "swap" to which it is a party from the clearing requirements of the Commodity Exchange Act, as amended by the Act (the "CEA"). In the Data NOPR, the Commission defines a category of swap party that is "non-SD/MSP counterparty," which encompasses both "end users" and financial entities which are not swap dealers or major swap participants. NFP Electric End Users are both "non-SD/MSP counterparties" and non-financial entities, and the NFP Electric End Users anticipate utilizing the "end user exception" in respect of all Energy Commodity Swaps to which they are parties. Therefore, the NFP Electric End Users are a prototype for the proposed "end user only" classification of "non-SD/MSP counterparties" (see Section IIA2 below).

<sup>4</sup> We have footnoted this term, and direct the reader to the comment letter submitted by the Not-For-Profit Energy End User Coalition dated September 20, 2010, submitted in response to the Commission's "Definitions ANOPR," and in particular to the comments on the definition of "swap" in that letter. A link to such comment letter is available at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26217&SearchText>. The comments herein 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. We use the term "non-cleared" in this comment letter, rather than "uncleared," so that our comments to the Commission on different rulemakings on identical concepts are consistent. The Act, and the CEA as amended by the Act, use the terms interchangeably. We respectfully request that the Commission confirm, for the sake of clarity, that the terms are synonyms.

<sup>5</sup>We use the term "Energy Commodity Swaps" to mean (a) those non-cleared swaps referencing or derived on energy commodities in which the NFP Electric End Users transact in the ordinary course of their core public service activities, such as electric energy, natural gas, and other fuels for electric generation, including coal and fuel oil (but excluding oil, gasoline or petroleum products -- these commodities are not germane to the NFP Electric End Users' public service activities, and the markets for these commodities and related derivatives are

user acts as the “reporting party” for the swap, **to report data in respect of that swap** to a “registered entity.” Our comments on the Real-Time Data NOPR focus on the aspects of the Proposed Rules under Part 43 that would require an end user which acts as the reporting counterparty to a non-cleared Energy Commodity Swap **to report data in respect of that swap** to a registered entity “in real time.” We respectfully request that the Commission accept, in our comments, three major themes:

First, the subject matter of the two NOPRs overlaps -- in requiring a reporting party to a swap **to report data in respect of a swap**. We believe that the flow chart attached to the two comment letters as “Diagram #1” gives an overview of what the Act requires of a reporting party in terms of reporting swap transaction data in respect of a swap. We believe that, for a non-cleared swap, that reporting obligation triggers once, when a swap is “executed” between the parties. If a reporting obligation is intended to be triggered more than once for a non-cleared swap, the rules should be clear as to what that second trigger is. And, at one or both triggering events, it should be clear what data elements are to be reported. Where our comments on the two NOPRs address Theme #1, we will try to highlight that Theme #1. We respectfully request the Commission to reconcile the definitions, triggering events, and swap transaction data element reporting requirements used in the two NOPRs. The reporting party to a swap must have regulatory certainty as to what event triggers a reporting obligation, and what swap transaction data elements need to then be reported. The reporting party cannot otherwise report swap transaction data in a timely manner, much less “in real time” (for purposes of the Real-Time Data NOPR).

Second, we agree with the approach taken in the Data NOPR that any data reporting required of a reporting party after the initial obligation should be periodic “state” or “snapshot” reporting for Energy Commodity Swaps. We understand that this form of reporting is applicable to each non-SD/MSP counterparty which is a reporting entity for one or more Energy Commodity Swaps during the life of the swap. Periodic “state” data reporting is, conceptually, a “snapshot” of the data elements of the relevant (previously reported) Energy Commodity Swaps in the reporting party’s portfolio. However, there are many places in the Proposed Rules in Parts 43 and 45 which would impose reporting requirements that are conceptually relevant only to a “life cycle” or “event flow” approach to reporting. These reporting obligations “follow the swap” rather than take snapshots of the reporting party’s outstanding reportable swaps portfolio. As the Commission notes in the Data NOPR at page 76,583, the reporting requirements must

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distinguishable from the markets in which the NFP Electric End Users participate), (b) those non-cleared swaps referencing or derived on transmission, transportation, generation capacity or storage concepts or services related to the energy commodities described in (a), and (c) those non-cleared swaps referencing or derived on environmental or emissions regulations, or renewable energy or other environmental attributes, applicable to the NFP Electric End Users. All of these “Energy Commodity Swaps” reference or are derived on “nonfinancial commodities,” are intrinsically related to our members’ core public service activities, and many are subject to the continuing jurisdiction of regulators other than the Commission.

adopt either a “state” reporting approach or a “life cycle” reporting approach, and not both. It is the same data and each reporting party must design and implement its reporting (and recordkeeping) systems for a swap asset class based on one of these two distinct approaches, not both. We respectfully request that all references to “life cycle” reporting obligations in the two NOPRs be made clearly applicable only to those swap asset classes (credit and equity) to which the “life cycle” reporting approach applies.

Third, we have proposed in our comments on the Data NOPR, a “CFTC-lite” method of registration, recordkeeping and reporting for non-SD/MSP counterparties that we believe will accomplish what the Act requires, and fulfill the Commission’s need for data to monitor the markets. We have used the concept in our comments on the Real-Time Data NOPR as well. We respectfully request that the Commission consider such an approach -- to recognize the differing burdens and costs being imposed by its new regulatory structure on non-SD/MSP counterparties which are “end users only” like the NFP Electric End Users. As Congress and Chairman Gensler have recognized, “end users” are not professional financial market participants. They have other commercial and public service priorities. They are not financial institutions that are interconnected and represent systemic risk. This “CFTC-lite” method of regulation will preserve access to the swap markets for end users hedging commercial risk, and not subject such end users to a “one-size-fits-all” regulatory scheme as if the end user were a financial institution, a swap dealer, a major swap participant or even a hedge fund which may want full access to all swap asset classes in the global swap market. The Commission should lower barriers to entry and preserve access for end users, and structure its regulation and costs of compliance to limit the burdens on end users.

As the Commission (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 its Proposed Rules will impact the commercial enterprises that are “end users” of commodities and swaps. These are not financial entities, and they have not previously been regulated by the Commission. On the day after the effective date of the Act, each of these end users will still have a commercial enterprise to run, commercial risks to manage and, for the NFP Electric End Users, retail energy customers to serve.

The Act was intended by Congress to regulate the financial markets more effectively, to provide regulatory oversight to financial entities and to reduce risk to the financial system. It was also intended to bring more transparency to the swaps markets. We fully support these policy objectives. However, the regulations must tell commercial enterprises which of their ongoing activities will now be regulated by the Commission and how to comply with the Commission’s new rules. The regulations should not impose unnecessary new regulatory costs and burdens on these non-financial commercial enterprises.

## **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”).<sup>6</sup> 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 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

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<sup>6</sup> 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 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.



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 ("SBREFA"). 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). Only four distribution cooperatives and approximately 28 G&Ts do not meet the definition. The RFA incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA"). The SBA's small business size regulations state that entities which provide electric services are "small entities" if their total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. 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 "small entities" under SBREFA.

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, AS ARE THE "MARKETS" IN WHICH THEY TRANSACT AND THE TRANSACTIONS IN WHICH THEY ENGAGE

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. 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 the Commission's regulation as "swaps" (even among those who are "end users" of energy and energy-related commodities and 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 gains or losses on an NFP Electric End User's energy transactions result in higher or lower 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. 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 focus on reliability of service and regulated rates payable by the

retail customer. In addition, the electric industry in North America (including the NFP Electric End Users) is 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 Dodd-Frank 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.

Some of the NFP Electric End Users’ energy transactions are conducted through, “on,” or “in” the “markets” operated by various regional transmission organizations or independent system operators (collectively, “RTOs”). Each RTO operates its “market” in a defined geographic area of the United States, and all RTOs operate under a comprehensive regulatory structure established by the Federal Energy Regulatory Commission (“FERC”). The FERC-regulated markets are established by tariff in many instances, rather than by contract, and analogies between these FERC-created/FERC-regulated “markets,” and the bilateral contract markets between independent and arm’s length third parties, are inapt. Although in some ways, the markets conducted by the various RTOs are similar in structure, no two RTO markets are exactly alike and their “products” or “transactions” are not fungible between RTOs. Each RTO also has in place credit risk mitigation policies and procedures to protect market participants from credit risk from other market participants, and to protect the RTO markets from disruption due to market participant default. These RTO credit risk mitigation policies are established and maintained in accordance with the principles established by FERC.<sup>7</sup>

FERC’s mandate from Congress under the Federal Power Act is to regulate in the “public interest” -- which is interpreted as the delivery of reliable electric energy 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 RTO markets are intrinsically tied to the reliable physical transmission and ultimate delivery of electric energy in interstate commerce at just and reasonable rates.

Most of the Energy Commodity Swaps in which the NFP Electric End Users are engaged are currently conducted under exemptions or exclusions from the Commodity Exchange Act (the “CEA”), whether conducted in the bilateral OTC contract market (as most are, including RTO transactions) or on exempt commercial markets. The participants in these markets are “eligible contract participants” either by virtue of their size and financial characteristics, or by virtue of their use of underlying cash commodities relevant to their businesses (as “eligible commercial entities”). Other than a few large industrial companies, retail energy consumers generally 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.

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<sup>7</sup> Such policies were recently updated by FERC in its Final Rule on Credit Reforms in Organized Wholesale Electric Markets, 18 CFR Part 35, Docket No. RM10-13-000, Order No. 741 (issued October 21, 2010).

NFP Electric End Users primarily engage in non-cleared, “end-user-to-end-user” Energy Commodity Swaps. Counterparties for these Energy Commodity Swaps are typically the NFP Electric End Users’ traditional commercial (physical energy commodity) counterparties, rather than financial entities (whether financial intermediaries or financial institutions) from whom the NFP Electric End Users secure financing. In the markets for Energy Commodity Swaps, an end user may be a buyer one day and a seller the next, as its seasonal commercial needs for one or more energy commodities fluctuate. And the end user may be a buyer of one type of energy commodity or derivative, and a seller of another type of energy commodity or derivative. In the markets for Energy Commodity Swaps, a single energy company may buy natural gas swaps and sell electric energy swaps for the same month. Or it may buy natural gas swaps for one month and sell natural gas swaps for the next month. Most energy companies’ commercial risks are geography-specific and seasonal, and risk management decisions are made based on developing long-term weather forecasts, and generation availability and/or load projections. Some energy companies hedge multiple commodity risks, such as an electric utility hedging the commercial risks of its input (natural gas as fuel) and output (electric generation/deliverable electric energy). Cross-commodity hedging is also commonplace. There is no “sell-side/buy-side” dichotomy in the non-cleared Energy Commodity Swap market, and there are often no financial intermediaries -- many non-financial entities play multiple commercial end user roles.<sup>8</sup>

The transactions contain customized, non-quantitative operating conditions, transmission or transportation contingencies, and operating risk allocations that one would expect between commercial businesses. Although some legal and administrative terms are standardized through the use of master agreements, the negotiated schedules to such master agreement and individual transaction confirmations are highly negotiated and differ based on the needs and preferences of each pair of contract counterparties. These are commercial transactions, when viewed through the traditional lens of “goods” and “services” used by American businesses. It is only when the transactions are viewed through the financial markets lens that these transactions are described using the financial market regulatory labels such as “exempt commodities,” “swap agreements,” “swaps” or “nonfinancial commodities” -- and analogized to “futures contracts” or “positions” created or engaged in by financial entities on a transaction-by-transaction basis for profit or speculation, and potentially subject to regulation traditionally applicable to such financial market professionals.

Credit risk management in the bilateral contract world of non-cleared Energy Commodity Swaps is grounded in broad-based, continuing and reciprocal credit risk analysis and credit risk management between each set of counterparties, backstopped by credit support and collateralization principles. This type of credit risk management is not analogous to the transaction-by-transaction margining (without regard to counterparty identity) that takes place in today’s CFTC-regulated futures and options markets.

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<sup>8</sup> Please let us know if the NFP Electric End Users can provide the Commission with further information on this unique aspect of the markets for Energy Commodity Swaps.

The NFP Electric End Users currently have the risk management choice to conduct some Energy Commodity Swap transactions on CFTC-regulated contract markets, or to clear some of these transactions through CFTC-regulated centralized clearing entities. CFTC-regulated exchanges have only recently begun to list these types of contracts; and central clearing entities have only recently begun to clear energy transactions. Listed and cleared transactions are typically those delivered at “hubs,” in tradable increments and for tradable durations -- transactions or “products” that are “standardized” and “fungible” in financial market terms, and with sufficient contract trading liquidity to allow for financial markets to function. As the CFTC-regulated financial markets have evolved, some of the larger NFP Electric End Users have chosen to manage certain of their commercial risks using exchange-traded and cleared instruments. But the vast majority of NFP Electric End Users’ commercial commodity transactions and Energy Commodity Swaps are still conducted “the old fashioned way”: under tariffs within the public power and cooperative systems or by contract with known and reliable physical commodity suppliers and customers, and not with CFTC-regulated financial intermediaries or on exchanges or with clearing entities. And the vast majority of NFP Electric End Users do not either post collateral to their counterparties or require that their counterparties post collateral to them.<sup>9</sup>

Due to the Dodd-Frank Act’s wholesale deletion of applicable exemptions in the CEA, and the potentially sweeping nature of the Dodd-Frank Act’s new definitions, these everyday business transactions of the NFP Electric End Users are at some risk of being redefined as “swaps.” Although Congress has repeatedly indicated that its intention was NOT to reduce risk management options for end users or to impose new regulatory costs on end users hedging the risks of traditional commercial enterprises, Congress is relying on the regulators to implement understandable rules consistent with that intent. Congress did not intend for the regulators to read the expansive language of the Dodd-Frank Act without regard to legislative intent or to

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<sup>9</sup> For examples of the diversity of credit support and collateral (or “margin”) relationships which the NFP Electric End Users have in place with their Energy Commodity Swap counterparties, as well as the diversity of assets, load (customers served within the utility’s geographic service territory), energy hedging and risk management policies, and swap usage within the coalition’s membership, see the profiles attached to the NFP Electric End Users’ comment letter to the Capital and Margin Task Force, dated December 14, 2010 (a link to such comment letter is [http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfs submission/dfs submission5\\_121410-0017.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfs submission/dfs submission5_121410-0017.pdf)). None of these profiles purport to be “typical” of large, medium or small NFP Electric End Users (by number of customers). No NFP Electric End User is typical, given their diverse commercial profiles. However, the Commission’s regulations have to work for all NFP Electric End Users who share the identical public service mission.



regulate and impose costs on end users as if they were financial entities or professional financial market participants.<sup>10</sup>

## II. GENERAL COMMENTS<sup>11</sup>

Our comments on the Data NOPR provide a foundation for the comments herein. See general Theme #1. We therefore recommend that the reader review the Data NOPR comment letter first. In it, we describe many of the overlapping and inconsistent ways in which Part 45 (in the Data NOPR) and Part 43 (in this Real-Time Data NOPR) describe the data reporting obligations of a non-SD/MSP counterparty which executes a non-cleared swap and acts as the reporting party for such swap. As we recommended in footnote 20 of our comment letter to the Data NOPR, we respectfully recommend that the Commission publish for comment a single revised NOPR, with a single set of proposed data reporting requirements applicable to non-SD/MSP counterparties which may be reporting parties to a non-cleared swap.

### A. CONGRESS DID NOT IMPOSE A REAL TIME REPORTING REQUIREMENTS APPLICABLE TO ALL SWAPS

The NFP Electric End Users concur with the statutory interpretation comments in Section IA of the EEI/EPISA Letter on this pivotal issue with respect to “real-time” data reporting provisions in Proposed Part 43. See Diagram #1. We also agree with the policy analysis in Section IB of the EEI/EPISA Letter. The coalition urges the Commission to carefully comply with the language of CEA 2(a)(13)(C)(i), along with the language of CEA 2(h)(1) and CEA 2(h)(2)(d). The statute does not require, nor did Congress intend, the Commission to impose broad brush “real time” reporting obligations on counterparties to “all swaps.” The Act anticipates data reporting requirements for all swaps and, *where appropriate*, “real-time” reporting requirements. But the statute recognizes that there will be some non-cleared swaps

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<sup>10</sup> The Commission should not, in its rule-making under the Act, be distracted by those commentators who intone or invoke the names “AIG” or “Enron,” without analysis. In fact, neither AIG nor Enron would be entitled to the end user exception under the CEA as amended by the Act, and neither would be exempt from margin requirements applicable to cleared swaps by clearing entities. AIG, whose substantial positions in non-cleared credit default swaps allegedly endangered the financial system, would be registered and regulated as an MSP in credit default swaps. Enron, with its notorious “one-to-many” electronic interface offering to buy or sell swaps from energy to broadband, is the poster child for the Act’s definition of “swap dealer,” and would be registered and regulated as such. The NFP Electric End Users, and other end users hedging commercial risk with Energy Commodity Swaps and other types of non-cleared swaps, simply do not represent the types of systemic risk that the mere mention of those entities’ names implies.

<sup>11</sup>The coalition has reviewed the comments submitted in this docket by the Edison Electric Institute and the Electric Power Supply Association (the “EEI/EPISA Letter”) and we will concur by reference to Sections of that EEI/EPISA Letter, rather than restating the comments.

that, because the swap is not required to be cleared and the parties have not chosen to clear through a derivatives clearing organization, will fall outside the scope of the real-time reporting provisions in CEA 2(a)(13)(C). For those swaps, the reporting obligations on the “reporting party” to the swap are in CEA Section 4r(l). And the word “real time” does not appear in that provision of the Act. This careful reading of Section 2(a)(13) of the Act is confirmed by CEA 2(a)(13)(F), which provides that: the “[p]arties to a swap (including agents of the parties to a swap) shall be responsible for reporting swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission (emphasis added).” The Commission should focus on what the statute requires of parties to all swaps -- reporting. But, in doing so, the Commission should not jump to the conclusion that the statute requires “real time reporting” of all swaps. To do so would impose unnecessary and costly burdens on the NFP Electric End Users and other non-SD/MSP counterparties to customized, non-cleared Energy Commodity Swaps.<sup>12</sup>

#### B. CONGRESS ALLOWED A REPORTING PARTY TO FULFILL ITS REPORTING OBLIGATIONS BY SUBMITTING A SWAP FOR CLEARING

The NFP Electric End Users also strongly disagree with the Commission’s footnote 16 in the Real-Time Data NOPR, which inexplicably reads the words “derivatives clearing organization” out of the statutory definition of “registered entity” in CEA 1a(40). The footnote seems to be a further extrapolation of the Real-Time Data NOPR’s incorrect assumption that the Act requires “real time reporting” for “all swaps” (see Section IIA above)<sup>13</sup>. The Commission’s disregard of the clear language of the definition compounds the confusion in the two NOPRs, and places further unnecessary reporting obligations, costs and potential liabilities on non-

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<sup>12</sup> See footnote 4. Note that, if the Commission’s definition of “swap” is not clarified to exclude or exempt commercial energy and energy-related transactions in which the NFP Electric End Users engage every day, such as physical forwards, commercial options, transmission, transportation, generation capacity and other energy services transactions, we reserve the right to submit additional, revised comments on the two NOPRs and to dispute the ability of the NFP Electric End Users, as “non-SD/MSP counterparties,” to comply with any of these Proposed Rules requiring electronic reporting in respect of their commercial energy and energy-related transactions.

<sup>13</sup> Footnote 16 in the Real-Time Data NOPR makes yet another unsupported assumption - that, for a non-cleared swap executed bilaterally (not on a designated contract market or a swap execution facility), considerable time might elapse before the parties submit the swap for clearing. In the over-the-counter Energy Commodity Swap markets in which the NFP Electric End Users transact, the decision to clear is typically made simultaneously with swap execution, or very shortly thereafter. There is not a lengthy process of “presenting a swap to a clearing organization,” as seems to concern the Commission in footnote 16. The decision to clear or not to clear is part of pricing/credit risk determination that is possible in the non-cleared swap market due to the fact that the counterparties know each other’s identity (and the parties’ reciprocal credit risks) prior to executing a swap.

SD/MSP counterparties to non-cleared swaps. By contrast, the definition of “registered entity” in the Act, when read together with CEA Section 2(a)(13)(F) -- see the underlined language quoted in Section IIA above -- provides that, if the parties decide to clear a swap, submission of the swap to the derivatives clearing organization (a “registered entity”) fulfills the reporting obligation of the swap reporting party.

We recommend that the Commission step back to interpret CEA 2(a)(13) as an integrated whole. The title is “Public availability of swap transaction data,” and it contains the provisions whereby the data, in two steps, gets into the public domain. The purpose of CEA 2(a)(13) is to “enhance price discovery.” This language must be the foundation for the Commission’s rule-making. Section 2(a)(13)(C), the “general rule,” begins by saying that “The Commission is authorized and required to provide by rule *for the public availability of swap transaction and pricing data* as follows:” Elsewhere in the Act, and in the Data NOPR, the words “swap transaction data” are used in place of the underlined words in CEA 2(a)(13)(C). We encourage the Commission to read the statutory language in context, and to envision a two step process: first, the swap transaction data is reported by the reporting party to a “registered entity” (or to the Commission if a swap data repository is unavailable -- see CEA 4r(a)(1)). Thereafter, in a second step, the Commission “*may* require registered entities to publicly disseminate the swap transaction and pricing data required to be reported [(by swap parties)] under this paragraph.” See CEA 2(a)(13)(D) and the flow chart in our attached Diagram #1. The Act does not anticipate that the swap parties would be directly responsible for public dissemination of the swap transaction data. As the EEI/EPISA Letter says in Section IB and IIC3, such a regulatory requirement would be unworkable and provide the public with no useful price transparency.

The concept that the swap party’s “timely reporting” obligation is fulfilled by clearing with a derivatives clearing organization as a “registered entity” is also consistent with concepts elsewhere in the Act and in the Data NOPR. Swaps are deemed “reported” by the parties by executing on a designated contract market or a swap execution facility, or by submitting to a derivatives clearing organization. That is where the swap is given its Unique Swap Identifier. Non-cleared swaps -- if not executed on a swap execution facility -- are reported to a swap data repository, another “registered entity,” or to the Commission. All reporting obligations of the parties to a swap are fulfilled by reporting to a registered entity (or to the Commission) in a timely manner.

The combination of these two misinterpretations of the statute results in Proposed Rule 43 containing a number of new concepts -- which do not appear in the Data NOPR or in other Proposed Rules applicable to non-SD/MSP counterparties to non-cleared swaps: definitions such as “off-facility swaps” and “swap markets,” provisions contemplating “third party service providers” that are “real time price disseminators” on behalf of swap markets and swap parties, and other inconsistent provisions as to where or to whom a swap party must report. These are unnecessary complications to an already complex process, and are simply not required by the Act.



C. CONGRESS DID NOT ANTICIPATE SWAP PARTIES REPORTING TO ENTITIES OTHER THAN SWAP DATA REPOSITORIES OR THE COMMISSION

The NFP Electric End Users disagree with the Real-Time Data NOPR's concept that there might be "no swap data repository available to accept data for a swap," and that instead the reporting party to a swap might be required to report an "off-facility swap" (or even a "non-cleared swap") to a "third-party service provider" as a "real-time disseminator" which would make public dissemination of swap data "on behalf of the reporting party." See the Real-Time Data NOPR's proposal in Proposed Rule 43.3(a)(4) and the definition of "Third Party Service Provider." This is directly inconsistent with Proposed Rule 43.3(c)(2), which provides that a swap data repository, if it accepts data for some swaps in a Commission-identified asset class, must accept data for ALL swaps in that asset class. It is also directly inconsistent with CEA 4r(a)(1)(B), which provides that, if there is no swap data repository available, the reporting party reports the swap to the Commission. See CEA 4r(a)(1)(B). The only two circumstances when a swap data repository would be unavailable would be if the Commission chooses to allow a reporting obligation to become effective prior to a swap data repository being registered for the asset class (and all product types within that asset class) within which the swap is categorized, or if the Commission does not require a swap data repository to accept data in respect of all swaps within an asset class. Either of these circumstances is within the Commission's control. These provisions in the Proposed Rules should be revised to be consistent with Proposed Rule 43.3(c)(2) and CEA 4r(a)(l).<sup>14</sup>

D. THE REPORTING PARTY TO A NON-CLEARED SWAP BETWEEN "SD/MSP COUNTERPARTIES" SHOULD HAVE ONE SET OF CLEAR REPORTING OBLIGATIONS FOR SWAP TRANSACTION DATA

We concur with Section II of the EEI/EPISA comment letter for the policy arguments supporting the statutory interpretation discussed in Section IIB above. We also refer the Commission to Section IIE of our comment letter on the Data NOPR specifically on the *timing* of reporting of swap transaction data by non-SD/MSP counterparties as reporting parties. The non-SD/MSP counterparty has the obligation to report "in a timely manner" under CEA 2(a)(13)(F) "as may be prescribed by the Commission." Our comments on the Commission's prescribed manner are in our comments to the Data NOPR. For purposes of this Real-Time Data NOPR, we merely comment that the timely manner should not be synonymous with "real time." That would read CEA 2(a)(13)(F) out of the Act. All references in Part 45 of the Proposed Rules which imply that non-SD/MSP counterparties to non-cleared swaps have an obligation to report

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<sup>14</sup> This Proposed Rule is also entirely impractical -- it would hold a reporting party (which may be an end user -- a commercial enterprise) responsible for a third party service provider's dissemination of swap transaction data to the public. A commercial enterprise has no ability to accomplish such an objective, and no reason to undertake such a responsibility. We concur with Section IIC3 of the EEI/EPISA Letter.

swap transaction data to a registered entity within seconds, minutes, hours or even days, of executing a non-cleared swap should be revised.<sup>15</sup>

#### E. LARGE NOTIONAL ENERGY COMMODITY SWAPS

Once the Commission revises Part 43 to separate the reporting obligations of parties to a non-cleared swap from the public dissemination obligations of a registered entity, we also respectfully request the Commission to revise the provisions of Part 43.5 on reporting of “Large Notional Swaps.” The topic should be addressed separately from the rules for “block trades” in order to comply with CEA 2(a)(13)(C)(iii). Many Large Notional Swaps will be non-cleared swaps and will not be executed on a swap execution facility. The reporting party to the Large Notional Swap will report the swap to a swap data repository. See Diagram #1. When proscribing a swap data repository’s public dissemination obligation in respect of the terms of such non-cleared Large Notional Swaps, the NFP Electric End Users recommend that the Commission take a wholly-different approach than the Commission takes for “block trades.” “Block trades” are executed on designated contract markets or cleared through derivatives clearing organizations. As a result, they can be preserved to contain only standardized, fungible terms.

In keeping with the analysis in Section IIA above as to why “real time reporting” is not required for non-cleared swaps, the non-cleared Large Notional Swap is either not required to be cleared under CEA 2(h)(1) because it is not standardized and does not meet the requirements of CEA 2(h)(2) of “[t]he existence of significant outstanding notional exposures, trading liquidity and adequate pricing data,” or one of the two parties to the swap has exercised the end user exception. In either case, public dissemination of swap transaction data about the non-cleared Large Notional Swap runs the risk of violating the important statutory principle in new CEA Section 2(a)(13)(C)(iii) and CEA Section 8(a)(1).

The Proposed Rules must provide data to the public “in a manner that does not disclose the business transactions and market positions of any person.” Many non-cleared Energy Commodity Swaps are executed between non-SD/MSP counterparties. The swap may be large in notional amount because the counterparty is an electric utility (like the NFP Electric End Users) with a significant public service load obligation in an illiquid geographic location. Or the swap may be large in notional amount because the owner of a large generation unit (some of the NFP Electric End Users own generation, see Section ID) has either a significant need for fuel or

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<sup>15</sup> See footnote 4. Note that, if the Commission’s definition of “swap” is not clarified to exclude or exempt commercial energy and energy-related transactions in which the NFP Electric End Users engage every day, such as physical forwards, commercial options, transmission, transportation, generation capacity and other energy services transactions, we reserve the right to submit additional, revised comments on the two NOPRs and to dispute the ability of the NFP Electric End Users, as “non-SD/MSP counterparties,” to comply with any of these Proposed Rules requiring electronic reporting in respect of their commercial energy and energy-related transactions.

a significant amount of generation to sell -- again, in an illiquid geographic market. Another customized term might disclose transmission contingencies or transportation capacity held by a party. The public dissemination of information about such a non-cleared Large Notional Swap must be carefully structured so as to maintain as confidential the business transactions and market positions of the parties to the swap. See NOPR at 76,151.

For Energy Commodity Swaps in particular, and in illiquid markets for non-cleared swaps in general, data elements which reference geographic information or other customized terms, or data elements containing seasonal information corresponding to a utility's load profile, would reveal a party's identity by designating a generation source or load sink/delivery node. Tenor of a transaction may identify an energy infrastructure project that is being built.<sup>16</sup> For Large Notional Swaps, there are numerous data elements other than quantity (the only element that is important in the block trade analysis) that could compromise the confidentiality of a swap party's identity, and put at risk the non-SD/MSP counterparty's ability to hedge its commercial risk. Part 43.5 should not use the same analysis as may be appropriate for block trades. Protecting counterparty identity in the context of non-cleared Large Notional Swaps will take time and carefully drafted public dissemination rules. Proposed Rule 43.5(k) as it is drafted now presents considerable risk that the identity of one or both parties to a non-cleared Large Notional Swap will be readily apparent to market participants.

F. RESPONSIBILITIES OF THE REPORTING PARTY TO REPORT SWAP TRANSACTION DATA

Proposed Rule 45.3 duplicates provisions in Proposed Rule 43.3. This is our General Theme #1. We respectfully request the Commission to propose for public comment a single, integrated data recordkeeping and reporting rule, once the definition of "swap" has been finalized and other initial rules implementing the Act have been finalized.

G. NEW DEFINED TERMS AND IMPRECISE CONCEPTS IN PROPOSED PART 45 RAISE UNCERTAINTY AS TO INTERPRETATION OF REPORTING REQUIREMENTS, ARE INCONSISTENT WITH PROPOSED RULES IN THE DATA NOPR, AND RAISE CONCEPTS THAT ARE NOT AUTHORIZED IN THE STATUTE

In accordance with our general Theme #2, as well as Sections IIF and IIG of our comment letter on the Data NOPR, we respectfully request that Parts 45 and 43 be revised and reissued for public comment. In particular, there is no statutory basis for requiring "real time"

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<sup>16</sup> This will be even more often the case should the Commission not clarify the definition of "swap" to exclude or exempt physical forward contracts, commercial options, transmission, transportation, generation capacity and other commercial energy or energy-related transactions. We reserve the right to submit additional, revised comments on the two NOPRs and to dispute the ability of the NFP Electric End Users to comply with any of these Proposed Rules requiring electronic reporting in respect of their commercial energy and energy-related transactions.

reporting for post-swap events, and there is no statutory basis for requiring non-SD/MSP counterparties to report valuation data or other post-swap pricing data.

The following are examples of provisions in the two NOPRs that need to be reconciled:

1. Aspects of the defined terms “affirmation,” “execution,” “execution process,” “confirmation” and “confirmation by affirmation” call into question the legal significance of each step in the negotiation of the swap, and therefore also confuse when a reporting party’s reporting obligation is triggered. In the Data NOPR, different terms are defined or used, such as “verification.”
2. Several undefined terms used in the definitions make the Proposed Rules difficult to understand. For example, “primary economic term,” “all of the terms of a swap,” “complete swap terms,” “economic terms.” In the Data NOPR, different terms are defined or contained in definitions: “swap creation data,” “confirmation data,” “required swap continuation data,” and “state data.”
3. The definition of “reportable swap transaction” includes “post-execution events that affect the pricing of a swap.” These are events which occur during the “life cycle” of a swap. Moreover, the way in which the term “reportable swap transaction” is then layered into the Proposed Rules in Part 43 seems to require new, continuing and ambiguous reporting requirements during the “life cycle” of the swap. Proposed Rule 43.4(g) requires reporting of events that affect the pricing of a swap, or “swap specific events.” This is inconsistent with Proposed Rule 45.3(b)(2) (in the Data NOPR).
4. Proposed Rule 43.3(i) contains an ambiguous reference to a recordkeeping obligation for “all data related to a reportable swap transaction.” See Section IIB of our comment letter on the Data NOPR on recordkeeping by non-SD/MSP counterparties.

#### H. APPENDIX A TO PROPOSED PART 43

We concur with Section IIC2 of the EEI/EPSC comment letter that it is premature to comment on either the appropriateness or comprehensiveness of data elements proposed in Appendix A to Proposed Part 43 as applied to Energy Commodity Swaps. The universe of potential data elements and data fields is too large until certain critical definitions are finalized, such as “swap,” “swap dealer” and “major swap participant,” and “nonfinancial commodity,” among others. Data elements and data fields for Energy Commodity Swaps will contain numerous material quantitative and qualitative data elements as described in Section ID above. If the definition of “swap” is not clarified to exclude or exempt physical forwards, commercial

options, physical commodity contracts with “embedded optionality,” tariff regulated products, environmental attributes transactions or other unique energy or energy-related “products,” there will be exponentially more data elements and variations.

We support EEI/EPISA’s suggestion that, once the definitions are finalized, the Commission should convene workshops of market participants and stakeholders to develop the data elements and reporting software applicable to Energy Commodity Swaps markets (and a taxonomy and hierarchy of applicable data fields and data elements). Participants should include swap data repositories registered to accept swap data for Energy Commodity Swaps, and software vendors and technical consultants with significant experience in the electric industry and Energy Commodity Swaps markets. We have offered the same proposal, and our willingness to work with the Commission in such a manner, to the team of CFTC staff members developing data recordkeeping and reporting requirements for “pre-enactment swaps” and “transition swaps.”

#### I. THE COMMISSION’S APPROACH MUST DIFFER FROM THE APPROACH TAKEN BY THE SECURITIES AND EXCHANGE COMMISSION

The Real-Time NOPR asks on p. 76,141 whether, why and how the Commission’s approach to “real-time reporting” should differ from the SEC’s approach. Due to the fundamental differences in the market structures for “swaps” vs. “security-based swaps” (and in particular in the markets for commodity swaps such as Energy Commodity Swaps), and given the importance of the end user exception in the commodity swap markets, the interplay between the physical and financial markets for nonfinancial commodities like Energy Commodity Swaps, and the importance of preserving the ability of non-financial entities to hedge their commercial risks (especially those commercial risks that arise due to the nature of their commercial enterprise activities), it is imperative that the Commission’s approach take these differences into account.

If an important objective of the Commission is to preserve the right of non-financial entities to access the swaps markets for risk management purposes, the Commission should focus on implementing a regulatory regime which keeps the barriers to entry low for non-SD/MSP counterparties that are not financial entities. For that reason, as explained in our comments on this NOPR and the Data NOPR, the Commission should implement a single, clear and understandable “CFTC-lite” form of registration, recordkeeping and reporting for non-SD/MSP counterparties. This is our general Theme #3.

J. THE COMMISSION SHOULD DELEGATE TO THE DIVISION OF MARKET OVERSIGHT THE AUTHORITY TO ACCOMMODATE THE NEEDS AND CHALLENGES OF NON-SD/MSP COUNTERPARTIES, AND THE AUTHORITY TO WAIVE ANY AND ALL REQUIREMENTS AS NECESSARY AND APPROPRIATE, FOR “REAL-TIME” DATA REPORTING BY NON-SD/MSP COUNTERPARTIES

Proposed Rule 45.9(c) is very important to the NFP Electric End Users, who will face significant implementation challenges, significant barriers to entry and continuing participation, and material ongoing costs to comply with the Commission’s data reporting rules. Section IB of the EEI/EPISA Letter describes how the potential burdens to end users from reporting “real-time” data are not justified by any value associated with enhanced price discovery, which is the statutory purpose of real-time reporting. As the EEI/EPISA Letter explains, even if end users were able to report the data the next business day, the information would have no value with respect to price discovery in real-time.

III. ALL COMMENT PERIODS SHOULD REMAIN OPEN UNTIL ALL THE BASIC RULES UNDER TITLE VII OF THE DODD-FRANK ACT HAVE BEEN PROMULGATED. THEREAFTER, ONCE THE RULES ARE FINALIZED, THE COMMISSION SHOULD PROVIDE EXTENDED TRANSITION PERIODS TAILORED TO THE NEEDS OF END USERS IN THE DIVERSE MARKETS FOR DIFFERENT CATEGORIES, CLASSES AND TYPES OF SWAPS USED AS COMMERCIAL RISK MANAGEMENT TOOLS

The coalition urges the Commission to hold open the comment periods on all initial rules being promulgated under the Act, to enable various industries such as the energy industry, and various types of market participants in the diverse markets for swaps, to consider the regulations and the corresponding definitions as a whole. The rules are complex and interconnected, and create a new market structure within which end users will need to conduct their commercial enterprises and hedge their commercial risks.

In the case of the markets for Energy Commodity Swaps, the new market structure will need to be integrated with the existing regulatory structures within which the energy end users currently conduct their commercial enterprises. Once the rules are finalized, energy end users will need substantial time to analyze their operations and install new systems, staffing and operating procedures and protocols to adapt to the new market structure, while continuing to seamlessly deliver reliable and affordable electricity to American consumers and businesses and comply with their existing regulatory and corporate recordkeeping and reporting requirements. We urge the Commission to allow time for comprehensive review of the new market structure prior to making the complex new rules effective, and transition times that are adequate for end users to adapt their commercial enterprises to the new market structure and regulatory protocols.



#### **IV. THE COMMISSION MUST CONSIDER THE OVERALL IMPACT OF ITS RULES PROMULGATED UNDER THE ACT ON SMALL ENTITIES**

The Coalition's members include many "small entities" as that term is defined in the Small Business Regulatory Flexibility Act. 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). 13 C.F.R. §121.201, n.1. Each of the complex and interrelated regulations currently being proposed by the Commission has both an individual, and a cumulative, affect on such small entities. Whether a particular proposed regulation is required by the Act, or is proposed pursuant to the Commission's "interpretation" of the Act, or pursuant to "implicit" authority or "to provide guidance and clarity" for the Commission's jurisdiction under the Act (see the Second Interim Final Rule, 75 Fed Reg. 78,892, issued December 17, 2010, at 75,893), the Commission rule-makings under the Act constitute an accumulation of interrelated regulatory burdens and costs on non-financial small entities like the NFP Electric End Users, who seek to transact in Energy Commodity Swaps only to hedge the commercial risks of their not-for-profit public service activities. The NFP Electric End Users reserve their rights as small entities to assess the full impact of the initial rule-makings being promulgated by the Commission under the Act, and to require a SBREFA analysis be conducted with respect to those regulations as a whole.

In each of its ongoing rule-makings, the Commission acknowledges that it has no experience under the new requirements of the Act in regulating the swaps markets or market participants such as the NFP Electric End Users. Each Proposed Rule addresses a different piece of the Commission's overall rule-making challenge under the Act. The Commission's cost-benefit analysis in each release includes assumptions about the number of non-cleared "swaps," the number of "swap dealers" and major swap participants," the number of "financial entities," the number of annual transactions, the number of end-user-to-end-user transactions, the number of calculations, valuations and disclosures, and what information the Commission needs about the non-cleared swaps markets or each non-cleared swap transaction or each market participant. The NFP Electric End Users reserve the right to dispute all these assumptions, and request that the Commission fulfill its statutory requirements under SBREFA to provide economic data showing that the aggregate costs and cumulative regulatory burdens imposed on such small entities by the initial rule-makings to implement the Act are necessary, and that there are no alternatives to achieving the regulatory goals that would impose fewer burdens and less costs on the NFP Electric End Users and energy consumers.

#### **V. CONCLUSION**

The Coalition encourages the Commission to consider the perspective of end users of "swaps" at every step of its regulatory rule-making process under the Act, and to ask whether its rules are clear to those who are not financial entities and not regular participants in the financial markets. We respectfully request that, as the Commission drafts its rules, it carefully consider the questions of and consequences to those who operate commercial enterprises and are drawn into this new regulatory environment only because of the Act's broad statutory language could be interpreted to redefine traditional commercial contracts as "commodities" or as "swaps." And we respectfully request that only the minimum, necessary regulatory burdens and costs be applied to non-financial entities participating in the markets as "end users" hedging commercial

David Stawick, Secretary

February 7, 2011

Page 21

risk. Each new direct or indirect cost or regulatory recordkeeping or reporting requirements will result, dollar for dollar, in higher costs to the NFP Electric End Users' customers and owners -- approximately 87 million consumers of electric energy.

We stand ready to help the Commission understand our businesses, our industry and our markets, our transaction and documentation, and how our not-for-profit members use Energy Commodity Swaps to hedge the commercial risks inherent in their public service activities. Please contact any of the Coalition's representatives for information or assistance.



David Stawick, Secretary  
February 7, 2011  
Signature Page

**REAL-TIME PUBLIC REPORTING OF  
SWAP TRANSACTION DATA**

Respectfully yours,

**THE "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 & 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

David Stawick, Secretary  
February 7, 2011  
Signature Page

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Honorable Michael Dunn, Commissioner  
Honorable Jill E. Sommers, Commissioner  
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Honorable Scott O'Malia, Commissioner

**Copy of Comment Letter on End-User Exception NOPR**

See Attached.



**END-USER EXCEPTION TO  
MANDATORY CLEARING OF SWAPS  
RIN 3038-AD10**

February 22, 2011

David Stawick, Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20581

**Re: Comments on Notice of Proposed Rulemaking on the End-User Exception to Mandatory Clearing of Swaps, under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”) (17 CFR Part 39)**

Dear Mr. Stawick:

The trade associations comprising the “Not-For-Profit Electric End User Coalition” (the “Coalition”)<sup>1</sup> respectfully submit these comments to the Commodity Futures Trading Commission (the “Commission”) on the **Notice of Proposed Rulemaking on the End-User Exception to Mandatory Clearing of Swaps**, issued December 23, 2010 (the “End-User Exception NOPR”).<sup>2</sup>

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<sup>1</sup> The National Rural Electric Cooperative Association, the American Public Power Association and the Large Public Power Council (see Section I for a description of the members of each such trade association). The comments contained in this filing represent the comments and recommendations of the organizations comprising the “Coalition,” but not necessarily the views of any particular member with respect to any issue.

<sup>2</sup> 75 Fed. Reg. 80,747 (Dec. 23, 2010).

The Coalition's members are commercial enterprises, not swap dealers or major swap participants, and not financial entities. Our members engage in swaps only to mitigate or hedge commercial risks that arise in the course of their public service activities. Therefore, our comments focus on the aspects of the Proposed Rules under Part 39 that would require an "end user"<sup>3</sup> of non-cleared "swaps,"<sup>4</sup> of a type that the NFP Electric End Users define as "Energy Commodity Swaps,"<sup>5</sup> to register and comply with certain **reporting requirements as an entity**

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<sup>3</sup> This term is not defined in the Act, but is used to describe an entity that is not a "financial entity" (so we use the term "non-financial entity"), that utilizes swaps to hedge or mitigate commercial risk, and that notifies the Commission how it generally meets its financial obligations associated with entering into non-cleared swaps. CEA 2(h)(7)(A). Such a non-financial entity may except a "swap" to which it is a party from the clearing requirements of the Commodity Exchange Act, as amended by the Act (the "CEA") pursuant to what is called the "end-user exception." In some of the Proposed Rules published to date for comment, the Commission defines a category of swap party that is "non-SD/MSP counterparty," which encompasses both financial entities that are not swap dealers or major swap participants and non-financial entities. NFP Electric End Users are non-SD/MSP counterparties and non-financial entities, and the NFP Electric End Users anticipate utilizing the end-user exception in respect of all Energy Commodity Swaps to which they are parties. See Diagram #1. Therefore, the NFP Electric End Users will all register with the Commission for the proposed "end user only" sub-classification of "non-SD/MSP counterparties" See our recommendation for a CFTC-lite protocol for non-SD/MSP counterparty registration, recordkeeping and reporting requirements in our second General Theme on page four of this letter, and as more fully described in our comments to the Swap Data NOPRs for which web links are provided at footnote 11.

<sup>4</sup> We have footnoted this term, and direct the reader to the comment letter submitted by the Not-For-Profit Energy End User Coalition dated September 20, 2010, submitted in response to the Commission's August 2010 "Definitions ANOPR," and in particular to the comments on the definition of "swap" in that letter. A web link to such comment letter is available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26217&SearchText>. The comments herein 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. We use the term "non-cleared" in this comment letter, rather than "uncleared," so that our comments to the Commission on different rulemakings on identical concepts are consistent. The Act, and the CEA as amended by the Act, use the terms interchangeably. We respectfully request that the Commission confirm in its regulations, for the sake of clarity, that the terms are synonyms.

<sup>5</sup> We use the term "Energy Commodity Swaps" to mean (a) those non-cleared swaps referencing or derived on energy commodities in which the NFP Electric End Users transact in the ordinary course of their core public service activities, such as electric energy, natural gas, and other fuels for electric generation, including coal and fuel oil (but excluding crude oil, gasoline

in connection with executing swaps, in addition to reporting requirements the non-financial entity might have to report swap transaction data as a “reporting party” if it executes a swap with another non-SD/MSP counterparty. We are focused on preserving the value of the “end-user exception” by streamlining the regulatory reporting burdens and costs for non-financial entities like the NFP Electric End Users in light of three general Themes:

First, experienced risk managers and market participants in the United States electric power and natural gas industry believe that there are now, and will be after the Act becomes effective, more Energy Commodity Swaps executed which do not involve a swap dealer, major swap participant or other financial entity as a party than swaps executed in other categories, classes and types (or asset classes) of swaps.<sup>6</sup> We refer to these swaps as “end-user-to-end-user

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or refined petroleum products other than fuel oil -- these commodities are not germane to the NFP Electric End Users’ public service activities, and the markets for these commodities and related derivatives are distinguishable from the markets in which the NFP Electric End Users participate), (b) those non-cleared swaps referencing or derived on transmission, transportation, generation capacity or storage concepts or services related to the energy commodities described in (a), and (c) those non-cleared swaps referencing or derived on environmental or emissions regulations, or renewable energy or other environmental attributes, applicable to the NFP Electric End Users. All of these “Energy Commodity Swaps” reference or are derived on “nonfinancial commodities,” are intrinsically related to our members’ core public service activities, and many are subject to the continuing jurisdiction of regulators other than the Commission.

<sup>6</sup> In several places in the End-User Exception NOPR (and in other NOPRs issued to date), the Commission assumes that there are only a small number of swap transactions in which no swap dealer to major swap participant plays a role. See the End-User Exception NOPR at footnotes 9-13. See also footnote 18 in the Notice of Proposed Rule-making on Further Definition of Swap Dealer, Major Swap Participant and Eligible Contract Participant, 75 Fed. Reg. 80,174 at 80,180. The Commission’s assumption is based on the Commission’s reliance on two publicly-available, but financial-entity-dominated survey sources on over-the-counter derivatives markets: first, the survey by the International Swaps and Derivatives Association (“ISDA”) of its members, and second, the quarterly surveys by the Office of the Comptroller of the Currency (the “OCC”) of regulated financial institutions. These surveys may reflect comprehensive information about the scope of the global swaps markets **where at least one of the counterparties is a financial entity.** However, ISDA is a trade association comprised primarily of large financial institutions and other financial entities who transact regularly or act as dealers in the global derivatives markets. Only a few United States energy companies, other than major oil companies, are ISDA members. Moreover, in the Energy Commodity Swaps markets, many non-financial entities transact using the ISDA master agreement without being members of the ISDA trade association. In fact, ISDA facilitates this practice by providing physical energy annexes along with other annexes to the ISDA Master Agreement, so counterparties can engage in physical commodity and commodity derivatives transactions (that



swaps.”<sup>7</sup> There will be an even higher percentage of these end-user-to-end-user swaps if the Commission does not clarify its definition of “swap” to exclude or exempt commercial energy and energy-related transactions in which the NFP Electric End Users engage every day: including physical forwards, commercial options and transmission, transportation, capacity or other energy services transactions.<sup>8</sup> For NFP Electric End Users, it is critical that such end-user-to-end-user Energy Commodity Swaps take place with a minimum of new regulatory costs and burdens in order to preserve the value of the end-user exception.

Second, we recommend a “CFTC-lite” method of registration, recordkeeping and reporting for non-SD/MSP counterparties (including non-financial entities) that we believe will accomplish what the Act requires, and fulfill the Commission’s need for data to monitor the markets. We respectfully request that the Commission consider such an approach -- to recognize the differing burdens and costs being imposed by its new regulatory structure on non-SD/MSP counterparties like the NFP Electric End Users. As Congress and Chairman Gensler have recognized,<sup>9</sup> non-financial entities or “end users” are not financial entities, and do not represent the same degree of systemic risk as financial entities. This “CFTC-lite” method of regulation will also preserve access to the swap markets for end users hedging commercial risk. We refer you to Diagram #1, which outlines the CFTC-lite regulatory sub-classifications of the non-SD/MSP counterparty category of swap parties.

Third, to foster commercially efficient non-cleared swap markets consistent with the Commission’s fundamental mission, we recommend the Commission establish a regulatory

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by their terms settle financially) under the same ISDA master agreement. An ISDA survey of its members would not capture many end-user-to-end-user transactions. The OCC surveys reflect the derivatives activities of the financial institutions regulated by the OCC. Therefore, in the case of the OCC surveys, no end-user-to-end-user transactions would be reflected. **As a result, the Commission’s underlying assumption that there are relatively few “end-user-to-end-user swaps” is inaccurate, and it results in a fundamental misunderstanding by the Commission of the markets for Energy Commodity Swaps.** See Section ID beginning on page 8 below for a description of the unique aspects of the Energy Commodity Swaps markets.

<sup>7</sup> We use the term “end-user-to-end-user swaps,” but we also intend to include in this definition swaps that are executed by two non-financial entities, whether or not one or both of the non-financial entities elects the end-user exception.

<sup>8</sup> We reserve the right to submit revised or additional comments on this NOPR once the Commission issues its final rules on the definition of “swap” and other definitions, including “swap dealer” and “major swap participant.”

<sup>9</sup> Testimony of Chairman Gary Gensler before the House Committee on Agriculture, February 10, 2011, available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-68.html>.

reporting regime that minimizes reporting duplication, maximizes the best available source and timing for information capture, and streamlines reporting and public dissemination of swap transaction data to the public. Accordingly, we propose that the Commission clearly define and distinguish in its regulations among those reporting requirements that are appropriate and applicable: (i) to swap participant entities, (ii) to bilateral swap relationships (when a master agreement is executed), and (iii) to swap transactions (those “swap-by-swap” commercial decisions that are only made at the time a swap is executed).

In taking this approach, the Commission can structure its reporting requirements in the manner that does not require a significant change in the way bilateral market participants in the non-cleared swaps market interact today. It is inefficient and unproductive to burden bilateral counterparties engaged in the time-sensitive commercial negotiation of each swap transaction with repetitive and unnecessary representations and information exchanges. Also, there is no benefit or justification to require one counterparty (the “reporting party”) to meet swap-by-swap reporting requirements for entity data elements (for itself and the other counterparty), or for master agreement data elements that were already agreed for the express purpose of governing and representing all the counterparties’ subsequent swap transactions under a master agreement. Such an approach is cumbersome and will result in unnecessary time delays and transaction costs, greater potential for administrative recordkeeping and reporting errors, increased liabilities for reporting parties, and prolonged negotiations of the liability provisions and representations in master agreements.

We refer the Commission to Diagram #2, which gives our recommendation as to the notices, reports and data elements the Commission should require as periodic entity reports to be made directly to a registered entity such as a swap data repository (for use by the Commission), master agreement reports to be made to the swap data repository (as and when master agreements are executed between each pair of registered counterparty entities), and swap transaction data elements appropriate for reports by a reporting party at the time the swap is executed. Our recommendation is consistent with the recommendations we made in our pre-NOPR comment letter to the Commission’s End-User Exception Task Force,<sup>10</sup> and in our comment letters on the two recent Swap Data NOPRs.<sup>11</sup>

As the Commission (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

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<sup>10</sup> A web link to such comment letter, dated November 22, 2010, is [http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission11\\_1122\\_10-email1.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission11_1122_10-email1.pdf).

<sup>11</sup> Web links to such comment letters, each filed February 7, 2011 are <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27623&SearchText> and <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27624&SearchText>.

step along the way how its Proposed Rules will impact the non-financial entities that are “end users” of commodities and swaps, and especially how the Proposed Rules will impact non-financial entities transacting among themselves, without a financial entity such a swap dealer or major swap participant to bear the burdens and costs of the types of reporting obligations to which such financial entities are accustomed. The NFP Electric End Users and other commercial energy companies are not financial entities, and they have not previously been regulated by the Commission. On the day after the effective date of the Act, each of these non-financial entities will still have a commercial enterprise to run, commercial risks to manage and, for the NFP Electric End Users, retail energy customers to serve.

The Act was intended by Congress to regulate the financial markets more effectively, to provide regulatory oversight to financial entities and to reduce risk to the financial system. It was also intended to bring more transparency to the swap markets. We fully support these policy objectives. However, the regulations must tell commercial enterprises which of their ongoing activities will now be regulated by the Commission and how to comply with the Commission’s new rules. The regulations should not impose unnecessary new regulatory costs and burdens on these non-financial commercial enterprises.

## **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”).<sup>12</sup> 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

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<sup>12</sup> 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 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.

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 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.

The vast majority of NRECA's members meet the definition of "small entities" under the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). Only four distribution cooperatives and approximately 28 G&Ts do not meet the definition. SBREFA incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA"). The SBA's small business size regulations state that entities which provide electric services are "small entities" if their total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. 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 "small entities" under SBREFA.

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, AS ARE THE "MARKETS" IN WHICH THEY TRANSACT AND THE TRANSACTIONS IN WHICH THEY ENGAGE

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. 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 the Commission's regulation as "swaps" (even among those who are "end users" of energy and energy-related commodities and swaps) in that the 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 gains or losses on an NFP Electric End User's energy transactions result in higher or lower 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. 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 focus on reliability of service and regulated rates payable by the retail customer. In addition, the electric industry in North America (including the NFP Electric End Users) is 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.

Some of the NFP Electric End Users' energy transactions are conducted through, "on," or "in" the "markets" operated by various regional transmission organizations or independent system operators (collectively, "RTOs"). Each RTO operates its "market" in a defined geographic area of the United States, and all RTOs operate under a comprehensive regulatory structure established by the Federal Energy Regulatory Commission ("FERC"). The FERC-regulated markets are established by tariff in many instances, rather than by contract, and analogies between these FERC-created/FERC-regulated "markets," and the bilateral contract markets between independent and arm's length third parties, are inapt. Although, in some ways, the markets conducted by the various RTOs are similar in structure, no two RTO markets are exactly alike and their "products" or "transactions" are not fungible between RTOs. Each RTO also has in place credit risk mitigation policies and procedures to protect market participants from credit risk from other market participants, and to protect the RTO markets from disruption

due to market participant default. These RTO credit risk mitigation policies are established and maintained in accordance with the principles established by FERC.<sup>13</sup>

FERC's mandate from Congress under the Federal Power Act is to regulate in the "public interest" -- which is interpreted as the delivery of reliable electric energy 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 RTO markets are intrinsically tied to the reliable physical transmission and ultimate delivery of electric energy in interstate commerce at just and reasonable rates.

Most of the Energy Commodity Swaps in which the NFP Electric End Users are engaged are currently conducted under exemptions or exclusions from the Commodity Exchange Act (the "CEA"), whether conducted in the bilateral OTC contract market (as most are, including RTO transactions) or on exempt commercial markets. The participants in these markets are "eligible contract participants" either by virtue of their size and financial characteristics, or by virtue of their use of underlying cash commodities relevant to their businesses (as "eligible commercial entities"). Other than a few large industrial companies, retail energy consumers generally 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.

NFP Electric End Users engage in a substantial number of non-cleared, "end-user-to-end-user" Energy Commodity Swaps.<sup>14</sup> Counterparties for these Energy Commodity Swaps are typically the NFP Electric End Users' traditional commercial (physical energy commodity) counterparties, rather than financial entities (whether financial intermediaries or financial institutions) from whom the NFP Electric End Users secure financing. In the markets for Energy Commodity Swaps, an end user may be a buyer one day and a seller the next, as its seasonal commercial needs for one or more energy commodities fluctuate. And the end user may be a buyer of one type of energy commodity or derivative, and a seller of another type of energy commodity or derivative. In the markets for Energy Commodity Swaps, a single energy company may buy natural gas swaps and sell electric energy swaps for the same month. Or it may buy natural gas swaps for one month and sell natural gas swaps for the next month. Most energy companies' commercial risks are geography-specific and seasonal, and risk management decisions are made based on changing long-term weather forecasts, generation availability and/or load projections. Some energy companies hedge multiple commodity risks, such as an electric

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<sup>13</sup> Such policies were recently updated by FERC in its Final Rule on Credit Reforms in Organized Wholesale Electric Markets, 18 CFR Part 35, Docket No. RM10-13-000, Order No. 741 (issued October 21, 2010).

<sup>14</sup> See footnote 6. There will be an even higher percentage of these end-user-to-end-user swaps if the Commission does not clarify its definition of "swap" to exclude or exempt commercial energy and energy-related transactions in which the NFP Electric End Users engage every day. See footnote 8.



utility hedging the commercial risks of its input (natural gas as fuel) and output (electric generation/deliverable electric energy). Cross-commodity hedging is also commonplace. There is no “sell-side/buy-side” dichotomy in the non-cleared Energy Commodity Swap market, and there are often no financial intermediaries -- many non-financial entities play multiple commercial end user roles.<sup>15</sup>

The transactions contain customized, non-quantitative operating conditions, transmission or transportation contingencies, and operating risk allocations that one would expect between commercial businesses. Although legal and administrative terms are standardized through the use of master agreements, the negotiated schedules to such master agreements and individual transaction confirmations are highly negotiated and differ based on the needs and preferences of each pair of counterparties. These are commercial transactions, when viewed through the traditional lens of “goods” and “services” used by American businesses. It is only when the transactions are viewed through the financial markets lens that these transactions are described using the financial market regulatory labels such as “exempt commodities,” “swap agreements,” “swaps” or “nonfinancial commodities” -- and analogized to “futures contracts” or “positions” created or engaged in by financial entities on a transaction-by-transaction basis for profit or speculation, and potentially subject to regulation traditionally applicable to such financial market transactions.

Credit risk management in the bilateral contract world of non-cleared Energy Commodity Swaps is grounded in broad-based, continuing and reciprocal commercial credit risk analysis and credit risk management between each set of counterparties, backstopped by credit support and collateralization principles. This type of credit risk management is not analogous to the transaction-by-transaction margining (without regard to counterparty identity) that takes place in today’s CFTC-regulated futures and options markets.

Today, the NFP Electric End Users have the commercial risk management choice to conduct some Energy Commodity Swap transactions on CFTC-regulated contract markets, or to clear some of these transactions through CFTC-regulated centralized clearing entities. Listed and cleared transactions are typically those delivered at “hubs,” in tradable increments and for tradable durations -- transactions or “products” that are “standardized” and “fungible” in financial market terms, and with sufficient contract trading liquidity to allow for financial markets to function. As the CFTC-regulated financial markets have evolved, some of the larger NFP Electric End Users have chosen to manage certain of their commercial risks using exchange-traded and cleared instruments. But the vast majority of NFP Electric End Users’ commercial commodity transactions and Energy Commodity Swaps are still conducted “the old fashioned way:” under tariffs within the public power and cooperative systems or by contract with known and reliable physical commodity suppliers and customers, and not with CFTC-regulated financial intermediaries or on exchanges or with clearing entities. And the vast

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<sup>15</sup> Please let us know if the NFP Electric End Users can provide the Commission with further information on this unique aspect of the markets for Energy Commodity Swaps.

majority of NFP Electric End Users do not either post collateral to their counterparties or require that their counterparties post collateral to them.<sup>16</sup>

Due to the Act's wholesale deletion of applicable exemptions in the CEA, and the potentially sweeping nature of the Act's new definitions, these everyday business transactions of the NFP Electric End Users are at some risk of being redefined as "swaps." Although Congress has repeatedly indicated that its intention was NOT to reduce risk management options for end users or to impose new regulatory costs on end users hedging the risks of traditional commercial enterprises, Congress is relying on the regulators to implement understandable rules consistent with that intent. Congress did not intend for the regulators to read the expansive language of the Act without regard to legislative intent or to regulate and impose costs on end users as if they were financial entities or professional financial market participants.<sup>17</sup>

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<sup>16</sup> For examples of the diversity of credit support and collateral (or "margin") relationships which the NFP Electric End Users have in place with their Energy Commodity Swap counterparties, as well as the diversity of assets, load (customers served within the utility's geographic service territory), energy hedging and risk management policies, and swap usage within the coalition's membership, see the profiles attached to the NFP Electric End Users' comment letter to the Capital and Margin Task Force, dated December 14, 2010. Such comment letter can be found at the following link: [http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission5\\_121410-0017.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission5_121410-0017.pdf). None of these profiles purport to be "typical" of large, medium or small NFP Electric End Users (by number of customers). No NFP Electric End User is typical, given their diverse commercial profiles. However, the Commission's regulations have to work for all NFP Electric End Users who share the identical public service mission.

<sup>17</sup> The Commission should not, in its rule-making under the Act, be distracted by those commentators who intone or invoke the names "AIG" or "Enron," without analysis. In fact, neither AIG nor Enron would be entitled to the end-user exception under the CEA as amended by the Act, and neither would be exempt from margin requirements applicable to cleared swaps by clearing entities. AIG, whose substantial positions in non-cleared credit default swaps allegedly endangered the financial system, would be registered and regulated as a "major swap participant" in credit default swaps. Enron, with its notorious "one-to-many" electronic interface offering to buy or sell swaps from energy to broadband, is the poster child for the Act's definition of "swap dealer," and would be registered and regulated as such. The NFP Electric End Users, and other non-financial entities hedging commercial risk with Energy Commodity Swaps and other types of non-cleared swaps, simply do not represent the types of systemic risk that the mere mention of those entities' names implies.

## II. GENERAL COMMENTS<sup>18</sup>

We begin our comments on this NOPR with our general Theme #1: in the markets for Energy Commodity Swaps, there are more “end-user-to-end-user swaps” than in other swap categories or asset classes. Many of the NFP Electric End Users execute a measurable percentage of Energy Commodity Swaps with their traditional physical energy commodity counterparties, in addition to executing such Energy Commodity Swaps with financial institutions or with ISDA members.<sup>19</sup>

In the futures and exchange-traded options markets currently regulated by the Commission (prior to the Act), the Commission required reports of information from regulated market professionals, such as dealers, brokers and other entities regulated by the Commission (colloquially called the “sell-side”), including information about their “customers” (the “buy-side”). In effect, the Commission required the market professionals to gather such information from their customers and report it to the Commission on a transaction-by-transaction basis, because the Commission did not have jurisdiction over the customers to require that information be reported directly to it. And there was always a “sell-side” market professional involved -- that is the way the regulated futures markets are currently structured. In addition, the Commission required the exchanges, the clearing entities and exempt commercial markets (also entities regulated by the Commission) to report information on a transaction-by-transaction basis.

In the market for Energy Commodity Swaps, there is no consistently applicable “sell-side/buy-side” market dichotomy. See Section ID. However, as part of its new jurisdiction over the swap markets, the Commission now has limited jurisdiction over both parties to a non-cleared swap, even if one or both of the parties is a non-financial entity, to the extent the Commission has the authority to monitor the use of the end-user exception. As a result of this new jurisdiction, by using an entity registration system, the Commission can require direct “entity reporting” from non-financial entities which execute swaps.

We respectfully note that many of the “entity” reporting requirements contemplated by the Act are not swap-specific, but are general in nature. The entity data should be reported directly to a registered entity such as a swap data repository, for use by the Commission. Moreover, as we recommended in our comments to the Data NOPRs, we respectfully request

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<sup>18</sup> The coalition has reviewed the comments submitted in this docket by the Edison Electric Institute and the Electric Power Supply Association (the “EEI/EPSA Letter”), and we will concur by reference to Sections of that EEI/EPSA Letter herein as appropriate, rather than restating the comments.

<sup>19</sup> See footnote 6. There will be an even higher percentage of these end-user-to-end-user swaps if the Commission does not clarify its definition of “swap” to exclude or exempt commercial energy and energy-related transactions in which the NFP Electric End Users engage every day. See footnote 8.

that the Commission differentiate between those data elements that can be collected at the time a swap master agreement is executed between two counterparties, rather than burdening the swap-by-swap negotiations and transaction mechanics between those same counterparties with confirming such prior contractual choices. See Diagram #2.

A. THE COMMISSION SHOULD STREAMLINE THE REGULATORY REQUIREMENTS FOR UTILIZING THE END-USER EXCEPTION

End-user-to-end-user Energy Commodity Swaps are not always executed electronically, nor are they always verified electronically, nor are the non-financial entity's recordkeeping and reporting systems similar to those that a financial entity might maintain.<sup>20</sup> If two non-financial entity counterparties execute an Energy Commodity Swap and both claim the end-user exception, one of the two will act as reporting party for the swap. The negotiation and execution of a swap should not require the counterparties to confirm or reconfirm entity data which has previously been submitted by each counterparty directly to a registered entity for use by the Commission. Nor should the parties have to confirm or reconfirm master agreement terms already in place between them and reported to a registered entity for use by the Commission. See our general Theme #3 and Diagram #2.<sup>21</sup>

1. *The Statute Does Not Require Swap-By-Swap Financial Obligation Notices.* Proposed Rule 39.6 requires 10 additional data elements to be reported for each swap in which one of the counterparties claims the end-user exception (12 for a swap where the "end user" counterparty is a public company). If both non-financial entity counterparties are public companies and both elect the end-user exception, that is 24 additional data elements per swap. This cumbersome requirement goes well beyond what the statute requires.
2. *The Commission Should Require Only What the Statute Requires in Terms of Financial Obligation Notices.* We have reviewed Section VA of the EEI/EPSC Letter and we concur with the comments made on this issue. CEA Section 2(h)(7)(A)(iii) requires notice to the CFTC of how a non-financial entity "generally meets its financial obligations associated with non-cleared swaps." For public companies, CEA Section 2(j) requires a public company's Board committee to approve a company's "decision to enter into swaps that are subject to such exemptions [intended to reference the end-user exception in CEA 2(h)]." These entity representations can be made by the non-financial

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<sup>20</sup> See our recommendations for a "CFTC-lite" protocol to registration, recordkeeping and reporting in general Theme #2 and our comments to the Swap Data NOPRs. Web links are provided at footnote 11.

<sup>21</sup> This recommendation is consistent with our recommendations in the comment letters on the Swap Data NOPRs.

entity directly to the swap data repository for use by the Commission, and should not be made and remade, confirmed and reconfirmed between counterparties in the midst of the time-sensitive negotiation of a swap used to hedge commercial risk. We recommend entity representations be made no more frequently than annually, unless there is a change to the information being reported. We provided suggestions on the form and substance of such regulatory Financial Obligation Notices in our pre-NOPR comment letter to the Commission's End-User Exception Task Force, and we refer the Commission to those comments.<sup>22</sup>

Proposed Rules 39.6(b)(5) and (6) would unnecessarily require new contractual representations and warranties between swap counterparties (requiring contract changes to all outstanding master agreements), would require entity data and master agreement data to be unnecessarily exchanged between the counterparties during time-sensitive commercial negotiations, and would require cumbersome swap-by-swap reporting (creating the potential for misunderstandings, potential liability for reporting inaccuracies and delays in reporting swap transaction data). We respectfully comment that all this exchange of data is unnecessary and burdensome, and the Commission should revise its Proposed Rules to streamline the process.<sup>23</sup>

**B. THE COMMISSION SHOULD NOT ESTABLISH UNNECESSARY TRANSACTION HURDLES FOR NON-FINANCIAL ENTITIES HEDGING COMMERCIAL RISK**

For non-financial entities who are not otherwise subject to the Commission's jurisdiction, the technological and administrative details and the incremental costs to engage in "the first" Energy Commodity Swap or "a few" Energy Commodity Swaps after the effective date of the Act should not be an intimidating set of regulatory hurdles. Whether a non-financial entity chooses to engage in one or one thousand Energy Commodity Swaps, the non-financial entity will be required to become familiar with the CEA, register with the Commission (or a swap data repository), enter into new master agreements or modify one or more of its existing master

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<sup>22</sup> See footnote 10 for a web link.

<sup>23</sup> On page 80,750, the NOPR asks whether it will be difficult or "prohibitively expensive" to report the information required by Proposed Rule 39.6. We respectfully suggest that those are not the right questions. Rather, we request the analysis to focus on whether the cumbersome swap-by-swap process is required by the statute, and whether there are not simpler and more effective ways to achieve the regulatory objectives without unnecessary costs. See Section IV below. The Commission asks, on page 80,752 whether the time needed to gather the required information will disrupt the transaction process for swaps to any material extent. The answer from the NFP Electric End Users is "yes." Our focus is on preserving the value of the end-user exception as it was intended by Congress -- as a cost-effective commercial risk management tool.

agreements, and comply with certain periodic notifications, and new recordkeeping and reporting requirements. In addition, if it is the “reporting party” for any swap, at the time the swap is executed, it will have to report swap transaction data and, thereafter for the life of that Energy Commodity Swap, the reporting party will have to report state data in respect of that Energy Commodity Swap.<sup>24</sup>

For NFP Electric End Users, enterprise staffing and administrative processes, and mission-critical information and operating systems, are focused on 24/7 reliable delivery of energy in accordance with public service commitments. The NFP Electric End Users’ swap execution processes are intended to make time-sensitive decisions on material terms of the swap transaction, while at the same time assuring that the swap transaction represents a prudent commercial risk decision in volatile commodity swap markets. Especially for non-financial entities that only occasionally engage in Energy Commodity Swaps, adding dozens of additional, unnecessary negotiation and confirmation items to the swap transaction checklist will be expensive, will delay execution of swaps to hedge commercial risk, and will make Energy Commodity Swaps a less effective commercial risk management tool.

C. THE COMMISSION SHOULD NOT MAKE IT MORE CUMBERSOME TO TRANACT IN NON-CLEARED SWAPS WITH OTHER NON-FINANCIAL ENTITIES THAN WITH FINANCIAL ENTITIES<sup>25</sup>

As discussed in Section ID, the markets for Energy Commodity Swaps in which the NFP Electric End Users participate often do not involve financial market intermediaries. The Act (as implemented by the Commission’s rule-makings) should not make end-user-to-end-user swaps so cumbersome and so costly that non-financial entities are forced to deal with financial intermediaries (and pay the related costs) in order to comply with the new regulatory burdens.<sup>26</sup>

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<sup>24</sup> See Section IIC below.

<sup>25</sup> We have reviewed Section VC of the EEI/EPSCA comment letter, and we concur with the comments on this issue. We provided to the Commission our recommendations on “reasonable time frames for reporting swap information” for end-user-to-end-user swaps, and the “alternatives to automated electronic reporting processes” for such swaps (referenced in the EEI/EPSCA letter in Section VC) in our comments on the Swap Data NOPR, and refer the Commission to our views expressed therein. A web link to that comment letter can be found at footnote 11.

<sup>26</sup> See footnote 6.

D. THE COMMISSION SHOULD CLARIFY THE “CHECK THE BOX” SWAP-BY-SWAP REPRESENTATIONS AS THEY APPLY TO NON-CLEARED SWAPS

If the “Financial Obligation Notices” described in Proposed Rule 39.6 must be reported for each swap, the Commission should clarify the meaning of several of the Proposed Rules including:

1. The Commission is respectfully asked to confirm that, in representing which swaps are secured by collateral, the counterparty should check the box under Proposed Rule 39.6(b)(5)(ii) only if “all or any portion of the financial obligations associated with the reported swap **are secured** by collateral that **has been pledged** . . . to the swap counterparty” at the time the swap is entered into, and that the counterparty should “check the box” under Proposed Rule 39.6(b)(5)(i) only if the obligations associated with the reported swap **are to be secured in the future** by collateral that **is to be, or may in the future be, pledged** . . . to the swap counterparty pursuant to a master agreement or other credit support agreement applicable to the swap. In other words, Proposed Rule 39.6(b)(5)(i) is the appropriate box where the counterparties have in place collateralization arrangements subject to agreed unsecured credit thresholds.
2. If the swap counterparty relationship involves no credit support, no collateral (or collateralization) provisions, and no guaranties -- so none of Proposed Rules 39.6(b)(5)(i)-(iii) apply -- and a non-financial entity does not have **available** assets, lines of credit or other financial resources at the time the swap is executed, but nonetheless “intends to **generally** meet its financial obligations associated with non-cleared **swaps**” by managing its commercial risks prudently, offsetting its obligations under its non-cleared swaps against those commercial risks and, for an NFP Electric End User, passing through its costs and benefits of hedging to its retail energy customers during the time period(s) for which a swap hedges or mitigates commercial risk (pursuant to accepted and allowed energy rate-making processes), the Commission is requested to clarify whether such counterparty should check the box for Proposed Rule 39.6(b)(5)(iv) or for (v). In other words, when must the financial resources be “available” to a non-financial entity to check the box for (iv): at the time the swap is executed, or by the time the swap is expected to settle and hedge or mitigate the commercial risk?

E. SAFE HARBOR FROM MONETARY PENALTIES AND SANCTIONS

On page 80,750, the NOPR, the Commission asks whether the swap-by-swap reporting requirements are clear and what additional instructions should be adopted. If the information required by Proposed Rule 39.6 is required for each swap, the Rules should include safe harbors for reporting parties for administrative and inadvertent reporting errors or delays that have no

material effect on the relevant swap markets, and for any reporting party that relies in good faith on representations made to it by the non-reporting party.

F. BROAD DEFERENCE TO NON-FINANCIAL ENTITIES HEDGING COMMERCIAL RISK

We have reviewed Section VI of the EEI/EP SA Letter filed in this docket, and we concur with the comments on this issue. We are generally supportive of the Commission's definition of "hedging or mitigating commercial risk," and support utilizing the same definition in the end-user exception and elsewhere in the CEA. The Commission should give maximum deference to non-financial entities to determine, at the time a swap is entered into, the "economically appropriate" way to hedge commercial risks facing their enterprises. Risk management issues and practices vary considerably by commercial risk being hedged, by industry, by the size of a commercial enterprise's operations and administrative staff, by number of swaps of a particular class, category or type in which such non-financial entity engages, and by the risk appetite or hedging strategies of the commercial enterprise. The Commission should make it clear in its rules that the commercial risk management decision is made at the time the swap is entered into based on the facts and circumstances known by the non-financial entity at that time. The rules should be clear that the Commission will not second-guess that knowledge, the decision to enter into the swap or the terms of the swap, and should not review such commercial risk management decisions with "20/20 hindsight."

The Commission asks whether "single risk or aggregate risk hedging" or "single entity or consolidated group hedging" is appropriate, whether "industry-specific rules on hedging should apply, or apply only to certain swap categories," and whether "asset optimization" or "dynamic hedging" should be considered appropriate. We encourage the Commission not to be proscriptive about commercial risk management practices for non-financial entities, but to allow non-financial entities to establish and implement commercial risk management principles and procedures economically appropriate to their unique circumstances. Moreover, although evolving industry "best practices" may be aspirational goals, generalized "best practices" cannot be regulatory requirements for all non-financial entities.

The Commission also asks whether special considerations are warranted with respect to the use of non-cleared swaps by non-profit, governmental, or municipal entities engaged in electric power or energy activities. We respectfully request that the Commission clarify in its Proposed Rules that "commercial enterprise" is intended to include (i) a governmental entity (including the United States, a State or a foreign government) and a political subdivision of any such governmental entity, (ii) a multinational or supranational governmental entity, and (iii) an instrumentality, agency or department of any such governmental entity or political subdivision, and (iv) a not-for-profit or tax-exempt entity, including an electric cooperative.

G. AFFILIATE ISSUES

We have reviewed Section VD of the EEI/EP SA Letter, and concur in general with the comments on this issue. The Commission should not limit the ability of non-financial entities to



hedge commercial risks through “affiliated” entities. Moreover, the Commission should clarify in its rules that the defined term “affiliate” or “affiliated” includes the unique ways in which NFP Electric End Users maintain affiliate relationships.

The NFP Electric End Users respectfully request that the Commission clarify in its rules its interpretation of CEA Section 2(h)(7)(D)(i) to allow members of a “Related NFP EEU Group” to act for or on behalf of each other,<sup>27</sup> and to allow affiliated entities of NFP Electric End Users to hedge the NFP Electric End Users’ commercial risks. To understand the NFP Electric End Users’ affiliates, we refer the Commission to ACES Power Marketing, which is wholly-owned by electric cooperatives. ACES Power Marketing acts as agent for its NFP Electric End User member/owners in executing risk management transactions in the physical energy commodity, energy futures and Energy Commodity Swaps markets. We also refer the Commission to The Energy Authority, which is owned by public power entities and, as its regular business, it executes physical energy commodity, futures and Energy Commodity Swaps for and on behalf of NFP Electric End Users. Both ACES Power Marketing and The Energy Authority are “affiliates” of NFP Electric End Users (they are principally owned by NFP Electric End Users). The Commission’s rules should provide that affiliated entities such as ACES Power Marketing and The Energy Authority should be able to utilize the end-user exception for the NFP Electric End User on whose behalf the affiliated entity is acting. In the end-user exception rules, the word “affiliate” or “affiliated entity” shall mean any member of a Related NFP EEU Group or any entity principally owned by NFP Electric End Users.<sup>28</sup>

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<sup>27</sup> We use the term “Related NFP EEU Group” to describe the unique “federated systems” of NFP Electric End Users discussed in Section I. For example, some electric cooperatives which provide electric service to their members/consumers, and some municipal or other governmental entities providing electric utility services to their constituents, are also “members” (for cooperatives) or “participants” (for governmental entities) in larger NFP Energy End Users entities. For example, an electric “distribution cooperative” may also be a member of a “generation and transmission cooperative (a G&T cooperative).” Or, a municipal electric utility may also be a participant in a “joint action agency” or a “joint power authority.” NFP Electric End Users also act as members of joint project entities, established to build or operate large energy infrastructure projects, or as co-owners or operators of such infrastructure assets, without an intervening project entity. These groups of related NFP Energy End Users (“Related NFP EEU Groups”) are **not** analogous to corporate affiliates, families of affiliated investment funds or limited partnerships, or other affiliated groups of independent for-profit entities. What binds a Related NFP EEU Group together is a shared public service commitment to providing reliable and affordable electric service to consumers and businesses in their respective service territories.

<sup>28</sup> NRECA has reviewed the comment letter submitted by the National Rural Utilities Cooperative Finance Corporation (“CFC”) in this docket and concurs with the comments made by CFC in such letter. As NFP Electric End Users and member-owners of CFC, the rural electric

**III. ALL COMMENT PERIODS SHOULD REMAIN OPEN UNTIL ALL THE BASIC RULES UNDER TITLE VII OF THE DODD-FRANK ACT HAVE BEEN PROMULGATED. THEREAFTER, ONCE THE RULES ARE FINALIZED, THE COMMISSION SHOULD PROVIDE EXTENDED TRANSITION PERIODS TAILORED TO THE NEEDS OF NON-FINANCIAL ENTITIES IN THE DIVERSE MARKETS FOR DIFFERENT CATEGORIES, CLASSES AND TYPES OF SWAPS USED AS COMMERCIAL RISK MANAGEMENT TOOLS**

The coalition urges the Commission to hold open the comment periods on all initial rules being promulgated under the Act, to enable various industries such as the energy industry, and various types of market participants in the diverse markets for swaps, to consider the regulations and the corresponding definitions as a whole. The rules are complex and interconnected, and create a new market structure within which non-financial entities will need to conduct their commercial enterprises and hedge their commercial risks. The Coalition appreciates the Chairman's recent statement that the Commission has established a "31st rulemaking team" (in addition to the 30 task forces originally established by the Commission to draft rules under the Act), whose sole task is to review the regulations under the CEA as a whole, in light of the changes to the CEA made by the Act.<sup>29</sup> We look forward to working with this new team to provide the perspective of the non-financial entity "end user" of non-cleared swaps -- a type of entity over which the Commission, prior to the Act, did not have jurisdiction in many respects. In reviewing the existing regulations, as well as in the current rule-makings, we encourage the Commission to assure that its rules, taken as a whole, are clear, consistent and understandable to entities like the NFP Electric End Users.

In the case of the markets for Energy Commodity Swaps, the new market structure will need to be integrated with the existing regulatory structures within which the energy companies currently conduct their commercial enterprises. Once the rules are finalized, the NFP Electric End Users will need substantial time to analyze their operations and install new systems, staffing and operating procedures and protocols to adapt to the new market structure, while continuing to

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cooperatives rely on CFC for access to the non-governmental capital markets. All of the swaps that CFC uses to hedge its risks also serve to hedge the NFP Electric End Users' commercial risks by allowing CFC to provide NRECA members the long-term financing for energy infrastructure development projects. We respectfully request that the Commission clarify in its rules that, for purposes of the end-user exception, an "affiliate" of the NFP Electric End Users includes a non-profit, tax-exempt cooperative of which NFP Electric End Users are members, and which is not a depository institution. In order to provide regulatory certainty, the Commission must confirm in the rules that a cooperative entity such as CFC can elect the end-user exception for swaps used to hedge or mitigate commercial risk.

<sup>29</sup> Testimony of Chairman Gary Gensler before the House Committee on Agriculture, February 10, 2011, available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-68.html>.

seamlessly deliver reliable and affordable electricity to American consumers and businesses and comply with their existing regulatory and corporate recordkeeping and reporting requirements. We urge the Commission to allow time for comprehensive review of the new market structure prior to making the complex new rules effective, and transition times that are adequate for non-financial entities to adapt their commercial enterprises to the new market structure and regulatory protocols.<sup>30</sup>

#### **IV. THE COMMISSION MUST CONSIDER THE OVERALL IMPACT OF ITS RULES PROMULGATED UNDER THE ACT ON SMALL ENTITIES**

The Coalition's members include many "small entities" as that term is defined in the Small Business Regulatory Flexibility Act. 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996). 13 C.F.R. §121.201, n.1. Each of the complex and interrelated regulations currently being proposed by the Commission has both an individual, and a cumulative, affect on such small entities. Whether a particular proposed regulation is required by the Act, or is proposed pursuant to the Commission's "interpretation" of the Act (such as the Real-Time Data NOPR), or is proposed pursuant to "implicit" authority or "to provide guidance and clarity" for the Commission's jurisdiction under the Act (see the Second Interim Final Rule, 75 Fed. Reg. 78,892, issued December 17, 2010, at 75,893), the Commission rule-makings under the Act constitute an accumulation of interrelated regulatory burdens and costs on non-financial small entities like the NFP Electric End Users, who seek to transact in Energy Commodity Swaps only to hedge the commercial risks of their not-for-profit public service activities. The NFP Electric End Users reserve their rights as small entities to assess the full impact of the initial rule-makings being promulgated by the Commission under the Act, and to require a SBREFA analysis be conducted with respect to those regulations as a whole.

In each of its ongoing rule-makings, the Commission acknowledges that it has no experience under the new requirements of the Act in regulating the swaps markets or non-financial entity market participants such as the NFP Electric End Users. Each Proposed Rule addresses a different piece of the Commission's overall rule-making challenge under the Act. The Commission's cost-benefit analysis in each NOPR includes assumptions about the number of non-cleared "swaps," the number of "swap dealers" and major swap participants," the number of "financial entities," the number of annual transactions, the number of end-user-to-end-user transactions, the number of calculations, valuations and disclosures, and what information the Commission needs about the non-cleared swaps markets or each non-cleared swap transaction or each market participant. The NFP Electric End Users reserve the right to dispute all these assumptions, and request that the Commission fulfill its statutory requirements under SBREFA

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<sup>30</sup> We have reviewed Section VII of the EEI/EPSCA Letter filed in this docket, and we concur with the comments on this issue. We recommend that longer transition periods be allowed for those non-financial entities, like the NFP Electric End Users, that expect to elect the end-user exception for all of their swaps, and that have no independent resources from which to pay the cost of the new regulatory market structure.

to provide economic data showing that the aggregate costs and cumulative regulatory burdens imposed on such small entities by the initial rule-makings to implement the Act are necessary, and that there are no alternatives to achieving the regulatory goals that would impose fewer burdens and less costs on the NFP Electric End Users and energy consumers.

## V. CONCLUSION

The Coalition encourages the Commission to consider the perspective of non-financial entities using swaps to hedge commercial risk at every step of its regulatory rule-making process under the Act, and to ask whether its rules are clear to those who are not regular participants in the financial markets. We respectfully request that, as the Commission drafts its rules, it carefully consider the questions of and consequences to those who operate commercial enterprises and are drawn into this new regulatory environment only because of the Act's broad statutory language could be interpreted to redefine traditional commercial contracts as "commodities" or as "swaps." And we respectfully request that only the minimum, necessary regulatory burdens and costs be applied to non-financial entities participating in the markets as "end users" hedging commercial risk. Each new direct or indirect cost or regulatory recordkeeping or reporting requirements will result, dollar for dollar, in higher costs to the NFP Electric End Users' customers and owners -- approximately 87 million consumers of electric energy.

We stand ready to help the Commission understand our businesses, our industry and our markets, our transactions and documentation, and how our not-for-profit members use Energy Commodity Swaps to hedge the commercial risks inherent in their public service activities. Please contact any of the Coalition's representatives for information or assistance.

David Stawick, Secretary  
February 22, 2011  
Signature Page

**END-USER EXCEPTION TO  
MANDATORY CLEARING OF SWAPS**

Respectfully yours,

**THE "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 & 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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