



PRE-ENACTMENT SWAP COLLECTION

March 14, 2011

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

Re: Comments on Agency Information Collection Activities: Proposed Collection, Comment Request: Reporting of Pre-Enactment Swap Transactions, under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”)

Dear Mr. Stawick:

The trade associations comprising the “Not-For-Profit Electric End User Coalition” (the “Coalition”)¹ respectfully submit these comments to the Commodity Futures Trading Commission (the “Commission”) in response to the **Agency Information Collection Activities:**

¹ The National Rural Electric Cooperative Association, the American Public Power Association and the Large Public Power Council. 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. The Coalition is grateful to the following organizations that are active in the legislative and regulatory policy arena in support of the NFP Electric End users, and that have provided considerable assistance and support in developing these comments. The Coalition is authorized to note to the Commission the involvement of these organizations, and to indicate their full support of these comments and recommendations: the Transmission Access Policy Study Group (an association of transmission dependent electric utilities located in more than 30 states), ACES Power Marketing and The Energy Authority.

Proposed Collection, Comment Request: Reporting of Pre-Enactment Swap Transactions, issued January 11, 2011 (the “Comment Request”).²

The Coalition’s members are the not-for-profit, consumer-owned electric utilities in the United States (collectively, the “NFP Electric End Users”) that provide reliable electric energy to retail electric consumer/customers as a public service every hour of the day and every season of the year. The NFP Electric End Users hedge their commodity and other commercial risks using energy and energy-related commodity and derivatives transactions to keep electric energy costs low and supply predictable, while practicing good environmental stewardship.³ Our members are commercial enterprises, not swap dealers or major swap participants, and not financial entities. Prior to the Act, our members’ hedging transactions -- other than those conducted on CFTC-regulated designated contract markets or on exempt commercial markets (or cleared by derivatives clearing organizations) -- were excluded or exempt from the Commission’s jurisdiction under the Commodity Exchange Act (the “CEA”).

Our members engage in commercial energy commodity and derivatives transactions that may or may not be considered “swaps”⁴ under the Act of a type that the NFP Electric End Users

² 76 Fed. Reg. 1603 (January 11, 2011). The Comment Request deals burdens imposed on respondents by the Commission’s Interim Final Rule on Data Recordkeeping and Reporting, issued October 14, 2010 (75 Fed. Reg. 63,080) (the “Interim Final Rule”). The Coalition submitted comments on the Interim Final Rule on November 15, 2010 (the “IFR Comment Letter”). A copy of that IFR Comment Letter is attached hereto for convenience of reference.

³ See Section I of the IFR Comment Letter referenced in footnote 2 above for a further description of the NFP Electric End Users.

⁴ We have footnoted this term, and direct the reader to the comment letter submitted by the Not-For-Profit Energy End User Coalition 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>. We have requested the Commission to further define the term “swap” to exclude or exempt commercial energy and energy-related transactions in which the NFP Electric End Users engage every day, including forward contracts on nonfinancial commodities which by their terms settle physically, commercial options on nonfinancial commodities, and transmission, transportation, capacity, emissions, renewable energy credits and similar nonfinancial energy commodity transactions. In other comment letters, we have requested the Commission to clarify that commercial energy and energy-related transactions between and among the NFP Electric End Users and certain of their unique affiliated entities are not to be regulated or reported under the Commission’s new Proposed Rules. We reserve the right to change or expand our comments, or submit additional comments, once the Commission’s final rules in respect of the definition of “swap” and final rules in respect of affiliated transactions are published.

define as “Energy Commodity Swaps.”⁵ Our members engage in such transactions only to mitigate or hedge the commercial risks that arise in the course of their public service activities.

We submitted comments on the Commission’s “Definitions ANOPR,” and in particular on the need for the Commission to further define the term “swap,” on September 20, 2010.⁶ We submitted the IFR Comment Letter on November 15, 2010, explaining the burdens imposed on our members by the Interim Final Rule and the “interpretive note” therein requiring collection of information and retention of records related to pre-enactment “swaps.” In the IFR Comment Letter, we asked the Commission to clarify the information collection and records retention provisions of the Interim Final Rule in a number of specific ways to reduce those burdens and to provide our members with regulatory certainty.

In response to the Comment Request, we respectfully refer the Commission to our IFR Comment Letter. The Coalition is on record with respect to the burdens imposed on the NFP Electric End Users and similarly situated non-financial entities as a result of the Act and the Interim Final Rule. In the IFR Comment Letter, we made recommendations as to how the Commission could more clearly identify the information to be collected and the records to be retained, in an effort to make the language of the Interim Final Rule plain, coherent, unambiguous and understandable for our members, who are to comply with the Interim Final Rule. Many of our members do not maintain all the information to be collected and records to be retained in an electronic format. Those NFP Electric End Users who do keep some of the information in electronic format(s) may retain such records in a format or formats designed to meet internal or governance board financial reporting requirements or applicable periodic energy regulatory reporting requirements. These formats may or may not be compatible with those

⁵ 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.

⁶ See footnote 4 above.

maintained by financial entities, and may be dispersed throughout the commercial enterprise. Other information to be collected or records to be retained are likely in various paper files.

The NFP Electric End Users engage in commercial energy commodity and derivatives transactions with their traditional physical commodity counterparties, such as other electric utilities (both not-for-profit and investor-owned), merchant energy companies, natural gas producers and energy marketers active in the NFP Electric End Users' geographic service territories. As we have commented in response to other Commission rule-makings, many of our transactions are "end-user-to-end-user,"⁷ and do not involve financial entities either as counterparties or as intermediaries. Our members' commercial energy commodity transactions are often long-term and highly customized, with commercial credit risk management terms rather than financial markets "mark-to-market" daily cash margining provisions. The variations and permutations of primary economic terms in these commercial energy commodity transactions are myriad.⁸ Most of our members do not collect and retain the material economic terms of their commercial energy commodity transactions in an electronic format that comports with the Commission's requirements of financial markets professionals and intermediaries in terms of format and accessible electronic media.

⁷ 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. 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 4 above.

⁸ For further information about our members' Energy Commodity Swap transactions, see our comment letter dated February 22, 2011 on the End-User Exception NOPR (75 Fed. Reg. 80,747, December 23, 2010). A web link is provided at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27916&SearchText>.

I. THE COMMISSION'S ESTIMATES OF THE REGULATORY BURDENS IMPOSED BY THE INTERIM FINAL RULE ARE UNDERSTATED. A RESPONSIBLE ANALYSIS OF THE REGULATORY BURDEN CANNOT BE MADE WITHOUT CONSIDERING THE NUMBER AND DIVERSITY OF RESPONDENTS, INCLUDING NONFINANCIAL ENTITIES (AND SMALL ENTITIES) LIKE THE NFP ELECTRIC END USERS⁹

We dispute the Commission's "burden" statement in the Comment Request, including (a) the estimated number of respondents (which the Commission estimates at 1800), and (b) the estimated "burden" per respondent (which the Commission estimates at .5 hour per respondent).

A. THE ESTIMATED NUMBER OF RESPONDENTS (COMMISSION ESTIMATE - 1800)

The Commission cites its estimate of respondents as 1800, without attributing the source or basis for such estimate. There are approximately 2900 NFP Electric End Users, each of which engages routinely in power supply and/or fuel supply transactions that may or may not fall within the definition of "swap."¹⁰ Our 2900 members are merely a subset of those nonfinancial entity respondents who engage in Energy Commodity Swaps. And that number does not include potential nonfinancial entity respondents that may engage in other asset classes, categories or type of "swaps," from commodity swaps based on jet fuel or agricultural commodities to interest rate and currency swaps.

⁹ We share the concerns expressed in the letter, dated March 11, 2011, from the Chairman of the House Committee on Agriculture and the Chairman of the House Subcommittee on General Farm Commodities and Risk Management to the Inspector General of the Commission (the "Congress/IG Letter") on the importance of a responsible cost-benefit analysis of each and all of the rules and proposed rules promulgated under the Act by the Commission. In particular, we are focused on the responses to "factors" 4 and 5 cited in the Congress/IG Letter:

"...4.) The extent to which the CFTC has evaluated and distinguished the costs and benefits of proposed regulations on market participants of diverse sizes and from diverse sectors . . . , [and]

5.) The extent to which the CFTC gives special consideration to evaluating the costs and benefits for small businesses; . . ."

¹⁰ See footnote 4 above.

B. THE ESTIMATED BURDEN PER RESPONDENT (COMMISSION ESTIMATE
- 0.5 HOURS PER RESPONDENT)

The Commission cites its estimated burden per respondent as a half an hour, again without attributing the source or basis for such estimate or considering the diversity of size, complexity and experience with the CEA of the respondents it considered. Each of the NFP Electric End Users structures its commercial operations differently, but power supply, and transmission operations and fuel supply, if applicable,¹¹ are likely to be separate departments. Each NFP Electric End User evaluates its unique commercial risks, and then decides to hedge or mitigate those commercial risks using commodity and derivatives transactions in unique ways.¹² Each NFP Electric End User currently maintains business records in a manner and format that are suitable for commercial governance and applicable energy regulatory purposes, but may not resemble at all the way a financial institution keeps records. The NFP Electric End Users are just one example of one type of commercial enterprise that may face the “burden” of complying with the Interim Final Rule (and the other rules being proposed and promulgated pursuant to the Act).

The “burden” to be measured is not just how long it would take each respondent to send out a single records retention memo to one or all of its employees. Our members have not previously been subject to the Commission’s jurisdiction. Each must review and understand the Act and the CEA to understand why the Commission has jurisdiction over “pre-enactment

¹¹ Some NFP Electric End Users do not have transmission operations or require fuel supply as they do not own electric generation or transmission assets.

¹² At some NFP Electric End Users, separate departments may be charged with evaluating the ongoing market risk of energy commodity and derivatives markets, and other departments may evaluate the credit risk of contract counterparties. Still other departments may manage environmental risks, or execute natural gas or coal transportation contracts, or manage the NFP Electric End User’s capacity obligations in support of reliability of the electric grid. Still other departments in the organization may manage interest rate and currency risk to which the commercial enterprise is subject (executing interest rate or currency “swaps”). For examples of the diversity of assets, load (customers served within the utility’s geographic service territory), energy hedging and risk management policies, and energy commodity and derivatives usage by NFP Electric End Users, as well as 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, 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. 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.

swaps,” and over NFP Electric End Users as entities. Each NFP Electric End User must review the Interim Final Rule and understand how and why it may apply to their commercial enterprise, and to which departments or operations. Each must interpret the Interim Final Rule and translate it into terms that are relevant to the electric utility industry and to others within its commercial enterprise. As the NFP Electric End Users have said since September 2010, this is particularly difficult since there is, as yet, no guidance from the Commission on a further definition of “swap.” Finally, each NFP Electric End User must respond to questions from employees, collect information and review the information collected, from many different parts of the commercial enterprise, and put in place procedures to retain such records in a good faith effort to comply. We respectfully comment that this regulatory burden is far more than a half hour for each NFP Electric End User.

Moreover, if, at some future date, the Commission requires the collected information and retained records to be submitted to a swap data repository or to the Commission, the burden will be significantly higher. The burden to collect and retain records will only be a first step should the Commission require any manipulation, compilation or interpretation of the paper and electronic data records in order for the collected information to have practical utility to the Commission.¹³

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 burden the non-financial entities that are “end users” of commodities and swaps and that were not previously subject to the Commission’s jurisdiction. 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 in plain, coherent and unambiguous terminology what information must be collected and what records must be retained. And the regulators must perform a complete and thorough cost/benefit analysis, with an evaluation and explanation by the Commission as to whether the information collected and retained will have practical utility for accomplishing the Commission’s regulatory mission. If

¹³ Although we understand that this Comment Request is focused narrowly on the burden imposed on respondents by the Interim Final Rule to collect information and retain records in existing formats, we respectfully note that collecting and retaining the information is just one facet of the burden of this one rule and all the Commission’s proposed and final rules to be analyzed under the Paperwork Reduction Act and the Small Business Regulatory Flexibility Act (see part II).

the burden required for collection of information and records retention is analyzed in the abstract, regardless of whether the information has any practical utility in terms of the Commission's regulatory objectives, then each dollar and each hour of the burden on nonfinancial entities is an unnecessary and wasteful burden, with no correlation to a measurable regulatory purpose or benefit.

II. 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 ("SBREFA").¹⁴ Each of the complex and interrelated regulations currently being proposed by the Commission (and the final rules being promulgated, such as the Interim Final Rule) has both **an individual, and a cumulative, effect** 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. The NFP Electric End Users reserve their rights as small entities to assess the full burden of the initial rule-makings being promulgated by the Commission under the Act, and to require a comprehensive Paperwork Reduction Act and 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 and Interim Final 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 respondents, the number of "swaps,"¹⁵ 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 the PRA and SBREFA to provide economic data showing that the aggregate costs and cumulative

¹⁴ See Section I of the IFR Comment Letter for a further description of the NFP Electric End Users.

¹⁵ See the comment letter referenced in footnote 4 above.

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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.

III. 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 whose transactions were, prior to the Act, exempt or excluded from CFTC jurisdiction and who are not regular participants in the financial markets. And we respectfully request that only the minimum, necessary regulatory burdens and costs be imposed on non-financial entities participating in the markets as “end users” hedging commercial risk. Each new direct or indirect cost or regulatory burden 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
March 14, 2011
Signature Page

PRE-ENACTMENT SWAP COLLECTION

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
March 14, 2011
Signature Page

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Respectfully yours,

**THE "NOT-FOR-PROFIT ELECTRIC END USER
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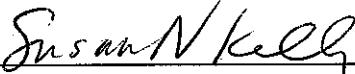
**NATIONAL RURAL ELECTRIC
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Noreen Roche-Carter
Chair, Tax & Finance Task Force

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

IFR COMMENT LETTER DATED NOVEMBER 15, 2010

(See Attached)



INTERIM FINAL RULE

November 15, 2010

David Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
Email: peswapreport@cftc.gov and via CFTC website protocol

Re: Comments on Interim Final Rule on Data Recordkeeping and Reporting under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (17 CFR Part 44)

Dear Mr. Stawick:

The trade associations comprising the “Not-For-Profit Electric End User Coalition” (the “Coalition”) respectfully submit these comments to the Commodity Futures Trading Commission (the “CFTC”) on the Interim Final Rule on Data Recordkeeping and Reporting, issued October 14, 2010 under Title VII of the “Dodd-Frank Wall Street Reform and Consumer Protection Act.”¹ Because the comments on the Interim Final Rule are also relevant to the CFTC’s Task Force XVII (the “Data Recordkeeping and Reporting Task Force”) established as part of the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”), we are also submitting these comments to such Data Recordkeeping and Reporting Task Force.

¹ 75 Fed. Reg. 63,080 (Oct. 14, 2010).

Given the nature of our members' commercial enterprises,² our comments focus on the aspects of the Interim Final Rule that will affect the record-keeping obligations of "end users" of energy and energy-related commodities and "swaps."³

As the CFTC (along with the Securities and Exchange Commission and the prudential regulators) embarks on the complex and interrelated rule-makings necessary to implement the Act, the Coalition respectfully requests that the regulators keep in mind at each step along the way how these rule-makings will ultimately impact the commercial enterprises that are "end users" of commodities and swaps. These are not financial entities, and they have not previously been regulated by the CFTC.

On the day after the effective date of the Act, each of these end users will still have a business to run, commercial risks to manage and customers to serve. The Act was intended by Congress to regulate the financial markets more effectively, and to provide regulatory oversight to financial entities. The rule-makings must not leave commercial enterprises uncertain as to which of their ongoing activities will now be regulated by the CFTC or how to comply with the CFTC's new rules. Nor should the rule-makings impose on these enterprises unnecessary new regulatory costs and burdens.

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").⁴ The primary business of these NFP Electric End Users has been for well over 75

² 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.

³ We have footnoted this term, and direct the reader to the comments submitted by the Not-For-Profit Energy End User Coalition dated September 20, 2010, submitted in response to the "Definitions ANOPR," and in particular to the comments on the definition of "swap" in that letter. A copy is attached for convenience of reference. Given the broad definition of "swap" and the fact that everyday commercial transactions of the NFP Electric End Users may arguably fall within that definition, the regulatory burdens of data record-keeping and reporting with respect to "swaps" are of significant concern to NFP Electric End Users.

⁴ 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.

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.

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 they dispose of 4 million MWh or less per year. 13 C.F.R. §121.201, n.1.

B. AMERICAN PUBLIC POWER ASSOCIATION (“APPA”)

APPA is the national service organization representing the interests of publicly-owned electric utilities in the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers and serve 45 million people. APPA’s member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. These systems take various forms, including departments of a municipality; a utility board or a public utility district formed under state or local law; a joint action agency or joint power agency formed under state law to provide wholesale power supply and transmission service to distribution entity members; a state agency, authority or instrumentality; or other type of political subdivision of a state. Like the members of NRECA, the vast majority of APPA’s members are considered “small entities” under 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, while others purchase electric energy (from associated public power systems and cooperatives or from third parties), and distribute it to retail consumers. Still others perform all or a combination of these commercial functions. The Coalition's members are unique among "end users" whose transactions are potentially subject to CFTC 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, and the interconnected Federal, state and local system of laws and financial regulation within which they operate is designed specifically to support this public service mission.

The market for power in North America is comprehensively regulated at the Federal, state and local level, with a 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"). RTOs operate their "markets" in certain defined geographic areas of the United States 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.

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 markets are intrinsically tied to the reliable physical transmission and ultimate delivery of electric energy in interstate commerce at just and reasonable rates.

All the energy contracts, agreements and transactions 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 involvement in the underlying cash commodity markets relevant to their businesses (as “eligible commercial entities”). Other than a few large industrial companies, retail energy consumers 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. As distinguished from other markets regulated by the CFTC, a significant percentage of these energy transactions do not involve financial intermediaries.

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 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 they are viewed through the financial markets lens that these transactions are described using the financial market regulatory labels such as “exempt commodities,” “swap agreements,” “options,” “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.

The NFP Electric End Users currently have the risk management choice to conduct some of these everyday 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 those delivered at “hubs,” in tradable increments and for tradable duration – 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 are still conducted “the old fashioned way”: under tariffs within the public power and cooperative systems or by contract with known and reliable suppliers and customers, and not with CFTC-regulated financial intermediaries or on exchanges or with clearing entities.

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 suddenly, unexpectedly, redefined as “swaps.” Although Congress has repeatedly indicated that its intention was NOT to reduce risk management options for end users or impose new regulatory costs on end users hedging the risks of traditional commercial enterprises, Congress is relying on the regulators to implement that intent and to write clear rules. 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 professional financial market participants.⁵

II. COMMENTS

A. *The Interim Final Rule Creates Uncertainty as to What Records Need to be Maintained for Pre-Enactment Swaps.*

The NFP Electric End Users appreciate the CFTC’s timely issuance of the Interim Final Rule. The Interim Final Rule removed uncertainty as to what, if any, “non-cleared swaps” the NFP Electric End Users would be required to report to the CFTC on or prior to November 15, 2010 (30 days after issuance of the Interim Final Rule) pursuant to new Section 4r of the CEA, as set forth in Section 729(a) of the Act.⁶

⁵ See 156 Cong. Rec. H5248 (the “Dodd-Lincoln letter”).

⁶ Pending the CFTC’s complex and interrelated rule-makings under the Act, it is currently impossible to tell which of the NFP Electric End Users’ everyday commercial transactions will be determined to be covered by, and not excluded from, the definition of “swap.” It is also impossible to determine which of the NFP EEU’s counterparties will be required to register as “swap dealers” or “major swap participants.” For transactions with non-swap dealer/non-major swap participant counterparties (transactions not involving these CFTC-defined entities or other “financial entities”), it is commercially impractical to negotiate a reporting obligation for an outstanding transaction without deciding who will pay for such reporting. There are presently no “swap data repositories” registered to accept information about any, or any particular, category of non-cleared swaps. And it is yet to be determined what data elements in respect of particular categories of swaps will need to be reported, whether quantitative or qualitative, and in what form. Consequently, before the Interim Final Rule

However, while removing uncertainty with respect to reporting requirements, the Interim Final Rule **creates uncertainty as to what business records end users are required to retain in respect of pre-enactment swaps.** The NFP Electric End Users do not have the data storage systems to maintain a complete backup of their commercial business transactions in order to comply with potential CFTC data recordkeeping and reporting requirements. Our computer systems are focused on reliability and current regulatory record-keeping and reporting requirements to which our businesses are subject from energy, finance and environmental regulators at the local, state and Federal levels.

We respectfully request prompt clarification of the Interim Final Rule, in particular as the Rule applies to any entity which anticipates being eligible for the “end user” exception to clearing and in particular as the Rule applies to the energy and energy-related “swaps” to which the NFP Electric End Users are party. We respectfully request that the CFTC clarify that only the swap transaction documentation (e.g., confirmations), and applicable master agreements to the extent that such master agreements contain or define commercial terms incorporated into swap transaction documentation, and any modifications of those documents (the “Swap Documentation”), need be retained for pre-enactment swaps. Finally, we request that the CFTC provide a “safe harbor” for those market participants who make a good faith effort to comply with the Interim Final Rule in the absence of further guidance from the CFTC.

1. *For End Users, “Value” and “Price” are Evaluated and Determined Only in Relation to the Commercial Risk Being Hedged.* Three phrases in Proposed Rule 44.02 imply that documentation outside the four corners of the Swap Documentation must be retained. The three ambiguous phrases are the requirement to retain: “. . . information relating to the swap transaction . . .,” “. . . information necessary to . . . value the transaction” or “. . . information relevant to the price of the transaction.” For end users who utilize “swaps” to hedge commercial risks, such documentation could be interpreted to include documents from all areas of the commercial business enterprise. For end users, “value” and “price” are not evaluated and determined in the abstract (as they might be for a financial entity engaging in market transactions solely to manage price risk of existing contracts), but are evaluated and determined in relation to the commercial risk or risks being hedged. The documentation required to be kept, if viewed in the most conservative records retention/compliance sense, would be voluminous.

In some cases, this documentation may be viewed on, or downloaded from, third party systems subject to confidentiality agreements. In other cases, the information may be developed on proprietary systems or software, either of the

deferred reporting requirements under the Act, end users were faced with an impossible task of determining what documentation about what pre-enactment transactions to report to what entity, in what manner or form, and at whose cost.

end user or of third parties. For example, an energy supply employee may view price curves or weather projections provided by third parties in valuing or pricing a swap for July 2011 power. In the course of “valuing” a swap for purposes of pre-transaction or post-transaction risk management, credit risk management or regulatory compliance, a utility employee may look at load projections in its service territory, regulatory reliability or resource adequacy data, or regional transmission data. Extensive information relevant to valuation or price of “swaps” may exist in other departments of a commercial business about the commercial risk being hedged, the fluctuations in that commercial risk, and the business enterprise’s risk tolerance. An employee may look at 30 year weather records, current year or future budget information, regulatory or reliability compliance or reserve requirements, or generation performance statistics. Finally, in valuing or pricing any over-the-counter swap transaction, a key part of the analysis will be the operating and financial strength of the counterparty and other counterparties in the marketplace potentially willing to enter into the same transaction, and how that credit risk is evaluated relative to the end user’s own operating and financial strength and relative to the nature of the particular transaction and the counterparty relationship as a whole. Such information is developed on an ongoing basis before, during final negotiations, at the time and after any particular transaction is entered into. From the standpoint of the end users, such credit support and credit risk management information has considerable bearing on the value (pre-transaction and post-transaction) of the swap in managing or mitigating commercial risk.

It would be impossible for an end user hedging commercial risk to retain all information relevant to the value or pricing of any particular swap transaction. For this reason, we request that the CFTC clarify that, for persons who anticipate being eligible for the “end user” exception to clearing under the Act, no information is required to be maintained outside of the Swap Documentation.

2. *Only Swap Documentation is Necessary for the CFTC to Effectively Regulate Swaps.* We strongly support the CFTC’s goal of price transparency for the markets in energy and energy-related swaps, classes and types of energy and energy-related swaps. The Swap Documentation will identify all the relevant commercial terms of the swap transaction, including the price at which the swap transaction is agreed. The CFTC’s regulatory mission to bring transparency to the swaps market is fulfilled if it requires record-keeping and facilitates publication of that price and the price at which other comparable and concurrent swap transactions are agreed. The CFTC is not authorized to bring transparency to how those prices were reached between counterparties, or how a transaction is valued or priced by one or another of the contract counterparties. Nor is the CFTC charged with analyzing on what basis an end user “values” its decision to enter into a swap. To require end users to maintain records (or to report) information other than the terms included in the Swap Documentation does not advance the

CFTC's goal of swap price transparency. And end users should not be required to maintain records that do not contain information reasonably likely to be necessary for the CFTC to fulfill its regulatory obligations.

3. *Alternatively, the CFTC Should Outline Categories of Documentation Which Need Not Be Retained, in Terms That are Relevant to an End User's Commercial Business.* If the CFTC declines to make the clarification requested above, we alternatively respectfully request that the CFTC outline categories of information which need not be retained by persons who anticipate being eligible for the "end user" exception to clearing under the Act. No information must be retained which is or might reasonably be expected to be subject to confidentiality agreements with third parties. No proprietary information must be retained. No information must be retained about the commercial risks the end user hedges or considers hedging with swaps. No information need be retained about the actual, historical or potential fluctuations in that commercial risk or the end user's risk tolerance. No information need be retained about the relative or actual credit risk or credit support of the end user itself, its counterparty or other potential counterparties. We request that the CFTC clarify this for the categories, classes and types of energy and energy-related swaps in which the NFP Electric End Users regularly transact -- and we would be happy to provide further information about those categories, classes and types of swaps. Finally, we request that the CFTC clarify this for the NFP Electric End Users, who utilize these energy and energy-related transactions in the ordinary course of their business solely to hedge commercial risk, and anticipate availing themselves of the end user exception to clearing in respect of 100% of their swap transactions.

- B. *The CFTC Should Also Confirm That No Records are Required to Be Kept for Post-Enactment Swaps.*

The Interim Final Rule addresses what records should be retained in respect of **pre-enactment swaps** -- those entered into and remaining outstanding as of the date the Act was enacted (July 21, 2010). For that reason, the NFP Electric End Users have "taken a snapshot of," or "sent a records retention notice for," pre-enactment swaps. However, the following two questions are being asked by the NFP Electric End Users: "Does the Interim Final Rule require companies to retain similar information for transactions entered into daily in August 2010, September 2010, October 2010, and for all ongoing post-enactment periods until the CFTC issues its final rules with respect to data record-keeping and reporting?" Also, "If a company does not currently have business practices or technology that captures and retains information referenced in the Interim Final Rule (with respect to pre-enactment swaps), does the CFTC's rule require or suggest that a commercial business develop and install such systems which are not otherwise necessary or useful to its operations?" The Interim Final Rule does not address these issues.

The NFP Electric End Users continue to do their commercial business, day in, day out, as they have for decades. In the process, the NFP Electric End Users enter into transactions that

may or may not be “swaps,” with parties that may or may not be swap dealers or major swap participants. Such swaps are mostly “non-cleared.” Many of these transactions will no longer be outstanding when the CFTC issues its final record-keeping and reporting rules. The NFP Electric End Users have limited funds available for the types of non-operating information technology systems or data storage resources which would be necessary to keep this type of information for an indeterminate period of time. The NFP Electric End Users respectfully request the CFTC confirm that market participants have no ongoing CFTC record-keeping requirements in respect of post-enactment swaps, and that it is still considering whether any or all of the data elements referenced in the Interim Final Rule will be required to be retained or reported under its final rules.

C. *A “Safe Harbor” Provision is Appropriate Given the Regulatory Uncertainty.*

In light of the ambiguities in the Interim Final Rule, and the complex and interrelated nature of the ongoing CFTC rule-making proceedings, the NFP Electric End Users respectfully request that the CFTC provide a “safe harbor” for those market participants who make a good faith effort to comply with the Interim Final Rule.

III. CONCLUSION

The Coalition strongly encourages the CFTC to consider the perspectives of end users of “swaps” at every step of its regulatory rule-making process 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 CFTC drafts its rules, it carefully consider the questions of and consequences to those who operate commercial businesses and are drawn into this new regulatory environment only because of the Act’s broad statutory language which could be interpreted to redefine traditional commercial contracts as “swaps.” Any new direct or indirect costs or regulatory record-keeping or reporting requirements will result, dollar for dollar, in higher costs to the NFP Electric End Users’ customers and owners -- approximately 87 million American retail consumers of electric energy.

The NFP Electric End Users are relying on the CFTC to draft clear rules, to make clear how current interpretations, no action positions and precedent under the CEA should be read in light of the Act’s new and different regulatory structure, and to conduct all necessary exemption proceedings prior to the effective date of the Act (and with appropriate regulatory transition periods thereafter). We stand ready to help the CFTC understand our businesses, our industry and our “markets.” Please contact any of the Coalition’s representatives for information or assistance.

Respectfully yours,

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

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

Copy of Comment Letter Dated September 20, 2010

See Attached.

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