



POSITION LIMITS FOR DERIVATIVES
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March 28, 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 Position Limits for Derivatives, under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”) (17 CFR Parts 1, 150 and 151)

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”) on the **Notice of Proposed Rulemaking on Position Limits for Derivatives**, issued January 26, 2011 (the “Positions Limits NOPR”).²

¹ 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.

² 76 Fed. Reg. 4752 (Jan. 26, 2011).

The Coalition's members are commercial enterprises, not swap dealers or major swap participants, and not financial entities. Our members engage in energy and energy-related derivatives transactions (futures and other exchange-traded derivatives and over-the-counter ("OTC") derivatives, including swaps) only to mitigate or hedge commercial risks that arise in the course of their public service activities.

Our comments on the Commission's rule-makings to date implementing the Act have focused on the aspects of the Proposed Rules that would require an "end user"³ of non-cleared "swaps,"⁴ of a type that the NFP Electric End Users define as "Energy Commodity Swaps,"⁵ to

³ 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" (see footnote 4) 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 market participant that is a "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. Therefore, the NFP Electric End Users will register 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 comment letter on the End-User Exception NOPR (75 Fed. Reg. 80,747, Dec. 23, 2010). A copy of such End-User Exception NOPR comment letter is attached for convenience of reference. The CFTC-lite protocol is more fully described in our comments to the Swap Data NOPRs for which web links are provided at footnote 10.

⁴ 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. To date, the sequencing of the Commission's Proposed Rules has precluded the NFP Electric End Users and other market participants from being able to assess the effect, costs and benefits of the Proposed Rules implementing the Act on their commercial activities due to the fact that, the Commission has proposed more than 40 rules for comment without defining this most fundamental term. The NFP Electric End Users respectfully request the Commission to further define the term "swap" to exclude or exempt the

register and comply with the Commission's new regulatory requirements. In parallel, our comments on this Position Limits NOPR will focus on the aspects of the Proposed Rules that require a "bona fide hedger"⁶ as a "trader" to evaluate the energy derivatives transactions it

types of commercial energy and energy-related transactions in which the NFP Electric End Users engage every day, including forward transactions in nonfinancial commodities which by their terms settle physically, commercial options, capacity, transmission and transportation services contracts and emissions and renewable energy contracts. 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.

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 This term is not defined in the Act, but is used in CEA Section 4a(a)(3)(B)(iii) and means an entity or person (defined and sometimes referred to in these Proposed Rules as a "trader") that requests the Commission to exempt a referenced contract or a position from the Commission's position limits as a "bona fide hedging transaction," to the extent the referenced contract or position meets the criteria set forth in Proposed Rule 151.5. We respectfully ask the Commission to confirm that, for a non-financial entity, a "bona fide hedger" has the same meaning in respect of "referenced contracts" as the term "end user" has in respect of "swaps." See Section IIA below requesting that the Commission align the requirements for a non-financial entity to utilize the "bona fide hedging exemption" for referenced contracts to the requirements for a non-financial entity to elect the end-user exception for "swaps." NFP Electric End Users are non-SD/MSP counterparties and non-financial entities, and the NFP Electric End Users also anticipate being qualified to utilize the "bona fide hedging exemption" in respect of all the referenced contracts made or made for the NFP Electric End Users.

makes in “referenced contracts” in order to assure compliance with the Commission’s position limits, or that require such a “trader” to keep records or file reports with the Commission in order to maintain its status as a “bona fide hedger,” or to utilize the “bona fide hedging transaction exemption” for purposes of the Commission’s position limits.

We are focused on preserving the value of the end-user exception for non-cleared swaps, and preserving the correlated value of the “bona fide hedging exemption” to the Commission’s position limits for referenced contracts. Our members do not speculate in energy or energy-related commodities or derivatives transactions (such as Energy Commodity Swaps and “referenced contracts” with the NYMEX Henry Hub Natural Gas contract as the “core referenced futures contract”).⁷ However, in connection with our members’ public service activities, they engage routinely in energy and energy-related commodity transactions, and many of the NFP Electric End Users engage in “referenced contracts” in respect of the NYMEX Henry Hub Natural Gas futures contract to manage the commercial risks inherent in their public service activities.⁸

In order to preserve access to these valuable risk management tools for non-financial entities as “end users” and “bona fide hedgers” as Congress intended, the NFP Electric End Users respectively request the Commission to streamline and clarify the applicability of the “bona fide hedging exemption” from the Commission’s position limit rules, and to reduce the regulatory recordkeeping and reporting burdens and costs on non-financial entities like the NFP Electric End Users that are “end user only” and “bona fide hedger only” market participants. Our comments will focus on three general themes:

First, we recommend a “CFTC-lite” method of registration, recordkeeping and reporting for non-financial entities that engage in “bona fide hedging transactions.” Such a protocol will accomplish what the Act requires of the Commission, 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 being imposed by its new regulatory structure on non-financial entities like the NFP Electric End Users. As Congress and Chairman Gensler have

⁷ The term “speculate” as used herein means taking a position, and then offsetting it with another position, for the purpose of profiting from favorable movements in market prices. Speculation is a risk-increasing activity in which commodity traders commonly engage. An NFP Electric End User may enter into an energy or energy-related derivatives transaction that settles favorably (i.e., “in the money”). But that favorably-settling energy or energy-related derivatives transaction offsets a correlated unfavorable price movement/settlement in the commercial risk being hedged.

⁸ See footnote 4.

recognized,⁹ non-financial entities (in particular those that are “end users” or “bona fide hedgers,” as those terms are used in the Act and in the Proposed Rules) do not represent the same degree of systemic risk as financial entities. We refer you to Diagram #1, which provides an overview of the CFTC-lite regulatory sub-classifications of the “non-SD/MSP counterparty” category of market participants.¹⁰

Second, to foster commercially efficient markets consistent with the Commission’s new jurisdiction over the swap markets and non-financial entity market participants, we recommend the Commission establish a regulatory regime that minimizes reporting duplication, maximizes the best available source and timing for information capture and validation, and streamlines reporting of transaction-by-transaction data. Accordingly, we propose that the Commission clearly define and distinguish in its Proposed Rules among: (i) those reporting requirements that are appropriate and applicable for market participant entities to make directly to a regulated entity for use by the Commission in its regulatory oversight of the markets, (ii) those reporting requirements that are appropriate and applicable for bilateral swap counterparty relationships (when and if a master agreement is executed in respect of bilateral swaps), and (iii) those reporting requirements that are appropriate and applicable for individual transactions. We respectfully request the Commission to keep this third category of transaction-by-transaction requirements to a minimum.

The Commission has the authority to structure its new regulatory regime in the manner that does not require a significant change in the way non-financial entities currently engage in futures and options on futures and execute transactions in the over-the-counter derivatives market, and that does not impose unnecessary costs and burdens of the Commission’s new regulatory regime on non-financial entities. We refer the Commission to Diagram #2, which gives our recommendation as to the notices, reports and data elements the Commission should require (i) as “entity reports” to be made periodically to a registered entity such as a swap data repository for use by the Commission, (ii) as master agreement reports to be made to the swap data repository as and when master agreements are executed between each pair of registered

⁹ 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>.

¹⁰ Diagram #1 is identical to the one we proposed in our comment letters on the two recent Swap Data NOPRs. 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>. This Diagram was also referenced in our comment letter on the End-User Exception NOPR, referenced in footnote 3. For purposes of the Position Limits NOPR, we have added language in footnote 3 to Diagram #1 that makes it clear that an “end user only” market participant may also transact in “referenced contracts,” but that the non-financial entity does so as a “bona fide hedger only.”

swap counterparty entities, and (iii) transaction data elements for a non-cleared swap that is not executed or cleared on regulated entity, appropriate for reports by a reporting party at the time the non-cleared swap is executed. There is no parallel regulatory list of transaction data elements necessary for futures, options on futures or swaps traded or cleared on a regulated entity -- those data elements will be specified by the regulated entity as part of its market rules or clearing entity procedures (subject, of course, to Commission oversight).¹¹

Third, we respectfully request that the Commission clarify its Proposed Rules to incorporate the defined terms used elsewhere in proposed rules implementing the Act, so that the rules work together to implement the language of the statute and establish a clear position limits regime for referenced contract markets.

In the alternative, if the Commission does not provide the necessary streamlining and clarification such that the NFP Electric End Users can effectively use the bona fide hedging exemption, we respectfully request that the Commission provide in its Proposed Rules appropriate exclusions from its position limits requirements, as contemplated by CEA Section 4a(a)(7). Congress clearly intended that the Commission establish by rule different position limit regimes for different markets, for different commodities and for different categories of transactions and market participants, rather than simply propose a one-size-fits-all position limits regime as may have been appropriate for the less diverse markets and market participants that were subject to the Commission's jurisdiction prior to the effective date of the Act. Congress clearly intended that the Commission establish by rule categorical exclusions and exemptions from its position limits regime, rather than require individual market participants to seek exemptions if, as and when needed. We respectfully suggest that, if the Commission does not revise its Proposed Rules to allow effective use of the bona fide hedging exemption, the Commission should clearly, simply and comprehensively exclude from position limits (and from ongoing calculation, recordkeeping and reporting obligations) the NFP Electric End Users. This will fulfill the important statutory principles in CEA Sections 4a(a)(1), 4a(a)(3)(B)(iii) and (iv) and 4a(a)(7), and preserve the ability of the NFP Electric End Users to continue to use these cost-effective tools to manage their commercial risks.

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 non-financial entities that are "end

¹¹ Diagram #2 is identical to the one we proposed in our comment letters on the two recent Swap Data NOPRs. See the web links provided in footnote 10 above. This Diagram was also referenced in our comment letter on the End-User Exception NOPR referenced in footnote 3. For purposes of the Position Limits NOPR, we have added language in the top section of Diagram #2 that makes it clear that a non-financial entity can provide appropriate representations directly to the swap data repository for validation of its status as a "bona fide hedger."

users” and “bona fide hedgers” of commodities and swaps. This is especially important because the Proposed Rules will impact non-financial entities transacting in Energy Commodity Swaps among themselves, without a financial entity such a swap dealer or major swap participant to interpret and bear the burdens and costs of the types of reporting obligations to which such financial entities are accustomed. The NFP Electric End Users 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 and establish position limits as necessary and appropriate to eliminate the burdens on the markets caused by excessive speculation. 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”).¹² 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.

¹² 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 association of transmission dependent electric utilities located in more than 30 states), ACES Power Marketing and The Energy Authority.

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 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. Some NFP Electric End Users act as operating or purchasing agent on behalf of multiple co-owners of a generation project or a project entity that generates and transmits electric energy to participating public power systems. 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 NFP Electric End Users that are electric cooperatives 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 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 a market participant default. These RTO credit risk mitigation policies are established and maintained in accordance with the principles established by FERC.¹³

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 physical transmission capacity, reliability, 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.¹⁴ 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 system-specific, geography-specific and seasonal, and

¹³ 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).

¹⁴ 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 commodity and derivatives transactions in which the NFP Electric End Users engage every day. See footnote 4.

risk management decisions are made based on changing long-term weather forecasts, generation or transmission 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.¹⁵

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 made by financial entities trading 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

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

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.¹⁶

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.” 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. But 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.¹⁷

¹⁶ 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. 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.

¹⁷ 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 COMMENTS¹⁸

The NFP Electric End User Coalition fully supports the Commission's efforts to establish position limits to diminish, eliminate or prevent the burdens on commodity and commodity derivatives markets imposed by excessive speculation. But we urge the Commission to do so carefully, to preserve for non-financial entities the benefit of the "bona fide hedging exemption." Like the end-user exception to the mandatory clearing and exchange-trading rules for swaps, the bona fide hedging exemption from the Commission's position limits is critical to the NFP Electric End Users' ability to cost-effectively execute energy and energy-related derivatives transactions to hedge or mitigate the commercial risks of their public service activities.

The NFP Electric End Users are eager to understand whether and how the energy and energy-related derivatives transactions in which they engage every day are to be regulated by the Commission under the comprehensive new regulatory structure that the Commission is establishing to implement the Act. In this regard, we respectfully request that the Commission implement the bona fide hedging exemption to its position limits in a manner that recognizes several fundamental market structure differences between the markets the Commission currently regulates (and the entities which are "bona fide hedgers" in such markets) and the new markets that the Commission is structuring pursuant to its authority under the Act.¹⁹

In the futures market currently regulated by the Commission (prior to the Act), the Commission required reports of information from regulated market professionals, such as futures commission merchants 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. And there was always a "sell-side" market professional involved -- that is the way the regulated

¹⁸ 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.

¹⁹ The Commission's new authority under the Act is not evolutionary, but revolutionary. The Act deletes the exclusions and exemptions under which the current over-the-counter energy and energy-related derivatives markets have developed and the NFP Electric End Users and other non-financial entities have hedged their commercial risks. The Act makes such risk management transactions unlawful unless the NFP Electric End Users comply with the Commission's new rules. Consequently, the Coalition is relying on the Commission to establish a new and integrated market regulatory structure that preserves the ability of non-financial entities to continue to hedge commercial risks, without disruption, and without unnecessary new costs and burdens imposed by the Commission's new regulatory regime.

futures (and securities) markets are currently structured. The Commission also 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 over-the-counter market for Energy Commodity Swaps, there is no consistently applicable “sell-side/buy-side” market dichotomy. See Section ID. Moreover, there are many more Energy Commodity Swaps that are executed in the bilateral markets as “end-user-to-end-user swaps” without the participation of financial intermediaries or financial entities of any sort. See Section ID.²⁰

Under the Act, as part of its new jurisdiction over the swap markets, the Commission now has limited jurisdiction over both parties to an over-the-counter derivatives transaction, even if one or both of the parties is a non-financial entity, to the extent the Commission has the direct authority to monitor the use of the end-user exception and the bona fide hedging transaction exemption. This limited direct jurisdiction over non-financial entities means that non-financial entities must register for a “Unique Swap Identifier” to access the CFTC-jurisdictional markets, and can provide information directly to a regulated entity such as a swap data repository for use by the Commission. The swap data repository can also collect directly such non-financial entity’s bona fide hedging information, rather than burdening the transaction process for a “referenced contract” with such an exchange of information. From the standpoint of the non-financial entity, the regulatory protocol for using the “bona fide hedging exemption” under the new regulatory regime established under the Act can and should be parallel to the regulatory protocol for electing the “end-user exception” for swaps. See Diagram #2.

As non-financial entities that engage in “referenced contracts” only to hedge or mitigate commercial risks and not for speculation, the NFP Electric End Users as bona fide hedgers should not be subject to the Commission’s position limits. However, we respectfully submit that the Proposed Rules, as currently drafted, do not provide that regulatory certainty. Moreover, the NFP Electric End Users respectfully submit that the Proposed Rules’ calculation methodologies and use of terms that are not defined in either the CEA, as amended by the Act, or in the Proposed Rules are so ambiguous as to make it impossible to calculate or determine compliance with such position limits.

We respectfully request that the Commission streamline the use of the bona fide hedging exemption for non-financial entities, especially for those that engage in CFTC-regulated transactions as “end user only/bona fide hedger only” market participants. We also respectfully request that the Commission clarify the Proposed Rules in light of the new market regulatory

²⁰ This concept is more fully developed in our comment letter on the End-User Exception NOPR, referenced in footnote 3. 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.

structure being implemented pursuant to the Act and the other Proposed Rules issued to date. Alternatively, if the Commission does not streamline and clarify the Proposed Rules to allow the NFP Electric End Users to effectively use the bona fide hedging exemption, we respectfully request that the Commission provide in the Proposed Rules clear and comprehensive regulatory exemptions and exclusions from the position limits for the NFP Electric End Users.

A. THE COMMISSION SHOULD STREAMLINE THE REGULATORY REQUIREMENTS FOR UTILIZING THE BONA FIDE HEDGING TRANSACTION EXEMPTION TO PARALLEL THE RECOMMENDED NEW “CFTC-LITE” REGULATORY PROTOCOL FOR A NON-FINANCIAL ENTITY ELECTING THE END-USER EXCEPTION FOR SWAPS

The statute provides in Section 4a(a)(2) that the Commission “shall establish limits on the amount of positions as appropriate, *other than bona fide hedge positions*” that may be held by any person in identified futures contracts, or options on such futures contracts. Then the statute goes on to provide in Section 4a(a)(5) that the Commission shall establish limits “on the amount of positions, including aggregate position limits, as appropriate, *other than bona fide hedge positions*, that may be held by any person with respect to *swaps that are economically equivalent to [the futures contracts and options on such futures contracts] subject to paragraph (2).*”

The statute authorized the Commission to establish limits for positions in futures, options on futures and economically equivalent swaps, other than bona fide hedge positions. But the Proposed Rules turn the statutory language on its head. The Proposed Rules instead establish limits for all referenced contract positions made by a trader, and then require a trader to request exemptions for its bona fide hedging transactions or positions if the aggregate position limits will be exceeded. The statute does not require, or even suggest, that all “traders” (all persons that make or have made for them “referenced contracts” for whatever reason, including bona fide hedgers) be subject to limits on referenced contract positions (including positions comprised of bona fide hedging transactions). The statute does not require that all traders engage in ongoing calculations to determine if and when such aggregate position limits would be exceeded. The statute does not require that traders request transaction-by-transaction bona fide hedging exemptions from its aggregate position limits. Nor does the statute contemplate that, if a trader’s aggregate referenced contract positions (including bona fide hedging transactions) exceed position limits, the trader must submit daily reports with respect to its “referenced contracts,” its bona fide hedging transactions, and its underlying cash commodity positions. But the Proposed Rules require such an aggregate position limits regime, applicable to all traders, including bona fide hedgers. The Commission should propose a workable, streamlined bona fide hedging exemption in keeping with the statutory intent.

We have reviewed Section VB, C and D of the EEI/EP SA Letter, and we concur with the comments in those Sections. The NFP Electric End Users respectfully request that the Commission integrate into Proposed Rule 151 the same streamlining concepts that we recommended for non-financial entities electing the “end-user exception” to clearing and exchange-trading of swaps. The statutory concepts of “end-user exception” for swaps and the

“bona fide hedging transaction” exemption to position limits (and the nouns used in Act and in the Proposed Rules to identify “end users” and “bona fide hedgers”) are parallel. Both concepts are intended by Congress to exclude non-financial entities’ commercial hedging transactions from the new regulatory scheme, and to protect and preserve the important rights of non-financial entities to continue to use derivatives transactions to hedge or mitigate commercial risk in a cost-effective way.

See our comment letter on the End-User Exception NOPR, which recommends a three-tiered “CFTC-lite” protocol for registration, recordkeeping and reporting for non-SD/MSP counterparties, including “end user only” market participants. See Diagram #1. See also our recommendation of a periodic reporting regime for entity data, with less stringent recordkeeping requirements and less frequent reporting requirements for “end user only” market participants, in particular in respect of non-cleared swap transactions. See also Diagram #2 and our comment letters on the Data NOPRs, web links for which are provided in footnote 9.

The “CFTC-lite” protocol and the direct entity data reporting requirements recognize the Commission’s new jurisdiction over all market participants, rather than over just market infrastructure as “regulated entities” and market professionals and intermediaries as “registered entities.” If a non-SD/MSP counterparty registers with a swap data repository as an “end user only” market participant, and represents annually (or once, with further notice of any change) that it “makes transactions, or has such transactions made” of it, or “holds [referenced] contracts or positions,” *only* to “hedge or mitigate commercial risk” as “bona fide hedging transactions,” there is no reason for the Commission to require that non-financial entity to monitor its aggregate positions in referenced contracts for compliance with position limits.

Once a non-financial entity has reported its entity data to a swap data repository for use by the Commission, there is no reason for regulated entities or swap counterparties to be required to confirm or reconfirm, document or redocument, the non-financial entity’s status as a bona fide hedger, or to investigate or question the non-financial entity’s status as a bona fide hedger or that a transaction is a bona fide hedging transaction. That data is directly available to the swap data repository (and to the Commission) in the Unique Counterparty Identifier and the periodic entity reports. All the interactions, representations, warranties, independent assessments and documentation requirements in Proposed Rule 151.5(g) impose unnecessary regulatory burdens, create the potential for administrative errors, misunderstandings and reporting inaccuracies, and will delay time-sensitive commercial hedging transactions.²¹

²¹ We note that the third prong of the “CFTC-lite” protocol is a less stringent and less frequent entity reporting regime for “end user only/bona fide hedger only” market participants. In other comment letters, the Coalition has requested clarity in terms of what data must be collected from non-financial entities that are “end user only/bona fide hedger only” market participants, what records must be retained, in what format and for how long. See our comment letters on the Interim Final Rule on pre-enactment swaps (75 Fed. Reg. 63,080, Oct. 14, 2010), the “Second” Interim Final Rule on transition swaps (75 Fed. Reg. 75,892, Dec.17, 2010) and the

Proposed Rule 151.5 contains a requirement for a referenced contract to qualify as a bona fide hedging transaction that is not found in the requirements for a non-financial entity electing the end-user exception for a swap used to hedge commercial risk. According to Proposed Rule 151.5(a)(1)(i), a “transaction or position in a referenced contract” must represent “a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel.” This requirement in the Proposed Rule is drawn from the Act itself which, in CEA Section 4a(c)(2), establishes the bona fide hedging exemption for futures and options on futures to which position limits are to be applied. In the contract markets for futures and options on futures, the fact that the Act requires such a direct tie between such contracts and the nonfinancial commodity markets is a relevant additional criteria. But CEA Section 4a(c)(2) does not require this additional criteria for swaps to qualify for a bona fide hedging exemption. Instead, as the Commission notes on page 4760 of the NOPR, CEA Section 4a(c)(1) authorizes the Commission to define bona fide hedging transactions or positions “consistent with the purposes of the Act.”

In Proposed Rule 151.5, the Commission applies one set of bona fide hedging exemption criteria to all “referenced contracts,” including swaps. See NOPR at 4760. However, by establishing one set of bona fide hedging exemption criteria for all referenced contracts (which is not required by the Act), the Commission creates an inconsistency for non-financial entities that are end-users and bona fide hedgers and that use swaps to hedge commercial risks. Swaps for which an end-user exemption is elected are, by definition, used to hedge commercial risks which inherently arise “in a physical market channel.” The additional criteria added by Proposed Rule 151.5 is unnecessary for swaps. The NFP Electric End Users propose the better way to reconcile the statutory language in CEA Section 4a(c)(1) and 4a(c)(2), in a manner consistent with the purposes of the Act, is to require that for swaps the appropriate criteria for a bona fide hedging transaction is, simply, the same criteria required for a non-financial entity to elect the

Position Reports for Physical Commodity Swaps (75 Fed. Reg. 67,258, Nov. 2, 2010). Web links for such comment letters are available at

[http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26390&SearchText=;](http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26390&SearchText=)

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

[http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26626&SearchText=.](http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26626&SearchText=)

Proposed Rule 151.5(e) provides that an entity that “qualifies” for bona fide hedging exemptions “shall maintain complete books and records concerning all of their related cash, futures, and swap positions and transactions and make such books and records, along with a list of swap counterparties, available to the Commission upon request.” We respectfully request the Commission to clarify Proposed Rule 151.5(e) to provide clear guidance on what records a non-financial entity must retain, and in what format and for how long, in respect of its referenced contracts and bona fide hedging exemptions, in terms consistent with the Commission’s other Proposed Rules. In particular, we respectfully request that the Commission propose a consistent “CFTC-lite” set of recordkeeping requirements for “end user only/bona fide hedger only” market participants.

end-user exception. The NFP Electric End Users respectfully request that the Commission clarify the bona fide hedging transaction exemption for swaps (as referenced contracts), to require that a non-financial entity that has elected the end-user exception in Proposed Rule 151.5(a)(1)(i) has fulfilled the requirements to also exempt such referenced contract as a bona fide hedging transaction.

B. THE COMMISSION SHOULD PROVIDE IN ITS RULES FOR EXEMPTIONS FROM THE ACCOUNT AGGREGATION RULES THAT RECOGNIZE THE UNIQUE AFFILIATE RELATIONSHIPS TO WHICH NON-FINANCIAL ENTITIES SUCH AS THE NFP ELECTRIC END USERS ARE PARTY

We have reviewed Section VI of the EEI/EPISA Letter, and we concur with the comments in that Section. As we discussed in Section IIG of our comment letter on the End-User Exception NOPR, the Commission should not limit or unnecessarily burden the ability of non-financial entities to hedge commercial risks through affiliated entities. Moreover, the Commission should clarify, for purposes of the position limits, that the unique ways in which a Related NFP EEU Group functions will not result in aggregation of the individual NFP Electric End Users' positions for purposes of calculating compliance with the Commission's position limits.²²

The NFP Electric End Users specifically object to the Commission's presumptions, in Proposed Rule 151.7(f)(4), that in order to be entitled to an exemption from the account aggregation principles, owned non-financial entities should not share risk management systems and/or personnel. Many small non-financial entities like the NFP Electric End Users share systems or personnel with their affiliates, with joint power authorities, or with joint projects or project entities, in order to access market, credit and risk management information, and to

²² 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.

manage and hedge their commercial risks using systems and expertise that each small entity would not otherwise be able to afford on its own. When non-financial entities share systems, personnel or even a common “trading strategy” of hedging similar commercial risks, such factors do not indicate common control, common ownership, or positions or accounts that should be aggregated. These cost management strategies indicate that the NFP Electric End Users share a public service commitment to deliver reliable, affordable energy to retail electric customers, and to cost-effectively hedge their similar commercial risks.

We respectfully submit that the Commission should not just allow non-financial entities and their affiliated entities to request exemptions from its account aggregation rules. The Commission should proactively provide by rule additional categories of exemptions from the account aggregation principles for non-financial entities -- to recognize the unique affiliate relationships that have been reported to the Commission in comments on its Proposed Rules.²³ In particular, for non-financial entities which are “end user only/bona fide hedger only” market participants, the ways in which such non-financial entities structure their affiliate relationships should not require individual exemptions from the account aggregation principles. The NFP Electric End Users should not have to engage in time-consuming and expensive exemption requests, when CEA Section 4a(a)(7) clearly authorizes the Commission to provide *in its rules* exemptions and exclusions for particular categories of market participants. As the EEI/EPSA Letter points out, requiring non-financial entities with a continuing and continuous need to hedge commercial risks to file individual exemption requests will result in an immediate, large and unnecessary backlog of exemption requests for entities who need to conduct their ongoing commercial enterprises the day after the Commission’s rules are effective. The Commission

²³ The Commission requests comments on page 4763 of the Position Limits NOPR on whether and in what circumstances the Commission should grant exemptions from its account aggregation rules under CEA Section 4a(a)(7). The Coalition respectfully requests such an exemption for all NFP Electric End Users, as such principles would apply to Related NFP EEU Groups. In addition, we refer the Commission to the discussion of certain affiliated entities of NFP Electric End Users in our comment on the End-User Exception NOPR, a copy of which is attached for convenience of reference. 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 options on 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, options on 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 should provide an exemption from its account aggregation rules under CEA Section 4a(a)(7) for ACES Power Marketing and The Energy Authority to the extent that such entities execute referenced contracts on behalf of NFP Electric End Users to hedge those NFP Electric End Users’ commercial risks.

should issue Proposed Rules that provide regulatory clarity (and a workable transition plan) for the non-financial entities that will be subject to the Commission's new jurisdiction under the Act.

The NFP Electric End Users encourage the Commission to articulate a conceptually consistent set of account aggregation principles in the Proposed Rules implementing the Act in a manner appropriate to the regulation of non-financial entities and their affiliates. As discussed earlier, the Commission cannot assume, as it may have in the pre-Act regulatory structure, that only financial entities and market professionals will be subject to its regulatory regime.²⁴ The Proposed Rules should be drafted to recognize and allow for differences in the ways non-financial entities structure their businesses and departments, the ways in which categories of non-financial entities comply with other applicable regulatory requirements to which they are subject, and the ways in which non-financial entities utilize shared data and risk management systems and personnel.

C. THE COMMISSION SHOULD REVISE ITS PROPOSED RULES ON POSITION LIMITS TO USE CONSISTENTLY THE TERMS DEFINED IN THE ACT AND DEFINED ELSEWHERE IN THE PROPOSED RULES IMPLEMENTING THE ACT, SUCH THAT THE PROPOSED RULES WORK TOGETHER TO IMPLEMENT THE LANGUAGE OF THE STATUTE AND ESTABLISH A CLEAR POSITION LIMITS REGIME FOR REFERENCED CONTRACT MARKETS

If the Commission declines to provide a streamlined exemption process for bona fide hedging positions and transactions, the NFP Electric End Users must understand how to determine if the position limits set forth in Proposed Rule 151.4 on "referenced contracts" "in same commodity" as the "core referenced futures contract" NYMEX Henry Hub Natural Gas (NG)²⁵ will affect NFP Electric End Users that use such natural gas futures, options on futures and Energy Commodity Swaps ("CFTC-regulated HHNG derivatives") to hedge or mitigate commercial risks.²⁶ Larger NFP Electric End Users with large geographic service territories, significant natural gas-fired generation assets, and conservative long-term hedging strategies, or those that act as purchasing agents or operating agents (and hedge related commercial risks) for

²⁴ See the introductory paragraphs to Section II above.

²⁵ See Proposed Rule 151.3(c)(4).

²⁶ We are not familiar with, and do not comment on, the diverse commodity derivatives markets for referenced contracts on core referenced futures contracts listed in Proposed Rule 151.3 other than the NYMEX Henry Hub Natural Gas futures contract.

large Related NFP EEU Groups, need to understand how to calculate position limits for CFTC-regulated HHNG derivatives.²⁷

The NFP Electric End Users are also concerned about loss of cost-effective risk management tools and loss of liquidity and price transparency in the markets for referenced contracts related to NYMEX Henry Hub Natural Gas if the position limits regime is not clarified. These markets are critical to the NFP Electric End Users' ability to deliver reliable and affordable energy to American consumers and businesses.

The Proposed Rules on position limits do not clearly integrate important new market structure concepts contained in the Act, such as the exclusion from the definition of "swap" of forward transactions on nonfinancial commodities,²⁸ and the end-user exception to mandatory

²⁷ As noted in the introduction to Section II, none of the NFP Electric End Users speculate in energy or energy-related commodities or derivatives. The size of a person's CFTC-regulated HHNG derivatives position, or number of referenced contract transactions that comprise such a position, does not imply a speculative purpose. The large NFP Electric End Users hold sizeable and fluctuating positions in CFTC-regulated HHNG derivatives because the commercial risks they hedge are sizeable, seasonal and fluctuating (due to geographic service territory and weather), long-term (well beyond the one year crop cycle that might be a relevant anticipatory hedge duration for bona fide hedgers in an agricultural commodity market), and the market prices for CFTC-regulated HHNG derivatives are highly volatile and directly affect the price of natural gas and electric energy to retail American consumers. See Section I. Conservative commercial risk management principles for such NFP Electric End Users require sizeable and constantly changing bona fide hedging positions. Therefore, our focus is on whether position limits (if bona fide hedging transactions are not clearly excluded) are calculable based on the Proposed Rules in Part 151. There needs to be clarity on whether "physically-settled indexed-price contracts are counted toward position limits along with the "cash-settled" fixed-price contracts employed to hedge them. And whether or not purchase and sale contracts with similar, if not identical, principal economic terms can be netted in the position limit calculation. We also seek to understand the principles involved in calculating and complying with such position limits, to the extent that similar principles may be applied in the future to other referenced contracts that are important to the NFP Electric End Users. The Commission may also change the levels or percentages proposed in applying the position limits principles (without changing the principles), making the position limits more likely to impact more of the NFP Electric End Users. The Commission's position limits in respect of CFTC-regulated HHNG derivatives become even more of an issue for NFP Electric End Users if the Commission does not clarify its definition of "swap" to exclude or exempt certain commercial energy and energy-related transactions in which the NFP Electric End Users engage every day. See footnote 4.

²⁸ CEA Section 1a(47)(B(ii)).

clearing and exchange-trading of swaps.²⁹ Instead, the Proposed Rules use pre-Act concepts and terminology, including the binary focus on “physically-settled” vs. “cash-settled” contracts or positions (how and when are nonfinancial commodity forwards to be excluded from the calculation?), “traders” making transactions and holding positions (how and when are “bona fide hedgers” or “end users,” or transactions executed in reliance on those exceptions or exemptions, to be excluded from the calculations?). The Proposed Rules leave non-financial entities scratching their heads as to what transactions are to be measured and subject to position limits. This is because the Proposed Rules use principles and terminology from the futures markets, without explaining or modifying such terms to apply rationally to the over-the-counter derivatives market now subject to the Commission’s new jurisdiction under the Act.

We have reviewed Section IVA and IVD of the EEI/EPISA Letter, and we concur with the comments in these Sections. The Proposed Rules should be revised to eliminate the use of ambiguous terminology understandable only in relation to the markets regulated by the Commission prior to the Act. The post-Act Proposed Rules on position limits must clearly identify, in regulatory language consistent with the other Proposed Rules, how the universe of such transactions or positions to be limited is to be determined (the denominator), and which such transactions/positions are to be considered “referenced contracts” (including which swaps are “economically equivalent” to a core referenced futures contract), if a market participant is to be able to calculate its compliance with such limits.

1. *The Commission Should Define “Deliverable Supply” in the Proposed Rules.* A non-financial entity executing a referenced contract, either on a designated contract market or a swap execution facility or bilaterally, should not have to guess about how the Commission establishes the denominator for the Commission’s new regulatory position limits. The Commission should explain clearly in its Proposed Rules how it will determine “deliverable supply” for purposes of Proposed Rule 151.4 for each “core referenced futures contract.” The Proposed Rules should explain how the Commission will determine “what supply will be available to fulfill the delivery obligations arising from current trading.” The Commission’s general comments in the Position Limits NOPR at 4758 that it will consider the estimates by designated contract markets listing the core reference futures contract, and the Commission’s own data and other criteria, does not provide regulatory certainty.³⁰

²⁹ CEA Section 2(h)(7).

³⁰ The Commission should explain how referenced contracts, including swaps that are economically equivalent to the core reference futures contract, will be treated in determining “deliverable supply.” The Commission should confirm that bona fide hedging transactions will be excluded from the calculation of “deliverable supply,” as they are committed to hedge commercial risks, just as bona fide hedging transactions in futures and options on futures are

2. *The Commission Should Define “Economically Equivalent” in the Proposed Rules.* The Commission should also explain in its Proposed Rules how it interprets the phrase “economically equivalent” in identifying the swaps that are (and those that are not) subject to its position limits regime. The NFP Electric End Users respectfully suggest that CEA Section 4a(a)(5) authorizes position limits only for “swaps that are economically equivalent” to identified core referenced futures contracts. This is not simply a reference to the swap having the same delivery point as the core referenced futures contract. The swap must be “economically equivalent in all material respects -- that is, the economically equivalent deliverable supply unit must be interchangeable and fungible with other deliverable supply units to be measured and included in the position limits calculation.

Customized swaps are not “economically equivalent” to a core referenced futures contract unless all of the principal economic terms are economically equivalent to those contained in the core referenced futures contract. Delivery point is one primary economic term that could differ, making the swap not economically equivalent. But swaps, and in particular customized end-user-to-end-user Energy Commodity Swaps, contain myriad other principal economic terms that are customized in economically important commercial ways, including bespoke operational conditions, transportation or transmission contingencies, seasonal or hourly pricing and quantity variations, unique credit risk mitigation requirements, or plant specific operating conditions and excuses for performance, any or all of which reflect the unique commercial needs of the parties and the commercial risks that the Energy Commodity Swaps are structured to hedge.

The statute does not authorize the Commission to replace the precise concept of “economically equivalent” swaps with a less precise concept of subjecting to position limits all cleared and non-cleared swaps having delivery points where the market pricing is to some ambiguous degree correlated with the core referenced futures contract. The only swaps for which the statute requires the Commission to establish position limits are those that are so standardized as to be “economically equivalent” in all material respects and in all principal economic terms to the identified core referenced futures contract. If the swap contains a customized primary economic term that differs in any material respect from the standardized terms comprising the NYMEX Henry Hub Natural Gas contract, the rules should make it clear that such swap is excluded from both the numerator and the denominator of the position limits calculation.

“committed for long-term agreements,” and therefore not “available to fulfill the delivery obligations arising from current trading.” See the Position Limits NOPR at 4758.

3. *The Commission Should Explain Clearly the Calculation Methodology for Non-Financial Entities.* The Proposed Rules should also explain the interplay between the exclusion from the definition of “swap” for nonfinancial commodity forwards (for example, natural gas forwards), the end-user exception and the bona fide exemption, and the application of the Proposed Rules in Part 151. The NFP Electric End Users do not simply use referenced contracts or positions to hedge other contracts or positions, as a financial entity might. The NFP Electric End Users engage in a wide variety of commercial contracts or transactions in financial and nonfinancial commodities. They may “hold positions” in natural gas as inventory, as well as forward contracts for delivery of natural gas (a nonfinancial commodity) at a particular delivery point and with customized operating conditions and contingencies. The NFP Electric End Users may use referenced contracts or transactions, natural gas inventory and forward contracts collectively and dynamically to hedge constantly fluctuating commercial risks, such as projected generation fuel needs, based on projected generation unit availability, projected future load and weather conditions, and for some “combination” gas and electric utilities, to hedge commercial risks associated with both natural gas and electric energy requirements. Cross-commodity hedging is common in the energy markets, where it may not be common in other markets to which the Commission’s Proposed Rules will be applicable.

The Proposed Rules on position limits in Part 151 should be revised to incorporate the defined terms “swap,”³¹ “nonfinancial commodity,” “financial entity,” “non-SD/MSP counterparty,” “hedging and mitigating commercial risk,” and to define “economically equivalent,” in a manner that explains to a non-financial entity the manner in which such entity’s transactions are to be analyzed, how the non-financial entity is to avail itself of the bona fide hedging exemption for some or all of its derivatives transactions, and which of the non-financial entity’s positions, assets and hedged commercial risks are to be reported to the Commission should a non-financial entity exceed the Commission’s newly-established position limits.

4. *The Commission Should Revise Proposed Rule 151.4(a)(2) to Provide Clarity as to How the Conditional Spot-Month Limits are to Apply.* The Commission should explain when, where, under what circumstances and in what format the certifications required by clause (iv) in respect of the conditional spot-month position limits should be filed. The NFP Electric End Users and other bona fide hedgers will likely need to rely on the conditional spot-month position limits if the Commission does not provide a useable bona fide hedging exemption.

³¹ See footnote 4.

Proposed Rule 151.4(a)(2)(iv) requires ongoing certification that the trader meets the conditions of paragraphs 2(ii) and 2(iii) of such sections but does not explain how, to whom or how often to provide such certifications. The NFP Electric End Users respectfully suggest use of the “CFTC-lite” reporting protocol in this circumstance. Such certifications should be required only once of “bona fide hedgers only,” with new certifications only if a change is required.

D. THE COMMISSION SHOULD EVALUATE THE INFORMATION IT RECEIVES ON THE DIFFERENT COMMODITY MARKETS FROM THE POSITION REPORTS ON PHYSICAL COMMODITY SWAPS AND THE VISIBILITY REPORTS BEFORE IT FINALIZES THE “SECOND PHASE” OF ITS POSITION LIMITS REGULATIONS.

Section 4a(a)(1) provides that “[n]othing in this section shall be construed to prohibit the Commission from fixing different trading or position limits for different commodities, markets, futures or delivery months, or ... different trading limits for buying and selling operations ...” The Commission acknowledges at page 4753 of the NOPR that it does not have the necessary data to establish position limits for the second phase of its position limits regulations. The Commission has proposed regulations that would permit it to gather positional data on physical commodity swaps on a regular basis, but those regulations are not yet final.³² Proposed Rule 151.6 would require traders with positions in referenced contracts in excess of certain “visibility levels” to provide reports to the Commission of certain information on its positions, but Proposed Rule 151.6 contains the same ambiguities as the Commission’s other position limits rules in terms of using ambiguous terms and not providing a clear bona fide hedging exemption.

The Commission should finalize and issue its data gathering rules, and then carefully evaluate the information it receives in respect of each different commodity, each different market structure, and the types of market participants that are active in each such market, including end users and bona fide hedgers, before finalizing position limits in respect of any such market.³³ Until such data is collected and analyzed, the NFP Electric End Users respectfully comment that

³² We provided comments on the Commission’s Position Reports for Physical Commodity Swaps NOPR (75 Fed. Reg. 67,258) that are consistent with these comments. A web link to those comments can be found at footnote 21.

³³ Unless the Commission clearly provides in its rules that all bona fide hedging transactions are excluded in calculating the visibility levels in Proposed Rule 151.6, we agree with the statement in the EEI/EPISA Letter, in Section IVC1 at page 11, that the visibility level for referenced contracts on NYMEX Henry Hub Natural Gas will capture far more than the “30 unique owners” per year estimated by the Commission. See also footnote 4 in respect of the definition of “swap” and the clarifications requested in Section IIC as to how to calculate the aggregate positions in “referenced contracts.”

the Commission will not be able to adequately evaluate the affect of the “second phase” of its Proposed Rules on the markets for referenced contracts in which the NFP Electric End Users participate. Therefore, the NFP Electric End Users must respectfully decline to comment further on the “second phase” position limits in the Proposed Rules. We urge the Commission to adopt the approach it suggests in footnote 5 to the Position Limits NOPR, and bifurcate consideration of the Proposed Rules for the “first phase ” and the “second phase.”

E. CEA SECTION 4a(a) DOES NOT REQUIRE THE COMMISSION TO IMPOSE ONE-SIZE-FITS-ALL POSITION LIMITS ON ALL COMMODITY AND COMMODITY-RELATED DERIVATIVES MARKETS, OR TO MAKE SUCH POSITION LIMITS EQUALLY APPLICABLE TO ALL PARTICIPANTS IN SUCH MARKETS AS “TRADERS”

The statute anticipates the CFTC exempting *by rule* persons and entire classes of persons, swaps and entire classes of swaps, from position limits requirements. See CEA Section 4a(a)(1) and 4a(a)(7). If the Commission does not provide a streamlined process for using the bona fide hedging exemption and clarifications to the Proposed Rules that will establish a clear position limits regime for referenced contract markets, the NFP Electric End Users respectfully request the CFTC to use its authority under Section 4a(a)(7) to do just that: clearly, unambiguously and simply exempt the NFP Electric End Users by rule from all aspects of the Proposed Rules in Part 151, to allow the NFP Electric End Users to execute Energy Commodity Swaps under the “end-user exception” and enter into “referenced contracts” on NYMEX Henry Hub Natural Gas as “bona fide hedging transactions.”

If the Commission declines to provide such an exemption in its rules, as it is authorized to do in CEA Section 4a(a)(7), the Coalition respectfully requests the Commission to allow trade associations representing the NFP Electric End Users to apply for categorical exemptions on behalf of the trade associations’ members, rather than require individual NFP Electric End Users to apply for exemptions. In September of 2010, the Commission declined a request by several energy trade associations to file petitions under Section 723(c)(1) of the Act on behalf of their members. We understand that the Commission received hundreds of similar petitions from energy companies, including the NFP Electric End Users. Subsequently, the Commission’s order responding to such petitions indicated that any relief granted under Section 723(c)(1) would be available to all similarly-situated market participants. The Commission is faced with a similar circumstance here, and we respectfully request that the Commission provide non-financial entities, especially those such as the NFP Electric End Users which are small entities, the cost-effective ability to rely on their trade associations to file collective exemption requests rather than requiring unnecessary and costly individual exemption requests.

III. ALL COMMENT PERIODS SHOULD REMAIN OPEN UNTIL ALL THE BASIC RULES UNDER TITLE VII OF THE 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.³⁴ We look forward to working with this new team to provide the perspective of the non-financial entity "end user" of non-cleared swaps and a "bona fide hedger" of referenced contracts -- 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.

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 to allow transition times that are adequate for non-financial entities to adapt their commercial enterprises to the new market structure and regulatory protocols.³⁵

³⁴ 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>.

³⁵ We have reviewed Section VII of the EEI/EP SA 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 the bona fide hedging exemption for all of their

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

The Commission cannot assume the overarching regulatory benefit of its Proposed Rules, while ignoring the regulatory costs of those same Proposed Rules that it will be imposing on non-financial entities, for markets about which the Commission acknowledges it has insufficient information. In the Position Limits NOPR, the Commission fails to explain the assumptions underlying any of the estimates in its regulatory cost/benefit analysis. The Position Limits NOPR states simply that “[t]he Commission anticipates that the compliance cost associated with all of these filings [for position reporting and compliance with the position limits rules] will be substantial.” See the NOPR at page 4766. Then, the Commission invites the public and other federal agencies to comment on the cost benefit analysis for which the Commission has provided no basis for its estimates. In response to the Commission’s invitation, the Coalition will provide a copy of this comment letter to the Office of Information and Regulatory Affairs at OIRA-submissions@omb.eop.gov.

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 and “referenced contracts” 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

referenced contracts, and that have no independent resources from which to pay the cost of the new regulatory market structure.

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 non-financial entities using derivatives 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."³⁶ 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" or "bona fide hedgers" 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.

³⁶ See footnote 4.

David Stawick, Secretary
March [28,] 2011
SIGNATURE PAGE

POSITION LIMITS FOR DERIVATIVES

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: _____
Its: _____

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 [28,] 2011
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cc: Honorable Gary Gensler, Chairman
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David Stawick, Secretary
March [28,] 2011
SIGNATURE PAGE

POSITION LIMITS FOR DERIVATIVES

Respectfully yours,

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

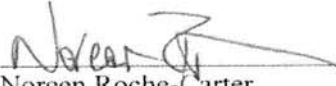
**NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION**

By: _____
Russell Wasson
Director, Tax, Finance and Accounting
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AMERICAN PUBLIC POWER ASSOCIATION

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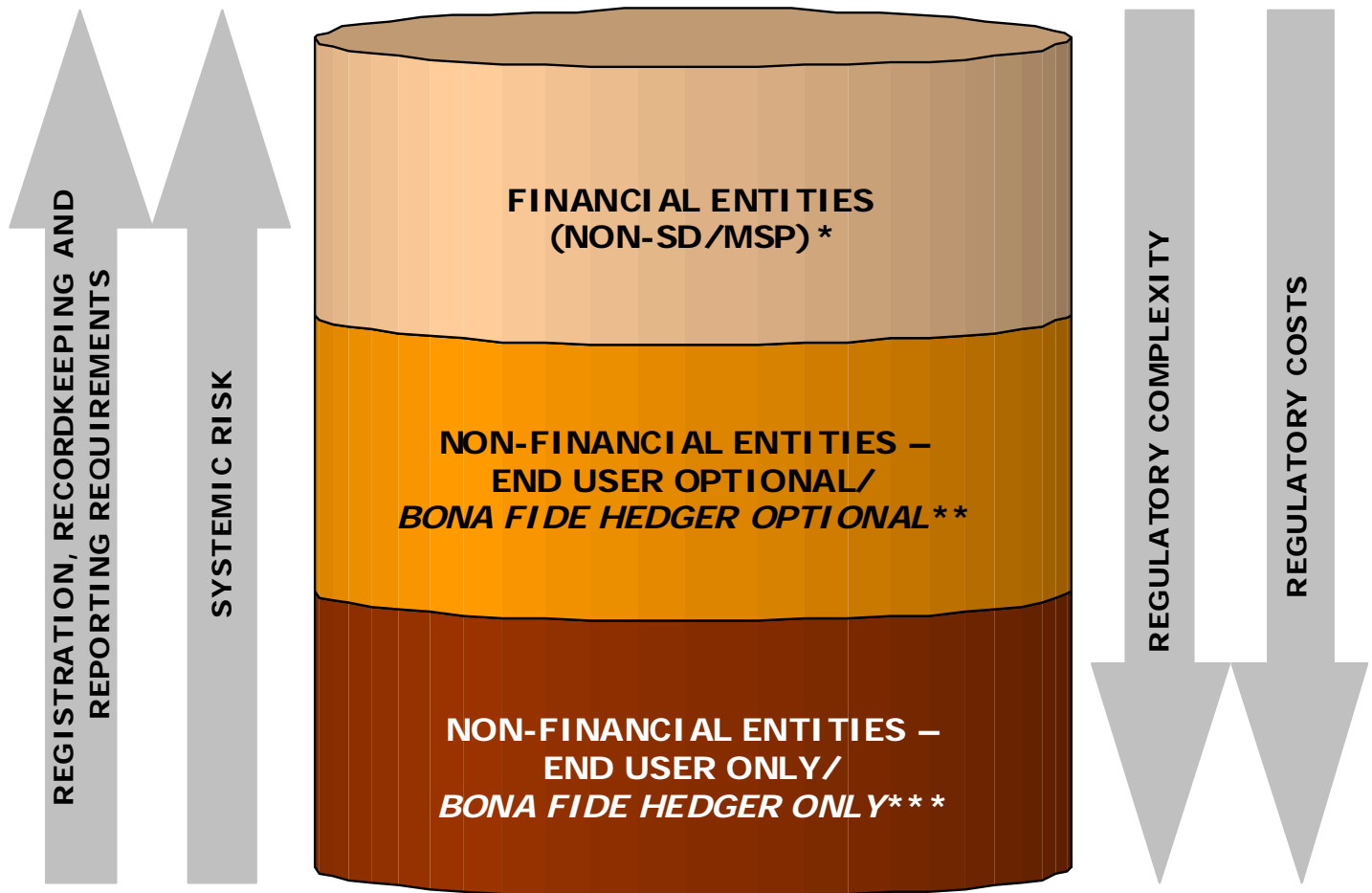
LARGE PUBLIC POWER COUNCIL

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

Diagram 1

Non-SD/MSP Counterparty Sub-Classifications for “CFTC-Lite” Protocol



*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 *and/or to engage in bona fide hedging transactions* to hedge commercial risk. This category of "non-SD/MSP counterparties" chooses to make the end user exception decision, *and/or to engage in bona fide hedging transactions*, on an asset-class-by-asset-class, or product-by-product, or transaction by transaction or other ongoing basis, as distinguished from the "Non-Financial Entities - End User Only/*Bona Fide Hedger*" category below.

***Includes entities which, because they are not financial entities, are entitled to use the end user exception for swaps *and to engage in bona fide hedging transactions* 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 *and all referenced contracts are bona fide hedging transactions*. This classification would be used by commercial enterprises like the NFP Electric End Users -- who engage in commodity derivatives only to hedge commercial risks.

Diagram 2

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 *and the bona fide hedging exemption for some or all referenced contracts*):

- 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 – Reports 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.

TRANSACTION DATA REPORTING

(If Reporting Party, when Execute a “Swap,” or when Execute a *Bilateral Referenced Contract**):

- Counterparties and applicable Master Agreement, if any
- End User Exception Election *and Bona Fide/Hedging Transaction Designation* (One or Both Parties)
- 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 definition of “swap” to exclude or exempt commercial energy transactions in which the NFP Electric End Users engage every day — such as nonfinancial forwards, commercial options, transmission, transportation, capacity or other energy services transactions and 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 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”)¹ 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”).²

¹ 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.

² 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"³ of non-cleared "swaps,"⁴ of a type that the NFP Electric End Users define as "Energy Commodity Swaps,"⁵ to register and comply with certain **reporting requirements as an entity**

³ 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.

⁴ 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.

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

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.⁶ We refer to these swaps as “end-user-to-end-user

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 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.”⁷ 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.⁸ 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,⁹ 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

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.

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.

⁸ 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.”

⁹ 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,¹⁰ and in our comment letters on the two recent Swap Data NOPRs.¹¹

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

¹⁰ 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.

¹¹ 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”).¹² 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

¹² 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.¹³

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.¹⁴ 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

¹³ 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).

¹⁴ 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.¹⁵

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

¹⁵ 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.¹⁶

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.¹⁷

¹⁶ 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. 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.

¹⁷ 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 COMMENTS¹⁸

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.¹⁹

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

¹⁸ 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.

¹⁹ 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.²⁰ 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 #2.²¹

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/EPISA 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

²⁰ 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.

²¹ 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.²²

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.²³

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

²² See footnote 10 for a web link.

²³ 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.²⁴

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 ENTITIES²⁵

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.²⁶

²⁴ See Section IIC below.

²⁵ We have reviewed Section VC of the EEI/EPISA 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/EPISA 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.

²⁶ 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,²⁷ 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.²⁸

²⁷ 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.

²⁸ 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.²⁹ 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

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.

²⁹ 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.³⁰

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

³⁰ We have reviewed Section VII of the EEI/EPSC 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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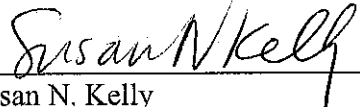
**NATIONAL RURAL ELECTRIC
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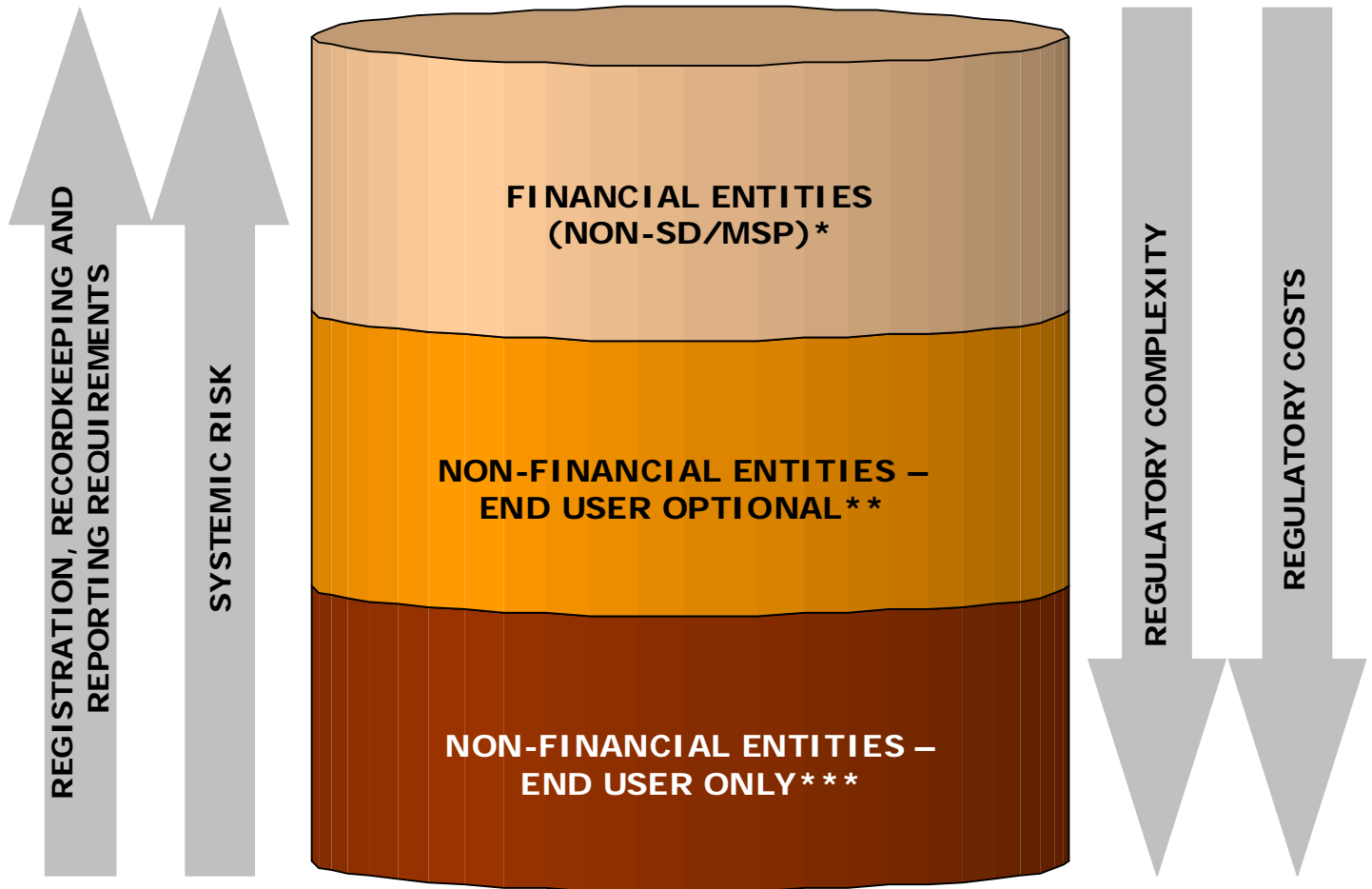
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cc: Honorable Gary Gensler, Chairman
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Honorable Scott O'Malia, Commissioner

Diagram 1

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 2

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.