

April 11, 2011

Via Online Submission

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

Re: **COMMENTS OF EDISON ELECTRIC INSTITUTE, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AMERICAN PUBLIC POWER ASSOCIATION, AND LARGE PUBLIC POWER COUNCIL - Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, RIN No. 3038-AC96**

Dear Mr. Stawick:

By Notice of Proposed Rulemaking published February 8, 2011, the Commodity Futures Trading Commission ("CFTC" or "the Commission") issued "Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants" (the "NOPR" or "Documentation NOPR").¹ By this letter, the Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), and the Large Public Power Council ("LPPC") (collectively the "Joint Associations") provide comments on the Documentation NOPR.

The Joint Associations

EEI is the association of U.S. shareholder-owned electric companies. EEI's members serve ninety-five percent of the ultimate customers in the shareholder-owned segment of the U.S. electricity industry and represent approximately seventy percent of the U.S. electric power industry. EEI also has more than sixty-five international electric companies as Affiliate members and more than one-hundred-seventy industry suppliers and related organizations as Associate members.

Formed in 1942, NRECA is the national service organization for more than nine hundred not-for-profit rural electric utilities and public power districts that provide electric energy to approximately forty-two million consumers in forty-seven states or twelve percent of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately eleven percent of all electric energy sold in the United States. 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

¹ *Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants*, 76 Fed. Reg. 6715 (Feb. 8, 2011).

Business Regulatory Enforcement Fairness Act ("SBREFA").² Only four distribution cooperatives and approximately twenty-eight G&Ts do not meet the definition. The RFA incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA"). The SBA's small business size regulations state that entities which provide electric services are "small entities" if their total electric output for the preceding fiscal year did not exceed four million megawatt hours.³ NRECA is grateful to ACES Power Marketing, which has provided considerable assistance and support in developing these comments.

APPA is the national service organization representing the interests of publicly-owned electric utilities in the United States. More than two thousand public power systems provide over fifteen percent of all kilowatt-hour sales to ultimate customers. APPA's member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. Some publicly-owned electric utilities 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. 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 and safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

The Large Public Power Council is an organization representing twenty-four 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 ninety percent of the transmission investment owned by non-federal public power entities in the U.S. LPPC member utilities supply power to some of the fastest growing urban and rural residential markets in the country. Members are located in eleven 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.

Introduction

The Documentation NOPR was issued by the Commission to comply with Section 731 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act").⁴ Section 731 provides that "the Commission shall adopt rules governing documentation standards for Swap Dealers and Major Swap Participants."⁵ The topics referenced by the Act include "timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps."⁶

² 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996).

³ 13 C.F.R. §121.201, n.1

⁴ Public Law No. 111-203, 124 Stat. 1376 (2010).

⁵ Dodd-Frank at § 731 as codified at 7 U.S.C. § 4s(i)(2).

⁶ *Id.*

The Joint Associations recognize that the Commission is required by Section 731 of Dodd-Frank to adopt rules on the topics listed above. The Joint Associations' members are not financial entities and are end-users,⁷ as contemplated by Dodd-Frank. As such, the Joint Associations' members do not anticipate being required to register with the Commission as "Swap Dealers" or "Major Swap Participants." However, the proposed rules impact the Joint Associations' members, as Section 731 requires the Commission to adopt rules for Swap Dealers and Major Swap Participants, and those entities are Joint Associations members' counterparties. Further, given the industry attempts to standardize documentation, any rules affecting Swap Dealers and Major Swap Participants will ultimately cause unnecessary burdens on others transacting in such markets. In these comments, the Joint Associations will recommend certain revisions to the rules proposed in the NOPR. As their members are end-users of Over-the-Counter ("OTC") swaps, the Joint Associations will focus on the aspects of the Documentation NOPR that most affect their members and end-users in general.

The Joint Associations' members generally use swaps to hedge the commercial risks of their electricity businesses. The Joint Associations' members typically execute swaps through the use of an International Swaps and Derivatives Association ("ISDA") Master Agreement,⁸ although some swaps are also executed through long-form confirmations.⁹ As a general matter, prior to trading, an ISDA Master Agreement will be negotiated¹⁰ to create a vehicle to effectuate a trading relationship in which general commercial terms can be agreed to up front, leaving only trade-specific matters to be included in a transaction. Under the architecture of the ISDA Master Agreement, swap transactions are binding when made orally, with the confirmation process serving to provide a written memorialization of a transaction.

As energy markets are dynamic and volatile, swaps are often entered into on a "real-time basis" rather than after lengthy negotiation. On the other hand, more structured swaps may require a negotiation period. The Joint Associations' members enter into swaps directly with counterparties and through brokers and trading platforms such as the Intercontinental Exchange

⁷ Dodd-Frank at § 723 as codified as 7 U.S.C § 2(h)(7). Although the term "end-user" is not defined in the CEA, the "end-user clearing exception" is available to non-financial entities that use swaps to hedge or mitigate commercial risk and that notify the Commission as to how they generally meet their financial obligations associated with entering into non-cleared swaps.

⁸ See *International Swap Dealers Association Master Agreement (Multicurrency-Cross Border)* (1992 & 2002).

⁹ A long-form confirmation will typically be used with a counterparty that does not have an existing ISDA Master Agreement to promptly document a transaction.

¹⁰ The Joint Associations are also concerned that amending their existing ISDA Master Agreement documentation with each of their counterparties who are Swap Dealers or Major Swap Participants to reflect the requirements of this NOPR will be a lengthy and burdensome process. Such agreements are typically the outcome of complex, arm's length negotiations between parties, and can be even more complex when reflecting less standardized commodities such as energy. For this additional reason, the Joint Associations request that the Commission grant the clarifications and modifications requested in these Comments, which will help limit changes needed to existing swaps documentation and thereby preserve uninterrupted access to cost-effective hedging of commercial risks by end-users, especially in important American industries like the electricity industry.

("ICE"). Generally, swaps are entered into over the course of a day and are subject to a written confirmation sent at the close of business on that day at the earliest.

The Joint Associations' members believe their current practices efficiently and effectively permit them to enter into swaps to hedge their risks. For example, based on an approximate twenty year track record, the ISDA Master Agreement documentation has proved to be adequate and sufficient to meet the industry's needs with no indication that significant changes, such as those being proposed in the Documentation NOPR, are necessary. It is with this perspective that the Joint Associations offer these comments seeking to preserve this well-established, well-understood, and legally sound process.

The Documentation NOPR, in large part, consists of high level principles which the Joint Associations believe are satisfied by current documentation and practices. The Joint Associations request clarification of certain aspects of the NOPR to confirm their understanding and the continuing validity of current practices. The Documentation NOPR also seeks at least one very significant departure from current practices which the Joint Associations recommend that the Commission not include in the final rule. Further, as end-users that will be materially impacted by the "End-User Documentation" provision proposed by the NOPR, the Joint Associations request that the Commission omit the provision in a final rule to significantly reduce the burdensome and anti-competitive requirements contained therein. Finally, the Joint Associations request that the Commission make clear that violations of these regulations will not affect the legal validity of related swaps.

Therefore, the Joint Associations respectfully submit the following comments:

Requested Clarifications

1. Existing ISDA Master Agreements and Processes Are Acceptable

As stated above, the Joint Associations' members typically execute swaps pursuant to either a 1992 or 2002 ISDA Master Agreement. The Joint Associations request that the Commission make clear in its final rule that these master agreements or any master agreement substantially similar¹¹ to them satisfies the documentation requirements of the final rule.

In addition, it is a relatively common practice in OTC swap markets for new trading relationships to be established by the use of "long-form" confirmations. These confirmations set forth the terms of a transaction and often incorporate by reference the ISDA Master Agreement form with relatively few amendments. Long-form confirmations are utilized so that parties that don't have an established relationship but wish to transact expeditiously can do so without going through the sometimes lengthy process of establishing the appropriate master agreement. The flexibility to establish new trading relationships advances competition because it broadens the base of potential counterparties. Moreover, inhibiting the use of long-form confirmations would be anti-

¹¹ The Joint Associations believe that the term "swap" should only refer to financially-settling transactions. In the event that the Commission broadens that definition (for example, to include physically settling options), other agreements such as the EEI Master Power Purchase and Sale Agreement could be implicated.

competitive, because parties would be limited to transacting only under existing trading relationships. Accordingly, EEI requests that the Commission make clear that long-form confirmations that contain all requisite terms also satisfy the documentation requirements of the final rule.

Finally, in accordance with the ISDA Master Agreements and applicable state law,¹² the Joint Associations request that the Commission make clear that swaps are binding when made orally or otherwise. It is critical that the legal certainty of trades entered into under the legal and commercial structure in place today not be disrupted by the Documentation NOPR.

2. Margin and "Haircut" Determinations Should Be As Agreed by Counterparties

The Joint Associations request that the Commission make clear in the provisions regarding credit documentation that the language relating to initial and variation margin and asset "haircuts"¹³ is not prescriptive. As indicated by Chairman Gensler, the Commission does not intend to impose regulatory requirements relating to margin to be assessed to end-users.¹⁴ Thus, while trading documentation should include applicable margin requirements, those margin requirements should only be those agreed to between the Swap Dealer or Major Swap Participant and an end-user. Similarly, while the trading documentation should recognize the types of collateral acceptable under its terms, a "haircut," if any, to the value of the collateral should be that agreed to between the Swap Dealer or Major Swap Participant and an end-user counterparty.

Requested Modifications

1. Swap-by-Swap Valuations Should Not Be Required

The Documentation NOPR diverges materially from current practice by its requirement that the parties to trading documentation include provisions in which they "agree on the methods, procedures, rules, and inputs for determining the value of each swap at any time from execution to the termination, maturity, or expiration of such swap. To the maximum extent practicable, the valuation of each swap shall be based on objective criteria"¹⁵ The Joint Associations respectfully request that the Commission delete or modify this requirement from the final rule.

The Joint Associations' members have executed innumerable swaps using ISDA Master Agreement documentation for many years and have not found the absence of a complex, formulaic, swap-by-swap valuation approach to be detrimental to efficient and effective trading documentation. The credit professionals in the Joint Associations' member companies working with trading business personnel have proven capable of valuing counterparty exposures. There is

¹² See N.Y. Gen. Oblig. Law § 5-701 (2006).

¹³ NOPR at 6726 (proposed as § 23.504(b)(3)).

¹⁴ See Gary Gensler, *Testimony Before the U.S. Senate Committee on Agriculture, Nutrition & Forestry* (Mar. 3, 2011). "Rules on margin requirements should focus only on transactions between financial entities rather than those transactions that involve non-financial end-users."

¹⁵ NOPR at 6726 (proposed as § 23.504(b)(4)).

no need to impose the complex and disruptive impact of the Commission's valuation proposal on a well-functioning process.

The Joint Associations' members enter into many types of swaps for varying terms. These swaps can be used to hedge: (1) fuel costs; (2) a single power plant's output; (3) a generating fleet's output; (4) supply to electric customer load; or (5) other risk-reducing transactions involving the electricity business. These swaps can be in highly liquid markets, highly illiquid markets, and everything in between. These swaps are often entered into in real-time in a dynamic market.

As the Joint Associations' members are using these swaps to hedge their risk, they fully consider their hedging needs, pricing trends, market projections, and other relevant data and enter into legally binding swaps using current practices. Valuation of exposures with counterparties is conducted on a total book level. The Joint Associations' members and their Swap Dealer counterparties have generally found that they do not vary greatly on valuations, and operations/credit departments generally conduct a continuous conversation regarding exposures. It is the Joint Associations' experience that, in the rare event when a valuation dispute may occur, the "valuation agent" and dispute resolution provisions of the ISDA Master Agreement¹⁶ more than satisfactorily serve to permit efficient resolution. There is no business need for formulaic, swap-by-swap valuation.

Accordingly, the Documentation NOPR seeks to impose on a well-functioning process a new requirement that will not have commercial value. In addition to the burden imposed by the proposal, it may actually disrupt commerce. Parties enter into swaps in dynamic markets where prices are constantly changing. It is often difficult, if not impossible, to "hold a price" for a counterparty if the market is moving. The requirement that the parties also negotiate a formulaic valuation of the swap in question simply adds to the negotiation and documentation effort needed to enter into a swap. The Joint Associations believe that the burden is unwarranted and potentially disruptive.

Further, the forward valuation of a swap in some cases is as much an art as it is a science and is not susceptible to being accurately reduced to a formula that can be objectively calculated. Forward market value often has an element of subjectivity and expert judgment. A forward curve for a commodity like electricity is typically composed of available market data from constantly changing liquid markets coupled with traders' informed market viewpoints.¹⁷ In commodity markets, the use of a formula would result in the "false precision" of an outcome that meets a regulatory requirement but would be unlikely to accurately value the transaction.¹⁸

¹⁶ See *ISDA Credit Support Annex* (ISDA Agreement is subject to New York Law), Paragraph 5, Dispute Resolution.

¹⁷ If the Commission would accept a valuation technique that stated "the parties will utilize agreed-upon data from liquid markets to the degree possible to value the transaction," the Joint Associations would have no objection to the NOPR's proposal on this point.

¹⁸ Another unintended consequence of the proposed regulations in the NOPR would be the need for entities to keep multiple sets of books related to swap valuations. All entities that publish financial statements must value swap transactions according to Generally Accepted Accounting Principles (GAAP). If the agreed upon valuation method between counterparties differed from GAAP, dual

Electricity prices are affected by numerous economic factors. Of course, supply and demand are critical, but electricity is sensitive to a myriad of other factors.

- Electricity is both a regulated and market-driven commodity. Regulatory policies that impact electricity prices include: renewables policy and portfolio standards; climate change/carbon policy; and conservation policies such as demand response. In today's world, renewables and carbon emissions policies are in place at both the state and federal levels. Various states have renewables policies and portfolio standards requiring the purchase of electricity generated from specific sources.¹⁹ The federal government provides tax credits to certain qualifying generators²⁰ and Congress is considering federal portfolio standards. Certain states have climate change policies focused on electricity generation.²¹ The federal government has been considering carbon regulatory action both in Congress and through the Environmental Protection Agency. The Federal Energy Regulatory Commission ("FERC") has taken the lead to promote "Demand Response," a type of electricity conservation. Further, FERC policies regarding transmission open access and Regional Transmission Organization (RTO) market design also affect electricity prices.²²

All of the foregoing regulatory policies affect the forward price of electricity. It is impossible to predict today the impact of any or all of these factors in any type of formulaic way. Public policy is inherently political. Policy decisions are made by or are dependent upon the policy makers in office at the time. The electric utility industry is often a vehicle to carry out public policy. While such policy choices have and will have real impacts on prices over time, they are not susceptible to accurate prediction.

- Electricity is a capital-intensive and technologically-sensitive industry. Electricity is generated by expensive power plants. These plants are expensive to

valuations would be required, creating a tremendous resource burden. In addition, when the agreed upon valuation method differs amongst counterparts, an entity will be forced to value the same type of swap with multiple methods. These proposed regulations will add multiple layers of complexity to the already arduous task of swap valuation.

¹⁹ See Database of State Incentives for Renewables & Efficiency, <http://www.dsireusa.org/> (last visited April 5, 2011).

²⁰ See 26 U.S.C. § 45 (1992). See also Database of State Incentives for Renewables & Efficiency Federal Incentives/Policies, http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=US13F (last visited April 5, 2011).

²¹ Regional Greenhouse Gas Initiatives have been enacted in Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. See Regional Greenhouse Gas Initiative at <http://www.rggi.org/design/regulations>. California has also enacted its own program. See Global Warming Solutions Act of 2006, California Assembly Bill 32 (2006).

²² See *Regional Transmission Organization (RTO)/Independent System Operators (ISO)*, <http://ferc.gov/industries/electric/indus-act/rto.asp> (last visited April 4, 2011).

build, modify, and maintain. Other electricity infrastructure such as transmission and distribution facilities are also costly to construct and maintain. Accordingly, the electricity market has always been sensitive to interest rates. As the cost of capital increases, the price of electricity tends to increase. Further, electric generation has also always been a technologically-sensitive industry. Electric generation equipment is generally manufactured by large cutting-edge firms such as General Electric or Siemens. These firms are constantly designing upgrades to their technology that can improve performance and efficiency through the use of coatings, limited retrofits, or other techniques. Finally, electric transmission enhancements can have large impacts on the locational price of electricity. Transmission can take "bottled up" low cost power and make it more widely available, affecting prices in sending and receiving areas.

The complexity, uncertainty, and integrated nature of the foregoing items further illustrate the difficulty in creating a meaningful formula to predict electricity prices for the purpose of valuation. Predicting interest rates and technology changes is not likely to be a simple task among counterparties to a swap.

- Electricity prices can be sensitive to macro-economic factors. Electricity prices are sensitive to fuel input prices. Currently, due to an abundance of shale gas, the conventional wisdom is that natural gas prices (often the marginal fuel) will be depressed in price for the foreseeable future.²³ There is good reason to take this view; however, "conventional wisdom" regarding long term natural gas prices is often well-supported and often wrong. Global events such as the Japanese earthquake's potential impact on nuclear power and levels of overall economic activity can have material impacts on electricity prices.²⁴ Nuclear power has low variable costs and any reduction in nuclear generating plant availability would tend to raise prices. Overall economic activity (as well as weather patterns) would either increase or decrease electricity consumption which, due to power plant economic dispatch, would either increase or decrease marginal prices (which tend to clear the market). Public policy, technology, and other impacts such as the widespread use of electric vehicles may also have implications for electricity prices.²⁵ Like technological change, it is beyond the reach of power traders to predict or reduce unknown macro-economic factors to a formula at the time a swap is entered into.

As shown above, the electricity market is affected by a myriad of interrelated and dynamic factors. As electricity cannot be purchased at a certain price and stored for later use, it is a

²³ See Daniel Yergin, *Stepping on the Gas*, Wall Street Journal, April 2, 2011.

²⁴ See Kiran Stacey, *UBS: Fukushima is Worse for the Nuclear Industry than Chernobyl*, Financial Times, April 4, 2011, <http://blogs.ft.com/energy-source/2011/04/04/ubs-fukushima-is-worse-for-the-nuclear-industry-than-chernobyl/>.

²⁵ See Kevin G. Hall and Renee Schoof, *Is the Moment for Electric Cars Finally Driving Up?*, McClatchy, April 4, 2011, <http://www.mcclatchydc.com/2011/04/04/111483/is-the-moment-for-electric-cars.html>.

particularly volatile and unpredictable commodity. That is why electricity market participants hedge their price risk. If they were in possession of a formula that could accurately show the forward value of electricity for a meaningful period, there would be less price risk to deal with. Given the uncertainty in the factors affecting price, the only useful metric traders can use to predict forward prices is the then-current liquid market because that is where there is "agreement" on a forward price as parties will transact at that price. Any other construction of a forward price will be the product of judgment – not a formula.

Consistent with their current approach, it is more appropriate for the Joint Associations' members to use "objective criteria, such as recently-executed transactions or valuations provided by independent third parties such as derivatives clearing organizations"²⁶ to value positions. This data must be coupled with judgment to construct a forward price unless the transaction in question sits squarely in the liquid market and has been valued thereby. It is not possible or desirable to work to craft an objective formula to value a swap which will likely be rendered stale and inaccurate by changing events. Furthermore, as also stated above, there is no commercial purpose to attempt to create a swap-by-swap formula, and what matters are exposures, not trades. As such, the Joint Associations request that the Commission delete this provision from any final rule.

2. End-Users Should Not Be Required To Provide Documentation To Swap Dealers

The Commission has proposed in the Documentation NOPR to go beyond the mandate of Section 731 and impose documentation requirements on end-users that elect not to clear a swap pursuant to Section 723 of Dodd-Frank.²⁷ The Commission has proposed:

For swaps excepted from a mandatory clearing requirement. Each swap dealer and major swap participant shall obtain documentation sufficient to provide a reasonable basis on which to believe that its counterparty meets the statutory conditions required for an exception from a mandatory clearing requirement . . .²⁸

The proposed requirement is burdensome, anti-competitive, and redundant to other regulations imposed by Dodd-Frank and proposed by the Commission. It should not be part of any swap documentation final rule.

Pursuant to Section 723 of Dodd-Frank, the Commission has already proposed a rule according to which each time an end-user elects to opt out of clearing, it must attest to its legitimate ability to do so.²⁹ In its comments responding to the Commission's proposal, EEI suggested that the Commission reduce the overall filing requirement to a "One-Time General Financial Obligation Notice."³⁰ Therefore, as a general matter, any notification that would be required of an end-user

²⁶ NOPR at 6726 (proposed as § 23.504(b)(4)).

²⁷ Dodd-Frank § 723 as codified at 7 U.S.C. § 2.

²⁸ *Id.* at 6726 (proposed as § 23.505(a)).

²⁹ *See End-User Exception to Mandatory Clearing of Swaps*, 75 Fed. Reg. 80747 (Dec. 23, 2010).

³⁰ *See* EEI Comments to *End-User Exception to Mandatory Clearing of Swaps* at 5 (Feb. 22, 2011.)

would be limited to informing the Swap Dealer or Major Swap Participant that it is electing, on a blanket or transaction-specific basis, not to clear the subject swap. While that notification is effectively made to the Commission, it is relayed by the end-user's counterparty by virtue of the reporting requirements proposed by the Commission.³¹ Given the existing process already proposed by the Commission, there is no need for the requirement proposed in the Documentation NOPR. It is redundant and unnecessary. It creates the burdensome need to provide some sort of undefined documentation to the counterparty that will delay commerce and could even prevent a swap from being executed as the market moves.

Further, the proposal requires an end-user to provide "a reasonable basis" for its counterparty to believe that it meets the statutory conditions.³² Implicit in this requirement is the role of the Swap Dealer/Major Swap Participant to determine whether its end-user counterparty "reasonably" meets the statutory criteria.³³ The Joint Associations do not believe it is appropriate to assign to its members' commercial counterparties the job of assessing Joint Associations' members compliance with statutory criteria.³⁴

Unlike in commodities markets such as those related to interest rates, Swap Dealers and Major Swap Participants in the energy markets are often competitors of energy companies. Major banks that are active in the electricity market are public utilities regulated by FERC, operate in physical cash markets, own or control power plants, and even own large stakes in utilities. While it is appropriate for a competitor end-user to inform its Swap Dealer/Major Swap Participant counterparty that it is electing not to clear a swap, it is inappropriate to require a competitor end-user to inform its Swap Dealer/Major Swap Participant counterparty of proprietary details about its business, including its hedging activities.

Accordingly, the Commission should not include the redundant end-user exception documentation provision in any final rule.

3. Section 739 Should Apply

Dodd-Frank contains Section 739, *Legal Certainty For Swaps*,³⁵ the purpose of which is to make clear that the failure to meet certain requirements of Dodd-Frank would not affect the enforceability of a swap. The Joint Associations are concerned that it is not clear if Section 739 applies to these proposed regulations.

³¹ See *Swap Data Recordkeeping and Reporting Requirements*, 75 Fed. Reg. 76753 (Dec. 8, 2010).

³² NOPR at 6726 (proposed as § 23.505(a)).

³³ Moreover, such a requirement suggests that some potential liability may attach to the Swap Dealer/Major Swap Participant that fails to properly assess an end-user counterparty's qualifications. Given this possibility, Swap Dealers and Major Swap Participants may be less inclined to transact with end-users, or Swap Dealers and Major Swap Participants may increase prices for end-users to account for the increased responsibility and risk associated with such transactions.

³⁴ The Joint Associations assume that Swap Dealers and Major Swap Participants have similar concerns with the proposed rule.

³⁵ Dodd-Frank at § 739 as codified at 7 U.S.C. § 25(a).

Accordingly, the Joint Associations request that the Commission make clear that Section 739 does apply to the proposed regulations, or that Swap Dealer/Major Swap Participant noncompliance with the final rule resulting from the Documentation NOPR will not otherwise affect the enforceability of a swap. End-users need to be able to enter into swaps without concern that their counterparty's regulatory issues could affect the legal validity of their hedges.

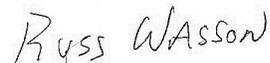
Conclusion

The Joint Associations request that the Commission modify the Documentation NOPR and provide the clarifications described above. The Joint Associations' members should be able to continue to transact with their Swap Dealer and Major Swap Participant counterparties using the effective and legally sound documentation and processes used today. Finally, in no event should the Commission impose documentation requirements on end-users by this rulemaking, particularly requirements that are redundant to other proposed rules.

Respectfully submitted,



Richard F. McMahon, Jr.
Vice President
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, DC 20004
rmcmahon@eei.org



Russell Wasson
Director of Tax, Finance and
Accounting Policy
National Rural Electric Cooperative
Association
4301 Wilson Blvd., EP11-253
Arlington, VA 22203
russell.wasson@nreca.coop



Sue N. Kelly
Senior Vice President of Policy
Analysis and General Counsel
American Public Power Association
1875 Connecticut Avenue, NW
Suite 1200
Washington, DC 20009-5715
SKelly@publicpower.org



Noreen Roche-Carter
Chair, Large Public Power Council
Tax and Finance Task Force
6201 S St.
Sacramento, CA 95817-1899
nrochec@smud.org