COMMENTS ON BEHALF OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AMERICAN PUBLIC POWER ASSOCIATION LARGE PUBLIC POWER COUNCIL EDISON ELECTRIC INSTITUTE ELECTRIC POWER SUPPLY ASSOCIATION FOR "END USER PERSPECTIVE" PANEL ON CFTC/SEC JOINT PUBLIC ROUNDTABLE ON SCHEDULE FOR FINAL RULES AND IMPLEMENTING FINAL RULES UNDER THE DODD-FRANK ACT RULEMAKING

ORAL REMARKS BASED ON THESE COMMENTS WERE DELIVERED BY RUSSELL WASSON OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AT THE CFTC/SEC ROUNDTABLE ON MAY 3, 2011:

The National Rural Electric Cooperative Association ("NRECA") appreciates the CFTC's invitation on Thursday evening to participate in this important roundtable. In the short time we had to prepare, we have reached out to others in the electric industry for their views. We appreciate the support we received from the American Public Power Association, the Large Public Power Council, the Edison Electric Industry and the Electric Power Supply Association (collectively, with NRECA, the "Electric Trade Associations") and others in preparing these remarks.[1]

Our comments are focused on the over-the-counter markets for non-cleared (or "uncleared") energy commodity products in which our members are regular market participants. Our comments may not be applicable to the SEC or the security-based swaps markets that the SEC will regulate under the new Dodd-Frank Act rules. I thank the SEC representatives for your patience.

The electric industry has been very active in the CFTC's rule-making process. We believe Congress clearly intended that commercial end users of "swaps" have at least one or two seats at this round table. We note the serious consequences to American business should the regulators rush to finalize and implement the Dodd-Frank Act rules without careful consideration of unique and diverse commercial end users' perspectives in the various and different OTC derivatives markets. The regulators can construct new swap markets. However, if the markets that exist now are dismantled or made "unlawful," we will have lost a valuable risk management tool that has helped the electric industry keep America's electric rates affordable and its electric supply reliable for decades. And if these new markets (when they become operational) are too expensive or too cumbersome to allow commercial

[1] Due to the short time frame for preparing and submitting these comments, we have not been able to solicit input from our trade association members, and therefore the comments represent the collective views of the Electric Trade Associations, but may not reflect the views of any individual trade association member or members.

end users to cost-effectively hedge commercial risk, American businesses will not use the new markets.

1. CONGRESS INTENDED COMMERCIAL END USERS TO BE TREATED DIFFERENTLY THAN FINANCIAL ENTITIES: Congress intended the "end user exception" to protect nonfinancial entities (aka "commercial end users") from new regulatory costs and burdens, and to preserve the ability of American business and industry to use OTC derivatives to cost-effectively manage commercial business risks.

2. NONFINANCIAL END USERS HAVE A UNIQUE PERSPECTIVE ON MANY OF THE CFTC'S PROPOSED RULES ON "SWAPS." Electric utilities and other commercial end users of energy commodity swaps have commented on more than 20 of the CFTC's rule-makings to date. Our perspective is new to the CFTC, which in the past has viewed non-futures market professionals as "customers" of regulated entities, or "the buy-side," while the CFTC regulated only "the sell side." In the OTC energy commodity swap markets, those concepts do not have easily identifiable parallels, and in the post-Dodd-Frank swap markets, the CFTC has jurisdiction over nonfinancial entities who are end users of "swaps" to a limited extent. The regulators also have obligations to such non-financial end users.

Ours are markets where nonfinancial, commercial entities often deal directly with each other. Collateralization, or "margining," is the exception rather than the rule. If they exist, unsecured credit thresholds are high for our low risk nonfinancial entities. In our markets, often letters of credit or physical assets are pledged, rather than cash or Treasury securities. Margin is not always delivered electronically and not typically exchanged daily. Our forwards, options and swaps do not settle daily, and valuation of net exposures is not agreed by the counterparties daily or with precision, except in a default or other termination scenario. Our commercial hedging needs are geographic-specific, seasonal and immediate, and our forwards, options and swaps contain highly customized operating and transmission contingencies and optionality.

We agree on many points with yesterday's market infrastructure panelists and the panelists today, most of whom represent financial entities. We believe the CFTC (and the SEC) should sequence issuance of the Dodd-Frank final rules, and implementation of those rules, by asset class. The CFTC and the SEC should first focus on evaluating data currently collected in each market, and the unique attributes of each market, and then issue appropriate rules and register market infrastructure entities, then register market professionals, then register financial entities with new roles in each asset class. In implementing clearing and transaction documentation and reporting mandates, the CFTC and the SEC should focus on professional-to-professional transactions first, then non-swap dealer/MSP financial entities, and only then turn to implementing rules affecting nonfinancial entities. And, the CFTC and the SEC should implement rules requiring new systems and personnel for larger or more systemically important entities first, and allow those nonfinancial entities who only use swaps to hedge commercial risks more time.

We agree that the CFTC should focus first on credit swap and rate swap asset classes, and focus on "other" commodities last. Within the "other commodities" asset class, we believe there should be further prioritization and separate analysis, recognizing that the agricultural markets are different from the metals markets, from the oil and petroleum products markets, and from the domestic natural gas, electricity and related nonfinancial commodity markets.

Nonfinancial energy commodity "products" are those which we use as nonfinancial entities and commercial end users. These are the markets where FERC, the state energy regulators, the RTOs, the EPA and other US regulators have a stake. These are the markets where nonfinancial commodity forwards and nonfinancial commodity options play a key role in the way nonfinancial commercial end users manage their risks. Our markets are full of diverse entities and affiliates -- all end users -- and unique customized data elements. Trading in any one "product" is likely to be relatively illiquid and commercial entities are acutely interested in the confidentiality of trading data, which can easily disclose nonfinancial market participant identities and risk management strategies.

As examples of a "unique" end user perspective on the rules discussed yesterday, we offer the following thoughts:

a. Throughout the discussion on swap data repositories, there was no discussion of the important Congressional mandate in new CEA Section 2(a)(13)(E) to maintain confidentiality of market participant data.

b. During the discussions on technology, there was no discussion of the tremendous new regulatory burdens and costs on a nonfinancial entity which wants to engage in just a few swaps, or has to report a non-cleared swap for the first time, either to an SDR or "in real time" to the public, and yet nonfinancial entities have commercial priorities other than installing financial reporting technology.

c. Most panel members have asked for deliberate and careful regulatory "harmonization" -- between the CFTC and the SEC, with prudential regulators and with international regulators. However, there was no mention of the energy or environmental regulators which currently and comprehensively regulate the electric industry, or the FERC/CFTC MOUs or the statutory "public interest" exemptions. Electric companies need regulatory harmonization before any new regulations are finalized.

These are perspectives that need to be addressed if nonfinancial entities are to continue to have access to nonfinancial commodity swaps as cost-effective risk management tools.

3. NONFINANCIAL ENTITIES LIKE ELECTRIC UTILITIES NEED REGULATORY CERTAINTY NOW -- WHILE THE CFTC FINALIZES AND IMPLEMENTS ITS NEW MARKET STRUCTURES. Since last September, we have had pending petitions under Section 723(c) of the Dodd-Frank Act for a one-year exemption from the Dodd-Frank Act to allow us to continue to do business in the electric industry during the construction of the CFTC's new swap markets -- petitions which the CFTC indicated it would reconsider within 90 days of the effective date for Dodd-Frank. That time is now. As Commissioner Sommers noted last week, discussing the new market structure as the looming Dodd-Frank Act effective date approaches provides no guidance to a commercial entity as

to what it is supposed to do on Monday, July 18, 2011. The Act summarily deletes the exclusions and exemption upon which our energy commodity and derivatives markets rely. While the CFTC sequences its rule-makings and the implementation of its new market structure, and then "transitions" the market participants onto the new platform -- how does an electric utility hedge the commercial risks inherent in its nonfinancial energy commodity business during its summer peak season?

4. AS NONFINANCIAL END USERS, WE RECOMMEND SEQUENCING THE FINAL RULES, AND IMPLEMENTATION OF THE RULES, IN THE NEW CFTC SWAP MARKETS AS FOLLOWS. As for constructing the new market structure, we recommend that the CFTC sequence as follows:

a. define the scope of the CFTC's new jurisdiction over nonfinancial commodity transactions by finalizing the definition of "swap," defining "nonfinancial commodity," and providing certainty on the question of all requested and anticipated exclusions and exemptions. From "nonfinancial commodity options" to the "public interest exemptions" for "tariffed products" and "between FPA 201(f) transactions," and other clear Congressional mandates to avoid overlap and regulatory uncertainty, American electricity and other commercial businesses need clarity -- if we don't need to spend 2011 dollars understanding and implementing the CFTC's new rules, we could allocate those dollars to reliability or energy infrastructure projects;

b. if the world of financial commodities and "swaps" derived on such commodities is ready for the new regulatory structure, proceed with those asset classes and leave the nonfinancial commodities (including energy commodities important to the electric industry) to a later date -- our markets are the least standardized, the most comprised of end-user-to-end-user transactions, the least likely to pose a threat to the global financial markets, and are already regulated by other Federal and state agencies with comprehensive oversight and detailed, evolving jurisdiction;

c. enter into the statutory MOUs with Federal energy regulators, and analyze the information the industry already provides to FERC, the EIA, the EPA and other energy and environmental regulators -- to reduce the duplicative regulatory costs and burdens that are weighing down our economy;

d. establish recordkeeping and reporting rules in clear and common sense terms, and provide for a "CFTC-lite" regulatory scheme for nonfinancial entities new to the CFTC regulatory regime -- commercial end users -- without systems and personnel that the CFTC assumes are present, and probably would be present if we were financial entities;

e. while we get on with our commercial businesses, define rules and construct new market infrastructure entities, define and register market professionals like swap dealers and major swap participants (FCMs and IBs), and test the regulatory structure on <u>financial</u> products -- those that are more easily standardized, moved to exchanges, accepted by transaction reporting entities, and cleared;

f. at each stage of this process (in e, above) consider how these market entities would interact with, or market processes would function in relation to, a commercial end user, which nonfinancial entity is not

subject to prudential regulation and has unique and significant commercial data privacy and competitive market position interests at stake;

g. within an asset class, sequence the implementation such that transactions between swap dealers and major swap participants (once defined, registered and tested) are regulated well before transactions to which nonfinancial entities are parties;

h. provide a CFTC office to assist commercial end users, especially those who need the nonfinancial commodity "swaps" and options to hedge commercial risks, in understanding the new regulatory regime -- a "CFTC-lite" form of regulation as we have recommended for nonfinancial entities in our many comment letters; and

i. provide significant time for different types of commercial end users (from Fortune 100 or global companies to small non-profits like electric cooperatives) to watch and learn, choose to participate in the new regulatory structure or not, register and finally assume a place in the new CFTC-regulated swap markets.

5. WE OBJECT TO THE PRESUMPTION IN THE PROPOSED RULES THAT EACH COMMERCIAL END USER (EVEN THE SMALLEST ENTITY ENTERING INTO ONE OR A FEW SWAPS) SHOULD BEAR A "PROPORTIONATE" SHARE OF THE FULL REGULATORY COST BURDEN OF THE DODD-FRANK LEGISLATION. To date, when read from the "commercial end user" perspective, the CFTC's proposed new market structure rules for "swap" regulation that treat a commercial end user as if it were just another market participant -- the rules impose costs on an electric cooperative as if it were a hedge fund or a global bank. The rules propose a new swap market structure -- with new market infrastructure entities, financial institutions restructuring their operations and registering under new labels, all new recordkeeping and reporting systems, all new documentation, all new "valuation" processes, collateralization structures and credit support relationships. Commercial end users are assumed to be responsible to bear their "proportionate" share of all these new costs, which from the perspective of a commercial end user, puts a "disproportionately" large share of the regulatory cost on those market participants least able to bear the cost and burdens, and who post no systemic risk to the financial markets.

6. FOR NONFINANCIAL ENTITIES TODAY, THE CFTC'S CURRENT REGULATORY SCHEME FOR FUTURES AND EXCHANGE-TRADED OPTIONS IS OPTIONAL -- IF WE DON'T' WANT TO PAY THE COST, WE TRANSACT OTC. DODD-FRANK MAKES THE NEW SWAP REGULATORY REGIME MANDATORY. OUR ONLY CHOICE TO AVOID THESE COSTS IS NOT TO HEDGE USING SWAPS. The past 8 months have been an interesting adventure for electric utilities (including government entities and electric cooperatives) -- to learn a new regulatory language and to struggle to understand the interrelated and overlapping new rules, especially without key definitions -- some of which were announced only last week, and some which remain to be defined, such as "nonfinancial commodity." We have participated diligently, expending significant resources in an effort to assist the CFTC in understanding our nonfinancial businesses and the commercial end user perspective. When the proposed rules were announced, in some instances the

notices asked for explanations and data on electric industry concepts that we have repeatedly discussed and explained in comments and in meetings with the staff.

7. REGULATORY OVERLAP PRESENTS A SIGNIFICANT AND UNNECESSARY COST TO HEAVILY-REGULATED NONFINANCIAL ENTERPRISES (COMMERCIAL END USERS). We have awaited the FERC-CFTC MOUs required by Congress, to understand how our regulated enterprises are to reconcile the obligations to our existing energy reliability regulators and to our new commodity markets regulators. We have asked the CFTC to put in place a simplified "CFTC-lite" form of regulation for commercial entities that are already subject to energy and environmental regulators, are new to the financial markets regulatory regime and pose NO RISK to the global financial system.

8. COMMERCIAL END USERS SEEK REGULATORY CLARITY -- ESPECIALLY IN THE SWAP MARKETS DERIVED ON NONFINANCIAL COMMODITIES -- DEFINING THE SCOPE OF THE CFTC'S JURISDICTION MUST BE ADDRESSED AS A PRIORITY. AS YET, THERE HAS BEEN NO CLARITY PROVIDED. Since last September, the electric industry has asked for clarity on the definition of "swap," and related matters, such as:

a. the forward contract exclusion and the definition of "nonfinancial commodity" -- a term that still lacks a proposed definition;

b. for forward contracts that are "booked out" prior to delivery, or otherwise settled by means other than physical delivery using exchange-offered or exempt commercial market products now available;

c. for clarity that all commercial end users of energy commodities qualify as "eligible commercial entities;"

d. for clarity that trade options on nonfinancial commodities are not swaps;

e. for clarity that electric transmission and generation capacity contracts are not swaps;

f. for clarity that forward fuel supply contracts, like natural gas and coal which might have significant embedded optionality on delivery points and/or quantities due to the geography-specific and seasonal nature of commercial business, are not swaps; and

g. for clarity that renewable energy credit and emissions contracts, and other commonly used contracts that we use every day in our public service enterprises to manage our regulatory obligations, are not swaps.

9. COMMERCIAL END USERS ARE NOT "CUSTOMERS" AND NOT PROFESSIONAL MARKET PARTICIPANTS -- THE COSTS OF THE NEW MARKET STRUCTURE SHOULD NOT BE DIRECTLY (OR INDIRECTLY) ALLOCATED TO COMMERCIAL END USERS. Commercial end users did not cause the financial crisis, nor do electric cooperatives "trade" or "speculate" -- we hedge. The proposed rules treat all market participants equally -- a fine market

structure among professionals, like the futures markets currently regulated by the CFTC. But, in the regulated swap markets, such a market structure puts "equal" and substantial new cost burdens on the smallest of market participants -- commercial end users like electric cooperatives -- or denies them access to the markets. Our comments on proposed rules to date have repeatedly pointed this out to the CFTC and requested a "CFTC-lite" regulatory regime for nonfinancial entities, especially for "end user only" entities. To engage in "swap #1":

a. an end user must register with a "swap data repository" for a "unique counterparty identifier" under the new regulatory regime;

b. the commercial end user, such as an electric cooperative, must educate itself about an entirely new and complex set of regulations, binding on the entity merely because it wants to buy an option on power delivered into a service territory in rural Montana -- in case its customers need more power than the entity's generation assets can produce during July;

c. to execute an option on a nonfinancial commodity (which would be viewed by the CFTC as a swap) an electric cooperative must be an "eligible contract participant." If not, the electric cooperative must transact that option on an exchange, and we doubt there would be a liquid market in such rural Montana power options such that an exchange would list such a "product";

d. a commercial end user will need to enter into new swap documentation to transact with a swap dealer or major swap participant -- with required terms not presently in standard industry documentation such as the ISDA or, for commodity trade options, the EEI or the NAESB;

e. if a commercial end user executes a non-cleared swap with another end user of nonfinancial commodities like power, one of them must report to a "swap data repository" AND in some way report to the public in "real time," as if the end users had the types of systems and personnel that a Wall Street bank or hedge fund maintains. But an electric utility's personnel and systems are focused on reliable delivery of power, at the lowest possible cost to its consumer/members.

10. IN THE NONFINANCIAL COMMODITY SWAP MARKETS, THERE ARE MORE END-USER-TO-END-USER TRANSACTIONS THAN IN OTHER MARKETS. The nonfinancial commodity swaps in which electric utilities engage are not always transacted with financial entities, or even with large entities who may be swap dealers. The electric cooperative may be transacting with another electric utility in its region, or with a regional natural gas producer or other commercial entity, which is hedging its own commercial risk. No Wall Street intermediary is involved such that the regulatory burdens and reporting obligations can be borne by that financial entity. No market professional is there to walk the parties through the regulatory maze of new regulatory terminology and compliance obligations.

11. FINANCIAL ENTITIES WILL SHIFT NEW REGULATORY COSTS TO END USERS SHOULD THE FINANCIAL ENTITIES CHOOSE TO CONTINUE TO ENGAGE IN PARTICULAR SWAP ASSET CLASSES. A financial entity chooses the markets in which it participates. To maintain a profit, the financial entity will shift new regulatory costs to the end user --

after all, the financial entity can "trade" in other asset classes or in other "instruments" if the energy asset class is not profitable. The utility, as a commercial end user, does not have that flexibility -- its commercial risks arise naturally from its public service business and require it to transact in the types of "nonfinancial energy commodity swaps" in which it has transacted for decades -- or not to hedge using swaps at all.

12. END USER ENTITY AND AFFILIATE STRUCTURES ARE DIFFERENT THAN THOSE MAINTAINED BY FINANCIAL ENTITIES -- AND MANY ARE UNIQUE TO INDUSTRIES OR OTHER REGULATORY COMPLIANCE REGIMES. Thus far, the proposed rules have not recognized the valid commercial reasons for which a nonfinancial entity structures its enterprise and affiliate relationships in a way that is different in many respects than the way in which a financial institution or other financial entity might be structured. And, in the electric industry, the shared public service mission of reliable energy delivery, reasonable rates, and environmental stewardship are often the basis upon which affiliated entities operate among themselves.

13. THE PROPOSED RULES INCLUDE BURDENSOME, TIME-CONSUMING AND COSTLY TRANSACTION DOCUMENTATION PROCESSES AND REPORTING. The proposed end user exception rule "only" requires 12 to 24 more transaction-by-transaction data elements be exchanged between the parties to a non-cleared swap, and reported to a new regulated entity (SDR) and, perhaps, to the public "in real time." The proposed end user exception and swap documentation rules "only" require all new documentation between the end user and any swap dealer or major swap participant with which the end user does business. For electric utilities that are governmental entities, the new swap dealer business conduct rules "only" require a host of new valuations and advisory scenarios be provided, as well as advice and disclaimers that are not currently requested or required. None of this additional regulatory paperwork will be free. In the electric industry's nonfinancial energy commodity markets, the CFTC has not provided any estimates of the cost of all this new documentation to the commercial end user. Neither has the CFTC explained how all these new rules, or any one of them, would have prevented "another AIG," "another Lehman" or even "another Enron."

IN SUMMARY -- NONFINANCIAL END USERS HAVE A VALUABLE PERSPECTIVE TO OFFER IN THE RULEMAKING PROCESS -- IN PARTICULAR, AS IT RELATES TO NONFINANCIAL COMMODITIES AND THE RELATED SWAP MARKETS. WE STAND READY TO ASSIST THE CFTC BY PARTICIPATING "AT THE TABLE" -- SO THAT OUR NEWEST REGULATORS CAN UNDERSTAND AND REGULATE IN A THOUGHTFUL, COORDINATED, DELIBERATE AND FULLY-INFORMED MANNER.