

**UNITED STATES OF AMERICA
BEFORE THE
COMMODITIES FUTURES EXCHANGE COMMISSION**

Further Definition of “Swap,”)	
“Security-Based Swap,” and)	
“Security-Based Swap Agreement”;)	RIN 3038-AD46
Mixed Swaps; Security-Based Swap)	
Agreement Recordkeeping)	
Mandatory Clearing)	
)	

**COMMENTS OF THE
BONNEVILLE POWER ADMINISTRATION
ON
PRODUCTIONS DEFINITIONS**

I. COMMENTS IN RESPONSE TO PROPOSED RULEMAKING

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).¹ Title VII of the Dodd-Frank Act amends the Commodities Exchange Act overseen by the Commodities Futures Trading Commission (Commission).² In particular, the Dodd-Frank Act creates a new regulatory framework for commodities- and securities-based swaps.

The Commission, jointly with the Securities and Exchange Commission, issued a Notice of Proposed Rulemaking (NOPR)³ on May 23, 2011, proposing to further define, amongst other terms, the term “swap” under the Dodd-Frank Act and invited comments on the proposed rules and interpretations. The Bonneville Power Administration (Bonneville) appreciates and thanks the Commission for this opportunity to comment. Bonneville provides the following comments on the Commission’s proposed rules and

¹ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

² 7 U.S.C. §§ 1 *et seq.*

³ Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”: Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 F.R. 29818, 29821 (May 23, 2011).

proposed interpretive guidance under the Commodity Exchange Act to further define the term “swap.”

II. DESCRIPTION OF BONNEVILLE

The Bonneville Power Administration is a Federal agency created in 1937 by Congress to market electric power from the Bonneville Power Project, located on the Columbia River, and to construct transmission facilities necessary to transmit such power. Currently, Bonneville markets electric power from 31 federally owned and operated projects, supplier of 35 percent of the electricity used in the Pacific Northwest. Bonneville constructed, operates, and maintains a high voltage transmission system comprising approximately 75 percent (15,000 circuit miles) of the bulk power transmission capacity in the Pacific Northwest. Bonneville’s service area includes Oregon, Washington, Idaho, and Western Montana, covering approximately 300,000 square miles. Bonneville sells wholesale power to public and private utilities, Federal agencies, marketers, power brokers, and large industrial customers.

Bonneville is a self-financed non-profit Federal utility.⁴ As a self-financed agency, Bonneville must recover its costs, including repayment of funds borrowed from the U.S. Treasury, through establishing rates for sales of power and transmission services. Bonneville rates are established “with a view to encouraging the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles.”⁵

⁴ Bonneville has a statutorily established line of credit with the U.S. Treasury and also obtains financing from other sources.

⁵ Federal Columbia River Transmission System Act, § 9(1), 16 U.S.C. § 838g(1).

Bonneville is charged by Congress with the responsibility of implementing numerous enabling statutes.⁶ Bonneville is statutorily obligated to provide preference and priority in the purchase of available low-cost Federal power to over 130 “preference customers” made up of non-FERC jurisdictional utilities, including public utility districts, municipalities and electric cooperatives in the Pacific Northwest.⁷ To extend the benefits of low cost Federal System hydro power to residential and small farm electric power consumers throughout the Pacific Northwest Region, including, primarily, electric power consumers that are not served by preference customers, Congress established a “residential exchange” program in section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (Northwest Power Act).⁸

III. BONNEVILLE’S INTEREST IN THE PROPOSED DEFINITION OF A “SWAP” – THE RESIDENTIAL EXCHANGE PROGRAM

Bonneville has a unique statutory obligation that requires Bonneville to exchange electric power with regional utilities for the benefit of residential and small farm power consumers in the Pacific Northwest Region.⁹ Bonneville refers to the implementation of section 5(c) of the Northwest Power Act (the Residential Exchange Statute) as the Residential Exchange Program (REP). Under the REP, a Pacific Northwest electric utility has a right to offer to sell power to Bonneville at the utility’s average system cost¹⁰

⁶ BPA’s primary enabling legislation includes the following Federal statutes: the Bonneville Power Project Act of 1937, 16 U.S.C. §§ 832 *et seq.*; the Flood Control Act of 1944, 16 U.S.C. §§ 825s *et seq.*; Public Law 88-552 (the Pacific Northwest Consumer Power Preference Act of 1964), 16 U.S.C. §§ 837 *et seq.*; the Federal Columbia River Transmission System Act of 1974, 16 U.S.C. §§ 838 *et seq.*; and the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. §§ 839 *et seq.*

⁷ Pacific Northwest Consumer Power Preference Act of 1964, 16 U.S.C. §§ 837 *et seq.*

⁸ 16 U.S.C. § 839c(c).

⁹ *Id.* at § 839c(c)(2).

¹⁰ A utility’s average system cost is a term that has been very contentious and subject to numerous litigation challenges. For purposes of these comments and in an overly simplistic way, the term means the

(ASC) of providing that power.¹¹ Once such offer is made, Bonneville's is required to purchase that power at the utility's ASC, and then sell an equivalent amount of power back to the utility at Bonneville's rates which are based in substantial part on low cost Federal hydro power.¹² As required by the Residential Exchange Statute, the amount of such power "exchanged" is based on the related utility's residential and small farm customer's power needs (also known as "loads") in the Pacific Northwest Region. Under this "exchange," no actual power is transferred to or from Bonneville. Instead, consistent with Congressional intent, the exchange transaction is implemented as an accounting device that avoids the costs and burdens associated with a physical exchange of power and that results in the payment of funds by Bonneville to the REP exchanging utilities. Reduced to the essentials, the Residential Exchange Statute as implemented in the REP contracts results in Bonneville making cash payments for the positive difference between the utility's ASC and Bonneville's lower rate multiplied by the qualifying residential and small farm loads. And, as required under the Residential Exchange Statute, the entire monetary benefit Bonneville provides to the REP exchanging utilities is in turn passed through to the residential and small farm power consumers of that utility. These benefits are reflected in the consumers' power bills from their respective utilities as a credit or a deduction from the amount otherwise due by the consumer.

The key determinants for both sides of the exchange – the utility's ASC and Bonneville's lower rate – are developed through formal administrative processes

average cost for the REP exchanging utility of producing electricity to serve its residential and farm consumers, with certain controversial costs excluded.

¹¹ 16 U.S.C. § 839c(c)(1).

¹² *Id.*

conducted by Bonneville with numerous parties participating in the process.¹³ The method for determining a utility's ASC and Bonneville's exchange power rate are subject to review and approval by the Federal Energy Regulatory Commission.¹⁴

IV. DEFINING "SWAP" BROADLY SUCH THAT IT MAY INCLUDE BONNEVILLE'S PURCHASE AND EXCHANGE SALES IS INCONSISTENT WITH CONGRESSIONAL INTENT

Bonneville is concerned that a broad reading of a "swap" as currently defined in the Commodities Exchange Act § 1a(47)(A) as amended by § 721(a) of the Dodd-Frank Act,¹⁵ could potentially incorporate a Congressionally-created consumer benefit program provided by Bonneville through the exchange conducted under the REP. As Bonneville stated in its February meeting with the Commission and in previous discussions, Bonneville continues to believe that it was not Congress's intent to include a statutory program of this type within the Dodd-Frank regulatory sphere. The REP does not pose a market-related risk of the type Dodd-Frank seeks to reduce or eliminate.

IV. "SWAP" SHOULD BE DEFINED TO SPECIFICALLY EXCLUDE BONNEVILLE'S PURCHASE AND EXCHANGE SALES

Bonneville respectfully requests that the Commission further define "swap" to specifically exclude the consumer benefits provided under the Residential Exchange Statute and REP. While recognizing that many of Dodd-Frank's new regulatory mandates will not directly affect the REP, *e.g.*, the Commission's proposed end-user exemption should prevent application of any clearing requirements to the REP (assuming the REP were to be deemed a swap), Bonneville is concerned about potential consequences that may occur if the REP is not specifically excluded. For example, at

¹³ *Id.* at § 839c(c)(7).

¹⁴ *Id.*

¹⁵ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

some point, one of Bonneville's REP exchanging utilities could be deemed a swap dealer¹⁶ or major swap participant¹⁷ with corresponding capital and margin requirements.¹⁸ If the REP were deemed a swap, then the benefits that Congress intended for residential and small farm customers under the Northwest Power Act might well be offset by costs incurred by an REP exchanging utility or Bonneville in meeting Dodd-Frank requirements in connection with the REP.

Further, calculating the appropriate margin for a unique, statutorily-defined, untraded product may prove immensely difficult for the REP exchanging utility or Bonneville. In addition, if the REP were to be swept into the definition of a swap, Bonneville may be faced with reporting requirements it would otherwise not have; Bonneville does not currently engage in any uncleared swaps. There may be other unforeseen or unintended consequences as well.

With its basis in statute, and the obvious underlying intention that it result in payments from Bonneville to the benefit of residential and small farm electric power consumers (and, pointedly, not to the benefit of the REP exchanging utilities), the REP is simply not the commercial-type transaction of the sort that Congress intended to regulate under Dodd-Frank. Moreover, the basic components of REP are subject to review and approval by FERC, further arguing against regulation by the Commission. Bonneville believes that most forthright way to resolve this matter consistent with Congress's intent

¹⁶ 7 U.S.C. § 1a(33).

¹⁷ *Id.* at § 1a(49).

¹⁸ *Id.* at § 4s(e).

is for the Commission to further define swaps as follows:

Swap does not include

A purchase and exchange sale under Section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (16 U.S.C.839c(c)).

IV. CONCLUSION

Bonneville thanks the Commission staff for its efforts to address rulemaking pursuant to the Dodd-Frank Act and appreciates the opportunity to provide comments.

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Respectfully submitted,

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