ADAPTATION OF REGULATIONS

August 8, 2011

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

Re: Comments on Adaptation of Regulations to Incorporate Swaps (17 CFR Parts 1, 5, 7, 8, 15, 18, 21, 36, 41, 140, 145, 155 and 166), 76 Fed. Reg. 33,066 (June 7, 2011), RIN No. 3038-AD53

Dear Mr. Stawick:

The Electric Utility Trade Associations[1] respectfully submit these comments to the Commodity Futures Trading Commission (the "Commission") on the notice of proposed rulemaking captioned "**Adaptation of Regulations to Incorporate Swaps"** (the "Adaptation NOPR") pursuant to the Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

This rulemaking is premature. The Preamble acknowledges as much in its description of each of the three categories of "adaptation:" the "ministerial changes" are just that, ministerial, noncontroversial and mechanical. But they are not comprehensive, since there are dozens of

[1] The National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), the Large Public Power Council ("LPPC"), and the Edison Electric Institute ("EEI"). See Attachment A for a description of the members of each Electric Utility Trade Association. The comments contained in this filing represent the comments and recommendations of the Electric Utility Trade Associations, but not necessarily the views of any particular member of any one or more of the Electric Utility Trade Associations on any issue. The Electric Utility Trade Associations are authorized to note the involvement of the following organizations and associated entities to the Commission, 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.

regulations defining the Commission's new regulatory regime for "swaps" that have been proposed for comment (the "Other Proposed Rules").

More importantly, where the proposed rules in the Adaptation NOPR go beyond ministerial amendments, corrections and deletions to the existing Commodity Exchange Act ("CEA") regulations, they are not ***just*** premature. The Adaptation NOPR's proposed rules take the existing CEA regulations in a variety of wrong directions. The proposed rules that purport to "accommodate" the Dodd-Frank Act in the existing CEA regulations, or to align or harmonize concepts in the CEA regulations in a "substantive" way, presume that "swaps" are identical to futures contracts, and that swap counterparties are either market professionals or "customers." The Adaptation NOPR represents a fundamental misunderstanding of the swap market structures that exist today in the electric industry.

The proposed rules do not take into account the myriad Other Proposed Rules that have been issued for comment by the Commodity Futures Trading Commission (the "Commission"), on which hundreds of comments have been submitted, and for which final rules have yet to be issued.[2] The Electric Utility Trade Associations cannot effectively comment on the proposed rules in the Adaptation NOPR without understanding how the Commission intends to revise, repropose and/or finalize the Other Proposed Rules implementing its new jurisdiction over "swaps." Only then can the Commission "adapt" its existing regulations (governing futures contracts and exchange-traded options) to include, ***only where appropriate***, parallel provisions for its brand new regulatory regime governing "swaps." The Electric Utility Trade Associations respectfully reserve the right to comment further in this docket and on all Other Proposed Rules that may be affected by the Adaptation NOPR's proposed amendments, at such time as an Adaptation NOPR is ripe, revised and reproposed.

The Electric Utility Trade Associations and their members have a direct and significant interest in a single set of clear, integrated and comprehensible rules applicable to "swaps," "nonfinancial commodity forward contracts," "commercial merchandising arrangements" involving a "nonfinancial commodity," and clear rules applicable to "nonfinancial entities" and "end users." All these terms and concepts are new to the CEA under the Dodd-Frank Act. The introduction of such new terms and concepts requires a comprehensive approach to rulemaking. This complex, intertwined, new rulemaking process should not be confused by the Commission's premature and seemingly disconnected attempt to adapt the way in which the Commission applies its existing regulations to new types of transactions and new types of entities.

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[2] The Preamble acknowledges this a number of places including footnote 9 on page 33,067, and footnotes 64 and 65 on page 33, 072. When purporting to "adapt" or "harmonize" existing defined terms and existing regulations, the Adaptation NOPR propose substantive new regulatory obligations for entities engaging in swaps that are different than those proposed in Other Proposed Rules. See Section IIIC below about recordkeeping and reporting obligations for "swaps." The Electric Utility Trade Associations respectfully comment that the Commission should address the hundreds of comments they have already received on proposed defined terms and rules applicable to "swaps" to date before proposing different, competing definitions and rules.

"Swaps" are not "contracts for future delivery of a commodity." "Nonfinancial entities" are not market professionals, but neither are they always "customers." The electric industry has spent months explaining this to other Dodd-Frank Act Task Forces of Commission staff and to the Commissioners. Adaptation of the Commission's existing rules is an exercise for later, depending on whether and how the new comprehensive and integrated regulatory regime governing "swaps" is, ***or is not***, similar to the existing futures market regulatory structure. The Adaptation NOPR is premature and should be withdrawn.

I. Summary of Comments of the Electric Utility Trade Associations.

The Electric Utility Trade Associations respectively request that the Commission:

- Withdraw the Adaptation NOPR as premature, and reissue only when an integrated mosaic of final (or substantially final) rules implementing the Commission's new Dodd-Frank Act jurisdiction over "swaps" is available for public review and analysis, including the foundational definitions which give meaning to the proposed rules.

- In particular, withdraw the proposed rule defining "physical," which has broad ramifications under the CEA, as amended by the Dodd-Frank Act, as it relates to "swaps."

- In particular, withdraw the proposed rules defining "registered entity," "organized exchange," "electronic trading facility," "trading facility" and "member," and proposed regulation 1.35.

- Conduct the cost-benefit analysis required by law with respect to the proposed rules implementing the Commission's new Dodd-Frank Act jurisdiction over "swaps," and the burdens imposed by such rules on "small entities," at such time as an integrated and complete mosaic of rules are available for review and analysis, including the definitions which give meaning to the rules, and at such time provide the legally-required economic basis for the Commission's cost-benefit analysis.

II. Background of the Electric Utility Trade Associations' Active Involvement in the Commission's Dodd-Frank Act Rulemakings.

The Electric Utility Trade Associations are submitting comments on behalf of their members, which are commercial (or "nonfinancial") entities and "end users"[3] of nonfinancial

[3] This term is not defined in the Dodd-Frank Act. Congress also refers to these entities as "commercial end users," but that term is not defined in the Dodd-Frank Act either. The Electric Utility Trade Associations respectfully request the Commission to define the term "end user" (which is the term that seems to appear most often in its Other Proposed Rules to date), and to agree with the Securities and Exchange Commission and prudential regulators on the definition. The term is used inconsistently in the Commission's Other Proposed Rules to date, and is defined inconsistently in the other regulators'

commodity "swaps."[4] Nonfinancial entities are given the statutory right under the CEA, as amended by the Dodd-Frank Act, to except such transactions from mandatory clearing and from many of the CEA's other requirements.[5]

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proposed rules. See the Prudential Regulators proposed margin rules, 76 Fed. Reg. 27,564 (May 11, 2011), which defines "financial end user." In legislative history, Congress used the term "commercial end user" or, in shorthand "end user," to mean an entity that has the right to elect the "end user exception" provided in new CEA Section 2(h)(7). That Section provides that the "end user exception" cannot be elected by a "financial entity" as therein defined. For nonfinancial entities reviewing the proposed rules implementing the Dodd-Frank Act, this and other inconsistent use of the same defined terms to have different meanings in the regulations creates confusion: as to who is, and who is not, entitled to the statutory rights and benefits provided to an "end user." Members of the Electric Utility Trade Associations are all nonfinancial entities, and anticipate utilizing the end-user exception in respect of all or a significant number of the "swaps" to which they are parties.

[4] We have footnoted this term as well, and we refer the Commission to comments filed in September 2010 by the electric industry in the Definitions ANOPR docket (75 Fed. Reg. 51,429, Aug. 20, 2010) and to the comment letter filed by the Electric Utility Trade Associations in the "Definition of Swap" docket (76 Fed. Reg. 29,818, May 23, 2011), all requesting further definition of the term "swap." A weblink to the latter comment letter is found at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=47934&SearchText=. The Electric Utility Trade Associations respectfully again request the Commission to further define the term "swap" to clearly exclude by regulation or exempt from the definition of "swap" the types of commercial energy and energy-related transactions in which the Electric Utility Trade Associations' members engage every day.

[5] Our comments on this and all other Commission rulemakings are narrowly-focused. The Energy Utility Trade Associations are not commenting on any provisions of the Preamble or the proposed rules that deal with interest rate, currency, credit or equity asset classes of "swaps," *i.e.*, those asset classes of "swaps" where the Commission's jurisdiction might be shared with or potentially overlapping with the jurisdiction of the SEC. We are focused exclusively on transactions which might fall within the Commission's "Other Commodity" asset class of "swaps." Even within that "Other Commodity" asset class, we are not commenting on "swaps" that are based on agricultural commodities, metals, crude oil, gasoline or refined petroleum products other than fuel oil (which is a fuel for electric generation). All of these asset classes and product types of commodities and commodity "swaps" are transacted in different market structures than the over-the-counter ("OTC") markets for nonfinancial energy commodities and commodity derivatives which are integral and intrinsically related to the operations of our members' nonfinancial commodity-based enterprises – generating, transmitting and delivering electric energy to the American public. For a more detailed description of the United States electric industry, the entities, the commercial agreements, contracts, transactions and arrangements (some involving "nonfinancial commodities"), the derivatives, including options and swaps, utilized in such industry, and other regulators with jurisdiction over the entities and transactions in the industry, see Attachment A. From time to time, the Commission's staff has declined to consider whether nonfinancial commodity and related swap markets are indeed different in any meaningful way from financial commodity markets, or from the futures and exchange-traded options markets, the Electric Utility Trade Associations continue to urge the Commission to engage in a considered analysis of such differences and the implications of such differences for its rulemaking process.

The Electric Utility Trade Associations and individual members have been active participants in the Commission's rulemaking process.[6] We have met with the Commission and various members of the Commission's staff on numerous occasions. When invited by the Commission, the Electric Utility Trade Associations and our members have participated in the Commission roundtables. We have described the types of transactions in which our members engage, and provided citations to treatises and websites for further information about electric industry transactions. We provided profiles of some of our members and examples of our commercial hedging activities.[7] We recommended that the Commission convene a workshop in conjunction with the Federal Energy Regulatory Commission ("FERC"), focused on the electric industry transactions.[8] We have repeatedly requested that the Commission finalize its memorandum of understanding on jurisdiction with FERC, and/or initiate the Section 4(c)(6) "public interest waiver" proceedings contemplated by Congress for the electric industry.[9]

"Nonfinancial commodity swaps" are not futures contracts, and nonfinancial entities are not financial institutions, nor are they financial market professionals or "registrants." Nonfinancial entities executing swaps are not always "customers" of their counterparties in the way that non-registrants in the futures contract markets are customers of market professionals. When Congress gave the Commission its new jurisdiction over "swaps" in the Dodd-Frank Act, Congress intended that the Commission structure its new regulatory regime[10] in such a way that nonfinancial entities would continue to have cost-effective direct access to nonfinancial

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[6] Individually and collectively with other energy trade associations, the Electric Utility Trade Associations have filed 46 comment letters. Their members, individually and in other industry coalitions and groups, have filed dozens more. For a list of the comment letters filed by the Electric Utility Trade Associations, with links to the Commission's website, please call any of the signatories to this letter.

[7] See the profiles of NRECA, APPA and LPPC members attached to the NFP Electric End User Coalition's "Pre-NOPR comment letter" to the Capital and Margin Task Force, at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission5_121410-0017.pdf and the EEI/EPSA comment letter on the Entities Definition NOPR (75 Fed. Reg. 80,174, Dec. 23, 2010, at http://comments.ctfc.gov/PublicComments/ViewComment.aspx?id=279188SearchText=

[8] See our comment letter filed in the 30 Day Reopening of Comments docket, 76 Fed. Reg. 25,274 (May 4, 2011), a weblink is found at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=44667&SearchText=

[9] See the Electric Utility Trade Associations comment letter in the Definition of Swap NOPR docket, referenced in footnote 4, and the other comment letters cited therein.

[10] The Commission's new authority under the Dodd-Frank Act is not evolutionary, but truly revolutionary. Consequently, the electric industry is relying on the Commission to establish a new and integrated market regulatory structure for swaps that preserves the ability of nonfinancial entities to continue to hedge commercial risks using nonfinancial commodity swaps, without disruption and without unnecessary new costs and burdens imposed by the Commission's new regulatory regime.

commodity swaps to hedge commercial risks. The new regulatory regime cannot be a mere "adaptation" of the existing CEA regulations.

Any adaptation of the existing CEA regulations must recognize that there will be "swaps" that will not involve a "registered entity," or even a "registrant."[11] There will be nonfinancial entities interacting with swap execution facilities and providing information to swap data repositories (and to the Commission), and some of those nonfinancial entities are not subject to the jurisdiction of any "applicable prudential regulator." There will be nonfinancial entities that need direct cost-effective access to swap execution facilities and/or swap data repositories, as a result of which these new registered entities cannot simply be regulated in an identical way to designated contract markets and derivatives clearing organizations. Importantly, the Commission has a statutory obligation to maintain the confidentiality of such nonfinancial entities' commercially sensitive information if and to the extent such information is reported to or in the possession of such new registered entities. The Commission's new rules governing "swaps" must recognize and protect such nonfinancial entities' rights.

In the Adaptation NOPR, the Commission has once again reverted to a "one-size-fits-all" market structure for financial commodity swaps and nonfinancial commodity swaps, patterned on the Commission's futures markets. There seems to be no recognition of the new market participants (nonfinancial entities and "end user only" entities) in the nonfinancial commodity swap markets. There seems to be no recognition of the important Congressional intent and directive to preserve direct access to swaps as cost-effective risk management tools for nonfinancial entities hedging commercial risk, and the important new obligations to protect commercially sensitive information. There seems to be no recognition of significant market structure differences for certain categories of nonfinancial commodity swaps.

The Adaptation NOPR is premature and should be withdrawn. If not, the Electric Utility Trade Associations reserve the right to provide further comment on all the "accommodating" or "substantive" amendments in the Adaptation NOPR, once the Commission's rulemakings implementing its new jurisdiction over "swaps" are finalized.[12]

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[11] 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 nonfinancial energy and energy-related commodity and derivatives transactions, and commercial merchandising arrangements, in which the Electric Utility Trade Associations' members engage every day. In particular, nonfinancial commodity options (aka "trade options") are often executed between nonfinancial entities hedging offsetting commercial risks. In the electric industry, it is commonplace that "financial entities" are not involved in a large number of nonfinancial commodity transactions (some of which may be determined to be "swaps" under the Commission's new regulatory regime).

[12] The Adaptation NOPR cannot fairly apprise interested persons of the nature of the Commission's rulemaking, nor can it provide notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved," as required by the Administrative Procedures Act, when the proposed rules purport to adapt to a moving target like the Other Proposed Rules. For more on this topic, see the

III. The Commission Should Withdraw the Adaptation NOPR as Premature.

Each of the three categories of amendments proposed in the Adaptation NOPR is premature: The "ministerial amendments are by their nature nonsubstantive, and yet are inconsistently "adapted" and incomplete. The "accommodating" amendments inject new regulatory requirements referencing "swaps" into various existing regulations referencing "futures," without differentiating or explaining ***why*** the overall Commission regulatory regime in respect of "swaps" requires such additions, ***how*** the additions implement Congressional intent in respect of preserving cost-effective access to "swaps" for nonfinancial (or commercial) entities utilizing such transactions to hedge commercial risks, or ***whether*** the additions are consistent or inconsistent with Other Proposed Rules that also impose new requirements in respect of "swaps." The "substantive" amendments purport to align and harmonize existing Commission regulations with regulations that are as yet only *proposed* by the Commission in other rulemakings, without recognition that those Other Proposed Rules are not yet final.

A. The ministerial amendments are by their nature nonsubstantive and, due to dozens of Other Proposed Rules, incomplete.

The Electric Utility Trade Associations understand that references and cross-references in the Commission's existing regulations to CEA Sections will now change due to the Dodd-Frank Act. This makes an already complex rulemaking process even more difficult for market participants. The existing regulations governing the futures markets do not articulate a regulatory framework that is easily adaptable to the Dodd-Frank Act's new Commission jurisdiction over "swaps" and parties that execute "swaps." Even the existing CEA regulations include bad cross-references.[13] Outdated references in the regulations to concepts like "derivatives trading facility" are distracting, but no more so that they were prior to the Dodd-Frank Act. As the Preamble recognizes, no such entity has ever registered with the Commission for such statutory designation.[14]

Incorrect references and cross-references to existing CEA sections embedded within the Dodd-Frank Act also make it difficult to understand or implement

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request for a logical sequencing of the regulatory process and a clearly-articulated request for rehearing process recommended in the comment letter dated March 11, 2011 by NextEra Energy Resources, in the Commodity Options and Agricultural Swap docket (76 Fed. Reg. 6095, Feb 3, 2011). See also the letter sent on July 14, 2011 by Representatives Lucas and Conaway to Chairman Gensler on the need to establish a Commission process for reproposing rules for comment, when the public comments received to date on the initial proposed rules raise substantial concerns or recommend alternative and less burdensome/more tailored regulatory solutions. The Representatives expressed their concern, which echoes the electric industry's concern, that the Commission address in each rulemaking whether issuing a final rule meets the "logical outgrowth" standard in the Administrative Procedures Act.

[13] See the comment in the Preamble at page 33,068 to fixing the existing bad cross reference to Part 33 (rather than Part 38) in regulation 1.3(h).

[14] See Preamble at 33,074.

Congressional intent for the new regulatory regime for "swaps." Many definitions of terms used in the Dodd-Frank Act remain incomplete – this need for definition, or further definition, of foundational terms for the Commission's new jurisdiction over "swaps" is at the heart of comments filed by the electric industry over the past year.[15]

For some of the defined terms under the Dodd-Frank Act, the proposed rules in the Adaptation NOPR copy the words of the statute with no changes, adding no additional regulatory clarity. For others, the regulations merely cross reference to the statutory definition. The terms that are defined elsewhere than in new CEA Section 1a (in other provisions of the Dodd-Frank Act) are not all included in the ministerial amendments, either by incorporation or by cross-reference to statutory definitions. An example of this is the all important term "financial entity" which is defined in new CEA Section 2(h)(7)(C)(i) by Section 723 of the Dodd-Frank Act.

The Adaptation NOPR's proposal (presumably with the intention to finalize) is, at best, a nonsubstantive and incomplete set of "ministerial" amendments to the existing CEA regulations, and is premature. The Commission should withdraw the proposed ministerial amendments until it is able to perform such a process in a comprehensive fashion.

B. **The accommodating amendments are premature to the extent that they impose additional regulatory requirements on parties to "swaps" by summarily including "swap," "swap markets" or "swap entities" within the existing regulatory framework applicable to futures, or expand existing regulatory definitions used in the futures industry to "swaps" and entities that execute or are integral to the market infrastructure for "swaps."**

In its "accommodating" amendments, the Adaptation NOPR adds the word "swap" to numerous parts of the CFTC's existing regulations referencing contracts or "commodity interests." The Adaptation NOPR also expands regulatory definitions such as "customer" to encompass entities that execute "swaps." These "accomodating" amendments are performed seemingly without recognition that such changes result in

[15] For these reasons, the "purely ministerial" amendments to the Commission's existing rules proposed in the Adaptation NOPR are almost an affront to the many months of discussions and explanations by the electric industry of our unique corner of the nonfinancial commodity swap markets, and our unique perspective as nonfinancial entities with existing regulatory obligations to serve the public with reliable and affordable electricity. "Ministerial" amendments are, perhaps, not the best use of the Commission's limited resources at this point in its push to create a new and workable regulatory regime for the global swap markets. If the Commission wants to provide on its website a Commission-reconciled interlineation of the CEA, post-Dodd-Frank Act, and a Commission-reconciled errata with ministerial corrections to cross-references in its existing regulations as an aid to public understanding of the Dodd-Frank Act, the Electric Utility Trade Associations would support such an approach.

additional, significant and inappropriate obligations for swap counterparties (including nonfinancial entities).

As an example, the proposed rules amend the definition of "member" so that "it would include those [who]…hav[e] trading privileges on a "registered entity." "Registered entity" is a defined term that, as a result of the Dodd-Frank Act, will now include a "swap execution facility." The structure of these new entities, i.e., swap execution facilities, and the way in which swap execution facilities will be used by market participants to execute "swaps," has yet to be finalized. In another section of the proposed rules, the Adaptation NOPR proposes in regulation 1.35 that "members" of swap execution facilities have the same recordkeeping requirements that are presently applicable to futures commission merchants who are members of designated contract markets.

In Other Proposed Rules issued by the Commission,[16] the Electric Utility Trade Associations, their members and other nonfinancial entities have submitted extensive comments about the unnecessary burdens and costs associated with recordkeeping obligations imposed on nonfinancial entities that execute swaps; and the need for nonfinancial entities to have direct access to swap execution facilities to cost-effectively execute swaps. Swap execution facilities represent potentially the only cost-effective way that nonfinancial entities will be able to execute swaps without incurring financial intermediary costs. Swap execution facilities may also be the only way that nonfinancial entities can fulfill the Commission's proposed reporting requirements (sometimes on a "real time" basis) without a huge investment in information technology comparable to that of financial market professionals.

The Adaptation NOPR does not provide the regulatory or economic justification for such adaptation of its existing regulations. In most cases there is no explanation as to ***why*** any particular existing regulatory requirement now applicable to futures contracts should now be applicable to "swaps," or the regulatory implications of such amendment. Nor does the Adaptation call out where, in the Other Proposed Rules, similar, overlapping or conflicting regulatory requirements are proposed. The costs for non-financial entities will be significant. See Section VI below.

The Electric Utility Trade Associations respectfully request the Commission to defer "adapting" its existing regulations to incorporate "swaps," until the scope of the Commission's new jurisdiction over "swaps" is clearly defined, and the manner in which such new jurisdiction is to be implemented is clarified, as to each asset class and each

[16] See the various swap data recordkeeping and reporting, as well as the position limit, Other Proposed Rules.

product type of "swap."[17] All of the "accommodating" amendments are premature, unless and until the Commission explains how the modifications to existing regulations interrelate to the Other Proposed Rules, and why each such additional regulatory requirement is appropriate in respect of "swaps."

C. **The "substantive" amendments are premature, as they align the Commission's existing regulations with moving targets, i.e., the Other Proposed Rules.**

The Adaptation NOPR's "substantive" amendments purport to align the Commission's existing regulations to the Other Proposed Rules or to "harmonize" the current recordkeeping rules. But there is no explanation as to what will be the effect on these proposed rules if the Other Proposed Rules are changed prior to being issued in final form, perhaps in significant ways. Nor is there an explanation as to how these proposed rules will be integrated with the Other Proposed Rules to form a cohesive whole.

As an example, the Adaptation NOPR's proposed regulation 1.35 would impose extensive recording requirements for electronic communications "concerning" or "leading to the execution" of a cash commodity transaction or a "commodity interest," a defined term that would include a "swap." The electronic recording and related recordkeeping obligations would be applicable to all "members" of "registered entities," including swap execution facilities. Even nonfinancial entities that engaged only in nonfinancial commodity swaps for their own commercial risk management purposes, in order to access a swap execution facility directly, would be required to record phone calls, retain instant messages and emails, sort and retain such tape recordings and electronic records by transaction and by counterparty, and maintain these records in a native file format for extended regulatory retention periods.

The Electric Utility Trade Associations strongly concur with the comment letter submitted by the Working Group of Commercial Energy Firms in this docket. The Commission should not impose these new recording and recordkeeping requirements on nonfinancial entities as a condition to direct access to swap execution facilities, and should certainly not do so in an "adaptation" rulemaking without analysis of the impact such a proposed regulation would have on nonfinancial entities. Such a regulation would be extraordinarily costly – in fact cost prohibitive – for nonfinancial entities while

[17] For further information about the Electric Utility Trade Associations' views on the scope of the Commission's jurisdiction and the need for clarity in the Commission's regulations on this point, see the comment letter submitted in the "Definition of Swap" docket (76 Fed. Reg. 29,818, May 23, 2011). A weblink to such comment letter is found at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=47934&SearchText=.

providing little or no benefit to the nonfinancial commodity swap markets to which the Electric Utility Trade Association members require access.[18]

The Adaptation NOPR attempts to align and harmonize with moving targets, and fails to explain whether the Adaptation NOPR's substantive amendments will somehow evolve (or be later reproposed) in order to follow the evolving nature of the Other Proposed Rules. In light of the hundreds and hundreds of comments submitted by the public in respect of Other Proposed Rules on recordkeeping and reporting, it seems likely that there will be some changes to the Other Proposed Rules. Unless and until the Commission proposes a substantially final, integrated set of rules implementing its new jurisdiction over "swaps," it is premature to make competing substantive amendments adapting the Commission's existing regulations to the evolving mosaic of the Commission's new regulatory regime for swaps. The proposed rules should be withdrawn.

IV. In Particular, the Commission Should Withdraw the Proposed Rule Defining "Physical."

The Commission should withdraw the proposed rule defining "physical," whether used as an adjective or an adverb, in describing the Commission's new jurisdiction over "swaps" under the CEA as amended by the Dodd-Frank Act. As the Commission notes in the Preamble,[19] the term "physical" is only currently defined in the Commission's regulations as it relates to the commodity trade option exemption, which the Commission has proposed deleting.[20] So the Commission's seeming urgency to define the term in the Adaptation NOPR cannot be explained by a need to provide clarity in an existing regulation that the Commission proposes to delete.

The term is also used many times in the Commission' current regulations defining its jurisdiction over futures contracts,[21] and the defined term is used a number of additional times in the Dodd-Frank Act provisions which define the Commission's new jurisdiction over "swaps." To compound the confusion, the Dodd-Frank Act uses a different statutory term, "nonfinancial commodity" -- establishing important new statutory rights and distinctions -- in defining transactions that ***are not*** "swaps." It is this new term that needs definition, as we recommended

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[18] In this instance, the Adaptation NOPR's proposed rules also purport to align or harmonize with evolving international regulations in futures and standardized derivatives markets – again with no analysis as to why such rules are appropriate or beneficial in the context of the Commission's new regulatory jurisdiction over swaps in general, or nonfinancial energy commodity swaps in particular. The Electric Utility Trade Associations respectfully request all required rulemaking procedures and cost/benefit analysis be completed in respect of this substantive rulemaking. See Section VI.

[19] See Preamble at page 33,068-33069.

[20] See 76 Fed. Reg. 6095 (Feb. 3, 2011).

[21] Forty-five times, according to the Preamble at 33,069.

in our comment letter on the Definition of Swap NOPR. [22] Only once that definition is finalized can the Commission "adapt" its prior regulatory scheme for futures -- involving "physical" commodities, "physical" and "cash" markets, and "physical market channels" – to align with the new regulatory regime for swaps referencing "nonfinancial commodities."

This part of the Adaptation NOPR is clearly a substantive rulemaking, not a mere adaptation. In proposing such a substantive rule, the Commission must explain how defining the term "physical" will affect all its regulations, once the Other Proposed Rules that use this term and correlated terms are finalized. The Electric Utility Trade Associations respectfully concur with the comments filed in this docket by the Environmental Markets Association, and request the Commission to withdraw the proposed rule purporting to define the term "physical."[23] We request the Commission to reissue such a definition only with a comprehensive analysis of the way in which such word, whether used as an adjective or an adverb, interrelates with the Dodd-Frank statutory term "nonfinancial commodity," as well as the concepts of "cash market," "physical market channels" and the "bona fide hedging exemption" to position limits as applicable to "nonfinancial commodities" and related "swaps."

V. In Particular, the Commission Should also Withdraw the Proposed Rules Defining "Registered Entity," "Organized Exchange," "Electronic Trading Facility" and "Trading Facility."

The Commission should also withdraw the proposed rules defining "registered entity," "organized exchange," "electronic trading facility" and "trading facility." In the case of "registered entity," "organized exchange" and "electronic trading facility," the proposed rules merely copy the definitions from the Dodd-Frank Act. In the case of "trading facility," on the other hand, the proposed rule cross-references to the statute. In Other Proposed Rules, the Commission has defined new terms like "swap market,"[24] or used terms like "organized market."[25] In at least one Other Proposed Rule, the Commission proposed modifying the statutory definition of "registered entity" to delete the reference to derivatives clearing organization for certain purposes.[26]

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[22] See the comment letter in the weblink in footnote 4, at page 13.

[23] See the comment letter file by the Environmental Marketing Association, a weblink is found at: http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=47883&SearchText=

[24] 75 Fed. Reg. 76,140 (Dec. 7, 2010) (the "Real Time Reporting NOPR") at 76, 172.

[25] See the Definition of Swap NOPR, 76 Fed. Reg. 29,818, at 29,888 in Proposed Rule 1.3(xxx)(4)(i)(C).

[26] In the Real-Time Reporting NOPR, the Commission proposed to read the statutory definition of "registered entity" without the statutory reference to derivatives clearing organization. See footnote 16 on page 76,142 of 75 Fed. Reg. 76,139 (Dec. 7, 2010). When the Adaptation NOPR copies the statutory definition of such term, without noting the deletion made by the Commission in some, but presumably not

The terms "registered entity" and "trading facility" are also used in new CEA Section 2(a)(1)(I), which was added to the CEA by Section 722(e) of the Dodd-Frank Act. In the Dodd-Frank Act, Congress recognized that additional regulation by the Commission of energy transactions that were already subject to state and Federal energy regulators' jurisdiction could interfere with the energy regulators' ability to ensure the delivery of reliable and affordable electric energy to American electric consumers and businesses. Therefore, Congress limited the Commission's broad jurisdiction over swaps in CEA Section 2(a)(1), by including new Section 2(a)(1)(I), which defines the new jurisdictional relationship between the Commission and the Federal Energy Regulatory Commission in respect of swaps.

As in many provisions of the Dodd-Frank Act, Congress left implementation of Congressional intent to the agencies. In Section 720 of the Dodd-Frank Act, Congress called for the Commission and FERC to enter into a memorandum of understanding (the "FERC/CFTC MOU"), making clear that the transactions and services subject to FERC's jurisdiction should not be regulated duplicatively as "swaps." Congress instructed the Commission and FERC to promptly enter into the FERC/CFTC MOU, to avoid lingering regulatory uncertainty about electric industry transactions as the Commission began implementing its new jurisdiction with respect to "swaps." Congress directed the Commission to work with FERC to (1) "ensure effective and efficient regulation," (2) to "resolve conflicts concerning overlapping jurisdiction" and (3) to "avoid to the extent possible conflicting or duplicative regulation.[27] The FERC/CFTC MOU was to have been filed with the appropriate Committees of Congress on or before January 17, 2011. The Commission's new jurisdictional relationship with existing energy regulators has serious implications for the Electric Utility Trade Associations' members and all those entities that participate in the United States electric industry.

The electric industry is still waiting for clarity on how the two agencies will draw the jurisdictional lines, and how the Commission's new jurisdiction over "swaps" will affect the electric industry's mission to deliver electric energy to American consumers -- more than a year after the Dodd-Frank Act was enacted and more than 6 months after the due date for the FERC/CFTC MOU. The transactions involved in the electric energy, natural gas and related nonfinancial commodities are complex, well-regulated by FERC and state energy regulators, and instrinsically related to the operational challenges of providing reliable, affordable electric service. The geographically unique electric industry operates differently than financial commodity markets, and differently than other nonfinancial commodity markets. The Electric Utility Trade Associations respectfully request that the Commission and FERC work together to

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all, of the Other Proposed Rules, it once again demonstrates the premature nature of the Adaptation NOPR.

[27] See Section 720 of the Dodd-Frank Act. President Obama's Executive Order 13,563, issued July 11, 2011, confirms the President's commitment to regulatory coordination and restraint to avoid unnecessary, duplicative and burdensome regulatory burdens on American businesses. The Executive Order calls on independent Federal agencies, including the Commission and FERC, to carefully balance the need for regulation against the costs imposed on business.

avoid duplicative and overlapping jurisdiction, and deliver the FERC/CFTC MOU as Congress intended.

The Electric Utility Trade Associations respectfully request the Commission to finalize the CFTC-FERC MOU process, issue clear rules defining the scope of its jurisdiction over nonfinancial energy commodity swaps, clearly exclude from the definition of "swap" certain electric industry transactions involving such nonfinancial energy commodities, finalize exemptions provided for in Section 4(c)(6) for RTO and ISO and other tariffed transactions, all prior to proceeding with regulatory definitions of "registered entity," "organized exchange" (or "organized market"), "electronic trading facility" and "trading facility." It is only by reading these definitions in the context of the Other Proposed Rules that the Electric Utility Trade Associations can evaluate how these defined terms fit into the Commission's new regulatory regime in respect of the nonfinancial commodity energy "swaps."[28]

VI. The Commission is Respectfully Requested to Consider the Overall Impact of its Rules Promulgated Under the Dodd-Frank Act on Small Entities such as NRECA and APPA's Members.

The Commission's cost-benefit analysis assumes that, since the proposed rules and the statutory interpretations in the Adaptation NOPR relate only to definitions, and not to operable regulatory provisions, the proposed rules and statutory interpretations have no independent costs, and instead only facilitate the benefits that Congress intended by the Dodd-Frank Act. We respectfully disagree. As the Electric Utility Trade Associations have said consistently in prior comment letters, the cost-benefit analysis required by law must be conducted in respect of the Commission's initial rulemakings under the Dodd-Frank Act taken as a whole. And the overall scope of the Commission's new jurisdiction under the Dodd-Frank Act over "swaps," and the burdens that the Commission's rules place on nonfinancial entities, including small entities, that execute such "swaps" can ***only*** be determined once the rules and interpretations in the Swap Definition NOPR and in this Adaptation NOPR are finalized.[29]

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[28] See the request for such an industry-wide, Commission-initiated public interest waiver exemption process in the NFP Energy End User Coalition's comment letter dated September 20, 2010 referenced in footnote 4, which we requested again the comment letter on the Definition of Swap NOPR, cited in footnote 4. See also the Electric Utility Trade Associations' request for an electric industry workshop in our comment letter in the 30 Day Reopening of Comment Periods docket. A weblink is provided at footnote 8.

[29] The vast majority of NRECA's 900 members meet the definition of "small entity" under the Small Business Regulatory Enforcement Fairness Act. 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996 by the Small Business Regulatory Enforcement Fairness Act) ("SBREFA"). 13 C.F.R. §121.201, n.1. Only four distribution cooperatives and approximately twenty-eight generation and transmission entities do not meet the definition. The Regulatory Flexibility Act 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 an entity which provides electric services is a "small entity" if its total electric output for the

The Commission cannot assume the overarching regulatory benefit of its proposed rules, while pleading its inability to estimate the regulatory costs of those same proposed rules that it will be imposing on nonfinancial entities, for markets about which the Commission acknowledges it has insufficient information.[30] 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. As hundreds of small entities, NRECA and APPA's members seek to continue their use of nonfinancial commodity "swaps" only to hedge the commercial risks of their not-for-profit public service activities. Their members are all "end user only" and "bona fide hedger only" entities. NRECA and APPA, for and on behalf of their members, reserve the right to assess the full impact of the initial rulemakings being promulgated by the Commission under the Dodd-Frank Act, and to require a SBREFA analysis be conducted with respect to those regulations as a whole. In each of its ongoing rulemakings, the Commission acknowledges that it has no experience under the new requirements of the Dodd-Frank Act in regulating the swaps markets or in regulating nonfinancial entity market participants.

Each proposed rule addresses a different piece of the Commission's overall rulemaking challenge under the Dodd-Frank 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 Electric Utility Trade Associations 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 rulemakings to implement the Dodd-Frank Act are necessary, and that there are no alternative ways to achieve the regulatory goals that would reduce the burdens imposed by the Commission's rulemakings under the Dodd-Frank Act on such small entities.

The Commission cannot assume the overarching regulatory benefit of its proposed rules, while ignoring the regulatory costs of those same proposed rules. Nor can the Commission ignore the heavy regulatory burden and cost it will be imposing on nonfinancial entities. We

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preceding fiscal year did not exceed four million megawatt hours. Most of APPA's members also meet the definition of "small entity" under the Small Business Regulatory Enforcement Fairness Act. The Electric Utility Trade Associations refer the Commission to the comment letter filed by NRECA, APPA and LPPC as the "Not-for-Profit Electric Coalition" in the Commodity Option NOPR (76 Fed. Reg. 6095, Feb. 3, 2011) for comments on certain other fundamental flaws in the Commission's cost-benefit analysis, including the unsupported assertion that there are no "eligible contract participants" that are "small entities" for RFA purposes.

[30] *See* *Business Roundtable and Chamber of Commerce of the United States vs. the Securities and Exchange Commission* (D.C. Circuit No. 10-1305, July 22, 2011).

urge the Commission not to ignore or underestimate these significant burdens on American business.[31]

X. Conclusion.

The Adaptation NOPR is premature. The Electric Utility Trade Associations, for themselves and on behalf of their members, respectfully request that the Commission withdraw it. Alternatively, the Electric Utility Trade Associations request that the Commission provide a comprehensive analysis of each of the proposed rules that goes beyond the "ministerial" level of amendment, to analyze the affect of each such Proposed Rule, when read together with all Other Proposed Rules, on nonfinancial entities that may execute nonfinancial commodity "swaps" to hedge commercial risks. As examples, we request in particular such further analyses described in Sections IV and V above, as well as the comprehensive SBREFA analysis in the context of the Commission's Dodd-Frank Act rulemakings taken as a whole. Please contact any of the Electric Utility Trade Associations' undersigned representatives for more information or assistance.

[31] See the letter sent on July 14, 2011 by Representatives Lucas and Conaway to Chairman Gensler requesting a response to certain questions by July 29, 2011 on the cost-benefit analysis being conducted under the Dodd-Frank rulemakings.

ADAPTATION OF REGULATIONS

Respectfully yours,

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

I. Description of the Electric Utility Trade Associations.

NRECA is the national service organization for more than nine hundred rural electric utilities and public power districts that provide electric energy to approximately forty-two million consumers in forty-seven states or thirteen 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 an electric cooperative's electric service customers are also members of the cooperative, the cooperative operates on a not-for-profit basis and all the costs of the cooperative are directly borne by its consumer-members.

APPA is the national service organization representing the interests of government-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 electric 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 government-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. Government-owned utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a government-owned electric utility is to provide reliable and safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

LPPC is an organization representing twenty-four of the largest government 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 government-owned electric utilities in the United States. LPPC member utilities supply power on a not-for-profit basis 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.

EEI is the association of U.S. shareholder-owned electric companies. EEI's members serve 95 percent of the ultimate electric customers in the shareholder-owned segment of the U.S. electricity industry, and represent approximately 70 percent of the U.S. electric power industry. EEI also has more than 65 international electric companies as Affiliate members, and more than 170 industry suppliers and related organizations as Associate members.

II. Commercial Electric Industry Agreements.

Agreements, contracts and transactions (as well as commercial merchandising arrangements) involving nonfinancial commodities like electric energy and related commodities,

and the standardized and customized derivatives related thereto, are often executed without Commission-regulated financial intermediaries or trading facilities involved, in geographic regional "markets" throughout the United States. Such agreements, contracts, transactions and arrangements contain highly customized commercial terms. Reciprocal counterparty credit risk analysis and management is an integral and ongoing part of this bilateral contract market structure.

a. Well-Regulated.

The market for the purchase and sale of electric energy in interstate commerce in the United States is well-regulated at the Federal, state and local level, with a focus on reliability of service and affordable regulated rates payable by the retail energy customer. In addition, the electric industry in North America is subject to extensive Federal environmental regulations and, in many regions and states, further environmental regulation and renewable energy standards. Unlike other "markets" for nonfinancial commodities and related OTC commodity derivatives and/or commodity "swaps" (as newly defined by the Dodd-Frank Act), these are <u>not</u> unregulated markets. Any new regulatory structure must be carefully tailored so as not to conflict with existing regulatory structures and unnecessarily burden market participants with existing regulatory public service obligations.

Some of the electric industry transactions are conducted through, "on," or "in" the "organized [wholesale electric] markets" operated by various regional transmission organizations or independent system operators (collectively, "RTOs"). Each RTO operates in a separate and defined geographic area of the United States, and all RTOs operate under a comprehensive regulatory structure established by the Federal Energy Regulatory Commission ("FERC") or, in the case of the Electric Reliability Council of Texas ("ERCOT"), by the Public Utility Commission of Texas ("PUCT").[1] In the FERC-regulated geographic markets, the parties' rights and obligations are established by tariff in many instances, rather than by contract, and analogies between these FERC-created/FERC-regulated "markets," and the bilateral contract transactions between independent and arm's length third parties and governed by and enforced under state contract laws, are inapt. Although, in some ways, the markets conducted by the various RTOs are similar in structure, no two RTO market are exactly alike and their "products, "contracts" or "instruments" are ***<u>not</u>*** fungible between RTOs. Each RTO also has in place credit risk mitigation policies and procedures to protect market participants from the credit risk of other market participants, and to protect the RTO markets from disruption due to a market participant default.

[1] Throughout the rest of this attachment, when references are made to FERC-regulated markets and transactions, it should be noted that, within the state of Texas, ERCOT (which is regulated by the PUCT, rather than by FERC) maintains the tariffed or "organized [wholesale electric] markets" and manages the transmission grid. Transactions are completed in and pursuant to the terms of the ERCOT tariffs.

These RTO credit risk mitigation policies are established and maintained in accordance with the regulatory principles established by FERC.[2]

For "public utilities," as that term is defined in the Federal Power Act, the sale of wholesale electric energy and electricity transmission in interstate commerce are also subject to extensive FERC regulation, through approval of cost-based tariffs and market-based rate authorizations, as well as regulations governing utility-affiliate transactions and utility governance, among others. Electricity sales to customers that consume electricity in homes or businesses are subject to similar scrutiny by state public utility commissions. In some cases, moreover, contracts may be subject to both state and federal oversight as is the case with contracts by utilities to obtain electric supply to meet "provider of last resort" obligations in states that allow retail open access. In these cases, the contracts typically are initially approved by the state commission and then become subject to FERC jurisdiction after execution.

In addition, FERC has in place extensive regulatory requirements for recordkeeping and reporting of wholesale electric energy and electricity transmission transactions and for financing transactions involving public utilities. FERC has recently proposed a rule that would expand its transaction reporting requirements to encompass additional entities.[3] States also have counterpart recordkeeping and reporting requirements applicable to electric energy sales by utilities under their jurisdiction to consumers and businesses.

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. The same tests apply to FERC regulation of public utility rates for electric energy sales outside the RTO context.

Most of the nonfinancial electric energy and related commodity and commodity derivatives agreements, contracts, transactions and arrangements in which the Electric Utility Trade Associations' members are engaged are conducted under exemptions or exclusions from the Commodity Exchange Act (the "CEA"), whether conducted as bilateral OTC transaction (as most are, including RTO transactions) or on exempt commercial markets. The participants in

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[2] 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). 111 FERC Stats. & Regs., Regs. Preambles 31,317(2010), order on reh'g, Order No. 741-A, 111FERC Stats. & Regs., Regs. Preambles 31,320, reh'g denied, Order No. 741-B, 135 FERC 61,242 (2011) (PJM Docket No. ER11-3972-000).

[3] 76 Fed. Reg. 24188, "Electricity Market Transparency Provisions of Section 220 of the Federal Power Act," April 29, 2011. A web link is: http://www.gpo.gov/fdsys/pkg/FR-2011-04-29/pdf/2011-10113.pdf.

these markets are "eligible contract participants" either by virtue of their size and financial characteristics, or by virtue of their use of underlying nonfinancial commodities relevant to their businesses (as "eligible commercial entities"). The nonfinancial commodity transactions occur principal to principal, some through agents and/or energy brokers, and often with a wide variety of counterparties.

b. End-User-to-End-User Transactions -- Highly Customized.

The Electric Utility Trade Associations' members engage in a substantial number of non-cleared, "end-user-to-end-user" nonfinancial energy commodity agreements, contracts, transactions and arrangements ("Energy Commodity Transactions").[4] Counterparties for these Energy Commodity Transactions may be traditional commercial (nonfinancial energy commodity) counterparties, rather than financial entities (whether financial intermediaries or financial institutions) from whom the electric companies secure financing or buy financial commodity derivatives.

In the markets for Energy Commodity Transactions, 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 Transactions, 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 electric companies' commercial risks are system-specific, geography-specific, and seasonal. Commercial risk management decisions are made based on ever-changing long-term and short-term regional weather forecasts, generation or transmission availability and/or load projections, evolving environmental regulatory constraints, and the affect of constantly changing market dynamics on the most cost effective way to hedge projected electric load requirements, from among a variety of available fuels and sources, including the wholesale power market. It is not uncommon for load-serving energy companies to hedge multiple commodity risks, such as an electric utility hedging the commercial risks of its input (natural gas as fuel) and the risks of its output (electric generation/deliverable electric energy). Consequently, cross-commodity hedging is commonplace. There is no "sell-side/buy-side" dichotomy in the non-cleared Energy

[4] 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 nonfinancial entities, whether or not one or both of the nonfinancial 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 the nonfinancial commodity forward contract exclusion to the definition of "swap" to exclude nonfinancial energy commodity option transactions in which the Electric Utility Trade Associations' members engage every day. In particular, nonfinancial commodity options are often executed between large and small nonfinancial energy companies hedging offsetting commercial risks in a particular geographic region.

Commodity Swap market, and there are often no financial intermediaries -- many nonfinancial entities play multiple commercial end user roles.[5]

The transactions contain customized, non-quantitative operating conditions, transmission or transportation contingencies, and operating risk allocations that one would expect between pairs of commercial enterprises. Although legal and administrative terms may be 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. Nonetheless, in each transaction, the primary economic terms are negotiated between the counterparties. These are commercial merchandising arrangements or transactions, when viewed through the traditional lens of "goods" and "services" used by American businesses. It is only when these transactions are viewed through the financial markets lens that these transactions are described using the financial market regulatory labels such as "products," "instruments," "exempt commodities," "swap agreements," "swaps" or "nonfinancial commodities" -- and analogized to "futures contracts" or "positions" created and traded by financial entities interacting with "buy-side customers" on a transaction-by-transaction basis for profit ("dealing") or speculation ("trading"). These commercial agreements, contracts, transactions and arrangements should not be subject to a regulatory regime that is traditionally applicable to financial market instruments.[6]

c. Counterparty Credit Risk Management -- Extensive, Continuous and Relationship-Based.

Credit support arrangements in the bilateral world of non-cleared Energy Commodity Transactions are 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 credit risk analysis and management is *not* performed because a regulator requires it or specifies its parameters. Each of the Electric Utility Trade Associations' members' senior management and governing bodies recognizes the credit risks in the commercial markets and implements credit risk management policies appropriate for the size of the entity, the types of counterparties with which it deals, and the entity's unique risks and risk tolerances. 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 Commission-regulated futures and options markets, and that is required by clearing entities of their members or required by Commission regulation of the clearing entities and exchanges.

Today, the Electric Utility Trade Associations' members have the commercial risk management choice to conduct some Energy Commodity Swap transactions on Commission-regulated contract markets, or to clear some of these transactions through Commission-regulated

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[5] Please let us know if the Electric Utility Trade Associations can provide the Commission with further information on this important and unique aspect of "the markets" for Energy Commodity Transactions.

[6] 76 Fed. Reg. at 29,833.

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 commodity and commodity derivatives market structures to function. As the Commission-regulated financial markets have evolved, some of the larger electric companies have chosen to manage certain of their commercial risks using exchange-traded and cleared instruments in addition to customized OTC transactions. The vast majority of smaller electric companies' Energy Commodity Transactions are still conducted "the old fashioned way": under tariffs or in transactions with known and reliable commodity suppliers and customers, and not with Commission-regulated financial intermediaries, on exchanges or with clearing entities. Most of the smaller members of the Electric Utility Trade Associations, especially the members of the NRECA and APPA that are SBREFA "small entities," do not either post collateral to their counterparties or require that their counterparties post collateral to them.[7] Similarly, larger companies dealing with known and reliable commodity suppliers will take account of the creditworthiness of the counterparty and, frequently, will negotiate margining requirements to the extent that they are determined to be needed in the over-the-counter contracts.

Due to the Dodd-Frank Act's wholesale deletion of applicable exemptions in the CEA, the potentially sweeping nature of the Dodd-Frank Act's new definition of "swap," the lack of clarity of the nonfinancial commodity forward contract exclusion, and the commercial merchandising analysis that appears in the Preamble but not in the rule, many of these everyday commercial agreements, contracts, transactions (including nonfinancial commodity trade options) and arrangements are subject to continuing legal uncertainty – in 20/20 hindsight a binding contract could be recharacterized by the Commission or a counterparty as a "swap."[8]

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[7] For examples of the diversity of credit support arrangements and collateral (or "margin") relationships which NRECA, APPA and LPPC members 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 these Electric Utility Trade Associations' membership, see comment letters cited in footnote 7.

[8] The Commission should not, in its rulemaking under the Dodd-Frank 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 a nonfinancial entity or entitled to the end-user exception under the CEA as amended by the Act, and so neither would be able to except its swaps from clearing or be exempt from margin requirements. 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" or a "swap dealer." Enron, with its notorious "one-to-many" electronic interface, offering to buy or sell swaps on underlyings from energy to broadband, is the poster child for the Act's definition of "swap dealer," and would be registered and regulated as such. Nonfinancial entities hedging commercial risk with Energy Commodity Transactions, 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.