

MICHELLE C. GARDNER
Attorney at Law

One International Place
Boston, MA 02110

T: (617) 345 4697 F: (617) 206 9322
mcgardner@daypitney.com

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VIA OVERNIGHT MAIL

David Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20518

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SECRETARY

COMMENT

Re: Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping (RIN No. 3038-AK46)
Comments of New England Power Pool Participants Committee

Dear Mr. Stawick:

The New England Power Pool ("NEPOOL") Participants Committee,¹ which has more than 430 members in every sector of the power industry in New England, respectfully submits these comments for consideration by the Commodity Futures Trading Commission (the "CFTC") as it deliberates its role in regulating energy-related transactions. More specifically, NEPOOL files this letter to comment on the joint proposed rules and proposed interpretations issued by the CFTC and the Securities and Exchange Commission (the "SEC") captioned Further Definition of

¹ NEPOOL is a voluntary stakeholder association organized in 1971 that includes more than 430 members, representing every sector of the power industry in New England. Its Participants include electric utilities, independent power generators, marketers, load aggregators, brokers, consumer-owned utility systems, demand response providers, developers, end users and a merchant transmission provider. Notably, NEPOOL's membership is not limited to just investor-owned utilities or power producers, its membership spans to include municipal interests, non-governmental organizations, and consumer advocates. Its governance provisions have been approved by the Federal Energy Regulatory Commission (the "FERC") and it provides the sole stakeholder process for advisory voting on matters relating to the ISO New England's ("ISO-NE") administration of wholesale markets and the reliable operation of the electric grid in New England. ISO-NE is the regional transmission organization serving New England. NEPOOL Participants act through the NEPOOL Participants Committee. The NEPOOL Participants Committee voted unanimously, with one abstention, to support the filing of these comments at its meeting on October 14, 2011.

“Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping² (the “Swap Definition NOPR”) pursuant to the Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).³

NEPOOL requests that the CFTC consider these comments, even though they are being submitted after the July 22, 2011 due date for filing such comments in this proceeding.⁴ NEPOOL has a comprehensive stakeholder process for receiving input from all interested members and for taking any actions, including the filing of these comments. The terms governing NEPOOL’s organization have been filed with and approved by the FERC. NEPOOL did not begin its consideration of the issues raised in this proceeding until early June. NEPOOL’s arrangements are FERC-regulated and NEPOOL follows closely and is involved in FERC matters, but as the CFTC may recognize, NEPOOL has not previously involved itself with CFTC matters. It learned in June, though, that ISO-NE was exploring these issues with CFTC staff, and NEPOOL promptly thereafter sought stakeholder input through its process, which it only recently completed on October 14, 2011 with a vote to largely support the comments filed by the FERC on July 22, 2011.

In sum, NEPOOL requests that the CFTC not to interpret its jurisdiction under the Dodd-Frank Act to extend to any energy or energy-related agreements, contracts, transactions or arrangements executed or traded in RTO or ISO markets pursuant to a FERC-accepted rate schedule or tariff. NEPOOL notes the comprehensive federal oversight by the FERC to many of the arrangements among NEPOOL members regarding the wholesale purchase and sale of electric-related wholesale energy products, and urges the CFTC not to create and subject these same arrangements also to CFTC oversight. Consistent with the direction advocated by the FERC, NEPOOL submits that such agreements should be excluded either on the basis that they are commercial merchandising transactions that fall within the forward contract exclusion, as further described herein, or because such inclusion is inconsistent with the intent or purpose of the Dodd-Frank Act. Specifically, the CFTC should make clear in this proceeding that it is excluding all transactions executed or traded in RTO/ISO markets that are subject to the FERC’s jurisdiction – including but not limited to energy, capacity,⁵ and ancillary markets – from the CFTC’s interpretation of the term “swap” in this rulemaking.⁵

² 76 Fed. Reg. 29,818 (May 23, 2011).

³ Pub. L. No. 111-203, 124 Stat. 1376 (2010) (“the Dodd-Frank Act”).

⁴ *Id.* Due to their late status, NEPOOL is submitting these comments via overnight mail rather than through the CFTC website.

⁵ NEPOOL also recognizes that several entities in this proceeding have requested exclusion for environmental attributes, such as RECs and emission credits. NEPOOL is also supportive of such exclusion.

RTO and ISO markets are economically dispatched, which is the operation of generation facilities to produce energy at the lowest cost to reliably serve consumers, recognizing any operational limits of generation and transmission facilities, or, in other words, the selection of generating resources to cover load as inexpensively as possible. CFTC regulation over such transactions and services is not consistent with the intent or goals of the Dodd-Frank Act, which had as its stated purpose to decrease risk and increase transparency in the financial markets.⁶ Extending the application of the Act to such transactions would create unnecessary duplication with FERC oversight and control and create regulatory uncertainty, resulting in less infrastructure investment and increased costs to end users of electricity. NEPOOL recognizes that the CFTC does regulate some transactions in the energy industry, and does not seek here to reduce or eliminate any such CFTC regulation.

Enacted last year, the Dodd-Frank Act sets forth an entirely new and broad definition of the term “swap,” which could be interpreted broadly to encompass any category of transactions that transfers any financial risk from one contract party to the other contract party, with certain exceptions such as for commercial merchandising transactions whose primary purpose is to transfer ownership of a commodity and not to transfer solely its price risk. Section 712(d)(1) of the Dodd-Frank Act provides for the CFTC to define further the term “swap.”⁷ In this proceeding, the CFTC stated its belief that extensive further definition of this term by rule is not necessary.⁸ CFTC has recognized in this rulemaking that the definition of “swap” could be read to include certain types of agreements, contracts, and transactions that had not previously been considered swaps and that nothing in the legislative history of the Dodd-Frank Act suggests that this was intended by Congress.⁹ The CFTC did, however, provide further guidance on certain transactions that it considered outside its interpretation of the term “swap,” such as insurance products and certain consumer and commercial contracts.¹⁰ The CFTC also provided guidance with respect to its forward contract exclusion, which the CFTC said should be read consistently with established, historical understanding that such contracts are commercial merchandising transactions.¹¹

NEPOOL does not believe the definition of the term “swap” under the Dodd-Frank Act should include energy or energy-related agreements, contracts, transactions or arrangements traded in a RTO/ISO market pursuant to a FERC-accepted rate schedule or tariff. Such exclusion is justified either or both because such transactions fall within the forward contract

⁶ See 76 Fed. Reg. at 29,819.

⁷ Dodd-Frank Act Section 712(d)(1).

⁸ 76 Fed. Reg. at 29,821.

⁹ 76 Fed. Reg. at 29,821.

¹⁰ *Id.*

¹¹ *Id.* at 29,828.

exclusion and/or because their exclusion is consistent with the intent and purposes of the Dodd-Frank Act. Section 722(e) is clear that nothing in that Act shall limit or affect any statutory authority of the FERC or a state regulatory authority with respect to any agreement, contract, or transaction that is entered into pursuant to a tariff or rate schedule approved by the FERC or a state regulatory authority that is traded in a RTO/ISO market.¹² The Act is also clear in Section 720(a)(1) that the CFTC and the FERC shall establish procedures for applying their respective authorities in a manner so as to ensure effective and efficient regulation in the public interest, resolve conflicts concerning overlapping jurisdiction, and avoiding, to the extent possible, conflicting or *duplicative* regulation.¹³ Failure to take action in this proceeding to exclude from the definition of “swap” transactions already regulated by FERC will increase regulatory uncertainty for the industry. Existing FERC oversight over such transactions provides the certainty sought by would-be-investors in this industry, which duplicative regulation by the CFTC would reduce, with the expected effect of hampering infrastructure investments and ultimately increased costs for electricity consumers.

The Dodd-Frank Act was enacted, in the CFTC’s own words, to reduce risk, increase transparency, and promote market integrity within the *financial* system.¹⁴ One of the stated purposes of the Act is to promote the *financial* stability of the United States by improving accountability and transparency in the *financial* system.¹⁵ Concerns over energy and energy-related products were clearly not intended by Congress to be the aim of this legislation. As an illustration, commodity swaps overall, which include not just energy, but also metals, agriculture and other categories, represent less than 1% of the total global over-the-counter (“OTC”) derivative markets that were the focus of concern leading up to the enactment of the Dodd-Frank Act.¹⁶ It is not energy derivatives that impacted or influenced the current economic downturn,

¹² Dodd-Frank Act Section 722(e).

¹³ *Id.* at Section 720(a)(1). NEPOOL notes as well that Section 722(f) of the Dodd-Frank Act contains what has been referred to as a Tariff Transaction exemption that would give CFTC jurisdiction, if found in the public interest, to exempt from the requirements of the Act, agreements, contracts or transactions that are entered into pursuant to a tariff or rate schedule approved by the FERC or a state regulatory authority. The CFTC stated in its proposed rules that given this specific provision, the treatment of FERC regulated instruments or other specified electricity transactions “should be considered under the standards and procedures specified in section 722 of the Dodd-Frank Act for a public interest waiver, rather than through this joint rulemaking to define further the terms ‘swap’ and ‘security-based swap.’” The CFTC directed persons with concerns about whether FERC-regulated products may be considered swaps to request a public interest exemption. To the extent that such requests are made to the CFTC, NEPOOL may have further comments at that time.

¹⁴ 76 Fed. Reg. at 29,819.

¹⁵ See Preamble to Dodd-Frank Act.

¹⁶ See Bank of International Settlements at <http://www.bis.org/statistics/otcder/dt1920a.pdf> (as of December 2010).

yet they are getting swept up into potential dual regulation by the FERC and CFTC. Also, as noted previously, the CFTC has recognized that the definition of “swap” could be read to encompass certain types of agreements, contracts, and transactions that Congress clearly did not intend to be included.¹⁷ In its proposed rules, the CFTC has already provided guidance on certain of those transactions, such as insurance products and certain consumer and commercial contracts,¹⁸ and it ought to extend similar guidance to electric energy market products as requested herein.

Under the Federal Power Act, FERC regulates the transmission and sale for resale of electricity in interstate commerce.¹⁹ FERC is charged with a statutory mandate to ensure that rates for wholesale power and transmission are just and reasonable and not unduly discriminatory or preferential.²⁰ That responsibility extends to transactions and other arrangements that significantly affect those sales and services.²¹ Such oversight of the energy industry extends to the heavily regulated ISO and RTO wholesale markets.²² ISOs and RTOs maintain reliability for a region’s integrated bulk power grid, oversee system planning on a fair and independent basis, and administer regional wholesale markets, through which wholesale electric power is bought and sold. Every action taken by ISOs and RTOs in performing these functions is authorized by the FERC and such authorizations are implemented in tariffs (sometimes thousands of pages long) reviewed and approved by the FERC. In addition, the FERC requires each RTO and ISO to have an independent market monitor to review all market activities in real-time and to refer to the FERC any potential violations of the FERC’s rules (that is in addition to the fraud and market manipulation authorities given to FERC under the Energy Policy Act of 2005).²³ In FERC staff’s own words, RTOs and ISOs are regulated by the FERC more extensively than other public utilities.²⁴ Recently, the FERC approved new credit reforms

¹⁷ 76 Fed. Reg. at 29,281.

¹⁸ *Id.*

¹⁹ 16 U.S.C. §§ 824 et seq. (2011).

²⁰ 16 U.S.C. § 824d.

²¹ *See id.*

²² *See* 18 C.F.R. § 35.34 (2011); *see also* Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs., ¶ 31,089 (1999), order on reh’g, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), affirmed sub nom. Public Utility District No. 1 of Snohomish County, Washington, et al. v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

²³ *See Policy Statement on Market Monitoring Units*, 111 FERC 61,267 (2005); 18 C.F.R. §§ 35.28(g)(3), 35.34(j)(6) (2011); *see also* 15 U.S.C. § 717c-1.

²⁴ *See Letter to CFTC from FERC Office of the General Counsel*, dated February 22, 2011 (RIN 3038-AD10 “End User Exception to Mandatory Clearing of Swaps”) at 4.

proposed by the ISOs and RTOs to include minimum market participation criteria in these tariffs and to minimize credit risks, including limiting the use of unsecured credit.²⁵

Applying CFTC regulations to any energy or energy-related agreements, contracts, transactions or arrangements traded in an RTO/ISO market pursuant to a FERC-accepted rate schedule or tariff is not only unnecessary, but it also will hinder needed infrastructure investment and increase costs to all participants in this industry, including every consumer of electricity in the United States. NEPOOL has members from every sector of these markets, both the buyers and sellers. While its members oftentimes disagree, generally between buyers and sellers, on specific market issues, remarkably all of the Market Participants support these comments and all agree that such application would have a detrimental impact on these markets. These contracts and agreements play a critical role in ensuring robust competition that can minimize costs for energy in the longer term to consumers and in allowing purchasers of electric power to manage the risk associated with providing energy to consumers. Energy companies regularly hedge against fuel prices and availability risks through the use of bilateral arrangements, which are particularly appropriate in this industry given the potential volatility in demand (e.g., caused by extreme weather, outages, etc.), and the fact that there is very limited ability to store electric power. FERC has direct and unquestionable authority to regulate these energy transactions and has acquired the staff and budget and developed the expertise and experience necessary for that regulation. Requiring any electric energy or energy-related agreements, contracts, transactions or arrangements entered into in an RTO/ISO market pursuant to a FERC-accepted rate schedule or tariff to be subject to the provisions of the Dodd-Frank Act and the CFTC's implementing regulations could severely limit, or make more expensive, those hedging and risk management transactions.

²⁵ See *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, 133 FERC 61,060 (2010), *order on reh'g*, Order No. 741-A, 134 FERC 61,126 (2011), *reh'g denied*, Order No. 741-B, 135 FERC 61,242 (2011).

For the foregoing reasons, NEPOOL urges the CFTC: (1) to consider these comments in this rulemaking and (2) not to interpret its jurisdiction under the Dodd-Frank Act to extend to any energy or energy-related agreements, contracts, transactions or arrangements entered into in an RTO/ISO market pursuant to a FERC-accepted rate schedule or tariff, as described above.

Respectfully submitted,

NEPOOL Participants Committee



David T. Doot

Michelle C. Gardner

Jennifer Galiette

Day Pitney LLP

One International Place

Boston, MA 02110

Tel: (617) 345-4697

Fax: (617) 345-4745

E-mail: mcgardner@daypitney.com

Its Attorneys