



No-Action Request; Rule 140.99

October 12, 2012

Richard Shilts, Acting Director
Division of Market Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Ananda Radhakrishnan, Director
Division of Clearing and Risk
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Gary Barnett, Director
Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

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

2012 OCT 24 PM 4:23
Office of the
Secretary
Received
CFTC

Re: Request for Interim No-Action Relief Regarding the Commission's New Regulatory Requirement to Document Oral "Bookouts"

Gentlemen and Ms. Yochum:

Pursuant to Commission Rule 140.99,¹ the Petitioners² respectfully request that the appropriate divisions of the Commodity Futures Trading Commission (the "Commission") grant no-action relief for the interim period described below to the Petitioners' members and all participants in transactions for electric energy and natural gas from the new regulatory requirement described below (the "Bookout Documentation Requirement") announced in the joint final rule and interpretations issued by the Commission and the Securities and Exchange Commission captioned **Further Definition of "Swap," "Security-Based Swap," "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping**³ (the "Product Definitions Release").

The Bookout Documentation Requirement, which appears in Section II.B.2(a)(i)(D) of the Product Definitions Release, is found in the Commission's regulatory "safe harbor" for "[f]orward contracts in nonfinancial commodities," and provides that "in the event of an oral ['bookout'] agreement, such agreement must be followed in a commercially reasonable

¹ 17 C.F.R. § 140.99.

² The National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), the Large Public Power Council ("LPPC"), and the Transmission Access Policy Study Group ("TAPS").

³ 77 Fed. Reg. 48,208 (August 13, 2012).

timeframe by a confirmation in some type of written or electronic form”(the “Bookout Documentation Requirement”).⁴

According to the Product Definitions Release, such new regulatory requirement is necessary in order for forward contracts in nonfinancial commodities, where the parties intend physical delivery (a/k/a “physical settlement”) at the time the transaction is executed, to remain within the regulatory “safe harbor” interpreting new CEA 1a(47)(B)(ii) as an exclusion from the defined term “swap.” The Product Definitions Release states that the Bookout Documentation Requirement is necessary “to prevent abuse of the safe harbor.”⁵

I. Petitioners

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 publicly-owned electric utilities in the United States. More than two thousand public power systems provide over fifteen percent of all kilowatt-hour sales to ultimate customers. APPA’s member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. Some publicly-owned electric utilities generate, transmit, and sell power at wholesale and retail, while others purchase power and distribute it to retail customers, and still others perform all or a combination of these functions. Public power utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a public power utility is to provide reliable and safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

LPPC is an organization representing 26 of the largest government-owned electric utilities in the nation. LPPC members own and operate over 86,000 megawatts of generation capacity and nearly 35,000 circuit miles of high voltage transmission lines, representing nearly 90% of the transmission investment owned by non-Federal government-owned electric utilities in the United States.

TAPS is an association of transmission-dependent utilities in more than 35 states, promoting open and non-discriminatory access to the transmission grid and regulatory policies to facilitate the participation of smaller utilities in the electricity markets.

⁴ See 77 Fed. Reg. at 48230.

⁵ *Id.*

II. Background

The effective date of this new regulatory requirement *appears* to be 60 days after its publication in the Federal Register, or October 12, 2012. Although the Commission has postponed a majority of the October 2012 deadlines, this deadline for the confirmation of oral bookouts *appears* to remain. In this regard, there is confusion among Petitioners' members and others in the energy markets as to the actual effective date, and the implications of a failure to comply, based on the following provision in Section X of the Product Definitions Release, entitled "Administrative Law Matters – CEA Revisions":

As noted above, the CFTC believes that its interpretation which clarifies that oral book-out agreements must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form *would result in a new "collection of information" requirement within the meaning of the PRA*. Therefore, the CFTC is submitting the new "book-out" information collection to OMB for review in accordance with 44 U.S.C. 3506(c)(2)(A) and 5 CFR 1320.8(d). The CFTC will, by separate action, publish in the Federal Register a notice on the paperwork burden associated with the interpretation's requirement that oral book-outs be followed in a commercially reasonable timeframe by confirmation in some type of written or electronic form in accordance with 5 CFR 1320.8 and 1320.10. *If approved, this new collection of information will be mandatory.*

See 77 Fed. Reg. at 48,305 (emphasis added). Note that this language from the Product Definitions Release states that "if" the necessary approvals are obtained, the Bookout Documentation Requirement "will be mandatory."

These approvals have not yet been obtained by the Commission. In fact, the public comment period does not end until October 15, 2012. Therefore, the Petitioners respectfully submit that granting this interim no-action relief will eliminate any confusion as to when the North American electric energy and natural gas industries must comply with this new documentation requirement and whether, if such approvals are obtained, such Bookout Documentation Requirement will indeed be mandatory, or only required to secure the benefit of the regulatory "safe harbor."

This request for no-action relief is in support of, and consistent with, the request for a delay of the effective date of the Bookout Confirmation Requirement submitted by the International Energy Credit Association ("IECA Request") on September 21, 2012.⁶ This

⁶ A copy of the IECA request is attached.

request for no-action relief is also consistent with the request for comprehensive relief from the effective and compliance dates for regulations promulgated pursuant to Title VII of the Dodd-Frank Act (“Title VII DFA Regulations”) submitted by the Edison Electric Institute and the Electric Power Supply Association on September 24, 2012 (the “EEI/EP SA Request”). This request is also consistent with the Petitioners’ letter, submitted on September 27, 2012, in support of the EEI/EP SA Request respecting the nonfinancial energy commodity transactions in which the Petitioners’ members rely to fulfill their public service obligations to deliver electric energy to American businesses and consumers, and the related derivatives transactions that the members use to hedge or mitigate the commercial risks of their electric operations.

Today, October 12, 2012, the Petitioners as well as other energy industry entities and associations will submit their comments in a timely manner to the Commission on the Product Definitions Release and the related Commodity Options Release.⁷ Many commenters will raise the Bookout Documentation Requirement and ask that the Commission withdraw this new and burdensome regulatory requirement. (See Section VII of the Petitioners’ comment letter in the Product Definitions Release docket). In addition, the Petitioners and other energy industry entities and associations will submit comments in the Agency Information Collection Activities docket,⁸ and expect to be involved further in the review of the Bookout Documentation Requirement by the Office of Management and Budget in that proceeding (the “OMB Proceeding”). The Petitioners respectfully request that the Commission carefully consider the public comments on the Product Definitions Release and the interrelated Commodity Options Release in a thoughtful and deliberate manner.

The Commission has yet to complete its rulemaking process on new CEA Section 1a(47) in respect of nonfinancial commodity transactions. After such rulemaking is completed, the Commission has been requested to provide sufficient transition and implementation time to enable the energy industry and other commercial businesses to comply with the new regulatory requirements, while not disrupting the ongoing nonfinancial commodity and commodity derivatives markets. Such transition and implementation time is also necessary to preserve the ability of commercial end users, such as the Petitioners’ members, to hedge the ongoing commercial risks of their businesses. During this interim period, the Petitioners’ members and other energy companies must be able to operate their electric facilities, deliver electric service to their customers, and hedge or mitigate the commercial risks arising from electric operations, without diverting time and resources to comply with newly-proposed and burdensome regulatory requirements.

⁷ 77 Fed. Reg. 25,320 (April 27, 2012).

⁸ 77 Fed. Reg. 49,428 (August 16, 2012).

III. Request for No-Action Relief

In light of today's October 12, 2012 effective date, the fact that the Commission has not yet addressed either the IECA Request or the EEI/EPISA Request, the continuing regulatory uncertainty resulting from the Commission's ongoing regulatory proceedings in respect of the definition of "swap" and the exclusions therefrom, and in order to ensure that the Commission has sufficient time to consider fully the comments submitted in response to the Product Definitions Release and the Commodity Options Release, including completion of the OMB Proceedings and conducting a full analysis 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) of the Bookout Documentation Requirement, the Petitioners request that the appropriate divisions of the Commission grant no-action relief.

Specifically, the Petitioners respectfully request that the no-action relief state that the Commission's Divisions will not recommend that the Commission commence an enforcement action against any market participant in the North American electric or natural gas industries for failure to comply with the Bookout Documentation Requirement until not less than 180 days after the Commission completes the rulemaking process for the comprehensive Title VII DFA Regulations. Once all of the Title VII DFA Regulations have been published in the Federal Register, the Petitioners respectfully request that the Commission establish an implementation schedule that provides electric energy and natural gas market participants with sufficient time to commence compliance with these regulations, including the Bookout Confirmation Requirement.

In the alternative, the Petitioners respectfully request that the no-action relief state that the Commission's Divisions will not recommend that the Commission commence an enforcement action against any market participant in the North American electric or natural gas industries for failure to comply with the Bookout Documentation Requirement until 180 days after the Commission provides its response to the open questions set forth in the Product Definitions Release and the related Commodity Options Release and completes its rulemaking implementing and interpreting Section 721(a)(21) of the Dodd-Frank Act and the definition of "swap" in new CEA 1a(47) as it applies to nonfinancial commodity transactions..

The Petitioners' members are not financial entities, but instead are commercial "end users." Without such interim no-action relief, the Petitioners' members are left with uncertainty as to whether they may be in violation of the new Bookout Documentation Requirement, and must spend unnecessary time and implement unnecessary new operational procedures in order to comply. Such an unnecessary expenditure of the electric and natural gas industry's operational time and substantial costs would be directly contrary to Congresses intent in the Dodd-Frank Act.

For all of the aforementioned reasons, the Petitioners respectfully request that the appropriate divisions of the Commission grant the no-action relief requested. Please contact any of the individuals below or Patricia Dondanville, Reed Smith LLP, 10 South Wacker Drive, 40th Floor, Chicago Illinois 60606, telephone (312) 207-3911, or e-mail (pdondanville@reedsmith.com), if you have questions regarding this request.

**REQUEST FOR NO-ACTION RELIEF-
BOOKOUT DOCUMENTATION REQUIREMENT**

Respectfully submitted,

**NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION**

Russ Wasson

Russell Wasson
Director, Tax Finance and Accounting Policy
4301 Wilson Blvd., EP11-253
Arlington, VA 22203
Tel: (703) 907-5802
E-mail: russell.wasson@nreca.coop

AMERICAN PUBLIC POWER ASSOCIATION

Susan N. Kelly

Susan N. Kelly
Senior Vice President of Policy Analysis and General
Counsel
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20009-5715
Tel: (202) 467-2933
E-mail: skelly@publicpower.org

LARGE PUBLIC POWER COUNCIL

Noreen Roche-Carter

Noreen Roche-Carter
Chair, Tax and Finance Task Force
c/o Sacramento Municipal Utility District
6201 S Street
Sacramento, CA 95817-1899
Tel: (916) 732-6509
E-mail: nrochec@smud.org

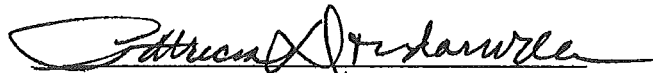
**TRANSMISSION ACCESS POLICY STUDY
GROUP**

John Twitty

John Twitty, Executive Director
Transmission Access Policy Study Group
4203 E. Woodland St.
Springfield, MO 65809
Tel: (417) 838-8576
Email: 835consulting@gmail.com

ATTACHMENT

I hereby certify that the material facts upon which the Petitioners no-action request are based are true and complete to the best of my knowledge, information and belief.⁹



Patricia Dondanville
Reed Smith LLP
10 South Wacker Drive, 40th Floor
Chicago Illinois 60606
Tel: (312) 207-3911
Email: pdondanville@reedsmith.com

Counsel for the Petitioners

cc: Honorable Gary Gensler, Chairman
Honorable Mark Wetjen, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner
Daniel Berkovitz, General Counsel
Julian Hammar, Assistant General Counsel
Lee Ann Duffy, Assistant General Counsel
Mark Fajfar, Assistant General Counsel
David Aron, Counsel

⁹ In addition, I hereby agree that, if any time prior to issuance of a no-action letter, any material statement made in this letter ceases to be true and complete, I will ensure that the Commission Staff is informed promptly in writing of all materially changed facts and circumstances.